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Asleep at the School-Bus Wheel: The Success and Failure of School Desegregation in San Jose Unified School District and How to Save It

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COMMENT

ASLEEP AT THE SCHOOL-BUS WHEEL: THE SUCCESS AND FAILURE OF SCHOOL DESEGREGATION IN SAN JOSE UNIFIED SCHOOL DISTRICT AND HOW TO SAVE IT

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I. INTRODUCTION

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated . . . are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment . . . .
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> Because . . . of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity.[1]

* The author, Richard Miyasaki, Golden Gate University School of Law, JD Candidate May 2015, would like to extend enormous thanks to Professor Mark Yates of Golden Gate University School of Law for his guidance and support throughout the creation of this Comment. The author would also like to thank his fellow staff writers and editors at the Golden Gate University Law Review. This Comment also owes much to the hard working and talented teachers of Abraham Lincoln High School in San Jose, California. While the author has moved on from his time as a high school teacher, he will never forget those who have dedicated their lives to the education of future generations. Lastly, the author would like to thank his parents, who have been an ever-present source of encouragement and support of education not only of the author but also of the larger community.

[1] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

Since the doctrine of "separate but equal" in public education was invalidated in 1954, our society, and our schools in particular, have faced a daunting task. In a racially charged nation in which many communities remain de facto segregated, the Supreme Court placed a major burden on our schools to reflect the multi-ethnic nature of our larger community.[2] In the decades since, further decisions by the Supreme Court and the appellate courts have clarified this duty to address the segregation that exists de facto in our school systems today. This shifting challenge has changed from one of correcting institutionalized segregation to one of correcting for segregation arising as a result of our ethnically divided society. This means that we are still faced with the burdensome question of how to deal with ethnicity in our schools.

Courts have crafted a variety of orders to correct school segregation across the nation, but these solutions have not always had the desired long-term effect. Many school systems, whether they are large or small, urban or rural, have had to face these issues.[3] San Jose Unified School District in Santa Clara County, California ("the District") demonstrates the complexity of crafting workable solutions to segregation. The District faced judicial intervention in the 1970's, but despite the seeming effectiveness of the court-ordered desegregation, the current data demonstrates a return to significant ethnic imbalances that were present before desegregation efforts.

If our society is still of the belief that "separate but equal" is anything but equal, then segregated schools place a burden on our children and the educators we trust to educate those children. If we are not going to abandon the goal of desegregating schools, then we must find ways in which to address this issue. We must examine if segregation exists in our schools, such as those in San Jose, and we must examine how others have addressed this issue. In doing so, we must accept that each school system poses its own unique set of problems, and although solutions may be complex, we must at a minimum examine what options may be available to us.

Segregation is certainly something that is on the minds of at least some teachers. In August 2005, I became a Drama teacher at Abraham Lincoln High School in San Jose, California. After receiving my Masters in Dramatic Arts, I was excited to have an opportunity to teach at this school, which was one of the premier Performing Arts programs in the area, with many of the students active and enthusiastic participants in

[2] Emily Badger, *Housing Segregation Is Holding Back the Promise of Brown v. Board of Education*, WASH. POST, May 15, 2014, http://www.washingtonpost.com/blogs/wonkblog/wp/2014/05/15/housing-segregation-is-holding-back-the-promise-of-brown-v-board-of-education/.

[3] *Brown*, 347 U.S. at 495.

the program. As I later discovered in conversation with my coworkers, the arts programs at this school, and similar programs elsewhere in the school district, were implemented as part of a court-ordered plan to eliminate segregation in the schools; however, that order had recently been lifted after a finding that the district had eliminated segregation in those schools.

These same teachers, some of whom had been teaching at this school since before 1980, predicted that the removal of the court order and a return to the previous enrollment practices would lead to the return of segregation in the district and another probable lawsuit down the road. When presented with the opportunity to look into this court order and its ultimate outcomes, I found it readily apparent based upon the data discussed below that the solution ordered by the court has not had a lasting effect. Although the problems posed by desegregation today may seem insurmountable, it behooves us to examine all possible approaches before abandoning desegregation efforts entirely. Perhaps, amongst the many different approaches, there exists some combination that may yield lasting results. In any event, a different approach than that which is currently in use will be necessary to avoid a return to court.

To determine if the District will be vulnerable to future litigation in this area, we begin by looking at the District's past and the results of its prior efforts toward desegregation. We must also look at what the court deemed to be the desegregated school system that resulted from that court order. By comparing the past situations, both before and after the court-ordered desegregation plan, with the current state of the District's schools, we can determine if the District is again in danger of being found to be a segregated school system. Having been previously found to have desegregated its schools, if the District has returned to the situation that precipitated the initial court order through its own knowing actions, it will likely be at risk of further legal action.

If the District has resegregated, we must also examine possible solutions that could be implemented at various stages. Although any desegregation plan will be inherently complex, and possibly beyond the ability of the District to implement, this Comment will examine some approaches that may have use in alleviating issues present in the District. These possible solutions may take a number of forms that have been used across the nation, including those previously applied in San Jose. We must also examine the United States Supreme Court cases in this area, starting with *Brown v. Board of Education*.[4] However, the application of any approach in San Jose may be of particular difficulty, as it was

[4] *Id.* 347 U.S. 483.

pointed out by the court that San Jose presents a unique challenge in that it covers a wide geographic area that incorporates both urban and suburban areas.[5] We must also examine how current California statutory law may impact any prospective desegregation plans. This includes the impact of California Proposition 209,[6] which prohibits the use of ethnicity in any public education program.

In summary, this Comment will examine the history of school desegregation in San Jose, how the law bears upon those orders and any possible future plans, whether San Jose will likely again face allegations of operating segregated schools, and how the school authorities or courts may find a more lasting solution. Specifically, it will examine the impact of desegregation in the District's high schools and possible solutions. Although no simple solutions are present, it is my hope that this Comment may both bring attention to this issue and offer areas for further exploration in attempting to deal with segregated schools today.

II. BACKGROUND

A. THE HISTORY OF SCHOOL DESEGREGATION IN SAN JOSE

1. Diaz v. San Jose Unified School District

Segregation in San Jose schools first came to the attention of the courts in 1971.[7] In November of that year, a group of parents sued the District for violating the Equal Protection Clause of the Fourteenth Amendment by purposefully maintaining a segregated school system.[8] The U.S. District Court for the Northern District of California found that the District had acted with knowledge of racial imbalances in its schools relative to the overall racial percentages for the district, and that the District had recognized that such segregation is "inherently harmful."[9] Despite this knowledge, the District moved forward with new school construction that ignored the negative impact these new schools would have on racial segregation in the District.[10] Of twelve schools authorized for construction in 1971, over half had Spanish-surnamed enrollment in excess of 50%,[11] while the percentage of Spanish-surnamed students in

[5] Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310, 313 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979).

[6] CAL CONST. art. I, § 31.

[7] *Diaz*, 412 F. Supp. at 311.

[8] *Id.*

[9] *Id.* at 315.

[10] *Id.* at 316–17.

[11] *Id.* at 318.

the district was 24.6%.[12] This demonstrates the radical disparities between what would be expected based upon the ethnic composition of the district as a whole versus the ethnic composition of these individual schools. These new schools were constructed despite both the District's awareness of the segregative impact and the existence of available alternative school sites that would have avoided such an effect.[13]

The district court found that these choices by the District did not have segregative intent because the imbalances in school enrollment resulted from the District's adherence to a neighborhood school enrollment policy.[14] However, this decision was vacated by a panel of the Ninth Circuit, which found that, although neighborhood school policies are not unconstitutional by themselves, the school site decisions of the District might have been motivated by discriminatory intent, and "[s]trict adherence to a neighborhood policy is no more than circumstantial evidence" of the non-existence of segregative intent.[15]

Although the district court on remand again found for the District,[16] this was ultimately reversed by the Ninth Circuit sitting en banc, based upon the cumulative weight of evidence concerning the District's activities involving school site selection, allocation of transportation resources, faculty and staff assignments, and the departure from policies that would otherwise have involved the busing of Anglo students.[17] The Ninth Circuit held that "choices that consistently maintained or intensified segregation" supported "the firm conviction that the district court was clearly erroneous in its ultimate conclusion that the Board did not act with segregative intent."[18]

On remand, the district court ordered, among other things, that students electing to attend schools based on participation in magnet programs be given priority in enrollment, with student ethnicity being

[12] *Id.* at 314.

[13] *Id.* at 319.

[14] *Id.* at 335.

[15] Diaz v. San Jose Unified Sch. Dist., 612 F.2d 411, 415–16 (9th Cir. 1979).

[16] Diaz v. San Jose Unified Sch. Dist., 518 F. Supp. 622 (N.D. Cal. 1981), *rev'd*, 733 F.2d 660 (9th Cir. 1984) (en banc).

[17] Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 674–75 (9th Cir. 1984) (en banc) ("The District . . . deliberately ignored state guidelines in making decisions and consistently refused to implement suggestions for desegregation. . . . [The District's Board of Education] sited new schools, rebuilt the Field Act schools, used portables and closed schools in a manner that maintained and, in some instances, intensified ethnic imbalance. . . . [It] used buses for one-third of its students, but refused to use those buses to achieve integration. . . . [It] assigned faculty and staff on the basis of ethnic origin without any plausible neutral justification. . . . [It]responded to overcrowding in the schools by instituting educationally disadvantageous double sessions and departed from its neighborhood school policy to avoid transferring Anglo students to predominantly Hispanic schools. . . . [It]consistently rejected other suggestions for desegregating its schools.").

[18] *Id.* at 675.

actively used as a determinative factor to prioritize these enrollments if a school had not reached the required ethnic percentages.[19] These magnet programs were created to provide specialized and focused instruction.[20] Students electing to participate in one of the specialized magnet programs, such as performing arts, science and engineering, or various vocational programs, would be given priority in enrollment, in contrast to the procedure followed by neighborhood schools, which enroll students primarily based upon their proximity to the school site.[21]

The District supported this approach, stating that the use of magnet schools in particular would "lead to effective and stable desegregation if given an opportunity to succeed."[22] Although other school systems have used an assortment of other approaches to choice-based systems, such as charter schools,[23] some scholars have warned that such systems can lead to an increase in segregation.[24] Given the short-term successes that the *Diaz* plan achieved, this Comment will limit its discussion of choice-based plans to those attempted under this plan.

2. The Temporary Success of the Diaz Plan

The court-ordered plan mandated that the District schools be desegregated within five years.[25] After the final court proceeding, the target year was set at the 1990–1991 school year.[26] The goal was defined as at least 20% majority and 20% minority students, with neighborhood schools within +/- 20% of the district majority percentage.[27] In other words, any single school must have at a minimum 20% Caucasian and 20% Hispanic students, with the actual percentages being within 20% of the district totals. According to the data presented in the court's findings and available from the California Department of Education, we find the following enrollment percentages for Hispanic students in the District high schools for the years 1973 and 1993:[28]

[19] Diaz v. San Jose Unified Sch. Dist., 633 F. Supp. 808, 817 (N.D. Cal. 1985).

[20] *See* 20 U.S.C.A. § 7231 (Westlaw 2015).

[21] *See Diaz*, 633 F. Supp. at 817.

[22] *Id.* at 827.

[23] CAL. EDUC. CODE § 47605 (Westlaw 2015) (authorizing persons other than school districts to operate public charter schools). Since charter schools are not initiated by school districts, but rather by private individuals or companies, they will not be discussed in this Comment.

[24] *See* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814 (2011).

[25] *Diaz*, 633 F. Supp. at 812.

[26] Diaz v. San Jose Unified Sch. Dist., 861 F.2d 591, 593 (9th Cir. 1988).

[27] *Diaz*, 633 F. Supp. at 813.

[28] *See* Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310, 314–22 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979); *DataQuest*, CALIFORNIA DEPARTMENT OF EDUCATION (Nov. 4, 2013, 6:01 PM), http://dq.cde.ca.gov/dataquest/page2.asp?level=school&subject=enrollment&

School	**Percentage of Hispanic Enrollment**		
	1973	**1993**	**Net Change**
All District Schools	24.6	45.7	+21.1
Abraham Lincoln	50.2	59.0	+8.8
Gunderson (opened 1976)	NA	27.3	NA
Leland	3.4	12.8	+9.4
Pioneer	8.1	38.6	+30.5
San Jose	64.7	62.3	-2.4
Willow Glen	13.6	50.2	+36.6

Table 1. Hispanic Student Enrollment Percentages for 1973 and 1993

These numbers show us the situation both when the District was found to be segregated and after the court order had been implemented. Given the large increase in Hispanic enrollment in the District as a whole, we can see that this increase was distributed in a manner that brought the high schools within the +/- 20% requirement in almost all the District high schools. Even the one high school not meeting the mark by 1993, Leland High School, had shown a significant increase from 3.4% to 12.8% Hispanic enrollment. The policies of a school district are often fluid, however, and once released from the court order the District soon changed enrollment procedures and policies. The impact of these changes will be examined below. First, we will turn to the shape of desegregation law as it has come down from *Brown*.

B. *BROWN* AND APPROACHES TO DESEGREGATION

Any discussion of school desegregation law must begin with a discussion of *Brown v. Board of Education*,[29] the first case to recognize school segregation as a violation of the Equal Protection Clause of the Fourteenth Amendment. In overturning the policy of "separate but equal,"[30] the Court in *Brown* held that "[s]eparate educational facilities are inherently unequal."[31] Ending unconstitutional segregation in schools, the Court said, "may require solution of varied local school

submit1=submit.From this page, information can be accessed by selecting school years and entering school names. Numbers for 1973 were used by the court and numbers for 1993 are used as a near approximation for the target year of 1991 while giving some additional time for numbers to stabilize in the student population. 1993 data was found by using DataQuest and looking at School Demographics: Enrollment and looking by school. *See id.*

[29] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[30] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by Brown*, 349 U.S. 483.

[31] *Brown*, 347 U.S. at 495.

problems."[32] In response to the Court's direction that local education authorities and courts craft plans to eliminate segregation,[33] a multitude of approaches were developed across the country, and a line of cases was heard by the Court addressing the question of appropriate plans. Beginning with *Green v. County School Board*[34] and up through *Parents Involved in Community Schools v. Seattle School District No. 1*,[35] the Court has delineated a set of requirements for any constitutionally valid desegregation plan.

In *Green*, the Court addressed the validity of a freedom-of-choice plan in which students were allowed to select which school they would attend; however, in that instance only a minimal number of students chose to change schools, leaving segregated schools essentially unchanged.[36] The Court held that, although a voluntary system may be an effective solution, it must "prove itself in operation," and "if there are reasonably available other ways . . . promising speedier and more effective conversion . . . 'freedom of choice' must be held unacceptable."[37]

Green was followed by a large number of cases in the 1970's examining a variety of approaches and further illuminating what the Court would find to be a segregated school system. One such approach, approved by the Court in *Swann v. Charlotte-Mecklenburg Board of Education*, involved the use of transportation of students, usually through the pairing of segregated schools of different racial groups and moving students between the schools, and through the altering of school attendance zones.[38]

The Court in *Keyes v. School District No. 1, Denver, Colorado,* addressed the question of school districts that were segregated only in part, finding that the burden lay with the school districts to show that such segregation was not due to segregative intent.[39] Although the Court was open to court intervention in such cases, it was more hesitant to allow courts to order desegregation across school district lines. As shown by the Court's holding in *Milliken v. Bradley*, a multi-district approach first requires a finding that all the districts involved operated segregated schools, that the boundary lines of the districts were drawn with segrega-

[32] Brown v. Bd. of Educ., 349 U.S. 294, 299 (1955).

[33] *Id.*

[34] Green v. Cnty. Sch. Bd., 391 U.S. 430 (1968).

[35] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[36] *Green*, 391 U.S. at 441.

[37] *Id.* at 440–41.

[38] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[39] Keyes v. Sch. Dist. No. 1, Denver, Colo., 413 U.S. 189 (1973).

tive intent, and that the districts acted in furtherance of segregation in other districts.[40]

The Court also began addressing questions about the cessation of desegregation orders. Once a district has remedied segregation, there is no need to monitor any changes in demographics on a year-to-year basis unless a district takes some action that may affect the racial integration of its schools.[41] In order for a district to be found desegregated, the Court requires that a district have "complied in good faith" and that "the vestiges of past discrimination [have] been eliminated to the extent practicable."[42] Although an examination of this requires a court to look at "every facet of school operations," once released from court order the district still "remains subject to the mandate of the Equal Protection Clause."[43] In examining how shifting residential populations can affect school racial balances, the Court found that a district is not responsible for de facto segregation in schools due to forces outside of its control and is responsible only for de jure segregation caused by its own actions.[44]

As can be seen from this progression of cases, the trend of the Court over time has been to more and more strictly restrain court interference with the local control of school districts. This was reiterated in *Missouri v. Jenkins*, which clearly stated the principle that a remedy must be narrowly tailored to redress the effects of unconstitutional action.[45] However, the release of a district from a desegregation order is still predicated only on whether the district has complied with the order in good faith and whether segregation has been eliminated to the extent practicable.[46] Further, the Court later held that, absent a finding that a school district had engaged in unconstitutional segregative practices, a school district is barred from the use of race-based assignment of students.[47]

In summary, the Supreme Court has held that any desegregation plan may utilize student/parent choice if such a plan demonstrates that it will correct the imbalances, but that the best and quickest means should be used. Restructuring of school neighborhood zones and transportation of students between schools may also be appropriate.

Regardless of the approach utilized, it must be narrowly tailored to remedy the violation and restore the injured parties to the position they would have occupied had the violation not occurred. Plans to correct de

[40] Milliken v. Bradley, 418 U.S. 717, 721 (1974).
[41] Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).
[42] Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991).
[43] *Id.* at 250.
[44] Freeman v. Pitts, 503 U.S. 467, 490 (1992).
[45] Missouri v. Jenkins, 515 U.S. 70, 88 (1995).
[46] *Id at 89.*
[47] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

facto segregation may not use race-specific remedies, as these are limited only to cases of de jure segregation. It is not necessary to find that an entire school district is in violation to issue an order affecting the whole of the district to correct any segregation present. Desegregation orders generally will be limited to a single school district unless there is a showing that segregative intent influenced the formation of school district lines in an effort to segregate between districts. A district found in violation must work in good faith to eliminate segregation as much as is practicable. Once a district has corrected past segregation, it need not monitor on an annual basis, and the district will bear no responsibility for segregation that results from forces outside of its control.

C. THE CALIFORNIA EDUCATION CODE AND DESEGREGATION

Any school desegregation plan, voluntary or court-ordered, must operate within the California public school system, which itself is subject to the California Education Code. Although the history of *Diaz v. San Jose Unified School Dist.* shows that the discussion of statutory requirements for schools was minimal,[48] the case originally precipitated from choices made due to implementation of the Field Act.[49] This act mandated that schools be made earthquake-resistant, and as a result of mandatory inspections under the Field Act, a number of schools in the District were closed and new schools built to replace them.[50] This presented the District with an opportunity to re-site the schools so as to alleviate de jure segregation among its many schools; however, it chose not to do so, which precipitated the initial lawsuit.[51]

Issues such as the procedures for school enrollment, the restrictions on student transportation, the formation and alteration of school district lines, the restrictions on student transfer between districts, and school site selection all have a tremendous impact on the creation of de jure segregation and on efforts to desegregate those schools.

1. Student Enrollment and Assignment

California restricts the assignment of students to particular schools on the basis of ethnicity, among a number of other characteristics.[52] However, in order to receive school apportionments from the state school

[48] *See* Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979).

[49] *Id.*

[50] *Id.* at 316–17.

[51] *See id.*

[52] CAL. EDUC. CODE § 35351 (Westlaw 2015).

fund, every district is required to adopt rules and regulations for open enrollment of resident students of the district, allowing a student to attend any school in the district regardless of the specific residence of the student (unless the district is required to maintain ethnic balances by its discretion or by court order).[53]

Once a given school has received more applicants than its capacity as determined by the district, enrollment must be on a random basis irrespective of the academic or athletic performance of a given student.[54] Further, no student from within a given school's attendance area may be displaced by a student from outside that area.[55]

There are limited exceptions to this "at capacity" rule, the most common of which are based upon the attendance of a student's sibling or employment of a student's parent at the school.[56] This ensures that, unless a school's capacity exceeds that of the student population in the school's attendance area, a given school will have students from within that attendance area only.

These statutory requirements limit the ability of parent choice, absent some exception, to effectively promote desegregation in schools if the school neighborhoods are themselves racially imbalanced. Although open enrollment within a district at any school is required, this is cut short by the practical fact that, in a school at capacity, neighborhood students will take precedence and may not be displaced by other students. Unless school capacity is significantly larger than the neighborhood student population, non-neighborhood students will rarely be able to enroll.

2. Student Transportation

In districts of any size, transportation plays a major role in the lives of students and their families.[57] California students are entitled to transportation to school at the request of the parents or guardians, but only if such transportation is required and funded by federal law.[58] This transportation may not be forced upon a student.[59] As a result of this, any plan that would attempt to shift students between schools would require

[53] CAL. EDUC. CODE § 35160.5(b) (Westlaw 2015).

[54] CAL. EDUC. CODE § 35160.5(b)(2)(B) (Westlaw 2015).

[55] CAL. EDUC. CODE § 35160.5(b)(2)(C) (Westlaw 2015).

[56] CAL. EDUC. CODE § 35160.5(b)(3)(B) (Westlaw 2015).

[57] *Solving a Big City Transportation Challenge*, SCHOOLS FOR CHILDREN, INC., http://www.schoolsforchildreninc.org/what-we-do/case-studies/success-story-transportation-more (last visited Nov. 11, 2014).

[58] CAL. EDUC. CODE § 35160.5(b)(4) (Westlaw 2015).

[59] CAL. EDUC. CODE § 35350 (Westlaw 2015).

parental consent to such transportation. Magnet and specialized enrichment programs can offer an inducement toward such consent, but school districts often incur significant expense to support such programs.[60] Although forced busing of students has been utilized elsewhere, it cannot be used in California.

3. School District Lines

As our cities have expanded, so too have our school districts, shifting district lines as needed. The State Board of Education may approve any reorganization of school districts based upon a number of conditions being substantially met.[61] One of those conditions is that each district must comprise a "substantial community identity."[62] Another is that the district reorganization must "not promote racial or ethnic discrimination or segregation."[63]

This may be a possible solution for the problem of segregation in San Jose. The District is one of the larger districts in the state, with a significant student population,[64] and splitting the district might be a plan to examine. However, the requirement that a district comprise a "substantial community identity" is vague and undefined. Additionally, San Jose's mix of urban and suburban would present significant issues of forming contiguous districts that do not segregate between districts.[65]

4. Interdistrict Transfer

There are procedures for students living in one school district to be enrolled in a public school in another district. Districts are expressly allowed to deny the transfer of a student between districts if such transfer would negatively impact a voluntary or court-ordered desegregation plan or the ethnic balance within either district.[66] The district of residence of a student may not adopt policies designed to prevent or discourage such transfers.[67] Districts may not target the communication of the availability of such transfers to specific students on any basis, including specific

[60] *See* Robert A. Frahm, *Magnet School Costs Strain State, Local Budgets*, CT MIRROR (Jan. 26, 2010), http://ctmirror.org/magnet-school-costs-strain-state-local-budgets/.

[61] CAL. EDUC. CODE § 35753 (Westlaw 2015).

[62] CAL. EDUC. CODE § 35753(a)(2) (Westlaw 2015).

[63] CAL. EDUC. CODE § 35753(a)(4) (Westlaw 2015).

[64] Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310, 313 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979).

[65] *See also* Milliken v. Bradley, 418 U.S. 717, 745 (1974) (mentioning that this could invoke intra-district desegregation action).

[66] CAL. EDUC. CODE § 48355(a) (Westlaw 2015).

[67] CAL. EDUC. CODE § 48355(b) (Westlaw 2015).

residential neighborhoods.[68] This means that, although a district may not prevent its students from transferring out to other districts, it may target a neighboring district to draw students away through transfers, but such efforts must be general and must not target individual students or specific neighborhoods.

A student may also be deemed to be a resident of a district if a parent or guardian works within that district for at least ten hours during the school week.[69] This cannot be used en masse, as the number of students allowed such a transfer is restricted based on the student population of the district of actual residence.[70] This provision is currently scheduled to be inoperative on July 1, 2017.[71]

Although the parent-workplace provision would allow a small number of students to transfer out of a district, since many adults do not commute outside of the school district for work the vast majority of students would not be able to use that exception and therefore could be forbidden from transferring out of their home districts. In addition, the prohibition against targeting students to recruit for interdistrict transfers into a district would further limit the ability of the district to bring outside students into its schools.

5. School Site Selection

Standards for school site selection are set by the State Department of Education.[72] These regulations concern the size and shape of the site footprint, various health and safety concerns, site access, location within the proposed attendance area to avoid busing except for desegregation purposes, proximity to other public services such as parks and libraries, and short- and long-term costs.[73] This gives significant latitude to a district to change its neighborhood attendance zones, which could drastically affect the racial balance of given schools if their attendance zones can be shifted in such a way as to redistribute students of specific ethnicities. The lack of utilizing such opportunities in school site selection is one of the key factors that supported a finding of segregation in *Diaz*.[74]

[68] CAL. EDUC. CODE § 48355(c) (Westlaw 2015).

[69] CAL. EDUC. CODE § 48204(b) (Westlaw 2015).

[70] CAL. EDUC. CODE § 48204(b)(6) (Westlaw 2015).

[71] CAL. EDUC. CODE § 48204(c) (Westlaw 2015).

[72] CAL. EDUC. CODE § 17251(b) (Westlaw 2015).

[73] CAL. CODE REGS. tit. 5, § 14010 (Westlaw 2015).

[74] Diaz v. San Jose Unified Sch. Dist., 733 F.2d 660, 665.

D. PROPOSITION 209 AND THE BERKELEY PLAN

The above statutory framework dealing with and impacting desegregation plans has also been added to by an amendment to the California Constitution. Although districts are authorized to voluntarily implement or continue school desegregation plans,[75] a significant restraint was placed upon these various plans when California voters approved Proposition 209 in 1996.[76] Proposition 209 amended the California Constitution to provide that no governmental entity may "discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[77] This prohibition closely mirrors that announced by the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, which restricts the use of ethnicity to cases in which de jure segregation exists.[78] Proposition 209 effectively prevents any voluntary integration plan or state-court-ordered plan from using race as an explicit and determinative factor in school enrollment policies.[79]

The Berkeley Unified School District in Alameda County, California, has adopted a novel approach in reaction to Proposition 209 that attempts to address desegregation without using race as a determinative factor.[80] Berkeley schools are divided into three geographic attendance zones, with multiple schools in each zone.[81] The schools are individually required to balance, within certain tolerances, the geographic attendance zone as a whole.[82] This is determined by breaking down each zone into a large number of four- to eight-city-block "planning areas," which are then categorized based on income, adult education level, and percentage of minority students within each area.[83] These areas are then classified as category one (predominantly low-income, limited adult education level, and large minority population), category two (a mix of these fac-

[75] CAL. CONST. art. I, § 7(a).

[76] *See* CAL. CONST. art. I, § 31 (added by Prop. 209, effective Nov. 6, 1996).

[77] CAL. CONST. art. I, § 31(a).

[78] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[79] While *Parents Involved* restricted the use of ethnicity to the crafting of orders to correct de jure segregation, Proposition 209 restricts school districts and state courts from *any* explicit use of ethnicity for *any* purpose.

[80] A similar approach is also being attempted in Jefferson County, Kentucky, by a former defendant in *Parents Involved*. *See* Daniel Kiel, *Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World*, 78 FORDHAM L. REV. 2873 (2010).

[81] American Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789, 794 n.4 (Ct. App. 2009).

[82] *Id.* at 794.

[83] *Id.*

tors), or category three (predominantly high-income, high adult education level, and small minority population).[84] Regardless of an individual student's race, each student within the area receives the same score.[85] Priority in enrollment is given to students from categories that are underrepresented in a given school compared to the overall percentage in the attendance zone.[86]

This approach is somewhat related to the pairing of schools used in some busing plans, in that students from a larger geographic area may be eligible to enroll at multiple schools. This addresses the issue of neighborhood students blocking other students from enrollment due to schools being at or near capacity. The challenges lie in trying to adapt the Berkeley plan from a district in a relatively small city[87] to a very large district in San Jose comprising a variety of housing concentrations[88] and a student population currently over three times the size of its Berkeley counterpart.[89]

III. THE *DIAZ* PLAN HAS FAILED, AND WHAT CAN BE DONE ABOUT IT

Despite the successes of the *Diaz* plan in reducing segregation in District schools, it has not had a lasting effect upon enrollment practices and results. Looking at numbers from the California Department of Education, a trend can be found in the enrollment of Hispanic students in District schools. Turning to the District high schools, we find the following:

[84] *Id.*

[85] *Id.*

[86] *Id.* at 794–95.

[87] *About Berkeley*, CITY OF BERKELEY, http://www.ci.berkeley.ca.us/ContentDisplay.aspx?id=7158 (last visited Apr. 3, 2015, 3:51 PM).

[88] Diaz v. San Jose Unified Sch. Dist., 412 F. Supp. 310, 313 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979).

[89] *DataQuest*, CALIFORNIA DEPARTMENT OF EDUCATION (Nov. 7, 2013, 3:54 PM), http://dq.cde.ca.gov/dataquest/page2.asp?level=CDIstrict&subject=enrollment&submit1=submit (From this page, information can be accessed by selecting school years and entering district names).

Percentage of Hispanic Students for 2002–2003 through 2012–2013 School Years[90]

	02–03	03–04	04–05	05–06	06–07	07–08	08–09	09–10	10–11	11–12	12–13	Net Change
District Total	50.4	50.7	50.4	50.6	51.3	51.4	51.7	51.5	51.7	52.4	52.4	2.0
Abraham Lincoln	53.6	54.6	57.5	56.8	59.7	62.7	64.2	66.2	67.2	69.2	70.3	16.7
Gunderson	48.2	51.5	51.9	51.3	53.1	56.3	56.9	56.0	57.7	58.2	57.9	9.7
Leland	13.8	13.1	12.7	13.3	12.0	13.6	12.9	12.5	11.9	10.6	10.8	-3.0
Pioneer	27.8	26.2	27.7	28.6	29.6	30.4	29.5	30.3	31.9	32.8	32.2	4.4
San Jose	61.5	62.1	60.7	64.6	72.2	75.1	77.2	78.0	76.6	78.2	78.6	17.1
Willow Glen	56.7	56.5	56.5	56.2	58.4	59.2	57.7	55.7	54.0	52.6	52.8	-3.9

Table 2. Hispanic Student Enrollment Percentages for 2002 to 2013

Although the numbers present in the 2002–2003 school year were a marked improvement from the pre-desegregation-order school years,[91] the current numbers show a disturbing trend of returning segregation. As can be seen by the net change over the listed years, schools disproportionately increased their Hispanic student population, while the District student population as a whole has only minimally increased. Two schools in particular (Leland and Willow Glen) have decreased their percentage of Hispanic students, while other schools (Abraham Lincoln and San Jose) have shown increases far beyond the District's total increase in Hispanic students. These changes disproportionately impact schools with Hispanic student populations already well in excess of the District enrollment. Three high schools would fall out of the +/- 20% range required by the *Diaz* court order (Leland, Pioneer, and San Jose) with a fourth school very close to that line and trending toward passing it (Lincoln). With only modest changes to the District's Hispanic population as a whole, something must have changed to cause such a rapid swing away from the earlier trend under the *Diaz* order.

A. THE DISTRICT VOLUNTARY INTEGRATION PLAN'S FAILURE

This may be in large part due to the change from the court-ordered plan to the current Voluntary Integration Plan (VIP) used by the District.[92] The VIP states that the District will "regularly review its proposed and/or existing policies, programs, practices, procedures, and

[90] *DataQuest*, CALIFORNIA DEPARTMENT OF EDUCATION (Nov. 4, 2013, 6:01 PM), http://dq.cde.ca.gov/dataquest/page2.asp?level=school&subject=enrollment&submit1=submit (From this page, information can be accessed by selecting school years and entering school names).

[91] *Diaz*, 412 F. Supp. at 322.

[92] SAN JOSE UNIFIED SCH. DIST., VOLUNTARY INTEGRATION PLAN (2010), *available at* http://www.sjusd.org/pdf/districtinformation/Voluntary_Integration_Plan.pdf.

decisions to assess whether any such measure appears to be having an adverse effect upon racial integration."[93] In addition, "when considering action and policy alternatives, [the District will] consider their potential racial and ethnic impact, and where appropriate and consistent with sound educational policy, endeavor to reject alternatives that create or intensify racial isolation in its schools."[94]

In practice, however, the VIP has drastically altered the student assignment process for middle and high school students.[95] Whereas the court-ordered plan placed the neighborhood of a student as a low priority for attending a magnet or specialty enrichment program school,[96] the VIP places this as the primary determining factor,[97] with this change being the most drastic difference between the two plans for student enrollment. Although the segregative effect shown by the shifting demographics of student enrollment may be the result of de facto segregated communities, the VIP does not adequately address this as compared to the court-ordered plan. With a return to the neighborhood school zone being the determinative factor in enrollment, other changes must be made if the District is to avoid a return of segregated schools.

As shown by the data above, the current plan has resulted in numbers that do not fit the definition provided by the court and is showing a trend away from that goal. Although the court order did promote the desegregation of the District, once released from that court order the District significantly altered its policies for student enrollment. As a consequence, the existing and largely unchanged school neighborhoods and neighborhood school policy have resulted in segregated schools in the District. A permanent solution was not achieved, and the District is prevented from reinstating the policies and procedures of the court order due to the inclusion of enrollment caps based on ethnicity.[98] The shape of any new solution must conform to the legal requirements established both by the courts and by California law.

B. ADAPTING THE BERKELEY PLAN TO SAN JOSE

Although the *Diaz* plan relied heavily on voluntary transfers of students, it also included provisions based explicitly on ethnicity, which are now precluded from consideration in any new plans due to Proposition

[93] *Id.* at 1.

[94] *Id.*

[95] *Id.* at 4.

[96] Diaz v. San Jose Unified School Dist., 633 F. Supp. 808, 817 (N.D. Cal. 1985).

[97] SAN JOSE UNIFIED SCH. DIST., *supra* note 93, at 4.

[98] *See* CAL. CONST. art. I, § 31.

209. The Berkeley plan has survived judicial scrutiny on this basis[99], but Berkeley Unified enrolls only 9,779 students compared to the District's 33,184 students (as of the 2012–2013 school year).[100] In addition to being over three times the size in student population, the city of San Jose (although not coextensive with the District, it is a close match) is 176.53 square miles with a population density of 5,358.7 persons per square mile, whereas Berkeley is only 10.47 square miles with a population density of 10,752.6 persons per square mile.[101] A dense population in a small area allows for easy transfer of students between schools, while the significantly larger San Jose has a much more geographically dispersed population, making any transfers very difficult. This difficulty must be addressed if the Berkeley plan is to be applied in San Jose.

It is beyond the scope of this Comment to examine whether the Berkeley plan categorization of the various census blocks in San Jose would be diverse enough across the whole of the District to allow the plan to be applied independently in each school neighborhood. But it may be worth exploring whether it would be possible to group schools into geographic zones that would reflect the demographics of the District as a whole, thus treating each of these zones as the whole of Berkeley Unified is treated under its plan. Unfortunately, the schools with the most segregated numbers are also on opposite sides of the District (*see* Fig. 1), making any zoning changes difficult to address due to the long bus trips necessary to move students across such a large area.

[99] American Civil Rights Found. v. Berkeley Unified Sch. Dist., 90 Cal. Rptr. 3d 789 (Ct. App. 2009).

[100] *DataQuest*, CALIFORNIA DEPARTMENT OF EDUCATION (Dec. 22, 2013, 6:01 PM), http://dq.cde.ca.gov/dataquest/page2.asp?level=district&subject=enrollment&submit1=submit (From this page, information can be accessed by selecting school years and entering district names).

[101] *State & County QuickFacts*, UNITED STATES CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045214/0606000,00 (last visited on Dec. 22, 2013, 6:50 PM).

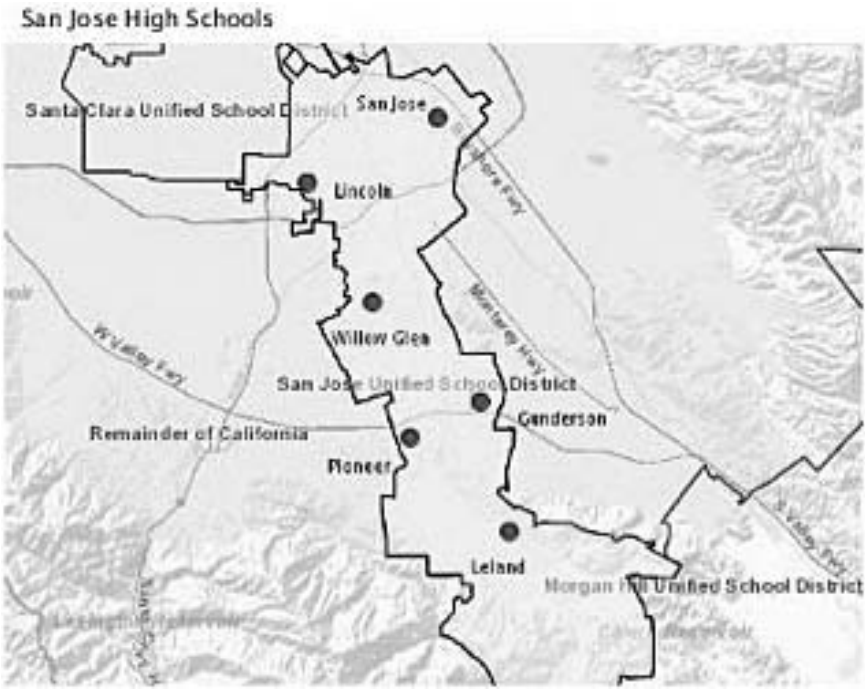

Figure 1. Map of San Jose Unified School District noting location of District High Schools[102] *demonstrating the distance between the schools with over-represented Hispanic populations (Lincoln and San Jose), and the schools with predominantly under-represented Hispanic populations (Pioneer and Leland)*

While moving school neighborhood attendance zones could be readily achieved, the District's geography does not lend itself to any easy solutions. The VIP's current approach to enrollment is to prioritize students based on neighborhood attendance, with no use of district-wide programs and, where they still exist, magnet programs given a lower priority than neighborhood residence.[103] The option exists, however, to return some schools to district-wide attendance zones, thus allowing priority to return to students electing into the various magnet programs. The District had previously expressed the thought that voluntary transfers for the district-wide magnet programs would be sufficient to desegregate the schools,[104] yet this is a primary difference between the court

[102] *American FactFinder*, UNITED STATES CENSUS BUREAU (Dec. 22, 2013, 7:47 PM), http://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?ref=geo&refresh=T&tab=map&src=bkmk. Under "Find a Location, search for San Jose Unified School District. School address data retrieved from San Jose Unified School District High Schools (Dec. 22, 2013, 7:23 PM), http://www.sjusd.org/schools/high-schools/, and manually approximated by the Author on the map.

[103] SAN JOSE UNIFIED SCHOOL DISTRICT, *supra* note 93, at 4.

[104] Diaz v. San Jose Unified School Dist., 633 F. Supp. 808, 815 (N.D. Cal. 1985).

order and the current VIP initiated by the District. While the costs for transportation associated with this are not within the scope of this Comment, an examination of the feasibility of such a change in enrollment policy versus the cost of any future litigation would be advisable.

C. CURRENT POLICIES WILL LEAD TO FUTURE LITIGATION

Should the District not take up a voluntary option, such as that presented *supra*, the District will likely be found in violation of the Equal Protection Clause, should litigation be pursued against it. The Ninth Circuit has stated that changing or failing to change a policy "with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor . . . in determining whether an inference of segregative intent should be drawn"[105] and that proof of foreseeable consequences and the historical sequence of events are highly relevant to this inquiry.[106] After being relieved from the *Diaz* court order, the District chose to implement its VIP, which included self-directives to "regularly review" policies for their effect on segregation and to actively "prevent racial or ethnic isolation from surfacing in District schools."[107] This active policy choice, with an awareness of the consequences for segregation, is similar to the active choices and awareness of consequences for segregation that led to the *Diaz* case.[108]

These changes to enrollment policies include the change of enrollment priorities to return to a neighborhood-first policy that was part of the enrollment practices held to be in violation by *Diaz*.[109] By returning to a previous invalid system of enrollment, the District would be aware that the system would still be in violation. Additionally, the readily available demographic data, and the District's own statements in the VIP of its commitment to regularly monitor its schools for the effect of these policies on ethnic balances, would support a finding that the District is aware of the effect of the policy changes made by the VIP and has not moved to correct for these foreseeable consequences.[110]

[105] Diaz v. San Jose Unified School Dist., 612 F.2d 411, 414 (9th Cir. 1979).

[106] Diaz v. San Jose Unified School Dist., 733 F.2d 660, 663 (9th Cir. 1984) (en banc).

[107] SAN JOSE UNIFIED SCHOOL DISTRICT, *supra* note 93, at 1.

[108] *See* Diaz v. San Jose Unified School Dist., 412 F. Supp. 310 (N.D. Cal. 1976), *vacated*, 612 F.2d 411 (9th Cir. 1979).

[109] *Diaz*, 733 F.2d at 664 ("[T]he location and construction of new schools and the closing of old schools . . . are decisions that may determine whether the prescribed neighborhood attendance areas will be integrated or segregated.").

[110] This data is readily available to the District, and the VIP states that the District has assumed a duty to monitor this data. This demonstrates that the District is aware of the data, which shows a trend returning to pre-*Diaz* segregation. Additionally, the District has made controlled and limited changes to the enrollment policies, and the overall changes to the population living within

Although the Hispanic student population has increased slightly during the years covered by the data presented in Table 2, this small change has been disproportionally borne by schools with already-high Hispanic student populations, thus increasing segregation of this population. The VIP was originally approved by the District on June 19, 2003,[111] when percentages of Hispanic enrollment were largely unchanged from 1993 (*see* Table 1). After this change in policy, the Hispanic student population has been allowed to swell disproportionately at the two high schools (Lincoln and San Jose) that were also the high schools most impacted by the disproportionate enrollment of Hispanic students in 1974 (*see* Table 1 and Table 2). By removing one of the key provisions of the court order that led to desegregation in the high schools, and by returning to a neighborhood school system of enrollment such as that used pre-*Diaz*, the District has caused the schools to begin resegregating. This result both was foreseeable by the District at the time of the policy change, and is currently recognizable through readily available data from the District and the Department of Education. All that remains is for someone to file a claim, and the District will face a significant risk of being found in violation of the Equal Protection Clause by the maintenance of a segregated school system.

D. Future Court-Ordered Desegregation Should Utilize District Reorganization

As has been demonstrated by the actions of the District, enrollment policies are easily changed. Although we may muse as to the reasons for the change, unless there exists some explicit and vindictive racism within the District, there are probably some pressures (such as transportation costs) that led the District to change a system that appeared to have been working to eliminate and prevent segregation within District schools. Therefore, any future court order should use some measures that are more physical in nature and thus less susceptible to easy alteration.

One possible option is to order changes to school sites and attendance zones. With increased capacity at schools, students will more readily be able to move to schools outside their immediate neighborhoods without requiring any change to enrollment policies.[112] By establishing overlapping attendance zones, students within an overlapping area may

the District are known and do not support the degree of change demonstrated by the data on school enrollment. Given that one of the changes to enrollment policies made by the District was to change the priorities for enrollment at the existing magnet programs, this marks a shift toward pre-*Diaz* practices, with the foreseeable consequence of a return of pre-*Diaz* enrollment statistics.

[111] San Jose Unified School District, *supra* note 93, at 1.

[112] *See* Cal. Code Regs. tit. 5, § 14010 (Westlaw 2015).

have priority enrollment based on a neighborhood enrollment policy at either school.[113] If the overlapping areas are positioned in predominantly minority neighborhoods, these students will have greater flexibility in enrollment. A supplementary approach would be to order the construction of new schools at specific sites to alleviate segregation based on segregated housing patterns. Placing these new schools between existing schools of disproportionately high and disproportionately low Hispanic populations and setting the new school's attendance zone as largely overlapping the preexisting schools may alleviate imbalance at the preexisting schools.

Another category of option that could result in a much more permanent change is a full reorganization of the District, possibly by splitting the District. The unfortunate problems of geography discussed above will present a problem here as well, however, and it may take the joining of neighboring school districts to be able to form viable district lines that would not encourage segregation. This is highly unlikely in a court order, as the Supreme Court has expressed a general preference to avoid multi-district solutions.[114] Alternatively, a possible solution could involve splitting the District into smaller districts with single high schools, but any such district lines would have to be drawn in a way that would not further segregation while also maintaining "substantial community identity."[115] This community identity, although vague, seems to be readily drawn on existing school neighborhood lines, but given that these neighborhoods are ethnically imbalanced, it would leave the formation of these districts open to accusations that they "promote racial or ethnic discrimination or segregation."[116]

All of these options involve significant expenditure, and such plans would be highly complicated and far outside the scope of this Comment. It is my hope, however, given the greater resources available when this returns to court, that these options may be further explored in an effort to produce a more permanent and physical change to the District to prevent an easy return of segregation. It is unlikely that a court could be persuaded to split the district, due to the immense complication presented by that option, so that option is probably best left as a voluntary option to be presented to the communities in question. Instead, the redrawing of school neighborhood attendance zones, the creation of more overlapping zones and the use of district-wide schools, and an increase in school capacity, while possibly presenting significant costs, may be a more palat-

[113] *See* CAL. EDUC. CODE § 35160.5(b)(2)(C) (Westlaw 2015).
[114] *See* Milliken v. Bradley, 418 U.S. 717, 721 (1974).
[115] CAL. EDUC. CODE § 35753(a) (Westlaw 2015).
[116] CAL. EDUC. CODE § 35753(a)(4) (Westlaw 2015).

able option for the courts while still resulting in a longer-lasting effect. Combining this with directives for changes in new school site construction, development of the physical structure of the district may result in a more permanent solution that had been missed by *Diaz*.

IV. The Future of Desegregation in San Jose

As shown by the changing school demographics within the District since the implementation of the VIP, the District has returned to the segregative effects that were present in the 1970's leading up to *Diaz*. Given the changes made by the District in adopting the VIP, it will likely be found in violation of the Equal Protection Clause if it is once again called to court by minority students in the District. Although any changes that would turn the tide against this shift toward resegregation may be costly, the District must either correct the situation now through a means of its own choosing or be forced through court order to once again eliminate the segregation knowingly caused by the District's policy choices.

With the current budgetary issues within public education in mind, costs will surely be a driving issue in any discussion of solutions. The *Diaz* plan demonstrated that it was largely effective and, despite the Proposition 209 amendment to the California Constitution and recent U.S. Supreme Court cases, that plan may be effectively reinstated by incorporating elements of the Berkeley Unified School District plan. It may also be prudent for the District to explore more drastic reorganization of the District, through some combination of splitting and ceding parts of the District to willing neighboring school districts, but such a plan may be politically or fiscally impossible. However, despite these obstacles, these are still options that the District should explore. Additionally, the District may find geographically and fiscally viable options for altering attendance boundaries with modest increases to school capacity to allow greater voluntary movement of students to alleviate segregation.

Barring voluntary action on the part of the District, all of these options will be at the court's disposal in ordering corrective action. The District should explore all the above options in anticipation of future legal action, as it will find that data indispensable in that litigation. The court should be aware of where the *Diaz* plan failed and take measures to ensure a more lasting solution that cannot simply be switched back as soon as the present violations are corrected, such as alterations to school attendance zones, increases to school capacity, and possibly even splitting the District.

Ultimately, any school district must deal with segregation that exists outside of its control. Neighborhoods populated on largely ethnic lines can, when sufficiently large, overwhelm the ability of a school system to integrate those ethnic neighborhoods with different ethnic populations. The isolation of different ethnic groups caused by larger social issues is an undeniable fact of life in many communities. Although some have placed partial blame for these ethnically based housing patterns on school systems,[117] efforts in other areas of social justice may be the only lasting solution to school segregation. However, even if that is the basis for the situation in San Jose, or in any school district, if the idea that segregated school systems are inherently unequal remains true, then the burden is placed upon all in the community to attempt any available, effective, and legal means to adapt to the challenges presented by the structure of the community, in order to give each student access to a positive educational experience.

[117] *See* Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397 (2013).