

## Legal Implications of Race-Based School Funding Policies to Close Racial Achievement Gaps in Education

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### Abstract

*Within the field of school finance litigation, some scholars contend that a policy shaped around the idea of having school funding targeted to minority student populations could narrow the achievement gap in education between Black and White students. This research highlights the legal implications of such a policy and assesses current literature in the field which reveals as late as 2006, the absence of such strategies as a policy approaches. An assessment of current research also reveals that there is some correlation between school funding and educational outcomes for minority students educated within school districts across the country facing financial challenges. This research also examines what could be some of the underlying factors for why states have racial funding gaps. Further, many of the adequacy studies in the field often omit race variables and this work seeks to determine why this has characterized these previous studies. Finally, this work examines the impact of No Child Left Behind (NCLB) which was reauthorized in 2015 as Every Student Succeeds Act (ESSA) under the Obama Administration and whether race-based funding strategies would conflict with the Equal Protection Clause.*

**Key words:** School finance litigation, school funding, racial funding gaps, student achievement, adequacy studies, adequacy litigation, race variables, standards-based accountability, NCLB, ESSA, public schools

### 1. Introduction

This research examines legal implications concerning the policy of using race-based school funding strategies to address existing racial achievement gaps in education. Within the field of school finance litigation, there has been a growing consensus among some scholars that the policy or strategy of having school funding targeted to minority student populations may narrow existing racial achievement gaps in education (Green, Baker, & Oluwole, 2006). However, an assessment of current literature in the field indicates that as late as 2006, there were no state school finance formulas utilizing race-based funding strategies as a policy approach (Green, Baker, & Oluwole, 2006). Scholars within the field conducting studies such as Green, Baker, and Oluwole (2006) have identified that some U.S. states like Alabama and Kansas have school districts with higher percentages of black students resulting in lower nominal resources per pupil. Green, Baker, and Oluwole's (2006) research also indicates that how the state aid formula is designed itself leads to lower allocations of funding to school districts having higher percentages of black students when controlling for local fiscal capacity and cost factors. Further, scholars such as Imazeki and Reschovsky (2004) have conducted studies using race variables in a cost function model of school districts in the state of Texas that show a positive and statistically significant association of the percentages of Hispanic students, black students, and students who qualify for Free and Reduced Lunch Programs with costs of achieving outcome levels that are mandated in the state by the No Child Left Behind (NCLB) Act (Imazeki&Reschovsky, 2004).

Aside from examining some of the relevant legal issues concerning the use of race-based school funding strategies to narrow racial achievement gaps in education, this work also assesses research in the field where there is some correlation between school funding and the actual educational outcomes for minority students being educated within financially challenged school districts (Green, Baker, & Oluwole, 2006). Another issue addressed is what could be some of the leading factors for why many U.S. states are facing racial funding gaps. In addition, most adequacy studies in the field tend to omit race variables (Green, Baker, & Oluwole, 2006).

Therefore, this research attempts to shed light upon why this has been a characteristic of adequacy studies. Some observers contend that the NCLB Act prompted some states to employ race-based funding strategies or policies to meet mandated educational outcomes (Green, Baker, & Oluwole, 2006). Finally, this research examines the impact of the NCLB Act and assesses whether race-based funding strategies are allowed under the Equal Protection Clause.

## **2. Historical Background: The Changing Demographics in U.S. Public Schools**

In examining legal implications concerning the use of race-based school funding strategies, it is useful to trace the dramatic changes in the demographics of U.S. public schools. There has been an increase in the number of poor and minority children attending public schools who are educationally deprived (Southern Education Foundation, 2010). This change in public school demographics has become most pronounced in the South. In fact, southern public schools no longer enroll a majority of students who are white as 51% of the South's public-school students are from minority populations while 49% are white (Southern Education Foundation, 2010). A report by the Southern Education Foundation (2010) indicates that the South has become the first region of the nation where more than half of the students attending public schools are poor and more than half are members of minority groups. This major shift in public school demographics in the South is primarily due in part to the return of blacks to the South, an influx of Latinos, Asian Pacific Islanders, and other ethnic groups into the region, and also higher birth rates among black and Latino families (Southern Education Foundation, 2010). This demographic shift in southern public schools was not fueled by whites leaving the public school system. The flight of whites from public schools in the South actually spiked during the period of desegregation and has not had much of an overall effect on public school demographics since the early 1980s. The Southern Education Foundation's (2010) research results indicate that in the South, most white children attend predominantly white schools with an even greater or higher percentage of black and Hispanic children attending schools that are primarily minority in composition. Moreover, there is also a trend in the South towards more white students attending private or parochial PK-12 schools.

The Southern Education Foundation's (2010) research findings concerning the increase in the number of poor and minority students attending public schools in the South is consistent with Green, Baker, and Oluwole's (2006) findings pertaining to school districts in states such as Alabama and Kansas having higher percentages of black students. A large workforce that is undereducated with limited skills is clearly a competitive disadvantage particularly in an economy that has become increasingly global in nature. If the educational needs of socioeconomically disadvantaged minority students who attend our nation's public schools are not adequately met and these children continue to underachieve academically, certain regions of the country such as the South may become more marginalized in an increasingly global economy (Green, Baker, & Oluwole, 2006). The social and governmental costs of a substantial segment of the population being allowed to remain undereducated within a global economy are quite high. The research findings of Green, Baker, and Oluwole (2006) as well as the Southern Education Foundation (2010) lend credence to the view that there is an increased need for legal remedies through the U.S. court system as well as the development and implementation of sound policies to better educate children and fund public schools.

## **3. School Funding: Does it Correlate with Minority Student Achievement?**

In assessing whether there is a correlation between school funding and the academic achievement of minority students, it is clear that until the early 1990s, the predominate view amongst scholars was that any increase in school funding did not necessarily lead to an increase in the academic achievement of minority students (Green, Baker, & Oluwole, 2006). This perspective was supported by *The Coleman Report*, a critical study by James S. Coleman which suggested that schools essentially had little impact on a student's academic achievement independent of the child's background and overall social context (Green, Baker, & Oluwole, 2006). However, since the early 1990s and the research findings of *The Coleman Report*, empirical data from other studies has shown that greater financial resources may have a positive influence and lead to improvements in the academic achievement of minority students. In fact, the research findings of some scholars within the field indicate that student's scores on the National Assessment of Education Progress Tests (NAEP) lend credence to the perspective that school funding specifically targeted at minority students can improve their educational outcomes or academic achievement.

In contrast, some of their research results suggest that when school funding is targeted toward students that may be more advantaged, there is a significantly smaller or negligible effect on educational outcomes (Green, Baker, & Oluwole, 2006).

Further, research findings from studies conducted in the late 1980s and early 1990s suggest that educational spending with an objective to decrease the size of classes and enhance teacher quality may narrow racial achievement gaps. Green, Baker, & Oluwole (2006) note that the state legislature in Tennessee pursued an actual study to assess both short and long-term effects of small class sizes in early grades. This study by the Tennessee state legislature was essentially conducted in three phases. The first phase of the study was known as Project Star (Student-Teacher Achievement Ratio). This study was conducted over a four-year period from 1985 to 1989 and placed a limit on class sizes to between thirteen and seventeen students from grades K-3 (Green, Baker, & Oluwole, 2006). The second phase of the study was referred to as the Lasting Benefits Study and was basically a study to observe resulting consequences from Project Star after students returned to more normal-sized classes. The third and final phase known as Project Challenge was essentially a policy initiative where the poorest school districts in the state of Tennessee received more school funding in order to reduce their class sizes in the early grades PK-3.

In terms of research results, the Project Star study revealed that students experienced substantial improvements in their academic performance when they were educated in smaller classes (Green, Baker, & Oluwole, 2006). In fact, the improvements in academic performance for African American students were particularly significant. The results of the Lasting Benefits Study indicated that children enrolling in smaller-sized classes continued to perform academically at higher levels than students being educated in normal-sized classes even after returning to these classes (Green, Baker, & Oluwole, 2006). Further, in the case of Project Challenge, researchers found that the academic performance of students in the areas of mathematics and reading within the state of Tennessee's school districts improved by a substantial rate (Green, Baker, & Oluwole, 2006). Many educational researchers have argued that the quality of teachers within public schools is equally if not more critical than reducing the overall size of classes in hopes of improving educational outcomes for students (Green, Baker, & Oluwole, 2006). However, some research within the field concerning labor markets for public school teachers indicates that educators with stronger academic backgrounds tend to avoid teaching where there are higher percentages of African American students (Green, Baker, & Oluwole, 2006). When they are adequately compensated in terms of salary to counteract or off-set less than ideal work conditions however, studies also show that this can make some difference. Regardless of the existing labor markets for teachers, the conclusion one can draw from this research is that it will cost more dollars per pupil to attract high quality teachers to teach in minority school districts than in those that have low-minority composition.

#### **4. Racial Funding Gaps: What are Some of the Inherent Causes?**

Although there is clear evidence from these respective studies highlighted by Green, Baker, and Oluwole (2006) that race-based funding strategies or policies have the potential to improve educational outcomes for minority students, attempts to employ race-based funding approaches have been virtually non-existent. A particularly noteworthy statistic is that on average, school districts where at least 60% of the student body is black, spend 13.8% more per pupil than districts where less than 20% of the student body is black (Green, Baker, & Oluwole, 2006). However, when there is an adjustment made for costs that tend to be associated with elevating student academic achievement in school districts that face higher poverty rates and some regional labor market variation, school districts where at least 60% of the student body is black spend almost 83.5% of what school districts where less than 20% of the student body is black actually spend (Green, Baker, & Oluwole, 2006). In short, these statistics reinforce the fact that there are clear disparities between minority school districts and non-minority ones and that there is a need for an initiation of substantive policies and legal remedies to address these differences.

As to the reasons why some states are facing racial funding gaps, the predominant view is that disparities in funding between minority and non-minority school districts may be a function of the overall level of commitment of state legislators to spend on public schools (Green, Baker, & Oluwole, 2006). When there is less funding being allocated by respective state legislatures, less wealthy school districts with higher percentages of minority students do not fare well. Moreover, in many states, representatives of suburban school districts with lower poverty rates have been politically astute or effective at acquiring more school funding per pupil than representatives of minority school districts with higher poverty rates (Green, Baker, & Oluwole, 2006).

Furthermore, suburban school districts often have political clout that permits them to acquire cost adjustments that can essentially counter any adjustments that may advantage less wealthy school districts.

### **5. Adequacy Studies and the Exclusion of Race Variables**

As highlighted in studies assessed by Green, Baker, and Oluwole (2006), there is evidence that there is a correlation or association between school funding and educational outcomes for minority students. However, despite this correlation, race indicators are often omitted from adequacy studies in the field centered upon providing district level cost estimates. Most studies address variations in educational costs by percentages of low-income students and how cost variation can arise or result from migrant populations. In fact, Green, Baker, and Oluwole (2006) note from a review by Gronberg, Jansen, and Taylor (2004) that out of some thirty state level studies focused upon educational costs and how the costs vary across respective school districts, none examined variations due to race variables. Some scholars contend that the omission of race variables may be attributed to the overall reluctance of researchers to address any legal or political developments resulting from it potentially costing more money to accomplish reaching better educational outcomes in school districts with higher percentages of minority students (Green, Baker, & Oluwole, 2006).

Some adequacy studies concerned with district level costs attempt to estimate educational costs for minority students by focusing upon district size or location and socio-economic status as a set of measures to highlight racial differences in student populations (Green, Baker, & Oluwole, 2006). However, it is important to note that socio-economic status and district size or location often fall short of providing exact or precise information about student population distribution. On the other hand, these indicators may prove valuable in discerning differences in population distribution and educational costs between rural and urban poverty and the impact of a growing immigrant population within public schools (Green, Baker, & Oluwole, 2006).

### **6. Adequacy Litigation and the Movement Towards Standards-Based Accountability**

School finance reform and the movement towards adequacy litigation have stressed specifying exactly what state obligations are to provide educational opportunities so that all children regardless of their race can acquire a vital or necessary set of basic educational skills. In fact, recent adequacy litigation has essentially changed the landscape for education policy by instituting educational interventions such as universal pre-school (Koski, 2007). As it concerns more recent school finance litigation, courts have focused their efforts on making sure that socio-economically disadvantaged children in public schools receive additional fiscal attention and educational support (Koski, 2007). Many advocates of school finance reform today view adequacy litigation as essentially a path to educational equity for these children.

In association with the movement towards adequacy litigation, state legislatures and state executives have increasingly become more supportive of policies such as standardized-based reform and accountability for student educational outcomes (Koski, 2007). The policy of standards-based reform aims to alleviate low educational expectations for socio-economically disadvantaged children. This policy essentially establishes challenging content standards in terms of what children should know and what basic skills they should acquire (Koski, 2007). It also provides for student assessment to determine whether children have achieved these basic standards (Koski, 2007). In short, the policy of standards-based reform attempts to improve children's individual academic achievement to meet a set of state standards of what is considered proficient or adequate.

The policy of standards-based reform has now been supplemented by a policy of accountability. This education policy encompasses requiring accountability of both public schools and the children themselves for their performance on standards-based achievement tests (Koski, 2007). This policy of requiring accountability in public schools essentially rewards schools and administrators who succeed in meeting established standards for student academic achievement, but sanctions those who fail to meet these standards for achievement (Koski, 2007). In fact, the performance of schools and districts on standards-based assessments are often published and in turn open for public review and scrutiny. Public schools that are successful in meeting established standards for student academic achievement are often provided with commendations and in some instances financial rewards (Koski, 2007). In contrast, public schools that fail to meet established educational standards for academic performance or achievement are sometimes offered technical assistance and temporary grants to improve their educational standing. If the school fails persistently, they may face actions or measures like reconstitution or a state takeover (Koski, 2007).

As a result of the introduction of these educational policies, students in public schools today are evaluated to determine if they can meet a set of standards for academic achievement through periodic, statewide criterion-based assessments and high-school exit examinations (Koski, 2007).

The No Child Left Behind Act (NCLB) which was an example of these standards-based accountability provisions, had promised to elevate the academic performance of socio-economically disadvantaged children and close the achievement gap. However, NCLB had often been criticized for falling short of providing both much needed educational resources and appropriate conditions for all children regardless of their race to achieve academically at the highest possible levels (Koski, 2007). Many advocates of school finance reform rightly question whether or not it is appropriate to hold students accountable for failing to learn without providing them with the necessary opportunities to learn (Koski, 2007).

Some advocates of school finance reform contend that U.S. courts should hold states accountable through state constitutional education articles to provide necessary resources for teaching and learning at state authorized levels (Koski, 2007). Moreover, many judges are pointing to students failing to meet minimum standards of achievement or proficiency on tests mandated by states as evidence of an ineffective public education system. Ideally, the political divisions or branches set expectations concerning local educational performance (Koski, 2007). Further, schools and their respective educators prepare to meet established standards with courts overseeing political divisions to guarantee that they are providing the necessary conditions for schools and educators to reach expected standards (Koski, 2007). However, some observers contend that what is essentially needed is for local communities, parents, and students themselves to hold the public education system accountable for educational resources along with the inclusion of monitoring and enforcement mechanisms (Koski, 2007).

### **7. The No Child Left Behind Act (NCLB): What Were Its Impacts?**

The No Child Left Behind Act (NCLB) was enacted in 2002 by the U.S. Congress and it required states to develop and initiate accountability systems for public schools. However, in December 2015 the U.S. Congress passed the Every Student Succeeds Act (ESSA) a new law to replace NCLB. A primary goal of NCLB was to close or narrow academic achievement gaps between black and white students (Green, Baker, & Oluwole, 2006). The act mandated that states must get all students to reach a certain level of proficiency in terms of academic achievement on state tests by the year 2014 (Green, Baker, & Oluwole, 2006). It also required socio-economically disadvantaged students, racial and ethnic minorities, students with disabilities, and limited English proficient students to make adequate yearly progress on all specified state standards (Green, Baker, & Oluwole, 2006).

The NCLB Act had provisions in place for schools that persistently failed. If schools failed to make adequate yearly progress for two consecutive years, they were required to develop an improvement plan and notify parents of their failure to make progress (Green, Baker, & Oluwole, 2006). For three consecutive years of failing to make progress, schools had to provide supplemental services such as tutoring to their students and allow them the option of transferring to other schools (Green, Baker, & Oluwole, 2006). If there were four years of failure, corrective measures had to be undertaken such as replacing school staff or offering public school choice to students and their parents (Green, Baker, & Oluwole, 2006). If schools failed to make adequate yearly progress for five years, school restructuring measures such as converting to a charter school state takeover, or staff restructuring had to occur with the possibility of the school districts losing federal funding (Green, Baker, & Oluwole, 2006).

While some observers argued that the NCLB Act's acknowledgement that socio-economically disadvantaged children were not performing as well as other children and recognition that action was needed by school districts was commendable, they doubted whether remedial provisions of the statute such as charter schools, school transfers, and state takeovers would improve academic performance for minority students (Green, Oluwole, & Baker, 2009). Green, Oluwole, and Baker (2009) contended that as the U.S. Congress considered reauthorizing NCLB, it needed to also consider race-based funding strategies to closing or narrowing academic achievement gaps (Green, Oluwole, & Baker, 2009). Green, Oluwole, and Baker (2009) argued that given the fact that there were serious questions about the overall effectiveness of charter schools in achieving goals of NCLB such as closing the academic achievement gap, approaches such as race-based funding should be considered. However, there were some who argued that a policy approach of race-based funding targeted towards minority students under NCLB would most likely result in increased school finance litigation in the future. (Oluwole & Green, 2008).

These scholars believed that if state legislatures employed race-based funding strategies to elevate the academic achievement of socio-economically disadvantaged children in high-minority school districts, these policy approaches would ultimately be subjected to Equal Protection Clause challenges from plaintiffs attending low-minority school districts (Green, Baker, & Oluwole, 2006). In fact, the reaction of U.S. courts would be to apply strict scrutiny analysis. In these instances, states would be required to demonstrate that funding policies are narrowly tailored to satisfy a compelling government interest (Green, Baker, & Oluwole, 2006). In short, strict scrutiny essentially makes sure that the goal of the government is sufficiently important to justify using race-based classifications.

## **8. Conclusion: Legal Implications of Race-/Based Funding Strategies**

The research findings highlighted in this study provide some evidence to substantiate the view held by some proponents of school finance reform that race-based school funding can potentially improve educational outcomes for minority students. However, there are some clear legal implications for this policy approach to education reform. In the current climate where there are limited resources due to the economic state of the nation and critical shortfalls in state budgets for public school education, asking courts to target remedies or state legislatures to orient legislation exclusively toward immigrants, minorities, and poor children may be a losing legal and political strategy. The issue of race can be polarizing even for judges in the U.S. court system entrusted with the important responsibility of being strict interpreters of the law because they bring their own set of life experiences concerning the issue of race to the table when making court decisions concerning school finance litigation. Since the reauthorization of NCLB in December 2015 under the Obama Administration as the ESSA, some observers have suggested that the U.S. Congress should consider race-based funding strategies to close academic achievement gaps (Green, Oluwole, & Baker, 2009). However, this action would likely result in increased school finance litigation (Oluwole & Green, 2008). A race-based strategy would no doubt be subjected to legal challenges based upon the Equal Protection Clause from plaintiffs who attend public schools in districts with lower percentages of minority students (Green, Baker, & Oluwole, 2006). Further, a race-based funding strategy targeted towards minority students in public schools would be potentially politically explosive for state legislatures in terms of the reaction from their constituents. With any policy to reform public schools, garnering public support is crucial for overall success. Given that we are currently in a political climate where a small economic pie must be divided evenly amongst so many different groups, it would be difficult to garner public support for a public-school reform strategy that exclusively targets minorities.

The challenges public schools face and how to properly address the educational needs of their socio-economically disadvantaged students given current fiscal constraints faced by state and local governments is one of the most critical education issues for the U.S. The problems are particularly pressing in inner-city public schools. There are increasing numbers of low-income disadvantaged families within inner cities across the nation and the underlying social implications are quite pronounced in large, urban districts (Waxman, Anderson, & Baptiste, 1992). Most of these urban districts have large percentages of minority students and their schools face challenges such as student underachievement, student and teacher alienation, and high dropout rates (Waxman, Anderson, & Baptiste, 1992). The students attending these schools are largely poor and minority and are amongst an increasing group of children in the U.S. who are clearly at risk of failure educationally.

Finally, despite the legal challenges race-based measures would face, some scholars within the field still strongly advocate for this policy approach to reform public school education. Oluwole and Green (2007) are strong proponents of race-based school funding and contend that race-based measures are not all unconstitutional. They argue that school districts should be able to employ race-based measures to reform public school education and withstand constitutional scrutiny if they adhere to central legal principles upheld in the U.S. Supreme Court case of *Parents Involved in Community Schools v. Seattle School District No. 1* (Oluwole & Green, 2007). In addition, another legal challenge facing advocates for race-based measures to reform public schools is that the plaintiffs in education reform litigation are often disempowered by the same educational system they challenge, race and class differences between attorneys, and clients, and the limited preparation attorneys receive working effectively with minority communities (Reichbach, 2007). Given these challenges, individuals representing plaintiffs must pay special attention to the quality of their professional relationships with clients and minority communities (Reinbach, 2007).

It is crucial to avoid alienation or a disconnect with their clients or minority communities if lawyers who are proponents of education reform expect to effectively improve conditions for public schools (Reinbach, 2007)

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