Integration Rule and Statute Alignment Work Group

Recommendations to the Commissioner

February 14, 2014

Cost of Report Preparation

The total cost for the Minnesota Department of Education (MDE) to prepare this report was approximately $850. Most of these costs involved staff time preparing the written report. Incidental costs include paper, copying, and other office supplies.

Estimated costs are provided in accordance with Minnesota Statutes 2011, section 3.197, which requires that at the beginning of a report to the Legislature, the cost of preparing the report must be provided.

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The following recommendations were given to the commissioner for consideration:

Recommendation: The legislature should enact session law that addresses the priority items listed below. In addition, the legislature should grant expedited rulemaking authority to the commissioner for priority issues, and general rulemaking authority to address remaining issues during the rulemaking process.

1. **Purpose Statement.** Because the current statute includes a purpose statement (Minn. Stat. § 124D.861 Subd. 1(a)), a similar statement is not needed in rule.

   Recommendation: Delete purpose section from Rule 3535.0100 or replace the current rule purpose statement aligned to the statute, as well as the following: "Avoiding racial isolation and promoting diversity are legitimate activities for the state to pursue."

2. **Student Classifications.** Clarify "protected class student" classifications.

   Recommendation: Use the statutory designated classification and not those in rule.

   a. For the purpose of determining "eligible districts" and for determining funding, use the following NCLB designated classifications:
      - American Indian/Alaskan Native
      - Asian/Pacific Islander
      - Hispanic
      - Black

   The term "protected class students" should include the foregoing classifications.

   b. For the purpose of plan development, implementation, reporting, and evaluation, use the following NCLB classifications referenced in statute:
      - American Indian/Alaskan Native
      - Asian/Pacific Islander
      - Hispanic
      - Black
      - Free and Reduced Priced Lunch (economic)

   c. **Recommendation:** Retain rule language about the dual status of American Indian students to acknowledge their dual status as protected students and members of sovereign nations (3535.0110 Subp. 2).

3. "**Eligible District"**. The definition of eligible district should be modified as follows:

   Recommendation: "Eligible district" should be defined as:

   a. A district with an enrollment of 20 percent or more "protected class students"; or

   b. A district or districts that have an enrollment disparity of 20 percent or more "protected class students" compared to an adjacent district, provided the adjacent district participates in a cross-district plan; or

c. A district with a school site that has an enrollment disparity of 20 percent or more "protected class students" compared to other school sites within the district; or

d. A district submitting a voluntary plan to meet the intent of the statute.

Note: Appropriate means for addressing eligibility of districts and schools with high numbers of enrolled American Indian students should be developed in consultation with the Tribal Nations Education Committee in recognition of the unique educational needs of American Indian students and their dual status as members of sovereign nations.

4. **Intentional Discrimination**. The statute does not cover intentional discrimination, while the rule requires the commissioner to make a determination of intent. (Minn. R. 3535.0110 Subp. 9 and 3535.0130-0150)

   The work group expressed concern about acts of intentional segregation. The following recommendations address this.

   Recommendations:

   - Eliminate current definition and process in rule pertaining to intentional discrimination.
   - Utilize provisions of the Minnesota Human Rights statute and other relevant statutes to respond to acts of intentional discrimination and cross-reference either in statute or rule (Minn. Stat. § section 127A.41), which provides for the reduction in state aid if a district violates the Minnesota Human Rights Act or the Minnesota Constitution. (See Appendix C for these statutes)

5. **Collaboratives**: The rule requires all eligible districts adjacent to racially isolated districts to collaboratively develop cross-district integration plans. The new statute does not. This has raised the question of when cross-district planning for integration strategies should be required. Collaboration among districts should be meaningful and support the goals required in statute. The current rule only focuses on one of these required goals.

   Recommendations:

   - If a district has been identified as eligible (under the new criteria) because of a disparate percentage of enrolled protected class students when compared with one or more adjacent district, cross-district collaboration is voluntary for adjoining districts and at the discretion of the racially isolated district so long as one adjoining district participates.
   - If a racially isolated district declines to participate in the achievement and integration program with an adjacent district, the adjacent district shall not be required to submit a plan or engage in cross-district integration planning and shall not receive funding.
   - If a district qualifies under more than one definition of "eligible", all the definitions apply.

6. **Plan Development and Implementation:** The process for developing and implementing the integration plan is identified in statute and may conflict with the rule because the rule is not as focused on achievement. Districts should follow

the plan development process that is aligned with the World's Best Workforce process in statute.

Recommendation: Those similar provisions in rule should be repealed so as to prevent confusion. Integration strategies to address isolated schools within a district must be specified in the district's plan. This should be clarified by amending statute or through the rulemaking process.

7. **Evaluation:** Integration and achievement goals within the integration plan should be part of the overall achievement goals within the district's World's Best Work Force plan and aligned with the MMR measures of closing the achievement gap, proficiency, and growth and graduation rates. However, more specific measures should be identified to evaluate integration activities listed in that plan and funded with achievement and integration revenue.

   Recommendation: Evaluation provisions in rule should be repealed so as to prevent confusion.

   Recommendation: The commissioner should develop specific evaluation criteria to be shared with districts that determine how progress toward achievement and integration goals is to be measured. This should be done through rulemaking.

8. **Community Input on plans.** This process is required and outlined in statute.

   Recommendation: Rules related to this should be repealed.

   Recommendation: District plans must include a provision describing the process for input by the local American Indian Parent Advisory Committee, if such a committee is in place. This requirement can be adopted in either rule or statute.

9. **Incentive funding/Use of integration funds guidelines.** Although broad areas for the acceptable uses of integration funds are specified in statute, criteria for the use of integration funding, including the use of incentive funding, may need clarification.

   Recommendation: Criteria for the use of integration funds should be developed in rule consistent with statutory requirements. While it is in the public's best interest to have guidelines established in rule, districts shall operate under the commissioner's guidance until rulemaking is complete.

10. **Additional issues:** Additional issues were discussed by the work group but need further study and consideration. This should take place as part of any rulemaking process. Some of these issues include:
    - Ethnocentric schools.
    - Language immersion schools.
    - Charter schools (currently excluded in rule).
    - Online schools or programs (Issue: Students enrolled in an online school or program are included in a district's overall pupil count and funding).
    - EL sites (currently excluded in rule).
    - Special Education sites (currently excluded in rule).
    - Care and treatment facilities (currently excluded in rule).

- Open enrollment impact on an integration plan.
- The use of incentives to support pro-integrative establishment of attendance boundaries.

Appendix A

124D.896 DESEGREGATION/INTEGRATION AND INCLUSIVE EDUCATION RULES.

(a) By January 10, 1999, the commissioner shall propose rules relating to desegregation/integration and inclusive education.

(b) In adopting a rule related to school desegregation/integration, the commissioner shall address the need for equal educational opportunities for all students and racial balance as defined by the commissioner.

History:

Ex1959 c 71 art 2 s 11; 1965 c 718 s 1; 1969 c 9 s 23,24; 1969 c 288 s 1; 1973 c 492 s 14; 1975 c 162 s 6,7; 1976 c 271 s 21; 1977 c 347 s 19; 1977 c 447 art 7 s 4; 1982 c 424 s 130; 1982 c 548 art 4 s 4,23; 1983 c 258 s 22; 1984 c 640 s 32; 1985 c 248 s 70; 1987 c 178 s 5; 1987 c 398 art 7 s 5; 1989 c 329 art 7 s 2; art 8 s 1; art 9 s 4; 1990 c 375 s 3; 1991 c 265 art 9 s 13; 1993 c 224 art 12 s 2-6; art 14 s 4; 1994 c 647 art 7 s 1; art 8 s 1; 1Sp1995 c 3 art 7 s 1; art 16 s 13; 1996 c 412 art 7 s 1; 1997 c 1 s 1; 1997 c 162 art 2 s 11; 1998 c 397 art 4 s 1,51; art 11 s 3; 1998 c 398 art 5 s 6,7; art 6 s 38; 2000 c 254 s 35,50

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Appendix C: Pertinent 2013 Minnesota Statutes

124D.855 SCHOOL SEGREGATION PROHIBITED.

The state, consistent with section 123B.30 and chapter 363A, does not condone separating school children of different socioeconomic, demographic, ethnic, or racial backgrounds into distinct public schools. Instead, the state's interest lies in offering children a diverse and nondiscriminatory educational experience.

History:

1Sp2011 c 11 art 2 s 42

123B.30 IMPROPER CLASSIFICATION OF PUPILS.

No district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or departments upon any of such grounds. Any district so classifying or separating any of its pupils, or denying school privileges to any of its pupils upon any such ground shall forfeit its share in all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue. The state commissioner upon notice to the offending district and upon proof of the violation of the provisions of this section, shall withhold in the semiannual apportionment the share of such district and the county auditor shall thereupon exclude such district from the apportionment for such period.

History:

Ex1959 c 71 art 8 s 8; *1986 c 444*; *1998 c 397 art 6 s 124*

127A.42 REDUCTION OF AID FOR VIOLATION OF LAW.

Subdivision 1.**State aids.**

The amount of state aids to which a district is entitled shall be the amount computed according to statutes. The annual state aid certificate made by the commissioner to the commissioner of management and budget shall show the amount of any reductions made.

Subd. 2.**Violations of law.**

The commissioner may reduce or withhold the district's state aid for any school year whenever the board of the district authorizes or permits violations of law within the district by:

(1) employing a teacher who does not hold a valid teaching license or permit in a public school;

(2) noncompliance with a mandatory rule of general application promulgated by the commissioner in accordance with statute, unless special circumstances make enforcement inequitable, impose an extraordinary hardship on the district, or the rule is contrary to the district's best interests;

(3) the district's continued performance of a contract made for the rental of rooms or buildings for school purposes or for the rental of any facility owned or operated by or under the

direction of any private organization, if the contract has been disapproved, the time for review of the determination of disapproval has expired, and no proceeding for review is pending;

(4) any practice which is a violation of sections 1 and 2 of article 13 of the Constitution of the state of Minnesota;

(5) failure to reasonably provide for a resident pupil's school attendance under Minnesota Statutes;

(6) noncompliance with state laws prohibiting discrimination because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance or disability, as defined in sections 363A.08 to 363A.19 and 363A.28, subdivision 10; or

(7) using funds contrary to the statutory purpose of the funds.

The reduction or withholding must be made in the amount and upon the procedure provided in this section, or, in the case of the violation stated in clause (1), upon the procedure provided in section 127A.43.

Subd. 3.**Assurance of compliance.**

(a) After consultation with the commissioner of human rights, the commissioner of education shall adopt rules in conformance with chapter 14. The rules must direct districts to file with the commissioner of education assurances of compliance with state and federal laws prohibiting discrimination. The assurances must be provided in a form and manner prescribed by the commissioner.

(b) If it appears that one or more violations of the Minnesota Human Rights Act are occurring in a district, the commissioner of human rights shall notify the commissioner of the violations, and the commissioner of education may then proceed pursuant to subdivision 4.

Subd. 4.**Notice to board.**

When it appears that a violation is occurring in a district, the commissioner shall notify the board of that district in writing. The notice must specify the violations, set a reasonable time within which the district must correct the specified violations, describe the correction required, and advise that if the correction is not made within the time allowed, special state aids to the district will be reduced or withheld. The time allowed for correction may be extended by the commissioner if there is reasonable ground therefor.

Subd. 5.**Dispute violations; hearing.**

The board to which such notice is given may, by a majority vote of the whole board, decide to dispute that the specified violation exists or that the time allowed is reasonable or the correction specified is correct, or that the commissioner may reduce or withhold aids. The board must give the commissioner written notice of the decision. If the commissioner, after further investigation as the commissioner deems necessary, adheres to the previous notice, the commissioner shall notify the school board of its decision. If the commissioner, after further investigation as the commissioner deems necessary, adheres to the previous notice, the board shall be entitled to a hearing by the commissioner under this subdivision and notwithstanding chapter 14. The commissioner must set a hearing time and place and the board of the district must be given notice by mail. The hearings must be designed to give a full and fair hearing and

permit interested parties an opportunity to produce evidence relating to the issues involved. A stenographic record must be made of all testimony given and other proceedings during the hearing. If practicable, rules governing admission of evidence in courts shall apply to the hearing. The final decision of the commissioner must be in writing and the controlling facts upon which the decision is made must be stated in sufficient detail to apprise the parties and the reviewing court of the basis and reason for the decision. The decision must be confined to whether any of the specified violations existed at the date of the commissioner's first notice, whether the violations were corrected within the time permitted, whether the violations require withholding or reduction of the state aids under this section, and in what amount.

Subd. 6.**Violation; aid reduction or withholding.**

The commissioner shall not reduce state aids payable to the district if the violation specified is corrected within the time permitted, or if the commissioner on being notified of the district board's decision to dispute decides the violation does not exist, or if the commissioner decides after hearing no violation specified in the commissioner's notice existed at the time of the notice, or that the violations were corrected within the time permitted. Otherwise state aids payable to the district for the year in which the violation occurred may be reduced or withheld as follows: The total amount of state aids to which the district may be entitled shall be reduced in the proportion that the period during which a specified violation continued, computed from the last day of the time permitted for correction, bears to the total number of days school is held in the district during the year in which a violation exists, multiplied by up to 60 percent of the basic revenue, as defined in section 126C.10, subdivision 2, of the district for that year.

Subd. 7.**Reduction in aids payable.**

Reductions in aid under this section and sections 127A.41 and 127A.43 must be from general education aid. If there is not sufficient general education aid remaining to be paid for the school year in which the violation occurred, the reduction shall be from other aids that are payable to the district for that year. If there is not a sufficient amount of state aids remaining payable to the district for the school year in which the violation occurred to permit the full amount of reduction required, that part of the required reduction not taken from that school year's aids will be taken from the state aids payable to the district for the next school year, and the reduction will be made from the various aids payable for the next year.

Subd. 8.

[Repealed, 1999 c 241 art 9 s 54]

Subd. 8a.**Appeal.**

A final decision of the commissioner under this section may be appealed in accordance with section 480A.06, subdivision 3.

Subd. 9.**Notice to district.**

Any notice given to the board of a district will be deemed given when a copy thereof is mailed, registered, to the superintendent of the district, if there is a superintendent, and to the clerk of the board of the district. If it is shown that neither the superintendent nor the clerk in fact received such notice in the ordinary course of mail, then the time for correction will be accordingly extended by the commissioner so that a reasonable time will be allowed from actual receipt of notice for correction. If notice is sent by the commissioner with respect to a violation

which is continued by the district in a succeeding year, no separate notice for that violation for the succeeding year will be required. Proceedings initiated by such notice shall include any continuing violation notwithstanding that a part thereof occurs in a year different from the year in which it started. The commissioner may require reasonable proof of the time that a violation ceased for the determination of the amount of aids to be reduced or withheld. Costs and disbursements of the review by the Court of Appeals, exclusive of those incurred in the administrative proceedings, may be taxed against the losing party and in the event taxed against the state must be paid from the appropriations made to the department for the payment of state aids.

February 14, 2014

Dr. Brenda Cassellius
Commissioner of Education
State of Minnesota

Re: Report of the Integration Rule and Statute Alignment Working Group

Dear Commissioner Cassellius:

"In its effort to make the Rule consistent with the Integration Aid Statute, the working group goes far afield and ultimately subverts the clear, deep-rooted legislative intent for the state to support, encourage, and require integrated education to the full extent of its powers. The rule also proposes to illegally withdraw remedial provisions required by the dual nature of the Minneapolis School district.[1] For these reasons, I must dissent from the majority report.

The present rule was based on an illegal rewriting of an appropriately promulgated Minnesota State Board of Education administrative rule. This administrative rule would have been far more effective in supporting integration and reducing the racial achievement gap. Recommending that this administrative rule, or something like it, be resurrected would be the best thing our committee could do..

The present rule is based on a legally inaccurate Statement of Needs and Reasonableness ("SONAR"). In 1994, the legislature authorized and Board of Education to promulgate an effective and constitutional desegregation rule.[2] SONAR, contrary to the decisions of the United States Supreme Court, declared that the State of Minnesota did not have a compelling interest in the racial integration of its schools.[3] In so doing, it

[1] *See* Memorandum from Myron Orfield to Rose Hermodson, Re: Eliminating the Remedial Clauses of the School Desegregation Rule (Jan. 28, 2014) (attached).
[2] *See* Margaret Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice Based Education*, 35 WM. MITCH. L. REV. 936, 958–64 (2009); Myron Orfield, *Regional Strategies for the Integration of Schools and Housing Post Parents Involved*, 29 LAW & INEQ. 149, 171–2 (2011). *But see* Cindy Lavorato & Frank Spencer, *Back to the Future with Race Based Mandates: Response to Missed Opportunity*, 36 WM. MITCH. L. REV. 1747 (2010) (asserting an erroneous position, this time based on Justice Robert's opinion in *Parent's Involved* that was only supported by three other justices and was not the holding of the Court).
[3] State of Minnesota, Dep't of Children, Families & Learning, Statement of Needs & Reasonableness, In the Matter of the Proposed Rules Relating to Desegregation: Minn. R. 3535 (3535.0100 to 3535.0180) 13–18, *available at* http://www.leg.state.mn.us/lrl/sonar/sonar.asp [hereinafter Proposed Rule].

ignored Supreme Court decisions directly on point[4] and used irrelevant employment law decisions and minority opinions in other circuits to assert that the Board's rule was unconstitutional. It also ignored alternative state constitutional grounds for the rule's legitimacy.[5]

Based on its inaccurate statement of the law, the Attorney General proceeded to improperly declare the Board of Education's proposed rule unconstitutional, and, therefore, illegally subverted a properly promulgated administrative rule that was consistent with legislative intent and within the Board's authority.

In *Swann v. Charlotte-Mecklenburg Board of Education*,[6] the Court validated the use of race in student assignments, absent a showing of intentional segregation, when the goal was integration rather than segregation. The Court held that a locally elected school board could use quotas to prescribe precise racial balance in local schools, even though a court could not undertake such precise racial balancing.[7] A court could, however, use a rough target of a 71-29 ratio [percentage of white students to black students in individual schools]—as distinguished from prohibited racial balancing—as a "flexible starting point" to integrate schools.[8]

More recently, the Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.[9] reaffirmed the state's compelling interest. Justice Anthony Kennedy writing for the Court held:

> The nation [and Minnesota] has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest therefore exists both in avoiding racial isolation and achieving a diverse student population.
>
> State and local authorities can consider the racial makeup of schools and adopt general policies to encourage a diverse student body, one aspect of

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[4] Bd. of Educ. v. Crawford, 458 U.S. 527 (1982); Bd. of Educ. v. Harris, 444 U.S. 130. 148–49 (1979); Bustop, Inc. v. Los Angeles Bd. of Educ., 439 U.S. 1380 (1978); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971) [hereinafter *Swann*]; North Carolina Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Sch. Comm. of Boston v. Bd. of Educ., 389 U.S. 572 (1969). *See also* Tometz v. Bd. of Educ. 39 Ill.2d 593, 237 N.E.2d 498, 501 (citing decisions from the high courts of Pennsylvania, Massachusetts, New Jersey, California, New York, and Connecticut and from the Court of Appeals for the First, Second, Fourth, and Sixth Circuits).

[5] See Hobday et al., *supra* note 2, at 960 (citing Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) (holding that education is a fundamental right under the Minnesota Constitution)).

[6] *Swann*, 402 U.S. 1 (1971).

[7] *Id.* at 16. The Court's statement in *Swann* concerning the power of an elected school board may be limited by Justice Kennedy's controlling concurrence in which he states his agreement "in many respects" with Justice Roberts plurality opinion, Section III.A. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 791 (2007) (Kennedy, J., concurring).

[8] *Swann*, 402 U.S. at 23–5.

[9] *Parents Involved*, 551 U.S. 701 (2007).

> which is its racial composition. In so doing, they are free to devise race-conscious measures to address the problem of segregation in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.
>
> The State and local school boards may pursue the goal of bringing together students of diverse backgrounds and races through strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race.[10]

The statement of purpose is inaccurate and needs to be changed to reflect legislative intent. I would suggest the following revision:

> Since its founding the State of Minnesota's commitment to support, encourage and require racially integrated education to the full extent of its authority, consistent with the United States Constitution, has been clear and unwavering. In 1869, Minnesota was the first state after the passage of the Fourteenth Amendment to legislatively prohibit segregated schools, and shortly after the Supreme Court's decision in *Brown v. Board of Education*, Minnesota strengthened this commitment with the Minnesota Human Rights Act's prohibition on segregated education.

Next, while I support the effort to eliminate the inaccurate definition of intentional discrimination contained in the rule, I object to removing all language concerning the determination of intentional segregation, as this makes it more difficult for citizens to protect their rights.

The present rule's standard of intentional discrimination conflicts with the Supreme Court's decision in *Columbus Board of Education v. Penick*, which allows the foreseeability of segregation to be evidence of intentional discrimination.[11] Moreover, the present rule does not reflect the commissioner's power to find intentional segregation based on one or more of the *Keyes* factors (several of which are omitted in the present rule) outlined by the United States Supreme Court. Finally, the rule declares that says it is not discrimination if segregation occurs based on parental choice. This provision conflicts with the constitutional prohibition on optional attendance boundaries that have racially disparate impacts. I would replace the existing language with the following legally accurate provisions.

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[10] *Id.* at 788–89, 797–98.

[11] Columbus Bd. of Educ. v. Penick, 443 U.S.449, 464–65 (1979). *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979).

Subp. 9. **Segregation by Law**. ~~"Segregation" means the intentional act or acts by a school district that has the discriminatory purpose of causing a student to attend or not attend particular programs or schools within the district on the basis of the student's race and that causes a concentration of protected students at a particular school.~~ Segregation by law means the intentional act or acts by the state or a school district that have, at least in part, the discriminatory purpose of causing racial segregation within or among school districts. A finding of segregation by law can be made based upon one or more of the following factors:

~~A. It is not segregation for a concentration of protected students or white students to exist within schools or school districts:~~

~~(1) if the concentration is not the result of intentional acts motivated by a discriminatory purpose;~~

~~(2) if the concentration occurs at schools providing equitable educational opportunities based on the factors identified in part 3535.0130, subpart 2; and~~

~~(3) if the concentration of protected students has occurred as the result of choices by parents, students, or both.~~[12]

A. the creation or modification of school attendance areas, or school district boundaries, that could foreseeably cause or increase segregation;

B. optional attendance areas, or transfer and recruitment policies and practices, that disproportionately allow white students to avoid racially integrated schools serving the white students' neighborhood;

C. a clear and substantial pattern of segregated faculty assignments;

D. construction or expansion of school facilities that have the foreseeable effect of increasing segregation; or

E. in a school district with a history of segregation by law, the existence of single race schools or schools substantially disproportionate in their racial composition.

[12] Proposed Rule, *supra* note 3, at 31.

In terms of the duties of the Commissioner, I would amend the present legally inaccurate section 3535.0130 as follows:

D. RULE: 3535.0130 DUTIES OF COMMISSIONER.

Subpart 1. Review of data. The commissioner shall review the data provided by a school district under part 3535.0120 within 60 days of its receipt. If the commissioner determines that there is a racially identifiable school within a district, or if the commissioner receives a complaint alleging that a district is engaged in acts of segregation by law, the commissioner shall request further information to determine whether the racial composition at the school or schools in question results from acts motivated at least in part by a discriminatory purpose. ~~The commissioner's finding of a discriminatory purpose must be based on one or more of the following except that the commissioner shall not rely solely on item D or E, or both:~~ First, the commissioner will review:

A. the historical background of the acts which led to the racial composition of the school, including whether the acts reveal a series of official actions taken for discriminatory purposes; […]

B. whether the specific sequence of events resulting in the school's racial composition reveals a discriminatory purpose; […]

C. departures from the normal substantive or procedural sequence of decision making, as evidenced, for example, by the legislative or administrative history of the acts in question, especially if there are contemporary statements by district officials, or minutes or reports of meetings that demonstrate a discriminatory purpose; […]

D. whether the racial composition of the school is the result of acts which disadvantage one race more than another, as evidenced, for example, when protected students are bused further or more frequently than white students; and […]

E. whether the racially identifiable composition of the school was predictable given the policies or practices of the district.[13]

If upon reviewing the evidence, the commissioner determines that the district, motivated in part by a discriminatory purpose, engaged in one or more of the following practices:

[13] *Id.* at 34–7.

A. created or modified a school attendance areas, or school district boundaries, in a manner that could foreseeably cause or increase segregation;

B. employed optional attendance areas, or transfer and recruitment policies and practices, that disproportionately allow white students to avoid racially integrated schools serving the white students' neighborhood;

C. demonstrated a clear and substantial pattern of segregated faculty assignments;

D. constructed or expanded school facilities in a way that had the foreseeable effect of increasing segregation; or

E. in a school district with a history of segregation by law, operated single race schools or schools substantially disproportionate in their racial composition

The commissioner shall find that the district is segregated by law.

F. RULE 3535.0150 DEVELOPMENT OF PLAN FOR MANDATORY DESEGREGATION; ENFORCEMENT.

Subpart 1. District plan. If the commissioner determines that segregation by law exists and affects a substantial portion of the district, the district will be declared to be operating a dual system. In response to this finding, the district shall provide a plan within 60 days that proposes how it shall remedy the segregation. The plan shall address the specific actions that were found by the commissioner to contribute to the segregation and will describe how segregation by law will be eliminated "root and branch" and how the district will be returned to unitary status. This plan will address how district schools will become racially integrated and how each school within the district will be substantially equivalent in its faculty, staff, transportation, extracurricular activities, and facilities.

If the discrimination does not affect a substantial portion of the district, or if the discrimination involves only segregated faculty assignments, a more narrowly tailored remedy may be proposed.

In either case, t~~T~~he plan shall be developed in consultation with the commissioner. If the commissioner rejects any or all of the plan, the commissioner shall provide technical assistance to help the district revise the plan. However, if the district and the commissioner cannot agree on a plan within 45 days after the original plan was rejected, the commissioner shall develop a revised plan to remedy the segregation by law that the district shall implement in the time frame specified by the commissioner. A finding of segregation by law, or a

finding that the district's initial plan is inadequate, shall be based on written findings of fact and conclusions of law issued by the commissioner. […]

Subp. 2. Remedy. If the commissioner has made a finding of segregation by law, student assignments based on race that are made to remedy the finding of segregation by law are permissible in a plan for mandatory desegregation, so long as they are narrowly tailored to remedy the act of segregation by law. […]

Subp. 3. Extension. The commissioner may extend the time for response from a district under parts 3535.0140 and 3535.0150 if compliance with the deadline for response would impose an undue hardship on the district, for example, if the information is not easily ascertainable or the plan requires a complex remedy that includes consultation with outside sources. […]

Subp. 4. Enforcement of desegregation. If the district fails to submit data required by the commissioner, fails to provide or implement a plan to remedy the segregation by law, or fails to implement a plan developed by the commissioner as provided in subpart 1, the commissioner must:

A. notify the district that its aid shall be reduced pursuant to Minnesota Statutes, section 127A.42;

B. refer the finding of segregation by law to the Department of Human Rights for investigation and enforcement; and

C. report the district's actions to the education committees of the legislature by March 15 of the next legislative session with recommendations for financial or other appropriate sanctions.[14]

The existing rule illegally exempts charter schools and open enrollment from integration requirements. Charter schools are highly racially segregated, underperform the public schools, and cause public schools to be more segregated and weaker educationally.[15] Thus to address the achievement gap and to encourage racial integration,

[14] *Id.* at 47–9.

[15] Failed Promises: Assessing Charter Schools in the Twin Cities (2008) (INST. ON RACE & POVERTY), *available at* http://www.law.umn.edu/uploads/5f/ca/5fcac972c2598a7a50423850eed0f6b4/8-Failed-Promises-Assessing-Charter-Schools-in-the-Twin-Cities.pdf; Update of Failed Promises: Assessing Charter Schools in the Twin Cities (Jan. 2012) (INST. ON RACE & POVERTY), *available at* http://www.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65_2012_Update_of_IRP_2008_Charter_School_Study.pdf; Charter Schools in the Twin Cities (Oct. 2013) (INST. ON METRO. OPPORTUNITY), *available at* http://www.law.umn.edu/uploads/16/65/1665940a907fdbe31337271af733353d/Charter-School-Update-2013-final.pdf.

they must be included in the rule. Similarly, because open enrollment increases racial segregation and the achievement gap[16] it must also be included under the rule.

It is illegal to allow a separate state-supported public school or school district to interfere with or undermine in any way the efforts of a school district or state to integrate its schools.[17] Charters schools do this all the time. No other state in the nation exempts charter schools from this clear constitutional duty.[18] All other state laws, to the extent they discuss the subject, make clear that charter schools must conform to existing desegregation plans.[19] Finally, the legislature did not provide authority for charter schools to be exempted from the rule.

In term of open enrollment, the Supreme Court in *Keyes v. Denver School District No. 1*,[20] *Dayton Board of Education v. Brinkman*[21] and *Columbus Board of Education v. Pennick*[22] declared the state-sanctioned transfer policies that systematically and foreseeably increase racial segregation in a district's schools or between school districts are improper.[23] In *Missouri v. Jenkins*[24] Justice O'Connor further defined the nature of an inter-district open enrollment violation:

> [W]here [suburban] those districts "arrang[e] for white students residing in [a segregated city district] to attend schools in [white suburban districts]," *Milliken I* of course permits interdistrict remedies...Such segregative effect may [also] be present where a predominantly black district accepts black children from adjacent districts….or perhaps even where that fact of intradistrict segregation actually causes whites to flee the district….for example, to avoid discriminatorily, underfunded schools—and such actions produce regional segregation along district lines. In those cases where a purely intradistrict violation has caused significant interdistrict effect, certain interdistrict remedies may be appropriate.[25]

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[16] Open Enrollment and Segregation in the Twin Cities, 2000-2010 (Jan. 2013) (INST. ON METRO. OPPORTUNITY), *available at* http://www.law.umn.edu/uploads/30/c7/30c7d1fd89a6b132c81b36b37a79e9e1/Open-Enrollment-and-Racial-Segregation-Final.pdf.

[17] Wright v. City of Emporia, 407 U.S. 451 (1972).

[18] Erica Frankenberg & Genieve Siegal Hawley, Equity Overlooked: Charter School and Civil Rights (The Civil Rights Project, UCLA) 21–5, *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy/frankenberg-equity-overlooked-report-2009.pdf.

[19] *Id.*

[20] Keyes v. Denver Sch. Dist. No. 1, 413 U.S. 139 (1973).

[21] *Dayton*, 443 U.S. 526 (1979).

[22] *Penick*, 443 U.S. 449 (1979).

[23] *See Keyes*, 413 U.S. at 235 (Powell, J., concurring). The failure to adhere to a district's approved integration plan is also a factor that may result in a finding of intentional segregation. *See* GARY ORFIELD, MUST WE BUS?: SEGREGATION AND NATIONAL POLICY 20 tbl.1-1 (1978).

[24] Missouri v. Jenkins, 515 U.S. 70 (1995).

[25] *Id.* at 110–11.

Minnesota's open enrollment system "arranges for" white students residing in a segregated city district to attend schools in whiter suburban districts and "arranges for" black students in integrated districts to attend segregated city schools and thus runs afoul of the Constitution.

Next the rule's exemption of "American Indians" as a group from Rule 3535 violates the 1964 Civil Rights Act and the constitution. The equal protection clause protects American Indians from discrimination by the state and federal governments, but does not apply to tribal governments.[26] Under the Supreme Court's decision in *Morton v. Mancari,*[27] exceptions from civil rights law cannot be made to "American Indians" as a group, but only to "enrolled tribal members."[28] The exception is a political one based on sovereignty not a racial one. Further, such exemptions must be consistent with the federal special trust relationship with Indian tribes and must further such uniquely Indian interests such "as tribal self-government, religion or culture." In this context, they must be consistent with the statutory purposes of improving Indian educational attainment and increasing the capacity for tribal self-governance.[29] No such findings have made to justify the overboard exemption from civil rights protections of all American Indians embodied in the existing rule.

Finally, while the collaboration sections of the present rule were poorly conceived, they should be revised rather than be eliminated or made voluntary. To eliminate or make voluntary these collaborations would undermine legislative intent and the ability to accomplish inter-district desegregation.

For the foregoing reasons, I respectfully dissent from the committee report.

Sincerely,

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Professor of Law and Director
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[26] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-58 (1978); Talton v. Mayes, 163 U.S. 376 (1896).
[27] 417 U.S. 535 (1974)
[28] Morton v. Mancari, 417 U.S. at 554; see also Nell J. Newton et al. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ED) at 930-31, Cruz Reynosa and William Kidder, *Tribal Membership and State Affirmative Action Bans: Can Membership in a Federally Recognized Indian Tribe be a Plus Factor in Admissions at Public Universities in California and Washington*, 27 CHICANO-LATIN.L.REV. 29 (2008) (describing the holding of Morton).
[29] Id.