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.