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Equity and Diversity

DEFINING THE RIGHT TO EDUCATION
FOR THE 21ST CENTURY

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ELC's legal and policy advocacy, which includes the landmark court rulings in the *Abbott v. Burke* litigation, has significantly advanced the provision of fair school funding, high quality preschool and school facilities improvements, especially for students from low-income families and students of color. ELC's mission is to ensure all students receive a high-quality public education effectively preparing them to participate as citizens in a democratic society and as valued contributors to a robust economy.

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As we approach the first quarter mark of the 21st century, two structural deficits continue to define the landscape of public education in the United States.

The first is the consignment of low-income and Black and Brown students to a subset of districts deprived of the funding and resources essential for student success. The second is the intense isolation of students by race and socioeconomic status in segregated districts and schools not reflective of the multiracial and multicultural society they will enter as adults.

There is no explicit right to education in the United States Constitution. And while our democracy requires an informed and engaged citizenry, the U.S. Supreme Court has not recognized education as a fundamental interest necessary to effectuate the core rights of citizenship: speech, assembly, and voting.

In our country, the right to education resides in the states. Every state constitution affirmatively requires state legislatures to maintain and support a system of elementary and secondary schools open to all resident children. Although the language of these constitutional provisions varies, in all cases they mandate states, through their elected officials, to guarantee all children access to a free public education.¹

The states, and not the federal government, are constitutionally obligated to provide education to the nation's school children. In striking down state laws that compelled racially segregated schools, the United States Supreme Court in its 1955 *Brown v. Board of*

Education II ruling made clear that the opportunity for an education provided by the states "is a right which must be made available to all on equal terms."

Yet consensus on a working definition of the "right" to "equal educational opportunity" and what is essential to deliver it has been elusive: Is the right measured by a baseline level of education or school quality? What is that baseline? Is there a ceiling, that is, too *much* if it means others have less? Do schools segregated by race and poverty need more, not less? Is diversity beneficial, and for whom? What resources are essential for achievement and how do we pay for them? At the end of the day, who is accountable to ensure delivery of equal educational opportunity to students?

Lacking a common understanding for these elemental questions, civil and education rights advocates often fragment into separate camps: those pushing for equity in segregated schools and those calling for school desegregation as the only feasible road to equal opportunity.² The debates are often heated, and the divergent views distract from what should be a common goal: breaking down entrenched barriers to a constitutional education for every child.

This brief proposes a way to move past the dichotomy of equity or diversity as the path to equal educational opportunity. *First*, we offer **a unified and expansive definition of the constitutional right to education**. Under this definition, the right to equal educational opportunity encompasses *both* equitable funding *and* the opportunity for an education in diverse schools and

learning environments. The pursuit of both equity and diversity, we contend, is essential to make meaningful progress in the historical quest to deliver a “constitutional education” to all students, particularly low-income students and students of color consigned to intensely segregated public schools across the nation.

Secondly, the absence of meaningful progress on equity and diversity is attributable to yet another collective failing: a lack of sustained political pressure on the locus of responsibility for the condition of our public schools: state governments. Whatever role Congress and local school boards may play, *state legislatures*

and governors are legally obligated to deliver the equal educational opportunity to every child under their respective constitutions. It is state law, policy, rules, and enforcement practices that either advance — or impede — a child’s access to a constitutional education.

These two core, interrelated convictions lie at the center of our call for a renewed movement to build strong and sustainable political campaigns in every state to advocate for, and secure, the constitution right of every child to an equitable *and* diverse public education in the 21st century.

Defining a “Constitutional Education”

Today, there is broad agreement that the education guaranteed by state constitutions must be one that prepares all students for active participation as citizens in a democratic society and as valued contributors to a robust economy. Young people must have the opportunity to fully pursue their intellectual, academic, and vocational aspirations. This requires access to a quality, content-rich curriculum, delivered by qualified teachers in schools led by strong instructional leaders, and a safe and inclusive environment with sufficient in-school supports to address students’ academic, social and health needs.³ And we know that providing a constitutional education demands equitable school funding for all students and *greater* levels of funding to enable schools to respond to the additional needs generated by concentrated poverty, disability, lack of language proficiency, homelessness, and other challenges faced by so many of our children.

Educating students in the 21st century also demands preparing them for the racially and ethnically diverse society they will enter as adults. By 2050, over half of United States citizens will be people of color. Students entering kindergarten today are likely to graduate

from college in a nation where a majority of the population is non-white.⁴ Already, white students comprise a minority (46.6 percent) of public school students.⁵ School systems must embrace this profound transition. Segregation keeps students apart from one another in their crucial formative years in school. The education of *all* students – whether low-income, affluent, Black, Latino, Asian or white – is diminished by attending segregated schools. Simply put, school diversity is not peripheral, but central, to the delivery of a constitutional education.

The call for an expansive definition of a constitutional education is clear-eyed, issued with the understanding that advancing equity and diversity requires confronting the deeply rooted fault lines of race and class that have fueled stubborn resistance to change for decades. Overcoming this resistance must go beyond reliance on litigation, episodic activism, or quick fix reforms. It is an historical project. And it demands multi-dimensional political campaigns, built for the long haul, powered by state-specific research, policy development, organizing, communications and, when necessary, legal action.⁶

The right to equal educational opportunity must include both equitable funding and resources for students in segregated schools *and* the opportunity for all students to be educated in diverse learning environments. The states, through their elected

officials, are affirmatively obligated under their constitutions to provide both. It is our collective responsibility to hold them to that task. Not only is the education of our children at stake, but also the very survival of our democracy.

Key Structural Barriers to Equity and Diversity

Two interrelated, state-enacted policies lie at the heart of the denial of equal educational opportunity that defines the condition of public education in the United States: inequitable school funding and segregative school assignment.

SCHOOL FUNDING INEQUITY

America's public schools are among the most inequitably funded of any nation in the industrialized world.⁷ The trail of this inequity leads directly to the doorsteps of state capitols.

By far the most important – and impactful – expressions of a state's commitment to public education are the formulas for school funding enacted by legislators and the level and allocation of revenue through those formulas in annual or biannual state budgets.

In most states, the money available to schools to spend on teachers, support staff and other essential resources from year to year is dependent on antiquated policies that tie funding levels to local property taxes. The result is immense disparities in funding and resources that mirror vast differences in income and property wealth – and political clout – from one community to another. Children unlucky enough to reside in communities where property values are low are relegated to schools that are grossly under-resourced, while children who live amid expensive homes and household affluence are

offered a state-of-the-art educational experience. Across the country, it can only be a street or a mile or two that separate these two worlds of educational opportunity.

These inequitable finance regimes are enacted into law by state legislatures. And they have the power to correct them. Where local revenues for schools are inadequate due to differences in local property wealth, states must generate their own revenue at sufficient levels and allocate that revenue to the communities most in need. Most state funding formulas, however, are not based on the actual cost of delivering the resources necessary to give all students the opportunity to achieve a constitutional education.

Most state funding for public schools is not determined by the actual cost of delivering a constitutional education to all students. Instead, it is dependent on what state lawmakers are politically willing to spend from year to year.

Instead, what schools have to spend is typically dependent on what state lawmakers are politically willing to spend each year.⁸

In some states, underfunding is so severe that the judicial branch has stepped in, directing lawmakers to develop and implement finance reforms. These court rulings have affirmed that states are obligated to ensure all children — especially those in high poverty districts — have the resources needed to provide a meaningful opportunity for a constitutional education. Where legislators have responded by targeting increased funding to high need, low wealth districts, research now convincingly demonstrates that the boost in spending yields measurable improvements in achievement levels and other key outcomes for students, especially in schools isolated by race and socioeconomics.⁹

The issue is straightforward. State legislatures and governors have both the authority and obligation under their respective constitutions to enact school funding reforms designed to deliver the resources all students need for academic success, especially those in segregated schools.

BOUNDARY DRIVEN SCHOOL SEGREGATION

States, through laws sometimes more than a century old, determine the boundaries of districts, requiring children to attend schools within their district of residence. These student assignment policies typically mirror municipal or county boundaries. States also delegate to districts the power to determine where to locate schools and establish attendance zones for schools. These restrictive policies, coupled with dramatic population shifts within states since the 1950s, have resulted in districts and schools that today are deeply segregated.¹⁰

Young people are better prepared to engage in both civic and economic life when, at an early age, they are exposed to, and learning with and from, children of different racial and socio-economic groups.

The isolation of students by race and poverty has intensified in recent years.¹¹ According to the Government Accountability Office (GAO), in the 2020-21 school year, more than a third of U.S. K-12 students attended a school where 75 percent or more of the student population was of a single race or ethnicity. This is not just about students of color: the GAO found that 45 percent of white students attend schools where 75 percent or more of their classmates are also white. Over 18 million students, in other words, attend public K-12 schools that are racially and economically isolated, where they have little chance to interact with and learn from children different from themselves.¹²

This intense isolation of districts and schools by race and poverty is a profound tragedy. A 2016 synthesis of social science evidence on school integration found multiple benefits *for both students of color and white students*. These included higher academic achievement as well as positive nonacademic outcomes, such as a reduction in racial and ethnic prejudice, an increase in cross-racial trust and friendships, and stronger workplace readiness and interpersonal skills.¹³ Young people are better prepared to engage in both civic and economic life when, at an early age, they are exposed to, and learning with and from, children of different racial and socioeconomic groups.

Only a few states even recognize diversity as a central element of a constitutional education for all students, despite the rapid demographic changes in our nation's population. The New Jersey Supreme Court's ruling requiring a diverse education resonates even more powerfully today than when issued in 1965;

“**In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous school populations and point to the disadvantages of homogenous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority.**”¹⁴

The rapidly growing multiracial and multicultural society we now live in compels a reckoning with the long history of state policies that – whether intentionally or not – have led to the extreme levels of racial and socioeconomic isolation experienced by so many students in today's public schools.



The States Cause Inequity and Segregation: How They Can End It

Much is made of the American tradition of “local control” of schools. But it is just that – a tradition. When it comes to the foundational elements that determine the opportunity for a constitutional education, state elected lawmakers hold all the cards.

By virtue of their constitutions, the legal obligation to maintain and support a system of public schools to educate the nation’s children falls squarely on the shoulders of state legislators and governors, not local school boards or members of Congress. By the policies they enact, state lawmakers can either perpetuate and obstruct, or dismantle and advance, the delivery of a constitutional education to all students in the school systems they are mandated to operate.

This is especially true as it relates to the core foundational elements that must be in place for schools to be *both* equitable and diverse. Inequitable school funding and school segregation didn’t just happen. They are the product of decades of deliberate decision-making by lawmakers and governors in statehouses across the country. Without meaningful progress on funding equity and school diversity, future generations of students in segregated schools will continue to endure the deprivations of an unconstitutional education.

As a testament to the strength of the tradition of local control, much of the advocacy to improve educational opportunity for students of color and low-income students centers on districts and schools. At the other end of the spectrum, enormous effort is expended in Washington in the hope that Congress will somehow step in and rescue these students from educational harms caused by state policies that perpetuate inequity and racial and socioeconomic isolation.

Federal policy and district practices can and do play an important role in providing public education.¹⁵ But state lawmakers hold the key to the reforms required to remedy inequitable school funding and school segregation.

Some states have advanced equity in segregated schools through the actions of successive legislatures and governors – and often with prodding from the courts. But none have made a concerted effort on school diversity. The failure to act is not because of a lack of solutions. Research demonstrates how to design, build, and implement equitable and diverse school systems. What is lacking is the political commitment and will in statehouses to provide what our children and schools need.

“**All of the money that supports education is public money, local money no less than state money. It is authorized and controlled, in terms of source, amount, distribution, and use, by the State.**”

Abbott v. Burke, 119 N.J. 287 (1990)



Building Blocks of School Equity

Three building blocks are essential to ensure equitable public schools: cost-based, weighted student funding; universal, high quality preschool; and safe and adequate school buildings. State policies on these building blocks determine the extent to which low income students and students of color in segregated schools are afforded equal opportunity for a constitutional education.

- **Cost-Based School Funding, Weighted for Student Poverty and Other Need Factors**

To be equitable, school systems must be supported by a state funding formula explicitly designed to achieve a core objective: providing the resources required to deliver a rich and comprehensive K-12 curriculum to all students, as well as the additional resources required to address the extra-academic and academically related needs generated by student poverty, English learner status, disability, homelessness, and other factors. A “weighted” student funding formula, however, must be built upon research determinations of the *actual costs* of essential education resources, not by political and budgetary considerations. And where a cost-based, weighted formula requires funding increases from

year to year, those increases must be provided by legislators and governors through the annual or biannual state budget.¹⁶

The sobering reality is that most states do not have finance systems that meet these prerequisites. Only 12 states allocate at least ten percent more in per pupil funding to high-poverty districts. Half of states provide roughly comparable amounts to high- and low-poverty districts despite distinctly different levels of student need. And inexplicably, 17 state legislatures skew funding towards more *affluent* districts, locking in stark disparities in funding and resources for students in districts segregated by poverty and race.¹⁷

A robust body of research demonstrates that equitable school funding leads to improved student outcomes for students in schools serving high enrollments of low-income students and students of color. Money matters in education. For students in segregated schools long deprived of essential resources, it matters the most.¹⁸ State school funding reform can unlock the power of increased investment to improve opportunities and outcomes for these students.

Effective and Efficient District Spending

Districts are legal entities created by the states for the purpose of delivering public education at the local level. This means that, in addition to equitable funding, states are also obligated to ensure their districts use funding to enable students to achieve. This often overlooked principle is most forcefully articulated by the New Jersey Supreme Court:

“The [State] Commissioner has an essential and affirmative role to assure that all education funding is spent effectively and efficiently, especially in the special needs districts, in order to achieve a constitutional education.”

California’s Local Control Funding Formula is a powerful model of state policy requiring districts to provide greater funding to high poverty schools that, in turn, must utilize the funds to improve teacher quality, reduce class size and make other effective expenditures proven to boost student outcomes.¹⁹

- **Universal, High Quality Preschool**

Research on the immediate and long-term benefits of high quality early education, especially for children living in poverty, is overwhelming. In the nation's first constitutional mandate for universal, high quality preschool in segregated urban communities in 1998, the New Jersey Supreme Court relied upon this undisputed evidence, stating that "pre-school for three and four year olds will have a significant and substantial positive impact on academic achievement in both early and later school years."²⁰

The stark reality is that children living in poverty enter kindergarten already 18 months to three years behind their more advantaged peers. Without access to a high quality preschool, they are deprived of the opportunity to succeed in school. States must bring down the start date for public education at least to age 4 by making early education an essential component of a constitutional K-12 education. Simply put, states must do what all other developed nations do – start early and well.

Achieving this goal will require substantial increases in preschool spending. But it also requires states to aggressively build local programs that unify existing Head Start, private childcare and public preschools around a set of high quality early education standards, with adequate funding to support qualified teachers in every classroom and developmentally appropriate learning linked to the state's K-12 curriculum standards.²¹

A number of states, such as California, are moving in this direction. But progress often happens in fits and starts. Access to preschool cannot wait. It must have the force of a constitutional imperative. That's precisely what happened in New Jersey, where "Abbott" preschool is universal in urban districts and expanding to all high need districts statewide. And it serves as a national model for the delivery of effective

early education for children in high-poverty, racially isolated communities.²²

States must be obligated to afford these children the same equal educational opportunity as their more affluent peers: to be prepared "to face the challenges of kindergarten and first grade," followed by the "year-to-year improvement" that is a "critical condition for the attainment" of a constitutional education.²³

- **Safe and Adequate School Buildings**

The closing of schools in the pandemic brought into sharp public focus what may be the most severe inequity in our states' public school systems: the dilapidated, unsafe, and overcrowded conditions in school building infrastructure, especially in segregated districts. As the New Jersey Supreme Court made clear, "adequate physical facilities are an essential component" of a constitutional education. The state is obligated to provide all students adequate facilities; and the "quality of the facilities cannot depend on a district's willingness or ability to raise taxes or incur debt."²⁴

Modernized school facilities are essential for the delivery of a comprehensive Pre-K-12 curriculum in classrooms of appropriate size, including space for science, the arts, physical education, and extra and co-curricular activities. Additional space is also needed to build out "community schools" that offer a wide range of services to students, faculty, parents and neighborhood residents. The community school model has a proven record of improving academic outcomes for students.²⁵

To satisfy the obligation to provide safe and adequate facilities, states must enact a comprehensive facilities construction and financing policy. Eleven states have none, and most states have minimal or piecemeal programs, leaving districts to address facilities

needs on their own or with little state support.²⁶ At a minimum, state school facilities policy must require: 1) regular assessments of school building conditions compared against uniform standards of health, safety, capacity and adequacy; 2) determinations of the need for facilities improvements to meet state building standards; and 3) state school construction financing to enable districts to fund needed facilities improvements, including emergent repairs, capital maintenance, and new or major upgrades of outmoded buildings.

It bears repeating that state academic and accountability standards alone cannot – and will not – deliver equity in segregated public schools. Nor will changes to local school governance. Equity for students in segregated districts is entirely dependent on state fulfillment of the obligation to provide the three building blocks of a constitutional education: cost-based, weighted school funding; universal, high quality early education; and safe and adequate school buildings.

Building Blocks of School Diversity

Since the 1960s, discriminatory housing policies such as redlining and housing covenants – along with economic disinvestment in urban and rural communities – have created vast disparities in local property wealth and household income in school districts across states.²⁷ Overlapping state laws that set the boundaries for where students are educated have locked in these persistent patterns of intense racial

and socioeconomic segregation in far too many of the nation's public school systems.

The highest courts in three states – Minnesota, Connecticut, and New Jersey – have interpreted the constitutional obligation to establish and maintain a system of public schools as prohibiting school segregation in fact, or *de facto*, no matter the cause.

“**The state has nonetheless played a significant role in the present concentration of racial and ethnic minorities in the Hartford public school system. Although intended to improve the quality of education and not racially or ethnically motivated, the districting statute that the legislature enacted in 1909, now codified at §10-240 is the single most important factor contributing to the present concentration of racial and ethnic minorities in the Hartford public school system...**

...the state's awareness of existing and increasing severe racial and ethnic isolation imposes upon the state the responsibility to remedy segregation... We therefore hold that...[state law] requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto.”

The Supreme Court in Connecticut put it plainly in its groundbreaking 1996 ruling involving Hartford’s segregated schools:

By law, states have created – and perpetuate – hard boundaries demarcating student assignment, enrollment and attendance to specific districts and schools. These boundaries often mirror longstanding patterns of residential segregation, perpetuating the consignment of students of all races and income backgrounds to segregated, homogeneous, learning environments.

If states can lock in school segregation through policies that fix boundaries for school assignment and attendance, they can also enact reforms to loosen them to advance school diversity. A constitutional education demands that they do so.

There are four reforms states can adopt and implement to undo the *de facto* segregation caused by policies that impose hard lines for district and within-district school assignment.²⁸

- **Redrawing District Boundaries and School Attendance Zones**

States can reform their laws demarcating district boundaries to create new district configurations that create the opportunity for diverse schools. States can also incentivize district consolidation where those mergers would yield a reconfigured district with more diverse student enrollment. District consolidation as a mechanism for school diversity is especially opportune in states with small K-12 districts or lower-grade-range districts in compact metropolitan regions.²⁹

States also delegate to districts authority to adopt school attendance zone policies. These policies fix the boundaries that assign students to elementary, middle and high schools. These boundary lines often lock in school segregation by mirroring neighborhood

demographic patterns. As districts serve more diverse student populations, especially large suburban districts, altering attendance zone boundaries can advance diversity. But the states must lead by revising laws to require districts to maximize student diversity in attendance zone policies and offer expertise to help districts reshape their school boundaries.³⁰

- **Expanding Public School Opportunity**

The states, through policy changes and funding incentives, can loosen calcified district boundaries and school assignment policies through enacting or expanding inter-district public school transfer programs. In some states, these programs exist as small experiments that can be converted to large scale, permanent programs that allow students to bypass fixed district and school boundaries and afford them the opportunity for a diverse education.

When it comes to inter-district opportunity, Boston’s METCO regional program is now over 30 years old and provides a strong model, although the state has constrained its growth by limiting funding for the program.³¹

- **Prohibiting Segregative Secessions**

Since 2000, 73 communities across the country have drawn new school district boundaries, seceding from an existing district. In many cases, these secessions have exacerbated patterns of school segregation. The GAO recently found that among 36 secessions between 2009 and 2021, the new districts created had on average roughly three times the proportion of white students as the original district. The new districts were also generally wealthier.³² When wealthier communities within a larger and more diverse district secede, they take their local property wealth with them. Not only does this create a new, smaller district with more resources, but it also leaves the pre-existing district with less.

Thirty states have laws that permit secessions, sometimes only requiring a *majority vote of residents within the seceding district*.³³ Some states, including Georgia and Florida, explicitly prohibit secessions in their state constitutions. In New Jersey, secessions must be approved by the State Education Commissioner and, by court ruling, cannot be approved if they will contribute to racial imbalance or exacerbate racial isolation. The states must prohibit district secessions that exacerbate segregation.

- **Utilizing Multi-District Magnet and Specialized Schools to Achieve Diversity**

Many states authorize specialized schools serving more than one district, county or region. These include magnet schools and vocational-technical schools that offer specialized instruction or innovative academic offerings. In practice, these multi-district schools perpetuate existing patterns of student segregation, often through selective admissions policies. But, with state policy reform, they could offer a ready resource

allowing students to cross district lines for an education in a diverse learning environment.

The regional magnet school program in Hartford is a well-known example. After the Connecticut Supreme Court in 2003 found the public schools in Hartford and its surrounding suburbs unconstitutionally segregated, the state established a portfolio of regional magnet schools and a voluntary district transfer program to give urban and suburban students the opportunity to attend diverse schools. After years of sustained effort, magnet school enrollments are more racially diverse, with demonstrable achievement gains for participating Hartford students.³⁴

As the New Jersey Supreme Court has made clear, *de facto* school segregation is so “inimical” to the constitutional guarantee of a public education that states must use their “full panoply of powers” to dismantle policies that perpetuate segregation and to enact reforms advancing school diversity.³⁵



Conclusion: A Renewed Movement for Equal Educational Opportunity

To prepare children for citizenship and participation in our democracy, public education must be responsive to the democratic, multiracial, and multicultural society they will enter as adults. This demands we educate children in schools that are equitable *and* diverse.

Equitable funding and resources for segregated schools are crucial building blocks. The need is also immediate. The shocking disparities between educational resources in low-income and communities of color and affluent, majority white communities can only be ameliorated through increased funding and resources targeted to communities beset by concentrated poverty and racial isolation.

Diversity in schools is equally required. School segregation harms *all* students, no matter their race, ethnicity or class. We cannot invigorate communities and safeguard democratic institutions unless our youngsters experience diversity in the classroom and are given the opportunity to work, play and learn together with peers different from them.

It's time to set aside the debates over which is the right way to improve public education. Our nation can no longer afford this either/or.

We must not lose sight of where the fight to secure a constitutional education must be waged: in the state capitol. State governments hold the power over public education, enacting the policies that impact all elements central to the operation of local public schools: from school governance to where district boundaries are drawn, from curriculum and performance standards to how much districts have available to expend from year to year. It is elected state

officials that propose, enact, modify, reform and enforce state policies that can either forestall or further students' constitutional right to equal educational opportunity.

Effectuating our expansive definition of the constitutional right to education – one grounded in both equity and diversity – will require advocates, lawyers, researchers, parents, teachers, and others to set aside differences and work together to hold state lawmakers and governors to account.

This, in turn, requires a commitment to building and sustaining multifaceted campaigns for equitable and diverse schools, state by state. Political and economic winds bring constant change. Elections bring new leaders and power blocks to statehouses and governor's mansions. These can quickly unravel hard-fought policy gains or unleash cuts to school funding. Or they can blow in a fresh wind to undo stagnant prospects for reform. Whether organizing in a state facing the strong headwinds of resistance or in one with the winds of success at our backs, the political campaigns for equity and diversity are never finished.³⁶

Children only have one opportunity for an education. While we work to ensure that children in segregated schools receive all the resources necessary to succeed, we must also develop and advocate for strategies to integrate their schools. The New Jersey Supreme Court perhaps said it best: "the lessons of the history of the struggle to bring our children" a constitutional education "render it essential that their interests remain prominent, paramount and fully protected."³⁷

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