

# **EDUCATION**

Response to the Periodic Report of the United States  
to the United Nations Committee on the Elimination  
of Racial Discrimination

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**Prepared by:  
US Human Rights Network Education Caucus**

# **Racial Disparities in Educational Opportunities in the United States**

## **Violations of the International Convention on the Elimination of All Forms of Racial Discrimination**

### **A Response to the 2007 Periodic Report of the United States of America**

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## Executive Summary

1. More than five decades since the US Supreme Court's landmark decision in *Brown v. Board of Education*<sup>1</sup>, the United States has failed to provide equal educational opportunity and a high quality, inclusive education to all students. Public schools today are more segregated than they were in 1970,<sup>2</sup> as federal court decisions and government inaction have contributed to the persistence of apartheid conditions in schools. Indeed, the continued racial inequities and segregation of US schools is evidenced in large gaps in achievement and access, high rates of suspension, expulsion, and criminal sanctions, and low graduation rates for minority and English Language Learner ("ELL") students.<sup>3</sup>

2. Major factors contributing to racial inequality in educational opportunities include underperforming, poorly financed schools that perpetuate minority students' underachievement due to lower teacher quality, larger class size, and inadequate facilities;<sup>4</sup> school assignment policies that promote segregation;<sup>5</sup> setting of school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; systems of ability grouping and tracking that consistently retain or place minority students in lower level classes where they learn less than their White peers in higher level tracks;<sup>6</sup> failure to counteract differences in parental income and educational attainment, which correlate with race;<sup>7</sup> and lower teacher and administrator expectations of minority students.<sup>8</sup> Research shows that laws and policies have systematically placed the poorest minority children within inadequate educational environments, further perpetuating and increasing the overall racial disparity here.<sup>9</sup>

3. The International Convention on the Elimination of All Forms of Discrimination (hereinafter "ICERD") defines discrimination as an impermissible distinction that has the "purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms...."<sup>10</sup> By including discriminatory effects and proscribing distinctions that limit enjoyment or exercise of rights "on an equal footing," ICERD's definition encompasses *de facto* discrimination. ICERD says that each State Party shall take effective measures to "amend, rescind or nullify any laws and regulations which have

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<sup>1</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1954, after a series of legal victories challenging racial segregation in higher education, the US Supreme Court declared "separate but equal has no place in education." In that year, the Court unanimously held that segregated public primary and secondary schools are "inherently unequal" and unconstitutional under the equal protection provisions of the Fifth and the Fourteenth Amendments. See Appendix A of this chapter, "The History of Racial Disparities in Educational Opportunities in the United States."

<sup>2</sup> GARY ORFIELD and CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (August 2007), Civil Rights Project/*Proyecto Derechos Civiles* at UCLA, available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf).

<sup>3</sup> The term English language learner (ELL), as used throughout this chapter, indicates a person who is in the process of acquiring English and has a first language other than English.

<sup>4</sup> ROSLYN ARLIN MICHELSON, WHEN ARE RACIAL DISPARITIES IN EDUCATION THE RESULT OF RACIAL DISCRIMINATION? A SOCIAL SCIENCE PERSPECTIVE (2003), 105 TCHRS. C. REC at 1130.

<sup>5</sup> *Id.* at 1062, 1069.

<sup>6</sup> *Id.* at 1063.

<sup>7</sup> *Id.* at 1064-65.

<sup>8</sup> GEORGE FARKAS, RACIAL DISPARITIES AND DISCRIMINATION IN EDUCATION: WHAT DO WE KNOW, HOW DO WE KNOW IT, AND WHAT DO WE NEED TO KNOW? (2003), 105 TCHRS. C. REC. 1128, 1135.

<sup>9</sup> MICHELSON, *supra* note 4 at 1073.

<sup>10</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1) Jan, 4 1969, reprinted in 25+ Human Rights Documents (2005) [hereinafter ICERD] (emphasis added).

the effect of creating or perpetuating racial discrimination wherever it exists,”<sup>11</sup> regardless of the presence of a discriminatory purpose. To achieve integration and substantive equality, each state “undertakes to encourage...integrationist multiracial organizations...and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”<sup>12</sup>

4. The US Congress and the Executive Branch of the federal government, including the US Department of Education and the US Department of Justice, have all but abandoned school integration and diversity as a matter of policy. Moreover, the US government has opposed voluntary and conscious efforts by communities nationwide to reduce extreme racial and ethnic isolation in grades K-12, open pathways to higher education for minority students, and promote diversity in minority and disadvantaged businesses.<sup>13</sup>

5. Most recently, the US government filed two amicus briefs in the cases *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v Jefferson County Board of Education* (hereinafter “*Seattle/Louisville*”), supporting the prohibition of any measures to voluntarily and consciously address racial inequality in schools. In June 2007, the US Supreme Court issued a decision in these cases to limit the ability of school districts to promote school diversity and reduce the harms caused by structural inequalities still present in these school districts and in school districts across the Nation.<sup>14</sup> This judicial decision and the actions by the State Party directly contradict the intent of ICERD Article 1 and Article 2.

6. As US judicial remedies for racial discrimination weaken and federal legislation proves inadequate, it is imperative that the State Party take affirmative action and far-reaching structural reforms to comply with ICERD and eliminate racial disparities in public education.

### **Recommendations**

7. In the United States, local, state, and the federal governments share the responsibility of implementing and enforcing equal opportunities to public education. As a result, all levels of government have an assenting obligation to fulfill ICERD’s requirements. Therefore, we recommend the following actions to the US government:

8. Enact laws that adopt an effects test to measure *de facto* barriers to equal educational opportunities. Concurrently, ensure that all persons are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis.

9. Reject the use of the ‘colorblind’ doctrine in legislation and government education policies. This doctrinal incorporation threatens US obligation under ICERD to use special measures to promote the adequate development of quality educational opportunities to those

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<sup>11</sup> *Id* at Art 2 § (1)(c).

<sup>12</sup> *Id* at Art 2 § (1)(e).

<sup>13</sup> See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Seattle/Louisville)*, 127 S.Ct. 2738 (2007).

<sup>14</sup> *Seattle/Louisville*, 127 S.Ct. at 2751-2761.

historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities. Particularly, permit school districts to voluntarily promote school integration<sup>15</sup> through the use of carefully tailored race-conscious measures to promote educational, democratic, and cultural benefits of racial and ethnic diversity in the classroom.<sup>16</sup>

10. Propose a constitutional amendment and support ratification by the states to create a fundamental right to education based on human rights standards;<sup>17</sup> and promote the creation and preservation of United States laws that provide remedies the underlying causes of *de facto* segregation and racial inequalities in education. A federal right to a quality education ought to provide federal protections equal to or greater than the constitutional rights that already exist in particular state jurisdictions throughout the United States.<sup>18</sup>

11. Increase language access services<sup>19</sup> for students and parents. Oblige and support local school implementation of best teaching practices for ELL students to reach English proficiency and for English speakers to learn a second language.<sup>20</sup>

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<sup>15</sup> Meaningful school integration eliminates the incentive for Whites to move to White enclave neighborhoods because children attend integrated schools no matter where in the district they live. Fully integrated schools open all areas of a community to parents who can live anywhere in the district and know that their children will not be racially isolated in any school they attend. See USHRN CERD SHADOW REPORT chapter on HOUSING DISCRIMINATION.

<sup>16</sup> *Seattle/Louisville*, 127 S.Ct. at 2738.

<sup>17</sup> In 2005, parents, students, teachers and advocates convened at an education action summit to discuss findings that the New York City public school system failed to guarantee human rights standards set forth in the United Nations Convention on the Rights of the Child and other human rights documents; such standards as the right to quality education and equitable distribution of resources. Following the summit, parents, community members, students, teachers, principals, policy-makers, elected officials, scholars and business leaders formed *The Independent Commission on Public Education* (iCOPE) to call for a new common vision for schools based on human rights and lead civic conversations and the mobilization of the community to demand a restructuring of the school system. Proposed reform included a governance structure that guarantees the rights of parents, students and communities to have power in education decision-making independent of local government and school administrators; ending discrimination by developing school policies, relationships, and classroom methods to eliminate institutional racism and class bias; and requiring the collaboration of cultural, civic and health agencies to address the many social and economic problems facing communities. More information available at <http://www.icope.org/>

<sup>18</sup> e.g., The North Carolina State Constitution guarantees to all children within its jurisdiction a “sound basic education” that ensures a student will have enough knowledge and skill to function as an informed and productive member of society. Local educational entities have the obligation to monitor a child’s progress and implement learning strategies to ensure the child will obtain proficiency in core subject matters. Furthermore, the state government must afford the opportunity for every child to attend a public school, which at minimum has the following: well-trained, certified teachers in every classroom; competent school administrators; and educational resources to support effective instruction for all children, including those at-risk for academic failure. The North Carolina Supreme Court decision in *Leandro v. State of North Carolina*, 346 N.C. 336, 347 (1997) set this legal precedent; however, the State of North Carolina continues to appeal the decision by the court in order to evade fiscal and regulatory responsibilities for ensuring equal educational opportunities. See UNC CENTER FOR CIVIL RIGHTS, *What Stands Between North Carolina Students and a Sound Basic Education* in ACTION FOR CHILDREN EDUCATION ISSUE BRIEF (March 2007), available at <http://www.law.unc.edu/documents/civilrights/briefs/leandroeducationissuebrief-march2007.pdf>.

<sup>19</sup> New York City has taken incremental steps toward alleviating this problem such as a regulation that formalized and expanded translation and interpretation services in its public schools for non-English speaking parents. This regulation builds on services already provided to parents by the New York City Department of Education’s (DOE) Translation and Interpretation Unit and added \$2 million in future spending for the provision of these services.<sup>19</sup> Despite this positive step, a significant increase in funding and staff is necessary to serve all non-English speaking parents and students.

<sup>20</sup> The dual-language educational programming and implementation at the Oyster Bilingual School in Washington, DC is an example of best practices to provide equitable and effective educational opportunities for both language minority and language majority students. Every Oyster school classroom has two teachers, one teaching in Spanish and the other teaching in English. Dual language instruction demonstrates commonalities in languages and provides students the opportunity to learn all subjects in both languages. This approach aims to reject the assumption of the need to monolingualism in US society and build student proficiency in dual languages. See Freeman, Rebecca D., *Bilingual Education and Social Change*, Philadelphia: Multilingual Matters LTD (1998).

12. All levels of government should take affirmative steps to remove barriers to higher education for children who have adapted to life in the United States and have excelled. Chiefly, states should allow immigrant children residents to pay in-state tuition for post-secondary education.

13. While school finance adequacy litigation does not address the underlying problem of minority students being racially concentrated and isolated, cases in various states do address funding in poor, majority minority districts. Given the racial implications of school funding, all levels of government should support efforts to ensure adequate education funding as a remedy for the elimination of racial discrimination.<sup>21</sup>

14. All levels of government ought to direct resources to innovative programs designed to teach positive behavior and conflict resolution as a way to improve school climate. ‘Positive Behavior Support’ (PBS) programs include instruction on good behavior as part of student daily curriculum. Furthermore, restorative justice practices promote conflict resolution and peer mediation. These types of programs serve as an alternative to zero-tolerance discipline and criminalization in schools.<sup>22</sup>

## Analysis

### **A. International Legal Framework**

15. ICERD Article 5 provides:

(...) States Parties undertake to prohibit and to eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably the enjoyment of the following rights (...) (e) Economic, social and cultural rights, in particular: (...)<sup>23</sup>

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<sup>21</sup> In 2003, New York’s highest court struck down the state’s school-funding system as unconstitutional. In 2007, the New York State Legislature and Governor Elliot Spitzer enacted an education law to provide school funding through a new funding formula, Foundation Aid, designed to distribute state aid based on the needs of students. The Foundation Aid funding formula will determine the majority of aid a district receives. The law also established a new accountability system that requires that 56 high-needs districts complete an annual Contract for Excellence that describes how the district will spend the new state aid. In its Contract for Excellence, a district is required to explain how it will use the Foundation Aid funding to create new or expand existing research-proven programs or activities to improve student performance. These programs must be targeted toward students with the greatest educational needs—those in poverty, with disabilities, and with Limited English Proficiency. The district can use the funding to reduce class size, increase instructional time, improve teacher and principal quality, re-structure middle and high schools, or establish full day kindergarten for five-year-olds or full day pre-kindergarten for four-year-olds. The new law provides several ways for the public to review the decisions of school districts and provide feedback. Such provisions include requirements that districts solicit public input when creating the Contract, maintain a system to allow parents to file complaints if the district is not properly implementing the contract, and report how they spent the Contract funding. Thus, with the Foundation Aid formula, the New York State Legislature has taken steps in the right direction, though it remains to be seen how effective this legislation will prove to be. See NEW YORK CITY CERD SHADOW REPORT [hereinafter New York City CERD Shadow Report] at [www.hrpujc.org](http://www.hrpujc.org).

<sup>22</sup> See *infra* at note 128-31.

<sup>23</sup> Article 5 of ICERD, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not of itself create civil, political, economic, social or cultural rights, but assumes the existence and recognition of these rights. The Convention obliges States to prohibit and eliminate racial discrimination in the enjoyment of such human rights. [General Recommendation XX: Non-Discriminatory Implementation of Rights and Freedoms]. See Conclusions and

(v) The right to education and training.<sup>24</sup>

16. On the issue of taking affirmative steps to eliminate racial discrimination, two Articles are important. Article 1 (4) states:

Special measures taken for the sole purpose of securing adequate advancement of certain racial and ethnic groups or individuals requiring such protection may be necessary (...) [and] shall not be deemed racial discrimination.<sup>25</sup>

17. Similarly, ICERD Article 2 provides in relevant part:

(1) (c) Each State Party shall (...) amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (...) (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial divisions.

(2) States Parties shall, when the circumstances so warrant, take (...) special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights, and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different groups after the objective for which they were taken have been achieved.<sup>26</sup>

18. The ICERD Committee, in its 2001 Concluding Observations for the US specifically noted its concern about racial disparities in education by stating, “[T]he Committee is concerned about persistent disparities in the enjoyment of, in particular, the right to...equal opportunities to education.”<sup>27</sup> The Committee also reminded the United States that “the adoption of special measures by States Parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from Article 2, paragraph 2, of the Convention.”<sup>28</sup>

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Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 398 (2001), available at <http://www1.umn.edu/humanrts/country/usa2001.html>.

<sup>24</sup> ICERD, *supra* note 10, Article 5 § (e) (v). Consequently, we must look outside the Convention for the particulars regarding the right to education. The right to a quality education is recognized in article 26 of the Universal Declaration of Human Rights (UDHR), Articles 28 and 29 of the Convention on the Rights of the Child, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990; and Article 13 of the International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>25</sup> ICERD, *supra* note 10 art. 1 § (4).

<sup>26</sup> *Id.*, Art. 2 §§ (1) (c) (e), (2) (emphasis added).

<sup>27</sup> Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 398 (2001), available at <http://www1.umn.edu/humanrts/country/usa2001.html>.

<sup>28</sup> *Id.* at ¶ 399 (2001).

19. In August of 1995, the UN Committee on ICERD adopted General Recommendation XIX concerning the wording of Article 3, which obligates States Parties to undertake to prevent, prohibit, and eradicate all practices of racial segregation and apartheid. In this Recommendation, the Committee recognized “that while conditions of complete or partial racial segregation may in some countries have been created by governmental policies, a condition of partial segregation may also arise as an unintended by-product of the actions of private persons,” such as residential patterns reflecting the racial divisions in society which often overlap with economic divisions.<sup>29</sup>

20. CERD General Recommendation XXX urges parties to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education . . . .”<sup>30</sup>

## **B. The Current State of Disparities in Educational Opportunities in the United States<sup>31</sup>**

21. Racial isolation and school segregation are increasing in the United States.<sup>32</sup> The average White child in the United States attends a school where 78% of the other students are White. The average Black student attends a high school where only 30% of the other students are White.<sup>33</sup> According to the New York City CERD shadow report, 60% of all Black students in New York State, including those in New York City, attend schools that are at least 90% Black.<sup>34</sup>

22. Over five million ELL students, ten percent of the total US public school population, are enrolled in K-12 schools.<sup>35</sup> In New York City alone, approximately 43% of public school students in New York City, or 500,000 students, speak a language at home other than English.<sup>36</sup> Approximately 140,000 students in New York City are enrolled in ELL programs because they do not speak English proficiently.<sup>37</sup>

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<sup>29</sup> Committee on the Elimination of Racial Discrimination - General Comment 19: Article 3 (Racial Segregation) (1995), available at <http://www.ohchr.org/english/bodies/cerd/comments.htm>.

<sup>30</sup> Gen. Rec. 30 ¶ 29, *see supra* at note 27.

<sup>31</sup> See Appendix A of this chapter, *The History of Racial Disparities in Educational Opportunities in the United States*.

<sup>32</sup> GARY ORFIELD AND CHUNGMEI LEE, BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE? (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf>.

<sup>33</sup> GARY ORFIELD AND CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION (2006) The Civil Rights Project at Harvard University, available at: [http://www.civilrightsproject.harvard.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Racial_Transformation.pdf).

<sup>34</sup> NEW YORK CITY COUNCIL COMMITTEE ON EDUCATION, BRIEFING PAPER AND REPORT OF THE HUMAN SERVICES DIVISION, TRANSLATION SERVICE, May 17, 2005, available at <http://webdocs.nycouncil.info/attachments/66243.htm?CFID=1732230&CFTOKEN=30224325>. For more New York City specific information, please refer to the NEW YORK CITY CERD SHADOW REPORT at [www.hrpujc.org](http://www.hrpujc.org).

<sup>35</sup> See NCELA.org, Frequently Asked Questions, available at <http://www.ncela.gwu.edu/expert/faq/08leps.html> (publishing state-reported data regarding ELL enrollment.)

<sup>36</sup> NEW YORK CITY COUNCIL COMMITTEE ON EDUCATION, BRIEFING PAPER AND REPORT OF THE HUMAN SERVICES DIVISION, TRANSLATION SERVICE, May 17, 2005, available at <http://webdocs.nycouncil.info/attachments/66243.htm?CFID=1732230&CFTOKEN=30224325>. For more New York City specific information, please refer to the New York City CERD Shadow Report [hereinafter New York City CERD Shadow Report] at [www.hrpujc.org](http://www.hrpujc.org).

<sup>37</sup> *Id.*

23. Nationwide, more than 53% of ELL students are concentrated in schools where more than 30% of their peers are also ELLs.<sup>38</sup> By contrast, 57% of English-speaking students attend schools where less than one percent of students have limited English proficiency.<sup>39</sup>

24. In the 2003-2004 school year, more than three-fourths (79%) of the estimated ELL students were native Spanish speakers.<sup>40</sup> Overall, Latinos<sup>41</sup> are 20% of the K-12 population; and Latinos are the most racially isolated minority group in US schools.<sup>42</sup> Nationally, almost one in nine Latino students attends a school that is 99-100% minority.<sup>43</sup> Seventy-six percent of Latinos attend predominantly minority schools.<sup>44</sup> A typical Latino student attends a school that is less than one-third White.<sup>45</sup> Latinos in New York State, more than in any other state, go to schools with student populations 90% or more Latino.<sup>46</sup>

25. Segregation and concentration by race and ethnicity in K-12 grades produces harmful academic and social results for minorities in several ways.<sup>47</sup> Racially segregated minority schools tend to have dramatically fewer resources,<sup>48</sup> and minority students are more likely to learn from inexperienced teachers.<sup>49</sup> Disparate educational resources lead to larger class sizes, substandard facilities, lower per-pupil spending, and fewer counseling services.<sup>50</sup> Furthermore, segregated minority schools are more likely to be housed in high-poverty neighborhoods that possess fewer community learning resources and have high crime rates that further inhibit learning.

26. Government reports and other entities in the United States use the term “achievement gap” to describe a nation-wide phenomenon where lower-income, Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers. For example, nationally in 2005, 58% of Black and 54% of Latino fourth grade students scored

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<sup>38</sup> See *supra* at note 35

<sup>39</sup> *Id.*

<sup>40</sup> RANDY CAPPS ET AL., THE NEW DEMOGRAPHY OF AMERICA’S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT. (2005). The Urban Institute, available at [http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED490924&ERICExtSearch\\_SearchType\\_0=eric\\_accno&accno=ED490924](http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED490924&ERICExtSearch_SearchType_0=eric_accno&accno=ED490924)

<sup>41</sup> We exchange the term ‘Hispanic’ with ‘Latino’ in this chapter. ‘Latino’ refers to persons of the origin of Latin America, while ‘Hispanic’ insinuates origin from Spain. In US consensus data, however, ‘Hispanic’ is the term used to indicate origin from Spanish speaking countries. Nonetheless, ‘Latino’ is considered by many as a more appropriate term for describing a person from a Spanish-speaking county other than Spain; and moves the focus from a pan-ethnic, historical identity to contemporary struggles for equality of people of Spanish-speaking ancestry in the United States. See GÁNDARA, PATRICIA AND CHRISTINA GONZÁLEZ, WHY WE LIKE TO CALL OURSELVES LATINAS, *Journal of Hispanic Higher Education*, Vol. 4, No. 4, 392-398 (2005), available at <http://jhh.sagepub.com/cgi/content/abstract/4/4/392>

<sup>42</sup> Source: U.S. Department of Education. See <<http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp>>

<sup>43</sup> ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? at 32, C.R. Project Harv. U., Jan. 2003, available at <http://www.civilrightsproject.harvard.edu/research/resseg03/AreWeLosingtheDream.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> NEW YORK CITY CERD SHADOW REPORT, available at [www.hrpuj.org](http://www.hrpuj.org)

<sup>47</sup> ROBERT L. LINN AND KEVIN G. WELNER, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (2007), National Academy of Education.

<sup>48</sup> MICHELSON, *supra* at note 4 at 1061.

<sup>49</sup> See generally, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents (2006) [hereinafter SOCIAL SCIENTIST BRIEF]; at App. 31, (noting that teacher inexperience correlates with lower student performance).

<sup>50</sup> *Id.* at App. 33 (describing gaps in class size, facilities, per-pupil spending, and curricular and interpersonal counseling).

below the basic reading level for their grade, compared to only 36% of students overall.<sup>51</sup> The current achievement gap correlates to the long-standing difference in educational opportunity and attainment that looms between Black students and their White and Asian counterparts.<sup>52</sup>

27. These achievement gaps and lack of access to quality educational opportunities reflect an ‘educational debt’ that has accumulated over centuries of denied access to education and employment, reinforced by deepening racial isolation and poverty, and resource inequalities in schools.<sup>53</sup> Social and educational inequities outside of the school, such as lack of access to health care or varying levels of parent involvement, also contribute to these noticeable differences in achievement.<sup>54</sup> Low-income students tend not to be as ready for primary education. Furthermore, low-income students are more likely to repeat a grade and less likely to graduate from high school than wealthier peers. As a whole, they perform worse than higher income students on state and national exams measuring educational progress.<sup>55</sup>

28. Throughout Minnesota, a state with both rural and metropolitan areas, race and income-based achievement gaps underscore the absence of equitable access to education. The performance of students of color lags significantly behind that of White students. As the enrollment of minority students increases throughout Minnesota schools, overall student enrollments are decreasing in Minnesota’s public school system. Since 1989-90, enrollments of minority students have increased by 135% thus becoming a larger portion of total enrollments in Minnesota schools. In 2004-05, 21% of Minnesota K-12 students identified themselves as minority students, compared to just over nine percent in 1989-90.<sup>56</sup> Minnesota has consistently ranked as one of the best performing states in the nation. Yet, on the 2005 National Assessment of Educational Progress (NAEP) for reading, Minnesota fourth graders had the largest Black to White achievement gap, while eighth graders had the second largest gap in the nation. For math, Minnesota fourth graders had the fifth largest gap, while eighth graders had the second largest gap in the nation.<sup>57</sup>

29. Minority children make up a disproportionate percentage of the 25% of Minnesota students who live in poverty.<sup>58</sup> While nearly 20% of Minnesota students are minorities, 97% of

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<sup>51</sup> 2005 ASSESSMENT RESULTS, THE NATION’S REPORT CARD., NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION. The US Department of Education annually releases the National Assessment of Educational Progress (NAEP) or “The Nation’s Report Card,” which shows the national standardized test scores of all students from different racial and ethnic backgrounds, available at <http://nces.ed.gov/nationsreportcard/>.

<sup>52</sup> An article in the *Educational Researcher*, describes an achievement gap evident by NAEP data as the long-term trend in reading and mathematic national average score differences between Whites and Blacks and Hispanics. See JAEKYUNG LEE, RACIAL AND ETHNIC ACHIEVEMENT GAP TRENDS: REVERSING THE PROGRESS TOWARD EQUITY?, *Educational Researcher*, Vol. 31, No. 1, 3-12 (2002), available at <http://edr.sagepub.com/cgi/content/abstract/31/1/3>.

<sup>53</sup> LINDA DARLING-HAMMOND, EVALUATING ‘NO CHILD LEFT BEHIND’, *The Nation* (May 21, 2007).

<sup>54</sup> The opportunity gap involves social and educational inequities outside of the school that help contribute to the achievement gap. See THE OPPORTUNITY GAP ACHIEVEMENT AND INEQUALITY IN EDUCATION (Carol DeShano da Silva, James Philip Huguley, Zenub Kakli, and Radhika Rao eds, Harvard Education Publishing Group 2007).

<sup>55</sup> SOUTHERN EDUCATION FUND, A NEW MAJORITY: LOW INCOME STUDENT’S IN THE SOUTH’S PUBLIC SCHOOLS (2007), available at <http://www.sefatl.org/pdf/A%20New%20Majority%20Report-Final.pdf>

<sup>56</sup> MINNESOTA MINORITY EDUCATION PARTNERSHIP, 2006 STATE OF STUDENTS OF COLOR (2006).

<sup>57</sup> THE EDUCATION TRUST, EDUCATION WATCH: 2006 STATE NAEP TABLES (2006), available at <http://www2.edtrust.org/edtrust/summaries2006/2006StateNAEPTables.pdf>. Only 37 percent of African American students passed the eighth grade Basic Skills Test math test, as compared to 85 percent of White non-Hispanic students in 2005.

<sup>58</sup> THE MINNEAPOLIS FOUNDATION, ALL KIDS LEARN (2007), available at <http://www.minneapolisfoundation.org/2010/PDFsPublications/AllKidsLearnfactsheetGap.pdf>.

their teachers are White.<sup>59</sup> At the same time that Minnesota's all-White schools are becoming more diverse, Minnesota leads the nation in segregating non-White students into all-minority schools.<sup>60</sup> In part, as a result of redistricting and weakening desegregation laws in the 1990's, Minnesota "went from nine schools in the Minneapolis-St. Paul metro area being mostly minority in 1992, to more than 100 in 2002."<sup>61</sup>

30. ELL students suffer particularly acute educational inequalities in US schools. In Minnesota, children who are proficient in English score twice as high as those who are still learning the language.<sup>62</sup> Contrary to the assumption that children speaking a language other than English recently arrived from their country of origin—native-born, US citizens predominate in the ELL, K-12 student population. Seventy-six percent of elementary school and 56% of secondary school ELL students are citizens; and over 50% of the ELL students in public secondary schools are second or third-generation citizens.<sup>63</sup> Therefore, the stereotype of ELL students as foreign-born immigrants is inaccurate. The majority are, in fact, citizens and legal permanent residents of the United States whose academic and linguistic needs are not met by the US public school system.

31. Latino student outcomes are intrinsically tied to ELL student achievement, as Latinos make up the largest majority of ELL students. Moreover, given the growth of Latinos and ELLs in our nation's schools, overall student achievement in US schools will increasingly depend on how these groups fare academically. ELLs represent around ten percent of public school enrollment and are concentrated in large, urban school districts; a quarter of the 100 largest school districts have an ELL population of at least fifteen percent.<sup>64</sup>

32. The Latino student 'dropout rate' is disproportionately high. In 2000, about 530,000 Latinos between the ages of 16-19 years old did not graduate from high school, yielding a dropout rate of 21.1% for all Latino persons between those ages.<sup>65</sup> The Latino youth dropout rate was more than three times greater than that of their White, non-Latino counterparts whose dropout rate in 2000 was roughly seven percent.<sup>66</sup> The school dropout rate in secondary schools is more pronounced in large inner-cities, among foreign-born Latino, and among ELLs.<sup>67</sup>

33. It is unclear how ELLs, or millions of Latino students, perform academically and whether or not they are receiving high-quality instructional services. Distortion of student dropout rates, has enabled schools and districts to artificially inflate test scores and misrepresent student

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<sup>59</sup> *Id.*

<sup>60</sup> "State's Schools Rank Second in Racial Change", Star Tribune, August 31, 2007, available at <http://www.startribune.com/1592/story/1393414.html>

<sup>61</sup> *Id.*

<sup>62</sup> See MINNESOTA MINORITY EDUCATION PARTNERSHIP, *supra* at note 56.

<sup>63</sup> RANDY CAPPS ET AL., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT (2005), Washington, DC: The Urban Institute.

<sup>64</sup> MELISSA LAZARIN, IMPROVING ASSESSMENT AND ACCOUNTABILITY FOR ENGLISH LANGUAGE LEARNERS IN THE NO CHILD LEFT BEHIND ACT (2006), Issue Brief, No. 16, National Council of La Raza, available at <http://www.titlei.org/reports/nclrib16.pdf>.

<sup>65</sup> Source: U.S. CENSUS BUREAU (2003).

<sup>66</sup> RICHARD FRY. HIGH SCHOOL DROPOUT RATES FOR LATINO YOUTH. Eric Digest. Nov. 2003, available at <http://www.ericdigests.org/2004-3/latino.html>

<sup>67</sup> ADRIANA D. KOHLER, HISPANIC EDUCATION IN THE UNITED STATES (Statistical Brief No. 8, Conference Edition) at National Council of La Raza (2006).

outcomes. In effect, tracking of ELL student achievement is difficult, and entities have not been able to hold local and state educational agencies fully accountable for improving educational outcomes for ELLs.<sup>68</sup> Nonetheless, some data exists on ELL performance in specific states. In the Commonwealth of Massachusetts, the total percentage of students that dropped out in 2006 was 11.7%, while that number more than doubled for ELL students, whose dropout rate was approximately twenty-six percent.

34. Female student dropout rates increase for minority females of color. Nationwide, in 2004, 37% of Latina female students, 40% of Black female students, and 50% of Native American/Alaskan Native female students failed to graduate in four years. Female students in each racial and ethnic group graduate at higher rates than their male peers of the same race or ethnicity. Nonetheless, Latina, Black, and Native American/Alaskan Native female students graduate at significantly lower rates than white and Asian/Pacific Islander males. Studies have shown that a number of factors contribute to the female student dropout rate, including pregnancy and family responsibilities and negative experiences at school, such as discipline and poor performance. Moreover, school characteristics such as high minority and predominantly low-socioeconomic status student enrollment lead to high levels of dropout by female students.<sup>69</sup>

35. Children of the undocumented immigrants living in the United States, approximately 1.8 million,<sup>70</sup> are unable to legally work or afford a college education based on the decisions their parents made years ago. Only five to ten percent of these students obtain access to higher education due to ineligibility for work authorization or financial aid.<sup>71</sup>

36. Earning potential is tied to one's level of education—"Someone with a bachelor's degree earns nearly one million dollars more over his or her lifetime than a high school graduate."<sup>72</sup> Likewise, immigrants who are able to adjust their status to become legal residents are able to obtain better jobs. "[T]he US Department of Labor found that the wages of immigrants legalized under [the 1986 Immigration Reform and Control Act] had increased by roughly 15% five years later."<sup>73</sup> Restricted access to education and better jobs for undocumented students will have a detrimental effect on US society as a whole. In California, there are more jobs requiring a college education than there is demand for these jobs. A California study predicts, "by 2025, forty-one percent of the state's jobs will require a college education, but only 32% of workers in the state will have the necessary education."<sup>74</sup>

37. Tracking or "ability grouping" of low-income and minority students into lower-level and remedial courses are other institutional practices that have a discriminatory effect on student

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<sup>68</sup> See CAPPS, *supra* at note 63.

<sup>69</sup> NATIONAL WOMEN'S LAW CENTER, WHEN GIRLS DON'T GRADUATE, WE ALL FAIL (2007), available at <http://www.nwlc.org/pdf/DropoutReport.pdf>

<sup>70</sup> ROBERTO G. GONZALES, WASTED TALENT AND BROKEN DREAMS (Oct. 2007), Immigration Policy In Focus.

<sup>71</sup> *Id.*

<sup>72</sup> "Amount of Schooling Affects Earning Potential," (July 18, 2002), available at <http://www.usatoday.com/news/nation/census/2002-07-18-degree-dollars.htm>; See also, San Francisco Chronicle, "Getting a Degree Pays Off with Higher Salary," (Aug 18, 2007) available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/18/BUQ5RKS4J.DTL> ("The median annual salary for a high school graduate in 2006 was about \$30,940, according to the bureau. For college graduates with a bachelor's degree, the median was \$50,024.").

<sup>73</sup> See GONZALES, *supra* at note 70.

<sup>74</sup> *Id.*

achievement and access to educational opportunity. These practices are not always explicit in policy, but appear in various forms. Groupings may occur on objective criteria, such as standardized testing, or on subjective decisions by teachers or school administrators. Once tracked or grouped to a particular level, a student may remain in the same level throughout his or her academic career. Students tracked at lower levels often lack access to higher quality curriculum, thus impacting their achievement relative to higher tracked peers. Research has shown that minority students are overrepresented in lower level tracks and under-represented in higher level tracks.<sup>75</sup>

38. Many minority parents are uninformed of their child's curriculum options, or their neighborhood schools do not offer higher level or college preparatory curriculum. Therefore, low income and minority students often find themselves ill-prepared and ineligible for post-secondary education.<sup>76</sup> Minority parents traditionally have fewer resources for challenging a history of discriminatory tracking, and thus even high-achieving minority students often find themselves ineligible for direct enrollment to university.<sup>77</sup>

39. In 1995, the City of Chicago Public School system (CPS) established a retention program to improve student readiness for grade-level promotion. Under this program, CPS held back students concentrated in elementary schools that served the highest numbers of low-income and minority students. Black students are four times as likely to be held back as White pupils, and Latino students are three times as likely to be held back.<sup>78</sup> Furthermore, minority students, particularly in schools with teacher shortages and high turnover, are retained disproportionately to their more affluent, generally White counterparts.<sup>79</sup>

40. Throughout the United States, the bulk of funding for elementary and secondary education is provided by revenue raised from local property taxes. This system of funding results in a disparity in the quality of education between property-rich districts that are able to raise more money for education, and property-poor districts that have more limited economic resources. Too often, these property-poor districts also have predominantly minority students. After prior efforts to address this racial inequity through integration and funding equity suits were stymied by the courts, education advocates have moved into a third generation of reform efforts centered around state funding adequacy suits.

41. In the State of New York, the *Campaign for Fiscal Equity* brought a funding adequacy suit against the state charging, among other things, that the state's funding formula had a

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<sup>75</sup> LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ONE CHILD AT A TIME: A PARENT'S GUIDE TO ADVOCATING FOR EQUAL EDUCATIONAL OPPORTUNITIES (2005), available at [http://www.lawyerscomm.org/2005website/projects/education/educationpics/Arizona%20Guidebook\\_final.doc](http://www.lawyerscomm.org/2005website/projects/education/educationpics/Arizona%20Guidebook_final.doc)

<sup>76</sup> SUSAN AUERBACH, WHY DO THEY GIVE THE GOOD CLASSES TO SOME AND NOT TO OTHERS? *Latino Parent Narratives of Struggle in a College Access Program*, 104 TCHRS C. R. 1369, 1372 (2002), available at <http://www.hrpujc.org/documents/TCRecordAuerbach.pdf>.  
<sup>77</sup> *Id.* at 1372, 1383.

<sup>78</sup> MAUREEN KELLEHER, SUSPENSIONS UP IN CPS (Dec. 2004), Catalyst Chicago.

<sup>79</sup> DONALD R. MOORE, ED. D., JENNY NAGAOKA, MELISSA RODERICK, ELAINE ALLENSWORTH, COMMENT ON 'ENDING SOCIAL PROMOTION IN CHICAGO: THE EFFECTS OF RETENTION and ENDING SOCIAL PROMOTION: DROPOUT RATES IN CHICAGO AFTER IMPLEMENTATION OF EIGHTH GRADE PROMOTION RATE. (Chicago: Consortium on Chicago School Research) Designs for Change (April 2004).

disproportionately negative effect on New York's minority students.<sup>80</sup> In 2003, New York's highest court struck down the state's school funding system as unconstitutional and found that New York City's schools, which are attended by a majority of minority children, were insufficiently funded by the state to provide a 'sound basic education' as required by the New York State Constitution.

42. Schools across the Southern region of the United States spend less per pupil than other areas of the country, which means extra educational and social services are not available for students with extra social and economic needs. The State of Connecticut in the Northeastern part of the United States—with just 29% low income student enrollment—spends up to \$11,600 on each student. The State of Mississippi in the Southeastern part of the United States, where low-income student enrollment is 75%, spends just \$5,600 per student. Southern states set taxes for education at the same rates other regions of the country do, but the South's higher poverty rates translate into less taxable income and less revenue to invest in education. In recent years, the influx of Latino immigrants moving into the South coupled with high birth rates among poor minorities have caused low-income enrollment in Southern schools to increase dramatically. In 2006, 54% of students enrolled in public schools in the South were low income, up from 37% just 16 years ago.<sup>81</sup>

43. Systematic disparities foster lower academic achievement in highly segregated minority schools.<sup>82</sup> They create stigmas that lower student expectations and discourage academic engagement.<sup>83</sup> They also contribute to the disproportionate suspension and expulsion of minority students. In 2004, Black students constituted 17% of the national student population, but 37% of out-of-school suspensions and 35% of expulsions.<sup>84</sup> Racial overrepresentation in school suspension may not always be the result of intentional racial bias as classified by the law; rather, it is a corollary of the overuse of exclusionary school discipline in schools with fewer resources and higher concentrations of students from lower socio-economic backgrounds.<sup>85</sup> These schools are more often overcrowded with large class sizes and lack the resources, such as guidance counselors, social workers, and conflict resolution programs, to discipline constructively, and administrators more often suspend and expel students.<sup>86</sup> For example, in the City of Los Angeles public school system, where the student population is 91% minority and 75% low-income,<sup>87</sup>

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<sup>80</sup> CAMPAIGN FOR FISCAL EQUITY, PLAINTIFFS' EVIDENCE IN *CFE v. STATE OF NEW YORK: NEW YORK STATE NEEDS TO FUND ITS STANDARDS*, available at <http://www.cfequity.org/ns-trisum.html> (last visited Oct. 29, 2007). [For more New York City specific information, please refer to the NEW YORK CITY CERD SHADOW REPORT at [www.hrpujc.org](http://www.hrpujc.org)].

<sup>81</sup> See, SOUTHERN EDUCATION FUND, *supra* at note 55.

<sup>82</sup> See, SOCIAL SCIENTIST BRIEF, *supra* at note 49; App. 37-40 (noting reduced test scores and graduation rates for students in minority segregated schools, independent of the race of the student).

<sup>83</sup> NAACP LEGAL DEFENSE AND EDUCATION FUND, DISMANTLING THE SCHOOL TO PRISON PIPELINE, available at [http://www.naacpldf.org/content/pdf/pipeline/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline.pdf](http://www.naacpldf.org/content/pdf/pipeline/Dismantling_the_School_to_Prison_Pipeline.pdf).

<sup>84</sup> U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS (2004), available at <http://vistademo.beyond2020.com/ocr2004rv30/xls/2004Projected.html>

<sup>85</sup> INDIANA EDUCATION POLICY CENTER, COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT, Policy Research Report #SRS1, June 2000, available at <http://www.indiana.edu/~safeschl/cod.pdf>

<sup>86</sup> See LINN, *supra* at note 47 (noting that student testing and accountability programs give schools incentives to remove such students from schools, and testing encourages holding students back, which in turn leads to misbehavior).

<sup>87</sup> DISTRICT PROFILE 2004-2005, Los Angeles Unified School District. Education Data Partnership, CALIFORNIA DEPARTMENT OF EDUCATION.

there is only one guidance counselor for every 840 students.<sup>88</sup> The high frequency and extremity of disciplinary measures increase student alienation from schools and force young students onto a track that has a high probability of leading to incarceration.<sup>89</sup>

44. Overall, the public school system has become an entry point into the juvenile justice system, in particular for minority youth.<sup>90</sup> As documented in the Juvenile Justice section of this CERD shadow report, racial disparities in suspension, expulsion, and arrest rates in school contribute to disproportionately high dropout rates and referrals to the justice system for minority youth. For example, while national data is unavailable, local cities show increasing arrest rates in schools for minority students. In 2002-03, Black students in the Chicago Public School system constituted 51% of total enrollment, but 76% of suspensions, almost 78% of expulsions, and 77% of arrests in schools during the same period.<sup>91</sup> This creates what is often referred to as the “school to prison pipeline”. Historical inequities, such as racially segregated education, underfinanced schools, concentrated student poverty, and racial disparities in law enforcement, all impact this virtual pipeline.<sup>92</sup>

45. Researchers from the National Economic and Social Rights Initiative (NESRI) conducted qualitative interviews and focus groups in New York City and Los Angeles schools to document the destructive school culture and punitive school disciplinary measures which contribute to this pipeline. The report highlights several alarming issues and found that teachers often do not have the training and support needed to foster a positive climate for students, and consequently, resort to degrading and abusive treatment.<sup>93</sup> Students also reported that there is disparate treatment in the application of discipline based on racial and ethnic background. For example, the report documents how teachers and school administrators stereotype students based on how they are dressed and even make disparaging comments based on those stereotypes.<sup>94</sup>

### **C. State Party Failure to Promote Racial Inclusion and Eliminate Racial Disparities in Educational Opportunities.**

46. The legal concepts of colorblindness,<sup>95</sup> *de jure* and *de facto* segregation,<sup>96</sup> and the intent test versus the effects test<sup>97</sup> are US legal doctrines that continue to create barriers to the eliminations of all forms of discrimination in education.

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<sup>88</sup> NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS (2007), at 39, available at [http://www.nesri.org/programs/Deprived\\_of\\_Dignity\\_07.pdf](http://www.nesri.org/programs/Deprived_of_Dignity_07.pdf).

<sup>89</sup> See NAACP Legal Defense and Educational Fund, *supra* at note 83.

<sup>90</sup> For more information see USHRN CERD SHADOW REPORT, chapter on juvenile justice.

<sup>91</sup> See KELLEHER. *supra* at note 78.

<sup>92</sup> See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, *supra* at note 83.

<sup>93</sup> ELIZABETH SULLIVAN, NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE (NESRI), DEPRIVED OF DIGNITY, DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK & LOS ANGELES PUBLIC SCHOOLS (2007), available at <http://www.nesri.org/Deprived%20of%20Dignity%2007.pdf>

<sup>94</sup> *Id.* at iv.

<sup>95</sup> JEFFERY J. WALLACE, JOHN BINGHAM AND THE MEANING OF THE FOURTEENTH AMENDMENT: IDEOLOGY VS. REALITY: THE MYTH OF EQUAL OPPORTUNITY IN A COLOR BLIND SOCIETY, 36 Akon L. Rev. 693, 715. In his law review article, Wallace illustrates the legal concepts of colorblindness and the social ramifications as he explains, “the lack of consistency in defining integration, equal opportunity and equality, and the assumption of racial neutrality or colorblindness, causes us not to deal with the root of the

47. In two recent school integration cases, *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* (“*Seattle/Louisville*”),<sup>98</sup> White parents challenged the voluntary use of race-conscious measures to promote diversity and avoid the harms of racial isolation in Seattle, Washington and Louisville, Kentucky public schools. The US government filed two amicus briefs in the *Seattle/Louisville* cases,<sup>99</sup> supporting the prohibition of any measures to voluntarily and consciously address racial inequality in schools. Meanwhile, the Supreme Court received numerous amicus briefs by researchers providing massive evidence demonstrating the harms of racial isolated schools and the educational and social benefits of integrated schools.<sup>100</sup> In June 2007, the US Supreme Court issued a decision that limits the ability of school districts to promote school diversity and reduce the harms caused by structural inequalities still present in these school districts and in school districts across the Nation.

48. This judicial decision and actions by the state party directly contradicts the intent of ICERD Article 1 and Article 2 (emphasis added). At a time when schools are rapidly resegregating—indeed, they are as racially segregated as they were in 1970—the decision will likely have a preclusive impact on school districts’<sup>101</sup> to provide a high quality, diverse education to all students and to prevent the resegregation of schools. Moreover, the US Department of Education has submitted a proposal to change the racial classification of students—limiting the ability to effectively measure the Court’s decision on school segregation.<sup>102</sup>

49. The *Seattle/Louisville* decision undermines traditional US jurisprudence and mechanisms to desegregate public schools, including the landmark case *Brown v. the Board of Education*.<sup>103</sup> While school districts can continue to use some race-conscious measures to promote

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problem. If one would imagine a society where true integration and equality had been achieved and then look at the present condition or circumstances in society; then one would clearly see the gulf between the idea of integration and the reality of continued segregation, racism and injustice.

<sup>96</sup>EBONI S. NELSON. PARENTS INVOLVED & MEREDITH: A PREDICTION REGARDING THE (UN) CONSTITUTIONALITY OF RACE CONSCIOUS STUDENT ASSIGNMENT PLANS. 84 Denv. U.L. Rev. 293. Nelson addresses *de jure* versus *de facto* segregation in court cases and discusses the exceptions apparent in *Seattle/Louisville* explaining that “Directly addressing the constitutionality of the voluntary use of race to remedy *de facto* segregation in public education will be a case of first impression for the Court. The Court, however, has had previous opportunities to consider the use of race to remedy *de jure* segregation in the educational context. In its desegregation jurisprudence, the Court has permitted school districts to employ race-conscious measures in their attempts to eliminate unconstitutional dual educational systems. The measures, however, were restricted to circumstances in which schools’ student bodies and faculties were racially imbalanced as a result of the districts’ intentional discrimination. Such circumstances do not exist in *Parents Involved* and *Meredith*. ”

<sup>97</sup> DAVID A. STRAUSS. DISCRIMINATORY INTENT AND THE TAMING OF BROWN. 56 U. Chi. L. Rev. 935 (1989). Strauss outlines the basic principals of the intent test vs. the effects test saying, it is conventional to distinguish between “intent tests” and “effects tests”—tests that consider the intent of the government actor and tests that consider the effects of the action on the alleged victims of discrimination.”

<sup>98</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (*Seattle/Louisville*), 127 S.Ct. 2738 (2007).

<sup>99</sup> *Id.*, Amicus Brief of the United States of America to the Supreme Court.

<sup>100</sup> *Id.*, amicus briefs submitted in support of school districts; See NAACP LEGAL DEFENSE FUND, *Summary of Amicus Briefs Filed in Support of Respondents*, available at

[http://www.naacpldf.org/content/pdf/voluntary/both\\_parties/SummaryofAmicusBriefsinSupportofSchoolDistricts.pdf](http://www.naacpldf.org/content/pdf/voluntary/both_parties/SummaryofAmicusBriefsinSupportofSchoolDistricts.pdf)

<sup>101</sup> Plaintiffs filed a motion for relief from final judgment in *Comfort v. Lynn Sch. Comm.*, 126 S.Ct. 798 (2005), by which the Supreme Court upheld constitutionality of the school district’s voluntary plan for school improvement and the elimination of racial isolation by allowing students to transfer to non-neighborhood schools so long as it did not exasperate racial isolation in a particular school.

<sup>102</sup> See ORFIELD, *supra* at note 2.

<sup>103</sup> See *Brown supra* at note 1.

integration,<sup>104</sup> their ability to enact special measures under ICERD Articles 1 and 2 to promote adequate racial inclusion is clearly limited. Under ICERD, such remedial measures are not only sanctioned but required, so long as “they shall not be continued after the objectives for which they were taken have been achieved.”<sup>105</sup> Interestingly, the local school governing bodies in these cases were attempting to implement such measures, namely programs to promote integration and diverse environments in their school districts. Yet rather than support the school governing bodies in these voluntary community-generated efforts at the local level, the US government condemned such programs efforts.<sup>106</sup>

50. The Court further indoctrinated “colorblindness” into US jurisprudence, giving legal equivalency to efforts to exclude and segregate children by race, and those that seek to include and bring children together across lines of difference. Similarly, the Court ignored history and legal precedence by maintaining a false dichotomy between intentional school segregation and *de facto* segregation.<sup>107</sup> Although intentional segregation continues to be unconstitutional,<sup>108</sup> by this decision, *de facto* segregation will continue to permeate schools in every region of the United States, undermining efforts to promote a high quality, diverse education for all students, and exacerbating the harms prevalent in racially isolated, under resourced schools.

51. In 2001, the federal government enacted the No Child Left Behind Act (“NCLB”) to improve standards of state and local accountability for primary and secondary students, with the goal that all US students would achieve proficiency in reading and math by the year 2014. In the Periodic Report of the United States to the U.N. Committee on the Elimination of Racial Discrimination, the United States government asserts that it has instituted several initiatives “to strengthen federal protections in the area of education.”<sup>109</sup> In particular, the Periodic Report claims that the No Child Left Behind Act (“NCLB”)<sup>110</sup> “is designed to promote high educational standards in accountability in public elementary and secondary schools, thus providing an important framework for improving the performance of all students.”<sup>111</sup> The Periodic Report also asserts that “the Act requires . . . that the results of annual statewide testing be published and disaggregated at the school, school district, and states levels, by poverty, race, ethnicity, gender, migrant status, disability status, and limited English proficiency.”<sup>112</sup> Each state is required to establish academic content and standards for school districts to ensure that students from all backgrounds make “adequate yearly progress” toward academic proficiency.

52. Although the spirit and provisions of NCLB seeks to highlight the differences in student performance by race and class and eliminate the pervasive achievement gap in the United States,

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<sup>104</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (Seattle/Louisville)*, 127 S.Ct. 2738, 2788 (2007) (Kennedy, J., concurring).

<sup>105</sup> See ICERD *supra* at note 24 and 25.

<sup>106</sup> See *Amicus Brief of the United States of America supra* note 99.

<sup>107</sup> See *Seattle/Louisville*, 127 S. Ct. at 2797 (Breyer, J., dissenting). In his dissent, Justice Breyer notes the false dichotomy between intentional school segregation and *de facto* segregation. He asserts that history makes clear “the futility of looking simply to whether earlier school segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible form the constitutionally forbidden use of “race-conscious” criteria.” *Id.* at 2920 (Breyer, J., dissenting).

<sup>108</sup> See *id.* at 2769.

<sup>109</sup> See US CERD Periodic Report, ¶¶ 93-97.

<sup>110</sup> 20 U.S.C. § 6301

<sup>111</sup> See US CERD Periodic Report, ¶¶ 96.

<sup>112</sup> *Id.*

the legislation does little to address systemic inequities or “educational debt” to disadvantaged students that has accrued over centuries of racial isolation and unequal access to quality education.<sup>113</sup> Moreover, the federal government’s efforts under the NCLB Act fall short of ICERD’s requirement that the United States implement special measures to promote racial inclusion.

53. NCLB mandates that states hold teachers and administrators accountable for the testing capabilities of students. Yet the Act fails to hold state education agencies accountable to the school for providing adequate resources and funding in order to meet the standards, nor does the federal government provide such funding to support the intent of the law’s provisions.<sup>114</sup>

54. NCLB student test performance results are disaggregated by race, disability, and socioeconomic status, providing widespread documentation of racial inequalities in education. However, the only federal remedy offered parents with children in schools designated by such inequities is the option to transfer the child to attend another school receiving federal funds within their same school district. Often, schools with low-achievement levels are located in school districts with high concentrations of poverty and minority students; and almost all schools within the same district have rampant inequities and low-achievement. Hence, leaving no or limited options for parents to ensure quality educational opportunities for their children, and failing to promote adequate racial inclusion.

55. Education research on ELL student achievement demonstrates that native language instruction significantly improves academic achievement in English.<sup>115</sup> Title III of the No Child Left Behind Act provides federal requirements and tools for encouraging English language proficiency. Federal Title III funds, however, are not necessarily supporting best instructional practices for ELL students, including native language or bilingual instruction.<sup>116</sup> In addition, a number of states have enacted propositions for citizen authorization to ban instruction and assignment to bilingual education programs.<sup>117</sup>

56. Federal law does not require the state and local educational agencies to provide translation from English to parents of elementary and secondary students except for a very limited set of documents concerning special education evaluation and placement.<sup>118</sup> As demonstrated by the low attainment rates of high school diplomas for ELL students compared to other racial and ethnic groups, language barriers serve as a means of disenfranchising many students from educational opportunities. The diversity of languages spoken by parents has served as a barrier to parents’ ability to participate in their children’s education. The challenges include communicating with parents; promoting their participation in school institutions and

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<sup>113</sup> See DARLING-HAMMOND, *supra* note 53.

<sup>114</sup> AMELIA PARKER, RACIAL DISPARITIES IN U.S. PUBLIC EDUCATION AND INTERNATIONAL HUMAN RIGHTS STANDARDS: HOLDING THE U.S. ACCOUNTABLE TO CERD (2007), available at, <http://www.wcl.american.edu/hrbrief/14/3parker.pdf?rd=1>.

<sup>115</sup> PETER ZAMORA, *Policies to Help English Language Learners*, in *EROSION OF RIGHTS*, 79 (William L. Taylor et al. eds, 2007).

<sup>116</sup> ELSA ROBERTS AUERBACH, “Reexamining English Only in the ESL Classroom,” *TESOL Quarterly*, Vol. 27, No. 1 (Spring, 1993).

<sup>117</sup> June 1998, in a referendum vote, California voters approved Proposition 227, a mandate for English-only instruction in California public school classrooms. November 2000, Arizona voters approved Proposition 203, limiting bilingual instruction for ELL students.

<sup>118</sup> See New York City Council Committee *supra* note 34.

school-community activities; and parents' ability to understand student report cards, homework, disciplinary matters, and curriculum choices.<sup>119</sup>

57. The US government has failed to take affirmative steps to eliminate obstacles preventing qualified immigrant students from reaching their full potential. In fact, the US government has issued federal provisions that discourage states from providing in-state tuition and work authorization to their undocumented immigrant student residents.<sup>120</sup> Such policies and actions violate CERD obligations and ignore CERD General Recommendation XXX, which urges parties to “[r]emove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education . . . .”<sup>121</sup>

58. Furthermore, the US Executive Branch has opposed legislative efforts to allow immigrant children to apply for conditional status for up to six years of legal residence—during which time the student would have to complete at least two years of college education or US military service. In opposition, the US government has expressed fear that such initiatives would “provide incentives for recurrence of the illegal conduct that has brought the Nation to this point” and “inevitably lead to large-scale document fraud.”<sup>122</sup>

59. NCLB grants substantial privileges to the US Department of Defense (DOD) to collect basic contact and educational information about students ages 17 or older for the purpose of military recruitment.<sup>123</sup> Under NCLB, schools with low-income students are required to submit lists of students to the DOD or waive entitlement to federal funding. Schools submit information to the DOD unless a parent writes and signs a letter to circumvent this requirement. Furthermore, schools must also allow the DOD representatives equal access to the school as prospective employers and colleges.<sup>124</sup>

60. A DOD recruitment program called Joint Advertising and Market Research Studies (JAMRS) collects student information on ethnic origin and gender.<sup>125</sup> The DOD values ethnicity information because military recruiters target working-class and minority youth that attend third-rate educational institutions in low-income communities and traditionally lack access to post-secondary schools or professional jobs.<sup>126</sup> An investigation found that recruiters frequently and inappropriately used instructional time for recruiting, intentionally misinformed students about

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<sup>119</sup> *Id.*

<sup>120</sup> See 8 U.S.C. § 1623 (“[A]n alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State . . . for any postsecondary education benefit unless a citizen or national of the United States is eligible for such . . . without regard to whether the citizen or national is such a resident.”).

<sup>121</sup> Gen. Rec. 30 ¶ 29, *see supra* note 27.

<sup>122</sup> “Statement of Administration Policy” EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET (Oct. 24, 2007) available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/s2205sap-s.pdf>.

<sup>123</sup> ACLU.ORG, *NYCLU Lawsuit Challenges DoD’s Unauthorized Military Recruiting of High School Students*, <http://www.aclu.org/studentsrights/privacy/25310prs20060424.html>.

<sup>124</sup> NYCLU.ORG, *NYCLU Launches Campaign to Protect Students’ Rights from Abusive Military Recruitment Tactics*, <http://milrec.nyclu.org/archive/00000004.html>.

<sup>125</sup> NYCLU.ORG, *To Settle NYCLU Lawsuit, Defense Department Reforms Student Military Recruiting Database*, <http://milrec.nyclu.org/archive/00000016.html>.

<sup>126</sup> *Id.*

the requirements and realities of enlistment, and exceeded the prescribed limits on their presence in schools.<sup>127</sup>

61. US legislation enacting “zero tolerance” policies has led to an increasing number of in-school arrests, suspensions and expulsions.<sup>128</sup> Many of the zero tolerance policies currently in place in the US educational system originated in the Gun-Free Schools Act of 1994, which conditioned federal funding for public schools on the state’s adoption of legislation mandating expulsion of any student found with a firearm at school. Concurrently, states have passed legislation mandating expulsion for a broad range of offenses. In general, zero tolerance student discipline policies have often led to the imposition of overly harsh or disproportionate punishments for relatively minor infractions. State statutes on zero tolerance policy in Arizona allows for schools to modify expulsion requirements on a case-by-case basis. School officials can therefore expel some students for offenses, but simultaneously decline to punish other students for the same offense, ultimately leading to disproportionate treatment.<sup>129</sup>

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<sup>127</sup> SCOTT STRINGER & NEW YORK CIVIL LIBERTIES UNION, “We Want You(th): Confronting Unregulated Military Recruitment in New York City Public Schools (2007), available at [http://www.nyclu.org/files/we\\_want\\_youth\\_milrec\\_report\\_090607.pdf](http://www.nyclu.org/files/we_want_youth_milrec_report_090607.pdf); see also KAREN HOUPPERT, “Who’s Next?” THE NATION, September 12, 2005, available at <http://www.thenation.com/doc/20050912/houppert>.

<sup>128</sup> ADVANCEMENT PROJECT. OPPORTUNITIES SUSPENDED: THE DEVASTATING CONSEQUENCES OF ZERO TOLERANCE AND SCHOOL DISCIPLINE POLICIES (June 2000), available at <http://www.advancementproject.org/reports/opsusp.pdf>.

<sup>129</sup> *Id.*

### **Positive Behavior Support and Restorative Justice Practices in Schools**

As an alternative to zero-tolerance discipline, some school districts and states around the United States have begun to implement supportive and restorative approaches to discipline that aim to reduce suspension and expulsion. The Positive Behavior Support (PBS) model for discipline teaches shared norms and expectations for behavior.<sup>130</sup> PBS policies have been implemented successfully in schools in Illinois, Maryland, and other states with sharp decreases in suspension rates. For example, at Springfield High School in Illinois out-of-school suspensions decreased by 38%, reclaiming 180 school days that would have been lost to suspensions. After Lincoln Elementary School in Chicago Heights, Illinois implemented PBS programming, the number of students sent to an administrator's office for fighting dropped by half over the course of a year. At Mark Twain Primary School in Kankakee, Illinois, annual disciplinary referrals decreased dramatically, from 268 before PBS compared to 38. In February 2007, the Los Angeles Unified School District, the second largest school district in the country, passed a district-wide PBS policy.

Restorative justice practices also promote positive school climates using peer mediation, classroom discussion circles, and family group conferencing to respond to conflict and misbehavior in school.<sup>131</sup> Several school districts and states have implemented restorative practices with positive results. In Minnesota, from 1999-2003 the state legislature awarded grant money for the implementation and evaluation of several restorative justice programs.<sup>132</sup> Between 2001 and 2003 schools in the evaluation that had baseline data showed 30 to 50% reduction in suspension.<sup>133</sup> In 2006, the Chicago public school system, the third largest in the country, adopted a new student code of conduct based on restorative justice.

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<sup>130</sup> PBS engages teachers and students in 1) developing shared norms and expectations for behavior, 2) teaching those norms and supporting students in learning behavioral skills, 3) reinforcing positive behavior, and 4) intervening proactively when behavioral problems arise. Teachers receive staff development to implement PBS and staff time is allocated to mentoring and counseling.

<sup>131</sup> Restorative justice approaches engage all persons affected by an incident of misbehavior, such as the victims, offenders and other members of the school community, by discussing collectively how to resolve the incident. The approach is described as part of a healing and learning process which puts the responsibility on students themselves to collaboratively respond to a wrongdoing.

<sup>132</sup> Four districts were awarded grants for restorative programs between 1999 and 2001 and another five were awarded grants between 2001 and 2003. Over the latter period, 1892 staff members participated in training sessions and restorative programs were implemented in at least 39 different buildings. Nancy Riestenberg, *Restorative Measures In Schools: Alternatives To Suspensions In-School Behavior Intervention Grants*, Minnesota Department of Education (2003), 41. These numbers do not include programs that may have been implemented without state grants.

<sup>133</sup> NANCY RIESTENBERG, *Aides, Administrators and All the Teachers You Can Get: A Restorative Training Guide for Schools*, Minnesota Department of Education (2002), available at <http://education.state.mn.us/MDE/groups/safehealthy/documents/announcement/007622.pdf>, last visited 10/17/07.

### **Recommendations**

62. Both the federal and state government must undertake far-reaching structural reforms to comply with the Race Convention and eliminate racial disparities in education. Local, state, and the federal governments in the United States share the responsibility of implementing and enforcing equal opportunities to public education. As a result, all levels of government have an affirmative obligation to fulfill the requirements of ICERD. Therefore, we recommend the following actions to the US government:

63. Enact laws that adopt an effects test to measure *de facto* barriers to equal educational opportunities. Concurrently, ensure that all persons are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis.

64. Reject the use of the ‘colorblind’ doctrine in legislation and government education policies. This doctrinal incorporation threatens US obligation under ICERD to use special measures to promote the adequate development of quality educational opportunities to those historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities. Particularly, permit school districts to voluntarily promote school integration<sup>134</sup> through the use of carefully tailored race-conscious measures to promote educational, democratic and cultural benefits of racial and ethnic diversity in the classroom.<sup>135</sup>

65. Propose a constitutional amendment and support ratification by the states to create a fundamental right to education based on human rights standards;<sup>136</sup> and promote the creation and preservation of United States laws that provide remedies the underlying causes of *de facto* segregation and racial inequalities in education. A federal right to a quality education ought to provide federal protections equal to or greater than the constitutional rights that already exist in particular state jurisdictions throughout the United States.

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<sup>134</sup> Meaningful school integration eliminates the incentive for Whites to move to White enclaves because children attend integrated schools no matter where in the district they live. Fully integrated schools open all areas of a community to parents, who can live anywhere in the district and know that their children will not be racially isolated in any school they attend. *See* CERD shadow report chapter on housing discrimination.

<sup>135</sup> *See Seattle/Louisville*, 127 S.Ct. at 2788 (Kennedy, J., concurring).

<sup>136</sup> In 2005, parents, students, teachers and advocates convened at an education action summit to discuss findings that the New York City public school system failed to guarantee human rights standards set forth in the Convention on the Rights of the Child and other human rights documents; such standards as the right to quality education and equitable distribution of resources. Following the summit, parents, community members, students, teachers, principals, policy-makers, elected officials, scholars and business leaders formed *The Independent Commission on Public Education* (iCOPE) to call for a new common vision for schools based on human rights and lead civic conversations and the mobilization of the community to demand a restructuring of the school system. Proposed reform included a governance structure that guarantees the rights of parents, students and communities to have power in education decision-making independent of local government and school administrators; ending discrimination by developing school policies, relationships, and classroom methods to eliminate institutional racism and class bias; and requiring the collaboration of cultural, civic and health agencies to address the many social and economic problems facing communities. More information available at <http://www.icope.org/>

66. Increase language access services<sup>137</sup> for students and parents. Oblige and support local school implementation of best teaching practices for ELL students to reach English proficiency and for English speakers to learn a second language.<sup>138</sup>

67. All levels of government should take affirmative steps to remove barriers to higher education for children who have adapted to life in a new country and excelled. Chiefly, states should allow immigrant children residents to pay in-state tuition.

68. While school finance adequacy litigation does not address the underlying problem of minority students being racially concentrated and isolated, cases in various states do address funding in poor, majority minority districts. Given the racial implications of school funding, all levels of government should support efforts to ensure adequate education funding as a remedy for the elimination of racial discrimination.<sup>139</sup>

69. All levels of government ought to direct resources to innovative programs designed to teach positive behavior and conflict resolution as a way to improve school climate. ‘Positive Behavior Support’ (PBS) programs include instruction on good behavior as part of student daily curriculum. Restorative justice practices promote conflict resolution and peer mediation. This type of programming serve as an alternative to zero-tolerance discipline and criminalization in schools.<sup>140</sup>

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<sup>137</sup> New York City has taken incremental steps toward alleviating this problem such as a regulation that formalized and expanded translation and interpretation services in its public schools for non-English speaking parents. This regulation builds on services already provided to parents by the Department of Education’s (DOE) Translation and Interpretation Unit and added \$2 million in future spending for the provision of these services.<sup>137</sup> Despite this positive step, a significant increase in funding and staff is necessary to serve all non-English speaking parents and students.

<sup>138</sup> The dual-language educational programming and implementation at the Oyster Bilingual School in Washington, DC is an example of best practices to provide equitable and effective educational opportunities for both language minority and language majority students. Every Oyster school classroom has two teachers, one teaching in Spanish and the other teaching in English. Dual language instruction demonstrates commonalities in languages and provides students the opportunity learn all subjects in both languages. This approach aims to reject the assumption of the need to monolingualism in US society and build student proficiency in dual languages. *See* Freeman, Rebecca D., *Bilingual Education and Social Change*, Philadelphia: Multilingual Matters LTD (1998).

<sup>139</sup> In 2003, New York’s highest court struck down the state’s school-funding system as unconstitutional. In 2007, the New York State Legislature and Governor Elliot Spitzer enacted an education law to provide school funding through a new funding formula, Foundation Aid, designed to distribute state aid based on the needs of students. The Foundation Aid funding formula will determine the majority of aid a district receives. The law also established a new accountability system that requires that 56 high-needs districts complete an annual Contract for Excellence that describes how the district will spend the new state aid. In its Contract for Excellence, a district is required to explain how it will use the Foundation Aid funding to create new or expand existing research-proven programs or activities to improve student performance.<sup>139</sup> These programs must be targeted toward students with the greatest educational needs—those in poverty, with disabilities, and with Limited English Proficiency. The district can use the funding to reduce class size, increase instructional time, improve teacher and principal quality, re-structure middle and high schools, or establish full day kindergarten for five-year-olds or full day pre-kindergarten for four-year-olds. The new law provides several ways for the public to review the decisions of school districts and provide feedback. Such provisions include requirements that districts solicit public input when creating the Contract, maintain a system to allow parents to file complaints if the district is not properly implementing the contract, and report how they spent the Contract funding. Thus, with the Foundation Aid formula, the New York State Legislature has taken steps in the right direction, though it remains to be seen how effective this legislation will prove to be.

<sup>140</sup> *See supra* at note 128-131.

## Appendix A

### **The History of Racial Disparities in Educational Opportunities in the United States**

1. In 1868, the US Congress ratified the Fourteenth Amendment to the US Constitution, requiring all states to provide equal protection under law to persons within their jurisdiction.
2. Decades following, public schools remained legally racially segregated. In 1940, for example, 29 states and the District of Columbia had laws that required students to be segregated by race. Not until 1954, after a series of legal victories challenging racial segregation in higher education, the US Supreme Court declared “separate but equal has no place in education.” In that year, the Court unanimously held that segregated public primary and secondary schools are “inherently unequal” and unconstitutional under the equal protection provisions of the Fifth and the Fourteenth Amendments.<sup>141</sup>
3. In 1955, in the face of opposition within local communities to desegregate public schools, the US Supreme Court ordered lower federal courts to require desegregation “with all deliberate speed.”<sup>142</sup>
4. In 1964, US Congress adopted the Civil Rights Act,<sup>143</sup> authorizing the federal government to file school desegregation cases and prohibiting discrimination in programs—including schools—receiving federal financial assistance.
5. In 1968, the US Supreme Court ordered states to dismantle segregated school systems “root and branch,” identifying five factors—facilities, staff, faculty, extracurricular activities, and transportation—that courts should use to gauge a school system’s compliance with desegregation orders.<sup>144</sup>
6. In 1971, the US Supreme Court approved busing, magnet schools, compensatory education, and other tools as appropriate remedies to overcome the role of residential segregation in perpetuating racially segregated schools.<sup>145</sup>
7. Despite these positive steps, in recent decades, the US Supreme Court has limited the ability of states and localities to desegregate their schools. In 1973, the Supreme Court distinguished between state-mandated segregation (*de jure* segregation) and segregation that was not mandated by the state (*de facto* segregation). The Court held that *de facto* segregation is not unconstitutional because it was not a direct result of a legal mandate to maintain racially separate schools.<sup>146</sup> Thus, because segregated school systems such as New York City, are largely based

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<sup>141</sup> See *Brown v. Board of Education*, 347 U.S. 483 (1954) (Fourteenth Amendment); *Bolling v. Sharpe*, 347 U.S. – (1954) (Fifth Amendment).

<sup>142</sup> See *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955).

<sup>143</sup> 42 U.S.C. §2000 et seq. (2007).

<sup>144</sup> See *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

<sup>145</sup> See *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971).

<sup>146</sup> See *Keyes v. Denver School District No. 1*, 413 U.S. 189 (1973).

on housing patterns,<sup>147</sup> and are not mandated by the state, courts cannot order those *de facto* segregated schools to desegregate.

8. In 1973, in, the US Supreme Court held that education is not a “fundamental right” protected by the US Constitution.<sup>148</sup> Among the implications of this decision is the lack of a federal remedy for those who attend schools with inadequate resources, a group that is disproportionately students of color.

9. In 1974, the Court struck down metropolitan-wide desegregation plans as a means to desegregate urban school districts with high minority populations, making it impossible to desegregate racially isolated urban school districts.<sup>149</sup> The New York City school system is an example of such a racially isolated urban school district. Today, of the approximately 1.1 million students in New York City public schools, about 13 percent are Asian, 15 percent White, 32 percent Black and 40 percent Latino.<sup>150</sup>

10. The Court has also made it more difficult for colleges and universities to engage in affirmative action plans. In 1978, the Court struck down a university affirmative action admissions program because it set aside a specific number of seats for minority students, but the Court also stated that race can be one factor considered in admissions.<sup>151</sup> In 2003, the Court upheld diversity as a rationale for affirmative action programs in higher education admissions, but concluded that points systems, giving points to students based on their race, were unconstitutional.<sup>152</sup>

11. The percentage of African American students attending school districts with a majority percentage of African Americans was on the decline until the early 1980s.<sup>153</sup> Economic factors such as “White flight”—a national phenomenon where White, typically more affluent, families move to the suburbs surrounding metropolitan areas—produced urban public school systems comprised primarily of minority students and racially isolated communities reminiscent of the late 1960s.<sup>154</sup> Overall, residential housing patterns in the United States lead to racial isolation and segregating conditions in schools.<sup>155</sup>

12. During the 1990s, the Supreme Court further diminished the mandate of *Brown*, holding that court orders are not intended to “operate in perpetuity” and making it easier for formerly segregated school systems to fulfill their obligations under desegregation decrees<sup>156</sup>; holding that district courts can relinquish their supervision of school desegregation orders in an incremental

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<sup>147</sup> See New York City CERD Shadow Report, available at [www.hrpujc.org](http://www.hrpujc.org)

<sup>148</sup> See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

<sup>149</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>150</sup> *Id.*

<sup>151</sup> See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) *see* Powell’s opinion

<sup>152</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>153</sup> See ORFIELD *supra* note 2.

<sup>154</sup> See JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA*, 240 (Crown Publishers 2005)..

<sup>155</sup> Gary Orfield, *Metropolitan School Desegregation: Impacts on Metropolitan Society*, in *IN PURSUIT OF A DREAM DEFERRED: LINKING HOUSING AND EDUCATION POLICY* 135 (John A. Powell et al. eds., 2001); *see also* Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 164, 180 (John Charles Boger & Gary Orfield eds., 2005).

<sup>156</sup> See *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237 (1991).

fashion<sup>157</sup>; and stating that the goal for desegregation plans is to return schools to local control since judicial remedies were intended to be “limited in time and extent.”<sup>158</sup>

13. On June 28, 2007, the Supreme Court rejected voluntary desegregation plans in the Seattle, Washington and Jefferson County, Kentucky school districts, holding, in part, that public schools may not use race as the sole determining factor for assigning students to schools. Invoking *Brown v. Board of Education*, Chief Justice Roberts wrote, “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>159</sup>

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<sup>157</sup> See *Freeman v. Pitts*, 503 U.S. 467 (1992).

<sup>158</sup> See *Missouri v. Jenkins*, 515 U.S. 70 (1995).

<sup>159</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2768 (2007).