

# Racial Disparities in Educational Opportunities in the United States

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

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## **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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**Contents**

INTRODUCTION.....	594
I. EXECUTIVE SUMMARY.....	595
II. ANALYSIS.....	598
A. <i>International Legal Framework</i> .....	598
B. <i>The Current State of Disparities in Educational Opportunities in         the United States</i> .....	600
1. Minnesota: A Case Study.....	601
2. English Language Learners.....	602
a. Latino Students.....	603
b. Dropout Rates.....	603
c. Postsecondary Education and Employment Opportunity.....	604
5. Relationship between Segregation and Educational Disparities and the Juvenile Justice System.....	605
6. Local and State Policies that Create Segregation and the Achievement Gap.....	607
a. Tracking and Ability Grouping.....	607
b. Funding Adequacy.....	608
C. <i>Federal Government Failure to Promote Racial Inclusion         and Eliminate Racial Disparities in Educational Opportunities</i> .....	609
1. Case Law.....	609
2. The No Child Left Behind Act.....	612
a. The No Child Left Behind Act and the Department of Defense.....	613
b. English Language Learners.....	614
3. Zero Tolerance Policies.....	615
III. RECOMMENDATIONS.....	617
IV. CONCLUSION.....	619
Appendix A.....	622
Appendix B.....	625

## INTRODUCTION

The Lawyers' Committee for Civil Rights Under Law and other contributors originally produced this article as a chapter to an omnibus report on the U.S. government's failure to comply with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>1</sup> In December 2007, a coalition of nongovernmental organizations (NGOs) and academic institutions within the US Human Rights Network<sup>2</sup> submitted the report to the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee) in preparation for the CERD Committee's review of the 2007 Periodic Report of the United States government.<sup>3</sup> This particular article on education (1) highlights the U.S. government's failure to prevent apartheid conditions in U.S. public schools and to promote access to quality educational opportunities for racial and ethnic minority groups, and (2) provides recommendations designed to remedy the deficiencies apparent in the U.S. government's report and in U.S. implementation of the treaty.

In 1994, the United States signed and became a state party to the ICERD, also known as the anti-apartheid treaty.<sup>4</sup> Each state party to the ICERD is obligated to submit an initial report to the CERD Committee within one year of the date the treaty enters into force as to that state party and a periodic report every two years, detailing the extent to which it has complied with terms of the ICERD and its response to past recommendations by the CERD Committee.<sup>5</sup> The United States submitted its most recent periodic report to the CERD Committee in April 2007. The CERD Committee reviewed this report during its 2008 spring session in Geneva, Switzerland by holding hearings and evaluating the testimony of U.S. government representatives and NGOs.<sup>6</sup> Following these hearings, the CERD Committee publicly released its *Concluding Observations* to the U.S. government, including the CERD Committee's Concerns and Recommendations.<sup>7</sup>

When the U.S. government issues its reports, it often presents the best possible picture of its compliance, focusing on laws it has passed or laws that have existed for decades rather than discussing how government entities actually implement and enforce those laws. As protocol, the CERD Committee provides civil society groups, specifically NGOs, the opportunity to react to government reports and educate its members on research, data, and technical aspects of U.S. law.<sup>8</sup> Thus, NGOs generally submit “shadow reports” to correct oversights and highlight a more realistic picture of systematic racial disparity in the United States.<sup>9</sup>

The ICERD is especially important to many civil and human rights legal practitioners and activists because it contains important antidiscrimination standards such as an obligation for a state party to eliminate de facto segregation and undertake “special measures” for securing adequate advancement for certain ethnic and racial groups.<sup>10</sup> Hundreds of organizations and academic institutions were involved with the 2007–2008 ICERD shadow reporting process,<sup>11</sup> and a number of other organizations<sup>12</sup> and individuals<sup>13</sup> specifically endorsed this chapter report on education.

This article first begins with an executive summary of the entire chapter on education submitted to the CERD Committee. Second, this article analyzes international law, current disparities in educational opportunities in the United States, and the United States’ failure to promote racial equality. Finally, this article sets forth recommendations as to what the U.S. government can do to comply with its international agreement to the ICERD.

#### I. EXECUTIVE SUMMARY

1. It has been more than five decades since the U.S. Supreme Court’s landmark decision in *Brown v. Board of Education*,<sup>14</sup> yet the United States has failed to provide equal educational opportunities to all students. Public schools today are more segregated than they were in 1970,<sup>15</sup> as federal court decisions and government inaction have contributed to the persistence of

apartheid conditions in schools. Indeed, continued racial inequities and segregation in U.S. schools is evidenced by large gaps in achievement; limited access to postsecondary educational opportunities; high rates of suspension, expulsion, and criminal sanctions; and low graduation rates for minority and English Language Learner (ELL) students.<sup>16</sup>

2. This continued racial inequality in educational opportunities can be attributed to a number of factors, including: (1) underperforming, poorly financed schools characterized by low quality of teaching, larger class sizes, and inadequate facilities that perpetuate underachievement by minority students;<sup>17</sup> (2) school assignment policies that promote segregation;<sup>18</sup> (3) school district boundaries that are coterminous with town boundaries and local land use, zoning, and taxation powers; (4) systems of ability grouping and tracking that consistently retain or place minority students in lower level classes with less exposure to curriculum that builds critical analytical skills;<sup>19</sup> (5) failure to counteract differences in parental income and educational attainment—factors that impact a child’s development and which often correlate with race;<sup>20</sup> and (6) lower teacher and administrator expectations of minority students.<sup>21</sup> Research shows that laws and policies have systematically placed the poorest minority children in inadequate educational environments, further perpetuating and increasing the overall racial disparities in education.<sup>22</sup>

3. The 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>23</sup> By including discriminatory effects and proscribing distinctions that limit enjoyment or exercise of rights “on an equal footing,” the ICERD’s definition encompasses *de facto* discrimination. The ICERD states that each state party shall take effective measures to “amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists,”<sup>24</sup> regardless of the presence of a discriminatory purpose. To

achieve integration and substantive equality, each state “undertakes to encourage . . . integrationist multi-racial organizations . . . and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.”<sup>25</sup>

4. The U.S. Congress and the executive branch of the federal government, including the U.S. Department of Education and the U.S. Department of Justice (DOJ), have not actively pursued school integration and diversity as a matter of policy since the 1990s.<sup>26</sup> Moreover, the U.S. 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>27</sup>

5. Most recently, the DOJ filed amicus briefs in two cases—*Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education*—supporting the prohibition of any measures to voluntarily and consciously address racial inequality in schools.<sup>28</sup> In June 2007, the U.S. Supreme Court issued a decision in these cases limiting the ability of school districts to promote school diversity and to reduce the harms caused by structural inequalities still present in these school districts and in school districts across the nation.<sup>29</sup> This judicial decision directly contradicts the intent of ICERD Article 1 and Article 2.<sup>30</sup>

6. As U.S. judicial remedies for racial discrimination weaken and federal legislation proves inadequate, it is imperative that the U.S. government take special measures and far-reaching structural reforms to comply with the ICERD and eliminate racial disparities in public education.

## II. ANALYSIS

### *A. International Legal Framework*

7. The ICERD provides the framework in which its state parties must act. As such, it is crucial to understand the obligations the United States agreed to undertake by signing on to the ICERD before discussing the United States' failure to fulfill these obligations. Thus, pertinent portions of the ICERD follow.

8. 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>31</sup>

(v) *The right to education and training*[.]<sup>32</sup>

9. On the issue of taking affirmative steps to eliminate racial discrimination, two articles are important: Article 1 and Article 2. 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>33</sup>

10. 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 and 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>34</sup>

11. The CERD Committee, in its 2001 Concluding Observations for the United States, 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 for education . . . .”<sup>35</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 [ICERD].”<sup>36</sup>

12. In August 1995, the CERD Committee adopted General Recommendation XIX to clarify the meaning 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>37</sup>

13. CERD Committee General Recommendation XXX (1994) 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>38</sup>

*B. The Current State of Disparities in Educational Opportunities in the United States*<sup>39</sup>

14. Racial isolation and school segregation are increasing in the United States.<sup>40</sup> Today, the average White child<sup>41</sup> attends a school where 77 percent of the other students are White.<sup>42</sup> The average Black student attends a high school where only 30 percent of the other students are White.<sup>43</sup> For example, in New York State, 60 percent of all Black students, including those in New York City, attend schools that are at least 90 percent Black.<sup>44</sup> Nationally, 76 percent of Latinos attend predominantly minority schools.<sup>45</sup>

15. This increased segregation is problematic for a number of reasons.<sup>46</sup> Racially segregated minority schools tend to have dramatically fewer resources<sup>47</sup> and employ less experienced teachers.<sup>48</sup> These disparate educational resources lead to larger class sizes, substandard facilities, lower per pupil spending, and fewer counseling services.<sup>49</sup> Furthermore, segregated minority schools are more likely to be housed in high-poverty neighborhoods that have high crime rates and limited access to community resources that enhance learning and development.<sup>50</sup>

16. Government reports and other entities in the United States use the term “achievement gap” to describe a nationwide phenomenon where lower-income Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers.<sup>51</sup> For example, nationally in 2005, 59 percent of Black and 56 percent of Latino fourth grade students scored below the basic reading level for their grade, compared to only 38 percent of students overall.<sup>52</sup> The current achievement gap correlates to the longstanding difference in educational opportunity and attainment that looms between Black and Latino students and their White and Asian counterparts.<sup>53</sup>

17. These achievement gaps and lack of access to quality educational opportunities reflect an “educational debt” to poor and minority students “that has accumulated over centuries of denied access to education and

employment and is reinforced by deepening poverty and resource inequalities in schools.”<sup>54</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>55</sup> Nonetheless, low-income students tend not to be as ready for primary education.<sup>56</sup> Low-income students are more likely to repeat a grade and less likely to graduate from high school than wealthier peers.<sup>57</sup> As a whole, low-income students perform worse than higher-income students on state and national exams measuring educational progress.<sup>58</sup>

### **1. Minnesota: A Case Study**

18. Throughout Minnesota, a state with both rural and metropolitan areas, race and income-based achievement gaps underscore the inequitable access to education. In Minnesota, the performance of minority students lags significantly behind that of White students.<sup>59</sup> As the enrollment of minority students increases throughout Minnesota schools, overall student enrollment is decreasing in Minnesota’s public school system.<sup>60</sup> Since 1989–90, enrollment of minority students has increased by 135 percent, thus becoming a larger portion of total enrollment in Minnesota schools.<sup>61</sup> “In 2004–05, 21 percent of Minnesota K–12 students identified themselves as [minority students], compared to just over 9 percent in 1989–90.”<sup>62</sup>

19. Minnesota has consistently ranked as one of the best overall performing states in the nation on the National Assessment of Educational Progress (NAEP).<sup>63</sup> Yet in the 2005 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.<sup>64</sup> For math, Minnesota fourth graders had the fifth largest gap, while eighth graders had the second largest gap in the nation.<sup>65</sup>

20. Minority children make up a disproportionate percentage of the 25 percent of Minnesota students who live in poverty.<sup>66</sup> While nearly 20 percent of Minnesota’s students are minorities, 97 percent of their teachers

are White.<sup>67</sup> Minnesota's predominately White schools are becoming more diverse; however, Minnesota is one of the states leading the nation in segregating non-White students into nearly all-minority schools.<sup>68</sup> In part, as a result of redistricting and weakening desegregation laws in the 1990s, Minnesota "went from nine schools in the [Minneapolis-St. Paul] metro area being mostly minority in 1992, to more than 100 [in 2002]."<sup>69</sup>

## 2. English Language Learners

21. ELL students suffer particularly acute educational inequalities in U.S. schools. In Minnesota, children who are proficient in English score twice as high as those who are still learning the language.<sup>70</sup> Contrary to the assumption that children speaking a language other than English have recently arrived from their country of origin, native-born, U.S. citizens predominate among ELL students in the K–12 student population.<sup>71</sup> Seventy-six percent of elementary school and 56 percent of secondary school ELL students are citizens, and over 50 percent of the ELL students in public secondary schools are second- or third-generation citizens.<sup>72</sup> Therefore, the stereotype of ELL students as foreign-born immigrants is inaccurate.<sup>73</sup> The majority are, in fact, citizens and legal permanent residents of the United States whose academic and linguistic needs are not met by the U.S. public school system.<sup>74</sup>

22. Over five million ELL students compose approximately 10 percent of all U.S. students enrolled in K–12 public school.<sup>75</sup> In New York City alone, approximately 43 percent of public school students, or 500,000 students, speak a language at home other than English.<sup>76</sup> Approximately 140,000 students in New York City are enrolled in ELL programs because they do not speak English proficiently.<sup>77</sup>

23. ELL students represent approximately 10 percent of public school enrollment and "are concentrated in large, urban school districts; a quarter of the 100 largest school districts have an ELL student population of at least 15 [percent]."<sup>78</sup> Nationwide, 53 percent of ELL students are concentrated

in schools where more than 30 percent of their peers are also ELL students.<sup>79</sup> By contrast, 57 percent of English-only speaking students attend schools where less than 1 percent of students have limited English proficiency.<sup>80</sup>

a) Latino Students<sup>81</sup>

24. Latino student achievement is intrinsically tied to ELL student academic abilities, as Latinos make up the largest majority of ELL students in the United States. Moreover, given the growth of Latinos and ELL students in our nation's schools, overall student achievement in U.S. schools will increasingly depend on how these groups fare academically.<sup>82</sup>

25. In the 2003–04 school year, more than three-fourths (79 percent) of the estimated five million ELL students were native Spanish speakers.<sup>83</sup> Overall, Latinos comprise 20 percent of the K–12 population, and Latinos are the most racially isolated minority group in U.S. schools.<sup>84</sup> Nationwide, almost one in nine Latino students attends a school that is comprised of nearly 100 percent minority students.<sup>85</sup> A typical Latino student attends a school that is less than one-third White.<sup>86</sup> Latinos in New York State, more than in any other state, go to schools with student populations that are 90 percent or more Latino.<sup>87</sup>

b) Dropout Rates

26. The Latino student dropout rate is disproportionately high. In 2000, over half a million Latinos between the ages of sixteen- to nineteen-years-old did not graduate from high school, yielding a dropout rate of 21.1 percent for all Latino persons between those ages.<sup>88</sup> During the same year, the dropout rate for non-Latino students was nearly two thirds lower—7 percent.<sup>89</sup> The school dropout rate in secondary schools is more pronounced in large inner-cities, among foreign-born Latino, and among ELL students.<sup>90</sup>

27. It is unclear how ELL students, or millions of Latino students, perform academically and whether or not they are receiving high-quality instructional services. The U.S. Department of Education allows states to loosely define graduation rates, resulting in insufficient tracking of students that drop out without filing paperwork or that transfer to disciplinary alternative schools.<sup>91</sup> Furthermore, in the absence of meaningful accountability for graduation rates, schools have a loop hole for sidestepping federal accountability for academic performance by expelling low-performing students.<sup>92</sup>

28. Some data exists on ELL performance in specific states. In Massachusetts, for example, the total percentage of students that dropped out in 2006 was 11.7 percent. In that same year, the dropout rate for ELL students was nearly 26 percent, more than double the overall rate.<sup>93</sup> Nonetheless, distortion of student graduation and dropout rates has enabled schools and districts to artificially inflate test scores and misrepresent student outcomes.<sup>94</sup> In effect, tracking ELL student achievement is difficult, and the public has not been able to hold local and state educational agencies fully accountable for improving educational outcomes for ELL students.<sup>95</sup>

c) *Postsecondary Education and Employment Opportunity*

29. Children of undocumented immigrants living in the United States, approximately 1.8 million in total, are unable to legally work or afford a college education based on the decisions their parents made years ago.<sup>96</sup> Due to ineligibility for work authorization or financial aid, only 5 to 10 percent of these students obtain access to higher education.<sup>97</sup>

30. Earning potential is tied to one's level of education—"[s]omeone with a bachelor's degree earns nearly \$1 million more over his or her lifetime than a high school graduate."<sup>98</sup> Likewise, immigrants who are able to adjust their status to become legal residents are able to obtain better jobs. "[T]he U.S. Department of Labor found that the wages of immigrants

legalized under [the 1986 Immigration Reform and Control Act] had increased by roughly 15 percent five years later.”<sup>99</sup> Restricted access to education and better jobs for undocumented students will have a detrimental effect on U.S. society as a whole. In California, there are more jobs requiring a college education than there is demand for these jobs.<sup>100</sup> A California study predicts that “by 2025, 41 percent of the state’s jobs will require a college education, but only 32 percent of workers in the state will have the necessary education.”<sup>101</sup>

#### **5. Relationship Between Segregation and Educational Disparities and the Juvenile Justice System**

31. Systematic disparities between schools with high concentrations of poor and minority students and schools with more White and affluent students foster lower academic achievement in highly segregated minority schools.<sup>102</sup> Disparities such as historical lack of access to educational and economic opportunities create stigmas that lower student expectations and discourage academic engagement.<sup>103</sup> Such disparities also contribute to the disproportionate suspension and expulsion of minority students.<sup>104</sup> In 2004, Black students constituted 17 percent of the national student population but 32 to 37 percent of out-of-school suspensions and 35 percent of expulsions.<sup>105</sup> Racial overrepresentation in school suspension may not always be the result of intentional racial bias as classified by the law; rather, it is often a “corollary of the overuse of exclusionary school discipline” in schools with fewer resources and higher concentrations of students from lower socioeconomic backgrounds.<sup>106</sup> Schools primarily comprised of minority students 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>107</sup> For example, in the Los Angeles public school system, where the student population is 91 percent minority and 75 percent low income,<sup>108</sup> there is only one guidance counselor for

every 840 students.<sup>109</sup> “[T]he American School Counselor Association (ASCA) recommends that there be no more than 250 students to each school counselor . . . [because] lower student to counselor ratios decrease both the recurrence of student disciplinary problems and the share of students involved in a disciplinary incident.”<sup>110</sup> The high frequency and extremity of disciplinary measures increases student alienation from schools and forces young students onto a track that has a high probability of leading to incarceration.<sup>111</sup>

32. For minority youth in particular, the public school system has become an entry point into the juvenile justice system.<sup>112</sup> Racial disparities in suspension, expulsion, and arrest rates in schools contribute to disproportionately high dropout rates and referrals to the justice system for minority youth.<sup>113</sup> For example, while national data is unavailable, local cities show increasing arrest rates in schools for minority students. In 2002–03, Black students in Chicago Public Schools (CPS) constituted 51 percent of total enrollment but 76 percent of suspensions, almost 78 percent of expulsions, and 77 percent of arrests in schools during the same period.<sup>114</sup> This creates what observers and advocates often refer to as the “school to prison pipeline,” which describes the dual trends of lower rates of high school graduation and student achievement and stiffer sanctions of student behavior.<sup>115</sup> Racially segregated education, underfinanced schools, concentrated student poverty, and racial disparities in law enforcement are powerful historical inequities that impact this virtual pipeline.<sup>116</sup>

33. 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 that contribute to this pipeline. The report highlighted 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>117</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>118</sup>

## **6. Local and State Policies that Create Segregation and the Achievement Gap**

### *a) Tracking and Ability Grouping*

34. In addition to the general shortcomings of predominately minority schools, tracking and “ability grouping” of low-income and minority students into lower-level and remedial courses are institutional practices that have a discriminatory effect on student achievement and access to educational opportunity.<sup>119</sup> These practices are not always explicit in school 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.<sup>120</sup> Students tracked at lower levels often lack access to higher quality curriculum, impacting their achievement relative to higher tracked peers.<sup>121</sup> “Research has shown that minority students are overly represented in lower level tracks and underrepresented in higher level tracks.”<sup>122</sup>

35. In addition, many minority parents are uninformed of their children’s curriculum options, or their neighborhood schools do not offer higher level or college preparatory curriculum.<sup>123</sup> As mentioned above, schools with a high concentration of poor and minority students lack access to guidance counselors who are important to assisting students and parents in making informed decisions about important curricular choices.<sup>124</sup> Therefore, low-income and minority students often find themselves ill-prepared or ineligible for postsecondary education.<sup>125</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 in a university.<sup>126</sup>

36. During the 1995–96 school year, Chicago Public Schools (CPS) established a retention program to improve student readiness for grade-level promotion.<sup>127</sup> Under this program, CPS held back students concentrated in elementary schools that served the highest numbers of low-income and minority students.<sup>128</sup> In 1997, Black students were four times as likely to be held back in this program as were their White peers, and Latino students were three times as likely to be held back as were their White peers.<sup>129</sup> Furthermore, minority students, particularly those in schools with teacher shortages and high teacher turnover, are held back disproportionately to their more affluent, generally White counterparts.<sup>130</sup>

*b) Funding Adequacy*

37. 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 better able to raise more money for education and property-poor districts with more limited economic resources.<sup>131</sup> Too often, these property-poor districts are comprised of 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.<sup>132</sup>

38. 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 disproportionately negative effect on New York's minority students.<sup>133</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.<sup>134</sup>

39. 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 percent low-income student enrollment—spends up to \$11,694 per year on each student.<sup>135</sup> In contrast, the state of Mississippi, in the southeastern part of the United States, where low-income student enrollment is 75 percent, spends, at most, \$5,631 per student.<sup>136</sup> 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 birthrates among poor minorities have caused low-income enrollment in southern schools to increase dramatically.<sup>137</sup> In 2006, 54 percent of students enrolled in public schools in the South were low income, up from 37 percent just sixteen years ago.<sup>138</sup>

*C. Federal Government Failure to Promote Racial Inclusion and Eliminate Racial Disparities in Educational Opportunities*

**1. Case Law**

40. The legal concepts of colorblindness,<sup>139</sup> de jure and de facto segregation,<sup>140</sup> and the intent test versus the effects test<sup>141</sup> are U.S. legal doctrines that continue to create barriers to the eliminations of all forms of discrimination in education. For example, in 1973, the U.S. Supreme Court, in *Keyes v. Denver School District No. 1*, distinguished between state-mandated segregation (de jure segregation) and segregation that was not mandated by the state (de facto segregation).<sup>142</sup> The Court held that de facto segregation was not unconstitutional because it was not a direct result

of a legal mandate to maintain racially separate schools.<sup>143</sup> Thus, because segregated school systems such as the New York City public school system are largely based on housing patterns<sup>144</sup> and are not mandated by the state, courts cannot order those de facto segregated schools to desegregate.

41. Nowhere was the continuing prevalence of these legal concepts mentioned above more clear than in the Supreme Court's decisions 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>145</sup> First, in two individual cases and then in a consolidated case in front of the Supreme Court, White parents challenged the voluntary use of race-conscious measures to promote diversity and avoid the harms of racial isolation in the public schools of Seattle, Washington, and Louisville, Kentucky. The DOJ filed two amicus briefs in the *Seattle/Louisville* cases supporting the prohibition of any measures to voluntarily and consciously address racial inequality in schools.<sup>146</sup> Meanwhile, the Supreme Court received numerous amicus briefs from researchers providing massive evidence demonstrating the harms of racially isolated schools and the educational and social benefits of integrated schools.<sup>147</sup> Furthermore, researchers proved that race-conscious measures have historically been the most efficient and effective means of integrating schools.<sup>148</sup> In June 2007, the U.S. Supreme Court issued a decision in the consolidated case.<sup>149</sup> The Court left a small window for the use of narrowly tailored race-conscious measures.<sup>150</sup> Unfortunately, however, the Court's decision greatly limits the ability of school districts across the nation to promote school diversity and to reduce the harms caused by structural inequalities still present.<sup>151</sup>

42. This recent judicial decision and actions by the U.S. government directly contradict the intent of ICERD Article 1 and Article 2. At a time when schools are rapidly resegregating—indeed, they are as racially segregated now as they were in 1970—the decision will likely have a preclusive impact on school districts' attempts to provide a high quality,

diverse education to all students and to prevent the resegregation of schools.<sup>152</sup> Moreover, since the Supreme Court's decision in June 2007, the U.S. 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>153</sup>

43. The *Seattle/Louisville* decision undermines traditional U.S. jurisprudence and mechanisms to desegregate public schools, including the landmark case *Brown v. Board of Education*.<sup>154</sup> While school districts can continue to use some race-conscious measures to promote integration,<sup>155</sup> the Supreme Court's decision in *Seattle/Louisville* limited school districts' ability to enact special measures under ICERD Articles 1 and 2 to promote adequate racial inclusion. Under the 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>156</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 U.S. government condemned such efforts.<sup>157</sup>

44. The Court further indoctrinated "colorblindness" into U.S. jurisprudence, giving legal equivalency to efforts to exclude and segregate children by race and undermining those that seek to include and bring children together across lines of difference (see *infra* Appendix A, ¶ 13). In *Seattle/Louisville*, the Court ignored history and legal precedence by maintaining a false dichotomy between intentional school segregation and de facto segregation.<sup>158</sup> Although intentional de facto segregation continues to be unconstitutional,<sup>159</sup> through the Court's 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, underresourced schools.

## 2. The No Child Left Behind Act

45. 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 U.S. students would achieve proficiency in reading and math by the year 2014.<sup>160</sup> In the Periodic Report of the United States to the CERD Committee, the U.S. government asserts that it has instituted several initiatives “to strengthen federal protections in the area of education.”<sup>161</sup> In particular, the U.S. government claims that the NCLB<sup>162</sup> “is designed to promote high educational standards and accountability in public elementary and secondary schools, thus providing an important framework for improving the performance of all students.”<sup>163</sup> The U.S. government, in its 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 state levels by poverty, race, ethnicity, gender, migrant status, disability status, and limited English proficiency.”<sup>164</sup> According to the Periodic Report, 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.<sup>165</sup>

46. The spirit and provisions of the NCLB seek to highlight differences in student performance by race and class in order to eliminate the pervasive achievement gaps in the United States.<sup>166</sup> In actuality, however, the legislation does little to address systemic inequities or the “educational debt to disadvantaged students that has accrued over centuries of [racial isolation and] unequal access to quality education.”<sup>167</sup> Moreover, the federal government’s efforts under the NCLB fall short of the ICERD’s requirement that the United States implement special measures to promote racial inclusion.<sup>168</sup>

47. NCLB student test performance results are disaggregated by race, disability, and socioeconomic status, providing widespread documentation of racial inequalities in education.<sup>169</sup> However, the only federal remedy offered to parents with children in schools designated by such inequities is the option to transfer the child to another school receiving federal funds within their same school district.<sup>170</sup> 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.<sup>171</sup> Hence, the NCLB leaves limited or no options for parents to ensure quality educational opportunities for their children and fails to promote adequate racial inclusion.<sup>172</sup>

*a) The No Child Left Behind Act and the Department of Defense*

48. The NCLB grants substantial privileges to the U.S. Department of Defense (DOD) to collect basic contact and educational information about students ages seventeen and older for the purpose of military recruitment.<sup>173</sup> Under the NCLB, schools with Title I<sup>174</sup> (low-income) students are required to submit lists of students to the DOD or waive entitlement to federal funding.<sup>175</sup> Schools must submit information to the DOD unless a parent writes and signs a letter to circumvent this requirement.<sup>176</sup> Furthermore, schools must also allow DOD representatives access to the school equal to that given to prospective employers and colleges.<sup>177</sup>

49. A DOD recruitment program called Joint Advertising and Market Research Studies (JAMRS) collects student information on ethnic origin and gender.<sup>178</sup> The DOD values ethnicity information because military recruiters target working-class and minority youth who attend third-rate educational institutions in low-income communities that traditionally lack access to postsecondary schools or professional jobs.<sup>179</sup> An investigation found that recruiters frequently and inappropriately used instructional time to intentionally recruit students who were misinformed about the

requirements and realities of enlistment and exceeded prescribed limits on their presence in schools.<sup>180</sup>

*b) English Language Learners*

50. Educational “research on ELL student achievement demonstrates that . . . native language instruction significantly improves academic achievement in English . . . .”<sup>181</sup> Title III of the NCLB provides federal requirements and tools for encouraging English language proficiency, including professional development for teachers and support of language instructional programs.<sup>182</sup> Federal Title III funds, however, do not necessarily support best instructional practices for ELL students, including native language or bilingual instruction.<sup>183</sup> Insufficient funding for the development of best instructional practices is linked to the fact that many states have failed to provide adequate data regarding the number of students eligible for Title III in the states’ public schools. As a result, the federal government has not adequately distributed Title III funds to communities with the most need for this type of programming.<sup>184</sup> On a related note, a number of states have enacted propositions for citizen authorization to completely ban instruction and assignment to bilingual education programs.<sup>185</sup>

51. Except for a limited set of documents concerning special education, evaluation, and placement, federal law does not require state and local educational agencies to provide non-English speaking parents with documents that have been translated from English.<sup>186</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’ participation in their children’s education.<sup>187</sup> The challenges faced by teachers and school administrators include communicating with parents, promoting their participation in school institutions and school-community

activities, and parents' ability to understand student report cards, homework, disciplinary matters, and curriculum choices.<sup>188</sup>

52. In addition, the U.S. government has failed to take affirmative steps to eliminate obstacles that prevent qualified immigrant students from reaching their full potential. In fact, the U.S. government has created federal provisions that discourage states from providing in-state tuition and work authorization to their undocumented immigrant student residents.<sup>189</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>190</sup>

53. Furthermore, the U.S. Executive Branch has opposed legislative efforts<sup>191</sup> 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 U.S. military service.<sup>192</sup> In support of its opposition, the U.S. government has expressed fear that such initiatives would "provide incentives for recurrence of the illegal conduct that has brought the [n]ation to this point" and would "inevitably lead to large-scale document fraud."<sup>193</sup>

### **3. Zero Tolerance Policies**

54. U.S. legislation enacting "zero tolerance" policies has led to an increasing number of in-school arrests, suspensions, and expulsions.<sup>194</sup> Many of the zero tolerance policies currently in place in the U.S. 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.<sup>195</sup> Concurrently, states have passed legislation mandating expulsion for a broad range of offenses in addition to firearm offenses.<sup>196</sup> In general, zero-tolerance student discipline policies have often led to the imposition of overly harsh or disproportionate punishments for relatively minor

infractions. The Arizona State zero-tolerance policy allows schools to modify expulsion requirements on a case-by-case basis.<sup>197</sup> School officials can therefore expel some students for offenses but simultaneously decline to punish other students for the same offenses, ultimately leading to disproportionate treatment.<sup>198</sup>

55. As an alternative to federal zero-tolerance school discipline policies, some school districts and states around the country 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>199</sup> PBS policies have been implemented successfully in schools in Illinois,<sup>200</sup> Maryland,<sup>201</sup> and other states with sharp decreases in suspension rates and office referrals.<sup>202</sup> For example, at Springfield High School in Illinois, after implementing PBS programming, out-of-school suspensions decreased by 38 percent, reclaiming 180 school days that would have been lost to suspensions.<sup>203</sup> In addition, 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.”<sup>204</sup> At another elementary school, Mark Twain Primary School in Kankakee, Illinois, annual “disciplinary referrals decreased dramatically, from 268 before PBS [implementation] compared to 38 [after PBS implementation].”<sup>205</sup> In 2007, the Los Angeles Unified School District, the second largest school district in the country,<sup>206</sup> passed a district-wide PBS policy.<sup>207</sup>

56. Restorative justice practices also promote positive school climates through peer mediation, classroom discussion circles, and family group conferencing to respond to conflict and misbehavior in school.<sup>208</sup> Several school districts and states have implemented restorative practices with positive results. In Minnesota, from 1999 to 2003, the state legislature awarded grant money for the implementation and evaluation of several restorative justice programs.<sup>209</sup> Between 1999 and 2001, “schools in the

evaluation that had base-line data showed a 30 to 50 percent reduction in suspension[s].”<sup>210</sup> In June 2007, Chicago Public Schools (CPS), the third largest public school system in the country,<sup>211</sup> adopted a new student code of conduct based on restorative justice.<sup>212</sup>

### III. RECOMMENDATIONS

57. Both federal and state governments must undertake far-reaching structural reforms to comply with the ICERD and eliminate racial disparities in education. Both the U.S. federal government and state and local governments share the responsibility of implementing and enforcing equal opportunities in public education. As a result, all levels of government have an affirmative obligation to fulfill the requirements of the ICERD. Therefore, we recommend that the U.S. government take the following actions:

58. 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 discriminating on a racial basis.

59. Reject the use of the colorblind doctrine in legislation and government education policies. Use of the colorblind doctrine threatens U.S. obligation under the ICERD to use special measures to promote quality educational opportunities to those historically denied opportunities and to those currently facing de facto barriers to quality educational opportunities. Particularly, the U.S. government should permit school districts to voluntarily promote school integration<sup>213</sup> through the use of carefully tailored race-conscious measures aimed at advancing the educational, democratic, and cultural benefits of racial and ethnic diversity in the classroom.<sup>214</sup>

60. Propose a constitutional amendment and support its ratification by the states to create a fundamental right to education based on human rights standards,<sup>215</sup> and promote the creation and preservation of U.S. laws that

remedy 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.

61. Increase language access services<sup>216</sup> for students and parents. Require 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>217</sup>

62. All levels of government should take affirmative steps to remove barriers to higher education for undocumented students who entered the United States as children, adapted to life in a new country, and excelled. For example, states ought to make immigrant children eligible for in-state tuition rates by permitting states to determine state residency for higher education purposes and to authorize the cancellation of removal and adjustment of status for certain undocumented students.

63. Court decisions regarding racial isolation in various states address inadequate funding in poor districts with high concentrations of minority districts. Given the racial implications of school funding, however, all levels of government should support efforts to ensure adequate education funding as a remedy for the elimination of racial discrimination.<sup>218</sup>

64. All levels of government ought to direct resources to innovative programs designed to teach positive behavior and conflict resolution as a way to improve the school climate. Positive Behavior Support 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 serves as an alternative to more punitive discipline in schools, which has a detrimental effect on a student's academic achievement and social development.<sup>219</sup>

#### IV. CONCLUSION

The CERD Committee conducted a periodic review of the United States during its 2008 spring session in Geneva, Switzerland, where it orally evaluated the testimony of U.S. government representatives and NGOs.<sup>220</sup> Prior to the periodic review and following the submission of this shadow report, the CERD Committee assigned a country rapporteur to lead the review of the United States' periodic report during the seventy-second session of the CERD. In January 2007, the country rapporteur put forth thirty-two questions to the United States in preparation for the review.

Four of those questions directly addressed inequities in education and requested comments on: (1) the consistency of the Supreme Court decisions in the *Seattle/Louisville* cases with the United States' obligation under the ICERD to adopt special measures when circumstances so warrant; (2) measures adopted by the United States to reduce residential segregation—characterized by underresourced schools and high exposure to crime and violence—based on racial and national origin; (3) measures to address racial resegregation of public schools and advance integration and equal educational opportunities in light of the *Seattle/Louisville* cases; and (4) implementation of the NCLB and measures to address the school-to-prison pipeline. The country rapporteur's particular attention to disparities in educational opportunities serves as an indicator that the United States has failed to incorporate the framework of international standards designed to eliminate all forms of discrimination in educational systems.<sup>221</sup>

The U.S. government delegation, which included the acting assistant attorney general for the Civil Rights Division of the DOJ, provided oral and written responses to the country rapporteur's questions. The United States noted that each state party has judgment over "special measures" and those measures may or may not be race based. Under U.S. law, where segregation is the result of intentional segregation, race-conscious special measures may be taken in a manner that is narrowly tailored to remedy the illegal discrimination.<sup>222</sup> The U.S. government accepts workable race-

neutral means such as magnet schools and lotteries to address underlying socioeconomic disparities. Furthermore, the United States declared that individual schools manage matters of student discipline; hence, the concept of a school-to-prison pipeline is a broad characterization lacking sufficient data to prove logically possible.<sup>223</sup>

CERD Committee members posed further questions to the U.S. government on inequalities in education in their oral remarks during the periodic review. The CERD Committee members were concerned about the divergence between the United States and the UN on the obligation regarding special measures under CERD Article 2(2). Many CERD members expressed disappointment in the U.S. government's overly formalistic approach to its obligations under the treaty and recognized severe disparities in housing, education, incarceration rates, and access to health care. Rather than simply discussing its jurisdiction under U.S. law, the U.S. government should articulate a practical plan to comply with the CERD.

The CERD Committee member from Brazil noted that the 1950–60 U.S. civil rights movement inspired CERD Article 2, and now the world is seeing a rollback of such positive measures in the United States. CERD members found it questionable whether race-neutral measures are sufficient to satisfy the ICERD. They emphasized that a long-term race-conscious approach is necessary to education considering the rising U.S. population growth of minorities.<sup>224</sup>

Overall, the attention to these disparities by an international body aims to spur the U.S. government to take appropriate action to remedy current conditions in the United States and serve as a model for the world. Although the U.S. government has continually failed to consider UN recommendations as obligations, it has acknowledged a willingness to take UN recommendations into consideration for public policy.<sup>225</sup> As we continue to evolve into a more global society, international pressure—from

both government institutions and civil society—fuels demand for change in a high profile country such as the United States.

Many NGOs involved in the ICERD shadow reporting process assert the importance of bringing human rights into the scope of our domestic racial justice work in order to move toward federal recognition of positive, socioeconomic rights such as the right to education.<sup>226</sup> Human rights standards encompassed under the ICERD provide the vision and the framework for the elimination of racial discrimination and access to equal opportunity. Implementation of UN observations on U.S. compliance to the ICERD will inevitably involve U.S. political processes. Hence, using the shadow reporting process to hold the government accountable to international standards, to explain the problems of our constituents and the impact of government action and inaction in perpetuating those problems, and to recommend solutions is a valuable tool for NGOs to bring human rights to the U.S. domestic agenda.

#### APPENDIX A

The History of Racial Disparities in Educational Opportunities in the United States:

1. In 1868, the U.S. Congress ratified the Fourteenth Amendment to the U.S. Constitution requiring all states to provide equal protection under law to persons within their jurisdiction.

2. In the decades following, public schools remained legally racially segregated. When the Court decided *Brown*, almost all children in twelve southern states and the District of Columbia attended racially segregated schools mandated by law.<sup>227</sup> Many other schools, primarily in urban areas, were segregated based on other factors, such as residential patterns.<sup>228</sup> It was not until 1954, after a series of legal victories challenging racial segregation in higher education, that the U.S. Supreme Court declared “separate but equal has no place in education.”<sup>229</sup> In that year, the Court unanimously held that segregated public primary and secondary schools were “inherently unequal” and unconstitutional under the equal protection provisions of the Fifth and Fourteenth Amendments.<sup>230</sup>

3. In 1955, in the face of opposition within local communities to desegregate public schools, the U.S. Supreme Court ordered lower federal courts to require desegregation “with all deliberate speed.”<sup>231</sup>

4. In 1964, the U.S. Congress adopted the Civil Rights Act,<sup>232</sup> authorizing the federal government to file school desegregation actions and prohibiting discrimination in programs—including schools—receiving federal financial assistance.

5. In 1968, the U.S. 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>233</sup>

6. In 1971, the U.S. 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>234</sup>

7. Despite these positive steps, in recent decades, the U.S. 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).<sup>235</sup> The Court held that de facto segregation was not unconstitutional because it was not a direct result of a legal mandate to maintain racially separate schools.<sup>236</sup> Thus, because segregated school systems such as New York City's are largely based on housing patterns<sup>237</sup> and are not mandated by the state, courts cannot order those de facto segregated schools to desegregate.

8. In 1973, in *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court held that education is not a "fundamental right" protected by the U.S. Constitution.<sup>238</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>239</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,<sup>240</sup> about 13 percent of the students are Asian, 15 percent are White, 34 percent are Black, and 38 percent are Latino.<sup>241</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>242</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>243</sup>

11. The percentage of Black students attending school districts with a majority percentage of Blacks was on the decline until the mid-1980s.<sup>244</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>245</sup> Overall, residential housing patterns in the United States led to racial isolation and segregating conditions in schools.<sup>246</sup>

12. During the 1990s, the Supreme Court further diminished the mandate of *Brown* in three separate opinions. First, it held that court orders were not intended to “operate in perpetuity,” making it easier for formerly segregated school systems to fulfill their obligations under desegregation decrees.<sup>247</sup> Second, it held that district courts can relinquish their supervision of school desegregation orders in an incremental fashion.<sup>248</sup> Finally, it held that the goal for desegregation plans was to return schools to local control since judicial remedies were intended to be limited in time and extent.<sup>249</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,

[b]efore *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>250</sup>

APPENDIX B

Summary of United States reference to education in its *2007 Periodic Report to the United Nations Committee on the Elimination of Racial Discrimination* (U.S. Report):

*Article 2*<sup>251</sup>

With regard to condemning and eliminating racial discrimination consistent with ICERD Article 2(1)(b) in the education context, the U.S. Report highlights antidiscrimination enforcement by the DOJ's Civil Rights Division. The Division monitors school districts that remain under court desegregation orders by reviewing student assignment, faculty assignment and hiring, transportation policies, extracurricular activities, the availability of equitable facilities, and the distribution of resources. Case reviews may lead to litigation, consent decrees, or out-of-court settlements.

Under Article 2(1)(d), the United States outlines a series of executive orders aimed at prohibiting and ending racial discrimination at all levels of society. Included is the President's Advisory Commission on Educational Excellence for Hispanic Americans, which is designed to improve opportunities for Hispanic Americans to participate in and benefit from federal education programs and to close the achievement gap between Hispanic and White Americans. The President also created a board of advisors on historically black colleges and universities (HBCUs) to strengthen and ensure the viability of these institutions. Similarly, the President issued an executive order on tribal colleges and universities with the purpose of strengthening the institutional capacity, viability, fiscal stability, and physical infrastructure of tribal colleges and universities so they can maintain high standards of educational achievement. The United States Report also offers the NCLB, which is designed to promote high educational standards and accountability in public elementary and secondary schools, as an example of legislation aimed at ending racial disparities in education. Other legislation includes the D.C. Choice

Incentive Program, which provides vouchers for low-income school students in the nation's capital to attend private and religious schools.

The U.S. Report notes that while signatories to the ICERD should take "special and concrete" measures to develop and protect certain racial groups under Article 2(2), Article 1(4) notes that such special measures, while not discrimination, cannot be used to maintain "unequal or separate rights for different racial groups" or "be continued after the objectives for which they were taken have been achieved." Education-related special measures mentioned in the report include: race-conscious educational admission policies and scholarships; direct support for predominantly minority and minority-serving educational institutions; "Gear Up" grants designed to increase the number of low-income students prepared for college; and federal, state, and local efforts to help students overcome language barriers faced by children with limited English proficiency.

The U.S. Report also comments on Supreme Court decisions (*Grutter v. Bollinger*,<sup>252</sup> *Gratz v. Bollinger*,<sup>253</sup> and *Adarand Constructors Inc. v. Peña*<sup>254</sup>) that have limited affirmative action efforts in recent years while still preserving the notion that attaining diverse student bodies through narrowly tailored race-conscious admissions policies is an admirable and constitutional goal. Further, the report describes the debate over "reverse discrimination," explaining that Supreme Court precedents have defined which programs do and do not meet constitutional requirements. The U.S. Report states that it is

the view of the United States that, consistent with its obligations under the Convention, the United States may adopt and implement appropriately formulated special measures consistent with U.S. constitutional and statutory provisions, and that the Convention gives the state party broad discretion to determine both when circumstances warrant the taking of special measures and how, in such cases, it shall fashion such special measures.

This position is reiterated later in the report.

*Article 3*

Article 3 requires state parties to condemn racial segregation and apartheid and to undertake to prevent, prohibit, and eradicate “all practices of this nature” in territories under their jurisdiction. The initial U.S. Report described private institutions’ and the United States federal, state, and local governments’ response to entities (private and governmental) that supported or tolerated apartheid. No such policies or practices are permitted in U.S. territories, and it remains the United States’ position that such practices should be condemned and eradicated wherever they are found.

*Article 5*

Pertaining to Article 5(e)(v), the right to education and training, the U.S. Report comments that de facto racial segregation in education was deemed unconstitutional by the U.S. Supreme Court in its 1954 *Brown v. Board of Education* decision. The U.S. Report asserts that after that decision, and in combination with the Civil Rights Act of 1964, schools became more integrated. As previously noted, the DOJ continues to monitor school districts’ compliance with the *Brown* decision and its progeny.

The U.S. Report explains that the Department of Education’s Office of Civil Rights is the primary federal entity responsible for enforcing the federal antidiscrimination laws in the context of education. The Office of Civil Rights’s purpose and activities are detailed: its primary objective is to promptly investigate complainants’ allegations of discrimination and to determine accurately whether the civil rights laws and regulations it enforces have been violated.

The government lists the NCLB in this section, describing it as a law designed to bring all students up to grade level in reading and math, to close achievement gaps between students of different races and ethnicities within a decade, and to hold schools accountable for results through annual assessments. The U.S. Report provides 2005 data collected from the National Assessment for Educational Progress (NAEP) to illustrate that the

achievement gaps between White and minority students are beginning to narrow, even as student populations become more diverse.

President George W. Bush signed an executive order in 2005 pledging to meet the NCLB's high standards "in a manner that is consistent with tribal traditions, languages and cultures." The U.S. Report further highlighted educational achievement gaps at higher levels of education, noting that Asian Americans were far more likely to earn bachelor's degrees than any other racial group, while Blacks, Hispanics, Native Hawaiians, Pacific Islanders, American Indians, and Alaska Natives lagged far behind White and Asian Americans. However, the overall likelihood of earning a higher degree improved compared to 1990 census numbers. Similarly, gaps exist in the attainment of a high school diploma, though these numbers have also improved compared to 1990 numbers.

The U.S. Report explains that the NCLB requires states to develop and implement English language proficiency standards and to carry out annual assessments of ELL students. The NCLB provides grants to states for ELL supplemental services. Further, the Department of Education's Office of Civil Rights works with school districts on issues related to ELL students, such as developing plans for communicating with parents with limited English proficiency.

#### *Article 7*

Discrimination in education is prohibited by a number of federal statutes, and these laws are primarily implemented and enforced by the DOJ and the Department of Education. The Department of Education provides assistance with voluntary compliance and funding to deal with prejudice and intolerance in some areas (such as in drug and violence prevention programs). The DOJ's Community Relations Service works with schools and communities to defuse racial and ethnic tensions and violence.

The U.S. Report notes that many schools in the country feature human rights education as part of their curricula and that a number of NGOs assist

schools in providing this type of coursework. Institutions of higher learning also include courses on both civil rights and international human rights, with educational centers devoted to the study of these areas.

Training of federal and state officials, law enforcement officers, and others in civil rights and racial and ethnic tolerance is widespread. All federal managers must receive diversity training as part of the No FEAR law enacted in 2002. According to the State Department's report, this type of training has substantially increased since September 11, 2001.

In 2004, to honor the fiftieth anniversary of the *Brown* decision, Congress established an Anniversary Commission, which developed plans and programs to celebrate racial and ethnic integration and to remind all Americans of the meaning and critical importance of the constitutional principle of equality. Federal agencies have also distributed publications and fact sheets to keep discrimination in the consciousness of the American public. The U.S. Report gives as an example in the education context the Department of Education's 2004 publication "Achieving Diversity: Race Neutral Alternatives in American Education."

The U.S. Report also notes that rights enumerated in Article 5 are not explicitly recognized as legally enforceable "rights" under U.S. law, but that federal and state constitutions and law fully comply with the requirements of the ICERD that the rights and activities covered by Article 5 be enjoyed on a nondiscriminatory basis.

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<sup>1</sup> United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 1, ¶ 1, Jan. 4, 1969, 660 U.N.T.S. 195 [hereinafter ICERD].

<sup>2</sup> The US Human Rights Network (USHRN) is a national umbrella organization that brings together civil society entities to promote U.S. accountability to human rights standards. USHRN works towards connecting the U.S. human rights movement with the broader U.S. social justice movement and human rights movements around the world. USHRN is governed by a coordinating committee composed of leading human rights organizers, lawyers, policy analysts, educators, researchers, scholars, and individuals directly affected by human rights violations. More information on USHRN and its ICERD NGO coalition is available at US Human Rights Network (USHRN),

International Convention on All Forms of Racial Discrimination (ICERD), <http://www.ushrnetwork.org/projects/cerd> (last visited Apr. 19, 2008) [hereinafter USHRN].

<sup>3</sup> US HUMAN RIGHTS NETWORK, ICERD SHADOW REPORT 2008 (2008), available at [http://www.ushrnetwork.org/cerd\\_shadow\\_2008](http://www.ushrnetwork.org/cerd_shadow_2008); see Matthew Bigg, *Civic Groups Slam U.S. for “Abysmal” Record on Race*, RUETERS NEWSWIRE, Dec. 10, 2007, available at <http://www.reuters.com/article/topNews/idUSN1037707620071210>.

<sup>4</sup> The UN General Assembly adopted and opened ICERD for signature and ratification on December 21, 1965 with Resolution 2106 (XX). ICERD, *supra* note 1. The opening paragraph comments on the alarmed manifestation of racial discrimination by governmental policies such as apartheid, segregation, or separation and resolves to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations. *Id.* Furthermore, Article 3 of ICERD states that state parties particularly condemn racial discrimination and apartheid and undertake to prevent, prohibit, and eradicate all practices of this nature in territories under their jurisdiction. *Id.* In General Recommendation XIX, the CERD Committee notes that the reference to apartheid in Article 3 of the Convention may have been directed exclusively to South Africa, but the article as adopted prohibits all forms of racial segregation in all countries. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation 19: The Prevention, Prohibition, and Eradication of Racial Segregation and Apartheid*, at 140, U.N. Doc. A/50/18 (Aug. 18, 1995), available at <http://www1.umn.edu/humanrts/gencomm/genrexix.htm> [hereinafter *General Recommendation 19*]. Furthermore, the Committee notes the obligation to eradicate all practices of this nature including trends that give rise to racial segregation. *Id.*

<sup>5</sup> The Secretary-General, *Compilation of Guidelines on the Form and Content of Reports To Be Submitted by States Parties to the International Human Rights Treaties*, ch. 4, ¶ 1, at 32, delivered to the General Assembly, U.N. Doc. HRI/GEN/2/Rev.3 (May 8, 2006), available at <http://www.unhcr.ch/tbs/doc.nsf> (follow “Basic Reference Document” hyperlink; then follow “E” hyperlink for U.N. document no. HRI/GEN/2/Rev.3) [hereinafter *Compilation of Guidelines*].

<sup>6</sup> *Id.*; AM. CIVIL LIBERTIES UNION FOUND., FREQUENTLY ASKED QUESTIONS: CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION 2, [http://www.aclunc.org/issues/racial\\_justice/asset\\_upload\\_file567\\_6311.pdf](http://www.aclunc.org/issues/racial_justice/asset_upload_file567_6311.pdf) (last visited Mar. 31, 2008) [hereinafter FREQUENTLY ASKED QUESTIONS].

<sup>7</sup> See U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Concluding Observations of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008), available at <http://www1.umn.edu/humanrts/CERD/ConcludingComments2008.pdf>; *id.*

<sup>8</sup> Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination—Working Methods, The Committee’s Relations with National Human Rights Institutions and Non-Governmental Organizations, <http://www2.ohchr.org/english/bodies/cerd/workingmethods.htm#B>.

<sup>9</sup> See LIBERTY & JUSTICE FOR ALL, RIGHTS WORKING GROUP, Q & A: INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION & SHADOW REPORTS 1–2 (2007), available at [http://65.36.162.162/files/QA\\_CERD.pdf](http://65.36.162.162/files/QA_CERD.pdf).

<sup>10</sup> ICERD, *supra* note 1, art. 1, ¶ 4, art. 2, ¶ 2; *see also* FREQUENTLY ASKED QUESTIONS, *supra* note 6.

<sup>11</sup> *See* USHRN, *supra* note 2.

<sup>12</sup> Organizations' endorsements: African American Institute for Policy Studies & Planning; American Friends Service Committee; Center for Community Alternatives; Center for Human Rights and Humanitarian Law, American University Washington College of Law; Communities United Against Police Brutality, Minneapolis, MN; Developing Government Accountability to the People—Chicago; Global Rights; Human Rights Advocates; Leitner Center for International Law & Justice, International Law & the Constitution Initiative, Fordham Law School; The Advocates for Human Rights; NAACP Legal Defense and Educational Fund, Inc; National Economic and Social Rights Initiative (NESRI); National Lawyers Guild; New York University School of Law, Education Law and Policy Society; Poverty & Race Research Action Council; Program in International Human Rights Law, Indiana University School of Law; Parents in Action for Leadership and Human Rights; Southern Poverty Law Center; United Church of Christ Justice and Witness Ministries; Women's Institute for Leadership Development for Human Rights.

<sup>13</sup> Individuals' Endorsements: George E. Edwards, Program Director and Professor in International Human Rights Law, Indiana University School of Law; Ann Fagan Ginger, Meiklejohn Civil Liberties Institute; Sylvanna Falcón, Assistant Professor, Connecticut College; Norm Fruchter, Director, Community Involvement Program, Annenberg Institute for School Reform; Molly Hunter, David Sciarra, and Ellen Boylan, Education Justice, Education Law Center (ELC); Ellen Johnson, Legal Aid Services of Oregon; Hope Lewis, Professor, Northeastern University School of Law (attribution only); Tonya McClary, Louisiana Capital Assistance Center; David Weissbrodt, Professor of Law University of Minnesota; Marsha Weissman, Executive Director, Center for Community Alternatives.

<sup>14</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). In 1954, after a series of legal victories challenging racial segregation in higher education, the U.S. Supreme Court declared “separate but equal has no place” in education. *Id.* at 495. 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. *Id.* *See infra* Appendix A.

<sup>15</sup> *See generally* GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), available at [http://www.civilrightsproject.ucla.edu/research/deseg/reversals\\_reseg\\_need.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf) [hereinafter HISTORIC REVERSALS].

<sup>16</sup> The term “English Language Learner” (ELL), as used throughout, indicates a person who is in the process of acquiring English and has a first language other than English.

<sup>17</sup> Roslyn Arlin Michelson, *When Are Racial Disparities in Education the Result of Racial Discrimination? A Social Science Perspective*, 105 TCHRS. C. REC. 1052, 1070–73 (2003).

<sup>18</sup> *See id.* at 1062, 1069–73.

<sup>19</sup> *Id.* at 1063–64, 1069–70.

<sup>20</sup> *See id.* at 1064–65.

<sup>21</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?*, 105 TCHRS. C. REC. 1119, 1128, 1135 (2003).

<sup>22</sup> Michelson, *supra* note 17, at 1073.

<sup>23</sup> ICERD, *supra* note 1 (emphasis added).

<sup>24</sup> *Id.* art. 2, ¶ 1(c).

<sup>25</sup> *Id.* art. 2, ¶ 1(e).

<sup>26</sup> See The Civil Rights Project/*Proyecto Derechos Civiles*, <http://www.civilrightsproject.ucla.edu/>.

<sup>27</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271–72 (1978); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 470–72 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 200–02 (1995); *Gratz v. Bollinger*, 539 U.S. 244, 245–47 (2003); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 127 S. Ct. 2738, 2741–44 (2007).

<sup>28</sup> Brief for the United States as Amicus Curiae Supporting Petitioner, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 127 S. Ct. 2738 (2007) (No. 05-908), available at <http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0908.mer.ami.pdf> [hereinafter Brief for the United States, *PICS*]; Brief for the United States as Amicus Curiae Supporting Petitioner, *Meredith v. Jefferson County Board of Educ.*, 127 S. Ct. 2738 (2007) (No. 05-915), available at <http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2005-0915.mer.ami.pdf> [hereinafter Brief for the United States, *Meredith*].

<sup>29</sup> *PICS*, 127 S. Ct. at 2751–61.

<sup>30</sup> ICERD, *supra* note 1.

<sup>31</sup> Article 5 of ICERD, apart from requiring a guarantee that the exercise of human rights shall be free from racial discrimination, does not in and of itself create civil, political, economic, social, or cultural rights, but assumes the existence and recognition of these rights. ICERD, *supra* note 1, art. 5. The Convention obliges states to prohibit and eliminate racial discrimination in the enjoyment of such human rights. U.N. Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation 20: The Guarantee of Human Rights Free from Racial Discrimination*, ¶ 393, annex VIII, at 124, U.N. Doc. A/51/18 (Mar. 8, 1996). See U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America*, ¶ 398, U.N. Doc. A/56/18 (Aug. 14, 2001), available at <http://www1.umn.edu/humanrts/country/usa2001.html> [hereinafter *Conclusions and Recommendations*].

<sup>32</sup> ICERD, *supra* note 1, art. 5, ¶ 1(e)(v) (emphasis added). 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], G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); Articles 28 and 29 of the United Nations Convention on the Rights of the Child, Sept. 2, 1990, 1577 U.N.T.S. 3; and Article 13 of the United Nations International Covenant on Economic, Social, and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

<sup>33</sup> ICERD, *supra* note 1, art. 1, ¶ 4 (emphasis added).

<sup>34</sup> *Id.* art. 2, ¶ 1(c), (e), art. 2, ¶ 2 (emphasis added).

<sup>35</sup> *Conclusions and Recommendations*, *supra* note 31.

<sup>36</sup> *Id.* ¶ 399.

<sup>37</sup> *General Recommendation 19*, *supra* note 4, ¶ 3.

<sup>38</sup> U.N. Comm. on the Elimination of Racial Discrimination [CERD], *General Recommendation 30: Discrimination Against Non-Citizens*, ¶ 29, U.N. Doc. CERD/C/64/Misc.11/rev.3 (Jan. 1, 2004) [hereinafter *General Recommendation 30*].

<sup>39</sup> *See infra* Appendix A.

<sup>40</sup> GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 2 (2004), available at <http://www.civilrightsproject.ucla.edu/research/reseg04/brown50.pdf> [hereinafter *BROWN AT 50*].

<sup>41</sup> The average White child refers to the average of all the White K–12 students in the United States.

<sup>42</sup> GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION* 24 (2006), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Racial\\_Transformation.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf).

<sup>43</sup> *Id.* at 8.

<sup>44</sup> THE HUMAN RIGHTS PROJECT, URBAN JUSTICE CTR., *RACE REALITIES IN NEW YORK CITY* 19 (2007) [hereinafter *RACE REALITIES*].

<sup>45</sup> ERICA FRANKENBERG ET AL., THE CIVIL RIGHTS PROJECT AT HARVARD UNIV., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 28 (2003), available at <http://www.civilrightsproject.ucla.edu/research/reseg03/AreWeLosingtheDream.pdf>.

<sup>46</sup> *See generally* ROBERT L. LINN & KEVIN G. WELNER, *RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES* (2007) (summarizing and analyzing social science research related to race-conscious student assignment policies referenced in the amicus curiae briefs submitted to the U.S. Supreme Court in the *PICS* case).

<sup>47</sup> Michelson, *supra* note 17, at 1061.

<sup>48</sup> Brief of 553 Social Scientists as Amici Curiae in Support of Respondents at 3, app. 31, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (*PICS*), 127 S. Ct. 2738 (2007) (Nos. 05-908 & 05-915), available at [http://www.civilrightsproject.ucla.edu/research/deseg/amicus\\_parents\\_v\\_seattle.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/amicus_parents_v_seattle.pdf) [hereinafter Brief of 553 Social Scientists] (noting that teacher inexperience correlates with lower student performance).

<sup>49</sup> *Id.* at app. 33 (describing gaps in class size, facilities, per-pupil spending, and curricular and interpersonal counseling).

<sup>50</sup> *Id.* at 11.

<sup>51</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b) (2006).

<sup>52</sup> NAT'L CTR FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., *NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, READING* 14 fig.11, 37 tbl.A-4 (2005), available at <http://nces.ed.gov/nationsreportcard/pdf/main2005/2006451.pdf> [hereinafter NAT'L CTR FOR EDUC. STATISTICS, *THE NATION'S REPORT CARD*]. The U.S. 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.

<sup>53</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, Blacks, and Hispanics. See Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, 31 EDUC. RESEARCHER 3 (2002), available at [http://www.aera.net/uploadedFiles/Journals\\_and\\_Publications/Journals/Educational\\_Researcher/3101/3101\\_Lee.pdf](http://www.aera.net/uploadedFiles/Journals_and_Publications/Journals/Educational_Researcher/3101/3101_Lee.pdf).

<sup>54</sup> Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION, May 21, 2007, at 11, 13, available at <http://www.thenation.com/doc/20070521/darling-hammond>.

<sup>55</sup> See Ronald F. Ferguson, *Opportunity Now: Raising Achievement in Spite of Structural Impediments, Afterword to THE OPPORTUNITY GAP: ACHIEVEMENT AND INEQUALITY IN EDUCATION* 321, 321–24 (Carol DeShano da Silva et al. eds., 2007). The opportunity gap involves social and educational inequities outside of the school that help contribute to the achievement gap. See *id.*

<sup>56</sup> See S. EDUC. FOUND., *A NEW MAJORITY: LOW INCOME STUDENTS IN THE SOUTH'S PUBLIC SCHOOLS* 11 (2007), available at <http://www.sefatl.org/pdf/A%20New%20Majority%20Report-Final.pdf>.

<sup>57</sup> See *id.*

<sup>58</sup> *Id.*

<sup>59</sup> MINN. MEETING, THE MINNEAPOLIS FOUND., ALL KIDS LEARN, A MINNESOTA MEETING SERIES ON K–12 EDUCATION: MINNESOTA'S ACADEMIC ACHIEVEMENT GAP 1 (2004), available at <http://www.minneapolisfoundation.org/2010/PDFsPublications/AllKidsLearnfactsheetGap.pdf>.

<sup>60</sup> MINN. MINORITY EDUC. PARTNERSHIP (MMEP), 2006 STATE OF STUDENTS OF COLOR 9 (2006), available at [http://www.mmep.net/sites/aaa55a49-007c-4af4-923a-711964af19e7/uploads/MMEP-SOSOC\\_2006.pdf](http://www.mmep.net/sites/aaa55a49-007c-4af4-923a-711964af19e7/uploads/MMEP-SOSOC_2006.pdf).

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

<sup>62</sup> *Id.*

<sup>63</sup> See NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 52, at 14 fig.11, 16 fig. 12.

<sup>64</sup> EDUC. TRUST, INC., EDUCATION WATCH: 2006 STATE NAEP TABLES 3, 17 (2006), available at <http://www2.edtrust.org/edtrust/summaries2006/2006StateNAEPTables.pdf>.

<sup>65</sup> *Id.* at 10, 24. Only 37 percent of African American eighth graders in Minnesota performed at or above the *Basic* achievement level as compared to 85 percent of White, non-Hispanic students in 2005. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: THE NATION'S REPORT CARD, MATHEMATICS 43 tbl.A-9 (2005), available at <http://165.224.221.98/nationsreportcard/pdf/main2005/2006453.pdf>.

<sup>66</sup> MINN. MEETING, *supra* note 59, at 1.

<sup>67</sup> *Id.* at 2.

<sup>68</sup> See David Peterson, *State's Schools Rank Second in Racial Change: The Pew Center Found a Shift away from Almost Exclusively White Schools, Along with More Schools with Nearly All Minority Students*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Aug. 31, 2007, at 1B, available at <http://www.startribune.com/1592/story/1393414.html>.

<sup>69</sup> *Id.*

<sup>70</sup> MINN. MEETING, *supra* note 59, at 2.

<sup>71</sup> RANDY CAPPS ET AL., THE URBAN INST., THE NEW DEMOGRAPHY OF AMERICA'S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT 17–18 (2005), available at [http://www.urban.org/UploadedPDF/311230\\_new\\_demography.pdf](http://www.urban.org/UploadedPDF/311230_new_demography.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Impact of NCLB on English Language Learners: Hearing Before the Subcomm. on Early Childhood, Elementary and Secondary Education of the H. Comm. on Education and Labor*, 110th Cong. (2007) (statement of Peter Zamora, Washington, D.C. Regional Counsel, MALDEF, Co-Chair, Hispanic Education Coalition), available at <http://edlabor.house.gov/testimony/032307PeterZamoratestimony.pdf>. NEED to find pincite and official title in official source.

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

<sup>75</sup> See Clearinghouse for English Language Acquisition, Frequently Asked Questions, <http://www.ncela.gwu.edu/expert/faq/08leps.html> (last visited Mar. 19, 2008) (citing state-reported data regarding ELL enrollment).

<sup>76</sup> COMM. ON EDUC., N.Y. CITY COUNCIL, BRIEFING PAPER AND REPORT OF THE HUMAN SERVICES DIVISION: A LOCAL LAW TO AMEND THE ADMINISTRATIVE CODE OF THE CITY OF NEW YORK, IN RELATION TO THE PROVISION OF LANGUAGE ASSISTANCE SERVICES (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 Human Rights Project, Urban Justice Ctr., *Compliance with Article 5: Economic Social and Cultural Rights Under the International Convention on the Elimination of Racial Discrimination*, Aug. 3, 2001, available at <http://www.urbanjustice.org/pdf/publications/humanrights/shadowreportHRP.pdf>.

<sup>77</sup> COMM. ON EDUC., *supra* note 76.

<sup>78</sup> Melissa Lazarin, *Improving Assessment and Accountability for English Language Learners in the No Child Left Behind Act*, at 2 (Nat'l Council of La Raza, Issue Brief No. 16, 2006), available at <http://www.titlei.org/reports/nclrib16.pdf>.

<sup>79</sup> CAPPS ET AL., *supra* note 71, at 2.

<sup>80</sup> *Id.*

<sup>81</sup> We exchange the term “Hispanic” with “Latino” in this chapter. “Latino” refers to persons of Latin American origin, while “Hispanic” insinuates origin from Spain. See Patricia Gándara & Christina González, *Why We Like to Call Ourselves Latinas*, 4 J. HISP. HIGHER EDUC. 392, 396 (2005), available at <http://jhh.sagepub.com/cgi/content/abstract/4/4/392>. U.S. census data, however, used “Hispanic” as one of the terms 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 *id.*

<sup>82</sup> Lazarin, *supra* note 78, at 1–2.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2007, at 26 (2007), available at <http://nces.ed.gov/pubs2007/2007064.pdf>; FRANKENBERG ET AL., *supra* note 45, at 4, 32.

<sup>85</sup> FRANKENBERG ET AL., *supra* note 45, at 28, 44.

<sup>86</sup> *Id.* at 44.

<sup>87</sup> BROWN AT 50, *supra* note 40, at 28.

<sup>88</sup> JENNIFER CHEESEMAN DAY & AMIE JAMIESON, U.S. CENSUS BUREAU, SCHOOL ENROLLMENT: 2000, at 6 fig.5 (2003), *available at* <http://www.census.gov/prod/2003pubs/c2kbr-26.pdf>.

<sup>89</sup> Richard Fry, *High School Dropout Rates for Latino Youth*, at 2 (Educ. Res. Info. Ctr. [ERIC] Clearinghouse on Urban Educ., ERIC Digest No. 193, 2003), *available at* [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/1b/99/83.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/99/83.pdf).

<sup>90</sup> See PEW HISPANIC CTR., LATINO TEENS STAYING IN HIGH SCHOOL: A CHALLENGE FOR ALL GENERATIONS 1–2 (2004), *available at* <http://pewhispanic.org/files/factsheets/7.3.pdf>; *see also* Adriana D. Kohler & Melissa Lazarín, *Hispanic Education in the United States*, at 9 (Nat'l Council of La Raza, Statistical Brief No. 8, 2006).

<sup>91</sup> See AM. CIVIL LIBERTIES UNION FOUND., RACE & ETHNICITY IN AMERICA: TURNING A BLIND EYE TO INJUSTICE 139 (2007), *available at* [http://www.aclu.org/pdfs/humanrights/cerd\\_full\\_report.pdf](http://www.aclu.org/pdfs/humanrights/cerd_full_report.pdf) [hereinafter RACE & ETHNICITY IN AMERICA]; Christopher B. Swanson, *The New Math on Graduation Rates*, EDUC. WEEK, July 28, 2004, at 40, *available at* <http://www.urban.org/publications/1000675.html>.

<sup>92</sup> See RACE & ETHNICITY IN AMERICA, *supra* note 91, at 139–40, 147–49.

<sup>93</sup> Massachusetts Department of Elementary & Secondary Education, Cohort 2006 Graduation Rates—State Results, <http://www.doe.mass.edu/infoservices/reports/gradrates/06state.html> (last visited Mar. 31, 2008).

<sup>94</sup> RACE & ETHNICITY IN AMERICA, *supra* note 91, at 139–40.

<sup>95</sup> *See id.* at 139–41.

<sup>96</sup> See Roberto G. Gonzales, *Wasted Talent and Broken Dreams: The Lost Potential of Undocumented Students*, IMMIGR. POL'Y IN FOCUS, Oct. 2007, at 1, 3, *available at* <http://www.immigrationpolicy.org/images/File/infocus/Wasted%20Talent%20and%20Broken%20Dreams.pdf>.

<sup>97</sup> *Id.* at 3.

<sup>98</sup> *Amount of Schooling Affects Earning Potential*, USATODAY.COM, July 18, 2002, <http://www.usatoday.com/news/nation/census/2002-07-18-degree-dollars.htm>; *see Getting a Degree Pays Off with Higher Salary*, S.F. CHRON., Aug. 18, 2007, at C-1, *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>99</sup> *See* Gonzales, *supra* note 96, at 3.

<sup>100</sup> *Id.* at 8.

<sup>101</sup> *Id.*

<sup>102</sup> *See* Brief of 553 Social Scientists, *supra* note 48, at app. 37–40 (noting reduced test scores and graduation rates for students in minority segregated schools, independent of the race of the student).

<sup>103</sup> *See* NAACP LEGAL DEF. & EDUC. FUND, INC., DISMANTLING THE SCHOOL-TO-PRISON PIPELINE 4–5, 9 (2007), *available at* <http://www.naacpldf.org/content/pdf/>

pipeline/Dismantling\_the\_School\_to\_Prison\_Pipeline.pdf; see also Brief of 553 Social Scientists, *supra* note 48, at apps. 18–19.

<sup>104</sup> NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 103, at 7.

<sup>105</sup> The Human Rights Project, *supra* note 76, para. 138, at 43; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CIVIL RIGHTS DATA COLLECTION 2004: NATIONAL AND STATE PROJECTIONS (2004), <http://vistademo.beyond2020.com/ocr2004rv30/xls/2004Projected.html> (follow “National Total” hyperlink).

<sup>106</sup> RUSSELL J. SKIBA ET AL., IND. EDUC. POLICY CTR., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 4 (2000), available at <http://www.indiana.edu/~safeschl/cod.pdf>.

<sup>107</sup> See NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 103, at 5 (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>108</sup> ELIZABETH SULLIVAN, NAT'L ECON. AND SOC. RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY & LOS ANGELES PUBLIC SCHOOLS 9 (Catherine Albisa et al. eds., 2007), available at [http://www.nesri.org/programs/Deprived\\_of\\_Dignity\\_07.pdf](http://www.nesri.org/programs/Deprived_of_Dignity_07.pdf); see also Great Schools, Los Angeles Unified School District, [http://www.greatschools.net/cgi-bin/ca/district\\_profile/286/#students](http://www.greatschools.net/cgi-bin/ca/district_profile/286/#students) (last visited Mar. 31, 2008).

<sup>109</sup> SULLIVAN, *supra* note 108, at 29.

<sup>110</sup> Scott E. Carrell & Susan A. Carrell, *Do Lower Student to Counselor Ratios Reduce School Disciplinary Problems?*, CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y, Jan. 2006, Article 11, at 1, 2.

<sup>111</sup> NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 103, at 2–4.

<sup>112</sup> Working Group on Juvenile Justice, US Human Rights Network, *Juvenile Justice: Children in Conflict with the Law: Juvenile Justice & the U.S. Failure to Comply with Obligations Under the Convention for the Elimination of All Forms of Racial Discrimination*, in ICERD SHADOW REPORT 2008, ch. 08, § 2, para. 1, at 3 (2008), available at [http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/8\\_Juvenile%20Justice.pdf](http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/8_Juvenile%20Justice.pdf).

<sup>113</sup> *Id.* § 2, paras. 1–4, at 3–5.

<sup>114</sup> Stop the Schoolhouse to Jailhouse Track, Chicago: Fast Facts, <http://www.stopschools.tojails.org/chicago/overview/fastfacts.asp> (last visited Apr. 23, 2008); see also Maureen Kelleher, *Suspensions Up in CPS*, CATALYST CHI., Dec. 2004, at 8.

<sup>115</sup> Johanna Wald & Daniel J. Losen, *Defining and Redirecting a School-to-Prison Pipeline*, *New Directions for Youth Development*, Autumn (Fall) 2003, at 9, 9–11, available at [http://media.wiley.com/product\\_data/excerpt/74/07879722/0787972274.pdf](http://media.wiley.com/product_data/excerpt/74/07879722/0787972274.pdf).

<sup>116</sup> NAACP LEGAL DEF. & EDUC. FUND, INC., *supra* note 103, at 2.

<sup>117</sup> SULLIVAN, *supra* note 108, at ii, 33.

<sup>118</sup> See *id.* at 2, 13–15, 31.

<sup>119</sup> Press Release, Stanford Univ. News Serv., School Tracking Harms Millions, Sociologist Finds (Mar. 2, 1994), available at <http://news-service.stanford.edu/pr/94/940302Arc4396.html>.

<sup>120</sup> LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW, ONE CHILD AT A TIME: A PARENT'S GUIDE TO ADVOCATING FOR EQUAL EDUCATIONAL OPPORTUNITIES, ARIZONA 3 (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>121</sup> *Id.* at 3–4.

<sup>122</sup> *Id.* at 7.

<sup>123</sup> Robert Leitman, Katherine Binns & Akhil Unni, *Uninformed Decisions: A Survey of Children and Parents About Math and Science*, NACME RES. LETTER (Nat'l Action Council for Minorities in Eng'g, New York, N.Y.), June 1995, at 1, 2, 6; Mary Stein et al., *College Prep 101*, PRINCIPAL LEADERSHIP, Sept. 2005, at 22, 23–24, available at <http://www2.edtrust.org/NR/rdonlyres/9025DE7B-81FD-4D05-98FF-9157DD1F9045/0/College101.pdf>.

<sup>124</sup> See Valerie E. Lee & Ruth B. Ekstrom, *Student Access to Guidance Counseling in High School*, 24 AM. EDUC. RES. J. 287, 296–99 (1987).

<sup>125</sup> See 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. REC. 1369, 1372–73 (2002).

<sup>126</sup> See *id.* at 1382–84.

<sup>127</sup> ELAINE ALLENSWORTH, CONSORTIUM ON CHI. SCH. RESEARCH, ENDING SOCIAL PROMOTION IN CHICAGO: DROPOUT RATES IN CHICAGO AFTER IMPLEMENTATION OF EIGHTH-GRADE PROMOTION GATE 1 (2004), available at <http://ccsr.uchicago.edu/publications/p69.pdf>.

<sup>128</sup> Donald R. Moore, Designs for Change, Studies Show that Chicago Grade Retention Program is a Failure—Comment on Two Studies by the Consortium on the Chicago School Research, "Ending Social Promotion in Chicago: The Effects of Retention" and "Ending Social Promotion: Dropout Rates in Chicago After Implementation of the Eighth-Grade Promotion Gate" 2 (2004) (unpublished comment), available at <http://www.designsforchange.org/pdfs/RetentionComment04.pdf>.

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

<sup>130</sup> See *id.*

<sup>131</sup> Districts in the top quartile nationally for serving the highest concentrations of students in poverty receive \$938 less per pupil in state and local funding than the districts in the bottom quartile of poverty; high-minority districts receive \$877 less per pupil in state and local funds than low-poverty districts. CARMEN ARROYO, THE EDUC. TRUST, THE FUNDING GAP 6–7 (2008).

<sup>132</sup> See Michael A. Rebell, *Adequacy Litigations: A New Path to Equity*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATION POLICY 291, 292, 295–97 (Janice Petrovich & Amy Stuart Wells eds., 2005).

<sup>133</sup> Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003).

<sup>134</sup> *Id.* For more New York City specific information, please refer to the The Human Rights Project, *supra* note 76.

<sup>135</sup> S. EDUC. FOUND., *supra* note 56, at 12.

<sup>136</sup> *Id.* at 9, 12.

<sup>137</sup> See *id.* at 10.

<sup>138</sup> *Id.* at 6, 8.

<sup>139</sup> Jeffery J. Wallace, *Ideology Vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 714–15 (2003). In his law review article, Wallace illustrates the legal concepts of colorblindness and the social ramifications as he explains, “[t]he 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 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.” *Id.*

<sup>140</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 (2006). Nelson addresses de jure versus de facto segregation in court cases and discusses the exceptions apparent in *PICS*, explaining:

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 *PICS* and *Meredith*.

*Id.* at 319 (footnotes omitted).

<sup>141</sup> David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 945 (1989). Strauss outlines the basic principals of the intent test vs. the effects test saying that “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.” *Id.*

<sup>142</sup> See *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189 (1973).

<sup>143</sup> See *id.*

<sup>144</sup> See The Human Rights Project, *supra* note 76, para. 104, at 34.

<sup>145</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1 (PICS)*, 127 S. Ct. 2738 (2007).

<sup>146</sup> Brief for the United States, *PICS*, *supra* note 28; Brief for the United States, *Meredith*, *supra* note 28.

<sup>147</sup> See NAACP LEGAL DEF. & EDUC. FUND, INC., SUMMARY OF AMICUS BRIEFS FILED IN SUPPORT OF RESPONDENTS: PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT (05-908) & MEREDITH V. JEFFERSON COUNTY BOARD OF EDUCATION (05-915), 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>148</sup> Brief of 533 Social Scientists, *supra* note 48, at apps. 41–54.

<sup>149</sup> *PICS*, 127 S. Ct. 2738; see also Linda Greenhouse, *Justices, Voting 5-4, Limit the Use of Race in Integration Plans*, N.Y. TIMES, June 29, 2007, at A1.

<sup>150</sup> *PICS*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

<sup>151</sup> See NAACP LEGAL DEF. & EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT/PROYECTO DERECHOS CIVILES, STILL LOOKING TO THE FUTURE: VOLUNTARY K-12 SCHOOL INTEGRATION (2008), available at [http://www.civilrightsproject.ucla.edu/research/deseg/Still\\_Looking\\_to\\_the%20Future\\_Integration\\_Manual.pdf](http://www.civilrightsproject.ucla.edu/research/deseg/Still_Looking_to_the%20Future_Integration_Manual.pdf).

<sup>152</sup> Plaintiffs filed a motion for relief from final judgment in *Comfort v. Lynn Sch. Comm.*, 546 U.S. 1061 (2005), which the Supreme Court denied, thus upholding the constitutionality of the school district's voluntary plan for school improvement and the elimination of racial isolation and allowing students to transfer to non-neighborhood schools so long as it did not exacerbate racial isolation in a particular school.

<sup>153</sup> HISTORIC REVERSALS, *supra* note 15, at 3.

<sup>154</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>155</sup> *PICS*, 127 S. Ct. at 2792 (Kennedy, J., concurring).

<sup>156</sup> See ICERD, *supra* note 1, art. 1, ¶ 4.

<sup>157</sup> See Brief for the United States, *PICS*, *supra* note 28; Brief for the United States, *Meredith*, *supra* note 28.

<sup>158</sup> See *PICS*, 127 S. Ct. at 2802 (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 from the constitutionally forbidden use of 'race-conscious' criteria." *Id.* at 2810.

<sup>159</sup> See *id.* at 2768–69.

<sup>160</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6311(b) (2006).

<sup>161</sup> See U.S. DEP'T OF STATE, PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION CONCERNING THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶¶ 93–97 (2007).

<sup>162</sup> 20 U.S.C. § 6301.

<sup>163</sup> U.S. DEP'T OF STATE, *supra* note 161, ¶ 96.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; 20 U.S.C. § 6311(a)(2)(B).

<sup>166</sup> *Darling-Hammond*, *supra* note 54, at 11, 13.

<sup>167</sup> *Id.* at 1, 13, 16.

<sup>168</sup> Amelia Parker, *Racial Disparities in U.S. Public Education and International Human Rights Standards: Holding the U.S. Accountable to CERD*, HUMAN RIGHTS BRIEF, Spring 2007, at 27, 31, available at <http://www.wcl.american.edu/hrbrief/14/3parker.pdf?rd=1> [hereinafter *Holding the U.S. Accountable to CERD*].

<sup>169</sup> 20 U.S.C. § 6311(b)(2).

<sup>170</sup> *Holding the U.S. Accountable to CERD*, *supra* note 168.

<sup>171</sup> STEPHANIE STULLICH ET AL., POLICY AND PROGRAM STUDIES SERV., OFFICE OF PLANNING, EVALUATION AND POLICY DEV., 1 NATIONAL ASSESSMENT OF TITLE I FINAL REPORT, IMPLEMENTATION 61 (2007), available at [http://ies.ed.gov/ncee/pdf/20084012\\_rev.pdf](http://ies.ed.gov/ncee/pdf/20084012_rev.pdf).

<sup>172</sup> James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 964 (2004), available at <http://www.law.nyu.edu/JOURNALS/LAWREVIEW/ISSUES/vol79/no3/NYU303.pdf>.

<sup>173</sup> Press Release, Am. Civil Liberties Union Found., NYCLU Lawsuit Challenges DOD's Unauthorized Military Recruiting of High School Students (Apr. 24, 2006), available at <http://www.aclu.org/studentsrights/privacy/25310prs20060424.html>.

<sup>174</sup> Title I is a set of government programs to improve the learning of children from low-income families. The U.S. Department of Education provides Title I funds to states to give to school districts based on the number of children from low-income families in each district.

<sup>175</sup> See Elementary and Secondary Education Act of 1965, 20 U.S.C. § 7908(a)(1) (2006); U.S. DEP'T OF EDUC., POLICY GUIDANCE—ACCESS TO HIGH SCHOOL STUDENTS AND INFORMATION ON STUDENTS BY MILITARY RECRUITERS 1 (2002), <http://www.ed.gov/policy/gen/guid/fpco/pdf/ht100902b.pdf>.

<sup>176</sup> 20 U.S.C. § 7908(a)(2); U.S. DEP'T OF EDUC., *supra* note 175, at 2.

<sup>177</sup> Press Release, N.Y. Civil Liberties Union, NYCLU Launches Campaign to Protect Students' Rights from Abusive Military Recruitment Tactics (Sept. 22, 2005), available at <http://milrec.nyclu.org/archive/00000004.html>.

<sup>178</sup> Press Release, N.Y. Civil Liberties Union, To Settle NYCLU Lawsuit, Defense Department Reforms Student Military Recruiting Database (Jan. 9, 2007), available at <http://milrec.nyclu.org/archive/00000016.html>.

<sup>179</sup> Karen Houppert, *Who's Next?*, THE NATION, Sept. 12, 2005, at 15, 15–20, available at <http://www.thenation.com/doc/20050912/houppert>; see also SCOTT STRINGER & N.Y. CIVIL LIBERTIES UNION, WE WANT YOU(TH): CONFRONTING UNREGULATED MILITARY RECRUITMENT IN NEW YORK CITY PUBLIC SCHOOLS 8 (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).

<sup>180</sup> See STRINGER & N.Y. CIVIL LIBERTIES UNION, *supra* note 179, at 16–23; see also Houppert, *supra* note 179, at 15–20.

<sup>181</sup> Peter Zamora, *Policies To Help English Language Learners*, in CITIZEN'S COMM'N ON CIVIL RIGHTS, EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 79, 80 (William L. Taylor et al. eds., 2007), available at [http://www.americanprogress.org/issues/2007/03/pdf/civil\\_rights\\_report.pdf](http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf).

<sup>182</sup> *Id.* at 81; see also No Child Left Behind Act of 2001, 20 U.S.C. §§ 6311–6312 (2006).

<sup>183</sup> Elsa Roberts Auerbach, *Reexamining English Only in the ESL Classroom*, 27 TESOL Q. 9, 9 (1993).

<sup>184</sup> The U.S. Department of Education distributed “Title III funds for fiscal years 2005 and 2006 using data on school-age ELL children generated by the American Community Survey (ACS).” Zamora, *supra* note 181, at 82. ACS collected this data through samplings of self-reported survey responses. Its figures for ELL differed significantly from the figures reported by states; its figures also fluctuated significantly from year to year. *Id.* at 82–83. As a result, funds were distributed erratically—Arkansas received 82 percent more in 2006 than 2005, while the District of Columbia received nearly 37 percent less. *Id.* at 83.

<sup>185</sup> In June 1998, in a referendum vote, California voters approved Proposition 227, a mandate for English-only instruction in California public school classrooms. Sara

