

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

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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).¹ In December 2007, a coalition of nongovernmental organizations (NGOs) and academic institutions within the US Human Rights Network² 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.³ 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.⁴ 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.⁵ 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.⁶ Following these hearings, the CERD Committee publicly released its *Concluding Observations* to the U.S. government, including the CERD Committee's Concerns and Recommendations.⁷

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.⁸ Thus, NGOs generally submit “shadow reports” to correct oversights and highlight a more realistic picture of systematic racial disparity in the United States.⁹

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.¹⁰ Hundreds of organizations and academic institutions were involved with the 2007–2008 ICERD shadow reporting process,¹¹ and a number of other organizations¹² and individuals¹³ 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*,¹⁴ yet the United States has failed to provide equal educational opportunities to all students. Public schools today are more segregated than they were in 1970,¹⁵ 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.¹⁶

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;¹⁷ (2) school assignment policies that promote segregation;¹⁸ (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;¹⁹ (5) failure to counteract differences in parental income and educational attainment—factors that impact a child’s development and which often correlate with race;²⁰ and (6) lower teacher and administrator expectations of minority students.²¹ 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.²²

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”²³ 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,”²⁴ 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.”²⁵

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.²⁶ 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.²⁷

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.²⁸ 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.²⁹ This judicial decision directly contradicts the intent of ICERD Article 1 and Article 2.³⁰

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:³¹

(v) *The right to education and training*[.]³²

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"³³

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.³⁴

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”³⁵ 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].”³⁶

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.³⁷

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”³⁸

*B. The Current State of Disparities in Educational Opportunities in the United States*³⁹

14. Racial isolation and school segregation are increasing in the United States.⁴⁰ Today, the average White child⁴¹ attends a school where 77 percent of the other students are White.⁴² The average Black student attends a high school where only 30 percent of the other students are White.⁴³ 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.⁴⁴ Nationally, 76 percent of Latinos attend predominantly minority schools.⁴⁵

15. This increased segregation is problematic for a number of reasons.⁴⁶ Racially segregated minority schools tend to have dramatically fewer resources⁴⁷ and employ less experienced teachers.⁴⁸ These disparate educational resources lead to larger class sizes, substandard facilities, lower per pupil spending, and fewer counseling services.⁴⁹ 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.⁵⁰

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.⁵¹ 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.⁵² 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.⁵³

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.”⁵⁴ 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.⁵⁵ Nonetheless, low-income students tend not to be as ready for primary education.⁵⁶ Low-income students are more likely to repeat a grade and less likely to graduate from high school than wealthier peers.⁵⁷ As a whole, low-income students perform worse than higher-income students on state and national exams measuring educational progress.⁵⁸

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.⁵⁹ As the enrollment of minority students increases throughout Minnesota schools, overall student enrollment is decreasing in Minnesota’s public school system.⁶⁰ Since 1989–90, enrollment of minority students has increased by 135 percent, thus becoming a larger portion of total enrollment in Minnesota schools.⁶¹ “In 2004–05, 21 percent of Minnesota K–12 students identified themselves as [minority students], compared to just over 9 percent in 1989–90.”⁶²

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

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

are White.⁶⁷ 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.⁶⁸ 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]."⁶⁹

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.⁷⁰ 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.⁷¹ 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.⁷² Therefore, the stereotype of ELL students as foreign-born immigrants is inaccurate.⁷³ 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.⁷⁴

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

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]."⁷⁸ Nationwide, 53 percent of ELL students are concentrated

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

a) Latino Students⁸¹

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.⁸²

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

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.⁸⁸ During the same year, the dropout rate for non-Latino students was nearly two thirds lower—7 percent.⁸⁹ The school dropout rate in secondary schools is more pronounced in large inner-cities, among foreign-born Latino, and among ELL students.⁹⁰

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.⁹¹ 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.⁹²

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.⁹³ Nonetheless, distortion of student graduation and dropout rates has enabled schools and districts to artificially inflate test scores and misrepresent student outcomes.⁹⁴ 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.⁹⁵

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.⁹⁶ Due to ineligibility for work authorization or financial aid, only 5 to 10 percent of these students obtain access to higher education.⁹⁷

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."⁹⁸ 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.”⁹⁹ 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.¹⁰⁰ 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.”¹⁰¹

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.¹⁰² Disparities such as historical lack of access to educational and economic opportunities create stigmas that lower student expectations and discourage academic engagement.¹⁰³ Such disparities also contribute to the disproportionate suspension and expulsion of minority students.¹⁰⁴ 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.¹⁰⁵ 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.¹⁰⁶ 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.¹⁰⁷ For example, in the Los Angeles public school system, where the student population is 91 percent minority and 75 percent low income,¹⁰⁸ there is only one guidance counselor for