OPEN SOCIETY JUSTICE INITIATIVE

Submission to the Universal Periodic Review:
Germany

16th session of the UPR, 22 April to 3 May 2013

I. EXECUTIVE SUMMARY

The Open Society Justice Initiative presents this submission in preparation for the Universal Periodic Review of Germany. The submission focuses on Germany's failure to guarantee the right to education for all "migrant children"[1] without discrimination.

In 2009, Germany accepted several recommendations in the context of the UPR: "Take fully into account the relevant recommendations of CERD aimed at ensuring the integration of non-German children into the regular school system (Italy); pay special attention to ensure that children of migrant background are not denied academic opportunities based primarily on their acquired proficiency in the German language (Canada); continue to implement the national integration plan to increase access to education for children of migrant workers (Saudi Arabia)."[2] While some steps have been taken to implement these recommendations, discrimination against migrant children continues to undermine their right to education.

Several primary and secondary schools in Berlin are segregating migrant children in separate classes from native-born German students[3] on the putative grounds that their German language skills are inadequate for regular classes. These children commonly speak German as a second language,[4] but even where their language skills are inadequate for regular classes, they are not given sufficient additional support to enable them to access those regular classes. The separate classes to which they are assigned provide vastly inferior education to regular classes. The discriminatory practices stigmatize migrant students, undermine their potential to integrate and participate fully in German society, and violate Germany's obligations to prohibit discrimination in education under the International Covenant on Economic, Social and Cultural Rights Articles 2 and 13, the International Covenant on Civil and Political Rights Articles 2 and 26, the Convention on the Elimination of All Forms of Racial Discrimination Article 5(e)(v), and the Convention on the Rights of the Child Articles 2 and 28.

The Open Society Justice Initiative promotes human rights and builds legal capacity through litigation, advocacy, research, and technical assistance. For the past three years, the Justice Initiative has worked in Germany to address discrimination in education through advocacy and litigation. Within the past three months, the Justice Initiative filed a case challenging the segregation of migrant students in a Berlin *gymnasium*, and is conducting research with respect to discrimination in other primary schools with a view to possible litigation and/or advocacy.

II. RECOMMENDATIONS

The Justice Initiative encourages members of the UPR Working Group to make the following recommendations to Germany, that it:

- Amend the General (federal) Antidiscrimination Law (*Algemeines Gleichbehandlungsgesetz*) to include protection against discrimination in public education.
- Amend regional (Länd) level school legislation to
  - Explicitly prohibit separate schooling of ethnic minorities and protect against discrimination
  - Integrate non-native German speakers into regular classes and provide additional instruction and support

- Lift immunity from suit for secondary schools that fail to support especially non-native German students.
- Institute a full statistical anonymous recording of the ethnic composition of schools and classes.
- Introduce mandatory teacher training in non-discrimination and intercultural teaching.
- Create an independent oversight body (separate from existing authorities), where parents can take complaints, advocate for their rights and those of their children, and receive support.
- Carry out a Berlin-wide study assessing the experience and school track record of migrant children in the wake of recent reforms and in view of current practices which classify students on the basis of German as their second language, and assign students to particular classes at each school on that basis.

III. FACTUAL BACKGROUND

A. Disproportionate numbers of migrant children in the lowest-level schools

1. Questions regarding discrimination in the education of migrant children have persisted in Germany for several years. Germany's responses to concerns raised by the UPR and other UN human rights mechanisms have been inadequate to address the problem. While this submission focuses largely on discrimination against migrant children in primary and secondary schools in Berlin, the problems described herein have national resonance. What happens in Berlin schools has nationwide significance because Berlin is both a Länd and Germany's largest city. Berlin often serves as an example for the relationship between the entire country and its migrant population. Education in Germany is decentralized and each federal entity (Länd) is responsible for ensuring its delivery within its territory.

2. In German schools, children are subject to compulsory education from the age of six. (Optional Kindergarten, or nursery school education, is provided for children from ages 3-6). Primary education lasts for four years in most Länder (six in some, such as Berlin), and, upon the completion of primary education, students are typically placed into one of three types of secondary school—*Gymnasium* (the most elite level, which prepares children for academic work at a higher level), *Realschule* (the intermediate level, which provides a broad, general education), or *Hauptschule* (the lowest level, which prepares children for work or vocational training).[5] In some cases, the latter two are integrated into a *Gesamtschule*. Pupils must complete a total of 12 (via *Gymnasium*) or 13 years (via the layered secondary school) of education before they can access higher education.

3. According to the German yearly federal education report for 2010 (*Bildungsbericht*), children with a migrant background continue to be more likely to attend the lowest level *Hauptschule* or *Gesamtschule*. On average, they attend a Hauptschule twice as often as other children, even within the same socio-economic class.[6]

4. Reliable statistical evidence of the educational achievements of migrant children in the German school system is difficult to obtain and assess for two reasons: (a) Wide variation among the student population exists across ethno-national origins, and (b) the process of gathering statistics is being revised to record pupils' "migratory background" instead of their nationality,[7] because naturalized and native-born students seem to perform better academically than do students from the same nationality with migrant backgrounds. Nonetheless, the lack of precision in gathering meaningful statistics over time makes it difficult to craft effective interventions.

B. Inadequate improvements in eliminating discrimination in education

5. Although there have been some improvements to the elimination of discrimination against migrant children in education in recent years, they have been inadequate to meet Germany's obligations. While at least one report from educational researchers suggests that admission to *Gymnasium* in Berlin for migrant children is no longer discriminatory,[8] these children continue to be underrepresented at the *Gymnasium* level. This is in part related to a new practice, based on the most recent reform to the Berlin School Law and effective as of 2011-2012 school year, whereby students who are not performing at a certain level after the first year are dismissed from *Gymnasium*. Many schools that want to accommodate native or ethnic German parents' wishes are reportedly reluctant to accept pupils from migrant backgrounds. Parents belonging to the majority native German population often resist placing their children in schools with pupils from migrant and/or ethnic minority groups because they perceive these children as less capable of performing well in class.[9] This prejudice, in turn, results in lower teacher expectations and support, worse grading, and school recommendations directing migrant children to lower level schools.[10]

6. In the past two years, the Regional Government has introduced some reforms in Berlin in an effort to address concerns raised by the Special Rapporteurs on Education and Racism (see para. 12 below) as well as the recommendations from the UPR.[11] The *Berlin School Law*, amended in 2010, contains a provision dictating that children whose native languages are German and non-German must be educated together, with exceptions for special learning groups aimed at German language learning support. The amended law also contains a non-discrimination provision, as does the German Constitution in Article 3. However, the German Federal anti-discrimination law (*Algemeines Gleichbehandlungsgesetz*) does not cover public education.[12]

7. The *Berlin School Law* reform involved the redesign of the three-level school system into two levels, with more flexibility, theoretically, for students to switch between streams and schools. The reforms were intended in part to provide students from traditionally disadvantaged backgrounds (including migrant students) greater mobility within the secondary school system of Berlin and to encourage ethnic diversity among student populations. The former *Hauptschulen* (lowest level) and *Realschulen* (intermediate level) are now contained within a new integrated *Sekundarschule*.

8. Under the amended *Berlin School Law*, the elite *Gymnasiums*, which remain a separate track and are the primary gateway to higher education, are no longer allowed to handpick all their students. A *Gymnasium* may pick 60% of its students while 30% of its places will be allocated by lottery and are open to all pupils regardless of their performance in primary school. The remaining 10% of places are reserved for children whose siblings are already enrolled at the school.[13]

IV. GERMANY'S INTERNATIONAL LEGAL OBLIGATIONS

9. The International Covenant on Eonomic, Social and Cultural Rights (ICESCR) emphasises in Article 13(1) one of the important objecives of education, namely that "education shall be directed to the full development of the human personality and the sense of its dignity." The aims towards which education should be directed have been further elaborated on in the Convention on the Rights of the Child (CRC) Article 29(1).

10. Germany is obligated by ICESCR Article 13(2)(b) to make "secondary education in its different forms, … generally available and accessible to all by every appropriate means." Under CRC Article 28(1)(b), Germany has a responsibility to "encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need." The Committee on Economic, Social and Cultural Rights has clarified that the phrase "generally available" in Article 13(2)(b) means that secondary education is not dependent on a student's apparent capacity or ability and that throughout the territory it must be provided on the same basis to all.[14]

11. Further, ICESCR Article 13(2)(c) and CRC Article 28(1)(c) requires Germany to "make higher education accessible to all on the basis of capacity by every appropriate means". The Committee on Economic, Social and Cultural Rights has underlined that the capacity of individuals "should be assessed by reference to all their relevant expertise and experience."[15]

12. All of the above provisions must be implemented without discrimination, including on the grounds of race, language, religion, and national origin, as required by ICESCR Article 2(2) and CRC Article 2(1). The prohibition against discrimination in education is not subject to progressive realization. It has immediate and full effect.[16] The Committee on Economic, Social and Cultural Rights has emphasised that States must ensure that education at all levels is "accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds."[17]

13. The Convention on the Elimination of all Forms of Racial Discrimination (CERD) Article 5(e)(v) also imposes a duty on Germany to ensure the right to education without distinction as to race, color, or national or ethnic origin. ICCPR Article 26 provides effective protection against discrimination in law or in fact in any field regulated and protected by public authorities.[18] The Human Rights Committee has stated that "in fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26."[19] The same interpretation should apply to education, which is fundamental to the enjoyment of a number of Covenant rights, as recognized by the Committee in its General Comment on Article 24 on the rights of the child.[20]

14. Treaty bodies have criticized racial discrimination and segregation in education in their reviews of numerous State parties' compliance with their legal obligations. The Committee on the Elimination of Racial Discrimination has expressed concern that "the de facto segregation of educational establishments, particularly primary and secondary schools, remains a problem in the State party and that measures such as the establishment of the Mixed Schools Knowledge Centre and the role assigned to the Education Inspectorate in promoting integration have proved inadequate."[21] The Committee urged the State party to increase its efforts to prevent and abolish segregation in education, including through the review of admissions policies which may have the effect of creating or exacerbating this phenomenon and other disincentives to such segregation.

15. The Human Rights Committee has expressed concern at "de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated."[22] The Human Rights Committee was troubled that the State party, despite measures adopted, had not succeeded in eliminating racial discrimination creating wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students.[23] It recalled the obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. The Human Rights Committee has called on States to ensure that "any differentiation within education is aimed at securing attendance in non-segregated schools and classes."[24] It has also stated that the placement in schools should be "carried out on an individual basis and … [should] not [be] influenced by the child's ethnic group."[25]

16. The Committee on the Rights of the Child has expressed serious concern at continuous discrimination suffered by children of foreign origin, including in the area of education.[26] The Committee called upon the State party to collect disaggregated data to enable effective monitoring of de facto discrimination and to adopt and implement a comprehensive strategy addressing all forms of discrimination, including multiple forms of discrimination against all groups of children in vulnerable situations and combating discriminatory societal attitudes, in particular towards children living in poverty, children with disabilities and children of foreign origin. Further, the CRC called for strengthened efforts to reduce performance disparity, giving special attention to promoting education of children of foreign origin. The Committee on the Elimination of Racial Discrimination has also called for "measures to strengthen participation of children of immigrant backgrounds in upper secondary education."[27]

V. GERMANY'S CONTINUED FAILURE TO MEET ITS OBLIGATIONS

A. A history of discrimination in education in recent years

17. Following his visit to Germany in 2006, the Special Rapporteur on the Right to Education expressed concern that this extremely stratified school system led to a negative correlation between educational achievement and a student's migrant background.[28] In 2010, the Special Rapporteur on Racism, likewise, noted that "the three-tiered system of German education, with early selection into separate levels of education, creates a bias against students whose mother tongue is not German. The Special Rapporteur believes that the overrepresentation of minority students in the lower school stratum is an indication of the problems in the three-tiered mode."[29]

18. The CERD Committee, during its examination of Germany in 2008, also expressed concern "that children of immigrants are overrepresented in special schools for "under-achievers" (*Sonderschulen*), mainly on account of their lack of adequate German language skills, and underrepresented in secondary and tertiary education." It recommended that Germany take "effective measures to ensure the integration of children of non-citizens in the regular school system, and reconsider the problem of transfer of such children to *Sonderschulen* including the criteria for any such transfer, as well as improving current arrangements to support the German language skills of such children."[30]

B. Clear indications of continuing discrimination

19. The recent reforms described above may have eliminated the practice of early and irrevocable streaming of children of migrant background into lower level schools in Berlin on paper, but significant evidence of continuing discrimination exists. Furthermore, it remains to be seen to what extent migrant children will be able to effectively access the higher school levels. This will largely depend on whether steps are taken to address negative attitudes, official discouragement, segregation, and lack of effective educational support.

20. Signs exist of an increasingly hostile attitude within the educational system towards migrants and in particular, those affiliated with Islam, mainly people of Turkish, Kurdish, and Arabic descent.[31] In response to the more flexible admission rules, both primary and secondary schools, and especially *Gymnasiums*, have started to create separate classes for native-born German and migrant students, with predictably negative consequences for the latter. In Berlin, at the *Gymnasium* level in school year 2011-2012, approximately 850[32] 7th grade[33] pupils failed the first test-year and were relegated to special classes ("failed students classes") in secondary schools (*integrierte Sekundarschulen*). The majority of those relegated pupils are migrant students,[34] or as the German authorities indicate, pupils "whose native language is not German (*nichtdeutsche Herkunftsprache, or NdH*)." Only a few weeks into the school year, many of those relegated students had been informed by their teachers that they were unlikely to pass the test. Despite these warnings, school administrators or teachers made insufficient efforts to accommodate special needs or provide special support, leaving these children with virtually no chance of success in their further educational careers.[35] While these schools, in principle, allow students to obtain a higher education diploma (*Abitur*), albeit it after a longer period of study, students of migrant origin, in reality, are rarely able to do so, and experience stigma and disadvantage as a result.[36]

21. Examples of class segregation in primary and secondary schools in Berlin abound, and include

    - Separate elite classes comprised entirely of native-born German children, created by school directors to attract ethnic German parents, with preferential conditions, better teachers, and additional learning projects.[37]

    - Classes in which the highest level of German language amongst pupils is guaranteed. The groups of students comprising these classes are formed at the Kindergarten level, and school administrators and teachers "guarantee" the groups to the ethnic German parents before enrollment, demonstrating the collusion to keep classes closed.[38]

    - Separate classes based on parents' choice of religious instruction[39] or second foreign language instruction. This segregation is justified as necessary for internal organizational school purposes.

C. Discrimination in education against migrant children creates long-term harm

22. The German practice of placing migrant children in separate classes seriously undermines the purported aim of integrating pupils into mainstream education. Separate classes for such children cannot be characterized as positive measures intended to support them in accessing the same educational opportunities as their native German-speaking peers, especially with regard to higher education. Evidence demonstrates that migrant children in these separate classes are not, in fact, provided sufficient additional educational support to effectively address any potential special educational or linguistic needs.

23. The assignment of migrant students to separate classes based on language skills also constitutes indirect discrimination. There is no evidence to demonstrate a correlation between non-native language skills and academic capacity. Rather, native language is being used as a proxy to separate children based on ethnicity or nationality and to provide children of migrant backgrounds with distinctly different—and in fact, inferior—educational opportunities. Such segregation constitutes unlawful differentiation under international law.

24. The affected minorities suffer harm as a result of 1) access to weaker educational programs than enjoyed by native or ethnic German children; 2) the inability to access equal higher education opportunities as a result of their lower "tracking"; 3) stigmatization because of race, ethnicity, or nationality. There is no legitimate justification for segregating migrant children into separate classes from their ethnic German peers. As a practice in violation of ICESCR Articles 2(2) and 13, CERD Article 5(e)(v), CRC Articles 2 and 28, and ICCPR Articles 2 and 26, the wholesale discrimination in education against migrant children should cease immediately, and each child in Germany should gain access to educational opportunities based on ability, not ethnicity, nationality, or religion.

[1] For the purpose of this submission, the term "migrant child" or "child of migrant background" is used to denote a child who was either born outside of Germany, or whose parent(s) or grandparent(s) was born outside of Germany, *and* who is a member

of the Turkish, Kurdish, or Arabic ethnic minority groups. Although migrants come to Germany from many countries, some migrant children may speak German as their first language. The fact that they may also speak another language—frequently described as their "home language" or "language of family origin"—is used often as a pretext to discriminate against them on the basis of their ethnic minority status.

[2] Human Rights Council, Report of the Working Group on the Universal Periodic Review, Germany, A/HRC/11/15, 4 March 2009.

[3] This submission utilizes the phrase "native-born German children" to indicate those who were born in Germany or whose parents or grandparents were born in Germany, who are German nationals, and whose first language is German. The vast majority of these children are ethnically German and white.

[4] Although migrants come to Germany from many countries, some migrant children may speak German as their first language. The fact that they may also speak another language—frequently described as their "home language" or "language of family origin"—is used often as a pretext to discriminate against them on the basis of their ethnic minority status.

[5] In Berlin now only *Gymnasium* and *Integrierte Sekundarschule* (integrated school), see below.

[6] See Authoring Group Educational Reporting, *Education in Germany 2010*, p. 14, available at http://www.bildungsbericht.de/daten2010/summary10.pdf.

[7] Sachverständigenrat deutscher Stiftungen für Integration und Migration (SVR)(2010): Einwanderungsgesellschaft 2010. Jahresgutachten 2010 mit Integrationsbarometer. Berlin.

[8] WZBrief Bildung, 12.5.2012: Migrantenkinder auf dem Weg zum Abitur: Wie kommen die Übergangsempfehlungen nach der Grundschule zustande?

[9] See, e.g., Schule mit Migrationshintergrund, Maren Wilmes, Jens Schneider und Maurice Crul, Sind die Kinder türkischer Einwanderer in anderen Ländern klüger als in Deutschland?Bildungsverläufe in Deutschland und im europäischen Vergleich: Ergebnisse der TIES-Studie, pp. 30-46.

[10] See BGPE Discussion Paper No. 99, Are Immigrants and Girls Graded Worse? Results of a Matching Approach, David Kiss, May 2011.

[11] The Berlin School Law was amended in 2010 (Schulgesetz für Berlin, 8.6.2010), the relevant reforms effectively entered into force in the school year 2011-2012.

[12] See Federal Anti-Discrimination Agency, Guide to the General Equal Treatment Act: "The AGG provides protection in the field of education to the extent that contracts under private law are involved. If discriminatory behavior is exhibited at a private language school, then the protection offered by the General Equal Treatment Act applies directly. In the case of education in the state system, the school laws of the individual Länder apply."

[13] So-called "hardship cases."

[14] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant), para. 13, 8 December 1999.

[15] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant), para. 19, 8 December 1999.

[16] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant), para. 31, 8 December 1999.

[17] Committee on Economic, Social and Cultural Rights, General Comment No. 13 (Twenty-first session, 1999) The right to education (article 13 of the Covenant), para. 6(b)(i), 8 December 1999.

[18] Human Rights Committee, General Comment No. 18: Non-discrimination, 11 October 1989, para. 12.

[19] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para. 8.

[20] Human Rights Committee, General Comment No. 17: Rights of the child (Art. 24), para. 3.

[21] Concluding observations of the Committee on the Elimination of Racial Discrimination Netherlands, CERD/C/NLD/CO/17-18, 25 March 2010.

[22] Human Rights Committee, Concluding Observations, United States of America, CCPR/C/USA/CO/3, para. 23, September 2006.

[23] Human Rights Committee, Concluding Observations, United States of America, CCPR/C/USA/CO/3, para. 23, September 2006.

[24] Human Rights Committee, Concluding Observations, Slovakia, CCPR/CO/78/SVK, 2003.

[25] Human Rights Committee, Concluding Observations, Slovakia, CCPR/C/SVK/CO/3, 2011.

[26] CRC Concluding observations: Belgium, CRC/C/BEL/CO/3-4, 18 June 2010.

[27] Concluding observations of the Committee on the Elimination of Racial Discrimination, Norway, CERD/C/NOR/CO/18, 19 October 2006.

[28] A/HRC/4/29/Add.3.

[29] A/HRC/14/43/Add.2.

[30] Concluding observations of the Committee on the Elimination of Racial Discrimination Netherlands, CERD/C/NLD/CO/17-18, 25 March 2010.

[31] See e.g., Muslims in Berlin At Home in Europe Project, Open Society Institute, 2010, pp 76-80; Haben Migranten die gleichen Chancen an der Schule?, Sonderauswertung einer Allensbach-Umfrage, 10.3.2010, Bertelsmann Foundation, THE ECONOMIST: Immigration in Germany, Multikulturell? Wir? How a fresh debate on multiculturalism in Germany clashes with the country's need for more immigrants, 11 November 2010 at http://www.economist.com/node/17469563.
[32] Out of 13.773 in all of Berlin, of which 3.714 (27% were of migrant origin). See http://www.berlin.de/imperia/md/content/sen-bildung/bildungsstatistik/blickpunkt_schule_2011_12.pdf?start&ts=1329729903&file=blickpunkt_schule_2011_12.pdf.
[33] The equivalent of 1st grade of secondary school.
[34] See, e.g., Susanne Vieth-Entus, 1000 Berliner Siebtklässler nicht geeignet fürs Gymnasium, at http://www.tagesspiegel.de/berlin/probejahr-am-gymnasium-1000-berliner-siebtklaessler-nicht-geeignet-fuers-gymnasium/6180492.html.
[35] See Institut: Initiativen zur Sprachförderung von Migrantenkindern bisher nahezu wirkungslos, at http://www.finanznachrichten.de/nachrichten-2012-01/22437847-institut-initiativen-zur-sprachfoerderung-von-migrantenkindern-bisher-nahezu-wirkungslos-003.htm, and also: Gewerkschaft Erziehung und Wissenschaft Landesverband Berlin (Hrsg.) Dossier zur Tagung der GEW Berlin: "Tag der Sprachförderung - Zweitsprachförderung im sozialen Kontext". http://www.gew-berlin.de/documents_public/Dossier_zur_DaZ-FachtagungNov10-6.pdf; Ungenutzte Potenziale Zur Lage der Integration in Deutschland, Berlin-Institut für Bevölkerung und Entwicklung 2009.
[36] See, e.g., Maurice Crul and Jens Schneider, Children of Turkish Immigrants in Germany and the Netherlands, at http://www.helmholtz-berlin.de/media/media/forschung/energie/si_photovoltaik/themes/publikationen/dissertation_jens_schneider.pdf.
[37] Lenau Grondschule, at http://w w w .tagesspiegel.de/berlin/grundschule-in-kreuzberg-tuerkische-eltern-protestieren-gegen-trennung-nach-herkunft/7012242.html.
[38] Gustaf-Falke Grundschule Erfolgsmodell oder Elitenbildung? Eine Deutsch-Modellklasse in Berlin-Wedding, http://www.3sat.de/page/?source=/kulturzeit/themen/147760/index.html.
[39] Askanisches Gymnasium: Gymnasiasten nach Religion getrennt, http://www.wz-newsline.de/home/politik/gymnasiasten-nach-religion-getrennt-1.159520.