

# United States of America

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### On the Right to Education

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#### Endorsed by:

**Organizations:** Center for Community Alternatives; Education Rights Center; Human Rights Caucus, Northeastern University School of Law; International Training Centre for Human Rights and Peace Teaching (CIFEDHOP); Justice Now; LatinoJustice PRLDEF; The Leadership Conference on Civil and Human Rights; Lawyers' Committee for Civil Rights Under Law; Metro Atlanta Task Force for the Homeless; National Disability Rights Network; National Economic & Social Rights Initiative; National Lawyers Guild; New York Law School Racial Justice Project; Public Interest Projects; Society of American Law Teachers—SALT; South Bay Communities Alliance; South Coastal Counties Legal Services; Three Treaties Task Force of the Social Justice Center of Marin; Youth Justice Coalition

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1. In this submission on the right to education in the United States, our organizations provide information under sections B, C, and D, as stipulated in the General Guidelines for the Preparation of Information under the Universal Periodic Review. This report is submitted by The Poverty and Race Research Action Council, Charles Hamilton Houston Institute for Race and Justice, Kirwan Institute for the Study of Race and Ethnicity, Center for Civil Rights at the University of North Carolina School Of Law, and Meiklejohn Civil Liberties Institute, and has also been endorsed by numerous organizations and individuals as listed in Appendix A.

## **I. EXECUTIVE SUMMARY**

2. This report focuses on the right to education in the United States and the current state of implementation of human rights commitments in this area. While the federal government has recently taken certain steps to improve its human rights compliance in this area, serious concerns remain. This report focuses primarily on (a) school segregation and diversity, (b) school discipline and (c) the achievement gap. The U.S. has a long history of segregation and unequal education. While historically steps have been taken to improve the diversity of and equal access to education, the U.S. continues to struggle with providing equal education to all, as guaranteed by the Universal Declaration of Human Rights, Article 26. Racial minorities, children from low income families, and students with disabilities continue to be placed in lower performing schools, faced with the increased likelihood of disciplinary measures taken against them, and high drop out rates.

## **II. CURRENT NORMATIVE AND INSTITUTIONAL FRAMEWORK FOR THE PROMOTION AND PROTECTION OF HUMAN RIGHTS**

3. The U.S. has ratified the following Human Rights Treaties which include protections for the right to education:

- *The Universal Declaration of Human Rights (Article 26)*
- *The Convention on the Elimination of all Forms of Racial Discrimination (Article 5)*

The U.S. has signed, but not ratified, the following treaties which also contain provisions protecting the right to education:

- *The Convention on the Elimination of all Forms of Discrimination against Women (Article 10)*
- *The Convention on the Rights of Persons with Disabilities (Article 24)*
- *The International Covenant on Economic, Social and Cultural Rights (Article 13)*
- *The Convention on the Rights of the Child (Article 28)*

4. The United States is a member of the U.N. Human Rights Council and as such has made certain human rights commitments in order to obtain membership. The U.S. lacks a nationally coordinated infrastructure for the promotion and protection of human rights. The U.S. Commission on Civil Rights has a limited jurisdiction and does not consider U.S. human rights treaty obligations or commitments when conducting its work. However, the Commission should consider human rights treaty obligations under the U.N. human rights treaties that the U.S. has agreed to.<sup>1</sup> On Jan. 20, 2010, Harold Koh, Legal Advisor of the State Department, released a memo for state governors, stating that the U.S. is bound to implement treaty

provisions on “federal, state, insular and local” levels, and that the U.N. treaty committees insist that the treaty texts be publicized around the country.<sup>2</sup>

5. In addition to lacking a coordinated infrastructure for the promotion and protection of human rights, the U.S. has, through judicial opinion, curtailed the ability of individuals to challenge disparate outcomes and enforce anti-discrimination standards in domestic courts and tribunals, a right which is protected under the Convention on the Elimination of all Forms of Racial Discrimination (“CERD”) Article 6. Title VI of the Civil Rights Act of 1964 offered the promise of aiding the government’s efforts to eliminate racial discrimination, as the Act prohibits, “on the ground of race, color, or national origin, [that any person] be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>3</sup> Despite the enactment of Title VI, subsequent judicial interpretation of the Equal Protection Clause and Title VI has significantly limited the ability of citizens and the executive branch of government to eliminate racial discrimination in education.<sup>4</sup> Currently, proof of discriminatory animus (intent) is required for a claim of discrimination to be brought in court under the Title VI statute. This limitation prevents the U.S. from meeting its obligations as a state party to CERD, including its commitment to prohibit not only racially discriminatory intent, but also racially discriminatory impact in governmental action, government supported programs, and government policies affecting education.

### **III. ACHIEVEMENTS, BEST PRACTICES, CHALLENGES AND CONSTRAINTS**

#### **A. Segregated, Unequal Education in the U.S.**

6. The U.S. has a long history of segregated and unequal education. In *Brown v. Board of Education*, the U.S. Supreme Court declared “separate but equal has no place in education” and subsequently unanimously held that segregated public primary and secondary schools are “inherently unequal” and unconstitutional.<sup>5</sup> Nevertheless, since the early 1990s, courts and government agencies have abandoned aggressive desegregation efforts and have allowed many successful integration plans to be dissolved. This trend has been exacerbated by the failure of the federal courts to address metropolitan interdistrict segregation. As a result, public schools today are more segregated than they were in 1970.<sup>6</sup> While American schools will soon be half nonwhite, the school system is becoming increasingly segregated as many schools in metropolitan areas are resegregating.<sup>7</sup> In the 2006-2007 school year, approximately 40 percent of Black and Latino students attended schools that were 90-100 percent minority, while whites remained the most isolated students in the system.<sup>8</sup> Additionally, more than nine in ten segregated minority schools are also schools of high poverty.<sup>9</sup>

7. The students in these racially and socio-economically isolated schools suffer from disparate educational opportunities including fewer resources and a lack of qualified, effective teachers. Disparate educational resources lead to larger class sizes, substandard facilities, lower per-pupil spending, and fewer counseling services.<sup>10</sup> For the most part, segregated nonwhite schools suffer from lower test scores, lower graduation rates, and overall lower achievement records than their counterparts. They also suffer from more U.S. military recruiters using more invasive tactics among students under 18 years of age,<sup>11</sup> a practice specifically condemned by

the Committee on the Rights of the Child.<sup>12</sup> Conversely, evidence shows that students from racially isolated schools who are given the opportunity to attend more diverse schools tend to have more success in the school system, including higher graduation rates and a greater likelihood of attending college.<sup>13</sup>

8. Following the review by the United Nations Committee on the Elimination of Racial Discrimination, the Committee issued its concluding observations in February, 2008. The CERD Committee noted its concern about “the persistence of *de facto* racial segregation in public schools.” The Committee recommended that the U.S. “undertake further studies to identify the underlying causes of *de facto* segregation and racial inequalities in education, with a view to elaborating effective strategies aimed at promoting school de-segregation and providing equal educational opportunity in integrated settings for all students. . . . [The Committee further recommended that the U.S.] take all appropriate measures—including the enactment of legislation—to restore the possibility for school districts to voluntarily promote school integration through the use of carefully tailored special measures adopted in accordance to article 2, paragraph 2 of the [CERD].” Despite these recommendations, no action has been taken to rectify the persistence of racial segregation in the public school system.

9. The CERD Committee took particular issue with the U.S. Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County Board of Education* that overturned voluntary integration plans in two cities that used the race of individual students as a factor in student assignment.<sup>14</sup> Ultimately, the *Seattle/Louisville* decision undermines traditional U.S. jurisprudence and mechanisms to desegregate public schools. The new restrictions on race conscious measures in school assignment<sup>15</sup> limit the application of special measures under CERD Articles 1 and 2 to promote adequate racial inclusion. Under CERD, 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>16</sup> 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 overseeing these voluntary community-generated efforts at the local level, the U.S. government at that time condemned such programs’ efforts.<sup>17</sup> While the *Parents Involved* decision leaves in place a variety of race conscious methods to achieve integration, it has taken away a crucial tool traditionally used by districts seeking to promote school integration.

10. The United States’ failure to strongly address racial and economic school segregation goes beyond the actions of its court system. It includes the lack of adequate funding for integrated magnet schools, the absence of integration incentives or requirements for federally and state funded charter schools, the lack of federal mandates or incentives to reduce school poverty concentration, and the inability of parents with children in failing schools to choose interdistrict transfers to lower poverty schools for their children under the Elementary and Secondary Education Act.

11. The Elementary and Secondary Education Act (“ESEA”, Title I) was originally enacted to direct more money to students who attended the most disadvantaged schools. However, this federal statute does nothing to address racial and economic segregation. Although ESEA

includes a provision for students in underperforming schools to transfer to another school, those transfers are only available to other schools within the same school district. Often, schools with low-achievement levels are located in school districts with high concentrations of poverty and minority students; and almost all schools within the same district have rampant inequities and low-achievement. ESEA provides no incentives for states and districts to reduce high poverty levels in individual schools and districts, leaving limited or no options for parents to ensure quality educational opportunities for their children, and failing to promote adequate racial inclusion. Greater inter-district opportunities are necessary and could create greater diversity within schools and improve academic outcomes.<sup>18</sup> Additional support for interdistrict transfer programs is also necessary, including support for parent education and organizing, transportation costs, and staff development and training to ensure incoming students receive the best possible education.

12. The Department of Education should support revisions in the basic Title I funding formula to more strongly encourage racial and economic integration, expansion of funding for parent involvement, and inclusion of a “private right of action” to permit parents to enforce their children’s rights under the Act. Reauthorizing ESEA with increased incentives for integration would bring the U.S. further in compliance with its human rights commitments by improving the equality of access to elementary education.

13. Encouragingly, the President’s FY 2011 budget provides for an increase of \$10 million—to a total of \$110 million—for magnet school assistance<sup>19</sup> However, substantially more support is needed to expand magnet school options for children in high poverty, racially isolated districts.

14. In addition to unequal opportunities available to poor and minority students with regards to school choice, federal law exacerbates these inequalities by inequitable distribution of federal funds. For example, Title I does not require any level of inter-district funding equity. Because large funding and resource disparities exist within school districts, it is difficult for Title I schools to attract and retain high-quality teachers. Inequitable school finance structures have led to states spending, on average, nearly one thousand dollars less per student per year in high-poverty districts than in low-poverty districts. Thus Title I does not provide additional or equitable opportunities for poor children. In order to provide all students with equal opportunities, resources—including high quality teachers—must be fairly and equitably distributed between high- and low-poverty schools.

## **B. Excessive and Discriminatory School Discipline**

15. Over the past two decades, schools have increasingly relied on punitive, exclusionary discipline policies and practices, such as excessive suspensions, expulsions and arrests, which create degrading school climates, undermine academic achievement and contribute to dropout. According to the Office of Civil Rights (OCR) in the U.S. Department of Education, more than 3.3 million students were suspended out-of-school at least once during the 2005-2006 school year, and 102,000 students were expelled.<sup>20</sup> This is more than double the rate of suspension and expulsion in 1974.<sup>21</sup>

16. The trend towards the use of harsh exclusionary discipline policies began in 1994 when the U.S. Congress passed the federal Gun Free Schools Act, requiring that in order to receive federal education funding, states and school districts must create “zero-tolerance” policies resulting in mandatory removal from school.<sup>22</sup> Initially, zero-tolerance expulsions were limited to offenses such as having a weapon in school. Over time, as states and school districts implemented their own policies, they expanded the scope of zero-tolerance to include suspensions, expulsions and arrests for far less serious misbehavior, including school fights, classroom disruptions, dress code violations and even being late to school.<sup>23</sup>

17. While all students are impacted by these policies, students of color and students with disabilities are disproportionately impacted. For example, nationally in 2006, African American students made up 17.1% of the overall student population, but 37.4% of students suspended out of school.<sup>24</sup> In 2006, African-American students were three times as likely to be suspended and 3.5 times as likely to be expelled than white students, and Latino students were 1.5 times as likely to be suspended and twice as likely to be expelled than white students.<sup>25</sup> Students with disabilities are also suspended and expelled at a rate twice that of their non-disabled peers.<sup>26</sup>

18. Research has also shown that higher rates of suspension and expulsion among students of color are not the result of these students engaging in higher levels of disruptive behavior.<sup>27</sup> Students of color are more likely to be suspended and removed for subjective offenses, such as disrespect or disruptive behavior, and to receive more severe punishments for the same offenses than white students.<sup>28</sup> Rather, the disproportionate punishment of students of color is in part due to their concentration in schools with fewer supportive resources. Schools with high suspension rates have fewer preventive disciplinary systems in place, fewer resources for providing counseling and conflict resolution, larger class sizes, and lower academic quality ratings.

19. Across the country, schools have also increased the number of school safety officers, police officers, metal detectors, and security cameras in schools. Between 1999 and 2007, the percent of students across the country reporting regular police or security presence in their schools increased from 54% to 69%.<sup>29</sup> Police personnel are patrolling school hallways, handcuffing, arresting, and referring students to the juvenile justice system for relatively minor infractions, such as petty school fights or disobeying staff. In New York City, more than 5,000 police officers work in public schools every day, representing a larger police presence than exists in many U.S. cities. This heavy police and security presence is most concentrated in schools with a higher percentage of students of color.<sup>30</sup>

20. While nationwide data is not available, information from individual cities shows an increasing number of arrests of children while in school, again largely for minor misbehavior. For example, in 2003 in Chicago, Illinois, 8,539 students were arrested in public schools.<sup>31</sup> Almost 10% of those arrested were children age 12 or younger. Black students made up 77% of the arrests, but only 50% of the school population. Many arrests made in schools are for non-criminal activity, and are carried out without regard for the age of the student or the context for the child’s misbehavior.<sup>32</sup>

21. In its 2006 review of exclusionary and zero-tolerance disciplinary policies, the American Psychological Association (APA) found no evidence that the use of suspension, expulsion, or zero-tolerance policies has resulted in improvements in student behavior or increases in school safety.<sup>33</sup> Rather, excessive suspensions and expulsions increase the likelihood that students will fall behind academically, become detached from school, or have future behavior problems.<sup>34</sup> Schools with high suspension rates scored lower on state accountability tests, even when adjusting for demographic differences.<sup>35</sup>

22. The APA also found that suspensions, expulsions and arrests increase the likelihood that students will dropout of school and come into contact with the juvenile and criminal justice system. Each year approximately 1.3 million young people drop out of school.<sup>36</sup> The National Center for Educational Statistics found that students who had been suspended three or more times by the 10<sup>th</sup> grade, were 5 times more likely to drop out than students who had never been suspended. Students that have dropped out of school are in turn three times more likely to be incarcerated.<sup>37</sup> This phenomenon has come to be known as the “school to prison pipeline”, reflecting recognition of the direct and dire consequences of harsher punishments for minor disciplinary infractions in the public school system.

23. In its concluding observations in February 2008, the CERD Committee stated, “[t]he Committee also notes with concern that alleged racial disparities in suspension, expulsion and arrest rates in schools continue to exacerbate the high drop out rate and the referral to the justice system of students belonging to racial, ethnic or national minorities.” The Committee called on “the State Party to encourage school districts to review their “zero tolerance” school discipline policies, with a view to limiting the imposition of suspension or expulsion to the most serious cases of school misconduct, and to provide training opportunities for police officers deployed to patrol school hallways.”

24. As an alternative to harsh, zero-tolerance discipline, some schools, districts and states around the country have begun to implement supportive and restorative approaches to discipline that aim to reduce suspension and expulsion. School-wide Positive Behavior Supports (PBS) train teachers to reinforce positive behavior among students and provide positive, early interventions for misconduct.<sup>38</sup> Research from around the country has shown that PBS can reduce disciplinary incidents, improve the school environment and increase academic outcomes for students.<sup>39</sup> Growing numbers of schools and districts are also integrating restorative practices into their disciplinary policies and practices. Restorative practices use de-escalation and community circle techniques to build a sense of school community and manage conflict by repairing harm and restoring positive relationships.<sup>40</sup>

### **C. Confronting the Achievement Gap**

25. Government reports and other entities in the U.S. use the term “achievement gap” to describe a nation-wide phenomenon where lower-income, Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers. For example, nationally in 2007, 54% of Black and 51% of Latino fourth grade students scored below the basic reading level for their grade, compared to only 34% of students overall.<sup>41</sup> The current achievement gap correlates to the long-standing difference in educational opportunity

and attainment that looms between Black and Latino students and their White and Asian counterparts.<sup>42</sup>

26. Where there is adequate opportunity, students at the low end of the gap can excel. Opportunity not only includes adequate funding for high-poverty schools, but also superb instruction and support for all students. The gap exists in part because students of color are more likely to be negatively impacted by low financial resources in their school districts, less qualified, experienced and effective teachers in their schools, and lower academic standards in the classroom.<sup>43</sup>

27. In 2008, the CERD Committee expressed its concern about the “persistent ‘achievement gap’ between students belonging to racial, ethnic or national minorities, including English Language Learner students, and white students.” The Committee recommended that the U.S. adopt measures to reduce the achievement gap by “improving the quality of education provided to these students.” The President’s FY 2011 education budget has requested an increase of \$50 million for English Learner education. While a positive step, the government still has not sufficiently addressed the issue of the achievement gap or equal access to quality education for all students.

28. Current federal law does little to address systemic inequities or “educational debt” to disadvantaged students that has accrued over centuries of racial isolation and unequal access to quality education.<sup>44</sup> The current law requires states to ensure that “poor and minority students are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers.”<sup>45</sup> While this law appears to further the obligation under CERD Article 5 to provide education “without distinction as to race, colour, or national or ethnic origin . . .” research suggests that this provision has not been well implemented and is inadequately enforced.<sup>46</sup> Thus, while laws on their face may comply with CERD, their implementation is failing to fully satisfy CERD’s requirements.

29. English Learner (“EL”) students make up a large portion of the U.S. student body and also suffer from educational inequalities in U.S. schools.<sup>47</sup> More than 10.5 million—or 20 percent of all—U.S. students speak a language other than English at home, and more than 5 million lack sufficient proficiency to be taught in English without support. EL students are predominantly—79%—native Spanish Speakers.<sup>48</sup> Overall, Latinos constitute 20% of the K-12 population and are the most racially isolated minority group in U.S. schools.<sup>49</sup> Not only does this language barrier create disadvantages for EL students, at least two-thirds of these students are being raised in low-income families.<sup>50</sup> According to federal data EL students are struggling in the current school system—only 12 percent of EL students tested at a proficient level in fourth grade mathematics compared to 41 percent of non-EL students.<sup>51</sup> The achievement gap for ELs increases in higher grades and the graduation rate for ELs is well below 50%.<sup>52</sup>

#### **D. Lack of Access to Higher Education**

30. Students of color and low-income students face many barriers to postsecondary education opportunities in the U.S. Often times these students are college-qualified but do not enroll in



institutions of higher education.<sup>53</sup> In order to ensure access, adequate funding for all students, and in particular students of color and low-income students, is necessary. Low income students are more likely to be African-American, Hispanic or Asian.<sup>54</sup> In 2007-2008, 66% of all undergraduate students received some type of financial aid and 47% received federal aid; but some students are ineligible to take advantage of federal student loan opportunities.<sup>55</sup> For example, some community colleges, collectively enrolling over one million students, have opted out of the federal student loan program; and where community colleges do participate in the program, African-American and Native-American students are less likely to have access to federal loans than their peers.<sup>56</sup>

31. Immigrant children also face barriers to higher education. In 2006 there were 12.9 million immigrant school age children living in the U.S.<sup>57</sup> Children of immigrants constituted 22% of all children age 0 to 17 nationwide in 2006.<sup>58</sup> Children of undocumented immigrants living in the United States, approximately 1.8 million,<sup>59</sup> are unable to legally work or afford a college education based on the decisions their parents made years ago. Only five to ten percent of these students obtain access to higher education due to ineligibility for work authorization or financial aid.<sup>60</sup> The Universal Declaration of Human Rights (“UDHR”) declares that “higher education shall be equally accessible to all on the basis of merit.”<sup>61</sup> By restricting a student’s right to enroll in college because of their immigration status, the U.S. government is not conforming to its human rights commitments. Other impediments to college enrollment exist, including the prohibitive cost of higher education. For example, the University of California’s 32% undergraduate tuition increase and California’s K-12 budget cuts are new serious denials of human rights.<sup>62</sup>

32. The government has historically failed to take affirmative steps to eliminate obstacles which prevent qualified immigrant students from reaching their full potential. Recently, however, Congress took steps to increase opportunities for undocumented immigrant children to enlist in the military or go to college and have a path to citizenship which they otherwise would not have through Development, Relief and Education for Alien Minors Act (The “DREAM Act”) which was introduced both in the House of Representatives and the Senate in March 2009.<sup>63</sup>

33. If passed, the DREAM Act would be a positive step toward better compliance with CERD obligations, specifically 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 area[...] of education . . . .”<sup>64</sup> Additionally, the DREAM Act would improve the U.S.’s compliance with its commitments to the UDHR.

34. Earning potential is tied to one’s level of education—“Someone with a bachelor's degree earns nearly one million dollars more over his or her lifetime than a high school graduate.”<sup>65</sup> Likewise, immigrants who are able to adjust their status to become legal residents are able to obtain better jobs.<sup>66</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. A California study predicts, “by 2025, forty-one percent of the state’s jobs will require a college education, but only 32% of workers in the state will have the necessary education.”<sup>67</sup> Thus, passage of legislation such as

the DREAM Act, which promotes college enrollment, would have a positive effect not only on those children directly affected by the Act, but also on society as a whole.

#### **E. Children with Disabilities and the use of restraints and seclusion**

35. The use of seclusion, restraint and other aversive interventions in schools are causing trauma, injury and the death of school age children. Currently, no federal legislation protects children in classroom settings, although such federal protections exist for children and adults in mental health and residential facilities. Because there is not a Federal statute that protects children from inappropriate use of or abuse from restraint or seclusion in school, governing the use of these practices has been left to the States. However, state laws are widely divergent and neither provide sufficient protection of children nor effectively prevent or reduce the use of restraint and seclusion.

36. Existing research, recent reports, and a recent GAO investigation<sup>68</sup> clearly establish that the risk of harm, coupled with the ineffectiveness of such strategies, justify prohibiting the use of restraint and seclusion except in the rarest of circumstances; and then only after intense training, under rigorous supervision, and after specified preconditions have been met. There is evidence that the use of restraints disproportionately affects children with disabilities in the school system.<sup>69</sup> Every child has the right to be free from restraint and seclusion unless he or she poses a clear and imminent physical danger to him or herself or others. While the U.S. has not yet ratified The Convention on the Rights of Persons with Disabilities, the federal government's failure to establish clear law on this subject goes against the spirit of the UDHR and human rights protections as a whole.

#### **IV. RECOMMENDATIONS**

37. In light of the foregoing, we make the following recommendations:

- a) Amend Title VI to expressly adopt an effects test to permit court challenges to *de facto* barriers to equal educational opportunities and ensure that all persons are guaranteed effective protection against educational practices that have a discriminatory effect.
- b) Reject the use of the 'colorblind' doctrine in legislation and government education policies. This doctrinal incorporation threatens U.S. obligations under CERD to use special measures to promote the adequate development of quality educational opportunities to those historically denied opportunities and those currently facing *de facto* barriers to quality educational opportunities.
- c) The federal government should strongly encourage and fund states and school districts to voluntarily promote school integration through the use of non-discriminatory, race-conscious measures to promote educational, democratic, and cultural benefits of racial and ethnic diversity in the classroom. The government should strengthen ESEA's right-to-transfer provisions, including requiring states to ensure that every low-income child assigned to a school that consistently underperforms on ESEA's accountability standards has the guaranteed right to enroll in a high performing school while also supporting low-performing schools through "turnaround" funds and technical assistance to improve the quality of education for all children.

- d) Increase federal funding through the reauthorization of ESEA and ensure that funds are equitably dispersed between high- and low-poverty schools.
- e) Pass federal legislation that significantly restricts the use of restraint and seclusion except under the narrowest, most emergent circumstances. Ensure that all school personnel are trained annually in positive behavior supports; proactive approaches to learning, social, and behavioral needs, and school-wide emergency and crisis prevention procedures.
- f) Direct federal, state and local funding towards ending school push-out, reducing exclusionary discipline practices and improving school climate, through implementing proven methods including School-Wide Positive Behavior Supports (SWPBS) and Restorative Practices.
- g) In order to identify and address racial disparities in discipline, require the annual collection of school climate and disciplinary data, including suspensions, expulsions, corporal punishment, school-based arrests, referrals to law enforcement and alternative schools, attendance, dropout and graduation rates, for all schools (including charters), disaggregated by race, gender, special educational status, socioeconomic status, and English proficiency, made available to the public at the national, state, district and school levels.
- h) Create federal, state and local accountability mechanisms which measure school climate and monitor discipline policies and provide technical assistance and support for schools in need of improvement.
- i) Increase language access services for students and parents. Oblige and support local school implementation of best teaching practices for EL students to reach English proficiency and for English speakers to learn a second language.
- j) Implement the DREAM Act and take affirmative steps to remove barriers to higher education for immigrant children.

## Endnotes

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<sup>1</sup> The International Covenant on Civil and Political Rights, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, and the two Optional Protocols to the Convention on the Rights of the Child.

<sup>2</sup> See Memorandum from Harold Koh, Legal Advisor, U.S. Dep't of State, to State Governors (Jan. 20, 2010), available at <http://www.state.gov/documents/organization/137292.pdf>

<sup>3</sup> Title VI of the Civil Rights Act of 1964, 45 C.F.R. §80.8(1) (2006).

<sup>4</sup> Alexander v. Sandoval, 532 U.S. 275 (2001)

<sup>5</sup> Brown v. Board of Education, 347 U.S. 483 (1954).

<sup>6</sup> G. Orfield and C. Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, Civil Rights Project/Proyecto Derechos Civiles at UCLA, (Aug. 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).

<sup>7</sup> G. Orfield & E. Frankenberg, *The Last Have Become First: Rural and Small Town America Lead the Way on Desegregation*, Civil Rights Project/Proyecto Derechos Civiles (Jan. 2008).

<sup>8</sup> G. Orfield, *Reviving the Goal of an Integrated Society: A 21<sup>st</sup> Century Challenge*, Civil Rights Project/Proyecto Derechos Civiles (Jan. 2009).

<sup>9</sup> E. Frankenberg, G. Sigel-Hawley, & J. Wang, *Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards*, Civil Rights Project/Proyecto Derechos Civiles (Jan. 2010).

<sup>10</sup> See generally, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, Brief of 553 Social Scientists as Amici Curiae in Support of Respondents (2006) at App. 33.

<sup>11</sup> Low income rural conservative families in Arcata and Eureka, California collected signatures to put on the ballot an initiative prohibiting invasive acts by U.S. military recruiters at their high school, successfully targeting economically disadvantaged, low achieving students. When the initiatives were passed by significant majorities and the city councils passed ordinances forbidding such tactics, the U.S. government sued to outlaw their enforcement. The cities' appeal from U.S. District Court decision without a trial on the merits is pending. See *United States v. Arcata*, No. C 085725SBA. See also [http://articles.sfgate.com/2009-04-26/news/1719250\\_1\\_arcata-military-recruiting](http://articles.sfgate.com/2009-04-26/news/1719250_1_arcata-military-recruiting).

<sup>12</sup> See Concluding Observations concerning enforcement of the Optional Protocol on the Involvement of Children in Armed Conflict, to which the U.S. is a party, Jan. 25, 2008, ¶¶ 15-18.

<sup>13</sup> J. Guryan, "Desegregation and Black Dropout Rates," *American Economic Review* 94(4) (Sept. 2004), 919-43.

<sup>14</sup> *Parents Involved in Cmty. Sch.* 551 U.S. at 701.

<sup>15</sup> See opinion of Justice Kennedy in *Parents Involved in Cmty. Sch.*, 551 U.S. at 701 (2007).

<sup>16</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1945. 660 U.N.T.S. 195.

<sup>17</sup> See *Amicus Brief of the United States of America* in *Parents Involved in Cmty. Sch.*, 551 U.S. at 701 (2007).

<sup>18</sup> Some states have embraced interdistrict choice programs, most notably Connecticut, which has seen both academic and social benefits from its program. See R. Bifulco et al, CAN INTERDISTRICT CHOICE IMPROVE STUDENT ACHIEVEMENT? THE CASE OF CONNECTICUT'S INTERDISTRICT MAGNET SCHOOL PROGRAM, *EPAA*, vol. 31, no. 4 (2009).

<sup>19</sup> FY 2011 Department of Education Budget Request, available at <http://www2.ed.gov/about/overview/budget/budget11/summary/edlite-section3a.html#ela>

<sup>20</sup> National Center for Education Statistics, Contexts of Elementary and Secondary Education, 2009, <http://nces.ed.gov/programs/coe/2009/section4/indicator28.asp>. U.S. Office for Civil Rights, U.S. Department of Education, 2006 Civil Rights Data Collection.

<sup>21</sup> Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions, Justice Policy Institute, 2001. [http://www.justicepolicy.org/images/upload/01-09\\_REP\\_SchoolsSuspensions\\_JJ.pdf](http://www.justicepolicy.org/images/upload/01-09_REP_SchoolsSuspensions_JJ.pdf)

<sup>22</sup> Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track, 2005.

<sup>23</sup> Advancement Project, Education on Lockdown: The Schoolhouse to Jailhouse Track, 2005.

<sup>24</sup> U.S. Office for Civil Rights, 2006.

<sup>25</sup> National Center for Education Statistics, 2009. U.S. Office for Civil Rights, 2006.

<sup>26</sup> U.S. Office for Civil Rights, 2006.

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- <sup>27</sup> Open Society Institute-Baltimore, Putting Kids Out of School: What's Causing High Suspension Rates and Why are they Detrimental to Students, Schools and Communities, September 2008.
- <sup>28</sup> Pedro Noguera, "Preventing and Producing Violence: A Critical Analysis of Responses to School Violence," *Harvard Educational Review*, 65 (2), 1995.
- <sup>29</sup> National Center for Education Statistics, Indicators of School Crime and Safety 2008, Table 21.1.
- <sup>30</sup> For example, in New York City, 93% of children attending schools with metal detectors were Black and Latino, compared to 82% in the citywide school population. See *Criminalizing the Classroom: The Over-policing of New York City schools*, New York Civil Liberties Union, 2007.
- <sup>31</sup> Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track*, 2005.
- <sup>32</sup> In Palm Beach County, Florida in 2003, 26% of school arrests were for fights or threats where there were no injuries or weapons, and 22% were for miscellaneous, and highly discretionary, offenses such as "disruptive behavior". *Id.*
- <sup>33</sup> Russell Skiba et al, *Are Zero Tolerance Policies Effective in the Schools? A Report by the American Psychological Association Task Force*, 2006.
- <sup>34</sup> Consider also that zero tolerance policies are merely one aspect of discretionary powers of school and law enforcement officials. There are alternatives to mass incarceration. There is currently a movement in Texas to decriminalize some juvenile offenses, and use of a broader range of discretion given to school and law enforcement officials. See Texas Public Policy Foundation, "Getting More for Less in Juvenile Justice," available at <http://www.texaspolicy.com/pdf/2010-03-RR01-JuvenileJustice-ml.pdf>
- <sup>35</sup> Russell Skiba & M. Rausch, *Zero Tolerance, Suspension and Expulsion: Questions of Equity and Effectiveness*, in C.M. Everston & C.S. Weinstein (Eds.), *Handbook of Classroom Management: Research, Practices, and Contemporary Issues*, 2005. For example, a state's suspension ranking was negatively related to their National Assessment of Educational Progress (NAEP) achievement ranking in mathematics, writing, and reading. Russell Skiba et al, *Consistent Removal: Contributions of School Discipline to the School-Prison Pipeline (2003) Paper presented at the Harvard Civil Rights Project School-to-Prison Pipeline Conference, Cambridge, MA.*
- <sup>36</sup> Alliance for Excellent Education (2009). *The High Cost of High School Dropout*. <http://www.all4ed.org/files/HighCost.pdf>
- <sup>37</sup> L. Lochner and E. Moretti. (2004). "The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self Reports." *The American Economic Review*, 94 (1), 155-189. Freeman, R. (1996). "Why Do So Many Young American Men Commit Crimes and What Might We Do About It?" *Journal of Economic Perspectives*, 10(1), 25 - 42.
- <sup>38</sup> [www.pbis.org](http://www.pbis.org)
- <sup>39</sup> In the state of Illinois, there are over 600 schools implementing PBS. At Carpentersville Middle School, for example, after implementing PBS, office disciplinary referrals fell by 64% from 2005 to 2007. During the same period, the number of students that met or exceeded standards for 8th grade tests increased by 12.3% in Reading and 44% in Math. In Florida, a study of 102 schools using PBS found that after one year of implementation office disciplinary referrals fell by an average of 25% and out of school suspensions fell by an average of 10%. School districts including Los Angeles and New Orleans have adopted district-wide PBS policies.
- <sup>40</sup> In 2006, Chicago Public Schools adopted a new student code of conduct incorporating restorative practices and now over 50 high schools in Chicago now have restorative peer jury programs. As a result over 1,000 days of suspension were avoided in 2007-2008 by referring students to peer jury programs for violating school rules, thereby keeping them in the learning environment. At West Philadelphia High School in Pennsylvania, previously labeled as a "Persistently Dangerous Schools," after implementing restorative practices suspensions dropped by 50% and violent acts and serious incidents dropped by 52%.
- <sup>41</sup> 2007 ASSESSMENT RESULTS, THE NATION'S REPORT CARD., NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION. 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, available at <http://nces.ed.gov/nationsreportcard/>.
- <sup>42</sup> See J. Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?* EDUCATIONAL RESEARCHER, Vol. 31, No. 1, 3-12 (2002), available at <http://edr.sagepub.com/cgi/content/abstract/31/1/3>.
- <sup>43</sup> A. Wilkins, et al., *Yes We Can: Telling Truths and Dispelling Myths About Race and Education in America*, The Education Trust, Sept. 2006.

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- <sup>44</sup> L. Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION (May 21, 2007).
- <sup>45</sup> No Child Left Behind Act of 2001, 20 U.S.C. §6301, 1111(b)(8)(C) (2008)
- <sup>46</sup> W. Taylor et al., *The Continuing Challenge*, Report of the Citizens' Commission on Civil Rights pp. 7-9 (Feb. 2008) available at <http://www.cccr.org/doc/TheContinuingChallengeReport.pdf>
- <sup>47</sup> Contrary to the assumption that children speaking a language other than English recently arrived from their country of origin—native-born, U.S. citizens predominate in the EL, K-12 student population. Seventy-six percent of elementary school and 56% of secondary school EL students are citizens; and over 50% of the EL students in public secondary schools are second or third-generation citizens.<sup>47</sup> Therefore, the stereotype of EL students as foreign-born immigrants is inaccurate. The majority are, in fact, citizens and legal permanent residents of the U.S. whose academic and linguistic needs are not met by the public school system. Nonetheless, all children in the U.S. are entitled to a quality education, regardless of their citizenship. Plyler v. Doe, 457 U.S. 202 (1982).
- <sup>48</sup> R. Capps et al., *The New Demography of America's Schools: Immigration and the No Child Left Behind Act*. (2005). The Urban Institute, available at [http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=ED490924&ERICExtSearch\\_SearchType\\_0=eric\\_accno&accno=ED490924](http://www.eric.ed.gov:80/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED490924&ERICExtSearch_SearchType_0=eric_accno&accno=ED490924)
- <sup>49</sup> U.S. Department of Education. See <http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp>
- <sup>50</sup> R. Capps, *supra* note 48.
- <sup>51</sup> National Center for Education Statistics (2009). The Nation's Report Card: Mathematics 2009 (NCES 2010-451). Institute of Education Sciences, U.S. Department of Education, Washington, D.C.
- <sup>52</sup> See U.S. Department of Education, SY 2007-2008 Consolidated State Performance Reports, <http://www.ed.gov/admins/lead/account/consolidated/sy07-08part1/index.html>
- <sup>53</sup> R. Hahn and D. Price, *Promise Lost: College-Qualified Students Who Don't Enroll in College*, Institute for Higher Education Policy, Nov. 2008; D. Gerald and K. Haycock, *Engines of Inequality: Diminishing Equity in the Nation's Premier Public Universities*, The Education Trust, 2006.
- <sup>54</sup> The Pell Institute, *Indicators of Opportunity in Higher Education*, 2005.
- <sup>55</sup> U.S. Department of Education, National Center for Education Statistics. (2009). *2007-2008 National Postsecondary Student Aid Study*.
- <sup>56</sup> The Project on Student Debt, *Denied: Community College Students Lack Access to Affordable Loans*, 2008.
- <sup>57</sup> K. Fortuny et al., *Children of Immigrants: National and state Characteristics*, (Washington DC: Urban Institute, 2009).
- <sup>58</sup> *Id.*, at 11.
- <sup>59</sup> Roberto G. Gonzales, *Wasted Talent and Broken Dreams*, IMMIGRATION POLICY IN FOCUS (Oct. 2007).
- <sup>60</sup> *Id.*
- <sup>61</sup> Universal Declaration of Human Rights Art. 26(1), GA res. 217A (III), UN Doc A/810 at 71 (1948).
- <sup>62</sup> See <http://www.cnn.com/2009/US/11/19/california.tuition.protests/index.html>; <http://www.npr.org/templates/story/story.php?storyId=124317949>; and <http://www.cnn.com/2010/LIVING/03/04/layoffs.education/index.html?iref=allsearch>
- <sup>63</sup> See DREAM Act of 2009 (Introduced in Senate) S. 729; see also <http://dreamact.info/>
- <sup>64</sup> Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, ¶ 398 (2001), available at <http://www1.umn.edu/humanrts/country/usa2001.html>.
- <sup>65</sup> "Amount of Schooling Affects Earning Potential," (July 18, 2002), available at [http://www.usatoday.com/news/nation/\\_census/2002-07-18-degree-dollars.htm](http://www.usatoday.com/news/nation/_census/2002-07-18-degree-dollars.htm); See also, San Francisco Chronicle, "Getting a Degree Pays Off with Higher Salary," (Aug 18, 2007) available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/08/18/BUQ5RKS4J.DTL> ("The median annual salary for a high school graduate in 2006 was about \$30,940, according to the bureau. For college graduates with a bachelor's degree, the median was \$50,024.").
- <sup>66</sup> "[T]he US Department of Labor found that the wages of immigrants legalized under [the 1986 Immigration Reform and Control Act] had increased by roughly 15% five years later." See GONZALES, *supra* at note 59.
- <sup>67</sup> *Id.*
- <sup>68</sup> Government Accountability Office, *Seclusion & Restraints, Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*, Testimony before the Committee on Education and Labor, House of Representatives, May 19, 2009.
- <sup>69</sup> See *id.* at pp. 7-8.