

CERD SHADOW REPORT:

**Education in the United States and
the Federal Responsibility to
Reduce School Segregation and
Address the Achievement Gap**

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Submission prepared by:
Poverty & Race Research Action Council

I. Reporting Organizations

This Shadow Report is submitted by the following organizations:

- Poverty & Race Research Action Council*
- Kirwan Institute for the Study of Race and Ethnicity at Ohio State University
- Center for Civil Rights at the University of North Carolina School Of Law
- Civil Rights Project / Proyecto Derechos Civiles at the University of California Los Angeles
- Lawyers' Committee for Civil Rights Under Law

II. Issue Summary

This Shadow Report provides an overview of the United States' progress in implementing the education-related recommendations included in the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee's 2008 review of U.S. compliance with the convention. The CERD Committee's 2008 Concluding Observations stated:

- (in ¶ 17) that the U.S. should “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. In this regard, the Committee recommends that the State party 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 Convention”¹
- (in ¶ 34) that the U.S. should “adopt all appropriate measures – including special measures in accordance with article 2, paragraph 2, of the Convention – to reduce the persistent ‘achievement gap’ between students belonging to racial, ethnic or national minorities and white students in the field of education, *inter alia* by improving the quality of education provided to these students” and also “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.”²

* This report was prepared by Michael Hilton, Policy Analyst, Poverty & Race Research Action Council

¹ Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America, UN Doc. CERD/C/USA/CO/6 (2008) at 4

² *Id.* at 11-12

Continuing Patterns of *De Facto* Segregation and Disparities in Resources and Outcomes

Although the federal government has spent a significant amount of money on education programs since the 2008 review,³ a distressingly small portion of those funds has gone to programs with an integration focus, which could help remedy the problems inherent in segregated schools noted below. There are grants available under the Magnet Schools Assistance Program (MSAP) for magnet schools with approved desegregation plans that focus on the “elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools,”⁴ but the program’s impact is curtailed by the funding allocated – in 2014, \$91.6 million was allotted for the MSAP, significantly less than programs without a strong integration priority such as the Charter Schools Program (received \$248.2 million in 2014) and Race to the Top (received \$250 million in 2014).⁵ While the Charter Schools Program does contain a weak diversity incentive, this incentive is far outweighed by the priority placed on serving high concentrations of low-income and disadvantaged students,⁶ which evidence suggests has a segregating effect.⁷ The lack of funding for education programs with an integration priority is a clear violation of the U.S. obligation under ICERD to use special measures to encourage the creation of quality educational opportunities for those students historically denied such opportunities, and those students facing de facto barriers to enjoying a quality educational opportunity.

³ While the majority of funding for elementary and secondary education comes from local taxes, the federal government contributes a significant amount of funding to education programs, and since the 2008 report and review the federal government has spent well over three hundred billion dollars on education. *See* <http://www2.ed.gov/about/overview/budget/history/index.html>

⁴ §5301(b)(1) - <http://www2.ed.gov/policy/elsec/leg/esea02/pg65.html>

⁵ Charter School Programs – The charter school funding competitions do include a small number of points in the competitive rating system for schools that “promote student diversity, including racial and ethnic diversity, or avoid racial isolation,” but these priorities do not provide a strong incentive for applications to promote diverse charter schools. At the same time, a significant number of points are available for serving “educationally disadvantaged” students, including students from low-income families, English language learner students, migratory children, children with disabilities, and neglected or delinquent children. This disparity in points available (between policies promoting diversity and policies focused solely on serving disadvantaged students, without regard to levels of segregation permitted by their state educational agency) may have the unintended effect of rewarding segregation since more points are available for applicants with high concentrations of disadvantaged students. Race to the Top – The Race to the Top program does not include diversity or reduction of racial isolation as an absolute or competitive priority, but does include a token gesture of support – up to \$2 million for “strategies for increasing diversity across schools and LEAs and within schools and classrooms.” Investing in Innovation – The Investing in Innovation program contains no language promoting diversity or reduction of racial isolation. Early Childhood Education – Taking into account Head Start, Title I of the ESEA, Race to the Top Early Learning Challenge, and the Child Care and Development Fund, none of these programs provide incentives for racially or socioeconomically diverse student bodies. In fact, programs that prioritize funds for proposals that are designed solely for low-income children may have the effect of rewarding segregated early education programs.

⁶ *See* The National Coalition on School Diversity, *Issue Brief 4, Federal Support for School Integration: A Status Report* (2014) at 2.

⁷ ERICA FRANKENBERG & GENEVIEVE SIEGEL-HAWLEY, *EQUITY OVERLOOKED: CHARTER SCHOOLS AND CIVIL RIGHTS POLICY* (2009), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/equity-overlooked-charter-schools-and-civil-rights-policy> at 12 (“All of the federal reviews found higher levels of minority segregation for charter schools than traditional public schools”). *See also* GARY MIRON, ET AL, *SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM* (2010), available at <http://nepc.colorado.edu/publication/schools-without-diversity> at 25 (“In a nutshell, the data paint a pattern of schools gravitating to the extremes—regarding race/ethnicity, poverty status, special needs status, or ELL status—rather than clustering around district average.”).

Unfortunately, students today are still more segregated by race than they were in the early 1970s,⁸ and the de facto racial segregation in schools identified in the 2008 review has continued to rise.⁹ In fact, the U.S. has reduced funding for the one education program with an explicitly integrative focus, the Magnet Schools Assistance Program, by over \$10 million since the 2008 review, resulting in a one-third decrease in the number of new projects funded in 2013 compared to 2008.¹⁰ Levels of segregation like those found in U.S. schools can produce detrimental outcomes for impacted students in a number of different ways.¹¹ Segregated students usually have fewer in-school resources,¹² as well as less experienced instructors,¹³ larger class sizes, insufficient facilities, lower spending per-pupil, and reduced access to services like counseling.¹⁴

Achievement Gap and School Discipline

Schools that are more racially isolated are also more likely to see high concentrations of poverty within the student body, which further drives inequality. Across the U.S., lower-income, Black and Latino students as a group perform worse academically and score lower on standardized tests than their peers, a difference in performance known as the “achievement gap.”¹⁵ The U.S. has made little progress in closing this gap in the past two decades. The Equity and Excellence Commission, which was convened by the federal government and tasked with providing advice to the secretary of the Department of Education regarding disparities in educational opportunity and how to combat the achievement gap, found that, “[i]n math, the average African American eighth-grader is performing at the 19th percentile of white students. The average Hispanic student is at the 26th percentile.”¹⁶ Researchers have found that

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- ⁸ Between 1970 and 1971, there was an average of 32 percent of white students in a typical black student’s school. The number grew to 36.2 percent from 1980-1981 and then began its decline. By 2009-2010, the percentage had dropped to 29.2 percent. See Richard Rothstein, *For Public Schools, Segregation Then, Segregation Since*, Education Policy Institute at 12 (2010) (table 7), available at <http://www.epi.org/files/2013/Unfinished-March-School-Segregation.pdf>. See also GARY ORFIELD and CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (August 2007), Civil Rights Project/*Proyecto Derechos Civiles* at UCLA, available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.
- ⁹ Black and Latino students were more likely to attend schools that were at least 90% minority in 2011 than in 2008. See http://nces.ed.gov/programs/digest/d13/tables/dt13_216.50.asp
- ¹⁰ See <http://www2.ed.gov/programs/magnet/funding.html>. Due to inflation, this decrease in funding would be even greater if measured in 2008 dollars.
- ¹¹ ROBERT L. LINN AND KEVIN G. WELNER, RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES (2007), National Academy of Education.
- ¹² ROSLYN ARLIN MICKELSON, WHEN ARE RACIAL DISPARITIES IN EDUCATION THE RESULT OF RACIAL DISCRIMINATION? A SOCIAL SCIENCE PERSPECTIVE (2003), 105 TCHRS. C. REC at 1061.
- ¹³ 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. 31, (noting that teacher inexperience correlates with lower student performance).
- ¹⁴ *Id.* at App. 33 (describing gaps in class size, facilities, per-pupil spending, and curricular and interpersonal counseling).
- ¹⁵ An article in the *Educational Researcher*, describes an achievement gap evident by NAEP data as the long-term trend in reading and mathematics national average score differences between Whites and Blacks and Hispanics. See JAEKYUNG LEE, RACIAL AND ETHNIC ACHIEVEMENT GAP TRENDS: REVERSING THE PROGRESS TOWARD EQUITY?, *Educational Researcher*, Vol. 31, No. 1, 3-12 (2002), available at <http://edr.sagepub.com/cgi/content/abstract/31/1/3>.
- ¹⁶ U.S. Department of Education, *For Each and Every Child—A Strategy for Education Equity and Excellence*, Washington, D.C., 2013, at 13

“the achievement gap [in mathematics] between Hispanic and White students did not change significantly at either grade 4 or 8 from 1990 to 2009”¹⁷ and “the achievement gap [in reading] between Hispanic and White students did not change for fourth- or eighth-graders when comparing 1992 to 2009.”¹⁸ A 2009 report from the National Center for Education statistics found that, “[w]hile the nationwide gaps in 2007 [between Black and White students] were narrower than in previous assessments at both grades 4 and 8 in mathematics and at grade 4 in reading, White students had average scores at least 26 points higher than Black students in each subject, on a 0-500 scale.”¹⁹

These persistent achievement gaps reflect the diminished educational opportunity for minorities in a system of education that the U.S. has developed over centuries, which is reinforced by growing poverty, racial isolation, and a disparity in school and community resources accessible to minority students.²⁰ In addition to disparate access to in-school resources, a relative lack of access to social and educational resources outside of schools (such as health care, parental involvement, public parks, high-literacy households, etc.) contribute to lower educational opportunity for minority students.²¹ These disparities in access to educational resources and the resulting impacts on student achievement have resulted in a significant economic loss for the U.S.²²

The U.S. is also home to a growing number of English Language Learner (ELL) students,²³ with more than 20% of students now speaking a language other than English at home.²⁴ Nationwide, over half of

¹⁷ Hemphill, F. C., and Vanneman, A. (2010). *Achievement Gaps: How Hispanic and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress* (NCES 2011-459). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC., at iv.

¹⁸ *Id.* at v.

¹⁹ Vanneman, A., Hamilton, L., Baldwin Anderson, J., and Rahman, T. (2009). *Achievement Gaps: How Black and White Students in Public Schools Perform in Mathematics and Reading on the National Assessment of Educational Progress*, (NCES 2009-455). National Center for Education Statistics, Institute of Education Sciences, U.S. Department of Education. Washington, DC., at iii.

²⁰ LINDA DARLING-HAMMOND, EVALUATING ‘NO CHILD LEFT BEHIND,’ *The Nation* (May 21, 2007).

²¹ See THE OPPORTUNITY GAP ACHIEVEMENT AND INEQUALITY IN EDUCATION (Carol DeShano da Silva, James Philip Huguley, Zenub Kakli, and Radhika Rao eds, Harvard Education Publishing Group 2007). See also David C. Berliner, *Poverty and Potential: Out-of-School Factors and School Success*. Boulder and Tempe: Education and the Public Interest Center & Education Policy Research Unit. (2009). Available at <http://epicpolicy.org/publication/poverty-and-potential>.

²² McKinsey and Company, *The Economic Impact of the Achievement Gap in America’s Schools* (April, 2009).

²³ “In 2011–12, ELL students in cities made up an average of 14.2 percent of total public school enrollment, ranging from 10.9 percent in small cities to 16.7 percent in large cities. In suburban areas, ELL students constituted an average of 9.0 percent of public school enrollment, ranging from 6.4 percent in midsize suburban areas to 9.4 percent in large suburban areas. In towns, ELL students made up an average of 6.2 percent of public school enrollment, ranging from 5.7 percent in distant areas to 8.4 percent in fringe areas. In rural areas, ELL students made up an average of 3.9 percent of public student enrollment, ranging from 2.5 percent in distant areas to 4.7 percent in fringe areas.” See National Center for Education Statistics, “Fast Facts: English Language Learners,” <http://nces.ed.gov/fastfacts/display.asp?id=96>. See also Thomas, W., & Collier, V. (2002). *A national study of school effectiveness for language minority students’ long-term academic achievement*. (ELL students are predicted to make up 40% of all U.S. students by the 2030s).

²⁴ National Center for Education Statistics, “Fast Facts: English Language Learners,” <http://nces.ed.gov/fastfacts/display.asp?id=96>.

ELL students are in schools where nearly a third of their peer students are also ELLs, whereas more than half of English-speaking students attend schools where ELL students make up less than one percent of students.²⁵ The majority of ELL students are native Spanish-speakers,²⁶ and overall Latinos are the most segregated racial group in U.S. schools.²⁷

U.S. schools have increasingly relied on harsh disciplinary policies and practices, and increasingly are relying on police action, in dealing with classroom disruptions and unwanted student behaviors. In the 2005–06 school year students were suspended and expelled at twice the rate they were in 1974.²⁸ In Florida, over 16,000 students were referred to the juvenile courts by a school-based police officer in the 2010–2011 school year.²⁹ Minority students constitute a much higher share of students disciplined than they do the student body as a whole.³⁰ For example, in 2011–2012 school year, “[b]lack students [were] suspended and expelled at a rate three times greater than white students.”³¹ Additionally, minority students, and Black students in particular, generally receive harsher punishments than their White counterparts,³² even when their patterns of behaviors are indistinguishable from those of White students.³³ Furthermore, students have reported a significant increase in police presence at schools, with the increase concentrated in schools with a higher proportion of minority students.³⁴ The National Center on Education Statistics reports that in 2011, approximately “70 percent of students reported the presence of security guards and/or assigned police officers,”³⁵ up from 54 percent in 1999.³⁶ Additionally, school disciplinary policies often include the use of restraint and seclusion,³⁷ practices which are known to be harmful, and disproportionately impact students with disabilities.³⁸

²⁵ See *Education: Response to the Periodic Report of the United States to the United Nations Committee on the Elimination of Racial Discrimination*, US Human Rights Network Education Caucus (2008), at 9 (citing NCELA.org, Frequently Asked Questions, available at <http://www.ncela.gwu.edu/expert/faq/08leps.html> (publishing state-reported data regarding ELL enrollment.)).

²⁶ See RANDY CAPPS ET AL., *THE NEW DEMOGRAPHY OF AMERICA’S SCHOOLS: IMMIGRATION AND THE NO CHILD LEFT BEHIND ACT*. (2005). The Urban Institute

²⁷ See <http://nces.ed.gov/programs/coe/2007/section1/indicator05.asp>

²⁸ *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

²⁹ Florida Department of Juvenile Justice, *Delinquency in Florida’s Schools: A Seven Year Study 3* (2011), available at <http://www.djj.state.fl.us/docs/research2/2010-11-delinquency-in-schools-analysis.pdf?sfvrsn=0>.

³⁰ National Center for Education Statistics, 2009. U.S. Office for Civil Rights, 2006.

³¹ U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection: *Data Snapshot (School Discipline)* (2014), at 1

³² 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

³³ See Russell J. Skiba, *Zero Tolerance, Zero Evidence*, Indiana Education Policy Center (2000) at 12.

³⁴ See *Criminalizing the Classroom: The Over-policing of New York City schools*, New York Civil Liberties Union, 2007.

³⁵ National Center for Education Statistics, *Indicators of School Crime and Safety 2012*, at 90.

³⁶ *Id.* at 91.

³⁷ U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection: *Data Snapshot (School Discipline)* (2014), at 9.

³⁸ 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.

III. U.S. Government Report

The federal government has documented some progress in addressing racial discrimination in education in its recent report to the Committee, but these steps have been in the area of civil rights enforcement against local school districts, not advances in program reform and federal funding of separate and unequal schools. Some of the positive enforcement efforts described by the U.S. Government include:

- Monitoring and enforcing “approximately 200 federal school desegregation cases and actively combats discrimination against English Language Learner students and their parents through enforcement of the Equal Educational Opportunities Act of 1973 and Title VI”³⁹
- Issuing “guidance in December 2011 on the voluntary use of race in K-12 schools and higher education.”⁴⁰
- Enforcing “laws, such as Titles IV and VI of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Patsy T. Mink Equal Opportunity in Education Act of 1972 (Title IX), and the Rehabilitation Act of 1973, that prohibit discrimination in education, including on the basis of race, color and national origin.”⁴¹
- The Department of Education “initiates compliance reviews where information suggests widespread discrimination. Between FY 2009 and 2012, ED initiated more than 60 reviews specifically targeting Title VI discrimination issues.”⁴²
- The Department of Education “formed the Equity and Excellence Commission to recommend ways school finance can be improved to increase equity and achievement [which] issued a report containing its findings and recommendations in February 2013.”⁴³

IV. Legal Framework

ICERD defines discrimination as a 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...”⁴⁴ The inclusion of discriminatory effects means that ICERD applies to de facto, as well as de jure discrimination.

The relevant portions of the ICERD are:

- **Article 1 – (4)** “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”

³⁹ www.ushrnetwork.org/sites/ushrnetwork.org/files/periodic_icerd_report_of_the_usg_2013.pdf at 15

⁴⁰ *Id* at 20, para. 28. See also www2.ed.gov/ocr/docs/guidance-ese-201111.pdf

⁴¹ *Id* at 27, para. 41

⁴² *Id* at 28, para. 43

⁴³ *Id* at 29, para. 45

⁴⁴ United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 1(1) Jan, 4 1969, reprinted in 25+ Human Rights Documents (2005).

- **Article 2** – (1)(c) “Each State Party shall (...) amend, rescind, or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists; (...) (e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial divisions.”

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

- **Article 3** – “States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.”
- **Article 5** – “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: (...) (v) The right to education and training”

V. The CERD Committee General Comments

- **General Recommendation 20** – “Article 5 of the Convention contains the obligation of States parties to guarantee the enjoyment of civil, political, economic, social and cultural rights and freedoms without racial discrimination.”
- **General Recommendation 30** - “Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education; Ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party; Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, colour, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education”

VI. Other UN Body Recommendations

- **ICCPR Human Rights Committee** issued a recommendation that the U.S. “should...promote the use of alternatives to the application of criminal law to address disciplinary issues in schools”⁴⁵

⁴⁵ Concluding observations on the fourth periodic report of the United States of America, UN Doc. CCPR/C/USA/CO/4 (2014) at 8

VII. Recommended Questions

- How will the US uphold its obligation to provide all students an equal education and combat growing segregation in public schools where the segregation is increasingly between rather than within school districts?
- Can an amended Elementary and Secondary Education Act be enacted which encourages and effectively supports the inter-district transfer of students from failing school districts to successful school districts?
- How is the U.S. planning to address the double segregation, by race and socioeconomic status, of students living in inner cities?
- How will the U.S. remove barriers to higher education for minority students?
- How will the U.S. support English Language Learners as they increase as a proportion of the overall student body?

VIII. Suggested Recommendations

- Increase federal funding for education programs proven to create racially integrated learning environments for students, such as the MSAP.
- The U.S. should reauthorize the Elementary and Secondary Education Act with provisions that support and encourage inter-district remedies to the problem of school segregation (such as paying up-front for the transportation of students crossing district lines and incentives for non-failing districts to receive transfers).

