

**The Persistence of School Segregation
in the United States, its Effects on Racial
Disparities in School Funding,
Achievement, and Discipline, and the
Failure of the U.S. Government to
Sufficiently Address the Problem**

Report to the
United Nations Committee on the Elimination of Racial Discrimination
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Submitted in Response to the
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EXECUTIVE SUMMARY

This report outlines the progress, or lack thereof, that the United States has made toward eliminating school segregation and education-related racial discrimination since the 2014 United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD) Committee Review. In their 2014 Concluding Observations, the Committee expressed significant concern about continuing patterns of *de facto* segregation, discipline disparities, and racial achievement gaps present in U.S. education and called for the U.S. to use special measures (including national, state, and local policy) to condemn and eradicate all forms of racial discrimination.

While the U.S. made some initial progress on these goals under the Obama administration (including guidance designed to promote school integration, encouraging collaboration on school and housing integration across government agencies, school integration planning grants through the *Opening Doors, Opening Opportunities* program, and guidance on racial discrimination in school discipline), all of this progress was erased during the Trump administration starting in 2017. And while the new federal administration has begun to take some positive steps, their efforts to date are inadequate to address the enormity of the challenge.

The growing trend of racially isolated schools coupled with the fact that about three-fourths of Black and Hispanic students attend majority low-income public schools, has exacerbated the economic and racial isolation of vulnerable children while negatively impacted students of all races through the reinforcement of harmful stereotypes. School segregation, which increases as neighborhood segregation increases, has led to a public school system where wealthy, largely-white families opt out of school integration, racially-concentrated districts are drained of funding, and students of color are left without adequate school resources and often find themselves two-years behind their white peers in test scores and achievement. Further, systemic racial bias has resulted in students of color being disparately targeted by school discipline practices – exposing them disproportionately to the school-to-prison pipeline.

It is crucial that the United States take the obligations of the CERD Treaty seriously and research, develop, and implement strategies and policies at scale to combat school, residential, and economic segregation, end racial discrimination in the administration of school discipline, and foster national, state, and local collaboration to promote school integration.

I. Legal Framework/Obligations

The International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD” or “Convention”) defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”¹

The relevant portions of the Convention are:

- **Article 1** - (4) “Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary . . . [and] shall not be deemed racial discrimination, provided, however, that such measures do not . . . lead to the maintenance of separate rights for
- **Article 2** - (1)(c) “Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;”

(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.
- **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 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 and social rights in particular . . . (v) the right to education and training”

Accordingly, the CERD Committee’s 2014 Concluding Observations to the U.S. stated:

- (in ¶ 14) That, while “welcoming measures taken to address de facto segregation in education...the Committee remains concerned that students from racial and ethnic minorities disproportionately attend segregated schools with segregated or unequal facilities...are frequently assigned to “single-race” classes, denied equal access to advanced courses and disciplined disproportionately due to their race, including referral to the criminal justice system. It also expresses concerns in academic achievement which contribute to unequal access to employment opportunities.”²

1 United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 1, at 2. Available at: <https://www.ohchr.org/sites/default/files/cerd.pdf>.

2 Concluding observations on the combined seventh to ninth periodic reports of the United States of America,

II. U.S. Government 2021 Report

The United States federal government has claimed progress toward ending segregation and discrimination in public education in its 2021 submission to the CERD Committee: *Tenth, Eleventh, and Twelfth Periodic Reports on the International Convention on the Elimination of All Forms of Racial Discrimination*.³ Some of the positive efforts describing the United States strong support of diversity in education⁴ include: President Biden’s January 20, 2021 executive order on advancing racial equity⁵; the 2021 American Rescue Plan’s focus on addressing the needs of underserved students⁶; the amending of the Elementary and Secondary Education Act of 1965 (ESEA) by the Every Student Succeeds Act of 2015 (ESSA)⁷; the funding of Equity Assistance Centers⁸; the Department of Justice’s (DOJ) and the Department of Education’s (ED) Office for Civil Rights’ (OCR) enforcement of federal civil rights laws⁹; and preventative efforts such as the Civil Rights Data Collection (CRDC).¹⁰ These are positive steps toward addressing the educational needs of underserved students, but they do not directly address a key underlying driver of educational inequality – continuing racial and economic school segregation unabated by federal policy.

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- United States of America, UN Doc. CERD/C/USA/CO/7-9 (2014) at 6. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/172/16/PDF/G1417216.pdf?OpenElement>.
- 3 Tenth, Eleventh, and Twelfth Period Reports on the International Convention on the Elimination of All Forms of Racial Discrimination, United States of America, UN Doc. CERD/C/USA/10-12 (2021). Available at: http://www.prrac.org/pdf/cerd_c_usa_10-12_7522_e-1.pdf.
 - 4 *Id.* at 5.
 - 5 *Id.* at 3; See Executive Order No. 13985, 86 Fed. Reg. 14 (Jan. 25, 2021), Available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/> (Biden’s “Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government” made it a policy of the Biden administration to pursue the advancement of equity for people of color and others who have been historically underserved, marginalized, and/or adversely affected by persistent poverty and inequality).
 - 6 The 2021 American Rescue Plan included \$122.8 billion to support schools in reopening safely and remaining open to provide on-site instructional services, especially to the most vulnerable students, and to address the academic, social, emotional, and mental health needs of students. The Department has also issued guidance outlining best practices for addressing the needs of students, particularly those from communities disproportionately impacted by COVID-19 or from historically underserved student subgroups.” *Id.* at 16-17.
 - 7 ESSA requires states to set ambitious goals for closing student achievement gaps and encourages the collaboration of state and local educational authorities, as well as civil society groups, to help states and school districts provide equal access to educational opportunity for all children, including addressing factors that contribute to the education achievement gap. *Id.* at 17-18.
 - 8 Equity Assistance Centers provide technical assistance at the request of government agencies to address equity issues related to desegregation of public schools based on race, national origin, sex, and religion. *Id.* at 18.
 - 9 DOJ and OCR share responsibility for enforcing Title VI of the Civil Rights Act of 1964, which prohibits recipients, including public and private schools that receive federal financial assistance, from discriminating based on race, color, or national origin. DOJ and OCR investigate and resolve claims of discrimination, including allegations concerning racially discriminatory school discipline, racial discrimination in access to educational resources, racial harassment that creates a hostile environment. *Id.*
 - 10 CRDC measures student access to courses, programs, staff, and resources impacting education equity and opportunity for students. The 2018 CRDC results included information on topics such as grade 8 Algebra I enrollment and passing rates by race; high school STEM enrollment by race; referrals to law enforcement by race; harassment or bullying reports by race; students disciplined for harassment or bullying by race; students subjected to restraint or seclusion by race; and suspensions and expulsions by race. *Id.*

III. Progress, Setbacks, and Remaining Concerns Since the 2014 CERD Report

Since the 2014 Concluding Observations, the United States has experienced two separate presidential administrations and is now partway through a third. Each of these administrations has had drastically different approaches to and priorities for education reform, and, as a result, there exist varying levels of progress toward eliminating racial discrimination and *de facto* segregation in education.

A month before the end of Obama's second term, ED announced a small program designed address socioeconomic segregation in public schools.¹¹ This program, known as the *Opening Doors, Opening Opportunities Grant*, was meant to support "LEAs [local education agencies] and their communities in preparing to implement innovative, effective, ambitious, comprehensive, and locally driven strategies to increase socioeconomic diversity in schools and LEAs as a means to improve the achievement of students in the lowest-performing schools."¹² Nearly 30 school districts applied for the grant, seeking an opportunity to better integrate their public schools through careful examination and improvement of their school assignment and enrollment policies before the Trump Administration decided to end the program.¹³

In the beginning of 2014, under the Obama administration, DOJ and ED issued a joint guidance summarizing schools' obligation to avoid racial discrimination in the administration of student discipline.¹⁴ Arising from data from the Civil Rights Data Collection (CRDC) showing that African American students are three times more likely to be suspended or expelled than white students¹⁵, this guidance notified schools that they may be in violation of federal

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- 11 Kalyn Belsha, *Dozens of school districts applied to an Obama-era integration program before Trump officials axed it. Since then, many plans have gone nowhere*, Chalkbeat (Dec. 2, 2019), <https://www.chalkbeat.org/2019/12/2/21121866/dozens-of-school-districts-applied-to-an-obama-era-integration-program-before-trump-officials-axed-it>.
 - 12 *Opening Doors Expanding Opportunities*, Department of Education Office of State Support Grant Initiative. Available at: <https://www2.ed.gov/programs/odeo/index.html> (Last updated Dec. 12, 2016).
 - 13 In 2017, the Department of Education under Trump ended the Obama-era school integration grant program. The Secretary of Education cited a lack of interest in the program, presumptively ignoring the almost 30 school districts that applied for help with local integration initiatives. Press Release: *Scott Condemns Trump Administration's Decision to Pull Funding for School Diversity*, Chairman Bobby Scott, Education & Labor Committee (Mar. 30, 2017), <https://edlabor.house.gov/media/press-releases/scott-condemns-trump-administrations-decision-to-pull-funding-for-school-diversity>. Kalyn Belsha, *Dozens of school districts applied to an Obama-era integration program before Trump officials axed it. Since then, many plans have gone nowhere*, Chalkbeat (Dec. 2, 2019), <https://www.chalkbeat.org/2019/12/2/21121866/dozens-of-school-districts-applied-to-an-obama-era-integration-program-before-trump-officials-axed-it>. Emma Brown, *Trump Education Department nixes Obama-era grant program for school diversity*, The Washington Post (Mar. 29, 2017), <https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity/>.
 - 14 [RESCINDED] *Dear Colleague Letter: Nondiscriminatory Administration of School Discipline*, U.S. Department of Justice, Civil Rights Division & U.S. Department of Education, Office for Civil Rights (Jan. 8, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf> at 5. See also *Federal Support for School Integration: An Obama Administrative Review*, The National Coalition on School Diversity, Issue Brief 8 (Jan. 2017) at 3, Available at: <https://files.eric.ed.gov/fulltext/ED603697.pdf>.
 - 15 [RESCINDED] *Dear Colleague Letter*, *supra* note 14, at 3.

civil rights law if they are found to have significant and unexplained disparities in student discipline that give rise to concerns of racial discrimination¹⁶, are alleged to engage in racially discriminatory student discipline practices¹⁷, and/or implement facially neutral policies and practices that have an unjustified effect against students on the basis of race even if not adopted with the intent to discriminate.¹⁸ In a major step backwards, The Trump administration withdrew this guidance in 2018.¹⁹

In October 2014, ED addressed chronic and widespread racial disparities in education resources (historically resulting in students of color having less access to rigorous curricula, effective teachers, and high-quality learning materials) by issuing guidance regarding state and local obligations to minority and low-income students.²⁰ This guidance was focused on resource comparability, not segregation, and did not address disparities between districts.²¹ To our knowledge, no progress was made in implementing this guidance in the subsequent administration.

In 2016, ED, the Department of Housing and Urban Development (HUD), and the Department of Transportation (DOT) issued a “*Dear Colleague*” letter urging housing, education, and transportation agencies on the state and local level to collaborate on the implementation of HUD’s Affirmatively Furthering Fair Housing process in an effort to promote diversity in schools and communities.²² The letter encouraged state education agencies (SEAs) and local education agencies (LEAs) to consider a wide range of actions (in addition to coordinating with housing and transportation authorities) to improve school and community diversity.²³ To our knowledge, there was no additional progress in implementing this directive in the Trump administration, and indeed, the HUD regulation that the letter was based on was suspended by the new administration in January of 2018.²⁴

In a final significant blow to the cause of racial integration in public schools, in July 2018, the Trump administration withdrew two important 2011 guidance documents giving school

16 *Id.* at 4.

17 *Id.* at 5.

18 *Id.* at 11.

19 In 2018, the Trump administration withdrew the Obama administration’s school discipline discrimination guidance. Namely, the *Dear Colleague Letter of Nondiscriminatory Administration of School Discipline* (2014); the *Overview of the Supportive School Discipline Initiative* (2014); and the *School Discipline Guidance Package FAQ* were rescinded along with related documents. *Dear Colleague Letter* [rescinding Obama-era guidance], U.S. Department of Justice, Civil Rights Division & U.S. Department of Education, Office for Civil Rights (Dec. 21, 2018). Available at: <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf>.

20 *Federal Support for School Integration: An Obama Administrative Review*, The National Coalition on School Diversity, Issue Brief 8 (Jan. 2017) at 3. Available at: <https://files.eric.ed.gov/fulltext/ED603697.pdf>.

21 *Dear Colleague Letter: Resource Comparability*, U.S. Department of Education, Office of Civil Rights (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

22 *Dear Colleague Letter: Mobility via Educational Socioeconomic Opportunity*, U.S. Department of Housing and Urban Development, U.S. Department of Education, & U.S. Department of Transportation (June. 3, 2016), <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf>.

23 *Id.* at 2-3.

24 Kriston Capps, *The Trump Administration Just Derailed A Key Obama Rule on Housing Segregation*, Bloomberg (Jan. 4, 2018), <https://www.bloomberg.com/news/articles/2018-01-05/trump-s-hud-delays-affirmatively-furthering-fair-housing>.

districts and other educational institutions advice on how to legally promote school integration²⁵: *Guidance on the Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools; and a Dear Colleague Letter Regarding the Use of Race by Educational Institutions*.²⁶

IV. Continuing Patterns of De Facto Segregation, Disparities, and Discrimination

In spite of efforts during the Obama Administration to address school segregation at the federal level, the overall federal response has been wholly inadequate to the magnitude of the problem. It is true that U.S. public schools are becoming marginally more diverse²⁷, but at the same time, there has been a growing trend since the 1990s of intensely segregated schools, or schools where Black or Hispanic students represent at least 90% of the total population.²⁸ Further, about three-fourths of Black and Hispanic students attend public schools where a majority of their classmates are classified as low-income (compared to about one-third of white students).²⁹ Regardless of the United States' efforts, racial inequality in education cannot be eliminated without the reduction of systemic economic and racial isolation (through policy that combats both school and residential segregation) – indeed, research has shown that the single most important predictor of racial achievement gaps is the level of poverty within a school.³⁰

Despite tremendous increases in the Latino and Asian populations in the U.S., racial and economic isolation in schools have continued to worsen. From 1988 to 2016, the share of schools with enrollments of 90-100% non-white students more than tripled from 5.7% to 18.2%, showcasing a drastic increase in intensely segregated school environments.³¹ The discrepancy between growing diversity and growing segregation is partly explained by the shrinking share of white students in the overall population,³² and is also driven by continued school district design and student assignment policies that effectively relegate many children of

25 These guidance documents were designed to encourage schools to take race into account to promote student diversity. Andrew Ujifusa, *How Have Obama's K-12 Policies Fared Under Trump?*, EducationWeek (Aug. 8, 2018), <https://www.edweek.org/policy-politics/how-have-obamas-k-12-policies-fared-under-trump/2018/06>.

26 Janel George & Linda Darling-Hammond, *The Federal Role and School Integration: Brown's Promise and Present Challenges*, Learning Policy Institute (Feb. 2019), https://learningpolicyinstitute.org/sites/default/files/product-files/Federal_Role_School_Integration_REPORT.pdf at 4.

27 Will McGrew, *U.S. school segregation in the 21st century*, Washington Center for Equitable Growth (Oct. 2019) at 7. Available at: <https://equitablegrowth.org/wp-content/uploads/2019/10/101519-school-seg.pdf>.

28 *Id.* at 6.

29 Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, The Atlantic (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/>.

30 McGrew, *supra* note 27, at 6.

31 Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue, Gary Orfield, *Harming our Common Future: America's Segregated Schools 65 Years after Brown*, The Civil Rights Project (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>, at 27.

32 *Id.* at 6-7.

color to racially and economically isolated schools.³³ Thus, although a vast majority of Americans value racially and socioeconomically diverse public school learning environments, school segregation remains a pervasive and worsening issue in the United States.³⁴ School segregation negatively impacts students of all races by reinforcing intergroup biases and stereotypes.³⁵

“More than a third of students (about 18.5 million) attended a predominantly same-race/ethnicity school—where 75 percent or more of the student population is of a single race/ethnicity—according to GAO’s analysis of Department of Education data for school year 2020-21. GAO also found that 14 percent of students attended schools where 90 percent or more of the students were of a single race/ethnicity.”³⁶ In a number that exceeds the segregation rate of 1968, 2019 saw 81% of Black students attending majority non-white schools.³⁷ As stark as these numbers are, they become even more alarming with the findings that Black and Hispanic students are more likely than their white peers to attend schools with high rates of concentrated poverty.³⁸ The isolation of low-income Black students has increased nationwide.³⁹ In the South, the percentage of Black students attending majority-white schools decreased by almost half from 1988 to 2011.⁴⁰

These stark trends warrant a stronger response from the United States government than has been given thus far. Students who attend schools with high proportions of disadvantaged students are significantly affected by their environment and lack of quality resources.⁴¹ Within these schools, teachers sometimes spend more time disciplining students and offering remedial services than they do on learning.⁴² This phenomenon is further complicated by the fact that teachers have less time to spend challenging students who have to overcome family, community,

33 Emma García, *Schools are still segregated, and black children are paying a price*, Economic Policy Institute (Feb. 12, 2020), at 1. Available at: <https://files.epi.org/pdf/185814.pdf>.

34 Halley Potter, et al., *School Integration Is Popular. We Can Make It More So.*, The Century Foundation (June 3, 2021), <https://tcf.org/content/commentary/school-integration-is-popular-we-can-make-it-more-so/>.

35 McGrew, *supra* note 27, at 19-20.

36 *K-12 EDUCATION: Student Population Has Significantly Diversified, But Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines*, United States Government Accountability Office, Report to the Chairman, Committee on Education and Labor, House of Representatives, GAO-22-104737 (June 2022). Available at: <https://www.gao.gov/assets/gao-22-104737.pdf>. See also Halley Potter, *School Segregation in U.S. Metro Areas*, The Century Foundation (May 17, 2022), <https://tcf.org/content/report/school-segregation-in-u-s-metro-areas/> (noting that, in the 2018-2019 school year, one out of every six public school students attended a school where over 90% of the students shared their racial background).

37 Warren Fiske, *Fact-check: Are public schools as segregated today as in 1960s?*, Austin American-Statesman (June 14, 2022), <https://www.statesman.com/story/news/politics/politifact/2022/06/14/fact-check-public-schools-segregated-today-1960-s/7608945001/>.

38 Emma García, *Poor black children are much more likely to attend high-poverty schools than poor white children*, Economic Policy Institute (Jan. 13, 2017), <https://www.epi.org/publication/poor-black-children-are-much-more-likely-to-attend-high-poverty-schools-than-poor-white-children/>.

39 Richard Rothstein, (Presentation) *Modern Segregation*, Economic Policy Institute (Mar. 6, 2014), at 3. Available at: <https://files.eric.ed.gov/fulltext/ED558146.pdf> (from 1911-2011, the percentage of Black students attending schools that are more than 90% minority grew from 34% to 39%).

40 *Id.* at 6.

41 *Id.* at 2.

42 *Id.*

and personal hardships.⁴³ It is an unfortunate reality that children in high poverty neighborhoods (who are more likely to be Black and Hispanic⁴⁴) suffer from greater stress interfering with their learning than their affluent peers.⁴⁵

School segregation is closely related to neighborhood segregation – as the intensity of neighborhood segregation increases, so does the racial segregation of schools.⁴⁶ The standard practice of requiring students to attend their neighborhood or district schools allows the effects of residential segregation to become intertwined with the United States’ public education system.⁴⁷ In fact, more than half of the nation’s public school students live in racially concentrated districts where over 75% of the students are either white or nonwhite.⁴⁸ Neighborhood segregation is intensified by the increasing incidence of the gerrymandering of public schools via school district secession⁴⁹. Secession of higher income, often whiter, neighborhoods from larger diverse districts ultimately drains funding from schools and worsens school segregation for the children left behind.⁵⁰

A. DISPARITIES IN FUNDING, RESOURCES, AND OUTCOMES

School segregation exacerbates school district funding disparities, often resulting in a lower quality of curricula for underfunded schools while cultivating discriminatory stereotypes.⁵¹ These disparities dampen disadvantage student’s academic performance, future employment opportunities, and social/economic opportunities and prospects.⁵²

The majority of funding for public schools is raised through local property tax and, as a result, students who attend schools in poverty-concentrated neighborhoods receive, on average, \$1,000 less per student than districts with low rates of poverty.⁵³

43 *Id.*

44 Michael B. Sauter, *Faces of poverty: What racial, social groups are more likely to experience it?*, USA Today (Oct. 10, 2018), <https://www.usatoday.com/story/money/economy/2018/10/10/faces-poverty-social-racial-factors/37977173/>.

45 Rothstein, *supra* note 39, at 2.

46 *Id.* at 3.

47 Erika Zelaya, *Why School Segregation Matters*, Urban Institute: Housing Matters (Apr. 27, 2022), <https://housingmatters.urban.org/articles/why-school-segregation-matters>.

48 Keith Meatto, *Still Separate, Still Unequal: Teaching about School Segregation and Educational Inequality*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/learning/lesson-plans/still-separate-still-unequal-teaching-about-school-segregation-and-educational-inequality.html>.

49 McGrew, *supra* note 27, at 13.

50 *Id.* at 14. “Seceding (new) districts were generally wealthier than the original and remaining districts. On average, 33 percent of students in new districts were eligible for free or reduced-price lunch compared to 62 percent of students in the original districts and 70 percent of students in the remaining districts.” K-12 Education, *supra* note 36, at 22.

51 *Id.* at 18.

52 *Id.*

53 Ivy Morgan & Ary Amerikaner, *Funding Gaps: An analysis of School Funding Equity Across the US and Within Each State*, The Education Trust (Feb. 2018), at 4. Available at: https://edtrust.org/wp-content/uploads/2014/09/FundingGapReport_2018_FINAL.pdf.

Despite the United States' efforts to address inequity in education, there has been no significant change in the disparities in academic achievement between Black and white students and, in nearly every school district, white students outperform their minority counterparts on national assessments.⁵⁴ Although around a third of school districts experienced a smaller achievement gap between Black and white students during the 2009 and 2016 school years, most reductions in the disparity were quite small, often less than 0.10 standard deviations.⁵⁵ As a result, despite this minute difference, the achievement gap is still very large – the difference in standardized test scores between Black and white students amounts to roughly two years of education.⁵⁶ The gap between Hispanic and white students is almost as large.⁵⁷

A. RACIAL DISCRIMINATION IN SCHOOL DISCIPLINE

Disciplinary measures in public schools disproportionately target Black students and the biased application of harsh disciplinary measures and referrals to law enforcement contribute to the disproportionate exposure of students of color to the school-to-prison pipeline.⁵⁸ In the 2015-2016 school year, 2.7 million public school students received at least one out-of-school suspension and, while only representing 8% of the student population, Black boy students represented 25% and Black girl students represented 14% of the gender's out-school suspensions.⁵⁹ In contrast, while 25% and 24% of white boy and girl students are white, respectively, they only represented 24% and 8% of out of school suspensions.⁶⁰ In the 2017-2018 school year, Black students received 38% of out-of-school suspensions, 37.6% of expulsions, 28.7% of referrals to law enforcement, and 31.6% of school arrests, despite only making up about 15% of the public-school student population.⁶¹

These numbers show that students from marginalized communities are more likely to end up in the school-to-prison pipeline – not because of behavioral differences across racial groups but because of systemic racial bias.⁶² Experience with the criminal system as a result of the

54 Allison Atteberry, Kendra Bischoff, & Ann Owens, *Identifying Progress Toward Ethnoracial Achievement Equity across U.S. School Districts: A New Approach*, *Journal of Research on Educational Effectiveness* (2021), at 426-428.

55 *Id.*

56 David Elliot, *This is what the racial education gap in the US looks like right now*, World Economic Forum (Oct. 16, 2020), <https://www.weforum.org/agenda/2020/10/us-education-racial-equality-stanford-data-project/>. See also Sean Reardon, *What Explains White-Black Differences in Average Test Scores?*, Data Discovery by The Educational Opportunity Project at Stanford University (Sep. 2019), <https://edopportunity.org/discoveries/white-black-differences-scores/>.

57 Reardon, *supra* note 56.

58 The school-to-prison pipeline refers to practices and/or policies that expose students of color to the criminal system. *Who Is Most Affected by the School to Prison Pipeline?*, American University School of Education (Feb. 24, 2021) <https://soeonline.american.edu/blog/school-to-prison-pipeline>.

59 *Id.*

60 *Id.*

61 2017-2018 *Civil Rights Data Collection*, U.S. Education Department, Office for Civil Rights (June 2021). Available at: <https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf>.

62 School-to-prison pipeline, *supra* note 58. See also Russell J. Skiba & Natasha T. Williams, *Are Black Kids Worse? Myths and Facts about Racial Differences in Behavior: A Summary of Literature*, The Equity Project at Indiana University (Mar. 2014), at 3-5. Available at: <https://www.justice4all.org/wp-content/uploads/2016/04/Are-Black-Kids-Worse-Myths-and-Facts-About-Racial-Differences-in-Behavior.pdf>.

school-prison pipeline has life-changing negative effects on students of color. Imprisonment, and the resulting criminal record, can make it difficult for these students, as adults, to attain housing, gain employment, or qualify for public/financial assistance.⁶³ The school-to-prison pipeline was exacerbated by “Zero-Tolerance” policies originating from the 1994 Gun-Free-Schools Act (GFSA)⁶⁴. Under GFSA’s instruction, zero-tolerance policies expanded to encompass a wide-range of offenses, the increased reporting of said offenses to law enforcement, and the increased presence of school-resource officers (SROs)⁶⁵ in public schools.⁶⁶ In 2018, 51% of high schools with over 75% of Black or Hispanic students contained SROs, as compared to 34% of majority white schools.⁶⁷ To make matters worse, disciplinary approaches such as zero-tolerance policies and the use of SROs are often utilized in situations where students are neither exhibiting criminal behavior nor endangering other students or faculty.⁶⁸

Unfortunately, because of the Trump administration’s reversal of Obama-era guidance on school discipline, and despite the Biden administration’s 2021 plan to revisit racial equity in education⁶⁹, the United States federal government has not yet reissued its guidance on school discipline.

V. Renewed Efforts Under the Biden Administration

Although the Biden administration has yet to reinstate any official guidance on school diversity, a few promising steps have been taken toward improving racial and socioeconomic diversity in public schools. Unfortunately, these steps are not sufficient to address the scale of the problem. First, Congress and the administration have continued and slightly expanded the Magnet Schools Assistance Program while encouraging schools to collaborate with housing agencies in the efforts.⁷⁰

63 School-to-prison pipeline, *supra* note 58.

64 *Id.*

65 School-resource officers are police officers with special training for working with youth and are primarily placed in majority Black and Hispanic schools. *Id.*

66 *Id.*

67 Wendy Gomez, *Abolishing School Resource Officers Amidst the Black Lives Matter Movement: A History and Case Study in Oakland and Los Angeles*, Journal of Public and International Affairs (May 5, 2021). Available at: <https://jpia.princeton.edu/news/abolishing-school-resource-officers-amidst-black-lives-matter-movement-history-and-case-study#:~:text=Oakland%20and%20Eliminating%20SROs%20in,Strauss%2C%20and%20Bell-ware%202020>).

68 Nicholas Triplett, Ayana Allen, & Chance W. Lewis, *Zero Tolerance, School Shootings, and the Post-Brown Quest for Equity in Discipline Policy: An Examination of How Urban Minorities Are Punished for White Suburban Violence*, 83 (3) The Journal of Negro Education 352, 352-372 (June 1, 2014).

69 Evie Blad, *Biden Team to Revisit How Schools Should Ensure Racial Equity in Discipline*, EducationWeek (June 4, 2021), <https://www.edweek.org/leadership/biden-team-to-revisit-how-schools-should-ensure-racial-equity-in-discipline/2021/06>.

70 *Magnet Schools Assistance Program*, Office of Elementary and Secondary Education. Available at: <https://oese.ed.gov/offices/office-of-discretionary-grants-support-services/school-choice-improvement-programs/magnet-school-assistance-program-msap/> (last modified May 9, 2022).

Additionally, effective as of January 1, 2021, Congress lifted a key prohibition on the use of federal school transportation funds to support school integration.⁷¹

That same year, Biden's federal budget proposal included a \$100 million grant program that would support competitive grants to LEAs and partner agencies for activities (such as engaging with housing agencies to promote school integration) to improve racial and socioeconomic diversity in preK-12.⁷² Unfortunately, these funds have not yet been allocated by Congress. 2021 also saw the introduction of the Strength in Diversity Act of 2021 [H.R. 729] which would establish a program through which ED can support the development, implementation, and evaluation of strategies designed to improve diversity and reduce or eliminate racial or socioeconomic isolation in public schools.⁷³ There is no likelihood that this bill will pass in the face of monolithic resistance from the opposition party.

Finally, the Biden administration's FY 2022 Budget seeks to "Address Entrenched Disparities in Education" by: providing universal preschool to all 3- and 4-year-olds; making historic investments in high-poverty schools⁷⁴; and eliminating inequitable school infrastructure conditions.⁷⁵ This budget proposal shows acknowledgement of the fact that students of color are more likely than their white peers to attend schools with run down and unsafe conditions. The proposed redress shows promise for the Biden administration's role in eliminating racial disparities in education. Unfortunately, the FY 2023 Budget only mentions expanded access to affordable childcare rather than a universal allowance, a setback that calls into question the Biden administration's dedication to tackling racial disparities as early as possible in the education process.⁷⁶

71 Janel George, *Federal Action Removes Long-Standing Obstacle to School Integration*, Learning Policy Institute (Mar. 3, 2021), <https://learningpolicyinstitute.org/blog/federal-action-removes-long-standing-obstacle-school-integration>

72 Kalyn Belsha & Matt Barnum, *\$100 million and many open questions: Here's how Biden is approaching school integration*, Chalkbeat (June 22, 2021), <https://www.chalkbeat.org/2021/6/22/22545227/biden-cardona-school-integration-desegregation-diversity>. See also *The Budget for Fiscal Year 2022 (Federal Funds)*, Department of Education, Office of Elementary and Secondary Education, at 342. Available at: https://www.whitehouse.gov/wp-content/uploads/2021/05/edu_fy22.pdf.

73 Strength in Diversity Act of 2021, H.R. 729, 117th Cong. § 2 (2021). Available at: <https://www.congress.gov/bill/117th-congress/house-bill/729/text>.

74 The Budget includes \$20 billion for a new Title I Equity Grants program. *The Budget for Fiscal Year 2022*, *supra* note 72, at 336.

75 *President's FY 2022 Budget Advances Equity Across Government*, Office of Management and Budget. Available at: <https://www.whitehouse.gov/wp-content/uploads/2021/06/FY22-Budget-Equity-Fact-Sheet.pdf>.

76 "Expands Access to Affordable, High-Quality Early Child Care and Learning. The Budget provides \$20.2 billion for HHS's early care and education programs, an increase of \$3.3 billion, or 19 percent, from the 2021 enacted level. This includes \$7.6 billion for the Child Care and Development Block Grant, an increase of \$1.7 billion from the 2021 enacted level to expand access to quality, affordable child care for families across the Nation. In addition, the Budget helps young children enter kindergarten ready to learn by providing \$12.2 billion for Head Start, an increase of \$1.5 billion from the 2021 enacted level. The Budget also helps States identify and fill gaps in early education programs by funding the Preschool Development Grants program at \$450 million, an increase of \$175 million from the 2021 enacted level." *Budget of the U.S. Government, Fiscal Year 2023*, Office of Management and Budget, at 68. Available at https://www.whitehouse.gov/wp-content/uploads/2022/03/budget_fy2023.pdf.

Further, in recognition of the role that residential segregation has on school segregation, a new Biden administration regulation adds requirements to the application process⁷⁷ for grants from the federal Charter School Program (CSP).⁷⁸ The final regulation requires grant applicants to prove demand and community support for their schools, examine the effect they would have on neighboring district-run schools, and demonstrate that they would not exacerbate segregation.⁷⁹ Promisingly, the final rule for CSP also prioritizes diverse charter schools by including a needs analysis requirement in the application that requires applicants to include a plan to establish and maintain a racially and socio-economically diverse student body⁸⁰ and feedback on the steps they have taken (or will take) to ensure that the proposed charter school does not disrupt desegregation efforts⁸¹.

Lastly, Biden's FY 2023 Budget requests over \$88 billion for ED.⁸² This funding includes \$100 million for a new Fostering Diverse Schools program that would help communities develop and implement strategies to build more racially and socioeconomically diverse schools and classrooms.⁸³ The budget also requests \$468 million to expand the Full-Service Community Schools program, a program that recognizes the role of schools as the centers of communities and neighborhoods and would fund efforts to integrate resources for student and family support, collaborative practices, and community engagement.⁸⁴

77 Under the Obama Administration in 2016, ED issued new guidelines for the Charter School Program ("*Grants for Replication and Expansion of High-Quality Charter Schools*"). The selection criteria for these grants were meant to ensure that charter "school models and practices that focus on racial and ethnic diversity in student bodies with respect to educationally disadvantaged students" was consistent with applicable law among other factors. See *Federal Support for School Integration: An Obama Administrative Review*, The National Coalition on School Diversity, Issue Brief 8 (Jan. 2017) at 7. Available at: <https://files.eric.ed.gov/fulltext/ED603697.pdf>. See also *Charter Schools Program (CSP) Grants for State Educational Agencies*, U.S. Department of Education, 81 Fed. Reg. 77 (Apr. 21, 2016), at 23471. Available at: <https://www.govinfo.gov/content/pkg/FR-2016-04-21/pdf/2016-09298.pdf>.

78 See [Notice] *Expanding Opportunity through Quality Charter Schools Program—Grants to Charter School Developers for the Opening of New Charter Schools, Replication and Expansion of High-Quality Charter Schools*, Department of Education, 87 Fed. Reg. 40218 (July 6, 2022). Available at: https://www.govinfo.gov/content/pkg/FR-2022-07-06/pdf/2022-14448.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list. See also *Final Priorities, Requirements, Definitions, and Selection Criteria: Expanding Opportunity through Quality Charter Schools Program—Grants to State Entities, Charter Management Organizations, etc.*, Department of Education, 87 Fed. Reg. 40406 (July 6, 2022). Available at: https://www.govinfo.gov/content/pkg/FR-2022-07-06/pdf/2022-14445.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list.

79 Erika L. Green, *New Biden Administration Rules for Charter Schools Spur Bipartisan Backlash*, N.Y. Times (May 13, 2022), <https://www.nytimes.com/2022/05/13/us/politics/charter-school-rules-biden.html>.

80 87 Fed. Reg. 40406, at 40414.

81 *Id.* at 40418.

82 *President Biden's FY 2023 Budget Update: Education and Labor Requests*, McGuireWoods Consulting (Apr 7, 2022), <https://www.mwcllc.com/ideas/updates/articles/2022/4/biden-education-labor-budget#:~:text=%24100%20million%20for%20a%20new,the%20Magnet%20Schools%20Assistance%20Program.>

83 *Id.*

84 *Id.*

VI. Areas of Serious Concern

While the Obama administration delivered some promising steps toward eliminating school segregation, the sharp setbacks of the Trump administration and the Biden administration's slow efforts to tackle school segregation have failed so far to comply with the United States' obligations under the CERD Treaty.

Since the Inauguration in January of 2021, the Biden administration has promised to address key aspects of racial inequality in education such as disparities in school discipline, school infrastructure, early childhood education, and school integration/diversity. Unfortunately, most of these promises have not yet materialized – for example the reissuing of Obama-era guidance on school integration; reissuing guidance on school discipline⁸⁵; an Action Plan for improving school infrastructure⁸⁶; the expansion of childcare for low- and moderate-income families⁸⁷; the Strength in Diversity Act and the related Fostering Diverse Schools grants program⁸⁸, which still remains an unfunded concept.

Another unaddressed concern is a phenomenon where communities have sought to secede from their current school district, forming new racial and/or economic borders and, as a result, increasing the overall level of school segregation.⁸⁹ In 2019, a report found that there were 128 attempts to secede amongst America's school districts.⁹⁰

Another key unaddressed area of concern is relationship between racial segregation and school funding across school district lines – a recent report found that, across seven major metro areas, 90% of majority-Black/Hispanic school districts spend below estimated adequate levels, compared to 12% of majority-white districts; and 85% of majority-Black/Hispanic districts are both inadequately funded and score below the U.S. average on math and reading tests,

85 [Archived] *U.S. Department of Education's Office for Civil Rights Seeks Information on the Nondiscriminatory Administration of School Discipline*, U.S. Department of Education (June 4, 2021). Available at: <https://www.ed.gov/news/press-releases/us-department-educations-office-civil-rights-seeks-information-nondiscriminatory-administration-school-discipline>.

86 *White House Unveils Action Plan for Improving School Infrastructure*, Electrical Construction & Maintenance (Apr. 11, 2022), <https://www.ecmweb.com/lighting-control/article/21238682/the-bidenharris-action-plan-for-building-better-school-infrastructure> (Biden administration launches \$500 million grant program to make public schools more energy-efficient, protecting the health and learning of children).

87 The American Families Plan calls for universal pre-school for all three- and four-year olds. See *FACT SHEET: The American Families Plan*, The White House Briefing Room, Statements and Releases (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/28/fact-sheet-the-american-families-plan/>. See also Alana Wise, *White House Proposes \$1.8 Trillion Plan for Children and Families*, NPR (Apr. 28, 2021), <https://www.npr.org/2021/04/28/991357190/white-house-proposes-massive-spending-on-children-and-families> (designed to help reduce child, and overall, poverty, the American Families Plan proposes \$200 billion for universal preschool, which the White House says will save the average family \$13,000).

88 H.R. 729, § 2 (2021). President Biden's FY 2023 Update, *supra* note 82.

89 Peter Greene, *White Flight, Without the Actual Flight*, FORBES (Nov. 12, 2019), <https://www.forbes.com/sites/petergreene/2019/11/12/white-flight-without-the-actual-flight/?sh=30af3e0253c6>.

90 [2019 Update] *Fractured: The Breakdown of America's School Districts*, EDBuild (Apr. 2019). Interactive database available at: <https://edbuild.org/content/fractured#intro>.

compared with 6% of majority-white districts.⁹¹ The lack of attention given to this intersection calls into question the federal government's commitment to the promises of the CERD Treaty and its obligation to foster equity in opportunity for public school students.

As a way to promote socioeconomic diversity through magnet schools, the Obama Administration proposed \$115 million for magnet schools.⁹² Known as the Magnet Schools Assistance Program, which offered 5-year grants to high-quality magnet schools in Local Education Agencies (LEAs) to help them implement desegregation plans⁹³ and eliminate, reduce, and prevent minority group isolation in elementary and secondary schools with high numbers of minority students.⁹⁴ In the 2022 Funding Notice, the current administration estimated that \$135 million would be used for awards under this program.⁹⁵ Although this funding amount appears significant as an increase on funding from previous years, it pales in comparison to the \$440 million in funding maintained for the Charter School Program.⁹⁶

A final area of serious concern relates to some recent federal court interpretations of the U.S. Constitution's 14th Amendment, in a manner that directly contradicts the CERD Treaty. For example, the U.S. Court of Appeals for the Fourth Circuit recently ruled that Fairfax County Public Schools (FCPS) can continue using an admissions system for its prestigious magnet school Thomas Jefferson High School for Science and Technology (TJ) despite the controversy that the admissions system has sparked.⁹⁷ With the goal of increasing diversity and facing the nation's racial reckoning head on, FCPS officials altered the admissions process, opting for a holistic review that includes consideration of an applicant's socioeconomic status, the language spoken at home, the applicant's disability status, and whether the applicant's middle school has historically sent few students to TJ.⁹⁸

After the new admissions policy took effect, the Coalition for TJ (a group representing parents, students, alumni, staff, and community members⁹⁹) successfully sued to reverse the changes in

91 Bruce D. Baker, Matthew Di Carlo, Preston C. Green III, *Segregation and School Funding: How Housing Discrimination Reproduces Unequal Opportunity*, Albert Shanker Institute (Apr. 2022), <https://www.shankerinstitute.org/sites/default/files/2022-05/SEGreportfinal.pdf>, at 1-3.

92 Caitlin Emma, *More Money for Magnet Schools?*, POLITICO, Weekly Education (Feb. 15, 2017), <https://www.politico.com/tipsheets/morning-education/2017/02/more-money-for-magnet-schools-218761>.

93 *Fiscal Year 2017 Budget Summary and Background Information*, at 5, and 22. Available at: <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>.

94 Belsha & Barnum, *supra* note 72.

95 *Magnet Schools Assistance Program*, U.S. Department of Education, 87 Fed. Reg. 35 (Feb. 22, 2022), at 9587-9596. Available at: <https://www.govinfo.gov/content/pkg/FR-2022-02-22/pdf/2022-03643.pdf>.

96 The U.S. Department of Education is fully committed to high-quality public schools, whether traditional public, charter, magnet, community school, or another public-school approach. As such, the Administration has continued to request that Congress maintain \$440 million in funding for the Charter School Programs (CSP). *Charter School Programs Final Rulemaking Fact Sheet*, U.S. Department of Education (Revised July 6, 2022). Available at: https://oese.ed.gov/files/2022/07/CSP-Fact-Sheet_v3_07.06.22.pdf.

97 Hannah Natanson, *Court says Thomas Jefferson admissions can remain as case proceeds*, The Washington Post (Mar. 31, 2022), <https://www.washingtonpost.com/education/2022/03/31/fourth-circuit-rules-tj-lawsuit/>.

98 *Id.*

99 *Fighting Race-Based Discrimination at Nation's Top-Ranked High School*, Pacific Legal Foundation, https://pacificlegal.org/case/coalition_for_tj/.

the school's admission system, arguing that admissions changes are racially discriminatory and were designed to reduce the number of Asian students.¹⁰⁰ In response, the Fourth Circuit stated that "The Coalition appears to have identified no evidence that TJ's current race neutral policy is intended to achieve a certain percentage of Black, Hispanic, or Asian American students."¹⁰¹ Then, in April, the Supreme Court denied intervention in the case and upheld a stay from the appellate court allowing FCPS to continue to use the new admissions process.¹⁰² The ultimate outcome of this case will significantly impact the promotion of diversity in admissions as well as the socioeconomic composition of public schools.

VII. Suggested Recommendations

In addition to the excellent recommendations included in the Committee's 2014 Concluding Observations, we recommend consideration of the following:

- Reissue guidance on the importance of promoting racial and economic integration in K-12 schools, including legal guidance on constitutional techniques for achieving diversity
- Significantly expand federal funding for education programs proven to promote racial integration in public schools, including the Fostering Diverse Schools grants program, and the Magnet Schools Assistance Program.
- Develop and implement incentives within Title I and other sections of the Elementary and Secondary Education Act to support integration efforts across public schools.
- Engage in more aggressive enforcement of Title VI of the Civil Rights Act of 1964 to combat school secession efforts.
- Research, develop, and implement strategies designed to combat residential and school segregation, in tandem, to address the double segregation (by race and wealth) of students living in areas of concentrated poverty.
- Reissue guidance summarizing schools' obligation to avoid racial discrimination in the administration of student discipline, including, but not limited to, elimination of the school-to-prison pipeline and significant reduction of the presence of SROs in minority schools.
- Continue to encourage interagency collaboration to combat residential and school segregation.

100 Magnet Schools Assistance Program, *supra* note 94 (The percentage of Asian students receiving offers, however, dropped from a typical 70 percent to roughly 50 percent.)

101 *Id.*

102 Margaret Barthel, *Supreme Court Lets Thomas Jefferson High Admissions Policy Stand - For Now*, DCist (Apr. 26, 2022), <https://dcist.com/story/22/04/26/supreme-court-thomas-jefferson-lawsuit/>.

