
Still Segregated: How Race and Poverty Stymie the Right to Education

Shadow Report of The Leadership Conference Education Fund
on behalf of The Leadership Conference on Civil and Human Rights
with American Civil Liberties Union, Anti-Defamation League, Lawyers' Committee for Civil Rights Under Law,
NAACP, National Women's Law Center, and Poverty & Race Research Action Council

For Review of United States' Compliance with the International Covenant on Civil and Political Rights
109th Session of the Human Rights Committee, Geneva 14 Oct 2013 – 01 Nov 2013

13 September 2013



Acknowledgements

This report was prepared by The Leadership Conference Education Fund's Human Rights Policy and Education Project and was submitted to the U.N. Human Rights Committee for review of the United States' compliance with the International Covenant on Civil and Political Rights. It is part of the ongoing work of The Leadership Conference on Civil and Human Rights to hold the United States government accountable for its human rights obligations.

This report was prepared under the direction and substantive guidance of June Zeitlin, director of human rights policy. We would like to thank our legal intern, Noah Baron, a student at Georgetown Law School, for the excellent research and analysis and his major contribution to the writing of this report; Sakira Cook, senior policy research associate, for her overall substantive input and management of the report drafting and editing; and Max Marchitello, William F. Taylor Education Fellow, and Dianne Piche, senior counsel and director of educational programs, for their important substantive contributions on educational equity.

Staff assistance in the editing and finalizing of the report was provided by Tyler Lewis, director of messaging and project management; Patrick McNeil, communications assistant; Jeff Miller, vice president for communications; and Corrine Yu, managing policy director.

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Supporting Organizations

American Civil Liberties Union

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization dedicated to protecting human rights and civil liberties in the United States. The ACLU is the largest civil liberties organization in the country, with offices in 50 states and over 500,000 members. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America’s entry into World War I, including the persecution of political dissidents and the denial of due process rights for non-citizens. In the intervening decades, the ACLU has advocated to hold the U.S. government accountable to the rights protected under U.S. Constitution and other civil and human rights laws and treaties. The ACLU works to extend rights to segments of our population that have traditionally been denied their rights, including people of color; women; lesbians, gay men, bisexuals and transgender people; prisoners; and people with disabilities. The full breadth of the ACLU’s work can be seen at www.aclu.org.

Anti-Defamation League

The Anti-Defamation League was founded in 1913 “to stop the defamation of the Jewish people and to secure justice and fair treatment to all.” Now the nation’s premier civil rights/human relations agency, ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all.

The Lawyers’ Committee for Civil Rights Under Law

The principal mission of the Lawyers’ Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers’ Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar’s leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today.

NAACP

Founded in 1909, the NAACP is our nation’s oldest, largest and most widely-recognized grassroots-based civil rights organization. We currently have more than 2,200 membership units in our country.

The National Economic & Social Rights Initiative

In partnership with communities, the National Economic and Social Rights Initiative (NESRI) works to build a broad movement for economic & social rights, including health, housing, education and work with dignity. Based on the principle that fundamental human needs create human rights obligations on the part of government and the private sector, NESRI advocates for public policies that guarantee the universal and equitable fulfillment of these rights in the United States.

The National Women’s Law Center

The National Women’s Law Center is a nonprofit legal organization that is dedicated to the advancement and protection of women’s legal rights and the expansion of women’s opportunities. Since 1972, the Center has worked to

secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination.

The Poverty & Race Research Action Council

The Poverty & Race Research Action Council (PRRAC) is a civil rights policy organization convened by major civil rights, civil liberties, and anti-poverty groups in 1989-90. PRRAC's primary mission is to help connect advocates with social scientists working on race and poverty issues, and to promote a research-based advocacy strategy on structural inequality issues. PRRAC sponsors social science research, provides technical assistance, and convenes advocates and researchers around particular race and poverty issues. PRRAC also supports public education efforts, including the bimonthly newsletter/journal *Poverty & Race*, and the award-winning civil rights history curriculum guide, *Putting the Movement Back Into Civil Rights Teaching* (co-published with Teaching for Change). PRRAC's work is informed by an extensive national network of researchers, organizers, attorneys, educators, and public health and housing professionals.

Foreword

*Wade Henderson
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I am pleased to submit this report prepared by The Leadership Conference Education Fund on behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. The Leadership Conference's more than 200 national organizations¹ represent persons of color, women, children, organized labor, persons with disabilities, the elderly, the lesbian, gay, bisexual, and transgender (LGBT) community, and major religious groups. Since its inception, The Leadership Conference has worked to ensure that all persons in the United States are afforded civil and human rights protections under the U.S. Constitution and in accordance with international human rights norms. In 1969, The Leadership Conference Education Fund was founded as the education and research arm of The Leadership Conference. The Education Fund builds public will for federal policies that promote and protect the civil and human rights of all persons in the United States through initiatives grounded in the belief that an informed public is more likely to support effective federal civil rights and social justice policies.

Yet, there remains an inconsistency between the ideals the nation professes and the reality of its practices. While it is true that U.S. laws and policies are comparatively advanced in protecting civil rights, the gap in U.S. law and policy as it relates to the protection of universal human rights recognized by the Universal Declaration of Human Rights (UDHR) is striking, especially in the areas of economic inequality, racial discrimination, and educational inequity. The U.S. government has fallen short of fully implementing its obligations, particularly under the International Convention on Civil and Political Rights (ICCPR) as discussed below, as well as the Convention on the Elimination of All Forms of Racial Discrimination (CERD). In both instances the U.S. government has failed through legislative or executive means to take affirmative steps to fully integrate the provisions of the treaty into U.S. law and policy and the recommendations of this committee.

For all of these reasons, The Education Fund and The Leadership Conference, in collaboration with the American Civil Liberties Union, the Anti-Defamation League, The Lawyers' Committee for Civil Rights Under Law, the NAACP, The National Economic & Social Rights Initiative, The National Women's Law Center and The Poverty & Race Research Action Council, have compiled this report to provide the Human Rights Committee with information on the lack of educational equity in the United States, contrary to its obligations under the ICCPR. We acknowledge that the U.S. report to the committee included many areas where demonstrable improvements have been made. However, there remain areas where the report falls short in providing concrete information on ICCPR implementation. This submission is limited to elementary and secondary education (typically grades Kindergarten through 12) and focuses largely on de facto racial segregation in education and on educational inequity, areas where we believe the United States has not undertaken adequate efforts to implement the provisions of the ICCPR, and has disregarded the 2006 recommendations of the committee. We urge the committee to include this topic in its questioning of the United States government in October.



Introduction

“[Education] is required in the performance of our most basic public responsibilities, even services in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to¹ cultural values, in preparing him [or her] for later professional training, and in helping him [or her] to adjust normally to his [or her] environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education.”

—*Brown v. Board of Education*²

1. In its list of adopted issues for the fourth periodic review, the Human Rights Committee asked the United States to “provide information on” the disparate use of corporal punishment against Black students and students with disabilities, as well as “the application of criminal law to minors in order to address disciplinary issues arising in schools.”³ Though important, these two issues are symptoms of a much broader problem in the United States: educational inequity.
2. In its 2006 concluding observations, the committee expressed concern over “reports of de facto racial segregation . . . caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs” and the way in which districts are “created, funded and regulated.”⁴ Such segregation contravenes the United States’ obligations under Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR), which prohibit discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁵
3. The United States responded to these concerns in its 2011 report. In particular, it discussed the 2001 reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA), which requires schools to disaggregate testing data by “poverty, race, ethnicity, sex, immigration status, disability status, and English learners,” and report that data to the federal government.⁶ The federal government also emphasized civil rights cases it has brought against school districts for insufficient desegregation, racial disparities in discipline, and failure to address bullying and harrassment.⁷
4. Notwithstanding the efforts highlighted by the United States in its report, the disturbing conditions noted by the Human Rights Committee in 2006 remain unchanged seven years later: American students continue to attend schools that are deeply segregated by both race and class, and schools serving low-income families and racial minorities consistently lack the funding, resources, and faculty experience and expertise necessary to improve the education outcomes of minority students. While the federal government has made attempts to address the academic outcomes associated with vast racial and socioeconomic disparities, it has insufficiently grappled with the underlying causes of those disparities.
5. This shadow report will focus on the need for: (1) a robust federal role in guaranteeing the right to education; (2) greater and more equitable investment of resources in the public school system; and (3) tougher enforce-

ment of existing civil rights laws. Such actions, if undertaken by the federal government, will be important steps forward in bringing the United States closer to fulfilling its obligations under the ICCPR. In addition, other steps will need to be taken to ameliorate the egregious racial and socioeconomic segregation and inequities that plague the American education system.

Lay of the Land

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6. The American educational system has a long history of racial and socioeconomic segregation, which has persisted despite the ratification of the 14th Amendment of the U.S. Constitution, *Brown v. Board of Education* and its progeny, the passage of civil rights legislation, and the civil and human rights movement. Today, children in the United States continue to be segregated by race and socioeconomic status and attend schools that are not only separate but grossly unequal in both resources and academic outcomes. This is not new: the American educational system has never fully lived up to its egalitarian ideals and many children continue to suffer from the legacies of slavery, Jim Crow, and institutional racism. Inequality is evident in both outcome data, such as student achievement and graduation rates, and input data, such as the distribution of qualified teachers—and also in the application of exclusionary school discipline policies.
 7. The funding mechanisms for public schools, which are determined primarily at the state and local level, present some of the most significant challenges to reducing inequity in our public education system. With the sole exception of Hawaii, every state operates its public education system through localized school districts that raise revenues primarily by levying a property tax. Nationwide, local taxes represent just under half of education funding. The remainder is provided by the state and federal governments.⁸ Although the federal government has increased its investment in public education from 7.3 percent of the overall spending in 2000-01 to 12.7 percent in 2009-2010, it has nevertheless failed to keep pace with the growing needs of the public education system. In addition, it has not fully funded its two primary programs of aid to school districts, the Individuals with Disabilities Education Act and Title I of the Elementary and Secondary Education Act, which provide assistance to meet the needs of students with disabilities and those living in poverty. The result is that districts with a great deal of property wealth are able to spend many tens of thousands of dollars per student while maintaining a relatively low tax rate, while districts that lack property wealth must choose between a low tax rate and well-funded schools (and often can choose neither).⁹
 8. Because the Supreme Court has precluded federal challenges to state funding schemes,¹⁰ the federal government has an increasingly important role to play in addressing racial disparities in public education through administrative action and enforcement of civil rights laws. However, to date, the federal government's response has been insufficient.

Persistent Racial and Socioeconomic Segregation, Inequity, and Discrimination

9. The problems of both racial and socioeconomic segregation continue to haunt the United States. Despite efforts to address racial disparities, millions of American students continue to attend separate and unequal schools. In 1968, 76.6 percent of Black students and 54.8 percent of Latino students attended majority-minority schools.¹¹ For Black students, those numbers have remained virtually unchanged, while Latino students are today substantially more segregated than they were a half-century ago: as of 2010, 74.1 percent of Black students and 79.1 percent of Latino students attended majority-minority schools.¹² Even more distressing, the number of Black

and Latino students attending schools that are more than 90 percent segregated has increased: between 1980 and 2009, the number of Black students attending these schools rose from 33.2 percent to 38.1 percent, and the number of Latino students attending these schools increased from 28.8 percent to 43.1 percent.¹³ Although the causes of this trend are numerous, the federal government bears some responsibility for its failure to provide the vigorous leadership, adequate enforcement, and sufficient resources necessary to combat segregation.

10. This deep racial segregation is compounded by socioeconomic segregation.¹⁴ In fact, the correlation is so strong that almost every supermajority-minority school is associated with high levels of poverty, which is not the case for White-dominated schools.¹⁵ Today, “the typical Black student attends a school where almost two out of every three classmates [64 percent] are low-income, nearly double the level in schools of the typical White . . . student [37 percent].”¹⁶ This “double segregation” has a deep lifelong academic impact on the students who experience it,¹⁷ as studies show that the concentration of poverty within schools plays a significant role in determining student achievement—even more than the poverty status of individual students.¹⁸
11. The growing racial and socioeconomic isolation of American schools is mirrored by growing inequalities in their funding. Though inequalities in nationwide per-pupil expenditures decreased between 1972 and 2000, inequalities have since been on the rise.¹⁹ Today, for example, high-poverty districts in Illinois spend only \$8,707 per pupil, while low-poverty districts spend significantly more—\$11,312 per pupil.²⁰ This trend has been consistent nationwide over the past decade.²¹
12. High-minority and high-poverty schools often also have the added burden of lower levels of funding, lower teacher quality, and higher dropout rates.²² The result is that students whose families already face hardship are placed at an even greater disadvantage. For example, according to the U.S. Department of Education, in schools where more than three-quarters of the students were classified as low-income, “there were three times as many uncertified or out-of-field teachers in both English and science.”²³ In addition—regardless of whether funding has been equalized—high-poverty and high-minority schools often fail to provide opportunities for many students to achieve at the highest level, including courses required by many universities.²⁴ Even comparing similar courses, majority-minority schools tend to teach a less demanding curriculum than wealthier, non-minority schools.²⁵ On average, these schools provide lower-quality teachers with a greater rate of turnover.²⁶
13. Partly as a result of these factors, schools with majority low-income Black and Latino youth rely significantly upon extensive use of suspensions and expulsions, and even law enforcement, to enforce discipline. Nationwide, the percent of students reporting the presence of law enforcement personnel in their schools increased from 54.1 to 69.8 percent between 1999 and 2011.²⁷ Schools also have invested a significant amount of money in “security infrastructure”—for example, the percent of students reporting security cameras in their schools increased from 38.5 to 76.7 percent.²⁸ In particular, the concentration of inexperienced or less-qualified teachers and administrators, and understaffed or under-trained counseling offices, has been linked to the overuse of law enforcement in educational environments.²⁹ In many schools, and especially “hyper-segregated” school systems such as those in New York City or Chicago, administrators even place the local police force in charge of school security and ensuring discipline.³⁰ In New York City, the New York Police Department employs more than 5,000 “School Safety Agents” who patrol the city’s public schools. By contrast, there are only 3,100 guidance counselors employed in New York City schools.³¹ This contributes to nationwide disparities in disciplinary treatment between White students and Black and Latino students: Black and Latino students make up only 18 percent of the U.S. student population, but comprised 70 percent of school-related arrests or referrals to law enforcement in 2009.³²
14. Disciplinary policies that remove students from the classroom—such as suspension and expulsion—also have increased dramatically over the past four decades. Today, 3.3 million students are suspended out of school each year—double the number of students suspended each year in the 1970s.³³ Black students are 3.5 times more likely to be suspended than their White peers.³⁴ Yet as policymakers pursue “security,” they often ignore the deleterious effects of these practices on the ability of students to learn and perform well. In fact, students who are suspended in the ninth grade have a greatly diminished likelihood of “graduating and enrolling in post-secondary schooling” or performing well amongst a host of other indicators of success.³⁵ In a recent study that tracked nearly one million public school students in Texas over eight years, researchers found that students who were

suspended or expelled for a discretionary offense were twice as likely to repeat a grade.³⁶ Roughly 10 percent of students who were suspended or expelled dropped out, compared to only 2 percent of students who were not.³⁷ In addition, students who were suspended or expelled were nearly three times more likely to be involved in the juvenile justice system.³⁸

15. However, the underfunding of, and punitive approach used in, many majority-minority schools does not fully explain racial disparities in disciplinary treatment. Even in more affluent schools and schools where White students are in the majority, Black and Latino students face significantly steeper punishments than their White peers.³⁹ In one study of Florida students, 39 percent of all Black students were suspended at least once, compared with only 22 percent of White students.⁴⁰ Even among those students suspended, White students averaged only 6.6 days of suspension, while Black students averaged 7.4 days of suspension.⁴¹ Repeated studies have shown that such disparities are not attributable to the degree or nature of the offense, but to different responses by schools to the same types of misbehavior.⁴² In particular, Black and Latino students receive more severe punishments for less serious and more subjective offenses, such as “defiance,” which are most open to interpretation and which may reflect the biases and perceptions of staff.⁴³
16. Likewise, majority-minority schools are often understaffed and underequipped to deal with common school problems such as bullying and harassment. Bullying and harassment often results in lower academic achievement along with greater rates of truancy, drug use, and alcohol abuse.⁴⁴ As a result, it exacerbates already serious disparities in outcomes among all commonly targeted groups in those schools, including racial minorities, students with disabilities, and LGBT students. An estimated 10 percent of students aged 12 to 18 report that someone at school has used hate-related words against them and more than one-third (35 percent) report having seen hate-related graffiti at school.⁴⁵ LGBT youth frequently experience bullying, with 81.9 percent reporting having been verbally harassed because of their sexual orientation, and 63.5 percent saying that they feel unsafe in school.⁴⁶ In addition, Black and Latino students who are bullied are “more likely to suffer academically than their White peers.”⁴⁷ Finally, about half of all girls endure sexual harassment in school, ranging from being the subject of sexual rumors to experiencing unwanted touching.⁴⁸ Sexual harassment results in worse academic outcomes, difficulty in studying, and increased rates of truancy.⁴⁹
17. Simply put, students of color often attend segregated schools where they receive a substandard education and where police, rather than school administrators, enforce discipline. Further, even those who do not attend segregated schools are disproportionately disciplined by being removed from the classroom. The disparities of treatment in school discipline that students of color face also contribute to vast racial disparities in achievement and outcome.⁵⁰
18. The promise of *Brown v. Board of Education* was a country in which students, regardless of race, would have an equal opportunity to learn. However, that promise remains unfulfilled: American students remain deeply divided by class and race, with, as before, racial minorities and low-income students far more likely to receive a substandard education and to be treated poorly.

Disparities of Outcome

19. By almost any measure of outcome, low-income and minority students underperform in the American educational system. Latino students, for example, are four times more likely than White students to drop out of school, and Black students are twice more likely to drop out than their White counterparts.⁵¹ In fact, for the vast majority of ethnic and racial minorities, high school graduation rates remain at about 60 percent, compared to 83 percent for white students. The graduation rate is even lower, at 50 percent, for Black students attending high-poverty schools.⁵²
20. The evidence of how this system has failed low-income students and students of color is seen at every grade level. For example, in mathematics, less than 10 percent of fourth grade White children scored “below basic” proficiency levels, while between 29 percent and 36 percent of Black, Latino, and American Indian children did so.⁵³ Likewise, while only between 21 percent and 26 percent of White students from 4th to 12th grade were below proficient in reading, more than half of Black and Latino children (between 50 percent and 54 percent) did not meet this standard.⁵⁴ These disparities increase with every additional year of public education. For example,

in terms of vocabulary, Black students begin elementary school only one year behind their White counterparts—but by 12th grade, Black students are four years behind White students.⁵⁵

21. By some measures the achievement gap has shrunk, but it has done so very slowly. Data from the most recent National Assessment of Education Progress (NAEP) reveal that in 1992, the average reading score for a White student was 266 out of 500 total points; by contrast, the average reading score for a Black student was 238—a difference of 28 points. In 2012—a decade later—that difference had narrowed by only five points, to 23 points.⁵⁶ At this rate, it will take many more decades before disparities of outcome—and the deep negative impacts they have on the lives of millions—are insignificant.
22. These negative academic outcomes often impact students for the rest of their lives. For example, Black and Latino students have a significantly lower college-going rate than their White counterparts. According to 2010 data from the National Assessment of Education Progress (NAEP), just over half (55.7 percent) of Black students and just under two-thirds (63.9 percent) of Latino high school graduates enroll in postsecondary education, compared with 71.7 percent of White graduates.⁵⁷ Furthermore, because students of color are often underprepared by their schools, their college completion rates are lower as well: for full-time students attending a 4-year institution for the first time, only 20.4 percent of Black students graduated in 4 years, compared with 41.1 percent of White students.⁵⁸ Finally, young Black men without a high school diploma have an unemployment rate of more than 50 percent—while Black men who graduate college have an unemployment rate of only 9 percent.⁵⁹
23. The United States lags far behind many other developed nations in education competitiveness. On the 2009 Programme for International Student Assessment (PISA), the United States performed at or below average, ranking 14th in reading, 17th in science, and 25th in math of the 36 developed countries measured.⁶⁰ However, if Black and Latino students performed at the level White students perform on such assessments, the position of the United States would rise dramatically.⁶¹

Inadequacy of Court Responses to School Inequity

Federal Court Response

24. In *Brown v. Board of Education* (1954), the U.S. Supreme Court declared segregation in public education to be unconstitutional. In that case, Chief Justice Warren, writing for a unanimous court, observed, “Separate educational facilities are inherently unequal.” Progress eventually followed, but later decisions limited the ability to enforce *Brown*, effectively excluding numerous possible remedies for segregation and unequal facilities. The result was continued inequity in funding and significant but limited progress in desegregation.
25. Faced with conditions of both segregation and poverty, families from a poor school district in Texas challenged the constitutionality of the way Texas funded its school districts. The case reached the Supreme Court in 1972 as *Rodriguez v. San Antonio Independent School District*.⁶² In *Rodriguez*, the Court declined to subject wealth-based inequality to any form of exacting scrutiny and held that education is not a “fundamental right.” This decision severely limited the ability to bring federal constitutional challenges to state education funding schemes. Although judicial orders at the state level have sometimes been effective in reducing inequity of resources, the Court’s decision in *Rodriguez* has precluded the possibility of any nationwide redress through the federal judiciary.
26. Beginning in the 1970s, the Supreme Court also began limiting the judicial remedies available to address so-called *de facto* segregation. For example, in *Milliken v. Bradley*, a 1974 case regarding deep racial segregation between the Detroit school district and the districts of the city’s White suburbs, the Court effectively took interdistrict remedies off the table.⁶³ In other words, the existence of two types of school districts—one overwhelmingly White and one overwhelmingly Black—did not constitute a constitutional violation and there was no judicial remedy available unless the plaintiffs could demonstrate that district or state policies caused the segregation—a difficult burden to meet, in part because it excluded the numerous historical causes of segregation that were the product of government policy.⁶⁴ Other cases increased the burden of proof on plaintiffs alleging segregation as well.⁶⁵
27. In more recent years, the Supreme Court has also brought to an end many desegregation plans ordered by federal courts. In *Board of Education of Oklahoma City v. Dowell*,⁶⁶ for example, the Court held that once desegregation has taken place, the order must end—even if there is strong evidence that doing so would result in the resegregation of the district.⁶⁷ The Court also has struck down attempts to desegregate through the judicially required creation of magnet schools to attract White students.⁶⁸
28. The Supreme Court has even interfered with voluntary attempts by school districts to desegregate. When school districts in Louisville, Kentucky and Seattle, Washington, attempted to use race as one of the factors in assigning students to schools within their districts—as a means of achieving greater diversity and reducing segregation—the Court struck the plans down as unconstitutional.⁶⁹

State Court Response

29. The *Rodriguez* decision largely cut off the ability to challenge disparities in school spending at the federal level, but it did not do so at the state level. As Justice Marshall noted in his dissent, “[N]othing in the Court’s decision today should inhibit further review of state educational funding schemes under state constitutional provisions.”⁷⁰ Since the *Rodriguez* decision, the education funding scheme of almost every state has been subject to state judicial scrutiny. This litigation often focused on a provision that appears in the vast majority of state constitutions, which requires the state to provide a free, “thorough and efficient” public education system.⁷¹ Challenges to the funding schemes were successful in 17 states—in the other 27 challenges, state courts upheld the school funding plans.⁷²
30. Where these challenges have been both successful and fully implemented, the result has generally been a decrease in funding inequities. In fact, where state courts have required reform of state education financing schemes, “within-state inequality fell as much as 15-19 percent between 1972 and 2002” compared to states without court orders.⁷³ At the same time, per-pupil spending in court-order states increased by \$701 more than in states without such orders.⁷⁴ Overall, these suits produced a significant increase in educational equity.
31. For example, in cases in the late 1980s, the Supreme Court of Texas struck down the educational financing system the Supreme Court had upheld in *Rodriguez*. At that time, per-pupil spending ranged from \$2,112 in the poorest districts, to \$19,333 in the wealthiest. In response to the Court’s ruling, the state legislature eventually adopted a funding system that aimed to limit intrastate inequity by “requir[ing] wealthy districts to limit their wealth by one of five methods, including ‘recapture,’ or paying credits to the state.”⁷⁵ This change had a significant impact. By 1995, “the ratio of taxable property wealth per student between the wealthiest and poorest districts fell from 700:1 in 1989 to 28:1.”⁷⁶ While significant barriers to universal, quality education remain—as demonstrated, for example, by the growth of disparities between 1995 and the present, as well as by a 2011 attempt to cut school funding by \$5.4 billion that passed the state legislature and is now working its way through the state courts⁷⁷—the reform mandated by Texas state courts has produced an undeniable improvement from the disparities challenged in *Rodriguez*.

Inadequacy of Policy Responses to School Inequity

State Legislative Response

32. Despite these advances, the majority of constitutional challenges in state courts to education funding have not been successful.⁷⁸ Sometimes, states have initiated reforms on their own, but these have been, on average, ineffective in reducing inequity.⁷⁹ Largely, these “fixes” involve a guarantee of some minimum level of spending for all school districts. The problem is that this approach does not consider that factors such as segregation and concentration of poverty may mean that even more funds are necessary to provide an adequate education. As a result, students in poorer school districts continue to receive an inferior education than their wealthier peers.⁸⁰
33. Moreover, even when courts demand legislative action, actual educational equity is not guaranteed because the executive and legislative branches often lack the political will to execute and maintain the orders. As noted above, for example, even after a series of court victories in Texas requiring legislative action to address educational inequity, the state legislature attempted massive budget cuts for schools that would have crippled the ability of low-income school districts to provide an adequate education. In some cases, states have barely responded to state court rulings on educational equity;⁸¹ other states have responded but done so inadequately, or sporadically, requiring repeated litigation and court orders.⁸²
34. Experiences with efforts to reform education funding on the state level have provided a number of lessons. First, although court-ordered education financing reform has been shown, on average, to effectively reduce funding inequities while also producing increases in per-pupil spending, legislative responses to court orders have not always been sufficient. Second, even where state-level litigation to achieve educational equity is successful, those victories often encounter political resistance and are difficult to sustain over time. Third, while state-level litigation and advocacy can be effective in some states, it is at best an inefficient and irrational approach to fixing a systemic, national problem. In other words, neither state-level litigation nor state-level legislative advocacy has been a fully effective strategy in ameliorating educational inequity. For these reasons, in the decades since the *Rodriguez* decision, it has become increasingly evident that an enhanced federal role is necessary to provide low-income minority school children with an even playing field.

Federal Executive Response

Data, Resources, and Guidance without Action

35. Despite the failures of the state legislatures, and the difficulties posed by the federal judiciary, the federal executive branch has the authority and tools to provide strong incentives for states to take effective action in reducing education inequity. Providing resources for research and consensus-building on the substantive steps that need to be taken in order to resolve racial segregation and inequity in the public education system is one way the Obama administration has sought to do so. For example, the U.S. Department of Education chartered the Equity and Excellence Commission to “provide advice to the secretary of the U.S. Department of Education on disparities in meaningful educational opportunities that give rise to achievement gaps, with a focus on systems of

finance, and to recommend ways in which federal policies could address such disparities.”⁸³ However, research and recommendations alone are not enough—for this report to have an impact, these recommendations must be taken seriously by the federal government and resources must be allocated and leveraged to implement them fully.

36. Likewise, in December 2011, the U.S. Department of Education and the U.S. Department of Justice jointly issued guidelines on the “Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools.”⁸⁴ Guidance, though representing an important step, must be accompanied by greater enforcement and oversight.⁸⁵

Limited Enforcement and Oversight

37. Federal attempts to compensate for the structural flaws in public education funding and delivery through the Elementary and Secondary Education Act (ESEA) have been significantly limited by resistance to an increased—or, sometimes, any—federal role in education.⁸⁶ This has prevented the reauthorization of a robust ESEA, including proposals to require states to raise their academic standards, to ensure the resources needed for all schools to be able to meet them, and to direct greater attention to at-risk populations. Resistance to federal oversight and political gridlock in Congress also led the federal U.S. Department of Education to announce in 2011 that it would reduce its own role in overseeing compliance with ESEA. In 2011, the Secretary of Education invited each state to apply for waivers of key ESEA provisions. Forty-seven states (including the District of Columbia and Puerto Rico) did so—and 41 states were approved. Although the administration termed the waivers “flexibility” and asserted they would result in higher student achievement, the waivers in fact allowed states to avoid compliance with important provisions of the law. Of great concern to civil rights NGOs were those provisions aimed at closing achievement gaps based on race, national origin, family income or disability in federally funded schools. If the the U.S. Department of Education fails to carefully monitor implementation of waivers and holds states accountable for improving achievement and graduation rates, it is likely that inequality among students, schools, and school districts will persist or worsen.
38. Despite the need for a reauthorized ESEA, the federal government has the power to seek greater educational opportunities for high-poverty and high-minority schools in other ways, such as through its enforcement priorities—and in particular, by using the “disparate impact” theory of liability, without having to prove intentional discrimination, under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race and national origin in programs receiving federal funding.⁸⁷ The U.S. Department of Education’s Office for Civil Rights (OCR)—charged with administrative enforcement—investigates school districts’ compliance with Title VI, including where it finds segregation and significant racial disparities in the use of punishment. However, voluntary resolution agreements between OCR and school districts can be too limited to be effective. For example, in 2010, OCR began a compliance review of the Christina School District, in Delaware. The review sought to determine whether the district violated Title VI in light of significant racial disparities in its use of punishment, particularly with respect to African-American male students. Two years later, OCR settled the case with a voluntary resolution agreement from the Christina School District. The agreement, however, failed to include as a requirement the actual elimination of the disparities that prompted the initial investigation.⁸⁸ Both enhanced enforcement of Title VI and more rigorous requirements when the parties come to settlement are necessary to achieve real progress and racial parity in educational outcomes in the United States.⁸⁹
39. The federal government also has been active in working to prevent harassment and bullying, which disproportionately impact girls, minority students, students with disabilities, and LGBT youth. In 2010 OCR issued a “Dear Colleague” letter with guidelines to address bullying and harassment of students in schools. The guidelines explicitly set out a school’s duty to address incidents of discriminatory harassment under specific federal civil rights laws and described the responsibilities schools have for appropriate responses, including timely investigation, counseling, discipline, education and training. In addition, the U.S. Department of Justice has used litigation, and the U.S. Department of Education has opened investigations, under federal civil rights laws—including Title IX of the Education Amendments of 1972 in cases of harassment of LGBT students, and Title VI of the Civil Rights Act of 1964 in cases of harassment of racial minorities—to protect students from severe bullying. The Obama administration also has taken significant steps toward elevating the public discourse on bullying and harassment prevention by hosting summits on the issue; creating a website with extensive infor-

mation and resources for school administrators, teachers, parents and students about bullying and cyber bullying prevention;⁹⁰ and calling on Congress to pass legislation that would establish a comprehensive, explicit prohibition against discrimination and harassment in all public elementary and secondary schools across the country based on a student's actual or perceived sexual orientation or gender identity.⁹¹ However, while efforts to prevent bullying have been moving in the right direction, the Obama administration also must take into consideration the impact of resource inequity. For example, the ability of school officials to effectively combat bullying is limited in poorer and non-White school districts largely because they lack sufficient numbers of experienced teachers and counselors with the right training; likewise, the problems of bullying can be exacerbated by segregation, which produces feelings of alienation, isolation, and marginalization.⁹² Moreover, there is still no federal requirement that schools adopt comprehensive, inclusive, enumerated anti-bullying policies for personnel and students, leaving girls, minorities, students with disabilities and LGBT youth vulnerable in many schools throughout the United States.

Conclusion

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40. The public education system in the United States is deeply segregated. Moreover, schools that serve low-income and racial minority families overwhelmingly lack the necessary resources to provide an adequate education to their students. As a result, millions of Americans come of age without the ability to adequately compete in a global market or the tools necessary to attend, or remain, in college. These conditions lie in stark contrast to the obligations of the United States under the ICCPR, which requires equal treatment without regard to race or any other status.⁹³
 41. A significant part of this inequity is the product of state and local funding schemes for education. Nonetheless, the federal government has a great number of options which it may pursue to address this crisis. Although the Supreme Court has limited the remedies available to combat segregation, and refused to recognize a federal right to education, this has only made the need for action by Congress and the executive branch all the more important. Through the implementation of the following recommendations, the federal government can take swift and effective action to address the problem of educational inequity in the United States and fulfill its obligations under articles 2 and 26 of the ICCPR.

Recommendations

Greater Federal Involvement

42. The U.S. Department of Education should monitor and enforce commitments made by states in their ESEA waiver plans and in other proposals connected to the receipt of federal financial assistance. The Secretary of Education should consider annual student achievement and graduation data when evaluating the impact of the waivers and during the review for renewal.
43. The U.S. Department of Education should aggressively identify states and Local Education Agencies (LEAs) that report high rates and/or disproportionality in the following areas, and require the incidence be lowered and the gaps closed:
 - a. Suspensions
 - b. Expulsions
 - c. Other overly-punitive disciplinary action
 - d. Referrals to law enforcement
 - e. Arrests and police searches and seizures on school property
 - f. Corporal punishment
 - g. Assignment to alternative education placements for disciplinary reasons
 - h. Bullying and harassment
 - i. Truancy (i.e. unexcused absences)
 - j. Restraint and Seclusion
44. The U.S. Department of Education should, through audits by the inspector general and other means, ensure that data collected and reported by LEAs and states pursuant to federal requirements are current, complete, and accurate.
45. The U.S. Department of Education should begin to aggressively enforce provisions in ESEA that are intended to mitigate some of the worst disparities in schools. These provisions include:
 - a. The requirements in Sections 1111 and 1112 for both states and LEAs to ensure that low-income and minority students are not taught disproportionately by unqualified, inexperienced or out-of-field teachers.
 - b. The fiscal requirements for comparability, “supplement-not-supplant,” and “maintenance of effort.”
46. The federal government should promote the inclusion of comprehensive anti-bullying, harassment and cyber bullying initiatives as an ESEA priority. These initiatives should also respect the free speech rights of students

as protected by the First Amendment to the Constitution.

47. The U.S. Department of Education should end corporal punishment in schools receiving federal financial assistance, a practice still legal in 19 states.

Tougher Enforcement of Civil Rights Laws

48. The U.S. Departments of Justice and Education should continue to identify and begin investigations in the states and LEAs with the worst records, e.g., those with persistent or growing disparities in per-pupil spending and specific resources (e.g., access to college-preparatory courses, school counselors, experienced teachers, etc.) that are associated with low achievement, poor high school completion rates and college-going rates, and continued school segregation.
49. The U.S. Department of Education should conduct the Civil Rights Data Collection on an annual basis, instead of every two years; take steps to ensure greater accuracy in data reported by states and districts; and where school districts fail to report all or part of their data, deny competitive preference for grants and withhold portions of federal funding.
50. The U.S. Department of Education’s Office for Civil Rights should expand its use of the disparate impact provision under Title VI to address patterns of systemic discrimination and hold schools, districts and states accountable for student outcomes.
51. The U.S. Department of Education should strictly enforce the “supplement-not-supplant,” “maintenance of effort,” and related fiscal provisions of ESEA to ensure that Title I dollars are used to provide greater resources to disadvantaged students and communities.
52. The Obama administration should continue to urge Congress to pass legislation that clearly and explicitly bars discrimination on the basis of actual or perceived sexual orientation and gender identity in all public elementary and secondary schools. The administration’s use of existing civil rights laws barring sex discrimination to protect LGBT youth from discrimination and harassment has been commendable, but an explicit prohibition is also needed.

Greater Federal Investment in Education

53. The U.S. Department of Education should require that any state that has received a waiver or will apply for a waiver under ESEA be able to show evidence that it has and will continue to increase resources for those high-poverty districts in the state that also have low per-pupil expenditures. The Department also should require states and districts applying for federal grants or waivers to address high suspension, expulsion and arrest rates, as well as other disparities by race and other characteristics.
54. The U.S. Departments of Education and Justice should place clear restrictions on federal grants for school policing to require all states and districts receiving funds through the U.S. Department of Justice Community Oriented Policing Services grants and other federal programs to ensure training on youth development, de-escalation and positive discipline approaches for all school police and school resource officers, and require agreements to limit students’ contact with the juvenile justice system.
55. The U.S. Department of Education should increase funding and support for best practices in improving school climate and reducing disciplinary disparities and incidents.
56. The U.S. Department of Education, through the leveraging of federal funds, should incentivize schools and school districts to increase diversity and decrease racial and socioeconomic isolation.
57. The U.S. Department of Education should encourage Congress to provide appropriations, and should provide incentives for states to provide high-quality universal early childhood education and high-quality expanded learning opportunities—including summer academic and enrichment programs—at all grade levels.

58. The Obama administration should urge Congress to increase appropriations for federal education programs that are targeted to the communities and schools with greatest needs and that effectively serve vulnerable and disadvantaged populations.

Endnotes

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1. Full list of The Leadership Conference Membership available at http://www.civilrights.org/about/the-leadership-conference/coalition_members/.
 2. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
 3. List of Issues to be Taken up in Connection with the Consideration of the Fourth Periodic Report of the United States of America, U.N. Doc CCPR/C/USA/CO/4 (March 2013).
 4. U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: United States of America, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).
 5. International Covenant on Civil and Political Rights, art. 2, 26, Dec. 19, 1966, 999 U.N.T.S. 171.
 6. The federal government also cited the ESEA's requirement upon states to establish achievement standards and "flexibility" for states from ESEA requirements as programs designed to ensure equality of opportunity in education. U.N. Human Rights Comm., Fourth Periodic Reports of States Parties Due in 2011: United States of America, U.N. Doc. CCPR/C/USA/4 19 (Dec. 30, 2011).
 7. *Id.* at 20.
 8. U.S. Department of Education, *Table 202. Revenues for public elementary and secondary schools, by source of funds: Selected years, 1919-20 through 2009-10*, Digest of Education Statistics (2012), available at: http://nces.ed.gov/programs/digest/d12/tables/dt12_202.asp.
 9. For example, in Texas, in 1973, per-pupil spending ranged from \$2,112, in the poorest districts, to \$19,333, in the wealthiest. The Leadership Conference Education Fund, *Reversing the Rising Tide of Inequality: Achieving Educational Equity for Each and Every Child* 7 (April 2013).
 10. *San Antonio Independent School Dist. v. Rodriguez*, 411 US 1 (1973).
 11. Gary Orfield, John Kucsera, and Genevieve Siegel-Hawley, *E Pluribus...Separation: Deepening Double Segregation for More Students* 20 (The Civil Rights Project, UCLA 2012), available at: <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/>.
 12. *Id.*
 13. *Id.* at 20
 14. Gary Orfield and Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality ??* (The Civil Rights Project, Harvard University 2005), available at: <http://civilrightsproject.ucla.edu/research/k-12-educa->

[tion/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf](#).

15. Orfield, *supra* note 11, at 27.
16. *Id.* at 7.
17. Segregation also produces feelings of alienation and isolation among minority students. American Psychological Association, Presidential Task Force on Educational Disparities *Ethnic and racial disparities in education: Psychology's contributions to understanding and reducing disparities* 8 (2012), available at: <http://www.apa.org/ed/resources/racial-disparities.aspx>.
18. Orfield, *supra* note 14, at 7.
19. Sean P. Corcoran and William N. Evans, *Equity, Adequacy, and the Evolving State Role in Education Finance*, in *HANDBOOK OF RESEARCH IN EDUCATION FINANCE AND POLICY* (Helen F. Ladd and Edward B. Fiske, eds. 2008).
20. U.S. Department of Education, Equity and Excellence Commission, *For Each and Every Child—A Strategy for Education Equity and Excellence* 18 (2013), available at: <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.
21. In 2000, the Gini coefficient for inequality in per-pupil expenditures in the United States was 12.3. In 2002 it rose to 12.9; in 2004 it rose again to 13.7. Corcoran and Evans, *supra* note 19, at 337.
22. Orfield, *supra* note 11, at 6; *see also* Elizabeth Lamura, *Our Children, Ourselves: Ensuring the Education of America's At-Risk Youth*, 31 *BUFF. PUB. INTEREST L.J.* 117, 127 (2012).
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24. Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and its Aftermath*, 94 *Va. Law Rev.* 1963, 1975 (2008), available at: <http://www.virginialawreview.org/content/pdfs/94/1963.pdf>.
25. George Farkas, *Racial Disparities and Discrimination in Education: What Do We Know, How Do We Know It, and What Do We Need to Know?*, 105 *TEACHERS COLLEGE RECORD* 1119, 1123 (2003), available at: <http://www.hrpujc.org/documents/TCRecordFarkas.pdf>; *see also* Orfield, *supra* note 10, at 7 (“Schools serving low income and segregated neighborhoods have been shown to provide less challenging curricula than schools in more affluent communities...”).
26. Lamura, *supra* note 22, at 127.; Orfield, *supra* note 14, at xv.
27. Bureau of Justice Statistics and National Center for Education Statistics, *Figure 21.1. Percentage of students ages 12–18 who reported selected security measures at school: Various years, 1999–2011*, *Indicators of School Crime and Safety: 2012* (2013), available at: http://nces.ed.gov/programs/crimeindicators/crimeindicators2012/figures/figure_21_1.asp.
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29. Lamura, *supra* note 22, at 127.
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 37. *Id.* at 56.
 38. *Id.* at xii.
 39. Hirschfield, *supra* note 30, at 83.
 40. Balfanz, *supra* note 35, at 5.
 41. *Id.*
 42. *See, e.g.*, Russel J. Skiba et al., *Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 *School Psychology Review* 85, 87 (2011), available at: <http://www.indiana.edu/~atlantic/wp-content/uploads/2011/12/Skiba-et-al.-Race-is-not-neutral.pdf>.
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 48. AAUW, *Crossing the Line: Sexual Harassment in School* 2, 12 (2011), available at: <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.
 49. *Id.* at 23.
 50. Numerous scholars have found this to be the case. *See generally*, Balfanz, *supra* note 35; *see also* Hirschfield, *supra* note 30.
 51. American Psychological Association, *supra* note 17, at 14, 16.
 52. *Id.* at 14.
 53. *Id.*
 54. *Id.*
 55. Farkas, *supra* note 25.
 56. National Assessment of Education Progress (NAEP) (2012). Washington, DC: US Department of Education.
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degree/certificate-seeking students, by sex, race/ethnicity, time to completion, and level and control of institution where student started: Selected cohort entry years, 1996 through 2007, Digest of Education Statistics (2012), available at: http://nces.ed.gov/programs/digest/d11/tables/dt11_345.asp.

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61. Equity and Excellence Commission, U.S. Department of Education, *supra* note 20, at 13.
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66. 498 U.S. 237 (1991).
67. Chemerinsky, *supra* note 64, 1608.
68. *Missouri v. Jenkins*, 515 U.S. 70 (1995).
69. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).
70. *Rodriguez*, *supra* note 10 at 133 n.100 (Marshall, J., dissenting).
71. *E.g.*, Md. Const. art. VIII, sec 1; Ohio Const. art. VI, sec. 2; *see also* Sutton, *supra* note 24, at 1965.
72. Corcoran and Evans, *supra* note 19, at 334.
73. *Id.* at 340.
74. *Id.*
75. The Leadership Conference Education Fund, *supra* note 9, at 8.
76. Sutton, *supra* note 24, at 1976.
77. The Leadership Conference Education Fund, *supra* note 9, at 8.
78. Corcoran and Evans, *supra* note 19, at 334 (There have been 27 state court rulings upholding the constitutionality of state funding schemes, compared with only 17 successful challenges).
79. *Id.* (Providing the examples of Georgia, Idaho, Michigan, Missouri, and Oklahoma).
80. Sutton, *supra* note 24, at 1973.
81. Corcoran and Evans, *supra* note 19, at 334 (Providing Ohio as an example).
82. Kansas is one such example of this. Litigants successfully challenged state education funding schemes in court in 1991, 2003, 2005, and 2013. These lawsuits were the product of repeated attempts by the legislature to enact deep education funding cuts and failures to allocate funds in accordance with court rulings. The Leadership Conference Education Fund, *supra* note 9, at 9-10.

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83. Equity and Excellence Commission, U.S. Department of Education, *supra* note 20, at 3.
 84. U.S. Department of Education, Office for Civil Rights, and U.S. Department of Justice, Civil Rights Division, *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools* (“PICS Guidance”), available at: <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>, along with *Guidance on the Voluntary Use of Race to Achieve Diversity in Post-Secondary Education*, available at <http://www.justice.gov/crt/about/edu/documents/guidancepost.pdf>.
 85. *Compare id. with* Orfield, *supra* note 11, at xvi.
 86. This resistance has also impacted the structure of federal funding for education. One key example is what is known as the “comparability loophole.” Under Title I of the ESEA any school district receiving Title I funds must offer educational services in their high-poverty schools comparable to low-poverty schools in the district. However, when determining compliance with this requirement, schools are prohibited from considering teacher salaries, which are driven primarily by experience. As a result, the most experienced teachers tend to concentrate in low-poverty schools, while students in high-poverty schools are relegated to instruction by inexperienced teachers. This is yet another example of a the federal government’s failure to implement legislation that would significantly reduce the disparities of outcome for minority students. Equity and Excellence Commission, *supra* note 20, at 3.
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 88. *See* http://www.christinak12.org/pdf/Code_Conduct/OCR/Resolution-Agreement-CSD-OCR-Case-03-10-5001.pdf.
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 90. *See* <http://www.stopbullying.gov/>.
 91. Chris Geidner, *BREAKING: White House Endorses Safe Schools Bill and Student Non-Discrimination Act*, MetroWeekly, April 20, 2012, available at <http://www.metroweekly.com/poliglot/2012/04/white-house-endorses-safe-schools-bill-and-student.html>.
 92. American Psychological Association, *supra* note 17, at 66.
 93. International Covenant on Civil and Political Rights, art. 2, 26, Dec. 19, 1966, 999 U.N.T.S. 171.



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