



Minority Access to Education in the United States

Recent Developments and Recommendations

American Civil Liberties Union

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I. Executive Summary

Education for minority students in the U.S. is in crisis. Statistics indicate that minority students have less positive educational outcomes across the board. Minority students are more likely to be subjected to abusive, degrading disciplinary tactics ranging from over-policing to corporal punishment. They are less likely to be in well-funded, well-resourced schools offering advanced classes. Facing these obstacles, minority students are more likely to drop out of school before obtaining a high school diploma. Unsurprisingly, minorities are overrepresented in the juvenile and criminal justice system.

While the U.S. had made some progress toward desegregation of schools, since the early 1990s re-segregation has been accelerating, and minority students are now increasingly likely to find themselves in poor, predominantly minority schools. Special measures such as affirmative action have been challenged at both the federal and state government levels. The American Civil Liberties Union calls on federal and state governments to take urgent measures, outlined below, to provide all students with access to quality education.

Recommendations:

- To redress the drop-out crisis:
 - o Increase nationwide graduation rates, particularly for minority students.
 - o Ensure there is no disparity in graduation rates for majority and minority students.
- To combat re-segregation:
 - o Prohibit rezoning of school districts adverse to minority student interests.

- Encourage the use of voluntary integration programs.
- Make use of regional opportunities, such as inter-district transfer programs and cooperative education services between school districts.
- To eradicate abusive and discriminatory discipline:
 - Ban abusive school discipline techniques, including corporal punishment.
 - Discourage push-out of minority students.
 - Prohibit the use of armed police officers in schools except where legitimate security concerns require it.
 - Require schools to institute positive discipline systems.
- To provide for immigrant access to education:
 - Ensure free access to education for non-citizens and children of undocumented immigrants. Ensure that no proof of parents' immigration status is required for the child's registration.
 - Provide linguistically and culturally appropriate education for children belonging to minority groups.
- To preserve affirmative action:
 - Uphold the legality of affirmative action (or other special measures) until such a time as the underlying disparities in education for minorities have been redressed.
 - Increase government funding of minority-attended schools.
- To move toward compliance with international obligations:
 - Implement concluding observations from the Committee on the Elimination of Racial Discrimination and the Human Rights Committee regarding equal access to quality education programs for minority students. Specific recommendations include fostering special measures to end the achievement gap between minority students and others, and redressing the connection between minority student discipline and pathways into the criminal justice system.

II. Background on Minority Access to Education in the United States

A. Minority Rights Under U.S. and International Law

There is no fundamental right to education recognized in the U.S. Constitution. Nonetheless, international treaties to which the U.S. is party provide binding standards that strongly defend the right to education, particularly with respect to minorities. Furthermore, customary international law standards as reflected in numerous human rights treaties and other instruments articulate standards for protecting the rights of minorities in education.¹ However the U.S. approaches non-discrimination standards and other aspects of international law with exceptionalism, creating an environment in which minorities are not adequately protected.

¹ This briefing paper is prepared with reference to numerous human rights treaties and other instruments, including, *inter alia*, Articles 6, 13 and 14 of the ICESCR; Articles 3 and 18 of the ICCPR; Articles 2 and 5 of ICERD; Article 10 of CEDAW; and Article 4 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

Non-discrimination is a fundamental principle of international law, which protects minorities in the U.S. For example, article 1(1) of CERD, to which the U.S. is party, mandates the eradication of discrimination based on race, color, descent, or national or ethnic origin.² The United States, as a state party to CERD, is obliged to undertake to prohibit and to eliminate racial discrimination in the enjoyment of the right to education and training, in keeping with Article 5(5)(e). Yet minorities in the United States – including African-Americans, Hispanics, Native Americans, and non-citizens – face obstacles accessing quality education.

The U.S. has effectively rejected the internationally recognized definition of discrimination highlighted by the CERD Committee. In its Concluding Observations of both 2001 and 2008, the Committee made it abundantly clear that CERD’s definition of discrimination includes indirect discrimination, and that the test of discrimination is whether actions have an “unjustifiable disparate impact” on a minority group. Thus, member states must ensure that equality exists both *de jure* and *de facto*. The U.S. effectively rejects this internationally recognized definition of discrimination. The U.S. posits that, by “unjustifiable disparate impact,” the Committee means “race-neutral practices.” Under U.S. law, a disparate impact standard alone can rarely be used in education-related claims, except for claims brought under the Civil Rights Act of 1964. For all constitutional violations of equal protection, intent to discriminate must be shown. The burden of proof for intent is high, and such claims rarely succeed.

With respect to the ICCPR, CAT, and CERD, the U.S. maintains its understanding concerning federalism and its declaration that these treaties remain non self-executing. The U.S. asserts that existing U.S. law provides protections and remedies sufficient to satisfy the requirements of these treaties. In fact, the government rarely consults its treaty obligations in passing domestic legislation and much national policy and legislation contains less protection for minorities than those seen in, for example, CERD, except as concerns freedom of speech and of religion and belief. In education, minorities routinely face disparate educational outcomes, from higher rates of drop-out and disciplinary enforcement to lower rates of achievement and college graduation.

B. The No Child Left Behind Act and On-going Problems with Minority Access to Education

Unlike under international law, there is no fundamental right to education in the U.S.³ However, federal laws protect against discrimination in education on the basis of race, national origin, sex and disability. Title I of the Elementary and Secondary Education Act of 1965, amended in 2001 as the No Child Left Behind Act (NCLB), also provides federal funding for high poverty schools and schools with limited English proficient children, children with disabilities, and other children in need of assistance. NCLB, was

² The CERD Committee extends this protection equally to citizens and non-citizens (CERD Gen. Rec. No. 24).

³ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982).

designed to bring all students up to age-appropriate standards in reading and mathematics, to close the achievement gaps between students of different races and ethnicities within a decade, and to hold schools accountable through annual assessments. Data from 2005 show that, although achievement gaps between white and minority students continue to exist, the gaps are beginning to narrow.

Nonetheless, substantial disparities in educational outcomes persist throughout the U.S. between racial minority students and white students,⁴ and between students of low socioeconomic status and economically advantaged students. For instance, nationwide in 2005, 58% of African-American and 54% of Latino fourth grade students (9-10 year olds) scored below the basic reading level for their grade, compared to only 36% of students overall. In 2001 in high-poverty school districts the graduation rate was 57.6% compared to 76% in low-poverty school districts.⁵ These disparities are largely the result of failures to address the U.S.'s dropout crisis and to support schools serving at-risk students, issues which disproportionately affect students of color.

Public schooling, especially for minorities, is in crisis, as demonstrated not only by NCLB's limited efficacy, but also by the rapid re-segregation of schools, the spread of the "school-to-prison" pipeline phenomenon, compromised access to education for immigrants, and challenges to affirmative action. The U.S. Census Bureau projects that by 2050, about 50% of the U.S. population will be minority. Given this steep demographic shift, the government must address the performance of children of color and nature of the schools they attend.

B.1. Failure to Give Sufficient Financial Support to Minority Students

Although the No Child Left Behind Act's stated goal of narrowing the achievement gap between races remains laudable, in reality NCLB undermines this fundamental purpose. NCLB emphasizes the imposition of sanctions on schools and districts that do not meet performance goals, rather than the provision of additional support and resources to those schools. Consequently, the schools and districts serving disproportionately low-income and minority students remain drastically under-funded and without the basic provisions of bare educational minimums.

⁴ For example, in Washington State, pursuant to the NCLB, educational policy-makers increasingly have relied on high-stakes testing both to evaluate the performance of individual schools and to determine whether individual students can graduate, with drastic differences in Washington Assessment of Student Learning (WASL) test scores between students of different racial and ethnic groups. American Civil Liberties Union of Washington, "Racial Disparity in Education: Questions WSIPP and Policy-makers Should Consider" (2006), available at http://www.aclu-wa.org/library_files/WSIPP%20report%20-%20combined.pdf. According to the 2005 WASL results, 47% of white 10th-grade students passed all three sections of the test. But only 21.7% of Native Americans, 18.1% of African-Americans and 20.1% of Latinos passed all three sections – less than half the passage rate for white students.

⁵ NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 1 (2007), available at <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.

Government under-funding has caused service shortages that are most acute in minority-attended schools. In 31 of 49 states, school districts with the highest minority enrollment get fewer resources than school districts with the lowest number of minorities enrolled. These 31 states educate six out of ten minority children in America.⁶ There is a remarkable correlation between under-resourced minority districts and lower achievement levels. **Georgia**, for instance, spends twice as much per prisoner as per public school pupil.⁷ Not surprisingly, a disproportionate number of black (88%) and Latino (86%) fourth graders could not read at grade level in 2005,⁸ and only 79% of Georgia's 2,071 schools met the basic performance targets required under NCLB.⁹

In **New York**, the New York City public school system enrolls approximately 1.1 million students, 85% of whom are non-white, and 73.4% of whom are low-income. In this predominantly minority and poor district, 43% of fourth graders read below the basic level of proficiency for their age group and only 38% of high school students graduate in four years.¹⁰

Even the basic infrastructure of some primarily minority schools is crumbling. In **California**, for instance, "there is a dramatically unfair concentration of the worst conditions in schools attended primarily by low income children, African-American and Latino children, and English Language Learners."¹¹ More specifically, "[h]uge numbers of schools are failing to hire and keep qualified teachers. Textbooks are so scarce that kids are unable to take them home to do their homework. Classrooms are severely overcrowded, and the buildings themselves are crumbling and infested with rats and cockroaches."¹²

⁶ KEVIN CAREY, THE EDUCATION TRUST, THE FUNDING GAP, 2004: MANY STATES STILL SHORT-CHANGE LOW-INCOME AND MINORITY STUDENTS 2 (Fall 2004), *available at* <http://www2.edtrust.org/NR/rdonlyres/30B3C1B3-3DA6-4809-AFB9-2DAACF11CF88/0/funding2004.pdf>.

⁷ Children's Defense Fund, "Cradle-to-Prison Pipeline Georgia" (2007), *available at* <http://www.childrensdefense.org/site/DocServer/cpp07-Georgia.pdf?docID=4370>.

⁸ *Id.*

⁹ Governor's Office of Student Achievement and the Georgia Department of Education, 2006 Adequate Yearly Progress (AYP) Overview Report, *available at* <http://public.doe.k12.ga.us/ayp2006/overview.asp?SchoolID=000-0000-b-1-2-3-4-5-0-0-8-0-10>.

¹⁰ NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 9 (2007), *available at* <http://www.nesri.org/Deprived%20of%20Dignity%2007.pdf>.

¹¹ LOUIS HARRIS, REPORT ON THE STATUS OF PUBLIC SCHOOL EDUCATION IN CALIFORNIA 2004 WITH SPECIAL EMPHASIS ON THE STATUS OF EQUALITY IN PUBLIC SCHOOL EDUCATION: A SURVEY OF A CROSS-SECTION OF CLASSROOM TEACHERS IN CALIFORNIA PUBLIC SCHOOLS 3 (2004), *available at* <http://www.hewlett.org/NR/rdonlyres/7C8362B1-4D4D-4977-B10B-B5AB01A6E906/0/Harrisexecutivesummary.pdf>.

¹² Press Release, Peter Harris Research Group, New Survey of California Teachers Reveals Serious Problems in Classrooms, Starkly Unequal Conditions for African-American, Latino Students, and Broad Teacher Support for Transferring More Control, Accountability from Districts to Schools Fifty Years After Brown vs. Board of Education, Students of Color Still Denied Equal Opportunity to Quality Education in California (May 6, 2004), *available at* <http://www.hewlett.org/NR/rdonlyres/F08c609d-45a2-498f-98f6-c6580f00bf4b/0/harrispollrelease.doc>.

In *Williams v. State of California*, a suit unrelated to NCLB but concerning state governance of education, the California ACLU and others filed a lawsuit on behalf of California public school students who lacked basic tools for learning in their schools and classrooms.¹³ The suit charged the state with violating students' rights by not providing the bare minimum necessities required for an education and violating state and federal requirements for non-discriminatory access to public education. (Perhaps unsurprisingly, more black men are likely to go to prison than college in California.¹⁴) After four years of litigation, in 2004, the *Williams* lawsuit culminated in a successful settlement, resulting in the infusion of nearly one billion dollars to repair California schools.¹⁵ ACLU reports fully document the implementation of the settlement.¹⁶

Across the U.S., children of color are disproportionately left to attend the poorest schools with the fewest resources, and the No Child Left Behind Act has failed to address these devastating resource disparities.

III. Minority Students and the Drop-Out Crisis

The U.S. is allowing a dangerously high percentage of students to disappear from the educational pipeline before graduating from high school.¹⁷ Nationally, high school graduation rates are low for all students, with only an estimated 68% of those who enter 9th grade graduating with a regular diploma in 12th grade. But, as the table below makes clear, graduation rates are substantially lower for most minority groups, and particularly for males.¹⁸

National Graduation Rates by Race and Gender, 2001 (%)

By Race/Ethnicity	Nation	Female	Male
<i>American Indian/Alaska Native</i>	51.1	51.4	47.0
<i>Asian/Pacific Islander</i>	76.8	80.0	72.6
<i>Hispanic</i>	53.2	58.5	48
<i>Black</i>	50.2	56.2	42.8
<i>White</i>	74.9	77	70.8
All Students	68	72	64.1

¹³ For information about the suit, see www.decentschools.org.

¹⁴ J.T. Rothwell, *Race & America's Punitive Excesses*, Princeton University Blog (Oct. 23, 2007), available at http://blogs.princeton.edu/14points/2007/10/race_and_americas_punitive_excesses.html.

¹⁵ See www.decentschools.org/settlement.php.

¹⁶ BROOKS M. ALLEN, *THE WILLIAMS V. CALIFORNIA SETTLEMENT: THE FIRST YEAR OF IMPLEMENTATION* (2005), available at <http://www.decentschools.org/settlement/WilliamsReportWeb2005.pdf>; ACLU OF SOUTHERN CALIFORNIA & PUBLIC ADVOCATES, INC., *WILLIAMS V. CALIFORNIA: THE STATEWIDE IMPACT OF TWO YEARS OF IMPLEMENTATION* (2007), available at <http://www.decentschools.org/settlement/WilliamsReportWeb2007.pdf>.

¹⁷ GARY ORFIELD, ET AL., *LOSING OUR FUTURE, HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS* (2004), available at http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf.

¹⁸ In 2004, a different study reports that the numbers rose slightly to 53% for black males, and 76% for white males. Editorial Projects in Education, *Diplomas Count 2007: Ready for What? Preparing Students for College, Careers, and Life After High School*, Education Week 26(40) (2007), PowerPoint presentation available at http://www.edweek.org/media/ew/dc/2007/DC07_PressConf_presentation.pdf.

The No Child Left Behind Act (NCLB) has failed to address meaningfully the significant racial disparities in graduation rates in the U.S. In fact, NLCB has exacerbated the crisis by creating perverse incentives to push at-risk children, who are disproportionately low-income and children of color, out of public schools. Under NCLB, schools are penalized for failing to meet certain performance standards, called adequately yearly progress (AYP), which are based largely on students' performance on standardized tests in math and English. NCLB's heavy reliance on standardized test scores creates perverse incentives for schools to push out the low-performing children, and while Congress tried to alter the Act, in reality, poor regulations permit this to happen.

First, although the law requires each State to ensure that all students enrolled in schools achieve 100% proficiency on standardized tests, there is no requirement that States make any significant steps toward improving graduation rates.¹⁹ Second, the federal Department of Education has been permitting States to define graduation rates in ways that depart from the statutory definition of graduation rates, resulting in inaccurate and exaggerated claims of graduation rates. For example, some states calculate the graduation rates simply by counting the number of official "dropouts" from a given school; such a measure fails to account for the large numbers of students who do not take the time to fill out the paperwork to drop out officially. Third, the Department of Education issued regulations that concluded, contrary to the Act, that graduation rates do not need to be disaggregated by minority sub-group. Thus, a State may now satisfy the graduation-rate provisions of NCLB, regardless of whether the graduation rate for students of color is significantly less than the graduation rate for white students.

At the same time, the NCLB's emphasis on high-stakes testing encourages schools to "game the system" by simply getting rid of low-performing students through suspensions, expulsions, referrals to law enforcement or the juvenile justice system, or other methods. In the absence of any meaningful accountability for graduation rates, there is nothing to counteract these incentives. Given the close correlation between test scores, race, and socio-economic status, the students who are most at-risk – low-income students and children of color – bear the brunt of this push-out phenomenon.

Recommendations to Redress the Drop-Out Crisis:

- Increase nationwide graduation rates, particularly for minority students.
- Ensure there is no disparity in graduation rates for majority and minority students.

IV. Re-segregation of Schools

The policy of *de jure* racial segregation in schools was reversed by the 1954 Supreme Court decision *Brown v. Board of Education*.²⁰ *Brown* spurred further litigation and a period of desegregation. Nonetheless, schools that had been integrated in or after the

¹⁹ Under the current law, each State is permitted to establish its own goal for graduation rates, as well as its benchmarks toward achieving that goal.

²⁰ 347 U.S. 483 (1954).

1960s have been rapidly re-segregating on the basis of race. Today, even districts that were once required by federal court order to racially integrate students are becoming more and more likely to educate minority students separately from white students.

The trend toward desegregation began reversing in the late 1980s, and public school enrollment changed dramatically. From 1991 to 2003, the number of black students attending majority non-white schools rose sharply across all regions. By 2003, the country's 27 largest schools school districts were "overwhelmingly" segregated.²¹ Nationwide today, more than one third of black and Latino children attend schools where less than 10% of the students are white. Meanwhile, the average white student attends a school that is 80% white and far more affluent.²² Since the 1990s, the percentage of students of every race in multiracial groups has increased – segregation is no longer black and white but increasingly multiracial.²³

The increase in racially re-segregated schools depends in large part on federal judicial action. U.S. Supreme Court decisions have steadily eroded the progress in educational integration, including cases ending desegregation plans in 1991, and the 1974 decision against city-suburban desegregation.²⁴ More recently, in 2007, the U.S. Supreme Court imposed additional roadblocks to school integration in the two companion cases *Parents Involved in Community Schools v. Seattle School District* and *Meredith v. Jefferson County Board of Education*. In those cases, the Court rejected voluntary integration plans in Seattle, **Washington** and Louisville, **Kentucky** designed to reduce racial segregation in the schools by allowing consideration of a student's race in making school assignments. The ACLU submitted an amicus brief in that case, arguing that race-conscious measures are necessary to ensure racial integration in public schools because they are the least restrictive means available to achieve that goal. The Supreme Court's rejection of this position, although a significant setback, did not signal the end of voluntary integration plans across the country. The Court recognized that school districts maintain a compelling interest in racially diverse public schools, and wrote that states and localities are entirely free to adopt express race-based *goals* that seek to achieve racial inclusion in K-12²⁵ public education so long as the *means* to achieve those goals are race-

²¹ GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf.

²² Juan Williams, *A Little Rock Reminder*, WASH. POST, Sept. 25, 2007, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401322.html>.

²³ Attendance in multiracial schools varies by region: more than half of black and Asian students attend these schools in the West and about two fifths of Latino students attend these schools in the Border region. States where the largest shares of students attend multiracial schools include the three largest states – California, Texas, and Florida – and one state in which the Latino population seems to be exploding: Nevada. More than three quarters of intensely segregated schools are also high poverty schools. Nationally, Asians are more likely than students of other races to attend multiracial schools.

²⁴ GARY ORFIELD & CHUNGMEI LEE, RACIAL TRANSFORMATION AND THE CHANGING NATURE OF SEGREGATION 37-40 (2006), available at http://www.civilrightsproject.ucla.edu/research/deseg/Racial_Transformation.pdf.

²⁵ K-12 is the North American designation for primary and secondary education; the expression is a shortening of Kindergarten (5 or 6-year-old) through 12th grade (generally 17 or 18-year-old), the first and last grades of free education in the United States.

neutral. Nonetheless, the rejection of the Seattle and Louisville school plans represents a drastic step backwards in a nation where schools are becoming increasingly segregated by race and ethnicity.²⁶

Now, almost 2.4 million students, or over 5% of all public schools, attend a school with less than 1% white students.²⁷ Segregated schools are far more likely than non-segregated institutions to be under-funded and to struggle with retaining highly qualified teachers. Historically, schools with high concentrations of minority students have lacked the resources necessary to provide equal educational opportunity, demonstrated through inferior access to qualified and experienced teachers, higher turnover rates among staff, larger class size, fewer advanced courses, poorer infrastructure, and fewer basic educational supplies. In most of these schools, graduation rates are less than 50%, and even among the students who do graduate, there are few who are prepared for college.²⁸ Even school districts across the country that succeeded in achieving some degree of racial integration through the 1970's are now rapidly re-segregating.²⁹

A. Challenges to School Desegregation Efforts

In **Massachusetts**, there has been a statewide trend toward re-segregation. The percentage of white students who attended schools that could be defined as multiracial has declined 12% since 1980. In 2003-2004, more than two-thirds of all black students attended schools in which minorities were the majority, and more than a quarter of all black students attended schools that were 90%-100% minority.

Despite these statewide trends, public schools in Lynn, Massachusetts had made significant strides toward racial integration through a carefully-tailored, race-conscious transfer plan and several other innovations, including better facilities, programs and staff training. Schools showed steady improvement in terms of attendance, levels of violence and racial harmony. White parents whose children had been denied transfers to the

²⁶ The Supreme Court struck down these two voluntary integration plans. *Seattle's Plan*: Under this plan, high school students ranked their preference for Seattle's ten high schools. Where a school was oversubscribed, the district employed a series of tiebreakers. First, students with siblings attending the school would be granted preference. Second, if the percentages of white and non-white students in the school deviated by more than ten percentage points from the percentages of white and non-white students in the district as a whole, then preference would be granted to students whose race would bring the school closer in line with the district's racial composition. Third, students who lived closest to the school would be granted preference. *Louisville's Plan*: The district grouped schools according to geographical "clusters," and students ranked their preference for schools within their cluster. The district would then assign students to schools on the basis of availability and on the basis of the racial guidelines, which required that the percentage of minority students in each school be within fifteen percentage points --- between fifteen and fifty percent --- of the racial composition of the district as a whole. Once assigned, students could apply to transfer to another school, but transfers could be denied based on lack of space or based on the racial guidelines.

²⁷ GARY ORFIELD & CHUNGMEI LEE, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES (2007), available at http://www.civilrightsproject.ucla.edu/research/deseg/reversals_reseg_need.pdf

²⁸ *Id.*

²⁹ *Id.*

school of their choice brought a civil action against the school district; the appeals court upheld the school's plan.³⁰ However, the 2007 Supreme Court voluntary-integration ruling striking down the race-conscious student assignment plans in Seattle and Louisville has emboldened the plaintiffs to try again, and put at risk the 20 race-conscious plans adopted by various Massachusetts school districts.

In 1996, **California** voters passed Proposition 209, which – on its face – would prohibit the state government from “discriminating” or “granting preferences” on the basis of race. In reality, the initiative, championed by the anti-affirmative action crusader Ward Connerly, prohibited the state from maintaining a variety of race- and gender-conscious programs. Currently, the vast majority of black students in California attend majority-minority schools.³¹ Five lawsuits have been filed challenging efforts to desegregate schools, each arguing that desegregation efforts violate California's controversial Proposition 209.³²

B. Zoning Detrimental to Minority Children

In some parts of the U.S., school districts have been drawn such that students of color remain in predominantly minority schools. For example, **Mississippi's** schools remain highly segregated, due in large part to the “white flight” phenomenon, wherein white students flee to private academies when they perceive their public schools to be “too black.” In a perverse effort to counteract this trend, however, school districts are reconfigured to limit the opportunity of black students to attend certain schools when black student enrollment exceeds 30%. In Jones County, for example, attendance zones are drawn so as to ensure that the black student population does not exceed 10% in each

³⁰ *Comfort v. Lynn School Committee*, No. 03-2415 (1st Cir. June 16, 2005).

³¹ HARRIS, LOUIS, REPORT ON THE STATUS OF PUBLIC SCHOOL EDUCATION IN CALIFORNIA, WITH SPECIAL EMPHASIS ON THE STATUS OF EQUALITY IN PUBLIC SCHOOL EDUCATION: A SURVEY OF A CROSS-SECTION OF CLASSROOM TEACHERS IN CALIFORNIA PUBLIC SCHOOLS 3 (2006), available at <http://www.hewlett.org/NR/rdonlyres/7C8362B1-4D4D-4977-B10B-B5AB01A6E906/0/Harrisexecutivesummary.pdf>.

³² The suits are the following: *Neighborhood Schools for Our Kids v. San Juan Capistrano Unified School District* (settled in November 2006 in Orange County Superior Court), challenging school district attendance boundary drawing that involved mere data collection but no further use of race; the court and settlement agreement upheld the collection practice. *American Civil Rights Foundation v. Los Angeles Unified School District* (pending in Los Angeles Superior Court), challenging the use of race in selecting students to enroll in magnet schools and a district busing program. We argue that the district is required by court order to use race to desegregate its schools and would in any event be required so to do because of the continuing racial segregation in the district. *American Civil Rights Foundation v. Los Angeles Unified School District* (pending in Los Angeles Superior Court), challenging the use of race in assigning teachers to particular schools as part of the Teacher Integration Program. We argue that this program is court-ordered and, independently, essential to district desegregation that cannot be achieved without use of the program. *American Civil Rights Foundation v. Berkeley Unified School District* (pending in Alameda Superior Court), challenging student assignment to elementary school through census boundary information that does not use individual students' race data. We argue that the program successfully provides integrated educational offerings without involving any impermissible use of race. *Avila v. Berkeley Unified School District* (successfully resolved in court), challenging a voluntary integration program on the theory that it violated Proposition 209; the court sided with the ACLU and Berkeley Unified School District, relying in part on a California statute embracing the definition of “racial discrimination” found in CERD.

school. The U.S. Department of Justice is currently investigating allegations of racial discrimination in Webster County based on a complaint two families filed with the Department of Justice's Civil Rights Division.³³

During court-ordered desegregation, schools in the racially mixed city of Tuscaloosa, **Alabama**, a city of 83,000, roughly reflected the school system's racial makeup, and there were no all-black schools. But in recent years, the board has carved the district into three zones, each with a new high school. For example, one cluster of schools has 5 schools with 2,330 students, of whom only 19 are white and its high school is 99% black. In contrast, a cluster of schools that draw white students from an affluent area, as well as some blacks bused into the area, now includes two majority-white elementary schools. Some black parents are challenging the rezoning as a violation of the federal No Child Left Behind law, which gives students the right to transfer out of failing schools.

Students of color across the U.S. are more and more likely to be educated in separate schools from white students. Schools for minority students have far fewer resources and far poorer educational outcomes. The U.S. today continues to operate a dual school system on the basis of race.

Recommendations to Combat Re-Segregation:

- Prohibit rezoning of school districts adverse to minority student interests.
- Encourage the use of voluntary integration programs.
- Make use of regional opportunities, such as inter-district transfer programs and cooperative education services between school districts.

V. Threats to Minority Education Through Abusive School Discipline

Though international law indicates that school discipline should be consistent with the dignity of the individual,³⁴ schools throughout the U.S. use degrading discipline techniques that have a disproportionate impact on minority youth.

A. Racial Discrimination and Discipline

Minority children in the U.S. may face racial discrimination within schools, sometimes at the hands of school officials. Schools tolerate racial bullying, which results in students dropping out, and has been shown to discriminate on the basis of race by disciplining students of color more harshly than their white counterparts.

Native American students, for example, sometimes suffer disproportionate discipline, in some cases for alleged gang affiliation, and may leave school as a result. In **Washington**

³³ Reports from education advocacy groups like Southern Echo, available at <http://www.southernecho.org/>.

³⁴ See, e.g., Committee on Economic and Social Rights, General Comment No. 13, para. 41 (1999) ("In the Committee's view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law... the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation."); Committee on the Rights of the Child, General Comment No. 8 (2006).

State, the ACLU found that students in the Colville Confederated Tribes wearing “Native Pride” gear were being sent home from school for purported gang affiliation, and a police officer routinely interrogated children without notifying parents. The ACLU found that Native Americans were disciplined out of proportion to their numbers and referred to juvenile court for truancy far more often than white students. After ACLU intervention, the district’s board eventually adopted the new procedures.

Similar problems exist for Native Americans in other states. In **South Dakota**, in March 2006, the ACLU filed a lawsuit against the Winner School District claiming that the schools discriminated against Native American students in discipline and took statements from the students that were later used to prosecute them in juvenile and criminal court. Under the settlement agreement reached in June 2007, the district will enact policies and practices to ensure that the rights of Native American students are not violated.

In 2005, after reports of pervasive discrimination, harassment and excessive force against Native American students in the Bishop Unified Elementary School District, the **California** ACLU and California Indian Legal Services began an investigation into local practices. They found a long history of discrimination by both the District and the Bishop Police Department. For example in the school years 2000-2006, Native American students were about 17% of the student population, but they were almost 67% of those suspended for being “disrespectful/argumentative.” In September 2007, the ACLU reached a settlement that will remain in effect until 2012.³⁵

Racial harassment and disparate discipline has a particular impact on African-American students and may be a motivating factor in high drop out rates. For instance, the **Mississippi** ACLU has documented racial discrimination in discipline. Generally, Caucasian students receive substantially better treatment than African-American students for the same offenses. For certain minor offenses, Caucasian students are rarely disciplined while African-American students may even be suspended from school.³⁶ Meanwhile, in 2001, an African-American student in a Modesto, **California** high school was involved in a fight with another student because the other student called him a “nigger.” The African-American student was suspended and forced to transfer to another school, while the white student received a less severe punishment. The student and his father filed a complaint with the U.S. Department of Education, Office of Civil Rights against the school district, noting that African-American students were 2.5 times more likely than white students to be expelled.³⁷ The ACLU recently negotiated school

³⁵ Press Release, ACLU of Northern California, ACLU Seeks Information about Alleged Racial Harassment of Native American Children in Small Rural Town (April 12, 2006), available at http://www.aclunc.org/news/press_releases/aclu_seeks_information_about_alleged_racial_harassment_of_native_american_children_in_small_rural_town.shtml.

³⁶ One African-American student in Jones County was expelled and arrested for hitting a Caucasian student who had repeatedly called the African-American students in the class ‘nigger’ and ‘black bitch’. The teacher did nothing. He was jailed for several days, charged with felony assault. The judge refused to release him saying that he was a flight risk and a danger to society. The charges were eventually dropped and he spent the remainder of the year in an alternative school.

³⁷ Jodie Morse, *Learning While Black*, TIME MAGAZINE, June 5, 2002, at <http://www.time.com/time/magazine/article/0,9171,238611,00.html>.

conduct code reforms, and is pursuing other policy changes through local advocacy. In another California school district (Los Angeles) in 2007, the ACLU helped pass a novel board resolution mandating nondiscriminatory school discipline practices and policies that promote collaboration over discipline.³⁸

A particularly severe incident occurred in Jena, **Louisiana**, in 2007, when black students were disciplined far more harshly than their white counterparts. The day after a black student sat under the “white tree” in the school yard – after receiving the principal’s permission to do so – nooses were hung from the tree. The students responsible for the nooses were recommended for expulsion, but the school board and Superintendent overruled the recommendation and reduced the punishment to a three-day suspension. The police then repressed a peaceful school protest led by black students outraged at the minimal punishment. The following week, there was a fight at the school between black and white children, in which one student suffered minor injuries. Six black students were expelled as a result, and the District Attorney, who also serves as the legal counsel for the school board in expulsion hearings, filed charges against all 6 black students for conspiracy to commit second-degree murder and attempted second-degree murder where the “dangerous weapon” required to sustain a felony charge was a tennis shoe. One of the black students, Mychall Bell, on trial in an adult court, faced 85 years or more in prison. The ACLU of Louisiana assisted with community organizing efforts, and after much national public outcry, the charge was reduced to aggravated battery, and his possible punishment to 22 years, but he remained in adult court and was quickly convicted by an all-white jury. The appeals court then ruled that because Bell was 16 at the time of the schoolyard beating, he should not have been tried as an adult and has remanded him to juvenile court. The deterioration of race relations led to a protest march of over tens of thousands in Jena on September 20, 2007.

Since the Jena incident, reports have surfaced of at least 45 noose-hanging incidents across the country, including stories of nooses being hung outside university professors’ offices and black student campus organizations.³⁹

B. Disciplinary Techniques with Disproportionate Impact on Students of Color

Abusive discipline techniques frequently used in U.S. public schools – including “zero tolerance” policies, over-policing, corporal punishment, and placement in “alternative” schools – have a disparate impact on minority students’ education. Students of color and students with mental or physical disabilities are disproportionately subjected to these harsh disciplinary techniques. These students, who may find themselves in hostile school environments and are frequently forced to miss lessons, ultimately drop out of school at disproportionately high rates.

³⁸ Angie Green & Joel Rubin, *L.A. Board of Education Adopts Discipline Policy Aimed at Reducing Suspensions*, L.A. TIMES, February 28, 2007, at B4, available at <http://www.calstate.edu/pa/clips2007/february/28feb/board.shtml>.

³⁹ See <http://www.diversityinc.com/public/2588.cfm> for details of all the noose incidents to date.

B.1. Push-out of At-Risk and Minority Students

Under the banner of “zero-tolerance,” schools today mandate excessively harsh discipline for minor misconduct, regardless of the circumstances. Initially, “zero tolerance” policies gained favor pursuant to the federal Gun Free School Zones Act of 1994, followed by the Columbine shootings in 1999, and sought to eliminate firearms in public schools. However, states, school districts, and public schools across the nation have begun implementing “zero tolerance” to suspend and expel students for even the most minor of school offenses. Children are being excluded from schools for talking back to their teachers, not having their shirts tucked in, or being late to class. For example, in Michigan, “zero tolerance”⁴⁰ encompasses not only drug and alcohol-related conduct, but also “disobedience,”⁴¹ which frequently serves as the basis for the disciplining of black students. The annual number of students receiving out-of-school suspensions nearly doubled from 1.7 million in 1974 to 3.1 million in 2000.⁴²

Nationally, minority students are suspended at rates of two to three times that of other students. They are also more likely to be subject to office referrals, corporal punishment, and expulsion.⁴³ Nationally, African-American students comprise approximately 17% of the student population, but account for 36% of school suspensions and 31% of expulsions.⁴⁴ In **New Jersey**, for instance, black students are nearly 60 times more likely to be expelled than their white counterparts. In **Iowa**, blacks make up just 5% of the statewide public school enrollment, but account for 22% of suspensions.⁴⁵ In **Georgia** in 2004, black students had a suspension rate of 13.5%, as compared to 5.8% for Latino students and 5.2% for white students. Minority students with disabilities are particularly vulnerable. African-American students with disabilities are three times more likely to receive short-term suspensions than their white counterparts, and are more than four times as likely to end up in correctional facilities.⁴⁶

⁴⁰ The Federal Gun Free Schools Act requires every state that receives Elementary and Secondary Education Act funds to enact a statute that provides for one year expulsions of students who possess firearms. 20 USC Sec. 7151. This legislation came to be popularly known as a “Zero Tolerance” law. Michigan legislators went beyond the “firearms” “one year” requirements of the federal legislation by amending the Michigan School Code to require permanent expulsion for possession of a “dangerous weapon,” “arson,” and “criminal sexual conduct.” MCLA Sec. 380.1311(2) ; MCLA Sec. 380.1311a(1) and (2).

⁴¹ Ruth Zweifler & Julia De Beers, *The Children Left Behind: How Zero Tolerance Impacts Our Most Vulnerable Youth*, 8 MICH. J. RACE & L. 1, 200 (2002), available at http://www.studentadvocacycenter.org/legalresources/publications/Race_and_Law_Article.pdf.

⁴² THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

⁴³ RUSS SKIBA, ZERO TOLERANCE: THE ASSUMPTIONS AND THE FACTS 4 (2004) available at http://ceep.indiana.edu/projects/PDF/PB_V2N1_Zero_Tolerance.pdf.

⁴⁴ NATIONAL ECONOMIC AND SOCIAL RIGHTS INITIATIVE, DEPRIVED OF DIGNITY: DEGRADING TREATMENT AND ABUSIVE DISCIPLINE IN NEW YORK CITY AND LOS ANGELES PUBLIC SCHOOLS 6 (2007), available at <http://nesri.org/Deprived%20of%20Dignity%2007.pdf>.

⁴⁵ Howard Witt, *School Discipline Tougher on African Americans*, CHI. TRIB., Sept. 25, 2007, at <http://www.chicagotribune.com/services/newspaper/printedition/tuesday/chi-070924discipline.0.5751354.story>.

⁴⁶ JOHANNA WALD & DAN LOSEN, DEFINING AND REDIRECTING A SCHOOL-TO-PRISON PIPELINE, available at http://www.woodsfund.org/community/Folder_1036081004377/File_1084877618748

These disciplinary policies result in a larger number of students of color entering the juvenile and criminal justice systems. When students are excluded from the school, they are more likely to end up on the street with little to no adult supervision. According to the American Bar Association, the “single largest predictor” for later arrest among adolescent girls, for example, is having been suspended, expelled, or held back during the middle school years.⁴⁷ In **Texas**, more than 81% of Texas prison inmates are dropouts.⁴⁸ Unsurprising given the disparities in school discipline, African-Americans are significantly overrepresented in the prison population in Texas.⁴⁹

B.2. Criminalization of School Discipline

Increasingly, schools rely on law enforcement and the court system to address trivial school-related offenses, a phenomenon which disproportionately affects students of color. Growing numbers of districts employ full-time police officers to patrol middle school and high school hallways, often with little or no training on how to work within the educational environment. Many of these officers approach youth as they would approach adult perpetrators on the street, rather than as children in their classrooms.

Consequently, children are far more likely to be arrested at school than they were a generation ago. And these school arrests are not just for violent behavior. For example, in one **Texas** school district, 17% of school arrests were for “disruptive behavior”, and 26% were for “disorderly conduct”.⁵⁰ Zero-tolerance policies result in automatic arrests for incidents such as giving over-the-counter pain reliever to a classmate, getting into a fight with a classmate in self-defense, or even, as the ACLU has now seen twice in **Florida**, having a temper tantrum.

Again, these police practices disproportionately harm youth of color. A 2006 report found that there were close to 27,000 school-related referrals to the Florida Department of Juvenile Justice in the 2004-05 school year.⁵¹ Over three-quarters of the referrals were

⁴⁷ *Id.*, at 4, (citing American Bar Association & National bar Association, *Justice by Gender*, 2001).

⁴⁸ LISA S. WALLISCH & LISA KERBER, SUBSTANCE USE AND DELINQUENCY AMONG YOUTHS ENTERING TEXAS YOUTH COMMISSION FACILITIES: 2000-2001 (2001), available at http://www.dshs.state.tx.us/sa/research/youth_delinquency00-01.pdf; LAURA ZVONEK, FINANCIAL COSTS OF NOT GRADUATING COME HIGH (2006), available at <http://www.window.state.tx.us/comptrol/fnotes/fn0612/failure.html>.

⁴⁹ While blacks make up approximately 11.7% of the state population, they comprise 37.5% of the population in custody of the Texas Department of Criminal Justice. U.S. Census Bureau, Texas QuickFacts, available at <http://quickfacts.census.gov/qfd/states/48000.html> (last visited August 7, 2007); Texas Department of Criminal Justice, Statistical Report Fiscal Year 2006 8 available at http://www.tdcj.state.tx.us/publications/executive/FY_2006_Statistical_Report.pdf (last visited August 7, 2007). (Whites make up approximately 49.2% of the Texas population, but 31.9% of the prison population. Hispanics account for 35.1% of the Texas population and 30% of the prison population.).

⁵⁰ THE ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (2005), available at <http://www.advancementproject.org/reports/FINALEOLrep.pdf>.

⁵¹ FLORIDA STATE CONFERENCE NAACP, ADVANCEMENT PROJECT & THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA (2006), available at http://www.naacpldf.org/content/pdf/pipeline/arresting_development_full_report.pdf.

for misdemeanor offenses such as disorderly conduct, trespassing, or assault and/or battery, often no more than a schoolyard fight. Black students received 46% of out-of-school suspensions and police referrals, although they comprised only 22.8% of the student population.

Public schools in New York City, **New York**, likewise exemplify the way policing in schools has negatively impacted children of color. A 2007 ACLU report documents the excesses of the New York City school policing program, a program which employs more officers than the police forces of Detroit, Boston, or Las Vegas.⁵² While students and teachers are entitled to a safe learning environment that is conducive to education, the deployment of inadequately trained police personnel in schools creates a hostile environment. Schools in the New York City district – an overwhelmingly minority district – feel more like juvenile detention facilities than learning environments. The burden of over-policing falls primarily on the schools with permanent metal detectors, which are attended by the city’s most vulnerable children: children living in poverty, and children of color.⁵³ Children attending high schools with permanent metal detectors also receive grossly under-funded educations.⁵⁴ Available data show that the vast majority of high schools with permanent metal detectors qualify as drop-out factories.⁵⁵

Thus, as schools across the nation increasingly rely on law enforcement and the criminal justice system to enforce disciplinary rules, more and more children of color are arrested and sent to detention facilities.

B.3. Corporal Punishment that Disproportionately Affects Minorities

Every year in the United States, at least 220,000 children in public schools are subjected to corporal punishment. Permitted in 21 states,⁵⁶ the practice leaves many children

⁵² The report was based on 1,000 student surveys, an analysis of publicly available data, and interviews of students, parents, teachers, school administrators, school safety agents, and officials from the Department of Education the United Federation of Teachers, and the New York City Police Department (NYPD). ACLU and NYCLU, *Criminalizing the Classroom: The Over-Policing of New York City Public Schools* (2007)

⁵³ 82% of children attending high schools with permanent metal detectors were black and Latino. Analysis of enrollment data from New York City DOE Register, provided by ATS. Data current as of October 15, 2006. Available online at <http://schools.nyc.gov/OurSchools/>.

⁵⁴ Even in comparison with children attending the average under-funded New York City high school, children at high schools with permanent metal detectors receive substantially less funding for direct services, which “include all services provided by the school to support teaching and learning, including classroom instruction, parent involvement, school safety, and building maintenance.”⁵⁴ In the 2003-2004 school year, the city spent an average of \$ 9,601.87 on the education of a child at a high school with permanent metal detectors, compared with a citywide average of \$11,282.⁵⁴ For students at the largest high schools with permanent metal detectors, the funding shortfall was even starker. A child at a high school with more than 3,000 students and daily metal detector scans received \$8,066 of funding.

⁵⁵ Thirty-one of the 89 schools qualify as drop out factories; 13 schools do not. There is no information for 35 metal detector schools, which are not old enough to have 2005 cohort rates. Nine metal detector schools are too new to have Annual School Reports at all.

⁵⁶ Corporal punishment in public schools is permitted in some form in Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming.

injured, degraded, and disengaged from the process of learning. As documented in a 2008 joint report from the ACLU and Human Rights Watch,⁵⁷ corporal punishment in the United States typically takes the form of “paddling:” an administrator or teacher hits a child repeatedly on the buttocks with a long wooden board, causing pain, humiliation, and in some cases deep bruising or other serious injuries. Students of all ages are punished in this way for minor infractions such as chewing gum or tardiness, as well as for more serious transgressions such as fighting.

African-American students and students with mental or physical disabilities receive corporal punishment at disproportionate rates, creating a hostile environment in which these students may struggle to succeed. African-American students make up 17.1 % of the nationwide student population, but 35.6 % of those paddled. In the 13 states that use paddling most heavily, African-American girls are more than twice as likely to be subjected to paddling as their white counterparts. Meanwhile, in **Texas**, for example, students with mental or physical disabilities were almost twice as likely to be beaten as might be expected given their proportion of the student population.

Corporal punishment is ineffective: it teaches that violence is legitimate, damages the educational environment, and does not act as an effective deterrent to future misbehavior. It is also incompatible with human rights standards prohibiting cruel, inhuman and degrading treatment and protecting children from physical violence. African-American students and students with disabilities find themselves disproportionately immersed in violent, degrading school environments in which it is harder for them to receive a decent education. A 17-year-old girl in **Mississippi** spoke of the atmosphere produced by the disparate use of corporal punishment at her high school: “it feels to me like we’re back in slavery.”⁵⁸ Without effective, positive discipline systems in schools that currently use corporal punishment, minority students will continue to struggle.

B.4. Involuntary Transfers to Inadequate “Alternative Schools”

In addition to simply suspending and expelling children or referring to them to the juvenile justice system, schools across the US are expelling at-risk children from the track toward high school graduation by funneling them into “alternative schools.” These shadow systems—sometimes run by private, for-profit companies—are often immune from educational accountability standards (such as minimum classroom hours and curriculum requirements) and often fail to provide adequate educational services to the students who need them the most. As a result, struggling students return to their regular schools unprepared, are permanently locked into inferior educational settings, or are funneled through alternative schools into the juvenile justice system.

⁵⁷ *A Violent Education: Corporal Punishment of Children in U.S. Public Schools*, ISBN: 1-56432-369-2, Human Rights Watch/ ACLU (2008).

⁵⁸ Human Rights Watch / ACLU interview with Abrea T., rural Mississippi, December 10, 2007.

In many states, minority students are sent to alternative schools at disproportionate rates. In **Texas**, for example, the Texas Safe Schools Act⁵⁹ mandates students be removed from mainstream schools to disciplinary alternative education programs (DAEPs) for criminal violations, or for any violation of the local school code of conduct. Approximately 80% of these involuntary transfers to alternative schools are discretionary, i.e., for non-violent, non-criminal behavior.⁶⁰ Students with disabilities and students of color are overrepresented in these alternative schools, which have five times the drop-out rate of regular schools.⁶¹

Lee County, **Florida**—where Alternative Learning Centers (ALCs) serve as warehouses for poor students—likewise exemplifies the ways that alternative schools harm minority youth. Black students are being disproportionately funneled into the ALC system. Although black students make up just 14% of Lee County’s student population, 31% of referrals to the ALC system are for black students. 20% are for black males, who comprise just 7% of the county student population.⁶² The disparity in referrals is also acute among girls. A black girl in Lee County is nearly four times as likely to be referred to an ALC as a white girl.⁶³ Alternative schools offer substandard education, and the minority students who end up in alternative schools in disproportionate numbers bear the brunt of these poor substitutes.

Recommendations to Eradicate Abusive and Discriminatory Discipline:

- Ban abusive school discipline techniques, including corporal punishment.
- Discourage push-out of minority students.
- Prohibit the use of armed police officers in schools except where legitimate security concerns require it.
- Require schools to institute positive discipline systems.

VI. Barriers to Education for Immigrant Students

A. Barriers to Primary and Secondary Education for Undocumented Immigrant Children and U.S. Citizen Children of Immigrants

Although the Supreme Court’s decision in *Plyler v. Doe* (1982) guarantees all children – including undocumented immigrants – the right to a free public K-12 education, some schools and districts continue to refuse to enroll students who do not establish their or their parents’ lawful immigration status. Schools in Texas and New Jersey, for example, have required students or parents to provide social security numbers before enrolling children in school.

⁵⁹ The Act is codified in the Texas Education Code, Chapter 37 (“Chapter 37”)TEX. EDUC. CODE §37.001 et. seq.

⁶⁰ MARK LEVIN, *POLICY PERSPECTIVE*, SCHOOLING A NEW CLASS OF CRIMINALS? BETTER DISCIPLINARY ALTERNATIVES FOR TEXAS STUDENTS 10 (2006), available at <http://www.texaspolicy.com/pdf/2006-03-PP-DAEP-ml.pdf>.

⁶¹ Texas Education Agency, <http://www.tea.state.tx.us/research/> (the drop-out rate in the 2004-2005 school year for mainstream schools was 0.9%, for DAEPs it was 5.3%).

⁶² *Id.*

⁶³ *Id.*

The American Civil Liberties Union of **New Jersey** (ACLU-NJ) has found that at least 20 percent of New Jersey public school districts are breaking the law by asking for information that would reveal a parent or child's Social Security number or immigration status as a prerequisite for enrollment. Two years ago, ACLU-NJ advocacy resulted in promises from nearly two-thirds of the offending districts to remove sections of enrollment forms asking for students' immigration status. In this year's follow-up survey, 21 of the offending school districts from 2006 still required that information. A 2004 Pew Hispanic Center study found that Latinos in New Jersey were the most likely to feel that discrimination in school interfered with their ability to succeed.

In addition to facing the same problems as other poor public school children, immigrant students and the children of immigrants also suffer from the failure of schools to recognize or address their linguistic and cultural needs. For example, some schools have wrongly placed immigrant children in special education programs, mistaking limited language skills or cultural differences for mental disability. Others have consistently failed to offer tutoring or bilingual placement for which students are eligible, or conducted disciplinary proceedings against non-English proficient students without a translator present. Even worse, many high schools – anxious to meet the standards imposed by No Child Left Behind – have pressured non-native English speakers to drop out of school and enroll in GED programs due to these students' lower test scores.

B. Barriers to Post-secondary Education for Undocumented Immigrant Children and U.S. Citizen Children of Immigrants

Undocumented immigrants face curtailed access to post-secondary education, as public colleges and universities sometimes refuse to admit such students and often deny them in-state tuition rates. In-state tuition has also been denied to U.S. citizen children of undocumented immigrants. The Immigrants' Rights Project of the ACLU has challenged and continues to challenge these practices – particularly the denial of in-state tuition to undocumented immigrants or to the U.S. citizen children of undocumented parents. In most states, there is a significant difference between in-state and out-of-state tuition. States (or private groups seeking to challenge state law) have increasingly taken the position that individuals cannot form legal domicile under state laws – required for in-state tuition purposes – unless they establish lawful immigration status.

Recommendations to Provide for Immigrant Access to Education:

- Ensure free access to education for non-citizens and children of undocumented immigrants. Ensure that no proof of parents' immigration status is required for the child's registration.
- Provide linguistically and culturally appropriate education for children belonging to minority groups.

VII. Threats to Affirmative Action

Affirmative action has been a major tool for redressing issues faced by minorities attempting to access quality education. The U.S. has employed various measures including race-conscious educational admission policies and scholarships at all levels of education, as well as direct support for historically black colleges and universities, Hispanic-serving institutions, and Tribal Colleges and Universities. However, affirmative action in the U.S. is under attack, from barriers created by the federal government and from anti-affirmative action campaigns at the state level.

Even without considering domestic attacks on affirmative action, it must be noted that the U.S. commitment to affirmative action has long been less substantial than comparable provisions for remedial measures under international law. The CERD Committee, for example, has expressed concern at the U.S. claim that CERD “*permits*, but does not *require*” affirmative action, emphasizing that such action is not permissive when warranted by circumstances such as “persistent disparities.”⁶⁴ Many such “persistent disparities” remain throughout all levels of education in the U.S.

Affirmative action has been one of the most successful policies designed to redress the stubborn realities of structural racism in education. For instance, a 2005 analysis of affirmative action in U.S. law schools found that ending affirmative action would leave many Latinos and African-Americans behind. According to that analysis, as of 2005, there were “roughly 80,000 Latino and African-American attorneys and judges in the U.S., compared with about 6,200 in 1970, much of this remarkable thirteen-fold increase due to the presence of affirmative action policies at law schools.”⁶⁵ Indeed, where such programs are eliminated, the numbers of minority and women drop dramatically.⁶⁶ At law schools in **California, Texas and Washington**, where affirmative action in admissions is now prohibited, African-Americans were 6.65% of the enrolled population before the ban,⁶⁷ and now comprise a mere 2.25% of the enrolled population.⁶⁸

⁶⁴ CERD, Concluding Observations of the CERD: United States of America, ¶ 399, 59th Sess., U.N. Doc. A/56/18 (Aug. 14, 2001) available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/A.56.18.paras.380-407.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/A.56.18.paras.380-407.En?Opendocument) (Emphasis added) (Emphasis added).

⁶⁵ WILLIAM C. KIDDER, DOES AFFIRMATIVE ACTION REALLY HURT BLACKS & LATINOS IN U.S. LAW SCHOOLS? 1 (2005), available at http://www.trpi.org/PDFs/affirm_action.pdf.

⁶⁶ THE DISCRIMINATION RESEARCH CENTER & EQUAL RIGHTS ADVOCATES, PROPOSITION 209 AND THE DECLINE OF WOMEN IN THE CONSTRUCTION TRADES (2004), available at http://www.impactfund.org/publications/public_contractors_report.pdf (The passage of Proposition 209 in 1996 led to a decline in the number of women in construction trades—a 33% decline after the industry’s employment of women had earlier risen 26% between 1990 and 1996.) “Proposition 209 and the Decline of Women in the Construction Trades,” Discrimination Research Center & Equal Rights Advocates, June 2 004, available at http://drcenter.org/studies/prop209_tradeswomen_04.pdf, p 40. The research further demonstrates that women of color “suffer the double jeopardy of racial and gender discrimination.” Morris, Monique W., “Women of Color Hurt by Proposition 209,” Bay Area Business Woman, October 2006, <http://www.babwnews.com/article.php?id=701>

⁶⁷ William C. Kidder, *The Struggle for Access from Sweatt to Grutter: a History of African American, Latino, And American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 31 (2003) (Subsection 6 explains the fall of affirmative action in public schools as the result of the prohibition of affirmative action and the implementation of the percentage plans in various states. The numbers and

Despite its role in providing opportunity to countless individuals across scores of American institutions from kindergartens to law schools, affirmative action has suffered severe “reputational harms” from the concerted efforts of highly-funded and well-organized detractors. Opponents of affirmative action have attacked these policies in the federal courts with increased frequency, as discussed below. Foes of affirmative action programs also attack the policy by financing referenda to repeal race-conscious programs in the states. In 2006, a well-funded conservative group from California placed on Michigan’s ballot an amendment to the Michigan Constitution to eliminate affirmative action and outreach programs involving state and local governments. The proposal, passed by the voters, was deceptively titled the “Michigan Civil Rights Initiative.” Similar initiatives were put forward by the same organization in five states in 2008, succeeding in Nebraska but failing in Arizona, Colorado, Missouri and Oklahoma.

A. Federal Government Barriers to Affirmative Action

Rather than promoting access to equal and adequate educational opportunities for minorities, the federal government has created barriers, as the following examples demonstrate. First, as a general point, since 2001, the federal government has sought to recast its role in the civil rights arena, notably by diminishing its traditional involvement in race issues.⁶⁹ Second, the Supreme Court recently ruled that school districts may not take race into account to remedy racial segregation in public schools.⁷⁰ The U.S. submitted an *amicus* brief in support of white parents, who had sued to end the desegregation plans adopted voluntarily by the school districts.

In another set of cases concerning affirmative action,⁷¹ the administration filed *amicus* briefs opposing a university’s program, which was designed to encourage a diverse student body.⁷² In order to deflect criticism, the administration announced plans to increase funding to historically black colleges and universities (“HBCUs”) and Hispanic-serving colleges and institutions (“HCIs”).⁷³ Notwithstanding somewhat increased support for HBCUs in recent years, support for programs that increase minority access to

percentages derived directly from the paper, the charts and tables 4, 5, and 7 were used in the paper to reveal the drop in admissions for African-Americans in the higher education programs).

⁶⁸ *Id.*

⁶⁹ Neil A. Lewis, *Justice Dept. Reshapes Its Civil Rights Mission*, N.Y. TIMES, June 14, 2007, at <http://www.nytimes.com/2007/06/14/washington/14discrim.html?ex=1339560000&en=1e2768988bb8b6a8&ei=5124&partner=digg&expd=digg>.

⁷⁰ *See Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007) and *Meredith v. Jefferson County Board of Education*, 127 S.Ct. 2738 (2007); *see also* Linda Greenhouse, *Justices Reject Diversity Plans in Two Districts*, N.Y. TIMES, June 28, 2007, at <http://www.nytimes.com/2007/06/28/us/28cnd-scotus.html?ex=1189310400&en=e2f85b36886d6a35&ei=5070>.

⁷¹ *Jennifer Gratz and Patrick Hamacher v. Lee Bollinger*, 539 U.S. 244 (2003) & *Barbara Grutter v. Lee Bollinger*, 539 U.S. 306 (2003).

⁷² Vikram David Amar, *The Bush Administration’s Position in the Michigan Affirmative Action Cases: Do Michigan’s Policies Satisfy Bakke’s Standards?*, FINDLAW, Jan. 24, 2003, at <http://writ.news.findlaw.com/amar/20030124.html>

⁷³ *Id.*

traditional universities has decreased. The administration's position reveals a failure on the part of the government to appreciate or support the well-documented benefits of integrated education.

Rather than recognizing the benefits of affirmative action, the government body, the U.S. Commission on Civil Rights (USCCR) released a report on August 28, 2007, warning that affirmative action might harm minority students.⁷⁴ The USCCR based the report largely on questionable and contested data implying that the race-conscious admissions system resulted in a "mismatch" of minority students with top-tier educational institutions. This was allegedly due to the fact that some minority students are admitted to top institutions in the nation but fail to obtain their law school degrees or fail to pass the bar on the first attempt.⁷⁵ The report also claimed that minorities in race-blind systems are capable of achieving greater success in law school and the legal profession than those in a race-based admissions system.⁷⁶ This research was criticized by other academics as incomplete and vague, and because it failed to account for other factors that may have contributed to lower performance by minority law students, such as economic status prior to and while attending law school.

Beyond its failure to support most affirmative action policies, the federal government has been criticized for turning those policies on their head, by using them to protect whites rather than minorities. For example, the current administration ordered the Department of Justice' Civil Rights Division to sue Southern Illinois University on behalf of white men opposing fellowships offered to minority and female students.⁷⁷ The University dropped the program in order to avoid a protracted and expensive court battle.⁷⁸

B. State Anti-Affirmative Action Initiatives

During the 2008 election cycle, California millionaire Ward Connerly and his American Civil Rights Institute (ACRI) continued their attempts to dismantle an array of equal opportunity programs by introducing anti-affirmative action ballot initiatives—so-called "civil rights initiatives"—in **Arizona, Colorado, Missouri, Nebraska** and **Oklahoma**. The 2008 campaign, deceptively dubbed a "Super Tuesday for Equal Rights," was the latest installment in Connerly's strategy to end race- and gender-conscious policies nationwide.

The Colorado initiative was rejected at the polls by 51% of voters, and the Arizona, Missouri and Oklahoma initiatives failed to qualify for the ballots.

⁷⁴ Press Release, U.S. Civil Rights Commission, U.S. Civil Rights Commission Warns That Affirmative Action Might Harm Minority Law Students (August 28, 2007) (link available at <http://www.usccr.gov/index.html>).

⁷⁵ David Pluviose, *U.S. Rights Commission Condemns Affirmative Action in Law School Admissions*, DIVERSE, Sept. 10, 2007, at http://www.diverseeducation.com/artman/publish/article_9253.shtml.

⁷⁶ *Id.*

⁷⁷ People for the American Way, *The Bush Administration's Abysmal Civil Rights Record*, <http://www.pfaw.org/pfaw/general/default.aspx?oid=21799> (last visited Nov. 18, 2007).

⁷⁸ *With New Faces, New Types of Cases*, B. GLOBE, July 23, 2006, at http://www.boston.com/news/nation/washington/articles/2006/07/23/with_new_faces_new_types_of_cases.

Nebraska is the only state where Connerly's initiative passed, and questions remain about what will happen to many of the state's outreach and opportunity programs. In states where similar initiatives have passed, they have been used to challenge a whole host of equal opportunity programs including targeted outreach to underrepresented communities, mentoring for women in nontraditional employment, admissions and hiring programs, and data collection requirements that help the government identify racial and gender discrimination.

These so-called "civil rights" initiatives have, in states like California, dramatically reduced the participation of women and minorities in public education, state contracting and employment. After the 1996 abolition of racial and gender "preferences" in that state, the number of women employed in construction declined by 33 percent.⁷⁹ By 2006, only 2% of the incoming UCLA class was African American, representing the lowest enrollment of black freshmen since 1973.⁸⁰

Recommendations to Preserve Affirmative Action and Provide Quality Education for Minority Students:

- Uphold the legality of affirmative action (or other special measures) until such a time as the underlying disparities in education for minorities have been redressed.
- Increase government funding of minority-attended schools.

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⁷⁹ *A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women Business Enterprises*. Thelton E. Henderson Center for Social Justice at the University of California Berkeley School of Law, September 2007, p. 15.

⁸⁰ Rebecca Trounson, "A Startling Statistic at UCLA." *Los Angeles Times* 3 June 2006.