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# Not Separate but Not Equal: How Should the United States Address its International Obligations to Eradicate Racial Discrimination in the Public Education System?

Rebecca L. Case\*

## Abstract:

When the United States ratified the “International Convention on the Elimination of all Forms of Racial Discrimination,” the “International Covenant on Civil and Political Rights,” and the “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,” it made a clear promise to the international community that it would address the racial discrimination present in United States. The racial discrimination in the public education system is one area that the United States has failed to remedy. This comment will highlight the areas in the public education system that the United States has successfully addressed. Then this comment will explore how the United States could improve the system to ultimately eliminate racial discrimination currently present in the United States’ public education system.

## I. Prologue

Tony is a five-year-old child growing up in an urban town in the United States of America.<sup>1</sup> He lives in a poor neighborhood with

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1. Tony and his friend Gerald are fictitious characters based upon studies by the ERASE INITIATIVE that show how racial discrimination plagues many children throughout the country during school. Tony and Gerald have been created to illustrate the real-life discriminatory situations that have not been addressed by the United States. See generally ERASE INITIATIVE, APPLIED RESEARCH CENTER, FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS (2000) [hereinafter CONSEQUENCES].

inadequate funding for his school. When Tony enters school, he has some trouble adjusting to the social atmosphere and proves to have disciplinary problems. The school determines that Tony's disciplinary issues are caused by a perceived lack of intelligence and Tony is placed in an oversized remedial classroom.<sup>2</sup> Tony's friend Gerald, comes from a similar societal class and disrupts the classroom in similar ways as Tony. However, the school Gerald attends believes that Gerald has potential. Therefore Gerald is required to meet with a school counselor for individualized assistance to help him through his adjustments.

A few years pass and Gerald has done well academically, but still has some disciplinary issues. When he acts out, he is given after-school detention as a form of punishment. Tony is also doing well, but he has not been able to advance beyond the remedial classroom and therefore has not been challenged academically. Like Gerald, Tony still disrupts the class, but since his school has adopted a new "zero-tolerance" discipline policy, Tony is given a week of out-of-school suspension and has fallen behind in his schoolwork.<sup>3</sup>

When the boys are required to take standardized tests, Tony does poorly and remains frustrated with school. Gerald does relatively well and is now encouraged more by his teachers to study harder. As years progress, Gerald has become a well-adjusted student and is looking forward to applying to college. Tony, on the other hand, has become very frustrated with school and often does not show up for class. Now, just before his senior year, Tony is considering dropping out of school.<sup>4</sup>

The two friends have many things in common. They both had behavioral problems while growing up, neither of the boys were the naturally studious types, and they both came from similar economic backgrounds; yet Tony dropped out of high school, and Gerald is on his way to college. The key difference between these two boys is the fact that Tony is a minority student and his friend Gerald is Caucasian. Because of the color of their skin, the boys have encountered the effects of institutional racism in the American public education system and have experienced life-impacting consequences.

## II. Introduction

The United States of America has often prided itself upon the anti-discriminatory laws on the books, originating with the Emancipation

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2. TRANSNATIONAL RACIAL JUSTICE INITIATIVE, APPLIED RESEARCH CENTER, THE PERSISTENCE OF WHITE PRIVILEGE AND INSTITUTIONAL RACISM IN US POLICY: A REPORT ON US GOVERNMENT COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶ 121 (2001).

3. *See id.*

4. *See id.*

Proclamation in 1863, through the Supreme Court decision desegregating public education in 1954<sup>5</sup>, progressing through the United States' recent ratification of several international treaties,<sup>6</sup> and recently with their participation in a global convention discussing racial discrimination.<sup>7</sup> The United States acts as a leader in addressing racial discrimination. In reality, the current legal system overlooks the discrimination that takes place everyday in the United States' society. While there are remedies if blatant or intentional discrimination occurs, there is little one can do if the act is unintentional or difficult to prove in the court system.<sup>8</sup> A prime example is the unintentional racism in the public schools that appears to lie outside the law.<sup>9</sup>

Public schools around the nation are failing to provide an equal education to all students.<sup>10</sup> Studies show that African American, Latino, and Native American students have higher dropout rates, higher suspension and expulsion rates, decreased access to advanced placement courses, and fewer college applicants than Caucasian students.<sup>11</sup> These disparities are not necessarily an intentional attempt to discriminate, but

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5. See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

6. See International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. CERD was signed by the United States September 28, 1966, and was ratified October 21, 1994. The United States signed the ICCPR on October 5, 1977, and ratified it on June 8, 1992. The CAT was signed by the United States April 18, 1988, and was ratified October 21, 1994.

7. See UNITED NATIONS, GENERAL ASSEMBLY, WORLD CONFERENCE AGAINST RACISM, RACIAL DISCRIMINATION, XENOPHOBIA AND RELATED INTOLERANCE; DECLARATION AND PROGRAMME OF ACTION, PROGRAMME OF ACTION, U.N. Doc. A/CONF.189 (2001) [hereinafter WORLD CONFERENCE].

8. CONSEQUENCES, *supra* note 1, at 3.

9. *Id.*

10. *Id.* at 1.

11. *Id.* at 2. The ERASE (Expose Racism and Advance School Excellence) Initiative, under the Applied Research Center, conducted a study about school districts in twelve cities representative of the various geographic and ethnic locations around the country. The twelve districts were: Los Angeles Unified School District; Austin, Texas; Boston, Massachusetts; Chicago, Illinois; Miami-Dade, Florida; Denver, Colorado; Durham, North Carolina; Missoula, Montana; Providence, Rhode Island; Richland County School District One of Columbia, South Carolina; Salem, Oregon; and San Francisco, California. The purpose of the study was to "determine how they measured up in terms of racial justice." The cities were measured against a "Racial Justice Report Card" with the following subjects: dropout rate, graduation rate, college entrants, student discipline, language, advanced classes, teaching staff, learning environment, curriculum, and staff training. For each district, a grade was given for the specific subjects, and then an overall grade was given after all the grades were averaged together. Out of the twelve districts studied, Boston, Massachusetts was the only district to attain an overall grade of "D". The other eleven districts failed. *Id.*

studies demonstrate that racial discrimination continues to plague the American public education system.<sup>12</sup>

The United States has taken steps to support the elimination of racial discrimination in the international spotlight by signing and ratifying three major international treaties addressing the violations of human rights<sup>13</sup> and in 2001, by attending a world conference on racism. The treaties include: (1) the "International Convention on the Elimination of all Forms of Racial Discrimination" (CERD),<sup>14</sup> (2) the "International Covenant on Civil and Political Rights" (ICCPR),<sup>15</sup> and (3) the "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (CAT).<sup>16</sup>

Pursuant to the United States' Constitution, treaties that the United States ratifies become part of the "Supreme Law of the Land."<sup>17</sup> Although the United States has ratified the above named treaties, the country has failed to bring itself into compliance with any of the treaties regarding the racially discriminatory acts that infest its country. This comment will deal specifically with the United States' treaty obligations addressing racially discriminatory practices within the American public education system.

#### A. *Definitions of Critical Terms*

The terms "racial discrimination," "racism," and "institutional racism" are related but have distinct differences. Throughout this comment, these terms will be used in accordance with the following definitions. The term "racial discrimination" will be used as defined in the CERD:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>18</sup>

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12. *Id.* at 1, 3.

13. *See* CERD, *supra* note 6; ICCPR *supra* note 6; CAT *supra* note 6.

14. *See* CERD, *supra* note 6.

15. *See* ICCPR, *supra* note 6.

16. *See* CAT, *supra* note 6.

17. U.S. CONST., art. VI, cl. 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every States shall be bound thereby, any Thing in the Constitution or Laws of any State to the Constitution notwithstanding." *Id.*

18. CERD, *supra* note 6, art. 1, § 1.

The term “racism” will be understood as “the systematic mistreatment of certain groups of people . . . on the basis of skin color or other physical characteristics.”<sup>19</sup>

The term “institutional racism” is defined as the occasion when the “standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group.”<sup>20</sup> The notion of institutional racism within the education system involves:

the incorporation into institutional policies or practices of attitudes or values that work to the disadvantage of students of color, . . . the unquestioned acceptance by the institution of white middle-class values, . . . and schools’ being passive in the face of prejudiced behavior that interferes with students’ learning or well-being.<sup>21</sup>

There is also a distinct difference between “institutional racism” and “personal racism” that should be clarified.<sup>22</sup> “Personal racism” exists when a single individual or a group of individuals act in a racist manner.<sup>23</sup> Unless these individuals are involved with the administration of the normal operating procedures within an administration, the racist acts or outcomes are not the result of institutional racism.<sup>24</sup>

19. Julian Weissglass, *Racism and the Achievement Gap*, 20 EDUC. WK., Aug. 8, 2001, at 72, available at [http://www.edweek.org/ew/ew\\_printstory.cfm?slug=43weissglass.h20](http://www.edweek.org/ew/ew_printstory.cfm?slug=43weissglass.h20) [hereinafter *Achievement Gap*]. Julian Weissglass defined the term racism through his perspective as the director of the National Coalition for Equity in Education and a professor of education at the University of California, Santa Barbara. Weissglass was also a nongovernmental delegate at the United Nations World Conference Against Racism in South Africa. *Id.*

20. This definition was used by Dr. McDaniel when he testified in the Northern District of California regarding the case, *Hawkins v. Coleman*, 376 F. Supp. 1330, 1336 (N.D. Cal. 1974). He is qualified as an expert in institutional racism within the educational system because he has studied 1,163 educational institutions in all 50 states and has drafted programs designed to eliminate institutional racism. The case *Hawkins v. Coleman* dealt with a class of African American students in the Dallas Independent School District who contested the adoption, substance, and enforcement of the student suspension procedure in their school district. *Id.* The students alleged that the procedures were based upon race discrimination and denied their equal protection rights and their procedural and substantive due process rights. The N.D. Court of California directed the school district to review the program and implement a program aimed to substantially lessen the white institutional racism in the Texas school district. *Id.*

21. *Achievement Gap*, *supra* note 19. The examples Julian Weissglass gives are differential allocation of resources, or tracking practices that consign many students of color to low tracks with less experienced teachers, from which they can seldom escape, the unquestioned acceptance by the institution of white-middle-class values . . . , and school’s being passive in the face of prejudiced behavior that interferes with students’ learning or well-being. *Id.*

22. *Id.*

23. *Id.*

24. *Hawkins*, 376 F. Supp. at 1336. Dr. McDaniel makes a clear distinction between institutional racism and personal racism. McDaniel testified that the Texas school district

### B. Overview of CERD, ICCPR, and CAT

The three United Nations treaties, which the United States has signed and ratified, pertaining to human rights, encompass various aspects of racial discrimination. When these treaties are examined collectively, they present a broad model for the United States to use to rectify the internal problems of racial discrimination.

The CERD is the primary United Nations treaty dealing with racial discrimination.<sup>25</sup> The CERD requires states that have ratified the treaty to protect all people within their borders against discrimination committed by both the state's government and private individuals.<sup>26</sup> The CERD also requires the state to protect several substantive rights including: the right to equal treatment before justice tribunals,<sup>27</sup> the right to equal protection from governmental officials and private individuals,<sup>28</sup> the right to education and training,<sup>29</sup> and the right to access any place or service meant for the entire public.<sup>30</sup> The CERD specifically addresses the area of education within the various countries.<sup>31</sup> The nations who have ratified the CERD must adopt measures to achieve "understanding, tolerance and friendship" between the various racially divided lines.<sup>32</sup> They must find ways to combat prejudicial practices and attitudes that will eventually lead to racial discrimination.<sup>33</sup> The obligated nations must also ensure that everyone residing within its borders are protected from acts of racial discrimination that are contrary to the CERD.<sup>34</sup>

The ICCPR is the first of the three U.N. treaties pertaining to racism that was ratified by the United States. The ICCPR requires nations to protect rights, including all people's right to life,<sup>35</sup> the right not to be enslaved,<sup>36</sup> the right to liberty and security of person,<sup>37</sup> the right to be treated equally before the state's justice system,<sup>38</sup> and the right to equal

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was a "white controlled institution" because a large majority of the decisions are made by white administrators, and through the cumulative effect of these decision makers, the school district portrayed an example of institutional racism.

25. AMNESTY INTERNATIONAL, USING THE INTERNATIONAL HUMAN RIGHTS SYSTEM TO COMBAT RACIAL DISCRIMINATION 14 (2001) [hereinafter AMNESTY INTERNATIONAL].

26. See *id.* at 15; see also CERD, *supra* note 6, art. 5(b).

27. CERD *supra* note 6, art. 5(a).

28. *Id.* art. 5(b).

29. *Id.* art. 5(e)(v).

30. *Id.* art. 5(f).

31. *Id.* art. 7.

32. CERD, *supra* note 6, art. 7.

33. *Id.*

34. *Id.* art. 6.

35. ICCPR, *supra* note 6, art. 6(1).

36. *Id.* art. 8.

37. *Id.* art 9(1).

38. *Id.* art. 14(1).

protection by the state's laws.<sup>39</sup> Under this convention, the nations that have ratified the ICPR are required to ensure that every child, regardless of their "race, colour, sex, language, religion, national or social origin, property or birth," receives protection as a minor in that state's society.<sup>40</sup> The nations must make illegal any racially or religiously motivated hatred that generates discrimination.<sup>41</sup> The nations must ensure that adopted laws, giving force to the ICCPR, will be enforced in order to uphold the various rights protected under the ICCPR.<sup>42</sup>

The CAT requires the state parties to ensure that their laws and private residents do not commit acts of torture toward any person within the territory of that country.<sup>43</sup> The CAT defines torture as,

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for . . . any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>44</sup>

The CAT specifically states that any intentional infliction of mental pain or mental suffering is a form of torture.<sup>45</sup> The CAT also requires the country to train and educate all public officials about forms of torture and the prohibition of such acts.<sup>46</sup> When an official violates the CAT, the victim has the right to request proper redress, adequate compensation, and as much rehabilitation as necessary.<sup>47</sup>

### C. *United States Treaty Reservations*

While the United States ratified the CERD, the ICCPR, and the CAT, the United States commitment is limited by their submission of various reservations to each treaty. By including reservations with treaty ratification, a country is obligated to adhere only to the sections of the treaty that do not conflict with the country's reservations.

#### 1. CERD

According to the United States' reservations in CERD, the United States will not restrict the right to free speech and association when that speech and/or association is protected by the United States'

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39. *Id.* art. 26.

40. ICCPR, *supra* note 6, art. 24(1).

41. *Id.* art. 20(1).

42. *Id.* art. 2(2).

43. CAT, *supra* note 6, art. 2(1).

44. *Id.* art. 1(1).

45. *Id.*

46. *Id.* art. 10(1).

47. *Id.* art. 14(1).



Constitution.<sup>48</sup> This implies that the United States has no authority under the Constitution to restrict individual behavior and therefore, the government will not interfere or regulate private conduct that is not regularly subject to governmental intervention.<sup>49</sup> Also, the United States government will intervene to ensure state and local governments comply with CERD when the federal government has the jurisdiction to do so.<sup>50</sup>

## 2. ICCPR

According to the United States' reservations in the ICCPR, the United States reiterates that they will not restrict the right to free speech and association protected by the United States Constitution.<sup>51</sup> The United States will recognize distinctions based upon race only if the distinctions are "rationally related to a legitimate governmental objective" or if there is a "public emergency, based solely on the status of race."<sup>52</sup> If the federal government has jurisdiction to require a state or local government to uphold the requirements of the ICCPR, the federal government will do so; however, the federal government generally will not interfere with the actions of local governments.<sup>53</sup>

## 3. CAT

Through the use of reservations in CAT, the United States has significantly limited the implications of the treaty and thereby the United States' obligations. The United States has redefined and limited the crucial term of "torture." According to the reservations, the concept of "cruel, inhuman or degrading treatment or punishment" in the CAT means the "cruel, unusual and inhumane treatment or punishment prohibited by the Fifth,<sup>54</sup> Eighth,<sup>55</sup> and/or Fourteenth Amendments<sup>56</sup> to

48. CERD, *supra* note 6, annex II § I(1).

49. *Id.* Annex II § I(2).

50. *Id.* Annex II § II.

51. ICCPR, *supra* note 6, annex II § I(1).

52. *Id.* at annex II § II(1).

53. *Id.*

54. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. *Id.*

55. U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines impose, nor cruel and unusual punishments inflicted." *Id.*

56. U.S. CONST., amend. XIV § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

the Constitution of the United States.”<sup>57</sup> The United States further limits the term torture to specifically intended acts, meant to cause severe mental or physical pain.<sup>58</sup> Additionally, the pain or suffering must last for an extended period of time, and must be caused by any one of the following circumstances:

- 1) the intentional infliction or threatened infliction of severe physical pain or suffering
- 2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality
- 3) the threat of imminent death or
- 4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.<sup>59</sup>

The United States continues to limit the extent of the definition of torture to the victims when they are in the perpetrator’s physical control and/or custody.<sup>60</sup> Finally, the United States limits the implementation of CAT to the jurisdiction of the United States’ federal government and to the applicable jurisdiction of state and local governments.<sup>61</sup>

#### D. *Implementation of Treaty Obligations*

When state parties sign and ratify a United Nations treaty such as the CERD, the ICCPR, or the CAT, they are bound by the treaty stipulations and are expected to implement the treaty requirements into their national practices.<sup>62</sup> However, due to the current state of international practices, there is no practical method to compel a country to abide by the treaty it has ratified. Nonetheless, the United Nations has created a mechanism to ensure a country is aware of its compliance with a treaty. Once a country agrees to the terms of the treaty, a committee, called a “treaty body,” oversees the enactment of the treaty in the

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they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. *Id.*

57. CAT, *supra* note 6, annex I § I(1).

58. *Id.* annex I § II(1)(a).

59. *Id.* annex I § II(a)(1-4).

60. *Id.* annex I § II (1)(b).

61. *Id.* annex I § II(5).

62. *See generally* AMNESTY INTERNATIONAL, *supra* note 25.

respective countries.<sup>63</sup> Although every treaty body works differently according to the terms of the treaty, generally, the U.N. treaty body will review and comment on the reports that the countries are required to submit.<sup>64</sup>

These country reports present detailed instructions for the state to use while implementing the treaty. The reports also identify where a state has fulfilled its obligations agreed upon under the treaty. The countries are expected to submit a report approximately every four to five years.<sup>65</sup> After the country submits a report, a representative from the country must attend a public committee session and formally present the report to the treaty body.<sup>66</sup> The committee members have the opportunity to converse with the representative in order to gain a broader understanding of the state report.<sup>67</sup> After the session, the treaty body drafts their conclusions, concerns, and recommendations about the progress of the state in the form of a report to the country.<sup>68</sup>

Once the conclusions of the treaty body are issued, non-governmental organizations (“NGOs”) are encouraged to use the state reports and the treaty body conclusions to comment on the country’s progress or lack thereof.<sup>69</sup> Through this reporting process, the country is encouraged to change their practices, laws, and societal norms.<sup>70</sup> When the NGOs report conclusions about a country, the NGOs publish what are commonly known as “shadow reports.” These shadow reports help countries recognize their shortcomings under the treaty.<sup>71</sup> Through the use of the media and other public forums, the shadow reports can generate public debate, discussion, and help motivate countries to modify their policies.<sup>72</sup>

#### E. *World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance*

The United States publicly supported the eradication of racial discrimination at all levels of society, despite their reservations to the

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63. AMNESTY INTERNATIONAL, *supra* note 25, at 8.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. AMNESTY INTERNATIONAL, *supra* note 25, at 8.

69. *Id.*

70. *Id.* Sometimes, the NGOs may submit their shadow reports prior to the committee that will review and ask questions of the state representative. These reports can be of great use to the committee members to find areas that need improvement in the state’s laws and policies. *Id.*

71. *Id.* at 9.

72. *Id.*

foremost treaties, by participating in the “World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance” held between August 31, 2001 and September 8, 2001 in Durban, South Africa.<sup>73</sup> As a result of the conference, the participants adopted a record that laid out the parties’ recognition that racism still exists and that something must be done in the individual countries to rectify the situation.<sup>74</sup>

In the United Nations Declaration, which arose from the conference in South Africa, the members noted “the importance of paying special attention to new manifestations of racism, racial discrimination, xenophobia, and related intolerance to which youth and other vulnerable groups might be exposed.”<sup>75</sup> The parties also acknowledged that people of African descent face inequalities and barriers everyday in both public and private sectors, including within the educational systems.<sup>76</sup> The participants further recognized that there is a link between the right to a quality education and the continued existence of racism and racial discrimination.<sup>77</sup>

The Programme of Action, adopted by the attending countries and states, including the United States, urges all participants to “adopt and implement, . . . measures and policies . . . which encourages all citizens and institutions to take [a] stand against racism, [and] racial discrimination.”<sup>78</sup> The Programme of Action urges the nations to “ensure equal access to education for all in law and in practice and to refrain from any legal or any other measures [that] lead to imposed racial segregation in any form in access to schooling.”<sup>79</sup> The nations are invited to take all measures to provide all children with a quality, equal education without regard to their race.<sup>80</sup> The Programme of Action specifically addresses the need to remove the barriers at all levels of education that may limit an individual’s access to quality education and thereby limit their access to future employment.<sup>81</sup>

### III. Addressing Discrimination in Education

The United States has confirmed its intention, in several international venues, to address racial discrimination and institutional

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73. WORLD CONFERENCE, *supra* note 7.

74. *See generally id.*

75. *Id.* ¶ 17.

76. *See id.* ¶¶ 32-34.

77. *See id.* ¶¶ 94-95.

78. WORLD CONFERENCE, *supra* note 7, ¶ 58.

79. *Id.* ¶ 123.

80. *Id.* ¶ 124(a-e).

81. *See id.* ¶ 125.

racism existing within the United States' borders. The United States has attended world conferences and signed several treaties expressing the country's aspirations to eradicate racially discriminatory practices in the education system. The promises the United States has made to the international community currently are only aspirations and goals that the country must still address. The story of Tony illustrates how racial discrimination and institutional racism can still affect children's lives in the United States. The treaties and the conference recommendations present a framework that the United States can use to address the discrepancies of the education system.

Considering the enormous consequences of discriminatory acts toward children in school, the remainder of this comment will address the United States' obligations and promises under the CERD, the CAT, the ICCPR, and the Programme of Action from the World Conference on Racism to eliminate the racially discriminatory practices in the American public education system. This comment will acknowledge where the United States has fulfilled their duties under the treaties and will highlight the areas where the United States has not yet satisfied their treaty obligations. Finally, this comment will recommend solutions based on shadow reports, the general comments to the treaty bodies from the United States, the recommendations made by the treaty body members to the United States, recommendations from the "World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance," and other independent sources that address racial discrimination within the American education system.

#### A. *Improvements in United States' Education System*

While the CERD, ICCPR, and CAT have different goals, each treaty addresses the need to protect children, regardless of their ethnic origin in the area of education. The "World Conference on Racism Programme of Action" states the need to ensure equal access to a quality education.<sup>82</sup> The CERD requires every child to have a right to an education.<sup>83</sup> The ICCPR states that children have a right to be protected, irrespective of their skin color.<sup>84</sup> The CAT requires all forms of torture

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82. *Id.*

83. CERD, *supra* note 6, art. 5 (e)(v).

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (e) Economic, social and cultural rights, in particular: (v) The right to education and training. *Id.*

84. ICCPR, *supra* note 6, art. 24(1).

to be eliminated; this includes the severe mental suffering that is associated with discrimination.<sup>85</sup> The CAT also requires that all public officials be taught what torture is and how to prevent torturous acts.<sup>86</sup> The United States has addressed these treaty obligations with some success.

Prior to the ratification of any of the treaties, the United States made a monumental step toward eradicating discrimination in the public education system when the Supreme Court desegregated the country's public schools in the *Brown v. Board of Education* decision in 1954.<sup>87</sup> Consequently, the American schools are no longer permitted to reject a student solely on the student's ethnic background.<sup>88</sup> *Brown v. Board of Education* also led to the mandated integration of public schools in historically segregated schools. Post-Brown, schools may have become physically more integrated but more was left to achieve.

The United States continues to make improvements in the area of education and today has created a framework within the federal government to theoretically ensure that any obstacles to an equal

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the state. *Id.*

85. CAT, *supra* note 6, art. 1(1).

For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, which such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. *Id.*

86. *Id.* art. 10(1).

Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment. *Id.*

87. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The Supreme Court of the United States overturned their doctrine of "separate but equal" from *Plessy v. Ferguson*, 163 U.S. 537 (1896). The *Brown* court decided that the segregated schools were inherently unequal and not constitutionally sound. According to the court, "segregation of white and colored children in public schools has a detrimental effect upon the colored children [and] [t]he impact is greater when it is the sanction of the law." *Id.* The Court therefore ordered the Alabama school district to desegregate their schools. *Id.*

88. See UNITED NATIONS, HUMAN RIGHTS COMMITTEE, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT, U.N. Doc. CCPR/C79/Add.50 ¶ 698 (1994) [hereinafter REPORT TO ICCPR].

education are removed.<sup>89</sup> For instance, the United States Department of Education administers laws and programs aimed to eliminate the racial disparities in the educational system.<sup>90</sup> Recently, the Office for Civil Rights, which operates within the United States Department of Education, has broadened its responsibilities from simply administering laws, to now monitoring activities in the educational system,<sup>91</sup> enforcing desegregation plans,<sup>92</sup> issuing policies to help educators meet civil rights requirements,<sup>93</sup> administering studies to review the system's compliance with civil rights laws,<sup>94</sup> and investigating civil rights complaints.<sup>95</sup>

The Office of Civil Rights has further broadened its focus on monitoring school districts by examining the more complex and subtle issues that underlie unequal access to programs that students may encounter.<sup>96</sup> For example, the Office of Civil Rights has moved from focusing solely upon school districts and colleges that are openly segregated toward ensuring that there are no racial barriers for students who apply or participate in various educational programs and services.<sup>97</sup> In addition to what the Office of Civil Rights already investigates, the office has also expanded the method of investigating civil rights complaints by utilizing non-adversarial dispute resolution methods to assist all parties to reach workable solutions for all involved.<sup>98</sup>

The United States has made efforts to educate the public officials

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89. See UNITED NATIONS, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION, INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION; REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 9 OF THE CONVENTION, U.N. Doc. CERD/C/351/Add.1, ¶ 396 (2000) [hereinafter REPORT TO CERD]. The United States acknowledges, that due to the *Brown* decision, the Civil Rights Act of 1964, and *Swann v. Board of Education*, 402 U.S. 1 (1971), the United States' schools became increasingly more integrated and numerous statutes were enacted to further integrate the school system. These decisions and laws provided a catapult for the creation of more programs and laws meant to construct a total framework focused to eliminate race-based discrepancies in educational quality and accessibility.

90. REPORT TO CERD, *id.* ¶ 396.

91. *Id.* ¶¶ 397-98. The Office for Civil Rights monitors almost 15,000 public school districts, more than 3,600 colleges and universities, approximately 5,000 proprietary organizations such as truck driver and cosmetologist training schools, and thousands of public libraries, museums and vocational rehabilitation agencies. *Id.*

92. *Id.* ¶ 400.

93. *Id.* ¶ 404.

94. *Id.* ¶ 403.

95. REPORT TO CERD *supra* note 86, ¶ 402.

96. *Id.* ¶ 400.

97. *Id.*

98. *Id.* ¶ 402. The Office of Civil Rights will either utilize mediation, negotiation, or some combination of the two. If these methods fail to result in an agreement between the parties, the Office of Civil Rights will move to formal administration or judicial enforcement. At times the Office of Civil Rights will come to the conclusion that there is not enough evidence to support a finding of a civil rights violation. In these situations, the complaint will be discarded. *Id.*

regarding torture, but due to the United States' unique definitions of torture and public officials, the extent to which the United States must educate their school officials is limited.<sup>99</sup> While the government provides a formal education to all individuals who will be involved in the treatment of persons who are arrested, detained, or imprisoned,<sup>100</sup> the United States does not include school officials in this list of officials.<sup>101</sup> Although educational information on torture is not specifically directed toward school educators, the school officials and the general public may access the information through the United States Department of State web page.<sup>102</sup> However, it is apparent that the United States does not intend to ensure that public school officials understand their obligation to prevent torture in the school system.<sup>103</sup>

### *B. United States' Deficiencies Under International Treaties*

The United States claims that "the American public educational system is open and accessible to all, regardless of race, ethnicity, immigration status, or socio-economic status,"<sup>104</sup> and yet the academic achievement gap between white students and students of color persists.<sup>105</sup> The racial disparities in "funding, curriculum, school discipline, [and] college enrollment rate[s]," portray a public education system still plagued by institutional racism and still unequal.<sup>106</sup> Although the United States has attempted to address the racial disparities in the public education system through programs and methods that are not facially

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99. UNITED NATIONS, COMMITTEE AGAINST TORTURE, CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT; CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION, U.N. Doc. CAT/C/28/Add.5 annex I § 1(a), (b) (2000) [hereinafter REPORT TO CAT].

100. *See generally id.* ¶¶ 206-19.

101. *See generally* REPORT TO CAT, *supra* note 99.

102. *Id.* at ¶ 206; *see generally* U.S. Department of State home page available at <http://www.state.gov> (last visited October 7, 2002).

103. *See generally* ¶ 206-19. The United States addresses the education of public officials such as law enforcement and corrections officers. School officials are never mentioned throughout the report.

104. REPORT TO CERD *supra* note 86, ¶ 396. The United States claims through the resegregation of school systems, and through the responsibilities of the Office for Civil Rights, a quality educational system is now accessible by all individuals. However, in paragraph 407, the United States acknowledges that there still are inequalities in the proportions of white academic degrees and minority academic degrees attained. *Id.* ¶ 407.

105. *See Achievement Gap, supra* note 19.

106. TRANSNATIONAL RACIAL JUSTICE INITIATIVE, APPLIED RESEARCH CENTER, THE PERSISTENCE OF WHITE PRIVILEGE AND INSTITUTIONAL RACISM IN US POLICY: A REPORT ON U.S. GOVERNMENT COMPLIANCE WITH THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION ¶ 119 (2001)[hereinafter WHITE PRIVILEGE].



discriminatory, the effects of the programs create higher standards and greater obstacles for minority students, and consequently add to the racial discrimination problem. This comment will address three areas in the education system that have discriminatory effects: disparate funding, academic tracking, and "zero tolerance" discipline policies.

### 1. *Disparate Funding*

First, the capabilities of schools in impoverished districts are extremely limited due to the structure of public school funding.<sup>107</sup> If a school has minimal funding, the opportunity for impoverished students to excel is more difficult. When the money is unavailable, the necessities of a solid education such as books, technology, clean and safe facilities, good teachers, and small class sizes often cannot be provided. The students score lower on standardized tests and are unable to compete with the students from wealthier districts with more educational resources.<sup>108</sup>

### 2. *Academic Tracking*

Many districts have created academic tracking programs. These programs allow teachers and school administrators to determine a student's abilities and potential and then place that student in an academic track reflective of teacher's or administrator's personal perception.<sup>109</sup> The academic tracks range from remedial and special education programs to accelerated and gifted programs.<sup>110</sup> Studies show that African American and Latino students are over-represented in the lower tracks and under-represented in the higher tracks.<sup>111</sup> The tracking can begin very early in a child's academic career and can be extremely detrimental to the child's future. If a child is placed in a lower track because of a perceived inability to do mainstream work, it is often very difficult for the child to break into the higher track due to the very nature of the tracking system.<sup>112</sup>

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107. See *Achievement Gap*, *supra* note 19.

108. See generally *Achievement Gap*, *supra* note 19.

109. CONSEQUENCES, *supra* note 1, at 15.

110. *Id.*

111. *Id.*

112. *Id.* at 16. The purpose of the remedial track is supposed to help the student catch up with the mainstream but the studies show that once a student is assigned, the students are unable to move out and often find themselves falling behind academically every year they are in the lower track. The reason for this is because as the mainstream students progress through their studies, the remedial class will proceed at a much slower rate. *Id.* If a student appears to be doing well in the remedial class and has done well enough to be transferred out of the remedial class, the student will soon find that he/she is too far behind the mainstream studies and are therefore unable to keep up. Once the student is locked in, the consequences reach far beyond the high school years. As the students in

The method of determining how to put a student in a particular track is laden with racially discriminatory factors. To determine which track to place a child in, three factors are considered: standardized test scores, teacher recommendations, and parental intervention.<sup>113</sup> First, the standardized tests have frequently been criticized for being racially biased.<sup>114</sup> Second, teacher recommendations are strictly subjective and can be based solely upon general impressions.<sup>115</sup> Third, if parents are unaware of the system due to language barriers or because of general ignorance, the parents are unlikely to intervene on behalf of their child and push for a higher track placement.<sup>116</sup>

### 3. "Zero-Tolerance" Discipline Policies

Another area of racial disparity that leads to unequal treatment in the schools is the area of discipline. Studies show that students of color are more likely to be suspended and/or expelled from school than similarly situated white students.<sup>117</sup> This statistic has become more pronounced now that schools that receive federal funding (all public schools) must implement "zero-tolerance" policies for weapons offenses.<sup>118</sup> The policy may appear race neutral on its face, but the implementation of the policy has led to findings of racial discrimination.<sup>119</sup>

Since the consequences of bringing a weapon to school can be harsh, and can include suspension or expulsion, schools are permitted to evaluate incidents on a case-by-case basis and may deliver a less severe punishment if mitigating circumstances permit.<sup>120</sup> There is evidence to suggest that if a student appears to have a positive and promising future, schools will overlook relatively minor violations such as weapon possession, and will not expel the student. Instead the schools will

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the mainstream build upon knowledge starting from their elementary years, they may find themselves in advanced placement classes that will further prepare them for college. *Id.* Those students who remain in the lower track will not receive the opportunity to tackle the more difficult and more necessary subjects, such as math and science, which are critical areas of understanding if the student wishes to proceed to college. *Id.*

113. *Id.*

114. *Id.*

115. CONSEQUENCES *supra* note 1, at 15.

116. *Id.*

117. *Id.* at 8.

118. *Id.* at 9. The "zero tolerance" policies are rooted in the federal Gun-Free School Act of 1994 which requires every state to create a law requiring a one-year mandatory expulsion for any student who brings a weapon to school. Although the Act defines a weapon as a firearm, and specifically not a device that is not created for the purpose of a weapon, students are still being expelled for bringing paring knives in their lunch boxes and nail files in their purses. *Id.*

119. *See generally id.* at 9-10.

120. CONSEQUENCES *supra* note 1, at 10.

deliver a lesser punishment in the hopes of rehabilitation, but there are inequalities in the application of this school discretion.<sup>121</sup> Often, the minority students do not receive the benefit of this second chance and tend to suffer more devastating consequences.<sup>122</sup>

Racial discrimination affects more than disparate test scores and overall unequal treatment in the schools. One effect is addressed indirectly in CAT; however, because of the United States' limited definition of "torture," the CAT's implications are severely limited. According to the United States, the government need only deal with mental suffering caused by torturous acts in very few circumstances. These situations do not deal with any intentional racial discrimination that takes place in the schools but rather they address situations when the victim is in the custody of an official in the criminal setting or in a mental institution.<sup>123</sup> The United States appears to ignore the times when children are under the control of the state during schools hours.<sup>124</sup>

Children are under the school's control during much of the day, for five days a week. Yet this time of responsibility is not considered time during which the United States accepts a responsibility to ensure that the children are not experiencing torture in the form of mental suffering. When a child endures racial discrimination in the school system, the child will experience severe mental suffering that will affect him/her throughout the child's life.<sup>125</sup> Students can easily feel frustrated as they

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121. *Id.* at 10-11. One example of such discrepancies in the application of "zero-tolerance" policies is found in a Michigan. In the town of Olivet, Michigan, two white students were found with a gun in their car at the beginning of hunting season. *Id.* Their punishment under the "zero-tolerance" policy was a 10-day suspension and 40 hours of community service. According to the principal, there was no need for the police, a criminal record, or expulsion because the students had no intent to harm anyone. *Id.* In another Michigan county, a black student was found with a pocketknife as he was cleaning his nails. After he immediately handed the knife to his teacher, the police were called and the student was expelled. In another example, two African American students in Chicago's southwest side were break-dancing in school. The students were suspended for six days because the white school officials misperceived the dancing as "gang representation." *Id.* at 12. Prior to the Enactment of the Gun-Free School Act, students who brought weapons to school still were punished by suspension or expulsion, but they were not done in such large numbers as they are done today. *Id.* at 11. The difference is because prior to the law, there was more flexibility to allow the teachers and administrators to distribute punishments as they see fit. *Id.* at 11-12.

122. *Id.* at 10, 14. "Studies have shown that students who are suspended or expelled are more likely than their peers to drop out of school altogether." According to students of Generation Y, when you are suspended from school, "You don't learn. You fall behind. You get a negative attitude about school." *Id.*

123. See REPORT TO CAT, *supra* note 99, ¶ 95. The United States notes that there is increasing use of torture through "psychological forms of torture and ill-treatment, such as mock executions, sensory deprivations, use of drugs, and confinement to mental hospitals."

124. See *id.*

125. See *Achievement Gap*, *supra* note 19. Weissglass explains that "Internalized

are disregarded and classified in lower academic brackets, punished more harshly, and not given the financial means to succeed in school. As the discrimination continues throughout school, the long-term effects will cause severe mental pain as the students begin to believe they are inferior to their white peers.<sup>126</sup> The United States has not acknowledged the possibility that the suffering of the students under the government's control may fall squarely under its own limited definition of torture.

According to all three treaties, the unequal treatment between minority students and Caucasian students runs counter to the United States' international obligations.<sup>127</sup> In the United States' report to CERD, the government characterizes racial discrimination problems as mainly private acts of discrimination.<sup>128</sup> However, the disparities in schools are not just a result of intentional or private acts. Discrimination in school is a form of institutional racism and must be addressed by the United States. The United States has an obligation under CERD to protect everyone from acts of racial discrimination and laws that either discriminate or have the effects of discrimination.<sup>129</sup> Under CAT, the United States must prevent torture of all forms, including mental torture.<sup>130</sup> Under ICCPR, the United States must protect every child, regardless of his/her race, as a minor in the society.<sup>131</sup> These requirements are not currently being met.

### C. *How To Begin Eradicating Racial Discrimination*

The problem with attempting to eliminate racial discrimination in the United States is its deep-rooted foundation. Over time, the United States has tried to tackle the issue of discrimination; but through many self-imposed limitations, such as the ones found in the treaty reservations, the government and the court have skirted around issues that need to be directly addressed. Discrimination in the schools is an issue that is easy to overlook because intent can rarely be proven.

The first step to eliminating racial discrimination in the school system is to recognize the serious disparities within the schools, and to recognize that the reasons for these disparities are not due solely to student abilities or personal racism. The type of discrimination in the

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racism causes people to give up, become hopeless, or believe that they are not as intelligent or as worthwhile as whites. Internalized racism undermines people's confidence and, as a result, their ability to function well." *Id.*

126. *See id.*

127. *See generally* CERD, *supra* note 6; ICCPR, *supra* note 6; CAT, *supra* note 6.

128. WHITE PRIVILEGE, *supra* note 106, at 13.

129. CERD, *supra* note 6, art. 1 § 1.

130. CAT, *supra* note 6, art. 1 § 1.

131. ICCPR, *supra* note 6, art. 24(1).

schools that is often the most devastating is institutional racism. This type of racism has no intentional motivation but instead is set up within the system so that even if a person tries to be fair and equal, the chances are that discrimination will still occur.

There are several ways in which the United States can begin to attain the international standards that they have agreed to in various forms.<sup>132</sup> The first step is to recognize that the reservations in CAT, CERD, and ICCPR are too narrow to truly reach the heart of discrimination. Institutional racism affects more people and has a more damaging effect upon the victims than personal racism does. If the United States ratifies a treaty but submits so many limiting reservations that the actual obligations of the United States in the treaty reflect the current laws of the country, the aspirational value of the treaty is lost.

The United States is not in compliance with any of the three aforementioned treaties in the area of education. However, according to the United States' report to the three treaty bodies, the United States has fulfilled most of the commitments agreed upon in the treaties.<sup>133</sup> As long as the reservations pertaining to intentional acts exist, many of the problems with discrimination will persist; yet the United States will not have an international obligation to address them. Currently, the United States has ratified treaties that have been narrowed so much by reservations that the aspirational purpose of the treaty is lost. Thus the ratification by the United States resembles mere lip service to the international community, rather than a promise to improve.

A second vital step to eradicating racial discrimination in the schools is to provide equal funding for all students. It is ironic that students who are in the poorest of districts receive the smallest amount of funding. The students in these neighborhoods often face innumerable obstacles that will inhibit their ability to break out of the poverty circle. Yet these are the students who are given the fewest of school supplies and educational materials. The government cannot expect a school to produce students with quality test scores when the school has no resources to implement improvements.

The third step is to begin collecting data with consistent criteria around the country. The various school districts have several methods that are generally inconsistent with each other when collecting statistics about discipline, test scores, and academic placements.<sup>134</sup> If schools

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132. See generally, CERD, *supra* note 6; ICCPR, *supra* note 6; CAT, *supra* note 6; WORLD CONFERENCE, *supra* note 7.

133. See generally, CERD, *supra* note 6; ICCPR, *supra* note 6; CAT, *supra* note 6.

134. WHITE PRIVILEGE *supra* note 106, at ¶¶ 141-143. There can be inconsistencies between the way school districts report within state counties or even towns within a state county. There are inconsistencies in the classification of the students' ethnic background,

were required to adhere to a uniform method, the country could provide evidence of the actual deficiencies in the public schools. The more the country accurately reports about weaknesses, the better chance legislators and school administrators have to efficiently and effectively address insufficiencies in public policy.

A fourth way to address the discrimination in schools is to eliminate the academic tracking programs that virtually lock students into a remedial track. When a student is locked into a program, the objective of providing equal education is lost. The United States is supposed to be the land of opportunity but in the tracking programs, the opportunity to succeed academically is practically siphoned away.

Finally, the federal government should reevaluate the "zero-tolerance" policies in schools. As the Programme of Action from the World Conference against Racism states, all measures should be taken to avoid programs that deny a student's equal access to a quality education.<sup>135</sup> Because schools apply the "zero-tolerance" standard differently for similar offenses, the government must reexamine the goals of the policy and perhaps find a more rigid method for schools to apply the standard. If a more rigid application is impossible to agree upon, then the expulsionary element of the policy must be reserved for only the most severe of violations. Schools have been given so much discretion that personal racial biases are playing a significant role in the administration of the policy and are harming minority students disproportionately to white students. For these reasons, the policy must be adjusted or eliminated.

#### IV. Conclusion

The United States has promised the international community that it will work to eliminate racial discrimination in the public education system. The United States has supported its commitment to eradicate racial discrimination in the CERD, the CAT, the ICCPR, and by their attendance at the "World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance." In 1954, the United States took a significant step forward by recognizing that the doctrine of "separate but equal" is not a constitutionally sound policy, but the struggle toward full integration is not yet finished.

Today the schools appear relatively integrated, but beyond the

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types of disciplinary actions, and the general terminology. For example, a community organization was doing a study on "in-school suspensions." One district reported having no "in-school suspensions." When the organization asked more questions, they found out that the school was able to put "0" for that question because they had recently changed the name "in-school suspensions" to "in-school supervisions." *Id.*

135. See WORLD CONFERENCE, *supra* note 7.

physical integration, many still areas are severely segregated. The funding is unequal, the opportunities within the schools are limited to minority students through the tracking programs, and the disciplinary policies impact minority students disproportionately to white students. The schools are not yet "open and accessible to all, regardless of race" as the United States has claimed.<sup>136</sup> There is still a long road ahead of the country, with respect to the elimination of racism. The first step is an honest recognition of the problem. Children across the nation are entitled to a quality education and equal access to that education. The United States has acknowledged this right of children, but so far the country has not turned it into a reality. The United States must make the necessary steps to address the problems in the American public education system before the education system will ever reflect the intent of the *Brown* decision. We may not uphold the "separate but equal" doctrine but we have certainly not created an integrated *and* equal system.

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136. REPORT TO CERD, *supra* note 89, ¶ 396; see also *supra* text accompanying note 104.