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**The Changing
Face of Education**



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Section of
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The Unfinished Work of Thurgood Marshall: Addressing the Educational Achievement Gap

By Kay H. Hodge

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Education,
347 U.S. 483, 493 (1954)

Over fifty years ago, the U.S. Supreme Court recognized in *Brown v. Board of Education* that education is not only essential for every child, but also for the future of our democracy. The promise that every child has the absolute right to an education has become the driving force of our society. However, for many minority children today, the promise of *Brown* is now being lost, and we have no one to blame but ourselves. An unprecedented number of minority children drop out of school without graduating from high school. Even more troubling is the fact that more minority children attend schools today that are effectively segregated by race than ever before in our nation's history. Think about *that*.

As the achievement gap continues to grow, there are issues that need to be addressed immediately, and among the most critical are the great disparities in resources as well as policy and organizational failures. We, as lawyers, have an opportunity, and, as I see it, an *obligation*, to step up and step in. From the Father of American Education, Horace Mann, to Thurgood Marshall, lawyers have played a critical role in shaping and reshaping America's educational system. Before we lose another generation of children, lawyers must renew their efforts to ensure that the education system serves all children without regard to their race or economic circumstances.

For lawyers, our involvement means reengaging in our communities. Historically, lawyers were key players in every city or town. They were active participants in city or town governance, served on nonprofit boards, and were involved in virtually all aspects of daily and civic life of society. It is difficult to pinpoint where that change started to take place and we stopped actively being a lawyer outside of our own office. Whether it was the need for billable hours, the increasingly difficult work/life balance issues, or, given today's

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Over the past decade, several school districts have sought to desegregate their schools, believing that this is crucial to providing equal educational opportunities to all students. The Supreme Court in *Parents Involved v. Seattle School District* placed limitations on how districts can achieve this goal. School districts and advocates are testing the limits and receiving approval from the federal government and courts.

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Public charter schools, supported by federal policy, are growing rapidly but still enroll a small portion of students. Though free from some state and local regulations, charters must still comply with federal education laws, but there is evidence of some problems. Research does not reflect impressive achievement results in the aggregate, nor a tendency to spur innovative practice, but there are examples of high-achieving, innovative schools.

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By Rod Boggs and Ron FlaggDunn

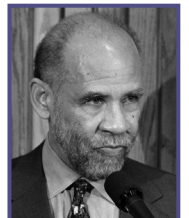
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By James E. Coleman Jr.



Associated Press, AP



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Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity

By Derek W. Black

In 2007, the U.S. Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), decided its first school desegregation case in over a decade. The case was distinct from all previous desegregation cases to reach the Court because it involved voluntary rather than mandatory desegregation. The issue before the Court was the extent to which school districts that are not under a legal obligation to remedy past discrimination can still use race classifications to achieve desegregation or diversity. In a convoluted opinion, the Court held that districts are free to use race to integrate and diversify their schools under some circumstances. They must have a compelling interest for doing so—eliminating the negative effects of racial isolation or achieving the educational benefits of diversity—and adopt plans that are narrowly tailored to that end.

The Court, however, applied a stringent narrow tailoring analysis, which left many to wonder whether any voluntary desegregation plan might realistically meet the standard. In the immediate aftermath of the Court's opinion, advocates scrambled to devise and identify plans they believed would pass constitutional muster, knowing that the failure to do so would effectively concede the end of desegregation in our nation's schools. At the time of the Court's opinion, only a small number of school districts were still under mandatory court order to desegregate, and their numbers steadily drop with each ensuing year. Soon, voluntary desegregation will be the only means to maintain whatever integration currently exists and potentially reverse an overall trend of rapid resegregation.



Students practice in band class at Southwind High School in Shelby County, Tenn., near Memphis, where an effort is underway to merge the city and suburban school districts.

Associated Press, AP

Reversing the trend of resegregation is important, not just for the sake of racial balance, but because segregated schools—de jure or de facto—exact a number of harmful impacts on the students who attend them. While various policies currently compete for attention at the federal and state levels with the promise of reducing the achievement gap, desegregation is the only policy with a long and consistent track record of improving educational outcomes for disadvantaged students. For decades, social science has confirmed that the level of racial isolation and poverty in schools directly correlates with the academic achievement of the students in those schools. In short, nothing less than the chance to receive a basic and quality education is at risk in voluntary desegregation.

Fortunately, the steadfast commitment of advocates to defend voluntary desegregation and diversity goals has recently begun to pay dividends. In the winter of 2012, the U.S. Department of Justice and the Office for Civil Rights jointly issued policy guidance that supports the

goals of voluntary desegregation and diversity plans and offers suggestions as to how to achieve them. In addition, the Third Circuit Court of Appeals settled a key question regarding race-conscious redistricting of schools that makes the task easier for school districts attempting to diversify or desegregate. With a consensus forming around the appropriate goals and methods of voluntary desegregation and diversity plans, the most important step is to take to well-intentioned districts the message that they are free to act.

Understanding the Court's Opinion and Its Effect

The Court's decision in *Parents Involved* was confusing to almost all but the closest followers of the Court because its decision was a 4–1–4 split, with Justice Anthony Kennedy's opinion at the center. He concurred with Chief Justice John Roberts' opinion that the desegregation plans in question were subject to strict scrutiny and not narrowly tailored, making Justice Kennedy the fifth vote to strike down

the desegregation plans before the Court. But Justice Kennedy disagreed with Chief Justice Roberts' position that the only compelling interest that justifies the use of race classifications in elementary and secondary schools is remedying past discrimination. Instead, Justice Kennedy agreed with the four dissenters on this point and wrote that eliminating the negative effects of racial isolation and achieving diversity are also compelling interests. Under the legal prevailing tests for analyzing Supreme Court precedent, Justice Kennedy's opinion provides the controlling rationale and holding in the case. See *Marks v. United States*, 430 U.S. 188 (1977) (stating the test for determining the holding in split decisions); see also *Hart v. Cmty. Sch. Bd.*, 536 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) (applying the *Marks* analysis and indicating that Justice Kennedy's concurrence was the controlling holding of *Parents Involved*).

Recognizing Justice Kennedy's opinion as controlling, *Parents Involved* stands for three major principles. First, schools that individually classify students by race and then assign them to a school on this basis are subject to strict scrutiny, which requires them to establish a compelling interest to justify the plan and prove that the means they chose to achieve this objective are narrowly tailored. Second, eliminating the harmful effects of racial isolation and achieving the benefits of diversity are compelling interests. Third, student assignment plans that do not classify or assign individual students by race, but rather only consider race in a general way when redrawing school district boundaries, building new schools, or targeting recruits, are unlikely to even trigger strict scrutiny.

While on balance this holding is positive, it represents both victories and losses for desegregation advocates. The major victories are relatively obvious. Some feared that the Court would strike down voluntary racial desegregation under all circumstances and possibly even overturn the Court's holding from *Grutter v. Bollinger*, 539 U.S. 306 (2003), that approved of race-conscious admis-

sions policies to achieve the educational benefits of diversity in higher education. The Court in *Parents Involved* did neither and, instead, firmly established that voluntary desegregation can continue. Equally important, Justice Kennedy's indication that desegregation plans that do not use individual racial classifications, but rather only consider race generally, are unlikely to receive strict scrutiny was an unexpected victory. Many assumed that all race-conscious voluntary desegregation plans would be treated alike, regardless of whether the Court struck down or upheld the plans in *Parents Involved*.

The Court's holding, however, also represents significant losses. First, voluntary desegregation is, in many instances, now subject to strict scrutiny. Second, those plans that rely on individual race classifications in assigning students to schools must engage in an individualized review of each student analogous to that which the Court approved of in *Grutter*. While strict scrutiny and individualized admissions may serve a purpose in higher education, they serve little purpose in primary and secondary education. Higher education involves competitive merit-based admissions, but with the exception of a portion of magnet schools and specialized programs, primary and secondary education does not involve any sort of competitive student assignments. Moreover, even if a voluntary desegregation plan assigns a student to a school other than the one he or she sought, the result is not an absolute denial of educational opportunity. Rather, the district provides opportunities in another school within the district. Finally, while school districts might pay close attention to race in the effort to ensure that all schools are racially integrated, no group is systematically favored over another. Voluntary desegregation "prefers" multiracial schools, not individual racial groups. The extent to which race will even play a role in any given assignment varies depending on the existing racial makeup of a school, the number of students seeking assign-

ment, the number of available seats, and the number of students who have siblings at the school. In many instances, an individual's race will be entirely irrelevant to his assignment.

Recognition of these distinctions would have exempted voluntary desegregation from strict scrutiny and allowed school districts a measure of flexibility as they confront ever-shifting demographic trends and parental preferences. In fact, one lower court prior to *Parents Involved* noted these differences and applied intermediate scrutiny instead. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F. Supp. 2d 328, 366 (D. Mass. 2003). As it stands now, districts must weigh the need for achieving voluntary desegregation against the legal scrutiny a race-based plan will inevitably bring.

Recent Clarifications

While much of the confusion surrounding the Court's opinion in *Parents Involved* was attributable to its split decision, some of it was a result of misinformation from the federal government during the Bush administration. On August 28, 2008, the Office for Civil Rights issued a "Dear Colleague" letter to school districts that offered a blatantly inaccurate statement of the Court's opinion. The Office for Civil Rights premised its letter entirely on Chief Justice Roberts' plurality opinion in *Parents Involved* and failed to even mention Justice Kennedy's pivotal opinion. Because the letter failed to address Justice Kennedy's controlling opinion, it incorrectly stated that the Court has recognized that "a government interest is compelling for equal protection purposes in the school context in only two instances: to remedy the effects of intentional discrimination and to obtain a diverse student body in higher education." STEPHANIE J. MONROE, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (Aug. 28, 2008). The letter further misled school districts by going beyond even Chief Justice Roberts' plu-

rality opinion to “strongly encourage [] the use of race-neutral methods for assigning students to elementary and secondary schools.” *Id.*

In the winter of 2012, the Obama administration finally removed this letter from the Office for Civil Rights’s website and replaced it with more helpful guidance. *See* U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., & U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (Dec. 1, 2011). The legal parameters laid out in this new guidance provide sufficient room for school districts to voluntarily adopt school assignment plans that promote the well-documented educational benefits of school diversity and integration. The guidance affirms that achieving the benefits of diversity and avoiding the harms of racial isolation are compelling interests that justify the use of race in assigning students to primary and secondary education.

The guidance, however, emphasizes that, if a school district is going to use race, it must first consider whether or not any race-neutral means could achieve its stated goals of diversity or avoiding racial isolation. Race-neutral means allow school districts to be aware of or to consider the racial or ethnic outcomes in developing plans so long as no specific student is assigned to a school based on his or her individual race. But if a school district explores race-neutral means for meeting its goals and finds them inadequate or unworkable, the guidance states that administrators may use race as an “express criterion” in student assignments. Under this option, school district officials must

- a. evaluate each student in the selection process similar to the way college admissions use race as one factor among several others, as permitted under the law.
- b. not make the student’s race the

- “defining characteristic” for admission or nonselection; and
- c. periodically evaluate whether or not it is still necessary to use race to achieve diversity and avoid racial isolation.

The guidance also offers a plethora of detailed examples of student assignment plans that would pass constitutional muster. The methods described range from strategic school and program siting, realignment of school feeder patterns, and redrawing school attendance zones to the explicit consideration of race in school choice or competitive programs. Although the guidance does not specifically reference any school district’s assignment plans currently in operation in places like Berkeley, California, and Louisville, Kentucky. In short, the guidance offers any school system that is seriously committed to diversifying or reducing the racial isolation realistic and workable options to achieve its goal.

Resegregation and Why Voluntary Desegregation Matters

Nothing short of the future of equal and quality educational opportunity for minority students attending segregated schools hangs in the balance with voluntary desegregation. Voluntary desegregation stands as the last line of defense in a troubling trend of resegregation. Mandatory desegregation has been in steady decline for, at least, the past two decades. The Supreme Court’s opinions in the late 1980s and early 1990s weakened the authority of district courts to order and maintain desegregation remedies and encouraged district courts to instead dissolve desegregation decrees. The result has been to cede back almost all of the integration gains of the past. Though it is not the story often told today, desegregation was very successful for a period of time. From the mid-1960s until the late 1980s, the percentage of students attending desegregated schools expanded each year. GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HAR-

YARD UNIV., *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* (2004). When desegregation reached its height in 1988, nearly half of the African Americans in the South attended integrated schools. Since then, however, Supreme Court precedent has allowed schools to resegregate to levels that existed in 1970 when desegregation was still in its infancy.

This resegregation has negative consequences for both minorities and nonminorities. School segregation has long-term effects on minorities’ political, housing, employment, and social opportunities and deprives whites of the cultural competence that is important to their later educational and career success. Most notable, however, are the immediate educational harms that minorities suffer because predominantly minority schools, as a general matter, fail to deliver quality educational opportunities to the students who attend them. Yet, the problems of racially isolated minority schools stem not from race per se, but from the fact that predominantly minority schools also tend to be predominantly poor. In fact, more than 75 percent of predominantly minority schools are also high-poverty schools. ANURIMA BHARGAVA ET AL., NAACP LEGAL DEF. AND EDUC. FUND, INC. & THE CIVIL RIGHTS PROJECT, STILL LOOKING TO THE FUTURE: VOLUNTARY K–12 SCHOOL INTEGRATION 14 (2008). In several major academic categories, predominantly poor and minority schools cause educational harm or underperform in comparison to other schools.

First, students in predominantly poor and minority schools tend to receive a generally low-quality curriculum and have unequal access to high-level curricular offerings. Jeanne Oakes, Adam Gamoran & Reba N. Page, *Curriculum Differentiation: Opportunities, Outcomes, and Meanings*, in HANDBOOK OF RESEARCH ON CURRICULUM 570–608 (Philip W. Jackson ed., 1992).

Second, even though research shows teacher quality is closely linked to stu-

dent achievement, students in predominantly poor and minority schools tend to have limited access to highly qualified teachers. Charles Clotfelter, Helen Ladd & Jacob Vigdor, *Who Teaches Whom? Race and the Distribution of Novice Teachers*, 24 *ECON. EDUC. REV.* 377–92 (2005). These schools find it extremely difficult to attract and/or retain high-quality teachers and experience exceptionally high teacher turnover, which seriously undermines instructional continuity. Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39 *J. HUMAN RES.* 326, 337 (2004). Money alone cannot easily fix the problem because the racial and socioeconomic characteristics of schools significantly influence where teachers decide to teach. Wendy Parker, *Desegregating Teachers*, 86 *WASH. U. L. REV.* 1, 35–37 (2008). Absent huge salary increases—the size of which is beyond the capacity of nearly all districts—teachers with options will tend to choose to teach in schools with fewer numbers of poor and minority students.

Third, high poverty levels at predominantly minority schools deprive students of the invaluable influence of middle- and upper-class peers, which decades of data demonstrate is the most important factor in the success or failure of a school. RICHARD D. KAHLBERG, *ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* 6, 47–76 (2001). Some studies have found that the achievement gap between high- and low-poverty schools is equivalent to two years of learning. Most important, the concentration of poverty in a school reduces an individual student's chance of academic success, regardless of his or her individual race or wealth. Both minority and nonminority, and poor and middle-income, students who attend high-poverty schools score substantially lower on standardized tests than similarly situated students who attend low-poverty schools. Russell W. Rumberger & Gregory J. Palardy, *Does Resegregation Matter?: The Impact of Social Composition on Academic Achievement in Southern*

High Schools, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 127, 128 (John Charles Boger & Gary Orfield eds., 2005). In short, poor minority students have a better chance of academic success at schools with low levels of poverty than middle-class white students have at schools with high levels of poverty.

Fourth, the depressed achievement of students in predominantly minority schools has compounding long-term effects. On average, only four out of ten students graduate on time in the nation's predominantly poor and minority high schools. BHARGAVA ET AL. These lower graduation rates also hold true regardless of a student's individual race or wealth.

While diversity is an important goal that produces significant benefits, these educational harms suggest that school systems dealing with racially isolated minority schools confront a more serious challenge: delivering a basic and adequate education. The various state constitutions, and to some extent No Child Left Behind, mandate that students receive an equal and/or quality education. This simply does not occur on a consistent basis in predominantly minority schools. Thus, the goal of voluntary desegregation is not necessarily to achieve racial integration for its own sake. Rather, racially balancing schools is a precursor to the conditions necessary to deliver equal education opportunities in many districts. So long as schools are racially identifiable, parents, teachers, and resources will gravitate toward some schools and away from others. The result is a vicious cycle that drives down the quality of educational opportunities in poor and minority schools, making them even less attractive. Recognizing this reality, schools' only real option for delivering equal education is to control student assignment.

Expanding Integrated Schools

A significant number of school systems recognize the importance of racial integration and diversity to

equal educational opportunities and are willing to fight for it. Louisville, Kentucky, is the perfect example. The district court released the school district from court-ordered desegregation in 2000, but the school district quickly saw that its school system would not work properly unless it maintained integration. After the Supreme Court struck down its plan in *Parents Involved* as not narrowly tailored, the school district did not waiver, but rather revamped its plan to continue integration within the Court's parameters. The federal government and lower federal courts are seemingly rallying around school districts undertaking similar efforts.

Notwithstanding these encouraging trends, they are not enough alone. More work is to be done if *Brown v. Board of Education's* promise of equal educational opportunity and desegregated schools is to continue. Not knowing what awaits them on the other side, far too many school systems are eager to get out from under court-ordered desegregation; far too many well-intentioned school districts have sat on the sidelines for the past few years out of confusion over what the Constitution would permit them to do; and far too communities have grown disillusioned with the capacity of public schools to improve education and have become fascinated with charter schools, testing, and teacher accountability. A core community recognizes the incomparable value that integrated schools bring to students, but most have forgotten or discount that value. Ironically, if integrated and diverse schools are to flourish, we must once again explain and justify them to the broader public.

Derek W. Black is an associate professor at Howard University School of Law and director of its Education Rights Center. He is the author of numerous articles addressing inequality based on race, poverty, gender, language status, and disability in schools. He also has a forthcoming casebook titled Education Law: Equality, Fairness, and Reform.

The Impact and Growth of Public Charter Schools

By Kathleen B. Boundy and Paul Weckstein

Charter schools are public schools of choice operating with a charter issued under state law defining their terms and granting greater autonomy from state and local rules applicable to traditional schools. Some are created or run by community-based and other nonprofit organizations, parents, teachers, existing districts and schools, or networks of educational management or charter management organizations (including for-profit companies). Support for charters has been fueled by the hope that they would create options for parents, foster innovation to improve quality, and spur competition.

Charter school enrollment more than tripled between 1999 and 2009. In 2011–12, it increased 13 percent over the previous year. However, students in charter schools still constitute less than 3 percent of total public school enrollment, and the more than 5,000 charter schools comprise about 5 percent of all public schools. A small but rapidly growing number are virtual, online schools.

By 2008–09, 55 percent of charter schools were in cities, compared to 25 percent of traditional schools. And 30 percent of charter schools had enrollments in which over 75 percent of the students were from low-income families (up from 13 percent a decade earlier). [There is evidence of at least some increases in racial isolation after accounting for their geographic concentration.]

Students with disabilities have grown to 11.9 percent of charter school enrollment (roughly comparable to traditional schools), although there is evidence of underserving students with more significant disabilities, along with evidence and complaints regarding the screening out of students with disabilities despite requirements for nondiscrimination and random selection among

students in oversubscribed schools. As with most things that can be said about charters, aggregate enrollment figures mask major variation—including a few places where charter schools are far more dominant: over 70 percent of public school enrollment in New Orleans; 40 percent in Washington, D.C.; and 12 percent across Arizona.

Growth has been encouraged by federal policy and funding (and setting the definition and conditions for charter schools) beginning with the 1994 version of the Elementary and Secondary Education Act (ESEA) and continued in the 2001 No Child Left Behind version of ESEA. The 2009 American Recovery and Reinvestment Act (ARRA) federal stimulus act brought additional charter funds. Equally significant, to compete for the Race to the Top funds that started with ARRA, states had to agree to provide equitable funding and facility support for charters and to lift state caps on the number of charter schools. Some low-performing traditional schools have been reconstituted as charters.

Charter schools are eligible for other federal funds on the same basis as other public schools and are bound by the same requirements—for example, under Title I of ESEA (the current version of which is No Child Left Behind), the Individuals with Disabilities Education Act, and the civil rights laws prohibiting discrimination by race, national origin, disability, or gender (Title VI, Section 504, and Title IX). Thus, while charter schools are by definition exempted from some *state or local* rules inhibiting flexible operation, they are not exempted from *federal* education law requirements by virtue of their charter status. But administration of these requirements does vary based on the governance charter arrangements within each

state. About 40 percent of all charter schools are part of an existing school district (local educational agency (LEA)), while 60 percent operate as their own freestanding LEA (or sometimes as a cluster of related charters). Thus, the extensive oversight and support responsibilities set out for school districts in federal program law (e.g., under the Individuals with Disabilities Education Act or Title I) may be placed upon a regular district or upon the charter itself. Researchers have found that understanding of and capacity for fulfilling these responsibilities under IDEA generally tend to be lower in charters operating as autonomous districts.

Do charter schools outperform traditional public schools? Research to date is limited, inconsistent, and inconclusive. A 2009 Stanford study of matched students found that 17 percent of charters did better, 46 percent about the same, and 37 percent worse than their traditional school counterparts; outcomes were modestly better for low-income students and English-language learners, modestly worse for African Americans and Latinos, and worse in the first year of charter enrollment but better thereafter. Similarly, fall 2011 National Council for Education Statistics data showed no overall difference in academic progress, with significant negative impact on math scores in charters serving more advantaged students but positive impact in charters serving more low-income or low-achieving students. Inaccurate counting of students with disabilities and English-language learners makes drawing conclusions about those groups difficult.

Related to these findings, research to date shows relatively few classroom innovations or departures from traditional approaches, very small

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Alabama Introduces the Immigration Debate to Its Classrooms

By Jeremy B. Love

Ana is a nine-year-old girl who lives in a small town in rural Alabama. She attends elementary school and has excelled at reading. She goes through about two books a week. I met Ana and her family recently at a legal clinic for low-income immigrant families in her small part of Alabama. As an immigration attorney, I have been fortunate to participate in several legal clinics across Alabama assisting the state's underserved immigrant population. Ana was born in Alabama, about a year after her mother and older sister rejoined her father, who had been working in the United States. In her home, she speaks Spanish, and in school she learns all of her subjects in English.

Ana's father left Guatemala for the United States to find work twelve years ago. Like many other Hispanics, he found work in a poultry plant. The work was grueling, but he was happy to have the employment and sent nearly half of his income to Guatemala for his wife to buy food for herself and their oldest daughter Celina. The Guatemalan Civil War had ended just a few years before, but the country was still ravaged by thirty years of war and human rights violations by the country's military, a military that received funds from the United States in the 1960s and 1970s.

Because she was born in the United States, Ana is a U.S. citizen. When she grows up, she can work for the federal government if she chooses, and when she turns eighteen, she can vote. Her sister Celina is without legal status because she crossed the border with her parents without a visa when she was three



Demonstrators protest Alabama's immigration law at the Capitol in Montgomery, Ala., on Feb. 7, 2012.

years old, and she will not be able to obtain a driver's license when she turns sixteen in a few years.

Ana and her family came to me because they wanted to know what could be done about their immigration status. They also wanted to know more about Alabama's infamous immigration law, H.B. 56, and how it may affect the parents' ability to work or the children's opportunity to attend school.

The Beason-Hammon Alabama Taxpayer and Citizen Protection Act, also known as the Alabama Immigration Law, or H.B. 56, went into effect on September 28, 2011. Despite its name, the bill fails to provide any protection for certain taxpayers—undocumented immigrants who paid \$130 million in taxes in Alabama in 2010. After the bill was proposed in March, it labored for months in the State House while the immigrant community in Alabama scrambled for information on the bill's contents and implications. The panic reached a fever pitch in June, when Governor Robert Bentley signed the bill into law, and continued as nonprofit

organizations, the U.S. Department of Justice (DOJ), and religious leaders battled the state over the law. Community organizations, such as the Hispanic Interest Coalition of Alabama (¡HICA!), saw a dramatic increase in the number of clients seeking services including powers of attorney, consultations on immigration issues, and assistance with passport applications. ¡HICA! saw an increase in clients in 2011 by over 50 percent from those served in 2010.

Alabama Brings the Immigration Issue into the Classroom

One growing concern about H.B. 56 has been the effect that the law has had on education, particularly on immigrant children. Clearly, children are not immune to what takes place outside of school. That being said, the Alabama law takes the immigration issue one step further than any other state. By bringing the issue of immigration directly into the classroom, Alabama has created an even greater distraction for immigrant and nonimmigrant kids in school.

While some sections of the law were blocked by U.S. District Court Judge Sharon Blackburn, likely the most controversial part of the law, section 28, was allowed to go into effect. Section 28 states that “[e]very public elementary and secondary school in this state, at the time of enrollment in kindergarten or any grade in such school, shall determine whether the student enrolling in public school was born outside the jurisdiction of the United States or is the child of an alien not lawfully present in the United States.” Therefore, the law requires that every public school in the state inquire into the immigration status of students and their parents when students enroll in school.

Schools cannot deny education to a child based on immigration status, as held by the U.S. Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982). The Court found that the Texas state statute in the case violated the Fourteenth Amendment of the Equal Protection clause because the state failed to show that it had a substantial government interest. The Court also explained that denying children access to education “imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. . . . By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions and foreclose any realistic possibility that they will contribute even in the smallest way to the progress of our Nation.” *Id.* at 223. Therefore, kids like Celina, who crossed the border with their parents as children, should not be persecuted for the acts of their parents.

While there is no rationale given for section 28 by the state of Alabama, many state residents have expressed concerns over tax dollars and how an increase in immigration to Alabama over the last ten years has affected the public school systems. According to the 2010 Census, Alabama had the second highest growth of Latino population in the country since 2000. However, the Alabama lawmakers who sponsored the bill have shown clear evidence of

prejudice against racial or national origin minorities. Senator Scott Beason used a racial slur while wearing a wire during an FBI investigation into an alleged vote-buying scheme. Representative Micky Hammon quoted numbers of Alabama’s Hispanic population when asked about how many undocumented immigrants were in the state. During a legal challenge to one section of H.B. 56, U.S. District Judge Myron Thompson cited examples of Alabama lawmakers using the terms “Hispanic” and “illegal immigrant” interchangeably. Judge Thompson stated that the H.B. 56 legislative debate was “laced with derogatory comments about Hispanics.”

Regardless of the intent behind section 28, the DOJ issued a memo in May to state agencies explaining that the immigration status of students is irrelevant in administering education. Further, schools cannot use that information to discriminate against students of a particular race or national origin. While the law does not facially discriminate against Hispanics, it clearly has had that effect since its enactment.

The Monday after H.B. 56 took effect, 2,285 Latino students were absent from school out of the 34,000 Latino students statewide. That absentee rate is nearly double what it would be on a normal day. Over fear of Alabama’s immigration law, many parents elected to keep their kids out of school. The DOJ memo also recommended that states review their enrollment procedures to ensure that they do not have a chilling effect on education. Drops in attendance of Hispanics, such as the one in Alabama, are evidence of a potential barrier to education that violates the United States’ long line of cases that ensure all children of a right to an education. Even though section 28 was later blocked by the Eleventh Circuit Court, the damage had been done.

In the first few months after the enactment of H.B. 56, the Latino community in Alabama was in a complete panic. Even the elected

state officials will admit that the seventy-page law is extremely confusing. Imagine how an immigrant, who may not speak English proficiently, would fare in deciphering it.

To further complicate an understanding of H.B. 56, there have been many developments in the courts as to which sections are blocked as well as interpretations made in different counties and city governments on parts of the law. Since the law went into effect, government agencies, religious organizations, and many nonprofit organizations, including HICA!, the Southern Poverty Law Center (SPLC), and Alabama Appleseed, have worked diligently to educate the community on the contents of the law. However, there is virtually no way to educate everyone on how the law is being interpreted in each county. I have spoken with many school officials and law enforcement officers that stated that they had absolutely zero training on H.B. 56 before the law took effect. Furthermore, there are no provisions in the law to provide funding for this dramatic expansion of state employees’ duties.

Numerous teachers have reported that children have been unable to concentrate because they are fearful or are being bullied. Immigrant children, both those with immigration status and those without, do not know if they will be back in school the next day. One parent reported that her Puerto Rican and therefore U.S. citizen son was asked by a classmate if he had a green card. When her son answered in the negative, the classmate said, “You’ll have to leave the country.”

Even children who are not being bullied have been significantly less attentive in the classroom. Jefferson County ESL Coordinator Lari Valtierra explained that many immigrant children, even those who are U.S. citizens, have their bags packed in case they need to leave Alabama. Children call home during the day to see if their parents are still there or if police or immigration picked them up. One Birmingham area teacher had to reassure a legal permanent

resident student that she did not need to go home to check to see if her parents, who are also legal permanent residents, had been detained. Children are also fearful of their parents losing their jobs, which would mean that they would no longer be able to obtain health insurance. Valtierra explains that H.B. 56 has affected high school students more than middle and elementary school kids. Some teenagers have begun working forty hours per week in addition to attending school to help support their family because one or both parents have been detained or fired due to their immigration status.

Several schools have tried to help Hispanic kids by giving them flyers on the immigration law. However, some parents reported that their children received the papers because they had foreign-sounding names or because the school felt that they looked like immigrants. In providing this information to people based on their national origin or race, it differentiates children from their classmates and further drives the wedge that Alabama has created between immigrant and nonimmigrant children.

A License to Discriminate

There have been many reports of schools using this law to discriminate against immigrant children. For instance, several parents reported in one community that a school official called out the Latino children and questioned them about their immigration status. While there were reports of discrimination prior to H.B. 56, now many people feel that Alabama has created a sense of empowerment for those who wish to discriminate.

Unfortunately, section 28 is far from being the only provision of H.B. 56 that has been affecting education in Alabama. Section 30 provides that any undocumented immigrant who conducts business with the state has committed a Class C felony. This provision has been interpreted very broadly to include not only vehicle, and until recently mobile home, registration, but also by denying undocumented immigrants access to electricity and water for their homes.

Several of my immigrant clients have stated that their local water boards have denied them water service because they are not citizens. When my clients or I asked utility company employees about how a company could deny someone such a basic human necessity, they often responded, “that’s our policy.” While some companies are merely trying to protect themselves from liability, it would be naïve to believe that the world is free of people who choose to discriminate against others due to their accent or the color of their skin. H.B. 56 compounds the problem by empowering them to do so.

The state-sponsored acceptance of discrimination is even more obvious in the effects of section 27, which prevents state courts from enforcing a contract when a party is undocumented. In reliance of this law, auto dealers have been repossessing cars purchased by immigrants because there is no recourse for undocumented buyers in the courts. Similarly, tenants are being kicked out of their apartments with little or no warning because leases possessed by undocumented immigrants are no longer enforceable.

Undocumented immigrants have been made prisoners in their own homes for fear of this immigration law. Based on my conversations with immigrant families, many immigrants do not leave their homes unless absolutely necessary and keep the lights off so as not to alert law enforcement that anyone is home. Because they cannot renew their vehicle registration under section 30, they are afraid to even take their kids to school. Even if parents are not pulled over for driving with expired tags on the way to school, there are often police officers who sit waiting outside the school.

To further complicate driving with an expired vehicle registration, section 12 is included in H.B. 56. This section, also known as “Papers, Please,” states that an officer in the course of a lawful stop must determine the person’s immigration status if he/she has reasonable suspicion that the immigrant is undocumented. The issue over what may be used to

raise reasonable suspicion has been a major source of concern for immigrant communities across the country. Any use of race to suspect that someone is undocumented is a clear violation of the Fourth Amendment.

Police in Alabama are required to inform ICE of the identity and whereabouts of a person believed to be undocumented. If the law enforcement officer’s stop or search of the immigrant is unlawful, the criminal charges may be dropped, but ICE can still continue with removal proceedings. Therefore, H.B. 56 allows officers to assist in the deportation of an immigrant even through an unlawful search.

Clearly, officers are put in a difficult position because they have to be concerned about their own liability. Not only did the law fail to provide time or training for police officers, but it also opened them up to personal liability for not enforcing the immigration laws. Officers can be held liable criminally, and as outrageous as it sounds, in civil court from lawsuits filed by any legal state resident for failure to uphold H.B. 56.

“We Don’t Want to Be Alabama”

Alabamians have worked for fifty years to erase the reputation the state earned for itself during the Civil Rights Movement—the darkest time in Alabama’s history. The indelible images of firemen literally knocking people off their feet with fire hoses and police dogs jumping to attack high school students burn an all-too-familiar picture in the minds of Alabamians. In less than one year, the state has managed to undo much of the progress that was made over the last fifty years and rewrite itself as a leader in denying basic civil rights to its residents. Alabama leaders were able to lure foreign investment into the state as three major auto manufacturers built and currently maintain plants in the state. Since the enactment of H.B. 56, state officials have arrested or stopped executives from two of those plants who had legal immigration status to interrogate them in accordance

with H.B. 56. Alabamians merely need to look at their past to know that denying people basic civil rights, such as equal protection under the law, due to the color of their skin is wrong. March 7, 2012, marked forty-seven years since “Bloody Sunday,” a day when many protestors were brutally beaten and injured during a civil rights march from Selma to Montgomery. The reenactment of the march was heavily attended and included multiple speakers on rights being denied to Alabama residents due to H.B. 56. If Alabamians do not learn from their mistakes of the past century, they dishonor those who fought and died so that this one would be better for mankind.

Prior to enacting H.B. 56, Alabama possessed a crystal ball by which its residents could see the future it faced if the state passed a law similar to those in Arizona, Utah, and Georgia. Alabamians had the opportunity to see the billions of dollars lost by the economies of other states due to boycotts, lost investments, and a gross shortage of immigrant labor to pick crops. Despite these alarming events, Alabama’s elected officials decided to create an even more egregious immigration law than those states could muster. Prior to passing H.B. 56, Senator Beason suggested that Alabama should do everything it could to combat illegal immigration in the state. Using Senator Beason’s words, instead of heeding the warnings of its neighbors, Alabama decided to “empty the clip.”

Many states considering passing immigration laws steered clear of provisions directly relating to education, such as Alabama’s controversial section 28. State legislators have stuck to provisions that have been upheld, such as the mandatory use of E-Verify, an employment authorization system sponsored by the U.S. Department of Homeland Security. States such as Georgia, Louisiana, South Carolina, and Tennessee have begun requiring the use of E-Verify. Alabama now requires E-Verify for new public employees and contracts, and will begin mandatory use of the program for all

other new employees by April 1, 2012. One exception to states avoiding immigration laws aimed at education is Missouri’s S.B. 590. State Senator Will Kraus proposed the bill, which would require schools to ask students for birth certificates when enrolling in school. The bill includes provisions for data collection on immigration status and enrollment in ESL classes.

In Ana’s case, her parents have always been very adamant about their kids’ education. However, over fear of H.B. 56, they kept Ana and Celina home for a week after the law took effect. Her father was able to keep his job at the poultry plant, but he saw many other coworkers leave without even picking up their paychecks. Ana and Celina will be able to graduate from high school due to the right of all students to elementary and secondary education. However, because Celina crossed the border without a visa, she will not be able to attend college in Alabama because section 8 of the act states that all undocumented immigrants are ineligible for enrollment in post-secondary education. She is also ineligible for scholarships to attend college.

The U.S. Congress and some state legislatures have discussed passing DREAM Acts, which would allow certain undocumented students who meet attendance and grade requirements to apply for financial aid to attend college. For Celina to have such an opportunity, she would have to leave Alabama. One common misconception that I hear in my law practice is that a U.S. citizen child can file for permanent residence for his/her parents and siblings. While a U.S. citizen can file for parents and siblings, he/she cannot do so before the age of twenty-one. In twelve years when Ana turns twenty-one, she can file for her parents and sister. However, Celina would have to wait an additional eleven years to become a permanent resident due to the immigrant visa waiting period for siblings. Also, due to their unlawful entry into the United States, once Ana applies for her relatives, they would have to return to Guatemala and ask for I-601 waivers based on extreme hardship. Under our

current immigration system, obtaining some form of lawful status is a very long road for immigrant families.

Some state representatives, such as Senator Kraus from Missouri, explain that state immigration bills are merely temporary solutions and attempt to force the Obama administration to address the issue at the federal level. In my experience, most people on both sides of the issue favor federal immigration action, but the contents of such legislation would be hotly contested.

Conclusion

Reports have shown that over the first few months of 2012, many immigrants who left Alabama due to H.B. 56 have since returned. Families like Ana’s that have kids in school are reluctant to move due to the roots that they have put down in the state. Many immigrants have expressed to me that Alabama is their home and they want to ride out the legal battle over H.B. 56 to see if some reprieve from this harsh law will arrive. As one immigrant who attended this year’s Selma march stated, “All I’ve tried to do is work hard and raise my family to love America and Alabama. And this law hurts me to my soul.”

The debate over immigration will rage on in each state, on the campaign trail, and in the courtroom. In the meantime, the most vulnerable victims are the children whose education has become disjointed and wracked with distractions. Many states have avoided immigration laws aimed at education to distance themselves from the example set by Alabama. The state already ranks as one of the least educated in the nation. The solution is not to turn and blame immigrants for its problems but to ensure that Alabama remains a sweet home for immigrants and for everyone.

Jeremy B. Love has worked as the legal services director at the Hispanic Interest Coalition of Alabama. Love returned to private practice in 2012 and formed The Love Law Firm, LLC, where he focuses his practice on immigration.

A Past, Present, and Future Look at No Child Left Behind

By Andrea L. Bell and Katie A. Meinelt

On January 8, 2002, President George W. Bush, with significant bipartisan support, signed the No Child Left Behind (NCLB) Act into law. At the time of its passage, President Bush decried the “soft bigotry of low expectations” of African-American, Hispanic, and disabled students and gave the law its name: *No Child Left Behind*. The idea was to measure the progress of *all* students, placing a particular emphasis on subgroups of students who have been on the low end of the achievement gap, and to hold states and schools accountable for each student’s progress. NCLB was a reauthorization of the Elementary and Secondary Education Act (ESEA), which was first enacted in 1965 and reauthorized in 1994. 20 U.S.C. ch. 70.

One of the law’s main functions is to provide so-called Title I funds to states. Title I funds are distributed to schools, which in turn generally use the money to finance programs and personnel in order to support its economically disadvantaged children. By providing Title I funds, Congress was able to implement requirements that applied to the states that accepted the money and to the public schools within those states. Many of NCLB’s requirements, however, particularly with regard to educational standards, are followed by schools regardless of whether their district or school receives Title I money.

NCLB set forth the ambitious goal for *all* children to be “proficient,” meaning that each student is performing at his/her average grade level, in the areas of reading and math by 2014. No Child Left Behind (NCLB) Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002).

In order to achieve “proficiency,”



Associated Press, AP

More than 90 percent of the students at Oasis Elementary School in Oasis, Calif., are Hispanic. They are taught only in English—still a foreign language for many. Under No Child Left Behind, they’re expected to test in English at proficient levels in reading and math.

NCLB employs several principles, all which helped redefine the role of the federal government in our students’ education: (1) it uses a standards-based model requiring states to teach and test to measure progress; (2) it incorporates accountability for academic student achievement, particularly when achievement goals are not met; (3) it requires schools to disaggregate data so that schools can track the progress of subgroups of students who are generally considered at-risk; (4) it addresses the need for highly qualified teachers; and (5) it places a greater emphasis on research-based instruction. NCLB places considerable responsibility on building principles, particularly on student progress and achievement, the quality of the school’s curriculum, and the quality of the teaching and instruction in classrooms.

There has been widespread criticism of NCLB, particularly as the law has been implemented and its flaws have become more apparent. Is it reasonable

to expect that *all* students will become proficient by 2014? What does it mean to be “proficient” and who decides what constitutes “proficiency”? Does the emphasis on testing narrow the curriculum or give teachers the incentive to teach to the test? What is the effect of high-stakes testing on students, particularly ones who are vulnerable?

As 2014 approaches, these concerns have become more prevalent. Many view the ultimate goal of *all* students being proficient by 2014 as unattainable because NCLB has stigmatized nearly half of the public schools across the country as “failing.” Indeed, the goal of every student being proficient by 2014 has been compared to “Congress mandating that every city, town, and village in the nation must be crime-free by 2014 . . . or their police departments would be severely punished.” Diane Ravitch, *Obama Grants Waivers to NCLB and Makes a Bad Situation Worse*, DAILY BEAST (Feb. 10, 2012).

In the fall of 2011, President Barack Obama and his administration announced that they would entertain applications from individual states for waivers of many of NCLB's requirements. Known as "ESEA Flexibility," waivers will allow states to continue the process of education reform while relieving some of the pressure created by NCLB's mandates. As of February 2012, ten states have applied for and received a waiver. However, reports have already stated that more than twenty-five additional states are in the process of applying, and it is expected that the number will continue to increase. It should be noted, however, that the waivers are not given out for free. States receiving waivers have certain mandates that they must follow, including adopting more rigorous academic standards, such as "Common Core" state standards; designing and implementing more robust teacher and administrator evaluations; and agreeing to forcefully intervene in underperforming schools.

This article provides a summary of the major aspects of NCLB, including a review of the law since its inception and how states have fared in light of it. It also provides insight into the modified approach being taken by the Obama administration through ESEA Flexibility.

The History of NCLB

NCLB's central goal of improving the educational outcome for *all* students means just that . . . *all* students. Through the use of standardized tests, each school district and each school assess the entire student population to ensure that the school as a whole is moving toward "proficiency." The students' performance on the standardized tests is used to determine whether or not the school and its students are making adequate yearly progress, or AYP. The AYP goals are set for each grade, each subject area, and each subgroup, and are essentially used as a ladder so schools can measure the progress they are making toward their ulti-

mate goal of "proficiency" in reading and math by 2014.

NCLB also highlights the troubling "achievement gap" that exists. In an effort to close the gap, NCLB requires schools to disaggregate data so they can measure the progress of certain at-risk subgroups and be accountable for their progress as well. These NCLB subgroups are

- Economically disadvantaged students;
- Students from major racial and ethnic groups;
- Students with disabilities under the Individuals with Disabilities Education Act; and
- Students with limited English proficiency.

Therefore, in order to make the AYP goals, the school as a whole *and* each subgroup must meet certain benchmarks each year, or the school would be considered failing. This has caused significant controversy because some schools have gone to extreme measures to increase their score. For instance, school administrators have been accused of encouraging students in certain subgroups to stay home on testing days or, even more troubling, encouraging students to drop out of school entirely to increase the school's AYP score.

Failing schools not only suffer the stigma of being labeled such, but can also suffer real consequences of their status. NCLB includes a graduated system of interventions that are applied against schools that continuously fail to make AYP year after year. For example, schools that are failing for two years must offer school choice to students to a non-failing school, or divert Title I funds to support supplemental services for students, such as private tutoring sessions. In the most severe cases, it is possible that the school would be restructured and educators and administrators would be replaced.

On the flip side, however, NCLB also includes a rewards program for deserving school districts whose students

make AYP. For example, teachers and principals can receive financial incentives when student scores increase.

In addition to the testing requirements that are a central part of the NCLB standards-based approach, the law also required states to implement certain measures directed at improving education in each school district across the country. The following components were phased in over several years: report cards, teacher qualifications, increased funding, and Reading First Grants.

Report Cards

States and school districts are required to produce report cards, accounting for each school's scores for statewide testing. The report cards are made public and are meant to assist in closing the achievement gap among states, school districts, schools, and subgroups.

Teacher Qualifications

Every new teacher has to be "highly qualified" in his/her subject, meaning he/she has to have at least a bachelor's degree and pass a state test in his/her subject area. The qualification standards are also required for paraprofessionals. In order to be considered "highly qualified," paraprofessionals must either (1) have completed two years of college; (2) have obtained at least an associate's degree; or (3) demonstrate sufficient knowledge and teaching ability.

Funding

NCLB included provisions to increase funding where necessary, in an effort to give disadvantaged schools more money. The funding would then be used to implement research-based teaching programs and teacher trainings in schools in an effort to improve scores.

Reading First Grants

NCLB created Reading First Grants, which assist schools, especially those in high-poverty areas, in creating research-based reading programs for kindergarten through third-grade students. Reading First Grants will fund reading programs for ninety-minute

blocks, five days a week, and will also be used to fund teacher training.

The Effects of NCLB

After ten years under NCLB, how have schools fared? According to the Center for Education Policy (CEP), for the 2010–11 school year, it is estimated that 48 percent of schools did not make AYP. ALEXANDRA USHER, CTR. FOR EDUC. POLICY, AYP RESULTS FOR 2010–2011 (Dec. 2011). This was an increase over the previous year, which was 39 percent, and was the highest ever percentage of “failing” schools reported since NCLB’s implementation. *Id.*

Researchers have continued to analyze the “achievement gap” to see if NCLB’s strategy to highlight subgroup achievement has paid off for students. The *Nation’s Report Card* uses data collected through the National Assessment of Educational Progress (NAEP), which tests fourth- and eighth-grade students in the areas of reading and math. NAT’L CTR. FOR EDUC. STATISTICS, INST. FOR EDUC. SCI., U.S. DEP’T OF EDUC., THE NATION’S REPORT CARD: FINDINGS IN BRIEF: READING AND MATHEMATICS 2011 (2011). In 2011, the *Nation’s Report Card* found that gaps between fourth- and eighth-grade black and Hispanic students either narrowed or stayed the same in reading and math but ranged from twenty to twenty-five points lower than their white peers. Gaps between economically disadvantaged fourth- and eighth-grade students, as compared to their peers, has remained fairly constant since 2003 and ranged from twenty-four to twenty-nine points.

The numbers paint a grim picture of the status of schools across the United States and their ability to succeed in the NCLB framework. The persisting “achievement gap” remains a significant challenge for schools. In addition, more and more schools are becoming frustrated with the “failing” label. But do the numbers tell the whole story? Under NCLB’s strict AYP application, it is possible, if not likely, for some schools known as high-performing

schools to not meet their AYP goals and be considered failing. There are several possible reasons why this is so. First, it may be because all scores, including scores in each subgroup, must contribute to each school’s overall score. Second, it also may be because schools that perform at a high level do not have as much of a margin for improvement than the lower-performing schools and therefore may not make the gains necessary to achieve AYP.

Many politicians and education leaders recognize that there are flaws in the NCLB approach, and over the past four years, they have worked to have Congress rewrite the law. Reauthorization efforts have stalled, however, leaving NCLB intact and a legislative overhaul will not likely occur during this election year. Instead, with U.S. Secretary of Education Arne Duncan leading the way, the administration has worked on an alternative plan for states by accepting applications for waivers from NCLB, a program known as ESEA Flexibility.

The Future of NCLB

In the fall of 2011, President Obama announced that the Department of Education would provide states the opportunity to apply for a waiver from certain requirements of NCLB. Calling NCLB “broken” and citing Congress’s failure to fix NCLB through the reauthorization process, the federal government outlined a path for states to enjoy greater flexibility and be more able to carry out reforms designed to improve student achievement without all of the restrictions set forth in NCLB.

Many of the principles touted at the passage of NCLB remain central to the administration’s current goals for education. It is the approach that is different.

ESEA Flexibility allows states to avoid prescribed responses for failing to meet AYP and ultimately the goal of universal proficiency by 2014, in exchange for states undertaking certain statewide reforms. The administration’s approach of

bargaining with states to encourage local reform echoes the administration’s bargain with states in its “Race to the Top Initiative,” where additional grants were provided to those states that agreed to undertake major reform efforts. Below are some of the highlights of the ESEA Flexibility initiative.

High Standards for Academic Achievement

One of the many criticisms of NCLB is that the law allowed each state to define “proficiency.” This, however, means that standards from state to state could be vastly different. It also provided states with an incentive to set the academic bar too low so that these states could meet their AYP and “proficiency” goals more easily. In its explanation for the need for ESEA Flexibility, the Department of Education stated:

In many states, parents are being told that their children are proficient based on a low bar. Many of them are being lied to because their children aren’t really being prepared for college and career.

U.S. DEP’T OF EDUC., WHAT ESEA FLEXIBILITY MEANS FOR STUDENTS, TEACHERS AND PARENTS: ANSWERING THE PUBLIC’S QUESTIONS (Sept. 2011).

ESEA Flexibility attempts to provide answers to those criticisms. States that applied for a waiver had to show that their plan incorporated “College and Career-Ready Expectations for All Students.” The administration has approved waivers for states that have adopted the Common Core state standards. States that are Common Core states have the option of (1) collaborating with the state university system to verify that the standards are sufficiently challenging for students and will prepare students for college-level work or (2) working with other states, similar to the approach taken by Common Core standards, to develop research-based standards that have been determined to prepare students for college or the workforce.

Accountability

The NCLB accountability provisions solely relied on testing to measure prog-

ress toward the ultimate goal of “proficiency.” By emphasizing testing, some unintended consequences resulted, such as (a) narrowing the curriculum to focus on those areas that are being tested; (b) placing greater weight on core skills such as reading, writing, and math to the exclusion of other subject areas and other skill areas, such as critical thinking and problem solving; and (c) also causing teachers to “teach to the test.” In one disturbing case, eighty-two educators in the Atlanta Public Schools confessed to cheating in the administration of Georgia’s Criterion-Referenced Competency Test, and ninety-six others were implicated in the scandal. Patrik Jonsson, *America’s Biggest Teaching and Principal Cheating Scandal Unfolds in Atlanta*, CHRISTIAN SCI. MONITOR (July 5, 2011).

And, of course, poor performance by students triggered the interventions used with schools and districts that failed to make AYP, including the possibility of a state takeover of the school district. Considering the estimated number of “failing” schools in 2011, the wisdom of the “one-size-fits-all” approach of NCLB, after *nearly* a decade later, is certainly called into question.

Under ESEA Flexibility, states are allowed to design their own accountability systems. Testing and accountability remain a focus; however, states can combine test scores with other measures to evaluate student and school progress rather than rely on test data alone. In addition, ESEA Flexibility does not require schools to emphasize individual subgroups, as required by NCLB. Certain states that have filed waiver applications have addressed the achievement gap by creating one super-subgroup, instead of separate subgroups. The expectation is that by allowing other measures to be considered and by grouping subgroups together, the “failing” label will not be as prevalent as it is under NCLB, but student progress will be achieved.

The changes to the subgroup approach will be watched carefully by

civil rights groups. Holding schools accountable for the performance of at-risk groups was one of the hallmarks of NCLB. There is concern that using the super-subgroup approach or watering down the accountability for the performance of these groups will turn back the clock to the days when the subgroups were hidden among a larger student population. On the flip side, however, under NCLB, if there was not a critical mass of students in a particular subgroup, schools were not held accountable for a subgroup’s performance. With a super-subgroup approach, it is more likely that all subgroup students will be captured and scores will be reported.

With respect to interventions, the top-down approach of NCLB is waived through ESEA Flexibility, and the states are left to develop their own systems of differentiated recognition, accountability, performance incentives, and differentiated incentives. Some states may elect to continue to employ some of the NCLB interventions or some modified version of the graduated approach, while some states may use a more targeted approach to intervention. Either way, schools that rank among the lowest-performing schools could be identified as “priority schools” and be subject to three years of meaningful intervention based on certain “turnaround principles.”

Schools that have the greatest achievement gaps or have certain subgroups that are the farthest behind could be identified as “focus schools” and be subject to interventions that address the persisting gap. The interventions may include publicly supported tutoring or offering school choice, which are similar to interventions currently required by NCLB. Schools that make the most progress or have the highest performances will be identified as “reward schools” and will be financially rewarded for their performance.

Teacher Quality

Under NCLB, teacher quality focused on the educational background and

certification of teachers while professional development focused on what would be necessary to maintain certification. With ESEA Flexibility, the administration has added layers to improve teacher quality by requiring that states adopt teacher evaluation systems that incorporate the use of “multiple measures” of teacher progress. These multiple measures may include principal observations, peer review work, portfolios, and student work. The idea is to use the evaluation process to improve teacher performance by giving consideration to student work and by bringing other educators into the classroom to see the teacher in action and provide feedback.

Conclusion

As of now, only ten states—Colorado, Florida, Georgia, Indiana, Kentucky, Massachusetts, Minnesota, New Jersey, Oklahoma, and Tennessee—have received ESEA Flexibility waivers. It is expected, however, that other states will follow suit in the upcoming months. Education is in perpetual motion—there are always new studies that drive reform efforts and shape the policies and law at the local, state, and federal level, all in the name of improving education. In this situation, we will have an interesting dichotomy between the states that are taking the ESEA Flexibility path and the other states that are continuing to live under NCLB as it stands today. Which states will ultimately fare better? Only time will tell.

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Remedying Disparate Impact in Education

By Dianne Piché, June Zeitlin, Sakira Cook, and Max Marchitello

In 1954, *Brown v. Board of Education of Topeka* (347 U.S. 483) launched a revolution that changed the world. The Supreme Court decision not only outlawed school segregation, it also inspired an era of civil and human rights progress for all Americans. A unanimous Court in *Brown* described the importance of education in terms that are as relevant now as they were nearly six decades ago:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Yet our nation continues to be plagued by conditions of inequality and deprivation in schools the minority poor are required by law to attend. Today, the dream of *Brown*—equal educational opportunity for all American children—remains a dream deferred.

Though many Americans may consider ensuring quality education for all children to be an insurmountable challenge, this is not the case. In this article,

the authors pose some alternative ways of thinking about and enforcing the right to education through the dual and related lenses of the “disparate impact” theory of liability under Title VI of the Civil Rights Act of 1964 and international human rights law. Applying an international human rights framework to promote an affirmative right to education, together with bolder enforcement of civil rights laws that address disparate impact, will shift the discussion from educational inputs to educational outcomes.

Using international treaties as a legal underpinning emphasizes the need for government to eliminate discrimination and specifically provide access to quality education for all children—the vision and promise of *Brown*.

What Happened on the Road from *Brown* to Obama?

The concept of a federal right to education has been steadily eroded to the point where federal court litigation is no longer a reliable tool to achieve educational justice for minority students.

Any hope that *Brown* and its progeny would be used to require states to equalize their educational systems based on wealth and class was erased by the Supreme Court in its decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), where the Court upheld the constitutionality of Texas’s state system of school finance. Texas, like



Students and parents rally to take a stand against illegal immigration legislation that would deny thousands of children access to a public education.

Associated Press, AP

many other states, relied heavily on local property taxes to fund its public schools. The *Rodriguez* Court held that the system did not violate the Equal Protection Clause of the Fourteenth Amendment and that wealth would not be subject to the heightened scrutiny reserved for race and national origin classifications. The Court also decided that education was not a “fundamental right” under the federal Constitution.

Rodriguez forced students and education officials in under-resourced school districts—often enrolling high proportions of minority students—to mount legal and political advocacy on a state-by-state basis. Predictably, however, in the nearly forty years since *Rodriguez*, we now have a confusing patchwork of state court rulings. In those states where courts have ordered improvements in resource allocation, there has been

widespread noncompliance.

In the 1990s, the Supreme Court further curtailed federal education rights in a trilogy of cases from Oklahoma City; DeKalb County, Georgia; and Kansas City, Missouri. The Court signaled to states and districts that had maintained *de jure* systems that far less than complete elimination of all vestiges of segregation and its effects would be required of them. The impact of these decisions, in the aggregate, was a watering down of standards districts are required to meet in order to meet unitary status. The cases also provided a quick and easy exit strategy for districts and states seeking to avoid further compliance with federal court orders and desegregation agreements. While the Court later articulated standards for voluntary integration plans in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), it is not likely to recognize an affirmative right to education in the foreseeable future.

The constitutional right to education that has survived into the Roberts Court is a limited right: of children residing in the United States to attend a public school free of intentional discrimination on the basis of race and other protected categories. While *Brown* and its progeny clearly established a federal right for children to be free from government-sponsored segregation (and other invidious discrimination), the federal courts in the main did not require more than a minimal set of educational inputs. Moreover, administrative enforcement of Title VI by the Department of Education's (the Department's) Office for Civil Rights (OCR) has proven insufficient to bring about systemic improvement in reducing resegregation, excessive discipline rates experienced by minority students, or inequitable resource allocation to schools.

Disparities in Achievement, Resources, and Student Discipline

Nearly six decades after *Brown*, gross disparities in academic achievement, resource allocation,

and student discipline persist. High-quality public education is not "available to all on equal terms," as the Supreme Court mandated in *Brown*. Simply put, the public school system in this country is failing millions of children—especially children of color, poor children, English learners, and those with disabilities. (Due to space, however, the focus of this article is on students protected from discrimination on the basis of race, color, or national origin.)

How bad is it? Only last year, the National Assessment of Educational Progress (NAEP) reported that half of African-American and Latino fourth-graders lacked even a basic level of reading and literacy skills (compared to 22 percent of whites). In mathematics, the United States continues to lag behind our international competition. While we have seen some remarkable improvement in progress from below-basic to basic achievement, only 12 percent of African-American and 18 percent of Latino students have reached the levels of "proficient" or "advanced" (compared to 33 percent of whites).

These achievement disparities are exacerbated by the disproportionate dropout rates for these student populations. In 2009, African-American students dropped out of high school at an annual rate of 9.3 percent and Latino students at a rate of 17.6 percent, while their white counterparts exit school prematurely at a rate of 5.2 percent.

Race-based achievement gaps often correlate with significant shortfalls in the resources allocated for underprivileged communities. A 2011 Department report confirmed that school districts habitually underfund schools enrolling higher proportions of low-income and minority students. Based on 2008–09 school year data, the report found that "from 42 percent to 46 percent of Title I schools (depending on school grade level) had per-pupil expenditure levels that were below their district's average for non-Title I schools at the same grade level, and

from 19 percent to 24 percent were more than 10 percent below the non-Title I school average." More recently, following a trend in state court litigation, a state trial court in Colorado determined that the state's school finance system was both inadequate and unequal, violating the state's constitutional guarantee for a "thorough and uniform system" of public education.

Another factor related to achievement gap is the persistence of race-based disparities in school disciplinary actions. According to the Department's Civil Rights Data Collection, in the 2008–09 school year, black students were suspended nearly three times more frequently than white students. In 2010, OCR opened compliance reviews in two school districts that reported suspending *two-thirds* of their African-American male students in a year. Latino students were suspended more than two times as often as whites. Students with disabilities, especially those of color, experience higher rates of suspension and are far more often subjected to physical seclusion or restraint. Although school discipline codes are facially neutral, their impact on these student groups has been injurious.

Changing the Paradigm

All of these conditions are associated with significant disparities in educational outcomes for low-income and minority students. A campaign by the administration and advocates to challenge educational policies and practices that result in a disparate impact would emphasize the need for positive student outcomes—for example, staying in school, academic achievement, college-readiness. And public officials might be required to finally begin to address the patterns of policy—systemic discrimination that adversely impacts students of color.

Viewed this way, substantial outcome disparities between student groups would be treated as legal violation wrongs that would trigger positive remedies. So, too, could policies and practices like inequi-

table systems of resource allocation (including qualified, effective teachers) and disciplinary rules that have a disparate impact on children of color, students with disabilities, and English language learners.

While the Fourteenth Amendment and the Title VI statute require proof of intent to discriminate, the Title VI regulation does not and includes an effects standard. The Supreme Court determined in *Alexander v. Sandoval*, 532 U.S. 275 (2001), however, that there is no private right of action to enforce this provision. This decision severely limited the ability of private plaintiffs to pursue legal remedies for policies and practices with an adverse, disparate impact. Fortunately, the disparate impact provision can still be invoked by federal agencies on behalf of people who experience unintentional but demonstrable discrimination. The Department has the ability to resolve complaints and to conduct compliance reviews against states, districts, and schools for practices that create a disparate impact on students. By accelerating investigation of egregious cases of disparate impact, the Obama administration can take significant steps toward enforcing the law, protecting students' right to education, and guaranteeing that all students are actually afforded a quality education.

This approach, with its emphasis on addressing outcomes, is consistent with international human rights norms and standards. The international human rights framework, which the United States helped to develop when the United Nations was founded, focuses on realizing affirmative rights as well as protection from denial of such rights. Within this framework, the government's role is clear: to respect and ensure the rights of individuals. At the very basic level, respect involves not violating one's rights, while to ensure is an affirmative obligation to protect rights, investigate and punish rights violations, and promote and fulfill rights. This holistic view considers rights to be indivisible, interrelated,

and interdependent and acknowledges that *all* must be considered in order to effectively address social ills. It places the onus on governments to create policies based on human rights principles that effectively combat discrimination in all of its forms and to take affirmative steps to implement and monitor human rights obligations domestically.

Education As a Human Right

As enumerated in the Universal Declaration of Human Rights (UDHR), and further expanded in the International Covenant on Civil and Political Rights (ICCPR) and the International

Without the right to education, realization of all other rights becomes impracticable.

Covenant on Economic, Social and Cultural Rights (ESCR), human rights are those that are essential to live as human beings—basic standards without which one cannot enjoy equality and dignity. These treaties serve as the blueprint for *all* rights and the foundation for the development of the human rights framework, universal norms, and standards.

The right to education appears specifically in several human rights instruments, including the UDHR (Article 26), the ESCR (Articles 13 and 14), the Convention on the Rights of the Child (CRC) (Articles 23(3), 28, 29, and 33), the International Convention on the Elimination of Racial Discrimination (ICERD) (Articles 2(2), 5(e)(iv), and 33), and the Convention on the Elimination of Discrimination Against Women (CEDAW) (Articles 10 and 14(2)). (While the United States has endorsed the UDHR, which is com-

prehensive and inclusive of the right to education, the only one of these treaties the United States has ratified is CERD, which includes a binding commitment on the nation to implement its provisions.)

The right to education, when it was first recognized internationally, focused on access and established an entitlement to free, compulsory primary education for all children; an obligation to develop secondary education, supported by measures to render it accessible to all children, as well as equitable access to higher education; and a responsibility to provide basic education for individuals who have not completed primary education. Unquestionably, progress in that regard has been made. However, achieving the goal of assuring every child a quality education that respects and promotes his or her dignity and optimum development has necessitated a broader focus.

A recent report by the United Nations Educational, Scientific and Cultural Organization entitled *A Human Rights Based Approach to Education for All* describes the rights-based approach to education for all as a holistic one, encompassing access to education, educational quality (based on human rights values and principles), and the environment in which the education is provided. This approach integrates the norms, standards, and principles of international human rights into the entire education process from development to programming, including plans, strategies, and policies. It specifically considers the effect that the policy will have rather than focusing on its intent. And in doing so, it enables us to reevaluate our current systems and assess those inputs that directly affect a child's ability to receive a high-quality education. As applied, it seeks to create greater awareness among governments and other relevant institutions of their obligations to fulfill, respect, and protect human rights and to support and empower individuals and communities to claim their rights.

The Committee on ESCR describes it best in its General Comment No. 13, which states that "education

is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.” Stated another way, without the right to education, realization of all other rights becomes impracticable. This is the very foundation of *Brown*.

Although no affirmative constitutional right to education has been recognized in this country, it is important to note that the United States is accountable for moving toward the realization of the right to education in the context of its international treaty obligations. In particular, as a party to ICERD and the ICCPR, the United States is required to file a periodic report to each committee, detailing how it has successfully implemented each provision. Responding to those reports with respect to education, both ICERD and the ICCPR noted with great concern “the persistence of de facto racial segregation in public schools; the persistent ‘achievement gap’ between students belonging to racial, ethnic or national minorities, including English Language Learner (ELL) students, and white students; and the alleged racial disparities in suspension, expulsion, and arrest rates in schools [that] contribute to exacerbat[ing] the high drop-out rate and the referral to the justice system of students belonging to racial, ethnic or national minorities.”

Further, the committee recommended that the United States take steps to adopt all appropriate measures to “elaborate effective strategies aimed at promoting school desegregation and providing equal educational opportunity in integrated settings for all students and enact legislation to restore the possibility for school districts to voluntarily promote school integration in accordance with article 2, paragraph 2 of the convention.” Also, the committee urged the United States to take special measures to reduce the achievement gap, improve the quality of education for all students, and encourage school districts to review

“zero-tolerance” school discipline policies. It is no surprise that these recommendations by the committee are directly related to the pervasive problems within our education system as stated above.

American Public Education Through the Human Rights Lens

There is broad agreement that the current approaches employed to achieve the goal of quality education and eliminate discrimination are inadequate. Need-based and service-delivery approaches fail to acknowledge or address the complex barriers that impede children’s access to school, attendance, completion, and attainment and, in so doing, inhibit progress in closing the gap among underserved communities.

By contrast, a human rights framework for confronting systemic inequities in the American public education system would emphasize outcomes rather than inputs or access. Under this framework, neutral policies crafted as an attempt to eliminate discrimination and ensure all students have an equal opportunity would be considered ineffectual given the persistence of wide disparities in educational outcomes.

What would it mean to apply a human rights framework to education? In the context of school discipline, for example, while our current practice to address discipline issues is often to remove the student from the class, under a human rights approach, one would conclude that both out-of-school and in-school suspensions prohibit students from participating in the daily activities inherent to quality schooling and arguably violate their right to education. A human rights approach would involve intervening in an effective and holistic way, determining the child’s needs, and attempting to meet them.

Utilizing disparate impact theory is one way to begin to implement the human rights framework through domestic laws. As a result of bringing disparate impact cases against states,

districts, and schools, there would need to be new solutions to improve education for all that may exist beyond the current educational paradigm. As disparate impact cases highlight discrimination in our public education system, adopting the human rights framework will help to develop new, holistic solutions. It is premature to speculate on exactly what proposals could grow out of the implementation of a human rights framework; however, it is certain that they will be more comprehensive and cross-cutting rather than isolated; reflective of all student needs; cognizant of the results of the policy; and cognizant of all students’ right to education.

The United States is a world leader in advancing human rights and promoting basic civil and political rights and equality around the globe. Yet, application of the international human rights framework has generally not occurred domestically; rather, the pursuit of civil rights and social justice in the United States has rested primarily on rights guaranteed by the Constitution and our domestic laws. Unquestionably, there have been substantial improvements in domestic law prohibiting discrimination with the passage of the Civil Rights Act, the Voting Rights Act, the Americans with Disabilities Act, and many others. Yet we still fall short in successfully eliminating discrimination at its root, a failure that may be attributed in part to our focus on proving intent.

Through the human rights framework, we have an opportunity to define a clear mandate for our government, the private sector, and our nation to dramatically improve public education in America.

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The Intersection of Free Speech and Harassment Rules

By Brett A. Sokolow, Daniel Kast, and Timothy J. Dunn

The very nature of education necessitates that a high priority be given to the rights of individuals to freely express themselves. An unequivocal opportunity to challenge the status quo is not only valuable, but indispensable for an effective educational environment, particularly as students move into the realms of secondary and higher education. Paradoxically, institutions are continually under fire for alleged failures to safeguard the free speech rights of their students and faculty members.

The question posed here is simple: Why do schools and colleges continue to make themselves such easy targets for criticism? To answer this question, this article clarifies the distinction between free speech and harassing speech so that administrators can formulate appropriate policies and implement lawful practices. School administrators who fail to heed this distinction are routinely painted as thought police, heavily-handedly imposing their own politically correct views onto timid and hapless students. Violations of free speech rights seem to occur at schools and on college campuses regularly, but the media doesn't report all the instances in which administrators honor and defend the First Amendment, as there are no lawsuits to write about when they do. Coverage of the violations makes good grist for the media mill, and watchdog groups have spent years crafting the perception that freedom of speech is under general and widespread attack.

In contrast, those entrusted with maintaining a civil and educationally effective environment often feel they have no choice but to respond quickly and decisively in light of seemingly offensive conduct. Failure to do so may

result in criticism from parents and other stakeholders eager to protect underrepresented populations within the school community. Rather than give in to the rock on the one side and the hard place on the other, some discussion of the critical factors involved in this delicate balancing act may help administrators avoid a showdown at their own institution—or at least turn the argument to a more constructive place in the event a specific incident catches the attention of free speech advocates, the “PC crowd,” and/or the media.

As a point of legal departure, school regulations and actions that impact speech must be content and viewpoint neutral and must be narrowly tailored to fit the circumstances. These regulations must be clear enough for a person of ordinary intelligence to understand, or courts will find them unconstitutionally void for vagueness. They cannot overreach by covering both protected and unprotected speech or courts will find them unconstitutionally overbroad. The regulation cannot act to preemptively prevent students from exercising their right to freely express themselves because the courts will find the prior restraint of speech presumptively unconstitutional. Some basic guidelines for public schools, public colleges, and many private colleges in California may be useful to consider:

- If it is against school or campus rules to demean or disgrace someone, the policy is overbroad.
- If it is against the rules to be inflammatory, contemptuous, or argumentative, the policy is vague and overbroad.
- If it is against the rules to harass someone generally, and

not on the basis of a protected class such as race or gender, the policy risks being vague and overbroad.

- If it is against the rules to insult someone, even if the insult is as vile as “f*cking n%\$*or,” it will be difficult to argue fighting words unless the insult does in fact lead imminently to a fight, in which case the school or college might be better off addressing the behavior as an assault or battery.
- If the rules prohibit *merely* offensive speech or conduct, even on the basis of protected class status, as creating a hostile environment, the policy should refocus on whether the offense was severe enough to cause a discriminatory effect. If not, it was merely offensive, and offensive speech is protected speech.

Critics of administrative overreach make much of what they term “speech codes.” Speech codes are policies (including posting policies, protest policies, designated free speech “zones,” harassment policies, and so forth) that facially prohibit or curtail protected speech or activities. Policies, for example, that prohibit derogatory comments are the prime example. Students are meant to be civil, inclusive, and tolerant, but the First Amendment does not readily permit punishment when they are not. It is also important to note that while most school policies cannot accurately be termed speech codes on their faces, they can nevertheless be applied in a way that encroaches via over breadth or vagueness on the constitutional rights of students.

Some training can help to en-

hance sensitivity to where the boundaries lay. Generally, administrators believe they are correctly applying policy in many of the situations that lead to complaints of infringement. They believe calling a woman “fat,” or a homosexual a “f*#%*t,” or an African American a “n%*#*r” is a violation of their campus harassment policies. On a private college campus or at a private school, that could be true. But it will not be true at public schools and colleges. Harassment rules are always subject to First Amendment scrutiny because public school and college employees are state actors.

In some ways, activist courts, agencies, and educational messages about civility and tolerance may have given a false impression that any sexist, ageist, racist, and so forth, remark is tantamount to harassment. As a society, we now use the term “harassment” to mean being bothered, generically. We must distinguish generic harassment from discriminatory harassment. The standard laid out in *Davis v. Monroe County Board of Education* makes this clear: To be considered discriminatory harassment, the conduct in question must be “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”

All too often, a school’s reaction focuses too heavily on the content of speech. However, content is, to risk oversimplification, somewhat irrelevant. It is the context that matters, and the context helps to make the determination about whether conduct is actionable under school policy or protected by the First Amendment. Severity, pervasiveness, and *objective* offense are all factors that must be evaluated outside the immediate emotional distress on the part of those subjected to a specific instance of questionable speech.

To assess whether there is a violation of a harassment policy, three critical elements must all be present:

- Targeting of a protected class

(gender, race, religion, etc.);

- Unwelcomeness of harassing behavior or verbal, written, and/or online conduct; *and*
- Deprivation of educational access, opportunities, rights, and/or peaceful enjoyment therefrom.

Public school and college policies must focus more effectively on the third element. It is ignored too often. One instance of a comment, no matter how egregious or offensive, is protected speech. The authors do not believe there exists a viable “fighting words” exception to the First Amendment today, mainly because of the reclamation of epithets and slang by various groups and because of the general coarsening of discourse within our society since the fighting words doctrine was first acknowledged by the courts in the *Chaplinsky* case more than half a century ago. If nothing else, the fighting words doctrine has merged with the threat doctrine today, and threats of immediate violence are not protected speech.

To summarize, merely offensive harassing speech is protected speech. Speech that rises to the level of discriminatory harassment is not protected speech. Examples of such speech are rare and unusual. Most school and campus speech is going to be merely offensive unless it is repetitive or widespread, which does, we should acknowledge, become more likely when disseminated online.

Perhaps the problem is in terminology, to some extent. School policies prohibit harassment when they ought more accurately to be explicitly prohibiting discriminatory harassment. In harassment cases, the stringent legal requirement is that merely offensive conduct is not enough to establish a policy violation at a public school or on a public college campus. We must learn to look for the discriminatory impact. More precisely, if someone calls you a “fag,” that person is harassing you. But that person’s right to call you a “fag” is protected by the First Amendment and outweighs your

right to be free from being called a “fag” unless and until that action is so persistent or pervasive that it causes you—and would cause a reasonable person—to experience an educational deprivation.

Individuals have a First Amendment right to harass anyone they want, in the lay sense of the word “harassment” as irritating or tormenting someone, though the rights of school and college employees to do so in their professional capacities are narrower than the free speech rights of students. Yet, when a person is called a “fag” or any other derogatory term or epithet, or demeaned based on an immutable characteristic so often and so publicly that it impacts his or her peaceful enjoyment of the school or campus, then the right to peaceful enjoyment is the highest priority, and there is no First Amendment right to engage in discriminatory harassment.

A pair of recent case studies, below, illustrate the intersection of free speech and harassment in the educational environment. Reviewing and discussing them can help us to apply the principles addressed above.

In the first, hailed as a victory for free speech by the Foundation for Individual Rights in Education (FIRE), Oakland University near Detroit suspended a student for three semesters, barred him from campus, and demanded he undergo “sensitivity” counseling because he wrote in a class assignment that he found his instructors attractive. While the course specifically permitted students to write creatively about any topic, the university chose to classify his writing as “unlawful individual activities.”

The issue arose when the student submitted his writing journal to the professor in early November 2011. The course materials instructed the students to use the journal as “a place for a writer to try out ideas and record impressions and observations” and stated that it should contain “freewriting/brainstorming” and “creative entries.”

In an entry titled “Hot for Teacher,” the student discusses his concerns about being distracted in class by attractive professors. In a separate entry, the student states that his professor is like Ginger from the television series *Gilligan’s Island*, while another professor is like the character Mary Ann.

In an e-mail on November 29, his professor announced to some of her colleagues, “Either [the student] leaves campus or I do.” On December 7, the dean of students and assistant vice president of student affairs and the vice president for student affairs and enrollment management met with the student and pressured him to withdraw from his winter semester classes. Shortly after, the student was suspended.

On these described facts, this is a perfect example of administrative overreaching and infringing on free speech, though it should be noted that Oakland has asserted it was also concerned about references to guns and possible implied threats contained in the writings. The student writing did not rise to the level of harassment because it was not persistent/pervasive nor did it deprive the professor of her right of education or employment access, benefits, or opportunities. The journal entries contained no “direct threat” and it is clearly, then, constitutionally protected speech. While the professor was so offended that she threatened to resign, her ultimatum does not grant the university license to violate the student’s constitutional rights. By classifying his writing as “unlawful individual activities,” the university could try to argue that its action was content neutral. That would fail because the student was required to undergo sensitivity training, which, in itself, is used to change the way a person expresses himself to others. To date, this matter remains unresolved.

The second of our case studies involves two concurrent court decisions from last year: *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*. Both cases involved student ridicule of school officials through the use of

online social media.

Justin Layshock was disciplined by Hickory High School after he created a fictitious MySpace profile for the school principal, Eric Trosch, using a private computer. Layshock copied a photo of Trosch from the district website, but otherwise used no school resources in formulating his “parody.” As part of the profile creation process, Layshock completed various survey questions meant to help MySpace users define themselves. Layshock’s answers included repeated use of the word “big” (which the court noted was an apparent reference to Trosch as a “large man”), references to drug and alcohol use, and homophobic remarks. Some examples:

Birthday: too drunk to remember

In the past month have you smoked:
big blunt

Ever been beaten up: big fag

Layshock subsequently popularized this fake profile among his friends, which led to several more “parodies” being created, which Trosch characterized as “degrading,” “demeaning,” “demoralizing,” and “shocking.” The court noted that while Trosch reported the matter to police, no criminal charges were filed. Nevertheless, Layshock was suspended from school for ten days, restricted from extracurricular activities, and prohibited from participating in his graduation ceremony.

J.S. was likewise disciplined for creating a fake MySpace profile of her school principal, James McGonigle. Again, the profile was created using a private computer, off of school property, and without the use of educational resources. In this case, the principal was not identified by name, although McGonigle’s photo was used on the fake profile. Instead, the name given was “M-Hoe,” and the following listed in the “About me” section:

HELLO CHILDREN[,] yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCI-

PAL[,] I have come to myspace so i can pervert the minds of other principal’s [sic] to be just like me. I know, I know, you’re all thrilled[,] Another reason I came to myspace is because - I am keeping an eye on you students (who[m] I care for so much)[.] For those who want to be my friend, and aren’t in my school[,] I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN . . .

This fake profile was initially made public; however, J.S. changed it to “private” after several other students made reference to it at school. After this change, access to the profile was limited to approximately two dozen students. As in the *Layshock* case, when J.S. was discovered to be the creator of the profile, the school issued a ten-day suspension. Again, the police were contacted, but no criminal charges were ever filed.

The two cases were heard en banc by the Third Circuit in Pennsylvania and decisions handed down on June 13, 2011. In both, the court found for the students, indicating their belief that the schools overreached in disciplining them for behavior that took place outside the classroom.

In writing for the *Layshock* majority, Chief Judge Theodore McGee stated, “it would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child’s home and control his/her actions there to the same extent that it can control that child when he/she participates in school-sponsored activities. Allowing the [school] district to punish Justin for conduct he engaged in while at his grandmother’s house using his grandmother’s computer would create just such a precedent. . . .”

Judge Michael Chagares wrote for the majority in the *J.S.* case. In it, he dismissed comparison to the 1986 *Bethel School District v. Fraser* decision, which upheld the right to limit freedom of speech while at school: “[T]o apply

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Education Reform Issues in Washington, D.C.

By Rod Boggs and Ron Flagg

In 2005, the Washington Lawyers' Committee for Civil Rights and Urban Affairs issued a report on the state of District of Columbia Public Schools (DCPS) to mark the anniversary of the U.S. Supreme Court's decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954), invalidating segregated schools in the District. Although *Bolling* held out the promise of dramatic improvements in education through the end of governmental segregation, as described in the 2005 report, racial isolation, substandard educational opportunities, and decrepit facilities remained a hallmark of DCPS fifty years after *Bolling*. District lawyers, using litigation, public advocacy, and partnerships with individual D.C. public schools, have helped lead efforts to address this fundamental civil rights issue.

Public School Governance

For decades, improvement in D.C. public schools was hindered by fragmented governance that fostered a blame game in which nobody was held accountable for the failure of D.C. schools. Prior to 2007, the Board of Education and superintendent had responsibility for educational programs but did not control the amount of funds appropriated for the schools, while the mayor and council had responsibility (subject to congressional oversight) for public school appropriations but did not control educational programs or the internal allocation of public school funds. This fragmentation permitted all those with some responsibility for public education in the District to point fingers at each other for continuing problems plaguing our schools.

For a decade, District lawyers, led by the Lawyers' Committee, publicly advocated for a change in this governance structure, issuing public reports and testifying before the District Council. In 2007, the mayor proposed and the council

enacted a fundamental change in the governance of the District's public schools, vesting authority for school programs, facilities, and budgets largely in the mayor, eliminating uncoordinated control over D.C. public schools, and establishing a single point of accountability for their improvement.

School Facilities

The 2005 Lawyers' Committee report recounted the decrepit conditions of D.C.'s public schools: School buildings were, on average, over seventy-five years old. Many suffered from leaking roofs; broken windows; crumbling walls, floors, and ceilings; and old and unreliable plumbing, wiring, and heating systems. Children often tried to avoid using school bathrooms altogether.

Past efforts to address school facilities issues had focused on litigation. A 1992 lawsuit found 5,695 total fire code violations throughout D.C. public schools, the vast majority of which were deemed to be life-threatening. A D.C. superior court judge issued injunctive relief, requiring the school system to remedy the violations. Although this and other lawsuits addressed the most egregious facilities issues, they did not remedy the overarching problem—the lack of public attention and political will needed to modernize the District's dilapidated school buildings.

To address this broader issue, the Lawyers' Committee and others again engaged in concerted public advocacy, including public reports, legislative testimony, and appearances on local media and at public rallies. As a result of this advocacy and the 2007 governance reform, the District has embarked on an ambitious \$3.5 billion program to modernize the District's schools. From 2007 to 2010, thirteen schools and thirty-

three athletic fields and playgrounds were fully modernized. In addition, twelve schools had roofs replaced, sixteen received major repairs to heating systems, seventy-five underwent significant plumbing work, thirty-five had electrical work done, and more than 9,000 work orders for health code violations were completed.

Special Education

Federal law requires that students with disabilities have access to a free and appropriate education designed to meet their individualized needs, in the least restrictive environment. D.C. legal services providers, such as the Children's Law Center and the Bazelon Center for Mental Health Law, assisted by pro bono lawyers, provide direct representation to children and families to secure the services necessary to improve educational outcomes. In a 1998 lawsuit, the U.S. District Court for the District of Columbia found DCPS in violation of federal law due to its failure to hold timely due process hearings and subsequently implement decisions rendered from those hearings. Three years after the 2007 education reform legislation, DCPS reported to the court a timeliness rate of 90 percent and just six remaining cases in the backlog over ninety days overdue (compared to 600 cases in the backlog in June 2007).

Partnerships with Public Schools

The Lawyers' Committee operates a project to bring lawyers into public education by creating partnerships between law firms and individual D.C. public schools. Currently, over two dozen law firms and law departments sponsor partnerships. The partnership firms provide multiple resources, including tutoring, mentoring, and peer mediation programs. They offer a variety of other re-

sources as well, including technology training for students and school staff, computer networking or support, fund-raising support, summer jobs for students, and field trips. They also sponsor a systemwide program, Geo-Plunge, a fun program designed to

improve children's appreciation for and knowledge about U.S. geography. In November 2011, 270 children from forty-five D.C. public schools gathered at the Smithsonian's National Portrait Gallery for the seventh annual GeoPlunge Tournament.

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the *Fraser* standard to justify the school district's punishment of J.S.'s speech would be to adopt a rule that allows school officials to punish any speech by a student that takes place anywhere, at any time, as long as it is about the school or a school official, is brought to the attention of a school official and is deemed 'offensive' by the prevailing authority. . . . Accordingly, we conclude that the *Fraser* decision did not give the school district the authority to punish J.S. for her off-campus speech."

Neither of these cases involved allegations of harassment; therefore, in making its decisions, the court relied not on the *Davis* standard, but on that established by *Tinker v. Des Moines Independent Community School District*, in which the Supreme Court stated schools may only restrict speech that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."

The *Layshock* decision states, "[W]hen pressed at oral argument, counsel for the School District conceded that the District was relying solely on the fact that Justin created the profile of Trosch, and not arguing that it created any substantial disruption in the school." Likewise, the *J.S.* decision contends that "beyond general rumblings, a few minutes of talking in class, and some officials rearranging their schedules to assist McGonigle in dealing with the profile, no disruptions occurred." The *Tinker* standard is comparable to the *Davis* standard, which places the threshold for harassment at the point where conduct "bars the victim's access

to an educational opportunity," in that speech can be restricted only when the educational process is substantially impeded. In other words, when reviewing school policies, and the implementation thereof, it is critical to ensure students are being disciplined as a result of the objective impact of their speech, and not solely based on its content and/or the feelings of those to whom that speech is targeted.

Despite concerns about the tactics employed by critics such as FIRE, the authors agree with most of FIRE's contentions about free speech. In particular, FIRE's guide to free speech is a worthwhile read. Many schools have problematically expanded the concept of harassment to encompass general campus or school civility. In such cases, the moral value of civility and tolerance has been raised above the moral value of free speech. The policies and practices of a public institution or district need to honor discourse, and use free and open debate—not disciplinary proceedings—as the remedy for unpopular speech. The moral value of free speech is at least as important as the moral values of civility and tolerance.

Schools are in the business of education, and when members of those communities engage in repulsive speech, the moment must be used to educate, not to punish. By honoring free speech, we honor the moral values of civility and tolerance. By repressing or chilling speech, we dishonor those values.

Source List

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
Broadrick v. Oklahoma, 413 U.S.

601 (1973).
CAL. EDUC. CODE §94367 (West 2009).
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999).
FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org>.
J.S. et al. v. Blue Mountain Sch. Dist., 593 F.3d 286 (2010).
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).
Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (2010).
Near v. Minnesota, 283 U.S. 697 (1931).
Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

Brett A. Sokolow is the managing partner of the National Center for Higher Education Risk Management, one of the largest higher education law practices in the country. Sokolow also serves as executive director of the National Behavioral Intervention Team Association and the Association of Title IX Administrators. For more information, visit thenchermgroup.org.

Daniel Kast is the assistant dean of students at the University of Wisconsin–Milwaukee. He has over ten years' experience in student conduct investigation and adjudication and has been the primary author of multiple student conduct codes. He has also served as contributing editor to the Journal of Campus Safety & Student Development since 2005.

Timothy J. Dunn is the director of Greek Affairs at Union College. He serves as a hearing officer for the college and teaches law in the department of philosophy. Dunn is also a member of the Association for Student Conduct Administration.

Charter Schools

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and mixed competitive effects, parent choices uninformed by academic performance, little scaling up by drawing on successful charter practices, and limited oversight of underperforming schools. At the same time, the aggregate findings on performance and practice do not gainsay those individual charter schools with major innovations and exemplary results. Neither the aggregate trends nor the exceptions can be ignored. So, for both the individual family and the

larger policy perspective, whether or not a charter school is a better option than the traditional local public school requires looking at the particulars—the actual practices that affect educational quality and equity.

Kathleen B. Boundy and Paul Weckstein are codirectors of the Center for Law and Education (CLE), a national organization that strives to make the right to high-quality education a reality for all children, with an emphasis on those in low-income communities. The three policies adopted by the ABA in 2009 on the right to quality education—and which should be applied to charter schools—reflect CLE's work

and are available at its website, www.cleweb.org.

Much of the information here can be found in Kathleen B. Boundy, Center for Law and Education, Charter Schools and Students with Disabilities: Preliminary Analysis of the Legal Issues and Areas of Concern, prepared for the Council of Parent Advocates and Attorneys (2012), www.copaa.org/general/charter-schools-and-students-with-disabilities-preliminary-analysis-of-the-legal-issues-and-concerns. In addition to a specific focus on students with disabilities, it provides more in-depth analysis of the general issues raised here.

Introduction

continued from inside front cover

economy, the need to be involved in more practical matters, lawyers are no longer as involved in their cities, towns, and communities as they used to be. That must change. The complex and difficult choices required by educational reform need the skills that a lawyer brings to the table.

Lawyers have a certain skill set that no other professionals have. We are thinkers. Problem solvers. Masters of our practice area. Every day, on behalf of clients, lawyers regularly confront complex issues, analyze them, and formulate solutions. Every day, lawyers help clients understand their options and resolve their disputes. And every day, we help bridge the gap between clients in seriously disparate positions. We already have the skills necessary to make an impact and begin closing the educational achievement gap. It is now just a matter of doing it.

There are numerous ideas for how to make our educational system more effective. The kind of leadership that is necessary to take on this task will require lawyers to become involved beyond volunteering for one day in a classroom or making a speech on

graduation day. We need to learn about the extraordinarily complex issues involved in our educational system and come together to implement the change that needs to happen. Meaningful change will need to be widespread and span across the political spectrum. It will require knowledge of the many issues that confront our public education system, and we will need involvement in all areas, including the governance of schools, the policy development process, and, as necessary, litigation.

Although this nation currently spends billions of dollars each year on public education, that number is insufficient to address the fact that today more and more children are growing up in poverty and many do not have the family support that is essential to learning the basic skills of communication and personal qualities, like persistence and everyday survival. As lawyers, we see the result of our failure to educate our children in the work that we do. We represent young people without a high school diploma caught in the juvenile and criminal courts. We represent clients who are looking for better-educated workers and finding it difficult. We represent clients who

are opening offices and factories outside the United States to be closer to the educated workforce they need. We see the end result day after day, and we have to recognize the need to change it down to its very core.

I encourage all of you to attend the upcoming IRR Spring Conference from May 3 through May 5, 2012, at Boston University Law School, for which registration is now open on the Section's website. This conference will bring together respected experts in the fields of law and education who will help identify ways lawyers can get involved to make equal educational opportunity a reality. There are many, I can assure you of that.

We have to remember that, as lawyers, our entire professional being is based on the importance of education. It is undeniable that we would not be lawyers if education had not been a driving force in our lives. Change cannot happen overnight. The old adage that it is not a sprint but a marathon may describe the time it will take to reshape our educational system. But we have to recognize that change needs to happen and it needs to begin happening now.

It is time to finish what we started. Who will join me?

A Crisis in Our Courts

By William T. (Bill) Robinson III

No matter where we live, what language we speak, or what gender we are, every individual deserves to be treated fairly and equally. And yet we know that this statement is largely an ideal, especially in countries where the rule of law has not taken hold. But in the United States, where we take the right to vote and right to assemble for granted, our fundamental right to justice is now threatened by a crisis in our courts.

Simply put, while the docket is growing, the money is dwindling. And the consequences are real: People have to wait longer to gain custody of a child or fight foreclosure of their home. The saying holds true: Justice delayed is justice denied.

State judiciaries handle approximately 95 percent of all cases filed in the United States, according to the National Center for State Courts (NCSC). In 2008, the most recent year for which data is available, states reported 106 million incoming trial court cases—the most in thirty-five years. Anecdotally, we know that trend has continued as more people represent themselves and legislators add more laws to the books.

Unfortunately, an increase in trial cases has not led to an increase in the number of judges. In fact, in many states the opposite has happened. Forty-two states cut funding for their judiciaries in 2011, says NCSC.

In Morrow County, Ohio, courts are closed on Fridays because of a funding shortage. New York City courts end a half hour early each day to avoid overtime costs. Massachusetts courts have lost 1,100 employees through attrition to meet budget

demands. Courts in Georgia solicit pen and pencil donations from vendors like LexisNexis and Westlaw.

Due to California's \$350 million in cuts to the courts, lines start at the Sacramento court's front door and wrap around the building as residents wait their turn. Our country should not have citizens camping outside a courthouse to get a restraining order in the same way we camp outside concert venues to get front-row tickets.

The judiciary is a coequal branch of government. Yet, throughout the United States we see that some courts must operate on less than individual departments in their state's executive branch. Many judiciaries receive as little as 1 percent or less of the state budget pie, and no state court system receives more than 4 percent.

Members of the legal community are beginning to recognize this crisis and take action to remedy the fundamental flaws in how our courts are funded.

The University of Kentucky College of Law and *Kentucky Law Journal* recently held a symposium on court underfunding cosponsored by the American Bar Association, NCSC, and LexisNexis. This national conference demonstrated that there is a will to collaborate for the future of our judicial system.

Courts themselves are doing their part to demonstrate integrity, efficiency, and innovation. The expanded use of videoconferencing in Pennsylvania, for example, has saved taxpayers an estimated \$21 million annually in defendant transportation costs.

The ABA is continuing the work of its Task Force on Preservation of the

Justice System, bringing together those affected by this crisis to discuss strategies to better support our judiciary nationwide. The task force has created a venue to share court funding data and ideas at <http://bit.ly/mPjNoc>.

The ABA is also working with state and local bar associations to rethink how to sensibly spend taxpayer dollars to ensure public safety. We can't sustain the costs of a system where states spend, on average, \$23,000 per inmate per year. We need to decriminalize minor offenses, utilize pretrial release, and implement effective re-entry programs, among other criminal justice reforms.

Finally, we must also articulate what courts do and why they are so essential by more effectively educating legislators and the general public about this crisis. Civic education can drive a renewed dedication to the preservation of our justice system.

Courts must be open, available, and adequately staffed. No one would accept closing the local emergency room, or the local fire house, or the local police station for one day a week. Our justice system is no different.

Even in times of extreme economic hardship, our courts need sustainable financial support and essential resources to fulfill their constitutional responsibility. Our rights are being threatened, and we must stand together and speak out for our courts. Our liberty depends on it!

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A Tribute to John Payton

By James E. Coleman Jr.

John Payton, president and counsel-director of the NAACP Legal Defense Fund (LDF), and a former member of the Council of the Section of Individual Rights and Responsibilities (2002–08), died on March 22, 2012, after a brief illness. He was sixty-five. John will be remembered as one of the most brilliant and successful lawyers of his generation.

Since his death, many, including President Barack Obama, have described John as a great civil rights lawyer, an accurate but incomplete description of his career. He was a prominent Washington, D.C., lawyer who made extraordinary contributions locally, nationally, and internationally and to the legal profession.

John, a California native, spent most of his legal career at Wilmer, Cutler & Pickering and its successor, WilmerHale. He joined the firm as an associate in 1979, after graduating from Harvard Law School and clerking for the Northern District of California. He remained at the firm until 2008, except for a three-year stint as corporation counsel for the District of Columbia (1991–94). At Wilmer, where his mentors included firm founders Lloyd Cutler and John Pickering, John had a successful career as a commercial litigator; from 1998–2000, he headed the firm's Litigation Group. He was president of the D.C. Bar in 2001. From the very first day of his career, John's passion was, in the words of the Section's mission, "protecting and advancing human rights, civil liberties, and social justice."

As a brand-new associate, John worked with Lloyd Cutler and Jim Robertson on *NAACP v. Claiborne Hardware*, which upheld the First Amendment right of civil rights organizations to boycott white merchants over racial discrimination. He was one of the lead attorneys in *Mozert v. Hawkins County Board of Education* (1983–87), an important case upholding a school board's right to require students to read particular books over their parents' religious objections. In 1998, he argued *City of Richmond v. Croson* in the Supreme Court, defending the city's voluntary affirmative action plan for awarding government contracts.

A critical lesson from *Croson* was that an affirmative action

plan needed to be supported by a compelling factual record to have any chance in the Supreme Court.

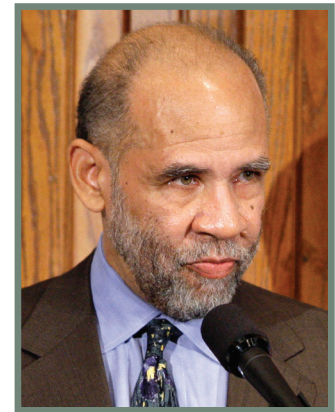
So John went to work to develop such a record in his successful defense of the University of Michigan in the *Gratz* and *Grutter* cases, which upheld the right of institutions of higher education to consider race in order to achieve the educational benefits of a racially diverse student body. Beginning in 1997, John undertook a Herculean effort in the district court to develop an unassailable factual record to support Michigan's affirmative action plans; then he brilliantly used the record to defend the plans in the Sixth Circuit and ultimately in the U.S. Supreme Court.

After the landmark victories in the Michigan cases, John turned his attention to improving K–12 education, the logical next step after Justice Sandra Day O'Connor's majority opinion in *Grutter*, which acknowledged the failed promise of *Brown v. Board of Education*. In a 1994 article, John described that promise as "a country pulled together rather than apart by race. A country strengthened by its racial diversity. A democracy made healthy."

In the brief time after John took over its helm, LDF achieved important Supreme Court victories in *Lewis v. City of Chicago* (protecting rights of minority firefighters) and *Northwest Austin Municipal Utility District v. Holder* (defending the Voting Rights Act of 1965).

John's legacy is recorded not only in the legal battles he shaped, fought, and won, but also in his many acts of kindness and compassion. He was an independent and intellectually honest lawyer. His quest was pure; he had no enemies list. Along his short journey, he made friends of some who could have been enemies, and he made a lasting difference.

James E. Coleman Jr. is the John S. Bradway Professor of Law at Duke University Law School and is a former chair of the Section of Individual Rights and Responsibilities.



Associated Press, AP