

# **The Justiciability of Economic, Social, and Cultural Rights in the U.S.**

**— Domestic Implementation of the Right to  
Equal Education —**

*A Plan for Action*



*Partners for Justice*

**October 2004  
U.S. Racial Discrimination Program**

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## Introduction

Though today the concept of Economic, Social, and Cultural Rights (ESCR) seems foreign to many U.S. audiences, it was not always so. In fact, President Franklin Delano Roosevelt, in his 1944 State of the Union address, declared,

We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed. Among these are: The right to a useful and remunerative job; ...to adequate food and clothing and recreation...to adequate medical care...to protection from the economic fears of old age, sickness, accident, and unemployment...[and] the right to a good education.<sup>1</sup>

Franklin and Eleanor Roosevelt then worked to enshrine this second Bill of Rights as an indivisible part the post-war international human rights framework, including references in both the U.N. Charter and the Universal Declaration of Human Rights.<sup>2</sup> However, as the Cold War emerged, the global political divide threw a wedge into the concept of universal human rights, with the U.S. and its allies focusing on civil and political rights and the Soviet states espousing ESCR. The international division also forced domestic organizations to disavow ESCR, lest their opponents paint them “red”, and discredit them amongst their audience.

Thus languished ESCR in the U.S. for fifty years of the Cold War. During this time, politicians and legal scholars developed rhetoric to justify the political stance against ESCR. They noted the difficulty in identifying violations – if you give people the right to work, and there are those who are jobless, how can you tell if the state is failing to fulfill its obligation, or if those individuals are choosing not to work? Who has standing to bring such a claim? Moreover, what should the remedy be? Is the government required to directly provide jobs for all, or what if it tries to restructure the tax code to promote job growth in the private sector – does that fulfill its obligation? What if that does not work – is it still in violation? Because of these difficulties, ESCR were deemed to be “non-justiciable.”

Official policy has been explicitly against the concept of ESCR. The U.S. did not sign the International Covenant on Economic, Social and Cultural Rights until the Carter administration, and has not ratified it to this day.<sup>3</sup> Moreover, in the early days of the Reagan administrations, an internal memorandum of the Department of State on human rights policy, approved by then Secretary of State Alexander Haig, endorsed the unqualified rejection of economic, social and cultural “rights” as rights. Human rights were to be explicitly defined for the purposes of future U.S. policy as “meaning political rights and civil liberties.” To entrench this highly restrictive definition, the memorandum urged that the administration “move away from ‘human rights’ as a term, and begin to speak of ‘individual rights,’ ‘political rights’ and ‘civil liberties.’” This strategy of

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<sup>1</sup> Franklin D. Roosevelt, State of Union Message, 90-I CONG. REC. 55, 57 (1944).

<sup>2</sup> See U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945, at art. 55; Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 22 –27.

<sup>3</sup> See Office of the United Nations High Commissioner for Human Rights, Status of Ratifications of the Principle International Human Rights Treaties, June 9, 2004, at <http://www.unhchr.ch/pdf/report.pdf>.

simply defining economic rights out of existence was rapidly put into place by deleting the sections dealing with “economic and social rights” from the first of the State Department’s annual country Reports on Human Rights Practices submitted to Congress by the Reagan administration in February 1982.<sup>4</sup>

Much of the policy and judicial elite remain in this Cold War mindset, but now, without the threat of red-baiting, social justice organizations have begun to return to explore what the concepts of ESCR may hold for their causes. Their initial efforts have often failed in the face of the entrenched opposition, whether from administrative directives such as the Haig memo, or from courts who hold that separation of powers denies them the mandate to fashion remedies that would impact on governmental appropriations. The latter objection, of course, is a weak justification – courts have routinely made decisions that the legislature has later had to fund. Civil and political rights, while often deemed “negative” rights, generally require the government to refrain from action. But courts have also found “positive” obligations: from the right to a public defender to regulations on the conditions of prisons. However, the further one strays into ESCR, the more reluctant courts are to intervene.

As noted by E. Nii Ashie Kotey in his speech to the International Commission of Jurists, “There is nothing inherent about the nature of ESCR which makes them unenforceable by judicial process. It is simply that many states and many human rights systems have chosen not to enforce them through the judicial process, but to enforce them through other means.”<sup>5</sup> In the U.S., the one exception to the rule of non-justiciability of ESCR has been in regards to the right to education where courts have actively engaged the question of what state obligations are in meeting the right to education. Thus, this paper will look specifically at the right to education in the U.S. context and use it to explore some opportunities to undertake policy advocacy, legislative reform and litigation to address inequality in public education using a rights-based approach. Specifically, this paper will consider how U.S. activists can expand their opportunities for action through local implementation of international human rights treaties. By using education as an example of how ESCR can be justiciable in the U.S., we hope to spur further discussion of how other rights from Roosevelt’s “Second Bill of Rights” can also be implemented.

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<sup>4</sup> See Philip Alston, U.S. RATIFICATION OF THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE NEED FOR AN ENTIRELY NEW STRATEGY, 84 A.J.I.L. 365, 372 (Apr. 1990), citing memo leaked to NY Times and published at N.Y. Times, Nov. 5, 1981, at 1 and 29.

<sup>5</sup> E. Nii Ashie Kotey, Some Fallacies About Rights: of Indivisibility, Priorities and Justiciability, *in* INTERNATIONAL COMMISSION OF JURISTS, REPORT OF A REGIONAL SEMINAR ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1998.



## **Executive Summary**

U.S. civil rights activists, though part of the foundation for the international human rights system, have long been divorced from the opportunities available at the international level. This both limits the options of domestic activists in their tactics, and deprives international advocates of the energy and ideas of their U.S. counterparts. This paper seeks to bridge this gap by promoting a vision of concrete steps U.S. activists can take to integrate the international human right to an equal education into their work.

Given the lack of a federal right to education, most education equity litigation in the U.S. has been based on state constitutions. Human rights treaties and other international documents provide a great deal of useful language that goes beyond what existing U.S. state constitutions grant to their children in terms of a right to education and could help craft a stronger and more substantive right to education for states whose present constitutions give a weak basis for equity lawsuits. Ratified treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) already commit the federal government to certain standards, and can be used as a foundation for accountability internationally. Unratified treaties such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not bind the U.S., but provide consistent definitions of rights and are a rich resource for language for amendments to state constitutions.

The specific language each state or locality should adopt will be dependent on the precise objective of future litigation, but in general, by utilizing as broad and as detailed content as possible in the amendment, based on the principles of international human rights, activists can create the greatest number of future options for litigation. Local incorporation of international treaty language has already helped other cities implement far more progressive changes than might otherwise have been possible, and provides opportunities for advocacy both domestically and internationally. By relying on a consistent, progressive system of international definitions of rights, education rights proponents can preclude the weakening of standards and in fact lay the groundwork for future strengthening of the content through working both in domestic courts and with international treaty bodies. Moreover, by integrating international human rights into the public campaign around the amendment, activists can generate greater awareness of the concept of rights, and how one can demand the obligations imposed by those rights are met.

Education advocates should also consider utilizing the international system for advocacy on multiple levels. By participating in hearings before regional or international human rights bodies, or inviting international observers, local activists can draw a brighter spotlight on their concerns. By using the system pro-actively, one can help develop the language of rights at the international level for use in individual domestic campaigns. Finally, by building international alliances with experts and activists from around the globe, local activists enhance their opportunities for finding new means and methods of combating the violations of rights at the local level.

## Racial Disparities in Education Fifty Years After *Brown*

Fifty years after the Supreme Court found in *Brown v. Board of Education* that racial segregation in public education violated the constitutional right of African American children to equality before the law, the equal access to quality education is still an unfulfilled promise. The statistics reveal that:

- Whites are the most segregated group in the nation's public schools; they attend schools, on average, where eighty percent of the student body is white.
- Public schools are becoming steadily more nonwhite, as the minority student enrollment approaches 40% of all U.S. public school students, nearly twice the share of minority school students during the 1960's.
- There is a substantial group of American schools that are virtually all non-white. These schools educate one-sixth of the nation's black students. One ninth of Latino students attend schools where 99-100% of the student body is composed of minority students.
- The twenty-seven largest urban system have lost the vast majority of their white enrollment and today serve almost one-quarter of our Black and Latino student population
- Many of the most rapidly resegregating school systems since the mid-1980s are suburban. Clearly, segregation and desegregation are no longer merely urban concerns but wider metropolitan issues
- During the 1990s, the proportion of black students in majority white schools has decrease by 13 percentage points, to a level lower than any year since 1968.<sup>6</sup>
- Black and Hispanic children are more likely than white children to be impoverished. Sixty-two percent of Hispanic children ages 5 to 17 years old live in families that poor or near poor. Fifty-nine percent of all Black children age 5-17 years old live in families that are poor or near poor. Only 25 percent of white children in the same age group live in poor or near poor families.<sup>7</sup>

These disparities are not a matter of happenstance. They are the result of a systematic disregard for sustained remediation of past intentional government supported racial discrimination in public schools across the nation. For many decades, black children and Hispanic children were by law denied equal educational opportunity. That denial had an impact not only on the children who were its victims but subsequent generations of children whose parents' lack of education propelled them into a cycle of poverty and a life without choices in terms of where and with whom they would live. The declaration by the Supreme Court in 1954 in the *Brown v. Board of Education* case that segregated

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<sup>6</sup> Statistics are from the 2000-2001 school year. "Multiracial Society with Segregated Schools: Are We Losing the Dream?", Erica Frankenberg, Chungmei Lee, and Gary Orfield, The Harvard University Civil Rights Project, January, 2003.

<sup>7</sup> "Racial Discrimination in the K-12 Public Education System of the United States", Judith A. Winston, Testimony delivered on behalf of Global Rights to the Inter-American Commission on Human Rights, October 15, 2003.

schools were inherently unequal promised a remedy that has never been fully realized in any state.

The promise of the *Brown* decision – to desegregate schools and provide equal access to high quality teaching and related resources -- and the 1964 Civil Rights Act – to sanction school districts that did not provide equal treatment and equal access to education to all racial groups -- evaporated over time. The demise of the promise was the result of many converging factors such as the deliberate denial of federal government support to desegregation efforts in the late 1960's and early 1970's. President Nixon's southern strategy significantly impeded efforts to desegregate by denying federal technical assistance and litigation support to the parents of black children suing districts that ignored the command of the *Brown* decision.

This weakening of the federal government's commitment was substantially supplemented by white flight -- white middle class families fleeing the cities to the suburbs where school district boundaries protected them from the reach of court-ordered desegregation. These families took substantial wealth with them – and central city school districts could no longer depend upon the property tax generated by a healthy housing stock and commercial infrastructure to finance an adequate education for the poor children of color left behind in urban public schools. As the number of Black and Hispanic students continued to grow, federal courts overseeing the implementation of court-ordered desegregation ultimately agreed with school districts that attempts to desegregate appeared futile and permitted school districts to abandon desegregation efforts.

The linkage of residence to education is one of the classic examples of courts struggling with the justiciability of ESCR. After *Brown* found segregated education was a violation of the Constitution, courts and districts tried for years to determine what the remedy required “with all deliberate speed” actually should be. In *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court unanimously approved of a sweeping judicial remedy to the failure of integration efforts – gerrymandering of school districts and the busing of students between inner-city and outlying schools.<sup>8</sup> This seemingly allowed for courts to provide remedies – even those that would involve the expenditure of huge amounts of resources – for violations of children's right to education. The creation and enforcement of the busing remedy thus in some ways represents a high point in the justiciability of ESCR, though opponents would be quick to note that the cases were brought under a civil/political right framework, namely the equal protection clause, and not as ESCR enforcement.

The Supreme Court in early school desegregation cases expressed its strong condemnation of attempts by southern school districts to subvert its mandate to eliminate dual schools “root and branch.” But the Court gradually abandoned its commitment to this principle as desegregation efforts moved from the South to the North and the West. The Court ruled in *Milliken v. Bradley* that federal courts lack the power to impose inter-district remedies, thus enabling white flight to the suburbs as an effective means of

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<sup>8</sup> See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

avoiding integration.<sup>9</sup> In *Milliken*, the parents of black children argued that Detroit schools could be desegregated only by permitting cross-district busing to and from the surrounding mostly white suburban school districts. The Court found that the school district boundaries of the suburban districts were an essential component of local control and autonomy established by the state of Michigan. Those boundaries could be transgressed only if black parents could prove that the suburban districts were guilty of intentionally discriminating against black children in Detroit – a task that was virtually impossible.

While desegregation cases argued that the psychological effect of segregation was harmful in and of itself, ultimately desegregation was really supposed to be a method of ensuring equality of resources. Concurrent with desegregation efforts, another method of seeking this equality of resources was tried. In 1973, the Supreme Court heard arguments that a federal right to education existed, and it required equity of funding between rich and poor school districts within a state.<sup>10</sup> However in *San Antonio Independent School District v. Rodriguez*, the Court held that there is no federal right to an adequate education. The Court reasoned that the commonality of the plaintiffs in being (supposedly temporarily) impoverished did not create a protected class under the equal protection clause. More importantly, while *Brown* proclaimed education to be important, the Court ruled that adequate education is not fundamental right protected by the Constitution. The Court said that so long as there is not an absolute denial of access to education, funding of education should be left to local control.

Based on the local funding formulas approved by the Court in *Rodriguez*, this left the inner-city schools with a dearth of funds. In *Missouri v. Jenkins (Jenkins I)*, the Court then went on to rule that a judge who had ordered a property tax increase to improve the schools of Kansas City had abused his discretion (although it ultimately held that judges could order tax increases).<sup>11</sup> Five years later, the Court revisited the case in *Jenkins II*, ruling that an order to create magnet schools to attract students from outside the district was in effect a forbidden inter-district remedy.<sup>12</sup> In a biting concurrence, Justice Thomas marked the end of federal courts innovative exercise of what he called “virtually unlimited equitable powers to remedy this alleged constitutional violation.” He further stated, “The exercise of this authority has trampled upon principles of federalism and the separation of powers and has freed courts to pursue other agendas unrelated to the narrow purpose of precisely remedying a constitutional harm.”<sup>13</sup> Thus, both the federal right to education and the right to an effective remedy creating equality in the now separate schools failed.

After a half-century of effort, we seem to have little choice but to admit that attempts to desegregate schools have failed. A disproportionate number of students of color are still denied equal access to the resources and quality of schooling that is found in most

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<sup>9</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>10</sup> See *San Antonio Indep. School Dist. v. Rodriguez* 411 U.S. 1 (1973).

<sup>11</sup> See *Missouri v. Jenkins*, 495 U.S. 33 (1990).

<sup>12</sup> See *Jenkins v. Missouri*, 515 U.S. 70 (1995).

<sup>13</sup> *Id.*

schools that have predominantly white student enrollment. Negative racial stereotypes continue to flourish and are acted upon by teachers and administrators almost unabated in schools that are racially isolated. Racial stereotypes and prejudice thrive where there is little or no interaction among and between racial groups.

How, then, can the promise of the *Brown* decision be realized in the present day context? If, as the Supreme Court found in *Brown*, separate is inherently unequal and discriminatory, then does not the current profile of public education in the U.S. violate the Constitution and U.S. obligations under international human rights treaties? Does the constitutional principle of federalism against mitigate effective action against the federal government to remedy state and local schemes that are perpetuating the inequalities? What is the core content of the right to education under international human rights treaties? Has that standard been met with respect to the majority of public schools, particularly those with majority students of color?

## The Right to Education: A Consideration of Strategies

With school desegregation ultimately failing due to white flight, and with the right to education out of the federal picture, activists and litigators began to look for other opportunities for litigation at the state level. All 50 states now have constitutional provisions of varying degrees requiring state provision of education.<sup>14</sup> Under the so-called “adequacy” movement, the plaintiffs argue, with increasing success, that the state’s funding method is inadequate to provide for an education of adequate quality, denying children their constitutional right to education. Federal action, in the form of the No Child Left Behind Act, has also impacted on these state cases, though without creating a federal right to education.

### State Constitutions

The constitutional rights to education vary widely from state to state. William Thro, in his 1989 article on state education finance reform, notes these clauses can be grouped into four general categories based upon the language of the clauses and the affirmative duties imposed on the state legislature.<sup>15</sup>

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<sup>14</sup> See Ala. Const. art. XIV, 256; Alaska Const. art. VII, 1; Ariz. Const. art. XI, 1; Ark. Const. art. XIV, 1; Cal. Const. art. IX, 1; Colo. Const. art. IX, 2; Conn. Const. art. VIII, 1; Del. Const. art. X, 1; Fla. Const. art. IX, 1; Ga. Const. art. VIII, 1, 1; Haw. Const. art. X, 1; Idaho Const. art. IX, 1; Ill. Const. art. X, 1; Ind. Const. art. VIII, 1; Iowa Const. art. IX, 2d, 3; Kan. Const. art. VI, 1; Ky. Const. 183; La. Const. art. VIII, 1; Me. Const. art. VIII, pt. 1, 1; Md. Const. art. VIII, 1; Mass. Const. pt. 2, ch. 5, 2; Mich. Const. art. VIII, 2; Minn. Const. art. XIII, 1; Miss. Const. art. VIII, 201; Mo. Const. art. IX, 1(a); Mont. Const. art. X, 1; Neb. Const. art. VII, 1; Nev. Const. art. XI, 2; N.H. Const. pt. 2, art. LXXXIII; N.J. Const. art. VIII, 4, 1; N.M. Const. art. XII, 1; N.Y. Const. art. XI, 1; N.C. Const. art. IX, 2; N.D. Const. art. VIII, 1; Ohio Const. art. VI, 3; Okla. Const. art. XIII, 1; Or. Const. art. VIII, 3; Pa. Const. art. III, 14; R.I. Const. art. XII, 1; S.C. Const. art. XI, 3; S.D. Const. art. VIII, 1; Tenn. Const. art. XI, 12; Tex. Const. art. VII, 1; Utah Const. art. X, 1; Vt. Const. ch. 2, 68; Va. Const. art. VIII, 1; Wash. Const. art. IX, 1; W. Va. Const. art. XII, 1; Wis. Const. art. X, 3; Wyo. Const. art. VII, 1.

<sup>15</sup> William Thro, *To Render them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*. 75 VA. L. REV. 1639 (1989).

Category I education clauses<sup>16</sup> impose the minimal educational obligation on a state. Because the Category I education clauses provide for a system of free public schools and nothing more, it is not surprising that these clauses had for a long time proven useless as vehicles for public school finance reform.<sup>17</sup> However, as the “adequacy” movement has picked up steam, the state courts have more recently been finding that even these minimal guarantees imply some higher standards.<sup>18</sup>

Category II education clauses<sup>19</sup> impose a greater obligation than Category I clauses because Category II provisions mandate that the system of public schools meet a certain minimum standard of quality, such as “thorough and efficient.” While lawsuits brought under Category II clauses have had mixed results, some of the seminal cases requiring reform of the education funding system were in Category II states.<sup>20</sup>

The Category III education clauses<sup>21</sup> are distinguished from the Category I and II clauses by both a “stronger and more specific education mandate” and “purposive preambles.” Unlike most of the Category I and II clauses, the Category III clauses do not all have identical or nearly identical language. Their stronger language makes litigation under such provisions seem promising for reformers, but because few state courts have yet interpreted a Category III clause in the context of school finance reform litigation, conclusions about their interpretation are difficult to draw.

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<sup>16</sup> Ala. Const. article 14, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Conn. Const. art. VIII, § 1; Haw. Const. art. X, § 1; Kan. Const. art. VI, § 1; La. Const. art. VIII, § 1; Neb. Const. art. VII, § 1; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; Okla. Const. art. XIII, § 1; S.C. Const. art. XI, § 3; Utah Const. art. X, § 1; and Vt. Const. ch. 2, § 68.

<sup>17</sup> For example, in *Britt v. North Carolina State Bd. of Educ.*, 86 N.C. App. 282, 357 S.E.2d 432, appeal dismissed mem., 320 N.C. 790, 361 S.E.2d 71 (1987), the North Carolina Court of Appeals looked at the framers' intentions and held that the education clause was intended to continue the method of financing the schools from local sources that was in place prior to its adoption. 86 N.C. App. at 287, 357 S.E.2d at 435-36. The North Carolina Constitution provides that the legislature “shall provide by taxation . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students.” N.C. Const. art. IX, § 2(1). The court looked at the system in place under the 1868 Constitution and the commentaries of the 1970 framers and determined that the intention of the 1970 framers was to continue the 1868 system of financing but to eliminate segregation.

Connecticut, has declared its system unconstitutional; that decision, however, was based solely on the equality guaranty clause. *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977).

<sup>18</sup> For example, New York recently found their clause to require a meaningful high school education for every child. *CFE v. State*, Slip Op. 15615 (2003). See discussion below.

<sup>19</sup> Ark. Const. art. XIV, § 1; Colo. Const. art. IX, § 2; Del. Const. art. X, § 1; Idaho Const. art. IX, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Minn. Const. art. XIII, § 1; Mont. Const. art. X, § 1; N.J. Const. art. VIII, § 4; N.D. Const. art. VIII, § 1; Ohio Const. art. VI, § 3; Or. Const. art. VIII, § 3; Pa. Const. art. III, § 14; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Va. Const. art. VIII, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3.

<sup>20</sup> See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Rose v. Council for Better Educ.*, 790 S.W. 2d 186 (Ky. 1989); *Helena Elementary Sch. Dist v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Independent School District v. Kirby*, 777 S.W. 2d 391 (Tex. 1989); 804 S.W. 2d 491 (Tex. 1991); 826 S.W. 2d 489 (Tex. 1992); 893 S.W. 2d 450 (Tex. 1995).

<sup>21</sup> Cal. Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, 2d, § 3; Mass. Const. pt. 2, ch. 5, § 2; Nev. Const. art. XI, § 2, R.I. Const. art. XII, § 1; S.D. Const. art. VIII, § 1; and Wyo. Const. art. VII, § 1.

By their texts, the Category IV clauses<sup>22</sup> impose the greatest obligation on the state legislature. Typically, they provide that education is "fundamental," "primary," or "paramount." Florida in its recent revision of its constitution, takes this to a new height, requiring not just "uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education" but even specifying the maximum student-teacher ratios for various grade levels.<sup>23</sup> Courts have rejected challenges based on Category IV provisions, though often on standing or other grounds and not on the merits.<sup>24</sup> In those cases that do address the merits, the higher content has often, though not always aided in the result.<sup>25</sup>

## State Constitutional Litigation of Right to Education School Finance Cases

In the courts, the adequacy strategy appears to be succeeding. Judges have upheld increased state obligations in about 70 percent of the cases, bucking the conventional wisdom that ESCR are unenforceable and non-justiciable in the U.S., at least at the state level.<sup>26</sup> Since 1989, when a successful case was filed in Kentucky, courts in 18 of 29 states facing legal challenges to their funding systems have ordered the states to reform how they pay for schools. Most of those cases were based on adequacy arguments – in other words, giving tangible content to the supposedly unjusticiable ESCR of the right to education.<sup>27</sup>

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<sup>22</sup> Ga. Const. art. VIII, § 1; Ill. Const. art. X, § 1; Me. Const. art. VIII, pt. 1, § 1; Mich. Const. art. VIII, § 2; Mo. Const. art. IX, § 1(a); N.H. Const. pt. 2, art. LXXXIII; and Wash. Const. art. IX, § 1.

<sup>23</sup> See Florida Const., Art. IX, Sec. 1) (a) mandating, "the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that: (1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for pre-kindergarten through grade 3 does not exceed 18 students; (2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and (3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students."

<sup>24</sup> The exception to this statement -- and, indeed, the only cases other than *Robinson I*, *Rose*, *Helena Elementary School District* and *Edgewood Independent School District* to order finance reform solely on the basis of the education clause -- was the sudden reversal of the Washington Supreme Court in interpreting that state's education clause. In 1974, in *Northshore School District No. 417 v. Kinnear*, the court examined both the state equality clause and the state education clause and held that the public school finance system did not violate either. Four years later, in *Seattle School District No. 1 v. State*, the court expressly overruled *Kinnear*, reinterpreted the education clause to impose a "duty" on the state, and concluded that "the State system of school funding during school year 1975-76 did not comply with [Wash.] Const. art. 9, § 1 in making 'ample provision' for the education of the children residing within the District."

<sup>25</sup> See, e.g. *Committee for Educ. Equality v. Missouri*, 878 S.W. 2d 446 (Mo. 1994). The case declared the funding system unconstitutional, and held that the state must provide the same educational opportunity to children in both rich and poor districts. Subsequent legislation increased school funding and improved equity, but by 2004, the parties were back in court.

<sup>26</sup> See Michael Dobbs, *Poor Schools Sue for Funding*, WASHINGTON POST, June 7, 2004, at A13.

<sup>27</sup> Lori Olzewski, *Focus on Legal Battles Shifts from Equality to Adequacy*, Chicago Tribune, May 18, 2004, C1.

One of the first states to find the right to education was a fundamental right, even where not clearly written in the Constitution, was West Virginia in the case of *Pauley v. Kelly*. Although the West Virginia Constitution only states that “The Legislature shall provide ... for a thorough and efficient system of free schools,” (a Category II clause), the West Virginia Supreme Court looked deeper.<sup>28</sup> Contrasting itself with the U.S. Supreme Court, the court noted, “Our examination of *Rodriguez* and our research in this case indicates an embarrassing abundance of authority and reason by which the majority might have decided that education is a fundamental right of every American.” This court even cited to international law: “*The Universal Declaration of Human Rights* approved December 10, 1948, by the General Assembly of the United Nations... appears to proclaim education to be a fundamental right of everyone, at least on this planet.”<sup>29</sup> The court then remanded to the lower courts, which determined that the state’s financing system unconstitutionally violated this fundamental right.

While not citing international law, New York’s more recent case gave clear core content to the right to education, requiring a meaningful high school education.<sup>30</sup> The state’s highest court rejected an “8th grade education is enough” standard and said that all public school students statewide are entitled to a meaningful high school education, and remanded to the lower courts to enforce the decision. It did so by emphasizing that the constitution requires a “meaningful high school education”<sup>31</sup> The court affirmed the trial court’s conclusion that students must be provided the skills they need today to function capably as civic participants and that to be prepared for employment in the 21<sup>st</sup> century economy, they require “a higher level of knowledge, skill in communication and the use of information, and the capacity to continue to learn over a lifetime.”<sup>32</sup> In addition, the court ruled that “The State must assure that some essential [resources] are provided.”<sup>33</sup> The court gave the state 13 months to comply with the order, but the state failed to settle on either a cost figure or a plan to finance it, so the litigation has once again resumed before a panel of court-appointed special masters who will ultimately determine the state’s obligations.

Litigation is underway in about 20 other states, where courts are putting pressure on legislatures to spend from 15 percent to 40 percent more on education.<sup>34</sup> In Arkansas, the court ordered an \$800 million increase to the education budget; the legislature consolidated school districts and raised the budget by half the court-ordered amount – satisfying the Arkansas court, but subjecting itself to a new federal lawsuit on the consolidation issue.<sup>35</sup> In Kansas, a district judge sided with the two city school districts, which argued that the state was not spending enough on education or handing out the

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<sup>28</sup> W.Va Const., art, XII, §1.

<sup>29</sup> *Pauley v. Kelley*, 255 S.E.2d 859 (W. Va. 1979).

<sup>30</sup> *CFE v. State*, Slip Op. 15615 (2003). In *Campaign for Fiscal Equity, Inc. (CFE) v. State of New York*, 86 N.Y. 2d 307 (1995), (“CFE I”).

<sup>31</sup> *CFE v. State*, Slip Op. 15615 (2003), (“CFE II”) at 53.

<sup>32</sup> *Id.* at 9-10.

<sup>33</sup> *CFE I*, 86 N.Y. 2d at 317; *CFE II*, at 11-13.

<sup>34</sup> See Diane Carroll, *States under pressure to boost school funding*, *Kansas City Star*, Feb. 22, 2004, at A1.

<sup>35</sup> See Eric Kelderman, *Small Arkansas schools pay big price for new money*, *Stateline.org*, July 28, 2004, at <http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=388465>.



money fairly. A state-commissioned study said the state needed to spend \$1 billion more – which equates to a rise of 40 percent – and the judge gave the Legislature until July 1 to figure out a solution. The legislative session adjourned without a new plan, but with authorization for the attorney general to seek a stay of the judge’s order that school funding be frozen for failure to create a constitutional funding scheme. That stay was granted by the Kansas Supreme Court and the litigation continues.<sup>36</sup>

As evidence of both the power and the vulnerability of this line of litigation, since a decision invalidating New Hampshire’s public school funding scheme, Governor Benson has twice introduced an amendment to its constitution that would forbid the judiciary from intervening in school finance issues.<sup>37</sup>

### **Federal Legislation**

Despite the lack of *litigation* on the federal level since *Rodriguez*, there has been significant *legislation* that holds both promise and threat for the concept of a right to education. Most recently, the No Child Left Behind Act (NCLB) was designed as part of an overall system to reduce the racial gap in educational achievement. Its prime purpose in setting standards for accountability was to force schools that received Title I money to improve education across all racial and class lines.<sup>38</sup> By mandating not just average student improvement, but also increased achievement broken down by racial and economic subgroup, it attempted to focus attention on the issues raised by *Brown*, but abandoned by *Rodriguez*.<sup>39</sup>

In response to testimony presented last year by Global Rights before the Inter-American Commission on Human Rights calling attention to the U.S.’s violation of the right to education, the U.S. government issued a response stating that through legislating the NCLB, it was meeting its international obligations. However, while the legislation itself might have been evidence of an attempt to properly address the achievement gap, it is the execution of the act that has accented its false promise, and the government’s underlying failure to meet its obligations. On the one hand, NCLB provides for strict financial penalties for underachieving schools; on the other, however, there is no promise of adequate funding to meet its mandates. The Bush administration under funded the very program it helped design by \$9 billion.<sup>40</sup>

However, the adequacy movement has drawn strength from aspects of NCLB: schools are arguing that they lack the resources to meet NCLB’s accountability goals, and are using the data collected under NCLB to prove it.<sup>41</sup> Even though the federal law requires no federal mandates on the states be unfunded, because NCLB is technically optional (states are not required to take the federal dollars), it is not deemed to be an unfunded

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<sup>36</sup> See *School Finance Lawsuit At A Glance*, at <http://www.ksde.org/topics/lawsuit.htm>

<sup>37</sup> See Anne Saunders, *Children's advocates urge defeat of constitutional amendment*, Associated Press State & Local Wire, Jan. 20, 2004.

<sup>38</sup> See Peter Schrag, *What’s Good Enough?*, THE NATION, May 3, 2004, at 43.

<sup>39</sup> *Id.*

<sup>40</sup> See Schrag, *supra*.

<sup>41</sup> See Dobbs, *supra*.

mandate.<sup>42</sup> A Pennsylvania school district, though, has already sued a state education department over NCLB requirements, alleging that the state failed provide adequate technical and financial assistance for it to comply with the Act.<sup>43</sup> 25 other states are currently considering bills that would request waivers or additional money to meet NCLB requirements.<sup>44</sup> NCLB's potential to be a source of equity in the schools has failed because the federal government did not fulfill its half of the bargain while penalizing schools for not achieving theirs.

While NCLB and Title I have dealt with aspects of problems in education, they have not addressed the right to education itself. On March 4, 2003, Cong. Jesse Jackson Jr. proposed a Constitutional amendment guaranteeing the “all citizens of the United States shall enjoy the right to a public education of equal high quality,” enforceable by Congress. The bill, HJ Res. 29, which currently has 33 cosponsors, was moved to the Subcommittee on the Constitution on May 5, 2003, where it has sat for the past year.<sup>45</sup> While not a constitutional right, Senator Chris Dodd and Congressman Chaka Fattah announced on May 17 a year-long effort to pass a Student Bill of Rights legislation to honor the 50th anniversary of Brown v. Board of Education. The requirements of the bill include: instruction from a highly qualified teacher, rigorous academic standards, a small class size, up-to-date facilities and textbooks, state-of-the-art libraries, updated computers and qualified guidance counselors.<sup>46</sup> While neither of these bills is likely to go anywhere in the near future, it shows evidence of opportunities for progress, and may also provide some idea of what the core content of the right to education in the U.S might require.

### **Summary of Obstacles**

Though litigation and legislation have brought some improvement to children's enjoyment of their right to education, the movement has also been stymied by several brick walls thrown up in the way of progress. *Milliken* effectively removed the opportunity for inter-district remedies, thus allowing white flight to defeat the move to desegregate. Moreover, the finding of an intentionality requirement for illegal discrimination under the equal protection clause has severely limited plaintiffs' means of addressing structural racism. The difficulty of identifying the violation of rights – or what the substance of the right to education actually requires – has also defeated many plaintiffs. To help establish a core content of the right to education that could span across state lines and break through these other barriers, the answer could lie in incorporating the international human rights system into domestic law.

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<sup>42</sup> See GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO 04-637, May 2004, at 9.

<sup>43</sup> See Eleanor Chute, *School district fights state over No Child Left Behind sanctions*, Pittsburgh Post-Gazette, December 17, 2003, at <http://www.post-gazette.com/localnews/20031217nclb1217p3.asp>.

<sup>44</sup> National Council of State Legislatures, *No Child Left Behind: Quick Facts*, May 2004. [http://www.csba.org/nclb/Quick\\_Facts\\_04.pdf](http://www.csba.org/nclb/Quick_Facts_04.pdf)

<sup>45</sup> See Jesse Jackson, Jr., *Brown at 50: Where do we go from here*, Congressional Press Releases, May 14, 2004. On another ESCR note, Congressman Jackson, Jr. has also introduced an amendment (H. J. Res. 30) to guarantee all Americans safe, adequate and affordable health care.

<sup>46</sup> See H.R. 236, 108<sup>th</sup> Cong. §1 (2003).

## The International Human Right to Education in the U.S.

The right to education is well established across a spectrum of human rights instruments. Many treaties, and the commentaries on those treaties, contain significantly more progressive language than that found in domestic law. While the U.S. has only ratified two of the relevant treaties, and those two have only limited substance about the content of a right to education, there remains a great deal of opportunity in looking to international treaty language for several reasons. First, ratified treaties bring direct accountability – ultimately it is the federal government who must guarantee the rights in the treaties it signs. Second, treaties bring consistency of language and definition – rather than fighting for years over what “thorough and efficient schools” may require, we can look for the core content of what the right to education is across district or state boundaries. Finally, by working for the local incorporation of international treaty language into city and state constitutions, several cities and states have already begun to draw their localities up to the progressive standards of international human rights and gone beyond what was possible under domestic law alone.

### ***Existing Obligations***

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by the U.S. in 1994, requires states to eliminate racial discrimination in education, and specifies that laws that have either the purpose *or effect* of discrimination are violations of the convention.<sup>47</sup> This goes beyond traditional American jurisprudence, which has largely limited its purview to laws or acts that have discriminatory intent, as discussed in *Milliken*. In addition, ICERD mandates that “State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups...”<sup>48</sup> In other words, in certain circumstances, affirmative action is not only allowed, but mandated. This is another provision that is broader than U.S. law, which has been interpreted by the Supreme Court to be allowed only in limited circumstances.<sup>49</sup>

The other major treaty ratified by the U.S. is the International Covenant on Civil and Political Rights (ICCPR), which also guarantees aspects of the right to education. The ICCPR is very limited in its purview with regards to education directly – protecting only the right of “legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”<sup>50</sup> However, article 26 also requires the state to provide “equal and effective protection” against discrimination, which the Human Rights Committee has interpreted, similar to ICERD, “that the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination...”<sup>51</sup>

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<sup>47</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969, at art. 1.

<sup>48</sup> *Id.*, at art. 2(2).

<sup>49</sup> See, e.g. *Grutter v. Bollinger*, 539 US \_\_\_\_ (2003).

<sup>50</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, at art. 18(4)..

<sup>51</sup> See *id.*, at art. 26. CCPR - General Comment No. 18 (Non-discrimination) (1989).

Ratification of a treaty makes it the “supreme law of the land,”<sup>52</sup> and creates accountability of the government for protecting and promoting the rights it guarantees. The ICERD requires the U.S. to submit its domestic laws and practices to the scrutiny of an international oversight body, the Committee on the Elimination of Racial Discrimination (CERD) to examine the U.S.’s obligations under the treaty. This creates opportunities for intervention by U.S. activists, whether in the form of shadow reports accompanying the government’s official report, or through oral hearings conducted by the CERD on various thematic issues. Similar opportunities exist with regards to the ICCPR and its oversight body, the Human Rights Committee.

In addition to the explicit language in the treaty, CERD has adopted General Recommendations, which are authoritative interpretations of states’ obligations under the Convention.<sup>53</sup> In two of the last four Recommendations, CERD addressed the right to education as a separate thematic element within their broader discussions of discrimination against Roma and descent-based discrimination.<sup>54</sup> In its most recent Recommendation, on nationality-based discrimination, the Committee discussed education under economic, social and cultural rights.<sup>55</sup> The Recommendations to this point have ranged from a comprehensive review of textbooks for “stereotyped or demeaning images, references, names or opinions,”<sup>56</sup> to “taking necessary measures to ensure a process of basic education for Roma children of traveling communities,”<sup>57</sup> a situation analogous to many homeless children in the U.S. Comments and Recommendations can provide additional content to an integrated international right in a constitutional amendment, and could be a potential target for future advocacy, as will be discussed below.

## **Reservations, Understandings and Declarations**

As noted above, the U.S. has ratified a few of the major treaties that do provide for a right to education, including ICERD. However, these treaties, along with every other human rights treaty the U.S. is party to, are subject to a variety of reservations, understandings, and declarations (RUDs) that limit the domestic effects of the treaty. For example, in the case of ICERD, these RUDs include an understanding that the federal government only has authority to guarantee compliance with the treaty insofar as the federal system allows, though it acknowledges ultimate responsibility lies with the federal government.<sup>58</sup> More important is the Senate’s declaration that the treaty is non-self-executing.<sup>59</sup> This declaration means that no private cause of action is created under ICERD unless the

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<sup>52</sup> Const. Art. VI.

<sup>53</sup> CERD and CEDAW refer to these official statements as "General Recommendations" and CCPR, CESCR, CAT and CRC refer to them as "General Comments".

<sup>54</sup> General Recommendation No. 27: Discrimination against Roma (2000); CERD General recommendation No. 29: Article 1, paragraph 1, of the Convention (Descent), A/57/18 (2002) 111.

<sup>55</sup> General Recommendation No. 30: Discrimination against Non-Citizens, CER/C/64/Misc.11/rev.3 (2004), *at* paras. 29-31.

<sup>56</sup> General Recommendation No. 29, *at* para. 48.

<sup>57</sup> General Recommendation No. 27, *at* para. 21.

<sup>58</sup> *See* U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

<sup>59</sup> *See id.*

federal government first enacts enabling legislation. However, one can still creatively employ ICERD (and other treaty) language in legal actions as an interpretive guide to U.S. law. Under the so-called *Charming Betsy* principle, the Supreme Court declared that any legislation passed following the U.S.’s accession to a treaty should be interpreted to be consistent with that treaty, unless Congress includes a specific directive that the U.S. intends to contravene international law.<sup>60</sup> Thus, ICERD’s requirements for affirmative action should still guide U.S. law, although they do not create a separate cause of action.<sup>61</sup>

## Customary International Law

Customary international law (CIL) is also binding in the United States, and may further expand the U.S.’s obligations under international law for upholding a right to education. CIL is derived from the general practice of nations, and it binds even those who are not parties to treaties enumerating such rights. In the U.S., courts have applied international customary and treaty law in interpreting US statutes, as in the landmark *Filartiga* case, where the 2nd Circuit based its decision on a customary right of freedom from torture.<sup>62</sup> Connie De la Vega has presented a case that a customary international legal right to equal opportunity to education exists.<sup>63</sup> First, she finds widespread treaty language with an overwhelming majority of nations having ratified these treaties establishes a general practice, from the ICESCR to the Convention on the Rights of the Child, now almost universally ratified (a great deal of this treaty and declaration language is collected in the appendix to this paper). She then notes that 66 countries as of 1988 provided for equal opportunity in education, further establishing that this is a general principle, common amongst states. De la Vega then addresses the state court struggle, and asserts that by applying CIL standards, consistency and uniformity could be achieved among the widely varying state decisions. Finally, she returns to *Rodriguez*, and recommends using CIL as a tool in any and all of the interpretative methods which could find a right to education in US law (e.g. Due Process, Equal Protection, 9th Amend., etc.)

## More Content of an International Right to Education

Even without ratification, treaties and other international declarations can provide useful sources of progressive language for drafting legislation, and as noted above, are evidence of CIL. Some broader concepts and specifics of the international right to education are highlighted below; for further content, please see the appendix to this paper.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) as part of the so-called “International Bill of Human Rights” reflects a broad concept of the right to education “directed to the full development of the human personality and the sense of

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<sup>60</sup> See *Murray v. The Schooner Charming Betsy*, 6 US (2 Cranch) 64 (1804).

<sup>61</sup> See, e.g. Brief of NOW Legal Defense and Education Fund, et, al. as Amici Curaie in Support of Respondents, *Gutter v. Bollinger*, *supra*, at 4.

<sup>62</sup> See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2<sup>nd</sup> Cir. 1980). *Filartiga*’s reasoning was approved by the Supreme Court in *Sosa v. Alvarez Machain*, 124 S.Ct. 2739 (2004).

<sup>63</sup> Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?* 11 HARV. BLACKLETTERL.J. 37 (1994).

its dignity.”<sup>64</sup> It also sets forth certain minimum standards, and notes that each state is required to meet obligations progressively, according to its resources.

The Protocol of San Salvador to the American Convention on Human Rights is an example of how others in our hemisphere view our human rights obligations with regards to ESCR. The Protocol proclaims, among other things, “education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.”

Declarations can similarly be utilized in seeking the best language for a constitutional amendment or as evidence of existing consensus on the content of the right. The U.S. has participated in the drafting of a plethora of international declarations. The Universal Declaration of Human Rights, as noted in the *Pauley v. Kelly* case described above, sets forth the right to education and says education should be directed to the full development of the human personality.<sup>65</sup> The World Declaration on Education for All is comprised of two parts: the Declaration itself, and a Framework for Action to Meet Basic Learning Needs.<sup>66</sup> While largely focusing on the bare minimum, such as establishing schools in areas of the world where none currently exist, many standards such as literacy and numeracy are also not being met in the U.S. Moreover, the Declaration notes that “the scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.”<sup>67</sup> This means that in countries such as the U.S. where a higher standard of education is required to satisfy basic needs, this becomes the baseline the country must meet. Such language allows for the continuous progression of standards to ever-higher levels.

The American Declaration on the Rights and Duties of Man (American Declaration) has a special status among declarations in the U.S. While refusing to concede it is bound by its decisions, our government has recognized the power of the Inter-American Commission on Human Rights to interpret the treaty, and gives some attention to its rulings.<sup>68</sup> U.S. groups have found the Inter-American Commission to be a useful forum for bringing petitions and generating international scrutiny. Regarding education, the American Declaration elaborates that the content of a right to an education will prepare a person “to attain a decent life, to raise his standard of living, and to be a useful member of society,” and notes that the “right to an education includes the right to equality of

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<sup>64</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, at art. 13(1).

<sup>65</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), at art. 26.

<sup>66</sup> World Declaration on Education For All, adopted by the World Conference on Education for All *Meeting Basic Learning Needs*, Jomtien, Thailand, March, 1990.

<sup>67</sup> *Id.*, at art. 1(1).

<sup>68</sup> See, e.g. Response of the United States to the Presentation on “Racial Discrimination in the K-12 Public Education System of the U.S.” at a Hearing on October 15, 2003, letter of Dec. 30, 2003., at 4.

opportunity in every case.”<sup>69</sup> The Commission has held the right to education to be justiciable, and found the Dominican Republic in violation, resulting in the government allowing two non-citizen girls to attend school.<sup>70</sup>

As noted above, General Comments and Recommendations are authoritative interpretations of treaties by the treaty bodies which continue to elaborate on the content of the rights under the treaties. The Committee on Economic, Social, and Cultural Rights (CESCR) has addressed the right to education under the Covenant in two Comments, which provide a great deal of additional beneficial language for consideration in inclusion as part of a right to education. Comment 11 notes, among other things, that “the education offered must be adequate in quality, relevant to the child and must promote the realization of the child's other rights.”<sup>71</sup> Comment 13 outlines “4 A’s” of the right to education: that education must be available, accessible, acceptable, and adaptable, and further elaborates on what the content of each of those “A’s” requires.<sup>72</sup> Specifically in relation to teaching resources, Comment 13 says, “While the Covenant requires that ‘the material conditions of teaching staff shall be continuously improved’, in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13 (2) (e), but it is also a major obstacle to the full realization of students' right to education.”<sup>73</sup> Moreover, Comment 13 incorporates by reference all other international declarations and agreements on education as “reflect[ing] a contemporary interpretation” of the right to education.<sup>74</sup> This includes treaties such as the ICERD, and the Comment explicitly notes “Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.”<sup>75</sup> Again, the U.S is not legally bound to uphold the ICESCR or its Comments without ratification. However, this tremendously useful language need not go unused for, as detailed in the section below, lack of ratification or federal implementation is not a total barrier to accountability, for there are other ways of using the treaty language.

### **Local incorporation**

Where the federal government has left many treaties unratified or limited the impact of those it has ratified by failing to pass enabling legislation, local governments have begun to pick up the slack. Numerous movements around the country have begun pressing their local city or state governments to incorporate human rights treaty language into their statutory codes. This then provides local litigators with a powerful tool based on the

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<sup>69</sup> American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), *at* art. 12.

<sup>70</sup> Dilcia Yean y Violeta Bosica, (Case N° 12.189), Inter-American Commission on Human Rights, Feb. 22, 2001.

<sup>71</sup> General Comment 11 (1999) \*Plans of action for primary education (Article 14) E/C.12/1999/4, art. 6.

<sup>72</sup> General Comment 13 (1999) ‘The right to education’ (Art.13). E/C.12/1999/10,, art. 6.

<sup>73</sup> *Id.*, *at* art. 27.

<sup>74</sup> *Id.*, *at* art. 5.

<sup>75</sup> *Id.* *at* art. 35.

principles laid down in the international treaties, avoiding the federal government's reservations that the treaties will not be self-executing. By working to amend local and state constitutions to incorporate the language of international human rights, domestic activists can draw on a wide range of existing jurisprudence and draw on the rich potential of the human rights system.

Legislation passed last year in California now defines "racial discrimination" to have "the same meaning as the term 'racial discrimination' as defined and used in paragraphs 1 and 4 of Article 1 of Part I of the International Convention on the Elimination of All Forms of Racial Discrimination."<sup>76</sup> This means that some of the beneficial language of ICERD, which, as noted above, goes beyond domestic law in invalidating laws with discriminatory effects and approving of affirmative action can be used by California litigators to press for more fair laws.<sup>77</sup>

This novel approach of local implementation of international treaties has already yielded successful results in court as well. In the case of *Avila v. Berkeley Unified School District*, the plaintiff challenged Berkeley's voluntary desegregation plan, claiming it violated California's Prop. 209, which forbids discrimination or preferencing on the basis of race in education (among other fields).<sup>78</sup> The judge ruled that California's incorporation of ICERD's definition of racial discrimination, as described above, specifically clarifies the definition of Prop. 209 to make it compatible with the desegregation plan.<sup>79</sup> In their defense brief, the school district's attorney's argued that because the law now states that "special measures" taken to "secure adequate advancement of certain racial...groups...shall not be deemed racial discrimination" the voluntary desegregation plan should be deemed non-discriminatory for the purposes of Prop. 209.<sup>80</sup> The judge reasoned, with explicit references to ICERD, that because the desegregation plan does not have "the purpose or effect of nullifying or impairing the recognition...on an equal footing of human rights and freedoms of any student," it should stand.<sup>81</sup> While the judge here used the ICERD language defensively to fend off a suit under California's retrogressive Prop. 209, there is no reason similar language passed in other localities could not be used as a pro-active tool to push for greater equality in their schools.

Several other localities have pushed beyond local implementation of ratified treaties, and have gone to the treaties the U.S. has yet to ratify, thus making a considerable advancement in the acknowledgement of human rights. San Francisco passed city-wide implementation of the Convention on the Elimination of Discrimination Against Women (CEDAW), and pursuant to its mandate conducted a full gender audit of all its

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<sup>76</sup> CAL. GOV'T. CODE § 8315 (2004).

<sup>77</sup> Unfortunately, the more progressive language of Article 2(2) mandating the use of affirmative action was expressly not adopted.

<sup>78</sup> See *Avila v. Berkeley Unified School District*, No. RG03-110397, Cal. Sup. Ct. Alameda, Apr. 6, 2004 (unreported opinion, available at <http://www.naacpldf.org/landing.aspx?sub=24>); Cal. Const., Art. I §31.

<sup>79</sup> *Id.*, at 9.

<sup>80</sup> *Id.*, *Defendants' Memorandum of Points and Authorities in Support of their Demurrer to plaintiff's Complaint for Declaratory and Injunctive Relief and Damages*, at 12.

<sup>81</sup> *Avila.*, at 9. (internal quotes removed).



programs.<sup>82</sup> This review has helped change policies from the placement of streetlights to agency operating hours to correct gender-biases.<sup>83</sup> Organizers from Seattle, Santa Cruz, Los Angeles, Palo Alto, Santa Clara, Chicago, and Boston are working toward similar initiatives. Massachusetts also has a strong movement to implement CEDAW on a state-wide basis,<sup>84</sup> and New York City is considering implementation of both CEDAW and CERD through the New York City Human Rights Initiative.<sup>85</sup> In effect, progressive local governments are doing the implementation of the treaties that the U.S. has failed to do.

## Action Recommendations

### ***Incorporate Treaty Language Locally***

Thus, our recommendations for actions U.S. activists begin with working towards local incorporation of human rights standards. To this end, the amendments could make either explicit or implicit reference to the sources of international law that mold its definition. Explicitly, amendments could adopt the definitions of various treaties whole cloth, as did California with its definition of racial discrimination described above. This could include language indicating that not just the treaty definition applies, but also that the interpretations of that right by the various treaty bodies also apply, thereby incorporating a vast amount of beneficial, progressive language. Implicitly, the amendment could merely use identical language, for example “education of the child shall be directed to the development of the child's personality, talents and mental and physical abilities to their fullest potential” without noting its origins in the Convention on the Rights of the Child. This would allow for the use of progressive language without making an overt target of the effort by Congressional representatives and others who would be loathe to see references to international law enshrined in domestic statutes and constitutions. However, it would then require domestic litigation to get the appropriate interpretations of that language incorporated into the law.

Once jurisdictions have adopted international language into their constitutions, the likely next step down the road would be to enforce that right through advocacy in the legislature and litigation in the courts if necessary. For example, incorporation of language defining discrimination as acts with either discriminatory intent *or effect* helps get around the *Milliken* requirement of intentionality. For litigation based on the “adequacy” line of cases, providing more content to the state right to education will assist courts in determining a higher level of obligation on the part of the state legislature. In either case, the greatest advantage of using universal language is that local development of jurisprudence based on treaty language may help other activists across the country in analogous situations.

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<sup>82</sup> See Summary of San Francisco's CEDAW Ordinance (April 14, 1998), at [http://www.wildforhumanrights.org/ordinance\\_summary.html](http://www.wildforhumanrights.org/ordinance_summary.html).

<sup>83</sup> See CEDAW Task Force Gender Analyses Report: An Overview of CEDAW Implementation in the City and County of San Francisco, December, 2001 at [http://sfgov.org/site/cosw\\_page.asp?id=10869](http://sfgov.org/site/cosw_page.asp?id=10869).

<sup>84</sup> See *The Massachusetts CEDAW Project*, at [http://www.suffolk.edu/cwhhr/Mass\\_CEDAW.html](http://www.suffolk.edu/cwhhr/Mass_CEDAW.html).

<sup>85</sup> See *The New York City Human Rights Initiative*, at [http://www.aclu.org/hrc/NYC\\_Initiative.pdf](http://www.aclu.org/hrc/NYC_Initiative.pdf).

## ***Use the International System***

Another way to bring attention to local violations of rights is through the Shadow Reporting process at the treaty bodies. The U.S. government is required under ICERD and the ICCPR to submit periodic reports detailing how it is implementing the treaty provisions. While the U.S.'s reporting is considerably overdue, the State Department has recently indicated that it intends to get its reports out by the end of next year. When the treaty bodies consider the government's reports, they also look at informal "shadow reports," information gathered by non-governmental organization, to give a fuller picture of the effects of racial discrimination in the country. Domestic advocates should be aware of the submission process – once the government submits its reports, they should analyze those reports and see where the government has left out issues important to them. They can then draft written submissions to the bodies, and ally themselves with groups such as Global Rights, who have standing to give oral presentations to the bodies themselves when they meet in Geneva. Advocates can then directly present their concerns to the oversight bodies, and hopefully get specific commentary on their issue when the bodies issue their final reports.

As noted earlier, the U.S. also accepts the jurisdiction of the Inter-American Commission on Human Rights to hear petitions and determine violations of the Inter-American Declaration. For example, the D.C. Statehood Solidarity Committee brought a petition to the Commission, which received a ruling this past December confirming that D.C.'s lack of national representation is a violation of the Declaration. This generated a great deal of positive press for that movement, though ultimately the government has not remedied the violation. However, as a part of a greater strategy of awareness-raising leading to eventual policy change, petitions should not be ignored.

In addition to individual petitions, the Commission also hears more general cases on violations of the Declaration, such as the testimony Global Rights gave last year on the U.S. government's violation of the right to education through its failure to create equality of opportunity across racial lines. The U.S. issued a written response, and we intend to continue this dialogue with the Commission and the government by submitting written testimony this fall and giving an oral presentation again next spring, and welcome other groups' involvement in the process. Again, the presentation is not an end in itself, but an opportunity to draw additional attention to an issue which may prove useful in changing the minds of legislators or judges further down the road.

One of the potentially most interesting and valuable tactics would be to seek a General Recommendation from the treaty bodies once language has been locally incorporated. A General Recommendation presents several opportunities for progressive change. First, by working with the Committee, domestic organizations can advocate for language that would particularly help their cause to be included in the Recommendation. Thus, for example, an interpretation of ICERD that declares systems of funding that result in inequitable distribution of education resources between different racial groups a violation of the Convention would be a clear benefit to education advocates in this country. Especially if localities were to enact an explicit reference to international definitions in their amendment, as did California, it would imply that the General Recommendations

issued on the interpretation of the treaty definition would also hold true for domestic interpretation, and should be granted persuasive value by courts. Further advances could come in incorporating even the unratified treaties on ESCR and applying their Comments locally. While advocating for General Recommendations would be a longer-term goal, it would involve many activists from across the country and globe, thus linking activists to a wider network, and perhaps providing wider support for their own local efforts as well.

## **Conclusion**

Though the above discussion focuses on the right to education, it is important to note that the model set forth above is available to all seeking enforcement of their rights, both civil/political rights and ESCR. While the right to education has the advantage of being pre-established at the state level, it was not until relatively recently that this actually began to be given content. Thus, though it may be a longer road to push for recognition of, say, a right to health care, it has been done in other countries, it can happen here. We encourage activists to think creatively about how local incorporation of international human rights can be done and how it can help in varied situations. Most of all, throughout the process, we encourage communication – first to explore options, then to devise tactics, finally to share successes and rally others to the cause. The lack of justiciability of economic, social and cultural rights in the U.S. is the rule at present, but it is a rule waiting to be broken.

## Appendix I: Treaties and other texts on the Right to Education

| <i>Treaty</i>  | <i>Article</i> | <i>Text</i>   |
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| <b>International Ratified</b>  |                |   |
| <i>International Covenant on Civil and Political Rights</i>                              | 18(4)          | "Everyone shall have the right to freedom of thought, conscience and religion. [...] The State Parties [...] undertake to have respect for the liberty of parents [...] to ensure the religious and moral education of their children in conformity with their own convictions."  |
| <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> | 1(1)           | Defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."  |
| <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> | 1(4)           | Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.   |
| <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> | 2(1)           | States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:<br>(a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;<br>(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;<br>(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;<br>(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;<br>(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division. |
| <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> | 2(2)           | States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.  |
| <i>International Convention on the Elimination of All</i>                                | 5 (e)<br>(v))  | States required to "prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin to equality before the law, notably in the   |

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| <i>Forms of Racial Discrimination</i>   |           | enjoyment of...the right to education and training.”  |
| <b>International Unratified</b>   |           |   |
| <i>International Covenant on Economic, Social and Cultural Rights</i>   | 1         | The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.   |
| <i>International Covenant on Economic, Social and Cultural Rights</i>   | 2         | The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:<br>(a) Primary education shall be compulsory and available free to all;<br>(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;<br>(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;<br>(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;<br>(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.   |
| <i>Convention on the Rights of the Child</i>  | 28 and 29 | "States Parties recognize the right of the child to education [...] (They) agree that the education of the child shall be directed to ... the development of the child's personality, talents and mental and physical abilities to their fullest potential [...]"   |
| <i>UNESCO Convention Against Discrimination in Education</i> , 429 U.N.T.S 93, entered into force 22 May 1962 | 1         | 1. For the purpose of this Convention, the term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, color, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:<br>(a) Of depriving any person or group of persons of access to education of any type or at any level;<br>(b) Of limiting any person or group of persons to education of an inferior standard;<br>(c) Subject to the provisions of article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or<br>(d) Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.<br>2. For the purposes of this Convention, the term "education" refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given. |
| <i>UNESCO Convention Against Discrimination in Education</i>  | 4         | Requires states “to formulate, develop and apply a national policy which, by methods appropriate to the circumstances and to national usage, will tend to promote equality of opportunity and of treatment in the matter of education and in particular:<br>(a) To make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all;   |

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|   |        | <p>make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;</p> <p>(b) To ensure that the standards of education are equivalent in all public educational institutions of the same level, and that the conditions relating to the quality of the education provided are also equivalent;</p> <p>(c) To encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity;</p> <p>(d) To provide training for the teaching profession without discrimination.</p>  |
| <i>Convention on the Elimination of All Forms of Discrimination against Women</i> | 10     | <p>States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:</p> <p>(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;</p> <p>(b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality;</p> <p>(c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods;</p> <p>(d) The same opportunities to benefit from scholarships and other study grants;</p> <p>(e) The same opportunities for access to programs of continuing education, including adult and functional literacy programs, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;</p> <p>(f) The reduction of female student drop-out rates and the organization of programs for girls and women who have left school prematurely;</p> <p>(g) The same Opportunities to participate actively in sports and physical education;</p> <p>(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.</p> |
| <i>World Declaration on Education for All, Jomtien, 1990</i>                      | 1(1)   | <p>Every person -- child, youth, and adult -- shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning. The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.</p>  |
| <i>World Declaration on Education for All, Jomtien, 1990</i>                      | 3 (4). | <p>An active commitment must be made to removing educational disparities. Underserved groups: the poor; street and working children; rural and remote populations; nomads and migrant workers; indigenous peoples; ethnic,</p>   |

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|  |      | racial , and linguistic minorities; refugees; those displaced by war; and people under occupation , should not suffer any discrimination in access to learning opportunities   |
| <i>World Declaration on Education for All, Jomtien, 1990</i>               | 9(2) | Enlarged public-sector support means drawing on the resources of all the government agencies responsible for human development, through increased absolute and proportional allocations to basic education services with the clear recognition of competing claims on national resources of which education is an important one, but not the only one. Serious attention to improving the efficiency of existing educational resources and programs will not only produce more, it can also be expected to attract new resources. The urgent task of meeting basic learning needs may require a reallocation between sectors, as, for example, a transfer from military to educational expenditure. Above all, special protection for basic education will be required in countries undergoing structural adjustment and facing severe external debt burdens. Today, more than ever, education must be seen as a fundamental dimension of any social, cultural , and economic design.  |
| <b>Regional Unratified</b>   |      |  |
| <i>American Declaration on the Rights and Duties of Man</i>                | 12   | Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.<br>Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education.   |
| <i>Protocol of San Salvador to the American Convention on Human Rights</i> | 13   | 1. Everyone has the right to education.<br>2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.<br>3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:<br>a. Primary education should be compulsory and accessible to all without cost;<br>b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;<br>c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;<br>d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;<br>e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.<br>4. In conformity with the domestic legislation of the States Parties, parents |

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|  |    | should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.<br>5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.                         |
| <i>European Convention on Human Rights, Protocol 1</i> | 2  | No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.  |
| <b>CERD General Recommendations</b>                    |    |   |
| <i>CERD General Recommendation 27</i>                  | 17 | To support the inclusion in the school system of all children of Roma origin and to act to reduce drop-out rates, in particular among Roma girls, and, for these purposes, to cooperate actively with Roma parents, associations and local communities.   |
| <i>CERD General Recommendation 27</i>                  | 18 | To prevent and avoid as much as possible the segregation of Roma students, while keeping open the possibility for bilingual or mother-tongue tuition; to this end, to endeavor to raise the quality of education in all schools and the level of achievement in schools by the minority community, to recruit school personnel from among members of Roma communities and to promote intercultural education. |
| <i>CERD General Recommendation 27</i>                  | 19 | To consider adopting measures in favor of Roma children, in cooperation with their parents, in the field of education.  |
| <i>CERD General Recommendation 27</i>                  | 20 | To act with determination to eliminate any discrimination or racial harassment of Roma students.  |
| <i>CERD General Recommendation 27</i>                  | 21 | To take the necessary measures to ensure a process of basic education for Roma children of traveling communities, including by admitting them temporarily to local schools, by temporary classes in their places of encampment, or by using new technologies for distance education.  |
| <i>CERD General Recommendation 27</i>                  | 22 | To ensure that their programs, projects and campaigns in the field of education take into account the disadvantaged situation of Roma girls and women.  |
| <i>CERD General Recommendation 27</i>                  | 23 | To take urgent and sustained measures in training teachers, educators and assistants from among Roma students.  |
| <i>CERD General Recommendation 27</i>                  | 24 | To act to improve dialogue and communication between the teaching personnel and Roma children, Roma communities and parents, using more often assistants chosen from among the Roma.  |
| <i>CERD General Recommendation 27</i>                  | 25 | To ensure adequate forms and schemes of education for members of Roma communities beyond school age, in order to improve adult literacy among them.   |
| <i>CERD General Recommendation 27</i>                  | 26 | To include in textbooks, at all appropriate levels, chapters about the history and culture of Roma, and encourage and support the publication and distribution of books and other print materials as well as the broadcasting of television and radio programs, as appropriate, about their history and culture, including in languages spoken by them.   |
| <i>CERD General Recommendation 29</i>                  | rr | Ensure that public and private education systems include children of all communities and do not exclude any children on the basis of descent;   |
| <i>CERD General Recommendation 29</i>                  | ss | Reduce school drop-out rates for children of all communities, in particular for children of affected communities, with special attention to the situation of girls;   |
| <i>CERD General</i>                                    | tt | Combat discrimination by public or private bodies and any harassment of   |



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| <i>Recommendation 29</i>              |    | students who are members of descent-based communities;  |
| <i>CERD General Recommendation 29</i> | uu | Take necessary measures in cooperation with civil society to educate the population as a whole in a spirit of non-discrimination and respect for the communities subject to descent-based discrimination;   |
| <i>CERD General Recommendation 29</i> | vv | Review all language in textbooks which conveys stereotyped or demeaning images, references, names or opinions concerning descent-based communities and replace it by images, references, names and opinions which convey the message of the inherent dignity of all human beings and their equality of human rights.  |
| <i>CERD General Recommendation 30</i> | 29 | Remove obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens, notably in the areas of education, housing, employment and health;   |
| <i>CERD General Recommendation 30</i> | 30 | Ensure that public educational institutions are open to non -citizens and children of undocumented immigrants residing in the territory of a State party  |
| <i>CERD General Recommendation 30</i> | 31 | Avoid segregated schooling and different standards of treatment being applied to non-citizens on grounds of race, color, descent, and national or ethnic origin in elementary and secondary school and with respect to access to higher education;  |
| <b>CESCR General Comments</b>         |    |   |
| <i>CESCR General Comment 11</i>       | 2  | ...[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights.   |
| <i>CESCR General Comment 11</i>       | 7  | Indirect costs, such as compulsory levies on parents (sometimes portrayed as being voluntary, when in fact they are not), or the obligation to wear a relatively expensive school uniform, can also fall into the same category. Other indirect costs may be permissible, subject to the Committee's examination on a case-by-case basis.   |
| <i>CESCR General Comment 13</i>       | 6  | While the precise and appropriate application of the terms will depend upon the conditions prevailing in a particular State party, education in all its forms and at all levels shall exhibit the following interrelated and essential features:<br>(a) Availability - functioning educational institutions and programs have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programs are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;<br>(b) Accessibility - educational institutions and programs have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:<br>Non-discrimination - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);<br>Physical accessibility - education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighborhood school) or via modern technology (e.g. access to a "distance |

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|                                 |    | <p>learning" program);</p> <p>Economic accessibility - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available "free to all", States parties are required to progressively introduce free secondary and higher education;</p> <p>(c) Acceptability - the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));</p> <p>(d) Adaptability - education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.</p> |
| <i>CESCR General Comment 13</i> | 25 | <p>The requirement that the "development of a system of schools at all levels shall be actively pursued" means that a State party is obliged to have an overall developmental strategy for its school system. The strategy must encompass schooling at all levels, but the Covenant requires States parties to prioritize primary education (see para. 51). "[A]ctively pursued" suggests that the overall strategy should attract a degree of governmental priority and, in any event, must be implemented with vigor.</p>   |
| <i>CESCR General Comment 13</i> | 26 | <p>The requirement that "an adequate fellowship system shall be established" should be read with the Covenant's non-discrimination and equality provisions; the fellowship system should enhance equality of educational access for individuals from disadvantaged groups.</p>  |
| <i>CESCR General Comment 13</i> | 27 | <p>While the Covenant requires that "the material conditions of teaching staff shall be continuously improved", in practice the general working conditions of teachers have deteriorated, and reached unacceptably low levels, in many States parties in recent years. Not only is this inconsistent with article 13 (2) (e), but it is also a major obstacle to the full realization of students' right to education. The Committee also notes the relationship between articles 13 (2) (e), 2 (2), 3 and 6-8 of the Covenant, including the right of teachers to organize and bargain collectively; draws the attention of States parties to the joint UNESCO-ILO Recommendation Concerning the Status of Teachers (1966) and the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997); and urges States parties to report on measures they are taking to ensure that all teaching staff enjoy the conditions and status commensurate with their role</p>  |
| <i>CESCR General Comment 13</i> | 31 | <p>The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2 (2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues.</p>   |
| <i>CESCR General Comment 13</i> | 32 | <p>The adoption of temporary special measures intended to bring about de facto equality for men and women and for disadvantaged groups is not a violation of the right to non-discrimination with regard to education, so long as such measures do not lead to the maintenance of unequal or separate standards for different groups, and provided they are not continued after the</p>   |

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|                                 |    | objectives for which they were taken have been achieved.   |
| <i>CESCR General Comment 13</i> | 33 | In some circumstances, separate educational systems or institutions for groups defined by the categories in article 2 (2) shall be deemed not to constitute a breach of the Covenant. In this regard, the Committee affirms article 2 of the UNESCO Convention against Discrimination in Education (1960).   |
| <i>CESCR General Comment 13</i> | 34 | The Committee takes note of article 2 of the Convention on the Rights of the Child and article 3 (e) of the UNESCO Convention against Discrimination in Education and confirms that the principle of non-discrimination extends to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.  |
| <i>CESCR General Comment 13</i> | 35 | Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant.  |
| <i>CESCR General Comment 13</i> | 36 | The Committee affirms paragraph 35 of its General Comment 5, which addresses the issue of persons with disabilities in the context of the right to education, and paragraphs 36-42 of its General Comment 6, which address the issue of older persons in relation to articles 13-15 of the Covenant.   |
| <i>CESCR General Comment 13</i> | 37 | States parties must closely monitor education - including all relevant policies, institutions, programs, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.   |
| <i>CESCR General Comment 13</i> | 43 | While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" (art. 2 (2)) and the obligation "to take steps" (art. 2 (1)) towards the full realization of article 13. Such steps must be "deliberate, concrete and targeted" towards the full realization of the right to education. |
| <i>CESCR General Comment 13</i> | 44 | The realization of the right to education over time, that is "progressively", should not be interpreted as depriving States parties' obligations of all meaningful content. Progressive realization means that States parties have a specific and continuing obligation "to move as expeditiously and effectively as possible" towards the full realization of article 13.   |
| <i>CESCR General Comment 13</i> | 45 | There is a strong presumption of impermissibility of any retrogressive measures taken in relation to the right to education, as well as other rights enunciated in the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the State party's maximum available resources.  |
| <i>CESCR General Comment 13</i> | 46 | The right to education, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfill. In turn, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide.   |
| <i>CESCR General Comment 13</i> | 47 | The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. The obligation to protect requires States parties to take measures that prevent third parties from interfering with the enjoyment of the right to education. The obligation to fulfill (facilitate) requires States to take positive measures that enable and  |

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|                              |   | assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfill (provide) the right to education. As a general rule, States parties are obliged to fulfill (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant.   |
| <b>CRC General Comment 1</b> |   |  |
| <i>CRC General Comment 1</i> | 1 | Article 29, paragraph 1, of the Convention on the Rights of the Child is of far-reaching importance. The aims of education that it sets out, which have been agreed to by all States parties, promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights. These aims, set out in the five subparagraphs of article 29 (1) are all linked directly to the realization of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities. The aims are: the holistic development of the full potential of the child (29 (1) (a)), including development of respect for human rights (29 (1) (b)), an enhanced sense of identity and affiliation (29 (1) (c)), and his or her socialization and interaction with others (29 (1) (d)) and with the environment (29 (1) (e)).  |
| <i>CRC General Comment 1</i> | 2 | Article 29 (1) not only adds to the right to education recognized in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centered, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates. The education to which every child has a right is one designed to provide the child with life skills, to strengthen the child's capacity to enjoy the full range of human rights and to promote a culture which is infused by appropriate human rights values. The goal is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. "Education" in this context goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society. |
| <i>CRC General Comment 1</i> | 3 | The child's right to education is not only a matter of access (art. 28) but also of content. An education with its contents firmly rooted in the values of article 29 (1) is for every child an indispensable tool for her or his efforts to achieve in the course of her or his life a balanced, human rights-friendly response to the challenges that accompany a period of fundamental change driven by globalization, new technologies and related phenomena. Such challenges include the tensions between, <i>inter alia</i> , the global and the local; the individual and the collective; tradition and modernity; long- and short-term considerations; competition and equality of opportunity; the expansion of knowledge and the capacity to assimilate it; and the spiritual and the material. And yet, in the national and international programs and policies on education that really count the elements embodied in article 29 (1) seem all too often to be either largely missing or present only as a cosmetic afterthought.  |
| <i>CRC General Comment 1</i> | 9 | Third, while article 28 focuses upon the obligations of State parties in relation to the establishment of educational systems and in ensuring access thereto, article 29 (1) underlines the individual and subjective right to a specific quality of education. Consistent with the Convention's emphasis on the importance of acting in the best interests of the child, this article emphasizes the message of child-centered education: that the key goal of  |

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|                                     |               | <p>education is the development of the individual child's personality, talents and abilities, in recognition of the fact that every child has unique characteristics, interests, abilities, and learning needs.<sup>(3)</sup> Thus, the curriculum must be of direct relevance to the child's social, cultural, environmental and economic context and to his or her present and future needs and take full account of the child's evolving capacities; teaching methods should be tailored to the different needs of different children. Education must also be aimed at ensuring that essential life skills are learnt by every child and that no child leaves school without being equipped to face the challenges that he or she can expect to be confronted with in life. Basic skills include not only literacy and numeracy but also life skills such as the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.</p> |
| <i>CRC General Comment 1</i>        | 12            | <p>Fourth, article 29 (1) insists upon a holistic approach to education which ensures that the educational opportunities made available reflect an appropriate balance between promoting the physical, mental, spiritual and emotional aspects of education, the intellectual, social and practical dimensions, and the childhood and lifelong aspects. The overall objective of education is to maximize the child's ability and opportunity to participate fully and responsibly in a free society. It should be emphasized that the type of teaching that is focused primarily on accumulation of knowledge, prompting competition and leading to an excessive burden of work on children, may seriously hamper the harmonious development of the child to the fullest potential of his or her abilities and talents. Education should be child-friendly, inspiring and motivating the individual child. Schools should foster a humane atmosphere and allow children to develop according to their evolving capacities.</p>   |
| <b>Other Constitutions</b>          |               |   |
| <i>United Mexican States Const.</i> | Art. 2 (B) II | <p>B. The Federation, states, and municipalities, to promote equal opportunity for indigenous people and eliminate any discriminatory practice, will establish the institutions and determine the necessary policies to guarantee the rights of indigenous peoples and the complete development of their people and communities. These will be designed and operated together with them.</p> <p>To eliminate the scarcities and leftovers that affect indigenous people and communities, these authorities have the obligation to:...</p> <p>II. Guarantee and increment the levels of education, favoring bilingual and bicultural education, literacy, completion of basic education, vocational training, and mid-superior and superior education. Establish a system of grants for indigenous students at all levels. Define and develop educational programs of regional level that recognize the cultural heritage of their peoples, in agreement with the laws about the matter and in consultation with indigenous communities. Stimulate the respect and knowledge of the diverse cultures that exist in the nation.</p>   |
| <i>United Mexican States Const.</i> | Art. 3        | <p>Every individual has the right to receive education. The State--Federation, States, and Municipalities--will provide preschool, primary, and secondary education. Primary and secondary education are compulsory.</p> <p>The education that the State provides will try to harmoniously develop all the faculties of being human, and will instill in the student at the same time, love of country and awareness of international solidarity, in independence and justice.</p> <p>I. As <a href="#">Article 24</a> guarantees freedom of beliefs, education will be</p>   |

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|  | <p>independent of church beliefs and as such, it will be completely free of any religious doctrine.</p> <p>II. This education will be based on the results of scientific progress and will aid the student in struggling against ignorance and its effects --slavery, fanaticism, and prejudice.</p> <p>a) Furthermore: It shall be democratic, considering democracy not only a judicial structure and a political regimen, but also a system of life based on the constant economic, social, and cultural betterment of the people.</p> <p>b) It will be national without hostile restrictions, ties, or exclusions. It will assist in the understanding of our problems, the use of our resources, the defense of our political independence, the securing of our economic independence, the continuing and growth of our culture and:</p> <p>c) It will contribute to better human life, and at its end, will have instilled in the student appreciation for personal dignity and the integrity of the family, the conviction of general interest in society, and especially in sustaining the ideals of fraternity and equal rights of all people, without the privileges of races, creeds, groups, sexes, or individuals.</p> <p>III. In full compliance with what is specified in the second paragraph and in section II, the Federal Executive will determine the plans and programs of primary, secondary, and post secondary education for all the Republic. To these ends, the Federal Executive will consider the opinions of the governments of federated entities and of the various social sectors involved in education, in the terms that the law specifies.</p> <p>IV. All the education that the State provides will be free of charge.</p> <p>V. Besides providing preschool, primary, and secondary education, the State will promote and assist in all types and means of education, including higher education necessary for the development of the Nation. Education will support scientific and technological research, and advance the strengthening and knowledge of our culture.</p> <p>VI. Individual schools may provide education in all its types and means. In the terms that the law establishes, the State will grant and withdraw official recognition of studies conducted in particular facilities. In the case of primary, secondary, and post-secondary education, the criteria shall be:</p> <p>a) Provide education according to the same ends and criteria that are in the second paragraph and section II, as well as comply with the plans and programs that section III refers to, and;</p> <p>b) Obtain previously, in each case, express authorization of the public power, in the terms that the law establishes.</p> <p>VII. Universities and other institutions of higher education to which the law grants autonomy, will have the power, ability, and responsibility to govern themselves, achieve their ends of education, research, and spreading culture in agreement with the principles of this article, respecting freedom of teaching and research and of free examination and discussion of ideas, will determine their plans and programs, fix the terms of salary, promotion, and tenure of their academic personnel, and administer their own property. Labor relations, of academic as well as administrative personnel, will be conducted according to part A of <a href="#">Article 123</a> of this Constitution, in the terms and with the means that the Federal Labor Law establishes in conformance with the characteristics of special work, in a manner that agrees with autonomy, freedom of teaching, and research, and the ends of the institutions to which this section refers, and;</p> <p>VIII. The Congress of the Union, with the purpose of unifying and coordinating education in all the Republic, will pass the laws needed to allocate the social function of education among the Federation, States, and Municipalities, to set the levels of spending for this public service and to</p> |
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|                                     |               | specify sanctions applicable, to which officials who do not comply or cause to be complied with these laws, as well as to all those who break them.  |
| <i>United Mexican States Const.</i> | Art. 4        | Children have the right to satisfaction of their needs of food, health, education, and healthy play for their whole development.   |
| <i>Philippines Const.</i>           | Art. XIV, § 1 | The State shall protect and promote the right of all citizens to quality education at all levels and shall take appropriate steps to make such education accessible to all.  |
| <i>Philippines Const.</i>           | Art. XIV § 2  | The State shall:<br>(1) Establish, maintain, and support a complete, adequate, and integrated system of education relevant to the needs of the people and society;<br>(2) Establish and maintain a system of free public education in the elementary and high school levels. Without limiting the natural right of parents to rear their children, elementary education is compulsory for all children of school age;<br>(3) Establish and maintain a system of scholarship grants, student loan programs, subsidies, and other incentives which shall be available to deserving students in both public and private schools, especially to the underprivileged;<br>(4) Encourage non-formal, informal, and indigenous learning systems, as well as self-learning, independent, and out-of-school study programs particularly those that respond to community needs; and<br>(5) Provide adult citizens, the disabled, and out-of-school youth with training in civics, vocational efficiency, and other skills.  |
| <i>South African Const.</i>         | §2, Art. 29   | (1) Everyone has the right to a basic education, including adult basic education; and to further education, which the state, through reasonable measures, must make progressively available and accessible.<br>(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account equity; practicability; and the need to redress the results of past racially discriminatory laws and practices.<br>(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that do not discriminate on the basis of race; are registered with the state; and maintain standards that are not inferior to standards at comparable public educational institutions.<br>(4) Subsection (3) does not preclude state subsidies for independent educational institutions. |

## Appendix II: State Constitutional Right to Education

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| <p>ALABAMA<br/>(ARTICLE XIV, Sec. 256)</p> | <p>It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.</p> <p>The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.</p> <p>To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make such election to that end, such election to be effective for such period and to such extent as the legislature may provide. <i>[As amended by Amendment No. 111]</i></p> |
| <p>ALASKA<br/>(ARTICLE VII, Sec. 1)</p>    | <p>The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.</p>   |
| <p>ARIZONA<br/>(ARTICLE XI, Sec. 1)</p>    | <p>Section 1. A. The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include:</p> <ol style="list-style-type: none"> <li>1. Kindergarten schools.</li> <li>2. Common schools.</li> <li>3. High schools.</li> <li>4. Normal schools.</li> <li>5. Industrial schools.</li> <li>6. Universities, which shall include an agricultural college, a school of mines, and such other technical schools as may be essential, until such time as it may be deemed advisable to establish separate state institutions of such character.</li> </ol> <p>B. The legislature shall also enact such laws as shall provide for the education and care of pupils who are hearing and vision impaired.</p>  |
| <p>ARKANSAS<br/>(ARTICLE XIV, Sec. 1)</p>  | <p>Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it. <i>[As amended by Const. Amend. 53.]</i></p>   |
| <p>CALIFORNIA<br/>(ARTICLE IX, Sec. 1)</p> | <p>A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement.</p>  |
| <p>COLORADO</p>                            | <p>The general assembly shall, as soon as practicable, provide for the establishment and</p>   |



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| (ARTICLE IX, Sec. 2)                  | maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously. One or more public schools shall be maintained in each school district within the state, at least three months in each year; any school district failing to have such school shall not be entitled to receive any portion of the school fund for that year.   |
| CONNECTICUT<br>(ARTICLE VIII, Sec. 1) | There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.  |
| DELAWARE<br>(ARTICLE X, Sec. 1)       | The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means.  |
| FLORIDA<br>(ARTICLE IX, Sec. 1)       | <p>(a) The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require. To assure that children attending public schools obtain a high quality education, the legislature shall make adequate provision to ensure that, by the beginning of the 2010 school year, there are a sufficient number of classrooms so that:</p> <p>(1) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for pre-kindergarten through grade 3 does not exceed 18 students;</p> <p>(2) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 4 through 8 does not exceed 22 students; and</p> <p>(3) The maximum number of students who are assigned to each teacher who is teaching in public school classrooms for grades 9 through 12 does not exceed 25 students. The class size requirements of this subsection do not apply to extracurricular classes. Payment of the costs associated with reducing class size to meet these requirements is the responsibility of the state and not of local schools districts. Beginning with the 2003-2004 fiscal year, the legislature shall provide sufficient funds to reduce the average number of students in each classroom by at least two students per year until the maximum number of students per classroom does not exceed the requirements of this subsection.</p> <p>(b) Every four-year old child in Florida shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards. An early childhood development and education program means an organized program designed to address and enhance each child's ability to make age appropriate progress in an appropriate range of settings in the development of language and cognitive capabilities and emotional, social, regulatory and moral capacities through education in basic skills and such other skills as the Legislature may determine to be appropriate.</p> <p>(c) The early childhood education and development programs provided by reason of subparagraph (b) shall be implemented no later than the beginning of the 2005 school year through funds generated in addition to those used for existing education, health, and development programs. Existing education, health, and development programs are those funded by the State as of January 1, 2002 that provided for child or adult education, health care, or development.</p> |
| GEORGIA<br>(ARTICLE                   | The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college  |

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| XIII, Sec. 1)                               | or postsecondary level shall be free and shall be provided for by taxation. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.  |
| HAWAII<br>(ARTICLE X,<br>Sec. 1)            | The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefore. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution, except that proceeds of special purpose revenue bonds authorized or issued under section 12 of Article VII may be appropriated to finance or assist not-for-profit corporations that provide early childhood education and care facilities serving the general public. [Ren and am Const Con 1978 and election Nov 7, 1978; am L 1994, c 280, §4 (HB 2692-94) and election Nov 8, 1994]  |
| IDAHO<br>(ARTICLE IX,<br>Sec. 1)            | The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.   |
| ILLINOIS<br>(ARTICLE X,<br>Sec. 1)          | A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.  |
| INDIANA<br>(ARTICLE<br>XIII, Sec. 1)        | Knowledge and learning, general diffused throughout a community, being essential to the preservation of a free government; it should be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual scientific, and agricultural improvement; and provide, by law, for a general and uniform system of Common Schools, wherein tuition shall without charge, and equally open to all.   |
| IOWA  | No Right to Education.  |
| KANSAS<br>(ARTICLE VI,<br>Sec. 1)           | The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.   |
| KENTUCKY<br>(Sec. 183)                      | The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.   |
| LOUISIANA<br>(ARTICLE<br>VIII, Sec. 1)      | The legislature shall provide for the education of the people of the state and shall establish and maintain a public educational system.  |
| MAINE<br>(ARTICLE<br>VIII, Sec. 1)          | Legislature shall require towns municipalities to support public schools; duty of Legislature.  |
| MARYLAND<br>(ARTICLE<br>XIII, Sec. 1)       | The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.   |
| MASSACHUSETTS<br>(PART 2, Sec.<br>5, Ch. 2) | Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and |

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|   | punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people. [See Amendments, Arts. <a href="#">XVIII</a> , <a href="#">XLVI</a> , <a href="#">XCVI</a> and <a href="#">CIII</a> .]  |
| MICHIGAN<br>(ARTICLE VIII, Sec. 2)      | The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.<br>No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre - elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school. |
| MINNESOTA<br>(ARTICLE XIII, Sec. 1)     | The stability of a republican form of government depending mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state.   |
| MISSISSIPPI<br>(ARTICLE VIII, Sec. 201) | The Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe.  |
| MISSOURI<br>(ARTICLE IX, Sec. 1(a))     | A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law.   |
| MONTANA<br>(ARTICLE X, Sec. 1)          | (1) It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.<br>(2) The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.<br>(3) The legislature shall provide a basic system of free quality public elementary and secondary schools. The legislature may provide such other educational institutions, public libraries, and educational programs as it deems desirable. It shall fund and distribute in an equitable manner to the school districts the state's share of the cost of the basic elementary and secondary school system.   |
| NEBRASKA<br>(ARTICLE VII, Sec. 1)       | No lands now owned or hereafter acquired by the state for educational purposes shall be sold except at public auction under such conditions as the Legislature shall provide. The general management of all lands set apart for educational purposes shall be vested, under the direction of the Legislature, in a board of five members to be known as the Board of Educational Lands and Funds. The members shall be appointed by the Governor, subject to the approval of the Legislature, with such qualifications and for such terms and compensation as the Legislature may provide.   |
| NEVADA<br>(ARTICLE XI, Sec. 2)          | The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction, and the legislature may pass such laws as will tend to secure a general attendance of the children in each school district upon said public schools.  |

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| <p>NEW HAMPSHIRE<br/>(SECTION 2, ARTICLE LXXXIII)</p> | <p>Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools, to encourage private and public institutions, rewards, and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and economy, honesty and punctuality, sincerity, sobriety, and all social affections, and generous sentiments, among the people: Provided, nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools of institutions of any religious sect or denomination. Free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it. The size and functions of all corporations should be so limited and regulated as to prohibit fictitious capitalization and provision should be made for the supervision and government thereof. Therefore, all just power possessed by the state is hereby granted to the general court to enact laws to prevent the operations within the state of all persons and associations, and all trusts and corporations, foreign or domestic, and the officers thereof, who endeavor to raise the price of any article of commerce or to destroy free and fair competition in the trades and industries through combination, conspiracy, monopoly, or any other unfair means; to control and regulate the acts of all such persons, associations, corporations, trusts, and officials doing business within the state; to prevent fictitious capitalization; and to authorize civil and criminal proceedings in respect to all the wrongs herein declared against.</p> |
| <p>NEW JERSEY<br/>(ARTICLE VIII, Sec. 4, 1)</p>       | <p>The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.</p>   |
| <p>NEW MEXICO<br/>(ARTICLE XII, Sec. 1)</p>           |  |
| <p>NEW YORK<br/>(ARTICLE XI, Sec. 1)</p>              | <p>The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.</p>   |
| <p>NORTH CAROLINA<br/>(ARTICLE IX, Sec. 2)</p>        | <p>(1) General and uniform system: term. The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.<br/>(2) Local responsibility. The General Assembly may assign to units of local government such responsibility for the financial support of the free public schools as it may deem appropriate. The governing boards of units of local government with financial responsibility for public education may use local revenues to add to or supplement any public school or post-secondary school program.</p>   |
| <p>NORTH DAKOTA<br/>(ARTICLE VIII, Sec. 1)</p>        | <p>A high degree of intelligence, patriotism, integrity and morality on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people, the legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control. This legislative requirement shall be irrevocable without the consent of the United States and the people of North Dakota.</p>   |
| <p>OHIO<br/>(ARTICLE VI, Sec. 3)</p>                  | <p>Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district</p>   |

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|  | board of education, and provision shall be made by law for the exercise of this power by such school districts.   |
| OKLAHOMA<br>(ARTICLE XIII, Sec. 1)     | The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.   |
| OREGON<br>(ARTICLE VIII, Sec. 3)       | The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools.   |
| PENNSYLVANIA<br>(ARTICLE III, Sec. 14) | The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.   |
| RHODE ISLAND<br>(ARTICLE XII, Sec. 1)  | Duty of general assembly to promote schools and libraries. -- The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advances and opportunities of education and public library services.   |
| SOUTH CAROLINA<br>(ARTICLE XI, Sec. 3) | The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the State and shall establish, organize and support such other public institutions of learning, as may be desirable.  |
| SOUTH DAKOTA<br>(ARTICLE VIII, Sec. 1) | The stability of a republican form of government depending on the morality and intelligence of the people, it shall be the duty of the Legislature to establish and maintain a general and uniform system of public schools wherein tuition shall be without charge, and equally open to all; and to adopt all suitable means to secure to the people the advantages and opportunities of education.  |
| TENNESSEE<br>(ARTICLE XI, Sec. 12)     | The State of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such postsecondary educational institutions, including public institutions of higher learning, as it determines.   |
| TEXAS<br>(ARTICLE VII, Sec. 1)         | A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.  |
| UTAH<br>(ARTICLE X, Sec. 1)            | The Legislature shall provide for the establishment and maintenance of the state's education systems including: (a) a public education system, which shall be open to all children of the state; and (b) a higher education system. Both systems shall be free from sectarian control.  |
| VERMONT<br>(CHAPTER II, Sec. 68)       | Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth. All religious societies, or bodies of people that may be united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates, which they in justice ought to enjoy, under such regulations as the general assembly of this state shall direct. |
| VIRGINIA<br>(ARTICLE VIII, Sec. 1)     | The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.   |
| WASHINGTON<br>(ARTICLE IX,             | It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.  |

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| Sec. 1)                             | The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.   |
| WEST VIRGINIA (ARTICLE XII, Sec. 1) | The Legislature shall provide, by general law, for a thorough and efficient system of free schools.   |
| WISCONSIN (ARTICLE X, Sec. 3)       | The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours. |
| WYOMING (ARTICLE VII, Sec. 1)       | The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.   |



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