The Achievement Gap:

A Fourteenth Amendment Violation?

Amanda Lumnah

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The Problem

In summer of 2010, the director of *An Inconvenient Truth* introduced the next hot topic to the American audience—public education and its failure to live up to its name. Despite the concerns of some, Davis Guggenheim was less concerned with the "public" and more concerned with "education"; embracing charters and traditional public school districts alike, Guggenheim chose to reveal the "drop-out factories" and the system that leads to them in the United States today.

More than fifty years after *Brown v. Board of Education* and the beginning of the civil rights movement, many blacks in America are still at a great disadvantage in society and in schools. Only this time, the discrimination and, perhaps, manufactured disability, is not solely a product of race. Education reformers, experts, and anyone who has sat in a theater for Guggenheim's film will speak of the problems in education in terms of *socioeconomic* factors. Although these are often found to be tied to race, it is important to separate the two from each other. Students in largely African-American-populated schools which perform badly today are there not because of the color of their skin but because of their parents' income.

In examining the achievement gap, there are many different perspectives that should be used. First, gaps among *subgroups*, especially those as defined by the No Child Left Behind Act of 2002, are often analyzed at a national level, comparing English Language Learners (ELLs) from all states with native-born English speakers, also from all states. This perspective is important for identifying groups at particular risk for under-performance. Within states, *school districts* are often analyzed for drastic differences. These are most often found to be along urban/suburban lines, but are sometimes found in accordance with the relative wealth of the districts. Finally, No Child Left Behind has helped reveal achievement gaps *between states*.

None of these "gaps" can be separated from the others, and there are likely several others which can be examined (such as a black-white gap or the boy-girl gap). In reality, they all influence each other but for policy or research purposes one of these may be more important at any given time than others.

Definition: What Does the Achievement Gap Look Like?

To begin an exploration of the achievement gap, let us begin with national trends. Two distinct "gaps" appear when examining public education, particularly when examining urban public education. First, the white-black achievement gap is still highly prevalent. Second, differences in early childhood literacy, which directly impact success later in life, are apparent between socio-economic classes.

The black-white gap is extraordinarily frustrating, as *Brown v. Board of Education* was designed to overcome this barrier. However, on the 2009 National Assessment of Educational Progress, a nationally-administered test which assess all students' knowledge on the same topics (which do not necessarily align with state learning standards):

> [o]nly 12 percent of black fourth-grade boys are proficient in reading, compared with 38 percent of white boys, and only 12 percent of black eighth-grade boys are proficient in math, compared with 44 percent of white boys. Poverty alone does not seem to explain the differences: poor white boys do just as well as African-American boys who do not live in poverty[1].

[1] Gabriel, Trip. "Proficiency of Black Students Is Found to Be Far Lower Than Expected." The New York Times.com. 9 November 2010. 8 December 2010. <http://www.nytimes.com/2010/11/09/education/09gap.html?_r=2&partner=rss&emc=rss>

By establishing that poverty (to be examined next) is not the cause of this gap, the NAEP data reveals that *Brown* has not been fully implemented. More importantly, an entire class of students, of citizens, is not being treated as well as others. And the problem is not limited to African-American students learning *less* than other students; "[i]n high school, African-American boys drop out at nearly twice the rate of white boys[2]. In many cases, this means that African-American students are not learning *at all*.

In addition to a national gap between white and black students, a socioeconomic gap has a national pattern. In the *Windows on Achievement and Inequality* report of 2008, research conducted by Betty Hard and Todd Risley on early childhood education explains the disadvantage children of low-income families have before they even enter the discrimination of the school buildings:

> By age 4, the average child in a professional family in the study heard:
>
> - About 20 million more words than the average child in a working-class family, and
> - About 35 million more words than the average child in a welfare family[3].

With a difference of 35 million words heard in a household, it is not difficult to imagine why students from professional families will speak at a higher level than their peers from families on welfare, nor why they may begin reading both more quickly and more easily. This was clearly identified in the study:

> The lines begin to diverge between children in professional families and the others at around 15 months, when children start to talk. The divergence between children from

[2] Gabriel.
[3] Barton, Paul E., and Richard J. Coley, Windows on Achievement and Inequality, (Educational Testing Service: 2008) 3.

> working-class and welfare families begins after about 22 months. By 36 months, the vocabulary of children in professional families is more than double that of children in welfare families[4].

In addition, "[a]n affirmative tone was slightly more prevalent in professional families… However, in the families on welfare, about 80 percent of parents' feedback was negative"[5].

How much of this difference is a school obligated to correct? In the *Brookings Papers on Education Policy: 1999*, William Galston comments on Jeffrey Mirel's argument and easily summarizes the necessity for quality education. "Educational research converges on the conclusion that the more disadvantaged you are in background, the more schools matter and the more you are damaged by the failure of schools to do their job"[6]. Does the Equal Protection Clause demand that states equally prepare their students for life and jobs as adults?

Some might argue that a right to education does not exist in the Constitution; this is true. However, a basic education is essential for success in life. For those who argue that success is a function of effort, it should be contended that the academic success of our students is essential for the United States to not only remain stable but to continue as a competitive player in the global economy and as a world power. "Even as the United States was struggling with a near 10 percent unemployment rate in the summer of 2010, businesses complained that they could not find workers with needed skills"[7]. Simply put, our education system is either no longer teaching students with the rigor it once imposed, or students are being passed along from grade to grade without adequately learning their material. In his 2000 exposé-style book, *Conspiracy of*

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[4] Barton, 9.
[5] Barton, 8.
[6] Mirel, Jeffrey, Brookings Papers on Education Policy, 57.
[7] Hanushek, Eric A., Paul E. Peterson and Ludger Woessmann. "Teaching Math to the Talented." EducationNext.org. 8 December 2010. <http://educationnext.org/teaching-math-to-the-talented/>.

Ignorance, Martin L. Gross reveals that the "Department of Education has stated: Half the 17-year-olds lack math skills commonly taught… in junior high school'"[8].

But the United States' educational system is not only failing classes of American students—with an international frame of mind, it is failing all of them:

> Without denying that the paucity of high-achieving students within minority populations is a serious issue, let us consider the performance of white students for whom the case of discrimination cannot easily be made. Twenty-four countries have a larger percentage of highly accomplished students than the 8 percent achieving at that level among the U.S. white student population in the Class of 2009[9].

Internationally, several countries are faring better than the United States. National competitions and tests from various which have been compared for similarity of material prove that the US is performing far below other countries. Released on December 9, 2010, the Program for International Student Assessment math test provided the most-recent disheartening data about how American students compare with their international peers:

> [T]he percentage of students in the U.S. Class of 2009 who were highly accomplished in math is well below that of most countries with which the United States generally compares itself. No fewer than 30 of the 56 other countries that participated in the Program for International Student Assessment (PISA) math test, including most of the world's industrialized nations, had a larger percentage of students who scored at the international equivalent of the advanced level on our own National Assessment of

[8] Gross, Martin L, Conspiracy of Ignorance, (Harper Collins, 2000) 19.
[9] Hanushek.

> educational Progress (NAEP) tests… The 30-country list [of countries that out-performed the U.S.] includes virtually all the advanced industrialized nations of the world [10].

Standardized tests in the United States often provide students with the "percentile" at which they perform—the percent of students that the test-take performs *better* than. A student in the 80th-percentile performs better than 80% of his or her peers. To place the PISA results in context, the United States was rated (at best) in place 31 out of 56 and *is currently performing at about the 55th-percentile*. For a country that prides itself on innovation and development, the United States is not producing students capable of producing the technology, materials, and *ideas* that meet our needs. "Maintaining our productivity as a nation depends importantly on developing a highly qualified cadre of scientists, engineers, entrepreneurs, and other professionals. To realize that objective requires a system of schooling that produces students with advanced math and science skills"[11]. However, the United States currently does not provide this to its students: "Each year it is estimated that more than one-half million students graduate from American high schools with only rudimentary academic skills"[12].

There are some bright spots in education. "Despite the high failure rate that will occur under NCLB, Massachusetts schools rank at or near the top on the National Assessment of Educational Progress tests, the SATs, college attendance rates and other measures of achievement"[13]. Then again, to provide some international context, consider this: In a recent study which published the results of the Program for International Student Assessment (PISA), Shanghai stood out among all other cities as having the highest-performing students. But

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[10] Hanushek.
[11] Hanushek.
[12] Lewis, Lionel, "SOCIAL SCIENCE AND THE CITIZEN," Society 41.3 (2004): 2-6.
[13] "Study Predicts High Massachusetts Failure Rate Under NCLB." PR Newswire 23 June 2005 ABI/Inform Dateline, ProQuest. Web. 9 December 2010.

> [i]f Shanghai is a showcase of Chinese educational progress, America's showcase would be Massachusetts, which has routinely scored higher than all other states on America's main federal math test in recent years. But in a 2007 study that correlated the results of that test with the results of an international math exam, Massachusetts students scored behind Singapore, Hong Kong, South Korea, Taiwan, and Japan. Shanghai did not participate in the test[14].

Having established a true national education crisis, it follows that some school districts have more "at risk" students in their population than others. For example, as discussed by the Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) cited a Connecticut study which found lower-class families to be clustered around cities. As presented above, this indicates that students at higher risk for lower literacy rates upon entering school are clustered in urban districts. And increased funding for poorer districts is not necessarily the solution.

> [I]t has been repeatedly shown that on standardized tests, the scores of students are more closely related to their and their classmates' family characteristics than to what is spent on their education. Socioeconomic status, race and religion have been shown to be related to school performance directly, for example, by providing access to resources and indirectly, for example, by providing aspirations.[15]

Student achievement (or lack thereof) *cannot* be blamed on socio-economic background or race, however. Although these are trends in education, it would be wrong to lay the blame on the students. In fact, a study released on summer 2010 proved this very point. Project Star

[14] Dillon, Sam. "Top Test Scores From Shanghai Stun Educators," *New York Times.com* 7 December 2010.
[15] Lewis, Lionel.

"examined the life paths of almost 12,000 children who had been part of a well0known education experiment in the 1980s"[16]. Although the original experiment is not detailed, Project Star intended to determine the effect of quality early childhood teachers on the "life opportunities" (a term often heard from former DC Public Schools Chancellor Rhee) of the same students as adults.

> Students who had learned much more in kindergarten were more likely to go to college than students with otherwise similar backgrounds. Students who learned more were also less likely to become single parents. As adults they were more likely to be saving for retirement. Perhaps most striking, they were earning more. All else equal, they were making about an extra $100 a year at age 27 for ever percentile they had moved up the test-score distribution over the course of kindergarten[17].

To put an economic face on the achievement gap—and the role teachers have to play in overcoming it—"Mr. Chetty and his colleagues—one of whom, Emmanuel Saez, recently won the prize for the top research economist under the age of 40—estimate that a standout kindergarten teacher is worth about $320,0000 a year. That's the present value of the additional money that a full class of students can expect to earn over their careers"[18].

All of these "gaps" can be considered state matters, as the variance is within the state as well as across states. However there is a distinctly national achievement gap—one that could only be a federal concern. This is the gap in achievement between states. Since the passage of No Child Left Behind, several studies have examined the learning standards and state standardized

[16] Leonhardt, David. "The Case for $320,000 Kindergarten Teachers" *The New York Times.com* 27 July 2010.
[17]Leanhardt.
[18] Leanhardt.

tests of the fifty states and the District of Columbia. Learning standards, sometimes referred to as "content standards," are part of:

> "a system of standards [which] consists of two main components: *content standards* and *performance standards*. All states have both sets of standards in place. *Content standards* spell out what all students are expected to learn… *[P]erformance standards* indicate *how well* students are expected to perform… Using a variety of methods, states have set scores on tests that indicate various levels of performance—often "basic", "proficient" and "advanced"—on the standards[19] [emphasis in original].

At Lesley University in 2006, findings of some of these studies were presented at a hearing titled "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB." The overarching conclusion of these studies is that "[d]ifferences in the quality and rigor of states' tests and standards have fueled suggestions that some states have set their expectations low to avoid sanctions under the No Child Left Behind Act (NCLB). These suggestions and various analyses… have confirmed that among the states there are very different levels of expectations for students"[20].

To be fair, the differences in standard rigor between states may well have begun before No Child Left Behind, at least in some states; the studies cited do not consider state tests before NCLB. However, there is no denying that there should be a significant concern about the varied education American children are getting. The state-by-state method of testing students (and defining proficiency) results in very few opportunities to truly compare academic achievement

[19] "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University," *The Aspen Institute* 31 August 2006.
[20] "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University."

nation-wide. The SATs and college acceptance rates allow for some comparison, but these do little to explain how much students learn, especially in elementary education. However, the National Assessment of Educational Progress (NAEP) provides a more concrete, consistent and broader method for analysis. "NAEP is a nationwide assessment sample that is recognized as a key public check on relative student proficiency among the states"[21]. The National Center for Education Statistics, which develops the NAEP, describes the test as follows:

> Since NAEP assessments are administered uniformly using the same sets of test booklets across the nation, NAEP results serve as a common metric for all states and selected urban districts. The assessment stays essentially the same from year to year, with only carefully documented changes. This permits NAEP to provide a clear picture of student academic progress over time[22].

The test is administered to students at the 4th, 8th, and 12th grade levels and is largely the source cited for proficiency rates on a national level because it overcomes the discrepancies between state tests. However, the strength of NAEP also reveals the weaknesses in state benchmarks:

> In many states, 80 to 90 percent of students score at a proficient level of performance on state test. In some of these same states, however, as low as 35 percent of students score at the proficient level or above on NAEP. For example, in Tennessee, 87 percent of fourth graders are proficient on the state test in math, compared with 28 percent proficient on

[21] "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University."
[22] "National Assessment of Educational Progress," *National Center for Educational Statistics*.

> NAEP. In Massachusetts, on the other hand, 40 percent of fourth graders are proficient on the state math test, compared with 41 percent on NAEP[23].

The NAEP is not alone in highlighting differences between state standards. "In its July 2006 brief, the AFT [American Federation of Teachers, the second-largest teachers union in the United States] said that only 11 states met the union's criteria for strong content standards and tests that align with them"[24]. Unfortunately, there is currently little recourse for an individual desiring increased rigor in the state curricula.

Discussion

When the importance of education is considered, it is clear that it is the foundation of any society. As much as been said by political theorists of antiquity and modernity, as well as by the United States Supreme Court. Tackled consistently since 1965 by the executive and legislative branches of the United States government, the judicial branch has also encountered education various times although, true to its role, it has never put forth a policy. However most cases with regards to education (rather than other rights as they apply to individuals within schools) have been decided under the Equal Protection Clause of the Fourteenth Amendment, with one notable exception decided as it related to the Due Process Clause of the Fifth Amendment. The Amendments in question are as follows:

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

[23] "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University."
[24] "State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University."

forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation[25] [emphasis added].

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*[26] [emphasis added].

Why can education be considered an Equal Protection matter? As Supreme Court precedent would come to recognize, although it is not a fundamental right explicitly laid out to persons by the Constitution or Bill of Rights, education is a necessity to be a member of society in the United States. Without an adequate education, work opportunities are unavailable for all but the most menial positions (and in some cases, even these remain unavailable). Additionally, without instruction to develop foundational literacy and mathematics skills, there is little

[25] "Constitution." National Archives.com. 8 December 2010. <http://www.archives.gov/exhibits/charters/constitution.html>.
[26] "Constitution."

potential for a hard-working individual to change his or her circumstances. Certain aspects of life as a member of the United States remain inaccessible to the uneducated.

Aside from domestic concerns and equality, a strong education system remains essential for the United States to compete (economically as well as in matters of self-defense) with its global peers. As outlined above, America currently trails many other countries in compulsory education, indicating that its own citizens are unprepared to develop the policies and technologies necessary to maintain the country's position as world leader.

Supreme Court Precedent

The first significant case relating to public education and race was *Plessy v. Ferguson*. It was this case and its famous "separate but equal" doctrine which was overturned by *Brown v. Board of Education* (1954) and the lesser-known *Bolling v. Sharpe* (1954). The relevant case law continues with *Brown v. Board of Education II* (1955), *San Antonio v. Rodriguez* (1973) addressing school funding, and *Plyler v. Doe* (1982).

Plessy v. Ferguson (1896)

This case reviewed Plessy's challenge to a statute under which "no colored person is permitted to occupy a seat in a coach assigned to white persons, nor any white person to occupy a seat in a coach assigned to colored persons"[27]. At first glance, it has little to do with public education but its "separate but equal" doctrine was the precedent overruled by *Brown v. Board of Education* almost a half-century later. Throughout its rhetoric, the Court through Justice Brown

[27] Justice Harlan. *Plessy v. Ferguson*, No 163 U.S. 537, U.S. Supreme Court, 18 May 1896.

relied upon the constitutionality of separate education for the races as justification for separate public transportation. In considering the Fourteenth Amendment, Justice Brown says:

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color... [W]e think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws within the meaning of the Fourteenth Amendment…Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures[28].

Having established that it is acceptable to keep the races separate in schools, the logic is extended to trains and separate cars. But the special attention shown to and reliance on separation in public education (particularly in Washington, DC) would provide the basis for *Brown v. Board* to overrule *Plessy* fifty years later. "Dissenting in Plessy, Justice John Marshall Harlan stated forthrightly what everyone actually knew: that racial segregation arose not from any mutual, reciprocal, respectful desire for social distance and group autonomy but rather as an expression

[28] Justice Brown, *Plessy v. Ferguson*.

of white supremacist subordination of people of color"[29]. Indeed it was the opening sentence of his dissent which coined the term "separate but equal." Writing eloquently he asserted that:

> In respect of civil rights common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and, under appropriate circumstances, when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper[30].

Looking forward, Harlan accurately predicted *Brown v. Board* in saying "In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott Case*"[31].

Brown v. Board of Education (1954)

Brown v. Board of Education was an historic decision which changed the course of American education-- or so it was intended. A drastic Supreme Court case which demanded public schools to be desegregated under the 14th Amendment, this case promised equal education for all Americans regardless of race. It is important to note that at the time, race was the largest indicator of inequality, and was generally associated with economic status. Black Americans were disadvantaged, and thus more likely poor, because they were black. This is still largely true today, although experts have begun talking about socio-economic status and a "cycle of poverty" as the causes for minority disadvantages, rather than the reverse.

[29] Foner, Eric, and Randall Kennedy, "Brown at 50" Nation 278.17 (2004): 15-17.
[30] Justice Harlan, *Plessy v. Ferguson*.
[31] Justice Harlan, *Plessy v. Ferguson*.

Arriving 50 years after *Plessy*, was a unanimous decision that represented a changed view of the Fourteenth Amendment. Where in *Plessy* Justice Brown would state that "The object of the amendment… could not have been intended to abolish distinctions based upon color"[32], Justice Warren would write for the court in *Brown* that "[t]he most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States'"[33].

Justice Warren also considered in his opinion why the Fourteenth Amendment did not explicitly consider education, but why *it must be considered to implicitly affect schools*:

> An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate… As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education[34].

Having established that education can indeed be considered under the Equal Protection Clause, the court needed to determine "the effect of segregation itself on public education" because there were "findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors"[35]. The Court here wisely acknowledged that while resources are

[32] *Plessy v. Ferguson*.
[33] *Brown v. Board of Education of Topeka*, No 347 U.S. 483, U.S. Supreme Court, 17 May 1954.
[34] *Brown v. Board*.
[35] *Brown v. Board*.

important to education, they are not the sole factor for success. By consider the effect of an intangible factor upon public education, the Court indicates that it is the *results* of education that must be equal in order to meet the requirements of the Equal Protection Clause.

Today, this same argument might be applied not to segregation but to the rigor of curricula, the accuracy of state standardized testing, or the quality of teachers who are responsible for the success of children. Research conducted in recent years indicates that all of these factors have a measurable impact on the opportunities students are prepared to take advantage of upon high school graduation. In a more self-serving fashion, research indicates that these will impact how ready our students are to fulfill needed roles in the American workplace, government, and society.

This relationship was evident even in 1954, as Justice Warren continued on to say:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms[36].

[36] *Brown v. Board of Education*.

Why would education be of more importance in 1954 than in today's high-tech environment? This argument was made before the Cold War, before significant advancements in technology. And yet the importance of education appears to have slipped. With more complex jobs to fulfill, this inverse relationship is puzzling from a policy point of view, and frustrating for high school graduates unable to find jobs, employers unable to find qualified candidates, or even teachers who wish to teach more challenging material to their students, material the children will not be prepared to learn.

In its eloquent opinion, *Brown* would make one more point which should be considered by today's policy-makers and education reformers:

> The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system[37].

Although today the inequities in education are not strictly due to race, there should be no doubt that the same logic applies. In Washington, DC, the differences between a Ballou High School (DC Public School) student and Georgetown Day School or Sidwell Friends student are visible. Examining the school campuses from a street will provide a vastly different view of each, but there is little doubt that public school students know the expansive opportunities available to the private school students that are unavailable to them. This is not a state action, but inequities

[37] *Brown v. Board of Education.*

within school districts or within state boundaries are a result of state action and thus fall into Equal Protection Clause grounds. Still in Washington, DC, the public school district holds lotteries for students to attend the most highly-performing schools; charter schools do the same thing when they have more applicants than slots. When children are competing with each other to attend a school, there is little doubt that the same sense of inferiority indicated in *Brown* is felt by those who do not "win" a slot and are forced to attend a worse school.

Bolling v. Sharpe **(1954)**

Washington, DC is an interesting case in most respects; without designation as a state, it provided a particular difficulty after *Brown v. Board of Education* when it did not fit the Court's ruling due to federal (not state) jurisdiction. However, a companion case to *Brown* provided the District with an opportunity to remain consistent with the rest of the country as well as further the interest of education. Decided on Fifth Amendment grounds, *Bolling* held that:

> (a) … the concepts of equal protection and due process are not mutually exclusive;
>
> (b) Discrimination may be so unjustifiable as to be violative of due process;
>
> (c) Segregation in public education… imposes on Negro children … a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause; and
>
> (d) it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government [38]

together with remanding the case to a lower court. In the court opinion, Justice Warren elaborates on part (c) saying that "[l]iberty under law extends to the full range of conduct which

[38] *Bolling v. Sharpe*, No347 U.S. 497, U.S. Supreme Court, 17 May 1954.

the individual is free to pursue, and it cannot be restricted except for a [p500] proper governmental objective"[39]. It is unclear from *dicta* whether the "liberty" in question is which school a student is free to attend or if this is a more broad "liberty" which might include "life opportunities" after compulsory education has finished. Regardless of the meaning, it is important to note that *Bolling* established that discrimination or lack of opportunity in public education can be so severe as to violate the Due Process Clause. This may not be a sufficient argument to make further progress in educational reform through the courts, but this precedent remains necessary for most progress within the District of Columbia.

***Brown v. Board of Education of Topeka II* (1955)**

After the remarkable progress that appeared to have been made in the original *Brown* case, *Brown II* lent a small defeat to the emerging civil rights movement and equality of education in the United States. Where *Brown v. Board* appeared to expect immediate steps to be taken to desegregate schools, *Brown II* allowed leniency to districts. Writing for the court, Chief Justice Warren said:

> [T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis will all deliberate speed the parties to these cases[40].

The leniency was intended to prevent violence resulting from overly-hasty desegregation but effectively allowed white-controlled school districts and the white-controlled courts they answered to to stall in their actions to desegregate.

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[39] *Bolling v. Sharpe*.
[40] *Brown v. Board of Education of Topeka (II)*, No 349 U.S. 294, U.S. Supreme Court, 31 May 1955.

San Antonio Independent School District v. Rodriguez (1973)

In the first substantive education case since *Brown v. Board*, *San Antonio v. Rodriguez* addressed inequality in education based on state funding. Based on the tax abilities of a school district, the state of Texas contributed monies proportionally to the public elementary and secondary schools in the state. This ultimately resulted in the poorest communities, those with the least tax power, receiving the least financial support from the state. These communities also had less to contribute from their own revenue by nature of being poorer than districts which received more aid.

When challenged at the Supreme Court under the Equal Protection Clause of the Fourteenth Amendment as discrimination against a suspect class, the Court ruled against the appellees, represented in name by Rodriguez. The court reasoned that "poor" is not a narrow enough class to deserve "suspect" classification. The court further remained unconvinced that the community represented by Rodriguez would fit the criteria even if it had: "Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here… Second, lack of personal resources has not occasioned an absolute deprivation of the desired benefit"[41] said Justice Powell, writing for the court. Additionally, and perhaps critically for future cases related to education, the Court determined that education is not a fundamental right guaranteed under the United States Constitution: "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected"[42].

[41] *San Antonio v. Rodriguez*, 411 U.S. 1, U.S. Supreme Court, 21 March 1973.
[42] *San Antonio v. Rodriguez*.

On its face, *San Antonio* provided an opportunity for inequities in education to be addressed by requiring equal funding, which would increase potential for equal opportunities and resources for the students. However, not only did *San Antonio* reject this possibility, it created precedent to remove education from the list of fundamental rights.

Would overruling *San Antonio* be sufficient to close the achievement gap? Some scholars might indicate so. "Studies by economists have shown that had the money spent to equalize educational opportunity over the years instead been given directly to the poor, more opportunity would actually have been created"[43]. In NCLB, an attempt to correct this reality has been made. However, "[e]ven though NCLB requires states to set aside 4 percent of Title I funds to help schools needing improvement, this does not cover the needs of struggling schools"[44]. Even if No Child Left Behind or other funding could help close financial gaps, it is unlikely that overruling *San Antonio* alone could solve the problem. As previously stated, "[I]t has been repeatedly shown that on standardized tests, the scores of students are more closely related to their and their classmates' family characteristics than to what is spent on their education"[45].

Plyler v. Doe **(1982)**

This case addressed the constitutionality of a Texas law which denied public education to undocumented children—to illegal aliens. Although the Court did not stray from its ruling in *San Antonio* that education is not a fundamental right, it took a decidedly different view of the role education plays in American society. This may prove to be a fortuitous change, as it is closer to the original intent of *Brown* than *San Antonio* had been. Writing for the court, Justice Brennan established important and significant new precedent:

[43] Lewis, Lionel.
[44] Lewis, Anne C, "Washington News," Education Digest 73.5 (2008): 71-74
[45] Lewis, Lionel.

> This situation [caused by the Texas law] raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents[46].

In identifying education as a foundational (if not fundamental) characteristic of United States society, Justice Brennan comes closer to an implicit right to education than *San Antonio* allowed. He also establishes that education is necessary to enjoy benefits of being a resident of the United States. Although the holding of the case does not demand equity in education, only *access* to it, examining the *dicta* of *Plyler* provides an argument that can be used to expand the current precedent to benefit all citizens in a more substantial manner.

> [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests…[47]

Using the reasoning provided here, a new plaintiff could contend that there is no, and that there could not be, a substantial government interest in denying a basic education to its citizens. This is one of the important points of *Plyler*; it took educational disparity out of the realm of the rational basis test but withheld it from the scope of strict scrutiny. Applying an intermediate scrutiny places a higher burden on the government; with this precedent established, future plaintiffs will

[46] *Plyler v. Doe*, 457 U.S. 202, U.S. Supreme Court, 15 June 1982.
[47] *Plyler v. Doe*.

find themselves more easily developing a case against discrimination through disparity in education.

Shifting focus, the Court opinion made a clear connection to the Equal Protection Clause and the disparities that were occurring between legal residents and citizens of Texas and undocumented aliens in saying that "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit"[48]. Finally, the Court addressed the most revolutionary concept of its opinion:

> Illiteracy is an enduring disability...the inestimable toll of that deprivation on the social, economic, intellectual, and psychological wellbeing of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. [The Texas law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status[49].

In claiming that illiteracy is a disability, Justice Brennan placed a powerful tool in the hands of would-be education reformers. The Court in *Plyler* recognized the essential role education plays in both the lives of individual and the life of the nation. Additionally, the Court recognized the children being affected by the law to be a discrete subgroup deserving of protection.

Plyler begs the question: Why are we resolved to offer equal educational opportunities to illegal immigrants as their citizen peers, but we do not assure equal educational opportunities for children with their peers in other school districts or, in some cases, other schools? Although the

[48] *Plyler v. Doe*.
[49] *Plyler v. Doe*.

precedent in *Plyler* addresses only undocumented students, the spirit of the precedent includes some bare minimum of education that all people (citizen or not) are entitled to. Admittedly, this is *dicta* from Justice Brennan's opinion, but since 1983 significant advancements have been made in education research. In the last 35 years, studies have focused on the impact of family life, teachers, school buildings and even the race of characters in textbooks on students and their academic achievement. With all of this information indicating that some students are receiving not only poor but *entirely inadequate* educations, it may well be time to expand *Plyler* to encompass a standard education for all children.

Why has this not been done already? The simplest answer is that there is not law requiring different types or differently-rigorous education for different classes of students. A more complex answer is that the "disabled" class, by nature of their particular disability, is less likely to consider the judicial system as a remedy to their ailment. Further, when considering the potential for functionally illiterate students, it is likely that potential plaintiffs would be too embarrassed to pursue judicial action.

Washington, DC as a Case Study

In order to consider the possibility of the achievement gap as a violation of the Equal Protection Clause, expanding upon the precedent established in *Brown* and *Plyler*, a few requirements must be met. First, the Fourteenth Amendment governs the actions of *states* and so state action must be inherent to a claim made under this amendment. Because states set academic standards through superintendents offices, state (government) action is inherent in public education, especially with regards to *rigor*, the aspect most in question. Differences in

educational offerings within have been previously established, so the inequalities in education can be examined under the Fourteenth Amendment as well.

Washington, DC is a unique school district to examine. In 2007 Mayor Adrian Fenty took control of the school system, abolishing the school board and appointing Chancellor Michelle Rhee. Known as one of the worst school systems in the country, the public schools were (and still are) chronically failing. It provides a unique opportunity for potential plaintiffs to be found and encouraged to bring a case before the court. Not only are the schools chronically failing but the achievement gap between African American and white students is still substantial. Schools remain largely—if not entirely—minorities.

> To be sure, today's racial separation is not sanctioned by law. But in terms of racial isolation, the effect is much the same, and with the same consequences. As in the pre-Brown era, we are still trying to bring up to speed predominantly black schools -- often located in poverty-stricken communities -- by spending money on compensatory programs and other catch-up improvements to increase educational opportunities for minority students[50].

The demographics of the schools and *de facto* segregation is just one example of the unrealized promises of *Brown*. An advisory committee report released by Parents United for the DC Public Schools asserts that:

> Simply stated, the promise of *Brown v. Board of Education* and *Bolling v. Sharpe* is that every child will have equal educational opportunities... Most African-Americans in our area live in the District and Prince George's County and attend under-funded, low-

[50] King, Colbert I, "Slow Progress, 50 Years After Brown," The Washington Post 28 February 2010: A21.

> achieving schools. Conversely, most white students live in the suburbs and attend well-funded, high-achieving schools. A half-century after Brown, African-American children attending the schools in and around Washington, D.C. are largely segregated *de facto* and have far more limited educational opportunities than their white counterparts in affluent suburban districts next door[51].

Based on the due process argument made in *Bolling v. Sharpe*, the variance in curriculum rigor across the United States should be considered unconstitutional. A lack of opportunity available due purely to place of birth or residence, and *not* due to parental choice should be considered unacceptable in light of these two cases. However, *San Antonio* established that access to education is the necessary requirement, not equal education. *Plyler* would seem to change this; however the enduring disability argument seems to strike a low baseline for functional literacy rather than requiring *equal* educational opportunities. The most unfortunate thing about current public education systems is that *functional literacy* is beyond the grasp of some of our students.

DC Learns, a literacy coalition in Washington, DC, provides an assessment of the 2009 National Assessment for Adult Literacy (NAAL) as related to the District. According to the National Center for Education Statistics, which conducts the NAAL, adults assessed fit into one of four categories, as defined below

- Below basic indicates no more than the most simple and concrete literacy skills.
- Basic indicates skills necessary to perform simple and everyday literacy activities.
- Intermediate indicates skills necessary to perform moderately challenging literacy activities.

[51] Parents United for the DC Public Schools, "D.C. Public School Funding: Myth & Reality," DC Watch, February 2003.

- Proficient indicates skills necessary to perform more complex and challenging literacy activities[52].

Carefully noting the descriptions of "below basic" and "basic" literacy levels, it is shocking to learn that *19% of the adult population in Washington, DC is rated at "below basic"* according to the NCES[53]. This means that almost 1 in 5 adults in Washington, DC lack the "skills necessary to perform simple and everyday literacy activities"[54]. This is compared to the national adult illiteracy rate of 14%[55]-- another unacceptable statistic, but one which makes Washington, DC look even worse by comparison.

"Below basic" literacy is closely related (although not defined as equivalent by the NCES) to the concept of "functional illiteracy." An article about a similar study conducted by the State Education Agency of Washington, DC defines the term as follows:

> People who are functionally illiterate have some ability to read and write, but not enough to be able to fully function in everyday life. They have difficulty with crucial tasks such as filling out job applications, reading maps, understanding bus schedules, reading newspaper articles, etc[56].

When considered with *Plyler*, this definition confirms the concept of illiteracy as an "enduring disability."

Although one cannot tell how many of these adults may be a product of the public school system, it would be foolish to assume that none of them attended the schools. Although the

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[52] "National Assessment of Adult Literacy," *National Center for Education Statistics*, 12 December 2010.
[53] "Adult Literacy Skills in Washington, DC," *DC Learns.org*, March 2009.
[54] "National Assessment of Adult Literacy."
[55] "Adult Literacy Skills in Washington, DC."
[56] Monten, May, "More Than One-third of Washington DC Residents are Functionally Illiterate" *Yahoo! Contributor Content* 19 March 2007.

NAAL does not correlate adult literacy with student performance at a specific grade level, it would be unwise to assume that "basic literacy", according to the definition provided by the NCES, is equivalent to proficiency at the high school— perhaps even the middle school—levels, and so student drop-out rates should not be considered the sole responsibility for this weakness. Could, then, illiterate adults who graduated from the public school system make a Fourteenth Amendment claim with *Plyler* as precedent? This question will be explored in more detail shortly.

Educational rigor aside, *Brown* and *Bolling* have likely failed in spirit, if not in the letter of the law, on desegregation grounds. The Parents United report continues on to say that "[t]he overwhelming majority of African-American students in District of Columbia public schools attend schools populated almost solely by other African-American students; 78% of African-American students attend schools where African-Americans comprise 90% or more of the student body"[57]. Editorialist Colbert King describes this with: "[s]egregation has found its way back -- if, indeed, it ever left some schools"[58].

"With a few notable exceptions, educational programs in the District of Columbia Public Schools (DCPS) fall woefully short of preparing our children for the challenges they will face as adults in our diverse, highly competitive and increasingly technology-driven global economy"[59]. Like education systems nationwide, Washington, DC is failing to provide its students with the skills *they* need to succeed, and the skills *this country* needs its citizens to have.

[57] Parents United for the DC Public Schools.
[58] King.
[59] Parents United for the DC Public Schools.

Potential Solutions

Non-Judicial Options

There are many proposed solutions to the achievement gap: eliminating teacher tenure, hiring more highly-educated teachers, increasing rigor of learning standards, decreasing rigor of learning standards, eliminating learning standards altogether, eliminating teachers and classes altogether… A personal favorite is the one espoused to former DC Public Schools Chancellor Michelle Rhee by Warren Buffet: "It's easy to solve the problems of public education in America. All you have to do is outlaw private schools and assign every child to public school by lottery"[60]. The list is nothing if not exhaustive, and many of these options have been tried in a charter school, if not in an entire school district. Washington, DC has served as a laboratory for several experiments. Although the public school district has received more than its share of media attention, local charter schools have also been experimenting with different methods. Few of these are practical on a national scale, however.

President Obama's education initiative, Race to the Top, brought attention to one of the few nationally-applicable and potentially practical ways to address the achievement gap: the Common Core standards.

> The Common Core State Standards Initiative is a state-led effort coordinated by the National Governors Association Center for Best Practices (NGA Center) and the Council of Chief State School Officers (CCSSO). The standards were developed in collaboration

[60] Witte, Carolyn, "Confident, But Failing," *The Cornell Daily Sun* 11 November 2010.

> with teachers, school administrators, and experts, to provide a clear and consistent framework to prepare our children for college and the workforce[61].

According to the mission provided above, the Common Core will begin to address some of the most critical issues of the Achievement gap, particularly on the largest scales. Some critics fear that the Common Core might have the same unintentional effect as NCLB—bringing down the performance or expectations of the highest states. However,

> [t]he Standards are designed to build upon the most advanced current thinking about preparing all students for success in college and their careers. This will result in moving even the best state standards to the next level. In fact, since this work began, there has been an explicit agreement that no state would lower its standards[62].

Implemented correctly, the Common Core will increase rigor nation-wide, allowing states to learn from national best practices and increase the proficiency and performance of their students.

Judicial Options

Solutions like the common core are a wonderful start to addressing the achievement gap. However they do not address the larger problems such as unequal resource allocation or school districts who choose not to adopt the standards or school districts that are persistently failing, despite higher expectations. If the achievement gap is an equal protection clause matter, it can be addressed with a constitutional question.

But how to attack the constitutionality of a circumstance? Unfortunately, that is what the achievement gap largely remains today—a circumstance. There is no law requiring states to

[61] *Common Core State Standards Initiative* 2010.
[62] *Common Core State Standards Initiative*.

provide students with differently rigorous or productive educations based on where they live, how much money their parents make, or their race. To reconsider school funding in a case such as *San Antonio* is one route, and certainly appears to allow for discrimination based on a student's geographic location. However this has already been considered by the Supreme Court and rejected as an unconstitutional method of providing education. Additionally, there is little proof that funding makes a significant difference in the quality of education that is provided to children; recall the schools of Washington, DC for a simple confirmation of this.

Fortunately, a 2001 law may provide an answer to this challenge. Unfortunately, great difficulty would arise in trying to gain the preferred outcome. In order to use this law to gain a Supreme Court sanction against the achievement gap in public education on Fourteenth Amendment grounds, the United States' students need a school district willing to challenge the constitutionality of federal law—and they need the school district to lose.

No Child Left Behind

President George W. Bush began in 2001 when he took office to make a very un-Republican-like change in federal policy: he took on public education, a "Democrat issue." A bipartisan bill, the reauthorization of the Elementary and Secondary Schools Act, signed in 2002, became known as "No Child Left Behind (NCLB)." "It is based on the ambitious goal that *ALL* children will be proficient in reading and math by 201 [emphasis in original]"[63]—a goal which will not be met in many places.

> On that day [the day the bill was signed], President Bush said "We owe the children of America a good education. And today begins a new era, a new time in public education in

[63] Missouri Department of Elementary and Secondary Education, "Questions & Answers about No Child Left Behind," *Department of Elementary and Secondary Education*.

> our country. As of this hour, America's schools will be on a new path to reform, and a new path of results… From this day forward, all students will have a better chance to learn, to excel, and to live out their dreams"[64].

"All public schools and districts must make satisfactory improvement each year toward that goal"[65]. For those that do not, NCLB enforces accountability by penalizing schools in various ways, even going so far as to allow school districts to "reconstitute" individual schools. This process allows a school district to "separate" (i.e., fire) all school personnel, regardless of tenure status or union contracts, and re-staff the school with as much new personnel as it pleases.

In Missouri, "[a]ny subgroup that fails to achieve AYP for two consecutive years in the same subject area will be identified by the state as 'needing improvement.' Initially, a school that does not make AYP for two consecutive years must, if possible, offer students the opportunity to transfer to another, higher-performing school within the district"[66].

In a *Frequently Asked Questions* document provided by the Missouri Department of Elementary and Secondary Education, the state provided some clarity on one of the most curious quirks of NCLB:

> **Is it possible for individual schools to not meet AYP goals while the district has been recognized by the state for outstanding performance?**
>
> Yes. This is likely to be one of the most disconcerting aspects of the federal law for teachers, parents and students. Through the MSIP process, the state accredits the school

[64] "No Child Left Behind: Unfulfilled Promises," *Civil Rights Monitor* Summer 2003.
[65] Missouri Department of Elementary and Secondary Education
[66] Missouri Department of Elementary and Secondary Education.

> district as a whole. Individual buildings are evaluated according to the MSIP standards, but they do not receive separate accreditation ratings.
>
> While school districts are accountable for making adequate yearly progress, the focus of NCLB is on individual buildings. The standards of the federal law are extremely high in that every subgroup of students must meet the specified AYP targets. Because of the different criteria used in the state's accreditation system and those required under NCLB, it is quite likely that many school districts will have at least some buildings that do not meet AYP standards with certain groups of students[67].

The four subgroups under unique consideration for meeting AYP are the economically disadvantaged, special education students, English Language Learners (ELLs), and students from major racial/ethnic groups[68]. These "high standards" established by NCLB have been widely criticized, but are (almost) precisely what is needed to create equal protection for all children with regards to education. The true goal to aspire to would include national standards for education, to eliminate achievement gaps among the states. However, establishing a need for equality within a state is a foundational step that NCLB has excelled at. In fact, it is this requirement that could provide an avenue for judicial review.

Although the penalizations have been known to be harsh (one report recommended that "NCLB should be amended so that schools failing to meet educational standards receive technical assistance and support, not just penalties"[69]), NCLB set expectations for schools nationwide for the first time.

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[67] Missouri Department of Elementary and Secondary Education.
[68] "Adequate Yearly Progress," *NCLB Action Briefs*.
[69] "Study Predicts High Massachusetts Failure Rate Under NCLB," *PR Newswire* 23 June 2005.

No Child Left Behind is, like most laws, far from perfect. In conference regarding *San Antonio*, Justice Blackmun considered, "If courts were to mandate 'equality in education,' this would be… 'another step towards big government.' Moreover, Blackmun concluded, in an attempt to achieve equality, there might well be 'a general lowering of educational standards'"[70]. Unfortunately, this has been the case in a few states. In an attempt to ensure proficiency, state standards were lowered rather than rigor of instruction increased. However, now that the legislature has taken the burden of addressing *quality* in education and the consequences have been seen, the potential exists for the Court to address the question of *equality* and potential establish standards for *quality* as well.

Hypothetical Cases

NCLB School District Challenge

One of the mandates of No Child Left Behind is that growth on state standardized tests (known as AYP) must be shown across all subgroups which include minorities and special education students: "Subgroups of students, including low-income, black, Hispanic, special needs students and English language learners, also must meet AYP standards. If they do not, the entire school is deemed to have failed"[71]. It is not unheard of for schools or districts to meet AYP for their total student population but to have one subgroup persistently failing—or, rather, persistently not being adequately instructed. It is a challenge for a school district to learn how to adapt to the needs of these students quickly enough for them to show progress.

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[70] Sracic, Paul A, *San Antonio v. Rodriguez and the pursuit of equal education: the debate over discrimination and school funding*, (University Press of Kansas, 2006) 96.

[71] "Study Predicts High Massachusetts Failure Rate Under NCLB."

In a backwards attempt to address the achievement gap in courts, an advocate would need a school district to challenge the constitutionality of NCLB—particularly its requirements for meeting AYP across all subgroups. If a school or district were willing to challenge the constitutionality of NCLB in the Supreme Court, the Court would have the opportunity to expand the ruling of *Plyler* to all American citizens. In *Plyler*, the Court examined the necessity of providing undocumented children with education and determined that they do have a right to education. The cited reasoning for this decision in *dicta* relied largely on the role literacy has in providing opportunities—academic, professional, and in performing roles in society—to students of all kinds. Unfortunately the Texas law in question only addressed illegal immigrants; No Child Left Behind addresses students regardless of their citizenship.

More realistic, perhaps, would be to challenge the constitutionality of a law which exempted a state from meeting AYP for a specific subgroup. This case would be easier to bring to court as the education reform advocate would need to find someone to represent the position he or she hoped would win, not the reverse. However, laws of this type do not currently exist. As 2014 draws nearer, and the goal of NCLB remains unmet, perhaps state or federal legislation will be drafted to address schools not meeting the requirements; with this may come potential for a court case.

Parental challenge under NCLB for non-compliance for subgroup

"'For most schools, the greatest risk of failing AYP lies with ELA proficiency,' says Cardullo, a professor of biology. 'It is the Socioeconomically Disadvantaged and English Language Learner subgroups within the schools that are most likely going to fail to meet AYP in

California'"[72]. With that in mind, a parent may be able to sue for underperformance in a school under the requirements of No Child Left Behind. Likely a school's underperformance would not be sufficient, because NCLB allows for penalizations; presumably if the school were already being penalized, a parent could not file suit against the school or district for not providing her child with a quality education in compliance with the law. However, if the school were not being penalized, or if the school did not make "safe harbor" (a secondary measure allowing schools to show significant growth that nevertheless does not meet AYP, without penalization) and the parent was not provided with an option to send her child elsewhere (or if there were no other school meeting AYP in the district that would accept the child), perhaps a challenge could be made. NCLB mandates a certain quality of education to be provided to *all* students, and a parent would be able to make a case claiming that this quality was not met.

Military student

The 2010 documentary, *Waiting for Superman*, is a provocative film. Splicing the disheartening and heart-wrenching stories of children growing up in failing school systems without hampered dreams (but decidedly hampered options) with shocking statistics, director Davis Guggenheim includes one fact to scare all parents whose jobs may require that they move: a student failing the state test in Massachusetts can move into Rhode Island and pass the state test for the same grade level without any additional instruction[73]. While on the surface this allows a student to "perform better" in school, what happens if the move were to go in the opposite direction? A student who moves from Rhode Island to Massachusetts could find themselves suddenly struggling when he or she had previously been a very strong student.

[72] "University of California – Riverside; Most elementary schools in California will fail to meet proficiency requirements by 2014" NewsRx Science 19 October 2008: Science Module.
[73] Guggenheim, Davis, *Waiting for Superman*, Film 2010

This becomes a more significant problem when one considers the fate of children of military men and women. Often moving along with their parents' assignments, children in military families might often suffer in acclimating to a new school district. Not only will the new district have new people, places, and rules, but very likely the child could find him- or herself in classes he or she is entirely unprepared for. Or perhaps covering material that the student had previously learned, resulting in a loss of instructional time.

It would be more difficult to make an Equal Protection claim for this student. Likely the argument would need to be made under the Fifth Amendment as the inequity results from lack of federal laws to standardize learning standards. An easier case may be made if a student moved within state boundaries and found him- or herself performing worse academically. However, as tests are administered state-wide, this is unlikely.

Conclusion

Examining education in the United States today is a disheartening process. There can be no denying the insufficient opportunities that many American students have upon graduating from high school, when they persevere through difficult conditions to graduate at all. The spirit of *Brown v. Board of Education*, continuing in *Plyler v. Doe*, is equity in education for all students, regardless of race, citizenship, or other potential factors for discrimination. However, hesitant to infringe on states' rights to act in too progressive a manner, the Supreme Court has refrained from declaring an implicit right to education to be found in the U.S. Constitution.

In 1983, almost forty years ago, the Supreme Court recognized the "enduring disability" conferred upon children without an adequate education in *Plyler v. Doe*. Since that time, significant research has been conducted into the deficiencies of the American educational system

which should be cause for alarm to all who wish a bright future for the United States and its individual citizens. While the holding of *Plyler* does not demand *equity* in education, the spirit to be found in its *dicta* indicates that the goal of education should be equalization of differences. This is undeniably not the result of education today.

With a current drive towards increasing the performance of school districts, it is time for the holding of *Plyler* to be expanded to reflect what the American public has come to know as fact: education today is not serving its function for students or for the country. Without education, many of the rights conferred to citizens by the Bill of Rights remain unexercisable, and the country finds itself without the educated minds it needs to fulfill its functions. The time has come for the Supreme Court to acknowledge the functions of education as inherent to the exercise of civil rights and as implied by the Constitution. And as the Court can only accept those cases presented to it, it is time for a citizen to raise an Equal Protection claim against the educational system he or she must contend with.

"Adequate Yearly Progress." NCLB Action Briefs. 8 December 2010. <http://www.ncpie.org/nclbaction/ayp.html>.

"Adult Literacy Skills in Washington, DC." DC Learns.org. March 2009. 12 December 2010. <http://dclearns.org/files/2010/07/Fact-Sheet-Adult-Literacy1.pdf>.

Barton, Paul E., and Richard J. Coley, Windows on Achievement and Inequality. Educational Testing Service: 2008.

Bolling v. Sharpe. No 347 U.S. 497. U.S. Supreme Court. 17 May 1954. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0497_ZS.html>.

Brown v. Board of Education of Topeka. No 347 U.S. 483. U.S. Supreme Court. 17 May 1954. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0347_0483_ZS.html>.

Brown v. Board of Education of Topeka (II). No 349 U.S. 294. U.S. Supreme Court. 31 May 1955. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0349_0294_ZS.html>.

Common Core State Standards Initiative. 2010. 12 December 2010. <http://www.corestandards.org/>.

"Constitution." National Archives.com. 8 December 2010. <http://www.archives.gov/exhibits/charters/constitution.html>.

Davis, Michelle R. "ACHIEVEMENT GAP." Education Week 26.12 (2006): 15. Academic Search Premier. EBSCO. Web. 16 Nov. 2010.

Dillon, Sam. "Top Test Scores From Shanghai Stun Educators." New York Times.com. 7 December 2010. 8 December 2010. <http://www.nytimes.com/2010/12/07/education/07education.html?_r=3&pagewanted=1&hp>.

Foner, Eric, and Randall Kennedy. "Brown at 50." Nation 278.17 (2004): 15-17. Academic Search Premier. EBSCO. Web. 16 Nov. 2010.

Fritzberg, Gregory J. "No Child Left Behind? Assessing President Bush's Assessment Law." Educational Foundations. 18.3/4 (2004): 7-24. ProQuest Education Journals, ProQuest. Web. 9 Dec. 2010.

Gabriel, Trip. "Proficiency of Black Students Is Found to Be Far Lower Than Expected." The New York Times.com. 9 November 2010. 8 December 2010. <http://www.nytimes.com/2010/11/09/education/09gap.html?_r=2&partner=rss&emc=rss>.

Gross, Martin L. Conspiracy of Ignorance. Harper Collins, 2000.

Hanushek, Eric A., Paul E. Peterson and Ludger Woessmann. "Teaching Math to the Talented." EducationNext.org. 8 December 2010. <http://educationnext.org/teaching-math-to-the-talented/>.

King, Colbert I. "Slow Progress, 50 Years After Brown." The Washington Post 28 February 2010: A21.

Leonhardt, David. "The Case for $320,000 Kindergarten Teachers." The New York Times.com. 27 July 2010. 8 December 2010. <http://www.nytimes.com/2010/07/28/business/economy/28leonhardt.html?_r=2&partner=rss&emc=rss>.

Lewis, Anne C. "Washington News." Education Digest 73.5 (2008): 71-74. Academic Search Premier. EBSCO. Web. 16 Nov. 2010.

Lewis, Lionel. "SOCIAL SCIENCE AND THE CITIZEN." Society 41.3 (2004): 2-6. SPORTDiscus with Full Text. EBSCO. Web. 16 Nov. 2010.

Mirel, Jeffrey. "Urban Public Schools in the Twentieth Century: The View from Detroit." Brookings Papers on Education Policy, 1999.

Missouri Department of Elementary and Secondary Education. "Questions & Answers about No Child Left Behind." Department of Elementary and Secondary Education. 2 August 2006. 8 December 2010. <http://dese.mo.gov/divimprove/nclb/QandA.html>.

Monten, May. "More Than One-third of Washington DC Residents are Functionally Illiterate." Yahoo! Contributor Content. 19 March 2007. 12 December 2010. <http://www.associatedcontent.com/article/183792/more_than_onethird_of_washington_dc.html>.

"National Assessment of Adult Literacy." National Center for Education Statistics. 12 December 2010. <http://nces.ed.gov/naal/perf_levels.asp>.

"No Child Left Behind: Unfulfilled Promises." Civil Rights Monitor. Summer 2003. 8 December 2010. <http://www.civilrights.org/monitor/summer_03/art1p1.html>.

Parents United for the DC Public Schools. "D.C. Public School Funding: Myth & Reality." DC Watch. February 2003. 8 December 2010. <http://www.dcwatch.com/parents/pu030207.htm>.

Plessy v. Ferguson. No 163 U.S. 537. U.S. Supreme Court. 18 May 1896. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0163_0537_ZS.html>.

Plyler v. Doe. 457 U.S. 202. U.S. Supreme Court. 15 June 1982. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0457_0202_ZS.html>.

Rhee, Michelle. "International study finds U.S. students far behind those in other countries." Studentsfirst.org. 8 December 2010. 9 December 2010. <http://www.studentsfirst.org/blog/entry/international-study-finds-u.s.-students-far-behind-those-in-other-countries/#>.

San Antonio v. Rodriguez. 411 U.S. 1. U.S. Supreme Court. 21 March 1973. Web. <http://www.law.cornell.edu/supct/html/historics/USSC_CR_0411_0001_ZS.html>.

Smith, Rend. "The End of Black Men?" WashingtonCityPaper.com. 20 August 2010. 8 December 2010. <http://www.washingtoncitypaper.com/blogs/citydesk/2010/08/20/the-end-of-black-men/>.

Sracic, Paul A. San Antonio v. Rodriguez and the pursuit of equal education: the debate over discrimination and school funding. Kansas: University Press of Kansas, 2006.

Strauss, Valerie. "How to help African-American males in school: Treat them like gifted students." WashingtonPost.com. 22 November 2010. 8 December 2010. <http://voices.washingtonpost.com/answer-sheet/achievement-gap/how-to-help-african-american-m.html>.

"State Standards: Assessing Differences in Quality and Rigor and How They Impact NCLB, A Hearing at Lesley University." The Aspen Institute. 31 August 2006. 8 December 2010. <http://www.aspeninstitute.org/policy-work/no-child-left-behind/reports/state-standards-assessing-differences-qual>.

"Study Predicts High Massachusetts Failure Rate Under NCLB." PR Newswire 23 June 2005 ABI/Inform Dateline, ProQuest. Web. 9 December 2010.

"University of California – Riverside; Most elementary schools in California will fail to meet proficiency requirements by 2014." NewsRx Science. 19 October 2008: Science Module, ProQuest. Web. 9 December 2010.

Washington, Adrienne T. "50 years later, Sousa students still struggling over Brown." The Washington Times 14 May 2004: B02.

Witte, Carolyn. "Confident, But Failing." The Cornell Daily Sun. 11 November 2010. 8 December 2010. <http://www.cornellsun.com/section/opinion/content/2010/11/11/confident-failing>.