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Racial Justice and Equity for African-American Males in the American Educational System: A Dream Forever Deferred

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ARTICLES

RACIAL JUSTICE AND EQUITY FOR AFRICAN-AMERICAN MALES IN THE AMERICAN EDUCATIONAL SYSTEM: A DREAM FOREVER DEFERRED

FLOYD D. WEATHERSPOON*

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I. INTRODUCTION

The plight of African-American males to achieve racial justice and equity in this country continues to deteriorate at an alarming rate. The American justice system has permitted and in some cases sanctioned the marginalization of African-American males as full citizens.¹

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1. See, e.g., *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (holding that the United States Constitution did not grant African-Americans rights equal to those of white citizens); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding state-mandated racial segregation in railroad passenger cars).

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The basis for the denial of racial justice and equity for African-American males is caused, in part, by the intersection of their race and gender (black and male).²

African-American males are disproportionately represented in every aspect of the criminal justice system,³ from being racially profiled,⁴ stopped,⁵ arrested,⁶ prosecuted,⁷ sentenced,⁸ incarcerated,⁹ and

2. See Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 61-72 (1996); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1252, 1258 (1991).

3. See generally Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23 (1994) (detailing the extensive disproportionate treatment received by African-American males in the American criminal justice system); MARC MAUER, *THE CRISIS OF THE YOUNG AFRICAN-AMERICAN MALE AND THE CRIMINAL JUSTICE SYSTEM* (1999), <http://www.sentencingproject.org/pdfs/5022.pdf> (discussing disproportionate suffering of African-American males in the criminal justice context).

4. See, e.g., Floyd D. Weatherspoon, *Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection*, 38 J. MARSHALL L. REV. 439 (2004) (providing examples and analyzing the extent of racial profiling of African-Americans); Erika L. Johnson, "A Menace to Society": *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629 (1995) (providing an analysis of multiple stages of racial profiling); Ann Belser, *Suspect: Black Men Are Subject to Closer Scrutiny from Patrolling Police, and the Result is Often More Fear, Antagonism Between Them*, PITTSBURGH POST GAZETTE, May 5, 1996, at A15; see also *State v. Soto*, 734 A.2d 350, 351 (N.J. Super. Ct. Law Div. 1996).

5. See, e.g., *United States v. Harvey*, 16 F.3d 109, 113-15 (6th Cir. 1994) (Keith, J., dissenting) (admonishing majority for failing to overturn conviction of African-American defendant after officers stopped automobile due to race of occupants); *Murphy v. Reynoldsburg*, 604 N.E.2d 138, 138-39 (Ohio 1992) (describing racial profiling practices of local police).

6. See generally JEROME G. MILLER, *SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM* (1996) (providing a number of reports of how African-American males are disproportionately arrested and incarcerated).

7. See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (denying relief under selective prosecution claim).

8. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE STATISTICAL TABLES NCJ 198822, *STATE COURT SENTENCING OF CONVICTED FELONS, 2000*, at 27 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf00.pdf>. Seventy-five percent of black males who were convicted of a felony (including all offenses such as violent offenses, property offenses, drug offenses and weapon offenses) and sentenced by state courts in 2000 were sentenced to incarceration. *Id.* Sixty-six percent of white males who were convicted of a felony (including all offenses such as violent offenses, property offenses, drug offenses and weapon offenses) and sentenced by state courts in 2000 were sentenced to incarceration. *Id.* Twenty-five percent of black males who were convicted of a felony (including all offenses such as violent offenses, property offenses, drug offenses and weapon offenses) and sentenced by state courts in 2000 were sentenced to probation. *Id.* at 28. Thirty-four percent of white males who were convicted of a felony (including all offenses such as violent offenses, property offenses, drug offenses and weapon offenses) and sentenced by state courts in 2000, were sentenced to probation. *Id.* The mean length of state felony sentences for black males incarcerated for all offenses (including all offenses such as violent offenses, property offenses, drug offenses and weapon offenses) was 41 months as compared to 37 months for white males. *Id.* at 29. When looking only at sentences for violent offenses, the mean sentence length for black males was 81 months, compared to 69 months for white males. *Id.* When looking only at sentences for weapon offenses, the mean sentence length for black males was 29 months, compared to 23 months for white males. *Id.*

placed on death row.¹⁰ Indeed, the overrepresentation of African-American males in the criminal justice system negatively impacts their ability to gain meaningful employment,¹¹ health care,¹² to exercise their ability to vote,¹³ and to obtain a quality education,¹⁴ if any edu-

9. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE SPECIAL REPORT NCJ 197196, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>. About 1 in 3 black males are expected to go to prison during their lifetime, if current incarceration rates remain unchanged. *Id.* In 2001, the chances of going to prison were highest amongst black males (32.2%) and Hispanic males (17.2%) and lowest amongst white males (5.9%). *Id.* Amongst the more than 1.38 million sentenced inmates at year end 2002, an estimated 442,300 were black males between the ages of 20 and 39. *Id.* at 2. At year end 2002, 10.4% of black males age 25-29 were in prison, compared to 2.4% of Hispanic males and 1.2% of white males in the same age group. *Id.* at 1; See also BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ 200248, PRISONERS IN 2002, at 9 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf>. In 2002, out of the total sentenced inmates at year end, 586,700 were black males. *Id.*; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ 203947, PRISON AND JAIL INMATES AT MIDYEAR 2003, at 11 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf>. By midyear 2003, among the more than 2 million offenders incarcerated on June 30, 2003, an estimated 577,300 were black males between the ages of 20 and 39. *Id.* Likewise, by midyear 2003, 12.8% of black males were in prison or jail, compared to 3.7% of Hispanic males and 1.6% of white males. *Id.*

10. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE BULLETIN NCJ 206627, CAPITAL PUNISHMENT, 2003, at 1, 4 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> (reporting that 42% of individuals on death row were black and 56% were white); CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. SUMMER 2005, at 1 (reporting that approximately 42% of individuals on death row are African-Americans). See generally *McCleskey v. Kemp*, 481 U.S. 279 (1987) (discussing reports of disproportionate presence of African-Americans on death row).

11. See, e.g., Frank Akpadock, *The Social and Economic Impacts on the African-American Community of Incarcerated Black Males Between the Ages of 18 and 35, From 1996-2000 in Ohio* DEP'T OF REHAB. AND CORR., OHIO CORRECTIONS RESEARCH COMPENDIUM 141 (Vol. II 2004); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (finding that criminal records present a major barrier to employment, with important implications for racial disparities); Janny Scott, *Nearly Half of Black Men Found Jobless*, N.Y. TIMES, February 28, 2004, at B1; Steven M. Schultz, *Many New York Employers Discriminate Against Minorities, Ex-Offender's*, NEWS@PRINCETON, June 28, 2005, <http://www.cms-edit.princeton.edu/main/news/archive/S11/23/70K64/>.

12. See, e.g., CDC/NCHS, NATIONAL VITAL STATISTICS SYSTEM, DEATHS, PERCENT OF TOTAL DEATHS, AND DEATH RATES FOR THE 15 LEADING CAUSES OF DEATH IN 5-YEAR AGE GROUPS, BY RACE AND SEX: UNITED STATES, 2000, at 78-88 (2002), <http://www.cdc.gov/nchs/data/dus/LCWKI2000> (reporting the causes of death of African-American males); BRIAN D. SMEDLEY, ADRIENNE Y. STITH, & ALAN R. NELSON, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley, Adrienne Y. Stith, & Alan R. Nelson, eds. 2003) (finding that race and ethnicity remain significant predictors of the quality of health care received); David R. Williams, *Social Structure and the Health Status of Black Males*, 1 CHALLENGE: J. RES. ON BLACK MEN 25, 28 (1990).

13. See, e.g., Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, 1998 THE SENTENCING PROJECT 2 ("1.4 million African-American men, or 13 percent of the black adult male population, are disenfranchised, reflecting a rate of disenfranchisement that is seven times the national average. More than one-third (36 percent) of the total disenfranchised population are black men."); see also Ryan S. King & Marc Mauer, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia*, 2004, <http://www.sentencingproject.org/pdfs/atlanta-report.pdf> (finding that one of every eight black males in Georgia is disenfranchised as a result of a felony conviction).

cation at all. At the root of many of these issues is a discriminatory criminal justice system which targets African-American males for punishment. There is a direct correlation between the failure of African-American males to obtain a quality education and their overrepresentation in the criminal justice system.¹⁵ Just as insidious as our criminal justice system, public school systems are warehousing African-American male students for future placement in the criminal justice system. In other words, public school systems indirectly supply the criminal justice system with African-American male students who have dropped out of school or have been suspended or expelled. Further, public school systems have failed to provide an effective, adequate, and non-discriminatory education system, as mandated by *Brown v. Board of Education*.¹⁶ Without a quality education, African-American males are forever relegated to the level of second class citizens in American society.

It was the hope and dream of African-Americans that the Supreme Court decision in *Brown* would have resulted in the end of separate and deplorable schools for African-American students. However, for many African-American students, the failure of *Brown* to ensure quality and equity in education can be seen in every aspect of our public educational system. In particular, African-American male students are disproportionately assigned to the "sports curriculum"¹⁷ or

14. See, e.g., The Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965), amended as Pub. L. No. 105-244, 112 Stat. 1581 (1998), which prohibits federal educational grants and loans to students who have been convicted for the possession or sale of a controlled substance under federal or state law. Because African-American males are disproportionately arrested and charged with drug offenses, they consequently will be negatively impacted by this Act to receive financial assistance to attend college. See also U.S. GOV'T ACCOUNTABILITY OFFICE, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 61 (2005) (finding that racial minorities may be negatively impacted by the provisions of the Higher Educational Act which prohibits federal grants and loans to drug offenders).

15. See Akpadock & Morrison, *supra* note 11, at 44 (reporting that a lack of education contributes to the incarceration of Black males); Candace Chambliss, *The Relationship Between Mass Incarceration and Unequal Education in the United States*, <http://www.fedcrimlaw.com/visitors/PrisonLore/PrisonEducation2.htm> (last visited Feb. 21, 2006); Daniel Asukile Edington, *The Effects of Incarceration on the Achievement Motivation of African American Males*, <http://www-mcnair.Berkeley.edu/97journal/Edington.html> (last visited Nov. 10, 2005); Rosa A. Smith, *Saving Black Boys*, 15 AM. PROSPECT, February 1, 2004, <http://www.prospect.org/print-friendly/print/V15/2/smith-ro.html>; SENTENCING PROJECT, SCHOOL AND PRISONS: FIFTY YEARS AFTER *Brown v. Board of Education* 1-2 (2004), <http://sentencingproject.org/pdfs/brownvboard.pdf>.

16. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954). See generally PETER H. IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION (2002) (detailing the deficiencies in public school education systems remaining since *Brown*).

17. To avoid having a low grade point average which would disqualify athletes from playing basketball and football, they are counseled to take less challenging general education courses. I describe this as the "sports curriculum."

special education classes.¹⁸ For example, starting in kindergarten, African-American males who have above average athletic skills are nourished and developed to play sports through high school. Often, this over-emphasis on sports is at the expense of their education.¹⁹ In addition, African-American males are disproportionately suspended and expelled from school, and are systematically excluded from advanced and college prep classes.²⁰ Moreover, African-American males who are perceived to have educational deficiencies are assigned to special education classes or ignored and passed on through the system. African-American males consistently represent the highest drop-out rates for high school students.²¹ Even though public school systems are well aware of the status of African-American male students, they are ignored, neglected, labeled, stereotyped, and written off as dysfunctional.²²

This article will explore how the failure of *Brown* to ensure quality and meaningful education for African-American male students is the major impetus for racial injustice and inequity that African-American male students endure. Part II of this article describes the initial impact that the *Brown* decision had on ending the segregation of public schools. Part III reveals how public schools have returned to segregated institutions. Part IV explains how the *Brown* decision has failed to ensure equity and quality education for African-American males. This section will also document the present deteriorating status of African-American males in public schools. Lastly, Part V, the conclusion, provides a brief discussion on remedies to enhance the status of African-American males in public educational systems.

18. See generally JAWANZA KUNJUFU, KEEPING BLACK BOYS OUT OF SPECIAL EDUCATION (2005); MICHAEL PORTER, KILL THEM BEFORE THEY GROW: THE MISDIAGNOSIS OF AFRICAN-AMERICAN BOYS IN AMERICA'S CLASSROOMS (1998); Robert Cooper & Will Jordan, *Cultural Issues in Comprehensive School Reform*, in EDUCATING AFRICAN AMERICAN MALES, 8-10 (Olatukunbo S. Fashola ed. 2005). The deficit model which incorporates the belief that African-American males are mentally deficient has resulted in "African-American boys' being disproportionately mislabeled as mentally retarded, assigned to special education classes, and frequently identified as discipline problems." *Id.* at 8.

19. JOHN HOBERMAN, DARWIN'S ATHLETES: HOW SPORT HAS DAMAGED BLACK AMERICA AND PRESERVED THE MYTH OF RACE 8 (1997).

20. See A.M. Garibaldi, *Educating and Motivating African American Males to Succeed*, 61 J. NEGRO EDUC. 4-11 (1992) (finding that African-American males' education statistics consistently reveal that Black male students cluster to the bottom of the distribution of virtually every indicator of school failure, such as dropouts, absenteeism, suspension, expulsion, and lower standardized test scores); Will J. Jordan & Robert Cooper, *High School Reform and Black Male Students: Limits and Possibilities of Policy and Practice*, 3 URBAN EDUC. 16-21 (2003).

21. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STATUS AND TRENDS IN THE EDUCATION OF BLACKS 38 (2003), available at <http://nces.ed.gov/pubs2003/2003034.pdf> [hereinafter STATUS AND TRENDS].

22. Throughout this article, numerous governmental reports and studies completed by school districts find that African-American male students are failing in public schools; yet, year after year, the deficiencies are reported with little progress being reported.

In this article, I have not attempted to set forth an exhaustive list of remedies and strategies to enhancing the status of African-American males in public schools. Instead, I only briefly cite a few possible remedies. It is hoped that this article will engender further dialogue and research on enhancing the status of African-American males in public schools.

II. IMPACT OF *BROWN* ON THE DESEGREGATION OF PUBLIC SCHOOLS

In 1954, the United States Supreme Court issued one of the most, if not vitally important, civil rights decisions in the history of the country.²³ This came in the seminal decision of *Brown v. Board of Education*.²⁴ *Brown*, which overruled *Plessy v. Ferguson*,²⁵ invalidated the legal doctrine of separate but equal. For more than 50 years, the decision in *Plessy* upheld the legality of separate but equal educational systems. According to *Plessy*, it was legal to educate African-American and white students separately in different facilities. However, the court in *Brown* held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."²⁶

The *Brown* decision has had an enormous impact on the education of all students, especially minorities.²⁷ The *Brown* decision also has had a tremendous impact on ending segregation in public transporta-

23. For a series of articles on the litigation leading up to the *Brown* decision and the various strategies to desegregate schools, see Wendell LaGrand, *Brown at 50*, 90 A.B.A. J. 38 (2004); Derek W. Black, *Beyond Brown: It's Impact Upon American Education and Culture*, NAT'L BAR ASS'N MAGAZINE, March/April 2004, at 14.

24. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (requiring implementation of *Brown I*). Prior to *Brown I* and *Brown II*, the Supreme Court rendered decisions in a number of school desegregation cases but none specifically addressed the issue of separate but equal. See, e.g., *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

25. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

26. *Brown*, 347 U.S. at 495.

27. In *NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1367-68 (M.D. Ga. 2004), *aff'd in part and rev'd in part* 425 F. 3d 1325 (11th Cir. 2005), *reh'g denied* No. 04-11063, 2005 U.S. App. LEXIS 29469 (11th Cir. Ga. Nov. 25, 2005), the court stated that "[m]uch progress has been made. Legislatures no longer codify racial segregation in the statute books. Governors do not stand in school house doors. Black and white children share desks, teachers, and water fountains." See generally Finesse G. Couch, *Not Just Another Brown Analysis: A Call for Public Education Reform*, 20 N.C. CENT. L.J. 143 (1992) (highlighting the impact of *Brown* on public education); Paul Finkelman, *The Radicalism of Brown*, 66 U. PITT. L. REV. 35 (2004) (discussing the impact of *Brown* to end *de jure* discrimination).

tion,²⁸ accommodations,²⁹ and recreation and park facilities.³⁰ Indeed, the legal principles set forth in the *Brown* decision, transcends from educational law to other substantive laws.³¹

In many school districts, especially in the South, the *Brown* decision was successful in ending *de jure* segregation.³² Unfortunately though, the *Brown* decision failed to be a catalyst for ending institutionalized racism. Racism has plagued African-American students, especially African-American male students who were often bused into predominantly white and hostile educational environments for the sake of desegregation.³³ African-American students experienced more hostility as school districts attempted to desegregate public schools.³⁴ As school districts return to segregated schools, African-American male students find themselves in school environments similar to the legal segregation scheme in *Plessy*. The only difference between pre-*Brown* and post-*Brown* is that the discrimination is not blatant but hidden in policies and practices that create a hostile learning environment.

The *Brown* decision established the importance of education and the responsibility of state and local governments to provide a quality

28. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (striking down bus segregation); *Flemming v. South Carolina Elec. & Gas Co.*, 239 F.2d 277 (4th Cir. 1956) (invalidating bus segregation policies).

29. See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971); *Turner v. City of Memphis*, 369 U.S. 350 (1962); *Dawson v. Mayor of Baltimore City*, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1955); *McCain v. Davis*, 217 F. Supp. 661 (E.D. La. 1963).

30. See, e.g., *Muir v. Louisville Park Theatrical Ass'n*, 202 F.2d 275 (6th Cir. 1953).

31. See generally Kevin H. Smith, *The Jurisprudential Impact of Brown v. Board of Education*, 81 N.D. L. REV. 115 (2005) (noting that the *Brown* decision has impacted legal jurisprudence in prison rights cases, the death penalty, and voting rights); Elias Garcia, *A Latino Perspective: The Impact of Brown v. Board of Education*, 3 BROWN QUARTERLY, No. 2 Fall 1999, available at <http://brownvboard.org/brwnqurt/03-2/03-2b.htm> (describing how *Brown* impacted bilingual education programs).

32. See Dennis D. Parker, *Are Reports of Brown's Demise Exaggerated?: Perspectives of a School Desegregation Litigator*, 49 N.Y.L. SCH. L. REV. 1069 (2004/2005).

33. The Supreme Court, in *Swann v. Charlotte-Meckleburg Bd. of Educ.*, 402 U.S. 1 (1971), permitted mandatory busing as a remedy to end *de jure* segregation. *Id.* at 29-32. African-American students were disproportionately bused outside their neighborhoods. *Id.* at 6-9. Twenty years after *Swan*, African-American parents began to seriously doubt the benefits of busing African-American students for purposes of integration. See Robin D. Barnes, *Black America and School Choice: Charting A New Course*, 106 YALE L.J. 2375 (1997); Drew S. Days, III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992); Robert Anthony Watts, *Shattered Dreams and Nagging Doubts: The Declining Support Among Black Parents for School Desegregation*, 42 EMORY L.J. 891 (1993).

34. See, e.g., *Little Rock Sch. Dist. v. Armstrong*, 359 F.3d 957 (8th Cir. 2004); *Cooper v. Aaron*, 358 U.S. 1 (1958); Tony A. Freyer, *Enforcing Brown in the Little Rock Crisis*, 6 J. APP. PRAC. & PROCESS 67 (2004) (discussing the effects of desegregation in Little Rock public schools and the tension and clashes between races); Mary L. Dudziak, *Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997); Jaime Malamud Goti, *State Terror and Memory of What?*, 21 U. ARK. LITTLE ROCK L. REV. 107 (1998).

education to all its citizens, including minorities. Specifically, the court stated:

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.³⁵

Ironically, Chief Justice Warren's statement still remains the primary issue in public schools today. It is clear from the wealth of educational data that state and local school districts have failed miserably to provide equal opportunities to minority students, especially African-American males.³⁶ Even more compelling today, African-American children will find it difficult to "succeed in life" without an adequate education. For African-American males, it is more than a doubt, but a reality, that the American education system has failed to place them on a path which leads to the fulfillment of the American dream. Instead, African-American males are disproportionately expelled, segregated in a segregated educational system, and pushed along a path of despair and failure.

III. RE-SEGREGATION OF PUBLIC SCHOOLS: A RETURN TO *PLESSY*

It was Martin Luther King's dream that white and black students would be educated in an integrated environment.³⁷ The National Association for the Advancement of Colored People (NAACP) vigor-

35. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954). See generally William E. Thro, *An Essay: The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 EDUC. L. REP. 477 (2005) (arguing that a lack of adequate funding by states impacts the status of African-Americans).

36. See, e.g., *NAACP v. Duval County Sch. Bd.*, 273 F.3d 960 (11th Cir. 2001). The court stated that many poor children are still waiting on the promise of *Brown*—a promise of education and opportunities for every American. Regrettably, as some of the evidence in this case demonstrates, this promise has not been fulfilled for many children who find themselves trapped in an educational system that cannot meet their needs. *Id.* at 970.

37. Martin Luther King, Jr., *March on Washington for Jobs and Freedom: I have a Dream* (Aug. 28, 1963) in Martin Luther King, Jr., *The Autobiography of Martin Luther King, Jr.*, 223-27 (Clayborne Carson, ed., Warner Books 1998).

ously pursued this dream through litigation.³⁸ Fifty years later, minorities and the economically disadvantaged are segregated into the poorest schools in the country where school resources and funding are limited.³⁹

School districts across the country are rapidly re-segregating.⁴⁰ The dream that Dr. Martin Luther King, Jr., so eloquently spoke of has never been truly realized. Indeed, fifty years after the *Brown* decision, African-Americans have awakened to a nightmare of *de facto* segregation and isolation.⁴¹

We celebrate the 50th anniversary of *Brown*, but it is as much about its history than its present day effect on public education.⁴² As a result of the *Brown* decision, public schools, especially in the South, ini-

38. See, e.g., *NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340 (M.D. Ga. 2004), *aff'd in part and rev'd in part* 425 F. 3d 1325 (11th Cir. 2005), *reh'g denied* No. 04-11063, 2005 U.S. App. LEXIS 29469 (11th Cir. Ga. Nov. 25, 2005) (summarizing federal litigation to end the segregation of schools).

39. See, e.g., *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993); *Campaign for Fiscal Equity v. New York*, 719 N.Y.S.2d 475 (N.Y. 2001), *rev'd* 295 A.D.2d 1 (N.Y. App. Div. 1st Dep't 2002), *aff'd and modified* 801 N.E.2d 326 (2003); *Abbeville Co. Sch. Dist. v. South Carolina*, 515 S.E.2d 535 (S.C. 1999) (holding that the education clause of the state constitution requires the legislature to provide children with a minimally adequate education); *DeRolph v. Ohio*, 677 N.E.2d 733, 737 (Ohio 1997) (holding the current funding legislation "fails to provide a thorough and efficient system of common schools, in violation of Section 2, Article VI of the Ohio Constitution"); Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging The Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953 (1998); Amy J. Schmitz, Note, *Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Urban Schools*, 78 MINN. L. REV. 1639 (1994).

40. See, e.g., John Logan, Lewis Mumford Center for Comparative Urban and Regional Research, University at Albany, *Resegregation in American Public Schools?: Not in the 1990s* (Apr. 26, 2004), <http://mumford.albany.edu/census/noresegregation/noresegregation01.htm> (crediting resegregation trends to broader changes in national demographic shifts); ERICA FRANKENBERG & CHUNGMEI LEE, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (Civil Rights Project, Harvard University 2002), available at http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf; see also *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (stating "[a]s to public education, data for the years 2001-2001 show that 71.6% of African-American children and 76.3% of Hispanic children attended a school in which minorities made up a majority of the student body").

41. See GARY ORFIELD AND CHUNGMEI LEE, *Brown at 50: King's Dream or plessy's Nightmare 4-7* (Civil Rights Project, Harvard University 2004) (citing Martin Luther King, Jr., National Committee for Rural Schools: Desegregation and the Future (Dec. 15, 1956)), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

42. Michael J. Klarman, *50 Years of Brown v. Board of Education: Essay: Brown at 50*, 90 VA. L. REV. 1613 (2004) (providing a historical analysis of *Brown*). See also Black *supra* note 23 (offering varying interpretations of *Brown's* effect); Couch, *supra* note 27 (finding that most school systems must engage in major education reform to meet the needs of all students); Ernest Green, Gary Orfield & Drew Days, John F. Kennedy Presidential Library Forum: 50th Anniversary of *Brown v. Board of Education* (May 17, 2004) (transcript available at <http://www.jfklibrary.org/NR/rdonlyres/DDEC7552-CB54-41C6-B65F-3BF928E8AD4E/28241/BrownvBoardofEducation51704.pdf>); See generally RICHARD KLUGER, SIMPLE JUSTICE, THE HISTORY OF *Brown v. Board of Education* and Black America's struggle for Equality (Alfred A. Knopf 2004) (1975); Hillary Rodham Clinton, *Brown at Fifty: Fulfilling the Promise*, 23 YALE L. & POL'Y REV. 213 (2005).

tially began to desegregate schools. However, the success of *Brown* was short-lived. To avoid integrating their children with African-Americans, white parents moved out of school districts⁴³ or sent their children to private schools.⁴⁴ The Supreme Court's decision in *Milliken v. Bradley*,⁴⁵ which restricted the use of busing to desegregate the Detroit School system by implementing an inter-district remedy, for all practical purposes, ended efforts by school districts to desegregate public school systems.⁴⁶ In theory, separate but equal is now illegal, but in practice, public schools are largely separate and unequal.⁴⁷

During the past decades, federal courts have slowly but consistently dissolved the federal desegregation plans which had some initial success in desegregating public schools. Indeed, many school districts have asked federal courts to terminate their consent orders to desegregate public schools and to return control of public schools totally or partially⁴⁸ back to local school boards. School boards have primarily

43. See, e.g., *Davis v. Sch. Dist. of Pontiac*, 95 F. Supp. 2d 688 (E.D. Mich. 2000) (discussing how the population demographics changed after the court ordered busing to integrate schools); *Moss v. Columbus Bd. of Educ.*, No. 2:00-CV-855, 2002 U.S. Dist. LEXIS 19604 (S.D. Ohio Aug. 16, 2002), *aff'd* 98 Fed. App'x. 393, (2004) (unpublished) (discussing how the school board's action resulted in "white flight" to the suburbs); Roslyn Arlin Mickelson, *Subverting Swann: First and Second - Generation Segregation in Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001); Patrick Bayer, Robert McMillan & Kim Reuben, *Residential Segregation in General Equilibrium* (Yale Univ. Economic Growth Center, Paper No. 885, 2004), available at http://www.econ.yale.edu/growth_pdf/cdp885.pdf.

44. See, e.g., Sean F. Reardon & John T. Yun, *Do Southern Schools Face Rapid Resegregation?: Integrating Neighborhoods, Segregating Schools: The Retreat From School Desegregation in the South, 1999-2000*, 81 N.C. L. REV. 1563 (2003) (discussing in detail the trends in "white flight to private schools").

45. *Milliken v. Bradley*, 433 U.S. 267 (1977).

46. *Id.* at 288-91; see also *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978); Grover G. Han-kins, *The Constitutional Implications of Residential Segregation and School Segregation - To Boldly Go Where Few Courts Have Gone*, 30 How. L.J. 773, 781-82 (1987).

47. See generally DERRICK BELL, *SILENT COVENANTS, Brown v. Board of Education and the Unfulfilled Hopes For Racial Reform* (Oxford University Press 2004) (providing evidence of perpetual discrimination in public schools); CHARLES J. OGLETREE, JR., *ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF Brown v. Board of Education* (W.W. Norton & Co. 2004) (discussing problems existing since the announcement of *Brown*).

48. See *NAACP v. Duval County Sch.*, 273 F.3d 960, 974 (11th Cir. 2001). The court held that after 41 years of litigation involving desegregation, the School Board had made substantial improvements; therefore the Court affirmed that the school district had "achieved unitary status." *Id.* at 967. Even though there was and still is disparity in minorities being disciplined, placement in advanced classes, and exclusion from extracurricular activities, the court, nevertheless, granted the school districts request to affirm the grant of partial unitary status, because they were acting in good faith. See *Little Rock Sch. Dist.*, 359 F.3d at 965-70. The court granted the School Board's request to dissolve the remedial decree. See *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073, 1077-78 (7th Cir. 2001). The court stated that "it is obvious that other factors besides discrimination contribute to unequal educational attainment, such as poverty, parents' educations and employment, family size, parental attitudes and behavior, prenatal, neonatal, and child health care, peer-group pressures, and ethnic culture." *Id.* at 1076. The school board was granted a motion to declare the school system partially unitary "in the areas of special programs, extracurricular activities, dropout intervention, and majority-to-minority trans-

relied on the Supreme Court decision in *Board of Education v. Dowell*,⁴⁹ which established the “good faith” standard to determine whether a school district has moved from *de jure* segregation to a unitary system.⁵⁰ The ending of court-ordered and supervised desegregation plans, for all practical purposes, sanctions the legitimacy of segregated schools, so long as the school board is acting in “good faith.”⁵¹ In particular, states such as California, New York, Michigan, and Illinois represent the “most segregated states for [African-American] students.”⁵² However, many school districts in these states have asked the courts to end court ordered monitors of school districts.

This is not to suggest that control of schools should never be returned to local school boards who maintained *de facto* segregated school systems. The Supreme Court in *Freeman v. Pitts*⁵³ stated that “local autonomy of school districts is a vital national tradition.”⁵⁴ The concern, however, is that federal courts seem eager to return local control of schools out of frustration and defeat. Even where there may be vestiges of disparity lurking within the system, federal courts nevertheless readily relinquish control.⁵⁵

School districts that attempt to achieve racial integration by using racial classification must meet the strict scrutiny test.⁵⁶ In *McFarland v. Jefferson County Public Schools*,⁵⁷ the school board was partially successful in meeting this strict scrutiny test by using the Supreme Court’s decision in *Grutter v. Bollinger*,⁵⁸ which upheld

fers.” See *Lee v. Autauga County Bd. of Educ.*, No. 2:70cv3098-T, 2004 U.S. Dist. LEXIS 14571, at *26 (M.D. Ala. July 30, 2004).

49. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

50. *Id.* at 248-50.

51. *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (citing *Dayton Bd. of Educ. v. Brinkman (Dayton I)*, 433 U.S. 406, 410 (1977)).

52. ORFIELD & LEE, *supra* note 41, at 27 (ranking the most segregated states for African-American students in 2001-2002). See generally PAUL R. DIMOND, *BEYOND BUSING: INSIDE THE CHALLENGE TO URBAN SEGREGATION* (1985) (discussing the resistance by school boards in the North to desegregate public schools); Paul R. Dimond, *School Segregation in the North: There Is but One Constitution*, 7 HARV. C.R.-C.L. L. REV. 1 (1972) (discussing intricacies of late school segregation cases).

53. *Freeman*, 503 U.S. 467.

54. *Id.* at 490 (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977)); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

55. See, e.g., *NAACP v. Duval County Sch. Bd.*, 273 F.3d 960 (11th Cir. 2001); *Lee v. Butler County Bd. of Educ.*, 183 F. Supp.2d 1359 (M.D. Ala. 2002); *Lee v. Opelika City Bd. of Educ.*, No. 70-T-853-E, 2002 U.S. Dist. LEXIS 2513 (M.D. Ala. 2002).

56. See, e.g., *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989) (applying standard to minority contracting statutes); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (applying standard to provision providing protection to minorities from employment layoffs); *Washington v. Davis*, 426 U.S. 229 (1976) (applying standard to discriminatory testing procedures for police employment).

57. *McFarland v. Jefferson County Pub. Sch.*, 330 F. Supp.2d 834 (W.D. Ky. 2004), *aff’d*, 416 F.3d 513 (6th Cir. 2005).

58. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

race-conscious admission policies in university admission programs.⁵⁹ The school board was successful because their 2001 plan met the strict scrutiny test.⁶⁰ To comply with *Grutter*, the school board “define[d] with precision the interest being asserted”⁶¹ in order to validate its use of race as an admission factor.⁶² The Jefferson County Public Schools stated the following interest:

To give all students the benefits of an education in a racially integrated school and to maintain community commitment to the entire school system precisely express the Board’s own vision of Brown’s promise. The benefits the JCPS hopes to achieve go to the heart of its education mission: (1) a better academic education for all students; (2) better appreciation of our political and cultural heritage for all students; (3) more competitive and attractive public schools; and (4) broader community support for all JCPS schools.⁶³

The school board’s plan supports the principles in *Brown*; however, most school districts have given up on using race as a factor to integrate public schools.⁶⁴ Consequently, public schools are more segregated now than in the 1970s and 1980s.⁶⁵ Often segregated schools lack funding and educational resources, have poor facilities, offer less advanced courses and employ teachers with less skill and teaching experience. Even where minorities are attending desegregated schools, they are often humiliated by being placed in segregated classes designated for low academic achievers. Minorities and African-American males in particular, in desegregated schools, are also isolated and invisible to their white peers and teachers.⁶⁶ It is now time for school districts and state education officials to take meaningful steps to effec-

59. *Id.* at 343; *McFarland*, 330 F. Supp.2d at 864; *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 426 F.3d 1162 (9th Cir. Wash. 2005) *cert. granted*, 126 S. Ct. 2351 (2006) (holding racial integration tiebreaker provision in open-choice assignment plan permissible); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738 (2d Cir. 2000) (holding that the reduction of racial isolation is a compelling interest justifying racial classification); *Parent Ass’n of Andrew Jackson High Sch. v. Ambach*, 598 F.2d 705 (2d Cir. 1979) (holding that the state has a compelling interest in the integration of schools); *Comfort v. Lynn Sch. Comm.*, 283 F. Supp.2d 328 (D. Mass. 2003) (upholding a Massachusetts desegregation and racial balancing plan) *remanded* 2004 U.S. App. LEXIS 21791 (1st Cir. Mass., Oct. 20, 2004), *aff’d*, 2005 U.S. App. LEXIS 11755 (1st Cir. Mass., June 16, 2005).

60. *McFarland*, 330 F. Supp. 2d at 861-62.

61. *Grutter*, 539 U.S. at 354 (Thomas, J., dissenting).

62. *McFarland*, 330 F. Supp. 2d at 856-62.

63. *Id.* at 850 n.29.

64. *See, e.g.,* *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120 (D. Mass. 1998), *rev’d*, *Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998).

65. GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION 2-3* (2001), *available at* http://www.civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf.

66. Fredreka Schouten, *Minorities, Poor Are Still Receiving Inferior Education*, GANNETT NEWS SERVICE, May 14, 2003, <http://azbilingualed.org/AABE%20Site/AABE%20NEWS%202003/minorities.htm>.

tuate the decision in *Brown*, or at least renew efforts to enhance the quality of education for minorities, especially African-American males.

IV. THE FAILURE OF *BROWN* TO ENSURE EQUITY AND QUALITY EDUCATION FOR AFRICAN-AMERICAN MALES

Fifty years after *Brown*, the status of African-American males in public schools has only improved marginally; indeed, in some cases it has deteriorated. African-American male students are stereotyped as deviant, hostile, and oppositional.⁶⁷ African-American male students are disproportionately labeled hyperactive and as special needs students.⁶⁸ By the fourth grade, African-American males are on dysfunctional tracks to fail in public schools.⁶⁹ In elementary schools, African-American male students are systematically isolated and segregated within the school.⁷⁰ The isolation and marginalization of African-American males may be a motivating factor for the large numbers of African-American males who drop out of school and even commit suicide.⁷¹

There is evidence that African-American male students may have different learning styles,⁷² motivators, and cultural differences which may conflict with the traditional method of teaching and educational models.⁷³ Clearly, there is a major need in reforming our educational

67. See YOUNG, BLACK, AND MALE IN AMERICA: AN ENDANGERED SPECIES (Jewelle Taylor Gibbs et al. eds., 1988); TRANSITION IN THE LIFE COURSE OF AFRICAN-AMERICAN MALES: ISSUES IN SCHOOLING, ADULTHOOD, FATHERHOOD, AND FAMILIES (Vivian Gadsden & William Trent eds., 1995), available at <http://www.ncoff.gse.upenn.edu/wrkppr/af-am.pdf>.

68. SUSAN FRAZIER-KOUASSI, RACE AND GENDER AT THE CROSSROADS: AFRICAN-AMERICAN FEMALES IN SCHOOL 152-154 (2002), <http://www.rcgd.isr.umich.edu/prba/perspectives/springsummer2002/frazier.pdf> (citing a number of studies on the schooling of African-American male students and how they are labeled and tracked).

69. See generally JAWANZA KUNJUFU, DEVELOPING POSITIVE SELF-IMAGES AND DISCIPLINE IN BLACK CHILDREN (2nd ed. 2000); Celeste Fremon & Stephaine Renfrow Hamilton, *Are Schools Failing Black Boys?*, <http://www.terry.uga.edu/~dawndba/4500FailingBlkBoys.html> (last visited Sept 21, 2006) (finding that boys and girls are performing at about the same level until third grade. "Then African-American boys start to fall off as they move on through school.").

70. Lionel Brown, *America's Black Male: Disadvantaged from Birth to Death*, 3 PERSPECTIVES ON URBAN EDUC., at 3-5, available at <http://www.urbanedjournal.org/notes/notes0016.pdf> (discussing the educational challenges of African-American male students from their formative years to middle school).

71. Michael Ibrahim, *African-American Male Suicides*, 6 RESIDENT'S J., Mar.-Apr. 2002, available at <http://www.wethepeoplemedia.org/Articles/MichaelIbrahim/Suicides.html>. The suicide rate for African-American male students between the ages of 10-19 years has more than doubled from 1981-1998. *Id.*

72. See JAWANZA KUNJUFU, COUNTERING THE CONSPIRACY TO DESTROY BLACK BOYS, VOL. 2 14, 31-41 (1986) (arguing that African-American males have different cognitive learning styles).

73. See Marlene Carter, *Helping African American Males Reach Their Academic Potential*, in GOING PUBLIC WITH OUR TEACHING: AN ANTHOLOGY OF PRACTICE 189, 199 (Thomas Hatch et al. eds., 2005) (encouraging the use of more active learning opportunities for African-

system to meet the needs of all students, specifically the various subgroups, which include African-American males.⁷⁴

In addition, economic disparity may further frustrate and isolate black male students who are not only placed in predominately white middle-class environments,⁷⁵ but even predominately black educational environments which rely totally on a European model of teaching.⁷⁶ It is not to suggest that African-American males have not made a significant accomplishment in education since *Brown*, but just the opposite.⁷⁷ What is clear is that their accomplishments lag substantially behind the educational accomplishments of other groups. Indeed, African-American males' academic progression in public schools has leveled off, if not remained stagnate. Statistical educational data supports the fact that the graduation rates for African-American males are in crisis. African-American male students are missing in the statistical data that represents success and academic achievements.⁷⁸ African-American males are normally listed among the most negative educational statistical data collected and reported. The following troubling educational statistics on African-American male graduation rates, dropout rates, suspension and expulsion rates, placement in special education classes, low test scores, and lack of placement in advance placement classes illustrate their underclass status in public schools.

American males as a technique to enhance their achievements); Michael John Weber, Note, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1103-1109 (1993) (citing two studies that support the argument that an Afrocentric curriculum better serves the educational needs of African-American children as opposed to the traditional Eurocentric approach currently used in public schools); See generally Asa G. Hilliard, III, *Behavioral Style, Culture, and Teaching and Learning*, 61 J. NEGRO EDUC. 379 (1992) (arguing that African-American children have a different behavioral style from white children, and instructional planning should be adjusted to account for that difference).

74. See, e.g., Will J. Jordan & Robert Cooper, *High School Reform and Black Male Students, Limits and Possibilities of Policy and Practice*, 3 URB. EDUC. 196 (2003).

75. See, e.g., Jacqueline E. King, *Gender Equity in Higher Education: Are Male Students at a Disadvantage?* (Am. Council on Educ. 2000), available at http://www.acenet.edu/bookstore/pdf/2000_gender_equity.pdf (indicating that the socio-economic status of African-American males also negatively impacts their achievements in education).

76. See Sonia R. Jarvis, Essay, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1292 (1992); see generally Dorothy Gilliam, *Afrocentric Education Would Benefit All*, WASH. POST, Nov. 19, 1990, at B3.

77. See generally Susan Williams McElroy & Leon T. Andrews, Jr., *The Black Male and the U.S. Economy*, 569 ANNALS OF THE AM. ACAD. OF POLITICAL AND SOC. SCI. 160 (2000) (finding that black males have made significant accomplishments in education, professionalism, occupations, and economic opportunities).

78. See generally DARIA HALL, *GETTING HONEST ABOUT GRAD RATES: HOW STATES PLAY THE NUMBERS AND STUDENTS LOSE* (2005), available at <http://www2.edtrust.org/NR/rdonlyres/C5A6974D-6C04-4FB1-A9FC-05938CB0744D/0/GettingHonest.pdf#search=%22Getting%20Honest%20about%20grad%20rates%22> (finding that the graduation rates reported by states may be lower than suggested).

A. *Graduation Rates*

The overall graduation rate of African-American students is deplorable. For example, the national graduation rate in 1998 for white students was 78%, whereas African-American students' graduation rate was 56%.⁷⁹ In 2001, the national graduation rate for African-American males was 56.2%, which is a minimal increase from the percentage three years prior.⁸⁰ In some school districts, the graduation rate for African-American males is substantially less than the national rate.

In virtually every state, regardless of which part of the country, African-American males' graduation rate is disproportionately lower than whites. Interestingly, the graduation rate of African-American males is lower in the Northeast than in the South.⁸¹ With the long history of racial segregation in the South, the thought would be that their graduation rate would be lower than in any other region of the country.

Recent reports by The Schott Foundation for Public Education⁸² and the Urban Institute's Education Policy Center,⁸³ vividly reveal the disparity between the graduation rates of African-American males and white students. Similar to other studies, both studies report that on a national level African-American males graduated at a rate of 45%, while the graduation rate for white males was 70%.⁸⁴ When one reviews the graduation rates of African-American males in each state, the disparity is startling. For example, African-American males in

79. JAY P. GREENE, MANHATTAN INST., HIGH SCHOOL GRADUATION RATES IN THE UNITED STATES 3 (2002), http://www.manhattan-institute.org/pdf/cr_baeo.pdf; see also GARY ORFIELD ET AL., LOSING OUR FUTURE: HOW MINORITY YOUTH ARE BEING LEFT BEHIND BY THE GRADUATION RATE CRISIS (rev. ed. 2004), available at <http://www.civilrightsproject.harvard.edu/research/dropouts/LosingOurFuture.pdf> (indicating that in 2001, only 50.2% of all black students graduated from high school).

80. See sources cited *infra* note 84.

81. See CHRISTOPHER B. SWANSON, WHO GRADUATES? WHO DOESN'T?: A STATISTICAL PORTRAIT OF PUBLIC HIGH SCHOOL GRADUATION, CLASS OF 2001 40-41 (URBAN INST. EDUC. POLICY CTR. 2004) [hereinafter URBAN INST.], available at http://www.urban.org/UploadedPDF/410934_WhoGraduates.pdf (finding that in 2001, the graduation rate for African-American males in the Northeast was 35.7% and 44.4% in the South); see also REBECCA DAUGHTERY & JOAN LORD, GETTING SERIOUS ABOUT HIGH SCHOOL GRADUATION 8 (S. REG'L EDUC. BD. 2005) available at www.sreb.org/main/Goals/Publications/05E06-Graduation.pdf (reporting that the graduation rate for African-American males in the south in 2001 was 43%).

82. MICHAEL HOLZMAN, PUBLIC EDUCATIONS AND BLACK MALE STUDENTS: THE 2006 STATE REPORT CARD (SCHOTT FOUND., 2006) [hereinafter SCHOTT STUDY], available at http://www.schottfoundation.org/publications/Schott_06_report_final.pdf.

83. URBAN INST., *supra* note 81, at 22-23.

84. URBAN INST., *supra* note 81, at 38 (reporting a 2001 study); SCHOTT STUDY, *supra* note 82, at 2 (reporting a 2003/2004 study).

states such as Nebraska,⁸⁵ North Carolina,⁸⁶ Ohio,⁸⁷ Illinois,⁸⁸ Michigan,⁸⁹ Indiana,⁹⁰ Iowa,⁹¹ Minnesota,⁹² Florida,⁹³ Pennsylvania,⁹⁴ Georgia,⁹⁵ and New York⁹⁶ have a graduation rate of less than 55%.

85. SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2003/2004 cohort for African-American males in Nebraska was 49%; whereas the graduation rate for white males was 85%).

86. *Id.* (reporting that the graduate rate for the Class of 2003/2004 for African-American Males in North Carolina was 47%; whereas the graduation rate for white males was 65%).

87. *Id.* (reporting that the graduation rate for the class of 2003/2004 for African-American males in Ohio was 45%; whereas the graduation rate for white males was 75%).

88. *Id.* (reporting that the graduation rate for the class of 2003/2004 for African-American males in Illinois was 44%; whereas the graduation rate for white males was 84%); *see also The State of Black Men*, CHI. REP., Apr. 2000, available at <http://www.chicagoreporter.com/2000/042000/042000%20Graphics%20The%20State%20of%20Black%20Men.htm>, (reporting 2/3 of African-American male students who entered high school did not graduate within five years).

89. SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2001 for African-American males in Michigan was 39%; whereas the graduation rate for white males was 73%).

90. *Id.* (reporting that the graduation rate for the class of 2003/2004 for African-American males in Indiana was 38%; whereas the graduation rate for white males was 71%); URBAN INST., *supra* note 81, at 57 (reporting that the graduation rate for the class of 2001 for African-American males in Indiana was 40.7%; whereas the graduation rate for white students was 70.7%. The graduation rate in Indianapolis Public Schools was similar to the State's overall statistics. The graduation rate for African-American male students is approximately 35%); *see also* Editorial, *Educational Genocide*, IND. STAR, May 18, 2005, at 10A; Editorial, *Dropout Factories*, IND. STAR, May 16, 2005, at 8A.

91. SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2003/2004 for African-American males in Iowa was 54%; whereas the graduation rate for white males was 83%).

92. *Id.* (reporting that the graduation rate for the class of 2003/2004 for African-American males in Minnesota was 54%; whereas the graduation rate for white males was 85%).

93. URBAN INST., *supra* note 81, at 52 (reporting that the graduation rate for the class of 2001 for African-American males in Florida was 34.9%; whereas the graduation rate for white students was 57.9%); SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2003/2004 for African-American males in Florida was 31%; whereas the graduation rate for white males was 54%).

94. SCHOTT STUDY, *supra* note 82, at 6 (reporting that the estimated graduation rate for the class of 2003/2004 for African-American males in Pennsylvania was 50%; whereas the graduation rate for white males was 84%).

95. URBAN INST., *supra* note 81, at 53 (reporting that the graduation rate for the class of 2001 for African-American males in Georgia was 36.7%; whereas the graduation rate for white male students was 58.5%). In 2001, African-American males comprised 14.7% of the graduating students in Georgia. *Id.* African-American males that were represented in the graduating class, were granted degrees designated as: Vocational Diploma (19.1%); Special Education Diploma (37.2%); Certificates of Performance (NOT a diploma) (25.9%). *Id.*; SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2003/2004 for African-American males in Georgia was 39%; whereas the graduation rate for white males was 54%).

96. URBAN INST., *supra* note 81, at 75 (reporting that in New York, only 29.6% of African-American males graduated from high school in 2001; whereas the white male graduation rate was 71.2%); SCHOTT STUDY, *supra* note 82, at 2 (reporting that the graduation rate for the class of 2003/2004 for African-American males in New York was 38%; whereas the graduation rate for white males was 76%).

African-American males are in lower grades than white students based on their age.⁹⁷ In addition, African-American males are more likely to repeat grades than white males.⁹⁸ These factors may impact African-American male student desire to remain in school and graduate. Moreover, African-American males rarely graduate valedictorians of their high school class; nor are they recognized for scholastic achievements.⁹⁹

The failure of public schools to educate African-American males, starting in elementary school, may ultimately impact their high school graduation rate. Their negative educational experience in turn affects their employment abilities. Surprisingly, many school districts do not collect statistical data on various sub-groups, e.g. African-American males, thus making it difficult to track and verify racial and gender graduation disparities in the school system.¹⁰⁰ Consequently, the graduation rates and progress of African-American males in public schools may be worse than what is presently reported.

B. Dropout Rates

The dropout rate has marginally decreased for African-American males during the past 20 years; however, dropout rates of African-American males still remain high in comparison with white students.¹⁰¹ The dropout rate of African-American male students in high school is disproportionately higher than other groups of students. In some school districts the dropout rate for African-American males is higher than 50%¹⁰² and has reached an endemic problem facing Afri-

97. STATUS AND TRENDS, *supra* note 21, at 38 (reporting that “[I]n 1999, 18 percent of Black students in kindergarten through 12th grade had ever repeated at least one grade. This retention rate is higher than the 13 percent of Hispanic students and the 9 percent of White students who had ever repeated a grade”).

98. *Id.*; NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., THE EDUCATIONAL PROGRESS OF BLACK STUDENTS at 6 (1995), available at <http://nces.ed.gov/pubs95/95765.pdf>.

99. In an interesting case in Waynesboro, Virginia, an African-American male high school senior made history when he was selected as the class valedictorian. After the announcement, a white parent questioned the selection and the principal changed the process from how it had traditionally been done and selected a white student. Justin Bergman, *Valedictorian Debate Sparks Outrage*, WASHINGTON TIMES, July 16, 2004, available at <http://www.washingtontimes.com/metro/20040715-104806-1189r.htm>.

100. See generally REBECCA GORDON, LIBERO DELLA PIANA, & TERRY KELEHER, ERASE, FACING THE CONSEQUENCES: AN EXAMINATION OF RACIAL DISCRIMINATION IN U.S. PUBLIC SCHOOLS (2000) (recommending that “school districts should be required to keep and publish key statistics, by age, sex, and race” and issue an annual Racial Equity Report).

101. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL HIGH SCHOOL DROPOUT RATES BY SEX, RACE, GRADE, AND HISPANIC ORIGIN: OCTOBER 1967-2004, at Table A-4 (reporting that the dropout rate for African-American males in grades 10-12 in 2002 was 5.1% and was 9.7% in 1967).

102. DURHAM YOUTH COORDINATING BD., THE STATE OF DURHAM’S CHILDREN 2000, at 7 (2000) (estimating that “about one in two African-American males . . . drop out of school before earning their high school diploma”); Editorial, *Township Black Male Dropout Rates Are Unac-*

can-American male students. According to the U.S. Census Bureau, in 2000 the dropout rate for African-Americans aged 14-24 years was 15.3%¹⁰³ whereas the dropout rate for whites the same age was 12.2%.¹⁰⁴ Practically every state reports that African-American students, particularly African-American males, disproportionately drop out of school.¹⁰⁵

There is no one reason why African-American males drop out of high school.¹⁰⁶ Clearly, among the reasons has to be a curriculum that fails to motivate and stimulate African-American males in a way that they appreciate the immediate benefits of an education.¹⁰⁷

The strict enforcement of school policies on zero tolerance for various infractions¹⁰⁸ has a direct correlation to African-American male students being expelled and/or suspended, which may encourage them to drop out of school permanently.¹⁰⁹ Even more disheartening is that

ceptably High, IND. STAR, July 17, 2005 (finding that the graduation rate in four high schools in "Marion County township districts are . . . dropout factories-graduating less than 50 percent of black males"); News Release, State of Wis. Dep't of Pub. Instruction (Feb. 24, 2003) (reporting that African American males have the highest dropout rate of any subgroup).

103. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, THE POPULATION 14-24 YEARS OLD BY HIGH SCHOOL GRADUATE STATUS, COLLEGE ENROLLMENT, ATTAINMENT, SEX, RACE, AND HISPANIC ORIGIN 1967-2002 (2005).

104. *Id.* at A-38; see also Phillip Kaufman, Martha Naomi Alt & Christopher D. Chapman, U.S. DEP'T OF EDUC., NAT'L CTR OF EDUC. STATISTICS, DROPOUT RATES IN THE UNITED STATES: 2000, at iii (2001).

105. See SCHOTT STUDY, *supra* note 82; URBAN INST., *supra* note 81.

106. See Antoine M. Garibaldi, *Improving the Educational Achievement of African American Males in the Third Millennium*, in 1 THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE IN THE INNER CITIES 59 (1999); Sylvia T. Johnson & Michael B. Wallace, *Assessment and the Educational Progress of African American Males*, in 1 THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE IN THE INNER CITIES, *supra*, at 80; Carolyn Talbert-Johnson, *Continuing the Dialogue: The Overrepresentation of African American Males in Special Education*, in 1 THE CRISIS OF THE YOUNG AFRICAN AMERICAN MALE IN THE INNER CITIES, *supra*, at 70; see also James L. Morrison, *Why the Disadvantaged Drop Out: The Administrator's View*, 7 C. STUDENT J. 54, 54-56 (1973).

107. See Kristen F. Benson, *Constructing Academic Inadequacy: African-American Athlete's Stories of Schooling*, 71 J. HIGHER EDUC. 223, 223-246 (2000) (finding that some research indicates that African-American athletes may do poorly in school because of "the way schools are structured to maintain prevailing social and economic order"). See generally TEX. EDUC. AGENCY, SECONDARY SCHOOL COMPLETIONS AND DROPOUTS IN TEXAS PUBLIC SCHOOLS 2000-01 (2002).

108. See, *eg.*, Gun Free Schools Act of 1994, 20 U.S.C. § 8921(b) (1994) (repealed 2002); DAVID RICHART, KIM BROOKS & MARK SOLER, BUILDING BLOCKS FOR YOUTH, UNINTENDED CONSEQUENCES: THE IMPACT OF "ZERO TOLERANCE" AND OTHER EXCLUSIONARY POLICIES ON KENTUCKY STUDENTS 27 (2003) (finding that African-American students are disproportionately suspended in comparison to white students).

109. V. Costenbader & S. Markson, *School Suspension: A Study with Secondary School Students*, 36 J. SCH. PSYCHOL. 59, 60-61 (1998); Sybil Fix, *Dropouts Tied to Suspensions*, POST & COURIER, Apr. 30, 2000, at A12, available at <http://www.Charleston.net/news/education/drop0430.htm>; internet; see also RUSSELL SKIBA & M. KAREGA RAUSCH, CTR. FOR EVALUATION AND EDUC. POL'Y, THE RELATIONSHIP BETWEEN ACHIEVEMENT AND RACE: AN ANALYSIS OF FACTORS PREDICTING ISTEP SCORES 2-3 (2004).

some studies have suggested that the dropout rates of students have a correlation to incarceration rates.¹¹⁰

The absence of African-American male teachers to inspire, motivate, and encourage African-American male students to remain in school may also have a negative impact on their desire to stay in school and graduate. Too often, the one or two African-American male teachers also serve as coaches and are primarily focused on the upcoming sport season, not the academic success of African-American males. Other African-American male teachers have simulated into the white culture, thus there is a disconnect between them and young urban African-American male students.¹¹¹ With no support from home, school, or community, African-American male students may drop out and seek acceptance among other African-American male dropouts. The long term effect will be lower wages, longer periods of unemployment, underemployment, and positions without benefits or pensions.¹¹²

C. *Disproportionate Suspensions and Expulsions*

Numerous educational studies and school district records support the conclusion that minority students in public schools throughout the country are disproportionately suspended and expelled from school.¹¹³ Even long before high school, African-American males are

110. See, e.g., VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL'Y INST., CELL BLOCK OR CLASSROOMS? THE FUNDING OF HIGHER EDUCATION AND ITS IMPACT ON AFRICAN AMERICAN MEN 8-9 (2002); BRUCE WESTERN, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUST. POL'Y INST., EDUCATION AND INCARCERATION 6 (2003) (finding that "in 1999, an astonishing 52% of African-American male high school dropouts had prison records by their early thirties"); see also CAROLINE WOLF HARLOW, U.S. DEPARTMENT OF JUST., EDUCATIONAL AND CORRECTIONAL POPULATIONS (2003), available at www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf (finding that a large percent of state inmates did not graduate from high school).

111. COOPER & JORDAN, *supra* note 18, at 11 (finding that black male teachers are normally middle class, thus may not in all situations be successful in teaching black males where there are major social class differences).

112. ANDREW SUM ET. AL, ALTERNATIVE SCHS. NETWORK, TRENDS IN BLACK MALE JOBLESSNESS AND YEAR-ROUND IDLENESS: AN EMPLOYMENT CRISIS IGNORED 26 (2004); see also JOINT CTR. FOR POL. & ECON. STUDIES, HIGH SCHOOL DROPOUT (1999), <http://www.jointcenter.org/DB/factsheet/highsch.html> (reporting that from 1988 to 1977, sixteen to twenty-four year old black men were more than twice as likely as young white men to be both out of school and out of work); U.S. CENSUS BUREAU, THE BLACK POPULATION IN THE UNITED STATES: MARCH 1997 (1998) available at <http://www.census.gov/prod/3/98pubs/p20-508.pdf> (highlighting unemployment rate of African-Americans and the impact of education on their earnings).

113. See RUSSELL J. SKIBA, ROBERT S. MICHAEL & ABRA CARROLL NARDO, IND. EDUC. POL'Y CTR., THE COLOR OF DISCIPLINE, SOURCES OF RACIAL AND GENDER DISPROPORTIONATELY IN SCHOOL PUNISHMENT (2000) (citing a number of studies on disproportionality in school punishment); see also Costenbader & Markson, *supra* note 109, at 62; Joe D. Nichols, William G. Ludwin & Peter Iadicola, *A Darker Gray: A Year-End Analysis of Discipline and Suspension Data*, 34 EQUITY & EXCELLENCE EDUC. 43 (1999).

disproportionately suspended from pre-school and kindergarten.¹¹⁴ This trend continues throughout the African-American males' educational experience. A study by the National Center for Education Statistics reported that "[i]n 1999, 35 percent of Black students in grades 7 through 12 had been suspended or expelled at some point in their school careers, higher than the 20 percent of Hispanics and 15 percent of Whites."¹¹⁵

Not only are African-American males disproportionately suspended, often their suspensions are more severe than those of other students.¹¹⁶ The *Brown* decision eliminated *de jure* segregation and forced schools to desegregate, but *Brown* failed to protect African-American males from disproportionate suspension in predominantly white schools.¹¹⁷

When school districts report suspension and expulsion by subgroups, African-American males will be among the highest group suspended and expelled.¹¹⁸ For example, African-American males represent more than 20% of students expelled and 23% suspended, even though they represent less than 9% of students in high school.¹¹⁹ Even more telling is a review of specific cities and states. In the school year 1997-1998, African-American males made up 45% of the long-term suspensions in North Carolina schools even though they only represented 16% of state enrollment.¹²⁰ Moreover, the expulsion rate of African-American males in North Carolina was 52%.¹²¹

114. WALTER S. GILLIAM, YALE UNIV. CHILD STUDY CTR., PRE-KINDERGARTNERS LEFT BEHIND: EXPULSION RATES IN STATE PRE-KINDERGARTEN SYSTEMS 6 (2005) (finding that "boys were expelled at a rate over four and a half times that of girls. The increased likelihood of boys to be expelled over girls was similar across all ethnicities, except for African-Americans, where boys accounted for 91.4% of the expulsions").

115. STATUS AND TRENDS, *supra* note 21, at 38.

116. John Newsom, *Suspension Rates Higher Among Minority Students: A Statewide Report Shows Black Males Are Nearly Three Times More Likely to be Suspended for at Least 10 days*, NEWS & RECORD (Greensboro, NC), Jan. 5, 2001, at A1; STATE BD. OF EDUC./DEPT. OF PUB. INSTRUCTION, *Annual Study of Suspensions and Expulsions: 2000-2001*, at 13 (finding that in North Carolina Public Schools "Black/Multi-racial males represented approximately 16% of the overall student population in 2000-2001. However, they accounted for 41% of the long-term suspensions given during that same year"); N.C. JUST. AND CMTY. DEV. CTR., EXPOSING THE GAP: WHY MINORITY STUDENTS ARE BEING LEFT BEHIND IN NORTH CAROLINA'S EDUCATIONAL SYSTEM (2000) [hereinafter EXPOSING THE GAP], available at http://www.ncjustice.org/media/library/67_gapstudy.pdf.

117. See, e.g., Maurice C. Taylor & Gerald A. Foster, *Bad Boys and School Suspensions: Public Policy Implications for Black Males*, 56 SOC. INQUIRY 498 (1986).

118. James Earl Davis & Will J. Jordan, *The Effects of School Context, Structure, and Experiences on African American Males in Middle and High Schools*, 63 J. NEGRO EDUC., at 570-87 (1994).

119. Smith, *supra* note 15.

120. See generally EXPOSING THE GAP, *supra* note 116 (reporting that African-American male students disproportionately receive long-term suspensions in North Carolina).

121. *Id.* at 10.

Whether the school district is located in the South,¹²² North,¹²³ or West,¹²⁴ African-American male students will be at the top of the statistical data for school suspensions and expulsions. The disproportionate rate of suspensions and expulsions of African-American males may violate state constitutional provisions, which often require a fundamental right to an education.¹²⁵ Such practices may also violate Title VI of the Civil Rights Act of 1964.¹²⁶ There is no definitive study which explains why African-American males are disproportionately suspended and expelled from school; however, in *Hawkins v. Coleman*,¹²⁷ the court determined that African-American students were disproportionately suspended because of “institutional racism.”¹²⁸ Although, in *Hoots v. Pennsylvania*,¹²⁹ the federal court released the school district from judicial supervision in the area of discipline, even though African-American students were disproportionately disciplined.¹³⁰

Unfortunately, school districts still intentionally or unintentionally rely on discriminatory factors in administering disciplinary actions. There are a number of indicators that have been identified as having a

122. Liz Chandler, Adam Bell & Peter Smolowitz, *Blacks Suspended Far More than Whites*, CHARLOTTE OBSERVER, June 12, 2005, at 9A. For example, in the Charlotte-Mecklenburg school district, which has had a long history of school desegregation issue, it was reported, “African-American males made up 21 percent of all CMS students but 46 percent of those suspended.” *Id.* See also *Little Rock Sch. Dist. v. Armstrong*, 359 F.3d 957, 970 (8th Cir. 2004) (stating that in the 2000-2001 school year “black students consisted of 68% of the student population, but accounted for 89% of the disciplinary sanctions”). See generally Taylor & Foster, *supra* note 117 (revealing that African-American males were disproportionately suspended in integrated schools in the Southeastern portion of the United States).

123. See, e.g., *Ross v. Saltmarsh*, 500 F. Supp. 935 (S.D.N.Y. 1980); MICHAEL ESKENAZI ET AL., NAT’L CENTER FOR SCHS. AND COMMUNITIES, EQUITY OR EXCLUSION, THE DYNAMICS OF RESOURCES, DEMOGRAPHICS, AND BEHAVIOR IN THE NEW YORK CITY PUBLIC SCHOOLS 24 (2003), [hereinafter EQUITY OR EXCLUSION], available at <http://www.ncscatfordham.org/binarydata/files/EQUITYOREXCLUSION.pdf> (reporting that “[t]he suspension rate for black students was over four times that of Asians and others”).

124. See, e.g., Janet Bingham, *Minority Suspensions a Shocker: School Officials Ask Why Rates So High*, DENVER POST, Jan. 13, 1996, at A1 (reporting that 59% of African-American male students in Colorado Springs were suspended).

125. See Roni Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 583 (1996) (arguing that state constitution may require alternatives to students who have been suspended or expelled).

126. 42 U.S.C. §§ 2000d – 2000d-4 (2004).

127. *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974).

128. *Id.* at 1337-38. Institutional racism is said to occur when “standard operating procedures of an institution are prejudiced against, derogatory to, or unresponsive to the needs of a particular racial group.” *Id.* at 1336. See also *Bryant v. Indep. Sch. Dist.*, 334 F.3d 928, 930 (10th Cir. 2003) (challenging policy resulting in disproportionate suspension of African-American students); Philip T.K. Daniel & Karen Bond Coriell, *Suspension and Expulsion in America’s Public Schools: Has Unfairness Resulted from a Narrowing of Due Process?*, 13 HAMLINE J. PUB. L. & POL’Y 1, 32-34 (1992) (providing a summary of cases on suspension and expulsion of minority students).

129. *Hoots v. Pa.*, 118 F. Supp. 2d 577 (W.D. Pa. 2000).

130. *Id.* at 614-15.

negative impact on African-American males. For example, the disproportionate number of African-American males suspended or expelled may be the result of race, plus gender, stereotyping.¹³¹ The issue of stereotyping was alleged in *Fuller v. Decatur Public School Board of Education*.¹³² In *Fuller*, six high school age African-American male students were expelled for fighting at a football game.¹³³ The students alleged that they were expelled because "they were stereotyped as gang members and racially profiled by the actions of the School Board."¹³⁴ Similarly, in *Lee v. Butler County Board of Education*,¹³⁵ testimony was presented that African-American males "were being disproportionately disciplined."¹³⁶ Nevertheless, the court granted the school board's motion to declare the school system a unitary status, thus ending the school desegregation litigation.¹³⁷ The court accepted the superintendent's testimony that the school was primarily African-American, but failed to explore the race plus sex theory.¹³⁸ The courts failed to determine whether African-American males were disproportionately receiving more disciplinary actions, as well as more severe disciplinary actions, than any other group. For example, African-American males received more disciplinary actions than African-American female students for the same infractions.¹³⁹ School districts should be mandated by the United States Department of Education to analyze suspensions and expulsion data according to race plus gender. This would determine whether African-American males are disproportionately receiving disciplinary actions in schools.

The disproportionate numbers of African-American males suspended and expelled from school also has a direct impact on the disproportionate numbers of African-American males in the juvenile court system,¹⁴⁰ low graduation rates, low grades, and their motivation to remain in school. School districts have a moral and legal obligation to develop alternatives to reduce the suspension and expulsion rate of African-American males from schools.

131. See generally RACIAL PROFILING AND PUNISHMENT IN U.S. PUBLIC SCHOOLS: HOW ZERO TOLERANCE POLICIES & HIGH STAKES TESTING SUBVERT ACADEMIC EXCELLENCE AND RACIAL EQUITY (Tammy Johnson et al. eds., 2001).

132. *Fuller v. Decatur Pub. Sch. Bd. of Educ.*, 78 F. Supp. 2d 812 (C.D. Ill. 2000), *aff'd*, 251 F.3d 662 (7th Cir. 2001).

133. *Id.* at 816.

134. *Id.* at 814.

135. *Lee v. Butler County of Educ.*, 183 F. Supp. 2d 1359 (M.D. Ala. 2002).

136. *Id.* at 1367.

137. *Id.* at 1368.

138. *Id.*

139. See Gregory, *supra* note 118; Taylor & Foster, *supra* note 117.

140. See Kim Brooks, Vincent Schiraldi & Jason Ziedenberg, *School House Hype: Two Years Later*, 8 KY. CHILD. RTS. J. 7, 14-15 (2000).

D. *Exclusion from Honor and College Preparatory Classes*

African-American students are systematically excluded from honors classes, college prep courses, and gifted programs.¹⁴¹ They are more often placed on a special education track and excluded from educational tracks designed for advanced placement and gifted programs.¹⁴² For example, in *NAACP v. City of Thomasville School District*,¹⁴³ the court determined that the practice of “ability group[ing]” or “tracking,” resulted in a disproportionate number of African-American students being placed in the “lower ability group,” thus not being placed in the academically advanced classes.¹⁴⁴ The court stated, “Tragically, it appears that for many of these children, the ‘die is cast’ as early as kindergarten. These children do not appear to be reevaluated (and thus potentially ‘re-tracked’) during their progressions through the system.”¹⁴⁵

The court, nevertheless, held that there was no evidence that the school district intentionally used the tracking system to exclude African-American students from certain classes.¹⁴⁶ In essence, the court sanctioned a system which maintains the segregation of students on the basis of race. The white students are assigned to advanced courses and minorities are assigned to low ability classes. Approximately thirty years before the decision in *City of Thomasville School Dist.*, the District of Columbia Circuit Court in *Hobson v. Hansen*,¹⁴⁷ held that African-American students were discriminately tracked into lower level, less challenging schools.¹⁴⁸ This practice of segregating African-American students into general education courses continues to be practiced by many school districts.

141. See *Peters v. Jenney*, 327 F.3d 307, 312-13 (4th Cir. 2003) (providing evidence indicating that the selections device used to select students in the gifted program “under-identified black students as eligible for the gifted program”); *Vaughns v. Bd. of Educ.*, 758 F.2d 983, 985 (4th Cir. 1985) (discussing whether African-American students were disproportionately excluded from the gifted program).

142. See GORDON, *supra* note 100 at 15-18 (providing data indicating that African-American students are disproportionately excluded from advanced placement and gifted programs); Ronald F. Ferguson, *A Diagnostic Analysis of Black-White GPA Disparities in Shaker Heights, Ohio*, 2001 BROOKINGS PAPERS ON EDUC. POL’Y 347 (2001) (reporting that 73.7% of African-American males take no courses at honors or advanced placement levels).

143. *NAACP v. City of Thomasville Sch. Dist.*, 299 F. Supp. 2d 1340, 1367-68 (M.D. Ga. 2004), *aff’d in part and rev’d in part* 425 F. 3d 1325 (11th Cir. 2005), *reh’g denied* No. 04-11063, 2005 U.S. App. LEXIS 29469 (11th Cir. Ga. Nov. 25, 2005).

144. *Id.* at 47-48.

145. *Id.*

146. *Id.* at 49.

147. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1976).

148. *Id.* at 443-92. For a more detailed discussion of tracking and its history, see generally Harold McDougall, *School Desegregation or Affirmative Action*, 44 WASHBURN L.J. 65 (2004) (providing a lengthy analysis of “tracking” in public school systems).

The exclusion of African-American students from advanced courses is not always blatant, but often subtle. This subtlety was obvious in *People Who Care v. Rockford Board of Education*,¹⁴⁹ where the plaintiffs, African-American and Hispanic, argued that while the school may be desegregated, classrooms within the school were still segregated.¹⁵⁰ The plaintiffs argued that minority students were under-represented in advanced courses.¹⁵¹ In dismissing this claim, the court reasoned that minorities had an opportunity to enroll in such cases. Specifically, the court stated, "It is provincial and naive to suppose that because [the school district] once engaged in de facto segregation of its public schools, the choices of its minority students regarding voluntary enrollment in advanced classes open to all are a legacy of that segregation."¹⁵²

This reasoning on the part of the court clearly indicates a lack of understanding of the long term negative impact segregation and isolation can have on minority students. The mere fact that a school board announces that they are no longer excluding minorities from advanced classes, where in the past white students were nourished, mentored, and encouraged to take such courses, will not, without more, eradicate the present effect of past discrimination. The inference that only white students are capable of taking such courses may linger until school districts take positive actions to ensure that minorities, especially African-American males, feel welcome in such classes. Moreover, the use of tracking maintains segregation within a school system.¹⁵³

African-American males are systematically excluded from taking advanced courses in science, mathematics, and foreign languages.¹⁵⁴ These courses are considered college preparatory courses that may lead to acceptance in college, scholarships, and advanced placement in college courses. These exclusions may be intentional on the part of teachers as part of a stereotypical bias that African-American males lack the intelligence, motivation, and support from their parents to be successful.¹⁵⁵ Teachers may reinforce their stereotypical biases by

149. *People Who Care v. Rockford Bd. of Educ.*, 246 F.3d 1073 (7th Cir. 2001).

150. *Id.* at 1073-74.

151. *Id.*

152. *Id.* at 1077.

153. See generally Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS 469 (1996) (providing a historical analysis of tracking).

154. See U.S. DEP'T. OF EDUC., OFFICE FOR CIVIL RTS., 2000 ELEMENTARY AND SECONDARY SCHOOL SURVEY (2000) (reporting that Black males represent 2.98% of students in advanced mathematics and 2.69% in advanced science courses), available at www.ed.gov/about/offices/list/ocr/data.html?src=RT.

155. Monique McMillian, *Is No Child Left Behind 'Wise Schooling' for African-American Male Students?* 87.2 HIGH SCHOOL JOURNAL, 25-33 (2003) (reporting a number of studies that

projecting low expectations for achievement toward African-American male students.¹⁵⁶ Thus, the self-fulfilling prophecy becomes a reality. African-American males are more likely to be placed in lower, less challenging educational tracks.¹⁵⁷ Likewise, African-American males are more likely to be taking remedial mathematics and general English.¹⁵⁸ In addition to being excluded from honor classes, they are absent from honor and academic related organizations. From elementary school to college, African-American males are intensely recruited to play school sports but are not recruited or encouraged to join or participate in academic school clubs and organizations.

African-American males are less likely than whites to be identified as "gifted" and to participate in gifted educational programs.¹⁵⁹ Often, these programs are not well publicized and are secretly shared with a select group of parents. Students are selected based on a teacher's recommendation. These programs permit students to par-

suggest that "education professionals' stereotypes about ability are partly responsible for the disengagement and lagging achievement of African-American students").

156. See, e.g., James Earl Davis & Will J. Jordan, *Determinants of School Success Among African-American Males*; Dick Lilly, *Prep Courses on Minorities*, SEATTLE TIMES, January 4, 1995, at B1 (finding that discrimination or stereotyping causes teachers and others to have lower expectations for minority children, who, therefore, are not encouraged to take tougher college prep or advanced placement courses); BROOKINGS INST., *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jencks & Meredith Phillips, eds., 1998); *TRANSITIONS IN THE LIFE COURSE OF AFRICAN-AMERICAN MALES: ISSUES IN SCHOOLING, ADULTHOOD, FATHERHOOD, AND FAMILIES*, (Vivian C. Gadsden & William Trent eds., 1995), available at <http://www.ncoff.gse.upenn.edu/wrkppr/af-am.pdf> (finding that "[w]hen teachers' perception of accountability for the success or failure of their students was low, Black male performance dropped").

157. In North Carolina during the 1998-1999 school year, for grades 3-8, minorities were disproportionately assigned to special education programs and disproportionately excluded from the academically gifted programs. Most startling is that whites represented 85% percent of students designated as academically gifted. *EXPOSING THE GAP*, *supra* note 116, at 14.

158. JONATHAN JACOBSON ET AL., U.S. DEP'T OF EDUC, *EDUCATIONAL ACHIEVEMENT AND BLACK-WHITE INEQUALITY* 42 (NCES 2001-061), available at <http://nces.ed.gov/pubs2001/2001061.pdf> (finding that throughout elementary and secondary school, blacks scored lower overall on mathematics and reading).

159. See Coalition to Save our Child. v. State Bd. of Educ., 90 F.3d 752, 763-67 (3d Cir. 1996); Donna Y. Ford & Karen S. Webb, *Desegregation of Gifted Educational Programs: The Impact of Brown on Underachieving Children of Color*, 63 J. NEGRO EDUC. 358, 358 (1994). A study by the state of Georgia determined that

A large percentage of special education diplomas is earned by African-American males, 37.2 percent of all such diplomas in 2001. African-American males also receive a disproportionate share of certificates of performance. Future research should focus on how and when students are tracked into curricular paths in Georgia, why African-American males are underrepresented among those taking the CP track and over-represented among those receiving special education diplomas and certificates of performance.

THE UNIV. SYSTEM OF GEORGIA'S TASK FORCE ON ENHANCING ACCESS FOR AFRICAN-AMERICAN MALES, REPORT OF THE RESEARCH AND POLICY ANALYSIS SUBCOMMITTEE 8-9 (2003), http://www.usg.edu/aami/Research_and_Policy_Analysis_Subcommittee.pdf; see also Jenel Few, *Black Males Continue to Lag in Enrollment in Gifted Programs*, June 19, 2004, <http://old.savannahnow.com/stories/061804/2247286.shtml> (finding that in Savannah - Chatham County Schools, only 3% of the district's 11,141 black male students have been identified as gifted).

ticipate in a variety of enrichment programs, as well as placement in advanced courses. Unlike in sports, African-American males are not groomed and actively recruited for these programs.¹⁶⁰ School systems that intentionally exclude African-American students from gifted and college prep programs may be in violation of Title VI of the Civil Rights Act of 1964.¹⁶¹ Civil rights complaints may be filed with the Office of Civil Rights of the U.S. Department of Education¹⁶²

The systematic exclusion and isolation of African-American males from gifted school programs perpetuates the stereotypical biases that African-American males are only interested in sports. It also further perpetuates their perceived academic inferiority. In *Strauder v. West Virginia*,¹⁶³ Justice Strong expressed the concern that the exclusion of African-American men from serving as jurors was like permanently placing a brand of inferiority on them in violation of the law.¹⁶⁴ Similarly, the over-placement of African-American males in special education programs, and the practice of systematically excluding them from advance courses, forever brands them as inferior among other students and teachers.

E. Overrepresentation in Special Education Classes

Far too many African-American males are assigned to special education classes and graduate with special education diplomas.¹⁶⁵ It was never the intention of the Supreme Court's decision in *Brown* that African-American students, especially African-American males, would be segregated by race in schools and further segregated by race plus gender in special education classes.¹⁶⁶ The segregation of Afri-

160. D.Y. Ford, T.C. Grantham, & D.F. Bailey, *Identifying Giftedness Among African-American Males: Recommendations For Effective Recruitment and Retention*, in AFRICAN-AMERICAN MALES IN SCHOOL AND SOCIETY: PRACTICES AND POLICIES FOR EFFECTIVE EDUCATION 51-67 (V.C. Polite & J.E. Davis eds., 1999).

161. 42 U.S.C. §§ 2000a – 2000h (2000).

162. *Peters v. City of Va. Beach*, 327 F.3d 307, 311 (4th Cir. 2003). The Director of Gifted Education and Magnet Program filed a complaint with OCR, after she was terminated for allegedly advocating for increasing minority participation in the program. *Id.* A complaint had been filed by a community organization because African-American students were disproportionately excluded from the program. *Id.*

163. *Strauder v. W.Va.*, 100 U.S. 303 (1879).

164. *Id.* at 310-11.

165. See Smith, *supra* note 15; see also U.S. DEP'T OF EDUC., TWENTY-SECOND ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (2000), <http://www.ed.gov/about/reports/annual/osep/2000/preface.pdf>; Beth Harry & Mary G. Anderson, *The Disproportionate Placement of African American Males in Special Education Programs: A Critique of the Process*, 63 J. NEGRO EDUC. 602, 602-619 (1994).

166. See, e.g., Charles J. Russo & Carolyn Talbert-Johnson, *The Overrepresentation of African American Children in Special Education: The Resegregation of Educational Programming?*, 29 EDUC. & URB. SOC'Y 136 (1997); Beth A. Ferri & David J. Connor, *Special Education and the Subverting of Brown*, 8 J. GENDER RACE & JUST. 57, 57 (2004) (arguing that disproportionate numbers of minorities in special education classes contributes to the failure of *Brown*).

can-American males into special education classes and tracking programs negatively impacts their self-esteem, progress in school, and ultimately their rates of dropout and graduation.¹⁶⁷ The disproportionate placement of African-American males in special education programs further subordinates their status in public schools. Moreover, the disproportionate assignment of African-American males in special education classes further perpetuates stereotypical biases that African-American male students who have behavioral issues are automatically labeled as being mentally challenged and academically deficient.¹⁶⁸

Numerous studies and reports by leading researchers have determined that minority students are overrepresented in special education school programs.¹⁶⁹ Additionally, the U.S. Department of Education, Office of Civil Rights, which is the agency that investigates discrimination in school systems receiving federal funds, has determined that school systems disproportionately assign African-American students to special education curriculum.¹⁷⁰ For example, in some states, 25% of African-American males are in special education programs.¹⁷¹ Even more disturbing is that in some school districts, African-Ameri-

167. See sources cited *supra* note 18.

168. See generally EQUITY OR EXCLUSION, *supra* note 123, at 24-25; Pedro Antonio Noguera, *The Trouble with Black Boys: The Role and Influence of Environmental and Cultural Factors on the Academic Performance of African American Males*, IN MOTION MAG., May 13, 2002, available at <http://www.inmotionmagazine.com/er/pntroub2.html> (reporting that social, environmental, and cultural factors play a substantial role in the "labeling and sorting processes that occurs within school[s]"); Yvette Owo, *African-Americans Still Face Discrimination in Schools*, DAILY TEXAN ONLINE, Apr. 30, 2004, at 4A, <http://www.dailytexanonline.com/news/2004/04/30/> (follow hyperlink for title of article).

169. See, e.g., DANIEL J. LOSEN & GARY ORFIELD, *introduction to RACIAL INEQUITY IN SPECIAL EDUCATION*, (Daniel J. Losen & Gary Orfield eds., 2002) (discussing the extent of overrepresentation of minority students in special education classes); Philip C. Chinn & Selma Hughes, *Representation of Minority Students in Special Education Classes*, 8 REMEDIAL AND SPECIAL EDUC. 41, 41-46 (1987); James M. Patton, *The Disproportionate Representation of African-Americans in Special Education: Looking Behind the Curtain for Understanding and Solutions*, 32 J. SPECIAL EDUC. 25, 25-27 n.1 (1998); Alfredo J. Artiles & Stanley C. Trent, *Overrepresentation of Minority Students in Special Education: A Continuing Debate* 27 J. SPECIAL EDUC. 410, 410-37 (1994); Kimberly Suzette Peterz, *The Overrepresentation of Black Students in Special Education Classrooms*, IN MOTION MAG., May 31, 1999, available at <http://www.inmotionmagazine.com/peterz1.html>; GWENDOLYN CARTLEDGE, *Minority Overidentification and Misidentification*, NAT'L ASS'N FOR THE EDUC. OF AFRICAN AM. CHILDREN WITH LEARNING DISABILITIES, ¶ 1 (2002), <http://www.charityadvantage.com/aacld/cartledgepresentation.asp>.

170. See *Spain v. Mecklenburg County Sch. Bd.*, 54 F. App'x 129, 131 (4th Cir. 2002) (referring to a finding by the OCR that African-American students were assigned to special education classes); *Vaughns v. Bd. of Educ.*, 758 F.2d 983, 991 (4th Cir. 1985) (citing a finding of OCR ranking of school systems with minority overrepresentation in special education).

171. See generally U.S. DEP'T OF EDUC., *TWENTY-FIFTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 81-183* (2005) (providing statistics indicating that more than 25% of African-American males, in numerous states, are in special education programs), <http://www.ed.gov/about/reports/annual/osep/2003/25th-vol-1.pdf>.

can males represent more than 40% of students placed in special education programs.¹⁷² African-American students comprise 20% of the population of students receiving special education services.¹⁷³

There are numerous reasons for the disproportionate number of minorities placed in special education, such factors include the “misidentified and misuse of tests,” the “failure of the general education system,” and “insufficient resources.”¹⁷⁴ There are also concerns that teachers may place African-American male students in special education programs as a disciplinary action.¹⁷⁵ Assigning African-American males to special education classes may also discourage them from completing school. For example, New York City Schools reported that for the 2001-2002 school year “61% of New York City’s special education students of graduation age had dropped out of school.”¹⁷⁶

In 1975, Congress passed the Individuals with Disabilities Act (IDEA) to ensure that students with disabilities would have “free appropriate public school education which emphasizes social education and related services designed to meet their unique needs.”¹⁷⁷ Prior to the passage of the IDEA, many school districts failed to provide disabled individuals with an adequate public education, if any at all. For example, in *Mills v. Board of Education*,¹⁷⁸ six of the seven minority plaintiffs were African-American male students who challenged the school board’s practice of excluding them and other disabled students from adequate public schools and facilities.¹⁷⁹ The court held in *Mills*

172. See generally Rosa A. Smith, *Building a Positive Future for Black Boys*, 192 AM. SCH. BD. J. 26 (2005) (finding that in some school districts, African-American males represent 41% of the special education population), available at <http://www.asbj.com/2005/09/0905asbjsmith.pdf>.

173. U.S. DEP’T OF EDUC., *supra* note 171, at 28 (noting that this percentage is based on “the racial/ethnic compositions of the 6-through 21-year old IDEA population”).

174. See generally COMM. ON MINORITY REPRESENTATION IN SPECIAL EDUC., MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION (M. Suzanne Donovan & Christopher T. Cross, eds., 2002).

175. Such action would be in violation of 20 U.S.C. § 1415 (2005). Daniel J. Losen & Kevin G. Weiner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 417-23 (2001).

176. See generally EQUITY OR EXCLUSION, *supra* note 123, at 4. (citing Citizens Budgets Commission, *Setting Higher Standards for Special Education in New York* (2002) (determining that there were racial disparities with placement in special education programs and special education students have considerably lower graduation rates).

177. 20 U.S.C. §§ 1401-1419 (1996). See also U.S. DEP’T OF EDUC., *supra* note 165; U.S. DEP’T OF EDUC. OFFICE OF SPECIAL EDUC. PROGRAMS, DATA TABLES FOR OESP STATE REPORTED DATA (2000), http://www.ideadata.org/arc_toc2.html#partbCC (last visited Sept. 12, 2003).

178. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

179. *Id.* at 866-871.

that disabled children have a constitutional right to a free and appropriate education.¹⁸⁰

Unfortunately, the IDEA has been at times a double-edged sword. In other words it has been overly used to label and disproportionately place African-American males in special education programs and out of mainstream educational instruction.¹⁸¹ At the same time, African-American males with mental disabilities have been suspended and expelled from school in lieu of receiving services required by the IDEA.¹⁸² Even though it was quite obvious to educators and researchers that minorities were disproportionately placed in special education programs, the federal government did not respond in any meaningful manner until 1997, when they passed the amendments to IDEA.¹⁸³ The amendments state that “[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.”¹⁸⁴ Notwithstanding the amendment, minorities, particularly African-American males, are still often mislabeled and disproportionately drop out of school.

Standardized intelligence tests, otherwise known as IQ tests, are used to determine the placement of students in special education classes. The use of IQ tests was challenged in *Larry P. v. Riles*.¹⁸⁵ In *Riles*, African-American elementary school children challenged the use of the State of California’s IQ test, which resulted in a disproportionate number of African-American students placed in special education classes. The District Court held that the State had used tests which were “racially and culturally biased, and had a discriminatory impact against black children”¹⁸⁶ in violation of Title VI of the Civil

180. *Id.* at 16; see also *Penn. Ass’n for Retarded Child v. Penn.*, 343 F. Supp. 279 (E.D. Pa. 1972). Still, the recent United States Supreme Court decision in *Schaffer v. Weast*, 126 S. Ct. 528 (2005), may make it more difficult for parents to prove that the school district failed to comply with the mandates of the IDEA.

181. Rebekah Denn, *Coping with the School System*, SEATTLE POST-INTELLIGENCER, Mar. 15, 2002, at F7, available at http://seattlepi.nwsourc.com/disciplinegap/61963_helpline13.shtml (reporting black parents’ grim stories of mistreatment of their African-American sons); COUNCIL FOR EXCEPTIONAL CHILD., ADDRESSING OVER-REPRESENTATION OF AFRICAN-AMERICAN STUDENTS IN SPECIAL EDUCATION; THE PREFERRAL INTERVENTION PROCESS 1 (2002) [hereinafter COUNCIL FOR EXCEPTIONAL CHILDREN STUDY].

182. See sources cited *supra* note 113.

183. 34 C.F.R. § 300.755 (1999) (current version 71 Fed. Reg. 46540 (Oct. 13, 2006)).

184. 20 U.S.C. § 1400(c)(12)(A) (2000).

185. *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff’d*, 502 F.2d 963 (9th Cir. 1974); *Larry P. v. Riles*, 495 F. Supp. 926 (N.D. Cal. 1979), *aff’d in part, rev’d in part*, 793 F.2d 969 (9th Cir. 1984). For a discussion on *Larry P.*, see David P. Prasse & Daniel J. Reschly, *Larry P.: A Case for Segregation, Testing or Program Efficiency?*, 52 EXCEPTIONAL CHILD. 333-346 (1986).

186. *Larry P.*, 495 F. Supp. at 933.

Rights Act of 1964,¹⁸⁷ the Rehabilitation Act of 1973,¹⁸⁸ and the Education for All Handicapped Children Act of 1975.¹⁸⁹ The Court expressed concern with permanently placing African-American students “into educationally dead-end isolated, and stigmatizing classes. . . .”¹⁹⁰ More than twenty-years later, African-American students, especially African-American males, are disproportionately placed in such classes.

Similarly, in *Parents in Action on Special Education v. Hannon*,¹⁹¹ African-American parents challenged the use of standardized intelligence tests administered by the Chicago Board of Education as being culturally biased toward African-American students. The parents presented evidence that African-American students were disproportionately placed in the educable mentally handicapped classes.¹⁹² As a result of the test, 80% of the students in the educable mentally handicapped classes were African-American students.¹⁹³ Even though the Judge recognized that there were a few questions on the intelligence tests that were “culturally biased against black children, or at least sufficiently suspect,” nevertheless, the court held that these few questions would not invalidate the test.¹⁹⁴ Unfortunately, a negative impact of the *Brown* decision was that African-American students, especially African-American males who were assigned to desegregated schools, were disproportionately labeled with having a mental disability and “dumped” into special education classes. Ostensibly, they were assigned to such classes to receive specialized educational assistance, in reality they were warehoused and passed on through the system.¹⁹⁵ Similarly, African-American males who attend

187. 42 U.S.C. § 703(a)(1) (2000). See also Theresa Glennon, *The Stuart Rome Lecture Knocking Against the Rock: Evaluating Institutional Practices and the African-American Boy*, 5.5 J. Health Care L. & Pol’y 10 (2002) (outlining that African-American boys are negatively treated by “our educational, mental health and juvenile justice systems”); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (placing limitations on individuals pursuing private claims under Title VI Regulations).

188. 29 U.S.C. § 794 (2000) (providing that no “individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency”).

189. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (subsequently enacted as the Individuals with Disabilities Education Act Amendment of 1997, 20 U.S.C. §§ 1400-1487 (2004)).

190. *Larry P.*, 495 F. Supp. at 933.

191. *Parents in Action on Special Educ. v. Hannon*, 506 F. Supp. 831 (N.D. Ill. 1980).

192. *Id.* at 834.

193. *Id.* at 833.

194. *Id.* at 883.

195. See, e.g., *Johnson v. San Francisco Unified Sch. Dist.*, 339 F. Supp. 1315 (N.D. Cal. 1971), *vacated*, 500 F.2d 349 (9th Cir. 1974); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967).

segregated schools are warehoused and segregated in special education classes.

F. *Proficiency and Achievement Tests*

African-American males trail whites and African-American female students in every aspect of education achievement tests. Specifically, African-American girls out-perform African-American boys.¹⁹⁶ There is also evidence of a significant difference in the educational achievement of African-American boys and girls in lower socio-economic status.¹⁹⁷ Once again, our educational system has failed to identify and address the causes for the differential between white and African-American students, and within the subgroups of African-American boys and girls. African-American male students as a subgroup lag behind in academic achievement of all other students.¹⁹⁸

African-American students' test scores tend to be lower than white students' scores on proficiency tests from kindergarten through high school.¹⁹⁹ Since *Brown*, the gap between African-American students and whites has narrowed, but the differential between the gaps is still very prevalent.²⁰⁰

As public schools re-segregated, African-American students and other minorities remained in poorly funded, dilapidated school buildings, and were taught with outdated books and by uncertified teachers. Such conditions were similar to the pre-*Brown* period. The failure on the part of school districts to provide adequate resources and a positive learning environment may negatively impact minority students' academic achievement. Since *Brown*, states have been sued to adequately fund public school systems and to provide "at least a minimally adequate education."²⁰¹

196. See Christopher Wheat, *Difference in Educational Achievement for Low Income Black Males and Females*, May 27, 1997, <http://www.wjh.harvard.edu/~cwheat/malefemale.html>.

197. See *Campaign for Fiscal Equity, Inc. v. N.Y.*, 719 N.Y.S. 2d 475, 491 (Sup. Ct. 2001) (finding that the City of New York failed to provide adequate funding to city public schools), *rev'd*, 744 N.Y.S. 2d 130 (N.Y. App. Div. 1 Dept. 2002), *aff'd*, 801 N.E.2d 326 (N.Y. 2003).

198. See Garibaldi, *supra* note 106; Johnson & Wallace, *supra* note 106. See generally BROOKINGS INST., *supra* note 156 (providing a detailed discussion of the test-score disparity between African-American males and other subgroups).

199. JONATHAN JACOBSON ET AL., *supra* note 158, at 42 (finding that throughout elementary and secondary school, "blacks with levels of prior achievement similar to whites still frequently score lower on mathematics and reading tests than whites").

200. *Id.* (finding that African-American students have made progress in narrowing the gap between white and African-American students in educational reform but there still is substantial disparity).

201. *Campaign for Fiscal Equity, Inc.*, 719 N.Y.S.2d at 477.

There is a growing gap in the grade point averages of white and black high school graduates.²⁰² This will negatively impact their ability to obtain admission to college and/or employment.

The use of standardized assessment and proficiency tests by school systems negatively impacts minority students' graduation rate, promotions,²⁰³ and placement. Where standardized tests have been challenged in court, courts have given deference to states' educational policies.²⁰⁴ Despite this deference, courts recognize that state school systems have had a long history of discriminating against minority students.²⁰⁵ It is ironic that states which have historically discriminated against African-American students, by intentionally providing inferior educational opportunities, can now legally design standardized tests based on a system which has not corrected its past discriminatory acts.²⁰⁶

The over-emphasis of sports in the African-American community lessens the motivation of African-American males to strive for excellence in academia. A disproportionate number of young African-American males believe that playing sports will lead them to a professional sports contract.²⁰⁷ Consequently, their focus is not on making the honor roll or the debate team but the varsity basketball or football teams. Sadly, African-American males cling to the hope of playing professional sports after high school, but the odds of playing professional sports are extremely remote.²⁰⁸ Supporters of sport programs in school will often point to success stories of African-American males who were inspired to stay in school because of their participation in sports. However, far too many African-American males who fail to maintain their "star status" are at the bottom of the academic scale.

202. *E.g.*, ROBERT PERKINS ET AL., THE HIGH SCHOOL TRANSCRIPT STUDY: A DECADE OF CHANGE IN CURRICULA AND ACHIEVEMENT, 1990-2000, 3-8 (Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., No. 455, Mar. 2004) (reporting that the mean grade point average of African-American high school graduates increased 0.2 points while that of white high school graduates increased 0.28 points), available at <http://nces.ed.gov/pubs2004/2004455.pdf>.

203. *See, e.g.*, *GI Forum v. Tex. Educ. Agency*, 87 F. Supp.2d 667 (W.D. Tex. 2000) (upholding test that adversely affected minorities high school graduation rate).

204. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973), *reh'g denied*, 411 U.S. 959 (1973).

205. *See, e.g.*, *GI Forum*, 87 F. Supp.2d 667, 674 (recognizing that standardized tests have been implemented to disadvantage minorities, and that minorities may continue to be "victims of educational inequality").

206. *See id.*

207. John Simons & David Butow, *Improbable Dreams: African-Americans Are a Dominant Presence in Professional Sports: Do Blacks Suffer As a Result?*, U.S. NEWS & WORLD REP., Mar. 24, 1997, at 46 (reporting a study by Northeastern University's Center for the Study of Sports in Society which unveiled that 66% of African-American males between the ages of 13 and 16 believe they can earn a living playing professional sports).

208. *See id.* (reporting that the odds of a high school athlete playing professional sports are 10,000 to 1).

In addition, African-American male students who are not athletes also succumb to strive for mediocre grades.²⁰⁹ The preferential treatment that athletes receive lessens their motivation to achieve academically.²¹⁰ Unfortunately, those few who go on to play collegiate sports maintain their “star status” until the season is over or until they can no longer play because of academic troubles or physical inability. A disproportionate number of African-American males who play collegiate sports never graduate, especially at the Big Ten schools.²¹¹

African-American male athletes who are highly skilled are intensely worshipped, idolized, and praised by teachers, alumni, the press, and other students. African-American male students, who are not super-jocks, are ignored, invisible, and stereotyped.²¹²

V. CONCLUSION

The Supreme Court’s ruling in *Brown* mandating equal and quality education for students regardless of their race has long been forgotten or ignored by state legislators who refuse to provide adequate funding for public schools. Since the *Brown* decision, all States have ended the legal mandate to educate African-American and white students separately. Nevertheless, a majority of schools remain severely underfunded and segregated, with African-American males further segregated within these schools. George Wallace, the former governor of Alabama’s infamous statement, “segregation now, segregation forever,” correctly describes the current status of public schools in America. Thus, African-American students, African-American males in particular, are systematically denied educational opportunities.

There is no one solution to enhancing educational opportunities for African-American males.²¹³ There must be holistic solutions developed at the national, state²¹⁴ and local levels of government. As the

209. See, e.g., Kristen F. Benson, *Constructing Academic Inadequacy: African-American Athletes’ Stories of Schooling*, 71 J. HIGHER EDUC., 223 (2000).

210. See generally HOBBERMAN, *supra* note 19.

211. NAT’L COLL. ATHLETIC ASS’N, NCAA RESEARCH RELATED TO GRADUATION RATES OF DIVISION 1 STUDENT ATHLETES, 1984-1997 (Sept. 2003), available at http://www.ncaa.org/grad_rates/2004/d1/index.html (reporting that the graduation rate for a selected group of student athlete African-American males entering classes in 1996 and 1997 was 48% versus 59% for white males; and for basketball, the graduation rate for African-American males entering classes in 1996 was 41% versus 52% for white males).

212. See Ferguson, *supra* note 142, at 384-85 (reporting observations of peer pressure upon African-American males to conform to stereotypes).

213. See Gordon et al., *supra* note 100 (outlining a number of solutions to eliminate racial disparities in public schools).

214. See, e.g., COLORADO CIVIL RIGHTS COMMISSION/DIVISION, A RESEARCH BASED ASSESSMENT OF THE DISPARITY IN EDUCATIONAL ACHIEVEMENT BETWEEN BLACK AND WHITE STUDENTS: A COMPREHENSIVE REVIEW OF CONTEMPORARY KNOWLEDGE (2002), available at <http://www.dora.state.co.us/civil-rights/Publications/BAEOfinalwithletterhead.pdf> (outlining the

Brown decision has taught us, there must not be total reliance on the legal system to cure this problem. The African-American community should explore how to change and expand the culture of African-American males by partnering with school administrators to develop plans which devalue sports among African-American males²¹⁵ and develop programs which emphasize academics.

States should pass laws which mandate parental accountability in the education of their children.²¹⁶ School systems should develop alternatives to suspension and expulsion of students,²¹⁷ develop alternative programs to reduce the number of African-American males in special education classes,²¹⁸ and increase the number of African-American male teachers in secondary schools.²¹⁹ Colleges and universities should develop affirmative action programs that are designed specifically to recruit, admit and retain African-American males.²²⁰ Every school district should conduct an extensive study of the status of African-American male students at all stages of education.²²¹

Unless public school systems take an aggressive role in planning, developing, and implementing educational systems that meet the needs of all students, especially African-American males, the dream that Martin Luther King spoke of and the decision in *Brown* is forever deferred.

"Denver Dozen," an urban systemic model for enhancing academic achievement of African-American students).

215. See Carter, *supra* note 73 (providing a review of the "extent of involvement of African-American males in sports").

216. Mary Dennard Tanksley, Improving the Attendance Rate for African American Male Students in an After School Reading Program through Parental Involvement, Positive Male Role Models, and Tutorial Instruction (July 14, 1995) (unpublished Ed.D dissertation, Nova Southeastern University) (on file with author).

217. See, e.g., PROJECT EASE, DEP'T OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION-CENTER FOR THE PREVENTION OF SCHOOL VIOLENCE, PROMISING STRATEGIES DOCUMENT (2003) (identifying "promising strategies put into practice at each of the guiding school sites [to] reduc[e] the disproportionate minority suspension and expulsion rates."), available at http://www.ncdjjdp.org/cpsv/Acrobatfiles/Project_EASE_Promising_Strategies.pdf; Brenda L. Townsend, *The Disproportionate Discipline of African-American Learners: Reducing School Suspensions and Expulsion*, 66 COUNCIL FOR EXCEPTIONAL CHILD. 381 (2000) (detailing a program to reduce the number of African-American male students being suspended).

218. See Cartledge, *supra* note 169; Charles J. Russo & Carolyn Talbert-Johnson, *The Overrepresentation of African-American Children in Special Education, The Resegregation of Educational Programming*, 29 EDUC. & URBAN SOC'Y, 136-148 (1997) (recommending change in education programs to address disproportionality).

219. See Jordan & Cooper, *supra* note 20, at 9-16 (recommending the hiring of black male teachers, even if it goes against the principle of integration).

220. See *African-American Male Retention*, <http://www.ccs.ohio-state.edu> (follow "African American Male Retention" hyperlink) (describing program to increase the retention of African-American students at OSU).

221. See, e.g., THE UNIV. SYSTEM OF GEORGIA'S TASK FORCE OF ENHANCING ACCESS FOR AFRICAN-AMERICAN MALES, RESEARCH AND POLICY ANALYSIS, <http://www.usg.edu/aami/index.shtml>; see also EXPOSING THE GAP, *supra* note 116 (providing proposals for reducing the educational gap between minority and white students).