

**Testimony of  
Vincent Southerland, Assistant Counsel  
NAACP Legal Defense and Educational Fund, Inc.  
to the  
New York City Council  
Committee on Higher Education  
Proposed Resolution No. 858 Concerning a Provision of the Higher Education Opportunity  
Act of 2008  
September 26, 2008**

Thank you for providing me with the opportunity to testify before you today. My name is Vincent Southerland, and I am Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. The Legal Defense Fund, since its founding by Thurgood Marshall in 1940, has engaged in a multilayered strategy of litigation, advocacy, public education and outreach in an effort to transform the United States' Constitutional promise of equality under the law into a concrete reality for African-Americans and ultimately all individuals. LDF works to secure the full social and economic integration of all Americans into our society, to ensure social justice and to break down the barriers that prevent the most vulnerable among us from realizing full civil and human rights. Education, and equal access to primary, secondary and higher education, is at the cornerstone of these efforts. Fifty-four years ago, the United States Supreme Court spoke to the critical value of education, declaring that:

[E]ducation is perhaps the most important function of state and local governments. . . . 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.<sup>1</sup>

Speaking for a unanimous court in *Brown v Board of Education*, Chief Justice Earl Warren forever changed the course of our democracy with the stroke of a pen. The trajectory of our nation was shaped by the opening of doors to education.

Now we find ourselves engaged in a continuing struggle. Though that struggle has evolved in some ways, it is still characterized by our collective efforts to once again open the doors to education. Today, my focus is higher education. Indeed, higher education is a key to success in an increasingly complex and globally interconnected world. As the United States Supreme Court explicitly recognized “[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity” and “[e]ffective participation by members of all

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<sup>1</sup>*Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954).

racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”<sup>1</sup>

The Aid Elimination Penalty provision of the Higher Education Act, which bars students with previous drug convictions from receiving financial aid, will impede access to higher education for thousands of students. At a time when our nation is asking how we can help young people to get on a positive and constructive path, the Aid Elimination Penalty slams a door in the face of those who find themselves enmeshed in the criminal justice system, with a drug conviction while having once been the recipients of federal financial aid. Who are these students? If the current statistics on crime, arrest and incarceration rates reveal anything, they are overwhelmingly and disproportionately people of color. A look at the raw numbers makes both the over-incarceration trend and the racial disparities clear.

Since the early 1970's, America's prison and jail population has risen at an alarming rate.<sup>2</sup> A nearly 500% increase in the number of individuals incarcerated has left more than 2.2 million people behind bars—of which 900,000 are African-American.<sup>3</sup> Data from a 2007 study produced by the Sentencing Project tells us that African-Americans are incarcerated at a rate nearly six (5.6) times that of their white counterparts.<sup>4</sup> Hispanics are incarcerated at a rate nearly double (1.8) that of whites.<sup>5</sup>

The War on Drugs accounts for the dramatic increase in involvement with the criminal justice system. America's War on Drugs has ravaged communities, undermined trust in our government and law enforcement officials and created a permanent and persistent class of undereducated and unprepared citizens. There has been an 1100% increase in the number of drug offenders behind bars since 1980.<sup>6</sup> Against this backdrop, we are faced with drug arrests that have more than tripled in the last 25 years, accounting for 1.8 million arrests in 2005.<sup>7</sup> And despite comprising 14% of regular drug users, African-Americans are 37% of those arrested for

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

<sup>2</sup>The Sentencing Project, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 1 (2007), available at [http://www.sentencingproject.org/admin/documents/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/admin/documents/publications/rd_stateratesofincbyraceandethnicity.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 3

<sup>5</sup> *Id.*

<sup>6</sup> The Sentencing Project, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, 2 (2007), available at [http://www.sentencingproject.org/Admin/documents/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin/documents/publications/dp_25yearquagmire.pdf).

<sup>7</sup> *Id.*

drug offenses and are 56% of those in state prison for drug offenses.<sup>8</sup> As of 2006, African-Americans were 3.5 times more likely to be arrested for drug offenses than whites.<sup>9</sup>

When juxtaposed with the tremendous disparities in access to opportunities for higher education among people of color, what remains is a system designed to exacerbate an already harsh reality. Only 55% of African-American high school graduates enroll in college immediately following high school in comparison to 64% of white students.<sup>10</sup> According to the National Center for Education Statistics, in the fall of 2006 African-Americans comprised 5.5% of the total students enrolled at four year Title IV institutions, while white students comprised 30.1% of those enrolled.<sup>11</sup>

The financial burden of attending school serves as a persistent obstacle to enrollment and graduation for all students, and for students of color in particular. A vast majority—75.3%—of all students at public, four-year Title IV institutions, were recipients of financial aid.<sup>12</sup> Of those, nearly half—37.1%—received federal grants.<sup>13</sup> Studies show that financial barriers serve as one of the greatest obstacles to students of color attending postsecondary institutions.<sup>14</sup> For example, low income students are more likely to be African American, Hispanic, or Asian.<sup>15</sup> For African-American students and other student of color in particular, as the cost of college education rises, the financial strain creates a greater dependence upon financial aid.<sup>16</sup> Even after African-American students are able to overcome the financial stressors of initial enrollment, the challenges of obtaining a degree remain tremendous. A mere 36.4% of all African-American students who enrolled in four-year colleges in 1995-1996 attained a bachelor's degree within five

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<sup>8</sup> *Id.*

<sup>9</sup> National Council on Crime and Delinquency, *Racial and Ethnic Disparities in the US Criminal Justice System*, 16 (2008).

<sup>10</sup> NAACP Legal Defense and Educational Fund, *Closing the Gap: Moving from Rhetoric to Reality in Opening Doors to Higher Education for African-American Student*, 5 (2005).

<sup>11</sup> Institute of Education Sciences, *Enrollment in Postsecondary Institutions, Fall 2006*, 4 (2008) *available at* <http://nces.ed.gov/pubs2008/008173.pdf>.

<sup>12</sup> *Id.* at 12.

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

<sup>14</sup> Laura Perna & Michelle A. Cooper, *Transforming the First Year of College for Students of Color (review)*, 76 *J. Higher Educ.* 4, 479-482 (Jul/Aug 2005); *see also* Jacqueline King, *Money Matters: the Impact of Race/Ethnicity and Gender on How Students Pay for College* (1999).

<sup>15</sup> The Pell Institute, *Indicators of Opportunity in Higher Education*, 5 (2005) *available at* [http://www.pellinstitute.org/files/6\\_indicators.pdf](http://www.pellinstitute.org/files/6_indicators.pdf).

<sup>16</sup> *Closing the Gap* at 5.

years, as compared to 58% of white students.<sup>17</sup> During the 2002-2003 school year, approximately 67% of all degrees conferred went to white students, when approximately 22% went to students of color.<sup>18</sup> Clearly, a statutory provision that aims to eliminate aid for those students caught in the criminal justice system is nothing short of disastrous, particularly for African-Americans and other students of color.

The Higher Education Act's Aid Elimination Penalty turns back the clock on the promise of higher educational opportunity for all. And it does so by allowing an individual's one-time status as a drug offender to define—in the most absolute terms—a life that may otherwise be filled with promise and potential. Even beyond the statistics, which highlight the overwhelming impact of this nation's War on Drugs among African-Americans and other people of color, the force and consequences of the law betray both basic common sense and this nation's Constitutional promise.

First, and perhaps most startling, is the message conveyed to those who have had interactions with the criminal justice system through drug convictions: education shall be foreclosed as a means for self improvement. While punishment and deterrence are functions of the criminal justice system, rehabilitation is also an important—and often overriding goal. The prevalence of drug courts, first-time offender programs and other alternatives to incarceration are clear indicators of the emphasis placed on the rehabilitative function of involvement with the criminal justice system. Yet, rather than providing individuals with the necessary tools to end their addiction to illegal substances and their entanglement with the criminal justice system or to learn from past mistakes and improve their lives, the government's current policy compounds the problem. It works to entrench an under-educated class while reinforcing the very same inadequate social conditions and lack of opportunities that may have pulled a drug offender into the criminal justice system in the first place. It eliminates a path to rehabilitation, employment prospects, economic opportunities and social networks which not only foster individual growth but allow for a more full and active participation in our democracy. In the end, this message will be most heavily received by the African-American community, a community in which rates of arrest, conviction and incarceration for drug offenses are disproportionately the highest and among whose members the need for federal financial aid for higher education remains the greatest.

Proponents of the provision are sure to highlight that those deemed ineligible for financial aid can regain eligibility by completing an acceptable drug program. Such arguments fail to address the very serious economic burdens imposed by such programs, particularly when individuals have already demonstrated a need for federal financial assistance to attend an institution of higher learning. A student who cannot afford to go to college is now burdened with the prospect of paying for a rehabilitation program which he or she also is unlikely to be able to afford.

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<sup>17</sup> *Id.*

<sup>18</sup> Institute of Education Sciences, Postsecondary Institutions in the United States: Fall 2003 and Degrees and Other Awards Conferred: 2002-03, 13 (2005), *available at*: <http://nces.ed.gov/pubs2005/2005154.pdf>.

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Second, the provision does not fully differentiate between classes of drug offenses or even the nature of the controlled substances involved. Though there is a distinction between the sale and possession of drugs and the number of drug convictions one may have, the same cannot be said for the nature of drugs involved. Thus, a student who is convicted of a misdemeanor for possessing a marijuana cigarette will be treated the same as a student convicted of a felony for possession of a kilogram of crack/cocaine. A student who sells marijuana to a neighbor and one who sells heroin to a teenager are treated the same. While the criminal law makes a distinction based on the severity, nature and characteristics of a drug offense, for some inexplicable reason, the federal government fails to do so in determining basic eligibility for financial aid.

Finally, under the Aid Elimination Penalty, nonviolent drug offenders who have already suffered criminal consequences are singled out for the additional punitive measure of financial aid ineligibility, as compared to those who are convicted of more serious crimes and face no such barriers to aid. Such treatment fails to recognize the nexus between the severity of a crime and the appropriate punishment and underscores the shortsightedness and illogical thinking inherent in the Aid Elimination Penalty.

In the end, we must continue to call upon the United States Congress to repeal the HEA's Aid Elimination Penalty. The continued practice of stripping individuals of financial aid for drug convictions not only runs counter to common sense, but it also offends the very promise embodied by the spirit of our Constitution—the notion that educational opportunities should truly be open to all. Its disproportionate impact on African-Americans and other students of color, its failure to recognize the redemptive quality of education and the lack of foresight and common sense tied to the Aid Elimination Penalty require nothing less than our full attention and continued commitment to the struggle for equal access to higher education.