

# Submission to the UN Human Rights Committee: Review of Germany

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The Open Society Justice Initiative presents this submission in preparation for the Human Rights Committee's review of Germany during the 106<sup>th</sup> session. This paper focuses on Germany's failure to guarantee the right to education for all migrant children without discrimination.

## Executive Summary

The Open Society Justice Initiative presents this submission in preparation for the Human Rights Committee’s review of Germany. In its list of issues, the Committee has requested detailed information on “specific measures taken to eliminate discrimination against people with an immigration background in areas of employment, housing and education ... [as well as] measures taken to improve the collection of disaggregated statistical data on cases involving racial discrimination.”<sup>i</sup> While the Human Rights Committee has used the term “immigration background” to describe children of non-German, ethnic minority origin, this submission will utilize the phrase “migrant children,”<sup>ii</sup> and will focus on Germany’s failure to guarantee the right to education for all migrant children without discrimination.

Several primary and secondary schools in Berlin are segregating migrant children in separate classes from native-born German students<sup>iii</sup> on the putative grounds that their German language skills are inadequate for regular classes. In fact, although they speak German as a second language (in most cases), their language skills generally are adequate for regular classes, but serve as a proxy for discrimination on the basis of ethnicity or other suspect criteria. These separate classes provide vastly inferior education to regular classes. The discriminatory practices stigmatize migrant students, undermine their potential to integrate and participate fully in German society, and violate Germany’s obligations to prohibit discrimination under the ICCPR article 26, read together with article 2.

The Open Society Justice Initiative promotes human rights and builds legal capacity through litigation, advocacy, research, and technical assistance. For the past three years, the Justice Initiative has worked in Germany to address discrimination in education through advocacy and litigation. Within the past three months, the Justice Initiative filed a case challenging the segregation of migrant students in a Berlin gymnasium, and is conducting research with respect to discrimination in other primary schools with a view to possible litigation and/or advocacy.

## Recommendations

As a result of the harm suffered by migrant children in Germany, the Justice Initiative encourages the Committee to include in its concluding observations and recommendations to Germany that it:

- Amend the General (federal) Antidiscrimination Law (*Allgemeines Gleichbehandlungsgesetz*) to include protection against discrimination in public education.
- Amend regional (Länder) level school legislation to

- explicitly prohibit separate schooling of ethnic minorities and protect against discrimination
- integrate non-native German speakers into regular classes and provide additional instruction and support
- lift immunity from suit for secondary schools that fail to support especially non-native German students.
- Institute a full statistical anonymous recording of the ethnic composition of schools and classes.
- Introduce mandatory teacher training in non-discrimination and intercultural teaching.
- Create an independent oversight body (separate from existing authorities), where parents can take complaints, advocate for their rights and those of their children, and receive support.
- Carry out a Berlin-wide study assessing the experience and school track record of migrant children in the wake of recent reforms and in view of current practices which classify students on the basis of German as their second language, and assign students to particular classes at each school on that basis.

## Factual Background

### A. Disproportionate numbers of migrant children in the lowest-level schools

Questions regarding discrimination in the education of migrant children have persisted in Germany for several years. Germany's responses to concerns raised by UN human rights mechanisms have been inadequate to address the problem. In its most recent periodic report, the State claims that "educational institutions from elementary education up to higher education are open to all people in Germany based upon their aptitude, performance and abilities. Students with learning difficulties are supported by many measures, such as mentor programmes which foster close cooperation between the schools and the parental home. Relevant programmes have also been developed and are offered to children and teenagers of Sinti and Roma ethnicity."<sup>iv</sup> The facts belie these claims.

While this submission focuses largely on discrimination against migrant children in primary and secondary schools in Berlin, the problems described herein have national resonance. What happens in Berlin schools has nationwide significance because Berlin is both a Länd and Germany's largest city. Berlin often serves as an example for the relationship between the entire country and its migrant population. Education in Germany is decentralized and each federal entity (Länd) is responsible for ensuring its delivery within its territory.

In German schools, children are subject to compulsory education from the age of six. (Optional Kindergarten, or nursery school education, is provided for children from ages 3-6). Primary education lasts for four years in most Länder (six in some, such as Berlin), and, upon the completion of primary education, students are typically placed into one of three types of

secondary school—*Gymnasium* (the most elite level, which prepares children for academic work at a higher level), *Realschule* (the intermediate level, which provides a broad, general education), or *Hauptschule* (the lowest level, which prepares children for work or vocational training).<sup>v</sup> In some cases, the latter two are integrated into a *Gesamtschule*. Pupils must complete a total of 12 (via *Gymnasium*) or 13 years (via the layered secondary school) of education before they can access higher education.

According to the German yearly federal education report for 2010 (*Bildungsbericht*), children with a migrant background continue to be more likely to attend the lowest level *Hauptschule* or *Gesamtschule*. On average, they attend a *Hauptschule* twice as often as other children, even within the same socio-economic class.<sup>vi</sup>

## B. Inadequate improvements in eliminating discrimination in education

Although there have been some improvements in recent years, they have been inadequate to meet Germany's obligations. While at least one report from educational researchers suggests that admission to *Gymnasium* in Berlin for migrant children is no longer discriminatory,<sup>vii</sup> these migrant children continue to be underrepresented at the *Gymnasium* level. This is in part related to a new practice, based on the most recent reform to the *Berlin School Law* and effective as of 2011-2012 school year, whereby students who are not performing at a certain level after the first year are dismissed from *Gymnasium*. Many schools that want to accommodate native German parents' wishes are reportedly reluctant to accept pupils from migrant backgrounds. Parents belonging to the majority native German population often resist placing their children in schools with pupils from migrant and/or ethnic minority groups because they perceive these children as less capable of performing well in class.<sup>viii</sup> This prejudice, in turn, results in lower teacher expectations and support, worse grading, and school recommendations directing children of migrant descent to lower level schools.<sup>ix</sup>

In the past two years, the Regional Government has introduced some reforms in Berlin in an effort to address the concerns raised by the Special Rapporteurs on Education and Racism as well as the recommendations from the UPR.<sup>x</sup> The *Berlin School Law*, amended in 2010, contains a provision dictating that children whose native languages are German and non-German must be educated together, with exceptions for special learning groups aimed at German language learning support. The amended law also contains a non-discrimination provision, as does the German constitution in Article 3. However, the German Federal anti-discrimination law (*Allgemeines Gleichbehandlungsgesetz*) does not cover public education.<sup>xi</sup>

The *Berlin School Law* reform involved the redesign of the three-level school system into two levels, with more flexibility, theoretically, for students to switch between streams and schools. The reforms were intended in part to provide students from traditionally disadvantaged backgrounds (including migrant students) greater mobility within the secondary school system of Berlin and to encourage ethnic diversity among student populations. The former *Hauptschulen*

(lowest level) and *Realschulen* (intermediate level) are now contained within a new integrated *Sekundarschule*.

Under the amended *Berlin School Law*, the elite *Gymnasiums*, which remain a separate track and are the primary gateway to higher education, are no longer allowed to handpick all their students. A *Gymnasium* may pick 60% of its students while 30% of its places will be allocated by lottery and are open to all pupils regardless of their performance in primary school. The remaining 10% of places are reserved for children whose siblings are already enrolled at the school.<sup>xii</sup>

## Legal Obligations under the Covenant

According to Article 50 of the ICCPR, the Covenant’s provisions “extend to all parts of federal States without any limitations or exceptions.” The Human Rights Committee has explained that “the obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local – are in a position to engage the responsibility of the State Party.<sup>xiii</sup> The German legal framework, which regulates education at the Länder as well as the federal level, therefore is clearly subject to the relevant provisions of the ICCPR, in particular articles 2 and 26 on equality and non-discrimination.

### A. Article 2

ICCPR Article 2, paragraph 1 places an obligation on States parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The Committee has explained that the word “discrimination” in the Covenant should be understood to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” While article 2 applies only to rights provided for in the Covenant, the Committee has stated that “in fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.” The same interpretation should apply to education, which is fundamental to the enjoyment of a number of Covenant rights, as recognized by the Committee in its General Comment on Article 24 on the rights of the child. The Committee in that context affirmed that “in the cultural field, every possible measure should be taken to foster the development of their personality and to provide them with a level of education that will enable them to enjoy the rights recognized in the Covenant, particularly the right to freedom of opinion and expression.

## B. Article 26

ICCPR Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 prohibits any discrimination in law or in fact in any field regulated and protected by public authorities. It also guarantees to all persons equal and effective protection against discrimination. As such, the provision can be understood to apply to the enjoyment of the right to education.

The Committee has noted that not every difference of treatment will constitute discrimination under the Covenant. If the criteria for the differentiation are reasonable and objective and if the aim is legitimate under the ICCPR, the difference in treatment will not breach article 26. The Committee has previously examined differences of treatment in the area of education, such as disparities in quality and segregated classes for racial or ethnic minority students.

The Committee has expressed concern at “de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated.” The Committee was concerned that the State party, despite measures adopted, had not succeeded in eliminating racial discrimination creating wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students. It also noted with concern the State party’s position that federal government authorities cannot take legal action if there is no indication of discriminatory intent by state or local authorities. The Committee recalled the obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. It called on the State party to conduct in-depth investigations into the de facto segregation and take remedial steps, in consultation with the affected communities.

The Committee also has previously called on several States to end and prevent practices of school segregation of Roma children. It has called on States to ensure that “any differentiation within education is aimed at securing attendance in non-segregated schools and classes.” The Committee has acknowledged that States should, “where needed, provide special training to Roma children to secure, through positive measures, their access to education without segregation.” The Committee has also stated that the placement in schools should be “carried out on an individual basis and ... [should] not [be] influenced by the child’s ethnic group.” .

# Germany's Continued Failure to Meet its Obligations

## A. A History of Discrimination in Education in Recent Years

Following his visit to Germany in 2006, the Special Rapporteur on the Right to Education expressed concern that this extremely stratified school system led to a negative correlation between educational achievement and a student's migrant background. In 2010, the Special Rapporteur on Racism likewise noted that "the three-tiered system of German education, with early selection into separate levels of education, creates a bias against students whose mother tongue is not German. The Special Rapporteur believes that the overrepresentation of minority students in the lower school stratum is an indication of the problems in the three-tiered mode."

The CERD Committee, during its examination of Germany in 2008, also expressed concern "that children of immigrants are overrepresented in special schools for "under-achievers" (Sonderschulen), mainly on account of their lack of adequate German language skills, and underrepresented in secondary and tertiary education." (art. 5(e) (v)). It recommended that Germany take "effective measures to ensure the integration of children of non-citizens in the regular school system, and reconsider the problem of transfer of such children to Sonderschulen including the criteria for any such transfer, as well as improving current arrangements to support the German language skills of such children."

In 2009, Germany accepted the following recommendations in the context of the UPR: "Take fully into account the relevant recommendations of CERD aimed at ensuring the integration of non-German children into the regular school system (Italy); pay special attention to ensure that children of migrant background are not denied academic opportunities based primarily on their acquired proficiency in the German language (Canada); continue to implement the national integration plan to increase access to education for children of migrant workers (Saudi Arabia)."

## B. Clear indications of continuing discrimination, even absent reliable statistics

The recent reforms described above may have eliminated the practice of early and irrevocable streaming of children of migrant background into lower level schools in Berlin on paper, but significant evidence of continuing discrimination exists. Furthermore, it remains to be seen to what extent migrant children will be able to effectively access the higher school levels. This will largely depend on whether steps are taken to address negative attitudes, official discouragement, segregation, and lack of effective educational support.

Reliable statistical evidence of the educational achievements of migrant children in the German school system is difficult to obtain and assess for two reasons: (a) Wide variation among the student population exists across ethno-national origins, and (b) the process of gathering statistics is being revised to record pupils' "migratory background" instead of their nationality, because

naturalized and native-born students seem to perform better academically than do students from the same nationality with migrant backgrounds. Nonetheless, the lack of precision in gathering meaningful statistics over time makes it difficult to craft effective interventions.

Despite the challenges of obtaining reliable statistics, signs exist of an increasingly hostile attitude within the educational system towards migrants and in particular, those affiliated with Islam, mainly people of Turkish, Kurdish and Arabic descent. In response to the more flexible admission rules, both primary and secondary schools, and especially Gymnasiums, have started to create separate classes for native-born German and migrant students, with predictably negative consequences for the latter. In Berlin, at the Gymnasium level in school year 2011-2012, approximately 850 7th grade pupils failed the first test-year and were relegated to special classes (“failed students classes”) in secondary schools (integrierte Sekundarschulen). The majority of those relegated pupils are migrant students, or as the German authorities indicate, pupils “whose native language is not German (nichtdeutsche Herkunftssprache).” Only a few weeks into the school year, many of those relegated students had been informed by their teachers that they were unlikely to pass the test. Despite these warnings, school administrators or teachers made insufficient efforts to accommodate special needs or provide special support, leaving these children with virtually no chance of success in their further educational careers. While these schools, in principle, allow students to obtain a higher education diploma (Abitur), albeit it after a longer period of study, students of migrant origin, in reality, are rarely able to do so, and experience stigma and disadvantage as a result.

Examples of class segregation in primary and secondary schools in Berlin abound, and include

- Separate elite classes comprised entirely of native-born German children, created by school directors to attract ethnic German parents, with preferential conditions, better teachers, and additional learning projects.
- Classes in which the highest level of German language amongst pupils is guaranteed. The groups of students comprising these classes are formed at the Kindergarten level, and school administrators and teachers “guarantee” the groups to the ethnic German parents before enrollment, demonstrating the collusion to keep classes closed.
- Separate classes based on parents’ choice of religious instruction or second foreign language instruction. This segregation is justified as necessary for internal organizational school purposes.

The German practice of placing migrant children in separate classes seriously undermines the purported aim of integrating pupils into mainstream education. Separate classes for such children cannot be characterized as positive measures intended to support them in accessing the same educational opportunities as their German speaking peers, especially with regard to higher education. Evidence demonstrates that migrant children in these separate classes are not, in fact,

provided sufficient additional educational support to effectively address any potential special educational or linguistic needs.

The assignment of migrant students to separate classes based on language skills also constitutes indirect discrimination. There is no evidence to demonstrate a correlation between non-native language skills and academic capacity. Rather, native language is being used as a proxy to separate children based on ethnicity or nationality and to provide children of migrant backgrounds with distinctly different—and in fact, inferior—educational opportunities. Such segregation constitutes unlawful differentiation under the Covenant.

The affected minorities suffer harm as a result of (1) access to weaker educational programs than enjoyed by white German children; 2) the inability to access equal higher education opportunities as a result of their lower “tracking”; 3) stigmatization because of race, ethnicity, or nationality. There is no legitimate justification for segregating migrant children into separate classes from their ethnic German peers. As a practice in violation of ICCPR Articles 26 and 2, the wholesale discrimination in education against migrant children should cease immediately, and each child in Germany should gain access to educational opportunities based on ability, not ethnicity, nationality, or religion.

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<sup>i</sup> Human Rights Committee, List of issues to be taken up in connection with the consideration of the sixth periodic report of Germany (CCPR/C/DEU/6) adopted by the Human Rights Committee at its 105th session, 9-27 July 2012, CCPR/C/DEU/Q/6, para. 7.

<sup>ii</sup> For the purpose of this submission, the term “migrant child” or “child of migrant background” is used to denote a child who was either born outside of Germany, or whose parent(s) or grandparent(s) was born outside of Germany, *and* who is a member of the Turkish, Kurdish, or Arabic ethnic minority groups. Although migrants come to Germany from many countries, some migrant children may speak German as their first language. The fact that they may also speak another language—frequently described as their “home language” or “language of family origin”—is used often as a pretext to discriminate against them on the basis of their ethnic minority status.

<sup>iii</sup> This submission utilizes the phrase “native-born German children” to indicate those who were born in Germany or whose parents or grandparents were born in Germany, who are German nationals, and whose first language is German. The vast majority of these children are ethnically German and white.

<sup>iv</sup> Sixth periodic report of Germany, CCPR/C/DEU/6, 11 May 2011.

<sup>v</sup> In Berlin now only *Gymnasium* and *Integrierte Sekundarschule* (integrated school), see below.

<sup>vi</sup> See Authoring Group Educational Reporting, *Education in Germany 2010*, p. 14, available at <http://www.bildungsbericht.de/daten2010/summary10.pdf>.

<sup>vii</sup> WZBrief Bildung, 12.5.2012: Migrantenkinder auf dem Weg zum Abitur: Wie kommen die Übergangsempfehlungen nach der Grundschule zustande?

<sup>viii</sup> See, e.g., *Schule mit Migrationshintergrund*, Maren Wilmes, Jens Schneider und Maurice Crul, *Sind die Kinder türkischer Einwanderer in anderen Ländern klüger als in Deutschland? Bildungsverläufe in Deutschland und im europäischen*

*Vergleich: Ergebnisse der TIES-Studie*, pp. 30-46.

<sup>ix</sup> See BGPE Discussion Paper No. 99, *Are Immigrants and Girls Graded Worse? Results of a Matching Approach*, David Kiss, May 2011.

<sup>x</sup> Berlin school law amended in 2010 (Schulgesetz für Berlin, 8.6.2010), the relevant reforms effectively entered into force in the school year 2011-2012.

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<sup>xi</sup> See, Federal Anti-Discrimination Agency, Guide to the General Equal Treatment Act: “The AGG provides protection in the field of education to the extent that contracts under private law are involved. If discriminatory behavior is exhibited at a private language school, then the protection offered by the General Equal Treatment Act applies directly. In the case of education in the state system, the school laws of the individual Länder apply.”

<sup>xii</sup> So-called “hardship cases.”

<sup>xiii</sup> Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para. 4.

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