

# PUBLIC EDUCATION FUNDING INEQUITY

IN AN ERA OF INCREASING CONCENTRATION  
OF POVERTY AND RESEGREGATION

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING  
REPORT



JANUARY 2018

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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# **Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation**

Briefing Before  
The United States Commission on Civil Rights  
Held in Washington, DC

Briefing Report

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## UNITED STATES COMMISSION ON CIVIL RIGHTS

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### Letter of Transmittal

President Donald J. Trump  
Vice President Mike Pence  
Speaker of the House Paul Ryan  
Senate Majority Leader Mitch McConnell

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*. The report is also available in full on the Commission’s website at [www.usccr.gov](http://www.usccr.gov).

The report examines the funding of K-12 education and how the inequitable distribution of these funds negatively impacts the educational opportunities of low-income students and students of color.

The majority of the Commission voted for key findings including that quality education is critical to prepare students to be contributing members of a democratic society and competitive workers in a global economy. The Commission majority also found that vast funding inequities in our state public education systems factor significantly in rendering the education available to millions of American public school students profoundly unequal.

The Commission majority found that many students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and that there is potential for housing policy to help provide better educational opportunities for these students. Low-income students and students of color are often relegated to low-quality school facilities that lack equitable access to teachers, instructional materials, technology and technology support, critical facilities, and physical maintenance. These absences can negatively impact a student’s health and ability to be attentive and can exacerbate existing inequities in student outcomes.

As data on school spending become more accurate, some scholars believe there is concrete empirical evidence that funding is critical to positive student outcomes.

The majority of the Commission voted for key recommendations, including that Congress should prioritize incentivizing states to adopt equitable public school finance systems that provide

meaningful educational opportunity, promote student achievement for all students, and close achievement gaps where they exist; increase federal funding to supplement state funding with a goal to provide meaningful educational opportunity on an equitable basis to all students in the nation's public schools; and promote the collection, monitoring, and evaluation of school spending data to determine how funds are most effectively spent to promote positive student outcomes.

The Commission majority also calls on Congress to make clear that there is a federal right to a public education. Federal, state, and local government should develop incentives to promote communities that are not racially segregated and do not have concentrated poverty, which in turn would positively impact segregation and concentrated poverty in public schools and the educational challenges associated with such schools.

We at the Commission are pleased to share our views, informed by careful research and investigation, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,

A handwritten signature in blue ink, appearing to read "C. Lhamon", is positioned above the printed name.

Catherine E. Lhamon

Chair

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## EXECUTIVE SUMMARY

In 1954, the Supreme Court decreed in *Brown v. Board of Education* that public education “is a right which must be made available to all on equal terms,”<sup>1</sup> yet all across the United States (U.S.), there are many millions of students who are unable to access a quality public education due to inequities in public education finance. With insufficient financial resources, our nation’s public schools generally struggle to provide a quality education on equal terms and evidence is concrete that “the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status.”<sup>2</sup>

Repeat litigation filings challenge some of these inequities. For example, the Southern Poverty Law Center recently filed a lawsuit on behalf of four black mothers in Mississippi who alleged their children’s schools lack textbooks, teachers, basic classroom supplies, and even toilet paper.<sup>3</sup> One mother described her young daughter’s school as “old, dark and gloomy—like a jail,” with paint peeling off the wall and water spots.<sup>4</sup> Parents also alleged that sometimes their children are served lunches with curdled milk and rotten fruit.<sup>5</sup> The school districts involved in the lawsuit serve predominantly low-income, black students and both have been given the lowest ratings by the state’s education department, and at one child’s elementary school only 10 percent of students are proficient in reading and only 4 percent are proficient in math.<sup>6</sup> The parents’ complaint contrasts their children’s school conditions to the highly-ranked nearby schools that they describe as serving predominantly wealthy, white students; having adequate resources; and achieving proficiency in reading and math for the majority of students (73 percent proficient in reading and 71 percent proficient in math).<sup>7</sup>

Such widespread educational inequities are also documented in repeated government reports as well as in court findings regarding decrepit school facilities in chronic disrepair and in public

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

<sup>2</sup> Linda Darling Hammond, “Unequal Opportunity: Race and Education,” Brookings Institution, Mar. 1, 1998, <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

<sup>3</sup> Taryn Finley, “Black Parents Sue Mississippi Over Inequitable Schools,” Huffington Post, May 24, 2017, [http://www.huffingtonpost.com/entry/black-parents-lawsuit-mississippi-inequitable-schools\\_us\\_59258e34e4b0650cc020afcf](http://www.huffingtonpost.com/entry/black-parents-lawsuit-mississippi-inequitable-schools_us_59258e34e4b0650cc020afcf); Southern Poverty Law Center, “SPLC Suit: Mississippi Violates Binding Obligation to Provide ‘Uniform’ System of Public Education,” May 23, 2017, <https://www.splcenter.org/news/2017/05/23/splc-suit-mississippi-violates-binding-obligation-provide-%E2%80%99uniform%E2%80%99-system-public-education>.

<sup>4</sup> Southern Poverty Law Center, *supra* note 3.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

officials' pleas for funds sufficient to serve students in their charge.<sup>8</sup> For example, the U.S. General Accounting Office's (GAO) 1995 examination of the quality of America's schools reported that approximately 14 million students attend one-third of schools, distributed nationwide, that reported needing extensive repair or replacement of one or more buildings.<sup>9</sup> The GAO continued: "problems with major building features, such as plumbing, are widespread even among those schools reported in at least adequate condition. Almost 60 percent of America's schools reported at least one major building feature in disrepair, needing to be extensively repaired, overhauled, or replaced . . . Some district officials we spoke to told us that a major factor in the declining physical condition of the nation's schools has been decisions by school districts to defer vital maintenance and repair expenditures from year to year due to lack of funds."<sup>10</sup> These data have not improved over time: The National Center for Education Statistics reports that "53 percent of public schools needed to spend money on repairs, renovations, and modernizations to put the schools' onsite buildings in good overall condition."<sup>11</sup> The most recent data from schools reflect that only 48 percent of high schools offer calculus, to anyone—but 33 percent of high schools with high black and Latino student enrollment offer calculus, compared to 56 percent of high schools with low

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<sup>8</sup> See U.S. General Accounting Office, "School Facilities: Condition of America's Schools," February 1995, <http://www.gao.gov/assets/230/220864.pdf> (hereinafter GAO, "Condition of America's Schools"); Catherine E. Lhamon, U.S. Department of Education, Office for Civil Rights, "Dear Colleague Letter: Resource Comparability," Oct. 1, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> (hereinafter OCR, "Dear Colleague Letter: Resource Comparability"); Laurie Lewis *et al.*, U.S. Department of Education, Office of Educational Research and Improvement, "Condition of America's Public School Facilities: 1999," June 2000, <https://nces.ed.gov/pubs2000/2000032.pdf>; Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 198 (Ky. 1989); Tenn. Small Sch. Sys. v. McWherter, 851 S.W. 2d 139, 143-46 (Tenn. 1993); Abbott *ex rel.* Abbott v. Burke, 710 A.2d 450 (N.J. 1998); Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 332-40 (N.Y. 2003); Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 263 (Mont. 2005); Roosevelt Elementary Sch. No. 66 v. Bishop, 877 P. 2d 806 (Ariz. 1994); Hannah Saunders, "Detroit Teachers Protest Facilities, School Supplies, Gov's Plan," Fox 2 Detroit, January 11, 2016, <http://www.fox2detroit.com/news/local-news/detroit-teachers-protest-facilities-school-supplies-govs-plan>. In a public statement, the mayor noted that, "the school district has lost nearly half of its student enrollment, has suffered declines in math and reading scores to the lowest level in the country, and has run up new deficits in excess of \$700 million. Thirty percent to 40% of all state funding for Detroit schools is now going to pay debt instead of going to teaching our children. This is an issue of critical importance to the future of Detroit's children - students have no chance of learning when their education funding is diverted from the class." *Ibid.* See also Kristen A. Graham, "Philly School Buildings Need Nearly \$5B in Repairs, New Report Says," The Philadelphia Inquirer, January 26, 2017, <http://www.philly.com/philly/education/Phila-school-buildings-need-almost-5b-in-repairs.html>. Superintendent William R. Hite, Jr. said in a statement, "[e]very child should have access to safe, healthy, and welcoming school facility that supports teaching and learning opportunities," and a recent facilities report that estimated a cost of nearly \$5 billion to fix 12,000 outstanding repairs at schools in the Philadelphia School district "empowers us to prioritize capital projects and clearly show our existing and potential public and private partners what our infrastructure needs are and how they can help." *Ibid.*

<sup>9</sup> GAO, "Condition of America's Schools," *supra* note 8, at 2.

<sup>10</sup> *Ibid.*

<sup>11</sup> U.S. Department of Education, National Center for Education Statistics, "Fast Facts: Condition of Public School Facilities," <https://nces.ed.gov/fastfacts/display.asp?id=94>.

black and Latino student enrollment.<sup>12</sup> Whereas most schools offer counselors to their students, “21 percent of high schools and about 850,000 high school students nationwide do not have access to any school counselor.”<sup>13</sup> While the demographics of public school enrollment have shifted over the decades since *Brown* due to desegregation efforts and population shifts, among other factors, racial, ethnic, and economic segregation remain a reality all across the U.S. Residential segregation exacerbates school inequalities. Students who live in high-poverty neighborhoods often attend schools that lack the financial resources to provide them with quality educational opportunities, as school resources are so closely tied to the wealth of the surrounding community. An achievement gap has resulted and persisted, largely between students who attend well-funded schools in low-poverty neighborhoods and the most disadvantaged students—often students of color and students from poor households—who attend poorly-funded schools in high-poverty neighborhoods.

Decades of social science research reflects that schools that remain segregated by income and race tend also to remain extremely unequal in the educational opportunities that they afford students of different racial, ethnic, and economic backgrounds.<sup>14</sup> There is an emerging body of research that finds significant positive educational outcomes for students—particularly students of color—who attend integrated schools. Such outcomes include the development of critical thinking skills, higher graduation rates, more prominent educational and career goals, greater earnings in the workforce, and even more positive health outcomes.<sup>15</sup> Despite these proven outcomes, educational inequity still persists across the U.S.

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<sup>12</sup> U.S. Department of Education, Office for Civil Rights, “A First Look: 2013-2014 Civil Rights Data Collection,” June 2016, revised October 28 2016, p. 6, <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> (hereinafter OCR, “A First Look: 2013-2014 Civil Rights Data Collection”).

<sup>13</sup> *Ibid.* at 9.

<sup>14</sup> Gary Orfield *et al.*, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” The Civil Rights Project, May 15, 2014, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>; Sean F. Reardon, “School Segregation and Racial Academic Achievement Gaps (CEPA Working Paper No.15-12),” Stanford Center for Education Policy Analysis, January 2016, <https://cepa.stanford.edu/sites/default/files/wp15-12v201601.pdf> (hereinafter Reardon, “School Segregation and Racial Academic Achievement Gaps”); Jonathan Rabinovitz, “Local Education Inequities Across U.S. Revealed in New Stanford Data Set,” Stanford News, April 29, 2017, <http://news.stanford.edu/2016/04/29/local-education-inequities-across-u-s-revealed-new-stanford-data-set/>.

<sup>15</sup> Karen McGill Arrington, U.S. Commission on Civil Rights, “With All Deliberate Speed: 1954-19??” 1981 (hereinafter USCCR, “With All Deliberate Speed: 1954-19??”); Amy Stuart Wells *et al.*, “How Racially Diverse Schools and Classrooms Can Benefit All Students,” The Century Foundation, February 9, 2016, [https://tcf.org/assets/downloads/HowRaciallyDiverse\\_AmyStuartWells.pdf](https://tcf.org/assets/downloads/HowRaciallyDiverse_AmyStuartWells.pdf); The Century Foundation, “Stories of School Integration,” October 14, 2016, <https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/10/13195652/StoriesOfSchoolIntegration.pdf>; Erica Frankenberg and Gary Orfield, “Lessons in Integration: Realizing the Promise of Racial Diversity in American Schools,” (U. Va. Press, 2007); Adai Tefera *et al.*, “Integrating Suburban Schools: How to Benefit from Growing Diversity and Avoid Segregation,” The Civil Rights Project, 2011, <http://files.eric.ed.gov/fulltext/ED520331.pdf>; Reardon, “School Segregation and Racial Academic Achievement Gaps,” *supra* note 14.

The Elementary and Secondary Education Act (ESEA) was passed in 1965 to improve educational equity and opportunity by providing funding, authorized under Title I of the Act, to school districts that serve low-income students.<sup>16</sup> President Johnson, in his remarks on signing the Act, said that it “represents a major new commitment of the federal government to quality and equality in the schooling that we offer our young people,” and will “bridge the gap between helplessness and hope for more than five million educationally deprived children.”<sup>17</sup> Since then, it has been reauthorized several times, most notably by the No Child Left Behind Act (NCLB) and the Every Student Succeeds Act (ESSA). While these authorizations have led to achievement gains, many schools still fall short of providing quality education to all students due to a lack of funding and resources.

Each year, the U.S. spends over \$550 billion on public education.<sup>18</sup> While school districts spend an average of \$11,066 on each student each year, that number fluctuates drastically from district to district. Public schools in the U.S. are funded from a combination of local, state, and federal dollars. The revenue that local governments provide for public education is primarily generated from local property taxes, thus the funding provided for public education is largely tied to property values and the wealth of a community. This contributes to school funding inequities between high-poverty and low-poverty districts.

States bear the obligation to provide public education for their students, and as a result of funding inequity lawsuits brought in the majority of states, many states have implemented state funding reforms to increase funding in districts serving the most disadvantaged students.<sup>19</sup> However, there are still stark funding inequities, as the highest-poverty districts receive an average of \$1,200 less

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<sup>16</sup> Every Student Succeeds Act of 2015 (ESSA), Pub. L. No. 114-95 (codified as amended at 20 U.S.C. §6301 *et seq.*); U.S. Department of Education, “Every Student Succeeds Act (ESSA),” <https://www.ed.gov/essa?src=rn>.

<sup>17</sup> President Lyndon B. Johnson (Remarks on Signing the Elementary and Secondary Education Act, Johnson City, TX, April 11, 1965), <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/johnsons-remarks-on-signing-the-elementary-and-secondary-education-act>.

<sup>18</sup> Stephen Q. Cornman and Lei Zhou, U.S. Department of Education, National Center for Education Statistics, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14 (Fiscal Year 2014),” October 2016, p.2, <https://nces.ed.gov/pubs2016/2016301.pdf> (hereinafter NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14”).

<sup>19</sup> Emily Parker, “Constitutional Obligations for Public Education,” Education Commission of the States, March 2016, <http://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>; Derek W. Black, Unlocking the Power of State Constitutions with Equal Protection: The First Step Toward Education as a Federally Protected Right, 51 *Wm. & Mary L. Rev.* 1343 (2010); Lauren Nicole Gillespie, The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education, 95 *Cornell L. Rev.* 989, 990-1019 (2010).

per-pupil than the lowest-poverty districts, and districts serving the largest numbers of students of color receive about \$2,000 less per-pupil than districts who serve the fewest students of color.<sup>20</sup>

Schools that receive Title I funding are required by law to provide comparable services to schools that do not receive Title I funding.<sup>21</sup> Yet, poorer schools often have less experienced and lower-paid teachers, fewer high-rigor course offerings, substandard facilities, and less access to school materials and resources.<sup>22</sup> School districts that serve the most disadvantaged students often require higher levels of funding to overcome the financial challenges of serving the needs of disadvantaged students, including students with disabilities, and English language learners, particularly those who come from low-income households and who are also students of color.<sup>23</sup>

In 1965, the average white seventh grade student from the urban northeast region performed just as well academically as a black twelfth grade student from the rural southern region.<sup>24</sup> Since that time, there has been marginal improvement, but there are still significant gaps among white students and students of color across the U.S.<sup>25</sup> These discernable achievement gaps open up among students by the time they enter kindergarten, and are present among students from households of varying income levels, as well as among white students and students of color.<sup>26</sup>

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<sup>20</sup> Natasha Ushomirsky and David Williams, “Funding Gaps 2015: Too Many States Still Spend Less,” The Education Trust, March 2016, p. 1, [https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015\\_TheEducationTrust1.pdf](https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf).

<sup>21</sup> Ruth Heuer and Stephanie Stullich, U.S. Department of Education, “Comparability of State and Local Expenditures among Schools within Districts: A Report from the Study of School-Level Expenditures,” 2011, <https://www2.ed.gov/rschstat/eval/title-i/school-level-expenditures/school-level-expenditures.pdf> (hereinafter U.S. Department of Education, “Comparability of State and Local Expenditures among Schools Within Districts”).

<sup>22</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8.

<sup>23</sup> Bruce D. Baker, “America’s Most Fiscally Disadvantaged School Districts and How They Got that Way,” Center for American Progress, July 2014, <https://cdn.americanprogress.org/wp-content/uploads/2014/07/BakerSchoolDistricts.pdf>; OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 5.

<sup>24</sup> Eric A. Hanushek, “What Matters for Student Achievement: Updating Coleman on the Influence of Families and Schools,” *Education Next*, Spring 2016, p.25, [http://educationnext.org/files/ednext\\_XVI\\_2\\_hanushek.pdf](http://educationnext.org/files/ednext_XVI_2_hanushek.pdf) (citing Coleman Report).

<sup>25</sup> U.S. Department of Education, National Center for Education Statistics, “The Nation’s Report Card: Trends in Academic Progress,” 2012, p. 2, <https://nces.ed.gov/nationsreportcard/subject/publications/main2012/pdf/2013456.pdf> (hereinafter NCES, “The Nation’s Report Card: Trends in Academic Progress”).

<sup>26</sup> Cecilia Rouse *et al.*, “Introducing the Issue,” 15 *The Future of Children* 5, 5 (Spring 2005), [http://www.futureofchildren.org/sites/futureofchildren/files/media/school\\_readiness\\_15\\_01\\_fulljournal.pdf](http://www.futureofchildren.org/sites/futureofchildren/files/media/school_readiness_15_01_fulljournal.pdf). The authors explain that U.S. education policy is largely focused on school-aged children from K-12, and until recently, the education of pre-school aged children was not a policy concern. Daphna Bassok *et al.*, “Socioeconomic Gaps in Early Childhood Experiences: 1998 to 2010,” 2 *AERA Open* 1 (2016), <http://journals.sagepub.com/doi/pdf/10.1177/2332858416653924>; Eric Westervelt, “Surprise! Amid Rising Inequality, One School Gap is Narrowing,” *NPR*, August 28, 2016, <http://www.npr.org/sections/ed/2016/08/28/491260896/surprise-amid-rising-inequality-one-school-gap-is-narrowing>. Sean Reardon indicates that two likely explanations for the narrowing gap are “improvements in the

While some researchers argue whether there is a direct correlation between per-pupil spending and achievement, it has been found that the manner in which funds are spent is critical to closing the achievement gap.<sup>27</sup>

Over the past three decades, wealth disparities have increased and poverty has become more concentrated in certain areas, disproportionately affecting racial and ethnic minorities.<sup>28</sup> Residential segregation exacerbates inequity in educational opportunities, and with the changing demographics of school enrollment, many students of color experience “double segregation,” or segregation by both race/ethnicity and concentrated poverty.<sup>29</sup> While schools that had been segregated pursuant to state law were ordered to desegregate as a result of the *Brown* decision, there are many school districts that remain highly segregated by race, ethnicity, and poverty.<sup>30</sup> Indeed several school districts remain under their original desegregation consent decrees because they have not yet eliminated the vestiges of segregation.<sup>31</sup> In certain districts, “resegregation” has occurred, which has caused students of color to be increasingly isolated from white students.<sup>32</sup>

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quality of preschool available to low-income families and more engagement of families across the income distribution, but particularly low-income families, in sort of cognitively enriching activities with their kids.” *Ibid.*

<sup>27</sup> James S. Coleman *et al.*, U.S. Department of Education, National Center for Educational Statistics, “Equality of Educational Opportunity,” 1966 (hereinafter NCES, “Equality of Educational Opportunity”),

<http://files.eric.ed.gov/fulltext/ED012275.pdf>; Hanushek, “What Matters for Student Achievement: Updating Coleman on the Influence of Families and Schools,” *supra* note 24; Bruce D. Baker, “Does Money Matter in Education?” Albert Shanker Institute, 2016,

[http://www.shankerinstitute.org/sites/shanker/files/moneymatters\\_edition2.pdf](http://www.shankerinstitute.org/sites/shanker/files/moneymatters_edition2.pdf); Geoffrey D. Borman and Maritza Dowling, “Schools and Inequality: A Multilevel Analysis of Coleman’s *Equality of Educational Opportunity* Data,” 112 *Teachers College Record* 1201 (2010).

<sup>28</sup> Richard Fry and Paul Taylor, “The Rise of Residential Segregation by Income,” Pew Research Center, August 1, 2012, <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/>.

<sup>29</sup> Gary Orfield *et al.*, “E Pluribus... Separation: Deepening Double Segregation for More Students,” The Civil Rights Project, September 2012, [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf).

<sup>30</sup> *Ibid.* See also *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954); *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

<sup>31</sup> U.S. Department of Justice, “Educational Opportunities Cases,” <https://www.justice.gov/crt/educational-opportunities-cases>; Yue Qiu and Nikole Hannah-Jones, “A National Survey of School Desegregation Orders,” *Pro Publica*, December 23, 2014, <http://projects.propublica.org/graphics/desegregation-orders>.

<sup>32</sup> Gary Orfield *et al.*, “Sorting Out Deepening Confusion on Segregation Trends,” Civil Rights Project, March 2014, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/sorting-out-deepening-confusion-on-segregation-trends/Segregation-Trends-Dispute-CRP-Researchers.pdf>; See also Statement of Jacob L. Vigdor, University of Washington, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), at 5 (hereinafter Vigdor Statement). Jacob Vigdor clarifies the term “resegregation” by explaining, “the term ‘resegregation’ is often applied to this recent trend in public school enrollment. The direction of the trend in school segregation is sensitive to the method of measurement. Scholars of school segregation have tended to closely examine the proportion of African-American students attending schools above 90% nonwhite (*for example*, Orfield *et al.* 1997) . . . As a measure, it can be criticized for confounding segregation with demographic change. In a world

Notwithstanding these persisting and reconfiguring segregation challenges, federal policymaking could successfully drive integration and increase equal educational opportunity, especially, some advocates argue, if education policy and housing policy intersect in productive ways.<sup>33</sup> Some of the largest federal housing programs and initiatives recognize that providing housing opportunities ultimately can lead to better educational opportunities and long-term outcomes. Essentially, housing policy is education policy, and with greater collaboration at the federal, state and local levels, policies can be developed that can successfully integrate communities, integrate schools, raise achievement for all students, and ultimately realize the goals of *Brown*.

The U.S. Commission on Civil Rights (USCCR) has historically placed great importance on the topic of providing equal educational opportunities to all students, and has issued a number of reports that provide important findings and recommendations.<sup>34</sup> A few of USCCR's reports were issued to Congress prior to the enactment of ESEA, and their recommendations for education are closely aligned with the goals of this foundational legislation.<sup>35</sup> With the goal of furthering equal educational opportunity for all students, including students of color, low-income students, and students of other protected groups, USCCR highlights the following findings and recommendations made herein:

#### Findings:

- Although the United States Supreme Court ruled in 1954 that public education is a right that should be available to all on equal terms, the longstanding and persistent reality is that vast funding inequities in our state public education systems render the education available to millions of American public school students profoundly unequal.
- The U.S. Department of Education reported that more than 40 percent of Title I schools spent less on personnel per-pupil than non-Title I schools at the same grade level and that are within the same school district.
- These school finance inequities cause harm to students subject to them. In addition, as data on school spending become more accurate, some scholars believe there is concrete empirical evidence that funding is critical to positive student outcomes.
- Low-income students and students of color are often relegated to low-quality school facilities that lack equitable access to teachers, instructional materials, technology and

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where the public school population is increasingly nonwhite—but also nonblack—all students face higher proportions of nonwhite classmates, even when perfectly integrated.”

<sup>33</sup> Phil Tegeler, Poverty & Race Research Action Council, testimony, Briefing Transcript, p. 205-206.

<sup>34</sup> See U.S. Commission on Civil Rights, “Education,” <http://www.usccr.gov/pubs/education.php>; University of Maryland Frances King Carey School of Law, “Historical Publications of the United States Commission on Civil Rights—Publications by Subject,” <http://www.law.umaryland.edu/marshall/usccr/subjlist.html?subjectid=16>.

<sup>35</sup> U.S. Commission on Civil Rights, “Education,” 1961; U.S. Commission on Civil Rights, “Equal Protection of the Laws in Public Higher Education,” 1960; U.S. Commission on Civil Rights, Public Education: 1963 Staff Report,” 1963; U.S. Commission on Civil Rights, “Public Education: 1964 Staff Report,” 1964. The U.S. Commission on Civil Rights also issued a series of reports in the early 1960s on the state of public schools in various regions of the U.S.

technology support, critical facilities, and physical maintenance. These absences can negatively impact a student's health and ability to be attentive and can exacerbate existing inequities in student outcomes.

- Many students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and there is potential for housing policy to help provide better educational opportunities for these students.
- The reality of American schooling is fundamentally inconsistent with the American ideal of public education operating as a means to equalize life opportunity, regardless of zip code, race, economic status, or life circumstance.

#### Recommendations:

- We agree with the Equity and Excellence Commission that the federal government must take bold action to address inequitable funding in our nation's public schools.
- Congress should:
  - incentivize states to adopt equitable public school finance systems that provide meaningful educational opportunity, promote student achievement for all students, and close achievement gaps where they exist;
  - incentivize states to ensure adequate funding for students with disabilities, without incentivizing classifying students into special education
  - incentivize states to invest in facilities which can help to provide an equitable environment for students to achieve.
  - increase federal funding to supplement state funding with a goal to provide meaningful educational opportunity on an equitable basis to all students in the nation's public schools;
  - promote the collection, monitoring, and evaluation of school spending data to determine how funds are most effectively spent to promote positive student outcomes;
  - develop mechanisms to monitor and evaluate the effectiveness of federal spending on enhancing student achievement and closing achievement gaps; and
- Since the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, a quality education has become even more mandatory for students to gain the skills necessary to work in the new global information age economy and it has become clear that some states and cities are continuing to discriminate against students of color in the funding of their schools. Congress should make clear that there is a federal right to a public education.
- Federal, state, and local government should develop incentives to promote communities that are not racially segregated and do not have concentrated poverty, which in turn would positively impact segregation and concentrated poverty in public schools and the educational challenges associated with such schools.



## CHAPTER 1: INTRODUCTION & OVERVIEW

*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.*

—Chief Justice Earl Warren, *Brown v. Board of Education* opinion<sup>36</sup>

### 61 Years after Brown: the Equity of Public Education

It has been over six decades since the Supreme Court decreed in *Brown v. Board of Education* that public education “is a right which must be available to all on equal terms.”<sup>37</sup> In *Brown*, the U.S. Supreme Court unanimously ruled that racially segregated public school facilities are “inherently unequal” and therefore unconstitutional.<sup>38</sup> For nearly 60 years prior, “separate but equal” had been the law of the land, after the U.S. Supreme Court’s *Plessy v. Ferguson* decision that upheld the validity of state and local Jim Crow laws that perpetuated racial segregation in public accommodations.<sup>39</sup> Prior to *Brown*, a U.S. District Court had ruled in *Mendez v. Westminster* that schools that segregated students of Mexican or Latin descent were unconstitutional, as they denied equal protection under the 14th Amendment.<sup>40</sup> This decision was later affirmed by a U.S. Court of Appeals.<sup>41</sup> In 1950, UNESCO issued the first of four statements on race entitled *The Race Question*, which influenced in part the *Brown* decision and served to “make known the scientific facts about race and to combat racial prejudice.”<sup>42</sup> The *Brown* decision stated that *de jure* segregation was a violation of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, overturning key aspects of the *Plessy v. Ferguson* decision that had allowed for “separate but equal” public schools.<sup>43</sup>

While the *Brown* decision was historic in nature, it initially provided little practical guidance for how to desegregate schools. The Supreme Court subsequently ruled in a second decision

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<sup>36</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 495.

<sup>39</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>40</sup> *Mendez v. Westminster Sch. Dist. of Orange County*, 64 F. Supp. 544 (S.D. Cal. 1946).

<sup>41</sup> *Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

<sup>42</sup> UNESCO, “The Race Question,” 1950, Foreword, <http://unesdoc.unesco.org/images/0012/001229/122962eo.pdf>; see also UNESCO, *Four Statements on the Race Question*, 1969; Poul Duedahl, “UNESCO Man: Changing the Concept of Race, 1945-1965,” American Anthropological Association: 107<sup>th</sup> Annual Meeting, 2008, p. 27, [http://vbn.aau.dk/files/61248765/UNESCO\\_Man\\_Paper\\_Poul\\_Duedahl.pdf](http://vbn.aau.dk/files/61248765/UNESCO_Man_Paper_Poul_Duedahl.pdf).

<sup>43</sup> *Brown*, 347 U.S. 483; see also Richard Rothstein, “Modern Segregation,” Economic Policy Institute, Mar. 6, 2014, <http://www.epi.org/files/2014/MODERN-SEGREGATION.pdf>. The author characterizes *de jure* segregation as “resulting from racially-motivated public policy.” *Ibid.* at 2.

(commonly referred to as *Brown II*) that schools must desegregate “with all deliberate speed.”<sup>44</sup> That phrasing proved to be problematic though, as the language was not forceful enough to compel all schools to desegregate on an immediate basis, and left room for resistance by segregationists and other entities opposed to the ruling.<sup>45</sup>

## STILL SEPARATE, STILL UNEQUAL

While schools were ordered to desegregate “with all deliberate speed” as a result of the *Brown II* decision in hopes of affording all students—but particularly students of color—equal educational opportunities, the process was slow, especially in certain areas of the country.<sup>46</sup> Public school desegregation efforts in the South encountered massive delays, and in 1968, prompted the Supreme Court to declare that, “the time for mere ‘deliberate speed’ has run out.”<sup>47</sup> Much of the school desegregation efforts occurred shortly after this time, reaching an apex in the mid-1970s, following a period of aggressive enforcement from the U.S. Department of Education.<sup>48</sup> This enforcement effort included withholding federal funds from over 200 school districts in the South, who refused orders under Title VI to desegregate.<sup>49</sup> When the U.S. Department of Education and the U.S. Department of Justice (DOJ) subsequently discontinued aggressive enforcement, in the Reagan administration, and after the Reagan administration successfully advocated with Congress to change law to eliminate busing as a federal statutory remedy and the U.S. Supreme Court narrowed available desegregation remedies, practical desegregation fell substantially, which has persisted to

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<sup>44</sup> *Brown v. Board of Education of Topeka*, 349 U.S. 294, 301 (1955).

<sup>45</sup> Charles Ogletree, “All Deliberate Speed,” Center for American Progress, April 12, 2014, <https://www.americanprogress.org/issues/general/news/2004/04/12/660/all-deliberate-speed/>.

<sup>46</sup> *Ibid.* In this article, Dr. Ogletree explains that the phrase “with all deliberate speed” that was written into the language of the second *Brown* decision was interpreted by Chief Justice Thurgood Marshall and other civil rights lawyers to mean “slow,” which effectively allowed schools to desegregate at their own pace. As of 2015, there were nearly 180 schools in the U.S. involved in active desegregation cases, a prominent one being schools in the Cleveland, Mississippi school district that finalized a settlement in early 2017 after a five-decade legal battle. See Aria Bendix, “A Mississippi School District Is Finally Getting Desegregated.” *The Atlantic*, Mar. 14, 2017, <https://www.theatlantic.com/education/archive/2017/03/a-mississippi-school-district-is-finally-getting-desegregated/519573/>; see also Becky Monroe, Department of Justice, testimony, Briefing Transcript, p. 92-93. Ms. Monroe notes that a school district in Mississippi (as referenced in the previous Atlantic article link) just adopted the U.S. Department of Justice’s desegregation plan, as ordered by a federal district court. The court noted that “the delay in desegregation has deprived generations of students the constitutionally guaranteed right of an integrated education.” *Ibid.*

<sup>47</sup> *Alexander v. Holmes County Bd. of Ed.*, 396 U.S. 1218, 1219 (1969).

<sup>48</sup> Chinh Q. Le, Racially Integrated Education and the Role of the Federal Government, 88 *N.C. L. Rev.* 725, 731-42 (2010); Genevieve Siegel-Hawley and Erica Frankenberg, “Southern Slippage: Growing School Segregation in the Most Desegregated Region of the Country,” *The Civil Rights Project*, September 2012, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/southern-slippage-growing-school-segregation-in-the-most-desegregated-region-of-the-country/hawley-MLK-South-2012.pdf>; Orfield *et al.*, “E Pluribus... Separation: Deepening Double Segregation for More Students,” *supra* note 29, at 3-4.

<sup>49</sup> Le, *supra* note 48, at 737.

this day.<sup>50</sup> Public schools today remain racially and economically segregated, exacerbated by concentrated poverty and resegregation in communities across the U.S. This is especially true in urban areas, where in 90 of the 95 largest cities in the U.S., students of color are more likely to attend public schools with low-income students than are white students.<sup>51</sup> While economic segregation has a profound effect on racial disparities in school achievement, it has been noted that it is difficult to “separate racial exposure to poverty from racial exposure to segregation.”<sup>52</sup>

Much like the population demographics of U.S. cities are changing, the population demographics of school enrollment are changing as well. Black students used to be the predominant minority, but the Hispanic population has been rapidly growing in the U.S. and they became the predominant minority in public schools, with 18 percent enrollment during the 2002-2003 school year.<sup>53</sup> Hispanic enrollment also differs greatly by region, with a concentration of Hispanic students in the West making up approximately 35 percent of total enrollment.<sup>54</sup> Enrollment data also demonstrates that school segregation is stark. Approximately 77 percent of Hispanic students and 73 percent of black students attend schools that are majority students of color (with 50-100 percent enrollment of students of color), and approximately 88 percent of white students attend schools that are at least half white.<sup>55</sup> Further exacerbating the issue, a recent study from the Southern Education Foundation found that the majority of students enrolled in public schools in the U.S. come from low-income households.<sup>56</sup> Poverty is strongly linked with racial and ethnic minority enrollment in schools, and the higher this minority enrollment, the higher the enrollment of students coming from high-poverty households.<sup>57</sup>

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<sup>50</sup> *Ibid.* at 742-44; Orfield *et al.*, “E Pluribus... Separation: Deepening Double Segregation for More Students,” *supra* note 29, at 3-5.

<sup>51</sup> Janie Boschma, “Separate and Still Unequal,” *The Atlantic*, March 1, 2016, <https://www.theatlantic.com/education/archive/2016/03/separate-still-unequal/471720/>; *see also* “National Equity Atlas,” PolicyLink and the University of Southern California Program for Environmental and Regional Equity, <http://nationalequityatlas.org/>. The National Equity Atlas is a joint product of PolicyLink and the University of Southern California Program for Environmental and Regional Equity, who have been working to provide “equity advocates with clear, convincing data to make the case that equity is both a moral imperative and the key to our nation’s economic prosperity” since 2011. School poverty is one of the indicators.

<sup>52</sup> Boschma, *supra* note 51.

<sup>53</sup> Gary Orfield and Chungmei Lee, “Why Segregation Matters: Poverty and Educational Inequality,” Civil Rights Project, Harvard University, January 2005, pp. 10, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/why-segregation-matters-poverty-and-educational-inequality/orfield-why-segregation-matters-2005.pdf>.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 13-14.

<sup>56</sup> Steve Suits, “New Majority Research Bulletin: Low Income Students Now a Majority in the Nation's Public Schools,” Southern Education Foundation, January 2015, <http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx>.

<sup>57</sup> Orfield and Lee, *supra* note 53, at 14-17.

As school enrollment has changed, many predominantly minority schools experience “double segregation,” or segregation by both race/ethnicity and concentrated poverty. These schools tend to face more challenges to achievement, such as instability of enrollment, high teacher turnover, and/or combining groups of students such as students with limited English proficiency (LEP) and special education students together in the same classroom with insufficient supports for their learning.<sup>58</sup> The majority of the nation’s “dropout factory” schools are heavily segregated by race and poverty.<sup>59</sup> The effects of concentrated poverty exacerbate existing racial and ethnic inequalities, and “[t]he differential racial exposure to concentrated school poverty is a fundamental reason why segregation is so strongly related to educational inequality.”<sup>60</sup>

Because schools are largely funded through revenue generated by local property taxes, poorer communities are unable to generate the funds to adequately fund their schools, which creates funding disparities among school districts.<sup>61</sup> States also allocate significant funds for local school districts based on funding formulas that may take into account factors such as student enrollment, financial need, or the characteristics of the students.<sup>62</sup> Federal money makes up a smaller portion of a district’s overall revenue, and is meant to supplement state and local funds.<sup>63</sup>

The U.S. Department of Education’s Office for Civil Rights (OCR) noted that schools across the U.S. find it increasingly difficult to provide a quality education to all students.<sup>64</sup> With existing racial and income disparities in student achievement across schools, the allocation of funds for public education “exacerbates rather than remedies achievement and opportunity gaps,” and “these disparities may be indicative of broader discriminatory policies or practices that, even if facially neutral, disadvantage students of color.”<sup>65</sup> These funding inequities hinder efforts to provide quality education to all students, including quality instruction, educational programs, materials, and facilities.<sup>66</sup>

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<sup>58</sup> Orfield *et al.*, “E Pluribus... Separation: Deepening Double Segregation for More Students,” *supra* note 29, at 26.

<sup>59</sup> *Ibid.* at 8.

<sup>60</sup> *Ibid.* at 76.

<sup>61</sup> “Local Funding,” New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/local-funding/>.

<sup>62</sup> “State Funding,” New American Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/state-funding/>.

<sup>63</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 5.

<sup>64</sup> *Ibid.* at 2.

<sup>65</sup> *Ibid.* at 2, 5.

<sup>66</sup> *Ibid.* at 12-19.

## Title VI of the Civil Rights Act of 1964 and Equal Educational Opportunity

Title VI of the Civil Rights Act of 1964 prohibits discrimination in programs that receive federal financial assistance on the basis of race, color or national origin.<sup>67</sup> Public education in the U.S. is funded in part by federal dollars.<sup>68</sup> A variety of public educational agencies and institutions are covered by Title VI, and all programs that receive federal funds must operate in a nondiscriminatory manner.<sup>69</sup> OCR is charged with enforcement to ensure that all students are given an equal opportunity to education.<sup>70</sup>

## Other Relevant Laws that Promote Equal Educational Opportunity

The Equal Educational Opportunities Act protects students by affirming that states cannot deny educational opportunity, including by engaging in or failing to remedy deliberate segregation, on the basis of race, color, national origin, or sex.<sup>71</sup> OCR has specified that this law, along with Title VI of the Civil rights Act of 1964, extends to English language learners and requires that public schools overcome any language barriers that “impede equal participation by students in their instructional programs.”<sup>72</sup> The English Language Acquisition, Language Enhancement, and Academic Achievement Act, also known as Title III, Part A of the Elementary and Secondary Education Act of 1965, as amended, awards grants to schools to aid English language learners “meet the same challenging State academic standards that all children are expected to meet.”<sup>73</sup>

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<sup>67</sup> Department of Justice, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, <https://www.justice.gov/crt/fcs/TitleVI-Overview>.

<sup>68</sup> NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14,” *supra* note 18.

<sup>69</sup> U.S. Department of Education, “Education and Title VI,” <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>; Denise Forte, House Committee on Education & the Workforce, testimony, Briefing Transcript, p. 271. Denise Forte notes that H.R. 5260, the Equity and Inclusion Enforcement Act, was introduced and if passed, will amend Title VI of the Civil Rights Act of 1964 to restore “the right to individual civil actions in cases involving disparate impact based on race, color or national origin.” See Equity and Inclusion Enforcement Act, H.R. 5260, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/5260>.

<sup>70</sup> U.S. Department of Education, “Education and Title VI,” *supra* note 69; Jessie Brown, U.S. Department of Education, Office for Civil Rights, testimony, Briefing Transcript, p. 279. Jessie Brown notes that OCR is charged with enforcement of civil rights violations of educational resource comparability, and has provided guidance to school administrators, teachers, parents, students and advocates to understand how OCR might investigate such issues.

<sup>71</sup> Equal Educational Opportunities Act of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified at 20 U.S.C. §§ 1701-1758 (Supp. III 2015)).

<sup>72</sup> U.S. Department of Education, “Dear Colleague Letter, English Learner Students and Limited English Proficient Parents,” January 7, 2015, pp. 1, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-el-201501.pdf>. See also U.S. Department of Education, “Schools’ Civil Rights Obligations to English Learner Students and Limited English Proficient Parents,” <https://www2.ed.gov/about/offices/list/ocr/ellresources.html>.

<sup>73</sup> 20 U.S.C. §§ 6821(b)(2)(D)(ii) (Supp. III 2015).

Section 504 of the Rehabilitation Act of 1973 protects people with disabilities from discrimination in programs or facilities that receive federal financial assistance.<sup>74</sup> The Americans with Disabilities Act (ADA) protects students with disabilities in public accommodations and government services on the basis of race, national origin, religion and sex.<sup>75</sup> In addition, the Individuals with Disabilities Education Act (IDEA) extends free, quality educational opportunities to students with disabilities by providing special education and related services to those students.<sup>76</sup>

## The Coleman Report

In 1966, scholars commissioned by the U.S. Department of Education published the *Equality of Educational Opportunity* report for the President and Congress, as mandated by the Civil Rights Act of 1964.<sup>77</sup> Also known as the Coleman Report, this comprehensive report examined several key questions regarding the extent to which racial and ethnic groups are segregated in public schools, whether schools offer equal educational opportunities, how to effectively measure student achievement, and whether student achievement is linked to certain types of schools.<sup>78</sup> While the Coleman Report failed to translate all of its data into clear policy objectives for improving equal educational opportunity, one key finding from the report was that there were severe racial disparities in school achievement across the U.S.<sup>79</sup> Despite that fact, the Coleman Report did not link these disparities to school resources or racial segregation, noting:

The aim of racial integration of our schools should be recognized as distinct from the aim of providing equal opportunity for educational performance. To confound these two aims impedes the achievement of either.<sup>80</sup>

As mentioned, the Coleman Report addressed the issue of segregation, and the extent to which racial and ethnic minorities are racially and economically segregated in public schools. The report

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<sup>74</sup> Rehabilitation Act of 1973, § 504, Pub. L. 93-112, 87 Stat. 355 (codified at 29 U.S.C. § 794 (Supp. III 2015)).

<sup>75</sup> Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102-12701 (Supp. III 2015).

<sup>76</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (Supp. III 2015); U.S. Department of Education, “About IDEA,” <https://sites.ed.gov/idea/about-idea/>.

<sup>77</sup> The “*Equality of Educational Opportunity*” report, *supra* note 27, commonly referred to as the “Coleman Report” as a nod to the lead author and researcher James S. Coleman from Johns Hopkins, is regarded as the foundational document for education policy research. Eric A. Hanushek, in his article “What Matters for Student Achievement: Updating Coleman on the Influence of Families and Schools,” *supra* note 24, discusses how the Coleman Report “fundamentally altered the lens through which analysts, policymakers, and the public at large view and assess schools[,]” and noted that there was a shift towards looking at outcomes as a measure of a good school rather than inputs, which had previously been the measure prior to Coleman.

<sup>78</sup> NCES, “Equality of Educational Opportunity,” *supra* note 27.

<sup>79</sup> *Ibid.*; Hanushek, “What Matters for Student Achievement: Updating Coleman on the Influence of Families and Schools,” *supra* note 24, at 22.

<sup>80</sup> Steven Rivkin, “Desegregation since the Coleman Report,” *Education Next*, Spring 2016, pp. 29, [http://educationnext.org/files/ednext\\_XVI\\_2\\_rivkin.pdf](http://educationnext.org/files/ednext_XVI_2_rivkin.pdf) (quoting James S. Coleman).

also found that the role of the family in learning is significantly more important than a school's resources or racial/ethnic makeup for student achievement, a finding that has been contested by many education scholars.<sup>81</sup> Additionally, the report found (and subsequent education research has confirmed) that the concentration of poverty in a school was more influential for student achievement than the individual poverty level of the student, as this was related to peer engagement as a factor in improving educational achievement for students of color.<sup>82</sup>

Another key finding in the Coleman Report was that differences in per-pupil spending do not necessarily correlate with better student outcomes.<sup>83</sup> This finding has sparked debate among researchers and advocates. On one hand, some argue that the data from the Coleman Report and subsequent studies support the fact that providing more money to particular schools or districts will not necessarily equalize achievement.<sup>84</sup> On the other hand, it can be argued that increased spending can lead to improved student outcomes, and the manner in which money is spent is most important to these improved outcomes.<sup>85</sup>

### **Past Findings and Recommendations from the U.S. Commission on Civil Rights on How to Achieve Equal Educational Opportunity**

Since its inception, the U.S. Commission on Civil Rights (USCCR) has held briefings and released reports that address the issue of equal access to public education, an issue on which the Commission places great importance. The Commission has broadly offered a number of findings and recommendations on various topics related to public education, which include:

- *Eliminate racial isolation in schools (1961, 1967, and 1981).* Congress should establish a mechanism for eliminating school segregation, and states will be responsible for devising the appropriate remedies to achieve that goal, with financial and technical assistance from Congress to help in the planning process.<sup>86</sup>
- *Develop affordable housing on a nondiscriminatory basis in order to integrate communities and schools (1961, 1967).* Congress should expand federal aid programs that

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<sup>81</sup> Borman and Dowling, "Schools and Inequality: A Multilevel Analysis of Coleman's *Equality of Educational Opportunity* Data," *supra* note 27; NCES, "Equality of Educational Opportunity," *supra* note 27.

<sup>82</sup> Orfield *et al.*, "E Pluribus... Separation: Deepening Double Segregation for More Students," *supra* note 29, at 7; NCES, "Equality of Educational Opportunity," *supra* note 27; Richard D. Kahlenberg, "From All Walks of Life: A New Hope for School Integration," 36 *American Educator* 2 (Winter 2012-2013); Reardon, "School Segregation and Racial Academic Achievement Gaps," *supra* note 14.

<sup>83</sup> NCES, "Equality of Educational Opportunity," *supra* note 27, at 312.

<sup>84</sup> See Chapter 3, The Case that Increased Spending Alone Does Not Matter for Achievement.

<sup>85</sup> See Chapter 3, The Case that Equitable, Targeted Spending Matters for Student Achievement.

<sup>86</sup> U.S. Commission on Civil Rights, "Racial Isolation in Public Schools," 1967; U.S. Commission on Civil Rights, "Education," 1961; U.S. Commission on Civil Rights, "With All Deliberate Speed: 1954-19???" 1981.

provide for the development of affordable housing for low-moderate income families, and make sure that these projects are planned in a nondiscriminatory manner so as to reduce residential segregation and school segregation on the basis of race.<sup>87</sup>

- *Implement federal initiatives to desegregate schools (1961, 1975)*. School desegregation is a “constitutional imperative” that must be recognized by leaders at the national, state, and local levels, and the federal government should expand programs to help facilitate school desegregation. Furthermore, there should be stricter enforcement to make sure that desegregation occurs.<sup>88</sup>
- *Develop a national standard for eliminating school segregation, and increase federal funding for desegregated school districts (1961, 1975)*. A uniform standard should be implemented for school desegregation efforts with accountability measures, and schools that have met that proposed standard should receive an increase in federal funding.<sup>89</sup>
- *School desegregation offers all students an equal chance to learn and develop (1981)*.<sup>90</sup> School districts across the country must be committed to make desegregation work, along with leadership on a local level from political and community partners, as well as a partnership from all branches of the federal government.<sup>91</sup>
- *Build local partnerships and establish government interagency coordination (1996)*. The U.S. Department of Education, specifically OCR, should coordinate with other government agencies and partner with advocacy groups, local beneficiaries, and other entities on issues of enforcement and maximizing efficiency in order to further the mission of providing “equal opportunity and access to high-quality education for all students.”<sup>92</sup>
- *Some students benefit from racial and ethnic diversity in elementary and secondary education (2006)*. While studies cited in testimony before the Commission had a variety of results and experts disputed the educational benefits of diversity, some studies did find that racial and ethnic minorities achieved modestly higher academic performance in diverse

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<sup>87</sup> U.S. Commission on Civil Rights, “Racial Isolation in Public Schools,” *supra* note 86; U.S. Commission on Civil Rights, “Education,” *supra* note 86.

<sup>88</sup> U.S. Commission on Civil Rights, “Twenty Years after Brown: Equality of Educational Opportunity,” 1975; U.S. Commission on Civil Rights, “Education,” *supra* note 86.

<sup>89</sup> U.S. Commission on Civil Rights, “Twenty Years after Brown: Equality of Educational Opportunity,” 1975; U.S. Commission on Civil Rights, “Education,” *supra* note 86. Federal agencies such as the U.S. Department of Justice Civil Rights Division and the U.S. Department of Education, Office for Civil Rights do have guidance for their respective agencies’ enforcement of Title VI. *See, e.g.* OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8; U.S. Department of Justice, Civil Rights Division and U.S. Department of Education, Office for Civil Rights, “Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools,” December 2, 2011, <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf>; U.S. Department of Justice, Civil Rights Division, “DOJ Title VI Legal Manual (Updated),” April 13, 2017, <https://www.justice.gov/crt/fcs/T6manual>.

<sup>90</sup> USCCR, “With All Deliberate Speed: 1954-19??” *supra* note 86.

<sup>91</sup> *Ibid.*

<sup>92</sup> U.S. Commission on Civil Rights, “Equal Educational Opportunity Project Series: Volume I,” 1996, pp. 251-52.



learning environments, had more favorable educational outcomes, and students benefitted from positive non-educational outcomes such as “cross-racial friendships and greater understanding of racial and cultural differences.”<sup>93</sup>

- *Increase enforcement efforts to ensure that school districts operating under court supervision to desegregate are complying with existing orders (2007).*<sup>94</sup> Furthermore, DOJ should continue an active review of districts to determine which ones qualify for unitary status, and provide guidance to help districts achieve unitary status.<sup>95</sup>

## The Evolution of the Elementary and Secondary Education Act—Unrealized Goals

In 1965, President Lyndon B. Johnson signed into law the Elementary and Secondary Education Act (ESEA) which aimed to improve educational equity and opportunity by providing funding to school districts that serve low-income students.<sup>96</sup> Title I of ESEA is the largest elementary and secondary education program funded by the U.S. Department of Education, and has been

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<sup>93</sup> U.S. Commission on Civil Rights, “The Benefits of Racial and Ethnic Diversity in Elementary and Secondary Education,” 2006, p. 17. The overall findings of the report, based on the panelists’ testimonies, found that “there is little evidence that racial and ethnic diversity in elementary and secondary schools results in significant improvements in academic performance.” *Ibid.* at 15. The Commission found that the cited studies on the effects of diversity and integration on academic performance yield varied results, and while some studies find positive educational or non-educational outcomes or aspirations, “methodological weaknesses in these studies make it difficult to isolate school racial composition as the cause of these aspirations and attainments.” *Ibid.* at 16. However panelist Arthur Coleman testified that OCR believed that “reducing minority group isolation can be a compelling interest.” *Ibid.* at 6. The appendix of a report he co-authored titled *From Desegregation to Diversity: A School District’s Self-Assessment Guide on Race, Student Assignment, and the Law* included a review of over 30 research studies conducted between 1978-1998 on the benefits of diversity in education, where findings included increased opportunity in education and the workforce, reducing prejudice, and more. *Ibid.* at 68. Commissioners Arlan Melendez and Michael Yaki dissented, citing that the report findings “present an incomplete, unbalanced view of the social science research on the topic.” *Ibid.* at 98. Commissioner Yaki wrote in a separate dissent, “In the 21st century...resegregation, racial division, and ethnic isolation [have] no more place now than it did over a half-century ago. While we must acknowledge that the methods of ensuring diversity have become immensely more complicated, and that the challenge of ensuring diversity becomes ever greater as the diversity of our country increases, it does not mean that we, as a country, should retreat from our obligations—indeed, our sacred duty—to ensure that the next generation of Americans, and the generations after, are raised in a United States, indivisible, not merely regardless of race, color, creed or national origin, but embracing each other’s race, color, creed and national origin.” *Ibid.* at 104.

<sup>94</sup> U.S. Commission on Civil Rights, “Becoming Less Separate? School Desegregation, Justice Department Enforcement, and the Pursuit of Unitary Status,” 2007. The report does note that within the parameters of this study, “when the analysis includes other racial and ethnic groups, such as Hispanics, Asian Americans and Native Americans, the results indicate that school districts, on average, are substantially more integrated than would appear from a comparison of just the black-white balance alone.” *Ibid.* at xiii.

<sup>95</sup> *Ibid.* at 80. This report explains that as per the Supreme Court established in *Green v. County Sch. Bd. of New Kent County* that “a school system that successfully transitioned from a segregated, racially dual system to an integrated one would be classified as ‘unitary.’” *Ibid.* at xi.

<sup>96</sup> U.S. Department of Education, “Every Student Succeeds Act (ESSA),” *supra* note 16.

reauthorized several times since its inception to incorporate certain programmatic changes in hopes of more effectively making progress towards its fundamental goals.<sup>97</sup> While progress has been made, the ultimate goals of ESEA still remain unrealized today, as educational opportunity remains unequal for students.

## OVERVIEW OF NO CHILD LEFT BEHIND—SUCCESSSES AND FAILURES

ESEA was most notably reauthorized in 2002 with the passage of the No Child Left Behind (NCLB) Act due to a bipartisan effort, which was intended to increase the accountability of districts receiving Title I funding by implementing performance measures that could identify and address achievement gaps among students in order to expand educational opportunity.<sup>98</sup> Of all the reauthorizations of ESEA, NCLB was by far the most comprehensive and expansive because it expanded the federal role in public education.<sup>99</sup> NCLB set benchmarks for student performance and implemented assessment tools, such as annual testing in math and reading, and required public reporting of that testing data, disaggregated by race and other student characteristics.<sup>100</sup> In addition, rigorous standards were set for teachers and certain interventions were put in place for schools that receive Title I funds as an accountability measure.<sup>101</sup>

NCLB, like its predecessor reauthorizations of ESEA, contained a finance comparability provision that required schools that receive Title I funds to provide comparable education services to schools that do not receive Title I funds.<sup>102</sup> The comparability requirement originated from a report that was released by the National Association for the Advancement of Colored People (NAACP) in 1969, stating that Title I funds were being misused, as the funds were not being spent to enhance high-poverty schools, but were instead spent to fill the gaps that existed from state and local funding streams.<sup>103</sup> Over time and various administrations, however, the comparability requirement regulations were relaxed and lacked enforcement for a period of time.<sup>104</sup> NCLB sought to expose and address achievement gaps, and while the act once again raised standards, it

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<sup>97</sup> “The ABC’s of ESEA and No Child Left Behind,” Education Post, <http://educationpost.org/issues/taking-responsibility/esea-reauthorization/abcs-esea-child-left-behind/>.

<sup>98</sup> U.S. Department of Education, “Every Student Succeeds Act (ESSA),” *supra* note 16; Tom Loveless, “The Peculiar Politics of No Child Left Behind,” Brookings Institution, Aug. 1, 2006, [https://www.brookings.edu/wp-content/uploads/2016/06/08k12education\\_loveless.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/08k12education_loveless.pdf).

<sup>99</sup> Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 Wash. U. L. Rev. 959, 965 (2015).

<sup>100</sup> *Ibid.* at 966.

<sup>101</sup> *Ibid.*

<sup>102</sup> “Comparability of Services,” New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/federal-funding/title-i/fiscal-requirements/comparability-services/>.

<sup>103</sup> “Fiscal Requirements,” New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/federal-funding/title-i/fiscal-requirements/>.

<sup>104</sup> “Comparability of Services,” New America Foundation, *supra* note 102.

became increasingly clear that implementation of the goals of NCLB would prove to be challenging.<sup>105</sup>

Some have argued that NCLB set standards that did not necessarily help in advancing equal educational opportunities for students as it was originally intended, as the NCLB standards of equity are merely symbolic.<sup>106</sup> While Title I imposed achievement standards, NCLB required low-income students to meet certain proficiency standards without the promise of their schools receiving equitable funding to help them meet those standards.<sup>107</sup> Furthermore, some argue that NCLB exemptions to spending Title I funds (for example, unequal spending on teacher salaries) essentially allowed states and school districts to make funding decisions that may not have ultimately helped the most disadvantaged students.<sup>108</sup> Ultimately, states and school districts consistently spend less on schools that serve higher numbers of low-income students than schools that do not.<sup>109</sup>

After its passage, NCLB faced criticism from advocates on both sides of the aisle due to what they viewed as onerous requirements and standards that it put in place.<sup>110</sup> Some advocates decried what they viewed as insufficient capacity of states and districts to implement NCLB standards and that NCLB did not allocate or distribute sufficient funding to cover implementation costs.<sup>111</sup> In these advocates' view, complying with federal administrative requirements was already an onerous undertaking for state education agencies, and NCLB dramatically increased that administrative burden.<sup>112</sup> Furthermore, advocates criticized that the U.S. Department of Education was enforcing NCLB requirements inconsistently, which undermined its implementation.<sup>113</sup> Most states had difficulties meeting the educational standards set forth by NCLB, and were eventually released from some provisions through waivers granted by the U.S. Department of Education if they agreed to different conditions in order to maintain their federal funding.<sup>114</sup>

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<sup>105</sup> U.S. Department of Education, "Every Student Succeeds Act (ESSA)," *supra* note 16.

<sup>106</sup> Derek W. Black, The Congressional Failure to Promote Equal Protection Through ESEA, 90 B.U. L. Rev. 313, 315 (2010).

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> Loveless, *supra* note 98, at 1.

<sup>111</sup> Robinson, "Disrupting Education Federalism," *supra* note 99, at 994, 999.

<sup>112</sup> Dan Lips and Evan Feinberg, "The Administrative Burden of No Child Left Behind," The Heritage Foundation, Mar. 23, 2007, <http://www.heritage.org/education/report/the-administrative-burden-no-child-left-behind> ("No Child Left Behind increased state and local governments' paperwork burden by 6,680,334 hours, at an estimated cost of \$141 million dollars."). NCLB's provisions placed a strong emphasis on accountability, and while many scholars agree with the critique that this came with an increased administrative burden, some note that this administrative burden—a common feature of civil rights legislation—aims to ensure that NCLB goals are met. See Michael A. Rebell, The Right to Comprehensive Educational Opportunity, 47 Harv. C.R.-C.L. L. Rev. 47 (2012).

<sup>113</sup> Robinson, "Disrupting Education Federalism," *supra* note 99, at 1002.

<sup>114</sup> *Id.* at 966.

The fact that so many states requested waivers due to their inability to meet educational standards has been seen by some advocates as a deviation from the accountability goals of NCLB. “This policy framework has shifted the blame for inequality from issues of race and poverty to teachers and teachers’ organizations—and it has failed[,]” and “states accepting onerous conditions in exchange for a waiver from NCLB sanctions, due to fall on many thousands of schools which have failed to meet the standards, reflects this failure.”<sup>115</sup> On one hand, some advocates view NCLB as having moved education policy away from attempting to close achievement gaps by addressing equity issues such as poverty and segregation, and instead toward implementing policies “based on the premise that setting demanding standards, coupled with harsh sanctions, can equalize schooling.”<sup>116</sup> On the other hand, opposing views dictate that the states’ struggles to meet accountability goals is evidence that these burdensome federal mandates should be eliminated altogether, allowing states to opt out altogether and use Title I funds at their discretion.<sup>117</sup> As time went on, NCLB was met with opposition from both ends of political spectrum, agreeing that a change is needed, but disagreeing fundamentally on what that change should look like.<sup>118</sup>

## THE EVERY STUDENT SUCCEEDS ACT AND ITS POTENTIAL FOR CREATING EDUCATIONAL OPPORTUNITIES

President Barack Obama signed the Every Student Succeeds Act (ESSA) into law in December 2015, which reauthorized ESEA by replacing NCLB, the previous version of the law.<sup>119</sup> Because NCLB’s accountability measures had drawn criticism because of their implementation challenges, ESSA shifted accountability to the states, while still providing limited federal oversight in order to ensure quality education and the advancement of equity for disadvantaged students.<sup>120</sup>

The new law allows states to grant waivers to schools that have more than 40 percent of students enrolled from low-income backgrounds, which would allow schools to use Title I funds for schoolwide purposes.<sup>121</sup> Some believe this will enable school districts “to pursue more

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<sup>115</sup> Orfield *et al.*, “E Pluribus... Separation: Deepening Double Segregation for More Students,” *supra* note 29, at xix.

<sup>116</sup> Orfield *et al.*, “Brown at 60: Great Progress, a Long Retreat and an Uncertain Future,” *supra* note 14, at 32.

<sup>117</sup> Lindsey Burke, “Reauthorizing No Child Left Behind: Four Recommendations to Advance Federalism in Education,” The Heritage Foundation, December 8, 2014, <http://www.heritage.org/education/report/reauthorizing-no-child-left-behind-four-recommendations-advance-federalism>.

<sup>118</sup> Loveless, *supra* note 98, at 1.

<sup>119</sup> Every Student Succeeds Act of 2015 (ESSA), 20 U.S.C. §6301 *et seq.*

<sup>120</sup> U.S. Department of Education, “Every Student Succeeds Act (ESSA),” *supra* note 16.

<sup>121</sup> Andrew Ujjifusa, “Funding Flexibility Enhanced under New K-12 Law,” Education Week, January 5, 2016, <http://www.edweek.org/ew/articles/2016/01/06/funding-flexibility-enhanced-under-new-k-12-law.html>.

transformative innovation to close achievement gaps and other performance measures that clearly indicate important outcomes and therefore opportunity.”<sup>122</sup>

Those who support ESSA believe that the law includes new provisions that will increase transparency and shed light on certain inequities in the educational system.<sup>123</sup> For example, ESSA requires that schools report actual per-pupil expenditures and students’ access to rigorous courses, and the most recent relevant data in the Civil Rights Data Collection.<sup>124</sup> Also, ESSA leaves measures in place to help guard against low-income students and students of color being disproportionately taught by inexperienced or ineffective teachers.<sup>125</sup>

Critics of ESSA believe that the law can do much more to help disadvantaged students receive a quality education.<sup>126</sup> For example, while ESSA authorizes a 3 percent annual funding increase, critics say that the law should authorize a more significant funding increase.<sup>127</sup> The law adds two new provisions that involve funding equity—requiring improvement plans for the lowest performing schools to address resource inequities, and implementing a competitive grant program to allow districts to create weighted per-pupil funding formulas to help the most disadvantaged students—but the provisions fail to address whether districts are “presently receiving adequate state-level funding.”<sup>128</sup>

While ESSA eliminated some of the most burdensome requirements of NCLB and scaled back on the sanctions for noncompliance, some argue that ESSA still maintains the same structure of NCLB, which operates primarily as a test-based system.<sup>129</sup> On one hand, critics in favor of more state control over education argue that ESSA falls short of yielding states the full authority to make their own decisions about education.<sup>130</sup> On the other hand, critics concerned that ESSA moved away from its equity principles argue that the reduced oversight at the federal level leaves states

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<sup>122</sup> Doug Mesecar, Lexington Institute, U.S. Commission on Civil Rights, Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation (Washington, D.C., May 20, 2016), p. 4 (hereinafter Mesecar Statement).

<sup>123</sup> Liz King, The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, testimony, Briefing Transcript, pp. 78-79; Forte, Briefing Transcript, *supra* note 69, at 270.

<sup>124</sup> King, Briefing Transcript, *supra* note 123, at 78-79.

<sup>125</sup> *Ibid.*

<sup>126</sup> William J. Mathis and Tina M. Trujillo, “Lessons from NCLB for the Every Student Succeeds Act,” National Education Policy Center, November 2016, [http://nepc.colorado.edu/files/publications/PB%20Mathis-Trujillo%20ESSA\\_0.pdf](http://nepc.colorado.edu/files/publications/PB%20Mathis-Trujillo%20ESSA_0.pdf).

<sup>127</sup> Joseph Rodgers, The Campaign for Educational Equity, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), p. 7 (hereinafter Rodgers Statement).

<sup>128</sup> *Ibid.*

<sup>129</sup> Mathis and Trujillo, *supra* note 126.

<sup>130</sup> Ann Ryland and Lindsey Burke, “School Rules: Lessons from the ESSA Regulatory Process,” The Heritage Foundation, February 1, 2017, <http://www.heritage.org/education/report/school-rules-lessons-the-essa-regulatory-process>.

with accountability mandates that are unclear and insufficient.<sup>131</sup> Leaving decision making in the hands of the states may lead to varied enforcement as well as varied expectations of goals, funding, and technical support across states.<sup>132</sup> Furthermore, critics charge that ESSA does not move the country any closer to the original goals of ESEA, which were to ensure that federal funds were used to provide equal educational opportunities for disadvantaged students.<sup>133</sup>

Critics believe that in order for ESSA to be more effective in achieving its equity goals, a number of things can be improved upon by states, districts, and schools.<sup>134</sup> Some critics advocate that states must lessen their regulatory role and provide more assistance to districts and schools to ensure equal access to resources, including high-quality teachers and curriculum.<sup>135</sup> In addition, critics argue schools must look beyond just test scores, and develop thoughtful assessment and accountability measures that take into account both the desired outcomes and the necessary inputs to achieve those outcomes.<sup>136</sup> Efforts should be made to improve instruction through reviews and evaluations, and criteria should be developed for when interventions are necessary.<sup>137</sup> Furthermore, investing in early education, extended school schedules, reducing class size, building school-community partnerships and other investments can help states, districts, and schools achieve ESSA's equity goals.<sup>138</sup>

## Recommendations from the Equity and Excellence Commission

The Equity and Excellence Commission, a federal advisory committee chartered by Congress, prepared a report for the Secretary of Education in 2013 titled “For Each and Every Child: A Strategy for Education Equity and Excellence.”<sup>139</sup> The bipartisan Commission was comprised of a body of members from academia, research organizations, nonprofits, advocacy organizations,

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<sup>131</sup> The Conversation, “Why Every Student Succeeds Act Still Leaves Most Vulnerable Kids Behind,” U.S. News and World Report, December 14, 2015, [available at https://www.usnews.com/news/articles/2015-12-14/why-every-student-succeeds-act-still-leaves-most-vulnerable-kids-behind](https://www.usnews.com/news/articles/2015-12-14/why-every-student-succeeds-act-still-leaves-most-vulnerable-kids-behind); Conor Williams, “Williams: Why Progressives Should Fear, Conservatives Should Hate and Obama Should Veto the NCLB Rewrite,” *The 74*, November 29, 2015, <https://www.the74million.org/article/williams-why-progressives-should-fear-conservatives-should-hate-and-obama-should-veto-the-nclb-rewrite>.

<sup>132</sup> Williams, “Williams: Why Progressives Should Fear, Conservatives Should Hate and Obama Should Veto the NCLB Rewrite,” *supra* note 131.

<sup>133</sup> The Conversation, *supra* note 131.

<sup>134</sup> Mathis and Trujillo, *supra* note 126.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> U.S. Department of Education, Equity and Excellence Commission, “For Each and Every Child: A Strategy for Education Equity and Excellence,” February 2013, <https://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf> (hereinafter Equity and Excellence Commission). Many members of the Equity and Excellence Commission are cited throughout this report.

labor unions, the media, the private sector, government, and others, with a diverse wealth of experience and research on school finance equity.<sup>140</sup> This Commission was charged with providing advice to the Secretary of Education on how to better address “disparities in meaningful educational opportunities that give rise to the achievement gap, with a focus on systems of finance, and to recommend ways in which federal policies could address such disparities.”<sup>141</sup> The Commission found that for the most part, the education finance systems of most states do not take into account the actual costs of providing a high-quality education with academic standards that deliver high achievement of all students, noting that “[t]heir schools have less, yet their students need more.”<sup>142</sup> The Commission also noted:

Admittedly, many of these disadvantaged students enter school far behind their more advantaged peers. But instead of getting deadly serious about remedying that fact—by making sure such students are in high-quality early childhood and pre-K programs, attend schools staffed with teachers and leaders who have the skills and knowledge to help each student reach high standards, get after-school counseling or tutorial assistance or the eyeglasses they need to see the smart board—the current American system exacerbates the problem by giving these children less of everything that makes a difference in education.<sup>143</sup>

Furthermore, educational resources are often not used most efficiently, which hinders schools’ ability to ensure that all students receive a quality education.<sup>144</sup>

The Commission recommended that states and districts conduct analyses to identify the educational resources and associated costs needed to deliver high academic achievement, and to publically report that information.<sup>145</sup> The Commission concluded that adopting an education finance system that is able to equitably distribute resources and adequately fund public education for all students is of the utmost importance, and schools should ensure that funding is streaming from “stable and predictable” sources.<sup>146</sup> The Commission reported that states and districts should monitor their school finance systems, and adapt said systems accordingly based on changes to academic standards, research, costs, student demographics, or other factors.<sup>147</sup> Furthermore, the Commission called for a priority to be placed on using funds efficiently; innovation should be

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<sup>140</sup> *Ibid.* at 5 (list of members). This bipartisan Commission included several scholars and researchers that are cited in this report. While members of this Commission had opposing viewpoints on how to address disparities in educational opportunity, they came to an agreement on a meaningful set of findings and recommendations in order to help advise the Secretary of Education.

<sup>141</sup> *Ibid.* at 3.

<sup>142</sup> *Ibid.* at 17, 21.

<sup>143</sup> *Ibid.* at 14.

<sup>144</sup> *Ibid.* at 17.

<sup>145</sup> *Ibid.* at 18.

<sup>146</sup> *Ibid.* at 19.

<sup>147</sup> *Ibid.* at 19.

encouraged, such as the use of technology to enhance the educational experience; and data should be used to track student achievement in relation to the resources needed to provide quality education to all students.<sup>148</sup>

The Commission also provided a few recommendations at the federal level, noting that “there is no constitutional barrier to a greater federal role in financing K-12 education.”<sup>149</sup> Recommendations included creating legislation to target new funding for schools serving low-income students to enhance achievement for all students, incentivizing states to reform their education funding structures, and providing oversight to measure the performance of the new equity investments.<sup>150</sup> Recommendations suggested that there should be more oversight on the part of the federal government to monitor states and districts to ensure that state and local funds are being distributed equitably. Additionally, the Commission recommended that the federal role in enforcing equity principles should be expanded to provide better oversight to ensure educational opportunity for all students.<sup>151</sup>

Since the Commission provided its guidance, the U.S. Department of Education under the Obama administration had generated grant programs specifically designed to increase integration of low-income students in school districts.<sup>152</sup> In 2016, the U.S. Education Secretary announced the “Opening Doors, Expanding Opportunities” grant competition, a \$12 million investment for up to 20 districts or group of districts, aimed at increasing socioeconomic diversity in schools and improving academic achievement.<sup>153</sup> This is in addition to some of the Department’s other grant initiatives focused on fostering diversity in schools, which include the “Charter Schools Program,” “Investing in Innovation,” and the “Magnet Schools Assistance Program.”<sup>154</sup> This is also in addition to OCR’s guidance on educational resource equity, which aims to address disparities and help districts “comply with the legal obligation to provide students with equal access to these resources without regard to race, color, or national origin.”<sup>155</sup>

In March 2017, the U.S. Department of Education under the Trump administration announced that the “Opening Doors, Expanding Opportunities” grant program would be discontinued.<sup>156</sup>

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<sup>148</sup> *Ibid.* at 19.

<sup>149</sup> *Ibid.* at 19.

<sup>150</sup> *Ibid.* at 19.

<sup>151</sup> *Ibid.* at 19.

<sup>152</sup> U.S. Department of Education, “U.S. Education Secretary Announces Grant Competitions to Encourage Diverse Schools,” December 13, 2016, <https://www.ed.gov/news/press-releases/us-education-secretary-announces-grant-competitions-encourage-diverse-schools>.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 1.

<sup>156</sup> Emma Brown, “Trump’s Education Department Nixes Obama-Era Grant Program for School Diversity,” *Washington Post*, March 29, 2017, [https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity/?utm\\_term=.04f0ecceab0c](https://www.washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity/?utm_term=.04f0ecceab0c).



## CHAPTER 2: THE PUBLIC EDUCATION FUNDING STRUCTURE

### Federal, State and Local Funding Streams—How Public Education is Funded

Each year, the U.S. spends over \$550 billion on public education.<sup>157</sup> In 2014, the U.S. had \$623.2 billion in public elementary-secondary school system revenue, comprised of \$54.5 billion in federal revenue, \$288.1 billion in state revenue, and \$280.5 billion in local revenue.<sup>158</sup> As the numbers show in Figures 1 and 2, public education funding is heavily reliant on state and local funding, with only about 9 percent of direct expenditures being contributed from the federal government.<sup>159</sup>

Education spending varies drastically across states and localities in the U.S. While school districts spend an average of \$11,066 on each student each year, that number fluctuates dramatically from district to district.<sup>160</sup> This fluctuation is based on the ability to raise money at the local level and funding allocations at the state and federal levels, which are calculated based on a variety of funding formulas.<sup>161</sup> As displayed in Figure 3, there are varying levels of spending per-pupil at the state level, from \$6,546 per-pupil in Utah at the low end and \$20,156 per-pupil in New York at the high end.<sup>162</sup> This disparity is caused by a number of factors, such as a state's economy, resources, differences in regional costs, and willingness to fund education.<sup>163</sup> In addition, intra-district funding disparities are sometimes present, often attributed to the allocation of teachers.<sup>164</sup> Higher-paid, more experienced teachers tend to be employed at lower-needs schools, and lower-paid, less experienced teachers are congregated in high-needs schools.<sup>165</sup> Despite the various funding streams, however, there are still significant gaps in funding which create fundamental inequities that cause high-poverty schools to be unable to offer equal educational opportunity to

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<sup>157</sup> NCES, "Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14," *supra* note 18, at 2.

<sup>158</sup> *Ibid.* at 4.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.* at 2.

<sup>161</sup> "School Funding," New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/>.

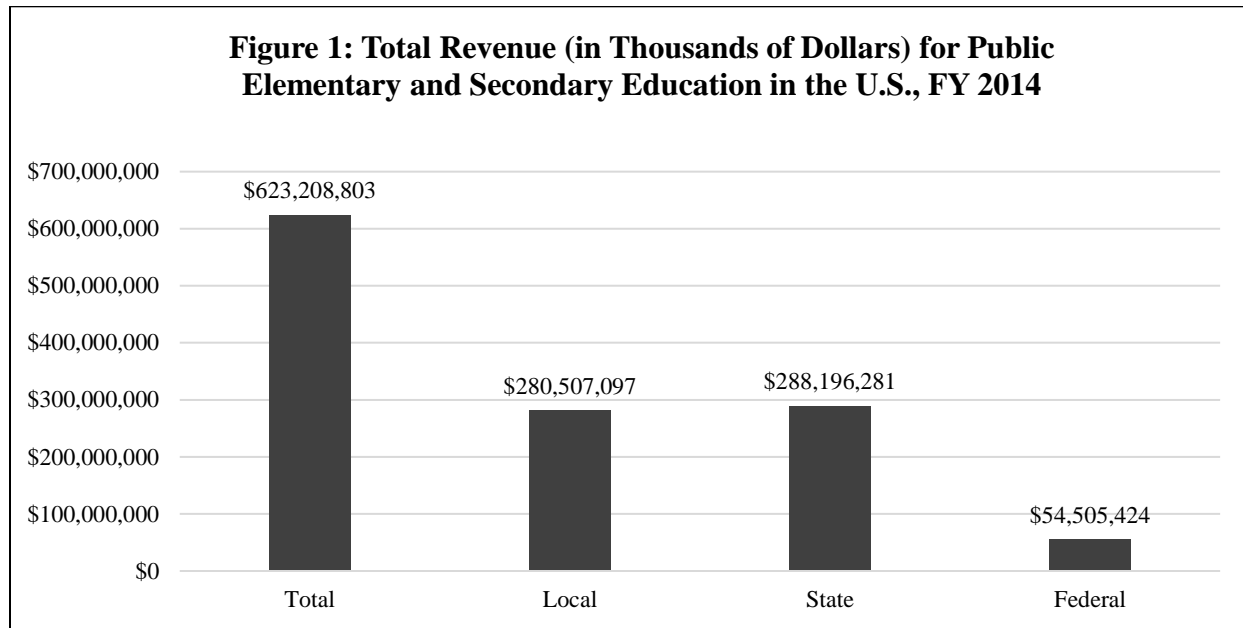
<sup>162</sup> NCES, "Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14," *supra* note 18, Table 5. The District of Columbia is reported as having a higher per-pupil expenditure than New York at \$20,577.

<sup>163</sup> "Funding Disparities," New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/funding-disparities/>.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

their students.<sup>166</sup> These gaps ultimately deny “equal let alone equitable resources for the students most in need.”<sup>167</sup>

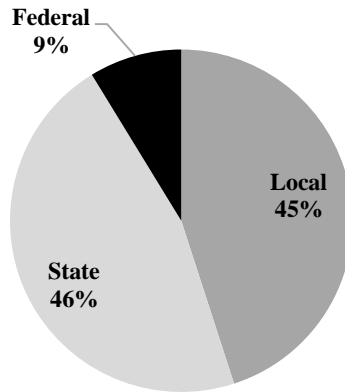


Source: Compiled by USCCR from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “National Public Education Financial Survey (NPEFS),” fiscal year 2014, and NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14, p. 5, Table 1.

<sup>166</sup> Daria Hall and Natasha Ushomirsky, “Close the Hidden Funding Gaps in Our Schools,” The Education Trust, March 2010, [https://1k9g11yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/Hidden-Funding-Gaps\\_0.pdf](https://1k9g11yevnfp2lpq1dhrqe17-wpengine.netdna-ssl.com/wp-content/uploads/2013/10/Hidden-Funding-Gaps_0.pdf).

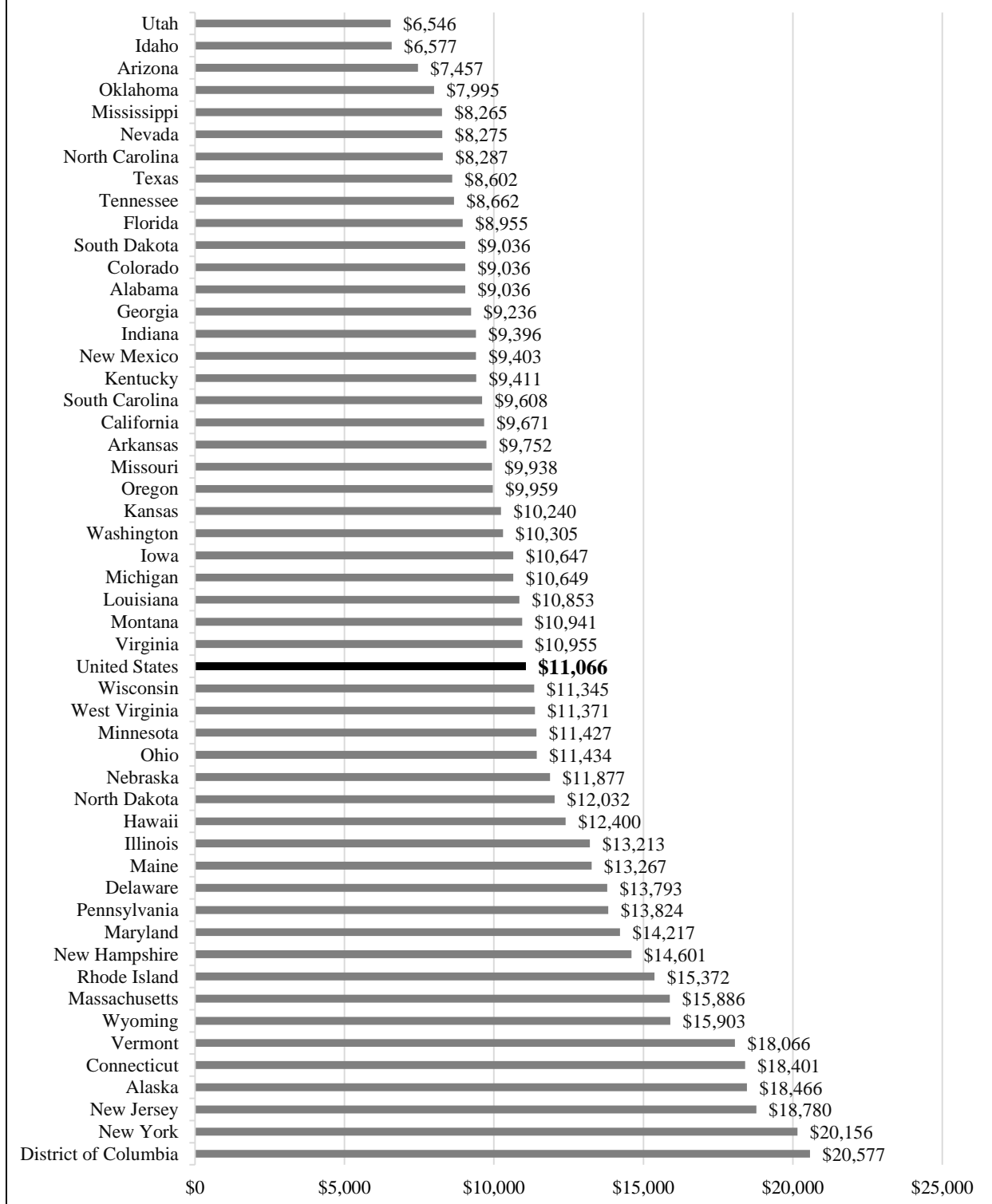
<sup>167</sup> Equity and Excellence Commission, *supra* note 139, at 18.

**Figure 2: Percentage of Total Revenue for Public Elementary and Secondary Education in the U.S., FY 2014**



Source: Compiled by USCCR from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), "National Public Education Financial Survey (NPEFS)," fiscal year 2014, and NCES, "Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14, p 5, Table 1.

**Figure 3: Expenditures Per-Pupil for Public Elementary and Secondary Education by State, FY 2014**



Source: Compiled by USCCR from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), "National Public Education Financial Survey (NPEFS)," fiscal year 2014, and NCES, "Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013-14, p 13-14, Table 5.

## Measuring Inequity

As mentioned, there are various levels of spending among schools on a national basis. The U.S. Department of Education measures school finance equity—also called the “equity factor”—to determine how equitably funding is distributed across school districts in a state.<sup>168</sup> The equity factor measures how much the average per-pupil spending in a given district deviates from the average per-pupil spending in the state (measured in a percentage), taking into account the size and poverty level of the district.<sup>169</sup> School finance equity can vary widely across districts, based on how states decide to distribute funds, how many school districts exist in a given state, and the size of those districts.<sup>170</sup> To explain further:

If a state has a large number of small school districts, it tends to have more variation in per-pupil expenditure. A smaller number of large school districts translates into less variation and more equity.

This makes sense intuitively—if you aggregate funding in large school districts, and then distribute it among a large number of students in a uniform fashion, local funding disparities are minimized. Small school districts, on the other hand, magnify the influence of local property taxes and thus disparities in local property wealth. Moreover, funding decisions are less centralized, leading to wider variation in per-pupil expenditure levels.<sup>171</sup>

For example, districts in the South tend to be the most equitable with an average equity factor of 10.5 percent, as compared to districts in the Northeast that tend to be the least equitable, with an average equity factor of 14.9 percent.<sup>172</sup> Although this may seem counterintuitive, southern states generally have fewer, large districts relative to the Northeast, with an average of 200 districts with about 5,650 students in the southern region as compared to an average of 330 districts with 2,670 students in the Northeast region.<sup>173</sup> States that have higher per-pupil average expenditures tend to have higher equity factors, as they may have wealthier districts with higher per-pupil expenditures that skew the average for the state.<sup>174</sup> This measure of equity does not apply to intra-district inequities due to the equity formula using district level per-pupil spending averages.<sup>175</sup> It is

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<sup>168</sup> “School Funding Equity Factor,” New America Foundation, <https://www.newamerica.org/education-policy/policy-explainers/early-ed-prek-12/school-funding/federal-funding/title-i/school-funding-equity-factor/>.

<sup>169</sup> *Ibid.*

<sup>170</sup> Lindsey Luebchow, “School Finance Equity: National Trends,” New America Foundation, January 29, 2008, <http://preview.staging.newamerica.org/education-policy/school-finance-equity-national-trends/>.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> “School Finance Inequity,” New America Foundation, March 29, 2012, <http://febp.newamerica.net/k12/rankings/schofiineq>.

<sup>175</sup> *Ibid.*

important to note that intra-district inequities occur, often most starkly reflected in disparities in teacher salaries across schools, as the most experienced teachers tend to gravitate towards schools with the most resources.<sup>176</sup>

### **Fundamental Funding Inequities at the Local Level**

As mentioned above, nearly half of all public elementary-secondary school system funds were drawn from local government revenue. As such, the level of local revenue that is provided for public education is correlated to property values in a particular school district.<sup>177</sup> For decades, this correlation has been a cause for concern, as disparities in wealth can create fundamental inequities in school funding between high-poverty and low-poverty districts.<sup>178</sup>

This concern is not new, as President Nixon’s Commission on School Finance released a report entitled *Schools, People, Money: The Need for Educational Reform* in 1972. The report found that reliance on local property taxation for financing schools “has become inadequate to do the job,” citing “serious imbalances in the money available and the money needed for tax revenues for schools.”<sup>179</sup> The report explains that the use of property taxes was the traditional way of funding schools for many years, but certain changes have created imbalances in that system:<sup>180</sup>

But the growth of manufacturing and other industries, the relative decline in the importance of agriculture, the migrations to cities and to suburbs have created enormous imbalances in this traditional system. Real estate is no longer the fundamental measure of the ability of people to pay for government services or of their need for them. Yet it has persisted as practically the sole local basis for financing schools and other community activities. And that very persistence became one of the principal causes of the growing inequities and inefficiencies.<sup>181</sup>

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<sup>176</sup> *Ibid.*

<sup>177</sup> Education Commission of the States, “The Progress of Education Reform: Who Pays the Tab for K-12 Education?” August 2013, <http://www.ecs.org/clearinghouse/01/08/47/10847.pdf>. This article notes that historically, property taxes became the primary source of education funding at the local level because they are a predictable funding source based on property values that are relatively easy to collect, and the value of a taxpayer’s property can be used as a proxy for an individual’s wealth.

<sup>178</sup> Equity and Excellence Commission, *supra* note 139, at 17.

<sup>179</sup> The President’s Commission on School Finance, “Schools, People, Money: The Need for Educational Reform,” 1972, p. 28.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.* at 28-29.

Local school boards do not always have autonomy when it comes to establishing their own district budget and a tax rate to support that budget.<sup>182</sup> Those districts that are fiscally independent may be beholden to a vote to approve any proposed budget increases or changes in the tax rate, but those districts that are not fiscally independent are not able to impose their own taxes, and must rely on local or county government to approve any budget and tax adjustments.<sup>183</sup> Some scholars believe that local participation in school board governance has been diminished to the point where it may no longer exist in certain localities, notably in low-income communities and communities of color.<sup>184</sup> These residents often lack the political power and financial means to influence local governance to create favorable policies and reforms, and these communities may lack funds for implementation of any desired reforms.<sup>185</sup> Additionally, parents do not have much control over choosing schools for their children, often restricted by their ability to afford to live in certain neighborhoods.<sup>186</sup> Accountability is also lacking at the local level, with low voter participation in local school board elections, limited attendance at school board meetings, and limited community influence on school board decisions.<sup>187</sup> All of these factors contribute to a lack of actual local control over the decision-making process in funding local public schools.

Due to the nature of the funding system at the local level, the share of local funds contributed to public education can greatly differ across school districts and even within districts. During the 2008-2009 school year, 14 states and the District of Columbia saw over half of their education revenue come from local sources.<sup>188</sup> This is in contrast to a state such as Vermont, where very little local revenue is used to fund public schools, and over 85 percent of its public education revenue comes from the state.<sup>189</sup> Since states typically have funding formulas to address some of the gaps in funding, these funding formulas vary across states and can contribute to educational inequities across schools.<sup>190</sup>

There is little dispute that public education funding at the local level varies from district to district based on the overall wealth of the district.<sup>191</sup> The *San Antonio Independent School District v. Rodriguez* Supreme Court decision addressed whether unequal funding for public schools is

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<sup>182</sup> Kathy Checkley, “Money Matters: A Primer on K-12 School Funding,” Center for Public Education, July 2, 2008, <http://www.centerforpubliceducation.org/Main-Menu/Policies/Money-matters-At-a-glance/Money-matters-A-primer-on-K12-school-funding.html>.

<sup>183</sup> *Ibid.*

<sup>184</sup> Robinson, “Disrupting Education Federalism,” *supra* note 99, at 974-75.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.* at 975.

<sup>187</sup> *Ibid.*

<sup>188</sup> Susan Aud *et al.*, U.S. Department of Education, National Center for Education Statistics, “The Condition of Education 2012,” pp. 54, May 2012, <https://nces.ed.gov/pubs2012/2012045.pdf>.

<sup>189</sup> *Ibid.*

<sup>190</sup> “School Finance Inequity,” New America Foundation, *supra* note 174.

<sup>191</sup> “Funding Disparities,” New America Foundation, *supra* note 163.

unconstitutional discrimination.<sup>192</sup> The Supreme Court determined that the San Antonio funding system that relied on local property taxes did not violate the Equal Protection Clause of the Fourteenth Amendment.<sup>193</sup> The decision ruled that the federal government is not constitutionally obligated to provide public education.<sup>194</sup> Supreme Court Justice Thurgood Marshall dissented, arguing that education was too important to be left to the political process.<sup>195</sup>

Following the *San Antonio* decision, advocates for equitable funding shifted their focus to litigation in the state courts. While *San Antonio* affirmed that education is not a fundamental right, subsequent federal cases opened the door for further challenges at the state level, with the *Plyler v. Doe* decision indicating that free public education cannot be denied to students based on their immigration status and *Papasan v. Allain* where the court chose not to decide whether “minimally adequate education” is a fundamental right.<sup>196</sup> Thus, a wave of litigation started at the state level, making equity-based arguments based on state constitution clauses on equal protection and requiring the provision of educational services for all students.<sup>197</sup>

Some advocates and legal scholars believe that the *San Antonio* decision should be revisited.<sup>198</sup> One examination of the decision indicated that *San Antonio* was “a federalism decision,” and “a right to adequate education would not be inconsistent with the Court’s federalism concerns” if it can be demonstrated that education is a key part of the federal system.<sup>199</sup> Some argue that the Constitution contains certain provisions that imply the right to an education at the federal level, and have provided a theoretical legal foundation to support that argument.<sup>200</sup> Some acknowledge the steadily increasing federal role in public education over the past several decades since the enactment of ESEA, and point out that the “actions of Congress and the executive branch in the

<sup>192</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>193</sup> Mildred Wigfall Robinson, “It Takes a Federalist Village: A Revitalized Property Tax as the Linchpin for Stable, Effective K-12 Public Education Funding,” 17 *Rich. J.L. & Pub. Int.* 549, 551 (2014).  
<http://scholarship.richmond.edu/jolpi/vol17/iss2/4/>.

<sup>194</sup> *Ibid.*

<sup>195</sup> *San Antonio*, 411 U.S. at 71 (Marshall, J., dissenting).

<sup>196</sup> Gillespie, *supra* note 19, at 997-998; *Plyler v. Doe*, 457 U.S. 202 (1982); *Papasan v. Allain*, 478 U.S. 265 (1986).

<sup>197</sup> Gillespie, *supra* note 19, at 998-1002.

<sup>198</sup> Susan H. Bitensky, “Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis,” 86 *Nw. U. L. Rev.* 550 (1992); Penelope A. Prevolos, *Rodriguez Revisited: Federalism, Meaningful Access, and the Right to Adequate Education*, 20 *Santa Clara L. Rev.* 75 (1980); Erwin Chemerinsky, “The Deconstitutionalization of Education,” 36 *Loy. U. Chi. L.J.* 111 (2004); Kimberly Jenkins Robinson, “The Case for a Collaborative Enforcement Model for a Federal Right to Education,” 40 *U.C. Davis L. Rev.* 1653 (2007); Goodwin Liu, “Education, Equality, and National Citizenship,” 116 *Yale L.J.* 330 (2006); Ian Millhiser, “What Happens to a Dream Deferred? Cleansing the Taint of *San Antonio Independent School District v. Rodriguez*,” 55 *Duke L.J.* 405 (2005); Gillespie, “The Fourth Wave of Education Finance Litigation: Pursuing a Federal Right to an Adequate Education,” *supra* note 19.

<sup>199</sup> Prevolos, *supra* note 198, at 75-76.

<sup>200</sup> Bitensky, *supra* note 198.



sixty years following the decision have established an implicit federal right to education that is equivalent—and perhaps even superior—to any right the Court might have established.”<sup>201</sup>

On the other hand, there are arguments against revisiting *San Antonio*.<sup>202</sup> Some constitutional law scholars believe that *San Antonio* was “correctly decided,” as the Constitution “protects us *from* certain kinds of governmental action . . .” but “does not create expansive positive rights or guarantee governmental assistance.”<sup>203</sup> Furthermore, the assumption of those who argue for revisiting *San Antonio* is that there will be success at the federal judicial level where local policymakers have failed, however opposing scholars argue federal judges lack “the capacity and expertise to solve entrenched problems like the achievement gap from the bench.”<sup>204</sup> Some advocates argue that the role of providing public education should be left to the states, as federal intervention has “brought out the worst in education governance,” and creates a “compliance burden” that invests time and money that could be better allocated to improve educational outcomes.<sup>205</sup> Some scholars argue that while there may be valid arguments for revisiting the issue of whether there is (or should be) a federal right to education, it may not be wise to revisit this in federal court in order to “achieve a quick fix to the country’s school funding problems,” especially when there has been decades of successful state school funding litigation.<sup>206</sup>

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<sup>201</sup> Sarah G. Boyce, *The Obsolescence of San Antonio v. Rodriguez in the Wake of the Federal Government’s Quest to Leave No Child Behind*, 61 *Duke L.J.* 1025, 1029 (2012).

<sup>202</sup> Daniel S. Greenspahn, *A Constitutional Right to Learn: The Uncertain Allure of Making a Federal Case out of Education*, 59 *S.C. L. Rev.* 755 (2008); Alfred A. Lindseth, *et al.*, *Federal Courts Can’t Solve Our Education Ills*, 17 *Education Next* 71 (Spring 2017), [http://educationnext.org/files/ednext\\_xvii\\_2\\_forum.pdf](http://educationnext.org/files/ednext_xvii_2_forum.pdf).

<sup>203</sup> Lindseth *et al.*, *supra* note 202, at 73.

<sup>204</sup> *Ibid.*

<sup>205</sup> Jennifer Marshall, “Freeing Schools from Washington’s Education Overreach,” The Heritage Foundation, April 6, 2011, <http://www.heritage.org/education/report/freeing-schools-washingtons-education-overreach>; *see also* U.S. House of Representatives, Subcommittee on Oversight and Investigations, Committee on Education and the Workforce, “Education at a Crossroads: What Works and What’s Wasted in Education Today, Subcommittee Report,” July 17, 1998, <http://www.eric.ed.gov/PDFS/ED431238.pdf>; Jennifer Marshall and Lindsey Burke, “Why National Standards Won’t Fix American Education: Misalignment of Power and Incentives,” The Heritage Foundation, May 21, 2010, <http://www.heritage.org/education/report/why-national-standards-wont-fix-american-education-misalignment-power-and>.

<sup>206</sup> Greenspahn, *supra* note 202, at 783.

## The Role of the State & Gradual Disinvestment

States have constitutional obligations to provide public education to all students.<sup>207</sup> All 50 states stipulate in their constitutions their obligation to provide public education.<sup>208</sup> States play a major role in funding public education, as nearly half of the overall education revenue stream comes from state funds.<sup>209</sup> Historically, public education was largely funded by local revenue, but states have played an increasingly important role in public education funding since the 1970s.<sup>210</sup> In addition to the collection of local property taxes, states fund public education through a variety of other taxes and nearly half of states also use lottery proceeds to supplement public education funding.<sup>211</sup>

States typically utilize funding formulas to distribute state funds collected to local or regional school districts within that state.<sup>212</sup> There are two basic ways states fund schools at the state level, either by allocating an amount per-pupil (foundation formulas) or allocating an amount for certain positions (teachers, principals, etc.).<sup>213</sup> While the majority of states utilize foundation formulas, it is up to the individual state to make funding allocation decisions and there are nuanced calculations that determine their distribution of funds, which take factors such as per-pupil spending, equity or adequacy into account, but also give consideration for certain types of students or programs such as special education, Limited English Proficiency, or at-risk programs.<sup>214</sup> It is the decision of the individual state to determine how to distribute its funds to the school districts in that state, and these decisions ultimately can “have a profound effect on the resources districts receive and the

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<sup>207</sup> Emily Parker, “50 State Review: Constitutional Obligations for Public Education,” Education Commission of the States, March 2016, <https://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf>. Since the *San Antonio v. Rodriguez* decision affirmed that the federal government does not have the responsibility to provide public education, the responsibility was left to the states, based on language in their individual constitutions. This language varies from state to state, but has been used as the basis for court cases and policy decisions for educational equity. The chart included in this article reviews the language of each state’s constitution to determine if each constitution includes language about public school funding, religious restrictions, education for students with disabilities, students’ age, the duration of the school year, and the establishment of state higher education systems.

<sup>208</sup> Black, *The Congressional Failure to Promote Equal Protection through ESEA*, *supra* note 106, at 316.

<sup>209</sup> U.S. Census Bureau, “Public Education Finances: 2014,” June 2016, p. 5, <https://www2.census.gov/govs/school/14f33pub.pdf>.

<sup>210</sup> “Federal, State and Local K-12 School Finance Overview,” New America Foundation, June 2015.

<sup>211</sup> Kathy Checkley, “Money Matters: A Primer on K-12 School Funding,” Center for Public Education, July 2, 2008, <http://www.centerforpubliceducation.org/Main-Menu/Policies/Money-matters-At-a-glance/Money-matters-A-primer-on-K12-school-funding.html>.

<sup>212</sup> “Federal, State and Local K-12 School Finance Overview,” *supra* note 210.

<sup>213</sup> Education Commission of the States, “Understanding State School Funding,” 13 *The Progress of Education Reform* 3 (2012).

<sup>214</sup> *Ibid*; Checkley, *supra* note 211. As defined in the Checkley article, “equity” means an equal distribution of money among students, and “adequacy” refers to the level of funding required for students to succeed.

educational opportunities they provide.”<sup>215</sup> This autonomy in decision making about creating funding formulas and allocations inevitably creates a variance in approaches among states and among districts.<sup>216</sup>

Since public schools rely heavily on state funding, it can be particularly detrimental to the quality of education when state levels of funding are reduced.<sup>217</sup> The Center on Budget and Policy Priorities conducted a survey on school funding which indicated that many states have been reducing funding since the Great Recession, and specifically found that at least 31 states provided less school funding per-pupil in 2014 than in 2008, and cuts in about half of those states exceeded 10 percent.<sup>218</sup> During the recession, property values dropped as well which reduced local education revenue and put schools in the position where they either had to cut back educational services or devise a strategy to raise more revenue (which is challenging in a recession).<sup>219</sup>

The Education Law Center has reported similar information, finding that the highest-poverty districts receive an average of \$1,200 less per-pupil than the lowest-poverty districts, and districts serving the largest numbers of students of color receive about \$2,000 less per-pupil than districts who serve fewer students of color.<sup>220</sup> See also Figure 4, which shows an overall decline over time in the percentage of revenue for public elementary and secondary schools coming from states from 1999-2014.

With funding inequities at the local level and disinvestment at the state level, fundamental inequities occur based on the overall wealth of a community or district. The majority of states do not allocate more funding to high-poverty school districts.<sup>221</sup> A recent report from the Education

<sup>215</sup> Natasha Ushomirsky and David Williams, “Funding Gaps 2015: Too Many States Still Spend Less,” The Education Trust, March 2015, p. 6, [https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015\\_TheEducationTrust1.pdf](https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf).

<sup>216</sup> Statement of Beth Schiavino-Narvaez, Superintendent of Hartford Public Schools, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), p. 2 (hereinafter Schiavino-Narvaez Statement).

<sup>217</sup> Beth Schiavino-Narvaez, Superintendent of Hartford Public Schools, testimony, Briefing Transcript, p. 30. Ms. Schiavino-Narvaez notes that Hartford schools have experienced eight years of flat funding from the city and are facing a \$900 million deficit at the state level, which puts at risk efforts to “integrate our schools, provide more to those schools that need more and to continue the progress of our district . . .”

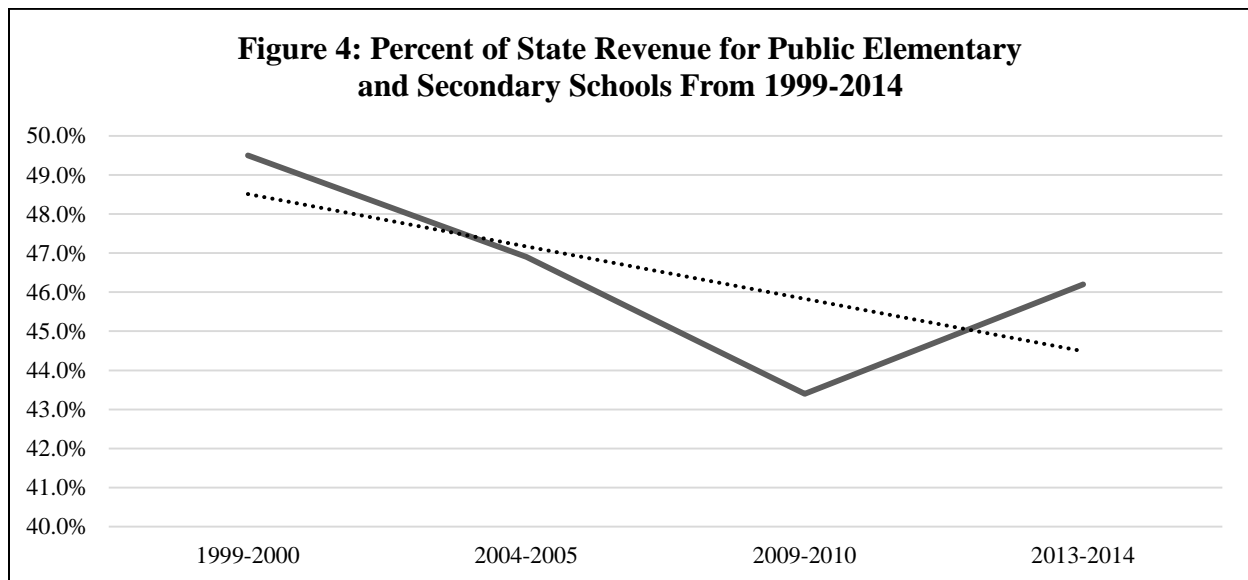
<sup>218</sup> Michael Leachman *et al.*, “Most States Have Cut School Funding, and Some Continue Cutting,” Center on Budget and Policy Priorities, January 25, 2016, p. 1, <http://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf>. The Great Recession refers to the market decline that occurred in the late 2000s into the early 2010s.

<sup>219</sup> *Ibid.* at 10-11.

<sup>220</sup> Leadership Conference Education Fund and Education Law Center, “Cheating Our Future: How Decades of Disinvestment by States Jeopardizes Equal Educational Opportunity,” June 2015, p. 3 (hereinafter Cheating Our Future), <http://ctschoolfinance.org/assets/uploads/files/Cheating-Our-Future-How-Decades-of-Disinvestment-by-States-Jeopardizes-Equal-Educational-Opportunity.pdf>.

<sup>221</sup> Statement of Danielle Farrie, Research Director, Education Law Center, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), p. 2 (hereinafter Farrie Statement).

Law Center reported that fourteen states including Pennsylvania and Illinois had “regressive” funding patterns where more funds were allocated to affluent districts rather than districts serving poor students.<sup>222</sup> Nineteen other states (including California and Florida) have “flat” funding that does not allocate any additional funds to high-poverty schools.<sup>223</sup> Inequities also occur based on race and/or ethnicity. School districts that serve students of color often receive less funding than districts that serve fewer students of color, and these inequities are often “more prevalent, and more substantial, than those based on poverty.”<sup>224</sup>



Source: Compiled by USCCR from the Digest of Educational Statistics, U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “National Public Education Financial Survey,” 1989–90 through 2012–13

## FUNDING INEQUITY LITIGATION

Although *San Antonio v. Rodriguez* recognized that there is no federal constitutional right to a public education, high-quality public education is an important policy priority for many states. Prior to *San Antonio*, a class action lawsuit (*Serrano v. Priest I, II, and III*) brought on behalf of California public school students successfully challenged the educational financing system in the California State Supreme Court on equal protection grounds.<sup>225</sup> In these cases, plaintiffs

<sup>222</sup> Bruce D. Baker *et al.*, “Is School Funding Fair? A National Report Card,” Education Law Center and Rutgers Graduate School of Education, Spring 2015, p. 9, [http://blogs.edweek.org/edweek/state\\_edwatch/Is%20School%20Funding%20Fair%20-%204th%20Edition%20\(2\).pdf](http://blogs.edweek.org/edweek/state_edwatch/Is%20School%20Funding%20Fair%20-%204th%20Edition%20(2).pdf).

<sup>223</sup> *Ibid.*

<sup>224</sup> Ushomirsky and Williams, *supra* note 215, at 8.

<sup>225</sup> *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (*Serrano I*); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (*Serrano II*); *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) (*Serrano III*).

successfully argued that poor school districts are unable to raise sufficient revenue from property taxes at a reasonable tax rate, which deprives poorer districts of local control of their schools' finances, and that wealth-based finance disparities violate the California state constitution.<sup>226</sup> Furthermore, *Serrano II* affirmed that education is a fundamental interest in California, pursuant to the California State Constitution.<sup>227</sup> As a result, the California legislature passed a finance reform that increased funding minimums, set per-pupil spending maximums by capping tax rates, and sought to redistribute funds in order to make up the difference in tax revenue generated by poor and wealthy school districts.<sup>228</sup> While *Serrano I* was litigated prior to *San Antonio*, *Serrano II, III* and other "equity" cases that followed *San Antonio* were considered to be the "second wave" of school finance litigation, following the "first wave" of federal cases that focused on the Equal Protection Clause of the U.S. Constitution.<sup>229</sup>

Following *San Antonio v. Rodriguez*, lawsuits that challenge the state's public education funding structure have been brought in 45 of the 50 states.<sup>230</sup> These "second wave" lawsuits asserted similar claims to that of the first wave cases, but focused on the equal protection clauses and education clauses under state constitutions.<sup>231</sup> The *Abbott v. Burke* series of rulings by the Supreme Court of New Jersey resulted in a ruling that New Jersey's public education financing system was unconstitutional as applied to poorer school districts, due to disparities in the funding distribution among high-poverty urban and low-poverty suburban districts in the state.<sup>232</sup> This led to a series of subsequent rulings in various districts across New Jersey, which led to new legislation and the implementation of certain remedial measures to ensure adequate and equal education for low-income students.<sup>233</sup>

The "third wave" of litigation, or "adequacy" litigation, focused on the education clauses in state constitutions and primarily challenged whether the funding levels of districts were sufficient based on educational need.<sup>234</sup> Based on states' constitutional obligation to provide "adequate" or "quality" education, plaintiffs who brought these lawsuits have been successful at challenging funding inequities at the state level in over 60 percent of cases.<sup>235</sup> These "adequacy" rulings differ

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<sup>226</sup> *Serrano v. Priest*, 557 P.2d 929,949-52 (Cal. 1976); see also Gillespie, *supra* note 19, at 999-1000.

<sup>227</sup> *Serrano v. Priest*, 557 P.2d at 951; see also David Hinojosa and Karolina Walters, *How Adequacy Litigation Fails to Fulfill the Promise of Brown [But How It Can Get Us Closer]*, 2014 Mich. St. L. Rev. 575, 599 (2014).

<sup>228</sup> Gillespie, *supra* note 19, at 999-1000.

<sup>229</sup> Hinojosa and Walters, *supra* note 227, at 598-601.

<sup>230</sup> Joseph R. Rogers, Jr., Director of Public Engagement/Senior Researcher, Campaign for Educational Equity at Teachers College, Columbia University, testimony, Briefing Transcript, p. 17.

<sup>231</sup> Hinojosa and Walters, *supra* note 227, at 598.

<sup>232</sup> *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); see also Education Law Center, "The History of *Abbott v. Burke*," <http://www.edlawcenter.org/cases/abbott-v-burke/abbott-history.html>.

<sup>233</sup> "The History of *Abbott v. Burke*," *supra* note 232.

<sup>234</sup> Hinojosa and Walters, *supra* note 227, at 602-03.

<sup>235</sup> Rogers, *supra* note 230, at 17-18. Joseph Rogers notes in his testimony that after 1989, the rate of success for plaintiffs bringing state education funding inequality cases increased, as courts were more willing to accept

from earlier “equity” rulings, as they do not focus on the inequality of the tax base but rather the outcomes for students of disadvantage.<sup>236</sup> As defined by precedents set by state courts, “adequate” or “quality” education is characterized by 1) the standard of whether students are being adequately prepared to “function as capable citizens of a democratic society and as competitive workers in the global economy,” 2) whether students are acquiring the fundamental knowledge and skills to allow them to pursue higher education or secure gainful employment, or 3) whether students have access to the appropriate resources (i.e., quality instruction, adequate class sizes and school facilities, access to technology, etc.) to acquire these knowledge and skills.<sup>237</sup>

As a result of state litigation, many states have implemented state funding reforms to increase funding in districts serving the most disadvantaged students. From 1990-2011, 27 states implemented funding reforms that increased funding for low-income districts, and these districts spent \$1,150 per-pupil more on average than high-income districts.<sup>238</sup> School districts in states that did not implement finance reforms have seen relatively no change in funding levels, and schools that serve low-income students remain generally underfunded.<sup>239</sup>

## Disparities in Title I Spending at the Federal Level

States bear the primary responsibility of providing public K-12 education, although the federal government does provide supplementary financial assistance.<sup>240</sup> Each year, the federal government will spend approximately \$79 billion on education programs, most of which is administered by the U.S. Department of Education and distributed to states and school districts through funding formulas and competitive grant programs.<sup>241</sup> One of the largest grant programs administered by the U.S. Department of Education is authorized under Title I, Part A of ESEA, reauthorized in 2002 by NCLB and again in 2015 by the ESSA.<sup>242</sup> This grant program provides financial assistance to schools with the highest percentages of economically disadvantaged students to help ensure that

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jurisdiction of these cases and were in a better position to be able to measure whether schools were meeting the standard of providing a “quality” or “adequate” education for all students.

<sup>236</sup> Statement of Jesse Rothstein, Director, Institute for Research on Labor and Employment, University of California, Berkeley, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), p. 3 (hereinafter Rothstein Statement).

<sup>237</sup> Statement of Joseph R. Rogers, Jr., Director of Public Engagement/Senior Researcher, Campaign for Educational Equity at Teachers College, Columbia University, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), pp. 2-3 (hereinafter cited as Rogers Statement).

<sup>238</sup> Rothstein Statement, *supra* note 236, at 4-5.

<sup>239</sup> *Ibid.* at 5.

<sup>240</sup> U.S. Department of Education, “10 Facts about K-12 Education Funding,” June 2005, <https://www2.ed.gov/about/overview/fed/10facts/index.html?exp> .

<sup>241</sup> “Federal, State and Local K-12 School Finance Overview,” *supra* note 210.

<sup>242</sup> “Every Student Succeeds Act (ESSA),” *supra* note 16.

all students meet academic standards, and funds are allocated through statutory formulas based on individual state education costs and poverty estimates.<sup>243</sup> Each year, approximately \$14 billion is spent on Title I grants to Local Educational Agencies (LEAs), which serves approximately 24 million students in more than 50 percent of all public schools nationwide.<sup>244</sup> Title I grants are distributed through four separate funding formulas:

1. *Basic Grant Formula.* Most school districts receive Title I funds under this formula, as funds are distributed to districts if at least 10 children or 2 percent of its students is in poverty.<sup>245</sup> Approximately 45 percent of Title I funds are distributed through the Basic Grant Formula.<sup>246</sup>
2. *Concentration Grant Formula.* Title I funds are distributed to school if they have at least 15 percent of poor students or 6,500 poor children, and districts receive the same amount of funds no matter what percentage or number of poor students they serve above that threshold.<sup>247</sup> Approximately 9 percent of Title I funds are distributed through the Concentration Grant Formula.<sup>248</sup>
3. *Targeted Assistance Grant Formula.* The level of Title I funds a school district receives is based on a weighted number or percentage of poor students served by the district.<sup>249</sup> About 23 percent of Title I funds are distributed through the Targeted Assistance Grant Formula.<sup>250</sup>
4. *Education Finance Incentive Grant Formula.* School districts receive Title I funds through this funding formula based on their state's level of school finance equity, rewarding states that have good school finance equity and targeting those that have bad finance equity.<sup>251</sup> Approximately 23 percent of Title I funds are distributed through the Education Finance Incentive Grant Formula, and it is the most targeted funding formula.<sup>252</sup>

Historically under ESEA, Title I funding is meant to “supplement, not supplant” state and local funding for education, and was intended to “reduce, and ultimately eliminate, disparities in

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<sup>243</sup> U.S. Department of Education, “Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A),” October 5, 2015, <https://www2.ed.gov/programs/titleiparta/index.html?exp=0>.

<sup>244</sup> U.S. Department of Education, “Fiscal Year 2017 Budget Summary and Background Information,” 2017, p. 16, <https://www2.ed.gov/about/overview/budget/budget17/summary/17summary.pdf>.

<sup>245</sup> Clare McCann, “Title I Distribution Formulas,” New American Foundation, <http://www.edcentral.org/edcyclopedia/no-child-left-behind-act-title-i-distribution-formulas/>.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

educational quality.”<sup>253</sup> Historically, the “supplement, not supplant” provision was written into the law based on findings that exposed “egregious misuses of funds,” resulting in an imbalance of per-pupil expenditures between schools predominantly serving white students and schools predominantly serving students of color.<sup>254</sup> Approximately 5,750 Title I schools receive approximately \$440,000 less per year than non-Title I schools in the same district, and federal funds are often used to make up for this difference instead of providing additional resources to these high-poverty schools.<sup>255</sup> Districts may not use Title I funds to compensate for an inequitable funding base at the state or local levels.<sup>256</sup> The U.S. Department of Education also proposed a rule for the supplement-not-supplant provision in ESSA to help better implement the provision.<sup>257</sup> The regulation would have required districts to shift about \$800 million to Title I schools from non-Title I schools, or spend an additional \$2.2 billion in state and local funds.<sup>258</sup> However, the regulation was met with opposition from several groups, who were worried that it would send district budgets into “chaos on a national level,” and was eventually dropped towards the beginning of 2017.<sup>259</sup> Betsy DeVos, Secretary of Education under the Trump administration, has not provided any specific guidance about this provision, other than to indicate that she shares the concerns of GOP lawmakers, and will implement ESSA “as Congress intended.”<sup>260</sup>

ESEA was originally passed by Congress to address disparities among high-poverty and low-poverty schools. However, disparities still exist as evidenced by the range in per-pupil spending among school districts around the country. In more than half of all states, high-poverty school districts receive less funding than low-poverty school districts, and in nearly half of all states, high-

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<sup>253</sup> Elementary and Secondary Education Act of 1965, 20 U.S.C. §6321; U.S. Department of Education, “Fact Sheet: Supplement-not-Supplant under Title I of the Every Student Succeeds Act,” August 31, 2016, <https://www.ed.gov/news/press-releases/fact-sheet-supplement-not-supplant-under-title-i-every-student-succeeds-act>.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> Statement of Liz King, Senior Policy Analyst and Director of Education Policy, The Leadership Conference on Civil and Human Rights and The Leadership Conference Education Fund, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), at 7 (hereinafter King Statement) (Ms. King appeared on behalf of Wade Henderson, President and CEO of the Leadership Conference on Civil and Human Rights. The written statement was initially submitted by Mr. Henderson.).

<sup>257</sup> Ary Amerikaner, Deputy Assistant Secretary, Office of Elementary and Secondary Education, U.S. Department of Education, testimony, Briefing Transcript, pp. 101-102.

<sup>258</sup> Thomas Frank, “Obama Administration drops last-minute Education Department rule change,” CNN, January 18, 2017, <http://www.cnn.com/2017/01/18/politics/obama-rule-department-of-education/>.

<sup>259</sup> Nicole Gorman, “Education Department Drops Controversial ‘Supplement Not Supplant’ Regulation,” *Education World*, January 19, 2017, [http://www.educationworld.com/a\\_news/education-department-drops-controversial-%E2%80%98supplement-not-supplant%E2%80%99-regulation-1979012106](http://www.educationworld.com/a_news/education-department-drops-controversial-%E2%80%98supplement-not-supplant%E2%80%99-regulation-1979012106).

<sup>260</sup> *Ibid.*



poverty school districts spend less on education per-pupil than low-poverty school districts.<sup>261</sup> While Title I funds are meant to supplement state and local funds, the funds ultimately do not go very far, as they only amount to about \$500-600 per-pupil per year.<sup>262</sup>

Catherine Brown, in her testimony before USCCR, indicated that the U.S. Department of Education can allocate more Title I money to high-poverty schools by consolidating the four current Title I funding formulas into one simplified formula. Ms. Brown indicated that these existing four formulas can “send opaque and even contradictory incentives to states and districts,” and having one simplified formula can incentivize these states and districts “to create progressive funding systems, systems that provide additional resources to schools serving students with additional needs.”<sup>263</sup> Weighted funding formulas can also be a way to create a more equitable funding system, and ESSA includes a pilot program for schools to create weighted funding formulas to distribute funds based on student need, ultimately distributing more funds to disadvantaged students.<sup>264</sup> Finally, the U.S. Department of Education had previously leveraged existing programs (for example, the Investing in Innovation program, which “provides funding to support local educational agencies (LEAs) and nonprofit organizations in partnership with one or more LEAs or a consortium of schools,” and the Magnet Schools Assistance program, which “provides grants to eligible local educational agencies to establish and operate magnet schools that are operated under a court-ordered or federally approved voluntary desegregation plan”) and proposed a \$120 million grant program called “Stronger Together,” which would have authorized funding to promote racial and socioeconomic diversity in schools.<sup>265</sup> Consequently, federal guidance is needed to clarify the allowable uses of Title I funds, to make sure that funds can be utilized in the most efficient and effective manner.<sup>266</sup>

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<sup>261</sup> Center for American Progress, “A Fresh Look at School Funding: 5 New Ideas for ESEA Reauthorization,” May 18, 2015, (hereinafter A Fresh Look at School Funding), <https://www.americanprogress.org/issues/education/reports/2015/05/18/113397/a-fresh-look-at-school-funding/>.

<sup>262</sup> Statement of Catherine Brown, Vice President for Education Policy, Center for American Progress, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), p. 2 (hereinafter cited as Catherine Brown Statement)

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> Tanya Clay House, Deputy Assistant Secretary, Office of Planning, Evaluation and Policy Development, U.S. Department of Education, testimony, Briefing Transcript, pp. 276-277. Senator Chris Murphy and Marcia Fudge introduced the “Stronger Together Diversity Act of 2016,” which would have created the “Stronger Together” grant program. Stronger Together Diversity Act of 2016, H.R. 5738, 114<sup>th</sup> Cong. (2016); U.S. Department of Education, “Murphy, Fudge Introduce Stronger Together School Diversity Act of 2016,” July 12, 2016, <https://www.ed.gov/news/press-releases/murphy-fudge-introduce-stronger-together-school-diversity-act-2016>; see also The National Coalition on School Diversity, “The Stronger Together School Diversity Act of 2016: Why Promoting Racial and Socioeconomic Diversity in our Public Schools is Vitaly Important,” [http://school-diversity.org/pdf/Stronger\\_Together\\_School\\_Diversity\\_Act\\_of\\_2016\\_two-pager.pdf](http://school-diversity.org/pdf/Stronger_Together_School_Diversity_Act_of_2016_two-pager.pdf).

<sup>266</sup> *Ibid.*

The Stronger Together School Diversity Act of 2016 did not advance in the House of Representatives, and has not been re-introduced this legislative session.<sup>267</sup> It is unclear whether the Investing in Innovation program will continue under the Trump administration.<sup>268</sup> The Magnet School Assistance Program appears to be ongoing, although the Trump administration has proposed to decrease funding for this program by 1 percent in 2018.<sup>269</sup>

### How is the Money Spent?

In the 2013-2014 school year (Fiscal Year 2014), public schools across the U.S. spent an average of \$11,066 per-pupil.<sup>270</sup> As seen in Figures 5 and 6, an average of \$6,726 or 61 percent of the total per-pupil expenditures was spent on instruction.<sup>271</sup> About 34 percent of the total per-pupil expenditures is spent on support services, which includes general administration, operations and maintenance, and transportation.<sup>272</sup>

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<sup>267</sup> Stronger Together Diversity Act of 2016, H.R. 5738, 114<sup>th</sup> Cong. (2016).

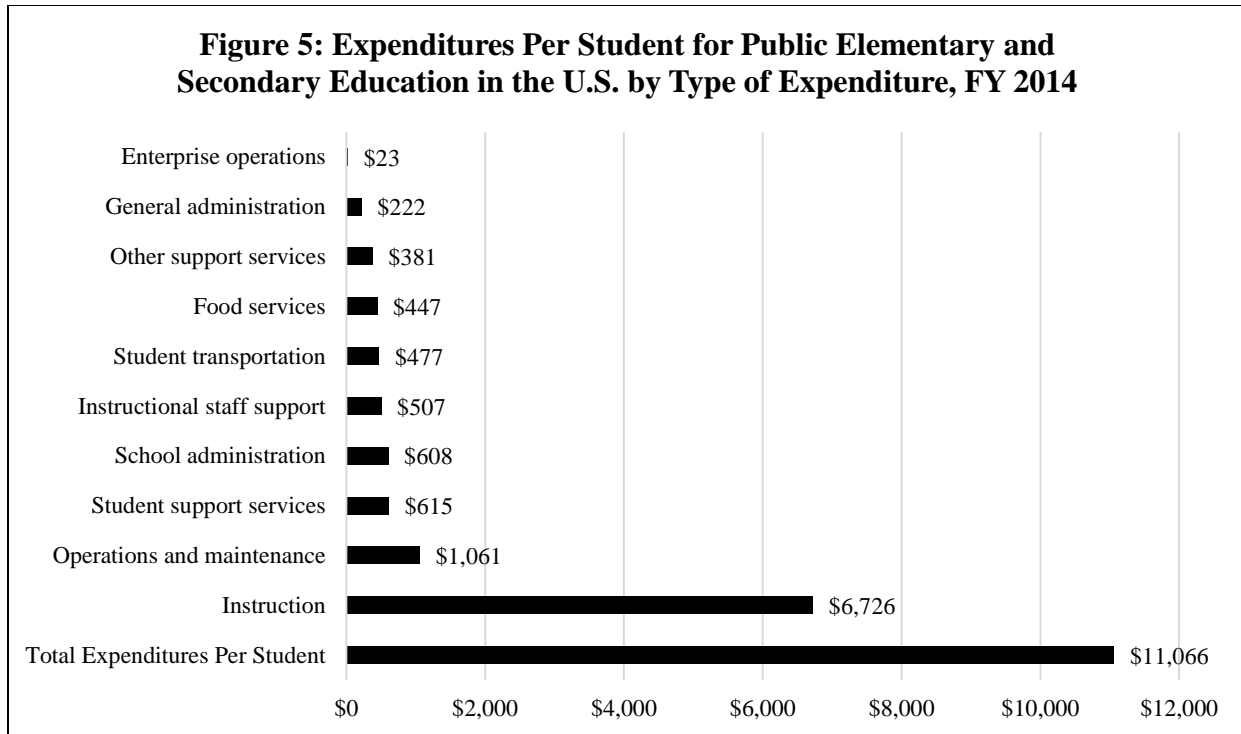
<sup>268</sup> U.S. Department of Education, “Investing in Innovation (i3),” <https://innovation.ed.gov/what-we-do/innovation/investing-in-innovation-i3/>.

<sup>269</sup> U.S. Department of Education, “Magnet Schools Assistance Program (MSAP),” <https://innovation.ed.gov/what-we-do/parental-options/magnet-school-assistance-program-msap/>; Noelle Ellerson Ng, “Summary & Analysis: President Trump’s FY18 Budget Proposal,” The School Superintendents Association, May 23, 2017, p. 5, [https://www.aasa.org/uploadedFiles/Policy\\_and\\_Advocacy/files/AASA%20FY18%20Analysis.pdf](https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/files/AASA%20FY18%20Analysis.pdf).

<sup>270</sup> NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14,” *supra* note 18.

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*



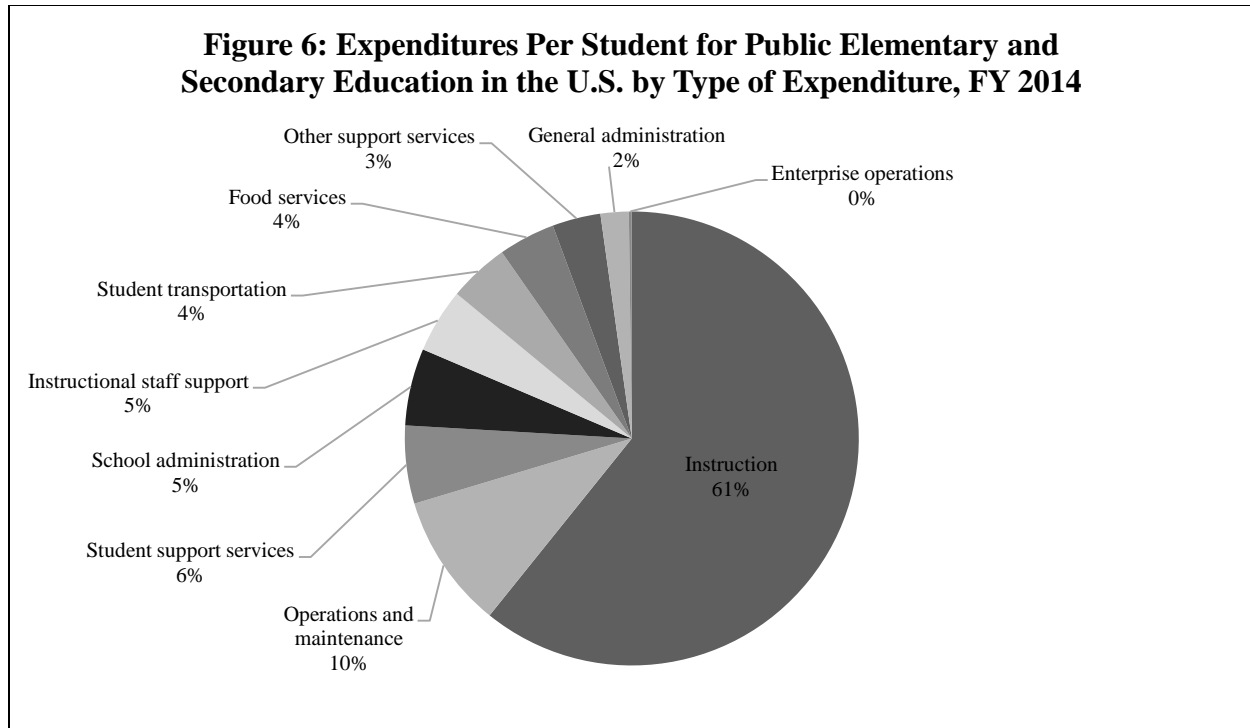
Source: Compiled by USCCR from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “National Public Education Financial Survey (NPEFS),” fiscal year 2014, and NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14, p 13-14, Table 5.

Since most of a district’s revenue is spent on instruction, operations, and other support services, the level of funding matters in order to make sure that a school can properly operate and compete in the regional labor market.<sup>273</sup> Many experts argue that high-need districts require not only equal, but higher levels of funding to overcome the financial challenges they experience for teacher recruitment and retention, and provide programs and services to disadvantaged students.<sup>274</sup> Therefore, many state financing systems are ill-equipped to actually cover the costs of hiring and retaining high-quality teachers and quality instruction.<sup>275</sup>

<sup>273</sup> Baker, “America’s Most Fiscally Disadvantaged School Districts,” *supra* note 23, at 8.

<sup>274</sup> *Ibid.* at 5-8.

<sup>275</sup> *Ibid.* at 8.



Source: Compiled by USCCR from U.S. Department of Education, National Center for Education Statistics, Common Core of Data (CCD), “National Public Education Financial Survey (NPEFS),” fiscal year 2014, and NCES, “Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2013–14, p 13-14, Table 5.

## INEQUITY IN TEACHER SALARIES

Many factors can contribute to the amount of money a teacher earns, such as years of experience, degree level, or simply geography. Research has validated that there is a measurable link between teacher wages and teacher quality, finding that wage levels can also affect a person’s decision to enter the profession, and raising wage levels can have an overall effect upon reducing student dropout rates.<sup>276</sup> However, some argue that teachers remain underpaid compared to other professionals, and that increasing salaries at high-need schools might help attract high-quality teachers to those schools.<sup>277</sup>

In California, teachers at the median point of the salary scale (with roughly 10 years of experience, a bachelor’s degree, and 60 additional education credits) could earn salaries that range from \$42,000 to over \$100,000, depending on the district.<sup>278</sup> In New York, the salary range is similar

<sup>276</sup> Baker, “Does Money Matter in Education?” *supra* note 27, at 5.

<sup>277</sup> *Ibid.* at 5-7.

<sup>278</sup> Frank Adamson and Linda Darling-Hammond, “Addressing the Inequitable Distribution of Teachers: What It Will Take to Get Qualified, Effective Teachers in All Communities,” Stanford Center for Opportunity Policy in

for teachers at the median point, from \$43,900 to \$95,786. The lowest median salaries are reported at districts close to New York City that predominantly serve students of color, whereas the highest salaries are reported in wealthy, suburban districts which serve predominantly white students.<sup>279</sup> Aside from labor market differences, the disparities in salaries can be explained by the fact that districts that serve the highest proportion of low-income students and students of color are populated by about twice as many uncredentialed and inexperienced teachers.<sup>280</sup>

The U.S. Department of Education released a report in 2011 that examined school-level expenditures, and found that measurable disparities exist.<sup>281</sup> 82 percent of Title I school districts have at least one Title I school that spends less per-pupil than the district's average of expenditures for non-Title I schools.<sup>282</sup> That includes teacher salary expenditures, where Title I schools consistently spent less than the average of non-Title I schools at all grade levels.<sup>283</sup>

### **INEQUITY IN SPENDING ON SCHOOL FACILITIES, TECHNOLOGY AND INSTRUCTIONAL MATERIALS**

School facilities matter for education. OCR discussed the importance of equitable school facilities, as they are essential for both student achievement and teacher retention:

The physical spaces where our children are educated are also important resources that influence the learning and development of all students, yet many of our Nation's schools have fallen into disrepair. Too often, school districts with higher enrollments of students of color invest thousands of dollars less per student in their facilities than those districts with predominantly white enrollments. While conditions have improved in some districts, older buildings with inadequate or poorly maintained heating, ventilation, and air conditioning (HVAC) systems still are more likely to house schools attended mostly by students of color, who in many instances are also low-income students. Schools with the most students of color are more likely to have temporary, portable buildings, and permanent buildings with poorer building conditions, including poorly maintained exterior features such as lighting and walls. Students of color must not be consigned to dilapidated, overcrowded school buildings that lack essential educational facilities, such as science laboratories, auditoriums, and athletic fields, and that may not be able to support the

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Education, December 2011, p. 2, <https://edpolicy.stanford.edu/sites/default/files/publications/addressing-inequitable-distribution-teachers-what-it-will-take-get-qualified-effective-teachers-all-1.pdf>.

<sup>279</sup> *Ibid.* at 3.

<sup>280</sup> *Ibid.* at 3.

<sup>281</sup> U.S. Department of Education, Comparability of State and Local Expenditures among Schools within Districts, *supra* note 21, at x.

<sup>282</sup> *Ibid.* at 26.

<sup>283</sup> *Ibid.* at 27.

increasing infrastructure demands of rapidly expanding educational technologies while providing better facilities for other students.<sup>284</sup>

For example, in 2016, Detroit Public School teachers staged a “sickout” to protest the alleged deplorable conditions in about 100 public schools in Detroit, including overcrowded classrooms, vermin, mold, unreliable heating, and a lack of textbooks and other supplies.<sup>285</sup> These allegations mirror deeply disturbing inequities in school conditions that have been repeatedly described in reports and litigation across the country, which demonstrate that over time finance inequity has led to inequitable school conditions.<sup>286</sup> Poor quality school facilities not only affect teachers, but can negatively impact a student’s health and ability to be attentive, and can exacerbate existing inequities in student outcomes.<sup>287</sup>

The conditions of school facilities are not only important for student achievement and teacher retention, but the availability of school facilities and technology (for example, well-equipped laboratories for science instruction, libraries, performance arts spaces, physical education facilities, Internet access, online databases, computers, mobile devices, etc.) can provide students with an enhanced learning experience, as well as provide opportunities to teach technological literacy and provide accessible instruction.<sup>288</sup> Schools in poorer areas tend to spend more money and effort than schools in wealthier areas on upkeep and repair costs of school facilities.<sup>289</sup> Conversely, schools in poorer districts tend to spend less on capital investments for building system upgrades or overall modernization, which leads to higher costs in the long term.<sup>290</sup> Furthermore, an average of 45 percent of revenue for operating costs is funded at the state level and 81 percent of revenue for capital costs is funded at the local level.<sup>291</sup> High-poverty districts generally do not have the ability to fund new construction or capital improvements at the same level as wealthy districts, which, if not corrected through other funding streams, perpetuates inequities in the condition of schools.<sup>292</sup>

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<sup>284</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 4; *see also* Jamella Miller, testimony, Briefing Transcript, pp. 36, 63. Ms. Miller noted, “I think in our district, we can’t even get past the fact that we don’t have insulated walls. We have metal walls up where teachers bring in blankets to the students because it’s cold in the wintertime.”

<sup>285</sup> Emma Brown, “Rats, roaches, mold—poor conditions lead to teacher sickout, closure of most Detroit schools,” *Washington Post*, January 20, 2016, [https://www.washingtonpost.com/news/education/wp/2016/01/20/rats-roaches-mold-poor-conditions-leads-to-teacher-sickout-closure-of-most-detroit-schools/?utm\\_term=.6363c8ba1771](https://www.washingtonpost.com/news/education/wp/2016/01/20/rats-roaches-mold-poor-conditions-leads-to-teacher-sickout-closure-of-most-detroit-schools/?utm_term=.6363c8ba1771).

<sup>286</sup> *See generally* OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8.

<sup>287</sup> 21<sup>st</sup> Century School Fund, National Council on School Facilities, and The Center for Green Schools, “State of Our Schools: America’s K-12 Facilities,” 2016, p. 6 (hereinafter *State of Our Schools*), <https://centerforgreenschools.org/state-our-schools>.

<sup>288</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 4-5.

<sup>289</sup> *State of Our Schools*, *supra* note 287, at 18.

<sup>290</sup> *Ibid.* at 7, 14, 19.

<sup>291</sup> *Ibid.* at 3, 18.

<sup>292</sup> *Ibid.* at 18-19.

## Spending Gaps Due to the Title I Comparability “Loophole”

While inequity exists among school districts of varied affluence within a state, inequity can also exist among schools in the same school district. Existing funding gaps are often widened even further due to variances in spending on teachers’ salaries at different schools in the same district.<sup>293</sup> ESSA, like the ESEA before it, requires school districts to provide educational services at Title I schools that are comparable to those at schools that do not receive Title I funding.<sup>294</sup> However, Title I provisions consider school spending “comparable” at 90 percent of the average of non-Title I schools, which allows high-poverty schools to spend less, thus perpetuating and sometimes widening the spending gaps.<sup>295</sup>

A report prepared for the U.S. Department of Education disclosed that more than 40 percent of Title I schools spent less on personnel per-pupil than non-Title I schools at the same grade level and that are within the same school district.<sup>296</sup> School districts, under current law, can report average teacher salaries instead of actual salary expenditures to meet comparability requirements.<sup>297</sup> This method does not account for the difference in experience between teachers with different levels of education, seniority, and who are consequently compensated at different salary levels.<sup>298</sup> This report goes on to explain that low-poverty schools tend to hire teachers with more experience and education than high-poverty schools, so the district winds up paying more for teacher salaries at more affluent schools.<sup>299</sup> Thus, this “comparability loophole” helps to perpetuate funding inequities among schools and districts.<sup>300</sup>

Pennsylvania has some of the nation’s most inequitably funded schools within a single state, where high-poverty districts spend approximately 30 percent less than more affluent districts on average.<sup>301</sup> For example, the School District of Philadelphia serves many low-income, inner-city

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<sup>293</sup> Hall and Ushomirsky, *supra* note 166, at 2.

<sup>294</sup> Stephanie Stullich, “The Potential Impact of Revising the Title I Comparability Requirement to Focus on School-Level Expenditures,” U.S. Department of Education, November 2011, at 1, <https://www2.ed.gov/rschstat/eval/title-i/comparability-requirement/comparability-policy-brief.pdf>; Every Student Succeeds Act of 2015, 20 U.S.C. §6301 *et seq.*

<sup>295</sup> Hall and Ushomirsky, *supra* note 166, at 5.

<sup>296</sup> U.S. Department of Education, “Comparability of State and Local Expenditures Among Schools Within Districts,” *supra* note 21, at xi.

<sup>297</sup> Robert Hanna *et al.*, “Comparable but Unequal: School Funding Disparities,” Center for American Progress, March 2015, p. 1, <https://cdn.americanprogress.org/wp-content/uploads/2015/03/ESEAComparability-brief2.pdf>.

<sup>298</sup> Hall and Ushomirsky, *supra* note 166, at 2.

<sup>299</sup> *Ibid.* at 2.

<sup>300</sup> Hanna *et al.*, *supra* note 297, at 1.

<sup>301</sup> David Volkman, Executive Assistant Secretary of Education for Pennsylvania, testimony, Briefing Transcript, pp. 31-33. David Volkman noted that 20% of students in Pennsylvania are living in abject poverty, with another 24% coming from working poor families. He stated “we really don’t have an education crisis in this country, we have a child poverty crisis, which not only impacts education ... it also impacts a child’s ability to become

students and spends approximately \$13,000 per-pupil each year, while the Lower Merion School District in the affluent Philadelphia suburbs spends approximately \$23,000 per-pupil each year.<sup>302</sup> In 2012, Pennsylvania school districts' expenditures per-pupil varied approximately \$2,495 from the state's average, or by a factor of 16.8 percent.<sup>303</sup> The range of per-pupil spending is wide in Pennsylvania, from expenditures of \$8,700 in more impoverished rural districts to \$26,600 in more affluent suburban districts.<sup>304</sup> This inequitable spending amounts to "larger class sizes, fewer academic options, older buildings, less technology, and fewer art, music, and gym classes."<sup>305</sup> As a result, teachers are often left to purchase their own classroom supplies out-of-pocket, to make up for the budget shortfall.<sup>306</sup>

Many have argued in favor of reform to close this "comparability loophole" by requiring districts to demonstrate comparability of actual school expenditures.<sup>307</sup> If the loophole were closed, high-poverty schools would ultimately benefit from an increase in funding, and could increase per-pupil spending by 4-15 percent.<sup>308</sup> At the same time, an estimated 18-28 percent of Title I districts would not be in compliance if this loophole were closed.<sup>309</sup> By closing the loophole, high-poverty schools would receive an estimated \$8.5 billion in new funding annually.<sup>310</sup> In 2016, the U.S. Department of Education proposed regulations to implement the Title I requirement that federal funds must supplement, not supplant state and local funds.<sup>311</sup> The Department subsequently withdrew the proposed regulations in January 2017 due to the timing of their release so close to the inauguration, criticism received on certain provisions, and the likelihood that the Trump administration would overturn it.<sup>312</sup>

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everything he or she was born to be."; *see also* A Fresh Look at School Funding, *supra* note 261; Cheating Our Future, *supra* note 220.

<sup>302</sup> Emma Brown, "Pa. schools are the nation's most inequitable. The new governor wants to fix that." Washington Post, April 22, 2015, (hereinafter Brown, "Pa. schools are the nation's most inequitable"), [https://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e\\_story.html?utm\\_term=.a0a21244bf1d](https://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e_story.html?utm_term=.a0a21244bf1d).

<sup>303</sup> New America Foundation, "School Funding Equity Factor," *supra* note 168.

<sup>304</sup> Brown, "Pa. schools are the nation's most inequitable," *supra* note 302.

<sup>305</sup> Statement of Jamella Miller, Pennsylvania Parent, William Penn School District, Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation (Washington, D.C., May 20, 2016), at 1 (hereinafter cited as Miller Statement).

<sup>306</sup> Jan Carabeo, "Philadelphia Teachers, Students Prepare for Another School Year with Less," *CBS Philly*, August 22, 2014, <http://philadelphia.cbslocal.com/2014/08/22/philadelphia-teachers-students-prepare-for-another-school-year-with-less/>.

<sup>307</sup> Stullich, *supra* note 294, at 2.

<sup>308</sup> *Ibid.* at 5.

<sup>309</sup> *Ibid.* at 3-4.

<sup>310</sup> Hanna *et al.*, *supra* note 297, at 3.

<sup>311</sup> U.S. Department of Education, "Fact Sheet: Supplement-not-Supplant under Title I," *supra* note 253.

<sup>312</sup> Caitlin Emma, "Education Department withdraws proposed Title I spending rule," *Politico*, January 18, 2017, <https://www.politico.com/story/2017/01/education-department-state-local-funding-minority-poor-233795>; Gorman, *supra* note 259.



## Equal Funding vs. Equitable Funding

In discussing funding disparities and inequitable spending, it is important to make the distinction between “equal” spending and “equitable” spending. As discussed, Title I schools tend to receive less funding per year than non-Title I schools, and tend to spend less per-pupil.<sup>313</sup> Those funding tendencies have consequences for students in schools, whose needs—for example, for English language acquisition, for accommodation for particular disabilities, or for support to achieve grade level competency in one or more core subject—may exceed baseline funding a school receives.<sup>314</sup> Therefore, simply equalizing spending is often not enough to close the achievement gap.<sup>315</sup> Equitable spending, will ultimately provide the most disadvantaged students with additional resources in order to allow them an equal opportunity to succeed.<sup>316</sup>

## School Choice as an Alternative Financial Path to Equal Educational Opportunity

In the debate about how to improve educational opportunities for the most disadvantaged students, the idea of school choice has been touted by advocates as a viable solution for those students residing in poor districts who are assigned to low-performing public schools. School choice has been debated for decades. Economist Milton Friedman heavily influenced the modern day arguments for school choice, as he believed that all parents should have the option to enroll their children in any school, and proposed the school voucher that could be redeemed at any school.<sup>317</sup> This, in turn, he argued, would create competition among schools and therefore foster excellence and a high level of achievement, thus retaining students.<sup>318</sup>

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<sup>313</sup> U.S. Department of Education, “Fact Sheet: Supplement-Not-Supplant under Title I,” *supra* note 253; A Fresh Look at School Funding, *supra* note 261, at 1; Ushomirsky and Williams, *supra* note 215, at 1.

<sup>314</sup> OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8; Ushomirsky and Williams, *supra* note 215; Thomas A. Downes and Thomas F. Pogue, Adjusting School Aid Formulas for the Higher Cost of Educating Disadvantaged Students, 47 National Tax Journal 89 (1994), <https://www.ntanet.org/NTJ/47/1/ntj-v47n01p89-110-adjusting-school-aid-formulas.pdf?v=%CE%B1&r=10022272254094733>; William Duncombe and John Yinger, School Finance Reform: Aid Formulas and Equity Objectives, 51 National Tax Journal 2239 (1998), <https://www.ntanet.org/NTJ/51/2/ntj-v51n02p239-62-school-finance-reform-aid.pdf>; William Duncombe and John Yinger, How Much More Does a Disadvantaged Student Cost?, 24 Economics of Education Review 513 (2005); Jesse Rothstein, Professor of Public Policy and Economics, University of California, Berkeley, testimony, Briefing Transcript, pp. 137-139.

<sup>315</sup> *Ibid.* See also Marin Gjaja *et al.*, “Equity is the Key to Better School Funding,” Education Week, February 18, 2014, <http://www.edweek.org/ew/articles/2014/02/19/21puckett.h33.html>.

<sup>316</sup> Gjaja *et al.*, *supra* note 315.

<sup>317</sup> Julie F. Mead, “How Legislation and Litigation Shape School Choice,” Great Lakes Center for Education Research and Practice, March 2008, p. 4, [https://greatlakescenter.org/docs/Research/2008charter/policy\\_briefs/02.pdf](https://greatlakescenter.org/docs/Research/2008charter/policy_briefs/02.pdf).

<sup>318</sup> *Ibid.*

There are many different types of school choice, including school vouchers for private schools, inter- or intra-district public school choice, charter schools, magnet schools, open enrollment, scholarships, individual tax credits and deductions, and other supplemental or alternate educational services.<sup>319</sup> School choice programs are available in the majority of states in the U.S. Under NCLB, states were required to provide opportunities for students who attended Title I schools that had been identified by the state for “school improvement, corrective action, or restructuring” to choose to attend another public school that is not identified as such.<sup>320</sup> Under ESSA, that requirement no longer exists, however states have the discretion to allow school choice or any other voluntary programs that provide supplemental educational services.<sup>321</sup> Additionally, the establishment of charter schools and magnet schools in certain localities give students additional choices beyond their traditional public assigned school.<sup>322</sup>

Beth Schiavino-Narvaez, Superintendent of City of Hartford Public Schools, discussed in her testimony to USCCR her school district’s participation in Connecticut’s Open Choice program.<sup>323</sup> The City of Hartford Public Schools chose to participate in Open Choice due to *Sheff v. O’Neill*, in which the Connecticut Supreme Court ruled that despite measures that the state of Connecticut had taken to equalize funding across districts, persistent racial and economic segregation hindered students from receiving equal educational opportunities. The state was ordered to “take further remedial measures.”<sup>324</sup> The Connecticut Open Choice program is run by a lottery system, where students in Hartford have the opportunity to attend non-magnet district schools in the suburbs, and suburban students can attend non-magnet district schools in Hartford.<sup>325</sup> Additionally, the City of Hartford runs 20 magnet schools, where half of the students are from the suburbs and half are Hartford residents.<sup>326</sup> Ms. Schiavino-Narvaez believes that the introduction of magnet schools into Hartford has been a “valuable tool” in providing an array of educational options to students.

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<sup>319</sup> “Types of School Choice,” EdChoice, <https://www.edchoice.org/school-choice/types-of-school-choice/>; see also “School Choice by State,” EdChoice, <https://www.edchoice.org/school-choice/school-choice-in-america/>.

<sup>320</sup> U.S. Department of Education, “School Choices for Parents,”

<https://www2.ed.gov/parents/schools/choice/definitions.html>. U.S. Department of Education, “Transitioning to the Every Student Succeeds Act (ESSA): Frequently Asked Questions,” February 26, 2016, pp. 4-5, <https://www2.ed.gov/policy/elsec/leg/essa/faq/essa-faqs.pdf>.

<sup>321</sup> U.S. Department of Education, “Transitioning to the Every Student Succeeds Act (ESSA),” *supra* note 320, at 4-5.

<sup>322</sup> U.S. Department of Education, “School Choices for Parents,” *supra* note 320; see also Steven Rivkin, Professor of Economics, University of Illinois at Chicago, testimony, Briefing Transcript, p. 147. While Dr. Rivkin acknowledges that the evidence of the effectiveness of charter schools has been “decidedly mixed,” he believes that additional school choices can improve the performance of charter schools and even public schools through competition.

<sup>323</sup> Schiavino-Narvaez Statement, *supra* note 216, at 3.

<sup>324</sup> *Ibid*; *Sheff v. O’Neill*, 678 A.2d 1267 (Conn. 1996); Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 Law & Ineq. 81, 103-105 (2006).

<sup>325</sup> Connecticut State Department of Education, “Open Choice Programs,” October 27, 2017, <http://www.sde.ct.gov/sde/cwp/view.asp?A=2774&Q=336806>.

<sup>326</sup> Schiavino-Narvaez Statement, *supra* note 216, at 3.

However, she also indicated that an “unintentional outcome” of the use of District resources for the establishment of these magnet schools has been “a concentration of needs in those schools not affected by *Sheff*.”<sup>327</sup>

An increasing number of states and school districts are implementing voucher programs. As of July 2017, there were various private school choice programs in 29 states and the District of Columbia.<sup>328</sup> Voucher programs allow parents to use an allotment of public funds for their child at the school of their choice, whether it be public, private, magnet, charter, religious or parochial, so they are not bound to their assigned neighborhood public school.<sup>329</sup> Often, these programs are restricted to low-income students, or restricted by residency in a certain district or geographical boundary.<sup>330</sup> School choice advocates argue that school choice vouchers can create equity in education by promoting efficiency, eliminating administrative defects that hinder effectivity, providing incentives to parents to get more involved, and giving poorer families the same school options as wealthier families.<sup>331</sup>

Evaluations and research have been conducted as to the effectiveness of school voucher programs in various localities in boosting academic achievement. While research results support both sides of the argument on whether voucher programs are effective at boosting achievement and other educational outcomes, it’s clear that voucher program design matters, and can affect the overall effectiveness of the program.<sup>332</sup> Most voucher programs only affect a limited amount of students, and some scholars question whether school choice will ultimately make a difference in boosting achievement:

If choice schools remain similar in socioeconomic status to current public schools, there is little reason to assume that choice alone will improve academic achievement. Concentrated poverty in choice schools, in other words, will be just as daunting an obstacle as it is in existing public schools.<sup>333</sup>

The DC Opportunity Scholarship Program grants “need-based annual scholarships to eligible District children to attend a participating private DC elementary, middle or high school of their

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<sup>327</sup> *Ibid.*

<sup>328</sup> “Fast Facts on School Choice,” EdChoice, <https://www.edchoice.org/resource-hub/fast-facts/>. The private school choice programs include voucher programs, Education Savings Accounts, and tax credits.

<sup>329</sup> Center for Education Reform, “Just the FAQs—School Choice,” <https://www.edreform.com/2011/11/just-the-faqs-school-choice/>.

<sup>330</sup> *Ibid.*

<sup>331</sup> Dominick Cirelli, Jr., Utilizing School Voucher Programs to Remedy School Financing Problems, 30 Akron L. Rev. 469, 491-95 (1997).

<sup>332</sup> Rajashri Chakrabarti, Impact of Voucher Design on Public School Performance: Evidence from Florida and Milwaukee Voucher Program, Institute for Education and Social Policy, Working Paper No. 09-03, 2009, <http://files.eric.ed.gov/fulltext/ED556790.pdf>.

<sup>333</sup> James E. Ryan and Michael Heise, *The Political Economy of School Choice*, 111 Yale L.J. 2043, 2108 (2002).

parent's choice."<sup>334</sup> This program provides individual scholarship awards up to \$8,653 for elementary and middle school and \$12,981 for high school, and awards can be used for tuition, books, uniforms, and other school-related fees.<sup>335</sup> An evaluation of Washington D.C.'s Opportunity Scholarship Program found that students admitted into the program and who attended private school were performing at the same level in reading and math than students not admitted five years later, but graduation rates were significantly higher for students who participated in the program.<sup>336</sup> This result is echoed by a research review of private school choice programs, including the DC Opportunity Scholarship Program, which indicated that certain other evaluations found that participating students are more likely to graduate from high school and enroll in a four-year college.<sup>337</sup> A more recent evaluation in June 2017 found that students who participated in the program scored significantly lower in math (equivalent of 5.4 percentage points behind in the national distribution of scores) after a year in the program than students who did not participate.<sup>338</sup> Furthermore, reading scores were also lower after one year, although the results were not statistically significant for the overall sample.<sup>339</sup>

A common concern that opponents of school choice voice is whether school choice programs are counterproductive to school desegregation efforts.<sup>340</sup> Charles Lawrence's article, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism," discusses the issue of the "cultural meaning" of decisions that affect policies and practices that have a disparate or direct negative impact upon persons of color, and notes that "segregation was not a case of mutual separation, but a system that one group imposed on another."<sup>341</sup> He also notes that "the workings of the unconscious make this dissonance between efforts to achieve full civil rights for blacks and the self-interest of those who are most able to effect change even more difficult to overcome."<sup>342</sup>

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<sup>334</sup> "For Parents," Serving Our Children, <http://servingourchildrenc.org/our-program/>.

<sup>335</sup> *Ibid.*

<sup>336</sup> Patrick Wolf *et al.*, U.S. Department of Education, National Center for Education Evaluation and Regional Assistance, Institute for Education Sciences, "Evaluation of the DC Opportunity Scholarship Program: Final Report," June 2010, p. 1, <https://ies.ed.gov/ncee/pubs/20104018/pdf/20104032.pdf>.

<sup>337</sup> Anna J. Egalite and Patrick J. Wolf, *A Review of the Empirical Research on Private School Choice*, 91 *Peabody Journal of Education* 441, 450-51 (2016), <http://www.tandfonline.com/doi/pdf/10.1080/0161956X.2016.1207436?needAccess=true>.

<sup>338</sup> Mark Dynarski *et al.*, U.S. Department of Education, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, "Evaluation of the DC Opportunity Scholarship Program: Impacts After One Year," April 2017, pp. 11-12, <https://ies.ed.gov/ncee/pubs/20174022/pdf/20174022.pdf>.

<sup>339</sup> *Ibid.*

<sup>340</sup> Ryan and Heise, *supra* note 333, at 2092-93.

<sup>341</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317, 362 (1987).

<sup>342</sup> *Ibid.* at 387.

With regards to private school vouchers, many share the concern that white parents will choose private schools and thus cause public schools to be increasingly segregated.<sup>343</sup> A study of magnet school choice in Philadelphia found that “the private choices of individual families for schools are patterned by the race of families seeking alternative schools as well as the racial composition of the schools they leave,” and “result in greater racial segregation in public, neighborhood schools,” and “voucher programs would likely have the same effect.”<sup>344</sup> Another study of charter schools found that they are “most likely to be established in urban locales, alongside traditional public school systems that educate a disproportionate number of low-income and minority students,” and “influence the level of segregation experienced by all of our nation’s school children.”<sup>345</sup> An evaluation of North Carolina’s charter school program found that parents (of any race) tend to “choose schools with peers who are more similar to their own children racially and socioeconomically than would be the case in their regular public school,” and black students in particular experienced negative achievement effects in charter schools.<sup>346</sup>

In regards to students with disabilities, there has been increasing discussion about the utility of vouchers for special education, due to the concern that the current system is failing to meet the needs of many children with disabilities.<sup>347</sup> When parents of students with disabilities accept these vouchers, they essentially waive their protections under IDEA as a condition of receiving state money.<sup>348</sup> In many cases, vouchers only benefit affluent students due to the fact that they only cover part of school tuition and low-income students may not be able to supplement the costs.<sup>349</sup> Furthermore, students who remain in public schools would find themselves “increasingly segregated from their typical peers, and have diminished resources to serve their needs.”<sup>350</sup>

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<sup>343</sup> Hamilton Lankford and James Wyckoff, “The Effect of School Choice and Residential Location on the Racial Segregation of Students, in *Improving School Accountability (Advances in Applied Economics, Vol. 14)* 185 (Timothy J. Gronberg, Dennis W. Jansen, ed., 2006), <http://www.albany.edu/~wyckoff/segpap14.PDF>.

<sup>344</sup> Salvatore Saporito, *Private Choices, Public Consequences: Magnet School Choice and Segregation by Race and Poverty*, 50 *Social Problems* 181, 198-99 (2003).  
<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.594.4080&rep=rep1&type=pdf>.

<sup>345</sup> Erica Frankenberg *et al.*, “Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards,” *The Civil Rights Project*, January 2010, pp. 80, 82, <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenber-choices-without-equity-2010.pdf>.

<sup>346</sup> Robert Bifulco and Helen F. Ladd, *School Choice, Racial Segregation and Test-Score Gaps: Evidence from North Carolina’s Charter School Program, Paper Presented at Annual Meeting of Allied Social Science Associations*, Jan. 8, 2006, p. 26  
<https://pdfs.semanticscholar.org/e993/1e7be5f6e79864a37c7536454b724cb76ad2.pdf>.

<sup>347</sup> See generally Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 *J.L. & Educ.* 291 (2010).

<sup>348</sup> *Ibid.* at 293.

<sup>349</sup> Lex Frieden, “School Vouchers and Students with Disabilities,” *National Coalition on Disability*, April 15, 2003, <https://www.ncd.gov/publications/2003/April152003>.

<sup>350</sup> Hensel, *supra* note 347, at 348-49.

Opponents also question whether voucher programs will divert funds from already-underfunded public schools, which may affect the overall adequacy of public education.<sup>351</sup> Advocates of school choice believe that competition for students will boost the quality and efficiency of public schools, but opponents disagree, voicing concerns that public schools suffer primarily from a lack of funding as opposed to a lack of efficiency, and investing funds directly into public schools will help more children than diverting funds into voucher programs.<sup>352</sup>

While some school choice voucher programs have been successful, others have either been rejected by voters on ballot initiatives or have been challenged in the courts.<sup>353</sup> Often, voucher initiatives do not gain popularity in suburban areas, as many parents have invested in purchasing homes in certain areas with reputable schools and they want to protect both the schools and property values in their communities.<sup>354</sup> Current federal education policy is moving in the direction of expanding school choice all across the nation, with a planned \$1 billion investment.<sup>355</sup>

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<sup>351</sup> Cirelli, *supra* note 331, at 494.

<sup>352</sup> *Ibid.* at 494-95.

<sup>353</sup> Ryan and Heise, *supra* note 333, at 2078-85; Ian Whitaker, "A Case Study for Betsy DeVos's Educational Utopia," *The Atlantic*, February 2, 2017, <https://www.theatlantic.com/education/archive/2017/02/can-a-universal-voucher-program-succeed/515436/>.

<sup>354</sup> *See generally* Ryan and Heise, *supra* note 333.

<sup>355</sup> Valerie Strauss, "What 'School choice' Means in the Era of Trump and DeVos," *Washington Post*, May 22, 2017, [https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/22/what-school-choice-means-in-the-era-of-trump-and-devos/?utm\\_term=.e68f01052696](https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/22/what-school-choice-means-in-the-era-of-trump-and-devos/?utm_term=.e68f01052696).

## CHAPTER 3: INEQUITABLE SPENDING AND THE EFFECT ON ACHIEVEMENT

### What the Achievement Gap Looks Like for Low-Income Students and Students of Color

Although more than six decades have passed since the release of the Coleman Report, there is still debate about how to effectively close the achievement gap among low-income students, students of color and their peers. While the Coleman Report placed more importance on the role of the family and peer engagement for student achievement than a school's resources, one of the report's key findings was that there were undeniable racial disparities in school achievement nationwide. The Coleman Report is still regarded as an influential body of education policy research, but has sparked decades of policy debates and subsequent research into the issue of student achievement and how to shape education policy to close the achievement gap for low-income students and students of color.

### Measuring Achievement

Since the late 1960s, the standard measure of student achievement nationwide has been the National Assessment of Educational Progress (NAEP), which is an assessment of students' knowledge and skills in various subject areas including mathematics, reading, science, writing, the arts, civics, economics, geography, U.S. history, and Technology and Engineering Literacy.<sup>356</sup> The NAEP assessments have served as a common measure of student achievement across all states and in selected districts. Because the assessments are administered uniformly and do not change drastically from year to year, they can be used as a longitudinal measure of achievement.<sup>357</sup> The main NAEP assessments track student performance at grades 4, 8, and 12, and since 1971, long-term student performance has been tracked at ages 9, 13, and 17.<sup>358</sup> Since 2004, NAEP has made accommodations for students with disabilities and English language learners, and has tracked exclusion rates of students of these populations since 1990.<sup>359</sup>

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<sup>356</sup> U.S. Department of Education, National Center for Educational Statistics, "NAEP Overview," May 10, 2017, <https://nces.ed.gov/nationsreportcard/about/>.

<sup>357</sup> *Ibid.*

<sup>358</sup> *Ibid.*

<sup>359</sup> NCES, "The Nation's Report Card: Trends in Academic Progress," *supra* note 25, at 4.

In 2010, Common Core State Standards (CCSS) were developed and implemented in schools in the majority of states, as part of a state-led effort to combat stagnant academic progress.<sup>360</sup> CCSS were developed for mathematics and English language arts/literacy in grades K-12 to provide “a clear and consistent framework for educators,” and are meant to prepare students with the knowledge and skills to graduate high school, pursue higher education, and succeed in the entry-level job market.<sup>361</sup> While there is not a national standard assessment for CCSS, states currently have the autonomy to develop their own assessments and two state-led consortia have each worked to develop uniform assessments to chart students’ academic progress each year, the first round of which were administered during the 2014-2015 school year.<sup>362</sup>

## Achievement Trends

“The Nation’s Report Card: Trends in Academic Progress” (2012) reported that while achievement gaps continue to exist between white students and students of color, both reading and math NAEP scores have improved for students of color aged 9, 13, and 17 since the early 1970s.<sup>363</sup> The score gaps in both reading and math narrowed between black and white students aged 9, 13, and 17 since the early 1970s.<sup>364</sup> During that same time, the score gaps in both reading and math also narrowed between Hispanic and white students aged 13 and 17, but score gaps experienced no significant change at the age of 9.<sup>365</sup> The most significant NAEP score increases for reading and math over that period of time were seen for students (particularly black and Hispanic students) aged 9.<sup>366</sup> There were not significant score increases for reading or math demonstrated by students of any race at age 17 over that period of time.<sup>367</sup>

Figure 7 shows the long-term trend analysis for NAEP reading scores by race for students at the age of 17. The achievement gap in reading narrowed between black and white students and

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<sup>360</sup> “About the Standards,” Common Core State Standards Initiative, <http://www.corestandards.org/about-the-standards/>; “Development Process,” Common Core State Standards Initiative, <http://www.corestandards.org/about-the-standards/development-process/>.

<sup>361</sup> *Ibid.*

<sup>362</sup> Education Week, “Common Core’s Big Test: Tracking 2014-15 Results,” November 16, 2015, <https://www.edweek.org/ew/section/multimedia/map-common-core-2015-test-results.html>.

<sup>363</sup> NCES, “The Nation’s Report Card: Trends in Academic Progress,” *supra* note 25. The Nation’s Report Card reports NAEP findings that track student performance in a variety of subjects based on periodic assessments. Long-term performance has been tracked since 1971, and is assessed at ages 9, 13, and 17. NAEP is a project of the U.S. Department of Education’s National Center for Education Statistics.

<sup>364</sup> *Ibid.*

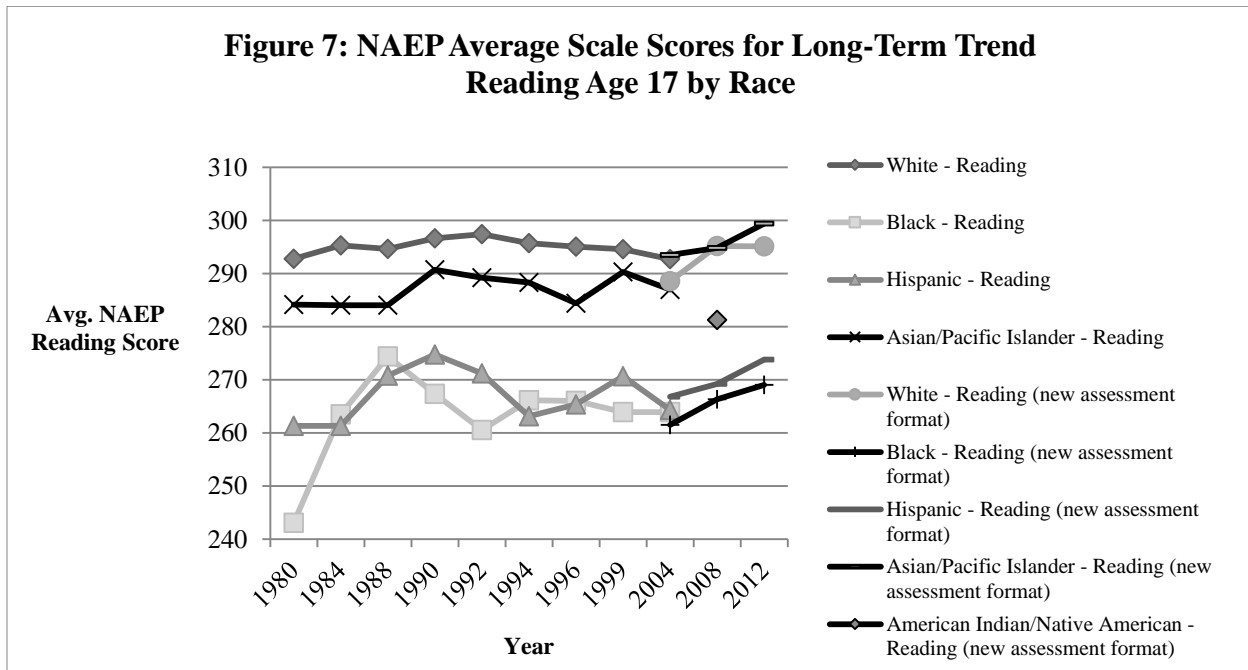
<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*



Hispanic and white students between 1980 and 2012, and test scores for Asian and Pacific Islander students surpassed those of white students in 2008.<sup>368</sup>

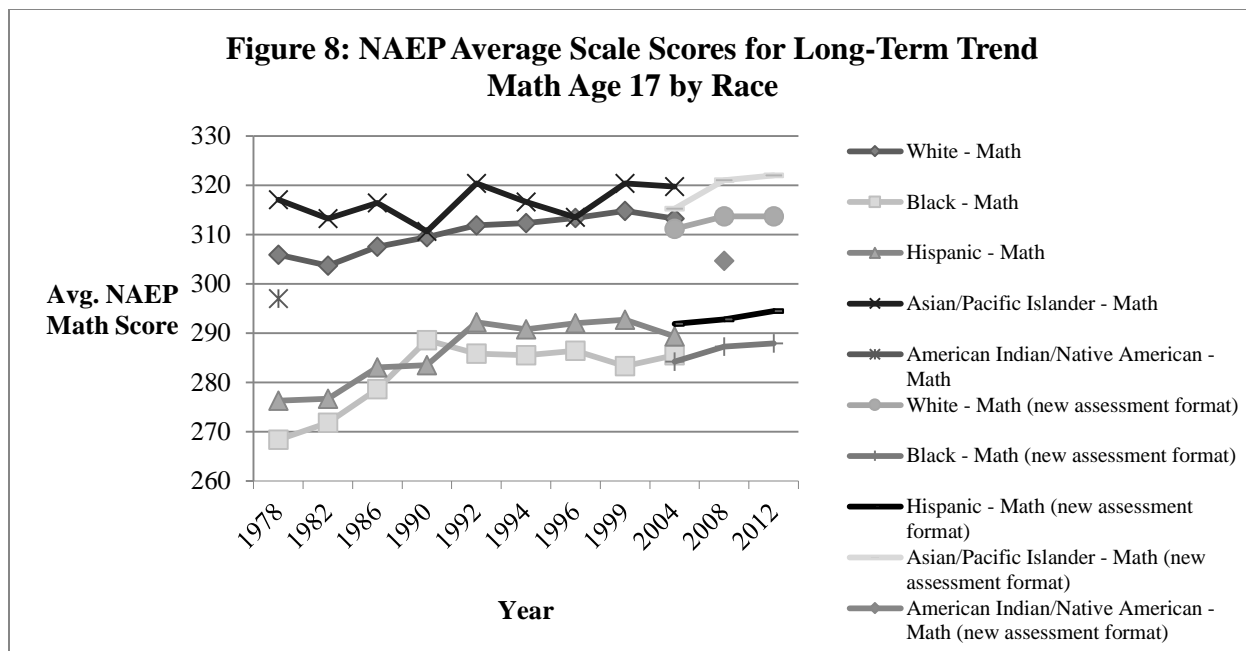


Source: Compiled by USCCR from National Assessment of Academic Progress data, U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics

Figure 8 shows the long-term trend analysis for NAEP math scores by race for students at the age of 17. The achievement gap in math narrowed between black and white students and Hispanic and white students between 1978 and 2012. Asian and Pacific Islander students have historically outperformed white students, which has remained the trend over time.<sup>369</sup>

<sup>368</sup> Prior to 2011, the NAEP reading and mathematics data is reported for six mutually exclusive categories, which include: 1) White, 2) Black, 3) Hispanic, 4) Asian/Pacific Islander, 5) American Indian/Alaska Native, and 6) Other or unclassified. In 2011, in compliance with U.S. Office of Management and Budget standards, racial and ethnic data was reported separately for Asian students, Native Hawaiian/Other Pacific Islander students, and students identifying with two or more races. These new categories include: 1) White, 2) Black or African American, 3) Hispanic, 4) Asian, 5) Native Hawaiian or Other Pacific Islander, 6) American Indian or Alaska Native, and 7) Two or more races. For more information, see National Center for Education Statistics, “How Results are Reported,” July 12, 2012, <https://nces.ed.gov/nationsreportcard/about/nathowreport.aspx>.

<sup>369</sup> *Ibid.* It is problematic to aggregate Asian and Pacific Islander race data, as this broad classification combines “more than 17 million members of nearly 50 different races and ethnicities” into a monolithic group, according to the Washington Center for Equitable Growth. There is so much racial, ethnic, and socioeconomic diversity within this broad group (often stereotypically seen as “exemplary achievers,” and racial/ethnic data aggregation can create the risk that certain subgroups may be underserved. For more information, see Kavya Vaghul and Christian Edlagan, “How data disaggregation matters for Asian Americans and Pacific Islanders,” Washington Center for Equitable Growth, December 14, 2016, <http://equitablegrowth.org/equitablog/how-data-disaggregation-matters-for-asian-americans-and-pacific-islanders/>; Stacey J. Lee and Kevin K. Kumashiro, “A Report on the Status of Asian



Source: Compiled by USCCR from National Assessment of Academic Progress data, U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics

“The Nation’s Report Card” also acknowledged that the demographics of the U.S. have changed significantly, with the population of Hispanic students at least tripling and the population of white students decreasing from 1978-2012.<sup>370</sup> The population of black students remained relatively the same during that time period. The population of Asian students and other ethnic groups has increased, but these students are still a small percentage of the overall student population.<sup>371</sup>

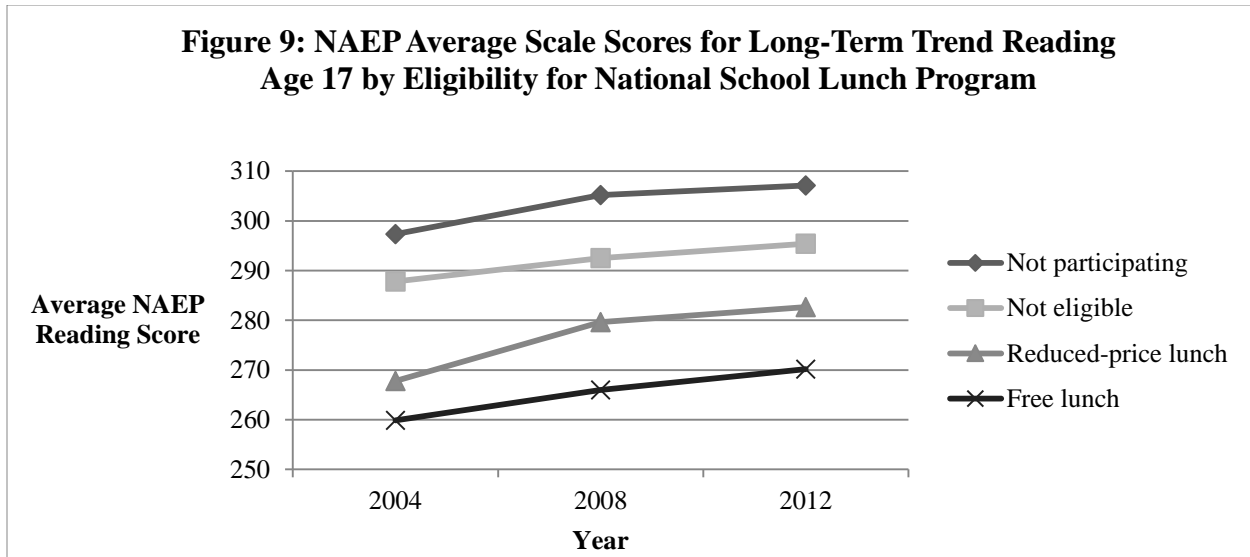
Achievement gaps are also discernable for low-income students. As demonstrated in Figure 9, reading scores of students at age 17 of all income levels (based on their participation in the National School Lunch Program) rose between 2004-2012. However, achievement gaps persisted between students from high-poverty households and low-poverty households. In 2012, students who did not participate in the National School Lunch Program scored an average of 37 points higher on the NAEP reading test than students receiving free lunch, and an average of 24 points higher than students receiving reduced-price lunch. Between 2004 and 2012, the achievement gap narrowed slightly (by 5 points) between students not participating in the National School Lunch Program and students receiving reduced-price lunch, but remained the same for students not participating and students receiving free lunch.

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Americans and Pacific Islanders in Education: Beyond the “Model Minority” Stereotype,” National Education Association, 2005, <http://files.eric.ed.gov/fulltext/ED569217.pdf>; Sefa Aina, “The Significance of Data Disaggregation to the Asian American and Pacific Islander (AAPI) Community,” The White House, President Barack Obama, July 27, 2012, <https://obamawhitehouse.archives.gov/blog/2012/07/27/significance-data-disaggregation-asian-american-and-pacific-islander-aapi-community>.

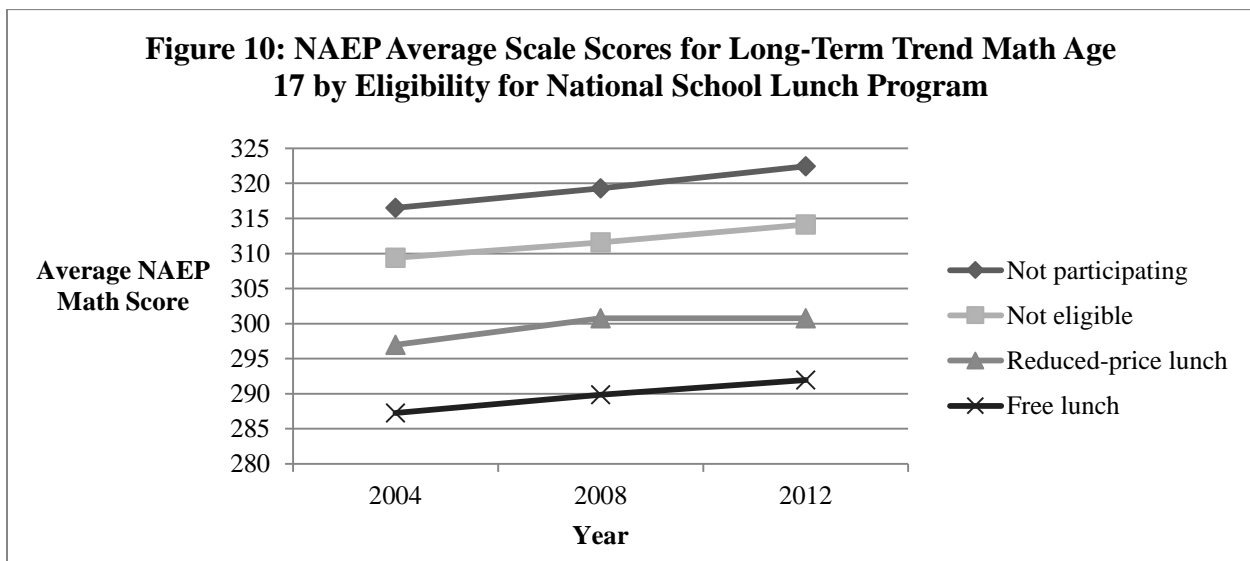
<sup>370</sup> NCES, “The Nation’s Report Card: Trends in Academic Progress,” *supra* note 25, at 4.

<sup>371</sup> *Ibid.*



Source: Compiled by USCCR from National Assessment of Academic Progress data, U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics

As demonstrated in Figure 10, math scores of students at age 17 of all income levels (based on their participation in the National School Lunch Program) also rose from 2004-2012. Achievement gaps persisted between students from high-poverty households and low-poverty households. Students who did not participate in the National School Lunch Program scored an average of 30 points higher on the NAEP math test than students receiving free lunch, and an average of 20 points higher than students receiving reduced-price lunch in 2012. Between 2004 and 2012, the achievement gap remained the same between students not participating in the National School Lunch Program and students receiving reduced-price lunch, as well as students receiving free lunch.



Source: Compiled by USCCR from National Assessment of Academic Progress data, U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics

## Beyond Test Scores: School Discipline, Access to Courses, Gifted Programs, and Extracurricular Programs

Test scores are just one component of student achievement. OCR has released data from a nationwide survey of public schools and districts for the 2013-2014 school year. The CRDC collects data on a variety of topics from school discipline to teacher and staffing equity. Among the key findings:

- *Student Discipline.*<sup>372</sup> Black students are 3.8 times more likely to receive out-of-school suspensions, are 1.9 times more likely to be expelled from school, and are 2.2 times more likely to be disciplined through law enforcement or subject to a school-related arrest than their white peers.<sup>373</sup> Black preschool children are 3.6 times more likely to receive out-of-school suspensions than their white peers, with 45 percent of black boys receiving out-of-school suspensions.<sup>374</sup> Native American/Alaska Native students are also disciplined at disproportionately high rates.<sup>375</sup> While this group of students makes up less than 1 percent of total public school enrollment, they represent 2 percent of total out-of-school suspensions and 3 percent of expulsions.<sup>376</sup> Furthermore, students with disabilities are twice as likely (12 percent) to receive out-of-school suspensions than students without disabilities (5 percent), and students of color are more likely to be identified as having a disability.<sup>377</sup>

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<sup>372</sup> It is worth noting that racial bias in school discipline may contribute to disparate treatment of students of color. The CRDC reflects that black students are substantially more likely than white students to be subject to exclusionary discipline in school. The U.S. Departments of Education and Justice issued joint guidance to assist elementary and secondary public schools to meet their obligations under federal law to “administer student discipline without discriminating on the basis of race, color, or national origin.” U.S. Department of Justice Civil Rights Division and the U.S. Department of Education Office for Civil Rights, “Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline,” January 8, 2014, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.pdf>. See also Tom Loveless, “The 2017 Brown Center Report on American Education: How Well are Students Learning?” Brookings Institution, March 2017, pp. 22-33, <https://www.brookings.edu/wp-content/uploads/2017/03/2017-brown-center-report-on-american-education.pdf>; U.S. Department of Education Office for Civil Rights, “Civil Rights Data Collection Data Snapshot: School Discipline,” March 2014, <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf>; Adrienne Green, “When Schools Are Forced to Practice Race-Based Discipline,” *The Atlantic*, August 26, 2015, available at <https://www.theatlantic.com/education/archive/2015/08/teachers-say-no-disparate-impact-discipline/402144/>; Daniel Losen *et al.*, “Are We Closing the School Discipline Gap?” The Center for Civil Rights Remedies at the Civil Rights Project, February 2015, [https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap\\_FINAL221.pdf](https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/are-we-closing-the-school-discipline-gap/AreWeClosingTheSchoolDisciplineGap_FINAL221.pdf).

<sup>373</sup> OCR, “A First Look: 2013-2014 Civil Rights Data Collection,” *supra* note 12, at 3.

<sup>374</sup> *Ibid.*

<sup>375</sup> *Ibid.* at 4.

<sup>376</sup> *Ibid.*

<sup>377</sup> *Ibid.*

- *Access to High-Rigor, and Science, Technology, Engineering, and Math (STEM) Courses.* Black and Latino high school students have less access to high-rigor courses than white students. Of all high schools with high black and Latino student enrollment, only 33 percent offered calculus, 48 percent offered physics, 65 percent offered chemistry, and 71 percent offered Algebra II.<sup>378</sup> This compares with high schools with low black and Latino student enrollment, where 56 percent offered calculus, 67 percent offered physics, 78 percent offered chemistry, and 84 percent offered Algebra II.<sup>379</sup> Black and Latino students represent fewer than 37 percent of students enrolled in these high-rigor courses as compared to more than half of white students, and represent only 29 percent of students enrolled in Advanced Placement courses.<sup>380</sup> Additionally, female students of color likewise are disproportionately underrepresented in these courses.<sup>381</sup> Native American girls, Native Hawaiian/Pacific Islander girls and black girls respectively are least likely to attend high schools with high-rigor courses such as chemistry, calculus, and physics.<sup>382</sup> Figure 11 shows the percentage of girls attending high schools without STEM in the 2013-2014 school year by race. Students with disabilities and English language learners are also underrepresented in high-rigor and Advanced Placement courses.<sup>383</sup>

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<sup>378</sup> *Ibid.* at 6.

<sup>379</sup> *Ibid.*

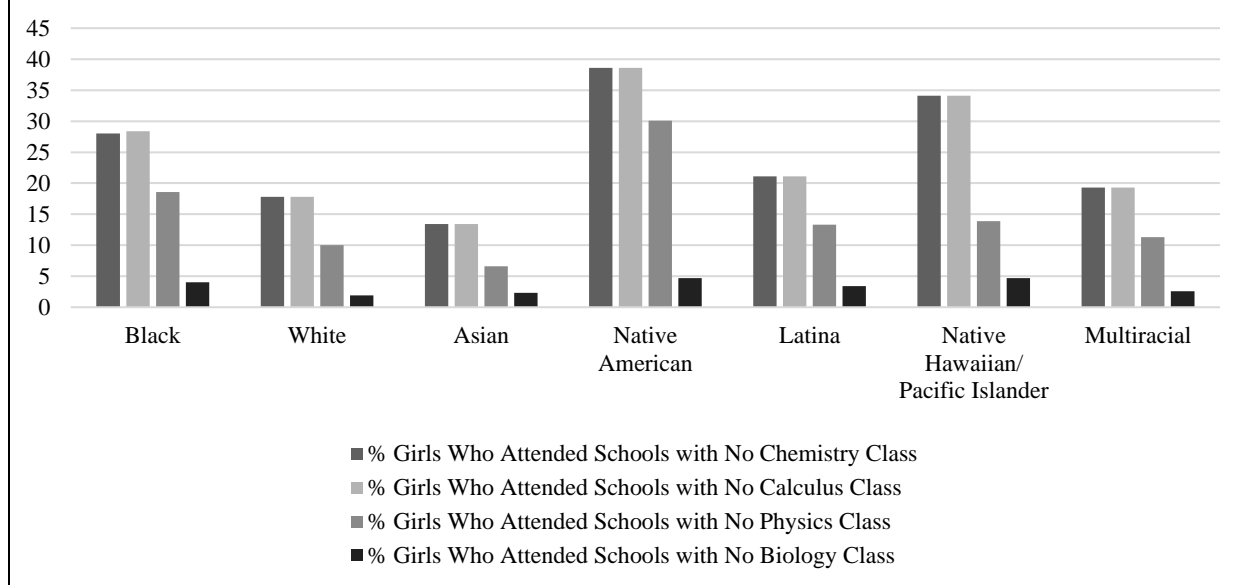
<sup>380</sup> *Ibid.* at 7.

<sup>381</sup> U.S. Department of Education, Civil Rights Data Collection, [https://ocrdata.ed.gov/StateNationalEstimations/Estimations\\_2011\\_12](https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12); Adaku Onyeka-Crawford *et al.*, “Let Her Learn: Stopping School Pushout for Girls of Color,” National Women’s Law Center (hereinafter Let Her Learn), [https://nwlc.org/wp-content/uploads/2017/04/final\\_nwlc\\_Gates\\_GirlsofColor.pdf](https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf); Fatima Goss Graves, Senior Vice President of Program, National Women’s Law Center, testimony, Briefing Transcript, pp. 82-84. Ms. Graves’ testimony explains that disparities in funding for public education contribute to the underrepresentation of women of color in STEM. Ms. Graves stated that the lack of STEM offerings in high-poverty schools with a high minority student enrollment contributes to the low number of women of color who enroll in STEM courses and pursue STEM careers. Funding disparities also can affect students of color’s ability to access experienced STEM teachers, which “may impede their academic success.”

<sup>382</sup> Let Her Learn, *supra* note 381, at 9-10.

<sup>383</sup> OCR, “A First Look: 2013-2014 Civil Rights Data Collection,” *supra* note 12, at 6-7. Students with disabilities served by IDEA are 12% of students in schools that offer Algebra II, 11% of students in schools that offer calculus and physics, yet represent only 6%, 1%, and 6% of all students enrolled in these courses respectively. English language learners are 5% of students in schools that offer Algebra II, calculus and physics, yet represent only 4%, 1%, and 4% of all students enrolled in these courses respectively.

**Figure 11: Percentage of Girls Attending High Schools without STEM in the 2013-14 School Year by Race**



Source: Compiled by USCCR from National Women’s Law Center Calculations of data from the Office for Civil Rights, Civil Rights Data Collection, U.S. Department of Education for the 2013-2014 school year. See Adaku Onyeka-Crawford *et al.*, “Let Her Learn: Stopping School Pushout for Girls of Color,” p. 10, National Women’s Law Center, [https://nwlc.org/wp-content/uploads/2017/04/final\\_nwlc\\_Gates\\_GirlsofColor.pdf](https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_GirlsofColor.pdf).

- *Access to Experienced Teachers.* Black, Latino, and Native American/Alaska Native students are twice as likely as white students to attend schools with more than 20 percent of first-year teachers, and are twice as likely to attend schools with more than 20 percent of teachers who have not met all state certification or licensure requirements.<sup>384</sup> Research has shown that teachers with more experience (e.g., who are certified or have more years of teaching experience) are more effective for student achievement than teachers who are less experienced.<sup>385</sup>

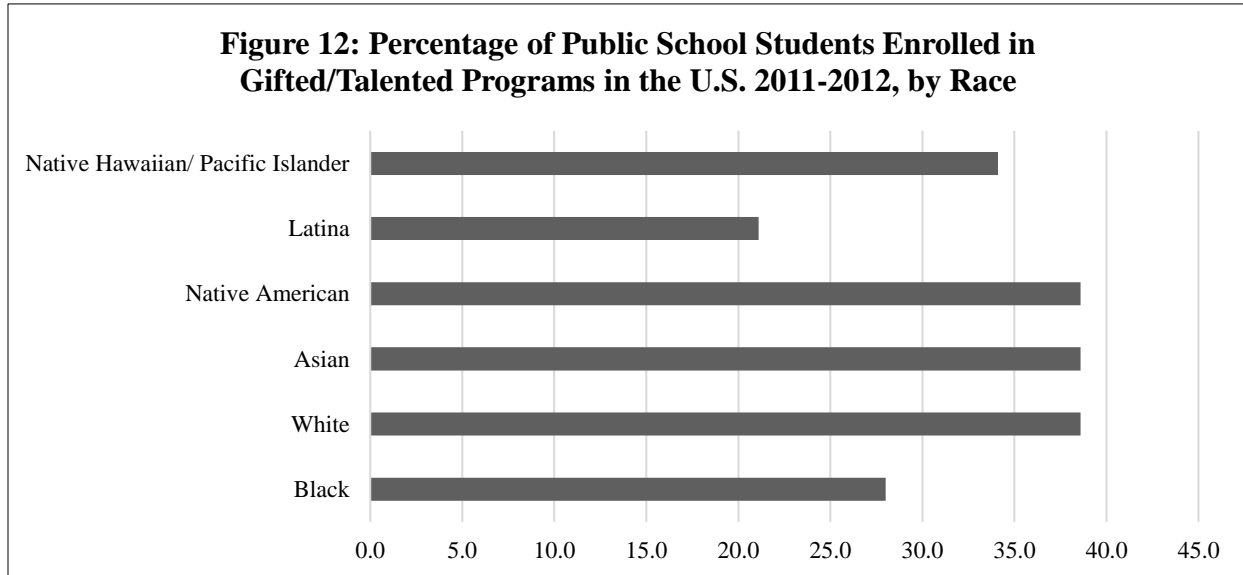
While disparities in achievement exist among white students and some students of color, students of color are also underrepresented in gifted and talented programs. Black students are 66 percent less likely to be assigned to gifted programs than white students, and Hispanic students are 47 percent less likely to be assigned to such programs than white students.<sup>386</sup> Figure 12 demonstrates

<sup>384</sup> *Ibid.* at 9.

<sup>385</sup> Charles T. Clotfelter *et al.*, “How and why do teacher credentials matter for student achievement?” National Center for Analysis of Longitudinal Data in Education Research, Working Paper No. 2, 2007, <https://pdfs.semanticscholar.org/448e/2b0e8b8054cc2000ec7f8f0c0b6ccbc76ec2.pdf>.

<sup>386</sup> Jason A. Grissom and Christopher Redding, *Discretion and Disproportionality: Explaining the Underrepresentation of High-Achieving Students of Color in Gifted Programs*, 2 AERA Open 1, 8 (2016), <http://journals.sagepub.com/doi/abs/10.1177/2332858415622175>; see also Alia Wong, “Why Are There So Few Black Children in Gifted Programs?” The Atlantic, Jan 19, 2016,

the breakdown of students enrolled in gifted programs during the 2011-2012 school year.<sup>387</sup> Furthermore, black students who have non-black teachers are systematically less likely to receive gifted services in subsequent years, and 80 percent of black elementary school students are taught by non-black teachers.<sup>388</sup>



Source: Compiled by USCCR from Civil Rights Data Collection, U.S. Department of Education for the 2011-2012 school year

In addition to academics, there are disparities in the quality of athletic programs and extracurricular program offerings among low-poverty and high-poverty schools. Fatima Goss Graves, in her testimony before USCCR, noted that these disparities disproportionately affect girls of color:

High poverty schools are less likely to provide opportunities to participate in sports, and when students do play, they are less likely to have adequate facilities, coaches, and programs . . . While heavily minority schools typically have fewer resources and provide fewer spots on teams compared to heavily white schools, they also allocate those fewer spots unequally, such that girls of color get less than their fair share.<sup>389</sup>

In order to provide more opportunities for students of color—girls of color in particular—schools should actively enforce nondiscrimination policies to address discriminatory conduct.<sup>390</sup> Advocates recommend that schools provide diversity training for educators and staff, and training

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<https://www.theatlantic.com/education/archive/2016/01/why-are-there-so-few-black-children-in-gifted-and-talented-programs/424707/>.

<sup>387</sup> U.S. Department of Education, Civil Rights Data Collection, *supra* note 381.

<sup>388</sup> Grissom and Redding, *supra* note 386, at 15.

<sup>389</sup> Graves, Briefing Transcript, *supra* note 381, at 13-14.

<sup>390</sup> Let Her Learn, *supra* note 381, at 19.

on how to best support all students and set high expectations for achievement.<sup>391</sup> Schools should set high expectations for all students, without regard to race or gender, including initiating discussions about desired courses, extracurricular activities, college and career goals, and managing multiple responsibilities.<sup>392</sup> Schools should implement school discipline policies that provide for equitable treatment of students in the administration of discipline.<sup>393</sup> Furthermore, schools can support teachers by offering opportunities for mentorship, leadership, and professional development.<sup>394</sup>

### STANFORD EDUCATION DATA ARCHIVE

A new data set was recently made available by Stanford researchers which further highlights the inequities in education by providing a highly detailed account of academic disparities across the nation.<sup>395</sup> The data was created from over 200 million math and reading test scores from students in grades 3-8 during 2009-2013 in every public school district in the country, and includes characteristics about the racial, ethnic, and socioeconomic makeup of these districts.<sup>396</sup> See Figure 13 and Figure 14 for maps that display the nationwide average of English/Language Arts and Mathematics test scores for grades 3-8 over the period of 2009-2013.<sup>397</sup>

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<sup>391</sup> *Ibid.* at 19-20.

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*

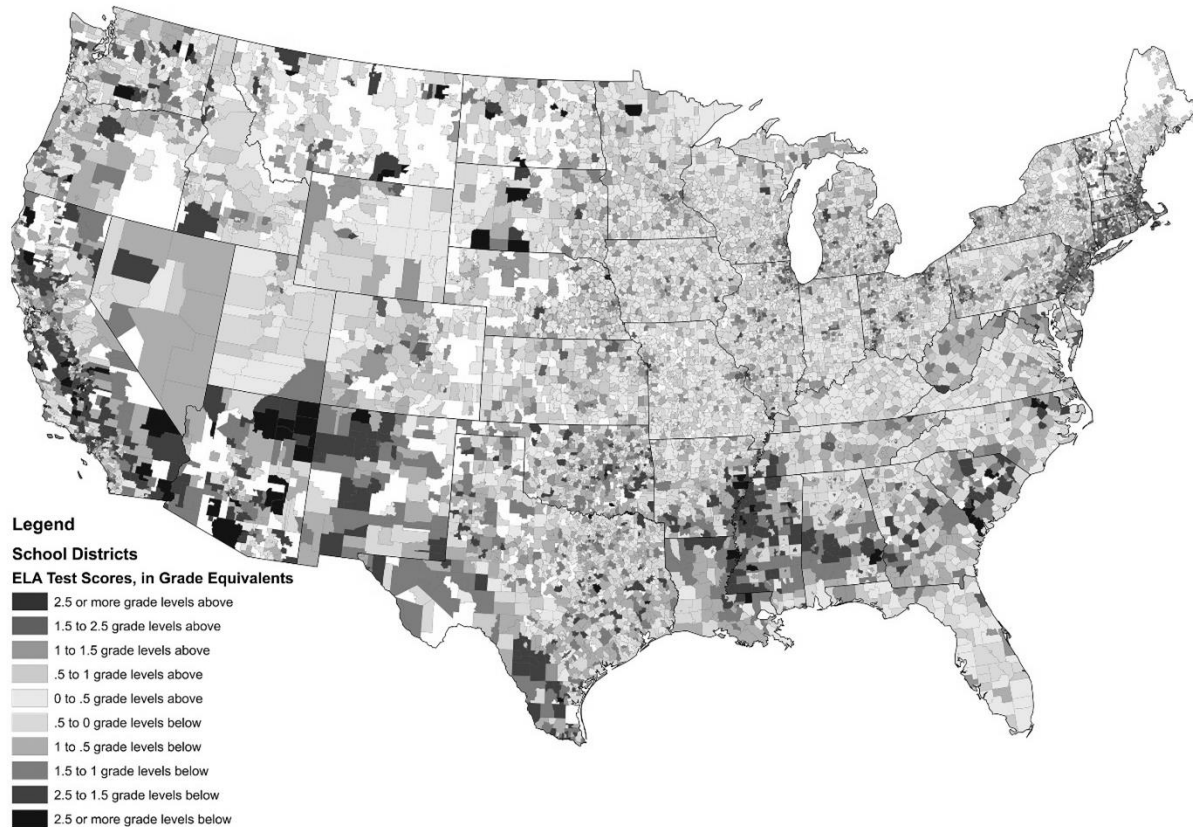
<sup>395</sup> Sean F. Reardon *et al.*, “Stanford Education Data Archive (Version 1.1 File Title),” 2016, <http://purl.stanford.edu/db586ns4974>.

<sup>396</sup> Rabinovitz, *supra* note 14.

<sup>397</sup> Reardon *et al.*, *supra* note 395; *see also* Stanford Education Data Archive, “Maps,” Stanford Center for Education Policy Analysis, <https://cepa.stanford.edu/seda/maps>.



**Figure 13: Average English/Language Arts Test Scores by School District, Grades 3–8, 2009–2013**



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Source: Sean F. Reardon, Demetra Kalogrides, Erin Fahle, Kenneth Shores, and Benjamin Shear, Stanford Education Data Archive: seda.stanford.edu

Stanford researchers used this data to provide new estimates on how much standardized test scores vary among school districts.<sup>398</sup> Variance in test scores can span four grade levels between the lowest-poverty and highest-poverty school districts.<sup>399</sup> Within individual school districts, achievement levels of black and Hispanic students are on average 2.0 and 1.5 respective grade levels lower than that of white students.<sup>400</sup> Variations in academic achievement are “very highly correlated with the socioeconomic characteristics of families in the local community,” and “racial

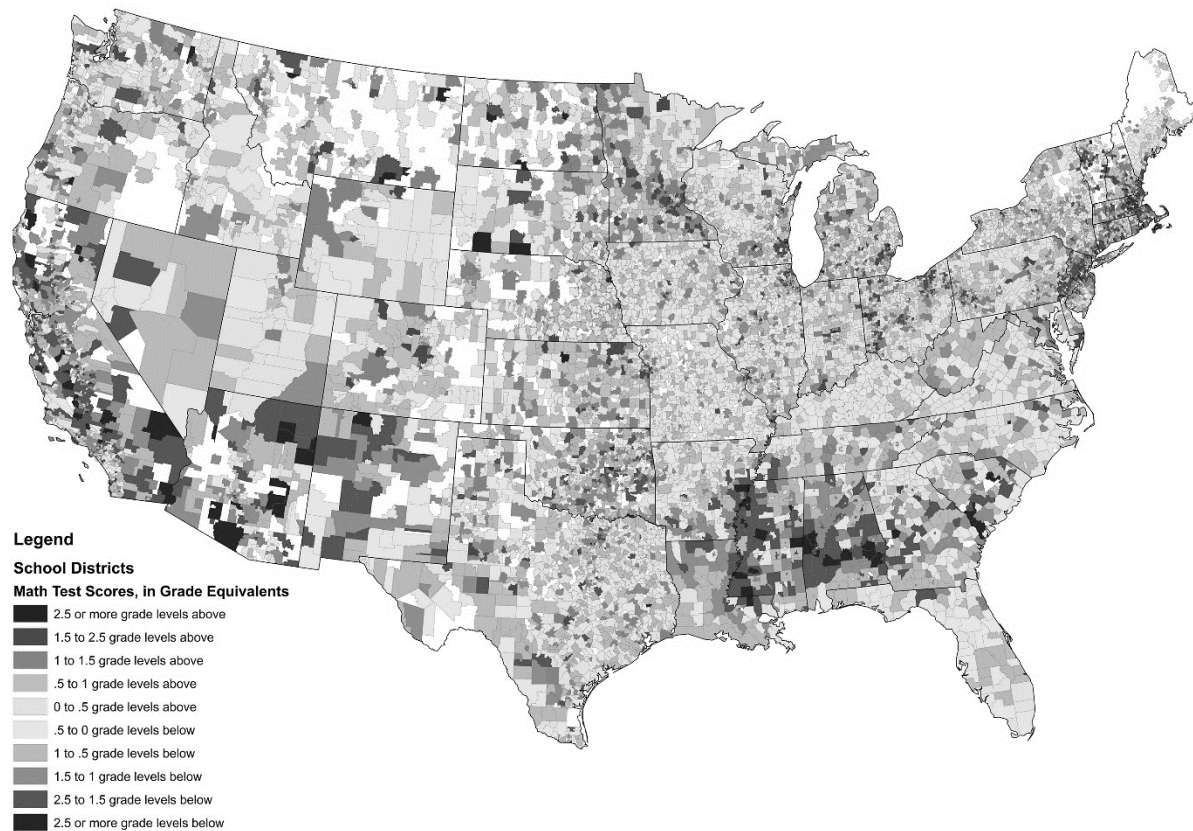
<sup>398</sup> Erin M. Fahle and Sean F. Reardon, *How much do test scores vary among school districts? New estimates using population data, 2009-2013* (CEPA Working Paper No.17-02), Stanford Center for Education Policy Analysis, January 2017, <https://cepa.stanford.edu/sites/default/files/wp17-02-v201701.pdf>.

<sup>399</sup> Sean F. Reardon, *School District Socioeconomic Status, Race, and Academic Achievement* (April 2016) (preliminary draft), Stanford Center for Education Policy Analysis, p. 12 <https://cepa.stanford.edu/sites/default/files/reardon%20district%20ses%20and%20achievement%20discussion%20draft%20april2016.pdf>.

<sup>400</sup> *Ibid.* at 13.

differences in exposure to poor schoolmates is linked to achievement gaps.<sup>401</sup> In addition, in heavily segregated areas that experience “racial disparities in socioeconomic conditions,” achievement gaps are larger.<sup>402</sup>

**Figure 14: Average Math Test Scores by School District, Grades 3–8, 2009–2013**



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Source: Sean F. Reardon, Demetra Kalogrides, Erin Fahle, Kenneth Shores, and Benjamin Shear, Stanford Education Data Archive: [seda.stanford.edu](http://seda.stanford.edu)

One might imagine, for example, that metropolitan areas that are more segregated than expected are those in which racial prejudice and discrimination are particularly high in general; if such discrimination affected students’ opportunity through some mechanism other than segregation, this might explain the observed association between segregation and achievement gaps . . . The association between segregation and achievement gaps is large, however, so such an alternate pathway would need to lead to sizeable effects on achievement gaps . . . It is not immediately obvious whether there are plausible candidate

<sup>401</sup> *Ibid.* at 12; Reardon, “School Segregation and Racial Academic Achievement Gaps,” p. 25.

<sup>402</sup> Reardon, “School Segregation and Racial Academic Achievement Gaps,” at 20-21.

explanations that would explain the association. Thus, the results presented here are suggestive of powerful effects of segregation, but are not completely definitive.<sup>403</sup>

Furthermore, racial segregation correlates with the unequal allocation of financial resources, and this finding could inform “the extent to which low-performing students are concentrated in a small number of school districts, and so may be useful for designing school finance systems and determining how resources should be distributed among school districts.”<sup>404</sup>

## DISPARITIES IN TEACHER QUALITY BETWEEN LOW- AND HIGH-POVERTY SCHOOLS

*A good teacher is someone who wants to build relationships with students, who keeps students at the center of everything that they do, and who constantly works to get better.*<sup>405</sup>

—Sydney Chaffee, 2017 National Teacher of the Year

As mentioned in chapter 1, school districts are required to provide comparable educational services at Title I schools. However, significant disparities exist in teacher quality among low-poverty and high-poverty schools, despite the responsibility of schools to provide all students access to “highly qualified teachers.”<sup>406</sup> NCLB mandated that highly qualified teachers have a bachelor’s degree, state certification or licensure, and specific knowledge of the subjects they will be teaching.<sup>407</sup> States are mandated to ensure that all students—particularly the most disadvantaged students—have access to highly qualified teachers.<sup>408</sup>

Teacher “quality” is a highly debated term, and scholars, researchers, policymakers, and others have a variety of definitions of how to determine a “quality” teacher.<sup>409</sup> The U.S. Department of

<sup>403</sup> *Ibid.*, p. 21.

<sup>404</sup> Fahle and Reardon, *supra* note 398, at 17.

<sup>405</sup> CBS Boston, “Boston Charter School Teacher Named ‘National Teacher of the Year,’ April 20, 2017, <http://boston.cbslocal.com/2017/04/20/national-teacher-of-the-year-sydney-chaffee-boston-codman-massachusetts/>.

<sup>406</sup> U.S. Department of Education, “New No Child Left Behind Flexibility: Highly Qualified Teachers,” November 29, 20015, <https://www2.ed.gov/nclb/methods/teachers/hqtflexibility.html>.

<sup>407</sup> *Ibid.*; No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110 (codified as amended at 20 U.S.C. § 6301 *et seq.*); Every Student Succeeds Act of 2015 (ESSA), Pub. L. No. 114-95 (codified as amended at 20 U.S.C. §6301 *et seq.*).

<sup>408</sup> *Ibid.* The U.S. Department of Education has granted some flexibility with this requirement for certain teachers who are in high demand, have specialized roles, who are needed to teach multiple subjects, or teachers are certain grade levels.

<sup>409</sup> Eric A. Hanushek and Steven G. Rivkin, “Teacher Quality, Handbook of the Economics of Education,” 2006, pp. 1051-1078,

<http://hanushek.stanford.edu/sites/default/files/publications/Hanushek%2BRivkin%202006%20HbEEdu%202.pdf>; Linda Darling-Hammond, “Doing What Matters Most: Investing in Quality Teaching,” National Commission on Teaching and America’s Future, 1997, <https://nctaf.org/wp-content/uploads/DoingWhatMattersMost.pdf>; Jane G. Cogshall, “Communication Framework for Measuring Teacher Quality and Effectiveness: Bringing Coherence to the Conversation,” National Comprehensive Center for Teacher Quality, 2007,

Education acknowledges that “one of the most important factors in raising student achievement is a highly qualified teacher,” and acknowledges factors such as having a bachelor’s degree, state certification and licensure, and subject matter knowledge.<sup>410</sup> Research has pointed to a number of other factors that might be important to determining teacher quality, such as years of experience, teacher test scores, teacher training, and earning advanced degrees.<sup>411</sup> Other research indicates that “effective” teachers are identified by their performance rather than their background or experience.<sup>412</sup> While the debate on this issue continues, many will agree that teacher quality is difficult to measure, and many factors must be considered when determining the impact on student achievement.<sup>413</sup>

There is a growing body of research that shows how student achievement is linked to teacher quality. Exposure to high-quality teachers can have a significant positive impact on a child’s educational development, particularly if that exposure starts as early as possible in a child’s life.<sup>414</sup> One study found that highly qualified teachers who are certified, scored higher on certification and licensure exams, have a degree from a more competitive undergraduate institution, and have more years of teaching experience are more effective for student achievement than teachers who are less qualified.<sup>415</sup> One study reported that quality teachers can have a measurable effect on a student’s future earnings, citing that an “excellent” teacher can add over \$800,000 to the future earnings of a class of 30 students.<sup>416</sup> Furthermore, highly qualified teachers can have a more significant impact

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<http://files.eric.ed.gov/fulltext/ED543771.pdf>; Barnett Berry *et al.*, “Teacher Effectiveness: The Conditions that Matter Most and a Look to the Future,” Center for Teaching Quality, March 2010,

<http://files.eric.ed.gov/fulltext/ED509720.pdf>; Melissa McCabe, “Teacher Quality,” *Education Next*, July 8, 2011, <http://www.edweek.org/ew/issues/teacher-quality/index.html>.

<sup>410</sup> U.S. Department of Education, “Highly Qualified Teachers for Every Child,” August 2006,

<https://www2.ed.gov/nclb/methods/teachers/stateplanfacts.html>; U.S. Department of Education, “New No Child Left Behind Flexibility: Highly Qualified Teachers,” *supra* note 406.

<sup>411</sup> Jennifer King Rice, “Teacher Quality: Understanding the Effectiveness of Teacher Attributes,” Economic Policy Institute, 2003; “Teacher Quality and Student Achievement: Research Review,” Center for Public Education, November 1, 2005, <http://www.centerforpubliceducation.org/Main-Menu/Staffingstudents/Teacher-quality-and-student-achievement-At-a-glance/Teacher-quality-and-student-achievement-Research-review.html>; Darling-Hammond, *supra* note 409.

<sup>412</sup> Kata Milhay, “Teachers Matter: Understanding Teachers’ Impact on Student Achievement,” Rand Education, <https://www.rand.org/education/projects/measuring-teacher-effectiveness/teachers-matter.html>.

<sup>413</sup> McCabe, *supra* note 409.

<sup>414</sup> Rachel Herzfeldt-Kamprath and Rebecca Ullrich, “Examining Teacher Effectiveness between Preschool and Third Grade,” Center for American Progress, January 2016, <https://cdn.americanprogress.org/wp-content/uploads/2016/01/19064517/P-3TeacherEffectiveness2.pdf>.

<sup>415</sup> Clotfelter *et al.*, *supra* note 385. This particular study also found that teachers with a master’s degree who are paid at a higher salary at best have no effect on student achievement. *Ibid.* at 27-28. The article also explains that “debate still persists about the causal relationship between specific teacher credentials and student achievement.” *Ibid.* at 2.

<sup>416</sup> Eric A. Hanushek, “Boosting Teacher Effectiveness in What Lies Ahead for America’s Children and Their Schools” (Chester E. Finn, Jr., and Richard Sousa eds., Hoover Institution Press 2006), p. 25, <http://hanushek.stanford.edu/sites/default/files/publications/Hanushek%202014%20Koret%20ch2.pdf>.

on student achievement than factors such as the race of the student or the level of education of the student's parents.<sup>417</sup>

Access to highly qualified teachers matters for student achievement, yet across the nation schools do not provide low-income students and students of color equal access to those highly qualified teachers as readily. NCLB sought to remedy the problem of inadequate teacher quality, and while some progress has been made in states, significant disparities still exist and have been raised in over 40 state school finance lawsuits across the country.<sup>418</sup> Thus far, efforts to remedy these disparities have not been effective to even out the distribution of highly qualified teachers throughout districts.

These racial and economic disparities in teacher quality are manifest in various ways:

- *Teacher salaries.* There is evidence that school districts that disproportionately serve low-income students and students of color tend to pay their teachers lower salaries.<sup>419</sup>
- *Teacher education and experience level.* There is a greater proportion of teachers with bachelor's degrees or lower education credentials teaching in school districts that disproportionately serve low-income students and students of color.<sup>420</sup> Furthermore, the proportion of teachers who have less than three years of experience teaching is greater in school districts that disproportionately serve low-income students and students of color.<sup>421</sup>
- *Newly hired teachers.* School districts that disproportionately serve low-income students and students of color tend to hire more teachers in a given year, which indicates a higher turnover rate.<sup>422</sup>

Therefore, low-income students and students of color generally are less likely to have teachers who have higher credentials, higher degree attainment, more years of experience, higher salaries, and demonstrable success in their students' test score performance. Furthermore, class sizes in school districts that disproportionately serve low-income students and students of color tend to be higher, which indicates a lack of resources for personnel.<sup>423</sup> Teacher retention has proved challenging nationwide and teacher turnover is highest in schools that serve academically

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<sup>417</sup> *Ibid.* at 24, but see Clotfelter *et al.*, *supra* note 385, at 39 (“even highly credentialed teachers are not likely to offset the effects of educationally impoverished family backgrounds on student achievement in reading.”).

<sup>418</sup> See Adamson and Darling-Hammond, *supra* note 278.

<sup>419</sup> Raegen T. Miller, “Comparable, Schmomparable: Evidence of Inequity in the Allocation of Funds for Teacher Salary Within California’s Public School Districts,” Center for American Progress, May 2010, p. 6, [https://cdn.americanprogress.org/wp-content/uploads/issues/2010/05/pdf/comparable\\_schmomparable.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2010/05/pdf/comparable_schmomparable.pdf); Adamson & Darling-Hammond, *supra* note 2788, at 6-7.

<sup>420</sup> See Adamson and Darling-Hammond, *supra* note 278; OCR, “A First Look: 2013-2014 Civil Rights Data Collection,” *supra* note 12, at 9; OCR, “Dear Colleague Letter: Resource Comparability,” *supra* note 8, at 9.

<sup>421</sup> Adamson & Darling-Hammond, *supra* note 278, at 24.

<sup>422</sup> *Ibid.* at 23.

<sup>423</sup> *Ibid.* at 22.

disadvantaged students.<sup>424</sup> In addition, race does play a factor inasmuch as “non-black and non-Hispanic teachers are more likely to transition [to another position] the higher the black and Hispanic enrollment shares, and . . . Exactly the opposite is true of black and Hispanic teachers, who tend to be less likely to transition the higher the enrollment share of their race/ethnic group.”<sup>425</sup> Increasing teacher salaries could affect teacher retention up to a point, however, research reflects that increased salaries alone tend to be insufficient to stem high teacher turnover without also addressing working condition issues such as perceived safety of the community surrounding a school, availability of resources necessary for instruction, teacher autonomy, and teacher participation in school governance.<sup>426</sup> These disparities further perpetuate achievement gaps among white students and students of color.<sup>427</sup>

### ACCESS TO PRESCHOOL

Studies have shown that there are discernable achievement gaps that open up among students by the time they enter kindergarten.<sup>428</sup> These achievement gaps are present among students from households of varying income levels, but also among white students and students of color. These gaps could stem from the lack of access to preschool programs in certain school districts. According to the Civil Rights Data Collection, only about 54 percent of school districts across the country offer preschool not served by IDEA, and about 73 percent of those programs in those districts are available to all students in the district.<sup>429</sup>

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<sup>424</sup> Eric A. Hanushek *et al.*, Why Public Schools Lose Teachers, *Journal of Human Resources*, pp. 326-354, Spring 2004, [http://hanushek.stanford.edu/sites/default/files/publications/Hanushek%2BKain%2BRivkin%202004%20JHumRes%2039\(2\).pdf](http://hanushek.stanford.edu/sites/default/files/publications/Hanushek%2BKain%2BRivkin%202004%20JHumRes%2039(2).pdf); Deborah M. Hill and Marlene Barth, “NCLB and Teacher Retention: Who Will Turn Out the Lights?” 16 *Education and the Law* 173 (2004); Cassandra M. Guarino *et al.*, Teacher Recruitment and Retention: A Review of the Recent Empirical Literature, *Review of Educational Research*, pp. 173-208, Summer 2006; Linda Darling-Hammond, “Solving the Dilemmas of Teacher Supply, Demand, and Standards: How We Can Ensure a Competent, Caring, and Qualified Teacher for Every Child,” National Commission on Teaching & America's Future, 2000.

<sup>425</sup> Hanushek *et al.*, *supra* note 424, at 350.

<sup>426</sup> *Ibid.*; see also Adamson & Darling-Hammond, *supra* note 278.

<sup>427</sup> See Hanushek, “Boosting Teacher Effectiveness,” *supra* note 416.

<sup>428</sup> James J. Heckman, “The American Family in Black and White: A Post-Racial Strategy for Improving Skills to Promote Equality,” 140 *Daedalus* 70 (Spring 2011); Cecilia Rouse *et al.*, *supra* note 26, at 5. The authors explain that U.S. education policy is largely focused on school-aged children from K-12, and until recently, the education of pre-school aged children was not a policy concern. See also: Betty Hart and Todd R. Risley, “Meaningful Differences in the Everyday Experience of Young American Children,” (Paul H Brookes Publishing 1995). The authors examined the “word gap” between children from upper class, well-educated families, middle-class families and families on welfare. Children from well-educated families hear more words of encouragement in their early years (ages 1-3), and that has a profound positive affect upon children’s vocabulary development and reading performance.

<sup>429</sup> OCR, “2013-2014 Civil Rights Data Collection: A First Look,” *supra* note 12.

<https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf>. It is noted in the “First Look” publication

Only 48 percent of poor students are ready for school at age 5 as compared to 75 percent of students who come from moderate to high-income households, evidenced by math and reading skills, behavior issues, overall physical health, and other factors.<sup>430</sup> Children entering Head Start programs, which disproportionately serve low-income students and students of color, are significantly behind in math, vocabulary, and reading by age 3 or 4.<sup>431</sup> Additionally, 85 percent of black 3-4 year old children scored lower than white children of the same age in a vocabulary assessment.<sup>432</sup> Poor achievement during the preschool years can lead to poor achievement in elementary and high school, which can also lead to less favorable outcomes later in life.<sup>433</sup> While research on the effectiveness of Head Start and other preschool programs on educational outcomes shows varied results, some students benefit from access to well-designed preschool programs, as it can improve long-term outcomes such as graduation rates, college enrollment, employment, and earnings.<sup>434</sup>

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that these numbers reflect preschool programs beyond those services that schools are required to provide for students with disabilities under the Individuals with Disabilities Act (IDEA). It is also noted that in 70% of these districts, preschool programs are only offered for part of the day, as opposed to 48% of districts that offer full-day preschool programs.

<sup>430</sup> Julia B. Isaacs, "Starting School at a Disadvantage: The School Readiness of Poor Children," Brookings Institution, March 19, 2012, <https://www.brookings.edu/research/starting-school-at-a-disadvantage-the-school-readiness-of-poor-children/>. The report indicates that this stems partially from the lack of financial resources that poor families have, and partially because of certain parental characteristics that may affect a poor child's performance such as a lack of education, higher rates of single parenthood, poorer health, and others.

<sup>431</sup> Ron Haskins and Cecilia Rouse, "Closing Achievement Gaps," Brookings Institution, March 1, 2005, <https://www.brookings.edu/articles/closing-achievement-gaps/>.

<sup>432</sup> *Ibid.*

<sup>433</sup> *Ibid.* The author describes some of these poor outcomes as a likelihood to "become teen parents, engage in criminal activities, suffer from unemployment, and become clinically depressed as adults."

<sup>434</sup> Grover J. "Russ" Whitehurst, "New Evidence Raises Doubts on Obama's Preschool for All," Brookings Institution, November 20, 2013 ("the group that experienced the Tennessee Voluntary State Pre-K Program performed somewhat less well at the end of first grade than the control group, even though ¾ of the children in the control group had no experience as four-year-olds in a center-based early childhood program."), <https://www.brookings.edu/research/new-evidence-raises-doubts-on-obamas-preschool-for-all/>; Mark W. Lipsey *et al.*, "Evaluation of the Tennessee Voluntary Prekindergarten Program: Kindergarten and First Grade Follow-Up Results from the Randomized Control Design," Peabody Research Institute Vanderbilt University, August 2013, p. 12 ("For preschool programs, a typical finding is that the cognitive effects are not sustained for very long after the end of the program. Though none of those other studies investigated the effects of a single year of a scaled up state-funded public pre-k program, many involved more intensive measures that also failed to show long-term effects on cognitive achievement measures."), [https://my.vanderbilt.edu/tnprekevaluation/files/2013/10/August2013\\_PRI\\_Kand1stFollowup\\_TN-VPK\\_RCT\\_ProjectResults\\_FullReport1.pdf](https://my.vanderbilt.edu/tnprekevaluation/files/2013/10/August2013_PRI_Kand1stFollowup_TN-VPK_RCT_ProjectResults_FullReport1.pdf); U.S. Department of Health and Human Services, "Head Start Impact Study Final Report Executive Summary," January 2010, p. ix ("the advantages children gained during their Head Start and age 4 years yielded only a few statistically significant differences in outcomes at the end of 1st grade for the sample as a whole."), [https://www.acf.hhs.gov/sites/default/files/opre/executive\\_summary\\_final.pdf](https://www.acf.hhs.gov/sites/default/files/opre/executive_summary_final.pdf); W. Steven Barnett, "Preschool Education and Its Lasting Effects: Research and Policy Implications," National Institute for Early Education Research, September 2008, [http://nepc.colorado.edu/files/PB-Barnett-EARLY-ED\\_FINAL.pdf](http://nepc.colorado.edu/files/PB-Barnett-EARLY-ED_FINAL.pdf); James Heckman *et al.*, "Understanding the Mechanisms Through Which an Influential Early Childhood Program Boosted Adult Outcomes," American Economic Review, November 2012

The Learning Policy Institute issued a report in 2016 that analyzed high-quality early education systems in four states—Michigan, West Virginia, Washington, and North Carolina.<sup>435</sup> These states were chosen because they “exemplify an array of promising practices that are designed to meet a state’s needs and to satisfy its priorities,” and each state was judged on the quality, scale, and diversity of their programs.<sup>436</sup> Children who attended these early education programs tended to score higher on reading and math assessments in elementary school, and low-income students and students of color saw the greatest gains in achievement.<sup>437</sup> Overall, participation in these programs boosted school readiness, and some programs achieved better outcomes for students such as fewer grade repetitions and a higher percentage of students to graduate on time than students who did not participate in these early education programs.<sup>438</sup> Some of the recommendations noted focused on prioritizing continuous improvement to maintain quality programs; investing in teacher training; coordinating the administration of Birth-Through-Grade-3 programs (to create a “seamless educational experience”); combining multiple funding sources to increase access and improve quality (state dollars, Head Start, Temporary Assistance for Needy Families, Early Head Start, etc.); and creating broad-based coalitions and support.<sup>439</sup>

## DROPOUT RATES

High school dropout rates in the U.S. have been on the decline for years, and have decreased from 12.1 percent in 1990 to 6.5 percent in 2014.<sup>440</sup> Nevertheless, most students of color dropout at higher rates than white students.<sup>441</sup> In 2014, the dropout rates for white, black, Hispanic, Asian, Pacific Islander, and American Indian/Alaska Native students were 5.2 percent, 7.4 percent, 10.6

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[https://my.vanderbilt.edu/petersavellyev/files/2012/11/0\\_PerryFactorPaper\\_wp\\_2012-11-23a\\_Peter1.pdf](https://my.vanderbilt.edu/petersavellyev/files/2012/11/0_PerryFactorPaper_wp_2012-11-23a_Peter1.pdf); Elizabeth U. Cascio and Diane Whitmore Schanzenbach, “The Impacts of Expanding Access to High-Quality Preschool Education,” *The Brookings Institution*, vol. 47, no. 2 (2013), pp. 127-192; Rodney J. Andrews *et al.*, “The Effects of Texas’s Targeted Pre-Kindergarten Program on Academic Performance,” National Bureau of Economic Research, Working Paper No. 18598 (2012), <http://www.nber.org/papers/w18598.pdf>; Rivkin, Briefing Transcript, *supra* note 322, at 149.

<sup>435</sup> Marjorie Wechsler *et al.*, “The Road to High-Quality Early Learning: Lessons From the States,” Learning Policy Institute (Palo Alto, 2016).

<sup>436</sup> *Ibid.*

<sup>437</sup> *Ibid.*

<sup>438</sup> *Ibid.*

<sup>439</sup> *Ibid.*

<sup>440</sup> U.S. Department of Education, National Center for Education Statistics, “Table 219.70. Percentage of high school dropouts among persons 16 to 24 years old (status dropout rate), by sex and race/ethnicity: Selected years, 1960 through 2015,” [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_219.70.asp?current=yes](https://nces.ed.gov/programs/digest/d16/tables/dt16_219.70.asp?current=yes) (hereinafter National Center for Education Statistics, Table 219.70).

<sup>441</sup> *Ibid.*; *See also*: U.S. Department of Education, National Center for Education Statistics, “Status and Trends in the Education of Racial and Ethnic Groups 2016,” pp. 77-78, 81, <https://nces.ed.gov/pubs2016/2016007.pdf>. Asian students (as an aggregated group) have a consistently lower dropout rate than white students, however certain Asian subpopulations of students dropout at higher rates than white students.



percent, 2.5 percent, 10.6 percent, and 11.5 percent respectively.<sup>442</sup> Dropout rates decreased for white, black and Hispanic students from 1990 to 2014, and decreased for Asian and American Indian/Alaska Native students from 2006-2014.<sup>443</sup> Dropout rates increased for Pacific Islander students from 2006-2014.<sup>444</sup> The gap between the dropout rates of white and Hispanic students significantly narrowed by about 18.0 percentage points from 1990 to 2014, however, the gap between the dropout rates of white and black students has only modestly narrowed by 2.0 percentage points over that time.<sup>445</sup> The gaps between the dropout rates of white and Asian students, and white and American Indian/Alaska native students slightly narrowed by 0.6 and 2.4 percentage points respectively from 2006 to 2014.<sup>446</sup> However, the gap between the dropout rates of white and Pacific Islander students widened by 4.4 percentage points from 2006 to 2014.<sup>447</sup> See also Figure 15.

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<sup>442</sup> National Center for Education Statistics, Table 219.70; U.S. Department of Education, National Center for Education Statistics, “Table 219.80. Percentage of high school dropouts among persons 16 to 24 years old (status dropout rate) and number of status dropouts, by noninstitutionalized or institutionalized status, birth in or outside of the United States, and selected characteristics: Selected years, 2006 through 2014,” [https://nces.ed.gov/programs/digest/d15/tables/dt15\\_219.80.asp](https://nces.ed.gov/programs/digest/d15/tables/dt15_219.80.asp) (hereinafter National Center for Education Statistics, Table 219.80). The data on white, black and Hispanic students draws from Table 219.70; and the data on Asian, Pacific Islander, and American Indian/Alaska Native students draws from Table 219.80. This corresponds with the numbers displayed in Figure 15. The decision was made to draw from two different sources of data because longitudinal data dating back to 1972 was readily available for black, white and Hispanic students, but data sought for Asian, Pacific Islander, and American Indian/Alaska Native students does not date back that far.

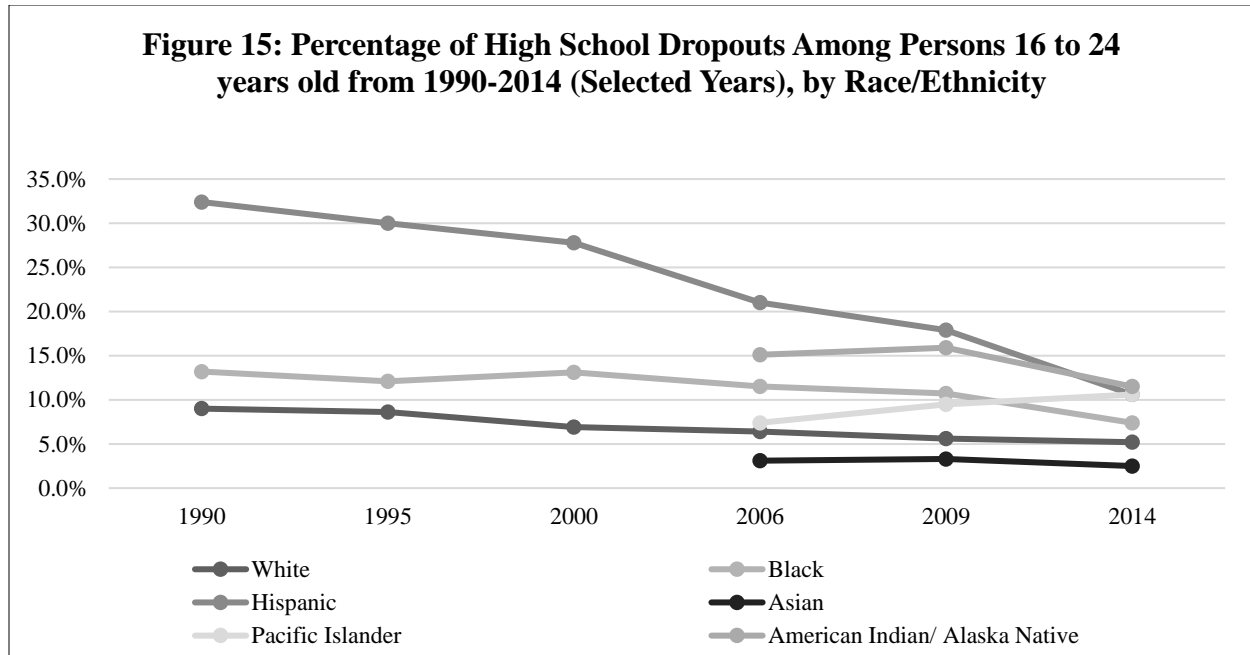
<sup>443</sup> *Ibid.*

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid.*

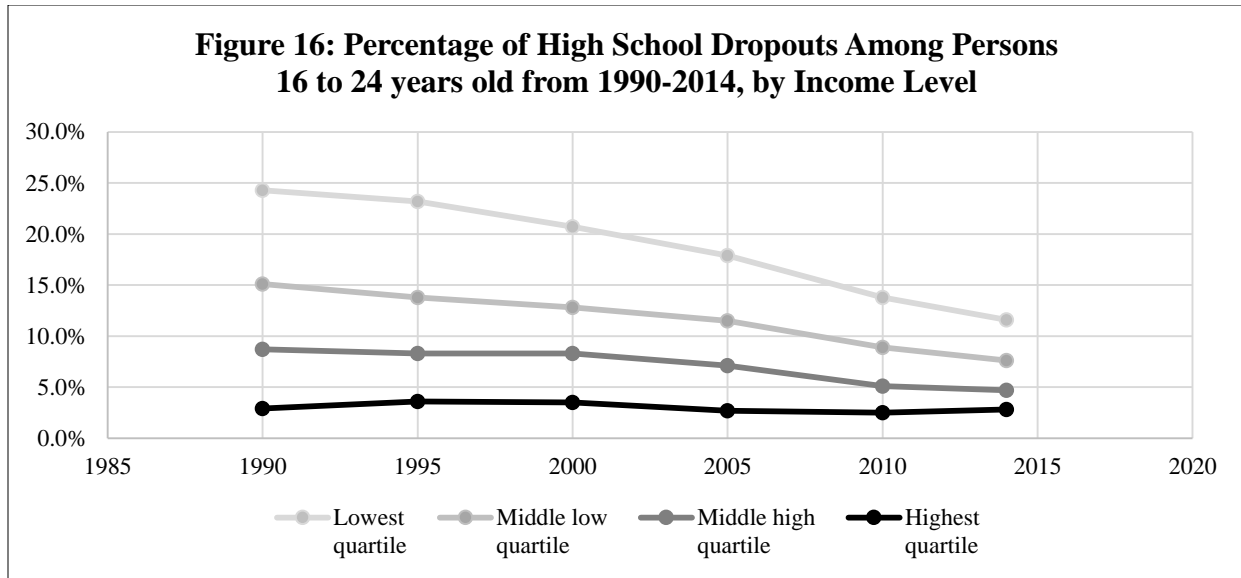
<sup>446</sup> *Ibid.* For insight about Pacific Islander students’ achievement, see: “How Pacific Islander Students are Slipping through the Cracks,” NBC News, July 24, 2014, <http://www.nbcnews.com/news/asian-america/how-pacific-islander-students-are-slipping-through-cracks-n144281>.

<sup>447</sup> National Center for Education Statistics, Table 219.70; National Center for Education Statistics, Table 219.80.



Source: Compiled by USCCR from the Digest of Educational Statistics, 2016, Table 219.70 (for White, Black and Hispanic data) and Table 219.80 (for Asian, Pacific Islander, and American Indian/Alaska Native data), U.S. Department of Commerce, Census Bureau, Current Population Survey (CPS), October 1967 through 2015; American Community Survey, 2006, 2009, 2013 and 2014

Students who come from households with lower family incomes are more likely to drop out. Figure 16 shows that while dropout rates have decreased for students of all family income categories during the period of 1990-2014, the dropout rate in 2014 for students from households in the lowest income quartile is 8.8 percent higher than that for students from households in the highest income quartile. However, the gap between the dropout rates of students from households in the lowest income quartile and those from households in the highest income quartile has narrowed significantly from 1990-2014, which is largely attributed to the dropout rate for students in households from the lowest income quartile dropping by 12.7 percent over that period of time. The dropout rate for students in the highest income quartile only dropped by 0.1 percent from 1990-2014.



Source: Compiled by USCCR from the Digest of Educational Statistics, U.S. Department of Commerce, Census Bureau, Current Population Survey (CPS), October 1970 through 2014, and U.S. Department of Education, National Center for Education Statistics, “Table 219.75, Percentage of high school dropouts among persons 16 to 24 years old (status dropout rate), by income level, and percentage distribution of status dropouts, by labor force status and years of school completed: 1970 through 2015,” [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_219.75.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_219.75.asp).

Dropping out of school can come with serious consequences and severely limit economic opportunity later in life. For example, students who graduate high school earn between 50 percent and 100 percent more than students who do not obtain a diploma, are more likely to be employed, and less likely to rely on public assistance.<sup>448</sup> While dropout rates have improved for students over time, the public high schools with the worst dropout rates are still disproportionately populated by low-income students and students of color.

## Per-Pupil Spending—Does Spending Matter for Bolstering Student Achievement?

There is much debate among education scholars and advocates about whether more money matters for expanding equal educational opportunity among students. While the Coleman Report did not find a direct correlation between per-pupil spending and achievement, the education community and policymakers keep circling back to this question. There has been much research since the Coleman Report that makes a strong case that spending matters, and that the manner in which funds are spent is critical to closing the achievement gap.<sup>449</sup>

<sup>448</sup> Tiffany D. Miller and Catherine Brown, “Dramatic Action, Dramatic Improvement: The Research on School Improvement,” Center for American Progress, March 31, 2015, <https://cdn.americanprogress.org/wp-content/uploads/2015/03/SchoolTurnaround-briefv2.pdf>.

<sup>449</sup> Baker, “Does Money Matter in Education?” *supra* note 27.

Educational spending data often uses the per-pupil expenditures as the measure of the level of spending at schools, districts, and at the state level.<sup>450</sup> The average public school spends over \$11,000 annually per-pupil, although there are wide fluctuations in spending depending on the overall wealth of the locality.<sup>451</sup> On the district level, the highest-poverty districts spend on average 15.6 percent less per-pupil than the lowest-poverty districts.<sup>452</sup> While state and federal funds are formulaically allocated to close the spending gaps between low- and high-poverty school districts, funding gaps often exist which create disparities among the high- and low-poverty schools. In most cases, schools in high-poverty areas are not receiving equitable funding, let alone equal funding to those schools in low-poverty areas.<sup>453</sup> Despite this fact, some researchers and policymakers raise the question as to whether additional allocations of funds or overall spending will actually make a difference in student achievement.<sup>454</sup>

### THE CASE THAT EQUITABLE, TARGETED SPENDING MATTERS FOR STUDENT ACHIEVEMENT

For those who argue that money does matter for school achievement, there are a wide range of conclusions drawn about how spending affects overall student achievement. One study examined the effect of the school finance reforms that occurred as a direct result of the state “adequacy” litigation.<sup>455</sup> Many of the states’ reforms increased funding across all districts which significantly increased funding to low-income districts.<sup>456</sup> Examining nationally representative data on student achievement, this study focused on measuring a link between increased spending and overall achievement gains for low-income school districts.<sup>457</sup> The study found that there was in fact a

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<sup>450</sup> Luebchow, *supra* note 170.

<sup>451</sup> “School Finance,” *Education Week*, 2016, <https://www.edweek.org/media/school-finance-education-week-quality-counts-2016.pdf>.

<sup>452</sup> Amerikaner Testimony, Briefing Transcript, *supra* note 257, at 100; House Testimony, Briefing Transcript, *supra* note 265, at 275-276.

<sup>453</sup> U.S. Department of Education, Fact Sheet: Supplement-Not-Supplant under Title I of the Every Student Succeeds Act,” *supra* note 253; A Fresh Look at School Funding: 5 New Ideas for ESEA Reauthorization, *supra* note 261; Ushomirsky and Williams, “Funding Gaps 2015: Too Many States Still Spend Less,” *supra* note 20.

<sup>454</sup> Eric A. Hanushek, “The Economics of Schooling: Production and Efficiency in Public Schools,” 24 *Journal of Economic Literature* 1141 (Sept. 1986); Ruben Hernandez and Deborah Roisman, “Tough Lesson: More Money Doesn’t Help Schools; Accountability Does,” Federal Reserve Bank of St. Louis, [https://www.stlouisfed.org/~media/Files/PDFs/publications/pub\\_assets/pdf/re/2004/b/tough\\_lesson.pdf](https://www.stlouisfed.org/~media/Files/PDFs/publications/pub_assets/pdf/re/2004/b/tough_lesson.pdf); Caroline M. Hoxby, “Are Efficiency and Equity in School Finance Substitutes or Complements?” 10 *The Journal of Economic Perspectives* 51 (1996); Andrew J. Coulson, “State Education Trends: Academic Performance and Spending over the Past 40 Years,” Cato Institute, March 18, 2014, <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa746.pdf>.

<sup>455</sup> Julien Lafortune *et al.* “School Finance Reform and the Distribution of Student Achievement,” National Bureau of Economic Research, 2015, [http://eml.berkeley.edu/~jrothst/workingpapers/LRS\\_schoolfinance\\_120215.pdf](http://eml.berkeley.edu/~jrothst/workingpapers/LRS_schoolfinance_120215.pdf).

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*

measurable link between increased spending and achievement gains for students in low-income districts.<sup>458</sup>

Another study focused on the effect of increased school funding on students from low-income households, examining nationally representative longitudinal data, and concluded that increasing per-pupil spending can have a profound effect upon economically disadvantaged students, as they see gains in educational achievement, future wages, and the reduction of poverty as adults.<sup>459</sup> Furthermore, incremental funding increases associated with policy reforms have been associated with improvements in school inputs, including smaller class sizes and higher teacher salaries.<sup>460</sup> Other studies confirm these findings, citing that increased school district spending can have long-term effects on students, such as higher college admission and degree completion rates, and a local response to education policies mandated by higher levels of government can benefit students who were not necessarily the intended beneficiaries of the policy.<sup>461</sup>

Some scholars believe that educational investments in key areas will yield higher academic achievement and better educational outcomes, particularly for low-income students. For example, investing in early childhood education programs, hiring more teachers to ultimately reduce class sizes, and allocating more funds for grants and loans to reduce financial barriers to a college education for economically disadvantaged students are all ways to achieve more positive educational outcomes.<sup>462</sup> While these investments would merit higher levels of spending, they may be able to make strides towards equalizing achievement for the most disadvantaged students.<sup>463</sup>

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<sup>458</sup> *Ibid.* The author noted that the closing of the achievement gap occurred overall among high-income and low-income districts, and not among high-income and low-income (or students of color and white) students within the same district. The author also noted that some critics have noted that the effects of school finance reforms will be offset by local funding decisions such as changes in the tax rate or the efficiency of how the funds are spent. However, the results of this study do not support those claims.

<sup>459</sup> C. Kirabo Jackson, Rucker C. Johnson, Claudia Persico, “The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms,” *The Quarterly Journal of Economics*, Vol. 131, No. 1 (2016): 157-218, [http://socrates.berkeley.edu/~ruckerj/QJE\\_resubmit\\_final\\_version.pdf](http://socrates.berkeley.edu/~ruckerj/QJE_resubmit_final_version.pdf); C. Kirabo Jackson, Rucker C. Johnson and Claudia Persico, “Boosting Educational Attainment and Adult Earnings,” *Education Next*, Vol. 15, No. 4 (Fall 2015), <http://educationnext.org/boosting-education-attainment-adult-earnings-school-spending/>; C. Kirabo Jackson, Rucker C. Johnson, Claudia Persico, “The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes,” *National Bureau of Economic Research*, Working Paper No. 20118 (May 2014); Catherine Brown Testimony, Briefing Transcript, p. 211-213. Ms. Brown noted a finding from this study in her testimony, that an increase in school spending of 10% would yield about 13% more future earnings at age 40 for low-income students.

<sup>460</sup> C. Kirabo Jackson, Rucker C. Johnson, Claudia Persico, “The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms,” *supra* note 459; C. Kirabo Jackson, Rucker C. Johnson and Claudia Persico, “Boosting Educational Attainment and Adult Earnings,” *supra* note 459.

<sup>461</sup> Joshua Hyman, “Does Money Matter in the Long Run? Effects of School Spending on Educational Attainment?” *EPI Working Paper* (2016), <http://www.edpolicy.umich.edu/files/09-2016-does-money-matter.pdf>.

<sup>462</sup> Rivkin Testimony, Briefing Transcript, *supra* note 322, at 149-150.

<sup>463</sup> Baker, “Does Money Matter in Education?” *supra* note 27; T. A. Downes and T. F. Pogue, “Adjusting School Aid Formulas for the Higher Cost of Educating Disadvantaged Students,” *National Tax Journal*, 1994, pp. 89-110;

One recent analysis applied refined methodologies to examine the link between school funding and achievement, acknowledging the complexity of comparing per-pupil spending across different geographies and economies, and distinguishing the role of funding in academic achievement separately from the role of the student's family or background in fostering student outcomes.<sup>464</sup> Additionally, many studies examining aggregate per-pupil spending and student outcomes have shown positive findings, and many more have shown a positive association between spending and items such as teacher quality and experience, which is important for achievement.<sup>465</sup> As data has become more accurate and the precision of methodologies has sharpened, scholars believe that there exists concrete empirical evidence that funding does in fact matter, and is critical to positive student outcomes.<sup>466</sup>

Some scholars have warned against school funding reductions as related to teacher quality, because teacher quality is linked with student achievement.<sup>467</sup> Since the majority of funding is spent on teacher salaries, any reductions in funding could have a negative effect on attracting top talent, which in turn could affect student achievement.<sup>468</sup> Higher teacher salaries, on the other hand, are linked to reducing attrition and increasing contentment in the profession.<sup>469</sup> This could have an

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W. Duncombe and J. Yinger, "School Finance Reform: Aid Formulas and Equity Objectives," *National Tax Journal*, 1998, pp. 239-262; W. Duncombe and J. Yinger, "Why Is It So Hard to Help Central City Schools?" *16 Journal of Policy Analysis and Management* 85 (1997); W. Duncombe and J. Yinger, "How Much More Does a Disadvantaged Student Cost?" *24 Economics of Education Review* 513 (2005).

<sup>464</sup> James Dewey *et al.*, "The Ineffectiveness of School Inputs: A Product of Misspecification," *19 Economics of Education Review* 27 (2000).

<sup>465</sup> R. G. Fryer Jr. *et al.*, "Enhancing the Efficacy of Teacher Incentives through Loss Aversion: A Field Experiment (no. w18237)," National Bureau of Economic Research, 2012; R. Greenwald *et al.*, "The Effect of School Resources on Student Achievement," *66 Review of Educational Research* 361 (1996); J. P. Papay and M. A. Kraft, "Productivity Returns to Experience in the Teacher Labor Market: Methodological Challenges and New Evidence on Long-Term Career Improvement," *Journal of Public Economics*, 2015; M. Wiswall, "The Dynamics of Teacher Quality," *100 Journal of Public Economics* 61 (2013); H. F. Ladd and L. C. Sorensen, "Returns to Teacher Experience: Student Achievement and Motivation in Middle School, Working Paper 112," National Center for Analysis of Longitudinal Data in Education Research, (2014); Baker, "Does Money Matter in Education?" *supra* note 27.

<sup>466</sup> H. Wenglinsky, "How Money Matters: The Effect of School District Spending on Academic Achievement," *70 Sociology of Education* 221 (1997); R. Greenwald, L. Hedges and R. Laine, "The Effect of School Resources on Student Achievement," *66 Review of Educational Research* 361 (1996).

<sup>467</sup> Rachel Herzfeldt-Kamprath and Rebecca Ullrich, "Examining Teacher Effectiveness between Preschool and Third Grade," *supra* note 414; Clotfelter *et al.*, *supra* note 385; Eric A. Hanushek, "Boosting Teacher Effectiveness" *supra* note 416; Frank Adamson, and Linda Darling-Hammond, "Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions," *20 Education Policy Analysis Archives* (2012).

<sup>468</sup> Baker, "Does Money Matter in Education?" *supra* note 27; D. N. Figlio and K. Rueben, "Tax Limits and the Qualifications of New Teachers," *80 Journal of Public Economics* 49 (April 2001); T. A. Downes and D. N. Figlio, "Do Tax and Expenditure Limits Provide a Free Lunch? Evidence on the Link between Limits and Public Sector Service Quality," *52 National Tax Journal* 113 (1999).

<sup>469</sup> Baker, "Does Money Matter in Education?" *supra* note 27; J. Ondrich, E. Pas and J. Yinger, "The Determinants of Teacher Attrition in Upstate New York," *36 Public Finance Review* 112 (2008).

effect on the distribution of quality teachers, which could help improve the equity of student outcomes.<sup>470</sup>

Gerard Robinson, in his testimony before the USCCR noted that “money matters, and it matters a lot when we spend it wisely.”<sup>471</sup> He recommended that the Commission study high-performing public high schools, and how they spent their funds, in order to identify what choices were successful, and how to replicate those choices in other schools.<sup>472</sup> He also noted that it’s important to “innovate to educate, but not just litigate,” as desegregation cases risk “supporting the established mechanisms that have failed to improve student achievement.”<sup>473</sup>

### **THE CASE THAT INCREASED SPENDING ALONE DOES NOT MATTER FOR ACHIEVEMENT**

Eric Hanushek, economist and education policy researcher, published a paper in 1986 that confirmed the Coleman findings that there is no link between school spending and achievement.<sup>474</sup> This paper, a meta-analysis of a range of post-Coleman studies, would become one of the most widely cited sources for the argument against any correlation between school achievement and spending.<sup>475</sup> Hanushek’s claim was well respected in certain circles, and “became a mantra for many politicians and advocates,” despite numerous later studies refuting his analyses.<sup>476</sup>

Some argue that the conclusions in certain studies that Hanushek reviewed in his 1986 paper no longer hold as much weight, due to “advances in data quality, statistical techniques, and researchers’ understanding of educational production and schooling quality.”<sup>477</sup> Hanushek, years later, clarified his original statement by explaining, “I have never said that money cannot matter” and “I have only said that the way we have traditionally spent money has not led to better performance.”<sup>478</sup> He went on to say, “It’s absolutely true that if you spend money well, it has an effect,” and that “just putting money into schools and assuming it will be spent well isn’t necessarily correct and there is substantial evidence that it will not happen.”<sup>479</sup>

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<sup>470</sup> *Ibid.*

<sup>471</sup> Gerard Robinson, Resident Fellow at the American Enterprise Institute for Public Policy Research, testimony, Briefing Transcript, p. 158.

<sup>472</sup> *Ibid.* at 26.

<sup>473</sup> *Ibid.* at 28.

<sup>474</sup> Hanushek, “The Economics of Schooling: Production and Efficiency in Public Schools,” *supra* note 454.

<sup>475</sup> Baker, “Does Money Matter in Education?” *supra* note 27.

<sup>476</sup> *Ibid.*

<sup>477</sup> *Ibid.*

<sup>478</sup> Mark Robison, “Is there no link between spending more on schools and improved student performance?” *Reno Gazette-Journal*, June 2, 2015, <http://www.rgj.com/story/news/education/2015/06/03/fact-checker-is-there-no-link-between-spending-more-on-schools-and-improved-student-performance/28326635/>.

<sup>479</sup> *Ibid.*

There have been numerous studies that echo the Coleman results and Hanushek's original assessment, and maintain that there is no link between public school spending and student achievement. These studies posit that in the past 40 years, school spending has tripled, yet student achievement levels have remained stagnant or have lowered.<sup>480</sup>

A recent Cato Institute study examined SAT scores calculated on a statewide level, adjusted for variation in participation rates and student demographics, over the period of time between 1972 and 2012.<sup>481</sup> Adjusted SAT statewide scores were used as a measure, as state-level testing score trends were not available over the same time period.<sup>482</sup> The study found that SAT scores have declined over time by approximately 3 percent, and "there has been essentially no correlation between what states have spent on education and their measured academic outcomes."<sup>483</sup> Furthermore, this study found that SAT scores in states that experienced spending decreases remained relatively the same, and did not experience notable declines.<sup>484</sup>

Other scholars echo that viewpoint. Doug Mesecar, a scholar from the Lexington Institute, provided testimony before the US Commission on Civil Rights, and noted:

Providing additional resources does not necessarily result in student success; moving from inputs to outputs by focusing on measurable achievement is absolutely essential for student success and our country's prosperity. While some have suggested various tweaks to the Title I formulas, they all miss the basic point that funding should contain a performance component. As policymakers look to the future of federal education funding, incorporating [Performance Based Funding] PBF into Title I could deliver long-term, positive results.<sup>485</sup>

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<sup>480</sup> Coulson, "State Education Trends: Academic Performance and Spending over the Past 40 Years," *supra* note 454; Dan Lips and Shanea Watkins, "Does Spending More on Education Improve Academic Achievement?" The Heritage Foundation, September 8, 2008, <http://www.heritage.org/education/report/does-spending-more-education-improve-academic-achievement>; Mark Dynarski and Kirsten Kainz, "Why Federal Spending on Disadvantaged Students (Title I) Doesn't Work," Brookings Institution, November 20, 2015, <https://www.brookings.edu/research/why-federal-spending-on-disadvantaged-students-title-i-doesnt-work/>.

<sup>481</sup> Coulson, "State Education Trends: Academic Performance and Spending over the Past 40 Years," *supra* note 454.

<sup>482</sup> *Ibid.* at 1. The author indicates that the study's methodology was modeled after a 1993 study by Mark Dynarski and Philip Gleason of the Economics of Education Review and improved upon, as the adjusted SAT scores (calculated and validated against NAEP data with "good results") offered a "plausible estimate" of statewide performance on the SAT. The author also addressed the argued racial bias of the SATs, based on gaps in performance between certain minority groups and white students, stating that "test bias is not the only possible cause for these subgroup test score differences—differential levels of academic preparedness across subgroups could also explain the observed results."

<sup>483</sup> *Ibid.* at 57.

<sup>484</sup> *Ibid.* at 57.

<sup>485</sup> Mesecar Statement, *supra* note 122, at 8; Doug Mesecar, Lexington Institute, testimony, Briefing Transcript, pp. 154-155. Mr. Mesecar acknowledges that "funding truly is a necessary precondition to equality of opportunity, but it isn't sufficient in and of itself to produce transformative results." He also notes that with ESSA and the shifting of



Mr. Mesecar went on to cite some examples of school districts that have implemented PFB, such as Arizona with “Student Success Funding,” and similar programs in Michigan, Pennsylvania, and Florida.<sup>486</sup> While he notes that these programs are still very new and it may be premature to determine their effect on educational outcomes, he believes they are additive, and thus are “worthy endeavors.”<sup>487</sup>

Other scholars argue that when comparing the average per-pupil funding rate in the U.S. and testing data from long-term National Assessment of Educational Progress (NAEP) reading examination over time as well as graduation rates nationwide, it appears that reading scores have not seen much improvement and graduation rates have risen only marginally as funding levels have risen sharply.<sup>488</sup> Furthermore, while the achievement gap has narrowed slightly for black and Hispanic students, test scores and graduation rates still remain higher for white students than students of color.<sup>489</sup> These scholars argue that, on a policy level, funding and resources should be better allocated to use existing funds more efficiently, and school choice policies should be implemented to “improve [children’s] performance in response to competition created by parents’ ability to choose alternative schools for their children.”<sup>490</sup>

### ACCOUNTABILITY—WHO BEARS THE BURDEN?

Some critics of test-based accountability systems argue that the burdensome accountability measures incentivized schools to lower the bar on state tests to allow more students to pass, with a larger focus on accountability to the federal government than to parents and the public.<sup>491</sup> Many of these critics also believe that states should be able to opt out of ESSA programs to allow for more state and local control of the allocation of education funds.<sup>492</sup> Additionally, critics believe

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decision making to states and localities, “personalized learning” may be a more “transformative” strategy to boost achievement, which relies on a flexible learning environment that meets students “where they’re at.” See also Doug Mesecar and Don Soifer, “Applying Performance-Based Funding to Public Education,” Lexington Institute, July 2013, <http://www.lexingtoninstitute.org/wp-content/uploads/2013/11/Performanced-BasedFunding.pdf>. An example of a PFB mechanism is merit pay for teachers or groups of teachers.

<sup>486</sup> *Ibid.*

<sup>487</sup> *Ibid.*

<sup>488</sup> *Ibid.*

<sup>489</sup> *Ibid.*

<sup>490</sup> *Ibid.*

<sup>491</sup> Ben Lieberman, “Saving Accountability and Transparency in Public Education,” The Heritage Foundation, March 23, 2007, <http://www.heritage.org/education/report/saving-accountability-and-transparency-public-education>.

<sup>492</sup> Lindsey Burke, “The Every Student Succeeds Act: More Programs and Federal Intervention in Pre-K and K-12 Education,” The Heritage Foundation, December 2, 2015, <http://www.heritage.org/education/report/the-every-student-succeeds-act-more-programs-and-federal-intervention-pre-k-and-k>.

that making Title I funds portable will shift accountability to the parents and allow them a choice in their child's education.<sup>493</sup>

Some advocates believe that accountability at the federal level should be preserved in order to “directly protect historically disadvantaged subgroups of children,” and “targeted, tailored intervention options” are needed for achieving academic improvement.<sup>494</sup> Research has shown that test-based accountability systems have had some positive effects on student achievement.<sup>495</sup> Advocates also believe that state accountability measures are critical in combination with flexibility to help close achievement gaps.<sup>496</sup> To achieve these goals, advocates have identified a number of recommendations, including maintaining high academic standards; ensuring that school resources are distributed equitably, and that all children have access to academically rigorous career or college preparatory courses that will provide a well-rounded education; distributing qualified, experienced, and effective teachers and principals equitably; creating state resource equity plans that identify and provide options for intervention for the lowest performing “priority schools”; and implementing more effective measurement standards and higher-quality reporting procedures to track performance.<sup>497</sup>

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<sup>493</sup> *Ibid.* See also Jay P. Greene, “Futile Accountability Systems Should Be Abandoned,” 17 *Education Next* (2017), <http://educationnext.org/futile-accountability-systems-should-be-abandoned-forum-greene/>.

<sup>494</sup> Accountability Principles for ESEA Reauthorization: A Joint Statement of Civil Rights leaders,” April 2001, [https://nwlc.org/wp-content/uploads/2015/08/esea\\_civil\\_rights\\_letter.pdf](https://nwlc.org/wp-content/uploads/2015/08/esea_civil_rights_letter.pdf).

<sup>495</sup> David Figlio and Susanna Loeb, “School Accountability,” in “The Handbooks in Economics Vol. 3: Economics of Education,” (Eric A. Hanushek, Stephen Machin, and Ludger Woessmann, eds., Elsevier B.V., 2011), pp. 384-421.

<sup>496</sup> *Ibid.* at 2; Becky Pringle, Vice President, National Education Association, testimony, Briefing Transcript, pp. 89-91. Ms. Pringle notes that the National Education Association is advocating for the federal government to offer incentive grants to states to promote school finance reform consistent with the recommendations of the Equity and Excellence Commission.

<sup>497</sup> *Ibid.* at 10.

## CHAPTER 4: HOW HOUSING POLICY IMPACTS EDUCATIONAL OPPORTUNITY

*“School enrollment patterns are closely tied to residential patterns. In short, housing policy is school policy.”*

—David Rusk<sup>498</sup>

The Government Accountability Office has reported that our nation’s public schools are heavily segregated by race and class, and segregation has worsened with over 20 million students of color attending under resourced schools, isolated by race and class.<sup>499</sup> Given persisting racial and socioeconomic segregation in communities as well as schools, many scholars and policymakers argue that housing policy impacts educational opportunity and likewise that educational opportunity can impact housing choices.<sup>500</sup> In some scholars’ view, schools cannot improve student outcomes and reduce achievement gaps unless residential housing becomes more integrated and social supports such as access to hospitals and medical care and access to healthy foods and enrichments such as museums and the arts also become more ubiquitous.<sup>501</sup> Other scholars and policymakers argue that notwithstanding challenges present in integrating communities external to schools and ensuring access to elements necessary to thriving

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<sup>498</sup> Heather Schwartz, “Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland” *The Century Foundation*, <https://tcf.org/assets/downloads/tcf-Schwartz.pdf> (quoting David Rusk, “Trends in School Segregation,” *Divided We Fail: Coming Together through School Choice: The Report of The Century Foundation Task Force* (New York: The Century Foundation Press, 2002)).

<sup>499</sup> U.S. Government Accountability Office, *K-12 Education: Better Use of Information Could Help Agencies Identify Disparities and Address Racial Discrimination* (Washington, D.C., 2016); Forte Testimony, Briefing Transcript, *supra* note 69, at 268.

<sup>500</sup> Tegeler Testimony, Briefing Transcript, *supra* note 33, at 205-207; Statement of Katherine O’Regan, Assistant Secretary for Policy Development and Research at the U.S. Department of Housing and Urban Development, U.S. Commission on Civil Rights, *Briefing: Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation* (Washington, D.C., May 20, 2016), at pp. 1-3 (hereinafter cited as O’Regan Statement); Heather Schwartz, “Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland” *The Century Foundation*, <https://tcf.org/assets/downloads/tcf-Schwartz.pdf> (last accessed May 31 2017); Richard D. Kahlenberg, “Socioeconomic School Integration,” *University of North Carolina Law Review*, Vol. 85, No. 5 (2007): 1545; Orfield *et al.*, “E Pluribus Separation: Deepening Double Segregation for More Students,” *supra* note 29.

<sup>501</sup> Pedro A. Noguera, “A broader and bolder approach uses education to break the cycle of poverty,” *Phi Delta Kappan*, vol. 93, no. 3 (2011), pp. 8-14; R. Rothstein, *Class and schools: Using social, economic, and educational reform to close the black-white achievement gap*, Economic Policy Institute, Washington, DC: 2004; J. Dryfoos, “Schools as places for health, mental health, and social services,” *Teachers College Record*, vol. 94, no. 3 (1993), pp. 540-567; Jeanne Brooks-Gunn and Lisa B. Markman, “The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness,” *The Future of Children*, vol. 15, no. 1 (2005), pp. 139-168. Greg J Duncan and Katherine A. Magnuson, “Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?” *The Future of Children*, vol. 15, no. 1 (2005), pp. 35-54.

communities, schools can, in and of themselves, eradicate achievement gaps and offer students fair and meaningful educational opportunity.<sup>502</sup>

There is a substantial body of research that suggests that a student's socioeconomic status is a determinant of the student's level of achievement, and addressing concentrated poverty is key for closing achievement gaps.<sup>503</sup> Pedro Noguera wrote, "more often than not, when the obstacles confronting poor communities are ignored, efforts to help students achieve and schools improve are less effective."<sup>504</sup>

Children from low-poverty households often have access to educational support systems and resources outside the classroom (family or community support, private tutors, summer enrichment camps, etc.) that students from high-poverty households may not have, which can create disparities in student achievement.<sup>505</sup> In areas where poverty is most concentrated, low-income students are more likely to experience stress, their overall quality of life and health is worse, and they are more likely to encounter violence or crime than students who do not reside in areas of concentrated poverty.<sup>506</sup> It is difficult to improve achievement and educational outcomes when environmental factors that influence students and schools are not considered, rendering a more comprehensive approach as beneficial to improving achievement for disadvantaged students.<sup>507</sup>

A recent study that examined over five million families who moved across counties in the U.S. sought to "characterize the effects of neighborhoods on children's earnings and other outcomes in

<sup>502</sup> Vilsa E. Curto, Roland G. Fryer, Jr., and Meghan L. Howard, "It May Not Take a Village: Increasing Achievement among the Poor," Unpublished Paper, Harvard University, [http://scholar.harvard.edu/files/fryer/files/it\\_may\\_not\\_take\\_a\\_village\\_increasing\\_achievement\\_among\\_the\\_poor.pdf](http://scholar.harvard.edu/files/fryer/files/it_may_not_take_a_village_increasing_achievement_among_the_poor.pdf); Will Dobbie and Roland J. Fryer, Jr., "The Medium-Term Impacts of High-Achieving Charter Schools," *Journal of Political Economy*, vol. 123, no. 5 (2015), pp. 985-1037 [http://scholar.harvard.edu/files/fryer/files/dobbie\\_fryer\\_hcz\\_01062015\\_1.pdf](http://scholar.harvard.edu/files/fryer/files/dobbie_fryer_hcz_01062015_1.pdf).

<sup>503</sup> Pedro A. Noguera, "A broader and bolder approach uses education to break the cycle of poverty," *Phi Delta Kappan*, vol. 93, no. 3 (2011), pp. 8-14.

<sup>504</sup> Pedro A. Noguera, "A broader and bolder approach uses education to break the cycle of poverty."

<sup>505</sup> NCES, *Equality of Educational Opportunity*; Annette Lareau, "Unequal childhoods: Class, race, and family life," (Berkeley and Los Angeles, CA: University of California Press, 2003).

<sup>506</sup> Pedro A. Noguera, "A broader and bolder approach uses education to break the cycle of poverty;" D. Kirp, "Kids first: Five big ideas for transforming children's lives and America's future," (New York, NY: Perseus, 2011); P. Noguera, *City schools and the American dream: Reclaiming the promise of public education* (New York, NY: Teachers College Press, 2003).

<sup>507</sup> Noguera, "A broader and bolder approach uses education to break the cycle of poverty;" R. Rothstein, *Class and schools: Using social, economic, and educational reform to close the black-white achievement gap*, Economic Policy Institute, Washington, DC: 2004; J. Dryfoos, "Schools as places for health, mental health, and social services," *Teachers College Record*, vol. 94, no. 3 (1993), pp. 540-567; Jeanne Brooks-Gunn and Lisa B. Markman, "The Contribution of Parenting to Ethnic and Racial Gaps in School Readiness," *The Future of Children*, vol. 15, no. 1 (2005), pp. 139-168. Greg J Duncan and Katherine A. Magnuson, "Can Family Socioeconomic Resources Account for Racial and Ethnic Test Score Gaps?" *The Future of Children*, vol. 15, no. 1 (2005), pp. 35-54.

adulthood.<sup>508</sup> This study found that children experience better outcomes in adult life by having prolonged exposure to better neighborhoods, and upward mobility can make a significant impact in fostering those better outcomes.<sup>509</sup> Since residency almost always determines school assignments, more integrated neighborhoods will lead to more integrated schools. A substantial body of research shows that students who attend racially and socioeconomically diverse schools have higher academic performance and higher graduation rates than students who do not attend diverse schools.<sup>510</sup> Black students, in particular, who attend integrated schools have access to more challenging curriculum, have higher graduation rates, often have higher earnings, and experience better health outcomes than black students in segregated environments.<sup>511</sup>

Katherine O'Regan, Assistant Secretary for Policy Development & Research at the U.S. Department of Housing and Urban Development (HUD) testified to USCCR on the link between housing segregation and the inequality of education:

Where a family lives largely determines where their children go to school. This also means that where families of different incomes, race and ethnicities live, largely determines the composition of schools.

This combination—the close connection between residential segregation and school segregation and resulting funding and performance differences in schools attended by minority and low-income students—means we cannot provide equality of opportunity in this country without addressing both housing segregation and education policy.<sup>512</sup>

Consistent with this view, some scholars and advocates believe that “community schools” that serve as hubs to bring educators, families, and the community at large together are important for mitigating the effects of poverty and fostering learning.<sup>513</sup> These schools focus on addressing external barriers to learning and align community supports through partnerships with local nonprofits, businesses, and community institutions that can provide a variety of academic

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<sup>508</sup> Raj Chetty and Nathaniel Hendren, “Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-level Estimates,” *Harvard University and National Bureau of Economic Research* (2015), [http://scholar.harvard.edu/files/hendren/files/nbhds\\_paper.pdf](http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf).

<sup>509</sup> *Ibid.*

<sup>510</sup> Roslyn Arlin Mickelson, “The Reciprocal Relationship between Housing and School Integration,” *The National Coalition on School Diversity*, September 2011, <http://www.school-diversity.org/pdf/DiversityResearchBriefNo7.pdf>.

<sup>511</sup> Orfield *et al.*, “E Pluribus Separation: Deepening Double Segregation for More Students,” *supra* note 29.

<sup>512</sup> O'Regan Statement, *supra* note 500, at 1-2.

<sup>513</sup> Pedro A. Noguera, “A broader and bolder approach uses education to break the cycle of poverty;” J. Dryfoos, “Schools as places for health, mental health, and social services,” *Teachers College Record*, vol. 94, no. 3 (1993), pp. 540-567; J.G. Dryfoos, J. Quinn, and C. Barkin, *Community schools in action: Lessons from a decade of practice*, Oxford Press (New York, NY: 2005).

enrichment, health, and after school/summer programs that provide support to students.<sup>514</sup> Research has shown that many community schools have seen positive effects on students, families, and communities.<sup>515</sup>

On the other hand, some scholars have examined the importance of schools alone to bring educational opportunity all students. Roland G. Fryer, Jr., for one, has argued that good schools are quintessential for achievement, and achievement gaps can be closed if children have access to high-quality schools.<sup>516</sup> Much of his research involves an examination of good charter schools, here he has observed that high-quality charter schools have a significant effect on educational and economic outcomes, and in reducing risky behavior.<sup>517</sup> He has also said that students, when placed in different neighborhoods, do not necessarily increase their achievement:

With these important caveats in mind, we use recent evaluations of charter [schools] across the US to show that providing high quality schools to children who live in low-quality environments can significantly increase their achievement. Yet, changing environments by moving individuals to different neighborhoods or placing them in boarding schools to create a more nurturing and stimulating home environment does not significantly alter achievement. Taken together, the evidence to date suggests it may not take a village to increase the achievement of the poorest minority students, just a high-quality school.<sup>518</sup>

Other educators and advocates echo this sentiment. In an op-ed in the *Washington Post*, Joel Klein, former Chancellor of the New York City Schools, Michael Lomax, chief executive of the United Negro College Fund, and Janet Murguía, president and chief executive of the National Council of La Raza (now UnidosUS), wrote:

In the debate over how to fix American public education, many believe that schools alone cannot overcome the impact that economic disadvantage has on a child, that life outcomes are fixed by poverty and family circumstances, and that education doesn't work until other problems are solved. This theory is, in some ways, comforting for educators. After all, if schools make only a marginal difference, we can stop faulting ourselves for failing to make them work well for millions of children . . . Problem is, the theory is wrong. It's hard to

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<sup>514</sup> Elaine Weiss, "Community Schools As a Model for a Civil Rights-Oriented ESEA," *Huffington Post*, August 6, 2015 [http://www.huffingtonpost.com/elaine-weiss/community-schools-as-a-mo\\_b\\_7950072.html](http://www.huffingtonpost.com/elaine-weiss/community-schools-as-a-mo_b_7950072.html)

<sup>515</sup> Joy G. Dryfoos, "Evaluation of Community Schools: Findings to Date," *Coalition for Community Schools*, 2000, <http://files.eric.ed.gov/fulltext/ED450204.pdf>.

<sup>516</sup> Curto, *et al.*, *supra* note 502; Dobbie and Fryer, "The Medium-Term Impacts of High-Achieving Charter Schools," *supra* note 502.

<sup>517</sup> Adam Ozimek, "Roland Fryer On Why Good Schools Matter," *Forbes*, April 27, 2015, <https://www.forbes.com/sites/modeledbehavior/2015/04/27/roland-fyer-on-why-good-schools-matter/#7918e7301ce5>.

<sup>518</sup> Curto, *et al.*, *supra* note 502.

know how wrong—because we haven’t yet tried to make the changes that would tell us—but plenty of evidence demonstrates that schools can make an enormous difference despite the challenges presented by poverty and family background.<sup>519</sup>

Regardless of whether schools alone could reduce the achievement gap and help students overcome unequal access to learning opportunity, unquestionably residential segregation influences who attends school together and the homogeneity or heterogeneity of external-to-school factors influencing students’ experiences in school. Many students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and there is potential for housing policy to help provide better educational opportunities for these students.

### **The Role of Residential Segregation & Concentrated Poverty in Exacerbating Unequal Educational Opportunities for Low-Income Students and Students of Color**

*“We still have many neighborhoods that are racially identified. We still have many schools that even though the days of state-enforced segregation are gone, segregation because of geographical boundaries remains.”<sup>520</sup>*

—U.S. Supreme Court Justice, Ruth Bader Ginsburg

Over the decades, while residential segregation has declined in certain areas within the U.S., the changing population demographics of the U.S. has lent to the complexity of examining the issue of segregation. Black-white segregation has moderately declined and black neighborhoods are becoming less black, but part of this can be attributed to the influx of Hispanics and other people of color into these communities.<sup>521</sup> In communities that have a growing population, segregation has declined significantly, largely due to the establishment of new neighborhoods that lack a preexisting racial or ethnic identity.<sup>522</sup> In general, racial and ethnic segregation has declined less rapidly in communities that do not have significant population growth.<sup>523</sup> While rates of black-white segregation have slightly declined, Hispanics and Asians have become more isolated from

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<sup>519</sup> J. Klein, M. Lomax, and J. Murguia, “Why great teachers matter to low-income students,” *Washington Post*, April 9, 2010,

<http://www.washingtonpost.com/wp-dyn/content/article/2010/04/08/AR2010040804802.html>.

<sup>520</sup> This quote is from an excerpt of the transcript of Justice Ruth Bader Ginsburg’s interview with Irin Carmon, which aired on “The Rachel Maddow Show” on February 16, 2015, <http://www.msnbc.com/msnbc/exclusive-justice-ruth-bader-ginsburg-interview-full-transcript>.

<sup>521</sup> William H. Frey, “Census Shows Modest Declines in Black-White Segregation,” *Brookings Institution*, December 8, 2015, <https://www.brookings.edu/blog/the-avenue/2015/12/08/census-shows-modest-declines-in-black-white-segregation/>.

<sup>522</sup> Vigdor Statement, *supra* note 32, at 3.

<sup>523</sup> *Ibid.*

whites over the past two decades.<sup>524</sup> Additionally, rates of socioeconomic residential segregation have risen. Jacob L. Vigdor, a professor of public policy and governance at the University of Washington noted in his testimony before USCCR:

In 1970, when racial segregation was at its peak, the African-American population was actually more economically integrated than the white population. While economic segregation has widened for all racial groups, the increase is significantly greater among African-Americans. This reflects the differential capacity of black families to take advantage of new residential opportunities that opened up following passage of the Fair Housing Act. Affluent families have found more racially integrated and more affluent neighborhoods; poor families have not.<sup>525</sup>

Neighborhood segregation still persists, and it is a valid indicator of neighborhood inequality.<sup>526</sup>

## A LOOK AT RESIDENTIAL SEGREGATION IN METROPOLITAN AREAS IN THE U.S.

To get an idea of how residential segregation has changed over time, Tables 1, 2, and 3 use the Dissimilarity Index to measure the rates of residential segregation in 1980, 1990, 2000, and 2010 for the top 25 metropolitan areas in the U.S. where black-white, Hispanic-white, and Asian-white segregation rates are highest.<sup>527</sup>

Rank	Metropolitan Area	1980	1990	2000	2010	Difference from 1980-2010
1	Detroit-Livonia-Dearborn, MI	.83	.86	.86	.80	-0.03
2	Milwaukee-Waukesha-West Allis, WI	.84	.83	.82	.80	-0.04
3	New York-White Plains-Wayne, NY-NJ	.82	.82	.82	.79	-0.03
4	Newark-Union, NJ-PA	.83	.83	.80	.78	-0.05
5	Gary, IN	.91	.90	.85	.77	-0.14
6	Chicago-Joliet-Naperville, IL	.89	.85	.81	.76	-0.13

<sup>524</sup> John R. Logan, "Separate and Unequal: The Neighborhood Gap," *USA2010*, 2011, <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report0727.pdf>.

<sup>525</sup> Vigdor Statement, *supra* note 32, at 3.

<sup>526</sup> Logan, "Separate and Unequal: The Neighborhood Gap," *supra* note 524.

<sup>527</sup> The U.S. Census Bureau defines the Dissimilarity Index as measuring "the percentage of a group's population that would have to change residence for each neighborhood to have the same percentage of that group as the metropolitan area overall. The index ranges from 0.0 (complete integration) to 1.0 (complete segregation)."



**Table 1: Black-White Segregation Rates for the Years 1980, 1990, 2000, and 2010, for the Top 25 Metropolitan Areas in the U.S. in 2010 where Black-White Segregation Rates are Highest**

Rank	Metropolitan Area	1980	1990	2000	2010	Difference from 1980-2010
7	Philadelphia, PA	.83	.81	.77	.74	-0.09
8	Miami-Miami Beach-Kendall, FL	.79	.72	.72	.73	-0.06
9	Cleveland-Elyria-Mentor, OH	.86	.83	.77	.73	-0.13
10	Buffalo-Niagara Falls, NY	.80	.80	.77	.71	-0.09
11	St. Louis, MO-IL	.82	.77	.73	.71	-0.11
12	Nassau-Suffolk, NY	.77	.76	.74	.69	-0.08
13	Boston-Quincy, MA	.80	.74	.72	.68	-0.12
14	Cincinnati-Middletown, OH-KY-IN	.78	.76	.73	.67	-0.11
15	Bridgeport-Stamford-Norwalk, CT	.70	.69	.69	.66	-0.04
16	Birmingham-Hoover, AL	.72	.70	.69	.65	-0.07
17	Los Angeles-Long Beach-Glendale, CA	.81	.73	.67	.65	-0.16
18	Syracuse, NY	.75	.73	.69	.65	-0.1
19	Indianapolis-Carmel, IN	.79	.74	.71	.65	-0.14
20	Baltimore-Towson, MD	.74	.71	.68	.65	-0.09
21	Washington-Arlington-Alexandria, DC-VA-MD-WV	.71	.68	.66	.64	-0.07
22	New Orleans-Metairie-Kenner, LA	.70	.68	.69	.63	-0.07
23	Dayton, OH	.79	.76	.71	.63	-0.16
24	Toledo, OH	.79	.74	.69	.63	-0.16
25	Pittsburgh, PA	.73	.71	.67	.63	-0.1

Source: Compiled by USCCR from data from Brown University's American Communities Project

As shown in Table 1, residential segregation among blacks and whites declined from 1980 to 2010 in each of the 25 metropolitan areas where rates of black-white segregation are highest. The numbers are very different, however, for segregation among Hispanics and whites (see Table 2), as there was an increase in segregation from 1980 to 2010 in 11 of the 25 metropolitan areas where rates of Hispanic-white segregation are highest.

**Table 2: Hispanic-White Segregation Rates for the Years 1980, 1990, 2000, and 2010, for the Top 25 Metropolitan Areas in the U.S. in 2010 where Hispanic-White Segregation Rates are Highest**

Rank	Metropolitan Area	1980	1990	2000	2010	Difference from 1980-2010
1	Peabody, MA	.66	.69	.70	.68	+0.02
2	Springfield, MA	.67	.64	.64	.63	-0.04
3	Los Angeles-Long Beach-Glendale, CA	.57	.61	.63	.63	+0.06
4	New York-White Plains-Wayne, NY-NJ	.65	.65	.65	.63	-0.02
5	Newark-Union, NJ-PA	.67	.67	.65	.63	-0.04
6	Boston-Quincy, MA	.62	.62	.65	.62	0.00
7	Providence-New Bedford-Fall River, RI-MA	.47	.58	.65	.60	+0.13
8	Bridgeport-Stamford-Norwalk, CT	.62	.60	.66	.59	-0.03
9	Philadelphia, PA	.64	.63	.61	.59	-0.05
10	Hartford-West Hartford-East Hartford, CT	.67	.66	.63	.58	-0.09
11	Milwaukee-Waukesha-West Allis, WI	.55	.56	.59	.57	+0.02
12	Chicago-Joliet-Naperville, IL	.64	.62	.61	.57	-0.07
13	Allentown-Bethlehem-Easton, PA-NJ	.56	.58	.60	.55	-0.01
14	Lake County-Kenosha County, IL-WI	.45	.51	.58	.55	+0.1
15	Oxnard-Thousand Oaks-Ventura, CA	.53	.52	.56	.55	+0.02
16	New Haven-Milford, CT	.58	.57	.58	.54	-0.04
17	Santa Ana-Anaheim-Irvine, CA	.42	.50	.55	.54	+0.12
18	Worcester, MA	.53	.55	.56	.53	0.00
19	Houston-Sugar Land-Baytown, TX	.48	.48	.53	.53	+0.05
20	Bakersfield-Delano, CA	.54	.55	.54	.52	-0.02
21	Cleveland-Elyria-Mentor, OH	.58	.58	.58	.52	-0.06
22	Dallas-Plano-Irving, TX	.49	.50	.54	.52	+0.03
23	Detroit-Livonia-Dearborn, MI	.45	.45	.55	.52	+0.07
24	Buffalo-Niagara Falls, NY	.48	.55	.56	.51	+0.03
25	Memphis, TN-MS-AR	.42	.32	.46	.51	+0.09

Source: Compiled by USCCR from data from Brown University's American Communities Project

As demonstrated in Table 3, residential segregation among Asians and whites increased from 1980 to 2010 in 19 of the top 25 metropolitan areas where rates of Asian-white segregation are highest.

**Table 3: Asian-White Segregation Rates for the Years 1980, 1990, 2000, and 2010, for the Top 25 Metropolitan Areas in the U.S. in 2010 where Black-White Segregation Rates are Highest**

Rank	Metropolitan Area	1980	1990	2000	2010	Difference from 1980-2010
1	Edison-New Brunswick, NJ	.39	.42	.50	.54	+0.15
2	Buffalo-Niagara Falls, NY	.51	.51	.47	.51	0.00
3	New York-White Plains-Wayne, NY-NJ	.49	.47	.49	.50	+0.01
4	Pittsburgh, PA	.45	.51	.49	.49	+0.04
5	Houston-Sugar Land-Baytown, TX	.45	.48	.50	.49	+0.04
6	Syracuse, NY	.41	.45	.45	.48	+0.07
7	Baton Rouge, LA	.41	.53	.52	.48	+0.07
8	Los Angeles-Long Beach-Glendale, CA	.47	.46	.48	.48	+0.01
9	Boston-Quincy, MA	.59	.52	.52	.47	-0.12
10	Sacramento—Arden-Arcade—Roseville, CA	.47	.48	.47	.47	0.00
11	San Francisco-San Mateo-Redwood City, CA	.51	.50	.49	.47	-0.04
12	Detroit-Livonia-Dearborn, MI	.40	.41	.45	.47	+0.07
13	Warren-Troy-Farmington Hills, MI	.41	.44	.46	.46	+0.05
14	Atlanta-Sandy Springs-Marietta, GA	.35	.42	.45	.46	+0.11
15	Stockton, CA	.42	.56	.49	.46	+0.04
16	McAllen-Edinburg-Mission, TX	.27	.40	.41	.46	+0.19
17	Greensboro-High Point, NC	.43	.43	.47	.46	+0.03
18	New Orleans-Metairie-Kenner, LA	.52	.50	.47	.45	-0.07
19	Dallas-Plano-Irving, TX	.39	.42	.44	.44	+0.05
20	San Diego-Carlsbad-San Marcos, CA	.46	.48	.47	.44	-0.02
21	Raleigh-Cary, NC	.41	.43	.38	.44	+0.03
22	Birmingham-Hoover, AL	.45	.49	.47	.43	+0.12
23	San Jose-Sunnyvale-Santa Clara, CA	.31	.39	.42	.43	+0.12
24	Worcester, MA	.38	.39	.43	.43	+0.05
25	Oakland-Fremont-Hayward, CA	.38	.40	.41	.42	+0.04

Source: Compiled by USCCR from data from Brown University's American Communities Project

As demonstrated in the above tables, while black-white segregation rates are decreasing in the top 25 metropolitan areas where black-white segregation rates are highest, there are many other metropolitan areas in the U.S. where Hispanics and Asians are growing increasingly more isolated in communities. Furthermore, blacks tend to be more isolated from whites on average than are Hispanics or Asians, notwithstanding the decrease of the black-white segregation rates from 1980.

## WEALTH DISPARITIES AND CONCENTRATED POVERTY IN THE U.S.

Since the abolition of slavery and with the rise of immigration from more diverse ethnic groups in the U.S., neighborhoods have historically been racially, ethnically and socioeconomically segregated. Over the past three decades, wealth disparities have increased and poverty has become more concentrated in certain areas. A Pew Research Center study reported that income inequality has risen, and the share of upper-income households has risen from 15 percent to 20 percent, while the share of middle-income households has fallen from 54 percent to 48 percent and lower-income households have remained stagnant.<sup>528</sup> Additionally, there are more census tracts in which at least half of households fall into either the upper-income or lower-income range, and higher concentrations of upper-income and lower-income households on average within each tract.<sup>529</sup>

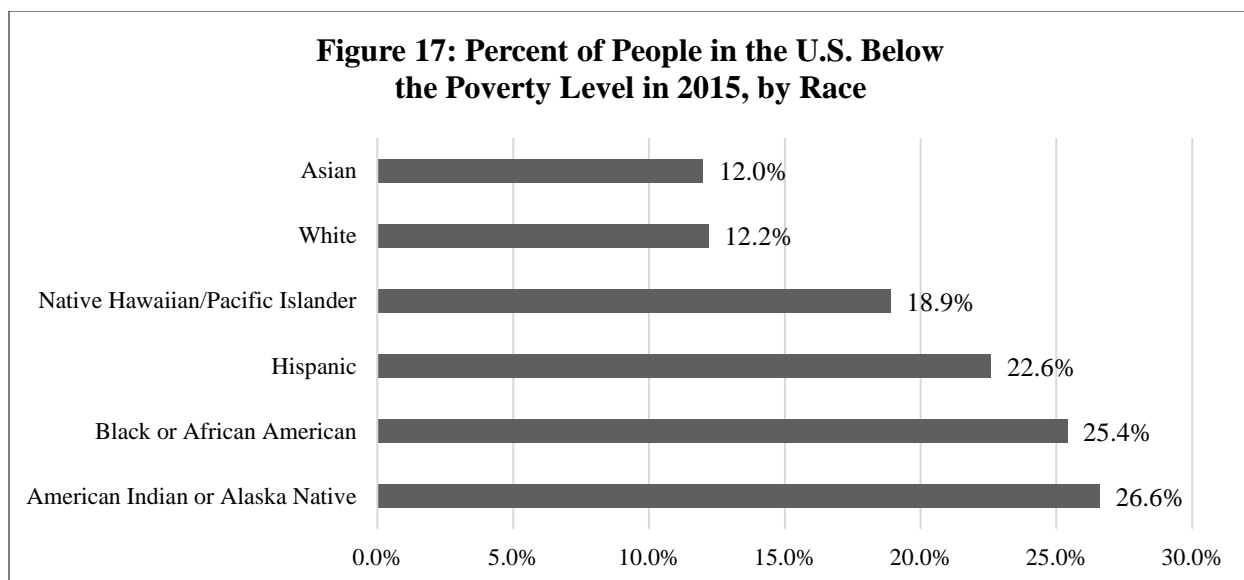
Black, Hispanic, and Native American households are approximately twice as likely to fall below the poverty line than white households in the U.S. Figure 17 shows the percentage of people below the poverty level in 2015, broken down by race. Approximately 12.2 percent of white people lived below the poverty line nationwide, as compared to 25 percent of black people, 22 percent of Hispanic people, 12 percent of Asian people, 18.9 percent of Native Hawaiian/Pacific Islander people, and 26.6 percent of American Indian/Alaska Native people.<sup>530</sup>

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<sup>528</sup> Fry *et al.*, “The Rise of Residential Segregation by Income,” *supra* note 28.

<sup>529</sup> *Ibid.*

<sup>530</sup> Josh Ishimatsu, “Spotlight on Asian American and Pacific Islander Poverty: A Demographic Profile,” *National Coalition for Asian Pacific American Community Development* (Washington D.C.: 2013), <http://assetbuildingpolicynetwork.org/wp-content/uploads/2013/08/National-CAPACD-Asian-Americanand-Pacific-Islander-Poverty.pdf>; Karthick Ramakrishnan and Farah Z. Ahmad, “State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population,” *Center for American Progress*, September 2014 <http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf>. This report notes that while improvements have been made in the collection of disaggregated data on the Asian American and Pacific Islander (AAPI) population, “for many of the outcomes, disaggregated data by national origin do not exist or are made possible only by combining several years of data, rendering them less current and less comparable to data available for the rest of the U.S. population.” Poverty in the AAPI community is concentrated in some ethnic groups, and tends to be highest in the Hmong, Bangladeshi, Tongan, and Samoan subpopulations. Pacific Islanders and Asian Americans experience the most concentrated poverty, with 55% of poor Pacific Islanders and 50% of poor Asian Americans reside in just 10 metropolitan statistical areas.



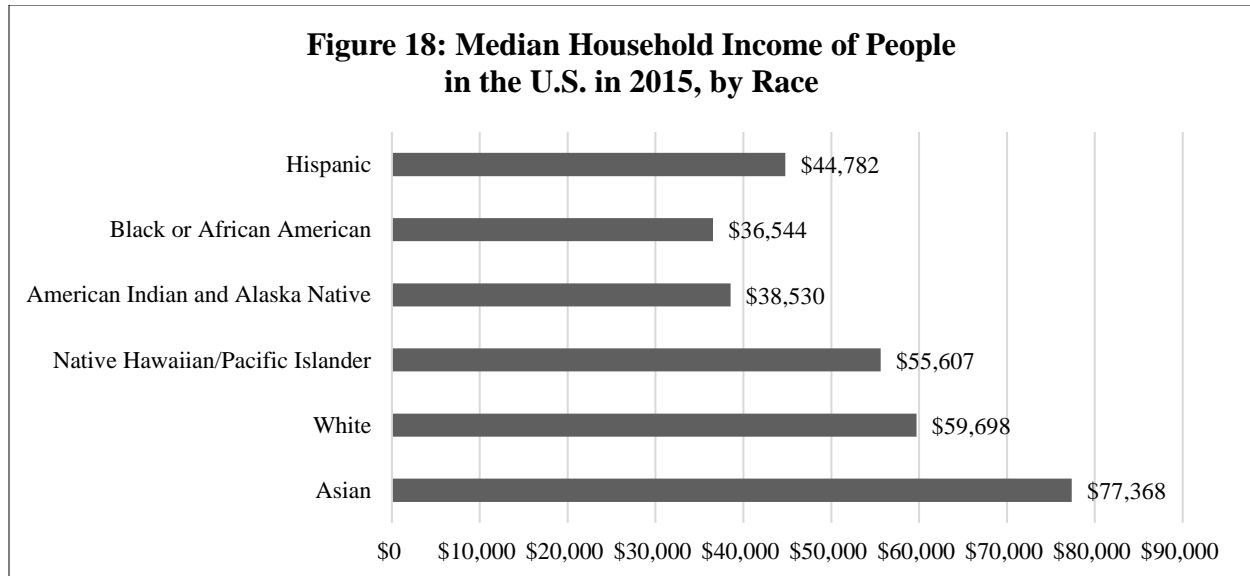
Source: Compiled by USCCR from the U.S. Census Bureau, 2015 American Community Survey 1-Year Estimates

On average, black and Hispanic household incomes are at least 30 percent lower than white and Asian household incomes, and all minorities tend to live in poorer neighborhoods than whites of a similar income level.<sup>531</sup> The picture is more complex when comparing Asian households and white households. In some metropolitan areas, Asian households are more likely to be in poorer neighborhoods than comparable whites, but in other metropolitan areas, Asian households actually tend to be in *wealthier* neighborhoods than comparable whites.<sup>532</sup> Figure 18 shows that the median household income of black people is \$36,544, American Indian and Alaska Native people is \$38,530, Hispanic people is \$44,782, and Native Hawaiian/Pacific Islander people is \$55,607, which is only 61 percent, 64 percent, 75 percent, and 93 percent of the annual income of white people (\$59,698) in the U.S., respectively. The median household income of Asian people, on the other hand, is \$77,368, which is about 130 percent higher than that of white people.<sup>533</sup>

<sup>531</sup> Logan, “Separate and Unequal: the Neighborhood Gap,” *supra* note 524.

<sup>532</sup> *Ibid.* at 13-14.

<sup>533</sup> Karthick Ramakrishnan and Farah Z. Ahmad, “State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population,” *Center for American Progress*, September 2014 <http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf>. AAPIs have a relatively high-income level as a whole, but there is a vast fluctuation among subpopulations, with the median household income for Asian Indians being \$95,000 on the high end, and \$46,950 for Bangladeshis on the low end (2012 inflation-adjusted dollars).



Source: Compiled by USCCR from the U.S. Census Bureau, 2015 American Community Survey 1-Year Estimates

Given the data, most communities of color are disproportionately affected by concentrated poverty and residential segregation. Given that school resources are so closely tied to the wealth of a community, low-income students and students of color are more likely to attend a neighborhood school that spends less on them and can provide fewer quality resources compared to a wealthier school that serves white students that would be able to provide more spending per-pupil and more quality resources.

### **Disconnect Between Federal Housing and Federal Education Policy: Separate Silos, Separate Agendas**

The U.S. Department of Education and Department of Housing and Urban Development (HUD) govern education policy and housing policy, respectively. While there is a reciprocal relationship between the two, as educational opportunity is so frequently tied to housing opportunity, collaboration between the two Departments to address strategies to achieve racial and socioeconomic integration is rarely evident to the public and has been insufficient to dramatically alter students' experiences in schools.<sup>534</sup> Phil Tegeler notes in his testimony before USCCR:

We find that opponents of school integration sometimes point to school funding as the sole solution to disparities in resources and achievement for children in high poverty, racially isolated schools. And likewise, we often hear housing segregation used as an excuse for

<sup>534</sup> Tegeler Testimony, Briefing Transcript, *supra* note 33, at 205.

not taking stronger steps on school integration, as if these policies were not related and mutually reinforcing.<sup>535</sup>

Mr. Tegeler also noted that this disconnect is seen on the state and local levels as well for similar reasons:

We do not routinely ask questions like how will a new low-income housing development affect the racial and economic balance of a neighborhood school? Or what is the optimal location of a new elementary school to ensure an integrated student body? Or how can we work together across school district lines to ensure that our communities remain successfully integrated?<sup>536</sup>

Consistent with these concerns, some advocates argue that while federal education policy, largely, has been focused on closing the achievement gap through Title I spending and accountability measures, insufficient emphasis has been placed upon combating the effects of residential segregation by race and poverty.<sup>537</sup>

Their concern is that as a result, “separate but equal” has again become the standard of education policy in recent decades, since school desegregation efforts slowed.<sup>538</sup> They charge that policymakers who viewed integration efforts as having failed or stalled shifted efforts to accountability and raising achievement “within more and more segregated systems, often deepening the burdens and demoralizing the educators in isolated schools of concentrated poverty.”<sup>539</sup> Even recognizing that residential segregation and school segregation are not inevitably linked when thinking about funding public education, and in many instances their pairing is a product of “state supported segregation” which will take state efforts to dismantle.<sup>540</sup> Nonetheless, these advocates promote federal efforts to advance educational opportunity linked to housing integration progress, and have noted that in order to make these advancements, more connections need to be made at the federal, state, and local levels.<sup>541</sup>

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<sup>535</sup> *Ibid.*

<sup>536</sup> *Ibid.*

<sup>537</sup> Orfield *et al.*, “E Pluribus Separation: Deepening Double Segregation for More Students.” *supra* note 29.

<sup>538</sup> *Ibid.* at xix.

<sup>539</sup> *Ibid.*

<sup>540</sup> Monique Lin-Luse, testimony before the U.S. Commission on Civil Rights, Briefing, Washington, D.C., May 20, 2016, p. 21 (*hereinafter cited as* Lin-Luse Testimony).

<sup>541</sup> Tegeler Testimony, Briefing Transcript, *supra* note 33, at 207-209.

## AFFIRMATIVELY FURTHERING FAIR HOUSING AS A MEANS OF ADVANCING EDUCATIONAL OPPORTUNITY

In testimony before the Commission, advocates cited a longstanding policy component of the Fair Housing Act as a promising area for joint federal efforts to advance educational opportunity.<sup>542</sup> Title VIII of the Civil Rights Act of 1968, also known as the Fair Housing Act, was enacted to combat discrimination in housing transactions on the basis of race, color, religion, national origin or sex (and since amended to add disability and familial status).<sup>543</sup> The Fair Housing Act has a provision that mandates HUD program participants to affirmatively further fair housing. Specifically, Section 808(d) of the Act states:

Cooperation of Secretary and executive departments and agencies in administration of housing and urban development programs and activities to further fair housing purposes.

All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.<sup>544</sup>

Congress created HUD in 1965 with the mission of creating “strong, sustainable, inclusive communities, and quality, affordable homes to all.”<sup>545</sup> HUD administers a number of diverse programs to help achieve its mission, such as housing finance programs, rental assistance, homelessness prevention, building resilient communities, promoting fair housing, and more.<sup>546</sup> HUD and DOJ are tasked with enforcement of the Fair Housing Act.<sup>547</sup> HUD has defined affirmatively furthering fair housing as, “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity.”<sup>548</sup>

The Supreme Court affirmed that a major goal of the Fair Housing Act was to establish integrated communities, which echoed the sentiment of Senator Walter Mondale, a co-sponsor of the Act,

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<sup>542</sup> Tegeler Testimony, Briefing Transcript, *supra* note 33; O’Regan Statement *supra* note 500, at 1.

<sup>543</sup> The Fair Housing Act, 42 U.S.C. 3601 *et seq.*

<sup>544</sup> 42 U.S.C. 3601 Sec. 808(d).

<sup>545</sup> U.S. Department of Housing and Urban Development, *Strategic Plan 2014-2018* (April 2014, Washington, DC), <https://portal.hud.gov/hudportal/documents/huddoc?id=hudstrategicplan2014-2018.pdf>.

<sup>546</sup> *Ibid.*

<sup>547</sup> U.S. Department of Justice, “The Fair Housing Act,” <https://www.justice.gov/crt/fair-housing-act-1>.

<sup>548</sup> Office of the Secretary, U.S. Department of Housing and Urban Development, Final Rule, “Affirmatively Furthering Fair Housing,” *Federal Register*, 80 FR 42271 (July 16, 2015): 42271-42371. <https://www.federalregister.gov/documents/2015/07/16/2015-17032/affirmatively-furthering-fair-housing>.



who said that the act was proposed to replace segregated communities “by truly integrated and balanced living patterns.”<sup>549</sup>

Historically, HUD program participants were required to affirmatively further fair housing by taking active steps to assess, remediate, and document the patterns and practices of segregation in their jurisdictions.<sup>550</sup> This required conducting an analysis of impediments to fair housing in that jurisdiction, taking meaningful action to eliminate any impediments to fair housing, and maintaining documentation of the analysis and actions taken.<sup>551</sup> Failure to meet these obligations could result in a loss of federal funding or legal exposure.<sup>552</sup> Although affirmatively furthering fair housing has been a provision of the Fair Housing Act since its passing in 1968, critics charge that it has historically lacked effective enforcement.<sup>553</sup> Residential segregation persists today, caused and perpetuated by both socioeconomic conditions and ongoing instances of discrimination in the housing market, which diminishes housing, employment, financial, and educational opportunity, particularly for low-income individuals and people of color.<sup>554</sup>

In recent years, advocates as well as HUD have proactively used the affirmatively furthering fair housing Fair Housing Act requirement to promote housing integration. Among the most publicly recognized efforts was a 2009 landmark lawsuit settled for \$62.5 million in *U.S. ex rel. Anti-Discrimination Center v. Westchester County*.<sup>555</sup> The suit alleged that Westchester County, New York, had not met its obligation to affirmatively further fair housing, as it had received more than \$50 million in federal funds and had failed to address the racial barriers to housing choice and persistent segregation in the county.<sup>556</sup> As per the terms of the settlement, Westchester County was in part required to establish 750 affordable housing units within 7 years in its demographically

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<sup>549</sup> *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 209 (1972).

<sup>550</sup> Timothy M. Smyth, Michael Allen, and Marisa Schnaith, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *Journal of Affordable Housing*, vol. 23, no. 2 (2015), pp. 231-258.

<sup>551</sup> *Ibid*; 24 C.F.R. §§ 91.225(a) (1), 91.325(a) (1); 24 C.F.R. §§ 570.487(b), 570.601(a) (2).

<sup>552</sup> Smyth, Allen, and Schnaith, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *supra* note 550.

<sup>553</sup> James A. Kushner, “An Unfinished Agenda: The Federal Fair Housing Enforcement Effort,” *Yale Law & Policy Review*, vol. 6, no. 2, Article 8 (1988), pp. 348-360; U.S. Government Accountability Office, GAO-10-905, *Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans* (Washington, DC, 2010), <http://www.gao.gov/new.items/d10905.pdf>.

<sup>554</sup> Robert G. Schwemm, “Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s ‘Affirmatively Further’ Mandate,” *Kentucky Law Journal*, vol. 100, no. 1 (2001-2002), pp. 125-176; Margery Austin Turner, Rob Santos, Diane K. Levy, Doug Wissoker, Claudia Aranda and Rob Pitingolo, *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. Department of Housing and Urban Development (Washington, DC, 2013) [https://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf).

<sup>555</sup> *U.S. ex rel. Anti-Discrimination Center of Metro New York Incorporated v. Westchester County*, Case No. 1:06-cv-2860-DLC, 2009 WL 455269 (S.D.N.Y. Feb. 24, 2009).

<sup>556</sup> “Westchester Case,” *Anti-Discrimination Center*, <http://www.antibiaslaw.com/westchester-case> (last accessed May 31, 2017).

whitest neighborhoods and affirmatively market them to people of color, and conduct a new analysis of impediments to fair housing.<sup>557</sup> This case was significant due to its reliance on the False Claims Act to enforce the Fair Housing Act’s mandate, although it has been noted that this legal strategy may not be broadly effective for every AFFH claim.<sup>558</sup> Following *Westchester*, HUD, DOJ, and private litigants increased enforcement efforts concerning compliance with the affirmatively furthering fair housing provision of the Fair Housing Act.<sup>559</sup>

In 2015, the Obama administration issued a rule regarding Affirmatively Furthering Fair Housing (AFFH) to enable HUD program participants to meet “long-standing fair housing obligations in their use of HUD funds.”<sup>560</sup> Some of the major provisions of the rule include:

- Implementing a more standardized Fair Housing Assessment to identify and evaluate fair housing issues (replacing the analysis of impediments that was previously required);<sup>561</sup>
- Tasking HUD with providing data to its program participants to aid in improving the assessment, planning, and decision making process for establishing fair housing analyses and goals;<sup>562</sup>
- Incorporating fair housing priorities into the existing housing and community development planning process;<sup>563</sup>
- Encouraging regional approaches to address fair housing issues;<sup>564</sup>
- Providing opportunities for community participation and public comment about fair housing issues, goals, and priorities from individuals or groups that have been traditionally underserved or excluded on the basis of any of the protected characteristics of the Fair Housing Act.<sup>565</sup>

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<sup>557</sup> Smyth, Allen, and Schnaith, “The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients,” *supra* note 550.

<sup>558</sup> *Ibid.*

<sup>559</sup> *Ibid.* See also: *Gallagher v. Magner*, 619 F.3d 823 (8th Cir. 2010) and *Magner v. Gallagher*, 132 S. Ct. 1306 - Supreme Court 2012; *Greater New Orleans Fair Housing Action Center v. HUD*, 639 F.3d 1078; *Greater New Orleans Fair Housing Action Center v. HUD*, 723 F. Supp. 2d; *Texas Low-Income Housing Information Service v. State of Texas*, No. 06-10-0410-8 (HUD May 25, 2010); *HUD v. St. Bernard Parish*, No. 00-11-0024-8 (HUD Jan. 28, 2011); “Recent Filings,” Fair Housing—Fair Lending, May 1, 2011 in reference to *Metropolitan Milwaukee Fair Housing Council v. Waukesha County*, *MSP Real Estate, Inc. v. City of New Berlin*, Nos. 11-C-281, 11-C-608, 2011 WL 3047681 (E.D. Wis. 2011), *Diamond State Community Land Trust of Dover v. Sussex County*; U.S. Government Accountability Office, GAO-10-905, *Housing And Community Grants: HUD Needs to Enhance its Requirements and Oversight of Jurisdictions’ Fair Housing Plans*, September 2010, <http://www.gao.gov/assets/320/311065.pdf>.

<sup>560</sup> U.S. Department of Housing and Urban Development, “HUD Rule on Affirmatively Furthering Fair Housing,” July 2015, [https://www.huduser.gov/portal/affht\\_pt.html#final-rule](https://www.huduser.gov/portal/affht_pt.html#final-rule).

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid.*

<sup>563</sup> *Ibid.*

<sup>564</sup> *Ibid.*

<sup>565</sup> *Ibid.*

This rule provides clarification about HUD program participants' obligations under the law, and provides clear guidelines to meet those obligations in the use of HUD funds, in order to make it easier for grantees to incorporate fair housing goals into the local planning process.<sup>566</sup>

In June 2016, the Secretaries of the U.S. Department of Education, HUD, and the U.S. Department of Transportation released a joint letter to colleagues with guidance about the AFFH rule, highlighting the opportunity for “cross-agency collaboration and strong community involvement.”<sup>567</sup> This letter indicates that this rule “represents a new tool that provides housing, transportation, and education stakeholders the chance to work together to develop thoughtful goals and strategies to promote fair housing choice and equal opportunity through, among other things, improved economic, education, and health outcomes for disadvantaged communities.”<sup>568</sup> This letter encourages state and local educational agencies to:

Develop strategies for drawing school attendance boundaries, selecting sites for new schools, and the placement of boundary-free open enrollment or lottery schools (such as charter schools or magnet schools and programs) with a specific aim of providing equal access to high-quality schools and increasing the diversity of the community served by these schools.

Consult with transportation and housing authorities and housing development agencies when engaging in school site planning, in order to ensure safe passage to school for students and that high-performing schools serve diverse populations, including high-need students.

Work with transportation and housing agencies to share important information on school achievement, graduation rates, and demographic composition to create housing and school choice opportunities that best address the unique needs of students, families, and communities, and expand access to an excellent education.<sup>569</sup>

Furthermore, the letter encourages HUD's program participants to develop “resource sharing opportunities and mechanisms,” and reach out to local education and transportation stakeholders in the fair housing planning process.<sup>570</sup> A number of advocates support this collaborative approach across agencies, and believe that policymakers should develop a routine set of metrics to assess

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<sup>566</sup> *Ibid.*

<sup>567</sup> U.S. Department of Housing and Urban Development, U.S. Department of Education, and U.S. Department of Transportation, “Dear Colleagues Letter—AFFH Rule,” <https://www2.ed.gov/documents/press-releases/06032016-dear-colleagues-letter.pdf>.

<sup>568</sup> *Ibid.*

<sup>569</sup> *Ibid.*

<sup>570</sup> *Ibid.*

housing and education decisions from an equity perspective, considering whether policies will perpetuate racial and socioeconomic segregation in neighborhoods and schools.<sup>571</sup>

In this planning process, HUD program recipients are asked to assess the impact that housing decisions make on local schools.<sup>572</sup> Transportation infrastructure and infrastructure equity are also important components in the planning process, as “transportation allows for the movement that can further lead to more integration of schools and housing.”<sup>573</sup> Additionally, it provides open data and mapping tools to grantees to help with goal setting and tracking fair housing priorities, and provides technical assistance to grantees in the process.<sup>574</sup>

The data that HUD makes available to grantees includes a series of indices to help communities understand segregation patterns and disparities in access to opportunity in their jurisdiction.<sup>575</sup> One of these indices is the School Proficiency Index, which uses school performance data to identify which neighborhoods have either high or low-performing schools nearby.<sup>576</sup> The school data index is limited, as it only captures performance at the elementary school level and not at higher grades, “which is important to a community’s well-being, but likely less geographically tied to individual neighborhoods than elementary schools.”<sup>577</sup>

Advocates who promote linking steps to affirmatively further fair housing to efforts to increase equitable educational opportunity point to one documented success story in Montgomery County, MD, a neighboring suburban county to the District of Columbia.<sup>578</sup> Montgomery County is one of the wealthiest counties in the U.S., and has a highly-rated school district.<sup>579</sup> The county has a well-established zoning policy that allows approximately one-third of its housing units to operate as federally subsidized public housing, affording opportunities to low-income families to reside in wealthier neighborhoods and send their children to better schools.<sup>580</sup> Heather Schwartz, an education policy researcher, examined the longitudinal effects of Montgomery County’s integrative housing policy over a 5-7 year period, and found the following:

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<sup>571</sup> Tegeler Testimony, Briefing Transcript, *supra* note 33, at 209.

<sup>572</sup> *Ibid.*

<sup>573</sup> Lin-Luse Testimony, Briefing Transcript, *supra* note 540, at 220.

<sup>574</sup> *Ibid.*

<sup>575</sup> U.S. Department of Housing and Urban Development, *AFFH Data Documentation*, HUD Exchange, <https://www.hudexchange.info/resources/documents/AFFH-Data-Documentation.pdf>.

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*

<sup>578</sup> Heather Schwartz, “Housing Policy Is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland” *The Century Foundation*, <https://tcf.org/assets/downloads/tcf-Schwartz.pdf>.

<sup>579</sup> *Ibid.*

<sup>580</sup> *Ibid.* at 4.

- Students in public housing assigned to low-poverty schools performed better in math and reading than students in public housing assigned to moderate-poverty schools<sup>581</sup>
- The county's inclusionary zoning program has been successful in integrating families into low-poverty communities on the long-term, thus allowing children to have long-term exposure to schools in low-poverty communities<sup>582</sup>
- The achievement level of students in public housing rose due to residential stability<sup>583</sup>
- Students in public housing benefitted more academically from exposure to low-poverty schools than from exposure to low-poverty neighborhoods<sup>584</sup>

Heather Schwartz concluded, “Since education is an investment with both individual and societal benefits, improving low-income students’ school achievement via integrative housing is a tool that not only can reduce the income achievement gap but also can help stem future poverty.”<sup>585</sup>

While the housing policies in Montgomery County have led to positive outcomes for students from low-income households, the effectiveness of other interventions at the federal, state or local levels to help increase housing opportunity for low-income families have been debated by social scientists.<sup>586</sup> Some research has found that residential relocation can lead to negative outcomes for children.<sup>587</sup> Furthermore, the AFFH rule has been met with a degree of criticism by scholars, advocates, and municipal officials. Some indicate that the AFFH rule amounts to “social engineering” to forcibly impose integration on America’s suburban communities, and that it is HUD’s overreaching attempt to exert its power to dismantle local zoning.<sup>588</sup>

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<sup>581</sup> *Ibid.* at 6.

<sup>582</sup> *Ibid.* at 7.

<sup>583</sup> *Ibid.* at 7.

<sup>584</sup> *Ibid.* at 8.

<sup>585</sup> *Ibid.* at 36.

<sup>586</sup> Hanna Rosin, “American Murder Mystery,” *The Atlantic Monthly*, July/August 2008, <https://www.theatlantic.com/magazine/archive/2008/07/american-murder-mystery/306872/>; Ingrid Gould Ellen, Michael C. Lens, Katherine O’Regan, “American Murder Mystery Revisited: Do Housing Voucher Households Cause Crime?” *NYU Wagner School and Furman Center for Real Estate & Urban Policy*, March 2002, [http://furmancenter.org/files/publications/American\\_Murder\\_Mystery\\_Revisited\\_32012.pdf](http://furmancenter.org/files/publications/American_Murder_Mystery_Revisited_32012.pdf); Xavier de Souza Briggs and Peter Dreier, “Memphis Murder Mystery? No, Just Mistaken Identity,” *Shelterforce*, July 23, 2008, [https://shelterforce.org/2008/07/23/memphis\\_murder\\_mystery\\_no\\_just\\_mistaken\\_identity/](https://shelterforce.org/2008/07/23/memphis_murder_mystery_no_just_mistaken_identity/); Heather L. Schwartz, Liisa Ecola, Kristin J. Leuschner, and Aaron Kofner, “Inclusionary Zoning Can Bring Poor Families Closer to Good Schools,” *MacArthur Foundation—How Housing Matters*, March 2014 [https://www.macfound.org/media/files/HHM\\_-\\_Inclusionary\\_Zoning\\_Can\\_Bring\\_Poor\\_Families\\_Closer\\_to\\_Good\\_Schools.pdf](https://www.macfound.org/media/files/HHM_-_Inclusionary_Zoning_Can_Bring_Poor_Families_Closer_to_Good_Schools.pdf).

<sup>587</sup> Edward Scanlon and Kevin Devine, “Residential Mobility and Youth Well-Being, Research, Policy and Practice Issues,” *Journal of Sociology and Social Welfare*, vol. 28, no. 1, pp. 119-138.

<sup>588</sup> Peter Kirsanow, “Ben Carson Should Rescind the AFFH Rule ASAP,” *National Review*, July 20, 2017 <http://www.nationalreview.com/corner/449686/affirmatively-furthering-racial-engineering>; Mark J. Perry, “This could be the most ambitious and disturbing social-engineering project ever undertaken by the federal gov’t,” *AEI Ideas*, September 11, 2013 <http://www.aei.org/publication/this-could-be-the-most-ambitious-and-disturbing-social->

The Trump administration has neither modified the joint guidance from the previous administration's Secretaries responsible for housing, education, and transportation nor taken steps to rescind the Affirmatively Furthering Fair Housing rule. In July 2017, HUD Secretary Ben Carson indicated that HUD will "reinterpret" the AFFH rule, as he doesn't believe in "extra manipulation at a cost."<sup>589</sup> This statement comes in the wake of recent calls by a group of Republican members of Congress to rescind the rule.<sup>590</sup> It is unclear how Secretary Carson plans to "reinterpret" the rule, and whether that will be an official policy objective of HUD under the Trump administration.<sup>591</sup> Secretary Carson specifically noted that the U.S. Supreme Court last term upheld the constitutionality of claims brought under the Fair Housing Act, consistent with that rule.<sup>592</sup>

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[engineering-project-ever-undertaken-by-the-federal-govt/](#); Robert P. Astorino, "Washington's 'Fair Housing' Assault on Local Zoning," *The Wall Street Journal*, September 5, 2013, <https://www.wsj.com/articles/washingtons-fair-housing-assault-on-local-zoning-1378422087?tesla=y>; Hans Bader, "HUD's 'Affirmatively Furthering Fair Housing' Rule Is about Social Engineering, Not Desegregation," *Competitive Enterprise Institute*, July 20, 2015 <https://cei.org/blog/huds-affirmatively-furthering-fair-housing-rule-about-social-engineering-not-desegregation>; Stanley Kurtz, "Attention America's Suburbs: You Have Just Been Annexed," *The National Review*, July 20, 2015, <http://www.nationalreview.com/corner/421389/attention-americas-suburbs-you-have-just-been-annexed-stanley-kurtz>.

<sup>589</sup> Joseph Lawler and Al Weaver, "Ben Carson: HUD will 'reinterpret' Obama housing discrimination rule," *Washington Examiner*, July 20, 2017, <http://www.washingtonexaminer.com/ben-carson-hud-will-reinterpret-obama-housing-discrimination-rule/article/2629178>.

<sup>590</sup> *Ibid.*

<sup>591</sup> *Ibid.*

<sup>592</sup> *Ibid.*

**CHAPTER 5: FINDINGS AND RECOMMENDATIONS**

## Findings:

1. Quality education is critical to prepare students to be contributing members of a democratic society and competitive workers in a global economy.
2. Although the United States Supreme Court ruled in 1954 that public education is a right that should be available to all on equal terms, the longstanding and persistent reality is that vast funding inequities in our state public education systems is a significant factor in rendering the education available to millions of American public school students profoundly unequal.
3. Many states have cut funding for public schools since the Great Recession of the early 21st century, and the majority of states do not allocate more funding to high-poverty school districts. Fourteen states have “regressive” funding systems where more funds are allocated to affluent districts rather than districts serving low-income students, and some of the most disadvantaged school districts similarly have regressive funding systems for distributing funds to schools.
4. The U.S. Department of Education reported that more than 40 percent of Title I schools spent less on personnel per-pupil than non-Title I schools at the same grade level and that are within the same school district.
5. School districts in states that have not implemented finance reforms have seen relatively no change in funding levels. In addition, schools that serve low-income students generally remain underfunded.
6. These school finance inequities cause harm to students subject to them. As the foremost research skeptic about impact of school spending has put it, “it’s absolutely true that if you spend money well, it has an effect.”<sup>1</sup> In addition, as data on school spending become more accurate, some scholars believe there is concrete empirical evidence that funding is critical to positive student outcomes.
7. Equalizing spending is often not enough to close the achievement gap. Equitable levels of funding allow an equal opportunity for all students to succeed.
8. Low-income students and students of color are often relegated to low-quality school facilities that lack equitable access to teachers, instructional materials, technology and technology support, critical facilities, and physical maintenance. These absences can negatively impact a student’s health and ability to be attentive and can exacerbate existing inequities in student outcomes.
9. Notwithstanding decades of scholarly research, litigation, and periodic Congressional action, school finance inequity is a standard feature of American public schooling and low-income students and students of color disproportionately live its consequences.

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<sup>1</sup> Commission report at 81 [Mark Robison, “Is there no link between spending more on schools and improved student performance?” *Reno Gazette-Journal*, June 2, 2015, <http://www.rgj.com/story/news/education/2015/06/03/fact-checker-is-there-no-link-between-spending-more-on-schools-and-improved-student-performance/28326635/>].

10. Many schools continue to experience racial segregation, including 77 percent of Hispanic students and 73 percent of black students attending schools that are majority students of color. Poverty is strongly linked with enrollment of students of color in schools, causing many racially segregated schools to experience “double segregation” by both race/ethnicity and concentrated poverty.
11. Students attending these schools tend to face more challenges to achievement, such as instability of enrollment due to unstable housing and high teacher turnover.
12. Many students in the U.S. living in segregated neighborhoods and concentrations of poverty do not have access to high-quality schools simply because of where they live, and there is potential for housing policy to help provide better educational opportunities for these students.
13. The reality of American schooling is fundamentally inconsistent with the American ideal of public education operating as a means to equalize life opportunity, regardless of zip code, race, economic status, or life circumstance.
14. Inequity in public education teaches current and future generations that inequality is an acceptable feature of American life.
15. The federal government can and should take effective steps to eradicate the reality and consequence of school finance inequity, ensuring in fact that education is a right available to all on equal terms.

#### Recommendations:

1. We agree with the Equity and Excellence Commission that the federal government must take bold action to address inequitable funding in our nation’s public schools.
2. Congress should:
  - a. incentivize states to adopt equitable public school finance systems that provide meaningful educational opportunity, promote student achievement for all students, and close achievement gaps where they exist;
  - b. incentivize states to ensure adequate funding for students with disabilities, without incentivizing classifying students into special education;
  - c. incentivize states to invest in facilities which can help to provide an equitable environment for students to achieve.
  - d. increase federal funding to supplement state funding with a goal to provide meaningful educational opportunity on an equitable basis to all students in the nation’s public schools;
  - e. promote the collection, monitoring, and evaluation of school spending data to determine how funds are most effectively spent to promote positive student outcomes;
  - f. develop mechanisms to monitor and evaluate the effectiveness of federal spending on enhancing student achievement and closing achievement gaps; and
3. Since the Supreme Court’s decision in *San Antonio Independent School District v. Rodriguez*, a quality education has become even more mandatory for students to gain the skills necessary to work in the new global information age economy and it has become clear that some states and cities are continuing to discriminate against students of color in



the funding of their schools. Congress should make clear that there is a federal right to a public education.

4. Federal, state, and local government should develop incentives to promote communities that are not racially segregated and do not have concentrated poverty, which in turn would positively impact segregation and concentrated poverty in public schools and the educational challenges associated with such schools.

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## COMMISSIONERS' STATEMENTS

### Statement of Chair Catherine E. Lhamon

This report excavates the enduring truism that American public schooling is, and has been, profoundly unequal in the opportunity delivered to students, the dollars spent to educate students, and the determinations of which students are educated together. Notwithstanding many and varied federal efforts to date, federal influence on public education has fallen short of our national ideals, failing to equalize public educational opportunity. Through this report, the Commission calls on Congress to redirect efforts to ensure educational opportunity is meaningful for all the nation's children. I strongly endorse that goal.

I also strongly endorse this report's focus on equity and its effort to refocus public understanding on the education students actually receive, as distinct merely from the dollars that pay for its delivery. We ask the wrong questions when we ask whether we should spend more on our students, and whether spending matters in those students' success. Of course we should, and of course it does. Even Eric Hanushek, who as the Commission report notes is the author of "one of the most widely cited sources for the argument against any correlation between school achievement and spending,"<sup>1</sup> agrees that dollars do matter when spent wisely.<sup>2</sup>

Viewed through a civil rights lens, the relevant question is not whether dollars matter but whether our schools provide opportunity fairly to all, without discriminating on the basis of race, color, national origin, sex including sexual orientation and gender identity, disability, age, religion, or socioeconomic status. When I look for schools for my own two beloved daughters, I do not ask—and have not ever asked—what quantum of dollars the schools spend per-pupil. I do research and ask whether the schools treat all students fairly, meeting their individual needs and challenging their intellectual and social and emotional growth. I meet with their teachers to determine whether the teachers recognize my daughters for the jewels they are and identify ways to unlock their learning and encourage their curiosity while recognizing the individual challenges each of my daughters—like all learners—has. I check on how much the schools welcome parent involvement and how actively the community supports and interacts with the schools. I research the degree to which the schools and my daughters' classes are racially diverse, socioeconomically diverse, and diverse with respect to ability status—and whether educators in the schools support their diverse community equally well across identity statuses. I check the libraries and art studios and music

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<sup>1</sup> U.S. Commission on Civil Rights, *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*, Dec. 2017 [hereinafter Report] at 81.

<sup>2</sup> *Id.* (explaining that "Hanushek, years later, clarified his original statement by explaining, "I have never said that money cannot matter" and "I have only said that the way we have traditionally spent money has not led to better performance." He went on to say, "it's absolutely true that if you spend money well, it has an effect," and that "just putting money into schools and assuming it will be spent well isn't necessarily correct and there is substantial evidence that it will not happen.").

rooms and science labs and counseling centers to confirm they all exist in the schools and that they are well resourced and have diverse representations and communicate welcoming, high expectations for students and families from all backgrounds—and that the counselors know my children and all children in the school. I confirm that the educators in the school are racially diverse and diverse with respect to gender identity. These are essential elements of education, for which dollars and good governance are necessary predicates.

As this report documents, nationally we have not achieved—or frankly come close to—the promise that public schools will be equally available to all, with opportunity for all. That reality is especially devastating all these years after the Court’s recognition in *Brown v. Board of Education* of the dignitary as well as learning-specific harms visited on young people when their governments send them the unmistakable message that they are less worthy than other learners.<sup>3</sup>

One possible conclusion, generally unexamined in the literature, from the reality that while spending levels have increased over time test score results have remained often stagnant and achievement gaps have persisted, is that we have not attended sufficiently to the opportunity actually provided to students in schools, as distinct from the dollars spent or even the test results achieved. Of course we care about outcomes and performance: the end goal is learning. But we know, and have known conclusively since the 1954 *Brown* decision, that every bit as much as schools teach reading, writing, and arithmetic, schools also send implicit as well as explicit messages about students’ worth, likelihood of success, and government support for the people they are.<sup>4</sup> When schools exclude students of color and students with disabilities from their communities, schools send the message that those kids are less valuable. When schools offer fewer material resources and learning opportunities to low-income students and students of color than to their wealthier and white peers, schools send the message that those kids are less valuable. When schools ignore or perpetuate hostile environments for girls, parenting students, students of color, and low-income students, schools teach all of us that some kids are less valuable than others. Unless and until we address the expectations we communicate and offer the same caliber of opportunity to each and every learner, we cannot be surprised that in the aggregate the people we teach rise only to the expectations we teach them.

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<sup>3</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954).

<sup>4</sup> Professor Michelle Fine distilled this core truth in an expert report she submitted in an education reform suit I litigated now 13 years ago. Michelle Fine, *The Psychological and Academic Effects on Children and Adolescents of Structural Facilities' Problems, Exposure to High Levels of Under-Credentialed Teachers, Substantial Teacher Turnover, and Inadequate Books and Materials*, available at [http://decent-schools.org/expert\\_reports/fine\\_report.pdf](http://decent-schools.org/expert_reports/fine_report.pdf). The expert report was one of several produced for *Williams v. State of California*, a class action lawsuit filed in 2000 against the State of California and state education agencies to “provide all students equal access to instructional materials, safe schools, and quality teachers.” California Department of Education, *The Williams Case—An Explanation*, <https://www.cde.ca.gov/eo/ce/wc/wmslawsuit.asp> (last visited Oct. 19, 2017).

The reality is that we know how to do better to educate students. We need to muster the political will to deliver the equity that is within our reach. When I served as Assistant Secretary for Civil Rights at the U.S. Department of Education's Office for Civil Rights (OCR), I had the good fortune to witness local school systems' good practices that both merit replication and serve as proof points for the possible. For instance, when OCR investigated, in a school district in Lynchburg, Virginia, the very resource equity issues this Commission report investigates, OCR was delighted to learn that an elementary school in the district already modeled good governance steps the district ought to adopt districtwide to ensure equity.<sup>5</sup> OCR's review reflected that one elementary school, which a school official described as "high minority, high poverty" and "with a record of poor achievement" that "was being considered for possible closure a number of years ago," made extraordinary student performance gains from the 2006-2007 school year to the 2010-11 school year, after implementing school improvement measures that included an extended school year, remedial intersessions for students in reading and math, daily language arts instruction for two hours, staff development support, implementing an anti-bullying curriculum and measures to limit discipline suspensions, and increasing parental involvement.<sup>6</sup> Students went from performing at 56% and 74% proficiency levels to 83% and 100% proficiency levels after implementing the improvement measures, far exceeding both district and state averages for proficiency.<sup>7</sup> Whereas significant disparities in students' access to high rigor course offerings persisted among schools elsewhere in the district, this elementary school—Bass Elementary—stood out as a model for the district, and for the country, in how to deliver equity for students and thereby incent and invite the students' high achievement. Reviewing the school's successes, OCR concluded that "[t]he improvements in student achievement at Bass suggest that it could be a model for similar improvements at other Division elementary schools."<sup>8</sup>

In another case, after OCR found legally unjustifiable race-based disparities in access to gifted and talented, honors, and advanced placement coursework in an Elk Grove, California school district,<sup>9</sup> the district implemented new criteria and processes for determining which students would have access to the advanced coursework. Positive, inclusive results were almost immediate. The year after OCR released its findings, the school district administered a new entrance test for its third

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<sup>5</sup> Letter from Alice B. Wender, Director, DC Office, Office for Civil Rights, Department of Education to Dr. Scott S. Brabrand, Superintendent, Lynchburg City Schools Re: OCR Case No. 11-10-5004, dated Aug. 18, 2014, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11105004-a.pdf>.

<sup>6</sup> *Id.* at 7.

<sup>7</sup> *Id.* at 8.

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

<sup>9</sup> Letter from Arthur Zeidman, Director, San Francisco Office, Office for Civil Rights, Department of Education to Steven M. Ladd, Superintendent, Elk Grove Unified School District Re: OCR Case No. 09-11-5002, dated Jul. 24, 2014, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09115002-a.pdf>.

graders and “the total number of gifted students rose by nearly 100, with higher proportions of low-income, black, and Hispanic students identified as gifted.”<sup>10</sup>

These examples point to two unsurprising but deeply welcome truths: (1) some schools already are providing equal opportunities for every student and (2) equity is not fantastical and unreachable, but rather possible and achievable. As Sonjhia Lowery, director of the Elk Grove district’s learning-support services, noted: “What we see, being immersed in this work, is that there are a lot of great things happening in schools, but unless the district allows for that to become systemic, then that equity won’t be there for everyone.”<sup>11</sup>

Equity for every public school student is not just our goal, it is the law. Our nation’s students depend on us to achieve it for them. And our nation’s health and prosperity depend on it as well. The Commission’s report calls us to action, operating the nation’s public schools the way each of us would want the schools to operate for our own children. The elements I want for the two children I love most in the world—my own daughters—are the same elements I want for every learner because I know those elements are what matters to meaningful educational opportunity. Dollars make those elements possible and so I care that the schools have enough money to deliver them. And I care more that the schools do in fact deliver them. Congress should—now, this term—take steps to wield federal influence in ways that incent delivery of equitable educational opportunity for each and every student in our nation’s schools.

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<sup>10</sup> Sarah D. Sparks, *Schools Seek to Diversify Gifted, Honors Classes*, Education Week, Oct. 27, 2015, <http://www.edweek.org/ew/articles/2015/10/28/schools-seek-to-diversify-gifted-honors-classes.html>.

<sup>11</sup> *Id.*

## Statement of Commissioner Karen K. Narasaki

I proposed this investigation<sup>1</sup> into funding inequities in our state public education systems after seeing a documentary about the vast disparities in school conditions inner city Philadelphia children were facing compared to those of students in nearby suburbs.<sup>2</sup> The contrast between schools within miles of each other can be stark—bright modern facilities with computers and a broad array of classes versus dark, dilapidated buildings with not even a sufficient number of desks and books.<sup>3</sup> The situation in Philadelphia was particularly infuriating because the state government had taken over the Philadelphia school district and was cutting funding for the city's schools and closing some of them down at the same time the then-governor and state legislature were able to find funding to build a new prison.<sup>4</sup> As I looked further into this issue, I discovered this is the reality for too many students, particularly students of color.

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<sup>1</sup> As the Commissioner who originally proposed this investigation I would like to thank Commission staff for their hard work in completing this report, including our Administrative Services and Clearinghouse Division team, who helped coordinate our briefing in 2016, and our Office of Civil Rights Evaluation team, especially Sarale Sewell for her contributions to this report.

<sup>2</sup> COMMONWEALTH (Audience Network, DirecTV 2014) (documentary examining Philadelphia schools as funding is cut for schools as prisons are being built). For example, Philadelphia parents and teachers had to buy paper and office supplies that schools could not afford, and schools lacked sufficient textbooks for students. See Claudio Sanchez, *Philadelphia Schools: Another Year, Another Budget Crisis*, NPR (Nov. 4, 2014), <http://www.npr.org/blogs/ed/2014/11/04/360146623/philadelphia-schools-another-year-another-budget-crisis>; Jan Carabeo, *Philadelphia Teachers, Students Prepare for Another School Year with Less*, CBS Philly (Aug. 22, 2014), <http://philadelphia.cbslocal.com/2014/08/22/philadelphia-teachers-students-prepare-for-another-school-year-with-less/>; Valerie Strauss, *The Ugly Facts of Life in Philadelphia Public Schools*, Washington Post (Oct. 7, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/10/07/the-ugly-facts-of-life-in-philadelphia-public-schools/>. Yet in an affluent suburb ten miles away, Lower Merion High issues each student a laptop, offers a wide range of courses, and even has a social worker on staff. Emma Brown, *Pa. Schools are the Nation's Most Inequitable. The New Governor Wants to Fix That*, Washington Post (April 22, 2015), [http://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e\\_story.html](http://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e_story.html).

<sup>3</sup> See generally Report at n. 8; compare Tawnell D. Hobbs, *150 Spruce High School students Walk Out in Protest Over Conditions*, DallasNews (Apr. 20, 2016), <https://www.dallasnews.com/news/news/2016/04/29/over-100-spruce-high-school-students-walk-out-in-protest> (Dallas ISD high school students protesting poor conditions including too many substitute teachers, high faculty and staff turnover, bad food, leaking roofs, and broken air conditioning) with H. Drew Blackburn, *A Tale of Two Schools: South Oak Cliff High and Highland Park Fund Disparity*, Texas Monthly (Dec. 10, 2015), [https://www.texasmonthly.com/the-daily-post/south\\_oak\\_cliff\\_walk\\_out/](https://www.texasmonthly.com/the-daily-post/south_oak_cliff_walk_out/) (comparison of Dallas ISD with the wealthy suburb of Highland Park twelve miles away, where its high school is well maintained and the student body is 89 percent white and zero percent economically disadvantaged).

<sup>4</sup> Then-newly elected Pennsylvania Governor Tom Wolf committed to increasing Pennsylvania's spending on public schools and making the state's funding formula more equitable. Brown, *supra* note 2. In 2016 Pennsylvania passed a more equitable funding formula, but advocates argue the state still needs to commit to sustained funding increases. Maya Earls, *New Education Report Slams Pennsylvania School Funding*, Philadelphia Tribune (Mar. 10, 2017), [http://www.phillytrib.com/news/new-education-report-slams-pennsylvania-school-funding/article\\_03a65f46-f424-5659-af0d-92a5d7c94270.html](http://www.phillytrib.com/news/new-education-report-slams-pennsylvania-school-funding/article_03a65f46-f424-5659-af0d-92a5d7c94270.html).

During the Commission's hearing, there was some debate over whether or not funding matters for student achievement. It was heartening to hear that one of the researchers most cited for the proposition that it may not have clarified that funding does matter if it is well spent.<sup>5</sup> Of course it matters. It is obvious that students attending a school without computers, science labs, up-to-date textbooks, and experienced teachers will not be prepared for the 21st century economy as well as those who attend a school with these basic resources.<sup>6</sup> It is equally obvious that more resources are required for schools whose students lack stable housing, adequate nutrition, and health care, and whose parents cannot afford the time to volunteer in the schools or personally contribute funds to enable the schools to maintain classes in the arts, science and debate clubs, and other programs that help to engage and challenge students, that the government should be providing to all children.<sup>7</sup> The continuing reality of the intersection between race and poverty, the resegregation of neighborhoods, and over-reliance on local property taxes to fund schools, make these disparities even more untenable.

Making a quality public education available to every child will go a long way in addressing many of the other racial inequities that continue to hold America back from being able to fully live up to its highest ideals. President Lyndon B. Johnson understood this when he pushed the passage of the Elementary and Secondary Education Act of 1965, along with other civil rights legislation.<sup>8</sup> He understood the sad reality that the states do not always live up to their responsibilities, even when enshrined in their state constitutions.<sup>9</sup> And he understood that the federal government has an important stake, and therefore role, in ensuring that every child has a quality education. This is

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<sup>5</sup> Finding 6 ("it's absolutely true that if you spend money well, it has an effect.").

<sup>6</sup> See Report at 47-48 (discussing inequitable spending on facilities, technology, and instructional materials).

<sup>7</sup> See Report at 86 (discussing the impact of living in poverty on student achievement).

<sup>8</sup> See President Lyndon B. Johnson, Remarks in Johnson City, Texas, upon Signing the Elementary and Secondary Education Bill (Apr. 11, 1965), <http://www.lbjlibrary.net/collections/selected-speeches/1965/04-11-1965.html> ("education is the only valid passport from poverty"); President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), <http://www.lbjlibrary.net/collections/selected-speeches/1965/06-04-1965.html> ("Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man."); Laura Jimenez & Will Ragland, *School Funding is a Civil Right*, U.S. News & World Report (June 9, 2016), <https://www.usnews.com/opinion/articles/2016-06-09/view-the-elementary-and-secondary-education-act-as-a-civil-rights-law> (viewing ESEA as a civil rights law, not just an anti-poverty law).

<sup>9</sup> All fifty states require in their constitutions the creation of a public education system. Emily Parker, Education Commission of the States, *50-State Review: Constitutional Obligations for Public Education* (2016), <http://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> (surveying state constitutions); Emily Zackin, *Looking for Rights in All the Wrong Places: Why State Constitutions Contain America's Positive Rights* 67-105 (2013) (discussing history of public education in state constitutions).



why the Commission has examined this issue 17 times in its 60-year history.<sup>10</sup> Progress has been made but it has been much too slow.

In all too many cases, elected officials still are not delivering on their campaign promises. Witnesses noted at our hearing that instead of asking the question of how much funding does it really take to ensure all of our students are getting a quality education and making sure there are resources to cover that responsibility, states hand school districts a budget number and are told to do more with less.<sup>11</sup> According to Education Law Center's 2017 report card, only four states (Delaware, Minnesota, New Jersey, and Massachusetts) have high funding levels and provide significantly more funding to districts where student poverty is highest.<sup>12</sup> The report also found the number of states that have regressive funding models that provide more money to affluent school districts than those serving low-income students increased from fourteen to twenty-one from the previous year.<sup>13</sup> Moreover, states have gradually disinvested in public school education<sup>14</sup>

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<sup>10</sup> See Report at 17-19. The Commission released its first report on education in 1961, and its State Advisory Committees have also issued numerous reports.

<sup>11</sup> Danielle Farrie, Transcript at 26 ("The sad fact is that most states still fund schools the old-fashioned way, based on how much lawmakers want to spend, not on what students actually need. Only a handful have had the courage to enact funding reforms driven by the cost of essential educational resources, including the extra support for struggling students and other interventions in high-poverty schools."); Jesse Rothstein, Transcript at 176-77 ("States still cannot tell you exactly to the penny how much it costs to educate children").

<sup>12</sup> Bruce Baker *et al.*, Education Law Center, *Is School Funding Fair? A National Report Card 1* (6th ed. 2017), [http://www.edlawcenter.org/assets/files/pdfs/publications/National\\_Report\\_Card\\_2017.pdf](http://www.edlawcenter.org/assets/files/pdfs/publications/National_Report_Card_2017.pdf).

<sup>13</sup> *Id.* At least one state, Illinois, has since taken steps to join the handful of states that are looking at the question of what are the actual costs to provide a quality education to all students. See David Kall *et al.*, McDonald Hopkins, *Illinois: Gov. Rauner Signs New School Funding Formula into Law* (2017), <https://mcdonaldhopkins.com/Insights/Blog/Tax-and-Benefits-Challenges/2017/09/07/Illinois-Gov-Rauner-signs-new-school-funding-formula-into-law> (describing Illinois' new evidence based funding model).

<sup>14</sup> Report at 36-38. An example of state legislators working to prevent the adequate funding of public schools occurred in 2015 when Mississippi citizens secured enough signatures for a ballot initiative named Initiative 42 to amend the Mississippi Constitution to (1) secure a child's "fundamental right to educational opportunity," (2) require the state to fund an "adequate and efficient system of free public schools," and (3) give state courts the power to enforce the rule. For the first time in state history, legislators passed an amendment to the citizen measure confusingly named Initiative 42A, which only amended the constitution to guarantee an "effective system of free public schools." Ballotpedia, *Mississippi Public School Support Amendments, Initiative 42 and Alternative 42* (2015), [http://ballotpedia.org/Mississippi\\_Public\\_School\\_Support\\_Amendments,\\_Initiative\\_42\\_and\\_Alternative\\_42\\_\(2015\)](http://ballotpedia.org/Mississippi_Public_School_Support_Amendments,_Initiative_42_and_Alternative_42_(2015)) (last visited Oct. 26, 2017). Initiative 42 actually received support from a majority of voters, but ultimately failed because a majority did not support amending the state constitution (a prerequisite) in-part because "confusion with the ballot caused folks to just not know what to do." Kate Royals, *School Funding Ballot Issue Initiative 42 Fails*, Clarion Ledger (Nov. 3, 2015), <https://www.clarionledger.com/story/news/2015/11/03/initiative-42-election-results/75036674/>. For Fiscal Year 2016 Mississippi passed a \$2.5 billion elementary and secondary education spending bill—its largest ever—but it was still \$211 million short of what was mandated under Mississippi's school funding formula. Jeff Amy, *Miss. Senate Sends \$2.5B Education Budget to Bryant*, Hattiesburg American (Mar. 17, 2015), <http://www.hattiesburgamerican.com/story/news/politics/2015/03/17/mississippi-education-budget/24933801/> (Mississippi last fully funded education in 2008).

and maintain local revenue models that rely on property taxes and lack local control,<sup>15</sup> which all contribute to overall funding inequities.

America has been the envy of the world precisely because quality public education is what made it possible for many to move in one generation from poverty to prosperity. Now America ranks only 40th in the world in math, 25th in science, and 24th in reading literacy (compared to 73 other similar countries) because of its failure to sufficiently invest in education, which threatens our economic well-being as well as moral standing in the world.<sup>16</sup> The technological revolution has so changed the nature of our economy, it has become extremely difficult for someone with an inadequate education to find jobs that pay a living wage.

This is why I believe it is time for the courts to revisit the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*, which held education is not a fundamental right under the Constitution.<sup>17</sup> Numerous scholars have since developed legal theories that support a different finding.<sup>18</sup> Education has been shown to result in healthier lives, a highly educated workforce, reduced crime, and increased political participation.<sup>19</sup> While some state courts have been able to address inadequate spending levels and inequitable education funding formulas under their state constitutions, until there is a federal right to a quality education many states will continue to fail to equitably fund their schools.<sup>20</sup>

What I find most heartbreaking about inequitable funding of our public schools is the message we are sending children attending underfunded schools that adults do not care about their lives and that racial inequality is acceptable.<sup>21</sup> Jameria Miller, a high school student, had to run to Spanish

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<sup>15</sup> Report at 32-33.

<sup>16</sup> Joe Heim, *On the World Stage, U.S. Students Fall Behind*, Washington Post (Dec. 6, 2016), [https://www.washingtonpost.com/local/education/on-the-world-stage-us-students-fall-behind/2016/12/05/610e1e10-b740-11e6-a677-b608fbb3aaf6\\_story.html?utm\\_term=.c86622f32542](https://www.washingtonpost.com/local/education/on-the-world-stage-us-students-fall-behind/2016/12/05/610e1e10-b740-11e6-a677-b608fbb3aaf6_story.html?utm_term=.c86622f32542).

<sup>17</sup> 411 U.S. 1 (1973).

<sup>18</sup> See Report at 34-35 (discussing revisiting the decision). Moreover, in dicta the Court noted the Constitution might protect "some identifiable quantum of education" to ensure the meaningful exercise of other fundamental rights, like free speech and participation in the political process. *Rodriguez*, 411 U.S. at 36-37; *Papasan v. Allain*, 478 U.S. 265, 285 (1986) ("[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.").

<sup>19</sup> See Dana Mitra, Pennsylvania State University, *Pennsylvania's Best Investment: The Social and Economic Benefits of Public Education* (2011), [https://www.elc-pa.org/wp-content/uploads/2011/06/BestInvestment\\_Full\\_Report\\_6.27.11.pdf](https://www.elc-pa.org/wp-content/uploads/2011/06/BestInvestment_Full_Report_6.27.11.pdf) (discussing impact of education on employment, crime, health, civic and political participation, and inequality); John Hudson, *An Urban Myth That Should Be True*, The Atlantic (July 2, 2012), <https://www.theatlantic.com/business/archive/2012/07/an-urban-myth-that-should-be-true/259329/> (discussing connection between third grade reading scores, high school dropout rates, and incarceration rates).

<sup>20</sup> Report at 38-40 (discussion state litigation trends and mixed results).

<sup>21</sup> Finding 14 ("Inequity in public education teaches current and future generations that inequality is an acceptable feature of American life.").

class in order to ensure she got a blanket because her classroom's walls are not insulated.<sup>22</sup> Having previously attended a more affluent school district when her family could afford to live there, she knows that other students have access to a better education. She feels, "It's never going to be fair. [My former classmates are] always going to be a step ahead of us. They'll have more money than us, and they'll get better jobs than us, always."<sup>23</sup>

This is America. Every child deserves a quality education that does not depend on their zip code. As you read our report, I hope you will keep Miss Miller's words in mind.

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<sup>22</sup> Cory Turner *et al.*, *Can More Money Fix America's Schools?*, NPR (Apr. 25, 2016), [www.npr.org/sections/ed/2016/04/25/468157856/can-more-money-fix-americas-schools](http://www.npr.org/sections/ed/2016/04/25/468157856/can-more-money-fix-americas-schools).

<sup>23</sup> *Id.*

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## Dissenting Statement of Commissioner Peter Kirsanow

### Money and Education

The Commission’s report and recommendations boil down to one thing: *spend more money*.

Fine. Spend more money. Lots and lots of money. Spew money into the educational air like you’re drilling for oil and just hit a gusher. But it won’t matter. Nothing much will change. Because the primary problem with our education system is *not* lack of money. (Get out the defibrillators.)

The Department of Education periodically issues the Digest of Education Statistics, which, among other things, tracks education spending over time. On the next several pages there is a chart of annual per-pupil expenditures from 1919-2013.<sup>1</sup> The figures below emphatically confirm that the definition of insanity is doing the same thing (in this case, increasing spending) over and over and expecting a different result.

Table 236.55: Total and current expenditures per pupil in public elementary and secondary schools: Selected years, 1919–20 through 2013–14									
School year	Expenditure per pupil in average daily attendance				Expenditure per pupil in fall enrollment <sup>1</sup>				
	Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		
	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Annual percent change in current expenditure
1	2	3	4	5	6	7	8	9	10
1919-20	\$64	\$53	\$800	\$667	\$48	\$40	\$598	\$499	—
1929-30	108	87	1,510	1,207	90	72	1,251	999	—
1931-32	97	81	1,601	1,340	82	69	1,355	1,135	—
1933-34	76	67	1,372	1,214	65	57	1,165	1,032	—
1935-36	88	74	1,525	1,288	74	63	1,290	1,090	—
1937-38	100	84	1,658	1,395	86	72	1,424	1,198	—
1939-40	106	88	1,803	1,502	92	76	1,562	1,302	—
1941-42	110	98	1,681	1,502	94	84	1,440	1,286	—
1943-44	125	117	1,705	1,600	105	99	1,436	1,348	—

<sup>1</sup> Table 236.55, Digest of Education Statistics, National Center for Education Statistics (2016), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_236.55.asp?current=yes](https://nces.ed.gov/programs/digest/d16/tables/dt16_236.55.asp?current=yes).

**Table 236.55: Total and current expenditures per pupil in public elementary and secondary schools: Selected years, 1919–20 through 2013–14**

School year	Expenditure per pupil in average daily attendance				Expenditure per pupil in fall enrollment <sup>1</sup>				
	Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Annual percent change in current expenditure
	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	
1	2	3	4	5	6	7	8	9	10
1945-46	146	136	1,905	1,782	124	116	1,623	1,518	—
1947-48	205	181	2,095	1,856	179	158	1,829	1,621	—
1949-50	260	210	2,620	2,116	231	187	2,325	1,878	—
1951-52	314	246	2,851	2,231	275	215	2,496	1,953	—
1953-54	351	265	3,110	2,346	312	236	2,765	2,087	—
1955-56	387	294	3,430	2,608	354	269	3,136	2,384	—
1957-58	447	341	3,733	2,846	408	311	3,405	2,596	—
1959-60	471	375	3,820	3,042	440	350	3,568	2,842	—
1961-62	517	419	4,099	3,321	485	393	3,847	3,117	—
1963-64	559	460	4,316	3,556	520	428	4,017	3,310	—
1965-66	654	538	4,882	4,015	607	499	4,533	3,728	—
1967-68	786	658	5,511	4,612	732	612	5,126	4,290	—
1969-70	955	816	6,024	5,147	879	751	5,546	4,738	—
1970-71	1,049	911	6,295	5,465	970	842	5,819	5,052	6.6
1971-72	1,128	990	6,531	5,731	1,034	908	5,989	5,256	4.0
1972-73	1,211	1,077	6,738	5,994	1,117	993	6,216	5,529	5.2
1973-74	1,364	1,207	6,970	6,169	1,244	1,101	6,356	5,626	1.7
1974-75	1,545	1,365	7,107	6,278	1,423	1,257	6,547	5,783	2.8
1975-76	1,697	1,504	7,292	6,460	1,563	1,385	6,715	5,949	2.9
1976-77	1,816	1,638	7,374	6,648	1,674	1,509	6,795	6,126	3.0
1977-78	2,002	1,823	7,618	6,935	1,842	1,677	7,006	6,378	4.1
1978-79	2,210	2,020	7,687	7,028	2,029	1,855	7,059	6,454	1.2
1979-80	2,491	2,272	7,644	6,973	2,290	2,088	7,027	6,410	-0.7
1980-81	2,742 <sup>5</sup>	2,502	7,543 <sup>5</sup>	6,881	2,529 <sup>5</sup>	2,307	6,958 <sup>5</sup>	6,347	-1.0
1981-82	2,973 <sup>5</sup>	2,726	7,528 <sup>5</sup>	6,901	2,754 <sup>5</sup>	2,525	6,974 <sup>5</sup>	6,393	0.7
1982-83	3,203 <sup>5</sup>	2,955	7,777 <sup>5</sup>	7,174	2,966 <sup>5</sup>	2,736	7,201 <sup>5</sup>	6,643	3.9

**Table 236.55: Total and current expenditures per pupil in public elementary and secondary schools: Selected years, 1919–20 through 2013–14**

School year	Expenditure per pupil in average daily attendance				Expenditure per pupil in fall enrollment <sup>1</sup>				
	Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Annual percent change in current expenditure
	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	
1	2	3	4	5	6	7	8	9	10
1983-84	3,471 <sup>5</sup>	3,173	8,126 <sup>5</sup>	7,429	3,216 <sup>5</sup>	2,940	7,528 <sup>5</sup>	6,882	3.6
1984-85	3,722 <sup>5</sup>	3,470	8,385 <sup>5</sup>	7,818	3,456 <sup>5</sup>	3,222	7,785 <sup>5</sup>	7,259	5.5
1985-86	4,020 <sup>5</sup>	3,756	8,802 <sup>5</sup>	8,224	3,724 <sup>5</sup>	3,479	8,155 <sup>5</sup>	7,619	5.0
1986-87	4,308 <sup>5</sup>	3,970	9,228 <sup>5</sup>	8,505	3,995 <sup>5</sup>	3,682	8,558 <sup>5</sup>	7,887	3.5
1987-88	4,654 <sup>5</sup>	4,240	9,573 <sup>5</sup>	8,721	4,310 <sup>5</sup>	3,927	8,865 <sup>5</sup>	8,077	2.4
1988-89	5,108	4,645	10,042	9,132	4,737	4,307	9,313	8,468	4.8
1989-90	5,547	4,980	10,409	9,345	5,172	4,643	9,705	8,712	2.9
1990-91	5,882	5,258	10,465	9,355	5,484	4,902	9,757	8,722	0.1
1991-92	6,072	5,421	10,468	9,346	5,626	5,023	9,700	8,660	-0.7
1992-93	6,279	5,584	10,498	9,335	5,802	5,160	9,701	8,626	-0.4
1993-94	6,489	5,767	10,575	9,399	5,994	5,327	9,767	8,681	0.6
1994-95	6,723	5,989	10,650	9,488	6,206	5,529	9,832	8,758	0.9
1995-96	6,959	6,147	10,733	9,480	6,441	5,689	9,934	8,774	0.2
1996-97	7,297	6,393	10,942	9,586	6,761	5,923	10,138	8,882	1.2
1997-98	7,701	6,676	11,344	9,834	7,139	6,189	10,518	9,118	2.7
1998-99	8,115	7,013	11,752	10,156	7,531	6,508	10,906	9,424	3.4
1999-2000	8,589	7,394	12,089	10,406	8,030	6,912	11,302	9,729	3.2
2000-01	9,180	7,904	12,492	10,756	8,572	7,380	11,665	10,043	3.2
2001-02	9,611	8,259	12,852	11,043	8,993	7,727	12,025	10,333	2.9
2002-03	9,950	8,610	13,019	11,265	9,296	8,044	12,164	10,525	1.9
2003-04	10,308	8,900	13,198	11,395	9,625	8,310	12,324	10,641	1.1
2004-05	10,779	9,316	13,398	11,580	10,078	8,711	12,528	10,828	1.8
2005-06	11,338	9,778	13,576	11,709	10,603	9,145	12,696	10,950	1.1
2006-07	12,015	10,336	14,024	12,064	11,252	9,679	13,133	11,298	3.2
2007-08	12,759	10,982	14,361	12,361	11,965	10,298	13,467	11,591	2.6

**Table 236.55: Total and current expenditures per pupil in public elementary and secondary schools: Selected years, 1919–20 through 2013–14**

School year	Expenditure per pupil in average daily attendance				Expenditure per pupil in fall enrollment <sup>1</sup>				
	Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		Unadjusted dollars <sup>2</sup>		Constant 2015–16 dollars <sup>3</sup>		
	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Total expenditure <sup>4</sup>	Current expenditure	Annual percent change in current expenditure
1	2	3	4	5	6	7	8	9	10
2008-09	13,033	11,239	14,467	12,475	12,222	10,540	13,567	11,699	0.9
2009-10	13,035	11,427	14,331	12,563	12,133	10,636	13,339	11,693	-0.1
2010-11	12,926	11,433	13,931	12,322	12,054	10,663	12,991	11,492	-1.7
2011-12	12,796	11,362	13,398	11,897	11,991	10,648	12,556	11,149	-3.0
2012-13 <sup>6</sup>	12,859	11,509	13,243	11,854	12,033	10,771	12,394	11,093	-0.5
2013-14	13,187	11,831	13,373	11,998	12,335	11,066	12,509	11,222	1.2

—Not available.

<sup>1</sup> Data for 1919-20 to 1953-54 are based on school-year enrollment.

<sup>2</sup> Unadjusted (or “current”) dollars have not been adjusted to compensate for inflation.

<sup>3</sup> Constant dollars based on the Consumer Price Index, prepared by the Bureau of Labor Statistics, U.S. Department of Labor, adjusted to a school-year basis.

<sup>4</sup> Excludes “Other current expenditures,” such as community services, private school programs, adult education, and other programs not allocable to expenditures per student at public schools.

<sup>5</sup> Estimated.

<sup>6</sup> Revised from previously published figures.

NOTE: Beginning in 1980-81, state administration expenditures are excluded from both “total” and “current” expenditures. Current expenditures include instruction, support services, food services, and enterprise operations. Total expenditures include current expenditures, capital outlay, and interest on debt. Beginning in 1988-89, extensive changes were made in the data collection procedures.

SOURCE: U.S. Department of Education, National Center for Education Statistics, *Biennial Survey of Education in the United States*, 1919-20 through 1955-56; *Statistics of State School Systems*, 1957-58 through 1969-70; *Revenues and Expenditures for Public Elementary and Secondary Education*, 1970-71 through 1986-87; and Common Core of Data (CCD), “National Public Education Financial Survey,” 1987-88 through 2013-14. (This table was prepared July 2016.)

From 1919 to 2013, per-pupil expenditures increased from approximately \$496 (adjusted for inflation) to \$11,011.<sup>2</sup> Even taking into account increases in enrollment<sup>3</sup> and curricula, it is

<sup>2</sup> *Id.*

<sup>3</sup> “120 Years of American Education: A Statistical Portrait,” National Center for Education Statistics, U.S. Department of Education, at 6 (1991), <https://nces.ed.gov/pubs93/93442.pdf> (over sixty percent of white children and approximately fifty percent of black and other-race children aged 5-19 were enrolled in school in 1919).



difficult to argue that the average contemporary American student's academic performance is twenty-two times better than that of his 1919 counterpart. Indeed, in some respects, it is inarguable student performance has gotten worse.

According to the Commission's report, "school districts spend an average of \$11,066 on each student each year,"<sup>4</sup> but "the highest poverty districts receive an average of \$1,200 less per-pupil than the lowest-poverty districts, and districts serving the largest numbers of students of color receive about \$2,000 less per student than districts who serve fewer students of color." If *more than doubling* per-pupil expenditures since 1970 has made almost no difference in NAEP scores, an extra \$1,200 or \$2,000 per pupil per year won't make much of a difference.<sup>5</sup> In fact, some of our panelists stated as much. Catherine Brown from the Center for American Progress stated that she believed that low-income students needed to receive 150 to 200 percent as much per-pupil spending as more affluent students.<sup>6</sup> Even then, as shown below, the evidence suggests the results would not be appreciably different.

The United States has dramatically increased education spending over the past 100 years, yet we have little to show for it. A study of long-term NAEP trends found that reading scores for nine-year-olds had increased from 208 to 221 from 1971 to 2012 and thirteen-year-old reading scores had increased from 255 to 263 from 1973 to 2012. Math scores for nine-year-olds had increased from 219 to 244, and math scores for thirteen-year-olds had increased from 266 to 285. These modest improvements are, however, temporary and fleeting, *as the reading and math scores of seventeen-year-olds were essentially unchanged*.<sup>7</sup> In contrast, in the 1971-72 school year the United States spent an average of \$5,692 (in 2015 dollars) per pupil, and in the 2011-12 school year it spent \$11,817 (in 2015 dollars). So the math and reading scores remained static over 40 years while spending doubled. Should we, then, triple educational spending? Quadruple it? What is the last dollar that will finally move the needle by even one point? And even if we could move the needle by ten points, where does the money come from? Current expenditures for education total \$634 billion, an amount nearly equal to the entire federal deficit.<sup>8</sup> If money made much of a difference, we should be seeing far greater improvements in NAEP scores than we are.<sup>9</sup>

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<sup>4</sup> Report at 4.

<sup>5</sup> Neal McCluskey, "Sequestration Needed for Federal Education Programs," Testimony before Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, July 15, 2012 ("overall per-pupil expenditures through high school graduation have nearly tripled since 1970."), <https://www.cato.org/publications/congressional-testimony/sequestration-needed-federal-education-programs>.

<sup>6</sup> Transcript at 244-45.

<sup>7</sup> "Trends in Academic Progress," National Center for Education Statistics, U.S. Dep't of Ed., at 1 (2013), <https://nces.ed.gov/nationsreportcard/subject/publications/main2012/pdf/2013456.pdf>.

<sup>8</sup> "Fast Facts," National Center for Education Statistics, <https://nces.ed.gov/fastfacts/display.asp?id=66>.

<sup>9</sup> Neal McCluskey, "Sequestration Needed for Federal Education Programs," Testimony before Subcommittee on Labor, Health and Human Services, Education, and Related Agencies, July 15, 2012 ("overall per-pupil

## Choice and Education

The report and findings and recommendations repeat over and over that high-poverty districts tend to have less experienced teachers.<sup>10</sup> There are hints in the Commission’s transcript that salary disparities are *not* the primary reason that less experienced teachers are clustered in high-poverty schools, but largely because high-poverty schools are often unpleasant places to work—in large part because of crime and disciplinary issues.<sup>11</sup> Increasing teacher pay will only do so much to retain good, experienced teachers in low-income districts. As Professor Rivkin stated at our briefing, “a lot of [within-district differences] are due to the fact that teachers who are more experienced and earn higher salaries choose to work in the less-poor schools. And I do think that justifies higher pay in schools serving more disadvantaged children, particularly if the teacher is effective. But I think ... we should be open about that, that *a lot of this is driven by choices.*” [emphasis added]<sup>12</sup> Professor Jacob Vigdor testified, “There is a lot of evidence suggesting that teachers favor jobs that are in lower poverty settings. *Teachers will often take a pay cut in order to move from a job in a high poverty school to a job in a low poverty school.*” [emphasis added]<sup>13</sup>

In some cases, offering more money to teachers may be enough to convince some high-quality teachers to stay in high-poverty schools. Professor Vigdor suggested that districts would need to offer salaries that were 50 to 60 percent higher in order to induce good teachers to remain in high-poverty schools.<sup>14</sup> As I stated during the briefing, however, at some point we run into fiscal reality. Maybe some states have enough money to increase the pay of some teachers by 50 to 60 percent.<sup>15</sup> However, we simply do not have the money to make up for the abysmal family situations of these children, which is essentially what we are trying do with “wraparound services” and social workers

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expenditures through high school graduation have nearly tripled since 1970.”), <https://www.cato.org/publications/congressional-testimony/sequestration-needed-federal-education-programs>.

<sup>10</sup> Report at 5 (“poorer schools often have less experienced and lower-paid teachers”); Report at 27 (“Higher-paid, more experienced teachers tend to be employed at lower-needs schools, and lower-paid, less experienced teachers are congregated in high-needs schools.”).

<sup>11</sup> Professor Jacob Vigdor, Transcript at 200.

Another thing that I’ll tell you about is discipline. It is a pattern that schools serving higher poverty, intense poverty student bodies adopt stricter disciplinary practices. ... These schools are serving a high risk population. They react to this high risk population by imposing strict standards.

This is a polite way of saying that children in higher poverty schools tend to be less well-behaved than their better-off peers, and schools adopt strict discipline policies in an effort to maintain some semblance of order.

See also Katherine Kersten, “No Thug Left Behind,” City Journal, Winter 2017, <https://www.city-journal.org/html/no-thug-left-behind-14951.html>.

<sup>12</sup> Transcript at 178.

<sup>13</sup> Transcript at 199.

<sup>14</sup> Transcript at 202.

<sup>15</sup> What is to be done with the teacher in a wealthy district who turns out National Merit Scholars year after year? Should she not be financially rewarded because she started with more promising students?

and free lunches and all the other non-educational services mentioned at this briefing.<sup>16</sup> Those services traditionally are provided by families. No amount of money will transform schools into adequate substitutes for families.

Some of us were raised in families much poorer in a material sense than many of these families. The children in these families suffer less from material poverty than from the structural poverty of growing up in chaotic, dysfunctional, single-parent households. This is not blaming the victim. This is acknowledging reality, something the report strenuously endeavors to avoid.

### **Housing and Coercion**

One subtle current flowing through this report is “racial/societal engineering.” The report is concerned with so-called “residential segregation,” which it blames for poor educational outcomes.<sup>17</sup> I reject the use of the term “segregation,” which is used to elicit an emotional reaction by conjuring up visions of lunch counters and *Brown v. Board*. This vision is inaccurate. There are no racial covenants in the United States today. A person of any race is legally entitled to buy or rent a house in any area and send his child to the local public school. The fact that one’s financial circumstances may constrain one to live in a less expensive neighborhood is not segregation. As

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<sup>16</sup> For example, consider the Abecedarian early childhood treatment program, which provided full-day, intensive interventions to 57 high-risk children from infancy until entrance into kindergarten. The primary outcome was that the treated group completed an average of 13.46 years of education compared to 12.31 for the control group, and 12 members of the treated group completed bachelor’s degrees compared to 3 from the control group. The treatment group was more likely to be employed and less likely to use public assistance, although their earnings were substantially the same as the control group and they were as likely to engage in criminal activity. See Frances Campbell et al., “Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up,” *Dev. Psych.* 48(4): 1033-1043, July 2012, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3989926/>. Even these modest results have been questioned by other researchers and likely cannot be replicated on a large scale. See Dale C. Farran and Mark Lipsey, “Evidence for the Benefits of State Pre-kindergarten Programs: Myth and Misrepresentation,” Peabody Research Institute, Vanderbilt University, Nov. 9, 2015, at 18 (“there is virtually no methodologically credible evidence that these immediate positive effects of state pre-k programs are sustained for any length of time past the end of the pre-k year.”), [https://peabody.vanderbilt.edu/research/pri/Evidence\\_for\\_BenefitsofStatePK\\_Myth\\_Misrepresentation.pdf](https://peabody.vanderbilt.edu/research/pri/Evidence_for_BenefitsofStatePK_Myth_Misrepresentation.pdf); Charles Murray, “The shaky science behind Obama’s universal pre-K,” American Enterprise Institute, Feb. 20, 2013, <http://www.aei.org/publication/the-shaky-science-behind-obamas-universal-pre-k/>; Dale C. Farran and Mark W. Lipsey, “Misrepresented evidence doesn’t serve pre-K programs well, Brookings,” Feb. 24, 2017, <https://www.brookings.edu/blog/education-plus-development/2017/02/24/misrepresented-evidence-doesnt-serve-pre-k-programs-well/>; Lindsey Burke, “Research Review: Universal Preschool May Do More Harm than Good,” Heritage Foundation, May 11, 2016, <http://www.heritage.org/education/report/research-review-universal-preschool-may-do-more-harm-good>.

<sup>17</sup> Recommendation 4.

Federal, state, and local government should develop incentives to promote communities that are not racially segregated and do not have concentrated poverty, which in turn would positively impact segregation and concentrated poverty in public schools and the educational challenges associated with such schools.

Justice Thomas has written, “Racial imbalance is not segregation, and the mere incantation of terms like resegregation and remediation cannot make up the difference.”<sup>18</sup>

The Commission majority recommends:

Federal, state, and local government should develop incentives to promote communities that are not racially segregated and do not have concentrated poverty, which in turn would positively impact segregation and concentrated poverty in public schools and the educational challenges associated with such schools.<sup>19</sup>

Some form of societal or racial engineering by bureaucrats will be necessary to implement this suggestion on a broad scale. The Commission presumably has HUD’s Affirmatively Furthering Fair Housing rule in mind.<sup>20</sup> “Incentives” are the carrots that are followed by *sticks* if a community is recalcitrant, and thus are freedoms subtly but inevitably eroded. As I recently wrote:

HUD has already forced some communities into overreaching agreements. These communities include New York’s Westchester County and Dubuque, Iowa.<sup>21</sup> These communities have already been deprived of a degree of self-government, and that injury persists as long as these agreements are in effect. Dubuque already has a waitlist for Section 8 housing assistance, but a “Voluntary” Compliance Agreement requires it to advertise in Chicago in an attempt to attract *more* Section 8 voucher holders.<sup>22</sup> Dubuque residents

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<sup>18</sup> Parents Involved in *Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 750 (2007)(Thomas, J., concurring).

<sup>19</sup> Recommendation 4.

<sup>20</sup> Commissioner Narasaki, Transcript at 188.

The other [question] is what HUD recently announced this year in terms of trying to really use its programming on fair housing to give poor families more of a choice of where they can live. And hopefully open up more opportunities for them to live in better school districts and more integrated situations which some researchers say help to contribute to better educational outcomes.

<sup>21</sup> Jeremy Carl, “The Obama Administration Thinks Hillary’s Hometown is Racist: Does Congress Agree?,” National Review Online, May 18, 2016, <http://www.nationalreview.com/article/435531/obama-administration-thinks-hillarys-hometown-racist-does-congress-agree>;

<sup>22</sup> Deborah D. Thornton, “The Nanny State Is Expanding—and Private Property Rights Are Decreasing,” Public Interest Institute, at 11-14 (June 2015), <http://www.limitedgovernment.org/publications/pubs/studies/ps-15-6.pdf>; Voluntary Compliance Agreement Between the U.S. Dep’t of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 18, <http://cityofdubuque.org/DocumentCenter/View/22707>.

The Affordable Housing section shall also include specific one year goals to Affirmatively Further Fair Housing, by including a plan to increase the number of minorities, specifically African American households, to be provided affordable housing through activities that provide rental assistance, family self-sufficiency programs, or homeownership assistance. This may include marketing and information sharing of the programs availability and participation benefits.

continue to be harmed by the Compliance agreement, which prohibits Dubuque from preferring its own residents who are in need of housing to those from outside the area, or even outside the state.<sup>23</sup> The people on the housing assistance waitlist in Dubuque are too white, so the city must try to attract out-of-state African-Americans to join its waitlist—which of course makes the list even longer.

Insofar as any such agreements require communities to build types of housing mandated by HUD—for example, constructing apartment buildings in communities where the residents prefer to have single-family homes—the character of these communities will be irreversibly changed.<sup>24</sup>

The American tradition of local control of schools and communities is part of who we are as a people and precedes the founding of the Republic. The report downplays this by claiming:

Some scholars believe that local participation in school board governance has been diminished to the point where it may no longer exist in certain localities, notably in low-income communities and communities of color. These residents often lack the political power and financial means to influence local governance to create favorable policies and reforms, and these communities may lack funds for implementation of any desired reforms. Additionally, parents do not have much control over choosing schools for their children, often restricted by their ability to afford to live in certain neighborhoods.<sup>25</sup>

It will always be the case that some people will have more political power than others. Regardless, even if residents of low-income neighborhoods have less political power than residents of another neighborhood, removing local control *will take away the little political power they have*. It may

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<sup>23</sup>Voluntary Compliance Agreement Between the U.S. Dep't of Housing and Urban Development and Dubuque, Iowa, HUD Compliance Case Review Number 07-11-R001-6, Mar. 31, 2014, at 19, <http://cityofdubuque.org/DocumentCenter/View/22707>.

Availability of Application: remove the clause that “or may accept only applications meeting certain criteria such as limiting the waiting list to applicants with local preference only.”

Local Preferences: Delete the final paragraph pertaining to residency preferences. *Id.* at 25.

[T]he City shall develop and submit to the Department an Outreach Plan to ensure that information regarding the City's Section 8 Program, including the opening of the waitlist and the corollary programs offered by the City, reaches minority populations within Dubuque and surrounding interstate areas. . . .

If the information submitted to HUD indicates that the Outreach Plan is not successfully reaching a diverse pool of potential applicants as evidenced by a lack of increased African Americans on the waitlist and/or a lack of increased participation in the program by African American families, HUD may prescribe additional Outreach activities that do not constitute an undue burden . . . .

<sup>24</sup> Letter from Commissioner Peter Kirsanow to Secretary Ben Carson, July 20, 2017, <http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/Letter-to-Secretary-Carson-re-AFFH-July-20-2017.pdf>.

<sup>25</sup> Report at 33.

be difficult for a single mother to make arrangements to show up at the school board meeting, but it is at least feasible. If it is important enough to her, she has the ability to show up in person and address school board members face-to-face. On the other hand, it will be virtually impossible for her to determine which bureaucrat in the state capitol or the federal Department of Education is responsible for a particular decision made at her child's school. It is often difficult even for members of Congress and political appointees in the executive branch to determine that functionary Winston Smith in Cubicle 114-A is responsible for a particular policy. And even if that single mother determines that Winston Smith is the appropriate functionary, all she can do is call or send an email, which is much less effective than an in-person discussion. Winston Smith may be smarter than the school board members (obviously, he's from Washington!), he may even be better-intentioned than the school board members (virtue, after all, resides primarily inside the Beltway), but there is no substitute for on-the-ground knowledge of the community and community members' ability to confront you in person—and vote you out of office.

Removing local control is fundamentally at odds with the American ideal of representative government. Citizens should be in charge of making political decisions, including school funding. It is their money, after all. And one of the important aspects of representative government is that it allows the majority to express its will on political issues. The panjandrums of Washington, D.C. have a different vision, one that coerces polities and individuals alike. As one of the panelists at our briefing stated:

There are lots of localities. They have their own rules and laws. And so, one lever that you look for is how do you incentivize adoption of policies that may be useful in fair housing and opening up areas.

So the local policy grants were designed around—it was almost a light version of Race to the Top. Could we have some incentive grants for localities to adopt policies that could be particularly useful for increasing affordable housing and affordable housing in areas of opportunity?

That has not actually passed yet in a budget. But that's how it would be used. A way in which you could imagine it being used that could be effective would be an area that would adopt source of income protection.

**It is currently legal in this country to discriminate on the basis of whether somebody has a housing voucher. And so, in fact, perfectly legal in a large majority of states. [Y]ou know, a first step for getting voucher households into a broader array of choices would be imagining prohibiting that discrimination.<sup>26</sup> [emphasis added]**

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<sup>26</sup> Katherine O'Regan, Assistant Secretary for Policy and Development, HUD, Transcript at 231-32.

Poverty is not a protected class. The rule is, and should remain, that one is allowed to exclude anyone for any reason unrelated to that person's membership in a protected class. Lack of money is as non-discriminatory a reason as one can find. Furthermore, when the good people at HUD discover that eliminating discrimination on the basis of a housing voucher still does not result in moving enough poor people into wealthier areas because rent is more than is covered by a voucher, they will inevitably begin pressing for legislation that requires landlords to accept vouchers, even if it means operating at a loss.

Commissioner Narasaki said at the briefing, "what would we change in the law to make it easier for parents to bring lawsuits or for the government to successfully help the politicians do the right thing by kids by providing this litigation leverage."<sup>27</sup> Respectfully, that gets our system of government backwards. The government is not a separate entity from politicians and should not be "help[ing] politicians do the right thing." The bureaucratic aspect of government only has the authority delegated to it by the politicians, and when politicians pursue a particular policy, the bureaucracy must follow. Likewise, it is not the role of the federal government to interfere in state education funding decisions. If there is anything that is within the purview of the states, it is how and at what level to fund education—and even whether to fund public education at all. If the right of self-government is to mean anything, it must mean the right to make decisions our self-appointed betters believe are wrong. That includes decisions about education that such betters believe to be shortsighted.

### **Education and Family**

The crux of this report is "more money" because money is something we can control. Per-pupil education spending has doubled since the 1970s, but NAEP scores are flat. But despite the report's dogged efforts to downplay the Coleman Report's determination that a child's family is *the most important factor in his academic success*, the Coleman Report's insight has only been confirmed by 50 years of societal disintegration. Money isn't the problem—family decay is the problem.

The report barely discusses the issue of family structure, which is the single greatest factor in education outcomes, and no amount of government spending will change the fact that family structure has disintegrated as government spending has exploded. The report touches on this when discussing the Coleman Report on pages 13-14, and in footnote 75 on page 70, where a Brookings report is cited that identifies single parenthood as one factor that can have a deleterious effect on the school performance of poor children. The Commission report's discussion of the Coleman report is primarily dedicated to arguing against the Coleman Report's findings. The Commission report's almost complete omission of the importance of family structure to education outcomes, particularly the vital importance of being born to two married parents, is the elephant on steroids in the room.

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<sup>27</sup> Transcript at 118.

Princeton's Fragile Families and Wellbeing Study [*hereinafter* the "Fragile Families Study"] "has been following approximately 5,000 children born in large U.S. cities between 1998 and 2000, including a large oversample of children born to unmarried parents."<sup>28</sup> This study is a rich vein of information, but here are just two findings that are pertinent to this report:

**Despite their high hopes, most parental relationships do not last, and as a result many children experience high levels of instability.** Only 35% of unmarried couples are still living together five years after the birth of their child, and less than half of the 35% are married. Couples that were cohabiting at birth are more likely to be together than couples in 'visiting unions.' Just over 50% of cohabiting couples are married or cohabiting five years after the birth.

Once their relationship with baby's father ends, many unmarried mothers form new partnerships and many have children with new partners. Nearly 40% of all unmarried mothers experience at least one new partnership, and about 14% have a child with a new partner, adding to the instability and complexity of these families.

***Children born to unmarried parents do not fare as well as children born to married parents.*** Single mothers and mothers in unstable partnerships engage in harsher parenting practices and fewer literacy activities with their child than stably married mothers. Family instability also reduces children's cognitive test scores and increases aggressive behavior. The increase in aggression is especially pronounced among boys.<sup>29</sup>

These disadvantages are likely to persist for life. A peer-reviewed study of children born in Finland between 1934-1944, when approximately 10% of children were born out of wedlock, found the following:

This life course study shows that children born out of wedlock carry a socioeconomic disadvantage throughout life. As compared with children born to married mothers, they have approximately three-fold odds of ending up in the lowest than in the highest educational and occupational categories. Most likely to end up in these categories are children born to unmarried mothers who have no male caregiver during childhood. These associations are not explained by other socioeconomic factors as indicated by mother's and

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<sup>28</sup> "Fact Sheet," The Fragile Families and Child Wellbeing Study, [https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/ff\\_fact\\_sheet.pdf](https://fragilefamilies.princeton.edu/sites/fragilefamilies/files/ff_fact_sheet.pdf).

<sup>29</sup> *Id.* [emphasis in original]



possible male caregiver's occupational statuses. This disadvantage starting in early life is likely to have a substantial effect on lifetime health.<sup>30</sup>

Consider Utah, which in 2015 had the lowest out-of-wedlock birthrate in the country at 18.8 percent<sup>31</sup>, which is only slightly below the level Daniel Patrick Moynihan considered catastrophic in the African-American community sixty-two years ago.<sup>32</sup> Utah also has the lowest per-pupil educational expenditures - \$6,546 per student.<sup>33</sup> Yet Utah's 2015 NAEP scores for math and reading were classified as "significantly higher" than the national public average.<sup>34</sup> On the other hand, 39.5 percent of New York state births were out of wedlock, which puts it right in the middle of the pack.<sup>35</sup> New York also spends \$20,156 per-pupil, more than any other state.<sup>36</sup> But its NAEP scores are also average, and its mathematics scores among fourth-graders were significantly lower than the national public average.<sup>37</sup> There are ten states where more than 45 percent of 2015 births were out of wedlock—Nevada, Arizona, New Mexico, Louisiana, Mississippi, Florida, Georgia, South Carolina, Delaware, and Rhode Island—and all but two of those states had NAEP scores significantly below the national average.<sup>38</sup> And the ten states that had the lowest percentage of illegitimate births—Washington, Idaho, Wyoming, Utah, Colorado, Nebraska, North Dakota, Minnesota, New Hampshire, and Massachusetts<sup>39</sup>—all had NAEP scores at or above the national average.<sup>40</sup>

Some of my colleagues might protest that there is no point in drawing attention to the deleterious consequences of single parent families, because nothing we can do will change behavior. They

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<sup>30</sup> H. Maiju Mikkonen, et al., "The lifelong socioeconomic disadvantage of single-mother background—the Helsinki Birth Cohort study 1934-1944," *BMC Public Health*, Aug. 18, 2016, <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-016-3485-z>.

<sup>31</sup> "Percentage of Births to Unmarried Mothers by State: 2015," National Center for Health Statistics, Centers for Disease Control, Jan. 5, 2017, <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm>.

<sup>32</sup> Daniel Patrick Moynihan, "The Negro Family: The Case for National Action," Office of Policy Planning and Research, U.S. Dep't of Labor, March 1965, <https://www.dol.gov/oasam/programs/history/webid-meynihan.htm>.

<sup>33</sup> Report at 30.

<sup>34</sup> The Nation's Report Card, State Profiles,

<https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=MN&year=2015>  
**R3.**

<sup>35</sup> "Percentage of Births to Unmarried Mothers by State: 2015," National Center for Health Statistics, Centers for Disease Control, Jan. 5, 2017, <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm>.

<sup>36</sup> Report at 27.

<sup>37</sup> The Nation's Report Card, State Profiles,

<https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=MN&year=2015>  
**R3.**

<sup>38</sup> The Nation's Report Card, State Profiles,

<https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=MN&year=2015>  
**R3.**

<sup>39</sup> "Percentage of Births to Unmarried Mothers by State: 2015," National Center for Health Statistics, Centers for Disease Control, Jan. 5, 2017, <https://www.cdc.gov/nchs/pressroom/sosmap/unmarried/unmarried.htm>.

<sup>40</sup> The Nation's Report Card, State Profiles,

<https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=MN&year=2015>  
**R3.**

might be right, but, strangely, this sort of defeatism has never been pertinent to the futile expenditure of taxpayer dollars.

College-educated whites still, by and large, delay childbearing until after marriage, whereas their less educated fellow whites have an increasingly high illegitimacy rate. Standing on a college campus does not magically inoculate one from unwed childbearing. Rather, these individuals have factored in the consequences of having a child out of wedlock.

### **Conclusion**

This report adds absolutely nothing new to the education policy debate. It likely obscures more than it helps. The thousands of hours of Commission and staff time spent on this report would have been better spent going door-to-door in poor and working class neighborhoods populated by people of all races and handing out pictures of rainbows and unicorns. Because that would have done more to improve the world than this report ever will, even if the relevant authorities adopt every recommendation in it.

## Dissenting Statement of Commissioner Gail Heriot

**The Problem Isn't that School Districts that Serve Large Numbers of Minority or Low-Income Students Get Fewer Actual Dollars Than the Average School District.**

**The Evidence Shows that, While Pockets of Underfunding Exist, On Average, School Districts that Serve Large Numbers of Minority or Low-Income Students Get Somewhat More Money.**

**The Biggest Problem Is That Schools Serving Low-Income Students Arguably Need More. Is There Some Reason the Commission Can't Be More Clear and Upfront About That?**

It is easy to get confused by this Report, so I would urge the reader to maintain a critical eye while examining it.

The Report states that “there are still stark funding inequities, as the highest poverty districts receive an average of \$1,200 less per-pupil than the lowest-poverty districts, and districts serving the largest number of students of color receive about \$2,000 less per student than districts who serve fewer students of color.”<sup>1</sup>

This is an attention grabber. And it is a linchpin statement in the Report. That's likely why it is repeated twice.<sup>2</sup>

But the figures—which came from an advocacy group, not from the Commission's own research—are for state and local expenditures only. Even assuming *arguendo* that they are otherwise accurate,<sup>3</sup> they do not take into account billions of dollars worth of federal funding, most of which

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<sup>1</sup> Rep. at 4-5 & n. 20. The Report cites a nine-page pamphlet published by the Education Trust for this point. See Natasha Ushomirsky & David Williams, *Funding Gaps 2015: Too Many States Still Spend Less*, The Education Trust (March 2016), available at [https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015\\_TheEducationTrust1.pdf](https://edtrust.org/wp-content/uploads/2014/09/FundingGaps2015_TheEducationTrust1.pdf). But that pamphlet is explicit that it is counting only state and local funding, not federal.

<sup>2</sup> Curiously, the Report repeats these statistics thirty pages further into the text, but this time citing a different source: “The Education Law Center has reported similar information, finding that the highest poverty districts receive an average of \$1,200 less per-pupil than the lowest-poverty districts, and districts serving the largest numbers of students of color receive about \$2,000 less per student than districts who serve fewer students of color.” Rep. at 35 & n.64. The footnote is to the following: Leadership Conference Education Fund, Education Law Center, *Cheating Our Future: How Decades of Disinvestment by States Jeopardizes Equal Educational Opportunity* (June 2015), available at [http://blogs.edweek.org/edweek/state\\_edwatch/Resource-Equity-Report-2.pdf](http://blogs.edweek.org/edweek/state_edwatch/Resource-Equity-Report-2.pdf). But the original citation (to the Education Trust publication) is the correct one. The Education Law Center merely cites to that publication.

<sup>3</sup> Just the fact that the numbers are so round (both perfect multiples of \$100) makes one wonder.

is targeted at low-income, high-need students.<sup>4</sup> *When all sources of funding are taken into account, the picture looks very different.*<sup>5</sup>

There is precious little reason to believe that, on average, fewer actual dollars are being spent nationally by school districts that serve large numbers of minority students.<sup>6</sup> Indeed, the evidence goes in the opposite direction—on average, more dollars are spent on these school districts.<sup>7</sup>

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<sup>4</sup> Among the federal government’s most important education programs that provide significant supplemental funding to school districts are Title I of the Elementary and Secondary Education Act, the Individuals with Disabilities Education Act (IDEA), Reading First, English Language Acquisition, Head Start, and the National School Lunch program.

Title I funds are intended to “supplement not supplant” state and local funds available to schools that serve low-income students. 20 U.S.C. § 6321. But note that national statistics, like the Education Trust numbers recited by the Commission, cannot help us determine whether states are short-changing school districts with high proportions of students below the poverty line. Some states—like Mississippi and New Mexico—have a lot of students in poverty. Others—like Wyoming and New Hampshire—have comparatively little poverty. If all four states funded their schools such that every school district got exactly the same amount per pupil (but the amounts varied from state to state), the national statistics would nevertheless reflect that school districts in high poverty areas were getting less per pupil simply because there are more of such school districts in Mississippi and New Mexico than in Wyoming and New Hampshire. You’ve really got to keep your eye on the ball. Are the numbers being presented to you comparing school districts nationally, states nationally, schools nationally, school districts within a particular state or states, schools within a particular state or states, schools within a particular district or districts? Or what?

<sup>5</sup> On its web site, the Education Trust bills itself as “fierce advocates for the high academic achievement of all students—particularly those of color or living in poverty.”

I would feel better about accepting the Education Trust’s figures (subject to the caveat that they cover only state and local expenditures) if its web site were not so heavily political. For example, at the time of this writing, its most recent blog post, entitled *Dear White People: We’ve Always Had Affirmative Action*, is a harangue against “White power and privilege.” It recites statistics about the racial composition of American universities complaining of the under-representation of African Americans and Hispanics, apparently oblivious to the fact that some of the numbers quoted show that whites are under-represented too. For example, the blog post states that whites are 53.1% of the students enrolled at elite research universities. But the Census projections for 2015 show that Non-Hispanic whites were expected to be (and probably were) about 55.7% of the college-age population (18-24). See National Center for Education Statistics, Youth Indicators 2011: America’s Youth: Transitions to Adulthood, NCES 2012-026, table 2 (December 2011), available at [https://nces.ed.gov/pubs2012/2012026/tables/table\\_02.asp](https://nces.ed.gov/pubs2012/2012026/tables/table_02.asp). This hardly gives one confidence in the Education Trust. See Brooke Haycock, *Dear White People: We’ve Always Had Affirmative Action* (August 22, 2017), available at <https://edtrust.org/the-equity-line/dear-white-people-weve-always-affirmative-action/>

<sup>6</sup> The original title of this Report was *Public Education Funding Inequality in an Era of Increasing Concentration of Poverty and Resegregation*. On the Chair’s motion, at the Commission meeting at which the Report was adopted, the title was changed to *Public Education Funding **Inequity** in an Era of Increasing Concentration of Poverty and Resegregation*. (Boldface added.) Presumably this was a nod toward the fact that what is being sought is not equal funding, but rather higher funding for schools in low-income areas. See Telephonic Meeting of September 27, 2017 Tr. at 8.

<sup>7</sup> See, e.g., Thomas B. Parrish, Christine S. Matsumoto & William J. Fowler, Jr., Disparities in Public School District Spending 1989-90: A Multivariate Student-Weighted Analysis, Adjusted for Differences in Geographic Cost of Living and Student Need, National Center for Education Statistics 95-300, Office of Educational Research and Improvement, U.S. Department of Education xx (1995), available at <https://nces.ed.gov/pubs95/95300.pdf>.

It is not just that school districts that serve poor and minority students tend on average to get more actual dollars. On top of that, within districts, “poor and minority students on average receive 1 or 2 percent more resources than non-poor and white students in the same district.” See Simon Ejdemyr & Kenneth A. Shores, Pulling Back the Curtain:

It is not easy to find reliable statistics comparing actual dollars spent per pupil from all governmental sources—local, state and federal—by school districts nationally. Here's what I have found from a report published by the U.S. Department of Education:

*More money is spent in districts with the highest percentages of minority students compared to districts with the lowest percentages of minority students (\$4,514 versus \$3,920). Although minority students in poverty are often viewed as those least served by current systems of public education funding, these findings suggest that while inequalities may remain for students in poverty, they do not appear to be driven by minority status.<sup>8</sup>*

The evidence with regard to school districts that serve large numbers of students below the poverty line is a bit more complicated. It appears to be true that a few school districts at the high end get more than school districts at the low end, but that's not the end of the story. Here is what the same Department of Education report said:

*Public education expenditures per student are highest in low-poverty districts. The fully adjusted differential between the highest and lowest poverty districts is \$309 per students*

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Intra-District School Spending Inequality and Its Correlates, Working Paper (May 19, 2017), available at [http://stanford.edu/~ejdemyr/docs/ejdemyr\\_shores\\_schoolineq.pdf](http://stanford.edu/~ejdemyr/docs/ejdemyr_shores_schoolineq.pdf).

The authors nevertheless found that *some* school districts “under-allocate” to disadvantaged students. As the authors explain in their abstract:

Districts that under-allocate resources to poor students relative to non-poor students tend to be poorer and have less income segregation. Districts that under-allocate to minority students relative to white students tend to have smaller racial income gaps, less segregation, and (when it comes to under-allocation to black students) larger white student populations.

<sup>8</sup> See, e.g., Thomas B. Parrish, Christine S. Matsumoto & William J. Fowler, Jr., Disparities in Public School District Spending 1989-90: A Multivariate Student-Weighted Analysis, Adjusted for Differences in Geographic Cost of Living and Student Need, National Center for Education Statistics 95-300, Office of Educational Research and Improvement, U.S. Department of Education xx (1995), available at <https://nces.ed.gov/pubs95/95300.pdf>. These figures appear to be adjusted for cost of living. The report also reports figures that are unadjusted or what I would call “actual dollars.” The authors divide school districts into four categories—those with less than 5% minority enrollment, those with 5 to <20%, those with 20 to <50%, and those with 50% or more. These are roughly quartiles with 21.9%, 26.4%, 25.6% and 26.1% of enrollment respectively. The actual dollars spent per pupil were as follows:

Less than 5% (Least Minority):	\$5043 (Least Amount)
5% to <20% (2d Least Minority):	\$5169 (3d Least Amount)
20% to <50% (3d Least Minority)	:\$5071 (2d Least Amount)
50% or more (Most Minority):	\$5474 (Highest amount)

*Id.* at 15.

This doesn't fit the narrative. Again, it may well be true that high poverty school districts or schools with high proportions of English learners or students with disabilities need more funds. High minority-enrollment school districts may indeed tend to have more of such students. Or they may not. But it's important to be clear about that high-minority enrollment school districts aren't getting less money. They simply need more. We have reached a point in our political discourse where facts asserted by so-called experts are no longer trustworthy. No wonder voters get confused. It is not a good idea to tell minority students and parents that they have been given fewer actual dollars when that isn't so. It creates resentments that need not exist.

(\$2,219 versus \$4,528). However this relationship is not linear and affects only the 11 percent of students in the wealthiest districts. Among the other 89 percent of students, the variation is only \$8 per student.<sup>9</sup>

Here's the complicated part (which the Department of Education report makes clear further in): ***In terms of poverty, both the high- and the low-end school districts, on average, get more than the middle.*** If smoothing out expenditures so that all school districts, no matter how wealthy or poor their students, get the same dollar investment per pupil, that might well end up meaning that dollars must be taken *away from* some school districts that serve a large proportion of students below the poverty line and given instead to school districts more toward the middle.<sup>10</sup>

This is not to say that we live in a world in which every minority student or student below the poverty line is getting at least as many actual dollars spent on his or her education as the average

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<sup>9</sup> *Id.* at xviii. The above figures appear to be adjusted for cost of living. At another point in the Department of Education report, the authors give figures that they label “actual.” Those figures are contrasted with figures that are both “cost” and “need” adjusted, so by “actual” they appear to mean “actual dollar expenditures.” They divide school districts into four categories—those with less than 5% of school-age children in poverty, those with 5- <15%, those with 15- <25%, and those with 25% or more. Note that these categories are not quartiles. The low-poverty school districts have only 11.3% of total student enrollment, the next group has 36% of total student enrollment, the next 26.3% and the highest-poverty group has 26.4%. The actual dollars spent per pupil were as follows:

Less than 5% (Least Poverty):	\$6,565 (highest amount)
5% to <15% (2d Least Poverty):	\$5,120 (3d highest amount)
15% to <25% (3d Least Poverty):	\$4,736 (lowest amount)
25% or more (Most Poverty):	\$5,173 (2d highest amount)

*Id.* at 17, table 2.

Again, this doesn't fit the narrative. It shows that it's not the districts with the highest proportion of poor students who get the least actual dollars. Rather it is the districts with proportions that are “in between” the highest and the lowest.

Note that a disproportionate number of school districts with the least poverty are likely to be located in large, urbanized states with large numbers of very small school districts. For example, Scarsdale Union Free School District in New York and New Trier High School Township High School District (serving Winnetka, Wilmette, Kenilworth, and Glencoe, as well as parts of Northfield and Glenview, Illinois) spend a lot of actual dollars and have extraordinarily high median household incomes. Note that such districts tend to be in major metropolitan areas where the cost of living is high. The figures in the text are apparently after controls for cost of living (but not differences in need) are taken into consideration and they show smaller differences.

<sup>10</sup> *See supra* at n. 6.

student nationally.<sup>11</sup> As I explain in a bit more detail below, that would not be true.<sup>12</sup> The point is simply that the tired narrative that school districts that disproportionately serve minority and low-income students are *systematically* being given less money than other school districts all is false. Over the decades, the nation has made progress toward correcting what was indeed a problem at an earlier time.

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<sup>11</sup> One source of inequality is states with very small school districts (e.g. New York and Illinois). These states tend to have greater inequalities from district to district than those with countywide school districts (e.g. North Carolina and Georgia). As I noted in Footnote 9, these small districts probably account for why the school districts with the very least amount of poverty (and with 11.3% of total enrollment) have greater resources than school districts with students who are disproportionately below the poverty line (which in turn have greater resources than school districts somewhere in between).

The Report states that “districts in the South tend to be the most equitable with an average equity factor of 10.5%, as compared to districts in the Northeast that tend to be the least equitable, with an average equity factor of 14.9%. Although this may seem counterintuitive . . .” Rep. at 29. Well . . . uh . . . I don’t know about the counterintuitive part there. What seems intuitive to me is that states with tiny school districts (like Illinois, New York and New England states) will have greater inter-district inequalities than states that have countywide governance (like North Carolina and Georgia). Southern states have long been known for their strong counties while New England states have long been known for their town meetings and extremely localized governance structures. The Report ultimately recognizes this, but only after admitting that its intuition has been (apparently owing the existence of slavery and Jim Crow in the South) that inequality would be greater in the South.

Maybe this will be a learning experience for those whose intuitions turned out to be wrong: Before one blames a history of Jim Crow and slavery for something, look to the political structures of the present. You may find they explain things better than your one-dimensional intuitions. It’s a complex world out there.

Are very small school districts a bad idea given that they increase the likelihood of inequality within states (and also nationally)? That is a judgment call I cannot make. The virtues of small districts are increased parental and taxpayer control. Fighting the local school board isn’t easy. But it is often easier than fighting the state board of education or the school board of a large, heavily bureaucratized, unified district. Another virtue of small districts is that they can compete with each other. Moving to a different part of the country on the ground that its school system is better requires tremendous sacrifice. Moving to a different part of the metropolitan area may not be easy, but it is easier than moving from Las Vegas to Boston. All of this must be balanced against the downsides, including the downside of inequality in expenditure.

<sup>12</sup> The GAO did a report, entitled *School Finance: Per-Pupil Spending Differences Between Selected Inner City and Suburban Schools Varied by Metropolitan Area*. It summarized its findings as follows:

In Boston, Chicago, and St. Louis, the selected inner city schools generally outspent suburban schools on a per-pupil basis. In Fort Worth and New York, the suburban schools in our study generally spent more per pupil than the selected inner city schools. In Denver and Oakland, spending differences between inner city and suburban schools were mixed. In general, higher per-pupil expenditures at any given school were explained primarily by higher staff salaries regardless of whether the school was an inner city or suburban school.

As would be predicted given its very small school districts, New York had some of the largest inequalities. Interestingly, however, while the New York inner city schools received less than their corresponding New York suburban schools, they still received more than any of the suburban schools in all the other cities studied (Boston, Chicago, Denver, Fort Worth Oakland and St. Louis). Also interestingly, while all the suburban schools studied had smaller proportions of students below the poverty line than their corresponding inner city schools, some had higher proportions of English learners or disabled students.

General Accounting Office, *School Finance: Per-Pupil Spending Differences Between Selected Inner City and Suburban School Varied by Metropolitan Area*, GAO-03-234 (December 2002), available at <http://www.gao.gov/new.items/d03234.pdf>.

*Do school districts that serve large numbers of students below the poverty line need more money than other districts in order to deliver the kind of education that all children should have?*

Probably they do. Moreover, the federal government has taken the position that they do.<sup>13</sup> But how much more? Are they getting what they need? If not, who should provide it? And what strings, if any, should be attached? That is certainly a conversation that I would have been (and remain) willing to have. But it's not easy to have that conversation when I constantly have to watch my hat and coat. A little more truth in statistics would be helpful.<sup>14</sup>

If school districts that serve large numbers of students below the poverty line arguably need more money than other schools, why am I so interested in establishing that, if anything, more actual dollars, on average, are spent on school districts with high proportions of poor or minority students? Because if the total expenditures of actual dollars were really as the Commission alleged, it would suggest a much more inequitable situation than actually exists. It fuels racial and class resentment based on a misunderstanding. The real problems (as usual) are more complex and nuanced.<sup>15</sup>

There are enormous state-to-state differences in funding that are worth discussing here. The Report gives us a state-by-state chart. But that chart does not provide much to support the race/poverty narrative that is being promoted by the Commission (and which forms the basis of the Commission's jurisdiction on this issue). Instead, it shows that a non-State jurisdiction, the District of Columbia, had the highest per-pupil expenditure in the nation in FY 2014 at \$20,577.<sup>16</sup> The

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<sup>13</sup> Under Title I, state agencies distributing federal funds are required to give priority to local educational agencies that serve the lowest-achieving schools, demonstrate the greatest needs for such funds, and demonstrate the greatest commitment to ensuring that such funds are used to enable the lowest-achieving schools to meet the progress goals detailed in their school improvement plans. 20 U.S.C. § 6303(f).

<sup>14</sup> These days when there is a proposal to decrease the *rate of increase* in spending on some government program, it gets billed by opponents as "deep cuts" to the program. See, e.g., A. Barton Hinkle, Trump's Medicaid "Cuts" Actually Increase Federal Spending, Reason (May 29, 2017), *available at* <http://reason.com/archives/2017/05/29/trumps-medicaid-cuts-actually-increase-f>. If anyone wonders why so many voters seem uninterested in policy debates, here's the answer: Those who would like to be conscientious can't trust what they are being told. It's a full-time job just to keep track of a portion of the misinformation.

<sup>15</sup> Another example of such "fuel" is Chair Lhamon's statement, "*When schools exclude students of color and students with disabilities from their communities, schools send the message that those kids are less valuable.*" Lhamon Statement at 1102 (italics added). It's 2017. Schools are not excluding students on account of their race. Nor are they targeting students in wheelchairs or with visual or auditory problems, as her statement may lead many to believe. It is not clear what point Chair Lhamon was trying to make, but whatever it was, it needs to be stated more clearly and less tendentiously.

<sup>16</sup> Rep. at 3028. I am assuming *arguendo* that the chart is more or less accurate. I note, however, making comparisons across jurisdictions is very difficult, since every part of the country may have its own methods of accounting. For example, employee benefits are usually a very substantial part of a school district's spending. Yet some pension funds are being fully funded and others are not. In addition, some school districts may provide extensive athletic opportunities over the summer. Others may not need to because local recreation boards, churches, and girls' and boys' clubs are already filling that need. There are lots of other potential differences like these. Areas



District of Columbia happens to also have the highest concentration of African Americans in the nation. According to the District of Columbia Public Schools web site, for the 2013-14 School Year, 68% of its students were Black, 16% were Hispanic, 12% were White and 4% were Other Ethnicity.<sup>17</sup> In addition, 76% of its students were eligible for a free or reduced-price lunch, so it ranks very high in terms of low-income students.<sup>18</sup> Yet it spends the most according to our chart.<sup>19</sup>

At the other end of the spectrum were Utah and Idaho, which spent only \$6546 and \$6577 respectively. Both of these states are among our least racially diverse. They differ from each other substantially, however, in terms of household income. Utah is a fairly wealthy state by that measure, ranking 13<sup>th</sup> in the nation in 2014. Idaho, on the other hand, was ranked 40<sup>th</sup> at that time.<sup>20</sup>

Interestingly, the amount spent has no obvious positive correlation with student performance. District of Columbia students are ranked last in the nation in terms of percentages that are at or above proficient in the 4<sup>th</sup> grade on both the Math and Reading tests of the National Assessment of Educational Progress. Utah and Idaho students ranked in the middle range at 26<sup>th</sup> and 32<sup>nd</sup> (Math) and 27<sup>nd</sup> and 33<sup>rd</sup> (Reading) respectively.<sup>21</sup>

In general, however, the extreme case of the District of Columbia aside, one shouldn't read too much about racial diversity into the state expenditure levels. Eyeballing the chart, I detect neither an obvious positive nor an obvious negative correlation between racial diversity and expenditure level.<sup>22</sup> New York, New Jersey and Pennsylvania are racially diverse states with high expenditures. But Wyoming, New Hampshire and Vermont are high-expenditure states with low racial diversity. Similarly, while Utah and Idaho have low racial diversity, Texas and New Mexico are majority-minority states that are among the low-expenditure states. The state-by-state differences expenditures do not appear to be a function of race.

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where the student population is expanding must invest in new buildings, which can be extremely expensive, while areas where the student population is shrinking need only maintain the buildings they already have.

<sup>17</sup> <https://dcps.dc.gov/page/dcps-glance-enrollment>.

<sup>18</sup> *Id.*

<sup>19</sup> Note that the world is complicated, much more complicated than the narrative implies: In 2014, the District of Columbia ranked only after Maryland and New Jersey in per capita income.

<sup>20</sup> List of U.S. States by Income, [https://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_states\\_by\\_income](https://en.wikipedia.org/wiki/List_of_U.S._states_by_income). As measure by per capita income, both Utah and Idaho fall. Utah sinks all the way to #41 and Idaho to #44.

<sup>21</sup> The Nation's Report Card: Data Tools: State Profiles, available at <https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=RED&sj=AL&sfj=NP&st=AP&year=2013R3> (Grade 4 Reading) and <https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=AP&year=2013R3> (Grade 4 Mathematics.)

<sup>22</sup> The District of Columbia is an outlier on too many dimensions for its first-place position to be regarded as proof of a positive correlation between racial diversity and high expenditure. For example, the District is the only completely urbanized jurisdiction on the list.

A somewhat better predictor of which states will be high expenditure is cost of living.<sup>23</sup> Of the top ten states in cost of living for the first quarter of 2017, seven of them also ranked in the top ten states for per pupil expenditures.<sup>24</sup> The high-spending District of Columbia tops them all for cost of living. The 10 states with the lowest cost of living all come in below the national average in their spending.

Some states move from high to low or from low to high once cost of living is taken into account. For example, Hawaii is a higher-than-average expenditure state under the Report's chart, but once the cost of living is factored in, it is a lower-than-average expenditure state. Iowa and Kansas run in the other direction: Once the cost of living is taken into account, they go from lower-than-average to higher-than-average expenditure states.

Still, cost of living is just one factor. Another useful predictor of which states will be high and which will be low expenditure per pupil is age demographics. Utah is by far our "youngest" state. In 2014, the median age was 30.5.<sup>25</sup> Utah thus has a lot of students and a very high student-to-taxpayer ratio. Idaho and Texas are also both among our "youngest" states (35.9 and 34.3 respectively) and our lowest per-pupil expenditure states. These states likely feel the need to take advantage of whatever economies of scale they can. If the father in the classic novel for young people, *Cheaper By the Dozen*, was right, those economies can be (and likely have been) found.<sup>26</sup> By contrast, our four "oldest" states—Maine (44.1), New Hampshire (42.5), Vermont (42.8) and West Virginia (41.9)—are all high-expenditure states on a per pupil basis. Under the circumstances, even relatively poor states—like West Virginia—can afford to be high-expenditure per pupil without busting the state budget. They just don't have as many school-age children to contend with.

But age demographics do not always predict correctly. For example, Alaska—our second "youngest" state with a median age of 33.3—is a high-expenditure state per pupil.

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<sup>23</sup> I am using statistics published by the State of Missouri here. Missouri derives the cost of living index for each state by averaging the indices of cities and metropolitan areas in that state that participate in the Council for Community & Economic Research (C2ER) survey. Cities across the nation participate in that survey on a volunteer basis. Price information in the survey is governed by C2ER collection guidelines, which strive for uniformity. [https://www.missourieconomy.org/indicators/cost\\_of\\_living/](https://www.missourieconomy.org/indicators/cost_of_living/). Presumably it would be better if I could compare the various costs of providing the inputs to education. But I don't have such numbers, and unless I am mistaken, nobody else does either.

<sup>24</sup> The two biggest outliers are California and Oregon, two states that are thought of as highly Progressive. Yet their per-pupil expenditures put them in the bottom half of states. Once cost of living is factored in, they sink still lower.

<sup>25</sup> Joe Murphy, Chart: Compare the Average Age in Each U.S. State, 2005-2014 **Denver Post (October 8, 2015)(using statistics from the U.S. Census Bureau's 2014 American Community Survey)**.

<sup>26</sup> Ernestine Gilbreth Carey & Frank B. Gilbreth, Jr., *Cheaper by the Dozen* (1948). The authors were brother and sister and the "novel" is essentially biographical.

A third contributing factor might be state wealth. At a very general level, the high-spending states tend to be wealthy (as measured by household or per capita income), while the low-spending states tend to be poorer. This may help explain Connecticut, New Jersey and Massachusetts, all with both high income and high expenditures (and Mississippi near the low end). But it doesn't help explain West Virginia—a high-than-average-expenditure, low-income state.<sup>27</sup>

I am sure I haven't covered it all. Other things might matter too—like the strength of teachers' unions in a particular state. This, I believe, would be something worth exploring for researchers. I note, for example, that West Virginia is a poor state (ranked # 49 on a per capita basis and #48 on a median household income basis).<sup>28</sup> But its per-pupil expenditures are above the national mean, and according to one source it ranks #13 in terms of the strength of teachers' unions.<sup>29</sup> Meanwhile, nearby Virginia is a wealthy state (ranked #6 in per capita income and #8 in median household income). But despite its wealth, Virginia's per-pupil expenditures are slightly lower than the national mean, and it is ranked #47 in terms of the strength of its teachers' unions.

The real question is whether we should tolerate state-to-state differences of this kind and magnitude. For what it's worth, my opinion is that we have a lot more to fear from the centralization of education than we do from the fact that some states spend more on education per pupil than others.<sup>30</sup> So we need to be careful.

I might feel differently if there were solid evidence that more spending consistently (or even usually) leads to better-educated students.<sup>31</sup> But alas, my 28 years of experience in higher education leads me to conclude that additional money tends to get sucked into endeavors that do nothing to increase student learning—from opulent athletic facilities to reduced teaching loads for faculty to various student services that can be most charitably referred to as “frills.” Law schools

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<sup>27</sup> List of U.S. States by Income, [https://en.wikipedia.org/wiki/List\\_of\\_U.S.\\_states\\_by\\_income](https://en.wikipedia.org/wiki/List_of_U.S._states_by_income).

<sup>28</sup> *Id.*

<sup>29</sup> Amber M. Winkler, Janie Scull & Dara Zeehandelaar, How Strong Are U.S. Teacher Unions?: A State-by-State Comparison (October 2012), available at [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20121029-Union-Strength-Full-Report\\_7\\_0.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20121029-Union-Strength-Full-Report_7_0.pdf).

<sup>30</sup> Chair Lhamon writes that “federal influence on public education has fallen short of our national ideals, failing to equalize public educational opportunity.” Lhamon Statement at 109. But our national ideals are complex and multifaceted. The nation's founders would be surprised to find that the federal government pays anything toward education, since the Constitution does not grant Congress jurisdiction over that topic. That issue was thought to be a matter for the states and their local subdivisions. Is the founders' vision out of sync with the ideals of modern Americans? I think not. Inside-the-Beltway elites may have a hard time believing it, but when it comes to the education of their children, many Americans prefer more local control rather than more control by distant bureaucracies. The only effective way to ensure the complete equality that these elites seem to be demanding is to insist on identical educational experiences. The only way to ensure identical educational experiences is to cede even greater control to the federal bureaucracy than is already the case. That isn't as appealing as the majority on the Commission might think it is.

<sup>31</sup> For more on this point, see Kirsanow Statement at 1-10.

and colleges could probably deliver a better education for much less than they charge. I wish they would.

I am less familiar with K-through-12 education. It's been a long time. But K-through-12 teachers and recent graduates have told me that their experiences are at least similar to mine: It's not lack of money. It's the bureaucracy. It's the feeling that one is simply a cog in a wheel. That will only get worse if the federal government's role expands. Moreover, some have a complaint that I don't have teaching at a law school: *In many urban classrooms that disproportionately serve low-income and minority students, it's disorderly classrooms.*<sup>32</sup> More money won't fix that.<sup>33</sup>

Here is why we should all fear increased centralization: Education differs from most other endeavors in at least two important ways. First, the quality of its services is difficult to measure. Second, in part because its benefits are believed to extend beyond students, it is heavily subsidized by government and charitable foundations. This renders it somewhat insulated from both competition and criticism and vulnerable to demands for various kinds of patronage.<sup>34</sup>

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<sup>32</sup> When Chair Lhamon was Assistant Secretary of Education for Civil Rights, she took the position that it is a violation of Title VI and its accompanying regulations for a school district's discipline policy to have a disparate impact on African Americans regardless of whether the school district is actually discriminating (i.e. treating students differently) on the basis of race. For reasons that I detail in a forthcoming article (with Alison Somin), tentatively titled *The Department of Education's Initiative on Racial Disparities in School Discipline: Wrong for Students, Wrong on the Law*, I believe that the interpretation of the law championed by Chair Lhamon is mistaken and that, moreover, it is not at all in the interest of students at inner city schools who are trying to learn amid classroom chaos. That includes, of course, African American students.

<sup>33</sup> Both Chair Lhamon and Commissioner Narasaki make almost identical claims about whether we should be spending more on schools and whether spending more contributes to student success. As Chair Lhamon put it, "Of course we should and of course it does." Lhamon Statement at 109. Commissioner Narasaki echoes, "Of course it matters." Narasaki Statement at 11-2-114.

I have no quarrel with the position that if all funds were spent wisely, educational outcomes might improve. But neither the staff-generated section of the Report nor the individual Commissioner statements tell us how the money should be spent in order to be "well-spent." That does not exactly make me feel confident that efforts to increase learning by increasing spending will be successful.

The problem is that Chair Lhamon and Commissioner Narasaki (as well as the staff-generated section of the Report) seem to assume that coming up with recommendations as how to spend the money wisely and getting school districts to spend the money in accordance with those recommendations are easy feats—so easy that they needn't even discuss them. The hard part, in their view, is getting the taxpayers to cough up the necessary funds.

But this is a mistake. The first two steps—figuring out how the money can be spent wisely and getting school districts to go along rather than continuing business as usual—are at least as hard as getting the financing for the spending and probably harder. And given how money has been spent in the past, these steps must come first.

I would be interested in being directed to serious empirical research that points the way to more effective spending in education. I would also be interested in being directed to serious discussions of how state and local education bureaucracies can be structured in order to give decision-makers an incentive to spend money on the things that work, not on the things that don't.

<sup>34</sup> Cf. Gary Becker, *The Economics of Discrimination* (1971) (arguing that institutions that are protected from competition, like government and government-protected monopolies, are more likely to engage in racial discrimination than institutions that are subject to more direct market pressure).

As a consequence of these structural factors, education is prone to fads—some of which can become deeply rooted. Some are relatively harmless—like the fashionable but quirky recommendation that mathematics classrooms be painted indigo or blue and that social studies classrooms be painted orange, green or brown.<sup>35</sup> Sometimes, however, they can have seriously harmful effects. A good example is discussed in *Why Minimal Guidance During Instruction Does Not Work: An Analysis of the Failure of Constructivist, Discovery, Problem-Based, Experiential, and Inquiry-Based Teaching*, which recounts the extreme popularity over the last half century of pedagogical methods that emphasize unguided or minimally-guided student learning. As that article discusses, however, the evidence is that, at least for students without considerable prior knowledge, these methods are less effective than more guided learning.<sup>36</sup> Yet their popularity persists.

I therefore counsel extreme caution before anything is done that will tend over long periods of time to promote the centralization of decision-making in education. The problem with centralized control of education is that when it goes wrong, it goes very wrong. And there is no escape for parents and students.

Chair Lhamon obviously disagrees with me. She states, “The reality is that *we know* how to do better to educate students.”<sup>37</sup> But who is the “we”? It is apparently the U.S. Department of Education’s Office for Civil Rights (where, until recently, she served as Assistant Secretary). In other words, it is people like her.

But what exactly do people like Chair Lhamon think makes for an excellent education? She tells us what she sees as “essential elements of education.” Her short description of what she looks for in a school for her own daughters contains the word “diverse” seven times.<sup>38</sup> In each case, “diverse” refers to what she calls “identity statuses,” not to course offerings or schools of thought. Among the areas she believes diversity to be “essential” are the gender identity and race of faculty members and the race, socio-economic status, and “ability status” of the students in both the school as a whole and each class. As much as I respect the time and care Chair Lhamon puts into selecting

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<sup>35</sup> See William R. Daggett, et al., *Color in an Optimum Learning Environment* (2008).

<sup>36</sup> Paul A. Kirchner, John Sweller, and Richard E. Clark, 41 *Educ. Psychologist* 75-86, available at [http://www.cogtech.usc.edu/publications/kirschner\\_Sweller\\_Clark.pdf](http://www.cogtech.usc.edu/publications/kirschner_Sweller_Clark.pdf).

<sup>37</sup> Lhamon Statement at [1102](#) (emphasis added).

<sup>38</sup> Lhamon Statement at [109](#). “Diverse” appears more than any other word in the relevant paragraph with the exceptions of “I,” “the,” “and,” and “schools.” Lhamon offers little in the way of specifics on curriculum or pedagogy except to say that she looks to ensure that a school has well-resourced libraries, art studios, music rooms, and science labs. One thing she does mention apart from diversity is that she prefers schools with teachers who treat her daughters as individuals, recognizing both their special talents and their individual challenges (which all students have). But will increasing the power of the federal bureaucracy over our schools increase or decrease the ability of teachers to treat their students as individuals? I rather suspect the latter.

a school for her daughters, I'm afraid her Statement is evidence for my point that education is prone to fashionable thinking.

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There are other problems in this Report as well. Here's a sampling: In trying to make the point that schools are highly segregated, the Report makes the following statement: "Approximately 77% of Hispanic students and 73% of black students attend schools that are almost all students of color (with 99-100% enrollments of students of color), and approximately 88% of white students attend schools that are at least half white."<sup>39</sup> Somehow this slipped past the proofreaders, all of whom are supposed to be expert in race issues and should therefore have recognized the statement's implausibility. It is a simple misreading of a chart. The sentence should have read: "***Approximately 77% of Hispanic students and 73% of black students attend schools with enrollments of 50-100% students of color, and approximately 88% of white students attend schools that are at least half white.***" That's a lot different.<sup>40</sup>

Are those numbers troubling? Not at all. The U.S. Census found that in 2014, non-Hispanic whites were a minority among children under the age of five.<sup>41</sup> This is particularly true in states like California, Texas, Hawaii and New Mexico, all of which are majority minority overall, not just among children. Starting with the 2014-15 school year, non-Hispanic whites have been a minority in public schools. If schools were nearly perfect in their racial integration, one would expect extremely large numbers of schools would be 50% or more "minority."

On the other hand, there are some troubling figures out there. The actual numbers of Latino and African-American students who attend schools that are *99% to 100% minority* is 11% and 18% respectively.<sup>42</sup> That is a lot higher than we would hope for. But it is nowhere near as high as this Report mistakenly leads the reader to believe.

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<sup>39</sup> Rep. at 130, citing Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, The Civil Rights Project, Harvard University 13 (January 2005).

<sup>40</sup> Departing from longstanding past practices, several members of the Commissioners' and career staff conducted a substantive citation check after a draft of this report had already been approved by the Commission and after my statement had already been completed and made available to other Commissioners and staff. This passage of the report was changed after that citation check.

<sup>41</sup> Kendra Yoshinaga, *Babies of Color Are Now the Majority*, *Census Says*, NPR (July 1, 2016) ("We've already been seeing this shift in U.S. schools: the 2014-15 school year marked the first time that minority student enrollment in public schools surpassed that of white students"), available at <http://www.npr.org/sections/ed/2016/07/01/484325664/babies-of-color-are-now-the-majority-census-says>; Bill Chappell, *For U.S. Children, Minorities Will Be The Majority By 2020*, *Census Says*, NPR (March 4, 2015), available at <http://www.npr.org/sections/ed/2016/07/01/484325664/babies-of-color-are-now-the-majority-census-says>.

<sup>42</sup> Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, The Civil Rights Project, Harvard University 13 (January 2005).



Some of the defects in the Report are just embarrassing. The Report states, without supporting argument, that teachers are “underpaid.” Rep. at 44. Whom does it cite for this conclusion? *A report of the Albert Shanker Institute*. Is the Commission unaware that the Albert Shanker Institute is an organ of the American Federation of Teachers, the second largest teachers’ union in the country?<sup>43</sup> Does the Commission really want to cite an organ of the teachers’ unions for the proposition that teachers are underpaid?

Teachers may or may not be underpaid. The Commission has not investigated that issue and has no expertise in that area. But it should know enough not to cite an organization under the control of the teachers’ unions for that point. The point is not to denigrate teachers’ unions, but simply to recognize that it’s their job to advocate higher pay for teachers. The Commission’s mission is different. Or at least I thought it was.

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<sup>43</sup> Wikipedia describes the Albert Shanker Institute this way:

The Institute has a three-member staff, and is governed by a 22-member foundation (six of whom are AFT elected leaders, including AFT president Randi Weingarten, AFT secretary-treasurer Nat LaCour and AFT executive vice president Antonia Cortese). The Institute is funded in part by the AFT and in part by an endowment, and is housed at the AFT headquarters in Washington, D.C.

[https://en.wikipedia.org/wiki/Albert\\_Shanker\\_Institute](https://en.wikipedia.org/wiki/Albert_Shanker_Institute).

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## **Surrebuttal of Chair Catherine E. Lhamon, joined by Commissioners Adegbile and Kladney<sup>1</sup>**

Commissioner Heriot asserts, without support, that schools no longer exclude students on the basis of race or disability.<sup>2</sup> While I wish her claim were accurate, my experience enforcing federal civil rights laws in schools confirms that it is not. I include here a sampling of recent publicly reported examples to ensure that we fulfill our mission to operate based on facts.<sup>3</sup> Though they are indirectly related to the school finance inequity focus of this Commission report, these facts matter because they actually reflect the experience of students in schools and because they underscore the critical necessity for the Commission to follow where facts lead when evaluating civil rights policy.

In a June 2015 resolution letter, the United States Department of Education Office for Civil Rights (OCR) found a Denver charter school institute to have violated federal disability rights law for disenrolling an elementary school child with a physical disability because of his disability.<sup>4</sup> The Head of School made explicit her view that the school “cannot service” a child with “moderate” disabilities because “we are mild.”<sup>5</sup> OCR’s investigation found that when the child and his father came to the school for an open house shortly before the school year began, school officials saw that the little boy had physical difficulty navigating some situations and ultimately concluded they could not accommodate his spanning the four-inch drop to the playground and that their decision

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<sup>1</sup> Commissioners Adegbile and Kladney concur in the spirit and substance of the Chair’s surrebuttal while acknowledging that her observations as the former Assistant Secretary for Civil Rights at the Department of Education are based on her unique professional experience enforcing federal civil rights laws.

<sup>2</sup> Dissenting Statement of Commissioner Gail Heriot, p. 138, n. 15.

“When schools exclude students of color and students with disabilities from their communities, schools send the message that those kids are less valuable.” Lhamon Statement at 2 (*italics added*). It’s 2017. Schools are not excluding students on account of their race. Nor are they targeting students in wheelchairs or with visual or auditory problems, as her statement may lead many to believe. It is not clear what point Chair Lhamon was trying to make, but whatever it was, it needs to be stated more clearly and less tendentiously.

*Id.*

<sup>3</sup> When the Senate originally considered legislation creating the Commission 60 years ago, then-Senate Majority Leader Lyndon Johnson said the Commission “can gather facts instead of charges; it can sift out the truth from the fancies; and it can return with recommendations which will be of assistance to reasonable men.” Report of the United States Commission on Civil Rights (1959),

<https://www.law.umaryland.edu/marshall/usccr/documents/cr11959.pdf> at ix (quoting Congressional Record, Aug. 7, 1957, p.12637 (daily edition)). I share the view that we should hew to that charge to focus on fact rather than fancy, assisting reasonable men—and all persons—in evaluating civil rights policy for the nation.

<sup>4</sup> Letter from Thomas E. Ciapusci, Supervisory Team Leader, Region VIII, Office for Civil Rights, U.S. Department of Education to Ethan Hemming, Executive Director, Colorado Charter School Institute Re: Colorado Charter School Institute, OCR Case # 08-14-1263, dated Jun. 30, 2015, available at

<https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08141263-a.pdf>.

<sup>5</sup> *Id.* at 3.

to site his classroom upstairs would be too burdensome for the school because the school would have to assign an adult to ride the elevator with him to get to the second floor.<sup>6</sup> Obvious alternatives, such as a ramp to cover the four-inch distance to the playground or siting his classroom on the first floor evidently seemed too burdensome to the school until OCR acquainted them with the Americans with Disabilities Act, enacted 25 years before.

That same year, OCR found a North Carolina university also to have violated federal civil rights law by rescinding enrollment for a student based on that student's disability.<sup>7</sup> In this instance, the college revoked admission for a student who has cerebral palsy once the college learned of the student's disability;<sup>8</sup> college administrators informed OCR that their typical practice had been simply not to admit students with disabilities where the University had concern that it may not be able to meet the students' needs but the admissions officers had not understood that this student had cerebral palsy at the time of admission.<sup>9</sup>

A 2014 resolution confirmed a Cleveland, Ohio school district left seats unfilled in specialized STEM (science, technology, engineering, and math)-themed schools rather than advertise course availability in Spanish—even though Spanish is the home language of 80% of the Limited English Proficient students in the district and, as OCR explained, federal civil rights law requires school districts to “adequately notify” national origin-minority group parents of school programs and activities that are called to the attention of other parents.”<sup>10</sup>

Similarly, a 2015 resolution with a New Jersey school district revealed that the district segregated English Language Learner (ELL) students, including Spanish, Arabic, Urdu, Gujarati, and Hindi speakers, separate from other students in the district.<sup>11</sup> OCR found specifically that the district

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<sup>6</sup> *Id.* at 4.

<sup>7</sup> Letter from Alessandro Terenzoni, Team Leader, Team II, District of Columbia Office, Office for Civil Rights, U.S. Department of Education to Jason Langberg, Attorney, Advocates for Children's Services, Legal Aid of North Carolina, OCR Complaint No. 11-15-2032, dated Jun. 3, 2015, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11152032-a.pdf>.

<sup>8</sup> *Id.* at 3. The school wrote to the student: “We regret to inform you that we must rescind your admission” because “We have consulted the Disability Services Coordinator and have determined that your needs are beyond the scope of what the University can reasonably provide.” *Id.*

<sup>9</sup> *Id.* at 4.

<sup>10</sup> Letter from Meena Morey Chandra, Program Manager, Region XV, Office for Civil Rights, U.S. Department of Education to Eric S. Gordon, Chief Executive Officer, Cleveland Metropolitan School District, OCR Docket #15-11-5003, dated Jan. 7, 2014, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15115003-a.pdf>, at 3, 10. *See also* Office for Civil Rights, U.S. Department of Education, *Protecting Civil Rights, Advancing Equity: Report to the President and Secretary of Education*, April 2015, <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf>, at 19.

<sup>11</sup> Letter from Timothy C. J. Blanchard, Director, New York Office, Office for Civil Rights, U.S. Department of Education to Dr. Marcia V. Lyles, Superintendent, Jersey City Public Schools, Case No. 02-13-5002, dated Jan. 30,

excluded certain ELL students from specialized programs in violation of federal law.<sup>12</sup> In addition, OCR found that “students in [a particular bilingual] program do not take any classes with the general education population, and do not otherwise associate with the general education population unless there is an after school program, an assembly, or lunch.”<sup>13</sup>

My immediate past experience with enforcing federal civil rights laws in schools is, unfortunately, not isolated. Taking only the most recent prior examples, annual reports to President George W. Bush from OCR in his Administration included repeated recitations of resolutions with school districts that excluded students on the basis of race, national origin, and disability.

In one example, OCR reported that a special education teacher admitted to pulling black students away from instructional time to admonish those students, but not students of other races, about how to talk and behave.<sup>14</sup>

The report also found that two charter schools denied admission to a student because he used a wheelchair,<sup>15</sup> and that an online school “denied admission to the online high school to students with disabilities solely because of their need for certain special education or related services.”<sup>16</sup>

The second Bush Administration OCR also entered a resolution with a school district that “acknowledged” it was “segregating elementary school Hispanic students based on national origin.”<sup>17</sup>

Like my fellow Commissioner, I wish that the passage of time, at least, had ensured that in this country we are past excluding children from educational opportunity based on their race or their ability status, or any other identity factor. We do not fulfill our statutory mandate, however, if we do not address actual experience, unvarnished. The sampling I share here reflects only a handful of recent publicly described completed investigations; OCR’s files—and more distressingly, the

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2015, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02135002-a.pdf>, at 3, 24.

<sup>12</sup> *Id.* at 23.

<sup>13</sup> *Id.* at 24.

<sup>14</sup> Office for Civil Rights, U.S. Department of Education, *Annual Report to Congress of the Office for Civil Rights, Fiscal Years 2007-08*, Jan. 2009, <https://www2.ed.gov/about/reports/annual/ocr/annrpt2007-08/annrpt2007-08.pdf>, at 19.

<sup>15</sup> *Id.* at 35. This resolution from the Bush II Administration specifically contradicts Commissioner Heriot’s unsupported claim that “Nor are [schools] targeting students in wheelchairs.” Dissenting Statement of Commissioner Gail Heriot, p. 138, n. 15. During my tenure, OCR also resolved an investigation of a school district that had refused to allow a student who uses a wheelchair to compete in the track team, excluding the student from full participation in his school activities. Letter from Catherine D. Criswell, Director, Office for Civil Rights, U.S. Department of Education to Kathryn I. Perrico, Esq., Britton Smith Peters & Kalail Co. L.P.A. et al., OCR Docket #15-11-1080, OCR Docket #15-12-4010, OCR Docket #s 15-13-5901—15-13-5904, dated Feb. 18, 2014, available at <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/15111080-a.html>.

<sup>16</sup> Office for Civil Rights, *supra* note 14, at 36.

<sup>17</sup> Office for Civil Rights, U.S. Department of Education, *Annual Report to Congress of the Office for Civil Rights, Fiscal Year 2006*, Jul. 2007, <https://ed.gov/about/reports/annual/ocr/annrpt2006/annrpt2006.pdf>, at 12.

lives of children and students in schools—reflect fuller instantiations of continuing race-based, disability-based, discriminatory exclusion from school. It is the Commission’s charge to advocate civil rights policy responsive to the facts real people live. The fact of prejudice visited on the nation’s students is too important to ignore, even when, as in these examples, it is appalling and anathema to any conception of equity or fairness. The Commission report published today offers concrete recommendations for moving this nation closer to its civil rights promises; I encourage policy change consistent with these recommendations to prevent and ameliorate the types of harms described here, among so many others.

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