

**EDUCATION EQUITY IN NEW YORK:  
A FORGOTTEN DREAM**



**NEW YORK ADVISORY COMMITTEE TO THE  
U.S. COMMISSION ON CIVIL RIGHTS**

**February 10, 2020**



## **Advisory Committees to the U.S. Commission on Civil Rights**

By law, the U.S. Commission on Civil Rights has established an advisory Committee in each of the 50 states and the District of Columbia. These Committees are composed of state/district citizens who serve without compensation; they are tasked with advising the Commission of civil rights issues in their states/district that are within the Commission's jurisdiction. Committees are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state or district's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to Committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states/district.

## **Acknowledgements**

The New York Advisory Committee thanks all the participants in the June 12 and 13, 2019 briefings for sharing their expertise. The Committee greatly appreciates the many contributions of the Committee's members who helped set the agenda, identify and interview the participants, run the briefings and produce this report. The Staff of the Eastern Regional Office extends special thanks to the invaluable support and work on this project of Ximeng Tang, Yu Tanebe, Charlotte Hopkinson, Joy Sgobbo, and Io Jones, as well as the contributions of Mitchell Friedman, Ayoung Kim, and Kataeya Wooten. Lastly, the Committee thanks David Barreras, the designated federal officer for the administrative and programmatic support he has provided.

*Letter of Transmittal*

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**New York Advisory Committee to the  
U.S. Commission on Civil Rights**

The New York Advisory Committee (the “Committee”) submits this report, “Education Equity in New York: A Forgotten Dream” as part of its responsibility to advise the Commission on Civil Rights issues within New York State.

The Committee held two days of public briefings in New York City on June 12 and June 13, 2019. Testimony was provided to the Committee by 20 persons on 7 panels. The presenters were academics, school administrators, government officials and advocates with particular expertise on the matters covered by this report. The Committee invited a number of individuals to testify, some of whom declined to participate as a result of ongoing litigation, among them members of the Board of Regents and the Chancellor of the New York City Department of Education.

This report summarizes important information from the presenters’ testimony, written submissions and publicly available information. The report provides recommendations based on the information received. The Committee trusts the Commission and the public will find the material in this report informative.

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U.S. Commission on Civil Rights**

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## **Introduction**

On June 12 and 13, 2019, the New York State Advisory Committee to the U.S. Commission on Civil Rights (the “Committee”) held a briefing (the “Briefing”) during which academics, school administrators, advocates, government officials and leaders in the education finance area provided testimony regarding public education funding issues in New York State (the “State” or “New York”), and in particular, the State’s Foundation Aid program. The purpose of the Briefing was to determine whether the State’s approach to educational financing has a discriminatory effect on students on the basis of race or otherwise.

## Executive Summary

Educational opportunity is the foundation for an equitable society. As such, it is a civil rights issue.

In 1954, the U.S. Supreme Court (the “Court”) decreed in *Brown v. Board of Education* that:

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

Despite these powerful words, the Court ruled in 1973 in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental interest and poor students in unequal wealth school districts are not a suspect class under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution—characterizations that ensure that states must have a compelling interest in enacting narrowly tailored laws that infringe those classes or interests. The Court has been loath to recognize fundamental rights, only selectively incorporating the Bill of Rights into Fourteenth Amendment jurisprudence, largely in deference to separation of powers.

Plaintiffs seeking redress for the inequity of any school financing system under the Fourteenth Amendment are left to prove that there is discriminatory intent under the Equal Protection Clause in order for the Court to require that a state justify its facially neutral law (like most public funding statutes) on a basis greater than simple rationality. Alternatively, they have

to convince a court that there is no rational basis for the facially neutral law. These are high bars. Moreover, the Court's ruling in 2001 in *Alexander v. Sandoval* has compounded the difficulty of bringing a successful Constitutional or federal statutory case for educational equity based on state funding schemes. In that case, the Court ruled that section 601 of Title VI of the Civil Rights Act of 1964, which proscribes discrimination against any federal funds recipient on the basis of race, color or national origin, requires a showing of intentional discrimination and that section 602 of Title VI of the Civil Rights Act of 1964 does not provide individuals with a private right to enforce Title VI's disparate impact prohibitions.

The *Rodriguez* and *Sandoval* rulings, however, are not the end of the story. Advocates and scholars have urged the federal courts to revisit *Rodriguez* in light of the importance of education to any citizen seeking to participate in an increasingly data-driven world and the growing divide in the United States between the haves and have-nots. It is also possible that litigants successfully pursue the fact that many educational funding schemes, including New York's, do not provide educational opportunity on "equal terms," a phrase the Court has stated is required of state educational systems but has never elaborated upon. On a federal level, claims of discriminatory impact from facially neutral education funding laws also could be redressed by filing a claim with the U.S. Department of Education to enforce, or have the Department of Justice enforce, the provisions of Title VI.

In addition, state courts provide an alternative venue for pursuing educational equity litigation. In New York, there has been substantial litigation regarding the State's funding scheme. Unlike the U.S. Constitution, the New York State Constitution explicitly grants all children the right to what has been interpreted as "a sound basic education"—not an equal or substantially equivalent education. In 2006, in the landmark case of *Campaign for Fiscal Equity*,

*Inc. v. State of New York*, New York’s highest court, finding the funding of New York City schools unconstitutional under the State Constitution, held that a sound basic education requires that the State, at minimum, provide children with an education that consists of “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.” Two pending cases in the New York court system are considering whether the State has failed to provide a “sound basic education” to certain plaintiff school districts.

In 2007, in part in response to litigation, the New York State legislature adopted Foundation Aid, a complex formula aimed at redressing some of the inequities resulting from a school funding system that relies heavily on local tax revenues, so that all districts would meet the sound basic education requirement of New York’s Constitution. Foundation Aid, however, has failed to accomplish its goal of educational equity.

Like other states in the United States, New York schools are funded by three principal sources, local funding (59%), federal aid (3%) and state aid (38%). Foundation Aid is the largest component of State aid, constituting 65.5% of total State education aid to localities. New York historically has been and remains a high education-spending state. In 2017, New York governments (State and local) spent on average \$23,091 per pupil on elementary and secondary education, more than any other state in the United States and 89% more, not accounting for cost of living differences, than the national per pupil spending average. Critics contend, however, that the average per pupil statistics do not take into account, among other things, the fact that New York is a high-cost state that makes a greater effort than many other states to fund its pension obligation and that per pupil spending is an average that does not reveal the degree to which poorer communities are underfunded. Moreover, critics say, wealthier communities invest

considerably more in their local school districts than do lower-wealth communities, as wealthier communities have a larger tax base.

In school year 2019-2020, approximately 70% of all State education aid goes to the neediest schools, while the wealthiest schools get approximately 14% of State education aid. Low-wealth districts receive nearly six times more aid per pupil from the State than do the highest-wealth districts (\$12,442 versus \$2,172) without accounting for the STAR Program, which provides State-subsidized tax relief to certain homeowners. While the State spends disproportionately on the neediest districts, overall average spending per pupil in the highest-need districts in the State is still approximately only two-thirds of the overall average spending per pupil in the wealthiest districts (\$17,758 versus \$27,845), in large part as a result of the disparity in revenue-raising abilities of low-wealth versus high-wealth districts. In school year 2016-17, the average actual per pupil value of taxable real property among the lowest-spending 10% of districts was \$342,500, while the average actual per pupil taxable real property value among the highest-spending 10% of districts was \$2,086,937, a difference of 509%.

The 2007 legislation that established Foundation Aid authorized a four-year phase-in for State school aid to increase by \$7 billion by school year 2010-11. However, after two years and a \$2.3 billion distribution, as a result of the financial crisis of 2008, the State froze any increase in Foundation Aid and decreased funding to eliminate the spending gap caused by the recession. Overall, the total amount of State aid withheld from school districts due to the spending gap measures of the recession was approximately \$9.24 billion. New York's schoolchildren are still owed between \$3.4 billion and \$4.1 billion of the original promised Foundation Aid based on calculations prior to the start of school year 2019-2020. Most (71%) of that amount is owed to high-need school districts and approximately two-thirds is owed to districts which have majority

Black and Latinx students. Moreover, New York’s schoolchildren, particularly those in high-need districts, are owed annual fully-funded Foundation Aid.

The base Foundation Aid formula in essence aims to capture the difference between (i) the total amount of money a district needs to meet the New York State constitutional “sound basic education” requirement and (ii) the expected amount a district can contribute based on its wealth. However, in reality, the Foundation Aid formula is renegotiated each year and is amended to effect political compromises so that Foundation Aid actually distributed to school districts—while having a foothold in the formula—is a function of a number of factors, including, in 2019-20, the base amount that a district received the prior year, how much of an increase in aid is allocated by the State legislature to Foundation Aid for that year, and the most favorable result derived from ten, newly adopted sub-formulas based in part on need-eligibility. Layered on top of the original Foundation Aid formula is a “save harmless” provision—a statutory guarantee that a district will not receive less aid than received in the previous year—and the fact that certain school districts, including New York City, receive a fixed “share” of school aid increases each year without any particular policy reason, both of which, critics say, further distort the underlying Foundation Aid formula.

While Foundation Aid generally is perceived by educators, government officials and advocates as grounded in good intentions, it is also universally viewed as riddled with flaws, plagued by political compromise, underfunded and unrealized in its original vision, leaving New York with an inequitable school funding system that discriminates against the poor and, in particular, Black and Latinx children. In its stead is a system in which high-need, predominantly Black and Latinx school districts are chronically underfunded, burdened not only with education resource deprivation but also with all the by-products of poor communities that are generally

lacking in resources. Despite its overall significant aid to schools, New York, experts say, is failing to provide the sound basic education mandated by the New York State Constitution to its students.

Although it leads the U.S. in average per pupil spending, New York ranks 48th in educational equity among all states by measure of the funding gap between the districts enrolling the most students in poverty and the districts enrolling the fewest, and ranks 44th by measure of the funding gap between the districts enrolling the most students of color and those enrolling the fewest. Some experts believe that the underfunding issue is less an issue of underfunded high-need districts than an issue of intra-district inequity because school districts have broad discretion in allocations to schools within the district. Others contend that laying inequity at the door of intra-district funding is a distraction from the reality of underfunding, noting that the State's highest-need school districts have few schools that do not have high poverty rates. At the end of the day, underfunding has forced school districts, among other things, to close schools, lay off teachers (thereby increasing class sizes) and specialists, overcrowd their classrooms, reduce the number of counselors and psychologists (in some districts to 1 for 1800 students), eliminate or drastically reduce arts, music and foreign language programs, shutter libraries, and provide their students with limited, outdated technology and science laboratory equipment.

According to experts, underfunding high-need school districts in turn translates into underfunding school districts where the majority of students of color are enrolled.

One study showed that in 2014, looking only at high-poverty school districts, students of color (about 44% of New York public school students identify as Black or Latinx), on average, received \$0.91 for every dollar of Foundation Aid spent on a White student. Another study found that districts with Black students comprising over 40% of enrollment have the greatest

2019-20 Foundation Aid per pupil (\$11,998), but are also the poorest in both local fiscal capacity and student poverty. Experts say underfunding leads to disparate outcomes: for example, the graduation rate in 2017-18 for the 25 school districts that represent 80% of the Black and Latinx students in the State was 69%, compared to 95% in wealthy districts; and, based on 2014 data, half of all Black students in New York State were in districts with overall proficiency rates below 20%, compared to only 8% of White students in districts with such low proficiency rates.

According to critics, the low proficiency rates in high-need school districts where historically disadvantaged groups are concentrated reflect the high poverty rate and other factors that raise the cost of education and lower the tax base, and the inadequacy of the amount of actual State aid these districts receive in relation to their need. Because, critics say, of historical redlining and discrimination, people of color are concentrated and segregated into a small number of communities, which are then systematically starved of resources, causing students to be less ready for school, have more intense social and emotional needs, and suffer more adverse childhood experiences, in turn, reducing executive function skills and the ability to learn and regulate emotions, negatively affecting academic, social and health outcomes, and increasing the risk of interpersonal and self-directed violence, substance abuse, depression and behavioral problems.

Experts say that educational equity requires more than equal funding for high-need schools because it is more expensive to provide an adequate education to a disadvantaged student than it is to provide one to an advantaged student. While there are policymakers and academics that contend that spending more does not necessarily correlate to better outcomes, the overwhelming consensus among experts is that money spent well matters, and increased funding

is associated with higher student achievement, higher wages, lower poverty rates and lower long-term expenditures on social safety-net programs and the criminal justice system.

Many experts believe that beyond the need for more funding, the Foundation Aid formula needs to be revisited by educators and the State to update decade-old inputs and to determine whether economic and social changes in the last decade require changes to the factors and multipliers that determine a district's need as well as its capacity to fund. Moreover, they say, the State-mandated 2% cap on increases in taxes that may be levied by school districts, the homeowner-biased STAR program, the State-mandated "save harmless" requirement and the share agreement combine to magnify the disparate impact of State education financing on children of poverty, primarily those of color.

Specifically, experts contend that the weightings in the formula should take into account the "exponential" costs that arise as a result of the cumulative effect of a concentration and overlap of at-risk students. Moreover, they say, 2000 Census data used to measure the proportion of the population in poverty in a school district is outdated. They also contend that the formula also fails to accurately measure the ability of any given district to contribute to annual school expenditures. The result of the theoretical local contribution calculation, they say, is that it can overstate poor districts' actual local funding, thereby understating the State aid needed to fund a sound basic education in those districts. In addition, it can overstate the need for State aid to wealthy districts. They also challenge the existence of a floor and a cap in the wealth index used to measure a district's theoretical wealth. Based on the Foundation Aid calculations for 2019-20, 326 districts in New York State have an index below the floor, thereby contributing to an overestimation of their ability to raise local revenue.

Compounding the inequity, critics contend, is the fact that low tax base districts bear a disproportionate tax burden for having to fund part of their students' schooling with local tax dollars. In 2016-17, the average tax rate for every \$1,000 of taxable property value in the highest-spending wealthy districts was \$11.30 and the average tax revenue per pupil in those districts was \$24,020, compared to the average tax rate for every \$1,000 of taxable property value in the lowest-spending poor districts of \$15.59 and an average tax revenue per pupil of only \$5,324.

New York has an inequitable school funding system that discriminates against the poor and particularly Black and Latinx children. It would appear that New York students are being deprived of the right to participate in civil society simply based on their poverty or their color. In federal court, that fact could translate to a Fourteenth Amendment Equal Protection Clause claim based on race, or although the Court has yet to recognize it, poverty, as a suspect class, or purely based on the theory that no rational basis could possibly exist for a funding system that has the type of discriminatory impact that the New York funding scheme has. It could also become a claim under the Fourteenth Amendment for a deprivation of a fundamental right; notwithstanding the Court's reticence, it is time for the Court to recognize that the right to an education that, at minimum, provides a child with the ability truly to exercise their right to vote, their right to free speech, and their right to enjoy the liberties enshrined in the Constitution, is fundamental. It is clear that without a quality education, no citizen can exercise their recognized fundamental rights or enjoy the liberties the Constitution has guaranteed.

Because of the time needed for such a case to work its way through the legal system, the more viable approach to righting the existing inequities would be either for the State to legislate or the Office of Civil Rights of the U.S. Department of Education to enforce Title VI of the Civil

Rights Act of 1964. State legislation could include, at minimum, fully funding Foundation Aid, a significant funding increase to the neediest schools, a revision to the Foundation Aid formula and a right of private litigants to sue based on disparate impact in the provision of educational resources. At the same time, the Office of Civil Rights should investigate the inequitable funding in New York State.

New York State's educational funding system is in urgent need of an infusion of money and focus. Substantially increasing funding to high-need districts benefits not just the deprived students but all of society and its taxpayers in the ultimate effects of a more educated citizenry and reduced spending on social safety-net programs and the criminal justice system. As one expert testified: "Education is the only and best way to build a democracy that works on behalf of all. Children who are deprived of a sound basic education make democracy smaller, less inclusive, and ultimately more fragile. The stakes are very high, and the solution is at hand."

The recommendations of the Committee are as follows:

- 1. The Commission should issue a finding that New York State is discriminating against poor students and students of color by failing to provide high-need school districts with sufficient resources to make up for the spending gap between high tax base districts and low tax base districts.**
- 2. The Commission should look into the Schenectady claim that was filed with the Office of Civil Rights arguing that the effect of the funding system in New York is discriminatory under Title VI of the Civil Rights Act of 1964, and should ensure that the Department of Education ties future federal funding of New York education to the State's progress in promoting equity and the adequacy of the State's funding formulas.**
- 3. The Commission should recommend to the New York State legislature that it enact, in this legislative session, a budget that includes a substantial increase in revenues per pupil in high-need school districts so that per pupil spending in high-need districts equals at least per pupil spending in low-need districts, and that at minimum, the legislature allocate in 2020 the remaining originally promised Foundation Aid.**
- 4. The Commission should recommend to the New York State legislature that they substantially revise key elements of the Foundation Aid formula to ensure greater**

**educational equity, based on a transparent and in-depth review by an office that is capable of conducting the statistical analysis required to update the Foundation Aid formula or an independent commission comprised of education experts. In the interim, at minimum, the following should be effected:**

- a. Adjust the weightings of the various components of Foundation Aid to reflect current levels of student poverty, disability, enrollment growth, English proficiency and population density as well as the exponential cost of educating at-risk students;
  - b. Remove the arbitrary cap of 2.0 on the Pupil Needs Index;
  - c. Use an alternative measure for the Extraordinary Needs component of the formula, to consider variables such as the share of students eligible for a free lunch (instead of the share of students eligible for a Free and Reduced-Price Lunch or the Small Area Income and Poverty Estimates), the share of students with disabilities, and the share of students receiving career and technical education; and
  - d. Remove or adjust the arbitrary minimum of 0.65 and maximum of 2.0 on the Income Wealth Index.
- 5. The Commission should recommend to the New York State legislature that it eliminate the property tax cap.**
  - 6. The Commission should recommend to Congress that it amend Title VI of the Civil Rights Act of 1964 to provide for a private right of action based on disparate impact under the regulations implementing Title VI.**
  - 7. The Commission should recommend to the New York State legislature that it adopt a law that provides for a private right of action based on disparate impact in the provision of educational resources.**
  - 8. The Commission should recommend to the Governor and the New York State legislature that they establish a blue-ribbon commission to explore alternative funding structures to the current inequitable local tax-based system as well as ways to reduce racial segregation within and across school districts.**
  - 9. The Commission should recommend to the New York State legislature that they put forward, or call a constitutional convention for, an amendment to the State Constitution that includes an automatic escalator that would require State education aid to meet or exceed the ceiling of per pupil spending in the wealthiest districts in the State (adjusted for student need and local capacity).**
  - 10. The Commission should recommend to the New York State Education Department that it provide public access to student-level data on revenues, expenditures and performance outcomes.**

## Chapter I. The State of the Law Regarding Education Equity

### 1. Federal Law

#### A. The Fourteenth Amendment as a Potential Basis for Educational Equity

Most litigation for educational equity has centered on the Fourteenth Amendment to the U.S. Constitution, which was adopted in 1868 specifically to stop states from discriminating against former slaves during Reconstruction.<sup>1</sup> The Fourteenth Amendment provides that

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>2</sup>

While the Privileges or Immunities Clause is a potentially viable basis for the assertion of rights to equality of educational opportunity, early Supreme Court (the “Court”) interpretations severely limited its application, making clear that neither Congress (nor the courts) had the right to enlarge beyond previously recognized state “privileges and immunities” the litany of protected federal rights.<sup>3</sup> As a result, the focus of U.S. constitutional jurisprudence relating to rights to educational opportunity has been on the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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<sup>1</sup> The Fourteenth Amendment is viewed as providing the constitutional basis of the rights set out in the Civil Rights Act of 1866. *See Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948) (“Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States.”).

<sup>2</sup> U.S. CONST. AMEND. XIV § 1.

<sup>3</sup> *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). The Court has not overruled the holding in *Slaughter-House* despite the fact that it has been universally discredited by scholars and jurists alike. *See also infra* notes 59-65 and accompanying text.

## Substantive Due Process and Fundamental Rights

Under the Fourteenth Amendment substantive due process jurisprudence, the Supreme Court has established a framework of judicial review for assessing whether a state has sufficient justification for depriving a person of life, liberty or property, with the applicable standard of judicial review depending on whether the Court recognizes the infringed interest as being a fundamental right, either explicitly or implicitly in the U.S. Constitution.<sup>4</sup> Under the general framework,<sup>5</sup> fundamental rights are entitled to strict scrutiny review, and state action is upheld only if the law or regulation is necessary to achieve a compelling government interest, is narrowly tailored and uses the least restrictive means to achieve that interest.<sup>6</sup> If the Court does not recognize a fundamental right, generally it applies rational basis review, and state action will be upheld as long as it is rationally related to a legitimate government purpose.<sup>7</sup>

The vast majority of interests recognized as “fundamental” under the Court’s substantive due process jurisprudence either (i) are explicitly recognized in the U.S. Constitution (*e.g.*, the

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<sup>4</sup> The jurisprudence is named so because the inquiry is focused on the substance of the interest itself and whether that interest is one of the fundamental rights implicitly or explicitly protected by the U.S. Constitution. *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (2015); Joshua Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL’Y 143, 148 (2008).

<sup>5</sup> The Supreme Court has carved out an intermediate level of scrutiny, known as the “undue burden test,” in very limited cases. This test asks whether the regulation has the purpose or effect of placing a substantial obstacle in the path of the fundamental right.

<sup>6</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 497-498 (1965) (Goldberg, J., concurring).

<sup>7</sup> *See, e.g.*, *Wash. v. Glucksberg*, 521 U.S. 702, 728 (1997).

freedom of peaceable assembly,<sup>8</sup> the freedom of speech and the press,<sup>9</sup> the free exercise of religion,<sup>10</sup> the right to counsel in capital cases,<sup>11</sup> and the right to a speedy trial<sup>12</sup>) or (ii) are derived from the right to privacy<sup>13</sup> (e.g., the right to procreate,<sup>14</sup> the right to use contraceptives,<sup>15</sup> the right to control the upbringing of one's children,<sup>16</sup> the right to private intimate conduct,<sup>17</sup> and

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<sup>8</sup> *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”). The right of the people to peaceably assemble is explicitly set forth in the First Amendment to the U.S. Constitution.

<sup>9</sup> *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“[F]reedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”).

<sup>10</sup> *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (finding that the Fourteenth Amendment “embraces” freedom of religion, which is guaranteed by the First Amendment).

<sup>11</sup> *Powell v. Ala.*, 287 U.S. 45, 67-69 (1932).

<sup>12</sup> *Klopper v. North Carolina*, 386 U.S. 213, 226 (1967) (incorporating the Sixth Amendment right to a speedy trial as “it is one of the most basic rights preserved by our Constitution”); *see also McDonald v. Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment right to bear arms); *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968) (incorporating the Sixth Amendment right to trial by jury in criminal cases because it is “fundamental to the American scheme of justice”); *Robinson v. California*, 370 U.S. 660, 667 (1962) (incorporating the Eighth Amendment prohibition on cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment right against unreasonable search and seizure). The Court has never accepted the theory initially championed by Justice Black that the Due Process Clause fully incorporates the Bill of Rights. However, the Court has adopted what has become known as “selective incorporation” under which most of the rights set forth in the Bill of Rights have ultimately been labeled fundamental under the Fourteenth Amendment jurisprudence.

<sup>13</sup> *See Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>14</sup> *See Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942). *Skinner* overruled *Buck v. Bell*, 274 U.S. 200 (1927), in which the Supreme Court had refused to recognize the right to procreate as a fundamental right.

<sup>15</sup> *See Griswold v. Conn.*, 381 U.S. 479 (1965).

<sup>16</sup> *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>17</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003), overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court held unconstitutional a sodomy law prohibiting private homosexual

the right to marry<sup>18</sup>). The Court has characterized the privacy-derived rights as “fundamental to the very existence and survival of the race,”<sup>19</sup> and as falling “within the zone of privacy created by several fundamental constitutional guarantees.”<sup>20</sup>

A few Court-recognized fundamental rights have no textual bases in the Constitution nor can they be framed under the privacy penumbra, such as the right to vote in state elections<sup>21</sup> and the right to an appeal from a criminal conviction.<sup>22</sup> The right to vote in state elections has been recognized as fundamental by the Court because it is “preservative of other basic civil and political rights.”<sup>23</sup> As such, the Court’s view is that “any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>24</sup> The right to an appeal from a

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activity between consenting adults on the basis that it impinged upon their right to liberty under the Due Process Clause of the Fourteenth Amendment.

<sup>18</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>19</sup> *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

<sup>20</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The Court looked at the First Amendment (right of association), Third Amendment (prohibition against quartering soldiers), Fourth Amendment (right against unreasonable searches and seizures in persons, houses, papers, and effects), Fifth Amendment (right against self-incrimination) and Ninth Amendment (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”) to infer a zone of privacy that falls within the penumbra of the rights guaranteed explicitly by the Bill of Rights.

<sup>21</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>22</sup> *Griffin v. Illinois*, 351 U.S. 12 (1956). Although there is no constitutional right to an appeal, if a state offers such a right, it must do so in accordance with both the Due Process and the Equal Protection Clauses. See *Garza v. Idaho*, 139 S. Ct. 738, 744 n.4 (2019); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (“The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action.”).

<sup>23</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>24</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); see Joshua Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL’Y 143, 148 (2008) (“[T]he Supreme Court has

criminal conviction has been recognized as fundamental because it ensures the constitutional promise of a fair trial.<sup>25</sup> In the Court’s view, all of the associated protections of a fair trial, including notice, the right to be heard, and the right to counsel would all be “meaningless promises” to the poor without a right to an appeal.<sup>26</sup>

In general, the Court has been circumspect in its approach to recognizing fundamental rights, largely in deference to notions of separation of powers.<sup>27</sup> According to the *Glucksburg* Court, which held that the right to assisted suicide is not a fundamental liberty interest protected by the Due Process Clause,<sup>28</sup> fundamental rights recognized by the Court under substantive due process jurisprudence are only those “objectively, deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would

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included the right to vote in its list of fundamental rights and has never explicitly stated that the right is not fundamental.”). The Court, however, has applied varying degrees of scrutiny to the right to vote depending on the effect of the classification, despite it being recognized as a fundamental right. For example, in his dissent in *San Antonio Independent School District v. Rodriguez*, Justice Marshall highlights that the Equal Protection claim against the poll tax in Virginia was a wealth classification that was struck down because the Court “generally gauge[s] the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests.” 411 U.S. 1, 122 (1973). However, the Court does not always apply strict scrutiny when the right to vote is affected. Compare *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (applying strict scrutiny to strike down parenthood and real property requirements for school district voting); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying strict scrutiny to strike down durational requirements for voting) with *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978) (applying rational basis to uphold the exclusion of voters who were outside of the municipality but within the municipality’s police jurisdiction from voting in municipal elections). See also, Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473 (2002); Joshua Douglas, *Is the Right to Vote Really Fundamental*, 18 CORNELL J.L. & PUB. POL’Y 143, 147-63 (2008) (explaining the Court’s “fractured” approach to levels of scrutiny for voting cases).

<sup>25</sup> *Griffin v. Illinois*, 351 U.S. 12, 18-19 (1956).

<sup>26</sup> *Id.*

<sup>27</sup> *Washington v. Glucksberg*, 521 U.S. 702, 786-87 (1997) (O’Connor, J., concurring).

<sup>28</sup> *Id.* at 728.

exist if they were sacrificed.”<sup>29</sup> There has been some disagreement among the Justices on the Court in recent times, however, as to the actual construct of the determination of fundamental rights under substantive due process principles.<sup>30</sup> For example, the *Obergefell* Court, which upheld the right to same-sex marriage in 2015, rejected the notion that a fundamental right analysis necessarily requires a nod to tradition, citing to numerous precedents and stating “[h]istory and tradition guide and discipline this inquiry but do not set the outer boundaries. . . . The nature of injustice is that we may not always see it in our own times.”<sup>31</sup>

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<sup>29</sup> *Id.* at 720-21. For prior Court interpretations of “fundamental,” see *Duncan v. Louisiana*, 391 U.S. 145, 149 (whether “a civilized system could be imagined that would not accord the particular protection”), and *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 238 (1897) (“a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice”).

<sup>30</sup> The concurring and dissenting opinions in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), demonstrate the Court’s disagreement as to the appropriate method of identifying fundamental rights under the Due Process Clause. Compare *id.* at 806 (Thomas, J., concurring in part) (“Applying what is now a well-settled test, the Court concludes that the right to keep and bear arms applies to the States through the Fourteenth Amendment’s Due Process Clause because it is ‘fundamental’ to the American ‘scheme of ordered liberty,’ and ‘deeply rooted in this Nation’s history and tradition.’” (citations omitted)), and *id.* at 792-93 (Scalia, J., concurring) (“For whether [the substantive dimension of liberty test proposed by Justice Stevens] requires only that ‘a fair and enlightened system of justice would be impossible without’ the right sought to be incorporated or requires in addition that the right be rooted in the ‘traditions and conscience of our people,’ many of the rights Justice Stevens thinks are incorporated could not pass muster under either test: abortion, homosexual sodomy, the right to have excluded from criminal trials evidence obtained in violation of the Fourth Amendment, and the right to teach one’s children foreign languages, among others.” (citations omitted)), with *id.* at 871 (Stevens, J., dissenting) (“Our precedents have established, not an exact methodology, but rather a framework for decision-making. In this respect, too, the Court’s narrative fails to capture the continuity and flexibility in our doctrine.” (citations omitted)), and *id.* at 917 (Breyer, J., dissenting) (“The majority here. . . relies almost exclusively upon history to make the necessary showing. But to do so for incorporation purposes is both wrong and dangerous.” (citations omitted)).

<sup>31</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). “If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification.” *Id.* at 2602; see also *McDonald*, 561 U.S. at 874 (2010) (Stevens, J., dissenting) (“To the extent the principal opinion could be read to imply that the historical pedigree of a right is the exclusive or dispositive determinant of its status under the Due Process Clause, the opinion is seriously mistaken. A rigid historical test is inappropriate . . . because our substantive due process doctrine has never evaluated substantive rights in purely, or even predominantly, historical

With respect to notions of liberty, the Court has been more unified over time. It has defined liberty for purposes of the analysis as “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to *acquire useful knowledge*, to marry . . . and generally to enjoy those privileges long recognized at common law as *essential to the orderly pursuit of happiness by free men*,”<sup>32</sup> and has made numerous pronouncements along these lines: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>33</sup>

### **Equal Protection: Protected Classes and Fundamental Rights**

The Court’s equal protection jurisprudence looks at whether a state action (i) treats an individual from a protected class differently than it does other individuals or (ii) discriminates against an individual with respect to the exercise of a fundamental right.

Under the protected class approach, the Court employs strict scrutiny review if the challenged governmental classification is race,<sup>34</sup> alienage<sup>35</sup> or national origin.<sup>36</sup> Strict scrutiny requires that the suspect classification be narrowly tailored to serve a compelling governmental

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terms.”); *id.* at 875 (Stevens, J., dissenting) (“More fundamentally, a rigid historical methodology is unfaithful to the Constitution’s command.”).

<sup>32</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added). The Court found unconstitutional a state law that forbade the teaching of foreign languages to children who had not yet reached the eighth grade because the statute as applied was arbitrary and had no reasonable relation to any purpose within the competency of the State.

<sup>33</sup> *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>34</sup> *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>35</sup> *Graham v. Richardson*, 403 U.S. 365, 371 (1971).

<sup>36</sup> *See, e.g., Oyama v. State of California*, 332 U.S. 633 (1948); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Korematsu v. United States*, 323 U.S. 214 (1944).

interest.<sup>37</sup> If the challenged classification is sex<sup>38</sup> or legitimacy,<sup>39</sup> the Court applies intermediate scrutiny review, which requires that the classification be “substantially related” to “important governmental objectives.”<sup>40</sup> For all other classifications, the Court uses rational basis review, which upholds a law if it is rationally related to a legitimate state interest.<sup>41</sup>

The Court has advanced certain indicia for determining whether the use of a suspect class warrants a level of scrutiny greater than rational basis review: it asks whether (i) there has been a history of discrimination; (ii) there is a shared and immutable characteristic; (iii) the characteristic is not such that it bears on a person’s ability to contribute meaningfully to society; and (iv) the class lacks political power to adequately defend themselves through the democratic process.<sup>42</sup>

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<sup>37</sup> Plyler v. Doe, 457 U.S. 202, 217 (1982).

<sup>38</sup> Craig v. Boren, 429 U.S. 190 (1976).

<sup>39</sup> Trimble v. Gordon, 430 U.S. 762, 767 (1977) (“[C]lassifications based on illegitimacy fall in a ‘realm of less than strictest scrutiny.’”); Lalli v. Lalli, 439 U.S. 259 (1978).

<sup>40</sup> Boren, 429 U.S. at 197; Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 784 (1987).

<sup>41</sup> See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 783 (1987).

<sup>42</sup> See *Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion) (noting the history of sex discrimination based on the “high visibility” and “immutable” characteristic which “bears no relation to ability to perform or contribute to society” and which continues to “face pervasive, although at times more subtle, discrimination . . . in the political arena”); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (finding that close relatives are not a “suspect” or “quasi-suspect” class because “[a]s a historical matter, they have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless.”); Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CAL. L. REV. 323, 333, 344-345 (2016) (discussing whether the poor meet the four factor test in *Frontiero*).

In the case of a law that is ostensibly neutral and does not discriminate on its face, the Court has held since 1976 that plaintiffs must show that there was either discriminatory intent or discriminatory enforcement to warrant strict or heightened judicial scrutiny.<sup>43</sup> In determining whether there was discriminatory intent, the courts look to both direct and circumstantial evidence.<sup>44</sup> Though disparate impact can be evidence of discriminatory intent, the courts have rarely found discriminatory intent in the case of a facially neutral law.<sup>45</sup>

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<sup>43</sup> See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[The Court has] not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”) (internal quotation omitted); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (“Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. . . . The holding in *Davis* reaffirmed a principle well established in a variety of contexts.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.”).

<sup>44</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Factors such as statistics demonstrating a clear pattern of discriminatory effect; the historical background of the decision and other on comparable matters; the sequence of events leading up to the decision; departures from normal procedures or substantive conclusions; relevant legislative or administrative history; and consistent pattern of actions of decision-makers that impose much greater harm on minorities than on non-minorities can all be considered to prove discriminatory intent. *Id.*; Title VI Legal Manual, *infra* note 151.

<sup>45</sup> *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose,’ however, implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”); Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1082-83 (2011) (“The requirement for a discriminatory purpose is made all the more pernicious because the Supreme Court has made it very difficult to prove. . . . As a result, a court will rarely find a discriminatory purpose for a facially race-neutral law. Thus, only rational basis review will be used and the law is sure to prevail. Many laws with both a discriminatory purpose and effect may be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose.”); Henry L. Chambers, Jr., *Retooling the Intent*

Under the Equal Protection Clause prong that prohibits discrimination in the case of a recognizable fundamental right, the Court employs strict scrutiny; if the right is not recognizable, the Court applies the rational basis test.<sup>46</sup> No showing of discriminatory intent is required under this prong of the jurisprudence. The main fundamental rights that have been recognized under the Equal Protection Clause jurisprudence and protected against the state's unwarranted discrimination are the right to vote in state elections on an equal basis,<sup>47</sup> the right to interstate travel,<sup>48</sup> the right to access appellate courts in criminal cases,<sup>49</sup> associational rights such as choices about marriage, family life, and the upbringing of children,<sup>50</sup> and freedom of speech.<sup>51</sup>

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*Requirement under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611, 615-16 (2004) (“[The intent requirement] allows legislation supported by unconscious racism or somewhat veiled discrimination to avoid strict scrutiny. That is troublesome, as the trigger may leave too much discrimination unremedied.”); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1031 (1988) (“The dissatisfaction with the discriminatory purpose doctrine has several facets, but a recurring theme in the literature is the difficulty of proving discriminatory purpose.”).

<sup>46</sup> Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 782-83 (1987); Russell Galloway, *Basic Equal Protection Analysis*, 121, 148-49 (1989).

<sup>47</sup> The fundamental right to take part in the electoral process can be inferred from the structure of the U.S. Constitution, the Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments, and the Guarantee Clause of the U.S. Constitution. *See also* Gray v. Sanders, 372 U.S. 368 (1963); Reynolds v. Sims, 377 U.S. 533 (1964); Bush v. Gore, 531 U.S. 98 (2000); Katzenback v. Morgan, 384 U.S. 641 (1966); Vieth v. Jubelirer, 541 U.S. 267 (2004).

<sup>48</sup> The fundamental right to interstate travel is inferred from the Fourth Amendment. *See* U.S. CONST. AMEND. XIV § 4; *see also* Shapiro v. Thompson, 394 U.S. 618 (1969).

<sup>49</sup> *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956).

<sup>50</sup> *See supra* notes 13-20 and accompanying text; *but see* 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 11:8 (3d ed. 2011) (“State burdens on individual decision involving personal and family relationship have on occasion also been labeled as fundamental in the equal protection context.”).

<sup>51</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973) (Steward, J., concurring) (freedom of speech is “a substantive right or liberty created or conferred by the Constitution” and any state regulation thereof is therefore “presumptively invalid, whether or not the law’s purpose or effect is to create any classifications” and subject to specific First Amendment analysis. In the case that a state classifies with respect to speech, an equal protection analysis is also possible and

The protection of fundamental rights under the Due Process Clause and the Equal Protection Clause began as independent lines of precedent and analysis, and although the modern Court has sometimes treated them interchangeably, they are not necessarily coextensive.<sup>52</sup>

In his dissenting opinion in *San Antonio Independent School District v. Rodriguez*, Justice Marshall suggested that, based on precedents, the Court's approach to discriminatory state action is more flexible than the majority opinion suggested; that actually the Court applies a spectrum of standards (and consequent varying degrees of scrutiny) depending on the constitutional and societal importance of the interest adversely affected as well as the invidiousness of the basis of any classification, regardless of whether the right is explicitly or implicitly guaranteed by the Constitution.<sup>53</sup> From Justice Marshall's dissenting viewpoint, the Equal Protection Clause jurisprudence demonstrated that as the nexus between the specific constitutional guarantee and the non-constitutional interest becomes closer, the

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“[t]he Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives.”); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

<sup>52</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-03 (2015) (“The Due Process Clause and the Equal Protection Clause are connected in a profound way. . . . Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other.”); see also Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 208-09; 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 11:7 (3d ed. 2011); see also, *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (deciding that the prohibition on homosexual sodomy was invalid under the Due Process Clause rather than the Equal Protection Clause because doing so “might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.”).

<sup>53</sup> *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting).

non-constitutional interest becomes more fundamental and warrants a greater degree of scrutiny when infringed.<sup>54</sup>

### **Procedural Due Process**

In addition to substantive due process and equal protection, courts have applied procedural due process jurisprudence, which looks at whether the government followed the necessary procedures before depriving a person of life or a liberty or property interest, in the context of access to education but not in the context of educational funding.<sup>55</sup> Under procedural due process, a reviewing court looks at (i) whether the deprived benefit is a valid liberty or property interest within the meaning of the Constitution, (ii) whether the government deprived an individual of the right, and (iii) whether the deprivation took place without due process.<sup>56</sup> This approach has been used frequently in the educational context of student discipline.<sup>57</sup> Although

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<sup>54</sup> *Id.* at 102-03. According to Marshall in *Rodriguez*, “The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.” *Id.* at 102. *See also* *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (closely scrutinizing a prohibition on contraceptives due to a close relationship to an individual’s privacy despite the sale of commercial goods being traditionally subject to rational basis review); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying strict scrutiny to a prohibition on voting due to durational residence laws because of its relation to the unconditional right to travel); *James v. Strange*, 407 U.S. 128 (1972) (closely scrutinizing state recoupment laws that denied indigent criminal defendants certain protective procedures available to other civil judgment debtors); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (striking down a statute which treated unacknowledged illegitimate children of a deceased parent differently than legitimate children and noting that children were not at fault for their own status); *Reynolds v. Sims* (holding that assigning the same amount of representatives for counties with differing populations was a violation of the right to vote); *Griffin v. Illinois*, 351 U.S. 12 (1956) (noting that although appellate review is not constitutionally required, the failure to provide court transcripts to indigents was unconstitutional).

<sup>55</sup> *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>56</sup> *See* *Matthews v. Eldridge*, 424 U.S. 319 (1976); *see also* *Local 342, Long Island Pub. Serv. Employees, UMD, ILA, AFL-CIO v. Town Bd. of Huntington*, 31 F.3d 1191, 1194 (2d Cir. 1994); Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871 (2016).

<sup>57</sup> *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565 (1975) (finding a protected property and liberty interest for students facing temporary suspension from public school under procedural due process,

public education has been recognized as a protected property interest, the procedural due process jurisprudence centers around whether the individual being deprived of a right to education was afforded due process.<sup>58</sup>

### **Privileges or Immunities Clause**

The Privileges or Immunities Clause of the Fourteenth Amendment, although potentially available to litigants, has not been relied upon to pursue rights related to educational equity largely because, from its earliest interpretation, the Supreme Court made clear that the clause is limited in the scope of its application. Shortly after the ratification of the Fourteenth Amendment, the Court held in the *Slaughter-House Cases* that the Privileges or Immunities Clause only protects against state interference of a person's rights arising out of federal citizenship such as the right of access to the seat of government, the right of assembly, the privilege of *habeas corpus*, the right to access courts of justice in the several states and the right to use navigable waters of the United States, and is not a vehicle through which Congress could effectively bypass state legislatures by recognizing newly found federal rights.<sup>59</sup> While the *Slaughter-House Cases*' list of federal rights of citizenship was not exhaustive, future cases have only narrowly expanded the list to include the right to petition Congress for a redress of

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which generally requires notice and a hearing except in limited circumstances). The Court noted “[h]aving chosen to extend the right to an education to [the class of students] generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred” and that Ohio must “recognize a student’s legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.”

<sup>58</sup> *Goss v. Lopez*, 419 U.S. 565 (1975).

<sup>59</sup> *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78-79 (1873).

grievances,<sup>60</sup> the right to vote for national officers,<sup>61</sup> the right to interstate travel<sup>62</sup> and the right to enter public lands.<sup>63</sup>

Most legal scholars today dispute the narrowness of the *Slaughter-House Cases* holding.<sup>64</sup> Nevertheless, because the Court for decades has interpreted the rights of individuals to be protected from state infringement under the Due Process Clause, the Court has been reluctant to disturb the *Slaughter-House Cases* holding, relying instead on substantive due process and equal protection analysis.<sup>65</sup>

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<sup>60</sup> *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

<sup>61</sup> *Ex parte Yarbrough*, 110 U.S. 651 (1884).

<sup>62</sup> *Edwards v. California*, 314 U.S. 160 (1941).

<sup>63</sup> *United States v. Waddell*, 112 U.S. 76 (1908); *Twining v. New Jersey*, 211 U.S. 78 (1908). Other rights include the right to be protected against violence while in the lawful custody of a U.S. marshal, *see Logan v. United States*, 144 U.S. 263 (1892), and the right to inform the U.S. authorities of violations of its laws, *see In re Quarles*, 158 U.S. 532 (1895).

<sup>64</sup> *McDonald v. Chicago*, 561 U.S. 742, 756-57 (2010) (citing *Saenz v. Roe*, 526 U.S. 489, 522, n.1, 527 (1999) (scholars of the Fourteenth Amendment agree “that the Clause does not mean what the Court said it meant in 1873”)); Akhil Reed Amar, *Substance and Method in the Year 2000*, 28 PEPPERDINE L. REV. 601, 631, n.178 (2001) (“Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment”); Brief for Constitutional Law Professors as Amici Curiae 33 (claiming an “overwhelming consensus among leading constitutional scholars” that the opinion is “egregiously wrong”).

<sup>65</sup> *McDonald*, 561 U.S. at 758; *but see id.* at 837-38 (Thomas, J., concurring) (“the ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights, including the right to keep and bear arms. . . . [T]here can be no doubt that § 1 was understood to enforce the Second Amendment against the States. . . because the right to keep and bear arms was understood to be a privilege of American citizenship guaranteed by the Privileges or Immunities Clause.”); *Timbs v. Indiana*, 139 S. Ct. 682, 691 (2019) (Gorsuch, J., concurring) (arguing that the appropriate vehicle for incorporating the Eighth Amendment’s Excessive Fines Clause against the States is the Fourteenth Amendment’s Privileges or Immunities Clause); *id.* at 691-92 (Thomas, J., concurring) (arguing that the right to be free from excessive fines is one of the “privileges or immunities of citizens of the United States” and is not derived from the Due Process Clause).

Only a couple of modern Court cases have seemingly managed to move the Court to apply the Privileges or Immunities Clause to recognize rights of national citizenship. In *Oyama v. California* in 1948, the Court found that the right to acquire and retain property was a privilege of American citizenship.<sup>66</sup> And, in *Saenz v. Roe* in 1999, the Court, relying on the Privileges or Immunities Clause, struck down a California law that would have restricted the level of welfare benefits available to its residents who had been residing in the state for less than a year, finding that the law unconstitutionally infringed on the right to travel.<sup>67</sup> The Court's reluctance to restrain state action through the Privileges or Immunities Clause does not obviate its potential availability to those arguing for the recognition of certain rights of national citizenship, such as education, that have not yet been viewed as "fundamental."<sup>68</sup> Because of its indispensable role in preparing children to become competent citizens and to contribute to the functioning of a successful democracy, the right to a quality education may be more readily accepted as a right of national citizenship under the Privileges or Immunity Clause, without needing to analogize the right to the litany of fundamental rights already recognized by the Court

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<sup>66</sup> *Oyama v. California*, 332 U.S. 633, 640 (1948).

<sup>67</sup> *Saenz v. Roe*, 526 U.S. 489 (1999). The majority ultimately found that citizens have the fundamental right to choose where to reside, but states do not have the right to select citizens. *Id.* at 510-11.

<sup>68</sup> Aaron Y. Tang, *Privileges and Immunities, Public Education, and the Case for Public School Choice*, 79 GEO. WASH. L. REV. 1103 (2011) (arguing that public education should be considered fundamental under the Privileges and Immunities Clause based upon both the purpose of the Clause and historical analysis); Kara A. Millonzi, *Education as a Right of National Citizenship under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286 (2003) ("Although in the context of a school funding case, the Supreme Court held that education is not a fundamental right under the Equal Protection Clause, *Saenz* signals that school funding schemes may be vulnerable to challenge under the Privileges or Immunities Clause.").

under the substantive due process jurisprudence.<sup>69</sup> Moreover, a case brought under the Privileges or Immunities Clause is likely to be more advantageous to plaintiffs than one typically brought under the Due Process Clause because it is more likely to be reviewed under a higher level of scrutiny. In *Saenz*, the Court indicated that neither rational basis review nor intermediate scrutiny was sufficient in the context of state infringement of the privileges and immunities afforded to national citizens.<sup>70</sup> That said, because the Court has been so reticent to apply the Privileges or Immunity Clause to expand the litany of right of national citizenship, it would be unlikely that a case for a national right of citizenship to education would be easily recognized by the current Court in the near term.

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<sup>69</sup> See Kara A. Millonzi, *Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment*, 81 N.C. L. REV. 1286, 1303-04 (2003) (noting that framers agreed that education is a vital component of defending democracy).

<sup>70</sup> *Saenz*, 526 U.S. at 504.

## **B. The Supreme Court’s Analysis of the Right to Equal Education Opportunity under the U.S. Constitution**

The Court consistently has recognized the central place education occupies within the republic since the 1920s. It has refused as yet, however, to recognize education as a fundamental right under its equal protection or substantive due process jurisprudence, arguing that recognition of such a right would require the Court to recognize housing, clothing and food as fundamental rights.<sup>71</sup> However, the Court has suggested (but not ruled) that a minimally adequate education (undefined) may be constitutionally protected<sup>72</sup> and that the right to education must be provided “on equal terms” if the state has decided to provide it, a phrase the Court has never elaborated upon but that lower federal courts have interpreted to mean available to everyone rather than available in some approximation of equal quality to everyone.<sup>73</sup>

In 1923, the Court in *Meyer v. Nebraska*, finding that a state law forbidding the instruction of foreign languages to children below the eighth grade was unconstitutional because

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<sup>71</sup> *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *see infra* notes 94-101 and accompanying text.

<sup>72</sup> The *Rodriguez* Court assumed, without deciding, that “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of” the right to vote and free speech. 411 U.S. at 25, n.60; *see also*, *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 n.1 (1988) (Marshall, J., dissenting); *Papasan v. Allain*, 478 U.S. 265, 284 (1986); Jeffrey H. Blattner, *The Supreme Court’s Intermediate Equal Protection Decisions: Five Imperfect Models of Constitutional Equality*, 8 HASTINGS CONST. L.Q. 777, 798 (1981).

<sup>73</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *D.S. v. New York City Dep’t of Educ.*, 255 F.R.D 59 (2008) (referencing that education “must be made available to all on equal terms” to certify a class of students that was excluded from the classroom or received no instruction at all during school hours); *Lau v. Nichols*, 483 F.2d 791, 794 (9th Cir. 1973), *rev’d on other grounds* 414 U.S. 563 (1974) (rejecting appellant’s argument that a student who is given the same course of instruction as others is denied education on “equal terms” if he cannot understand the language of instruction); *but see* U.S. Comm. on Civ. Rights, *Racial Isolation in the Public Schools*, 25-31 (1967) (suggesting that the provision of equal terms “would appear to render at least those substantial disparities which are readily identifiable—such as disparities in fiscal support, average per pupil expenditure, and average pupil-teacher ratios—unconstitutional”).

it infringed on the right to liberty that protected the teacher's right to teach and the right of parents to engage the teacher in educating their children, wrote that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."<sup>74</sup> In 1954, the Court in the landmark case of *Brown v. Board of Education*, finding that segregated education based on race violated the Equal Protection Clause of the Constitution even where facilities might be equal, unequivocally declared:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.<sup>75</sup>

Ten years later in 1963, Justice Brennan wrote in his concurring opinion in *School District of Abington Township v. Schempp* that it is "understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom" because "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."<sup>76</sup>

Over time, the Court has emphasized the importance of education in *dicta*, suggesting that "[p]roviding public schools ranks at the very apex of the function of a State,"<sup>77</sup> and that

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<sup>74</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>75</sup> *Brown*, 347 U.S. at 493.

<sup>76</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring).

<sup>77</sup> *Wis. v. Yoder*, 406 U.S. 205, 213 (1972).

“[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.”<sup>78</sup>

Yet, in the seminal Equal Protection Clause school funding case, *San Antonio Independent School District v. Rodriguez*,<sup>79</sup> while recognizing that “the grave significance of education both to the individual and to our society cannot be doubted,”<sup>80</sup> the Court refused to find that the differences between the public education received by low-income students and high-income students was sufficiently noxious to be violative of the Equal Protection Clause.<sup>81</sup> In *Rodriguez*, plaintiffs challenged the Texas school financing system, which had a significant, local property tax base component (approximately 40%) to total school spending<sup>82</sup> and, despite state-wide supplemental funding, led to substantial inter-district disparities.<sup>83</sup> Plaintiffs were led by Mexican-American parents whose children attended elementary and secondary schools in an urban school district in San Antonio, Texas, on behalf of schoolchildren throughout the state who were members of minority groups or who were poor and resided in school districts having a low property tax base.<sup>84</sup> At that time, public school funding in Texas came from property taxes

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<sup>78</sup> *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

<sup>79</sup> 411 U.S. 1 (1973).

<sup>80</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (internal quotations omitted).

<sup>81</sup> *Id.* at 55.

<sup>82</sup> *Id.* at 10 n.21.

<sup>83</sup> *Id.* at 73-77 (Marshall, J., dissenting). In school year 1967-68, the 10 richest districts (more than \$100,000 in taxable property per pupil) were able to raise an average of \$610 per pupil, whereas the four poorest districts (less than \$10,000 in taxable property per pupil), raised an average of \$63 per pupil. *Id.* at 74-75.

<sup>84</sup> *Id.* at 4.

levied by individual school districts, supplemented by distributions from general state funds.<sup>85</sup> Although aid from state funds sought to equalize the disparities among school districts with varying property values,<sup>86</sup> the lower court found that poor districts lagged far behind richer districts in education expenditures.<sup>87</sup>

The *Rodriguez* plaintiffs argued that such a system (i) discriminated against students based on wealth and thus violated the Equal Protection Clause and (ii) impinged upon the fundamental right to an education explicitly or implicitly (through the First Amendment and the right to vote) protected by the Constitution.<sup>88</sup> In finding that wealth was not a suspect classification, the Court held that there was no discernable class of “poor” since poor people can also live in wealthy districts.<sup>89</sup> The Court found that the “poor” taxable property district class could not show certain essential characteristics seen in previously successful wealth discrimination precedents: (i) that they were completely unable to pay for some desired benefit because of impecunity, and (ii) consequently, that they sustained an *absolute* deprivation of a meaningful opportunity to enjoy that benefit.<sup>90</sup> Further, the Court reasoned that, in any case, the

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<sup>85</sup> *Id.* at 10.

<sup>86</sup> In San Antonio, the average assessed property value per pupil in the poorest district was \$5,960, compared to \$49,000 in the most affluent school district. The poorest district’s education contribution was \$26 per pupil while that of the most affluent district was \$333 per pupil. *Id.* at 11-12.

<sup>87</sup> *Id.* at 25-26. For example, the expert for the plaintiff’s affidavit stated that “sample data show[s] that the ten wealthiest Texas districts, spending \$815 per pupil, contain 8% minority pupils, whereas the four poorest districts, spending \$305 per pupil, contain 79% minority pupils.” Motion for Leave to File Brief Amici Curiae and Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973) (No.71-1332), 1972 WL 136443.

<sup>88</sup> *Id.* at 4-5.

<sup>89</sup> *Id.* at 22-23.

<sup>90</sup> *Rodriguez*, 411 U.S. at 23-25, 28.

poor as a class may not be as politically powerless as certain discrete and insular minorities, another factor in the suspect class analysis.<sup>91</sup> Refusing to depart from precedent,<sup>92</sup> the Court stated that there was no evidence of an absolute deprivation of education for any person in Texas because each child was purportedly receiving an “adequate education.”<sup>93</sup>

On the question of whether education is a fundamental right, the Court refused to find an implicitly protected fundamental right to an education that the plaintiffs claimed derived from the First Amendment and the right to vote.<sup>94</sup> Stating that “the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause,”<sup>95</sup> the Court reasoned that the plaintiff’s nexus logic,<sup>96</sup> if applied to education, could then extend the fundamental right analysis to food, clothing, and housing and the Court’s jurisprudence refused to go that far.<sup>97</sup>

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<sup>91</sup> *Id.* at 28. Because discrete and insular minorities have been historically prejudiced and are “relatively powerless to protect their interests in the political process,” a state law that discriminates against these classes of people typically requires a heightened level of scrutiny to correct the political imbalance. *Id.* at 104-05. The difficulty, however, is defining such minorities. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., dissenting) (arguing that laws targeting people with mental disabilities should be subject to heightened scrutiny).

<sup>92</sup> *Id.* at 20-21 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956); *Britt v. North Carolina*, 404 U.S. 226 (1971); *Gardner v. California*, 393 U.S. 367 (1969); *Draper v. Washington*, 372 U.S. 487 (1963); *Eskridge v. Wash. Prison Bd.*, 357 U.S. 214 (1958)).

<sup>93</sup> *Id.* at 28.

<sup>94</sup> *Id.* at 30, 33.

<sup>95</sup> *Id.* at 30, 33-34.

<sup>96</sup> Plaintiffs urged the Court to find that education is a fundamental right because it is essential to exerting one’s First Amendment freedom of speech and the right to vote. According to plaintiffs, the right to speak and receive information is meaningless without the ability to articulate one’s thoughts and analyze information. Similarly, the right to vote requires an adequately informed voter. *Id.* at 35-36.

<sup>97</sup> *Id.* at 32-37. For countries that explicitly recognize such rights in their constitution, *see, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 44, art. 55 (guaranteeing children fundamental rights to health, social security, and adequate food and all citizens a right to live with dignity

Finding that relatively poorer taxable base districts were not a suspect classification<sup>98</sup> and that the right to education was not a fundamental right,<sup>99</sup> the Court applied rational basis review to hold that the financing system based on local property taxes was rationally related to a legitimate state interest in maintaining local control over funding of public schools and hence constitutional.<sup>100</sup> The Court did not consider whether socioeconomically disadvantaged

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which includes the promotion of public housing programs); CONSTITUTION OF MALAWI, 1994 (rev. 2017) art. 30.42 (requiring that the State take “all necessary measures” to ensure “equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.”); CONSTITUTION OF UKRAINE, art. 48 (providing a right to a “sufficient standard of living” which includes “adequate nutrition, clothing and housing”); S. AFR. CONST., 1996, art. 27 (“providing a right to access health care, social security, and *sufficient* food and water”) (emphasis added); CONSTITUTION OF PAKISTAN, art. 38 (undertaking that the State shall “provide basic necessities of life, such as food, clothing, housing, education and medical relief” for all those unable to do so); CONSTITUTION OF ECUADOR, 2008 (rev. 2015) art. 3 (imposing as a “prime duty” of the State to guarantee without discrimination the rights to education, health, food, social security and water for its inhabitants). Further, over 160 countries are States Parties to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”) which provides that “The States Parties . . . recognize the right of everyone to an adequate standard of living . . . including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right. . . .” International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966 993 U.N.T.S. 3, art. 11. The United States has signed but not ratified the ICESCR. Additionally, many countries recognize these rights implicitly in their constitutions or direct their legislature to take these matters into consideration. For example, the Constitution for the Kingdom of the Netherlands provides that “[i]t shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.” GW. [Constitution] art. 20, sub. 1. The Basic Law for the Federal Republic of Germany states that the “legislative power shall extend to . . . ensuring the adequacy of food supply.” GRUNDGESETZ [GG] [Basic Law] art. 74, sub. 17, *translation at* [https://www.constituteproject.org/constitution/German\\_Federal\\_Republic\\_2014?lang=en](https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en).

<sup>98</sup> Such districts lacked the “traditional indicia of suspectness: the class is not saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Rodriguez*, 411 U.S. at 28.

<sup>99</sup> *Id.* at 37.

<sup>100</sup> *Id.* at 54-55. Justice White, dissenting, joined by Justice Douglas and Brennan, argued that the Texas financing system based on property taxes was not rationally related to its stated objective of maximizing local control. Although the State tries to maximize local initiative and local choice through the ability to levy real property tax, Justice White argues that it “utterly

*children*, as opposed to poor tax base districts, constitute a suspect class.<sup>101</sup> Additionally, the plaintiffs did not argue (in a case that was heard before the Court decided that facially neutral laws required a showing of discriminatory intent to warrant strict scrutiny) that the effective discrimination was race-based even though an overwhelming percentage of the poor tax base districts were populated by students of color.<sup>102</sup> Moreover, the *Rodriguez* Court left open the possibility that a state’s provision of education might not pass Constitutional muster under certain circumstances, stating that “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise” of the rights of speech and of full participation.<sup>103</sup>

Subsequent Supreme Court decisions in *Plyler v. Doe*,<sup>104</sup> *Papasan v. Allain*,<sup>105</sup> and *Kadrmas v. Dickinson Public Schools*<sup>106</sup> affirmed *Rodriguez*. In *Papasan v. Allain*, a case involving disparate funding of schools arising out of state mismanagement of land trusts from

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fails” to do so when parents (rich or poor) living in poor districts where property tax bases are so low can do little, if anything, to augment school district revenues. *Id.* at 63, 67-69.

<sup>101</sup> *See id.* at 22-28 (emphasis added). The Court found that the purported class of persons discriminated against, whether defined as individual poverty discrimination, comparative wealth discrimination, or district wealth discrimination, resulted in “a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts” with none of the traditional indicia of suspectness.

<sup>102</sup> In the San Antonio school district that was at issue in *Rodriguez*, approximately 90% of the student population was Mexican-American and 6% was Black. *Rodriguez*, 411 U.S. at 12. *See, e.g.*, Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, by Race, Ethnicity and Income*, PEW RESEARCH (Nov. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>.

<sup>103</sup> *Rodriguez*, 411 U.S. at 36-37.

<sup>104</sup> 457 U.S. 202 (1982).

<sup>105</sup> 478 U.S. 265 (1986).

<sup>106</sup> 487 U.S. 450 (1988).

which local school funds were derived, the Court noted that it had “not yet definitively settled the question 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>107</sup> The Court in *Papasan* suggested in *dicta* that not being taught how to read or write or not receiving any instruction on even the educational basics could be examples of failing to meet this threshold;<sup>108</sup> however, it determined that it did not require a resolution of that issue to decide the case, and therefore did not establish further precedent on the matter.<sup>109</sup>

Two years later in *Kadrmass v. Dickinson Public Schools*, Justice Marshall noted in his dissent that the previous cases had only raised the question of whether deprivation of access to education would violate a fundamental Constitutional right, and that the question of “whether a State constitutionally could deny a child access to a *minimally adequate education*” remained open.<sup>110</sup>

In Michigan in 2018, plaintiffs representing students attending schools in Detroit, relying on the *dicta* from the Supreme Court cases that a right to “a minimally adequate education” may be constitutionally protected, sued the Governor of the State of Michigan for violating their constitutional right to “access to literacy” by failing to provide adequate education conditions.<sup>111</sup> The federal court in Michigan refused to find the right of access to literacy a fundamental right

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<sup>107</sup> 478 U.S. at 285-86 (1986).

<sup>108</sup> *See Papasan*, 478 U.S. at 284, 286.

<sup>109</sup> *Id.* at 286.

<sup>110</sup> *Kadrmass*, 487 U.S. at 466 n.1 (Marshall, J., dissenting) (emphasis added).

<sup>111</sup> *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 361 (E.D. Mich. 2018), *appeals docketed* No. 18-1855/1871 (6th Cir. July 30, 2018/Aug. 1, 2018).

and dismissed the plaintiffs' Fourteenth Amendment claims.<sup>112</sup> The plaintiffs' appeal of the district court's decision is currently pending before the federal appeals court.<sup>113</sup>

Departing on a seemingly one-off basis from its *Rodriguez* rational basis analysis, however, the Court in *Plyler v. Doe* in 1982 applied an intermediate level heightened scrutiny under the Equal Protection Clause to invalidate certain provisions in the Texas education funding statute that were on their face discriminatory.<sup>114</sup> The Texas statute at issue withheld state funding from school districts that enrolled children of undocumented immigrants and authorized public school districts to deny those children enrollment.<sup>115</sup> The state of Texas cited the control of the influx of undocumented immigrants and the preservation of resources for legal residents as the government purposes furthered by the discriminatory provisions.<sup>116</sup> While making clear that education is not a fundamental right and that undocumented aliens are not a suspect class, the *Plyler* Court nonetheless found that denying education to undocumented alien children did not further any substantial state interest and violated the Equal Protection Clause,<sup>117</sup> stating that the statute "imposes a lifetime hardship on a discrete class of children not accountable for their

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<sup>112</sup> *Id.* at 360-69.

<sup>113</sup> For media coverage and commentary, see, e.g., Eli Savit, *Detroit's Schools Are Unconstitutionally Unequal*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/opinion/detroit-public-schools.html?smid=nytcore-ios-share>.

<sup>114</sup> 457 U.S. 202 (1982).

<sup>115</sup> *Id.* at 205.

<sup>116</sup> *Id.* at 227.

<sup>117</sup> The Court struck down three substantial state interests put forward by the State of Texas: (i) that the State was seeking to protect itself from an influx of illegal immigrants, (ii) that educating undocumented children imposed a financial burden on the State's ability to provide high-quality public education, and (iii) that the State was seeking to preserve resources as undocumented children were less likely to remain in the state and thus put their education to productive social or political use within the state. *Id.* at 228-30.

disabling status.”<sup>118</sup> By denying those children a basic education, the Court stated, the stigma of illiteracy would be everlasting and there would be no realistic possibility for them to live in and to contribute to the nation’s civic institutions.<sup>119</sup> In the Court’s view, these countervailing costs required that the state action further a *substantial* interest of the state, not merely a legitimate one, to be constitutional, notwithstanding its finding that there was no fundamental right or suspect class involved.<sup>120</sup> The Court highlighted that the denial of education to undocumented alien children required an “intermediate” standard of scrutiny as had been used in other limited circumstances, such as gender and legitimacy.<sup>121</sup>

The Court later clarified in *Kadrmas v. Dickinson Public Schools*<sup>122</sup> that *Plyler*’s heightened scrutiny approach in invalidating the state school funding statute despite the absence of a fundamental right or suspect class was due to the unique circumstances in *Plyler*:<sup>123</sup> the classification at issue was based on a legal characteristic over which the children themselves had little control; the law would lead to the absolute denial of education; the law was discriminatory on its face; and despite the legitimate state interest in protecting itself from an influx of illegal immigrants, there was a lack of evidence suggesting that those immigrants imposed any

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<sup>118</sup> *Id.* at 223.

<sup>119</sup> *Id.* at 223 (“The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”).

<sup>120</sup> *Id.* at 217.

<sup>121</sup> *Id.* at 217-18 n.16; *Craig v. Boren*, 429 U.S. 190 (1976); *Lalli v. Lalli*, 439 U.S. 259 (1978).

<sup>122</sup> 487 U.S. 450 (1988).

<sup>123</sup> *See also* Campaign for Fiscal Equity, Inc. v. State of New York, 655 N.E.2d 661, 668 (N.Y. 1995) (“*Plyler v. Doe* does not stand for the broad proposition that heightened scrutiny applies in all State financing challenges”).

significant burden on the state economy or that the exclusion of undocumented children from schools would improve the quality of public education in Texas.<sup>124</sup>

The Court has also applied procedural due process in the educational realm but only in limited circumstances, such as to invalidate temporary suspensions that were issued without any notice and hearing;<sup>125</sup> lower courts have limited procedural due process protections mostly to students who are expelled, suspended, or otherwise excluded from school.<sup>126</sup>

In *Goss v. Lopez*, the Court held that when a state statute has provided for free public education and compulsory attendance, it may not temporarily deny a child his property interest in educational benefits or deprive her of her liberty right to reputation without notice and a hearing.<sup>127</sup> According to the Court, procedural due process was required because a 10-day suspension had more than a *de minimis* impact on both the student's property interest (by temporarily restricting the student's legitimate, state entitlement to a public education) and the student's liberty rights (by damaging the student's standing, higher education options, and employment opportunities). In light of the short 10-day suspensions, the Court found that students are constitutionally entitled under the Fourteenth Amendment's Due Process Clause to be given oral or written notice of the charges and, if such charges are denied by the student, to be given an explanation of the evidence and an opportunity to present their side of the story.<sup>128</sup>

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<sup>124</sup> See *Kadrmas*, 487 U.S. at 459; see generally, *Plyler*, 457 U.S. at 220, 227-230.

<sup>125</sup> *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

<sup>126</sup> See *D.C. v. Copiague Union Free Sch. Dist.*, 2017 U.S. Dist. LEXIS 113253, \*27 (E.D.N.Y. 2017).

<sup>127</sup> *Id.* at 574-76.

<sup>128</sup> *Id.* at 581.

Relying on *Goss*, the Second Circuit has held public education to be a protected property interest<sup>129</sup> although it has restricted the procedural due process rights to instances in which the student is excluded from the entire educational process rather than a particular course or activity.<sup>130</sup>

The Court's failure to recognize education as a fundamental right guaranteed by the Due Process Clause of the Constitution<sup>131</sup> and its refusal to identify poor children or districts with predominantly communities of color as a suspect class that would necessitate a higher level of scrutiny than rational basis<sup>132</sup> has hindered *Brown's* promise of education on "equal terms" for all. A property tax-based system of allocating school funds can create funding disparities that correlate with the racial and socioeconomic composition of the local residing population and result in less funding to high-poverty schools with more students of color.<sup>133</sup> The Supreme

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<sup>129</sup> See *Handberry v. Thompson*, 446 F.3d 335, 353 (2d Cir. 2006); see also *Saggio v. Sprady*, 475 F. Supp. 2d 203, 210 (E.D.N.Y. 2007) (New York Education Law Section 3202(1) establishes a right to public education); *S.C. v. Monroe Woodbury Cent. Sch. Dist.*, 2012 U.S. Dist. LEXIS 100622, \*20 (S.D.N.Y. 2012).

<sup>130</sup> *Mazevski v. Horseheads Cent. Sch. Dist.*, 950 F. Supp. 69, 72 (W.D.N.Y. 1997).

<sup>131</sup> Many articles have argued that the right to education should be considered a fundamental right. Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019); Kristen Safier, *The Question of a Fundamental Right to a Minimally Adequate Education*, 69 U. CIN. L. REV. 993 (2001); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279 (1993).

<sup>132</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109 (Marshall, J., dissenting) ("[T]his Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification.").

<sup>133</sup> Catherine E. Lhamon, *Dear Colleague Letter: Resource Comparability*, Department of Education, Office for Civil Rights, (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>. Schools across the U.S. find it increasingly difficult to provide a quality education to all students, and the allocation of funds for public education exacerbates rather than remedies achievement and opportunity gaps. U.S. Comm. on Civil Rights, *Public Education Funding Inequity: In an Era of Increasing Concentration of Poverty and Resegregation*, 14 (Jan. 2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf>; Drew Desilver, *U.S.*

Court’s reticence to firmly address the issue through any of the Constitution’s provisions—the Equal Protection Clause, the Due Process Clause, the Privileges or Immunities Clause or the Preamble<sup>134</sup>—forces litigants to rely on federal statutes, state constitutions, and state laws to varying degrees of success to fulfill *Brown*’s promise of equal opportunity to education for all.<sup>135</sup>

In his dissenting opinion in *Rodriguez*, Justice Marshall argued that the inequality of educational opportunity resulting from the disparity of educational funding, based in large part on the taxable wealth of the various Texas districts, formed the basis for a valid Equal Protection Clause claim.<sup>136</sup> In his view, the schoolchildren of property-poor districts constituted a suspect class entitled to heightened protection against discrimination.<sup>137</sup> For Justice Marshall, while the

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*Income Inequality, on the Rise for Decades, Is Now Highest Since 1928*, PEW RES. CTR. (Dec. 5, 2013), <https://www.pewresearch.org/fact-tank/2013/12/05/u-s-income-inequality-on-rise-for-decades-is-now-highest-since-1928/>.

<sup>134</sup> Although the Preamble of the U.S. Constitution states the U.S. Constitution is established to, among other things, “form a more perfect Union, establish Justice...promote the general Welfare, and secure the Blessings of Liberty,” the Supreme Court has rejected the Preamble as a substantive basis for legal claims but has used the Preamble as an interpretive guide of the Constitution. “The spirit of the Federal Constitution or its preamble cannot be invoked, apart from the words of that instrument, to invalidate a state statute.” *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). And, in *Tinsley v. Methodist Hospital of Indiana, Inc.*, the plaintiff argued that she was denied her constitutional rights comprising the “Blessings of Liberty” and “General Welfare” by the hospital’s action but the Court cited *Jacobson* and stated that the Preamble “does not guarantee any rights; instead it describes the goals and aspiration behind the text of the Constitution.” 70 F.2d. 1275 (7th Circ. 1995). Case law often refers to the Preamble as an interpretive guide to the U.S. Constitution, because “the Preamble was never considered to be a parameter in judicial review of the constitutionality. But . . . the Court still often feels the need to use the Preamble in formulating and reinforcing its *ratio decidendi*.” Justin O. Frosini, *Constitutional Preambles; More Than Just a Narration of History*, 2017 U. ILL. L. REV. 603, 611 (2017) (emphasis original). The use of the Preamble as an interpretive tool is also echoed in analyses of state constitutions, some of which have noted the “right to view educational opportunity as one of the ‘blessings of liberty.’” *Chance v. Mississippi State Textbook Rating & Purchasing Board*, 190 Miss. 453, 466 (1941).

<sup>135</sup> See *infra* Chapter I.1.C-Chapter I.2 and Chapter II.

<sup>136</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 90 (Marshall, J., dissenting).

<sup>137</sup> *Id.* at 91.

Texas statute on its face only discriminated against local districts, the discriminatory impact was felt by children based on where they happened to live.<sup>138</sup> In rejecting the majority's view that wealth discrimination cases require a showing of absolute deprivation of the interest involved, Justice Marshall pointed to the fact that the Court has recognized discrimination on the basis of wealth under the Equal Protection Clause even where there was relative wealth deprivation.<sup>139</sup>

Even absent a finding that poverty constitutes a suspect class or that education is a fundamental right, property tax-based methods of funding public education could still be found to be unconstitutional under a simple rational basis analysis. The Court has made clear that *Rodriguez* did not “purport to validate all funding variations that might result from a State’s public school funding decisions.”<sup>140</sup> Disagreeing with the *Rodriguez* majority opinion that the Texas school funding scheme was rationally related to its stated interest in maintaining local participation in and control of each district’s schools,<sup>141</sup> Justice White argued that states should be required to affirmatively show that the means (financing based in part on local property taxes) chosen is rationally related to effectuating the goal (local participation in and control of education), and not simply be required to show that there is a legitimate goal.<sup>142</sup> Not requiring that nexus, according to Justice White, “makes equal protection analysis no more than an empty

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<sup>138</sup> *Id.* at 92.

<sup>139</sup> *Id.* at 119-20. Justice Marshall noted that in *Griffin v. Illinois*, 351 U.S. 12 (1955), concerning the denial of a trial transcript, and *Douglas v. California*, 372 U.S. 353 (1963), concerning the denial of counsel, the actual right to an appeal was not absolutely denied; rather the right of appeal was a “substantially less meaningful right for the poor than for the rich,” thereby triggering an equal protection violation.

<sup>140</sup> *Papasan*, 478 U.S. at 267, 288.

<sup>141</sup> *Rodriguez*, 411 U.S. at 49-55.

<sup>142</sup> *Id.* at 67 (White, J., dissenting).

gesture.”<sup>143</sup> It is also noteworthy that the Court has not hesitated under rational basis review to invalidate state laws that violate rights or liberty interests that are important but do not otherwise fall squarely into one of the fundamental rights recognized by the Court’s jurisprudence.<sup>144</sup> Moreover, it is possible for the Court to find that the manner in which education funding schemes that rely heavily on local property taxes and result in the provision of disparate and unequal educations violate the “equal terms” requirement laid down in *Brown v. Board of Education*.

A recently filed federal case, *Cook v. Raimondo*, attempts to reframe the constitutional argument for educational deprivation under the Equal Protection, Due Process, and Privileges or Immunities Clauses by focusing on Rhode Island’s failure to provide “an adequate education for capable civic participation.”<sup>145</sup> The *Cook* plaintiffs—students from 14 high school, middle school, elementary school and preschools—have brought a class action lawsuit against the Rhode Island Governor and the Education Commissioner,<sup>146</sup> claiming that defendants have denied them their fundamental right to “a meaningful opportunity” to obtain the education necessary to prepare them to be capable voters and jurors, to exercise effectively their right of free speech and other Constitutional rights, to participate effectively and intelligently in the

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<sup>143</sup> *See id.* at 68 (White, J., dissenting).

<sup>144</sup> *See, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972) (denying only unmarried persons access to contraceptives lacks rational basis); Romer v. Evans, 517 U.S. 620 (1996) (criminalizing sodomy lacks legitimate governmental purpose); *see supra* note 54 and accompanying text.

<sup>145</sup> Class Action Complaint at 11, *Cook v. Raimondo* (D.R.I. filed Nov 28, 2018) (No. 18-00645).

<sup>146</sup> Other defendants include the Council on Elementary and Secondary Education, the Speaker of the Rhode Island House of Representatives, the President of the Rhode Island Senate, and the Rhode Island State Board of Education.

political system and to function productively as civic participants.<sup>147</sup> Referring to Justice Marshall’s dissenting opinion in *Rodriguez*, plaintiffs allege that defendants violated the Fourteenth Amendment’s Due Process, Equal Protection and Privileges or Immunities Clauses by their failure to provide students in Rhode Island with the degree of education necessary to prepare them to be capable voters and jurors and to exercise their rights of free speech and other U.S. Constitution rights and to effectively participate in our political system.<sup>148</sup> The district court held a hearing on the defendants’ motion to dismiss for failure to state a claim on December 5, 2019 but has not yet ruled.<sup>149</sup>

### **C. Right to Education under the Civil Rights Act of 1964**

Title VI of the Civil Rights Act of 1964<sup>150</sup> (“Title VI”) provides a separate avenue to pursue claims of discrimination on the basis of race, color and national origin in the realm of public education. Title VI claims are typically brought under two theories: (i) claims of intentional discrimination under section 601 of Title VI and (ii) claims of discriminatory impact brought as an administrative complaint with the federal agency providing the funds under section 602 of Title VI, in which case, the federal agency may seek to secure voluntary compliance with Title VI or, if that proves unsuccessful, initiate fund termination proceedings or refer the matter to the Department of Justice for appropriate judicial action.<sup>151</sup>

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<sup>147</sup> *Id.* at 121-29.

<sup>148</sup> The other Constitutional rights the plaintiffs asserted included the Sixth Amendment (right to jury in criminal trial), Seventh Amendment (right to jury in certain civil cases), and Article 4 Section 4 (guarantee of a republic form of government). Class Action Complaint at 45, 130-33, *Cook v. Raimondo* (D.R.I. filed Nov. 28, 2018) (No. 18-00645).

<sup>149</sup> Docket Entry 35, *Cook v. Raimondo*, No. 18-00645 (D.R.I., filed Nov 28, 2018).

<sup>150</sup> 42 U.S.C. § 2000d *et seq.* See also 34 C.F.R. Part 100 (implementing regulations).

<sup>151</sup> See U.S. Dep’t of Educ., *Education and Title VI*, <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last visited Feb. 3, 2020). See also U.S. Dep’t of Just., *Title VI Legal Manual*, [hereinafter Title VI Legal Manual]

## Intentional Discrimination

Section 601 of Title VI prohibits discrimination by providing:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.<sup>152</sup>

In *Alexander v. Sandoval*, in 2001, the Court determined that section 601 of Title VI only prohibits intentional discrimination.<sup>153</sup> Under section 601, an individual may bring a private right of action against any recipient of federal assistance, including state governments or public education institutions,<sup>154</sup> who engages in intentional discrimination on the basis of race, color or

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<https://www.justice.gov/crt/fcs/T6manual> (last updated Dec. 19, 2019). Title VI Guidelines list four alternative approaches to litigation and fund termination: (1) consulting with or seeking assistance from other Federal agencies . . . having authority to enforce nondiscrimination requirements; (2) consulting with or seeking assistance from State or local agencies having such authority; (3) bypassing a recalcitrant central agency applicant in order to obtain assurances from or to grant assistance to complying local agencies; and (4) bypassing all recalcitrant non-Federal agencies and providing assistance directly to the complying ultimate beneficiaries. 28 C.F.R. § 50.3 I.B.2.

<sup>152</sup> 42 U.S.C. § 2000d.

<sup>153</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (“it is . . . beyond dispute . . . that § 601 prohibits only intentional discrimination”) *abrogating* *Lau v. Nichols*, 414 U.S. 563 (1974). In *Sandoval*, the Court explicitly notes that it has rejected *Lau*’s interpretation of § 601 which decided that “discrimination is barred which has that *effect* even though no purposeful design is present.” *Lau v. Nichols*, 414 U.S. 563, 568 (1974); *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Guardians Association v. Civil Service Commission of New York City*, 463 U.S. 582, 607-08 (1983); *id.* at 610-11 (Powell, J., concurring); *id.* at 612 (O’Connor, J., concurring); *id.* at 642 (Stevens, J., dissenting). See *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003) (citing *Regents of University of California v. Bakke*, 438 U.S. 265, 287 (1978) (“Title VI . . . proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.”)); see generally Title VI Legal Manual, *supra* note 151.

<sup>154</sup> *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program. 28 C.F.R. § 42.102(f) (emphasis in original).

national origin.<sup>155</sup>

To prove intent, there must be a showing that the decision-maker acted, at least in part, as a result of the aggrieved party's race, color or national origin.<sup>156</sup> This may be proven by direct evidence or by circumstantial evidence.<sup>157</sup> In the absence of proof of discriminatory intent,<sup>158</sup> plaintiffs may prove their *prima facie* case by a preponderance of the evidence of a pattern or practice of systemic or widespread discrimination by showing that discrimination against

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<sup>155</sup> 42 U.S.C. § 2000d; *Sandoval*, 532 U.S. at 275.

<sup>156</sup> See, e.g., *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68 (1977) (identifying a non-exhaustive list of factors that may serve as indicia of discriminatory intent); *Elston v. Talladega City Board of Education*, 997 F.2d 1394, 1406 (11th Cir. 1993) (“To establish an [E]qual [P]rotection [C]lause violation, a plaintiff must demonstrate that a challenged action was motivated by an intent to discriminate”); *African American Legal Defense Fund, Inc. v. New York Department of Education*, 8 F. Supp. 2d 330, 337 (S.D.N.Y. 1998) (discriminatory intent required for a claim of intentional discrimination “implies more than intent as volition or intent as awareness of consequences” and requires “action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group”) (citations omitted).

<sup>157</sup> See generally, Title VI Legal Manual, *supra* note 151.

<sup>158</sup> Discriminatory intent may be proven by: (i) direct evidence of a discriminatory motive, (ii) the *Arlington-Heights* framework and (iii) the *McDonnell-Douglas* framework. The *Arlington Heights* framework uses different types of circumstantial evidence to show that the recipient acted, at least in part, because of race, color, or national origin. For example, the court can consider (i) statistics demonstrating a clear pattern of discriminatory effect; (ii) the historical and factual background leading up to the decision; (iii) procedural abnormalities; (iv) the legislative history; and (v) consistent patterns of imposing greater harm on minorities than on non-minorities. This kind of evidence is helpful when the policy challenged is facially neutral. The *McDonnell-Douglas* framework is used to show that similarly situated individuals were treated differently because of their race, color, or national origin. Plaintiffs may do so by making a *prima facie* case of discrimination by showing that they were a member of a particular protected group, were eligible for the activity, were not accepted, and a similarly situated individual not in the plaintiff's protected group was given better treatment. If plaintiff establishes a *prima facie* case, the burden shifts to the defendant who must articulate a legitimate, non-discriminatory reason; if the defendant sustains this burden, the burden shifts back to the plaintiff to prove that the proffered reason is a pretext for discrimination. Title VI Legal Manual, *supra* note 151; *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, (1977) (establishing a method of proof for intentional discrimination under the Equal Protection Clause); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) (establishing Title VII framework for establishing *prima facie* case of intentional discrimination often followed in Title VI cases).

individuals was the defendant’s standard operating procedure and not “the mere occurrence of isolated or accidental or sporadic discriminatory acts.”<sup>159</sup>

### **Disparate Impact**

Section 602 of Title VI directs each federal agency and department to “effectuate the provisions of section 601” by issuing regulations “consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . .”<sup>160</sup> Consistent with that directive, most federal funding agencies have adopted regulations that prohibit recipients of federal aid from engaging in practices that have a discriminatory effect, or “disparate impact,” on the basis of race, color, or national origin.<sup>161</sup> For instance, the U.S. Department of Education and the U.S. Department of Justice have each implemented substantially similar regulations that prohibit any recipient of federal funding from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals

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<sup>159</sup> EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263, 1286-87 (11th Cir. 2000) (quoting International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977) (citations omitted)).

<sup>160</sup> Section 602 of Title VI provides, in relevant part, that:

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 601 [of Title VI] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law: Provided, however, that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

42 U.S.C. § 2000d-1.

<sup>161</sup> See Department of Justice, *Title VI of the Civil Rights Act of 1964*, <https://www.justice.gov/crt/fcs/TitleVI> (last visited Feb. 3, 2020).

to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color or national origin.”<sup>162</sup> The validity of these discriminatory effect regulations have not been addressed by the Court after *Sandoval*.<sup>163</sup>

Discriminatory impact cases under Title VI, however, are not enforceable by private plaintiffs since the Court ruled in *Alexander v. Sandoval* that only federal agencies may enforce disparate impact claims under section 602 of Title VI.<sup>164</sup> And, because the *Sandoval* Court assumed the validity of the disparate impact regulations under section 602, there remains some uncertainty over whether section 602 regulations promulgated to “effectuate the provisions of section 601” are limited to the intentional discrimination scope of section 601.<sup>165</sup> For now, the federal agencies continue to enforce their disparate impact regulations.

To establish discriminatory impact, the federal agency must establish by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on the protected group by articulating facts and statistics that “adequately capture” the impact of the recipient’s policy or action on similarly situated members of protected and non-protected

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<sup>162</sup> 34 C.F.R. § 100.3(b)(2); 28 C.F.R. § 42.104(b)(2).

<sup>163</sup> *Guardians Ass’n. v. Civil Serv. Comm’n*, 463 U.S. at 643 (Stevens, J., dissenting) (“This Court has repeatedly held the validity of [Title VI’s implementing] regulations and their ‘effect’ standard.”) (citations omitted); *Alexandra v. Choate*, 469 U.S. 287, 293 (1985) (“actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI”); *but see* note 165 and accompanying text.

<sup>164</sup> The *Sandoval* decision does not undermine the validity of the regulations or otherwise limit the government’s authority to enforce Title VI regulations. 532 U.S. at 280, 285-86, 293.

<sup>165</sup> See JARED P. COLE, CONGRESSIONAL RESEARCH SERVICE, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 11-16 (2019), <https://fas.org/sgp/crs/misc/R45665.pdf>.

groups.<sup>166</sup> If such a causal link can be shown, the recipient of federal assistance must have a “substantial legitimate justification” for the challenged practice,<sup>167</sup> a standard that has been translated in practice to “necessary to meeting a goal that was legitimate, important, and integral to the [recipient’s] institutional mission.”<sup>168</sup> In cases focused directly on education, the challenged practice must be an “educational necessity,” meaning that the challenged practice “bear[s] a manifest demonstrable relationship to classroom education” or other educational goal.<sup>169</sup> A recipient must also show that there are no alternative practices that are comparably effective that would have less of a disparate impact than the practice being challenged.<sup>170</sup>

### **Title VI Disparate Impact Cases before *Sandoval***

Even prior to *Sandoval*, courts were loath to find Title VI disparate impact violations in cases involving education and funding formulas. In *Larry P. by Lucille P. v. Riles*, one of the few examples of a Title VI disparate impact finding, the Ninth Circuit held that California’s use of standardized intelligence tests that placed a disproportionate number of Black children in special classes for the “educable mentally retarded,” designed for children incapable of learning in regular classes, was a Title VI disparate impact violation.<sup>171</sup> The court found that a *prima facie*

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<sup>166</sup> *New York City Environmental Justice Alliance v. Giuliani*, 214 F.3d 65, 70 (2d Cir. 2000); *Elston*, 997 F.2d at 1407. The Title VI analysis of disparate impact mirrors that of Title VII. *N.Y. Urban League v. New York*, 71 F.3d 1031, 1037 (2d Cir. 1995) (“Courts considering claims under analogous Title VI regulations have looked to Title VII disparate impact cases for guidance.”).

<sup>167</sup> *Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1417 (11th Cir. 1985).

<sup>168</sup> *Elston*, 997 F.2d at 1412-13.

<sup>169</sup> *See, e.g., N.Y. Urban League*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407 n.14; *Ga. State Conference*, 775 F.2d at 1417.

<sup>170</sup> *Ga. State Conference*, 775 F.2d at 1417.

<sup>171</sup> 793 F.2d 969, 983 (9th Cir. 1984). The class action on behalf of Black schoolchildren in California was brought against California’s State Superintendent of Public Instruction. *Id.*

case had been demonstrated by showing that the tests had a discriminatory impact on Black schoolchildren,<sup>172</sup> and shifted the burden to the defendant to demonstrate that the test was “required by educational necessity.”<sup>173</sup>

Again, in *Meek v. Martinez*, the federal district court held that an intrastate funding formula used by Florida to distribute federal funds under the Older Americans Act of 1965, violated Title VI as the formula resulted in a “substantially adverse racially disparate impact” on districts with a relatively high percentage of minority residents.<sup>174</sup> Although the federal court found that intentional discrimination had not been proven by a preponderance of the evidence, it held that plaintiffs had established a *prima facie* case as to the disparate impact of two of the three factors included in the funding formula.<sup>175</sup> Finding that the State had not produced evidence to rebut the *prima facie* case or to prove a “manifest demonstrable relationship” between the factors and the goal of the Older Americans Act of providing services to older individuals with the greatest economic or social needs (particularly to low-income minority individuals), and that plaintiffs had demonstrated that less discriminatory alternatives to the

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<sup>172</sup> *Id.* at 982. In 1968-69, Black children accounted for 27 percent of the E.M.R. population although they represented only 9 percent of the state school population. *Id.* at 973.

<sup>173</sup> *Id.* at 983. The Ninth Circuit affirmed the district court’s holding that defendant had violated the Title VI disparate impact regulations. *Larry P. by Lucille P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

<sup>174</sup> 724 F. Supp. 888, 906 (1987). Defendants in the case included the Governor of the State of Florida and other individuals in their capacity as state officials.

<sup>175</sup> *Id.* The three factors were: (i) the number of persons age 60 and over whose income is below poverty line, as a proxy for economic need in the elderly population, (ii) the number of persons age 65 and over who are living alone or with non-relatives, as a proxy for the social and physical needs of the elderly, and (iii) the number of persons age 75 and over, as a proxy for the frailty of the elderly. *Id.* at 896-97. The court found from the evidence that factors (ii) and (iii) were not valid or legitimate proxies for the attributes sought and had a substantially disparate impact on districts with a higher percentage of minority elderly residents. *Id.*

formula were readily available and could be feasibly implemented, the court held that the intrastate funding formula violated Title VI.<sup>176</sup>

In *Campaign for Fiscal Equity, Inc. v. State of New York*, the New York Court of Appeals held that plaintiffs had pleaded a valid cause of action in seeking a declaratory judgment that New York State's public school financing system was unlawful under Title VI.<sup>177</sup> The appellate division below the Court of Appeals had dismissed plaintiffs' claim, concluding that the State's allocation of a lump sum of education aid to the New York City school system had not violated Title VI's discriminatory impact prohibition, on the ground that the subsequent allocation by the school district to individual schools was the actual cause of the disparate impact.<sup>178</sup> The Court of Appeals disagreed and held that statistical evidence of the disparity between the total and per capita education aid distributed to the New York City school system's predominantly minority student population compared to the amounts distributed to non-minority students in the state established a *prima facie* case of disparate impact, and as defendants had not yet offered a substantial justification for the challenged practice due to the lower courts' dismissal, reinstated

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<sup>176</sup> *Id.* at 902, 906 (citing *Ga. State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403, 1418 (11th Cir. 1985)).

<sup>177</sup> 655 N.E.2d 661, 663 (N.Y. 1995). Plaintiffs, including (i) Campaign for Fiscal Equity, Inc., a not-for-profit organization whose membership consisted of community school boards, individual citizens, and parent advocacy organizations; (ii) 14 of New York City's 32 school districts; and (iii) individual students who attended New York City public schools and their parents, brought an action against defendants that included New York State, the Governor, the Commissioner of Education, the Commissioner of Taxation and Finance, and the Majority and Minority Leaders of the Senate and Assembly. *Id.*; see *infra* Chapter I.2 for further discussion.

<sup>178</sup> *Id.* at 664.

the claim under the Title VI regulations.<sup>179</sup> Following *Sandoval*, however, the Court of Appeals dismissed the plaintiffs' Title VI claims based on disparate impact.<sup>180</sup>

And, in *African American Legal Defense Fund, Inc. v. New York Department of Education*, the federal district court dismissed a claim brought by parents of minority public school students against New York State and New York City educational agencies challenging the public education funding system as discriminatory under Title VI.<sup>181</sup> The court held that the plaintiffs had failed to make a *prima facie* case of disparate impact under Title VI due to questionable and incomplete statistical evidence. Further, plaintiffs had been “unable to show the absence of a rational relationship” between the funding system based on student attendance (rather than enrollment) and the State’s legitimate interests in (i) effectively spending its resources by only paying for those students actually attending school and (ii) providing an incentive to improve school attendance rates.<sup>182</sup>

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<sup>179</sup> *Id.* at 670-71. The Court of Appeals reasoned that, because the school districts can “only suballocate what the State allocates to it” and the New York City school system received only 34 percent of state education aid when it was comprised of 37 percent of the state’s student population, 81 percent of whom were minorities constituting 74 percent of the state’s minority student population, the minority students would “receive less aid as a group and per pupil . . . irrespective of how the City suballocates the education aid it receives.” *Id.* at 670. On remand, the trial court entered judgment for plaintiffs. See *Campaign for Fiscal Equity, Inc. v. State of New York*, 719 N.Y.S.2d 475 (Sup. Ct. 2001). However, the decision was later reversed and the claim dismissed following *Sandoval*. See *Campaign for Fiscal Equity, Inc. v. State of New York*, 295 A.D.2d 1 (N.Y. App. Div. 2002); *supra* Chapter I.1.C (explaining *Sandoval*). See *infra* Chapter I.2 (detailing the history of *CFE* cases in New York).

<sup>180</sup> *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E.2d 326, 329 n.1 (N.Y. 2003). See *infra* note 201 and accompanying text.

<sup>181</sup> 8 F. Supp. 2d 330 (S.D.N.Y. 1998).

<sup>182</sup> *Id.* at 336-39.

## **Title VI Claims Following *Sandoval***

Since *Sandoval*, claims under Title VI largely have been handled by the U.S. Department of Education’s Office of Civil Rights (“OCR”).

In 2013, the Schenectady City School District filed a complaint with the OCR<sup>183</sup> against the State of New York, the New York State Legislature, the Governor of the State of New York, the New York State Education Department, the New York State Board of Regents, and the New York State Commission on Education on behalf of students who attend the district’s schools alleging that the educational funding structure implemented in New York State has “resulted in *de facto* discrimination” and disparate impact harming student achievement.<sup>184</sup> According to the complaint, the State’s failure to fully implement Foundation Aid, the school funding program instituted in 2007, has a discriminatory and disparate impact on Black, Latinx,<sup>185</sup> and other non-White students as well as non-English-speaking students and those with disabilities.<sup>186</sup> The complaint alleges that, under the State’s current education funding scheme, the more “White” a school’s district population, the more likely the district receives all, or close to all, of the aid it was promised under Foundation Aid.<sup>187</sup> The OCR opened an investigation for the claims against

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<sup>183</sup> The Middletown school district joined in the complaint. *Office for Civil Rights Will Investigate Two NY School District Claims of School Funding Discrimination*, SCHENECTADY CITY SCHOOLS (October 4, 2019), [http://www.schenectady.k12.ny.us/about\\_us/strategic\\_initiatives/advocacy/civil\\_rights\\_complaint](http://www.schenectady.k12.ny.us/about_us/strategic_initiatives/advocacy/civil_rights_complaint).

<sup>184</sup> Schenectady City (NY) Sch. Dist., Complaint 2-3 (OCR 2013) [hereinafter OCR Complaint].

<sup>185</sup> For purposes of this report, the term “Latinx” is used interchangeably with the term “Hispanic.”

<sup>186</sup> *See generally infra* Chapter II; OCR Complaint, *supra* note 184, at 3.

<sup>187</sup> OCR Complaint, *supra* note 184, at 4. In particular, “[t]he Schenectady City School District student body is approximately 66% non-White and receives just 54% of the Foundation Aid to which it is entitled.” *Id.* at 13.

the New York State Education Department and the Board of Regents—both recipients of federal funds—but would not proceed to do so for claims against named respondents over whom it does not have jurisdiction.<sup>188</sup> According to Superintendent Spring of Schenectady City School District, federal officials have suggested that this complaint is the first of its kind from a school district.<sup>189</sup> The OCR says it is currently collecting and analyzing evidence, seven years following the submission of the claim.<sup>190</sup>

Most recently, the Trump Administration has signaled that it is rethinking Title VI regulations that reach beyond intentional discrimination to address policies with a racially disparate impact; it is expected that the Trump Administration will propose rule changes that will make it more difficult to bring such claims.<sup>191</sup>

A noteworthy parallel development is that, in August 2019, the U.S. Department of Housing and Urban Development proposed to change the rules under Title VIII of the Civil Rights Act of 1968, as amended, for disparate impact regulation.<sup>192</sup> The proposal, among other

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<sup>188</sup> Schenectady City Schs., *Office for Civil Rights Will Investigate Two NY School District Claims of School Funding Discrimination*, (October 4, 2019), [http://www.schenectady.k12.ny.us/about\\_us/strategic\\_initiatives/advocacy/civil\\_rights\\_complaint](http://www.schenectady.k12.ny.us/about_us/strategic_initiatives/advocacy/civil_rights_complaint); Haley Viccaro, *Feds to Probe Schenectady School Aid Complaint*, THE DAILY GAZETTE (Dec. 2, 2014).

<sup>189</sup> Schenectady City Schs., *Office for Civil Rights Will Investigate Two NY School District Claims of School Funding Discrimination*, (Oct. 4, 2019), [http://www.schenectady.k12.ny.us/about\\_us/strategic\\_initiatives/advocacy/civil\\_rights\\_complaint](http://www.schenectady.k12.ny.us/about_us/strategic_initiatives/advocacy/civil_rights_complaint)

<sup>190</sup> *Id.*; Testimony of Laurence Spring, Superintendent of Schenectady School District, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter *Spring Testimony*], 20-21.

<sup>191</sup> *See, e.g.*, Lauren Meckler & Devlin Barrett, Trump Administration Considers Rollback of Anti-Discrimination Rules, WASH. POST (Jan. 3, 2019), [https://wapo.st/2F7CKft?tid=ss\\_mail](https://wapo.st/2F7CKft?tid=ss_mail).

<sup>192</sup> Dep’t of Hous. & Urb. Dev., Office of the Assistant Sec’y for Fair Hous. & Equal Opportunity, *HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, 84 FR 42854-01 (Aug. 19, 2019).

changes, would include available defenses/rebuttals to allegations of disparate impact and create a new burden-shifting framework for establishing a *prima facie* inference of discriminatory effect.<sup>193</sup> The new framework would consist of five elements: (i) the challenged policy is arbitrary, artificial or unnecessary to achieve a legitimate objective; (ii) there is a robust causal link between the challenged policy and a disparate impact on a protected group; (iii) there is an adverse effect on members of a protected class; (iv) the disparity is material or “significant”; and (v) the challenged policy is the proximate cause of, or has a direct relation to, the injury.<sup>194</sup> The proposed changes are intended to make it more difficult to bring disparate impact claims, and may be a preview of potential changes to the Title VI Section 602 framework.<sup>195</sup>

#### **D. Equal Educational Opportunities Act of 1974**

The Equal Educational Opportunities Act of 1974<sup>196</sup> (“EEOA”) is another, albeit limited, avenue for potential education-related claims; because its reach is limited to prohibiting deliberate segregation as well as to the failure by a state to take appropriate action to overcome language barriers that impede equal student participation, it has not been relied upon in educational funding litigation outside issues pertaining to its language barrier provisions.<sup>197</sup>

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Cases decided under the Fair Housing Act often use a disparate impact standard that is “substantially similar” to the Title VI and Title VII standard. *See* Title VI Legal Manual, *supra* note 151.

<sup>196</sup> 20 U.S.C. § 1701 *et seq.*

<sup>197</sup> The EEOA prohibits: (i) deliberate segregation; (ii) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps to remove the vestiges of a dual school system; (iii) busing students to a farther school which has the effect of increasing segregation; (iv) discrimination in the employment of faculty and staff; (v) student transfers which have the purpose and effect of increasing segregation; and (vi) the failure to take appropriate action to overcome language barriers that impede equal student participation. *See* 20 U.S.C. § 1703. For example, the Schenectady City School District’s OCR complaint argued that New York State’s funding model results in *de facto* segregation against students who are English

Interestingly, however, in implementing the EEOA, Congress stated that “The Congress declares it to be the policy of the United States that . . . all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin.”<sup>198</sup>

## **2. Access to Education under New York State Law**

Unlike the U.S. Constitution, the Constitution of the State of New York mandates that the legislature “provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated” (the “Education Article”).<sup>199</sup> The Court of Appeals of New York (the “Court of Appeals”) has interpreted the Education Article as guaranteeing “a sound basic education,” but not an equal or substantially equivalent education, to all children in New York.<sup>200</sup>

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language learners in violation of the EEOA’s prohibition of “the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” OCR Complaint, *supra* note 184; 20 U.S.C. §1703(f).

<sup>198</sup> 20 U.S.C. § 1701.

<sup>199</sup> N.Y. CONST. ART. XI, § 1.

<sup>200</sup> *Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 47 (1982).

### A. The *CFE* Trilogy

Following extensive litigation begun in 1993,<sup>201</sup> the New York Court of Appeals in 2003 held in *Campaign for Fiscal Equity, Inc. v. State of New York* (“*CFE II*”)<sup>202</sup> that, measured either by inputs (*i.e.*, teachers, school facilities and classrooms, and instrumentalities of learning) or by outputs (*i.e.*, school completion and test results), New York City schoolchildren were not receiving a sound basic education,<sup>203</sup> which it defined as the “opportunity for a meaningful high school education, one which prepares [children] to function productively as civic participants.”<sup>204</sup> In the court’s words, New York State is required to ensure the availability of a sound basic education, consisting of “the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury.”<sup>205</sup>

In *CFE I*, in which the Court of Appeals reinstated plaintiffs’ claims under the Education Article on the basis that New York City students were not receiving a sound basic education,<sup>206</sup>

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<sup>201</sup> In 1993, the Campaign for Fiscal Equity (“*CFE*”), a not-for-profit organization comprised of community school boards, individual citizens, a number of parent advocacy organizations, 14 of New York City’s 32 school districts and individual students who attended New York City public schools and their parents, filed a lawsuit against the State of New York claiming that the State was not providing adequate funding for New York City public schools. The plaintiffs claimed violations of (1) the Education Article, (2) the equal protection clauses of the New York and U.S. Constitution, (3) the antidiscrimination clause of the New York State Constitution and (4) Title VI. *Campaign for Fiscal Equity, Inc. v. State of New York*, 655 N.E.2d 661, 663-64 (N.Y. 1995) (“*CFE P*”). The antidiscrimination clause of the New York State Constitution, Article I, § 11, contains both an equal protection and antidiscrimination clause:

[Equal protection of laws; discrimination in civil rights prohibited]

§ 11. No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Executive Law § 291(2) provides that “[t]he opportunity to obtain education without discrimination because of age, race, creed, color, national origin, sex or marital status, as

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specified in section two hundred ninety-six of this article, is hereby recognized as and declared to be a civil right.”

The trial court dismissed the plaintiffs’ equal protection claims but allowed claims under the Education Article, the antidiscrimination clause of the New York State Constitution and the implementing regulations of Title VI to proceed. *CFE I*, at 664. The Appellate Division reversed the trial court, which upheld the antidiscrimination cause of action by reference to Executive Law § 291(2) and the Appellate Division stated that Executive Law § 291(2) merely assures every student an “opportunity to obtain education.” According to the Appellate Division, “There is nothing in the funding allocation scheme which discriminates against any of the individual plaintiffs and thus deprives them of such educational opportunity.” *Campaign for Fiscal Equity v. State*, 205 A.D.2d 272, 276-77 (App. Div. 1994). In addition, the Appellate Division dismissed the plaintiffs’ remaining claims. *CFE I*, at 664. The Court of Appeals subsequently reinstated the plaintiffs’ claim under the New York State Constitution’s Education Article. *Id.* at 666-68. The Court of Appeals also reinstated the plaintiffs’ cause of action under Title VI because plaintiffs had alleged that the distribution of funds had the effect of subjecting minority students to discrimination on the basis of their race, color, or national origin and defendants had not yet advanced a substantial justification for such disparate impact. *Id.* at 669-71. Finally, the Court of Appeals rejected the plaintiffs’ Equal Protection Clause argument by applying the *Rodriguez* rational basis test because plaintiffs were unable to demonstrate a need to apply heightened scrutiny, such as the unique circumstances in *Plyler* or intentional discrimination causing a disparate impact. *Id.* at 668-69. The trial court was instructed to proceed to evaluate the facts and evidence to determine whether the Education Article or Title VI had in fact been violated. After *Sandoval*, the Court of Appeals later affirmed the dismissal of the private Title VI claims. *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 903 (N.Y. 2003); *see supra notes* 164, 177-180 and accompanying text. For more information on the history of this case and its legacy, *see Maxwell Univ., Ctr. for Pol’y Research, Education Finance and Accountability Program*, [https://www.maxwell.syr.edu/cpr/efap/Campaign\\_for\\_Fiscal\\_Equity\\_\(CFE\)/](https://www.maxwell.syr.edu/cpr/efap/Campaign_for_Fiscal_Equity_(CFE)/) (last visited Feb. 3, 2020); SchoolFunding.Info, *Overview of Litigation History – New York*, <http://schoolfunding.info/litigation-map/new-york/#1483935373027-36380f69-4a8a> (last visited Feb. 3, 2020).

<sup>202</sup>100 N.Y.2d 893 (N.Y. 2003). In *CFE II*, the Court of Appeals considered whether the trial court correctly defined a sound basic education and whether findings of the courts below comported with the weight of the credible evidence. *Id.* at 903.

<sup>203</sup> *Id.* at 905-19.

<sup>204</sup> *Id.* at 908.

<sup>205</sup> *Id.*

<sup>206</sup> *CFE I*, 655 N.E.2d at 668.

the Court of Appeals had interpreted “a meaningful high school education” to entail certain minimal essentials:

- (1) minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn;
- (2) minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks; and
- (3) minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.<sup>207</sup>

In light of previous Court of Appeals’ decisions, plaintiffs in *CFE I* and *CFE II* crafted their claims around the inadequacy (as opposed to inequality) of State aid received by New York City public schools in providing a sound basic education, citing the inadequacies in physical facilities, curriculum, numbers of qualified teachers, etc.<sup>208</sup> The trial court in *CFE II* expanded on these three minimal essentials by specifying seven categories of resources including:

- (1) sufficient numbers of qualified teachers, principals and other personnel;
- (2) appropriate class sizes;
- (3) adequate and accessible school buildings with sufficient space to ensure appropriate class size and implementation of a sound curriculum;
- (4) sufficient and up-to-date books, supplies, libraries, educational technology and laboratories;
- (5) suitable curricula, including an expanded platform of programs to help at-risk students;
- (6) adequate resources for students with extraordinary needs; and
- (7) a safe orderly environment essential to a sound basic education.<sup>209</sup>

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<sup>207</sup>*Id.* at 666.

<sup>208</sup> *Id.* at 664, 667; *CFE II*, 100 N.Y.2d at 905-08.

<sup>209</sup> *Campaign for Fiscal Equity, Inc. v. State of New York*, 295 A.D.2d 1, 10 (N.Y. App. Div. 2002), *aff'd as modified and remanded*, 100 N.Y.2d 893 (N.Y. 2003). Although this list was not repeated in the Court of Appeals’ opinion, the analysis and reasoning underlying the Court of Appeals’ holdings do not contradict the factors discussed by the trial court. 100 N.Y.2d 893, 908-14 (N.Y. 2003).

As a remedy, the Court of Appeals directed the State to reform the school funding system to ensure that every New York City school would be able to provide a sound basic education.<sup>210</sup> It instructed the State first to ascertain the actual cost of providing a sound basic education in New York City, and then to ensure a system of accountability to measure whether reforms provided the opportunity for a sound basic education.<sup>211</sup> In response, the Governor issued an executive order creating the New York State Commission on Education Reform, which determined that providing New York City students with a sound basic education would require between \$1.93 billion to \$4.69 billion in additional expenditures.<sup>212</sup> In 2004, the Governor proposed legislation that would increase funding for New York City schools by \$4.7 billion annually, phased over five years, but the State legislature did not enact the Governor's proposals.<sup>213</sup>

In 2006, in *Campaign for Fiscal Equity, Inc. v. State of New York*, (“CFE III”), the Court of Appeals rejected plaintiffs’ challenges to the State’s \$1.93 billion calculation for annual additional operating funds to remedy the deficiencies of New York City public schools.<sup>214</sup> Although lower State courts questioned the State’s methodology in arriving at the number and

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<sup>210</sup> *CFE II*, 100 N.Y.2d at 930.

<sup>211</sup> *Id.* The trial court would have required the state to reform the system as to (1) ensure every school district in the State would have the resources for a sound basic education; (2) take into account variations in local costs; (3) provide sustained and stable funding in order to promote long-term planning; (4) provide transparency on aid distributions; and (5) implement a system of accountability to measure the effect of reforms. *Id.* at 925-26. The Court of Appeals would not go that far, stating that courts did not have the authority to micromanage education financing and that it was important that they defer to the legislature for policy-making matters. *Id.* at 925.

<sup>212</sup> *Campaign for Fiscal Equity, Inc. v. State of New York*, 8 N.Y.3d 14, 22-24, 36-37 (N.Y. 2006).

<sup>213</sup> *Id.* at 25.

<sup>214</sup> *Id.*

decided that \$4.7 billion was a more correct number,<sup>215</sup> the Court of Appeals found that the only standard the State had to meet was that its calculation was rational,<sup>216</sup> finding that “courts have neither the authority, nor the ability, nor the will, to micromanage education financing,” noting that the legislature had the authority to determine such issues.<sup>217</sup>

## **B. Post-*CFE* Actions**

In partial response to *CFE III*, in 2007 the State legislature revamped the State-wide public school aid programs by passing laws that reformed the State public education funding mechanism (commonly referred to as the “Budget and Reform Act of 2007”), instituting Foundation Aid as the new formula for calculating State aid to school districts. As discussed more fully in Chapter II, Foundation Aid, the single largest component of State aid received by New York public schools, purports to fund each school district based on the difference between the true cost of providing a sound basic education to all schoolchildren in a given district and the amount that could be raised by the district through local revenues.<sup>218</sup> Originally designed to be completely phased in by school year 2010-11, Foundation Aid would have increased annual State school aid by \$5.5 billion (with a \$2.4 billion annual increase for New York City). However, with the 2008 recession, the State froze any annual increases in Foundation Aid for

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<sup>215</sup> *Id.* at 26-27. The lower courts also ordered the State to implement a capital improvement plan of \$9.179 billion. *Id.*; see discussion in *infra* Chapter II.1. Campaign for Fiscal Equity, Inc. v. State of New York, 29 A.D.3d 175, 180-81 (N.Y. Sup. Ct. 2006); Ctr. for Educ. Equity, *Students’ Constitutional Right to a Sound Basic Education: New York State’s Unfinished Agenda*, 9 (Nov. 2016), <http://www.centerforeducationalequity.org/publications/safeguarding-students-educational-rights/NY's-Unfinished-Agenda-Part-I.-Roadmap-final-12.15.17-revised.pdf>.

<sup>216</sup> *CFE III*, 8.N.Y.3d at 27.

<sup>217</sup> *Id.* at 28.

<sup>218</sup> N.Y. State Div. of the Budget, *N.Y.S. 2007-2008 Executive Budget Briefing Book* 35 (Jan. 31, 2007), [hereinafter 2007-2008 Briefing Book] <https://www.budget.ny.gov/pubs/archive/fy0708archive/fy0708littlebook/BriefingBook.pdf>; see *infra* Chapter II.1.

three straight years, never fully phasing in Foundation Aid while making other ad hoc changes to the formula.<sup>219</sup> Experts estimate that the New York school districts are still owed between \$3.4 and \$4 billion in originally promised Foundation Aid as of the beginning of the 2019-20 school year.<sup>220</sup>

In 2017, the Court of Appeals rejected claims by New Yorkers for Students' Educational Rights ("NYSER"), an educational advocacy group comprised of multiple parent and student unions in New York State, that the State had violated the Education Article by failing to follow through on the promised Foundation Aid under the Budget and Reform Act of 2007.<sup>221</sup> Finding that the amount of aid that had then been granted to New York City exceeded the \$1.93 billion remedy upheld in *CFE III*,<sup>222</sup> the Court of Appeals again stressed that a court cannot intrude upon the policy-making and discretionary decisions reserved to the legislature and the executive branch.<sup>223</sup> However, the Court of Appeals allowed NYSER to proceed with its claim that the State has failed to provide an opportunity for a sound basic education in the Syracuse and New

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<sup>219</sup> John Yinger, *How School Aid in New York State Penalizes Black and Hispanic Students*, MAXWELL UNIV., CTR. FOR POL'Y RESEARCH (Aug. 2019), <https://www.maxwell.syr.edu/uploadedFiles/cpr/efap/August%2014%202019.pdf>.

<sup>220</sup> *See infra* Chapter II.1.

<sup>221</sup> *New Yorkers for Students' Educ. Rights ("NYSER") v. New York*, 29 N.Y.3d 501, 513 (2017).

<sup>222</sup> *Id.* at 513 (2017) (“[P]laintiffs cannot state a claim for violation of the Education Article by pleading that state funding levels are not as great as they would have been under methods of calculation proposed by the State during the *CFE* litigation, or contemplated by the Budget and Reform Act of 2007.”). In the same opinion, the Court of Appeals dismissed claims made in another case by parents of New York City schoolchildren based on the fact that the State withheld \$290 million from New York City school districts for not complying with certain performance review plans. The court noted that the Education Article does not require a particular amount of State aid and the plaintiff did not allege any causation linking the \$290 million in withheld funds to any alleged failure to provide a sound basic education. *Id.* at 516-17.

<sup>223</sup> *Id.* at 513.

York City school districts because sufficient facts were alleged (*e.g.*, a lack of qualified teachers and basic learning materials and outdated curricula) that could support a finding of a level of education below the New York constitutional floor.<sup>224</sup> In permitting the case to proceed, the Court of Appeals made clear that it would only permit the claims made by specific districts, not State-wide or specific school claims, “because school districts, not individual schools, are the local units responsible for receiving and using state funding and the State is responsible for providing sufficient funding to *school districts*.”<sup>225</sup>

In response to the Court of Appeals’ decision, the *NYSER* plaintiffs filed an amended complaint in May 2018, adding specific allegations about funding inadequacies in the Schenectady, Central Islip and Gouverneur school districts.<sup>226</sup> The case is currently in discovery phase before the trial court.

In 2017, in *Maisto v. New York*, the State appellate division reversed a trial court’s finding against plaintiff parents of students in multiple small-city school districts outside of New York City that the State had provided sufficient resources for a sound basic education in the plaintiffs’ school districts, remanding the case to the trial court for reconsideration.<sup>227</sup> In rejecting the trial court’s conclusion, the State appellate division clarified that, when evaluating whether an Education Article violation has happened in the first instance, courts should apply

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<sup>224</sup> *Id.* at 514-55.

<sup>225</sup> *Id.* at 510-12 (quoting *N.Y. Civ. Liberties Union. v. New York*, 4. N.Y.3d 175, 182 (2005)) (emphasis added).

<sup>226</sup> New Yorkers for Students’ Educ. Rts., *New Development*, <http://nyser.org/> (last visited Feb. 3, 2020).

<sup>227</sup> 64 N.Y.S.3d 139 (2017). The school districts of the cities of Mt. Vernon, Port Jervis, Poughkeepsie, Kingston, Niagara Falls, Jamestown, Utica, Newburg. Educ. L. Ctr., *Maisto Districts*, (October 4, 2019), <https://edlawcenter.org/litigation/maisto-overview/maisto-districts.html>.

only the *CFE II* factors<sup>228</sup> to determine whether students have access to a sound basic education, without considering or deferring to legislative policies in place;<sup>229</sup> the deference to legislative educational policy and funding decisions articulated in *CFE III*, the State appellate division found, is relevant only upon adjudicating the sufficiency of the remedy for an established violation of the Education Article.<sup>230</sup> On remand, the trial court reached a revised decision against the plaintiffs, who are expected to appeal and ask for a special master to review the case.<sup>231</sup>

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<sup>228</sup> Specifically, the court must evaluate the “quality of teaching instruction, the adequacy of school facilities and classrooms and the availability of appropriate ‘instrumentalities of learning,’ including classroom supplies, textbooks, libraries and computers.” 64 N.Y.S.3d 139, 147 (2017). (*citing* Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893 (N.Y. 2003)); *see also supra* note 207 and accompanying text.

<sup>229</sup> Instead of applying the *CFE II* factors, the New York Supreme Court reasoned that because the State’s funding methodology was found reasonable with respect to the cost of providing a sound basic education in New York City under *CFE III*, the same methodology was also reasonable with respect to funding outside of New York City in this case. *Maisto v. State*, 56 Misc. 3d 295, 305-306, (N.Y. Sup. Ct. 2016), *rev’d*, 64 N.Y.S.3d 139 (2017).

<sup>230</sup> *Maisto v. State*, 64 N.Y.S.3d 139, 146 (2017).

<sup>231</sup> Amy Neff Roff, *Small Schools Suit Continuing on Appeal*, OBSERVER-DISPATCH, Mar. 5, 2019, at A1; Nina Schutzman, *Schools Lose Funding Lawsuit*, THE POUGHKEEPSIE J., Jan. 20, 2019, at A5.

## Chapter II. New York State Education Financing

### 1. Overview and Background of Foundation Aid

Like other states in the United States, New York schools are funded by three principal sources, local funding (59%), federal aid (3%) and state aid (38%).<sup>232</sup> Local funding consists primarily of property taxes (88% of local funds)<sup>233</sup> in localities other than the Big Five cities (New York City, Rochester, Buffalo, Yonkers and Syracuse); in the Big Five cities, constitutional limitations require funding to be sourced from municipal budgets rather than school system taxes.<sup>234</sup> State education aid is sourced from the State General Fund (80%), with State income and sales taxes as the major contributors, as well as the School Tax Relief Program (the “STAR Program”) (8%)<sup>235</sup> and a Special Revenue Fund (12%), which is supported by

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<sup>232</sup> Univ. of the State of N.Y., the State Educ. Dep’t, *2019-20 State Aid Handbook: Formula Aids and Entitlements for Schools in New York State as Amended by Chapters of the Laws of 2019*, 5 [hereinafter State Aid Handbook],

[https://stateaid.nysed.gov/publications/handbooks/handbook\\_2019.pdf](https://stateaid.nysed.gov/publications/handbooks/handbook_2019.pdf). These percentages are for the 2017-18 year. See also Governor Cuomo Outlines FY 2021 Budget: Making Progress Happen [hereinafter Making Progress Happen], <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-outlines-fy-2021-budget-making-progress>.

<sup>233</sup> Univ. of the State of N.Y., the State Educ. Dep’t, *State Aid to Schools: A Primer*, 2 (Aug. 2019) [hereinafter State Aid Primer], <http://www.oms.nysed.gov/faru/PDFDocuments/2019-20Primer.pdf>.

<sup>234</sup> *State Aid Handbook*, *supra* note 232, at 5. The Big Five cities are not independent school districts but are part of city government. They have access to sales tax revenue, and for New York City, income tax revenue. Urban school districts account for approximately 45% of the student enrollment in New York. N.Y. State Ass’n of Sch. Bus. Officials, *School Aid Concepts Voters Care About*, 12 [hereinafter School Aid Concepts], [https://www.asbonewyork.org/resource/resmgr/files/presentations/School\\_Aid\\_Concepts\\_Voters\\_Care\\_About.pdf](https://www.asbonewyork.org/resource/resmgr/files/presentations/School_Aid_Concepts_Voters_Care_About.pdf); Conference of Big Five Sch. Dists., *2019 District Overview and Data, Conference of Big 5 School Districts*, <https://big5schools.org/state-budget-legislative-issues> (last visited Feb. 3, 2020).

<sup>235</sup> The STAR program provides eligible homeowners with an exemption on the value of their house that lowers or eliminates the property taxes paid to the district by a homeowner; the exemptions are being phased out in favor of credits (in the form of a check from the State) for the exempt portion of the property taxes. See *infra* Chapter II.3.C.d for more information. The

lottery receipts and gaming funds.<sup>236</sup> The State’s support of primary and secondary school education as a percentage of the total State budget has declined from 25% in fiscal year 2008-09 to 20% in fiscal year 2018-19.<sup>237</sup>

State aid is provided to the 732<sup>238</sup> school districts in New York (comprised of 4,433 individual traditional public schools serving more than 2.6 million students from pre-kindergarten to 12th grade)<sup>239</sup> through a variety of aid programs, of which Foundation Aid is the largest component, constituting 66% (\$18.4 billion) of total State education aid to localities of \$27.86 billion in the approved 2019-20 budget.<sup>240</sup> The largest of the other aid categories are Building Aid, Transportation Aid, and Board of Cooperative Educational Services (“BOCES”) Aid, which constitutes approximately \$6 billion of total State school aid in 2019-20; the remaining \$3 billion includes Universal Pre-kindergarten Aid, Public Excess Cost High School

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STAR Program is estimated to lower the local tax burden by \$2.19 billion for the 2019-20 year. State Aid Handbook, *supra* note 232, at 56.

<sup>236</sup> *Id.* at 5.

<sup>237</sup> NEW YORK STATE OPEN BUDGET, <https://openbudget.ny.gov/spendingForm.html> (last visited Feb. 3, 2020).

<sup>238</sup> N.Y. State Educ. Dep’t, *New York State Education at a Glance*, <http://data.nysed.gov> (last visited Feb. 3, 2020).

<sup>239</sup> *Id.* More than half of the school districts are small, with fewer than 1500 students. School Aid Concepts, *supra* note 234, at 10.

<sup>240</sup> Press Release, The N.Y. State Assembly, *Approved SFY 2019-20 Budget Includes \$27.86 Billion in School Aid* (Apr. 1, 2019), <https://nyassembly.gov/Press/files/20190401b.php>. See also N.Y. State Div. of the Budget, *Description of 2020-21 New York State Executive Budget Recommendations for Elementary and Secondary Education*, 1, table II-A (Jan. 21, 2020) [hereinafter 2020-21 Proposed Executive Budget], <https://www.budget.ny.gov/pubs/archive/fy21/exec/local/school/2021schoolaid.pdf>.

In school year 2007-08 when it was first implemented, Foundation Aid was \$14.9 billion, representing 77% of the \$19.3 billion in State school aid. Citizens Budget Comm’n, *A Better Foundation Aid Formula: Funding Sound Basic Education with Only Modest Added Cost*, (Dec. 12, 2016) [hereinafter Better Foundation Aid Formula], <https://cbcny.org/research/better-foundation-aid-formula>.

Aid, Library, Textbook and Software Aids and Private Excess Cost Aid.<sup>241</sup> The 2019-20 budget also includes \$250 million in the form of the Community Schools Aid Set-Aside, which requires 240 of the 732 State school districts to use the set-aside of Foundation Aid funds to help

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<sup>241</sup> State Aid Handbook, *supra* note 232, at 18-58.

Building Aid is available for expenditures incurred in construction of new buildings, additions, alterations or modernization of district-owned buildings, for purchase of existing structures for school purposes, and for lease and installment purchase payments under certain circumstances. *Id.* at 18.

Transportation Aid is based on a district's approved transportation non-capital expenditures. *Id.* at 30.

BOCES Aid is available to school districts that have applied to the Commissioner of Education to centralize administrative and other shared expenditures. *Id.* at 47.

Universal Pre-Kindergarten Aid provides a grant amount equal to the sum of six consolidating pre-kindergarten grant programs for children ages three and four. *Id.* at 53.

Public Excess Cost High Cost Aid is available for a school district having a resident student with a disability for whom special education costs exceed the lesser of: (i) \$10,000, and (ii) four times the 2017-18 Approved Operating Expenditure per pupil. *Id.* at 44-45.

Library aid is equal to the product of \$6.25 multiplied by the number of pupils attending schools within the school district's boundaries and enrolled during the base year in grades K-12 in a public school district or nonpublic school. *Id.* at 50. Textbook aid is equal to the district's actual expenditures during the base year for textbook purchases for resident public and nonpublic pupils, including resident charter school pupils, up to a maximum equal to the product of \$58.25 multiplied by the number of pupils residing in the district and enrolled during the base year in grades K-12 in a public school district or nonpublic school. *Id.* at 49-50.

Private Excess Cost Aid is available to those districts having contracts with approved private schools, Special Act School Districts, the New York State School for the Blind or the New York State School for the Deaf for the education of students with disabilities. *Id.* at 43.

Critics note that some of these additional programs, such as Library, Textbook and Software Aids, which total \$240 million annually, are distributed to schools without taking into account wealth; as a result, each student in the State is allocated the exact same amount of aid, leading to overspending on wealthy districts. Written Testimony of David Friedfel, Director of State Studies at Citizens Budget Commission, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City's Education Aid Formulae and Student Need, (June 12, 2019) [hereinafter Friedfel Written Testimony], 1-2, <https://cbcny.org/advocacy/testimony-us-commission-civil-rights>.

transform schools into community hubs.<sup>242</sup>

The fiscal year 2020-21 Governor’s Executive Budget proposal recommends the consolidation of the BOCES Aid, Computer Software Aid, Special Services Aid, Computer Hardware Aid, High Tax Aid, Library Materials Aid, Charter School Transitional Aid, Academic Enhancement Aid, Textbooks Aid, and Supplemental Public Excess Cost Aid into Foundation Aid.<sup>243</sup> Without regard to the consolidation, the 2020-21 Executive Budget would increase Foundation Aid by \$504 million, with an additional \$200 million to be allocated to a fiscal stabilization fund to target high-need districts.<sup>244</sup> The fiscal year 2020-21 Executive Budget allocation to Foundation Aid includes \$300 million in the form of the Community Schools Aid Set-Aside (a \$50 million increase over the 2019-20 budget).<sup>245</sup>

Foundation Aid was adopted by the State legislature in 2007 as a means to equalize school spending across districts by increasing State aid to the neediest schools so that all districts would meet the sound basic education requirement of the New York State Constitution, and as a

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<sup>242</sup> State Aid Handbook, *supra* note 232, at 6; *infra* notes 344-347 and accompanying text (discussing community school set-asides). The proposed Executive Budget for fiscal year 2020-21 proposes to increase the set-aside by \$50 million and expand the amount of districts receiving community schools funding to 440 districts. New York State FY 2021 Executive Budget: Making Progress Happen, 45 [hereinafter *FY 2021 Budget Book*], <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/FY2021BudgetBook.pdf>.

<sup>243</sup> 2020-21 Proposed Executive Budget, *supra* note 240, at 41, 55.

<sup>244</sup> 2020-21 Proposed Executive Budget, *supra* note 240, at 1. The Association of School Business Officials estimated that, after removing the effect of the aid consolidation, the 2020-21 Executive Budget increases the traditional Foundation Aid by approximately \$493.7 million. N.Y. State Ass’n of Sch. Bus. Officials, State Budget Information—2020 Traditional Foundation Aid Increases, <https://www.asboneyork.org/page/statebudget#pastBudget>. S. 7503, A. 9503, 2020 Leg., Reg. Sess. (N.Y. 2020), 128, <https://www.budget.ny.gov/pubs/archive/fy21/exec/approps/local.pdf>. According to Governor Cuomo’s budget bill submitted to the Senate and the Assembly, only 70% of this additional \$200 million fiscal stabilization fund will be available in the 2020-21 state fiscal year. *Id.*

<sup>245</sup> FYI 2021 Budget Book, *supra* note 242, at 45.

reaction to the *CFE* litigation that had found the funding of schools in New York City to be unconstitutional under the New York State Constitution.<sup>246</sup> It effectively consolidated 30 disparate existing funding programs.<sup>247</sup> Approximately 70% of all State education aid in 2019-20 goes to the neediest schools, while the wealthiest schools are allotted approximately 14% of the State aid.<sup>248</sup> In 2019-20, low-wealth districts receive nearly six times more State aid per pupil than the highest-wealth districts (\$12,442 versus \$2,172) (without accounting for the STAR Program).<sup>249</sup> As an example of the progressive approach to education that Foundation Aid still

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<sup>246</sup> See *supra* Chapter I.2.A (discussing *CFE III*); Testimony of Michael Rebell, Professor of Law and Educational Practice at Columbia University, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Rebell Testimony], 35-36; Written Testimony of Sarita Subramanian, Supervising Analyst for Education Research, N.Y.C. Ind. Budget Office, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 13, 2019) [hereinafter Subramanian Written Testimony], 2; Friedfel Written Testimony. Currently, 38 states use a student-based foundation formula to distribute education aid to school districts. Subramanian Written Testimony, at 1.

<sup>247</sup> 2007-2008 Briefing Book, *supra* note 218.

Michael Rebell testified that the prior funding streams had been criticized by the courts as being non-transparent and riddled by political games. Rebell Testimony, at 109; see also Better Foundation Aid Formula, *supra* note 240.

<sup>248</sup> Written Testimony of Jim Malatras, President of Rockefeller Institute of Government, before the N.Y. Advisory Comm’n of the U.S. Comm’n on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 13, 2019) [hereinafter Malatras Written Testimony], 2.

For the 2019-20 enacted budget, 84% of the increase in education aid was allocated to high-need districts. See N.Y. State Ass’n of Sch. Bus. Officials, *Presentation on 2019-20 Enacted Budget on Education*, [hereinafter ASBO Presentation], [https://cdn.ymaws.com/www.asbonewyork.org/resource/resmgr/files/presentations/2019-20\\_state\\_budget\\_webina.pdf](https://cdn.ymaws.com/www.asbonewyork.org/resource/resmgr/files/presentations/2019-20_state_budget_webina.pdf). Similarly, for the 2020-2021 proposed Executive Budget, over 80 percent of the increase in education aid is proposed to be directed to high-need school districts. FY 2021 Budget Book, *supra* note 242, at 48.

<sup>249</sup> State Aid Primer, *supra* note 233, at 20.

represents, Dr. Jim Malatras, former President of the Rockefeller Institute of Government,<sup>250</sup> explains that in Bedford—a wealthy Westchester suburb—only 5.8% of its education revenues (\$29,688 per pupil) come from the State, whereas Buffalo—a high-need Big Five city—receives more than 76% of its education revenues (\$22,766 per pupil) from the State.<sup>251</sup> While the State spends a disproportionate six times the amount on the neediest schools, overall (State and local) average spending per pupil in the highest-need districts in the State is still approximately only two-thirds the overall average spending per pupil in the wealthiest districts (\$17,758 versus \$27,845), in large part as a result of the disparity in revenue-raising abilities of low-wealth versus high-wealth districts.<sup>252</sup>

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<sup>250</sup> The Rockefeller Institute of Government is a public policy think tank founded in 1981 that conducts research and analysis to inform lasting solutions to the problems facing New York State and the nation. Rockefeller Inst. of Gov't, *About Us*, <https://rockinst.org/about-us/> (last visited Feb. 3, 2020).

<sup>251</sup> Malatras Written Testimony, at 3-4 (using data from the Rockefeller Institute of Government Analysis of New York State Education Department Fiscal Profile Reports Masterfile); *see also Bedford Central School District 2019-2020 Proposed Budget*, Section IV, <https://www.bcsdny.org/cms/lib/NY02216273/Centricity/Domain/21/BUDGET%20BOOK%202019-2020.pdf> (showing that revenue from State aid is approximately \$7.7 million out of a total of \$133.3 million total revenue); *Buffalo Schools 2019-2020 Approved Budget*, 6, <https://www.buffaloschools.org/site/handlers/filedownload.ashx?moduleinstanceid=97&dataid=197087&FileName=2019-20 Adopted Budget.pdf> (showing that state aid far outweighs local contribution).

<sup>252</sup> State Aid Primer, *supra* note 233, at 20. In year 2015-16, lowest-wealth districts raised one-eighth of what high-wealth districts did (\$3,057 versus \$22,930). *Id.* Governor Cuomo stated in his 2020 State of the State Address that “the richer schools are spending 36,000 dollars per student and the poorest schools have 13,000 [dollars] per student.” Making Progress Happen, *supra* note 232.

The following table illustrates the number of school districts in the State, as measured by need/resource capacity.

Number of School Districts by Need/Resource Capacity, 2016-17<sup>253</sup>

2008 Need/Resource Capacity Categories	Number of Districts
New York City	1
Big 4 Cities	4
Urban/Suburban High-Need	45
Rural High-Need	153
Average-Need	336
Low-Need	135
Total Number of Districts	674

According to Michael Rebell, legal counsel for the plaintiffs in the *CFE* litigation and professor at Columbia University,<sup>254</sup> the funding system that predated the 2007 Foundation Aid legislation allocated funds to each district based on “political wheeling and dealing by three men in a back room,” rather than school need.<sup>255</sup> Foundation Aid, says Bob Lowry, Deputy Director for Advocacy, Research and Communications of New York State Council of School Superintendents,<sup>256</sup> “has been an under-appreciated accomplishment in public policy” because it

<sup>253</sup> N.Y. State Educ. Dep’t, *Analysis of School Finances in New York State School Districts: 2016-17*, 21 (Mar. 2019), [http://www.oms.nysed.gov/faru/PDFDocuments/2018\\_Analysis\\_a.pdf](http://www.oms.nysed.gov/faru/PDFDocuments/2018_Analysis_a.pdf). The State Education Department analysis looked at the 674 major school districts in school year 2016-17. *Id.* at v.

<sup>254</sup> Professor Rebell co-founded CFE and served as its executive director and counsel from 1993 to 2005. See <https://www.tc.columbia.edu/suburbanpromise/speakers/michael-rebell/>. Currently, he serves as counsel for plaintiffs in *NYSER v. New York*. See *supra* notes 221-226 and accompanying text (describing the *NYSER* case).

<sup>255</sup> Rebell Testimony, at 103-04.

<sup>256</sup> The New York State Council of School Superintendents is a professional and advocacy organization serving school superintendents and assistant superintendents in New York State, by providing numerous professional development opportunities, publications and personal services, while seeking to influence the development of policy and supporting the leadership of the superintendency. See N.Y. State Council of Sch. Superintendents, *About the Council*, [https://www.nyscoss.org/about\\_the\\_council/](https://www.nyscoss.org/about_the_council/) (last visited Feb. 3, 2020).

generally directed aid to the neediest districts, it promised greater predictability to school districts and made State aid more transparent.<sup>257</sup>

However, according to experts, political compromises and a reluctance to decrease aid to wealthy districts coupled with a lack of political will to invest heavily in high-need schools have resulted not only in flaws in the design of the Foundation Aid formula but also in the failure of the State to provide a sound basic education mandated by the New York State Constitution to all of its students despite its overall significant aid to schools.<sup>258</sup>

The 2007 legislation authorized a four-year phase-in for State school aid to increase by \$7 billion by school year 2010-11, including a \$3.2 billion increase for New York City.<sup>259</sup> Foundation Aid would account for \$5.5 billion of that amount, of which \$2.4 billion would go to New York City.<sup>260</sup> The phase-in was “back-loaded” in that school districts would receive 35% of the increase during the first two years and the other 65% in the last two years.<sup>261</sup> However, after two years, and a \$2.3 billion distribution,<sup>262</sup> as a result of the financial crisis of 2008, the

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<sup>257</sup> Testimony of Robert Lowry, Deputy Director for Advocacy, Research and Communications of New York State Council of School Superintendents, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Lowry Testimony], 32.

<sup>258</sup> See, e.g., Testimony of David Friedfel, Director of State Studies at the Citizens Budget Commission, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Friedfel Testimony], 113.

<sup>259</sup> 2007-2008 Briefing Book, *supra* note 218.

<sup>260</sup> N.Y.C. Ind. Budget Office, *New York City Schools Continue to See Shortfall in Foundation Aid*, 2(Mar. 2017), <https://ibo.nyc.ny.us/iboreports/new-york-city-schools-continue-to-see-shortfall-in-foundation-aid-march-2017.pdf>.

<sup>261</sup> 2007-2008 Briefing Book, note 218, at 29 (showing under “Investing in Education Reform” that Foundation Aid was scheduled to increase by approximately \$1 billion per year for the first two years); Rebell Testimony, at 110.

<sup>262</sup> Office of the N. Y. State Comptroller, *Research Brief: New York State School Aid: Two Perspectives*, App’x A, (Mar. 2016) [hereinafter School Accountability Research Brief],

State froze any increase in Foundation Aid and passed the Gap Elimination Adjustment (the “GEA”)<sup>263</sup> to close its budget deficit.<sup>264</sup> After three years of freezes, partially offset by federal aid, Foundation Aid increased slightly, but until the GEA’s end in school year 2016-17, the State reduced annual aid allocations to each school district (based on a GEA formula).<sup>265</sup> Mr. Lowry testified that the GEA disproportionately harmed poor school districts because it still prescribed a reduced but real 5% reduction for high-need districts<sup>266</sup> that derive higher proportions of their total support from State aid.<sup>267</sup> For example, he noted that a 5% reduction in State aid to a poor district relying on State aid for 70% of its total revenues amounts to a 3.5% reduction in total

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<https://www.osc.state.ny.us/localgov/pubs/research/schoolaid2016.pdf> (a \$1.1 billion increase for school year 2007-08 and a \$1.2 billion increase for school year 2008-09).

<sup>263</sup> The GEA was formerly named the Deficit Reduction Assessment and was first introduced in school year 2009-10. The effect of funding reductions that year due to the DRA was offset by the receipt of federal American Recovery and Reinvestment Act funding. *Id.*, App’x B.

<sup>264</sup> BOCES State Aid and Fin. Planning Service, *New York State Gap Elimination Adjustment* (Jan. 2016) [hereinafter *New York State Gap Elimination Adjustment*], <https://echalk-slate-prod.s3.amazonaws.com/private/groups/4837/site/fileLinks/bc8623c0-b5ee-4feb-8aa1-4a3b7ec36fcf?AWSAccessKeyId=AKIAJSZKIBPXGFLSZTYQ&Expires=1881603913&response-cache-control=private%2C%20max-age%3D31536000&response-content-disposition=%3Bfilename%3D%22NYSGEASheet.pdf%22&response-content-type=application%2Fpdf&Signature=SQR5EhepwDj90ihGV9LAI6GsCOQ%3D>.

<sup>265</sup> N.Y. State Sch. Bds. Ass’n., *Issue Brief: Gap Elimination Adjustment* [hereinafter *GEA Issue Brief*], [https://www.nyssba.org/clientuploads/nyssba\\_pdf/CapitalConference/Gap-Elimination-Adjustment13.pdf](https://www.nyssba.org/clientuploads/nyssba_pdf/CapitalConference/Gap-Elimination-Adjustment13.pdf); Written Testimony of Robert Lowry, Deputy Director for Advocacy, Research and Communications, New York State Council of School Superintendents, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, *New York State and City’s Education Aid Formulae and Student Need* (June 12, 2019) [hereinafter *Lowry Written Testimony*], 6.

Starting from school year 2012-13, the State began to “restore” the GEA (*i.e.*, reducing the effect of the GEA) through various formulae. The GEA was fully restored in school year 2016-17. *See* School Accountability Research Brief, *supra* note 262, App’x B (summarizing how GEA restoration amount was determined); State Aid Primer, *supra* note 233, at 12-13.

<sup>266</sup> School Accountability Research Brief, *supra* note 262, App’x B (noting that minimum GEA reduction was 8% and the maximum was 21% but an exception was made for high-need school districts).

<sup>267</sup> Lowry Written Testimony, at 6.

revenue, while a 10% State aid cut for a wealthy district deriving 10% of total support from State sources amounts to only a 1% loss in total revenue.<sup>268</sup>

By 2012, State funding had been rolled back to the 2008 level.<sup>269</sup> Overall, the total amount of State aid withheld from school districts due to the GEA was approximately \$9.24 billion.<sup>270</sup> According to Professor Rebell, even though the State generally increased the level of funding after the GEA ended, the increase is far from being enough to make up for the Foundation Aid that was not fully phased in.<sup>271</sup> During these years, among other things, schools were forced to cut personnel and programs, leading to increased class sizes, decreased academic intervention programs and reduced career and technical training.<sup>272</sup> Furthermore, to deal with the drastic cuts in funding, school districts turned to their reserve funds, pushing them into even more financially precarious positions.<sup>273</sup>

According to Mr. Lowry, by 2011, 75% of school districts stated that their financial condition had worsened since the crisis and despite some reports of improvement, over the eight years since their survey of State school superintendents began, a majority of superintendents reported no improvement or worsening conditions, and only 24% are optimistic that over the

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<sup>268</sup> *Id.*

<sup>269</sup> School Accountability Research Brief, *supra* note 262, at 4 (showing that State aid was \$19.7 billion in 2008 and \$19.5 billion in 2012).

<sup>270</sup> New York State Gap Elimination Adjustment, *supra* note 264.

Ms. Subramanian cited another source that estimated that, by year 2014, school districts collectively had lost more than \$8 billion of Foundation Aid while the GEA was in place. Subramanian Written Testimony, at 3.

<sup>271</sup> Rebell Testimony, at 111.

<sup>272</sup> GEA Issue Brief, *supra* note 265, at 2.

<sup>273</sup> *Id.*

next three years they could provide services adequate to the needs of their students.<sup>274</sup> Mr. Lowry believes that many districts have still not recovered from the reductions to programs brought about by the Great Recession.<sup>275</sup> When inflation is factored in, according to Billy Easton, the Executive Director of the Alliance for Quality Education,<sup>276</sup> the amount allocated annually under Foundation Aid today is no greater than it was in 2009: total Foundation Aid in 2009 was \$14.9 billion which, adjusted for inflation, would be \$18 billion in 2019 dollars, approximately the same as annual Foundation Aid is today, meaning that inflation has eaten up the nominal increases in total Foundation Aid over the past decade.<sup>277</sup>

Advocates contend that New York schoolchildren are still owed between \$3.4 billion and \$4.1 billion of the original promised Foundation Aid.<sup>278</sup> The New York State Board of

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<sup>274</sup> See The Council of Sch. Superintendents, *Policy Report, Superintendents' Survey Finds Wide Concern About Meeting Student Needs*, 1 (Feb. 2019), <https://www.nyscoss.org/img/uploads/file/2019-02-NYSCOSS-SURVEY-REPORT-FINAL.pdf>; Lowry Written Testimony, at 23.

<sup>275</sup> Lowry Testimony, at 37.

<sup>276</sup> The Alliance for Quality Education is a coalition mobilizing communities across the State to keep New York true to its promise of ensuring a high-quality public education to all students regardless of zip code. Alliance for Quality Educ., *About AQE*, <https://www.aqeny.org/about-us/> (last visited Feb. 3, 2020).

<sup>277</sup> Testimony of Billy Easton, Executive Director of the Alliance for Quality Education, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm'n on Civil Rights June 12 Briefing Transcript [hereinafter Easton Testimony], 65; Written Testimony of Billy Easton, Executive Director of the Alliance for Quality Education, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City's Education Aid Formulae and Student Need (June 12, 2019) [hereinafter Easton Written Testimony], 3.

<sup>278</sup> Lowry Testimony, at 35; Easton Testimony, at 55 (note that this figure was provided prior to the 2019-20 year's funding of \$618 million); Testimony of Edwin Quezada, Superintendent of Yonkers Public Schools, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm'n on Civil Rights June 12 Briefing Transcript [hereinafter Quezada Testimony], 252; Edu. Law Ctr., *ELC Calls for N.Y. Legislature to Phase In Foundation Aid, Restore Contract for Excellence* (Mar. 15, 2019), <https://edlawcenter.org/news/archives/new-york/elc-calls-for-ny-legislature-to-phase-in-foundation-aid,-restore-contract-for-excellence.html>. Depending on how the gap is measured and how inflation is accounted for, the exact amount of the funding deficiency differs.

Regents<sup>279</sup> concurred that the total original Foundation Aid owed (before allocation of the 2019-20 budget) was \$4.1 billion.<sup>280</sup> Most of what is owed in originally-promised Foundation Aid (71%) is owed to high-need school districts and approximately two-thirds is owed to districts which have majority Black and Latinx students, according to Mr. Easton.<sup>281</sup> For the 2019-2020 budget, the New York State Board of Regents called for a three-year phase-in of the original promised Foundation Aid still owed, including a \$1.66 billion Foundation Aid increase for 2019-20,<sup>282</sup> and the State Education Commissioner concurred in the proposed budget in a joint legislative budget hearing before the State legislature.<sup>283</sup> The State legislature, however, only authorized a \$618 million increase in Foundation Aid for the 2019-20 year,<sup>284</sup> 84% of which is

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<sup>279</sup> N.Y. State Educ. Dep't, State Aid Subcomm., *2019-2020 Regents State Aid Proposal \$2.1 Billion*, 6 (Dec. 10, 2018), <http://www.regents.nysed.gov/common/regents/files/SA%20-%202019-2020%20Budget%20and%20Legislative%20Priorities.pdf>.

<sup>280</sup> According to Senator Robert Jackson for the New York State 31st District, the New York State Senate and Assembly agreed as to this number as well. Testimony of Robert Jackson, Senator for the New York State 31st District, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm'n on Civil Rights June 13 Briefing Transcript [hereinafter Senator Jackson Testimony], 100-101.

<sup>281</sup> See, e.g., Easton Testimony, at 51; Easton Written Testimony, at 1; Marina Marcou-O'Malley, *Educational Racism*, ALLIANCE FOR QUALITY EDUC. (2018) [hereinafter Educational Racism]; Marina Marcou-O'Malley, *New York State Perpetuates Educational Inequality on Long Island*, LONG ISLAND PROGRESSIVE COALITION, ALLIANCE FOR QUALITY EDUC., & PUB. POL'Y AND EDUC. FUND OF N.Y. 3 (2018), <https://ppefny.org/wp-content/uploads/2018/03/NYS-Perpetuates-educational-inequity-on-Long-Island-final-2.pdf>.

<sup>282</sup> Press Release, N.Y. State Educ. Dep't, Board of Regents Advances 2019 Budget and Legislative Priorities and State Aid Request for the 2019-2020 School Year (Dec. 10, 2018), <http://www.nysed.gov/news/2018/board-regents-advances-2019-budget-and-legislative-priorities-and-state-aid-request-2019>.

<sup>283</sup> MaryEllen Elia, Comm'r of Educ., *Joint Legislative Budget Hearing on Education*, 2 (Feb. 6, 2019), <https://nyassembly.gov/write/upload/publichearing/000962/001894.pdf>.

<sup>284</sup> Office of N.Y. State Comptroller, *Report on the State Fiscal Year 2019-20 Enacted Budget*, 17 (Apr. 2019) [hereinafter Comptroller Report], <https://www.osc.state.ny.us/reports/budget/2019/enacted-budget-report-2019-20.pdf>.

allocated to high-need districts<sup>285</sup> and \$50 million of which is allocated as the Community Schools Increase.<sup>286</sup>

In 2019, New York Governor Andrew Cuomo proposed to end “the inequity in the funding and the differential in funding between rich schools and poor schools” by replacing Foundation Aid—which he called, together with the *CFE* litigation, “ghosts of the past and distractions from the present”—with a new approach.<sup>287</sup> Claiming that the current school system funds poor districts which have failed to direct the funds to the poorest schools in the district, Governor Cuomo in his 2019-20 proposed Executive Budget, sought to bypass local school districts in favor of directing aid to the poorer schools in the poorer districts.<sup>288</sup> Acknowledging the lack of educational equity in New York State, Governor Cuomo stated in his 2019 State of the State Address, “The additional resources, the additional need has to go to the poorer school, and the poorer student. That’s education equity. And that’s what we’ve been talking about for 40 years and we haven’t achieved it. . . . We want to make sure that this state can say a quality

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<sup>285</sup> ASBO Presentation, *supra* note 248, at 4.

<sup>286</sup> Comptroller Report, *supra* note 284, at 17. The total allocation for community schools is \$250 million for school year 2019-20. *Id.*; State Aid Handbook, *supra* note 232, at 6.

The 2019-20 Foundation Aid increase represents \$314 per pupil in New York City (54% of the total increase), \$423 per pupil in the Big Four cities (8% of the increase), \$426 per pupil (15% of the increase) in the high-need urban/suburban districts, \$309 per pupil (7% of the increase) in the high-need rural districts, \$119 per pupil (14% of the increase) in the average-need districts and \$31 per pupil in the low-need districts (2% of the increase). ASBO Presentation, *supra* note 248, at 8.

<sup>287</sup> Governor Andrew Cuomo, Social, Economic, and Racial Justice Agenda: 2019 State of the State, 25 [hereinafter 2019 Justice Agenda], <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2019StateoftheStateBook.pdf>; Transcript, Governor Cuomo Outlines 2019 Justice Agenda: The Time Is Now (Jan. 15, 2019) [hereinafter 2019 State of the State Address], <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-outlines-2019-justice-agenda-time-now>.

<sup>288</sup> 2019 State of the State Address, *supra* note 287; 2019 Justice Agenda, *supra* note 287, at 25.

education regardless of income, race, or zip code and that’s how our funds should be distributed.”<sup>289</sup> The proposal received criticism from lawmakers for, among other things, removing funding decisions from school districts to the State and for failing to provide for a higher level of increased funding to high-need districts, and was ultimately not enacted.<sup>290</sup>

In January 2020, in his State of the State address, Governor Cuomo again called for reform of Foundation Aid: “We use complicated funding formulas to disguise the ugly truth. The reality is wealthier districts have much higher funding [for] schools than poorer districts.”<sup>291</sup> Noting that “Education is the civil rights issue of our day” and that the “current formula is designed to achieve political needs not equity,” Governor Cuomo called for a new formula. Criticizing expense-based aid as unjustly flowing to low-need districts and the Foundation Aid formula for inaccurately judging poverty, Governor Cuomo stated that “the goal is what a wealthy school gets, a poor school should get.”<sup>292</sup>

Governor Cuomo’s 2020-21 Executive Budget, however, only proposes a \$504 million increase in Foundation Aid, with an additional \$200 million to be allocated to a fiscal stabilization fund to target high-need districts,<sup>293</sup> despite the New York State Board of Regents

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<sup>289</sup> 2019 State of the State Address, *supra* note 287.

<sup>290</sup> Zach Williams, *Lawmakers Lash Out at Cuomo’s Education Funding Plans*, CITY & STATE N.Y. (Mar. 4, 2019), <https://www.cityandstateny.com/articles/personality/personality/lawmakers-on-cuomo-education-funding-plans.html>.

<sup>291</sup> Transcript, Governor Cuomo Outlines 2020 Agenda: Making Progress Happen (Jan. 8, 2020) [hereinafter *2020 State of the State Address*], <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-outlines-2020-agenda-making-progress-happen>.

<sup>292</sup> Making Progress Happen, *supra* note 232.

<sup>293</sup> 2020-21 Proposed Executive Budget, *supra* note 240, at 1. The total school aid increase proposed by the 2020-21 Executive Budget is \$826 million. *Id.* According to Governor Cuomo’s budget bill submitted to the Senate and the Assembly, only 70% of this additional \$200 million fiscal stabilization fund will be available in the 2020-21 state fiscal year. S. 7503, A. 9503, 2020 Leg., Reg. Sess. (N.Y. 2020), 128, <https://www.budget.ny.gov/pubs/archive/fy21/exec/approps/local.pdf>. This total school aid

calling for a three-year phase-in of the original promised Foundation Aid, including a \$1.9 billion Foundation Aid increase for school year 2020-21.<sup>294</sup> In response, the Alliance for Quality Education stated that no “equity masquerade” should obscure the fact that schools in New York are still owed the “\$3.8 billion in Foundation Aid.”<sup>295</sup> And, the New York State United Teachers is calling for a \$2.1 billion increase in State aid in the 2020-21 State budget, a number that includes the first installment of a three-year phase-in of Foundation Aid owed.<sup>296</sup>

One proposed change in the fiscal year 2020-21 Executive Budget is the consolidation of ten existing aid categories into Foundation Aid.<sup>297</sup> The proposed Executive Budget notes that incorporating expense aids into the Foundation Aid formula will help direct more expense-based

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increase is a 3.0 percent increase from the prior year. 2020-21 Proposed Executive Budget, *supra* note 240, at 1. Multiple school districts and commentators have expressed frustration over the aid increase proposed by Governor Cuomo. *E.g.*, Neal Simon, *Early State Aid Numbers Raise More Questions Than Answers*, THE EVENING TRIBUNE (Jan. 29, 2020), <https://www.eveningtribune.com/news/20200129/early-state-aid-numbers-raise-more-questions-than-answers> (“To get an idea of what Hornell [City School District]’s “real” Foundation Aid number is, it’s important to know what Hornell will spend on [the combined aid categories] services and how much it will be reimbursed for those services.”); Denise Civiletti, *Not Even Close: Governor’s Budget Would Increase Foundation Aid to Riverhead Schools by Just 1.1 Million*, RIVERHEAD LOCAL (Jan. 23, 2020), <https://riverheadlocal.com/2020/01/23/not-even-close-governors-budget-would-increase-foundation-aid-to-riverhead-schools-by-just-1-1-million/> (“The increase is ‘still nowhere near what is considered [Riverhead School District’s] fair share.”); Amy Neff Roth, *Cuomo’s Budget Proposal for School Aid Draws Ire*, TIMES TELEGRAM (Jan. 24, 2020), <https://www.timestelegram.com/news/20200124/cuomos-budget-proposal-for-school-aid-draws-ire> (“The executive budget once again fails to commit to a fully-funded foundation aid formula.”).

<sup>294</sup> N.Y. State Educ. Dep’t, Presentation: 2020-2021 Regents State Aid Proposal \$2 Billion, 2, 6, 8, <https://www.regents.nysed.gov/common/regents/files/State%20Aid%20-%202020-2021%20Regents%20State%20Aid%20Proposal%202.0%20Billion.pdf>.

<sup>295</sup> Alliance for Quality Educ., *AQE Responds to Governor Cuomo’s Budget Address* (Jan. 21, 2020), <https://www.aqeny.org/2020/01/21/aqe-responds-to-governor-cuomos-budget-address/>.

<sup>296</sup> Press Release, NYSUT Reacts to Governor’s Executive Budget Proposal (Jan. 21, 2020), <https://www.nysut.org/news/2020/january/nysut-reacts-to-governors-executive-budget-proposal>.

<sup>297</sup> See *supra* note 243 and accompanying text for the list of consolidated expense aids.

aid to high-need districts—currently, only 50% of these 10 expense-based aids are distributed to high-needs districts, compared to more than 70% of Foundation Aid.<sup>298</sup> Michael Borges, Executive Director of the Association of School Business Officials of New York, however, argues that consolidating these aids into the budget mischaracterizes the aid increase: “With false aid increases based on eliminating needed reimbursable aids, the governor is pitting school districts against one another in a competition where there are no winners.”<sup>299</sup> The Governor’s initiative has nonetheless received support among other advocates. For example, the Citizens Budget Commission<sup>300</sup> notes that the consolidation “is a positive step for students and taxpayers” because these aids are currently distributed without accounting for district wealth or student need.<sup>301</sup>

Professor Rebell describes the impact of the derailment of Foundation Aid as “back to the pre-*CFE* system” and argues that New York State does not currently have “a rational system that’s based on the actual dollars that students need.”<sup>302</sup> The State’s failure to fully fund the original promised Foundation Aid, says Mr. Easton, “is a civil rights issue and it could best be described as educational racism.”<sup>303</sup>

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<sup>298</sup> FY 2021 Budget Book, *supra* note 242, at 49.

<sup>299</sup> Roth, Cuomo’s Budget Proposal for School Aid Draws Ire, *supra* note 293. According to Brian Fessler, Interim Director of Governmental Relations for the Association of School Business Officials of New York, by mixing some reimbursable aid, such as BOCES funding and software/library/textbook aid into foundation aid, districts risk not just losing aid, but losing incentives to send students to BOCES for career and technical education or to take advantage of shared services.

<sup>300</sup> *Infra* note 354 (introducing the Citizens Budget Commission).

<sup>301</sup> Citizens Budget Comm’n, Statement on the NYS Executive Budget for FY 2021 (Jan. 22, 2020), <https://cbcny.org/advocacy/statement-nys-executive-budget-fy-2021>.

<sup>302</sup> Rebell Testimony, at 112.

<sup>303</sup> Easton Testimony, at 51.

## 2. Foundation Aid and the Foundation Aid Formula

Foundation Aid at present is distributed to each New York school district in accordance with what is a negotiated amount between the Governor and the State legislature based on the 2008 Foundation Aid formula.<sup>304</sup> On paper, the Foundation Aid formula is based on (i) the adjusted per pupil cost that the State Board of Education calculated in 2007 as necessary to provide a general “sound basic education,” (ii) the level of expected local contribution (based on a local share formula or computed tax rate) and (iii) the number of “aidable” pupils in the district, adjusted based on phase-in factors and certain minimums and maximums.<sup>305</sup> However, in reality, the Foundation Aid formula is renegotiated each year and is amended to effect political compromises so that the Foundation Aid actually distributed to school districts—while having a foothold in the formula—is a function of a number of factors, including, in 2019-20, the base amount that a district received the prior year, how much of an increase in aid is allocated by the State legislature to Foundation Aid for that year, and the most favorable result derived from ten, (to the extent applicable) newly adopted sub-formulas based in part on need-eligibility.<sup>306</sup>

The base Foundation Aid formula aims to capture in essence the difference between (i) the total amount of money a district needs to meet the New York State constitutional “sound

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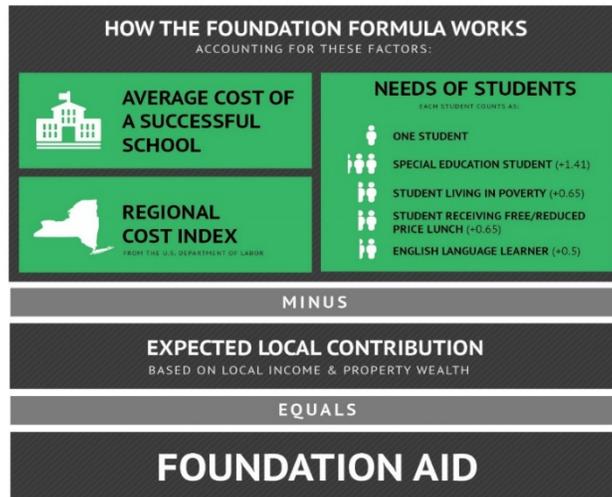
<sup>304</sup> Easton Written Testimony, at 2; Easton Testimony, at 57, 77-80; Rebell Testimony, at 114-15; Lowry Written Testimony, at 9; Lowry Testimony, at 39-40; *see also infra* Chapter II.3.C.f for further discussion.

<sup>305</sup> State Aid Handbook, *supra* note 232, at 7.

<sup>306</sup> State Aid Handbook, *supra* note 232, at 13-15; Easton Written Testimony, at 2; Easton Testimony, at 57, 77-80; Rebell Testimony, at 114-15; Lowry Written Testimony, at 7, 9, App’x 1; Lowry Testimony, at 39-40; *see also infra* Chapter II.3.C.f for further discussion. *But see infra* note 343 and accompanying text (the 2020-21 Executive Budget has proposed changes to the calculation of Foundation Aid payable).

basic education” requirement and (ii) the expected amount a district can contribute based on its wealth.<sup>307</sup>

The base Foundation Aid formula is presented in a simplified form by the Alliance for Quality Education as follows:<sup>308</sup>



Under the formula, base Foundation Aid is first calculated as follows:<sup>309</sup>

*District Adjusted Foundation Amount Per Pupil*

$$= (\text{Foundation Amount} \times \text{CPI change} \times \text{Pupil Need Index} \times \text{Regional Cost Index} \times \text{Phase-In Foundation Percent})$$

For school year 2019-20, the average per pupil Consumer Price Index (“CPI”) adjusted Foundation Amount was \$6,714.<sup>310</sup> That Foundation Amount is then adjusted by a Pupil Need

<sup>307</sup> 2007-2008 Briefing Book, *supra* note 218, at 35; Testimony of John M. Yinger, Professor of Economics and Public Administration at Syracuse University, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Yinger Testimony], 179; Lowry Testimony, at 34.

<sup>308</sup> Alliance for Quality Educ., *How the Foundation Formula Works*.

<sup>309</sup> State Aid Handbook, *supra* note 232, at 7.

<sup>310</sup> State Aid Handbook, *supra* note 232, at 7; State Aid Primer, *supra* note 233, at 23.

Index,<sup>311</sup> which measures the percentage of total K-12 district-enrolled students who count as students with Extraordinary Needs, and by a Regional Cost Index that was determined in 2006.<sup>312</sup>

The Extraordinary Needs factor is determined by (i) calculating the purported poverty in the district by applying a statutorily prescribed factor of 0.65 to (A) the percentage of students in the district eligible for Free and Reduced-Price Lunch over the preceding three years; and (B) the percentage of enrolled students (ages five to seventeen) whose families have incomes below the poverty level, using 2000 Census data on Small Area Income and Poverty Estimates (“SAIPE”);<sup>313</sup> (ii) applying a statutorily prescribed factor of 0.5 to the percentage of students in the district who are English Language Learners; and (iii) determining whether the district is eligible for a sparsity factor, calculated as 25 minus base year enrollment per square mile,

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<sup>311</sup> State Aid Handbook, *supra* note 232, at 8; Lowry Written Testimony at 4; Written Testimony of John Yinger, Professor of Economics and Public Administration at Syracuse University, before the N.Y. Advisory Comm. to the U.S. Comm. on Civil Rights (June 12, 2019) [hereinafter *Yinger Written Testimony*], 5.

The Pupil Need Index is calculated as follows:

*Pupil Need Index* = 1 + *Extraordinary Needs Percent*

= 1 + (0.65 × *FRPL* + 0.65 × *SAIPE* + 0.5 × *ELL* + *Sparsity Count*) / (*Base Year Public School Enrollment*) × 100

= 1 + [0.65 × *FRPL* + 0.65 × *SAIPE* + 0.5 × *ELL* + (25.0 – *Base Year Enrollment per Square Mile*) / 50.9] / (*Base Year Public School Enrollment*) × 100

*FRPL* is the 3-year average ratio of students eligible for Free and Reduced-Price Lunch; *ELL* is the base year count of English Language Learner pupils. *SAIPE* is the percentage of enrolled students (ages five to seventeen) whose families have incomes below the poverty level, using 2000 Census data on Small Area Income and Poverty Estimates.

<sup>312</sup> State Aid Handbook, *supra* note 232, at 8; State Aid Primer, *supra* note 233, at 24; Lowry Written Testimony at 4; *infra* notes 318-320 and accompanying text (discussing Regional Cost Index).

<sup>313</sup> The Census’s SAIPE program provides annual estimates of poor children aged five to seventeen by school district.

divided by 50.9.<sup>314</sup> The rationale underlying the poverty and English Language Learners adjustments is that more money is required to educate these students than to educate the average student; the sparsity factor is designed to take into account the lack of economies of scale in sparsely populated rural districts.<sup>315</sup> The Pupil Need Index has a minimum value of 1.0 and a maximum value of 2.0.<sup>316</sup> The weights given to each category of high-need students (*i.e.*, 0.65, 0.65 and 0.5) are hard-coded into the formula and have not been updated since 2007.<sup>317</sup>

The resulting Foundation Amount is then adjusted for regional costs differences based on 2006 numbers that also have never been updated.<sup>318</sup> Each of the State's nine regions is assigned a cost index factor based on labor market costs of median salaries for professions that require similar credentials to those in the education field, which are used as a proxy measure for operating costs.<sup>319</sup> The regional cost index sets the North Country and Mohawk Valley regions

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<sup>314</sup> State Aid Primer, *supra* note 233, at 23-24.

<sup>315</sup> Lowry Written Testimony, at 4.

<sup>316</sup> State Aid Handbook, *supra* note 232, at 8.

<sup>317</sup> *See id.*; Yinger Written Testimony, at 5.

<sup>318</sup> State Aid Handbook, *supra* note 232, at 8; *see, e.g.*, Lowry Written Testimony, at 4; Friedfel Testimony, at 170.

<sup>319</sup> State Aid Handbook, *supra* note 232, at 8; *see also* Better Foundation Aid Formula, *supra* note 240.

at the base value (1.000), while the New York City-Long Island region is the highest-cost region (1.425).<sup>320</sup>

Once the district’s Adjusted Foundation Amount has been calculated, it is reduced by the *expected* local per pupil contribution.<sup>321</sup> Expected local per pupil contribution is calculated based on a district’s wealth per student, as measured by its taxable property value and adjusted gross income.<sup>322</sup> Districts can choose the lower of the following two options in calculating the expected local contribution per pupil.<sup>323</sup>

The first option is calculated as follows:

*Expected Minimum Local Contribution*

$$= (\text{Selected Actual Value} / \text{TWFPU}) \times \text{Local Tax Factor} \times \text{Income Wealth Index}$$

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<sup>320</sup> State Aid Handbook, *supra* note 232, at 8. The regional cost index values are as follows:

<b>Labor Force Region</b>	<b>Index</b>
Capital District	1.124
Southern Tier	1.045
Western New York	1.091
Hudson Valley	1.314
Long Island/New York City	1.425
Finger Lakes	1.141
Central New York	1.103
Mohawk Valley	1.000
North Country	1.000

<sup>321</sup> State Aid Handbook, *supra* note 232, at 8.

<sup>322</sup> State Aid Handbook, *supra* note 232, at 7, 9-11; Lowry Written Testimony, at 4; Subramanian Written Testimony, at 3.

<sup>323</sup> State Aid Handbook, *supra* note 232, at 8; State Aid Primer, *supra* note 233, at 24.

This calculation applies a statewide average tax rate (0.0166 in year 2019-20), known as the “Local Tax Factor”<sup>324</sup> to the value of the taxable real property in the district (the “Selected Actual Value”)<sup>325</sup> per enrolled student (the total number of enrolled pupils being the Total Wealth Foundation Pupil Units (“TWFPU”)).<sup>326</sup> The result is then multiplied by an Income Wealth Index, which is calculated as the per enrolled pupil adjusted gross income for the district (as of three years prior) as a percentage of the statewide adjusted gross income per enrolled student (as of two years prior),<sup>327</sup> subject to a statutory minimum of 0.65 and a statutory cap of 2.0.<sup>328</sup>

The second option available to a district to calculate its expected per pupil local contribution is:

*Expected Minimum Local Contribution*

$$= \text{Adjusted Foundation Amount} \times (1.00 - \text{Foundation Aid State Sharing Ratio})$$

This formula multiplies the district’s Adjusted Foundation Amount by the result of 1 *minus* the largest of four statutory ratios, called the Foundation Aid State Sharing Ratio (“State

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<sup>324</sup> State Aid Handbook, *supra* note 232, at 10.

Pursuant to Section 3602.4.a.(4) and Section 3609-e 1.e of the Education Law, the Commissioner of Education must calculate the local tax factor as 90 percent of the three-year statewide average school tax rate. Better Foundation Aid Formula, *supra* note 240.

<sup>325</sup> For the 2019-20 year, the value of the taxable real property is the lesser of the 2016 actual value and the average of the 2015 and 2016 actual value. State Aid Handbook, *supra* note 232, at 9.

<sup>326</sup> TWFPU is the sum of the (i) average daily membership for the year prior to the base year, plus (ii) the full-time equivalent enrollment of resident pupils attending public school elsewhere, less the full-time equivalent enrollment of nonresident pupils, plus (iii) the full-time equivalent enrollment of resident pupils with disabilities attending a Board of Cooperative Educational Services full-time. *Id.* at 10.

<sup>327</sup> The statewide adjusted gross income per TWFPU is \$268,300 in year 2019-20 based on the 2016 adjusted gross income divided by the 2017-18 statewide TWFPU. *Id.* at 10.

<sup>328</sup> State Aid Primer, *supra* note 233, at 24; State Aid Handbook, *supra* note 232, at 10.

Sharing Ratio”),<sup>329</sup> that are a function of a district’s Foundation Aid Combined Wealth Ratio, a district’s wealth per weighted-average daily-attending pupil<sup>330</sup> as compared to the statewide average (with the district’s property wealth and adjusted gross income weighted equally).<sup>331</sup> A district with estimated poverty and a Foundation Aid Combined Wealth Ratio equal to the State

<sup>329</sup> The four Foundation Aid State Sharing Ratios are:

$1.37 - (1.23 \times \text{FACWR})$
$1.00 - (0.64 \times \text{FACWR})$
$0.80 - (0.39 \times \text{FACWR})$
$0.51 - (0.173 \times \text{FACWR})$

FACWR is the Foundation Aid Combined Wealth Ratio. The greatest of the four ratios is used (with a maximum value of .9). The ratio, when calculated for high-need/resource-capacity districts is multiplied by 1.05. State Aid Handbook, *supra* note 232, at 10; State Aid Primer, *supra* note 233, at 28.

<sup>330</sup> TWPU is the sum of the adjusted Average Daily Attendance, aidable pupils with special educational needs, weighted publicly placed students with disabilities, and aidable pupils weighted for secondary school, but excludes aidable pupils for summer school. *Id.* at 71; Questar, *Definitions of State Aid Factors: 2007-2008 Through 2018-2019 School Years*, 21 (January 2019), <https://www.questar.org/wp-content/uploads/2019/01/Multiyear-Comparison-of-State-Aid-Factors-Definitions-Final.pdf>.

<sup>331</sup> State Aid Handbook, *supra* note 232, at 10-11. Lowry Written Testimony, at 4.

$$\text{FACWR} = 0.5 \times (\text{District Selected Actual Value} / 2017-18 \text{ TWPU}) / \$615,200$$

$$+ 0.5 \times (\text{District Selected Adjusted Gross Income} / 2017-18 \text{ TWPU}) / \$206,400$$

The Statewide average taxable property value per weighted attending students for school year 2019-20 is \$615,200, up from \$584,600 in the prior year; the Statewide average adjusted gross income per weighted attending students for school year 2019-20 is \$206,400, up from \$206,000 the prior year. State Aid Handbook, *supra* note 232, at 10; Univ. of the State of N.Y., State Educ. Dep’t, *2018-19 State Aid Handbook*, 10-11, [https://stateaid.nysed.gov/publications/handbooks/handbook\\_2018.pdf](https://stateaid.nysed.gov/publications/handbooks/handbook_2018.pdf).

Average Wealth District	FACWR = 1.00
Below Average Wealth	FACWR = Less than 1.00
Above Average Wealth	FACWR = Greater than 1.00

State Aid Handbook, *supra* note 232, at 11; State Aid Primer, *supra* note 233, at 27.

average would have a need/resource-capacity index of 1.0.<sup>332</sup> For high-need/resource-capacity districts, the State Sharing Ratio is multiplied by 1.05.<sup>333</sup> The minimal expected contribution component of the Foundation Aid formula—which reduces what the State might otherwise provide a district—is a theoretical number that districts may not actually be able to contribute for the given year, either because they do not have the expected taxable base or because they are unable or unwilling to collect the necessary taxes.<sup>334</sup> Unlike half of the states that have enacted a foundation formula-based funding system, New York does not mandate the local contribution.<sup>335</sup>

Having reduced the Adjusted Foundation Amount by the hypothetical minimum local contribution, the resulting per pupil Adjusted Foundation Aid amount is further tweaked by multiplying it by the Total Aidable Foundation Pupil Units (“TAFPU”).<sup>336</sup> TAFPU is the weighted sum of various categories of pupils that could have attended school in the district,

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<sup>332</sup> The need/resource-capacity index, a measure of a district’s ability to meet the needs of its students with local resources, is the ratio of the estimated poverty percentage (*i.e.*, the estimated percentage of children eligible for free or reduced-price lunches, expressed in standard score form) to the Foundation Aid Combined Wealth Ratio (expressed in standard score form). *See* N.Y. State Educ. Dep’t, *Need/Resource Capacity Categories*, <http://www.p12.nysed.gov/irs/accountability/2011-12/NeedResourceCapacityIndex.pdf>.

<sup>333</sup> State Aid Handbook, *supra* note 232, at 10.

<sup>334</sup> Lowry Testimony, at 68-69; Yinger Testimony, at 220-221; Yinger Written Testimony, at 13; Friedfel Testimony, at 147-48; Yinger Written Testimony, at 13; Better Foundation Aid Formula, *supra* note 240.

For a 50-state survey of school funding models and the requirements of local school districts to raise expected funds or alter their tax revenue, *see* Deborah A. Verstegen, *A 50-State Survey of School Finance Policies and Programs* (2018), <https://schoolfinancesdav.files.wordpress.com/2018/09/survey18-vol-i1.pdf>; Edbuild, *FundEd: Expected Local Share Policies in Each State*, <http://funded.edbuild.org/reports/issue/local-share/in-depth> (last visited Feb. 3, 2020).

<sup>335</sup> *Id.*; Office of N.Y. State Comptroller *Financing Education in New York’s ‘Big Five’ Cities*, 11-14 (May 2005) (discussing the stress that a mandatory contribution would put on certain school districts and the preoccupation by policymakers over trade-offs in efficiency, local control and sometimes fairness brought by mandatory contribution).

<sup>336</sup> State Aid Handbook, *supra* note 232, at 11.

including Native Americans on reservations, non-residents, home-bound students, full-time equivalent charter school and BOCES attendees, pupils with disabilities who require certain special education (weighted 1.41), pupils declassified from special education during that first year (weighted 0.50) and pupils in summer school (weighted 0.12).<sup>337</sup>

Finally, the resulting Total Foundation Aid amount is used as a basis to determine how much is payable in the current school year.<sup>338</sup> The criteria used to determine Foundation Aid payable changes each year.<sup>339</sup> The Foundation Aid Payable in the 2019-20 year, for example, is a function of the previous year's Foundation Aid Payable (the "Foundation Aid Base"), *plus* the year-over-year increase in Foundation Aid included in the Governor's Executive Budget proposal for that year, *plus* the maximum derived from ten different formulas<sup>340</sup> depending on

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<sup>337</sup> State Aid Primer, *supra* note 233, at 30; State Aid Handbook, *supra* note 232, at 11-13.

<sup>338</sup> State Aid Handbook, *supra* note 232, at 13-15.

<sup>339</sup> Compare *id.* with Univ. of the State of N.Y., State Educ. Dep't, 2018-19 State Aid Handbook, 13-14, [https://stateaid.nysed.gov/publications/handbooks/handbook\\_2018.pdf](https://stateaid.nysed.gov/publications/handbooks/handbook_2018.pdf) and Univ. of the State of N.Y., State Educ. Dep't, 2017-18 State Aid Handbook, 13-14, [https://stateaid.nysed.gov/publications/handbooks/handbook\\_2017.pdf](https://stateaid.nysed.gov/publications/handbooks/handbook_2017.pdf).

<sup>340</sup> State Aid Handbook, *supra* note 232, at 13-15.

Tier A is equal to the maximum of: (i) the positive difference of 0.75% multiplied by the Foundation Aid Base, less the Executive Budget Foundation Aid Increase; or (ii) the Executive Budget Foundation Aid Increase multiplied by 5%.

Tier B is equal to the phase-in factor multiplied by Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base). The phase-in factor for Tier B is equal to:

- for the New York City School District, 9.011%;
- for the Buffalo City School District, 10%;
- for the Rochester City School District, 6%;
- for the Syracuse City School District, 8%;
- for the Yonkers City School District, 13.05%; and
- for all other school districts, 1.37%.

Tier C is equal to Total Foundation Aid multiplied by 50%, less the Foundation Aid Base. A district is eligible if: (i) the Foundation Aid Base divided by Total Foundation Aid is less than

eligibility, which in turn depends, among other things, on the location of the district, the Foundation Aid Combined Wealth Ratio of the district and the increase in enrollment in the

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50%; and (ii) the Foundation Aid Pupil Wealth Ratio is less than 1.1 or the Foundation Aid Combined Wealth Ratio declined by more than 0.025 from 2018-19 to 2019-20. (The Foundation Aid Pupil Wealth Ratio is a measure of a district's property wealth per pupil compared to the statewide average property wealth of districts and is calculated by dividing the Selected Actual Value per TWPU of the school district by the statewide average Actual Value per TWPU.) *Id.* at 74.

Tier D is equal to 2.5% multiplied by Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base). A district is eligible if: (i) public enrollment increased by more than 10% from 2008-09 to 2018-19; (ii) English Language Learners increased by more than 10% from 2012-13 to 2018-19; (iii) the Foundation Aid Combined Wealth Ratio decreased by more than 10% from 2014-15 to 2019-20, and (iv) the Foundation Aid Pupil Wealth Ratio is less than 1.4.

Tier E is equal to 2.05% multiplied by Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base). A district is eligible if: (i) public enrollment decreased from 2013-14 to 2018-19; (ii) the 3-year Average Direct Certification percentage is greater than 36%; and (iii) English Language Learners increased by more than 34% from 2013-14 to 2018-19 or increased more than 100 pupils from 2017-18 to 2018-19. (Average Direct Certification is the number of children eligible for free meals or free milk based on information from the Office of Temporary and Disability Assistance administering the supplemental nutrition assistance program and the Department of Health administering Medicaid divided by the enrollment). *Id.* at 13.

Tier F is equal to the Foundation Aid Base multiplied by 2.38%, less the Executive Budget Foundation Aid Increase. A district is eligible if: (i) the Foundation Aid Base divided by Total Foundation Aid is less than 75%; (ii) the 3-year Average Direct Certification percentage is greater than 44%; and (iii) the K-6, 3-year average Free and Reduced Price Lunch percentage is greater than 55%.

Tier G is equal to 2.77% multiplied by Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base). A district is eligible if: (i) the Foundation Aid Pupil Wealth Ratio is less than 0.7; and (ii) Public enrollment increased by one or more percent from 2015-16 to 2018-19.

Tier H is equal to 11.24% multiplied by Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base). A district is eligible if the district's boundaries include all or a portion of a small city.

Tier I is equal to Foundation Aid Base multiplied by 2%. A district is eligible if the district's boundaries include all or a portion of a small city.

Tier J is equal to the maximum of the Foundation Aid Remaining (Total Foundation Aid minus the Foundation Aid Base) multiplied by 4.8% or FAB multiplied by 0.75%. A district is eligible if: (i) sparsity factor is greater than zero; and (ii) Foundation Aid Combined Wealth Ratio is less than or equal to 1.5.

district over the previous year.<sup>341</sup> While the tiers negotiated for 2019-20 appear to attempt to redress some of the shortcomings inherent in the Foundation Aid formula, according to Mr. Easton, they are an example of how the Executive and the State legislature manipulate the budgets allocated to school districts yearly as part of education politics.<sup>342</sup> The fiscal year 2020-21 proposed Executive Budget provides five tiers for calculating the Foundation Aid payable and besides including the various consolidated expense-based aids in the base formula would appear to address similar concerns.<sup>343</sup>

An additional requirement of the Foundation Aid received by schools comes in the form of “set-asides.”<sup>344</sup> Some school districts must set aside a portion of what they receive in Foundation Aid as part of a Community Schools Set-Aside program.<sup>345</sup> The Community Schools Set-Aside allocates part of the Foundation Aid received by high-need school districts to provide students and families with support, social services, and health services, and to encourage the use of schools as community resources in order to counter environmental impediments to

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<sup>341</sup> State Aid Handbook, *supra* note 232, at 13-15.

<sup>342</sup> Easton Testimony, at 187; Easton Written Testimony, at 2.

<sup>343</sup> FY 2021 New York State Executive Budget, Education, Labor, and Family Assistance Article VII Legislation (2020), 24-31, <https://www.budget.ny.gov/pubs/archive/fy21/exec/artvii/el-fa-bill.pdf>; The 2020-21 Proposed Executive Budget, *supra* note 240, at 42; text accompanying *supra* note 243. This report has not analyzed the 2020-2021 proposed Executive Budget as it was released shortly before publication of this report.

<sup>344</sup> State Aid Handbook, *supra* note 232, at 6.

<sup>345</sup> State Aid Handbook, *supra* note 232, at 15. The 2019 Enacted Budget requires 240 listed districts to use the community schools aid. *Id.* at 6.

Community school set-asides apply to school districts that have been identified as high-need, with an additional requirement for schools with extraordinarily high levels of student need, as defined by the Commissioner of Education. N.Y. State Educ. Dep’t, *Foundation Aid: Community Schools Set-Aside Guidance*, <http://p12.nysed.gov/sss/expandedlearningopps/setasideguidance.html> (last updated June 24, 2019).

student achievement.<sup>346</sup> This set-aside does not result in extra funds; rather, it places restrictions on the way certain high-need districts can use some of their Foundation Aid funding, which some critics say removes control over use of resources from the district and is particularly challenging for high-need districts short on resources.<sup>347</sup> The 2020-21 Executive Budget proposes to increase the Community Schools Set-Aside from \$250 million to \$300 million. A similar set-aside requirement allocates portions of Foundation Aid to the Public Excess Cost Aid Set-Aside, which sets restrictions on the use of funds for students with disabilities.<sup>348</sup>

Layered on top of the original Foundation Aid formula is a “save harmless” provision—a statutory guarantee that a district will not receive less aid than received in the previous year—and the fact that certain school districts receive a fixed “share” of school aid increases each year without any particular policy reason, both of which, critics say, further distort the underlying Foundation Aid formula.<sup>349</sup>

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<sup>346</sup> State Aid Handbook, *supra* note 232, at 15; N.Y. State Educ. Dep’t, *Foundation Aid: Community Schools Set-Aside Guidance*, <http://p12.nysed.gov/ss/expandedlearningopps/setasideguidance.html> (last updated June 24, 2019); Written Testimony of Kara Finnigan, Professor of Educational Policy and Leadership at the University of Rochester, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 13, 2019) [hereinafter *Finnigan Written Testimony*], 5.

<sup>347</sup> Van Alstyne Testimony, at 190; Spring Testimony, at 88-89; Easton Testimony, at 89-90; N.Y. State Sch. Bds. Ass’n, *Testimony Presented to the New York State Senate Committee on Finance and the New York State Assembly Committee on Ways and Means* (Feb. 6, 2019), 4-5, <https://nyassembly.gov/write/upload/publichearing/000962/001909.pdf>; New York State Council of School Superintendents, *School Finance and the 2019-20 Executive Budget*, 4-5 (Feb. 2019).

<sup>348</sup> State Aid Handbook, *supra* note 232, at 15.

<sup>349</sup> Easton Written Testimony, at 2; Easton Testimony, at 57, 77-80; Rebell Testimony, at 114-15; Lowry Written Testimony, at 9-10; Lowry Testimony, at 39-40; Testimony of Jamaal Bowman, Founding Principal of Cornerstone Academy for Social Action Middle School, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter *Bowman Testimony*], 268, 285; *but see* Van Alstyne Testimony, at 188-89.

### 3. Criticism of the Current Funding System

While Foundation Aid generally is perceived by educators, government officials and advocates as grounded in good intentions and superior to the pre-*CFE* funding system, it is also universally viewed as riddled with flaws, plagued by political compromise, underfunded and unrealized in its original vision, leaving New York with an inequitable school funding system that discriminates against the poor and particularly Black and Latinx children.<sup>350</sup> “Neglect maintenance of a home or car for years and those assets will deteriorate,” says Mr. Lowry, adding, “[i]n effect, the Foundation Aid formula was neglected, and it deteriorated.”<sup>351</sup> In its stead is a system in which high-need, predominantly Black and Latinx school districts are chronically underfunded,<sup>352</sup> burdened not only with education resource deprivation but also with all the by-products of poor communities that are generally lacking in resources.<sup>353</sup> The

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<sup>350</sup> See Rebell Testimony, at 164; Yinger Testimony, at 190; Testimony of Sarita Subramanian, Supervising Analyst for Education Research at New York City’s Independent Budget Office, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Subramanian Testimony], 38; Testimony of Peter Cookson Jr., Professor of Sociology at Georgetown University and Senior Researcher at the Learning Policy Institute, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Cookson Testimony], 173-74; Rachel Silberstein, State Revisiting How Schools Are Funded, *TIMES UNION* (Oct. 14, 2019), <https://www.timesunion.com/news/article/Schools-funding-revisited-Senate-kicks-off-14509852.php>; Reema Abin, *It’s Time To Re-think New York’s 12-year-old Education Funding Formula, Some Lawmakers Say*, *CHALKBEAT* (Oct. 11, 2019); Gary Stern, *Some NY Educators Want To Fix Foundation Aid, While Others Tell State To Pay Up*, *ROCKLAND/WESTCHESTER J. NEWS* (Oct. 16, 2019), <https://www.lohud.com/story/news/2019/10/16/ny-foundation-aid-formula-senate-roundtable-tackles-education-funding/3984673002/>; 2019 State of the State Address, *supra* note 287; *The State of Funding Equity in New York*, *THE EDUC. TR.*, <https://edtrust.org/graphs/?sname=New%20York> (last visited Feb. 3, 2020); 2020 State of the State Address, *supra* note 291.

<sup>351</sup> Lowry Written Testimony, at 10.

<sup>352</sup> 87% of students of color are enrolled in a high-poverty district reside in a Big Five city school district, compared to only 48% of White students enrolled in a high-poverty district. Rueben Written Testimony, at 7-9.

<sup>353</sup> See, e.g., Bowman Testimony, at 267, 269-71.

Foundation Aid formula, according to David Friedfel, Director of State Studies at the Citizens Budget Commission,<sup>354</sup> “inequitably allocates aid by use of arbitrary adjustments, outdated data, and inconsistent local share calculations,” flaws that were built into the formula from the outset “as a political compromise to assuage concerns of suburban politicians.”<sup>355</sup> “The equity gap is real and persistent . . . and must be addressed,” Dr. Malatras testified.<sup>356</sup> Echoing the sentiment of many experts, Peter Cookson, Jr., Professor of Sociology at Georgetown University and Senior Researcher at the Learning Policy Institute,<sup>357</sup> testified that the equity gap requires immediate investment:

Investing in the success of each and every student requires a commitment to adequate and equitable funding if the deeply held American belief in equality of educational opportunity is to rise above the level of cliché and become a living reality. Inadequate funding and disparities in the distribution of those funds at the district and school levels directly impacts the opportunities students have to learn. This issue is of urgent importance both in New York and nationally—and to the students sitting in classrooms at this very moment.<sup>358</sup>

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<sup>354</sup> The Citizens Budget Commission is a nonpartisan, nonprofit civic organization whose mission is to achieve constructive change in the finances and services of New York City and New York State government. Citizens Budget Comm’n, *About Us*, <https://cbcny.org/about-us> (last visited Feb. 3, 2020).

<sup>355</sup> Friedfel Written Testimony.

<sup>356</sup> Malatras Written Testimony, at 7.

<sup>357</sup> The Institute conducts and communicates independent, high-quality research to improve education policy and practice; it works with policymakers, researchers, educators, community groups, and others to advance evidence-based policies that support empowering and equitable learning for each and every child.

<sup>358</sup> Written Testimony of Peter Cookson, Jr., Professor of Sociology at Georgetown University and Senior Researcher at the Learning Policy Institute, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 13, 2019) [hereinafter Cookson Written Testimony], 1.

As New York Governor and Lincoln’s secretary of state William Seward said in 1839, “The standard of education ought to be elevated . . . education is the chief of our responsibilities.”<sup>359</sup>

#### **A. The State Education System is Underfunded**

One of the main criticisms leveled at State education aid is that it is underfunded both because the State never followed through on its original Foundation Aid funding commitment and because it continues to fail to allocate sufficient funds to localities on an ongoing basis, particularly to high-need districts and schools.<sup>360</sup> “By far the biggest problem,” Mr. Easton says, “is the failure to actually fund the formula.”<sup>361</sup> If immediately implemented in 2007, the Foundation Aid formula would have resulted in, at minimum, a \$5.5 billion increase in State education aid through 2011 over the various State aid programs that were consolidated into Foundation Aid, and, assuming increases from then on, would have resulted in an even more significant allocation of funds over the last twelve years.<sup>362</sup> According to Professor Rebell, the

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<sup>359</sup> Malatras Written Testimony, at 1.

<sup>360</sup> *E.g.*, Easton Testimony, at 66 (“[Updates to formula] should not become yet one more excuse for the state to [fail] to fully fund [Foundation Aid].”); Testimony of Kim Rueben, Sol Price Fellow at the Urban Institute, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Rueben Testimony], 210-11 (stating that more aid would go to the neediest districts if the aid were fully funded). Dr. Rueben’s testimony before the committee was entirely her own and should not be attributed to the Urban Institute, its trustees, or its funders. N.Y. State Educ. Conf. Bd., *Education Groups Outline Need for a \$2.1 Billion State Aid Increase for 2020-21*, 2 (Nov. 2019) <https://www.nysut.org/~media/files/nysut/news/2019/ecbschoolfinancepaperfinal202021.pdf?la=en> (“While . . . it is important to revisit some of the formula elements, that fact remains that schools never received the resources needed to turn the promise of Foundation Aid into reality in New York’s classrooms.”).

<sup>361</sup> Easton Written Testimony, at 2.

<sup>362</sup> Lowry Written Testimony, at 4; Marina Marcou-O’Malley, *Billions Behind*, ALLIANCE FOR QUALITY EDUC. (Aug. 2014) <http://www.aqeny.org/wp-content/uploads/2014/08/REPORT-NY-Billions-Behind.pdf>; *supra* notes 259-281 and accompanying text.

State simply kept pushing back the phase-in schedule, and now it “has gone off the formula” without even pretending that the phase-in will be pushed back.<sup>363</sup>

Translated into 2016 prices and accounting for the increase in New York City’s student population since the *CFE III* ruling,<sup>364</sup> the \$1.93 billion more in annual State school aid to New York City required by *CFE III* beginning in 2006 for a sound basic education amounts to a shortfall of \$2.436 billion in State aid to New York City for 2017, and \$18.646 billion cumulatively since *CFE III*, according to John Yinger, Professor of Economics and Public Administration at Syracuse University.<sup>365</sup>

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<sup>363</sup> Rebell Testimony, at 113-14.

<sup>364</sup> New York City had 1,018,982 students attending schools at the time of the *CFE* ruling; in 2016-17, the number of students increased to 1,141,232. Yinger Written Testimony, at 7; N.Y.C. Dep’t of Educ., *Information and Data Overview: Demographic Snapshot*, <https://infohub.nyced.org/reports-and-policies/citywide-information-and-data/information-and-data-overview> (last visited Feb. 3, 2020).

As of the January 31, 2020, New York City’s student population is 1,126,501. N.Y.C. Dep’t of Educ., *DOE Data at a Glance*, <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> (last visited Jan. 31, 2020).

<sup>365</sup> Yinger Written Testimony, at 7-8. As of the 2019-20 year, New York City received only 88% of the original Foundation Aid promised. See ASBO Presentation, *supra* note 248, at 10.

The cumulative effects of yearly shortfalls can be seen in the table below.

**Shortfalls in Reaching *CFE* Spending Minima for NYC  
(in billions of 2016 dollars)<sup>366</sup>**

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Year	Shortfall Based on 2006-07 Pupil Count	Shortfall Due to Increase in Pupils, 2007-2017	Total Shortfall
2017	\$2.208	\$0.228	\$2.436
2016	\$2.032	\$0.201	\$2.232
2015	\$2.653	\$0.233	\$2.886
2014	\$2.510	\$0.158	\$2.667
2013	\$2.867	\$0.143	\$3.010
2012	\$2.670	\$0.118	\$2.788
2011	\$2.047	\$0.077	\$2.124
2010	\$1.074	\$0.028	\$1.102
2009	-\$0.310	-\$0.002	-\$0.313
2008	-\$0.285	-\$0.001	-\$0.286
Cumulative	\$17.465	\$1.181	\$18.646

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Mr. Lowry testified that high-need small cities and suburbs are the furthest from receiving their original promised Foundation Aid amounts, with their 2019-20 Foundation Aid allocation representing approximately 71.4% of their full phase-in promised amount.<sup>367</sup>

For example, according to Laurence Spring, Superintendent of the Schenectady School District, his small-city district with 10,000 students (i) comprised of 35% Black, 20% Latinx, 25% White and 15% Asian students, (ii) with a Free and Reduced-Price Lunch rate of 85% and (iii) with a Foundation Aid Combined Wealth Ratio of about 0.33 (a third of the State

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<sup>366</sup> Yinger Written Testimony, at 20. In this model: (i) “Shortfall” is equal to the *CFE*-required minimum aid increase *minus* actual aid above 2006-07 level; (ii) the *CFE* minimum is phased in from 2008 to 2011; (iii) the *CFE* minimum is reduced in recession years (by 10% in 2009 and 25% in 2010 and then phased back in at 5 percentage points per year); and (iv) adjustments for inflation use the CPI. *Id.*

<sup>367</sup> Lowry Written Testimony, at 13-14. As of the 2019-20 year, the Big Four cities have received 86% of the original Foundation Aid promised, the high-need urban/suburban districts, 71%, the high-need rural districts, 90%, the average-need districts, 84%, and the low-need districts, 74%. ASBO Presentation, *supra* note 248, at 10.

average),<sup>368</sup> has had an annual Foundation Aid shortfall (with respect to 2007-promised dollars) of approximately \$60 million (until recently, when the shortfall dropped to \$40 million annually) out of an annual school budget of approximately \$180 million.<sup>369</sup> The lack of funding has forced Schenectady to close schools, lay off teachers (thereby increasing class sizes) and specialists, eliminate elective curricula, reduce schedules, reduce maintenance and cleaning staff, and nearly shutter its library.<sup>370</sup> The district has needed to cobble together grant funding while facing a high turnover of teachers and administrators affected by the fiscal crunch.<sup>371</sup> Superintendent Spring testified that the reductions have led to suppressed graduation rates and academic achievement and elevated rates of suspension, involvement with the juvenile justice system and psychiatric hospitalization.<sup>372</sup>

A similar story exists in Yonkers, one of the Big Five cities and the fourth largest city in the State, with 26,576 students, of whom 16% are White, 59% are Latinx, 18% are Black and 6% are Asian-Pacific Islanders.<sup>373</sup> Of these students, 16% are students with disabilities, 11% are English Language Learners, and 1% are homeless; 76% of the students are economically

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<sup>368</sup> Written Testimony of Laurence Spring, before the N.Y. Advisory Comm'n of the U.S. Comm'n on Civil Rights, New York State and City's Education Aid Formulae and Student Need (June 13, 2019) [hereinafter Spring Written Testimony], at 3; *see also supra* Chapter II.2 (explaining Foundation Aid Combined Wealth Ratio).

<sup>369</sup> *Id.* at 4.

<sup>370</sup> *Id.* at 18.

<sup>371</sup> *Id.* at 18.

<sup>372</sup> *Id.* at 19.

<sup>373</sup> Written Testimony of Edwin Quezada, Superintendent of Yonkers Public Schools, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City's Education Aid Formulae and Student Need (June 12, 2019) [hereinafter Quezada Written Testimony], 3. According to Superintendent Quezada, Yonkers City is itself one of the most diverse cities in the State, with a citizenry comprised of 38% White, 35% Latinx, 18.6% Black and 7.5% Asian peoples; 31% of residents are foreign-born and 46% of households speak a foreign language. *Id.*

disadvantaged; and 75%, or approximately 20,000 students, live in three specific and densely populated zip codes that have the overall largest poverty concentrations.<sup>374</sup> According to Dr. Edwin Quezada, Superintendent of the Yonkers Public Schools, the Yonkers school district is owed somewhere in the range of \$45 to \$50 million in annual State settlement payments (with respect to a landmark fair housing case from 1980) and is shortchanged an additional amount for federal magnet school funding that is deducted from the Foundation Aid formula even though it is no longer funded.<sup>375</sup> Underfunding has caused Yonkers to dismantle many programs and services within the 39 schools across the district, according to Superintendent Quezada.<sup>376</sup> In addition, he says, its schools are overcrowded and the district cannot provide career and technical education in middle schools, early childhood education to more than only a handful of students, or full-time art, music and foreign language programs in elementary and middle schools.<sup>377</sup> Moreover, he says, Yonkers is able to provide only one counselor for every 800 students; one psychologist for every 1,800 students; and one social worker for every 2,000 students.<sup>378</sup> Superintendent Quezada estimates that Yonkers currently requires approximately 16 more counselors, 14 more social workers, 30 more psychologists, 10 additional art teachers, 11 foreign language teachers, 13 music teachers and 14 librarians; at times, he has needed over 123 additional full-time equivalent positions to properly staff Yonkers schools.<sup>379</sup> In addition, he

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<sup>374</sup> Quezada Written Testimony, at 2.

<sup>375</sup> *Id.* at 3.

<sup>376</sup> *Id.* at 2; Yonkers Public Schs., *Who We Are*, <https://www.yonkerspublicschools.org/domain/69> (last visited Feb. 3, 2020).

<sup>377</sup> Quezada Testimony, at 292, 302-03.

<sup>378</sup> *Id.* at 278.

<sup>379</sup> *Id.* at 291.

says, to provide pre-K instruction, Yonkers requires \$20 million a year, while the State has only allocated Yonkers \$12.1 million annually.<sup>380</sup>

Because of chronic and uncertain underfunding, Superintendent Quezada says, the district has been forced to rely on non-recurring, “one-shot” lump sum State aid awards, as well as revenue from other funding sources such as grants, bonds and lottery cash advances—a situation that makes planning very difficult.<sup>381</sup> The inconsistent application of the Foundation Aid formula and the use of such temporary solutions, according to Superintendent Quezada, fail to “recognize the prevailing needs of Yonkers students,” and the consequent inequities “profoundly affect [the district’s] ability to deliver 21st century readiness to . . . students.”<sup>382</sup> Superintendent Quezada says that the one-shot funding does not account for the recurring nature of the needs, nor does Foundation Aid take into account the most recent relevant data of the district, such as the facts that (i) Yonkers has had an “exponential” increase in students with autism; (ii) English Language Learners require a host of additional services that result in many instances from interrupted educations or source-country political upheaval; (iii) Yonkers has experienced a 13% increase in enrollment; and (iv) there have been significant changes in the needs of the student population.<sup>383</sup> Moreover, he says, the State formula does not account for the State-mandated expense for charter school enrollments.<sup>384</sup>

For the Cornerstone Academy for Social Action Middle School in New York City, serving predominantly Black and Latinx students from low-income communities, chronic

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<sup>380</sup> Quezada Written Testimony, at 4.

<sup>381</sup> *Id.* at 2, 4.

<sup>382</sup> *Id.* at 2-3.

<sup>383</sup> *Id.* at 4-5.

<sup>384</sup> *Id.* at 5.

underfunding—the school currently is funded at a 90% threshold and owed approximately \$330,000 annually since it was founded in 2009<sup>385</sup>—has prevented the hiring of two to three additional administrators, up to four teachers, guidance counselors or social workers, and 12 teaching assistants.<sup>386</sup> Moreover, as a result of underfunding, the school’s speech teacher and part-time counselor have resorted to working out of locker rooms, and Cornerstone has not been able to offer full-service sports, arts, and foreign language programs to its students.<sup>387</sup>

Jamaal Bowman, Founding Principal of Cornerstone Academy for Social Action Middle School, suggests that the persistent underfunding exacerbates the impact of trauma and adverse childhood experiences, noting that smaller class sizes, additional psychologists and counselors, and other intervention services could help tremendously; unfortunately, he says, the inequitable and insufficient allocation of aid under the Foundation Aid formula has led to “real world—even life or death—consequences” for his students.<sup>388</sup>

Senator Robert Jackson (D-NY), who joined the Alliance for Quality Education in a fact-finding visit to ten school districts in the State in February and March of 2019, found the same issues across the board caused by underfunding.<sup>389</sup> First, they found student trauma frequently is unaddressed due to inadequate social, emotional and mental health services.<sup>390</sup> For

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<sup>385</sup> Bowman Testimony, at 267.

<sup>386</sup> Written Testimony of Jamaal Bowman, Founding Principal of Cornerstone Academy for Social Action Middle School, before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 12, 2019) [hereinafter Bowman Written Testimony], 1; Bowman Testimony, at 267.

<sup>387</sup> Bowman Testimony, at 267-68.

<sup>388</sup> *Id.* at 270-71.

<sup>389</sup> Easton Testimony, at 51-52; Easton Written Testimony, at 1-2. *See also* Senator Jackson Testimony, at 97-99; Alliance for Quality Educ., *View from the Classroom* (Mar. 2019), [http://www.aqeny.org/wp-content/uploads/2019/03/equityreport\\_FINAL\\_digital.pdf](http://www.aqeny.org/wp-content/uploads/2019/03/equityreport_FINAL_digital.pdf).

<sup>390</sup> Easton Written Testimony, at 1.

example, the Ellenville school district did not have a single social worker; Schenectady can only provide social work support to a third of its students; and Queens PS 95 has a social worker only for two days per week for nearly 1,500 students.<sup>391</sup> Second, they found that technology is outdated, often a decade old, and access to computers is often limited in those communities where families are too poor to have one.<sup>392</sup> Third, they found that many schools did not have librarians, or had part-time librarians who needed to shuttle between schools.<sup>393</sup> Fourth, they observed that many schools lacked the proper facilities and equipment for science classes: some schools can only provide a “paper lab” where worksheets are substitutes for science experiments, while in other schools, due to a lack of equipment, the students are confined to observing the teacher performing the experiment.<sup>394</sup> According to Senator Jackson and the Alliance for Quality Education, these students must take the New York Regents Examination that requires the use of a science lab, but that may be the only time the students actually make use of one; meanwhile, they say, these students are competing for college admissions with students from wealthier school districts who have much greater access to such resources.<sup>395</sup> Lastly, Senator Jackson and the Alliance for Quality Education found that schools and classes were overcrowded, and in many high-need school districts, students attend classes in trailers, hallways, storage closets, locker rooms, libraries, cafeterias, the principal’s office or in front of an elevator bank.<sup>396</sup>

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<sup>391</sup> *Id.*

<sup>392</sup> *Id.* at 2.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.*

<sup>395</sup> Easton Testimony, at 54.

<sup>396</sup> *Id.*; Easton Written Testimony, at 2.

According to Dr. John Jackson, President and CEO of the Schott Foundation,<sup>397</sup> the situation the high-need schools are in “is not a random occurrence. That is a choice. . . . Simply stated, the schools with the most needs are being shortchanged the most.”<sup>398</sup>

Experts claim that New York State education funding is highly regressive even though it has the highest per pupil spending in the country.<sup>399</sup> As Professor Cookson testified, while Foundation Aid is one of the most progressive in the country, because of the combination of underfunding and the difference in availability of resources and tax base between wealthy and poor local districts, the distribution of revenue to schools is regressive.<sup>400</sup> The education funding system in New York, he says, is “highly unequal” and does not ensure that funding is related to the needs of the students.<sup>401</sup> As a result, he says, high-need school districts serving low-income students, mostly of color, do not have the resources “to enable and empower their students to reach their academic and creative potential.”<sup>402</sup> Moreover, as Professor Jesse Rothstein of University of California, Berkeley, points out, equal funding is not sufficient; it does not provide

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<sup>397</sup> The Schott Foundation is a non-profit organization that strives to develop and strengthen a broad-based and representative movement to fully resourced, quality pre-K through 12th grade public education. Schott Found. for Pub. Educ., *About Us, Mission & Strategy*, <http://schottfoundation.org/about> (last visited Feb. 3, 2020).

<sup>398</sup> Testimony of John Jackson, President and CEO of the Schott Foundation, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter *Dr. Jackson Testimony*], 140.

<sup>399</sup> See Subramanian Written Testimony, at 2; Cookson Written Testimony, at 2. Per pupil spending statistics includes State and local spending.

<sup>400</sup> Cookson Written Testimony, at 2.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

equal opportunity, he says, because it is more expensive to provide an adequate education to a disadvantaged student than it is to provide one to an advantaged student.<sup>403</sup>

New York historically has been and remains a high education-spending state.<sup>404</sup> In 2017, New York governments (State and local) spent \$23,091 per pupil on elementary and secondary education, more than any other state in the United States and 89% more, not accounting for cost of living differences, than the national per pupil spending average.<sup>405</sup> Moreover, every district in New York State spends more per pupil than the national average.<sup>406</sup> The big question, however, according to Dr. Kim Rueben, Sol Price Fellow at the Urban Institute,<sup>407</sup> “isn’t how much money that’s shown being spent but how those dollars are being allocated and is it equitable and efficiently being allocated across the state.”<sup>408</sup>

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<sup>403</sup> Testimony of Jesse Rothstein, Professor of Public Policy and Economics at the University of California, Berkeley, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Rothstein Testimony], 193.

<sup>404</sup> Rueben Testimony, at 205; Education Week, *Quality Counts 2019: Finance Grading the States* (June 6, 2019), <https://www.edweek.org/ew/collections/quality-counts-2018-state-finance/map-per-pupil-spending-state-by-state.html>; U.S. Census Bureau, *U.S. School Spending Per Pupil Increased for Fifth Consecutive Year, U.S. Census Bureau Reports*, (May 21, 2019), <https://www.census.gov/newsroom/press-releases/2019/school-spending.html>; Nat’l Educ. Council, *Rankings of the States 2018 and Estimates of School Statistics 2019*, 8, 37 (Apr. 2019).

<sup>405</sup> E.J. McMahon, *N.Y. Per-Pupil Spending Reaches \$23k*, EMPIRE CTR. (May 21, 2019), <https://www.empirecenter.org/publications/ny-per-pupil-spending-tops-23k/>. Adjusted for regional cost differences, Education Week reported in 2019, that New York State spent \$19,697 against a national average of \$12,756. See Educ. Week, *Quality Counts 2019: Finance Grading the States* (June 6, 2019), <https://www.edweek.org/ew/collections/quality-counts-2018-state-finance/map-per-pupil-spending-state-by-state.html>.

<sup>406</sup> Jim Malatras, *Uneven Distribution of Education Aid Within Big Five School Districts in New York State*, 3 (Nov. 14, 2018) [hereinafter Uneven Distribution], <https://rockinst.org/issue-area/uneven-distribution-of-education-aid-within-big-5-school-districts-in-new-york-state/>.

<sup>407</sup> Dr. Rueben’s testimony before the committee was entirely her own and should not be attributed to the Urban Institute, its trustees, or its funders.

<sup>408</sup> Rueben Testimony, at 206.

Mr. Friedfel says that New York State in the aggregate spends \$13 billion more than necessary to provide a sound basic education to each child, but that the issue is that it is not targeted correctly.<sup>409</sup> While many dispute the over-spending assertion, Mr. Friedfel notes that there are 165 districts that receive approximately \$2 billion in State aid annually that raise enough revenues locally (*i.e.*, without State aid) to fund a sound basic education.<sup>410</sup> According to Mr. Lowry, if the wealthiest 10% of school districts in 2019-20 were deprived of State aid, however, the State would only save \$209 million.<sup>411</sup>

Critics contend that the average per pupil statistics about State education aid do not take into account, among other things, the fact that New York is a high-cost state that makes a greater effort than many other states to fund its pension obligation,<sup>412</sup> which accounts on average for approximately 12.5% of the yearly amount allocated to Foundation Aid,<sup>413</sup> and that per pupil

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<sup>409</sup> Friedfel Testimony, at 121.

<sup>410</sup> Friedfel Testimony, at 122. Mr. Friedfel argues that a sound basic education “should provide the next generation with the knowledge and skills they need to fulfill their potential, be productive members of society, and improve the state’s economic and civic future.” Friedfel Written Testimony.

<sup>411</sup> Lowry Written Testimony, at 6.

<sup>412</sup> See Lowry Written Testimony, at 26; E.J. McMahon, *Teacher Pension Costs to Drop*, EMPIRE CTR. (Feb. 1, 2019), <https://www.empirecenter.org/publications/teacher-pension-costs-to-drop/>. In 2019-20, the New York State Teachers’ Retirement System (“NSTRS”) is expected to cut the employer (*i.e.*, school district) pension contribution rate from 10.62% to 8.86% of covered payrolls, which is estimated to reduce net costs to school districts by nearly \$300 million. *Id.* The New York Teachers’ Retirement System has consistently had funding rates over 90%. NYSTRS, *NYSTRS Finances*, <https://nystrs.org/getdoc/50ce72ec-addd-423b-9b0c-466c832a5788/NYSTRS-Finances> (last visited Feb. 3, 2020); TeacherPensions.org, *The Unpredictability of (New York) Teacher Pensions*, (Feb. 10, 2014), <https://www.teacherpensions.org/blog/unpredictability-new-york-teacher-pensions> (noting that the wide variability in yearly pension deductions and the fact that districts have no say in the amount deducted strain districts that are heavily dependent on State aid).

<sup>413</sup> This figure is the average ratio of pension contributions by school districts from the 2015 to 2018 fiscal years to the total amount of Foundation Aid allocated in the enacted budgets in those years. See NYSTRS, 2018 Annual Report, New York State Teachers’ Retirement System, 62 (2018), <https://www.nystrs.org/Library/Publications/Annual-Reports/2018CAFR.pdf>; N.Y. State

spending is an average that does not reveal the degree to which poorer communities are underfunded.<sup>414</sup> Using 2014 Bureau of Economic Analysis statistics, prices in New York State on average are 15% above the national average, with New York City's prices being 21.5% higher.<sup>415</sup>

Moreover, critics say, wealthier communities invest considerably more in their local school districts than do lower wealth communities, as local funding is one of the three principal sources of funding, and wealthier communities have a larger tax base.<sup>416</sup> In school year 2016-17, the average actual per pupil value of taxable real property among the lowest spending 10% of districts was \$342,500, while the average actual per pupil taxable real property value among the highest spending 10% of districts was \$2,086,937, a difference of 509%.<sup>417</sup> Since more than half of school revenues come from the local tax base, disparities in taxable property are reflected in disparities in expenditures per pupil; per pupil operating expenditures in New York State (excluding New York City) in 2016-17 ranged, according to the New York State Education

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Div. of the Budget, *Description of 2014-15 New York State School Aid Programs*, 1-2 (Oct. 2014), <https://www.budget.ny.gov/pubs/archive/fy1415archive/enacted1415/1415NYSSchoolAidPrograms.pdf>; Office of the N. Y. State Comptroller, *Report on the State Fiscal Year 2015-16 Enacted Budget*, 31 (Apr. 2015), [https://www.osc.state.ny.us/reports/budget/2015/2015-16\\_enacted\\_budget.pdf](https://www.osc.state.ny.us/reports/budget/2015/2015-16_enacted_budget.pdf); Office of the N. Y. State Comptroller, *Report on the State Fiscal Year 2016-17 Enacted Budget*, 19 (May 2016), [https://www.osc.state.ny.us/reports/budget/2016/2016\\_17\\_enacted\\_budget\\_report.pdf](https://www.osc.state.ny.us/reports/budget/2016/2016_17_enacted_budget_report.pdf); Office of the N. Y. State Comptroller, *Report on the State Fiscal Year 2017-18 Enacted Budget*, 18 (May 2017), <https://www.osc.state.ny.us/reports/budget/2017/2017-18-enacted-budget-report.pdf>.

<sup>414</sup> Cookson Written Testimony, at 6.

<sup>415</sup> Rueben Written Testimony, at 7.

<sup>416</sup> Testimony of Jim Malatras, President of Rockefeller Institute of Government, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm'n on Civil Rights June 13 Briefing Transcript [hereinafter *Malatras Testimony*], 26; *supra* note 251 and accompanying text (comparing Bedford school district with Buffalo City district).

<sup>417</sup> State Aid Primer, *supra* note 233, at 4.

Department, from \$11,529 for the district in the 10th percentile to \$21,476 for the district at the 90th percentile, amounting to a 86% difference.<sup>418</sup> Other experts testified that per pupil spending ranged from \$13,000 to \$40,000 per pupil.<sup>419</sup> As noted by the State Education Department, the statistics vary significantly depending on what elements are included in the calculations.<sup>420</sup> David Bloomfield, Professor of Education and Leadership, Law and Policy at Brooklyn College, testified that State and local funding disparities between New York’s wealthiest and poorest districts are “systemic” despite the greater need of poor districts for resources to meet the sound basic education threshold.<sup>421</sup> According to the Schott Foundation, this spending gap has grown by 24% over the last six years.<sup>422</sup>

The fact that New York spends more per student than any other state, a calculation based on the State-wide average, is “basically a meaningless data point,” says Mr. Easton.<sup>423</sup> For example, Mr. Easton says, Jericho is a wealthy school district that spends \$37,642 per pupil, and Utica is a very poor district, with a large refugee and immigrant population and schools that are

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<sup>418</sup> *Id.* (citing to N.Y. State Educ. Dep’t, *Analysis of School Finances in New York State School Districts: 2016-17*, 9 (Mar. 2019), [http://www.oms.nysed.gov/faru/PDFDocuments/2018\\_Analysis\\_a.pdf](http://www.oms.nysed.gov/faru/PDFDocuments/2018_Analysis_a.pdf)). Operating expenditure per weighted pupil are the operating expenditures of the school, excluding building construction, transportation and other non-day-to-day expenditures.

<sup>419</sup> Malatras Written Testimony, at 2; *supra* note 252 and accompanying text.

<sup>420</sup> State Aid Primer, *supra* note 233, at 4 n.12.

<sup>421</sup> Testimony of David Bloomfield, Professor of Educational Leadership, Law and Policy at Brooklyn College and the City University of New York Graduate Center, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Bloomfield Testimony], at 126; Written Testimony of David Bloomfield, Professor of Education Leadership, Law, and Policy at Brooklyn College and the City University of New York Graduate Center, before the N.Y. Advisory Comm. of the U.S. Comm. on Civil Rights, New York State and City’s Education Aid Formulae and Student Need (June 13, 2019) [hereinafter Bloomfield Written Testimony], at 1.

<sup>422</sup> Dr. Jackson Testimony, at 141.

<sup>423</sup> Easton Testimony, at 60.

overcrowded, that spends \$16,067 per pupil.<sup>424</sup> Jericho pushes up the State-wide average so the argument that Utica should not get money because Jericho pushed up the State-wide average “is perilous,” he says.<sup>425</sup> The reality is, he says, that New York State has the second highest inequality in spending between wealthy and poor districts in the country, after Illinois.<sup>426</sup> A 2018 study by The Education Trust–New York<sup>427</sup> likewise showed that educational equity in New York ranks 48th among all states by measure of the funding gap between the districts enrolling the most students in poverty and the districts enrolling the fewest, and ranks 44th by measure of the funding gap between the districts enrolling the most students of color and those enrolling the fewest.<sup>428</sup>

Professor Cookson testified that New York is “extremely segregated” so the fact that it has a high State-wide per student spending average does not necessarily mean that the statistic applies to all schools and to all students.<sup>429</sup> He noted that 51% of the State’s children qualify for Free or Reduced-Price Lunch and 21% live below the poverty line, with many of these students living in concentrated areas of poverty where nearly every family is poor.<sup>430</sup> In his view, average per pupil spending data “may camouflage serious funding inequities and these disparities

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<sup>424</sup> *Id.*

<sup>425</sup> *Id.* at 60-61.

<sup>426</sup> *Id.* at 61.

<sup>427</sup> The Education Trust is a national non-profit organization that works toward closing opportunity gaps affecting students of color and students from low-income families. The Educ. Tr., *Who We Are*, <https://edtrust.org/who-we-are/> (last visited Feb. 3, 2020).

<sup>428</sup> Ivy Morgan & Ary Amerikaner, *Funding Gaps: An Analysis of School Funding Equity Across the U.S. and Within Each State*, THE EDUC. TR. (Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/>; see also Cookson Written Testimony, at 6.

<sup>429</sup> Cookson Testimony, at 213.

<sup>430</sup> Cookson Written Testimony, at 6; *The State of Funding Equity in New York*, THE EDUC. TR., <https://edtrust.org/graphs/?sname=New%20York> (last visited Feb. 3, 2020).

result in low-income and students of color being educationally short-changed.”<sup>431</sup> Mr. Lowry also testified that aggregate or average statistics mask the considerable variation among districts; for example, he notes that in nearly one-third of “average-need” districts, over one-half of students are eligible for Free or Reduced-Price Lunches.<sup>432</sup>

Ms. Sarita Subramanian, Supervising Analyst for Education Research at New York City’s Independent Budget Office,<sup>433</sup> says that the fact that New York State’s school funding is the ninth most progressive in the country does not compensate for the highly regressive nature of local funding (*i.e.*, through property taxes),<sup>434</sup> resulting in New York ranking the second to last in educational equity among all states.<sup>435</sup> Districts serving high numbers of poor students receive, she says, on average, \$1,100 more per pupil from New York State educational funding than districts serving low numbers of poor students.<sup>436</sup> This number is dwarfed by the \$4,900 more per pupil received by high-poverty districts in New Jersey and the \$3,000 more per pupil received by high-poverty districts in Connecticut, compared to the low-poverty districts in those states, she testified.<sup>437</sup> As Governor Cuomo stated in his State of the State Address in 2017, “We still have two educational systems – one for the rich and one for the poor. Separate and unequal

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<sup>431</sup> *Id.*

<sup>432</sup> Lowry Written Testimony, at 13.

<sup>433</sup> The Independent Budget Office’s primary responsibility is to provide nonpartisan analysis and information for elected officials and the public about the New York City budget and tax revenues, ranging from reviewing how much a particular agency spends to more in-depth considerations of program costs, historical trends, tax burdens, debt, or capital finances. Ind. Budget Office of N.Y.C., *What We Do*, <https://ibo.nyc.ny.us/about/Whatwedo.html> (last visited Feb. 3, 2020).

<sup>434</sup> Subramanian Testimony, at 40-41.

<sup>435</sup> *Id.*; Subramanian Written Testimony, at 2.

<sup>436</sup> *Id.* (citing study of the Urban Institute).

<sup>437</sup> *Id.*

and that my friends, is intolerable in 2017.”<sup>438</sup> Echoing that statement, Professor Cookson testified, “[w]e have, in effect, not one but two public school systems in New York; one for students living in stable communities with sufficient resources to provide a sound basic education and another located in communities of concentrated poverty, which are quite often also communities of color. Students in these communities must struggle mightily if they are to receive a sound basic education.”<sup>439</sup>

While there are policymakers and academics that contend that spending more does not necessarily correlate to better outcomes, the overwhelming consensus among experts is that money spent well matters, and increased funding is associated with higher student achievement.<sup>440</sup> Professor Cookson has found that a teaching and learning system that provides excellent education for all students can be established if money is spent on: (i) need-based equitable funding; (ii) investments in a stable, diverse and high-quality workforce that is equitably distributed, and in training and support for all teachers; (iii) standards, curricula,

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<sup>438</sup> Video, Photos & Rush Transcript: Governor Cuomo Delivers His 2017 State of the State Speech in New York City (Jan. 9, 2017) [hereinafter 2017 State of the State Address], <https://www.governor.ny.gov/news/video-photos-rush-transcript-governor-cuomo-delivers-his-2017-state-state-speech-new-york-city>.

<sup>439</sup> Cookson Written Testimony, at 7.

<sup>440</sup> C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question*, BRONFENBRENNER CTR. FOR TRANSLATIONAL RES. CONF. (Fall 2018), [https://works.bepress.com/c\\_kirabo\\_jackson/38/](https://works.bepress.com/c_kirabo_jackson/38/); Bruce Baker, *How Money Matters for Schools*, LEARNING POL’Y INST. (Dec. 13, 2017), <https://learningpolicyinstitute.org/product/how-money-matters-report>; Bruce Baker et al., *Does Money Matter in Education?* ALBERT SHANKER INST. (Apr. 2019), <http://www.shankerinstitute.org/resource/does-money-matter-second-edition>; C. Kirabo Jackson et al., *The Effects of School Spending on Educational Economic Outcomes: Evidence From School Finance Reforms*, QUARTERLY J. OF ECON. 157 (2016) [hereinafter Effects of School Spending]; Bruce Baker, & Mark Weber, *Beyond the Echo Chamber: State Investments and Student Outcomes in U.S. Elementary and Secondary Education*, J. OF EDUC. FIN., 1 (2016); Bruce Baker, et al., *Mind the Gap: 20 Years of Progress and Retrenchment in School Funding and Achievement Gaps*, ETS RES. REP. SERIES, 1 (2016); Rothstein Testimony, at 201; Cookson Written Testimony, at 2-3.

instruction and assessments that are consistent and suitable for today’s society; (iv) high-quality early childhood education for children from low-income families; and (v) support for students’ health and welfare.<sup>441</sup>

According to a recent study, a 10% increase in per pupil spending for children from low-income families (in the form of improved school inputs, longer school years, better teachers, etc.) each year for all 12 years of public school led to 0.46 additional years of education, approximately 9.6% higher earnings, and a 6.1 percentage point reduction in the annual incidence of adult poverty.<sup>442</sup> One suggestive cost-benefit analysis found that the adult income gains for students who experience this type of education finance reform are roughly three times as large (in present value terms) as the added expenditures on education.<sup>443</sup> Two other recent studies in top journals demonstrated similar results.<sup>444</sup>

Professor Yinger points out that, in the long run, all taxpayers win from the extra education expenditures in low-income districts.<sup>445</sup> “The design of a school aid formula in New York is often seen as a zero-sum game, with each district fighting for its share,” he says, adding,

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<sup>441</sup> Cookson Written Testimony, at 4-5 (citing Linda Darling-Hammond, *Investing for Student Success: Lessons From State School Finance Reforms*, LEARNING POL’Y INST. (2019)).

<sup>442</sup> Effects of School Spending, *supra* note 440, at 160, 190-92, 197, 203.

<sup>443</sup> *Id.* at 212-13.

<sup>444</sup> One study found that school finance reforms cause increases in the achievement of students, and that the implied effect of school resources on educational achievement is large. Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement*, AM. ECON. J.: APPLIED ECON. 1 (2018). Another study found that students exposed to 10 percent more spending were 3 percentage points (7 percent) more likely to enroll in college and 2.3 percentage points (11 percent) more likely to earn a postsecondary degree. Joshua Hyman, *Does Money Matter in the Long Run? Effects of School Spending on Educational Attainment* AM. ECON. J.: ECON. POL’Y, 256 (2017).

<sup>445</sup> Yinger Written Testimony, at 13-15.

“[t]his is a short-sighted way to characterize the issue. All New Yorkers would gain from more school spending in the state’s neediest districts, especially its big cities.”<sup>446</sup>

The most obvious taxpayer savings, he says, would be found with the reduction in spending that would be required for social safety-net programs like Medicaid/CHIP and Temporary Assistance for Needy Families, citing a report that shows that higher wages and employer-provided health care would lower both state and federal public assistance costs.<sup>447</sup> Increases in income, he says, are also associated with reductions in crime and consequent lower costs for the criminal justice system.<sup>448</sup> Because of the multiplier effect, the net effect of more education funding is fewer children growing up in poverty in the future and cost savings to school districts with concentrations of students from poor families.<sup>449</sup>

Professor Cookson echoed the view, testifying that the evidence is clear that the return on investment of educating children, so that they reach and exceed their potential, will result in a larger tax base, lower crime rates and less dependency on public assistance.<sup>450</sup> These effects are even more pronounced for children from low-income families, he says.<sup>451</sup> According to Professor Rothstein, funding reforms in the United States that increased education aid to high-need districts beginning in the 1990s led to the elimination of the gap between per pupil spending

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<sup>446</sup> *Id.* at 15.

<sup>447</sup> *Id.* at 14 (citing Ken Jacobs, Ian Perry and Jenifer MacGillvary, *The High Public Cost of Low Wages*, U.C. BERKELEY LAB. CTR. (Apr. 13, 2015), <http://laborcenter.berkeley.edu/the-high-public-cost-of-low-wages/>).

<sup>448</sup> *Id.* at 15 (citing Sara B. Heller et al., *Family Income, Neighborhood Poverty, and Crime* 419-59, in *CONTROLLING CRIME: STRATEGIES AND TRADEOFFS* (Phillip Cook, Jens Ludwig, & Justin McCrary eds., 2011)).

<sup>449</sup> *Id.* at 15.

<sup>450</sup> Cookson Testimony, at 182.

<sup>451</sup> *Id.* at 174.

in high-income and low-income districts and to gradually increased test scores in low-income school districts over the next two decades.<sup>452</sup>

Part of the issue with lower funding is the effect it has on access to well-qualified teachers, according to Professor Cookson, who says that a growing body of research across the United States shows that teacher qualifications matter for achievement and that student achievement was hurt most by having an inexperienced teacher on a temporary license—a teaching profile most common in high-minority, low-income schools.<sup>453</sup> A 2011 study found that salaries for beginner teachers in New York were twice as high in some districts than in others and that these differences tracked inequalities in funding.<sup>454</sup> The study also showed that the lowest-salary districts served more low-income students and had more inexperienced and uncredentialed teachers, as well as teachers with lower levels of education.<sup>455</sup> A 2018 study shows that high-need, high-poverty schools struggle to attract and retain experienced teachers.<sup>456</sup> The Education Trust–New York also found that for the 32 school districts they looked at, schools

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<sup>452</sup> Rothstein Testimony, at 197, 199.

<sup>453</sup> Cookson Written Testimony, at 8. According to Professor Cookson, when New York City raised teacher salaries significantly in response to a court order, greatly reduced emergency hiring, and took steps to improve teacher retention in high-need schools, the profile of teachers in high-need schools shifted, resulting in an increase in the proportion of certified and experienced teachers and thereby reducing the achievement gap between the most poor and most affluent schools. *Id.*

<sup>454</sup> *Id.* (citing Frank Adamson & Linda Darling-Hammond, *Speaking of Salaries: What Will It Take to Get Qualified, Effective Teachers in All Communities*, AM. CTR. FOR PROGRESS 19 (May 2011) [hereinafter Speaking of Salaries]).

<sup>455</sup> *Id.* (citing Speaking of Salaries).

<sup>456</sup> *Id.* at 9-10 (citing Thomas Gais et al., *The State of the New York Teacher Work Force*, ROCKEFELLER INST. OF GOV'T. 4, 21 (Mar. 22, 2018)).

with less need had the most experienced teachers.<sup>457</sup> In addition, Professor Cookson found that districts with the highest percentage of students of color consistently have the lowest median salaries for teachers in the State, and that less funding results in less qualified and fewer teachers.<sup>458</sup> Moreover, he says, the turnover rate for teachers in high-poverty districts serving Black students is double that of low-poverty White districts.<sup>459</sup> The relationship between race and poverty as compared to teacher credentials, experience and turnover is illustrated in the table below:

**The Average (Mean) Values of Teacher Non-certification, Inexperience, and Turnover, by District Demographic, 2015–16<sup>460</sup>**

Demographic	Number of Districts	Teachers Out of Certification	Teachers with None or Provisional Certification	Teachers with Fewer Than Three Years Experience	Annual Turnover
Low poverty, White	288	1.35	8.98	3.22	8.06
High poverty, White	317	2.74	12.66	4.89	9.38
High poverty, Hispanic	73	5.78	17.81	6.72	10.42
High poverty, Black	36	8.00	21.40	8.69	15.67

In New York City, according to a 2018 report, 15% of teachers in the lowest-need elementary/middle and high schools were new, while 23% of teachers in the highest-need elementary/middle schools and 26% of teachers in the highest-need high schools were new; in the Syracuse school district, 12% of teachers in the lowest-need elementary/middle schools were

<sup>457</sup> Testimony of Ian Rosenblum, Executive Director of the Education Trust–New York, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 12 Briefing Transcript [hereinafter Rosenblum Testimony], 129-30.

<sup>458</sup> Cookson Testimony, at 178; Cookson Written Testimony, at 10.

<sup>459</sup> Cookson Testimony, at 178-179.

<sup>460</sup> Thomas Gais et al., *The State of the New York Teacher Work Force*, ROCKEFELLER INST. OF GOV’T, 21 (2018).

new, compared to 25% of teachers in the highest-need elementary/middle schools.<sup>461</sup> According to Dr. Malatras, a recent analysis found that districts with higher percentages of Black and Latinx students had a greater number of teachers teaching out of their certification areas or without certification entirely, and had a higher annual turnover rate, although, he says, the inequities in teacher assignments did not always correlate exactly with district funding.<sup>462</sup>

To compound the issue, The Learning Policy Institute found that the lower per pupil revenue districts also have the highest student-teacher ratios, despite significant evidence that smaller class sizes are correlated to higher achievement, particularly for students of color and students in poverty.<sup>463</sup>

Some experts believe that the underfunding issue is less an issue of underfunded high-need districts than an issue of intra-district inequity because school districts have broad discretion in allocations to schools within the district.<sup>464</sup> According to Governor Cuomo, this is a main source of funding inequities.<sup>465</sup> Among the Big Five school districts, three-quarters of the Buffalo schools with the highest enrollment of students in poverty have funding below the district-wide average; nearly one-fifth of the poorest New York City schools have per pupil

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<sup>461</sup> The Educ. Tr.–N.Y., *Equal is Not the Same as Equitable: Large New York School Districts Are Not Doing Enough to Prioritize Resources to the Schools With the Greatest Needs* (2018), <https://newyork.edtrust.org/press-release/equal-is-not-the-same-as-equitable-large-new-york-school-districts-are-not-doing-enough-to-prioritize-resources-to-the-schools-with-the-greatest-needs/>.

<sup>462</sup> Malatras Testimony, at 34-35.

<sup>463</sup> Cookson Written Testimony, at 11; Frederick Mosteller, *The Tennessee Study of Class Size in the Early School Grades*, THE FUTURE OF CHILDREN, 113 (1995); Barbara Nye et al., *The Long-Term Effects of Small Classes: A Five-Year Follow-Up of the Tennessee Class Size Experiment*, EVALUATION AND POL'Y ANALYSIS, 127 (1999); James Kim, *The Relative Influence of Research on Class-Size Policy*, BROOKINGS PAPERS ON EDUC. POL'Y, 273 (2006).

<sup>464</sup> Malatras Testimony, at 32.

<sup>465</sup> 2019 State of the State Address, *supra* note 287.

funding below the district-wide average; approximately half of the highest-poverty schools in the Rochester district are funded below the district-wide average; nearly one-fifth of the highest-poverty schools in the Syracuse district are funded below the district-wide average; and more than half of the highest-poverty schools in the Yonkers district are funded below the district-wide average.<sup>466</sup> According to Dr. Malatras, one analysis found that each of the Big Five school districts gave much less per pupil to their highest-poverty schools than they did to their most affluent schools: in Buffalo, the highest-poverty schools received 26% less per pupil than the most affluent schools; New York City gave 12% less per pupil; Rochester gave 2% less per pupil; Syracuse gave 12% less per pupil; and Yonkers gave 14% less per pupil.<sup>467</sup> Professor Rothstein claims that finance reforms typically focus on funding to the school districts, not to schools or to students, and so if you allocate more money to low-income school districts, it may reach some but not all of the disadvantaged students.<sup>468</sup> Further, a school district can contain both low- and high-need schools, and school district averages that are taken into account in the Foundation Aid formula can mask the dire situation at those individual schools with the highest needs, according to Professor Cookson.<sup>469</sup>

Mr. Easton and the Alliance for Quality Education say that intra-district inequity is a red herring, used by those who oppose Foundation Aid to deflect from the real issue, which is underfunding; without full funding, it is hard to argue that intra-district inequity is the source of the problem.<sup>470</sup> The truth, they say, is that the State's highest-need school districts have few

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<sup>466</sup> Uneven Distribution, *supra* note 406, at 4.

<sup>467</sup> *Id.* at 6; Malatras Testimony, at 32.

<sup>468</sup> Rothstein Testimony, at 203.

<sup>469</sup> See Cookson Written Testimony, at 6; Cookson Testimony, at 177.

<sup>470</sup> Alliance for Quality Educ., *The Real Numbers: Governor Cuomo's Educational Equity Hoax*, 3 (Jan. 2019) [hereinafter The Real Numbers], <https://www.ageny.org/2019/01/18/the-real->

schools that do not have high poverty rates.<sup>471</sup> In fact, according to Mr. Easton, the data used by the New York Executive would classify many schools as wealthy and as receiving too much money despite their high poverty rates, as shown in the following table.

**Ratio of Schools with Poverty Rates Above 50%**<sup>472</sup>

	<b>Ratio of Schools with Poverty Rate Above 50%</b>	<b>Poverty Rate of Schools Considered “Wealthy” by Executive Branch</b>
<b>Buffalo City</b>	54 of 56 schools (96%)	78%
<b>Rochester City</b>	All schools (100%)	88%
<b>Syracuse City</b>	All schools (100%)	73%
<b>Yonkers City</b>	36 of 40 schools (90%)	69%
<b>New York City</b>	Every 9 in 10 schools (90%)	62%

Professor Rothstein testified that any reform addressed to narrowing the gap between advantaged and disadvantaged students needs to couple district-based finance reform with other policies that ensure that low-income students have preferential access to resources regardless of whether the district overall is high-need.<sup>473</sup> Three new laws are likely to help with transparency. The first, which went into effect on a phased-in basis beginning in school year 2018-19, requires school districts to provide the State with data as to how much money each school within the district will be allocated.<sup>474</sup> The second, which was signed by President Obama but went into effect in the school year 2018-19, requires every school district to provide school-level data on

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[numbers-governor-cuomos-educational-equity-hoax/](#); Easton Written Testimony, at 3-4: *but see* Making Progress Happen, *supra* note 232 (Governor Cuomo stated “We keep talking about districts. I am not interested in districts. I am interested in school funding. How much does each school get?”).

<sup>471</sup> The Real Numbers, *supra* note 470, at 3.

<sup>472</sup> *Id.* at 4-5 (citing Uneven Distribution, *supra* note 406); Easton Written Testimony, at 3-4.

<sup>473</sup> Rothstein Testimony, at 203-04.

<sup>474</sup> *See* N.Y. EDUC. LAW § 3614; Rosenblum Testimony, at 124.

expenditures.<sup>475</sup> The third, in connection with the first, is an amendment to existing State law that requires “underfunded high-need schools,” as determined by a statutory formula, to be prioritized for funding by their school districts.<sup>476</sup> In reviewing preliminary data for 32 mid-size and large school districts that reported their budgets under the new requirements and which serve the majority of students of color in New York, the Education Trust–New York found that the great preponderance of the districts budgeted about the same in their highest-need schools as in their lowest-need schools.<sup>477</sup>

### **B. Underfunding High-Need Schools Translates to Racial Discrimination**

According to a number of experts, underfunding high-need school districts in turn translates into underfunding school districts where the majority of racial minorities are enrolled.<sup>478</sup> “The short answer is that the current Foundation Aid formula is underfunded, and

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<sup>475</sup> See Every Student Succeeds Act, Pub. L. No. 114-95 (2015) (codified as amended in 20 U.S.C. ch. 28 § 1001 *et seq.* and 20 U.S.C. ch. 70); Rosenblum Testimony, at 125.

<sup>476</sup> See N.Y. EDUC. LAW § 3614; N.Y. State Educ. Dep’t, Fiscal Analysis & Res. Unit, *Underfunded High-Needs School Report*, <http://oms32.nysed.gov/faru/StateSchoolFundingTransparency.htm> (last updated Aug. 16, 2019); Rosenblum Testimony, at 126.

For school year 2019-20 and thereafter, any school district that is required to submit a statement of the total funding allocation for each school in the district under § 3614(1) for the base year with an underfunded high-need school must prioritize all such underfunded high-need schools among its individual schools, and must submit to the Commissioner of Education on or before September 1 of that year a report specifying how such district effectuated appropriate funding for the underfunded high-need schools. For the purpose of this requirement, “underfunded high-need school” means a school within a school district that has been deemed both a “significantly high-need school” (a school with a student need index greater than the product of the average student need index by school type within the school district multiplied by 1.05) and a “significantly low funded school” (a school within a school district that has per pupil expenditures less than the product of the average per pupil expenditures by school type within the school district multiplied by 0.95). See N.Y. EDUC. LAW § 3614.

<sup>477</sup> Rosenblum Testimony, at 129. The New York School Funding Transparency Tool makes it possible to look at the budget of any school. See <http://www.nyschoolfunding.org/>.

<sup>478</sup> See Educational Racism, *supra* note 281, at 9; Rachel Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban Migrant School Children*, BYU ED. & L.

the lack of funding impacts those districts educating low-income and students of color most directly,” Professor Cookson says.<sup>479</sup> The Alliance for Quality Education says that while two-thirds of districts are still owed original promised Foundation Aid, 100% of the 25 districts that are high-need and majority Black and Latinx are still owed original promised Foundation Aid, and the students attending schools in these districts represent 80% of the Black and Latinx students in the State and 69% of the economically disadvantaged students in the State.<sup>480</sup>

Christopher Dunn, Legal Director of the New York Civil Liberties Union, also testified that funding is “very intricately related to race in the provision of education services.”<sup>481</sup> According to Professor Cookson, the differences in revenues per pupil between districts “are significant in terms of the educational opportunities available to low-income students and students of color who are most impacted by these disparities.”<sup>482</sup> Professor Cookson says that the underfunding “disproportionally impacts those districts educating low income and students of color.”<sup>483</sup>

Dr. Rueben also finds that insufficient funding under Foundation Aid has created a gap in

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J., 271 272-73 (2015); Edbuild, *NonWhite Schools Districts Get \$23 Billion Less Than White Districts Despite Serving the Same Number of Students*, <https://edbuild.org/content/23-billion>; *infra* note 508 and accompanying text.

As of January 31, 2020, New York State’s student population is 2,622,879, comprised of 43.2% White, 27% Latinx, 17.1% Black, 9.6% Asian or Pacific Islander, 2.4% multiracial and 0.7% American Native students. N. Y. State Educ. Dep’t, *New York State Education at a Glance*, <https://data.nysed.gov/> (last visited Jan. 31, 2020).

<sup>479</sup> Cookson Written Testimony, at 12.

<sup>480</sup> Educational Racism, *supra* note 281, at 6; Cookson Written Testimony, at 14 tbl.2.

<sup>481</sup> Testimony of Christopher Dunn, Legal Director of the New York Civil Liberties Union, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter *Dunn Testimony*], at 13.

<sup>482</sup> Cookson Testimony, at 177.

<sup>483</sup> Cookson Testimony, at 179.

funding equity across all districts, which is especially notable in the largest school districts which serve a disproportionate share of students of color.<sup>484</sup>

According to Superintendent Spring, analysis of 2012 data demonstrated that every district that serves predominantly Black and Latinx students was ten times as likely to receive less than 70% of their owed Foundation Aid compared to their peer districts that serve predominantly White students.<sup>485</sup> Mr. Dunn testified that funding disparities correlate with the racial composition of districts; on average, he says, non-White districts receive \$2,000 less per pupil than do White districts in New York State.<sup>486</sup> Dr. Rueben found that in 2007, right after the *CFE III* decision, school districts that served a disproportionate share of students of color were receiving 22% more Foundation Aid than those that served White students, but by 2014, this difference had decreased to 17% partly due to renewed funding so “we’ve actually seen movement back to inequitable funding.”<sup>487</sup> Her research for the 2000-14 period showed that the relative share of total State revenue for students of color compared with White students declined between 2007 and 2014, but the ratio of total revenues, including federal and local support, remained relatively constant for students of color, reflecting higher local contributions.<sup>488</sup> When aggregating federal, State, and local revenue, students of color, on average, received \$0.98 per dollar spent on a White student in 2000, \$1.09 per dollar spent on a White student in 2007, and \$1.08 per dollar spent on a White student in 2014, she found.<sup>489</sup>

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<sup>484</sup> Rueben Testimony, at 209-210.

<sup>485</sup> Spring Testimony, at 18.

<sup>486</sup> Dunn Testimony, at 21.

<sup>487</sup> Rueben Testimony, at 210-11.

<sup>488</sup> Rueben Written Testimony, at 6.

<sup>489</sup> *Id.*

Comparing only across high-poverty districts, however, Dr. Rueben found that White students received more aid than did students of color in 2014.<sup>490</sup> She found that in 2014, looking only at high-poverty school districts, students of color, on average, received \$0.91 for every dollar of Foundation Aid spent on a White student.<sup>491</sup> According to Dr. Reuben, with respect to high-poverty school districts, in 2014, districts attended by White students received approximately \$8,000 per pupil in Foundation Aid, compared to \$7,200 for those attended by students of color; in terms of overall State aid, districts serving White students received approximately \$12,000 compared to approximately \$11,000 for those high-poverty school districts serving students of color.<sup>492</sup> Dr. Rueben suggests that this could reflect geographical differences and the fact that impoverished students of color are mostly in the Big Five school districts and disproportionately in New York City.<sup>493</sup> According to Mr. Lowry, and as seen in the table below, the Rochester, Buffalo, Yonkers and Syracuse school districts (together, the “Big 4 Cities”) have the lowest Foundation Aid Combined Wealth Ratio and highest percentage

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<sup>490</sup> *Id.* at 8.

<sup>491</sup> *Id.*

<sup>492</sup> Rueben Testimony, at 212; Rueben Written Testimony, at 9.

<sup>493</sup> *Id.* According to Dr. Rueben, the discrepancies between per pupil funding for White students and students of color could be attributed to the fact that 18% of White students who are in these high-poverty school districts are in rural districts, for which the Foundation Aid formula has done a better job at supporting and maintaining support. She says that 20% of all White students are enrolled, compared to only 2% of all students of color, in such rural school districts; 14% of all White students, compared to 67% of all students of color, are enrolled in a Big Five school district; and, 87% of students of color enrolled in a high-poverty district reside in a Big Five school district, compared to only 48% of White students enrolled in a high-poverty district. Rueben Written Testimony, at 7-9.

of students in poverty.<sup>494</sup> New York City is a high-need district, despite its average fiscal capacity, because 72% of its students qualify for Free or Reduced-Price Lunches.<sup>495</sup>

**Selected Wealth and Need Measures for 2019-20 School Aid  
Districts Grouped by Need/Resource Capacity Category<sup>496</sup>**

	Property Wealth per Pupil Ratio	Resident Income per Pupil Ratio	Combined Wealth per Pupil Ratio	K-6 Free/ Reduced Price Lunch %	English Language Learners %	Square Miles per District
<b>New York State</b>	<b>1.000</b>	<b>1.000</b>	<b>1.000</b>	<b>53.9%</b>	<b>9.0%</b>	<b>70</b>
New York City	1.059	1.076	1.067	72.0%	13.0%	322
Big 4 Cities	0.365	0.454	0.409	80.0%	15.5%	31
High Need Small Cities and Suburbs	0.485	0.526	0.505	74.0%	16.7%	19
High Need Rural	0.557	0.467	0.512	59.9%	1.4%	120
Average Need	0.862	0.853	0.857	39.0%	4.2%	75
Low Need	1.742	1.689	1.716	14.3%	3.6%	27

Mr. Lowry found that underfunding high-need school districts affects different groups unequally, as Latinx<sup>497</sup> students are somewhat more dispersed across districts than are Black students.<sup>498</sup> Mr. Lowry found that districts with Black students comprising over 40% of enrollment (2% of all districts) have the greatest 2019-20 Foundation Aid per pupil (\$11,998), but are also the poorest in both local fiscal capacity (as measured by the Foundation Aid Combined Wealth Ratio (42.1% of State average)) and student poverty.<sup>499</sup> According to

<sup>494</sup> Lowry Written Testimony, at 13.

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

<sup>496</sup> Lowry Written Testimony, at 13 (citing New York State Council of School Superintendents analysis of 2019-10 New York State Education Department School Aid data). According to Mr. Lowry it is important to note that all these figures are aggregates and there is considerable variation among districts within each category. For example, he notes, over 50% of students in average-need districts are eligible for Free or Reduced-Price Lunches.

<sup>497</sup> Mr. Lowry uses the term “Hispanic”; for purposes of this report, we have used the term “Latinx.”

<sup>498</sup> In 36% of all districts, Black students comprise only between zero and 1% of district enrollment, but in only 9% of districts do Latinx students constitute 1% or less of district enrollment. Lowry Written Testimony, at 17. 21% of Hispanic students attended schools in average or low-need districts, compared to 14% of Black students. *Id.* at 10.

<sup>499</sup> Lowry Written Testimony, at 17.

Mr. Lowry, since 2007, districts with fewer Black students have tended to have steeper enrollment declines, which have contributed to increases in relative wealth of the districts for State aid purposes, thereby leading to low average annual increases in Foundation Aid, and districts with higher concentrations of Black students have experienced fairly flat enrollment but more significant declines in relative wealth and slightly higher average annual increases in Foundation Aid.<sup>500</sup>

The picture for districts grouped by the percentage of enrolled Latinx students is more complex, consistent with the finding that these students are less concentrated in high-need districts, according to Mr. Lowry.<sup>501</sup> Nevertheless, districts with more than 40% Latinx enrollment have the largest gap between their 2019-20 Foundation Aid per pupil and the amount they would receive if Foundation Aid were fully-funded.<sup>502</sup> The gap exists despite the fact that school districts with more than 40% Latinx enrollment have had the largest average annual increase in Foundation Aid (after New York City) since 2007-2008.<sup>503</sup> The trend can be explained by the fact that school districts with over-40% Latinx enrollment (i) have had weak growth in property values, contributing to a steep decline in their Foundation Aid Combined Wealth Ratio, (ii) have the highest percentage of students in poverty, measured by Free and Reduced Price Lunch eligibility (67.5%) and by students who are English Language Learners

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<sup>500</sup> *Id.*, at 17-18.

<sup>501</sup> For example, only 64 schools have 0-1% Latinx enrollment whereas 241 schools have 0-1% Black enrollment. *Id.* at 19-20.

<sup>502</sup> *Id.* at 19-20. For example, school districts with greater than 40% Black enrollment receive a sum equivalent to 84.6% of the Foundation Aid that would be due under a fully-funded formula; in contrast, school districts with greater than 40% Latinx enrollment only receive a sum equivalent to 64.1% of the amount that would be due under a fully-funded Foundation Aid. *Id.* at 17-20.

<sup>503</sup> *Id.*

(21.9%), and (iii) are the only group (other than in New York City) to increase enrollment since 2006-07.<sup>504</sup> For school districts with greater than 10% but less than 40% Latinx enrollment, the decline in their Foundation Aid Combined Wealth Ratio has been relatively small and enrollment has declined, and while the percentage of students in poverty has increased, the gap between their 2019-20 Foundation Aid per pupil and the amount they would receive if Foundation Aid were fully-funded is less than that for school districts with over-40% Latinx enrollment.<sup>505</sup>

Dr. Jackson says that, “New York’s policy of underfunding the funding formula is leading to different educational outcomes for students based on race and ethnicity. That is not a random occurrence. That is a choice.”<sup>506</sup> Senator Jackson echoes that thought—with a \$175 billion State budget, he says, “You mean to tell me that we can’t provide \$4 billion. . . so our children can receive a good education so that they can be productive citizens of our great State,” adding, “[n]o one can tell me that the money’s not there. It’s about priorities.”<sup>507</sup>

The Alliance for Quality Education found that the failure to fully fund the originally promised Foundation Aid has led to disparate outcomes based on race: the graduation rate in school year 2017-18 for the 25 school districts that represent 80% of the Black and Latinx students in the State was 69%, compared to 95% in wealthy districts.<sup>508</sup> According to Kara Finnigan, Professor of Educational Policy and Leadership at the University of Rochester, New York State was singled out by the UCLA Civil Rights project as having the most segregated

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<sup>504</sup> *Id.* at 19-20.

<sup>505</sup> *Id.*

<sup>506</sup> Dr. Jackson Testimony, at 138.

<sup>507</sup> Senator Jackson Testimony, at 103.

<sup>508</sup> Educational Racism, *supra* note 281, at 3.

schools in 2014.<sup>509</sup> Professor Finnigan says that the segregation has resulted in a concentration of need, and that high concentrations of poverty within a school have been shown to adversely affect student achievement.<sup>510</sup> “By isolating the privileged from the marginalized, segregation sets in motion powerful political and economic forces that propel inequality,” she testified.<sup>511</sup>

Professor Finnigan says that addressing segregation “is critical” to improving outcomes and resource equity.<sup>512</sup> According to her, the concentrated need associated with segregation imposes higher demands on school resources and personnel, making it all the harder for a school to improve without the necessary resources.<sup>513</sup> Professor Finnigan says research shows the positive effect of diverse learning environments on student and family outcomes, from decreased drop-out rates to improved earnings and increased access to better-paying jobs.<sup>514</sup> Urban school

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<sup>509</sup> Testimony of Kara Finnigan, Professor of Educational Policy and Leadership at the University of Rochester, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Finnigan Testimony], 131; *see also* Dunn Testimony, at 21.

<sup>510</sup> Finnigan Written Testimony, at 2.

<sup>511</sup> *Id.*, at 3.

<sup>512</sup> Finnigan Testimony, at 129. For example, within the New York City school district, some city school districts, such as District 3 and District 15, are taking proactive steps to integrate their schools and are seen as “pioneers for integration models that could spread to other parts of the city.” Michael Elsen-Rooney, *Manhattan School District’s Diversity Plan Starting to Change Student Demographics, Data Shows*, NY DAILY NEWS, (Dec. 12, 2019) <https://www.nydailynews.com/new-york/education/ny-school-diversity-plan-manhattan-20191213-m6lyvc5hg5g4vmlhajuubxhom-story.html>; Christina Veiga, *Two NYC Districts Embarked on Middle School Integration Plans. Early Results Show They May Be Making a Difference*, CHALKBEAT (Apr. 15, 2019); *D15 Diversity Plan* (last visited Feb. 3, 2020) <http://d15diversityplan.com/>.

<sup>513</sup> Finnigan Written Testimony, at 3.

<sup>514</sup> *Id.* at 3-4 (citing Jonathan Guryan, *Desegregation and Black Dropout Rates*, AM. ECON. REV. 919 (2004)); Rucker C. Johnson, *Long-Run Impacts of School Desegregation and School Quality on Adult Attainments*, NAT’L BUREAU OF ECON. RES. (Working Paper No. 16664) (2015), <https://www.nber.org/papers/w16664>; Orley Ashenfelter et al., *Evaluating the Role of Brown vs. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, AM. L. & ECON. REV. 213 (2006); Robert L. Crain & Jack Strauss, *School*

districts like Rochester and the low-income students of color they serve, Professor Finnigan says, “will continue to struggle unless the structure of segregation [is] tackled and without doing so I believe we are violating the civil rights of Black and Latinx students.”<sup>515</sup>

Experts say that academic outcomes in poorer communities reflect, in part, the insufficiency of funding, but note that greater community issues are also part of the story.<sup>516</sup> As Professor Rothstein testified, it is unrealistic to expect that any educational reform could fully offset the achievement gap between advantaged and disadvantaged school districts.<sup>517</sup>

According to a report published by the New York State Education Department about student performance on the state’s standardized achievement tests in English Language Arts (“ELA”) and mathematics in the third through eighth grades in 2018, the disparity in proficiency rates between White and Latinx students was 17 percentage points on the ELA tests and 22 percentage points on the math tests, respectively; and between White and Black students, the difference was 18 and 25 percentage points, respectively.<sup>518</sup>

Further, economically disadvantaged students had a proficiency rate 75% lower than the rate for non-economically disadvantaged students, and this gap was even greater when comparing English Language Learner students with other students.<sup>519</sup> Based on 2014 data, half of all Black students in New York State were in districts with overall proficiency rates below

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*Desegregation and Black Occupational Attainment: Results From a Longterm Experiment*, CTR. FOR SOC. ORG. OF SCH. (1985)).

<sup>515</sup> *Id.*, at 6.

<sup>516</sup> See Educational Racism, *supra* note 281; Cookson Written Testimony; Rothstein Testimony, at 202-203.

<sup>517</sup> Rothstein Testimony, at 203.

<sup>518</sup> Yinger Written Testimony, at 1.

<sup>519</sup> *Id.* at 2.

20%, compared to only 8% of White students in districts with such low proficiency rates.<sup>520</sup>

Based on 2018 data, the median Black student went to a school where the eighth grade proficiency rate was 25% for ELA and 11% for math, while the median White student went to a school where those rates were 47% and 25%, respectively; and the gap between the median Latinx student and median White student was not very far off in either case.<sup>521</sup> According to Professor Yinger, the results reflect the balance between (i) the high poverty rates and other factors that raise the cost of education and lower the tax base in districts where historically disadvantaged ethnic groups are concentrated and (ii) the inadequacy of the amount of actual State aid these districts receive.<sup>522</sup> These results, says Professor Yinger, are evidence that the State of New York “is not living up to its educational responsibilities.”<sup>523</sup> It is not possible, he says, for students to receive a “meaningful high school education” if they live in a district where only a small share of students attain proficiency in the tests leading up to ninth grade.<sup>524</sup> The outcomes that his study shows, he says, do not live up to the constitutional standard set forth in *CFE II* requiring an “opportunity for a meaningful high school education, one which prepares [students] to function productively as civic participants”<sup>525</sup> and “violate widely held principles of equal opportunity and fair treatment for children in different racial and ethnic groups.”<sup>526</sup>

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<sup>520</sup> *Id.* at 2.

<sup>521</sup> *Id.* at 2-3.

<sup>522</sup> *Id.* at 3.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 909 (N.Y. 2003).

<sup>526</sup> Yinger Written Testimony, at 3.

Dr. Jackson says that not only are districts serving students of color underfunded but they also are the product of overall neglect of the entire ecosystem.<sup>527</sup> Noting that national studies have shown that the most important variable in student performance is parental income, Dr. Jackson says that any inquiry into educational underfunding has to look at the lack of health, housing and livable wages for the same under-resourced communities.<sup>528</sup> “Are students, are teachers, are schools being given the types of ancillary support that are necessary to give them a fair and substantive opportunity to learn,” he asks rhetorically, adding that it is time that New York moved towards a support-based approach which asks what the right forms and levels of support are and how to deliver them.<sup>529</sup> The solution, he says, is simple: “Commitment is all that’s needed for such a time as this. It’s not about rocket science. It’s as simple as making a choice.”<sup>530</sup> According to Mr. Easton, “If the State continues to refuse to fully fund the Foundation Aid formula, they are sentencing another generation of students—in some communities—to an inadequate education with dire consequences for students, their families, their communities and our state as a whole. The failure to fully fund Foundation Aid locks educational racism in place.”<sup>531</sup>

Superintendent Quezada suggests that the fact that students of color are often also economically disadvantaged is not coincidental; it is, he says, “a by-product of our nation[’]s fundamental social, political and economic systems that maintain the status quo and do not fight

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<sup>527</sup> Dr. Jackson Testimony, at 143.

<sup>528</sup> *Id.* at 142.

<sup>529</sup> *Id.* at 143, 154.

<sup>530</sup> *Id.* at 144.

<sup>531</sup> Easton Written Testimony, at 3.

the problem of history.”<sup>532</sup> Likewise, Professor Finnigan testified that the historical expansion outside New York City of suburban development has led increasingly to students of different racial, ethnic and economic backgrounds living in separate school districts even though they may just be a few miles apart.<sup>533</sup> This “between district” segregation, she says, “must be considered in terms of civil rights violations of students from Black and Latinx communities.”<sup>534</sup>

Professor Finnigan testified that it is “undeniable” that one’s access to a sound basic education is determined by one’s ZIP code, noting that the segregation is the result of decades of policies that have created “an unequal system of education in New York State.”<sup>535</sup> Decades of exclusion from federal programs that extended low cost loans created lasting racial wealth disparities, she explains, that when combined with White and middle class flight and suburban resistance to (and in New York in the 1960s, a prohibition against) urban annexation and suburban limitations on multifamily housing, have fueled a system in which there is a competition among governments for residents, businesses and tax base.<sup>536</sup> The resultant underlying structural and racial inequities have been exacerbated by a school funding system that ignores the inequities, she says.<sup>537</sup>

According to Superintendent Spring, the creation and demarcation of school districts systematically concentrates Black and Latinx students in only certain school districts; although more than half of the students in the State are Black and Latinx, they are the majority of students

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<sup>532</sup> Quezada Testimony, at 261.

<sup>533</sup> Finnigan Written Testimony, at 2.

<sup>534</sup> *Id.*

<sup>535</sup> Finnigan Testimony, at 136.

<sup>536</sup> Finnigan Written Testimony, at 2-3.

<sup>537</sup> *Id.*

in 8% of the districts in the State.<sup>538</sup> Moreover, he says, not only are school districts segregated, but the effects of underfunding are further exacerbated by the historical effects of redlining in respect of housing and property ownership in their surrounding communities.<sup>539</sup> Mr. Dunn claims that the geographical boundaries of school districts in New York “are largely influenced by racial discriminatory policies and practices.”<sup>540</sup> Professor Cookson echoes this notion, saying that people of color in the United States today suffer a “cumulative disadvantage” of years of discriminatory policy.<sup>541</sup>

Superintendent Spring testified that “We very much still live in an era of separate and unequal” in New York State.<sup>542</sup> Black and Latinx students in the State are less likely to attend school with White peers now than in the year that *Brown v. Board of Education* was decided, he says.<sup>543</sup> In the redlined poor communities, mostly of color, he says, the lack of resources for schools because of the low tax base and the fact that school district funding depends so heavily on property taxes leads to a vicious cycle.<sup>544</sup> “Because of the policies that live on as surrogates of redlining and Jim Crow,” Superintendent Spring says, “people of color are concentrated and segregated into a small number of communities,” which are then “systematically starved of the resources needed to live the same quality life as others,” causing students to be less ready for school, have more intense social and emotional needs, and have more adverse childhood

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<sup>538</sup> Spring Written Testimony, at 7; Spring Testimony, at 17.

<sup>539</sup> Spring Testimony, at 21.

<sup>540</sup> Dunn Testimony, at 21.

<sup>541</sup> Cookson Testimony, at 195.

<sup>542</sup> Spring Written Testimony, at 14.

<sup>543</sup> *Id.* at 7.

<sup>544</sup> *Id.* at 13.

experiences.<sup>545</sup> In turn, these adverse childhood experiences, he says, can have “a traumatic effect” on children in terms of reducing executive function skills, reducing their ability to learn and reducing their ability to regulate emotions, and are consistently linked to negative academic, social and health outcomes, and increased risk of interpersonal and self-directed violence, substance abuse, depression and behavioral problems.<sup>546</sup> As an example, Superintendent Spring testified, in a third grade class of 26 students in Schenectady, 10 students (38%) have at least one parent incarcerated; six (23%) have both parents incarcerated; eight students (31%) have a parent with a significant or persistent mental illness; 11 students (42%) have some involvement with Child Protective Services; and just four students (15%) are proficient in the New York State standards in ELA.<sup>547</sup>

Superintendent Spring says that his regression analysis of 2012 data showed that the State not only was “systematically discriminating” against poor students but that there was “a clear and systematic discrimination against districts that serve predominantly Black and Brown children.”<sup>548</sup> As a result, Superintendent Spring filed a complaint with the U.S. Department of Education Office of Civil Rights in 2013, which opened an investigation but has yet to take any action.<sup>549</sup> The complaint alleges, among other things, that the New York educational funding structure, in contravention of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974, has resulted in *de facto* discrimination that has compromised his

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<sup>545</sup> *Id.* at 14-15; Spring Testimony, at 24.

<sup>546</sup> Spring Written Testimony, at 15; Spring Testimony, at 24-25; Bowman Testimony, at 272.

<sup>547</sup> Spring Testimony, at 26-27.

<sup>548</sup> Spring Written Testimony, at 6.

<sup>549</sup> Spring Written Testimony, at 10; OCR Complaint, *supra* note 184; *see also* discussion in Chapter I.1.C. There is no publicly available information about the current status of this case.

schools district's ability to provide for the educational needs of minority and non-English speaking students as well as students with disabilities, which discrimination is particularly acute when compared to education funding provided to districts with majority-White and mostly English-speaking students.<sup>550</sup> According to the complaint, the racial discrimination has “directly and regularly impacted student achievement.”<sup>551</sup>

Professor Bloomfield suggests that flowing from the State's funding inequities “are pervasive proficiency challenges among students of color in our poorest districts, robbing them of their [inherent] rights to educational and economic justice.”<sup>552</sup>

Professor Finnigan has argued in favor of a new four-prong approach to funding equity to ensure a sound basic education for all students. Citing to Nebraska as the only state that has tackled the “complex dynamics” resulting in segregation between districts, one she says that already has been dismantled by political forces, Professor Finnegan suggests that metropolitan areas should have tax base sharing, a system in which the metropolitan area pools resources and then distributes them on an equitable basis.<sup>553</sup> “Connecting the fate of communities in terms of tax resources is the first critical element in altering the competitive dynamics that undermine equity between school systems,” she says.<sup>554</sup> Second, she says, direct investments must be made in high-poverty, traditionally marginalized communities, but not in isolation.<sup>555</sup> Third, she

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<sup>550</sup> See OCR Complaint, *supra* note 184.

<sup>551</sup> *Id.*

<sup>552</sup> Bloomfield Testimony, at 126.

<sup>553</sup> Finnigan Written Testimony, at 4-5.

<sup>554</sup> *Id.* at 5.

<sup>555</sup> *Id.* According to Professor Finnigan, place-based strategies have long been exemplified in the ‘community schools’ movement, aimed at transforming schools into community hubs and which are intended to address both educational inequity and serve as a tool for broader neighborhood

suggests a mobility policy that allows students to attend schools in other districts.<sup>556</sup> Fourth, she says, the strategy should include a regional governing body that oversees regional equity goals while giving autonomy to local school boards on other key decisions.<sup>557</sup> “Since policy got us into this, it is time for policy to get us out of it,” Professor Finnigan says.<sup>558</sup>

Mr. Dunn believes that, to address New York State’s funding discrimination, either Congress should amend Title VI of the Civil Rights Act of 1964 or the State legislature needs to adopt Title VI disparate impact statutes to allow private plaintiffs, like the New York Civil Liberties Union, to bring court cases against the State on the basis of disparate impact discrimination under Title VI.<sup>559</sup>

According to Dr. Malatras, “the fundamental question is: would policymakers be open to redistributing State aid at even a greater level from our wealthier to our neediest districts?”<sup>560</sup> Superintendent Quezada echoed that view, testifying that “the unfortunate reality is that the Foundation Aid formula is only a tool and as such, it is only applicable to the workings of equity

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investment and development. *Id.* Scholars like David Rusk, however, point out that these types of in-place investments in isolated communities “allows powerful institutions to shirk once [again] their responsibility to confront racial and economic segregation.” DAVID RUSK, *INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* (Brookings Instit. Press, 2001).

<sup>556</sup> Finnigan Written Testimony, at 5. In Nebraska, both priority assignment and transportation were given to students who altered the socioeconomic balance of a school building. *Id.*

<sup>557</sup> *Id.* at 6.

<sup>558</sup> *Id.*

<sup>559</sup> Dunn Testimony, at 23-24.

<sup>560</sup> Malatras Testimony, at 32.

when in the hands of leaders, politicians, and appointed officials who are champions of equity.”<sup>561</sup>

Professor Bloomfield recommends that in light of the fiscal and educational crisis “reflecting structural social and political power imbalances,” there needs to be a new funding structure that takes into account the legislative power imbalances that, he says, favor wealthy districts—amending the New York State Constitution to incorporate an automatic escalator requiring State education aid to meet or exceed the ceiling of per pupil spending in the wealthiest districts in the State, adjusted for student need and local capacity.<sup>562</sup>

Professor Cookson points to New Jersey as one state that has recognized the pivotal role of school funding to advance educational excellence and equity for all students, including students of color.<sup>563</sup> According to Professor Cookson, New Jersey spends about the same amount per pupil as New York, but spends these funds much more equitably across districts, with very purposeful investments in high-quality early-learning programs and educator quality.<sup>564</sup> Given the similar student demographics between New Jersey and New York, Professor Cookson suggests that a sound basic education for economically disadvantaged students of color in New York is entirely possible if there is the will to make it happen and there are adequate and equitable resources.<sup>565</sup> “Education is the only and best way to build a democracy that works on behalf of all,” he says, adding, “Children who are deprived of a sound

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<sup>561</sup> Quezada Testimony, at 264-65.

<sup>562</sup> Bloomfield Written Testimony, at 1.

<sup>563</sup> Cookson Written Testimony, at 15.

<sup>564</sup> *Id.* at 16.

<sup>565</sup> *Id.*

basic education make democracy smaller, less inclusive, and ultimately more fragile. The stakes are very high, and the solution is at hand.”<sup>566</sup>

### **C. Equity Issues Exist in the Foundation Aid Formula and Other Components of State Funding**

Many critics believe the Foundation Aid formula, whose factors are understood by few, needs to be revisited by educators and the State to update decade-old data, and to determine whether economic and social changes in the last decade require changes to the factors and multipliers determining Extraordinary Need as well as district wealth and capacity to fund.<sup>567</sup>

Professor Bloomfield testified that re-weighting Foundation Aid categories “is urgently needed so that levels of student poverty, disability, enrollment growth, English proficiency and population density are more realistically considered.”<sup>568</sup> Moreover, the State-mandated cap on

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<sup>566</sup> *Id.* at 17.

<sup>567</sup> Finnegan Written Testimony, at 2, 6; Easton Written Testimony, at 2-3; Lowry Written Testimony, at 25; Bloomfield Written Testimony, at 1; Cookson Written Testimony, at 14-15; Rueben Written Statement, at 9; Lowry Testimony, at 48; Rebell Testimony, at 158; Yinger Testimony, at 183; Jackson Testimony, at 101-02; Bowan Written Testimony, at 1; Gary Stern, *Shelley Mayer to Begin Fresh Look at How New York State Funds Education*, ROCKLAND/WESTCHESTER J. NEWS (Sept. 11, 2019), available at <https://www.lohud.com/story/news/education/2019/09/11/shelley-mayer-school-funding/2199358001/>; Rachel Silberstein, *State Revisiting How Schools Are Funded*, TIMES UNION (Oct. 14, 2019), available at <https://www.timesunion.com/news/article/Schools-funding-revisited-Senate-kicks-off-14509852.php>; Kate Nalepinski, *School District Seeks Community’s Help for Increased State Funding*, RIVERHEAD NEWS-REVIEW (Oct. 8, 2019), available at <https://riverheadnewsreview.timesreview.com/2019/10/95883/school-district-seeks-communitys-help-for-increased-state-funding/>; Gary Stern, *Some NY Educators Want To Fix Foundation Aid, While Others Tell State To Pay Up*, ROCKLAND/WESTCHESTER JOURNAL NEWS (Oct. 16, 2019), available at <https://www.lohud.com/story/news/2019/10/16/ny-foundation-aid-formula-senate-roundtable-tackles-education-funding/3984673002/>; Friedfel Testimony, at 113-114; Citizens Budget Comm’n, *State Education Aid Proposal for 2019-2020*, (Feb. 6, 2019), <https://cbcny.org/advocacy/state-education-aid-proposal-2019-2020>.; Reema Amin, *Lawmakers Eye Changing School Funding Formula Amid High Stakes for City*, THE CITY (Oct. 14, 2019), available at <https://thecity.nyc/2019/10/school-funding-formula-fixes-eyed-amid-high-stakes-for-city.html>; Making Progress Happen, *supra* note 232.

<sup>568</sup> Bloomfield Written Testimony, at 1.

increases in taxes that may be levied by school districts, the homeowner-biased STAR program, the “save harmless” State-mandated requirement that no district receive less than it did the prior year and the share agreement that guarantees certain districts a set percentage of State education aid combine to magnify the disparate impact of State education financing on children of poverty, primarily those of color.

**a. Floors, Ceilings and Outdated Need Indices**

Critics contend, for example, that the factors comprising the Pupil Need Index need updating and should be determined on the basis of up-to-date data.<sup>569</sup> Professor Yinger and others point out that the Pupil Need Index weights were determined in 2007 and have not been updated since.<sup>570</sup> Studies show that a district with a high concentration of at-risk students must spend more than other districts to achieve a given student-performance target.<sup>571</sup> Yet, according

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<sup>569</sup> See, e.g., Subramanian Testimony, at 50-51; Better Foundation Aid Formula, *supra* note 240; N.Y. State Ass’n of Sch. Bus. Officials, *Meeting Student Needs: Demographic Changes, Costs, and State Support*, 17 (Oct. 2017), [https://cdn.ymaws.com/www.asbonevork.org/resource/resmgr/reports/Demographic\\_Changes\\_Costs.pdf](https://cdn.ymaws.com/www.asbonevork.org/resource/resmgr/reports/Demographic_Changes_Costs.pdf); David McKay Wilson, *Tax Watch: Lower Hudson Valley Schools Want What L.I. Schools Get in State Aid*, LOHUD (Mar. 8, 2018), <https://www.lohud.com/story/money/personal-finance/taxes/david-mckay-wilson/2018/03/08/state-aid-lower-hudson-valley/404061002/>.

The Pupil Need Index and Extraordinary Needs components of Foundation Aid are:

*Pupil Need Index* = 1 + *Extraordinary Needs Percent*

= 1 + (0.65 × *FRPL* + 0.65 × *SAIPE* + 0.5 × *ELL* + *Sparsity Count*) / (*Base Year Public School Enrollment*) × 100

= 1 + [0.65 × *FRPL* + 0.65 × *SAIPE* + 0.5 × *ELL* + (25.0 – *Base Year Enrollment per Square Mile*) / 50.9] / (*Base Year Public School Enrollment*) × 100

*FRPL* is the 3-year average ratio of students eligible for Free and Reduced-Price Lunch; *ELL* is the base year count of English Language Learner pupils. See also *supra* Chapter II.2.

<sup>570</sup> Yinger Testimony, at 180; Subramanian Written Testimony, at 6.

<sup>571</sup> Yinger Written Testimony, at 4; see, e.g., Syracuse Univ., Ctr. for Pol’y Res., *Education Finance and Accountability Program (EFAP)*, [https://www.maxwell.syr.edu/cpr/efap/It\\_s\\_Elementary/](https://www.maxwell.syr.edu/cpr/efap/It_s_Elementary/) (last visited Feb. 3, 2020).

to a study conducted by Professor Yinger, the Pupil Need Index, as currently constituted, understates the cost differences between educating the students in a district with a high concentration of at-risk students relative to a district with average needs.<sup>572</sup> Andrew Van Alstyne, Deputy Director of Education and Research at the New York State Association of School Business Officials,<sup>573</sup> testified that the weightings should take into account the “exponential” costs that arise as a result of the cumulative effect of a concentration and overlap of at-risk students.<sup>574</sup> Regarding the maximum Pupil Need Index cap of 2.0,<sup>575</sup> Professor Yinger observed that, as of 2015, although no district had exceeded the maximum of 1.0 for Extraordinary Needs, several school districts, including Rochester and Buffalo, had Extraordinary Needs values above 0.95, and any further increase in the high-need pupil population (e.g., an increase in the Small Area Income and Poverty Estimates or Free and Reduced-Price Lunch variables in the formula) could cause them to exceed the Pupil Need Index

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<sup>572</sup> Yinger Written Testimony, at 4.

<sup>573</sup> The New York State Association of School Business Officials is a non-profit membership organization chartered by the Board of Regents. Its membership includes school business officials and staff from school districts and BOCES around the state including students in School District Business Leader graduate programs and companies doing business with schools. N.Y. State Ass’n of Sch. Bus. Officials, *About ASBO*, <https://www.asboneويورك.org/page/aboutasbo> (last visited Feb. 3, 2020).

<sup>574</sup> Testimony of Andrew Van Alstyne, Deputy Director of Education and Research at the New York State Association of School Business Officials, Briefing Before the N.Y. Advisory Comm. of the U.S. Comm’n on Civil Rights June 13 Briefing Transcript [hereinafter Van Alstyne Testimony], at 198-99.

<sup>575</sup> *See supra* Chapter II.2.

cap, which would translate into their receiving less than full compensation for their added costs.<sup>576</sup>

Finding that the share of students eligible for a free lunch is the poverty measure with the strongest link to an explanation of added costs of poor students (rather than the Free and Reduced-Price Lunch and Small Area Income and Poverty Estimates indicators),<sup>577</sup> Professor Yinger testified that, holding student performance and other factors constant, it costs 125% more, by this measure, to bring a poor student to the level of a non-poor student.<sup>578</sup> Using a 1.25 weight for that measure and increasing the weight for the English Language Learners variable from 0.5 (in the current formula) to 0.61 and adding a 0.39 weight for students with a severe disability, Professor Yinger's study found that, in order for at-risk students to attain any given performance standard selected by New York State, State-wide school spending outside New York City had to increase by 37.1% to account for economically disadvantaged students, 2.5% for students with limited English proficiency and 6.7% for students with severe disabilities.<sup>579</sup> While the amount of spending increase required differs by district according to his study, as an example, Syracuse schools would need to receive an additional 16% funding to cover the added costs of economically disadvantaged and English Language Learner students in the district.<sup>580</sup>

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<sup>576</sup> Yinger Written Testimony, at 5.

<sup>577</sup> Free and Reduced-Price Lunch and Small Area Income and Poverty Estimates indicators are based on three-year averages. *See supra* notes 311-313 and accompanying text. Children from families with incomes at or below 130 percent of the Federal poverty level are eligible for free meals, whereas children with incomes between 130 and 185 percent of the Federal poverty level are eligible for reduced price meals. Department of Agriculture, *The National School Lunch Program* (Nov. 2017) <https://fns-prod.azureedge.net/sites/default/files/resource-files/NSLPFactSheet.pdf>.

<sup>578</sup> Yinger Written Testimony, at 5.

<sup>579</sup> *Id.*, at 6, 18 tbl.2, 19 tbl.3.

<sup>580</sup> *Id.*, at 6, 26 fig.6.

Professor Yinger testified that his findings imply that pupil weights in the Pupil Need Index need to be updated and the cap removed.<sup>581</sup> Mr. Lowry similarly observed a general increase in the Free and Reduced-Price Lunch indicator among the high-need school districts, with the exception of New York City, whose decreased level of Free and Reduced-Price Lunch indicator was probably due to a federal free lunch program that prohibits schools from collecting applications from families.<sup>582</sup>

Critics also suggest that the 2000 Census data used to measure the proportion of the population in poverty in a school district is outdated and invalid for the purpose of calculating need-based aid amounts.<sup>583</sup> Comparing the 2000 and 2016 Census numbers, the City of New York Independent Budget Office found that almost 80% of the State's school districts had an increase in school-aged residents in poverty, with increases ranging from 1% to 19%; the average increase was 4.5%, while New York City's remained about the same.<sup>584</sup>

Ms. Subramanian suggests that the formula should take a more nuanced approach to evaluating pupil needs as New Jersey has done.<sup>585</sup> She suggests, for example, that incorporating students with disabilities into the Pupil Need Index calculation rather than in the total student enrolment multiplier to Adjusted Foundation Aid could help correct the disproportionately lower funding to districts that serve high shares of students of color.<sup>586</sup> This proposal stems from the

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<sup>581</sup> *Id.*, at 6.

<sup>582</sup> Lowry Written Testimony, at 14.

<sup>583</sup> *E.g.*, Subramanian Written Testimony, at 6; Bowman Testimony, at 268; Better Foundation Aid Formula, *supra* note 240.

<sup>584</sup> Subramanian Written Testimony, at 6.

<sup>585</sup> Subramanian Testimony, at 45.

<sup>586</sup> Subramanian Written Testimony, at 6.

Independent Budget Office’s findings that in New York City, 78% of students with disabilities are Black or Latinx (although they comprise 67% of the student population) and all but one of the Big Five school districts ranked among the top-25 districts in terms of share of students with disabilities.<sup>587</sup>

One problem noted by Professor Yinger is the fact that scholars do not have access to any student-level data in New York; if they did, he says, it would be easier to estimate costs and make for more precise weighting.<sup>588</sup> Frustratingly, though, he says, the data to accurately calculate formula weights is hardly made available to anyone other than the State government itself, and the State has so far neglected to undertake a renewed inquiry itself.<sup>589</sup> Professor Yinger says the manner in which the weights originally were derived was never transparent and New York State does not have an office that is capable of estimating the weights nor is there the analytical capacity to do the statistical procedures that are required.<sup>590</sup> According to Senator Jackson, the Department of Education simply lacks the resources required to update the formula factors.<sup>591</sup>

Professor Rothstein believes the caps in the needs portion of the formula should be eliminated because if the State decides it is not willing to fully fund Foundation Aid, it should “scale the whole thing down proportionally rather than put in any caps.”<sup>592</sup>

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<sup>587</sup> *Id.*

<sup>588</sup> Yinger Testimony, at 181.

<sup>589</sup> *Id.*

<sup>590</sup> *Id.* at 180.

<sup>591</sup> Senator Jackson Testimony, at 102.

<sup>592</sup> Rothstein Testimony, at 247.

Mr. Easton says there are a number of ways the needs calculation of the formula could be improved, such as increasing the weighting for English Language Learners, adding a new factor for high concentrations of poverty and taking into account socio-economic changes, but cautions that the update “should not become yet one more excuse for the state to [not] fully fund the Foundation Aid.”<sup>593</sup>

Ms. Subramanian testified that the State Foundation Aid need portion of the formula could learn something from New York City’s Fair Student Funding formula which is used to distribute aid across the district.<sup>594</sup> In 2019-20, New York City uses 33 student-need weights across five broad categories: grade levels, academic intervention, English Language Learner needs, special education needs and students attending portfolio high schools.<sup>595</sup> Among other things, the New York City formula: (i) weighs middle and high school students as needing more assistance; (ii) takes into account the incoming academic achievement of students, with weights determined by grade level and degree of academic deficiency;<sup>596</sup> (iii) factors in the type of language education that English Language Learners are enrolled in, as well as the declassification of those students upon gaining proficiency; (iv) considers the types and

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<sup>593</sup> Easton Testimony, at 59, 66.

<sup>594</sup> Subramanian Written Testimony, at 5-6.

<sup>595</sup> *Id.*, at 5; N.Y.C. Dep’t of Educ., Div. of Fin., *Fair Student Funding & School Budget Resource Guide: FY 2020*, 13 (May 2019), [https://www.nycenet.edu/offices/finance\\_schools/budget/DSBPO/allocationmemo/fy19\\_20/FY20\\_docs/FY2020\\_FSF\\_Guide.pdf](https://www.nycenet.edu/offices/finance_schools/budget/DSBPO/allocationmemo/fy19_20/FY20_docs/FY2020_FSF_Guide.pdf).

<sup>596</sup> Incoming academic achievement is the only category that takes into account poverty; it is used to estimate academic need when test scores are not available for incoming students before fourth grade (for K-5, K-6, K-8, K-12 schools). N.Y.C. Dep’t of Educ., Div. of Fin., *Fair Student Funding & School Budget Resource Guide: FY 2020* (May 2019), 13, [https://www.nycenet.edu/offices/finance\\_schools/budget/DSBPO/allocationmemo/fy19\\_20/FY20\\_docs/FY2020\\_FSF\\_Guide.pdf](https://www.nycenet.edu/offices/finance_schools/budget/DSBPO/allocationmemo/fy19_20/FY20_docs/FY2020_FSF_Guide.pdf).

frequency of services received by students with disabilities; and (v) provides additional support (by type) for specialized instruction offered to students in portfolio high schools by including multipliers for transferred students depending on the perceived difficulty in graduating.<sup>597</sup>

**b. Local Funding Capability**

During the period 2007 through 2017, on a per pupil basis, State education aid increased 32% and local contributions increased 56%; State education aid in New York City during the period only increased 20% during that time, an amount roughly equal to inflation, while local aid to schools increased 80% during the same period.<sup>598</sup>

Experts contend that the Foundation Aid formula fails to accurately measure the ability of any given district to contribute to annual school expenditures.<sup>599</sup> There is wide variation in the amount of local revenue actually raised per pupil.<sup>600</sup> While high-need, small cities and suburbs get a greater share of State school aid, their effective tax rate is significantly higher than the State average.<sup>601</sup> Moreover, low tax base districts bear a disproportionate tax burden for having to fund part of their students' schooling with local tax dollars.<sup>602</sup> In 2016-17, the average tax rate for every \$1,000 of taxable property value in the highest-spending wealthy districts was \$11.30 and the average tax revenue per pupil in those districts was \$24,020, compared to the average tax

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<sup>597</sup> Subramanian Written Testimony, at 5-6.

<sup>598</sup> Friedfel Written Testimony.

<sup>599</sup> See, e.g., Yinger Written Testimony, at 13; Yinger Testimony, at 220-21; Friedfel Testimony, at 113-14; Better Foundation Aid Formula, *supra* note 240.

<sup>600</sup> Lowry Written Testimony, at 8.

<sup>601</sup> *Id.*

<sup>602</sup> State Aid Primer, *supra* note 233, at 4.

rate for every \$1,000 of taxable property value in the lowest-spending poor districts of \$15.59 and an average tax revenue per pupil of only \$5,324.<sup>603</sup>

The following table illustrates the variation among districts of sources of education aid per pupil, grouped by need level and urban-rural classifications, as computed by the New York Council of School Superintendents:

**2016-17 Revenues per Pupil and Effective Local Property Tax Rate, by Districts Grouped by Need/Resource Capacity Category<sup>604</sup>**

	Total Revenue per Pupil	State Aid per Pupil	STAR per Pupil	Federal Aid per Pupil	Local Revenue per Pupil	Effective Local Tax Rate*
<b>New York State</b>	<b>24,870</b>	<b>9,187</b>	<b>982</b>	<b>999</b>	<b>13,701</b>	<b>18.46</b>
New York City	26,084	9,218	328	1,421	15,117	19.28
Big 4 Cities	22,538	17,159	288	1,574	3,517	19.81
High Need Small Cities and Suburbs	22,288	11,805	1,028	1,082	8,373	24.36
High Need Rural	23,766	14,885	1,032	1,258	6,591	16.74
Average Need	22,946	8,458	1,623	528	12,337	19.26
Low Need	27,842	4,289	1,854	330	21,369	15.43

\* Total local revenue from all sources per \$1,000 of actual value property wealth

According to Superintendent Quezada, the Foundation Aid formula also fails to capture certain *intra*-district disparities, noting that Yonkers is a community with income levels that are fairly high in one part and extremely low in another; when combined, the district ends up with a greater local capability for Foundation Aid purposes than its student base reflects.<sup>605</sup>

Further, the problem with a formula that relies on an expected local contribution based on an assumed average New York State property tax rate (1.66 in 2019-20),<sup>606</sup> experts say, is that if the locality does not actually collect the amount expected, the students receive a lot less than

<sup>603</sup> *Id.*

<sup>604</sup> Lowry Written Testimony, at 8 tbl.3 (citing New York State Council of School Superintendents analysis of 2016-17 New York State Education Department School District Fiscal Profile data).

<sup>605</sup> Quezada Testimony, at 274-75.

<sup>606</sup> State Aid Handbook, *supra* note 232, at 10.

they actually need.<sup>607</sup> The result of the theoretical local contribution calculation, Mr. Friedfel says, is that it can overstate poor districts' actual local funding, thereby understating the State aid needed to fund a sound basic education in those districts.<sup>608</sup> In addition, it can overstate the need for State aid to wealthy districts.<sup>609</sup> For example, Mr. Friedfel says, the wealthiest decile of districts will spend \$1.9 billion more in 2020 than needed to fund a sound basic education; these districts, which he says spend more than \$33,000 per pupil, receive \$475 million in State aid and the Foundation Aid formula calculates that they need an additional \$67 million from the State.<sup>610</sup> Over time, these effects have been exacerbated, he says, by "save harmless" provisions<sup>611</sup> which prohibit aid decreases even in cases of declining enrollment or increasing wealth.<sup>612</sup>

Critics also challenge the calculation of the Income Wealth Index used to determine the expected local contribution that has a floor of 0.65 and a ceiling of 2.0.<sup>613</sup> They contend that the 0.65 minimum overstates the ability of some districts to raise local revenue.<sup>614</sup> Based on the

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<sup>607</sup> Yinger Testimony, at 220.

<sup>608</sup> Friedfel Written Testimony.

<sup>609</sup> *Id.*

<sup>610</sup> *Id.*

<sup>611</sup> *See infra* Chapter II.3.C.e.

<sup>612</sup> Friedfel Written Testimony.

<sup>613</sup> *See, e.g.*, Lowry Written Testimony, at 4 fn.7; Bowman Testimony, at 268, 284; Better Foundation Aid Formula, *supra* note 240; Dr. Rick Timbs, *The Numbers Don't Lie: The Current Crisis of New York State School District Finances*, STATEWIDE SCH. FIN. CONSORTIUM, 40-41 (Sept. 2012) [http://www.statewideonline.org/data/SSFC\\_2012\\_Whitepaper\\_FINAL\\_9-26-2012.pdf](http://www.statewideonline.org/data/SSFC_2012_Whitepaper_FINAL_9-26-2012.pdf); N.Y. State Educ. Dep't, State Aid Subcomm., *Reviewing the Foundation Aid Formula*, 26-27 (Oct. 17, 2016), <https://www.regents.nysed.gov/common/regents/files/Reviewing%20the%20Foundation%20Aid%20Formula.pdf> (finding that as in 2016-17, there are 318 (of 674 districts) with an IWI below the 0.65 floor and that the elimination of the floor would give a net benefit to 150 of these districts).

<sup>614</sup> Lowry Written Testimony, at 4 fn.7.

2019-20 Foundation Aid calculations, 326 districts in New York State have an Income Wealth Index below 0.65.<sup>615</sup> The Income Wealth Index statutory floor means that poorer districts with an Income Wealth Index value of less than 0.65 are assumed able to contribute more than what they can realistically contribute to education funding, while richer districts with an Income Wealth Index value greater than 2.0 are deemed to be able to contribute less than what they are actually able to contribute.<sup>616</sup> Principal Bowman calls the Income Wealth Index “arbitrary” because it does not accurately measure poverty or needs in the districts, and argues that the 0.65 floor “seriously disadvantages the poorest districts.”<sup>617</sup> These arbitrarily set minimums and maximums, experts say, leave the neediest districts with less than what is actually needed to provide a sound basic education.<sup>618</sup>

Professor Yinger has suggested that a more effective means of evaluating a high-need district’s ability to deliver a quality education given its tax base is to use a more comprehensive fiscal health analysis that not only recognizes the increased costs of educating economically challenged and limited English-proficiency students but also takes into account factors such as the higher wages needed to attract teachers and the economies of enrollment scale, while still assuming the then-average New York State property tax of 1.5%; this more comprehensive fiscal health analysis attempts to measure a district’s ability to deliver the educational services based on factors outside its control.<sup>619</sup> Using his cost/expenditure approach, Professor Yinger concluded that (i) State education aid does not fully compensate low-fiscal health districts for

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<sup>615</sup> *Id.*

<sup>616</sup> Better Foundation Aid Formula, *supra* note 240.

<sup>617</sup> Bowman Testimony, at 268, 284-85.

<sup>618</sup> *See* Better Foundation Aid Formula, *supra* note 240.

<sup>619</sup> Yinger Written Testimony, at 9-10.

their disadvantages,<sup>620</sup> and (ii) many large and/or high-need districts received far less aid than their fiscal health warranted.<sup>621</sup> “Overall,” Professor Yinger testified, “educational aid in New York State has an equalizing impact, but this impact falls far short of giving the neediest districts the aid they need to meet the State’s implicit student performance standards.”<sup>622</sup> Moreover, Professor Yinger asserts, a fiscal health-based approach demonstrates that the current State educational aid system “shortchanges” districts with high concentrations of Black and Latinx students (by about 19%).<sup>623</sup>

Because the Foundation Aid formula for determining the local district contribution to schools in its district assumes an average State property tax rate for every district,<sup>624</sup> districts that set their actual tax rates below the State-assumed rate in the formula receive fewer State funds than they otherwise would, Professor Yinger adds.<sup>625</sup> Mandating that each district raise its local property tax rate to the State rate, however, as some states do, would increase the financial burden on poor school districts.<sup>626</sup>

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<sup>620</sup> *Id.* at 10. According to Professor Yinger’s study, a \$1 increase in the need-capacity gap leads to only a \$0.62 increase in State aid. *Id.*

<sup>621</sup> *Id.* The gap between actual aid and fiscal-health based aid, according to Professor Yinger’s study, is \$3,495 per pupil in Rochester, \$4,930 per pupil in Syracuse, \$6,612 per pupil in Binghamton, \$7,924 per pupil in Schenectady, and \$13,214 per pupil in Yonkers. Buffalo is the only high-need district that receives more actual aid, almost \$2,000 per pupil, than aid based on fiscal health. *Id.* at 10-11.

<sup>622</sup> *Id.* at 11.

<sup>623</sup> *Id.*

<sup>624</sup> See discussion on Combined Wealth Ratio in *supra* Chapter II.2.

<sup>625</sup> Yinger Testimony, at 13.

<sup>626</sup> *Id.*

### c. Tax Cap

Experts contend that a State-imposed property tax increase cap implemented in 2012 and made permanent in 2019 is another source of inequity in the school finance system.<sup>627</sup> The tax cap is “really insidious,” Professor Rebell testified.<sup>628</sup> The tax levy limit generally restricts a district’s ability to raise their local contribution to school revenues, by requiring a local vote to increase property taxes at all, and by capping annual increases at the lesser of 2% and the annual increase in the CPI (plus or minus certain exclusions for each district), unless the voters approve a greater tax increase by a 60% or greater vote.<sup>629</sup> In the Big Five cities, school funding is derived from the municipal budgets, which are subject to State constitutional tax limits, resulting in education budgets that are subject to an overall cap; however, tax levy increases in the Big Five cities above the 2% cap need to be approved by the local governing body, not the voters.<sup>630</sup> Budget proposals for property tax increases under the 2% cap have received a 98% passing rate over the eight years the cap has been in effect; however, override attempts have been rare (around 4%) over the same period and only approximately half of those have succeeded.<sup>631</sup>

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<sup>627</sup> See, e.g., *id.* at 12; Lowry Written Testimony, at 10-11.

<sup>628</sup> Rebell Testimony, at 169.

<sup>629</sup> State Aid Primer, *supra* note 233, at 2; Lowry Written Testimony, at 10-11, n.11, 21-22.

<sup>630</sup> Lowry Written Testimony, at 21; State Aid Primer, *supra* note 233, at 2-3, 16; Office of N.Y. State Comptroller, *Understanding the Constitutional Tax Limit for Cities*, 2, <https://www.osc.state.ny.us/localgov/finreporting/cities.pdf>; Ctr. on Budget and Pol’y Priorities, *State Limits on Property Taxes Hamstringing Local Services and Should Be Relaxed or Repealed*, 6, (July 18, 2018) <https://www.cbpp.org/sites/default/files/atoms/files/7-18-18sfp.pdf>; N.Y. State Dep’t of Tax. & Fin. & N.Y. State Dep’t of State, *The Property Tax Cap: Guidelines for Implementation*, Publication 1000 (10-11), <https://www.tax.ny.gov/pdf/publications/orpts/capguidelines.pdf>.

<sup>631</sup> Lowry Written Testimony, at 22.

Preliminary data suggests that districts with Black or Latinx students comprising more than 30% of enrollment have had lower “yes” vote percentages than other districts.<sup>632</sup>

Because the Foundation Aid formula does not factor in the property tax cap, some school districts are effectively “banned” by law from raising the amount of expected local contribution that forms a part of the formula that decreases the Foundation Aid otherwise allocable to a district.<sup>633</sup> Moreover, for many poor districts, other services and needs (*e.g.*, police and fire departments) must compete with education for local tax revenue.<sup>634</sup> As such, according to Professor Yinger, the poor districts are not necessarily capable of fully funding the expected amount called for by the Foundation Aid formula.<sup>635</sup> Likewise, many wealthy districts that might be willing to forego State education aid also find it harder to garner the votes to raise local taxes, especially in light of the new federal cap on deductibility of state and local taxes.<sup>636</sup> As a result, the tax cap affects the distribution of State aid for all districts.<sup>637</sup>

Professor Yinger illustrates the practical impediment of the tax cap on poor districts using an example: assuming a cap on tax increases at 2% per year and assuming no taxpayer vote override, a poor district starting with a per pupil levy of \$2,800 (10 districts were below this amount in 2017) must wait at least 12 years to realize the same amount of per pupil revenue increase that can be achieved in one year by a rich district with a per pupil levy of \$37,750.<sup>638</sup>

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<sup>632</sup> *Id.*

<sup>633</sup> Lowry Testimony, at 69; Rebell Testimony, at 169.

<sup>634</sup> Yinger Testimony, at 220-21.

<sup>635</sup> *Id.*

<sup>636</sup> Lowry Written Testimony, at 11.

<sup>637</sup> *Id.*

<sup>638</sup> Yinger Written Testimony, at 12-13.

Moreover, as Superintendent Spring points out, poor communities, in the face of “dramatic underfunding” relative to their real wealth, need to levy more taxes to tread water and the effect of the increased taxes is to suppress property values; in turn, as property values go down, the tax rate needs to be further increased to raise the same amount of money for schools.<sup>639</sup>

**d. The School Tax Relief (“STAR”) Program**

Experts say that the STAR Program,<sup>640</sup> a component of the total State education aid package to localities, further inequitably skews the State’s school aid funding.<sup>641</sup>

The STAR program provides eligible homeowners an exemption on the value of their house that lowers or eliminates the property taxes paid to the district by a homeowner; the exemptions are being phased out in favor of credits (in the form of a check from the State) for the exempt portion of the property taxes.<sup>642</sup> The State reimburses the district for the revenue lost due to the exemption; in fiscal year 2018, the STAR program cost the State \$683 million for New York City and \$2.589 billion for the rest of the State.<sup>643</sup> For the 2017-18 fiscal year, the

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<sup>639</sup> Spring Written Testimony, at 13.

<sup>640</sup> See N.Y. State Dep’t of Tax. & Fin., *Star Program*, [hereinafter STAR Program], <https://www.tax.ny.gov/star/> (last visited Feb. 3, 2020).

<sup>641</sup> Yinger Written Testimony, at 12.

<sup>642</sup> *Id.* at 11-12. Eligible homeowners include those with incomes of \$250,000 or less a year for the STAR exemption and below \$500,000 per year for the STAR credit. STAR Program, *supra* note 640. Data on STAR payments can be found at [http://www.oms.nysed.gov/faru/Profiles/profiles\\_cover.html](http://www.oms.nysed.gov/faru/Profiles/profiles_cover.html).

<sup>643</sup> Andrew Cuomo, Governor, *FY 2019 Mid-Year Update*, 95 (Nov. 2018), <https://www.budget.ny.gov/pubs/archive/fy19/enac/fy19myfp.pdf>.

program constituted about 8% of the total amount of State education aid.<sup>644</sup> While it makes things fairer within a school district, Professor Yinger observes, the STAR program produces an inequitable distribution of State aid across districts in two ways: first, it favors school districts with high home ownership rates (*e.g.*, wealthy suburbs) over districts with high renter populations (*e.g.*, cities) that generally have high poverty rates and high student needs; second, the exemption amount is adjusted to account for local home sales prices, with increased exemption amounts in counties with above-average prices (*i.e.*, more wealthy school districts).<sup>645</sup> According to Professor Yinger, the second feature is “one of the most unfair provisions” because it subsidizes people for choosing to live in high cost locations,<sup>646</sup> noting that the STAR exemption in Westchester County in 2019 was \$79,875, while most of upstate New York had a \$30,000 STAR exemption.<sup>647</sup> In his view, the amount spent on STAR would be better spent on Foundation Aid.<sup>648</sup>

Ms. Subramanian criticizes the STAR Program as contributing to the regressive nature of local funding as it “exacerbates inequities in district wealth” because it affords more property tax relief on a per pupil basis to districts with lower student needs and a generally greater ability to generate revenue.<sup>649</sup> In 2016-17, the poorest decile of districts received on average \$964 per pupil from the STAR program compared to the wealthiest decile, which received on average

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<sup>644</sup> State Aid Handbook, *supra* note 232, at 2. According to Professor Yinger, outside of New York City, the STAR reimbursements account for approximately 14% of State aid. Yinger Written Testimony, at 12.

<sup>645</sup> *Id.*

<sup>646</sup> Yinger Testimony, at 234.

<sup>647</sup> Yinger Written Testimony, at 12.

<sup>648</sup> *Id.*

<sup>649</sup> Subramanian Testimony, at 40-41; Subramanian Written Testimony, at 2.

\$1,455 per pupil.<sup>650</sup> Dr. Rueben likewise questions whether the STAR Program is the right place to put money given that school districts are still recovering from the GEA, and argues that the program undermines some of the progressivity that we see in the rest of the system.<sup>651</sup>

**e. The “Save Harmless” Provision**

A “save harmless” provision of the State aid program provides a statutory guarantee that a district will not receive less aid than received in the previous year even when the Foundation Aid formula would lead to a reduced amount from the previous year.<sup>652</sup> Critics argue that the “save harmless” provision is another example of inequity built into the State’s educational funding system.<sup>653</sup> For instance, Mr. Friedfel points out that some districts are guaranteed the automatic increase even when they experience a decrease in enrollment of close to 20%.<sup>654</sup> Mr. Friedfel recommends that the State eliminate “save harmless” and use those same funds to increase funding to the highest-need districts.<sup>655</sup> Principal Bowman says the “save harmless” provision provides funds to wealthy districts that do not need the extra money; it is, he says, “another example of inequity.”<sup>656</sup>

According to Mr. Lowry, in 2019-20, 276 districts benefit from the “save harmless” provision insofar as they will receive approximately \$315 million more in funding than the

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<sup>650</sup> State Aid Primer, *supra* note 233, at 4.

<sup>651</sup> Rueben Testimony, at 214-15, 227.

<sup>652</sup> See Better Foundation Aid Formula, *supra* note 240.

<sup>653</sup> Friedfel Testimony, at 116; Bowman Testimony, at 268, 284-85.

<sup>654</sup> Friedfel Testimony, at 116.

<sup>655</sup> *Id.* at 123.

<sup>656</sup> Bowman Testimony, at 268, 284-85.

Foundation Aid formula would generate.<sup>657</sup> However, he says, most of the beneficiaries are average and high-need school districts; only 17% of the total will go to low-need districts.<sup>658</sup> Mr. Van Alstyne suggests that most districts that are in “save harmless” “frankly wouldn’t function” if they were not held harmless.<sup>659</sup> At the same time, Mr. Lowry testified that in part due to the “save harmless” provision, the relationship between Foundation Aid per pupil and need, measured by Free and Reduced-Price Lunch eligibility has diminished even though it remains strong.<sup>660</sup>

#### **f. Share Agreements**

Since the 1980s, with the exception of the recession years when aid was cut, certain school districts have received a fixed “share” of State school aid increases although no rationale has ever been provided to the public for the policy, according to Professor Rebell.<sup>661</sup> Since 2011-12, New York City consistently has received 38.86% of the annual increase in total State school aid (including Foundation Aid and other state aid) and Long Island consistently has received 12.96%.<sup>662</sup> Professor Yinger notes that New York City’s share of aid has been going down in recent years despite a significant increase immediately after *CFE III*, “slipping right

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<sup>657</sup> Lowry Written Testimony, at 10.

<sup>658</sup> *Id.*

<sup>659</sup> Van Alstyne Testimony, at 189.

<sup>660</sup> Lowry Written Testimony, at 11.

<sup>661</sup> Rebell Testimony, at 103-04; *see also* Lowry Testimony, at 39; Making Progress Happen, *supra* note 232.

<sup>662</sup> Lowry Written Testimony, at 9; Susan Arbetter, *How the School Aid Formula Became Unrecognizable*, CITY & STATE N.Y. (Apr. 15, 2018), <https://www.cityandstateny.com/articles/policy/education/how-school-aid-formula-became-unrecognizable.html>; Making Progress Happen, *supra* note 232.

back into” the 38% range.<sup>663</sup> According to Mr. Lowry, the percentages may once have been justifiable but, for example, 30 years have passed since New York City’s share was established and in that time its share of State-wide enrollment has increased but so has its relative wealth.<sup>664</sup> Mr. Lowry believes that such a share arrangement violates a simple test of equality: to treat similar districts similarly.<sup>665</sup> According to Mr. Lowry, the policy has led to “arcane and bizarre formula contrivances and essentially make[s] it impossible to have a formula which operates from one year to the next, as Foundation Aid was designed to do.”<sup>666</sup> Experts contend that because of the shares arrangement, “aid is increasingly divorced from what is happening in the schools” as what gets divvied up based on Foundation Aid is the result of the shares allocation being superimposed on the Foundation Aid formula and on whatever increase in State school aid is approved in that year’s budget.<sup>667</sup> Professor Rebell echoes the concern, noting that the State has deviated from the formula, with politicians basically deciding on the share first and then working the numbers back into the formula.<sup>668</sup>

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<sup>663</sup> Yinger Testimony, at 185.

<sup>664</sup> Lowry Written Testimony, at 9.

<sup>665</sup> *Id.*

<sup>666</sup> *Id.*

<sup>667</sup> *Id.* at 10; Lowry Testimony, at 40; Easton Written Testimony, at 2; Easton Testimony, at 77-80; Rebell Testimony, at 114-15.

<sup>668</sup> Rebell Testimony, at 114.

### **Chapter III. Conclusion and Recommendations**

New York has an inequitable school funding system that discriminates against the poor and particularly Black and Latinx children.

While New York State has the highest average per pupil education spending (by the State, localities and the federal government) in the country, it also has the second highest inequality in spending between wealthy and poor districts in the country and ranks 44<sup>th</sup> in the country by measure of the funding gap between the districts enrolling the most students of color and those enrolling the fewest. Although the State spends a disproportionate amount (70% of all State education dollars in 2019-20) on the neediest schools, overall average spending per pupil in the highest-need districts in the State is still approximately only two-thirds the overall average spending per pupil in the wealthiest districts (\$17,758 versus \$27,845), largely resulting from the disparity of taxable base (a difference of 509% in 2016-17) and consequent revenue-raising abilities of low-wealth versus high-wealth districts. That underfunding has a particularly noxious effect on the lowest-wealth districts in the State, comprised mostly of students of color. A massive 51% of the State's children qualify for Free or Reduced-Price Lunch and 21% live below the poverty line, with many of these students living in concentrated poverty in districts where nearly every family is poor.

The effect of the underfunding of New York's schools is pervasive. Lack of resources creates proficiency challenges among our poorest students in our poorest school districts, most of whom are students of color, robbing them of their rights to a minimally adequate "sound basic education" as well as the ability to participate meaningfully in the society at large. The graduation rate in the 25 school districts that represent 80% of the Black and Latinx students in the State was 69%, compared to 95% in wealthy districts. Moreover, wide disparities in teacher starting salaries track inequalities in funding, with districts with the highest percentage of

students of color consistently having the lowest median teacher salaries in the State, and less funding resulting in less qualified and fewer teachers in those districts.

Experts testified that there effectively are two public school systems in New York: one for students living in stable communities with sufficient resources to provide a sound basic education and another located in communities of concentrated poverty, which are quite often also communities of color, in which students struggle to receive a sound basic education. The historical demarcation of school districts systematically concentrates Black and Latinx students in only certain school districts; they are less likely to attend school with White peers now than in the year that *Brown v. Board of Education* was decided. In fact, New York State was singled out by the UCLA Civil Rights project as having the most segregated schools in 2014. In poor communities, mostly of color, the lack of resources for schools leads to a vicious cycle. These communities are systematically starved of resources, causing students to be less ready for school, have more intense social and emotional needs, and have more adverse childhood experiences, all of which add to the need for greater resources for schools in these communities.

For these underfunded communities, equal funding alone is not sufficient; for true equality of opportunity to exist, per pupil spending needs to exceed the per pupil spending in the wealthiest districts simply because it is more expensive to provide an adequate education to a disadvantaged student than it is to provide one to an advantaged student.

Governor Cuomo acknowledged in his last two State of the State Addresses that New York State has failed to achieve education equity. The question is what New York is going to do about the systemic inequity.

Foundation Aid, introduced in 2007, was meant to fix the education inequity by directing State aid to the neediest districts. But Foundation Aid has failed to accomplish its mission. First,

it has never been fully funded. Second, even the amount of aid originally promised under Foundation Aid is insufficient to make up for the discrepancies in local funding capacity between wealthy and poor school districts. Poorer tax base districts simply cannot make up for the lack of tax base and available resources without a massive infusion from the State. Yet, the State's support of primary and secondary school education as a percentage of the total State budget has declined from 25% in fiscal year 2008-2009 to 20% in fiscal year 2018-2019.

Justice Marshall noted in the landmark *Brown v. Board of Education*:

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

New York students are being deprived of the right to participate in civil society simply based on their poverty or their color. In federal court, that could translate to a Fourteenth Amendment Equal Protection Clause claim based on race, or although the Court has yet to recognize it, poverty, as a suspect class, or purely based on the theory that no rational basis could possibly exist for a funding system that has the type of discriminatory impact that the New York funding scheme has. It could also become a claim under the Fourteenth Amendment for a deprivation of a fundamental right; notwithstanding the Court's reticence, it is time for the Court to recognize that the right to an education that, at minimum, provides a child with the ability truly to exercise their right to vote, their right to free speech, and their right to enjoy the liberties enshrined in the Constitution, is fundamental. It is clear that without a quality education, no

citizen can exercise their recognized fundamental rights or enjoy the liberties the Constitution has guaranteed.

Because of the time needed for such a case to work its way through the legal system, the more viable approach to righting the existing inequities would be either for the State to legislate or the Office of Civil Rights of the U.S. Department of Education to enforce Title VI of the Civil Rights Act of 1964. State legislation could include, at minimum, fully funding Foundation Aid, a significant funding increase to the neediest schools, a revision to the Foundation Aid formula and a right of private litigants to sue based on disparate impact in the provision of educational resources. At the same time, the Office of Civil Rights should investigate the inequitable funding in New York State.

New York State's educational funding system is in urgent need of an infusion of money and focus. Substantially increasing funding to high-need districts benefits not just the deprived students but all of society and its taxpayers in the ultimate effects of a more educated citizenry and reduced spending on social safety-net programs and the criminal justice system. As one expert testified: "Education is the only and best way to build a democracy that works on behalf of all. Children who are deprived of a sound basic education make democracy smaller, less inclusive, and ultimately more fragile. The stakes are very high, and the solution is at hand."

The recommendations of the Committee are as follows:

- 1. The Commission should issue a finding that New York State is discriminating against poor students and students of color by failing to provide high-need school districts with sufficient resources to make up for the spending gap between high tax base districts and low tax base districts.**
- 2. The Commission should look into the Schenectady claim that was filed with the Office of Civil Rights arguing that the effect of the funding system in New York is discriminatory under Title VI of the Civil Rights Act of 1964, and should ensure that the Department of Education ties future federal funding of New York education to the State's progress in promoting equity and the adequacy of the State's funding formulas.**
- 3. The Commission should recommend to the New York State legislature that it enact, in this legislative session, a budget that includes a substantial increase in revenues per pupil in high-need school districts so that per pupil spending in high-need districts equals at least per pupil spending in low-need districts, and that at minimum, the legislature allocate in 2020 the remaining originally promised Foundation Aid.**
- 4. The Commission should recommend to the New York State legislature that they substantially revise key elements of the Foundation Aid formula to ensure greater educational equity, based on a transparent and in-depth review by an office that is capable of conducting the statistical analysis required to update the Foundation Aid formula or an independent commission comprised of education experts. In the interim, at minimum, the following should be effected:**
  - a. Adjust the weightings of the various components of Foundation Aid to reflect current levels of student poverty, disability, enrollment growth, English proficiency and population density as well as the exponential cost of educating at-risk students;
  - b. Remove the arbitrary cap of 2.0 on the Pupil Needs Index;
  - c. Use an alternative measure for the Extraordinary Needs component of the formula, to consider variables such as the share of students eligible for a free lunch (instead of the share of students eligible for a Free and Reduced-Price Lunch or the Small Area Income and Poverty Estimates), the share of students with disabilities, and the share of students receiving career and technical education; and
  - d. Remove or adjust the arbitrary minimum of 0.65 and maximum of 2.0 on the Income Wealth Index.
- 5. The Commission should recommend to the New York State legislature that it eliminate the property tax cap.**

- 6. The Commission should recommend to Congress that it amend Title VI of the Civil Rights Act of 1964 to provide for a private right of action based on disparate impact under the regulations implementing Title VI.**
- 7. The Commission should recommend to the New York State legislature that it adopt a law that provides for a private right of action based on disparate impact in the provision of educational resources.**
- 8. The Commission should recommend to the Governor and the New York State legislature that they establish a blue-ribbon commission to explore alternative funding structures to the current inequitable local tax-based system as well as ways to reduce racial segregation within and across school districts.**
- 9. The Commission should recommend to the New York State legislature that they put forward, or call a constitutional convention for, an amendment to the State Constitution that includes an automatic escalator that would require State education aid to meet or exceed the ceiling of per pupil spending in the wealthiest districts in the State (adjusted for student need and local capacity).**
- 10. The Commission should recommend to the New York State Education Department that it provide public access to student-level data on revenues, expenditures and performance outcomes.**

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**New York Advisory Committee to the  
United States Commission on Civil  
Rights**



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**U. S. Commission on Civil Rights**

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