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# Restructuring the Elementary and Secondary Education Act's Approach to Equity

Kimberly Jenkins Robinson

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Article

**Restructuring the Elementary and  
Secondary Education Act’s Approach to  
Equity**

**Kimberly Jenkins Robinson†**

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What the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon, it destroys our democracy.<sup>1</sup>

— John Dewey

## INTRODUCTION

The United States stands at a crossroads regarding educational equity. On one road, the Every Student Succeeds Act (ESSA),<sup>2</sup> the current reauthorization of the Elementary and Secondary Education Act (ESEA), greatly reduced federal involvement in education and returned control to state and local governments that had repeatedly criticized the prescriptive nature of the No Child Left Behind Act of 2001.<sup>3</sup> In the wake of this federal retreat, state and local control of education without effective federal oversight creates grave concerns for those who advocate for economically disadvantaged and minority students,

1. THE SAGUARO SEMINAR: CIVIC ENGAGEMENT IN AM., HARVARD KENNEDY SCH. OF GOV'T, CLOSING THE OPPORTUNITY GAP 36 (2015) [hereinafter CLOSING THE OPPORTUNITY GAP] (quoting John Dewey, *The School and Social Progress*, in *THE SCHOOL AND SOCIETY* (Univ. of Chi. Press ed., 1907)).

2. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

3. No Child Left Behind Act of 2001, Pub. L. No. 107-100, 115 Stat. 1425 (2002). For a critique of ESSA that contends that the federal government has essentially abandoned its role in education, see Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1340–61 (2017).

including many civil rights groups.<sup>4</sup> History confirms that states and localities have repeatedly neglected the needs of these students and provided them inferior educational opportunities.<sup>5</sup>

On the other road stands a national commitment to equity. Federal education law and policy has long included equity as one of its chief aims.<sup>6</sup> The principle of equal opportunity is a shared ideal that has transcended ideological and partisan divisions throughout U.S. history.<sup>7</sup> New evidence of a national commitment to equity can be found in a statement issued after state education chiefs gathered in 2017 under the leadership of the Council of Chief State School Officers and the Aspen Institute in which state chiefs committed to a set of recommendations regarding equity.<sup>8</sup> Some skeptics might dismiss this statement as mere political posturing.<sup>9</sup> However, it is worth remembering that the states and a handful of professional associations initiated the standards and accountability reform movement that all states eventually embraced.<sup>10</sup> After a 1989 summit of the nation's governors in Charlottesville, Virginia, the governors released a statement that supported national performance goals that would

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4. Julie Hirschfeld Davis, *President Obama Signs into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/11/us/politics/president-obama-signs-into-law-a-rewrite-of-no-child-left-behind.html>.

5. Chad Aldeman, *The Case Against ESSA: A Very Limited Law*, in THE EVERY STUDENT SUCCEEDS ACT: WHAT IT MEANS FOR SCHOOLS, SYSTEMS AND STATES 91, 92 (Frederick M. Hess & Max Eden eds., 2017) [hereinafter THE EVERY STUDENT SUCCEEDS ACT].

6. Charles Barone & Elizabeth DeBray, *Education Policy in Congress: Perspectives from Inside and Out*, in CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA'S SCHOOLS 61, 63 (Frederick M. Hess & Andrew P. Kelly eds., 2011).

7. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 8.

8. See THE ASPEN INST. EDUC. & SOC'Y PROGRAM & THE COUNCIL OF CHIEF STATE SCH. OFFICERS, LEADING FOR EQUITY: OPPORTUNITIES FOR STATE EDUCATION CHIEFS (2017), [https://ccsso.org/sites/default/files/2018-01/Leading%20for%20Equity\\_011618.pdf](https://ccsso.org/sites/default/files/2018-01/Leading%20for%20Equity_011618.pdf) (highlighting commitments state chiefs can implement to create equity plans); Daarel Burnette II, *State Chiefs at Conference Tout Equity Policies in ESSA Plans*, EDUC. WK.: POL. K-12, (Feb. 16, 2018, 5:52 PM), [http://blogs.edweek.org/edweek/state\\_edwatch/2018/02/state\\_chiefs\\_tout\\_equity\\_policies\\_in\\_essa\\_plans.html](http://blogs.edweek.org/edweek/state_edwatch/2018/02/state_chiefs_tout_equity_policies_in_essa_plans.html). Work on the recommendations preceded the 2016 election and represents the work of not only state chiefs but also district leaders and civil rights advocates. Alyson Klein, *See How States Plan to Approach Equity*, EDUC. WK.: POL. K-12, (Feb. 2, 2017, 7:02 AM), [https://blogs.edweek.org/edweek/campaign-k-12/2017/02/states\\_plan\\_approach\\_equity\\_ESSA.html](https://blogs.edweek.org/edweek/campaign-k-12/2017/02/states_plan_approach_equity_ESSA.html).

9. See Burnette II, *supra* note 8 (reporting civil rights and advocacy groups skepticism of state implementation of ESSA plans).

10. See *infra* note 11.

increase U.S. competitiveness.<sup>11</sup> Federal legislation in the form of the Improving America's School Act and No Child Left Behind built on what began merely as a widespread expression of state support.<sup>12</sup> Furthermore, history teaches us that state and local experiments that spread horizontally often become embedded in federal policy.<sup>13</sup>

Indeed, despite its reduction in the federal role in education, the bipartisan ESSA retains equity as one of its goals. ESSA's purpose emphasizes this equity aim in noting that the law seeks "to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."<sup>14</sup> ESSA also requires states and districts to measure and close achievement gaps.<sup>15</sup> Districts must intervene in the lowest performing schools as well as when subgroups of students are underperforming.<sup>16</sup> In fact, congressional Democrats insisted that equity requirements be included in ESSA to garner their support for the bill.<sup>17</sup>

Equity concerns also undergird the numerous recent teacher strikes that have occurred throughout the country. Teachers undoubtedly want increases in their salaries in light of falling teacher pay during the recent recession.<sup>18</sup> Yet, many of the strikes also seek to address the lackluster funding of schools in many states, particularly the reduction in funding since the 2008 recession.<sup>19</sup> Although nationally, combined state and local funding in actual dollars returned to pre-recession levels by 2016,

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11. DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 124 (2009); PATRICK J. MCGUINN, *NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005*, at 60–63 (2006).

12. COHEN & MOFFITT, *supra* note 11, at 9–11.

13. *See* CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 10.

14. 20 U.S.C. § 6301 (2016).

15. *Id.* § 6311(b)(2)(B), 6311(c)(4)(A).

16. *Id.* § 6311(c)(4)(D), 6311(d)(2)(A)–(B).

17. Alyson Klein, *How ESSA Passed: The Inside Scoop*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 43, 54–57.

18. *See* Robert Gebeloff, *The Numbers That Explain Why Teachers Are in Revolt*, N.Y. TIMES: UPSHOT (June 6, 2018), <https://nytimes.com/2018/06/04/upshot/school-funding-still-lags-after-recession-ended.html> (discussing how education spending cuts have decreased teacher salaries).

19. *See* Moria Ballingit, *Arizona Teachers, Among the Nation's Lowest Paid, Threaten to Strike*, WASH. POST (Mar. 29, 2018), [https://washingtonpost.com/news/education/wp/2018/03/29/arizona-teachers-among-the-nations-lowest-paid-threaten-to-strike/?utm\\_term=.5e00650ad401](https://washingtonpost.com/news/education/wp/2018/03/29/arizona-teachers-among-the-nations-lowest-paid-threaten-to-strike/?utm_term=.5e00650ad401) (noting that Arizona teachers were demanding a raise and restoration of school funding to pre-recession

school funding has shifted slightly to a greater reliance on local funding, which raises concerns regarding equity because of the disparities in funding based on local property taxes.<sup>20</sup> In addition, numerous states are funding schools well below pre-recession levels, with Florida and Arizona providing approximately 23% less funding, and Alabama, Georgia, Idaho, Nevada, North Carolina, and Oklahoma spending more than 10% less on education.<sup>21</sup> Teachers are experiencing the effects of less funding, both in their lower salaries as well as in the physical condition of their schools.<sup>22</sup>

The passage of ESSA and these events raise a critical question regarding how ESSA will impact educational equity: does ESSA allow states to use their new flexibility to stay on the well-trodden road that leaves disadvantaged and minority students behind,<sup>23</sup> or will ESSA help to guide states in advancing equity

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levels); Dana Goldstein, *Teachers in Oklahoma and Kentucky Walk Out: 'It Really Is a Wildfire'*, N.Y. TIMES (Apr. 2, 2018), <https://nytimes.com/2018/04/02/us/teacher-strikes-oklahoma-kentucky.html> (“Thousands of teachers in Oklahoma and Kentucky walked off the job Monday morning, shutting down school districts as they protested cuts in pay, benefits and school funding in a movement that has spread rapidly since igniting in West Virginia this year.”); Anita Snow & Terry Tang, *Arizona Teachers End Walkout After Governor Signs Off on 20 Percent Raise*, CHI. TRIB. (May 3, 2018), <http://chicagotribune.com/news/nationworld/ct-arizona-teacher-protests-20180503-story.html> (quoting the President of the Arizona Education Association regarding the need for continued campaigning from teachers for additional funding despite their increase in salary); Kalia White et al., *'Tired of Begging': Teacher Rebellion Shuts Down Oklahoma, Kentucky Schools*, USA TODAY (Apr. 2, 2018), <https://usatoday.com/story/news/nation/2018/04/02/teacher-strikes-shut-down-schools-across-oklahoma-kentucky/478102002> (noting that teachers were striking in Oklahoma to restore over \$100 million in school funding that had been cut over the last ten years despite a pay raise).

20. Michael Leachman, *New Census Data Show Persistent State School Funding Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES: OFF THE CHARTS (May 22, 2018, 2:15 PM), <https://cbpp.org/blog/new-census-data-show-persistent-state-school-funding-cuts>.

21. *See id.*

22. *See* Gebeloff, *supra* note 18 (explaining the ramifications of education spending cuts, including teacher layoffs); Josephine Sedgwick, *25-Year-Old Textbooks and Holes in the Ceilings: Inside America's Public Schools*, N.Y. TIMES (Apr. 16, 2018), <https://nytimes.com/2018/04/16/reader-center/us-public-schools-conditions.html> (summarizing teachers' descriptions of the poor conditions in their schools, including such comments as “[t]here are holes in the ceiling, skylights don't work, the walls need to be painted” and “I had six laptops for 42 fifth-grade students (in one classroom) with many broken keys and chargers”).

23. *See* Cynthia G. Brown, *From ESEA to ESSA: Progress or Regress?*, in THE EVERY STUDENT SUCCEEDS ACT, *supra* note 5, at 153, 164 (arguing that ESSA does not support disadvantaged students).

for all students? Congress undeniably succeeded in designing ESSA to reduce federal involvement in education.<sup>24</sup> This Article examines whether Congress also effectively designed ESSA to advance its equity goals as well as how Congress can reauthorize the law to more effectively advance equity. It engages with the ongoing scholarly debate about the potential impact of ESSA on equity in which some argue that ESSA can and should be used as a vehicle to advance equity and innovation,<sup>25</sup> while others express great skepticism about ESSA's ability to promote equity.<sup>26</sup>

To begin to answer if ESSA will effectively promote equity, I must first define equity. Equity in education requires educational opportunities to be distributed based on students' needs rather than their race, national origin, zip code, or parental income levels.<sup>27</sup> Our nation's diverse students need a fair allocation of opportunities and resources tailored to students' strengths, challenges, and vulnerabilities. Equity recognizes and responds to these differences rather than administers a one-size-

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24. See Black, *supra* note 3, at 1340–61; Michael Heise, *From No Child Left Behind to Every Student Succeeds: Back to a Future for Education Federalism*, 117 COLUM. L. REV. 1859, 1872–75 (2017) (describing the limitations placed on the federal government by ESSA).

25. CHANNA M. COOK-HARVEY ET AL., LEARNING POL'Y INST., EQUITY AND ESSA: LEVERAGING EDUCATIONAL OPPORTUNITY THROUGH THE EVERY STUDENT SUCCEEDS ACT v (2016) (“[T]he recent passage of the Every Student Succeeds Act . . . represents an opportunity for the federal government, states, districts, and schools to equitably design education systems to ensure that the students who have historically been underserved by these same education systems receive an education that prepares them for the demands of the 21st century.”); Martin R. West, *The Case for ESSA: A Proper Balance*, in THE EVERY STUDENT SUCCEEDS ACT, *supra* note 5, at 75, 76 (“Far from a retreat from the federal government’s long-standing commitment to support America’s most vulnerable children, ESSA represents a new vision for fulfilling that commitment in light of the capacity and resources at its disposal.”).

26. See Aldeman, *supra* note 5, at 91, 96 (“Under ESSA, states have the option to identify only the absolute bottom 5 percent of schools receiving federal funds, leaving the remaining 95 percent of schools without any pressure to improve.”); Black, *supra* note 3, at 1346–57 (contending that ESSA does not effectively require equality in inputs or outputs); Brown, *supra* note 23, at 153, 164 (“While ESSA offers some improvements, it’s mostly a missed opportunity. It’s weak on the training/assigning of quality teachers, . . . and financing public schools equitably nationwide.”).

27. See JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA 1 (2010) (noting that educational opportunities in this nation “too often depend on where students live, on how much money their parents earn, or the color of their skin”); U.S. COMM’N ON CIVIL RIGHTS, PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION 10 (2018) (recommending “that the federal government must take bold action” to combat educational funding inequities in the United States).

fits-all model.<sup>28</sup> It grants additional resources to the students with the greatest disadvantages and aims for differences in outcomes to be based on ability.<sup>29</sup> Equity also seeks excellence in the educational opportunities for all children, rather than accepting a leveling down to reduce disparities. Although I primarily use equity to encompass this definition, I also use the phrase “equal opportunity” as synonymous with equity.

Equity has been and should remain a national priority in education for many reasons. Equity provides one of the primary historical and modern justifications for federal involvement in education.<sup>30</sup> The last half-century reveals that Congress intervenes to advance equity when a constituency within U.S. society has been denied equal educational opportunity and when the states and districts show either an unwillingness or an inability to address these inequities.<sup>31</sup>

Research confirms that today many economically disadvantaged and minority students too often receive less funding, inferior teachers, less rigorous courses, and fewer resources, to name a few of the disparities.<sup>32</sup> These opportunity gaps undermine the

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28. See Janice Petrovich, *The Shifting Terrain of Educational Policy: Why We Must Bring Equity Back*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 3, 4 (Janice Petrovich & Amy Stuart Wells eds., 2005) (discussing the differences between equity-based reforms and excellence-based reforms). Thus, I am explicitly rejecting the definition of equity that provides all students with the exact same resources. See BENJAMIN M. SUPERFINE, EQUALITY IN EDUCATION LAW AND POLICY, 1954–2010, at 25 (2013) (noting that equity can be defined to include all students receiving the same resources and as all students being given the resources needed to achieve the same outcome).

29. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 51.

30. See MCGUINN, *supra* note 11, at 25, 31, 33–34 (noting historical and modern examples of federal intervention to advance equity in education); Barone & DeBray, *supra* note 6, at 61, 63 (highlighting increased congressional involvement in education to address denials of equal educational opportunity).

31. Barone & DeBray, *supra* note 6, at 61, 63.

32. See BRUCE D. BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR?: A NATIONAL REPORT CARD 9 (7th ed. 2018) (showing funding gaps for high-poverty districts); IVY MORGAN & ARY AMERIKANER, THE EDUC. TR., FUNDING GAPS 2018: AN ANALYSIS OF FUNDING EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 6, 10 (2018) (finding funding gaps for low-income and minority students); U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 5, 9–10 (confirming lower funding and inferior opportunities for poor and minority schoolchildren); Linda Darling-Hammond, *Inequality and School Resources: What It Will Take to Close the Opportunity Gap*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 77, 84–87 (Prudence L. Carter & Kevin G. Welner eds., 2013) [hereinafter CLOSING THE OPPORTUNITY

ability of many poor and minority students to be prepared for colleges and careers.<sup>33</sup> This longstanding inequitable distribution of high-quality educational resources is undermining successful academic outcomes for poor and minority children.<sup>34</sup> The National Assessment for Education Progress (NAEP), also known as the Nation's Report Card, provides a comparison of students across the United States, in contrast to state tests that vary between states in rigor and cut scores. This data confirms the "very large" racial achievement gap and the even larger socioeconomic achievement gap.<sup>35</sup> These gaps, on average, constitute approximately one and a half years of schooling.<sup>36</sup>

Longstanding opportunity and achievement gaps along lines of race, national origin, and class harm our national interests in

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GAP: WHAT AMERICA MUST DO] (noting that minority and disadvantaged students receive inferior teachers, fewer resources, and reduced access to high-quality curricula).

33. See Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO, *supra* note 32, at 1, 2–5.

34. *Id.* at 1, 3.

35. See Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 91, 93 (Greg J. Duncan & Richard J. Murnane eds., 2011); EDUC. OPPORTUNITY MONITORING PROJECT, STANFORD CTR. FOR EDUC. POLICY ANALYSIS, RACIAL AND ETHNIC ACHIEVEMENT GAPS, <http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/#first> (last visited Oct. 27, 2018); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., THE NATION'S REPORT CARD, NAEP READING REPORT CARD: NATIONAL STUDENT GROUP SCORES AND SCORE GAPS (2017), [https://nationsreportcard.gov/reading\\_2017/#nation/gaps?grade=8](https://nationsreportcard.gov/reading_2017/#nation/gaps?grade=8); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., THE NATION'S REPORT CARD, NAEP MATHEMATICS REPORT CARD: NATIONAL STUDENT GROUP SCORES AND SCORE GAPS (2017), [https://nationsreportcard.gov/math\\_2017/#nation/gaps?grade=8](https://nationsreportcard.gov/math_2017/#nation/gaps?grade=8); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., THE NATION'S REPORT CARD, NAEP MATHEMATICS REPORT CARD: NATIONAL STUDENT GROUP SCORES AND SCORE GAPS (2017), [https://nationsreportcard.gov/math\\_2017/#nation/gaps?grade=4](https://nationsreportcard.gov/math_2017/#nation/gaps?grade=4); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., THE NATION'S REPORT CARD, NAEP READING REPORT CARD: NATIONAL STUDENT GROUP SCORES AND SCORE GAPS (2017), [https://nationsreportcard.gov/reading\\_2017/#nation/gaps?grade=4](https://nationsreportcard.gov/reading_2017/#nation/gaps?grade=4); NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., THE NATION'S REPORT CARD, 2015 MATHEMATICS AND READING AT GRADE 12: NATIONAL SCORE GAPS (2015), [https://nationsreportcard.gov/reading\\_math\\_g12\\_2015/#reading/gaps](https://nationsreportcard.gov/reading_math_g12_2015/#reading/gaps).

36. See Michael Hansen et al., *Have We Made Progress on Achievement Gaps? Looking at Evidence from the New NAEP Results*, BROOKINGS INST.: BROWN CTR. CHALKBOARD (Apr. 17, 2018), <https://brookings.edu/blog/brown-center-chalkboard/2018/04/17/have-we-made-progress-on-achievement-gaps-looking-at-evidence-from-the-new-naep-results>.

an educated democracy, a robust economy, and a just society.<sup>37</sup> It is axiomatic that the citizenry must be educated to govern effectively in a democracy.<sup>38</sup> Economic estimates of the impact of the opportunity gap note that the failure of the United States to invest in economically disadvantaged children will cost the country approximately five trillion dollars over the course of their lives.<sup>39</sup> This accounts for additional health care costs, criminal justice experiences, and the cost of failing to take full advantage of the talents of these children.<sup>40</sup> In addition, if the graduation rate of students of color could be raised to 90%, the United States would add \$6.6 billion *annually* to the economy.<sup>41</sup> The 2018 report from the U.S. Commission on Civil Rights confirms that high-poverty communities, who are frequently communities of color, often do not possess the financial means to provide quality schools and opportunities.<sup>42</sup> Most importantly, students living in low-income households and students of color constitute *more than half* of all public school students.<sup>43</sup> Therefore, the future of

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37. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 6–8 (arguing that growing education gaps threaten the economic and societal health of the United States).

38. See EQUITY & EXCELLENCE COMM'N, A REPORT TO THE U.S. SECRETARY OF EDUCATION, FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 12 (2013) (discussing the contributions of a strong education system to a healthy democracy).

39. CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 7.

40. See *id.* at 7–8.

41. EQUITY & EXCELLENCE COMM'N, *supra* note 38, at 13–14. The 2016 graduation rates were: African American 76.4%; Hispanic 79.3%; White 88.3%; American Indian/Alaska Native 71.9%; and, economically disadvantaged students 77.6%. The graduation rate for Asian/Pacific Islander was not available for this year. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PUBLIC HIGH SCHOOL 4-YEAR ADJUSTED COHORT GRADUATION RATE (ACGR), BY RACE/ETHNICITY AND SELECTED DEMOGRAPHIC CHARACTERISTICS FOR THE UNITED STATES, THE 50 STATES, AND THE DISTRICT OF COLUMBIA: SCHOOL YEAR 2015–16, [https://nces.ed.gov/ccd/tables/ACGR\\_RE\\_and\\_characteristics\\_2015-16.asp](https://nces.ed.gov/ccd/tables/ACGR_RE_and_characteristics_2015-16.asp).

42. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 5.

43. See STEVE SUITTS, S. EDUC. FOUND., NEW MAJORITY RESEARCH BULLETIN: LOW-INCOME STUDENTS NOW A MAJORITY IN THE NATION'S PUBLIC SCHOOLS (2015), <http://southerneducation.org/our-strategies/research-and-publications/new-majority-diverse-majority-report-series/a-new-majority-2015-update-low-income-students-now> (reporting that economically disadvantaged students are a majority in American public schools); Lesli A. Maxwell, *U.S. School Enrollment Hits Majority-Minority Milestone*, EDUC. WK. (Aug. 19, 2014), <https://edweek.org/ew/articles/2014/08/20/01demographics.h34.html> (reporting that students of color now constitute the majority of students in public schools).

the nation depends upon fully developing the talents and abilities of poor and minority students.

This Article offers my model for institutional design to achieve an equitable education. This model embraces four elements: fair funding for schools, an equitable distribution of effective teachers, equitable access to high-quality preK-12 learning opportunities, and integrated school settings.<sup>44</sup> These elements are drawn from research regarding the critical components of effective education reform as well as my experience in education law and policy for over two decades. My model embraces the premise that the best model for equity must incorporate research on impactful education reform while acknowledging political and practical feasibility and parsimony. As discussed in detail below, these elements work synergistically to advance educational equity.

This Article shows that even though ESEA was passed in part to bridge the opportunity and achievement gaps for disadvantaged and minority students and to support improvements to education,<sup>45</sup> ESSA will not provide sufficient support and incentives for states to achieve these goals. Fortunately, ESSA only provides appropriations through fiscal year 2020,<sup>46</sup> and thus, lawmakers will soon begin to examine the law's effectiveness and possible reforms as reauthorization approaches. Indeed, lawmakers are already keeping very close tabs on ESSA as evidenced by the numerous hearings about implementation<sup>47</sup> and

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44. Research on the benefits of each of these building blocks is provided in Part II.

45. MCGUINN, *supra* note 11, at 31 ("ESEA was premised on the idea that the federal government should intervene in . . . an educational crisis among poor and minority children.").

46. 20 U.S.C. § 6301 (2016).

47. Congress has held eleven hearings on ESSA implementation since its passage in December 2015. *Every Student Succeeds Act: States Leading the Way: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 115th Cong. (2018); *ESSA Implementation: Exploring State and Local Reform Efforts: Hearing Before the H. Comm. on Educ. & the Workforce*, 115th Cong. (2017); *Supplanting the Law and Local Education Authority through Regulatory Fiat: Hearing Before the Subcomm. on Early Childhood, Elementary, & Secondary Educ. of the H. Comm. on Educ. & the Workforce*, 114th Cong. (2016); *ESSA Implementation: Perspectives from Education Stakeholders on Proposed Regulations: Hearing Before the S. Comm. on Health, Educ. Labor, & Pensions*, 114th Cong. (2016); *ESSA Implementation: Update from the U.S. Secretary of Education on Proposed Regulations: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 114th Cong. (2016); *Next Steps in K-12 Education: Examining Recent Efforts to Implement the Every Student Succeeds Act: Hearing Before the H. Comm. on Educ. & the Workforce*, 114th Cong. (2016); *ESSA Implementation: Perspectives from Education Stakeholders: Hearing Before the S. Comm. on*

Congress's decision to disapprove the U.S. Department of Education's (DOE) final regulations for the law.<sup>48</sup> Therefore, this Article proposes a timely, comprehensive plan to guide the rapidly approaching reauthorization.

This Article also contends that when Congress reauthorizes ESEA, it should adopt an incremental approach for reform that incentivizes and supports states in providing the essential elements of an equitable education.<sup>49</sup> This incremental approach involves gradual shifts to education federalism that would ultimately result in a more balanced federal-state partnership for education that would expand state and local education capacity for education reform.<sup>50</sup> This partnership would embrace the federal government as the final guarantor of equitable access to an excellent education, while giving states and localities significant latitude on how equity should be implemented at the state and local levels.<sup>51</sup> These incremental reforms would disrupt ESSA's anemic approach to equity.

This Article builds upon my past scholarship in two principal ways. First, it assumes that a restructuring of education federalism will be necessary to advance equitable access to an excellent education.<sup>52</sup> As I have demonstrated in prior work,

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*Health, Educ., Labor, & Pensions*, 114th Cong. (2016); *ESSA Implementation in States and School Districts: Perspectives from the U.S. Secretary of Education: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 114th Cong. (2016); *Next Steps for K-12 Education: Upholding the Letter and Intent of the Every Student Succeeds Act: Hearing Before the H. Comm. on Educ. & the Workforce*, 114th Cong. (2016); *ESSA Implementation in States and School Districts: Perspectives from Education Leaders: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 114th Cong. (2016); *Next Steps for K-12 Education: Implementing the Promise to Restore State and Local Control: Hearing Before the Subcomm. on Early Childhood, Elementary, & Secondary Educ. of the H. Comm. on Educ. & the Workforce*, 114th Cong. (2016).

48. Congressional Disapproval of Department of Education Rule, Pub. L. No. 115-13, 131 Stat. 77 (2017); 81 Fed. Reg. 86,076 (Nov. 29, 2016).

49. I recently proposed policy reforms for school funding that enact incremental shifts to education federalism. Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201 (2016).

50. See Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 1004–05, 1015 (2015).

51. *Id.* at 1005, 1015 (arguing that education federalism would expand the capacity of states to implement equitable policies). I apply my theory of education federalism from *Disrupting Education Federalism* in Kimberly Jenkins Robinson, *Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 223–38 (2016).

52. Robinson, *supra* note 50, at 983–1017.

federalism has served as a roadblock to equal educational opportunity and must be restructured to achieve greater equity and excellence in education.<sup>53</sup> Second, I build on my prior proposal for an incremental restructuring of education federalism that would gradually shift the balance of federal-state power over education to embrace federal policymaking strengths while retaining primary state and local control over education.<sup>54</sup>

Federal leadership, law, and policy will be necessary to enable states to fulfill their recent pledge to make educational equity a reality for all schoolchildren.<sup>55</sup> My emphasis on the need for an incremental restructuring of education federalism distinguishes my work from other ESSA scholarship. I recommend a unique combination of law and policy levers that strategically employ federal incentives, conditions, and mandates. This is in contrast to most proposals for ESEA reauthorization that solely focus on new conditions for federal education funds. Also, this Article presents my model for institutional design for educational equity that draws together a substantial body of research on the key components of an equitable and excellent education.

Part I describes ESSA with an emphasis on its approach to equity and contrasts it with its predecessor, No Child Left Behind. Part II analyzes why ESSA's approach to equity will prove ineffective. Part III recommends how ESEA should be reauthorized by incrementally restructuring education federalism in ways that would promote equitable access to an excellent education for all children.

## I. UNDERSTANDING THE EVERY STUDENT SUCCEEDS ACT

President Johnson signed ESEA into law in 1965 as part of his broader "war on poverty" because he viewed education as an essential ingredient for mobility, and he acknowledged that many schools did not have adequate resources to provide essential skills to children from low-income families.<sup>56</sup> Title I of ESEA directs additional funding to disadvantaged students and was

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53. *Id.* at 972–83; Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 293–305, 307–14, 322–30 (2013).

54. Robinson, *supra* note 49, at 220–37.

55. See THE ASPEN INST. EDUC. & SOC'Y PROGRAM, *supra* note 8 (discussing state implementation strategies to promote educational equity); Burnette II, *supra* note 8 (reporting the meeting of state education chiefs to strategize policies regarding educational equity).

56. MCGUINN, *supra* note 11, at 29.

included as the primary vehicle to address the needs of these students.<sup>57</sup> With the passage of the Improving America's Schools Act of 1994, the aim of the legislation broadened to include high achievement for all students, and this expansion ushered in federal support for the standards and accountability movement.<sup>58</sup> Both No Child Left Behind and ESSA embraced this broader focus.<sup>59</sup>

Despite this larger aim, funding under ESEA, particularly under Title I, still aims to reduce the adverse effects of poverty on educational opportunities and outcomes. Title I is the centerpiece of the law and serves as the largest federal education aid to communities with substantial numbers of schoolchildren living in poverty, even as the broader goal of improved achievement for all students has gained ascendancy.<sup>60</sup> For instance, ESSA, like No Child Left Behind, requires test scores to be disaggregated by economic status and race<sup>61</sup> to shine a spotlight on whether schools, districts, and states are meeting the needs of poor and minority students. Also like its predecessor, ESSA obliges districts to intervene when these students are performing poorly and to institute efforts to close the achievement gap between these students and their more affluent peers.<sup>62</sup> Therefore, even though ESSA increases state autonomy for education reform under ESEA, it remains worthwhile to assess the effectiveness of ESSA in improving the education of disadvantaged

57. *See id.* at 31.

58. *See id.* at 95–97.

59. *See id.* at 179; Charles Barone, *What ESSA Says: Continuities and Departures*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 59–66.

60. *See* STEPHEN Q. CORNMAN ET AL., NAT'L CTR. FOR EDUC. STATISTICS, REVENUES AND EXPENDITURES FOR PUBLIC ELEMENTARY AND SECONDARY EDUCATION: SCHOOL YEAR 2014–15 (FISCAL YEAR 2015) 18–19 (2018); Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 614, 623 (2013). *But see* Derek Black, *Leveraging Funding for Equity and Integration*, in *THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY* 227, 229–31 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015) [hereinafter Black, *Leveraging Funding*] [hereinafter *THE ENDURING LEGACY OF RODRIGUEZ*] (observing that a gradual shift in focus towards general educational reform has made Title I funds “no longer targeted or conditional in any meaningful sense”).

61. No Child Left Behind, 20 U.S.C. § 6311 (b)(3)(C)(xiii) (2012) (repealed 2015); Every Student Succeeds Act, 20 U.S.C. § 6311 (b)(2)(B)(xi)(I) & (II) (2016).

62. No Child Left Behind, 20 U.S.C. § 6316 (b)(1)(A), (3–5), (7), (8) (2012) (repealed 2015); Every Student Succeeds Act, 20 U.S.C. § 6311 (d)(2)(B) (2016).

and minority students because this aim remains a goal of this bipartisan law.

ESEA is comprised of many programs with a wide variety of aims, including programs to support neglected<sup>63</sup> and migrant children,<sup>64</sup> language instruction for English learners,<sup>65</sup> and support for the education of Native American children.<sup>66</sup> Title I is the largest program within ESEA, contains the major requirements of the law, and aims to support education of the disadvantaged.<sup>67</sup> Title I includes 59% of ESEA's funding at \$16.4 billion per year for fiscal year 2018.<sup>68</sup>

This Part briefly summarizes the key components of No Child Left Behind before describing ESSA's key requirements. Understanding No Child Left Behind is essential for understanding ESSA because ESSA retains some of the same conditions as No Child Left Behind. Section A also highlights some of the strengths and challenges that No Child Left Behind encountered. This research helps readers better understand ESSA. Section B explains the key requirements for ESSA.

#### A. THE NO CHILD LEFT BEHIND ACT OF 2001

No Child Left Behind ushered in the largest increase in federal involvement in the public schools in the nation's history.<sup>69</sup> No Child Left Behind aimed to reduce both achievement and opportunity gaps.<sup>70</sup> The focus of No Child Left Behind's accountability structures included the condition that states must implement "challenging" academic standards in math, reading, and

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63. Every Student Succeeds Act, 20 U.S.C. § 6421 (2016).

64. *Id.* § 6391.

65. *Id.*

66. *Id.* § 7401. Although many of the students in each of these programs are also poor or minorities, examination of the effectiveness of ESEA to help address the specific needs of these student groups is beyond the scope of this Article.

67. See Barone, *supra* note 59, at 59–60; Pasachoff, *supra* note 60, at 614.

68. See U.S. DEP'T OF EDUC., DEPARTMENT OF EDUCATION FISCAL YEAR 2018 CONGRESSIONAL ACTION (2018), <https://www2.ed.gov/about/overview/budget/budget18/18action.pdf>.

69. See MCGUINN, *supra* note 11, at 194–95.

70. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 1001, 115 Stat. 1425, 1439 (2002) (noting that No Child Left Behind seeks "to close the achievement gap with accountability, flexibility, and choice, so that no child is left behind" and "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments").

science for all students.<sup>71</sup> All schools, not just schools that received Title I funding,<sup>72</sup> were required to administer annual math and reading tests aligned to these standards beginning in the 2005–06 school year for third through eighth grade and once in tenth through twelfth grades.<sup>73</sup> Science testing began in the 2007–08 school year and occurred three times in third through twelfth grades.<sup>74</sup> Each state determined a proficient score and published an annual state report card with proficiency scores disaggregated by student economic disadvantage, gender, major racial and ethnic groups, disabled students, and English language learners.<sup>75</sup> Schools and districts also had to publish whether students were making adequate yearly progress toward the goal of proficiency for all students by 2014.<sup>76</sup> States exercised complete discretion over the standards because No Child Left Behind prohibited any requirement that states submit state standards to the Secretary of Education.<sup>77</sup>

Schools that received Title I funding were subject to accountability measures that became increasingly interventionist as the number of years increased that the school did not achieve adequate yearly progress. Schools were identified as in need of improvement and provided with technical assistance after missing adequate yearly progress for any group of students for one year; then students received the ability to transfer to another school within the district after two consecutive years of the school failing to make adequate yearly progress; and, after three consecutive years of not making adequate yearly progress students could receive tutoring. Finally, a school had to undertake corrective action after four consecutive years of failing to make adequate yearly progress and underwent restructuring after five consecutive years of failing to make adequate yearly progress.<sup>78</sup>

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71. See No Child Left Behind, 20 U.S.C. § 6311(b)(1)(A)–(C) (2012) (repealed 2015).

72. See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 942 (2004).

73. See No Child Left Behind, 20 U.S.C. § 6311(b)(3)(A)–(C) (2012) (repealed 2015).

74. Science testing occurred once in third through fifth grade, once in sixth to ninth grade, and once in tenth through twelfth grades. See No Child Left Behind, 20 U.S.C. § 6311(b)(3)(C)(v)(II) (2012) (repealed 2015).

75. See *id.* § 6311(b)(3)(C)(xiii) (2012) (repealed 2015).

76. See *id.* § 6311(b)(2)(F), (h)(1)(C)(v) (2012) (repealed 2015).

77. See *id.* § 6311(b)(1)(A) (2012) (repealed 2015).

78. See 20 U.S.C. § 6316(b)(1)(A) (2012) (repealed 2015); *id.* § 6316(a)(1), (b)(1)(A), (5), (7), (8) (one year requirements); *id.* § 6316(b)(7)(C) (two year requirements); *id.* § 6316(b)(5) (three year requirements); *id.* § 6316(b)(7) (four

No Child Left Behind sought to close an opportunity gap by requiring that Title I schools employ highly qualified teachers for all subjects by 2005–06.<sup>79</sup> For non-Title I schools, teachers of “core academic subjects” were required to be highly qualified by 2005–06.<sup>80</sup> A highly qualified teacher was required to have earned a bachelor’s degree, possess subject matter competency, and either have state certification or have passed a state licensing exam that provided a license to teach.<sup>81</sup> States had to ensure that inexperienced, unqualified, or out-of-field teachers did not teach poor and minority schoolchildren at higher rates than other children.<sup>82</sup>

Although many criticize No Child Left Behind as being misguided federal education policy,<sup>83</sup> it did spark some important improvements to education. The law included a significant increase in federal funding for education: in 2002 spending was at \$56.2 billion, which was a \$14.1 billion increase from 2001.<sup>84</sup> All states now have standards and assessments aligned to state standards.<sup>85</sup> Although most states had standards and tests before No Child Left Behind, only thirteen tested reading and math annually and even fewer had robust approaches to accountability.<sup>86</sup> The goal for all students to achieve proficiency on state tests by 2014 was unattainable due to disparities in opportunities to learn as well as student ability.<sup>87</sup> However, No Child Left Behind succeeded in ensuring that states adopted an assessment regime that informed parents and the public about how *students and subgroups of students* were performing in every public

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year requirements); *id.* § 6316(b)(8) (five year requirements).

79. *See id.* § 6319(a) (2012) (repealed 2015).

80. *See id.* § 6319(a)(2) (2012) (repealed 2015). “Core academic subjects” include a wide range of subjects including math, science, reading, language arts, foreign languages, government, history, arts, and geography. *See* Improving the Academic Achievement of the Disadvantaged, 34 C.F.R. § 200.55 (2003).

81. *See* No Child Left Behind, 20 U.S.C. § 7801(23)(A)–(C) (2012) (repealed 2015).

82. *See id.* § 6311(b)(8)(C) (2012) (repealed 2015).

83. *See, e.g.,* David L. Kirp, *Why the New Education Law Is Good for Children Left Behind*, N.Y. TIMES (Dec. 10, 2015), <https://www.nytimes.com/2015/12/10/opinion/why-the-new-education-law-is-good-for-children-left-behind.html>.

84. Patrick McGuinn, *From ESEA to NCLB: The Growth of the Federal Role and the Shift to Accountability*, in THE EVERY STUDENT SUCCEEDS ACT, *supra* note 5, at 13, 25.

85. *See* RYAN, *supra* note 27, at 244.

86. *See* MCGUINN, *supra* note 11, at 182.

87. *See* Black, *supra* note 3, at 1324–26.

school. This information had not previously been available. Furthermore, while many schools and districts had learned to tolerate low student performance, by attaching consequences to low performance, No Child Left Behind required educators to take focused action to raise student achievement.<sup>88</sup>

Nevertheless, No Child Left Behind fell short of many of its aims. It attempted to provide alternative school options for those schools that did not make adequate yearly progress. However, parents rarely exercised their school choice options because some parents did not know of, or were not interested in, other schools and some districts did not have enough successful schools to offer.<sup>89</sup> Although some expected that No Child Left Behind's sanctions would fall primarily on urban schools, as time went on, growing numbers of middle class, mostly white suburban schools were identified as in need of improvement.<sup>90</sup> In addition, those states with strong standards had higher rates of school failure, while those with lower standards had fewer failures.<sup>91</sup> This created perverse incentives to lower cut scores and standards.<sup>92</sup>

Eventually, as more and more schools entered improvement and it was clear that the 2014 proficiency goal was unattainable, states began to request waivers from No Child Left Behind's conditions from the DOE.<sup>93</sup> To receive a waiver, states were required to adopt college and career ready standards and to measure student growth on high-quality assessments at least once in grades three to eight and once in high school for math and reading.<sup>94</sup>

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88. No Child Left Behind, 20 U.S.C. § 6311 (b)(2)(A)(iii) (2012) (repealed 2015) ("Each state plan shall . . . include sanctions and rewards, such as bonuses and recognition, the State will use to hold local educational agencies and public elementary schools and secondary schools accountable for student achievement and for ensuring that they make adequate yearly progress."); *see also* REBECCA R. SKINNER & LEAH ROSENSTIEL, CONG. RESEARCH SERV., R44898, HISTORY OF THE ESEA TITLE I-A FORMULAS 41 (2017) (summarizing changes No Child Left Behind made to grant funding and state accountability requirements, and new requirements, including for the qualifications of teachers).

89. *See* RYAN, *supra* note 27, at 191.

90. *See* Jeffrey R. Henig et al., *From NCLB to ESSA: Lessons Learned or Politics Reaffirmed?*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 29, 33.

91. *See id.*

92. Ryan, *supra* note 72, at 934.

93. *See* Patrick McGuinn, *Incentives and Inducements: The Feds Fight Federalism*, in *BUSH-OBAMA SCHOOL REFORM: LESSONS LEARNED* 51, 59–61 (Frederick M. Hess & Michael Q. McShane eds., 2018).

94. *See* U.S. DEPT OF EDUC., ESEA FLEXIBILITY 1 (2012), <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

The standards requirement for waivers was viewed as an unwelcome federal push toward the Common Core Standards, which are a set of rigorous standards developed by academics and assessment specialists in response to a request from the National Governors Association and the Council of Chief State School Officers.<sup>95</sup> DOE permitted states to set new “ambitious but achievable . . . annual measurable objectives” that would guide school improvement efforts and to publish performance on school report cards.<sup>96</sup> The waivers released states from the interventions prescribed in No Child Left Behind, but states were required to intervene in the bottom 5% of schools.<sup>97</sup> The waivers also released districts from having to employ highly qualified teachers, and instead, states were required to evaluate teachers based in part on student growth on assessments.<sup>98</sup> The waivers retained the requirement that states ensure that poorly qualified teachers did not teach low-income and minority students at higher rates than other children.<sup>99</sup> Forty-three states, the District of Columbia, and Puerto Rico received waivers from No Child Left Behind.<sup>100</sup> ESEA waivers ultimately sowed seeds of discontent on the left and the right, and it was this widespread discontentment that led to passage of ESSA.<sup>101</sup>

#### B. THE EVERY STUDENT SUCCEEDS ACT

When President Obama signed the Every Student Succeeds Act (ESSA) into law, lawmakers on both sides of the political spectrum as well as state leaders and educators celebrated the passage of a bipartisan law.<sup>102</sup> ESEA was more than seven years

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95. See Frederick M. Hess & Max Eden, *Introduction*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 1, 7; Elaine McArdle, *What Happened to the Common Core?*, HARV. EDUC. MAG (Sept. 3, 2014), <https://gse.harvard.edu/news/ed/14/09/what-happened-common-core>; *Frequently Asked Questions*, COMMON CORE ST. STANDARDS INITIATIVE, <http://corestandards.org/about-the-standards/frequently-asked-questions> (last visited Oct. 27, 2018).

96. See U.S. DEP'T OF EDUC., *ESEA FLEXIBILITY 1–2* (2012), <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

97. See *id.* at 1, 6.

98. See *id.* at 2.

99. See *id.*

100. See *id.* at 1–2.

101. Henig et al., *supra* note 90, at 29, 39–40. On the right, Republicans charged the Obama administration with federal overreach into an area of state and local control. On the left, the administration's emphasis on school choice and the rapid implementation of the Common Core standards by some states as their chosen method for implementing college- and career-ready standards led many teachers unions to oppose No Child Left Behind and the waivers. See *id.*

102. See Hess & Eden, *supra* note 95, at 1; Klein, *supra* note 17, at 43, 57.

overdue for reauthorization, and ESSA escaped the partisan gridlock that had blocked other legislation.<sup>103</sup> Republicans heralded the substantial reduction in federal involvement in education, while Democrats emphasized the guardrails that limited state and district discretion and kept a civil rights emphasis on the needs of disadvantaged and minority students.<sup>104</sup> This Section notes the key requirements for ESSA with an emphasis on its requirements relating to equity.

At the outset, it is worth noting that ESSA sometimes merely requires disclosure of important data that might reveal an opportunity or achievement gap and at other times it requires both disclosure and that the gap be addressed. Part II analyzes why neither approach is successful in ESSA.

### 1. ESSA on Standards and Testing

ESSA requires states to maintain “challenging” academic content standards that are aligned to the requirements to enter colleges as well as career and technical education in the state.<sup>105</sup> ESSA retains the No Child Left Behind testing regime for math, reading, and science.<sup>106</sup> The results of the assessments must be disaggregated at the school, district, and state level by major racial and ethnic groups, economic disadvantage, disability, English proficiency status, gender, and migrant status.<sup>107</sup>

ESSA provides states the flexibility to establish their own long-term goals that include student proficiency on state tests, English language proficiency, and high school graduation rates.<sup>108</sup> States must choose four indicators for the accountability system, including three academic indicators: proficiency on state tests, proficiency in English, and student growth in elementary and middle schools or graduation rates in high schools.<sup>109</sup> These indicators in aggregate must weigh much more

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103. See Klein, *supra* note 17, at 43, 57.

104. See *id.* at 54–55, 57.

105. See 20 U.S.C. § 6311(b)(1)(A), (D) (2016).

106. The math and reading assessments must be administered annually in grades three to eight and once in high school, while the science assessments must be administered at least once in grades three to five, six to nine, and ten through twelve. *Id.* § 6311(b)(2)(B).

107. See *id.* § 6311(b)(2)(B)(xi). ESSA allows States to administer alternative assessments to students with severe disabilities as long as the percentage of students taking such assessments does not exceed 1%. *Id.* § 6311(b)(2)(D)(i).

108. See *id.* § 6311(c)(4)(A).

109. ESSA adopted new standards for English language learners that are aimed to help them attain English proficiency. See 20 U.S.C. § 6311 (c)(4)(B) (Supp. IV 2016); Barone, *supra* note 59, at 61.

than the fourth indicator.<sup>110</sup> The fourth indicator assesses “school quality or student success” and can include such factors as the engagement of students or educators, the opportunity to attend and completion of advanced courses, readiness for post-secondary opportunities, and school safety and climate.<sup>111</sup> All results from state assessments must be shared in a comprehensive review of academic performance for each school and district that is concise and comprehensible by the public.<sup>112</sup> In addition, individual student report cards must include a student’s performance on state assessments and the report cards must allow parents, teachers, and school leaders to understand a student’s academic performance and assess the needs of the student.<sup>113</sup>

## 2. ESSA on Accountability

ESSA identifies four categories of schools for intervention. Beginning at least once every three school years after the 2017–18 school year, a state must identify schools for “comprehensive support and improvement” if they are among the lowest 5% on performance in the state of those that receive ESSA funding or are a public high school in which one third or more of the students fail to graduate.<sup>114</sup> When a subgroup of students at a school consistently underperforms as defined by each state, ESSA requires states to identify the school for targeted support and improvement.<sup>115</sup> ESSA requires additional targeted support and improvement when a subgroup of students tests in the bottom 5% of students.<sup>116</sup>

ESSA eliminated the school interventions required by No Child Left Behind. In their place, ESSA requires that when a school is in need of comprehensive support and improvement, the district must partner with stakeholders to develop a plan to improve performance on state indicators that responds to an assessment of needs in the school; adopts “evidence-based interventions;”<sup>117</sup> and, identifies any inequities in resources that the

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110. 20 U.S.C. § 6311(c)(4)(B), (C)(ii) (2016).

111. *Id.* § 6311(c)(4)(B)(v)(I)–(II).

112. *Id.* § 6311(h)(1)(A)–(B).

113. *Id.* § 6311(b)(2)(B)(x).

114. *Id.* § 6311(c)(4)(D).

115. *Id.* § 6311(d)(2)(A), (B).

116. *Id.* § 6311(d)(2)(C).

117. Although the requirement that interventions be “evidence-based” could strengthen the quality of school interventions, education law scholar Eloise Pasachoff provides a compelling analysis of why this requirement may not achieve

plan will address.<sup>118</sup> The school, district, and state must approve the plan and the state must periodically monitor and review the plan.<sup>119</sup> If, in no more than four years, the school has not met state-defined criteria for progress, the state must intervene with “more rigorous . . . action” that may involve changing operations at the school level.<sup>120</sup> When a school is identified for targeted support and improvement or additional targeted support and intervention due to a low-performing subgroup, the school must develop a plan that meets similar criteria and that is approved and monitored by the district.<sup>121</sup> The district must follow up with additional action if improvement is not made in the timeframe set by the state.<sup>122</sup>

### 3. ESSA on Resource Equity, Teacher Quality, and DOE Oversight

ESSA contains numerous requirements that Congress included to shine a light on disparities in educational opportunity. For example, ESSA requires reporting on disparities in funding.<sup>123</sup> In state report cards, state plans must include, for each district and school, per-pupil spending of federal, state, and local funds, including actual personnel spending, by source of funds.<sup>124</sup> Districts also must publish per-pupil spending by school.<sup>125</sup>

ESSA also requires districts and states to report the number and percentage of students enrolled in early childhood programs, dual enrollment programs, as well as advanced coursework that

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the hoped-for results. In short, she contends that the evidence-based requirements in ESSA do not significantly constrain policy choices, underestimate implementation challenges, and overlook the significant disagreements on what to do. Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1936–37 (2017).

118. 20 U.S.C. § 6311(d)(1)(B) (2016).

119. *Id.* § 6311(d)(1)(B)(v)–(vi).

120. *Id.* § 6311(d)(3)(A).

121. *Id.* § 6311(d)(2)(B).

122. *Id.* § 6311(d)(2)(B)(v), (C).

123. *Id.* § 6311(h)(1)(C)(x).

124. *Id.*

125. *Id.* § 6311(h)(2)(C). These provisions will not take effect until the report cards for the 2018–19 school year due to a one-year extension on compliance from the DOE. Jason Botel, U.S. DEP’T OF EDUC.: OFFICE OF ELEMENTARY & SECONDARY EDUC. (June 28, 2017), <https://www.ed.gov/policy/elsec/leg/essa/perpupilreqtr.pdf>.

earns college credit while in high school.<sup>126</sup> In addition, states and districts must publish data on school climate measures such as in-school and out-of-school suspensions, school-related arrests, and incidents of bullying, harassment, and violence.<sup>127</sup>

ESSA maintains the prior Title I funding formulas.<sup>128</sup> ESSA retained the longstanding requirement that Title I and non-Title I schools must maintain comparable resources.<sup>129</sup> ESSA made only minor adjustments to the supplement-not-supplant requirement that prohibits federal funds from supplanting rather than supplementing state and local funds and the maintenance of effort requirement that attempts to prevent states and districts from lowering support for public schools.<sup>130</sup>

ESSA requires that states both disclose inequities in the qualifications of teachers as well as remedy these inequities.<sup>131</sup> ESSA eliminates the No Child Left Behind requirement that all schools must employ highly qualified teachers and does not require states to evaluate teachers based on student performance as the No Child Left Behind waivers demanded.<sup>132</sup> Instead, ESSA merely requires that teachers be certified as defined by state standards.<sup>133</sup> States and districts must publicly report the qualifications of teachers, including disaggregating this data by high- and low-poverty schools, as well as the number and per-

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126. 20 U.S.C. § 6311(h)(1)(C)(viii)(II) (2016).

127. *Id.* § 6311(h)(1)(C)(viii)(I).

128. *Id.* §§ 6333–39. ESSA does direct additional funds to rural schools through Title II. *See* SKINNER & ROSENSTIEL, *supra* note 88, at 45 (“[A]most all of the changes to the Title I-A formulas were removed in conference. One notable change made by the ESSA was an increase in the set-aside for the Bureau of Indian Education (BIE) and Outlying Areas from 1.0% to 1.1%, provided the total amount available for state grants would not be less than the amount available in FY2016.”).

129. 20 U.S.C. § 6321(c)(1)(B) (2016).

130. *Id.* § 6321(b); *see* SKINNER & ROSENSTIEL, *supra* note 88, at 45 & n.273; Black, *supra* note 3, at 1339; Michael Casserly, *ESSA and Urban Public Schools: Ambivalence and Opportunity*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 137, 142.

131. 20 U.S.C. § 6311(h)(1)(C)(ix).

132. Every Student Succeeds Act, Pub. L. No. 114-95, § 1001(1), 129 Stat. 1802, 1814 (2015) (repealing 20 U.S.C. § 6319(a)); *see* U.S. DEP’T OF EDUC., ESEA FLEXIBILITY, <https://ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last modified May 12, 2018) (describing the waiver process under NCLB); Ashley Jochim, *ESSA and State Policy: What’s Next for Education Policy?*, in *THE EVERY STUDENT SUCCEEDS ACT*, *supra* note 5, at 121, 131.

133. 20 U.S.C. § 6311(g)(2)(J) (2016).

centage of teachers who are inexperienced, teaching with provisional or emergency credentials, and out-of-field teachers.<sup>134</sup> ESSA also requires states to implement plans to ensure that low-income and minority students are not disproportionately taught by “ineffective, out-of-field, or inexperienced teachers.”<sup>135</sup> This provision requires the state plan to identify how it will evaluate and report to the public its progress on achieving this goal.<sup>136</sup> No Child Left Behind included a similar provision.<sup>137</sup>

Title II of ESSA provides grants to states to raise the quality of teachers, principals, and school leaders and their effectiveness at improving student achievement, as well as to improve the equitable distribution of teachers.<sup>138</sup> Most of the funding is passed directly to districts and the DOE also receives funds under Title II.<sup>139</sup> The state grants may support a wide range of activities to improve teacher quality, including reforming teacher certification, licensure or tenure requirements; supporting districts in designing teacher and principal evaluation systems that include student growth; and, improving the equitable distribution of effective teachers, among other activities.<sup>140</sup>

ESSA explicitly limits the authority of the Secretary of Education in response to concerns that Secretary Arne Duncan overreached when he issued waivers to No Child Left Behind that contained numerous terms that sought to accomplish President Obama’s education agenda.<sup>141</sup> For instance, ESSA automatically approves state plans unless the Secretary notifies a

134. *Id.* § 6311(h)(1)(C)(ix).

135. *Id.* § 6311(g)(1)(B).

136. *Id.*; § 6311(b)(8)(C) (noting that state plans must include “the specific steps the State educational agency will take to ensure that both schoolwide programs and targeted assistance schools provide instruction by highly qualified instructional staff as required by sections 6314(b)(1)(C) and 6315(c)(1)(E) of this title, including steps that the State educational agency will take to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field teachers, and the measures that the State educational agency will use to evaluate and publicly report the progress of the State educational agency with respect to such steps”);

137. No Child Left Behind, 20 U.S.C. § 6311(b)(8)(C) (2012) (repealed 2015).

138. *See id.* § 6601.

139. *See id.* § 6603(a)–(b) (authorizing appropriations to states and local education agencies and then national activities); Alyson Klein et al., *A Guide to State ESSA Plans: Goals, Teacher Quality, and More*, EDUC. WK. (Oct. 2, 2017), <https://edweek.org/ew/section/multimedia/a-guide-to-state-essa-plans-goals-teacher-quality.html>.

140. *See* 20 U.S.C. § 6611(c)(4)(B)(i)–(iii) (2016).

141. *Id.* § 6311(e)(1)(B); Henig et al., *supra* note 90, at 38–39. For an argument that Secretary Duncan exceeded his authority in issuing the waivers,

state within 120 days of submission of the plan that the plan is not in compliance with the law.<sup>142</sup> The Secretary also is prohibited from influencing states to adopt the Common Core Standards,<sup>143</sup> directing or controlling a school's curriculum or program of instruction,<sup>144</sup> or providing support for the development of a national test in reading, math or any other subject, including a test aligned to the Common Core.<sup>145</sup>

Despite the broad aims of ESSA and its desire to increase state autonomy for implementing education reforms, it retains the goal of improving outcomes for economically disadvantaged and minority students as well as greater equity in education within the aims of the law.<sup>146</sup> The next Part presents my model for the institutional design of equitable schools, which includes four building blocks for meeting the needs of disadvantaged and minority students. It then analyzes how ESSA will fall short of achieving its aims for enhancing outcomes for these students and promoting equity because it does not provide states and districts the appropriate incentives and supports to provide these building blocks.

## II. HOW ESSA MISSES THE MARK FOR EQUITY

The United States today is creating, tolerating, and reinforcing growing opportunity gaps. Children from different socioeconomic statuses and races too often live in separate and unequal worlds.<sup>147</sup> The most powerful federal response to educational inequities, ESEA, will not be the catalyst that is needed to guide states in remedying these disparities. ESSA is not effectively designed to provide states the incentives that are needed to ensure that they provide disadvantaged and minority students equitable access to an excellent education.

This Part provides my model for institutional design of an equitable education, which aims to provide excellent educational opportunities for all students. It includes four building blocks for meeting the needs of disadvantaged and minority students: fair

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please see Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607 (2015).

142. 20 U.S.C. §§ 6311(a)(4)(A)(v), 7871(a) (2016).

143. *Id.* §§ 6311(j), 7906a(a).

144. *Id.* § 7907(a).

145. *Id.* § 7909.

146. *Id.* § 6301.

147. CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 3–4; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 5.

funding, an equitable distribution of effective teachers, high-quality preK-12 opportunities to learn, and economic and racial integration. Disparities within each of these building blocks substantially contribute to opportunity gaps.<sup>148</sup> Each Section begins with research showing that these building blocks are not being provided and why this matters to the success of disadvantaged students. Each Section then critiques how ESSA fails to offer sufficient incentives and support for providing these critical building blocks.

My model for institutional design for equity differs from ESSA's approach to equity in numerous ways. My model seeks to remedy the root causes of the opportunity gaps that lead to achievement gaps in ways that ESSA does not. Rather than including conditions that insist that states address such essential foundations for equity as fair funding and high-quality preK-12 resources, ESSA mostly focuses on exposing achievement gaps and telling states to fix these symptoms of the broken foundation of our education system.<sup>149</sup> When ESSA does attempt to remedy aspects of the opportunity gap, such as teacher quality or disparities in resources, the flawed design and limited enforcement ability of the DOE will make these requirements ineffectual.<sup>150</sup>

My model also offers a comprehensive approach to education reforms to achieve educational equity that ESSA lacks. Instead of taking on the critical design flaws of the nation's education system, ESSA tinkers at the margins of reform in ways that will not ignite lasting change. Unlike ESSA, my model identifies the essential components of reform necessary to achieve educational equity while leaving substantial flexibility for states and districts to tailor these components to their needs. It includes the ability to advance equity through a variety of reforms such as innovative teacher training programs, on-line learning, and school choice, including magnet and charter schools. My model also creates a synergy among multiple reforms that is greater than each single reform.

My model recognizes that the implementation of No Child Left Behind revealed that states and districts do not always pos-

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148. See generally CLOSING THE OPPORTUNITY GAP, *supra* note 1 (discussing the scope and causes of educational opportunity gaps).

149. See Aldeman, *supra* note 5, at 91, 94–98.

150. For an analysis of ESSA's flawed approach to remedying opportunity gaps requirements, see *infra* Parts II.B (teacher quality) and II.C (resource inequities).

sess the knowledge and capacity needed to design and implement effective reforms.<sup>151</sup> For instance, when districts had to implement corrective action or the restructuring of schools under No Child Left Behind, which were intended to be the most systemic reforms, these efforts prompted some changes to schools “but fell short of what a lay observer might have considered dramatic reforms.”<sup>152</sup> Many state departments of education also lacked the expertise and capacity to guide reform under No Child Left Behind.<sup>153</sup> States similarly have reported under ESSA that they set low criteria to identify schools for improvement because they have concerns about their capacity to offer support to a substantial number of schools.<sup>154</sup> Lastly, while ESSA will result in a reduction in real per-pupil federal education spending<sup>155</sup> and federal education spending is expected to decrease in real dollars over the next ten years,<sup>156</sup> my model calls for an increase in the federal investment in education to support comprehensive and lasting reform that advances educational equity. This increase in federal education funding would expand the capacities of states and districts to implement reforms.

When assessing whether ESSA will enhance or undermine equity, it is important to understand that the initial reviews of state ESSA plans show that states have not prioritized equity.<sup>157</sup> For instance, the Education Trust’s 2017 review of ESSA plans found that “[f]or all of the talk about equity surrounding ESSA,

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151. See PAUL MANNA, COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES 49, 83–85 (2011).

152. *Id.* at 83.

153. See *id.* at 49.

154. See NATASHA USHOMIRSKY ET AL., THE EDUC. TR., TRENDS IN STATE ESSA PLANS: EQUITY ADVOCATES STILL HAVE WORK TO DO 8–9 (2017).

155. Aldeman, *supra* note 5, at 103 (explaining that ESSA’s 7.8% increase for Title I over four years will not keep pace with the 8.2% increase that would be required for ESSA to keep pace with a modest inflation adjustment).

156. JULIA B. ISAACS ET AL., URBAN INST., KIDS’ SHARE 2018: REPORT ON FEDERAL EXPENDITURES ON CHILDREN THROUGH 2017 AND FUTURE PROJECTIONS 52 (2018). Although federal education funding has increased from 2016 to 2017, a study of the trend of this funding finds that it will decline both in real dollars and as a percentage of the gross domestic product over the next decade. *Id.* at 14, 52.

157. As discussed in greater detail in Part II.B *infra*, an analysis of state plans to implement ESSA’s requirements on the equitable distribution of teachers found that states generally have evaded these requirements. See Elizabeth Ross, *State ESSA Plans Fail to Adequately Address Educator Inequities*, REALCLEAR EDUCATION (Nov. 14, 2017), [https://realcleareducation.com/articles/2017/11/14/state\\_essa\\_plans\\_fail\\_to\\_adequately\\_address\\_educator\\_inequities.html](https://realcleareducation.com/articles/2017/11/14/state_essa_plans_fail_to_adequately_address_educator_inequities.html).

too many state leaders have taken a pass on clearly naming and acting on schools' underperformance for low-income students, students of color, students with disabilities, and English learners."<sup>158</sup> In addition, "the vast majority of states" will determine school ratings based entirely or mostly on the average school-wide performance thereby ignoring student subgroup performance when rating schools.<sup>159</sup> Some states, such as Washington and Indiana, are providing ratings for subgroups, but these subgroup ratings typically do not influence a school's rating and thus are unlikely to spark improvements for, and investments in, improving subgroup performance.<sup>160</sup> Ultimately, the decision by states to base school ratings on averages will allow many schools to receive high ratings even though many historically disadvantaged students are showing minimal or no improvement.<sup>161</sup>

In addition, states must identify a school for targeted support and improvement if a subgroup is "consistently underperforming" as defined entirely by the state.<sup>162</sup> States exercised their discretion to set low performance expectations for the performance of subgroups.<sup>163</sup> For instance, states such as Washington and New Mexico are only defining underperformance as performance in the bottom 5% of all students.<sup>164</sup> This approach conflates two distinct categories that were intended for improvement under ESSA—targeted support for "consistently underperforming" subgroups and additional targeted support and improvement for a subgroup that is performing as poorly as the bottom 5% of all students.<sup>165</sup> This lackluster commitment to closing achievement gaps reveals that states are already not living up to their recent public commitment to prioritize equity.

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158. USHOMIRSKY ET AL., *supra* note 154, at 2.

159. *Id.* at 5.

160. *Id.* at 6.

161. *See id.* at 6–7.

162. 20 U.S.C. § 6311(d)(2)(A) (2016).

163. USHOMIRSKY ET AL., *supra* note 154, at 8.

164. *Id.*

165. *Compare* 20 U.S.C. § 6311(d)(2)(B) (requiring states to identify a school for targeted support and improvement if a subgroup of students consistently underperforms as defined by the state), *with id.* § 6311(d)(2)(C) (requiring additional targeted support and improvement when a subgroup of students tests in the bottom 5% of all students).

## A. FAIR FUNDING

## 1. The Challenge of Inequitable Funding and Why It Matters

Funding provides the foundation upon which education systems are built. Three funding sources support schools: state, local, and federal funding. The most recent data indicates that states provide 46.2% of funding, districts provide 45%, and the federal government provides 8.7%.<sup>166</sup> The percentage of the state contribution varies widely by state, with a high of 89.8% in Vermont and a low of 26% in Illinois.<sup>167</sup> Districts primarily raise their contribution through property taxes, which contributes to funding disparities due to the wealth differences between communities.<sup>168</sup>

Research has long confirmed that disadvantaged students require more resources for them to be competitive with their non-disadvantaged peers.<sup>169</sup> A conservative estimate is that disadvantaged students need 40% more resources than other students, a figure that is based on the Title I funding formula,<sup>170</sup> but some scholars contend that this is an underestimate of the additional costs of successfully educating these students.<sup>171</sup> For instance, one study estimates that it costs at least twice as much to educate a disadvantaged child to be as successful as his or her peers.<sup>172</sup> Additional funding for these students can provide ac-

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166. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, DIG. EDUC. STAT. Table 235.10 (July 2016), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_235.10.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_235.10.asp).

167. U.S. Dep't of Educ., Nat'l Ctr. for Educ. Statistics, DIG. EDUC. STAT. Table 235.20 (July 2016), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_235.20.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_235.20.asp).

168. Sean P. Corcoran, *The Role of Local Revenues in Funding Disparities Across School Districts*, in BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, *THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING* 55, 85 (2012); BETTY COX ET AL., *THE COSTS OF EDUCATION: REVENUE AND SPENDING IN PUBLIC, PRIVATE AND CHARTER SCHOOLS* 34 (2013).

169. JACK JENNINGS, *PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM* 179 (2015); Richard Rothstein, *Why Children from Lower Socioeconomic Classes, on Average, Have Lower Academic Achievement than Middle Class Children*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO, *supra* note 32, at 61, 61–69.

170. MORGAN & AMERIKANER, *supra* note 32, at 7.

171. *E.g.* BAKER ET AL., *supra* note 32, at 4–5.

172. See William D. Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?* 17 (Ctr. for Policy Research at Syracuse Univ., Working Paper No. 60, 2004) (finding that the weights for disadvantaged or limited

cess to a high-quality curriculum and supportive curricular resources; more learning time, such as strong after-school and summer programs, as well as high-quality early childhood education; and, partnerships with outside providers, such as the foster care system or health care providers.<sup>173</sup>

Research also reveals that although the overwhelming majority of states do provide significant levels of additional state funding to students from low-income families, the highest poverty districts typically receive less total state and local funding.<sup>174</sup> Indeed, when federal funding for poor students is removed from consideration, studies confirm that poor students often-times receive either less or the same funding as their more affluent peers.<sup>175</sup> For example, the 2018 study by the Education Trust of state and local funding found that nationally the districts with the highest poverty receive approximately \$1,000, or 7%, less per student than the lowest poverty districts.<sup>176</sup> For twenty-three states, high and low-poverty districts received about the same funding, while four states provided less funding to high-poverty districts (this pattern is considered regressive).<sup>177</sup> Twenty states gave at least 5% more funding to low-poverty districts and six of those states (Georgia, Minnesota, New Jersey, Ohio, South Dakota, and Utah) provide at least 15% more to the districts with the most poverty.<sup>178</sup> Thus, this study confirms that twenty-seven states do not provide high-poverty districts with the additional funding they need to meet the needs of students in these districts.<sup>179</sup> In addition, when this study accounted for the additional needs of disadvantaged students, it found even greater inequities in spending patterns.<sup>180</sup>

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English proficient students should be between 111% and 215%).

173. NATASHA USHOMIRSKY & DAVID WILLIAMS, THE EDUC. TR., *FUNDING GAPS 2015: TOO MANY STATES STILL SPEND LESS ON EDUCATING STUDENTS WHO NEED IT MOST 4* (2015); Darling-Hammond, *supra* note 32, at 77, 88–90; Rothstein, *supra* note 169, at 62, 70.

174. MORGAN & AMERIKANER, *supra* note 32, at 6, 9.

175. See BAKER ET AL., *supra* note 32, at 9; EQUITY & EXCELLENCE COMM'N, *supra* note 38, at 18 (“The majority of states do not provide additional funding for students living in high concentrations of poverty.”).

176. MORGAN & AMERIKANER, *supra* note 32, at 6.

177. *Id.*

178. *Id.*

179. *Id.* at 2.

180. After this adjustment, high-poverty districts received \$2,000 or 16% less funding. Twenty rather than four states were regressive and seven rather than twenty states provided more funding to high-poverty districts. *Id.* at 7.

A 2018 study by the Education Law Center similarly found that a majority of states do not provide high-poverty districts with more state and local funding than low-poverty districts, with thirty-seven states providing less (seventeen states) or the same (twenty states) funding to high-poverty districts.<sup>181</sup> State funding systems also disadvantage many minority students. The districts serving the highest percentages of minority students receive about \$1,800, or 13% less per pupil, than districts with the lowest percentages of students of color.<sup>182</sup> These disparities led the U.S. Commission on Civil Rights to conclude in a 2018 report that “vast funding inequities in our state public education systems render the education available to millions of American public school students profoundly unequal.”<sup>183</sup> When these disparities are aggregated among classrooms, schools, and districts, they negatively impact the educational opportunities of disadvantaged and minority schoolchildren.<sup>184</sup>

Funding disparities are important because the longstanding debate regarding whether money matters has concluded with a consensus that money spent well matters.<sup>185</sup> Compelling research supports this conclusion. For example, states that adopted reforms that aimed to increase the adequacy of school funding between 1990 and 2011 raised student achievement in

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181. The 2018 report *Is School Funding Fair?* measures the distribution of state and local funding relative to poverty. BAKER ET AL., *supra* note 32, at 9. The report finds that seventeen states provide at least 5% or less funding to districts with 30% poverty or more, twenty states provide essentially the same funding to low- and high-poverty districts and only eleven states provide at least 5% more funding to districts with 30% or more students in poverty. *See id.* at 9; *see also* EQUITY & EXCELLENCE COMM’N, *supra* note 38, at 17. In 2017, scholars at the Urban Institute conducted a study of the distribution of total funding and found that “poor students in most states attend school districts that are about as well funded as the districts nonpoor students attend in their state.” MATTHEW M. CHINGOS & KRISTIN BLAGG, THE URBAN INST., DO POOR KIDS GET THEIR FAIR SHARE OF SCHOOL FUNDING? 14 (2017). However, when federal dollars that are targeted to poor students are excluded, the study found that even though the state funding of education is largely progressive, “about half of the states in our study still distribute relatively more local and state funding to students not in poverty.” *Id.* at 7.

182. MORGAN & AMERIKANER, *supra* note 32, at 10.

183. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 9.

184. *See* USHOMIRSKY & WILLIAMS, *supra* note 173, at 1.

185. BAKER ET AL., *supra* note 32, at 1; Darling-Hammond, *supra* note 32, at 97; Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson, *Creating New Pathways to Equal Educational Opportunity*, in THE ENDURING LEGACY OF RODRIGUEZ, *supra* note 60, at 263, 266.

low-income districts and decreased achievement gaps.<sup>186</sup> In contrast, the achievement gap increased in states without such reforms.<sup>187</sup> Increased funding has been shown to increase graduation rates.<sup>188</sup> School funding reform also can influence outcomes beyond academic performance. For instance, one study found that a 10% increase in per-pupil funding for twelve years of schooling resulted in a 6% decrease in adult poverty, almost 10% more in adult earnings, and almost half a year of additional schooling.<sup>189</sup> This study suggests that a 25% funding increase during a child's school years could eliminate the disparities in outcomes between disadvantaged students and their peers.<sup>190</sup> Other research confirms that states that effectively target additional resources to higher poverty districts experience improved student achievement and smaller achievement gaps.<sup>191</sup> Yet, the majority of states do not provide sufficient funding for high-poverty children to attain even average levels of achievement.<sup>192</sup>

My prior research also identifies several shortcomings of school funding systems beyond failing to provide disadvantaged students the additional resources that they need.<sup>193</sup> For instance, state funding systems often are not systematically designed to provide the funding necessary to enable all students to successfully learn the content in state standards.<sup>194</sup> In addition, many states provide low funding levels that are insufficient to provide an adequate education,<sup>195</sup> “with the lowest funded states

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186. See Julien LaFortune et al., *Can School Finance Reforms Improve Student Achievement?*, WASH. CTR. FOR EQUITABLE GROWTH (Mar. 16, 2016), <https://equitablegrowth.org/can-school-finance-reforms-improve-student-achievement>.

187. See *id.*

188. See C. Kirabo Jackson et al., *How Money Makes a Difference: The Effects of School Finance Reforms on Outcomes for Low Income Students*, STAN. CTR. FOR OPPORTUNITY POL'Y EDUC. (Nov. 2014), <https://edpolicy.stanford.edu/sites/default/files/publications/how-money-makes-difference-effects-school-finance-reforms-outcomes-low-income-students.pdf>.

189. See C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q.J. ECON. 157, 160 (2016).

190. See *id.*

191. See BAKER ET AL., *supra* note 32, at 28.

192. See *id.*

193. Kimberly Jenkins Robinson, *How Reconstructing Education Federalism Could Fulfill the Aims of Rodriguez*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 60, at 213–20.

194. See *id.* at 214; EQUITY & EXCELLENCE COMM'N, *supra* note 38, at 17.

195. See Robinson, *supra* note 193, at 216.

providing less than a third of what the highest funded states provide their schools.”<sup>196</sup> Unfortunately, most states have failed to adopt school funding systems that effectively address the needs of the full complement of students, especially those who experience the greatest disadvantage due to disability, poverty, or limited English proficiency.<sup>197</sup> States also have not developed effective accountability mechanisms to ensure that the funding provided is used efficiently to improve student achievement and attain other educational goals.<sup>198</sup> These shortcomings compound the damage done by the broken foundation of inequitable funding.

## 2. Why ESSA Will Fail to Meet This Challenge

ESSA generally retains the same Title I funding formulas as well as the comparability, supplement-not-supplant, and maintenance of effort requirements from No Child Left Behind, and scholarly commentary on No Child Left Behind has established why these provisions will not result in fair funding. For instance, scholars have shown how Title I funds are spread too thinly and the formulas do not effectively acknowledge the adverse effects of concentrated poverty, among other concerns.<sup>199</sup> ESSA will mean a decline in actual, per-pupil spending because the 7.8% increase for Title I will provide less than the 8.2% increase that would be required to keep funding constant when adjustments are considered for a modest increase in inflation and student enrollment.<sup>200</sup> Similarly, despite the requirement that Title I schools be comparable to non-Title I schools, the U.S. Commission on Civil Rights noted in a 2018 report that “more than 40 percent of Title I schools spent less on personnel per-pupil than non-Title I schools at the same grade level and that are within the same school district.”<sup>201</sup> Congress failed to revise this provision despite the fact that the provision’s comparability requirement is illusory given a regulatory loophole that merely requires “substantial comparability,” exempts teacher salaries,

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196. BAKER ET AL., *supra* note 32, at 28.

197. *See id.* at 1.

198. *See* Robinson, *supra* note 193, at 216.

199. Aldeman, *supra* note 5, at 102; Black, *supra* note 3, at 1339; Black, *Leveraging Funding*, *supra* note 60, at 233–41; Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 973, 981 (2008).

200. *See* Aldeman, *supra* note 5, at 103.

201. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 9.

and has left such wide discretion in interpretation that enforcement has been essentially impossible.<sup>202</sup>

The DOE attempted to strengthen the supplement-not-supplant provision through its ESSA regulations, but Congress met this possibility with great hostility. Former U.S. Secretary of Education John King proposed a regulatory change to the supplement-not-supplant requirement that would have addressed the fact that an estimated 5,750 Title I schools received about \$440,000 less from their states and districts annually than non-Title I schools.<sup>203</sup> The requirement would have required districts to establish that they spent roughly the same amount of money, including teachers' salaries, on Title I schools and non-Title I schools.<sup>204</sup> Congress and interest groups, including the Council of Chief State School Officers, expressed strong opposition to this proposed regulatory revision.<sup>205</sup> The DOE eventually withdrew its proposal in early 2017 due to this strenuous opposition.<sup>206</sup>

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202. Aldeman, *supra* note 5, at 102; Black, *supra* note 3, at 1339; Black, *Leveraging Funding*, *supra* note 60, at 231, 239; Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 315–16 (2010).

203. See *Fact Sheet: Supplement-not-Supplant Under Title I of the Every Student Succeeds Act*, U.S. DEP'T EDUC. (Aug. 31, 2016), <https://ed.gov/news/press-releases/fact-sheet-supplement-not-supplant-under-title-i-every-student-succeeds-act>.

204. See *id.*

205. See *Next Steps in K-12 Education: Examining Recent Efforts to Implement the Every Student Succeeds Act: Hearing Before the H. Comm. on Educ. & the Workforce*, 114th Cong. 2 (2016) (Statement of John Kline, Congressman) (“The second troubling sign surrounds the long standing policy that Federal funds are a supplement and do not supplant State and local resources . . . . Last year, Congress decided the rule would be enforced equally across all schools. Now school districts must simply show that funds are distributed fairly, without prescribing a specific approach or outcome. The law explicitly prohibits the Secretary from interfering, yet that is precisely what you are proposing to do. What the Department is proposing would be both illegal and harmful to students and communities.”); *ESSA Implementation in States and School Districts Perspectives from the U.S. Secretary of Education: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 114th Cong 2 (2016) (statement of Lamar Alexander, Sen.) (“Mr. Secretary, not only is what you’re doing against the law, but the way you’re trying to do it is against another provision in the law. To accomplish your goals on comparability, you are using the so-called “supplement not supplant” provision that is supposed to keep local school districts from using Federal title I dollars as a replacement for State and local dollars in low-income schools. . . . We included specific prohibitions in the so-called “supplement not supplant” provision that would prohibit you from doing the very things you are proposing to do.”); Alyson Klein, *Education Department Withdraws Controversial ESSA Spending Proposal*, EDUC. WK. (Jan. 18, 2017), [http://blogs.edweek.org/edweek/campaign-k-12/2017/01/essa\\_john\\_b\\_king\\_jr\\_withdraws\\_.html](http://blogs.edweek.org/edweek/campaign-k-12/2017/01/essa_john_b_king_jr_withdraws_.html).

206. See Klein, *supra* note 205.

Given that ESSA maintains the status quo on provisions that directly influence Title I funding, the greatest potential for ESSA to improve the fairness of school funding is its requirement that districts must publish per-pupil spending data for each school and states must report this information for each district and school. This and other ESSA provisions are intended to offer the public better information and enable it to advance equity in student access to resources.<sup>207</sup> Education scholar Marguerite Roza predicts that making these inequities public will create a “sunlight effect” that will initially spark outrage and ultimately reform in communities where schools for low-income and minority children are provided less funding.<sup>208</sup> Others also note that this data will put powerful information into the hands of local advocates, including those litigating school funding disputes.<sup>209</sup>

I agree that this new data in the hands of parents, scholars, policymakers, and reformers will spark new conversations about funding inequities and what should be done about them. However, I predict that this requirement will not have as dramatic an impact on reducing funding inequities as some hope for several reasons. First, ESSA does not require states or districts to take any action when funding disparities are revealed. Thus, states and districts will still receive millions in federal funding without addressing funding inequities.

Second, many who are outraged about the prevalent disparities will lack a judicial forum to challenge them. The Supreme Court closed the courthouse door to federal claims for a right to education that might have remedied inequitable funding disparities in *San Antonio Independent School District v. Rodriguez* when it held that the U.S. Constitution does not recognize an explicit or implicit right to education.<sup>210</sup> In at least nineteen states, plaintiffs have never prevailed in school funding litigation.<sup>211</sup> One of these states is Virginia, where in the 1994 decision *Scott v. Commonwealth*, the Virginia Supreme Court held that the Commonwealth’s constitutional provisions requiring

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207. S. REP. NO. 114-231, at 29 (2016).

208. Marguerite Roza, *The Sunlight Effect: More Equitable Spending on Its Way Regardless of Rulemaking*, BROOKINGS BROWN CTR. CHALKBOARD (Apr. 27, 2016), <https://brookings.edu/blog/brown-center-chalkboard/2016/04/27/the-sunlight-effect-more-equitable-spending-on-its-way-regardless-of-rulemaking>.

209. Aldeman, *supra* note 5, at 103.

210. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); Ogletree & Robinson, *supra* note 185, at 264.

211. See Ogletree & Robinson, *supra* note 185, at 277.

the legislature to maintain public schools and “to seek to ensure” that they provide high-quality education did not require “substantial equality” in public school spending between or within school districts.<sup>212</sup> Instead, the Virginia Constitution entrusted the quality of the public schools to the sole province of the legislature.<sup>213</sup> Other states also have concluded that school funding remains within the exclusive and unreviewable purview of the legislature.<sup>214</sup> In addition, even where plaintiffs have been successful in school funding litigation, reforms have been very slow to secure and maintain, as many state legislatures frequently resisted enacting the necessary reforms, particularly when predominantly minority districts prevailed in court.<sup>215</sup> Even those who have brought successful school funding litigation support the development of a federal forum for funding litigation because state courts do not provide adequate protection for disadvantaged students.<sup>216</sup>

Third, poor and minority communities possess limited political power and influence to secure equitable reform through state legislatures and local school boards.<sup>217</sup> Most state legislatures are not interested in increasing educational equity.<sup>218</sup> State legislatures have long had access to the data that shows enduring inequities, yet education scholar and reformer Cynthia Brown has noted that “despite this ready access to information that can and does reveal inequities, state efforts to correct even glaring problems are rare.”<sup>219</sup> Similarly, many local governments will not provide effective avenues for reform. Local participation in school governance is quite low with no more than 10–

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212. See *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994).

213. See *id.*

214. See, e.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1186 (Ill. 1996) (“The framers of the 1970 Constitution embraced this limited construction that the constitutional efficiency requirement authorized judicial review of school district boundaries, but they did not intend to otherwise limit legislative discretion.”).

215. RYAN, *supra* note 27, at 153, 171; David G. Sciarra & Danielle Farrie, *From Rodriguez to Abbott: New Jersey’s Standards-Linked School Funding Reform*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 60, at 119, 125–33.

216. Michael A. Rebell, *Rodriguez Past, Present, and Future*, in *THE ENDURING LEGACY OF RODRIGUEZ*, *supra* note 60, at 65, 72–75; Sciarra & Farrie, *supra* note 215, at 133–39.

217. Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 633 (2011).

218. Brown, *supra* note 23, at 166.

219. See *id.*

15% of voters participating in school board elections.<sup>220</sup> Many local school boards limit the discussion of citizens at public meetings and the discussions often do not influence districts' decisions.<sup>221</sup> The limited political influence of many disadvantaged and minority communities suggests that they may lack the leverage to demand change.

Finally, the impacts of funding disparities have been plain for all to see for generations, including in New York Times best-selling books by such authors as Jonathan Kozol beginning in the 1990s and Robert Putnam in 2015.<sup>222</sup> These disparities are also in plain view in just a short drive from many cities to their surrounding suburbs.<sup>223</sup> The pervasiveness and consistency of these disparities reveals that the nation has decided to tolerate and even embrace these disparities. Therefore, while ESSA's requirements to publish per-pupil funding data could spark some reform, it is more likely that only limited reform will occur when citizens, advocacy groups, and state and local governments provide the catalyst for reform. History suggests that federal incentives and conditions that support funding reform will be necessary for states and localities to initiate and sustain comprehensive funding reform that provides fair funding.

#### B. AN EQUITABLE DISTRIBUTION OF EFFECTIVE TEACHERS

Scholars concur that access to high-quality teachers is the most important resource for student success, particularly for the success of disadvantaged students.<sup>224</sup> Achieving this goal requires, among other reforms, recruiting and retaining high-quality teachers for disadvantaged and minority students, offering impactful professional development and feedback as well as in-

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220. See Michael W. Kirst, *Turning Points: A History of American School Governance*, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 14, 38 (Noel Epstein ed., 2004).

221. See Wilson, *supra* note 217, at 633.

222. See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1992); JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* (2005); ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015).

223. See RYAN, *supra* note 27, at 1, 3.

224. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 38; LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA'S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* 40, 43 (James A. Banks ed., 2010); Michael A. Rebell, *Mandating Truly "Highly Qualified" Teachers for the Future of Education*, in *TEACHERS OF THE FUTURE, SCHOOLS OF THE FUTURE* 69–70 (2007).

creasing the selectivity of teacher hiring and retention decisions.<sup>225</sup> The research described below establishes that disadvantaged and minority students are consistently provided lower quality teachers and that the inequitable distribution of teachers has an adverse effect on their success. I also analyze why ESSA will not provide adequate support for ensuring the equitable distribution of effective teachers.

### 1. The Challenge of the Inequitable Distribution of Effective Teachers and Why It Matters

Research confirms that low-income and minority students are educated by significantly less experienced and less qualified teachers, which harms their academic outcomes.<sup>226</sup> These inequities occur just as often within schools as between schools.<sup>227</sup> Indeed, leading education expert Linda Darling-Hammond has noted that “[b]y every measure of qualifications—certification, subject matter background, pedagogical training, selectivity of college attended, test scores, or experience—less qualified teachers are found in schools serving greater numbers of low-income

225. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 38–39.

226. See Frank Adamson & Linda Darling-Hammond, *Funding Disparities and the Inequitable Distribution of Teachers: Evaluating Sources and Solutions*, 20 EDUC. POL’Y ANALYSIS ARCHIVES 1, 5 (2012) (“[L]ow-salary districts serve students with higher needs, offer poorer working conditions, and hire teachers with significantly lower qualifications, who typically exhibit higher turnover. We find that districts serving the highest proportions of minority and low-income students have about twice as many uncredentialed and inexperienced teachers as do those serving the fewest.”); Goldhaber et al., *Uneven Playing Field? Assessing the Teacher Quality Gap Between Advantaged and Disadvantaged Students*, 44 EDUC. RESEARCHER 293, 293 (2015) (“We demonstrate that in elementary school, middle school, and high school classrooms, virtually every measure of teacher quality we examine—experience, licensure exam scores, and value added—is inequitably distributed across every indicator of student disadvantage—free/reduced-price lunch status, underrepresented minority, and low prior academic performance.”); Glenda L. Partee, *Attaining Equitable Distribution of Effective Teachers in Public Schools*, CTR. FOR AM. PROGRESS 5 (2014), <https://americanprogress.org/issues/education-k-12/reports/2014/04/11/87695/attaining-equitable-distribution-of-effective-teachers-in-public-schools> (“There are near-unanimous findings that the best teachers—those capable of improving student achievement—are not equitably distributed across the spectrum of schools with concentrations of high- and low-poverty students and schools with high and low concentrations of students of color.”). High-poverty schools experience higher rates of teacher turnover, particularly when the school educates high concentrations of minority students. Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, 26 ECON. EDUC. REV. 145, 145 (2007).

227. See Partee, *supra* note 226, at 5.

and minority students.”<sup>228</sup> The fact that disadvantaged and minority students typically receive less effective teachers across multiple measures<sup>229</sup> confirms the deeply entrenched nature of this problem throughout the United States.

Studies of students, schools, districts, and states confirm that the background, preparation, certification, and experience of teachers exerts a substantial influence on student achievement.<sup>230</sup> As the proportion of teachers who are uncertified, inexperienced, and underprepared increases, student achievement decreases.<sup>231</sup> Teacher knowledge impacts student outcomes, particularly in mathematics, yet disadvantaged students are less likely than children from high-income families to be taught by teachers with high knowledge levels.<sup>232</sup> High-poverty schools are less likely than low-poverty schools to have a math or science teacher who is teaching in her or his field.<sup>233</sup> High-poverty schools also have significantly fewer teachers with a master’s degree than those in low-poverty schools.<sup>234</sup> Some research indicates that teachers who have taught for at least two years or more are more effective than teachers with one year or less of teaching experience.<sup>235</sup> Children from disadvantaged households have less access to teachers with at least two years of experience.<sup>236</sup> In addition, novice science and math teachers are more common in high-poverty schools than low-poverty schools, and are more common in high-minority schools than low-minority schools.<sup>237</sup>

Research also shows that instructional quality strongly influences the amount students learn and confirms the impact of

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228. See Darling-Hammond, *supra* note 32, at 87.

229. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 38 (“[N]o matter what the measure, [disadvantaged students] get *less-effective* teachers compared to higher-income students.”); Goldhaber et al., *supra* note 226, at 304 (“[A]cross nearly every combination of school level, student disadvantage indicator, and indicator of low teacher quality, disadvantaged students have lower-quality teachers compared to advantaged students, on average.”).

230. See DARLING-HAMMOND, *supra* note 224, at 87.

231. See *id.* at 89.

232. See Stephen W. Raudenbush, *The Brown Legacy and the O’Connor Challenge: Transforming Schools in the Images of Children’s Potential*, 38 EDUC. RESEARCHER 169, 175 (2009) (citations omitted).

233. See NAT’L SCI. FOUND., SCIENCE AND ENGINEERING INDICATORS 2012 1-26 app. tbl. 1-19 (2012).

234. See *id.* at 1-22, appendix table 1-11.

235. See Raudenbush, *supra* note 232, at 175 (citations omitted).

236. See *id.*

237. See NAT’L SCI. FOUND., *supra* note 233, at 1-25.

such instructional factors as adequate instructional time, a robust curriculum, and aligning instruction to the abilities of students. Children of different races with similar abilities perform similarly when they receive the same quality of instruction.<sup>238</sup> Schools with high concentrations of low-income and minority students experience more teacher turnover than other schools<sup>239</sup> and “the constant staff churn consigns a large share of children in high-need schools to a parade of relatively ineffective teachers, leading to higher rates of remediation, grade retention, and dropping out.”<sup>240</sup> When states invest resources in initiatives like smaller classes in high-poverty districts and competitive salaries, these states experience higher academic achievement for disadvantaged children and a smaller achievement gap between disadvantaged students and their more affluent peers.<sup>241</sup> In addition, some research has found that teacher qualifications can exert more influence on achievement than the race of a child or their parents’ education.<sup>242</sup>

Given the influential nature of teachers on student learning, the equitable distribution of effective teachers works in synergy with the other building blocks of my model. For instance, equitably distributing effective teachers is dependent on fair funding that appropriately recognizes the additional challenges teachers face in struggling communities. Teachers also will be reluctant to teach and remain in resource-starved working environments. Families will not choose to send their children to schools with low-quality teachers, and thus, integration is dependent on teachers being equitably distributed.

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238. See Darling-Hammond, *supra* note 32, at 90 (citation omitted); Roger D. Goddard & Wayne K. Hoy, *Collective Teacher Efficacy: Its Meaning, Measure, and Impact on Student Achievement*, 37 AM. EDUC. RES. J. 479, 479 (2000) (finding that “collective teacher efficacy was positively associated with differences between schools in student-level achievement in both reading and mathematics”); see also Lindsay Clare Matsumura et al., *Measuring Instructional Quality in Accountability Systems: Classroom Assignments and Student Achievement*, 8 EDUC. ASSESSMENT 207, 226–27 (2002) (finding that for secondary students “higher quality teachers’ assignments were associated with higher quality student work” and that “the quality of teachers’ assignments predicted students’ scores on the reading and language portions of the Stanford 9, even after controlling for students’ backgrounds and prior level of achievement”).

239. See NAT’L SCI. FOUND., *supra* note 233, at 1-29.

240. See Darling-Hammond, *supra* note 32, at 89.

241. See BRUCE D. BAKER ET AL., MIND THE GAP: 20 YEARS OF PROGRESS AND RETRENCHMENT IN SCHOOL FUNDING AND ACHIEVEMENT GAPS, EDUCATIONAL TESTING SERVICE RESEARCH REPORT NO. RR-16-15 at 27–28 (2016).

242. See Darling-Hammond, *supra* note 32, at 87.

## 2. Why ESSA Will Fail to Meet This Challenge

Despite its requirement that states must ensure that low-income and minority students are not disproportionately taught by inexperienced, out-of-field, or ineffective teachers,<sup>243</sup> ESSA will not have a significant impact on the equitable distribution of effective teachers for several reasons. Research and data confirm that the quality and qualifications of teachers remain inequitably distributed in spite of the No Child Left Behind requirement that states ensure that inexperienced, out-of-field, or ineffective teachers do not disproportionately teach disadvantaged and minority students and that state plans identify how states will evaluate and report to the public progress on achieving this goal.<sup>244</sup> A DOE study of teacher quality found that although the overwhelming majority of teachers were highly qualified by 2006–07, teachers who were not highly qualified were more likely to teach in a high-poverty school than a low-poverty school (5% of teachers not highly qualified versus 1% respectively), and more likely to teach in a school with more than 75% minority students than a school with less than 25% minority students (4% of teachers not highly qualified versus 1% respectively).<sup>245</sup> Even among highly qualified teachers, high-poverty schools were significantly more likely to employ teachers with less than three years of experience (14% of teachers with less than three years of experience versus 8% respectively), and such teachers were more than twice as likely to teach in a school with more than 75% minority students than a school with less than 25% minority students (15% of teachers with less than three years of experience versus 7% respectively).<sup>246</sup> Highly qualified secondary teachers of English and math were less likely to possess a degree in the field if they taught in high-poverty schools than in low-poverty schools (40% versus 59%), while the percentages of such teachers in high- and low-minority schools was comparable.<sup>247</sup> ESSA retains and does not make improvements to

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243. 20 U.S.C. § 6311(g)(1)(B) (2016).

244. *Id.*

245. See U.S. DEP'T OF EDUC., STATE AND LOCAL IMPLEMENTATION OF THE NO CHILD LEFT BEHIND ACT, VOLUME VIII—TEACHER QUALITY UNDER NCLB: FINAL REPORT 51 (2009), <https://www2.ed.gov/rschstat/eval/teaching/nclb-final/report.pdf>. This report generally defined a high-poverty school as a school with 75% or more students in poverty based on Census data and a low-poverty school as one in which less than 25% of students were living in poverty. See *id.* at app. A 149.

246. See *id.* at 53.

247. See *id.* at 53–54.

the No Child Left Behind requirements on the distribution of teachers that have allowed these disparities to persist.

When the DOE possessed real power to hold states accountable for compliance under No Child Left Behind, it paid minimal attention to the requirement that disadvantaged and minority students should not be disproportionately taught by unqualified teachers.<sup>248</sup> Early implementation efforts did not require states to address this requirement and instead emphasized accountability and assessment requirements.<sup>249</sup> Despite the fact that it contradicted No Child Left Behind, DOE did not require states to report the percentage of highly qualified teachers in schools with low concentrations of poverty. This allowed states to mask differences in teacher quality between high- and low- poverty schools because these differences are typically larger than the difference between the state averages and high-poverty schools.<sup>250</sup>

In addition, the ESSA requirement that poor and minority students must not disproportionately be taught by inexperienced, ineffective, and out-of-field teachers lacks an accountability provision to ensure enforcement.<sup>251</sup> Given the fact that DOE did not enforce this provision under No Child Left Behind and the many limits on the Secretary of Education's authority to enforce ESSA, the hands-off approach of ESSA is unlikely to spark significant state reform. In addition, ESSA notes that states are not required "to develop or implement a teacher, principal, or other school leader evaluation system."<sup>252</sup> This caveat suggests that states should rely on existing teacher evaluation systems to define an "ineffective" and "inexperienced" teacher despite the fact that these systems may not have been designed to assist in fostering the equitable distribution of effective and experienced teachers. States determine how an ineffective and inexperienced teacher is defined,<sup>253</sup> and thus, they have the flexibility to set a low bar for teacher effectiveness, just as they set low standards for a highly qualified teacher under No Child Left Behind.<sup>254</sup> Furthermore, the requirement to report the qualifications of

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248. See GAIL L. SUNDERMAN & JIMMY KIM, *TEACHER QUALITY: EQUALIZING EDUCATIONAL OPPORTUNITIES AND OUTCOMES* 26 (2005).

249. See *id.*

250. See *id.*

251. Aldeman, *supra* note 5, at 92.

252. 20 U.S.C. § 6311(g)(1)(B) (2016).

253. See Jochim, *supra* note 132, at 131.

254. BENJAMIN MICHAEL SUPERFINE, *THE COURTS AND STANDARDS-BASED EDUCATION REFORM* 52 (2008).

teachers based on school poverty will only lead to impactful reforms to the extent that local constituents have the ability to hold districts accountable for redistributing teachers. Thus, like the requirement to publish per-pupil spending, the impact of this provision will be circumscribed by the limited influence of socio-economically disadvantaged and minority local constituents.

ESSA also requires that teachers be state certified.<sup>255</sup> Since all states already have a certification system, this minimal requirement allows states to decide not to improve teacher quality at all. This approach retains some of the same flaws of No Child Left Behind's highly qualified teacher requirement because it similarly establishes a low standard to qualify as a teacher. No Child Left Behind required teachers to possess a bachelor's degree, state certification and subject matter knowledge.<sup>256</sup> The highly qualified teacher requirement did have some positive impacts. More content-focused professional development was provided to teachers in elementary schools with high concentrations of disadvantaged and minority students.<sup>257</sup> Principals reported an increase in firing or transferring teachers who were not highly qualified during No Child Left Behind implementation, with principals at high-poverty schools, high-minority schools, and schools selected for improvement reporting a greater likelihood of teacher firing or transfer.<sup>258</sup> Research also confirms that the percentage of teachers who were highly qualified increased in the years following No Child Left Behind.<sup>259</sup>

However, No Child Left Behind's highly qualified teacher requirements did not significantly raise the bar for teacher quality beyond the same basic teacher qualification standards that had been around for decades.<sup>260</sup> Many state and district officials have confirmed that the No Child Left Behind highly qualified requirements had little to no impact on teacher effectiveness.<sup>261</sup>

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255. See 20 U.S.C. § 6311(h)(1)(C)(ix)(III) (2016); Black, *supra* note 3, at 1336.

256. 20 U.S.C. §§ 6319(a)(1), 7801(23)(A–C) (2012) (repealed 2015).

257. See U.S. DEPT OF EDUC., *supra* note 245, at xxx.

258. See *id.* at xxvii–xxviii.

259. A review of data by the Congressional Research Service (CRS) found that 84.5% of teachers possessed a bachelor's degree and state certification before No Child Left Behind was passed and that a steady increase in the number of highly qualified teachers was found with 96.7% of teachers meeting the requirement by 2009–10. See JEFFREY J. KUENZI, CONG. RESEARCH SERV., TEACHER QUALITY ISSUES IN THE ELEMENTARY AND SECONDARY EDUCATION ACT 10–11 (2012).

260. Rebell, *supra* note 216, at 69.

261. See JENNIFER MCMURRER, CTR. ON EDUC. POLICY, IMPLEMENTING THE

Defining high quality with such a low bar does not address the many ways that students in high-poverty and high-minority schools are disadvantaged by disparities in teachers' experience, test scores, subject matter knowledge, out-of-field teaching and pedagogical training.<sup>262</sup> In fact, DOE itself acknowledged in a 2009 report on teacher quality under No Child Left Behind that "the designation of being highly qualified is not a guarantee that students will be taught by teachers with similar skills and knowledge, and the differences among teachers continued to disadvantage the students who were most in need."<sup>263</sup> Instead, inequities endured in the distribution of teacher qualifications, such as experience and course preparation, even when teachers satisfied the highly qualified teacher requirements.<sup>264</sup>

Furthermore, DOE did not enforce the highly qualified teacher provision, even when the Secretary had real authority to enforce the law against recalcitrant states, just as it did not enforce the requirement to not disproportionately burden disadvantaged and minority students with less qualified teachers.<sup>265</sup> Secretary of Education Margaret Spellings acknowledged in a July 2007 letter that the 2005–06 highly qualified teacher deadline passed without a single state meeting it.<sup>266</sup> She also provided greater flexibility beyond 2007 for state compliance.<sup>267</sup> Ultimately, "the existence of plans, improved data collection, and detectable progress toward meeting the highly qualified teacher goal, rather than accomplishing the goal itself, became the department's expectation."<sup>268</sup> Therefore, there is no reason to think

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NO CHILD LEFT BEHIND TEACHER REQUIREMENTS 1 (2007) ("More than one-third (38%) of responding states and almost three-quarters (74%) of districts reported that these requirements have had minimal or no impact on the effectiveness of the teacher workforce. Only 8% of states and 6% of districts said that these requirements have improved teacher effectiveness to a great extent.").

262. See NAT'L SCI. FOUND., *supra* note 233, at 1-22–1-22; Darling-Hammond, *supra* note 32, at 87.

263. See U.S. DEPT OF EDUC., *supra* note 245, at 59.

264. See *id.* at 53, 140; see also MANNA, *supra* note 151, at 102–05; Michael A. Rebell & Molly A. Hunter, "Highly Qualified" Teachers: Pretense or Legal Requirement?, 85 PHI DELTA KAPPAN 690, 691 (2004). The CRS data showed a smaller gap on the percentage of highly qualified teachers in high- and low-poverty schools. See KUENZI, *supra* note 259, at 10.

265. See MANNA, *supra* note 151, at 58.

266. See *id.*

267. See *id.*

268. See *id.*

that ESSA's limited provisions to improve the quality and distribution of teachers will bring about meaningful change in teacher quality.

An early analysis of the implementation of ESSA's requirements on teacher quality indicates that states are not planning to implement these requirements in ways that will drive equity. The National Council on Teacher Quality's review of the ESSA plans for fifty states and the District of Columbia found that states have mostly evaded their obligation to adopt strong accountability plans for ensuring that students of color and low-income students receive equitable opportunities to be educated by strong teachers.<sup>269</sup> Thirty-five states do not publicly report data that assesses whether low-income and minority students are disproportionately taught by ineffective, out-of-field, or inexperienced teachers.<sup>270</sup> To eliminate teacher equity gaps, states need to provide clear and purposeful timelines and goals for ending equity gaps. However, only seven states provide this information.<sup>271</sup> This review indicates that additional federal efforts are needed beyond ESSA for states to make firm commitments to teacher equity.

### C. HIGH QUALITY PREK-12 OPPORTUNITIES TO LEARN

The opportunity to learn encompasses a broad array of educational experiences, including exposure to a rigorous curriculum, the instructional materials needed to deliver the curriculum, facilities that support student engagement, and strong extracurricular offerings.<sup>272</sup> The opportunity to learn also includes the supports students need to reach their full potential, such as effective guidance counselors and tutors.<sup>273</sup> To understand why providing high-quality preK-12 opportunities to learn is critical for closing the opportunity gap, it is essential to recognize that standards measuring the opportunity to learn were a key component of the standards and accountability movement.<sup>274</sup> Opportunity to learn standards were introduced with content standards to ensure that students receive equal access

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269. Ross, *supra* note 157.

270. ELIZABETH ROSS ET AL., NAT'L COUNCIL ON TEACHER QUALITY, 2017 STATE TEACHER POLICY YEARBOOK: NATIONAL SUMMARY 4 (2017).

271. See Ross, *supra* note 157.

272. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 39–42.

273. See *id.*

274. See Barone & DeBray, *supra* note 6, at 73–74. For further analysis of how opportunity to learn standards could be developed and prove politically feasible, see Robinson, *supra* note 50, at 988–97.

to the resources that they need to successfully learn the content of challenging academic standards.<sup>275</sup> However, the avenues for states to adopt opportunity to learn standards included in Goals 2000<sup>276</sup> and the Improving America's Schools Act of 1994<sup>277</sup> were repealed once a Republican majority took control of Congress.<sup>278</sup>

Under both Goals 2000 and the Improving America's Schools Act, state opportunity to learn standards were voluntary and "states had little appetite to tackle inequitable resource issues."<sup>279</sup> State resistance to addressing inequities in the opportunity to learn remains as strong now as it was then.<sup>280</sup> Even with the growing abundance of data that reveals inequities in the distribution of school resources, states rarely address these inequities in a comprehensive fashion.<sup>281</sup> Yet, oftentimes what you measure is what matters,<sup>282</sup> so the rationale behind measuring opportunity to learn remains sound.

Today, many minority and disadvantaged students receive opportunities to learn that are significantly inferior in quality to the opportunities that are provided to their peers.<sup>283</sup> This occurs in substantial part due to the widespread nature of inequitable funding practices discussed in Part II.A. This Section highlights some of the important opportunity gaps. It then analyzes why ESSA is not structured to ensure equitable access to high-quality opportunities to learn.

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275. See DARLING-HAMMOND, *supra* note 224, at 73–74.

276. See Goals 2000: Educate America Act § 212, 213(c)–(d) (1994). Goals 2000 allowed states to develop their own opportunity to learn standards and it created the National Education Standards and Improvement Council to write voluntary opportunity to learn standards for states. *Id.*

277. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 1111(b)(8), 108 Stat. 3518, 3523 (codified as amended in scattered sections of 20 U.S.C.). The Improving America's Schools Act required states to explain how they would assist schools and districts in developing the capacity to enable students to achieve high standards, which could include opportunity to learn standards. *Id.*

278. See Robinson, *supra* note 50, at 992–93 (summarizing the federal legislation that included opportunity to learn standards).

279. See Brown, *supra* note 23, at 159.

280. See *id.*

281. See *id.* at 165.

282. See Welner & Carter, *supra* note 33, at 2–4 (explaining that the emphasis on measuring and remedying achievement gaps has overlooked the need to close educational opportunity gaps).

283. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 5, 9.

## 1. The Challenge of Disparities in PreK-12 Opportunities to Learn and Why It Matters

The opportunity gap begins very early in the lives of children in the United States.<sup>284</sup> For instance, a collaborative study of the opportunity gap by leading scholars led by Robert D. Putnam noted such profound differences as:

Rich kids enter kindergarten over a full year ahead of bottom-third kids, having had almost 1400 more hours of developmental time with their parents (think *Good Night Moon* or paddy cake time), having experienced more personalized daycare or the presence of stay-at-home moms, having received \$5,700 more of annual parental expenditures on categories like musical instruments or books or summer camp or trips to Paris, and having heard 30 million more words than their poorer counterparts.<sup>285</sup>

Most developed countries invest more in children under five than the United States.<sup>286</sup> Despite compelling evidence of the benefits of high-quality early childhood education, in the great majority of states within the United States, disadvantaged and minority children are significantly less likely to attend early childhood education programs than their peers.<sup>287</sup>

Disparities in educational opportunity among children from different socioeconomic backgrounds and racial groups continue throughout their elementary and secondary education. Public schools are exacerbating the challenges that disadvantaged and minority students bring to classrooms by giving them less of the essential tools that are needed to succeed.<sup>288</sup> For instance, schools serving higher concentrations of poor and minority students (except Asian students) have less access to advanced and gifted course offerings and college preparatory curricula than schools serving mostly white and middle class students.<sup>289</sup> Students in poor schools often lack access to foreign language

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284. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 24.

285. See *id.* at 4.

286. See *id.* at 24–25.

287. See BAKER ET AL., *supra* note 32, at 23; U.S. DEP'T OF EDUC., A MATTER OF EQUITY: PRESCHOOL IN AMERICA 5 (2015), <https://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf>. For benefits of high-quality care, see Meredith J. Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659, 679–84 (2015); Meredith J. Harbach, *Nudging Parents*, 19 J. GENDER RACE & JUST. 73, 78–81 (2016).

288. EQUITY & EXCELLENCE COMM'N, *supra* note 38, at 14.

289. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., HIGHER EDUCATION: GAPS IN ACCESS AND PERSISTENCE STUDY 45 (2012), <https://nces.ed.gov/pubs2012/2012046.pdf>; CHRISTINA THEOKAS & REID SAARIS, FINDING AMERICA'S MISSING AP AND IB STUDENTS 3–4 (2013), [https://edtrust.org/wp-content/uploads/2013/10/Missing\\_Students.pdf](https://edtrust.org/wp-content/uploads/2013/10/Missing_Students.pdf) (“Low-income students (15 percent)

courses in high school, while wealthier schools oftentimes offer these courses in elementary school.<sup>290</sup> A study of opportunities to learn across all fifty states found that approximately one-third or more of low-income and most minority students attend low-performing, poorly-resourced schools while 15% of white students and 21% of Asian American students attend such schools.<sup>291</sup> This rate of attendance at substandard schools is too high for all subgroups, but particularly egregious for poor and most minority communities.

Many low-income and minority students are educated in schools with instructional materials, technology, and essential facilities that are of lower quality than those of their peers.<sup>292</sup> More minority and low-income children attend school in buildings of substandard physical quality than their white and more affluent peers.<sup>293</sup> Research also confirms that students in substandard facilities perform below their peers who attend school in more functional and newer buildings.<sup>294</sup> Children from low-income backgrounds also participate in fewer extracurricular activities.<sup>295</sup> Small disadvantages in educational opportunity that are repeated on an annual basis can compound and become influential gaps by the time children complete school.<sup>296</sup>

Disparities in learning opportunities that occur throughout childhood influence lifelong outcomes. Cognitive, social, and emotional skill deficits of young children are harbingers of adult gaps in educational achievement and success in the labor market.<sup>297</sup> Early disadvantages also make it more difficult to close achievement gaps as the child matures.<sup>298</sup> Therefore, childhood,

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were almost twice as likely as other students (8 percent) to attend a school without the full complement of [Advanced Placement] courses. Similarly, American-Indian (18 percent) and black (15 percent) students were far more likely than white (9 percent) students to have more limited course options.”)

290. See Darling-Hammond, *supra* note 32, at 90.

291. SCHOTT FOUND. FOR PUB. EDUC., *LOST OPPORTUNITY: A 50 STATE REPORT ON THE OPPORTUNITY TO LEARN IN AMERICA: NATIONAL SUMMARY REPORT 8* (2009).

292. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 4–5.

293. COUNCIL OF THE GREAT CITY SCH., *REVERSING THE CYCLE OF DETERIORATION IN THE NATION’S PUBLIC SCHOOL BUILDINGS 5* (2014).

294. See *id.*; Sapna Cheryan et al., *Designing Classrooms to Maximize Student Achievement*, 1 *POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI.* 4, 6 (2014).

295. See PUTNAM, *supra* note 222, at 176.

296. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 37.

297. See *id.* at 26.

298. See *id.* at 25.

particularly early childhood, is an essential time to prevent educational inequalities.<sup>299</sup>

The good news is that early investments in children matter a great deal because the brain development of children as well as an array of skills, such as language, social-emotional, cognitive, and behavioral skills, are quite responsive in young children.<sup>300</sup> New research is finding that investments at the earliest ages—infants and toddlers—can help to prevent disparities in achievement outcomes.<sup>301</sup> Research confirms that early childhood is the most promising time to invest in children, with some studies finding that early investments sometimes not only resulted in substantial impacts but also “paid for themselves several times over.”<sup>302</sup> High-quality early childhood education can help disadvantaged and minority children enter school more ready to acquire the knowledge and skills provided in their schools.<sup>303</sup> High-quality early education also can improve high

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299. *See id.* at 26.

300. *See id.* at 24.

301. *See id.* at 30.

302. *Id.* at 28; *see also* COMM. FOR ECON. DEV., THE ECONOMIC PROMISE OF INVESTING IN HIGH-QUALITY PRESCHOOL: USING EARLY EDUCATION TO IMPROVE ECONOMIC GROWTH AND THE FISCAL SUSTAINABILITY OF STATES AND THE NATION 25 (2006) (noting research that finds that every dollar invested in preschool programs for disadvantaged students yields between \$2 and \$16 in benefits); James J. Heckman, *Schools, Skills, and Synapses*, 46 *ECON. INQUIRY* 289, 314 (2008) (noting that social policy should be directed to investment in a child’s early years and that late interventions are not as effective or efficient).

303. *See* FARAH Z. AHMAD & KATIE HAMM, CTR. FOR AM. PROGRESS, THE SCHOOL-READINESS GAP AND PRESCHOOL BENEFITS FOR CHILDREN OF COLOR 1 (2013) (noting the school readiness benefits of high-quality preschool for children of color); CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 28 (noting the benefits of high-quality early childhood education, particularly for disadvantaged students); DIONNE DOBBINS ET AL., ROBERT WOOD JOHNSON FOUND., UNEQUAL ACCESS: BARRIERS TO EARLY CHILDHOOD EDUCATION FOR BOYS OF COLOR 6 (2016) (noting that high-quality early education reaps educational and societal benefits for low-income children of color); U.S. DEPT OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, HEAD START IMPACT STUDY FINAL REPORT xxxvi (2010) (finding that African American children who participated in Head Start beginning at age four reported improved relationships with teachers, less inattentiveness, and fewer difficulties with peer interactions and structured learning by the end of kindergarten); Heckman, *supra* note 302, at 310 fig.17 (finding higher graduation rates, fewer arrests, higher earnings and less participation in welfare for adults who participated in the Perry Preschool Program).

school graduation rates, lower incarceration rates, improve outcomes in the labor market, and enhance health even when test score gains dissipate over time.<sup>304</sup>

Research also establishes that high-quality opportunities to learn in elementary and secondary school can improve student outcomes and help to reduce achievement gaps between disadvantaged students and their peers as well as between minority students and their peers. For instance, studies find that the achievement of both minority and economically disadvantaged students improves in small classes even though these children are more likely to be in large classes.<sup>305</sup> In addition, research confirms that disadvantaged and minority students benefit academically from such inputs as expanded learning opportunities, including after-school and summer programs, and adequate structural facilities that provide sufficient lighting, air quality, and heating.<sup>306</sup> A study of achievement of minority children in high-quality charter schools found that “providing high-quality schools to children who live in low-quality environments can significantly increase their achievement.”<sup>307</sup> In contrast, the study found that improving the social environment in which the children were raised did *not* result in a significant increase in achievement, and thus, it concluded that “it may not take a village to increase the achievement of the poorest minority students, just a high-quality school.”<sup>308</sup>

Disadvantaged and minority students benefit from access to a robust and engaging curriculum that includes an early emphasis on math and literacy, incorporates higher order thinking, and

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304. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 28; Heckman, *supra* note 302 (presenting evidence of long-term gains).

305. See WILLIAM J. MATHIS, RESEARCH-BASED OPTIONS FOR EDUCATION POLICYMAKING: THE EFFECTIVENESS OF CLASS SIZE REDUCTION 1; see also Kenneth Leithwood & Doris Jantzi, *A Review of Empirical Evidence About School Size Effects: A Policy Perspective*, 79 REV. EDUC. RES. 464, 470, 484 (2009) (showing that socially and economically disadvantaged students benefit from small schools).

306. See HOWARD T. EVERSON & ROGER E. MILLSAP, COLL. BD., EVERYONE GAINS: EXTRACURRICULAR ACTIVITIES IN HIGH SCHOOL AND HIGHER SAT SCORES 1 (2005); MARGO GARDNER ET AL., CAMPAIGN FOR EDUC. EQUITY, EQUITY MATTERS: RES. REV. NO. 4: CAN AFTER-SCHOOL PROGRAMS HELP LEVEL THE ACADEMIC PLAYING FIELD FOR DISADVANTAGED YOUTH? 5 (2009); Cheryan et al., *supra* note 294, at 9; Michael A. Rebell & Jessica R. Wolff, *Educational Opportunity Is Achievable and Affordable*, 93 PHI DELTA KAPPAN 62–63 (2012).

307. Vilsa E. Curto et al., *It May Not Take a Village: Increasing Achievement Among the Poor, in WHITHER OPPORTUNITY?*, *supra* note 35, at 483, 486.

308. *Id.* at 486.

embraces subjects like art, music, science and social studies.<sup>309</sup> Extracurricular activities are essential because, even after controlling for the socioeconomic background of the child's family, these activities are associated with beneficial outcomes, such as a "higher grade-point averages, lower dropout rates, lower truancy, better work habits, higher educational aspirations, lower delinquency rates, greater self-esteem, more psychological resilience, less risky behavior, more civic engagement (like voting and volunteering), and higher future wages and occupational attainment."<sup>310</sup> High-quality learning opportunities benefit all students, but they are particularly important for disadvantaged students because they help to mitigate the adverse effects of poverty.

## 2. Why ESSA Will Fail to Meet This Challenge

ESSA will not provide sufficient incentives for most states to close opportunity gaps for several reasons. ESSA requires districts with schools in the bottom 5% of the state to "identif[y] resource inequities" that are "to be addressed through implementation of [the] comprehensive support and improvement plan."<sup>311</sup> This provision is unlikely to guide districts to reduce opportunity gaps. ESSA does not specify which resource inequities should or must be studied, thereby allowing districts to come up with a relatively short list of resources to reduce their compliance burden. Although the provision notes that districts *may* consider school level budgeting,<sup>312</sup> even this basic metric is not required in the identification of resource inequities. This provision will also overlook the larger inequalities between districts within a state.<sup>313</sup>

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309. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 39; Darling-Hammond, *supra* note 32, at 89–91.

310. PUTNAM, *supra* note 222, at 174–75 (citations omitted); see also DEBORAH LOWE VANDELL ET AL., OUTCOMES LINKED TO HIGH-QUALITY AFTERSCHOOL PROGRAMS: LONGITUDINAL FINDINGS FROM THE STUDY OF PROMISING AFTERSCHOOL PROGRAMS (2007), <https://files.eric.ed.gov/fulltext/ED499113.pdf> ("A new study by researchers at the University of California, Irvine, the University of Wisconsin-Madison and Policy Studies Associates, Inc. finds that regular participation in high-quality afterschool programs is linked to significant gains in standardized test scores and work habits as well as reductions in behavior problems among disadvantaged students.").

311. 20 U.S.C. § 6311(d)(1)(B)(iv) (2016).

312. *Id.*

313. Black, *supra* note 3, at 1352–53 (noting that districts may even expand funding inequalities and deficits).

In addition, the provision is ambiguous about what “address” means. Anything from tinkering at the margins of inequities to eradicating them could fall within the definition of “address” because the provision does not specify that inequities must be addressed in a meaningful and comprehensive manner. Given that districts can claim compliance with minimal interventions, this provision is unlikely to yield significant reductions in longstanding opportunity gaps. Most importantly, this provision will prove ineffective because the district that created and tolerated the inequities is charged with addressing them. This approach resembles the nation’s approach to school desegregation that left the remedy to those who created the harmful practice.<sup>314</sup> That approach proved unsuccessful then<sup>315</sup> and it is unlikely to work now.

ESSA also continues the central flaw in the standards and accountability movement: it does not hold states, districts, and schools accountable for providing unequal access to the high-quality learning opportunities that would help to reduce achievement gaps.<sup>316</sup> The educational opportunity gap between disadvantaged students and their more affluent peers fuels most of the achievement gap.<sup>317</sup> Yet, it is the achievement gap that receives the lion’s share of attention from ESSA with the limited ineffectual exception noted above and the requirement regarding the equitable distribution of teachers critiqued in Part II.B.2.

Furthermore, ESSA’s continued heavy emphasis on using testing results to identify low-performing schools may help to perpetuate inferior learning opportunities for students in disadvantaged and minority schools. Being identified as a school in the bottom 5% of schools in a district or state is likely to have the same impact that the label “in need of improvement” had on

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314. See Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 798 (2010) (noting that *Brown II* “placed those most invested in forestalling desegregation in charge of implementation”).

315. See *id.* at 800–04 (noting that southern districts adopted measures that resulted in little to no desegregation).

316. See Black, *supra* note 3, at 1351–53; Welner & Carter, *supra* note 33, at 4 (noting that the increase in high standards “never took the next crucial step: holding policy makers accountable for ensuring the conditions and resources necessary to create and maintain a system of excellence that offers universal opportunity”).

317. Kevin G. Welner & Prudence L. Carter, *Building Opportunities to Achieve*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO, *supra* note 32, at 217–19.

schools under No Child Left Behind. Such schools were labeled as failures and this label sometimes caused an array of negative interventions, such as teaching to the test and repetitive practice tests that rely on memorization rather than a deep understanding of course material.<sup>318</sup> Given that many high-poverty and high-minority schools will be the schools that are identified, this approach can deprive these students of a much-needed rich curriculum that embraces higher order thinking and a range of academic subjects beyond math and reading, including art and music.<sup>319</sup> In addition, the continued heavy emphasis on test results can cause schools to devalue the importance of other activities that improve outcomes for children, such as extracurricular activities that can increase graduation rates and help students learn teamwork, interpersonal communication, and grit.<sup>320</sup> ESSA's ineffectual approaches to funding and the equitable distribution of teachers also will permit states and districts to maintain the funding and teacher distribution practices that exacerbate opportunity gaps. For these reasons, ESSA will not effectively guide states in closing longstanding opportunity gaps.

#### D. ECONOMIC AND RACIAL INTEGRATION

Substantial racial and economic isolation of students are well-documented causes of the opportunity gap.<sup>321</sup> Both concentrated poverty and racial isolation are growing within the public schools in the United States.<sup>322</sup> The challenges of economic segregation are often compounded by racial segregation.<sup>323</sup> This Section summarizes the research on the challenges that increasing socioeconomic and racial segregation cause and their impact on student achievement. This Section then shows how ESSA missed a critical opportunity to encourage states and districts to promote integration.

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318. See Linda Darling-Hammond, *Evaluating No Child Left Behind: The Problems and Promises of Bush's Education Policy*, NATION (May 2, 2007), <https://thenation.com/article/evaluating-no-child-left-behind/>; Peter Schrag, *High Stakes Are for Tomatoes*, ATLANTIC (Aug. 2000), <http://theatlantic.com/magazine/archive/2000/08/high-stakes-are-for-tomatoes/378306>.

319. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 39.

320. See *id.* at 40.

321. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 5; CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 38 ("American segregation is a problem because it leads to and reinforces inequalities in school quality and resources.").

322. EQUITY & EXCELLENCE COMM'N, *supra* note 38, at 18; GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, BROWN AT 62: SCHOOL SEGREGATION BY RACE, POVERTY AND STATE 1 (2016).

323. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 13.

### 1. The Challenge of Economic and Racial Segregation and Why It Matters

Socioeconomic and racial segregation in schools are on the rise in the United States. The percentage of public schools that are both poor and predominantly African American or Hispanic is increasing. These schools share a host of disadvantages, including fewer science, math, and college preparatory courses.<sup>324</sup> As the U.S. Commission on Civil Rights confirmed in its 2018 report: “[R]acial, ethnic, and economic segregation remain a reality all across the U.S.”<sup>325</sup>

These conditions exist today due in part to increasing poverty rates and the failure of law and policy to address increasing racial and socioeconomic segregation. In 2015, one in five of the approximately 73.6 million children under the age of eighteen living in the United States lived in poverty, with children zero to five experiencing the highest likelihood of living in poverty.<sup>326</sup> Schools reflect this high poverty rate and are experiencing increasing poverty levels. While the average low-income public school enrollment in 1993 was approximately 25%, by 2013 it had risen to just over 50%.<sup>327</sup> The average student from a low-income background attended a school that was just over 50% students from low-income backgrounds in 1993, and by 2013 she or he attended a school that was composed of approximately 67% students from low-income backgrounds.<sup>328</sup> The concentration of poverty in schools has increased for all races, with African American students experiencing the greatest increase (31%) while whites and Latinos also saw a dramatic increase (22%) over this time period.<sup>329</sup> By 2013, the average African American and Latino student attended a school that was about 68% low-income students, while whites and Asians attended a school that was 40% low-income students.<sup>330</sup>

Concentrated poverty has an independent adverse impact on student outcomes beyond the socioeconomic background of

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324. See GEN. ACCOUNTING OFFICE, BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016).

325. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 5.

326. See FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA’S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2017 viii, 14, 116 tbl.ECON1.A (2017).

327. See ORFIELD ET AL., *supra* note 322, at 7 fig.3.

328. See *id.*

329. See *id.*

330. See *id.*

the student.<sup>331</sup> Concentrated poverty brings with it a host of educational challenges because it correlates with factors that increase the cost of successfully educating children, including lower educational outcomes, racial isolation, homelessness, and increased student mobility.<sup>332</sup> In addition, schools of concentrated poverty often have less qualified and experienced teachers, fewer educational resources, a narrower curriculum taught at a less rigorous level, and additional safety and health problems.<sup>333</sup> Economic segregation also hinders teaching and learning because “remediation becomes the norm, and teachers have little time to challenge the exceptional students who can overcome the personal, family, and community hardships that typically interfere with learning.”<sup>334</sup> Economic segregation also reinforces school resource and quality inequalities.<sup>335</sup>

Racial segregation also has returned to many schools in the United States. For instance, the percentage of African American students in majority white schools peaked at 43.5% in 1988, but by 2011, it had returned to 23.2%, which is almost the exact same level that it was in 1968 when the Supreme Court announced that racially segregated schools had to convert to “just schools.”<sup>336</sup> Between 1988 and 2013, white students decreased in their racial isolation while the percentage of schools that are 90% to 100% minority more than tripled from 5.7% to 18.4%.<sup>337</sup> For the 2013–14 school year, in seventeen states, more than one-third of African American students attended schools that were 90% to 100% minority, with the highest rate for such attendance at 65.8% in New York.<sup>338</sup> For the same school year, in nine states more than one-third of Latino students attended schools that

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331. Darling-Hammond, *supra* note 32, at 82.

332. See BAKER ET AL., *supra* note 32, at 3; CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 38; Rothstein, *supra* note 169, at 61–69 (noting the educational challenges associated with concentrated poverty).

333. Darling-Hammond, *supra* note 32, at 83.

334. Rothstein, *supra* note 169, at 64.

335. See CLOSING THE OPPORTUNITY Gap, *supra* note 1, at 38.

336. *Green v. Cty. Sch. Bd. of New Kent Cty.*, 391 U.S. 430, 442 (1968); GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE 2, 10 (2014).

337. ORFIELD ET AL., *supra* note 322, at 3.

338. *Id.* at 4–5 (listing the 17 states and the rate of African American attendance in schools that are 90% to 100% minority as follows: New York (65.8%), Illinois (59.6%), Maryland (53.7%), New Jersey (49.2%), Michigan (48.7%), California (47.9%), Wisconsin (45.3%), Pennsylvania (45.3%), Mississippi (45.2%), Tennessee (44.3%), Texas (43.3%), Georgia (43.1%), Alabama (42.1%), Missouri (41.4%), Ohio (37.8%), Florida (34.4%), and Louisiana (33.2%)).

were 90% to 100% minority with the highest rate for such attendance at 56.8% in New York.<sup>339</sup>

In addition, just under two-thirds of all public school students in the United States attend schools where at least half of their classmates share their race or ethnicity.<sup>340</sup> Whites experience the highest rates of attending school with half of the students of the same race.<sup>341</sup> In 2014, whites attended schools in which more than half of the students were white at the rate of 81%, although this has decreased since 1995 when the rate for whites was 90.5%.<sup>342</sup> Further, 44.1% of black public elementary and secondary school students attended schools where at least half of their classmates also were black, and this rate also has declined since 1995 when it was 51.4%.<sup>343</sup> For Hispanic students, 56.7% attended schools in which more than half of their classmates also were Hispanic.<sup>344</sup> This percentage has risen slightly since 1995 when it was 52.6%.<sup>345</sup>

Racial segregation by race and class often occurs simultaneously with many African American and Hispanic students attending predominately poor schools while middle class students predominate in the schools attended by many of their white and Asian peers.<sup>346</sup> Racial segregation brings with it a host of harmful effects, including providing inferior educational opportunities and producing substandard educational outcomes, as I have

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339. *Id.* at 6 (listing the nine states and the rate of Latino attendance in schools that are 90% to 100% minority as follows: New York (56.8%), California (56.5%), Texas (53.7%), Rhode Island (49.5%), Illinois (44.9%), New Jersey (42.5%), Maryland (40.4%), Arizona (40.3%), and New Mexico (34.7%)).

340. ABIGAIL GEIGER, MANY MINORITY STUDENTS GO TO SCHOOLS WHERE AT LEAST HALF OF THEIR PEERS ARE THEIR RACE OR ETHNICITY, PEW RES. CTR. (Oct. 25, 2017), <http://pewresearch.org/fact-tank/2017/10/25/many-minority-students-go-to-schools-where-at-least-half-of-their-peers-are-their-race-or-ethnicity/ft-17-10-24-raceeducation-nearlytwothirds>.

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. ROSLYN ARLIN MICKELSON, NAT'L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K-12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE 1, 1 (2016); ORFIELD ET AL., *supra* note 336, at 2 (noting White and Asian students typically attend middle class schools).

summarized in past scholarship<sup>347</sup> and as other research confirms.<sup>348</sup>

The good news is that increasing socioeconomic integration and racial integration reaps important benefits for students. Research establishes that increasing socioeconomic integration to create predominantly middle class schools can improve the academic achievement of disadvantaged students without reducing the achievement of their middle-income peers as long as the school remains majority middle class.<sup>349</sup> When students from low-income schools attend a middle class school, they can gain several benefits. First, middle class peers are more academically engaged and are less likely to be a behavioral challenge for teachers.<sup>350</sup> Middle class peers can help to socialize and prepare other students for the environments that they will experience in college.<sup>351</sup> Middle class peers also can provide access to the relationships and opportunities that can lead to postsecondary success.<sup>352</sup> Second, more effective teachers with higher expectations teach in middle class schools.<sup>353</sup> Third, middle class parents are more involved in schools and are able to exert more influence over school officials.<sup>354</sup> Fortunately, socioeconomic integration

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347. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 327–36 (2009) (citing Jomills Henry Braddock II & Tamela McNulty Eitle, *The Effects of School Desegregation*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 828 (James A. Banks & Cherry A. McGee Banks eds., 2004)); Janet Ward Schofield, *Fostering Positive Intergroup Relations in Schools*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION, *supra*, at 799; Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998); Amy Stuart Wells & Erica Frankenberg, *The Public Schools and the Challenge of the Supreme Court's Integration Decision*, 89 PHI DELTA KAPPAN 178 (2007).

348. See, e.g., MICKELSON, *supra* note 346, at 1; ORFIELD ET AL., *supra* note 336, at 37.

349. RYAN, *supra* note 27, at 273.

350. See Richard D. Kahlenberg, *Turnaround Schools and Charter Schools That Work: Moving Beyond Separate but Equal*, in THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY 283, 284 (2012) [hereinafter THE FUTURE OF SCHOOL INTEGRATION].

351. See ORFIELD ET AL., *supra* note 322, at 6 (highlighting that when low-income students socialize only with other low-income students, they are less prepared for college).

352. See *id.* at 6 (noting that when low-income students remain segregated, they miss out on better opportunities associated with informal information and contacts).

353. See Kahlenberg, *supra* note 350, at 286–87.

354. See *id.* at 286.

can be a particularly cost effective strategy, with one study finding that the public return on investing in socio-economically integrated schools is three times its costs and the total return is more than five times its costs.<sup>355</sup> The only educational investment with a higher investment return is very high-quality early childhood education, an intervention that is discussed in Part II.C.<sup>356</sup>

Students also benefit from racial integration, although the benefit of socioeconomic integration is larger for academic achievement.<sup>357</sup> For example, desegregation helped to reduce the opportunity gaps for black and white students in the South in teacher quality, class size, and per-pupil spending.<sup>358</sup> Students who attended a desegregated school performed at higher academic levels than students in segregated schools and the benefit increased the earlier the student entered a desegregated school.<sup>359</sup> Students who attend racially integrated schools demonstrate a reduction in racial prejudice and stereotypes, an increase in interracial friendships, a more effective ability to navigate multiracial settings, and a greater likelihood to live in integrated neighborhoods.<sup>360</sup> Students, particularly students of color, in integrated schools also show such benefits as “development of critical thinking skills, higher graduation rates, more prominent educational and career goals, greater earnings in the workforce, and even more positive health outcomes.”<sup>361</sup>

Students from all racial groups and socioeconomic backgrounds benefit from diversity, but the largest gains are for mi-

355. See Marco Basile, *The Cost-Effectiveness of Socioeconomic School Integration*, in *THE FUTURE OF SCHOOL INTEGRATION*, *supra* note 350, at 127, 128.

356. Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, *AM. EDUCATOR* 2, 7 (Winter 2012–13).

357. See, e.g., RYAN, *supra* note 27, at 273; AMY STUART WELLS ET AL., *CENTURY FOUND., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* 12–15 (2016); U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 5.

358. Sean F. Reardon & Ann Owens, *60 Years After Brown: Trends and Consequences of School Segregation*, 40 *ANN. REV. SOC.* 199, 210–12 (2014).

359. JENNIFER AYSCUE ET AL., *NAT’L COAL. ON SCH. DIVERSITY, THE COMPLEMENTARY BENEFITS OF RACIAL AND SOCIOECONOMIC DIVERSITY IN SCHOOLS* 1–2 (2017); see also Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments* 18 (Nat’l Bureau of Econ. Research, Working Paper No. 16664, 2011) (“Black cohorts with more school-age years of desegregation exposure have higher completed years of education than unexposed cohorts and cohorts with fewer years of exposure.”).

360. See MICKELSON, *supra* note 346, at 4.

361. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 27, at 5.

nority students from economically disadvantaged backgrounds.<sup>362</sup> Furthermore, it is important to understand that although the gains from socioeconomic and racial diversity overlay, each type of diversity provides “unique effects for learners.”<sup>363</sup> Therefore, both socioeconomic and racial integration should remain the aims of policy rather than solely focusing on one of these goals.

## 2. Why ESSA Will Fail to Meet This Challenge

The U.S. Department of Education supports a handful of small grant programs that include economic and racial integration among their goals. For instance, the oldest and largest support for integration is the Magnet Schools Assistance Program, which aims to bring together students from different racial, ethnic, and economic backgrounds.<sup>364</sup> In fiscal year 2017, DOE awarded \$91.7 million to thirty-two grantees in sixteen states,<sup>365</sup> which was down from the \$104 million offered in fiscal year 2009.<sup>366</sup> This program reaches over 2.5 million students.<sup>367</sup> ESSA will increase funding for magnet schools to \$108 million by fiscal year 2020.<sup>368</sup>

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362. See MICKELSON, *supra* note 346, at 2.

363. *Id.*; see Reyn van Ewijk & Peter Slegers, *The Effect of Peer Socioeconomic Status on Student Achievement: A Meta-Analysis*, 5 EDUC. RES. REV. 134 (2010); Susan E. Mayer, *How Much Does a High School's Racial and Socioeconomic Mix Affect Graduation and Teenage Fertility Rates?*, in THE URBAN UNDERCLASS 321 (Christopher Jencks & Paul Peterson eds., 1991); Gregory J. Palardy, *High School Socioeconomic Segregation and Student Attainment*, 50 AM. EDUC. RES. J. 714 (2013).

364. See 20 U.S.C. § 7231 (2016).

365. Office of Innovation & Improvement, *Magnet Schools Assistance Program (MSAP), What's New*, U.S. DEPT OF EDUC., <https://innovation.ed.gov/what-we-do/parental-options/magnet-school-assistance-program-msap> (last visited Oct. 27, 2018).

366. Office of Innovation & Improvement, *Magnet Schools Assistance Program (MSAP), Funding and Legislation*, U.S. DEPT OF EDUC., <https://innovation.ed.gov/what-we-do/parental-options/magnet-school-assistance-program-msap/funding-and-legislation> (last visited Oct. 27, 2018).

367. See *id.*

368. 20 U.S.C. § 7231j (2016). In 2016, the Department of Education announced that the new “Opening Doors, Expanding Opportunities” grant would offer \$12 million for up to twenty districts or consortia of districts to increase socioeconomic diversity and raise academic achievement. *U.S. Education Secretary Announces Grant Competitions to Encourage Diverse Schools*, U.S. DEPT OF EDUC. (Dec. 13, 2016), <https://ed.gov/news/press-releases/us-education-secretary-announces-grant-competitions-encourage-diverse-schools>. Grantees were permitted to include racial and ethnic integration among their goals. *Id.* However, the Trump administration discontinued this program in 2017. Emma Brown, *Trump's Education Department Nixes Obama-Era Grant Program for*

Although ESSA did not highlight integration of schools as a policy priority,<sup>369</sup> ESSA included modest requirements to strengthen the Magnet Schools Assistance Program, including requiring grant applicants to note their evidence or rationale for how the magnet school will improve integration.<sup>370</sup> Grantees also must show how they will measure and assess the impact of integration activities on student achievement.<sup>371</sup> Grantees may now use the funds to create inter-district or regional magnet programs.<sup>372</sup> ESSA also allows grant funds to be used to support transportation costs if the transportation is sustainable beyond the grant and is not a substantial portion of the grant funds.<sup>373</sup> Despite these modest improvements, the very small allocation for the Magnet Schools Assistance Program will make magnet schools a low to nonexistent policy priority for most districts and states. States and districts that choose to implement socioeconomic and racial integration programs will do so solely because it is a state or local priority rather than a federal one.<sup>374</sup>

The failure to include socioeconomic and racial integration as a policy priority within ESSA is a valuable missed opportunity. Socioeconomic integration provides a cost-effective approach to improving student outcomes while not harming the

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*School Diversity*, WASH. POST (Mar. 29, 2017), <https://washingtonpost.com/news/education/wp/2017/03/29/trumps-education-department-nixes-obama-era-grant-program-for-school-diversity>. Other grant programs that support economic integration include the Education Innovation and Research program and the Charter Schools program. *See Charter Schools Program Grants for Replication and Expansion of High-Quality Charter Schools*, U.S. DEP'T EDUC., <https://innovation.ed.gov/what-we-do/charter-schools/charter-schools-program-grants-for-replications-and-expansion-of-high-quality-charter-schools> (last visited Oct. 27, 2018) (noting the program's aim to provide financial assistance for planning, design, and implementation of high-quality public charter schools); *Education Innovation and Research*, U.S. DEP'T EDUC., <https://innovation.ed.gov/what-we-do/innovation/education-innovation-and-research-eir> (noting the program's aim to provide funding to support high-need students). Economic integration is merely one possible goal of grantees for these programs.

369. Christopher A. Suarez, *Reducing Socioeconomic Isolation Through School Innovation Grants*, 3 EDUC. L & POL'Y REV. 90, 92 (2016).

370. *Id.* at 92–93.

371. *Id.* at 93.

372. *See id.*

373. 20 U.S.C. § 7231f(a)(9) (2016).

374. Magnet school grantees also must develop magnet schools in light of the research about the challenges that such schools face. For example, magnet schools that are not Title I schools, magnet schools under desegregation plans, and rural magnet schools enjoy greater success in reducing minority group isolation than other magnet schools. MANYA WALTON & ELIZABETH FORD, U.S. DEP'T OF EDUC., *MAGNET SCHOOLS ASSISTANCE PROGRAM: GRANTEE DATA ANALYSIS REPORT 37* (2014).

achievement of middle class students.<sup>375</sup> Therefore, this reform warrants inclusion within federal education priorities as reformers search for affordable school reforms. These benefits stand in sharp contrast to the many adverse effects of the standards and accountability movement that remain the centerpiece of ESSA, including teaching to the test, testing limited levels of knowledge, and the narrowing of the curriculum to name a few of the adverse effects of this approach under No Child Left Behind.<sup>376</sup> Similarly, racial integration brings benefits that other reforms cannot, including teaching students to work with those unlike themselves and reducing stereotypes.<sup>377</sup> The United States cannot rely on states to urge districts to promote class and race integration.<sup>378</sup> Therefore, the federal government must take the lead on pursuing these critical policy objectives.

In the next Section, I propose how Congress should restructure ESEA to advance educational equity.

### III. RESTRUCTURING ESEA'S APPROACH TO EQUITY

Although state chief school officers have signed a statement supporting equity, early reviews of state plans reveal a minimal commitment to equity by many states and indicate that it will take much more than a state-initiated statement supporting equity to ensure equitable access to excellent educational opportunities for all students.<sup>379</sup> Federal leadership is essential to support and incentivize states to meet the needs of disadvantaged students.<sup>380</sup> Further evidence of the need for federal leadership can be found in the fact that the Council of Chief State School Officers opposed the proposed regulatory revisions to the supplement-not-supplant requirement that would have required districts to spend the same funds, including teacher salaries, on Title I and non-Title I schools.<sup>381</sup> If the states are in fact committed to equity in funding, this provision could have been, and arguably should have been, merely the start of an effort to advance educational equity. Instead, civil rights advocates championed

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375. See RYAN, *supra* note 27, at 273.

376. See MANNA, *supra* note 151, at 110–11, 117.

377. See RYAN, *supra* note 27, at 273–74.

378. See *id.* at 274.

379. See USHOMIRSKY ET AL., *supra* note 154, at 2.

380. See BAKER ET AL., *supra* note 32, at 28 (“[T]o reduce achievement gaps both within and among states, an effective federal policy is needed to boost investments in states to reduce interstate inequality while encouraging states with unrealized capacity to do more to address their own shortfalls.”).

381. Klein, *supra* note 205.

the need to give meaning to this toothless requirement and the states opposed it, citing compliance challenges and potential adverse consequences such as forced teacher transfers.<sup>382</sup>

However, ESSA has sparked some positive reforms and federal efforts to advance equity can build on those efforts. For example, when permitted to select an additional indicator of school performance, at least thirty-five states are assessing college and career readiness, including SAT and ACT scores, and access to and passage of International Baccalaureate and Advanced Placement courses.<sup>383</sup> Many states also are assessing if students are on track in middle and high school, which can help to prevent students from lagging behind or dropping out.<sup>384</sup> State inclusion of these measures begins a process that can be nurtured to expand the opportunity to learn and to increase graduation rates.

As I explain below, the federal government should leverage and expand upon the \$550 billion that it spends on public education annually<sup>385</sup> to create a supportive partnership with states that are seeking to meet the needs of all students. It also should incentivize states that are merely paying lip service to equity goals to implement sustained and comprehensive reforms. The regular reauthorization of ESEA provides lawmakers, advocates, and the American people the opportunity to reexamine and restructure how they want to achieve equity.

Other scholars have provided an array of recommendations for reforming ESEA,<sup>386</sup> including Title I.<sup>387</sup> In this Part, I build upon this body of work while emphasizing the incremental approach that I recently proposed in *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*.<sup>388</sup> In contrast to other scholars that typically propose a single reform or an array of reforms to be implemented in a single piece of legislation or policymaking, in *No Quick Fix* I argue

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382. *See id.*

383. *See* Klein et al., *supra* note 139.

384. *See* USHOMIRSKY ET AL., *supra* note 154, at 4.

385. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 27, at 6.

386. *See* MANNA, *supra* note 151, at 159–63; MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 9–81 (2008).

387. *See, e.g.,* Black, *Leveraging Funding*, *supra* note 60, at 241–47; Cassandra J. Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & C.R.L. REV. 123, 127 (2009); Paul T. Hill, *Rethinking the Federal Role in Elementary and Secondary Education*, in THE FUTURE OF THE FEDERAL ROLE IN ELEMENTARY AND SECONDARY EDUCATION 46, 49 (2001); Liu, *supra* note 199, at 1011–12.

388. Robinson, *supra* note 49, at 201.

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that the backlash against the significant shift to education federalism embraced in *No Child Left Behind* should teach us that the nation will not embrace reforms that result in quick and radical shifts to education federalism.<sup>389</sup> Instead, a more effective approach would incrementally build toward the ultimate law and policymaking goal of equitable access to an excellent education.<sup>390</sup>

In *No Quick Fix*, I proposed that the United States implement three types of reforms that could lead to comprehensive restructuring of education funding systems: inviting incentives, compelling (but not coercive) conditions, and meaningful mandates.<sup>391</sup> Here, I translate my lessons for school funding to inform adoption of my model for an institutional approach to equity that would prepare for and ultimately reauthorize ESEA. I recommend federal incentives and conditions that together provide a more powerful and ultimately sustainable engine for change than any one of these strategies alone. I also briefly consider when mandates might be employed to provide a long-term national commitment to norms and policymaking objectives that prove successful under ESEA.

Fundamentally, my recommendations acknowledge that the United States must change not just specific laws and policies but ultimately the nation's approach to education federalism.<sup>392</sup> Without a foundational change to education federalism, reforms that advance equitable access to an excellent education will continue to be sacrificed at the altar of state and local control. With incremental shifts to education federalism undergirding reform, the United States can enact policies that move the nation towards greater equality and quality of educational opportunities for all students. My proposal for reforming education federalism seeks to establish a more collaborative federal-state partnership for education that expands state capacity for reform while drawing upon federal policymaking strengths. The nature of the federal-state partnership will vary in part depending on the capacity of a state to enact reform and its need for federal support and expertise.

Although some might question why this Article recommends reforms at the federal level at a time when the federal govern-

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389. *Id.* at 242–49.

390. *See id.*

391. *Id.* at 220–37.

392. *See* Robinson, *supra* note 50, at 983–85.

ment has shifted toward greater state and local control of education, focusing on federal reforms makes sense given the federal government's superior track record for enacting reforms that promote equal opportunity as compared to the states. This track record has been established through an array of federal education laws, including Title IX of the Education Amendments of 1972, the Rehabilitation Act of 1973, the Education for All Handicapped Children Act of 1975, and Pell Grants under the Higher Education Act of 1965, to name a few.<sup>393</sup>

My recommendations for reforming ESEA move beyond my framework in *No Quick Fix* in three important ways. First, my current focus is on how the United States should restructure its approach to reauthorizing ESEA. ESEA often includes untested reforms that are sharply criticized when they prove ineffective. My recommendations reveal that an effectual and impactful ESEA depends upon testing potential ESEA reforms before they serve as conditions for federal education funds. Second, while *No Quick Fix* focused on a long-term agenda for moving toward equitable funding, this article applies this framework to four critical education building blocks that would work synergistically within ESEA to achieve equity. Finally, my recommendations for reforming ESEA are calibrated to each specific building block by analyzing the current state of research on these building blocks and anticipating potential obstacles to incorporating each building block into ESEA, including practical and political obstacles. Therefore, this Article provides novel insights to guide future reauthorizations of ESEA, bolstering the concepts introduced in *No Quick Fix* with practical implementation and sustainability measures.

Section A describes the components of my incremental approach and why I believe it represents a superior approach for the type of comprehensive education reform that restructuring ESEA will require. Sections B through E explore how this ap-

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393. See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in 20 U.S.C. § 1070); Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1409 (2012)); Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)); Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2006)); see also Barone & DeBray, *supra* note 6, at 61, 63; Brown, *supra* note 23, at 165; Robinson, *supra* note 50, at 1005, 1015–16. For further details on my proposed reforms for restructuring education federalism, please see Robinson, *supra* note 50, at 983–1005.

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proach could be applied to federal incentive grants and reauthorization of ESEA to ensure that states provide the essential building blocks for educational equity that are discussed in Part II, including fair funding, an equitable distribution of effective teachers, high-quality preK-12 opportunities to learn, and economic and racial integration.

#### A. NO QUICK FIX

Before summarizing how incentives and conditions (with a limited discussion of future mandates) could be employed to support a reauthorization of ESEA that effectively advances equity, it is crucial to understand that each reform is intended to inform the structure of the preceding reform.<sup>394</sup> For example, new conditions in ESEA should build upon lessons learned from federal incentives that aim to achieve the same policymaking objective. Thus, my recommendations are preliminary in nature because it is difficult to predict the impact of, and response to, the preceding reform. However, it is important to consider the full array of potential reforms so that a comprehensive, long-term solution is designed, rather than a one-time solution that falls short of its goals.<sup>395</sup>

##### 1. Inviting Incentives

Incentives offer federal support and funding to encourage states to consider adopting preferred policy approaches.<sup>396</sup> Even before such incentives are adopted, the federal government must make the case to the American people that reform is needed.<sup>397</sup> Once the need for reform is explained, federal incentives send a signal that the federal government is prioritizing a preferred reform within its policymaking agenda, while not insisting that states implement particular reforms. The expressive function of incentives highlights a change in the federal approach to education reform that is less threatening than conditions and mandates and thus can encourage state and local cooperation.<sup>398</sup>

Federal incentives can take several forms. Incentives for reform should begin by offering research and technical assistance that support state efforts to adopt equitable reforms.<sup>399</sup> Research

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394. See Robinson, *supra* note 49, at 221.

395. See *id.*

396. See *id.* at 221–22.

397. See *id.* at 221.

398. See *id.*

399. See *id.* at 222.

and technical support can help states avoid approaches that have proven unsuccessful and concentrate on promising or proven reforms. Research and technical assistance help to expand the capacity of both state departments of education and local school districts, which have sometimes struggled to support effective reform, as evidenced with implementation of No Child Left Behind.<sup>400</sup> The initial implementation of ESSA also is confirming that states continue to lack the capacity to drive reform.<sup>401</sup> In a survey of forty-five states regarding ESSA implementation, all but one state indicated that the state lacked capacity to fulfill one or more requirement.<sup>402</sup>

As discussed in greater detail below, federal incentives should include grants to help states and districts assess the nature of specific barriers to opportunity and to reward innovative and impactful state and district practices.<sup>403</sup> Such grants also spark additional dialogue about why reforms are needed and the potential avenues for reform.<sup>404</sup> In a state survey on ESSA implementation, some states noted that they lack sufficient funding to implement ESSA.<sup>405</sup> Federal incentives in the form of grants can help to fill this gap in state funding in ways that expand states' capacity and thereby empower states to undertake comprehensive reform.

The Race to the Top (RTTT) initiative demonstrated that federal incentives can provide a powerful carrot that entices states to adopt desired reforms.<sup>406</sup> Given that some states have begun to pull back from reforms adopted when they hoped to secure RTTT funds that ultimately were not forthcoming, future federal incentives should build on the lessons learned from RTTT. For example, future federal incentives should provide technical assistance on how to write a successful grant application and ensure that the program has the ability to reward any

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400. *See id.*

401. *See* USHOMIRSKY ET AL., *supra* note 154, at 9.

402. CTR. ON EDUC. POLICY, STATES REFLECT ON YEAR ONE IMPLEMENTATION OF ESSA 1 (2017).

403. *See* Robinson, *supra* note 49, at 222–23.

404. *See id.* at 223.

405. CTR. ON EDUC. POLICY, *supra* note 402, at 1.

406. Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Education Agenda*, 26 EDUC. POL'Y 136, 143–47 (2012). *But see* Henig et al., *supra* note 90, at 29, 37–38 (arguing that “RTTT’s actual impact on state policy is difficult to determine” because some studies show significant adoption of the preferred policies but it is unclear which of the policies would have been adopted in the absence of RTTT and some states may not sustain the adopted changes).

state that demonstrates a strong commitment to lasting equity reforms.<sup>407</sup> Furthermore, future federal incentives should be distributed over several years with benchmarks established for the receipt of future funds rather than a one-time grant award. This can help to ensure that states follow through with the plans in grant applications.<sup>408</sup> Federal incentives should remain in place, even if federal conditions are adopted to provide ongoing encouragement for state investments in reform.<sup>409</sup>

Incentive grants should use DOE's discretionary funding, rather than funds authorized under ESEA. RTTT resulted from \$4.35 billion that Congress provided to DOE for "state incentive grants."<sup>410</sup> This type of discretionary spending gives the Department greater authority to initiate reform efforts without getting mired in the types of political battles that kept ESEA from being reauthorized for more than seven years.<sup>411</sup> Employing discretionary funding also allows the Department greater flexibility to adjust the conditions of grant programs for subsequent years in response to research regarding the effectiveness of a program.

One might appropriately question what federal incentives have to do with reforming ESEA given that it is a conditional spending program. Federal incentives through discretionary spending can encourage the laboratory of the states to try reforms before they are included as federal conditions for the entire nation through ESEA. If this approach had been adopted for the accountability and school sanction approaches in No Child Left Behind, perhaps the nation could have avoided the perverse incentives of the law that led states to lower standards and cut scores and teachers to teach to standardized tests.<sup>412</sup> Rather than implement innovative reforms through ESEA that require the entire nation to test the reform at the same time, a robust system of federal incentives that precedes reauthorization could help the federal and state governments enter a partnership. In this way, states can assess which reforms deserve to be conditions within ESEA and which should be left behind because they are ill-conceived, ineffective, infeasible, or too costly. Even as the nation waits to see the impact of greater state and local control

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407. See Robinson, *supra* note 49, at 223–24.

408. See *id.* at 224–25.

409. See *id.* at 225.

410. McGuinn, *supra* note 406, at 139.

411. Cf. Klein, *supra* note 17, at 43 (detailing the arduous political process behind the passage of the ESSA).

412. See RYAN, *supra* note 27, at 944–59, 973.

over education under ESSA, the federal government should continue to encourage experimentation through an ongoing program of federal incentives for promising equity reforms that could be implemented in future ESEA reauthorizations.

## 2. Compelling (But Not Unconstitutionally Coercive) Conditions

As conditional spending legislation, reforms of ESEA will take the form of conditions within the law. Conditions explain what a state or district must do to receive federal funding. If the conditions for receiving funds are not met, the DOE is empowered to seek the return of the funds, although this rarely occurs.<sup>413</sup>

Conditions in ESEA must not violate the parameters for Spending Clause legislation in *National Federation of Independent Business v. Sebelius*, in which the U.S. Supreme Court held that the Affordable Care Act's Medicaid expansion was unconstitutionally coercive.<sup>414</sup> The Court struck down the law because states were ultimately compelled to accept the Medicaid program given the large size of the program, its deep entrenchment in the states, and the potential loss of both new and old Medicaid funding.<sup>415</sup> In contrast, any future reauthorization of ESEA would condition new money on new conditions that represent only a fraction of Medicaid funding and thus would not contravene *Sebelius*.<sup>416</sup>

When considering potential ESEA conditions, it is helpful to understand that ESEA conditions currently range from merely setting forth possibilities for states to consider to very prescriptive terms. For instance, for the fourth indicator for accountability systems, ESSA states that public schools must include "one indicator of school quality or student success" and that this may include such measures as "student engagement," "educator engagement," "student access to and completion of advanced coursework," "postsecondary readiness," "school climate and safety," and "any other indicator the State chooses that meets

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413. See MANNA, *supra* note 151, at 53.

414. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579–80 (2012) (plurality opinion).

415. See *id.* at 579–80. In both *No Quick Fix* and *Disrupting Education Federalism*, I have analyzed in greater detail why *NFIB v. Sebelius* provides ample room for robust education legislation. See Robinson, *supra* note 49, at 225–26; Robinson, *supra* note 50, at 1006–11.

416. See Robinson, *supra* note 49, at 226; Robinson, *supra* note 50, at 1009–10.

the requirements of this clause.”<sup>417</sup> This condition is really an invitation to states to decide on the additional school quality or student success indicator that they think will be most effective. The state plans may also include student growth if the state deems it appropriate.<sup>418</sup> In contrast, each state plan must include a statewide accountability system that identifies the achievement of all students and the achievement of economically disadvantaged, racial, ethnic, disabled, and English-learner student subgroups.<sup>419</sup>

The varying degrees of prescriptiveness in these conditions reveal that conditions can require states to adopt a very specific policy approach, invite states to adopt a policy approach on a particular topic, and everything in between. Therefore, it is important to calibrate recommendations for new ESEA conditions in light of the degree of prescriptiveness that is appropriate for the particular policy agenda. In Sections B through E, I provide greater detail on recommendations for potential ESEA conditions that could help to align ESEA to advance equity.

### 3. Meaningful Mandates

Once the United States embraces a set of principles for education that the nation believes are both effective and should stand the test of time, those conditions should be considered for a federal mandate through either law or regulation. Mandates would transform an ESEA condition that has stood the test of time into a permanent fixture on the nation’s education landscape. Given the fact that education is consistently evolving in response to new research, federal mandates about educational equity should only rarely be adopted. Yet, some principles can and should be embraced for future generations and it is these principles that could first be tested with incentives and then as ESEA conditions, but ultimately be embraced with long-term legislation or regulations.

One example of such legislation is Title IX of the Education Amendments of 1972.<sup>420</sup> The United States no longer needs to debate whether sex discrimination is permissible in education. Instead, the Title IX prohibition on sex discrimination endures

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417. See 20 U.S.C. § 6311(c)(4)(B)(v) (2016).

418. See *id.* § 6311(c)(4)(B)(i).

419. See *id.* § 6311(c)(1), (2), (4)(B)(i).

420. See Title IX of the Education Amendments of 1972, Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

while ESEA changes in each reauthorization. There are other requirements for education that are essential to an excellent and equitable education, and these requirements should not be permitted to terminate based on which way the political wind blows. For instance, adequate and equitable funding is essential for providing the components of an excellent and equitable education and the United States should embrace a national commitment to this critical foundation for educational equity.

#### 4. Opposition to the No Quick Fix Approach

Undoubtedly, some will be opposed to the approach I proposed in *No Quick Fix*. In *No Quick Fix*, I analyze the costs and benefits of my proposal and explain why an incremental approach to shifting education federalism would be superior to the approach in *No Child Left Behind* that adopted an immediate and dramatic change to education federalism.<sup>421</sup> Here, it is worth noting that the primary opposition to my proposal for restructuring education federalism will be the insistence that state and local control should continue to remain largely unfettered because states and localities possess superior knowledge on what their schools and schoolchildren need.

When it comes to equity, state action, in contrast to states' claims, has historically shown the states to be "uninterested in education equity" and states rarely respond to data that reveals inequities.<sup>422</sup> Federal leadership is essential for the United States to move beyond the rhetorical commitment to equal opportunity that most Americans espouse to the reality of equitable and excellent schools.<sup>423</sup> Congress must insist that educational equity remain a national priority, just as it has insisted upon other civil rights laws in education.<sup>424</sup>

Nevertheless, state and local control would remain an essential characteristic of the U.S. education system if my model is adopted. State and local actors would continue to decide such issues as standards, achievement goals, school design, and the lion's share of educational opportunities and resources. States and localities would merely be required to distribute educational opportunities and resources in ways that aim to meet students' needs rather than in ways that privilege certain groups while

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421. See Robinson, *supra* note 49, at 237–49.

422. Brown, *supra* note 23, at 165.

423. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 10–11 (2003).

424. See *supra* text accompanying note 393.

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shortchanging others. The latter form of state and local control has reigned for too long in the United States and must be replaced by state and local control that empowers but does not oppress.

In the next Sections, I consider how these three federal tools could be used to guide reforms that help to more effectively align ESEA to advance equity.

#### B. FAIR FUNDING

*No Quick Fix* focuses exclusively on my recommendations that would lead states to reform school funding systems so that they ensure equitable access to an excellent education. I briefly summarize those recommendations here while offering some new insights on how fair funding could be advanced through a future ESEA reauthorization. Any conditions in ESEA on fair funding will likely be met with considerable opposition from states and districts. This opposition is likely given the longstanding opposition of most states to court-ordered reforms in school finance litigation.<sup>425</sup> Most recently, many state and local leaders also expressed opposition when DOE considered prohibiting spending disparities between Title I and non-Title I schools through its supplement-not-supplant regulation.<sup>426</sup> State opposition to funding equity occurs due to a variety of factors, including the reluctance of the states to increase or redistribute spending, the suburban domination of state legislatures, and the erroneous belief that money does not improve educational outcomes.<sup>427</sup>

The ESSA requirement to publicly report per-pupil spending will provide parents, communities, and school districts with new information about funding inequities. This data will breathe additional life into the ongoing dialogue among reformers, scholars, and legislators in states about the need for greater funding equity. However, as I explained in Part II.B.2, this additional data alone will not be sufficient to ignite widespread funding reform.

Once public scrutiny of school funding increases, the public, reformers, and some states should be hungry for—or at least more receptive to—federal support that will help increase the fairness of state funding systems.<sup>428</sup> Federal support for fair

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425. See RYAN, *supra* note 27, at 153.

426. See Klein, *supra* note 205.

427. See RYAN, *supra* note 27, at 148, 153, 172.

428. See Robinson, *supra* note 49, at 223–24 (explaining how federal grants

funding should build state capacity for reform by offering research and technical assistance on how states can achieve fair funding and federal grants that incentivize state adoption of innovative approaches to fair funding.<sup>429</sup> Through research, the federal government should publicize the lessons that states have learned and will learn about fair funding. Technical assistance should send federal expertise to state legislatures and departments of education to help states comprehend how to operationalize fair funding within state budgets, which must be balanced annually. Funding incentives should encourage states to reform the practices that research has proven lead to inequitable school funding, including providing more funding to affluent families, failing to link funding systems to educational goals, low funding levels, and ineffective oversight of how funding is allocated and utilized.<sup>430</sup>

As these reforms confirm and reshape trends in law and policymaking about the necessary elements of a fair funding system, the United States should include fair funding conditions within ESEA.<sup>431</sup> Given the deeply-entrenched nature of state funding systems, I believe that conditions within ESEA on this topic should begin with a general requirement that states demonstrate how their funding systems fairly and equitably allocate state and local funding. This requirement should include some specificity to ensure that states explain how they are addressing the primary shortcomings of funding systems, such as regressive funding and low funding levels, rather than merely inviting vague generalizations from states that their funding systems are fair and equitable without a way to measure if fairness and equity have been achieved.<sup>432</sup> Once the nation has seen the impact of such a condition, Congress could design more prescriptive conditions based on the most effective reforms sparked by federal incentives and state funding reforms, such as requiring progressive funding and a robust system of oversight and accountability for ensuring that funds are being used both efficiently and effectively.

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that reward innovation could be structured to encourage ongoing state reform of funding systems).

429. *See id.* at 222–23.

430. *See id.* at 210–20 (identifying these issues as some of the primary shortcomings of state funding systems).

431. *Id.* at 225–30.

432. *See id.* at 229.

By moving from a general to a prescriptive set of ESEA conditions regarding fair funding, the United States could avoid the backlash that would occur from moving from almost no conditions on fair funding to very prescriptive conditions. No Child Left Behind provides a cautionary tale that the nation should be slow to adopt prescriptive ESEA conditions that are untested in the laboratories of the states, particularly for an area as important as school funding that provides the very foundation of our nation's education system. My incremental approach provides an opportunity to determine which ESEA conditions would prove most fruitful and which conditions might engender unintended negative consequences.

One avenue for general and then prescriptive ESEA conditions to encourage fair funding would be to establish a separate program within ESEA focused on this issue.<sup>433</sup> One benefit of this approach is that states could choose to accept or reject funding for this program while continuing to accept funding for other ESEA programs.<sup>434</sup> The funding for these ESEA conditions must be sufficient to entice states to accept the funding. Once the nation is confident that the appropriate conditions for fair funding have been identified through state experimentation, funding conditions included within Title I provide the most likely route to encourage widespread state buy in and reform.<sup>435</sup>

The national conversation that new funding data sparks should increase the political feasibility of adopting grant programs that encourage fair funding as well as fair funding conditions within ESEA. Federal funding incentives also should increase public awareness of the benefits of reforms and their feasibility. My proposals as well as those of other scholars provide an array of potential conditions that could be studied and ultimately included within ESEA, including proposals to reform the comparability requirement within Title I.<sup>436</sup> For instance, education scholar Derek Black recently recommended that ESEA

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433. *See id.* at 227.

434. *See id.*

435. *See id.* at 227–28.

436. *See* SABA BIREDA, CTR. FOR AM. PROGRESS, FUNDING EDUCATION EQUITABLY: THE “COMPARABILITY PROVISION” AND THE MOVE TO FAIR AND TRANSPARENT SCHOOL BUDGETING SYSTEMS 2 (2011); ROBERT GORDON, CTR. FOR AM. PROGRESS, MORE EQUITY AND LESS RED TAPE: RETHINKING THE COMPARABILITY AND COMPLIANCE PROVISIONS IN TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 3 (2008); LINDSEY LUEBCHOW, NEW AM. FOUND., EQUITABLE RESOURCES IN LOW INCOME SCHOOLS: TEACHER EQUITY AND THE FEDERAL TITLE I COMPARABILITY REQUIREMENT 3–4 (2009).

funds be conditioned on states weighting their funding formulas to meet the needs of disadvantaged students while the federal government simultaneously increases its funding from \$15 billion to \$45 billion.<sup>437</sup> Congress should consider both the lessons from federal fair funding incentives and the full array of scholarly proposals for reform that include increasing federal education funding as it develops a separate fair funding program within ESEA or incorporates new conditions into Title I of ESEA.

Finally, the United States should consider future long-term legislation that requires progressive funding, with an appropriate transition period for states to reform their funding systems. This requirement would end the practice of favoring the rich over the poor<sup>438</sup> when poor students have greater needs,<sup>439</sup> and would bring the United States in line with most other developed nations that direct more funding to economically disadvantaged children.<sup>440</sup> Such a mandate could be embedded within a guarantee of a federal right to education, which is the right discussed in my forthcoming book *Thoughts on a Federal Right to Education*,<sup>441</sup> or adopted through legislation under Section 5 of the Fourteenth Amendment.<sup>442</sup> Furthermore, moving some reforms from conditions within ESEA to long-term legislation could reduce the burden on ESEA to solve the nation's education challenges. Further exploration of potential mandates on fair funding should await the insights of federal incentives and ESEA conditions that seek to achieve this aim.

Clearly, such a legislative mandate is not politically feasible at this time because ESSA represents a substantial reduction in the federal role in education.<sup>443</sup> Nevertheless, given that many other developed countries have embraced progressive funding and are outperforming the United States,<sup>444</sup> the United States

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437. Black, *supra* note 3, at 1364–65.

438. *Cf.* BAKER ET AL., *supra* note 32, at 9 (showing that seventeen states provide less state and local funding to high-poverty districts).

439. *See* CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 40; Rothstein, *supra* note 169, at 61–69.

440. *See* COUNCIL ON FOREIGN RELATIONS, REMEDIAL EDUCATION: FEDERAL EDUCATION POLICY 8 (2016).

441. KIMBERLY JENKINS ROBINSON, THOUGHTS ON A FEDERAL RIGHT TO EDUCATION (Kimberly Jenkins Robinson ed., forthcoming New York University Press 2019).

442. *See generally* U.S. CONST. amend. XIV, §§ 2, 5.

443. *See* Klein, *supra* note 17, at 43.

444. *See* ERIC A. HANUSHEK ET AL., ENDANGERING PROSPERITY: A GLOBAL VIEW OF THE AMERICAN SCHOOL vii (2013); NAT'L CTR. FOR EDUC. STATISTICS, SELECTED FINDINGS FROM PISA 2015, <https://nces.ed.gov/surveys/pisa/>

may eventually come to view this as a policy approach that benefits the entire nation. ESSA's requirement to report per pupil spending may make such legislation more politically feasible for future generations. If federal incentives and ESEA conditions prove successful, they also could prepare the nation for future mandates on this issue.

An increase in state efforts to provide fair funding is an essential foundation for the remaining elements of my model for institutional equity. Therefore, within the reform agenda, funding should be prioritized for federal incentives and ESEA conditions.

### C. AN EQUITABLE DISTRIBUTION OF EFFECTIVE TEACHERS

Teacher quality factors such as the background, preparation, experience, and certification of teachers exert significant influence on student achievement.<sup>445</sup> Some of the current state approaches to evaluate teachers as well as state tenure and dismissal policies have hindered efforts to improve the quality of teachers and student outcomes.<sup>446</sup> However, the flaws of current teacher evaluation, tenure, and dismissal policies demonstrate that further research is needed on how to measure teacher quality consistently over time. Another challenge for improving the access of disadvantaged and minority students to effective teachers is that states do not directly control hiring or placement of teachers within districts.<sup>447</sup> In addition, high-poverty schools often pay their teachers less than low-poverty schools. For instance, math teachers in schools with 50% or more students in poverty earned approximately \$7,000 less than teachers in schools with 10% or less students in poverty.<sup>448</sup>

These challenges suggest that federal involvement in promoting the equitable distribution of effective teachers should proceed in four phases. First, the U.S. Department of Education should create a grant program that incentivizes states and districts to experiment with how teacher quality and effectiveness

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pisa2015/pisa2015highlights\_1.asp (last visited Oct. 27, 2018).

445. See Darling-Hammond, *supra* note 32, at 87–89.

446. See McGuinn, *supra* note 406, at 145 (citations omitted).

447. Jochim, *supra* note 132, at 132. One scholar has suggested that the way to address this lack of direct control is for states to define, track and publish data on teacher effectiveness so that local advocates can use this information to challenge districts to distribute teachers in an equitable manner. See *id.*

448. NAT'L SCI. FOUND., *supra* note 233, at 1-28 fig. 1-11.

can be consistently measured and reported over time and between classrooms, schools, and districts. This might include such efforts as developing teacher report cards or numerical scores for teachers that include an array of factors.

Second, DOE should employ grant programs to encourage experimentation with how states and districts can ensure an equitable distribution of high-quality teachers. This phase should include a priority for experimenting with which incentives are effective at attracting and retaining some of the best teachers for the students who have the greatest educational needs.<sup>449</sup> For instance, research indicates that limited administrative support, low salaries, and low-quality working conditions that are endemic to disadvantaged schools explain a great deal of the high teacher turnover rates in such schools.<sup>450</sup> Districts will be better able to recruit and retain high-quality teachers in disadvantaged schools when equitable funding enhances administrative support, creates competitive teacher salaries and benefits, and addresses other evidence-based factors that influence teacher recruitment and retention, such as effective training, ongoing teacher mentoring, and impactful professional development.<sup>451</sup>

This phase should also encourage research on how teacher tenure and dismissal policies adversely affect the equitable distribution of high-quality teachers and how unions and districts can work together to achieve this goal.<sup>452</sup> Attention must be paid to ensuring the equitable distribution of teachers without creating perverse incentives for the teaching profession. For instance, if teachers were assigned to schools without any consideration of their preferences throughout their careers, the nation would witness a sharp decline in those entering the teaching profession. Successful collaborations between districts and teacher unions also should be examined.<sup>453</sup> Some research has been conducted

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449. See ANNE PODOLSKY ET AL., LEARNING POLICY INST., SOLVING THE TEACHER SHORTAGE: HOW TO ATTRACT AND RETAIN EXCELLENT EDUCATORS v (2016).

450. LEIB SUTCHER ET AL., LEARNING POLICY INST., A COMING CRISIS IN TEACHING? TEACHER SUPPLY, DEMAND, AND SHORTAGES IN THE U.S. 49, 51 (2016); Brian A. Jacob, *The Challenges of Staffing Urban Schools with Effective Teachers*, 17 FUTURE CHILD. 129, 142 (2007).

451. See SUTCHER, *supra* note 450, at 54–70.

452. See PARTEE, *supra* note 226, at 14 (noting some of the policies and practices that prevent getting the most effective teachers to the students who most need them).

453. Unions can work together with school districts to improve teacher quality so that all students benefit. Montgomery County, Maryland provides one example of a successful collaboration between a district and union to achieve

on these issues, but additional research would be valuable if ESEA is ultimately going to condition funds to states and districts on having effective plans for the equitable distribution of teachers.

DOE should highlight and disseminate effective approaches from each of these phases.<sup>454</sup> In addition, technical assistance from DOE for states and districts can help them achieve their intended aims.<sup>455</sup> Multiyear payouts should be included with clear conditions on what is required for future payments given the tendency of states to take federal money while avoiding the required reforms.<sup>456</sup> These two phases would build upon ESEA and grant programs that seek to improve teacher quality, including the Transition to Teaching program that seeks to recruit experienced, mid-career professionals to teach in disadvantaged schools as well as the Race to the Top District program that invited grantees to develop innovative improvements to teaching that improve student achievement.<sup>457</sup>

Like the funding proposals noted in Part III.B, the proposed grant programs should use discretionary funding and be modeled after the RTTT program while simultaneously avoiding some of the pitfalls of RTTT.<sup>458</sup> Although some districts were already experimenting with evaluating teachers based on student achievement before RTTT, after RTTT some states repealed laws

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this goal that has endured for over a decade. The district and the union adopted a collaborative approach to improve teacher quality that includes student test scores as a measure of student progress, embraces a peer support and review process, and promotes a continuous improvement model for teacher quality. Student achievement in the county has improved in all racial, ethnic, and income subgroups and achievement gaps have narrowed in all grades in math and reading. Stan Karp, *Taking Teacher Quality Seriously: A Collaborative Approach to Teacher Evaluation*, 26 RETHINKING SCHOOLS 46, 48–49 (2012).

454. See Robinson, *supra* note 50, at 994–96.

455. See *id.* at 996–97.

456. See Robinson, *supra* note 49, at 224–25.

457. See generally Office of Innovation & Improvement, *Teacher Quality*, U.S. DEPT EDUC., <https://innovation.ed.gov/what-we-do/teacher-quality> (last visited Oct. 27, 2018). The Trump Administration's budget proposal for FY2019 sought to eliminate the Teacher Quality Partnership program, the Supporting Effective Educator Development Grant Program, and the Teacher and School Leader Incentive Program. U.S. DEPT OF EDUC., FISCAL YEAR 2019 BUDGET SUMMARY AND BACKGROUND INFORMATION – PROGRAMS PROPOSED FOR ELIMINATION 51–56 (2018), <https://www2.ed.gov/about/overview/budget/budget19/summary/19summary.pdf>. However, funding for these programs remained consistent in the approved FY2019 budget. DEP'T OF EDUC., FISCAL YEAR 2019 CONGRESSIONAL ACTION (2018), <https://www2.ed.gov/about/overview/budget/budget19/19action.pdf>.

458. Cf. Robinson, *supra* note 49, at 223–24.

that prohibited using student achievement data to evaluate teachers; other states adopted requirements that teacher evaluation or tenure decisions include student achievement data; and, still others used RTTT to build momentum for reforms of teacher evaluation.<sup>459</sup> Even though a majority of states did not enact reforms of teacher accountability,<sup>460</sup> RTTT can still be credited with sparking significant teacher quality reforms in numerous states. The success of RTTT demonstrates that a large grant program can entice many states to reconsider how it evaluates teachers. However, care should be taken to provide a broad program capable of helping most states so that the program survives the criticism of unsuccessful applicants and the Congressmen and women who represent them.<sup>461</sup>

The third phase of reform would focus on direct federal support for increasing the quality and distribution of teachers. For this phase, I agree with the recommendation of Linda Darling-Hammond and Gary Sykes that the United States should implement a “major education manpower program” modeled after federal support for training and distributing doctors to shortage areas.<sup>462</sup> This federal program would aim to achieve three goals: “enhancing the supply of qualified teachers targeted to high-need fields and locations;”<sup>463</sup> “improving retention of qualified teachers, especially in hard-to-staff schools;”<sup>464</sup> and, “creating a national labor market by removing interstate barriers to mobility.”<sup>465</sup> This approach recognizes that some schools, districts, and

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459. See McGuinn, *supra* note 406, at 146.

460. See *id.* at 147.

461. See Robinson, *supra* note 49, at 224.

462. See Linda Darling-Hammond & Gary Sykes, *Wanted: A National Teacher Supply Policy for Education: The Right Way to Meet the “Highly Qualified Teacher” Challenge*, 11 EDUC. POLY ANALYSIS ARCHIVES, 3 (2003).

463. To increase the supply of qualified teachers for high-needs fields and locals, Drs. Darling-Hammond and Sykes recommend creating both a long-term program of scholarships linked to service and loan forgiveness as well as grants to increase the teaching capacities within cities and rural areas. See *id.* at 32–33.

464. To increase retention of qualified teachers in challenging schools, Drs. Darling-Hammond and Sykes suggest federal grants to states to create effective teacher induction programs that are integrated into certification and licensure requirements, research on effective strategies for improving compensation and working conditions in challenging schools, and identifying the needed inducements to enter and remain in teaching. See *id.* at 34–37.

465. See *id.* at 32. Drs. Darling-Hammond and Sykes propose that the federal government help to reduce barriers to teacher mobility by creating common licensing exams and interstate agreements that increases teacher mobility, sup-

states are hampered by limited access to high-quality teachers because of factors that are outside of their borders.<sup>466</sup> This phase would occur simultaneously with the first two phases.

Finally, conditions within ESEA also should be implemented in two phases. This final phase should begin with a separate program included in ESEA that provides funding to states to adopt the approaches that have proven effective. A separate program within ESEA will encourage states to be part of the laboratory of the states that develops effective approaches for teacher evaluation and the equitable distribution of teachers. Then, Title I conditions to measure and report teacher quality and effectiveness and to ensure equitable distribution of effective teachers should build upon the consensus that emerges from the first two phases. These provisions must be monitored by DOE and technical assistance must be provided to ensure that states and districts are complying with the requirements. Without this oversight, these conditions will remain empty rhetoric with little to no impact on schools and students and thus will remain as ineffectual as the current ESSA conditions. This four-step approach would provide a much stronger foundation of research and evidence for impactful ESEA requirements on the equitable distribution of effective teachers than the current approach in ESSA.

#### D. HIGH-QUALITY PREK-12 OPPORTUNITIES TO LEARN

As I and others have previously recommended, the United States should embrace standards that assess and publish the state of preK-12 opportunities to learn.<sup>467</sup> Given the lack of success of past efforts to encourage states to measure and close opportunity gaps discussed in Part II.C, how could the federal government effectively motivate states to measure and tackle the widespread educational inequities that betray equal opportunity and the principles of the American dream? First, any federal incentives or conditions within ESEA must be supported by a national conversation about the costs of inequitable distributions

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port for a portable pension system, and investing in research on the labor market at the federal, state, and local levels. *See id.* at 37.

466. *Id.* at 3.

467. *See* Robinson, *supra* note 50, at 988–94. Others also have argued for opportunity to learn standards. *See* LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW ET AL., FRAMEWORK FOR PROVIDING ALL STUDENTS AN OPPORTUNITY TO LEARN THROUGH REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 2–3 (2010); NAT'L OPPORTUNITY TO LEARN CAMPAIGN, FEDERAL RECOMMENDATIONS 8–10 (2009).

in educational opportunity<sup>468</sup> and the importance of closing opportunity gaps to our democracy, economy and national security. Only when critical national interests, such as the interest in national security, economic prosperity, and equal opportunity, have been undermined by state transgressions has the federal government been willing to enact broad legislation to right these wrongs.<sup>469</sup>

Second, powerful federal incentives can entice states to adopt opportunity to learn standards and close opportunity gaps. These incentives should include two components. Federal support should be provided for states to experiment with the creation of opportunity to learn standards. For instance, one group of scholars recommended that states develop “opportunity dashboards” that would enable schools to report both student inputs and outputs.<sup>470</sup> Support for research on measuring opportunity will help states identify which opportunities should be measured to help both close opportunity gaps and improve student achievement. In this phase, the way in which states measure opportunity to learn should be left to the states.

In addition, opportunity to learn conditions within ESEA should be considered if and when state experimentation has proven that opportunity to learn standards provide an effective tool for guiding states in closing the opportunity gaps that cause achievement gaps. If opportunity to learn standards have a proven track record of success, political support for this approach should increase, although admittedly some states will never support opportunity to learn measures because of the spotlight that they shine on inequitable practices and their unwillingness to remedy them.

Congress should first create a separate opportunity to learn program in ESEA and then incorporate a condition within Title I that requires states to adopt such standards.<sup>471</sup> Creating a separate opportunity to learn program allows additional state experimentation before opportunity to learn standards become a condition to receive Title I funds. Any ESEA opportunity to learn

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468. See Robinson, *supra* note 50, at 986.

469. See Barone & DeBray, *supra* note 6.

470. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 42.

471. See Robinson, *supra* note 49, at 227–28 (discussing how federal support for state funding reform could occur through a separate program within ESEA or through conditions for Title I).

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conditions within Title I should include some minimum requirements on what the standards should include based upon state experimentation with such standards.<sup>472</sup>

Most importantly, both phases of federal support for opportunity to learn standards and closing opportunity gaps must include a substantial financial contribution to the price tag for closing opportunity gaps, just as federal fair funding incentives must bear some of the costs of reforms. Spending more is inadequate on its own, but it will be required to expand and improve educational opportunities, enhance their after-school and summer-school experiences, and offer the social supports that are essential for success.<sup>473</sup> Additional federal financial assistance will provide an essential supplement to the diverse array of state investments in education. For instance, state investments in early childhood education vary greatly. Only fourteen states mandate that children attend kindergarten.<sup>474</sup> Scholars offer an array of policy approaches for states to consider as they expand high-quality early childhood education, including universal preschool for three and four year olds,<sup>475</sup> focusing early childhood education on low-income districts, and providing access to early childhood education on a sliding scale.<sup>476</sup> Federal financial support for closing opportunity gaps would indicate a firm commitment to making educational equity a reality for prekindergarten through secondary education.

Fortunately, this federal financial investment would not require a federal takeover of schools and districts, but rather a targeted investment that would strengthen state efforts to tackle these challenging disparities. This federal investment would transform the federal-state relationship into a true partnership that would be greatly superior to both the No Child Left Behind approach of substantial federal influence with limited investment and the ESSA approach of limited investment with little influence.<sup>477</sup> Collectively, these recommendations would replace

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472. A mandate on opportunity to learn standards is not only politically unsustainable, but also would lack the flexibility that effective opportunity to learn standards would need so that they could evolve with new education research.

473. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 42.

474. *Id.* at 29.

475. See Meredith J. Harbach, *Childcare, Vulnerability and the New Parens Patriae*, YALE L. & POL'Y REV. (forthcoming 2019) (proposing that more states should follow the lead of states that currently offer universal preK).

476. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 30.

477. See Robinson, *supra* note 50, at 1005.

the current federalism approach with a more collaborative approach in which the federal government serves as the ultimate guarantor of equal access to an excellent education.<sup>478</sup>

#### E. ECONOMIC AND RACIAL INTEGRATION

The federal government also should incentivize efforts to promote socioeconomic and racial integration. Of the reforms that I recommend in my model for institutional design for equity, economic integration is in the most nascent stage. By 2016, eighty-three school districts and eight charter schools or charter networks sought to promote socioeconomic integration through student assignments.<sup>479</sup> This is a dramatic increase from 1996 when a study by the Century Foundation only found two districts that included socioeconomic integration as a factor in student assignment.<sup>480</sup> Nevertheless, these efforts are still only being made by significantly less than 1% of the nation's approximately 13,600 public school districts that educate 50.7 million students in 98,300 public schools, including about 6,900 charter schools.<sup>481</sup> In addition, racial integration has become a disfavored policy goal for many states and districts.<sup>482</sup> A recent study found sixty districts that are pursuing racial or socioeconomic integration or both and that these districts enroll more than 3.5 million students.<sup>483</sup>

Efforts to pursue socioeconomic and racial integration must rely on the other three elements of my model to be successful. Integration is only achievable when parents may choose among well-funded, successful schools with effective teachers that also are socioeconomically and racially integrated. Even then, considerable effort will need to be made to convince parents of the benefits and importance of integrated school settings. Without fair funding, effective teachers and high-quality learning opportunities, parents will forego integration to pursue these other essential components of an excellent education.

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478. *See id.* at 1002–05.

479. THE CENTURY FOUND., THE GROWTH OF SOCIOECONOMIC INTEGRATION 2 (2016), <https://tcf.org/content/facts/the-growth-of-socioeconomic-school-integration>.

480. *Id.*

481. *Fast Facts: Back to School Statistics* (2018), NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372>.

482. *See* RYAN, *supra* note 27, at 273 (explaining that more states are now interested in academic achievement than racial and socioeconomic integration).

483. ERICA FRANKENBERG ET AL., CTR. FOR EDUC. & CIVIL RIGHTS, VOLUNTARY INTEGRATION IN U.S. SCHOOL DISTRICTS, 2000-2015 3 (2017).

The limited adoption of socioeconomic integration and the waning support for racial integration makes my incremental approach essential for guiding federal support that promotes integration. As with the recommendation for teacher evaluations, federal support should begin with long-term discretionary grants to districts that support experimentation with integration. Such a grant must greatly exceed the size of the Magnet Schools Assistance Program because that program only reaches thirty-two grantees in sixteen states and approximately 2.5 million students.<sup>484</sup> This new grant program will help districts and states experiment with how to promote integration and to tailor approaches to local conditions. For instance, research indicates that implementing districtwide choice policies and changing attendance zone boundaries have the greatest ability to socioeconomically integrate most or all schools in a district by class.<sup>485</sup> However, districts also use magnet and charter school admissions and transfer policies to promote integration.<sup>486</sup>

This grant program should be combined with federal research and technical assistance to grantees. It also should include federal efforts to publicize the beneficial impacts of integration. For example, the public must be made aware that concentrated poverty depresses the achievement of children from economically disadvantaged families, while socioeconomic integration that maintains a strong middle class majority does not harm the achievement of more affluent children.<sup>487</sup> Even with favorable research on the benefits of socioeconomic and racial integration, opposition to integration remains likely. The federal government may be able to overcome some opposition through concerted campaigns that highlight that integration is an effective approach to raising student achievement and countering the adverse effects of concentrated poverty and racial isolation that harm the nation.<sup>488</sup>

A new ESEA program that promotes integration should be included once more states and districts have experimented with such efforts. Broader experimentation and success with grants should provide the support needed in Congress to embrace more

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484. Office of Innovation & Improvement, *Magnet Schools Assistance Program*, U.S. DEP'T OF EDUC., <https://innovation.ed.gov/what-we-do/parental-options/magnet-school-assistance-program-msap/> (last visited Oct. 27, 2018).

485. HALLEY POTTER ET AL., *A NEW WAVE OF SCHOOL INTEGRATION: DISTRICTS AND CHARTERS PURSUING SOCIOECONOMIC DIVERSITY* 11 (2016).

486. *See id.*

487. *Cf.* Kahlenberg, *supra* note 356, at 2, 5.

488. *See id.* at 3–4, 7.

substantial support for integration than the Magnet Schools Assistance Program has received. Given the embryonic state of socioeconomic integration efforts and declining support for racial integration, the United States is quite a long way off from the political support that would be required to include promoting integration as a condition for Title I funds. Nevertheless, I agree with those who have suggested that integration should be incorporated within Title I,<sup>489</sup> with the caveat that an incremental build up to its incorporation will be essential for it to be added and retained as a Title I condition in a meaningful way.

### CONCLUSION

As understanding of opportunity gaps and their costs increases, the American public should begin to seek solutions.<sup>490</sup> This search must be accompanied by a shift in the national dialogue from seeking solutions for the challenges of other people's children to seeking solutions for all of our children.<sup>491</sup> John Dewey's recognition of the importance of an excellent education for the success of our democracy still rings true today. Undoubtedly, the state chiefs are taking an important first step toward developing solutions to address opportunity gaps by signing on to a commitment to equity.<sup>492</sup> However, federal support and reform will be essential to address the limited capacity and political will of most states to make equitable access to an excellent education a legislative and policy priority.

This Article lays bare the ways in which ESSA does not provide an effective framework to advance equity. Fortunately, there is substantial untapped potential and authority at the federal level to support equity. Future federal incentives and ESEA reauthorizations should restructure ESSA's fundamentally flawed approach to equity and instead embrace my model for institutional design to achieve equity. This approach will prove superior to ESSA because it embraces an incremental approach to restructuring education federalism to support federal leadership on equity. It also emphasizes a more balanced federal-state partnership that makes closing opportunity gaps an essential national objective as the United States aims to reduce achievement

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489. See, e.g., Black, *Leveraging Funding*, *supra* note 60, at 244–46 (recommending that Title I should advance integration).

490. See CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 7, 11.

491. See *id.* at 12.

492. THE ASPEN INST. EDUC. & SOC'Y PROGRAM, *supra* note 8; Burnette II, *supra* note 8; Klein, *supra* note 8.

gaps. Improvement is challenging yet attainable with rigorous, effective policies.<sup>493</sup>

The United States must move forward expeditiously to achieve educational equity and excellence. We fail to do so at our peril.

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493. CLOSING THE OPPORTUNITY GAP, *supra* note 1, at 11–13; Rothstein, *supra* note 169, at 70–74 (“Modest social and economic reforms that are well within our political reach could have palpable effects on student achievement.”).