

# STRENGTHENING THE FEDERAL APPROACH TO EDUCATIONAL EQUITY DURING THE PANDEMIC

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## ABSTRACT

*Strengthening the Federal Approach to Educational Equity During the Pandemic provides a timely analysis of three issues of great national significance for education and the United States. First, it synthesizes preliminary research regarding the pandemic's educational harms through the 2020–2021 school year, including learning losses and the disparate impact of the pandemic on particular subgroups of children. It concludes by noting that the disproportionate adverse impact of the pandemic on vulnerable subgroups should lead federal intervention to prioritize educational equity. Second, it describes the federal legislative and executive response to the pandemic and critiques how this response may impact educational equity. Finally, after explaining a comprehensive theory for education federalism that prioritizes educational equity, the article proposes how the federal response to the pandemic should be strengthened to advance a coherent and consistent approach to education federalism that focuses on educational equity.*

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I. INTRODUCTION

Every component of the primary and secondary education ecosystem in the United States is encountering difficult and unprecedented challenges during the COVID-19 pandemic.<sup>1</sup> Most schools shuttered their doors in spring 2020, and during the 2020–2021 school year they navigated in-person, hybrid and virtual models with a majority of schoolchildren beginning the school year attending fully remote classes.<sup>2</sup> As teachers were able to be vac-

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<sup>1</sup> See EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS & ELLEN VIRULEG, MCKINSEY & Co., COVID-19 AND LEARNING LOSS—DISPARITIES GROW AND STUDENTS NEED HELP 2 (2020), <https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/covid%2019%20and%20learning%20loss%20disparities%20grow%20and%20students%20need%20help/covid-19-and-learning-loss-disparities-grow-and-students-need-help-v3.pdf?shouldIndex=false> [<https://perma.cc/36Y4-53W2>] [hereinafter DORN ET AL., COVID-19 AND LEARNING LOSS]; MEGAN KUHFIELD, BETH TARASAWA, ANGELA JOHNSON, ERIK RUZEK & KARYN LEWIS, LEARNING DURING COVID-19: INITIAL FINDINGS ON STUDENTS’ READING AND MATH ACHIEVEMENT AND GROWTH 2 (2020), <https://www.nwea.org/content/uploads/2020/11/Collaborative-brief-Learning-during-COVID-19.NOV2020.pdf> [<https://perma.cc/5ATT-6PAE>].

<sup>2</sup> CIVIS, GATES FOUNDATION COVID-19 TRACKER ANALYSIS (2021), [https://www.civisanalytics.com/wp-content/uploads/2021/01/COVID\\_Tracker\\_Wave\\_14\\_Quicktakes\\_Report\\_National.pdf](https://www.civisanalytics.com/wp-content/uploads/2021/01/COVID_Tracker_Wave_14_Quicktakes_Report_National.pdf) [<https://perma.cc/6TMJ-CSUT>] (reporting that a nationally representative survey found that “24.9% of parents of K-12 students report that their children are attending all in-person classes, 51.7% report that their children are attending all remote classes, and 23.4% reporting a hybrid of in-person and remote.”); DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 4; Keeanga-Yamahtta Taylor, *What’s at Stake in the Fight over Reopening Our Schools*, NEW YORKER (Feb. 9, 2021), <https://www.newyorker.com/news/our-columnists/whats-at-stake-in-the-fight-over-reopening-schools> [<https://perma.cc/63DS-CT7L>]; EMMA GARCÍA & ELAINE WEISS, COVID-19 AND STUDENT PERFORMANCE, EQUITY, AND U.S. EDUCATION POLICY 2 (2020), <https://files.epi.org/pdf/205622.pdf> [<https://perma.cc/K9LK-2CXA>].

cinated and schools implemented mitigation practices, a majority of students ended the school year in person on a full-time basis.<sup>3</sup> Teachers struggled to make each of the delivery models effective while reporting unmatched levels of burnout and stress due to the demands of these models and the risks they faced to their own health by teaching in person.<sup>4</sup>

Schoolchildren and their families also struggled through a wide array of challenges due to the pandemic, whether a child attended school remotely, in-person or through a hybrid model. Many remote learners experienced connectivity and other technical challenges as well as lower quality teaching from educators who were unfamiliar with best practices for virtual teaching.<sup>5</sup> In-person learners returned to schools with new requirements regarding mask wearing, social distancing, and hand washing, which have changed how schools operate.<sup>6</sup> Students also experienced greater mental health stresses, including increasing rates of anxiety and depression and less access

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<sup>3</sup> U.S. DEP'T OF EDUC., INST. EDUC. SCI. & NAT'L CTR. FOR EDUC. STAT., MONTHLY SCHOOL SURVEY DASHBOARD, <https://ies.ed.gov/schoolsurvey/> [<https://perma.cc/98T6-Q4LE>] [hereinafter SCHOOL SURVEY DASHBOARD]; MEGAN FERREN, CTR. AM. PROGRESS, REMOTE LEARNING AND SCHOOL REOPENINGS: WHAT WORKED AND WHAT DIDN'T (2021), [https://cdn.americanprogress.org/content/uploads/2021/06/30062937/Remote-Learning-and-School-Reopening.pdf?\\_ga=2.133572814.1566433615.1632584712-1805090326.1632584712](https://cdn.americanprogress.org/content/uploads/2021/06/30062937/Remote-Learning-and-School-Reopening.pdf?_ga=2.133572814.1566433615.1632584712-1805090326.1632584712) [<https://perma.cc/M2LA-4NPT>] (finding that by May 2021, more than half (53% of public schools had fully reopened, 46% offered a hybrid approach and 1% remained fully virtual); AM. ENTER. INST. & DAVIDSON COLL., RETURN TO LEARN TRACKER, <https://www.returntolearntacker.net/> [<https://perma.cc/V86S-6RR3>] (last updated June 7, 2021) (finding that by June 2021, 54% of schools were fully in-person, 45% were hybrid and 1% were fully virtual).

<sup>4</sup> Madeline Will, *Teachers Are Stressed Out, and It's Causing Some to Quit*, EDUC. WK. (Feb. 22, 2021), <https://www.edweek.org/teaching-learning/teachers-are-stressed-out-and-its-causing-some-to-quit/2021/02> [<https://perma.cc/2WJJ-FUXK>]; Natasha Singer, *Teaching in the Pandemic: 'This is Not Sustainable.'* N.Y. TIMES (Dec. 1, 2020), <https://www.nytimes.com/2020/11/30/us/teachers-remote-learning-burnout.html> [<https://perma.cc/HA5H-6GSJ>].

<sup>5</sup> Erin Richards, Elinor Aspegren & Erin Mansfield, *A Year into the Pandemic, Thousands of Students Still Can't Get Reliable WiFi for School. The Digital Divide Remains Worse than Ever*, USA TODAY (Feb. 4, 2021), <https://www.usatoday.com/story/news/education/2021/02/04/covid-online-school-broadband-internet-laptops/3930744001/> [<https://perma.cc/ZAA9-U2W9>]; LAURA STELTANO, SY DOAN, ASHLEY WOO, MELISSA KAY DILIBERTI, JULIA H. KAUFMAN & DANIELLA HENRY, THE DIGITAL DIVIDE AND COVID-19: TEACHERS' PERCEPTIONS OF INEQUITIES IN STUDENTS' INTERNET ACCESS AND PARTICIPATION IN REMOTE LEARNING 1 (2020), [https://www.rand.org/pubs/research\\_reports/RRA134-3.html](https://www.rand.org/pubs/research_reports/RRA134-3.html) [<https://perma.cc/27SC-64Y9>]; Sarah Schwartz, *Survey: Teachers and Students Are Struggling with Online Learning*, EDUC. WK. (Nov. 16, 2020), <https://www.edweek.org/teaching-learning/survey-teachers-and-students-are-struggling-with-online-learning/2020/11> [<https://perma.cc/UJD9-BB4K>].

<sup>6</sup> *K-12 School Operational Strategy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html> [<https://perma.cc/CP73-DUL5>] (last updated May 15, 2021) [hereinafter *Operational Strategy*]; *Schools and Day Camps*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 30, 2020), <https://stacks.cdc.gov/view/cdc/88558> [<https://perma.cc/S9XN-Y6JN>] [hereinafter *Schools and Day Camps*]; *Interim Guidance for Administrators of US K-12 Schools and Child Care Programs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 12, 2020), <https://stacks.cdc.gov/view/cdc/85835> [<https://perma.cc/2Y59-V7Z5>] [hereinafter *Mar. 12th Interim Guidance*].

to counselors and school meals.<sup>7</sup> Whether children attended school virtually or in a hybrid model, both children and their parents reported significant increases in stress and decreases in well-being.<sup>8</sup>

In addition, some families have left public schools behind and switched to private schools or created small-group “learning pods” that either replaced schools or supplemented virtual school.<sup>9</sup> The percentage of families who selected homeschooling for their child doubled from 2019 to 2020.<sup>10</sup> Parental satisfaction with their child’s education dropped ten percentage

<sup>7</sup> See Kristina Cooke & M.B. Pell, *Special Report: As U.S. Schools Shuttered, Student Mental Health Cratered, Reuters Finds*, REUTERS (Mar. 19, 2021), <https://www.reuters.com/world/us/special-report-us-schools-shuttered-student-mental-health-cratered-reuters-finds-2021-03-19/> [https://perma.cc/D2TA-Z6C6]; Eliza W. Kinsey, Amelie A. Hecht, Caroline Glagola Dunn, Ronli Levi, Margaret A. Read, Courtney Smith, Pamela Niesen, Hilary K. Seligman & Erin R. Hager, *School Closures During COVID-19: Opportunities for Innovation in Meal Service*, 110 AM. J. PUB. HEALTH 1635, 1635–36 (2020); Isabella Kwai & Elian Peltier, ‘What’s the Point?’: *Young People’s Despair Deepens as Covid-19 Crisis Drags On*, N.Y. TIMES (Feb. 14, 2021), <https://www.nytimes.com/2021/02/14/world/europe/youth-mental-health-covid.html> [https://perma.cc/9DBA-D2SN]; Robin Lake, *Students Count: Highlights from COVID-19 Student Surveys*, CTR. ON REINVENTING PUB. EDUC. (July 7, 2020), <https://www.crpe.org/thelens/students-count-highlights-covid-19-student-surveys> [https://perma.cc/Q6WH-JXNG]; Valerie J. Calderon, *U.S. Parents Say COVID-19 Harming Child’s Mental Health*, GALLUP (June 16, 2020), <https://news.gallup.com/poll/312605/parents-say-covid-harming-child-mental-health.aspx> [https://perma.cc/V4JH-NE97]; Neal Morton, *Counseling Kids During the Coronavirus: A Tough Job Made Even Tougher*, HECHINGER REP. (May 8, 2020), <https://hechingerreport.org/counseling-kids-during-the-coronavirus-a-tough-job-made-even-tougher/> [https://perma.cc/5L58-H84M].

<sup>8</sup> Jorge V. Verlenden, Sanjana Pampati, Catherine N. Rasberry, Nicole Liddon, Marci Hertz, Greta Kilmer, Melissa Heim Viox, Sarah Lee, Neha K. Cramer, Lisa C. Barrios & Kathleen A. Ethier, *Association of Children’s Mode of School Instruction with Child and Parent Experiences and Well-Being During the COVID-19 Pandemic – COVID Experiences Survey, United States, October 8–November 13, 2020*, 70 CTRS. FOR DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 369, 369 (2021), <https://www.cdc.gov/mmwr/volumes/70/wr/pdfs/mm7011a1-H.pdf> [https://perma.cc/U6UY-NPK3].

<sup>9</sup> Damian Kavanaugh & Benjamin Scaffidi, *Opinion: One Sector Is Flourishing During the Pandemic: K-12 Private Schools*, HILL (Nov. 29, 2020), <https://thehill.com/opinion/education/527623-one-sector-is-flourishing-during-the-pandemic-k-12-private-schools> [https://perma.cc/2QT2-ZUZV]; Michael B. Horn, *The Rapid Rise of Pandemic Pods*, EDUC. NEXT (Sept. 2, 2020), <https://www.educationnext.org/rapid-rise-pandemic-pods-will-parent-response-covid-19-lead-to-lasting-changes/> [https://perma.cc/M895-SPXT]; Hannah Natanson, *Love Them or Hate Them, Pandemic Learning Pods Are Here to Stay—And Could Disrupt American Education*, WASH. POST (Sept. 2, 2020), [https://www.washingtonpost.com/local/education/love-or-hate-them-pandemic-learning-pods-are-here-to-stay—and-could-disrupt-american-education/2020/09/02/3d359f8c-dd6f-11ea-8051-d5f887d73381\\_story.html](https://www.washingtonpost.com/local/education/love-or-hate-them-pandemic-learning-pods-are-here-to-stay—and-could-disrupt-american-education/2020/09/02/3d359f8c-dd6f-11ea-8051-d5f887d73381_story.html) [https://perma.cc/WP6W-77LM]; Melinda Wenner Moyer, *Pods, Microschools, and Tutors: Can Parents Solve the Education Crisis on their Own?*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html> [https://perma.cc/AR6Y-GC6W].

<sup>10</sup> Megan Brennan, *K-12 Parents’ Satisfaction with Child’s Education Slips*, GALLUP (Aug. 25, 2020), <https://news.gallup.com/poll/317852/parents-satisfaction-child-education-slips.aspx> [https://perma.cc/52X9-XUX7]; see Juliana Menasce Horowitz & Ruth Igielnik, *Most Parents of K-12 Students Learning Online Worry About Them Falling Behind*, PEW RSCH. CTR. (Oct. 29, 2020), <https://www.pewresearch.org/social-trends/2020/10/29/most-parents-of-k-12-students-learning-online-worry-about-them-falling-behind/> [https://perma.cc/9PDJ-EWF7].

points during the same time frame.<sup>11</sup> Both food and housing insecurity were on the rise across households.<sup>12</sup>

The United States is only beginning to comprehend the adverse effects of this widescale disruption to the education system and the full impact will not be known for years.<sup>13</sup> Yet, it is already clear that many students are experiencing educational setbacks from the pandemic and students from low-income households and minority students are being disproportionately harmed by the pandemic, as are students with disabilities, English learners (“ELs”), and lesbian, gay, bisexual, transgender, and queer (“LGBTQ+”) students.<sup>14</sup> The disparities in opportunity and achievement that existed prior to the pandemic will only grow if they are not addressed in a comprehensive and sustained manner.<sup>15</sup>

The pandemic brought an immediate cry from the nation’s governors for federal help to support education as it became clear that states and localities lacked the resources and expertise to navigate the adverse educational effects of the pandemic.<sup>16</sup> The federal government has provided federal support for education during the pandemic by enacting three major aid packages. The Coronavirus Aid, Relief, and Economic Security (CARES) Act (“CARES Act”) includes more than \$2 trillion in federal aid, with al-

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<sup>11</sup> Brennan, *supra* note 10.

<sup>12</sup> CTR. ON BUDGET & POL’Y PRIORITIES, TRACKING THE COVID-19 RECESSION’S EFFECTS ON FOOD, HOUSING, AND EMPLOYMENT HARDSHIPS, <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and> [https://perma.cc/PXC9-4LE2] (last updated Oct. 21, 2021).

<sup>13</sup> The full impact of the pandemic will remain difficult to estimate because some students, particularly students of color, are not participating in assessments that are used to track the impact. *See, e.g.*, MEGAN KUHFIELD, ERIK RUZEK, ANGELA JOHNSON, BETH TARASAWA & KARYN LEWIS, TECHNICAL APPENDIX FOR: LEARNING DURING COVID-19: INITIAL FINDINGS ON STUDENTS’ READING AND MATH ACHIEVEMENT AND GROWTH 5 (2020), <https://www.nwea.org/content/uploads/2020/11/Technical-brief-Technical-appendix-for-Learning-during-COVID-19-Initial-findings-on-students-reading-and-math-achievement-and-growth-NOV2020.pdf> [https://perma.cc/TDP9-86XK].

<sup>14</sup> U.S. DEP’T OF EDUC., OFF. FOR C.R., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS iii–iv (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [https://perma.cc/5JJN-RKKE] [hereinafter DISPARATE IMPACTS]; DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 2.

<sup>15</sup> *See* DISPARATE IMPACTS, *supra* note 14, at iii; DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 2.

<sup>16</sup> *See* Letter from The American Federation of Teachers, the Association of Community College Trustees, the Council of Administrators of Special Education, the Council of State Governments, the National Association of State Boards of Education, the National Association of State Directors of Special Education, the National Center for Learning Disabilities, the National Governors Association, the National School Boards Association & the State Higher Education Executive Officers to Mitch McConnell, Majority Leader, U.S. Senate, Nancy Pelosi, Speaker of the House, U.S. House of Representatives, Chuck Schumer, Minority Leader, U.S. Senate & Kevin McCarthy, Minority Leader, U.S. House of Representatives (July 17, 2020), <https://www.nga.org/advocacy-communications/letters-nga/letter-regarding-educational-funding-and-local-control/> [https://perma.cc/E8A7-JE53] (calling for greater funding while preserving local control of education).

most \$31 billion set aside for the Education Stabilization Fund.<sup>17</sup> In December 2020, the Consolidated Appropriations Act, 2021 (“Appropriations Act”) authorized \$900 billion in federal support to address the pandemic,<sup>18</sup> with \$82 billion to the Education Stabilization Fund.<sup>19</sup> Congress also passed the \$1.9 trillion American Rescue Plan Act of 2021 (“American Rescue Plan” or “ARP”) in March, which includes \$165 billion for the Education Stabilization Fund—\$122 billion of which must be dedicated to K-12 schools.<sup>20</sup> In addition, the Executive Branch under the Trump and Biden administrations has taken steps to guide states, districts, and schools as they navigate the pandemic, including by providing guidance from the Centers for Disease Control (“CDC”) and the U.S. Department of Education (“US-DOE” or “the Department”) on the safe reopening of schools.<sup>21</sup>

This unparalleled influx of federal education funding undoubtedly will have a significant impact on education.<sup>22</sup> However, expanding the federal role in education does not always translate to a more strategic, effective or beneficial role, as the nation learned all too well as it implemented the No Child Left Behind Act of 2001 (“No Child Left Behind” or “NCLB”).<sup>23</sup>

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<sup>17</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18001, 134 Stat. 281, 564 (2020); Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html> [https://perma.cc/S53B-S6HX].

<sup>18</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

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

<sup>20</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(a–b), 135 Stat. 4, 19. \$800 million of this must be reserved for homeless children and youth. *Id.*

<sup>21</sup> See, e.g., U.S. DEP’T OF EDUC., OFF. OF PLAN., EVALUATION & POL’Y DEV., 2 ED COVID-19 HANDBOOK, ROADMAP TO REOPENING SAFELY AND MEETING ALL STUDENTS’ NEEDS (2021), <https://www2.ed.gov/documents/coronavirus/reopening-2.pdf> [https://perma.cc/SYWX-JMRA] [hereinafter ED COVID-19 HANDBOOK, VOL. 2]; U.S. DEP’T OF EDUC., OFF. OF PLAN., EVALUATION & POL’Y DEV., 1 ED COVID-19 HANDBOOK, STRATEGIES FOR SAFELY REOPENING ELEMENTARY AND SECONDARY SCHOOLS (2021), <https://www2.ed.gov/documents/coronavirus/reopening.pdf> [https://perma.cc/Z6CY-RLYV] [hereinafter ED COVID-19 HANDBOOK, VOL. 1]; *Interim Guidance for Child Care Programs and K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2020), <https://stacks.cdc.gov/view/cdc/85133> [https://perma.cc/9FVU-JLK7] [hereinafter *Feb. 16th Interim Guidance*]; Evie Blad, *In New Guidance for Schools, CDC Warns Against Universal Symptom Screenings*, EDUC. WK. (July 23, 2020), <https://www.edweek.org/education/in-new-guidance-for-schools-cdc-warns-against-universal-symptom-screenings/2020/07> [https://perma.cc/9MVS-U5TT]; Evie Blad, *How CDC Guidance Could Shape What Back-to-School Looks Like in the COVID-19 Era*, EDUC. WK. (May 30, 2020), <https://www.edweek.org/leadership/how-cdc-guidance-could-shape-what-back-to-school-looks-like-in-the-covid-19-era/2020/05> [https://perma.cc/Y757-R6SN].

<sup>22</sup> See Michael Griffith, *An Unparalleled Investment in U.S. Public Education: Analysis of the American Rescue Plan Act of 2021*, LEARNING POL’Y INST. BLOG (Mar. 11, 2021), <https://learningpolicyinstitute.org/blog/covid-analysis-american-rescue-plan-act-2021> [https://perma.cc/5KNG-6JRG].

<sup>23</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.), *modified by* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.). Although a comprehensive analysis of the flaws of NCLB is beyond the scope of this article, for a critique of how NCLB created perverse incentives for education and fell short of its aims, please see James E.

Although NCLB ushered in an influential expansion of the federal role in education, an array of design flaws resulted in perverse incentives that encouraged states to race to the bottom on their state standards and assessments.<sup>24</sup> The Every Student Succeeds Act's<sup>25</sup> contraction of the federal role in education also suffers from fundamental design flaws that undermine its ability to advance educational equity despite retaining equity as one of its critical goals.<sup>26</sup>

Given that the federal government has provided and will continue to provide critical support for education during the pandemic and beyond, it is essential to critique this response and consider how law and policy reforms could make it more impactful, particularly for children whose educational opportunities and outcomes have been disproportionately harmed by the pandemic. Advancing educational equity means focusing on distributing resources and educational opportunities to address students' needs rather than distributing them based on race, class, national origin and zip code.<sup>27</sup> Equity, as it is defined in this article, embraces excellence in educational opportunity. It rejects both a leveling down of educational opportunity and the practice of giving all children the same resources when research confirms that children have a wide array of educational needs.<sup>28</sup> Equity in education also aims to address historic and systemic disadvantages that have held back the opportunities and achievement of too many schoolchildren for generations.<sup>29</sup>

It also is important to comprehend the federal approach to education federalism during the pandemic, how this approach advances or undermines federal support for schools and how an alternative approach to education federalism could strengthen efforts to advance educational equity.

I present this analysis in three parts. Part I documents the educational harms of the pandemic beginning with the spring 2020 school closures through the 2020–21 school year. Documenting the scope and nature of the harms serves as an important contribution of this Article. Part I concludes by explaining why a focus on equity should guide federal law and policy interventions in response to the pandemic. Part II describes the federal response

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Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004); see also Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915, 931–32 (2018) [hereinafter Robinson, *Restructuring*].

<sup>24</sup> See JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART 239–67 (2010).

<sup>25</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.).

<sup>26</sup> Robinson, *Restructuring*, *supra* note 23, at 918, 924; see Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1340–61 (2017).

<sup>27</sup> Robinson, *Restructuring*, *supra* note 23, at 920–21.

<sup>28</sup> See *id.* at 921 n.28; see also MARILYN GITTELL, *The Politics of Equity in Urban School Reform*, in BRINGING EQUITY BACK: RESEARCH FOR A NEW ERA IN AMERICAN EDUCATIONAL POLICY 16, 39 (Janice Petrovich & Amy Stuart Wells eds., 2005) (describing the “full potential” of American Education as “excellence with equity”).

<sup>29</sup> See JANICE PETROVICH, *The Shifting Terrain of Educational Policy: Why We Must Bring Equity Back*, in BRINGING EQUITY BACK, *supra* note 28, at 3, 5–12.

to the pandemic and then identifies shortcomings in its approach to equity. Part III explains how a comprehensive approach to education federalism can strengthen federal efforts to advance educational equity and notes the inconsistencies in the approach to education federalism during the pandemic. It also proposes how this impactful approach to education federalism would support federal law and policy reforms that would transform the federal government into an effective and influential partner in remedying the education harms of the pandemic with an emphasis on educational equity.

Before beginning this analysis, it is important to note that the dynamic nature of the pandemic means that new data and research continue to be released and that actions by the federal government are ongoing. The article covers the onset of the pandemic through mid-summer 2021 and does not examine the 2021–22 school year. The impact of the pandemic on school-children, schools and communities as well as a critique of the government response at the federal, state and local levels can, and likely will, fill entire books. Therefore, this article provides merely a preliminary analysis of some of the educational harms of the pandemic and a critique of the federal response with the aim of proposing reforms to strengthen this response in ways that advance educational equity.

## II. THE PANDEMIC'S ADVERSE IMPACTS ON K-12 LEARNING AND PRIORITIZING EDUCATIONAL EQUITY

The pandemic's impact on school closures and school delivery models has adversely affected student learning.<sup>30</sup> Students experienced an unprecedented closure of schools in spring 2020, and this resulted in learning losses for many students.<sup>31</sup> Approximately sixty percent of students began the 2020–21 school year in a fully virtual learning environment, twenty percent of students returned to school in-person full time and twenty percent participated in a hybrid model of virtual and in-person schooling.<sup>32</sup> Data also revealed an increase in remote learning by December 2020 due to an array of concerns, including rising case rates, teacher and parental concerns, and the

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<sup>30</sup> Li-Kai Chen, Emma Dorn, Jimmy Sarakatsannis & Anna Wiesinger, *Teacher Survey: Learning Loss Is Global—and Significant*, MCKINSEY & CO. (Mar. 1, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/teacher-survey-learning-loss-is-global-and-significant> [https://perma.cc/ND56-MA3Q].

<sup>31</sup> See generally ERIC A. HANUSHEK & LUDGER WOESSMANN, *THE ECONOMIC IMPACTS OF LEARNING LOSSES* (2020), [http://hanushek.stanford.edu/sites/default/files/publications/The%20Economic%20Impacts%20of%20Learning%20Losses\\_final\\_v1.pdf](http://hanushek.stanford.edu/sites/default/files/publications/The%20Economic%20Impacts%20of%20Learning%20Losses_final_v1.pdf) [https://perma.cc/N2TW-YNE9] (finding that students had lost almost twenty days of school by mid-May 2020); see also NAT MALKUS, CODY CHRISTENSEN & JESSICA SCHURZ, AM. ENTER. INST., *SCHOOL DISTRICT RESPONSES TO THE COVID-19 PANDEMIC: ROUND 6, ENDING THE YEAR OF SCHOOL CLOSURES 4* (2020), <https://www.aei.org/wp-content/uploads/2020/06/School-district-responses-to-the-COVID-19-Pandemic-Round-6.pdf> [https://perma.cc/9TAX-HW7K] (finding that students lost an average of eight days of instruction in the 2019–2020 school year).

<sup>32</sup> See DORN ET AL., *COVID-19 AND LEARNING LOSS*, *supra* note 1, at 4.



emergence of a more contagious virus strain.<sup>33</sup> By the end of the 2020–21 school year, slightly more than half (fifty-three percent) of public school students had returned to in-person learning on a full-time basis, slightly less than half (forty-six percent) were learning in a hybrid format, and only one percent were fully virtual.<sup>34</sup>

The full scope of the educational harms from the pandemic will only be revealed over time and research is ongoing. The analysis below provides a preliminary review of some of the research and data regarding these harms through mid-summer 2021 and provides important insights for analyzing the law and policy interventions that are needed to address them.<sup>35</sup> It then examines why a comprehensive federal law and policy framework should focus on equity as it aims to remedy these harms.

### A. *The Educational Harms of the Pandemic*

Students have experienced an array of educational harms during the pandemic. The spring 2020 pivot to remote learning intersected with pre-existing disparities in access to resources, the Internet and technology that led to disparate virtual learning opportunities.<sup>36</sup> Although some progress was made to reduce these disparities, significant disparities in virtual learning environments continued even as many students relied on remote learning for significant (or even all) portions of the 2020–21 school year.<sup>37</sup> Learning losses also occurred as a result of the variance in quality and opportunities for in-person, hybrid and remote learning during the 2020–21 school year.<sup>38</sup>

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<sup>33</sup> See BETHENY GROSS, ALICE OPALKA & PADMA GUNDAPANENI, CONSORTIUM FOR POL'Y RSCH. IN EDUC., U-TURN: SURGE OF COVID CASES REVERSES REOPENING PROGRESS IN AMERICA'S SCHOOL DISTRICTS 2 (2021), [https://www.crpe.org/sites/default/files/u\\_turn\\_brief\\_jan\\_2020\\_0.pdf](https://www.crpe.org/sites/default/files/u_turn_brief_jan_2020_0.pdf) [https://perma.cc/3BL6-BHF2].

<sup>34</sup> See FERREN, *supra* note 3.

<sup>35</sup> The full scope of the educational harm is difficult to determine because virtual learning has not been studied on such a wide scale and the hybrid models also lack research regarding their impact and best practices. See DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 7.

<sup>36</sup> See DISPARATE IMPACTS, *supra* note 14, at iii; see also SUMIT CHANDRA, AMY CHANG, LAUREN DAY, AMINA FAZLULLAH, JACK LIU, LANE MCBRIDE, THISAL MUDALIGE & DANNY WEISS, CLOSING THE DIGITAL DIVIDE IN THE AGE OF DISTANCE LEARNING 3, 5 (2020), [https://www.common-sense-media.org/sites/default/files/uploads/pdfs/common\\_sense\\_media\\_report\\_final\\_7\\_1\\_3pm\\_web.pdf](https://www.common-sense-media.org/sites/default/files/uploads/pdfs/common_sense_media_report_final_7_1_3pm_web.pdf) [https://perma.cc/SA3Q-24KZ] [hereinafter CHANDRA ET AL., CLOSING THE DIGITAL DIVIDE].

<sup>37</sup> See TITILAYO TINUBU ALI, SUMIT CHANDRA, SUJITH CHERUKUMILLI, AMINA FAZLULLAH, HANNAH HILL, NEIL MCALPINE, LANE MCBRIDE, NITHYA VADUGANATHAN, DANNY WEISS & MATTHEW WU, LOOKING BACK, LOOKING FORWARD: WHAT IT WILL TAKE TO PERMANENTLY CLOSE THE K-12 DIGITAL DIVIDE 5 (2021), <https://www.southerneducation.org/wp-content/uploads/2021/01/Looking-Back-Looking-Forward-Report-01272021.pdf> [https://perma.cc/U73E-JBER] [hereinafter CHANDRA ET AL., LOOKING BACK, LOOKING FORWARD]; see also CIVIS, *supra* note 2; see also Alex Harwin & Yukiko Furuya, *Where Families Are Feeling Pandemic Impacts the Worst*, EDUC. WK. (Jan. 19, 2021), <https://www.edweek.org/leadership/where-families-are-feeling-pandemic-impacts-the-worst/2021/01> [https://perma.cc/5L3L-4NBQ].

<sup>38</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 4.

In addition, an array of student subgroups, including children from low-income households, students of color, students with disabilities, LGBTQ+ students, and ELs, have experienced disproportionate harms when compared to their peers.<sup>39</sup> This Section discusses the digital divide that students have experienced in virtual learning opportunities which contributed to learning losses and educational inequities during the pandemic.

### 1. *The Digital Divide*

The unprecedented and abrupt switch to remote learning in spring 2020 caught educators, districts, and families by surprise.<sup>40</sup> Data collected before the pandemic confirms that approximately fifteen to sixteen million students lacked sufficient internet connectivity, an adequate learning device or both.<sup>41</sup> The digital divide hits rural communities and African American, Hispanic, and Native American communities hardest.<sup>42</sup> Three challenges cause the digital divide: “affordability, availability and adoption,” with affordability affecting the greatest number of students followed by adoption and availability.<sup>43</sup>

Researchers also confirmed disparities in access to high-speed internet and devices after the pandemic hit. Data collected during the spring of 2020 found that six out of ten parents from low-income households expressed that their child faced at least one of three of the following technology obstacles to schoolwork: the student was forced to complete their schoolwork on a cellphone, had to rely on public Wi-Fi because home internet was unreliable, and had incomplete schoolwork due to lack of access to a computer in the household.<sup>44</sup>

Fortunately, significant progress has been made in reducing the digital divide since the pandemic began. When states and districts received funding from the CARES Act, they quickly moved to expand internet connectivity and to acquire and distribute learning devices.<sup>45</sup> These actions resulted in

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<sup>39</sup> DISPARATE IMPACTS, *supra* note 14, at 1, 11–17, 20–21, 25–26.

<sup>40</sup> See Laura Meckler, Valerie Strauss & Moriah Balingit, *Plunging into Remote Learning, Families Find Stress, Chaos, and Some Surprising Wins*, WASH. POST (Mar. 27, 2020), [https://www.washingtonpost.com/local/education/plunging-into-remote-learning-families-find-stress-chaos-and-some-surprising-wins/2020/03/27/36429de4-6f90-11ea-aa80-c2470c6b2034\\_story.html](https://www.washingtonpost.com/local/education/plunging-into-remote-learning-families-find-stress-chaos-and-some-surprising-wins/2020/03/27/36429de4-6f90-11ea-aa80-c2470c6b2034_story.html) [https://perma.cc/8AKN-9DQM]; see also Caralee Adams, *Teachers Need Lots of Training to Do Online Learning Well. Coronavirus Closures Gave Many Just Days*, HECHINGER REP. (Apr. 17, 2020), <https://hechingerreport.org/teachers-need-lots-of-training-to-do-online-learning-well-coronavirus-closures-gave-many-just-days/> [https://perma.cc/manage/create/?folder=5935-135577-135582].

<sup>41</sup> CHANDRA ET AL., CLOSING THE DIGITAL DIVIDE, *supra* note 36, at 11.

<sup>42</sup> *Id.* at 5.

<sup>43</sup> CHANDRA ET AL., LOOKING BACK, LOOKING FORWARD, *supra* note 37, at 5.

<sup>44</sup> Emily A. Vogels, *59% of U.S. Parents with Lower Incomes Say Their Child May Face Digital Obstacles in Schoolwork*, PEW RSCH. CTR.: FACT TANK (Sept. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork/> [https://perma.cc/AWG2-HHBK].

<sup>45</sup> CHANDRA, ET AL., LOOKING BACK, LOOKING FORWARD, *supra* note 37, at 11.

reducing the lack of access to high-speed internet service by 20–40% and the lack of access to a learning device by 40–60%.<sup>46</sup> These efforts helped to narrow but not eliminate the racial gap in access to the internet and devices with “Black and Hispanic households . . . still three to four percentage points less likely than white households to have reliable access to devices, and three to six percentage points less likely to have reliable access to the internet.”<sup>47</sup> African American students have experienced a greater improvement in access than Hispanic students, which may be a result of such barriers as language limitations and a greater hesitancy to provide personal information for Hispanic households.<sup>48</sup> The American Rescue Plan provided \$7.17 billion to close the digital divide by supporting the connectivity of teachers and students and by providing appropriate devices.<sup>49</sup>

Only time and additional research will confirm the full impact of the use of federal funds to reduce the digital divide. Research from spring 2021 finds that the digital divide endures.<sup>50</sup> A Census Bureau survey from April 29 to May 10, 2021, found that “18% of households with children in public or private school did not always have internet available for educational purposes.”<sup>51</sup> Black, Hispanic, and multiracial households lacked consistent internet access for educational aims at higher rates with 20–21% of these families facing this challenge, while 15–16% of white and Asian families experienced this challenge.<sup>52</sup> The additional federal funding should continue to address the affordability, adoption, and availability challenges that prevent schoolchildren from accessing the technology that they need to learn.

## 2. Learning Losses

The spring 2020 widespread school shutdowns resulted in substantial learning losses for millions of schoolchildren.<sup>53</sup> These learning losses arose from an array of causes, including the digital divide, the variations in teacher

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<sup>46</sup> *Id.* at 12.

<sup>47</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 5.

<sup>48</sup> CHANDRA ET AL., LOOKING BACK, LOOKING FORWARD, *supra* note 37, at 12.

<sup>49</sup> Amina Fazlullah, *Huge Win to Connect Kids and Teachers at Home*, COMMON SENSE MEDIA (Mar. 6, 2021), <https://www.commonsensemedia.org/kids-action/blog/huge-win-to-connect-kids-and-teachers-at-home> [https://perma.cc/Z3LY-QHSS].

<sup>50</sup> See John Busby, Julia Tanberk & Tyler Cooper, *BroadbandNow Estimates Availability for all 50 States; Confirms that More than 42 Million Americans Do Not Have Access to Broadband*, BROADBANDNOW RSCH. (May 27, 2021), <https://broadbandnow.com/research/fcc-broadband-overreporting-by-state> [https://perma.cc/Y7DR-YAKP] (finding that “[i]n its 2020 report, the FCC claimed that the number of Americans without access to broadband fell to 14.5 million . . .” but that based on new research that estimate is “at least 42 million Americans”).

<sup>51</sup> Adie Tomer & Caroline George, *The American Rescue Plan is the Broadband Down Payment the Country Needs*, BROOKINGS (June 1, 2021), <https://www.brookings.edu/research/the-american-rescue-plan-is-the-broadband-down-payment-the-country-needs/> [https://perma.cc/6DQX-ZU6J].

<sup>52</sup> *See id.*

<sup>53</sup> See CTR. FOR RSCH. ON EDUC. OUTCOMES, CREDO AT STANFORD UNIVERSITY PRESENTS ESTIMATES OF LEARNING LOSS IN THE 2019–2020 SCHOOL YEAR (2020), <https://>

quality after school closures took place, and disparities in learning opportunities that preceded and were exacerbated by the pandemic.<sup>54</sup>

Research confirms that students lost between eight and twenty school days in spring 2020.<sup>55</sup> Instructional quality declined significantly in public schools in spring 2020, and students suffered the effects of this inferior instruction.<sup>56</sup> A nationally representative survey found that less than half of all schools (forty-four percent) offered synchronous learning platforms by May 29, 2020, with approximately one-third of schools expecting student participation, while just over ten percent indicated that they did not have such expectations.<sup>57</sup> Among the 86% of schools that were in districts that offered asynchronous learning platforms, 28% did so without expectation of student participation, while 58% did expect student participation.<sup>58</sup>

A wide array of factors contributed to the sharp decline in instructional quality as schools went virtual in spring 2020. Research before the pandemic found that remote learning typically produces inferior learning outcomes.<sup>59</sup> Research also confirmed that prior to the pandemic, many teachers had limited professional development with regard to using computers as instructional tools, and thus teachers were ill-prepared to switch to a fully virtual platform.<sup>60</sup> A fully virtual environment also makes it significantly more difficult to develop the emotional bonds that provide an essential element for teaching, particularly for students in younger grades.<sup>61</sup> Many teachers worked from home and juggled caring for their own children and trying to teach their students.<sup>62</sup> Additionally, teacher engagement with students declined after schools moved to a virtual format.<sup>63</sup> Although many districts have since offered professional development to teachers on virtual instruc-

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mailchi.mp/9d437ebe9f0f/estimates-of-learning-loss-released-by-credo-at-stanford-university-4732038 [https://perma.cc/R88F-U2GW].

<sup>54</sup> See CHANDRA ET AL., CLOSING THE DIGITAL DIVIDE, *supra* note 36, at 5; see also GARCÍA & WEISS, *supra* note 2; BETHENY GROSS & ALICE OPALKA, CTR. ON REINVENTING PUB. EDUC., TOO MANY SCHOOLS LEAVE LEARNING TO CHANCE DURING THE PANDEMIC 2–7 (2020), <https://www.crpe.org/publications/too-many-schools-leave-learning-chance-during-pandemic> [https://perma.cc/9C4S-7YFP]; Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUC. WK. (Apr. 10, 2020), <https://www.edweek.org/technology/the-disparities-in-remote-learning-under-coronavirus-in-charts/2020/04> [https://perma.cc/X8DW-77ZM].

<sup>55</sup> See HANUSHEK & WOESSMANN, *supra* note 31, at 7 (finding that students had lost almost twenty days of school by mid-May 2020); see also MALKUS ET AL., *supra* note 31, at 4 (finding that students lost an average of eight days of instruction in the 2019–2020 school year).

<sup>56</sup> See MALKUS ET AL., *supra* note 31, at 6, 9.

<sup>57</sup> *Id.* at 5.

<sup>58</sup> *Id.*

<sup>59</sup> See Carycruz Bueno, *Bricks and Mortar vs. Computers and Modems: The Impact of Enrollment in K-12 Virtual Schools* 17–18 (Annenberg Inst. for Sch. Reform at Brown U., Working Paper No. 20-250, 2020), <https://edworkingpapers.com/sites/default/files/ai20-250.pdf> [https://perma.cc/XA9A-DMFK].

<sup>60</sup> See GARCÍA & WEISS, *supra* note 2, at 12–13.

<sup>61</sup> *Id.* at 14.

<sup>62</sup> *Id.*

<sup>63</sup> See GROSS & OPALKA, *supra* note 54, at 7.

tion, other impediments to high-quality virtual instruction remain as the pandemic endures.<sup>64</sup>

Learning losses also occurred because many families struggled to navigate the pivot to a fully online environment in spring 2020. For instance, a Gallup poll found that forty-five percent of families identified separation from teachers and peers and attention span in a remote environment as major challenges for their child.<sup>65</sup> Forty-three percent of parents also encountered major challenges with balancing work and supporting their child's learning from home.<sup>66</sup>

Students returned to school in fall 2020 less prepared to engage with work at their grade level due to the spring 2020 shutdown.<sup>67</sup> In mathematics, research confirms that students started the 2020–2021 school year an average of three months behind,<sup>68</sup> with white students approximately one to three months behind while minority students were typically three to five months behind. As significant as these losses are, they do not even begin to capture the full extent of the learning losses that students have experienced because the students in this study had already returned to in-person school.<sup>69</sup>

In spring 2021, a nationally representative survey of teachers and principals found less curriculum coverage. In particular, teachers in fully virtual schools and hybrid schools reported less curriculum coverage than in-person schools.<sup>70</sup> Principals of fully virtual schools reported that their schools offered less instructional time than in-person and hybrid schools.<sup>71</sup> Almost one-third of remote schools altered grading policies to provide incompletes

<sup>64</sup> See Bree Dusseault, Georgia Heyward & Travis Pillow, *More Districts Should Seize the Opportunity to Improve Professional Learning for Teachers*, CTR. ON REINVENTING PUB. EDUC. (Sept. 25, 2020), <https://www.crpe.org/thelens/more-districts-should-seize-opportunity-improve-professional-learning-teachers> [https://perma.cc/J7QX-WH8P]; see also David Rauf, *How Districts are Helping Teachers Get Better at Tech Under Coronavirus*, EDUC. WK. (Apr. 22, 2020), <https://www.edweek.org/leadership/how-districts-are-helping-teachers-get-better-at-tech-under-coronavirus/2020/04> [https://perma.cc/2PAE-RMNW].

<sup>65</sup> See Jeffrey M. Jones, *Social Factors Most Challenging in COVID-19 Distance Learning*, GALLUP (June 12, 2020), <https://news.gallup.com/poll/312566/social-factors-challenging-covid-distance-learning.aspx> [https://perma.cc/CZ9U-SATM].

<sup>66</sup> See *id.*

<sup>67</sup> MELISSA K. DILIBERTI & JULIA H. KAUFMAN, RAND CORP., WILL THIS SCHOOL YEAR BE ANOTHER CASUALTY OF THE PANDEMIC? KEY FINDINGS FROM THE AMERICAN EDUCATOR PANELS FALL 2020 COVID-19 SURVEYS (2020) [hereinafter DILIBERTI & KAUFMAN, ANOTHER CASUALTY], [https://www.rand.org/pubs/research\\_reports/RRA168-4.html](https://www.rand.org/pubs/research_reports/RRA168-4.html) [https://perma.cc/K3PJ-VS9F].

<sup>68</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 2.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> JULIA H. KAUFMAN & MELISSA K. DILIBERTI, RAND CORP., DIVERGENT AND INEQUITABLE TEACHING AND LEARNING PATHWAYS DURING (AND PERHAPS BEYOND) THE PANDEMIC: KEY FINDINGS FROM THE AMERICAN EDUCATOR PANELS SPRING 2021 COVID-19 SURVEYS 5 (2021), [https://www.rand.org/pubs/research\\_reports/RRA168-6.html](https://www.rand.org/pubs/research_reports/RRA168-6.html) [https://perma.cc/4K79-MATS] [hereinafter KAUFMAN & DILIBERTI, DIVERGENT AND INEQUITABLE TEACHING]. 35% of in-person teachers covered what they would typically cover in the curriculum while only 15% of virtual teachers and 19% of hybrid teachers covered the typical amount of curriculum.

*Id.*

<sup>71</sup> See *id.* at 4.

rather than failing grades to students, which is five times the number of in-person schools that made this change.<sup>72</sup> Together the data confirm that teaching and learning were less comprehensive and rigorous in virtual and hybrid schools than in in-person schools.<sup>73</sup> Students dealt with more absenteeism, a greater likelihood of failing to turn in assignments, and higher rates of failing grades at such schools when compared to in-person schools.<sup>74</sup>

The pandemic's adverse impacts on teaching and learning also can be observed in achievement data from the 2020–2021 school year, although the scope and breadth of the impact vary by study. For instance, McKinsey & Company analyzed data from an assessment of 1.6 million elementary students and found that students were five months behind in math and four months behind in reading.<sup>75</sup> A review by Renaissance, a company that creates assessments and educator solutions using analytics, of reading and math assessments for approximately 3.3 million students found slightly lower academic growth than in prior years.<sup>76</sup> Specifically, Renaissance found that students experienced a four percentage point loss in reading, which would take an average of seven weeks to remedy, and an eleven percentage point loss in math, that would take an average of eleven weeks to remedy, a far smaller loss than the McKinsey study found.<sup>77</sup> Students also experienced additional mental health challenges during the 2020–2021 school year with thirty-five percent of parents reporting that they were “very or extremely concerned about their children’s mental health” and eighty percent of parents reporting some concern about their child’s mental, emotional, or social health since the start of the pandemic.<sup>78</sup>

### 3. *Educational Inequities*

African American, Hispanic, and American Indian students, along with students in high-poverty schools, have shown greater learning losses than their peers.<sup>79</sup> This is occurring in part because these students are substantially

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<sup>72</sup> See *id.* at 5. 32% of fully remote schools changed their grading policies from issuing failing grades to incompletes, while 6% of in-person schools and 20% of hybrid schools made this change. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> See *id.* at 8.

<sup>75</sup> Dorn et al., *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, MCKINSEY & Co. (July 27, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning> [https://perma.cc/4C3Y-WLKN] [hereinafter Dorn et al., *Lingering Effects*].

<sup>76</sup> RENAISSANCE, HOW KIDS ARE PERFORMING: TRACKING THE SCHOOL-YEAR IMPACT OF COVID-19 ON READING AND MATHEMATICS ACHIEVEMENT 4 (2021), [www.renaissance.com/how-kids-are-performing](http://www.renaissance.com/how-kids-are-performing) [https://perma.cc/GP6D-MFH7] [hereinafter RENAISSANCE, HOW KIDS ARE PERFORMING].

<sup>77</sup> See *id.* at 5.

<sup>78</sup> Dorn et al., *Lingering Effects*, *supra* note 75.

<sup>79</sup> See DORN ET AL., *COVID-19 AND LEARNING LOSS*, *supra* note 1, at 4; RENAISSANCE, *HOW KIDS ARE PERFORMING*, *supra* note 76, at 17; KUHFIELD ET AL., *supra* note 13, at 5–6; Dorn et al., *Lingering Effects*, *supra* note 75.

more likely to experience remote learning, and they have less access to such instruments of learning as the internet, computers, and synchronous learning with teachers.<sup>80</sup> The pandemic also is adversely impacting other subgroups of students such as students with disabilities, students learning English, Asian American and Pacific Islander students, and LGBTQ+ students.<sup>81</sup> Furthermore, the pandemic has exacerbated “vast” educational opportunity and outcome gaps for historically disadvantaged communities that preceded the pandemic.<sup>82</sup> For instance, research confirms that students of color and students from low-income families are provided inadequate and inequitable school funding,<sup>83</sup> less qualified and experienced teachers,<sup>84</sup> inferior learning

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<sup>80</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 2, 4; Dorn et al., *Lingering Effects*, *supra* note 75; KAUFMAN & DILIBERTI, DIVERGENT AND INEQUITABLE TEACHING, *supra* note 70, at 3, 6–7.

<sup>81</sup> See DISPARATE IMPACTS, *supra* note 14, at iv.

<sup>82</sup> See Dorn et al., *Lingering Effects*, *supra* note 75, at 2; KEVIN G. WELNER & PRUDENCE L. CARTER, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 3 (Prudence L. Carter & Kevin G. Welner eds., 2013). More than twelve million children lived in poverty and more than 1.5 million were homeless before the pandemic. See generally NAT'L CTR. FOR EDUC. STAT., CHARACTERISTICS OF CHILDREN'S FAMILIES (2020), [https://nces.ed.gov/programs/coe/indicator\\_cce.asp#:~:text=IN%202018%2C%20approximately%2012.6%20million,in%20families%20living%20in%20poverty.&text=the%20poverty%20rate%20for%20children,except%20for%20Pacific%20Islander%20children](https://nces.ed.gov/programs/coe/indicator_cce.asp#:~:text=IN%202018%2C%20approximately%2012.6%20million,in%20families%20living%20in%20poverty.&text=the%20poverty%20rate%20for%20children,except%20for%20Pacific%20Islander%20children) [<https://perma.cc/NS6N-2WCK>]; see generally NAT'L CTR. FOR HOMELESS EDUC., FEDERAL DATA SUMMARY SCHOOL YEARS 2015–2016 THROUGH 2017–2018: EDUCATION FOR HOMELESS CHILDREN AND YOUTH (2020), <https://nche.ed.gov/wp-content/uploads/2020/01/Federal-Data-Summary-SY-15.16-to-17.18-Published-1.30.2020.pdf> [<https://perma.cc/GP3R-A5XH>].

<sup>83</sup> See DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., MAKING THE GRADE 2020: HOW FAIR IS SCHOOL FUNDING IN YOUR STATE? 8 (2020), <https://edlawcenter.org/assets/MTG%202020/Making%20the%20Grade%202020.pdf> [<https://perma.cc/GFA7-X8A3>] (noting that fair funding requires allocating more resources to children in high-poverty districts and finding that only sixteen states provide five percent or more funding to high-poverty districts, seventeen states provide the same funding to high-poverty districts and fifteen states provide less funding to high-poverty districts); BRUCE D. BAKER, MARK WEBER, AJAY SRIKANTH, ROBERT KIM & MICHAEL ATZBI, THE REAL SHAME OF THE NATION: THE CAUSES AND CONSEQUENCES OF INTERSTATE INEQUITY IN PUBLIC SCHOOL INVESTMENTS 38–39 (2018), <https://www.shankerinstitute.org/sites/default/files/The%20Real%20Shame%20of%20the%20Nation.pdf> [<https://perma.cc/554V-ENWJ>] (finding that most states do not deliver the school funding that the highest-poverty children need to reach national average achievement outcomes on standardized assessments; in “numerous states” such outcomes can only be attained by the districts with the lowest poverty concentrations; and, in several states, high-poverty districts do not receive “thousands to tens of thousands of dollars” that would be required to achieve such outcomes).

<sup>84</sup> JESSICA CARDICHON, LINDA DARLING-HAMMOND, MAN YANG, CAITLIN SCOTT, PATRICK M. SHIELDS & DION BURNS, LEARNING POL'Y INST., INEQUITABLE OPPORTUNITY TO LEARN: STUDENT ACCESS TO CERTIFIED AND EXPERIENCED TEACHERS 7 (2020), [https://learningpolicyinstitute.org/sites/default/files/product-files/CRDC\\_Teacher\\_Access\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/CRDC_Teacher_Access_REPORT.pdf) [<https://perma.cc/BC4R-Q4BM>]; EMMA GARCÍA & ELAINE WEISS, ECON. POL'Y INST., THE TEACHER SHORTAGE IS REAL, LARGE AND GROWING, AND WORSE THAN WE THOUGHT 7 (2019), <https://files.epi.org/pdf/163651.pdf> [<https://perma.cc/AF8Z-QPT4>]; 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, 82–83 (Prudence L. Carter & Kevin G. Welner eds., 2013).

resources, including facilities,<sup>85</sup> as well as segregated learning environments.<sup>86</sup> These disparities drive the achievement gap and limit millions of children from reaching their full potential.<sup>87</sup>

Beginning with a look at the data on class disparities, the spring 2020 shutdown of schools left many children from low-income households with inferior learning opportunities. Only 14.5% of high-poverty districts expected teachers to provide synchronous teaching, while the most affluent districts expected synchronous teaching twice as often.<sup>88</sup> Teachers in more affluent districts reported more frequent contact with students than teachers in high-poverty districts.<sup>89</sup> Children from low-income households participated in remote learning at higher rates than their affluent peers.<sup>90</sup> Parents from low-income households reported that their children received less online instruction, and they were significantly more concerned about their children falling behind than parents from more affluent families.<sup>91</sup>

These income-driven disparities continued in the 2020–2021 school year. In fall 2020, students in the highest-poverty districts were more likely than their peers to attend school in a completely virtual environment, with fifty-six percent of the highest-poverty districts offering a fully remote learn-

<sup>85</sup> U.S. COMM'N ON C.R., PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION 4–5 (2018), <https://www.usccr.gov/pubs/2018/2018-01-10-Education-Inequity.pdf> [<https://perma.cc/75G7-T4V2>]; COUNCIL OF THE GREAT CITY SCHS., REVERSING THE CYCLE OF DETERIORATION IN THE NATION'S PUBLIC SCHOOL BUILDINGS 5 (2014), <https://www.cgcs.org/cms/lib/DC00001581/Centricity/Domain/87/FacilitiesReport2014.pdf> [<https://perma.cc/MU3Y-YJKW>]; 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 14 (2013), <https://oese.ed.gov/files/2020/10/equity-excellence-commission-report.pdf> [<https://perma.cc/2Z8E-T68A>] (“Our education system, legally desegregated more than a half century ago, is ever more segregated by wealth and income, and often again by race. Ten million students in America’s poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students.”).

<sup>86</sup> U.S. COMM'N ON C.R., *supra* note 85, at 5.

<sup>87</sup> Welner & Carter, *supra* note 82, at 1, 3.

<sup>88</sup> GROSS & OPALKA, *supra* note 54, at 6.

<sup>89</sup> Holly Kurtz, *National Survey Tracks Impact of Coronavirus on Schools: 10 Key Findings*, EDUC. WK. (Apr. 10, 2020), <https://www.edweek.org/ew/articles/2020/04/10/national-survey-tracks-impact-of-coronavirus-on.html> [<https://perma.cc/Q579-RVL9>]; SARAH HODGMAN, ARIEL SABATINI & JOANNE CARMINUCCI, AM. INSTS. FOR RSCH., TEACHER INTERACTIONS WITH STUDENTS AND FAMILIES DURING COVID-19 3 (2021), <https://www.air.org/sites/default/files/Teacher-Interactions-with-Students-and-Families-COVID-19-Survey-Feb-2021rev.pdf> [<https://perma.cc/D9FB-G2NW>]. Districts at all poverty levels had similar expectations that teachers were available at least weekly to answer student questions while schools were closed in spring 2020. *See id.*

<sup>90</sup> Kurtz, *supra* note 89.

<sup>91</sup> Juliana Menasce Horowitz, *Lower-Income Parents Most Concerned About Their Children Falling Behind Amid COVID-19 School Closures*, PEW RSCH. CTR. (Apr. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/04/15/lower-income-parents-most-concerned-about-their-children-falling-behind-amid-covid-19-school-closures/> [<https://perma.cc/C8WP-2PSY>].



ing environment compared to a thirty-three percent average for all schools.<sup>92</sup> In contrast, students from higher income families were significantly more likely to attend school in person.<sup>93</sup> Parental preferences did not drive these disparities in access, given that parents from low-income and high-income households expressed a similar preference for in-person school, at seventy-one and seventy-two percent respectively.<sup>94</sup> Low-income students also have experienced lower quality remote instruction and have less access to a learning environment that is conducive to learning, such as one with parental supervision and a quiet space to work.<sup>95</sup> By May 2021, students in low-income schools attended school in person full time at three to four percentage points below the national average.<sup>96</sup> In addition, chronic absenteeism, which is defined as missing more than fifteen days of school in one year, rose from 3.1 million students to 5.4–7.7 million students overall with low-income and white students experiencing the largest increases.<sup>97</sup>

In contrast to the disadvantages for low-income households, middle class parents have bestowed important educational advantages upon their children during the pandemic, including by homeschooling their children or otherwise enhancing their child's education at home.<sup>98</sup> The students in private schools, which often educate more affluent children than public schools, have fared better than public school students due to the superior

<sup>92</sup> DILIBERTI & KAUFMAN, ANOTHER CASUALTY, *supra* note 66; BETHENY GROSS, ALICE OPALKA & PADMA GUNDAPANENI, CTR. ON REINVENTING PUB. EDUC., GETTING BACK TO SCHOOL: AN UPDATE ON PLANS FROM ACROSS THE COUNTRY 7 (2020), [https://www.crpe.org/sites/default/files/getting\\_back\\_to\\_school\\_brief.pdf](https://www.crpe.org/sites/default/files/getting_back_to_school_brief.pdf) [<https://perma.cc/8R65-NETH>] (reporting that a nationally representative survey found that 41% of students in the highest-poverty schools planned to begin the school year in a remote environment in contrast to 24% of students in the lowest-poverty quartile, 19% of students in the medium-low quartile, and 23% in the medium-high poverty quartile). *See id.*

<sup>93</sup> Robin Lake & Bree Dusseault, *Analysis: We Reviewed the School Reopening Plans for 106 Districts Around the Country. Here's How They Square With Reality*, THE 74 (Oct. 14, 2020), <https://www.the74million.org/article/analysis-we-reviewed-the-school-reopening-plans-for-106-districts-around-the-country-heres-how-they-square-with-reality/> [<https://perma.cc/G49A-YJT2>].

<sup>94</sup> Michael B. Henderson, Martin R. West & Paul E. Peterson, *Pandemic Parents Survey Finds Perverse Pattern: Students Are More Likely to Be Attending School In Person Where Covid Is Spreading More Rapidly*, EDUC. NEXT (2020), <https://www.educationnext.org/pandemic-parent-survey-finds-perverse-pattern-students-more-likely-to-be-attending-school-in-person-where-covid-is-spreading-more-rapidly/> [<https://perma.cc/9F7A-MWXT>].

<sup>95</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 2, 6.

<sup>96</sup> Forty-eight percent of fourth grade students in schools with higher concentrations of low-income students attended school in person on a full-time basis, which was below the fifty-two percent average for all students. Similarly, forty-three percent of economically disadvantaged eighth grade students attended school in person, which is lower than the national average of forty-six percent. SCHOOL SURVEY DASHBOARD, *supra* note 3.

<sup>97</sup> *See* Dorn et al., *Lingering Effects*, *supra* note 75.

<sup>98</sup> Valerie Strauss, *Why Covid-19 Will 'Explode' Existing Academic Achievement Gaps; From Richard Rothstein*, WASH. POST (Apr. 17, 2020), <https://www.washingtonpost.com/education/2020/04/17/why-covid-19-will-explode-existing-academic-achievement-gaps/> [<https://perma.cc/N7GJ-CL27>].

resources and support available and more opportunities for in-person learning.<sup>99</sup>

Racial gaps in educational opportunities also have occurred during the pandemic. Minority students were less prepared than their peers for learning in fall 2020.<sup>100</sup> In addition, a November and December 2020 survey found that African American and Hispanic students were almost twice as likely as their white peers to be learning remotely, with 66% and 64% of African American and Hispanic students engaging in remote learning respectively, while only 34% of white students engaged in remote learning.<sup>101</sup> Schools serving the highest percentages of students of color offered in-person instruction less frequently than other schools in fall 2020.<sup>102</sup> One aspect of this disparity was due to parental choice, as parents of African American and Hispanic students expressed a preference for virtual learning over in-person instruction at a higher rate than white parents, with 76% of white parents expressing a preference for in-person school while 56% and 67% percent of African American and Hispanic parents respectively expressed this preference.<sup>103</sup> Students in large school districts and city school districts also experienced more remote learning, which also may account for their greater prevalence of remote learning by African American and Hispanic students given their greater concentration in urban districts.<sup>104</sup>

The disadvantages in access to in-person schooling along lines of race continued through the spring of 2021. By May 2021, 66% of White fourth grade students attended school in person on a full-time basis while only 41% of Black students, 45% of Hispanic students, 57% of American Indian students and 27% percent of Asian students attended in-person, full-time school.<sup>105</sup> White eighth graders similarly had the highest percentage (57%) of students who attended in-person school, while 37% of Blacks and Hispanics, 49% of American Indians, and 20% of Asians attended school in person.<sup>106</sup> African American and Hispanic students also have experienced lower quality remote learning than their peers.<sup>107</sup>

The pandemic also is disproportionately harming children with disabilities, ELs, Asian American and Pacific Islander students, and LGBTQ+ students. Although a thorough examination of their plight is beyond the scope of this article because their interests deserve sustained and individual atten-

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<sup>99</sup> SCHOOL SURVEY DASHBOARD, *supra* note 3; Henderson et al., *supra* note 94.

<sup>100</sup> DILIBERTI & KAUFMAN, ANOTHER CASUALTY, *supra* note 67.

<sup>101</sup> Henderson et al., *supra* note 94.

<sup>102</sup> DILIBERTI & KAUFMAN, ANOTHER CASUALTY, *supra* note 67 (finding that 63% of districts with 75% or more minority students were fully remote compared to an average of 33% for all schools).

<sup>103</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 4; Henderson et al., *supra* note 94.

<sup>104</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 4.

<sup>105</sup> SCHOOL SURVEY DASHBOARD, *supra* note 3.

<sup>106</sup> *Id.*

<sup>107</sup> DORN ET AL., COVID-19 AND LEARNING LOSS, *supra* note 1, at 6.

tion,<sup>108</sup> it is important to acknowledge the pandemic's impact on these schoolchildren. In spring 2020, a majority of school districts reported that complying with requirements of the Individuals with Disabilities Education Act and providing support to children with disabilities was "more or substantially more difficult during than before the pandemic."<sup>109</sup> Parents whose children are in special education reported significant disruptions in services with four out of ten parents reporting no support for their children and only one in five parents reporting that their child received all appropriate services.<sup>110</sup> Many special education students cannot access the tools that other students use to engage in remote learning because some learning platforms, such as Zoom, printed packets of schoolwork, and Microsoft Teams, are not accessible to them.<sup>111</sup> Some special education services, such as physical, occupational, and speech therapies, are either exceedingly difficult or impossible to provide online.<sup>112</sup> Children from low-income backgrounds are

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<sup>108</sup> The 2021 report by the Department of Education Office for Civil Rights on the impact of COVID on various student groups provides a useful compilation of research about the pandemic's impact on students with disabilities, ELs, and LGBTQ+ students. See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 14, at iii–iv. For more about children with disabilities during the pandemic, please see, e.g., Allen G. Osbourne & Charles J. Russo, *Providing a FAPE During the COVID-19 Pandemic*, 385 EDUC. L. REP. 1 (2021); Crystal Grant, *COVID-19's Impact on Students with Disabilities in Under-Resourced School Districts*, 48 FORDHAM URB. L.J. 127 (2020). For more about ELs during the pandemic, please see, e.g., Conor P. Williams & Maggie Marcus, *Pandemic Response to Pandemic Recovery: Helping English Learners Succeed This Fall and Beyond*, CENTURY FOUNDATION (Aug. 11, 2021), <https://tcf.org/content/report/pandemic-response-pandemic-recovery-helping-english-learners-succeed-fall-beyond/?session=1> [<https://perma.cc/S87A-AW4F>]; GABRIELA URO, DAVID LAI, TAMARA ALSACE & AMANDA CORCORAN, COUNCIL OF THE GREAT CITY SCHS., SUPPORTING ENGLISH LEARNERS IN THE COVID-19 CRISIS (2020), <https://files.eric.ed.gov/fulltext/ED607280.pdf> [<https://perma.cc/VZ3Q-QNRF>]. For more about LGBTQ+ young people and the pandemic, please see, e.g., AMY E. GREEN, MYESHIA PRICE-FEENEY & SAMUEL DORISON, TREVOR PROJECT, IMPLICATIONS OF COVID-19 FOR LGBTQ YOUTH MENTAL HEALTH AND SUICIDE PREVENTION (2020), <https://www.thetrevorproject.org/wp-content/uploads/2021/08/Implications-of-COVID-19-for-LGBTQ-Youth-Mental-Health-and-Suicide-Prevention.pdf> [<https://perma.cc/UU55-UVUC>]; John P. Salerno, Jackson Devadas, M. Pease, Bryanna Nketia & Jessica N. Fish, *Sexual and Gender Minority Stress amid the COVID-19 Pandemic: Implications for LGBTQ+ Young Persons' Mental Health and Well-Being*, 135 PUB. HEALTH REPS. 721 (2020); Molly Sprayregen, *LGBTQ Youth are Scared to Go Back to School: Here's What Schools Can Do*, LGBTQ NATION (Aug. 19, 2021), <https://www.lgbtqnation.com/2021/08/lgbtq-youth-scared-go-back-school-heres-schools-can/> [<https://perma.cc/34Q2-4CWS>].

<sup>109</sup> DIA JACKSON & JILL BOWDON, AM. INSTS. FOR RSCH., RESEARCH BRIEF: SPOTLIGHT ON STUDENTS WITH DISABILITIES 1 (2020), <https://www.air.org/sites/default/files/COVID-Survey-Spotlight-on-Students-with-Disabilities-FINAL-Oct-2020.pdf> [<https://perma.cc/53WX-XRVC>].

<sup>110</sup> Anya Kamenetz, *Survey Shows Big Remote Learning Gaps for Low-Income and Special Needs Children*, NPR (May 27, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/27/862705225/survey-shows-big-remote-learning-gaps-for-low-income-and-special-needs-children> [<https://perma.cc/E8Y9-KKHU>].

<sup>111</sup> See Faith Hill, *The Pandemic Is a Crisis for Students with Special Needs*, ATLANTIC (Apr. 18, 2020), <https://www.theatlantic.com/education/archive/2020/04/special-education-goes-remote-covid-19-pandemic/610231/> [<https://perma.cc/H8TL-PB3J>].

<sup>112</sup> See Eliza Shapiro & Elizabeth A. Harris, *This Is Schooling Now for 200,000 N.Y.C. Children in Special Education*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/nyregion/special-education-coronavirus-nyc.html> [<https://perma.cc/GU87-6KJR>].

“overrepresented in special education,” and the lack of access to computers or the Internet can result in them being denied their right to a free appropriate public education.<sup>113</sup> School leaders reported difficulties with providing the services within a student’s individualized education program, technological impediments to services, and a lack of coordination between schools and parents on what services will be provided.<sup>114</sup> Researchers note that students with disabilities may have suffered the most from the spring 2020 switch to remote learning, and these losses are likely to widen the preexisting achievement gaps between students with disabilities and their peers.<sup>115</sup>

During the 2020–2021 school year, the pandemic continued to cause disruptions to learning for children with disabilities, but at the same time some districts implemented improvements. When creating reopening plans, some districts prioritized in-person instruction for some students, such as those with disabilities or who need additional assistance.<sup>116</sup> Students with disabilities surpassed the national average for in-person school enrollment with fifty-six percent of students with disabilities in fourth grade enrolled in school in person by May 2021 compared to the national average of fifty-two percent in-person enrollment.<sup>117</sup> Teachers of students with special needs, such as students with disabilities and EL students, also reported not receiving support and guidance to meet the needs of their students.<sup>118</sup>

ELs also have experienced additional educational harms during the pandemic. They were less prepared than other students to transition to a virtual school environment.<sup>119</sup> Once the pandemic hit, ELs experienced a decrease in the quality and quantity of educational opportunities and in the supports offered to them.<sup>120</sup> When ELs lose language instruction and support, they can

<sup>113</sup> See Anya Kamenetz, *Families of Children with Special Needs Are Suing in Several States. Here’s Why.*, NPR (July 23, 2020), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why> [https://perma.cc/BS49-QKA3].

<sup>114</sup> NAT’L SCH. BDS. ASS’N, THE SCH. SUPERINTENDENTS ASS’N & ASS’N OF EDUC. SERV. AGENCIES, SCHOOL LEADER VOICES: CONCERNS AND CHALLENGES TO PROVIDING MEANINGFUL IDEA-RELATED SERVICES DURING COVID-19 15 (2020), <https://nsba.org/-/media/Files/nsba-aasa-aesa-IDEA-white-paper-july-14-20.pdf> [https://perma.cc/8X2M-SRCL].

<sup>115</sup> NATHAN JONES, SHARON VAUGHN & LYNN FUCHS, EDRESEARCH FOR RECOVERY, ACADEMIC SUPPORTS FOR STUDENTS WITH DISABILITIES (BRIEF No. 2) 2 (2020), [https://annenberglbrown.edu/sites/default/files/EdResearch\\_for\\_Recovery\\_Brief\\_2.pdf](https://annenberglbrown.edu/sites/default/files/EdResearch_for_Recovery_Brief_2.pdf) [https://perma.cc/NEA5-DS27].

<sup>116</sup> GROSS ET AL., *supra* note 92, at 2; DILIBERTI & KAUFMAN, ANOTHER CASUALTY, *supra* note 67, at 2.

<sup>117</sup> SCHOOL SURVEY DASHBOARD, *supra* note 3.

<sup>118</sup> DILIBERTI & KAUFMAN, ANOTHER CASUALTY, *supra* note 67.

<sup>119</sup> Cf. U.S. DEP’T OF EDUC., SUPPORTING ENGLISH LEARNERS THROUGH TECHNOLOGY: WHAT DISTRICTS AND TEACHERS SAY ABOUT DIGITAL LEARNING RESOURCES FOR ENGLISH LEARNERS (2019), <https://www2.ed.gov/rschstat/eval/title-iii/180414.pdf> [https://perma.cc/ZVJ2-G762] (finding districts with high-EL student representation were more likely than districts with low-EL student representation to report providing support to teachers for digital learning resources for instructing EL students).

<sup>120</sup> See CLAUDIA VIZCARRA, CALIFORNIANS TOGETHER, COMMUNITIES OF PRACTICE: PARTICIPANT SURVEY RESULTS (2020), <https://www.californiantogether.org/communities-of-practice-participant-survey-results/> [https://perma.cc/YB2Z-T54N] (reporting survey results from

lose progress in learning English and experience difficulty understanding the instruction in core subjects.<sup>121</sup> In spring 2020, districts did not consistently require teachers to meet virtually with EL students, and some did not provide distance learning materials tailored to EL students.<sup>122</sup>

According to the Office for Civil Rights, students learning English “have been among the students hardest hit by COVID-19’s disruptions to in-person learning.”<sup>123</sup> ELs were more likely to be in remote learning environments during the 2020–2021 school year. By February 2021, 53% of English learners in fourth grade were in enrolled virtual learning environments while only 42% of fourth grade students nationwide were learning virtually.<sup>124</sup> Thirty-three percent of fourth grade ELs were enrolled in in-person classes by February 2021 while thirty-eight percent of all fourth grade students were enrolled in in-person classes.<sup>125</sup> ELs continued to be enrolled in remote learning environments at higher rates by the end of the 2020–2021 school year. By May 2021, 46% of fourth grade and 40% of eighth grade ELs were enrolled in full-time in-person school, which was below the 52% average for all fourth grade students and the 46% average for all eighth grade students.<sup>126</sup> The harms of remote learning included limitations on the ability to engage with peers and adults in English as well as inconsistent language instruction.<sup>127</sup> Language barriers in the home also created barriers to families’ efforts to support the learning of their children, and caregiving responsibilities also hindered students and families as they worked to participate in remote learning.<sup>128</sup>

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California from April and May 2020 that found that forty percent of teachers provided zero to one hour per week of face-to-face instruction to ELLs and thirty-six percent provided two to three hours of face-to-face instruction); GLOBAL STRATEGY GROUP, EDUC. TR., PARENTS’ SURVEY IDENTIFIES KEY NEEDS FOR WASHINGTON FAMILIES NAVIGATING NEW REALITY (2020), <https://edtrustmain.s3.us-east-2.amazonaws.com/wp-content/uploads/2014/09/19191517/WA-Public-School-Parents-Memo-F04.28.20.pdf> [<https://perma.cc/F2A9-8DQV>] (reporting survey results from Washington public schools that “[s]lightly more than a third (thirty-nine percent) of non-English home speakers say their child’s school has not provided information in other languages.”).

<sup>121</sup> See Yesenia Robles & Kalyn Belsha, *Less Learning and Late Guidance: School Districts Struggle to Help English Language Learners During COVID-19 Crisis*, CHALKBEAT (May 21, 2020), <https://www.chalkbeat.org/2020/5/21/21265475/less-learning-late-guidance-school-districts-struggle-english-language-learners-during-covid-19> [<https://perma.cc/A8K2-78WR>].

<sup>122</sup> PATRICIA GARCIA-ARENA & STEPHANIE D’SOUZA, AM. INSTS. FOR RSCH., RESEARCH BRIEF: SPOTLIGHT ON ENGLISH LEARNERS 3–4 (2020), <https://www.air.org/sites/default/files/COVID-Survey-Spotlight-on-English-Learners-FINAL-Oct-2020.pdf> [<https://perma.cc/46SW-PPRG>].

<sup>123</sup> DISPARATE IMPACTS, *supra* note 14, at 20.

<sup>124</sup> SCHOOL SURVEY DASHBOARD, *supra* note 3.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> See DISPARATE IMPACTS, *supra* note 14, at 20–21.

<sup>128</sup> See *id.* at 20.

The pandemic also has exacerbated racial harassment and violence towards Asian Americans and Pacific Islanders.<sup>129</sup> Some Asian American families may have been reluctant to send their children to school due to these actions,<sup>130</sup> which may be one of the reasons that Asian American students had the lowest participation rate for in-person school by the end of the 2020–2021 school year.<sup>131</sup> The harassment and violence also can adversely impact academic achievement and wellbeing for students of Asian American and Pacific Islander descent.<sup>132</sup> Additional research is needed to assess the full impact of this harassment and violence.

LGBTQ+ students also experienced increased exposure to anxiety, stress, and abuse during the pandemic, and they had fewer resources for support due to the increase in remote learning.<sup>133</sup> The disruption in access to school mental health services increased the vulnerabilities of these students.<sup>134</sup> More time at home increased exposure for some LGBTQ+ students to hostile or unsupportive family members.<sup>135</sup> One survey found that more than eighty percent of LGBTQ+ students from ages thirteen to nineteen expressed that the pandemic had increased the stress of their living situation and nearly half of these students reported that the pandemic had impacted their expression of their sexual orientation.<sup>136</sup> Almost half (forty-eight percent) of LGBTQ+ students who desired mental health services lacked access to those services in 2020.<sup>137</sup>

Finally, the pandemic has inflicted a more harmful impact on the academic achievement of subgroups of students who oftentimes performed below average before the pandemic. Although overall students experienced

<sup>129</sup> TOMOKO WAKABAYASHI ET AL., SOC'Y FOR RSCH. IN CHILD DEV., ADDRESSING INEQUITIES IN EDUCATION: CONSIDERATIONS FOR ASIAN AMERICAN CHILDREN AND YOUTH IN THE ERA OF COVID-19 (2020), [https://www.srcd.org/sites/default/files/resources/FINAL\\_AddressInequalities-Asian\\_0.pdf](https://www.srcd.org/sites/default/files/resources/FINAL_AddressInequalities-Asian_0.pdf) [<https://perma.cc/KC89-64AD>].

<sup>130</sup> Moriah Balingit, Hannah Natanson & Yutao Chen, *As Schools Reopen, Asian American Students Are Missing from Classrooms*, WASH. POST (Mar. 4, 2021), [https://www.washingtonpost.com/education/asian-american-students-home-school-in-person%20pandemic/2021/03/02/eb7056bc-7786-11eb-8115-9ad5e9c02117\\_story.html](https://www.washingtonpost.com/education/asian-american-students-home-school-in-person%20pandemic/2021/03/02/eb7056bc-7786-11eb-8115-9ad5e9c02117_story.html) [<https://perma.cc/9ALX-G86W>]; Kimmy Yam, *Amid Attacks, School Principals Concerned over Asian Americans' Return to Class*, NBC NEWS, (Feb. 18, 2021, 7:53 PM), <https://www.nbcnews.com/news/asian-america/amid-attacks-principals-concerned-over-asian-americans-returning-class-n1258302> [<https://perma.cc/Z7SQ-WZDK>].

<sup>131</sup> SCHOOL SURVEY DASHBOARD, *supra* note 3.

<sup>132</sup> Hsiu-Lan Cheng, *Xenophobia and Racism against Asian Americans During the COVID-19 Pandemic: Mental Health Implications*, 3 J. OF INTERDISC. PERSPS. & SCHOLARSHIP 1 (Oct. 2020); WAKABAYASHI ET AL., *supra* note 129, at 1–2.

<sup>133</sup> DISPARATE IMPACTS, *supra* note 14, at 29.

<sup>134</sup> *See id.*

<sup>135</sup> *See* John P. Salerno, Natasha D. Williams & Karina A. Gattamorta, *LGBTQ Populations: Psychologically Vulnerable Communities in the COVID-19 Pandemic*, 12 PSYCH. TRAUMA: THEORY, RSCH, POL'Y & PRAC. S239, S240 (2020), <https://psycnet.apa.org/fulltext/2020-41743-001.pdf> [<https://perma.cc/7Z9X-EWF6>].

<sup>136</sup> THE TREVOR PROJECT, NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 8–9 (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf> [<https://perma.cc/ADY3-MG5Y>].

<sup>137</sup> *See id.* at 5.

less academic growth, African American, American Indian or Alaska Native, and Hispanic students, as well as students who were learning English, students with disabilities, and students attending Title I schoolwide schools, and other groups, experienced even less growth than other students.<sup>138</sup> For instance, the pandemic has “disproportionately impacted” the academic performance of Hispanic, African American, and American Indian or Alaska Native students, with African Americans experiencing the greatest losses.<sup>139</sup> Students from low-income schools, ELs, students with disabilities, and students at Title I schools also experienced a relatively larger adverse impact than the average in both math and reading performance with math performance showing the greatest adverse impact.<sup>140</sup>

These findings confirm that the pandemic has hit hardest those students who already experienced educational disadvantages before the pandemic.

### B. Prioritizing Educational Equity in the Federal Response

The nature and scope of the harms to schoolchildren reveal that access and equity should be the top aims for law and policy interventions. Fortunately, access is already a top priority at all levels of government, due to the economy’s substantial dependence on in-person school.<sup>141</sup> Most educators as well as law and policy makers agree that in-person school remains most effective for schoolchildren.<sup>142</sup>

However, since many states neglect the provision of equitable educational opportunities that focus on the needs of disadvantaged communities, equity must also remain a top-tier goal for federal law and policy makers during and beyond the pandemic.<sup>143</sup> The pandemic is widening disparities in achievement because different racial and income groups, as well as other subgroups of students, are experiencing disparate opportunities to learn.<sup>144</sup>

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<sup>138</sup> RENAISSANCE, *supra* note 76, at 10.

<sup>139</sup> *See id.* at 17–19.

<sup>140</sup> *See id.*

<sup>141</sup> *See* Exec. Order No. 14,000, 86 Fed. Reg. 7215 (Jan. 21, 2021).

<sup>142</sup> *See id.* For evidence that in-person school is superior, *see* Benedict Carey, *What We’re Learning About Online Learning*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/06/13/health/school-learning-online-education> [<https://perma.cc/N4BZ-8X3U>]; Frederick M. Hess & Nat Malkus, *Why K-12 Remote Learning Might Actually Be Worse This Fall*, AM. ENTER. INST. (June 4, 2020), <https://www.aei.org/op-eds/why-k-12-remote-learning-might-actually-be-worse-this-fall/> [<https://perma.cc/ZWL9-8P4G>]; Susanna Loeb, *How Effective is Online Learning? What the Research Does and Doesn’t Tell Us*, EDUC. WK. (Mar. 20, 2020), <https://www.edweek.org/technology/opinion-how-effective-is-online-learning-what-the-research-does-and-doesnt-tell-us/2020/0> [<https://perma.cc/PT69-VPW6>].

<sup>143</sup> *See* Robinson, *Restructuring*, *supra* note 23, at 926–27; Cynthia G. Brown, *From ESEA to ESSA: Progress or Regress?*, in *THE EVERY STUDENT SUCCEEDS ACT: WHAT IT MEANS FOR SCHOOLS, SYSTEMS AND STATES* 153, 165 (Frederick M. Hess & Max Eden eds., 2017) [hereinafter *THE EVERY STUDENT SUCCEEDS ACT*]; Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 978 (2015) [hereinafter Robinson, *Disrupting Education Federalism*].

<sup>144</sup> *See* DORN ET AL., *COVID-19 AND LEARNING LOSS*, *supra* note 1, at 12.

The pandemic's harms are being layered onto an education system that tolerates vast funding disparities, with only sixteen states investing at least five percent more in funding in disadvantaged districts, and the students in these districts need significantly more resources to compete on a level playing field with their peers in more advantaged districts.<sup>145</sup> The U.S. pattern of higher spending in high-income districts compared to low-income districts makes it an outlier among other developed nations.<sup>146</sup>

History confirms that federal leadership and guidance has been essential for demanding that states and localities provide equal educational opportunity, including for female-identifying students, disadvantaged students, and students with disabilities.<sup>147</sup> The federal government plays a critical role in advancing equity in education, and in the absence of this leadership, disadvantaged schoolchildren are left to the whims of state and local politics that historically have failed to meet their needs.<sup>148</sup> Without an effective and comprehensive federal approach that insists on equity in how states, localities, and districts are addressing the educational harms of the pandemic, the United States risks leaving groups of schoolchildren that were already disadvantaged further behind.

The next Part describes and critiques the approach to federal support for K-12 education during the pandemic with a focus on efforts to advance educational equity.

### III. FEDERAL SUPPORT FOR SCHOOLS DURING THE PANDEMIC

The federal government's actions regarding the pandemic have been both a help and a hindrance to schools, districts, and states. Congress has authorized federal funding for education three times since the pandemic struck.<sup>149</sup> The federal government also has issued guidance on such topics as

<sup>145</sup> FARRIE & SCIARRA, *supra* note 83, at 6–8.

<sup>146</sup> COUNCIL ON FOREIGN RELS., REMEDIAL EDUCATION: FEDERAL EDUCATION POLICY 8 (2016), [https://cdn.cfr.org/sites/default/files/book\\_pdf/RA-RemedialEducation.pdf](https://cdn.cfr.org/sites/default/files/book_pdf/RA-RemedialEducation.pdf) [<https://perma.cc/P5TN-ZFVN>]; 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 TO GIVE EVERY CHILD AN EVEN CHANCE 61, 62–63 (Prudence L. Carter & Kevin G. Welner eds., 2013).

<sup>147</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 1003 (citing the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified as amended in scattered sections of 20 U.S.C.); 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); 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)).

<sup>148</sup> Robinson, *Disrupting Education Federalism*, *supra* note 143, at 1002–04; Susan H. Fuhrman, *Less than Meets the Eye: Standards, Testing and Fear of Federal Control*, in WHO'S IN CHARGE HERE?: THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 131, 131–58 (Noel Epstein ed., 2004); Michael W. Kirst, *Turning Points: A History of American School Governance*, in WHO'S IN CHARGE HERE?, *supra* note 148, at 15–16.

<sup>149</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).



school reopenings and compliance with federal requirements in these laws.<sup>150</sup> The federal response has taken some important steps toward educational equity but has not consistently prioritized it. States, districts, and schools have lacked the clear and consistent guidance, support, and leadership that they needed to tackle the pandemic.<sup>151</sup> These federal missteps hinder disadvantaged communities the most because they are more dependent on federal law and policy to ensure that their schoolchildren's needs are met.<sup>152</sup>

### A. Federal Legislative Support for Education During the Pandemic

Federal support for states, districts, and schools during the pandemic builds on a long track record of federal support for education.<sup>153</sup> Even with this long track record, federal aid during the pandemic provided an unprecedented infusion of federal funding for education.<sup>154</sup> This Section describes the three federal relief laws that the United States has enacted during the pandemic: the CARES Act;<sup>155</sup> the Appropriations Act;<sup>156</sup> and the American Rescue Plan Act of 2021 (“American Rescue Plan” or “ARP”).<sup>157</sup>

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<sup>150</sup> ED COVID-19 HANDBOOK, VOL. 2, *supra* note 21; ED COVID-19 HANDBOOK, VOL. 1, *supra* note 21; *Operational Strategy*, *supra* note 6; U.S. DEP'T OF EDUC., AMERICAN RESCUE PLAN ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF (ESSER) PROGRAM MAINTENANCE OF EQUITY REQUIREMENTS 2 (updated Aug. 6, 2021), [https://oese.ed.gov/files/2021/08/Maintenance-of-Equity-updated-FAQs\\_final\\_08.06.2021.pdf](https://oese.ed.gov/files/2021/08/Maintenance-of-Equity-updated-FAQs_final_08.06.2021.pdf) [<https://perma.cc/QGA4-BAAT>] [hereinafter MAINTENANCE OF EQUITY GUIDANCE]; U.S. DEP'T OF EDUC., GUIDANCE ON MAINTENANCE OF EFFORT REQUIREMENTS AND WAIVER REQUESTS UNDER THE ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF (ESSER) FUND AND THE GOVERNOR'S EMERGENCY EDUCATION RELIEF (GEER) FUND (Apr. 2021), [https://oese.ed.gov/files/2021/04/MOE-Chart\\_with-waiver-FAQs\\_FINAL\\_4.19.21\\_12pm.pdf](https://oese.ed.gov/files/2021/04/MOE-Chart_with-waiver-FAQs_FINAL_4.19.21_12pm.pdf) [<https://perma.cc/9JXA-882N>] [hereinafter MAINTENANCE OF EFFORT GUIDANCE].

<sup>151</sup> See Andrew Ujifusa, *How America's Leaders Have Failed Educators on COVID-19*, EDUC. WK. (July 16, 2020), <https://www.edweek.org/leadership/how-americas-leaders-have-failed-educators-on-covid-19/2020/07> [<https://perma.cc/HYB6-JTP6>]. But see Arne Duncan, *Arne Duncan: Reopening Schools Is a Local Decision, Not the President's*, EDUC. WK. (July 9, 2020), <https://www.edweek.org/leadership/opinion-arne-duncan-reopening-schools-is-a-local-decision-not-the-presidents/2020/0> [<https://perma.cc/G7YB-8T7D>].

<sup>152</sup> See 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) [hereinafter CARROTS, STICKS].

<sup>153</sup> See, e.g., Derek W. Black, *Leveraging Federal Funding for Equity and Integration*, in THE ENDURING LEGACY OF RODRIGUEZ: CREATING NEW PATHWAYS TO EQUAL EDUCATIONAL OPPORTUNITY 227, 230–32 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015) [hereinafter Black, *Leveraging Federal Funding*] (discussing the enactment of Title I of the Elementary and Secondary Education Act in 1965 and the evolution of its priorities).

<sup>154</sup> Griffith, *supra* note 22.

<sup>155</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

<sup>156</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020).

<sup>157</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

### 1. *The CARES Act*

Totaling more than two trillion dollars in federal aid, the CARES Act is the largest stimulus aid package in U.S. history.<sup>158</sup> The CARES Act established the Education Stabilization Fund (“ESF”) which provided nearly thirty-one billion dollars in federal funds for the pandemic’s impact on education.<sup>159</sup> ESF includes two funds that support elementary and secondary schools: the Elementary and Secondary School Emergency Relief Fund (“ESSER”) at \$13.2 billion and the Governor’s Emergency Education Relief Fund (“GEER”) at \$3 billion.<sup>160</sup>

ESSER provides broad discretion to state and local education officials to use the funds to address added costs caused by the pandemic.<sup>161</sup> The approved activities run the gamut from adopting and implementing response efforts; purchasing cleaning and sanitation supplies; acquiring technology for remote learning; and addressing the needs of students with disabilities, from low-income households, and ELs.<sup>162</sup> The law required states to provide assurances in their application that they would maintain funding support for education in fiscal years (“FYs”) 2020 and 2021 at no less than the average

<sup>158</sup> Hulse & Cochrane, *supra* note 17.

<sup>159</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18001, 134 Stat. 281, 564 (2020). Project SERV provides support to school districts and colleges and universities where a traumatic event disrupts the educational environment, such as a hurricane or a shooting at a school. The CARES Act included one hundred million dollars for Project SERV to assist schools and colleges and university with coronavirus prevention and response and these funds may be used for the costs of remote learning, disinfecting, and counseling. *See id.*; REBECCA R. SKINNER, CONG. RSCH. SERV., CARES ACT ELEMENTARY AND SECONDARY EDUCATION PROVISIONS (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11509> [<https://perma.cc/25W9-PLN5>].

<sup>160</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, §§ 18001(b)(1)–(2), 134 Stat. 281, 564 (2020); Press Release, U.S. Dep’t of Educ., Sec’y DeVos Makes Available Over \$13 Billion in Emergency Coronavirus Relief to Support Continued Education for K-12 Students (Apr. 23, 2020); *Governor’s Emergency Education Relief Fund*, OFF. ELEMENTARY & SECONDARY EDUC., <https://oese.ed.gov/offices/education-stabilization-fund/governors-emergency-education-relief-fund/> [<https://perma.cc/A68G-EM3J>] (last updated Aug. 5, 2021). It also included one fund for higher education: the Higher Education Emergency Relief Fund, which was funded at \$14.24 billion. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, §§ 18001–18004, 134 Stat. 281, 564–68 (2020). This fund is not the focus of this article.

<sup>161</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18003(d), 134 Stat. 281 (2020); *see also* Michael Griffith, Jessica Cardichon & Michael A. DiNapoli Jr., *A Second Round of Federal Relief: An Important Next Step*, LEARNING POL’Y INST. BLOG (Dec. 28, 2020), <https://learningpolicyinstitute.org/blog/covid-second-round-federal-relief> [<https://perma.cc/LVK7-KZC6>]. Even though governors possess significant statutory discretion on how to spend the CARES Act funding, the National Governor’s Association sent a letter to then-Secretary Betsy DeVos requesting “maximum flexibility.” Governors Asa Hutchinson & Jay Inslee, Education & Workforce Committee, *Letter to U.S. Department of Education Regarding Education Stabilization Fund*, NAT’L GOVERNORS ASS’N (Apr. 4, 2020), <https://www.nga.org/advocacy-communications/letters-nga/education-workforce-committee/letter-to-u-s-department-of-education-regarding-education-stabilization-fund/> [<https://perma.cc/G9B4-QVQY>].

<sup>162</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18003(d), 134 Stat. 281, 565–67 (2020).

level of support for the last three years, a requirement called “Maintenance of Effort.”<sup>163</sup> The law authorized the Secretary of Education to waive this requirement if a state “experienced a precipitous decline in fiscal resources.”<sup>164</sup>

Congress used the Title I formula to determine how much each state would receive.<sup>165</sup> Title I provides funding for the educational needs of low-income children through the current reauthorization of the Elementary and Secondary Act, which is titled the Every Student Succeeds Act (“ESSA”).<sup>166</sup> The average school district received \$973,000 in additional funding under ESSER through the CARES Act,<sup>167</sup> an average of \$286 per pupil.<sup>168</sup> Reports and news coverage confirm that states varied widely in their uses of these funds, including such uses as broadband connectivity and devices,<sup>169</sup> personal protective equipment,<sup>170</sup> nutritional programs and community schools,<sup>171</sup> and aids for students with disabilities<sup>172</sup> to name a few. Similarly, GEER provided great discretion to governors to distribute funds to districts that were “significantly impacted” by the coronavirus.<sup>173</sup> Governors varied widely in how they spent their funds with many focusing on broadband support and computers, closing student learning gaps, and social-emotional

<sup>163</sup> *Id.* § 18008(a).

<sup>164</sup> *Id.* § 18008(b).

<sup>165</sup> *Id.* § 18003(b).

<sup>166</sup> Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified in scattered sections of 20 U.S.C.); *see also* Robinson, *Restructuring*, *supra* note 23, at 926–27.

<sup>167</sup> Tom Lee, *Education Provisions in the Consolidated Appropriations Act, 2021*, AM. ACTION F. (Dec. 22, 2020), <https://www.americanactionforum.org/insight/education-provisions-in-the-consolidated-appropriations-act-2021/> [<https://perma.cc/QJ2J-MD8P>].

<sup>168</sup> Michael Griffith, *COVID-19 and School Funding: What to Expect and What States Can Do*, EDNOTE (May 22, 2020), <https://ednote.ecs.org/covid-19-and-school-funding/> [<https://perma.cc/4C4E-437P>].

<sup>169</sup> *See* Press Release, Ill. Off. Governor, Governor Pritzker Announces \$108.5 Million COVID Funding for PreK-12, Higher Education with Equity Focus (July 14, 2020), <https://www.illinois.gov/news/press-release.21812.html> [<https://perma.cc/M29X-ZPMR>]; Press Release, Ga. Dep’t of Educ., Georgia Department of Education Awards \$21 Million in Digital Learning Grants (Apr. 28, 2020), <https://www.gadoe.org/External-Affairs-and-Policy/communications/Pages/PressReleaseDetails.aspx?PressView=default&pid=765> [<https://perma.cc/SQ7Z-KZKM>].

<sup>170</sup> Katie Keleher, *Stitt: \$10M of CARES Act Funding Going Towards PPE in Schools*, KJRH (July 31, 2020), <https://www.kjrh.com/news/local-news/stitt-10m-of-cares-act-funding-going-towards-ppe-in-schools> [<https://perma.cc/C95E-AZY3>] (noting Oklahoma Governor’s announcement that \$10 million would be allocated to personal protective equipment to support school reopening).

<sup>171</sup> ESSER Fund Frequently Asked Questions, *Which Funds from the CARES Act Are Subject to the Equitable Services Requirement?*, CAL. DEP’T OF EDUC. (July 22, 2021), <https://www.cde.ca.gov/fg/cr/esserfaqs.asp> [<https://perma.cc/Q66Q-AYZU>].

<sup>172</sup> Press Release, Off. Tex. Governor, Governor Greg Abbott, TEA Establish Targeted Education Funds for Families of Students with Cognitive Disabilities (Oct. 21, 2020), <https://gov.texas.gov/news/post/governor-abbott-tea-establish-targeted-education-funds-for-families-of-students-with-cognitive-disabilities> [<https://perma.cc/4BXZ-XTEY>].

<sup>173</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18002(c)(1), 134 Stat. 281, 565 (2020).

health, while only a handful focused on reopening schools.<sup>174</sup> Some governors, almost exclusively in Republican-led states, also used GEER funding to support private school choice, home schooling, and private schools.<sup>175</sup>

The ESF aimed to prevent widespread layoffs in education.<sup>176</sup> However, the initial CARES Act allocation fell short of this goal, given the American Federation of Teachers' report in spring 2020 that more than 750,000 public school jobs had been lost, which is more than double the number of such jobs lost after the Great Recession.<sup>177</sup>

## 2. *The December 2020 Appropriations Act*

The December Appropriations Act's additional \$54.3 billion for K-12 education and \$4.1 billion to governors for education allowed states to take further steps to address the pandemic's effects on education.<sup>178</sup> Like the initial CARES Act funding, states were required to distribute this funding based on their Title I allocation, which is based upon the number and percentage of students in poverty in the district.<sup>179</sup> This legislation also included discretion for how schools could use these funds and allowed such funding to be used to enhance school ventilation, increase broadband access, remedy learning loss, and acquire technology.<sup>180</sup> Like the CARES Act, the law included a Maintenance of Effort requirement that required a state application for funds to include assurances that it would maintain funding for elementary, secondary, and higher education during FY 2022 to a level that was not below the average funding for FYs 2017, 2018, and 2019.<sup>181</sup> The law also

<sup>174</sup> Phyllis W. Jordan & Javaid Siddiqi, *How Governors Are Using Their CARES Act Education Dollars*, FUTURE-ED (Sept. 9, 2020), <https://www.future-ed.org/how-governors-are-using-their-cares-act-education-dollars/> [<https://perma.cc/BQ2K-Y937>].

<sup>175</sup> See *id.* For example, the governors in Oklahoma, North Carolina, and New Hampshire set aside significant funding to support private school scholarships. South Carolina Governor Henry McMaster attempted to use thirty-two million dollars of the state's forty-eight million dollar education grant to pay tuition for children from low-income households to attend a private school, but that move was halted by the South Carolina Supreme Court. See John Schilling, *How States Can Use CARES Act Funds to Promote and Support Educational Choice*, AM. ENTER. INST. (Oct. 7, 2020), <https://www.aei.org/research-products/report/how-states-can-use-cares-act-funds-to-promote-and-support-educational-choice/> [<https://perma.cc/NPT5-6PDP>]; *Adams v. McMaster*, 851 S.E.2d 703, 707 (S.C. 2020).

<sup>176</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18006, 134 Stat. 281, 568–69 (2020).

<sup>177</sup> See *Reopening Schools During a Time of Triple Crisis: Financial Implications*, AM. FED'N TCHRS. (June 10, 2020), <https://www.aft.org/reopen-schools/reopening-schools-during-time-triple-crisis-financial-implications> [<https://perma.cc/6LJ2-NF8R>].

<sup>178</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, §§ 311(b)–312, 134 Stat. 1182, 1924–29 (2020).

<sup>179</sup> *Id.* § 313(b).

<sup>180</sup> *Id.* § 313(d); see also Griffith et al., *supra* note 161; *COVID-19 Economic Relief Bill*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 4, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/covid-19-economic-relief-bill-stimulus.aspx> [<https://perma.cc/EM6S-ZMGN>].

<sup>181</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, § 317(a), 134 Stat. 1182, 1936–37 (2020).

followed the CARES Act blueprint by permitting exceptions for a “precipitous decline” in funding.<sup>182</sup>

School districts received an average of approximately \$1,065 per pupil.<sup>183</sup> Districts received approximately four million dollars from the ESSER fund in the Appropriations Act which brought the average total funding for a school district to five million dollars from the ESSER fund under both the December law and the CARES Act.<sup>184</sup> The December law also initiated the \$3.2 billion Emergency Broadband Benefit program and on May 12, 2021, the Federal Communications Commission launched this program.<sup>185</sup> Through this program, low-income families receive a discount of fifty dollars per month for broadband connectivity and a one-time discount of \$100 per device.<sup>186</sup>

### 3. *The American Rescue Plan*

The \$1.9 trillion American Rescue Plan authorized approximately \$122 billion for ESSER.<sup>187</sup> This funding provides the largest ever one-time investment in U.S. schools and combined with other stimulus funds amounts to approximately \$3,750 per student.<sup>188</sup> This law provides \$2.5 billion for schoolchildren with disabilities and \$800 million for educational services for students experiencing homelessness.<sup>189</sup> The law also allocates \$2.75 billion to support funding for COVID-related needs for private schools.<sup>190</sup> The ARP allocates almost \$7.2 billion for the Emergency Connectivity Fund for expanding broadband access as well as access to devices for students and libraries.<sup>191</sup> Ninety percent of the funds are distributed to districts in the same manner as the initial two aid packages, based on their Title I funding.<sup>192</sup> States must use five percent of their ESSER funding to remedy lost student

<sup>182</sup> *Id.* §§ 311(b)-312.

<sup>183</sup> Griffith et al., *supra* note 161.

<sup>184</sup> Lee, *supra* note 167.

<sup>185</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904(b), 134 Stat. 1182, 2131-34 (2020); Adie Tomer & Caroline George, *The American Rescue Plan is the Broadband Down Payment the Country Needs*, BROOKINGS, (June 1, 2021), <https://www.brookings.edu/research/the-american-rescue-plan-is-the-broadband-down-payment-the-country-needs/> [<https://perma.cc/3WAR-G927>].

<sup>186</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904(a)(6)-(b), 134 Stat. 1182, 2129-34 (2020); FCC Consumer and Governmental Affairs, *Emergency Broadband Benefit*, FED. COMM'NS COMM. (Aug. 27, 2021), <http://www.fcc.gov/broadbandbenefit> [<https://perma.cc/MV99-7UJJ>].

<sup>187</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(b), 135 Stat. 4, 19.

<sup>188</sup> See Griffith, *supra* note 22; Chad Aldeman, *Best- and Worst-Case Scenarios for How Stimulus Dollars Will be Spent*, THOMAS B. FORDHAM INST. (Mar. 26, 2021), <https://fordhaminstitute.org/national/commentary/best-and-worst-case-scenarios-how-school-stimulus-dollars-will-be-spent> [<https://perma.cc/4W3A-6K4R>].

<sup>189</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 2001(b)-2014(a), 135 Stat. 4, 19-29.

<sup>190</sup> *Id.* § 2002.

<sup>191</sup> *Id.* § 7402(c)(2)(A).

<sup>192</sup> *Id.* § 2001(c); see also Griffith, *supra* note 22.

learning using “evidence-based interventions”; districts must use twenty percent of their funds for this purpose.<sup>193</sup> States are required to reserve one percent of their ESSER funds for evidence-based summer programs and one percent for evidence-based afterschool programs.<sup>194</sup> States received sixty days to allocate most ARP funding to districts and districts have until September 30, 2024, to obligate the bulk of ARP funding.<sup>195</sup>

ARP includes requirements that aim to ensure that states maintain their funding effort and advance equity. The “State Maintenance of Effort” provision requires states to maintain funding for both K-12 and higher education for FYs 2022 and 2023 (the 2021–2022 and 2022–2023 school years) at the level proportional to the average spending for FYs 2017, 2018, and 2019.<sup>196</sup> In addition, the state Maintenance of Equity requirements apply to funding for FYs 2022 and 2023 and prohibit a state from cutting state funds to the top fifty percent of “high-need” districts more than statewide funding reductions and from cutting funds to any of the top twenty percent of the highest poverty districts below funding levels for FY 2019.<sup>197</sup> ARP also includes district Maintenance of Equity requirements that prohibit a district from reducing state and local funds per pupil or full-time staff per pupil at “high-poverty schools” more than it makes districtwide cuts for FY 2022 or FY 2023.<sup>198</sup> The ARP is the first federal education law to enact these Maintenance of Equity requirements.<sup>199</sup>

States submitted plans for the use of ARP funds in summer 2021 to the USDOE.<sup>200</sup> The DOE’s review of more than half of the plans noted that the funds were being used to help students return to school in person, and to remedy the educational inequities that the pandemic inflicted.<sup>201</sup> Other uses

<sup>193</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(e)–(f), 135 Stat. 4, 20–22.

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

<sup>195</sup> *Id.* § 2001(d)(2); *see also* U.S. DEP’T OF EDUC., FREQUENTLY ASKED QUESTIONS: ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF PROGRAMS, GOVERNOR’S EMERGENCY EDUCATION RELIEF PROGRAMS 14, 48 (2021), [https://oese.ed.gov/files/2021/05/ESSER.GEER\\_FAQs\\_5.26.21\\_745AM\\_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf](https://oese.ed.gov/files/2021/05/ESSER.GEER_FAQs_5.26.21_745AM_FINALb0cd6833f6f46e03ba2d97d30aff953260028045f9ef3b18ea602db4b32b1d99.pdf) [<https://perma.cc/G8YF-E34Z>] [hereinafter RELIEF PROGRAMS].

<sup>196</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(a), 135 Stat. 4, 24–25.

<sup>197</sup> *See id.* § 2004(b), 135 Stat. 4, 24. ARP defines high-need districts as the top half of districts “in rank order” serving “the highest percentage of economically disadvantaged students.” *Id.* § 2004(d)(3)(A). Highest poverty districts are those that serve “in rank order . . . the highest percentage of economically disadvantaged students” and that serve at least twenty percent of students in the state. *Id.* § 2004(d)(2)(B).

<sup>198</sup> *See id.* § 2004(c)(A)–(B). ARP defines high-poverty schools as the twenty percent of schools with the “highest percentage of economically disadvantaged students” in the district. *Id.* § 2004(d)(4).

<sup>199</sup> *See* Dear Colleague Letter from Miguel Cardona, U.S. Sec’y of Educ., to Chief State School Officers and School District Superintendents (Aug. 6, 2021), <https://oese.ed.gov/files/2021/08/21-006207-MOEquity-DCL-F08-05-2021-SIGNED.pdf> [<https://perma.cc/WY4H-3C9T>] [hereinafter Dear Colleague].

<sup>200</sup> *See* Press Release, U.S. Dep’t of Educ., U.S. Department of Education Posts State Plans for Use of American Rescue Plan Funds to Support Students and the Safe and Sustained Re-opening of Schools (June 14, 2021).

<sup>201</sup> *See id.*

included efforts to prevent and mitigate COVID-19, summer learning opportunities, support for students' mental and emotional health, and remedying learning losses.<sup>202</sup>

In addition to these critical supports for K-12 education, ARP is also helping to significantly reduce child poverty with much of that reduction occurring through its expansion of the Child Tax Credit.<sup>203</sup> The changes to the Child Tax Credit are raising 4.1 million children out of poverty and moving an additional 1.1 million children out of deep poverty.<sup>204</sup> Latino and Hispanic children are benefitting the most from the law's reforms.<sup>205</sup>

Although a full exploration of the ARP's impact on child poverty deserves its own analysis, it is helpful to understand that ARP's reduction in child poverty will reap important benefits for education. Research confirms that poverty brings with it a constellation of challenges that together hinder academic achievement, such as health, affordable housing, and less parental education and attention, to name a few of the challenges.<sup>206</sup> These adverse effects are compounded in schools of concentrated poverty that too often focus on remediation rather than excellence.<sup>207</sup> African American and Hispanic children are more likely to live in neighborhoods with concentrated poverty and these neighborhoods often have high percentages of households that are headed by single women and that receive benefits from the state.<sup>208</sup>

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<sup>202</sup> See *id.* The plans for each individual state can be found at *State Plans*, OFF. ELEMENTARY & SECONDARY EDUC., <http://oese.ed.gov/offices/american-rescue-plan/american-rescue-plan-elementary-and-secondary-emergency-relief/stateplans> [https://perma.cc/2ZVP-HHAP] (last updated Sept. 10, 2021).

<sup>203</sup> See Chuck Marr, Kris Cox, Stephanie Hingtgen, Katie Windham & Arloc Sherman, *American Rescue Plan Act Includes Critical Expansions of Child Tax Credit and EITC*, CTR. ON BUDGET POL'Y & PRIORITIES (Mar. 12, 2021), <https://www.cbpp.org/research/federal-tax/american-rescue-plan-act-includes-critical-expansions-of-child-tax-credit-and> [https://perma.cc/B3G5-WJVX]; LAURA WHEATON, SARAH MINTON, LINDA GIANNARELLI & KELLY DWYER, *POVERTY PROJECTIONS: ASSESSING FOUR AMERICAN RESCUE PLAN POLICIES 7* (2021), [https://www.urban.org/sites/default/files/publication/103794/2021-poverty-projections-assessing-four-american-rescue-plan-policies\\_0.pdf](https://www.urban.org/sites/default/files/publication/103794/2021-poverty-projections-assessing-four-american-rescue-plan-policies_0.pdf) [https://perma.cc/CM38-NEN6]. The expansion includes raising the eligibility age for a child from 16 to 17, making the credit fully refundable for those with little or no income, and increasing the amount of the credit, including a larger increase for young children from \$2,000 to \$3,600 for ages zero to five and to \$3,000 for children who are ages six to seventeen. See MARGOT L. CRANDALL-HOLLICK, *THE CHILD TAX CREDIT: TEMPORARY EXPANSION FOR 2021 UNDER THE AMERICAN RESCUE PLAN ACT OF 2021* (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11613> [https://perma.cc/LYN4-S93V]. Funds from the credit will be sent to families in installments throughout the year which will provide a consistent, minimum income. See Valerie Strauss, *Biden's American Rescue Plan Is Actually A Huge New School Reform*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/education/2021/03/11/biden-rescue-plan-actually-huge-new-school-reform/> [https://perma.cc/U88H-SQ9M]; Peter Edelman & Indivar Dutta-Gupta, *The Stimulus Shows U.S. Attitudes About Child Poverty Are Changing in a Big Way*, WASH. POST (Mar. 15, 2021), <https://www.washingtonpost.com/outlook/2021/03/15/stimulus-law-child-poverty/> [https://perma.cc/XC5K-KZTQ].

<sup>204</sup> See Marr et al., *supra* note 203.

<sup>205</sup> See *id.*

<sup>206</sup> See Rothstein, *supra* note 146, at 62–63.

<sup>207</sup> See *id.* at 64.

<sup>208</sup> See *id.* at 65.

Therefore, ARP's reduction in childhood poverty will reap important benefits for the achievement of children from low-income households.<sup>209</sup>

#### 4. Critiquing Federal K-12 Legislation During the Pandemic

Federal legislation during the pandemic made important steps toward advancing educational equity, including increasing federal support for K-12 schools, adopting funding conditions that support equity, and authorizing funding that will help narrow the digital divide. However, the legislation also has shortcomings that weaken its ability to support educational equity, including an insufficient prioritization of equity for the use of federal funds and distribution of funds through a formula that does not adequately account for concentrated poverty.

The federal relief laws take many important steps toward advancing educational equity. Given the greater harms that many communities of color and low-income students have experienced, the influx from the biggest single federal education funding in the ARP,<sup>210</sup> coupled with the funding in the first two relief bills, has the possibility of equipping states, districts, and schools with the funding that they need to remedy these harms and even move schools forward in a positive and impactful direction if districts and schools seize the opportunity to do this.<sup>211</sup> All three laws also provide great flexibility in how federal funds are used, which allows states, districts, and schools to choose to prioritize the needs of students who have experienced the greatest adverse impact from COVID-19.<sup>212</sup> It cannot be overemphasized that ARP's reduction of student poverty through the expansion of federal benefits for low-income families also should boost student achievement and indirectly support educational equity.<sup>213</sup>

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<sup>209</sup> See *id.* at 70; see also Robert Greenstein, Elaine Maag, Chye-Ching Huang, Emily Horton & Chloe Cho, *Improving the Child Tax Credit for Very Low Income Families*, U.S. P'SHIP ON MOBILITY FROM POVERTY 9 (Apr. 2018), <https://www.mobilitypartnership.org/improving-child-tax-credit-very-low-income-families> [<https://perma.cc/9KS6-SKLB>] (“[T]he weight of existing evidence shows that children in poverty whose families received increased income support experienced significant gains in education and health, with the strongest gains for the poorest children.”).

<sup>210</sup> See Marguerite Roza, *Smart Ways to Cover the Coming “Year of Ed Finance,”* PHI DELTA KAPPAN (June 23, 2021), <https://kappanonline.org/roza-russo-an-experts-advice-on-how-to-report-on-the-year-of-ed-finance/> [<https://perma.cc/M34M-2W4T>].

<sup>211</sup> See LINDA DARLING-HAMMOND, ABBY SCHACHNER & ADAM K. EDGERTON, LEARNING POL'Y INST., RESTARTING AND REINVENTING SCHOOL: LEARNING IN THE TIME OF COVID AND BEYOND v (2020), [https://restart-reinvent.learningpolicyinstitute.org/sites/default/files/product-files/Restart\\_Reinvent\\_Schools\\_COVID\\_REPORT.pdf](https://restart-reinvent.learningpolicyinstitute.org/sites/default/files/product-files/Restart_Reinvent_Schools_COVID_REPORT.pdf) [<https://perma.cc/W3JH-AGXL>] (examining how the response to the pandemic provides “an opportunity to identify evidence-based policies and practices that will enable them to seize this moment to rethink schools in ways that can transform learning opportunities for students and teachers alike”).

<sup>212</sup> See THE CTR. FOR LEARNER EQUITY, THE RISING TIDE THAT LIFTS ALL BOATS: INVESTING STIMULUS DOLLARS WITH AN EQUITY FOCUS 2 (2021), [https://www.centerforlearnerequity.org/wp-content/uploads/CLE-The-Rising-Tide-that-Lifts-All-Boats\\_-Investing-Stimulus-Dollars-with-an-Equity-Focus-4.20.2021.pdf](https://www.centerforlearnerequity.org/wp-content/uploads/CLE-The-Rising-Tide-that-Lifts-All-Boats_-Investing-Stimulus-Dollars-with-an-Equity-Focus-4.20.2021.pdf) [<https://perma.cc/4DKD-XC7Z>].

<sup>213</sup> See Rothstein, *supra* note 146, at 70; see also Strauss, *supra* note 203.



All three laws also include funding conditions that support educational equity. The Maintenance of Effort requirements aim to prevent drastic funding cuts,<sup>214</sup> and thus the inclusion of this requirement in all three laws indicates that Congress hopes to prevent reductions in school funding.<sup>215</sup> ARP is the first education law to include Maintenance of Equity for both states and districts as a funding condition.<sup>216</sup> These requirements aim to protect schools and districts that serve large proportions of students from low-income families from disproportionate cuts to their funding in the 2021–2022 and 2022–2023 school years.<sup>217</sup> They also seek to protect districts serving larger shares of students from low-income families from state funding cuts below FY 2019 amounts.<sup>218</sup>

Federal funds from all three laws also will help to reduce the digital divide that disproportionately harms low-income students, ELs, and many families of color. For instance, ARP authorizes almost \$7.2 billion for devices and connectivity for students and libraries, among other funding for technology.<sup>219</sup> ARP funding also can help shrink the digital divide because the general education funding can be used to purchase technology and increase connectivity.<sup>220</sup> One Brookings Institute estimate found that ARP provides \$388.1 billion in funding for which digital equity is a permissible use.<sup>221</sup>

The general funding of the ARP also makes important advances for equity. For instance, under the ARP, students, families, educators, and other stakeholders are provided opportunities to comment on how funds will be used at the state and district levels.<sup>222</sup> In addition, the ARP requirement that districts must use twenty percent of their funds on evidence-based interventions to address learning loss will support meeting the needs of all children who have fallen behind, which includes significant numbers of students from

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<sup>214</sup> See Black, *Leveraging Federal Funding*, *supra* note 153, at 238.

<sup>215</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(a), 135 Stat. 4, 24–25; see also Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18008(a), 134 Stat. 281, 569 (2020).

<sup>216</sup> See Dear Colleague, *supra* note 199.

<sup>217</sup> See *id.*

<sup>218</sup> See *id.*

<sup>219</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 7402(c)(2)(A), 135 Stat. 4, 109.

<sup>220</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(e)(2)(K), 135 Stat. 4, 21.

<sup>221</sup> Tomer & George, *supra* note 51.

<sup>222</sup> As states develop their plans to spend the money, the USDOE rules for the funds requires them to consult with a broad group of stakeholders, such as students, families, teachers, principals and other school leaders, civil rights organizations, and tribes. American Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21,195, 21,197 (Apr. 22, 2021) (to be codified at 34 C.F.R. ch. II). Districts that receive ARP funds are required to create and publish a plan to safely resume instruction in person within 30 days of receiving the funds, to solicit comments on the plan, and to consider such comments as they develop the plan. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(i)(1)-(2), 135 Stat. 4, 23.

historically disadvantaged communities.<sup>223</sup> Together, these aspects of ARP, the CARES Act, and the Appropriations Act provide significant potential to remedy the disparate impact of the pandemic on vulnerable communities.

Despite these strengths of the federal legislation, the federal laws also have numerous weaknesses that can render them ineffective vehicles to advance educational equity. First, the laws generally do not insist that when they use federal funds, states, districts, and schools prioritize the educational needs of those students who were hardest hit by the pandemic. Instead, this new federal aid includes broad flexibility for how the funds can be used to support schools.<sup>224</sup> In fact, the federal guidance about the use of funds for the three laws discusses educational equity as a goal that states and districts “should” pursue.<sup>225</sup> Undoubtedly, states and school districts need flexibility in how they use federal aid, so that they can allocate funding to meet the wide range of ever-changing needs.<sup>226</sup> However, the educational harms of the pandemic that are leaving behind many vulnerable students, including poor, minority, special education, and English learner students, also confirm that too few conditions on generous federal aid allows states to continue a long-standing pattern that neglects educational equity.<sup>227</sup> This is a tremendous missed opportunity to leverage federal funding to advance educational equity because the pandemic’s disruption of education is creating the possibility for reinventing schools by adopting evidence-based practices and policies.<sup>228</sup> Therefore, although the federal role in education was criticized under No Child Left Behind for demanding much while giving very little,<sup>229</sup>

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<sup>223</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 2001(e)(1), (f)(1), 135 Stat. 4, 20–22.

<sup>224</sup> See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18003(d), 134 Stat. 281, 565–67 (2020).

<sup>225</sup> RELIEF PROGRAMS, *supra* note 195, at 28 (“SEAs and LEAs *should* establish practices that ensure all students are provided resources that establish equitable opportunities to learn. Resource equity means that schools serving larger proportions of historically underserved groups of students—including students from low-income families, students of color, English learners, students with disabilities, and students experiencing homelessness—require more funding, depending upon the needs of the students at a particular school. In addition, resource allocation decisions *should* recognize that certain student populations and school communities have been disproportionately impacted by the pandemic and ensure resource equity, including through allocating funding to provide more intensive social, emotional, mental health, and academic services as needed on return to in-person learning.”) (emphasis added).

<sup>226</sup> Sarah Reber & Nora Gordon, *How Congress Can Equitably Allocate COVID-19 Education Aid to States*, BROOKINGS: BROWN CTR. CHALKBOARD BLOG (June 15, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/06/15/how-congress-can-equitably-allocate-covid-19-education-aid-to-states/> [<https://perma.cc/76NK-5JK2>].

<sup>227</sup> See FARRIE & SCIARRA, *supra* note 83, at 1; EQUITY & EXCELLENCE COMM’N, *supra* note 85, at 17–18.

<sup>228</sup> See Darling-Hammond et al., *supra* note 211.

<sup>229</sup> See MICHAEL A. REBELL & JESSICA R. WOLFF, MOVING EVERY CHILD AHEAD: FROM NCLB HYPE TO MEANINGFUL EDUCATIONAL OPPORTUNITY 245 (2008) (critiquing NCLB by noting that “[i]nsisting on definitive and demanding outcomes without ensuring that schools have the capacity to achieve these results has substantially undermined the law’s effectiveness and credibility.”).

the large federal aid packages to schools suffer the opposite flaw: they give generously while demanding very little.

Second, the funding distribution approach in the law does not effectively drive funding to students with the greatest needs, just as the American Recovery and Reinvestment Act failed to target more funding to the states, districts, and schools that were hardest hit by the Great Recession.<sup>230</sup> All three laws distributed most of the K-12 funding proportional to Title I funding.<sup>231</sup> However, the Title I funding formulas suffer from numerous shortcomings that undermine their ability to drive additional resources to poor students.<sup>232</sup> The Title I formulas generally disregard the documented harms of concentrated poverty, heavily weight school district size despite the failure of this weight to target additional funds to poor students, distribute funds based on “states per-pupil expenditures rather than need,” and guarantee a minimum grant regardless of student needs.<sup>233</sup> Driving an unprecedented amount of federal funding through a flawed formula only compounds the harms that the Title I formula was already inflicting.

These inefficiencies in the funding formula are further compounded by flaws in how states are distributing the funding. Research on state approaches to funding challenges during the pandemic reveals that states are not directing additional funds to districts with the most needs nor did their initial approaches shield K-12 education from funding cuts.<sup>234</sup> In addition, an early review of the spending patterns for districts during the pandemic has revealed that districts typically “default[] to making one-size-fits-all centralized spending decisions on behalf of schools,” which does not ensure that the money is spent equitably across schools because districtwide programs sometimes do not align with school and student needs.<sup>235</sup>

Finally, the Maintenance of Effort and Equity conditions suffer from several weaknesses. The CARES Act and the Appropriations Act included only Maintenance of Effort requirements and did not include state or district Maintenance of Equity provisions.<sup>236</sup> The absence of equity requirements in

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<sup>230</sup> Kenneth Shores & Matthew P. Steinberg, *The Impact of the Great Recession on Student Achievement: Evidence from Population Data* 30 (Stan. Ctr. for Educ. Pol’y Analysis, Working Paper No. 17-09, 2017), <https://cepa.stanford.edu/sites/default/files/wp17-09-v201708.pdf> [<https://perma.cc/EFE8-CLNH>].

<sup>231</sup> RELIEF PROGRAMS, *supra* note 195, at 10 (noting that ninety percent of the funds for ESSER are distributed based upon Title I).

<sup>232</sup> Black, *Leveraging Federal Funding*, *supra* note 153, at 233–38; Reber & Gordon, *supra* note 226.

<sup>233</sup> See Black, *Leveraging Federal Funding*, *supra* note 153, at 233–38.

<sup>234</sup> Mary McKillip, *Tracking State School Aid Cuts in the Pandemic*, EDUC. L. CTR. (Aug. 25, 2020), <https://edlawcenter.org/news/archives/school-funding-national/tracking-state-school-aid-cuts-in-the-pandemic.html> [<https://perma.cc/6GTZ-SJX5>].

<sup>235</sup> Marguerite Roza & Jessica Swanson, *Let Schools, Not District Offices, Decide How to Spend Some Federal Aid*, EDUC. NEXT (June 11, 2021), <https://www.educationnext.org/let-schools-not-district-offices-decide-how-to-spend-some-federal-aid> [<https://perma.cc/Z25P-Z98H>].

<sup>236</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18008(a), 134 Stat. 281, 569 (2020); Consolidated Appropriations Act, 2021, Pub. L. No.

the first two laws, coupled with very few to no limits on how the funds in the first two laws could be spent,<sup>237</sup> allowed over a year of states' responses to the pandemic to be implemented without a clear requirement from the federal government that the challenges of the pandemic must not be placed disproportionately on the backs of high-poverty or high-need school districts or high-poverty schools. Therefore, the first two laws squandered the chance to establish educational equity as a priority at the outset.

All three laws included a Maintenance of Effort requirement.<sup>238</sup> However, such provisions previously adopted a lenient standard, and similar equity focused provisions went largely unenforced by the USDOE.<sup>239</sup> Although the USDOE under the Biden administration notes in its guidance that it “has available a range of enforcement options” for the Maintenance of Effort requirement,<sup>240</sup> further evidence that this provision is unlikely to be enforced can be found in the fact that during the Great Recession that resulted in significant funding cuts to districts and schools,<sup>241</sup> “Congress gave state education systems billions of dollars but then, in the face of blatant violations, did not enforce the equity rules put in place for those funds.”<sup>242</sup> Given the history of minimal enforcement of these types of provisions and the unprecedented crisis that states are confronting, it is exceedingly unlikely that the USDOE will ask any of the states to return millions of dollars because they have violated the Maintenance of Effort condition in the pandemic relief bills. Finally, given the great reluctance of the USDOE to withhold federal funds in normal times,<sup>243</sup> it is highly unlikely that the USDOE would seek to recover federal funds in these unprecedented times.

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116-260, div. M, tit. III, § 317(a), 134 Stat. 1182, 1936–37 (2020); *see also* Dear Colleague, *supra* note 199.

<sup>237</sup> Susan Gentz, *The American Rescue Plan Includes \$122 Billion for Education: How Can it Be Used?*, TECH & LEARNING (Mar. 12, 2021), <https://www.techlearning.com/news/the-american-rescue-plans-includes-dollar126-billion-for-education-how-can-it-be-used> [https://perma.cc/XU96-K24T].

<sup>238</sup> *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(a), 135 Stat. 4, 24–25; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, § 317(a), 134 Stat. 1182, 1936–37 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18008, 134 Stat. 281, 569 (2020); *see also* MAINTENANCE OF EFFORT GUIDANCE, *supra* note 150, at 6; U.S. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS ON THE MAINTENANCE-OF-EFFORT REQUIREMENTS APPLICABLE TO THE CARES ACT PROGRAMS (May 2020), <https://oese.ed.gov/files/2020/06/CARES-Act-Programs-Maintenance-of-Effort-FAQ.pdf> [https://perma.cc/Q4ZY-VTAX].

<sup>239</sup> Black, *Leveraging Federal Funding*, *supra* note 153, at 238–39. For instance, the USDOE has a history of not enforcing the supplement-not-supplement provision that aims to make federal funds a supplement to state and local funds. *See id.* at 239.

<sup>240</sup> MAINTENANCE OF EFFORT GUIDANCE, *supra* note 150, at 11.

<sup>241</sup> *See* DANIELLE FARRIE & DAVID G. SCIARRA, EDUC. L. CTR., \$600 BILLION LOST: STATE DISINVESTMENT IN EDUCATION FOLLOWING THE GREAT RECESSION 2 (2021), [https://edlawcenter.org/assets/\\$600%20Billion/\\$600%20Billion%20Lost.pdf](https://edlawcenter.org/assets/$600%20Billion/$600%20Billion%20Lost.pdf) [https://perma.cc/C4MC-9HRH] [hereinafter FARRIE & SCIARRA, \$600 BILLION].

<sup>242</sup> Black, *Leveraging Federal Funding*, *supra* note 153, at 238–39.

<sup>243</sup> *See* Fuhrman, *supra* note 148, at 144 (noting the intense political pressure to keep federal funds flowing under No Child Left Behind because withholding federal education funds hurts the children who most need the funds).

Another reason that the Maintenance of Effort and Equity provisions are likely to prove ineffective at advancing equity is that despite the fact that this funding is the largest ever infusion of federal education funds in U.S. history,<sup>244</sup> states are only required to maintain their adherence to the Maintenance of Effort provisions for two years.<sup>245</sup> Similarly, the ARP's Maintenance of Equity conditions only require states and districts to avoid funding reductions that disproportionately harm high-need districts or high-poverty schools for two years.<sup>246</sup> The large impact of the pandemic on education on many schoolchildren, particularly vulnerable populations,<sup>247</sup> as well as the rising infection rates due to new variants that can adversely impact schools and schoolchildren,<sup>248</sup> indicate that states and districts will need to maintain their focus on funding effort and equity for many years to come.

Enforcement of the Maintenance of Equity conditions also is unlikely because the Department's guidance on this issue was issued in June 2021 and the requirement for Maintenance of Equity applies to the 2021–2022 and 2022–2023 school years.<sup>249</sup> The guidance encouraged states to promptly distribute ARP funds, but “[i]n theory, that could make it harder to put real teeth into the requirement when it comes to enforcement, since the money will have already gone out and [been] largely spent.”<sup>250</sup> It would likely spark significant state resistance if the USDOE tried to enforce the Maintenance of Equity requirement for the 2021–2022 school year for funds that were spent before the guidance was issued given the absence of this requirement in the first two pandemic relief bills.

The ARP's district Maintenance of Equity requirement also has significant limitations to the scope of its application. Although it prohibits school districts from reducing either per pupil full-time staff or funds to high-poverty schools more than it reduces these items on a districtwide basis, the law creates significant exceptions by excluding, among other districts, those that enroll less than one thousand students, those that include one school, and those that have a single school for each grade span.<sup>251</sup> The Department ac-

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<sup>244</sup> See Griffith, *supra* note 22.

<sup>245</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(a), 135 Stat. 4, 24–25; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, § 317(a), 134 Stat. 1182, 1936–37 (2021); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18008, 134 Stat. 281, 569 (2020).

<sup>246</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 2004(b), 2004(c), 135 Stat. 4, 25.

<sup>247</sup> See generally *infra* Section I.A.

<sup>248</sup> Emily Anthes, *The Delta Variant in Schools: What We Know*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/2021/08/02/us/covid-schools-delta-variant.html> [https://perma.cc/N7VA-HKMZ].

<sup>249</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(b), 135 Stat. 4, 25; MAINTENANCE OF EFFORT GUIDANCE, *supra* note 150, at 2.

<sup>250</sup> Andrew Ujifusa, *Education Department Issues Directive on Shielding Students in Poverty From Funding Cuts*, EDUC. WK. (June 9, 2021), <https://www.edweek.org/policy-politics/education-department-issues-directive-on-shielding-students-in-poverty-from-funding-cuts/2021/06> [https://perma.cc/P3SS-7HRJ].

<sup>251</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(c)(2), 135 Stat. 4, 25.

knowledgeled in an August 2021 Dear Colleague letter that the exceptions removed approximately seventy percent of districts and fifteen percent of U.S. students from this requirement.<sup>252</sup> The Department also allows districts that are not facing a budget reduction in fiscal year 2022 to obtain an exception from the Maintenance of Equity requirement,<sup>253</sup> which will further reduce the scope of its application. However, the requirement will apply to districts experiencing a revenue decline in the 2021–2022 and 2022–2023 school years.<sup>254</sup>

The district Maintenance of Equity requirement has additional shortcomings that may limit its effectiveness and inflict unintended consequences. One challenge with this provision, as highlighted by funding experts Marguerite Roza and Chad Aldeman, is that districts are required to rank schools according to poverty and protect the top twenty-five percent of schools with the greatest poverty from funding and staffing cuts.<sup>255</sup> However, the law does not require districts to first fund these higher poverty schools equitably nor compare their funding to other schools in the district, but instead solely protects these higher poverty districts from funding and staff cuts.<sup>256</sup> The requirement could disrupt equitable district practices by leading districts to apply the USDOE equity formula before the district’s formula in ways that undermine how equity was previously taken into account.<sup>257</sup> It also may lead districts to create “shadow budgets” merely to show compliance and discourage a commitment to equity if the USDOE formula seems unconnected to poverty or appears arbitrary.<sup>258</sup>

The state Maintenance of Equity requirement suffers from similar flaws in that it does not require states to equitably fund districts. Instead it essentially locks in the existing funding which could discourage efforts to advance equity if compliance does not promote a state’s genuine efforts to advance equity. The absence of a strong definition of equity in the state and district Maintenance of Equity requirements means that while further harm could be avoided, funding equity is likely to remain elusive.

The next Section briefly describes and critiques how the Executive Branch has supported and hindered K-12 schools during the pandemic and how these efforts advance and undermine educational equity.

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<sup>252</sup> See Dear Colleague, *supra* note 199.

<sup>253</sup> See *id.*

<sup>254</sup> Marguerite Roza & Chad Aldeman, *30-Minute Webinar: What Will MoEquity Mean for District Budgets?*, EDUNOMICS LAB (Aug. 12, 2021), [https://edunomicslab.org/wp-content/uploads/2021/08/Roza\\_MoEquity.presented.pdf](https://edunomicslab.org/wp-content/uploads/2021/08/Roza_MoEquity.presented.pdf) [<https://perma.cc/NJC3-EX2P>].

<sup>255</sup> *Id.*

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

<sup>258</sup> See *id.*

## B. Federal Executive Actions Regarding Education During the Pandemic

The Executive Branch has been both a help and a hindrance to schools, districts, and states during the pandemic. The Centers for Disease Control and the U.S. Department of Education have provided guidance to school districts on health and safety protocols and testing and accountability that offered valuable support for K-12 education. However, the White House's messages under both the Trump and Biden administrations have created confusion and consternation.<sup>259</sup> This Section examines these actions, including a brief look at the Federal Communications Commission in the subsection on the U.S. Department of Education.

Given the data and research showing that historically disadvantaged communities have been hardest hit by the pandemic, actions that send confusing or inaccurate messages about the safe reopening of schools harm these communities the most. Disadvantaged communities, in particular, often lack the resources that they need to navigate on their own the complex web of decisions that are necessary to keep schools open during the pandemic. Therefore, the shortcomings noted below disproportionately harmed students from disadvantaged communities.

### 1. The Centers for Disease Control

Throughout the pandemic, the CDC has published guidance to inform schools, districts, and states about the risk that the pandemic posed to communities and how to mitigate that risk. In February 2020, the CDC described COVID-19 as a low risk to the public in the United States.<sup>260</sup> Nonetheless, it encouraged schools to prepare for an increase in risk by monitoring the spread of the virus, following the recommended steps for addressing the higher risk posed by individuals returning from China, and advising staff and students to remain home if they showed symptoms of the virus or if they assisted an ill family member.<sup>261</sup> The CDC then offered more detailed guidance in March that continued to advise schools to prepare for a potential

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<sup>259</sup> Cory Turner, *How Education Secretary Betsy DeVos Will Be Remembered*, NPR (Nov. 19, 2020), <https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos> [<https://perma.cc/8YGU-WW8M>]; Erica L. Green, *DeVos Funnels Coronavirus Relief Funds to Favored Private and Religious Schools*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/betsy-devos-coronavirus-religious-schools.html> [<https://perma.cc/K4A7-3VD5>] [hereinafter Green, *DeVos Funnels Coronavirus Relief Funds*]; Ashley Parker, Laura Meckler, Fenit Nirappil & Annie Linskey, 'An Essential Service': Inside Biden's Struggle to Meet His School Reopening Promises, WASH. POST (Mar. 7, 2021), [https://www.washingtonpost.com/politics/biden-schools-reopen/2021/03/07/962560c6-7c40-11eb-b3d1-9e5aa3d5220c\\_story.html](https://www.washingtonpost.com/politics/biden-schools-reopen/2021/03/07/962560c6-7c40-11eb-b3d1-9e5aa3d5220c_story.html) [<https://perma.cc/Z753-FITLM>]; Erica L. Green, *Biden Trims Ambitions on School Reopening Pledge*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/biden-schools-reopening.html> [<https://perma.cc/B7NA-RUH8>] [hereinafter Green, *Biden Trims Ambitions on School Reopening Pledge*].

<sup>260</sup> Feb. 16th Interim Guidance, *supra* note 21.

<sup>261</sup> *Id.*

outbreak of the virus, while also explaining the steps that schools should follow if someone infected with the virus had entered a school and how to respond to varying levels of community transmission.<sup>262</sup> The CDC simultaneously offered considerations for short- and long-term closures to schools.<sup>263</sup>

After widespread school closures occurred in March 2020, the CDC then shifted the focus of its spring and summer 2020 guidance to reopening schools, including identifying mitigation strategies for preventing and reducing the spread of the virus in schools.<sup>264</sup> The spring 2020 guidance recommended that communities could plan a gradual resumption of school operations based upon the level of community transmission by tailoring the type and scope of mitigation practices to the level of community transmission.<sup>265</sup> The guidance urged school officials to collaborate closely with both local and state government officials and local health authorities to determine the appropriate mitigation approach given their respective community transmission and the ability of the local health care system to address it.<sup>266</sup> In summer 2020, the CDC issued guidance that pushed for school reopening and noted the possibility of minimal risk of virus transmission to and by children.<sup>267</sup> It then removed this guidance without an official statement in fall 2020.<sup>268</sup> The CDC also published additional indicators in fall 2020 that helped to determine the risk of virus introduction and spread in schools and identify potential mitigation strategies.<sup>269</sup>

Under the direction of the Biden administration, the CDC released further guidance in February 2021.<sup>270</sup> This guidance offers an “operational strategy” for how to resume instruction in person and to remain open, and it noted the importance of reopening schools for low-income communities that include substantial numbers of students with disabilities, ELs, and students of color.<sup>271</sup> The guidance provided “layered mitigation strategies” for

<sup>262</sup> See *March 12th Interim Guidance*, *supra* note 6.

<sup>263</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, CONSIDERATIONS FOR SCHOOL CLOSURE 1 (Mar. 12, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/downloads/considerations-for-school-closure.pdf> [<https://perma.cc/J9YB-7XLSJ>].

<sup>264</sup> See *Operational Strategy*, *supra* note 6; see also Press Release, Ctrs. for Disease Control & Prevention, CDC Releases Indicators for Dynamic School Decision-Making (Sept. 15, 2020) [hereinafter Ctrs. for Disease Control & Prevention, Decision-Making]; CTRS. FOR DISEASE CONTROL & PREVENTION, CONSIDERATIONS FOR SCHOOLS (2020), <https://stacks.cdc.gov/view/cdc/88188> [<https://perma.cc/MQK9-XZC6>].

<sup>265</sup> *Schools and Day Camps*, *supra* note 6.

<sup>266</sup> *Id.*

<sup>267</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, PREPARING K-12 SCHOOL ADMINISTRATORS FOR A SAFE RETURN TO SCHOOL IN FALL 2020 (July 23, 2020), <https://stacks.cdc.gov/view/cdc/90948> [<https://perma.cc/9E89-A2LQ>] [hereinafter PREPARING K-12 ADMINISTRATORS FOR A SAFE RETURN].

<sup>268</sup> Jessie Hellmann, *CDC Quietly Removes Guidance Pushing for School Reopening*, HILL (Nov. 17, 2020), <https://thehill.com/policy/healthcare/526370-cdc-quietly-removes-guidance-pushing-for-school-reopenings> [<https://perma.cc/4XWA-NJYH>].

<sup>269</sup> Ctrs. for Disease Control & Prevention, Decision-Making, *supra* note 264.

<sup>270</sup> *Operational Strategy*, *supra* note 6.

<sup>271</sup> *Id.*



school reopenings, clarified that two strategies—physical distancing of at least six feet and correct and consistent use of masking—serve as top priorities for school reopenings and recommended three additional essential measures: “handwashing and respiratory etiquette,” “cleaning and maintaining healthy facilities,” and “contact tracing in combination with isolation and quarantine.”<sup>272</sup> In addition, the guidance recommends full school reopening in places with little to moderate transmission and part-time reopening where substantial spread is occurring.<sup>273</sup> The guidance also notes that regular testing of students and staff is needed to reopen schools when community transmission is high, particularly for high schoolers and middle schoolers who should remain virtual if this testing is not available in an area of high transmission.<sup>274</sup> Schools also should prioritize vaccinating teachers and staff, although it does not indicate that such vaccinations must be completed before schools reopen.<sup>275</sup>

The CDC by March 2021 modified its guidance to schools to allow for students to be at least three feet apart rather than six feet.<sup>276</sup> Also, as the highly contagious Delta variant was circulating in summer 2021, the CDC reaffirmed the importance of masking for all individuals in schools over the age of two.<sup>277</sup> The CDC also recommended that individuals who are fully vaccinated who are exposed to an individual with COVID be tested three to five days after the exposure.<sup>278</sup>

Educators, school officials, and advocates have offered an array of criticisms for the CDC guidances, noting among other things that the guidance is inconsistent, vague, and incomplete.<sup>279</sup> The guidance from the CDC throughout 2020 vacillated from pushing reopening to emphasizing health and safety protocols.<sup>280</sup> Critics noted that the March 2020 guidance that advised schools to consider closing was far too vague on when school closures should occur and lagged behind the actions of states and districts that had

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<sup>272</sup> *Id.* (The CDC also noted that schools and local health authorities should consider the positivity rate and the number of new cases per 100,000 as critical indicators of community spread of the virus).

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

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, GUIDANCE FOR COVID-19 PREVENTION IN K-12 SCHOOLS, (2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> [<https://perma.cc/3PA4-UDMB>] [hereinafter COVID-19 PREVENTION]; see also Erin Banco, *CDC Cuts School Distancing Requirement to Three Feet*, POLITICO (Mar. 19, 2021), <https://www.politico.com/news/2021/03/19/cdc-school-social-distance-3-feet-477164> [<https://perma.cc/AFX2-K2H4>].

<sup>277</sup> COVID-19 PREVENTION, *supra* note 276.

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

<sup>279</sup> See Evie Blad, *CDC Pulls Statement That Stressed Importance of In-Person School*, EDUC. WK. (Nov. 17, 2020), <https://www.edweek.org/policy-politics/cdc-pulls-statement-that-stressed-importance-of-in-person-school/2020/11> [<https://perma.cc/D357-XKBD>].

<sup>280</sup> Compare PREPARING K-12 ADMINISTRATORS FOR A SAFE RETURN, *supra* note 268 (emphasizing school reopening) with Ctrs. for Disease Control & Prevention, *Decision-Making*, *supra* note 264 (emphasizing community virus transmission as schools plan for reopening).

already closed.<sup>281</sup> Educators also have noted that the CDC did not focus enough attention on their health and wellbeing.<sup>282</sup> Others criticized the summer 2020 CDC guidance's emphasis on school reopening and the possibility of low transmission risks for children as not only confusing but also as "light on evidence" and politically animated by President Trump's push to reopen schools.<sup>283</sup> The CDC eventually reversed course on this guidance and acknowledged that children can both catch the virus and transmit it to others, including in schools given the lengthy and close proximity of children and teachers during the school day.<sup>284</sup> A Government Accountability Office study of the CDC's 2020 guidance found it to be inconsistent and noted that the CDC's push for reopening schools did not align with risk-centered decisionmaking at the state and local levels.<sup>285</sup>

Some also criticized the February 2021 guidance for lacking scientific support that linked school reopening to community transmission, adopting community thresholds for reopening that were too restrictive, failing to emphasize ventilation, and recommending that students stay six feet apart rather than three feet when students are consistently masked.<sup>286</sup> Some contended that it will be impossible for most schools to reopen that spring if they must follow all of the recommendations and that disadvantaged communities will face the greatest barriers due to limited funding for the extensive mitigation strategies.<sup>287</sup>

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<sup>281</sup> See, e.g., Erica L. Green, *Administration Offers Guidance to Schools as They Shut Down on Their Own*, N.Y. TIMES, <https://www.nytimes.com/2020/03/13/us/politics/virus-school-closings-education.html> [<https://perma.cc/U538-Z9NN>] (last updated July 29, 2020).

<sup>282</sup> See Dana Goldstein & Eliza Shapiro, *'I Don't Want to Go Back': Many Teachers Are Fearful and Angry Over Pressure to Return*, N.Y. TIMES, <https://www.nytimes.com/2020/07/11/us/virus-teachers-classrooms.html> [<https://perma.cc/PZ3P-GTTE>] (last updated Aug. 13, 2020) (referencing Press Release, Am. Acad. of Pediatrics, Pediatricians, Educators and Superintendents Urge a Safe Return to School This Fall (Aug. 10, 2020)).

<sup>283</sup> See Blad, *supra* note 279; Hellmann, *supra* note 268; Valerie Strauss, *Confused by CDC's Changing Guidance on School Reopening? Here are Recommendations from Experts Not Pressured by the White House*, WASH. POST (July 25, 2020, 6:00 AM), <https://www.washingtonpost.com/education/2020/07/25/confused-by-cdcs-changing-guidance-school-reopening-here-are-recommendations-experts-not-pressured-by-white-house/> [<https://perma.cc/KM2M-8PRX>].

<sup>284</sup> Hellmann, *supra* note 268.

<sup>285</sup> GOV'T ACCOUNTABILITY OFF., COVID-19: FEDERAL EFFORTS COULD BE STRENGTHENED BY TIMELY AND CONCERTED ACTIONS 77, 276–77 (2020), <https://www.gao.gov/assets/gao-20-701.pdf> [<https://perma.cc/E54P-JNEE>].

<sup>286</sup> See Vladimir Kogan & Vinay Prasad, *New CDC School Opening Guidelines Fail to 'Follow the Science'*, STAT (Feb. 20, 2020), <https://www.statnews.com/2021/02/20/new-cdc-school-opening-guidelines-dont-follow-the-science/> [<https://perma.cc/85BL-J8H4>]; Matt Barnum, *New CDC Guidance: Vaccinate Teachers, but Don't Wait to Open Schools*, CHALKBEAT, <https://www.chalkbeat.org/2021/2/12/22280017/new-cdc-guidance-open-schools> [<https://perma.cc/R4QA-4RN7>] (last updated Feb. 12, 2021, 6:16 PM); Will Feuer, *CDC's Classroom Guidance Would Keep 90% of Schools at Least Partially Closed*, CNBC (Feb. 18, 2021, 2:01 PM), <https://www.cnbc.com/2021/02/18/cdcs-classroom-guidance-would-keep-90percent-of-schools-at-least-partially-closed.html> [<https://perma.cc/K3EM-M9UH>].

<sup>287</sup> See Laura Meckler & Joe Heim, *Biden Pushes Full-Time School, but Districts Are Cautious After CDC Weighs In*, WASH. POST (Feb. 25, 2021, 7:00 AM), <https://www.washingtonpost.com/education/cdc-schools-guidelines-reopen/2021/02/25/9b4d8ae8->

Despite the numerous shortcomings of the guidance issued by the CDC, the CDC also has served as a critical resource and repository of information for schools, districts, and states facing a novel threat to education. The February 2021 guidance in particular has been praised as the clear and “more robust” guidance that schools need to determine when and how to reopen, as it includes reopening strategies in light of different levels of community spread.<sup>288</sup> Educators also have praised the guidance as a clear roadmap and a critical tool to push for safer reopenings, testing, and tracing.<sup>289</sup> This guidance also is perceived as a move away from politicization and toward science, which many view as a necessary foundation for educators and communities to trust the advice that it offers.<sup>290</sup>

## 2. U.S. Department of Education

The USDOE has been both an aid and an obstacle to schools during the pandemic. The USDOE has waived requirements in federal law that schools were unable to meet and reminded districts and schools of their civil rights requirements. For example, in March 2020, the Office for Civil Rights issued a fact sheet that reminded school districts of their requirements under federal civil rights laws to not discriminate on the basis of race, color, and national origin and to provide a free, appropriate public education to students with disabilities.<sup>291</sup> In spring 2020, the USDOE offered broad waivers to states from the testing and accountability requirements under the ESSA,<sup>292</sup>

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76c2-11eb-948d-19472e683521\_story.html [https://perma.cc/B5T2-HCHT]; Anya Kamenetz, *If Schools Follow CDC Guidance, Biden’s Reopening Goals Could Be Hard to Reach*, NPR (Feb. 19, 2021, 1:01 PM), <https://www.npr.org/2021/02/19/969467560/if-schools-follow-cdc-guidance-bidens-reopening-goals-could-be-hard-to-reach> [https://perma.cc/R45C-25LS] (referencing Cory Turner, Anya Kamenetz & Tamara Keith, *CDC Offers Clearest Guidance Yet For Reopening Schools*, NPR (Feb. 12, 2021, 2:00 PM), <https://www.npr.org/2021/02/12/967033554/cdc-offers-clearest-guidance-yet-for-reopening-schools> [https://perma.cc/KY2X-KHXC]); Barnum, *supra* note 286.

<sup>288</sup> See Turner et al., *supra* note 287; Barnum, *supra* note 286; Meckler & Heim, *supra* note 287; Collin Binkley & Mike Stobbe, *CDC: Strong Evidence In-Person Schooling Can Be Done Safely*, AP NEWS (Feb. 12, 2021), <https://apnews.com/article/cdc-in-person-schooling-4265da944bb3b6c863db6ca6a03caa58> [https://perma.cc/5PY2-MRXM].

<sup>289</sup> See Barnum, *supra* note 286.

<sup>290</sup> *Id.*

<sup>291</sup> U.S. DEP’T OF EDUC., OFF. FOR C.R., FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-coronavirus-fact-sheet.pdf> [https://perma.cc/LQG9-TCV6] [hereinafter CIVIL RIGHTS]; U.S. DEP’T OF EDUC., OFF. FOR C.R., SUPPLEMENTAL FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN PRESCHOOL, ELEMENTARY AND SECONDARY SCHOOLS WHILE SERVING CHILDREN WITH DISABILITIES (2021), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/tr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf> [https://perma.cc/L6YM-DMFM] [hereinafter SUPPLEMENTAL FACT SHEET].

<sup>292</sup> See Press Release, U.S. Dep’t of Educ., Helping Students Adversely Affected by School Closures, Secretary DeVos Announces Broad Flexibilities for States to Cancel Testing During National Emergency (Mar. 20, 2020); Letter from Betsy DeVos, Sec’y of Educ., U.S. Dep’t of Educ., to Chief State School Officer (Mar. 20, 2020), <https://www2.ed.gov/policy/gen/guid/secletter/200320.html> [https://perma.cc/LWQ2-FV33].

a move that was widely praised given the impossibility of administering assessments on short notice during school closures.<sup>293</sup> In February 2021, the USDOE also invited state requests for waivers of the accountability and school identification requirements in ESSA, while not inviting waivers of assessments that provide critical information to educators, parents, and the public about student performance.<sup>294</sup>

The USDOE has also shared guidance with schools, districts, and states and offered technical assistance. Secretary Betsy DeVos hosted panels and fora about best practices for virtual learning, as well as strategies for school reopening.<sup>295</sup> In February 2021, the USDOE released a comprehensive guide for schools and districts to employ as they plan for reopening, which summarizes the CDC guidance and notes steps for safe reopening, acknowledging that additional guidance would be forthcoming.<sup>296</sup> The guide encourages an inclusive process for decisionmaking and outreach to historically disadvantaged families, such as students experiencing homelessness, students with disabilities, and children of color.<sup>297</sup> The USDOE also provides technical assistance to states, districts, and schools on a wide array of topics, such as school improvement, civil rights, improving the quality of instruction, reducing longstanding absenteeism, and social and emotional learning.<sup>298</sup>

However, the USDOE has made numerous missteps in its support for schools during the pandemic and has been criticized for being slow and counterproductive. The relationship between many states, schools, and districts and the USDOE was strained as the pandemic began because “[y]ears of distrust if not open hostility between U.S. Secretary of Education Betsy DeVos and many education leaders had already drained away goodwill DeVos might have drawn on during a crisis.”<sup>299</sup> This strain was exacerbated

<sup>293</sup> See, e.g., Kevin Mahnken, *Amid Pandemic, DeVos Announces One-Year Testing and Accountability Waiver. Here’s a Look at What to Expect*, THE 74 (Mar. 19, 2020), <https://www.the74million.org/article/states-are-begging-the-federal-government-to-cancel-spring-testing-what-happens-if-they-get-their-wish/> [<https://perma.cc/M8AH-3NVL>].

<sup>294</sup> Press Release, U.S. Dep’t of Educ., U.S. Department of Education Releases Guidance to States on Assessing Student Learning During the Pandemic (Feb. 22, 2021); Letter from Ian Rosenblum, Delegated the Auth. to Perform the Functions & Duties of the Assistant Sec’y, Off. Elementary & Secondary Educ., U.S. Dep’t of Educ., to Chief State School Officer (Feb. 22, 2021), <https://www2.ed.gov/policy/elsec/guid/stateletters/dcl-assessments-and-acct-022221.pdf> [<https://perma.cc/HR3L-43RM>] (The USDOE encouraged states to consider flexibility in their state assessments, including remote assessments, shorter assessments, and expanding the testing window.)

<sup>295</sup> See Press Release, U.S. Dep’t of Educ., Readout of the U.S. Department of Education’s Virtual Panel on Successful Strategies to Reopen Schools This Fall (Sept. 24, 2020); Press Release, U.S. Dep’t of Educ., Readout of the U.S. Department of Education’s K-12 Educator Forum on Remote Learning Best Practices During the COVID-19 Pandemic (June 10, 2020).

<sup>296</sup> ED COVID-19 HANDBOOK, VOL. 1, *supra* note 21.

<sup>297</sup> *Id.*

<sup>298</sup> U.S. DEP’T OF EDUC., OFF. ELEMENTARY & SECONDARY EDUC., OESE TECH. ASSISTANCE CTRS. (updated June 7, 2021), <https://oese.ed.gov/resources/oese-technical-assistance-centers> [<https://perma.cc/Q3QY-XRY3>] [hereinafter OESE TECH. ASSISTANCE CTRS.].

<sup>299</sup> Ujifusa, *supra* note 151.

by threats to cut funding if schools did not reopen.<sup>300</sup> Distrust of the Department and Secretary DeVos under the Trump administration, along with anger, too often hindered the Department from being the effective partner that schools, districts, and states needed.<sup>301</sup>

In addition, the USDOE took action or provided guidance far later than needed, according to some critics.<sup>302</sup> Educators have repeatedly criticized the Trump administration for failing to provide clear guidance on school reopening despite consistent pressure to reopen schools.<sup>303</sup> In May 2020, the USDOE issued a fact sheet that explained that districts must provide English language instruction and language accommodations to English learners if schools were providing remote learning to other students.<sup>304</sup> However, schools had already been operating virtually for two months and the school year was near its end.<sup>305</sup> Furthermore, in February 2021, along with the comprehensive guide to school reopening, the USDOE announced a new partnership with the Institute for Education Sciences to administer a national survey on the effects of COVID-19 on schoolchildren, educators, and school reopenings,<sup>306</sup> but these efforts were a belated and limited response to requests from education leaders across the nation who have been urging the USDOE to create an across-the-board database to assist them as they navigate the effects of the virus on schools.<sup>307</sup> The teacher and school leader digital learning guides that were released in January 2021 also were long overdue, given that many schools had been virtual since March 2020.<sup>308</sup>

The USDOE under the Trump administration took steps that were counterproductive to the interests of public schools. For example, the General Accounting Office found that the USDOE shared the CDC's guidance in ways that were incomplete, including omitting masking and social distanc-

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<sup>300</sup> *Id.*

<sup>301</sup> See Erica L. Green, *DeVos Abandons a Lifetime of Local Advocacy to Demand Schools Reopen*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/betsy-devos-schools-coronavirus.html> [<https://perma.cc/5DM7-W3H7>].

<sup>302</sup> See, e.g., Lauren Camera, *DeVos: Not My Job to Track School Reopening Plans*, U.S. NEWS (Oct. 20, 2020), <https://www.usnews.com/news/education-news/articles/2020-10-20/betsy-devos-not-my-job-to-track-schools-coronavirus-reopening-plans> [<https://perma.cc/PD29-B98L>].

<sup>303</sup> See e.g., *id.*

<sup>304</sup> U.S. DEP'T OF EDUC., FACT SHEET: PROVIDING SERVICES TO ENGLISH LEARNERS DURING THE COVID-19 OUTBREAK (2020), <https://www2.ed.gov/documents/coronavirus/covid-19-el-factsheet.pdf> [<https://perma.cc/B28C-C3TU>] [hereinafter PROVIDING SERVICES].

<sup>305</sup> See Robles & Belsha, *supra* note 121.

<sup>306</sup> Press Release, U.S. Dep't of Educ., ED Announces National Survey to Gather Critical Data on School Reopening (Feb. 5, 2021).

<sup>307</sup> Camera, *supra* note 303.

<sup>308</sup> OFF. OF EDUC. TECH., U.S. DEP'T OF EDUC., TEACHER DIGITAL LEARNING GUIDE 5 (2021), <https://tech.ed.gov/files/2021/01/Teacher-Digital-Learning-Guide.pdf> [<https://perma.cc/TS83-TV6K>]; OFF. OF EDUC. TECH., U.S. DEP'T OF EDUC., SCHOOL LEADER DIGITAL LEARNING GUIDE 4 (2021), <https://tech.ed.gov/files/2021/01/School-Leader-Digital-Learning-Guide.pdf> [<https://perma.cc/DM72-WHCD>]. The leadership vacuum led education organizations to fill the gap by creating resources and a dashboard that identifies virus transmission in schools and reopening plans. Camera, *supra* note 303.

ing recommendations.<sup>309</sup> In addition, Secretary DeVos issued guidance and an interim rule that would require a district to distribute CARES Act funding to private schools based on the total number of private school students regardless of their income level, despite the statute requiring the money to be distributed based on the number of private school children from low-income families.<sup>310</sup> Pleas from public school educators to rescind the guidance and four lawsuits followed, and the rule was enjoined and then vacated as contrary to the unambiguous statutory directive.<sup>311</sup> Many criticized this attempt to divert funds from public schools to private schools during a time of crisis.<sup>312</sup> Some also criticized the USDOE's refusal to grant testing waivers for the 2020–2021 school year, although educators disagree on whether waiving testing would hurt or help schools and schoolchildren.<sup>313</sup>

The USDOE under the Biden administration offered guidance and messaging that supported reopening schools safely and prioritizing equity by meeting the needs of those disproportionately harmed by the pandemic.<sup>314</sup>

<sup>309</sup> GOV'T ACCOUNTABILITY OFF., *supra* note 285, at 77.

<sup>310</sup> Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18005, 134 Stat. 281, 568 (2020); 20 U.S.C. § 6320(a)(4)(A)(i) (§ 1117 of the ESEA); Equitable Services to Students and Teachers in Non-Public Schools, 85 Fed. Reg. 39,479 (July 1, 2020) (to be codified at 34 C.F.R. pt. 76); U.S. DEP'T OF EDUC., PROVIDING EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN NON-PUBLIC SCHOOLS UNDER THE CARES ACT PROGRAMS 6 (2020), <https://oese.ed.gov/files/2020/07/FAQs-Equitable-Services.pdf> [<https://perma.cc/4XNM-Q9C9>] [hereinafter EQUITABLE SERVICES].

<sup>311</sup> See U.S. DEP'T OF EDUC., PROVIDING EQUITABLE SERVICES TO STUDENTS AND TEACHERS IN NON-PUBLIC SCHOOLS UNDER THE CARES ACT PROGRAMS ii (Updated Oct. 9, 2020), <https://oese.ed.gov/files/2020/10/Providing-Equitable-Services-under-the-CARES-Act-Programs-Update-10-9-2020.pdf> [<https://perma.cc/SU98-DHSA>] (noting that “the IFR [interim final rule] was challenged in four U.S. district courts: *Washington v. DeVos*, No. 2:20-cv-1119-BJR, 2020 WL 5079038 (W.D. Wash. Aug. 21, 2020) (granting preliminary injunction against the Department); *Michigan v. DeVos*, No. 3:20-cv-4478-JD, 2020 WL 5074397 (N.D. Cal. Aug. 26, 2020) (granting preliminary injunction against the Department); *NAACP v. DeVos*, No. 20-cv-1996 (DLF), 2020 WL 5291406 (D.D.C. Sept. 4, 2020) (vacating the IFR); and *Council of Parent Attorneys & Advocates, Inc. v. DeVos*, No. 1:20-cv-2310-GLR (D. Md.)”); ; Erica L. Green, *DeVos Funnel Coronavirus Relief Funds to Favored Private and Religious Schools*, N.Y. Times (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/betsy-devos-coronavirus-religious-schools.html> [<https://perma.cc/K4A7-3VD5>].

<sup>312</sup> Fred Jones, *A Pandemic Is No Time to Undermine Public Education*, HILL (July 28, 2020), <https://thehill.com/opinion/education/509350-a-pandemic-is-no-time-to-undermine-public-education?r=1> [<https://perma.cc/NRS8-3777>]; Green, *supra* note 311.

<sup>313</sup> Press Release, Nat'l Educ. Ass'n, NEA Blasts DeVos's Refusal to Grant Federal Testing Waivers During Pandemic (Sept. 9, 2020); Nyamekye Daniel, *Georgia School Superintendent: DeVos' Testing Decision 'A Complete Disconnect' from Reality*, CTR. SQUARE (Sept. 3, 2020), [https://www.thecentersquare.com/georgia/georgia-school-superintendent-devos-testing-decision-a-complete-disconnect-from-reality/article\\_9723948c-ee35-11ea-8a15-77b3885237d5.html](https://www.thecentersquare.com/georgia/georgia-school-superintendent-devos-testing-decision-a-complete-disconnect-from-reality/article_9723948c-ee35-11ea-8a15-77b3885237d5.html) [<https://perma.cc/ZDH3-ML5Y>]; Dale Chu, *Why Secretary DeVos Should Reject Michigan's Testing Waiver Request*, FORDHAM INST. (July 1, 2020), <https://fordhaminstitute.org/national/commentary/why-secretary-devos-should-reject-michigans-testing-waiver-request> [<https://perma.cc/C5CY-F4DD>].

<sup>314</sup> U.S. DEP'T OF EDUC., SAFER SCHOOLS AND CAMPUSES BEST PRACTICES CLEARINGHOUSE, <http://bestpracticesclearinghouse.ed.gov> [<https://perma.cc/9SNU-N4TN>] (last visited Nov. 8, 2021) [hereinafter SAFER SCHOOLS]; see also Press Release, U.S. Dep't of Educ., Department of Education Announces Actions to Advance Equity in Education (June 9, 2021) (describing the steps that the USDOE is taking to advance educational equity).

Supportive actions included the USDOE issuing two volumes of a COVID-19 handbook to provide research and information on safe school reopening and meeting students' needs, particularly those who had been hardest hit by the pandemic.<sup>315</sup> In addition, the Office for Civil Rights released a report that highlighted the disproportionate impact of the pandemic on educational opportunities for many student groups, including students of color, students with disabilities, ELs, and LGBTQ+ students and documented how these students oftentimes had fewer educational opportunities before the pandemic.<sup>316</sup> It also noted the increased harassment and discrimination that Asian American and Pacific Islander students are facing as well as the harmful loss of access to school-based supports for LGBTQ+ students.<sup>317</sup> The Department also created a clearinghouse of information that provides the best practices for opening schools in-person safely and meeting the needs of students and educators.<sup>318</sup> The Department's review of state plans noted that it expects all children to be able to resume school in-person in fall 2021, which will go a long way to address prior inequitable disparities in access.<sup>319</sup> It also acknowledged the pandemic's disproportionate adverse impact on children with disabilities and released \$3 billion in ARP funds to support states as they meet the needs of schoolchildren and youth, as well as infants and toddlers, with disabilities.<sup>320</sup>

The Department further supported educational equity when it provided guidance on allowable uses of federal funding as well as the Maintenance of Effort and Equity requirements.<sup>321</sup> The Department promoted transparency in compliance with the Maintenance of Equity provision by explaining in an August 2021 Dear Colleague letter that it plans to “publish[] a notice of proposed requirements that each SEA make publicly available information on how each LEA in the State is maintaining fiscal and staffing equity.”<sup>322</sup> This notice was intended to enable families and communities to understand how districts are providing staffing and funding equity to high-poverty schools.<sup>323</sup> In addition, the August 2021 USDOE guidance on evidenced-based strategies to address lost instructional time supported meeting the

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<sup>315</sup> ED COVID-19 HANDBOOK, VOL. 2, *supra* note 21; ED COVID-19 HANDBOOK, VOL. 1, *supra* note 21.

<sup>316</sup> DISPARATE IMPACTS, *supra* note 14.

<sup>317</sup> *See id.* at iv, 29.

<sup>318</sup> SAFER SCHOOLS, *supra* note 314.

<sup>319</sup> Press Release, U.S. Dep't of Educ., U.S. Department of Education Posts State Plans for Use of American Rescue Plan Funds to Support Students and the Safe and Sustained Reopening of Schools (June 14, 2021).

<sup>320</sup> Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases More than \$3 Billion in American Rescue Plan Funds to Support Children with Disabilities (July 1, 2021).

<sup>321</sup> MAINTENANCE OF EFFORT GUIDANCE, *supra* note 150; RELIEF PROGRAMS, *supra* note 195; MAINTENANCE OF EFFORT GUIDANCE, *supra* note 150.

<sup>322</sup> *See* Dear Colleague, *supra* note 199.

<sup>323</sup> *See id.*

needs of a broad array of students, particularly those who have been harmed the most by the pandemic.<sup>324</sup>

Secretary of Education Miguel Cardona has consistently emphasized the twin goals of safe school reopenings and addressing the inequities in the educational system that the pandemic worsened.<sup>325</sup> He has championed the importance of remedying educational inequities as schools respond to the pandemic and use new federal funds for education.<sup>326</sup> Among other remarks, he has insisted that schools “must reopen with equity at the center of all our decisions.”<sup>327</sup> He also has explained that a generations-long educational opportunity gap has hindered the opportunities for many schoolchildren to experience high-quality learning opportunities and that the nation must take action “to level the playing field” by increasing teacher diversity and providing educational opportunities that enable all children to succeed among other actions.<sup>328</sup> Indeed, he has even commented that remedying inequities rather than the pandemic’s harms on schoolchildren is the most important priority in stating that “As I have said when visiting schools across the country these last two months: ‘For educators, the pandemic will serve to sharpen our swords for the real fight ahead. The fight to address inequities in education is the real fight.’”<sup>329</sup> Secretary Cardona’s emphasis on educational equity builds upon the Biden-Harris administration’s focus on equity as a central priority.<sup>330</sup>

Although a complete review of the actions of the Federal Communications Commission (FCC) is beyond the scope of this article, it is worth noting some of the actions that the FCC took to connect students and educators to remote learning and teaching opportunities.<sup>331</sup> The FCC partnered with the

<sup>324</sup> See U.S. DEP’T OF EDUC., STRATEGIES FOR USING AMERICAN RESCUE PLAN FUNDING TO ADDRESS THE IMPACT OF LOST INSTRUCTIONAL TIME 4 (2021), <https://www2.ed.gov/documents/coronavirus/lost-instructional-time.pdf> [<https://perma.cc/2HQQ-C2EV>].

<sup>325</sup> See, e.g., Miguel Cardona, U.S. Sec’y of Educ., Remarks on the “Return to School Roadmap” (Aug. 4, 2021), <https://www.ed.gov/news/speeches/secretary-cardonas-remarks-return-school-roadmap> [<https://perma.cc/K8NW-FS2T>]; Miguel Cardona, U.S. Sec’y of Educ., Remarks on School Reopening and 100 Days of the Biden Administration (Apr. 30, 2021), <https://www.ed.gov/news/speeches/secretary-cardonas-remarks-school-reopening-and-100-days-biden-administration> [<https://perma.cc/ST8F-UMNH>] [hereinafter Cardona, Remarks on School Reopening].

<sup>326</sup> See, e.g., Cardona, Remarks on the “Return to School Roadmap,” *supra* note 325; Cardona, Remarks on School Reopening, *supra* note 325.

<sup>327</sup> Cardona, Remarks on School Reopening, *supra* note 325.

<sup>328</sup> Miguel Cardona, U.S. Sec’y of Educ., Oral Statement on the U.S. Department of Education Fiscal Year 2022 Budget Request (June 16, 2021), <https://www.ed.gov/news/speeches/oral-statement-miguel-cardona-secretary-education-us-department-education-fiscal-year-2022-budget-request-0> [<https://perma.cc/FW8G-5VWU>].

<sup>329</sup> Miguel Cardona, U.S. Sec’y of Educ., University of Connecticut Commencement Ceremony for the Class of 2021 (May 8, 2021), <https://www.ed.gov/news/speeches/university-connecticut-commencement-ceremony-class-2021> [<https://perma.cc/4RKZ-SM5Q>].

<sup>330</sup> Miguel Cardona, U.S. Sec’y of Educ., Remarks at the Department of Education’s Equity Summit (June 22, 2021), <https://www.ed.gov/news/speeches/secretary-cardonas-remarks-department-education-equity-summit> [<https://perma.cc/J9PM-8K7T>].

<sup>331</sup> A thorough examination of the actions of the FCC are beyond the scope of this article due to its length constraints.



USDOE to support the use of CARES Act funding for technology and remote learning.<sup>332</sup> The FCC also extended deadlines for E-rate applications that provide connectivity services at a discounted rate,<sup>333</sup> and waived gift prohibitions applicable to the E-rate programs so that schools and libraries can accept offers for enhanced broadband services to support virtual learning.<sup>334</sup> Chairman Ajit Pai under the Trump administration also urged telephone and broadband providers to sign onto a Keep Americans Connected Initiative in March 2020 that asked providers not to terminate individuals or small businesses who were unable to pay for their services due to the pandemic, to waive applicable late fees, and to expand access to Wi-Fi hotspots for those who lacked connectivity.<sup>335</sup>

However, the FCC under the Trump administration also was criticized for not going far enough to address connectivity demands.<sup>336</sup> As a result, some industry leaders stepped in to fill the gap by identifying homes with students who had nearby broadband access who had not subscribed to it and offered these families discounted services.<sup>337</sup> Eventually, the December Appropriations law stepped in to support discounted services to families in need through the Broadband Benefit Program.<sup>338</sup>

The FCC also oversees the Universal Service Administrative Company's administration of the almost \$7.2 billion Emergency Connectivity Fund established by ARP.<sup>339</sup> FCC Acting Chairwoman Jessica Rosenworcel under the Biden administration championed the program as an essential tool for expanding broadband access and getting devices to students and educa-

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<sup>332</sup> Press Release, Fed. Commc'ns Comm'n, FCC and U.S. Department of Education Promote Remote Education So Students Can Continue Learning (Apr. 27, 2020).

<sup>333</sup> Wireline Competition Bureau Directs USAC to Extend E-Rate Application Filing Window for Funding Year 2020 Due to Potential Coronavirus Disruptions, 35 FCC Rcd. 2089 (Mar. 13, 2020) (internal references omitted); Wireline Competition Bureau Confirms that Community Use of E-Rate-Supported Wi-Fi Networks is Permitted During School and Library Closures Due to Covid-19 Pandemic, 35 FCC Rcd. 2879 (Mar. 23, 2020) (internal references omitted).

<sup>334</sup> In the Matter of Rural Health Care Universal Service Support Mechanism and Schools and Libraries Universal Service Support Mechanism, 35 FCC Rcd. 14544 ¶ 5 (Dec. 14, 2020) (order) (internal references omitted).

<sup>335</sup> *Keep Americans Connected*, FED. COMM'NS COMM'N (July 8, 2020), <https://www.fcc.gov/keep-americans-connected> [<https://perma.cc/J5LZ-7V57>].

<sup>336</sup> ERIN N. HOLMES, CONG. RSCH. SERV., LSB10475, BROADBAND CONNECTIVITY AND COVID-19: THE FCC'S RESPONSE 3 (2020).

<sup>337</sup> Tom Wheeler, *The Broadband Industry Steps up to Connect Students When the FCC Will Not*, BROOKINGS (Sept. 15, 2020), <https://www.brookings.edu/blog/techtank/2020/09/15/the-broadband-industry-steps-up-to-connect-students-when-the-fcc-will-not/> [<https://perma.cc/K8FB-2ZVZ>].

<sup>338</sup> Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. N, tit. IX, § 904(b), 134 Stat. 1182, 2131–34 (2020).

<sup>339</sup> See Press Release, Fed. Commc'ns Comm'n, FCC Announces Emergency Connectivity Fund Application Window Will Open on June 29 (June 15, 2021); see also JESSICA ROSENWORCEL, ACTING CHAIRWOMAN, FED. COMM'NS COMM'N, THE EMERGENCY CONNECTIVITY FUND IS COMING! ARE YOU READY? (2021), <https://www.fcc.gov/news-events/notes/2021/06/15/emergency-connectivity-fund-coming-are-you-ready> [<https://perma.cc/T4BV-QES3>].

tors to help close the homework gap, which is the inability of some students to complete their homework due to connectivity issues or a lack of access to devices.<sup>340</sup> She has also prioritized ending the homework gap during her tenure at the Commission.<sup>341</sup> These actions by the FCC, when coupled with new federal laws, made it an essential support for expanding remote learning opportunities for many communities, particularly disadvantaged communities.

### 3. *The White House*

The Trump administration's approach to the pandemic often fell short of what K-12 schools needed because too often it demanded much from schools while failing to provide them the clear guidance that they needed to begin to meet those demands. It is important to understand that states and localities control when and whether schools reopen and the federal government possesses little direct authority over this issue.<sup>342</sup> Despite this lack of authority, President Trump repeatedly urged schools to reopen even if they were unable to implement the CDC safety guidance, and Secretary DeVos reaffirmed this message in direct contradiction to her longstanding support of local control.<sup>343</sup> President Trump embraced his access to the bully pulpit to threaten schools and tweeted in all caps, "SCHOOLS MUST OPEN IN THE FALL!!!"<sup>344</sup> He also threatened schools with a loss of funding if they did not reopen, despite his inability to withhold it.<sup>345</sup>

Many also charged President Trump with politicizing the CDC guidance by issuing guidance with limited scientific evidence, claiming low transmission rates for children.<sup>346</sup> President Trump undermined the effectiveness of the CDC guidance when he indicated that the CDC's recommended safety protocols do not have to be strictly followed, a move that frightened many teachers.<sup>347</sup> Furthermore, President Trump labeled hybrid plans "ridiculous" despite the advice of the American Academy of Pediatrics that rec-

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<sup>340</sup> See *id.*; see also Joshua Blackwell, *Jessica Rosenworcel Appointed as Acting FCC Chairwoman*, ADVANCED TELEVISION BROAD. ALL. (Jan. 22, 2021), <https://www.broadcastingalliance.org/jessica-rosenworcel-appointed-as-fcc-acting-chairwoman/> [<https://perma.cc/3Q4H-GRTQ>] (noting Rosenworcel's nomination to be Acting Chairwoman by President Biden).

<sup>341</sup> *Id.*

<sup>342</sup> Parker, Meckler, Nirappil & Linskey, *supra* note 259.

<sup>343</sup> Cory Turner, *How Education Secretary Betsy DeVos Will Be Remembered*, NPR (Nov. 19, 2020), <https://www.npr.org/2020/11/19/936225974/the-legacy-of-education-secretary-betsy-devos> [<https://perma.cc/8YGU-WW8M>].

<sup>344</sup> Duncan, *supra* note 151.

<sup>345</sup> Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding if Schools Do Not Reopen*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html> [<https://perma.cc/AG7B-PGN4>]; Turner, *supra* note 343.

<sup>346</sup> Hellmann, *supra* note 268.

<sup>347</sup> Goldstein & Shapiro, *supra* note 282.

ommended schools not adopt a uniform approach.<sup>348</sup> The Executive Branch's threats and criticisms left many educators and school leaders frustrated and confused.<sup>349</sup>

The Trump administration also failed to send a clear and consistent message that states, districts, and schools must prioritize the needs of disadvantaged students.<sup>350</sup> The federal government has demonstrated an ability to focus states and localities on critical education goals when it serves U.S. interests.<sup>351</sup> While the USDOE published reminders of civil rights obligations,<sup>352</sup> President Trump failed to use the bully pulpit to reaffirm the importance of serving the most disadvantaged students. Under the Biden administration, the federal response has begun to shift the nation's attention to focus on serving the needs of disadvantaged communities,<sup>353</sup> but real harm had already been done by the failure to emphasize these needs at the onset of the pandemic.

The Biden administration also has undermined K-12 schools by sending mixed messages about school reopenings.<sup>354</sup> President-elect Biden stated that "the majority of our schools can be open by the end of my first 100 days," and many applauded this commitment.<sup>355</sup> On his first day in office, President Biden issued an executive order that provided federal support to "create the conditions for safe, in-person learning as quickly as possible"<sup>356</sup> and to provide testing for schools.<sup>357</sup> As the weeks went by, the White House began to lower its expectations for elementary and middle schools, and White House Press Secretary Jen Psaki indicated that the Biden administration aimed to have a majority of the schools reopening with in-person instruction for a minimum of one day per week.<sup>358</sup> Some criticized this change in position and

<sup>348</sup> Nicole Gaudiano, 'Reopen!' Refresh: Trump Adds Masks, CDC Assist in Plea for In-Person School, *POLITICO* (Aug. 12, 2020), <https://www.politico.com/news/2020/08/12/reopen-trump-schools-cdc-masks-394552> [<https://perma.cc/8U5D-8E43>].

<sup>349</sup> Turner, *supra* note 343; Green, *supra* note 311.

<sup>350</sup> Chester E. Finn, Jr., *Agenda-Setters and Duds: A Bully Pulpit Indeed*, in *CARROTS, STICKS*, *supra* note 152, at 217, 226.

<sup>351</sup> Robinson, *Disrupting Education Federalism*, *supra* note 143, at 987.

<sup>352</sup> CIVIL RIGHTS, *supra* note 291; SUPPLEMENTAL FACT SHEET, *supra* note 291.

<sup>353</sup> ED COVID-19 HANDBOOK, VOL. 1, *supra* note 21; *Operational Strategy*, *supra* note 6.

<sup>354</sup> Parker et al., *supra* note 342.

<sup>355</sup> *Id.*

<sup>356</sup> Exec. Order No. 14,000, 86 Fed. Reg. 7,215 (Jan. 21, 2021) ("Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers").

<sup>357</sup> Exec. Order No. 13,996, 86 Fed. Reg. 7,197 (Jan. 21, 2021) ("Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats"); Exec. Order No. 13,987, 86 Fed. Reg. 7,019 (Jan. 21, 2021) ("Organizing and Mobilizing the United States Government To Provide a Unified and Effective Response To Combat COVID-19 and To Provide United States Leadership on Global Health and Security").

<sup>358</sup> See Erica L. Green, *Biden Trims Ambitions on School Reopening Pledge*, *N.Y. TIMES* (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/us/politics/biden-schools-reopening.html> [<https://perma.cc/B7NA-RUH8>]; Jen Psaki, Press Sec'y, The White House, Press Briefing by Press Secretary Jen Psaki (Feb. 9, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/02/09/press-briefing-by-press-secretary-jen-psaki-february-9-2021/> [<https://perma.cc/4MJL-EQK3>].

found the goal lacking in ambition and commitment.<sup>359</sup> President Biden at a town hall then backpedaled on the one-day-a-week message as a miscommunication and noted that he still wanted a majority of K-8 schools to be open all week by April 30.<sup>360</sup> Some criticized the administration's shifting position and contended that it created confusion for parents and schools while some education leaders found the shifting positions to be unsurprising because the plan to reopen schools in 100 days was a symbolic effort given the limited federal authority over school reopenings.<sup>361</sup>

Despite the changing scope of the message, the Biden administration signaled a clear commitment to reopening schools safely and addressing COVID-19's disproportionate impact on underserved students, including students of color.<sup>362</sup> In March 2021, President Biden placed teachers and school employees among the top priorities for receiving the vaccine<sup>363</sup> and by August 2021, the administration reported that almost ninety percent of school staff and teachers were vaccinated.<sup>364</sup> In the summer of 2021, the White House continued its focus on vaccinations by urging school districts to offer pop-up clinics providing vaccines at schools to encourage vaccination of students ages twelve and up.<sup>365</sup> In addition, the White House also highlighted the importance of protecting students' rights to equal educational opportunities, closing the connectivity gap, addressing the needs of disabled students, and maintaining equity in funding, including preventing funding reductions to high-poverty districts and urging states to not reduce their funding effort.<sup>366</sup>

#### IV. STRENGTHENING THE FEDERAL APPROACH TO EDUCATIONAL EQUITY DURING THE PANDEMIC

Although the federal government is providing generous federal funding and significant support for K-12 schools during the pandemic, much of this federal support does not effectively prioritize educational equity. In proposing a more comprehensive and efficacious federal approach to educational equity, it is important to note that such an approach should undertake a restructuring of education federalism that emphasizes a collaborative federal-state partnership. Such a partnership would embrace federal law and policymaking strengths while fostering state leadership and capacity in educa-

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<sup>359</sup> See Green, *supra* note 358.

<sup>360</sup> See Parker et al., *supra* note 342.

<sup>361</sup> See *id.*; Green, *supra* note 358.

<sup>362</sup> See *Fact Sheet: Reopening Schools and Rebuilding with Equity*, THE WHITE HOUSE (Aug. 2, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/02/fact-sheet-reopening-schools-and-rebuilding-with-equity/> [<https://perma.cc/6BYT-4XWF>] [hereinafter THE WHITE HOUSE].

<sup>363</sup> See Parker et al., *supra* note 342.

<sup>364</sup> See THE WHITE HOUSE, *supra* note 362.

<sup>365</sup> See *id.*

<sup>366</sup> See *id.*

tion. I propose conditions that Congress should consider for any future funding and note the importance of the Executive Branch enforcing existing conditions and federal civil rights protections. I also explain why Congress must remain attentive to new and evolving pandemic-driven needs of states, districts, and schools over time, rather than merely in the short term. Together, these proposals would strengthen the federal response to the pandemic in ways that would transform the federal government from a generous but sometimes ineffective bystander to a true collaborative partner that advances educational equity.

A. *How Restructuring Education Federalism Supports Educational Equity*

For more than half a century, Congress has adopted a broad federal approach when a substantial portion of schoolchildren are prevented from receiving equal educational opportunity and states and localities lack the capacity or willingness to remedy this harm.<sup>367</sup> My scholarship has documented how the U.S. approach to education federalism and its emphasis on state and local control and a limited federal role have hindered these efforts.<sup>368</sup> For instance, the United States Supreme Court's desire not to disrupt education federalism and to support local control provided a key rationale for its rejection of a federal right to education in *San Antonio Independent School District v. Rodriguez*.<sup>369</sup> Similarly, a focus on returning to local control influenced the Court's school desegregation jurisprudence in ways that undermined equal educational opportunity.<sup>370</sup>

In response to the U.S. approach to education federalism's hindrance of equal educational opportunity, my scholarship has proposed a reengineering of education federalism that would move the federal government from a financially supportive sideliners to a true shoulder-to-shoulder partner with states, districts, and schools.<sup>371</sup> My theory for restructuring education federalism embraces federal leadership that emphasizes the national goal of ensuring equitable access to an excellent education.<sup>372</sup> The public sometimes fails to understand how the opportunity gap systemically disadvantages and hinders the achievement of many schoolchildren from low-income families

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<sup>367</sup> CARROTS, STICKS, *supra* note 152, at 63.

<sup>368</sup> See Kimberly Jenkins Robinson, *The High Cost of The Nation's Current Framework for Education Federalism*, 48 WAKE FOREST L. REV. 287, 290 (2013) [hereinafter Robinson, *The High Cost*].

<sup>369</sup> See *id.* at 307–11 (analyzing how *San Antonio Indep. Sch. Dist. v. Rodriguez* privileged local control and education federalism over equal educational opportunity). See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>370</sup> See Robinson, *The High Cost*, *supra* note 369, at 297–305.

<sup>371</sup> Robinson, *Disrupting Education Federalism*, *supra* note 143, at 984–85.

<sup>372</sup> *Id.* Please note that since I published *Disrupting Education Federalism*, my scholarship has shifted to a focus on equity such that I believe the aim of restructuring education federalism should be equitable, rather than equal, access to an excellent education.

as well as children of color.<sup>373</sup> Federal leadership that emphasizes the twin goals of equity and excellence helps to raise public awareness about this gap.<sup>374</sup> Greater public awareness aims to curb the deeply ingrained tendency of more advantaged communities to hoard resources for themselves while neglecting the needs of other people's children.<sup>375</sup> Conveying how our shared national fate is in danger if opportunity and achievement gaps are not remedied is essential because history confirms that reform efforts typically fail when they only assist disadvantaged populations.<sup>376</sup>

My proposed restructuring of education federalism would couple a federal prioritization of equity and excellence with the federal government's superior capacity to provide financial, technical, and research-related assistance for education.<sup>377</sup> By building on federal law and policymaking strengths and embracing a stronger federal role in education, states and localities can be empowered to expand their capacity to improve education and engage in the experimentation and innovation that can support excellence.<sup>378</sup> Federal leadership also can guide a more efficient response to a crisis because it saves each state and locality from having to figure out the answers to a crisis on their own.<sup>379</sup>

The federal role in education has expanded in response to the pandemic's devastating impact on schoolchildren, schools, and communities. States, districts, and schools must rely on federal relief to address this impact, but the limited conditions on federal funding mean that they can take large amounts of federal money while neglecting federal priorities. As a result, the federal government is enabling states to continue their long track record of neglecting educational equity.<sup>380</sup> It is in the federal government's interest and within its purview to end this neglect.<sup>381</sup>

Unfortunately, the United States has implemented some elements of a comprehensive and efficacious approach to education federalism while neglecting others. The generous federal financial assistance for states and

<sup>373</sup> See Kimberly Jenkins Robinson, *The Essential Questions Regarding a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 1, 3–7 (Kimberly Jenkins Robinson ed., 2019).

<sup>374</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 985–88.

<sup>375</sup> See Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2386, 2403 (2021).

<sup>376</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 986 (citing DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* 9 (2009)).

<sup>377</sup> See DAVID T. CONLEY, *WHO GOVERNS OUR SCHOOLS? CHANGING ROLES AND RESPONSIBILITIES* 32 (2003); Marshall S. Smith, *Rethinking ESEA: A Zero-Base Reauthorization*, in *CARROTS, STICKS*, *supra* note 152, at 231, 233; PAUL MANNA, *COLLISION COURSE: FEDERAL EDUCATION POLICY MEETS STATE AND LOCAL REALITIES* 49, 160 (2011); Robinson, *Disrupting Education Federalism*, *supra* note 143, at 996–98.

<sup>378</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 1014–16.

<sup>379</sup> See *id.* at 996.

<sup>380</sup> See *id.* at 978; Black, *Leveraging Federal Funding*, *supra* note 153, at 238–40; Brown, *supra* note 143, at 165.

<sup>381</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 973–74.

districts in the three pandemic relief bills provides critical financial assistance to states and localities that are struggling.<sup>382</sup> The February 2021 guidance from both the CDC and the USDOE, as well as the USDOE's offer of technical assistance on an array of topics, offers schools, districts, and states some of the information that they need to reopen and to improve the access to and the quality of remote learning.<sup>383</sup> The USDOE's new study, in collaboration with the Institute of Education Sciences, about the pandemic's impact on students and plans to reopen schools also will supply important research to schools and districts.<sup>384</sup> Together these actions establish the beginning of valuable federal support for education at this time of crisis.

However, the federal role in education regarding the pandemic has often built upon an outdated notion of education federalism that too often leaves the federal government largely on the sidelines of education while distributing large amounts of federal aid with very few conditions. Narrowly circumscribing the federal role to that of a generous bystander leaves our most disadvantaged schoolchildren vulnerable to the state laws and policies that too often neglect their needs.<sup>385</sup> At other times, the federal role in education during the pandemic has shifted toward a directive stance that insists that states follow federal instructions, such as when President Trump ordered schools to reopen in fall 2020 and threatened to withhold federal funds if this did not happen even though he lacked the authority to do this.<sup>386</sup>

In addition to these inconsistencies, limited guidance from the Executive Branch under the Trump administration too often forced states, districts, and schools to figure out on their own how to successfully navigate many of the novel questions surrounding the pandemic.<sup>387</sup> Although the Biden administration has taken a more proactive role in emphasizing equity,<sup>388</sup> the mechanisms for accountability for equity remain limited and weak. The inconsistencies and shortcomings in the federal approach to advancing educational equity reveal the absence of a coherent model of education federalism to guide the federal role in supporting and leading states and districts as

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<sup>382</sup> See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, § 313(d), 134 Stat. 1182, 1930-31 (2020); Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18001, 134 Stat. 281, 564 (2020).

<sup>383</sup> See ED COVID-19 HANDBOOK, VOL. 2, *supra* note 21; *Operational Strategy*, *supra* note 6; OESE TECH. ASSISTANCE CTRS., *supra* note 298.

<sup>384</sup> See PROVIDING SERVICES, *supra* note 304.

<sup>385</sup> See Robinson, *Disrupting Education Federalism*, *supra* note 143, at 996; Brown, *supra* note 143, at 165.

<sup>386</sup> See Duncan, *supra* note 151; Baker, Green & Weiland, *supra* note 343; Turner, *supra* note 343.

<sup>387</sup> See Ujifusa, *supra* note 151.

<sup>388</sup> See Evie Blad, *To Get Remaining COVID-19 Aid, Schools and States Must Detail In-Person Learning Plans*, EDUC. WK. (Apr. 21, 2021), <https://www.edweek.org/policy-politics/to-get-remaining-federal-k-12-aid-schools-and-states-must-detail-in-person-learning-plans/2021/04> [<https://perma.cc/9LER-E8SH>] (describing the USDOE's instructions to states regarding the requirements that states must meet to receive federal aid under the American Rescue Plan, including their plans for reopening schools).

they spend an unprecedented federal investment.<sup>389</sup> The federal response to the pandemic should abandon this inconsistent and ineffective approach. Instead, the United States should adopt law and policy reforms that would build upon a strong federal-state partnership that prioritizes equity and excellence that would empower states and localities to mount a more effective response to the harms of the pandemic.<sup>390</sup>

The next sections propose three law and policy reforms that would enable the federal government to prioritize equity and excellence as states and districts respond to the harms of the pandemic that incorporate an intentional approach to education federalism.

### B. *The Right Conditions for Federal Funding to Schools*

The pandemic relief laws that provided generous federal financial assistance for education included wide discretion for using this assistance.<sup>391</sup> This approach reflected the widely held belief that states and localities know best how to meet the exigencies of the pandemic given the wide variations in how the pandemic is impacting schools, consistent with a traditional approach to education federalism.<sup>392</sup> This flexibility should be maintained with one critical modification: states and districts should be required to focus additional resources on the students who have been disproportionately harmed by the pandemic.

History tells us that driving a large amount of federal education aid through the engines of state and local politics will only promote educational equity if Congress and the USDOE insist that it does. State governments vary greatly in their commitment to equity, and most have a long track record of neglecting educational equity absent federal demands.<sup>393</sup> Education scholar and reformer Cynthia Brown explains the roots and evidence of this neglect:

Most state legislatures today are very conservative and uninterested in education equity. Technology advances, along with federal data requirements, provide state agencies and legislators more knowledge about the makeup of their states' student bodies, teaching forces, and education fi-

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<sup>389</sup> For my proposal for a coherent model of education federalism that prioritizes equity and excellence, please see Robinson, *Disrupting Education Federalism*, *supra* note 143, at 983–1005.

<sup>390</sup> *See id.* at 985–87, 1014–16; Robinson, *Restructuring*, *supra* note 23, at 920–24 (defining equity and why it should remain a federal priority for education).

<sup>391</sup> *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2001(a-b), 135 Stat. 4, 24–25; Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 18001, 134 Stat. 281, 564 (2020); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. M, tit. III, § 313(d), 134 Stat. 1182, 1930–31 (2020).

<sup>392</sup> *See* Reber & Gordon, *supra* note 226; Robinson, *Disrupting Education Federalism*, *supra* note 143, at 968–69.

<sup>393</sup> *See* Robinson, *Disrupting Education Federalism*, *supra* note 143, at 996; Brown, *supra* note 143, at 165.



nances. But despite this ready access to information that can and does reveal inequities, state efforts to correct even glaring problems are rare.<sup>394</sup>

If most states neglect equity in prosperous times, they are particularly unlikely to focus on the needs of the most disadvantaged when faced with the hard choices that occur during a time of crisis. More privileged communities oftentimes monopolize resources to benefit their children.<sup>395</sup> Local politics frequently resists significant reforms that aim to redistribute resources.<sup>396</sup> Low-income communities also typically lack the political influence that is needed to secure additional resources for their schoolchildren.<sup>397</sup> Fortunately, “Congress is well-equipped to tackle distributive concerns like equity and opportunity that have gone unaddressed at the state level . . . .”<sup>398</sup> Therefore, Congress, in partnership with the Executive Branch, must take a strong lead on insisting that states and districts advance equity as they respond to the pandemic.<sup>399</sup>

Congress and the USDOE should adopt an equity-focused approach in several ways. In any future aid allocations, Congress should revise its distribution formula for federal aid by focusing on such factors as the number and concentration of children in poverty rather than Title I allocations given the shortcomings in the Title I formulas.<sup>400</sup> Congress also should require states to disperse federal aid through a formula that considers, among other factors, the disparate needs of students, the concentration of student needs, adequate funding levels, and a district’s wealth.<sup>401</sup> Finally, I agree with Bruce Baker and others’ recommendation that states should be required to restore education funding to, at minimum, inflation-adjusted levels that preceded the Great Recession,<sup>402</sup> given that, more than a decade after the Great Recession, some states have failed to restore funding cuts to education.<sup>403</sup>

<sup>394</sup> Brown, *supra* note 143, at 165.

<sup>395</sup> See Wilson, *supra* note 375, at 2390.

<sup>396</sup> Kirst, *supra* note 148, at 14–16.

<sup>397</sup> See 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).

<sup>398</sup> Hess & Kelly, *Introduction*, in CARROTS, STICKS, *supra* note 152, at 12.

<sup>399</sup> See Gittell, *supra* note 28, at 39 (“American education can achieve its full potential—excellence with equity—only under a dynamic federal system that encourages all levels of government to work together with a more common vision.”).

<sup>400</sup> See Reber & Gordon, *supra* note 226; see also Black, *Leveraging Federal Funding*, *supra* note 153, at 242 (noting the need to revise Title I funding formulas to account for concentrated poverty).

<sup>401</sup> See Griffith, *supra* note 22; Kimberly Jenkins Robinson, *No Quick Fix for Equality and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201, 210–20 (2016) [hereinafter Robinson, *No Quick Fix*].

<sup>402</sup> See Bruce D. Baker, Mark Weber & Drew Atchison, *Weathering the Storm: School Funding in the COVID-19 Era*, 102 PHI DELTA KAPPAN 8, 10 (2020).

<sup>403</sup> See C. Kirabo Jackson, Cora Wigger & Heyu Xiong, *The Costs of Cutting School Spending: Lessons from the Great Recession*, EDUC. NEXT (Aug. 4, 2020), <https://www.educationnext.org/costs-cutting-school-spending-lessons-from-great-recession/> [https://perma.cc/PMB5-PN7G].

Furthermore, if Congress distributes aid in the future, it should revise the Maintenance of Equity standard to define funding equity and then condition funding on states achieving and maintaining it. This focus on funding equity in exchange for large amounts of federal aid is long overdue as other scholars and I have noted for some time.<sup>404</sup> Focusing on funding equity could include such reforms as requiring states to provide greater funding to students with greater needs, to link funding systems to desired outcomes, and to provide adequate funding levels and effective oversight and accountability for education spending.<sup>405</sup> Such an approach could be adopted over time through federal incentives and then funding conditions to avoid an abrupt and detrimental shift to education federalism.<sup>406</sup>

Although some might question requiring states to engage in school funding reform during a crisis, this funding reform would drive resources to remedy the disproportionate harm caused by the pandemic as well as the systemic disadvantages faced by many vulnerable communities. Therefore, the proposed reforms are tailored to meet the current crisis. Such reforms also would bring the United States in line with the funding approaches of the majority of other developed nations that invest more education funding in low-income communities.<sup>407</sup>

### C. *The Importance of Federal Enforcement of Funding Conditions*

Given that Congress has already disbursed an unprecedented amount of aid, the federal role in promoting equity in the use of ARP and other pandemic funds will primarily fall to the USDOE and enforcement of federal funding conditions. States may not limit how districts use these funds within the broad array of permissible activities.<sup>408</sup> The USDOE guidance encourages a focus on allocating resources equitably to address the disproportionate impact of the pandemic on low-income communities and communities of color.<sup>409</sup> This broad flexibility appropriately allows districts to tailor their response to the needs of schools and students.<sup>410</sup>

At the same time, the Executive Branch should employ all available tools to make sure that states and districts address the needs of students who suffered the most during the pandemic by enforcing civil rights laws and federal funding conditions. The USDOE's Office for Civil Rights (OCR), along with the Educational Opportunities Section of the Department of Justice's Civil Rights Division, have a powerful toolbox to insist on equity

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<sup>404</sup> See Robinson, *No Quick Fix*, *supra* note 401, at 220–37; Black, *Leveraging Federal Funding*, *supra* note 153, at 238–39.

<sup>405</sup> See Robinson, *No Quick Fix*, *supra* note 401, at 210–20.

<sup>406</sup> See *id.* at 221–32, 242–49.

<sup>407</sup> See COUNCIL ON FOREIGN RELS., *supra* note 146, at 8.

<sup>408</sup> RELIEF PROGRAMS, *supra* note 195, at 15.

<sup>409</sup> *Id.* at 9.

<sup>410</sup> Reber & Gordon, *supra* note 226.

through active and comprehensive enforcement of the nation's civil rights laws.<sup>411</sup> This authority should be used to address the disparate impact of the pandemic on children of color, including Asian American students, children with disabilities, ELs, and LGBTQ+ students.<sup>412</sup>

For example, the USDOE's Office for Civil Rights possesses the primary authority to enforce the regulatory prohibitions of disparate impact discrimination under Title VI of the Civil Rights Act of 1964<sup>413</sup> because the U.S. Supreme Court eliminated the ability of private individuals to enforce the disparate impact regulatory prohibition in *Alexander v. Sandoval*.<sup>414</sup> OCR's enforcement of the disparate impact protection is particularly critical because of the great difficulties in proving intentional discrimination.<sup>415</sup>

Given the disparate impact of the pandemic on children of color and ELs, OCR must play a critical role in making sure that states and localities do not violate Title VI by adopting policies or approaches that impose an unlawful discriminatory disparate impact on the basis of race, color, or national origin as they decide how to distribute and use generous federal aid.<sup>416</sup> Similarly, OCR must work to protect the civil rights of students with disabilities and LGBTQ+ students who have suffered from disproportionate harms during the pandemic.<sup>417</sup> OCR should make clear to states and districts its enforcement agenda for these laws in light of this new infusion of funds for K-12 education. OCR also could issue guidance regarding disparate impact discrimination that clarifies when an educational practice or policy that imposes a disparate impact is required by an educational necessity that justifies

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<sup>411</sup> OCR enforces the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-113. The Educational Opportunities Section of the Civil Rights Division of the U.S. Department of Justice also supports enforcement of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972 and Section 504 of the Rehabilitation Act. The Educational Opportunities Section also enforces Title IV of the Civil Rights Act of 1964, which authorizes the Attorney General to respond to certain complaints that allege discrimination on the basis of race, color, national origin, sex and religion by public schools and postsecondary institutions (Civil Rights Act of 1964, 42 U.S.C. § 2000c-6); the Equal Educational Opportunities Act of 1974, which, among other commands, requires states and school districts to offer ELs the services they need to remedy language barriers (20 U.S.C. § 1703(f)); as well as Title II of the Americans with Disabilities Act, which prohibits states and local entities, such as schools, from discriminating on the basis of disability (42 U.S.C. §§ 12101-12213). *Educational Opportunities Section*, U.S. DEP'T OF JUST., <https://www.justice.gov/crt/educational-opportunities-section> [<https://perma.cc/34LY-J4BS>].

<sup>412</sup> See *supra* Part I.

<sup>413</sup> 42 U.S.C. §§ 2000d, 2000d-1; 34 C.F.R. § 100.3(b)(2) (2020).

<sup>414</sup> 532 U.S. 275, 293 (2001); Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 71-73 (2020) [hereinafter Robinson, *Designing the Legal Architecture*]. The Educational Opportunities Section of the United States Department of Justice also enforces antidiscrimination laws for education, including Title VI. *Educational Opportunities Section*, *supra* note 411.

<sup>415</sup> See Robinson, *Designing the Legal Architecture*, *supra* note 414 at 67-69.

<sup>416</sup> *Id.* at 93.

<sup>417</sup> See U.S. DEP'T OF EDUC., OFF. FOR C.R., *supra* note 14, at i; Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

the disparate impact in the absence of either a comparably effective alternative practice or policy or proof that the asserted educational necessity is a pretext for discrimination.<sup>418</sup> Together, a clear enforcement agenda and clarity about the meaning and application of the disparate impact standard could lead states and districts to focus greater attention on remedying discriminatory disparate impacts.

Congress can and should serve as a critical partner in remedying disparate impact discrimination in two ways. Congress should authorize additional funding for OCR to engage in comprehensive enforcement, particularly given its repeated rejection of funding requests for OCR funding in recent years.<sup>419</sup> OCR is underfunded, understaffed, and unable to address the growing number of discrimination complaints that it receives.<sup>420</sup> OCR will only be able to enforce the laws under its jurisdiction regarding this new influx of federal funding if Congress authorizes additional funding for OCR's work. Congress also should restore the private right of action for disparate impact discrimination in the Civil Rights Act of 1964 so that civil rights advocates and others can bring private lawsuits that complement the federal fight against discriminatory practices.<sup>421</sup> This would relieve the federal government from being the sole arbiter of such claims and bring new attention to both the existence of disparate impact discrimination and the importance of remedying it.

In addition, the USDOE should make clear if and when it intends to enforce the Maintenance of Equity and Effort requirements in the pandemic relief laws. Given the history of not enforcing similar conditions,<sup>422</sup> states and districts should receive notice from the USDOE that enforcement is now a real possibility. This notice would encourage greater attention to funding equity and effort as states and districts spend federal funds. The USDOE should be mindful of the shortcomings in the Maintenance of Equity conditions and tailor enforcement efforts on states and districts where enforcement would best serve the students hardest hit by the pandemic. This tailored enforcement effort could help to mitigate some of the backlash from enforcement and help to avoid the perverse incentives noted above.<sup>423</sup>

#### *D. Federal Commitment to States and Districts for the Long Haul*

The federal government also must commit to partnering with states, districts, and schools for as long as the adverse effects of the pandemic endure. Federal support and intervention will be needed to avoid future state

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<sup>418</sup> See Robinson, *Designing the Legal Architecture*, *supra* note 414 at 73–74, 93–94.

<sup>419</sup> *Id.* at 93.

<sup>420</sup> Janel George, *Populating the Pipeline: School Policing and the Persistence of the School-to-Prison Pipeline*, 40 *NOVA L. REV.* 493, 520 (2017).

<sup>421</sup> Robinson, *Designing the Legal Architecture*, *supra* note 414, at 90–91.

<sup>422</sup> See Black, *Leveraging Federal Funding*, *supra* note 153, at 238–39.

<sup>423</sup> See *supra* notes 254–258 and accompanying text.

funding cuts to K-12 education. Years of inequitable and inadequate school funding preceded the pandemic.<sup>424</sup> The Great Recession resulted in substantial and lasting school funding budget cuts,<sup>425</sup> despite the American Recovery and Reinvestment Act's (ARRA), also called the stimulus bill, allocation of \$96 billion in discretionary funds for education that the USDOE administered, including funding for a State Fiscal Stabilization Fund.<sup>426</sup> The ARRA provided unprecedented federal support for education, and, for a brief time, the federal share of school district budgets doubled.<sup>427</sup> Research confirms ARRA funding helped to save and create jobs for teachers and other staff in schools.<sup>428</sup>

Despite this substantial federal support for education, severe and persistent school funding cuts occurred during the Great Recession, and many of these harms endure to this day.<sup>429</sup> Over the decade following the Great Re-

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<sup>424</sup> See generally Nicholas Johnson & Victoria Jackson, *American Rescue Plan Act Includes Much-Needed K-12 Funding*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 15, 2021), <https://www.cbpp.org/research/state-budget-and-tax/american-rescue-plan-act-includes-much-needed-k-12-funding> [<https://perma.cc/7ASS-VT8D>] (internal references omitted); FARRIE & SCIARRA, \$600 BILLION, *supra* note 241; Derek W. Black, *Educational Gerrymandering: Money, Motives, and Constitutional Rights*, 94 N.Y.U. L. REV. 1385, 1385 (2019).

<sup>425</sup> The Great Recession lasted from late 2007 to June 2009. Jackson et al., *supra* note 403. Scholars and economists generally identify the collapse of the national housing market as the cause of the Great Recession, which was the largest economic crisis in the United States since the Great Depression. COLIN MCARTHUR & SARAH EDELMAN, CTR. FOR AM. PROGRESS, THE 2008 HOUSING CRISIS: DON'T BLAME FEDERAL HOUSING PROGRAMS FOR WALL STREET'S RECKLESSNESS (2017), [https://cdn.americanprogress.org/content/uploads/2017/04/10093129/041117\\_RootsOfRecession-brief\\_UPDATE.pdf?\\_ga=2.70742297.845684047.1630277532-742743406.1626654209](https://cdn.americanprogress.org/content/uploads/2017/04/10093129/041117_RootsOfRecession-brief_UPDATE.pdf?_ga=2.70742297.845684047.1630277532-742743406.1626654209) [<https://perma.cc/7FS2-2F4E>].

<sup>426</sup> American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 181-84, 279-86; U.S. DEP'T. OF EDUC., OFF. OF INSPECTOR GEN., LESSONS FROM IMPLEMENTING THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (2014), <https://www2.ed.gov/about/offices/list/oig/auditreports/fy2014/x09m0002.pdf> [<https://perma.cc/TS5X-6JJZ>]; CONG. RSCH. SERV., R40151, FUNDING FOR EDUCATION IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (P.L. 111-5): SUMMARY AND LEGISLATIVE HISTORY 2 (2009).

<sup>427</sup> William N. Evans, Robert M. Schwab & Kathryn L. Wagner, *The Great Recession and Public Education*, 14 EDUC. FIN. & POL'Y 298, 323 (2019); Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [<https://perma.cc/LK3W-NV8W>].

<sup>428</sup> See CTR. ON EDUC. POL'Y, WHAT IMPACT DID EDUCATION STIMULUS FUNDS HAVE ON STATES AND SCHOOL DISTRICTS? 1, 3 (2012), <https://files.eric.ed.gov/fulltext/ED533671.pdf> [<https://perma.cc/H6LS-GXGY>]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-829, RECOVERY ACT: STATES' AND LOCALITIES CURRENT AND PLANNED USES OF FUNDS WHILE FACING FISCAL STRESSES, HIGHLIGHTS (2009), <https://www.gao.gov/assets/300/292104.pdf> [<https://perma.cc/CJ6B-7FHF>]; Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 106 (2011). One study finds that "ARRA's effects on education hiring were in fact small relative to the total dollars spent" and that the funds "at most" had a modest effect. Instead, the federal funding may have merely shifted the source of funding from increases in local and state debt and taxation to federal sources. James Feyrer & Bruce Sacerdote, *Did the Stimulus Stimulate? Real Time Estimates of the Effects of the American Recovery and Reinvestment Act 19-20* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16759, 2011), [https://www.nber.org/system/files/working\\_papers/w16759/w16759.pdf](https://www.nber.org/system/files/working_papers/w16759/w16759.pdf) [<https://perma.cc/S39D-FWMK>]; CTR. ON EDUC. POL'Y, *supra* note 427, at 3.

<sup>429</sup> See FARRIE & SCIARRA, \$600 BILLION, *supra* note 241; Gordon, *supra* note 427; CTR. ON EDUC. POL'Y, *supra* note 428, at 3.

cession, students and schools lost almost \$600 billion in state investments in schools.<sup>430</sup> The cuts endured for years to come:

In 2016, 24 states were funding K-12 schools less than before the Great Recession of more than a decade ago, on a per-pupil basis after adjusting for inflation. Many school districts never recovered from the layoffs they imposed at that time; when COVID-19 hit, schools overall were employing 77,000 fewer teachers and other workers even though they were educating 1.5 million more children.<sup>431</sup>

By 2018 (the latest year for which school funding data is available), twelve states with the deepest school funding cuts continued to provide a minimum of seven percent less general education aid than in 2008.<sup>432</sup>

Per-pupil funding experienced the greatest and most enduring declines in over a century after the Great Recession.<sup>433</sup> States made the greatest cuts to capital expenditures, which helped to reduce cuts to core instructional services.<sup>434</sup> Student test scores declined for the first time in more than half a century.<sup>435</sup> Greater achievement losses occurred in districts that experienced more substantial impacts from the recession.<sup>436</sup> The districts serving more minority and poor students experienced the greatest educational harm from the Great Recession.<sup>437</sup> Districts serving higher concentrations of students with additional educational needs, such as ELs and students with disabilities, also experienced a greater recessionary impact on achievement.<sup>438</sup>

The large school funding cuts followed the Great Recession for several reasons. Federal funding was inadequate to cover budget shortfalls, and states instituted cuts to comply with balanced budget requirements.<sup>439</sup> When the economy began to improve, states failed to reinvest the revenue increases in cash-starved schools.<sup>440</sup> In addition, most states reduced their fiscal effort at funding education, and almost half of the states reduced their

<sup>430</sup> FARRIE & SCIARRA, \$600 BILLION, *supra* note 241, at 2.

<sup>431</sup> Johnson & Jackson, *supra* note 424, at 2 (footnote omitted).

<sup>432</sup> Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 29, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding> [<https://perma.cc/8GWF-WPWK>].

<sup>433</sup> Jackson et al., *supra* note 403.

<sup>434</sup> *See id.*

<sup>435</sup> *Id.*

<sup>436</sup> Shores & Steinberg, *supra* note 230, at 18.

<sup>437</sup> *Id.* at 25; Jackson et al., *supra* note 403.

<sup>438</sup> Shores & Steinberg, *supra* note 230, at 23–24.

<sup>439</sup> Nicholas Johnson, *The Great Recession Badly Hurt Kids' Schooling; Today's Recession Could Do Much Worse*, CTR. ON BUDGET & POL'Y PRIORITIES (May 27, 2020), <https://www.cbpp.org/blog/the-great-recession-badly-hurt-kids-schooling-todays-recession-could-do-much-worse> [<https://perma.cc/JB2P-9UZX>]; Jackson et al., *supra* note 403.

<sup>440</sup> FARRIE & SCIARRA, \$600 BILLION, *supra* note 241, at 3.

effort by at least ten percent following the Great Recession.<sup>441</sup> If states had maintained pre-recession fiscal efforts, schools currently would have more than half a trillion dollars more in funding.<sup>442</sup> This lost revenue means that schools began the pandemic in a perilous position and will struggle even harder to recover from the pandemic.<sup>443</sup>

Lasting adverse impacts from the Great Recession's state budget cuts on students, teachers, and schools provide an urgent warning that as the United States navigates the harms of the pandemic, future school spending cuts should be avoided. Although only time will tell if the federal relief packages prove adequate to the task,<sup>444</sup> some question the ability of this funding to address the full scope of the costs for the wide-scale educational interventions or note that the impact of the funds depends upon smart decisions by state and local leaders.<sup>445</sup> A May 2021 survey conducted by *Education Week* identifies both how districts were faring and their concerns for the future.<sup>446</sup> One warning sign that funding challenges may lie ahead can be found in the finding that “[s]ixty-one percent of administrators who answered the . . . survey said persuading elected officials to sufficiently fund schools is a major challenge.”<sup>447</sup> Districts in some states, such as Wyoming, Wisconsin, and Texas, expressed concerns that state lawmakers will ask districts to use fed-

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<sup>441</sup> *Id.* at 5. The states with the largest declines in fiscal effort to fund schools also adopted the largest cuts to school funding. *Id.* at 6.

<sup>442</sup> *Id.* at 2.

<sup>443</sup> *See id.*

<sup>444</sup> *See* Aldeman, *supra* note 188 (“How this plays out, and whether we end up with more districts closer to the best-case than the worst-case scenario outlined here, will ultimately depend on state and local leaders making smart decisions on how to make the most of the federal investments.”).

<sup>445</sup> *See, e.g.,* Johnson & Jackson, *supra* note 424 (describing the costs of the wide array of interventions that districts and schools may have to undertake and stating that “[t]he \$123 billion in additional K-12 funding may even fall *short* of COVID-induced education costs, particularly if states and localities make a commitment to the investments needed to overcome the learning loss students have suffered.”); Tomer & George, *supra* note 51 (noting that “[a]s helpful as ARP and other commitments are to bridging the digital divide, there simply is not enough funding to complete the job. It will take anywhere from \$60 billion to over \$100 billion to wire every American community for broadband, and that doesn’t include estimates to upgrade all wireline connections to fiber or to blanket the U.S. with 5G wireless. American communities also need funding for digital equity programs that lasts beyond 2024, including permanent federal offices to partner with.”); Matt Barnum, *Congress Approves Massive Infusion of Funds for Schools, and High Poverty Districts Will Get the Most*, CHALKBEAT (Mar. 15, 2021), <https://www.chalkbeat.org/2021/3/10/22323283/congress-biden-stimulus-money-education-schools> [<https://perma.cc/5QBY-LZVX>] (“President Biden has suggested the new money will help more schools open their doors for in-person learning. But the money is unlikely to eliminate some of the challenges that have kept schools from fully reopening, including fear among families and educators and inadequate space to comply with the CDC’s social distancing recommendations.”).

<sup>446</sup> Mark Lieberman, *School Leaders Say Stimulus Cash Will Go a Long Way—But Deep Funding Challenges Remain*, EDUC. WK. (June 1, 2021), <https://www.edweek.org/leadership/school-leaders-say-stimulus-cash-will-go-a-long-way-but-deep-funding-challenges-remain/2021/06> [<https://perma.cc/WJH8-4MBY>].

<sup>447</sup> *Id.*

eral funds to make up for funding cuts to K-12 schools.<sup>448</sup> Forty-two percent of school districts were able to increase their spending during the 2019–2020 and 2020–2021 school year, and thirty percent maintained the same funding levels.<sup>449</sup> However, districts are beginning to note that long-term financial challenges lie ahead because of the need to spend the new federal aid in just a few years and the fact that more than half of the districts surveyed noted that it is “very likely” or “somewhat likely” that they will face declining enrollments within the next ten years, which would cause their total funding to decrease.<sup>450</sup> District leaders also expressed concern about the ability of federal funds to meet the additional expenses that the pandemic imposed.<sup>451</sup> Only time will tell if actual funding cuts for education materialize.<sup>452</sup>

More importantly, the fact that funding cuts continued for many years after the Great Recession ended warrants federal attention to long-term school funding trends following the pandemic and swift and decisive federal intervention if such cuts begin occurring. The state and district Maintenance of Equity requirements only prohibit funding cuts for FYs 2022 or 2023.<sup>453</sup> Even if perfect compliance with these provisions could be secured, the expiration of these requirements permit states and districts to institute such cuts beginning in FY 2024. Given the predictions that educational harms from the pandemic may endure for quite some time,<sup>454</sup> the short timeline for the Maintenance of Equity requirements seems unwise. Congress should take action to address any future funding cuts that states make and should focus

<sup>448</sup> See *id.*

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

<sup>450</sup> See *id.*

<sup>451</sup> See *id.* (“[M]ost school and district administrators said federal relief funding was at least somewhat adequate for covering pandemic-related expenses and making up for shortfalls in state and local funding . . .”).

<sup>452</sup> Evidence that future school funding cuts may be on the way include the fact that Wisconsin districts that received only a fraction of the federal aid that was allocated are considering budget cuts or raising local property taxes. See Madeleine Ngo & Kate Taylor, *Schools Are Receiving \$129 Billion in Stimulus Aid. Where Is It Going?*, N.Y. TIMES (July 13, 2021), <https://www.nytimes.com/2021/07/13/education/school-budget-stimulus.html> [https://perma.cc/KK2C-22FE]. In addition, New Jersey cut aid to some districts even after it received funds from the American Rescue Plan. Letter from David Sciarra & Danielle Farrie, Educ. L. Ctr., to Hon. Paul Sarlo, Chair, Sen. Budget and Appropriations Comm. & Hon. Eliana Pintor Marin, Assemb. Budget Comm. (June 16, 2021) (internal references omitted).

<sup>453</sup> American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2004(b)–(c), 135 Stat. 4, 25.

<sup>454</sup> See, e.g., Amelia Nierenberg & Kate Taylor, *How Can Schools Use \$129 Billion in Covid Relief Funds?*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/covid-schools-federal-funding.html> [https://perma.cc/G3F7-LBUN] (noting educator support for a long timeline for spending federal funds because it “is essential to addressing the upheavals of the past year. It takes time to help students regain lost literacy ground, and it takes patience to help students find confidence after a year of remote learning or pandemic-caused failing grades.”); Chad Aldeman, *Analysis: 10 Lessons from Past Educational Disruptions, and How They Can Help Students Make Up Lost Learning After COVID-19*, THE 74 (Mar. 10, 2021), <https://www.the74million.org/article/analysis-10-lessons-from-past-educational-disruptions-and-how-they-can-help-students-make-up-lost-learning-after-covid-19/> [https://perma.cc/4BGL-MBQX] (“Based on the research on past educational disruptions, . . . [w]e should expect large learning losses that will affect the current generation of students for the rest of their lives.”).



on ensuring that those cuts do not impose disproportionate harms on the most disadvantaged and vulnerable populations. This would make the federal government a more effective and influential leader in educational equity consistent with a more impactful approach to education federalism.

In addition, Congress should couple its long-term commitment to supporting states and districts with incentives for states to adopt best practices for fiscal responsibility and accountability at the state and district levels, so that its sizable investment in education is well spent. Given the long-term impact of the Great Recession, scholars and education experts recommend that states and districts focus on fiscal responsibility and accountability to make it possible to navigate difficult fiscal challenges that may lie ahead.<sup>455</sup> Incentivizing states to adopt fiscal responsibility and accountability measures can help to reduce the length of time that it takes to recover from the harms of the pandemic because funding is wisely invested in the most impactful and efficient reforms.

## V. CONCLUSION

The pandemic has inflicted an array of harms upon students. Disparate access to technology and the Internet created obstacles to learning for disadvantaged communities when schools shifted to remote learning in spring 2020 and retained remote and hybrid options during the 2020–2021 school year. Significant learning loss followed for many students, and some students experienced disproportionate harms, including students from low-income households, children of color, students with disabilities, ELs, and LGBTQ+ students.

Given the disproportionate harm that the pandemic has imposed on many disadvantaged and vulnerable students, the federal government should lead states and districts to prioritize educational equity as they respond to the pandemic. To accomplish this, the United States should adopt a more impactful federal-state partnership for education that couples the generous federal support for education with a federal prioritization of equity. Generous federal relief and guidance from the USDOE will help advance this goal. However, the shortcomings in the federal relief laws and the Executive Branch's response provide ample room to strengthen the federal approach to educational equity as it supports and guides states and districts.

With equity as its guiding principle, the federal government should adopt conditions for any future funding regarding the pandemic that incorporates a more effective approach to equity. The federal government also should enforce existing civil rights protections and funding conditions in

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<sup>455</sup> SARA MEAD, ANAND VAISHNAV, WILLIAM PORTER & ANDREW J. ROTHERHAM, BELL-WETHER EDUC. PARTNERS, *CONFLICTING MISSIONS AND UNCLEAR RESULTS: LESSONS FROM THE EDUCATION STIMULUS FUNDS* 4, 16, 21 (2010), <https://education-first.com/wp-content/uploads/2015/10/Conflicting-Missions-and-Unclear-Results.pdf> [<https://perma.cc/BFG5-4P5M>].

ways that would emphasize the importance of meeting the needs of students that experienced the greatest harm during the pandemic. In addition, the federal government should intervene if future funding cuts occur that would disproportionately harm disadvantaged communities.

This more efficacious federal-state partnership and the proposed reforms offer the potential not only to guide efforts to address the new harms inflicted by this crisis, but also to foster reforms that shore up preexisting disparities in educational opportunities and achievement. Moving forward, a comprehensive, equity-centered federal-state approach to remedying the educational harms of the pandemic also will help to prepare the nation to weather educational challenges from future crises, whether new crises include a new virus, the adverse effects of global warming on schools, or a different existential threat to teaching and learning.