

FROM DIGITAL DISPARITY TO EDUCATIONAL EXCELLENCE: CLOSING THE OPPORTUNITY AND ACHIEVEMENT GAPS FOR LOW- INCOME, BLACK, AND LATINX STUDENTS

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ABSTRACT

The health and economic crises brought about by COVID-19 in 2020 sent society into a downward spiral with the most marginalized groups in the United States feeling disproportionate impacts. For low-income, Black, and Latinx students in particular, school shutdowns and the transition to online learning exacerbated pre-existing inequities in access to quality education, widening the already broad achievement gap between these students and their White, more affluent peers. By displacing countless children from in-person classroom settings, the pandemic has highlighted several key areas that society must address in order to mitigate the effects of future disasters and ensure educational equity moving forward.

Focusing on PreK–12 education, this Note begins by examining the historical origin of the right to education. This includes how federal efforts have fallen short, leaving the states and the people to fill the gap through state constitutional provisions, litigation efforts, and policy reforms. This Note next discusses the emergence of opportunity and achievement gaps for low-income, Black, and Latinx students relative to their White and affluent peers. It then describes the expansion of these gaps in the time leading up to the pandemic and their continued widening during the pandemic. Both the effects of the digital divide as well as how economic and environmental influences have led to disproportionate impacts for low-income, Black, and Latinx students are analyzed. Finally, this Note ends by advocating for several policy proposals that serve not only to mitigate the adverse effects of the

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pandemic and future disasters, but also work to close the opportunity and achievement gaps once and for all.

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I. INTRODUCTION

“The coronavirus is not the only disease to be fought, but rather, the pandemic has shed light on broader social ills.”

—Pope Francis¹

COVID-19 radically changed the way society operated. From the expansion of work-from-home models² to increased government intervention in the economic sphere,³ the pandemic, much like past disasters, forced institutions and individuals to dramatically rethink their daily activities. Of the areas most impacted by the pandemic was PreK–12 education. Within a matter of days, teachers across the nation were called to rethink the way they

¹ Pope Francis (@Pontifex), TWITTER (Aug. 12, 2020, 7:30 AM), <https://twitter.com/Pontifex/status/1293510040096309249>, archived at <https://perma.cc/G4KK-93YE>.

² See May Wong, *Stanford Research Provides a Snapshot of a New Working-From-Home Economy*, STANFORD NEWS (June 29, 2020), <https://news.stanford.edu/2020/06/29/snapshot-new-working-home-economy/>, archived at <https://perma.cc/V5R3-5BPK> (detailing how at one point 42 percent of the U.S. labor force was working from home full-time during the pandemic).

³ See *The CARES Act Works for All Americans*, U.S. DEPARTMENT OF TREASURY, <https://home.treasury.gov/policy-issues/cares>, archived at <https://perma.cc/JS2H-L9EC> (last visited Jan. 3, 2021) (describing the various economic stimulus measures that took place at the onset of the pandemic).

taught their students.⁴ In-person classroom instruction and paper handouts were substituted for online lessons and virtual assignments.⁵ For students with adequate technologies at home and safe learning environments, the transition was damaging, but far from fatal to their long-term educational prospects. For those identifying as low-income, Black, and Latinx, however, evidence already suggests that the impacts may last a lifetime in part by widening both opportunity and achievement gaps.⁶

While sometimes the terms “opportunity gap” and “achievement gap” are used interchangeably, this article distinguishes and expands upon the terms according to definitions used in reports by the National Conference of State Legislatures.⁷ Put succinctly, the opportunity gap refers to the differences in students’ access to highly effective educators, exemplary curriculum and materials, and appropriate academic and social supports both in and out of the classroom.⁸ These opportunities, resources, and supports can be seen as educational inputs.⁹ Relatedly, the achievement gap refers to the differences in test scores, graduation rates, college matriculation rates, and employment and earnings outcomes.¹⁰ These differences can be seen as educational outputs, resulting from the educational inputs received.¹¹

The opportunity and achievement gaps are most prevalent when comparing low-income, Black, and Latinx students with their White and more affluent peers. For example, by 2009, it was estimated that the gap between White students and Black and Latinx students deprived the U.S. economy of \$310 billion to \$525 billion a year in productivity, or the equivalent of 2 to 4

⁴ See Anya Kamenetz, *The Biggest Distance-Learning Experiment in History: Week One*, NPR (Mar. 26, 2020, 4:17 PM), <https://www.npr.org/2020/03/26/821921575/the-biggest-distance-learning-experiment-in-history-week-one>, archived at <https://perma.cc/ET77-Q8CP>.

⁵ See *id.*

⁶ See Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime>, archived at <https://perma.cc/F7X5-2NQY>. Additionally, while the focus of this piece is the PreK–12 education of low-income, Black, and Latinx students, many other facets of the education system are consistently plagued by structural challenges and were further negatively affected by the pandemic. This includes the education of groups ranging from special education students to university students. See Sonali Kohli, *Children with Disabilities Are Regressing. How Much is Distance Learning to Blame?*, L.A. TIMES (Aug. 7, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-08-07/covid-19-distance-learning-weakens-special-education>, archived at <https://perma.cc/8JUR-QC22>; Saahil Desai, *The Real Lesson of the College Closures*, ATLANTIC (Mar. 16, 2020), <https://www.theatlantic.com/education/archive/2020/03/coronavirus-college-closure-disaster-students/608095/>, archived at <https://perma.cc/GSG3-ZNWS>.

⁷ See Matt Weyer, *Addressing Achievement Through Opportunity: Washington State’s Approach to Closing the Gap*, NCSL (2018), https://www.ncsl.org/Portals/1/Documents/educ/Achievement_Opportunity_v05.pdf, archived at <https://perma.cc/9JFF-A4UH>.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See *id.*

percent of GDP.¹² Even worse, the achievement gap between high-income and low-income students was even larger, at \$400 billion to \$670 billion, or the equivalent of 3 to 5 percent of GDP.¹³ Accordingly, both the opportunity and achievement gaps have been at the forefront of education policy debates in recent decades. The reality that these gaps are widening under the expansion of distance learning highlights the need for not only short-term solutions to mitigate these disproportionate impacts, but also for long-term structural and operational reforms to the U.S. education system.¹⁴ This Note examines the causes of these gaps and proposes solutions to eliminate them by drawing upon both the history of the right to education in the United States and lessons learned from the recent pandemic.

II. THE RIGHT TO EDUCATION AND THE FAILURES OF THE U.S. EDUCATION SYSTEM

“On education all our lives depend. And few to that, too few, with care attend.”

—Benjamin Franklin¹⁵

A. *The Evolution of the Right to Education*

The necessity of a well-educated populace has been recognized since before the founding of the United States. Yet, as Benjamin Franklin aptly noted almost three centuries ago, far too few have put in the effort to guarantee quality education for all. In fact, even though many of the other founding fathers shared similar views as Franklin,¹⁶ a formal right to education failed to explicitly make its way into the United States Constitution.¹⁷

Not until centuries later did the concept of a right to education begin to formalize as litigation centering around desegregation and Fourteenth Amendment principles shook the structure of the nation and its institutions. In 1931, in *Roberto Alvarez v. the Board of Trustees of the Lemon Grove School District*, the Mexican community of San Diego secured the first legal

¹² Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & CO. (June 1, 2009), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-cost-of-the-us-education-gap>, archived at <https://perma.cc/VE4R-LVYU>.

¹³ *Id.*

¹⁴ *See id.*

¹⁵ BENJAMIN FRANKLIN, POOR RICHARD IMPROVED (Leonard W. Labaree ed., Yale University Press 1961) (1748).

¹⁶ *See* Letter from John Adams to Abigail Adams (Oct. 29, 1775) (“Education makes a greater difference between man and man, than nature has made between man and brute. The virtues and powers to which men may be trained, by early education and constant discipline, are truly sublime and astonishing.”); Letter from George Washington to George Chapman (Dec. 15, 1784) (“The best means of forming a manly, virtuous, and happy people will be found in the right education of youth. Without this foundation, every other means, in my opinion, must fail.”).

¹⁷ U.S. CONST.

victory in the nation to desegregate schools.¹⁸ Over a decade later, in 1947, plaintiffs in yet another California desegregation case were able to achieve a similar outcome in the Ninth Circuit case, *Westminster School District of Orange County v. Mendez*.¹⁹ Several years later in 1954, the landmark case of *Brown v. Board of Education* ultimately reached the steps of the U.S. Supreme Court.²⁰ There, the Court held that “in the field of public education the doctrine of ‘separate but equal’ has no place.”²¹ Perhaps even more importantly, the Court in dictum made clear the importance of education. Specifically, the Court noted that, “[t]oday, education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”²²

With such strong language from the Supreme Court, one might expect future decisions to fervently protect the substantive right to education. But education advocates were delivered a severe blow in 1973 in *San Antonio Independent School District v. Rodriguez*.²³ In that case, appellees argued that education was a fundamental right with hopes to secure equitable funding across school districts in Texas. Though the Court still recognized the importance of education, it seemed to pivot from its earlier position and instead recognized that “education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”²⁴ Such a proclamation from the highest court in the land dealt a near fatal blow to those fighting for educational equity via litigation at the federal level. Fortunately, education enthusiasts, relentless in their efforts, pivoted their strategy and managed to find more success at the state level.

Though the Supreme Court has not construed the U.S. Constitution to protect education as a fundamental right, education is, to varying degrees, explicitly addressed by every state constitution.²⁵ Prior to 1960, only two states, Wyoming and North Carolina, embraced education as a fundamental

¹⁸ See Robert R. Alvarez, Jr., *The Lemon Grove Incident*, 132 J. SAN DIEGO HIST. (1986), <https://sandiegohistory.org/journal/1986/april/lemongrove/>, archived at <https://perma.cc/UQS3-RFG4>.

¹⁹ *Westminster Sch. Dist. of Orange Cty. v. Mendez*, 161 F.2d 774, 774 (9th Cir. 1947); see also Dave Roos, *The Mendez Family Fought School Segregation 8 Years Before Brown v. Board of Ed*, HISTORY (Sept. 18, 2019), <https://www.history.com/news/mendez-school-segregation-mexican-american>, archived at <https://perma.cc/B95J-63ZH>.

²⁰ *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

²¹ *Id.* at 495.

²² *Id.* at 493.

²³ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁴ *Id.* at 35.

²⁵ Molly Hunter, *Education Justice: State Constitution Education Clause Language*, ED LAW CENTER (2011), <https://edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf>, archived at <https://perma.cc/93F2-3CCB>.

right of their own accord.²⁶ It was largely due to litigation efforts that states began to recognize education as a fundamental right. In 1976, California became the first state to have its highest court make such a recognition in *Serrano v. Priest*.²⁷ Several other states would follow over the course of the next decade.²⁸ However, the next true landmark case was *Rose v. Council for Better Education, Inc.* in which the Supreme Court of Kentucky reiterated the commitment to education as a fundamental right found in Kentucky's state constitution and accompanying statutes.²⁹ Specifically, the court held that:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.³⁰

Rose proved to be highly influential in not only Kentucky but also several other states as its seven capacities of an efficient system of education were subsequently adopted by courts in Alabama, Arkansas, Kansas, Massachusetts, New Hampshire, North Carolina, South Carolina, and Texas.³¹ While other states would use different definitions, by the turn of the century, twelve more states had defined education as a fundamental right.³² Altogether, there are now twenty-two states recognizing education as a funda-

²⁶ Trish Brennan-Gac, *Educational Rights in the States*, 40 HUM. RTS. MAG. (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/, archived at <https://perma.cc/H386-NM98>.

²⁷ *Serrano v. Priest*, 18 Cal. 3d 728, 776 (1976).

²⁸ Brennan-Gac, *supra* note 26.

²⁹ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 201 (Ky. 1989).

³⁰ *Id.* at 212.

³¹ Brennan-Gac, *supra* note 26.

³² *Id.*

mental right, with the remaining states retaining some degree of commitment to education.³³

Although state litigation efforts have proven successful in elevating the status of education to the level of a fundamental right, litigation efforts have fallen short in ensuring the delivery of quality education. In California, for example, the state Supreme Court refused to review *Campaign for Quality Education v. California*, which sought to further define the meaning of the fundamental right to education.³⁴ The Court's decision to deny review means that a lower court's holding is still good law and that in California there is no state constitutional guarantee of any level of educational quality or minimum funding to support education.³⁵

California is not the only state that has deemed education a fundamental right yet has failed to set minimum standards for what that right requires. New York is another example. After a decade's worth of litigation, education advocates secured a victory in 2003 when the New York Court of Appeals in *Campaign for Fiscal Equity, Inc. v. State of New York* found the state's system for financing public education unconstitutional.³⁶ However, despite the fact that the court explicitly gave the state roughly a year to implement measures to ensure equitable funding, it took closer to four years to develop and implement a new funding formula.³⁷ Even then, promised increases to the education budget lasted only two years.³⁸

Though some believe that the combined failures of federal and state efforts indicate that litigation is not a viable path forward for education reformers, these failures should be considered in light of the broader arc of change that litigation has brought forward. For example, despite also witnessing lengthy litigation, education advocates in Texas were nonetheless successful in obtaining court decisions that lowered funding disparities.³⁹ Similarly, litigators in Ohio were able to persuade the state supreme court to issue a series of decisions, which ultimately prompted the Ohio General As-

³³ *Id.*

³⁴ *Campaign for Quality Education v. State of California*, 246 Cal. App. 4th 896 (2016); *Campaign for Quality Education v. California: Update on CQE v. California*, PUB. ADVOC. (2016), <https://www.publicadvocates.org/our-work/education/access-quality-education/campaign-quality-education-v-california/>, archived at <https://perma.cc/TZL5-P6TP>.

³⁵ *Id.*

³⁶ *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 930 (2003).

³⁷ Michael Rebell, *A History and Analysis of New York State's Failure to Meet Constitutional Requirements for Providing All Students the Opportunity for a Sound Basic Education: Part I of the Testimony Presented to the New York State Senate Standing Committees on Education and Budget and Revenues*, CTR. FOR EDUC. EQUITY CHRS. C. COLUM. U. (2019).

³⁸ *Id.* This delay was because in 2008 the Great Recession led the state to first freeze any further increases and then substantially cut school aid to levels almost below those in 2006. Thus, despite the court's mandate that funding meet constitutional standards for a "sound basic education," political and economic forces ultimately prevented the children of New York from receiving educational justice.

³⁹ *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); see also JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 31 (2018).

sembly to inject billions of dollars into the education system.⁴⁰ Furthermore, much of the litigation that arose during the COVID-19 pandemic built off of this rich history.⁴¹ The ability of litigation, moreover, to highlight the need for policy reforms has been extremely valuable. Some would argue that it is due to litigation efforts that the opportunity and achievement gaps were first recognized.

B. Failed Attempts to Close the Opportunity and Achievement Gaps

As noted above, some of the earliest litigation efforts emerged as communities of color fought to desegregate schools and attain greater educational resources.⁴² In fact, as some have argued retrospectively, desegregation was pursued in *Brown v. Board of Education* as the means to ensure educational equity.⁴³ *Brown* ultimately did provide the legal basis for the slow process of nationwide school desegregation.⁴⁴ Yet, as evidenced by both the federal and state history of the right to education, constitutional provisions and litigation efforts can only go so far without the support of concrete policies. Though efforts in the policy arena have been far from scarce, both federal and state policies have been far from perfect in providing all children access to a sound education.

One of the first major pieces of national legislation was the Elementary and Secondary Education Act (ESEA), passed in 1965 in the wake of *Brown*.⁴⁵ The ESEA intended to provide aid to impoverished schools and alleviate the opportunity and achievement gaps.⁴⁶ Similarly, that same year,

⁴⁰ DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000); see also JEFFREY SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 32 (2018).

⁴¹ See, e.g., Nina Agrawal, *California Is Failing to Provide Free and Equal Education to All During Pandemic, Suit Alleges*, L.A. TIMES (Dec. 1, 2020, 4:32 PM), <https://www.latimes.com/california/story/2020-12-01/parents-community-groups-sue-state-education-officials-over-inadequate-distance-learning>, archived at <https://perma.cc/6CA2-Y378> (describing how, “[t]he state of California has failed during the COVID-19 pandemic to provide a free and equal education to all students, violating the state Constitution and discriminating against Black, Latino and low-income families, according to a lawsuit filed Monday. These children have been left behind during months of distance learning, lacking access to digital tools as well as badly needed academic and social-emotional supports, according to the lawsuit filed by the Public Counsel on behalf of California students, parents and several community organizations.”).

⁴² *Supra* Section I.A.

⁴³ *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954); see MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 10 (2010) (“Looking back on the strategy, lawyer (later judge) Robert Carter has recalled: ‘We believed the surest way for minority children to obtain their constitutional right to equal educational opportunity was to require removal of all racial barriers in the public school system, with black and white children attending the same schools. . . . Integration was viewed as the means to our ultimate objective, not the objective itself.’”).

⁴⁴ *Brown*, 347 U.S. at 347.

⁴⁵ *Id.*; Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (1965).

⁴⁶ See Heather Hill, *50 Years Ago, One Report Introduced Americans to the Black-White Achievement Gap. Here’s What We’ve Learned Since*, CHALKBEAT (July 13, 2016, 3:40 PM), <https://www.chalkbeat.org/2016/7/13/21103280/50-years-ago-one-report-introduced-ameri->

Head Start was launched to address early childhood development and help break the cycle of poverty by providing preschool children of low-income families with educational opportunities otherwise unavailable to them.⁴⁷ Only a year later, in 1966, the necessity of public policy to address the disparities in education was solidified in the groundbreaking *Equality of Educational Opportunity Study*.⁴⁸ The report analyzed data from 4,000 schools, 66,000 teachers, and almost 600,000 first, third, sixth, ninth and twelfth graders.⁴⁹ It ultimately came to two overarching conclusions: 1) There was an achievement gap between America's Black and White students; and 2) the achievement gap, while caused by the opportunity gap, was more likely related to the social composition of the school, a student's sense of control over his or her environment and future, the verbal skills of teachers, and a student's family background than differences in the schools that students attended.⁵⁰ Related to this last conclusion, Black children who attended integrated schools were found to have had higher test scores if a majority of their classmates were White.⁵¹ This finding led to the era of mass busing with the goal of achieving racially balanced schools.⁵² Though busing ultimately had mixed results due to a number of White families fleeing to suburban schools in what was later dubbed "white flight," it still served as one of the first major actions taken to address the now explicit opportunity and achievement gaps.⁵³

Just years after the initiation of the ESEA, the federal government also took actions to address the challenges faced by English learners in particular. For example, the Bilingual Education Act (BEA) was passed and implemented as Title VII of the ESEA of 1968.⁵⁴ While California and Texas had already passed state legislation to assist their Spanish-speaking populations,

cans-to-the-black-white-achievement-gap-here-s-what-we-ve-le, archived at <https://perma.cc/K28D-GWSQ>.

⁴⁷ *About Us: Mission, Victory, History*, NAT'L HEAD START ASS'N, <https://www.nhsa.org/about-us/mission-vision-history>, archived at <https://perma.cc/25NE-MPT5>.

⁴⁸ JAMES S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY STUDY* (1966), <https://files.eric.ed.gov/fulltext/ED012275.pdf>, archived at <https://perma.cc/9VQM-5WZ8>; see also Hill, *supra* note 46.

⁴⁹ COLEMAN, *supra* note 48.

⁵⁰ COLEMAN, *supra* note 48, at 22–23 ("It appears that variations in the facilities and curriculums of the schools account for relatively little variation in pupil achievement insofar as this is measured by standard tests. . . For example, a pupil attitude factor, which appears to have a stronger relationship to achievement than do all the "school" factors together, is the extent to which an individual feels that he has some control over his own destiny."); see also Hill, *supra* note 46; Barbara J. Kiviat, *The Social Side of Schooling*, *JOHNS HOPKINS MAG.* (Apr.2000), <https://pages.jh.edu/jhumag/0400web/18.html#:~:text=coleman%20reached%20in%20the%201966,racial%20balance%20in%20public%20schools.&text=%22It%20was%20very%20hectic%2C%22,graduate%20student%20working%20with%20Coleman>, archived at <https://perma.cc/3AWZ-THUK>.

⁵¹ COLEMAN, *supra* note 48, at 22 ("[I]t turns out that the composition of the student bodies has a strong relationship to the achievement of Negro and other minority pupils."); see also Kiviat, *supra* note 50.

⁵² See Kiviat, *supra* note 50.

⁵³ See *id.*

⁵⁴ See Bilingual Education Act, K12 ACADS., <https://www.k12academics.com/Federal%20Education%20Legislation/bilingual-education-act>, archived at <https://perma.cc/7SVC-2PJK>.

the BEA recognized the needs of Limited English Speaking Ability (LESA) students at the federal level for the first time.⁵⁵ The BEA provided federal funding to assist these students via a competitive grant process.⁵⁶ Yet, as first implemented, the BEA did not have a mandatory participation requirement.⁵⁷ In fact, even after the BEA was initially passed, some school districts actively discriminated against Latinx students and English learners more broadly.⁵⁸ This discrimination prompted some students and teachers to protest for improved schooling conditions and bilingual education programs.⁵⁹

Both the judiciary and policymakers responded. In 1974, the Supreme Court, in *Lau v. Nichols*, recognized that 1,800 Chinese students were being denied an equal education despite receiving the same facilities, textbooks, teachers, and curricula because these resources did not meet their needs as English learners.⁶⁰ That same year, the Equal Education Opportunities Act (EEOA) was passed.⁶¹ It barred states from discriminating against students based on gender, race, color, or nationality and required public schools to provide for students who do not speak English.⁶² While symbolic in its passage alone, the Act also created an explicit statutory cause of action for minority students facing discrimination.

In the decades that followed, the BEA underwent numerous revisions.⁶³ And with each proposed revision came fierce debate between those supporting assimilation and those supporting cultural pluralism.⁶⁴ Furthermore, many of the congressional studies commissioned to determine the effectiveness of the BEA produced inconclusive or contradictory results.⁶⁵ This may be in part due to the fact that the states themselves have had a complicated history with bilingual education and the provision of services to immi-

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See Gloria Stewner-Manzanas, *The Bilingual Education Act: Twenty Years Later*, NEW FOCUS (1988), https://ncela.ed.gov/files/rcd/BE021037/Fall88_6.pdf, archived at <https://perma.cc/S7P4-G6WC>.

⁵⁸ See *id.*; see generally, MARIO T. GARCÍA & SAL CASTRO, BLOWOUT!: SAL CASTRO AND THE CHICANO STRUGGLE FOR EDUCATIONAL JUSTICE (2011) (describing discrimination and poor schooling conditions for Latinx students within the Los Angeles Unified School District).

⁵⁹ See generally GARCÍA & CASTRO, *supra* note 58; see also Christopher Cruz, *Latinas Leading the Way*, HARV. POL. REV. (May 16, 2015), <https://harvardpolitics.com/online/latinas-leading-way/>, archived at <https://perma.cc/DV37-M2HU> (“On March 8, 1968, educational reformer Sal Castro led thousands of Latino and Latina students belonging to a handful of East Los Angeles public schools to walk out of class in protest of the unfair conditions hindering them from reaching their goals of attending college. These students demanded a restructuring of the public education system so that they could take college preparatory classes. Following these walkouts, reforms were initiated to place more Latinos on the college track.”).

⁶⁰ *Lau v. Nichols*, 414 U.S. 563 (1974).

⁶¹ See GARCÍA & CASTRO, *supra* note 58.

⁶² See *This Day in History: August 21, 1974: The Equal Educational Opportunities Act is signed into law*, HISTORY (Aug. 28, 2020), <https://www.history.com/this-day-in-history/equal-educational-opportunities-act-1974-signed-into-law-nixon>, archived at <https://perma.cc/VVU7-BZ2M>.

⁶³ See Michael W. Punches, *The Shaping of a Social Policy: The Bilingual Education Act, 1968-1984*, 20 J. THOUGHT 62 (1982).

⁶⁴ See *id.* at 62.

⁶⁵ See *id.* at 67.

grants.⁶⁶ Even California, one of the first states to develop bilingual education programming, briefly took a sharp turn in the 1990s when voters first passed a proposition that denied benefits, including public education, to undocumented students in California and then later, after the first proposition was found unconstitutional, passed a subsequent proposition limiting bilingual education.⁶⁷ In any case, the BEA, through a good faith attempt to address inequities in education, like busing, ultimately failed to fully uplift minority students.

The next major piece of federal legislation to transform the K–12 education system was not enacted until after the turn of the century. The No Child Left Behind (NCLB) Act of 2001 was intended to hold schools and school districts accountable for their students' performance.⁶⁸ It attempted to promote student achievement through the use of high-stakes testing.⁶⁹ But in practice, the Act, by measuring student achievement against set standards rather than individual growth, led to the punishment of many schools and their students.⁷⁰ Schools that failed to meet targets were forced to choose from a list of "corrective actions," including changing curriculum or lengthening the school day.⁷¹ In theory, such corrective actions should have proven useful to students at struggling schools. In reality though, sanctioned schools struggled to implement reforms, and each year of inadequate progress only gave rise to further corrective action.⁷² Thus, the benefits of NCLB have been questioned by critics across both sides of the aisle. With regards to Latinx and Black students in particular, retrospective analyses have shown that while elementary, middle, and high school students all scored much higher on federal tests than they did in previous decades, most of those gains were not made after the passage of NCLB, but rather during the desegregation efforts of the 1970s and 1980s.⁷³ Despite NCLB, the achievement gap persisted, and so did its effects. As previously mentioned, by 2009, it was estimated that the gap between White students and Black and Latinx stu-

⁶⁶ See Press Release, ACLU, CA's Anti-Immigrant Proposition 187 is Voided Ending State's Five-Year Battle with ACLU, Rights Groups (July 29, 1999), <https://www.aclu.org/press-releases/cas-anti-immigrant-proposition-187-voided-ending-states-five-year-battle-aclu-rights>, archived at <https://perma.cc/98BJ-HA62>; Lillian Mongeau, *Battle of Bilingual Education Once Again Brewing in California*, PUB. BROADCASTING STATION (Apr. 18, 2016, 5:08 PM), <https://www.pbs.org/newshour/education/battle-of-bilingual-education-once-again-brewing-in-california>, archived at <https://perma.cc/C8UB-MEJE>.

⁶⁷ See ACLU, *supra* note 66 (explaining how Proposition 187 was found unconstitutional five years after voters passed the proposition); Mongeau, *supra* note 66.

⁶⁸ See Sharon L. Nichol et al., *High-Stakes Testing and Student Achievement: Problems for the No Child Left Behind Act*, EDUC. POL'Y STUD. LAB'Y AT ARIZ. ST. U. (2005), <https://files.eric.ed.gov/fulltext/ED531184.pdf>, archived at <https://perma.cc/9W27-2MX7>.

⁶⁹ See *id.*

⁷⁰ See *id.*; Cory Turner, *No Child Left Behind: What Worked, What Didn't*, NPR (Oct. 27, 2015, 4:29 AM), <https://www.npr.org/sections/ed/2015/10/27/443110755/no-child-left-behind-what-worked-what-didnt>, archived at <https://perma.cc/RKW2-UBNV>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Sam Dillon, *'No Child' Law Is Not Closing a Racial Gap*, N.Y. TIMES (Apr. 28, 2009), <https://www.nytimes.com/2009/04/29/education/29scores.html>, archived at <https://perma.cc/8GZC-JVFE>.

dents deprived the U.S. economy of \$310 billion to \$525 billion a year in productivity, or the equivalent of 2 to 4 percent of GDP.⁷⁴ Furthermore, the achievement gap between high-income and low-income students was even larger, at \$400 billion to \$670 billion, or the equivalent of 3 to 5 percent of GDP.⁷⁵

Also in 2009, the U.S. Department of Education launched its competitive grant program, Race to the Top.⁷⁶ The program required states that applied for a grant to pledge to accelerate student performance while adopting more rigorous academic standards and to rate teachers and principals in part on students' performance.⁷⁷ Ultimately, the program proved influential, with the states that won grants implementing more of the Department's desired policies than those that did not receive a grant.⁷⁸ Five years later, in 2014, the federal government continued its practice of incentivizing improvements through grants by issuing Preschool Development Grants.⁷⁹ These grants allocated more than \$200 million across 18 states and expanded access to high-quality preschool to 33,000 children.⁸⁰ Additionally, the following year, the federal government passed the Every Student Succeeds Act (ESSA), which replaced NCLB and allowed each state to develop its own methods for judging school quality and addressing low performing schools.⁸¹

Since the passage of ESSA, the federal government in recent years has worked to influence other areas of education policy, such as the debate on school choice.⁸² Nonetheless, the struggle to provide equitable educational opportunities for low-income, Black and Latinx students continues today largely at the state level with policy and litigation efforts still varying widely across the nation. For example, while the Biden administration hopes to eventually provide universal pre-kindergarten to all three- and four-year-

⁷⁴ Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & Co. (June 1, 2009), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-economic-cost-of-the-us-education-gap>, archived at <https://perma.cc/VE4R-LVYU>.

⁷⁵ *Id.*

⁷⁶ *Race to the Top (RTT): Reforming Education in Key American States*, CTR. FOR PUB. IMPACT (Apr. 15, 2016), [https://www.centreforpublicimpact.org/case-study/race-to-the-top-education-competitive-grant-in-the-us/#:~:text=race%20to%20the%20top%20\(RTT\)%3A%20reforming%20education%20in%20key%20American%20states,-Written%20by%20CPI&text=president%20Obama%20took%20office%20in,competitive%20grants%20to%20selected%20states](https://www.centreforpublicimpact.org/case-study/race-to-the-top-education-competitive-grant-in-the-us/#:~:text=race%20to%20the%20top%20(RTT)%3A%20reforming%20education%20in%20key%20American%20states,-Written%20by%20CPI&text=president%20Obama%20took%20office%20in,competitive%20grants%20to%20selected%20states), archived at <https://perma.cc/FYR9-Q922>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See Claudio Sanchez & Cory Turner, *Obama's Impact on America's Schools*, NPR (Jan. 13, 2017, 6:38 AM), <https://www.npr.org/sections/ed/2017/01/13/500421608/obamas-impact-on-america-schools>, archived at <https://perma.cc/E79R-NC2H>.

⁸⁰ *Id.*

⁸¹ Lyndsey Layton, *Obama Signs New K-12 Education Law That Ends No Child Left Behind*, WASH. POST (Dec. 10, 2015), https://www.washingtonpost.com/local/education/obama-signs-new-k-12-education-law-that-ends-no-child-left-behind/2015/12/10/c9e58d7c-9f51-11e5-a3c5-c77f2cc5a43c_story.html, archived at <https://perma.cc/JX4T-ERWW>.

⁸² Valerie Strauss, *What 'School Choice' Means in the Era of Trump and DeVos*, WASH. POST (May 22, 2017, 1:21 P.M.), <https://www.washingtonpost.com/news/answer-sheet/wp/2017/05/22/what-school-choice-means-in-the-era-of-trump-and-devos/>, archived at <https://perma.cc/P9TV-JUCN>.

olds,⁸³ some states currently offer only limited state-backed Pre–K education opportunities while others already offer essentially universal access.⁸⁴ Similarly, base funding per K–12 student can vary by several thousand dollars between states.⁸⁵ Thus, the next chapter in the pursuit for educational equity will require new federal initiatives, as well as, and perhaps most importantly, greater state and local government action.

III. DISCONNECTED AND SILENCED: HOW COVID-19 HAS WIDENED THE OPPORTUNITY AND ACHIEVEMENT GAPS

“A couple of hours a week of online school is not OK, and a choice of two days per week in the classroom is not a choice at all.”

—Former U.S. Secretary of Education Betsy DeVos⁸⁶

“If you’re a parent struggling with your child’s remote learning, or you’re a teacher struggling on the other side of that screen, you know that what we’re doing right now isn’t working.”

—Vice President Kamala Harris⁸⁷

A. *The Effects of School Closures and the Digital Divide*

The COVID-19 pandemic drastically changed teaching methods across the nation, further exacerbating the opportunity and achievement gaps that federal and state actions failed to close. Within just days, nearly every teacher, from the newest to the most tenured, was asked to take their classroom online.⁸⁸ While few public leaders shared then-Secretary of Education DeVos’s view that schools needed to quickly reopen, DeVos’s concerns regarding the quality of remote PreK–12 education were more widely held.⁸⁹

⁸³ Joe Biden’s *Preschool and K–12 Education Plan*, COMMITTEE FOR RESPONSIBLE FED. BUDGET (Jan. 14, 2020), <http://www.crfb.org/blogs/joe-bidens-preschool-and-k-12-education-plan>, archived at <https://perma.cc/ED6N-CV9C>

⁸⁴ Claudio Sanchez & Elissa Nadworny, *Preschool, A State-By-State Update*, NPR (May 24, 2017, 5:03 AM), <https://www.npr.org/sections/ed/2017/05/24/529558627/preschool-a-state-by-state-update>, archived at <https://perma.cc/YM59-ZAUD>.

⁸⁵ *50 State Comparison: K–12 Funding: Base Amount*, EDUC. COMM’N OF THE STATES (Aug. 2019), <https://c0arw235.caspio.com/dp/b7f93000211b30444e204b969ad9>, archived at <https://perma.cc/6AUG-95C9>.

⁸⁶ Peter Baker & Erica L. Green, *Trump Leans on Schools to Reopen as Virus Continues Its Spread*, N.Y. TIMES (July 29, 2020) (containing comments from then U.S. Secretary of Education Betsy DeVos during a call to governors regarding the reopening of schools during the coronavirus pandemic), <https://www.nytimes.com/2020/07/07/us/politics/trump-schools-coronavirus.html>, archived at <https://perma.cc/K3B7-9TXK>.

⁸⁷ Matt Stevens, *Kamala Harris Accepts Vice-Presidential Nomination: Full Transcript*, N.Y. TIMES (Aug. 20, 2020) (containing comments from then Senator and Vice-Presidential Candidate Kamala Harris during her vice presidential nomination acceptance speech at the Democratic National Convention.), <https://www.nytimes.com/2020/08/19/us/politics/kamala-harris-dnc-speech.html>, archived at <https://perma.cc/HQ24-EBQC>.

⁸⁸ See Kamenetz, *supra* note 4.

⁸⁹ See Baker & Green, *supra* note 86; Stevens, *supra* note 87.

Even early on in the pandemic, a majority of parents, though appreciative of teachers' efforts, worried that their children were not learning what they should be while distance learning.⁹⁰ In some cases, concerns were more prevalent among low-income and minority families. For example, in New York alone, by the summer of 2020, low-income families were less likely to describe distance learning as successful (36 percent) than higher-income families (48 percent).⁹¹ Additionally, from March to June 2020, satisfaction with distance learning dropped by 16 percentage points among Black families in New York.⁹² Importantly, these statistics related to those families able to engage in distance learning. According to one analysis, only 27 percent of students in rural districts across the nation required any instruction at all, meaning that some students may not have received any form of education at all during the early stages of the pandemic.⁹³ Some school districts seemed to acknowledge the difficulties present with instruction and learning during the pandemic and instituted "no fail" policies so that no student received a failing grade while distance learning.⁹⁴ While such policies were perhaps necessary, they also acted as a harbinger of the expected long-term effects of the pandemic on educational outcomes.

Though the full effects of the pandemic may not be ascertained for years to come, existing analyses show the effects of distance learning in general. Natural disasters have long had negative effects on student outcomes.⁹⁵ From wildfires to hurricanes, natural disasters take millions of students out of classrooms every year.⁹⁶ This is troubling because long-term or frequent absences have been found to increase the likelihood of students falling behind and, eventually, dropping out.⁹⁷ In one study, for example, more than one third of secondary school students dropped out after a year of

⁹⁰ See *The Pearson and Connections Academy Parent Pulse Report*, PEARSON & CONNECTIONS ACAD. (May 2020), https://www.pearson.com/content/dam/global-store/global/resources/Pearson_Parent_Pulse_Survey.pdf, archived at <https://perma.cc/BP5M-R79A>.

⁹¹ Press Release, The Education Trust—New York, Poll: Satisfaction With Distance Learning Drops, As Pandemic Widens Equity Gaps for Low-Income Students and Students of Color (June 29, 2020), <https://newyork.edtrust.org/press-release/poll-satisfaction-with-distance-learning-drops-as-pandemic-widens-equity-gaps-for-low-income-students-and-students-of-color/>, archived at <https://perma.cc/RG7Q-CNX6>.

⁹² *Id.*

⁹³ Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html>, archived at <https://perma.cc/HSV6-PFWW>.

⁹⁴ See, e.g., Howard Blume, *L.A. Unified Will Not Give Fs This Semester and Instead Give Students a Second Chance to Pass*, L.A. TIMES (Dec. 14, 2020, 7:55 PM), <https://www.latimes.com/california/story/2020-12-14/lausd-extend-no-fail-policy-january-covid-19>, archived at <https://perma.cc/DQ55-8MBR>.

⁹⁵ See Haley Samsel & Elissa Nadworny, *Natural Disasters And The Implications Of Missing So Much School*, NPR (Dec. 15, 2017, 5:49 AM), <https://www.npr.org/sections/ed/2017/12/15/564058043/natural-disasters-and-the-implications-of-missing-so-much-school>, archived at <https://perma.cc/9JWP-YAZX>.

⁹⁶ See *id.*

⁹⁷ See *id.*

chronic absences.⁹⁸ For students with more than one year of chronic absences, more than half dropped out.⁹⁹ The data behind online learning is also not promising. Historically, numerous studies have shown that students tend to learn less efficiently than usual in online courses.¹⁰⁰ Furthermore, online learning has been shown to maintain the achievement gap for low-income students. One study of 120,000 Michigan students taking online courses showed that only 50 percent of students living below the state's poverty line passed, as compared to 70 percent for those living above it.¹⁰¹ Early estimates also suggest that the pandemic will disproportionately affect the long-term trajectory of low-income, Black, and Latinx students. According to one model, the pandemic may exacerbate existing achievement gaps by 15 to 20 percent and result in even greater lifetime income losses for these students as compared to their White peers.¹⁰² Altogether, by 2040, this would translate into a GDP loss of \$173 billion to \$271 billion a year or a 0.8 to 1.3 percent hit to the economy.¹⁰³ Furthermore, the correlation between educational attainment and improved health, reduced crime and incarceration levels, and increased political participation suggests that the overall effects of the pandemic will broadly affect society beyond simply economic output.¹⁰⁴

In order to avoid these extreme predictions and best prepare the nation for the next disruption to traditional in-person instruction, policymakers must analyze expanding opportunity and achievement gaps at their causal roots. Perhaps the most apparent among these causes is what some have dubbed the “homework gap” (i.e. that households have varying levels of access to digital resources). The homework gap leaves many low-income, Black, and Latinx students disconnected from their everyday educational pursuits and silences their voices in virtual classrooms.¹⁰⁵ Approximately 15 to 16 million K–12 public school students, or 30 percent of all K–12 public school students, live in households that either do not have an internet connection or a device adequate for distance learning at home.¹⁰⁶ Yet there are stark differences among households of varying demographics. While 79 per-

⁹⁸ *Attendance Matters: How Expanded Learning Opportunities Keep Kids in School*, ATTENDANCE WORKS (Oct. 25, 2016), <https://www.attendanceworks.org/wp-content/uploads/2017/08/NSLA-slides-for-10-25-2016-Revised.pdf>, archived at <https://perma.cc/KTE9-UTSK>.

⁹⁹ *Id.*

¹⁰⁰ 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.html>, archived at <https://perma.cc/T735-FG9H>.

¹⁰¹ *Id.*

¹⁰² See Dorn et al., *supra* note 6.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ See Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital 'Homework Gap'*, PEW RSCH. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/>, archived at <https://perma.cc/4EDY-Y7P6>.

¹⁰⁶ *K–12 Student Digital Divide Much Larger Than Previously Estimated and Affects Teachers, Too, New Analysis Shows*, COMMON SENSE MEDIA (June 29, 2020), <https://www.common SenseMedia.org/about-us/news/press-releases/k-12-student-digital-divide-much-larger-than-previously-estimated-and>, archived at <https://perma.cc/2GKH-LAY9>.

cent of White adults have access to broadband at home, only 66 percent of Black adults and 63 percent of Latinx adults have home broadband.¹⁰⁷ The divide is even worse when comparing low-income and wealthy individuals; only 56 percent of low-income adults have home broadband whereas 92 percent of wealthy adults do.¹⁰⁸ Furthermore, home broadband access isn't the only digital resource sparse for marginalized groups. Among Latinx families now distance learning, 32 percent don't have enough computers for their children to use, and 35 percent have faced technical problems connecting.¹⁰⁹ In a similar vein, 17.2 percent of Black households do not own a single computer. In other words, of the over 7.2 million children in the U.S. living in households without a computer, over 1.84 million of these are Black children.¹¹⁰ These statistics illustrate the harsh reality that even during normal times, many low-income, Black, and Latinx students must either rely on public Wi-Fi or cell phone service to complete their homework or forgo their homework altogether.¹¹¹ Therefore, what was once an obstacle to homework completion for these students has now become a much larger learning and achievement barrier.¹¹²

¹⁰⁷ Internet/Broadband Fact Sheet, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>, archived at <https://perma.cc/H9GU-QKZG>; Matt Barreto & Gary Segura, *Executive Summary Memo: Latino Reactions and Impact of COVID19*, LATINO DECISIONS (2020), <https://latinodecisions.com/wp-content/uploads/2020/04/SOMOS-COVID19-Svy-Exec-Summary.pdf>, archived at <https://perma.cc/2KRH-CUTB>.

¹⁰⁸ PEW RSCH. CTR., *supra* note 107.

¹⁰⁹ Barreto & Segura, *supra* note 107.

¹¹⁰ *Expand Internet Access Among Black Households*, JOINT CTR. FOR POL. & ECON. STUD. (Aug. 4, 2020), https://jointcenter.org/expand-internet-access-among-black-households/#_edn1, archived at <https://perma.cc/FU97-6P8N>.

¹¹¹ See Auxier & Anderson, *supra* note 105 (explaining that 2018 survey data indicates that 35 percent of White teens, 30 percent of Black teens, 39 percent of Hispanic teens, and 45 percent of low-income teens rely on cell phone service to complete their homework); Stephanie Sun, *Taking an AP Test Outside McD's: The Low-Income Student's Predicament*, N.Y. DAILY NEWS (May 18, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-taking-an-ap-test-outside-mcds-20200518-pbzbctec4rgnvkhlwrzfsd3poe-story.html>, archived at <https://perma.cc/NBW5-WF6Y>.

¹¹² See Sun, *supra* note 111 (explaining how the College Board suggested to one teacher that she recommend to her student using McDonald's public Wi-Fi to take an AP test during the pandemic); Mar González & Fabiola Berriozábal, *High School Student Who Walked 6 Miles to School Now Doesn't Have Internet Access for School*, NBC L.A. (Sept. 2, 2020, 5:14 PM), <https://www.nbclosangeles.com/news/national-international/high-school-student-who-walked-6-miles-to-school-now-doesnt-have-internet-for-school/2422749/>, archived at <https://perma.cc/8NK7-K569> (describing how one student who previously walked 6 miles to school became reliant on an unreliable hotspot during the transition to distance learning); Alisha Ebrahimji, *School Sends California Family a Hotspot After Students Went to Taco Bell to Use Their Free WiFi*, CNN (Aug. 31, 2020, 10:28 PM), <https://www.cnn.com/2020/08/31/us/taco-bell-california-students-wifi-trnd/index.html>, archived at <https://perma.cc/5JXY-AC7C> (describing how two students went to their local Taco Bell for Wi-Fi access until their school sent them a hotspot).

B. Beyond the Digital Divide: Economic and Environmental Considerations

While access to digital resources is a major factor influencing the widening opportunity and achievement gaps, the harsh reality of the *Coleman Report* still rings true today: Economic and environmental considerations also need to be tackled in order to holistically address the challenges faced by low-income, Black, and Latinx students.¹¹³ Simply put, when the families of these students face struggles like food, job, health, and housing insecurity, student performance often suffers, too.¹¹⁴

Crises, like the recent pandemic, disproportionately affect low-income households and people of color.¹¹⁵ For example, people of color were more likely to both contract the coronavirus and die from it.¹¹⁶ By the end of May 2020, the rate of coronavirus cases was roughly three times as high for the Latinx and Black communities as compared to their White counterparts.¹¹⁷ Furthermore, minorities faced higher rates of death from COVID-19 and also experienced a higher percentage of young and middle-aged adults dying from the virus relative to White individuals. Examining statistics from early on in the pandemic shows that more than a quarter of Latinx people who died were younger than 60, yet only six percent of White people who died were in this age group.¹¹⁸ The higher rate of cases and deaths among people of color likely stemmed from the fact that a higher percentage of those individuals were essential workers and had pre-existing health conditions.¹¹⁹ Even before the pandemic struck, people of color have been overrepresented in many frontline occupations.¹²⁰ Latinx individuals, for example, are especially overrepresented in building cleaning services, composing 40.2 percent of those workers, while Black individuals are most overrepresented in child care and social services, making up 19.3 percent of those workers.¹²¹ Thus,

¹¹³ See COLEMAN, *supra* note 48; Hill, *supra* note 46.

¹¹⁴ See, e.g., Christopher Cruz, *Food for Thought*, 42 HARV. POL. REV. 21 (2015); Julian Barling et al., *Parents' Job Insecurity Affects Children's Academic Performance through Cognitive Difficulties*, 84 J. APPLIED PSYCHOL. 437 (1999).

¹¹⁵ See Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>, archived at <https://perma.cc/UML3-XGVX>; Kim Mills & Brian Smedley, *Speaking of Psychology: Why is COVID-19 Disproportionately Affecting Black and Latino Americans with Brian Smedley, PhD*, AM. PSYCHOL. ASS'N (Apr. 2020), <https://www.apa.org/research/action/speaking-of-psychology/african-americans-latinos-covid-19>, archived at <https://perma.cc/PE3D-GKWG>; Danielle Kurtzleben, *Job Losses Higher Among People Of Color During Coronavirus Pandemic*, NPR (Apr. 22, 2020, 10:18 AM), <https://www.npr.org/2020/04/22/840276956/minorities-often-work-these-jobs-they-were-among-first-to-go-in-coronavirus-layo>, archived at <https://perma.cc/A7SQ-2BJS>.

¹¹⁶ Oppel Jr. et al., *supra* note 115.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4.

¹²⁰ Hye Jin Rho et al., *A Basic Demographic Profile of Workers in Frontline Industries*, CTR. FOR ECON. POL'Y. & RSCH. (Apr. 2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>, archived at <https://perma.cc/VCK8-JTAT>.

¹²¹ *Id.*

many low-income, Black, and Latinx parents were forced to not only leave their children alone during the school day, but also to subject themselves to a higher level of risk than their counterparts who had the luxury of working from home. Turning to the latter factor of pre-existing health conditions, a growing body of evidence suggests that health inequities are—and have been—a product of structural racism within the nation’s health systems and society more broadly.¹²² Thus, what long plagued communities of color prior to the pandemic had even more devastating impacts when the pandemic hit. For some students, this meant that despite conditions at home being difficult, they and their families preferred distance learning over the rushed reopening of schools.¹²³

With regards to employment, the first few months of the pandemic alone showed that people of color faced higher rates of unemployment compared to their White counterparts by several percentage points.¹²⁴ Most stark among these differences were the unemployment rates for women. Black and Latinx women faced unemployment rates of 17.6 percent and 19.5 percent, respectively, as compared to White women, who faced an unemployment rate of 13.6 percent.¹²⁵ Later on in the pandemic, gaps in unemployment rates across demographic groups widened even as the national unemployment rate fell.¹²⁶ Even before the pandemic, Black and Latinx workers faced tremendous challenges to procuring employment, including disproportionate incarceration rates and outright discrimination.¹²⁷ On top of this, the fact that many of these workers lived paycheck to paycheck prior to the pandemic meant that even a temporary bout of unem-

¹²² Gilbert C. Gee & Chandra L. Ford, *Structural Racism and Health Inequities: Old Issues, New Directions*, 8 DU BOIS REV. 115 (2011), <https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/article/structural-racism-and-health-inequities/014283FE003DFD8EF47A3AD974C72690>, archived at <https://perma.cc/5ELX-DVJC>.

¹²³ See Isaac Lozano, *Remote Learning Is Hard. Losing Family Members Is Worse*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/08/13/opinion/covid-school-reopening-student.html>, archived at <https://perma.cc/XNY8-QPUZ> (“As difficult as distance learning was, returning to the classroom now—as cases in the U.S. break records and experts foresee the pandemic persisting until next year—would put my home and the homes of millions of low-income kids of color at greater risk of infection.”); PEARSON & CONNECTIONS ACAD., *supra* note 90 (indicating that at the onset of the pandemic, in April 2020, 94 percent of respondents believed that the closure of schools was the right response to COVID-19).

¹²⁴ See Patricia Cohen & Ben Casselman, *Minority Workers Who Lagged in a Boom Are Hit Hard in a Bust*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/business/economy/jobs-report-minorities.html>, archived at <https://perma.cc/L9JP-U4R6>.

¹²⁵ *Id.*

¹²⁶ Ella Koeze, *How the Economy Is Actually Doing, in 9 Charts*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/interactive/2020/12/17/business/economy/economic-indicator-charts-measures.html>, archived at <https://perma.cc/Y5S5-QH3K>.

¹²⁷ *Id.* (explaining the factors behind people of color facing lower hiring prospects as well as noting that, “As Jerome H. Powell, chair of the Federal Reserve, explained at a news conference in April, ‘Unemployment has tended to go up much faster for minorities, and for others who tend to be at the low end of the income spectrum.’ The coronavirus pandemic has only amplified the problem.”).

ployment sent some into severe financial strain.¹²⁸ This was especially true for those in the immigrant community without access to certain government aid programs; some even faced the prospect of unlawful evictions as a result.¹²⁹ Ultimately, the rise in unemployment and the slow trudge back to employment meant that many low-income students and students of color struggled not only to complete their studies at home, but also inherited stress from their parents' searches for monetary, food, and housing assistance.

Beyond stress, low-income, Black, and Latinx families endured increased food and housing insecurity during the pandemic. By December of 2020, 12.7 percent of American families were experiencing food scarcity and 9.1 percent were experiencing housing insecurity.¹³⁰ In some areas of the country, food banks had lines that stretched for a mile, meaning that parents and students lost countless hours waiting to see if they even had a chance to receive food assistance.¹³¹ In other areas of the country, such as Los Angeles, where school districts stepped up to provide free meals to members of the community, food was distributed more liberally, but on a per meal basis, meaning that some families had to constantly travel to and from food distribution sites to ensure they received food every day.¹³² Thus, no matter the mechanism of food distribution, those facing food insecurity also lost immense amounts of time that could have otherwise gone to their studies.

Even when students do have the time to study at home, home may not be the most optimal place to learn. With many low-income, Black, and Latinx students living in small, crowded living spaces, it can be difficult for students to concentrate on their studies.¹³³ Furthermore, over a quarter of Black and Latinx homes are multigenerational, suggesting that there may be

¹²⁸ See Anita Chabria, *These Essential Workers Face Evictions and Could Become Homeless During Pandemic*, L.A. TIMES (Aug. 13, 2020, 7:00 AM), <https://www.latimes.com/california/story/2020-08-13/migrant-farm-workers-face-evictions-california> (on file with journal).

¹²⁹ See *id.* (“With jobs scarce because of the pandemic and while suffering from a work injury, [Barbosa] has been unable to return to the packing plants where she has earned a living for 12 years. Nor can she return to her off-season job at the auto parts factory where she hurt her knee while filling boxes. She had offered to pay rent in installments, but the landlord wouldn’t let her, she said. Like many of the 1.6 million workers in California without legal status, Barbosa was uncertain of her rights and hesitant to fight the unlawful eviction. On the advice of an acquaintance, she refused to leave that Sunday morning, but she is fearful she could be forced out at any moment.”).

¹³⁰ Koeze, *supra* note 126.

¹³¹ See Tracey Tully, *Food Lines a Mile Long in America’s Second Wealthiest State*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/2020/04/30/nyregion/coronavirus-nj-hunger.html>, archived at <https://perma.cc/8CFE-XZ4S>.

¹³² Carla Javier, *How LAUSD Handed Out 13 Million Free Meals In 6 Weeks*, LAIST (Apr. 28, 2020), https://laist.com/2020/04/28/lausd_free_meals_coronavirus_budget.php, archived at <https://perma.cc/D8M8-5DN7>.

¹³³ See Oppel Jr. et al., *supra* note 115; Lozano, *supra* note 123 (“Throughout the pandemic, my five-member family has been huddled in a 920-square-foot, two-bedroom apartment, where I share a room with my two brothers. For my parents, social distancing isn’t an option. My father is a supervisor at a car distribution company, and my mother, in remission from cancer, recently resigned as a caregiver at a hospice facility.”); Reuters (@Reuters), TWITTER (Aug. 19, 2020), <https://twitter.com/reuters/status/1296123510088032256?s=21> (on file with journal) (“Five kids and one cell-phone hotspot; a low-income family in Los Angeles is trying to ensure its kids can learn virtually.”).

caretaking duties for parents beyond those related to their children.¹³⁴ In other cases, children themselves may need to care for their grandparents. Beyond these concerns, home may be a dangerous environment for children. In fact, as some child welfare scholars noted during the pandemic, the increased time at home raised the risk of child abuse going unchecked.¹³⁵ Finally, even if living conditions were more equal, generational education gaps, language barriers, less flexible work schedules, and other factors all contribute to parents of color being unable to help their children in the same way as their White peers. Among Latinx parents alone, 50 percent report having difficulty helping their kids with unfamiliar material and 58 percent have problems communicating with teachers.¹³⁶ Furthermore, early studies of the effects of the pandemic showed that areas of the country with higher income, better internet access, and fewer rural schools saw substantially larger increases in search intensity for online learning resources.¹³⁷ Thus, while some students from affluent families may even find comfort engaging in their studies while at home, for others, that simply isn't the case.

Examining factors beyond digital resources shows that low-income, Black, and Latinx students faced far greater obstacles to their educational pursuits during the pandemic than their more affluent and privileged peers. Many of these barriers have long existed, even in normal times. In fact, these barriers are part of the reason why it has been so difficult for minorities to break the cycle of intergenerational poverty.¹³⁸ With this in mind and with the understanding that education is a key component to breaking the cycle of poverty, it is important to prepare the education system for the next possible disruption. To do this and end the opportunity and achievement gaps once and for all, reformers will need to take a holistic approach to supporting students both in and out of the classroom.

¹³⁴ See D'Vera Cohn & Jeffrey S. Passel, *A record 64 million Americans live in multigenerational households*, PEW RSCH. CTR. (Apr. 5, 2018), <https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/>, archived at <https://perma.cc/2XWY-YZ9U>.

¹³⁵ See Elizabeth Bartholet, *At-risk children need more than virtual visits during the coronavirus pandemic*, BOS. GLOBE (April 21, 2020, 11:28 A.M.), <https://www.bostonglobe.com/2020/04/21/opinion/at-risk-children-need-more-than-virtual-visits-during-coronavirus-pandemic/?event=event12>, archived at <https://perma.cc/7RB2-2XH3>.

¹³⁶ Barreto & Segura, *supra* note 107.

¹³⁷ Andrew Bacher-Hicks, Joshua Goodman & Christine Mulhern, *Inequality in Household Adaptation to Schooling Shocks: Covid-Induced Online Learning Engagement in Real Time* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27555, 2020), https://www.nber.org/system/files/working_papers/w27555/w27555.pdf archived at <https://perma.cc/YHY5-SSCZ>.

¹³⁸ See Alana Semuels, *A Different Approach to Breaking the Cycle of Poverty*, ATLANTIC (Dec. 24, 2014), <https://www.theatlantic.com/business/archive/2014/12/a-different-approach-to-breaking-the-cycle-of-poverty/384029/>, archived at <https://perma.cc/5HWX-XRAP> (making the case for why a “two-generation approach” is needed to effectively address issues of poverty: “After all, a parent who finds a job working a night shift at a fast-food restaurant may be happy to find work, but end up with a whole new range of childcare problems.”).

IV. PA'LANTE: POLICY PROPOSALS FOR A PATH FORWARD TO EDUCATIONAL EQUITY

“[If] ever there was a time for big change, it’s now. We have to make this at least an era of action to reverse systemic racism . . . we can do it.”

—President Joe Biden¹³⁹

A. *Increasing Broadband Access and Digital Resources*

The inauguration of a new president has brought about new hopes for education reformers. While on the campaign trail, then candidate Joe Biden made promises to substantially increase broadband access and public education funding, including tripling Title I funding for public schools and universal pre-kindergarten.¹⁴⁰ He also explicitly called out the need to reverse systemic racism in the education system.¹⁴¹ As his administration and Congress begin to suggest new commitments to education¹⁴² and child welfare,¹⁴³ federal, state, and local policymakers must look to implement plans that not only fulfill these promises but also fulfill the holistic needs of the ecosystem supporting students in their studies. What follows are the basic building blocks needed to realize educational equity and extend all our children a fair shot at educational excellence.

As previously mentioned, many low-income, Black, and Latinx students faced tremendous educational challenges during the pandemic, such as limited access to broadband and other digital resources.¹⁴⁴ With blended learning models—which combine in-person and online instruction—on the rise,¹⁴⁵ the nation must take actions now to address these issues. To do so, the federal government and states should look to build upon past efforts as well as design new initiatives. To date, past efforts to expand broadband connectivity have focused on two core areas of development: expanding broadband access to reach rural areas and subsidizing costs for consumers.

¹³⁹ Amanda Menas, *Joe Biden to Educators: “You are the Most Important Profession in the United States.”*, NAT’L EDUC. ASS’N (July 3, 2020), <https://educationvotes.nea.org/2020/07/03/joe-biden-to-educators-you-are-the-most-important-profession-in-the-united-states/>, archived at <https://perma.cc/ED6N-CV9C> (quoting then 2020 Democratic presidential nominee, Joseph R. Biden, to the National Education Association’s virtual Representative Assembly).

¹⁴⁰ COMMITTEE FOR RESPONSIBLE FED. BUDGET, *supra* note 83.

¹⁴¹ Menas, *supra* note 139.

¹⁴² Andrew Ujifusa, *What Biden’s ‘American Rescue Plan’ Would Do for Schools and Students, in One Chart*, EDUCATION WEEK (Jan. 20, 2021), <https://www.edweek.org/policy-politics/what-bidens-american-rescue-plan-would-do-for-schools-and-students-in-one-chart/2021/01>, archived at <https://perma.cc/E6VX-X5V3>.

¹⁴³ Emily Cochrane & Alan Rappaport, *Democrats to Unveil Up to \$3,600 Child Tax Credit as Part of Stimulus Bill*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/07/us/politics/child-tax-credit-stimulus.html>, archived at <https://perma.cc/L78K-P8SH>.

¹⁴⁴ *Supra* Section III.A.

¹⁴⁵ See Ian Quillen, *The Rise of Blended Learning*, SMITHSONIAN MAG. (July 7, 2013), <https://www.smithsonianmag.com/innovation/the-rise-of-blended-learning-7719337/>, archived at <https://perma.cc/2WW8-6HXD>.

In terms of expanding broadband access, the story has always involved public-private partnership. Light-touch regulatory policy, paired with targeted government financial support, has led broadband providers to invest more than \$1.7 trillion in broadband capital expenditures since 1996, including \$80 billion in network infrastructure in 2018 alone.¹⁴⁶ Accompanying these private sector investments have been billions of dollars in support from the federal government in the form of loan and grant programs.¹⁴⁷ State governments have also utilized loan and grant programs to make significant investments in broadband.¹⁴⁸ Altogether, these investments amount to larger per capita spending on broadband infrastructure in the United States relative to peer countries and have propelled the nation to reach fixed broadband levels approaching 85 percent household penetration and nearly ubiquitous mobile broadband penetration.¹⁴⁹

Despite the United States' clear commitment to broadband expansion, in order to close the homework gap, the government must make a final and big push to deliver complete fixed broadband across the nation. According to one estimate, it would cost the government approximately \$40 billion to deploy fixed broadband to 98 percent of the country and another \$40 billion to reach the remaining two percent.¹⁵⁰ Such spending figures may seem readily attainable given the annual infrastructure investments by the industry as a whole, but spending by the private sector alone is split between existing infrastructure improvements and expansion efforts. Absent natural incentives leading the private sector to funnel resources towards last-mile broadband expansion, the government must step in to provide the incentives itself. Given the long history of difficult negotiations needed to spur private sector actors to commit to last-mile broadband expansion, the government should

¹⁴⁶ *USTelecom Industry Metrics & Trends 2020*, USTELECOM: BROADBAND ASS'N (Apr. 2020), <https://www.ustelecom.org/research/ustelecom-industry-metrics-and-trends-2020-update/>, archived at <https://perma.cc/474C-7QT6>; Patrick Brogan, *U.S. Broadband Investment Continued Upswing in 2018*, USTELECOM: BROADBAND ASS'N (July 31, 2019), <https://www.ustelecom.org/research/u-s-broadband-investment-continued-upswing-in-2018/>, archived at <https://perma.cc/9SF5-E32F>.

¹⁴⁷ See, e.g., *Trump Administration Invests More Than \$12.5 Million in High-Speed Broadband in Rural Georgia*, U.S. DEP'T OF AGRIC. (June 25, 2020), <https://www.usda.gov/media/press-releases/2020/06/25/trump-administration-invests-more-125-million-high-speed-broadband>, archived at <https://perma.cc/CKV9-EQKK>; U.S. DEP'T OF AGRICULTURE, BROADBAND RECONNECT PROGRAM FY 2019 FUNDING OPPORTUNITY ANNOUNCEMENT (FOA) AWARDS REPORT (2020), https://www.rd.usda.gov/sites/default/files/RD_RUS_ReConnectRoundOneReport20200430.pdf, archived at <https://perma.cc/KU6A-K36L>.

¹⁴⁸ See, e.g., Christine Book, *Broadband Expansion Gains Momentum Across the U.S., Smart & Resilient Cities*, CONNECTED NATION (Aug. 1, 2018), <https://connectednation.org/blog/2018/08/02/broadband-expansion-gains-momentum-across-u-s/>, archived at <https://perma.cc/7QGQ-LKZE>.

¹⁴⁹ USTELECOM: BROADBAND ASS'N (Apr. 2020), *supra* note 146; see also Press Release, Fact Sheet: President Obama Announces ConnectALL Initiative, White House (March 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/03/09/fact-sheet-president-obama-announces-connectall-initiative>, archived at <https://perma.cc/FU8Q-78UP>.

¹⁵⁰ PAUL DE SA, IMPROVING THE NATION'S DIGITAL INFRASTRUCTURE, FCC OFF. OF STRATEGIC PLANNING AND POL'Y ANALYSIS (Jan. 19, 2017), <https://www.fcc.gov/document/improving-nations-digital-infrastructure>, archived at <https://perma.cc/5266-CKLV>.

look to further incentivize and coordinate the action needed to deliver this access.¹⁵¹ Specifically, at both the federal and state level, policymakers and administrators should implement the recommendations of previous Federal Communications Commission (FCC) analyses, which call for direct funding support to reduce the cost of capital, changes to the tax code to increase the return on invested capital, and operations-related actions to enhance the productivity of capital expenditures.¹⁵² These recommendations, alongside other possible incentive structures, can continue the long history of public-private partnership that has been so crucial to broadband expansion. Furthermore, past evidence and current models suggest that such investments would essentially pay for themselves within just a few years, considering the benefits that would arise across industries such as commerce and healthcare.¹⁵³ Therefore, achieving last-mile connectivity is both feasible and prudent for the future of education and the nation more broadly.

Once wired broadband has been extended to all households, the nation will need to face the larger issue of making broadband services affordable for all. Currently, the average residential broadband connection in the United States costs households more than \$60 per month.¹⁵⁴ These costs are prohibitive and the data proves it, with half of non-broadband users indicating that they do not subscribe to broadband precisely because a monthly subscription costs too much.¹⁵⁵ While some government support exists to aid low-income individuals with the cost of broadband, such programs only provide limited funding. For example, the FCC's Lifeline program provides up to a \$9.25 monthly discount on broadband service for eligible low-income subscribers.¹⁵⁶ With monthly costs for broadband exceeding \$60 on average, this means that the federal subsidy covers less than 16 percent of the total monthly costs if households pay the sticker price for broadband service. That being said, a number of broadband providers are now beginning to offer service at lower rates for low-income households, with some plans costing as little as \$10 a month.¹⁵⁷ Additionally, during the pandemic, a limited number of school districts stepped up to provide hotspots and internet access to

¹⁵¹ See Tom Wheeler, *5 Steps to Get the Internet to All Americans: COVID-19 and the Importance of Universal Broadband*, THE BROOKINGS INST. (May 27, 2020), <https://www.brookings.edu/research/5-steps-to-get-the-internet-to-all-americans/>, archived at <https://perma.cc/3K6G-U8FA>.

¹⁵² DE SA, *supra* note 150.

¹⁵³ See Tyler Cooper, *The Decade in Broadband: 2020 Statistics & Predictions*, BROADBANDNOW (Jan. 15, 2020), <https://broadbandnow.com/research/broadband-2020>, archived at <https://perma.cc/9VSU-FCGT>.

¹⁵⁴ See Wheeler, *supra* note 151.

¹⁵⁵ Monica Anderson, *Mobile Technology and Home Broadband 2019*, PEW RSCH. CTR. (June 13, 2019), <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>, archived at <https://perma.cc/2U3Z-JWKW>.

¹⁵⁶ Lifeline Support for Affordable Communications, FCC (Aug. 19, 2020), <https://www.fcc.gov/consumers/guides/lifeline-support-affordable-communications>, archived at <https://perma.cc/Y7UJ-ECUJ>.

¹⁵⁷ Internet Options for Low and Fixed Income Households, BROADBANDNOW (July 20, 2020), <https://broadbandnow.com/guides/low-income-internet>, archived at <https://perma.cc/AD5T-TQNG>.

their students.¹⁵⁸ However, it is unclear if we will see such actions continue as the nation resumes traditional classroom learning. If natural market forces do not lead providers to offer more options for low-income households, the government should consider at least temporary measures to incentivize providers or the government could increase subsidy amounts. Additionally, as some Congress members have recently proposed, the government E-Rate Program may be expanded so that E-Rate expenditures can be used on home Wi-Fi devices, mobile connectivity, and hardware solutions for students.¹⁵⁹ Without such actions from the government, the opportunity and achievement gaps will only continue to expand.

Bridging the digital divide will require more than just broadband expansion. As noted previously, not all households had a sufficient number of laptops and tablets for their students to actively engage in distance learning.¹⁶⁰ While school districts across the nation handed out millions of devices to students, there were wide disparities by school in terms of which students received devices.¹⁶¹ In some cases, distribution was limited to one device per household.¹⁶² In other cases, even this was simply impossible and schools resorted to distributing paper packets to students without devices.¹⁶³ These disparities have prompted some policymakers to propose legislation that would increase the number of devices given to students.¹⁶⁴ Assuming that the government can improve device accountability systems and provide device training, such a move could prove powerful in helping to close the home-

¹⁵⁸ See Sydney Johnson, *Thousands of California Students to Get Free Wi-Fi and Chromebooks for Distance Learning*, EDSOURCE (Apr. 1, 2020), <https://edsources.org/2020/thousands-of-california-students-to-get-free-wifi-and-chromebooks-for-distance-learning/627823>, archived at <https://perma.cc/48HM-G92G>.

¹⁵⁹ See Press Release, U.S. Representative Raul Ruiz, Ruiz Calls on FCC to Close Digital Divide, Help Expand Remote Learning During COVID-19 Pandemic (Dec. 1, 2020), <https://ruiz.house.gov/media-center/press-releases/ruiz-calls-fcc-close-digital-divide-help-expand-remote-learning-during>, archived at <https://perma.cc/H9RR-SEGK> (describing one proposal from Representative Ruiz and other Congress members that calls “on the FCC to modify the E-rate program to help our school districts purchase equipment and provide internet access so that all students can continue to learn and grow during these unprecedented times.”).

¹⁶⁰ *Supra* Section III.A.

¹⁶¹ See Benjamin Herold, *Schools Handed Out Millions of Digital Devices Under COVID-19. Now, Thousands Are Missing*, EDUCATION WEEK (July 23, 2020), <https://www.edweek.org/ew/articles/2020/07/23/schools-handed-out-millions-of-digital-devices.html>, archived at <https://perma.cc/9K93-GPGU>; Paloma Esquivel et al., *A Generation Left Behind? Online Learning Cheats Poor Students*, *Times Survey Finds*, L.A. TIMES (Aug. 13, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-08-13/online-learning-fails-low-income-students-covid-19-left-behind-project>, archived at <https://perma.cc/4HGB-F83R>.

¹⁶² See Cory Turner et al., *‘There’s A Huge Disparity’: What Teaching Looks Like During Coronavirus*, NPR (Apr. 11, 2020, 7:01 AM), <https://www.npr.org/2020/04/11/830856140/teaching-without-schools-grief-then-a-free-for-all>, archived at <https://perma.cc/WMM9-EBD5>; cf. Reuters, *supra* note 133 (describing how one family received a device for each child, but only after the mother fought and pleaded with each of the children’s schools).

¹⁶³ See *id.*

¹⁶⁴ See Ruiz, *supra* note 159; see also Kayleigh Skinner & Geoff Pender, *Senate Proposes \$150 Million to Supply Public School Districts With Internet Devices*, MISS. TODAY (June 17, 2020), <https://mississippitoday.org/2020/06/17/senate-proposes-150-million-to-supply-public-school-districts-with-internet-devices/>, archived at <https://perma.cc/59GP-BJBH>.

work and achievement gaps. Yet, once again, more devices combined with expanded broadband access alone will not be enough to completely close the gaps.

B. *Improving the Quality and Delivery of Instruction*

In order to truly close the opportunity and achievement gaps, the playing field must be leveled for students in and out of the classroom. For decades now, policymakers, litigators, and activists have dedicated tremendous energies and resources towards trying to achieve this goal.¹⁶⁵ Thus, to say that a single reform, or even several, can serve as the silver bullet that the nation has been searching for would be misguided. Instead, what follows are concrete steps that, if taken, would continue to bend the arc towards greater educational equity.

Many education reform proposals revolve around improving conditions within schools – and rightly so. The first, and arguably most important, classroom a child enters into is that of her preschool. Early childhood development programs can have profound effects on the overall trajectory of a child.¹⁶⁶ In fact, evidence shows that quality early childhood education programs can result in better life outcomes, including closed wealth gaps and lower incarceration rates.¹⁶⁷ Therefore, the Biden administration’s commitment to providing quality universal pre-kindergarten education is one that could prove impactful for generations to come.

Though expanding quality pre-kindergarten programming is a step in the right direction, it is important to remember that students may lose achievement gains if they are sent to low-quality schools following their early education.¹⁶⁸ Thus, there must be serious reforms across the entire PreK–12 education spectrum. For example, bilingual education is one area in desperate need of reform. Recognizing the checkered history of the BEA and state policies, reformers should look to draw upon the latest empirical evidence surrounding bilingual education.¹⁶⁹ Though experts continue to debate elements of the perfect bilingual education program, mounting evidence suggests that existing dual immersion programs may be promising models to build upon.¹⁷⁰ In dual immersion classrooms, teachers provide rigorous academic instruction in both English and Spanish (or another non-English lan-

¹⁶⁵ *Supra* Section II.

¹⁶⁶ See Eliana Garces et al., *Longer-Term Effects of Head Start*, 92 AM. ECON. REV. 999 (2002); David Deming, *Early Childhood Intervention and Life-Cycle Skill Development: Evidence from Head Start*, 1 AM. ECON. J.: APPLIED ECON. 111 (2009).

¹⁶⁷ See Garces et al., *supra* note 166; Deming, *supra* note 166.

¹⁶⁸ See Deming, *supra* note 166, at 113–14.

¹⁶⁹ *Supra* Section II.B.

¹⁷⁰ See Conor Williams & Catherine Brown, *Schools That Teach in Two Languages Foster Integration — So How Come so Many Families Can’t Find Programs?: Dual Immersion’s Policymaking Opportunity*, HECHINGER REP. (Aug. 31, 2016), <https://hechingerreport.org/schools-that-teach-in-two-languages-foster-integration-so-how-come-so-many-families-cant-find-programs/>, archived at <https://perma.cc/A3MV-39B6>; Conor Williams, *The Intrusion of White Families into Bilingual Schools*, ATLANTIC (Dec. 28, 2017), <https://www.theatlantic.com>

guage) and enroll roughly equal numbers of native English speakers and native Spanish speakers. Such programs thereby offer multilingual benefits to both native and non-native English speakers. Additionally, such models of instruction have been found to not only benefit English learners in mastering the English language, but have also had spillover effects into other areas such as mathematics.¹⁷¹ Importantly, however, dual immersion programs are not possible without integrated classrooms and quality teachers willing to teach in two languages or co-teach alongside other teachers.

With regards to integrated classrooms and the advancement of low-income communities, education policy will need to work alongside broader economic and social policy in order to deliver the benefits that the reformers of the twentieth century first envisioned. As noted above, busing ultimately produced mixed results due to the advent of White flight.¹⁷² And government and private sector restrictions on housing throughout the twentieth century, such as that of redlining¹⁷³ and zoning, led to systemically (re)imposed segregation, adding yet another barrier for education reformers.¹⁷⁴ By clustering Black families together in poorer neighborhoods with fewer resources, the government and private sector actors more or less determined the quality of education that Black children would receive. Even today, the process of gentrification continues to displace low-income families and change the demographics of public schools.¹⁷⁵ Economic and social policy can help promote the retention and advancement of low-income families by encouraging affordable housing and promoting family-owned small businesses.¹⁷⁶ Policy-makers can also better tailor programs to ensure that low-income communi-

tic.com/education/archive/2017/12/the-middle-class-takeover-of-bilingual-schools/549278/, archived at <https://perma.cc/97CT-85NH>.

¹⁷¹ See Williams & Brown, *supra* note 170.

¹⁷² *Supra* Section II.B.

¹⁷³ See Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>, archived at <https://perma.cc/NKV5-QJBB> (“The term ‘redlining’ . . . comes from the development by the New Deal, by the federal government of maps of every metropolitan area in the country. And those maps were color-coded by first the Home Owners Loan Corp. and then the Federal Housing Administration and then adopted by the Veterans Administration, and these color codes were designed to indicate where it was safe to insure mortgages. And anywhere where African-Americans lived, anywhere where African-Americans lived nearby were colored red to indicate to appraisers that these neighborhoods were too risky to insure mortgages.”).

¹⁷⁴ See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 53, 65 (2017) (“The use of zoning for purposes of racial segregation persisted well into the latter half of the twentieth century . . . To guide their work, the [Federal Housing Administration] provided [appraisers] with an *Underwriting Manual*. The first, issued in 1935, gave the instruction: ‘If a neighborhood is to retain stability it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally leads to instability and a reduction in values.’”).

¹⁷⁵ See *id.* at 237 (“Most low-income families forced out of gentrifying neighborhoods have nowhere else to go, except to a few segregated suburbs where they soon become concentrated because other locales prohibit or excessively restrict the construction of affordable units.”).

¹⁷⁶ *Cf. id.* at 237 (advocating for affordable housing by using inclusionary zoning policies as a means to ensuring that gentrification leads to positive results).

ties receive the funding they deserve. As it stands, although Title I funding is meant to aid the nation's neediest schools, in reality, it sometimes funds already wealthy school districts.¹⁷⁷ As such, fiscal reforms should be implemented to better monitor Title I funding so that the dollars distributed through the program track more closely to the students that need such funds. In a similar vein, states and local municipalities, who control the lion's share of school funding, should also look to closely monitor and assess fund distribution.¹⁷⁸ Of note is the fact that property taxes govern much of local school funding and thus create large disparities between schools located in wealthy and impoverished communities.¹⁷⁹ One study analyzed bordering districts where there was at least a 25 percentage-point gap in White students as well as at least a 10 percent gap in funding.¹⁸⁰ The study found that there were nearly 9 million students who attend schools that were on average 65 percent non-White, with each school receiving about \$13,000 per pupil.¹⁸¹ In comparison, there were nearly 3 million students who attend schools that are on average 25 percent non-White, with each school receiving about \$17,000 per pupil.¹⁸² Thus, state and local policymakers looking to close the opportunity gap should give serious thought into how to adequately distribute funds both within school districts and across municipalities.

Alongside the integration of classrooms and funding reforms, the issue of teacher quality is one that has been hotly debated for years. This is especially true in states such as California where state court decisions have determined the constitutionality of teacher tenure laws and, in some cases, have made dismissing poorly performing teachers nearly impossible.¹⁸³ However, the focus of these debates should shift to instructional quality rather than simply teacher quality. Specifically, the holistic instructional landscape of a child should be evaluated to ensure that, no matter the child's starting point, they are able to achieve growth in their educational performance. It is within this framework that teachers are one of the most crucial elements contributing to the academic growth of a child. Therefore, whether he or she is the

¹⁷⁷ See Lauren Camera & Lindsey Cook, *Title I: Rich School Districts Get Millions Meant for Poor Kids*, US NEWS (June 1, 2016, 12:01 A.M.), <https://www.usnews.com/news/articles/2016-06-01/title-i-rich-school-districts-get-millions-in-federal-money-meant-for-poor-kids> (on file with journal).

¹⁷⁸ See *id.* (explaining that federal education funding accounts for only 10 percent of total public-school funds, leaving state and local governments to foot the rest of the costs).

¹⁷⁹ Cory Turner et al. *Why America's Schools Have a Money Problem*, NPR (Apr. 18, 2016, 5:00 AM), <https://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem>, archived at <https://perma.cc/EP8D-6BPL> (describing how school funding can vary by thousands of dollars due to differences in property taxes collected at the municipal level).

¹⁸⁰ Alvin Chang, *How Segregation Keeps Poor Students of Color Out of Whiter, Richer Nearby Districts*, VOX (July 25, 2019, 8:30 AM), <https://www.vox.com/policy-and-politics/2019/7/25/20703660/school-segregation-district-borders-map-data>, archived at <https://perma.cc/9DJZ-SSVQ>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See Christopher Cruz, *The Decision California Needed*, HARV. POL. REV. (April 21, 2016) (on file with author).

best in their field or not, every teacher deserves increased support and resources so that they can deliver quality instruction to their students.¹⁸⁴ For example, one option may involve increasing teacher pay and even shifting funds away from administrators and outside consultants towards professional development programs for teachers.¹⁸⁵ Additionally, teachers need to be given more time to meet with each other, exchange ideas, and offer peer guidance.¹⁸⁶ Steps like these may seem marginal, but in the long run, they could provide substantial benefits for teachers and students.¹⁸⁷

In continuing to think about a child's holistic instructional landscape, another major area of contention is the use of rigorous disciplinary policies within schools. In particular, the use of zero tolerance policies has contributed to what is known as the school-to-prison pipeline.¹⁸⁸ By enforcing harsh disciplinary policies resulting in suspensions and expulsions, educators and administrators take students outside of the classroom and increase the chances that these students will later be incarcerated.¹⁸⁹ Perhaps unsurprisingly, these policies are disproportionately enforced against students of color. One study found that Black students are nearly 3 times as likely to be suspended and 3.5 times as likely to be expelled as their White peers.¹⁹⁰ Similarly, Latinx students are 1.5 times as likely to be suspended and twice as likely to be expelled as their White peers.¹⁹¹ If instead, teachers and administrators addressed minor issues with more proportionate responses and worked to provide students demonstrating more serious concerns with in-school behavioral supports, then the school-to-prison pipeline could weaken and the chances of success for these students would increase.¹⁹²

The proposals mentioned thus far have mostly looked at reforms aimed at improving student performance along traditional indicators of academic achievement. To be sure, such reforms are vital since these reforms help place students on the pathway to college and higher paying jobs. While every effort should be made to continue reforms centered around the promotion of individual student growth along academic standards, the education system should also simultaneously look to better tailor education to the diverse pathways of its students. More concretely, skills-based education and jobs not requiring a four-year degree should not be discredited or viewed as

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See Matt Cregor & Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20 POVERTY & RACE 5 (Jan./Feb. 2011), https://www.naacpldf.org/wp-content/uploads/PRRAC-journal-Jan_Feb-2011-Dismantling_the_School-to-Prison_Pipeline-1.pdf, archived at <https://perma.cc/7LAM-JCZM>; Prudence Carter et al., *You Can't Fix What You Don't Look at: Acknowledging Race in Addressing Racial Discipline Disparities*, DISCIPLINE DISPARITIES (Dec. 2014), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/Acknowledging-Race_121514.pdf, archived at <https://perma.cc/LVY9-KZWD>.

¹⁸⁹ See Cregor, *supra* note 188, at 5; Carter, *supra* note 188.

¹⁹⁰ See Cregor, *supra* note 188, at 5.

¹⁹¹ *Id.*

¹⁹² See Cregor, *supra* note 188, at 5; Carter, *supra* note 188.

inferior to other forms of education and job opportunities. Consciously ensuring that students are supported no matter their particular pathway would honor the true legacy of state litigation efforts advocating for the right to education. Indeed, *Rose*¹⁹³ and its progeny were keen to note that the public education system should deliver sufficient levels of academic or vocational skills so that students are competitive in pursuing either higher education or job opportunities following secondary school.¹⁹⁴ While recent years have witnessed the federal government supporting such a view via its hiring policies,¹⁹⁵ courses and community partnerships can still be better utilized to offer more technical training to those students who may not be as inclined to pursue the college pathway.¹⁹⁶ Such efforts would help ensure that these particular students enter well-paying specialized jobs despite, at least initially, forgoing a four year degree.¹⁹⁷ However, improved efforts to provide skills-based education should not be used as an outlet to further tracking policies that have kept Black and Latinx students from pursuing higher education.¹⁹⁸ Rather, such efforts should create greater optionality and support for students. To this end, holistic reviews should be conducted of the tracks and programs offered to students within and across schools. These holistic reviews should analyze the degree to which each of the various tracks and programs are equally afforded to students across demographic indicators. Conducting these reviews and subsequently removing the barriers that impede Black and Latinx students from entering more advanced course tracks

¹⁹³ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 201 (Ky. 1989).

¹⁹⁴ *Supra* Section II.A.

¹⁹⁵ See Michael Collins, *Trump Signs Order Prioritizing Job Skills over College Degree in Government Hiring*, USA TODAY (June 27, 2020, 4:29 PM), <https://www.usatoday.com/story/news/politics/2020/06/26/trump-executive-order-stresses-skill-over-college-degree-hiring/3263074001/>, archived at <https://perma.cc/Z5CX-RS2A>.

¹⁹⁶ Cf. Susan Lund et al., *The Future of Work in America: People and Places, Today and Tomorrow*, MCKINSEY & Co. (July 11, 2019), <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-in-america-people-and-places-today-and-tomorrow>, archived at <https://perma.cc/6LPG-E7EK> (describing how “[a]ll levels of government, non-profits, education providers, and industry associations can play a role” in the reskilling of workers).

¹⁹⁷ Cf. *id.* (describing how proper (re)training can help smooth economic outlooks for employees without bachelor and graduate degrees).

¹⁹⁸ See Sonali Kohli & Quartz, *Modern-Day Segregation in Public Schools*, ATLANTIC (Nov. 18, 2014), <https://www.theatlantic.com/education/archive/2014/11/modern-day-segregation-in-public-schools/382846/>, archived at <https://perma.cc/TAS4-EN85> (“Duncan acknowledged the value of accelerated, subject-specific, and ‘gifted and talented’ programs for students who show particular promise or preferences. ‘But,’ he writes, ‘schools serving more students of color are less likely to offer advanced courses and gifted and talented programs than schools serving mostly white populations, and students of color are less likely than their white peers to be enrolled in those courses and programs within schools that have those offerings.’ In the 2011-12 school year, for example, Black and Latino students represented 16 percent and 21 percent of high school enrollment nationwide, respectively, according to the education department. But they were only 8 percent and 12 percent of the students taking the advanced-level math class calculus.”); see also GARCÍA & CASTRO, *supra* note 58.

can prove instrumental in helping to close the opportunity and achievement gaps.¹⁹⁹

In addition to making sure that all students have access to diverse educational pathways, schools may also look to add courses to the curriculum of their schools that have not always been traditionally offered. For example, the addition of ethnic studies has been found to increase the attendance and academic performance of students at risk of dropping out.²⁰⁰ By engaging students of color in ways that offer insight into their own histories and communities, these students can gain critical-thinking skills and feel more confident in school.²⁰¹ Regardless of the race of a student, such courses can be powerful for those trying to better understand the pluralistic history of the nation and the art of social change.²⁰² Despite these benefits, some have questioned the efficacy of ethnic studies as well as what particular content should be included in these courses, leading to a long and complicated history at the state level regarding the incorporation of ethnic studies into school curriculums.²⁰³ For example, while California recently made ethnic studies a graduation requirement for all 430,000 undergraduates in the California State University system, its governor vetoed a similar measure that would have made ethnic studies a high school graduation requirement.²⁰⁴ While debates over how to incorporate ethnic studies into curriculums have yet to settle, schools should continue to think about how to design courses and lessons so that they engage all students regardless of, and in light of, each of their particular backgrounds.

Looking beyond the traditional classroom, there are also numerous areas for reform that could prove instrumental in closing the opportunity and

¹⁹⁹ See Kohli & Quartz, *supra* note 198 (describing how past reviews of schools' tracks and programs have led to some schools increasing the number of Black and Latinx students participating in advanced course tracks and that various tactics have been used including the elimination of testing barriers).

²⁰⁰ See Brooke Donald, *Stanford study suggests academic benefits to ethnic studies courses*, STANFORD NEWS (Jan. 12, 2016), <https://news.stanford.edu/2016/01/12/ethnic-studies-benefits-011216/>, archived at <https://perma.cc/4S8X-F368>.

²⁰¹ Melinda D. Anderson, *The Ongoing Battle Over Ethnic Studies*, ATLANTIC (Mar. 7, 2016), <https://www.theatlantic.com/education/archive/2016/03/the-ongoing-battle-over-ethnic-studies/472422/>, archived at <https://perma.cc/Q7PR-8QFR> (quoting Siobhan King Brooks, an assistant professor of African American studies at Cal State Fullerton on the far-reaching benefits for all students of color—inside and out of the classroom: “The critical-thinking skills and self-esteem they develop in ethnic studies helps them advance in their education, communities, and careers.”).

²⁰² See, e.g., Anderson, *supra* note 201 (“Ethnic-studies courses dispel myths, Brooks said, and build connections among students as opposed to divisions. ‘Similar to students of color, white students have been miseducated about the roles of both whites and people of color throughout history,’ she said, and culturally relevant lessons allow white children to ‘not only learn about people of color, but also white people’s roles as oppressors and activists fighting for racial change. This is very important because often whites feel there is nothing [they] can do to change racism.’”).

²⁰³ See Donald, *supra* note 200.

²⁰⁴ Nina Agrawal, *Governor Newsom Vetoes High School Ethnic Studies Bill*, L.A. TIMES (Sept. 30, 2020, 10:16 PM), <https://www.latimes.com/california/story/2020-09-30/governor-newsom-vetoes-high-school-ethnic-studies-bill> (on file with journal).

achievement gaps both in times of traditional and remote learning. As alluded to above, government policies and private sector actions that look to promote job stability, housing affordability, healthcare access, and food security could greatly assist students struggling to complete their studies at home.²⁰⁵ For example, the recently proposed child tax credit is a step in the right direction.²⁰⁶ In addition, innovative economic incentives, such as other changes to the tax code, may be leveraged to encourage employers to provide paid time off for when employees choose to engage in their children's lives, be it at a school function or even through routine homework assistance. Such policies could prove impactful beyond educational outcomes considering the correlation between increased child care and the economy.²⁰⁷ In fact, studies have shown that government programs for low-income children can lead to real returns on investment.²⁰⁸

Beyond these broad economic and social policies, teachers may also consider implementing concrete pedagogical reforms to better allow students the opportunity to succeed in their coursework. These reforms can include providing greater deadline flexibility so that students who must share devices at home or have caretaking duties can better coordinate their schedules to complete their assignments rather than constantly fall behind. Additionally, teachers may look to encourage live participation when utilizing distance learning and can also provide recorded lectures for students unable to log in during scheduled lecture times. Relatedly, teachers may look to conduct individual check-ins with students who are in such situations to help them stay on track with the curriculum.²⁰⁹ While the list goes on, recognizing that reforms are needed both in and out of the classroom will be the key to closing the opportunity and achievement gaps for low-income, Black, and Latinx students.

V. CONCLUSION

“It can't be a few crusaders trying to do this. It has to be literally an entire community effort.”

²⁰⁵ *Supra* Section III.B.

²⁰⁶ Cochrane & Rappeport, *supra* note 143.

²⁰⁷ Lisa Lerer, *Elizabeth Warren Says Child Care Is Key to Bringing the Economy Back*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/us/politics/elizabeth-warren-child-care.html>, archived at <https://perma.cc/KJZ4-WCTX>.

²⁰⁸ See Soo Oh & Janet Adamy, *When the Safety Net Pays for Itself*, WALL ST. J. (July 22, 2019, 11:22 AM), <https://www.wsj.com/articles/when-the-safety-net-pays-for-itself-1156380405>, archived at <https://perma.cc/C4BZ-K847>.

²⁰⁹ Cf. Carey, *supra* note 100 (explaining how having a facilitator or mentor to check in on students can greatly improve the performance of students while online learning: “[s]tudents tend to learn less efficiently than usual in online courses, as a rule, and depending on the course. But if they have a facilitator or mentor on hand, someone to help with the technology and focus their attention—an approach sometimes called blended learning—they perform about as well in many virtual classes, and sometimes better.”).

—Former Los Angeles Unified School District Board President
Steve Zimmer²¹⁰

As with other disasters forcing school closures, COVID-19 highlighted and exacerbated the existing struggles that low-income, Black, and Latinx students face in the pursuit of educational excellence. These struggles and the opportunity and achievement gaps have been present from the onset of the nation's history. Similarly, the fight for educational equity in the United States is one that has spanned centuries and is one that will continue into the foreseeable future. This is because while education reformers have fought tirelessly for education to be viewed as a fundamental right, and while national, state, and local policies have sought to provide greater opportunities to marginalized students, the harsh truth remains that the opportunity and achievement gaps are still present. To be sure, past efforts have led to progress among several dimensions for these groups of students, such as increased academic performance on standardized tests and even improved long-term higher education and employment outcomes.²¹¹ However, in order to truly provide our children with better pathways, policymakers, administrators, teachers, parents, and all other community members must commit to supporting our children along every step of their development. This includes bridging the digital divide, implementing serious reforms to improve the quality and delivery of instruction, and providing holistic economic and social supports to students and their families. It is only by working together that we can ensure a brighter future for our children, a future where digital disparity is turned into educational excellence and where the opportunity and achievement gaps are closed once and for all.

²¹⁰ TEACH US ALL (Netflix 2021) (quoting Steve Zimmer).

²¹¹ See e.g., Dillon, *supra* note 73; Cruz, *supra* note 59.