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Education Law Consortium
850 College Station Road
University of Georgia
Athens, Georgia, USA
John Dayton, J.D., Ed. D., Editor-in-Chief

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**Foreword: The Aftermath of ESSA’s Devolution of Power to States:
A Federal Role in Incentivizing Equity and
Building State and Local Capacity**

Elizabeth DeBray & Ann Elizabeth Blankenship*

Last year, 2015, marked the 50th anniversary of the Elementary and Secondary Education Act (ESEA), signed by President Lyndon Johnson as part of the War on Poverty. As scholars with backgrounds in policy and law, our goal with this special issue was to ask both the education policy and law fields to generate fresh proposals for the ESEA reauthorization. We asked scholars to make recommendations for legislative changes that were grounded in research that could lead to improved educational practice. We challenged scholars to generate new policy alternatives and the legislative language to support them – all while embedding them in appropriate historical context.¹ Beyond those criteria, we did not specify any other conditions in our call for articles. We were impressed with the quality and diversity of the submissions, each scholar or group of scholars tackling policy problems from the angle of their different research backgrounds. The scholarship presented in each article introduces innovative policy ideas for improving federal and state education policy in various areas.

While we originally intended for this issue to be published prior to the reauthorization of ESEA, changing political circumstances somewhat redirected the focus of this special issue. After nearly a decade of political stalemate, in late 2015 House and Senate leaders began the “conference” process between two ESEA reauthorization bills passed earlier that year.

* Elizabeth DeBray, (Ed. D., Harvard, 2001), is a Professor of Educational Administration and Policy in the College of Education at the University of Georgia. Ann E. Blankenship, (J.D., University of Tennessee, 2004; Ph.D., University of Georgia, 2013) is an Assistant Professor of Educational Leadership in the College of Education and Psychology at the University of Southern Mississippi.

¹ It is not our intent to review the entire evolution of ESEA from 1965 through the present; our focus is on recent policy changes. For a recent comprehensive overview of the law’s history, see David A. Gamson, et al., *The ESEA at Fifty: Aspirations, Effects, and Limitations*, 1(3) RUSSELL SAGE J. OF THE SOC. SCI. 1 (2015). Also note that the pieces by both Jennings and Orfield discuss the full historical context of ESSA from their unique perspectives.

In the face of overwhelming odds, including international conflict, the beginning of a presidential campaign, and the pending resignations of House Speaker John Boehner (R-OH) and the Education Secretary Arne Duncan, Congress was able to work together to pass the Every Student Succeeds Act (ESSA) in December of 2015.

Following the reauthorization, the authors were given an opportunity to update their work to reflect the legislative changes. What resulted were thoughtful responses to the dramatic changes in ESSA and provocative ideas for improving education through incentivizing equity, strengthening mandates, and building capacity. Taken as a whole, we believe this collection of scholarship has the potential to influence educational decision making under ESSA and moving forward.

In this article, we first review some of the recent institutional conditions around the 2015 ESEA reauthorization, and then provide an overview of the varied themes about policy instruments and recommendations running through the articles.

Contemporary Context: The NCLB Framework of Standards, Testing, and Accountability

No Child Left Behind (NCLB), the 2001 reauthorization of ESEA, was a demonstration of overwhelming bi-partisan compromise. Passed in the wake of the September 11th terrorist attacks, party leaders were able to come together to pass legislation that dramatically expanded the role of the federal government in public education. Evolving out of the 1994 Improving America's Schools Act, NCLB tightened requirements for states sanctions on schools not making Adequate Yearly Progress (AYP) according to a sub-group accountability model that Congress approved under pressure from George W. Bush and Education Secretary Rod Paige. As AYP levels rose, it became apparent that the system created under NCLB was unsustainable; eventually, nearly all schools would fail to meet AYP.

While the issue of reauthorization arose periodically, it never gained much traction.² As years passed, it became ever more apparent that

² NCLB was scheduled to be reauthorized in 2007. However, efforts at reauthorization stalled in 2007 and Congress delayed further action until after the 2008 presidential election. Each year, NCLB endured by continuing resolution. While the issue of reauthorization arose periodically, it never gained much traction. In late 2011, after two years of negotiations, Senators Tom Harkin (D-IA), Chairman of the Senate Health, Education, Labor, and Pensions Committee (HELP) and Mike Enzi (R-WY) released a proposal for reauthorization and a major revision of NCLB. Sam Dillon, *Bill Would*

NCLB's ultimate goal of having all students performing on grade level by 2014 was unrealistic. Each year, as the bar for AYP raised, more schools fell into the "failing" category. In 2011, Secretary Duncan began approving NCLB waivers for states seeking some relief. In the years that followed, 46 states applied for waivers from the strictures of NCLB, hoping for increased flexibility. However, the waivers came with strings. Through waivers and the Race to the Top (RttT) voluntary grant program, the Obama administration was able to push states to implement additional accountability policies (such as test-based teacher evaluation systems) and make dramatic curricular changes.

NCLB, along with RttT, have proven ineffective strategies for building state capacity to narrow the achievement gap. In late October 2015, the National Center for Education Statistics announced a decline in scores in both mathematics and reading at all grade levels on the National Assessment of Educational Progress (NAEP). In mid-2015, there were renewed reauthorization efforts in both the House and the Senate. Despite extreme political polarization in Congress, both the House of Representatives and the Senate worked diligently to produce a new federal education plan. Unlike previous attempts when proposals originated in one house of Congress, in 2015 both the House and the Senate produced independent proposals for the reauthorization of ESEA. On July 8, 2015, the House of Representatives passed the Student Success Act (SSA)

Overhaul No Child Left Behind, NY TIMES (Oct. 11, 2011), http://www.nytimes.com/2011/10/12/education/12educ.html?_r=0. Dillon noted "Mr. Harkin made his draft bill public 18 days after President Obama announced that he would use executive authority to waive the most onerous provisions of the law, because he had all but given up hope that Congress could fix the law's flaws any time soon." *Id.* at para. 3. The Harkin-Enzi Act proposed to keep state testing with an increased focus on high school graduation rates, college and career readiness, and reading and writing skills for all students. Jason Amos, *U.S. Senators Harkin and Enzi Release Draft Language to Revise NCLB: Senate Committee to Consider Draft Containing Important Provisions for Nation's High Schools*, ALLIANCE FOR EXCELLENT EDUC. (Oct. 17, 2011), <http://all4ed.org/articles/u-s-senators-harkin-and-enzi-release-draft-language-to-revise-nclb-senate-committee-to-consider-draft-containing-important-provisions-for-nations-high-schools/>. The proposal called for relaxed federal oversight of most schools, focusing federal efforts on the worst performing schools and the schools with the largest achievement gaps. While the proposal did make it through the HELP Committee with three Republican votes, it did not fare as well on the Senate floor. Amid serious criticisms from both Democrats and Republicans, the Harkin-Enzi Act never made it to a vote. Further reauthorization discussion was put on hold as the 2012 presidential race approached.

introduced by Representative John Kline (R-OH).³ Less than two weeks later, the Senate passed the Every Child Achieves Act of 2015, co-sponsored by Senators Lamar Alexander (R-TN) and Patty Murray (D-WA).⁴ While the two proposals contained similar legislative features, there were distinct differences. In order to move forward in the process, Congress had to agree on a single proposal to put up for a vote in both houses and send forward for President Obama's approval.⁵ Members from

³ The Republican efforts to reauthorize ESEA include a series of reauthorization bills proposed since assuming control of the House. They passed the following bills out of committee: Empowering Parents through Quality Charter Schools Act, Student Success Act, and Encouraging Innovation and Effective Teaching Act. *The Student Success Act (H.R. 3989) Summary*, HOUSE OF REPRESENTATIVES' COMMITTEE ON EDUCATION AND THE WORKFORCE, http://edworkforce.house.gov/uploadedfiles/the_student_success_act_summary.pdf (last visited Oct. 25, 2015).

As one the several proposed reauthorization bills emerging from House committees, the SSA proposed to return a great deal of the responsibility for student achievement back to states by reducing the federal role in education. It sought to replace NCLB's Adequate Yearly Performance standards with accountability standards developed by each state. Under SSA, states would also have had more control over school funding decisions, including school improvement decisions, school funding levels, and the use of special population funds. Finally, SSA proposed to specifically limit the authority of the Secretary of Education, prohibiting him (or her) from changing standards or creating new state obligations. Overall, the focus of the SSA was on the rights of states and individual parents to control educational decision making.

⁴ *S.1177 – Every Child Achieves Act of 2015*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1177> (last visited Oct. 25, 2015). Unlike the series of bills introduced in the House, the Senate proposed to reauthorize the ESEA in one comprehensive education bill. ECAA sought to provide increased state flexibility in funding requirements and the development of accountability systems for teachers and schools, particularly with regard to teacher evaluation systems. It included increased funding opportunities for special populations like English-language learners, Native Americans, Alaska natives, and homeless students. Specifically, ECAA gives more flexibility rural school districts in how they allocate federal education funds. It also included increased funding for high quality charters schools, a feature designed to appeal to the more conservative Right. However, ECAA also included some provisions targeted at the White House, such as the requirement that states consult with community stakeholders in the decision making process and an increased focus on early childhood education.

⁵ On March 13, 2010, the Obama administration released its "blueprint" for the reauthorization of ESEA. *ESEA Reauthorization: A Blueprint for Reform*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/policy/elsec/leg/blueprint/index.html> (last accessed Oct. 27, 2015). In its plan, it called for an increased focus on equity, increased community involvement, rewards for success rather than a focus on failure, the development of better assessments for student achievement, more flexibility for struggling schools, greater funding equity, and better teacher preparation support. *Id.* (As originally conceived, the

both houses worked together in a conference committee and hashed out the details of a combined proposal that satisfied both conservative Republicans as well as the more liberal White House. In his article, Gary Orfield explains how the polarization between parties – as well as the rules set by the Republican majority in the House of Representatives – contributed to the alacrity of the enactment of ESSA, with little debate or opportunity for members to review the complexities of the law.

Every Student Succeeds Act

On December 10, 2015, President Obama signed the Every Student Succeeds Act (ESSA) into law. In some ways, ESSA is a dramatic departure from the dictates of NCLB, particularly in terms of the relationship between the federal government and states. Under ESSA, the federal government is largely removed from the education policy decision making process. However, with a continued focus on accountability, it is difficult to see how states will fare in protecting educational opportunity for all students. Below we review some of the highlights of the major provisions of ESSA.⁶

Accountability/Testing

One of the greatest changes of the new ESSA system is the accountability structure. Under ESSA, the states have almost exclusive

desire for improved assessment of schools included information beyond student test scores, such as attendance, learning conditions, and course completion). However, the White House's administrative and legislative actions did not quite match the ideals set forth in its blueprint. Instead, RttT and the issuance of NCLB waivers encouraged increased accountability for teacher and administrators and supported continued reliance on standardized test scores as a measure of student achievement and teacher effectiveness. However, President Obama may have had a change of heart, at least in part. In October 2015, the Obama administration called for a reduction in testing, encouraging schools to make testing "less onerous and more purposeful." Kate Zernike, *Obama Administration Calls for Limits on Testing in Schools*, NY TIMES, para. 1 (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/us/obama-administration-calls-for-limits-on-testing-in-schools.html?ref=us&_r=0. While then-Secretary of Education Arne Duncan noted that testing was necessary to keep track of student progress, students have become overwhelmed with excessive testing. The White House urged Congress to consider capping testing at two percent of classroom instruction time. *Id.* at para. 3.

⁶ This is by no means an exhaustive review of ESSA. It does not discuss new funding for early childhood education, charter schools, or other specifics of the bill but is intended rather as an overview of some main points that are relevant to the articles that follow.

control over educational policy decisions. Instead of federally established performance goals (like NCLB's AYP), ESSA allows states to set their own long- and short-term goals for school and district performance and to design interventions for low-performing schools. While states will be required to submit an accountability plan to the Education Department outlining their plans for student achievement, graduation rates, English-language proficiency, they will be given wide latitude and have an opportunity to appeal adverse Department decisions. Since ESSA strictly limits the authority of the U.S. Secretary of Education, it is unclear at this time how ESSA provisions or state accountability plans will be enforced.

ESSA does require states to identify and intervene to improve performance in three circumstances: if a school is in the bottom 5% based on performance indicators; if a school has a graduation rate of 67% or less; or if a school has a subgroup of students who have particularly low performance over a period of time. In these cases (referred to as "turnaround" schools), districts are required to work with schools to come up with evidence-based plans for improvement. The state is required to monitor progress of turnaround schools and if the school does not see improvement within four years, the state can step in and take over the school.⁷ However, unlike the mandates of NCLB, ESSA does not require take over and allows states to choose intervention strategies.

To measure student performance, ESSA still requires testing in reading and math for grades three through eight and once in high school and a breakdown of test data based on subgroups. However, standardized tests will only be part of the student achievement equation and states will have greater flexibility in selecting achievement indicators.⁸

Curriculum

Under ESSA, states will also have the responsibility of selecting their own academic and curricular standards. While Duncan pushed states to adopt Common Core Standards through the NCLB requirement waivers, states are permitted but no longer required to move in that direction. In fact, ESSA specifically prohibits the Education Secretary from

⁷ Alyson Klein, *ESEA Reauthorization: The Every Student Act Explained*, EDWEEK (Nov. 30, 2015, 10:59 a.m.), http://blogs.edweek.org/edweek/campaign-k-12/2015/11/esea_reauthorization_the_every.html.

⁸ States will select at least four school performance indicators from a list of options. High schools are required to include graduation rates as one performance indicator

influencing, incentivizing, or coercing states to adopt the Common Core Standards.⁹

Teachers

Notably, under ESSA states are no longer required to rely so heavily on student outcomes in teacher evaluations as they were under NCLB waivers. Instead, Title II provides funds for states to develop or improve evaluation systems “that are based in part on evidence of student academic achievement, which may include student growth, and shall include multiple measures of educator performance and provide clear, timely, and useful feedback to teachers, principals, or other school leaders...”¹⁰ ESSA also eliminates the “highly qualified teacher” requirement, instead requiring states to employ “teachers who meet the applicable State certification and licensure requirements, including any requirements for certification obtained through alternative routes to certification...”¹¹ It also includes several provisions aimed at strengthening alternative teacher and school leader certification programs, such as Teach for America.¹²

Equity

ESSA contains many positive provisions and certainly appears to be a better alternative than the system established under NCLB and the waivers. However, it seems to fall short of President Johnson’s original intent for ESEA of providing educational funding to states to ensure that every child, particularly those living in poverty, have access to education. While ESSA reduces the focus on testing and punitive measures, it still emphasizes accountability rather than the “root causes of educational inequality.”¹³ Following the same accountability theory as NCLB and

⁹ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, Title I, Section 1111(j)(1) (2015).

¹⁰ *Id.* at Title II, Part A, § 2101(c)(4)(B)(ii).

¹¹ *Id.* at Title IX, Part B, § 9214(c)(2).

¹² Kenneth Zeichner & Valerie Strauss, *The Disturbing Provisions about Teacher Preparation in No Child Left Behind Rewrite*, WASHINGTON POST (December 5, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/05/the-disturbing-provisions-about-teacher-preparation-in-no-child-left-behind-rewrite/>. Zeichner provides an in-depth discussion of how ESSA promotes fast-tracked and alternative teacher preparation programs and the possible implications for students, particularly those in high-poverty communities.

¹³ Felicity Crawford & Mary Battenfeld, *Why Every Student Succeeds Act Still Leaves Most Vulnerable Kids Behind*, US NEWS & WORLD REP. (Dec. 14, 2015, 2:32 p.m.),

RttT, ESSA treats “principals and teachers as managers subject to sanctions should they fail to achieve designated performance targets.”¹⁴

In a 2015 research bulletin, the Southern Education Foundation noted that in 2013, for the first time in recent history, “a majority of schoolchildren attending the nation’s public schools come from low income families.”¹⁵ While ESSA does require states to monitor vulnerable subgroups of students and prohibits the use of “super-subgroups,” it does not provide any actual mechanisms for reducing achievement gaps or improving educational opportunities for students living in poverty. Instead, it shifts the all of the responsibility to the states, who may or may not have the capacity to appropriately monitor student progress and implement effective interventions. Certainly students in some states will fare better under the new system than others and educational opportunity will be tied even more tightly to geography.

Overall, Johnson’s focus on education as an economic and civil right is largely absent from ESSA. While it may be better than NCLB, it may not be the best alternative, particularly for vulnerable student groups. The federal government and states will both have to take active steps to support equality of educational opportunity under this new system. This special issue seeks to be a place from which to begin the conversation of what is possible for protecting student rights, managing the teacher workforce, data management, and funding incentives to enhance equity. We also hope it is a crucible for fresh research-based proposals for what a future ESEA could include.

The Need for Policy and Legal Scholars to Advance Proposals

While the authors drafted the pieces in this volume with an eye to potentially informing a law they anticipated would pass later than it actually did, the editors strongly believe that the proposals are a very important contribution to both scholarly and policy discourse. Policy is

<http://www.usnews.com/news/articles/2015-12-14/why-every-student-succeeds-act-still-leaves-most-vulnerable-kids-behind>.

¹⁴ Michael Rebell, *The New Federal ESSA Statute: A Step Backward for Fair School Funding*, CAMPAIGN FOR EDUCATIONAL EQUITY (Jan. 16, 2016),

<http://educationalequityblog.org/2016/01/25/the-new-federal-essa-statute-a-step-backward-for-fair-school-funding/>

¹⁵ *A New Majority: Low Income Students Now a Majority in the Nation’s Public Schools*, S. EDUC. FOUND. 2 (January, 2015),

<http://www.southerneducation.org/getattachment/4ac62e27-5260-47a5-9d02-14896ec3a531/A-New-Majority-2015-Update-Low-Income-Students-Now.aspx>.

not made in a linear fashion, and the contributions of researchers can build incrementally toward a strengthened future for the law. The report of the Secretary's Commission on Equity and Excellence of 2013, for instance, which tackled numerous topics related to teacher quality, academic standards, and finance equity, is still highly relevant to federal policy, even though Congress did not directly embrace its recommendations in 2015.¹⁶

Readers would do best to bear the following considerations in mind in approaching this collection of pieces. First, ESSA loosens school-level accountability, and it remains unclear what enforcement power the Secretary of Education actually wields (see Gary Orfield's article, this issue), although it is plain that it will be less than under NCLB. At the time of this writing, the final version of the regulations has not yet been adopted. This devolution of power to the states, which permits them to design their own accountability systems, causes us to think about what, in the face of a retreat from many federal mandates, **both** the appropriate federal and state roles might be for incentivizing equity and building capacity. ESSA does include some competitive state programs, like the Preschool Development Grant program.

Second, while many of the papers' priorities were not those of Congress with ESSA, this does not necessarily mean that these cannot be emphasized as competitive or absolute priorities in federal programs, nor considered by the Education Department's Office for Civil Rights (OCR) in its ongoing work. Many of the lessons from the papers are cautions and/or recommendations for state officials – the better and worse ways to intervene in low-performing schools via Title I, the gathering of better data about school discipline practices, the specifying of charter school laws to prohibit racial segregation, the experimentation with regional student assignment plans or expansion of interdistrict magnet schools, to name a few.

Third, some of the authors tackled goals similar to each other – school-level diversity in race or socioeconomic status, for instance -- but came to somewhat differing conclusions about the optimal policy mechanisms for achieving them via the programs of ESEA. We highlight some of these discrepancies in the discussion that follows. The pieces are best read not as a unified, cohesive set of legislative recommendations that could be

¹⁶ Report to the U.S. Secretary of Education, Comm'n on Equity and Excellence: For Each and Every Child--A Strategy for Education Equity and Excellence (2013), <https://edpolicy.stanford.edu/sites/default/files/publications/each-and-every-child-strategy-education-equity-and-excellence.pdf>

adopted wholesale; it is better to read each of them as its individual author's or authors' definition of a problem and solutions. We also acknowledge that the issue is not best read as a comprehensive treatment of every policy topic relevant to the ESSA; there are some topical gaps, such as its relationship to IDEA and attendant implications for students with disabilities, or how to improve targeting of Title I funds between and within states (and funding within districts).

There are three broad types of policy instruments that emerge from the authors' recommendations: incentivizing equity via competitive grants; improving mandates where needed; and capacity-building at state and local levels. All of these are viable strategies for attempting to leverage improved educational outcomes for students.¹⁷ We draw on all of the articles to explain how these principles play out across the issue.

Strategy 1: Incentivizing Equity

In a 2013 article, we discussed the strategic direction of federal K-12 policy as moving towards "incentivizing equity."¹⁸ Devising financial incentives for states and localities to directly address structural and/or fiscal inequity was increasingly necessary in light of the limits of NCLB's testing and accountability mandates. Several of the articles here recommend embedding proposals within ESEA that would support and reward state and district efforts to put equity-building incentives in place.

For instance, Megan Hopkins, Christine Malsbary, and Zitlali Morales,¹⁹ describe how incentivizing states to develop their infrastructures for English language learners might work:

EL population size and diversity, as well as state EL educational infrastructure, could be included in Title I funding formulas with respect to establishing measures and methods for identifying ELs such that states would need to consider EL population size and growth *in addition to* linguistic and other forms of diversity. They could also be included within Title II related to teacher

¹⁷ Paul Manna & Jennifer Wallner, *Stepping stones or a bridge too far? The federal role in educational accountability*, in *CARROTS, STICKS, AND THE BULLY PULPIT LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA'S SCHOOLS* (Frederick M. Hess and Andrew P. Kelly eds., 2011).

¹⁸ Elizabeth DeBray & Ann Blankenship, *Future policy directions for Congress in ensuring equality of educational opportunity: Toward improved incentives, targeting, and enforcement*, 88(1) *PEABODY J. OF EDUC.* 21 (2013).

¹⁹ Hopkins, et al., *infra* page 53.

professional development, where the state's current infrastructure (or lack thereof) for teacher preparation related to ELs would be considered when allocating resources.

Christopher Suarez considers how a competitive incentive grant program within ESEA for districts to encourage greater student socioeconomic-level balancing within schools might be structured according to the "60-40 principle" -- schools should not have more than 60% of its students eligible for free and reduced lunch. Positing that current compensatory programs face an uphill battle in overcoming the challenges of high-poverty schools, Suarez draws on a recent New York State pilot program that has supported districts' plans to improve the balance between lower and middle-income students. He notes that the current Acting Secretary of Education, John King, supported such a program while formerly serving as Commissioner of Education in New York State. In February 2016, King announced that President Obama's 2017-18 budget proposal contains a requested \$150 million to support an initiative called "Stronger Together." The grants would be awarded competitively to local educational agencies that would voluntarily develop and implement plans to increase schools' socioeconomic diversity. Both planning grants for districts to engage the entire community, and implementation grants, would be part of Stronger Together. King also indicated incentives would be included for districts to collaborate as consortia so that student assignment plans could be designed to cross district boundaries (see discussion of Finnigan, Holme, and Sanchez paper below). While this measure is certain to face opposition in Congress, Stronger Together epitomizes the concept of a federal role in incentivizing equity.

Emily Hodge, Kendra Taylor, and Erica Frankenberg consider how a range of incentives (as well as some strengthening of mandates) can aid in preventing greater school-level racial segregation. These range from support for districts seeking to use magnets, to a program to incentivize the construction of racially diverse schools, to incentives built into Title II for training, recruitment and retention of a high quality and more racially diverse teacher workforce. These authors remind that there was historical precedent in federal policy for building such capacities in school districts under the Emergency Schools Assistance Act (ESAA), which was funded during the 1970s but repealed by Congress at the beginning of the Reagan administration. Furthermore, they write, magnet schools should be a turnaround option under Title I school improvement plans, and states should incentivize the creation of magnets that are racially diverse.

Addressing somewhat similar concerns are Kara Finnigan, Jennifer Holme and Joanna Sanchez, who argue that federal incentives are needed to overcome the intensifying racial segregation *between* school districts in the U.S. Using data from the Milwaukee Public Schools during the period of the ESEA, 1965 to the present, they show how this growing hyper-segregation of schools by race and poverty between city and suburbs have militated against federal compensatory dollars making a difference in students' education. They write: "We argue that ESSA implementation must focus on both more targeted, place-based efforts to strengthen schools and communities in high poverty neighborhoods and regional strategies to create more diverse schooling environments."²⁰ However, federal-level financial incentives are the most powerful policy lever available for making this kind of cooperation feasible, absent state action.

Strategy 2: Strengthening Mandates

A theme running throughout many of the papers is that there are still mandates within ESSA that need to be strengthened or better specified, particularly with respect to state-level accountability measures. The authors address these concerns for both states operating under the new law, as well as for the next revision of federal policy. For instance, Nicholas Triplett and his colleagues write that prior to ESSA, only eighteen states required schools to report disaggregated data on school discipline. "While the requirement of disaggregated discipline data is an important step forward," they write, "the ESSA does not establish what might be termed a *system* of discipline accountability."²¹ Tina Trujillo, in her piece on changes to school turnarounds under Title I, makes the same observation: ideally, federal policy would "require schools to develop plans for significantly reducing suspensions, expulsions, truancies, and referrals to law enforcement agencies" and "mandate that these plans focus on racial, economic, or other populations that are over-represented in the schools' discipline statistics."²² These are mandates that states should now address.

²⁰ Finnigan, et al., *infra* page 203.

²¹ Triplett et al., *infra* page 215. The authors go on to explain, "For example, the ESSA takes steps to address the 'overuse' of exclusionary discipline, however, it provides little guidance on what might constitute the overuse of suspension and expulsion. Furthermore, there is no definition of the concept of 'discipline disproportionality' or any indication of how the closing of associated 'discipline gaps' might be assessed." *Id.*

²² Trujillo, *infra* page 162.

Trujillo makes numerous other recommendations for uses of program funding and oversight. For instance, states can expressly prohibit Title I funding for interventions in lowest-performing schools from being used for “untested consultants, coaches, ‘turnaround specialists,’ or other intermediary organizations that do not have a demonstrated track record of success in providing support to demographically similar schools in these non-test based instructional areas.”²³ She calls for other specific mandates as preconditions for the schools receiving the funds: “Significantly increase mental and physical health services for children and their families, including hiring and/or increasing the currently allocated school psychologist, school nurse, and social worker. Open a school clinic that is available to both students and their families. Implement research-based, whole-school curriculum for socio-emotional learning.”²⁴

Hodge, Taylor, and Frankenberg note with concern that ESSA contains incentives and funding for charter schools to expand, but is absent of any new mandates about prevention of racial isolation. They recommend that “state authorizers of charter schools amend charter eligibility to ensure that racial isolation or promoting diversity is examined before awarding funding to any potential charter school. Further, state authorizers of charters should evaluate any potential impact on the diversity of public schools, particularly where districts have desegregation plans.”²⁵ However, these authors note that the new law:

...explicitly states that districts and/or consortia of districts may use ESSA Title IV funds to provide transportation to magnet schools as long as the transportation costs are sustainable and a relatively minor portion of the overall grant. Given the often prohibitive nature of transportation for many students to access choice options, this funding provision is another way in which federal funds could meaningfully expand the choice options for students to attend integrated schools.²⁶

Hopkins, Malsbary, and Morales find that ESSA made some improvement for English Learner (EL) reclassification rules, pushing the reporting requirement for reclassified ELs from two years, as it was under NCLB, to four years. However, they observe, “this stipulation still creates

²³ *Id.* at 163.

²⁴ *Id.* at 161.

²⁵ Hodge, et al., *infra* page 84.

²⁶ *Id.* at 83.

an EL subgroup that by its definition will always underperform relative to non-ELs, thus making it impossible to determine which states, districts, or schools are successfully meeting ELs' long-term needs." ESSA does now require states "to develop entry and exit criteria for EL identification and reclassification that are consistent across all school districts in the state"²⁷; however, federal guidance has still not been offered "as to the criteria that states should consider, and refining the EL category in each state is a prerequisite for implementing policy that is responsive to EL population size and growth."²⁸

Also concerned with changing the one-size-fits-all accountability measures in current law (including ESSA) are Finnigan, Holme, and Sanchez, who advocate positive labeling for diverse schools; that is, they write, "Accountability systems should also reward districts and schools for taking steps to becoming more diverse. ESSA represents an opportunity to include such a reward system, as the legislation requires states to report measures of school quality."²⁹ The authors suggest, "states could, for example, create categories of districts (i.e. urban, inner ring suburb, outer ring suburb, rural) and provide them with different performance measures, targets, and interventions, including greater capacity building and support structures around student and family needs in these contexts that disrupt the more technical aspects of teaching and learning."³⁰ Building such a differentiated system would take more work and discernment on the part of policymakers, but the benefit would be more effective interventions.

Strategy 3: Capacity-Building

Closely related to providing incentives for equity is the area of capacity-building, which refers to the federal government – or under ESSA, the states – investing in the knowledge, skills, and know-how of administrators at the levels of the system closest to instruction. In some form, building the capacity of states to oversee improvements in high-poverty schools has been a part of ESEA's history from the beginning.

²⁷ Hopkins, et al., *infra* page 33.

²⁸ *Id.* at 40.

²⁹ Finnigan, et al., *infra* page 205. The authors go on to note, "Examples listed in the legislation are student engagement, and school climate, but states are free to select their own indicators. We urge states to take advantage of this flexibility by incorporating school diversity as one measure of school quality. Indeed, states could also provide schools that have intentionally sought to attract students who are underrepresented in their school populations with a special designation as a 'Diversity School.'" *Id.*

³⁰ *Id.* at 206.

Jerome Murphy, in 1971, wrote about the new administrative staffs that state departments of education developed as federal monies flowed to districts.³¹ However, this growth in administrative capacity has been unmatched by advances in knowledge around instructional improvement, i.e., the technology of improving teaching and learning.³² In the present day, capacity-building should remain an important goal of federal policy, though there are many particular forms that aim can take. Gary Orfield, in his article, observes that one of the unintended consequences of the new law is likely to be the administrative overload on many state officials, who will be unsure of exactly how and when to proceed in implementing district and school-level interventions via Title I. The ambiguity is apt to create confusion along with flexibility; therefore, many of these articles can be read as commentary on new policy provisions as well as advice to policymakers seeking to build the capacity for state and local improvement efforts.

In their article, *The ESEA and Teacher Workforce Management Systems*, Benjamin Superfine and Craig Devoto recommend that under ESSA, states focus via Title II on building stronger systems of teacher workforce management. These comprehensive systems should be aimed at:

[M]anaging and developing the teacher workforce, including increasing the supply of potential teachers; credentialing; promoting the quality of initial preparation; recruiting; hiring; assigning teachers to workplaces and roles; promoting induction and socialization; providing opportunities for on-the-job training for new teachers; creating more extensive professional development opportunities for veteran teachers; generating working conditions conducive to improving development and performance; supervising and evaluating performance; retaining teachers; terminating employment; and compensating, promoting, and managing labor relations.³³

They write that while ESSA has continued to incorporate some Title II subgrants to facilitate policy moving in that comprehensive direction, it is

³¹ Jerome Murphy, *Title I of ESEA: The politics of implementing federal education reform*, 41(1) HARVARD EDUC. REV. 35 (1971).

³² Susan L. Moffitt & David K. Cohen, *The State of Title I: Developing the Capability to Support Instructional Improvement*, 1(3) RUSSELL SAGE J. OF THE SOC. SCI. 187, 192 (2015).

³³ Superfine & Devoto, *infra* page 267.

still too piecemeal. “As it stands,” they write, “there is no blueprint for states to follow, which could prove problematic for states with limited capacities.”³⁴

Policy for English language learners (ELL’s) is also an area where building state-level capacity under ESSA has the potential to make a significant positive difference. As Hopkins et al. write, ESEA should assist states in building their ELL “infrastructures” depending on their particular populations and needs as a precondition to allocating funding:

For example, a state with a small but growing number of newcomers who speak one or two languages – and that has an open or bilingual policy – might develop its infrastructure to support K-12 bi/multilingual programs for the languages present. On the other hand, a state with a large EL population who speaks several languages might develop its infrastructure to support the implementation of translanguaging practices across the K-12 continuum, which could be possible regardless of the state’s language policy. In either case, resources can be allocated to support the infrastructure that best matches the needs of the state’s particular population and policy environment. Before allocating resources, however, it is important to take stock of where states are in developing their EL educational infrastructures so that funding can be distributed in ways that match states’ needs.³⁵

Trujillo, in her article on mandated interventions in low-performing schools, focuses on alternatives to the current sanctions-based policies. The School Improvement Grants program has been discontinued under ESSA, but state policymakers should “require schools to build their capacity for overall improvement by implementing research-based, wrap-around services that address students’ social, emotional, civic, and broad academic needs.”³⁶ While she acknowledges that, absent active federal oversight and enforcement, it will be easy for states to turn to quick “fixes,” she urges states to look beyond them, prohibiting the diversion of federal funds to intermediary organizations without a track record of meaningful interventions in low-performing schools. The danger, however, is that even though the law mandates “evidence based interventions,” there still is not broad agreement in the social scientific

³⁴ *Id.* at 266.

³⁵ Hopkins et al, *infra* page 43.

³⁶ Trujillo, *infra* page 161.

community about what, exactly, those are. As Gary Orfield writes: “States and localities could call almost anything they wanted to do ‘evidence based’ if the standard is low enough. Since the states are going to be developing their own standards and evaluating their own programs, they are very likely to announce continual success as states have done in the past.”³⁷ This point illuminates the suggestions for capacity-building that many of the authors have advanced, citing strong research evidence, throughout this issue.

Two Historical Perspectives from Veteran Observers of Federal Education Policy: Orfield and Jennings

Finally, the issue contains two overarching pieces by veteran observers of and participants in the federal education policy process, Jack Jennings and Gary Orfield. From 1967 to 1994, Jack Jennings served as the subcommittee staff director and then general counsel for the U.S. House of Representatives’ Committee on Education and Labor. Subsequently, he founded and served as the CEO of the Center on Education Policy (CEP), an influential Washington, D.C.-based nonpartisan educational research organization. Gary Orfield is a professor of education, law, and political science at the University of California, Los Angeles (UCLA). Dr. Orfield is the co-founder (with Christopher Edley, Jr.) and now co-director (with Patricia Gandara) of The Civil Rights Project, one of the nation’s leading research centers on issues of civil rights and racial inequality. Dr. Orfield has dedicated his career to enhancing equality of educational opportunity for students through scholarship and its application to communities, particularly in the area of school desegregation.

From a historical standpoint, these two authors view ESSA differently, but both agree that Congress has acted quickly to undo the excess mandates and one-size-fits-all model of NCLB. Both are concerned about what such rapid deregulation may mean for Title I. Both also emphasize that civil rights enforcement should not change under the law - the Civil Rights Act and IDEA still protect.³⁸ Orfield looks through the lens of

³⁷ Orfield, *infra* page 287.

³⁸ Orfield notes, “The Department of Education will now have much more limited ability to use federal funds to try to prod changes in educational policy, but the 1964 Civil Rights Act forbids discrimination in any program or activity of any institution receiving federal school aid, as all school districts do.” *Id.* at 295. Similarly, Jennings writes, “In this revised federal role in education, IDEA would remain in effect with its student plans, due process procedures, and similar provisions. The funding for IDEA would be treated similarly to other federal aids.” Jennings, *infra* page 28.

federalism, likening this period to that of the block-granting under Ronald Reagan. Jennings looks to what he sees as the design flaws of both Title I and NCLB for answers to the current dilemmas:

The primary shortcoming of both reforms' approaches was that they were indirect: Title I provided some additional funds for extra services, and NCLB pressured teachers to raise student test scores. Neither directly focused on improving regular teaching and learning in the classroom. A direct approach to improvement is now needed, and not circumspection. Title I and NCLB were well-meant reforms rooted in the times of their creation, but today the means used by both reforms cannot bring about the betterment the schools need.³⁹

Jennings outlines a future federal K-12 education strategy that has less of a role for categorical programs than at present, with collaborative agreements between states and the federal government about goals for improving teaching and learning, made meaningful by *an active enforcement role* for the Education Department. It is this latter point that concerns him most about ESSA -- what is too much flexibility for the states? Both authors are concerned about the seeming backward step for Title I from its original purpose. Orfield emphasizes the role that scholars have to play in the coming period, documenting implementation, evaluating which state policies are and are not effective; and in an advocacy role, attempting to build relationships among policymakers across different levels of government that might lead to a more productively balanced federalism.

Conclusion

Congress acted decisively and with alacrity in enacting ESSA, and a period of "muddling through" its implementation begins once the regulations are in place. State administrators are likely to be overloaded and somewhat overwhelmed by the new flexibility. Clearly, the stakes are very high for economically disadvantaged students in the U.S., and we are entering a period in which these students' fates are increasingly going to be in the hands of state and local policymakers. We would emphasize that civil rights protections that have been in place for nearly fifty years must remain central to federal education policy, no matter how much latitude

³⁹ *Id.* at 12.

state officials will now have with respect to other kinds of accountability policies.

The range of ideas in these authors' articles deserves broad attention and debate in the policy and research communities; their careful scholarship is a reminder that research can and should be brought to bear in the policy process. We plan to disseminate the findings widely in the educational policy community, as well as to state policymakers. The influence, money, and protective authority that have been wielded by the federal government in elementary and secondary education since 1965 are too vital to students' opportunities for there to not be reasoned and informed debate about ESSA's provisions, both in implementation and enactment. To our way of thinking, getting federal accountability and enforcement policies right will always be of the utmost urgency.

Fifty Years of Federal Aid to School: Back into the Future?

Jack Jennings*

In 1965, the federal government began to provide major financial aid for education to states and local school districts. The Elementary and Secondary Education Act¹ of that year (ESEA), the embodiment of this new federal role, was the focus of high hope that it would bring about broad improvement in American education. As President Lyndon Johnson said when he signed the legislation into law: “As President of the United States, I believe deeply no law I have signed or will ever sign means more to the future of America.”²

Fifty years later, in 2015, President Barack Obama commented on the effects of federal school aid: “It didn’t always consider the specific needs of each community. It led to too much testing during classroom time. It often forced schools and school districts into cookie-cutter reforms that didn’t always produce the kinds of results that we wanted to see.” Obama gave these views in signing the Every Student Succeeds Act³ (ESSA), the latest amendments to ESEA. The President also noted that the goals of the former law were right; but, in practice, it often fell short.⁴

What happened during those fifty years to go from such high hopes to such harsh criticisms? The law that President Obama signed removed federal requirements on states and school districts and vested key decisions in state and local officials.

* Jack Jennings is the founder and former CEO of the Center on Education Policy. He served for 27 years as a subcommittee staff director and then as general counsel for the U.S. House of Representatives Committee on Education and Labor.

¹ Elementary and Secondary Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965).

² Lyndon B. Johnson, *Remarks in Johnson City, Tex., Upon Signing the Elementary and Secondary Education Bill*, THE AMER. PRESIDENCY PROJECT (April 11, 1965), <http://www.presidency.ucsb.edu/ws/?pid=26887>.

³ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015).

⁴ Barack Obama, *Remarks by the President at Every Student Succeeds Act Signing Ceremony*, WHITE HOUSE PRESS OFFICE (December 10, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/10/remarks-president-every-student-succeeds-act-signing-ceremony>.

Have we come full circle after fifty years of federal involvement in the schools — from local and state control before ESEA back to local and state control under ESSA? Is the past the future, or is there another possibility?

This article will explore those issues. After briefly reviewing the half century history of federal aid in order to understand how it became what President Obama described, the article will suggest a way to measure the performance of states and school districts as they use the freedom the new law provides them. In case that progress turns out to be inadequate, the article will also propose a way for the local, state and federal governments to work together to improve the schools.

A Long Perspective

At the beginning of this article, it might be useful to explain my involvement with the federal role in education. I was fortunate to have had two careers: as the principal education expert for twenty-seven years in the U.S. House of Representatives, and as founder and CEO of the Center on Education Policy (CEP) for the next seventeen years.⁵

In my first career in Congress, I got to know the original congressional authors of ESEA. Since I began my work on the Hill just after ESEA was enacted, talking to these key members of Congress and listening to them gave me a good idea of how ESEA came about and what the expectations had been at its creation.

During my time working for Congress I was the legal counsel and staff director responsible for ESEA, its subsequent amendments, and similar statutes. In that capacity, I dealt directly over the years with three different chairmen of the Committee on Education and Labor of the U.S. House of Representatives, set up hearings, drafted legislation, and helped the committee's chairmen to shepherd the legislative bills through the House and then the Senate-House conference committees which had to agree on the terms of the final legislation. My responsibilities included being the chief representative of the House committee in working with the presidential administrations, dealing with lobbyists of the organizations representing all the groups affected, and explaining the details of the legislation to the news media.

I was an “insider,” to use Washington, DC lingo. I go into this detail on my first career to note that I spent a lot of time working in Congress on

⁵ JACK JENNINGS, www.jackjenningsdc.com (last visited Feb. 7, 2016).

ESEA and other federal education and social policies. Of course, many other people were also involved in this work.

When I left Congress at the end of 1994, I set up the Center on Education Policy to provide independent, objective analysis of federal laws and policies, which I believed was sorely lacking amid a sea of reports and publications that used selected facts to justify established positions. I limited the Center's funding to grants from charitable foundations, and refused government funding and support from education and other organizations because I wanted CEP to be independent and not influenced by the views of government funders or private interests.⁶

The Center on Education Policy's products included a series of reports on the implementation of the No Child Left Behind Act (NCLB), the forceful amendments to ESEA adopted in 2002. Those reports on NCLB by the Center became mandatory reading for those in the news media, the Congress, the U.S. Department of Education, the White House, and associations representing education and business at the state and national levels. This research, which was released periodically over the course of nearly a decade, provided timely, comprehensive, readable, and factual information on NCLB, unmatched by any other group. In 2006, *Education Week*, the leading trade newspaper in this area, conducted a poll of national leaders in education and reported that CEP was one of the ten most influential education organizations in the country. CEP was by far the smallest of the ten in staffing and had the least amount of funding; others included the U.S. Congress, the U.S. Department of Education, the Bill and Melinda Gates Foundation, and established larger organizations.⁷

I retired from CEP in 2012, and have been involved since then in monitoring and commenting on federal involvement in the schools as well as on other issues. Currently, the news media describes me as a "long-time education policy expert" or something similar.⁸

⁶ Anne Lewis, *The Evolution of the Center on Education Policy: From an Idea to a Major Influence*, CTR. FOR EDUC. POL'Y (Jan. 27, 2012), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=393>.

⁷ Christopher B. Swanson & Janelle Barlage, *Influence: A Study of the Factors Shaping Education Policy*, EDUC. RES. CTR. 59 (Dec. 2006), http://www.edweek.org/media/influence_study.pdf.

⁸ Tom Chorneau, *Latest waiver pathway leaves NCLB altogether toothless*, CABINET REPORT (May 26, 2015) <http://cabinetreport.com/politics-education/latest-waiver-pathway-leaves-nclb-altogether-toothless>.

During this lengthy involvement with the federal role in the schools, I saw the good that came from this assistance and direction, such as the inclusion of children with disabilities in regular classrooms and the provision of extra services to disadvantaged children who needed them to succeed. But, I also saw the limitations of federal programs and some of the difficulties they created for educators and administrators, such as imposing too many regulations on administrators while providing too little federal funding to fulfill the promise of the federal laws.

Those two long careers afforded me the privilege of having a seat at the table as federal aid to education evolved from its modern beginnings until today. In *Presidents, Congress, and the Public Schools*,⁹ I draw from that unique long term involvement to lay out the history of federal aid, as well as to address the future of school improvement.

Part I: Why Education Needs to Improve and Whether Federal Assistance Has Helped

The Challenges

To place the federal role in education in perspective, it is helpful to understand the past and current condition of elementary and secondary education in the U.S. It is also useful to see the challenges the schools have faced over the last several decades.

Public schools are pivotal to the success of the United States, both as a society and as an economy. Since more than ninety percent of children attend public schools, those institutions are teaching the nation's future political figures, business leaders, military personnel, workers, and other citizens. All these individuals must be prepared in school for employment, for further learning, and for citizenship in a multi-racial, multi-ethnic country.

The public schools have faced and still face two great challenges in carrying out that huge responsibility. All students need to learn more, even those who are considered high-achieving; and every student should receive the same high-quality education regardless of family income, the property wealth of his or her school district, having a physical or mental disability, needing to learn English, or other inhibiting factor.

Before further explaining the need to bring about both higher academic achievement and greater equality of educational opportunity, we should

⁹ JACK JENNINGS, *PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM*, (2015).

get a fix on the level of academic achievement of students in public education in the United States. Contrary to general belief, American students are not doing worse than they did in the past. Instead, pupils are holding their own in academic achievement or even doing better as measured by national test scores, despite challenging demographic changes, such as many more schoolchildren from low-income families and more children needing to learn English. Some other indicators also show progress: the graduation rate from high school is at an historic high, concomitantly the proportion of high school dropouts aged seventeen to twenty-four has fallen by more than half since 1970, and college-going rates have increased significantly since 1980.¹⁰ In 2015, the National Assessment of Educational Progress (NAEP) showed a decline in mathematics achievement at grades 4 and 8 and a decline in reading at grade 8; but it is too early to know whether these are aberrations or trends.¹¹

While keeping in mind these mostly positive trends, what is different from the past—and what creates the urgency for the United States to act—is that other countries' students are taking education very seriously and are doing better than ours on several important measures of educational progress. From the 1940s through the 1990s, the United States led the world on many indicators of educational achievement, but that record has been eroding as the educational levels of other nations have risen. For example, in 1995 the United States ranked second after New Zealand in higher education graduation rates among nineteen Organization for Economic Co-operation and Development (OECD)¹² countries with comparable data, but by 2010 we ranked thirteenth among twenty-five such countries.¹³ This relative decline in rankings occurred not because

¹⁰ Emily Richmond, *High School Graduation Rate Hits 40-Year Peak in the U.S.*, THE ATLANTIC (June 6, 2014), <http://www.theatlantic.com/national/archive/2013/06/high-school-graduation-rate-hits-40-year-peak-in-the-us/276604/>; Andrew Mytelka, *College-Going Rates for All Racial Groups Have Jumped Since 1980*, CHRONICLE OF HIGHER EDUC. (July 10, 2014), <http://chronicle.com/blogs/ticker/college-going-rates-for-all-racial-groups-have-jumped-since-1980/25533>; *Appendix 1- Dropout Rates of 16 to- 24-Year-Olds, by Gender and Race/Hispanic Origin: Selected Years, 1970–2012*, CHILD TRENDS DATA BANK (Sept. 2013), http://www.childtrends.org/wp-content/uploads/2012/10/01_appendix1.pdf.

¹¹ 2015 Mathematics & Reading Assessments, The Nations Report Card, http://www.nationsreportcard.gov/reading_math_2015/#?grade=4 (last visited Feb. 7, 2016).

¹² The OECD is an association of the world's economically advanced countries, which tracks economic and educational trends in its member nations.

¹³ *Education at a Glance 2012: OECD Indicator*, OECD LIBRARY (Sept. 11, 2012),

the United States was doing worse, but because other countries were doing better.

Another indicator of the relative performance of American students comes from the international test called the Program for International Student Assessment (PISA). In results released in 2013, even our top high school students did not perform as well in mathematics as top students in many other economically advanced countries.¹⁴ PISA mainly assesses students' achievement in reading, mathematics, and science, and is designed to measure students' ability to solve problems and apply their knowledge to real-life problems.¹⁵

The other major factor that *should* compel us to adopt different strategies in our schools is the extent of poverty in the United States and the implications that has for the life opportunities of children born poor. As the U.S. Secretary of Education's Equity and Excellence Commission stated in its 2013 report, America does not compare favorably on this measure with other OECD nations:

Our poverty rate for school-age children—currently more than 22 percent—is twice the OECD average and nearly four times that of leading countries such as Finland. We are also an outlier in how we concentrate those children, isolating them in certain schools—which only magnifies poverty's impact and makes high achievement that much harder.¹⁶

To address those two big problems—broad improvement of the schools and a better education for disadvantaged students—the United States should follow through on its ideals and truly provide a good education for every student. In addition to being the right thing to do, economics compels us to change. A worldwide job market exists today in which

<http://dx.doi.org/10.1787/eag-2012-en>.

¹⁴ *PISA 2012 Results in Focus: What 15-year-olds know and what they can do with what they know*, OECD LIBRARY (OECD Publishing, 2012),

<http://www.oecd.org/pisa/keyfindings/pisa-2012-results-overview.pdf>.

¹⁵ *About PISA*, OECD, <http://www.oecd.org/pisa/aboutpisa/> (last visited Feb. 8, 2016); *PISA Overview*, NAT'L CTR. FOR EDUC. STAT., <http://nces.ed.gov/surveys/pisa/> (last visited Feb. 8, 2016).

¹⁶ *For Each and Every Child—A Strategy for Education Equity and Excellence*, U.S. DEPT. OF EDUC. 15 (Feb. 2, 2013), <http://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf>.

American students will have to compete for jobs with students from many countries that were earlier considered economically backward.

We ignore at our peril the economic and technological changes that have led to higher educational demands. As Marshall S. Smith, a former professor and high-ranking official in the Carter and Clinton Administrations, has noted,

The challenges of a global economy, a complex and changing international environment, and the technology and communication revolutions have dramatically increased our collective national need to ensure our future prosperity. As a nation, we are ever more dependent on the quality of our human capital to carry us into a productive and safe future. Our schools are better than many think, but we must ask them to change and become smarter.¹⁷

Has Federal Assistance Helped Meet these Challenges?

In 1965, the federal government became a partner with the states and local school districts in an effort to improve education in the country. The challenges described above—raising the overall quality of schooling and providing greater equity in education—were addressed by this new federal aid. For half a century, those objectives continued to be federal purposes. Thus, the question is: how much did federal aid to education help to meet those challenges?

In that period, the federal government mounted two different major reforms. Promoting equal educational opportunity, or equity, was the primary emphasis of the first movement; and raising student academic performance was the main objective of the second reform.

The Elementary and Secondary Education Act of 1965 inaugurated the equity reform. That law sought improvement in general for American schools, with a special emphasis on providing greater financial assistance to school districts with concentrations of low-income children. This particular focus was called an equity orientation since it emphasized help for children in need of special assistance to succeed in school.

¹⁷ Marshall S. Smith, *Rethinking ESEA*, in *CARROTS, STICKS, AND THE BULLY PULPIT: LESSONS FROM A HALF-CENTURY OF FEDERAL EFFORTS TO IMPROVE AMERICA'S SCHOOLS* 233 (Frederick M. Hess and Andrew P. Kelly eds., 2012).

“Title I,” the name of the largest new ESEA program, distributed funds to school districts based on their numbers of children in low income families. Although the initial funding for Title I was substantial, President Johnson intended to provide very large increases in appropriations in the following years; but, that did not come about due to the costs of the Vietnam War.

A decade and a half after its creation, Title I had become tightly focused on assisting the lowest-achieving students, mostly through “add-on” programs that took them out of their regular classrooms for intensified instruction. During those years, millions of students received this extra assistance, and many millions more were assisted through other federal programs modeled on Title I.¹⁸

These other ESEA programs were also meant to improve schooling, but they had different purposes than Title I’s focus on the most disadvantaged students. All these aids were called “categorical” programs because their purpose was limited to helping one student group such as those needing to learn English or to carrying out one purpose such as providing school libraries with books and audio-visual equipment. Most of this aid was equity-oriented, but not all of it. These improvement strategies were not intended to provide school districts with general operating funds or aid for broad purposes. An exception from an earlier time was the “impact aid” program which reimbursed school districts with general aid in lieu of property taxes when the federal government removed land from local tax rolls to build military bases and such.

In essence, the theory underlying these ESEA categorical programs, including Title I, was that providing some extra aid would help to overcome any impediments to learning that students brought to school, or to improve some aspect of a school such as through a better-equipped library. Improving regular classroom teaching and learning was not the principal purpose.

During the 1960s and 1970s, students made academic progress as a result of these ESEA and related programs. Studies showed an increase in student test scores; but because of limited funding and the strictly-regulated nature of the programs, this progress was modest overall. In the 1980s, President Ronald Reagan used those results to eliminate dozens of federal programs and to cut funding for the rest. After that, ESEA, in general, became less significant in schools until the No Child Left Behind Act’s (NCLB)¹⁹ accountability provisions took effect in 2002.²⁰

¹⁸ Jennings, *supra* note 9, at 55-6.

¹⁹ Pub. L. No. 107-110, 115 Stat. 1425 (2002).

What was neglected in the 1980s' general debate about the effectiveness of ESEA were general trends that could not causally be tied to federal aid because of a lack of data, but which had to be affected by federal programs whose objectives were increased equity and general improvement. For instance, the achievement gap between white students, on one hand, and Hispanic and African American students, on the other, narrowed from the early 1970s, according to the longitudinal National Assessment of Educational Progress. While white students improved their achievement in reading/English language arts and mathematics, Hispanic and African American students achieved at even greater rates.²¹

Title I, and federal aid in general, were instead judged by the initial hopes of President Johnson and others that this aid would transform the country's schools. That was not to be because of the way a grand theory of change was under-funded and over-regulated, thereby becoming both too rigid and of lesser effect. The positive gains in achievement influenced by federal aid were not large enough to fulfill Johnson's grand aspiration that the schools would greatly improve.

Wasn't the Standards/Testing/Accountability Reform More Successful?

In the 1980s this dissatisfaction with the academic results of Title I and related programs helped to feed a movement calling for major change in public education. *A Nation at Risk*, a report issued under President Reagan,²² crystallized the sentiment that major reform was needed.

The result was the second major federal campaign for school improvement. This was called "standards reform" because it began as an

²⁰ The Elementary and Secondary Education Act of 1965 is the basic law in this area of federal activity. Since its beginning in 1965, ESEA has had a fixed number of years specified for the authorization of appropriations contained in the law to fund its activities. Usually at the end of that term, another law would be passed to extend the authorization for an additional number of years; and those extending laws would regularly also contain amendments to change the provisions of ESEA or to add new provisions. Each of those laws extending the authorizations of appropriations in ESEA and amending it would have its own title. So, NCLB is the title for the ESEA amendments of 2001, and the Every Student Succeeds Act of 2015 is the latest set of amendments to ESEA. In sum, ESEA is the continuing statute; and NCLB, ESSA, etc. are the titles of the periodic sets of amendments to ESEA.

²¹ *Summary of Major Findings*, THE NATION'S REPORT CARD, http://www.nationsreportcard.gov/ltt_2012/summary.aspx (last visited Aug. 14, 2014).

²² *A Nation at Risk: The Imperative for Educational Reform*, NAT'L COMM'N ON EXCELLENCE IN EDUC. (Apr. 1983), available at http://datacenter.spps.org/uploads/SOTW_A_Nation_at_Risk_1983.pdf.

effort to develop explicit academic standards for the nation's schools. The country had never before had such state or national standards because of deference to local control of education. New York's Regents' examinations were the exception to this lack of state academic standards. In the late 1980s and early 1990s, state governors and business leaders departed from the tradition of local control of curriculum and advocated for national academic goals, which then evolved into an effort to develop national academic standards and some measurement of whether students were learning that subject matter.²³

The last four presidents—two Republicans and two Democrats—responded to this advocacy by adopting a standards and testing approach to school improvement. The first reform, Title I and the other categorical aids, remained in place, although eclipsed by this subsequent approach to school improvement.

The new reform was simply layered on top of the earlier one. In technical terms, the amendments calling for academic standards and tests were inserted into Title I of the Elementary and Secondary Education Act, and became conditions which states had to meet to receive ESEA aid. In the process, the regulatory strings on Title I and some other categorical programs were loosened. As a result, since then many schools receiving Title I aid can use the funds for activities to improve the whole school instead of concentrating on individual students who need extra assistance.

The key event for the new standards movement was the Charlottesville Education Summit called in 1989 by President George H.W. Bush and attended by most of the nation's state governors. As a result of that meeting, the governors worked on national education goals. Then, Bush called for national academic standards and tests, but was not successful in having those standards adopted across the country or in securing related legislation through Congress. In the mid-1990s, President Bill Clinton, who as a state governor had worked on developing the national goals, called for state standards and tests. Clinton succeeded in enacting two laws that led to state-by-state development and adoption of academic standards, and initiation or expansion of related testing programs.²⁴

Early in this century, President George W. Bush's No Child Left Behind Act of 2001 transformed the standards movement into test-driven accountability. NCLB added to the federal law strict requirements for school districts and schools to have their students score at pre-determined

²³ JOHN F. JENNINGS, WHY NATIONAL STANDARDS AND TESTS? POLITICS AND THE QUEST FOR BETTER SCHOOLS 9-34 (1998).

²⁴ Jennings, *supra* note 9, at 35-153.

levels on state tests—or face penalties. President Barack Obama further increased the importance of student test scores by making them a factor in evaluating the performance of educators. Such evaluations were in effect required by Obama’s Department of Education for receipt by states of Race to the Top grants (RttT) and of waivers from NCLB provisions.²⁵

The last two presidents’ actions were particularly important because they resulted in pressure being placed on teachers to raise student test scores, both to increase student academic achievement and to determine the effectiveness of the teachers themselves. That was a misguided recasting of the standards movement which not only did not achieve its major goal but also turned many Americans against federal aid.

National leaders had the best of intentions; they wanted American students to learn more. But, their means of attaining that goal steered policy in the wrong direction.

The emphasis was on test scores without an accompanying effort to provide additional financial assistance to schools to prepare them to teach more demanding subject matter to students. Also ignored were the great disparities between districts in the degree of poverty among their students and the large differences between districts within the same state in funding per student.

The punitive nature of the law was also a major shortcoming. Particularly resented by educators as unfair were the NCLB-prescribed penalties for schools and districts that did not achieve the pre-determined levels of student test scores. Delinquent schools were labelled as in need of improvement which the news media often converted into “failing schools.” In addition, such schools had to permit students to transfer to another school, and to make federal aid destined for that school available to private and public vendors of tutoring. Obama’s teacher evaluation demands could eventually lead to the firing of teachers or limits on their salaries. “Greater accountability” in the form of higher test scores was the name of the game.

Effects of the Two Reforms

The standards/testing/accountability movement’s objective of a general, significant increase in student achievement has not been attained.

²⁵ *Race to the Top Fund*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/programs/racetothetop/index.html> (last visited Feb. 8, 2016); *ESEA Flexibility*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html> (last visited Feb. 8, 2016).

In *Presidents, Congress, and the Public Schools*,²⁶ a thorough review of state and national test data shows no comprehensive increase in student achievement resulting from NCLB's strategy of pressures and penalties and Obama's supplementary push to raise student test scores.

Although its major purpose was not realized, NCLB did some good. It helped teachers make better use of data to understand students' needs and made it impossible to cover up the lack of improvement of disadvantaged students. With Obama's programs, it is too early at this time to reach a definitive conclusion.

The other federal strategy, as symbolized by Title I, also brought about education improvements through the provision of extra services to millions of students. Over the fifty year period of its existence, Title I's greatest accomplishment has been to keep equity on the education agenda so that students with limitations of language, poverty, or disability could not be ignored.

Neither national strategy, however, changed American schools broadly and positively enough to bring a good education to all students. That goal was part of the political rhetoric used to enact the laws containing both national school reforms, and thus were they judged.

The primary shortcoming of both reforms' approaches was that they were indirect: Title I provided some additional funds for extra services, and NCLB pressured teachers to raise student test scores. Neither directly focused on improving regular teaching and learning in the classroom. A direct approach to improvement is now needed, and not circumspection. Title I and NCLB were well-meant reforms rooted in the times of their creation, but today the means used by both reforms cannot bring about the betterment the schools need. Therefore, a more effective mechanism should be sought to raise the educational level of the country.

Has Congress found that means of improvement in the Every Student Succeeds Act? Has the wheel turned back to state and local decision-making as the answer?

The Every Student Succeeds Act

The No Child Left Behind Act expired in 2007; but because Congress could not agree on changes, it extended NCLB without amendment from year to year until it was replaced in 2015 by the Every Student Succeeds Act. Congress used the annual appropriation bills as the way to secure the

²⁶ Jennings, *supra* note 9, at 85-94.

yearly extensions of the expiring law since by simply providing funds for an expiring law that statute is extended for that year. Congress and the Obama administration bought time through these one-year extensions to seek agreement on legislative changes.

During that period, states and school districts complained repeatedly and loudly about the problems with NCLB, including the goal that all students would have to be proficient in reading and mathematics by 2014. In the absence of congressional agreement on change, the Obama administration initiated a program of waivers to the states from various NCLB provisions. Although the states were appreciative of the waivers, many objected to the way the Department of Education granted them. Secretary of Education Arne Duncan made the approval of waivers dependent on the states carrying out what he considered needed school reforms. The most contentious condition was that a state had to evaluate teachers' performances based on their students' test scores.²⁷

In this unsettled atmosphere, local and state resentment against NCLB grew. In fact, no federal law generated more hostility from teachers and other educators than NCLB. That statute was denounced for causing too much testing of school children, making teachers "teach to the test" to avoid penalties, and mandating the use of unproven improvement strategies for poorly performing schools.

Finally, on December 10, 2015, President Barack Obama signed the Every Student Succeeds Act. Although the congressional sponsors of this new law hailed it as a major departure from NCLB, the debut of ESSA is not the end of test-driven accountability.

Instead of moving beyond NCLB's basic premises, Congress created in ESSA an "NCLB light." The U.S. Department of Education will be far more limited in making decisions under this new law than it was under NCLB; and, states and local school districts will be able to determine more issues than before. But, the standards/testing/accountability approach to school improvement lives on. Congress simply tinkered with its details.

Some ESSA provisions acknowledge the arguments against test-driven accountability. For instance, a fourth factor, one not based on tests, can be included by a state in its accountability system; but that element must be subordinate in weight to the test-driven factors.

²⁷ Kenneth Artz, *Teachers Unions Push Back Against Teacher Evaluations*, THE HEARTLAND (February 13, 2014), <http://news.heartland.org/newspaper-article/2014/02/13/teachers-unions-push-back-against-teacher-evaluations>.

Whether schools are succeeding will still be mainly determined through a test-based accountability approach. States will still have to annually test students in various grades, break out the results by major student subgroups, and intervene in persistently low-performing schools.

Repealed are NCLB's provisions that were considered too rigid, such as the unachieved goal that all students would be proficient in reading and math by 2014, federal penalties for schools and districts failing to increase the number of students reaching proficiency goals, and federal remedies for low performing schools. States will now make all those key decisions about the goals, penalties for not meeting the test score targets for student performance, and remedies to be adopted in the lowest performing schools.

Although NCLB was the prime source of discontent, Duncan's major policies particularly with waivers and RttT grants were portrayed as "federal encroachment in the schools." RttT grants had been awarded after considering whether states would adopt high academic standards, implement prescribed strategies in low performing schools, and use student test scores to determine the effectiveness of teachers. As mentioned above, waivers of NCLB's requirements were granted only if states agreed to comply with provisions similar to RttT's.

Those policies angered states which felt that they were too intrusive. Teachers were also opponents because they thought it was unfair to use student test scores as determinants of their salaries and employment. Also stirring the pot of opposition was the political right that looks upon anything that Obama does as wrong. They asserted that the federal government was imposing a national curriculum, the Common Core Standards, on the states by requiring them to have "high standards."

All this opposition led to ESSA placing unprecedented restrictions on the U.S. Department of Education. For example, the Secretary cannot impose on states teacher evaluation systems, academic standards, or remedies for poorly performing schools. Another restriction on the Secretary is a provision that shifts the burden of proof from a state having to justify its plan for receiving federal funds to the Secretary having to prove that the state plan is inadequate.²⁸

²⁸Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, § 8013, 8014, 8023, 8024, 8036 (2015) (Section 8013 waivers of statutory and regulatory requirements, Section 8014 approval and disapproval of state and local applications, Section 8023 prohibitions, Section 8024 prohibition on federal government and use of funds, Section 8036 state control over standards), *available at* <https://www.congress.gov/bill/114th-congress/senate-bill/1177/text>.

So, the new law is a rejection of federal accountability provisions as being too rigid, as well as a rebuke to the U.S. Secretary for intruding into state matters. In contrast, the ESSA is touted by its congressional sponsors as bringing freedom to the states and local school districts so that they can be innovative in improving education. Will that be the result?

In the last section, the conclusion about both the equity reform of the 1960s/1970s and the standards/testing/accountability reform of the last several decades was that they did not achieve the goal of broad improvement of American education because they used indirect means, instead of directly aiming to improve teaching and learning. In ESSA, Congress and the President showed a different perspective. They opted for continuity. The new law retains the framework of accountability while limiting federal decision-making and investing those powers in states and local districts. In other words, they have given test-driven accountability a new lease on life.

Congress drew the wrong lesson from the experiences with NCLB. Congressional leaders thought that a little less accountability or accountability shaped by the states was the way to encourage an improvement in education. The lesson that was ignored was that accountability alone is, at best, only of some assistance. Shifting the decision-making about the desired levels of test scores from Washington, D.C. to state capitals is not the kind of change that will greatly improve the schools. Focusing on better teaching and learning can be.

The ESSA has a four-year authorization period, or life.²⁹ During those four years, the ball is in the hands of the states. The hope is that they will improve the schools more than was done while NCLB dominated the scene. To track the effects of the new flexibility under ESSA, an assessment of state and local activities is proposed in the next section. The overall objective of ESSA should be to promote general improvement in education and to secure greater equity, the two general challenges to the schools that were identified in the beginning of this article. These assessments should inform us on how those challenges are being addressed.

²⁹ As mentioned in an earlier note, the laws extending the authorizations of appropriations for ESEA and amending it have set terms for these extensions. This four year term is the length of the extension contained in ESSA.

Part II: Looking to the Future

Tracking State and Local Success

During the next stage of federal aid to the schools, the state governments and local school districts clearly have the upper hand. They succeeded in convincing the Congress that NCLB and Obama administration actions were intrusive in state and local governance of the public schools and that key decision-making about accountability ought to occur at the state and local levels.

In the next four years, to determine the effects of ESSA, a wider lens ought to be used than one limited to student scores on state tests. Such data, as well as state NAEP results, must of necessity be included in any comprehensive state evaluation; but, test scores have their limitations as indicators of educational quality.

It is also necessary to ask whether the conditions exist for students to learn more and for teachers to teach more effectively, and whether efforts are being made to create or expand those conditions. Fairness to both teachers and students requires that both state legislatures and school boards do everything they can so that teachers can do their work and that students can learn.

Essential questions therefore are: how can we help students to learn more? And, how can we assist teachers to be more effective? In other words, how can the best teaching and learning be achieved? Once the answers to those questions have been provided, then evaluations of ESSA's effects should ask whether states and school districts have created the appropriate conditions for more effective teaching and greater learning to occur.

What the Research Shows

An in-depth review of the research literature (contained in my book)³⁰ shows certain essential elements that can lead to improved teaching and learning: pre-school programs of high quality, especially for poor and middle class students; an improved teaching force based on high admission standards, better training and higher pay; greater attention to high-need schools; a more rigorous curriculum; and adequate funding fairly distributed to pay for this undertaking.

³⁰Jennings, *supra* note 9, at 158-184.

Studying research and data about how to improve teaching and learning led to those general areas. So, in determining the success of states and school districts in the next four years, information on those key components should be used.

In reviewing the research in this area, these are the specific indicators that could form the basis for annual ESSA evaluations of whether states and school districts have created the right conditions for effective teaching and greater learning.

- ***Preparation for schooling.*** Children should be better prepared for school by providing four-year-olds, especially those from low-income and lower-middle-income families, with a high-quality preschool education. In addition, social, health, and mentoring supports should be available to children from low-income families while they attend school.
- ***Improvement of teacher quality.*** A comprehensive approach is necessary, including (a) recruitment of candidates for teaching who demonstrate solid academic achievement in college through such evidence as high grade point averages and who score in the top third of those taking the ACT, SAT, or the Graduate Record Exam (tests for admission to college and graduate school) *and* who also show the attributes needed for teaching; (b) preparation in an accredited program; (c) at least a year of clinical teaching and at least a year of induction and mentoring; (d) state licensure; (e) evaluations that fairly measure teaching effectiveness; (f) salaries commensurate with teachers' responsibilities and sufficient to retain them; and (g) working conditions respectful of teachers as professionals.
- ***Extra resources for difficult schools.*** School districts should recruit the most effective teachers to work in schools with concentrations of students from low-income families, usually the schools with the greatest academic problems. Bonuses in pay and good working conditions will be needed to attract and retain such teachers in those schools.
- ***Challenging content.*** The Common Core State Standards for reading/English language arts and mathematics and the Next Generation Science Standards should be the basis for what is taught since they establish rigorous learning outcomes. Curricula and other learning materials can be derived from those standards.
- ***Adequate and fair funding.*** An adequate level of funding for public education, as documented by objective experts, should be

provided in a state. Further, every student's education should be supported by the same per-pupil expenditure throughout the state, except for variations among different areas in the cost of living. In addition to that amount, supplements for students with special needs should be provided to school districts. In raising funds for education, a state should treat taxpayers fairly so that the same local tax effort produces the same level of revenue in every district regardless of any disparities in real estate values.

Needless to say, these suggested indicators are based on policies dealing with serious issues that could generate controversy. For instance, if a state wished to expand enrollments in pre-school programs for children from low and lower middle income families, funds would have to be found for that policy with higher income taxpayers seeing no direct benefits. Controversy could also occur if a state sought to better fund low property wealth school districts and not more politically powerful higher wealth districts. These policies are also complex, such as raising the qualifications of candidates for teaching when there are shortages of teachers, providing clinical experiences for teaching trainees on a large scale, and ensuring better working conditions in schools with youth gangs and severe student discipline problems.

The answer to legitimate concerns about the feasibility of these changes is that these are the practices which research has shown have an effect on improving teaching and learning. By considering them together, they offer a comprehensive vision of what American schools should be. In my experience over the years, it is better to start with such a vision supported by evidence than to "compromise with yourself" by jettisoning essential elements even before the decision-making process begins. Therefore, states and school districts should be evaluated on whether they have used their new discretion under ESSA to improve the schools by considering all these research-based factors.

If these indicators are used to evaluate annually state and local performance under ESSA, states will have an incentive to create a research-based system of education that is likely to improve student academic achievement. These policies are not a one-shot approach, such as creating a better reading program or constructing one innovative school, and walking away declaring victory. These changes are meant to be comprehensive and ongoing with the emphasis on building a sound educational system to help all children do better.

Although these state assessments would be based on effective but difficult-to-implement policies, states and school districts have already

made considerable progress in adopting those policies. Therefore, this is not asking for the impossible.

Progress to Date

In considering the aims of each policy listed above, we are not standing with building plans in hand and a dream house in our mind's eye; rather, we are walking in as the carpenters are raising the walls. This brief overview will give some idea of what has been done so far by states and local school districts.

With preschool education, considerable progress has been made especially in programs for four-year-olds.³¹ Democratic and Republican governors for the last decade have worked to expand state-funded programs, and in Congress bi-partisan coalitions have endorsed greater federal aid for this purpose. For instance, the ESSA contains a new federal program of state grants to improve coordination among the separately funded and administered preschool systems. This is one of the very few new programs created in that legislation.³²

Regarding another area—the search for more academically prepared teachers—Teach for America (TFA) has been very prominent; but it is only one way to raise the academic quality of teachers and TFA has recognized its own shortcomings in preparing recent college graduates for the rigors of teaching. Other groups, most notably the Council for the Accreditation of Educator Preparation (CAEP), have also weighed in. CAEP has new standards for accrediting colleges of education so that by 2020, the average performance of candidates for teaching will be in the top third of those taking college entrance exams. Further, new exams for states to measure the teaching readiness of candidates for the classrooms have been developed both by The Educational Testing Service (ETS) and by the American Association of Colleges for Teacher Education in a joint project with Stanford University.³³ The clinical training of prospective teachers

³¹*A Matter of Equity: Preschool in America*, U.S. DEPT. OF EDUC. (April 2015), <http://www2.ed.gov/documents/early-learning/matter-equity-preschool-america.pdf>

³² Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, § 9212 (2015) (Preschool Development Grants).

³³*Standard 3: Candidate Quality, Recruitment, and Selectivity*, COUNCIL FOR THE ACCREDITATION OF EDUCATOR PREPARATION, <http://caepnet.org/standards/standard-3> (last visited Feb. 8, 2016); New Praxis Core Academic Skills for Educators Tests Overview, ETS PRAXIS, <http://www.ets.org/praxis/about/core/> (last visited Feb. 8, 2016); American Association of Colleges for Teacher Education, *New Assessment for Teacher Candidates Rolls Out After Two Years of Field Testing*, AMER. ASS'N OF COLLEGES FOR

and the mentoring of new teachers are increasingly recognized as research-based ways of improving the effectiveness of teachers.

With regard to the lowest performing schools, unfortunately, no long-term solutions have emerged; but, local experiments are promising such as a successful project in Tennessee to retain effective teachers by offering a \$5,000 bonus. With instituting a more rigorous curriculum, many states and school districts are well on their way to using the Common Core State Standards as the basis for developing curricula in reading/English language arts and mathematics. Several states have also adopted the Next Generation Science Standards. Implementation of the Common Core is proving challenging and will take longer than first anticipated, in part, because of loud opposition from the political right resulting in some Republican politicians wilting in their support of the standards and related testing.

Progress has also been made in school finance. Since the U.S. Supreme Court in 1973 turned over this responsibility exclusively to the states, most states have been sued with the plaintiffs usually prevailing. Progress has been difficult though because state legislatures drag their feet in finding the funds to fully comply. California offers a ray of hope since it has created a new system for a uniform payment for every child depending on grade, additional payments for children with high needs, and higher payments to districts with heavy concentrations of such children. That approach is akin to the indicators in this proposed assessment of progress under ESSA.

In sum, policies to promote research-based improvements in teaching and learning are being implemented in many states and school districts, or are at least being recognized as necessary. Some policies are further along in implementation than others. The good news is that none of these policies for improvement is foreign to states and local districts, but further action is needed to put in place for all children these elements of a good system of schools.

Using these five areas as the basis for annually evaluating state and local performance under ESSA will hopefully lead to further state and local improvements in each of these areas. Such changes may be dependent on governors proposing new laws and state legislatures passing legislation, as well as on school boards setting different policies. As teachers were evaluated under NCLB using test scores, so should elected

TCHR. EDUC. (Nov. 8, 2013), <http://aacte.org/news-room/press-releases-statements/156-new-assessment-for-teacher-candidates-rolls-out-after-two-years-of-field-testing>.

and appointed state and local officials be held to account for progress under ESSA using indicators of whether they have created good systems of education benefitting all students.

The Fall-back Proposal

After the four years of ESSA's existence, if broad improvement in the states and at the local level has not come about, it will be time to re-consider whether simply encouraging state and local innovation is the way to improve the quality of American education. The history of the last fifty years shows that such a re-examination is bound to occur.

As President George W. Bush's Secretary of Education, Margaret Spellings, said after ESSA became law: "I'm a little bit skeptical. We've tried the local control approach before, and we saw pretty pitiful results."³⁴ In the last fifty years, three major national campaigns to improve education were launched because of the inadequacy of state and local control.³⁵

In the 1960s and 1970s, discontent led to laws being enacted to promote equal educational opportunity for children with special needs due to state and local neglect. Most notably, the Elementary and Secondary Education Act of 1965 focused on improving education for students from economically disadvantaged families. The Individuals with Disabilities Education Act brought children with disabilities into the regular classroom from isolation at home, assignment to state institutions, or segregated classrooms.

In the late 1980s, state governors promoted national education goals which then led to national education standards and tests because they believed they needed national action after they had done all that they could at the state level. President George H.W. Bush proposed creating those national standards and tests. President Bill Clinton shifted strategy and provided federal funds for states to develop their own standards and tests.

In 2001, President George W. Bush proposed NCLB because this reform was not moving fast enough at the state and local levels. This

³⁴ Julie Hirschfeld Davis, *President Obama Signs Into Law a Rewrite of No Child Left Behind*, N.Y. TIMES (December 10, 2015), http://www.nytimes.com/2015/12/11/us/politics/president-obama-signs-into-law-a-rewrite-of-no-child-left-behind.html?_r=0.

³⁵ *Id.*

motivation that led to NCLB was well-intended, but the means chosen to implement the changes were faulty as was discussed earlier.

That history is briefly described earlier in this article and laid out in more detail in *Presidents, Congress, and the Public Schools*. The events of the last fifty years point in the direction of another national effort being mounted in the foreseeable future to accelerate improvement in education. Local innovation is good, as is state flexibility, but as Spellings said, we have tried that before.

A new approach. If events do lead in that direction, it would be prudent to think now about what would be a useful way to go. Let me make a proposal for a policy of encouraging school improvement that reflects what we have learned from the past.

In a nutshell, States and local school districts would agree to focus on improving teaching and learning by implementing research-based changes, in exchange for substantially increased federal funding in the form of unrestricted aid for the schools. In addition, the federal government would, over time, phase out current categorical programs turning these funds over to the states as they showed progress.

To be specific, the objective would be to encourage major improvement in the education that all students receive. This would be achieved by focusing on having students better prepared for school before they enter first grade, on raising the quality and effectiveness of the teaching force, on directing extra attention to challenging schools, on ensuring a rigorous curriculum, and on providing adequate and fairly distributed funding for the education of all students. These, of course, are the same general areas as were proposed earlier in this paper for annual assessments of ESSA's effects.

If a state was interested in participating in making improvements in those areas, it would negotiate with the federal government on a ten year plan to do so. The specific steps the state would take over those years would presumably be the same list of elements that were used in the state assessments under ESSA since these have been found to lead to greater student achievement. If a state wishes to modify those items, it would demonstrate through research how a different practice would raise student achievement.

Once agreement was reached between the state and the federal government, the state would receive its first increase in federal assistance to begin implementing its plan. Using markers to measure progress, also agreed to by the states and the federal government, implementation of the

plan would be regularly monitored. As a state progressed, it would receive more unrestricted federal aid for the support of these changes.

At the end of ten years, if a state were to achieve all these changes, federal funding in that state would have doubled. This federal aid would be guaranteed and continued as regular assistance to the state for its public schools. Federal categorical programs would also be converted into general aid for the states.

For this increase in funding and greater freedom on use of those funds, a state would have implemented the practices that research has shown would lead to greater student achievement. The students in that state will be better prepared for school before they enter, teachers will be more qualified, better trained, and receiving greater support to be effective. Students will have learned a more demanding curriculum, and the schools will be adequately funded with those resources fairly distributed.

That is the concept. Why should this idea be considered as a national policy to improve the schools?

Key questions. Since this is such a different way for the federal government to provide assistance to the schools, and such a different way for the states and local school districts to interact with the national government, it might be helpful to ask some questions about the concept.

1. *Why is this proposal being suggested?*

As discussed above, American public schools need to improve so that students are prepared as adults for a more challenging world. The two federal school improvement strategies of the last half century, for reasons described, are not adequate to bring about such broad improvement in the schools. The ESSA as an accountability measure suffers from the same limitation. Therefore, a different way must be found.

2. *Why focus on teaching and learning?*

Students and teachers are at the heart of education, whether it is in regular public schools or in charter schools. Creating the appropriate conditions for greater student learning and for more effective teaching should therefore be the proper focus of a national effort to raise the quality of schools.

3. *How is this really different from what has been tried before?*

As mentioned, a more direct approach is needed to improve teaching and learning, since the indirect methods of the two federal strategies have not been sufficient. But, if the federal government is to encourage a direct approach, it must be a cooperative venture

with the states and local school districts since the states are responsible for the schools under state constitutions and school districts actually operate the schools. Seeking such a major change requires all the major actors to participate.

4. *Isn't this proposal unrealistic in its broad scope?*

Policies that are difficult to implement are included in this proposal because research has identified them as improving teaching and learning and leading to increased student achievement. These changes create a vision of what American schools can be to provide each student with a good education. In the political process, compromises are usually necessary to get anything done; but to guide the process, it is important to start with the right vision of how all students can be well-educated.

5. *Why would states participate in such a difficult process?*

If state leaders believed that these policies would make their schools better, they would be willing to engage in seeing how they could be implemented. But, because of the scope of these changes, this must be a voluntary process, not dictated by the federal government, as was discovered with Duncan's demands on the states. A very strong incentive for the states would be the increased and flexible federal funds that would be available on a continuing basis to supplement their own funds.

6. *How would an agreement be reached between an interested state and the federal government?*

State leaders and local representatives would negotiate with the U.S. Secretary of Education on the contents of a state's plan. The beginning point would be the general areas and the specific elements identified by research as effective (referenced in the state assessments above); but a state could propose other elements, either as substitutes or additions. All final components of the plan must have a research basis showing their effectiveness in improving teaching and learning.

7. *What if Congress did not fund this law?*

If an agreement is reached between the federal government and a state, federal responsibilities would be to monitor state implementation and to provide funding. State and local responsibility would be to implement the agreement. If the federal government did not provide funding, the state would be relieved of its responsibility to carry out the agreement. If the state did not implement the agreement, then the federal government would not

provide the increased, flexible aid it promised. Duties and responsibilities would run in both directions.

8. *Is this just a block grant to the states, or is it a federal take-over of the schools?*

A block grant, such as Reagan's in the early 1980s, consolidates federal programs and gives those funds to the states with few or no strings attached, with the funding level generally reduced from the amounts in the consolidated programs. On the other extreme, a 'federal take-over of the schools' was alleged when Secretary Duncan set precise conditions for the receipt of Race to the Top funds and NCLB waivers. This new proposal is neither of those extremes. Unlike a block grant, specific research-based components to improve teaching and learning would be included in a state's plan; and the state would receive increased federal funding on a guaranteed and continuing basis. Unlike rigid federal programs, in this proposal a state would voluntarily agree to participate and would negotiate on the components of the plan as well as agree to the markers of success.

9. *How would happen to the traditional federal role of ensuring greater equity?*

The purpose of this proposal is to improve American education across the board. Of necessity, this includes the schools with concentrations of children from low-income families since those schools often face the greatest challenges. For instance, in writing state plans, specific components would include improving the quality and effectiveness of the teaching force, which would have a major beneficial effect on schools that concentrations of children from poor families attend. The proposed policies are meant to help all students but a disproportionate beneficial effect would occur in the education of those needing extra assistance.

The history of school reform over the last fifty years has certainly shown that it is not an easy task. The daunting changes in this proposal may seem unreachable, but so was the possibility of a man walking on the moon when President John Kennedy set that as a national goal in the early 1960s.

It is important to have a clear idea of where you want to go if a serious goal is the objective. Otherwise, we would be in the situation of the 15th century Zen monk who said: “Having no destination, I am never lost.”³⁶

Costs

The federal government’s special commitment in this arrangement is to provide additional funds to the states to solve these difficult problems. To illustrate the amounts of money involved, the appropriations for the elementary and secondary education programs in the U.S. Department of Education for fiscal year 2015 will be used.

The proposal in the first year of a state’s implementation of its plan would increase federal education funds in that state by an additional 20 percent. In fiscal year 2015, Title I, IDEA, and other categorical grants totaled almost \$35 billion. If all states chose to participate—an unlikely situation—the extra funding would be about \$7 billion.

If another 40 percent were awarded to all states in the fifth year, the cost would be another \$14 billion. At the end of the decade, the final 40 percent payment to all states would amount to an additional \$14 billion.

Therefore, the total costs if all states participated and fully carried out the policies would be an additional \$35 billion, in current dollars, over the present level of support, with all of the aid after the ten-year mark being in the form of general rather than categorical aid. The federal contribution to public elementary and secondary education would thus be doubled, from \$35 billion to \$70 billion, representing an increase from 10 percent of the total costs to 20 percent.

Where would the federal government find the extra federal funds for the new \$35 billion? One possibility would be a faster wind-down of the war in Afghanistan. That war and the Iraqi war have cost the United States \$6 trillion, according to a study done by the Kennedy School of Government at Harvard University. The interest alone on the debt assumed to pay for those costs is \$260 billion as of early 2014. If the Afghan war were to finish earlier, less money would be spent on war and more could be spent on education.

Another possibility is to look for the funds in other parts of the Department of Defense budget. For instance, the initial payment of \$7 billion to all the states to participate in implementing all these reforms could be found by eliminating just one war plane. Each F-35 Joint Strike

³⁶ Ikkyuu, Zen Buddhist priest (1394-1481).

Fighter costs \$7 billion, according to the National Priorities Organization. In subsequent years, the fifth year payment of \$14 billion could come from axing two planes. For the tenth year payment, two more would go on the chopping block.

Since these payments to the states are meant to be annual, ongoing support once state reforms are implemented, it may be necessary to identify other sources of funding. One avenue would be to eliminate some waste and fraud in the Department of Defense, the Department of Homeland Security, and the National Security Agency. Those agencies have had huge increases in their budgets since 9/11. In those vast sums of money, there are bound to be items that are wasteful, and perhaps there is even some fraud in contracting.

Another possible source of funding is a federal tax on new supplies of energy produced by improved methods of obtaining sources for fuel. A tax on fracking, a means of extracting increased amounts of oil and gas from rock formations, could produce the needed revenue. Since March 2008, oil production has increased 58 percent in the United States, and natural gas output has risen 21 percent, according to federal and international agency statistics cited in the *Wall Street Journal*. These developments have made the United States the world's largest producer of both fuels. Why can't we have two national goals: to be energy independent, and to have better-educated children? We would be investing for the future if we educated our children better while we enjoyed this increase in supplies of energy.

In 2009, the Congress passed the American Recovery and Reinvestment Act (ARRA) during the economic recession. The ARRA doubled the funding for the major categorical programs, provided the states with nearly another \$100 billion of general aid to schools, and gave the U.S. Secretary of Education more than \$5 billion for Race to the Top and other programs. While that legislation provided those funds over two to three years, it demonstrates that substantial increased funding is possible, if the political will is there.

In sum, squeezing out waste and abuse, eliminating some weapons, and/or raising some taxes on new supplies of energy would provide the funds to bring about comprehensive reform in America's public schools. The only question is whether the nation's political leaders share the determination to do this. They assert repeatedly education is important; now the issue is: will they do something about it?

Some Additional Points

School finance. If adopted, this new federal role would stabilize the funding base for public education in the country through diversifying financial supports. The federal government has the fiscal capacity to help with this diversification by doubling its support of education because it has broad taxing powers and a national taxing base.

Local school districts and state governments currently provide 90 percent of funding. School districts rely mainly on local property taxes, and state governments receive their revenues from income taxes, sales taxes, and other sources. The states vary in how much they rely on each of those sources. For example, Florida is dependent on sales tax revenue since it does not have a state income tax.

In an economic recession, state sales tax and income tax receipts fall, leading to lower state revenue. Since states must balance their budgets every year regardless of any such decline in revenues, funding for public education is at risk whenever there is an economic downturn.

The revenue that local school districts receive from real property taxation is more stable than state revenues. But in an economic downturn, school districts also run the risk that property tax revenue will shrink if property values decline or if property is abandoned.

If the federal government were to provide a larger share of the costs of education, this would bring greater stability to school funding to protect teachers' jobs and other essential elements of education. States should be required to maintain their own financial support of education so that the increased federal funds would in fact be additional to, and not in lieu of, current state and local funding.

IDEA. In this revised federal role in education, IDEA would remain in effect with its student plans, due process procedures, and similar provisions. The funding for IDEA would be treated similarly to other federal aids. The state funding formula as proposed would require supplemental payments to school districts for students with special needs, such as children with disabilities. Therefore, there should be no decrease in funding for the education of children with disabilities.

Constitutional and Legal Guarantees

In 2002, during his weekly radio address following passage of the No Child Left Behind Act, President George W. Bush declared that “education is the great civil rights issue of our time.”³⁷ At the National Action Network gala in April 2011, President Barack Obama echoed that sentiment: “The best possible education is the single most important factor in determining whether [our children] succeed. But it’s also what will determine whether we succeed. It’s the key to opportunity. It is the civil rights issue of our time.”³⁸

These presidential assertions emphasize how crucial it is today for children to receive a good education. These statements are also a reminder that the battles of the 1950s, 1960s, and 1970s to secure basic civil rights for African Americans and other racial and ethnic minorities involved multiple strategies, including seeking U.S. Supreme Court rulings, congressional approval of civil rights legislation, and creation of federal grant programs.

If attaining a good education is as important as Bush and Obama have said, then that objective cannot be left solely to the state grant program described in this article. Other ways ought to be used to broadly achieve this policy, similar to the means used to secure civil rights for all Americans in the last century.

For those reasons, the Rodriguez³⁹ decision handed down in 1973 by the U.S. Supreme Court should be challenged and a reversal sought. That ruling declared that education is not a fundamental right under the Constitution, thereby limiting access to the federal courts for those seeking a better education for children. This situation has changed since 1973, and experts believe that there could be a different outcome today.

Another strategy is to seek an amendment to the Constitution establishing a right to education. A statute for education similar to the Civil Rights Act of 1964 would be an additional means of ensuring a right to education.

I will not go into greater detail on those issues because the focus of this article is on the need to find a grant program that seeks the improvement

³⁷ *George W. Bush: Weekly Radio Address (Jan. 19, 2002)*, AMER. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25084> (last visited Feb. 8, 2016).

³⁸ *Remarks by the President at the National Action Network Annual Gala*, The White House (Apr. 6, 2011, 6:01 p.m.).

³⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

of the education of all children. The book explains these other points at greater length.

Conclusion

President Johnson would undoubtedly be disappointed with the criticisms of federal aid to education that his successor, Barack Obama, voiced on signing the latest amendments to Johnson's prized Elementary and Secondary Education Act. But, Johnson would not become defensive and try to divert criticisms. Rather, he would ask what could be done to make ESEA more useful in the battle to improve education.

That has been the principal purpose of this article—to get beyond the criticisms and to find a different, more effective way to improve the schools.

The country is still mired in a policy grounded in getting increased scores on state tests, achieved by whatever means, as the way to improve education. Success is declared when an overly rigid federal accountability statute is replaced by a less forceful accountability law. The difference is that the consequences for not raising scores are decided by state authorities and not by federal ones.

The proposal made in this article is meant to get us to think differently. To start the debate, this proposal sets as the objective the improvement of the daily interaction between students and teachers. This purpose can only be achieved if local school districts, the states, and the federal government work together and not at cross-purposes with one another. It also is best done using research as a guide to what has been shown to work. This would be different than in the past.

Since I worked on national legislation for nearly three decades, I am well-aware that what is proposed here in all its detail would be difficult to pass in Congress at the present time. This concept would, though, present a vision of what American schools *should* be. Every child should be prepared for school. Every teacher should be qualified, well trained, and supported. Schools must teach challenging subject matter, and every child's education should be adequately funded.

This ideal situation will not be achieved today or tomorrow, but it is the type of education the country should strive for. My hope is that others will be emboldened by this article to look for better ways to improve the schools than the test-driven accountability approach we are using today.

President Johnson worked day and night to get his vision of a better world into law. In our times, we must work as hard to find the appropriate way to make a good education available to all children.

Implementing Responsive Federal Policy for Bi/Multilingual Students

Megan Hopkins, Christine Brigid Malsbary & P. Zitlali Morales*

It is estimated that one in four public school students in the United States will be an English learner (EL)¹ by 2025.² The Elementary and Secondary Education Act (ESEA) has historically played an important role in the development of national capacity to support ELs, and accountability provisions that first appeared in its 2001 iteration (i.e., No Child Left Behind or NCLB) shed important light on the EL subgroup.³ Yet even with the passage of the Every Student Succeeds Act (ESSA) of 2015, which affords states and school districts more flexibility to adopt approaches that meet the needs of their particular students and schools,⁴ federal policy continues to offer little to no guidance, and few incentives, to create conditions that facilitate ELs' language development and

* Megan Hopkins is an Assistant Professor in the Department of Curriculum and Instruction at the University of Illinois-Chicago. Christine Brigid Malsbary is a Visiting Assistant Professor, Education Department, Vassar College. P. Zitlali Morales is an Assistant Professor in the Department of Curriculum and Instruction at the University of Illinois-Chicago.

¹ We use the term *English learners (ELs)* when referring to policy, achievement, or demographic trends and *bi/multilingual students* in all other cases to draw attention to students' potential rather than their limitations. See Ofelia Garcia, et al., *From English Learners to Emergent Bilinguals*, EQUALITY MATTERS 6 (2008), http://www.equitycampaign.org/i/a/document/6468_Ofelia_ELL_Final.pdf (stating that "English language learners are in fact *emergent bilinguals*. That is, through school and through acquiring English, these children become bilingual, able to continue to function in their home language as well as in English, their new language and that of the school").

² *English language learners face unique challenges*, NAT'L EDUC. ASS'N 1 (2008), [http://www.nea.org/assets/docs/HE/ELL_Policy_Brief_Fall_08_\(2\).pdf](http://www.nea.org/assets/docs/HE/ELL_Policy_Brief_Fall_08_(2).pdf).

³ Megan Hopkins et al., *Fully Accounting for English Learner Performance: A Key Issue in ESEA Reauthorization* 42 EDUC. RESEARCHER 101, 101 (2013) ("The No Child Left Behind (NCLB) Act of 2001 represented a step forward in federal policy for these students in two ways: (1) The law fostered greater inclusion of ELs in standards-based instruction, assessment, and accountability, and (2) it brought wider attention of policymakers and educators to ELs' language and academic needs.").

⁴ U.S. Department of Education Takes First Steps to Transition to New Law, U.S. DEPT. OF EDUC. (2015), <http://www.ed.gov/news/press-releases/us-department-education-takes-first-steps-transition-new-law>.

academic growth in ways that build upon their bi/multilingual assets and capabilities.

The year 2014 marked the 40th anniversary of *Lau v. Nichols*,⁵ a landmark Supreme Court case in the education of language minority students that mandated the provision of equal and equitable public education services for students designated as ELs. Although the resulting *Lau* remedies encouraged the use of bilingual programming, few resources were provided to states, districts, or schools to enable their implementation. Eventually, federal support for bilingual education ended in 2001 with NCLB, when all references to bilingual education were removed from federal education policy,⁶ and testing and accountability mandates embedded in the statute led to *de facto* English-only policies in many locales.⁷ Although the ESSA law includes modest improvements with respect to accountability for EL achievement, federal policy's silence on bi/multilingual education continues to reverberate.⁸

Particularly problematic for ELs are stipulations in Title I. Within Title I,⁹ blunt measures of English learner achievement continue to be supported in ESSA that do not consider a student's level of English language proficiency after they have been enrolled in U.S. schools for just one or two years.¹⁰ This oversight places unrealistic and unfair expectations on students – and on their teachers – with respect to the academic performance of ELs on tests administered in English.¹¹ That is,

⁵ *Lau v. Nichols*, 414 U.S. 563 (1974).

⁶ Patricia Gándara, et al., *Legacy of Brown: Lau and language policy in the United States*, 28 REV. OF RES. IN EDUC. 27, 39 (2004).

⁷ KATE MENKEN, ENGLISH LEARNERS LEFT BEHIND: STANDARDIZED TESTING AS LANGUAGE POLICY 4 (2008).

⁸ An exception is under Title VI, which supports native language instruction within Indian, Native Hawaiian, and Alaska Native education.

⁹ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015).

¹⁰ ESSA offers two options for including recently-arrived ELs in Title I accountability. The first option mirrors NCLB's approach, where ELs can be excluded from the English language arts test and related reporting requirements during their first year in U.S. schools, and then must be included in testing beginning in their second year. The second option requires states to test recently arrived ELs beginning in their first year in U.S. schools, but allows states to exclude their results in the first year and report a measure of growth in the second year, with regular inclusion in state reporting beginning in the student's third year.

¹¹ See Hopkins et al., *supra* note 5, at 105 (stating that “Educators are responsible for ensuring that all ELs become proficient in English, but it takes time for children to acquire English language proficiency even in the best instructional settings. Current federal accountability provisions ignore these developmental factors, and as a result, school systems are required to set unrealistic academic performance expectations for ELs

even though ELs' level of language proficiency substantially influences their performance on academic tests,¹² ESSA mandates that ELs participate in academic content assessments in English in addition to English language proficiency assessments. Failure on these tests can result in grade retention and non-graduation for students, as well as consequences for schools like school closure or turnaround. In New York State, for example, ELs have the lowest graduation rates (25%) and highest dropout rates (28%) of all students.¹³ In contexts with similar statistics, educators report experiencing undue pressure to raise ELs' test scores in the absence of curricular standards or resources that could support them, resulting in educators feeling isolated and demoralized.¹⁴ Finally, EL reclassification rules, which remove students from the EL category four years after they meet exit criteria, mean that there is a "revolving door" of students who are identified as ELs. Although the four-year reporting requirement for reclassified ELs in ESSA marks an improvement over NCLB's two-year requirement, this stipulation still creates an EL subgroup that by its definition will always underperform relative to non-ELs,¹⁵ thus making it impossible to determine which states, districts, or schools are successfully meeting ELs' long-term needs.¹⁶

Under ESSA, standards, assessment, and accountability for English language proficiency are fully integrated under Title I, rather than under Title III¹⁷ as in NCLB, which is the portion of the law focused on English learners and immigrant students. Title I in ESSA requires states to adopt English language proficiency standards that correspond with state content standards in language arts, mathematics, and science, and administer

who are not yet proficient in English. This undermines both the meaningfulness and the credibility of the accountability system and acts to demoralize teachers and students").

¹² KENJI HAKUTA & ALEXANDER BEATTY, TESTING ENGLISH-LANGUAGE LEARNERS IN U.S. SCHOOLS (2000).

¹³ Kate Menken, *From Policy to Practice in the Multilingual Apple: Bilingual Education in New York City* 14 *INT'L J. OF BILINGUAL EDUC. AND BILINGUALISM* 123-133 (2011).

¹⁴ Christine Brigid Malsbary & Mollie Appelgate, *Working Downstream: A Beginning EL Teacher Negotiating Policy and Practice*, 15 *LANG POL'Y* 27 (2014).

¹⁵ MARGARET HERITAGE, ET AL., ENGLISH LANGUAGE LEARNERS AND THE NEW STANDARDS (2015).

¹⁶ *Id.* at 102 (stating that: "unstable identification and reclassification procedures...produce a 'revolving door' effect, as more proficient students exit and less proficient students enter the EL subgroup. Under current policy, the more successful schools are in reclassifying their ELs, the more poorly their EL subgroup performance looks.... This poses a problem for accountability because it provides faulty information about the performance of the EL subgroup on long-term outcomes").

¹⁷ 20 U.S.C. § 6801 (2001).

assessments of English language proficiency and report results for all ELs. While these stipulations for the first time explicitly connect language and content in federal law, the focus remains on English language development, and the development of bi- or multilingual proficiencies for ELs are not addressed or even mentioned in the law.

Moreover, Title III, which offers assistance through a formula grant program to state and local educational agencies to develop instructional programs for ELs, includes no explicit support for the design, development, or implementation of bi- or multi-lingual instructional programs. Such programs would support students identified as EL in the development of both language and academic proficiency (more on this below). Moreover, given the aforementioned limitations related to defining the EL subgroup, Title III funds tend to be focused on students currently identified as EL and do not provide resources to foster the continuing linguistic and academic development of reclassified ELs over the long term.

As the number of English learners continues to grow in districts and schools nationwide,¹⁸ and drop-out rates for this population remain alarmingly high,¹⁹ it is imperative to revisit federal educational policy for the vast and diverse group of students subsumed under the EL subgroup. That is, while the EL subgroup in the U.S. is increasingly culturally and linguistically diverse, especially given shifting patterns in global migration processes,²⁰ federal policy remains “one size fits all.” We assert that federal policy must include explicit guidance and support for states to develop educational systems that value, and indeed foster, young people’s bi- and multilingual capacities, and are contextualized to accommodate the cultural and community assets embedded in each state’s population.

Specifically, we argue for the implementation of what we term *responsive federal policy* regarding the education of ELs in the United States. Given that states vary dramatically with respect to: (a) the size and diversity of their EL populations, (b) their existing educational infrastructures for ELs, and (c) their institutional memories related to

¹⁸ *The Growing Numbers of English Learner Students*, NAT’L CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION 1 (2011), http://www.ncele.us/files/uploads/9/growing_EL_0910.pdf.

¹⁹ Rebecca Callahan, *The English Learner Drop Out Dilemma: Multiple Risks and Multiple Resources*, CALIFORNIA DROPOUT RES. PROJ. (2013), <http://www.cdrp.ucsb.edu/researchreport19.pdf>.

²⁰ *Changing patterns of globalization and remittances*, PEW RES. CTR. (2013), <http://www.pewsocialtrends.org/2013/12/17/changing-patterns-of-global-migration-and-remittances/>.

bi/multilingual programs and practices, federal policymakers must consider and be responsive to all three of these dimensions when offering support and guidance to states. In Part I below, we present empirical evidence that supports the implementation of bi/multilingual educational programs and practices. In Part II, we define and describe the three aforementioned dimensions and present a framework for examining state EL contexts that can guide the implementation of responsive federal policy. In Part III, we make recommendations with respect to how this framework can be employed to create more robust state educational systems for bi/multilingual students.

Why Bi/Multilingual Education?

Since NCLB's passage in 2001, when ELs were first explicitly included as a subgroup within federal law, the knowledge base related to EL instruction has advanced considerably. As we move toward implementation of ESSA, it is important that federal and state policymakers take these new research findings into account as they refine and implement policies for ELs. In particular, although there remains much debate about the most effective ways to instruct English learners – especially ELs who vary demographically and generationally²¹ – as many as five quantitative research syntheses²² have demonstrated the superiority of bilingual approaches, particularly for reading achievement *in English*. These meta-analyses compared outcomes for ELs in bilingual and English immersion programs, and each concluded that teaching ELs to read in both their primary language and in English generates superior achievement in both languages. Importantly, none of the syntheses uncovered any achievement advantages for children in English-only programs.²³

²¹ Claude Goldenberg, *Teaching English Language Learners: What the Research Does—and Does Not—Say* 32 AMER. EDUCATOR 8 (2008).

²² David J. Francis, et al., *Language of Instruction*, in DEVELOPING LITERACY IN A SECOND LANGUAGE: REPORT OF THE NATIONAL LITERACY PANEL 365-410 (Diane August & Timothy Shanahan eds., 2006); Jay P. Greene, *A Meta-Analysis of the Rossell and Baker Review of Bilingual Education Research* 21 BILINGUAL RES. J. 1 (1997); Kellie Rolstad, et al., *The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners* 19 EDUC. POL'Y 4, 572-594 (2005); Robert E. Slavin & Alan Cheung, *A Synthesis of Research on Language of Reading Instruction for English Language Learners* 75 REV. OF EDUC. RES. 247 (2005); Ann C. Willig, *A Meta-Analysis of Selected Studies on the Effectiveness of Bilingual Education* 55 REV. OF EDUC. RES. 269 (1985).

²³ Diane August, et al., *Restrictive State Language Policies: Are They Scientifically Based?*, in FORBIDDEN LANGUAGE 139-158 (Patricia Gándara & Megan Hopkins eds.,

Additionally, a recent study examining ELs' reclassification rates, language proficiency, and academic achievement across four instructional models revealed that, while ELs enrolled in two-language programs were reclassified as English proficient at slower rates than ELs in English immersion programs, they caught up with their peers, and even surpassed them, by middle school, with the greatest gains evidenced in English language arts achievement and English language proficiency.²⁴

Moreover, a burgeoning body of scholarship has uncovered the potential for translanguaging pedagogies that position bi/multilingualism as a resource for learning. *Translanguaging*²⁵ reconceptualizes language as a fluid and dynamic system and supports the use of any linguistic resource a student has at his or her disposal to facilitate teaching and learning. Translanguaging practices have been leveraged pedagogically where bilingual instruction may not be sufficient, such as in classrooms that are comprised of five or more home languages and/or language varieties. In these classrooms, teachers view students as collaborative partners who are encouraged to use all of the linguistic resources available to support their learning, and who co-teach multilingually through translation or other practices to support their peers.²⁶ When implementing translanguaging in the classroom, teachers in multilingual contexts emphasize reading and writing in students' home languages and engage in regular practices like translating key vocabulary into all of the languages represented in the classroom.²⁷ Recent empirical studies have shown that translanguaging practices can facilitate meaning-making and a positive learning environment, and that the use of translanguaging practices can promote student engagement.²⁸ However, because translanguaging practices are not currently used systematically at a large-scale, findings from comparative studies that examine student outcomes (like those outlined above related to bilingual programs) are not yet available.

2011).

²⁴ Ilana M. Umansky, & Sean F. Reardon, *Reclassification Patterns among Latino English Learner Students in Bilingual, Dual Immersion, and English Immersion Classrooms* 51 AMER. EDUC. RES. J. 879, 906-7 (2014).

²⁵ OFELIA GARCÍA, BILINGUAL EDUCATION IN THE 21ST CENTURY 45 (2009).

²⁶ Christine Brigid Malsbary, *Liana's learning in a democratized classroom*. PEDAGOGIES: AN INT'L J. (in press).

²⁷ Christine Brigid Malsbary, *Teachers as creative designers in transcultural and multilingual contexts*. URB. EDUC. (in press).

²⁸ OFELIA GARCÍA & LI WEI, *TRANSLANGUAGING: LANGUAGE, BILINGUALISM AND EDUCATION* 92 (2014).

Considering the evidence supporting bi/multilingual approaches to educating English learners, policy should be developed and implemented that allows for and fosters their use across the K-12 continuum. The need for policies that support bi/multilingual instructional approaches through secondary school is increasingly acute, given that adolescent newcomers who need to learn English are among the most vulnerable groups of ELs²⁹ and that long-term English learners are insufficiently served by current programs. Long-term English learners (LTELs) are students who have been enrolled in U.S. schools for six or more years, but who have stalled in their progress toward English proficiency, and are struggling academically due to their limited English skills.³⁰ In large part due to ELs' lack of consistent access to high-quality programs and instruction in the early grades,³¹ an increasing number of middle and high schools are grappling with how best to meet LTELs' distinct language and learning needs. Yet the use of bilingual instruction with secondary students is extremely limited, suggesting the need for policy not only to support bilingual approaches K-12, but also to place particular emphasis on providing resources to implement bi/multilingual instructional programs and practices at the secondary level.

State-Level Dimensions of Bi/Multilingual Education

Given the empirical evidence supporting instruction that draws on students' bi/multilingual capabilities, we contend that that federal support and guidance must be in place to facilitate the development of state educational systems that employ bi/multilingual programs and/or practices (e.g., translanguaging). Yet these state systems must be contextually appropriate and tailored around three separate but related dimensions. To characterize these dimensions and explore their variation between states, we drew upon a variety of data sources: EL demographic data from the National Clearinghouse for English Language Acquisition (NCELA), policy reports from state departments of education and other educational organizations, empirical studies of language policies and programs in the

²⁹ Deborah J. Short & Beverly A. Boyson, *Helping Newcomer Students Succeed in Secondary Schools and Beyond*, CTR. FOR APPLIED LINGUISTICS (2012) <http://www.cal.org/resource-center/publications/helping-newcomer-students>).

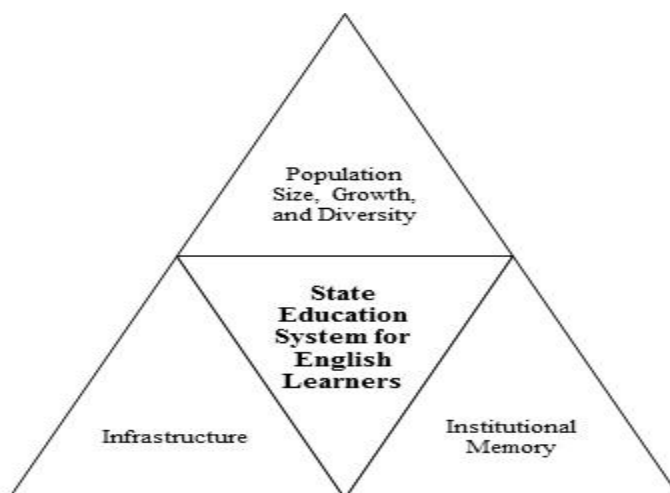
³⁰ Laurie Olsen, *Meeting the Unique Needs of Long Term English Language Learners*, NAT'L EDUC. ASS'N 4 (2014), http://www.nea.org/assets/docs/15420_LongTermEngLangLearner_final_web_3-24-14.pdf.

³¹ See García & Wei, *supra* note 30, at 68.

U.S., and observational data collected by each author in her state context(s).

In this section, we describe these three dimensions and present a framework for examining and delineating state EL educational contexts. A framework is a useful conceptual tool as federal policy is implemented because it keeps critical dimensions at the forefront and allows policy guidance to offer leadership and to remain flexible and contextual. The contextualization of policy is essential, as federal policies are necessarily negotiated and adapted as states develop educational systems for ELs in their particular settings. We argue that, whatever system a state designs, it must (a) be appropriate for its EL population, (b) build on existing educational infrastructures, and (c) use available institutional memory (see Figure 1). In other words, all three dimensions must be employed in responsive federal policy that supports states in improving their EL educational systems.

Figure 1: Components of a State Educational System for Bi/Multilingual Students to be Considered in Responsive Federal Policy



Dimension One: EL Population Size and Diversity

The size and diversity of a state's EL population is treated as negligible under current federal policy, despite how these factors affect necessary resources and services (e.g., availability of language programs, experienced teachers, knowledgeable administrators, etc.). We discuss

two issues relevant to EL population size and diversity: the proportion and growth of the EL population, and the diversity of needs that exist within the EL label.

Proportion and growth. States vary tremendously in terms of the proportion of students who are considered ELs and in the growth of their EL populations. In some traditional immigrant destinations, for example, ELs make up as much as 15 percent of the student population, and EL population growth is static or in some instances is declining (e.g., California and Arizona).³² For states on the other end of the spectrum, the proportion of ELs is much smaller, at 3 to 5 percent, yet EL population growth is exponential; for example, new immigrant destinations like Arkansas, Nebraska, North Carolina, and Pennsylvania are all experiencing over 100 percent EL population growth.³³

Proportion and growth may make developing coherent EL educational systems in states with large proportions or high growth of ELs more urgent. However, states' responses to these factors may look quite different. In states with large proportions of ELs but low growth, there is likely a longer state history of bilingual education programs and/or practices, which may mean pockets of support to develop and implement a state education system that encourages bi/multilingualism (see our discussion below related to infrastructure and memory). In new destination states, on the other hand, there are likely fewer resources to draw upon, as many of these states rely on English-dominant models such as English as a second language (ESL) pull-out or push-in that separate bi/multilingual students from their peers.³⁴ In these locales, more guidance and support is necessary, as systems will be built upon fewer existing scaffolds.

While these differences in proportion and growth have implications for the resources states need to develop robust bi/multilingual education systems, an important issue to note is that some of the between-state differences in EL population size are due at least in part to how ELs are identified and reclassified. That is, until the passage of ESSA, federal policy did not support consistent methods for identifying and reclassifying

³² See National Clearinghouse, *supra* note 20.

³³ *Id.*

³⁴ William A. Kandel & Emilio A. Parrado, *Hispanic Population Growth and Public School Response in Two New South Destinations*, in *LATINOS IN THE NEW SOUTH: TRANSFORMATIONS OF PLACE* 111-134 (Heather A. Smith & Owen J. Furueth eds., 2006).

English learners between states and local education agencies; thus, there is tremendous variability across these locales with respect to which students are included in the EL category.³⁵ Under Title III in ESSA, states are required to consult with a geographically representative sample of school districts to develop entry and exit criteria for EL identification and reclassification that are consistent across all school districts in the state. Still, no federal guidance has been offered as to the criteria that states should consider, and refining the EL category in each state is a prerequisite for implementing policy that is responsive to EL population size and growth.

Linguistic and other forms of diversity. Linguistic diversity varies considerably throughout the country, from predominantly bilingual communities in the Southwest and along the U.S-Mexico border, to highly diverse multilingual communities in the District of Columbia, New York City, and Seattle, to name just a few. These differences matter in the development of policy; for instance, policy that supports bilingual teacher preparation is useful to states with large bilingual populations, but preparing teachers to use translanguaging pedagogies³⁶ may be a better solution in states with greater linguistic diversity.

Diversity must also be taken into account in terms of the non-linguistic needs of immigrant and immigrant-origin (i.e., second and third generation) populations. The EL label obscures the educational needs pertinent to undocumented children, children from mixed-status homes, long-term ELs (LTELs), refugee children and youth, recent-arrivals, and students with interrupted formal education (SIFE).³⁷ Population diversity

³⁵ Robert Linquanti & Gary Cook, *Toward a Common Definition of English Language Learner*, COUNCIL OF CHIEF S. SCH. OFFICERS 4 (2013), http://www.ccsso.org/Documents/2013/Common%20Definition%20of%20English%20Learner_2013.pdf.

³⁶ Angela Creese & Adrian Blackledge, *Translanguaging in the Bilingual Classroom: A Pedagogy for Learning and Teaching?* 94 THE MODERN LANG. J. 103 (2010).

³⁷ Kate Menken, Tatyana Kleyn, & Nabin Chae, *Spotlight on “Long-Term English Language Learners”*: *Characteristics and Prior Schooling Experiences of an Invisible Population* 6 INT’L MULTILINGUAL RES. J. 121 (2012). See Laurie Olsen, *Reparable Harm: Fulfilling the Unkept Promise of Educational Opportunity for California’s Long Term English Learners*, CALIFORNIANS TOGETHER 32 (2010) <http://edsources.org/wp-content/uploads/ReparableHarm1.pdf> (“The basic understanding underlying a strong Long Term English Learner program is that solutions must be designed *for* them, and the recognition that their needs are distinct and different from newcomer and normatively developing English Learners, and are also unique and different from those of struggling

differs across states, where, for example, educators in California and New York grapple with a large long-term EL population,³⁸ and actors in Minnesota and Washington attend to refugee populations, especially in metropolitan areas.³⁹ The supports afforded these students must necessarily vary: while targeted literacy instruction for LTELs or SIFE may be necessary, socio-emotional support and counseling may be needed for students whose parents have been deported. This diversity of needs must be acknowledged in federal policy in order to provide supports to states in systematically addressing them.

As noted above, under current federal policy the composition of the EL subgroup is constantly in flux.⁴⁰ This approach to identifying ELs limits considerations of the forms of diversity described above; it also obscures ELs' progress and inadvertently creates a category of consistently low-performing students. One approach to remedying this issue, as identified elsewhere,⁴¹ would be to track students identified as ELs in both the short and long term. The creation of a "total English learner subgroup"⁴² would allow states to track the progress of students who were ever classified as ELs over time and at each language proficiency level, and to disaggregate performance for long-term ELs, SIFE, and other students in need of differentiated linguistic and academic supports.

Dimension Two: State Educational Infrastructure

State infrastructures for bi/multilingual education also vary greatly, from states with limited to robust infrastructures (see Table 1). We use the term infrastructure to describe the resources that support teachers and

native English speakers. Additionally, there is diversity of need within the Long Term English Learner population which requires assessments to accurately diagnose.”)

³⁸ See Kate Menken & Tatyana Kleyn, *The Difficult Road for Long-Term English Learners* 66 *EDUC. LEADERSHIP* 7 (2009); Olsen, *supra* note 39.

³⁹ Audrey Singer & Jill H. Wilson, *Refugee Resettlement in Metropolitan America*, MIGRATION POL'Y INST. (2007), <http://www.migrationpolicy.org/article/refugee-resettlement-metropolitan-america>.

⁴⁰ *Improving educational outcomes for English language learners: Recommendations for the reauthorization of the Elementary and Secondary Education Act*, WORKING GROUP ON ELL POLICY 3 (2010) [hereinafter Working Group, 2010], <http://ellpolicy.org/wp-content/uploads/ESEAFinal.pdf>.

⁴¹ See Hopkins et al., *supra* note 5, at 102-4; WORKING GROUP ON ELL POLICY, SELECTED RECOMMENDATIONS ON ESEA REAUTHORIZATION REGARDING ENGLISH LANGUAGE LEARNERS (2015) [hereinafter Working Group, 2015], http://ellpolicy.org/wp-content/uploads/ESEA_Updated.pdf.

⁴² See Working Group, 2015, *supra* note 42.

school leaders in providing high-quality instruction.⁴³ Minimum areas of state infrastructure development include: English language proficiency and content standards and assessments; funding to implement research-based bi/multilingual language programs and curricula for students who were ever identified as ELs; state and local leaders who have the capacity to provide guidance and to implement bi/multilingual educational programs and practices within and between local contexts; frameworks to guide the preparation and professional development of bilingual teachers, content teachers who are also teachers of academic English, and school leaders, with a focus on incorporating bi/multilingual practices (e.g., translanguaging) into all instructional programs; and universities that prepare teachers and leaders for this complex work.

In some states, educational language policy influences the development of these infrastructural components. For example, Arizona's infrastructure was built around an English-only policy that eliminated bilingual education programs,⁴⁴ resulting in instructional programming and teacher education practices that are developed around English immersion approaches. On the other hand, Texas' infrastructure is based on an explicit bilingual education policy that requires the implementation of bilingual education programs in grades K-6 when a sufficient number of ELs who speak the same language are present.⁴⁵ Still other states have no formal educational language policy, or they have open policies. Open policies mean that infrastructures are not guided by a specific orientation and thus allow local education agencies to implement any type of language program, from ESL to dual immersion programs to those that draw on translanguaging practices.

With their policy context in mind, state infrastructures should be considered in relationship to the state's student population, as outlined in the first dimension. For example, a state with a small but growing number of newcomers who speak one or two languages – and that has an open or bilingual policy – might develop its infrastructure to support K-12 bi/multilingual programs for the languages present. On the other hand, a state with a large EL population who speaks several languages might

⁴³ DAVID K. COHEN, DONALD J. PEURACH, ET AL., *IMPROVEMENT BY DESIGN: THE PROMISE OF BETTER SCHOOLS* 5 (2013).

⁴⁴ JAMES CRAWFORD, *AT WAR WITH DIVERSITY: U.S. LANGUAGE POLICY IN AN AGE OF ANXIETY* 42 (2000).

⁴⁵ Deborah Palmer & Anissa Wicktor Lynch, *A bilingual education for a monolingual test? The pressure to prepare for TAKS and its influence on choices for language of instruction in Texas elementary bilingual classrooms* 7 *LANG. POL'Y* 3, 217, 218-9 (2008).

develop its infrastructure to support the implementation of translanguaging practices across the K-12 continuum, which could be possible regardless of the state's language policy. In either case, resources can be allocated to support the infrastructure that best matches the needs of the state's particular population and policy environment. Before allocating resources, however, it is important to take stock of where states are in developing their EL educational infrastructures so that funding can be distributed in ways that match state's needs. Below, we describe the range of state EL infrastructures currently present across the United States.

Limited infrastructures. States with limited infrastructures are those that have relatively few supports in place to support bi/multilingual programs or practices. Federal policy requires states to adopt English language proficiency standards and assessments, and to align them with standards for the content areas, and 36 states have adopted a singular framework (World-Class Instructional Design and Assessment [WIDA]).⁴⁶ Nonetheless, there is little federal guidance given to states or local education agencies with respect to the type of instruction that will best facilitate their use.⁴⁷

Beyond standards and assessments, a handful of states with limited infrastructures have begun to provide funding for bi/multilingual programs and to mandate teacher-preparation requirements. Related to the former, Utah recently began offering start-up grants to local education agencies to implement two-way dual immersion programs.⁴⁸ With respect to the latter, Pennsylvania requires that all pre-service teachers complete a three-credit course related to teaching bi/multilingual students.⁴⁹

In other states, there are scattered areas of support for bi/multilingual education, although there is not yet a coherent infrastructure to scale up this support. In these states, which include Nebraska and North Carolina, local education agencies are beginning to use state funding and other resources to implement programs that support bi/multilingualism,

⁴⁶ WORLD-CLASS INSTRUCTIONAL DESIGN AND ASSESSMENT, CONSORTIUM MEMBERS (2014), <https://www.wida.us/membership/states/>.

⁴⁷ See Hopkins et al., *supra* note 5, at 105.

⁴⁸ Susan Eaton, *Utah's Bilingual Boon*, ONE NATION INDIVISIBLE 2 (2014), <http://www.onenationindivisible.org/wp-content/uploads/2014/03/ONIstoryNo.13UtahV3.pdf>.

⁴⁹ *Accommodations and Adaptations for Diverse Learners Guidelines*, PENNSYLVANIA DEPT. OF EDUC. (2008), http://www.education.state.pa.us/portal/server.pt/community/professional_education/8627/program_framework_guidelines/683300.

including dual language programs.⁵⁰ If these efforts were mobilized through more systematic supports at the federal and state levels, these states could potentially create more robust bi/multilingual education systems.

Restricted infrastructures. In at least three states (Arizona, California, and Massachusetts), the EL educational infrastructure is based on an English-only policy that is not reflective of current research and does not support long-term EL achievement.⁵¹ Although English language proficiency standards and assessments are employed in these states (in accordance with federal policy), and mandates are in place that require several hours of coursework or other preparation for all teachers and school leaders related to working with ELs, these infrastructural aspects must function within restrictive policies that do not value bi/multilingualism. A repercussion is that, for example, teacher and leader preparation focuses only on English immersion or sheltered English approaches, and educators are not exposed to practices that support bi/multilingualism (e.g., primary language instruction or translanguaging). In addition, curricula and materials are selected in these states such that they align with English-dominant approaches and do not support bi/multilingual practices.

Given recent research pointing to the effectiveness of bi/multilingual programs, and particularly dual language programs, over and above English-only approaches,⁵² there has been a recent emergence of dual language programs in school districts across California, as well as calls by state legislators to reverse the state's English-only policy.⁵³ In this

⁵⁰ Ryan Robertson, *Students in Nebraska's Two Dual Language Programs Outperforming Peers*, KVNO NEWS (2014),

<http://www.kvnonews.com/2014/04/students-nebraskas-two-dual-language-programs-outperforming-peers/>; Wayne P. Thomas, et al., *English Learners in North Carolina*, 2010 1 (2011),

http://p1cdn4static.sharpschool.com/UserFiles/Servers/Server_4502383/File/NC_ELL_Study_Yr2_Final%20Report_Jul27_2011.pdf.

⁵¹ FORBIDDEN LANGUAGE: ENGLISH LEARNERS AND RESTRICTIVE LANGUAGE POLICIES (Patricia Gándara & Megan Hopkins, eds., 2010).

⁵² See Umansky & Reardon, *supra* note 26, at 906.

⁵³ John Bensen, *The Fight for Bilingual Programs in the U.S.*, HUFFINGTON POST (Apr. 12, 2014, 11:52 a.m.), http://www.huffingtonpost.com/2014/04/12/bilingual-education-programs-_n_5138927.html (“Still, there are cracks in the anti-bilingual wall in terms of K-12 education with California legislators currently debating the elimination of Prop 227, which in 1998 effectively ended bilingual education in that state.”); April Linton & Rebecca C. Franklin, *Bilingualism for the Children: Dual-Language Programs Under*

context, it will be important for federal policy to acknowledge the institutional memory (see below) around bi/multilingual education that is embedded in communities across the state and include educators and community members who understand the state's long history around bi/multilingual education on advisory committees and in within- and between-state partnerships that are working to revive and reform EL educational infrastructures (see our recommendations).

Developing infrastructures. Some states have more developed infrastructures, with standards and assessments in place as well as explicit requirements and resources that support the implementation of bilingual programs. In Illinois, for example, schools must have a bilingual education program when there are more than 20 ELs present who speak the same language.⁵⁴ While bilingual education is mandated in Texas in grades K-6, New Mexico's overall vision for EL education includes bilingual-multicultural education.⁵⁵ An important consideration is that, although states have bilingual education policies and offer some technical assistance to local education agencies with respect to implementing bilingual programs, supports do not always extend across the K-12 continuum. Moreover, New Mexico, Texas, and Illinois do not have requirements for all teachers and leaders related to working with bi/multilingual students. Overall, these states focus on implementing bilingual education *programs*, yet the lack of explicit preparation requirements for all teachers and leaders related to ELs means that the extent to which bi/multilingual *practices* are supported may be limited; thus, we consider these states' infrastructures as still in development.

Promising Infrastructures. There are at least two states, New York and Florida, which have promising state-level infrastructures for bi/multilingual education. These states have standards and assessments in place, as well as support for bi/multilingual programs *and* practices. For example, in 2012 New York State launched a bilingual Common Core initiative to develop new English as a Second Language and Native Language Arts standards aligned to the Common Core; as a result, Home

Restrictive Language Policies, in FORBIDDEN LANGUAGE: ENGLISH LEARNERS AND RESTRICTIVE LANGUAGE POLICIES 175-194 (Patricia Gándara & Megan Hopkins eds., 2010).

⁵⁴ ILL. ADMIN. CODE tit. 23, § 228 (2015).

⁵⁵ *Bilingual Multicultural Education Bureau*, NEW MEXICO PUB. EDUC. DEPT (2014) <http://www.ped.state.nm.us/ped/BilingualIndex.html>.

Language Arts progressions are under development for every NYS Common Core Learning Standard in every grade.⁵⁶

In both states, any type of language instructional program is permitted with two requirements: that it is research-based and includes native language instruction. In Florida, regardless of program model (e.g., ESL, early- or late-exit bilingual, or dual language), ELs who number 15 or more in a school setting must be provided with a teacher or aide who speaks their language.⁵⁷ New York's infrastructure also supports native language instruction and bilingual programs through the Office of Bilingual Education and Foreign Language Studies; this approach is particularly promising as it indicates support for bilingual programs *as well as* bi/multilingual practices in general.

Additionally, New York and Florida are two of the five states that require *all* teachers (i.e., pre-service and in-service teachers) to be prepared to work with bi/multilingual students.⁵⁸ In New York, the state recommends that teacher education be framed around bi/multilingual capacities as opposed to English-dominant approaches. It is important to note that, although we consider these infrastructures promising, due to our federal policy environment they have not realized full potential.⁵⁹ Moreover, while policy and infrastructure may be in place to support bi/multilingual education in Florida, the predominant model used in schools is one of EL placement in English-dominant mainstream classrooms with language support.⁶⁰ Indeed, even educational systems in states with promising infrastructures require strengthened and responsive federal policy to develop infrastructures that support bi/multilingualism and address the diverse needs of growing and demographically changing bi/multilingual student populations.

⁵⁶ *New York State Bilingual Common Core Initiative*, ENGAGENY (2014), <https://www.engageny.org/resource/new-york-state-bilingual-common-core-initiative>.

⁵⁷ FLA. ADMIN. CODE r.6A-6.0904(4)(c) (2009).

⁵⁸ Keira Gebbie Ballantyne, et al., *Educating English Language Learners: Building Teacher Capacity*, NAT'L CLEARINGHOUSE FOR ENGLISH LANGUAGE ACQUISITION 121-2 (2008),

<http://www.ncela.us/files/uploads/3/EducatingELLsBuildingTeacherCapacityVol3.pdf>.

⁵⁹ See Menken, *supra* note 9.

⁶⁰ It is also important to note that Florida's ESL endorsement requirement is often conflated with the ESL certification, and it is not clear if those with the ESL endorsement (an add-on certificate) are as well-trained as those who hold a specialist certification. See Candace A. Harper, et al., *Marginalizing English as a Second Language Teacher Expertise: The Exclusionary Consequence of No Child Left Behind* 7 LANGUAGE POL'Y 267, 270 (2008).

Dimension Three: Institutional Memory

A related factor by which states vary is institutional memory, a concept we borrow from the organizational management literature.⁶¹ Broadly speaking, *institutional memory* is the information, perspectives, practices, and experiences that accumulate over an organization's history,⁶² created through shared meanings that are developed over time.⁶³ Institutional memory exists at the organizational level as well as at the person level because "interpretations of the past can be embedded in systems...as well as within individuals."⁶⁴ Institutional memory is an important construct for educational policymakers to consider, as it emphasizes the resources and knowledge that already exist, as embedded in states, districts, schools, and communities, as well as among educational actors. This shared history can and should inform policymaking in the present, especially in states that have long histories of community-supported language education or that once supported bi/multilingual education and are now under mandates that restrict bi/multilingual programs and practices. We describe institutional memory at the organizational and individual level further below.

Organizationally-embedded memory. A state's organizationally-embedded memory for bi/multilingual education is connected to the type of infrastructure in place for EL education, as outlined in the second dimension. For example, a well-developed infrastructure that is based upon current research in bi/multilingual education can contribute to the preservation of institutional memory at the organizational level, as well as to individuals' motivation to draw upon that infrastructure to support instructional improvement.⁶⁵ A state with this type of memory likely has experienced a history of political wins for bilingual education that create positive experiences and perspectives toward bi/multilingualism. This has generally been the case in New York, which does more than most states in

⁶¹ Richard L. Daft & Karl E. Weick, *Toward a Model of Organizations as Interpretation Systems* 9 ACAD. OF MGMT. REV. 284 (1984); Omar A. El Sawy, et al., *Preserving institutional memory: The Management of History as an Organizational Resource* 1 ACAD. OF MGMT. PROCEEDINGS 118 (1986).

⁶² See El Sawy, *supra* note 63.

⁶³ See Daft & Weick, *supra* note 63, at 286.

⁶⁴ James P. Walsh & Gerardo Rivera Ungson, *Organizational Memory*, 16 ACAD. OF MGMT. REV. 57 (1991).

⁶⁵ CHRIS ARGYRIS & DONALD A. SCHÖN, ORGANIZATIONAL LEARNING: A THEORY OF ACTION PERSPECTIVE (1978).

terms of requiring bilingual programming.⁶⁶ In addition to undertaking a statewide Bilingual Common Core Initiative as noted above,⁶⁷ the state recently released a *Blueprint for ELL Success* that outlines a set of principles for a statewide EL education framework; one of those principles includes recognizing that bilingualism and biliteracy are assets.⁶⁸ These principles link the memory of organizations who have worked in and for bi/multilingual education in the past to current and future organizational decision-making.⁶⁹ This organizational-level memory is a tool that should be drawn upon as states work to develop infrastructures that support bi/multilingualism.

On the other hand, a history of political losses for bilingual education in other states has led to diminished organizationally-embedded memory. After the passage of Proposition 227 in California, for example, most bilingual programs in the state were dismantled. Contrary to much of the public's understanding, the majority of the state's ELs were not enrolled in bilingual programs when the law passed. Thus, although the majority of bi/multilingual students were not *directly* affected by law, hundreds of thousands of students and teachers were *indirectly* affected by the message that primary language instruction was prohibited. The notion that bilingual education was "ineffective," as stated in the law itself,⁷⁰ thus began to permeate the state's institutional memory. Moreover, the dismantling of bilingual education has meant that fewer teachers are completing bilingual certifications in English-only states,⁷¹ further diminishing institutional memory for bi/multilingual education within the teaching force. Even so, institutions and their participating actors (i.e., school leaders, teachers, students, and community members) whose work was previously based within bi/multilingual programs or supported bi/multilingual practices may carry expertise and shared meanings related to their implementation. These aspects of memory, both diminished and hidden under the surface, are important considerations for policy that aims

⁶⁶ See Menken, *supra* note 15.

⁶⁷ See EngageNY, *supra* note 58.

⁶⁸ *Blueprint for English Language Learner (ELLs) Success*, NEW YORK S. DEPT. OF EDUC. (2014) <http://usny.nysed.gov/docs/blueprint-for-ell-success.pdf>.

⁶⁹ See Walsh & Ungson, *supra* note 65.

⁷⁰ CAL. EDUC. CODE § 300 (1998).

⁷¹ E.g., Megan Hopkins, *Beliefs in Context: Understanding Language Policy Implementation at a Systems Level*, 28 EDUC. POL'Y 1, 21(2014) ("Because California and Arizona only require teachers of ELLs to complete CLAD or SEI training, and bilingual methods are not supported by state language policy, there is decreasing incentive among teachers to complete bilingual training").

to help states (re)develop and (re)design EL education systems. That is, infrastructure development and design will necessarily look quite different in these states than in those with little to no memory around bi/multilingual education, as their organizational-level memories can be leveraged in the development of statewide systems that support bi/multilingualism.

Individually-embedded memory. In states with less developed or limited infrastructures, institutional memory for bi/multilingual education may not yet exist in formal structures; however, it may be embedded at the individual level among small groups, collectives, or non-governmental entities that are part of or have been advocating on behalf of bilingual communities or working to preserve non-English, indigenous languages. These individuals or groups pass on memory through oral histories or non-formal movements that aim to revitalize languages in moments of loss. Indeed, community-based reform efforts, which work to preserve non-English, indigenous languages outside of the public school system and/or to advocate on behalf of bi/multilingual communities,⁷² are resources that should be drawn upon in efforts to support and/or renew each state's focus on bi/multilingualism.

Such is the case in Hawai'i, where professors and lawyers recounted the history of a Language Council at a January 2014 forum convened to address the state's lack of EL services. Original goals of the Language Council were to include students' native languages in state and education provisions for ELs, but there were few formal records documenting their struggle and little state data available related to EL population characteristics. These efforts highlight the importance of individual-level work in efforts to create equitable language policy. Indigenous youth and their families create, negotiate, and adapt language policies every day, yet this micro-policymaking may not be recognized by formal mechanisms at the state level.⁷³ We assert that federal policy should acknowledge these individuals, and the communities they represent, and facilitate their inclusion in state-level deliberations related to the development and design of EL educational system (see recommendations).

⁷² Arnetha F. Ball, *Community-Based Learning in Urban Settings as a Model for Educational Reform*. 3 APPLIED BEHAVIORAL SCI. REV. 127 (1995); Teresa L. McCarty et al., *Indigenous Youth as Language Policy Makers* 8 J. OF LANG., IDENTITY & EDUC. 291 (2009).

⁷³ See McCarty et al., *supra* note 74.

Understanding a state's institutional memory means answering several questions: Where is the state with respect to bi/multilingualism, and what has been its history? What was the prior capacity for bi/multilingual education, and what memory is embedded if the law changes tomorrow? What has been written down, and what needs to be recorded? Taking stock of a state's institutional memory for bi/multilingual education is an essential part of policy formation, as it can be a valuable asset in cultivating, sustaining, or continually improving a state's EL education system. In the next section, we describe ways in which the three dimensions can be taken up in federal policy.

Recommendations for Implementing Responsive Federal Policy

While ESSA represents a departure from the federal government's compliance-driven approach found in NCLB, federal education policy still emphasizes standardized test performance as the primary measure of student achievement and growth. We have already seen that this approach tends to lead to the implementation of English-dominant programs and practices for ELs,⁷⁴ rather than the implementation of programs and practices that engage ELs' bi/multilingual assets and that develop a multilingual populous that is critical to our global economy. We argue that, as ESSA is implemented, federal support must be offered to states that considers EL population size and diversity, infrastructure, and institutional memory in ways that provide states with not only strong guidance, but also the flexibility to innovate and to develop more equitable, additive education systems for bi/multilingual students.

We also argue that policymakers do not do enough to include the histories and perspectives of communities who have been advocating for decades for equitable and bi/multilingual instruction for their children, and that these histories and perspectives are resources to be drawn upon when developing state education systems. In addition, much of policy is a "one size fits all" approach that does not consider the diversity of populations from state to state and community to community. As such, the approach we advocate is *responsive federal policy* that takes into account the dimensions we outlined above, and explicitly values bi/multilingualism⁷⁵ and engages the deep memory of and previous work done by communities.

⁷⁴ See Menken, *supra* note 9.

⁷⁵ OFELIA MIRAMONTES, ET AL. RESTRUCTURING SCHOOLS FOR LINGUISTIC DIVERSITY: LINKING DECISION MAKING TO EFFECTIVE PRACTICE 2 (1997) ("[B]ilingual education is regular education.").

We present a diagram that would allow federal policymakers to plot states along these dimensions and inform the provision of funding and guidance to states (see Figure 2 below). Considering all three dimensions, some states will require critical and immediate attention from federal policymakers. For instance, those states that have rapidly growing EL populations, yet have limited infrastructures and little institutional memory to draw upon, would benefit from short-term increases in federal funding as well as the support of established states that have more developed infrastructures and deeper institutional memory related to bi/multilingual education. In other states that are limited due to state policy restrictions on the use of bi/multilingual programs and practices, policy intervention in the form of incentives may be necessary. These incentives could motivate state-level infrastructure development that builds upon organizational- and individual-level institutional memory related to bi/multilingual education. Such differentiated supports are necessary for states to develop coherent EL educational systems, and federal policy should allow for, and even encourage, this variation.

What would it take to develop and implement responsive federal policy for bi/multilingual education? Our recommendations focus on the development of state-specific systems that are grounded in bi/multilingualism through the provision of federal guidance, resources and support for capacity-building, flexible funding, and monitoring. These supports should be offered as provisions within Title I, Title II, and Title III are implemented in order to support the development of robust systems for EL education across multiple levels (i.e., states, school districts, schools, classrooms). Additionally, we recommend that the federal government provide support and incentives for cross-state communication related to these issues, as states have much to learn from one another.

Figure 2. Dimensions of a Framework for Responsive Federal Policy for Bi/Multilingual Education, with State-Specific Categories to Inform the Provision of Funding and Guidance

Dimension 1a: Population Size and Growth			
Small proportion, high growth	Medium to high proportion and high growth in some locales	Medium to high proportion and lower growth	High proportion and moderate to low growth
<i>Arkansas, Nebraska, North</i>	<i>Illinois, Texas</i>	<i>Alaska, Hawai'i, New Mexico</i>	<i>California, Arizona</i>

<i>Carolina, Pennsylvania</i>			
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Dimension 1b: Population Diversity			
<i>Linguistic Diversity</i>		<i>Other Forms of Diversity</i>	
Primarily bilingual communities	Many multilingual communities	Newer population with many recent arrivals, including refugees and SIFEs	Population includes both new immigrants and LTELs, as well as SIFEs
<i>Arizona, New Mexico</i>	<i>New York, Washington DC</i>	<i>Minnesota, Washington</i>	<i>California, New York</i>

Note. LTEL=Long-Term English Learner; SIFE=Student with Interrupted Formal Education

Dimension 2: Educational Infrastructure for Bi/Multilingual Education			
<i>Limited</i> Standards and assessments; may have small initiatives supporting bilingual programs; may have teacher preparation requirements that support bi/multilingual practices	<i>Restricted</i> Standards and assessments; bi/multilingual programs restricted under law; teacher preparation focused on English-dominant practices	<i>Developing</i> Standards and assessments; bi/multilingual programs maintained by some local education agencies; no teacher preparation requirements	<i>Promising</i> Standards and assessments; bi/multilingual programs maintained by many local education agencies; teacher preparation requirements that support bi/multilingual practices
<i>Nebraska, North Carolina, Pennsylvania, Utah</i>	<i>Arizona, California, Massachusetts</i>	<i>New Mexico, Texas</i>	<i>Florida, New York</i>

Dimension 3: Institutional Memory			
Individual-level; community-based	Nascent organizational-level	Organizational- and individual-level, but diminishing	Organizational- and individual- level
<i>Hawai'i</i>	<i>Pennsylvania, Utah</i>	<i>Arizona, California</i>	<i>Florida, Illinois, New York, Texas</i>

Provide Targeted Yet Flexible Funds that Incentivize Innovation and Program Development

Funding and guidance must be offered by the federal government in order for states to begin to develop more robust education systems that support bi/multilingualism. Within Title III, the current statute allows for EL population size⁷⁶ to be included when allocating funds to states and local education agencies (LEAs) to support program implementation, resource acquisition, and/or teacher professional development. We recommend that funding formulas focused on the allocation of EL-related resources to states and LEAs include other variables that more accurately capture variation in state EL education systems. In doing so, these funding formulas would include the first two dimensions presented here, EL population size, growth, and diversity, as well as educational infrastructure. Considering these features of state or LEA systems in funding formulas would allow resources and guidance to be more targeted to the contextual needs of each state or LEA. For example, the resource needs of states with limited infrastructures look very different from those states with promising infrastructures, and the levels and type of funding provided would necessarily vary.

As ESSA is implemented, EL population size and diversity, as well as state EL educational infrastructure, could be included in funding formulas with respect to establishing measures and methods for identifying ELs such that states would need to consider EL population size and growth *in addition to* linguistic and other forms of diversity. They could also be included as Title II related to teacher professional development is

⁷⁶ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, § 3102 (2015).

(requiring the Department of Education to use data from the American Community Survey in combination with state English language proficiency test score data, to determine the size of the state EL population).

implemented, where the state's current infrastructure (or lack thereof) for teacher preparation related to ELs would be considered when allocating resources. Moreover, funds particular to the development of EL instructional programs within Title III could be determined based on the size and diversity of the EL population and strength of the existing infrastructure.

Additional funding incentives should also be offered by the federal government to support the development of statewide programs that foster bi/multilingualism across the K-12 continuum and that support the preparation of teachers to work within them. Under Title III, additional funding could be offered to states that demonstrate that they are working to implement dual language or other programs that support bi/multilingual practices. Under Title II, funding could be allocated to states to support grow-your-own teacher education initiatives in partnership with universities. (Such initiatives would attend to and allow for the institutional memory embedded within communities and individuals to be drawn upon.) To implement such changes, federal support would also need to be offered that facilitates knowledge and capacity development among state Title II and Title III directors, as well as university-based personnel, who could collaborate in supporting and overseeing such efforts.

Monitor Implementation, with Flexibility Designed around Each State's EL Population

To ensure that states are working toward developing infrastructures for EL education that are both contextually-appropriate and research-based, monitoring and compliance measures should require states to report on and evaluate the progress of the activities outlined above. Such evaluations would also necessitate interpretations of Title I that allow bi/multilingual students to demonstrate academic progress in multiple languages, and to consider language proficiency as well as linguistic and other forms of diversity when evaluating states and LEAs based on student outcomes. States' progress toward developing robust EL education systems would need to be assessed in terms of their existing infrastructure components for EL education, such that progress is accurately gauged according to what is present and what needs development. Currently, the Office of Civil Rights often serves as a change agent by monitoring LEAs who are out of compliance with respect to providing ELs with equitable educational opportunities. With a program of proactive activities at the federal level to support states in the development of their EL education

systems, and monitoring to ensure appropriate implementation, such punitive measures may be circumvented.

Develop National and State Advisory Groups to Provide Guidance and Monitor Progress

We draw upon recommendations from the Working Group on ELL Policy⁷⁷ and assert that a national advisory group needs to be in place at the federal level to offer guidance and support to states and to monitor their progress with respect to developing state EL education systems. In addition, federal policy should support the creation of state-level advisory groups that would interface directly with the national advisory group to provide contextually-appropriate information and recommendations to state educational leaders. Both at the national and state levels, these groups would include researchers and practitioners, as well as community members and grassroots organizers, who have expertise in bi/multilingual education and/or have been involved in efforts to support bi/multilingual learners at the community level. Attention to institutional memory would be important when selecting advisory group members to ensure that states with histories of organizational and/or community support for bi/multilingual education are represented and can assist states in generating the community support that is necessary for developing and maintaining an educational infrastructure that values bi/multilingualism.

The national advisory group would assist states in meeting the three-part assessment outlined by *Castañeda v. Pickard*⁷⁸ for determining if education programs for ELs meet the requirements of the Equal Educational Opportunities Act. That is, the group would ensure that states are developing systems that are based on sound educational theory, implementing them effectively with sufficient resources and personnel, and continually assessing their effectiveness. Using the framework we outlined, the first step in the advisory group's work with states and state-level advisory group would be to identify and define their EL populations in terms of size, growth, and linguistic and other forms of diversity (see Figure 1) using detailed demographic data at the state and local levels. Then, they would guide states in assessing their infrastructures and institutional memories to determine what supports could be drawn upon and what components need improvement. Finally, they would work with state-level advisory groups to develop a plan of action and locate

⁷⁷ See Working Group 2010, *supra* note 42; see Working Group 2015, *supra* note 43.

⁷⁸ *Castañeda v. Pickard*, 648 F.2d 989, 996-7 (5th Cir. 1981).

monetary and human capital support by drawing on intra- and inter-state collaborations (more on this below). Funding for these advisory groups could come out of Title III, and one home for this group might be in the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students (OELA),⁷⁹ if the office were to take on more of an advisory role.

Develop Capacity for Strong Partnerships within States

Part of the role of the national and state-level advisory groups would be to support partnerships within states that would help to bring coherence and alignment to statewide educational systems. Strong and thoughtful partnerships between state departments of education, institutes of higher education, K-12 public school districts, heritage language programs or activities, and communities would help states build on existing infrastructure and institutional memory. Such partnerships should support collaborative engagement with those who understand the state EL population and are bearers of institutional memory in order to build upon existing knowledge and expertise. Members of state-level advisory groups would be charged with facilitating these partnerships, with support and guidance from the national advisory group. Support for these partnerships could be stipulated as part of Title III guidance and required as part of states' plans for developing their EL education systems.

Provide Resources for Communication between States

While some states have emergent EL education systems, others have more established systems with components that could be adapted to and implemented in other contexts. As such, there should also be support provided from within Title III that facilitates the sharing of knowledge and resources related to EL education between states, and especially between states that vary along the three dimensions. These partnerships could be accomplished by creating a clearinghouse for what works specifically in bi/multilingual education and that brings state-level advisory groups together for national conferences led by the national advisory group.

As more and more research points to the value of bi/multilingual education, and our nation's education leaders have challenged schools and communities "to invest in our future leaders with biliteracy and

⁷⁹ OELA: *Office of English Language Acquisition*, U.S. DEPT. OF EDUC. (2015), <http://www2.ed.gov/about/offices/list/oela/index.html>.

multiliteracy skills,⁸⁰ it is essential that supports for this challenge be in place. A blanket federal policy will not work in state contexts that differ so dramatically with respect to their EL populations, infrastructures, and institutional memories for bi/multilingual education, however, and responsive federal policy is needed. With demographic shifts changing the linguistic makeup of schools across the nation, the time to create responsive federal policy in the service of EL students is now.

⁸⁰ Arne Duncan & Libia S. Gil, *English learners an asset for global, multilingual future: Arne Duncan and Libia Gil*, LA DAILY NEWS (2014), <http://www.dailynews.com/opinion/20140219/english-learners-an-asset-for-global-multilingual-future-arne-duncan-and-libia-gil>.

Lessons from the Past, Model for the Future: A Return to Promoting Integration through a Reauthorized ESEA

Emily Hodge, Kendra Taylor & Erica Frankenberg*

Massive demographic shifts have occurred in the nation's public school system over the last fifty years since the passage of major civil rights legislation in 1964. From 1968 through 2011, there has been a 28% decline in White student public school enrollment, a 19% increase in black student enrollment and a 495% increase in Hispanic student enrollment.¹ Some states are already majority-minority² and the U.S. as a whole is projected to be majority-minority in 2042.³ Public schools in rapidly changing regions of the country are grappling with new inequalities that have emerged when areas that were previously facing issues of biracial inequality are now seeking to educate and foster understanding among multiple groups of students from many ethnic/racial, linguistic, cultural, and economic backgrounds.⁴

There is no longer a majority race in the nation's public schools,⁵ yet growing racial diversity has not mitigated persistent inequality and segregation by race and class. Segregation by race often operates alongside segregation by class, thus acting as dual segregation. Most racial and economic segregation now occurs across districts rather than within districts; this is, of course, not a coincidence as people, particularly whites, with sufficient resources, move out of urban districts and into

* Emily Hodge is an assistant professor of educational leadership at Montclair State University. Kendra Taylor is a doctoral student in educational leadership at The Pennsylvania State University. Erica Frankenberg is an associate professor of education and demography at The Pennsylvania State University.

¹ Gary Orfield et al., *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future*, CIVIL RIGHTS PROJECT 7 (2014).

² Alejandro Portes & Rubén G. Rumbaut, *Immigrant America: A Portrait*, 16 BERKELEY: UNIV. OF CALIFORNIA PRESS 38 (2006) (As of 2010, states with majority-minority populations are HI, CA, TX, and NM).

³ *Id.*

⁴ See generally Orfield et al., *supra* note 1.

⁵ Lesli A. Maxwell, *U.S. School Enrollment Hits Majority-Minority Milestone*, EDUC. WEEK, (August 19, 2014),

<http://www.edweek.org/ew/articles/2014/08/20/01demographics.h34.html>.

suburban ones.⁶ In 2011–2012, more than three quarters of schools with 81% to 100% black and Latino students are also schools where more than 70% of the students live in poverty.⁷ Further, blacks are almost as segregated residentially from whites as they were in the 1940s.⁸ Racially and socioeconomically segregated schools tend to have conditions that are inferior to more integrated and affluent schools, including high teacher turnover and less qualified teachers,⁹ whereas integrated schools have been shown to have positive benefits for minority students in terms of academic achievement, career aspirations,¹⁰ and friendships among peers of different racial/ethnic backgrounds.¹¹

The United States has a long history of local control of schools; conversely, it also has a long history of unequal and separate education for students of different races and classes. The system of American federalism means that reform almost always comes slowly, with power fractured not only within Congress but also between national, state, and local officials, and no reform came more slowly than civil rights.¹² But when civil rights legislation was finally passed in the 1960s, federal intervention into the de jure segregated South provided an opening for major social change to occur that would have been otherwise improbable. Without the incentives and sanctions at the disposal of the federal government, it is unlikely that there would have been changes to the local dual school systems that local officials were otherwise committed to maintaining. Similarly, the status quo today of intractable segregation in areas of the North and resegregation in the South requires an affirmative federal role, as well as strong leadership supporting integration at the state level. Although the nature of segregation has changed since the peak of

⁶ Jennifer Hochschild, *What School Boards Can and Cannot (or Will Not) Accomplish*, in *BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS* 329 (William G. Howell ed., 2005).

⁷ See Orfield et al., *supra* note 1, at 16.

⁸ John R. Logan, *Diversity and Disparities: America Enters a New Century* (2011), available at <https://www.russellsage.org/publications/diversity-and-disparities>.

⁹ See generally Orfield et al., *supra* note 1.

¹⁰ Jacinta Ma & Michal Kurlaender, *The Future of Race-Conscious Policies in K-12 Public Schools: Support From Recent Legal Opinions and Social Science*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 239–257 (John C. Boger & Gary Orfield eds., 2005).

¹¹ Amy S. Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531 (1994).

¹² GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 306 (1969) [hereinafter “Orfield Reconstruction”].

school desegregation in the 1960s and 1970s, the challenges are no less pressing.

One of the ways in which the Elementary and Secondary Education Act (ESEA) of 1965 had an immediate effect on improving equality of educational opportunity was that, when combined with the conditional funding requirement of the Civil Rights Act's Title VI, desegregation across the South increased substantially.¹³ In subsequent years, the desegregative effectiveness of these two pieces of federal legislation has waned, but we know more now about the importance of integrated schools for improving the educational experiences and opportunities of students.¹⁴ Given the recent passage of the Every Student Succeeds Act (ESSA), this article offers suggestions for how state officials can promote integrated schooling through ESSA implementation, as well how federal officials can encourage and enforce integration. In particular, we describe the lessons learned for ESSA implementation from our analysis of previous federal legislation that furthered school desegregation: the combination of the initial structure of ESEA and the Civil Rights Act in the 1960s, the Emergency School Aid Act of the 1970s, the Magnet Schools Assistance Program of the 1980s through the present, and the Technical Assistance for Student Assignment Plans of the 2000s.

We analyze each program along three dimensions of contemporary segregation and target our suggestions for ESSA implementation to overcome these three dimensions: first, we describe the persistence of de facto segregation; second, we outline the ways in which school choice policies can undermine integration; and third, we discuss the growing race-neutrality of education policy as a barrier to integration. In the section below, we describe these three dimensions of contemporary school segregation. Then, we describe each piece of federal legislation and how each addressed these dimensions. Finally, we conclude with specific

¹³ Elizabeth Cascio et al., *Paying for Progress: Conditional Grants and the Desegregation of Southern Schools*, 125 THE Q. J. OF ECON., 445 (2010).

¹⁴ Erica Frankenberg & Kendra Taylor, *ESEA and the Civil Rights Act: An Interbranch Approach to Furthering Desegregation*, 1 RUSSELL SAGE FOUND. J. OF THE SOC. SCI., 32 (2015). On the waning effectiveness of the Civil Rights Act and ESEA and the importance of integrated schools, see, e.g., Robert L. Linn & Kevin G. Welner, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases*, NAT'L ACAD. OF EDUC. (2007), <http://files.eric.ed.gov/fulltext/ED531144.pdf>; Roslyn Arlin Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 REV. OF RES. IN EDUC., 197 (2012).

suggestions for how state and federal officials could incorporate aspects of these programs into their ESSA implementation plans to promote school integration and educational opportunity.

Dimensions of Contemporary Segregation

One difference from the context of federal legislation passed fifty years ago and today is that the nature of contemporary segregation is distinct from the de jure segregation of the South in the 1960s. De jure segregation, or statutory segregation, is often contrasted in law and policy with de facto segregation, or segregation resulting from segregated neighborhoods. Scholars have challenged this distinction because of the myriad of federal, state and local policies that have contributed to the creation and maintenance of segregated neighborhoods, including federal loan programs, exclusionary zoning, racially restrictive covenants, and urban renewal programs, among others.¹⁵ Given the persistence of residential segregation, de facto school segregation remains an intractable issue. The emergence of school choice has added new challenges to promoting integration, as school choice can sometimes exacerbate patterns of segregation by race and class. While school choice in the 1970s meant a relatively limited set of magnet schools founded to promote racial balance, the landscape of school choice today is composed of numerous charter schools and charter school networks throughout the country serving as parallel educational providers to local school districts. Charter schools have been criticized for serving a student population with fewer special needs than the local school district. Finally, because of the demise of de jure segregation, many Americans assume that racism and segregation are no longer urgent policy issues, and policy is—and should be—developed race neutrally as a result.

Scholars of education policy have expressed concerns about the degree to which ESSA will result in greater educational equity given continued structural inequalities, but ESSA implementation also represents an opportunity for states to encourage programs that transcend traditional district boundary lines and promote integration. As Kara Finnigan notes,

¹⁵ See KENNETH T. JACKSON, *CRABGRASS FRONTIER* 197–218 (1985); DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993). See also *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 291–331 (Gary Orfield & Susan Eaton eds., 1996).

Given that ESSA does not attend to these underlying issues [regional and societal inequities], state and federal policy makers and educational leaders must find ways to incentivize the development of policies and programs that break down the concentration of poverty and allow students more equitable access to high quality educational opportunities through a combination of place-based investments in our urban communities and through mobility programs that allow students to move across district boundaries.¹⁶

Importantly, the ESSA includes language in the Magnet Schools Assistance section specifically encouraging regional and inter-district magnet schools. Whether through magnet schools or other avenues, however, approaches to promoting greater equity through ESSA implementation must also account for the contemporary landscape of school segregation if they are to address persistent de facto segregation.

De Facto Segregation

The passage of the Civil Rights Act in 1964 marked the intervention of the federal government into local race relations in unprecedented ways. The consensus that arose to address de jure school segregation in the South through enforcement and judicial means led to the South becoming the most desegregated region for black students; conversely, the inability of the federal government to address de facto segregation in the North through these means led to the North being the most segregated region for black students.¹⁷ The framework for justifying action or remedies for school segregation through federal intervention rested on the distinction between de jure and de facto segregation, which are accorded different weight in terms of violation and thus remedy. However, there is evidence that this distinction is more of a national myth¹⁸ representing political and cultural beliefs rather than a meaningful construct.

The de jure/de facto distinction, which originated in the mid-1950s but has been maintained steadfastly through judicial and legislative action as much as political and cultural myth, rests on the notion of southern

¹⁶ *Initial Responses to the Every Student Succeeds Act*, AJE FORUM (December 21, 2015), <http://www.ajeforum.com/initial-responses-to-the-every-student-succeeds-act/>.

¹⁷ See Orfield et al., *supra* note 1, at 17–18.

¹⁸ THE MYTH OF SOUTHERN EXCEPTIONALISM 25–44 (Matthew D. Lassiter & Joseph Crespino eds., 2010).

exceptionalism and white innocence.¹⁹ The de jure/de facto binary began as an inherently regional distinction with an oppositional South and a North that was able to preserve a sense of liberal white innocence through categorizing northern-style segregation as a private matter of the free market, housing preferences, and economics, as opposed to a public matter of racism.²⁰ From its inception, the de facto designation had the capacity to act as an escape clause of sorts for any region outside of the South to avoid official responsibility for school segregation, and officials were often eager to rely on the de facto construct in order to avoid remedying segregation outside of the South. In the congressional debate over Title VI of the Civil Rights Act, language that would have allowed for federal action against “racial balancing” (a euphemism for de facto segregation) was removed from the final bill.²¹ While there was considerable support for federal intervention into matters of southern de jure segregation—both in terms of congressional support and federal support—there was a lack of support for remedies for de facto segregation, particularly when they involved busing.²²

The judicial branch has generally reaffirmed the de jure/de facto distinction²³ in decisions since the mid-1970s, with majority opinions applying various techniques to avoid finding public officials accountable for housing and school segregation. In particular, majority opinions have raised the burden of proof and relied on theories of natural preference to explain segregation, rather than structural explanations that take into account past discrimination.²⁴ The Supreme Court Justices who challenged the de jure/de facto distinction in the 1970s, Justices Douglas and Powell, exemplify the contradictions of the distinction. While Justice Powell argued against the distinction, he did so not to advance remedies in the North and West, but to argue against a distinction that had long felt unfair and hypocritical to many southerners, given the high levels of

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Orfield Reconstruction, *supra* note 12, at 38.

²² See *id.*; GARY ORFIELD, CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE (1975) [hereinafter “Orfield Congressional Power”]. See generally GARY ORFIELD, MUST WE BUS? SEGREGATION AND NATIONAL POLICY (1978).

²³ There were a few notable, outspoken lower court judges who sought to diminish the de jure/de facto distinction by recognizing the link between official action, housing, and school segregation. See, e.g., *Bradley v. Sch. Bd. of Richmond*, 53 F.R.D. 28 (E.D.Va. 1971) (opinion of Judge Merhige) and *Milliken v. Bradley*, 345 F. Supp. 914 (E.D. Mich. 1974) (opinion of Judge Roth).

²⁴ See Orfield & Eaton, *supra* note 15, at 302.

school and housing segregation in the North and West.²⁵ This mirrors arguments made in Congress by southerners who sought to diminish the regional binary not to further integration nationally but to create a national policy that would name both regions as similarly responsible for levels of segregation.²⁶ Justice Douglas, however, argued to abandon the de jure/de facto distinction because he viewed school officials' actions as state actions under the fourteenth amendment, no matter which region of the country they were occurring in; therefore, school officials in the North and South were equally accountable for the resulting segregation. Justice Douglas was ultimately concerned with holding officials accountable for segregation and advocating for a federal role in remedying segregated school and housing patterns created and maintained by official action. Justices Douglas and Powell's contradictory arguments yet similar position on the importance of abandoning the distinction are indicative of the unusual coalitions that emerged to both support the de jure/de facto myth and argue for its demise.

The political consensus that arose in the 1960s, and has been largely maintained since then, is that de facto segregation is a matter that is of private interest, and free markets have created limited opportunities for addressing contemporary segregation through federal policy. Despite many policy-makers' insistence that existing segregation is the result of innocent private decisions,²⁷ there is evidence that residential patterns have been powerfully shaped by government policies, including those of public schools, and require affirmative government action to remedy the resulting racial isolation. In his comparison of the de jure segregation of apartheid South Africa to the de facto segregation found in northern cities in the U.S in the year 2000, Douglas Massey finds that the average dissimilarity index between South Africa and the U.S. cities are not very different.²⁸ Concentrated poverty and explicitly state-sponsored racial disadvantage have produced seemingly intractable residential and school segregation in urban areas.²⁹ This suggests fluidity between private and

²⁵ See JOHN C. JEFFRIES, JUSTICE LEWIS F. POWELL, JR. (1994).

²⁶ See Joseph Crespino, *The Best Defense is a Good Offense: The Stennis Amendment and the Fracturing of Liberal School Desegregation Policy, 1964–1972*, 18 J. OF POL'Y HIST, 304 (2006).

²⁷ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (shows by contrast, briefs by districts and Justice Breyer's dissent).

²⁸ See Douglas S. Massey, *Segregation and Stratification: A Biosocial Perspective* 1 DU BOIS REV. 7, 11 (2004).

²⁹ See Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of Its Troubles*, ECON. POL'Y INST. (Oct. 15, 2014), <http://s3.epi.org/files/2014/making-of->

public discrimination and that regions in the U.S. that would never have been categorized as “de jure” segregated are very much segregated today.

School Choice

The theory behind school choice is that by introducing market forces into education, schools will improve by “competing” for students who will decide where to enroll based on assessing the quality of education being offered.³⁰ School choice has been promoted by a variety of supporters since the mid-twentieth century and has been used to both further and thwart integration efforts. In the 1960s, vouchers were used by some whites in the South to avoid desegregating public schools.³¹ Later in the 1960s, however, magnet schools arose as a school choice strategy to further desegregation efforts. Particularly in the North, where desegregating districts often were faced with the dilemma of how to retain white families who saw nearby suburban districts that were not subjected to similar desegregation efforts, magnet schools proved to be a popular strategy because they provided unique educational options. Choice subsequently became a more extensive part of districts’ desegregation efforts through student assignment policies that weighed families’ school preferences with the racial composition of schools.³² Such policies were curtailed in their use of students’ racial status in *Parents Involved*.³³

More recently, evidence suggests that laissez faire school choice policies may exacerbate within- or between-district segregation.³⁴ Other studies show that when choice policies have civil rights mechanisms as part of the policy design, they can result in more diverse schools.³⁵

ferguson-final.pdf.

³⁰ See Milton Friedman, *The Role of Government in Education*, ECON. AND THE PUB. INT. 123–144 (Robert A. Solo ed., 1955).

³¹ See GARY ORFIELD, EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 37–66 (Gary Orfield & Erica Frankenberg eds., 2013) [hereinafter “Orfield Educational Delusions”].

³² See *id.*

³³ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

³⁴ See Deenesh Sohoni & Salvatore Saporito, *Mapping School Segregation: Using GIS to Explore Racial Segregation Between Schools and Their Corresponding Attendance Areas* 115 AM. J. OF EDUC. 569 (2009); Jennifer Jellison Holme & Amy Stuart Wells, *School Choice Beyond District Borders: Lessons for the Reauthorization of NCLB from Inter-district Desegregation and Open Enrollment Plans*, THE CENTURY FOUNDATION (2008) <http://prrac.org/pdf/ASW-interdistrict.pdf>.

³⁵ See selected chapters in EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE IT FAIR (Gary Orfield & Erica Frankenberg eds., 2013).

However, even school choice policies with origins in the Civil Rights movement, such as magnet schools, are increasingly decoupled from the aim of desegregation. Moreover, in the recent school integration case challenging two districts' managed-choice policies, plaintiffs who successfully challenged the policies argued that students had the right to choose their school notwithstanding the districts' policy that considered family choices *along with* other district priorities like diversity. Most desegregation plans implemented today have some element of choice, despite the ways in which choice may lead to further stratification.

Choice indeed has become a part of the educational system beyond any connection with desegregation. Importantly, choice has become codified in ESEA, especially in the prior No Child Left Behind (NCLB) reauthorization. Under NCLB, if schools did not make adequate yearly progress, students were allowed to choose another school (although studies suggest this was not often used). Moreover, if schools were classified as failing for a certain number of years, one of the "turnaround" options was converting a traditional public school to a charter school. In ESSA, many of these provisions are retained as options for states and districts, though there are far fewer requirements about how districts and states should intervene in low-performing schools. However, charter schools continue to be supported in Title IV of ESSA, which provides between 270 and 300 million annually for state entities to open and expand high-performing charter schools. There is some language in Title IV to indicate that charters should enroll and retain a diverse student body, but there are no mechanisms of enforcement built into the federal or state levels. That the federal government continues to support relatively unregulated school choice divorced from requirements for diversity has important implications for integration. The persistence of school choice without civil rights guards fails to account for the research that shows school choice often makes segregation worse and deepens inequality.³⁶

Challenges to Race-conscious Policies

As many districts that were once under court-ordered desegregation plans are now years or even decades into unitary status,³⁷ and school boards' efforts to voluntarily maintain racially diverse schools through

³⁶ *See id.*

³⁷ *See* Sean F. Reardon et al., *Brown Fades: The End of Court-ordered School Desegregation and the Resegregation of American Public Schools* 31 J. OF POL'Y ANALYSIS & MGMT. 876–904 (2012); Orfield & Eaton, *supra* note 15, at 291–331.

race-conscious assignment policies have been constrained by the courts,³⁸ strategies for achieving racially diverse schools are becoming limited. Following many declarations of unitary status and court decisions in the 1990s, the South—which had been the most integrated region—has begun to resegregate.³⁹ In the idealized view of the American public school system, students will attend schools that are as diverse as the communities in which they live, and schools will be of about equal quality regardless of their location; however, in contrast to the idealized vision, schools tend to be fragmented along economic, racial, and/or neighborhood lines and to vary in quality.⁴⁰ Racial disparities have persisted despite the end of de jure discrimination. Research shows that white Americans understand discrimination differently from minorities, with whites viewing discrimination as a private problem, and minorities viewing discrimination as pervasive and structural.⁴¹ Few white Americans cite structural discrimination as a reason for existing inequalities,⁴² and fewer whites prefer race-conscious policies such as affirmative action to remedy existing inequalities.⁴³ The “color-blind” ideology that has emerged, emphasizing that discrimination is a thing of the past and that public policies should treat all races the same, has informed the debate around race-conscious policies and limited the ability of school districts and policymakers to employ policies that take into account the still-pervasive structural aspects of race in America.⁴⁴

The courts have played an important role in limiting school districts’ ability to adopt race-conscious policies to address racial isolation in schools.⁴⁵ A major shift that occurred was when the logic of pursuing diversity as a compelling government interest (established in *Bakke*)

³⁸ See *Parents Involved*, 551 U.S. at 701.

³⁹ SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK? 51–67 (John C. Boger & Gary Orfield eds., 2005); and see Reardon et al., *supra* note 37.

⁴⁰ See Kathryn McDermott et al., *The ‘Post-Racial’ Politics of Race: Student Assignment Policy in Three Urban School Districts*, 29 EDUC. POL’Y 504 (2015).

⁴¹ See Camille Zubrinsky Charles, *Can We Live Together? Racial Preferences and Neighborhood Outcomes*, in THE GEOGRAPHY OF OPPORTUNITY: RACE AND HOUSING CHOICE IN METROPOLITAN AMERICA 49 (Xavier de Souza Briggs ed., 2005).

⁴² Lawrence D. Bobo et al., *The Real Record on Racial Attitudes*, in SOCIAL TRENDS IN AMERICAN LIFE: FINDINGS FROM THE GENERAL SOCIAL SURVEY SINCE 1972 38–83 (Peter V. Marsden ed., 2012).

⁴³ See Charles, *supra* note 41, at 50.

⁴⁴ See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND RACIAL INEQUALITY IN CONTEMPORARY AMERICA (3d ed.) (2010).

⁴⁵ RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 769–780 (2004).

replaced the logic of pursuing the original goal of *Brown*—to eliminate racial discrimination.⁴⁶ The emphasis on diversity over the need to correct historical discrimination and inequities ultimately limits the potential for policies that seek to address racial disparities because they shift the focus to education for all children rather than those that have been historically disadvantaged.⁴⁷ Taking up the question directly of the use of race-conscious policies in the 2007 *Parents Involved* decision, the Court considered school districts' use of voluntary measures to address racial isolation. The ruling affirmed a shift in jurisprudence toward favoring private actions of individuals over actions of the government, assessing that segregation was caused by private actions rather than governmental causes.⁴⁸ Despite social science evidence about the benefits of integrated schools, the Court established significant hurdles for districts to achieve racial integration. Navigating the creation of diverse schools in the context of race-neutrality poses significant challenges for districts and policymakers. Race-neutral desegregation plans (which may use socioeconomic status, instead of race and socioeconomic status, or race alone) generally do not result in less segregated schools. Thus, it is critical that federal and state leaders encourage student assignment policies, including magnet school enrollment decisions, to be race-conscious, perhaps in combination with socioeconomic or other factors.⁴⁹

Prior Federal Legislation and These Dimensions

The Elementary and Secondary Education Act & The Civil Rights Act

Both ESEA and the Civil Rights Act (CRA) mark dramatic expansions of the federal role into areas of public life. We consider ESEA (1965) and the CRA (1964) together because the impact of these two pieces of legislation on desegregation was mutually reinforcing.⁵⁰ ESEA initially provided just over a billion dollars to schools to enhance the educational opportunities of disadvantaged children. The passage of the CRA prior to

⁴⁶ See McDermott et al., *supra* note 40, at 510.

⁴⁷ *Id.*; Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1627 (2003).

⁴⁸ Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era* 48 WAKE FOREST L. REV. 398 (2013).

⁴⁹ Sean F. Reardon, John T. Yun, & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation* 28 EDUC. EVAL. & POL'Y ANALYSIS 49 (2006).

⁵⁰ See Orfield Reconstruction, *supra* note 12.

ESEA settled the contentious issue of whether federal funding could be channeled to discriminatory programs, thus removing one of the major barriers to passage of federal education legislation.⁵¹ The money available through ESEA, and the threat to districts of losing those funds if found in violation of Title VI of the CRA, was substantial enough that it helped to move the South beyond token desegregation.⁵² Without the newly available federal funds from ESEA, it is unlikely that the impacts of Title VI of the CRA would have acted as an effective incentive to change local practices that maintained school segregation.

Although ESEA was not an explicitly race-conscious policy on its own, ESEA—with the explicitly race-conscious CRA—was used to further desegregation in a number of ways. The language in ESEA included no imperative to integrate schools or devote resources to schools differently based on race. ESEA only furthered desegregation through its collaboration with the CRA by adding teeth to the CRA in the form of large quantities of funds that could be withheld. Although ESEA did not specifically target funds in a race-conscious way, a byproduct of ESEA was that it increased aid to black students since the rates of poverty among black students was higher, thus furthering a civil rights cause without being explicitly race-conscious.⁵³ Some predominantly white schools and communities that had been avoiding desegregation were now facing more stringent enforcement under the CRA, and, with the prospect of educating black students in their schools who had higher rates of poverty, the ESEA funds were seen as a necessity, outweighing the commitment to avoid desegregation at all costs.⁵⁴ In this way, ESEA funding acted as leverage for a race-conscious agenda without having to include any race-specific goals or language because of the way in which ESEA and the CRA together incentivized and enforced desegregation.

Together, ESEA and the CRA made significant progress in dismantling de jure segregation in the South; however, this progress was unmatched in the North, despite limited attempts made to employ ESEA/CRA to attack de facto segregation.⁵⁵ In 1964, one year before the passage of ESEA, the

⁵¹ *Id.* at 35.

⁵² See Cascio et al., *supra* note 13.

⁵³ See PHILIP J. MERANTO, *THE POLITICS OF FEDERAL AID TO EDUCATION IN 1965* (1967); PATRICK MCGUINN & FREDERICK HESS, *FREEDOM FROM IGNORANCE? THE GREAT SOCIETY AND THE EVOLUTION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965* (2005).

⁵⁴ See DOUGLAS S. REED, *BUILDING THE FEDERAL SCHOOLHOUSE: LOCALISM AND THE AMERICAN EDUCATION STATE* (2014); Orfield Reconstruction, *supra* note 12.

⁵⁵ We can also learn from the history of the implementation of the CRA and ESEA about

southern and border states were receiving \$176 million in federal education funding, but by 1966, almost \$566 million was allocated to these states. This large pool of funds in the region where de jure segregation had reigned ensured that districts faced great disadvantage if they did not dismantle their dual systems.⁵⁶ The courts had made little progress in the decade after *Brown* in dismantling the dual school systems in the South, and the guidelines issued by the Department of Health, Education, and Welfare for compliance with the CRA in order to receive funds through ESEA helped the courts to force greater compliance in the South. In *Jefferson v. United States* (1966) the court stated, “We read Title VI as a congressional mandate for change—change in pace and method of enforcing desegregation,”⁵⁷ acknowledging that the courts had been slow in making progress on the desegregation of dual systems. The national consensus that emerged in the mid-1960s to attack the de jure system of school segregation in the South, and the systems of incentives and enforcement through the CRA and ESEA, proved to be effective at desegregating schools in the South.⁵⁸ However, the same coalition and same mechanisms that worked to desegregate schools in the South were unable to address de facto segregation in the North and West. At the passage of the CRA, Congress added language to Title IV that prevented its application to de facto segregation, limiting its use outside the South,⁵⁹ and Title VI was found to be almost completely unenforced in the non-South.⁶⁰ The lack of federal intervention to address de facto segregation has had lasting implications for patterns of school segregation. From 1970 through the present, the South has been the most integrated region, while de facto segregation in the North and West has continued unchecked.⁶¹

ESEA’s previous iteration, NCLB, was crucial to expanding school choice, with substantial implications for school desegregation. The federal government first became involved in public school choice with the Improving America’s Schools Act of 1994, which was incorporated into Title I of NCLB and provided two mechanisms of choice: first, students in

the barriers to expanding their interpretation of discrimination to include de facto segregation.

⁵⁶ See *U.S. v. Jefferson Co. Bd. of Educ.*, 372 F.2d 836 (5th Cir. 1966).

⁵⁷ *Id.* at 852–3.

⁵⁸ See Orfield Reconstruction, *supra* note 12.

⁵⁹ JAMES BOLNER & ROBERT A. SHANLEY, *BUSING: THE POLITICAL AND JUDICIAL PROCESS* 135 (1974).

⁶⁰ *Brown v. Weinberger*, 520 F.2d 1010 (8th Cir. 1975).

⁶¹ See Orfield et al., *supra* note 1, at 17–8 for support for the principle that the South is the most integrated region.

failing schools could transfer to better performing schools, and second, school districts could use Title I funds as a source to fund intra-district choice programs.⁶² The design of the choice program under Title I is meant to expand educational opportunities for low-income students by creating competitive pressure on schools that are underperforming to either improve or risk losing students. It is also based on the assumption that parents and students who are in underperforming Title I schools will have access to the kinds of choices that can lead to being enrolled in better schools. However, these assumptions are misleading. A fundamental challenge for many districts, particularly large urban districts, is that there is a limited supply of better-performing schooling options within a district, and thus, many students who transfer are leaving one poor-performing school for another.⁶³ Another fundamental problem is that parents' access to school choice opportunities depends on their social networks and other forms of capital that may not allow parents to have equally informed choices or the option to transfer to a better-performing school nearby. Without accounting for the differential ability to access school choice options through civil rights safeguards, school choice may increase segregation.⁶⁴

The Emergency School Aid Act and the Magnet School Assistance Program

The Emergency School Aid Act (ESAA) was one of the few federal programs to explicitly incentivize desegregation. Though the ESAA was initially proposed by Richard Nixon in 1970 as a way to appease his critics while requiring little in the way of actual desegregation, Congress enacted a series of pre-grant compliance reviews that gave the ESAA teeth as a desegregation tool when it was passed by Congress as part of the Education Amendments of 1972.⁶⁵ The ESAA was an explicitly race-conscious piece of legislation, with the multiple goals of supporting existing desegregation plans, incentivizing districts to desegregate, and providing compensatory funds to racially isolated schools (providing

⁶² GAIL L. SUNDERMAN ET AL., *NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD* (2005).

⁶³ *Id.*

⁶⁴ BRUCE FULLER & RICHARD F. ELMORE, *WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE* (1996).

⁶⁵ Emily Hodge, *School Desegregation and Federal Inducement: Lessons from the Emergency School Aid Act of 1972*, *EDUC. POL'Y* (forthcoming, 2016).

between 149 and 300 million dollars annually from 1973 to 1981 to meet these goals).⁶⁶ The ESAA's effectiveness as a desegregation tool depended on a combination of carrots and sticks. When districts applied for ESAA funds, their application triggered an automatic compliance review with Office of Civil Rights Title VI guidelines. If violations were found and not corrected voluntarily, districts did not just lose the additional money from the ESAA, but could lose *all* federal funds.⁶⁷

The ESAA's use of a voluntary incentive allowed it to reach into the de facto segregation in the North and West in a way that few other desegregation strategies were able to do. Districts throughout the country applied for ESAA funds to support many different kinds of programs. These programs were often only tangentially related to desegregation, and the funds could not be used for busing—yet, the pre-grant reviews ensured that any district applying for ESAA funds must have a high degree of desegregation. Critically, the ESAA guidelines that Congress imposed in the 1972 Education Amendments also asked schools to go above and beyond what was required by most court ordered plans into the realm of de facto segregation *within* schools. For example, pre-grant reviews asked schools to eliminate racially identifiable curricular tracks.⁶⁸ The ESAA also asked districts to ensure that all students speaking a language other than English were receiving language services, and that student discipline practices were equitable.

Although the ESAA did not promote school choice as we think about it today, the ESAA did fund the development of magnet schools in order to create school demographics that better represented the surrounding area. For example, ESAA funds established the Metropolitan World of Inquiry School in Rochester, NY, where ESAA program officer David Lerch wrote in his evaluation, “The school is 40% minority in a 99% white district and white parents are begging school officials to allow their

⁶⁶ James Stedman, THE POSSIBLE IMPACT OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT OF 1981 ON ACTIVITIES THAT HAVE BEEN FUNDED UNDER THE EMERGENCY SCHOOL AID ACT, CONG. RES. SERV., 1–21 (1982).

⁶⁷ *Id.* at 17; See also, U.S. COMMISSION ON CIVIL RIGHTS, OFFICE OF MGMT. & BUDGET: THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT-1974 139–140 (1975).

⁶⁸ However, districts were allowed to use “educationally justified and objectively determined ability grouping.” *Civil Rights Implication of the Education Block Grant Program: Oversight Hearing Before the Subcommittee on Civil and Constitutional Rights on the Committee of the Judiciary*, 97th Cong. 5, 4–15 (1982) (testimony of Cynthia Brown); Stedman, *supra* note 66, at 14–15 (Even so, during fiscal years 1974 and 1975, about 244,000 students were moved out of “racially isolated” classrooms as a result of the pre-grant reviews).

children to attend.”⁶⁹ The ESAA also funded the planning process for large, neutral site schools called education parks, which were to be located in such a way as to draw a racially balanced student population from across a metropolitan area.⁷⁰

When ESAA was effectively defunded in 1981 as part of Reagan’s Educational Consolidation and Improvement Act, the magnet school component of ESAA was established as its own program, the Magnet Schools Assistance Program (MSAP) in 1984. MSAP is a competitive grant program that typically funds magnet schools for 3 years, and is centrally focused on using school choice as a means to reduce racial isolation (as well as a changing variety of other goals). During its three decades, it has been both race-neutral and race-conscious depending on the funding cycle. An evaluation of the grants when districts were required to use race-neutral criteria found that districts were less successful at reducing racial isolation and suggested that race neutrality was a reason for this trend.⁷¹ MSAP’s funding has remained stagnant at approximately \$100 million annually, and declined to \$92 million since 2010 as a result of the federal budget sequester.⁷² In 2013, 27 districts received MSAP funding, down from 50 districts in earlier funding cycles. In the last several cycles, MSAP has been race-conscious (with a more complex definition of racial isolation since *Parents Involved*) and has had fewer goals that may have diluted MSAP’s effect during earlier funding cycles.⁷³ Both de jure and de facto segregation can be addressed through MSAP; in fact, in 2010 and 2013, there were at least twice as many voluntary integration recipients of MSAP funding than recipients under court-ordered plans.

⁶⁹ *West Irondequoit Central School District #3 (Monroe County, NY) RECORDS OF THE OFFICE OF EDUCATION, BUREAU OF EQUAL EDUCATIONAL OPPORTUNITY, EMERGENCY SCHOOL AID ACT (ESAA) (Box 9, Record Group 12, 1972-1975).*

⁷⁰ See Hodge, *supra* note 65.

⁷¹ Bruce Christenson et al., *Evaluation of the Magnet Schools Assistance Program, 1998 Grantees IV-1*, U.S. DEP’T OF EDUC. (2003),

<http://www2.ed.gov/rschstat/eval/choice/magneteval/finalexecsum.html>.

⁷² See Frankenberg & Siegel-Hawley, *supra* note 48. See also, *Issue Brief 4: Federal Support for Integration—a Status Report*, NAT’L COAL. ON SCH. DIVERSITY (April 2014), <http://school-diversity.org/pdf/DiversityIssueBriefNo4.pdf>.

⁷³ Erica Frankenberg & Chinh Q. Le, *The Post-Seattle/Louisville Challenge: Extra-legal Obstacles to Integration*, 69 OHIO ST. L. J. 1015 (2009).

The Technical Assistance for Student Assignment Plans Program

The Technical Assistance for Student Assignment Plans (TASAP) was a competitive grant program authorized in 2009 to provide small grants to local districts to seek expertise to design student assignment policy in compliance with current law (e.g., the *Parents Involved* decision that struck down a popular form of school choice used by districts, in which students' school preferences were considered alongside district goals of racial composition at each school). In the aftermath of the lengthy decision, with a number of conflicting opinions, there was confusion about what types of student assignment policies were permissible given the decision's validation of the important goals of pursuing diverse schools and trying to reduce racial isolation. Adding to the confusion, in August 2008, the Bush Administration released a "Dear Colleague" letter that suggested only race-neutral approaches would be legally permissible.⁷⁴

The TASAP program was authorized under Title IV of the Civil Rights Act, which funded what were formerly Desegregation Assistance Centers, now known as Equity Assistance Centers.⁷⁵ To be selected for funding through the competitive grant process, districts were assessed on several criteria, including need for the project, but also whether they had evidence of existing commitment to integration either through the adoption of an existing voluntary integration policy or court order. The TASAP Request for Proposals (RFP) was ambiguous about whether districts could seek race-conscious diversity, and several of the funded districts did pursue race-conscious policies, though most of the 11 funded districts did not.⁷⁶ Additionally, most districts were implementing some type of school choice policy, either a district-wide choice policy such as controlled choice (which was race-conscious and race-neutral) or choice for selected schools like magnets. While TASAP did apply to voluntarily adopted policies—which address de facto segregation—TASAP did not fund

⁷⁴Stephanie Monroe, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. (Aug. 28, 2008), http://works.bepress.com/cgi/viewcontent.cgi?article=1028&context=kathryn_mcdermott

⁷⁵ See Elizabeth DeBray, Kathryn McDermott, Erica Frankenberg, & Ann Elizabeth Blankenship, *Lessons From a Federal Grant for School Diversity: Tracing a Theory of Change and Implementation of Local Policies*, EDUC. POL'Y ANALYSIS ARCHIVES (September 2015), <http://epaa.asu.edu/ojs/article/view/1999>.

⁷⁶ See Erica Frankenberg, Kathryn A. McDermott, Elizabeth DeBray, & Ann Elizabeth Blankenship, *The New Politics of Diversity: Lessons from a Federal Technical Assistance Grant*, 52 AM. EDUC. RES. J. 440 (2015).

interdistrict plans, which aim to ameliorate between-district segregation, which comprises a large share of contemporary segregation.⁷⁷

TASAP was a one-time program with a small amount of funding (a maximum of \$250,000 for two years) that was released at once. While it was at least an opportunity for the federal government to symbolically endorse local integration efforts, the design of the program and limited funding provided may have lessened the program's effectiveness. Because, for example, program funding prioritized the need for projects, those selected for funding may have been overly complicated and difficult to address given the rather modest funding. In several instances, local politics became so contentious that districts' adopted student assignment policies likely will move districts away from more integration.⁷⁸ A second aspect of the program's design that may have harmed its effectiveness was the short turnaround time during the summer in which the RFP was circulated and the districts' proposals were due. This may have led to hastily designed proposals in which the implementation challenges that subsequently arose were not able to be fully thought through and anticipated. Finally, very few districts adopted race-conscious student assignment policies—which, as described above, are typically more successful than race-neutral policies. This was due in part to the fact that the only federal guidance available at the time cast doubt on the viability of race-conscious student assignment efforts, but it is also likely that it was hurt by the ambiguity of the TASAP RFP, the lack of clarity by the administering federal officials, and the up-front distribution of funding, which left federal officials with no way to hold districts accountable; districts may have used the choice and flexibility under TASAP in ways counter to the overall goal.

What ESSA Implementation Promoting Integration Might Look Like

Each piece of federal legislation considered here offers different—though interrelated—lessons for how the state-level implementation of the newly reauthorized ESEA, coupled with a strong federal role, could once again support desegregation efforts as part of a renewed focus on

⁷⁷Indeed, we found that one of the higher-rated applicants was an interdistrict program that wasn't funded, while lower rated applicants received funding. See DeBray et al., 2015, *supra* note 75.

⁷⁸Erica Frankenberg, Genevieve Siegel-Hawley, & Jia Wang, *Choice without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES (2011), <http://epaa.asu.edu/ojs/article/view/779>.

expanding educational opportunity for all students. The CRA, with ESEA, demonstrates how legislation can be mutually reinforcing to achieve desegregation, but also the inherent challenges of enforcing desegregation across varying political, social and legal contexts. The ESAA illustrates the power of a financial incentive to promote equity-oriented education policy. The ESAA and MSAP programs both offer successful examples of how to create magnet schools with greater racial balance within or across district lines. TASAP, a modest-sized federal program, helps us understand how ambiguity regarding the goals and permissible means to achieve the goals may lead to variable interpretation and implementation at the local level.

ESSA implementation should attempt to address the seemingly intractable problems that have emerged in school segregation; namely, de facto segregation as the confluence of residential segregation by race and class. In addition, these earlier federal programs each provide counterexamples to problematic ideas that seem to have become “conventional wisdom”: (1) that racial isolation can be decreased when race-conscious policies have been abandoned (as demonstrated in the *Parents Involved* decision), and (2) the notion that choice is an inevitable and desirable outcome for educational institutions in a democracy. A task of ESSA implementation, as well as future legislation, is challenging the inevitability of these patterns that have become normalized in institutions and society. In this section, we outline a comprehensive implementation approach, organizing our suggestions by ESEA title to be as specific as possible. Throughout, we ground our recommendations in examples from the previous legislative programs. Our suggestions are designed to mitigate the three critical issues in contemporary school segregation debates that we identified earlier in the paper: de facto segregation; the ways that school choice can further segregate schools; and the increasing race-neutrality of education policy.

ESEA Title I: Using School Diversity to Support Student Achievement

Implement Title I to allow interdistrict choice. As ESEA was amended under NCLB, Title I has allowed students the possibility of moving to other schools if their school is judged to be in need of improvement for multiple years. This policy will continue under Title I of ESSA, in which districts can offer students the option to transfer to higher performing schools if they are enrolled in the lowest performing five percent of schools in the state. As we saw from ESAA, interdistrict efforts are an important way to further integration. Thus, we suggest that states

interpret this aspect of Title I to allow students to transfer to another school in the region (instead of another district school) and to remind districts that Title I funds can be used for transporting students to those schools, including across district boundaries. Additionally, districts should provide information about all potential choice options in a variety of languages so that choice can be accessed by all who would be eligible. This approach may increase the opportunity for students to access meaningful, integrated choice options.

In order to incentivize suburban participation in interdistrict choice programs described below, it would be important for federal officials to work within the bounds of ESSA to include a safe haven provision from any accountability measures for suburban districts that accept central city students.⁷⁹ We also recommend that federal education officials collaborate with the Department of Housing and Urban Development to coordinate federal housing and educational policy on the metropolitan level to support integration. Where students are crossing boundaries for schools, housing incentives should be available for any families that might want to relocate to new jurisdictions if they would be integrative residential moves.⁸⁰ Hartford Public Schools, for example, has a recent Lighthouse Initiative through which, after a competitive application process, it provided over \$2 million to help improve a school in a diverse neighborhood as a means to stabilize community demographics and have a more naturally integrated school. Such programs build on lessons from earlier desegregation-era plans that allowed neighborhoods to be exempt from busing if they would be naturally diverse.

Incentivize new school construction to promote integrated schools. In addition to promoting interdistrict choice, we also recommend that state officials use their increased discretion over Title I funds to support the construction of new schools in locations that will encourage integrated schools. When communities are planning new school construction in response to population growth, we propose that states allocate funds to incentivize the construction of those schools in areas that would draw a racially diverse student body. For example, many metropolitan areas have

⁷⁹ See Elizabeth DeBray-Pelot & Erica Frankenberg, *Federal Legislation to Promote Metropolitan Approaches to Educational and Housing Opportunity*, 17 GEO. J. ON POVERTY L. AND POL'Y 265 (2010).

⁸⁰ For additional suggestions, see also, *Finding Common Ground: Coordinating Housing and Education Policy to Promote Integration*, NAT'L COAL. ON SCH. DIVERSITY (Philip Tegeler, ed., 2011) <http://www.prrac.org/pdf/HousingEducationReport-October2011.pdf>.

witnessed the growth of “white enclaves”, or exurban communities that are overwhelmingly white and affluent. Instead of building new schools in the fringes of a metropolitan area, locating new schools slightly inwards towards the urban center and towards increasingly diverse inner-ring suburban communities can create more racially diverse schools.

One model for how new school construction might encourage integration comes from one of the programs funded by the Emergency School Aid Act: planning for “education parks,” or large/multiple school buildings located in strategically chosen sites for racial integration across a metropolitan area. Education parks were designed as an explicit remedy for de facto segregation, as they were generally designed to be large enough so that several education parks would serve the student population of an entire metropolitan area (for example, in 1963, Pittsburgh’s superintendent Sidney Marland attempted to create five “Great High Schools”, or education parks that would serve the entire city).⁸¹ Harold Howe, Commissioner of Education under President Johnson, was an outspoken advocate for the use of educational parks to break-up racial and economic isolation. Howe describes educational parks as “...entities [that] will house 20,000 or more pupils, and will cut across all geographic, economic, and social boundaries to draw students. While such a park would deny the neighborhood school, it would express the vitality, the imagination, and the cultural mix that every vigorous city exemplifies.”⁸² Incentivizing the construction of *new* schools between neighborhoods that are, in many metropolitan areas, predominantly white and predominantly minority, and creating larger schools that can draw a more diverse student body, can help to create an integrated student body in spite of segregated neighborhoods.⁸³

Use Title I school improvement funds to promote integration. Under NCLB, School Improvement Grants (SIGs) provided money under Title I to turnaround consistently low-performing schools. While ESSA no longer includes the SIGs, it does allocate dedicated funds for states to assist schools performing in the bottom five percent. Further, Title I in

⁸¹ See Ansley T. Erickson, *Desegregation's Architects: Education Parks and the Spatial Ideology of Schooling*, HISTORY OF EDUC. QUARTERLY (forthcoming November 2016).

⁸² 89 CONG. REC. 12657 (1966) (statement of Harold Howe).

⁸³ See Genevieve Siegel-Hawley, *City Lines, County Lines, Color Lines: The Relationship between School and Housing Segregation in Four Southern Metro Areas*, 115 TEACHERS COLL. REC., 1 (2013) (Based on research findings, desegregated schools could also help to reduce neighborhood segregation).

ESSA specifies that states may provide funds to a consortium of local educational agencies (i.e., districts) for school improvement. Because the U.S. Department of Education had recently announced that magnet schools could be considered a turnaround option for districts to use the SIG funding under Title I, we see the creation of magnet schools and interdistrict transfer plans created by a consortium of local education agencies as well within the guidelines of Title I state school improvement funds.⁸⁴ We agree that magnet schools should be a turnaround option, and we have additional suggestions below under our Title IV recommendations for ensuring that magnet schools funded by ESEA also promote integration.

New York State also offers an example for how school improvement funds could be used more broadly to improve integration and achievement. In January, New York announced grants of over \$1 million to fund programs in 25 low-performing schools to improve socioeconomic integration. The reasoning behind this policy was, in part, that:

Diverse schools create important educational opportunities...they offer all children the opportunity to develop the kind of critical-thinking skills that come from the perspectives expressed by students from different backgrounds. These grants will help reduce socioeconomic isolation in New York's schools by giving districts support to pilot innovative programs to increase school diversity while improving student achievement. The world is a diverse place; our students shouldn't be isolated because they come from struggling neighborhoods.⁸⁵

With former New York Commissioner of Education John King now acting U.S. Secretary of Education, states will likely have support in using this

⁸⁴ See 80 FED. REG. 7224, 7240 (Feb. 9, 2015), available at <https://files.ctctcdn.com/1ae5d424201/21888746-69ed-4a2e-a3d0-5ed2180768b1.pdf>.

⁸⁵ See *NYS Schools to Receive Grants to Promote Socioeconomic Integration*, N.Y. STATE EDUC. DEP'T (Dec. 30, 2014), <http://www.nysed.gov/news/2015/nys-schools-receive-grants-promote-socioeconomic-integration> (Quote from then-New York Commissioner of Education John King, Dec. 30, 2014); Editorial Board, *Racial Isolation in Public Schools*, N. Y. TIMES (Jan. 9, 2015), http://www.nytimes.com/2015/01/10/opinion/racial-isolation-in-public-schools.html?_r=1.

model to create incentives to encourage more socioeconomically diverse schools.⁸⁶

ESEA Title II: The Importance of Diverse, Qualified, and Trained Staff for Student Achievement

Title II of ESEA has traditionally focused on improving teacher quality, both by improving the quality of the entering teaching force and by improving the skills of current teachers through professional development. Title II grants are given to all states for these purposes. ESSA Title II focuses on improving the quality of the teaching force in low-income schools in particular. Given that the achievement of students of color is higher when they have *teachers* of color and that white students also benefit from having teachers of color as professional role models, states could use Title II funds to promote the racial diversity of the teaching force. Further, states might provide training for all teachers in culturally responsive teaching. The ESAA provides a model of federal legislation that did both: the ESAA provided funds for professional development to support academic achievement and cultural awareness in newly desegregated schools, and required a desegregated teaching staff in order for districts to receive ESAA funds.

Funding for a more racially diverse teaching staff. Because of the benefits of a racially diverse teaching force, we propose that states channel Title II funds in a race-conscious manner regarding faculty composition, to ensure that schools with high minority populations have teachers that are high quality and experienced. Some researchers have commented that ESSA's support for teacher preparation academies will have a negative effect on teacher quality in low-income schools because teacher preparation academy students will be considered teachers-of-record before they have completed their preparation.⁸⁷ To address these issues, states might also ask that teacher preparation programs and districts receiving Title II funds have provisions for teacher and staff desegregation (e.g., a

⁸⁶ Philissa Cramer, Geoff Decker, Patrick Wall, & Monica Disare, *Former N.Y. Ed Chief John King Will Replace Arne Duncan as U.S. Education Secretary*, CHALKBEAT NEW YORK (Oct. 15, 2015), <http://ny.chalkbeat.org/2015/10/02/u-s-ed-secretary-arne-duncan-to-step-down-former-n-y-ed-chief-john-king-to-take-over/#.VhEVmXtVsqb>.

⁸⁷ See Kenneth Zeichner, *The Disturbing Provisions about Teacher Preparation in No Child Left Behind Rewrite*, THE WASHINGTON POST (December 5, 2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/05/the-disturbing-provisions-about-teacher-preparation-in-no-child-left-behind-rewrite/>.

criterion for school desegregation compliance in *Green*). Teacher and staff diversity is also a way to measure the level of school desegregation, and, along with teacher qualifications, is crucial to improving outcomes for student of color. Adding a race-conscious dimension language to the implementation of Title II would raise the standards for teacher quality in high minority schools, and also require teacher and staff desegregation, is compatible with Title II as conceived in 1965; adding such race-conscious language would strengthen ESSA's ability to enact integration. In addition to supporting diversity among the existing teaching pool, we suggest that Title II grants could be used to incentivize minority students to enter the teaching profession and fund their teacher training programs.

Professional development on culturally responsive instruction. Another suggestion for incorporating race-conscious policies into ESSA implementation would be to use the professional development provisions of Title II to promote forms of instruction that see students' varying backgrounds as sources of strength rather than as deficits. ESSA should promote training to help preservice and practicing teachers—often white—understand a variety of cultural backgrounds without reducing students' backgrounds to stereotypes.⁸⁸ This is especially important for teachers in schools with large numbers of minority students. Similarly, the ESAA funded a variety of professional development efforts, including those focused on multicultural education for teachers.⁸⁹

⁸⁸ See Gloria Ladson-Billings, *Toward a Theory of Culturally Relevant Pedagogy*, 32 AM. EDUC. RES. J. 465 (1995); ANA MARIA VILLEGAS & TAMARA LUCAS, EDUCATING CULTURALLY RESPONSIVE TEACHERS: A CONCEPTUALLY COHERENT AND STRUCTURALLY INTEGRATED APPROACH (2002).

⁸⁹ See Stedman, *supra* note 66; Douglas Longshore, *The Impact of the Emergency School Aid Act on Human Relations in Desegregated Elementary Schools*, 5 EDUC. EVAL. AND POL'Y ANALYSIS 415 (1983). We also want to acknowledge the importance of addressing other forms of racial discrimination *within* schools, such as racially identifiable tracking, or what is sometimes called second-generation segregation. While a comprehensive discussion of second-generation segregation and how it might be addressed through federal legislation is outside the scope of this particular article, the ESAA does provides one model of how a financial incentive can be used to encourage schools to eliminate racially identifiable tracking. Instead of only using an incentive to make sure that minority students are represented in higher tracks, however, a newer incentive tied to ESSA might promote whole-school detracking reforms. The professional development for which we advocate in this section could also include teacher training around scaffolding instruction in heterogeneous classes in a detracked school environment, so that teachers might feel more comfortable addressing a wide range of student needs while holding similar expectations for the quality of student work.

ESEA Title IV: Using Magnet and Charter Schools to Support Integration

In addition to using Title I funds to support interdistrict choice (as described above), we also build on prior federal programs such as MSAP and ESAA to describe how magnet schools (via ESSA's Title IV) can be used to promote racial integration and metropolitan solutions to school desegregation. Interdistrict magnet schools, in particular, represent one viable option to promoting integration. Title IV also includes new guidelines for charter school enrollment, and in this section, we elaborate upon our recommendations for federal- and state-level officials to use ESSA Title IV to make charter school enrollment more equitable.

Using race-conscious choice to promote racial integration. One of the most popular forms of school choice is charter schools, but states can also incorporate interdistrict choice programs into their ESSA implementation plans in a number of ways.⁹⁰ Drawing on the example of the ESAA, which incentivized and funded interdistrict choice programs, Title IV of ESAA could also provide funds for interdistrict choice. For example, ESAA money supported Hamden, CT in enrolling 100 students from neighboring New Haven.⁹¹ Unlike the ESAA, TASAP did not fund inter-district choice, even though a highly ranked proposal from an interdistrict desegregation program was submitted. Magnet schools, especially interdistrict magnet schools, are another option for incorporating school choice via Title IV while also trying to address de facto segregation and further integration.⁹² ESSA's Title IV specifies that magnet school assistance grants are "to enable the local educational agency, or consortium of such agencies, or other organizations partnered with such agency or consortium, to establish, expand, or strengthen inter-district and regional magnet programs."⁹³ Therefore, interdistrict magnet schools are explicitly within the scope of ESSA.

In addition, we recommend expanding federal funding for magnet schools, including grants that allow for longer implementation periods. In December 2011, after several years of considerable confusion after *Parents Involved*, the Departments of Education and Justice jointly

⁹⁰ See discussion of interdistrict choice in section on Title I above.

⁹¹ See Hodge, *supra* note 65.

⁹² See discussion of magnet schools in section on Title I above.

⁹³ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802, § 4401(3) (2015).

released guidance explicitly stating that race-conscious policies, including those that assign students, are permissible if they are aimed at reducing racial isolation or creating diverse schools. Such guidance was too late for the TASAP program, and as seen, many grantee districts adopted race-neutral policies, some of which may be leading districts away from more diversity.⁹⁴ However, recent rounds of MSAP have incorporated race-conscious policies in the Request for Proposals, which is a positive step after requiring race-neutral admissions strategy for magnet applicants during the Bush Administration. The language on magnet schools in ESSA's Title IV specifies that priority will be given to applicants who "propose to increase racial integration by taking into account socioeconomic status in designing and implementing magnet school programs."⁹⁵ While we interpret this language as asking district to consider socioeconomic status *and* race in designing magnet schools, given the growing race-neutrality of policy, it is possible that districts could interpret this language as mandating enrollment decisions based on socioeconomic status *alone*. However, desegregation plans that use socioeconomic status as a sole criterion (without factoring in race) so not lessen school segregation, so it is critical that magnet school enrollment decisions incorporate race in some way.⁹⁶

ESSA Title IV can also support transportation to interdistrict magnet schools. Because of the contentious political climate around busing in the 1970s, the ESAA specifically could not fund transportation, while it funded almost everything else. However, Title IV explicitly states that districts and/or consortia of districts may use ESSA Title IV funds to provide transportation to magnet schools as long as the transportation costs are sustainable and a relatively minor portion of the overall grant. Given the often-prohibitive nature of transportation for many students to access choice options, this funding provision is another way in which federal funds could meaningfully expand the choice options for students to attend integrated schools.

In addition to supporting magnet schools, Title IV provides funding for charter schools, a type of choice that has raised questions about

⁹⁴ See Jeremy A. Smith, *As Parents Get More Choice, S.F. Schools Resegregate*, SAN FRANCISCO PUB. PRESS (Feb. 2, 2015), <http://sfpublicpress.org/news/2015-02/as-parents-get-more-choice-sf-schools-resegregate>.

⁹⁵ ESSA, Pub. L. No. 114-95, § 4401(3).

⁹⁶ See Frankenberg & Le, *supra* note 73. See also Sean F. Reardon, John T. Yun, & Michal Kurlaender, *Implications of Income-Based School Assignment Policies for Racial School Segregation* 28 EDUC. EVAL. AND POL'Y ANALYSIS 49 (2006).

segregation and access for all students.⁹⁷ As we have seen through the examples of types of choice in other grant programs, having race-conscious goals and policies are essential for school choice. Importantly, Title IV now includes language that requires charters to recruit and enroll include all students, including educationally disadvantaged students, and support their retention. State and federal officials should elaborate upon the definition of “all students” and “educationally disadvantaged students” to ensure that charters are serving students of all races and proportionate numbers of students with Individualized Education Plans. We also recommend that state authorizers of charter schools amend charter eligibility to ensure that racial isolation or promoting diversity is examined before awarding funding to any potential charter school. Further, state authorizers of charters should evaluate any potential impact on the diversity of public schools, particularly where districts have desegregation plans.

Use Titles IV & VI of the Civil Rights Act

Although aspects of ESSA implementation will be critical to promoting integrated schools, a revised ESSA will likely not be enough to ensure integration. A stronger approach would look to the lessons of the 1960s, when ESEA was frequently used in combination with the Civil Rights Act to initiate administrative hearings against discriminatory school districts, ultimately cutting off federal funds if it was necessary to produce change.

As initially conceived, Title III of the Kennedy administration’s Civil Rights bill (which became Title IV) had provisions that would provide assistance to districts facing challenges related to racial imbalance; this title originally proposed providing grants, technical expertise, and loans to districts in order to address problems specific to de facto segregation.⁹⁸ However, aid to racially imbalanced districts was ultimately eliminated by Congress, foreshadowing the coming debates over de facto segregation that would result in Congress receding from addressing segregation in the non-South. Title IV of the final version of the Civil Rights Act of 1964, dealing with technical assistance, was also a contested site for language on de facto segregation, with integrationists pressing for the inclusion of aid

⁹⁷ See Frankenberg et al., *supra* note 78; Catherine E. Lhamon, *Dear Colleague Letter*, U.S. DEP’T OF EDUC., (May 14, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

⁹⁸ Edward M. Kennedy, *The Case for New Desegregation Legislation*, 4 EQUITY AND EXCELLENCE IN EDUC. 42, 41–44 (1966).

to racially imbalanced districts.⁹⁹ Despite their efforts, in order to gain cloture on the bill, language was added to Title IV stating that “*desegregation* shall not mean the assignment of students to public schools in order to overcome racial imbalance”, greatly limiting the capacity of the Civil Rights Act to aid school districts in the non-South in desegregation efforts. Title VI of the Civil Rights Act, which cut off funds to school districts that were found to discriminate, was greatly responsible—along with ESEA—for desegregating the South.¹⁰⁰ However, Title VI was found to be largely unenforced by HEW outside of the South.¹⁰¹

The Civil Rights Act worked very effectively with ESEA to dismantle *de jure* segregation, but represents a great missed opportunity to dismantle *de facto* segregation. Titles IV and VI can be revised to incorporate explicit language that affirms a commitment to address the challenges particular to *de facto* segregation, especially since most school segregation today is considered *de facto*. There has been considerable mission drift of Title IV, with the focus shifting to equity rather than desegregation. Currently there are ten Equity Assistance Centers (formerly Desegregation Assistance Centers) throughout the U.S., whose mission is to promote equal educational opportunity in the areas of race, gender, and national origin, but their purpose is no longer explicitly focused on desegregation. Technical assistance through Title IV should return to its initial focus on desegregation, and be enhanced to include under its purview schools that seek to voluntarily address racial imbalance. Title VI should be revised to include language that targets *de facto* segregation, not limiting the enforcement of Title VI to only previously *de jure* states.

Under the Obama administration, the Office of Civil Rights released guidance on the voluntary use of race to achieve diversity and approaches to avoid racial isolation.¹⁰² The OCR put forth a number of strategies that are permissible in the post-*Parents Involved* context, and the agency affirmed the importance of racially diverse schools in their guidelines. We suggest that the Office of Civil Rights continue to expand its role in K–12 education by providing support and guidance for school districts. Given

⁹⁹ See Bolner & Shanley, *supra* note 59.

¹⁰⁰ See Orfield Reconstruction, *supra* note 12.

¹⁰¹ See *Brown v. Weinberger*, 520 F.2d 1010 (8th Cir. 1975).

¹⁰² *Guidance on the Voluntary Use of Race To Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.pdf> (last visited Feb. 9, 2016).

the reduced level of federal intervention through the U.S. Department of Education in the new ESSA legislation, the Office of Civil Rights may be especially important for integration moving forward. Further, in recent years several federal agencies have enacted “equality directives” which have required state and local governments to account for the racial impacts of policies, placing an affirmative duty on states and local governments that are receiving federal funds.¹⁰³ The Department of Education could similarly institute such a requirement to ensure racial equity.

General Suggestions/Other Recommendations

Ensuring capacity at the federal level

In addition to our specific suggestions, we also make several general recommendations to ensure that there is enough capacity at the federal level to administer the ESSA. Because many of our suggestions are incentive programs, it is critical that all districts have the opportunity to apply, and to make sure that the federal government has appropriate capacity and expertise to evaluate districts’ proposals.

For any program that involves a competitive grant, it is essential that districts have enough time to apply. In the TASAP program, districts only had four weeks to apply and this was during the summer when districts may have fewer staff working. In a study of districts receiving TASAP grants, the authors speculated that some political problems that arose once the grants were funded may have been anticipated if the districts had more time, particularly to work with community partners like civil rights groups, to design their proposed policy.¹⁰⁴ Similarly, the first round of ESAA applications was plagued by misuse of funds because of a too-quick application period and little oversight.¹⁰⁵

In addition, in the TASAP program, districts were further hampered by the lack of clear theory of action from the federal government, including whether the use of race was permissible. If the Department of Education

¹⁰³ Philip Tegeler, *The "Compelling Government Interest" in School Diversity: Rebuilding the Case for an Affirmative Government Role*, 47 U. MICH. J. L. REFORM 1021 (2014).

¹⁰⁴ See DeBray et al., 2015, *supra* note 75.

¹⁰⁵ See *American Friends Service Committee, Delta Ministry of the National Council of Churches, Lawyers’ Committee for Civil Rights under Law, Lawyers Constitutional Defense Committee, NAACP Legal Defense and Educational Fund, Inc., & Washington Research Project*, THE EMERGENCY SCHOOL ASSISTANCE PROGRAM: AN EVALUATION 15-17 (1970), <http://files.eric.ed.gov/fulltext/ED045779.pdf>.

feels like it cannot advise districts in an effort to avoid a conflict of interest, perhaps regional Equity Assistance Centers could provide support and expertise to districts in submitting proposals.

Enforcement

Equity policies, and, in particular, desegregation policies, can be expected to have the most impact when they are enforced. The task of enforcement of school desegregation is challenging in a country that is as large and grounded in the tradition of local control of schools as the United States. From 1965 through 1970, the period in the United States when all three branches of the federal government enforced school desegregation, unprecedented progress was made towards school desegregation in the South, the most intransigent region of the country.¹⁰⁶ That period provides important insights into what effective enforcement entails: a competent and fully staffed Department of Education, and each branch of government using their unique set of levers to apply pressure to enforce standards. Given the complexity of desegregation cases, particularly with the growth of school choice options and the urban/suburban divide, expertise in the Department of Education is required to create remedies that can effectively desegregate across contexts. Further, challenges particular to de facto segregation, including collecting evidence on school board actions that exacerbate this form of segregation, require more resources than cases in formerly de jure segregated districts, due to the difficulty of proving violations where there is no history of statutory discrimination.¹⁰⁷

Enforcement of desegregation is most effective when all three branches of government can apply the tools of their office to the agenda of desegregation, as each branch has unique authority. Congress, with the power of the budget, can impose sanctions or incentives on desegregation, but as a popularly elected branch are inherently weak at protecting minority rights. The courts, as an unelected branch, are well positioned to enforce minority rights, but lack mechanisms of enforcement. The executive branch has decision-making power over how enforcement will be pursued and can provide important rhetorical support for desegregation. When all three branches act together to pursue desegregation, there are far greater opportunities for effective enforcement than when one branch takes on the task alone, as in the decade following *Brown*. However,

¹⁰⁶ See Frankenberg & Taylor, *supra* note 14.

¹⁰⁷ See Orfield Congressional Power, *supra* note 22, at 376.

given that ESSA returns considerable power and latitude to the state level, it is also important for federal officials to consider how to support and incentivize states in promoting integration, as well as how federal officials might think about enforcement through an expanded Office of Civil Rights or the regional Equity Assistance Centers. In addition, state officials should include state-level civil rights groups who might assist in building state capacity for integration.

Conclusion

Federal education legislation has the capacity to advance the civil rights of all students by sanctioning policy that promises that students will not be racially isolated in schools. Yet these three dimensions of contemporary school segregation—de facto segregation, school choice without civil rights guards, and race-neutral policies—present a complex set of new dilemmas with which federal education policy seeking to promote integration must contend. As the nature of segregation has grown more complex in recent decades, the federal commitment to mitigating racial isolation has waned. Because ESSA places much of the responsibility on the state educational agency, the state has a unique opportunity at this moment in time to implement ESSA in ways that lead to greater educational opportunity. In addition, while the federal role may be smaller, federal officials still have an important role to play in fleshing out ESSA implementation guidelines for states, and should take equity and integration into account when doing so. While the civil rights legislation of the 1960s was primarily concerned with the de jure segregated South, as policymakers and the public grew more aware of the detrimental effects of segregation, no matter the cause, the nation grappled with how to address de facto segregation, the use of race as a relevant individual factor, what it means to choose a school and who accesses such choices, and other perplexing questions. Addressing this set of complex desegregation issues requires a renewed commitment to integration from the federal government, one that has perhaps not been seen since the 1960s. The federal government though ESEA and the Civil Rights Act was exceptionally effective at school desegregation in the South, demonstrating the capacity that exists at the federal level for enacting local social change through incentives and enforcement. Similarly, previous federal programs like ESAA, MSAP, and TASAP all offer examples of federal policy that promotes integration, and lessons learned that could be incorporated into implementation of the new ESSA and, if that is ineffective for purposes of integration, future reauthorizations of the law

and/or other federal legislation. If such capacity is to be exercised to address the contemporary challenges of school segregation, it will only come with a renewed commitment to integration at the both the federal and state levels.

Reducing Socioeconomic Isolation through School Innovation Grants

Christopher A. Suarez*

Socioeconomic isolation is one of the most significant problems in education today. Over 60 years after *Brown v. Board of Education*, the vast majority of our students continue to be educated in racially and socioeconomically isolated settings. Poor students are educated with poor students, rich students are educated with rich students, and there is rarely any middle ground. Nearly 75% of low-income students attend high poverty schools (where more than 50% of the student body is low-income), while nearly 75% of students from wealthier families do not.¹ Socioeconomically and racially diverse schools are quite rare, and this “third rail” of education reform has been virtually untouched for decades.² But if we do not begin to touch this third rail at some point and attempt to move the needle on segregation, “we will have segregation now, segregation tomorrow, and segregation forever.”³ Ever since the United States Supreme Court’s Decision in *San Antonio v. Rodriguez*,⁴ local control of education has been viewed as a sacrosanct principle that must not be disturbed in American public education and, as such, students attend public schools according to established socioeconomic sorting patterns. Thus, it comes as no shock that the socioeconomic distributions of students in schools are such as they are today.

* Associate, Williams & Connolly LLP; Yale Law School, J.D. 2011; Dominican University, M.A.T. 2008; Massachusetts Institute of Technology, S.B. 2006. The statements and opinions expressed in this article are the author’s own and do not necessarily reflect the views of, and should not be attributed to, Williams & Connolly LLP or its clients.

¹ Reed Jordan, *A Closer Look at Income and Race Concentration in Public Schools*, THE URB. INST. (May 13, 2015), <http://www.urban.org/features/closer-look-income-and-race-concentration-public-schools>.

² I am not the first to highlight segregation as education’s “third rail.” See Adam Kirk Edgerton, *Segregation Now, and Segregation Forever*, THE HUFFINGTON POST (September 28, 2012, 4:43 p.m.), http://www.huffingtonpost.com/adam-kirk-edgerton/segregation-now-and-segre_b_1921451.html (noting that “the third rail of education reform” is “the indisputable overwhelmingly obvious fact that schools in the North are extremely segregated”).

³ *Id.*

⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972).

I operate from the premise that the current situation is troubling. As Justice Marshall stated in his dissent in *Milliken v. Bradley*,⁵ the case that famously refused to integrate schools across urban and suburban school district lines, “unless our children begin to learn together, there is little hope that our people will ever learn to live together.”⁶ Without socioeconomically integrated schools, people of different classes and racial backgrounds will never learn from each other, appreciate each other’s differences, or generate collective understandings of one another. Numerous studies suggest that there are significant social benefits to socioeconomic integration.⁷ And there are significant academic benefits to socioeconomic integration as well. Wealthier students will receive an education from their less well-off peers about the challenges of growing up in a relatively less advantaged background, will be educated on different cultural norms and values, and will see the successes of their lower-income peers.⁸ Meanwhile, lower income students will become attuned to the structural advantages that upper class students frequently benefit from and will be able to receive the benefits of being educated alongside those students.

In past work, I have advanced a principle I have referred to as the 60/40 principle.⁹ Under this principle, **no school within any school district should have more than 50% low-income students.** The goal of the principle, simply put, is to sort students within public school districts so that individual schools are not overly concentrated with low-income students.¹⁰ Because this is a lofty goal, the 60/40 principle, at least at the outset, merely requires that a school district embark on efforts to achieve district-wide student populations that are less than 60% low-income, with the long-term goal of achieving district-wide student populations that are less than 40% low-income.¹¹ There are myriad ways to achieve these goals—but school districts to date have made very few efforts to achieve

⁵ *Milliken v. Bradley*, 418 U.S. 717 (1974).

⁶ *Id.* at 783 (Marshall, J., dissenting).

⁷ See, e.g., U.S. COMMISSION ON CIVIL RIGHTS, THE BENEFITS OF RACIAL AND ETHNIC DIVERSITY IN ELEMENTARY AND SECONDARY EDUCATION (Nov. 2006), available at <http://www.usccr.gov/pubs/112806diversity.pdf>.

⁸ See Genevieve Siegel-Hawley, *Research Brief: How Non-Minority Students Also Benefit from Racially Diverse Schools*, THE NAT’L COAL. ON SCH. DIVERSITY (Oct. 2012), <http://www.school-diversity.org/pdf/DiversityResearchBriefNo8.pdf>.

⁹ See Christopher A. Suarez, *Democratic School Desegregation: Lessons from Election Law*, 119 PENN. ST. L. REV. 747 (2015).

¹⁰ *Id.*

¹¹ *Id.*

school integration absent consent decrees or other prodding from courts. In this piece, I highlight some of the school districts that are voluntarily attempting to reduce the degree of socioeconomic isolation in their districts, reflect on what has motivated these programs, and offer a next step for reform in the wake of the recent passage of the Every Student Succeeds Act (ESSA).¹²

The ESSA is the first major overhaul to the Elementary and Secondary Education Act (ESEA) since the passage of No Child Left Behind (NCLB) in 2001. The law largely retains the principles of accountability that were emphasized in NCLB, but allows states far more flexibility in choosing desired targets and goals. Under the ESSA, states will submit “accountability plans” to the Department of Education, which will allow states to set both their short term and long term accountability goals.¹³ Moreover, states will be entirely free to choose their own standards and will have more flexibility in choosing when and to what extent to administer tests.¹⁴ The law will also retain large pots of grant funding, including Title I funding for low-income schools.¹⁵ These funds will empower state and local decision-makers to employ evidence-based solutions for school improvement, and will not restrict these leaders to “cookie cutter” Federal approaches.¹⁶

While the ESSA did not emphasize integration as a national goal, it also did not roll back existing efforts to improve integration, such as the Magnet School Assistance Program (MSAP), which will continue to provide grant money for magnet schools designed to “increase interaction among students of different social, economic, ethnic, and racial backgrounds.”¹⁷ Congress has attempted to make the MSAP program stronger, inserting language into the existing MSAP statute requiring that applicants for such grants provide “any available evidence” or a “rationale” for how magnet school proposals will achieve diversity

¹² Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (December 10, 2015).

¹³ Alyson Klein, *ESEA Reauthorization: The Every Student Succeeds Act Explained*, EDUC. WEEK (November 30, 2015), http://blogs.edweek.org/edweek/campaign-k-12/2015/11/esea_reauthorization_the_every.html.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *FACT SHEET: Congress Acts to Fix No Child Left Behind*, THE WHITE HOUSE (December 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/12/03/fact-sheet-congress-acts-fix-no-child-left-behind>.

¹⁷ 20 U.S.C. § 7231d(b)(1)(A).

goals.¹⁸ It also added a requirement that applicants explain how it will “assess, monitor, and evaluate the impact of the activities . . . on student achievement and integration.”¹⁹ Moreover, Congress amended the priority criteria in awarding MSAP grants, currently codified at 20 U.S.C. § 7231(e), to prioritize funding to applicants who “propose to increase racial integration by taking into account socioeconomic diversity in designing and implementing magnet school programs.”²⁰ Moreover, it expanded the possible use of MSAP grant funds to include not only funding of individual magnet schools, but also efforts “to establish, expand, or strengthen inter-district and regional magnet programs.”²¹ Thus, while Congress did not prioritize integration in the ESSA writ large, it certainly recognizes its value, at least in the magnet school context.

Nonetheless, in light of the ESSA’s failure to tackle the integration problem in a larger way, I encourage efforts—whether at the federal, state, or local level—to design additional socioeconomic school integration grant programs and models. In light of recent school funding reform efforts, including “Race to the Top,” the use of grant money at both the state and federal level has been known to provide valuable incentives to school districts that wish to innovate. In 2015, New York State began a grant program that, using federal funds, has the express goal of reducing socioeconomic isolation in schools. This is the first known program of its kind, and no scholars have undertaken a detailed analysis of the program to date. And most recently, the Obama administration announced a proposed \$120 million grant program – called “Stronger Together” – that may provide additional federal funds to help school districts address socioeconomic isolation.²²

In light of these recent initiatives, school integration grant programs hold promise. This piece therefore performs a case study of the New York State socioeconomic school integration grant program, considers some of the socioeconomic school integration proposals that are currently being funded by the program, and considers ways in which similar socioeconomic school integration grant programs could be more broadly adopted or improved in other contexts, so that such programs may become

¹⁸ See ESSA § 4401.

¹⁹ *Id.* (amending and inserting language into 20 U.S.C. § 7231d).

²⁰ *Id.* (amending and inserting language into 20 U.S.C. § 7231e(4)).

²¹ *Id.* (amending and inserting language into 20 U.S.C. § 7231f(a)(8)).

²² Alyson Klein, *Obama Budget to Seek New Money to Help Schools Integrate, Source Says*, EDUC. WEEK (Feb. 8, 2016, 3:26 p.m.), http://blogs.edweek.org/edweek/campaign-k-12/2016/02/obama_budget_to_seeks_new_mone.html?cmp=SOC-EDIT-GOO.

a valuable piece of the broader education reform movement. Before doing so, however, I provide context on the current state of school integration efforts in the United States.

Current Examples of Efforts to Desegregate

As noted above, very few school districts in America proactively attempt to desegregate their schools. And most, if not all, of these programs exist as vestiges of legal rules or requirements that are either still in force or have lapsed, whether those mandates were imposed at the state or federal level. Nonetheless, more than eighty school districts around the country engage in some degree of socioeconomic integration efforts,²³ and some of the most notable plans are highlighted below.

Interdistrict Magnet Schools

Some school districts utilize inter-district magnet programs to encourage socioeconomic integration. The largest program of this nature is in greater Hartford, Connecticut, where 37 magnet schools offer students from Hartford's suburbs and inner-city school district opportunities to attend school together in academically rigorous settings.²⁴ These programs promote inter-district cross pollination of student populations by creating high-quality schools that draw students from both cities and their surrounding suburbs. This is due in part to the magnet schools' specialized instruction: in Hartford, for example, the inter-district magnet programs include several technical high schools, performing arts high schools, science and technology high schools, an international baccalaureate (IB) school, and numerous other magnet elementary,

²³ LINN POSEY MADDOX, WHEN MIDDLE-CLASS PATENTS CHOOSE URBAN SCHOOLS: CLASS, RACE & THE CHALLENGE OF EQUITY IN PUBLIC EDUCATION 154 (2014).

²⁴ Denisa R. Superville, *New Settlement Reached in Hartford, Conn., Desegregation Case*, EDUC. WEEK (Feb. 27, 2015), http://blogs.edweek.org/edweek/District_Dossier/2015/02/new_settlement_reached_in_hart.html; See also *Some Examples of Successful School Integration Models and Positive Outcomes for Achievement, Graduation Rates, and College Attendance*, NAT'L COAL. ON SCH. DIVERSITY (June 14, 2013), http://school-diversity.org/pdf/NCSD_list_of_examples-best_practices.pdf.

middle, and high schools.²⁵ Indeed, one of these schools was recently named the best magnet school in the country.²⁶

Hartford's magnet program, however, was not voluntary. It was the result of court-mandated integration due to the Connecticut Supreme Court's 1996 ruling in *Sheff v. O'Neill*,²⁷ which held that the racial and socioeconomic isolation of students in greater Hartford violated the Connecticut State Constitution. There have been numerous consent decrees in the *Sheff* case that have proscribed additional integration efforts in greater Hartford over the years, including a 2015 settlement that required that the inter-district magnet program add 1,000 more seats for Hartford students.²⁸ Hartford continues to be bound by a consent decree requiring that it reach certain racial diversity targets: The settlement that governed the 2014-15 school year stipulated that 44% of Hartford-resident minority students should be afforded the opportunity to attend schools in reduced isolation settings.²⁹

Other metropolitan areas have created more modest inter-district magnet programs. For example, the West Metro Education Program (WMEP) in greater Minneapolis, Minnesota organized two inter-district magnet schools.³⁰ The WMEP is a unique regional district—called a “Joint Powers School District”—which spans 11 districts and has a school board comprising members from each of those districts.³¹ The WMEP and

²⁵ See, *High Schools*, GREATER HARTFORD REG'L SCH. CHOICE OFFICE, <http://www.choiceeducation.org/high-schools> (last visited October 21, 2015).

²⁶ David Desroches, *WPNR: Hartford's Breakthrough Named Best Magnet School in the Country*, SHEFF MOVEMENT (May 4, 2015), <http://www.sheffmovement.org/sheffinthenews/wpnr-hartfords-breakthrough-named-best-magnet-school-in-the-country/>.

²⁷ 678 A.2d 1267 (Conn. 1996).

²⁸ See Superville, *supra* note 24. I have discussed *Sheff* extensively in the past. See Christopher A. Suarez, *Sliding Towards Educational Outcomes; A New Remedy for Education Lawsuits in a Post-NCLB World*, 15 MICH. J. RACE & L. 477 (2010).

²⁹ See *Sheff v. O'Neill*, December 13, 2013 Stipulation, Section III.A.2. The stipulation defines a “reduced isolation” setting as an interdistrict magnet school that is less than 75% minority (Black and/or Hispanic) or a school that accepts a Hartford minority student through an interdistrict transfer. See *id.* Section II.M.

³⁰ Kara S. Finnigan, Jennifer Jellison Holme, Myron Orfield, Tom Luce, Sarah Diem, Allison Mattheis, and Nadine D. Hylton, *Regional Educational Policy Analysis: Rochester, Omaha, and Minneapolis' Inter-District Arrangements*, 29 EDUC. POL'Y 780, 797 (2015). See also WEST METRO EDUC. PROGRAM, <https://sites.google.com/a/wmep.k12.mn.us/wmep6069/home>; West Metro Education Program, WIKIPEDIA, https://en.wikipedia.org/wiki/West_Metro_Education_Program (last visited Feb. 8, 2016).

³¹ Finnigan et al., *supra* note 30, at 797.

its magnet schools, like the *Sheff* magnets, were an outgrowth of state court action and subsequent settlements—specifically, they arose from cases including *NAACP v. State of Minnesota*³² and *Xiong v. State of Minnesota*,³³ which challenged segregated education under the Minnesota State Constitution. After these cases settled in 2000, the WMEP began to oversee the two inter-district magnet schools (which are now administered by local school districts) and assisted with an inter-district transfer program called the “Choice Is Yours” (CIY).³⁴ The two Minneapolis magnet schools both specialize in the fine arts and continue to focus on racial equity in their admissions policies.³⁵ In the CIY program, poorer students from Minneapolis have the opportunity to attend school in neighboring suburban districts, and the state pays transportation costs.³⁶ WMEP runs a “Cultural Collaborative Regional Professional Development Program,” which provides professional development to teachers to build cultural competence, as well as student programs that help build tolerance across different racial, cultural, and socioeconomic identities.³⁷

³² See Complaint, *NAACP v. State*, No. 95-14800 (Minn. Dist. Ct. 1995).

³³ See Complaint, *Xiong v. State*, No. 98-2816 (Minn. Dist. Ct. 1998).

³⁴ See *Minneapolis NAACP v. Minnesota/ Xiong v. Minnesota*, Case Nos. 95-14800 & 98-2816, Settlement Agreement (Minn. Dist. Ct., 2000); Finnigan et al., *supra* note 30, at 796-97; Jonathan Feldman, *Integrated Public Education is Still Worth Fighting For*, 32 HUMAN RIGHTS 13 (2005), available at http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol32_2005/fall2005/hr_Fall05_integratedpubliced.html (noting that “a settlement was reached shortly after [*Xiong*] was filed, allowing some increased opportunities for urban students to attend suburban schools”). The magnet schools remain operational as magnet schools, but they were recently conveyed by WMEP to the local school districts so that it may focus more on its professional development and student programs. Interview with Anthony Galloway, Student Programs Lead of WMEP (October 21, 2015) (transcript on file with the author); see also Beth Hawkins, *West Metro Integration District May Reinvent Itself, Spinning Off 2 Schools in the Process*, MINNPOST (January 12, 2015), <https://www.minnpost.com/learning-curve/2015/01/west-metro-integration-district-may-reinvent-itself-spinning-2-schools-proces>.

³⁵ See Kim McGuire, *FAIR School Plans Move Ahead Despite Lack of Clarity on Management*, MINNEAPOLIS STAR-TRIBUNE (May 25, 2015), <http://www.startribune.com/fair-school-west-metro-program-move-ahead-with-transitions/304943391/>.

³⁶ Interview with Anthony Galloway, *supra* note 34; see also “The Choice Is Yours” Minnesota Program, MINNEAPOLIS PUB. SCH., https://schoolrequest.mpls.k12.mn.us/the_choice_is_yours_minnesota_program (last visited October 21, 2015).

³⁷ WEST METRO EDUCATION PROGRAM, <https://sites.google.com/a/wmep.k12.mn.us/wmep6069/about/student-programs> (last

Interdistrict Transfer Programs

Numerous districts in the United States also implement interdistrict transfer programs, which typically allow students from poorer, urban school districts to transfer to wealthier, suburban school districts. Those programs are known as “one way” programs; other programs, known as “two way” programs, also facilitate transfers of students from suburban school districts to urban ones. These programs already exist in both Hartford (“Open Choice”) and Minneapolis (CIY) as counterparts to the interdistrict magnet programs referenced above.³⁸ There are also additional programs. For example, Milwaukee, Wisconsin has had a program called “Chapter 220.” In this program, lower-income students cross district lines and attend schools in higher-income suburban areas.³⁹ St. Louis also has an interdistrict transfer program currently serving about 5,100 students.⁴⁰ This program is run by the St. Louis Voluntary Interdistrict Choice Corporation (VICC) and, as a two-way program, it allows St. Louis Public School students to attend school in one of several suburban districts and suburban students to attend St. Louis magnet schools.⁴¹ Other programs exist in Omaha, Nebraska, which has created a “Learning Community” (LC) spanning two counties that encourages interdistrict choice,⁴² and in Rochester, New York, which created the first interdistrict transfer program in the 1960s.

visited Feb. 8, 2016); *What Is Cultural Collaborative, Our Professional Development*, WEST METRO EDUCATION PROGRAM, <https://sites.google.com/a/wmep.k12.mn.us/wmep6069/about/cultural-collaborative> (last visited Feb. 8, 2016).

³⁸ See “*The Choice is Yours*” Minnesota Program, MINNESOTA PUB. SCH., https://schoolrequest.mpls.k12.mn.us/the_choice_is_yours_minnesota_program (last visited August 9, 2015); *Open Choice*, CONNECTICUT ST. DEPT. OF EDUC., <http://www.sde.ct.gov/sde/cwp/view.asp?a=2681&Q=320444> (last visited August 9, 2015) (“The Open Choice program allows urban students to attend public schools in nearby suburban towns.”).

³⁹ Marti Mikkelsen, *Chapter 220 Participants Hoping Milwaukee’s School Integration Program Will Be Saved*, MILWAUKEE PUB. RADIO (May 19, 2015), <http://wuwm.com/post/chapter-220-participants-hoping-milwaukeees-school-integration-program-will-be-saved>. This program is directed toward racial integration, which is legally allowed because Milwaukee still operates under a desegregation consent decree and has yet to be declared “unitary by the Federal Courts.”

⁴⁰ See *Frequently Asked Questions*, VOLUNTARY INTERDISTRICT CHOICE CORP. 1-2, <http://choicecorp.org/FAQ.pdf> (last visited Feb. 8, 2016).

⁴¹ *Id.* at 2.

⁴² See Finnigan et al., *supra* note 30, at 793.

Many of these programs, like the interdistrict magnet programs discussed above, were outgrowths of prior court or other compelled legal action. For example, the St. Louis interdistrict transfer program was implemented in 1983 after a federal consent decree was entered in the *Lidell v. Board of Education* case.⁴³ Similarly, the Milwaukee Chapter 220 program resulted from *Amos v. Board of Education*, another federal case which had held in 1976 that the Milwaukee public schools were segregated, resulting in the Wisconsin legislature's passage of Chapter 220 and the federal court's subsequent approval of a desegregation plan in 1979.⁴⁴ The initial plan, along with subsequent court settlements, resulted in the interdistrict transfer programs that are currently implemented in Milwaukee—however, Governor Scott Walker has recently signed a budget that defunds the Chapter 220 program, and the future of this program is in jeopardy.⁴⁵

The Rochester and Omaha programs, though not legally compelled by a court order or consent decree, resulted from political unrest and proactive efforts to promote integrated schools across school districts. Rochester's Urban Suburban Interdistrict Transfer Program (USITP) was created in response to racial protests during the 1960s.⁴⁶ The Omaha plan resulted from a 2007 state law.⁴⁷ The Omaha plan provides autonomy to

⁴³ See *Liddell v. Bd. of Educ.*, 491 F. Supp. 351, 353-54 (E.D. Mo. 1980); see also Kimberly Jade Norwood, *Minnie Liddell's Forty-Year Quest for Quality Public Education Remains a Dream Deferred*, 40 WASH. U. J. L & POL'Y 1, 17-20 (2012).

⁴⁴ See Letter from Raymond P. Taffora, Deputy Attorney General, to Anthony S. Evers, Deputy State Superintendent of Education 3 (December 20, 2007) (on file with the author). See also *Desegregation and Civil Rights*, WISCONSIN HIST. SOC'Y, http://www.wisconsinhistory.org/turningpoints/tp-049/?action=more_essay (last visited August 9, 2015); see also Finnigan et al., *supra* note 30, at 784.

⁴⁵ See Taffora, *supra* note 44, at 3-4; Mikkelson, *supra* note 39; Bob Peterson, *Walker Shows His Real Politics: Destroy the Commons Starting with Public Schools*, EDUCATE FOR DEMOCRACY (July 12, 2015), <http://bob-peterson.blogspot.com/2015/07/walker-shows-his-real-politics-destroy.html>.

⁴⁶ Finnigan et al., *supra* note 30, at 784, 791. See also, Kara S. Finnigan & Tricia J. Stewart, *Interdistrict Choice as a Policy Solution: Examining Rochester's Urban-Suburban Interdistrict Transfer Program (USITP)*, NAT'L CTR. FOR SCH. CHOICE 9-11 (2009), available at <http://files.eric.ed.gov/fulltext/ED513912.pdf>.

⁴⁷ See Neb. Rev. Stat. § 79-4 (2007) (As revised by Legislative Bill 641: Change Provisions Relating to Schools, Learning Communities, School Governance, and School Finance); Jennifer Jellison Holme, Sarah L. Diem, & Katherine Cumings Mansfield, *Regional Coalitions and Educational Policy: Lessons from the Nebraska Learning Community Agreement*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION* 151, 151 (Erica Frankenberg & Elizabeth Debray eds., 2011).

the 11 participating school districts, uses a broad governance structure that includes each of the 11 districts, and receives funds from a common tax levy imposed across greater Omaha.⁴⁸ In generating support for the law creating the learning community, the Omaha Public School district—which had only comprised Omaha’s urban center and not the city as a whole—invoked a nineteenth Century law that allowed the Omaha Public School district to incorporate territory within the city limits of Omaha into its school district.⁴⁹ By doing so, the district triggered a regional conversation about integration as a *metropolitan* problem—not simply an urban problem.⁵⁰

Finally, an interdistrict transfer program was recently created by happenstance in the Normandy school district just outside of Ferguson, Missouri.⁵¹ After the Normandy school district was “unaccredited” by the State due to its low performance, a school transfer law kicked in, requiring that students in Normandy be afforded the opportunity to attend school in surrounding, accredited districts.⁵² The law also required the Normandy district to provide transportation to one of the surrounding districts.⁵³ Possibly hoping to dissuade Normandy parents from sending their children to outside districts, Normandy chose to provide busing to a school district that was more than a 30 minute ride away. Nonetheless, more than 2,000 students opted to use the law to transfer to surrounding school districts during the 2013-14 school year, costing the Normandy school district (and Riverview Gardens, another unaccredited district) more than \$23 million in combined transportation costs.⁵⁴ These numbers not only reflected the high demand from parents for better schools, but also revealed that *interdistrict* transfer programs could sap critical financial resources from struggling school districts. Accordingly, to the extent that interdistrict integration solutions are employed, struggling districts may need financial aid to ensure that they can improve academics *within* the district at the

⁴⁸ Holme et al, *supra* note 47, at 153.

⁴⁹ *Id.* at 155.

⁵⁰ *Id.*

⁵¹ See Ira Glass & Nikole-Hannah Jones, *The Problem We All Live With (Transcript)*, NATIONAL PUBLIC RADIO: THIS AMERICAN LIFE (Originally Aired July 31, 2015), <http://www.thisamericanlife.org/radio-archives/episode/562/transcript>.

⁵² *Id.*; Naomi Nix, *A Year After Ferguson, St. Louis Parents Fight to Escape Michael Brown’s Terrible High School*, THE SEVENTY FOUR (August 5, 2015), <https://www.the74million.org/article/a-year-after-ferguson-st-louis-parents-fight-to-escape-michael-browns-terrible-high-school>.

⁵³ Glass & Hannah-Jones, *supra* note 51.

⁵⁴ *Id.*

same time they promote inter-district transfers outside their districts. Additionally, it may be worthwhile for such districts to consider the creation of two-way interdistrict programs, so that students from surrounding, more affluent districts would have incentives to attend school in (and provide tuition money to) poorer, urban school districts that administer magnet and other programs that would draw such students to their districts.

District-Wide Integration Plans

Other districts attempt to achieve greater diversity in their districts by implementing plans that do not cross district lines. Two school districts that employ district-wide sorting and assignment plans to achieve socioeconomic integration include Jefferson County, Kentucky—including Louisville, KY—and Cambridge, MA.⁵⁵ Jefferson County is a compelling example because its large, countywide school district facilitates school attendance across urban and suburban lines. Despite the Supreme Court's ruling in *Parents Involved* rejecting the district's affirmative efforts to use race as a primary factor in promoting integration, the district continues to stay the course, recently placing increased emphasis on socioeconomic integration.⁵⁶ The district now uses "school clusters" designated throughout the county to promote socioeconomic and racial diversity within its schools.⁵⁷ It also relies on a "diversity index" that still considers race as one of many factors, but the index now also comprises, among other things, measures of family income and educational attainment levels.⁵⁸ This model has been praised by many commentators. However, as noted above, such *intra-district* efforts are

⁵⁵ *Some Examples of Successful School Integration Models*, *supra* note 24.

⁵⁶ See Alana Semuels, *The City That Believed in Desegregation*, THE ATLANTIC (Mar. 27, 2015), <http://www.theatlantic.com/features/archive/2015/03/the-city-that-believed-in-desegregation/388532/>.

⁵⁷ Allison Ross, *JCPS Student Diversity Shows Steady Gains*, COURIER-JOURNAL (Nov. 26, 2014, 8:03 a.m.), <http://www.courier-journal.com/story/news/education/2014/11/25/jcps-student-diversity-shows-steady-gains/70120322/>

⁵⁸ Lesli A. Maxwell, *60 Years After Brown, School Diversity More Complex Than Ever*, EDUC. WEEK (May 13, 2004), <http://www.edweek.org/ew/articles/2014/05/14/31brown-overview.h33.html>.

only successful where—as in Jefferson County—the district is sufficiently large so that it has a diverse socioeconomic and racial mix: while they are viable in the large, county-wide districts prevalent in southern states that incorporate central cities and surrounding suburbs in their districts, they are less viable in the town-based school districts in the North that do not.⁵⁹

Another district-wide plan known as “controlled choice” has been implemented in Cambridge, MA. Under this model, parents select preferred schools for their children, and these preferences are considered by the district in placing students, but the ultimate placement of the child into a school depends on the socioeconomic and racial diversity of the district. In the words of the district, “family choice is balanced against the district’s interest in creating equitable schools.”⁶⁰ In light of *Parents Involved*, these sorting decisions primarily depend upon socioeconomic factors.⁶¹ Thus, there are no “neighborhood schools” in Cambridge. Rather, students are placed into schools so that each school population roughly reflects the socioeconomic diversity of the school district as a whole.⁶² For each grade level, the district aims to ensure that the proportion of low-income students is within a few percentage points (for example, plus or minus ten points) of the district-wide average.⁶³ The goal of the program is to yield schools that are both racially and socioeconomically balanced using such measures—and Cambridge’s

⁵⁹ These larger school districts in the South resulted from Southern efforts to use larger school districts to dilute the strength of minority voting power, and also from court orders that had ordered school district consolidation post-*Brown*. See Suarez, *supra* note 9, at 776-77 (noting that southern school districts tended to be larger and consolidated because they had been designed to dilute minority voting power).

⁶⁰ See *About Controlled Choice*, CAMBRIDGE PUB. SCH., http://www.cpsd.us/departments/frc/making_your_choices/about_controlled_choice (last visited October 24, 2015).

⁶¹ Eric Schulzke, ‘Controlled Choice’: Does Mixing Kids Based on Family Income Improve Education? DESERET NEWS (Apr. 10, 2014), <http://national.deseretnews.com/article/1265/controlled-choice-does-mixing-kids-based-on-family-income-improve-education.html>, at 2 (“In Cambridge, children are assigned to school through a process called Controlled Choice.”). These factors include socioeconomic status, siblings, proximity, special education status, English language learner status, gender, and language dominance. See *Controlled Choice Plan*, *supra* note 60, at 4.

⁶² See *What Future for School Integration? (Pt. 2)*, INST. FOR SOC. PROGRESS (Aug. 13, 2015), <http://instituteforsocialprogress.org/what-future-for-school-integration-pt-2/>.

⁶³ See, e.g., *Controlled Choice Plan*, *supra* note 60, at 5-6 (noting that, depending on grade level, the goal is to have a proportion of free and reduced price lunch students that is within five to ten percentage points of the district-wide averages).

internal data suggests that over two-thirds of its schools have achieved the balancing goal as a result of the program.⁶⁴

Legal Realities

While the above-listed programs are extremely important to the future of socioeconomic desegregation efforts in the United States, each program was typically compelled by law or is a vestige of a court-ordered consent decree. In Hartford, as noted above, the Interdistrict Magnet Schools and Project Choice programs are programs that are mandated by the consent decree in *Sheff v. O'Neill*, which, pursuant to the Connecticut Constitution, continues to mandate annual benchmarks to reduce racial isolation in greater Hartford.

Similarly, many of the programs are the vestigial remnants of the mandates of consent decrees deriving from *Brown v. Board of Education*. As noted above, the St. Louis and Milwaukee inter-district programs were both outgrowths of post-*Brown* federal consent decrees. The consent decree in St. Louis has been watered down into requiring a purely voluntary inter-district transfer program.⁶⁵ As it stands, the program in St. Louis has been extended through at least the 2018-19 school year, but the program will remain purely voluntary.⁶⁶ And though the Chapter 220 program continues in Milwaukee, its existence is threatened.⁶⁷

As more school districts are declared “unitary” by the courts and are no longer subject to the dictates of *Brown*, moreover, there will be fewer incentives to pursue integration efforts moving forward. Hundreds of school districts have been declared unitary since the 1990s, particularly in the south.⁶⁸ In fact, around half of all districts that were under court oversight as of 1990 have been declared unitary since then, and the rate at which districts are being released from court oversight has only increased.⁶⁹

⁶⁴ *Id.* at 2.

⁶⁵ See *Frequently Asked Questions*, *supra* note 40, at 1-2.

⁶⁶ *Id.*

⁶⁷ See, e.g., Erin Richards, *Scott Walker Bid to End Integration Program Has Schools Seeking Answers*, MILWAUKEE J. SENTINEL (March 6, 2015), <http://www.jsonline.com/news/education/scott-walker-bid-to-end-integration-program-has-schools-seeking-answers-b99456791z1-295392981.html>.

⁶⁸ Abbie Coffee & Erica Frankenberg, *Two Years after the PICS Decision: Districts' Integration Efforts in a Changing Climate*, THE CIVIL RIGHTS PROJECT 10 (July 30, 2009), http://www.magnet.edu/files/pdf/ma_districts-integration.pdf.

⁶⁹ Sean F. Reardon, Elena Grewal, Demetra Kalogrides, & Erica Greenberg, *Brown Fase:*

Once “unitary,” school districts must move away from race and place their focus primarily on socioeconomic factors when pursuing efforts to desegregate. Otherwise, those school districts will run afoul of the requirements dictated in *Parents Involved v. Seattle School District No. 1*.⁷⁰ Indeed, the U.S. Department of Education initially suggested after *Parents Involved* that voluntary efforts to integrate in unitary districts must focus solely on socioeconomic factors to the exclusion of race, and only later guidance provided districts with a bit more leeway, suggesting that districts could also consider race in combination with socioeconomic and various other factors.⁷¹ In that uncertain legal environment, few school districts have had meaningful incentives to pursue integration remedies, particularly as other aspects of education reform—including charter schools, teacher accountability, and pre-k initiatives—have become increasingly popular.

That said, all hope is not lost for school integration. In many contexts, including several of those described above, school districts have felt a voluntary willingness to continue socioeconomic integration programs, even where the district is no longer compelled to do so. Louisville, in Jefferson County, is a prime example of an area that had once had been subject to a federal consent decree but, after the consent decree was removed, continued to pursue desegregation voluntarily.⁷² Moreover, the Rochester desegregation program has survived several legal challenges, and recently an eighth suburban district voted to join the inter-district

The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools, 31 J. OF POL’Y ANALYSIS AND MANAGEMENT 876, 903 (2012).

⁷⁰ See *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

⁷¹ In the 2012 Guidance, the Department of Education explained that school districts should, in the first instance, determine if they could use factors other than race, including socioeconomic status, in assigning students to schools, but clarified that “[a] district may consider a student’s race as a ‘plus factor’ (among other, non-racial considerations) to achieve its compelling interests.” *Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, THE WHITE HOUSE, <http://www2.ed.gov/about/offices/list/oct/docs/guidance-ese-201111.html> (last visited Feb. 8, 2016).

⁷² Enid Trucios-Hayes & Cedric Merlin Powell, *The Rhetoric of Colorblind Constitutionalism: Individualism, Race and Public Schools in Louisville, Kentucky*, 112 PENN ST. L. REV. 947, 971 (2008) (noting that, in the lead up to *Parents Involved*, Jefferson County “was no longer a system of compulsion imposed by a federal court because the system had malfunctioned; rather, this was a voluntary effort by the representative body of the community to preserve the vibrant diversity that was the hallmark of the Jefferson County school system”).

transfer program there.⁷³ Efforts are also underway in Rochester to create at least one regional—presumably magnet—school.⁷⁴ In at least some cases, then, it would seem that court-compelled desegregation is not an absolute prerequisite to racial and socioeconomic integration efforts.

* * *

The examples above illustrate that there have been few, if any, desegregation initiatives that have been *initiated* without legal compulsion. Socioeconomic and racial school integration efforts can happen, but that they are by no means guaranteed, given our history. The question becomes how we may continue to provide incentives for school integration in ways that foster meaningful change, but do so in a way that is more organic than the consent decrees and state constitutional mandates of the past. The remaining sections of this piece consider how grant programs implemented at the federal level—as well as at the state or local level—could be one way to foster such organic efforts to promote socioeconomic diversity in our schools. As noted above, the piece considers a recently adopted grant program from New York State—the first of its kind—as a starting point for analysis.

Ideas from New York State’s Current Socioeconomic Pilot Grant Program

In the wake of *Race to the Top*, which provided monetary incentives that encouraged states to, among other things, loosen state-level restrictions on charter schools and improve data retention and accountability efforts, it is worthwhile to consider state or federal grant programs that could promote socioeconomic integration. To date, few programs have sought to provide monetary incentives to promote school integration. Rather, most of the recent financial injections into education have come from proponents of education reform who, as alluded to above,

⁷³ See Peter J. Weishaar, *Urban-Suburban Interdistrict Transfer Program Upheld by Second Circuit in 2000*, ROCHESTER L. REV. (February 24, 2015), <http://rochesterlawreview.com/2015/02/24/urban-suburban-interdistrict-transfer-program-upheld-by-second-circuit-in-2000/>.

⁷⁴ See Erica Bryant, *Urban-Suburban Doesn’t Change the Game*, DEMOCRAT & CHRONICLE (January 31, 2015), <http://www.democratandchronicle.com/story/news/2015/01/30/urban-suburban-van-white-erica-bryant-rochester-schools/22597571/>. However, the Rochester inter-district transfer program discussed above has its own limitations, as suburban schools are not required to select the most economically disadvantaged minority students: the suburban districts use an application process to hand-select Rochester students. *Id.*

have turned their attention to efforts to improve charter schools, promote pre-kindergarten programs, bust unions, and increase teacher accountability. Some of these efforts were reflected in the goals of Race to the Top, as well as the myriad organizations that have popped up to advocate for these new reform efforts. Organizations like Democrats for Education Reform, 50Can, and StudentsFirst, for example, are promoting such advocacy efforts. And state level legislation around the country has promoted these efforts as well. None of these reform efforts, however, are mutually exclusive from efforts to reduce socioeconomic and racial isolation in schools.

If similar monetary incentive programs are to arise in the school integration context, we must ask whether there is a viable model for such a program in today's legal and political climate. A new potential model recently arose in New York State. As his near-final act as Commissioner of the New York State Education Department, John B. King, Jr., who is now the Acting Secretary of Education, announced a statewide grant program to promote socioeconomic integration. The announcement, made on December 30, 2014, declared that "Socioeconomic Integration Pilot Program grants of up to \$1.25 million each will be used to increase student achievement in up to 25 of the state's low-performing Priority and Focus Schools. The grants will support programs that will increase socioeconomic integration."⁷⁵

The design of the socioeconomic integration grant program is consistent and aligned with the 60/40 principle described in my previous work.⁷⁶ The program targets high poverty, urban school districts: the eligible school districts are "Title I Focus Districts with poverty rates of at least 60 percent and at least 10 schools in the district" – these are districts that, presumably, have many schools within them that are more than fifty percent low-income students. They are also districts that, having 10 or more schools, are urban and could potentially adopt creative solutions to socioeconomic school integration.⁷⁷ The pilot program allows any district that meets these criteria to apply for grants.

⁷⁵NYS Schools to Receive grants to Promote Socioeconomic Integration, NEW YORK ST. BD. OF EDUC. (December 30, 2014), <http://www.nysed.gov/news/2015/nysschoolsreceivegrantspromotesocioeconomicintegration>.

⁷⁶ Although the *Penn State* article was published well after the announcement of the socioeconomic integration grant program in New York, I originally presented the 60/40 principle at an Education and Civil Rights conference held at Penn State University in mid-2014.

⁷⁷ *Id.*

The program, while administered at the state level, uses funds from the federal School Improvement Grant (SIG) program under Section 1003(a) of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by approved ESEA Flexibility waiver.⁷⁸ Although the Section 1003(a) School Improvement Grant was significantly revised by the ESSA, the program is funded at least through 2016, and the understanding is that the money previously allocated for SIG funding will be reallocated into the Title I pot of money.⁷⁹ Because the New York State program is tied to school improvement grants, funding is awarded to *individual schools* that seek to adopt programming that will improve integration. Section 1003(a) is a relatively limited pot of money that states receive from the federal government to support Title I schools. The budget for the SES integration program “must supplement, not supplant” core instructional activities to be provided by the district.⁸⁰ Accordingly, the funds for the program are tightly restricted to certain purposes. New York’s SES integration grant program is not open to charter schools, non-title I schools, and priority schools that are already receiving school improvement grants under Section 1003(g) of the ESEA.⁸¹

SIG(a) funding is generated by a state reserve from “the amount the state receives under subpart 2 of [Title I] part A...to carry out the State’s responsibilities under sections 1116 and 1117.”⁸² States must “allocate not less than 95 percent of that amount directly to local educational agencies for school identified for school improvement corrective action, and restructuring, for activities under section 1116(b).”⁸³ SIG(a) funds for the SIPP program are allocated on a non-competitive basis rather than on a competitive basis. At the New York State level, the SIPP program is administered non-competitively, and school districts eligible for funding under 1003(a) can apply for funding so long as they meet additional

⁷⁸ New York State Grant Program RFP at 1, *available at* <http://www.p12.nysed.gov/funding/2015-18-title-1-ses-integration-grant/ses-integration-grant.pdf>; *see also* Final Requirements—School Improvement Grants—Title I of the Elementary and Secondary Education Act of 1965, 80 Fed. Reg. 7224 (Feb. 9, 2015). The School Improvement Grants statute is codified at 20 U.S.C. § 6303.

⁷⁹ Given this, the School Integration Pilot Program could be significantly revised under the new ESSA school improvement grant funding regime.

⁸⁰ RFP *supra* note 78, at 6; *see also* *Guidance on School Improvement Grants under Section 1003(g) of the Elementary and Secondary Education Act of 1965*, DEPT. OF EDUC. 22-23 (March 2015), <http://www2.ed.gov/programs/sif/sigguidance032015.doc>.

⁸¹ RFP *supra* note 78, at 1.

⁸² 20 U.S.C § 6303(a).

⁸³ *Id.* at §6303(b)(1).

eligibility criteria. Eligible districts that submit grant proposals that are consistent with the purposes of the program will receive funding under Section 1003(a). This is important, as it means that the school districts that are funded in the New York State program do not necessarily receive funds because they have adopted “best in class” socioeconomic integration initiatives.

Eligible School Districts

In New York State, a total of 12 school districts were eligible for the SES integration grant.⁸⁴ These school districts include, among others, New York City, Buffalo, Rochester, and Albany.⁸⁵ They have poverty levels ranging from 61% to 85% across each school district. Because the funding for the program is derived from federal SIG grants, it is no surprise that the program provides funding at the *school* level, and each eligible *school district* may apply for a given number of its schools to be funded, depending on its size. For example, New York City can apply to receive funding for eight of its schools while a smaller district such as Albany can only apply for funding of one school.⁸⁶ If selected, each school is eligible for as much as \$1.25 million—thus, the grants can range from \$1.25 to \$10 million at the district-wide level, depending on the district’s size.⁸⁷

Accountability Measures

Once a particular school or school district receives a socioeconomic school integration grant, it does not simply receive the money without any accountability.⁸⁸ Instead, the grants are administered over a three year period, and “[c]ontinuation funding after each period of the project is contingent upon progress toward meeting SES integration targets, student achievement goals, fidelity of implementation of approved plan, and maintenance of all grant requirements.”⁸⁹ However, because the program has just been announced, it is not clear how these accountability measures will take shape in practice.

⁸⁴ RFP *supra* note 78, at 2.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 2-3.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.* at 3.

Possible Solutions and Constraints of the Grant Program

The New York State program provides considerable flexibility in encouraging districts to promote socioeconomic integration within districts. However, grantees must implement their constraints within the bounds of three models that have been adopted by New York State. The three models contemplated within the program are described below.

Individual “Magnet School Model.” The first possible model is an individual “magnet school” model. Under this model, the idea would be to improve the academic quality of a school substantially so as to encourage demand to attend the school “by parents from a wide range of backgrounds in the district or relevant geographic area.”⁹⁰ The relevant geographic area can include areas beyond the school district boundary of the grantee school, as the “relevant geographic area” may be “determined jointly in the planning phase of the grant by NYSED and the applicant district through community engagement.”⁹¹ Parents can then apply for the magnet school under a “choice-based admissions policy that will promote socioeconomic diversity in the school’s *entry grade* through consideration of at-risk factors for each applicant as indicated in parent questionnaires submitted with the application for admission.”⁹² Under this model, which is akin to the *Sheff* magnet model in Hartford, a school district would attempt to improve its socioeconomic diversity by building (or developing) a larger number of magnet schools.

To date, and as I discuss below, nearly every eligible school district in the New York grant program applied under the individual magnet model—even applications under other models (for example, community innovation) were akin to magnet proposals. Most districts are trying to create strong magnet school programs that will increase academic achievement in various specialty areas, presumably in order to improve their school programs so that those programs will attract more students from outside, wealthier school districts.

⁹⁰ *Id.* at 4.

⁹¹ *Id.* at 3-4.

⁹² *Id.* at 4. Under the grant program, “socioeconomic diversity” is “defined for the purpose of the admissions policy with reference to the demographics of the district as a whole or other relevant geographic area as determined jointly in the planning phase of the grant by NYSED and the applicant district through community engagement”). *Id.*

Coordinated grants model. Under the coordinated grants model, districts with 25 or more schools can coordinate their grant applications across schools to “magnetize” nearby schools as part of a multi-school socioeconomic integration strategy across a district or “other relevant geographic area.”⁹³ The districts that use “coordinated grant applications are permitted (and encouraged) to supplement the grant with other sources of funding for implementation of the systemic, multi-school socioeconomic integration strategy.”⁹⁴ Under this “coordinated grants” model, one can pool school improvement grants across multiple schools within a single school district to generate a broader program of SES integration *within* a school district, whether by the use of magnet schools or via a program of “coordinated choice” such as the Cambridge model discussed above.⁹⁵ Thus, the thrust of such programs is more likely to be *intra*-district than *inter*-district.

Community innovation model. The final model contemplated in the New York SES grant program is a community innovation model. This is the model that most strongly contemplates *inter*-district solutions. Under this model, districts are permitted to submit alternative variations of the individual “magnet” model and the coordinated grants model “in response to unusual circumstances or special community needs as expressed through authentic, inclusive community-engagement processes.”⁹⁶ Under this model, schools can elect to employ “intra-district or inter-district program[s].”⁹⁷ However, under this program the applications are carefully reviewed to assess whether the proposal is likely to be more effective than the alternative options under the individual “magnet” model and the coordinated grants model, and whether the community-engagement process is likely “to yield a practical model that addresses the unusual circumstances or special community needs.”⁹⁸ This latter model appears to encourage creativity in the grant application process, but appears to be subject to strictures that may discourage applicants. Additionally, to the extent that a school district were to propose an *inter*-district model in the context of the New York grant program, its funding would be restricted to the Title I schools that were entitled to such funding under Section

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *About Controlled Choice*, *supra* at 60.

⁹⁶ RFP *supra* note 78, at 4-5.

⁹⁷ *Id.* at 5.

⁹⁸ *Id.* at 5.

1003(a). This would greatly constrain inter-district efforts—for example, SIG grant funding could not be provided in support of tuition paid from urban districts to more-advantaged suburban districts, even if that money were provided in support of educating a socioeconomically disadvantaged child from the urban district.

Current NYS grant proposals and assessments. Under the original request for proposal, grant applications needed to be postmarked by February 13, 2015.⁹⁹ I submitted a Freedom of Information Act (“FOIA”) request to the New York State Department of Education and obtained copies of the current proposals that have been submitted, revised, and are being preliminarily funded through New York’s pilot grant program. Nine school districts (out of the eligible twelve) responded with proposals spanning numerous schools. The districts that submitted grant proposals included Binghamton, Hempstead, Mount Vernon, Newburg, New York City, Rochester, Schenectady, Syracuse, and Yonkers. Each proposal received reviewer feedback and was adjusted in response to that feedback. A discussion of each district’s proposal(s), along with an analysis of the proposals, follows.

Binghamton. The Binghamton school district submitted a grant application for one school—its East Middle School, which comprised 76% low-income students as of the 2014-15 school year. It chose the “Community Innovation” program model and the free and reduced price lunch (FRPL) poverty measure. East Middle School’s International Baccalaureate (IB) program had been unaccredited,¹⁰⁰ and Binghamton’s proposal is to use the NYS funds to reestablish that program while, at the same time, reducing poverty measures to 71% schoolwide by targeting 5% annual decreases in poverty at each grade level. The district, however, did not explain how it would assign students to the school in a way that promoted integration, nor did it explain how the district would promote *inter*-district efforts to diversify the school: as it explained, “[w]hile the long-term vision for this effort includes the prospect of recruiting students from contiguous districts; especially those which have an IB program at the commencement level but none at the middle level, that conversation is only in its infancy”¹⁰¹

⁹⁹ *Id.* at 10.

¹⁰⁰ Binghamton Application at 6 (on file with author).

¹⁰¹ Binghamton Application, Response to Question 6 (on file with author).

The reviewers levied numerous critiques at this proposal—they noted that the diversity goals were modest, that the plan lacked an *inter*-district diversity plan, and that the plan did not use a “choice” assignment policy that would consider socioeconomic status as a factor in assigning students to the school.¹⁰² In response, Binghamton raised its goal so that it would aim for 10% decreases in poverty at each grade level each year (rather than 5%). It also said it would hold a “collaboration meeting” with area school districts who are interested in IB programs and that it would consider socioeconomic factors in assigning students to East Middle school. It also sought to clarify how it would be able to reaccredit the school as an IB program in a short timeframe.

Hempstead. Hempstead, an urban district on Long Island, directed its application to its Franklin School, an elementary school comprising approximately 69% low-income students that it sought to reduce to approximately 60% low-income students. The district chose the individual magnet school program model and chose FRPL as its poverty measure. Its grant application emphasized an “arts integrated initiative” and a dual language initiative that includes rigorous after school programs and the use of non-English language for at least 50% of the school day.¹⁰³ Given the district’s predominantly Hispanic population (roughly 60%), the district’s dual language immersion program would combine Spanish and English. The district’s application provided no suggestion that Hempstead would receive higher income students using *inter*-district efforts, and it provided some suggestion that it would encourage transfers from another elementary school in the district (David Paterson) to the Franklin school, even though that school itself had 90% low-income students.¹⁰⁴ It was not clear from the application that this was part of any broader strategy to change school admissions policies in Hempstead. In response to concerns from the reviewers that the Hempstead plan would not promote socioeconomic integration, the district responded that “[t]he district would like to open this opportunity to more of its focus schools,” rather than encourage inter-district efforts, and stated that it was “hesitant in placing more ambitious program targets on our district at this point until we are able to successfully recruit students from outside of the district.”¹⁰⁵ Hempstead’s hesitation to attempt inter-district efforts likely derives from

¹⁰² Feedback to Binghamton (on file with author).

¹⁰³ Hempstead Application at 1-3 (on file with author).

¹⁰⁴ Hempstead Application at 14-15 (on file with author).

¹⁰⁵ Hempstead Feedback Response at 5 (on file with author).

frustration: the district had sent out school choice letters to all districts across Long Island, and *all* of the surrounding districts “indicat[ed] that they will not accept [Hempstead] students.”¹⁰⁶ Despite Hempstead’s apparent frustration, creative solutions need to be considered so that partnerships and meaningful conversations may begin with these surrounding school districts.

Mount Vernon. The Mount Vernon school district, like Hempstead, pursued an individual magnet school model based on the FRPL benchmark. Its focus school, Longfellow Middle School, is approximately 77.3% low income students. Similar to Binghamton, which had lost an IB program and sought to reestablish it, Mount Vernon applied for the grant so that it could reestablish a magnet program.¹⁰⁷ The desired magnet would be a performing arts program for which planning had “began in earnest in September 2014”—before the socioeconomic integration grant program was even announced.¹⁰⁸ Mount Vernon sought to reestablish the program in light of its unique arts history, which included numerous individuals who became famous in the performing arts, including Sean “Puffy” Combs, Dick Clark, and Denzel Washington.¹⁰⁹ Like other districts, Mount Vernon did not explain how it would pursue *inter-district* solutions and provided little insight into its student selection process, explaining only that “the program will ensure that at least 50% of the seats are held for low-income students.”¹¹⁰

The reviewers explained, among other things, that Mount Vernon’s plan lacked specific integration targets, that it lacked any explanation how it would promote socioeconomic district both using *inter-district* and *intra-district* solutions, and failed to explain how its magnet school would be successful in light of the district’s prior failure to sustain the same magnet concept.¹¹¹ Even in its revision, Mount Vernon failed to provide socioeconomic diversity targets for its proposed middle school. However, it did provide some clarifications that it would promote greater socioeconomic diversity by (1) retaining more middle school students who typically transfer to private schools; and (2) developing plans with neighboring districts for outreach so that students from outside districts

¹⁰⁶ Hempstead Feedback Response at 9 (on file with author).

¹⁰⁷ Mount Vernon Application at Section B – Program Narrative (on file with author).

¹⁰⁸ *Id.* at 2-3.

¹⁰⁹ *Id.* at 7-8.

¹¹⁰ *Id.* at 12-13.

¹¹¹ *See* Mount Vernon Feedback (on file with author).

may enroll in the school as well.¹¹² As for student selection, the revised application clarified that the arts magnet school would enroll at least 35% low-income students and that the application process will be based on a rigorous audition process featuring a three person panel.¹¹³

Newburg. Newburg proposed a magnet program for the Vails Gate School within its district, which had an 86% poverty level as of 2014-15 (the district also used the FRPL poverty measure). The primary focus of its proposed magnet program is to use a STEM model for all grades, but Newburg's proposal also emphasizes both language development in the early grades and content development specialists in the middle grades.¹¹⁴ Its goal is to "attract[] families from across the district as well as the neighboring school districts of Cronwall, Washingtonville, and Valley Central."¹¹⁵ The proposal notes that the Newburg district will develop "[e]xplicit agreements" with these districts during the planning process, and that it will secure funding from several sources, including "the general tax levy, state aided transportation, Title I, A, IDEA, Part B Section 6111, grants from local agencies, the partnering school districts and parents."¹¹⁶ Thus, in contrast to the above proposals, the Newburg proposal was proactive in addressing inter-district solutions. It also noted that it would use a "choice" model to select students from within the district.¹¹⁷

In response to feedback, the district clarified that its goal is to reduce poverty in the Vails Gate School from 86% to 76% over the next two years (it had not specified a target initially). In response to a concern that the three referenced districts may not be interested in inter-district solutions, Newburg revised its application to clarify that it will survey and engage parents in the surrounding districts "to determine which program options will entice them to move their children across district lines."¹¹⁸ It also clarified various student selection policies in the district, which would select students for the Vails Gate school based on socioeconomic and dual language preferences, with the ultimate goal being that only 65% of the seats in the school would comprise low-income students.¹¹⁹ To promote

¹¹² Mount Vernon Revised Proposal at 15-16 (on file with author).

¹¹³ *Id.* at 16-18.

¹¹⁴ Newburg Proposal at 5-6 (on file with author).

¹¹⁵ Newburg Proposal at 5 (on file with author).

¹¹⁶ Newburg Proposal at 16 (on file with author).

¹¹⁷ *Id.*

¹¹⁸ Newburg Revised Proposal at 19 (on file with author).

¹¹⁹ *Id.* at 20.

integration, the school will organize recruitment events and compile information from interested families, among other things.

New York City. New York City submitted applications for eight target schools. All of NYC’s applications employed the community innovation models based on the FRPL poverty measure, and can be placed into one of three “target school” groups. Each group of target schools uses a different type of educational program, which is meant to promote socioeconomic integration. The first group of schools—all in Brooklyn—included the George Westinghouse High School, Boys and Girls High School, and the High School for Global Citizenship. They submitted applications that promote the “Brooklyn STEAM Center program model” through emphasis on Career and Technical Education (CTE). The second group of schools—P.S. 15 Roberto Clemente and M.S. 113 Ronald Edmonds Learning Center—are both elementary/middle schools that hope to promote schoolwide enrichment models and dual language immersion programs. And the third group of schools—Frederick Douglass Academy, Joseph Wade, and Bronx Writing Academy—are STEM magnets. We discuss each of these groups of schools in turn, because, the corresponding schools in each group submitted nearly identical applications. Notably, none of the proposals considered *inter*-district partnerships with school districts outside of NYC.

Group 1: Career and technical education. The first set of NYC applications focused on three Brooklyn target schools, which are each paired with one or more partner schools. Each of the target schools—Westinghouse, Global Citizenship, and Boys & Girls HS—has a poverty level between 70% and 80%--while the partner schools have lower poverty levels ranging from 45% to 68%. The program model utilizes a Brooklyn Navy Yard “hub” which will allow students from each of the three target schools to access courses in technical lab settings with CTE specialists. Participating students from the target schools will take these classes at the “hub” with students from the higher-income partner schools, and the students will be required to return to their respective schools for core instruction during the afternoon.¹²⁰ The hub model is designed to promote short-term integration, but the program is meant to encourage socioeconomic diversity in each focus school in the long run. While new students from the partner schools can enroll in the CTE program in years 1

¹²⁰ See Westinghouse at 1 (on file with author).

and 2 of the program, by year 3 the valuable CTE coursework will only be available to students who are enrolled in the target schools—thus, new students who wish to enroll in the CTE program will eventually be required to enroll in the target school.¹²¹ Assuming that the CTE program is successful, more students from the partner schools will thus enroll in the target schools over time.

The reviewers had some concerns about this group of proposals because it was not clear how the configurations of partner schools would necessarily decrease socioeconomic isolation, as some of the partner schools were greater than 60% low income.¹²² The reviewers also questioned the degree to which CTE programs could by themselves encourage more socioeconomic diversity, how the selection process for the CTE program would advance that goal, and how the program could be effective without changing NYC's student assignment policy at large. Nonetheless, the NYC CTE proposal provides some interesting ideas, including the use of CTE education and the use of high-SES partner schools that can be "paired" with low-SES target schools in promoting socioeconomic integration.

Group 2: Renzulli and dual language immersion models. The Group 2 NYC proposals are from Roberto Clemente, an elementary school in Manhattan, and Edmonds, an elementary school in Brooklyn. Clemente has an 89% poverty rate, which is 25% higher than the 64% average in Manhattan.¹²³ Accordingly, the proposal for Clemente is to "magnetize" it by converting it into a school that employs a "Renzulli school wide enrichment model," which is a model that has historically attracted higher socioeconomic status students to lower income schools. Creating such incentives is necessary in Manhattan because Manhattan uses an entirely choice-based model for school selection, rather than a neighborhood zoning model.¹²⁴ Clemente's proposal also includes a family resource center (FRC) that will provide parents with information regarding the improved school.¹²⁵ Clemente's goal (after some prodding from the review committee), is to reduce the proportion of high poverty students from 89% to 69% over the course of three years.¹²⁶ It explained that it

¹²¹ See Westinghouse at 33-35 (on file with author).

¹²² See Group 1 Feedback at 1 (on file with author).

¹²³ Clemente Proposal at 7 (on file with author).

¹²⁴ Clemente Proposal 5-9 (on file with author).

¹²⁵ Clemente Proposal at 17 (on file with author).

¹²⁶ See Clemente Feedback and Response at 1 (on file with author).

will engage the community to achieve the poverty-reduction goal and how the Renzulli enrichment model is supported by research.¹²⁷

The Edmonds School in Brooklyn is also a high poverty school, as 83% of its students are low-income.¹²⁸ Edmonds also hopes to “magnetize” itself, like Clemente, but will do so using a “dual language immersion” model instead of the Renzulli model.¹²⁹ The Edmonds plan ultimately calls for a 14% reduction in low-income students (from 83% to 69%), and the district believes the proposal will be successful because “[d]ual language programs have proven remarkably effective in attracting higher-SES parents to formerly segregated schools in gentrifying areas of Brooklyn.”¹³⁰ As part of both the Clemente and Edmonds proposals, the district intends to consult with Michael Alves, a nationally recognized SES integration expert.¹³¹ As with Clemente, an FRC will be used in conjunction with the Edmonds school to encourage enrollment.

Group 3: STEM magnets. The final group of schools in NYC’s proposals uses STEM magnet schools to encourage socioeconomic diversity. The three target schools have poverty rates ranging from 71% to 92.1%, and the proposal aims to reduce those poverty rates to anywhere from 61% to 82%, corresponding to decreases of about 10% in each target school over three years. In response to feedback, these goals were increased so that the desired decrease in poverty was about 20% for each school over the three years of the grant program. To achieve the goals, each of the three target schools, as with the CTE proposals, will be paired with various “partner” schools that have student populations with higher socioeconomic status levels. In the program, “[i]nterested students will be asked to make a commitment to participate in special STEM based classes during the regular school day and field Research Expeditions during the regular school day and after-school,” and students will “also be expected to make a commitment to attend a one-week summer residency either on the campus of RPI or SUNY Maritime.”¹³² Student and parent orientations will be held at the target or focus schools, rather than the partner schools.¹³³ Over time, NYC believes that its program will attract

¹²⁷ See Clemente Feedback and Response at 3 (on file with author).

¹²⁸ Edmonds Proposal at 6 (on file with author).

¹²⁹ Edmonds Proposal at 6-7 (on file with author).

¹³⁰ Edmonds Feedback and Response at 2 (on file with author).

¹³¹ *Id.* at 2-3.

¹³² Douglas Proposal at 19 (on file with author).

¹³³ *Id.*

students from “partner schools who will voluntarily transfer to the target schools, resulting in their improved socioeconomic integration and reduced isolation.”¹³⁴

STEM models have often been effective in encouraging school diversity, and NYC has performed its own research on the effectiveness of STEM programs in drawing from a broad socioeconomic base.¹³⁵ However, there may be some concerns with this program. In response to questions from reviewers regarding the selection process for the programs, NYC has made clear that all “low-income students have equal access to this innovative STEM program,” but at the same time has indicated that “[l]ow-income screening will not be an admissions criterion,” and that students “will complete the same middle schools choice application currently being used.”¹³⁶ Thus, it is not clear how NYC is modifying existing student assignment policies in conjunction with this program. The proposal suggested that a “random lottery” may be necessary if supply exceeds demand, but declined to explain how this lottery would work in that situation.¹³⁷

Rochester. Perhaps the most innovative grant applications were submitted by Rochester, which is unsurprising given its long history of inter-district efforts to promote integration. Rochester’s proposals involve three schools and use the community innovation model to create schools that will be appealing to the broader Rochester community, including surrounding districts.

The first of Rochester’s proposals is at its Edison Campus, where it has proposed shared-time CTE programs in Automotive Technology and Culinary Arts. These programs will be available to all students in the Rochester district, as well as students from surrounding districts in Monroe County “using the Monroe County Urban-Suburban Interdistrict Transfer Program as a springboard for new ‘suburban-urban’ integration efforts.”¹³⁸ In its applications, Rochester emphasized that eight of Monroe County’s 18 school districts already participate in the inter-district transfer program, signaling that these districts may be interested in the new program.¹³⁹ In contrast to the Rochester district, which has 90% low-

¹³⁴ Bronx Writing Academy Feedback and Response at 11 (on file with author).

¹³⁵ Bronx Writing Academy Feedback and Response at 21-22 (on file with author).

¹³⁶ *Id.* at 28.

¹³⁷ *Id.* at 28-29.

¹³⁸ Edison Campus Feedback & Revisions at 2 (on file with author).

¹³⁹ *Id.* at 9.

income students, the surrounding districts have substantially lower proportions of low-income students, ranging from 4% to 53%.¹⁴⁰ The selection process for the CTE program will be rigorous, as it will involve “a district-level review of student report cards, test scores, attendance records, teachers’ comments, and an interview with the student, parents, and staff.”¹⁴¹ The proposal does not explicitly incorporate socioeconomic status into the selection process, but 30% of the seats will be reserved for students outside of the district, making it likely that a wide range of socioeconomic perspectives will be represented.¹⁴² The one drawback of the Edison Campus proposal is that it is a shared time program that only creates diversity for a portion of the day, much like New York City’s similar CTE proposal at Brooklyn’s Navy Yard.

The two remaining proposals both involve partnerships between one Rochester school and a school from a surrounding district to promote inter-district exchanges between the districts. One of the proposals involves a partnership between Rochester’s James P. Duffy School and the French Road Elementary School in the Brighton school district. The proposal explains that there have already been conversations with the Brighton Central School District about the proposal, and that there is a willingness to participate.¹⁴³ It is not clear from the proposal, however, how there will be incentives for Brighton students to attend the Duffy school, so this may become more of a one-way exchange program than a two-way inter-district initiative. The final proposal involves a partnership between Rochester and West Irondequoit school district that would create “an inter-district socio-economic exchange program” based on a Universal Pre-Kindergarten program offered at Rochester’s Montgomery school.¹⁴⁴ As with the Duffy proposal, the Montgomery proposal confirms that conversations have been held with the West Irondequoit school district to gauge interest. Given the popularity of early childhood education, this program very well may draw students from outside the Rochester district, but it is unclear how this program will sustain socioeconomic integration in the Rochester classroom beyond the pre-K level.

Schenectady. Schenectady submitted one proposal under the “community innovation” model. It apparently received special approval

¹⁴⁰ *Id.* at 10.

¹⁴¹ *Id.* at 10-11.

¹⁴² *Id.* at 13.

¹⁴³ Duffy School (Revision) at 10 (on file with author).

¹⁴⁴ Montgomery School (Revision) at 5 (on file with author).

for its unique proposal, which was not directed toward a single school, but was instead a “redistricting implementation.” In Schenectady, the district had undertaken a year long process of redistricting because, after its previous magnet programs had failed, “the poverty gap ranged between 50% to over 90% in the schools,” and some of the schools “had fewer than 15% of white (non-Hispanic) students.”¹⁴⁵ This redistricting plan, which had been in the works since at least the middle of 2014, was not an inter-district plan, but would achieve a tighter range of low-income students within each school (between 60% to 80% low income students, rather than the previous 50% to 90% range).¹⁴⁶ The main use of the grant funds for this proposal would be to manage transportation costs within the district, as well as to support after school and professional development programming that will assist teachers and students in adjusting to socioeconomic shifts within the schools.¹⁴⁷ However, the proposed redistricting plan will still use “attendance zones” (albeit different ones), and does not appear directed toward drawing higher income students into the public school system.

Syracuse. Syracuse’s proposal for the grant program is keyed off its strategic plan called “Great Expectations 2012-2017.” Syracuse’s application is for two schools—the Clary Middle School and the LeMoyne Elementary School. Clary Middle School currently is 75% low-income students and, accordingly, Syracuse’s proposal is to create a magnet school at Clary by implementing an Expeditionary Learning Program “with the intent of attracting a more integrated SES student population” from other Syracuse schools.¹⁴⁸ This program “is a project-based comprehensive school reform model that uses evidence-based best practices in literacy, inquiry-based mathematics, and original research and data collection.”¹⁴⁹ Similarly, the proposal for LeMoyne Elementary School, which is also about 75% low-income students, intends to create a magnet model by implanting a “school-wide Montessori Learning Program,” which is characterized by “multi-age classrooms, a special set of educational materials, student-chosen work in long time blocks,

¹⁴⁵ Schenectady Proposal at 1-2 (on file with author).

¹⁴⁶ See Schenectady Proposal, Post-Redistricting Chart (on file with author).

¹⁴⁷ Schenectady Revised Proposal at 2-3 (on file with author).

¹⁴⁸ See Syracuse (Clary) Proposal at 2 (on file with author).

¹⁴⁹ *Id.*

collaboration, the absence of grades, and individual and small-group instruction in both academic and social skills.”¹⁵⁰

Though the proposals do not involve any inter-district solutions,¹⁵¹ the Clary and LeMoyne schools will become schools of choice district-wide; 50% of their seats would be reserved for neighborhood students while the other 50% can come from anywhere in the district.¹⁵² One of the critiques of the proposal is that it did not initially explain how the selection of the “at large” 50% of students would ensure socioeconomic diversity,¹⁵³ but the proposals were revised to clarify that the selection process will “take into account at-risk factors—including but not limited to socio-economic status—for each applicant” based on a “parent questionnaire,” and that “[s]tudents from higher income households who are identified as prospectively succeeding” in the programs will be encouraged to attend the schools.¹⁵⁴ Another criticism was that the initial proposals suggested that the proportion of low-income students would increase in each of the two target schools, rather than decrease. Ultimately, the district revised its proposal so that it would aspire to reduce the proportion of low-income students in Clary Middle School from 75% to 68%, and from 75% to 70% in LeMoyne Elementary School.¹⁵⁵

Yonkers. Yonkers, finally, has also used its application to pursue magnet programs at two of its schools, Cross Hill Academy and Yonkers Middle School. It intends to implement a STEM magnet program at the Cross Hill Academy and an Academy for Global Citizenship and Technology at Yonkers Middle School. While the initial socioeconomic diversity goals were modest, the final proposals provided a goal to reduce the proportion of low-income students in Cross Hill Academy from 82% to 76%, and in Yonkers Middle School from 88% to 76%. While these goals are slightly more ambitious than the initial proposals, the schools will still remain quite socioeconomically isolated even if the goals are achieved. Moreover, the initial Yonkers proposals did not suggest that the schools would attempt inter-district solutions or clarify how student selection procedures within the district would improve socioeconomic diversity. In response to these criticisms, the district explained that it did

¹⁵⁰ See Syracuse (LeMoyne) Proposal at 1-2 (on file with author).

¹⁵¹ See *id.* at 11.

¹⁵² *Id.* at 12.

¹⁵³ See Schenectady Feedback at 2 (on file with author).

¹⁵⁴ See, e.g., Schenectady Revisions to Proposal at 12 (on file with author).

¹⁵⁵ See Schenectady Revisions to Table 2 (on file with author).

not want to pursue inter-district solutions until “after [the district] ha[s] demonstrated success intra-district.”¹⁵⁶ It also explained that, under its current student assignment policy, 80% of the seats for each school go to neighborhood students while the remaining 20% go to students throughout the district; the revised applications noted that “socioeconomic status is not considered” by the district in assigning students, so it is not entirely clear how the proposal will successfully integrate students, even assuming that the proposed academic programs are successful within each of the two schools.¹⁵⁷

* * *

From a preliminary review of the grant applications in the New York pilot socioeconomic integration grant programs, several observations can be made. *First*, most of the school districts that were eligible for the program (nine of twelve) participated in the program—this is promising. However, it does not appear that the districts that participated in the program submitted proposals that were particularly new or unplanned. *Second*, most of the proposals were for various “magnet” programs that sought to incorporate various, potentially innovative, instructional models in schools. While it may be useful to gauge the success of these various instructional models in promoting socioeconomic diversity (including, for example, the CTE and STEM models discussed above), it is not clear that many of the districts have thought through the necessary partnerships that will need to be made in order to promote socioeconomic integration using these magnet programs. *Third*, most of the districts completely eschewed any *inter*-district solutions, so it is not clear how the programs proposed by many of the districts will foster sustained reductions in socioeconomic isolation, particularly if the participating school districts retain high numbers of low-income students. However jaded some districts may be (e.g., Hempstead), other districts have attempted *inter*-district solutions for decades and a broader conversation needs to be had regarding possible inter-district partnerships. This, for example, includes districts like Schenectady: while it proposed an interesting redistricting plan to reduce racial isolation, it could do a lot better if its redistricting plan were coupled with innovative inter-district solutions.

Fourth, even assuming that the various programs proposed are successful, the current socioeconomic isolation targets in the proposals are not very aggressive (even after revision). Once the goals of the proposals are met, most of the schools in the pilot program will still have more than

¹⁵⁶ See Global Citizenship and Technology (Revised Proposal) at 32 (on file with author).

¹⁵⁷ See *id.*

60% low-income students, meaning that more comprehensive efforts will be needed to achieve more significant levels of integration. Moreover, at least in their initial applications, some of the districts failed to appreciate that the goal of the program was to improve socioeconomic diversity *district-wide*. For this reason, “success” in one school does not mean success in the district as a whole. Most of these districts have not thought through how to redesign student assignment policies within their districts at large, as has been done in Cambridge, Jefferson County, and other forward-looking districts.¹⁵⁸ Indeed, many of the districts failed to change the neighborhood school model of student assignments in their districts.

Fifth, and related to student assignment policies, most districts failed to creatively think of diversity criteria other than Free and Reduced Price Lunch. Yet numerous criteria could be used to improve socioeconomic diversity in schools, including family income, zip code, parental employment, racial and ethnic information, ELL status, disability status, and numerous other factors. It appears that the grantees were not encouraged to think through such factors, and some districts such as New York decided to ignore race completely, which may produce schools under the program that are diverse from an income standpoint but not diverse along racial and other lines. These observations should be considered as we consider future socioeconomic integration grant programs.

Future Efforts to Desegregate: A Proposal for Socioeconomic Grant Programs

Ideally, we would operate in a world where efforts to integrate were not (1) compelled by law or (2) vestigial effects of such laws. As recent history reflects,¹⁵⁹ these legally compelled efforts are often fleeting.¹⁶⁰ Accordingly, we must aim to identify ways to encourage integration, and meaningful conversations about it, that are more organic than the mandates of the past.

In the socioeconomic integration space, the New York State pilot program appears to be a promising start. But, at least on a preliminary review, the program’s initial goals appear to be quite modest, and the proposals to date have mostly reflected efforts to build upon programs that

¹⁵⁸ See *About Controlled Choice*, *supra* at 60.

¹⁵⁹ See, e.g., the Milwaukee example discussed above, Mikkelson, *supra* note 39.

¹⁶⁰ Ross, *supra* note 57 (Tuscaloosa is given as an example in this article of a district that resegregated).

were contemplated before the grant program began. Few, if any, of the grant programs seem to have reflected an ambitious effort to alter student assignment processes, and none of them seem to have been an outgrowth of meaningful conversations with districts that already use innovative solutions, such as Hartford, Cambridge, Jefferson County, or others. The New York Program, moreover, is significantly constrained in that it appears to favor magnet and career education programs over other solutions, and the program is focused primarily on solutions at the individual school level, rather than on a district-wide or regional level—this, of course, is likely due to the program’s dependence on federal SIG grants.

In this section, we consider various models for federal grant funding that have already been adopted and, in some cases, have been used as vehicles to promote socioeconomic school integration. We begin with a look back in time at previous grant models that, in addition to the school improvement grants used in New York, could form the basis for a socioeconomic integration grant program in the upcoming reauthorization of the ESEA. These federal grant program examples, when considered in tandem with the lessons learned above from the New York State grant program, will be useful in formulating a potential framework for future grant programs that could promote socioeconomic integration within our nation’s schools.

Lessons Learned from Federal Education Grant Programs and Proposals

In the last decade, numerous grant programs have emerged at the federal level that, if leveraged effectively, could be used to promote school integration.

Technical Assistance for Student Assignment Plans (TASAP). Immediately after the *Parents Involved* decision, the federal government began a competitive grant program called the Technical Assistance for Student Assignment Plans (TASAP), which, in 2009, disbursed \$2,500,000 to 11 school districts that were willing to change or refine their policies for assigning students to schools.¹⁶¹ This grant program was

¹⁶¹ Erica Frankenberg, Kathryn A. McDermott, Elizabeth Debray, & Ann Elizabeth Blankenship, *The New Politics of Diversity: Lessons from a Federal Technical Assistance Grant*, 52 AMER. EDUC. RES. J. 440, 440-41 (2015).

authorized pursuant to federal statute, as codified at 42 U.S.C. § 2000c-2, which states:

The Secretary is authorized, upon the application of any school board, State, municipality, school district, or other governmental unit legally responsible for operating a public school or schools, to render technical assistance to such applicant in the preparation, adoption, and implementation of plans for the desegregation of public schools.

The TASAP grant application was explicit in that it had been a response to the Court's *Parents Involved* decision. It made clear that that the program's goal was "to arrange and pay for technical assistance in preparing, adopting, or modifying, and implementing student assignment plans *in accordance with the parameters of recent Supreme Court decisions pertaining to school desegregation.*"¹⁶² The grant funds were to be used "to seek assistance and expertise from student assignment specialists, demographers, community relations specialists," and others who had experience "in facilitating student diversity."¹⁶³ Although Congress appropriated \$2.5 million for this program in 2009,¹⁶⁴ appropriations have not been made for the program since.

While the goal of the TASAP program was to promote integration, the program requirements were quite general and did not set any accountability targets for achieving SES integration.¹⁶⁵ Although the "absolute priority" of the program was to provide "technical assistance for facilitating diversity,"¹⁶⁶ the scoring rubric for the program placed little emphasis on ensuring that the proposed plans to alter or improve student assignment promoted school diversity—nor did it provide any guidance on *how* that diversity was to be achieved.¹⁶⁷ Indeed, while the program's announcement seemed to be in response to the *Parents Involved* decision, the DOE provided no guidance on how that decision would affect student assignment policies.

¹⁶² See Fiscal Year 2009, Application for New Grants under the Technical Assistance for Student Assignment Plans Program ("TASAP Application"), U.S. Dept. of Educ. 1, <http://www2.ed.gov/programs/tasap/2009-004f.pdf> (last visited Feb. 8, 2016).

¹⁶³ *Id.* at 46; see also 74 Fed. Reg. 36174-01 (2009).

¹⁶⁴ See 155 Cong. Rec. H2241 (daily ed. February 23, 2009).

¹⁶⁵ See 74 Fed. Reg. at 36,177-78.

¹⁶⁶ *Id.* at 36,175.

¹⁶⁷ *Id.* at 36,177-36,178; see also Frankenberg et al., *supra* note 161, at 447.

Given this lack of guidance, the TASAP program did not realize its full potential. All TASAP districts, of course, ostensibly submitted applications that sought to improve school diversity. And some districts that were awarded funds, such as Jefferson County and San Francisco, “used their TASAP funds to support implementation of SAPs that continued to include diversity goals.”¹⁶⁸ But others did not. For example, Boston used its funds to subvert diversity goals.¹⁶⁹

This contrast between grantees was no surprise—districts such as Jefferson County had long promoted socioeconomic integration of its schools, and have maintained a historic commitment to integration that is virtually unparalleled—indeed, nearly 90 percent of JCPS parents believe that the district should “ensure that students learn with students from different races and economic backgrounds,” and a majority are willing to send their child to a school outside of their neighborhood to achieve this goal.¹⁷⁰ By contrast, Boston had experienced substantial discontent with court-imposed desegregation and busing in the 1970s and 1980s, and used the TASAP funds to prioritize student assignment to *neighborhood schools*—a policy that undermines the diversity goal.¹⁷¹ Two other TASAP districts—Rockford, Illinois and St. Paul, Minnesota—used the money to implement neighborhood school programs or other programs without explicit diversity criteria.¹⁷² And, rather than using a holistic student assignment program like Jefferson County’s, most TASAP districts did not use race at all in revising their student assignment plans because the common assumption at the time (albeit an incorrect one) was that districts could not use race at all after *Parents Involved*.¹⁷³ Many TASAP districts did, however, use some form of socioeconomic criterion in assigning students.¹⁷⁴

Several lessons could be learned from the TASAP program. *First*, the program could have provided more explicit accountability to ensure that the provided funds actually promoted integration, rather than subverted it. *Second*, the program could have been more transparent regarding the impact of *Parents Involved*, including the fact that school districts are

¹⁶⁸ *Id.* at 452.

¹⁶⁹ *Id.* at 452.

¹⁷⁰ *Id.* at 454-455. See also Gary Orfield & Erica Frankenberg, *Increasingly Segregated and Unequal Schools as Courts Reverse Policy*, 50 EDUC. ADMIN. QUARTERLY 718 (2014).

¹⁷¹ Frankenberg et al., *supra* note 161, at 459-61.

¹⁷² *Id.* at 464.

¹⁷³ *Id.* at 463.

¹⁷⁴ *Id.* at 463-64.

allowed under the law to use a combination of race and socioeconomic status as factors in assigning students to schools. *Third*, interviewees from school districts that implemented the TASAP grants in 2009 “described their disappointment at not being able to learn from other TASAP grantees.”¹⁷⁵ Accordingly, a Federal grant program should both encourage and incentivize further dialogue on creative methods of integrating schools post *Parents Involved*. It appeared that many of the TASAP grantees implemented their solutions in isolation from one another. *Finally*, more discussion needs to be had regarding why the TASAP program has failed to receive any appropriations from Congress since 2009.

Magnet School Assistance Program (MSAP). While the TASAP functioned only as a one-time, technical assistance grant, the federal Magnet School Assistance Program (MSAP) has been consistently funded over the years. This program, which was established in 1984 with the aim of combating segregation using magnet schools, encompasses “broad federal mandates designed to support innovative classroom programs and teacher practices, promote systemic reform, and enable all students to meet challenging academic standards.”¹⁷⁶ The program appropriates approximately \$100 million in funding per year to schools throughout the nation, and remains a fixture within the ESSA.¹⁷⁷

Under the MSAP program, the Department of Education annually provides grants for magnet schools with approved desegregation plans. In the past, the program had maintained race-based targets and requirements, but the program is now less focused on racial desegregation in light of *Parents Involved*, particularly for districts that are no longer bound by a consent decree.¹⁷⁸ With respect to those districts, the DOE will now

¹⁷⁵ *Id.* at 470.

¹⁷⁶ Claire Smrekar & Ellen Goldring, *Magnet Schools, MSAP, and New Opportunities to Promote Diversity*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION* 232 (Erica Frankenberg & Elizabeth Debray eds., 2014).

¹⁷⁷ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (December 10, 2015); *FY 2016 Omnibus Bill Replenishes Crucial Support for Magnet Schools, Eliminates Cuts Caused by Sequestration, and Provides Additional Investments to Implement Every Student Succeeds Act*, MAGNET SCH. OF AMER. (December 18, 2015), <http://www.magnet.edu/files/press-releases/fy-2016-omnibus-statement.pdf> (praising Congress for “restoring funding to the Magnet Schools Assistance Program in the FY 2016 Omnibus Appropriations Bill . . . on the heels of the passage of the Every Student Succeeds Act”). See also *Magnet Schools Assistance: Funding*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/programs/magnet/funding.html> (last visited August 14, 2015).

¹⁷⁸ Philip Tegeler & Sheela Ramesh, *Federal Support for School Integration: A Status*

“provide districts greater flexibility in how they demonstrate that their magnet or feeder schools will eliminate, reduce, or prevent minority group isolation and that their voluntary desegregation plans under Title VI.”¹⁷⁹

In providing this increased flexibility, the DOE removed, rather than replaced, specific legal standards. As but one example, the DOE removed its definition of “minority group isolation” from the regulations.¹⁸⁰ Under 34 C.F.R. 280.4(b), this term had been defined to mean, in reference to a school, “a condition in which minority group children constitute more than 50 percent of the enrollment of the school.” The DOE could have added a separate definition or guidance to the regulations, such as a broader definition of “socioeconomic isolation” that considers the proportion of socioeconomically disadvantaged students in schools, to the regulations, but it declined to do so. Such a definition could have included a wide range of social and economic factors. Indeed, the statutory purpose of the MSAP has always been “designed to bring students from *different social, economic, ethnic, and racial backgrounds together*.”¹⁸¹ More recent guidance from the DOE suggests that reduced “minority group isolation” is a priority of the MSAP Program, and has emphasized that applicant’s voluntary desegregation plans “must demonstrate how [school districts] will reduce, eliminate, or prevent minority group isolation,”¹⁸² but, again, the DOE has not adopted any specific regulations that use a socioeconomic index or other objective measure in assessing the success such plans.

The selection criteria for the MSAP program are very high-level and only reinforce the fact that the MSAP program would benefit from more meaningful targets and benchmarks.¹⁸³ For example, in selecting recipients for the grant, the education secretary must, as one of many factors, determine whether the project will “[f]oster interaction among students of different social, economic, ethnic, and racial backgrounds in classroom activities, extracurricular activities, or other activities in the magnet school.”¹⁸⁴ The secretary must also assess whether the program will “improve the racial balance of students in the applicant’s schools by

Report. Issue Brief No. 4, NAT’L COAL. ON SCH. DIVERSITY 1-2, <http://files.eric.ed.gov/fulltext/ED535443.pdf> (last visited Feb. 8, 2016).

¹⁷⁹ 75 Fed. Reg. 9777-01 (Mar. 4, 2010).

¹⁸⁰ *Id.*

¹⁸¹ 20 U.S.C. § 7231b; 34 C.F.R. § 280 (emphasis added).

¹⁸² 77 Fed. Reg. 77056-01 (December 31, 2012).

¹⁸³ *See* 34 C.F.R. § 280.31.

¹⁸⁴ 34 C.F.R. § 280.31(c)(2)(i).

reducing, eliminating, or preventing minority group isolation in its schools.”¹⁸⁵

As with TASAP, we are able to learn several lessons from the MSAP program. *First*, the MSAP is consistently funded, and is part of the newly passed ESSA. MSAP will thus provide opportunities to implement reforms using federal grant money for years to come. *Second*, it appears that, as with TASAP, MSAP has shied away from proscribing clear benchmarks for magnet school funding in the wake of *Parents Involved*. While DOE has clearly recognized the implications of the decision (for example, in light of its 2011 guidance), it has avoided articulating meaningful benchmarks for magnet school diversity that would be consistent with that ruling. As a result, there are no meaningful benchmarks to measure the current success of MSAP, except perhaps by relying on the academic results of the school districts and magnet schools that receive grant funding.

Charter school funding programs. Another federal funding priority in recent years has been charter schools. The primary goal of most charter schools has not been to promote school diversity to date. Instead, the focus has been to improve educational outcomes in settings that typically lack racial or socioeconomic diversity. Indeed, research suggests that charter schools have promoted racial and socioeconomic *segregation*, rather than integration.¹⁸⁶ Most recently, studies have highlighted charter

¹⁸⁵ 34 C.F.R. § 280.31(c)(2)(v).

¹⁸⁶ See, e.g., David Sirota, *Schools, Race and Integration: Complaint Says Charter Schools Are Resegregating Public Education*, INT’L BUSINESS TIMES (Dec. 5, 2014), <http://www.ibtimes.com/schools-race-integration-complaint-says-charter-schools-are-resegregating-public-1736791> (noting a recent complaint by the ACLU alleging that Delaware’s “high-performing charter schools are almost entirely racially identifiable as white” while “low-income students and students with disabilities are disproportionately relegated to failing charter schools and charter schools that are racially identifiable as African-American or Hispanic”); Jeff Guo, *White Parents in North Carolina are Using Charter Schools to Secede from the Education System*, THE WASHINGTON POST (April 15, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/15/white-parents-in-north-carolina-are-using-charter-schools-to-secede-from-the-education-system/> (noting a Duke study which found that “[c]harter schools in North Carolina tend to be either overwhelmingly black or overwhelmingly white—in contrast to traditional public schools, which are more evenly mixed”); Iris C. Rotberg, *Charter Schools and the Risk of Increased Segregation*, EDUC. WEEK (March 27, 2014), http://www.edweek.org/ew/articles/2014/02/01/kappan_rotberg.html (noting that “[s]tudies in a number of different states and school districts in the U.S. show that charter schools often lead to increased school segregation”); See Gary Miron, Jessica L. Urschel, William J. Mathis, & Elana Tornquist, *Schools Without Diversity: Education*

school segregation in North Carolina, and a recent complaint by the ACLU to the Department of Education highlights charter school segregation in Delaware.¹⁸⁷ Of the 6,000 charter schools in the United States that currently serve over 2.5 million students,¹⁸⁸ very few have racial or socioeconomic diversity as an important focus. Nonetheless, there are some charter schools that operate with explicit goals around diversity, and these charter schools have been growing in number.¹⁸⁹ Two examples of such schools include Capital City Charter School in Washington, D.C., which uses an “A.P for all” model and has been named the most diverse Charter school in D.C., and High Tech High, a network of eleven elementary, middle, and high schools in San Diego, California that emphasizes STEM education and assigns students using a lottery that weights only by zip code to promote socioeconomic diversity.¹⁹⁰ Both of these schools, in contrast to the charter schools that promote segregation, explicitly tout their diversity goals on their websites, and are members of the National Coalition of Diverse Charter Schools, a coalition with 32 member schools.¹⁹¹ There is no doubt that the charter school movement

Management Organizations, Charter Schools, and the Demographic Stratification of the American School System, NAT’L EDUC. POL’Y CTR. (February 2010),

<http://nepc.colorado.edu/publication/schools-without-diversity> (nationwide study of 968 charter schools that concluded that “charter schools more strongly segregate students than their respective local districts” and that “[m]ost charter schools were divided into either very segregative high-income schools or very segregative low-income schools”).

¹⁸⁷ See Complaint to the Office of Civil Rights, Region III Regarding Charter Schools and the Segregation of Delaware’s Public Schools in Violation of Title VI and § 504 of the Rehabilitation Act, American Civil Liberties Union Foundation of Delaware et al. v. State of Delaware and Red Clay Consolidated School District (December 3, 2014), <https://www.aclu-de.org/wp-content/uploads/2014/12/ACLU-et-al-v.-State-of-Delaware-and-Red-Clay-Consolidated-03-Dec-14.pdf>; Sirota, *supra* note 186 (highlighting the Delaware ACLU complaint); Guo, *supra* note 186 (highlighting charter school segregation in North Carolina).

¹⁸⁸ See Rick Ganley, *Nationally, Charter School Movement Beset by Oversight Scandals, Low Funding*, WNPR (October 23, 2015), <http://wnpr.org/post/nationally-charter-school-movement-beset-oversight-scandals-low-funding#stream/0>.

¹⁸⁹ Richard D. Kahlenberg & Halley Potter, *Diverse Charter Schools: Can Racial and Socioeconomic Integration Promote Better Outcomes for Students*, THE CENTURY FOUND. 12-19 (May 2012),

http://www.tcf.org/assets/downloads/Diverse_Charter_Schools.pdf; RICHARD D. KAHLBERG & HALLEY POTTER, *A SMARTER CHARTER: FINDING WHAT WORKS FOR CHARTER SCHOOLS AND PUBLIC EDUCATION* (2014).

¹⁹⁰ *Id.* at 16-17. See also, Steven Glazerman, *DC’s Most Diverse Charter Schools*, GREATER GREATER EDUCATION (Aug. 8, 2013), <http://greatergreatereducation.org/post/19691/dcs-most-diverse-charter-schools/>.

¹⁹¹ See *About High Tech High*, HIGH TECH HIGH, <http://www.hightechhigh.org/about/>

has been flourishing in the United States, and it is important that charter schools be included in the school integration conversation, particularly given that fewer than 1% of public charter schools are currently members of the coalition. Accordingly, I consider current federal grant programs that provide funding to charter schools, the extent to which these programs provide incentives to integrate, and whether grant programs can be useful vehicles to promote school integration.

Under the federal government's charter school grant programs, states and school districts have numerous opportunities to receive funding for charter schools.¹⁹² Over the past several years, in fact, the Federal Government has typically dispersed between \$100 and \$200 million per year to states for such schools.¹⁹³ This amount has only increased in the wake of the ESSA. Indeed, funding for the federal charter school funding program was set at \$333 million for fiscal year 2016—the highest amount ever.¹⁹⁴ Pursuant to 20 U.S.C. § 7221, one of the goals of the charter school funding program is to “expand[] the number of high-quality charter schools available to students across the nation.”¹⁹⁵ Diversity is not the main goal of the program, but has been one of its “competitive preferences,” whereby applicants can earn additional points on their grant application by “taking active measures to . . . [p]romote student diversity, including racial and ethnic diversity.”¹⁹⁶ The “absolute priority” that the DOE has recently used in selecting grantees is that the applicant “currently operate[s] or manage[s] more than one *high-quality charter school*,”

(last visited October 25, 2015) (highlighting its mission to “[s]erve a student body that mirrors the ethnic and socioeconomic diversity of the local community”); *Focusing on Race and Equity*, CAPITAL CITY PUB. CHARTER SCH., <http://www.ccpcs.org/post/equity/> (last visited October 25, 2015) (highlighting that Capital City is the most diverse charter school in Washington, D.C.). See NAT'L COAL. OF DIVERSE CHARTER SCH., <http://www.diversecharters.org/> (last visited October 25, 2015). See also Amanda Ulrich, *New Coalition Promoted Diverse Student Populations in Charter Schools*, EDUC. WEEK (July 1, 2014), http://blogs.edweek.org/edweek/charterschoice/2014/07/new_coalition_promotes_diverse_student_populations_in_charter_schools.html.

¹⁹² Tegeler & Ramesh, *supra* note 178, at 2.

¹⁹³ See, e.g., *Charter Schools Program State Educational Agencies (SEA) Grant Funding*, U.S. DEPT. OF EDUC., <http://www2.ed.gov/programs/charter/funding.html> (last visited Feb. 8, 2016).

¹⁹⁴ See Arianna Prothero, *Federal Charter School Grant Program Gets Big Boosts from Budget, ESSA*, EDUC. WEEK (December 22, 2015), http://blogs.edweek.org/edweek/charterschoice/2015/12/federal_charter_school_grant_program_gets_big_boosts_in_budget_essa.html.

¹⁹⁵ 20 U.S.C. § 7221.

¹⁹⁶ 77 Fed. Reg. 13304-01 (March 6, 2012).

which is a school that shows strong evidence of academic results for the past three years and has, among other things, narrowed achievement gaps that persist between white and minority students.¹⁹⁷ Most recently, the DOE issued guidance in June, 2015 that once again highlighted the importance of funding “high-quality charter schools.”¹⁹⁸

Nonetheless, guidance from the DOE has increasingly emphasized the importance of diversity in the charter school funding program. In January 2014, the DOE emphasized that charter schools may use weighted lotteries to favor the admission of low-income or economically disadvantaged students in charter schools that may not have many such students, much like the lotteries used by schools like High Tech High.¹⁹⁹ And, the most recent June 2015 guidance is promising in that it places a stronger emphasis on charter school diversity in the grant award criteria. The new list of priorities and criteria for charter school grant funding emphasizes that:

A critical component of serving all students, including *educationally disadvantaged students*, is consideration of student body diversity, including racial, ethnic, and socioeconomic diversity. For example, the selection criteria encourage applicants to meaningfully incorporate student body diversity into charter school models and ask applicants to describe specific actions they would take to support *educationally disadvantaged students* through charter schools.²⁰⁰

The DOE has indeed begun to place emphasis on the dual role of racial and socioeconomic diversity in supporting disadvantaged students in its final selection criteria.²⁰¹ One of its criteria, for example, encourages states to disseminate information on best practices of charter schools—as part of this factor, the DOE considers “[t]he quality of the SEA’s plan for disseminating information and research on best or promising practices used by, and the benefits of, charter schools that effectively incorporate student body diversity, including racial and ethnic diversity and diversity

¹⁹⁷ *Id.*

¹⁹⁸ 80 Fed. Reg. 34202-01 (June 15, 2015).

¹⁹⁹ See *Charter Schools Program, Title V, Part B of the ESEA, Nonregulatory Guidance*, U.S. DEPT. OF EDUC. 17-18 (January 2014), available at www2.ed.gov/programs/charter/fy14cspnonregguidance.doc.

²⁰⁰ 80 Fed. Reg. 34202-01 (June 15, 2015).

²⁰¹ See 80 Fed. Reg. 34223 (Final Selection Criteria)

with respect to *educationally disadvantaged students*, consistent with applicable law.”²⁰² Under another factor, states must provide oversight over charter agencies, and consider whether such agencies approve charter schools using “school models and practices that focus on racial and ethnic diversity in student bodies and diversity in student bodies with respect to *educationally disadvantaged students*.”²⁰³ Finally, the criteria require states to explain, when providing sub-grants to individual charter schools, how they will “create a portfolio of sub-grantees that focuses on areas of need within the State, such as increasing student body diversity or maintaining a high level of student body diversity.”²⁰⁴ Although the DOE has made clear that the selection requirements do “not require every approved school to be racially and ethnically diverse,”²⁰⁵ the newest guidelines appear to signal an acknowledgment by DOE that improving charter school diversity is an important goal.

From the federal government’s charter school grant program, we once again see that diversity may be incorporated as a goal in grant programs. At minimum, the recent updates to the selection criteria suggest that the DOE has placed an increasing importance on diversity, even though most charter schools to date have not embraced that goal. Given the importance of charter schools in the current education reform landscape, it is important that we consider increasing the numbers of diverse charter schools and the extent to which such schools could improve the socioeconomic diversity of schools more generally.

Race to the Top. The last federal grant program I consider is the Federal Government’s Race To The Top Program (RttT). Race to the Top was an unprecedented federal grant program that was passed in response to the 2008 financial crisis as part of the American Recovery and Reinvestment Act (ARRA).²⁰⁶ The law set up a unique competitive grant program that allowed the states to compete for a large pot of money—approximately \$4.35 billion—based on a range of criteria established by the DOE.²⁰⁷ Four broad criteria were established, including (1) “adopting internationally benchmarked standards”; (2) “improving the recruitment,

²⁰² *Id.* at 34224.

²⁰³ *Id.*

²⁰⁴ *Id.* at 34225.

²⁰⁵ *Id.* at 34216.

²⁰⁶ AARA, Pub. L. No. 111-5, 123 Stat. 115, §§ 14005-6 (2009).

²⁰⁷ Joseph P. Viteritti, *The Federal Role in School Reform: Obama’s “Race to the Top”*, 87 NOTRE DAME L. REV. 2087, 2102 (2012).

retention, and compensation of teachers and school administrators”); (3) “improving data collection”; and (4) “implementing strategies to turnaround failing schools.”²⁰⁸ These program incentives were not centered around diversity, but instead teacher quality, data systems, and other initiatives. The RttT program generated grant applications from forty states and the District of Columbia, many of which altered their state laws and local policies to demonstrate their competitiveness for the grants.²⁰⁹ These goals were not without controversy, as several commentators noted that they completely ignored school diversity.²¹⁰

When questioned about why DOE did not include diversity as an explicit (or even implicit) goal of the RttT program, Arne Duncan (the former Secretary of Education) has argued that would have been too difficult to pass such incentive programs through Congress, emphasizing that you cannot “force” these sorts of solutions.²¹¹ However, it is not clear how *incentive* grant programs force anyone to pursue integration—in any future incentive grant program, those districts that hope to take on the challenge could make proposals involving integration, while those that do not wish to do so can eschew the funds, just as several states opted not to participate in the RttT incentive program. The problem, as of now, is that few states and school districts even attempt to discuss or implement thoughtful solutions that promote integration, and are given minimal incentives to do so. Given that RttT encouraged states and school districts to consider and explore new ideas that may not have otherwise been

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 2013.

²¹⁰ See, e.g., Rachel M. Cohen, *Obama’s Mixed Record on School Integration*, THE AMER. PROSPECT (Aug. 30, 2015), <http://prospect.org/article/obamas-mixed-record-school-integration> (noting that, while ignoring school integration, “Duncan used incentives to get states to adopt Common Core standards, to promote after-school programs and early childhood education, and even within Race to the Top, incentives were used to encourage states to adopt teacher evaluation systems tied to student test scores”); Gary Orfield, John Kucsera, & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT 5 (Sept. 2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf, (noting that the Obama administration “rejected ideas of setting aside significant funding to expand magnet schools or to assist districts in designing new voluntary integration programs as part of the ‘Race to the Top’ program and other initiatives”).

²¹¹ *The Problem We All Live With*, THIS AMER. LIFE (Aug. 7, 2015), <http://www.thisamericanlife.org/radio-archives/episode/563/transcript>. See also Richard Rothstein, *How Much We Have Backslid*, ECON. POL’Y INST. (Sept. 6, 2013, 2:34 p.m.), <http://www.epi.org/blog/backslid/>.

attempted or discussed, the RttT example was a prime example of a grant program that could have been used to promote integration efforts, however modest, and it illustrates that competitive funding grants could be a useful tool in motivating complacent states or localities into action on a wide range of education reform issues.

High-Level Ideas for a Grant Program that Promotes Socioeconomic Integration of Schools

In fashioning a broad-based grant program that aims to promote socioeconomic integration within schools, we should consider the lessons learned from the federal government's previous grant programs, as well as the lessons learned from New York's current pilot program, to design and build one or more federal grant programs to promote socioeconomic school diversity.

First, a socioeconomic school integration grant program needs to be clear regarding the program's benchmarks and principles at its outset. The current federal grant programs do not emphasize socioeconomic and racial diversity as an overarching goal, though the magnet school assistance program now does place priority on efforts to achieve socioeconomic and racial economic integration.²¹² However, to the extent that federal programs refer to diversity at all, they typically reference it as one of several general criteria that may be used in awarding grant money. While that is somewhat promising, no federal grant programs require diversity efforts, and even the MSAP program does not explicitly set forth a "socioeconomic isolation" index or factor that could be used as a benchmark in funding magnet school programs (though the new law may incentivize the creation of such benchmarks). Similarly, while New York's pilot program refers to "SES integration targets," it is not clear, at least at this time, what those targets are. Building from my prior work, I submit that an appropriate principle to work from is that no child should attend a school that is more than 50% low-income students (of course, this benchmark may need to be adjusted say, to 60% or some other number, depending on the demographic realities of a school district). A set of principles or targets is absolutely necessary to frame a broad, meaningful conversation about the issue of socioeconomic isolation in schools.

Given this, an effective SES integration grant program should require applicants to convey the current status of socioeconomic diversity within

²¹² Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (December 10, 2015).

their school district, convey how the applicant intends to improve that diversity, and provide projected reductions in racial and socioeconomic isolation that would result from the district's efforts. The proposal should articulate the SES indices or benchmarks that will be used to diversify the schools and link those efforts to the district's results in improving school diversity over time. The grant program should ideally be competitive rather than non-competitive, prioritizing grant funding to applicants who have a sustained record of improving socioeconomic school diversity across systems over a sustained period of time, just as the federal charter school grant program prioritizes grant funding to charter school operators who have consistently demonstrated that their charter schools are "high quality" based on their performance on standardized tests. At minimum, innovative programs should receive funding over programs that implement outdated solutions that are not targeted toward improving diversity. Any school district should also, in describing its magnet and charter school programs that comprise its plan, discuss how it will continue to provide a high quality education and meet those other benchmarks, including the benchmarks deriving from statewide standardized testing programs.

Second, a useful grant program that promotes socioeconomic school integration would emphasize efforts that could occur at a regional or *inter*-district level to improve integration, rather than efforts that are made solely at the individual school level. While individual magnet schools and charter schools could certainly be part of a broader solution, funding such schools in isolation, without considering their effects on the school diversity of the school district or region as a whole, may be problematic. Notably, most of the grant programs discussed above—including the federal government's school improvement grants, magnet school funding, and charter school funding programs—are focused on providing schools with funding at the individual school level. Even the New York program, which is dependent on school improvement grant funding, is focused on providing funding to individual schools. Unsurprisingly, then, none of those programs have criteria that gauge regional or system-wide effects of grants on socioeconomic school diversity. Indeed, because the funding force for the New York State program is designed primarily to support improvement of individual identified schools, few of the New York State proposals focused on system-wide integration plans in any meaningful way, and nearly every plan avoided any attempt at broader, inter-district solutions. The TASAP grant program, with its extremely limited funding stream, touched on system-wide efforts to improve diversity, but it had its own problems. Individual school improvements can certainly aid diversity—for example, improving individual schools in low-income

communities could motivate higher-income students to attend those schools, thereby diversifying them. However, creative solutions to improve school diversity may be discouraged by suggesting that diversity efforts must be funded “one school at a time.”

For these reasons, any grant program should not be constrained to funding individual schools within school districts, or even to specific school districts, without an understanding of each school’s place in an entire school district’s or region’s diversity plans. Ideally, funding could be provided at a district-wide (or even regional) level, to encourage school districts and partnerships of school districts to adopt broad, regional socioeconomic diversity plans. Just as Jefferson County has such a broad plan, and greater Hartford and its surrounding towns have broad conversations regarding how they could reduce socioeconomic isolation over a large metropolitan area, so too can metropolitan coalitions of school districts around the country, with the proper incentives. The “Learning Community” model in Omaha, for example, could be expanded and improved upon, and an effective grant program could provide funding for *inter-district* transfers between city and suburban schools.²¹³ Such a funding program would be more aligned with the “Community Innovation” model contemplated in the New York pilot program, which was not seriously attempted by any of the grant applicants. But, rather than having that model represent the unlikely funding source—or be the presumptive last resort for grants—an effective grant program would prioritize community innovation models over models that simply fund individual schools within a single school district.

By untethering a socioeconomic school integration grant program from an individual school funding model, the program will be able to encourage far more creative solutions to the school diversity problem. For one, long-needed technical assistance could be provided to school districts and regional coalitions to foster creative solutions to address diversity challenges. Such creativity could engender robust *inter-district* transfer programs, student assignment policies, charter and magnet school programs, and much more. While regional approaches are alluded to in New York’s grant program, certainly these broader solutions could be considered as part of a grant program. Along similar lines, any grant

²¹³ There may be some interplay between providing incentives for voluntary *inter-district* transfers and the accountability requirements that states adhere to under the ESSA. However, in light of the increased state-level flexibility that ESSA affords, accountability requirements can now be designed to accommodate efforts to promote integration across different school districts.

program should consider a “team” approach where groups of neighboring school districts can propose inter-district plans to promote socioeconomic diversity within a broader metropolitan area. By encouraging such “teaming” of regions, both urban and suburban districts could benefit financially from the program and we may come to new understandings of the meaning of what “local” means when one refers to “local control.”

Third, any grant program should provide explicit criteria or suggestions regarding various student assignment models and practices that promote student diversity within each school district. One noteworthy trend in the grant applications in New York State was that most, if not all of them, made only modest changes to student assignment plans. The school districts avoided use of any measure other than free and reduced price lunch (FLPL) as a poverty measure, and typically did not articulate various other socioeconomic and demographic factors that may be useful in attaining a diverse school population in each school. Given the wide range of assignment policies that exist among school districts across the country, districts are capable of implementing student assignment plans that are more creative than the neighborhood school model.

Fourth, any grant program involving the socioeconomic school integration issue must require extensive information sharing and reporting by all participating districts. Specifically, best practices that result from the grant program must be readily shared, and districts that participate in the funding program should be required to share their experiences with one another both before and during the grant application process. It may even be worth requiring consultation between grant applicants and certain “preferred partner” districts who already exhibit creative efforts to pursue integration; such districts could be “mentors” to new socioeconomic integration grant applicants.²¹⁴ Such relationships and information-sharing could not only foster better ideas, but could also foster greater collaboration and confidence in integration efforts more broadly. Somewhat surprisingly, the federal TASAP grantees of 2009 did not communicate regarding their efforts to retool their student assignment policies after *Parents Involved*, and many of those grantees regretted that they had not spoken to the representatives from other school districts that implemented their own solutions.²¹⁵ As discussed above, numerous

²¹⁴ For example, a school district like Hartford, which has implemented integration programs in the past, could serve as a mentor to a school district like Hempstead, which has struggled with *inter*-district solutions.

²¹⁵ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (December 10, 2015).

school districts have adopted best practices in their efforts to improve school diversity and student outcomes, and school districts would benefit from a robust dialogue regarding these practices. Even Ira Schwartz, the Assistant Commissioner for Accountability at the New York State Education Department, thinks the plans submitted could have been strengthened if the New York State program had made the first step in the process a requirement that district staff participate in a professional development community focused on learning diversity best practices before being allowed to apply for additional funds under the SES integration pilot program. Such knowledge is sorely needed, particularly in the wake of *Parents Involved*, and surprisingly little information sharing has occurred to date.

Fifth, a socioeconomic school integration grant program should be a competitive grant program (akin to RttT), not merely an allocative one. One of the challenges with the New York pilot program is that it has attempted to bootstrap funding to promote SES integration using school improvement grant money. Because such funds cannot be awarded competitively, New York was required to award grant money in the program so long as the proposals submitted were consistent with the overarching goals of Section 1003(a) of the SIG program. Thus, New York State was not allowed to reward school districts' creativity by (a) providing larger grants to districts with particularly innovative integration programs; or (b) refusing to fund applications that may have little impact on socioeconomic diversity in the pertinent school district. By using the framework of a competition to provide guidance for the types of *inter*-district, regional proposals that would likely be funded, a well-designed socioeconomic school integration grant program would ensure that proposals take meaningful steps to combat school diversity, and that districts do not merely pay lip service to it. To promote such competition, the program should be administered at the federal level and should encourage both individual school district applications as well as applications from broader regional or statewide coalitions. Some preference would be given to grant applications that propose coordinated, regional or statewide solutions to socioeconomic isolation. But the idea would be to encourage all individual school districts to pursue integration efforts, whether they are part of a state that does not pursue broader integration efforts or not.

Sixth, no matter what form a SES school integration grant program takes, it would ideally have a consistent source of funding to thrive. Accordingly, an ideal venue for the program would be embedded within federal law, as grant programs that are already embedded in the ESEA

seem most likely to receive annual appropriations from Congress, in contrast to the “one off” programs such as TASAP that do not. Perhaps by messaging the moral imperative that no child should attend a school that is more than 50% low-income students, members of Congress could be persuaded to fund recurring grant programs that are more directly focused on reducing socioeconomic and racial isolation. Even if the annual funding allocation for an additional program is somewhat small, it would at least be a start. But even if not, continued efforts should be made to bootstrap school integration efforts into existing federal programs, including the MSAP and Charter School Funding programs. If more explicit criteria regarding school diversity were integrated into these programs, they could become more dependable funding streams for improving school diversity. Additionally, efforts could and should be made to encourage private foundations to provide funding for socioeconomic school integration efforts. These foundations have provided millions of dollars in funding to support efforts to create new charter schools and increase teacher accountability; such foundations, with the proper messaging, may begin supporting socioeconomic diversity initiatives as well.

Finally, no matter what form a socioeconomic school integration grant program were to take, such grant programs should not be viewed as mutually exclusive to other existing education reform efforts. Efforts to promote socioeconomic integration should be implemented in parallel with other reform efforts, including reform efforts involving pre-k education, teacher quality, charter schools, and other innovative academic programming efforts. While socioeconomically integrated schools will promote better opportunities for low-income children, integration efforts will not guarantee that all high-poverty schools will be eradicated with one stroke of a pen. For that reason, current reform efforts that target high-poverty schools should remain ongoing. Meanwhile, though, we should not use some of the successes in improving academic outcomes within high-poverty schools to justify the overwhelming racial and socioeconomic isolation that persists in those and other high-poverty schools.²¹⁶ To the extent that successes in high-poverty schools have shown skeptics that achievement in such schools is possible, I applaud those efforts, and they should continue as needed. But I believe we can do even better as a society, which is why those efforts need to be made in

²¹⁶ See Richard D. Kahlenberg, *High-Flying High Poverty Schools*, AMER. EDUCATOR (Winter 2012-13), <http://www.aft.org/periodical/american-educator/winter-2012-2013/high-flying-high-poverty-schools>.

tandem with incentives for socioeconomic school integration as I have proposed here.

Conclusion

At this point in the education reform movement, school integration has taken a back seat to other aspects of education reform, including efforts to improve teacher quality, improve instructional programs (including pre-school programs), and promote innovative charter and magnet school programs. None of these reform efforts, however, need to be undertaken apart from parallel efforts to promote the socioeconomic and racial diversity of schools. And no one, to date, has explained why these efforts cannot be performed in parallel. While court compelled integration is largely a thing of the past, and momentum for school integration has waned in some parts of the country, numerous school districts continue to pursue socioeconomic and racial integration on a voluntary basis. Meanwhile, a review of New York State's pilot socioeconomic school integration grant program reveals that grant funding could be a promising new avenue to incentivize additional voluntary efforts to promote school integration. As the current grant applications reflect, such integration efforts can be part and parcel of efforts to promote innovative instructional programming including Career and Technical Education (CTE), STEM Education, Arts Education, Universal Pre-School, International Baccalaureate, Montessori, and other innovative programs that may draw students from a wide range of educational backgrounds.

While the New York State socioeconomic integration pilot grant program is not without its flaws, and I have suggested numerous ways that such a program could be improved, policymakers and private foundations should remain mindful of the benefits of socioeconomic integration to society—both in terms of cultural awareness and academic success—and consider ways in which we may promote socioeconomic integration using other grant program designs moving forward. These grant programs, if guided by a clear principle such as one where no child should attend a school that is greater than 50% low-income students, can be a promising start to move the needle on school integration once and for all. As we consider future reform efforts in the wake of the ESSA, such grant programs could be useful complements to existing reform efforts.

**Restoring the Federal Commitment to
Equal Educational Opportunity:
New Directions for ESSA's School Improvement Initiatives**

Tina Trujillo*

Somber grey clouds muted Chicago's last hours of sunlight as I hailed an airport taxi to attend an annual conference for educational researchers. After I settled into my backseat, my driver commented that he moved to Chicago after spending four years in refugee camps when he and his family fled Iraq during the Persian Gulf War. His sober tone conveyed the trauma of those years. Upon asking what a typical day looked like, he shared that the living conditions were devastating; he described how people tried to stay cool, and how some days they had water and some days they had food, but not necessarily both on the same day. Unaware of my background in education, he remarked that after living for a while in the camps, people started schools. Those with enough physical strength became teachers, he remembered. A doctor taught whoever was curious about medicine or biology. Others taught math or writing or other subjects. Children and adults chose to go to school. The schools kept people going, as he put it. The schools were how they passed the days. Through them, people with nearly nothing left could share something with each other. After a pensive pause, he raised his voice: "Now they're closing all of these schools here [in Chicago], but they don't understand that when you close a school, you take out the heart of the community." When he was in the camps, he said, the schools were the heart of their community. "They're killing these communities," he repeated forcefully, "when they close all of these schools."

He was referring to Chicago's recent high profile shuttering of more than 50 schools that displaced almost 13,000 students, most of whom live in predominantly low-income African American or Latino communities. From a policy perspective, Chicago serves as a sort of ground zero for several high-stakes accountability policies that district and school leaders have experimented with for more than two decades. Included among these policies are mandates for permanently closing low-scoring schools, or closing them and re-starting them as charter schools, or "reconstituting"

* Tina Trujillo is an Assistant Professor at UC Berkeley's Graduate School of Education.

them through massive layoffs of both teachers and administrators. For some of Chicago's most struggling communities, reforms like these have drained their neighborhoods of schools, teachers, and educational and social resources for over two decades.

The most recent instantiation of these policies was the federal School Improvement Grant (SIG) program, a competitive grant program within the Elementary and Secondary Education Act (ESEA) that has provided temporary funding for states and schools to implement these types of interventionist, school-level reforms. Building on other "first generation" accountability policies¹ that prescribed school closures, mass layoffs, or charter conversions, since 2007 the SIG program has effectively scaled up such practices across the nation in hopes of turning around the nation's lowest-performing schools. Yet the "tough love" approach to school improvement embodied by the SIG program and similar district or state policies has garnered much critical attention by communities, educators, and researchers. Its lack of positive results, coupled with its deleterious effects on schools, students, and communities, has rekindled some policymakers' and practitioners' interest in reconsidering how the federal government can more effectively advance the ESEA's original intent—to equalize educational opportunity by using federal funding to increase protections for historically underserved students.

On December 10, 2015, President Obama signed the Every Student Succeeds Act (ESSA) into law, which re-authorized ESEA and curtailed some of the most controversial components of its predecessor, the No Child Left Behind Act of 2001 (NCLB). Yet these latest re-authorizations have moved the country further and further away from the original principle behind ESEA. It was originally a civil rights initiative. Unfortunately, with each revision to the law, the federal government has continually disregarded what research teaches us about the resources and conditions that struggling schools and communities require in order to guarantee adequate educational opportunities for all children.

This paper synthesizes the research evidence on the effects of SIG-driven reforms and proposes a more equitable policy structure for what has become a cornerstone of the ESEA. It begins by detailing the origins and intent of the SIG program. From there, it contextualizes the SIG program within the mounting grassroots opposition to SIG-mandated reforms. It analyzes the rationale behind civil rights complaints that have

¹ Heinrich Mintrop & Tina Trujillo, *Corrective Action in Low Performing Schools: Lessons for NCLB Implementation from First-Generation Accountability Systems*, 13 EDUC. POL'Y ANALYSIS ARCHIVES 34 (2005).

been filed against districts, superintendents, local boards of education, mayors, local departments of education, and the United States Department of Education, all of which contend that these increasingly common, federally-funded reforms disproportionately harm communities of color as they are implemented. It then synthesizes the research on school closures, turnarounds, and charter conversions. After reviewing this empirical evidence, it proposes a specific legislative proposal for more equitable federal aid and interventions in low-performing, under-served schools. It concludes with a discussion of why these new conditions of aid would further the original intent of the Elementary and Secondary Education Act – to use federal dollars to build schools' capacity for providing equal educational opportunities for traditionally under-resourced communities.

The Origins and Aims of ESEA's School Improvement Grant Program

In 2001, policy makers created the federal School Improvement Grant program as part of the reauthorization of the Elementary and Secondary Education Act, the No Child Left Behind Act (NCLB). Part of NCLB mandated that states identify their lowest scoring schools so that students could transfer to higher scoring ones. It also prescribed a series of increasingly interventionist corrective actions that were intended to improve persistently low-scoring schools and districts. These corrective actions ranged from changing curriculum, replacing school staff, handing over school management to an outside authority, to closing an entire school. Although policymakers first envisioned the SIG program as a source of financial support to build schools' capacity for carrying out these corrective actions, it was not funded until 2007.

In 2009 the Obama Administration renewed the SIG program by folding it into its American Recovery and Reinvestment Act. Since then, the program has represented a major component of the Education Department's broader Race to the Top program, a competitive grant program that required states to implement reforms by relying on competition, monitoring, and strict accountability to improve schools. The administration increased the SIG program budget from \$125 million in 2007 to \$3.5 billion in the 2010-11 school year. The program was funded at \$546 million for the 2011-12 school year and \$535 million for the 2012-13 school year. The administration's rationale for re-inventing the SIG program was that dramatically turning around schools requires financial investment alongside significant structural changes.

Until the 2016-17 school year, SIG-funded schools can receive up to \$2

million per year for three years. In exchange, they must implement one of four models, all derived from the corporate sector: turnaround, transformation, restart, or closure. School closures, as the name suggests, require districts to close a school and transfer students to higher-performing schools in the same district. The turnaround option mandates the firing of a school's principal and teachers, with the stipulation that the new leader may rehire up to 50 percent of the original teachers. Under the restart model, the school must be converted or closed, then reopened under a charter school operator, charter management organization, or education management organization. The transformation model requires districts to fire principals, institute a principal and teacher-evaluation system based on student achievement and other measures, and develop plans for significant instructional reforms.²

In essence, the SIG program extended NCLB's strategies for improving schools.³ It was based on the assumption that strong external threats could compel teachers and principals to improve performance, that standardized test scores were reliable measures of student learning, and that only within-school changes could spur meaningful growth in teaching and learning.

Proponents of turnaround-driven layoffs, closures, and increased charter access contend that these reforms offer the best strategies for improving teacher quality and student outcomes.⁴ They maintain that the reforms can effectively narrow test-based performance gaps along lines of race and class, and that they can efficiently improve overall student achievement. These advocates reason that dramatically changing a school's performance trajectory requires policy makers and educational leaders to implement dramatic changes regarding staffing and management authority over the school.⁵ However, this advocacy tends to

² U.S. Department of Education, *An Overview of School Turnaround* (Nov. 28, 2011), <http://www2.ed.gov/programs/sif/sigoverviewppt.pdf>.

³ Tina Trujillo & Michelle Renée, *Irrational Exuberance for Market-based Reform: How Federal Turnaround Policies Thwart Democratic Schooling*, 117 TCHR. C. REC. 1, 3 (2015).

⁴ Michelle Rhee et. al, *How to fix our schools: A manifesto by Joel Klein, Michelle Rhee and other education leaders*, THE WASHINGTON POST (2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/07/AR2010100705078.html>.

⁵ See, e.g., Melissa Lazarín, *Charting New Territory: Tapping Charter Schools to Turn Around the Nation's Dropout Factories*, AMERICAN PROGRESS (2011), <https://www.americanprogress.org/issues/education/report/2011/06/30/9753/charting-new-territory/>. See also Tiffany D. Miller & Catherine Brown, *Dramatic Action, Dramatic Improvement: The Research on School Turnaround*, AMERICAN PROGRESS

be based on unsubstantiated claims that are not supported by empirical evidence.⁶

Thus far, states have granted SIG funds to a total of 1,688 schools.⁷ For financially strapped schools already struggling to meet students' needs, the amount of money is significant – at least in the short term – until the schools return to their original funding structures – structures whose inequitable, inadequate distribution along lines of race and poverty have been well documented.⁸

While the most recent re-authorization of ESEA, the Every Student Succeeds Act (ESSA), eliminates the SIG program as a stand-alone initiative after the 2016-17 school year, it continues to set aside Title I funding for the same purposes that it was used for in the past. The most significant difference in the new law is that the power to decide which models schools will implement now resides primarily in the states, not the federal government. Thus, while the SIG program will cease to exist in name, financial incentives to implement the same school reform models remain.

Some observers have hailed ESSA as legislation that grants states more flexibility than in the past. It is true that ESSA expands the list of potential school reform models that schools can implement, and that it bestows upon states more authority to choose which models they will adopt. Now on states' list of potential reforms are, for example, full-service community schools programs. But the likelihood that today's decision-makers are primed to adopt more comprehensive reforms to which they are unaccustomed is not great. Most of today's policymakers

(2015),

<https://www.americanprogress.org/issues/education/report/2015/03/31/110142/dramatic-action-dramaticimprovement/>.

⁶Tina Trujillo, *Review of Charting New Territory: Tapping Charter Schools to Turn Around the Nation's Dropout Factories*, NAT'L EDUC. POL'Y CTR. 3 (2011),

<http://nepc.colorado.edu/thinktank/review-charting-new-territory>. See also Tina Trujillo & Marialena Rivera, *Review of The Effect of Co-Locations on Student Achievement in NYC Public Schools*, NAT'L EDUC. POL'Y CTR 4 (2014),

<http://nepc.colorado.edu/thinktank/review-effect-of-co-locations>.

⁷ U.S. Department of Education, SIG-Awarded Schools (SY 10-11, 11-12, 12-13, 13-14), <http://www2.ed.gov/programs/sif/index.html> (last visited Feb. 5, 2016).

⁸ Richard Rothstein & Mark Santow, *A Different Kind of Choice: Educational Inequality and the Continuing Significance of Racial Segregation*, ECON. POL'Y INST. 2 (2012),

<http://files.eric.ed.gov/fulltext/ED537326.pdf>. E.g., Jennie Oakes, *UCLA's Institute for Democracy, Education, and Access, Education Inadequacy, Inequality, and Failed State Policy*, ESCHOLARSHIP, UNIV. OF CALIFORNIA 1 (2002)

<http://escholarship.org/uc/item/8727d11z>.

and educational leaders have been socialized to accept punitive “corrective actions” like turnaround-driven layoffs, charter school conversions, and, increasingly, school closures as the most efficient response to traditionally under-performing schools. These are the reforms with which our current generation of educational decision-makers has grown up. In order for states to deviate from the reforms with which they are most familiar, their leaders will need to expand not just their expertise in broader, more comprehensive school improvement strategies, they will need to shift their norms and values about what historically under-resourced schools and communities need to thrive.

Communities Organize to Resist SIG-driven Reforms

Over the last four years, a 25-city coalition of parents, educators, and community members has organized to resist the School Improvement Grant reforms for what they claim are discriminatory impacts on communities of color and high-poverty families. At the heart of their concerns are the federal government’s strategies for turning around 5,000 of the nation’s lowest-scoring schools by mandating, in part, that SIG-funded schools implement one of the four reform models previously described: school closure, turnaround, restart, or transformation. These organizers contend that such reforms effectively destabilize communities, create no right of access to public schools for at-risk students, and do not result in better academic performance for the affected low-income students of color.⁹

Bolstered primarily by their first-hand knowledge of how these reforms have played out in their communities, community organizers across the county have banded together to resist districts’ and states’ decisions to carry out federally-driven school closures, mass layoffs, charter conversions, and the like – the same reforms whose adoption ESSA continues to incentivize. Specifically, they contend that the reforms violate Title VI of the Civil Rights Act of 1964 in that they have the effect of discriminating against African American and Latino students when they are implemented.

Title VI was created as part of the Civil Rights Act of 1964, to prohibit

⁹ Press Release, Journey for Justice, Boycott of Chicago Public Schools Kicks Off National Campaign Calling for Moratorium on School Closings: Chicago Joins 25-City Alliance Demanding Stop To School Deserts (Aug. 28 2013), http://www.thinkinstrategy.com/wp-content/uploads/2013/01/ChicagoAug28PR_8.2013-FINAL.pdf.

discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. The legislation is rooted in the assumption that social justice requires that public monies do not finance any activity that results in racial discrimination.

This grassroots opposition has led to the filing of Title VI civil rights complaints in more than 22 major metropolitan centers where schools have experienced these reforms. While the specifics of each Title VI complaint filed by affected parents, educators, and other community members vary based on the unique conditions in each setting, the most common complaints include the claims that reforms such as school closures, turnaround-driven layoffs, and charter conversions disproportionately affect African American and Latino students. These reforms, plaintiffs contend, degrade the quality of educational opportunities available to these students.

In each case, plaintiffs did not accuse respective agencies of intentional racial discrimination, but of enacting policies that, when implemented, contributed to patterns of racial and socioeconomic discrimination by disproportionately weakening schools that serve high numbers of racial minorities or by disproportionately reducing their students' access to adequate opportunities for teaching and learning.

Implementing such policies, plaintiffs argue, unintentionally exacerbates racial and socioeconomic segregation in previously segregated communities, increases upheaval almost exclusively in high minority, high poverty schools, impairs displaced students' ability to attend schools that are of an equal or higher quality as the targeted schools, and has no positive impact on the educational outcomes of those directly affected, who are almost always African American and Latino and who usually qualify for free- and reduced-price lunch (the conventional proxy for low-income socioeconomic status).

In 2013, the U.S. Department of Education agreed to investigate the complaints. If a district or other entity is found to have violated civil rights through closing schools, mass layoffs, or handing over management to a charter authority, it can be taken to court, denied federal funds, or ordered to comport their actions to federal law. The individuals and groups filing the complaints cite evidence that the percentages of African American and Latino students in schools targeted for closure, turnaround-driven layoffs, or charter expansions are disproportionately higher than their overall district enrollment. Further, they claim that this disproportionate impact is destructive.

The Evidence on SIG-style Reforms and Policies

Mainstream media often described the SIG program as a bold, new, innovative approach to improving schools. Yet because districts and states have been experimenting with most of the SIG-style reforms since before the No Child Left Behind Act of 2001,¹⁰ a sizeable body of rigorous research evidence exists about these types of reforms' anticipated outcomes, as well as their unintended consequences. Multiple high-quality research studies and other evidence reveal that these reforms disproportionately affect students of color, and that these effects are deleterious. Thus, although the overall evidentiary support for the most recent federally funded turnarounds is still in its infancy, much research exists about the practice of reconstitution, or the mass layoff of school staff members, as well as about charter school conversions, as school improvement strategies.¹¹ In what follows, I synthesize the seminal research to date that bears on the plaintiffs' major claims.

The Proportions of African American and Latino students in the Targeted Schools are Consistently Higher than the Overall District Populations

Multiple researchers have found that school closures have a disparate impact on African American and Latino families.¹² In Chicago, Lipman and Haines concluded that school district and city officials employed school closures as part of larger plans to displace African American communities, privatize public schools, and gentrify historically African American neighborhoods.¹³ Others have used GIS mapping to illustrate the heavy concentration of school closures in African American and Latino neighborhoods.¹⁴ In Chicago, for example, 88 percent of students were African American in the 54 schools that were closed, phased out, or attempted to be turned around through mass layoffs, compared to the district's overall African American enrollment of 43 percent. At the same

¹⁰ Trujillo & Renée, *supra* note 3..

¹¹ *Id.*

¹² See, e.g., Pauline Lipman, et al., *Root Shock: Parents' Perspectives on School Closings in Chicago*, COLLABORATIVE FOR EQUALITY AND JUST. IN EDUC. (June 2014), <http://ceje.uic.edu/wp-content/uploads/2014/06/Root-Shock-Report-Compressed.pdf>.

¹³ Pauline Lipman & Nathan Haines, *From Accountability to Privatization and African American Exclusion: Chicago's "Renaissance 2010"*, 21 EDUC. POL'Y 471, 473 (2007).

¹⁴ *The Color of School Closures*, SCHOTT FOUND., <http://schottfoundation.org/resources/color-school-closures>, (last visited Feb. 5, 2016)

time that Chicago's school closures have displaced more than 12,700 students, almost all of whom live in high-poverty Black and Latino neighborhoods, it has also opened more than 15 charter schools.¹⁵ Chicago leaders plan to increase charter enrollment three-fold over the next decade, despite evidence that the schools also serve disproportionately fewer students with special needs.¹⁶ These closings are also concentrated in areas undergoing gentrification, which has the effect of pushing out low-income, usually African American families in exchange for higher income, white or racially mixed families.

Philadelphia oversees the second-highest number of recently closed schools and shows similar stratification patterns. Officials there have shuttered 23 schools (displacing 10,000 students) and plan to continually close remaining schools until all are under charter or another external management authority. The shuttered schools serve 81 percent African Americans, in contrast to the district African American population of 58 percent. At the same time as they closed these public schools, officials opened nine new charter schools and increased the charter budget by \$107 million.¹⁷

In the 22 schools targeted for closure or phase out in New York City, 53 percent of their students were African American, while only 30 percent of all New York City students are African American.¹⁸

Similar patterns have been documented in Detroit, Washington D.C., Oakland, Newark, Houston, and other cities. Although the specific numbers vary across municipalities, these patterns make clear that students of color, usually from high-poverty backgrounds, experience school closures at higher rates than do their white counterparts from higher social strata.

School Closures and Charter Conversions Do Not Result in Students Attending Better Schools

A recent meta-analysis by the Broader, Bolder Approach to Education

¹⁵ Samantha Winslow, *In Chicago and Philadelphia, Closing Schools and Funding Charters*, LABOR NOTES (2013) <http://www.labornotes.org/2013/09/chicago-and-philadelphia-closing-schools-and-funding-charters>.

¹⁶ Sarah Karp, *The right choice? Charter schools serve fewer special education students, and some struggle to meld their unique philosophy with the needs of these students*, CATALYST (2012), <https://www.yumpu.com/en/document/view/34956527/download-this-issue-pdf-catalyst-chicagoorg/13>.

¹⁷ Winslow, *supra* note 15.

¹⁸ *The Color of School Closures*, *supra* note 14.

examined the impacts of school closures and increased charter school access on student test-based outcomes in Chicago, New York City, and Washington D.C.. These researchers found that school closures did not send students to better performing schools.¹⁹ Another recent study linked school closures with lower test score outcomes.²⁰ Another study found that when Chicago Public Schools' then Chief Executive Office Arne Duncan (the current U.S. Secretary of Education) closed 18 underperforming elementary schools, only six percent of displaced students ended up in schools with higher test scores and greater resources. Almost all transferred to an equally low-performing school.²¹

With respect to the argument that replacing struggling schools with charters or converting them into charters will improve students' access to better educational opportunities, Weiss and Long also comprehensively synthesize the research on charter school effectiveness and find that charters' impacts on achievement for low-income children of color is mixed at best. Among the multiple studies, they point to the seminal research from Stanford's Center for Research on Education Outcomes, which showed wide variation in performance across charters, and which revealed that twice as many students lost test points as those who gained points from being in a charter school. They also illustrate how the expansion of charter schools depletes a district of students and their associated per-pupil funding, while a district's overhead expenses may remain relatively constant. Over time, this charter school expansion can siphon financial resources from districts without the benefit of improving students' educational opportunities.

Mass Layoffs Do Not Result in Better Teacher Replacements or Higher Quality Academic Environments

In 2007, the Mass Insight Education and Research Institute published *The Turnaround Challenge*, a report that argued for a new, tougher

¹⁹ Better schools are defined as schools that score higher on standardized test scores. While measurement experts have called into question the validity of most standardized tests used for state and federal high-stakes accountability policies, for the purposes of this article, these outcomes are used as one indicator of success because they are the outcomes most often relied upon under the current policy structures.

²⁰ John Engberg, et al., *Closing schools in a shrinking district: Do student outcomes depend on which schools are closed?*, 71 J. OF URB. ECON. 189, 189 (2011).

²¹ Marisa de la Torre & Julia Gwyne, *When Schools Close: Effects on Displaced Students in Chicago Public Schools*, UNIV. OF CHICAGO CONSORTIUM ON SCH. RES. 2 (2009), <https://ccsr.uchicago.edu/sites/default/files/publications/CCSRSchoolClosings-Final.pdf>.

approach to improving the bottom 5% of schools.²² It was motivated by the mounting evidence documenting the failure of NCLB-driven reforms to produce quick, intensive test score gains, as well as by the growth of business and management gurus promoting corporate-style turnaround efforts.²³ At that time, school turnaround efforts had already begun springing up, most notably those spearheaded by Chicago's Academy for Urban School Leadership.²⁴

Such turnaround efforts continued to increase despite "a large body of research [that] explains the advantages of experienced teachers over lower-paid novices, and the importance of continuity and stability in improving student outcomes."²⁵ In D.C., New York, and Chicago, for example, not only were lower quality teachers brought in as replacements in turnaround schools; more experienced, credentialed teachers voluntarily resigned after the layoffs.²⁶ A comprehensive, long-term study in Maryland demonstrated that reconstitution inadvertently reduced schools' social stability and climate, and was not associated with either organizational improvements or heightened student performance.²⁷ In Texas, a cross-case analysis of four turnaround urban high schools found that rapidly changing technical changes and haphazard adjustments from external organizations in effect magnified certain organizational challenges that existed prior to the turnaround efforts. The study also

²² Andrew Calkins, William Guenther, Grace Belfiore, & Dave Lash, *The Turnaround Challenge: Why American's Best Opportunity to Dramatically Improve Student Achievement Lies in Our Worst-Performing Schools*, MASS INSIGHT EDUC. & RES. INST. (2007), <http://www.schoolturnaroundsupport.org/resources/turnaround-challenge-why-america%E2%80%99s-best>.

²³ See, e.g., JIM COLLINS, *GOOD TO GREAT: WHY SOME COMPANIES MAKE THE LEAP ...AND OTHERS DON'T* (2001). See also JOSEPH MURPHY & COBY V. MEYERS, *TURNING AROUND FAILING SCHOOLS: LEADERSHIP LESSONS FROM THE ORGANIZATIONAL SCIENCES* (2008).

²⁴ Daniel L. Duke, *Tinkering and turnarounds: Understanding the contemporary campaign to improve low-performing schools*, 17 J. OF EDUC. FOR STUDENTS PLACED AT RISK 9 (2012).

²⁵ ELAINE WEISS & DON LONG, *BROADER, BOLDER APPROACH TO EDUCATION, MARKET-ORIENTED EDUCATION REFORMS' RHETORIC TRUMPS REALITY: THE IMPACTS OF TEST-BASED TEACHER EVALUATIONS, SCHOOL CLOSURES, AND INCREASED CHARTER SCHOOL ACCESS ON STUDENT OUTCOMES IN CHICAGO, NEW YORK CITY, AND WASHINGTON, D.C.* (2013).

²⁶ Michael Holtzman, *A Rotting Apple: Education Redlining in New York City*, SCHOTT FOUND. (Apr. 2012) <http://schottfoundation.org/resources/education-redlining-new-york-city>.

²⁷ Betty Malen et al., *Reconstituting schools: "Testing" the "Theory of Action"*, 24 EDUC. EVAL. AND POL'Y ANALYSIS 113 (2002).

found no immediate improvements in student achievement, grade retention, or dropouts.²⁸ This study parallels other research, which showed that non-test-based indicators of quality, such as learning climate, the level of intellectually challenging academic work, or family and community involvement, did not match up with a turnaround school's test scores from year to year.²⁹

These patterns are also buttressed by seminal studies of Chicago's reform experiences, which demonstrate that teacher turnover harms schools even when higher quality replacements are found.³⁰ In addition to the adverse effects of mass layoffs on students' and teachers' morale, localized knowledge about students and the community also declines. Collegiality, trust, professional relations, and community ties – necessary conditions for improving student performance – all wane. Finding enough qualified personnel to fill vacant slots in reconstituted schools has also proven difficult. In some cities, for example, districts found themselves swapping principals from one SIG-funded school to another. In Louisville, over 40 percent of the teachers hired to work in turnaround schools were completely new to teaching.³¹ Another study showed how hiring difficulties forced many reconstituted schools to begin the school year with high numbers of substitutes.³²

Consistent with these findings, Weiss and Long also found that turnaround-driven layoffs and related reforms did not strengthen school systems, and actually *increased* instability and faculty churn.³³ They cite evidence from D.C. in which teacher attrition – beyond that attributable to the mass firings – increased each year the reforms were instituted. They go on to show that in order for teacher layoffs to achieve their intended goals, the systems must lose the worst teachers, but in D.C. and elsewhere the majority of those who left during these reforms were the better, more experienced educators.

²⁸ Julian Vasquez Heilig, et al. (In Press).

²⁹ Muriel Berkeley, *A practitioner's view on the policy of turning schools around*, 17 J. OF EDUC. FOR STUDENTS PLACED AT RISK 34 (2012).

³⁰ ANTHONY S. BRYK, ET AL., ORGANIZING SCHOOLS FOR IMPROVEMENT: LESSONS FROM CHICAGO 206-7 (2010).

³¹ Alyson Klein, *In Expensive School Turnaround Project, Questions about Effectiveness*, FLORIDA CTR. FOR INVESTIGATIVE REPORTING (2012), <http://fcir.org/2012/04/20/in-expensive-school-turnaround-project-questions-about-effectiveness/>.

³² *A Call to Restructure Restructuring: Lessons from the No Child Left Behind Act in Five States*, CTR. ON EDUC. POL'Y 25-6 (2008), <http://www.cep-dc.org/displayDocument.cfm?DocumentID=175>.

³³ Weiss & Long, *supra* note 18.

What is more, several scholars have investigated the effects of turnaround-driven layoffs and teacher replacements due to charter expansion to find that such staffing changes decreased the representation of teachers of color, particularly educators of color.³⁴ These demographic shifts are concerning, given the research that has demonstrated the positive effects of having a teacher of one's own race on student achievement³⁵ and on students' understanding about racism and ethnocentrism in school and society.³⁶ Such SIG-driven turnaround layoffs also work against national efforts to diversify the teaching force by retaining teachers of color in order to strengthen the quality of schools that serve large proportions of children of color.³⁷

Based on these patterns, the ultimate effects of turnarounds seem to be lower quality teachers and less stable learning environments for districts' neediest students.

Closures, Turnarounds, and Charter Conversions Do Not Improve Student Performance

Despite a lengthy research tradition that points to the multiple adverse effects of student mobility on student outcomes,³⁸ policymakers have been

³⁴ KRISTEN L. BURAS, CHARTER SCHOOLS, RACE, AND URBAN SPACE: WHERE THE MARKET MEETS GRASSROOTS RESISTANCE 125 (2015).

³⁵ Anna J. Egalite, et al., *Representation in the classroom: The effect of own-race teachers on student achievement* 45 ECON. OF EDUC. REV. 44 (2015); Robert W. Fairlie, et al., *A Community College Instructor Like Me: Race and Ethnicity Interactions in the Classroom*, NAT'L BUREAU OF ECON. RES. (Sept. 2011), <http://www.nber.org/papers/w17381.pdf>; Thomas S. Dee, *The Race Connection: Are Teachers more Effective with Students Who Share Their Ethnicity?*, EDUC. NEXT 52 (Spring 2004), http://educationnext.org/files/ednext20042_52.pdf.

³⁶ Alice Quioco & Francisco Rios, *The Power of their Presence: Minority Group Teachers and Schooling*, 70 REV. OF EDUC. RES. 485, 487 (2000); Ana Maria Villegas, et al., *Closing the Racial/Ethnic Gap between Students of color and their teachers: an elusive goal*, 45 EQUITY & EXCELLENCE IN EDUC. 283, 287(2012).

³⁷ Betty Achinstein, et al., *Retaining Teachers of Color: A Pressing Problem and a Potential Strategy for "Hard-to-Staff" Schools*, 80 REV. OF EDUC. RES. 71 (2010); Erica Frankenberg, *The Segregation of American Teachers*, 17 EDUC. POL'Y ANALYSIS ARCHIVES (2009).

³⁸ Eric A. Hanushek, et al., *Disruption versus Tiebout improvement: the costs and benefits of switching schools*, 88 J. OF PUB. ECON. 1721 (2004); Zeyu Xu et al., *Student Transience in North Carolina: The Effect of Mobility on Student Outcomes Using Longitudinal Data*, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RES. (Mar. 2009), http://www.caldercenter.org/sites/default/files/1001256_student_transience.pdf.

experimenting with reforms that displace students for some time. In fact, when Chicago first began employing turnaround-driven closures and layoffs, the media initially highlighted several cases of so-called “miracle” schools, or low-scoring schools that were alleged to have dramatically changed their performance by firing staff or being turned over to private management companies. Yet almost all of these cases were later debunked,³⁹ as analysts found that Chicago’s turnaround efforts did not produce the expected changes in test scores.⁴⁰

Likewise, in a large, urban district in the Western United States, Kirshner and colleagues found that African American and Latino students displaced after a school closure exhibited lower academic outcomes and higher indicators of emotional stress.⁴¹ And as recently as 2012, researchers found that when district officials transferred displaced students to either moderately or significantly higher-performing schools, test scores declined at the moderately higher-performing schools, but not at *significantly* higher-performing schools.⁴² Although scores did not improve in these schools, these latter findings suggest that transferring students to substantially higher performing schools – an atypical practice among school closures to date – may offset some of the negative effects.

Finally, in one of the most comprehensive analyses to date, researchers who studied district test score data from the National Assessment of Educational Progress (NAEP) – the test long judged to be the gold standard in student assessment – found that turnaround-driven layoffs and related reforms did not improve NAEP outcomes, either.⁴³ In some cases, they even found that race-based test score gaps increased.

Another comprehensive study, whose results are due to be released soon, is the Institute for Education Science’s current Turning Around Low-Performing Schools project. This longitudinal federal study analyzed three years’ worth of test score data to identify and analyze

³⁹ Matt Farmer, *Taking It To the Next Level with CPS and AUSL*, THE HUFFINGTON POST (2011), http://www.huffingtonpost.com/matt-farmer/chicago-collins-academy-turnaround_b_1159465.html.

⁴⁰ *Chicago’s democratically-led elementary schools far out-perform Chicago’s “turnaround schools”*: Yet turnaround schools receive lavish extra resources, DESIGNS FOR CHANGE (Feb. 2012), http://missourieducationwatchdog.com/wp-content/uploads/2015/02/democracy_vs_turnarounds.pdf.

⁴¹ Ben Kirshner, et al., *Tracing Transitions: The Effect of High School Closure on Displaced Students*, 32 EDUC. EVAL. AND POL’Y ANALYSIS 407 (2010).

⁴² John Engberg et al., *Closing schools in a shrinking district: Do student outcomes depend on which schools are closed?*, 71 J. OF URB. ECON. 189 (2011).

⁴³ Weiss & Long, *supra* note 18.

sustained turnarounds. Out of 750 low-performing schools, researchers identified 15 percent who were able to sustain an increase in the number of proficient students, but the increase was modest – five percentile points, usually in math.⁴⁴

With respect to charter expansions, scholars have repeatedly found that, at best, charter schools do only as well as traditional public schools, and oftentimes do worse.⁴⁵ Beyond the unpromising test-based effects of charter schools, however, other researchers have documented the racially segregative effects of charter expansion. Frankenberg and Lee, for example, analyzed charter school enrollment patterns in 16 states that represented over 95 percent of the U.S. charter school population to find that seventy percent of all black charter school students attend intensely segregated minority schools compared with only 34 percent of black charter school students.⁴⁶ They also found that white students consistently attended charters that were disproportionately whiter than the overall charter school population in their state. Other research has corroborated these findings.⁴⁷

Despite this evidence, reports of successful turnarounds and charter schools that are “beating the odds” still seem to permeate the media.⁴⁸ As for turnarounds, one explanation for these conflicting reports can be seen in the recent literature on turnaround-style school layoffs. Much of this literature relies on “snapshot” analyses, or studies that report only one year

⁴⁴ Sarah D. Sparks, *New Studies Dissect School Turnarounds*, EDUC. WEEK (Sep. 19 2012), <http://www.edweek.org/ew/articles/2012/09/19/04turnaround.h32.html>.

⁴⁵ *Multiple Choice: Charter School Performance in Sixteen States*, CTR. FOR RES. ON EDUC. OPPORTUNITIES (CREDO) (June 2009), http://credo.stanford.edu/reports/MULTIPLE_CHOICE_CREDO.pdf; Sarah Theule Lubienski & Christopher Lubienski, *School Sector and Academic Achievement: A Multilevel Analysis of NAEP Mathematics Data*, 43 AMER. EDUC. RES. J. 651 (2006); *A Closer Look at Charter Schools Using Hierarchical Linear Modeling (NCES 2006-460)*, NAT'L ASSESSMENT OF EDUC. PROGRESS (Aug. 2006), <http://nces.ed.gov/nationsreportcard/pdf/studies/2006460.pdf>; *The Evaluation of Charter School Impacts: Final Report (NCEE 2010-4029)*, NAT'L CTR. FOR EDUC. EVAL. & REGIONAL ASSISTANCE (June 2010), <http://files.eric.ed.gov/fulltext/ED510573.pdf>.

⁴⁶ Erica Frankenberg & Chungmei Lee, *Charter Schools and Race: A Lost Opportunity for Integrated Education*, 11 EDUC. POL'Y ANALYSIS ARCHIVES 32 (2003).

⁴⁷ See, e.g., John Kucsera & Gary Orfield, *New York's Extreme School Segregation: Inequality, Inaction, and a Damaged Future*, THE CIVIL RIGHTS PROJECT (Mar. 26, 2014), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/ny-norfl-et-report-placeholder>. See also Preston C. Green III et al., *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 253 (2012).

⁴⁸ Trujillo & Renée, *supra* note 3.

of test score data, rather than longitudinal data that could show growth over time. When researchers have examined the long-term test performance of schools initially identified as turnarounds, they have found that almost all gains incurred during the one- to three-year windows are not sustained and in some cases are linked with later declines.⁴⁹ This recent turnaround literature also varies as to its definitions of what constitutes a successful turnaround, including how much growth is required to consider a school effectively turned around. In the end, such examinations offer little reliable evidence about the lasting effects of mass layoffs.

Displaced Students' Safety May be Jeopardized When Commuting to New Schools

Much of the discourse about the efficacy of these reforms tends to focus on their impacts on test scores or teacher quality, yet in the affected communities basic considerations about safety have arisen as displaced students commute to new schools and through new neighborhoods with varying levels of security and order. After recently shuttering 47 schools in Chicago, Mayor Rahm Emanuel and the Chicago Public Schools CEO Barbara Byrd-Bennett expanded the Safe Passage program, a group of civilians hired to protect displaced children when walking through gang boundaries and hazardous neighborhoods to their new schools. Since the beginning of the school year, affected families have voiced numerous concerns about safety and order along designated Safe Passage routes, as multiple shootings of adults and minors have occurred along the routes (most during non-school hours), two Safe Passage monitors have been arrested on the job, and several have already resigned.⁵⁰

Similar concerns exist in Philadelphia, where the district is relying on

⁴⁹ Craig Hochbein, *Relegation and Reversion: Longitudinal Analysis of School Turnaround and Decline*, 17 J. OF EDUC. FOR STUDENTS PLACED AT RISK 92 (2012); Andy Smarick, *The Turnaround Fallacy*, 10 EDUC. NEXT 20 (Spring 2010); David A. Stuit, *Are Bad Schools Immortal? The Scarcity of Turnarounds and Shutdowns in Both Charter and District Sectors*, THOMAS B. FORDHAM INST. (Dec. 14, 2010), <http://edexcellence.net/publications/are-bad-schools-immortal.html>.

⁵⁰ *CPS Safe Passage Worker Turnover an Issue as Top Cop Calls Program's First Week a Success*, THE HUFFINGTON POST (Sept. 3, 2013, 5:35 p.m.), http://www.huffingtonpost.com/2013/09/03/cps-safe-passage_n_3862070.html; Mitch Smith & Jeremy Gorner, *Uptown shooting has parents on edge*, CHICAGO TRIBUNE (Aug. 20, 2013), http://articles.chicagotribune.com/2013-08-20/news/ct-met-uptown-shooting-folo-20130821_1_safe-passage-uptown-shooting-five-men.

the Safety First program to secure recently displaced students now commuting through high-crime neighborhoods and longer, more precarious paths. Newly transferred students in one school, for example, must now travel across 11 two-lane streets, over half of which have high vehicle traffic, as well as across three of the highest volume public transportation routes. 35 registered sex offenders are located within 1.5 miles of the new route.⁵¹

Although D.C.'s present Chancellor and Mayor still plan to shutter dozens more schools, the logistics of forcing students to commute increasingly farther distances and through hazardous neighborhoods are gradually becoming more convoluted. Because the district now only pays for bussing when mandated by special education students' Individual Education Plans, displaced families must absorb the heightened transportation expenses. Students who live far away from their new schools and who cannot afford the increased transportation costs may be at risk of attending school less often and dropping out altogether.⁵²

While this evidence is still anecdotal, the sharp rise in reports questioning students' safety amid school closures points to areas in need of systematic investigation, as well as areas where policy makers should more fully consider not just the academic and economic merits of these reforms, but their social costs – children's basic safety.

When considered in its entirety, the research discussed above suggests that these reforms are unlikely to result in the kind of broad, meaningful positive change that policymakers are seeking in terms of improving the affected students' access to high quality schools and educational outcomes over a sustained period of time. Several studies demonstrate that school closures and charter conversions do not consistently result in students attending higher quality schools, and others show that the reverse can occur. Research on reconstitution and related mass layoffs indicates that these techniques do not yield higher quality teacher replacements and that they regularly damage schools' climate, student and teacher engagement, and increase teacher attrition – even for those teachers not yet targeted for layoffs. Even the frequently cited “bottom line” – student test scores – does not transpire the way policymakers and advocates anticipate it will; repeated studies now point to these reforms' lack of positive effects on

⁵¹ Maurice Jones, *Safety First? District's Plans for Getting Students Safely to School are Lacking*, THE NOTEBOOK (Aug. 29, 2013), <http://thenotebook.org/articles/2013/08/29/safety-first-district-s-plans-for-getting-students-safely-to-school-are-lacking>.

⁵² Weiss & Long, *supra* note 18.

student achievement or adverse effects on test-based racial performance gaps. Finally, a much less prominent consequence discussed in the public discourse about these reforms is their impacts on students' basic safety and well-being. New, longer commutes risk exposing students to greater social dangers and impairing their ability to regularly and safely commute to their new schools.

An important characteristic of all of these reforms is their inattentiveness to the social and economic conditions within which the targeted schools exist. Despite decades of social science research that points to the pervasive effects of poverty, as well as the impacts of racial and economic segregation on students' academic performance,⁵³ these policies focus squarely on within-school factors to improve achievement. They do not address the community conditions within which these struggling schools are embedded. By ignoring larger structural impediments to students' educational opportunities, like inadequate funding structures, they deprive under-resourced schools of sustained, equitable resources. In their heavy focus on teacher- and school-based accountability for test-based achievement, they minimize attention to students' social, emotional, mental, and physical health—all factors that predict students' academic success more strongly than high-stakes interventions.

In this way, these findings illustrate the gulf between the federal government's current approach to school improvement and the ESEA's original intent—to equalize educational opportunity for historically underserved communities. They point overwhelmingly to the various ways in which school closures, turnarounds, and charter conversions have the effect of exacerbating existing inequalities for high-poverty students of color. In light of this knowledge base, this article proposes a more equitable structure for the Every Student Succeeds Act, one that takes into account the entrenched patterns of racial and economic segregation

⁵³ James Coleman, *The Concept of Equality of Educational Opportunity*, in TRANSFORMING URBAN EDUCATION 16 (Joseph Krestovics & Edward J. Nussel, eds., 1994); CHRISTOPHER JENCKS ET AL., INEQUALITY: A REASSESSMENT OF THE EFFECTS OF FAMILY AND SCHOOLING IN AMERICA (1972); IRA KATZNELSON & MARGARET WEIR, SCHOOLING FOR ALL: CLASS, RACE, AND THE DECLINE OF THE DEMOCRATIC IDEAL (1985); Gloria Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. schools*, 35 EDUC. RESEARCHER 3 (2006); Richard Rothstein, *The Racial Achievement Gap, Segregated Schools, and Segregated Neighborhoods: A Constitutional Insult*, 7 RACE AND SOCIAL PROBLEMS 21 (2014); JEAN ANYON, GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM (1997).

characteristic of most of the communities targeted by these reforms, and that returns to the ESEA's original goals for equalizing opportunities and access to quality schools for traditionally underserved populations.

Renewing the Federal Commitment to Equal Educational Opportunity: A Proposal for Investing in School and Community Capacity

Despite federal policy makers' good intentions, rigorous research evidence predicts that the particular federal interventions that continue to exist under ESSA will repeatedly miss the mark in terms their ability to address the root causes of the racial and socioeconomic disparities in academic performance. This is because our lawmakers' current "quick fix" strategies fail to take into account the structural and institutional obstacles that students in low-performing schools (and limited opportunity neighborhoods and communities) face, all of which result in persistently low school performance. Now that the Elementary and Secondary Education Act has been re-authorized, state and federal decision-makers stand at an important crossroads. They can maintain the status quo by continuing the same ineffective, deleterious practices that attempt to incentivize districts and schools to improve performance through competition-centered, high-stakes reforms, or they can abandon such counterproductive practices in favor of policies that promote more democratic, equitable investments in schools and communities.

By reorienting their approach away from punitive consequences for historically under-resourced schools and toward more sustained inputs that are based on proven strategies for increasing students' opportunities to learn, state and federal lawmakers can craft a robust system of educational support that addresses the various opportunity gaps that children of color and low-income families face outside of school. More specifically, policy makers can revive the original intent of the soon-to-be-defunct SIG program – to ensure greater educational opportunity – by redistributing financial and educational resources in a manner that targets families who lack access to stable housing, employment, health care, and other conditions that strongly predict educational success.⁵⁴

Thus, in what follows, I propose concrete legislative changes that would not only halt the current discriminatory aspects of the Department's

⁵⁴ Kevin G. Welner & William J. Mathis, *Reauthorization of the Elementary and Secondary Education Act: Time to Move Beyond Test-Focused Policies*, NAT'L EDUC. POL'Y CTR. (Feb. 12, 2015), <http://nepc.colorado.edu/publication/esea>.

current SIG programs, but that would replace them with policies and resources that stand to build the capacity of public schools and districts to provide more equal educational opportunities for our nation's least resourced communities. The proposal is organized around three focal areas: increased, equitable federal funding structures; full-service community schools; and broad-based university research.

1. Institutionalize greater, more equitable federal spending for public education, particularly as it is allocated to the least served schools and districts, by increasing ESSA's overall budget and redistributing federal and state education funding based on districts' and schools' demonstrated needs.

Secure permanent, more equitable financial support for states' lowest performing schools as a part of ESSA's official Title I budget. These changes can include the following:

1a. Instead of equally allocating increased permanent funding to all state and local agencies, re-allocate Title I funding based on a weighted formula that accounts for school and districts' poverty levels, percentages of English Learners, percentages of special education students, communities' economic and racial isolation, and other demographic characteristics that are associated with lower opportunities for and access to high quality schools. California's new Local Control Funding Formula provides one example of how this new redistributive finance formula might look.

1b. In addition to equitably increasing absolute Title I levels, eliminate the use of short-term federal funding for school improvement in favor of more sustained, augmented funding for historically underserved schools. The revised Title I grant-making formula for schools undergoing federally-driven reforms should allocate longer-term financial support that is phased out over a period of more than three years. This gradual reduction in funding provides schools more time and financial resources to adapt their changes to progressively shifting funding levels, and to forecast the economic, human, or technical structures that will need to be in place to sustain their growth as federal funding for their reforms slows.

2. Eliminate federally funded reform models whose effectiveness is not supported by research (e.g., turnarounds, charter schools, and closures) in order to invest significantly more resources in holistic, locally adaptive approaches to strengthening the whole child and the whole school: full-service community schools.

Rather than permit schools to use Title I funds for any reform model that has either proven to be ineffective or counterproductive, require schools to build their capacity for overall improvement by implementing research-based, wrap-around services that address students' social, emotional, civic, and broad academic needs. Currently, at least 17 state legislatures have introduced bills to provide for full-service community schools through state grants, re-allocated funding streams (e.g., federal ESEA waivers), and the allowable use of full-service community schools as an alternative to the current SIG turnaround models. Each of these states provides constructive examples of how other states can revise their legislation.

Here, too, California's recent community schools legislation provides a strong model upon which other states' program could be based. For example, a state can incentivize local education agencies to invest in students' social, emotional, mental, and physical health, as well as their broad academic development, by making funding contingent on their demonstrated commitment to the following school-wide changes:

2a. Significantly increase mental and physical health services for children and their families, including hiring and/or increasing the currently allocated school psychologist, school nurse, and social worker. Open a school clinic that is available to both students and their families.

2b. Implement research-based, whole-school curriculum for socio-emotional learning.

2c. Develop systems for Positive Behavior Intervention and Supports, Restorative Justice, or other school-wide strategies that reinforce positive behaviors, reduce ineffective and counterproductive punitive practices (e.g., zero tolerance

policies), and build students' capacity to identify positive resolutions to conflict, repair harm, and develop a school-wide climate of respect, dignity, and collective-minded values.

2d. Require schools to develop plans for significantly reducing suspensions, expulsions, trancies, and referrals to law enforcement agencies. Mandate that these plans focus on racial, economic, or other populations that are over-represented in the schools' discipline statistics.

2e. Develop research-based, school-wide professional development for all staff that focuses on implicit bias and cultural competence training, as well trauma-informed practices.

2f. Require partnerships with multiple community-based organizations (CBOs) that have a demonstrated track record of successfully providing the wrap-around services that the school is implementing. CBOs that are not located within the community and that do not have a history of serving the school's surrounding community (e.g., national school reform organizations or technical assistance providers that are external to the community) are not eligible.

2g. Develop opportunities for affordable summer and after school resources, including summer camps and enrichment classes, located on the school property. Ensure that financial assistance to participate in all camps, classes, etc. is available to families with demonstrated needs.

2h. Assemble a district stakeholder decision-making council composed of multiple school leaders, a cross-section of teachers, students, a demographically representative number of parents, mental health staff, a district representative, and community-based leaders. Authorize the council to review and select the school-wide wraparound services described above.

2i. Engage the district stakeholder council in deliberating about the schools' instructional priorities and in reviewing and selecting research-based, school-wide professional development resources for teaching and learning. In order to

ensure that Title I-funded schools develop a well-rounded instructional focus, require that these resources focus on non-test based instructional priorities. Do not permit Title I funding to be used for untested consultants, coaches, “turnaround specialists,” or other intermediary organizations that do not have a demonstrated track record of success in providing support to demographically similar schools in these non-test based instructional areas. Require that these new instructional priorities be specific to each school’s faculty needs. That is, design professional learning opportunities that differentiate among novice teachers, experienced teachers, teachers of English language learners or other special needs students, etc.

2j. Develop an evaluation and monitoring system in which the school reports the goals, progress, and outcomes of its wrap-around services each year to its district’s central office. Require that the school stakeholder council collaborate with the district to revise its goals for wrap-around services each year, based on the annual monitoring data.

3. Invest in ongoing, university-based research efforts that examine all aspects of federally funded processes and outcomes in schools and districts, and that disseminate this research-based knowledge to communities, practitioners, policy-makers, and academic audiences.

3a. Designate a portion of the ESSA budget to be allocated to funding longitudinal, university-based research and evaluation projects that examine multiple dimensions of federal school improvement initiatives, beyond their potential impacts on test-based achievement. Grant funding to interdisciplinary teams of university-based researchers with demonstrated expertise in each of the areas that the federally funded school improvement efforts are designed to target.

3b. Require federally-funded research teams to regularly report their findings to academic, policy, practitioner, and community audiences, and that the non-academic findings be disseminated in accessible formats.

3c. Require the Department of Education to convene periodic meetings in which its representatives collaborate with representatives from the federally-funded university-based research teams to share learning and discuss potential future revisions to ESSA based on this knowledge.

Conclusion

The original purpose of ESEA was to provide supplemental support to the nation's neediest schools and their students. The rationale seemed simple: schools could use increased aid to provide extra resources that their specific populations needed in order to equalize the educational opportunities available to them. Implicit in the legislation was a decidedly democratic assumption – as a welfare state, the federal government had a responsibility to ensure all children's equal educational opportunity by redistributing resources to schools based on needs created in part by legacies of both de jure and de facto unfair treatment.

Unfortunately, with the inception of the No Child Left Behind Act, the Race to the Top program, and now the Every Student Succeeds Act, the democratic spirit of the ESEA was sacrificed in an effort to promote a market-oriented educational system based primarily on principles of efficiency and measurable outcomes. While these two aims – efficiency and attention to results – are worthy goals, taken alone they distort the overall purpose of the ESEA because they minimize attention to the necessary inputs that are required to build an equitable system of public education for a diverse society. Under ESSA, adequate capacity-building resources remain scarce. And as the review of evidence in this article underscores, the types of reforms that ESSA continues to encourage have the paradoxical effect of actually reducing equal educational opportunity. They destabilize communities by systematically starving schools of indispensable resources. The effects of these federally driven reforms, then, directly contradict the original premise of the ESEA. In its present form, ESSA still drains schools of essential inputs that long lines of research have demonstrated are critical to creating thriving schools and communities.

With this most recent re-authorization, the federal government has continued to reinforce a primarily test-based, high-stakes accountability regime that depletes vital instructional, social, and economic resources and conditions from schools, and that has never produced the positive results that policymakers imagined it would. State policymakers, however, have

an opportunity to use their increased flexibility to rethink the rationale behind the latest incarnations of what was once a pioneering example of the United States' commitment to social welfare-oriented ideals. They can change course, if they choose to do so, by abandoning the most familiar, yet least constructive, approaches to school reform. Investing more broadly in holistic, full-service community schools, and building a systematic pipeline for learning from evidence, offers one step toward restoring lawmakers' promise fifty years ago to ensure equal opportunity for all children.

Regional Equity as an Educational Policy Goal: Tackling the Root Cause of Educational “Failure”

Kara S. Finnigan, Jennifer Jellison Holme & Joanna Sánchez*

Prior to the enactment of the Elementary and Secondary Education Act (ESEA), in the 1940s and 1950s, the vast majority of people living in metropolitan areas lived inside the boundaries of central cities. Residential patterns in cities were increasingly segregated as a result of a number of discriminatory housing policies and practices spread during this time, including violence, realtor steering, and racially restrictive covenants.¹ School districts exacerbated this housing segregation through gerrymandering of school attendance boundaries, discriminatory transfer policies, and race-based school construction decisions.² These segregation patterns were fueled by Federal Housing Administration (FHA) endorsed redlining by banks and insurance companies, thus denying housing opportunities to African American and Latino families, while incentivizing moves by whites to the suburbs through low-cost loans.³

In the 1960s through the 1990s, after the enactment of ESEA, white flight accelerated out of urban cores, while deindustrialization produced significant rises in the concentration of poverty in urban centers. This left urban school systems with high concentrations of high needs students, yet few tax dollars and resources with which to serve them.⁴

* Kara S. Finnigan is an Associate Professor of Educational Leadership in the Warner School of Education at the University of Rochester. Jennifer Jellison Holme is an Associate Professor of Educational Policy and Planning in the Department of Educational Administration at the University of Texas at Austin. Joanna Sánchez is a graduate student in the Department of Educational Administration at the University of Texas at Austin.

¹ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998).

² CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2004); JAMES RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2011).

³ KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985); Massey & Denton, *supra* note 2.

⁴ Jennifer Jellison Holme & Kara S. Finnigan, *School Diversity, School District Fragmentation, and Metropolitan Policy*, 115 *TEACHERS C. REC.* 1, 29 (2013).

Today, students are even more isolated from one another across district boundary lines—both by race and by social class. Indeed, a recent study found that in 2009, the proportion of segregation between whites and non-whites that was “between” (rather than within) school districts was 66.9%—a rise from 49.1% in 1993.⁵ In parallel, economic segregation between public school districts increased in the 1990s through 2000s in three-quarters of the 100 largest metropolitan areas.⁶ This growth in between-district segregation has serious implications for school systems and educational opportunity, limiting access to resources and to diverse learning environments.⁷ Racial and socioeconomic isolation is especially important in light of the research that suggests that diverse learning environments have resulted in positive benefits for students including improved achievement scores; reduced dropout rates; increased graduation rates, and improved racial attitudes.⁸

How did we get to where we are today given 50 years of attention to issues of educational inequality? Given the ongoing concerns around educational “failure,” it is important to consider whether ESEA led to improvement in educational outcomes or exacerbated inequities. In this article, we argue that ESEA was a missed opportunity to affect change and improve schools by directly targeting school segregation across district boundary lines, and, in fact, may have resulted in greater inequities between school districts across regions.

For this article, we draw on both an analysis of the educational reform literature, as well as our own study of the eight current inter-district desegregation plans across the country: Boston, St. Louis, Rochester, NY, Hartford, Milwaukee, Omaha, Minneapolis, and East Palo Alto, CA. The study, funded by the Ford Foundation, involved more than 100 interviews

⁵ Kori J. Stroub & Meredith P. Richards, *From Resegregation to Reintegration: Trends in the Racial/Ethnic Segregation of Metropolitan Public Schools, 1993-2009*, 50 AMER. EDUC. RES. J., 497, 531 (2013).

⁶ Sean F. Reardon & Ann Owens, *60 Years after Brown: Trends and Consequences of School Segregation*, 40 ANN. REV. OF SOC., 199, 218 (2014).

⁷ Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter*, 44 URB. AFF. REV. 182 (2008).

⁸ See Jonathan Guryan, *Desegregation and Black Dropout Rates*, 94 AMER. ECON. REV. 919 (2004); Rucker Johnson, *Long-Run Impacts of School Desegregation and School Quality on Adult Attainments*, NAT'L BUREAU OF ECON. RES. (January 2011), <http://www.nber.org/papers/w16664>; Reardon & Owens, *supra* note 7; Heather Schwartz, *Housing Policy is School Policy: Economically Integrative Housing Promotes Academic Success in Montgomery County, Maryland*, THE CENTURY FOUND. (October 15, 2010), <http://www.tcf.org/work/education/detail/housing-policy-is-school-policy/>; AMY STUART WELLS, ET AL., BOTH SIDES NOW: THE STORY OF DESEGREGATION'S GRADUATES (2009).

with key stakeholders as well as document analysis.⁹ Many of these plans were enacted at the same time that urban districts were receiving increasing amounts of federal funding through ESEA, and thus they illustrate the tension between efforts to address segregation and Title I efforts at reforming increasingly segregated urban schools.

First we discuss how ESEA represented a policy approach that largely overlooked the issue of segregation as an underlying cause of educational failure, as many reforms do today. We illustrate how, over time, ESEA became focused primarily on making segregation “work” through different policy strategies--at the same time that the communities we studied worked on their own, with little federal support, to tackle growing segregation between city and suburban schools. Second, we present a case study of one of our study sites, Milwaukee, to illustrate how ESEA’s ‘separate but equal’ strategy failed to improve achievement within a district that was growing increasingly racially isolated and with extreme rates of poverty, as poverty rates grew due to deindustrialization and families with resources moving to surrounding suburbs. We show how policymakers within Milwaukee tried to tackle growing segregation in the metro area through a city-suburban desegregation plan, but did so with little political support and disconnected from housing policy, and as a result these efforts have faded. Instead the growing isolation, combined with persistent low achievement, has triggered further flight out of the district via market based school choice options. We conclude by arguing that the local and state responses to the new Every Student Succeeds Act (ESSA) should address regional, between-district inequities in education through a more comprehensive combination of “place-based” and regional strategies ensuring that deconcentration of poverty is at the forefront to improve educational opportunities and outcomes for low-income, students of color.

⁹ For related studies see Jennifer Jellison Holme, et al., *Challenging Boundaries, Changing Fate? Metropolitan Inequality and the Legacy of Milliken*, 118 TEACHERS C. REC. (in press); Kara S. Finnigan, et al., *Regional Educational Policy to Address Racial and Socioeconomic Segregation: Examining Rochester, Omaha, and Minneapolis’ Inter-district Transfer Agreements*. 29 EDUC. POL’Y, 780, 814 (2014); Holme & Finnigan, *supra* note 5.

ESEA and Policy Misdiagnosis

While the context of ESEA, including the recent passage of ESSA, has already been provided in this special issue, here we focus on the narrative or discourse around the root cause of the policy problem embraced through ESEA. We begin by describing how ESEA's reform strategy emerged separately from, but in parallel to, an emerging consensus at the federal level about the relationship between segregation and educational opportunity. We then point to how the policy dialogue shifted in the 1970s away from focusing on better serving poor students within schools, to a focus on "reforming" whole urban schools. This focus on making "separate" schools more "equal" through educational reform evolved and sharpened in the 1980s through present day, with ESEA as a driver of such change. We also show how communities seeking to address racial isolation have done so with little federal support and point to the need for the federal government to attend to these issues through pilot or incentive programs given the shift in ESSA back to local and state agencies.

1960s Through Mid-1970s: ESEA and Competing Narratives around Educational Equity

During the time period around the passage of the ESEA in 1965, there were two broad visions for—or narratives around—equal educational opportunity at the federal level. The first vision, embodied by this legislation, centered on the assumption that providing targeted supports for low-income children, regardless of school context, would help students improve academically. Indeed, ESEA largely overlooked the question of school segregation.¹⁰ Instead, the legislation targeted funding toward first any schools with students who were low-income, and later shifted its focus to schools with high concentrations of poverty (e.g., through school-wide Title 1 grants). The legislation, which focused on improving schools for "educationally disadvantaged" students through additional resources for curricular and instructional supports, in many ways became the nation's de facto social welfare policy.¹¹

A second, parallel narrative existed at this same time, however, which included a vision promoted by civil rights advocates for greater equality of

¹⁰ Harvey Kantor & Robert Lowe, *Educationalizing the welfare state and privatizing education: The evolution of social policy since the New Deal*, in CLOSING THE OPPORTUNITY GAP (Prudence Carter & Kevin Welner eds., 2013).

¹¹ *Id.*

educational opportunity through school desegregation, based on the assumption that providing students with integrated learning environments would lead to improved achievement largely because of the unequal distribution of resources across schools and communities. This movement was:

Dedicated to creating a single society from a society that had been born divided by race and had, for centuries, built up institutions, beliefs, and practices that tended to perpetuate separation and inequity in order to keep a country polarized by race. It was directed at a system—the public schools—that has long been valued by both the public and the nation’s leaders not only for its impact on student academic learning but also for its central role in building the nation, socializing children, preparing citizens, communicating the basic values of our Constitution and democratic system, and helping immigrants from every part of the globe work and live together peacefully and successfully in a single democracy.¹²

This focus drove the national attention to school desegregation during this time period, and resulting court orders bolstered the efforts of many communities across the country. Such efforts were also supported during Nixon’s administration by the Emergency School Aid Act (ESAA) of 1972, which provided funding for voluntary desegregation efforts. This short-lived initiative was terminated under Reagan as he created the Education Consolidation and Improvement Act of 1981, shifting federal resources toward general aid and away from this focus on equity.¹³

As the 1974 *Milliken v. Bradley* decision made desegregation difficult in many northern contexts, ESEA’s approach became the political and practical “solution” for segregated urban school districts, providing extra resources to support reform in places where desegregation had become demographically, and legally, difficult. Increasingly the focus of federal policy became trying to improve urban high poverty schools through a

¹² Erica Frankenberg, et al., *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT (Jan. 16, 2003), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream>.

¹³ Kenneth K. Wong & Anna C. Nicotera, *Educational Quality and Policy Redesign: Reconsidering the NAR and Federal Title I Policy*. 79 PEABODY J. OF EDUC., 87, 104 (2003).

mixture of approaches embodied in renewals of ESEA legislation, including the provision of extra funding (1965), “comprehensive” school reform (1988), standards and accountability (1994), and reform and sanctions (2002). In essence, ESEA, and federal policies that built upon this landmark legislation, was largely a colorblind policy focused on improving the performance of racially isolated and high-poverty schools.

Late 1970s through Early 1980s: Desegregation Narrative Fades from National Policy

In the late 1970s, the narrative around school segregation as a source of educational failure began to slowly fade from the political and educational policy landscape as the national consensus about the importance of desegregation rapidly began to fray. This decline in support for integration was the result of several factors: first were the riots that swept through nearly every major city in the U.S. which resulted from intense residential discrimination, police brutality, and eroding employment.¹⁴ The riots had the effect of significantly dampening the national political support among whites for civil rights policies such as desegregation.¹⁵ Second was a growing dissatisfaction with and disillusionment around desegregation on the ground, rising from a call for community control and the highly publicized “black power” movement due to frustration with the intense resistance of white-dominated school boards and resultant slow pace of complying with court orders, and discriminatory treatment of students in diverse schools.¹⁶ Third, and perhaps most significantly, was the political reality that desegregation could not be achieved in most contexts without forced cross-district busing, which was not longer a viable option after the *Milliken* decision.

Furthermore, during this time period, the other narrative around providing targeted supports via ESEA shifted away from focusing on better serving poor students within schools, to a focus on “reforming” whole urban schools. Importantly, these urban schools grew more racially and economically isolated during this time as a result of deindustrialization and suburban flight. The unraveling of the consensus about the importance of desegregation was perhaps most vocally

¹⁴ Gary Orfield, *Race and the Liberal Agenda: The Loss of the Integrationist Dream, 1965-1974*, in *THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES* (Margaret Weir, et al., 1988).

¹⁵ *Id.*

¹⁶ *Id.*

articulated by Ron Edmunds, founder of the “effective schools” movement.¹⁷ Edmunds became famous initially for his strong rebuke to the Coleman report’s findings on the relative lack of importance of school “inputs” to student achievement. Edmunds argued that schools could, in fact, make a difference and noted that his own research along with that of other scholars had found what he called “correlates” of “highly effective schools,” which were racially isolated (predominately non-white) schools that successfully improved the achievement of students despite being segregated. These correlates included things like principal leadership focused on instructional quality, an orderly and safe climate, and positive home-school connections.¹⁸ This movement, on the heels of *Milliken*, offered a roadmap for those who wanted to reform urban schools in a context that barred cross-district desegregation or “metropolitan remedies.” The effective schools movement became embodied in federal educational policy through the 1988 amendments to ESEA, causing this reform to spread rapidly. In fact, as of 1989, the GAO found that 41% of districts surveyed had effective schools programs in operation.¹⁹

Interestingly, we find ourselves in the same moment in time today with protests around treatment of people of color, particularly African Americans, by police in communities across the country; highly segregated school districts and concentrated poverty; and resistance to metropolitan solutions with emphasis instead on school by school changes through charter schools and school turnaround models. These current efforts, like the effective schools movement, suggest that separate schools could indeed (in opposition to *Brown’s* holding) be made educationally equal.

The movement towards making separate schools equal, rather than addressing the underlying inequities among schools and differences in school populations, became folded into the next educational movement—focused on standards and accountability—in the 1990s. The federal Improving America’s Schools Act (IASA), the 1994 reauthorization of ESEA, and the Comprehensive School Reform Demonstration Program (referred to as Obey Porter) included funding for “school-wide” reform

¹⁷ Wells, et al., *supra* note 9.

¹⁸ Lawrence W. Lezotte, *Correlates of Effective Schools: The First and Second Generation* (1991), available at

<http://static1.1.sqspcdn.com/static/f/659196/14356922/1317128865050/Correlates+of+Effective+Schools.pdf?token=c2dtSGd4i3PCcn5o2cqjQ3eXV90%3D>.

¹⁹ *Effective Schools Programs: Their Extent and Characteristics*, U.S. GEN. ACCT. OFFICE (September 1989), <http://www.gao.gov/assets/80/77488.pdf>.

models with similar characteristics to the former “effective schools” principles. As the movement and funding for these comprehensive reform strategies was widely supported, funding for and enforcement of integrated schools waned. Furthermore, across the country courts began releasing districts from school desegregation orders and these districts became steadily more racially segregated.²⁰

In spite of the fading political popularity of desegregation nationally, some local communities took the problem of racial and socioeconomic segregation into their own hands, seeking court orders or state legislation to address these issues. One example of such efforts was the inter-district desegregation programs adopted in several metropolitan areas, which were designed to improve equity across metropolitan areas through choice-based integration of students across district lines. Such plans emerged in Rochester, NY, Boston, Hartford, and Milwaukee through state laws during this era, although Milwaukee’s was later codified in a federal court order based upon claims of 14th Amendment violations and Hartford’s in a state court ruling grounded in state constitutional guarantees of equal educational opportunities. These efforts were buttressed by court orders in the 1980s: the Tinsley case in East Palo Alto, California, was settled in state court after 10 years of legal battles, resulting in an inter-district desegregation program that allowed students from the Ravenswood School District to transfer into surrounding higher wealth and primarily white districts. St. Louis and Indianapolis and the state of Arkansas also had federal court rulings resulting in their inter-district choice programs.

All of these efforts were largely unsupported by the federal government, receiving little if any funding in the way of federal dollars or incentives, in contrast to the billions spent on ESEA reforms. Furthermore, few of these programs targeted the investment in or revitalization of city schools as a way to ensure that urban communities provided high quality options within the city. Several programs did include some magnet school options to stem the flight out of the city and retain middle class families with school-aged children, however such programs were relatively small.

²⁰ GARY ORFIELD, ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996); Sean F. Reardon, et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*. 31 *J. OF POL’Y ANALYSIS AND MGMT.*, 876, 904 (2012).

1990s -2015: Focus on Accountability, Sanctions, and Markets

A new orientation toward separate but equal strategies emerged through the enactment of IASA in 1994, and then NCLB in 2002, by injecting the system with competitive market forces (through school choice) and strengthening accountability systems by requiring schools institute annual testing, and increasing the severity of consequences on the lowest performing schools that failed to meet performance targets. Charter school policies took hold which shifted the governance structure of schools in many locales, creating public independently run schools as a way of breaking from the bureaucracy and developing schools that both families and teachers could choose with varied instructional and curricular approaches.²¹ Some started calling for a “portfolio” of schools in urban districts based upon market ideas in an effort to diversify the types of options available to families and reduce the influence of district central offices on individual schools.²² Along with these different market-based strategies came a re-emergence of a bipartisan focus on ‘excellence’ – resulting from concerns based on international comparisons and the contention that the U.S. should train a more competitive workforce with higher order skills linked to STEM careers to facilitate this.²³

During this time period the national policy conversations shifted again, framing educational crises in struggling urban districts as a technical problem, one that stemmed from problems with inadequate standards, inefficient resource allocation, and poor teaching. The solution, under this framework, requires a “technical fix” through an improved mixture of incentives, sanctions, and supports. Although the impact of NCLB and market-based reforms like charters and vouchers remain to be seen, some research has shown that NCLB failed to reduce achievement gaps.

²¹ JOE NATHAN, CHARTER SCHOOLS: CREATING HOPE AND OPPORTUNITY FOR AMERICAN EDUCATION (1996).

²² KATRINA E. BULKLEY, ET AL., BETWEEN PUBLIC AND PRIVATE: POLITICS, GOVERNANCE, AND THE NEW PORTFOLIO MODELS FOR URBAN SCHOOL REFORM (2010).

²³ See *Federal Science, Technology Engineering, and Mathematics (STEM) Education: 5-Year Strategic Plan*, COMM. ON THE STEM EDUC. NAT’L SCI. AND TECH. COUNCIL (2013),

https://www.whitehouse.gov/sites/default/files/microsites/ostp/stem_stratplan_2013.pdf.

Ina V. S. Mullis, et al., *TIMSS 2011 International Results in Mathematics*, TRENDS IN INT’L MATHEMATICS AND SCI. STUDY (2012),

<http://timss.bc.edu/timss2011/international-results-mathematics.html>.

Research around school choice reforms has identified varied results on student performance and in some cases, worsening segregation.²⁴

In spite of this continued (and even stronger) push toward choice and accountability, a number of communities across the country continued to fight during this time period against segregation between city and suburban school districts by adopting policies which enabled students to move across district boundaries. Some of these programs were adopted in response to plaintiffs filing lawsuits against states: for example, in both Minneapolis and Hartford state orders led to Choice is Yours and Open Choice, respectively. Omaha avoided a state court decision when key stakeholders joined together to develop the Learning Community of Douglas and Sarpy Counties in 2007. In Rochester, NY, as the program recently celebrated its 50th anniversary, four new suburban districts joined its efforts— the first new districts in more than 10 years.²⁵ While the program has been predominately “one way,” involving students transferring from urban to suburban schools, current efforts are focusing on reinstating the two-way component of the program.

Our research found that many of these programs, which specifically target the underlying inequities resulting from segregated communities by allowing mobility across these rigid systems, currently sit in a tenuous balance with weak political support, resulting in small numbers of students moving across boundaries. Such programs also have a lack of incentives to encourage participation of districts as they face greater school and educator accountability.

In the next section we consider how ESEA has interacted with patterns of growing segregation across metropolitan areas through a case study of Milwaukee. We show how ESEA’s focus on reforming segregated schools has largely failed to improve achievement. At the same time, we show— using geospatial mapping - how, since ESEA was enacted, segregation patterns have worsened significantly between urban and suburban school systems, leading to deepening academic crises for urban districts.

²⁴ Sean F. Reardon, et al., *Left Behind? The Effect of No Child Left Behind on Academic Achievement Gaps*, Soc. for Res. on Educ. Effectiveness (2012), <http://eric.ed.gov/?id=ED530121>. Erica Frankenberg, et al., *Charter without Equity: Charter School Segregation*. 19 EDUC. POL’Y ANALYSIS ARCHIVES (2011).

²⁵ Justin Murphy, *Two More Districts Join Urban-Suburban*, DEMOCRAT & CHRON. (Mar. 24, 2015), <http://www.democratandchronicle.com/story/news/2015/03/24/east-rochester-hilton-urban-suburban/70406892/>.

ESEA and Segregation Patterns: The Case of Milwaukee

In this section, we present a case study of Milwaukee metropolitan area, an area that faces similar problems to many metros, especially in the northeast and Midwest since the 1960s: growing segregation between cities and suburbs, increasing poverty concentration in the urban core, and growing educational inequality across districts. This case study illustrates how ESEA's separate but equal policy strategy, through focusing on improving racially isolated schools, failed to improve achievement within a district that was growing increasingly segregated by race and income.

We show how policymakers within Milwaukee attempted to address the growing isolation between school districts through a choice based city-suburban desegregation plan, but they received little political or fiscal support from the federal or state governments and faced local political resistance based upon concerns that African-American students might face greater challenges in the mostly white suburbs and that this would result in a further disinvestment in the city. Importantly, the growing isolation, combined with persistently low levels of educational achievement in the Milwaukee district, has triggered further flight out of the district via market based school choice options and currently a state takeover looms large. Today, Milwaukee Public Schools serves about 77,000 students, 86% who are students of color and 83% from low-income families.²⁶ This case study illustrates the missed opportunity that ESEA had to address racial and socioeconomic inequities.

Milwaukee and Growing Segregation

The Milwaukee metro area is one of the most segregated in the country in terms of race and poverty.²⁷ It is also one of the cities with fewest

²⁶ *District Fact Sheet*, MILWAUKEE PUB. SCHOOLS, <http://mps.milwaukee.k12.wi.us/en/District/About-MPS/At-A-Glance.htm> (last visited Feb. 11, 2016).

²⁷ Stephanie Lecci & Michelle Maternowski, *New Ranking: Milwaukee Still Country's Most Segregated Metro Area*, WUWM – MILWAUKEE PUBLIC RADIO (Nov. 27, 2013), <http://wuwm.com/post/new-ranking-milwaukee-still-countrys-most-segregated-metro-area>; Richard Florida, *The U.S. Cities Where the Poor Are Most Segregated from Everyone Else*, CITY LAB: THE ATLANTIC (2014), <http://www.citylab.com/housing/2014/03/us-cities-where-poor-are-most-segregated/8655/>. John Logan & Brian Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US2010 Project (Mar. 24, 2011), <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

blacks living in suburbs, with intense city/suburban segregation.²⁸ Furthermore, in 2010 Milwaukee ranked as the 4th poorest city in America, with a poverty rate of 27%.²⁹

Segregation in Milwaukee was present since the turn of the 20th century, but became more severe in the 1950s and 1960s as the large number of manufacturing jobs lured African Americans into the city. Indeed, as Miner notes, “Milwaukee’s integration has been called the ‘late Great Migration’ because it occurred decades after the height of migration to cities such as Cleveland, Gary, Chicago and Detroit”.³⁰ In 1950 in Milwaukee there were just over 21,000 blacks compared with more than 500,000 in Chicago and 300,000 in Detroit; by 1970 the number of African Americans in Milwaukee had risen to more than 105,000. Most migrants came from the south, and while many found employment and economic opportunity, many were locked out of the best paying jobs and jobs protected by white-dominated unions.³¹

Newly arrived blacks met significant discrimination and segregation in the housing market, as whites reacted to the growth of the African American population with tactics used in other cities: overt discrimination, realtor steering, and racially restrictive covenants.³² As in other places across the country, redlining was widely used by both banks and insurance agencies in the Milwaukee area to confine blacks to segregated parts of the city and keep them out of the suburbs. In addition, according to an attorney who participated in our study, many suburban towns instituted “sundown laws” requiring all non-resident workers, who were predominantly African-American, to leave town by sundown.

The Milwaukee school board responded to the growth of its African American population by enacting a variety of discriminatory tactics designed to keep black students apart from whites in the schools. As the court later found, the district redrew attendance zones, allowing whites to transfer out of diversifying schools, assigned teachers by race, and used what was called “intact busing” to relieve overcrowding--whereby black students in overcrowded schools would be bused to white schools where

²⁸ Lecci & Maternowski, *supra* note 28.

²⁹ Bill Glauber & Ben Poston, *Milwaukee Now Fourth Poorest City in Nation*, MILWAUKEE-WISCONSIN J. SENTINEL (Sept. 28, 2010), <http://www.jsonline.com/news/wisconsin/103929588.html>.

³⁰ BARBARA MINER, *LESSONS FROM THE HEARTLAND: A TURBULENT HALF-CENTURY OF PUBLIC EDUCATION IN AN ICONIC AMERICAN CITY* (2013).

³¹ *Id.*

³² *Id.*

they were kept entirely separate for classes, lunch, and recess.³³ As an attorney we interviewed noted of intact busing: "...black students had to be bused to the white schools for lunch, they would be bused intact, where they would be brought in to have lunch and they couldn't talk to any white students, or anything like that, and would be bused back to the black schools."

As a result of these policies, by the time a lawsuit was filed against MPS in 1965, also the year that ESEA was passed, schools were highly segregated in Milwaukee. According to the lawsuit, by 1965 13 elementary schools in MPS were more than 90% black and 86 were more than 90% white, with similar problems in middle and high schools.³⁴ As the map shows in Figure 1 and Figure 2, many parts of Milwaukee were already racially and economically isolated with the orange and red areas in the middle part of the city showing high concentrations of poor students and black families. Of course, even back in the 1970s this high concentration of poverty and racial isolation had a great impact on the surrounding neighborhood and its schools.

It was not until 1973 that desegregation lawsuit against MPS went to trial with a judicial ruling in 1976 to desegregate the school district. Importantly, segregation had grown significantly during the interim: "at the time of the decision [in 1976], 73 of the city's 158 schools were more than 90 percent white, while 23 were more than 90 percent African American".³⁵ The judge left it up to local school board officials and educators to devise a plan but after little progress, the case was settled in 1979 and the settlement agreement:

....required the Milwaukee Public Schools (MPS) to ensure that at least 75% of all students within the district would be enrolled in racially balanced schools. This was defined by the Court as having between 20 and 60 percent black enrollment at the high school level and between 25 and 60 percent black enrollment at the middle and elementary school level; only 9% of MPS schools met this standard in 1976. The settlement agreement remained in effect for five years, until July 1, 1984.³⁶

³³ *Id.*

³⁴ *Id.* At 77.

³⁵ *Id.*

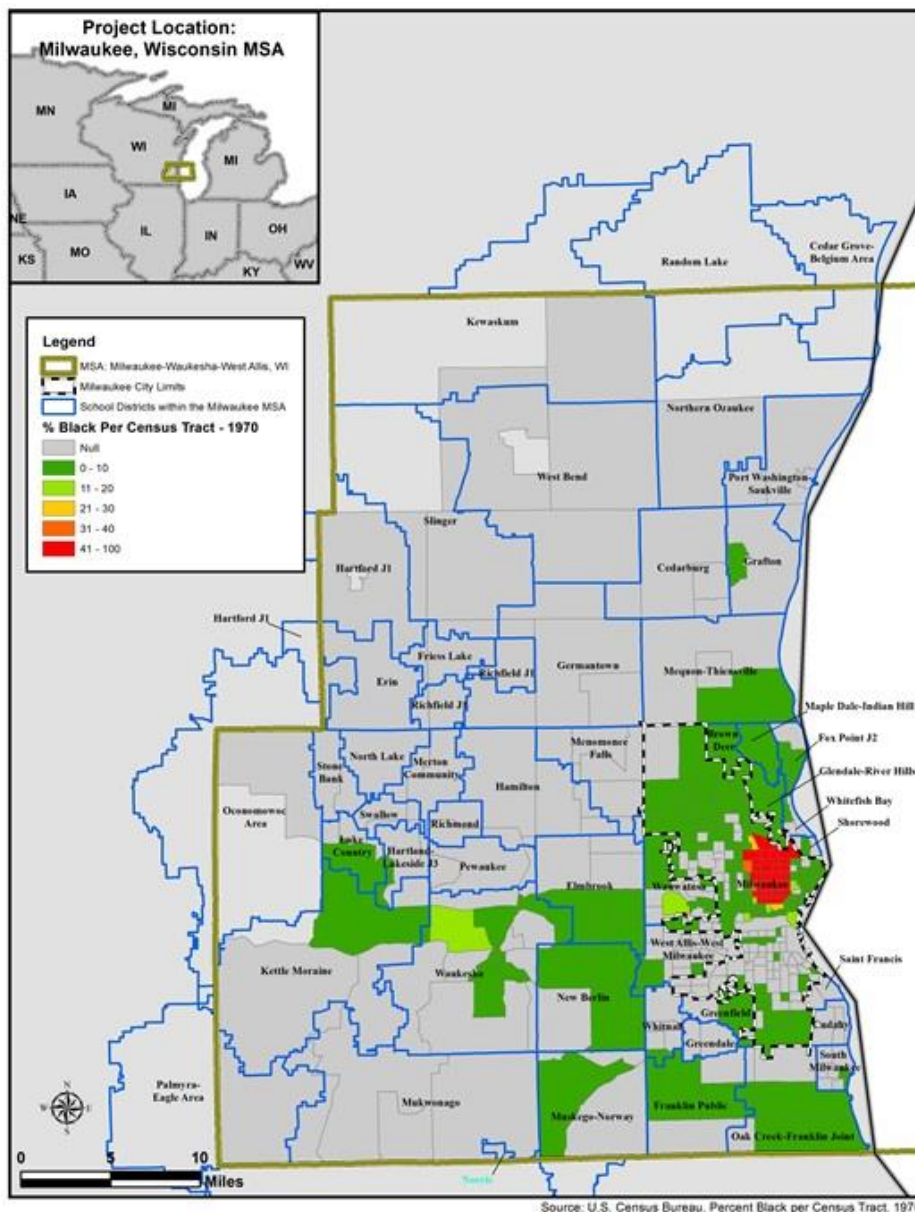
³⁶ Russ Kava, *School Integration (Chapter 220) Aid (Informational Paper 25)*, WISCONSIN FISCAL BUREAU 1 (2013).

Thus, the within-district integration goals set by the court gave the district relatively wide latitude about how many African American students could be in any given school within the district boundaries. The intra-district desegregation of MPS through the settlement agreement--even though it was relatively short lived--appeared to spur white flight almost immediately. In fact, the district lost about 14,000 white students between 1975 and 1977 and again another 14,000 by 1980.³⁷ Like many cities, however, during this time the desegregation efforts were not just contentious among the white community but also divided the African American community as some fought for integration while others fought for community investment and control.³⁸

³⁷ Michael Bonds, et al., *The Rise and Fall of a Voluntary Public School Integration Transportation Program: A Case Study of Milwaukee's 220 Program*. 47 EDUC. AND URB. SOC. 623, 645 (2013).

³⁸ JACK DOUGHERTY, MORE THAN ONE STRUGGLE: THE EVOLUTION OF BLACK SCHOOL REFORM IN MILWAUKEE (2004).

Figure 2: Concentration of Black Population in 1970



The Title 1 dollars received by the district, however, as later audits found, were steered away from the neediest schools. Indeed, Milwaukee was found guilty of mismanaging \$5.9 million of Title 1 funds in the late 1960s and 1970s, funneling large proportions of resources toward students

not living in low-income areas.³⁹ In 1980, as a result of these charges, Milwaukee was required to return some of its federal funding. Despite these problems, the amount of ESEA funding increased significantly to the Milwaukee public schools over the course of the 1970s, from \$4.2 to \$14.4 million in the course of the decade.⁴⁰ These remedial services were directly targeted to high poverty majority black schools.⁴¹

During this time, the Milwaukee school district was also receiving federal Emergency School Aid Act dollars to support desegregation efforts, though these dollars were going to voluntary within-district efforts only. These dollars were restricted towards activities that encouraged racial balancing, and could not be used for mandatory desegregation (Wong, 1990). As a result of these two programs, federal aid to Milwaukee increased in the 1970s, and by 1980 indeed ESEA comprised 40% of the federal aid to Milwaukee (Wong, 1990, p. 59), illustrating the powerful impact this legislation had upon educational strategies during this time period.

During the same time period that federal school aid was increasing to the city school system, both the city and school district were becoming more racially and economically isolated. Poverty rates grew significantly in city due to economic restructuring: from 1979 to 1987 the city of Milwaukee lost nearly 60,000 manufacturing jobs,⁴² as major Milwaukee industries were leaving the area. As Bonds et al. write:

Companies started closing, downsizing, merging and relocating to other states that had warmer climates and lacked labor unions.... Milwaukee witnessed the loss of major employers such as Miller Brewery, Pabst, Harnischfeger and other manufacturing employers...⁴³

Some of these jobs went to suburbs, which were out of reach of many of the lowest-income city residents who lacked transportation. Many of the

³⁹ Kenneth K. Wong, *City Choices: Education and Housing*, S. UNIV. OF N.Y. PRESS 68 (July 1990).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Rick Romell, *Milwaukee's Deep Racial, Economic Divisions Are Challenges to Rebirth*, MILWAUKEE J. SENTINEL SPECIAL REP. (Apr. 20, 2013), <http://www.jsonline.com/business/a-time-to-build-milwaukees-deep-racial-economic-divisions-are-challenges-to-rebirth-203641121.html>; Mark Levine & John Zipp, *City at Risk*, in SEEDS OF CRISIS (John L. Rury & Frank A. Cassell eds., 1993).

⁴³ Bonds et al., *supra* note 38.

manufacturing jobs were replaced by low paying service positions in the city. As a result of these shifts in the labor market, unemployment and poverty increased dramatically in the inner city.

These economic trends triggered further white and middle class flight out of Milwaukee and its school system. Indeed, at the same time that millions of federal dollars via ESEA were entering the district to support high poverty schools, with a smaller amount to assist with desegregation via ESAA, overall enrollment in the district dropped. MPS enrollment shrank from 128,734 students in 1972-73 to 81,372 in 2010-11, a drop of 45,000 students in almost 40 years.⁴⁴

The Enactment and Expansion of Chapter 220

During the early 1970s, State Representative Dennis Conta, who represented a suburban district in the Milwaukee metropolitan area, grew concerned about the growing segregation between city and suburban school systems as a result of these larger economic and demographic shifts. To address these issues, he proposed merging the politically more liberal (and also affluent and white) Shorewood district, which he represented, with the northern part of Milwaukee Public Schools. While the merger was not ultimately implemented, according to our interviews Conta's proposal formed the basis for the creation of the Chapter 220 inter-district desegregation program in 1975 via state legislation. (This legislation, it is interesting to note, was enacted prior to the federal court ruling in 1976 on the within-district Milwaukee desegregation case). The stated purpose of Chapter 220, which continues to exist today, is "to facilitate the transfer of students between schools and school districts to promote cultural and racial integration in education where students and their parents desire such transfer and where schools and school districts determine such transfers serve educational interests."⁴⁵

When the Chapter 220 program originated in 1975, it incorporated clear diversity goals, specifying that city to suburb transfers should occur until the suburbs reached a 30% minority enrollment, a benchmark that was established to reflect the Milwaukee metropolitan area's minority population at the time. Through the mid-1980s, the program only operated in a small number of suburban districts, but in 1987 it expanded as the result of a lawsuit filed by the MPS against 24 surrounding suburban school districts. In court, MPS attorneys argued that based upon current

⁴⁴ *Id.*

⁴⁵ Kava, *supra* note 37, at 1.

trends, the district would become predominantly black in the course of a short number of years due to white flight to suburbs. As one attorney in our study noted of his meeting with the top administrators in Milwaukee Public Schools:

The superintendent and deputy superintendent came in, I remember they sat down and met with us, and they brought all these charts and maps and demographics and statistics, and what they were basically showing is that the projections and the data and everything indicated that based on the demographics in the Milwaukee metropolitan area and given the population trends and birth rates of the minority communities, Milwaukee was on a trajectory to become virtually all minority district, which would be surrounded by suburbs that are white....So, this is not good, not acceptable, we need to do something to address that for a whole bunch of reasons, let alone the reasons espoused by *Brown*, and all that about an integrated education, but just the fact that to have Milwaukee as a poor, all-black, or other minority district, surrounded by much more affluent white districts -- what that means in terms of dollars and resources... And MPS' view was it was worth bringing a lawsuit or exploring the possibility of litigation to try to get some remedy to address that situation.

The MPS officials were hoping for a metropolitan remedy, much like the one that was sought in Detroit but ultimately rejected by the Supreme Court in *Milliken*. The attorneys for the NAACP and ACLU joined together with MPS and conducted a great deal of research on the issues prior to the filing of the lawsuit against the suburbs. One of the attorneys noted a number of important findings from the research going into the case:

Let me just first state the overall finding of the data. ...About 97% of all African Americans in the Milwaukee metro area lived in the city of Milwaukee. Fewer than three percent at that time lived in the collective surrounding suburbs...When we brought the lawsuit, it was 24 suburban districts that we sued. ... We found that there were a number of things that the state and the suburban school districts had done to maintain their districts as kind of lily white.....We had a very thick memo

that kind of laid out the evidence, and then we had smaller memos that discussed different pieces of it.

In 1984, MPS filed its lawsuit against the suburban Milwaukee districts and the state of Wisconsin alleging: “That the defendants had intentionally, individually and collectively, sought to isolate students of color in segregated schools and that the state had failed to act to bring an end to this.”⁴⁶ In essence this suit reflects the growing recognition that city schools could not address the growing racial and socioeconomic isolation alone.⁴⁷ In 1987 the suit reached a limited decree settlement (meaning the plaintiffs could not go back to the court) between MPS, the state, and the suburban school districts. This remedy recognized Latino/as as a distinct racial minority group in the city that had the right to transfer to suburban schools.⁴⁸

While the settlement focused primarily on the expansion of the Chapter 220 program, the structure of the remedy was intended to be broader than just focusing on schooling, including housing in addition to educational components, because of the ways that suburban communities had basically “locked” minority students out, according to the attorney, by not providing Section 8 and subsidized housing in their communities. The NAACP pushed for this because of the discriminatory actions in the suburbs uncovered as part of the preparation for trial including exclusionary zoning, rejection of low to moderate incoming housing developments, opposition to extension of sewers to proposed public housing to stop their construction, and preferential treatment to applicants from all-white suburbs in publicly subsidized projects.⁴⁹ In fact, in 1989 23 out of 25 suburbs of Milwaukee rejected proposals to place two units of public housing in each suburb.⁵⁰ Importantly, one of the civil rights attorneys involved noted that Chapter 220 was designed to use integrated schools as a stepping-stone to diversified housing:

⁴⁶ *Id.* at 9; Anneliese M. Dickman, et al., *Choosing Integration: Chapter 220 in the Shadow of Open Enrollment*, PUB. POL’Y FORUM (Jan. 2003), <http://publicpolicyforum.org/research/choosing-integration-chapter-220-shadow-open-enrollment>.

⁴⁷ Michael Stolee, *The Milwaukee Desegregation Case*, in SEEDS OF CRISIS (John L. Rury & Frank A. Cassell eds., 1993).

⁴⁸ Miner, *supra* note 31.

⁴⁹ Ruth Zubrensky, *A Report on Past Discrimination Against African-Americans in Milwaukee, 1835-1999* (1999) available at <http://leontodd.blogspot.com/2010/01/report-on-past-discrimination-against.html>.

⁵⁰ *Id.*

My understanding of the concept of all of this was that realizing this is just a stop-gap measure, you know, in other words, this isn't consolidation of school districts, this isn't housing relief...The idea was that if we could get this program up and running and off the ground, and get students transferring, and African American students going out to the suburbs, and this person is there, and then their brother is there, and then their family are there, and they are attending things there, and have more whites transferring into the city, then the idea was, rather than just the way it was with the district just quickly becoming totally one way, that this would serve as a...you know, it would blossom into perhaps more African American families moving to the suburbs, breaking down barriers, more white families relocating in the city, and their students and their brothers and sisters and friends attending it, and that this is something that could built on, and if MERO (Minority Employment Recruiting Office) is functioning and getting more professionals out there.

Unfortunately, the housing components of the settlement agreement, which included counseling grants and a center that promoted suburban housing for minority families and urban housing for white families, were weak and short lived, according to our interviews. The settlement also involved the creation of a program to help diversify the teaching force in suburban Milwaukee.

The agreement required the 18 suburban Milwaukee districts that were not already participating in Chapter 220 to make a “good faith effort to fill a specified number of seats, or to fill seats equal to certain percentages of their enrollments, with Chapter 220 minority transfers.”⁵¹ The agreement also required that “10 suburban districts set new goals for minority students in their schools ranging from 20% to 23%”.⁵² As part of the agreement, Milwaukee agreed to make available a number of seats in its specialty schools, alternative schools, and city wide schools equal to at least 10% of its resident enrollment for suburban pupil transfers.⁵³ The settlement agreement was due to expire in 1993, but was extended to 1995

⁵¹ Kava, *supra* note 37, at 9.

⁵² Bonds et al., *supra* note 38, at 11

⁵³ Kava, *supra* note 37, at 9-10; Bonds et al., *supra* note 38.

and since that time MPS has negotiated with districts on an individual basis each year to continue transfers.⁵⁴

A Shifting Policy Narrative from Desegregation to Choice

The Chapter 220 program was small when it began in 1976, with 323 students transferring to 12 suburban districts in the first year.⁵⁵ Its enrollment peaked at 5,981 in 1993, in large part due to the implementation of the settlement agreement.⁵⁶ The subset of suburb to city transfers, in contrast, peaked in 1988 when 1,021 students left suburbs for Milwaukee specialty schools. For over a decade after the agreement expired, Chapter 220 enrollment remained steady at about 5,000 per year.⁵⁷ However, starting in the 2001-02 academic year, enrollment began to decline. The latest enrollment statistics from 2011-12 show that just 2,025 students were in the program. This enrollment decline however reflects decline in seats available rather than decline in demand, as there are, according to interviewees and other documents, long waitlists for the slots available.

There are several reasons for the decline in enrollment in Chapter 220. One reason is that some of the suburban districts have become significantly more diverse, surpassing the minority percentage required to be a “receiving district” under the program (defined as noted previously at 30% minority). This aligns with larger trends as suburban districts – particularly inner ring suburbs – become increasingly diverse across metropolitan areas in the US.⁵⁸ However, according to many we interviewed, the bigger reason for the decline in enrolment in Chapter 220 was the implementation of a state-level “free market” inter-district choice program called Open Enrollment, enacted in the 1995/97 “biennial budget.” This program is like Chapter 220 in that it allows students to transfer between school districts, but it does not have any diversity goals, and it requires students to provide their own transportation. Indeed: “The legislative intent [of Wisconsin’s law] was to create competition between school districts, thereby motivating districts to improve educational

⁵⁴ Kava, *supra* note 37.

⁵⁵ Harold M. Rose & Diane Pollard, *Interdistrict Chapter 220: Changing Goals and Perspectives*, PUB. POL’Y FORUM (2000), <http://publicpolicyforum.org/sites/default/files/interdistrict220.pdf>.

⁵⁶ *Id.*

⁵⁷ Dickman, et al, *supra* note 49.

⁵⁸ ERICA FRANKENBERG & GARY ORFIELD, *THE RESEGREGATION OF SUBURBAN SCHOOLS: A HIDDEN CRISIS IN AMERICAN EDUCATION* (2012).

outcomes and/or programs."⁵⁹ Schools are not required to enroll transfer students through the program if they have been expelled from their prior school or if the district lacks special needs services for the student.

To admit students under these programs, suburban school districts are supposed to designate space available, and then give priority to Chapter 220 students prior to admitting any Open Enrollment students. However, we found in our interviews that many districts vote to open up different types of spaces or seats in schools (Chapter 220 seats versus separate Open Enrollment seats). Many have often allocated more slots to Open Enrollment because these spots are more financially lucrative as districts receive financial stipends for each student, unlike with Chapter 220 funds, which are simply given back to taxpayers through a property tax reduction. Thus, districts accepting students for Chapter 220 results in no net resources that are usable for schools, while Open Enrollment students yield additional resources for each student added. Since Open Enrollment is not linked to desegregation, much of the movement involves white families enrolling in suburban schools, fueling further racial isolation within the city school system. Indeed, during the 2007-08 school year 67% of the nearly 4,000 Open Enrollment transfers were white. As one of our interviewees noted: “[we have the 220] policy to promote integration in the metropolitan area, but then we’ve got this other program that promotes segregation...it’s been mostly whites who have open enrolled out of the city of Milwaukee.”

In an effort to address academic failure in the city of Milwaukee, a school voucher program, the Milwaukee Parental Choice Program, was enacted in 1990 by the Wisconsin state legislature. This program targets low-income students, providing tuition vouchers to private or parochial schools. Enrollment in the voucher program increased from 341 students in 1990-91 to 20,996 in 2010.⁶⁰ Neither the voucher program, nor Open Enrollment, offers financial recompense to MPS for students lost, unlike Chapter 220, which provides some limited compensation to MPS for each student who leaves the district due to the program.⁶¹ The funding follows the students for both the voucher and Open Enrollment programs, and as a result, the programs together have resulted in a significant drain in enrollment and financial resources from Milwaukee Public schools.

⁵⁹ Dickman, et al, *supra* note 49.

⁶⁰ Alan Borsuk, *Dissecting Change in Milwaukee Enrollments*, MILWAUKEE-WISCONSIN J. SENTINEL (2010), <http://www.jsonline.com/news/education/109563889.html>.

⁶¹ Dickman, et al, *supra* note 49.

The original vision for Chapter 220, like many inter-district desegregation programs of its time, included little support or long-term plan to address the challenges faced by the urban district. Although Chapter 220 was technically a two-way program, in actuality it ended up being a largely a “one way out” program, designed to diversify the metro area by drawing African Americans into white suburban schools; while providing only minor integration in specialty programs within city schools by drawing whites in. This migration out of Milwaukee has resulted, along with the migration of well-paying manufacturing jobs, in an intense concentration of poverty in the city and its schools. According to a recent study:

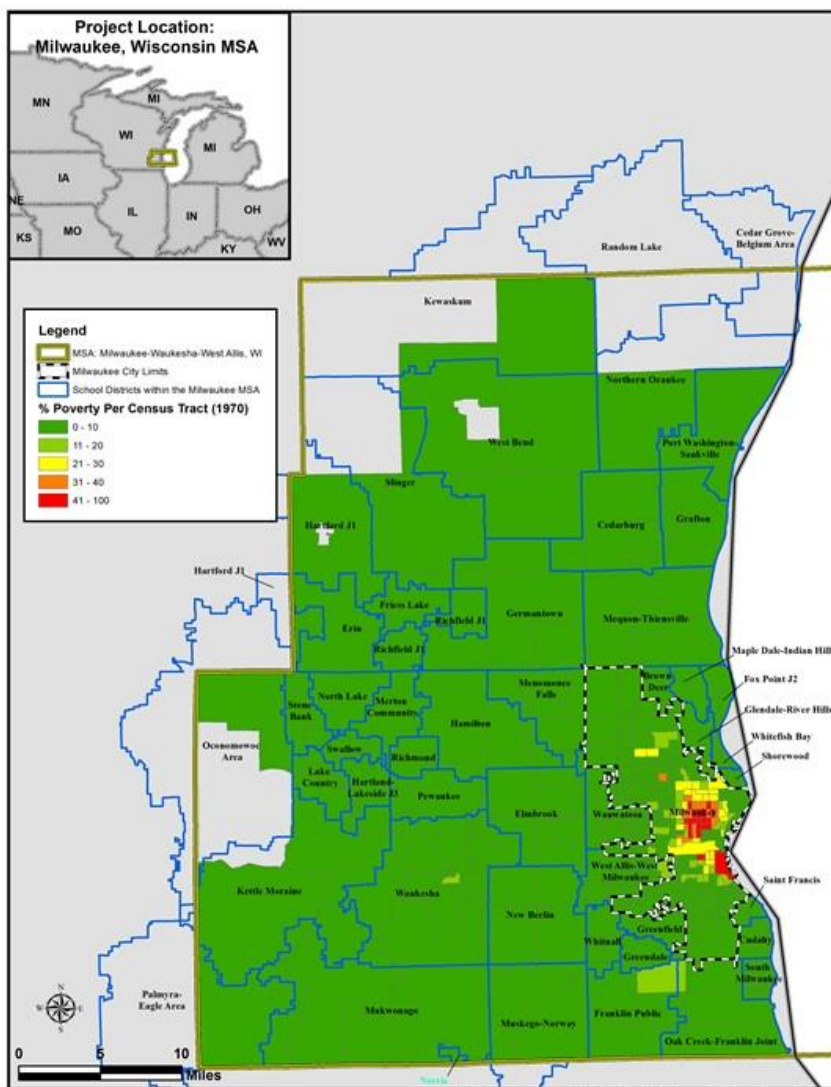
92 percent of MPS students attend a school where over half the children are poor, compared to only 4 percent of children in suburban schools in the four-county Milwaukee metro area enrolled in such high poverty schools....Thus, in 2009-2010, the average black primary school student in metro Milwaukee attended a school in which 78.1 percent of the students were poor, the 10th highest poverty rate for black students among the nation’s 100 largest metropolitan areas. The average Hispanic student attended a school in which 70.5 percent of the students were poor, the 29th highest rate among the 100 metros. By contrast, the average white primary school student in metro Milwaukee attended a school in which 24.2 percent of the students were poor – this is the 9th *lowest* rate of the 100 largest metropolitan areas in the country. Consequently, the minority-white disparity in school poverty in Milwaukee ranks among the widest in the country.⁶²

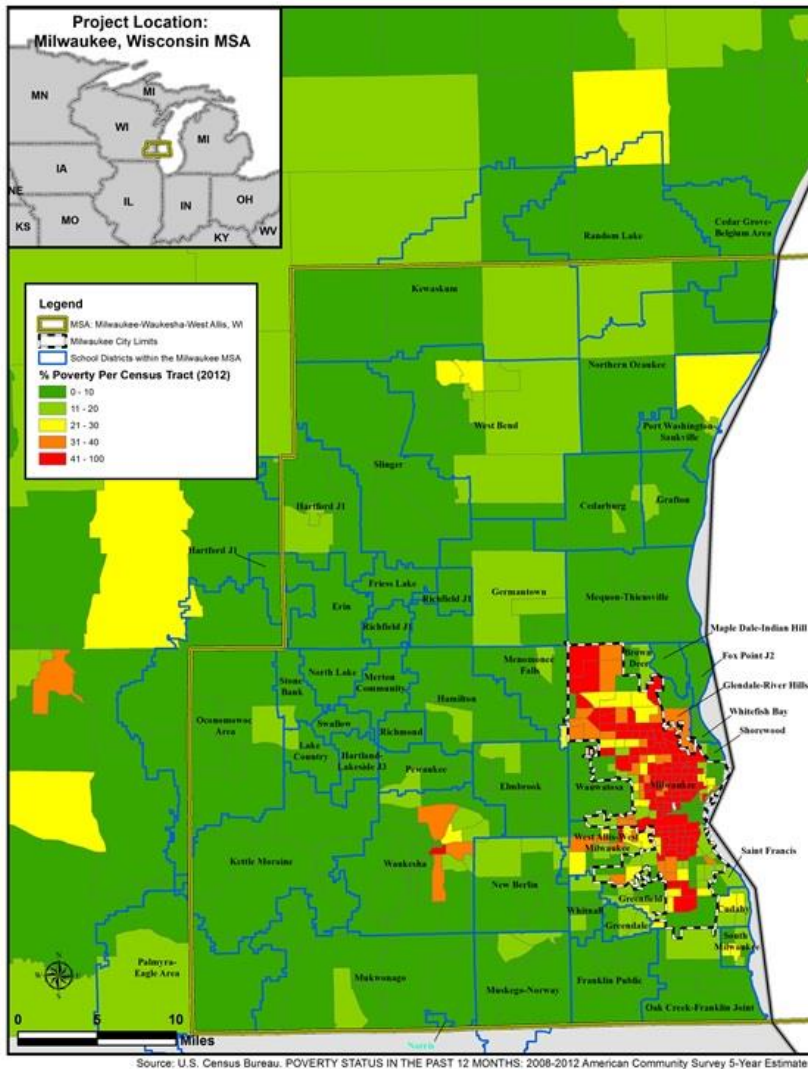
As seen in Figure 3, since the passage of ESEA and the limited implementation of Chapter 220, the concentration of poverty in Milwaukee Public Schools has become extreme. The first map shows the smaller concentration of poor students in 1970 with few areas reaching concentrations of 40-90% poor (shaded in red). The second map

⁶² Marc V. Levine, *Racial Disparities, Socioeconomic Status, and Racialized Politics in Milwaukee and Wisconsin: An Analysis of the Senate Factors Five and Six of the Voting Rights Act* (Expert Report Submitted on Behalf of Plaintiffs in *Frank v. Walker*, Civil Action No. 2:11-cv-01128(LA)), AMER. CIVIL LIBERTIES UNION (2012), https://www.aclu.org/sites/default/files/assets/2012.05.18_marc_levine_expert_report.pdf

illustrates the spread of poverty across nearly the entire district as seen by the extensive areas shaded red with only a few areas on the outside edges of the city with low levels of poverty. Importantly, poverty is extremely concentrated within MPS as just across the boundary lines of the district are suburbs that are only 0-10% poverty, shaded in green.

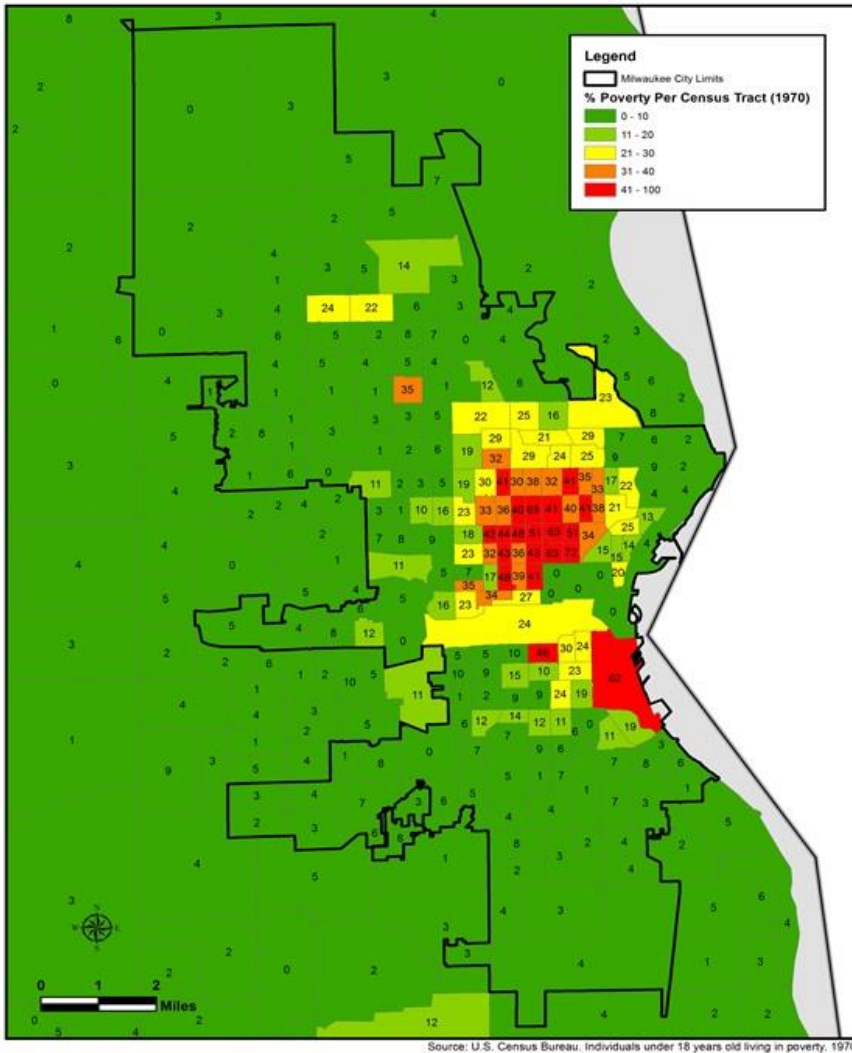
Figure 3: Spread of Poverty across MPS from 1970 to 2012





Digging more deeply into these maps (see Figure 4) we see that in 1970 very few census tracts had poverty levels above 41%. In addition, many areas of MPS were wealthier areas (less than 10% poverty), representing the segregation within MPS that prompted the original efforts to desegregate schools.

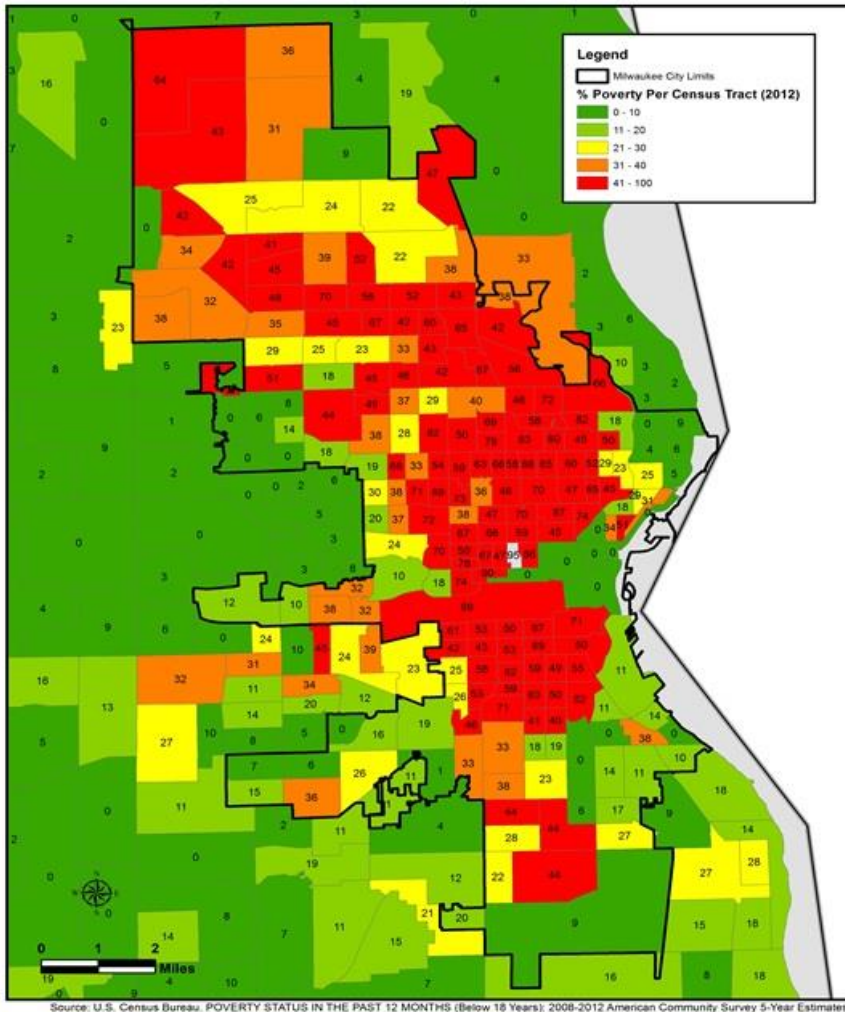
Figure 4: Percent Poverty in Milwaukee per Census Tract 1970



However, by 2012, these maps show a very different story (see Figure 5), with most of the census tracts having poverty rates above 41% (and many above 75%). Importantly, poverty has spread across the district with only a few areas of MPS on the outer edges still having less than 20% poverty. The 2012 map also shows just how rigid the boundaries are around poverty, with only a handful of areas outside of MPS having between 21% and 40% poverty (shaded in yellow and orange) and only one greater than 41% (shaded in red). However, in other areas these

trends have already occurred with suburban poverty increasing tremendously, so Milwaukee may again just be late in experiencing these broader demographic shifts occurring across the country.⁶³

Figure 5: Percent Poverty in Milwaukee per Census Tract 2012

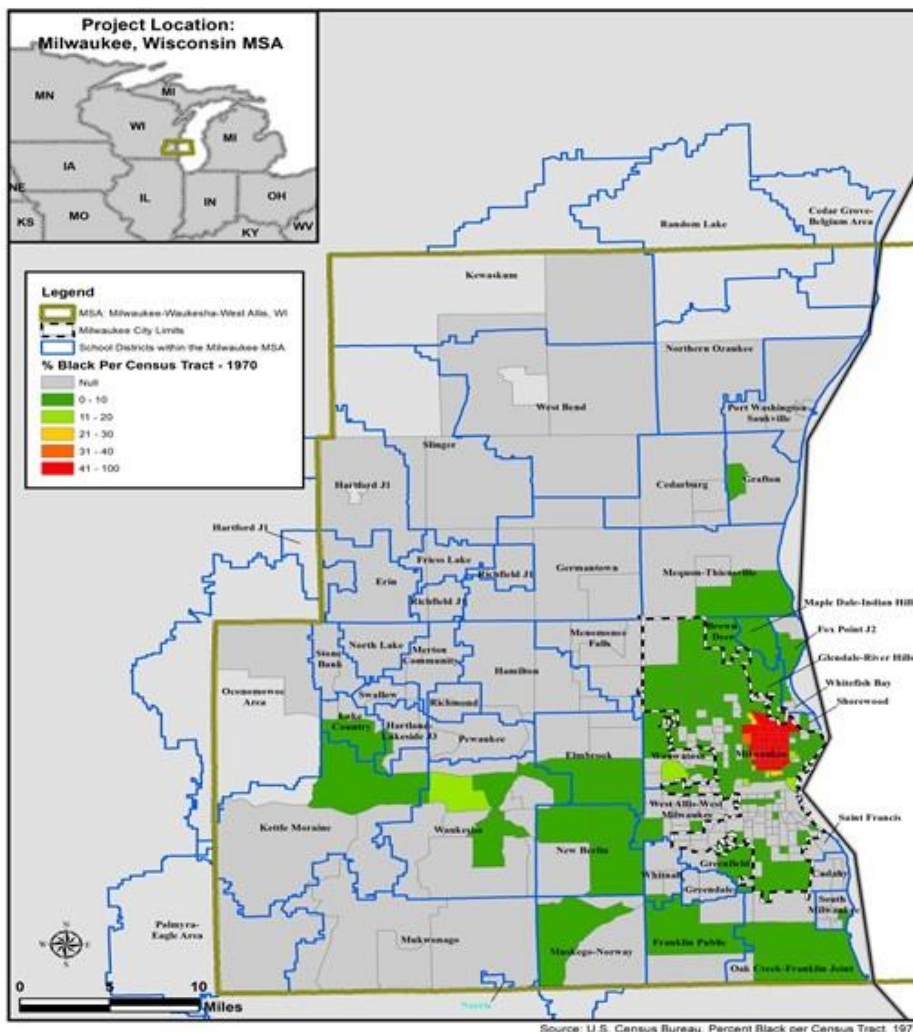


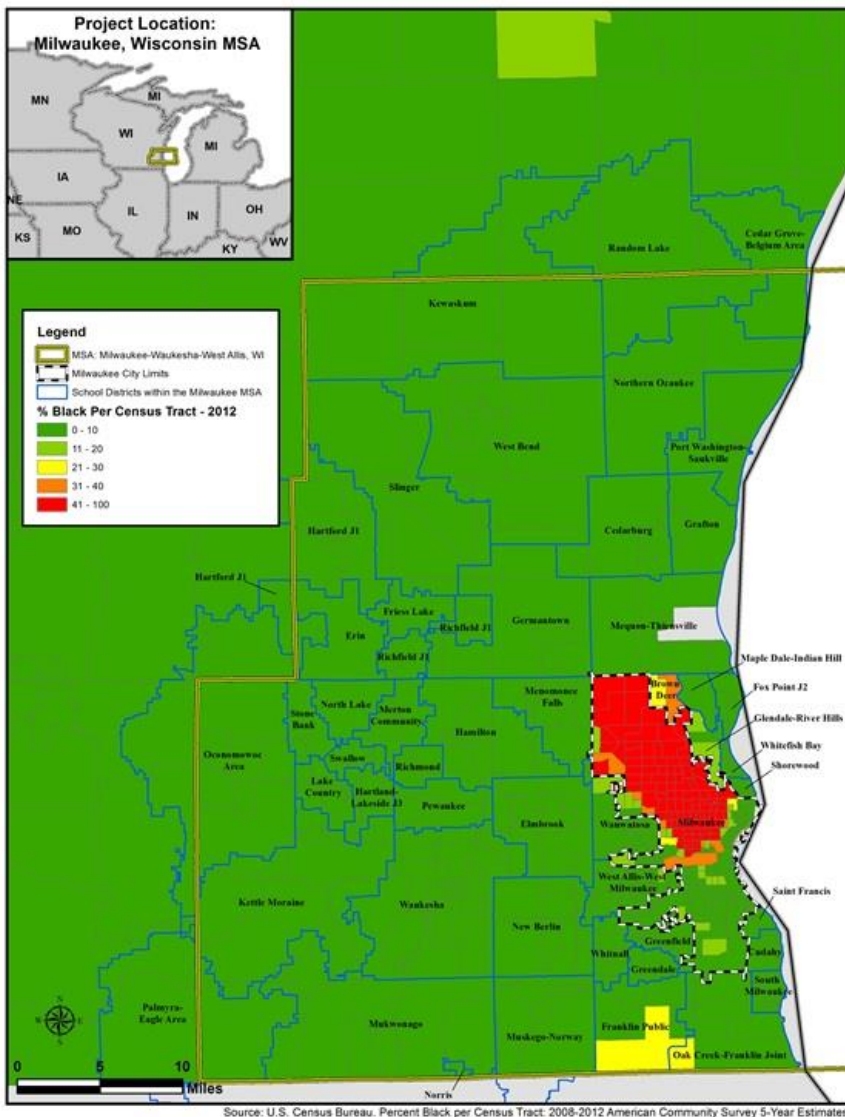
While the growing socioeconomic isolation in MPS is clearly illustrated in these maps, the racial isolation over time is even more stark. As the first map in Figure 6 shows the concentration of black families in

⁶³ Frankenberg & Orfield, *supra* note 61.

Milwaukee in 1970 is more extreme than the concentration of poverty – with a huge dichotomy between parts of the city that had less than 10% black families and those that had more than 41% – and nothing in between. In 2012 (the second map) the dichotomy is still quite strong but the black population now extends throughout the northwestern part of the city with very low percentages of black families in the southeast portion.

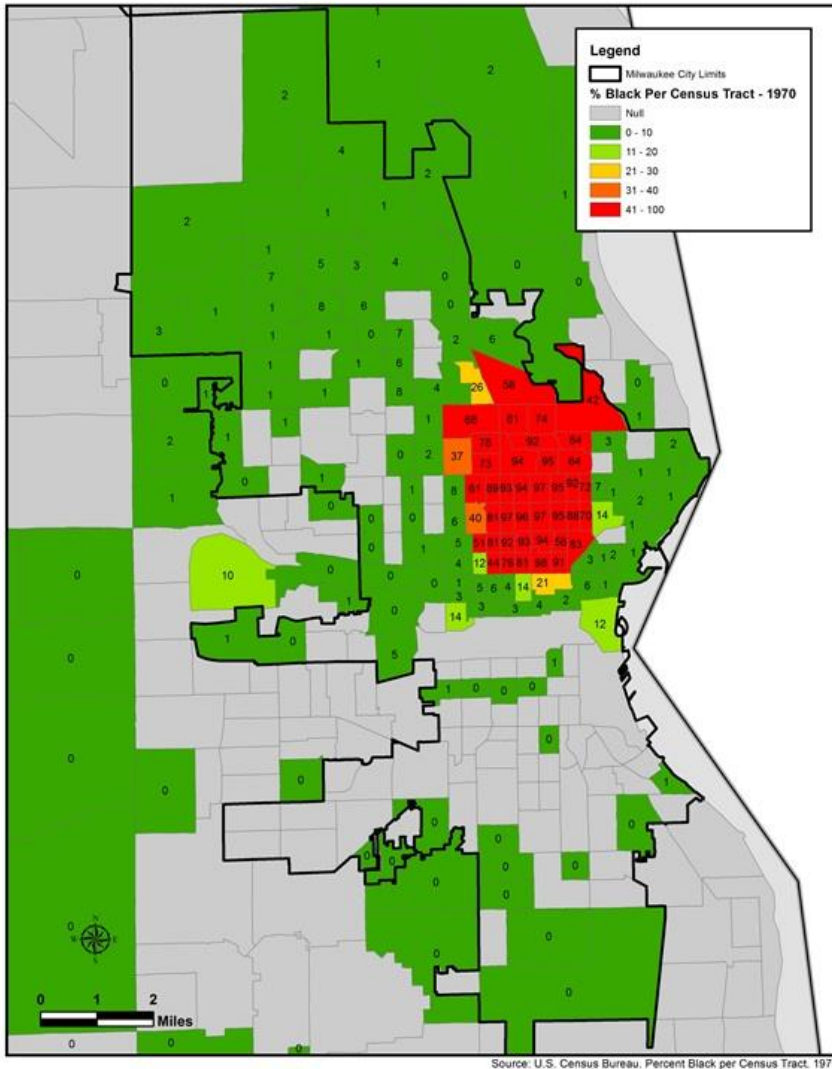
Figure 6: Increased Racial Isolation in Milwaukee 1970 to 2012





Again, looking more closely at the census tract level data helps to further illuminate these trends. As Figure 7 shows most of the census tract areas in which black families lived even back in the 1970s were 75% to nearly 100% black (as noted by the percentages listed in each area). Like we see now with city/suburban trends, these residential areas within the city were surrounded by communities within Milwaukee that had fewer than 10% black families.

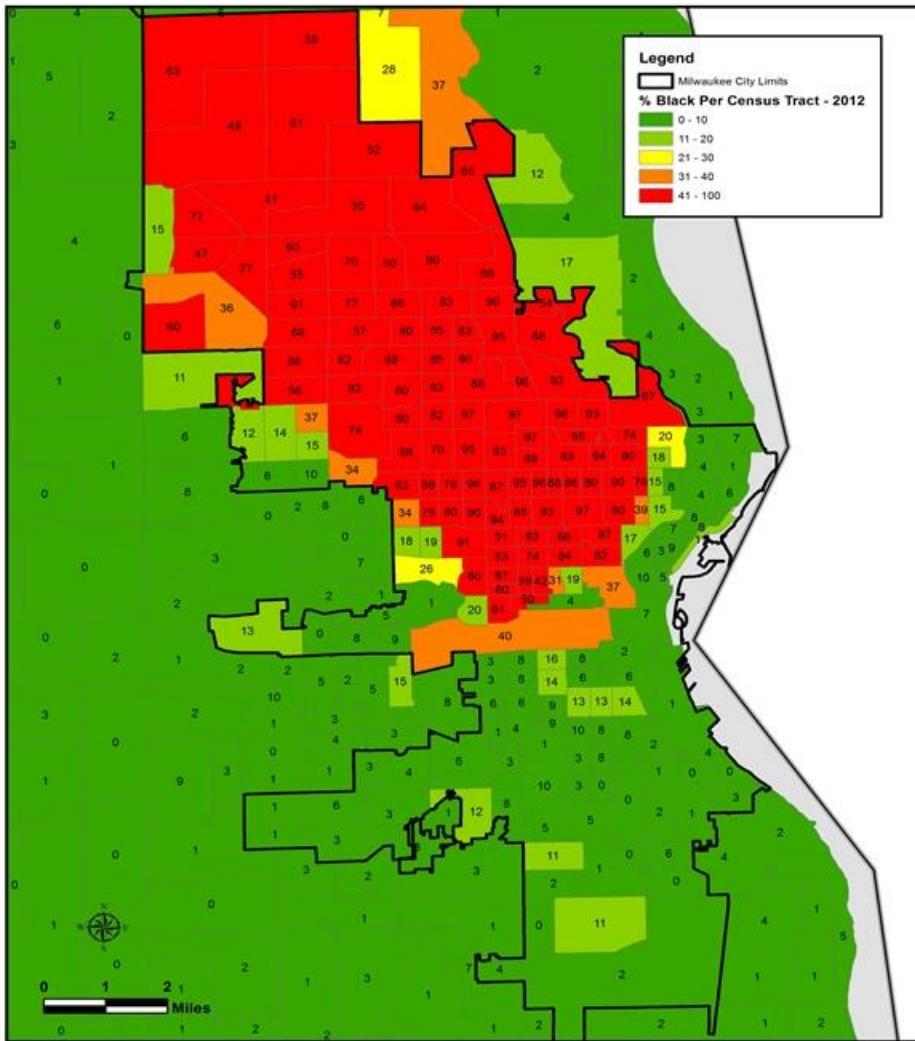
Figure 7: Percent Black Population in Milwaukee per Census Tract in 1970



Comparing the racial isolation in 1970 with data from 2012 (Figure 8) highlights the extreme segregation in this community, with the black population now spreading to the northwest boundary line – but, importantly, not going past it. A handful of areas within Milwaukee are 20% and 60% black but the majority of neighborhoods on the northwest side are more than 75% black and the majority in the southeast are less

than 10% black. This “hypersegregation” has been in place for decades with a 1989 study noting the concentration of segregation was worst among the thirty largest metro areas with significant black families.⁶⁴

Figure 8: Percent Black Population in Milwaukee per Census Tract in 2012



⁶⁴ Miner *supra* note 31.

1980s-2015: School and Student Performance in Milwaukee

ESEA reforms – along with the multitude of other reforms during this time period – failed to significantly improve public education in Milwaukee. The hypersegregation and poverty concentration resulted in declining levels of achievement over the course of four decades. This problem was noted in the late 1980s, when public officials started calling attention to the low levels of achievement and graduations rates.⁶⁵ Frustration around these measures led to calls for a separate black district by prominent black leaders, which did not succeed and caused fragmentation in the African American community but indicated the continued concerns around the quality of education and student outcomes within MPS, particularly in certain geographic areas of the city.⁶⁶

In 1992 the Wisconsin Advisory Committee to the U.S. Civil Rights Commission published a report pointing to the low grade point average and graduation rates in most MPS high schools. For example, the average GPA in 13 of the 15 public high schools was less than 2.0 and only about 40% of students graduated within four years.⁶⁷ By 2010 there was widespread concern around the “failure” of MPS, with a *Milwaukee Journal Sentinel* report in March stating that the state’s African American population were achieving at a lower level than anywhere else in the country and noting that the majority of African Americans in the state were in MPS.⁶⁸

Stronger federal and state accountability via NCLB has not significantly improved the outcomes for students in Milwaukee public schools. Indeed, the number of schools designated “Schools Identified For Improvement,” or SIFI, has increased from 48 in 2013-14, to 55 in 2014-15, which consists of of 83% of all failing schools in the state of Wisconsin. Proposals have been floated to have an external agency take over the schools in the district.⁶⁹

⁶⁵ See Dave Hendrickson, *Youths’ Reading Skills Deplored: O’Donnell Complains to McMurrin about “Educational Gap,”* THE MILWAUKEE J. (1987); Bednarek, *School Trial to Recess for Look at Evidence,* THE MILWAUKEE J. (1987).

⁶⁶ Miner *supra* note 31.

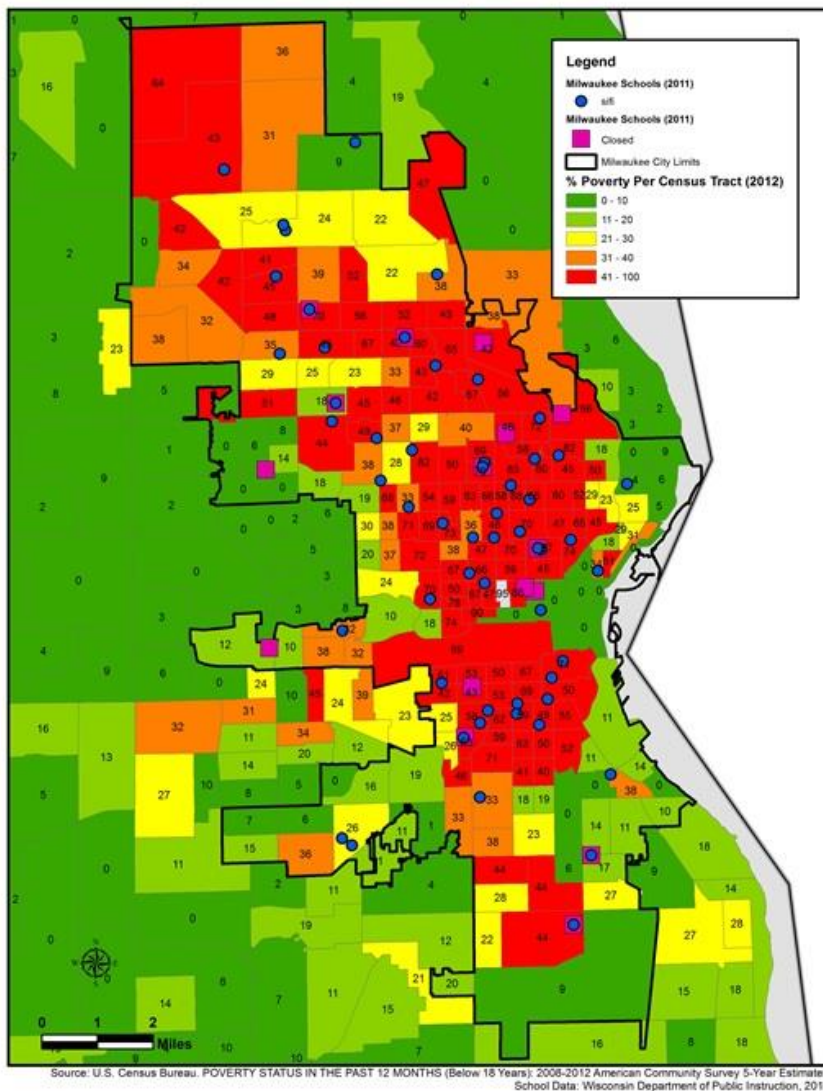
⁶⁷ *Impact of School Desegregation in Milwaukee Public Schools on Quality Education for Minorities.....15 Years Later,* U.S. COMM’N ON CIVIL RIGHTS, WISCONSIN ADVISORY COMMITTEE (1992), <http://eric.ed.gov/?id=ED351427>.

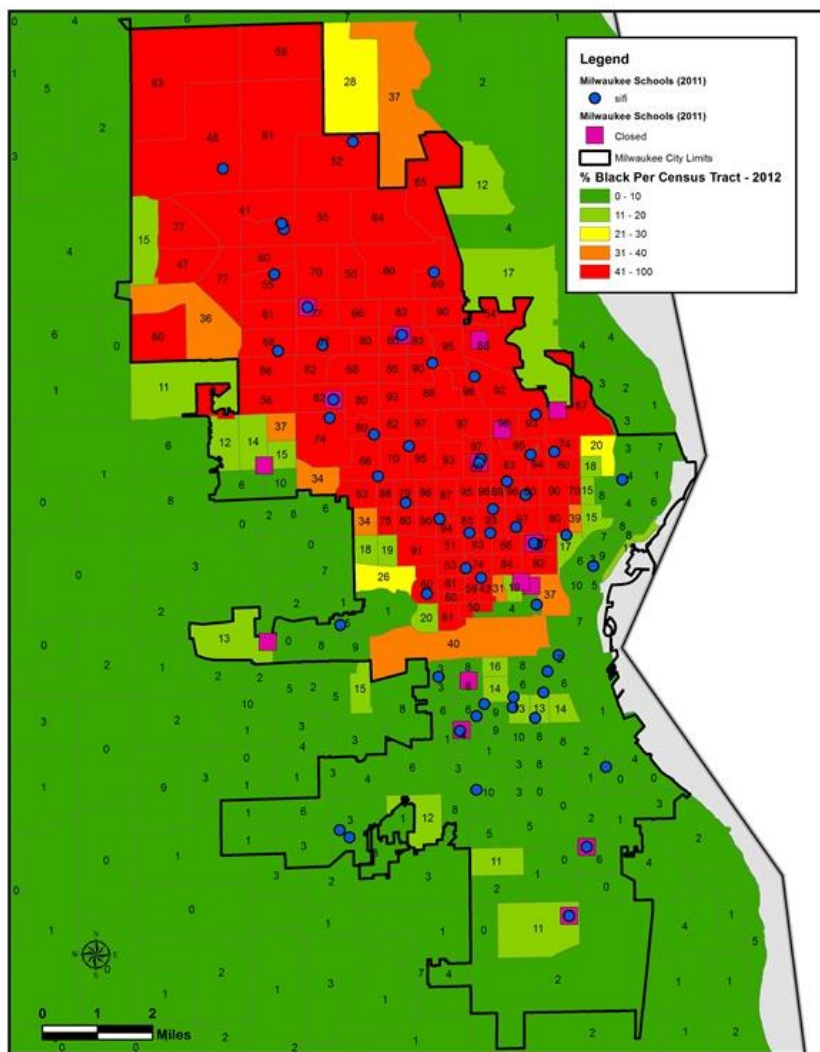
⁶⁸ Miner *supra* note 31.

⁶⁹ See Kent Wainscott, *Two lawmakers want county-appointed commissioner to control MPS failing schools,* ABC NEWS MILWAUKEE (May 11, 2015, 7:19 p.m.),

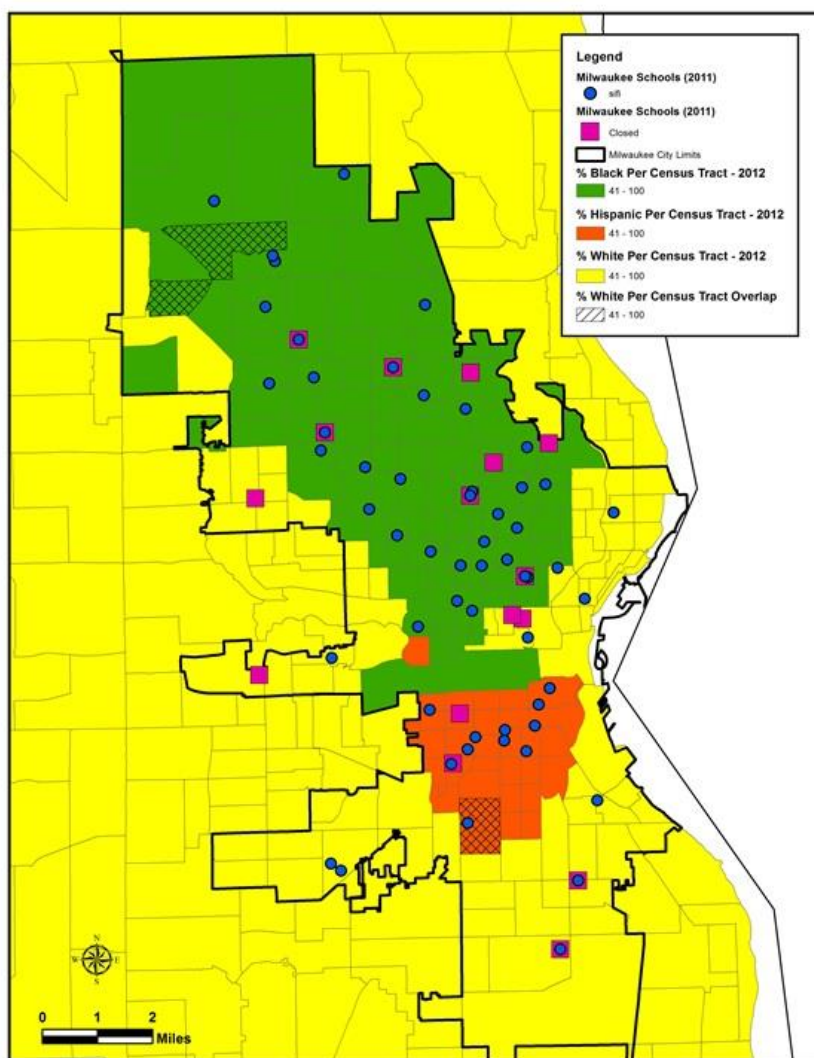
As we show in Figure 9 what is rarely talked about is that these “failing schools” are very closely linked to the geography of Milwaukee we have described above. In the first map, we show with a blue dot where each of the SIFI schools are located in Milwaukee and how this is linked to the poverty concentration in the city. Nearly all of the SIFI schools are located in census tract areas that are 41-100 percent poverty. In the second map in Figure 9 we illustrate the trends relating to racial/ethnic segregation and SIFI schools using the map of the percentage of black students per census tract. However, given the shifting demographic trends in recent years, including the growing Hispanic population, we also include a more detailed map, showing that nearly all of the SIFI schools are located in census tract that are 41-100 percent black or 41-100 percent Hispanic.

Figure 9: Maps of SIFI schools 2012 by Poverty and Race





Source: U.S. Census Bureau. Percent Black per Census Tract: 2008-2012 American Community Survey 5-Year Estimates; School Data: Wisconsin Department of Public Instruction, 2011.



Source: U.S. Census Bureau. Race Data Per Census Tract: 2008-2012 American Community Survey 5-Year Estimates. School Data: Wisconsin Department of Public Instruction, 2011.

The maps above illustrate what it means to be “stuck in place”⁷⁰ given the high levels of segregation and related low academic outcomes. Today, as a result, advocates in Milwaukee are arguing for targeted improvements in city schools or regional/integrative solutions, calling to mind the battles that were fought in Milwaukee in prior decades.

⁷⁰ PATRICK SHARKEY, URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUITY (2013).

Realigning ESEA toward Equality of Opportunity

The evidence from Milwaukee shows how ESEA misdiagnosed a key source of academic achievement gaps: by seeking to make separate equal, ESEA funneled millions of dollars into racially isolated districts like Milwaukee with little effect given the growing isolation and white and middle class flight out of the urban core. Despite this investment, Milwaukee's schools were unable to overcome the effects of segregation and concentrated poverty, and many today struggle with extremely low levels of achievement.

We are at a critical moment given the passage of ESSA, with an opportunity to redirect and realign state and local policy responses toward a commitment to educational equity across district boundary lines. In this section we provide concrete recommendations for the implementation of ESSA. We argue that ESSA implementation must focus on both more targeted, place-based efforts to strengthen schools and communities in high poverty neighborhoods and regional strategies to create more diverse schooling environments. Indeed, in Milwaukee and other areas with these similar trends an ongoing struggle exists between investing more fully and comprehensively in the neighborhoods and schools within cities (i.e., through Promise Neighborhood grants) versus reducing the concentrations of poverty and racial isolation in cities by enacting policies that move people across boundary lines for integrative purposes (i.e., Chapter 220). We argue that both are necessary. Through ESSA local and state responses, we argue, must go beyond the artificial and narrow "single district," and separate but equal approach of existing efforts, which disregards the racial and socioeconomic segregation, to consider the broader metropolitan areas within which districts are embedded with both of these components. Given the local resistance against integrative practices to address educational inequities, both ESSA and potentially other federal initiatives must promote needed policy change, including both positive and negative incentives toward these larger goals.

School Choice to Promote Diversity across District Lines

We argue that the flexibility of ESSA or new federal incentive programs must be realigned to promote diversity across district lines, in contrast to "intra-district" NCLB choice which limited students' choices to schools within their own districts thereby perpetuating segregation. For choice policies to improve diversity across all districts, they should be

two-way, with both urban and suburban districts sending and receiving students. To be enacted, the following components would need to be included:

- ***Investment in diversity-focused ‘turnaround’ schools:*** States are required under ESSA to adopt evidence-based interventions in the lowest performing (bottom 5%) of schools. Integration is a proven school improvement strategy, as it has been empirically linked to improved outcomes for students. Thus, because many urban districts have a number of very low-performing schools that fall into the “bottom 5%” category, this is the opportunity through ESSA to truly invest in “turnaround” by changing some of these “failing” schools into high priority inter-district magnets, which is an approach that is now being piloted in New York State. This type of place-based approach focuses on the city schools while also considering broader integrative goals so that over time the concentration of poverty and racial isolation is reduced - thereby addressing some of the concerns of activists who are skeptical that larger metropolitan efforts will be at the continued expense (and result in further decline) of cities. Funding to promote stipulations relating to diversity targets would be necessary, as well as funds for outreach and promotion, to ensure these magnets can, and do, attract families from outside the city.
- ***Incentives for participation and/or penalties for non-compliance:*** To create an inter-district choice program to foster diversity in today’s policy context, our research suggests that funding is necessary to incentivize districts to enroll students from other districts, whether urban or suburban. In some places, e.g., Connecticut, legislation provides additional per pupil funding once certain thresholds are met and at additional levels. These financial incentives have had a positive impact on the budgets of many suburban schools that accept diversity transfers. Alternatively, funds could be withheld from districts that fail to meet specified targets.
- ***Targeted funding:*** Additional set-aside funds would also be needed for the costs of operating diversity choice programs, e.g., for transportation costs, capital improvements (particularly for urban schools), professional development for culturally responsive teaching, and student supports. These funds could be allocated on a per pupil basis or in grant allocations for participating districts to ensure that the key features described above are met.

- ***Steady funding provisions:*** In at least the first few years of policy implementation, sending districts, particularly urban districts, that lose students to suburban schools via choice should be “held harmless” on current funding levels as the system begins to be put in place. This would require financial set asides to maintain federal and state funding levels.

Flexible and Differentiated Accountability Based on District Contexts

We argue that as states begin to develop their accountability systems in response to ESSA, they can take advantage of the added flexibility within the legislation to promote diverse schools as a state goal. This requires that state systems not only do not penalize schools for being racially diverse, but that they promote diverse and fully integrated learning environments as a goal.

- ***Flexible accountability to support diversity-based school choice:*** A key barrier to creating diverse schools via school choice policies relates to accountability for both schools and teachers, which has the potential to undermine these policies given the high stakes involved for districts and educators. In our research, a number of suburban educators told us that the accountability systems created disincentives for diversity transfers, as educators were reluctant to enroll students who count as a “subgroup” or would be perceived as having greater academic needs, thereby subjecting their schools (or themselves) to lowered ratings. To reduce this barrier, states should provide more flexibility for schools under accountability systems if they open seats to students who change the demographics of the classroom or school, by providing additional time or resources to meet targets.
- ***Positive labeling for diverse schools:*** Accountability systems should also reward districts and schools for taking steps to becoming more diverse. ESSA represents an opportunity to include such a reward system, as the legislation requires states to report measures of school quality. Examples listed in the legislation are student engagement, and school climate, but states are free to select their own indicators. We urge states to take advantage of this flexibility by incorporating school diversity as one measure of school quality. Indeed, states could also provide schools that have intentionally sought to attract students who are underrepresented in their school populations with a special designation as a “Diversity

School.” Providing this designation on students’ high school transcripts may provide an advantage in an increasingly competitive college admissions environment and could potentially attract both urban and suburban families.

- ***Differentiated accountability.*** States should also move beyond ‘one-size-fits-all’ models, which include the same policy interventions for schools regardless of social context. Such policies tend to subject racially isolated urban districts, like Milwaukee, to increasing sanctions and negative labels, which often fail to improve even despite those interventions. In response to ESSA, states could, for example, create categories of districts (i.e. urban, inner ring suburb, outer ring suburb, rural) and provide them with different performance measures, targets, and interventions, including greater capacity building and support structures around student and family needs in these contexts that disrupt the more technical aspects of teaching and learning. In many of these districts, the larger system faces high levels of leadership churn, undermining reform efforts and requiring a different set of strategies and interventions than more stable suburban and rural communities.⁷¹

Promoting Cooperation between School Districts within Metropolitan Areas

NCLB included few incentives for school districts to work together across regions, and instead fueled competition between districts by encouraging comparisons via accountability labels. Given the flexibility in ESSA, states should incentivize cooperation between school districts in ways that advance equity across district lines.

- ***Cooperation across districts:*** ESSA includes a provision that allows magnet school funding to go to LEAs or school district consortia to create cooperative magnet schools operated by more than one district, drawing from curricula and employees from both districts. This would require adjustments to accountability systems, which often hold one district accountable for student performance. Funds through ESSA or through a separate federal incentive program could also be provided to

⁷¹ Kara S. Finnigan, et al., *How Leadership Churn Undermines Learning and Improvement in Low-Performing School Districts*, in THINKING AND ACTING SYSTEMICALLY: IMPROVING SCHOOL DISTRICTS UNDER PRESSURE (Alan J. Daly & Kara S. Finnigan eds. (In Press).

create ‘magnet pathways’ as exists in legislation in Omaha, in which one district could sponsor an elementary magnet, that would feed into a middle school magnet in another district, etc.

- ***Regional educational projects:*** A federal pilot program could be developed that includes grants for regional educational projects, funneling funding not to districts but to entire metropolitan areas. Oversight of the funds and the project decisions could go to a regional board with representatives from districts across metropolitan areas, much like Omaha’s, with representation proportionate to population (as opposed to district, which would leave urban core districts at a numeric disadvantage).

Connecting ESEA to Housing Policy

ESEA largely operates in isolation from many other social policy efforts designed to foster greater diversity across metro areas and the new ESSA continues this trend. Therefore, it is critical that federal policy focus on linking education policy with other federal initiatives.

- ***Federally funded affordable housing targeted towards neighborhoods with high opportunity schools:*** In response to the recent Supreme Court ruling on fair housing,⁷² the Obama administration has issued new regulations for affordable housing programs that are intended to improve access for low-income families to high opportunity neighborhoods. We argue that the patterns of residential segregation and school failure suggest that such policies should be prioritized in ways that give families access to high opportunity *schools*.
- ***ESSA funding to support diversity under housing programs:*** ESEA regulations have historically required that schools and districts meet certain thresholds of poverty to receive funds, which would render some schools in high opportunity neighborhoods receiving students through federally funded affordable housing ineligible. Targeted funding through ESSA should provide special funding for schools that receive students under those programs, but which may not have the proportion of low-income students to otherwise receive funding, as a way to enable schools to support those families.

⁷² Texas Dept. of Housing and Comm’y Affairs v. Inclusive Communities Project, Inc., 135 S.Ct. 2507 (2015).

Conclusion

To return to the promise of ESEA, ESSA implementation and other areas of federal policy must move beyond the separate but equal approaches, particularly approaches that view urban schools and staff as the problem causing school failure, by shifting toward a broader understanding of how larger social processes, including racial and socioeconomic isolation, in these same communities have promoted the success of some at the expense of others. Individuals on the ground in Milwaukee and other locales that we studied have worked hard, often against strong political and educational pressures, to reduce inequities related to educational access and opportunity in their metropolitan areas, though none have been able to stem the tide of growing racial and socioeconomic inequality. As a result, at this point in time, not only must states and districts better understand the historical inequities and ways to alter these patterns through ESSA implementation, but also federal policy action is critical to both support more equity-driven policies across the country and to link educational equity with housing equity given the high levels of segregation in many of these communities. It is only with the intentional focus on policies that reinvest in the most racial and socioeconomically isolated communities in cities like Milwaukee, while also fostering greater diversity across metro areas through mobility of students across district boundaries, that the urban school “crisis” can be addressed and that opportunity can be improved for all youth. In essence, a combination of targeted incentives and greater coordination across governmental agencies and sectors through ESSA or other federal policy efforts, would re-focus the vision of ESEA back towards that originally articulated by civil rights reformers 50 years ago: that diverse schooling environments are a critical piece of equality of educational opportunity.

Discipline Disproportionality, Student Achievement, and the Every Student Succeeds Act (ESSA)

Nicholas P. Triplett, Amber C. Bryant, Aimy S. L. Steele, Katie E. Brown, Tameka Ardrey, Ayana Allen, and Chance W. Lewis*

Over forty years of research has demonstrated that African American students are overrepresented in school disciplinary infractions even after controlling for misbehavior rates, socio-economic status, and a host of other relevant classroom and school variables.¹ Research also shows persistent discipline disparities for Native Americans² and students with disabilities,³ and to a lesser degree, for populations based on Hispanic/Latino ethnicity⁴ and socioeconomic status.⁵ Rates of

* Nicholas P. Triplett, Amber C. Bryant, Aimy S. L. Steele, Katie E. Brown and Tameka Ardrey are Doctoral Fellows at the Urban Education Collaborative at the University of North Carolina at Charlotte. Ayana Allen, Ph.D. is an Assistant Professor of Urban Education and Educational Policy at Drexel University. Chance W. Lewis, Ph.D. is the Carol Grotnes Belk Distinguished Professor of Urban Education at the University of North Carolina at Charlotte.

¹ *School Suspensions: Are They Helping Children?* CHILDREN'S DEFENSE FUND (1975), <http://www.childrensdefense.org/library/archives/digital-library/school-suspensions-are-they-helping-children.html>; Tamela McNulty Eitle & David James Eitle, *Inequality, Segregation, and the Overrepresentation of African Americans in School Suspensions*, 47 SOC. PERSP. 269 (2004); Tony Fabelo et al., *Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement* (2011); Michael Roque & Raymond Paternoster, *Understanding the Antecedents of the "School-to-Jail" Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Russell J. Skiba et al., *Where Should We Intervene? Contributions of Behavior, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, 132-146 (Daniel J. Losen, ed., 2015).

² Carolyn A. Brown & Caterina Di Tillio, *Discipline Disproportionality among Hispanic and American Indian Students: Expanding the Discourse in US Research*, 2 J. EDUC. & LEARNING 47 (2013); Michael P. Krezmien et al., *Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting*, 14 J. EMOTIONAL & BEHAV. DISORDERS 217 (2006); Michael Roque, *Office Discipline and Student Behavior: Does Race Matter?* 116 AM. J. EDUC. 557 (2010).

³ Russel J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URB. REV. 317 (2002); John M. Wallace Jr. et al., *Racial, Ethnic, and Gender Differences in School Discipline among US High School Students: 1991-2005*, 59 NEGRO EDUC. REV. 47 (2008).

⁴ Anthony A. Peguero & Zahra Shekarkhar, *Latino/a Student Misbehavior and School*

suspension and expulsion are at historically high levels,⁶ and the overuse and disproportional application of exclusionary discipline has had profound negative effects on student academic outcomes.

Research shows that disproportional discipline contributes to student disengagement and alienation,⁷ as well as an increased likelihood of contact with law enforcement and the juvenile justice system.⁸ Discipline disparities are also mirrored in metrics related to student performance, including academic achievement,⁹ drop out rates,¹⁰ and instructional time.¹¹ A recent meta-analysis of 34 studies over a 26-year period

Punishment, 33 HISP. J. BEHAV. SCI. 54 (2011); Russell J. Skiba et al., *Race is Not Neutral: An Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85 (2011).

⁵ Christine A. Christie et al., *School Characteristics Related to the Use of Suspension*, EDUC. & TREATMENT CHILD. 509 (2004); Linda M. Raffaele Mendez et al., *School Demographic Variables and Out-of-School Suspension Rates: A Quantitative and Qualitative Analysis of a Large, Ethnically Diverse School District*, 39 PSYCHOL. SCH. 259 (2002); Russell J. Skiba et al., *Office Referrals and Suspension: Disciplinary Intervention in Middle Schools*, 20 EDUC. & TREATMENT CHILD. 295 (1997).

⁶ *Education on Lockdown: The Schoolhouse to Jailhouse Track*, ADVANCEMENT PROJECT (2005), http://b.3cdn.net/advancement/5351180e24cb166d02_mlbrqxlh.pdf; Daniel J. Losen & Tia Elena Martinez, *Out of School and Off Track: The Overuse of Suspensions in American Middle and High Schools*, THE CIVIL RIGHTS PROJECT (2013), <http://files.eric.ed.gov/fulltext/ED541735.pdf>.

⁷ SHARON LYNN NICHOLS & DAVID C. BERLINER, *COLLATERAL DAMAGE: HOW HIGH-STAKES TESTING CORRUPTS AMERICA'S SCHOOLS* (2007); *Education on Lockdown*, *supra* note 6; Lisa Guisbond & Monty Neill, *Failing Our Children: No Child Left Behind Undermines Quality and Equity in Education*, 78 THE CLEARING HOUSE: A J. EDUC. STRATEGIES & IDEAS 12 (2004).

⁸ *Education on Lockdown*, *supra* note 6; Ronnie Casella, *Punishing Dangerousness Through Preventive Detention: Illustrating the Institutional Link Between School and Prison*, in NEW DIRECTIONS FOR YOUTH DEVELOPMENT 55-70 (Johanna Wald & Daniel J. Losen, eds., 2003); Paul J. Hirschfield & Katarzyna Celinska, *Beyond Fear: Sociological Perspectives on the Criminalization of School Discipline*, 5 SOC. COMPASS 1 (2011).

⁹ See Fabelo et al., *supra* note 1; Russel Skiba & M. Karega Rausch, *The Relationship between Achievement, Discipline, and Race: An Analysis of Factors Predicting ISTEP Scores*, CTR. FOR EVAL. AND EDUC. POL'Y (2004), available at <http://eric.ed.gov/?id=ED488899>.

¹⁰ Robert Balfanz et al., *Sent Home and Put Off-Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the Ninth Grade*, in CLOSING THE SCHOOL DISCIPLINE GAP: EQUITABLE REMEDIES FOR EXCESSIVE EXCLUSION, 17-30 (Daniel J. Losen, ed., 2015).

¹¹ Chance W. Lewis et al., *African American Male Discipline Patterns and School District Responses Resulting Impact on Academic Achievement: Implications for Urban Educators and Policy Makers*, 1 J. AFR. AM. MALES EDUC. 7 (2010); Daniel J. Losen &

reported a consistent inverse relationship between suspension and achievement, along with a significant positive relationship between suspension and dropout.¹² This has led some scholars to refer to racial gaps in discipline and achievement as “two sides of the same coin.”¹³

A growing body of literature positions negative biases and cultural attitudes of predominantly White school authorities as important contributors to disparities in both school discipline and academic achievement.¹⁴ Studies have found that teachers tend to perceive minority students (especially African Americans) as more defiant and disrespectful, prone to misbehavior, and likely to earn lower grades than White students.¹⁵ Importantly, teacher perceptions have also been shown to predict outcomes in both student achievement and school discipline.¹⁶ Discipline studies have found that teachers’ racial stereotypes can influence their perception of student behavior and lead to the escalation of negative disciplinary responses toward African-American students.¹⁷ Achievement studies have shown that White teachers may have significantly lower academic expectations for African-American students,¹⁸ and that teachers’ unconscious racial attitudes can explain a

Russell J. Skiba, *Suspended Education: Urban Middle Schools in Crisis*, SOUTHERN POVERTY L. CTR. (2010), available at http://www.splcenter.org/sites/default/files/downloads/publication/Suspended_Education.pdf.

¹² Amity L. Noltemeyer et al., *Relationship between School Suspension and Student Outcomes: A Meta-Analysis*, 44 SCH. PSYCHOL. REV. 224 (2015).

¹³ Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 59 (2010).

¹⁴ ANN ARNETT FERGUSON, *BAD BOYS: PUBLIC SCHOOLS IN THE MAKING OF BLACK MASCULINITY* (2000); Michael Roque & Raymond Paternoster, *Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. CRIM. L. & CRIMINOLOGY 633 (2011); Linda Van den Bergh et al., *The Implicit Prejudiced attitudes of Teachers: Relations to Teacher Expectations and the Ethnic Achievement Gap*, 47 AM. EDUC. RES. J. 498 (2010); Frances Vavrus & KimMarie Cole, *“I Didn’t Do Nothin’”: The Discursive Construction of School Suspension*, 34 URB. REV. 87 (2002).

¹⁵ Anne Gregory & Rhona S. Weinstein, *The Discipline Gap and African Americans: Defiance or Cooperation in the High School Classroom*, 46 J. SCH. PSYCHOL. 455 (2008); I. Neal La Vonne et al., *The Effects of African American Movement Styles on Teachers’ Perceptions and Reactions*, 37 J. SPECIAL EDUC. 49 (2003).

¹⁶ Linda M. Raffaele Mendez, *Predictors of Suspension and Negative School Outcomes: A Longitudinal Investigation*, 2003 NEW DIRECTIONS FOR YOUTH DEV. 17 (2003).

¹⁷ Jason A. Okonofuna & Jennifer L. Eberhardt, *Two Strikes Race and the Disciplining of Young Students*, 26 PSYCHOL. SCI. 617 (2015).

¹⁸ Seth Gershenson et al., *Who Believes in Me? The Effects of Student-Teacher Demographic Match on Teacher Expectations*, W.E. UPJOHN INST. FOR EMPLOY. RES.

significant proportion of the variation in teacher expectations and achievement levels of racial sub-groups.¹⁹

Recent federal guidelines from the Department of Education (ED) and Department of Justice (DOJ)²⁰ have focused unprecedented political and legal attention to the issue of discipline equity. Several school districts have recently reached voluntary discipline settlements with the DOE and DOJ,²¹ and a number of states and locales are seeking ways to hold schools and districts accountable for disproportional discipline outcomes.²² This policy shift toward more equitable discipline reform, along with the overwhelming research evidence mentioned above, are reflected in new federal education policy reforms undertaken as part of the Every Student Succeeds Act (ESSA) of 2015.²³

The ESSA is the most recent authorization of the Elementary and Secondary Education Act (ESEA) of 1965, the original intent of which was to provide equal educational opportunity for poor children and children of color.²⁴ The modified purpose statement of Title I of the ESSA retains this orientation, stating, “The purpose of this title is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”²⁵

(2015), available at http://research.upjohn.org/up_workingpapers/231.

¹⁹ Linda Van den Bergh et al., *supra* note 14.

²⁰ *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, U.S. DEPT. OF EDUC. (2014), available at <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf>; Catherine E. Lhamon & Jocelyn Samuels, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, U.S. DEPT. OF EDUC. & U.S. DEPT. OF JUSTICE (Jan. 8, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html>.

²¹ See e.g., *U.S. Education Department Reaches Voluntary Resolution Agreement Following Minneapolis Public School District Discipline Investigation*, U.S. DEPT. OF EDUC. (Nov. 20, 2014), <http://www.ed.gov/news/press-releases/us-education-department-reaches-voluntary-resolution-agreement-following-minneapolis-public-school-district-discipline-investigation>.

²² *Minneapolis Public Schools Sees Progress with New Behavior Standards and Sets Goal for School Year*, MINNEAPOLIS PUB. SCH. (Nov. 7, 2014), http://www.mpls.k12.mn.us/november_7.html; *Significant Disproportionality*, OREGON DEPT. OF EDUC., <http://www.ode.state.or.us/search/page/?=3149> (last visited Feb. 9, 2016).

²³ Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, 129 Stat. 1802 (2015).

²⁴ *Federal Policy, ESEA Reauthorization, and the School-to-Prison Pipeline*, ADVANCEMENT PROJECT, ET AL., <http://aaldef.org/Federal%20Policy,%20ESEA%20Reauthorization,%20and%20the%20School-to-Prison%20Pipeline%20-%202001%2018%2011.pdf> (last visited Feb. 9, 2016).

²⁵ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1001 (2015).

The law operates by conditioning federal grant money on the submission and approval of plans or applications to fulfill this purpose.

Since the 2001 authorization, often referred to as the No Child Left Behind Act (NCLB), the ESEA has been an integral part of federal efforts to reduce achievement differences between student groups. However, NCLB and other previous authorizations failed to address the close relationship between achievement and discipline.²⁶ Under previous authorizations of the ESEA the collection of discipline data was optional,²⁷ and the importance of school discipline was recognized almost exclusively in relation to school safety and crime prevention.²⁸

The recent ESSA has taken important steps toward equitable school discipline reforms. First, it acknowledges the presence and potential harm of excessive use of exclusionary discipline like suspension and expulsion. For example, new language indicates that mandatory state plans must address how educational agencies can improve school conditions for student learning through a reduction in the “overuse of discipline practices that remove students from the classroom.”²⁹ Further, it requires the previously optional collection and dissemination of disaggregated discipline data as part of state annual report cards.³⁰ As a result, the ESSA provides an acknowledgement of the relationship between discipline and achievement, and introduces the potential for discipline outcomes to be integrated into federal accountability structures previously reserved exclusively for results related to academic achievement and attainment.

Despite the progress made with the ESSA, it remains unclear how state and local discipline outcomes will be integrated into federal accountability structures. For example, how will the status of federal grant money be affected by the existence of discipline disparities in educational agencies that otherwise meet standardized testing requirements? Furthermore, unlike various measures of academic attainment such as dropout, the ESSA provides no clear process for the assessment and mitigation of pronounced disparities in school discipline. Given the past four decades of well-documented but stubbornly persistent disparities for racial minorities and other student sub-groups, the ESSA leaves considerable

²⁶ *Federal Policy, ESEA Reauthorization, and the School-to-Prison Pipeline*, *supra* note 24.

²⁷ Elementary and Secondary Education Act (ESEA), 20 U.S.C. § 1111 (h)(D)(iv) (2002).

²⁸ Elementary and Secondary Education Act, 20 U.S.C. § 5431(h)(3)(A) (2002).

²⁹ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1111 (g)(1)(C)(ii) (2015).

³⁰ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1111 (h)(1)(C)(viii)(I) (2015).

uncertainty on a number of key issues related to equity in school discipline.

This manuscript is intended to promote further dialogue on school discipline policy and to introduce additional reform directions to further promote equitable discipline outcomes. As such, it seeks to critique the new provisions under the ESSA, to inform future authorizations of the ESEA and other federal policy initiatives. We begin with an appraisal of the new discipline data collection and dissemination requirements under Title 1 in order to highlight a number of unanswered questions raised by the ESSA. Next, we present detailed blueprints and sample legislation for reform in two specific areas. First, in recognition of the racial and cultural components of school discipline, we propose the *Equitable Discipline Act* (see Appendix A) that would make the cultural programs currently funded only for Native American, Native Hawaiian and Alaska Natives under Title VII available to all student subgroups that have historically experienced differential academic and disciplinary outcomes. Those groups include racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities. Second, in recognition of the legal and civil rights aspects of school discipline, we propose the *Cultural Education Equity, Support, and Assistance Act* (see Appendix B) be included in future authorizations of the ESEA, which a) establishes a process for the assessment and mitigation of pronounced disparities in discipline, and b) strengthens existing federal prohibitions (under Titles VI of the Civil Rights Act) against discriminatory discipline practices based on both *disparate treatment* and *disparate impact* legal frameworks.³¹

Data Collection & Dissemination

Title 1 of the ESSA now requires that disaggregated data collection for achievement from all state and local educational agencies be included in educational plans as a condition of federal grant money.³² As stated above, the collection of discipline data was optional under previous authorizations, and prior to these new requirements, only 18 states required student discipline data reporting through state statute.³³ The

³¹ *Guiding Principles*, *supra* note 20.

³² ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1111 (h)(1)(C)(viii)(I) (2015).

³³ *School Discipline Data: A Snapshot of Legislative Action*, COUNCIL OF ST. GOV'T JUST. CTR. (2014), available at <http://csgjusticecenter.org/wp-content/uploads/2014/03/NCSL-School-Discipline-Data-Brief.pdf>.

absence of data from all states and local educational agencies along with variation in collection, aggregation and reporting have historically made it difficult to study school discipline effectively and thus to successfully inform, implement, and evaluate the effectiveness of discipline policies and practices for all students. Previous authorizations also placed heavy emphasis on standardized test results, which, in the absence of federal oversight of school discipline, produced an incentive to remove or otherwise “push out” students perceived as disruptive or academically challenged.³⁴ The requirement of disaggregated discipline data from all states and locales may help to remove this push-out incentive, and may also make it possible to integrate discipline metrics into federal accountability frameworks.

While the requirement of disaggregated discipline data is an important step forward, the ESSA does not establish what might be termed a *system* of discipline accountability. For example, the ESSA takes steps to address the “overuse”³⁵ of exclusionary discipline; however, it provides little guidance on what might constitute the overuse of suspension and expulsion. Furthermore, there is no definition of the concept of “discipline disproportionality” or any indication of how the closing of associated “discipline gaps” might be assessed. The lack of specificity related to discipline measurement stands in stark contrast to more well-developed systems of academic measurement and accountability, which include concepts like “levels of achievement” based on “challenging state standards,” progress toward yearly “proficiency” goals, and “proficiency and graduation gaps.” Thus it is unclear what the notions of progress and proficiency might refer to within the realm of school discipline.

The ESSA also includes new language related to the intersection of school discipline, civil rights and the legal system including school-based student interaction with law enforcement, the juvenile justice system and incarceration. In its discussion of safe and healthy schools, the ESSA explicitly connects school discipline and future incarceration by funding “locally-tailored plan(s) to reduce exclusionary discipline practices...with the long-term goal of prison reduction through opportunities, mentoring,

³⁴ Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of “No Child Left Behind,”* 10 RACE ETHNICITY & EDUC. 245 (2007); Deborah Gorden Klehr, *Addressing the Unintended Consequences of No Child Left Behind and Zero Tolerance: Better Strategies for Safe Schools and Successful Students,* 16 GEO. J. ON POVERTY L. & POL’Y 585 (2009).

³⁵ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1111 (g)(1)(C)(ii) (2015).

intervention, support, and other education services.”³⁶ This new language recognizes a significant body of “school-to-prison pipeline” research showing that disproportional discipline contributes to an increased likelihood of contact with law enforcement and the juvenile justice system.³⁷

The growing overlap of discipline and the law enforcement highlights the importance of including legal and civil right considerations in future school discipline reform. Beyond its mentioning of “prison reduction,” the ESSA does little to secure the legal or civil rights of students punished in schools. For example, while the previous authorization of the ESEA included language explicitly preserving the civil rights of Native American students in school discipline cases, the ESSA does not expand such protection to other student subgroups who face disproportional incarceration rates. Part III of this manuscript addresses additional issues of legal and civil rights in greater detail.

The following sections propose reform directions and sample legislation intended to bring more clarity to the discipline measures in the ESSA. Central to these reforms are two proposed acts (*Equitable Discipline Act, Cultural Education Equity, Support, and Assistance Act*) which serve to define disproportionality, realize a fuller system of discipline accountability and further address the legal and civil rights components of school discipline.

Cultural Programs

Rationale

Title VII of the ESSA recognizes the relationship between student cultural identity and educational outcomes. While the ESSA is quite explicit in its recognition of culture as a mediator of academic outcomes, it does not address cultural differences in relation to school discipline. Title VII outlines a number of specific services and programs intended to promote educational equity amongst Native American, Native Hawaiian and Alaska Native populations, who “enter and exit school with serious

³⁶ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 4108 (5)(F) (iii) (2015).

³⁷ *Education on Lockdown*, *supra* note 6; Ronnie Casella, *Punishing Dangerousness Through Preventive Detention: Illustrating the Institutional Link Between School and Prison*, in *NEW DIRECTIONS FOR YOUTH DEVELOPMENT* 55-70 (Johanna Wald & Daniel J. Losen, eds., 2003); Hirschfield & Celinska, *supra* note 8.

educational handicaps”³⁸ based on a unique historical, social, and cultural identity. For example, in an effort to address the cultural diversity and unique needs of Alaska Natives, the ESEA authorizes the development of culturally-based curricular materials, professional development activities for educators, remedial and enrichment programs, and cultural education and exchange programs. While we take issue with the implication that a lack of congruence between the cultural identity of students and the prevailing cultural norms of American schools somehow constitute a “handicap” on the part of non-dominant social groups, we share the ESEA’s suggestion that cultural development experiences and curricular reforms have the potential to help school professionals address the needs of diverse student populations. As such, the kinds of cultural programs highlighted in Title VII represent a way to improve school outcomes for other historically underserved student populations, including African Americans, Hispanics/Latinos, low-income students, limited English proficient students, and students with disabilities.

As previously mentioned, there is a growing body of literature that positions the cultural attitudes, perceptions and biases of teachers and administrators as a contributor to disparities in achievement and discipline.³⁹ Students who are perceived as not conforming to prevailing school and classroom norms based on cultural forms of communication, interaction, dress or behavior are often labeled as “troublemakers,” and subjected to disproportional discipline and lower teacher expectations.⁴⁰ Ladson-Billings has noted that cultural “disconnections”⁴¹ between teachers and school authorities have resulted in students “[being] given less attention, ignored more, praised less, and reprimanded more than their counterparts when taught by Caucasian teachers.”⁴² This has led to increased focus on cultural competence and culturally relevant teaching.⁴³

³⁸ Elementary and Secondary Education Act, 20 U.S.C. § 7302(C)(3) (2002).

³⁹ GENEVA GAY, *CULTURALLY RESPONSIVE TEACHING: THEORY, RESEARCH, AND PRACTICE* (2nd ed. 2010); Anne Gregory et al., *supra* note 13. ; Brenda L. Townsend, *The Disproportionate Discipline of African American Learners: Suspensions and Expulsions*, 66 *EXCEPTIONAL CHILD*. 381 (2000); Linda Van den Bergh et al., *supra* note 14.

⁴⁰ Pamela Fenning & Jennifer Rose, *Overrepresentation of African American Students in Exclusionary Discipline: The Role of School Policy*, 42 *URB. EDUC.* 536 (2007); Gregory & Weinstein, *supra* note 15; Mendez, *supra* note 16.

⁴¹ Gloria Ladson-Billings, *Is the Team All Right? Diversity and Teacher Education*, 56 *J. OF TCHR. EDUC.* 229 (2005).

⁴² Clifton A. Casteel, *African American Students’ Perceptions of their Treatment by Caucasian Teachers*, 47 *J. OF INSTRUCTIONAL PSYCHOL.* 143 (2000).

⁴³ Gay, *supra* note 39.

Such culturally inclusive pedagogical tools are intended to help school personnel recognize and understand the unique cultural backgrounds of their students and to avoid the need for students to sacrifice their cultural integrity in order to avoid school discipline and achieve academic success. Ladson-Billings⁴⁴ has documented examples of teachers who successfully use both their own and their students' cultures to promote equitable educational outcomes. Howard⁴⁵ found that students of teachers who engage in culturally relevant teaching had smooth transitions from home to school culture, were excited about learning, and had meaningful relationships with their teachers. Extending the kinds of programs funded in Title VII to racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities represents a way to build cultural bridges between students and school authorities, and has the potential to attenuate the role of negative perception, attitudes and biases in differential outcomes in school discipline.

Recommendations

National, state and local educational entities could more fully address the cultural mismatch inherent in differential discipline outcomes through support of pre-service and in-service development experiences for school authorities. Given that school discipline operates within an environment of pervasive and often unconscious social bias toward racial/ethnic minorities, students from impoverished backgrounds, and the disabled, such development experiences should be intensive and substantial in duration.⁴⁶ As such, interventions intended to mitigate the role of prejudice in school discipline will likely exceed the scope of traditional forms of professional development and teacher training. As in previous authorizations, the ESSA maintains funding for school and community interventions such as youth PROMISE plans and positive behavioral interventions and supports (PBIS). It also includes new language funding

⁴⁴ Gloria Ladson-Billings, *But That's Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 THEORY INTO PRACTICE 159 (1995).

⁴⁵ Tyrone C. Howard, *Telling Their Side of the Story: African-American Students' Perceptions of Culturally Relevant Teaching*, 33 URB. REV. 131 (2001).

⁴⁶ Bertram Gawronski & Rajees Sritharan, *Formation, Change, and Contextualization of Mental Associations: Determinants and Principles of Variations in Implicit Measures*, in HANDBOOK OF IMPLICIT SOCIAL COGNITION 216-240 (Bertram Gawronski & Bryan K. Payne, eds., 2010).

“locally tailored” plans to reduce disparities and school discipline.⁴⁷ This language suggests an acknowledgement that all students and communities bring different cultural experiences to the classroom. It also represents a potential avenue for financially strapped schools and districts to finance the kinds of intensive (and expensive) development experiences for teachers and administrators that are needed in high-needs schools.

In terms of federal policy, future amendments to and authorizations of the ESEA should explicitly allow the funding of culturally-based curriculum materials, professional development activities for educators, remedial and enrichment programs, and cultural education and exchange programs for racial minorities, ethnic minorities, low-income students, limited English proficient students and students with disabilities. This would expand the availability of cultural programs previously reserved for Native American, Native Hawaiians and Alaska Natives. In order to give an indication of what such an expansion might look like in the context of future amendments to the ESEA, we offer the *Cultural Education Equity, Support, and Assistance Act* to be added to Title VII (See Appendix A).

Discipline Accountability and Disparate Impact Intervention

Rationale

School discipline, achievement, and accountability. Previous authorizations of the ESEA focused almost exclusively on academic testing as a metric for accountability. In the presence of such a narrow definition of educational success, schools could technically meet all the requirements of federal accountability structures despite the existence of detrimental and discriminatory discipline practices. However, as we have argued, discipline and academic outcomes are inherently linked. Studies have shown that punitive school discipline produces negative academic outcomes, student disengagement, dropout and juvenile justice contact.⁴⁸ For example, being suspended a single time in ninth grade is associated with a 20 percent increase in future high school dropout.⁴⁹ Lewis, Butler, Bonner III, and Joubert⁵⁰ linked the loss of classroom time due to

⁴⁷ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 4108 (5) (F) (iii) (2015).

⁴⁸ Emily Arcia, *Achievement and Enrollment Status of Suspended Students: Outcomes in a Large, Multicultural School District*, 38 EDUC. AND URB. SOC'Y 359 (2006); Gregory et al., *supra* note 13.

⁴⁹ See Fabelo et al., *supra* note 1.

⁵⁰ Lewis et al., *supra* note 11.

suspension with lower proficiency on standardized test scores in reading, writing, science and math. Fabelo and colleagues⁵¹ found that suspension and expulsion for a discretionary school violation almost tripled a student's likelihood of juvenile justice contact in the following year. Furthermore, research evidence indicates that less punitive and more restorative discipline policies can reduce racial discipline disparities while increasing academic achievement.⁵² The creation of a robust accountability system that includes the ESSA's newly required discipline metrics can provide a stronger and more comprehensive assessment of school success, and provide incentives to adopt reforms that can produce more equitable school discipline outcomes.

School discipline and federal legal intervention. Including discipline metrics in the ESSA's accountability structure would also provide a clear legal platform from which to pursue intervention intended to mitigate the effects of harmful discipline practices. The right not to be discriminated against on the basis of race, color, or national origin is protected by the Equal Protection Clause of the Fourteenth Amendment.⁵³ In addition, Title VI of the Civil Rights Act of 1964 specifically prohibits racial/ethnic discrimination under any programs or activity receiving Federal financial assistance,⁵⁴ which includes virtually all public schools. There are generally two ways to demonstrate discrimination in court: *disparate treatment* and *disparate impact*. Disparate treatment refers to instances of intentional discrimination (i.e. students from different races/ethnicities receive different punishments for the same violation), whereas disparate impact refers to seemingly neutral discipline practices that result in a disproportionate and unjustified effect on particular students (i.e. a discipline policy that does not mention race/ethnicity, but consistently over-selects minorities for discipline).

⁵¹ See Fabelo et al., *supra* note 1.

⁵² Robert H. Horner et al., *A Randomized, Wait-list Controlled Effectiveness Trial Assessing School-wide Positive Behavior Support in Elementary Schools*, 11 J. POSITIVE BEHAV. INTERVENTIONS 133 (2009); Joanna L. Kelm et al., *Effects of Implementing School-Wide Positive Behavioural Interventions and Supports on Problem Behaviour and Academic Achievement in a Canadian Elementary School*, 29 CANADIAN J. SCH. PSYCHOL. 195 (2014); Stephen R. Lassen et al., *The Relationship of School-wide Positive Behavior Support to Academic Achievement in an Urban Middle School*, 43 PSYCHOL. IN THE SCH. 701 (2006).

⁵³ U.S. Const. amend. XIV, § 1.

⁵⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964).

Proving discrimination in school discipline cases. While the intentional discrimination required to demonstrate disparate treatment in court certainly still exists, school discipline typically proceeds within the framework of policies and practices that are facially neutral, with no explicit mention of student race.⁵⁵ As a result, it has been difficult to successfully challenge discipline practices under Title VI based on disparate treatment (intentional discrimination) because the courts require litigants to show that the school officials acted with discriminatory intent and that discriminatory policies were racially motivated.⁵⁶ In addition, American courts have traditionally given wide discretion to school officials in matters of discipline.⁵⁷ Indeed, based on previous court decisions, some question whether it is even possible to demonstrate the kind of discriminatory intent required by disparate treatment in school discipline cases.⁵⁸ This leaves intervention based on disparate impact (disproportionate and unjustified effect) legal framework as the only feasible way to challenge disproportional discipline outcomes in court. However, based on varying legal interpretations and a lack of clear legal precedent, even disparate impact challenges in school discipline cases proceed on shaky legal footing.

Unanswered questions about disparate impact intervention in school discipline. The legal issue in question is whether Congress intended to allow disparate impact challenges under Title VI of the Civil Rights Act. While Congress specifically affirms disparate impact interventions in other areas of federal law,⁵⁹ it is unclear whether lawmakers intended to do so in Title VI of the Civil Rights Act.⁶⁰ In the absence of legal precedent, it is not clear whether Title VI's prohibits racial/ethnic

⁵⁵ Skiba et al., *supra* note 4.

⁵⁶ Patrick Pauken & Philip T.K. Daniel, *Race Discrimination & Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 EDUC. L. REP. 759, 761 n.15 (2000).

⁵⁷ *Education on Lockdown*, *supra* note 6.

⁵⁸ Russell J. Skiba et al., *African American Disproportionality in School Discipline: The Divide between Best Evidence and Legal Remedy*, 54 N.Y.L. SCH. L. REV. 1071 (2009).

⁵⁹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A); Individuals with Disabilities Education Act, 42 U.S.C. § 12112 (2004); Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (1965).

⁶⁰ *School Discipline and Disparate Impact*, U.S. COMM'N ON CIVIL RTS. (2011), available at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

discrimination in federally funded schools based on disparate impact alone (but see *Alexander v. Sandoval*⁶¹).

Despite the outstanding legal questions about federal intervention based on disparate impact, the Office of Civil Rights (OCR) currently pursues cases of alleged discrimination in school discipline based on both disparate treatment and disparate impact legal frameworks. OCR does so based on joint guidance from the Department of Education and Department of Justice.⁶² However, the Obama administration's application of disparate impact to discrimination in school discipline represents a break from previous legal interpretations, which did not view Title VI as permitting intervention based on disparate impact.⁶³ Furthermore, since extant OCR investigations have typically resulted in voluntary resolution agreements (rather than direct litigation), the Obama administration's application of disparate impact has not been tested in court.

Preserving disparate impact intervention. While changes to the ESEA would not necessarily alter current and future legal interpretations of the underlying statute (Title VI of the Civil Right Act), the inclusion of language explicitly permitting federal assessment of school discipline outcomes based on disparate impact can provide a more sound legal foundation on which to base federal intervention in cases of inequitable school discipline policies and practices. Further, affirming disparate impact in the context of federal education law would make wholesale abandonment of federal school discipline inquiries less likely in future presidential administrations, which may have differing legal interpretations or be less sensitive to the potential harm of discriminatory school discipline.

Recommendations

1. The integration of school discipline into federal accountability structures. Federal policy, including future amendments to the ESEA, should explicitly include discipline data within the accountability provisions in Title 1. While the full development and integration of

⁶¹ *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001)

⁶² *Guiding Principles*, *supra* note 20.

⁶³ John R. Martin, *Civil Rights: School Discipline and Disparate Impact*, 13 ENGAGE: J. OF THE FEDERALIST SOC'Y 30 (2012); *School Discipline and Disparate Impact*, *supra* note 60.

discipline metrics into federal accountability measures will need to go beyond the language of the ESSA. The U.S. Department of Education has produced *A Blueprint for Reform*⁶⁴ on which further actions can be based. In order to ensure that future state and local accountability plans account for indicators of equitable school discipline, we propose that the language of Title I section 1111(b)(2)(C)(vi) be amended to read as follows:

“(vi) in accordance with subparagraph (D), includes—

“(I) graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years);

“(II) discipline rates for public elementary, middle, secondary school students (defined as the percentage of office referrals, in-school suspensions, out-of-school suspensions, expulsions and referrals to law enforcement disaggregated by gender, race, ethnicity, language status and disability status)

“(III) at least one other academic indicator, as determined by the State for all public elementary school students;...

This language obliges federal officials to include the discipline rates of relevant student subgroups (along with academic indicators like graduation rates and assessment outcomes) in determining “adequate yearly progress.”⁶⁵

2. *Equitable Discipline Act.* We propose an *Equitable Discipline Act* (EDA) be added to the ESSA following the current Part H (sections 1801-1830). The EDA is modeled on the Dropout Prevention Act (beginning section 1801). It is intended to represent a first step toward more equitable discipline practices by further funding interventions to reduce discipline disproportionality in middle and secondary schools. The EDA makes additional grants available to state and local educational agencies for the prevention of racial discipline disparities through school wide programs proven effective in reducing disproportional discipline. It also creates a series of structural supports to collect systematic data on effective

⁶⁴ *A Blueprint for Reform: The Reauthorization of the Elementary and Secondary Education Act*, U.S. DEPT. OF EDUC. (2010), <https://www2.ed.gov/policy/elsec/leg/blueprint/blueprint.pdf>.

⁶⁵ Elementary and Secondary Education Act, 20 U.S.C. § 6161 (2002).

interventions, and to make information, best practices, and federal resources available to schools and educational agencies. Also included are provisions that increase the types of proven strategies that can address the needs of an entire school population or a subset of students based on race, ethnicity of disability status.

The EDA further promotes the integration of discipline into federal accountability structures by providing definitions of the terms “discipline” and “discipline disproportionality.” The intent here is to avoid excessive variation in the tabulation and reporting of discipline data across the spectrum of educational agencies, and provides an enhanced level of specificity to the discipline component of federal accountability to mirror that of the academic components. These steps will facilitate the integration of discipline data into a more comprehensive federal accountability structure. They will also facilitate the identification of disparate discipline outcomes and provide a basis for federal intervention. In addition, the proposed EDA contains language in section 1930(c)(1)(A) to ensure that federal officials have the ability to use disparate impact analysis to evaluate the effectiveness of grant-funded programs intended to prevent disproportional discipline (See Appendix B).

Summary & Conclusion

The current policy environment presents an unprecedented opportunity to address discipline inequity and its harmful effects on student outcomes through further changes to federal education law. This manuscript proposes changes to the ESSA that will enable stakeholders to measure, evaluate and mitigate the harmful effects of disproportional school discipline.

We recognize that federal reforms that entail additional responsibilities for public schools include the potential for unintended consequences. The most apt example is the current ESEA’s accountability measures of student achievement, which were intended to improve the performance of disadvantaged students but have in many cases created conditions that do just the opposite.⁶⁶ Thus, we will briefly address two potential points of opposition to the changes proposed here.

Firstly, some have argued that federal intervention in cases of racial discipline disparities may lead schools to avoid justified discipline of racial minorities in order to comply with accountability measures,

⁶⁶ LINDA DARLING-HAMMOND, *THE FLAT WORLD AND EDUCATION: HOW AMERICA’S COMMITMENT TO EQUITY WILL DETERMINE OUR FUTURE* (2010).

producing higher levels of misbehavior and school disorder.⁶⁷ This argument is perhaps best understood against a backdrop of the highly publicized instances of schools doctoring numbers to comply with achievement accountability requirements. However, we find this scenario implausible based on research that has found no relationship between student race and misbehavior rates.⁶⁸ Given that various racial groups generally have similar rates of misbehavior, our efforts to enhance the identification and oversight of racial discipline disparities are substantially more likely to reduce *unnecessary* punishment than to preclude reasonable responses to serious misbehavior.

A second potential point of opposition is the suspicion of additional unfunded federal accountability mandates, a suspicion we share. Therefore, our proposal includes measures intended to increase support for schools as they seek to implement discipline reform. The proposed *Cultural Education Equity, Support, and Assistance Act* further expands funding opportunities for cultural programs to reduce unwarranted discipline based on racial, ethnic and cultural differences. Likewise, the proposed *Equitable Discipline Act* provides resources and structural supports for school-based interventions specifically intended to prevent racial disparities in school discipline.

Ultimately, this manuscript seeks to promote equitable school discipline and educational success for all students. By fully integrating discipline metrics into federal accountability structures, expanding federal funding of cultural programs, providing resources for school-based discipline interventions, and establishing disparate impact intervention, we support the ESSA's explicit intention "to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps."⁶⁹

⁶⁷ George Leef, *Obama Administration Takes Groupthink to Absurd Lengths: School Discipline Rates Must Be "Proportionate,"* FORBES (February 20, 2014), <http://www.forbes.com/sites/georgeleef/2014/02/20/obama-administration-takes-groupthink-to-absurd-lengths-school-discipline-rates-must-be-orioirtuibate/#28d4ddd17e75>; Martin, *supra* note 63; Robert Weissberg, *Destroying Schools to Achieve Racial Justice*, AMER. THINKER (Oct. 14, 2010), http://www.americanthinker.com/articles/2010/10/destroying_schools_to_achieve.html.

⁶⁸ Jeremy D. Finn, *Educational Sequelae of High School Misbehavior*, 101 J. EDUC. RES. 259 (2008).

⁶⁹ ESSA, Pub. L. No. 114-95, 129 Stat. 1802, § 1001 (2015).

Appendix A

“PART D—CULTURAL EDUCATION

“SEC. 7401. SHORT TITLE.

“This part may be cited as the ‘Cultural Education Equity, Support, and Assistance Act’.

“SEC. 7402. FINDINGS.

“Congress finds and declares the following:

“(1) Racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities suffer singular or multiple discrimination based on race, ethnic origin, language status or disability status.

“(2) Educational success is critical to the betterment of the conditions and long-term well-being of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(3) It is the policy of the Federal Government to encourage the maximum educational opportunity for racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(4) The educational opportunity of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities is constrained by high drop-out rates, disproportional school discipline, underrepresentation in post-secondary education.

“SEC. 7403. PURPOSES.

“The purposes of this part are as follows:

“(1) To recognize the unique educational needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(2) To authorize the development of supplemental educational programs to benefit racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(3) To provide direction and guidance to appropriate Federal, State and local agencies to focus resources, including resources made available under this part, on meeting the educational needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students

with disabilities.

“SEC. 7404. PROGRAM AUTHORIZED.

“(a) GENERAL AUTHORITY.—

“(1) GRANTS AND CONTRACTS.—The Secretary is authorized to make grants to, or enter into contracts with, cultural organizations, educational entities with experience in developing or operating cultural programs or programs of instruction conducted in native languages, cultural and community-based organizations with experience in developing or operating programs to benefit racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities., and consortia of organizations and entities described in this paragraph to carry out programs that meet the purposes of this part.

“(2) PERMISSIBLE ACTIVITIES.—Activities provided through programs carried out under this part may include the following:

“(A) The development and implementation of plans, methods, and strategies to improve the education of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(B) The development of curricula and educational programs that address the educational needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities including the following:

“(i) Curriculum materials that reflect the cultural diversity or the contributions of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(ii) Instructional programs that make use of native languages.

“(iii) Networks that introduce successful programs, materials, and techniques to urban and rural schools.

“(C) Professional development activities for educators, including the following:

“(i) Programs to prepare teachers to address the cultural diversity and unique needs of racial

minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(ii) In-service programs to improve the ability of teachers to meet the unique needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(D) Family literacy services.

“(E) The development and operation of student enrichment programs in science and mathematics that may include activities that recognize and support the unique cultural and educational needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(F) Research and data collection activities to determine the educational status and needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(G) Other research and evaluation activities related to programs carried out under this part.

“(H) Remedial and enrichment programs to assist racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.in performing at a high level on standardized tests.

“(I) Education and training of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities enrolled in a degree program that will lead to certification or licensing as teachers.

“(J) Career preparation activities to enable racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.to prepare for meaningful employment, including programs providing tech-prep, mentoring, training, and apprenticeship activities.

“(K) Other activities, consistent with the purposes of this part, to meet the educational needs of racial minorities, ethnic minorities, low-income students, limited English proficient students, and students with disabilities.

“(b) LIMITATION ON ADMINISTRATIVE COSTS.—Not more than 5 percent of funds provided to a grantee under this section for any fiscal year may be used for administrative purposes.

“(c) AUTHORIZATION OF APPROPRIATIONS.—

“(1) IN GENERAL.—There are authorized to be appropriated to carry out this section such sums as may be necessary for fiscal year 2016 and each of the 5 succeeding fiscal years.

“(2) AVAILABILITY OF FUNDS.—Of the funds appropriated and made available under this section for a fiscal year, the Secretary shall make available—

“(A) not less than \$10,000,000 to support activities described in subsection (a)(2)(K);

“(B) not less than \$10,000,000 to support activities described in subsection (a)(2)(L);

“(C) not less than \$10,000,000 to support activities described in subsection (a)(2)(M);

“(D) not less than \$20,000,000 to support activities described in subsection (a)(2)(P); and

“(E) not less than \$2,000,000 to support activities described in subsection (a)(2)(Q).

“SEC. 7405. ADMINISTRATIVE PROVISIONS.

“(a) APPLICATION REQUIRED.—No grant may be made under this part, and no contract may be entered into under this part, unless the entity seeking the grant or contract submits an application to the Secretary in such form, in such manner, and containing such information as the Secretary may determine necessary to carry out the provisions of this part.

“(b) LOCAL EDUCATIONAL AGENCY COORDINATION.—Each applicant for an award under this part shall inform each local educational agency serving students who would participate in the program to be carried out under the grant or contract about the application.

“SEC. 7406. DEFINITIONS.

“In this part:

“(1) RACIAL MINORITIES.—The term ‘racial minorities’ means race categorizations of the Bureau of the Census other than ‘White.’

“(2) ETHNIC MINORITIES.—The term ‘ethnic minorities’ means ‘Hispanic or Latino’ as defined by the Bureau of the Census.

“(3) LOW-INCOME STUDENTS.—The term ‘low-income students’ means students that meet the criteria for poverty in section 1124(c)(3)(C).

“(4) LIMITED ENGLISH PROFICIENT STUDENTS.—The term ‘limited English proficient students’ has the same meaning as the term ‘limited English proficient student’ has in Title III.

“(5) STUDENTS WITH DISABILITIES.—The term ‘students with disabilities’ has the same meaning as the term ‘child with disability’ has in section 300.8(a) of the Individuals with Disabilities Act.”

Appendix B

“PART I—DISPROPORTIONAL SCHOOL DISCIPLINE PREVENTION

“SEC. 1901. SHORT TITLE.

“This part may be cited as the ‘Discipline Equity Act’.

“SEC. 1902. PURPOSE.

“The purpose of this part is to provide for the prevention of disproportional discipline and to raise academic achievement levels by providing grants that—

“(1) challenge all children to attain their highest academic potential; and

“(2) ensure that all students have substantial and ongoing opportunities to attain their highest academic potential through schoolwide programs proven effective in reducing disproportional discipline.

“SEC. 1903. DEFINITIONS.

“In this part:

“(1) DISCIPLINE.—The term ‘discipline’ means—

(A) office disciplinary referrals;

(B) in-school suspension

(B) out-of-school suspension

(C) expulsion; or

(D) referrals to law enforcement.

“(2) DISPROPORTIONAL DISCIPLINE.—The term ‘disproportional

discipline’ means the proportion of school discipline experienced by a student subgroup significantly exceeds ($p < .001$) the proportion of the school population represented by that student subgroup based on—

- (A) race;
- (B) ethnicity; or
- (C) disability status.

“(3) SIGNIFICANT LEVELS OF DISPROPORTIONAL DISCIPLINE.—The term ‘significant levels of disproportional discipline’ means that members of a particular student subgroup (based on race, ethnicity or discipline status) are at least 10% more likely to receive school discipline than would be predicted by that subgroup’s proportion of the school population.

“SEC. 1904. AUTHORIZATION OF APPROPRIATIONS.

“For the purpose of carrying out this part, there are authorized to be appropriated \$125,000,000 for fiscal year 2016 and such sums as may be necessary for each of the 5 succeeding fiscal years, of which—

“(1) 10 percent shall be available to carry out subpart 1 for each fiscal year; and

“(2) 90 percent shall be available to carry out subpart 2 for each fiscal year.

“Subpart 1—Coordinated National Strategy

“SEC. 1911. NATIONAL ACTIVITIES.

“(a) IN GENERAL.—The Secretary is authorized—

“(1) to collect systematic data on the effectiveness of the programs assisted under this part in reducing disproportional discipline;

“(2) to establish a national clearinghouse of information on disproportional discipline prevention programs that shall disseminate to State educational agencies, local educational agencies, and schools—

“(A) the results of research on disproportional discipline prevention programs; and

“(B) information on effective programs, best practices, and Federal resources to reduce disproportional discipline;

“(3) to provide technical assistance to State educational agencies, local

educational agencies, and schools in designing and implementing programs and securing resources to implement effective disproportional discipline prevention programs;

“(4) to establish and consult with an interagency working group that shall—

“(A) address inter- and intra-agency program coordination issues at the Federal level with respect to school disproportional discipline prevention, and assess the targeting of existing Federal services to students who are most at risk of being over-selected for school discipline, and the cost-effectiveness of various programs and approaches used to address disproportional discipline;

“(B) describe the ways in which State educational agencies and local educational agencies can implement effective disproportional discipline prevention programs using funds from a variety of Federal programs, including the programs under this part; and

“(C) examine Federal programs that may promote equitable school discipline;

“(5) to carry out a national recognition program in accordance with subsection (b) that recognizes schools that have made extraordinary progress in reducing disproportional discipline; and

“(6) to use funds made available for this subpart to carry out the evaluation required under section 1930(c).

“(b) RECOGNITION PROGRAM.—

“(1) ESTABLISHMENT.—The Secretary shall—

“(A) establish a national recognition program; and

“(B) develop uniform national guidelines for the recognition program that shall be used to recognize eligible schools from nominations submitted by State educational agencies.

“(2) RECOGNITION.—The Secretary shall recognize, under the recognition program established under paragraph (1), eligible schools.

“(3) SUPPORT.—The Secretary may make monetary awards to an eligible school recognized under this subsection in amounts determined appropriate by the Secretary that shall be used for dissemination activities within the eligible school district or nationally.

“(4) DEFINITION OF ELIGIBLE SCHOOL.—In this

subsection, the term ‘eligible school’ means a public middle school or secondary school, including a charter school, that has implemented comprehensive reforms that have been effective in lowering disproportional discipline—

“(A) in that secondary school or charter school; or

“(B) in the case of a middle school, in the

secondary school that the middle school feeds students into.

“(c) CAPACITY BUILDING.—

“(1) IN GENERAL.—The Secretary, through a contract with one or more non

Federal entities, may conduct a capacity building and design initiative in order to increase the types of proven strategies for disproportional discipline prevention that address the needs of an entire school population or a subset of students based on race, ethnicity of disability status.

“(2) NUMBER AND DURATION.—

“(A) NUMBER.—The Secretary may award not more than five contracts under this subsection.

“(B) DURATION.—The Secretary may award a contract under this subsection for a period of not more than 5 years.

“(d) SUPPORT FOR EXISTING REFORM NETWORKS.—

“(1) IN GENERAL.—The Secretary may provide appropriate support to eligible entities to enable the eligible entities to provide training, materials, development, and staff assistance to schools assisted under this part.

“(2) DEFINITION OF ELIGIBLE ENTITY.—In this subsection, the term ‘eligible entity’ means an entity that, prior to the date of enactment of the Discipline Equity Act—

“(A) provided training, technical assistance, and materials related to disproportional discipline prevention to 100 or more elementary schools or secondary schools; and

“(B) developed and published a specific management program or design related to disproportional discipline prevention for use by the schools.

“Subpart 2—Disproportional Discipline Prevention Initiative

“SEC. 1921. DEFINITIONS.

“In this subpart:

“(1) FREQUENTLY DISCIPLINED.—The term

‘frequently disciplined’

means a student who has received school discipline (office referral, suspension, expulsion more than three times in either (or both) of the previous two school years.

“(2) STATE.—The term ‘State’ means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Bureau of Indian Affairs for purposes of serving schools funded by the Bureau.

“SEC. 1922. PROGRAM AUTHORIZED.

“(a) GRANTS TO STATE EDUCATIONAL AGENCIES AND LOCAL EDUCATIONAL AGENCIES.—

“(1) AMOUNT LESS THAN \$75,000,000.—

“(A) IN GENERAL.—If the amount appropriated under section 1904 for a fiscal year equals or is less than \$75,000,000, then the Secretary shall use such amount to award grants, on a competitive basis, to—

“(i) State educational agencies to support activities—

“(I) in schools that—

“(aa) serve students in grades 6 through 12; and

“(bb) have significant levels of disproportional discipline; or

“(II) in the middle schools that feed students into the schools described in subclause (I); or “(ii) local educational agencies that operate—

“(I) schools that—

“(aa) serve students in grades 6 through 12; and

“(bb) have significant levels of disproportional discipline; or

“(II) middle schools that feed students into the schools described in subclause (I).

“(B) USE OF GRANT FUNDS.—Grant funds awarded under this paragraph shall be used to fund effective, sustainable, and coordinated disproportional

discipline prevention that may include the activities described in subsection (b)(2), in—

“(i) schools serving students in grades 6 through 12 that have significant levels of disproportional discipline; or

“(ii) the middle schools that feed students into the schools described in clause (i).

“(2) AMOUNT LESS THAN \$250,000,000 BUT MORE THAN \$75,000,000.—If the amount appropriated under section 1904 for a fiscal year is less than \$250,000,000 but more than \$75,000,000, then the Secretary shall use such amount to award grants, on a competitive basis, to State educational agencies to enable the State educational agencies to award subgrants under subsection (b).

“(3) AMOUNT EQUAL TO OR EXCEEDS \$250,000,000.—If the amount appropriated under section 1904 for a fiscal year equals or exceeds \$250,000,000, then the Secretary shall use such amount to award a grant to each State educational agency in an amount that bears the same relation to such appropriated amount as the amount the State educational agency received under part A for the preceding fiscal year bears to the amount received by all State educational agencies under such part for the preceding fiscal year, to enable the State educational agency to award subgrants under subsection (b).

“(b) SUBGRANTS TO LOCAL EDUCATIONAL AGENCIES.—

“(1) IN GENERAL.—From amounts made available to a State educational agency under paragraph (2) or (3) of subsection (a), the State educational agency shall award subgrants, on a competitive basis, to local educational agencies that operate public schools that serve students in grades 6 through 12 and that have significant levels of disproportional discipline, to enable those schools, or the middle schools that feed students into those schools, to implement effective, sustainable, and coordinated school disproportional discipline prevention programs that involve activities such as—

“(A) professional development;

“(B) obtaining curricular materials;

“(C) release time for professional staff to obtain professional

development;

“(D) planning and research;

“(E) remedial education;

“(F) reduction in pupil-to-teacher ratios;

“(G) efforts to meet State student academic

achievement standards;

“(H) counseling and mentoring for frequently disciplined students ;

“(I) implementing comprehensive school discipline reform models, such restorative discipline policies and practices, or positive behavioral supports

“(J) school reentry activities.

“(2) AMOUNT.—Subject to paragraph (3), a subgrant under this subpart shall be awarded—

“(A) in the first year that a local educational agency receives a subgrant payment under this subpart, in an amount that is based on factors such as—

“(i) the size of schools operated by the local educational agency;

“(ii) costs of the model or set of prevention strategies being implemented; and

“(iii) local cost factors such as poverty rates;

“(B) in the second year, in an amount that is not less than 75 percent of the amount the local educational agency received under this subpart in the first such year;

“(C) in the third year, in an amount that is not less than 50 percent of the amount the local educational agency received under this subpart in the first such year; and

“(D) in each succeeding year, in an amount that is not less than 30 percent of the amount the local educational agency received under this subpart in the first year.

“(3) DURATION.—A subgrant under this subpart shall be awarded for a period of 3 years, and may be continued for a period of 2 additional years if the State educational agency determines, based on the annual reports described in section 1930(a), that significant progress has been made in lowering the annual school dropout rate for secondary schools participating in the program assisted under this subpart.

“SEC. 1923. APPLICATIONS.

“(a) IN GENERAL.—To receive—

“(1) a grant under this subpart, a State educational agency or local educational agency shall submit an application and plan to the Secretary at such time, in such manner, and accompanied by such information as the Secretary may reasonably require; and

“(2) a subgrant under this subpart, a local educational agency shall submit an application and plan to the State educational agency at such time, in such manner, and accompanied by such information as the State educational agency may reasonably require.

“(b) CONTENTS.—

“(1) STATE EDUCATIONAL AGENCY AND LOCAL EDUCATIONAL AGENCY.—Each application and plan submitted under subsection (a) shall—

“(A) include an outline—

“(i) of the State educational agency’s or local educational agency’s strategy for reducing the State educational agency or local educational agency’s annual levels of disproportional discipline;

“(ii) for targeting secondary schools, and the middle schools that feed students into those secondary schools, that have the highest annual levels of disproportional discipline; and

“(iii) for assessing the effectiveness of the efforts described in the plan;

“(B) contain an identification of the schools in the State or operated by the local educational agency that have significant levels of disproportional discipline;

“(C) describe the instructional strategies to be implemented, how the strategies will serve all students, and the effectiveness of the strategies;

“(D) describe a budget and timeline for implementing the strategies;

“(E) contain evidence of coordination with existing resources;

“(F) provide an assurance that funds provided under this subpart will supplement, and not supplant, other State and local funds available disproportional discipline prevention programs; and

“(G) describe how the activities to be assisted

conform with research knowledge about disproportional discipline prevention.

“(2) LOCAL EDUCATIONAL AGENCY.—Each application and plan submitted under subsection (a) by a local educational agency shall contain, in addition to the requirements of paragraph (1)—

“(A) an assurance that the local educational agency is committed to providing ongoing operational support for such schools to address the problem of disproportional discipline for a period of 5 years; and

“(B) an assurance that the local educational agency will support the plan, including—

“(i) provision of release time for teacher training;

“(ii) efforts to coordinate activities for secondary schools and the middle schools that feed students into those secondary schools; and

“(iii) encouraging other schools served by the local educational agency to participate in the plan.

“SEC. 1924. STATE RESERVATION.

“A State educational agency that receives a grant under paragraph (2) or (3) of section 1922(a) may reserve not more than 5 percent of the grant funds for administrative costs and State activities related to disproportional discipline prevention activities, of which not more than 2 percent of the grant funds may be used for administrative costs.

“SEC. 1925. STRATEGIES AND CAPACITY BUILDING.

“Each local educational agency receiving a grant or subgrant under this subpart and each State educational agency receiving a grant under this subpart shall implement scientifically based, sustainable, and widely replicated strategies for disproportional discipline prevention. The strategies may include—

“(1) specific strategies for targeted purposes, such as—

“(A) the use of positive behavioral interventions and supports

“(B) the use of restorative discipline policies and practices

“(C) effective professional development to reduce disproportional discipline

“(D) effective programs to reduce disproportional discipline of students with disabilities

“(E) effective programs to reduce disproportional discipline of racial or ethnic minorities

“(F) effective programs to identify and encourage youth who have been expelled to reenter school and complete their secondary education

“SEC. 1926. SELECTION OF LOCAL EDUCATIONAL AGENCIES FOR SUBGRANTS.

“(a) STATE EDUCATIONAL AGENCY REVIEW AND AWARD.—The State educational agency shall review applications submitted under section 1923(a)(2) and award subgrants to local educational agencies with the assistance and advice of a panel of experts on disproportional discipline.

“(b) ELIGIBILITY.—A local educational agency is eligible to receive a subgrant under this subpart if the local educational agency operates a public school (including a public alternative school) that is eligible to receive assistance under part A.

“SEC. 1927. COMMUNITY BASED ORGANIZATIONS.

“A local educational agency that receives a grant or subgrant under this subpart and a State educational agency that receives a grant under this subpart may use the funds to secure necessary services from a community-based organization or other government agency if the funds are used to provide disproportional discipline prevention activities related to schoolwide efforts.

“SEC. 1928. TECHNICAL ASSISTANCE.

“Notwithstanding any other provision of law, each local educational agency that receives funds under this subpart shall use the funds to provide technical assistance to middle or secondary schools served by the agency that have not made progress toward reducing disproportional discipline after receiving assistance under this subpart for 2 fiscal years.

“SEC. 1930. REPORTING AND ACCOUNTABILITY.

“(a) LOCAL EDUCATIONAL AGENCY REPORTS.—

“(1) IN GENERAL.—To receive funds under this subpart for a fiscal year after the first fiscal year that a local educational

agency receives funds under this subpart, the local educational agency shall provide, on an annual basis, a report regarding the status of the implementation of activities funded under this subpart, and discipline data for students at schools assisted under this subpart—

“(A) Secretary, if the local educational agency receives a grant under section 1922(a)(1); or

“(B) State educational agency, if the local educational agency receives a subgrant under paragraph (2) or (3) of section 1922(a).

“(2) DISCIPLINE DATA.—The discipline data under paragraph (1) shall include—

“(A) annual discipline rates for each fiscal year disaggregated by gender, race, ethnicity, disability status; and

“(B) clear measures of disproportional discipline based on statistical comparisons between of the discipline rates of student subgroups (including gender, race, ethnicity and disability status) and the proportion of the student population represented by those subgroup

“(b) STATE REPORT ON PROGRAM ACTIVITIES.—Each State educational agency receiving funds under this subpart shall provide to the Secretary, at such time and in such format as the Secretary may require, information on the status of the implementation of activities funded under this subpart and the disciplinary data described in paragraphs (1) and (2) for students in schools assisted under this subpart.

“(c) ACCOUNTABILITY.—The Secretary—

“(1) shall evaluate the effect of the activities assisted under this subpart on disproportional discipline prevention—

“(A) based on the activities’ ability to reduce disproportional discipline; and

“(B) compared, if feasible, to a control group using control procedures.

“(2) may use funds appropriated for subpart 1 to carry out this evaluation.”

The ESEA and Teacher Workforce Management Systems

Benjamin Michael Superfine and Craig De Voto*

On December 10, 2015, President Barack Obama signed the reauthorization of the Elementary and Secondary Education Act (ESEA)¹ under the new moniker Every Student Succeeds Act (ESSA).² It had been nearly fourteen years since President George W. Bush signed the previous ESEA reauthorization—No Child Left Behind (NCLB).³ Indeed, the 2015 reauthorization was met with widespread bipartisan support. NCLB had routinely come under heavy attack from political, research, and advocacy communities, and also became the center of various high-profile lawsuits.⁴ Much of this criticism was related to its emphasis on accountability mechanisms and strict penalties for schools for underperformance.⁵ In an effort to alleviate some of these issues, the ESSA has returned much power over testing and accountability to states. Although it is being hailed as a cure to the ills of the NCLB era,⁶ an array of potential pitfalls accompanies the opportunities that the new ESEA presents.

Throughout its history, there have been several indications the ESEA has not been able to achieve some of its ultimate goals, such as equalizing

*Benjamin Michael Superfine is an Associate Professor in the Educational Policy Studies Department and Director of the Research on Urban Education Policy Initiative at the University of Illinois at Chicago. Craig De Voto is a graduate student in the Educational Policy Studies Department at the University of Illinois at Chicago.

¹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27-58 (1965).

² H.R. Rep. No. 114-354 (2015) (Conf. Rep.) [hereinafter “ESSA Conference Report”], available at <https://www.congress.gov/114/crpt/hrpt354/CRPT-114hrpt354.pdf>.

³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

⁴ See BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 87-122 (2008) (discussing litigation aimed at reforming No Child Left Behind).

⁵ See WILLIAM T. GORMLEY & STEVEN J. BALLA, BUREAUCRACY AND DEMOCRACY: ACCOUNTABILITY AND PERFORMANCE 3 (2012) (discussing how accountability systems and performance sanctions became a widespread issue for schools under NCLB).

⁶ See Valerie Strauss, *The Disturbing Provisions about Teacher Preparation in No Child Left Behind Rewrite*, WASHINGTON POST (2015), <https://www.washingtonpost.com/news/answer-sheet/wp/2015/12/05/the-disturbing-provisions-about-teacher-preparation-in-no-child-left-behind-rewrite/> (discussing how the reauthorization of the ESEA under the ESSA, despite being considered somewhat of a “fix-it” to NCLB, does indeed have issues, especially regarding teacher preparation).

and improving students' learning opportunities and performance.⁷ This was especially true under NCLB. For example, although recent National Assessment of Educational Progress (NAEP) data showed some improvement in student achievement during the implementation of NCLB,⁸ the initial promises made by its early advocates never came to fruition.⁹ Furthermore, there have been strong indications that NCLB resulted in many unintended consequences, such as the narrowing of curricula due to increased accountability measures and standardized testing, poorly defined subgroups by states for tracking Adequate Yearly Progress (AYP),¹⁰ and the inappropriate assessment of English language learners and students with disabilities.¹¹ And despite the U.S. Department of Education (ED) taking some action to soften several of the most unpopular and harmful effects of the law, including waiving some of the punitive accountability requirements for most states,¹² such actions also drew criticisms of federal overreach and illegality.¹³

Given the long history of the ESEA and the number of problems that NCLB in particular experienced, it is critical to examine the extent to which the ESEA can provide a “world-class” education to every student, as President Obama asserted.¹⁴ Many of the strategies set forth in the

⁷ Maris A. Vinovskis, *Do Federal Compensatory Education Programs Really Work? A Brief Historical Analysis of Title I and Head Start*, 107 AM. J. OF EDUC. 187, 189-98 (1999) (analyzing the effectiveness of major federal education programs since the 1960s).

⁸ *Id.* at 223-225.

⁹ See Kevin G. Welner & William J. Mathis, *Reauthorization of the Elementary and Secondary Education Act: Time to Move Beyond Test-Focused Policies*, NAT'L EDUC. POL'Y CTR. 4 (2015), <http://nepc.colorado.edu/publication/esea>.

¹⁰ Andrew C. Porter et al., *The Effects of State Decisions About NCLB Adequate Yearly Progress Targets*, 24 EDUC. MEASUREMENT: ISSUES AND PRACTICE 32 (2005).

¹¹ Linda Darling-Hammond, *Race, Inequality and Educational Accountability: The Irony of 'No Child Left Behind'*, 10 RACE ETHNICITY AND EDUC. 245 (2007) (broadly discusses the failings of NCLB accountability mechanisms).

¹² *NCLB/ESEA Waivers*, CTR. ON EDUC. POL'Y (2012), <http://www.cepd- dc.org/index.cfm?DocumentSubTopicID=48> (tracking NCLB waivers).

¹³ See Benjamin Riley, *Waive to the top: The dangers of legislating education policy from the executive branch*, AMER. ENTERPRISE INST. 3 (2012), <http://www.aei.org/publication/waive-to-the-top-the-dangers-of-legislating-education-policy-from-the-executive-branch/> (discussing the constitutional legality and implications of NCLB waivers).

¹⁴ *Every Student Succeeds Act: A Progress Report on Elementary and Secondary Education*, EXEC. OFFICE OF THE PRESIDENT 2 (2015), https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/ESSA_Progress_Report.pdf (discussing an overview of the progress made under the ESEA and how the reauthorization—ESSA—will aim to continue this

recently reauthorized version have already been tried in some form. For example, the law's reduction in federal power and its use of block grants¹⁵ were previously implemented under the Reagan administration. Neither proved effective.¹⁶ At the same time, new federal strategies like grants for incentive/performance-based pay,¹⁷ promotion of private "teacher preparation academies"¹⁸ like Teach for America, and the failure to strategically develop the teacher workforce all represent the government's continued willingness to employ theories of action that embody a thin research base, yet remain in vogue.¹⁹

Still, this not to say the ESSA will inevitably be a failure; the law is certainly a step in the right direction, especially relative to its predecessor. For instance, the ESSA responds to the arguments that the frequency of standardized testing under the ESEA should be reduced,²⁰ accountability requirements should be restructured in ways that offer a better change of school improvement,²¹ and a greater emphasis should be placed on increasing the capacities of schools and school personnel to improve student learning.²² Yet, at least one key component is missing; more attention must be given—either during the next reauthorization or by amending the ESSA—to spurring the development of highly functioning teacher workforce management systems at the state-level that build on

trend).

¹⁵ See generally, ESSA Conference Report *supra* note 2. The ESSA has implemented a block grant system under Title II where states apply for funds and receive a lump sum without much federal oversight.

¹⁶ Michael S. Knapp & Craig H. Blakely, *The Education Block Grant at the Local Level: Implementation of Chapter 2 of the Education Consolidation and Improvement Act in Districts and Schools*, U.S. DEP'T OF EDUC 40 (January 1986), <http://files.eric.ed.gov/fulltext/ED270835.pdf> (discussing the results of the National Study of Local Operations under Chapter 2 of the Educational Consolidation and Improvement Act of 1981).

¹⁷ See ESSA Conference Report, *supra* note 2 at 129.

¹⁸ See ESSA Conference Report, *supra* note 2 at 117.

¹⁹ See ESSA Conference Report, *supra* note 2 at 127.

²⁰ See Welner & Mathis, *supra* note 9.

²¹ JACK JENNINGS, PRESIDENTS, CONGRESS, AND THE PUBLIC SCHOOLS: THE POLITICS OF EDUCATION REFORM 85 (2015) (discussing the history of the ESEA and its impact of public schools).

²² See, e.g., Mark Smylie, *Teacher Evaluation and the Problem of Professional Development*, 26 MID-W. EDUC. RES. 97 (2014), available at <http://www.mwera.org/MWER/volumes/v26/issue2/v26n2-Smylie-POLICY-BRIEFS.pdf> (focusing on the value of professional development for improving teachers' instructional capacities).

states' pre-existing teacher evaluation systems.²³ This recommendation is rooted in two major principles: federal education policies should be (1) be grounded in an efficacious theory of action aimed at equalizing and improving students' learning opportunities and (2) present politically feasible modifications.

Based on these principles, further restructuring the ESEA to focus on teacher workforce systems would constitute a high-leverage type of reform and reflect an important advance over many federal education reforms of the past. A growing consensus among education researchers indicates that teacher quality and effectiveness are some of the most important in-school factors influencing student learning.²⁴ And although the most recent ESEA reauthorization has prioritized these issues, particularly for low-income schools, the past has shown these issues are difficult to overcome.²⁵ Indeed, such mandates—often incorporated in the provisions of Title II—have not effectively driven the improvement of teaching. For example, while NCLB included requirements that all teachers must be “highly qualified,”²⁶ such provisions have not been sufficient by themselves at increasing the effectiveness of teachers due to states setting low hurdles regarding these definitions.²⁷ And on a broader level, the federal government to date has possessed very little leverage in promoting the quality of teaching through the ESEA due to varying state and local administrative capacities.²⁸ This lack of leverage became particularly evident under NCLB due to the increased emphasis on

²³ Though the ESSA does make reference to increasing the capacity of teacher workforce systems for states, it provides no guidance on how to do so, given the “prohibition clause” found in Title II.

²⁴ See, e.g., Eric A. Hanushek, et al., *Teachers, Schools, and Academic Achievement* (NBER Working Paper o. w6691), NAT'L BUREAU OF ECON. RES. (1998), <http://poseidon01.ssrn.com/delivery.php?ID=383099002083113088100108111094082077084047001036057054066034116041036009030017015071047039066019065119067084003081120081096105082006082099008085022015023077086099004119031091094120030073110084&EXT=pdf>.

²⁵ Our Future, Our Teachers: The Obama Administration's Plan for Teacher Education Reform and Improvement, U.S. DEP'T. OF EDUC. (September 2011), <http://www.ed.gov/sites/default/files/our-future-our-teachers.pdf>.

²⁶ 20 U.S.C § 7801(23) (2015) (stating that “highly qualified” generally refers to teachers who have a bachelor's degree, have obtained full State certification or passed the State licensing examination, and hold a license to teach in the state).

²⁷ See *infra* notes 111-114.

²⁸ Richard F Elmore, *Unwarranted Intrusion*. 33 EDUC. NEXT 2 (2002); See also, Jerome Murphy, *Title V of ESEA: The Impact of Discretionary Funds on State Education Bureaucracies*, 43 HARV. EDUC. REV. 362 (1973) (discussing organizational constraints that are impeding the implementation of federal educational policy).

standardized testing, stretching many states to their limits.²⁹ Taken together, the advancement of teacher workforce systems would reorient the federal government's role in teacher quality and effectiveness, stepping away from more superficial provisions like HQT and toward more strategic initiatives.

At the same time, promoting states' development of teacher workforce management systems would also build on existing political and policy arrangements, increasing the likelihood of passage and effective implementation of ESEA modifications. States have recently enacted a slate of laws requiring the development and implementation of teacher evaluation systems. Whereas only 15 states required teacher evaluation to include "objective measures" of student achievement in 2009, 41 states required such evaluations by 2013.³⁰ The Race to the Top Fund (RttT), a part of the American Recovery and Reinvestment Act of 2009 (ARRA), included financial incentives and relief from certain NCLB requirements for states to enact such laws.³¹ While states have designed these systems in different ways, they commonly require teachers to be evaluated on the basis of student test score growth and administrator observation, hinging certain actions on the basis of these evaluations (e.g., granting or removal of tenure, compensation). But the evidence is mounting that extant teacher evaluation systems focus too narrowly on accountability and may ultimately be harmful for student learning in many cases.³² Indeed, the opportunity presented by this political and policy trend should not be squandered, but rather should be carefully rethought and restructured by federal law to provide the best chance for improving teaching and learning at scale.

In order to analyze existing federal and state law and provide recommendations for focusing the ESEA on the development of teacher workforce management systems, this Article is divided into four primary parts. Part I discusses the principles for modifying the ESEA and examines the historical evidence about policy development and implementation underlying these principles. Part II provides an overview

²⁹ *Id.*

³⁰ See generally, *State of the States 2012: Teacher Effectiveness Policies*, NAT'L COUNCIL ON TCHR. QUALITY (2012). http://www.nctq.org/dmsView/State_of_the_States_2012_Teacher_Effectiveness_Policies_NCTQ_Report.

³¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 284 § 14007 (codified as amended (2012)).

³² Richard J. Shavelson, et al., *Problems with the Use of Student Test Scores to Evaluate Teachers*, ECON. POL'Y INST. (2010), <http://www.epi.org/publication/bp278/>.

of the major federal and state laws aimed at enhancing the quality and effectiveness of teachers, including Title II of the ESEA, RttT, the array of state laws historically regulating teachers, and the recent slate of state-level teacher evaluation laws. This Part also addresses the major problems these laws have faced and the potential they hold for improving teaching and learning. Grounded in a discussion of principles for reauthorization and the existing terrain of teacher law and policy, Part III provides concrete recommendations for modifying the ESEA. This Part particularly focuses on how the federal government should promote the reconstruction of states' teacher evaluation systems into highly functioning teacher workforce management systems. Part IV offers concluding thoughts.

Principles for Reauthorizing the ESEA

When historians of education take a bird's-eye view of the education law and policy landscape in the U.S., many of them conclude that there is very little in education that has not been tried or at least is not deeply grounded in the past.³³ Given the press for innovation and the short-term needs of the political process, most current policy talk has an "ahistorical character"—ideas for education reform often give little weight or fail to acknowledge the history of education law and policy and the range of challenges and successes it reflects.³⁴ This Article attempts to avoid such a persistent problem by grounding recommendations for ESEA reauthorization in principles that emerge from an examination of the history of education law and policy and the ESEA in particular. These principles are that a reauthorized ESEA should: (1) be rooted in an efficacious theory of action aimed at equalizing and improving students' learning opportunities and (2) present politically feasible modifications. While these principles are by no means comprehensive, they can at least provide a starting point for modifying the ESEA in a way that avoids some of the major problems large-scale education reform has historically encountered.

³³ See, e.g., DAVID TYACK AND LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 6 (1997) (stating that "[m]any educational problems have deep roots in the past, and many solutions have been tried before").

³⁴ *Id.*

Efficacious Theory of Action

Perhaps most importantly, any ESEA reauthorization should be rooted in an efficacious theory of action. That is, it should be grounded in what we know about the types of large-scale education reform that have a “good shot” of producing increased and more equal educational opportunities.

Nature of the policy implementation process. Many education reforms begin with promising ideas in theory and the best of intentions; however, as decades of experience with large-scale education reforms clearly reflect, such reforms have generally failed to account for the challenges that inevitably emerge during implementation.³⁵ After any education reform is passed at the federal or state-level, it must be implemented by different actors across a variety of administrative levels and contexts. Implementation problems can arise at any number of places that may prevent the reform from being employed consistently with its initial intentions or requirements.³⁶ While some changes from these intentions or requirements ultimately may be beneficial for students or others implicated by the reform, other changes may be undesirable or even harmful.

The factors influencing implementation can arise in numerous places and have unexpected interactions. The design of the law or policy itself is also a critical element in many ways, including how it frames targeted problems or populations and its basis in scientific evidence.³⁷ On the one hand, factors like culture, resources, and administrative structures of the organizations and institutions through which policy passes can block or facilitate reforms aimed at improving schools.³⁸ On the other hand, individuals within these organizations interpret legal and policy requirements and decide whether or how to ignore, adapt, or adopt reforms in their practice.³⁹ School-level factors are also particularly important for

³⁵ See generally BENJAMIN M. SUPERFINE, *EQUALITY IN EDUCATION LAW AND POLICY, 1954-2010* (2013) (reviewing the history of the ESEA throughout reauthorizations).

³⁶ Paul A. Sabatier & Daniel a. Mazmanian, *The Implementation of Public Policy: a Framework of Analysis*, 8 POL’Y STUD. J. 538 (1980) (examining the factors influencing policy implementation).

³⁷ *Id.* at 540-541 (discussing how issues such as the tractability of problems or diversity of behavior affects implementation).

³⁸ Meredith I. Honig, *Complexity and Policy Implementation: Challenges and Opportunities for the Field*, in *NEW DIRECTIONS IN EDUCATION POLICY IMPLEMENTATION 1* (Meredith I. Honig, ed., 2006).

³⁹ See James P. Spillane, *Cognition and Policy Implementation: District Policymakers*

dictating the fate of reforms aimed at improving students' learning opportunities. Researchers have long noted that variation at the school-level is the norm rather than the exception.⁴⁰ Because of factors such as existing working knowledge and the personal histories of school leaders⁴¹ and teachers⁴²; the policies, norms, and existing practices of schools⁴³; and the school culture and structures⁴⁴, "street-level bureaucrats"⁴⁵ like teachers and school leaders are perhaps the most important actors in the education reform implementation process. These actors at the ground level of policy implementation are where the proverbial rubber meets the road.

Such factors influencing education policy implementation have led some researchers to highlight that variation is simply unavoidable in large-scale education policy and that policies should be designed with this insight in mind. Meredith Honig, for example, has argued that implementation and success are the projects of complex interactions among policies, people, and places.⁴⁶ As a result, laws and policies that can be considered successful are adapted to their local contexts and should be judged by their success in particular places at particular times. Yet this becomes a delicate balancing act among local, state, and federal contexts. Therefore, modifications to the ESEA should embrace the variation inherent in the education policy implementation process while still asserting a coherent set of mandates and incentives across state and local actors. This requires a nuanced combination of federal authority and state flexibility to consistently promote increased learning opportunities at the school-level.

and the Reform of Mathematics Education, 18 COGNITION AND INSTRUCTION 141, 145-146 (2000).

⁴⁰ See Jennifer A. Mueller & Katherine H. Hoyde, *Theme and Variation in the Enactment of Reform: Case Studies*, in THE IMPLEMENTATION GAP: UNDERSTANDING REFORM IN HIGH SCHOOLS 21 (Jonathan A. Supovitz and Elliot H. Weinbaum, eds., 2008).

⁴¹ See Cynthia E. Coburn, *Shaping Teacher Sensemaking: School Leaders and the Enactment of Reading Policy*, 19 EDUC. POL'Y 476 (2005) (discussing how school leaders interpret educational policy differently).

⁴² See *id.*

⁴³ *Id.*

⁴⁴ Jonathan Cohen, et al., *School Climate: Research, Policy, Practice, and Teacher Education*, 111 TEACHERS C. REC. 180 (2009) (examining the role school culture plays enacting education policy).

⁴⁵ See Richard Weatherly & Michael Lipsky, *Street-Level Bureaucrats and Institutional Innovation: Implementing Special-Education Reform*, 47 HARV. EDUC. REV. 171 (1977) (reporting on the ground-level implementation of federal education law).

⁴⁶ Honig, *supra* note 36.

Policy coherence. As education researchers have long underscored, policy incoherence has been a recurring problem for large-scale education policy. When laws and policies are not designed to work together, they can result in uncoordinated and conflicting demands on educational organizations and the actors in them.⁴⁷ For instance, research on the effects of several federal categorical programs on school and district operations found that such incoherence was associated with significant program interference and cross-subsidy, thereby comprising their implementation and intended outcomes.⁴⁸ These programs ultimately interfered with basic school-level operations and even instruction. Similarly, education research has revealed that “cluttered and contradictory” federal, state, and district policy initiatives are associated with fragmentation and compromise at the school-level.⁴⁹ Such a lack of coherence across actors has led to continued challenges related to increasing student achievement.⁵⁰ Lastly, legislation passed under the Obama administration through RttT has potentially reduced the status of teaching as a profession, with the result that many career-minded youth will not enter teaching⁵¹ due to its prevailing flat structure.⁵²

As a result of these problems, policymakers should strive for policy coherence. Modifications to the ESEA should be purposefully designed together to converge around similar goals, strategies, and resource demands.⁵³ Such a design would promote reforms that are mutually

⁴⁷ See David K. Cohen, *Policy and Organization: The Impact of State and Federal Education Policy on School Governance*, 52 HARV. EDUC. REV. 474, 476 (1982) (discussing the growth of federal and state education programs).

⁴⁸ Jackie Kimbrough & Paul T. Hill, *The Aggregate Effects of Federal Education Policies*, RAND CORP. (1981), <http://eric.ed.gov/?id=ED210785>.

⁴⁹ Fred M. Newmann et al., *Instructional Program Coherence: What It Is and Why It Should Guide School Improvement Policy*, 23 EDUC. EVAL. AND POL’Y ANALYSIS 297, 299 (2001).

⁵⁰ See David Hopkins & Benjamin Levin, *Government Policy and School Development*, 20 SCH. LEADERSHIP & MGMT 15 (2000).

⁵¹ Joe Onosko, *Race to the Top Leaves Children and Future Citizens Behind: The Devastating Effects of Centralization, Standardization, and High Stakes Accountability*, 19 DEMOCRACY AND EDUC. 7 (2011).

⁵² See Morgaen L. Donaldson & Susan Moore Johnson, *The Effects of Collective Bargaining on Teacher Quality*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY’S SCHOOLS 53 (Jane Hannaway & Andrew J. Rotherman eds., 2006).

⁵³ Michael S. Knapp et al., *Converging Reforms and the working Lives of Frontline Professionals in Schools*, 12 EDUC. POL’Y 397 (1998).

reinforcing and complement each other. The standards-based reform movement was in part aimed at remedying the incoherence that has long plagued the education policy landscape – standards were thought to provide an anchor for a range of education policies influencing what happens in the classroom, including those governing curriculum, assessment, and professional development.⁵⁴ However, there is little indication that standards-based reform has substantially succeeded in this goal.

Substantive Goal of Reform. The principles discussed in Parts I.A.1 and I.A.2 emerge from an understanding of how large-scale education law and policy reforms have historically been designed and implemented. But these principles are largely structural. They could apply to any education reform no matter what its substantive goal is. As such, modifications to the ESEA should also be aimed at a producing reform in a substantive policy area that has a “good shot” of producing increased and more equal educational opportunities. There are certainly many areas that have promise, and each of these areas has its own share of supporters. For example, areas such as early childhood education⁵⁵ and school leadership⁵⁶ exhibit promise, along with a range of other reforms. If implemented well, reform in any of these areas would likely improve students’ learning opportunities. Unfortunately, many reforms have been adopted that rely on mixed and ultimately limited evidence about their efficacy or effectiveness. For instance, the provisions of RttT encouraging states to adopt policies promoting school turnaround models are grounded in a very thin research base.⁵⁷ We focus on reform aimed at improving teaching, primarily because of the evidence underlying it and its fit within the current political and policy landscape.

⁵⁴ See Marshall S. Smith & Jennifer A. O’Day, *Systemic School Reform*, in THE POLITICS OF CURRICULUM AND TESTING: THE 1990 YEARBOOK OF THE POLITICS OF EDUCATION ASSOCIATION 233 (Susan H. Fuhrman & Betty Malen eds., 1991) (articulating central elements of standards-based, or systemic, reform)

⁵⁵ William H. Teale et al., *Early Childhood Literacy: Policy for the Coming Decade* (vol. 4 bk. 1.), UIC RES. ON URB. EDUC. POLICY INITIATIVE & RES. ON URB. EDUC. POL’Y INITIATIVE (2015), <http://buildinitiative.org/Portals/0/Uploads/Documents/Early%20Childhood%20Literacy%20-%20Policy%20for%20the%20Coming%20Decade.pdf>.

⁵⁶ ROBERT J. MARZANO, WHAT WORKS IN SCHOOLS: TRANSLATING RESEARCH INTO ACTION 172-178 (2003).

⁵⁷ See, e.g. Joseph Murphy, *Turning around Failing Schools*, 23 EDUC. POL’Y 796 (2009) (discussing the evidence underlying school turnaround models).

Directly focusing on improving teaching appears to be a particularly high-leverage approach for promoting increased and more equal educational opportunities for students. A growing consensus from the education research community has emerged indicating that the quality of teachers strongly influences student learning and achievement.⁵⁸ Teacher quality is especially important for improving the performance of poor and minority students.⁵⁹ Yet, what constitutes a quality teacher has been difficult to articulate concretely. While teacher quality can be defined in many ways and has been linked to characteristics such as qualifications, experience, subject matter knowledge, and the ability to motivate students, there is no consistent finding across studies regarding teacher quality.⁶⁰ However, there is a growing body of evidence that certain types of knowledge and skills are possessed by quality teachers. Generally referred to as pedagogical knowledge for teaching, this type of knowledge is specifically grouped around the intersection of subject matter (e.g. mathematics, language arts, etc.) content knowledge and pedagogical content knowledge, which includes the interrelated aspects of content and students.⁶¹ Most current teacher policies, though, have largely focused on basic content knowledge of a subject, and only a few assessments have been developed that are aligned to this vision of quality teaching.⁶²

As it currently stands, there are no “magic bullet” policies for improving teaching at scale. But robust professional development of

⁵⁸ See, e.g., Brian Rowan et al., *What Large-Scale, Survey Research Tells Us About Teacher Effects on Student Achievement: Insights from the Prospects Study of Elementary Schools*, CONSORTIUM FOR POL’Y RES. ON EDUC. (November 2002), <http://eric.ed.gov/?id=ED477466> (examining the influence of teachers on student achievement).

⁵⁹ See, e.g., Laura Goe, *The Link Between Teacher Quality and Student Outcomes: A Research Synthesis*, NAT’L COMPREHENSIVE CTR. FOR TCHR. QUALITY 4, 44 (2007), <http://eric.ed.gov/?id=ED521219> (examining the relationship between teacher quality and student outcomes).

⁶⁰ See, e.g., Julian R. Betts et al., *Determinants of Student Achievement: New Evidence from San Diego*, PUB. POL’Y INST. OF CALIFORNIA (2003).

⁶¹ See Deborah Loewenberg Ball, et al., *Content Knowledge for Teaching: What Makes It Special?* 59 J. OF TCHR. EDUC. 389 (2008) For example, pedagogical content knowledge in mathematics includes the ability to decide which of several errors students are likely to make based on where they are in the development of their mathematical understanding and how mathematical concepts fits within a curriculum and in relation to students’ developmental trajectories.

⁶² For example, the Learning Mathematics for Teaching Project has developed a suite of assessments for measuring elementary teachers’ mathematical knowledge for teaching in different areas of mathematics. See LEARNING MATHEMATICS FOR TEACHING PROJECT, <http://www.umich.edu/~lmtweb/>.

teachers appears to be a critical component.⁶³ Unfortunately, teachers currently receive a wide range of professional development in terms of both form and quality.⁶⁴ While policymakers have occasionally looked to merit pay policies to provide incentives to teachers—such as the Title II sub-grants recently incorporated in the ESSA—there is limited evidence that they actually do so. Similarly, there is little compelling research on the potential of alternative compensation schemes to improve student learning.⁶⁵ At the same time, strategies such as the “highly qualified teacher” mandate and teacher evaluation and accountability policies being implemented in a large majority of states are too narrow as they currently stand.⁶⁶ So, although some policies are currently in place that are aimed at improving teaching, they are insufficient by themselves to accomplish this task effectively.

Present Politically Feasible Modifications

In addition to being grounded in an efficacious theory of action, recommendations for amending or reauthorizing the ESEA should be politically feasible. Certainly, there are many recommendations that could be considered useful from a “policy perspective.” But without being able to mesh with the current political landscape, any recommended legislative changes will not stand a chance of passing and, even if enacted, may fall apart during implementation. As John Kingdon has argued, policy ideas only have a chance of being enacted if they fit in parameters defined by political agendas.⁶⁷ Moreover, coordinating policy stakeholders at the ground-level during implementation can be very difficult. Given each actor’s own political will and capacity, many well-intentioned policies can fail to be executed properly during the implementation process.⁶⁸

⁶³ See, e.g., DAVID K. COHEN & HEATHER C. HILL, *LEARNING POLICY: WHEN STATE EDUCATION REFORM WORKS* (2001) (discussing the importance of professional development in California’s mathematics reform).

⁶⁴ Heather C. Hill, *Professional Development Standards and Practices in Elementary School Mathematics*, 104 *ELEMENTARY SCH. J.* 215, 216 (2004) (examining the types of professional development that teachers receive).

⁶⁵ See, e.g., Thomas B. Corcoran, *The Changing and Chaotic World of Teacher Policy*, in *THE STATE OF EDUCATIONAL POLICY RESEARCH* 307, 309 (David K. Cohen et al. eds., 2007).

⁶⁶ See *infra* notes 129-135.

⁶⁷ See generally JOHN KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2010) (offering a theory of policy formation).

⁶⁸ See generally JEFFREY L. PRESSMAN & AARON WILDAVSKY, *IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND* (1984) (examining

The ESEA and Title I in particular have historically proven politically popular. Due to its broad definition of poverty, Title I at its inception sent funds to almost every House district and 90 percent of Senate districts.⁶⁹ However, throughout its history, the ESEA and especially Title I have faced their share of political problems. For example, in line with the current political climate, the Reagan administration generally pushed for a reduction in the federal role in policy and cut funding across a range of domestic spending areas.⁷⁰ Through the Education Consolidation and Improvement Act of 1981, many of the targeting and reporting requirements of Title I were eliminated, federal education funding was cut, and categorical programs were consolidated into a single block grant.⁷¹ Such moves were ultimately undone as the political climate shifted.

Indeed, more modern incarnations of the ESEA and closely related statutes have faced similar problems grouped around opposition to the expansion of federal power. Before Congress reauthorized the ESEA in 1994, it passed the Goals 2000: Educate America Act (Goals 2000).⁷² This law provided funding to states to develop the standards and assessment systems referenced later that year by the ESEA reauthorization. However, amidst heavy conservative opposition rhetorically focused on the unjustifiable expansion of the federal government, Goals 2000 faced significant political pushback.⁷³ As a result, some of its central provisions governing the use of funds and quality control mechanisms for the development of standards were ultimately eliminated.

Buy-in and support at the state-level have similarly proven critical for the successful implementation of federal education policy over time. When the federal government eased its oversight over Goals 2000, states allowed federal funding to be funneled to a large number of policy areas,

the implementation of a federal program).

⁶⁹ See generally DAVID K. COHEN & SUSAN L. MOFFITT, *THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS?* (2009) (examining the history of the ESEA).

⁷⁰ William Lowe Boyd, *How to Reform Schools without Half Trying: Secrets of the Reagan Administration*, 24 *EDUC. ADMIN. Q.* 299, 305 (1988) (examining how federal leadership cut educational expenditures).

⁷¹ Education Consolidation Improvement Act of 1981, H.R. 3941, 97th Cong. 20 U.S.C. § 9822 et seq. (1981).

⁷² Pub. L. No. 103-227, 108 Stat. 128 (1994).

⁷³ See Benjamin Michael Superfine, *The Politics of Accountability: The Rise and Fall of Goals 2000*, 112 *AM. J. OF EDUC.* 10 (2005) (discussing the political opposition against Goals 2000 at federal, state, and local levels).

thus losing the focus on developing standards and assessment systems.⁷⁴ NCLB offers an even starker cautionary tale. Given the flexibility NCLB offered to states to craft their own standards, define adequate yearly progress, and determine the minimums for subgroup sizes, states exhibited variability in policy implementation in problematic ways. For example, the quality of standards differed dramatically across states,⁷⁵ states implemented first-year AYP goals at different points,⁷⁶ states used different methods to determine whether schools make AYP from year to year,⁷⁷ and states established different numbers for what constitutes an assessable subgroup for AYP purposes.⁷⁸

As such, a significant part of the problem stems from the combination of federal mandates and the flexibility given to states. Federal mandates have been the predominant tool used by Title I of the ESEA since its inception to influence policy change in states. Certainly, the use of these mandates has helped to avoid the messy process of generating buy-in from state actors. However, as highlighted by NCLB, such buy-in was critical given the significant changes to assessment and accountability systems that were required as well as the seemingly unreachable goal of ensuring that all students were proficient in reading and mathematics by 2014. Consequently, state and local leaders immediately responded that they lacked sufficient capacity to fulfill such requirements.⁷⁹ At the same time, this flexibility given to states has been unavoidable, particularly because of the politics of federalism.⁸⁰ Together, these problems highlight the

⁷⁴ See *id.*

⁷⁵ See, e.g., G. Gage Kingsbury et al., *The State of State Standards: Research Investigating Proficiency Levels in Fourteen States*, N.W. EVALUATION ASS'N 11-19 (2004), https://www.nwea.org/content/uploads/2009/08/State_of_State_standards_complete_report.pdf.

⁷⁶ Eugene W. Hickok, *No Child Left Behind Act: Improvements Needed in Education's Process for Tracking States' Implementation of Key Provisions*, U.S. GOV'T ACCOUNTABILITY OFF. 12-13 (September 2004), <http://eric.ed.gov/?id=ED483253>.

⁷⁷ Superfine, *supra* note 4, at 17-18.

⁷⁸ See, e.g., Caroline M. Hoxby, *Inadequate Yearly Progress: Unlocking the Secrets of NCLB*, 5 EDUC. NEXT 46, 50 (Summer 2005) (noting that "Currently, the crude manner in which the progress of [NCLB] subgroups is measured has stirred controversy, because the number of such students varies from one school to the next—and is often too small to permit a confident forecast.").

⁷⁹ See Superfine, *supra* note 4 (discussing the various capacity issues faced by NCLB implementers).

⁸⁰ *Id.*

challenges of using federal mandates to leverage significant reform in teaching and learning.

However, it is important to note that these laws faced most of their political opposition during implementation, not during their passage. This political viability during policy formation has been due partly to their “borrowing strength” – a concept used to describe the process employed by policy entrepreneurs to gain political legitimacy for policy ideas.⁸¹ Under this process, policy entrepreneurs at the federal-level can borrow political legitimacy for policy ideas that are already being implemented at the state-level. Hence, this concept is potentially useful for the next ESEA reauthorization, or any amendments to the ESSA.

In addition, recent political moves of the Obama administration highlight new ways in which federal power can be better deployed to leverage education reform. Former U.S. Secretary of Education Arne Duncan, for example, frequently used the “bully pulpit,” making strong statements focusing on the types of reform strategies the administration favored.⁸² This stance was echoed in RttT and proved very successful from a political perspective. Intended to spur innovation in education, primarily by providing grants to states to implement policies focused on the development of teacher evaluation and accountability systems, RttT offered financial incentives for states to increase the number of charter schools and school turnaround models.⁸³ At the same time, the Obama administration released states from many of the onerous NCLB obligations through a waiver process in exchange for commitments to implement similar policies.⁸⁴ The result of this combined strategy is that a large majority of states now have in place the types of teacher evaluation systems favored by the administration. Furthermore, the House of Representatives recently introduced the Literacy Education for All, Results for the Nation Act (LEARN),⁸⁵ which, if enacted, would continue

⁸¹ See PAUL MANNA, *SCHOOL’S IN: FEDERALISM AND THE NATIONAL EDUCATION AGENDA*, 14-16 (2006) (discussing the theoretical underpinnings of education policy formation).

⁸² See Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 *MISSOURI L. REV.* 81, 105 (2011) (examining political and policy implications of the American Recovery and Reinvestment Act).

⁸³ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. 123 Stat. 115, 284 § 14007 (codified as amended (2012))

⁸⁴ Nancy Kober & Wayne Riddle, *Accountability Issues to Watch under NCLB Waivers*, *CTR. ON EDUC. POL’Y* 2 (2012), <http://files.eric.ed.gov/fulltext/ED535956.pdf>.

⁸⁵ Literacy Education for All, Results for the Nation Act, H.R. 858 (2015).

this type of grant-making strategy aimed at developing comprehensive plans to improve the literacy of children. So, although many of the policies that could promote desirable reform may not be politically feasible, approaches grounded in the concept of borrowing strength and the strategies used by the Obama administration appear to have significant potential, both during Congressional consideration and during implementation.

The Current Landscape of Teacher Policy

Because our recommendations for the ESEA focus on enhancing the quality and effectiveness of the teacher workforce, it is critical to examine the current landscape of teacher policy at both the state and federal-levels.

A Brief Overview of Teacher Policy in the States

Given the federalist approach to education in the United States, states and localities have long held most authority over teachers and educational governance more broadly.⁸⁶ State constitutions have provided the primary legal bases for governing education and teacher policy.⁸⁷ All states require teachers to hold licenses.⁸⁸ However, the nature and quality of licensure standards and assessments vary widely with regard to clinical experiences, coursework, assessment scores needed by teacher candidates, and measurement of general, subject matter, and pedagogical knowledge.⁸⁹ Additionally, though states have the authority to approve teacher preparation programs, these requirements tend to vary as well.⁹⁰ States set teacher compensation requirements, which generally specify teacher pay according to state or local salary schedules that are based on experience, credentials, and college credits;⁹¹ however, some states have experimented

⁸⁶ See Cohen, *supra* note 45.

⁸⁷ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995), (explaining that although education is not mentioned in the U.S. Constitution, every state constitution specifies a legal duty that they state must provide a system of public schools to students).

⁸⁸ See Corcoran, *supra* note 653, at 309.

⁸⁹ *Id.*

⁹⁰ *Table Comparing Professional Development Requirements by State (custom designed by authors)*, EDUC. COUNTS, <http://www.edweek.org/rc/2007/06/07/edcounts.html> (on file with authors).

⁹¹ See Corcoran, *supra* note 653, at 316.

with alternative compensation schemes, such as merit pay,⁹² despite little evidence these schemes are effective at boosting teacher quality or effectiveness.⁹³ States have also implemented reforms aimed at attracting high quality and effective teachers to high-need areas with strategies such as housing supplements and loan forgiveness programs, as well as greater pay in schools that are hard to staff or have a shortage of particular subjects (e.g. mathematics).⁹⁴

Despite the governance authority held by states, local school districts and schools have traditionally made a wide range of decisions about teacher management. School administrators (e.g. principals) have held primary responsibility for evaluating teachers and choosing curricula.⁹⁵ However, traditional teacher evaluation systems employed by such administrators have yielded high ratings for almost every teacher and generally failed at distinguishing teacher quality or effectiveness.⁹⁶ Moreover, in states that allow collective bargaining, most school districts and teachers forge agreements specifying procedural protections and working conditions for teachers in boundaries specified by state law.⁹⁷ Although teacher union advocates argue that collective bargaining protects teachers from unfair or unwise administrator treatment, critics often contend that it hamstrings administrative authority, prevents administrators from creating flexible staffing arrangements, protects ineffective teachers, fails to reward effective teaching, and ultimately creates huge inefficiencies.⁹⁸

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See generally LARRY CUBAN, *HOW TEACHERS TAUGHT: CONSTANCY AND CHANGE IN AMERICAN CLASSROOMS* (1984) (examining the history of instructional change).

⁹⁶ See, e.g., Daniel Weisberg et al., *The Widget Effect: Our Failure to Acknowledge and Act on Differences in Teacher Effectiveness*, THE NEW TCHR. PROJECT 6 (2d ed. 2009) (finding that in a study of ten school districts that 94% of teachers were rated as satisfactory). See also U.S. DEP'T OF EDUC., *supra* note 23, at 5-6 (stating that only 23% of all teachers, and only 14% of teachers in high-poverty schools, come from the top third of college graduates).

⁹⁷ Paul T. Hill, *The Costs of Collective Bargaining Agreements*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS 89 (Jane Hannaway & Andrew J. Rotherham, eds., 2d ed. 2006).

⁹⁸ Frederick M. Hess & A. P. Kelly, *Scapegoat, Albatross, or What? The Status Quo in Teacher Collective Bargaining*, in COLLECTIVE BARGAINING IN EDUCATION: NEGOTIATING CHANGE IN TODAY'S SCHOOLS 53 (Jane Hannaway & Andrew J. Rotherman eds., 2006).

Teacher Evaluation Policy in the States

Beginning in the mid-1980s, reforms focused on teacher evaluation had gained steam as an approach to improve teaching.⁹⁹ By 1992, a large majority of states had in place laws with specific requirements for teacher evaluation,¹⁰⁰ and by the mid-2000s, a handful of states had started focusing on enhancing teacher evaluation, linking evaluations with student performance, particularly on standardized tests.¹⁰¹ This trend accelerated in the late-2000s. By 2013, 40 states required teacher evaluations to include student achievement data, 35 states required student achievement growth to be the preponderant criterion, and 20 states tied evaluation to tenure decisions.¹⁰² Additionally, 12 states enacted legal requirements making poor performance grounds for “just cause” dismissal, and five states required teachers to lose their tenure after a set number of poor performance evaluations.¹⁰³ The student achievement component of these evaluations was generally based on value-added modeling (VAM), a statistical technique that attributes growth in student achievement scores to particular teachers. Although administrator observation still constitutes a significant component of teachers’ evaluations in most places, administrators are often required by school districts to use particular rubrics, such as Charlotte Danielson’s Framework for Teaching.¹⁰⁴ And as discussed below, federal policies such as RttT have provided some push for these changes in state policy.¹⁰⁵

⁹⁹ Carole A. Veir & David L. Dagley, *Legal Issues in Teacher Evaluation Legislation: A Study of State Statutory Provisions*, 2002 BYU EDUC. & L.J. 1, 1 (2002).

¹⁰⁰ *Id.* at 3 (indicating that 38 states had specific legal requirements governing teacher evaluation by 1992).

¹⁰¹ EDUCATION COUNTS, <http://www.edweek.org/rc/2007/06/07/edcounts.html> (showing that while only two states had policies linking teacher evaluation to student achievement by 2003, at least nine states had passed laws encouraging teachers to be paid for performance on a table Comparing Teacher Evaluation Requirements by State).

¹⁰² See NAT’L COUNCIL ON TCHR. QUALITY, *supra* note 28, at 10; see also Ann Elizabeth Blankenship, *Teacher Tenure: The Times, They Are a Changin’*, 2 EDUC. L. & POL’Y REV. 193 (2014).

¹⁰³ *Id.*, at 216.

¹⁰⁴ For example, Chicago Public Schools has developed the REACH evaluation. This evaluation combines several measures, such as student achievement growth and administrator observations using a modified version of Charlotte Danielson’s Framework for Teaching. See *Teacher Performance Evaluation*, CHICAGO PUB. SCHOOLS, <http://www.cps.edu/ReachStudents/Pages/Reach.aspx> (last visited Feb. 12, 2016).

¹⁰⁵ See Kober & Riddle, *supra* note 82.

Despite the political momentum of the teacher evaluation movement, it has become a contentious debate within the education research community.¹⁰⁶ While researchers tend to agree that traditional forms of teacher evaluation are problematic,¹⁰⁷ they have widely differing opinions concerning the recent shift of many states to the use of value-added measures (VAMs). Those in opposition have criticized VAMs because these statistical techniques have not been validated for providing evaluations about individual teachers¹⁰⁸ and have the strong potential to provide misleading evaluations about a teachers' actual effectiveness.¹⁰⁹ A major problem driving this lack of validity regarding current teacher evaluation systems is due to the large number of factors other than teachers that can influence student achievement growth, such as family income and ethnicity.¹¹⁰ Early studies on administrators' use of observational rubrics like the Framework for Teaching also reveal a large amount of variation in the observational component of teachers' evaluation scores.¹¹¹ As such, the National Research Council stated, "VAM estimates of teacher effectiveness...should not [be] used to make operational decisions because such estimates are far too unstable to be considered fair or reliable."¹¹² Although policymakers have believed that

¹⁰⁶ Douglas N. Harris & Carolyn D. Herrington, *Editors' Introduction: The Use of Teacher Value-Added Measures in Schools New Evidence, Unanswered Questions, and Future Prospects*, 44 EDUC. RES. 71 (2015) (discusses both sides of the debate among researchers regarding VAMs).

¹⁰⁷ See, e.g., Steven Glazerman et al., *Evaluating Teachers: The Important Role of Value-Added*, BROOKINGS INST. 1-2 (Nov. 17, 2010), http://www.brookings.edu/~media/research/files/reports/2010/11/17-evaluating-teachers/1117_evaluating_teachers.pdf (discussing problems of traditional forms of teacher evaluation and new types of teacher evaluation).

¹⁰⁸ Audrey Amrein-Beardsley, *Methodological Concerns about the Education Value-Added Assessment System*, 37 EDUC. RES. 65, 66 (2008).

¹⁰⁹ See, e.g., Rodney s. Whiteman et al., *Revamping the Teacher Evaluation Process*, CTR. FOR EVAL. & EDUC. POL'Y (2011), http://ceep.indiana.edu/projects/PDF/PB_V9-N4_2011_EPB.pdf (discussing a range of problems facing teacher evaluation systems relying on students achievement growth).

¹¹⁰ *Id.*

¹¹¹ See, e.g., Lauren Sartain et al., *Rethinking Teacher Evaluation: Findings from the First Year of the Excellence in Teaching Project in Chicago Public Schools (Policy Brief)*, U. OF CHICAGO URB. EDUC. INST. (2010), <https://consortium.uchicago.edu/publications/rethinking-teacher-evaluation-findings-first-year-excellence-teaching-project-chicago> (discussing the use of the Framework for Teaching in Chicago Public Schools).

¹¹² Letter from Edward H. Haertel (Chair, Board on Testing and Assessment) to Honorable Arne Duncan (Secretary of Education, U.S. Department of Education), at 10

such evaluation systems would motivate teachers to improve, there is mixed evidence at best to support this theory of action.¹¹³ And because of their narrow focus on accountability, researchers argue teacher evaluation systems fail to emphasize the importance of developing teachers throughout their careers.¹¹⁴ Thus, it is far from clear whether these measures can provide the type of high-leverage change legislators assert.

Teacher Policy at the Federal Level

Although the federal government traditionally has not exercised authority over teachers or been as deeply involved in teacher policy as the states, federal law has directly involved teachers in a few key areas. Over the last several decades, Title II of the ESEA has served as the chief mechanism by which the federal government has been involved in teacher policy. And despite the federal government only providing less than 10 percent of the overall education funding, it has arguably become the most influential actor in the process. What started out as a program for acquiring library resources and textbooks in 1965 has since evolved into a policy pushing toward accountability for teachers. Beginning in the early 1980s, Congress began modifying Title II to move it away from its original focus on providing physical resources toward improving teacher quality and competence. This shift became especially prominent during the 1990s under the Clinton administration. Borrowing concepts from Goals 2000, which had been passed less than a year earlier, the reauthorization of Title II under the Improving America's Schools Act (IASA) was aimed at providing "intensive high-quality professional development" to all teachers, while holding them accountable for their students' academic achievement.¹¹⁵ But given the lack of support for the IASA and Goals 2000,¹¹⁶ states were generally unable to engage in the kind of coherent reform envisioned under these laws.

Under NCLB, Title II became more intensely concentrated on enhancing teacher quality and effectiveness. Title II was consolidated by combining the Class Size Reduction program with the older Dwight D.

(October 5, 2009), available at <http://www.nap.edu/read/12780/chapter/1>.

¹¹³ Whiteman et al., *supra* note 107, at 4-8 (discussing a range of problems facing teacher evaluation systems relying on students achievement growth).

¹¹⁴ See, e.g., Cohen & Hill, *supra* note 631 (discussing the importance of in service professional development for enhancing the quality and effectiveness of teachers).

¹¹⁵ Pub. L. No.103-382, § 2001, 108 Stat. 3518 (1994).

¹¹⁶ *Id.*

Eisenhower Mathematics program, thereby producing a more generalized teacher quality block grant program.¹¹⁷ It was also renamed “Preparing, Training, and Recruiting High Quality Teachers and Principals,” dramatically increasing the number of categorical grants aimed at educators.¹¹⁸ As part of these amendments, Title II increased teacher accountability through three different mechanisms.

First, every state was required to develop a plan to ensure that all teachers were “highly qualified” no later than the end of the 2005-06 school year.¹¹⁹ While the definition of what constituted a “highly qualified teacher” (HQT) under its provisions was mostly left up to states, NCLB generally required those definitions to include earning a bachelor’s degree, being fully certified, and demonstrating competence in their respective content area.¹²⁰ At the same time, it promoted alternative teacher certification pathways. The underlying assumption was credentialed teachers—whether through traditional or alternative routes—would be more effective instructors, thereby helping to bridge the achievement gap.

Second, Title II was generally aimed at reducing bureaucracy and increasing flexibility for states under NCLB. States were given discretion to implement strategies that targeted their unique challenges with respect to teacher quality.¹²¹ Thus, if a state determined that a school district failed to make progress in meeting its annual objectives for two consecutive years, the district then had to develop an improvement plan to meet those objectives.

Third, Title II was intended to empower parents as levers of school accountability. Every year, principals were required to attest to whether a school was in compliance with the HQT provisions, making this information available to the public upon request. School districts had to then report their progress in meeting these mandates to the state annually, which would be included on state report cards.¹²²

Most recently, programs implemented under the Obama administration have also focused on improving teacher quality. For example, the Teacher

¹¹⁷ *What the Research Says about Class Size Reduction*, NW. COMPREHENSIVE CTR. (2014), <http://nwcc.educationnorthwest.org/resource/1519>.

¹¹⁸ Pub. L. No. 107-10, 115 Stat 17 (2001).

¹¹⁹ 20 U.S.C. § 7801(23) (2002).

¹²⁰ *Id.*

¹²¹ *No Child Left Behind: A Desktop Reference*, U.S. DEP’T. OF EDUC. (2002), <https://www2.ed.gov/admins/lead/account/nclbreference/reference.pdf>.

¹²² Race to the Top Fund, 74 Fed. Reg. at 59, 688-99 (Nov. 18, 2009).

Incentive Fund (TIF) has supported efforts to develop and implement performance-based teacher and principal compensation systems in high-need schools. The stated goals of the TIF include improving student achievement by increasing teacher and principal effectiveness, reforming teacher and principal compensations systems to reward teachers and principals for increasing student achievement, increasing the number of effective teachers teaching poor, minority, and disadvantaged students in subjects that are hard to staff, and creating sustainable performance-based compensation systems.¹²³

Similarly, as discussed earlier, the federal government has focused on reforming teacher evaluation through RttT, devoting \$4.35 billion targeted at spurring innovation in education.¹²⁴ ED awarded funds to states on the basis of several factors, including states' commitments to improving standards and assessments, building more robust data systems to support instruction, advancing the turnaround of the lowest achieving schools, and improving the performance of teachers and leaders.¹²⁵ RttT regulations specifically emphasized the importance of improving teacher and principal effectiveness based on performance, while expressing support for the adoption of VAMs.¹²⁶ And as noted above, observers have partly attributed states' recent actions on teacher evaluation policy to the federal push in this direction.¹²⁷ Indeed, this has particularly become apparent now under the ESSA, which has further emphasized such evaluation systems by offering sub-grants through Title II.

But despite this enhanced focus on improving teacher quality in Title II and federal policy more broadly, several problems have emerged. For instance, in the 2013-14 school year, Part A of Title II (under NCLB) provided states with approximately \$2.21 billion for teacher quality reforms.¹²⁸ A survey conducted by ED revealed that the highest poverty

¹²³ See *Teacher Incentive Fund, Program Description*, U.S. DEP. OF EDUC. (2009), <http://www2.ed.gov/programs/teacherincentive/index.html>.

¹²⁴ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5. 123 Stat. 115, 284 § 14007 (codified as amended (2012)).

¹²⁵ Race to the Top Fund, 74 Fed. Reg. at 59, 688-99 (Nov. 18, 2009) (to be codified at 34 C.F.R. subtitle B, chapter II) (clarifying the changes made to the "State Success Factors").

¹²⁶ *Id.* (listing the maximum number of points that may be assigned to each RttT selection criterion).

¹²⁷ See, e.g., PATRICK MCGUINN, AMERICAN ENTERPRISE INSTITUTE, CREATING COVER AND CONSTRUCTING CAPACITY, ASSESSING THE ORIGINS, EVOLUTION, AND IMPACT OF RACE TO THE TOP 3 (2010).

¹²⁸ See *Findings from the 2013-14 Survey on the Use of Funds under Title II, Part A*, U.S. DEP. OF EDUC. (2014), <http://www2.ed.gov/programs/teacherqual/2013findingsfinal.doc>.

districts and largest districts received most of these funds.¹²⁹ These districts largely channeled these funds toward professional development for teachers and class size reduction.¹³⁰ However, only 6.1% of these funds were devoted to promoting growth and quality teaching.¹³¹ Because districts had significant discretion over how to spend these funds,¹³² the types of activities Title II grants actually supported—even in categories such as professional development—were quite varied.¹³³ Moreover, in light of the vast range of quality and types of professional development, there has been little evidence that Title II funds have enhanced teacher quality or effectiveness.¹³⁴ And while class size reduction can be effective under certain conditions, it cannot be confirmed whether these conditions were in place when Title II support was provided.¹³⁵ As Andrew Rotherham writes, “tangible results from these efforts are scant, and there is little evidence that these funds are driving the sort of changes needed to help schools recruit, train, place, induct, and compensate quality teachers or changes that are aligned with broader human capital reform efforts in education.”¹³⁶ In sum, the states’ misuse of Title II funding demonstrates the balancing act between embracing the variation inherent in the education policy process and the need for coherent reforms rooted in an efficacious theory of action by the federal government.

The HQT provisions have also faced several problems, especially for states. In part because the federal government did not chart a specific course for how to provide a highly qualified teacher for every student, individual states often had a difficult time implementing the HQT provisions in the early stages of NCLB.¹³⁷ Consequently, states generally

¹²⁹ *Id.*

¹³⁰ *Id.* at 3 (showing that 43.6% of Title II, Part A funds went toward professional development and 35.3% of these funds went toward class size reduction).

¹³¹ *Id.*

¹³² Robin Chait, *From Qualifications to Results*, CTR. FOR AMER. PROGRESS (Jan. 28, 2009), <https://www.americanprogress.org/issues/education/report/2009/01/28/5494/from-qualifications-to-results/>.

¹³³ U.S. DEP. OF EDUC., *supra* note 126 at 10 (providing an overview of the number of sessions and teachers participating in professional development with Title II support).

¹³⁴ Hill, *supra* note 95.

¹³⁵ David K. Cohen, et al., *Resources, Instruction, and Research*, 25 EDUC. EVAL. AND POL’Y ANALYSIS 119, 128-132 (2003) (discussing the use of resources to reduce class size).

¹³⁶ Andrew Rotherman, *Title 2.0: Revamping the Federal Role in Education Human Capital*, EDUC. SECTOR 1 (November 2008), http://educationpolicy.air.org/sites/default/files/publications/Title_2.pdf

¹³⁷ See Superfine, *supra* note 4.

developed low hurdles for prospective teachers, such as low cut-scores on licensure exams and narrow certification requirements, thus limiting their ultimate value.¹³⁸ So, whereas the ED has trumpeted the fact that over 98 percent of teachers are now highly qualified¹³⁹—as compared to about half when NCLB was enacted—there is little indication such provisions have actually increased teacher effectiveness.

In seeking to mitigate these issues, recent changes to Title II under the ESSA have shown some promise. For example, the law emphasizes the development of “systems of professional growth and improvement... for teachers, principals, or other school leaders and opportunities for building the capacity of teachers.”¹⁴⁰ Moreover, it has grant mechanisms to promote the provision of “high-quality, personalized professional development that is evidence-based.”¹⁴¹ States awarded Title II subgrants are also now required to annually submit to ED how funds are specifically used to increase equity among teachers occupying low-income and minority predominant schools.¹⁴²

However, significant problems still remain. Although the creation of state teacher workforce systems under Title II that deliver increased professional development, leadership opportunities, and the retention/recruitment of those teaching in low-income and minority-predominant schools is encouraging, the lack of any meaningful guidance complicates their creation. This is especially true for states with low capacities to engage in deep design work of such systems. At the same time, the law’s allocation of policymaking power to states¹⁴³ and policymakers’ continued reluctance to define what makes an effective teacher—besides a degree or certificate—has limited the extent to which the law provides constructive guidance.

Further compounding this issue has been the promotion of policies like incentive/ performance-based pay¹⁴⁴ and non-traditional certification

¹³⁸ See generally, *From the Capital to the Classroom: Year 2 of the No Child Left Behind Act*, CTR. ON EDUC. POL’Y (2004), <http://www.cepdc.org/displayDocument.cfm?DocumentID=301>.

¹³⁹ See *Preparing and Credentialing the Nation’s Teachers: The Secretary’s Eighth Report on Teacher Quality Based on Data Provided for 2008, 2009, and 2010*, U.S. DEP’T OF EDUC. 48 (2011), <https://title2.ed.gov/Public/TitleIIReport11.pdf>. This was the last report indicating HQT data by the Department of Education.

¹⁴⁰ See ESSA Conference Report, *supra* note 2, at 128.

¹⁴¹ See ESSA Conference Report, *supra* note 2, at 130.

¹⁴² See ESSA Conference Report, *supra* note 2, at 126.

¹⁴³ See generally, EXEC. OFFICE OF THE PRESIDENT, *supra* note 12.

¹⁴⁴ See ESSA Conference Report, *supra* note 2, at 129.

pathways,¹⁴⁵ which continue to be supported despite a thin research base. Linda Darling-Hammond has argued that alternative certification pathways in particular cause “standards [to be] raised for traditional, university based teacher [certification] programs [while] standards for alternative routes to teaching are being relaxed.”¹⁴⁶ Yet this is happening at a time when presently, three-quarters of states are now implementing, or in the process of implementing, the edTPA—a much more rigorous, standardized certification assessment for teachers.¹⁴⁷ Nevertheless, almost a third of the current teacher preparation programs in the U.S. are classified as alternative,¹⁴⁸ despite two decades of research showing uneven results regarding their teaching effectiveness and overall retention rates.¹⁴⁹ Indeed, the U.S. Department of Education has argued these streamlined certification pathways for qualified candidates are more efficient.¹⁵⁰ Such requirements clearly raise problems of incoherence regarding the management of teachers beginning with their preservice training and extending through their time in the teacher workforce.

In short, teacher policy at the federal-level has broadly begun to move in the same direction as many high-profile state policies focused on enhancing teacher quality and effectiveness. However, there is little indication that Title II, one of the main levers for promoting teacher quality and effectiveness, has been coherently or strategically aimed to accomplish such goals.

¹⁴⁵ See ESSA Conference Report, *supra* note 2, at 117.

¹⁴⁶ *Certification and Teacher Preparation in the United States*, U.S. OFF. OF EDUC. RES. AND IMPROVEMENT 23 (2000), <http://files.eric.ed.gov/fulltext/ED450082.pdf>.

¹⁴⁷ *Participation Map*, AMER. ASS’N OF COLLEGES FOR TCHR. EDUC. (2015), available at <http://edtpa.aacte.org/state-policy> (Providing a detailed map of the states that are currently implementing, or in the process of implementing, the edTPA).

¹⁴⁸ See *Preparing and Credentialing the Nation’s Teachers: The Secretary’s Eighth Report on Teacher Quality*, U.S. DEP’T OF EDUC. 3 (2013), <https://title2.ed.gov/Public/TitleIIReport13.pdf>.

¹⁴⁹ Linda Darling-Hammond, *Teacher Quality and Student Achievement: A Review of State Policy Evidence*, 8 EDUC. POL’Y ANALYSIS ARCHIVES 1, 2 (2000), <http://epaa.asu.edu/ojs/article/view/392>.

¹⁵⁰ *Meeting the Highly Qualified Teachers Challenge: The Secretary’s Annual Report on Teacher Quality*, U.S. DEP’T OF EDUC. 15 (2002), <https://www2.ed.gov/about/reports/annual/teachprep/2002title-ii-report.pdf>.

The ESEA Reauthorization and Teacher Workforce Management Systems

While it is clear that any modification to the ESEA should include several fundamental modifications, this Part focuses on recommendations to improve the teacher workforce. These recommendations are grounded in the principles discussed in Part I and the current landscape of teacher policy at the federal- and state-levels, and are designed to address particular problems that have faced large-scale school reform efforts and recent iterations of the ESEA more generally. As discussed above, many large-scale reforms have failed to be grounded in an efficacious theory of action for several reasons—they have not accounted for the numerous factors or inherent variation found in the education policy process (particularly at local levels), they have not promoted policy coherence, and they have not focused on a substantive area of reform that has a “good shot” of producing increased and more equal educational opportunities. Moreover, large-scale federal reforms have failed to garner the significant political traction and buy-in specifically necessary at the state level to oversee strong implementation over time.¹⁵¹ At the same time, there are many “good ideas” that never make it into the federal legislative discourse in the first place because they are not sufficiently aligned with the current political debates or climate.¹⁵² Therefore, our recommendations are crafted directly in response to such problems. Part III.A addresses the substantive reforms that we recommend ESEA modifications to promote at the state-level, and Part III.B discusses the how this reauthorization should be structured to encourage such reform.

Teacher Workforce Management Systems

The next ESEA reauthorization should focus on encouraging states to develop highly functioning teacher workforce management systems. Although the ESSA has continued to incorporate some Title II sub-grants to further this process, it is by no means enough. As it stands, there is no blueprint for states to follow, which could prove problematic for states with limited capacities. Yet, these systems are not just predicated on the

¹⁵¹ See Cohen & Hill, *supra* note 731.

¹⁵² See, e.g., Kingdon, *supra* note 65; POLICY CHANGE AND LEARNING: AN ADVOCACY COALITION APPROACH (Paul A. Sabatier, Hank C. Jenkins-Smith eds., 1993) (explaining scholarly research of federal policy formation generally stresses the political conditions that need to be in place for an idea to be developed into law).

idea that workforce development is concerned with the size and quality of supply, initial preparation, and entry of persons into the teacher workforce—metrics the ESEA and ED have generally favored. Rather, they also take into account what happens after initial preparation and entry, further developing and managing the human resources that make up the workforce. In doing so, these systems are grounded in the idea that workforce development centers around two basic types of tasks: (1) competence development and management and (2) behavior development and management.¹⁵³ While the former involves the acquisition, development, utilization, retention, and displacement of human capital (i.e. teachers), the latter involves the coordination and control of human capital so that it functions effectively. Moreover, these systems are grounded in the assumption that the context in which they operate is neither uniform nor static. Teacher workforces (and workforces more generally) are diverse in terms of age, experience, gender, race, and ethnicity. They are also dynamic in terms of entry and exit, mobility, and changes in individual and collective capacity and need. At the same time, populations of students, demands for higher levels of performance and outcomes, and broad social, economic, and employment trends are always changing.

Given such vast considerations, teacher workforce management systems should be thought of as the “strategic combinations of practices that develop and manage the competence and behavior of dynamic groups of educators at different levels to achieve organizational objectives in ever-changing contexts.”¹⁵⁴ These systems would attend to several functions of managing and developing the teacher workforce, including increasing the supply of potential teachers; credentialing; promoting the quality of initial preparation; recruiting; hiring; assigning teachers to workplaces and roles; promoting induction and socialization; providing opportunities for on-the-job training for new teachers; creating more extensive professional development opportunities for veteran teachers; generating working conditions conducive to improving development and performance; supervising and evaluating performance; retaining teachers; terminating employment; and compensating, promoting, and managing

¹⁵³ Patrick M. Wright & Scott A. Snell, *Toward an Integrative View of the Strategic Human Resource Management*, 1 HUM. RESOURCE MGMT. REV. 203, 211 (1991).

¹⁵⁴ Benjamin Michael Superfine et al., *Promising Strategies for Improving K-12 Education in Illinois: Improving the Educator Workforce*, THE ILLINOIS REPORT 49, 54 (2009), available at <http://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/IR09/text/ch5-education.pdf>.

labor relations.¹⁵⁵ And while each of these functions is important to perform effectively, there generally should be a “coherent, congruent, and strategic use of different combinations of different practices over time.”¹⁵⁶ In other words, such systems should be strategically and systemically designed with a vision of how teachers ought to be developed throughout their careers, in light of particular contexts at state and local levels. Moreover, such systems should recognize the differences between new and veteran teachers and what constitutes an effective teacher.

To create this sort of system, however, states would need to articulate substantive and explicit descriptions of what teachers should know and be able to do throughout their careers. In other words, states would need to develop a robust conception of what constitutes an effective teacher. To date, states have not done so, instead narrowly defining teacher workforce indicators to put a positive light on reported teacher data and mask administrative deficiencies.¹⁵⁷ Toward this end, we suggest that effective teachers have strong content knowledge, pedagogical knowledge, and the ability to combine the two in ways that are attentive to the individual students they teach at any given time.¹⁵⁸ Moreover, what constitutes an effective teacher should be aligned to the visions of what students should know and be able to do, as described by the student learning standards states have adopted, such as the Common Core State Standards (CCSS). As the Gordon Commission on the Future of Assessment in Education suggested, effective teachers also teach students to evaluate the validity and relevance of different pieces of information and draw conclusions from them; make conjectures and seek evidence to test them; contribute to their job or community networks; and generally make sense of the world.¹⁵⁹ Simply put, teachers should not be narrowly focused on helping

¹⁵⁵ Mark A. Smylie, et al., *Rethinking Teacher Work Force Development: A Strategic Human Resource Management Perspective*, in 103 YEARBOOK OF THE NAT'L SOC. FOR THE STUDY OF EDUC. 34 (2004).

¹⁵⁶ Superfine, *supra* note 152, at 54.

¹⁵⁷ See Margret Plecki & Hillary Loeb, *Lessons for Policy Design and Implementation: Examining State and Federal Efforts to Improve Teacher Quality*, in 103 YEARBOOK OF THE NAT'L SOC. FOR THE STUDY OF EDUC. 34 (2004).

¹⁵⁸ Benjamin Michael Superfine, *The Promises and Pitfalls of Teacher Evaluation and Accountability Reform*, 17 RICHMOND J. OF THE L. AND THE PUB. INT. 591 (2014) (discussing the utility of the concept of mathematical knowledge for teaching in developing state-level teacher policy).

¹⁵⁹ *A Public Policy Statement*, THE GORDON COMM'N ON THE FUTURE OF ASSESSMENT IN EDUC. (2013),

http://www.gordoncommission.org/rsc/pdfs/gordon_commission_public_policy_report.pdf (noting also that the Gordon Commission was established by Educational Testing

students score well on standardized tests, but should be highly attentive to providing all students with high quality, conceptually-oriented learning activities. Therefore, the increase of VAMs linked to student test scores by states might be a component of such reform, but should not be the central piece.

Once states specify what constitutes an effective teacher, potentially through tools such as teacher standards, teacher workforce management systems should be built to enact this vision of teaching. The development of such teacher workforce management systems would flow directly from the principles discussed in Part I. Unlike the reforms enacted by previous iterations of the ESEA, though, these systems would be grounded in an efficacious theory of action. And as discussed previously, teachers are perhaps the strongest leverage point for increasing student learning opportunities in schools. But while the federal government's position that teachers are an important leverage point within the greater student achievement conversation is significant, these reforms should not be narrowly focused on accountability as in the past. Instead, these systems would be aimed at directly enhancing the quality and effectiveness of teachers by taking into account the context of a much broader range of teacher workforce functions designed to work coherently.

Indeed, policy coherence has been a goal that state and federal reforms have previously had, but achieving this goal has proven elusive at best. Hence, teacher workforce management systems would emphasize the development of teachers' knowledge and skills in addition to functions such as accountability and thereby attend to a necessary element of teacher policy all too often ignored by education reformers—the development of people as critical implementers of education policy.

These systems are also predicated on the notion that because the teacher workforce is ever-changing and exists in a dynamic context, they should be designed in ways that can support the management of individual teachers throughout their careers. In this way, these systems would promote better decision-making by administrators about how particular teachers should be treated given the realities of schools and the policy implementation process. Moreover, the policies focused on the development of teacher workforce systems would be politically feasible. Both federal and state-level reform efforts focusing on teachers already have substantial political momentum, and states have previously begun the difficult work of developing data systems for managing teachers.

Service and composed of policymakers, practitioners, and researchers).

Therefore, while our recommended focus on strategic teacher management goes beyond the current systems concentrated on evaluation and accountability, they would draw on “borrowing strength” as an expansion of an idea that has already spread quickly across states and the federal government.

Promoting Teacher Workforce Management Systems through the ESEA

Given the potential of teacher workforce management systems, how should they be structured so modifications to the ESEA have the best shot of being successful? Provisions encompassing the development of these systems would have a natural home in Title II because of its focus on improving teaching over the past three decades. As discussed earlier, Title II has integrated a range of provisions involving teachers, including those focused on professional development, accountability, and what constitutes a highly qualified teacher.¹⁶⁰ However, Title II has not been coherently or strategically designed to enhance the quality and effectiveness of teachers; instead, it has hinged on superficial approaches like the HQT provision and strategies that have a thin research base (e.g., alternative certification routes). Therefore, Title II should be restructured to promote the adoption and implementation of teacher workforce management systems by states.

Though there are many strategies that could be used to promote the development of these systems, incentive mechanisms structured like RttT appear to be the most efficacious.¹⁶¹ As a result, Title II should include a similar competitive grant program centered on expanding current state-level teacher evaluation systems into coherent teacher workforce management systems. States particularly would be responsible for developing the data collection and management infrastructure to support these systems. However, states should have some latitude on how to construct these systems and would be incentivized to develop their own strategies about how teachers should be evaluated, developed, promoted, etc. At the same time, Title II (and its regulations) should specify the workforce functions to which states’ systems must adhere to and a broader plan articulating how these functions fit together toward the ultimate goal of improving teaching and learning. In other words, conveying a coherent but general pathway for implementation of these systems—while taking into account the differing contexts of states and localities—remains imperative.

¹⁶⁰ See U.S. Dept. of Educ., *supra* notes 126-129.

¹⁶¹ See *supra* notes 80-83.

Given the critical role that local context plays in policy implementation, school districts would also play a major role in implementing these systems. Local leaders, such as superintendents, would need to develop specific strategies about how these systems would be used to promote teacher growth and performance throughout their careers. Indeed, the amount of flexibility given to district leaders to develop and implement strategies using these systems should be aligned with the dynamic nature of the teacher workforce in each state—as workforces change, decision-making needs to occur closer to the ground. Moreover, school leaders like principals would need to make decisions about specific teachers, such as hiring and firing decisions. Because there is significant variation in the nature of states' teacher workforces and politics related to local control, however—as exemplified by states' varying governance strategies inherent in their responses to RttT¹⁶²—it is difficult to recommend an exact distribution of governance authority that should be specified by federal law. Such a recommendation would not respect the existing variation among state political traditions and would likely weaken state buy-in. But at the very least, attending to the governance responsibilities and reasoning underlying them should be a critical part of states' grant applications. On the other hand, since such systems need substantive visions of teaching to anchor them, Title II should also require a federal committee to be convened to develop model teaching standards aligned to the Common Core State Standards that states could voluntarily adopt. But states would not be required to implement them in order to receive Title II funds—rather the federal development of these standards could ease the burden on states when forming their own systems by serving as a guide.

In sum, these strategies used to promote the development of teacher workforce management systems notably would flow from the principles discussed above. Unlike many reform efforts of the past, these recommendations are politically feasible. Although RttT was arguably a failure in terms of the substantive reforms it promoted, it was a clear political success. For a relatively small amount of funding, RttT was key in promoting policy changes focused on teacher evaluation across the states. Policymakers should learn from its strategic use of incentives and political pressure, expanding its strategies into attempts to modify the ESEA, especially regarding Title II.

¹⁶² See Benjamin M. Superfine, *The Expanding Federal Role in Teacher Workforce Policy*, 20 EDUC. POL'Y 58, 65-71 (2012) (discussing the role of state governance in shaping the development of teacher evaluation systems under RttT).

That said, more grants should be offered than were provided under RttT. While 40 states (and the District of Columbia) applied for RttT funds, only 20 eventually won grants through three different phases.¹⁶³ As discussed above, the lack of fiscal resources has put a strain on the implementation of federal reform. And most recently, this led to critiques of NCLB as an unfunded mandate. Therefore, by authorizing (and following through with) significantly more funding, this will provide for a more even distribution of funds across states, while taking into consideration the different capacities of states to research, develop, and implement such systems.¹⁶⁴

Conclusion

The next set of modifications to the ESEA represents a critical opportunity for improving teaching and learning around the U.S. While the ESEA has long been the centerpiece of federal efforts to improve students' educational opportunities, it has fallen short of its goals. Therefore, by strategically restructuring Title II to guide and build states' capacities to develop comprehensive teacher workforce management systems that emphasize the growth of teachers' skills and knowledge, the prospects of the ESEA would be much brighter. Clearly, such changes should not be the only modifications to the ESEA. Nevertheless, broadly focusing on enhancing teacher quality and effectiveness, and building on the recent political success of RttT and teacher evaluation systems, would constitute a highly efficacious strategy.

¹⁶³ Ulrich Boser, *Race to the Top: What Have We Learned from the States So Far?*, CTR. FOR AMER. PROGRESS 8 (2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/rtt_states.pdf.

¹⁶⁴ See generally, *Setting the Pace: Expanding Opportunity for America's Students Under Race to the Top*, THE WHITE HOUSE (2014), https://www.whitehouse.gov/sites/default/files/docs/settingthepacertreport_3-2414_b.pdf.

A Great Federal Retreat: The 2015 Every Student Succeeds Act

Gary Orfield*

When Congress acted after many years of stalemate to create a new fundamental education law, the Every Student Succeeds Act (ESSA), it moved with lightning speed in late 2015. Both the House and the Senate had passed reforms that differed in many ways and no one knew what was going to come out of the Conference Committee; many observers thought that it would be very difficult to put together an agreement for a new law between the extremely conservative House and a more moderate bipartisan coalition in the Senate. The conference agreement, over 700 printed pages of text, was suddenly published on November 30 and would move with light speed through Congress. The final bill that Congress had before it, Every Student Succeeds Act (ESSA), was virtually impossible to read with understanding. It was a jumble of lists of House Provisions and Senate provisions and new compromises, but you could not read directly through a title or even a provision in many cases; often the provisions would refer to other provisions in the law, many pages away, or provisions in previous laws. As is common in amended laws, some of the most important parts were written, not as a text, but as an endless set of changes in existing law. No one had time to think through and understand the interactions and potential contradictions between the many hundreds of provisions.

Regardless, within ten days ESSA passed both houses of Congress and was signed by President Obama on December 10, 2015. It was spurred by the frustration of being unable to create a new federal education law year after year after the No Child Left Behind Act (NCLB) had expired, and reflected a broad agreement that federal education policy had become so untenable that almost anything would be better. So Congress decided to give up most of the federal power accumulated over the past half century and bet the future on the state control of the expenditure of substantial funds from the federal government. In a remarkable turnabout, every Democrat voting in the House of Representatives voted for a bill that embodied ideas Democrats had fought against for generations, while a

* Gary Orfield is a Distinguished Research Professor of Education, Law, Political Science, and Urban Planning at the University of California, Los Angeles and the cofounder and co-director of The Civil Rights Project.

significant minority of Republicans refused to vote for this measure that achieved a long sought GOP objective of state control because the rising Tea Party fraction of the party thought it was not conservative enough.

Obviously there was a very strong incentive to get it done and to decisively move away from the long-expired but still-in-force NCLB and all the jury-rigged waiver and incentive policies of the Obama Administration. For seven years policies were invented without legislative authority and were imposed on resentful states that felt they had no choice. With ESSA's enactment the first major new federal education law in 12 years and only the second major change in a half-century was suddenly in effect, and destined to dramatically reduce the role of the federal government in American education.

This frustration with federal policy was deep enough and the accommodations to key interest groups strong enough that there was no fight at the end. Although there had been a great deal of discussion before the House and Senate passed their quite different bills, almost no one who voted for ESSA or who covered the story had a chance to fully read and think about the entire new law. Consequently, ESSA, as signed by the President, remains full of incomprehensible language. The following is a small sample:

(2) CHARTER SCHOOLS.—Part B of title V (20 U.S.C. 7221 et seq.) (as amended by paragraph (1) of this subsection) is— (A) transferred to title IV (as amended by section 2001 of this Act and subsection (a) of this section); (B) inserted so as to appear after part B of such title; (C) redesignated as part C of such title; and (D) further amended— (i) in the part heading, by striking “PUBLIC CHARTER SCHOOLS” and inserting “EXPANDING OPPORTUNITY THROUGH QUALITY CHARTER SCHOOLS”; (ii) by striking the subpart heading for subpart 1; and (iii) by redesignating sections 5201 through 5211 as sections 4301 through 4311, respectively.¹

With hundreds of provisions of this type, there is much to sort out.

¹ *Every Student Succeeds Act*, S. 1177, 114th Cong., 1st Sess., p. 116 (2015).

Back to an Earlier Tradition

In spite of all the complexities, ESSA fundamentally represents a return to state-dominated implementation of federal education policy that was the norm throughout U.S. history until the middle 1960s. Until 1965 the federal role in American schools was almost invisible and Congress had never been able to pass a general aid to education law. The federal government had always been a minor player. Fear of federal control, desire to preserve the racial status quo in the South, and deep division over the desirability and legality of aiding private religious schools made major legislation impossible.² In contrast to many other countries, the chief education official was not even in the cabinet. The main jobs of the Office of Education (it did not become a Department until 1980) were to collect statistics, carry out or fund research, and distribute money to the states. The states, together with the local districts, had vast power over the schools—certifying teachers, setting required curriculum, sometimes choosing text books, providing a large share of schooling costs, setting graduation and testing requirements, controlling districting, running retirement funds, and many others.

The basic role of the federal government before 1965 was to grant modest amounts money for use by the states. Federal aid to schools and colleges was not well regulated and in the few early instances that federal authorities tried to cut off funds for severe violations they were reversed in Congress.³ The only significant federal program before the 1960s was the 1917 Vocational Education Act, which seemed to give the federal government a significant role, but operated with almost no actual supervision, with the states sending in their regulations every few years and doing what they wanted with the money.⁴ In the seventeen states with officially segregated and highly unequal schools, the federal government ignored discrimination and inequality. The legislative process for vocational education was dominated by the National Association of State Vocational Education officials.⁵ The country had fifty different educational systems, linked by the use of books and tests from major

² Hugh Douglas Price, *Race, Religion and the Rules Committee: The Kennedy Aid-to-Education Bills*, in *THE USES OF POWER*, 1-62 (Alan F. Westin ed., 1962).

³ V.O. KEY, JR., *THE ADMINISTRATION OF FEDERAL GRANTS TO THE STATES* 161-62 (1937).

⁴ The land grant act for public schooling was the earliest policy.

⁵ LAWRENCE A. CREMIN, *THE TRANSFORMATION OF THE SCHOOL* 60-65 (1964); Key, *supra* note 3, at 73-74; DOXEY A. WILKERSON, *SPECIAL PROBLEMS OF NEGRO EDUCATION* 92-96, 109-10 (1939).

publishers, and by professional associations and publications, but operating with great autonomy from the federal government. Southerners, who occupied many key positions in Congress, fought federal aid proposals, believing that they would lead to interference in the segregated educational systems of Southern states (which turned out to be true after the enactment of the 1964 Civil Rights Act). Defenders of the separation of church and state resisted any attempts to provide assistance to religious schools. Even in those narrow areas where the federal government was a force, there was fierce resistance to “federal control of education” and the laws were written with explicit guarantees against such efforts.

The great breakthrough came under the leadership of President Lyndon B. Johnson, who started out as a young teacher of poor Latino children and focused intensely on education. His administration had a larger impact on education policy than any other, passing more than 20 federal education laws and radically increasing the federal role from preschool through college.⁶ The great changes were strongly related to the massive social changes initiated by the civil rights revolution and to the ideas underlying Johnson’s “war on poverty.” In the 1965 Elementary and Secondary Education Act, Congress and the President found the formula balancing the federal and state role that worked and remained central for fifty years. The basic idea was to target federal money to challenges facing the schools of concentrated poverty and to bypass the public-private divide by also helping poor students in private schools, including religious schools. The law greatly expanded federal funding and especially helped the poorest parts of the big cities and the South. The law explicitly prohibited the federal government from any role in the curriculum or internal educational processes of the schools. It provided dollars to upgrade and professionalize state education offices, many of which had little capacity, and increased money for research and experimentation, and for books and libraries. The great civil rights law passed the year before the new money came and lubricated difficult racial changes. The 1964 Civil Rights Act forbade discrimination by any institution receiving federal funds and gave powerful enforcement tools to the federal government. Under the influence of the Great Society’s poverty program, the law focused dollars on areas of deep poverty. The federal role was defined as providing and targeting resources so that the most disadvantaged children got access to them. This agenda was far more oriented on equity issues than the policies in most states, a number of

⁶ Gary Orfield, *LBJ and American Education*, in *LBJ’S NEGLECTED LEGACY* (Robert H. Wilson, Norman J. Glickman, & Laurence E. Lynn, eds. 2015).

which were conducting bitter-end battles against civil rights. So it combined a generous increase in resources with a stern warning about fairness. Outside of channeling dollars and enforcing Constitutional rights, however, the federal government was to respect the tradition of state and local control of the schools. ESEA was developed with active input from two groups of experts appointed by the Administration, drawing on their wide experience and contacts in the education and research worlds.⁷ The following major reforms, NCLB and the ESSA, were not—they were much more reflections of ideologies, lobbies, and politics, made with very little consultation with experts on the possible effects of educational policies.

The basic assumption of the 1965 legislation was that public schools were good, and the ones serving poor and minority kids needed more help. The role of the federal government was to increase opportunity and to see that all children had a fair chance to get it. At the same time under the 1964 Civil Rights Act as enforced by the Johnson administration, the schools in the 17 states with a history of legal segregation were being forced to rapidly desegregate the schools and teaching forces, or risk both losing federal money and being sued by the U.S. Department of Justice, producing the most dramatic move toward school integration in American history. Those policies were fundamentally about giving historically segregated students access to mainstream schools, not about the content or delivery of instruction.

The federal role was constantly contested between the Democrats and the Republicans, but usually it remained within the general boundaries set by the Johnson approach for nearly four decades. The GOP, beginning with President Richard Nixon and clearly under the succeeding GOP Presidents, pressed from time to time for “block grants” transferring the dollars to the states to do as they wished, but those were blocked by the Democrats.⁸ The Democrats controlled the House for forty years from 1954 to 1994 and during that time, the Senate had a Democratic majority too, except for six years under President Ronald Reagan.

During the Reagan administration, Republicans reframed education policy, mostly without legislation, through strong advocacy in the *Nation*

⁷ *Id.*; JULIE ROY JEFFREY, *EDUCATION FOR CHILDREN OF THE POOR: A STUDY OF THE ORIGINS AND IMPLEMENTATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACTION OF 1965* (1978); STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* (1968).

⁸ GARY ORFIELD, *CONGRESSIONAL POWER: CONGRESS AND SOCIAL CHANGE 123-72* (1975).

at Risk report, moving state policies away from equity and access and toward standards and accountability as the central issues. This period also led away from a firm focus on strengthening public schools and toward what would become strong political support for schools controlled by private organizations and firms—charter schools⁹—with much less public accountability. This support rested on the assumption that they were better, by definition, if they were less public and did not have teachers' unions.¹⁰ There were also recurring but unsuccessful efforts for federal vouchers for parents to choose private schools, the great majority of which were religious schools.

The idea of more standards, requirements and much more accountability attached to test scores was adopted in one form or another by the vast majority of states and one of its enthusiastic supporters was Gov. Bill Clinton of Arkansas who worked closely with Pres. George H.W. Bush to frame an agenda for federal policy that was followed in both of their administrations and set of ambitious goals for equity and progress in what became the Goals 2000 legislation promising to greatly improve racial equity in education, but none of those goals were achieved.

Though the central feature of the law, Title I, remained intact, an important test of the probable consequences of block granting came in the first year of the Reagan Administration. In the Omnibus Budget Reconciliation Act of 1981, the administration ended dozens of federal programs and simply transferred the money to the states.¹¹ Many small, targeted federal programs were combined into a block grant (Chapter II); the money from 29 programs was combined into a lump sum sent to each state and they were free to do whatever they wanted. The largest of the consolidated programs was the desegregation aid program, a program offering assistance in training teachers and staff to better manage diverse schools and classrooms, creating new curriculum, supporting effective classroom techniques, and creating many of the nation's magnet schools. Participation was purely voluntary – it did not pay for busing students, but there was a widespread demand from districts. There were also evaluations that showed positive educational and race relations outcomes. After the money was sent to the states as a lump sum, most just distributed

⁹ Reagan pushed unsuccessfully for vouchers but with the invention of charter schools in 1991, the attention turned to fostering charters.

¹⁰ NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE OF EDUCATIONAL REFORM* (1983).

¹¹ John William Ellwood, *Congress Cuts the Budget: The Omnibus Reconciliation Act of 1981*, 2(1) PUB. BUDGETING & FIN. 50 (1982).

it on the basis of a few dollars per student across the state.¹² In other words, it disappeared and these efforts were never refunded in the next third of a century. This program had stimulated many positive efforts in a country that was going through a massive change and trying to create successfully integrated schools. That and many of the other specific goals previously supported by federal dollars simply vanished.

Incentivizing schools to address particular problems is much more likely at the federal level where national nonprofit advocacy and education groups are concentrated, in Washington, than in the state capitals where such groups are much less likely to be present and policy is dominated by organizations of school officials and teachers unions. The big urban school districts suffered the largest loss in funding with the consolidation of the categorical programs. Overall, districts devoted much of the block grant funds to buying equipment and supplies.¹³ With the shift to state control, a major study concluded: “In the education block grant, states retreated from targeting funds to big-city schools with large minority populations.”¹⁴ The great majority of states sent out the funds without either a targeting of funds or programs on areas of great need and segregation. The change broke a fifteen-year pattern, beginning in 1965, during which federal school aid funds for targeted populations grew three times as fast as general aid.¹⁵

The NCLB and “Race to the Top” Fiascos

The George W. Bush administration brought an overreach in education policy that paralleled its overreach in international policy. In his campaign for President, Bush presented himself as a “compassionate conservative” and focused a great deal of his attention on what he presented as the “Texas miracle”, a strong record of education reform in Texas, where the model that began with industrialist Ross Perot in the

¹² REDUCTIONS IN U.S. DOMESTIC SPENDING 191-98 (John Ellwood ed., 1982); RICHARD APLING & CHRISTINE L. PADILLA, FUNDS ALLOCATION AND EXPENDITURES UNDER THE EDUCATION BLOCK GRANT. A SPECIAL ISSUE REPORT FROM THE NATIONAL STUDY OF LOCAL OPERATIONS UNDER CHAPTER 2 OF THE EDUCATION CONSOLIDATION AND IMPROVEMENT ACT (1986).

¹³ *Id.* at 44, 62-63.

¹⁴ Cheryl D. Hayes, RETHINKING BLOCK GRANTS: TOWARD IMPROVED INTERGOVERNMENTAL FINANCING FOR EDUCATION AND OTHER CHILDREN’S SERVICES 11 (1995), available at <http://files.eric.ed.gov/fulltext/ED394193.pdf>

¹⁵ GEORGE E. PETERSON, JR., THE REAGAN BLOCK GRANTS: WHAT HAVE WE LEARNED? 20-22 (1985).

1980s embraced a very high stakes testing focus attached to serious sanctions. NCLB emerged largely as a national version of the Texas plan, mandating tests throughout the elementary grades, requiring annual progress for all racial and other subgroups of students and setting a goal of having all students at the “proficient” level in their state tests within 12 years. The Democrats supported the policy because it provided a big initial budget increase and did not aid private schools, while the Republicans supported the sanctions against schools and remedies that included dissolution of a school and/or conversion from a public to a charter school. The compromise, which reached its final form in December 2001, was a very long bill negotiated by leaders from the committees in both chambers and the White House. It was voted through quickly before the holidays, with very little time to discuss the substantive issues in the final bill.

The day it was signed, President Bush spoke at the nation’s oldest public school, Boston Latin. I was there and I heard him say that he had not read the new law, but he was sure that it would make a positive difference and greatly aid state and local control of the schools. The law had many good components such as a requirement that all classes have “highly qualified” teachers and that there be a national effort to lower dropouts (which the Bush Administration never asked Congress to fund). In NCLB, however, Congress had enacted requirements for yearly gains in test scores for all groups that had no basis in experience, and scholars predicted before the law was enacted that eventually almost all schools would fail.¹⁶ Its problems became apparent in some of the early studies¹⁷, but many hoped that it would be improved or changed by Congress before a total disaster occurred. However, it was not; because of polarization in Congress, it was the law of the land for 13 years without any legislative change.

Under NCLB, the Bush Administration strongly pushed what turned out to be arbitrary and unattainable standards, sanctioning many thousands of schools across the U.S., blaming and punishing them for not attaining standards that had virtually never been attained in actual schools with diverse populations. The administration blamed teachers, their unions

¹⁶ Thomas Kane & Douglas Staiger, *Rigid Rules Will Damage Schools*, N.Y. TIMES (Aug. 13, 2001), www.nytimes.com.

¹⁷ GAIL L. SUNDERMAN & JIMMY KIM, EXPANSION OF FEDERAL POWER IN AMERICAN EDUCATION: FEDERAL-STATE RELATIONSHIPS UNDER THE NO CHILD LEFT BEHIND ACT, YEAR ONE (2004); GAIL L. SUNDERMAN, JIMMY KIM, & GARY ORFIELD, NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD (2005).

and public school bureaucracies, ignoring the underlying poverty and inequality of families, communities, and previous schooling. It pressed expansion of charter schools as an alternative and a solution, though research showed little difference. It also strongly supported alternatives to traditional teacher accreditation programs, especially Teach for America.

The Bush Administration chose to administer NCLB in a very intrusive and critical manner, blaming teachers, attacking the unions, and insisting on sanctions. Its first Secretary of Education, the former Houston Superintendent Rod Paige, initiated a deeply hostile relationship with the teachers unions, comparing their leaders to criminals.¹⁸ NCLB was strongly supported by many education reform groups at the beginning, but as thousands of schools were branded as failures and test pressure and test prep became dominant forces in low-income schools, support eroded and opposition grew.¹⁹ By the time the Obama Administration came to power it was apparent that very little true educational change had been accomplished and that there was growing opposition to the testing regime.²⁰

Barack Obama campaigned with the deep support of the teachers unions but ended up adopting much of the Bush agenda and pushing it forward. His White House Chief of Staff, Rahm Emanuel, identified with that agenda.²¹ Similar reforms had been fostered by the Chicago City government and its non-educator CEO of the school district, Arne Duncan, whom Obama appointed as Secretary of Education. The Department of Education leadership was deeply influenced by the Gates foundation, which was in basic sympathy with the Bush agenda, the leaders of the charter movement, and Teach for America (a two year program of volunteer teachers with only a few weeks of training), which fundamentally challenged both schools of education and teacher accreditation policies, as well as provoked active conflict with the unions. Since NCLB expired but remained in effect until Congress passed a new law, and the Obama administration basically spent its political capital on the health reform and faced a relentless GOP opposition in Congress after the 2010 midterm elections, it was never able to get Administration

¹⁸ The Houston data that had made Paige famous turned out to be deeply flawed.

¹⁹ GAIL L. SUNDERMAN, JAMES S. KIM, & GARY ORFIELD, *NCLB MEETS SCHOOL REALITIES: LESSONS FROM THE FIELD* (2005).

²⁰ Jaekung Lee & T. Reeves, *Revisiting the Impact of NCLB High-Stakes Accountability, Capacity and Resources: State NAEP 1990-2009 Reading and Math Achievement Gaps and Trends*, 34(2) *EDUC. EVALUATION AND POL'Y ANALYSIS* 209 (2012).

²¹ RAHM EMANUEL & BRUCE REED, *THE PLAN: BIG IDEAS FOR AMERICA*, (2006).

legislation enacted. With no new legislation, a great deal of temporary money from the bailout from the Great Recession, and schools and education authorities all over the country hitting the wall created by the impossible deadlines and extreme sanctions in NCLB and sharp state budget cuts, the Obama administration basically made up new policies and regulations. It used its initial control of a great deal of urgently needed Great Recession stimulus money and the fierce demand for waivers from the NCLB sanctions to virtually force policy changes on the country through *Race to the Top*, which required states to change policies – and many did.²² The changes they were most eager to force were pressing hard for states joining the Common Core curriculum and testing processes, mandating a broad expansion of charter schools, and requiring that teachers be evaluated in terms of their students' test scores. They did not, of course, build support from organizations of public school teachers, administrators, and school authorities, nor did they produce any clear evidence of educational gains. If a new policy does not build support across the country in a federal system in which all officials, except the President, are elected by state and local constituencies, it is always at risk. This is why most federal programs are administered collaboratively. A policy is hard to sustain if it builds opponents across many regions.

The Administration ended up without significant support from either Democrats or Republicans. It made people in both parties want to dispose of the ungainly corpse of NCLB and the other non-legislated requirements that Secretary Duncan imposed. What developed in ESSA was a bargain between the major interest groups and acceptance by both parties, reflecting a wish to jettison the federal role as played out in the Bush and Obama governments. The teachers' organizations got rid of mandated teacher evaluation based on student test scores, the state and local educators got rid of the federal authority to regulate their assessment practices and sanctions, the irritating waiver agreements evaporated, the highly organized charter school advocates got more money and rights, and the Teach for America and alternative teaching preparation advocates got their teachers recognized as equivalents to those with serious educational training. Simultaneously, state and local educators got to use the federal money pretty much as they wanted under rules they created with very few requirements to report to Washington on what the money was used for, or credible reports of how it worked. The law reinforced their position with many sweeping prohibitions of exercise of federal authority. After the

²² William G. Howell, *Results of President Obama's Race to the Top*, 15(4) EDUC. NEXT 58, available at http://educationnext.org/files/ednext_XV_4_howell.pdf.

Bush Administration's aggressive and ill-considered federal policies a similar approach by the Obama Administration destroyed confidence in strong federal power in education. Breaking the norms of federalism that Johnson carefully observed except in civil rights generated a powerful pushback. In the end there was no real constituency for the reforms. What was lost in the process was any serious way to preserve the distinctive federal role created a half century earlier—to support the schools struggling against the greatest odds and to fight discrimination.

The Obama Administration was able to enact no significant education legislation in its first seven years. Duncan went beyond the Bush agenda in his very strong pressure on states to move toward common tests, to expand charter schools, and to assess teachers on the basis of the test scores of their students—three very controversial issues that basically left Duncan and the Obama Administration without any constituency in the public education and research communities. This was the case particularly after the Republican Party abandoned the Bush approach and reverted back to its traditional advocacy on state domination of education policy, in response to widespread public and professional critiques of NCLB, as well as the general hostility to almost all policy initiatives of the Obama government. When it came down to it, the various groups that had been alienated worked with an activated GOP and a dispirited Democratic party, and the Obama Administration simply went along. The end result was a policy of state control that took education policy back to the 1950s or earlier in terms of the federal role.

By the time ESSA was ready for congressional action, the traditional legislative process in Congress had been badly broken for years. The traditional process provided more time and brought in many voices for public debate on the issues. Bills would go to subcommittees for serious hearings with leaders and members from both parties having the opportunity to bring in and cross-examine experts, often with serious coverage in the specialized press of the field and sometimes in the major media. The information from the hearings, especially the early exploratory field hearings, would be published and available. There would be time for experts to weigh in and for affected groups to mobilize. Every member of Congress could speak out and insert information in the Congressional Record. Then there would be full committee action and a committee report explaining the legislation. Then there would be floor action usually with a chance to make amendments, particularly in the Senate, and final passage.

This process was far from perfect, and was often manipulated by partisans to try to strengthen their arguments and to create legislative

history that could later sway courts and administrators to interpret Congress' intent a particular way. Once Congress became much more partisan with the filibuster process, requiring an extraordinary majority for virtually all significant issues in the Senate, and the Hastert rule for House Republicans, saying that the leadership would use the House rules to prevent consideration of any measure that the majority of the Republican members did not favor, a supermajority became necessary for any significant action. This meant that usually nothing that was not absolutely necessary legislatively got done, and then often in a crisis situation where intense negotiations among party leaders and the White House produced an agreement which was presented as a *fait accompli* and voted on without any serious time for discussion or even reading the document.²³

What happened with ESSA was that the House Republicans worked on their own legislation; and the Senate, where a bipartisan agreement is essential, worked from that. There was time for the decisive interest groups—the teachers and the school officials to weigh in on their key issues, for both parties to express their intense dislike of the status quo, for the Republicans to present their states' rights agenda (which the other education interest groups now saw as probably better than what they had seen in the last 15 years of federal policy) and for the civil rights groups and their Democratic allies to perpetuate testing and data by race and ethnicity and favored policies, such as more focus on preschool and high school graduation rates. When No Child Left Behind was adopted in 2001, the Democrats extracted an agreement for an initial substantial boost in education funding as part of the deal, but they won nothing significant on that front in 2015.²⁴ The result was a legislative process in which all consideration came down not to a great debate in the House and Senate, but instead a “take it or leave it” proposition that was enacted within days. More than anything else the bill as the product of a frustrated and exhausted Congress that had seen stupid, intrusive, and counterproductive federal leadership for fifteen years with no real evidence of major educational gains. Anything seemed better.

²³ THOMAS E. MANN AND NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2013).

²⁴ Michael A. Rebell, *The New Federal ESSA Statute: A Step Backward for Fair School Funding*, THE CAMPAIGN FOR EDUCATIONAL EQUITY (Jan. 25, 2016), <http://educationequityblog.org/2016/01/25/the-new-federal-essa-statute-a-step-backward-for-fair-school-funding/>.

The law is built around state plans developed and evaluated with a very limited federal role and subject to little oversight once approved.²⁵ The principal power of the federal government comes in approving or rejecting the plans. The law says that the federal government cannot go beyond the law's very general language in evaluating the plans, and it is explicitly prohibited from issuing regulations or guidance to the states that adds details or even expresses an opinion on preferred strategies. The law provides for the Secretary to appoint peer review teams representing many aspects of education, business, the community, etc., but to have no role in those teams. There is a requirement for geographic diversity, but not for racial and ethnic diversity. These peer review teams are expected to review state plans independently of the Department. The Secretary has a strictly limited period to examine the plans or they will be automatically approved and if he or she should reject one, the department must immediately explain the reasons and give the state a chance to resubmit and to demand a hearing. Obviously the entire system is designed to create a presumption that the states can do pretty much do what they want. There is also another block grant which consolidates dozens of small targeted programs designed to incentivize a wide range of activities from college credit high school AP courses to enhancing physical education. This \$1.6 billion effort may well be a reprise of the Reagan block grant experience.

The basic scheme is state control with very broad discretion, with the virtual certainty of very different educational policies and measures of success across the states and, depending on state policy, among individual districts. The basic reality is that many states have very limited capacity to manage all of their responsibilities under the Act, and the federal government has very little power and authority to do anything much to direct policy. In some areas, such as evaluation, and major educational reforms of schools state policy defines as failing, the great majority of state staffs simply do not have the manpower or basic tools. Like most federal statutes, the law strictly limits administrative expenses which

²⁵The law contains a long list of prohibitions against various forms of administrative control of state actions. There are a few exceptions to the general deference. The bill includes, for example, a long 21 page section on charter schools. In contrast to the general tone of extreme decentralization to the states this section strongly presses the states to expand charter schools, increase the funding in states where they got less than regular public schools, make the sector more independent of public school authorities and encourage provision of capital for construction or purchase of school facilities, something that many states did not do. *Every Student Succeeds Act Conference Report To Accompany S.1177*, H.R. REP. NO. 114-354, at 197-218 (2015).

would be necessary to assemble an adequate staff. Congress and legislatures typically do not understand what administrators do, and often view administrative costs as funds wasted that could be put into classrooms. But the people who are going to have to decide what the priorities and rules are for all the school districts are administrators. So are the people who are going to have to decide where and how to intervene in districts, and how to evaluate whether all the programs and policies funded with the federal dollars are successes. Even in California, the largest state, state board chair Michael Kirst concedes that the state's challenge to deal with around 500 low-performing schools will be a difficult undertaking.²⁶

It will be a while before we know much about what the educational effect of this great reform will be. In fact, we may never know because each state can set the standards it wants, change them when they want to, and evaluate their own success within broad limits. Because the law encourages the merging of state, local, and federal funds in implementing the policies state and local officials prefer, and prohibits strict accounting for federal dollars within these merged efforts, the federal resources are likely to often disappear into state and local budgets and programs with few traces.

The Future

On January 16, 2016, a month after the law was signed I made a statement to one of the two regional meetings of the Education Department asking advice on regulations under Title I of the Every Student Succeeds Act (ESSA). The hearing focused on the implications of ESSA for federal policy.²⁷ In that statement, I discussed the following five basic points of immediate concern for the future of public education under ESSA:

²⁶ Alyson Klein, *New Law, Fresh Challenges: States, Districts Will Share More Power under ESSA*, EDUC. WEEK 12 (Jan. 6, 2016), <http://www.edweek.org>.

²⁷ Gary Orfield, Statement Made at the Western Region Meeting (Los Angeles) of the Education Department on Regulations Under Title I of the Every Student Succeeds Act (ESSA) (Jan. 16, 2016) (transcript on file with the authors).

Civil Rights Law as a Strong Basis to Enforce Equity in ESSA Operation

This new law greatly diminishes federal authority in tying conditions to federal school expenditures but it makes no change to civil rights law and there are still massive civil rights problems in American education. Although the authority of the Secretary to issue regulations and guidance under ESSA is critically limited, the Administration has full authority and responsibility under civil rights law and should move on it. The Office for Civil Rights and the Justice Department's Civil Rights Division have issued some excellent guidance documents during this administration and the civil rights and research staffs should think hard about how they can assure that discrimination by race, religion or national origin, and special education status do not occur under the new law. They should also work to develop systematic statistical monitoring and field investigations to be certain that the laws' goals of equal opportunity for all are realized in the states and districts.

Evidence

The new law is full of requirements that states and localities implement "evidence-based" programs and practices to realize the goal of the law. The truth is that educational research has always been poorly funded and that there are only a small number of programs and practices that have strong enough evidence to be selected by the scholars evaluating the data for the What Works Clearinghouse. We know that most educational programs have no clear evidence of success and the standards in the new law are very loose, particularly in the bottom tier. States and localities could call almost anything they wanted to do "evidence based" if the standard is low enough. Since the states are going to be developing their own standards and evaluating their own programs, they are very likely to announce continual success as states have done in the past. Obviously the authors of this law have little trust in the federal department and extreme trust in the state departments. In this situation, the distrust of the federal government, which I think was caused to a great extent by very serious federal policy mistakes, ESSA prohibits Washington from prescribing programs and policies but the states often have limited knowledge and capacity to do high quality scientific analyses of their alternatives and probable consequences or to effectively monitor the impacts of their own programs.

This law has unrealistic assumptions about the resources and capacity of state governments and individual districts. Most state and local school agencies have little or no expertise in research and cannot or will not adequately evaluate whether their policies have actually worked. The law makes the states both judge and jury of their own programs. I do not think that it is reasonable to expect “gold standard” longitudinal research on individual programs at the state or local level but we need something much more convincing than just an administrator’s or politician’s claim that he or she saw an example someplace they visited or read an article about. In a situation where the Secretary is forbidden to give advice about state plans and the state and local officials do not have good scientific advice, a key necessity is nonpolitical but expert advice about what could work and state and local commitment to serious independent assessments rather than simply announcements of their own success. In this situation, I believe the best immediate step would be to ask neutral bodies of the best researchers, probably the National Academy of Sciences and the National Academy of Education, to prepare summaries of the evidence in various areas and the best techniques for measuring the impacts of programs and policies. These documents, prepared by nonpartisan academies of the nation’s leading researchers who volunteer their time in such efforts, could be very helpful to state departments and policy makers who were sincerely interested in the best available information to guide their decisions. Such advice could also help states try to generate serious scientific evidence on their own new ideas, which could then be of great interest to other states and national officials. When possible it would be good for state and local education officials to seriously engage university experts in creating and analyzing their data. The risk is that they would find out that their ideas don’t work or need to be revised. The gain would be the greater probability that the money would be spent on something that actually made a difference for the children who need it.

Obviously funding independent policy relevant research will become a much more central part of the work of the Department in the future. One of the many questions that might be useful would be to have a serious analysis of the often-used term “high-performing charter schools.” Does that mean performing better than the median public school? Almost every public or private or charter school would define itself as “high performing” in some way. For this term to have any real meaning and to avoid the political wars going on between charter school advocates and critics, good analysis of the overall actual performance levels, controlling as much as possible for selection bias and attrition could be a step toward a good definition and a wise expenditure of public funds.

Language: Toward Successful Programs and Valid Assessment

The states have the responsibility to develop assessments for students who are English language learners and whose knowledge cannot be validly assessed with English language tests. It is like trying to assess the knowledge of anyone here through a test written in Chinese or Spanish—the vast majority would be defined as failures but no one would know what students actually knew. More than 40% of the children in California and about 20% in the nation are growing up in homes where another language is spoken, the vast majority of which are Spanish-speaking. Neither has the federal government produced good tests; the Common Core developers have also failed on this point. This is truly inexcusable, and means much of our data is not valid. It underestimates the talent and knowledge of millions of students who come to school from a different language background. What are the states to do? Obviously federal research and development funds could be made available to interested states that could stimulate major contributions in this area. This is a classic example of the need for a focused federal effort to provide good materials, tools, and reports for consideration by the states and by Congress in the future as it oversees the law. State help in producing good data will be a necessary condition for rapid progress in serving this huge group of students.

Capacity

The federal authorities will be overwhelmed with the need to quickly make decisions on over fifty state plans in a brief period, and with determining how to manage the relationships if a plan is not accepted. The feds initially will have a great deal to do, but then they will have much less to do than during recent decades. State officials have a vastly more complex challenge of dealing with scores of hundreds of local districts submitting their local plans for the use of the federal funds. Research on the capacity of the states to carry out their more limited responsibilities under No Child Left Behind showed that many were overwhelmed. In many states, a handful of employees with limited resources were supposed to oversee the reform of large numbers of schools and districts failing to meet the federal standards.²⁸ Small staffs in

²⁸ Gail Sunderman & Gary Orfield, *Domesticating a Revolution: No Child Left Behind Reforms and State Administrative Response*, 76(4) HARVARD EDUC. REV. 526 (2006).

state capitols are required by the new law to play lead roles in a very wide array of responsibilities from creating and enforcing standards, reviewing all the local plans and monitoring them, making certain that there are good interventions for the lowest ranked schools and the dropout factory schools in the state, judging whether the local plans and actions are “evidence-based,” developing valid instruments for evaluating English language learners, and many other responsibilities.²⁹ While they will not have to spend so much time trying to negotiate with Washington, they will have to manage all the complexities of political and professional relationships within the state where districts may want the same kind of discretion the states have been given and some will have the political backing to seize it. Anyone who is familiar with the education department in a small state knows that this will all land on the desks of very few people who will not possess all these skills. They are going to be buried in a tidal wave of lengthy proposals and sweeping promises from districts which will often want to use the money to pursue their own visions. Larger urban and suburban districts typically have little respect for state departments. The local districts and schools will have to report whatever data the state defines. Whether or not a state can actually enforce any serious requirements will depend in large part on both capacity and state and local politics.

I think that the state offices, in cases where the state does not define specific goals and methods, will be inundated with a vast tide of paper that it will be impossible to meaningfully understand, evaluate, and manage. This will often produce authorization by exhaustion. States will tend to favor expansion of existing state and local priorities and programs whether or not there is any independent evidence that they work. Even the first step, defining the data requirements and tests, will require considerable expertise and resources that many state departments do not possess. They could, of course, simply adopt the Common Core and one of the two sets of Common Core assessments or the SAT or ACT but there is a great deal of resistance now to the Common Core and the college entrance exams are not appropriate for this purpose. States have had very broad control over their own assessment instruments and it has basically been a combination of state committees and items from national testing companies, assembled under contracts with testing companies, which also manage the actual assessment process. Now more dimensions are going to be added to standards and the tests developed in individual states are likely to have

²⁹ Sarah Sparks, *Evidence’ Requirements are Redefined in ESSA*, EDUC. WEEK (Jan. 6, 2016), <http://www.edweek.org>.

serious validity problems. The serious challenge of assessments for English language learner students will continue. Some of these are issues that have not yet been resolved by national experts, and it is going to be interesting to see how fifty different state systems cope with them.³⁰

Since the future of American school reform is now decisively in the hands of the state governments, it would be very valuable to do anything possible to increase the technical capacity and professional training for departments that vary enormously in size and professionalism. It is clearly an urgent national need to make these departments as skilled as possible and for the federal government to strongly encourage and support national professional networks, information exchanges, seminars, and meetings to discuss and communicate the latest research findings including those produced by other state departments of education. The problem is that very high stakes decisions are coming very soon with the need to produce the state plans and then evaluate and approve local plans. I think that one way to quickly increase the knowledge base in current research and in development of accountability measures and oversight systems is to use the Intergovernmental Personnel Act³¹ to request the leading public university or universities to temporarily transfer skilled researchers who know the state to work on the development of the plan and data and monitoring methods and help in its early implementation. Upgrading administrative capacity and skills should be a part of state plans and the U.S. Department of Education should sponsor efforts by regional labs to make this happen and to provide support for such training. It would be very useful for the Department to survey state departments about their needs if they are to effectively administer the law and summarize and present the findings to federal and state authorities. It would be an excellent investment of federal and state discretionary funds to get these plans in place and begin implementation as well as possible. I think that Congress has radically underestimated the complexity and cost of doing this well and that we all now have a very strong interest in the states doing this well. Some states have come to rely on federal oversight and do not have good oversight capacities and it will be important to have them in place to address inappropriate use of funds, since the states will now have primary responsibility. Great discretion can foster innovations but it can also foster return to unsuccessful traditions and abuses of funds, so a

³⁰ Corey Mitchell, *For ELL Advocates, Mix of Hope and Wariness*, EDUC. WEEK (Jan. 6, 2016), <http://www.edweek.org>.

³¹ 42 U.S.C. § 4701 et seq. (2015).

strong administrative structure is needed to foster the former and stop the latter.

Definitions

The law includes many terms and phrases that recur but need clearer definitions. This is clearly an appropriate role for the Department. For one example, the Civil Rights Project has done a great deal of dropout research and is concerned that the new law says that for graduation rates, kids who transfer to prison or the juvenile justice system leave the grad rate cohort. Since "transfer to" is not defined, we should be sure that there is not an incentive to arrest or push more kids into the failing system to make the school outcomes appear better. Our suggestion is that "transfer to" only means where a student is moved to a juvenile hall or prison that provides an educational program that can result in a regular diploma. Otherwise they stay in the cohort. Further, when students who spent time incarcerated return to school, policy should be clear that if they left the cohort, they will also re-enter the cohort. At the initial hearing on the new law in Los Angeles, advocates raised a number of such questions ranging from definitions in the special education provisions to the request from civil rights lawyers for state and local breakdowns by race and ethnicity on program beneficiaries and outcomes. As ambiguities arise, administrators, evaluators, and the public would benefit greatly by clarifications of terms, which may not, of course, alter explicit provisions of the law or violate its spirit of a modest federal role, but would clarify the intent and implementation and make the evaluation process more transparent. A law which came together in great haste has inevitably left many questions need to translate it into working policy up to administrators to clarify. The art of federal administration will be to respond to this need for clarity within the boundaries of constrained authority.

Learning from the Past?

The basic story of the ESSA is that, after waiting for a half century and experiencing many defeats and frustrations, the conservative opponents of Lyndon Johnson's masterful synthesis bringing together a broad coalition of education groups and a system of collaboration within federalism has been defeated, and the country is launched on a different path. The defeat of the Bush-Obama approach, and sharp shrinkage of the federal role reflected both the political victories that gave conservatives control of both houses of Congress and the reaction to the overzealous Bush and Obama

imposition of the standards and sanctions agendas. The turn toward much more intrusive policies began, ironically enough, with Ronald Reagan who came to office wanting to dissolve the new Department of Education and to turn schooling back to the states, and ended up setting a new agenda of intrusive test-based accountability which was adopted by Presidents of both parties and framed educational policy battles for three decades. It reached its peak in the extremely demanding policies of the Bush and Obama Administrations, which deeply alienated both teachers and school officials across the country, and produced both very negative research findings³² and growing opposition from the public and elected officials.³³ The Obama Administration came to office after the manifest failure and growing opposition to NCLB and was elected with the strong support of national teachers' organizations, which expected a new framework for policy. It quickly chose, however, to use the unique but temporary resources and power created by the Great Recession and the Democratic takeover of Congress to turn against the teachers organizations and to coerce state governments into policy changes they did not want by using the national financial resources and the urgent desire of the states to receive waivers from the NCLB requirements which were pushing vast numbers of schools toward failure and sanctions for not achieving educational goals that had long since proved to be wildly unrealistic. During the first Obama campaign, the transition leadership on education included figures deeply respected in the education and research communities including Stanford Professor Linda Darling-Hammond, but they were shunted aside after the inauguration by a very different group whose policies led to this denouement.

The Obama Administration adopted the theory that the critics were defenders of a failing old order and that the agenda very strongly embraced and financed by politically active foundations, especially the Gates³⁴ and Broad foundations and by the organizers of charter schools and alternative programs for developing teachers were the correct agendas. President Obama appointed Arne Duncan, a non-educator who had been CEO of the Chicago public schools, as his Secretary of Education.

³² HOLDING NCLB ACCOUNTABLE: ACHIEVING ACCOUNTABILITY, EQUITY AND SCHOOL REFORM, (Gail L. Sunderman ed., 2008).

³³ Valerie Calderon, *Americans Say There Is More to School Success than Test Results*, GALLUP, (Aug. 24, 2015), <http://www.gallup.com/opinion/gallup/184793/americans-say-school-success-test-results.aspx>.

³⁴ Roy Schestowitz, *Bill Gates is Occupying the Department of Education*, *Education Press, Education Forums/Debates, and Ultimately Politicians*, TECHRIGHTS (Apr. 8, 2013, 7:09 a.m.), <http://techrights.org/2013/04/08/department-of-education-coup/>

Chicago had followed a similar agenda under Mayor Richard Daley, who had control of the school system. The appointment of Rahm Emanuel, a strong advocate of this agenda, as the President's chief of staff was a very clear sign of the direction chosen.³⁵ The administration was able to enact no significant education legislation in its first seven years. Duncan went beyond the Bush agenda in his very strong pressure on states to move toward common tests, to make it much easier to expand charter schools, and to assess teachers on the basis of the test scores of their students—three very controversial issues that basically left Duncan and the Obama Administration without any significant constituency in the public education community. This was the case particularly after the Republican Party reverted back to its traditional advocacy on state domination of education policy, in response to widespread public and professional critiques of NCLB, as well as the general hostility to almost all policy initiatives of the Obama government. When it came down to it, the various groups that had been alienated worked with an activated GOP and a dispirited Democratic party, and the Obama Administration simply went along. The end result was a policy of state control that took education policy back to the 1950s or earlier in terms of the federal role. But, instead of getting control of a very small federal education budget, the now states now inherit the much larger budget of the present day, without even the categorical programs, which gave priority to various initiatives.

Overreach and Reaction

The radical overreach in NCLB which was the product of a bargain between President Bush, GOP leaders and Democratic leaders Edward Kennedy (D-MA) and George Miller (D-CA), a deal that was flawed and went horribly wrong in the implementation process. But the real gravestone came with President Obama's administration missed the chance for a midcourse revision and doubled down on the false assumptions about the value of aggressive federal policy, alienating a great many educators. By the end of those two presidencies the political and educational support for a vigorous federal role had evaporated, there had been a very frustrating decade-long failure to enact a new basic law, and the supporters of state domination were able to build an alliance with angry and powerful groups of teachers and educational officials to and achieve the stunning victory in which every Democrat in the House of

³⁵ Emanuel & Reed, *supra* note 21.

Representatives voted for a level of state domination that had been fought against for several political generations.

The shift to the states at a time when Democrats have legislative and executive control of only seven states but the Republicans control the governorships and both branches of the state legislature in 24 states.³⁶ Under ESSA, the plans rest with the current state government; this means that almost half the states have unified control in both houses of the legislature and the Governor's office and that Republicans will be able to deeply influence the key initial choices and policy development under the new law, many of which will be policies likely to last for a number of years. That will be true in only a handful of states for the Democrats. Since the current Republican party is probably the most conservative in its history, there have been severe cutbacks in some states, and since the law allows a great deal of discretion, the law offers a rare opportunity for large and rapid changes in education policy in some of these states where there is already a distinctively negative state political relationship with teachers' and educators' organizations. Some groups that fought excessive federal controls will soon be asking for federal limits on state actions in such areas.

In this setting the federal role will increasingly shift to data and research, traditional federal functions, and to civil rights enforcement since none of the civil rights laws were changed by Congress and the Supreme Court is closely divided. The Department of Education will now have much more limited ability to use federal funds to try to prod changes in education policy, but the 1964 Civil Rights Act forbids discrimination in any program or activity of any institution receiving federal school aid, as all school districts do. Liberal reformers and civil rights lawyers who are very likely to be frustrated by policies adopted by the more conservative state and local educational authorities are going to be thinking hard about filing federal civil rights complaints when state and local decisions seem harmful or unfair to minority students and communities. They may be emboldened by the desire to set some precedents about the way the state discretion under ESSA must be conditioned on civil rights compliance. Such rulings would be very important for all states and would strengthen the role of civil rights and community organizations in raising issues of racial and ethnic equity in the plans.³⁷

³⁶ *Gubernatorial and legislative party control of state government*, BALLOTPEDIA, https://ballotpedia.org/Gubernatorial_and_legislative_party_control_of_state_government (last visited Dec. 20, 2015).

³⁷ Successful complaints and lawsuits would, of course, shift more of the oversight power

Conclusion

The radical shift in federal education policy in 2015 was the product of the dramatic efforts of the Bush and Obama Administrations to impose a model of education reform on the states and schools across the country. The policies were not developed in collaboration with education officials and teacher organizations, but were heavily driven by sanctions, threats, urgently needed fiscal incentives, and the threat of massive official branding of vast numbers of schools as failures. The reforms were administered in an abrasive way that broke the normal pattern of comity and professional links in federal grant programs. Although they had the strong support of powerful private foundations and two Presidents, they did not develop powerful constituencies with the major components of either party's political base. In the end, the long-term desire of the Republicans to turn funds over to the states, the deep alienation of the teacher organizations that are a central part of the Democratic Party's coalition, as well as the failure to meet the goals the reforms promised, left the policies without a constituency. More importantly, they left the whole idea of active federal leadership in education gravely weakened. Back when the federal role expanded so rapidly in the 1960s, it seemed obvious to many that the federal government was a more progressive force in education than the states and a force with a clear mission of equalizing opportunity, and, in many ways, creating a stronger professional partnership with educators. Now federal authority has become associated for four presidential terms with policies that had no serious intellectual basis, involving the extensive and often insulting imposition of difficult and unsuccessful educational policies from Washington, and has been marked by a fundamental disrespect for education federalism.

If the Bush-Obama period underlined the flaws of misbegotten federal power, the new law is likely to expose soon the tremendous unevenness and racial and ethnic tensions and inequalities that still exist in many states, the limited capacities of some state governments and local officials, and the probable misuse of federal funds for policies and practices that will be criticized. Soon, the policy cycle will begin to generate calls for oversight and corrections by federal officials. Although the Education Department has little authority under the law, laws can be changed and

to the federal civil rights agencies (Office for Civil Rights and Civil Rights Division of the Justice) Department and the federal courts. The viability of this strategy would, of course, depend on who controlled the exec branch and was filling judicial vacancies after Obama.

decisions in the appropriation processes can redirect priorities over time. In a true federal system the manifest failure of one level of government generates demands to strengthen the other. And, though the education legislation has, for now, seriously disempowered the federal government, there have been no changes in the civil rights law, which requires federal oversight and action against discrimination in any school system receiving federal funds. This broad authority, and that of agencies like the General Accounting Office to oversee the expenditure of federal funds, and reports of problems by advocates, researchers and the press will likely trigger the next round of policy debates and reforms. Even as Bush and Obama officials ignored both the risks of misusing federal power and the built-in corrective forces in the federal system and its decentralized politics, it is likely that state and local overreach will initiate a new debate in the coming years. In this situation, researchers will play an important role in documenting implementation, and proposing possible solutions and fostering strong professional links among federal, state, and local leaders. The engagement of researchers could help move toward a better set of relationships which, ironically, would probably be much more like the ones the Johnson Administration understood a half century ago.

Forthcoming Issue of the *Education Law & Policy Review***Church-State Law in
Public Educational Institutions****John Dayton, J.D., Ed. D.****Hillel Y. Levin, J.D.****Co-Editors-in-Chief****Special Issue on Church-State Law in
Public Educational Institutions**

As James Madison—the author of the First Amendment—recognized, efforts to use the force of government to coerce and compel beliefs have caused great pains to individuals throughout human history and served as the basis of countless conflicts and wars. In recognition of these grave concerns, the First Amendment’s “Establishment Clause” prohibits government officials from establishing any favored or disfavored religion. In 1802 Thomas Jefferson recognized a symbolic “wall of separation” between church and state to set appropriate boundaries between private religious freedoms and public governmental powers. This wall of separation between church and state is at its highest in K-12 public schools where highly impressionable children are subject to compulsory attendance laws enforced by criminal sanctions. The Court has recognized that captive audiences of highly impressionable children are vulnerable to state sponsored religious indoctrination. Further, few issues are more potentially divisive and disruptive than battles over whether the political majority may use the common schools to compel their religious beliefs and practices on other people’s children through religious instruction and prayer under compulsory school attendance laws. There is increasing tension between advocates of well-established First Amendment law and persons showing open disregard for this law, e.g., public school coaches and other school officials claiming the right to lead public school students in prayer, overtly or covertly, and to proselytize the local majority faith. In response, there are growing numbers of lawsuits demanding legal compliance with well-established law. In this special issue of the *Education Law & Policy Review*, the nation’s leading church-state scholars examine the current status of church-state law, and its application in practice in the U.S., in the context of increasing religious and cultural diversity, and the politicization of religion, with public educational institutions as the battleground for these conflicts.

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