

# EDUCATIONAL OPPORTUNITY FOR ALL: REDUCING INTRADISTRICT FUNDING DISPARITIES

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*It is a common refrain in American education that the quality of a student’s education “should not depend on his or her zip code.” Yet American public education consistently falls short: Many schools and districts, in particular those with large populations of low-socioeconomic status (low-SES) and minority students, do not receive the funding necessary to provide their students with educational opportunities equal to those in wealthier schools. Plaintiffs in many states have sought to improve educational equity by using litigation to attack disparities in funding between districts. However, intradistrict inequity—the inequitable funding of schools within the same district—has persisted throughout the United States to the detriment of low-SES students around the country. This Note argues that these funding disparities can and should be addressed through both courts and policy changes. Students, families, and other parties harmed by intradistrict funding disparities should use state courts and state constitutions’ education clauses to extend previous interdistrict school funding victories and to force policymakers to implement more equitable intradistrict funding. Policymakers should implement school funding policies that promote comprehensive equity and take into account relevant student characteristics, including low socioeconomic status. These policies should promote comprehensive equity by providing all schools with base funding sufficient to give each student an adequate education and by distributing any funding beyond that amount equitably across schools in accordance with their students’ characteristics.*

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## INTRODUCTION

It is a common refrain in American education that the quality of a student's education "should not depend on his or her zip code."<sup>1</sup> This is not the reality for families and students attending five of the worst elementary schools in Florida. Dubbed "failure factories," Campbell Park, Fairmount Park, Lakewood, Maximo, and Melrose Elementary Schools are all situated within six square miles of each other in Pinellas County, "one of Florida's most affluent counties."<sup>2</sup> Their students consistently perform worse than others in the district

<sup>1</sup> This refrain is repeated across political orientations. *See, e.g.*, Betsy DeVos (@BetsyDeVosED), TWITTER (Feb. 28, 2017, 11:46 PM), <https://twitter.com/BetsyDeVosED/status/836784630833512448> ("No child, regardless of their ZIP code or family income, should be denied access to quality education."); *see also* Valerie Strauss, *A New "Education Declaration" for Genuine School Reform*, WASH. POST (June 11, 2013), <https://www.washingtonpost.com/news/answer-sheet/wp/2013/06/11/a-new-education-declaration-for-genuine-school-reform/> ("Opportunities to learn should not depend on zip code or a parent's abilities to work the system.").

<sup>2</sup> Cara Fitzpatrick et al., *Failure Factories: Part One*, TAMPA BAY TIMES (Aug. 14, 2015), <http://www.tampabay.com/projects/2015/investigations/pinellas-failure-factories/5-schools-segregation/> ("Ranked by the state Department of Education, Melrose is the worst elementary school in Florida. Fairmount Park is No. 2. Maximo is No. 10. Lakewood is No. 12. Campbell Park is No. 15.").

and consistently face violence in school; parents would prefer nearly any other schools in the district, but often lack the funds to relocate.<sup>3</sup>

A mere ten years ago, the five schools did not struggle with achievement gaps of this level. Following a late 1960s ruling that the Pinellas County School Board continued to discriminate on the basis of race after *Brown v. Board of Education*, the district school board implemented a federally monitored integration plan. Under this plan, the five schools became more diverse, and black students' performance improved.<sup>4</sup> But in 2007, this progress came to an end. Pinellas County achieved "unitary status" and turned away from integration.<sup>5</sup> The school board implemented a neighborhood school system, which based school assignment solely on geographic proximity and resulted in de facto segregation mapped onto preexisting segregated housing patterns.<sup>6</sup> In December 2007, none of the five schools was more than

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

<sup>4</sup> *Id.* In December 2007, "black students at the schools had posted gains on standardized tests in three of the four previous years." *Id.* Over fifty percent of Fairmount Park's students were reading at grade level; nearly sixty percent were proficient in math. *Id.*

<sup>5</sup> A school district is declared "unitary" when it has "comple[d] with the desegregation decree in good faith for a reasonable period of time, the board is unlikely to return to its former ways, and vestiges of prior *de jure* segregation are eliminated to the extent practicable." Ronald F. Berestka, Jr., Commentary, *Constitutional Law—Equal Protection in Public Education: The Effect of Unitary Status on Desegregation Decrees—Board of Education v. Dowell*, 111 S.Ct. 630 (1991), 25 SUFFOLK U. L. REV. 1215, 1215 n.4 (1991). As a result, court supervision and control over the local school district ends. See George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation Post-Parents Involved*, 17 U. PA. J. CONST. L. 625, 627 (2015) (noting that all but one request to the federal district courts for unitary status were granted between 1992 and 2002). "Unitary status" does not require a finding that desegregation efforts have been successful, but the "school district bears the burden of showing that any current imbalance is not traceable, in a proximate way," to violations by the government. *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). The Court took this approach to avoid endless judicial oversight in districts where "private choices" (such as de facto residential segregation and demographic shifts) had inhibited efforts to reduce school segregation. *Id.* at 495 ("It is beyond the authority and . . . practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated."). For a description of the inconsistency with which lower courts defined "unitary status" prior to the Supreme Court's rulings in *Freeman* and *Board of Education v. Dowell*, see Bd. of Educ. of Okla. City Pub. Schs. v. Dowell, 498 U.S. 237, 245–46 (1991) (describing different interpretations among lower courts); Leland Ware, "Deliberate Speed": Implementing Brown's Ambiguous Mandate, 22 DEL. LAW. 26, 28–30 (2004) (describing the transition from *Green v. County School Board of New Kent County*'s "affirmative duty to eliminate all vestiges of segregation" to *Dowell* and *Freeman*'s "much lower threshold").

<sup>6</sup> *Id.* Each of the five "failure factory" elementary schools is located in a neighborhood whose residents are predominantly low income and minority. The school board adopted the new system despite warnings by one member that this could permanently undo the progress the county had made through decades of integration. *Id.*

63% black; however, they are now the most segregated schools in Pinellas County. The reemergence of segregation, combined with funding difficulties, brought with it falling academic achievement. The schools all had ratings of “C” or higher in 2007; they now all have “F” ratings.<sup>7</sup> Teachers are reluctant to stay; one in three quit in any given year.<sup>8</sup> The impact on students is clear from the test scores: “Ninety-five percent of black students tested at the schools are failing reading or math, making the black neighborhoods in southern Pinellas County the most concentrated site of academic failure in all of Florida.”<sup>9</sup>

These results are not solely the inevitable consequence of neighborhood schools and challenging socioeconomic circumstances; rather, they are also the product of insufficient school financing. Two elementary schools in similar neighborhoods—one in one of Pinellas County’s most dangerous neighborhoods and another in one of Florida’s poorest neighborhoods—both have students passing at twice or three times the rate as these five elementary schools.<sup>10</sup> A series of decisions by the school board, however, resulted in insufficient funding at the soon-to-be “failure factories”—the schools receive less funding than other schools in Pinellas County, despite having a student body in need of *more* help and resources.<sup>11</sup> Maximo Elementary, for example, in 2011 received about \$5600 per pupil in state and local funds, whereas the district average for elementary schools was approximately \$6300.<sup>12</sup> Low funding reduces the schools’ capacity to implement new programs or hire staff to compensate for higher concentrations of at-risk students.<sup>13</sup> Even if funding exists to start a program in one year, inconsistent funding makes it nearly impossible to plan long-term remedial programs.<sup>14</sup>

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<sup>7</sup> *Id.* Fairmount Park, now ranked the second worst elementary school in Florida, had an “A” rating in December 2007. Campbell Park and Lakewood were “B schools,” and Maximo and Melrose had “C” ratings. *Id.*

<sup>8</sup> Cara Fitzpatrick et al., *Failure Factories: Who’s My Teacher Today?*, TAMPA BAY TIMES (Oct. 17, 2015), <http://www.tampabay.com/projects/2015/investigations/pinellas-failure-factories/teachers/>.

<sup>9</sup> Fitzpatrick et al., *supra* note 2.

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

<sup>11</sup> *Id.* “After reshaping the schools, the district funded four of them erratically. Some years [the schools] got less money per student than other schools, including those in more affluent parts of the county,” which typically had fewer high-risk students. *Id.*

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

<sup>13</sup> “At-risk” in this case refers to students identified as having a high risk of failing a grade level and eventually dropping out, including students with low socioeconomic status and students of parents who did not receive a high school diploma.

<sup>14</sup> This principle is true across education policy initiatives. *See, e.g.,* Leanne Richards et al., *Strategic Planning in Higher Education Institutions: The Role and Development of Information Strategies*, in 7 SIMULATION AND GAMES FOR STRATEGY AND POLICY PLANNING 1, 4 (Danny Saunders & Jackie Severn eds., 1999) (long-term strategic planning

This problem is not unique to Pinellas County. Across the country, schools attended by minority and low-socioeconomic status (low-SES) students are under-resourced relative to schools attended by wealthier peers in the same district.<sup>15</sup> In Denver, for example, the district “spen[ds] over fourteen thousand dollars more per pupil in one school than in another,” and in Chicago, “the district spends more than five times as much per pupil” in one high school as it does in another.<sup>16</sup> Researchers found similar differences of over \$5000 in per-pupil spending between schools in “Austin, Seattle, Baltimore, Fort Worth, and other urban districts, generating more than hundreds of thousands (and at times, millions) of dollar differences in total spending at the school level.”<sup>17</sup> Funding disparities can be beneficial if additional funding goes toward higher-need schools; in these cities, however, the additional funding tends not to be targeted toward schools with greater low-income populations.<sup>18</sup>

Improving intradistrict funding equity may help to reduce the negative effects of rising de facto racial segregation in schools across the country. Reemerging segregation has correlated in many of these districts, including Pinellas County, with fewer resources for high-minority schools and declining achievement for minority students. This has been exacerbated by the *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>19</sup> decision, which limits state

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“is difficult when resourcing is unstable, national policy is volatile, and sectors and institutions are under pressure. In this climate, it is not surprising to observe the dominance of short-term planning based on solving immediate problems and crises”).

<sup>15</sup> See William A. Owings & Leslie S. Kaplan, *The Alpha and Omega Syndrome: Is Intra-District Funding the Next Ripeness Factor?*, 36 J. EDUC. FIN. 162, 172 (2010) (discussing the inequities in funding between high- and low-poverty schools within the same district).

<sup>16</sup> Marguerite Roza & Paul T. Hill, *How Can Anyone Say What's Adequate if Nobody Knows How Money Is Spent Now?*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES' GOOD INTENTIONS AND HARM OUR CHILDREN* 235, 236 (Eric A. Hanushek ed., 2006) (emphasis added).

<sup>17</sup> *Id.* at 237.

<sup>18</sup> *Id.* For a discussion of how funding disparities impact low-income student populations, see *infra* Part I.

<sup>19</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (invalidating race-conscious assignment plans in two public school districts). *Parents Involved* addressed two student assignment programs in Seattle, Washington and Louisville, Kentucky. *Id.* Seattle used an application process for its high schools to facilitate school choice. It then used the racial demographics of the school and applicant as a “tie breaker” if too many students picked one school as their first choice, with the aim of making each school close to the racial demographics of the district as a whole. *Id.* at 711–12. In the Jefferson County public school system of Louisville, students were assigned to schools based in part on the demographics of the school. *Id.* at 710. The district sought to keep each school’s black population between 15% and 50% of the total school population. *Id.* at 726. The Court struck down both programs as failing to meet the burden of strict scrutiny. *Id.* at 745.

and local governments' options to combat segregation. With few options to combat it directly, improving funding levels for these schools may be another option for improving opportunities and outcomes for disadvantaged students.

Policymakers and courts have repeatedly addressed funding inequity between districts (interdistrict inequity), but have failed to address the problem within districts (intradistrict inequity).<sup>20</sup> Without addressing funding disparities at the school level, little funding may ultimately go to underfunded schools following a finding of interdistrict inequity. This Note argues that tackling intradistrict inequity should be the next frontier for ensuring that all students have access to equal educational opportunities. Part I describes the current state of school funding in the United States and the policies that perpetuate inequity. Part II describes theories of equity and adequacy, along with policymakers' and courts' attempts to address inequitable and inadequate school funding. Finally, Part III proposes several ways to improve intradistrict equity, including intradistrict litigation and potential improvements to weighted student funding. It argues that courts should grant remedies that improve both funding equity and adequacy (together, comprehensive equity) at the school level, not merely the "district average," and apply these remedies to all funding streams. Policymakers, even when not required by courts, should enact funding policies that promote comprehensive equity for *all* students, regardless of where they attend school.

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<sup>20</sup> Nearly all states in the United States use "school districts" as "special, independent local government entit[ies]" to run schools. Nadav Shoked, *An American Oddity: The Law, History, and Toll of the School District*, 111 Nw. U. L. REV. 945, 950 (2017). States, granted the power and responsibility to provide education under their state constitution, typically grant school districts the power to establish schools, hire teachers, set curricula, and assign students to schools. *Id.* at 956–57. The size and boundaries of school districts vary significantly across the United States. In eight states, school district boundaries correspond geographically with counties; in nine states, boundaries correspond to smaller governmental units, such as cities or townships; in nine states, district boundaries correspond to a combination of counties and cities. *Id.* at 959. In another twenty-three states, district boundaries do not correspond to city or county boundaries, creating seemingly arbitrary districts. *Id.* at 958; *see, e.g., Dividing Lines: School District Borders in the United States – Nebraska's Islands*, EDBUILD, <http://viz.edbuild.org/maps/2015/dividing-lines> (last visited Oct. 21, 2017) (describing Nebraska's "islands" as a series of non-contiguous land segments included in the same district). In some states, school boards are "fiscally independent" and have wide authority to set school budgets. *See generally* Kathy Checkley, *Money Matters: A Primer on K-12 School Funding*, CTR. FOR PUB. EDUC. (July 2, 2008), <http://www.centerforpubliceducation.org/Main-Menu/Policies/Money-matters-At-a-glance/Money-matters-A-primer-on-K12-school-funding.html>.

## I

## THE FAILURE OF SCHOOL FUNDING TO PROMOTE EQUITY

By any measure, the United States has failed to offer all of its students the same educational opportunities. Disparities in outcomes occur on the basis of SES, race, and geography. Although the United States is home to some of the best schools in the world, students attending high-poverty schools often perform at a reading level comparable to scores in much lower-achieving countries.<sup>21</sup> An achievement gap for African American and Hispanic students persists decades after the Supreme Court invalidated the “separate but equal” doctrine.<sup>22</sup> Student proficiency varies greatly between states: In math, students in Massachusetts ranked behind only five countries in the world, whereas students in Alabama ranked behind twenty-six “national and subnational entities” (of forty-seven national and subnational entities tested).<sup>23</sup> These differences could have important consequences for the United States economy, “impos[ing] on the United States the economic equivalent of a permanent national recession.”<sup>24</sup> At an individual level, the disparities may contribute to declining socioeconomic mobility, as low-SES students remain those most likely to attend the worst schools.<sup>25</sup>

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<sup>21</sup> See U.S. DEP’T OF EDUC., FOR EACH AND EVERY CHILD: A STRATEGY FOR EDUCATION EQUITY AND EXCELLENCE 12 (2013), <https://www2.ed.gov/about/bdscomm/list/eec/equity-excellence-commission-report.pdf> (describing achievement gaps throughout the United States).

<sup>22</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (invalidating “separate but equal” doctrine in public education); U.S. DEP’T OF EDUC., *supra* note 21, at 13 (“In math, the average African American eighth-grader is performing at the 19th percentile of white students. The average Hispanic student is at the 26th percentile.” (citation omitted)).

<sup>23</sup> See Julia Ryan, *Report: American Education Isn’t Mediocre—It’s Deeply Unequal*, ATLANTIC (Oct. 24, 2013), <https://www.theatlantic.com/education/archive/2013/10/report-american-education-isnt-mediocre-its-deeply-unequal/280827/> (comparing scores on the Trends in International Mathematics and Science Study (TIMMS)).

<sup>24</sup> MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA’S SCHOOLS 6 (2009), [http://mckinseysociety.com/downloads/reports/Education/achievement\\_gap\\_report.pdf](http://mckinseysociety.com/downloads/reports/Education/achievement_gap_report.pdf) (finding that existing achievement gaps have a detrimental effect on the U.S. economy).

<sup>25</sup> See Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSP. 79, 96–98 (2013) (anticipating further decline in intergenerational earnings mobility in the United States, based on predictive drivers identified in cross-country comparisons); Alana Semuels, *Poor at 20, Poor for Life*, ATLANTIC (July 14, 2016), <https://www.theatlantic.com/business/archive/2016/07/social-mobility-america/491240/> (describing an economic study by Michael D. Carr and Emily E. Wiemers, which found a decrease in earning mobility); cf. Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1554, 1556–59 (2014) (finding intergenerational mobility varies across the United States and identifying factors associated with high mobility, including “better primary schools”).

These outcomes reflect, in part, dramatically different levels of investment across the United States.<sup>26</sup> Disparities in per-pupil funding develop at three levels: between states, between districts in the same state (interdistrict), and between schools within the same district (intradistrict). The vast majority of school funding (ninety-one to ninety-two percent of school budgets nationwide<sup>27</sup>) in the United States comes from state and local budgets. Although this Note focuses on intradistrict inequity, understanding the disparities at all three levels is important for appreciating the complexity of school funding.

The federal government attempts to alleviate such disparities through Title I, which allocates funding to school districts based on the percentage of school-age children from low-income families in

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<sup>26</sup> Some argue that concerns about school funding inequity are unfounded, though arguments that “money does not matter” are almost universally employed as reasons to deprive high-poverty schools of additional funding, and never to advocate that wealthier schools and districts could make due with less funding. See, e.g., Gary Burtless, *Introduction and Summary*, in DOES MONEY MATTER?: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS 1, 20 (Gary Burtless ed., 1996) (“Much of the evidence summarized so far implies that additional resources do not have predictable or large effects on student achievement.”) (documenting the debate between scholars on the topic); Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 442–43 (1991) (“[V]ariations in school expenditures are exceedingly poor measures of the variations in education provided to students.”) (disputing arguments by advocates that more funding in low-performing schools would be beneficial). To be sure, increased funding will not improve educational opportunities if it is used irresponsibly. However, equitable funding is necessary to ensure schools have the same options for providing their students with quality education. Burtless himself acknowledges that “much of the historical evidence suggests that investments in added school resources can improve the earnings prospects of school graduates.” Burtless, *supra*. A recent National Bureau of Economic Research (NBER) working paper found that school funding did have an impact on results by examining the effect of increased funding following changes in states’ financing systems. See Julien Lafortune et al., *School Finance Reform and the Distribution of Student Achievement* 32 (Nat’l Bureau of Econ. Research, Working Paper No. 22,011, 2016), <http://www.nber.org/papers/w22011> (demonstrating that increasing per-pupil spending led to long-term gains in student achievement); see also MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 49 (2010) (“[S]pending more money alone does not guarantee success, but we also know that more money can help.”); MICHAEL A. REBELL & JOSEPH J. WARDENSKI, CAMPAIGN FOR FISCAL EQUITY, INC., OF COURSE MONEY MATTERS: WHY THE ARGUMENTS TO THE CONTRARY NEVER ADDED UP 3 (2004), [https://www.cga.ct.gov/ed/tfs/20110815\\_Education%20Cost%20Sharing%20Task%20Force/20110825/The%20Campaign%20for%20Fiscal%20Equity,%20Inc.%20Money%20Matters.pdf](https://www.cga.ct.gov/ed/tfs/20110815_Education%20Cost%20Sharing%20Task%20Force/20110825/The%20Campaign%20for%20Fiscal%20Equity,%20Inc.%20Money%20Matters.pdf) (“Studies have repeatedly shown that money targeted for proven instructional strategies, such as class-size reduction programs and preschool initiatives, yield dramatic results in student achievement. . . . To implement these necessary reforms, however, states and school districts require sufficient funding and meaningful accountability devices that ensure that funds are appropriately spent.”).

<sup>27</sup> Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

that district.<sup>28</sup> However, in practice, money's fungibility has reduced Title I's efficacy.<sup>29</sup> It was intended to provide *additional* funding to help low-SES students in high-poverty districts achieve the same outcomes as more privileged students. Instead, it is often used to provide the same programs or staffing levels that wealthier schools in the district already have.<sup>30</sup> Moreover, total federal funding, including Title I, still accounts for only 8.3% of school funding.<sup>31</sup> Absent a large—and improbable—influx of federal money directly to high-need schools, any lasting solution must be through state funding reforms.

### A. Interstate and Interdistrict Funding Inequity

Beginning at the state level, there are significant disparities in per-pupil spending across states, “ranging from a high of \$18,165 per pupil in New York to a low of \$5838 in Idaho.”<sup>32</sup> These numbers include both state and local funding and measure the average per-pupil expenditures across each state. The wide range of expenditures reflects both the different tax bases of states, and the policy choices made by legislators, other policymakers, and voters about schools, budgets, and taxation. Within most states, further disparities are found at the interdistrict and intradistrict level.

District-level funding is typically provided through a combination of state funding and “local effort” (in the form of local taxes) by the district—in particular, property taxes. With local effort accounting for 37.1% on average,<sup>33</sup> the funding levels for many schools became dependent on property values.<sup>34</sup> As a result, wealthier districts tend to raise greater funding, while districts with less wealthy or poor families

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<sup>28</sup> See *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T EDUC., <https://www2.ed.gov/programs/titleiparta/index.html?exp=0> (last updated Oct. 5, 2015) (describing the four grants used to provide Title I funding).

<sup>29</sup> The Every Student Succeeds Act (ESSA), passed and signed in 2015, calls for new reforms that may alleviate this issue. See James S. Liebman & Michael Mbikiwa, *Every Dollar Counts: In Defense of the Education Department's "Supplement Not Supplant" Proposal* 4–5, 8–9 (Columbia Pub. Law Research Paper, No. 14-523, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2811950](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811950) (arguing that the new proposal may reduce the ability of states and districts to funnel Title I funding away from low-income schools).

<sup>30</sup> *Id.* at 4. In the “failure factories” of Pinellas County, for example, Title I federal funding is used to replace state and local tax money rather than to give the schools additional funds to pay for benefits such as extra staff. Fitzpatrick et al., *supra* note 2.

<sup>31</sup> U.S. DEP'T OF EDUC., 10 FACTS ABOUT K–12 EDUCATION FUNDING 2 (2005), <https://www2.ed.gov/about/overview/fed/10facts/10facts.pdf>.

<sup>32</sup> BRUCE BAKER ET AL., EDUC. LAW CTR., IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 1 (6th ed. 2017), <https://drive.google.com/file/d/0BxtYmwryVI00VDhjRGIDOUh3VE0/view> (adjusting for regional differences).

<sup>33</sup> U.S. DEP'T OF EDUC., *supra* note 31.

<sup>34</sup> Semuels, *supra* note 27.

raise less funding. Some states have addressed this by creating progressive funding distributions, meaning that additional state funding—or funds raised by other districts—is allocated to districts with high concentrations of student poverty. However, twenty-one states have regressive funding patterns—per-pupil funding within those states tends to be lower for districts with relatively high concentrations of student poverty and higher for wealthier districts.<sup>35</sup> In Nevada’s top five districts, for example, the average funding per weighted pupil ranges from \$8852 to \$55,720, whereas “Clark County, containing Las Vegas, has only \$3940 per weighted pupil per year.”<sup>36</sup> In Connecticut, disparities tied to property values abound: Greenwich, a high-wealth area, “spends \$6000 more per pupil per year than Bridgeport,” a high-poverty area.<sup>37</sup>

### B. Persisting Intradistrict Funding Disparities

Inequity in many states is further exacerbated by intradistrict inequity—inequitable funding disparities between schools within the same district. This occurs in districts throughout the United States. This Part highlights districts throughout Ohio and the school district

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<sup>35</sup> BAKER ET AL., *supra* note 32. These states are New Mexico, Maryland, Texas, Rhode Island, New York, New Hampshire, Iowa, Alabama, Vermont, Idaho, West Virginia, Maine, Arizona, Missouri, South Dakota, Virginia, Montana, Illinois, North Dakota, Wyoming, and Nevada. *Id.* at 5. Concerningly, this number is up from fourteen regressive states documented in their 2016 report. *Id.* at 1.

<sup>36</sup> Deborah A. Versetgen, *Leaving Equity Behind? A Quantitative Analysis of Fiscal Equity in Nevada’s Public Education Finance System*, 39 J. EDUC. FIN. 132, 144 (2013) (finding large gaps in funding between school districts linked with local wealth). Scholars concerned with equity typically use a “per weighted pupil” measurement, rather than per pupil, to determine whether funding disparities are linked to differences in student populations (e.g., a higher proportion of special needs or low-income students). Instead of looking at the average funding per pupil, scholars add additional weight to students with greater needs, for example counting an English Language Learner (ELL) student as 1.50 students, but counting a student without any of the designated characteristics as 1.0. They then calculate the average funding per weighted pupil to better compare schools with varying populations. *See id.* at 141 (explaining how student weights are calculated based on characteristics such as special education, free and reduced lunch, and ELL).

<sup>37</sup> Semuels, *supra* note 27. Family incomes in Bridgeport are low enough that the federal government provides free lunch to all students. *Conn. Coal. for Justice in Educ., Inc. v. Rell (Conn. Coal. II)*, No. X07HHDCV145037565S, 2016 WL 4922730, at \*12 (Conn. Super. Ct. Sept. 7, 2016). Roughly seventy percent of municipal revenue in Connecticut is raised through property taxes, placing Bridgeport at a severe funding disadvantage compared to Greenwich, which has four times as much taxable property as Bridgeport (and approximately one-half as many residents). *Id.* One-third of high school students in Bridgeport and other poorly funded municipalities failed to “reach the most basic levels in math and only did modestly better at reading,” whereas most high school students in property-rich districts “scored as ‘advanced’ in math and approached the same status in reading.” *Id.* at \*14.

of Indianapolis, Indiana, as two examples of this problem.<sup>38</sup> Section II.B will show similar disparities in Washington, D.C.<sup>39</sup> and Los Angeles that led to intradistrict litigation in 1971 and 1994, respectively.

### 1. Ohio

Ohio illustrates why a new focus on intradistrict inequity is necessary: Even though school finance litigation led to higher average per-pupil expenditures in high-poverty *districts*, it did not lead to a commensurate increase in funding for high-poverty *schools*.<sup>40</sup> Ohio distributes funding to districts based on the size and needs of the student population, but the districts are not required to then distribute money between their schools in the same way.<sup>41</sup> Many of the districts allocate funding based on teacher positions without allocating additional funding if high-poverty schools receive less funding as a result.<sup>42</sup> Most districts, including high-poverty districts with greater than fifty percent low-SES students, allocate dramatically less funding to schools with low-SES students than they would if the districts applied the same characteristics the state uses to allocate funding to districts.<sup>43</sup> In the 2005–2006 school year alone, nearly “\$300 million [was] diverted from students who are disadvantaged, in special education programs, or gifted among the seventy-two schools in this sample,” which the researchers suspect to be primarily the result of teacher salary alloca-

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<sup>38</sup> These districts and states have been chosen, along with Pinellas County, to demonstrate that funding disparities emerge in diverse areas across the country.

<sup>39</sup> District of Columbia public schools are funded primarily through local funds, with some federal and private funding. See SOUMYA BHAT, *INVESTING IN OUR KIDS: DISTRICT OF COLUMBIA SCHOOL FINANCE PRIMER 3–7* (2015), <http://www.dcfpi.org/wp-content/uploads/2015/03/Revised-School-Primer-March2015-FINAL.pdf> (describing the revenue sources for public education in the District of Columbia).

<sup>40</sup> See Matthew J. Carr et al., *Shortchanging Disadvantaged Students: An Analysis of Intra-District Spending Patterns in Ohio*, 7 J. EDUC. RES. & POL'Y STUD. 36, 36, 38–40 (2007) (documenting the distribution of resources across Ohio schools).

<sup>41</sup> *Id.* at 40. This finding came ten years after the Ohio Supreme Court found the state had violated its state constitution's education clause “because resources were not being distributed equitably among the 600+ school districts across the state.” *Id.* at 37 (citing *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997)). In response, the Ohio legislature altered its school budgeting formula, seeking to improve both equity and adequacy. *Id.* at 38.

<sup>42</sup> See *id.* at 50–51 (explaining that districts largely distribute funds based on teacher seniority instead of student characteristics). For an explanation of how teacher position allocation contributes to intradistrict inequity, see *infra* Section I.C.

<sup>43</sup> Carr et al., *supra* note 40, at 43, 49 (finding that “only about a quarter of high-poverty school districts” in Ohio allocate financial resources to schools “based on the needs of [disadvantaged, special needs, or gifted] students” and “over 40% of students are not receiving their supplemental educational resources”).

tions.<sup>44</sup> As funding inequity has persisted, so have achievement gaps which amount to a twenty percent gap in reading proficiency between disadvantaged and non-disadvantaged districts.<sup>45</sup>

## 2. *Indianapolis, Indiana*

Severe funding disparities between schools were also found in Indianapolis in 2016.<sup>46</sup> One of its magnet schools, Broad Ripple High School, for example, receives over twice as much per-pupil funding as another magnet school, Crispus Attucks High School, despite having very similar student bodies—each school’s students are approximately seventy percent low-SES and sixty percent black.<sup>47</sup> Broad Ripple does have a higher percentage of students with disabilities, but not enough to fully explain the difference in funding.<sup>48</sup> Rather, some of the disparity comes from allocating special programs to Broad Ripple that are unavailable to Crispus Attucks students. Although the difference between both schools—with Broad Ripple receiving \$11,581 per student and Crispus Attucks receiving \$5630 per student—is one of the largest in the district, similar disparities occur throughout the district.<sup>49</sup> A chart plotting the relationship between per-pupil funding and the percentage of students receiving free or reduced-price lunch revealed scattershot spending patterns—traditional (non-magnet) elementary schools with over seventy-five percent of students on free or

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<sup>44</sup> *Id.* at 49–50. Although Carr’s study has not been updated to reflect more recent numbers, intradistrict inequity appears to persist in Ohio. In Cleveland Municipal District, for example, per-pupil expenditures in high schools vary dramatically, with some schools receiving over \$12,000 per-pupil—well above the state average of \$8840—and others receiving under \$7000. *E.g.*, *2015–2016 Report Card for Whitney Young High School*, OHIO DEP’T EDUC., [http://reportcard.education.ohio.gov/Archives%20TS/043786/062323/062323\\_2015-2016\\_BUILD.pdf](http://reportcard.education.ohio.gov/Archives%20TS/043786/062323/062323_2015-2016_BUILD.pdf) (showing the school receives \$12,662 per pupil and was given an “A” by the state for its graduation rates) (last visited Oct. 21, 2017); *2015–2016 Report Card for James Ford Rhodes High School*, OHIO DEP’T EDUC., [http://reportcard.education.ohio.gov/Archives%20TS/043786/017830/017830\\_2015-2016\\_BUILD.pdf](http://reportcard.education.ohio.gov/Archives%20TS/043786/017830/017830_2015-2016_BUILD.pdf) (showing the school receives \$6879 per pupil and was given an “F” by the state for its graduation rates) (last visited Oct. 21, 2017). The Cleveland Municipal District’s average per-pupil expenditure is \$10,696. *See 2015-2016 Report Card for Cleveland Municipal City School District*, OHIO DEP’T OF EDUC., [http://reportcard.education.ohio.gov/Archives%20TS/043786/043786/043786\\_2015-2016\\_DIST.pdf](http://reportcard.education.ohio.gov/Archives%20TS/043786/043786/043786_2015-2016_DIST.pdf) (last visited Oct. 25, 2017).

<sup>45</sup> Carr et al., *supra* note 40, at 39.

<sup>46</sup> *See* Dylan Peers McCoy, *Which Schools Get the Most Money? Indianapolis Public Schools Analysis Reveals How Schools Compare*, CHALKBEAT (May 18, 2016), <http://www.chalkbeat.org/posts/in/2016/05/18/which-schools-get-the-most-money-indianapolis-public-schools-analysis-reveals-how-schools-compare/>.

<sup>47</sup> Tyler Koteskey, *Indianapolis Looks to Student-Based Budgeting to Fix School Funding Gaps*, REASON FOUND. (May 23, 2016, 11:31 AM), <http://reason.org/blog/show/indianapolis-looks-to-student-based>.

<sup>48</sup> McCoy, *supra* note 46.

<sup>49</sup> Koteskey, *supra* note 47.

reduced-price lunch received anywhere from \$5787 to \$10,893 per pupil.<sup>50</sup>

### C. *How Intradistrict Inequity Develops*

Pinpointing how these disparities emerge within any one district can be challenging, as many districts and school boards have wide discretion to set school budgets. Critics of common budgeting practices would say the budget process is often “driven not by policy or by strategy but by budgeting practices that accommodate teacher preferences, political forces, and the haphazard distribution of many uncoordinated programs and services”<sup>51</sup> and subject to the whims of elected school board officials.<sup>52</sup> The opaque process makes it all the more challenging for low-SES students and their parents to navigate the complex bureaucracy necessary to improve funding for their schools. Even measuring school-level budgets can be challenging. Many districts publish centralized budgets that show categorical funding across schools, rather than the actual expenditures received by each school.<sup>53</sup> Historically, this has impeded demonstrating intradistrict disparities, though this may improve as districts adopt new federal requirements.<sup>54</sup>

Nonetheless, policymakers have identified several sources of inequity. One potentially benign source is the distribution of specialized programs for high-need students, such as English Language

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<sup>50</sup> *Id.* (“Notice how much more scattershot the per-student funding gets as schools percentages of low income students go up.”).

<sup>51</sup> Roza & Hill, *supra* note 16, at 237; *see also* EDUC. RES. STRATEGIES, SCHOOL FUNDING SYSTEMS: EQUITY, TRANSPARENCY, FLEXIBILITY 26 (2010), [https://www.erstrategies.org/library/school\\_funding\\_systems](https://www.erstrategies.org/library/school_funding_systems) (discussing how “failing to review and manage . . . ad hoc” departures from school funding guidelines “can result in significant inequities across schools” that “can unintentionally favor schools with the most savvy principals”).

<sup>52</sup> *See* Owings & Kaplan, *supra* note 15, at 177 (reporting that many school boards include elected positions, increasing the likelihood that funding goes toward the school board’s “expected voting constituency” or that more resources are allocated to schools with involved, powerful parents).

<sup>53</sup> *See* Roza & Hill, *supra* note 16, at 237 (“Reams of district budget and accounting data detail districtwide spending on particular items (e.g., teacher salaries, supplies, and administration) and by departments (e.g., elementary education, professional development, student services . . . bilingual education), but typically tell us nothing about how much is spent on any one school as opposed to another.”)

<sup>54</sup> Ohio’s Department of Education, for example, now publishes school-level financial data—including per-pupil expenditures—as part of their “report cards.” *See Cleveland Report Card, supra* note 44. The ESSA will require all states to publish per-pupil spending at the state, district, and school level. Andrew Ujifusa, *Funding Twists, Tight Budgets Loom for States at ESSA’s Debut*, EDUC. WK. (Dec. 30, 2016), <http://www.edweek.org/ew/articles/2017/01/04/funding-twists-tight-budgets-loom-for-states.html>.

Learner (ELL) instruction or special education programs.<sup>55</sup> Such programs may increase disparities in per-pupil expenditures, but still promote comprehensive equity, assuming comparable programs are provided to similarly situated students in schools throughout the district.<sup>56</sup> However, special programs that are not targeted toward high-need students, such as arts programs or advanced courses, and not made available at other schools may both increase disparities in per-pupil expenditures and decrease comprehensive equity.<sup>57</sup> Additionally, capital expenditures that provide some, but not all, schools with up-to-date facilities contribute to intradistrict inequity.<sup>58</sup>

Perhaps the biggest factor contributing to funding disparities is the way teaching positions are traditionally allocated within districts.<sup>59</sup> Most districts allocate to each school a certain number of teaching positions, based on the number of students, and schools fill those positions without a limit on the actual cost per teacher. Teacher salaries, meanwhile, are typically based on seniority, as dictated by that district's union contract.<sup>60</sup> Under most union contracts, more experienced teachers have greater flexibility to change schools and move to "the more desirable setting."<sup>61</sup> As teachers gain experience, they often transfer to more affluent and/or higher-performing schools, giving those schools both higher quality instruction and greater per-pupil

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<sup>55</sup> See EDUC. RES. STRATEGIES, *supra* note 51, at 17 (explaining how the distribution of special-needs students can affect spending variation within a district).

<sup>56</sup> See Roza & Hill, *supra* note 16, at 243–44 (describing districts where spending on ELL and gifted students varied dramatically between schools).

<sup>57</sup> See *id.* at 244–45 (discussing how funding for special programs and central budgeting can increase disparities).

<sup>58</sup> See John Augenblick & Justin Silverstein, *Financing Facilities*, AM. SCH. BOARD J., Oct. 2002, at 40 (describing financing systems for school construction, its impact on intradistrict equity, and related interdistrict equity and adequacy litigation).

<sup>59</sup> See Roza & Hill, *supra* note 16, at 238 (demonstrating that an uneven distribution of teachers leads to large intradistrict disparities in the amount spent on students).

<sup>60</sup> Carr et al., *supra* note 40, at 50; see also Dan Goldhaber et al., *Inconvenient Truth? Do Collective Bargaining Agreements Help Explain the Mobility of Teachers Within School Districts?* 1–2 (Ctr. for Educ. Data & Research, Working Paper No. 2015-1, 2015) (finding that collective bargaining agreements often contain provisions protecting voluntary transfers for senior teachers which increase the likelihood that a teacher within that district will transfer out of a school with a high number of disadvantaged students).

<sup>61</sup> Stephanie Levin, *Evaluating Intradistrict Resource Allocation and Its Implications for Equity: A Case Study* 53 (Jan. 1, 2012) (unpublished Ph.D. dissertation, University of Pennsylvania), <http://repository.upenn.edu/edissertations/536> ("For many teachers, this means favorable working conditions, students with higher academic performance, *less poverty, a lower percentage of minority students*, and fewer accountability requirements." (emphasis added)). Research shows that teachers' transfer decisions tend to mirror this theory. See *id.* at 53–54 (citing studies observing the movement patterns of teachers in New York City, Texas, and California).

expenditures relative to poor schools in the same district.<sup>62</sup> In low-performing schools, many of these teachers are replaced by less experienced teachers.<sup>63</sup> Under traditional budgeting systems, the lower-performing schools are thus left with more inexperienced teachers and no additional financing to compensate for this inexperience by hiring additional teachers or providing supplemental programs.<sup>64</sup>

More equitable funding may result in a more equitable distribution of qualified teachers by limiting schools' ability to monopolize the supply of experienced teachers.<sup>65</sup> Because more desirable schools would hit their financial limit for total teacher hires after a certain number of experienced teachers, but still have positions to fill, schools will be incentivized to hire more teachers with less experience. At the same time, schools that have a higher proportion of inexperienced teachers would have funds to compensate for this inexperience.<sup>66</sup> Such additional funding could be used for professional development, additional staff, or any number of other programs. This has the additional

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<sup>62</sup> See Dan Goldhaber et al., *Uneven Playing Field? Assessing the Teacher Quality Gap Between Advantaged and Disadvantaged Students*, 44 *EDUC. RESEARCHER* 293, 305 (2015) ("A number of studies . . . have shown that teachers are more likely to leave districts with more disadvantaged students . . . . Yet prospective teachers are more likely to apply to districts with fewer disadvantaged students . . . ." (citations omitted)). This remains true within districts, where "teachers are more likely to leave disadvantaged schools for another school in the district." *Id.* (first citing Dan Goldhaber et al., *Teacher Career Paths, Teacher Quality, and Persistence in the Classroom: Are Public Schools Keeping Their Best?*, 30 *J. POL'Y ANALYSIS & MGMT.* 57 (2010); and then citing Benjamin Scafidi et al., *Race, Poverty, and Teacher Mobility*, 26 *ECON. EDUC. REV.* 145 (2007)); see also Fitzpatrick et al., *supra* note 8 and accompanying text (noting that many teachers at the "failure factories" often leave within one year).

<sup>63</sup> See Goldhaber et al., *supra* note 60, at 29 (finding that veteran teachers are more likely to leave disadvantaged schools, whereas novice teachers are more likely to stay).

<sup>64</sup> Although there are diminishing marginal returns to teacher experience, studies have found that teacher experience does impact teacher quality and outcomes for their students. See LAURA GOE, NAT'L COMPREHENSIVE CTR. FOR TEACHER QUALITY, *THE LINK BETWEEN TEACHER QUALITY AND STUDENT OUTCOMES: A RESEARCH SYNTHESIS 3* (2007) (finding that "teachers appear to gain in effectiveness" with each year through the fifth year of teaching); JENNIFER KING RICE, *ECON. POLICY INST., TEACHER QUALITY: UNDERSTANDING THE EFFECTIVENESS OF TEACHER ATTRIBUTES* 15–40 (2003) (finding that teacher experience impacts student achievement, particularly for high school teachers). *But see* SUZANNE M. WILSON ET AL., *CTR. FOR THE STUDY OF TEACHING & POLICY, TEACHER PREPARATION RESEARCH: CURRENT KNOWLEDGE, GAPS, AND RECOMMENDATIONS 7* (2001), <http://www.education.uw.edu/ctp/content/teacher-preparation-research-current-knowledge-gaps-and-recommendations> (finding "inconsistent" relationships between teacher experience and student achievement).

<sup>65</sup> See Roza & Hill, *supra* note 16, at 238–42 (discussing the impact on per-student funding of allocating resources based on staff positions).

<sup>66</sup> For example, Roza and Hill estimated in 2006 that switching in Chicago "to a student-based allocation system with real-dollar accounting would relocate some \$96 million (6 percent of the district's direct allocation to schools) to schools currently shortchanged by the existing system." Roza & Hill, *supra* note 16, at 253.

benefit of providing more mentorship opportunities between teachers with varying experience levels.<sup>67</sup>

Consider two hypothetical schools in the same district: School A and School B. School A is considered a high-performing school and has a majority middle- to upper-middle-class student population. School B is considered low-performing, and eighty percent of its students are on free-and-reduced lunch. Each school has the same number of students and is allocated fifty teachers each. For simplicity, imagine that there are only three pay levels: New teachers cost \$40,000 per year, mid-level teachers cost \$50,000 per year, and senior teachers cost \$60,000 per year. Assume that, due to teacher transfers and attrition, School A has twenty senior teachers, twenty-five mid-level teachers, and five new teachers. Assume that School B has five senior teachers, fifteen mid-level teachers, and thirty new teachers. Under a traditional model, neither school bears the cost of these teachers, and the district would be responsible for School A's \$2.65 million in teacher expenditures and School B's \$2.25 million in teacher expenditures. In this scenario, School B has fewer experienced teachers and \$400,000 less funding per school year than School A—enough money to otherwise hire additional teachers and paraprofessionals or to implement additional programs, such as supplemental tutoring.

If, instead, both schools received equal funding toward teacher expenditures<sup>68</sup> (\$2.45 million in this example, adding together School A and School B's previous expenditures and dividing them evenly between the schools), School A would be incentivized to hire additional mid-level or new teachers, or else cover the additional teacher costs with funding from other portions of the budget. It might instead hire eleven senior teachers, twenty-eight mid-level teachers, and eleven new teachers, which (at a total of \$2.5 million) would take only an additional \$50,000 from elsewhere in the budget. For School B, this could mean the opportunity to hire more experienced teachers who are unable to transfer to School A. Even if attrition continues, under

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<sup>67</sup> See GOE, *supra* note 64, at 3 (noting that even after their impact on student achievement scores levels off, “[e]xperienced teachers may contribute to their schools in other important ways . . . including providing stability and serving as mentors to new or struggling teachers”).

<sup>68</sup> For simplicity, this example gives each school equivalent funding. However, this Note advocates for comprehensive equity, which would result in School B receiving *more* funding than School A to help fund the additional needs of a predominantly low-socioeconomic status (SES) student population.

the new model, School B would be able to repurpose funding for additional assistance.<sup>69</sup>

## II

### PREVIOUS EFFORTS TO IMPROVE SCHOOL FUNDING EQUITY

Some courts and policymakers, to their credit, have tried to improve school finance equity over the past several decades. Within courts, plaintiffs have focused on interdistrict litigation, which has, unfortunately, been insufficient to ensure equitable funding at the school level. Nonetheless, courts have used these cases to interpret their states' education clauses. It is therefore vital to crafting an *intradistrict* solution to understand the interdistrict case law. Some states and districts have also sought to improve equity by implementing weighted student funding. Existing plans have fallen short, but previous efforts are a useful starting point for future policy initiatives to address intradistrict inequity.

#### A. *Interdistrict Litigation*

School finance litigation has been brought in forty-five states,<sup>70</sup> almost exclusively under state education clauses. The vast majority of this litigation has addressed interdistrict funding disparities, and the prescribed remedies do not necessarily reduce intradistrict inequity.<sup>71</sup> However, these interdistrict school funding cases may provide the case law on which to base intradistrict school litigation.

Plaintiffs in the “first wave” of school funding cases tried to rely on the Equal Protection Clause of the U.S. Constitution, but this strategy ended with the Supreme Court’s ruling that there is no federally guaranteed “fundamental right” to education.<sup>72</sup> That same year, however, the Supreme Court of New Jersey struck down New Jersey’s school financing system as violating the state constitution’s education clause.<sup>73</sup> Since then, education clauses, which impose some duty on each state to provide public education, have been the primary source

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<sup>69</sup> Although this Section focuses on teacher expenditures, funding inequities can be created when districts use position-based allocations for other schoolwide positions, including guidance counselors, librarians, and assistant principals. EDUC. RES. STRATEGIES, *supra* note 51, at 19.

<sup>70</sup> Carr et al., *supra* note 40, at 36.

<sup>71</sup> For a discussion of two significant intradistrict school finance cases, see *infra* Section II.B.

<sup>72</sup> San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); see also William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188–89 (2003) (describing the evolution of school finance litigation).

<sup>73</sup> Robinson v. Cahill, 303 A.2d 273, 295, 297–98 (N.J. 1973).

of law for litigating school finance.<sup>74</sup> The duty imposed on each state varies with its constitution and, critically, the state high court's interpretation of its education clause.<sup>75</sup> The duty falls into four broad categories based on the state courts' rulings in school finance litigation<sup>76</sup>: those requiring equitable school funding (equity states), those requiring funding sufficient for an adequate education (adequacy states), those requiring a combination of equitable and adequate funding (comprehensive equity states), and those requiring no particular funding scheme.<sup>77</sup>

These interpretations each have advantages and challenges in measurement and implementation, and their respective goals may guide policymakers to different priorities. Among these theories, comprehensive equity is best equipped to ensure equal educational oppor-

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<sup>74</sup> *E.g.*, FLA. CONST. art. IX, § 1(a) (“It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made . . . for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education . . . .”); N.J. CONST. art. VIII, § IV (“The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”); N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

<sup>75</sup> Scholars once attempted to divide these clauses by textual language, hoping to predict the success of school finance litigation in each state. *See, e.g.*, Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 317–26 (1991) (categorizing education clauses by text as offering various levels of support for equity claims); William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661–70 (1989) (categorizing education clauses into four categories based on text). However, recent litigation has challenged the reliability of such taxonomies. *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 746 (2010) (arguing that scholars may conclude “law matters little, if at all, in education finance adequacy litigation” because cases do “not reveal any pattern that can be predicted based on differences in constitutional text relating to separation of powers” and research shows “that education clause language has little to no impact on case outcomes”).

<sup>76</sup> “Equity” and “adequacy” are the terms most frequently used by scholars to categorize school funding cases. *See, e.g.*, Koski, *supra* note 72, at 1192 (using the terms to describe trends in school finance litigation). “Comprehensive equity,” similar to what other scholars have called “equal educational opportunity,” is a term used by Stephanie Levin to describe the equity notion this Note endorses. *See infra* Section II.A.3 (describing comprehensive equity).

<sup>77</sup> The litigation strategy suggested in this Note will not be applicable to states that have found school financing to be a nonjusticiable political question, including Florida. In those states, however, more equitable funding may still be pursued through policy changes. *See infra* Section III.B (suggesting improvements to WSF programs). This Note focuses on equity as applied to the inputs (in particular funding) that enable schools to provide equal educational opportunity to all students. However, equity and adequacy standards can also be applied to review student outcomes (such as graduation rates, standardized test scores, etc.) to help assess whether input levels are promoting equal educational opportunity.

tunity and should be pursued by all policymakers and courts where possible. However, not all states' education clauses and case law require comprehensive equity, though policymakers would be permitted to pursue it. Understanding each category is therefore necessary to understand the options available to different states struggling with intradistrict inequity. Litigation and policy reforms recommended in Part III will build on these concepts.

### 1. *Equity States*

The "second wave" of school finance litigation sought equitable funding of districts primarily under state education clauses.<sup>78</sup> To measure equity in interdistrict cases, courts typically look at the average per-pupil allocation or expenditure for each district, eschewing school-level data. There are two major conceptions of equity: horizontal equity and vertical equity. Horizontal equity treats all students as roughly the same for funding purposes. An equal amount of resources would be allocated for each student, regardless of background or individual needs. This standard does not provide equal opportunity to all students because it fails to adjust resources to aid students with additional needs, such as low-SES students, ELL students, students with disabilities, and gifted students. As such, today "practically no one embraces horizontal equity as the appropriate conception of equal educational opportunity."<sup>79</sup>

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<sup>78</sup> This second wave is conventionally said to have started with *Serrano v. Priest* (*Serrano I*), in which the California Supreme Court found interdistrict funding disparities unconstitutional under the equal protection clauses of both the United States and California Constitutions. 487 P.2d 1241 (Cal. 1971); see also Koski, *supra* note 72, at 1187 n.4 (describing the three waves into which scholars typically divide educational finance reform litigations). After the *Rodriguez* decision, the California Supreme Court upheld the portion of the *Serrano I* decision that relied on California's constitution. *Serrano v. Priest* (*Serrano II*), 557 P.2d 929, 957–58 (Cal. 1976). Although some early cases were litigated under federal and state equal protection clauses, school funding cases are now almost exclusively decided on the basis of state constitutions' education clauses. MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* 15–29 (2009).

<sup>79</sup> William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equality in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 608–09 (2007). One early case that did adopt a horizontal equity requirement—although it did not use the term—was *Edgewood Independent School District v. Kirby*, 777 S.W.2d 391 (Tex. 1989). Relying on the education clause of the Texas Constitution, the court struck down the state's school funding system, which created district per-pupil spending ranging from \$2112 in the poorest district to \$19,333 in the wealthiest district. *Id.* at 392–93. The state's funding system relied heavily on local property taxes to meet even the basic allotment needs, leaving poorer districts unable to provide the same resources even when taxing at higher rates. The court found that the drafters would "never [have] contemplated the possibility that such gross inequalities could exist." *Id.* at 392–93, 395. While not prohibiting the use of supplemental funds for special characteristics, the court did not mandate it. *Id.* at 398

Vertical equity focuses on equality of *opportunity* through variations in funding for students with disadvantages resulting from traits wholly out of the control of the child, such as wealth, ethnicity, and race.<sup>80</sup> Additional resources are allocated for students with specific characteristics.<sup>81</sup> Rather than allocating the same absolute resources to each student, policymakers focus on “giving each student access to the resources they need to learn and thrive.”<sup>82</sup>

A Wyoming school finance case from 1980 is an early example of case law adopting vertical equity. The Wyoming Supreme Court struck down the state’s school financing system as violating the state’s equal protection and education clauses and prescribed a remedy focused on improving vertical equity.<sup>83</sup> It called for a formula “which will weight the calculation to compensate for special needs—educational cost differentials” and provide additional funding to school districts as needed to address additional costs, including “transportation costs, building maintenance costs, construction costs, logistic considerations, number of pupils with special problems, et cetera.”<sup>84</sup> In choosing a remedy, the court considered quality of education—acknowledging that financing is an imperfect proxy for quality—but mandated more equitable funding because “until equality of financing is achieved, there is no practicable method of achieving equality of quality.”<sup>85</sup> The design of the funding system was left to the legislature.<sup>86</sup>

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(“This does not mean that the state may not recognize differences . . . in costs associated with providing an equalized educational opportunity to atypical students or disadvantaged students.”).

<sup>80</sup> See Koski & Reich, *supra* note 79, at 553 (“In its most aggressive form, vertical equity seeks to target resources based on student need such that each student has an equal opportunity for an equal outcome.”). Scholars have noted, however, that, particularly as children age, one cannot conclusively differentiate between background characteristics outside of the child’s control and their own choices. See Levin, *supra* note 61, at 19 n.18 (discussing this problem and noting “that effort ‘is dependent upon happy family and social circumstances’” (quoting AMY GUTMANN, *DEMOCRATIC EDUCATION* 131 (rev. ed. 1999))).

<sup>81</sup> See Levin, *supra* note 61, at 16–17 (explaining that students from low-SES or minority families generally require greater resources). Not all states and districts agree on the appropriate characteristics to receive additional funding, and the amount of additional funding given to these characteristics also varies. While this Note advocates for additional funding for low-SES students, not all states provide additional funding in this manner.

<sup>82</sup> Shane Safir, *Equity vs. Equality: 6 Steps Toward Equity*, EDUTOPIA (Jan. 21, 2016) (emphasis omitted), <https://www.edutopia.org/blog/equity-vs-equality-shane-safir>.

<sup>83</sup> Washakie Cty. Sch. Dist. No. One v. Herschler, 606 P.2d 310, 332, 334–36 (Wyo. 1980). Compare *id.*, with Kirby, 777 S.W.2d 391. The Washakie case, uniquely, did not rely solely on the state’s education clause, as is now the norm, but also relied on the state constitution’s equal protection clause. *Washakie Cty. Sch. Dist. No. One*, 606 P.2d at 315.

<sup>84</sup> *Id.* at 315 n.3, 336.

<sup>85</sup> *Id.* at 334.

<sup>86</sup> *Id.* at 336.

## 2. *Adequacy States*

Recent years have seen a shift in school finance litigation towards “adequacy,” or ensuring that students are provided with a minimally adequate education but permitting inequality of resources beyond that threshold.<sup>87</sup> Under this theory, funding systems are not struck down solely because districts or schools have *differential* funding, but rather, because schools or districts are failing to provide either a baseline of necessary inputs or the inputs necessary to achieve certain outcomes for their students.<sup>88</sup> Supporters argue that adequacy is preferable to an equity framework because a funding standard that requires equity but does not mandate a minimum level of achievement or resources could prompt districts and states—particularly those with lower tax revenue or high economic inequality—to “level down” funding, leaving disadvantaged students with the same or fewer resources and other students worse off.<sup>89</sup>

However, a critical failing of an adequacy standard is that it assumes that there *is* a baseline level of education after which all students will be employable or otherwise prepared to become productive members of society. This neglects “positional good” aspects of education—the value of one’s education does not depend solely on that education itself, but also the education of others in the same popula-

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<sup>87</sup> See Owings & Kaplan, *supra* note 15, at 168 (defining adequacy as requiring enough funding “to teach the average student to state standards, and then to identify how much each district/school requires to teach students with special needs—the learning disabled, those from poverty with educationally deficient backgrounds, and those without English proficiency—to the same high and rigorous achievement standards”).

<sup>88</sup> See Koski & Reich, *supra* note 79, at 552–54 (discussing how distributional principles in school funding, including equity and adequacy, can be adopted either with a focus on educational inputs or educational outcomes).

<sup>89</sup> See *id.* at 591 (“Leveling down might increase equality of educational resources, but in the process it will significantly impact the absolute quality of education provided, worsening the better off and failing to improve the worse off.”). Following the *Serrano II* decision, California enacted a school funding bill that had the effect of “level[ing] down” funding for some schools. See CAL. BUDGET PROJECT, BUDGET BACKGROUNDER: SCHOOL FINANCE IN CALIFORNIA AND THE PROPOSITION 98 GUARANTEE 2 (Apr. 2006), [http://calbudgetcenter.org/wp-content/uploads/0604\\_prop98.pdf](http://calbudgetcenter.org/wp-content/uploads/0604_prop98.pdf). The bill (AB 65) altered the inflation-adjustment scales for districts based on their individual revenues—“districts with high revenues would receive smaller or no adjustments in order to ‘level down’ funding.” *Id.*; see also William N. Evans, et al., *The Impact of Court-Mandated School Finance Reform*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 72, 74–75 (Helen F. Ladd et al. eds., 1999) (explaining that California decreased spending in the aftermath of *Serrano*’s court-mandated school finance reform and noting that one study attributes “roughly one-half of the decline in spending . . . to *Serrano*”); Caroline M. Hoxby, *All School Finance Equalizations Are Not Created Equal 2* (Nat’l Bureau of Econ. Research, Working Paper No. 6792, 1998), <http://www.nber.org/papers/w6792.pdf> (“California is the classic case of leveling down.”). However, an alternative explanation for California’s decline in spending is the passage of Proposition 13, which limited the use of property taxes, rather than *Serrano*. Hoxby, *supra*, at 2 n.3.

tion or applicant pool.<sup>90</sup> As more of the population attains higher levels of education, the marketplace begins to *expect* an even higher level of education. If the adequacy standard itself does not increase as society's demand does, the most disadvantaged students will be left with an inadequate education and no recourse.

In a sweeping decision in 1989, the Supreme Court of Kentucky declared "Kentucky's *entire system* of common schools [ ] unconstitutional" under the state's education clause and provided a thorough and substantive definition of what an adequate and "efficient" education requires.<sup>91</sup> *Rose v. Council for Better Education, Inc.* outlined nine "essential, and minimal, characteristics of an 'efficient' system of common schools," including that the schools "be free to all," "provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances," and receive funding from the state "sufficient to provide each child in Kentucky an adequate education."<sup>92</sup> The court further outlined seven capacities which an adequate education should provide each student to set the parameters of an education that would provide students with the skills needed to function in the modern economy, pursue a vocation or higher education, and be a thoughtful citizen.<sup>93</sup> Within these parameters, the court left the ultimate policy solution to the legislature.<sup>93</sup>

Fourteen years later, the New York Court of Appeals adopted an even more comprehensive definition for adequacy under its state education clause in *Campaign for Fiscal Equity, Inc. v. State*.<sup>94</sup> Interpreting the state's mandate to "ensure the availability of a 'sound basic education' to all its children,"<sup>95</sup> the court found that an adequate education is an education that provides students with "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants," including the

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<sup>90</sup> Koski & Reich, *supra* note 79, at 595–604 (describing the positional good aspects of education).

<sup>91</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989). However, see *infra* Section II.A.3 for a discussion reframing the *Rose* decision as a "comprehensive equity" case.

<sup>92</sup> *Rose*, 790 S.W.2d at 212–13.

<sup>93</sup> *Id.* at 212–13. The seven capacities to which the definition refers are (1) oral and written communication skills for a "complex and rapidly changing civilization," (2) civics knowledge sufficient to "make informed choices" and (3) understand community and national issues, (4) "self-knowledge" about health, (5) knowledge about the arts and culture, (6) preparation for advanced academic or vocational training, and (7) academic or vocational skills needed to compete in the national market. *Id.* at 212.

<sup>94</sup> *Id.* at 217–18.

<sup>95</sup> *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326 (N.Y. 2003).

<sup>96</sup> *Id.* at 328 (quoting *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 664 (N.Y. 1995)).

ability to “compete for jobs that enable them to support themselves” and participate “*capably* and knowledgeably” on a jury.<sup>96</sup> It further defined the necessary inputs:

minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn . . . . [M]inimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks . . . . [and] minimally adequate teaching of reasonably up-to-date basic curricula . . . by sufficient personnel adequately trained to teach those subject areas.<sup>97</sup>

The court found the state’s funding of New York City schools insufficient to provide students with this minimally adequate education. In doing so, the court examined both instructional inputs given to schools and the resulting outputs of test results and graduation rates.<sup>98</sup>

### 3. *Comprehensive Equity States*

Another conception of equity, termed “comprehensive equity,” combines the goals of adequacy and vertical equity to best promote equal educational opportunity.<sup>99</sup> Comprehensive equity and the courts that have adopted its principles address the weaknesses of pure equity and pure adequacy standards. An equity notion is necessary to truly equalize educational opportunity, but does not in itself require a minimum level of competency. An adequacy notion may mandate a minimum level of competency, but fails to guard against the specters of inequality and unfairness that result from education’s positional good qualities.<sup>100</sup> In contrast, a comprehensive equity standard becomes a moving target and meets additional needs as society changes, by defining adequacy in terms of the preparation needed to pursue college or a career after high school.<sup>101</sup> Comprehensive equity

<sup>96</sup> *Id.* at 330–32 (emphasis added).

<sup>97</sup> *Id.* at 331–32 (quoting *CFE I*, 655 N.E.2d at 666).

<sup>98</sup> *Id.* at 328–29. At the time of the lawsuit, New York City schools were also examples of horizontal interdistrict inequity: per-pupil expenditures and the state’s contributions were lower in New York City than in 75% of other districts, “including all the other ‘large city’ districts.” *Id.* at 330.

<sup>99</sup> See Levin, *supra* note 61, at 27.

<sup>100</sup> See *supra* notes 83–89 and accompanying text (highlighting potential issues with equity and adequacy).

<sup>101</sup> See Koski & Reich, *supra* note 79, at 614–15 (advocating for a dynamic standard of proficiency that “must be recalibrated on a periodic basis as some function of how the top-performing percentiles are doing both in terms of academic achievement and attainment”); see also, e.g., *CFE II*, 801 N.E.2d at 330–31 (stating that the state constitution requires schools to prepare students for *more* than merely “the ability to get a job, and support oneself, and thereby not be a charge on the public fisc,” but also “a higher level of knowledge, skill in communication and the use of information,” as employers now demand); *CFE I*, 655 N.E.2d at 666 (including among the essentials to a sound basic

seeks to provide a level playing field for students who would otherwise be denied the greatest benefits of society due to a geographic accident of birth, rather than due to their own decisions.

Comprehensive equity has support in several states' jurisprudence, including in some states that the literature has previously categorized as equity or adequacy states. As discussed above, *Rose* is typically characterized as an "adequacy" case.<sup>102</sup> However, the case consistently demonstrates concern with equity as well as adequacy, perhaps making *Rose's* holding an early model of comprehensive equity. The court held:

The system of common schools must be adequately funded to achieve its goals . . . [and] must be *substantially uniform* throughout the state. Each child, *every child*, in this Commonwealth must be provided with *an equal opportunity* to have an adequate education. *Equality is the key word here.* The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts *must be given the same opportunity and access to an adequate education.*<sup>103</sup>

Elsewhere, the court characterizes the legislature's responsibility as providing "an adequate, *equal and substantially uniform* educational system,"<sup>104</sup> and the court's definition of an "efficient" system of common schools includes the mandate that "[c]ommon schools shall provide *equal educational opportunities* to all Kentucky children, regardless of place of residence or economic circumstances."<sup>105</sup> The court thus mandated a comprehensive equity system that took students' socioeconomic status into account.

More recently, the Connecticut Supreme Court expanded on the *Campaign for Fiscal Equity, Inc. v. State (CFE II)* definition of an adequate education in *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell* to adopt a comprehensive equity theory of school funding.<sup>106</sup> The court held that "the state must 'provide a *substantially*

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education "reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies").

<sup>102</sup> See *supra* notes 91–94 and accompanying text (describing *Rose* as an "adequacy" case).

<sup>103</sup> *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989) (emphasis added).

<sup>104</sup> *Id.* at 212 (emphasis added).

<sup>105</sup> *Id.* (emphasis added).

<sup>106</sup> *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell (Conn. Coal. I)*, 990 A.2d 206 (Conn. 2010). Although deciding based on Connecticut's state constitution, the court drew on *CFE II* and other "sister state" decisions in interpreting their state's education clause. See *id.* at 244–50. The trial court, on remand, recently struck down the state's funding system for failing to meet this standard, indicting the system as one that "has left rich school districts to flourish and poor school districts to flounder." *Conn. Coal. for Justice in*

equal educational opportunity to its youth in its free public elementary and secondary schools’”<sup>107</sup> and that this standard “guarantees Connecticut’s public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state’s economy, or to progress on to higher education.”<sup>108</sup> In evaluating Connecticut’s system for compliance with this standard, the court did not focus solely on adequacy or equity. Rather, it compared the resources at various schools<sup>109</sup>—an equity concern—and examined the many schools and districts without sufficient resources to meet the adequacy standard adopted by the court.<sup>110</sup>

These sample cases demonstrate a range of school funding jurisprudence in states that treat such claims as justiciable. Courts deciding intradistrict litigation will be confined to the frameworks set by interdistrict litigation in that state, even if the court would otherwise interpret the education clause as mandating a different form of equity or adequacy. These cases also introduce the primary theories for judging the appropriateness of school funding levels.

### B. Intradistrict Litigation

Although interdistrict funding has been litigated in many states, the courts have rarely examined intradistrict inequity. The two exceptions to this are *Hobson v. Hansen*,<sup>111</sup> a District of Columbia case decided in 1971, and *Rodriguez v. Los Angeles Unified School District*,<sup>112</sup> a California case resulting in a consent decree in 1992. Both cases called on the school districts to create more equitable funding schemes, but the remedies were fairly limited in scope and did not promote comprehensive equity.<sup>113</sup>

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Educ., Inc. v. Rell (*Conn. Coal. II*), No. X07HHDCV145037565S, 2016 WL 4922730, at \*1 (Conn. Super. Ct. Sept. 7, 2016). The ultimate results of litigation have yet to play out; the state legislature must implement a new funding system to meet the court’s requirements and meet the minimally adequate standards by “apply[ing] educationally-based principles to allocate funds in light of the special circumstances of the state’s poorest communities.” *Id.* at \*16.

<sup>107</sup> *Conn. Coal. I*, 990 A.2d at 210 (emphasis added) (quoting *Horton v. Meskill*, 376 A.2d 359, 375 (Conn. 1977)).

<sup>108</sup> *Id.* at 212.

<sup>109</sup> *See id.* at 212–13 (comparing the availability of inputs at two elementary schools and two high schools with the statewide average).

<sup>110</sup> *See id.* at 213–14 (evaluating outputs of Connecticut schools, including dropout rates).

<sup>111</sup> 327 F. Supp. 844 (D.D.C. 1971).

<sup>112</sup> No. B192039, 2007 WL 1990233 (Cal. App. Dep’t Super. Ct. July 11, 2007).

<sup>113</sup> *See infra* Section III.A (suggesting ways that state courts can build on the jurisprudence of interdistrict cases and these intradistrict cases to promote comprehensive equity).

*Hobson* compared funding for schools on the west side of Rock Creek Park, an overwhelmingly white and predominantly middle- to upper-class neighborhood in the District of Columbia, with funding for schools elsewhere in the District.<sup>114</sup> The differences were stark when the court compared expenditures in schools west of the Park, which had nearly seventy-five percent white enrollment, with schools in Anacostia, which had ninety-eight percent black enrollment: Schools west of the Park in 1971 had 24.9% smaller pupil-teacher ratios, 12.5% higher average teacher cost, and 40% higher teacher expenditures per pupil, compared with schools in Anacostia.<sup>115</sup>

The court found that the District of Columbia discriminated in favor of schools west of the Park and against schools east of the Park, particularly those attended by black students.<sup>116</sup> The defendants argued that the disparities were random and did not reflect discrimination—there were poor and black students who received greater funding than other poor or black students east of the Park.<sup>117</sup> The court found, however, that schools with low expenditures were concentrated in low-income and high-minority neighborhoods, with “children in poorer black neighborhoods fac[ing] a substantial probability of such assignment.”<sup>118</sup>

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<sup>114</sup> See *Hobson*, 327 F. Supp. at 846–50 (documenting different expenditures on schools situated on either side of the Park).

<sup>115</sup> *Id.* at 848 & n.7, 849–50. The higher average teacher cost reflects better-paid and more experienced teachers in the wealthier side of Rock Creek Park. *Id.*

<sup>116</sup> *Id.* at 860.

<sup>117</sup> *Id.* at 851–52.

<sup>118</sup> *Id.* at 852. The *Hobson* decision is of limited applicability due to its reliance on the Federal Equal Protection Clause and race discrimination. Nonetheless, the court acknowledged that the same logic should be applied even to cases in which there is no race discrimination, particularly where purely irrational inequalities fall on the poor. See *id.* at 846 (“Theoretically, therefore, purely irrational inequalities even between two schools in a culturally homogeneous, uniformly white suburb, would raise a real constitutional question. But in cases not involving Negroes or the poor, courts will hesitate to enforce the separate-but-equal rule rigorously.” (emphasis added) (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967))). However, the Court has typically applied rational basis review when adjudicating disparate spending, even if it has the effect of harming poor or indigent persons, unless another fundamental right is implicated. See, e.g., *Harris v. McRae*, 448 U.S. 297, 323–24 (1980) (applying rational basis review to uphold a limitation on Medicaid reimbursement under the equal protection clause, notwithstanding finding “the principal impact . . . falls on the indigent,” in part because “this Court has held repeatedly that poverty, standing alone, is not a suspect classification”); *Maher v. Roe*, 432 U.S. 464, 470–71 (1977) (“[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.”). But see *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (applying strict scrutiny to hold unconstitutional Virginia’s poll tax because “wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is . . . too fundamental to be so burdened”). When pursuing a claim under education clauses, arbitrary discrimination on the basis of socioeconomic status may nonetheless be a violation, as discussed in this Note.

The court limited its remedy to expenditures on teachers' salaries and required that per-pupil expenditures on teachers' salaries be equalized within five percent of the median.<sup>119</sup> This was to ensure that the remedy mandated the equalization of resources that have a "direct bearing on the quality of a child's education,"<sup>120</sup> which, in the court's view, includes class sizes and teachers' experience. The court treated teacher experience as a proxy for quality,<sup>121</sup> and limited these expenditures in part to ensure "either that experienced teachers be distributed uniformly among the schools in the system or that some offsetting benefit be given to those schools which are denied their fair complement of experienced teachers,"<sup>122</sup> such as additional teachers or assistants in the classroom, smaller class sizes, or additional tutors.<sup>123</sup>

Similarly, *Rodriguez v. Los Angeles Unified School District* emphasized an equitable distribution of qualified teachers.<sup>124</sup> The parties agreed to a consent decree, beginning in 1992 and ending in 2005, that required Los Angeles Unified School District (LAUSD) to "equalize the per pupil allocation and expenditure of basic norm resources among all of the District's regular schools" based on the number of students enrolled at that school.<sup>125</sup> The consent decree acknowledged that much of the funding disparities between schools in LAUSD resulted from higher salaries paid to experienced teachers, who often transferred to better LAUSD schools.<sup>126</sup> Existing union contracts would limit LAUSD's ability to equalize teacher funding, but the parties agreed that LAUSD "'would find alternate sources' to raise funding levels and improve the performance of teachers at the poorer schools."<sup>127</sup>

Unfortunately, the consent decree did not meet expectations: After 2002, LAUSD fell \$71.5 million short of the expected supple-

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<sup>119</sup> *Id.* at 863–64.

<sup>120</sup> *Id.* at 863.

<sup>121</sup> *See id.* at 854 n.19 ("[I]t remains beyond denial that, other factors equal, experience is a real asset for a teacher . . . [T]he initial few years of teaching make an enormous contribution to a teacher's competence.").

<sup>122</sup> *Id.* at 855.

<sup>123</sup> *Id.* at 862 n.28.

<sup>124</sup> The consent decree had "the goal[s] of (1) equalizing resources, teacher experience and training among [district] schools; (2) providing all students with maximum access to experienced, well-trained teachers; and (3) mitigating the consequences of limited teacher experience and training." *Rodriguez v. L.A. Unified Sch. Dist.*, No. B192039, 2007 WL 1990233, at \*1 (Cal. App. Dep't Super. Ct. July 11, 2007).

<sup>125</sup> *Id.* at \*1 n.1 (quoting from the 1992 consent decree).

<sup>126</sup> *Id.* at \*1 (summarizing the 1992 consent decree). For an explanation of the role that teacher salaries play in intradistrict inequity, see *supra* notes 59–67 and accompanying text.

<sup>127</sup> *Rodriguez*, 2007 WL 1990233, at \*1 (quoting and summarizing the 1992 consent decree).

mental resource allocation, and “at least 15 percent of the supplemental funds [that were allocated] were misspent” because the district did not advise schools to use the funds “to mitigate the harm of having inexperienced or less qualified teachers.”<sup>128</sup> In 2005, on the eve of the consent decree’s expiration, the plaintiffs filed to extend it for an additional five years. Despite finding that LAUSD failed to meet the funding requirements of the consent decree, the appellate court refused to extend it, in part because appellants waited too long to file for an extension and it was “no longer fair or just” to force LAUSD to fulfill both the consent decree and No Child Left Behind.<sup>129</sup>

Since *Hobson* and *Rodriguez*, intradistrict school funding has not been litigated. There are two possible explanations for this. For one, the remedies of these cases were limited to teacher expenditures, an important but ultimately insufficient change in school funding. More importantly, most districts and social scientists had limited data about actual expenditures within districts until recently.<sup>130</sup> For these reasons, litigants may have believed that interdistrict litigation would lead to the greatest improvements for the largest number of students. The greater availability of this data and evidence that intradistrict inequity has not been fixed by interdistrict litigation create an opening for future litigants to address intradistrict inequity.

### C. Weighted Student Funding

In the past twenty years, several districts—mostly large urban areas—have attempted to reform their school funding systems with weighted student funding (WSF). Some districts have implemented it with the explicit goal of improving intradistrict equity, others with the goals of decentralizing control of resource spending or improving

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<sup>128</sup> *Id.* at \*2–3.

<sup>129</sup> *Id.* at \*4. The No Child Left Behind Act of 2001 (NCLB) reauthorized the Elementary and Secondary Education Act and imposed new education regulations on state and local governments, primarily through conditional grants. The court was likely motivated in part by concerns about the cost of compliance with NCLB. When the court reviewed the consent decree, the state of Connecticut and the Commonwealth of Virginia, for example, estimated their annual compliance costs to be \$17 million and \$20 million, respectively. See generally DAN LIPS & EVAN FEINBERG, HERITAGE FOUND., THE ADMINISTRATIVE BURDEN OF NO CHILD LEFT BEHIND 1 (2007), <http://www.heritage.org/education/report/the-administrative-burden-no-child-left-behind> (analyzing the administrative costs forced on states by the federal government).

<sup>130</sup> See Carr et al., *supra* note 40, at 36 (“Most studies of equity in school finance analyze spending at the district level.” (citations omitted)); Christopher C. Klein, *Intradistrict Public School Funding Equity, Community Resources, and Performance in Nashville, Tennessee*, 34 J. EDUC. FIN. 1, 5 (2008) (analyzing school-level expenditures and noting that “[o]ddly, this is not done on a regular basis,” rather “[o]verall school-district expenditures are tracked . . . in broad categories across all schools”). However, increased data collection under the ESSA will likely improve data accessibility.

transparency.<sup>131</sup> Most existing WSF programs have fallen short of eliminating disparities, but some improvements may help districts and states to reduce resource disparities between schools.<sup>132</sup>

Districts' WSF programs can vary significantly—they may use WSF for different funding streams, concern themselves with different student characteristics, or use different names. However, WSF programs tend to have a few common characteristics. Rather than relying on a centralized pool of money distributed by position, districts implementing WSF allocate a certain amount of money to each school that it can use to fund its various expenses. The amount of funding is typically based on school size and/or student characteristics.<sup>133</sup> The student characteristics for which schools receive additional funding vary by district and state, but typically include low-SES students, ELL students, students with disabilities, and gifted students.<sup>134</sup> Most districts further differentiate base weights on the basis of grade, in part to account for varied class size requirements.<sup>135</sup>

### 1. New York Fair Student Funding

The New York City Education Department (NYCED) has adopted the Fair Student Funding (FSF) program, a form of WSF, with an equity goal based on the “weighted students” in each school population.<sup>136</sup> The expressed goal reflects comprehensive equity,

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<sup>131</sup> JAY CHAMBERS ET AL., AM. INSTS. FOR RESEARCH, A TALE OF TWO DISTRICTS: A COMPARATIVE STUDY OF STUDENT-BASED FUNDING AND SCHOOL-BASED DECISION MAKING IN SAN FRANCISCO AND OAKLAND UNIFIED SCHOOL DISTRICTS 3 (2008).

<sup>132</sup> See *infra* Part III (recommending best practices for WSF and noting common failures and areas of improvement).

<sup>133</sup> See EDUC. RES. STRATEGIES, TRANSFORMING SCHOOL FUNDING: A GUIDE TO IMPLEMENTING STUDENT-BASED BUDGETING (SBB) 6 (2014), <https://www.erstrategies.org/cms/files/2752-transforming-school-funding-student-based-budgeting-guide.pdf> (defining student-based budgeting, also known as weighted student funding); Lawrence J. Miller, Three Essays Examining the Relationship Between Public Budgeting Policies, Resource Equity and Student Outcomes 47 (Aug. 2009) (unpublished Ph.D. dissertation, Syracuse University), [http://surface.syr.edu/ppa\\_etd/1/](http://surface.syr.edu/ppa_etd/1/).

<sup>134</sup> Adjustments for student characteristics are not exclusive to WSF; all states make funding adjustments for at least some student characteristics, even if they are only employed for district-level allocations. See JESSE LEVIN ET AL., AM. INSTS. FOR RESEARCH, EVALUATION OF HAWAII'S WEIGHTED STUDENT FORMULA: HIGHLIGHTED FINDINGS 1–2 (2013) (“The current investigation found that there are 15 states . . . that address all five of these factors in their state funding mechanisms and zero states that provide no supplemental funding across any of these categories.”); Miller, *supra* note 134, at 47.

<sup>135</sup> See, e.g., CHAMBERS ET AL., *supra* note 132, at 19 (“[T]he weights for grades K-3 are higher than those for grades 4 and 5 because California’s class size reduction requirement for grades K-3 require more teachers, and therefore greater resources, for the lower grades.”).

<sup>136</sup> See N.Y.C. DEP’T OF EDUC., FAIR STUDENT FUNDING & SCHOOL BUDGET RESOURCE GUIDE FY 2016, at 13 (2016), [http://schools.nyc.gov/offices/d\\_chanc\\_oper/budget/dbor/allocationmemo/fy15\\_16/FY16\\_PDF/FSF\\_Guide.pdf](http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/allocationmemo/fy15_16/FY16_PDF/FSF_Guide.pdf) (explaining the major

stating that “[s]chool budgeting should fund students adequately, . . . [and] [d]ifferent students have different educational needs, and funding levels should reflect those needs as best as possible.”<sup>137</sup>

The NYCED formula begins with the same foundation grant for all schools and then calculates the number of “weighted students” in the school, using weights for a number of characteristics, including grade level, poverty, ELL status, special education, and school characteristics.<sup>138</sup> NYCED uses a weight for poverty only until fourth grade, after which additional weight is instead allocated on the basis of test scores, with students receiving 0.25 or 0.35 for being “below” grade level and 0.40 or 0.50 for being “well below” grade level.<sup>139</sup> These weights are a stark increase from the pre-fourth grade poverty weight of an additional 0.12.<sup>140</sup>

The NYCED program addresses inequitable funding resulting from position-based teacher funding by budgeting each school based on the FSF calculation and pulling the actual salary cost from those budgets.<sup>141</sup> When schools hire more experienced teachers, they have fewer funds remaining from which to hire other teachers.<sup>142</sup> When schools hire less experienced teachers, they are able to use the saved funds elsewhere.<sup>143</sup> Although it is too soon to know the effects this will have on New York City’s distribution of teachers, evidence from Houston’s WSF program indicates that it could lead “to a redistribution of both spending and teacher qualifications away from low cost and toward high cost schools.”<sup>144</sup>

## 2. *San Francisco WSF*

San Francisco also adopted WSF with a goal of improving equity and increasing school autonomy. San Francisco starts its school budgets with the WSF amount, then adds categorical funds and any

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goals of Fair Student Funding (FSF)). As with other districts implementing weighted student funding, NYCED also expressed an interest in improving student achievement, increasing budget transparency, and empowering schools. *Id.*

<sup>137</sup> *Id.* at 13.

<sup>138</sup> *Id.* at 14, 16. The formula also provides additional weight for middle school, high school, students who are not at grade-level proficiency, and portfolio schools. *Id.*

<sup>139</sup> *Id.* at 18–20.

<sup>140</sup> *Id.* at 20.

<sup>141</sup> *Id.* at 58. NYCED will provide additional funding to schools to account for collective bargaining raises. *Id.* at 59.

<sup>142</sup> *Id.* at 60.

<sup>143</sup> *Id.*

<sup>144</sup> Miller, *supra* note 134, at 51 (describing the effects of Houston’s switch to using “actual salaries instead of average salaries when budgeting for special revenue fund compensated teachers” and permitting schools “to keep the difference between the district average salary and each teacher’s actual salary, if that difference is positive”).

additional funds for which the school is eligible.<sup>145</sup> Like New York City, San Francisco allocates additional weight based on student characteristics, including low socioeconomic status (0.09), ELL status (ranging from 0.0605 to 0.2070), and students with disabilities (ranging from 0.097 to 0.0315).<sup>146</sup>

### 3. *Problems with New York City and San Francisco*

Although noble attempts, the NYCED and San Francisco weighted student funding programs fall short of achieving comprehensive equity. The weights provided by the formulae for low-SES students are significantly lower than what is recommended by research. San Francisco adds a weight of only 0.09 for low-income students,<sup>147</sup> whereas researchers recommend additional weight of 0.6 to 1.0.<sup>148</sup> NYCED adds only 0.12.<sup>149</sup> San Francisco has not been able to adequately address the issue of teacher positions, a significant source of intradistrict inequity. San Francisco continues to use average position costs, rather than actual costs, in budgeting “because of potential political tensions with the teachers’ union, administrative and privacy challenges, and a concern that principals might discriminate against more ‘expensive’ veteran teachers.”<sup>150</sup>

#### D. *Relationship with Proposed Reforms*

These cases and reforms provide the existing framework under which reformers should seek to improve intradistrict equity. Plaintiffs should apply their states’ interdistrict jurisprudence to enforce those standards at the school level, as further discussed in Section III.A. Ideally, policymakers and courts alike should promote comprehensive

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<sup>145</sup> CHAMBERS ET AL., *supra* note 132, at vi.

<sup>146</sup> *See id.* at 19 (charting the numerical weights allocated to various student characteristics).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*; Miller, *supra* note 134, at 58 (“[C]ost estimates for educating students living in poverty have suggested these costs to be between 160 percent to more than 200 percent of the funding level required for a student without special needs.” (citation omitted)).

<sup>149</sup> N.Y.C. DEP’T OF EDUC., *supra* note 137, at 20. Notably, even the New York Regents “recommended [total] weightings for low-income students ranging from 1.5 to 2.0, depending on the concentration of poverty in the district.” Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 66 (N.Y. 2006) (Kaye, J., concurring in part and dissenting in part). This was in contrast to a separate study conducted by Standard & Poor’s that recommended a total weight of 1.35 but conceded that “insufficient empirical evidence exist[ed] in New York to determine how much additional funding is actually needed for different categories of students with special needs to consistently perform at intended achievement levels.” *Id.* (quoting STANDARD & POOR’S SCH. EVALUATION SERVS., RESOURCE ADEQUACY STUDY FOR THE NEW YORK STATE COMMISSION ON EDUCATION REFORM 8–9 (2004)).

<sup>150</sup> CHAMBERS ET AL., *supra* note 132, at vii.

equity, which addresses the weaknesses of pure equity or pure adequacy frameworks. One method of doing so is improving current experiments in WSF programs with the best practices discussed in Section III.B.

### III

#### PROMOTING INTRADISTRICT EQUITY

As more inequitable districts are identified through more widely available data,<sup>151</sup> families, courts, and policymakers should act to improve comprehensive equity. Section III.A uses Connecticut's jurisprudence to demonstrate one way plaintiffs could build a case against states and districts with inequitable intradistrict funding and craft remedies that improve intradistrict equity by focusing on the school and all inputs that affect education. Section III.B examines ways that WSF programs could be improved to better promote comprehensive equity.

##### *A. Extending Interdistrict Decisions to Intradistrict Litigation*

As Section II.A explained, intradistrict school funding remains an under-litigated area compared to interdistrict school funding. This Note proposes that future litigants and courts apply existing interdistrict equity and adequacy jurisprudence to facts derived at the school level to promote intradistrict equity. Even though the evidence and remedies of previous cases most directly implicate district-level funding failures, dicta and holdings in those cases framed in terms of student need can be applied to combat intradistrict inequity as well. Although an imperfect and costly solution, intradistrict litigation could be a powerful tool for aggrieved students and their families to force states and districts to reevaluate their funding formulae and direct additional funds to the schools most in need.

Intradistrict school finance litigation is likely to pose new challenges for plaintiffs. Districts and states will likely reassert "local control" arguments and argue that adjudicating and dictating how districts allocate funding is an inappropriate encroachment by the courts into a political matter. In interdistrict cases, however, many courts have rejected these arguments—holding both that school funding schemes must conform to state constitutions and that the state

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<sup>151</sup> See, e.g., *Expenditure Per Pupil Rankings*, OHIO DEP'T EDUC., <http://education.ohio.gov/Topics/Finance-and-Funding/Finance-Related-Data/Expenditure-and-Revenue/Expenditure-Per-Pupil-Rankings> (last updated Nov. 22, 2016) (describing Ohio's publication of school-level financial data).

is responsible for local actors' failures to do so.<sup>152</sup> Additionally, given the smaller set of data points in most districts compared to states, it may be more challenging for plaintiffs to show an unconstitutional disparity in funding.<sup>153</sup> Finally, case law directly regarding intradistrict funding is sparse, and plaintiffs will need to convince courts to apply their previous rulings to disparities within district boundaries.<sup>154</sup>

Plaintiffs must establish several claims to successfully challenge school funding. First, they must establish that constitutional claims regarding school funding are justiciable. Second, the plaintiffs must offer a theory as to intradistrict funding requirements under the state's education clause. Third, the plaintiffs will need to show school funding fails to meet the state's standard—be it equity, adequacy, or comprehensive equity—within the district or districts being challenged. Finally, plaintiffs must propose a remedy suitable under the state's jurisprudence. In crafting a successful remedy, courts should require states and districts to (1) implement rational processes to create funding policies that conform with state constitutional standards, (2) track allocations and expenditures at the school level, and (3) increase the transparency of school budgets.

### 1. *Justiciability of School Funding*

The question of justiciability has been settled in most states through interdistrict litigation. Unfortunately, states that have held interdistrict funding disparities to be nonjusticiable are unlikely to reverse course in an intradistrict case,<sup>155</sup> but a majority of state courts have considered school funding cases on the merits. Opponents to school funding litigation argue primarily that (1) altering education

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<sup>152</sup> See, e.g., *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 343 (N.Y. 2003) (“[T]he State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights.”).

<sup>153</sup> See *infra* Section III.A.3 (discussing the magnitude of disparity necessary to successfully challenge school funding).

<sup>154</sup> See *infra* Section III.A.2 (discussing the extension of interdistrict court rulings to the intradistrict context).

<sup>155</sup> See, e.g., *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996) (dismissing case as nonjusticiable and finding that “the legislature has been vested with enormous discretion by the Florida Constitution to determine what provision to make for an adequate and uniform system of free public schools”); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996) (declining to review school funding under Illinois's education clause because “[i]t would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution”). *But see* Bauries, *supra* note 75, at 746–49 (finding nearly one-third of state supreme courts reviewing education finance adequacy cases have dismissed the cases on separation of powers grounds, but all state courts which find individual rights or state duties in the state education clause “ha[ve] engaged in or approved merits adjudication at some level”).

funding is beyond the core capacities of the court systems, and (2) education is a predominantly local concern and should remain subject to local control.<sup>156</sup> Nonetheless, most state courts have found constitutional school funding claims justiciable.<sup>157</sup>

## 2. *Defining State Education Clause Requirements*

Plaintiffs bringing intradistrict funding lawsuits must propose a school funding standard under the state constitution that will bring relief to the schools disadvantaged by funding disparities. This standard, if it is to be successful, should be guided by the interdistrict cases within that state, along with decisions in other states interpreting similar education clauses.<sup>158</sup> Unfortunately, this limits what can be demanded in most cases to the same equity or adequacy standard found in the state's interdistrict cases, as opposed to the more desirable comprehensive equity standard.<sup>159</sup> An adequacy state, for example, would likely only require that a district allocate "adequate" funding to its schools. Nonetheless, intradistrict adequacy litigation is important for ensuring schools receive the resources allocated to the district in compliance with the standards for that state. Where state courts have not already, they should endeavor to define educational adequacy or equity in detail. Doing so is likely to reduce future litiga-

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<sup>156</sup> See William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 924–26 (2011) (summarizing the debate between proponents of school funding litigation and others who question the validity and efficacy of litigation).

<sup>157</sup> As of 2010, twenty-six states' highest courts had considered school finance cases on adequacy grounds; eighteen of those states (roughly two-thirds) had permitted judicial review on the merits, although eleven of those courts did not allow the court to construct the remedy. See Bauries, *supra* note 75, 741–44. A current summary of all school finance litigation published by the Center for Educational Equity at Teachers College shows that courts in twenty-seven states have granted a plaintiff victory on the merits in at least one case; in five states, no cases have been filed. *Summary of School Funding Court Cases*, SCHOOLFUNDING.INFO, <http://schoolfunding.info/litigation-map/> (last visited Oct. 21, 2017).

<sup>158</sup> Most state courts that have ruled in favor of plaintiffs have considered others states' school funding decisions. See, e.g., Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell (*Conn. Coal. I*), 990 A.2d 206, 245–47 (Conn. 2010) (first citing Campaign for Fiscal Equity, Inc. v. State (*CFE I*), 655 N.E.2d 661 (N.Y. 1995); then citing Claremont Sch. Dist. v. Governor, 703 A.2d 1353 (N.H. 1997); and then citing Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (Ky. 1989)).

<sup>159</sup> Connecticut case law, in building on the adequacy standard established in *CFE II* and Connecticut's past decisions to develop a comprehensive equity standard, may set an example for courts seeking to adopt a comprehensive equity standard. See *supra* notes 107–11 and accompanying text.

tion by guiding the legislature's policy formulation and avoiding multiple rounds of litigation.<sup>160</sup>

This definition must then be applied to the intradistrict context. Most school finance decisions imposing standards on the state under the state education clause standards phrase the requirements in terms of the school level. New York and Connecticut, for example, do not call for the *average* school in a district to have essential components. Rather, they require that the state provide the funding necessary for *schools* themselves to provide the requisite education to their students.<sup>161</sup> These holdings place the mandate directly on their respective states and districts alike to ensure that *all* students, not merely the "average" student or school within each district, receive the resources necessary to attain an equal and adequate education. These rulings thus lay the groundwork for future cases to mandate that states enact policies to ensure school-level funding meets the same standards already required of districts in these states. It cannot be that a student attending an under-resourced school is less deprived merely because it is other students in the same district, rather than across arbitrary district lines, who receive greater resources.

### 3. *Establishing the District's Failure to Meet This Standard*

Litigants must then establish the state's failure to ensure constitutional levels of intradistrict funding. The evidence necessary to succeed in an intradistrict litigation case will inevitably vary by state—and its courts' interpretation of its education clause, focus on inputs or outputs, and relative deference to the legislature's discretion. Historically, school-level budget data was often difficult to acquire to identify and build a case. However, as more districts report school-level spending, rather than district-level categorical spending, litigants are better able to demonstrate disparities in school allocations.<sup>162</sup>

In building their cases, plaintiffs rely primarily on two types of evidence: (1) disparities in funding inputs and (2) disparities in educational outcomes. Courts typically discuss both inputs and outputs in

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<sup>160</sup> See Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2252–53 (2003) (describing multiple lengthy rounds of litigation in Ohio and Alabama, resulting from the courts' "vague command[s]").

<sup>161</sup> See, e.g., *Conn. Coal. I*, 990 A.2d at 253 ("[T]he state, through the local school districts, must provide *students* with an objectively 'meaningful opportunity' to receive "an education suitable to give them the opportunity to be responsible citizens . . . , progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy." (emphasis added)); *CFE I*, 655 N.E.2d at 666 ("*Children* are also entitled to minimally adequate teaching . . ." (emphasis added)).

<sup>162</sup> See *supra* note 54 (describing Ohio's publication of school-level financial data and ESSA's new reporting requirements).

dicta, analyzing them for equity, adequacy, or both.<sup>163</sup> The level of disparity or inadequacy necessary to invalidate the funding system will vary by state, but most interdistrict decisions favoring plaintiffs have come after a showing of large disparities between districts.<sup>164</sup> Connecticut's recent case measured high disparities in both inputs and outcomes,<sup>165</sup> and state policy may lead to similarly egregious differences at the intradistrict level. At the time of *Hobson*, for example, the disparity in teacher expenditure per pupil between schools west of Rock Creek Park and other schools in the district ranged from 24.3% to 26.7%, depending on the year.<sup>166</sup>

#### 4. Remedies

It is not enough to find a violation of its education clause. To ensure real change, the court must prescribe a remedy. In the interdistrict context, some courts have hesitated to prescribe comprehensive remedies, often citing concerns about judicial capacity or deference to the legislature.<sup>167</sup> In some states, this has led to a long cycle of litiga-

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<sup>163</sup> See, e.g., *Conn. Coal. for Justice in Educ., Inc. v. Rell (Conn. Coal. II)*, No. X07HHDCV145037565S, 2016 WL 4922730, at \*15 (Conn. Super Ct. Sept. 7, 2016) (analyzing money received by Connecticut districts); *id.* at \*19–20 (analyzing student outcomes in Connecticut districts, including standardized test results, school grades, and graduation rates); *Campaign for Fiscal Equity, Inc. v. State (CFE II)*, 801 N.E.2d 326, 328 (N.Y. 2003) (“To determine whether the State actually satisfied that standard the court then reviewed the various necessary instructional ‘inputs’ . . . . The trial court further held that the ‘outputs’ . . . likewise reflected systemic failure and . . . [a] constitutional violation.”).

<sup>164</sup> E.g., *Hobson v. Hansen*, 327 F. Supp. 844, 846 (D.D.C. 1971) (“Through use of a generous *de minimis* rule or of a relaxed justification doctrine, or simply in the name of institutional comity, courts will tolerate a high degree of inequality-producing play, and delay, in the joints of the educational system.” (quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967))); *CFE II*, 801 N.E.2d at 350 (“New York City schools have the *most* student need in the state and the *highest* local costs yet receive some of the *lowest* per-student funding and have some of the *worst* results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts.”).

<sup>165</sup> The court found that only eight percent of high school students in Hartford were college and career ready, versus eighty-six percent in Darien. *Conn. Coal. II*, 2016 WL 4922730, at \*19. In the state's poorest municipalities, nearly thirty-three percent of high school students fall below basic levels in reading and math. *Id.* The differences start early—nearly one-third of students in Connecticut's poorest communities fall below “the most basic reading levels under [the Connecticut Mastery Test],” Connecticut's test for students in grades 3 through 8, but less than ten percent of students in Connecticut's richest communities fail to reach that level. *Id.* at \*14. In the 2016–2017 fiscal year, the state's poorest districts received \$5.3 million less funding, while an *additional* \$5.1 million was allocated to wealthier towns. *Id.* at \*15.

<sup>166</sup> *Hobson*, 327 F. Supp. at 849 n.7.

<sup>167</sup> See REBELL, *supra* note 78, at 49 (noting that “[m]ost of the courts that have invoked the ‘political question’ doctrine in declining to accept jurisdiction . . . have done so after focusing on the courts’ limitations but without” considering if the other branches will face any fewer institutional difficulties).

tion, as states and plaintiffs learn the standard's parameters through trial-and-error. But students are granted positive educational rights through their state constitution, and state judges are empowered to ensure these rights are provided by the other branches of government.<sup>168</sup> Judges serve both students and the other branches of government best when they delineate clear standards and prescribe reforms or a process the government must follow. Moreover, comprehensive remedies combining the efforts of all three branches of government help to combat the short-term focus many elected officials maintain in pursuit of reelection and to overcome political malfunctions that may favor wealthier families and students.<sup>169</sup>

In a state whose constitution requires comprehensive equity, as Connecticut does, the court should require the state and districts to allocate to each school similar per-pupil funding to schools at or above a level sufficient to provide an adequate education. This would include adjustments that would grant additional funding for special characteristics, including low-SES, ELL, disabilities, and gifted, along with adjustments for grade-level and class-size requirements. The court should apply these notions to all funding streams related to a student's education, broadly defined. Although *Hobson* and *Rodriguez* claimed to have such a focus, applying their rulings only to teacher expenditures ignored the many other components that affect student outcomes. Instead, courts should apply their ruling more broadly to at least include all "teachers, facilities and instrumentalities of learning," reflecting the social science research in recent decades demonstrating the myriad of inputs which affect student learning.<sup>170</sup>

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<sup>168</sup> *Id.* at 46–48 (rebutting criticisms of "judicial activism" in school finance cases). In particular, Rebell notes that criticisms of "judicial activism" are particularly inappropriate at the state court level, because state supreme court judges "are usually drawn from the local political elite, [and] are well aware of the legal and political environment of the state scene." *Id.* at 46. A majority of states use elections or retention elections for their state judges, further reinforcing state judges' democratic imprimatur. See *id.* at 47–48. State court cases also do not have the same federalism concerns that were at play when *federal* judges decided the school desegregation cases, which prompted early pejorative use of the phrase "judicial activism." *Id.* at 46.

<sup>169</sup> See *id.* at 50–55 (describing the shortcomings of purely legislative remedies).

<sup>170</sup> See, e.g., Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 340 (N.Y. 2003) (stating that plaintiffs presented sufficient evidence to establish a causal link between "the present funding system" and poor student outcomes, by showing that increased funding can provide better "teachers, facilities and instrumentalities of learning"); Luke M. Cornelius, *Do State Constitutional Provisions Concerning Education Establish a Judicially Enforceable Standard?: Point*, in 6 SCHOOL FINANCE 167, 171 (William E. Thro ed., 2012) ("In many recent cases, . . . courts have been able to determine with great accuracy fiscal and program deficiencies such as inadequate classroom materials, insufficient media resources, and unmet capital needs. Even in the more difficult areas of

In addition to articulating the standard required by the state's education clause,<sup>171</sup> courts should prescribe certain process steps to meet these standards. This gives the court a manageable mechanism by which to judge compliance, but still appropriately allocates policymaking to the executive and legislative branches. First, the court should mandate that the state undertake a rational and publicly articulated process to determine the cost of providing an equitable and adequate education to all of its students. This may require funding a costing-out study,<sup>172</sup> or relying on existing expert literature. Then the court should require that the state enact a funding formula—or other method of allocating funding—that is rationally based on these determinations and traces the funding to the school level (thus addressing the intradistrict inequities).<sup>173</sup> The court should also require the state to implement accountability mechanisms that enable the court and constituents to monitor the state's success in meeting the constitutional standard, such as reporting requirements for financial inputs, student populations, and student outcomes.<sup>174</sup>

Particularly if the court's prescribed remedy gives the other branches significant latitude in developing policy, the court may also wish to retain jurisdiction to review the state's reforms, rather than wait for new litigation challenging the reforms. This would give the court a chance to review policy changes to ensure they are reasonably designed to address all aspects of the court remedy without plaintiffs having to bring a new case. Michael Rebell proposes that courts follow the three-stage process for review developed by the Fifth Circuit in *Castañeda v. Pickard*.<sup>175</sup> Under this framework, the court retains the responsibility to (1) “ascertain that a school system is pur-

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educational curricular and program quality, courts can increasingly rely on well-established and reliable methods of fiscal analysis such as ‘costing-out’ studies.”).

<sup>171</sup> See *supra* Section III.A.2.

<sup>172</sup> Costing-out studies “aim to determine objectively the amount of funding needed to provide . . . an adequate education.” Michael A. Rebell, *Adequacy Cost Studies: Perspectives on the State of the Art*, 1 EDUC. FIN. & POL'Y 465, 466 (2006); see also *infra* notes 181–86 and accompanying text (describing costing-out studies). Traditionally, courts have not ordered a specific methodology for these studies. REBELL, *supra* note 78, at 65.

<sup>173</sup> See, e.g., *Conn. Coal. for Justice in Educ., Inc. v. Rell (Conn. Coal. II)*, No. X07HHDCV145037565S, 2016 WL 4922730, at \*12 (Conn. Super. Ct. Sept. 7, 2016) (“[I]f the legislature can adopt principles and then ignore them—the state cannot be said to have a formula at all . . . . The General Assembly may have the power to decide how much to spend on education, but the state cannot afford to misallocate it or hide its spending priorities from scrutiny.”).

<sup>174</sup> See, e.g., *CFE II*, 801 N.E.2d at 348 (requiring that the reforms “ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education”).

<sup>175</sup> See MICHAEL A. REBELL, *COURTS & KIDS* 70–71 (2009) (citing 648 F.2d 989 (5th Cir. 1981)).

suing a program informed by an educational theory” that “experts in the field” consider “sound” or “a legitimate experimental strategy,” (2) determine whether the school system’s programs “are reasonably calculated to implement effectively” the adopted “educational theory,” and (3) review the program’s results after “a period of time sufficient to give the plan a legitimate trial” to determine if the program is still appropriate.<sup>176</sup> The last step of this process encourages continued experimentation—if the initial funding system enacted by the state or district fails to improve the situation, the state or district will not maintain the ineffective system simply because it already has judicial approval. Nonetheless, the power to choose specific policies remains in the hands of the executive and legislative branches.

Litigation is a less ideal approach to improving intradistrict equity than is a comprehensive policy solution pursued through legislation or new district policies. Litigation is costly and time consuming; successful education finance litigation often takes ten or more years. Second, many states’ precedents from interdistrict school funding do not mandate comprehensive equity, whereas state legislatures would be free to impose a funding scheme that does promote comprehensive equity. Moreover, even when successful, litigation ultimately requires the legislature and school districts to make policy choices to comply with the court’s standards. For this reason, policymakers<sup>177</sup> should seek to alleviate intradistrict inequity through changes in funding formulae and budget processes, both at the state and district level, even if not mandated by court order. However, in many states and districts, policymakers and wealthy constituents are reluctant to shift funding to more impoverished schools because they perceive it as taking resources from other (often wealthier) students. Thus, litigation remains an important option to force policymakers to take a constitutional approach to school funding.

### B. Policy Solutions

One potential policy solution is implementing weighted student funding (WSF).<sup>178</sup> As discussed in Part II, WSF programs can vary significantly and, thus far, many have not achieved the goal of com-

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<sup>176</sup> *Castañeda*, 648 F.2d at 1009–10.

<sup>177</sup> School budgets involve numerous policymakers, including legislators, state executive branch members, and local school districts. Because the division of labor and authority varies significantly by state and district, this Note uses the general term “policymakers” to refer to all officials with authority over school budgets.

<sup>178</sup> See Miller, *supra* note 134, at 201 (“Weighted Student Funding is associated with a reduction in the achievement gap between low cost and high cost schools in the seventh largest school district in the country [Houston].”).

prehensive equity. However, WSF could be a tool for continued improvement by incorporating the following best practices: (1) Weights should be tied to appropriate student characteristics and sufficiently high to redistribute teacher resources, and (2) WSF should be used to set all or nearly all of the school budget.

The problem of intradistrict inequity is most concerning in schools with high populations of low-SES and minority students. To address this issue, states and school districts must ensure that any WSF program includes weights allocating additional resources to schools with low-SES students, ideally at a level commensurate with recommendations by social scientists.<sup>179</sup> Additional weights should be added for ELL students, students with disabilities, and gifted students. One study has estimated that students living in poverty require between 111% and 215% of the same funding levels as other students.<sup>180</sup> There is less certainty about the appropriate weights for ELL students, but some studies suggest low-SES weights may reduce the amount of weight needed for ELL students in many schools.<sup>181</sup> Gifted students typically require lower weights, as the concern is not that additional resources are *needed* to meet the state standard; rather, additional funding exists to provide “pullout services or classes, which are separate from the general student population.”<sup>182</sup>

Cost estimates for an adequate education are important guides as districts establish finance policies to promote comprehensive equity.<sup>183</sup> Two of the primary costing methods include: (1) input-oriented methods, or estimating from empirical studies that measure the effect of different “inputs,” such as smaller class sizes; and (2) output-oriented methods, or estimating from the cost of resources used in

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<sup>179</sup> *Post-Parents Involved*, courts apply strict scrutiny to the allocation of governmental burdens or benefits based on individual racial classifications, including in the school context. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). Because high populations of low-SES students often overlap with high populations of minority students, low-SES could be used as a rough proxy to address the funding disparities that afflict both low-SES and minority populations.

<sup>180</sup> William Duncombe & John Yinger, *How Much More Does a Disadvantaged Student Cost?*, 24 *ECON. EDUC. REV.* 513, 530 (2005).

<sup>181</sup> See Miller, *supra* note 134, at 58–59 (“There appears to be one consistent finding across all studies, the bigger the low-income weight used, the smaller the weight that [ELL] students require. For example . . . with a weight of between 36 percent and 115 percent for low-income students, no additional [ELL] student weight may be needed.”).

<sup>182</sup> *Id.* at 59–60.

<sup>183</sup> BRUCE BAKER & JESSE LEVIN, AM. INSTS. FOR RESEARCH, EDUCATIONAL EQUITY, ADEQUACY, AND EQUAL OPPORTUNITY IN THE COMMONWEALTH: AN EVALUATION OF PENNSYLVANIA’S SCHOOL FINANCE SYSTEM v (2014), [http://www.air.org/sites/default/files/downloads/report/AIR-EEAEO in the Commonwealth - Full Report 10-09-14.pdf](http://www.air.org/sites/default/files/downloads/report/AIR-EEAEO%20in%20the%20Commonwealth%20-%20Full%20Report%2010-09-14.pdf) (“School finance policies are more likely to achieve equal educational opportunity or adequacy when guided by cost estimates.”).

high-performing schools that include high-cost populations.<sup>184</sup> In both cases, social scientists use regression analysis to estimate the appropriate weights for different student characteristics and school size.<sup>185</sup> However, any costing method is going to be an estimate at best. Districts and states should continue to monitor students' outcomes and adjust weights and base amounts as more data is acquired.<sup>186</sup>

When it is used, WSF often only allocates one-half to two-thirds of the district's budget, limiting the equalizing power of WSF, as centralized funding may still be distributed in inequitable ways.<sup>187</sup> For example, if WSF is used solely to allocate administrative and custodial budgets, but teacher salaries and special programs are allocated in the traditional manner, few improvements can be expected. In contrast, WSF will most directly address the issues discussed in this Note if it is used to allocate funding for programs directly impacting students' educations—in particular, teacher salaries, special programs, and administrative positions, such as guidance counselors and assistant principals. Building maintenance and other needs that do not change significantly based on student population could continue to be allocated based on the school needs. To maximize equity and autonomy for high-need schools, districts using WSF should apply it to as much of the total budget as is feasible.

### CONCLUSION

The American public school system faces many challenges, and increased funding is not itself a panacea. However, students in the United States will not truly have equal educational opportunities until schools receive the resources they need to provide them. Policymakers should implement new school funding systems that allocate funding on the basis of student characteristics, in particular low-SES students. To this end, students, families, and groups in districts with high levels

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<sup>184</sup> See *id.* at 30 (explaining the methodological distinction between input-oriented and output-oriented analyses). For a useful explanation of the components that go into an outcome-based education cost function, see *id.* at 32–37. It is worth noting that, at this point in time, many districts do not rely on these methods used by social scientists, relying instead “on a political process to determine which cost factors to weight and to decide the magnitude with which to weight each factor.” Miller, *supra* note 134, at 61. Although some political process is necessary to choose the characteristics which will be weighted, the weights should be set using the best evidence available, to ensure that weighted student formulae promote comprehensive equity.

<sup>185</sup> See William D. Duncombe & John Yinger, *Measurement of Cost Differentials*, in HANDBOOK OF RESEARCH, *supra* note 89, at 238–41 (explaining education cost functions).

<sup>186</sup> Additionally, where possible, policymakers should provide additional funding to account for the additional strain placed on schools with high concentrations of students with special characteristics.

<sup>187</sup> Miller, *supra* note 134, at 52, 65.

of intradistrict inequity should build on interdistrict funding jurisprudence to force legislatures to implement such school funding reforms.