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## **Persistent Inequalities, the Pandemic, and the Opportunity to Compete**

Rachel F. Moran

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# Persistent Inequalities, the Pandemic, and the Opportunity to Compete

Rachel F. Moran\*

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### I. Introduction

Even before the recent coronavirus pandemic, race, ethnicity, and socioeconomic status played a powerful role in allocating opportunity—in the public schools and elsewhere.<sup>1</sup> The pandemic has laid bare the dimensions of this inequality with a new and alarming clarity.<sup>2</sup> In this essay, I first will focus on the landscape of educational inequity that existed before the coronavirus forced public schools to shut down. In particular, I will explore patterns of racial and ethnic segregation in America’s schools and how those patterns are linked to additional challenges based on socioeconomic isolation. In addition, I will consider the role of language and immigration status in shaping educational opportunity. As I will explain, children with the greatest educational need often attend schools with the fewest resources, thus compounding disadvantage.<sup>3</sup>

Next, I will explore how the pandemic has exacerbated existing inequities.<sup>4</sup> I will show how the switch to remote learning has intensified patterns of segregation and isolation by confining

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1. See AMERICAN PSYCH. ASS’N, EDUCATION AND SOCIOECONOMIC STATUS (July 2017), <https://www.apa.org/pi/ses/resources/publications/education> (discussing how children from a lower socioeconomic background develop academic skills more slowly and attend schools with fewer resources than children from comparatively higher socioeconomic backgrounds) [perma.cc/BZE8-AG4E].

2. See Richard Rothstein, *The Coronavirus Will Explode Achievement Gaps in Education*, ECON. POL’Y INST.: WORKING ECON. BLOG (Apr. 14, 2020), <https://www.epi.org/blog/the-coronavirus-will-explode-achievement-gaps-in-education/> (“The COVID-19 pandemic will take existing academic achievement differences between middle-class and low-income students and explode them.”) [perma.cc/8PJH-C2YB].

3. See *id.* (“Schools with concentrated populations of children affected by serious socioeconomic problems are able to devote less time and attention to academic instruction.”).

4. See *id.* (noting how children from low-socioeconomic backgrounds have fewer resources such as consistent internet access, which is necessary for online schooling during the pandemic).

students to homes that are readily identifiable by race, ethnicity, poverty, and other indicia of disadvantage.<sup>5</sup> As a result, the burdens of shifting to online learning have not fallen equally on all students.<sup>6</sup> On the contrary, already disadvantaged children have faced the most obstacles to engaging in remote learning.<sup>7</sup> At the same time, schools that serve these students generally have had less in the way of resources to respond to the abrupt school closures.<sup>8</sup> As a result, these schools have struggled to ensure that students can access the curriculum and engage with teachers.<sup>9</sup>

Finally, I will offer some observations about the appropriate way to address academic setbacks that undoubtedly have occurred due to the pandemic. Parents and guardians already have filed suit challenging the uneven switch to online learning that occurred in spring 2020.<sup>10</sup> Other lawsuits are sure to follow. In all likelihood, these actions will turn on claims that students were denied a right to education, whether because they suffered an absolute deprivation of education, did not receive an adequate education, or were denied an equal education. The success of these arguments will depend on how courts evaluate inputs, including technological support, curricular content, and one-on-one access to teachers.<sup>11</sup>

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5. *See id.* (“When measured by race and ethnicity, the gap [in resources] is greater for African American and Hispanic families.”).

6. *See id.* (“[T]oo many students in low-income and rural communities don’t have internet access: 35% of low-income households with school-aged children don’t have high-speed internet . . .”).

7. *See* Rothstein, *supra* note 2 (showing how parents with less education are more likely to be working in-person despite the pandemic, which precludes them from spending time assisting their children with at-home schooling).

8. *See, e.g., id.* (explaining how the Philadelphia school system initially forewent online instruction because some students lacked internet access and how efforts to give Chromebooks to students failed to solve the problem).

9. *See id.* (stating the Philadelphia school system continues to struggle to address the internet inequalities of its students).

10. *See generally* Class Action Complaint for Injunctive and Declaratory Relief, *Shaw v. L.A. Unified Sch. Dist.*, Case No. 20STCV36489 (Cal. Super. Ct. Sept. 24, 2020) [hereinafter *Shaw Class Action Complaint*]; *see also generally* Complaint for Injunctive and Declaratory Relief, *Cayla J. v. California*, Case No. RG20084386 (Cal. Super. Ct. Nov. 30, 2020) [hereinafter *Cayla J. Complaint*]. Both suits emphasize the school closures’ adverse impacts on low-income students of color.

11. Nina Agrawal, *California is Failing to Provide Free and Equal Education to All During Pandemic, Suit Alleges*, L.A. TIMES, <https://www.latimes.com/california/story/2020-12-01/parents-community-groups->

Also critical will be the weight that courts attach to outputs, as measured by learning losses during the school closures.<sup>12</sup> When courts make these determinations, I argue that they should consider whether children have a meaningful opportunity to compete with their peers, given pre-pandemic inequities and pandemic-related learning losses.

## *II. Persistent Inequalities: Race, Ethnicity, Class, Language, and Immigration*

The coronavirus pandemic did not usher in inequalities in American education; instead, it revealed fault lines by race, ethnicity, and class that already existed.<sup>13</sup> These differences in educational access and opportunity have been mutually reinforcing, as students of color disproportionately find themselves in schools isolated by poverty.<sup>14</sup> For some students, language and immigration status pose additional challenges to benefiting from

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sue-state-education-officials-over-inadequate-distance-learning (“The lawsuit filed against the state Monday demands appropriate access to computing devices and technology; ‘effective remote instruction that is substantially equivalent to in-person instruction’ and meets minimum instructional times; academic and mental health supports for students; and a plan for a return to in-person instruction.”) [perma.cc/V3F4-NRZX].

12. See *id.* (reporting that one lawsuit alleges the closures have caused “enormous learning losses”).

13. See Rothstein, *supra* note 2 (“The academic achievement gap has bedeviled educators for years.”). Disability also is a significant source of unequal educational opportunity, and school closures during the pandemic have prompted lawsuits alleging violations of the Individuals with Disabilities Education Act. See Anya Kamenetz, *Families of Children with Special Needs Are Suing in Several States. Here’s Why*, NPR (July 23, 2020, 7:30 AM), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why> (telling the stories of multiple parents who have children with special needs, such as Autism, and how they are facing the new educational challenges posed by the pandemic) [perma.cc/TR54-B5PT]. However, these issues are beyond the scope of this Article.

14. See Janie Boschma & Ronald Brownstein, *The Concentration of Poverty in American Schools*, THE ATLANTIC (Feb. 29, 2016), <https://www.theatlantic.com/education/archive/2016/02/concentration-poverty-american-schools/471414/> (“In almost all major American cities, most African American and Hispanic students attend public schools where a majority of their classmates qualify as poor or low-income, a new analysis of federal data shows.”) [perma.cc/NGP7-FYGX].

the curriculum.<sup>15</sup> These disparities have persisted despite decades-long efforts to rectify them.<sup>16</sup>

*A. Race, Ethnicity, and the Intransigence of Segregation in the Schools*

In 1954, in *Brown v. Board of Education*,<sup>17</sup> the United States Supreme Court declared that “[s]eparate educational facilities are inherently unequal.”<sup>18</sup> That iconic language did not succeed in putting an end to racially identifiable schools because of wavering enforcement efforts.<sup>19</sup> In 1955, *Brown II*<sup>20</sup> refrained from aggressively implementing the mandate to desegregate public schools.<sup>21</sup> Instead, the Court embraced the gradualism of “all deliberate speed.”<sup>22</sup> As a result, federal courts tolerated considerable foot-dragging before Southern school districts had to take meaningful steps to integrate.<sup>23</sup> It would be another decade

15. See Kristin Lam & Erin Richards, *More US Schools Teach in English and Spanish, But Not Enough to Help Latino Kids*, USA TODAY, <https://www.usatoday.com/in-depth/news/education/2020/01/06/english-language-learners-benefit-from-dual-language-immersion-bilingual-education/4058632002/> (last updated May 23, 2020, 8:27 PM) (“Roughly 3.8 million students in U.S. schools are native Spanish-speakers who are not proficient in English . . . Sixty-seven percent of students with limited English skills graduated high school after four years in 2016, compared with 84% of all students . . .”) [perma.cc/AQ9M-EPZ5].

16. See Rothstein, *supra* note 2 (arguing that the 2001 No Child Left Behind Act “failed to fulfill its promise”).

17. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that the state-mandated segregation of public schools deprives children of equal protection of the laws as guaranteed by the 14th Amendment).

18. *Id.* at 495.

19. See Sonya Ramsey, *The Troubled History of American Education After the Brown Decision*, PROCESS HIST. (Feb. 9, 2017), <https://www.processhistory.org/american-education-after-brown/> (detailing the efforts by Southerners to resist the Supreme Court’s decision in *Brown*) [perma.cc/SUA8-NGL2].

20. *Brown v. Bd. of Educ.*, 349 U.S. 294, 296 (1955).

21. See *id.* at 299 (describing the implementation process as a “period of transition”).

22. *Id.* at 301.

23. See, e.g., HAROLD W. HOROWITZ & KENNETH L. KARST, LAW, LAWYERS, AND SOCIAL CHANGE: CASES AND MATERIALS ON THE ABOLITION OF SLAVERY, RACIAL SEGREGATION AND INEQUALITY OF EDUCATIONAL OPPORTUNITY 239–40 (Bobbs-

before Congress and the Executive Branch began to step up enforcement efforts in the South.<sup>24</sup>

In the North and West, school districts did not always operate under official segregation laws.<sup>25</sup> In determining whether students could demand an end to segregated schools, the Court made clear that remedies were available only when school officials acted with an intent to discriminate.<sup>26</sup> However, patterns of segregation due to private choices about where to live would not be a basis for judicial intervention.<sup>27</sup> As a result, in urban districts, predominantly white suburban schools that had not engaged in discriminatory acts were not obligated to participate in busing orders.<sup>28</sup> Without that participation, core city schools remained readily identifiable by race and ethnicity.<sup>29</sup>

Even in school districts subject to desegregation mandates, those orders eventually drew to a close after school systems were declared unitary.<sup>30</sup> A finding of unitary status would stand, even if

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Merrill 1969) (reporting that in seven of eleven Southern states, only 2.14% of Black students attended desegregated schools in the 1964–65 academic year, leading to “frustrat[ion] in the vindication of their rights”).

24. See GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 45–46, 355–61 (1st ed. 1969) (describing the significance of federal enforcement efforts that began in the 1960s to the meaningful desegregation of Southern schools).

25. See *Keyes v. Sch. Dist. No. 1, Denver*, 413 U.S. 189, 213 (1973) (finding prima facie elements of unlawfully segregated schools in Denver, Colorado).

26. See *id.* at 198–203 (describing remedies available to the plaintiffs).

27. See *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434–36 (1976) (concluding that there was no basis for judicial intervention to maintain racial balance if the enrollment shifts were due to demographic shifts rather than school board violations).

28. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 750 (1974) (holding that the actions done with segregative intent in one school district did not justify a desegregation plan applied to multiple districts).

29. See GARY ORFIELD AND SUSAN E. EATON, *THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 63–71 (The New Press 1996) (warning of the dismantling of desegregation through the persistence of racially identifiable schools with unequal curricula and disparate achievement outcomes).

30. See generally *Bd. of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89 v. Dowell*, 498 U.S. 237 (1991) (holding that a desegregation order was meant to be a temporary remedial measure, which could be terminated if a school district had complied in good faith and eliminated the vestiges of past discrimination to the extent practicable); *Freeman v. Pitts*, 503 U.S. 467, 490 (1993) (permitting the district court to gradually phase out its supervisory actions of the school district).

public schools subsequently resegregated.<sup>31</sup> Local officials who wanted to preserve or promote racially integrated schools had few options in the absence of a court order.<sup>32</sup> In 2007, in *Parents Involved in Community Schools v. Seattle School District*,<sup>33</sup> the Court struck down voluntary integration plans, even when race was only one factor in school assignments, received modest weight, and was used to promote diversity in the student body.<sup>34</sup> The upshot was that even as court-ordered desegregation came to an end, voluntary integration plans weighing race in individual student assignments were constitutionally forbidden.

Not surprisingly, then, in 2020, the Economic Policy Institute found that segregation remained a fact of life for most Black and Latinx students in the public schools.<sup>35</sup> Over 69% of Blacks, but only 13% of whites, attended schools with enrollments of 51-100% students of Color.<sup>36</sup> In 2019, education professor Bruce Fuller and his colleagues found that Latinx students' ethnic isolation had increased in the late 1990s and 2000s.<sup>37</sup> In 1998, the average

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31. See *Freeman*, 503 U.S. at 495 (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”).

32. Nikole Hannah-Jones, *Lack of Order: The Erosion of a Once-Great Force for Integration*, PROPUBLICA (May 1, 2015), <https://www.propublica.org/article/lack-of-order-the-erosion-of-a-once-great-force-for-integration> [perma.cc/9FCA-68PJ].

33. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, 551 U.S. 701, 747–748 (2007) (holding the school districts' use of racial classification in student assignment plans was unjustified),

34. See *id.* at 735 (“Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.”).

35. See Emma García, *Schools Are Still Segregated, and Black Children Are Paying a Price*, ECON. POL'Y INST. (Feb. 12, 2020), <https://www.epi.org/publication/schools-are-still-segregated-and-black-children-are-paying-a-price/> (“Well over six decades after the Supreme Court declared ‘separate but equal’ schools to be unconstitutional in *Brown v. Board of Education*, schools remain heavily segregated by race and ethnicity.”) [perma.cc/9MME-JUJ3].

36. See *id.* at 2 fig.A (showing the percentages of white and Black eighth-graders attending schools with a high concentration of students of Color).

37. See Bruce Fuller, Yoonjeon Kim, Claudia Galindo, Shruti Bathia, Margaret Bridges, Greg J. Duncan, & Isabel Garcia Valdivia, *Worsening School Segregation for Latino Children?*, 48 EDUC. RESEARCHER 407, 407 (2019) (“Overall,



Latinx kindergartner was in a school in which four out of ten classmates were white, while in 2010, only three out of ten were white.<sup>38</sup> Fuller and his colleagues attributed part of this change to an overall increase in the Latinx population and a decline in the white population.<sup>39</sup> However, the researchers also believed that Latinx families were migrating in substantial numbers to new communities, and upon arrival, they often settled in predominantly Latinx communities.<sup>40</sup>

### *B. The Intersection of Race, Ethnicity, and Poverty*

The deeper significance of these patterns of racial and ethnic segregation for Black and Latinx students becomes evident only when considered in conjunction with data on socioeconomic status.<sup>41</sup> For Black students, intense patterns of racial segregation have been compounded by high levels of socioeconomic isolation.<sup>42</sup> In 2020, the Economic Policy Institute found that over 70% of Black children attended high-poverty schools, those with 51% to 100% of the students receiving free or reduced-price lunch, while just over 30% of white students did.<sup>43</sup> The statistics were even more striking when comparing students who attended low-poverty, mostly white schools and students who attended high-poverty, mostly non-white schools.<sup>44</sup> Only 3.1% of Black students went to low-poverty, mostly white schools, while nearly one-fourth of

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we find intensifying segregation of Latino children from White peers among schools in districts that enroll at least 10% Latino pupils; this set against already high levels of racial isolation.”).

38. *Id.* at 413, 416.

39. *See id.* at 409, 414–15 (finding that Latinx students make up a rising share of the school population but home language, household income, and parental education significantly influence patterns of segregation as well).

40. *See id.* at 408 (“[T]he average Latino resident was less likely to see a White neighbor in 2010, compared with 1980 . . .”).

41. *See* García, *supra* note 35 (explaining that racially segregated schools reflect and reinforce socioeconomic segregation).

42. *See id.* at 4 (stating how some Black students are disadvantaged in two ways: Race and poverty).

43. *Id.* at 2 fig. B.

44. *See id.* at 3 fig.C (“Black children are highly likely to be in high-poverty schools with a high share of students of color, but white children are not.”).

whites did.<sup>45</sup> By contrast, only 8.4% of whites attended high-poverty, mostly non-white schools compared to 60% of Black students.<sup>46</sup> These attendance patterns correlated with achievement gaps: Black students who went to high-poverty, mostly non-white schools performed more poorly on math tests than Black students who went to low-poverty, mostly white schools.<sup>47</sup>

According to Fuller and his colleagues, the relationship between ethnic segregation and socioeconomic isolation for Latinx students has been a complicated one.<sup>48</sup> Even as Latinx grew more segregated from whites, they grew less isolated by class.<sup>49</sup> In 1998, Latinx kindergartners attended schools in which, on average, four in ten students were not eligible for free and reduced price lunches.<sup>50</sup> By 2010, that figure had risen to five in ten.<sup>51</sup> This meant that Latinx children increasingly were in classrooms with fewer white but more middle-class Latinx peers.<sup>52</sup> Fuller and his colleagues attributed this trend to migration and resettlement patterns, as working-class and middle-class families alike chose to live in predominantly Latinx communities.<sup>53</sup> Alternatively, the finding could reflect declining wealth among the Latinx middle

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45. *Id.*

46. *See* García, *supra* note 35, at 3 fig.C (comparing the racial gap in attending a high-poverty school with a large share of students of Color).

47. *Id.* at 3 (“When [B]lack children have the opportunity to attend the same schools that white children routinely attend, [B]lack children perform markedly better on standardized math tests . . .”).

48. *See* Fuller et al., *supra* note 37, at 407 (“Yet little is known empirically about recent trends in levels of racial and economic segregation that confront Latino children at entry to elementary school.”).

49. *See id.* at (finding “intensifying segregation of Latino children from White peers among schools in districts that enroll at least 10% Latino pupils,” but low-income children were “increasingly [likely to] attend school with middle-class peers over the 1998 to 2010 period.”).

50. *Id.* at 412 tbl.1 (showing changes in racial segregation in schools offering free or reduced-price meals)

51. *Id.* (same).

52. *See id.* at 413 tbl.2 (charting the increase).

53. *See id.* at. 414–15 (“To the extent that low-income Latino families migrate into middle-class communities, this helps to explain improving economic integration.”).

class during and after the Great Recession, forcing families to move to less affluent neighborhoods.<sup>54</sup>

As the researchers noted, the changing pattern of Latinx enrollments gives rise to an interesting but still unanswered question: Will socioeconomic integration yield achievement gains for Latinx students in the same way that racial integration once did for Black students?<sup>55</sup> Other studies raise some doubts about the durability of the trend identified by Fuller and his colleagues.<sup>56</sup> Recent demographic research by Amelie Constant and Douglas S. Massey indicates that in the South, a region that recently experienced high levels of Latinx migration, patterns of not only concentrated disadvantage but also concentrated affluence are emerging.<sup>57</sup> That development could mean that, over time, Latinx—much like their white counterparts—grow increasingly segregated from each other by socioeconomic class, reflecting widening divides in wealth and income.<sup>58</sup>

That said, assessing the benefits of socioeconomic integration is an urgent task, given that the Court has permitted school boards to use this tool, even as voluntary plans based on race and ethnicity are constitutionally suspect.<sup>59</sup> In turning to socioeconomic

54. See Fuller, et al., *supra* note 37, at 415 (“The net worth of Latino households fell from \$23,600 to \$13,700 (42%) between 2007 and 2013 . . .”).

55. See *id.* at 417 (“[T]he independence of economic integration vis-à-vis racial integration offers encouraging news for Latino families in some locales.”).

56. See AMELIE F. CONSTANT & DOUGLAS S. MASSEY, *LATINOS IN THE SOUTHERN UNITED STATES: TRENDS AND PATTERNS* 48–49 (Princeton Univ. Off. of Population Rsch. 2019) (noting that the spatial concentration of Latinx poverty in the South rose in the 1980s, was flat or intensified in the 1990s, and only began to decline in 2000; meanwhile, the concentration of Latinx affluence fell during the 1980s and 1990s and then began to rise in 2000).

57. See *id.* at 49–50 (“affluent Latinos are able to use their income, occupational, and educational attainments to gain access to more advantaged neighborhoods . . .”).

58. See *id.* at 56 (analyzing how, as Latinx-white segregation declines, affluent Latinos become more segregated from impoverished populations). Fuller and his colleagues note this pattern of growing economic segregation in the United States, “as affluent Americans increasingly reside in exclusive enclaves.” Fuller, *supra* note 37, at 410.

59. See ERICA FRANKENBERG, *INTERCULTURAL DEV. RSCH. ASS’N, USING SOCIOECONOMIC-BASED STRATEGIES TO FURTHER RACIAL INTEGRATION IN K-12 SCHOOLS* 4–5 (Feb. 2018) (describing how federal guidelines on school desegregation released in 2011 advised schools that “a variety of socioeconomic factors” could be considered); Sean Reardon & Lori Rhodes, *The Effects of Socioeconomic School Integration Policies on Racial School Desegregation*, in

integration, local officials hope that the plans will indirectly improve the racial and ethnic diversity of school populations.<sup>60</sup> Yet, administrators also anticipate that these plans will offer independent advantages as middle-class students of any race or ethnicity become a resource for children from less privileged backgrounds.<sup>61</sup> So far, relatively few school districts have attempted to use class-based integration plans.<sup>62</sup> Moreover, these plans have not always yielded benefits on a par with racial integration.<sup>63</sup> So, it remains unclear whether socioeconomic integration is a politically viable or educationally productive alternative to racial desegregation.

*C. Additional Dimensions of Difference: Language and Immigration Status*

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INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 187, 187–89 (Erica Frankenberg & Elizabeth DeBray eds., 2013) (noting the use of race in school assignment plans “is no longer legally permissible in most cases. However, because socioeconomic status does not create a protected class under the 14th Amendment, the use of individual socioeconomic status in school assignment plans is legally permissible”).

60. See FRANKENBERG, *supra* note 59, at 14 (assessing efforts to use socioeconomic integration plans to achieve racial diversity in schools); Reardon & Rhodes, *supra* note 59, at 187 (describing the claim that “socioeconomic integration will produce racial desegregation as a by-product, given the strong correlation between race and socioeconomic status in the United States”).

61. See RICHARD D. KAHLBERG, HALLEY POTTER & KIMBERLY QUICK, THE CENTURY FOUND., A BOLD AGENDA FOR SCHOOL INTEGRATION (2019) (citing evidence that “reducing socioeconomic segregation in our schools by half would produce a return on investment of three to five times the cost of the programs”).

62. See Reardon & Rhodes, *supra* note 59, at 189–90 (noting at the time of their study, districts with socioeconomic integration plans accounted for “roughly one-quarter of one percent of all districts in the United States”); RICHARD D. KAHLBERG, THE CENTURY FOUND., SCHOOL INTEGRATION IN PRACTICE: LESSONS FROM NINE DISTRICTS (2016) (stating 100 school districts and charter schools were pursuing socioeconomic integration). To put these figures in context, there were 13,588 public school districts in 2010–2011, according to the National Center for Education Statistics. NAT’L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS, *Table 98: Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869–70 Through 2010–11*, [nces.ed.gov/programs/digest/d12/tables/dt12\\_098.asp](https://nces.ed.gov/programs/digest/d12/tables/dt12_098.asp) [perma.cc/6D7P-XY8U].

63. See Reardon & Rhodes, *supra* note 59, at 202–03 (arguing that two-thirds of districts using socioeconomic integration plans adopted “weak mechanisms” that had “little or no impact on racial or socioeconomic segregation patterns”).

Some students of color attend schools that serve not only a disproportionate number of low-income students but also substantial numbers of English language learners (ELLs) and immigrant children, especially undocumented students.<sup>64</sup> Recent studies have shown that ELLs cluster in schools that are racially and ethnically identifiable and isolated by poverty.<sup>65</sup> According to a 2017 Economic Policy Institute report by Martin Carnoy and Emma García, over 55% of Latinx ELLs went to a school in which 75% or more students were Black or Latinx, while just 3.3% of white students did.<sup>66</sup> Similarly, over 55% of Latinx ELLs enrolled in a school in which more than 75% of the student body qualified for free or reduced price lunch.<sup>67</sup> That compared to only 6.9% of white students.<sup>68</sup> Some commentators have referred to this phenomenon as the “triple” segregation of Latinx students by ethnicity, poverty, and language.<sup>69</sup>

ELLs face special challenges in gaining access to the curriculum, despite the United States Supreme Court’s landmark 1974 decision in *Lau v. Nichols*,<sup>70</sup> sometimes characterized as the *Brown v. Board of Education* for English language learners.<sup>71</sup> After

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64. See MARTIN CARNOY & EMMA GARCÍA, ECON. POL’Y INST., FIVE KEY TRENDS IN U.S. STUDENT PERFORMANCE 16 (2017) (Black and Latinx students were more likely to attend schools segregated by race and poverty; the pattern was even more intense for Latinx ELLs).

65. See *id.* at 16–17 (most Latinx ELLs attend a high-poverty school as well as a high-minority school).

66. See *id.* at 22 tbl.3c (showing the share of eight-grade mathematics students attending schools with varying concentrations of poor students categorized by race, ethnicity, and level of poverty).

67. See *id.* (same).

68. See *id.* (same).

69. See Janie Tankard Carnock & April Ege, *The “Triple Segregation” of Latinos, ELLs: What Can We Do?*, NEW AM. FOUND. (Nov. 17, 2015), <https://www.newamerica.org/education-policy/edcentral/latinos-segregation/> (“Access [to high-performing schools] largely depends on where a family can afford to live . . . So, students of color—both Latinos and African Americans—often face a ‘double segregation’ along racial and socioeconomic lines . . . . But, a third form of segregation is largely unique to Latinos: *linguistic* isolation.”) (italics in original) [perma.cc/B7S8-4FKN].

70. See *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that the school system’s failure to provide assistance to Chinese-speaking students denied meaningful opportunity to participate in public educational programming in violation of the Civil Rights Act of 1964).

71. See Patricia Gandara, Rachel Moran, & Eugene Garcia, *Legacy of Brown*:

*Lau*, educators retained significant discretion to choose among pedagogical approaches that promise to afford ELLs access to the curriculum.<sup>72</sup> As controversies over teaching methodologies persisted,<sup>73</sup> stark achievement gaps between ELL students and their English-proficient peers brought home the ongoing difficulties.<sup>74</sup> In a study that looked at trends from 1996–2003 and 2003–2013, Carnoy and García found that even as achievement gaps in reading and mathematics between Latinx non-ELLs and whites narrowed significantly after controlling for socioeconomic status, the substantial gaps between Latinx ELLs and whites widened.<sup>75</sup> In 2009, in *Horne v. Flores*,<sup>76</sup> the Supreme Court put these disparities largely beyond the purview of civil rights protection by holding that school districts have no obligation under

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*Lau and Language Policy in the United States*, 28 REV. OF RES. IN EDUC. 27, 29–30 (2004) (contrasting *Brown* with *Lau*).

72. See *Lau*, 414 U.S. at 565 (declining to mandate a particular method of instruction). Shortly after the *Lau* decision, Congress codified the Court’s approach in the Equal Educational Opportunities Act (EEOA) of 1974, which required only that school districts take “appropriate action” to rectify language barriers. 20 U.S.C. § 1703(f). The Fifth Circuit Court of Appeals adopted a highly influential three-part test that reinforced this commitment to flexibility. See *Castaneda v. Pickard*, 648 F.2d 989, 1009–10 (5th Cir. 1981) (finding school districts could comply with the EEOA by showing that they had adopted a sound educational theory, had made reasonable efforts to implement it, and had monitored the results).

73. For example, over a decade ago, three states adopted statutes mandating structured English immersion and requiring waivers to use native-language instruction in the classroom. Recently, California and Massachusetts overturned their structured immersion initiatives, but the statute remains good law in Arizona. See Corey Mitchell, ‘English-Only’ Laws in Education on Verge of Extinction, EDUC. WEEK (Oct. 23, 2019), <https://www.edweek.org/ew/articles/2019/10/23/english-only-laws-in-education-on-verge-of.html> (“In the past three years, voters and lawmakers in California and Massachusetts repealed anti-bilingual education laws, leaving Arizona’s as the last one standing.”) [perma.cc/7KGGX-D533].

74. See CARNOY & GARCÍA, *supra* note 64, at 26 (finding that from 2003–2013, “[f]or ELL Asian and Hispanic children, there was essentially no catch-up relative to whites.”).

75. See *id.* (reporting that “the large negative gap between white students and [Hispanic and Asian ELLs] increased”).

76. See *Horne v. Flores*, 557 U.S. 433, 467 (2009) (holding that the Equal Educational Opportunities Act does not require “the equalization of results between native and nonnative speakers on tests administered in English . . .”).

federal law to close the achievement gap between ELLs and their English-proficient peers.<sup>77</sup>

With respect to immigration status, the most vulnerable children are clearly the undocumented. The United States Supreme Court's 1982 decision in *Plyler v. Doe*<sup>78</sup> protects these students' right to attend public elementary and secondary schools.<sup>79</sup> Although some state and local officials have tried to interfere with this right of access, the decision has been remarkably successful in turning school grounds into safe havens for undocumented students.<sup>80</sup> According to sociologist Roberto G. Gonzalez, *Plyler* enabled these children to feel that they were part of America until they began their "transition to illegality" upon graduating from high school.<sup>81</sup> The Deferred Action for Childhood Arrivals (DACA) program addressed this transition in part by providing some protections for undocumented youth to pursue higher education and employment.<sup>82</sup> In 2017, however, the Trump administration rescinded the program, prompting multiple lawsuits.<sup>83</sup> Despite the United States Supreme Court's recent decision rejecting the Trump administration's rescission of the program,<sup>84</sup> DACA protections remain precarious.<sup>85</sup> Moreover,

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77. *Id.*

78. *See Plyer v. Doe*, 457 U.S. 202, 215 (1982) (concluding that the undocumented plaintiffs were entitled to Fourteenth Amendment Due Process protection).

79. *Id.* at 240 ("[T]he exclusion of appellees' class of children from state-provided education is a type of punitive discrimination based on status that is impermissible under the Equal Protection Clause.").

80. MICHAEL A. OLIVAS, *PERCHANCE TO DREAM: A LEGAL AND POLITICAL HISTORY OF THE DREAM ACT & DACA* (NYU Press 2020) (describing unsuccessful state and federal efforts to overturn the Supreme Court's decision in *Plyler*).

81. ROBERTO G. GONZALEZ, *LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA 199–200* (Univ. of Cal. Press 2015).

82. *See* Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Programs of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1923–25 (2019) (explaining that until DACA was established, many beneficiaries were unable to pursue higher education or lawful employment).

83. *See id.* at 1930 (describing President Trump's rescission of the program).

84. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1891 (2020).

85. *See* Michael D. Shear and Caitlin Dickerson, *Trump Delays Efforts to End Protections for Immigrant 'Dreamers'*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/us/politics/trump-daca.html> (discussing the Trump administration's new restrictions on DACA) [perma.cc/SZ6X-J4WN];

Trump's harsh rhetoric about efforts to root out and deport the undocumented left some students feeling unsafe even at school.<sup>86</sup> These students feared, for example, that immigration officers could detain parents when the family was on the way to campus.<sup>87</sup> Those anxieties in turn could disrupt the learning environment at schools serving high numbers of immigrant students.<sup>88</sup>

#### D. Greater Needs, Fewer Resources

Due to ongoing segregation, disadvantaged students often find themselves in public schools that serve a disproportionate number of students of color, low-income students, ELLs, and immigrant students. These schools arguably need more resources to support children who face a variety of obstacles to learning.<sup>89</sup> Yet, these

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Elizabeth Redden, *Trump Administration Rejects New DACA Applications*, INSIDE HIGHER ED (July 17, 2020), <https://www.insidehighered.com/quicktakes/2020/07/17/trump-administration-rejects-new-daca-applications> (explaining that the Trump administration is refusing to accept new applications for the DACA program despite a Supreme Court ruling that required reinstatement of the program) [perma.cc/45QD-CM35]; Caitlin Dickerson and Michael D. Shear, *Judge Orders Government to Fully Reinstates DACA Program*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/us/daca-reinstated.html> (explaining President Trump's attempts to cancel the DACA program) [perma.cc/8UNR-7RHY]. Trump's successor, President Joseph R. Biden has reinstated and sought to strengthen DACA and has sent a comprehensive immigration reform bill to Congress. However, the fate of that bill remains uncertain. Korina Iribe, *For Dreamers, Action Will Speak Louder Than Words*, N.Y. TIMES, Jan. 29, 2021, <https://www.nytimes.com/2021/01/29/opinion/biden-immigration-reform-dreamers.html> [perma.cc/4VT4-FKJ8].

86. See Donna St. George, *Schools Warn of Increased Student Fears Due to Immigration Arrests, Trump Election*, WASH. POST (Dec. 26, 2016), [https://www.washingtonpost.com/local/education/schools-warn-of-increased-student-fears-due-to-immigration-arrests-trump-election/2016/12/26/a4b2b732-c0a7-11e6-b527-949c5893595e\\_story.html](https://www.washingtonpost.com/local/education/schools-warn-of-increased-student-fears-due-to-immigration-arrests-trump-election/2016/12/26/a4b2b732-c0a7-11e6-b527-949c5893595e_story.html) (explaining that attendance among Latino students had fallen due to parents keeping their children home due to deportation fears) [perma.cc/MP4K-7TFK].

87. See *id.* (explaining the schools' efforts to reassure families who were concerned about sending their children to school due to deportation fears).

88. See John Rogers, *School and Society in the Age of Trump*, UCLA INST. FOR DEMOCRACY, EDUC., & ACCESS (Mar. 13, 2019), <https://idea.gseis.ucla.edu/publications/school-and-society-in-age-of-trump/> (explaining the broad social issues in Trump's presidency and their effect on students and educators in America's high schools) [perma.cc/7XCY-MACY].

89. See Ivy Morgan and Ary Amerikaner, *Funding Gaps 2018*, ED TRUST



institutions often have substantially less in the way of funds than schools that serve predominantly white and affluent student bodies.<sup>90</sup> A 2018 study by Ed Trust concluded that districts with high numbers of students of color received \$1,800 less per student than districts with low numbers.<sup>91</sup> In addition, high-poverty districts received \$1,000 less per student than low-poverty districts.<sup>92</sup> A July 2020 study by the Century Foundation reported even starker disparities. That research concluded that school systems with high concentrations of Black and Latinx students had \$5,000 less per pupil to provide needed services compared to school systems with smaller concentrations.<sup>93</sup> In addition, schools with high enrollments of low-income students had to make do with \$6,700 less per pupil than more affluent districts.<sup>94</sup> To put these figures in perspective, the U.S. Census found that in 2018, average per-capita student spending was \$12,612.<sup>95</sup> The Century Foundation also determined that Black students were disproportionately concentrated in poorly funded, low-performing schools, while districts with high Latinx enrollments faced the

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(Feb. 27, 2018), <https://edtrust.org/resource/funding-gaps-2018/> (“School districts that serve large populations of students of color and students from low-income families receive far less funding than those serving White and more affluent students.”) [perma.cc/B5CF-KX6H].

90. *See id.* (explaining the stark difference in funding between schools that serve the largest populations of students of color and those that serve the fewest students of color).

91. *See id.* (stating that school districts serving the largest populations of students of color receive 13% less per student than those serving the fewest students of color).

92. *See id.* (describing the difference between school districts serving the largest populations of students from low-income families and those that serve higher-income students).

93. *See* THE CENTURY FOUND., CLOSING AMERICA’S EDUCATION FUNDING GAPS (2020) (“Nationally, districts with over 50 percent Black and/or Latinx students face a funding gap of more than \$5,000 per pupil on average.”).

94. *See id.* (finding low-income districts are more than twice as likely to have a funding gap as higher income districts, with “[t]he average gap in these districts [being] more than \$6,700 per pupil.”).

95. U.S. CENSUS BUREAU, RELEASE NO. CB20-TPS.21, SPENDING PER PUPIL INCREASED FOR SIXTH CONSECUTIVE YEAR (May 11, 2020), <https://www.census.gov/newsroom/press-releases/2020/school-system-finances.html#:~:text=MAY%2011%2C%202020%20%E2%80%94The%20amount,released%20today%20by%20the%20U.S> (stating the amount spent per pupil for public elementary and secondary school for all 50 states) [perma.cc/Q2CT-7SF6].

largest funding shortfalls.<sup>96</sup> In fact, of the districts studied, the ten with the worst funding disparities were all serving a majority Latinx student body.<sup>97</sup>

Before the pandemic, then, America's public schools remained identifiable by race, ethnicity, poverty, English language proficiency, and immigration status. These patterns concentrated barriers to learning in schools that often were poorly equipped to address them. In particular, these schools typically had fewer resources to address students' needs than those that served an affluent, predominantly white student body. When the coronavirus pandemic hit and schools were forced to close their doors abruptly, these disparities played a role in schools' responses and students' ability to learn.

### *III. The Pandemic and the Intensification of Inequality*

Patterns of segregation that correlate with disparities in school resources clearly predated the pandemic. The pandemic has highlighted the precarity and fragility of disadvantaged children's access to education in unprecedented ways.<sup>98</sup> With the shift to remote learning, a new kind of isolation, confinement to the home, emerged.<sup>99</sup> That separation intensified the experience of

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96. See THE CENTURY FOUND., *supra* note 93 (stating that over 20 percent of children in poorly funded, low performing districts are Black and nearly 40 percent of children in poorly funded, low-performing districts are Latinx).

97. See *id.* ("Among districts of at least 25,000 students (288 districts overall), the ten districts with the largest funding gaps per pupil are all majority Latinx.") (emphasis in original).

98. See Emma García, Elaine Weiss, & Lora Engdahl, *Access to Online Learning Amid Coronavirus Is Far from Universal, and Children Who Are Poor Suffer from a Digital Divide*, ECON. POL'Y INST.: WORKING ECONS. BLOG (Apr. 17, 2020, 11:25 AM), <https://www.epi.org/blog/access-to-online-learning-amid-coronavirus-and-digital-divide/> (explaining that the move to e-learning disadvantages students who do not have the resources they need to learn at home) [perma.cc/4P8B-8EGM].

99. See EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS, & ELLEN VIRULEG, COVID-19 AND STUDENT LEARNING IN THE UNITED STATES: THE HURT COULD LAST A LIFETIME 6 (June 1, 2020), <https://www.mckinsey.com/~media/McKinsey/Industries/Public%20and%20Social%20Sector/Our%20Insights/COVID-19%20and%20student%20learning%20in%20the%20United%20States%20The%20hurt%20could%20last%20a%20lifetime/COVID-19-and-student-learning-in-the-United-States-FINAL.pdf> (noting "the crisis is likely to cause social and

segregation traditionally felt at the neighborhood and school level.<sup>100</sup> Because households typically are racially, ethnically, and socioeconomically homogeneous, the pandemic has deepened dynamics of separate and unequal educational opportunities.<sup>101</sup> Some households are isolated by language and immigration status as well.<sup>102</sup>

At the same time, schools serving the most disadvantaged students confronted new demands on already strained resources.<sup>103</sup> There were significant differences in access to a device and to the internet based on race, ethnicity, and poverty, and districts with limited per-capita student funding found it hard to bridge the digital divide.<sup>104</sup> These schools struggled to ensure connectivity, to put together online learning platforms, to make certain that students were academically engaged, and to track students who simply disappeared from classes during the pandemic.<sup>105</sup> For all of these reasons, the pandemic revealed and worsened inequities that existed before the school closures.

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emotional disruption by increasing social isolation and creating anxiety over the possibility that parents may lose jobs and loved ones could fall ill.”) [perma.cc/T4JX-NKBB].

100. See *infra* notes 106–134 and accompanying text (describing patterns of segregation by race, socioeconomic status, language, and immigration status).

101. See *infra* notes 188–191 and accompanying text (describing compound learning barriers facing disadvantaged children during the pandemic).

102. See Randy Capps, Michael Fix & Jie Zong, *A Profile of U.S. Children with Unauthorized Immigrant Parents* 2016 MIGRATION POL’Y INST. 9 (explaining language isolation and the stress of students with undocumented immigrant parents).

103. See BRUCE D. BAKER AND MATTHEW DI CARLO, ALBERT SHANKER INST., *THE CORONAVIRUS PANDEMIC AND K-12 EDUCATION FUNDING* 10 (April 2020) (districts serving a high proportion of students in poverty had fewer resources to respond to the pandemic than those serving a low proportion of students in poverty).

104. See Natalie Spievack & Megan Gallagher, *For Students of Color, Remote Learning Environments Pose Multiple Challenges*, URBAN INST. (June 23, 2020) <https://www.urban.org/urban-wire/students-color-remote-learning-environments-pose-multiple-challenges> (explaining the various barriers to remote learning students of color face amid the coronavirus pandemic) [perma.cc/EF4J-F’TJF].

105. Emma García & Elaine Weiss, *COVID-19 and Student Performance, Equity, and U.S. Education Policy*, ECON. POL’Y INST. (Sept. 10, 2020), <https://www.epi.org/publication/the-consequences-of-the-covid-19-pandemic-for-education-performance-and-equity-in-the-united-states-what-can-we-learn-from-pre-pandemic-research-to-inform-relief-recovery-and-rebuilding/> (explaining how difficult it is for educators participating in remote learning to ensure students are

*A. Home as a Segregated Space*

The American home is overwhelmingly identifiable by race, ethnicity, and class. According to available data, same-race marriages remain a commonplace even though intermarriage rates have risen in recent decades.<sup>106</sup> According to a 2018 U.S. Census report, the proportion of interracial or interethnic married couples grew from 7.4% to 10.2% between 2012 and 2016.<sup>107</sup> Marriages between Latinx and non-Hispanic white spouses accounted for 40% of these intermarriages, far outpacing the 8% that involved a Black spouse and a white spouse.<sup>108</sup> These differences in part reflect the fact that rates of intermarriage increased dramatically for Latinx who obtained a bachelor's degree, while the same was not true for Blacks.<sup>109</sup> Despite some growth in intermarriage, it remains a relative rarity, though it is considerably more common among Latinx, particularly those who are highly educated.

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engaging with the material) [perma.cc/J4KY-QNG7].

106. See Brittany Rico, Rose M. Kreider & Lydia Anderson, *Race, Ethnicity, and Marriage in the United States: Growth in Interracial and Interethnic Married-Couple Households*, U.S. CENSUS BUREAU (July 9, 2018), <https://www.census.gov/library/stories/2018/07/interracial-marriages.html> (describing the growth in the number of interracial or interethnic couples across the United States) [perma.cc/3VAM-JNLZ].

107. See *id.* (explaining the Bureau's findings on the growth in interracial and interethnic married-couple households from 2000 to 2012–2016).

108. See Brittany Rico, Rose M. Kreider & Lydia Anderson, Examining Change in the Percent of Married-Couple Households that are Interracial and Interethnic: 2000 to 2012–2016, Presented at the Population Association of America (Apr. 26–28, 2018) (examining the change in the percent of married-couple households that are interracial and interethnic). Of the marriages, 14% included a non-Hispanic white partner and an Asian American partner. *Id.* These patterns have led Professor Richard Alba to argue that Latinx and Asian American identities are destabilized through intermarriage. See RICHARD ALBA, *THE GREAT DEMOGRAPHIC ILLUSION: MAJORITY, MINORITY, AND THE EXPANDING AMERICAN MAINSTREAM* 125–33 (2020).

109. See Michael J. Rosenfeld, *Racial, Educational, and Religious Endogamy in the United States: A Comparative Perspective*, 87 SOC. FORCES 1, 14–15 (2008) (explaining that Hispanics born in the United States are the only group whose pattern of ethnic or racial endogamy was dramatically altered by higher education). The odds of exogamy also increased for Asian-Americans with higher education but not so dramatically as for Latinx. *Id.* at 15.

Households also are segregated based on socioeconomic status.<sup>110</sup> Of course, measures of poverty often rely on household income, so by definition, all household members have the same classification.<sup>111</sup> However, there are other ways of evaluating homogeneity of socioeconomic status. For one thing, people tend to marry partners with similar levels of educational attainment.<sup>112</sup> According to the 2011 American Community Survey, 80% of women who dropped out of high school married a man who either dropped out or got a high school diploma.<sup>113</sup> By contrast, 86% of women with a bachelor's degree married a man with some college, a college degree, or an advanced degree.<sup>114</sup> Due to these patterns, men and women with weak labor market prospects often had similarly situated spouses.<sup>115</sup> As a result, it was more likely that both husband and wife would find themselves out of work during an economic downturn as compared to more highly educated couples.<sup>116</sup> Households marked by limited income and education had few buffers against economic adversity.<sup>117</sup>

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110. See generally DIANE B. ELLIOTT & TAVIA SIMMONS, U.S. CENSUS BUREAU, *MARITAL EVENTS OF AMERICANS: 2009* 10 (2011).

111. See *id.* at 11 tbl.3 (identifying households with income levels below the poverty level).

112. See Liana Christin Landivar, *Marital Homogamy and Economic Vulnerability During the Great Recession*, 5 (Census Bureau, Working Paper SEHSD-2012-20) (explaining that marital racial homogony has grown in recent years).

113. Philip N. Cohen, *Educational Endogamy (A Good Princeton Word)*, FAM. INEQ. BLOG (Apr. 4, 2013), <https://familyinequality.wordpress.com/2013/04/04/educational-endogamy/> (describing marital patterns based on educational attainment) [perma.cc/M8VE-3HU2].

114. See *id.* (same).

115. See Landivar, *supra* note 112, at 5-6, 12-14 (explaining that men in managerial and professional occupations were more likely to be married to women with a bachelor's degree).

116. See *id.* at 13-15 (explaining that economic necessity could be a factor in marriage patterns).

117. See *id.* at 16-17 (stating that individuals on the lower end of the socioeconomic spectrum are more likely to be unemployed or out of the labor force). There is also evidence that highly educated individuals marry spouses with privileged social origins, suggesting that in addition to improved income, there may also be increased intergenerational wealth. Christine R. Schwartz, Zhen Zeng, & Yu Xie, *Marrying Up by Marrying Down: Status Exchange between Social Origin and Education in the United States*, 3 Soc. Sci. 1003, 1003-04, 1021-22 (2016).

It is harder to get a sense of linguistic isolation within households. The Census reports on whether U.S. residents speak a language other than English in the home.<sup>118</sup> In 2018, 21.9% fell into this category, more than double the percentage in 1980.<sup>119</sup> However, some states had a much higher proportion of households in which members spoke a language other than English. For California, it was 45%; Texas, 36%; New Mexico, 34%; New Jersey, 32%; New York and Nevada, 31%; Florida, 30%; Arizona and Hawaii, 28%; and Massachusetts, 24%.<sup>120</sup> These statistics do not reveal whether members of these households spoke English as well as another language.<sup>121</sup> In 2018, 38% of those who used a language other than English at home reported that they did not speak English very well.<sup>122</sup> An analysis of language use among the foreign-born also found that in 2012, lack of fluency in English correlated with educational attainment.<sup>123</sup> For example, of those with less than a high school education, 25% said they did not speak English at all compared to just 1.4% of those with a bachelor's degree or higher.<sup>124</sup> Given these data, it seems likely that ELLs in households headed by foreign-born parents with limited education had few opportunities to converse in English with family members.

As for immigration status, families can be heterogeneous. Undocumented youth are likely to be living with undocumented parents or guardians, but a number of citizen-children also have at

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118. See KAREN ZEIGLER & STEVEN A. CAMAROTA, CTR. FOR IMMIGR. STUD., 67.3 MILLION IN THE UNITED STATES SPOKE A FOREIGN LANGUAGE AT HOME IN 2018 (Oct. 29, 2019), <https://cis.org/Report/673-Million-United-States-Spoke-Foreign-Language-Home-2018> (discussing new census data showing that 67.3 million residents in the U.S. now speak a language other than English at home) [perma.cc/9YPS-5UH6].

119. See *id.* (reporting on the rise since 1980 in residents speaking a foreign language at home).

120. See *id.* (detailing percentage increases in states that exceeded the average).

121. See *id.* (noting the limits of the data collected in assessing bilingualism).

122. See *id.* (noting that the census tried to account for fluency by asking individuals to self-report their proficiency in English).

123. See U.S. CENSUS BUREAU, ENGLISH-SPEAKING ABILITY OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2012 (2014) (stating that as level of educational attainment declines, so does the proportion with high English-speaking ability).

124. See *id.* (showing that ELLs in foreign-born households did not speak English as well as their non foreign-born household counterparts).

least one undocumented parent.<sup>125</sup> According to a 2016 Migration Policy Institute report, between 2009 and 2013, there were 5.1 million children, that is, 7% of those under age eighteen, who were living with at least one undocumented parent.<sup>126</sup> As with language, there were important regional differences.<sup>127</sup> In California, for example, 17% of children under age eighteen were living with an undocumented parent between 2009 and 2013 as were 13% in Texas and 10% in Arizona.<sup>128</sup> Nationally, 79% of children with at least one undocumented parent were U.S. citizens, a figure that varied significantly with age.<sup>129</sup> Only 3% below the age of two were undocumented compared to 41% of those between the ages of fifteen and seventeen.<sup>130</sup>

Regardless of citizenship status, children in these households regularly faced challenges associated with poverty and linguistic isolation.<sup>131</sup> Three-quarters were members of families with incomes that met the eligibility requirement to receive free and reduced price school lunch.<sup>132</sup> In addition, 43% of children with at least one undocumented parent lived in homes in which no one over the age of fourteen spoke English very well.<sup>133</sup> Thus, these children often encountered isolation by ethnicity, poverty, and language as well as immigration status, a kind of quadruple segregation.<sup>134</sup> Even when children were themselves legally present in the United States, the threat of a parent's deportation could cause significant anxiety for families.<sup>135</sup> Regardless of their

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125. See Capps et al., *supra* note 102, at 9 (explaining that a large number of children under the age of 18 live with at least unauthorized immigrant parent).

126. *Id.* at 3–4.

127. See *id.* at 8 (examining the geographic distribution of children of immigrants).

128. *Id.*

129. *Id.* at 1.

130. *Id.*

131. See *id.* (describing the notion of linguistic isolation, or living in a household lacking English proficiency among household members ages 14 and older).

132. *Id.* at 6.

133. *Id.* at 5.

134. See *id.* at 11 (summarizing the report's findings regarding risk factors and isolation experienced by children living in immigrant households).

135. See *id.* at 2 (highlighting the additional stress of fear of deportation of their undocumented parent on these children).

own immigration status, youth experienced psychological distress at forced separation from a parent, and the loss of a breadwinner could leave the family in serious financial straits.<sup>136</sup> Although undocumented students often came to see elementary and secondary school as a safe space, learning from home could be disrupted by new fears about increased immigration enforcement, particularly when additional forms of documentation were required to participate in remote learning platforms.<sup>137</sup>

### *B. Barriers to Learning During the Pandemic*

Patterns of isolation in homes marked by concentrated disadvantage have had real consequences when schools moved to remote learning during the COVID-19 pandemic. Studies have consistently shown differences in levels of student engagement in schools with large Black and Latinx enrollments and schools with predominantly white and Asian-American enrollments.<sup>138</sup> One study found that fewer than half of children in schools with predominantly Black enrollments participated in remote instruction compared to 60% to 70% of those in schools with small Black enrollments.<sup>139</sup> Another report concluded that 60% of low-income and 60% to 70% of Latinx students were logging in for online classes compared to 90% of high-income and white

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136. See Silva Mathema, *Keeping Families Together: Why All Americans Should Care About What Happens to Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Mar. 16, 2017), <https://www.americanprogress.org/issues/immigration/reports/2017/03/16/428335/keeping-families-together/> (explaining children whose parents are deported experience serious adverse effects, including psychological trauma, separation of family, and a greater likelihood of experiencing housing insecurity and economic instability) [perma.cc/NKA7-2AVG].

137. See *infra* note 187 and accompanying text (discussing why many undocumented families are reluctant to enroll in internet programs, even free programs, for fear that their information will be exposed to the government).

138. See Matt Barnum & Claire Bryan, *America's Great Remote-Learning Experiment: What Surveys of Parents and Teachers Tell Us About How It Went*, CHALKBEAT (June 26, 2020), <https://www.chalkbeat.org/2020/6/26/21304405/surveys-remote-learning-coronavirus-success-failure-teachers-parents> (noting the disparity in engagement with online instruction between schools serving predominantly white and minority populations) [perma.cc/7JNW-YNJL].

139. *Id.*



students.<sup>140</sup> An analysis of remote learning in Los Angeles Unified School District (LAUSD) reported that when schools first closed, fewer than 50% of Black and Latinx middle-school students participated weekly compared to 68% of their peers.<sup>141</sup> Though participation rates rose for all racial and ethnic groups as the pandemic wore on, a substantial gap remained.<sup>142</sup> By the ninth week of remote teaching in LAUSD, 60% of Black and 61% of Latinx students were participating weekly compared to over 80% of their peers.<sup>143</sup> Even with increasing participation rates, another study of LAUSD concluded that 10.94% of Black students and 16.51% of Latinx students received no online instruction during the school closures compared to 7.8% of white students.<sup>144</sup>

One LAUSD study found that intensity of participation also varied across racial and ethnic groups.<sup>145</sup> While 47% of Asian American and 43% of white middle-school students had high levels of participation when they logged on, only 17% of Black and 15% of Latinx students did.<sup>146</sup> Moreover, there were significant differences in persistence by race and ethnicity over seven or more weeks of online instruction.<sup>147</sup> Eighty-four percent of Asian American middle-school students and 80% of white students received seven or more weeks of instruction, but only 50% of Black

140. DORN ET AL., *supra* note 99, at 5.

141. MEGAN BESECKER & ANDREW THOMAS, L.A. UNIFIED SCH. DIST., STUDENT ENGAGEMENT ONLINE DURING SCHOOL FACILITIES CLOSURES: AN ANALYSIS OF L.A. UNIFIED SECONDARY STUDENTS' SCHOOLGY ACTIVITY FROM MARCH 16 TO MAY 22, 2020 7 (July 2020).

142. *See id.* (describing the disparity across racial lines regarding weekly participation in remote learning).

143. *See id.* (explaining the participation rates of school children in remote learning during the COVID-19 pandemic).

144. SPEAK UP UNITED PARENTS, SPEAK UP SURVEY: REOPENING LAUSD 3 (2020); Kyle Stokes, *Survey: Black, Latino Students in LA Got Fewer Live Video Classes During COVID-19 Campus Closures*, LAIST, [https://laist.com/latest/post/20200629/coronavirus\\_distance\\_learning\\_online\\_teaching\\_black\\_latino\\_survey](https://laist.com/latest/post/20200629/coronavirus_distance_learning_online_teaching_black_latino_survey) (last updated June 29, 2020, 1:07 PM) [perma.cc/MDM4-FQ9K].

145. *See* BESECKER & THOMAS, *supra* note 141, at 13 (showing disparities in the percentages of middle-school students who actively participated in online instruction).

146. *See id.* at 13 (finding schoolchildren from certain racial and ethnic groups participated at higher levels in online learning).

147. *See id.* at 16 (showing the disparity between the amount of online instruction received by students of different races).

and Latinx students did.<sup>148</sup> When students did have access to instruction, it was not always of the same quality.<sup>149</sup> Only 22% of Black, Latinx, and low-income students had lessons on new material compared to 43% of their peers.<sup>150</sup> There were also stark differences in access to teachers with 7.81% of Black students and 14.68% of Latinx students reporting no contact with their teachers compared to 2.43% of white students.<sup>151</sup>

### 1. *The Digital Divide*

The reasons for these differences in access to instruction are manifold. At least part of the disparity appears to be a result of a digital divide in access to technology. Black and Latinx families were more likely to report that they faced technological obstacles to participating in online learning; in this, these families resembled low-income households of any race or ethnicity.<sup>152</sup> One national study described a “homework gap” based on lack of access to a device or an internet connection.<sup>153</sup> According to the findings, 11% of Black students and 18% of Latinx students had no home computer compared to only 9% of white students.<sup>154</sup> The problem was even worse for low-income students with 25% lacking a computer, compared to 11% of middle-income and 4% of

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148. See *id.* (showing the disparity in participation rates between Black and Latinx students and students of other racial and ethnic groups).

149. See Barnum & Bryan, *supra* note 138 (“Even when students were connected and learning, low-income students were more likely to be reviewing material, not learning new concepts . . .”).

150. See *id.* (same).

151. See *id.* (finding low levels of student engagement with teachers during remote instruction).

152. See *id.* (“Over and over, Black and Hispanic students and students from low-income families faced more roadblocks to learning, driven in part by gaps in access to technology and the internet.”).

153. See Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital Homework Gap*, PEW RSCH. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/> (“The ‘homework gap’—which refers to school-age children lacking the connectivity they need to complete schoolwork at home—is more pronounced for black, Hispanic and lower-income households.”) [perma.cc/98NH-STWX].

154. See *id.* (finding disparities in access to necessary resources for participation in remote instruction).

high-income students.<sup>155</sup> Another study reached similar results, finding that nearly 25% of fifth-graders from low-income families lacked access to a computer or other device compared to just 8% of students from higher-income families.<sup>156</sup> These technological barriers in turn affected academic progress.<sup>157</sup> While 13% of white students often or sometimes could not complete their assignments due to lack of a device or internet connection, 25% of Black students and 17% of Latinx students could not.<sup>158</sup> Again, the problems were more significant for low-income students: 24% said they could not finish assigned work because of limited technology compared to 20% of middle-income and 9% of high-income students.<sup>159</sup> In LAUSD, a large urban district serving large numbers of students of color, the figures were even more striking. Overall, 27% of children in the district had no device or connectivity; for low-income students, the rate was an astonishing 50%.<sup>160</sup>

## 2. Household Fragility and Learning Barriers

The digital divide was not the only disparity in resources that affected Black, Latinx and low-income students. Black and Latinx parents were more likely to suffer serious financial reversals due to job loss during the pandemic than were white and Asian American parents.<sup>161</sup> By April 2020, shortly after school closures in response to COVID-19 began, Latinx had the highest

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155. *Id.*

156. García et al., *supra* note 98.

157. See Auxier & Anderson, *supra* note 153 (reporting that minority and low-income students had more trouble completing schoolwork than other students during the pandemic).

158. *Id.*

159. See *id.* (“Teens with an annual family income below \$30,000 were also more likely to say [they were unable to complete assignments because of a lack of reliable access to a computer or internet] than teens with a family income of at least \$75,000 a year.”).

160. HERNAN GALPERIN, ANNENBERG RSCH. NETWORK ON INT’L COMMC’N, COVID-19 AND THE DISTANCE LEARNING GAP 1 (April 19, 2020).

161. See ROGELIO SAENZ & COREY SPARKS, UNIV. N.H. CARSEY SCH. OF PUB. POL’Y, THE INEQUITIES OF JOB LOSS AND RECOVERY AMID THE COVID-19 PANDEMIC 5 (2020) (discussing the racial disparities in the job market caused by the pandemic).

unemployment rate at almost 19% followed by Blacks at 16.4% and whites at 13%.<sup>162</sup> By June, the jobless rate had fallen for all groups, but a gap remained with 14.9% of Blacks, 14.6% of Latinx, and 9.2% of whites unemployed.<sup>163</sup> These disparities reflected steeper job losses for Blacks and Latinx than for whites during the pandemic as well as differential employment rates before the coronavirus struck.<sup>164</sup> Financial insecurities even led some older children to obtain work to supplement the family income, interfering with their schooling.<sup>165</sup>

Low-income households were less able to weather economic hardships that the pandemic visited upon them.<sup>166</sup> In late April

162. *Id.* at 2 (describing the unemployment rate between February and April of 2020).

163. *See id.* at 2–3 (outlining the divide along racial and ethnic lines in unemployment during the COVID-19 pandemic).

164. *See id.* at 5 (comparing the net job loss rates between racial and ethnic groups and finding substantial disparities).

165. Erin Richards, *Coronavirus' Online School Is Hard Enough. What If You're Still Learning to Speak English?*, USA TODAY, <https://www.usatoday.com/in-depth/news/education/2020/05/14/coronavirus-online-classes-school-closures-esl-students-learn-english/5178145002/> (last updated May 23, 2020, 8:39 PM) (“[T]eens are picking up jobs to support their families during the economic crisis, rather than attending classes. Latino students especially are pitching in . . .”) [perma.cc/M366-RWNU]. Additionally, these economic pressures may explain why Black and Latinx students were substantially more likely than white students to report that they were changing their plans for college as a result of the pandemic. *See* Maeve Ward, *What We're Learning: COVID 19 and Education: Notable Findings and Data Sources*, GATES FOUND. (May 26, 2020), <http://k12education.gatesfoundation.org/blog/what-were-learning-covid-19-and-education-notable-findings-and-data-sources/> (“Parents of Black . . . and Latinx . . . students are particularly likely to say their plans for after high school have changed as a result of COVID-19.”) [perma.cc/CU57-7ZDM].

166. *See* Brenda Alvarez, *COVID-19 and the Latino Education Community*, NEA TODAY, NAT'L EDUC. ASS'N (May 11, 2020), <https://www.nea.org/advocating-for-change/new-from-nea/covid-19-and-latino-education-community> (“As the level of students on lunch plans increased . . . educators reported more problems in ensuring continuity of learning.”) [perma.cc/YHG5-XRP6]; *see also* Paloma Esquivel, *A Generation Left Behind? Online Learning Cheats Poor Students, Times Survey Finds*, L.A. TIMES (Aug. 13, 2020), <https://www.latimes.com/california/story/2020-08-13/online-learning-fails-low-income-students-covid-19-left-behind-project> (discussing the unique challenges faced by low income students in light of the pandemic) [perma.cc/R2B5-675B]; *What We're Learning: COVID 19 and Education: Notable Findings and Data Sources*, *supra* note 165 (finding that students experiencing poverty were less likely to attend school districts that had developed specific distance learning

2020, after school closures began, 38% of Black parents, 42% of Latinx parents, and 33% of white parents reported that they had run out of food without money to buy more.<sup>167</sup> By late May and early June, 29% of Black parents, 47% of Latinx parents, and 22% of white parents said that they had faced this kind of food insecurity.<sup>168</sup> The severe deterioration of Latinx families' access to food likely reflects—at least in part—their ineligibility for various forms of assistance based on at least one parent's status as an undocumented immigrant.<sup>169</sup> The hardships were multiplied by differential vulnerabilities to the virus itself.<sup>170</sup> Black and Latinx households were more likely to report that someone in the family had contracted coronavirus during the pandemic than whites were.<sup>171</sup> According to the Centers for Disease Control and Prevention, as of August 18, 2020, Blacks were 2.6 times more

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plans in light of the pandemic); Zoe Kirsch, *New Data Reveal COVID-19's Harsh Toll on Latino Community; 50% of Latino Parents Say They May Not Send Their Children Back to School*, THE 74 MILLION (August 26, 2020), <https://www.the74million.org/article/nyc-school-reopening-latino-safety/> (drawing a connection between the pandemic's disproportionate economic impact on Latinx families and the high number of Latinx families considering keeping their children out of school) [perma.cc/7QNH-NWCN].

167. DIANE SCHANZENBACH & ABIGAIL PITTS, INST. FOR POL'Y RSCH, NW UNIV., *FOOD INSECURITY DURING COVID-19 IN HOUSEHOLDS WITH CHILDREN: RESULTS BY RACIAL AND ETHNIC GROUPS 6* (2020) (explaining disparities in levels of food insecurity).

168. *See id.* (same).

169. *See* Alberto Gonzalez, *COVID-19 Exacerbates Food Insecurity in Latino Children and Families*, *Center for Primary Care*, HARV. MED. SCH. (July 23, 2020), <https://info.primarycare.hms.harvard.edu/blog/covid-food-insecurity-latino#:~:text=COVID-19%20Exacerbates%20Food%20Insecurity%20in%20Latino%20Children%20%26%20Families,-July%2023rd%2C%202020&text=Prior%20to%20COVID-19%2C%2016.8,Hispanic%20white%20households%20with%20children> (“[SNAP] eligibility restrictions prevent many Latinos in mixed immigration status households from putting food on the table.”) [perma.cc/WVC5-XY44].

170. *See COVID-19 Hospitalization and Death by Race/Ethnicity*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 18, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html> (last updated Nov. 20, 2020) (showing that American Indian or Alaskan Native, Black, and Latinx persons are all more likely to become infected with COVID-19 than white persons) [perma.cc/3SX5-PD4B].

171. *See id.* (outlining hospital and death rates for COVID-19 based on race and ethnicity).

likely than whites to contract coronavirus and Latinx were 2.8 times more likely.<sup>172</sup> After becoming infected, Blacks and Latinx were nearly five times more likely to require hospitalization than whites.<sup>173</sup> Although Latinx were slightly more likely than whites to die of coronavirus, Blacks died at over twice the rate that whites did.<sup>174</sup> Given these significant health disparities, the disease took a greater financial and psychological toll on Black and Latinx households than on white households.<sup>175</sup>

### 3. Language, Immigration, and Multiple Barriers to Learning

Language and immigration status further complicated the picture. Nearly 80% of ELLs attended a public school with high numbers of children in poverty and often were themselves poor.<sup>176</sup> Perhaps it is not surprising, then, that ELLs like other children from low-income families were less apt to engage regularly in online classes.<sup>177</sup> A national study found that a mere 35% of ELLs participated in remote learning.<sup>178</sup> In a study of participation rates in LAUSD, 48% of ELLs in middle school logged in weekly for online instruction shortly after the closure; their participation

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172. See *id.* (same).

173. See *id.* (reporting hospitalization rates for Blacks and Latinx individuals as 3.7 and 4.1 times the hospitalization rates of white individuals respectively).

174. See *id.* (reporting that Blacks were 2.8 times more likely to die from COVID-19 than whites).

175. See Alvarez, *supra* note 166 (discussing the unique challenges and considerations faced by Latinx immigrant communities caused by the pandemic and the effect these challenges may have on health and education); see also Esquivel, *supra* note 166 (noting that the heads of minority households were more likely to be essential workers and were less likely to be able to stay home and actively participate in their children's virtual learning programs); Kirsch, *supra* note 166 (discussing how the fact that Latino households were four times as likely to have contracted the virus than white households has led a disproportionate number of Latinx households to consider keeping their children out of school).

176. Peter Sayer & Derek Braun, *The Disparate Impact of COVID-19 Remote Learning on English Learners in the United States*, 11 TESOL J. 546, at 1, 2 (2020) ("Across the United States, 79% of ELs attend Title I schools.").

177. See *id.* at 2 (reporting only a small percentage of ELL learners were engaging in online learning).

178. See *id.* (finding Latinx students in the United States are three times as likely as white students to have no internet access at home).

later peaked at 56%.<sup>179</sup> These rates were 20% below those of English-speaking peers.<sup>180</sup> Just 7% of ELLs in middle school had high participation once they logged on, and only 34% persisted with online learning for seven weeks or more.<sup>181</sup> These low rates of engagement in part stemmed from a lack of access to devices and connectivity.<sup>182</sup> In addition, parents of ELLs reported that school districts often did not provide informational materials in the child's home language and that bilingual instructional materials were not readily available.<sup>183</sup> School lessons sometimes were limited to reading and writing and did not cover other academic subjects.<sup>184</sup> Immigration concerns also could make it difficult to

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179. BESECKER & THOMAS, *supra* note 141, at 9.

180. *See id.* (“English learners in both middle school and high school participated at lower rates than their peers who are English proficient by a difference of approximately 20 percentage points, a gap that remained relatively consistent over the nine weeks [of the study].”).

181. *See id.* at 14, 17 (showing average weekly participation levels and total weeks of participation).

182. *See* Kirsch, *supra* note 166 (reporting that 34% of Latinx families with children surveyed said they did not have access to wireless internet); *see also* Gabriel R. Sanchez, Edward D. Vargas, & Adrián A. Pedroza, *Latino Families are Not Equipped for Distance Learning in the Fall*, LATINO DECISIONS (July 16, 2020), <https://latinodecisions.com/blog/latino-families-are-not-equipped-for-distance-learning-in-the-fall/> (reporting that twenty-six percent of Latinx families surveyed needed better access to the internet or technology) [perma.cc/BQ9F-YAWT]; Richards, *supra* note 165 (describing a teacher's struggle to ensure that her ELL students had access to technology to complete their schoolwork); Yesenia Robles & Kalyn Belsha, *Less Learning and Late Guidance: School Districts Struggle to Help English Language Learners During COVID-19 Crisis*, CHALKBEAT (May 21, 2020), <https://www.chalkbeat.org/2020/5/21/21265475/less-learning-late-guidance-school-districts-struggle-english-language-learners-during-covid-19> (reporting that Latinx students are more likely than other students to rely on their cell phones for internet access at home) [perma.cc/9URK-8W9C]; Rikha Sharma Rani, *Imagine Online School in a Language You Don't Understand*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-immigrants-school.html> (“Nearly a quarter of immigrants and their American-born children live in poverty, and Hispanic immigrants, in particular, are less likely to have access to a computer or home internet service.”) [perma.cc/Q9JK-5SAE].

183. *See* Richards, *supra* note 165 (describing the efforts that some educators have had to take to ensure that English learner students understand how to use the technology and resources they have been provided); Rani, *supra* note 182 (“Some districts, especially small or rural ones, do not translate content into languages other than English, or have limited resources to do so.”).

184. *See* Sayer & Braun, *supra* note 176, at 4 (describing the limited lessons that were initially taught online).

take advantage of available resources.<sup>185</sup> For example, households with undocumented family members were reluctant to provide the identification needed to obtain free or discounted internet access for their children.<sup>186</sup> Parents feared that service providers might turn this information over to immigration authorities.<sup>187</sup>

As these statistics show, there were significant differences in access to remote learning platforms based on race, ethnicity, class, language, and immigration status. Because households often confronted multiple sources of disadvantage, students encountered an array of barriers to learning.<sup>188</sup> A 2020 Urban Institute study identified six risk factors for remote learning: Linguistic isolation, crowded living conditions, lack of access to a computer or the internet, no adult in the household with at least a high school education, a disability, and poverty.<sup>189</sup> The study found that Black, Latinx, and Native American students were more likely to confront multiple risk factors than their white and Asian American peers.<sup>190</sup> Latinx students were the most likely to face three or more of these factors simultaneously, which significantly interfered with their ability to benefit from remote learning.<sup>191</sup>

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185. See Jenny Brundin, *Some Undocumented Families Don't Feel Safe Applying for Free Internet, Making Remote Learning Even More Difficult*, CPR NEWS (Apr. 14, 2020), <https://www.cpr.org/2020/04/14/some-undocumented-families-dont-feel-safe-applying-for-free-internet-making-remote-learning-even-more-difficult/> (describing how immigration status adds an additional burden on already overburdened student populations) [perma.cc/5H9M-8LBX].

186. See *id.* (“[S]ome undocumented families are concerned that the application [for subsidized internet access] asks for a social security number or photo identification.”).

187. See *id.* (“Families say giving away that information makes them targets for deportation or being detained.”).

188. See *Students Weigh In: Learning & Well-Being During COVID-19*, YOUTH TRUTH SURV. (Aug. 11, 2020), [https://youthtruth.surveystudies.org/report\\_sections/1087936/](https://youthtruth.surveystudies.org/report_sections/1087936/) (summarizing findings from a study evaluating learning differences among students in various racial and ethnic groups) [perma.cc/5UF8-JW2H].

189. See KRISTIN BLAGG, ERICA BLOM, MEGAN GALLAGHER, & MACY RAINER, URB. INST., *MAPPING STUDENT NEEDS DURING COVID-19*, 2–3 (2020) (listing different remote learning challenges for students during the COVID-19 pandemic); see also *Students Weigh In: Learning & Well-Being During COVID-19*, *supra* note 188.

190. See *Students Weigh In*, *supra* note 188 (“Black and Latinx students faced more obstacles than White and Asian students.”).

191. See *id.* (reporting that Latinx children faced the highest average number



*C. The Pandemic and Disparate Per-Pupil Resources*

Unfortunately, school districts serving students with the greatest need often had the fewest resources to overcome the digital divide and other obstacles that hampered effective remote learning.<sup>192</sup> Districts with lower levels of per-pupil funding were less able to obtain devices and internet access for their students than were better-financed counterparts.<sup>193</sup> When the closures occurred, a sudden spike in demand for devices also made it difficult for small districts with limited resources to compete for much needed computers and tablets.<sup>194</sup> The challenges of providing internet access even led some districts to improvise by using school buses as Wi-Fi hot spots for students while searching for satisfactory long-term solutions.<sup>195</sup> Smaller districts, particularly in rural areas, sometimes had less experience in delivering online instruction.<sup>196</sup> As a result, teachers and staff were less prepared to

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of learning obstacles of any racial or ethnic group studied).

192. See Esquivel, *supra* note 166 (reporting that many lower-income school districts in the Los Angeles area were not able to transition to virtual learning as quickly as other more affluent school districts); Sayer & Braun, *supra* note 176, at 1–2 (“[Unlike some suburban districts] most underfunded urban districts had no [virtual learning] platform and teachers had to cobble together lessons from different sources.”).

193. See BAKER & DI CARLO, *supra* note 103, at 28 (2020) (showing that districts serving a high proportion of students in poverty had fewer resources to respond to the pandemic than those serving a low proportion of students in poverty).

194. See Esquivel, *supra* note 166 (“This scramble [for digital devices to be used in distance learning] may have contributed to problems [smaller] districts experienced in purchasing technology.”).

195. See *id.* (“In a desperate and resourceful move to help, the district deployed buses with WiFi routers to provide internet access during the school day.”); see also Nicol Turner Lee, *What the Coronavirus Reveals About the Digital Divide Between Schools and Communities*, BROOKINGS: TECHTANK BLOG (Mar. 17, 2020), <https://www.brookings.edu/blog/techtank/2020/03/17/what-the-coronavirus-reveals-about-the-digital-divide-between-schools-and-communities/> (describing current and former Wi-Fi on Wheels initiatives that used school buses to bring students access to wireless internet) [perma.cc/W8R5-D5UV].

196. See Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19. Who Has Access? Who Doesn't?*, CTR. ON REINVENTING PUB. EDUC. (June 16, 2020), <https://www.crpe.org/thelens/digital-divide-among-students-during-covid-19-who-has-access-who-doesnt> (“[R]esearch shows districts in rural areas have been significantly less likely to expect teachers to provide instruction during the COVID-19 pandemic.”) [perma.cc/FVZ2-754F].

make the transition to a virtual learning environment.<sup>197</sup> Faced with these technological challenges, some school districts had to prioritize setting up online instruction and largely forego other critical tasks like monitoring student attendance, providing one-on-one time with teachers, and measuring academic progress.<sup>198</sup> School systems with ELLs struggled to deliver information, support, and instruction in multiple languages to parents and students.<sup>199</sup> Districts serving the most disadvantaged student bodies also had to contend with other logistical challenges.<sup>200</sup> Most notably, some districts had to create new ways to deliver meals to students eligible for free and reduced price lunches while schools were closed.<sup>201</sup>

Because of these differences in school districts' ability to respond to the pandemic and emergency school closures, children had highly variable opportunities to benefit from online learning. There were significant differences in a number of key areas, including delays in providing instruction, dissemination of information about the transition to remote learning, access to technology necessary to benefit from instruction, creation of learning plans, preparation of new material for instruction, instruction in subjects other than reading and mathematics, and

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197. See *id.* ("Schools with higher concentrations of students from low-income households have been less likely to expect teachers to provide real-time lessons, track students' attendance, or grade their assignments.").

198. See Robin Lake & Bree Dusseault, *Remote Classes Are in Session for More School Districts, But Attendance Plans Are Still Absent*, CTR. ON REINVENTING PUB. EDUC. (Apr. 27, 2020), <https://www.crpe.org/thelens/remote-classes-are-session-more-school-districts-attendance-plans-are-still-absent> (reporting that a majority of school districts surveyed had not yet implemented a system to track student attendance) [perma.cc/52QS-8TEC].

199. See Sayer & Braun, *supra* note 176 (explaining the measures some schools took to combat these problems); Richards, *supra* note 165 (mentioning the specific struggles faced by ELLs); Robles & Belsha, *supra* note 182 (describing the attempts a school district made to reach ELL students during the pandemic).

200. See Ali Tadayon, *Grab-and-Go and Drive-Up Allow Families to Pick Up Food at Closed California Schools*, EDSOURCE (March 18, 2020), <https://edsources.org/2020/grab-and-go-and-drive-up-allow-families-to-pick-up-food-at-closed-california-schools/626088> (describing how districts that serve at-risk, low-income populations also have had to worry about how to serve lunch to their low-income students) [perma.cc/CZP6-Q996].

201. See *id.* (describing statewide lunch distribution programs at California schools).

contact with teachers outside of class periods.<sup>202</sup> These differences in turn meant disparities in the hours, quality, and content of instruction as well as the ability to benefit from teachers' counseling and advice during the pandemic.<sup>203</sup> The precise magnitude of these disparities in educational inputs has yet to be fully assessed. Even so, it seems plain that some children, often the most disadvantaged, have been shortchanged in ways that will affect their return to the classroom, their future learning trajectory, and their ability to pursue higher education and remunerative employment.<sup>204</sup>

#### *IV. Learning Losses During the Pandemic, a Right to Education, and the Opportunity to Compete*

If America's schools faced an "epidemic of educational inequality"<sup>205</sup> before the pandemic, school closures have prompted concerns about regression in student learning and a widening achievement gap.<sup>206</sup> New disparities in instructional resources, coupled with evidence of a differential impact on students, already

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202. See García & Weiss, *supra* note 105 (describing the effect of opportunity gaps widened by the pandemic on student learning); see also *What We're Learning: COVID 19 and Education: Notable Findings and Data Sources*, *supra* note 165 (pointing out the struggles schools have faced in maintaining contact with students and tracking their learning outcomes); see also Esquivel, *supra* note 166 (describing disproportionate delays in the development and administration of virtual learning plans by many lower-income schools).

203. See García & Weiss, *supra* note 105 (noting the need to be mindful of educational inequalities in developing remote learning plans); *What We're Learning: COVID 19 and Education: Notable Findings and Data Sources*, *supra* note 165 (discussing worsening disparities in expected educational outcomes among students of different racial and socioeconomic backgrounds because of the pandemic).

204. See DORN ET AL., *supra* note 99 ("[The effects of the pandemic on learning] may translate into long-term harm for individuals and society [including higher education and employment opportunities]").

205. Paloma Esquivel & Howard Blume, *L.A. Latino, Black Students Suffered Deep Disparities in Online Learning, Records Show*, L.A. TIMES (July 16, 2020), <https://www.latimes.com/622alifornia/story/2020-07-16/latino-and-black-students-hard-hit-with-disparities-in-their-struggle-with-online-learning> [perma.cc/23MU-AL3Z].

206. See *id.* ("School closures and distance learning have exacerbated [educational inequality] gaps, especially for students of color and students from lower-income communities.").

have prompted litigation over whether school closures violated some children's right to an education.<sup>207</sup> Depending on the jurisdiction, plaintiffs can pursue one of three approaches to challenging public school practices during the closures.<sup>208</sup> In federal court, plaintiffs can argue that there has been an absolute deprivation of education, either because school districts failed to offer instruction during the closures or because students did not have the necessary devices and internet connectivity to benefit from the instruction the schools provided.

In some state courts, plaintiffs can argue that even if public schools offered instruction, it was inadequate.<sup>209</sup> These lawsuits would demonstrate that limited instructional hours, narrow subject-matter content, and the focus on reviewing previously covered material led to less than a minimally adequate education.<sup>210</sup> To strengthen that argument, the plaintiffs could show how learning losses left them unable to meet grade-level standards that they might otherwise have satisfied.<sup>211</sup> In other state courts, plaintiffs can assert that disparities in public school instruction denied students an equal educational opportunity.<sup>212</sup>

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207. See generally Shaw Class Action Complaint, *supra* note 10; Cayla J. Complaint, *supra* note 10.

208. See Rachel F. Moran, *The Constitution of Opportunity: Democratic Equality, Economic Inequality, and the Right to Compete*, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY 261, 265–68 (Kimberly Jenkins Robinson ed. 2019) (contrasting federal and state approaches to the right to education).

209. See NAT'L RSCH. COUNCIL, EQUITY AND ADEQUACY IN EDUCATION FINANCE 193–99 (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen eds., 1999) (explaining that educational reform efforts should focus on educational adequacy and a high-minimum quality education for all).

210. See *id.* at 198 (describing the “proper” educational package that must drive school finance allocations).

211. See Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html> (last updated June 10, 2020) (“When all of the impacts are taken into account, the average student could fall seven months behind academically, while black and Hispanic students could experience even greater learning losses, equivalent to 10 months for black children and nine months for Latinos . . . .”) [perma.cc/6ZXXN-NPCD].

212. See N’dea Yancey-Bragg, *Families Sue California, Claiming State Failed to Educate Poor and Minority Students Amid Pandemic*, USA TODAY (Dec. 1, 2020, 4:30 PM), <https://www.usatoday.com/story/news/education/2020/12/01/california-families-sue-remote-learning-inequities-coronavirus/3780771001/> (last updated

Here, the suits could rely on evidence that there were significant differences among districts in delays in moving to remote learning, the hours of instruction provided, the subject areas covered, the content of lessons, and the availability of teachers for one-on-one consultation.<sup>213</sup> To bolster evidence of disparities in inputs, these plaintiffs could point to differential rates of learning loss for students of color, low-income students, and ELLs during the pandemic.

#### A. School Closures as an Absolute Deprivation of Education

In *San Antonio Independent School District v. Rodriguez*,<sup>214</sup> the United States Supreme Court rejected any fundamental right to an equal education under the Equal Protection Clause of the Fourteenth Amendment.<sup>215</sup> However, the Court left open the possibility that there might be a right to minimum access to education; if so, an absolute deprivation of education would violate a student's constitutional rights.<sup>216</sup> So far, the Justices have yet to encounter a case in which children have suffered a complete denial of access to schooling.<sup>217</sup> In *Kadmas v. Dickinson Public School*

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Dec. 1, 2020, 5:40 PM) (“The suit claims the state’s failure to meet the needs of homeless students and those who do not speak English exacerbates disparities and leaves some poor Black and Latino children ‘functionally unable to attend school.’”) [perma.cc/RA5J-Y8Y9].

213. See Benjamin Herold, *The Disparities in Remote Learning Under Coronavirus (in Charts)*, EDUC. WK. (Apr. 10, 2020), <https://www.edweek.org/technology/the-disparities-in-remote-learning-under-coronavirus-in-charts/2020/04> (noting specific inequities among school districts in areas like access to teacher instruction and methods of distributing assignments) [perma.cc/C7LP-L64L].

214. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973) (holding that the Texas public education financing system should not be subject to strict scrutiny because education is not a fundamental right).

215. *Id.*

216. See *id.* at 35–37 (“Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of education expenditures in Texas provide an education that falls short.”).

217. See NAT’L RSCH. COUNCIL, *supra* note 209, at 182 (“The defeat in *Rodriguez* spelled the end of federal constitutional litigation with respect to school finance.”).

*District*,<sup>218</sup> for example, a student from a low-income family challenged a school district's policy of charging a school bus transportation fee.<sup>219</sup> She alleged that due to her inability to pay, she had experienced an absolute denial of education.<sup>220</sup> However, the Court found that the child's family had made other arrangements for her to get to school, so she continued to have access to the curriculum.<sup>221</sup>

In an earlier case, *Plyler v. Doe*,<sup>222</sup> the Court confronted a Texas statute that effectively barred undocumented students from access to public schools.<sup>223</sup> This case arguably involved an absolute deprivation of education.<sup>224</sup> Even so, the Court did not apply strict scrutiny, as it would if it had found that minimum access to education is a fundamental right.<sup>225</sup> Instead, the Justices concluded that it was irrational for the state of Texas to punish innocent children for their parents' decision to enter the country as a way to deter illegal immigration.<sup>226</sup> In the Court's view, consigning these children to a shadow class of permanent illiterates and violating any regard for their human dignity did serious injury to our nation's shared democratic precepts.<sup>227</sup>

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218. See *Kadrmas v. Dickinson Pub. Sch. Dist.*, 487 U.S. 450, 450 (1988) (holding that a transportation fee did not completely deny students access to schooling because there were other private alternatives to the public school bus service).

219. *Id.*

220. See *id.* at 455–56, 458 (“Appellants contend that Dickinson’s user fee for bus service unconstitutionally deprives those who cannot afford to pay it of ‘minimum access to education.’”).

221. See *id.* at 458, 465 (emphasizing that *Kadrmas* continued to attend school during the time she was denied access to the school bus by finding alternative transportation).

222. See *Plyler v. Doe*, 457 U.S. 202, 202 (1982) (holding that a Texas statute denying undocumented students access to public school was a violation of the equal protection clause).

223. *Id.*

224. See *id.* (public schools were authorized to bar undocumented students from enrolling).

225. See *id.* at 223 (noting that public education is not a fundamental right).

226. See *id.* at 221–23, 226–30 (“If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing in its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here.”).

227. See *id.* at 219 (recognizing that the creation of an illiterate underclass of undocumented individuals “presents most difficult problems for a Nation that

In 2020, a federal court of appeals in *Gary B. v. Whitmer*<sup>228</sup> concluded that poor children of color in failing Detroit schools made out a prima facie case that they had suffered an absolute deprivation of education.<sup>229</sup> The plaintiffs offered evidence of an inadequate curriculum, poorly trained teachers, and decrepit facilities.<sup>230</sup> These deficiencies were linked to profoundly substandard performance on achievement tests in reading and mathematics.<sup>231</sup> After the initial decision, some judges successfully called for en banc review.<sup>232</sup> Before the court could rehear the case, however, the plaintiffs settled with the state of Michigan.<sup>233</sup> Because the original decision was withdrawn pending en banc consideration, the opinion has no precedential value.<sup>234</sup> However,

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prides itself on adherence to principles of equality under law.”).

228. See *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reh’g granted and opinion withdrawn*, 958 F.3d 1216 (6th Cir. 2020) (holding that a basic minimum education is a fundamental right).

229. *Id.* at 616.

230. See *id.* at 661 (noting that the plaintiffs’ complaint points to significant teacher shortages, school buildings with dangerous conditions, and a dearth of textbooks and school supplies).

231. See *id.* at 659–62 (“[N]early zero percent of students at these schools were graded as proficient in English or other subject-matter tests administered by the state.”).

232. See *Gary B. v. Whitmer*, 958 F.3d 1216, 1216 (6th Cir. 2020) (describing a judge’s sua sponte request for en banc review and a poll finding majority support to grant the request).

233. See Koby Levin, Lori Higgins, & Eleanore Catolico, *In a Blow to the ‘Right to Read,’ Full Appeals Court Will Review Detroit Literacy Lawsuit*, CHALKBEAT DETROIT (May 19, 2020, 7:10 PM), <https://detroit.chalkbeat.org/2020/5/19/21264371/appeals-court-will-review-detroit-lawsuit> (“Governor Gretchen Whitmer reached a settlement last week with the students who brought the lawsuit, promising to pursue legislation that would bring \$94.4 million to the Detroit Public Schools Community District.”) [perma.cc/A2CL-X7F3]; Valerie Strauss, *Michigan Settles Historic Lawsuit After Court Rules Students Have a Constitutional Right to a ‘Basic’ Education, Including Literacy*, WASH. POST (May 14, 2020, 12:50 PM), <https://www.washingtonpost.com/education/2020/05/14/michigan-settles-historic-lawsuit-after-court-rules-students-have-constitutional-right-basic-education-including-literacy/> (“While there is much work left to be done, today’s settlement paves the way for the State of Michigan to fulfill its moral obligation to provide equal educational opportunities to children that have been denied a fair shake for far too long.”) [perma.cc/AP2G-DDT4].

234. See Mark Walsh, *Federal Appeals Court Order Ends Detroit ‘Right to Literacy’ Case*, EDUC. WK. (June 12, 2020), [https://blogs.edweek.org/edweek/school\\_law/2020/06/federal\\_appeals\\_court\\_order\\_en.html](https://blogs.edweek.org/edweek/school_law/2020/06/federal_appeals_court_order_en.html) (“Lawyers involved in the case told *Education Week* they understood

*Gary B.* does suggest that there might be circumstances in which a federal court would find an absolute deprivation of education.

The public school closures during the pandemic offer a new occasion for federal courts to recognize that children have experienced a complete denial of education.<sup>235</sup> In some instances, school districts went for weeks and even months without offering instruction of any kind, whether in-person or remote.<sup>236</sup> The failure to provide curricular programming for a sustained period deprived every student in the district of access to education.<sup>237</sup> The resolution of these claims will turn on how the court frames an absolute deprivation. The plaintiffs are likely to contend that the relevant period for evaluating instruction is after the closures took place. The school district will respond that the correct interval is the academic year or even the student's entire academic career. With a longer timeframe, schools can argue that some portion of normal instruction was lost, but there was still meaningful academic programming throughout the remainder of the school year and even the rest of the student's overall time in school.<sup>238</sup>

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the order as meaning the settlement ended the case but that the 6th Circuit panel decision remains vacated and thus has no precedential value.”) [perma.cc/8HY6-9P2C].

235. See Kimberly Jenkins Robinson, *A Constitutional Right to Education Fulfills Our Democratic Promise*, REAL CLEAR EDUC., May 8, 2020, [https://www.realcleareducation.com/articles/2020/05/08/a\\_constitutional\\_right\\_to\\_education\\_fulfills\\_our\\_democratic\\_promise\\_110417.html](https://www.realcleareducation.com/articles/2020/05/08/a_constitutional_right_to_education_fulfills_our_democratic_promise_110417.html) (arguing that school closures during the pandemic offer an occasion to revisit a federal right to education) [perma.cc/2SXR-8KF9].

236. See Bethany Gross & Alice Opalka, *Too Many Schools Leave Learning to Chance During the Pandemic*, CTR. FOR REINVENTING PUB. EDUC. 1–2, 5–7 (June 2020), [https://www.crpe.org/sites/default/files/final\\_national\\_sample\\_brief\\_2020.pdf](https://www.crpe.org/sites/default/files/final_national_sample_brief_2020.pdf) (noting that 27% of rural or small-town school districts expected teachers to provide instruction while over half of urban school districts expected teachers to provide instruction); Catherine Gewertz, *Instruction During COVID-19: Less Learning Time Drives Fears of Academic Erosion*, EDUC. WEEK (May 28, 2020), <https://www.edweek.org/teaching-learning/instruction-during-covid-19-less-learning-time-drives-fears-of-academic-erosion/2020/05> (“[T]eachers report they’re spending less time on instruction overall, and they’re spending more time on review and less on introducing new material.”) [perma.cc/MQ4D-S24J].

237. See Gewertz, *supra* note 236 (“[W]ithout a major improvement in schooling soon, students could descend into ‘academic death spirals.’”).

238. See García & Weiss, *supra* note 105 (concluding that “[t]he 2019–2020 school year was cut by at least one third relative to its normal length,” which suggests learning losses across the board).



This dispute over the appropriate timeframe for a federal claim reveals an underlying problem with the notion of an “absolute” deprivation.<sup>239</sup> There is no way to evaluate whether a deprivation is substantial without putting it in context. For example, courts regularly uphold disciplinary sanctions that use removal from school as a punishment for misbehavior.<sup>240</sup> That suggests that some denials of access are not significant enough to count as an absolute deprivation of education. Even if children clearly lack access to instruction for part of the school year, the real issue is whether that interruption is disruptive enough to produce irretrievable impediments to their ability to make academic progress.<sup>241</sup> Although *Gary B.* focused on literacy, some lawsuits have alleged that interruptions in instruction are impermissible if they fatally undermine a student’s ability to complete academic requirements and graduate from high school.<sup>242</sup>

To find an absolute deprivation, federal courts should not require that students actually fail to complete their education before offering relief. Unlike tort actions for educational malpractice, which require that the injury actually materialize,<sup>243</sup> suits over pandemic-related school closures can evaluate the prospect of enduring and irretrievable academic harm. As a result, projected learning losses could be instructive.<sup>244</sup> A June 2020 study

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239. William S. Koski and Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Education Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 597–99, 604–05, 615 (2007) (explaining why a focus on an absolute deprivation of education is insufficient because it fails to account for the relative advantages and disadvantages that schooling confers).

240. See Maureen Carroll, *Educating Expelled Students After No Child Left Behind: Mending an Incentive Structure that Discourages Alternative Education and Reinstatement*, 55 UCLA L. REV. 1909, 1924–26 (2008) (discussing expulsion as punishment for misbehavior and how it temporarily deprives students of access to education).

241. See *id.* at 1965 (noting that expulsion is often the end of many expelled students’ public school careers).

242. See *id.* at 1953–55 (citing New York litigation in *RV v. New York City Dep’t of Educ.*, 321 F. Supp. 2d 538 (E.D.N.Y. 2004), which challenged exclusionary practices that prevented students from successfully graduating from high school).

243. See, e.g., *Peter W. v. S.F. Unified Sch. Dist.*, 60 Cal. App. 3d 814 (1976) (showing that a student had graduated from high school without the skills needed to compete for jobs; the court of appeals refused to recognize a duty in tort because of the myriad factors that could lead to inadequate academic performance).

244. See DORN ET AL., *supra* note 99 (describing the evidence of learning losses

by McKinsey found that if public schools remained closed until January 2021, the average student would suffer 6.8 months of learning loss, but Black students would suffer 10.3 months, Latinx students 9.2 months, and low-income students 12.4 months.<sup>245</sup> A more recent November 2020 study by the non-profit Northwest Evaluation Association (NWEA) found that learning losses were not as severe as had been predicted and that students' progress slowed in math but less so in reading.<sup>246</sup> However, the researchers offered important caveats: When schools administered achievement tests, there was significant attrition in test-takers, which was concentrated among Black, Latinx, and low-income students.<sup>247</sup> Moreover, among those tested, Black and Latinx students suffered disproportionate declines in reading in the upper elementary grades.<sup>248</sup> These studies indicate that even if the most advantaged children are able to compensate for lost weeks and months of instruction, the least advantaged are likely to suffer crippling learning losses.<sup>249</sup> Those losses in turn will impose long-term harms by relegating these students to illiteracy or by substantially reducing their odds of completing high school.<sup>250</sup>

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as the basis for a “call to action” to develop best practices for online learning and flexible approaches to combined in-classroom and remote learning).

245. *Id.*

246. See Megan Kuhfeld, Beth Tarasawa, Angela Johnson, Erik Ruzek, & Karen Lewis, *Learning During COVID-19: Initial Findings on Student's Reading and Math Achievement and Growth* 4, NWEA BRIEF (Nov. 2020), <https://www.nwea.org/research/publication/learning-during-covid-19-initial-findings-on-students-reading-and-math-achievement-and-growth/> (“Compared to fall 2019, student achievement this fall was similar in reading, on average, but 5 to 10 percentile points lower in math.”) [perma.cc/QDT5-P6H9].

247. See *id.* at 7–8 (noting that many schools are not administering assessments and within those that are testing, students are absent).

248. See *id.* at 3 (“[T]here was initial evidence of small declines in reading for some groups of students. Those declines were concentrated disproportionately among Hispanic and Black students . . .”).

249. See *id.* at 9 (advocating for clear data to understand where students have fallen behind in order to know where additional resources should be deployed because COVID-19 disruptions did not cause blanket declines in student achievement).

250. See DORN ET AL., *supra* note 99, at 6; see also Erin Einhorn, *When Covid-19 Closed Schools, Black, Hispanic and Poor Kids Took Biggest Hit in Math, Reading*, NBC NEWS (Nov. 30, 2020), <https://www.nbcnews.com/news/education/when-covid-19-closed-schools-black-hispanic-poor-kids-took-n1249352> (describing differential learning losses and growing achievement gap based on NWEA study and Renaissance Learning, Inc.

Another situation that could prompt a claim for an absolute deprivation of education involves students unable to access online instruction during the closures because they lacked access to a device or the internet.<sup>251</sup> For some students, these obstacles to learning have persisted, even months after public schools shut down.<sup>252</sup> One critical question is whether courts will treat these students as truants or as victims of barriers to education beyond their control. Many districts stopped taking attendance and enforcing truancy laws during the pandemic.<sup>253</sup> Even so, it is clear that at least some older students chose to forego school and go to work to help support families devastated by job loss and illness during the pandemic.<sup>254</sup> Still for the vast majority of students, the analogy to *Kadmas* seems apt because a lack of necessary

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study) [perma.cc/DQ6P-433P].

251. See Robinson, *supra* note 235 (describing substantial percentages of students who had not received online instruction during pandemic-related closures).

252. See Emily A. Vogels, Andrew Perrin, Lee Rainie, & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/> (stating that overall, one in five parents said children might not be able to complete homework because they lacked a computer, while 36% of low-income parents expressed this concern) [perma.cc/MC4T-PE8Q]. A Census survey estimated that slightly over 10% of families surveyed thought that lack of access to a computer would interfere with their children's ability to complete homework. See Lake & Makori, *supra* note 196 (describing teachers' and students' lack of preparedness for the shift to virtual learning).

253. See Mark Lieberman, *Taking Attendance During Coronavirus Closures: Is It Even Worth It?*, EDUC. WK. (Apr. 17, 2020), <https://www.edweek.org/ew/articles/2020/04/17/taking-attendance-is-tricky-during-coronavirus-closures.html> (last updated Apr. 20, 2020) (describing a range of school responses to monitoring attendance during pandemic-related school closures and how surveyed teachers described 21% of students as "essentially truant") [perma.cc/UJVV8-X68G].

254. See, e.g., Elizabeth Aguilera, *For Some California Teens, School Closures Led to Work in the Fields*, CAL MATTERS (June 22, 2020), <https://calmatters.org/children-and-youth/2020/06/california-teens-school-closures-migrant-farmworkers-fields-coronavirus/> (last updated Oct. 21, 2020) ("Advocates worry some students could decide to continue working instead of going back to school if they feel they have lost their educational footing.") [perma.cc/PB7K-PWPL]; Richards, *supra* note 165 ("Across America, teachers say teens are picking up jobs to support their families during the economic crisis, rather than attending classes.").

resources prevented children from benefiting from the instructional program.<sup>255</sup> Here, students contend that their families did not have the wherewithal to obtain a device or internet access, leaving children unable to participate in remote learning through no fault of their own.<sup>256</sup> Some parents could not afford a computer or internet service, while others could not miss work to pick up devices that schools made available.<sup>257</sup> Still, other families feared that turning personal information over to internet service providers might lead to deportation.<sup>258</sup> In *Kadrmas*, the Court never decided whether there had been an absolute deprivation of education because the student found other ways to get to school.<sup>259</sup> During the pandemic, however, students on the wrong side of the digital divide have not all found alternative ways to gain access to the curriculum.<sup>260</sup> These students will need to show not only that they suffered an interruption in instruction but also that this interruption was substantial enough to undermine their ability to persist in school and achieve at least a rudimentary level of literacy.

### *B. School Closures and Denial of an Adequate Education*

Although federal courts so far have required an absolute deprivation of education that leaves children illiterate or unable to complete school, state courts have been receptive to mandating an affirmative right to an adequate education, particularly under education clauses in state constitutions.<sup>261</sup> The meaning of an adequate education varies in ambition from jurisdiction to

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255. See *supra* notes 218–220 and accompanying text (explaining how a bus transportation fee allegedly deprived a low-income child of access to education).

256. See *supra* notes 251–252 (describing how a lack of resources deprived children of the ability to gain access to online instruction).

257. See *id.* (same).

258. See, e.g., Brundin, *supra* note 185 (reporting that some families fear applying for free internet because of their undocumented status).

259. See *supra* note 221 and accompanying text (explaining that the student at the center of the controversy found other modes of transportation while being barred from using the bus).

260. See *supra* notes 152–160 and accompanying text.

261. See Moran, *supra* note 208, at 265–68 (describing how a shift from equity to adequacy claims led to a high success rate in state courts).

jurisdiction. Some courts focus on the basic instruction needed to survive in adult life by getting a low-skilled job, while other courts mandate public schooling that prepares students for complex responsibilities as workers and citizens.<sup>262</sup> Very often, courts link the definition of adequacy to state accountability standards, which set forth benchmarks for minimum levels of proficiency in various subjects.<sup>263</sup> Although the meaning of adequacy can be elastic from one state to the next, courts should be able to find that instruction during the pandemic was inadequate even under a parsimonious interpretation of the standard.<sup>264</sup> The challenges could take at least two forms. First, plaintiffs could argue that public schools failed to provide an adequate education because closures deprived students of a substantial period of instruction. According to a 2020 Economic Policy Institute report, at least one-third of the 2019–2020 school year was lost.<sup>265</sup> That diminished time for instruction will predictably lead to learning losses, and for some students those losses will be profound.<sup>266</sup> In fact, some projections have indicated that students’ academic progress would be set back by nearly a year or even more due to the closures, had schools reopened in January 2021.<sup>267</sup> The longer the closures persist, the more these learning losses will grow.<sup>268</sup> As a result, plaintiffs can challenge the continued use of remote instruction in the 2020–2021 academic year, as many students increasingly are unable to meet state-mandated benchmarks of proficiency. Second, plaintiffs can challenge the quality of remote instruction, including the lack of comprehensive subject-matter instruction, the failure to provide

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262. See *id.* at 266–67, 270–71 (analyzing the varied definitions of adequacy from state to state).

263. See *id.* at 268 (noting the critical role of accountability standards in establishing the meaning of adequacy).

264. See *id.* (“The success of adequacy claims in part reflects the widespread sentiment that simple fairness requires minimum access to education for every child.”).

265. García & Weiss, *supra* note 105.

266. *Id.*; see DORN ET AL., *supra* note 99, at 7 (reporting findings on the significant impact of projected learning losses during the pandemic).

267. See DORN ET AL., *supra* note 99, at 8 (estimating projected learning losses under different scenarios).

268. See Goldstein, *supra* note 211 (explaining the learning losses that resulted from remote learning and warning that those gaps will be impossible to fill and will grow larger if remote learning continues in the current manner).

new content, and the limited access to one-on-one time with teachers.<sup>269</sup>

Recent adequacy lawsuits based on the closures address both the quantity and quality of remote learning during the pandemic. *Shaw v. Los Angeles Unified School District*,<sup>270</sup> a class action filed in a California superior court on September 24, 2020, is one of the first to challenge remote learning during the school closures as a violation of students' right to an education.<sup>271</sup> The action addresses both the 2019–2020 and the 2020–2021 academic years.<sup>272</sup> The plaintiffs argue that the school district failed to offer even basic instruction in the spring immediately following the closures and the following fall.<sup>273</sup> With respect to the spring closures, the plaintiffs have pointed to deficiencies in inputs based on an April 8, 2020 side letter agreement between the school district and United Teachers Los Angeles.<sup>274</sup> According to the complaint, the agreement provided that teachers need not offer live, interactive instruction, need not assess student learning, and need not devote more than one hour per week to “planning, collaborating, or attending professional development meetings.”<sup>275</sup> In addition, the agreement stated that the district would not monitor or evaluate teacher performance and that the district could cut workdays in half from eight hours to four hours per day.<sup>276</sup> The complaint asserts that as a result of the reduced services, “students suffered

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269. See *supra* note 202 and accompanying text.

270. See Shaw Class Action Complaint, *supra* note 10, at 1 (requesting declaratory and injunctive relief because Defendants allegedly deprived “Plaintiffs’ children and the Class Members of rights guaranteed to them by the California Education Code and the California Constitution”).

271. Early lawsuits focused on higher education, *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases (Updated November 9)*, NAT’L L. REV., July 17, 2020, and special education, Kamenetz, *supra* note 13.

272. Shaw Class Action Complaint, *supra* note 10, at 10–37 (chronicling the school district’s response from 2019 to 2021).

273. See Yancey-Bragg, *supra* note 212 (“Nine parents sued the Los Angeles Unified School District in September alleging that its distance learning program failed to meet state educational standards and disproportionately harmed Black and Latino students.”).

274. See Shaw Class Action Complaint, *supra* note 10, at 3 (alleging that the side letter agreement “all but guaranteed that its most vulnerable students would be denied a basic education”).

275. *Id.*

276. *Id.*

tremendously and many failed to learn anything new in the last nine weeks of school.”<sup>277</sup> Although *Shaw* addresses the spring closures in terms of the adequacy of instruction, it bolsters this claim by pointing to an absolute deprivation of education for some students.<sup>278</sup> According to the complaint, “[o]nly 60% of students participated in online learning and live video conferencing during remote learning in the spring semester.”<sup>279</sup> Accordingly, the April Side Letter left **40%** of students without any education whatsoever.”<sup>280</sup>

As for the fall 2020 term, the focus again is primarily on inputs, especially instructional time.<sup>281</sup> The *Shaw* litigation relies not only on state constitutional protections but also on a California statute passed after the closures “to ensure that California public school students received an adequate remote education.”<sup>282</sup> Under the statute, districts must confirm that all students have access to connectivity and devices, align remote instruction with grade level standards, make remote instruction equivalent to in-person instruction, account for students with unique educational needs, such as ELLs, and ensure daily live interaction with school personnel to keep students engaged with the educational program.<sup>283</sup> The *Shaw* complaint alleges that fall 2020 instruction in the Los Angeles Unified School District did not meet state constitutional and statutory requirements.<sup>284</sup> According to the plaintiffs, an August 2020 side letter agreement with United Teachers Los Angeles increased the teachers’ workday by only 1.5 hours.<sup>285</sup> As a result, the time spent on instruction was still substantially shorter than it had been before schools closed in

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277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* (emphasis in original).

281. *See id.* at 4 (noting that the fall 2020 distance learning plan increased the teacher workday by only 1.5 hours, which is still a 25% shorter workday to provide adequate remote education).

282. *Id.* at 2.

283. Cal. Educ. Code § 43503 (West 2020).

284. *See Shaw Class Action Complaint, supra* note 10, at 4 (“On August 11, 2020, the LAUSD finally passed a plan for distance learning in the fall,” but “[t]his plan failed to address or remedy the key failures of its spring plan.”).

285. *Id.*

response to the pandemic.<sup>286</sup> Moreover, teachers were not required to attend training over the summer to ensure that they could deliver remote instruction effectively.<sup>287</sup> According to the complaint, the shortfall in hours and failure to prepare for online teaching in the fall were especially egregious because of the learning losses that students had already experienced in the spring.<sup>288</sup> Those losses often compounded achievement gaps on statewide accountability tests that predated the pandemic.<sup>289</sup> As a result of these cumulative deficiencies, the plaintiffs assert, the district's "remote learning plan failed to provide students with even a basic education and is not preparing them to succeed."<sup>290</sup>

About two months after plaintiffs filed suit in *Shaw*, attorneys brought *Cayla J. v. State of California*<sup>291</sup> against the state as well as agencies and officials responsible for its educational policy.<sup>292</sup> The complaint alleges that California's response to the pandemic significantly disadvantaged Black, Latinx, and low-income students.<sup>293</sup> According to the plaintiffs, the shortcomings were severe enough to amount to, among other things, a denial of the right to an education under the California constitution.<sup>294</sup> Like *Shaw*, the *Cayla J.* lawsuit asserts that Black, Latinx, and low-income students have not received even a basic education during the school closures, but insists that the state, not a local

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286. *See id.* (stating that "[i]t defies logic that a teacher workday that is 25% shorter is sufficient to provide adequate remote education, let alone address the learning loss suffered by the LAUSD's most vulnerable students after the disastrous 'education' they received in the spring").

287. *Id.*

288. *See id.* (noting that Black and Latinx students were the most severely impacted as they were already performing below grade level in the spring).

289. *See id.* at 12–13 (noting that before the pandemic, less than one in four Black or Latinx students performed at grade level in English or Math; during the pandemic, more than 40,000 students in total had been noted as not having daily contact with their teachers, and 15,000 had failed to do any schoolwork).

290. *Id.* at 2.

291. *See generally* *Cayla J. Complaint*, *supra* note 10.

292. *Id.* at 1–2.

293. *See id.* at 2–4 (alleging that due to the State's insufficient attention to remote learning, Black, Latinx and low-income families are being deprived of their right to free and equal education).

294. *See id.* at 54 ("Elementary and high school students are entitled to receive 'basic educational equality,'" citing *Butt v. State of California*, 4 Cal. 4th 668, 680 (1992)).



educational agency, bears ultimate responsibility for the lapses.<sup>295</sup> The complaint notes, among other things, the state's failure to enforce statutory requirements for school district learning plans during the pandemic.<sup>296</sup> To bolster the claim of non-enforcement, the plaintiffs cite data on high rates of absenteeism among vulnerable student populations in large urban districts that serve low-income students of color.<sup>297</sup> In addition, the complaint describes a lack of access to devices and connectivity for disadvantaged students as well as the absence of training and support to access remote learning programs, the paucity of individualized attention for struggling students, and the failure to offer minimum hours of instruction.<sup>298</sup> The complaint describes the achievement gap that existed before the pandemic and asserts that projected learning losses due to school closures will have a long-term detrimental impact on the state's economic well-being.<sup>299</sup> Moreover, students will not be prepared "to participate meaningfully in politics and civic life, to exercise free and robust speech, and to voice the views of their communities."<sup>300</sup>

The *Shaw* and *Cayla J.* complaints reveal several interesting features of challenges to instructional adequacy during the pandemic. These lawsuits are apt to focus more on inputs than outputs, even though both measures have been relevant in past adequacy litigation.<sup>301</sup> Plaintiffs can readily identify changes in inputs because of districts' formal learning plans and agreements with teachers during the closures.<sup>302</sup> By contrast, many districts

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295. See *id.* at 24 (noting that the State bears the ultimate responsibility for public education and cannot delegate this obligation to another entity).

296. See *id.* at 23–24, 31, 32–37 (citing as one example Education Code §43509's requirement that the governing board of a school district or charter school consult with parents and children in developing a learning continuity plan and claiming that such consultation has been nonexistent).

297. See *id.* at 28–29 (noting that the absentee rate for LAUSD's from 2018–2019 was 25.2%, but from March to May of 2020, over 40% of middle and high school students were absent.).

298. *Id.* at 38–49.

299. *Id.* at 28, 51.

300. *Id.* at 3.

301. See, e.g., *id.* at 26 (noting inputs, such as devices and connectivity, daily live interaction of students and teachers, and challenging class assignments, required under a plan instituted by Governor Gavin Newsom).

302. See, e.g., *id.* at 25–26 (citing "rigorous" requirements for remote learning

ceased to monitor attendance, stopped assigning grades, and forewent accountability testing.<sup>303</sup> As a result, the precise impact of the closures on student learning, including the magnitude of learning losses, remains unclear.<sup>304</sup> Moreover, the lawsuits explicitly recognize that an education that is adequate for one child may not be adequate for another.<sup>305</sup> Both the *Shaw* and *Cayla J.* complaints argue that courts must evaluate the adequacy of remote learning during the pandemic in light of achievement gaps that existed before schools closed as well as the learning losses that occurred after the closures.<sup>306</sup> Under this approach, adequacy is not a “one-size-fits-all” proposition but instead must be responsive to the individual learning challenges that students face.

Finally, the *Shaw* and *Cayla J.* complaints embrace a more ambitious definition of adequacy than mere survival-level skills. In both cases, the concern is that remote learning does not prepare students to succeed economically or to participate in civic life.<sup>307</sup> Elsewhere, I have argued that state courts in adequacy cases “have concerned themselves with disparities substantial enough to undermine the opportunity to compete.”<sup>308</sup> For children to have a meaningful opportunity to compete, courts must “not only . . . look[] at whether they meet threshold requirements on

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under California’s pandemic plan for re-opening the public schools).

303. See *supra* note 198 and accompanying text (reporting that many school districts stopped taking attendance or using accountability measures during the pandemic).

304. See Megan Kuhfeld, Jim Soland, Beth Tarasawa, Angela Johnson, Erik Ruzek, & Karyn Lewis, *How is COVID-19 Affecting Student Learning?*, BROOKINGS, Dec. 3, 2020, <https://www.brookings.edu/blog/brown-center-chalkboard/2020/12/03/how-is-covid-19-affecting-student-learning/> (describing short-term and long-term uncertainties surrounding the impact of school closures on student learning) [perma.cc/47BR-K6UY].

305. See Cayla J. Complaint, *supra* note 10, at 41 (“On the surface, remote learning seems to treat rich and poor alike . . . [e]xcept that the wealthy can do something about it when their children’s Wifi fails, while the poor often cannot.”).

306. See *id.* at 28–30 (providing data on achievement gaps by race and ethnicity before the pandemic as well as statistics on differential rates of student participation in remote learning during the pandemic).

307. See *id.* at 3 (“Distance learning as it exists for these students cannot prepare them to participate meaningfully in politics and civic life . . .”); see also *Shaw Class Action Complaint*, *supra* note 10, at 41 (identifying a “duty to provide Plaintiffs’ children an education that will teach them the skills they need to succeed as productive members of modern society”).

308. Moran, *supra* note 208, at 266–67.

competency tests but also . . . consider[] how their performance compares to that of privileged peers.”<sup>309</sup> If student achievement levels are so depressed in some districts that they “bear little or no resemblance to those of students in better-supported, more affluent schools,” then these students “inhabit a separate academic world” and do not have an authentic opportunity to compete.<sup>310</sup> In both *Shaw* and *Cayla J.*, the emphasis on preparing students to succeed resonates with this notion that disadvantaged students must have some real chance to vie with privileged peers for jobs and political voice.

The biggest challenge that litigators will face in operationalizing a more ambitious notion of adequacy is that evidence on learning losses during the pandemic remains scant.<sup>311</sup> For that reason, there have been renewed calls for monitoring student progress as a way to rectify the disparities resulting from the shift to online learning.<sup>312</sup> There also have been efforts to gauge the magnitude of learning losses that school districts will have to address when they reopen their doors.<sup>313</sup> As a result of multiple obstacles while learning from home, Black and Latinx students, poor students, ELLs, and immigrant students will likely

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309. *Id.* at 269–70.

310. *Id.* at 270.

311. Christopher Edley, Jr. & Maria Echaveste, *Now Is the Right Moment to Measure Educational Disparities*, EDSOURCE (June 25, 2020), <https://edsource.org/2020/now-is-the-right-moment-to-measure-educational-disparities/634668> (noting that in 2019, the National Research Council published a report on recommending a national system to measure educational disparities so the public school system could be held accountable for improving performance and ensuring equitable opportunities for all students) [perma.cc/N2BC-8THD]. In February 2021, the U.S. Department of Education announced that schools would be required to administer achievement tests to gauge the impact of closures on student learning, but the testing process would be more flexible than in the past. Andrew Ujifusa, *States Still Must Give Standardized Tests This Year, Biden Administration Announces*, EDUC. WK., Feb. 22, 2021, <https://www.edweek.org/teaching-learning/states-still-must-give-standardized-tests-this-year-biden-administration-announces/2021/02> [perma.cc/4SMT-G5TG].

312. *See* Edley & Echaveste, *supra* note 311 (noting that not only should educational progress be monitored, but disparities in emotional, behavioral, mental, and physical supports should be measured as well).

313. *See* DORN ET AL., *supra* note 99, at 2 (describing methodology and findings of a study conducted to estimate the potential impact that COVID-19 and school closures have had on learning outcomes).

experience larger losses than their more advantaged peers.<sup>314</sup> For that reason, these vulnerable children will face significant obstacles in satisfying benchmarks of basic proficiency under state accountability testing regimes.<sup>315</sup> Studies that demonstrate the relationship between school closures and learning losses that render students incapable of meeting state academic standards will be critical to the success of these lawsuits.<sup>316</sup>

Far from requiring that students suffer harms so egregious that they fail to graduate from high school with even rudimentary literacy skills, adequacy cases will emphasize that the shift to remote learning has prevented children from meeting the states' own measures of satisfactory performance.<sup>317</sup> Considering whether disadvantaged children have a meaningful opportunity to compete can usefully inform the interpretation of adequacy by recognizing that education is a positional good.<sup>318</sup> That is, what counts as a basic education depends on the level of schooling that others receive.<sup>319</sup> Lawsuits can show how severely school closures have undermined the competencies students need to compete with peers for employment in the private market and for voice in the civic square.<sup>320</sup> If the closures prevent high-achieving students in

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314. See *Students Weigh In: Learning & Well-Being During COVID-19*, *supra* note 188 (describing how some disadvantaged students faced multiple risk factors that could contribute to larger learning losses); see also DORN ET AL., *supra* note 99, at 5 (reporting that Black, Hispanic and low-income students are at a higher risk of receiving remote instruction that is not of average or above-average quality).

315. See DORN ET AL., *supra* note 99, at 6 (noting that as students continue to fall behind, the amount of learning they are missing out on may exacerbate existing achievement gaps by “15 to 20 percent”).

316. *Id.*

317. See Cayla J. Complaint, *supra* note 10, at 31 (noting that although the state of California passed a plan with standards for local education authorities to follow while delivering remote instruction during the pandemic, the “State has exercised no oversight to ensure that LEAs are implementing them”).

318. See Ezra Klein, *Education as a Positional Good*, THE AM. PROSPECT (Nov. 1, 2005), <https://prospect.org/education/education-positional-good/> (identifying the idea that education is a positional good, meaning that “school quality mostly matters as compared to other schools rather than on isolated quality markers”) [perma.cc/585A-426N].

319. See *id.* (same).

320. See Cayla J. Complaint, *supra* note 10, at 50 (noting that without a basic education, citizens cannot engage in informed voting for candidates and serve in our country’s military, and they will experience significant barriers to securing

disadvantaged schools from approximating even the level of proficiency attained by low-performing students in advantaged schools, the pandemic has denied these vulnerable children an opportunity to compete, instead forcing them to inhabit a separate academic world.

### *C. School Closures and Denial of an Equal Education*

Although state courts increasingly have looked to adequacy as the norm for enforcing a right to education, some courts have held that children have a right to an equal education in the public schools.<sup>321</sup> Indeed, both the *Shaw* and *Cayla J.* lawsuits refer to equal opportunity for students in the Los Angeles Unified School District and the state of California respectively.<sup>322</sup> The *Shaw* complaint alleges that the district's response to the pandemic "has denied Plaintiffs' children the basic educational equality guaranteed to them by the California Constitution," which "requires the state to ensure that Plaintiffs' children have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society."<sup>323</sup> To support this argument, the complaint notes that the district's instruction has fallen below prevailing state standards.<sup>324</sup> In a similar vein, the *Cayla J.* lawsuit asserts that the state of California's failure to intervene decisively during the school closures has allowed the public school system to become "the great unequalizer," rather than "an engine of democracy" that "affords

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economic self-sufficiency).

321. See Moran, *supra* note 208, at 266–67 (contrasting equity and adequacy claims).

322. See Shaw Class Action Complaint, *supra* note 10, at 7 (noting that "[e]ach member of the proposed class claims that Defendants violated their children's constitutional rights for the equal opportunity to an education under the California Constitution and the California Government Code."); see also Cayla J. Complaint, *supra* note 10, at 4 ("The State's abdication of responsibility and insufficient response to the challenges of remote learning have denied Student Plaintiffs the basic educational equality guaranteed to them by the California Constitution.").

323. Shaw Class Action Complaint, *supra* note 10, at 2.

324. See *id.* at 1–2 (highlighting preexisting disparities in meeting state standards between Black and Latinx students on the one hand and white and Asian students on the other).

all children the opportunity to define their destinies, lift themselves up, and better their circumstances.”<sup>325</sup>

The first point of interest here is that the plaintiffs do not frame their adequacy and equality claims in dramatically different terms.<sup>326</sup> As I have noted, “equity and adequacy claims have much in common. Equalization of resources is not an authentic remedy if it fails to ensure meaningful access, and access is illusory if gross disparities in resources persist.”<sup>327</sup> Precisely because education is a positional good, the success of equality claims turns heavily on which groups of students the courts choose as the relevant comparators.<sup>328</sup> By selecting only similarly situated, failing schools, a court can find that children have equal, but extremely depressed, educational opportunities. That possibility is well illustrated in the recent litigation in *Gary B. v. Whitmer*,<sup>329</sup> even though that case addressed an absolute denial of education.<sup>330</sup> There, the federal district court concluded that the plaintiffs’ equal protection claim should be evaluated by comparing their failing Detroit schools to other troubled schools subject to emergency state management.<sup>331</sup> The judge then found no significant disparities under this narrow standard of comparison.<sup>332</sup> The plaintiffs, however, had asked that their schools be measured against other schools throughout the state, not just those in receivership.<sup>333</sup> The

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325. Cayla J. Complaint, *supra* note 10, at 3–4.

326. *See id.* at 23 (“The California Supreme Court has repeatedly recognized that all California students possess a constitutional right to ‘equal access to a public education system’ . . . Accordingly, schools cannot provide students with a program of education that ‘falls fundamentally below prevailing statewide standards.’”).

327. Moran, *supra* note 208, at 269.

328. *See id.* at 269–70 (describing how education’s role as a positional good requires comparisons that afford children an opportunity to compete).

329. *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), *reh’g granted and opinion withdrawn*, 958 F.3d 1216 (6th Cir. 2020).

330. *See id.* at 621 (noting that the central theory of Plaintiffs’ claims was that they had been denied a right to literacy).

331. *See id.* at 629 (“[B]ecause schools like Plaintiffs’—those under emergency management or experience other state interventions—were in a different position from other schools, only schools undergoing state interventions could serve as comparators in assessing their equal protection claims.”).

332. *Id.*

333. *See id.* (“Plaintiffs say that because Defendants control the entire statewide education system, other schools throughout the state are proper

court of appeals ultimately agreed, finding that “it is hard to see why only schools that experienced more direct state interventions are the correct comparators.”<sup>334</sup> Otherwise, there would be no way to evaluate allegations that the state had “ensured adequate resources and properly certificated teachers in other schools sufficient to provide students with access to literacy” while “allowing [plaintiffs’] school to deteriorate to the point of providing no meaningful education.”<sup>335</sup> In short, the court of appeals rejected the notion that children in failing Michigan public schools inhabit a segregated educational world, one that prevents meaningful comparisons with their peers across the state.

In the *Shaw* litigation, the plaintiffs have made clear that they are not interested in having the practices used in the Los Angeles Unified School District measured against only those in other large urban districts.<sup>336</sup> Instead, the complaint cites statewide standards and the need for plaintiffs to be prepared to succeed on the same terms as other students in California.<sup>337</sup> The *Cayla J.* complaint makes this point even more sharply by suing the state, rather than a local school district, and by openly challenging the differential treatment of “haves” and “have nots” during the school closures.<sup>338</sup> As was true in *Gary B.*, these cases reject the kind of “race to the bottom” that would result from blinkered comparisons that obscure the realities of a stratified educational system.<sup>339</sup> Instead, to ensure a meaningful opportunity to compete, the *Shaw* and *Cayla J.* plaintiffs compare disparities in educational inputs and

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comparators.”).

334. *Id.* at 636 (footnote omitted).

335. *Id.*

336. See *Shaw Class Action Complaint*, *supra* note 10, at 34–35 (highlighting how other large school districts have created better distance learning systems “more likely to provide . . . students with an adequate education”).

337. *Id.* at 41–42 (describing state content standards and the failure “to provide an equal system open to Plaintiffs’ children and those similarly situated on equal terms to higher income students and non-minority students”).

338. See *Cayla J. Complaint*, *supra* note 10, at 3–4 (noting how “[t]here has been no systematic planning by the State to catch up students who have lost precious months of education because of the State’s failure to undertake reasonable measures to deliver basic educational equality”).

339. See *Moran*, *supra* note 208, at 269 (“Equalization of resources is not an authentic remedy if it fails to ensure meaningful access, and access is illusory if gross disparities in resources persist.”).

outputs experienced by children around the state during the pandemic.<sup>340</sup> With respect to inputs, the comparisons include largely the same factors addressed in adequacy litigation: the amount of instructional time, the content of instruction, the ability to access instruction through a device and the internet, and the availability of teachers for counseling.<sup>341</sup> Here, however, the emphasis should not be on whether the inputs were adequate but on whether there were notable disparities in educational services in school districts across California.<sup>342</sup> As for outputs, again, the magnitude of learning losses during the closures will be the focus of litigation.<sup>343</sup> However, rather than determine whether the losses were so severe that children lacked an adequate education, it should be sufficient to establish that there were major differences in these losses from one district to another.<sup>344</sup> Widening gaps in educational attainment could confirm that disparities in educational services denied children their right to an equal education.

The opportunity to compete can play a useful role in equality-as well as adequacy-based challenges.<sup>345</sup> While projections so far have focused on average learning losses related to the pandemic, the opportunity to compete offers new metrics of inequality to supplement this analysis.<sup>346</sup> As already noted, an adequacy lawsuit could evaluate whether there was meaningful overlap in the achievement distributions at advantaged and disadvantaged

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340. See Cayla J. Complaint, *supra* note 10, at 1 (“It is incumbent on the State . . . to get underserved students through the pandemic with an education that does not widen the gap between them and their more privileged counterparts . . .”).

341. See *id.* at 35–49 (cataloging deficiencies in the State’s response to addressing school closures during the pandemic).

342. See *id.* at 55 (asserting that lapses in dealing with the shift to remote learning denied students access to “a ‘public education system open on equal terms to all,’” citing *Butt v. State of California*, 4 Cal. 4th 668, 680 (1992)).

343. See *id.* at 49–51 (describing the long-term effects of learning losses suffered by students during the pandemic).

344. See *id.* at 51–56 (alleging that an inadequate response to the pandemic denied students a “basically equivalent” education comparable to that received by affluent, white peers).

345. Moran, *supra* note 208, at 272–74 (explaining how recognition of an opportunity to compete can diversify the metrics used in equity and adequacy cases).

346. See *id.* (same).



schools after the closures.<sup>347</sup> That overlap at least would afford high-achieving students at disadvantaged schools a chance to compete with low-achieving students at privileged schools.<sup>348</sup> An equality claim, by contrast, would examine whether the closures led to growing and significant dissimilarities in the achievement distributions.<sup>349</sup> Even if some overlap remained, an equality-based suit could prevail if the distributions became markedly different because of large, pandemic-related learning losses among vulnerable students. Those disparities could relate to a widening excellence gap among high-performing students, a growing divide for average students, or a widening gulf for the lowest-performing students.<sup>350</sup> This diversification of measurements would avoid a narrow focus on learning losses based exclusively on average achievement scores and could reveal other forms of erosion in equal educational opportunity for high- and low-performing students.<sup>351</sup>

### V. Conclusion

If education is singularly important because it is essential to work and citizenship, our nation faces the prospect of a pandemic generation ill-prepared for the responsibilities of adulthood. There is growing evidence that school closures exacerbated deep disparities in access to educational resources and will worsen achievement gaps between disadvantaged students and their privileged peers. Litigation challenging the closures as a denial of the right to education seeks to convert this schooling crisis into an

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347. See *id.* at 272–73 (“Rather than focus exclusively on average levels of achievement at each school, judges should consider the distribution of achievement levels across the top, middle, and bottom range of the student bodies.”).

348. See *supra* notes 308–310 and accompanying text (arguing that courts should evaluate a child’s opportunity to compete not just by investigating whether the child meets threshold learning requirements, but also how that child’s performance measures up compared to a child at a privileged school).

349. See generally Shaw Class Action Complaint, *supra* note 10, at 1–2; Cayla J. Complaint, *supra* note 10, at 1.

350. See Moran, *supra* note 208, at 272–73 (arguing for diversified measures of equity and adequacy across the entire spectrum of student achievement).

351. See *id.* at 272 (describing forms of inequality that are not captured by looking at average achievement scores, including a growing excellence gap for high-achieving students).

opportunity to reflect on our nation's collective commitment to its most vulnerable children. These lawsuits take up Langston Hughes' admonition to "let America be America again, Let it be the dream it used to be," even if for many students in segregated, resource-starved schools, "America never was America to me."<sup>352</sup>

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352. Langston Hughes, *Let America Be America Again*, in *THE COLLECTED POEMS OF LANGSTON HUGHES* (Albert Rampersad ed. 1994).