

Inadequate and Inequitable: A Proposal to Update Title I to Address Limitations in Education Funding Litigation

Introduction

In 2020, the Sixth Circuit recognized a fundamental right to a basic minimum education.¹ For the first time, a federal remedy existed to address the state’s failure to provide students a minimally sufficient learning environment due to teacher shortages, decrepit and unsafe buildings, insufficient heating and cooling systems, and old and damaged textbooks.² This decision seemed to create a path to reforming an education system in which just three percent of fourth graders are proficient in math.³

Then, after twenty-eight days, the full Sixth Circuit vacated this ruling.⁴ The case then settled prior to rehearing,⁵ leaving the Sixth Circuit back in line with all other Courts of Appeals,⁶ providing limited federal protections from “school conditions that would significantly impair any child’s ability to learn.”⁷

¹ The case arose after students from five Detroit schools brought a federal complaint against state officials describing an environment where students were unable to learn basic literacy skills. After the district court dismissed the complaint, a three-judge Sixth Circuit panel reversed. The panel held that under the Fourteenth Amendment’s Due Process Clause, the students had a “fundamental right to a basic minimum education...that can provide them with a foundational level of literacy” and the complaint sufficiently alleged that state officials violated this right. *Gary B. v. Whitmer*, 957 F.3d 616, 662 (6th Cir.), reh’g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020)

² Class Action Complaint at 123–24, *Gary B. v. Snyder*, No. 2:16-cv-13292-SJM-APP (E.D. Mich. filed Sept. 13, 2016).

³ See U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, National Assessment of Educational Progress (NAEP), various years, 2012-2022 Mathematics Assessments; see also Sarah Mervosh and Ashley Wu, Math Scores Fell in Nearly Every State, and Reading Dipped on National Exam, *N.Y. Times* (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/us/math-reading-scores-pandemic.html>.

⁴ *Gary B. v. Whitmer*, 958 F.3d 1216 (6th Cir. 2020, Granting Rehearing en Banc, Vacating).

⁵ The vacateur related to scheduling a rehearing en banc which many expected to overturn the 3-judge panel decision. Koby Levin, Detroit Literacy Lawsuit Ends Without a ‘Right to Read’ Precedent. Advocates Say They’ll Keep Fighting (Jun. 10, 2020), <https://detroit.chalkbeat.org/2020/6/10/21287272/detroit-lawsuit-ends-without-right-read-precedent>.

⁶ The decision was a departure from nearly all federal courts considering the issue since the Supreme Court’s 1973 decision in *San Antonio School District v. Rodriguez*, which upheld school funding practices in Texas and declined to recognize education as a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁷ *Gary v. Whitmer* (Sixth Circuit, 2020, dissent).

With federal courts effectively shut to plaintiffs pursuing right-to-education claims, advocates have pursued similar claims under state constitutions. Unlike the federal constitution, every state has a constitutional provision requiring the state to provide education.⁸ Litigants in nearly every state have brought suits under state constitutions to reform school finance systems, leading to landmark victories for plaintiffs across the country.⁹ In just the last six months courts in North Carolina¹⁰ and Pennsylvania¹¹ issued rulings that ordered state legislatures to drastically reform their states' education funding systems.

Despite these victories, there are limits to the success of state constitutional litigation to reform education finance systems. Many state courts do not recognize strong constitutional rights to education¹² and states with prior commitments to these rights have expressed increasing reluctance to uphold these rights.¹³ The more political nature of state courts has also led to concerns that even recent decisions providing increased education funding may be reversed before taking effect.¹⁴ Lastly, perhaps most concerning is that even the most successful education funding litigation typically takes decades for the order to be implemented.¹⁵ While waiting for these orders to go into effect, students continue to receive inadequate education that shapes their lives.¹⁶

⁸ Ethan Hutt, Daniel Klasik & Aaron Tang, How Do Judges Decide School Finance Cases?, 97 Wash. U. L. REV. 1046 (2020).

⁹ Id.

¹⁰ October of 2022, for instance, the North Carolina Supreme Court held that the state's constitution required the legislature to increase funding by billions of dollars. *Hoke County Bd. of Educ. v. State*, 2022-NCSC-108 (2022).

¹¹ In February of 2023, a Pennsylvania state court issued a 776-page opinion holding that the state constitution required the legislature to provide more equitable funding across the state. *William Penn Sch. Dist. v. Pa. Dep't of Educ.* (Pa. Cmwlth., No. 587 M.D. 2014, filed Feb. 7, 2023).

¹² See *infra*, Section II.B.

¹³ See *infra*, Section II.B.

¹⁴ In North Carolina, a recent judicial election changing the court's members may threaten an order to increase state funding that only occurred just months ago. See *infra*, Section II.A.

¹⁵ See *infra*, Part II.

¹⁶ Litigation at the state level has spurred increased attention to examining the link between school financing and student achievement. In this litigation, courts often hear expert testimony from education policy professors and

Despite these drawbacks, advocates continue to pursue these constitutional because this is generally the only path available to improving state education funding systems. The federal government has a strong interest in ensuring students receive an adequate education,¹⁷ but it does little to require, or even encourage, states to ensure poorer school districts receive adequate funding.¹⁸ “Title I,”¹⁹ the federal government’s primary funding program for low-income students, imposes no requirements relating to funding equity and does not provide effective mechanisms to hold states accountable for the few requirements it does impose.²⁰ The program, in essence, does not achieve its stated purpose to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”²¹

economists concerning the impact state funding has on student outcomes and whether a change in funding would remove constitutional violations concerning the state failing to provide adequate or equitable education. The most recent example of this analysis, and among the most thorough, is in an opinion released on February 7, 2023 by Pennsylvania Commonwealth Court Judge Renee Cohn Jubelirer. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.* (Pa. Cmwlth., No. 587 M.D. 2014, filed Feb. 7, 2023). The decision found that the current funding scheme in Pennsylvania violated state constitutional rights. *Id.* In so doing, the trial court reviewed testimony from expert witnesses which included detail concerning the “robust, large, significant . . . positive relationship between education and adult outcomes -- lifetime outcomes[,]” *Id.* at 468-70 (testimony of Dr. Clive Belfield is the principal economist at the Center for Cost-Benefit Studies in Education at the University of Pennsylvania and a professor of economics at the Queens College City University of New York).

¹⁷ Federal courts have consistently reiterated the fundamental importance of public education. See e.g. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”); *Rodriguez*, 411 U.S. at 35, 93 S.Ct. 1278 (“The ‘marketplace of ideas’ is an empty forum for those lacking basic communicative tools.”); *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”). This recognition has come despite rejecting opportunities to recognize education as a fundamental right. See *Rodriguez*, 411 U.S. at 49-50. The Court in *Rodriguez* noted the importance of education to democratic ideals but placed an emphasis instead on local control. *Id.*; see also Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *Stan. L. Rev.* 203, 241-43 (2008).

¹⁸ See *infra*, Section I.C.2.

¹⁹ 20 U.S. Code § 6301, *et seq.*

²⁰ See *infra*, Section I.C.2.

²¹ 20 U.S. Code § 6301 - Statement of purpose; Every Student Succeeds Act (2015), Section 1001, Statement of Purpose.

Accordingly, this paper argues that a more robust federal legislative and administrative role in education funding policy is necessary to promote more equitable and adequate state education financing systems. Specifically, this Paper proposes three changes to Title I: (1) Congress should update Title I's grants program to better incentivize states to provide equitable funding for low-income students; (2) Congress should update Title I's state plan provisions to require states to develop equity and adequacy goals and plans to meet these goals and (3) Congress should create more effective enforcement mechanisms under Title I to increase states accountability in education funding.²² These proposals build on Title I's existing structure to provide a mix of incentives, requirements and enforcement to ensure the federal government promotes equity while respecting the traditional role of state and local governance in public education. These changes would better ensure state legislatures provide students a basic minimum education, the "very foundation of good citizenship."²³

The Paper proceeds as follows. Part I reviews the connection between funding and student achievement, the federal Title I program, and state and local governance of education. Part II then reviews why state constitutional litigation and Title I do not effectively promote funding equity. Lastly, Part III proposes changes to Title I that may promote more equitable and adequate funding, as well as the benefits and challenges of this approach.

I. Education Funding, Title I, and State and Local Schemes

A. Funding's Relationship to Academic Achievement

²² See *infra*, Part III.

²³ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

It may be intuitive that more funding will improve education outcomes, but the issue is complex and debated among education policy experts.²⁴ Many factors impact student performance separate from funding towards education, including the availability of early childhood programs, nutrition, access to healthcare, and family income levels.²⁵ This confluence of different factors has made the impact of poorly funded schools difficult to separate from external factors correlated to school performance.²⁶ Some have questioned whether funding has any positive impact at all.²⁷ Under this argument, low-income students trail their wealthier peers not due to a lack of sufficient funding but almost entirely due to external factors – no amount of funding can make up for the challenges student face before even entering the classroom.²⁸

This argument has been largely debunked in recently years, however, as the positive correlation between total funding and student achievement at each level of education has become clearer.²⁹ Recent studies have provided more confidence that school finance reforms and

²⁴ Education policy focuses on student achievement standards. Under Title I, the federal government requires states to adopt “challenging academic standards.” See 20 U.S.C. § 6311. State policymakers then set these standards, assess students based on these standards, and adjust programs accordingly. See e.g. NY standards at <http://www.nysed.gov/curriculum-instruction>.

²⁵ See Brodie, Pastore, Rosser & Selbin, *POVERTY LAW: POLICY & PRACTICE* 494-502 (2d ed. 2020).

²⁶ See C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question* NBER Working Paper (2018) (providing an overview of recent literature on school spending’s correlation to student outcomes); see also Bruce D. Baker, *How Money Matters for Schools*, Learning Policy Institute (2017); Baker 2018.

²⁷ See C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question* NBER Working Paper (2018).

²⁸ See Brodie, Pastore, Rosser & Selbin, *POVERTY LAW: POLICY & PRACTICE* 494-502 (2d ed. 2020).

²⁹ In this litigation, courts often hear expert testimony from education policy professors and economists concerning the impact state funding has on student outcomes and whether a change in funding would remove constitutional violations concerning the state failing to provide adequate or equitable education. See *supra*, note 16 (citing *William Penn Sch. Dist. v. Pa. Dep’t of Educ.* (Pa. Cmwlth., No. 587 M.D. 2014, filed Feb. 7, 2023)). In the recent Pennsylvania school funding decision, the trial court found reviewed testimony from expert witnesses reviewing, among other items, the connection between school funding, poverty, and education outcomes. See *William Penn Sch. Dist. v. Pa. Dep’t of Educ.* At 415-568 (Pa. Cmwlth., No. 587 M.D. 2014, filed Feb. 7, 2023). The expert testimony accepted by the court indicates “that increased school funding has a positive causal effect on student outcomes throughout the school trajectory.” *Id.* at 485. The court in reviewing the testimony from the plaintiff school districts against the testimony from the state found that although the impact of school funding on student outcomes was up for debate, the testimony credibly established a causal connection between education funding and student achievement. *Id.* at 500.

increases in educational resources has a positive impact on student performance.³⁰ Put simply, when states direct additional funds to low-income students' education, their academic results improve.

How these funds are used matters, however.³¹ Increased funding for “human capital” such as finding and retaining high-quality teachers has a significant positive impact on education levels.³² Improving funds for education may also be used to counteract the impact from external factors – those less directly linked to learning.³³ Almost every state requires its school districts to participate in the national school lunch program or a state equivalent, and many states also require districts to provide healthcare to students, including mental healthcare.³⁴ The federal government has increasingly focused funding on student nutrition³⁵ and mental healthcare.³⁶ The federal governments and states have also focused on support for community schools which provide integrated services for students and families.³⁷

³⁰ See Jackson, Kirabo, Rucker C. Johnson, Claudia Persico (2015). “The Effects of School Spending on Educational & Economic Outcomes: Evidence from School Finance Reforms”. *The Quarterly Journal of Economics* 131(1): 157-218; see also *William Penn Sch. Dist. v. Pa. Dep’t of Educ.* at 485-500 (Pa. Cmwlth., No. 587 M.D. 2014, filed Feb. 7, 2023) (testimony of Professor Johnson).

³¹ See e.g. Jeannie Oakes, Anna Maier and Julia Daniel, *Community Schools: An Evidence-Based Strategy for Equitable School Improvement*, National Education Policy Center (2017) (reviewing the research showing positive impacts of community schools which direct resources to a range of programs separate from direct provision of education such as “integrated student supports” and “parent and community engagement”), <https://www.jstor.org/stable/resrep42046>.

³² See e.g. Richard Rothstein, *Using Social, Economic, and Educational Reform to Close the Black–White Achievement Gap* (2004), https://www.epi.org/publication/books_class_and_schools/.

³³ Studies indicate that improving students' access to healthy nutrition or mental health services has a positive impact on education achievement. *Id.*

³⁴ Sherry Maria Tanious, *Schoolhouse Property*, Note, 131 *YALE L. J.* 1641 (2022).

³⁵ See e.g. Press Release, USDA, *USDA Invests \$50 Million for Schools & Food Industry to Work Together to Strengthen School Meals* (Nov. 10, 2022), <https://www.usda.gov/media/press-releases/2022/11/10/usda-invests-50-million-schools-food-industry-work-together>.

³⁶ See e.g. Department of Education, *Fact Sheet: Biden-Harris Administration Announces Two New Actions to Address Youth Mental Health Crisis* (July 29, 2022) <https://www.ed.gov/news/press-releases/fact-sheet-biden-harris-administration-announces-two-new-actions-address-youth-mental-health-crisis>.

³⁷ *Id.* (noting that Congress has increased funding for schools providing integrated student services).

In sum, funding has an important impact on student achievement and improvements in equitable and adequate schooling for low-income students.³⁸

B. State and Local Governance

1. State and Local Funding

While the federal government plays a prominent role in education policy, education remains predominantly a state and local government issue.³⁹ Local school districts generally manage operations, but states are ultimately responsible for structuring and funding education systems.⁴⁰ Approximately 92% of all education funding comes from states and local governments through: (1) local property taxes and (2) state funds.⁴¹ Local property taxes were traditionally the primary means of funding school districts, but state revenues now provide the largest share of funding for total public education funding.⁴²

State revenues are important not just for the amount of funds they provide, but also because the way the state chooses to allocate these funds plays the biggest part in determining how equitable the state's funding system is. The historic use of local taxes meant that school

³⁸ This is not to ignore the structural changes separate from increased funding. More funds for education do not address structural inequities such as a lack of affordable housing and segregation of students, known to impact student performance and dignity. See Derek Black, *Educational Gerrymandering: Money, Motives, Motives, and Constitutional Rights*, 94 N.Y.U. L. Rev. 1385 (December 2019); see also Derek Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 411 (2012) (discussing the higher costs in higher poverty districts and arguing that, for this reason, segregation is economically inefficient). Increasing funding for education will address some effects of inter-district inequity, but not underlying inequities.

³⁹ *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“[n]o single tradition in public education is more deeply rooted than local control over the operation of schools”).

⁴⁰ See Richard Briffault, *The Role of Local Control in School Finance Reform* (1992).

⁴¹ National Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: FY 20 2*, <https://nces.ed.gov/pubs2022/2022301.pdf>.

⁴² *Id.* However, this varies significantly by state. See Education Data Initiative, *U.S. Public Education Spending Statistics* (June 15, 2022), <https://educationdata.org/public-education-spending-statistics>.

funding in a given districted depended almost entirely on local property tax revenue, but the growth of state revenues allows states to redistribute funds more equitably across the state.

State funding formulas vary considerably across states and can be extremely complex, but there are three general approaches. One is to focus on districts' funding and achievement levels relative to others in the state and direct resources to *equalize* total funding (state revenues plus local property tax revenues) per student across districts.⁴³ A second approach is to focus on meeting a minimum funding level necessary to provide an *adequate* education and allowing districts to fund more than this minimum.⁴⁴ In state funding litigation, courts generally find *adequacy* to be a more realistic and less politically contentious goal than meeting *equality* standards.⁴⁵ Equality requires either substantial funds to “level up” spending in poor districts to match wealthier districts or “leveling down” spending in rich districts to match lower-income districts.⁴⁶ Adequacy focuses only on providing resources to relatively poorer districts to meet minimum requirements. Defining these minimum requirements for adequacy, however, is challenging for many courts.⁴⁷

A third approach is to tie state funding to a district's “tax effort.” Under “district power equalization” (“DPE”), if a district taxes at a certain rate (i.e. displays effort to fund education), the state will ensure the district has a certain amount of funds per student, up to a certain

⁴³ William S. Koski, *Beyond Dollars? The Promises and Perils of the Next Generation of Educational Rights Litigation*, 117 Colum. L. Rev. 1897, 1904-07 (2017). This approach has the benefit of being relatively simple to calculate. It also seems on its face to be a means to create more equitable funding. It has a few key downsides, however. Districts may be incentivized to reduce their total spending if they know the state will make up for the reduced funding in its equalizing formula. It also does not account for differences in student population. Students from lower-income districts generally require additional funding to make up for a lack of resources outside the education system to achieve equal outcomes.

⁴⁴ *Id.*

⁴⁵ William S. Koski, *Beyond Dollars? The Promises and Perils of the Next Generation of Educational Rights Litigation*, 117 Colum. L. Rev. 1897, 1904-07 (2017)

⁴⁶ Zachary D. Liscow, *The Efficiency of Equity in Local Government Finance*, 92 N.Y.U. L. Rev. 1828, 1898 n.262 (2017).

⁴⁷ *Id.*; Koski (2017) at 1904-07; Section II.A.

maximum level.⁴⁸ This approach addresses a concern that focusing on equality may lead districts to reduce their funding incentivizes local districts to increase their own funding levels, encouraging buy-in among districts while partially offsetting inter-district inequities in funding power by tying state funding to tax rates rather than total spending. A drawback to this approach, however, is that it ties spending to the policy choices of district taxpayers rather than the funding needs of students.⁴⁹

Under each approach, the formulas include a range of adjustments for demographics and other factors that can make the formulas exceedingly complex.⁵⁰

2. Local Control in Public Education

Although subject to plenary state control, school districts are generally locally elected and have considerable discretion to make decisions regarding the operation of schools.⁵¹ Local control plays an important role in education policy, with Courts and policymakers often stressing its importance when considering new reforms.⁵²

Proponents of local governance of education generally focus on the importance of family involvement in education. Educational governance raises unique concerns for parents who want to have a say in how the state educates their children.⁵³ By allowing parents and their local community to have a more direct say in school governance, local school districts mitigate the

⁴⁸ See *Gannon v. State*, 402 P. 3d 513 (KS 2017) (reviewing this approach).

⁴⁹ Briffault, Reynolds, et al., *State and Local Government Law* 607 (West 9TH ed. 2022).

⁵⁰ These formulas' complexities have the potential to allow states to manipulate and obfuscate its funding allocations to disadvantage particular communities. See Derek Black, *Educational Gerrymandering: Money, Motives, Motives, and Constitutional Rights*, 94 N.Y.U. L. Rev. 1385, 1388-89 (2019).

⁵¹ See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 786-87 (1992).

⁵² *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (noting that local control is "deeply rooted" in public education policy); see also Rodriguez, 411 U.S. at 49-50 (reviewing the importance of local control of education and its connection to pluralism and experimentation). This view of local control has continued among policymakers despite a continued increase of state and federal control over education policy. See Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 Stan. L. REV. 203, 241-43 (2008) (discussing the continued resilience of the concept of local control despite increasing federal policies affecting public education policy).

⁵³ See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 786-87 (1992).

threat to family interests that schools could have if more distantly governed.⁵⁴ Courts have also pointed to benefits local control has in encouraging experimentation across districts and the ability to respond and adapt to local preferences.⁵⁵

In less wealthy districts, however, the benefits of local decision-making are limited by funds available. A district without the necessary funds will be unable to react to parents' concerns or experiment with different education models.⁵⁶ Courts have often invoked local control as a means to reject efforts to improve financing systems, however, without fully discussing the limitations local districts face due to inadequate funding.⁵⁷ In addition, the power of states and local decisionmakers to draw and redraw district boundary lines has been used to implement racist and segregationist policies excluding students of color from partaking in districts with higher quality education.⁵⁸

Thus, local control is a deeply rooted tradition in public education and provides benefits of local participation. The potential for disparate funding and other inequitable policies, however, indicates a need for effective accountability mechanisms overseeing state and local policymaking.

⁵⁴ *Id.*

⁵⁵ See e.g. *Rodriguez*, 411 U.S. at 49-50.

⁵⁶ *Id.*

⁵⁷ See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 775-76 (1992); see also *Shofstall v. Hollins*, 515 P.2d 590, 593 (Ariz. 1973); *Lujan v. Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1021-23 (Colo. 1982) (*en bane*); *Thompson v. Engelking*, 537 P.2d 635, 645 (Idaho 1975); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788-89 (Md. 1983); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 367-68 (N.Y. 1982), appeal dismissed, 459 U.S. 1138 (1983); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820- 22 (Ohio 1979), cert. denied, 444 U.S. 1015 (1980); *Olsen v. State*, 554 P.2d 139, 146-48 (Or. 1976); *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979); *Kukor v. Grover*, 436 N.W.2d 568, 580- 82 (Wis. 1989); *Buse v. Smith*, 247 N.W.2d 141, 150-52 (Wis. 1976); see also *School Bd. v. Louisiana State Bd. of Elementary & Secondary Educ.*, 830 F.2d 563, 572 (5th Cir. 1987), cert. denied, 487 U.S. 1223 (1988).

⁵⁸ See e.g. Erika K. Wilson, *Monopolizing Whiteness*, 134 Harv. L. Rev. 2382, 2424–26 (2021). When districts attempt to alter boundary lines to remedy disparities in education quality in neighboring districts, there is often considerable pushback from parents who strongly react against such changes. *Id.*

C. The Federal Title I Program

1. Origins and Evolution of Title I

The federal government has long been involved in education policy. The 1965 Elementary and Secondary Education Act created Title I to provide funding to support low-income students' education.⁵⁹ Title I began alongside other War on Poverty programs with a primary purpose of directing federal funds to low-income students,⁶⁰ and initially imposed few conditions on states and local districts receiving these funds.⁶¹

Over time, the antipoverty focus of the program began to drift⁶² as Congress added additional requirements⁶³ in efforts to improve student achievement.⁶⁴ The evolution of Title I culminated in the 2002 No Child Left Behind Act ("NCLB") which many criticized for imposing rigid accountability requirements on states⁶⁵ and adding unrealistic achievements standards while doing little to fund needed improvements to meet these requirements.⁶⁶ In 2015, Congress pulled

⁵⁹ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 201, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. § 6301 (2002)). Note that the original purpose was amended in 2015 with a new stated purpose to "provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." Pub. L. No. 114-95, § 1001, 79 Stat. 27 (2015); see also Goodwin Liu, *Improving Title I Funding Equity across State, Districts, and Schools*, 93 IOWA L. REV. 973, 975 (2008).

⁶⁰ Goodwin Liu, *Improving Title I Funding Equity across State, Districts, and Schools*, 93 IOWA L. REV. 973, 975 (2008).

⁶¹ See Federal Educational Policy as an Anti-Poverty Strategy, K. Wong, 16 Notre Dame J.L. Ethics & Pub. Pol'y 421 (2002).

⁶² See Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309 (2017).

⁶³ *Id.* 938-39.

⁶⁴ Amendments to Title I began relatively soon after its passage with new requirements added in the 1970s, and then in the 1980s and mid-1990s, the federal government began to more fundamentally alter Title I to incorporate more rigid requirements on states receiving funds. Kenneth K. Wong, *Federal Educational Policy as an Anti-Poverty Strategy*, 16 Notre Dame J.L. Ethics & Pub. Pol'y 442 (2002); see also James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937-39 (2004).

⁶⁵ See e.g. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 933-34, 989 (2004); Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds*, 35 TOURO L. REV. 11, 12 (2019); see also Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 615-17 (2013) (reviewing criticisms of NCLB).

⁶⁶ See, e.g. Bruce Meredith & Mark Paige, *Reversing Rodriguez: A Siren Call to A Dangerous Shoal*, 58 Hous. L. Rev. 355, 379-81 (2020) (reviewing issues with NCLB and noting that "Congress did not want to pay the price tag even

back on NCLB’s strict assessment requirements and returned considerable discretion to state legislatures to define and meet student education standards when it passed the Every Student Succeeds Act (“ESSA”).⁶⁷

The ESSA is the current iteration of federal education policy under which Title I continues to play a key role.

2. The Every Student Succeeds Act Title I Program

There are two primary provisions under the current Title I program: (1) the four grant funding formulas, and (2) the state requirements.

a. Title I’s Grant Funding Formulas

Under Title I’s four main grant programs, the federal government allocated approximately \$17.5 billion to states in 2022.⁶⁸ The grant allocations primarily depend on two variables: (1) “formula child count,” which is essentially the number of low-income children in a school district, and (2) an “expenditure factor” which is essentially the average per pupil expenditure in the state.⁶⁹ The four formulas differ in certain details and complexity, but in

for modest improvements, much less for the proficiency demanded by NCLB, creating an underfunded mandate that severely burdened state and local school district budgets”).

⁶⁷ Some such as Professor Derek Black have criticized this pullback, arguing that the Every Students Succeeds Act as a whole represented a regression by the federal government in promoting equitable education opportunities to students and giving too much control to states to inadequately fund education. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309 (2017) (“The ESSA’s framework will, in effect, make equal educational opportunity a random occurrence rather than a legal guarantee”).

⁶⁸ Rebecca Skinner, CONG. RESEARCH SERV., *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer* 24 (2022). In total, \$27.7 billion was distributed to states under the Elementary and Secondary Education Act with the other programs more targeted toward specific programs. Id. at 28.

⁶⁹ REBECCA R. SKINNER, CONG. RESEARCH SERV., *ALLOCATION OF FUNDS UNDER TITLE I-A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 20* (2018). The population used to determine Title I-A grants for the 50 states, the District of Columbia, and Puerto Rico consists of children ages 5-17 (1) in poor families, according to estimates for a recent income year for LEAs from the Census Bureau’s Small Area Income and Poverty Estimates (SAIPE) program; (2) in institutions for neglected or delinquent children or in foster homes; and (3) in families receiving Temporary Assistance for Needy Families (TANF) payments above the poverty income level for a family of four (hereinafter referred to as TANF children). Id. The state expenditure factor is determined using the state average per pupil expenditure (APPE) for public K-12 education. Id. The expenditure factor is subject to a minimum of 80% and

general, the higher the formula child count and expenditure factor, the greater the Title I funds the state and local district receive.⁷⁰

b. Title I's State Plan Requirements

Under the ESSA, Title I imposes few requirements on states to receive Title I funds. While Title I imposes requirements on states to *have* certain academic standards and accountability mechanisms, states and localities have significant discretion to determine what those standards are, how to meet them, and how to measure them. There are no requirements tied to reducing funding inequities across districts.⁷¹

To receive funds under Title I, states must submit a “state plan” to the Department of Education providing assurances that the state has established “challenging academic standards” and accountability systems.⁷² States have wide discretion to craft education plans. When reviewing state plans, the “peer-review team” conducts “an objective review of State plans in their totality and out of respect for State and local judgments, with the goal of supporting State- and local-led innovation.”⁷³ The Secretary of Education (“Secretary”) and political appointees are prohibited from mandating particular standards⁷⁴ or requiring specific allocations of funds by

maximum of 120% of the national average to limit its impact for very-low spending or very-high spending states to 80% of the national average and 120% of the national average, respectively. *Id.*

⁷⁰ For a detailed discussion on each of these grants, see *id.* at 1-15. There are a number of consequences from these adjustments such as favoring small states. See e.g. <https://www.chalkbeat.org/2021/6/3/22517005/title-i-joe-biden-budget-school-funding>.

⁷¹ Note that in addition to Title I, there are other grant programs that are focused towards specific initiatives such as supporting teacher training, recruitment or retention, or supporting STEM programs. See Rebecca Skinner, CONG. RESEARCH SERV., *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer, Appendix (2022)* (appendix, reviewing grant allocations). However, given these programs are smaller in size than Title I, not targeted to low-income students in a similar manner, and do not have the same requirements, they are not reviewed in this Paper.

⁷² Rebecca Skinner, CONG. RESEARCH SERV., *The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer 4-7 (2022)*.

⁷³ 20 U.S. Code § 6311 - State plans

⁷⁴ 20 U.S. Code § 6311(b)(1)(A), (b)(1)(G).

the state.⁷⁵ While states must ensure the Title I funds are supplemental (i.e. the state must supplement state and local sources with federal funds rather than replace them), there are no requirements on states to equitably fund districts or schools.⁷⁶

In sum, Title I imposes few requirements on states to receive federal funding for education. Although it encourages promoting educational achievement across the state, the program has no provisions that encourage funding equity or adequacy.⁷⁷

II. Ineffective Measures to Address Educational Inequity and Inadequacy: State Constitutional Protections and Title I

State legislatures are ultimately responsible for crafting state financing systems, but state courts or the federal government restrict legislative discretion. The courts and federal government, however, are not currently doing enough to hold state legislatures accountable for inadequate or inequitable financing systems.

A. The Limitations of State Constitutional Protections

Every state constitution requires the provision of public education.⁷⁸ In the last five decades, plaintiffs have brought suits under these provisions to reform school financing systems that disadvantage low-income students. There have been notable successes leading to significant

⁷⁵ 20 U.S. Code § 6321(b)(4). There are also certain requirements for local districts in how they allocate the funds, but this is outside the scope of this paper. REBECCA R. SKINNER, CONG. RESEARCH SERV., ALLOCATION OF FUNDS UNDER TITLE I-A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 20 (2018)

⁷⁶ 20 U.S. Code § 6321(b)(1).

⁷⁷ Note that in addition to Title I, there are other grant programs that are focused towards specific initiatives such as supporting teacher training, recruitment or retention, or supporting STEM programs. See 2022 CRS ESSA Primer appendix (reviewing grant allocations). However, given these programs are smaller in size than Title I, not targeted to low-income students in a similar manner, and do not have the same requirements, they are not reviewed in this Paper.

⁷⁸ See Sherry Maria Tanious, Schoolhouse Property, Note, 131 YALE L. J. 1641, 1663 n. 153 (2022).

funding reforms,⁷⁹ but the viability of this approach varies significantly by state and has met consistent limitations.

1. State Courts Rejecting Constitutional Protections for Adequate Education or Pulling Back on Prior Protections

Some states have long rejected reform efforts. The Illinois Supreme Court, for instance, has consistently rejected constitutional challenges to the state financing system,⁸⁰ citing a lack of judicially manageable standards and holding that education financing is a matter solely left to the legislative branch.⁸¹ Even some state courts that previously recognized strong state constitutional rights to education have grown increasingly wary of their role in education finance reform in recent years, raising similar concerns as the Illinois Supreme Court.⁸²

Texas is one such state. In 1989, the Supreme Court of Texas interpreted its state constitution to require the state to establish an education system that provided “a direct and close correlation between a district’s tax effort and the educational resources available to it; in other words, districts must have substantially equal access to similar revenues per pupil at similar levels of tax effort.”⁸³ A trial court in 2014 relied on this precedent to find that the current school finance system violated the Texas Constitution, noting that “Texas school children, particularly the economically disadvantaged and English language learners, are denied access to that

⁷⁹ Brookings, What Drives Increases in State Funding for Education? (August 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/08/11/what-drives-increases-in-state-funding-for-education/>.

⁸⁰ See *Comm. for Educ. Rts. v. Edgar*, 174 Ill. 2d 1, 30, 672 N.E.2d 1178, 1189-92 (1996).

⁸¹ *Id.*

⁸² William S. Koski, *Beyond Dollars? The Promises and Perils of the Next Generation of Educational Rights Litigation*, 117 *Colum. L. Rev.* 1897, 1907-15 (2017); see also *Campaign for Quality Educ. v. State*, 209 Cal. Rptr. 3d 888, 899 (Ct. App. 2016) (rejecting the idea that education is a “subject within the judiciary’s field of expertise”) (internal quotation marks omitted) (quoting *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1191 (Ill. 1996))

⁸³ *Morath v. The Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 842 (Tex. 2016) (citing *Edgewood I*). The state constitution provides that “it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”

education needed to participate fully in the social, economic, and educational opportunities available in Texas.”⁸⁴ The Texas Supreme Court reversed the trial court’s decision. The Court held that while the state’s students deserved “transformational, top-to-bottom reforms” and that there were “doubtless” better systems available, the Court would not invalidate the state’s funding scheme out of a concern about second guessing the legislature in this “policy-laden area.”⁸⁵

Washington, Colorado, Kansas and California have also recently pulled back from their prior constitutional protections for a right to education.⁸⁶ After California’s Supreme Court declined to review a lower court’s dismissal of adequate education claims due to similar justiciability and legislative deference concerns, Justice Goodwin Liu echoed critics of this recent pullback, writing that “[i]t is regrettable that this court, having recognized education as a fundamental right in a landmark decision 45 years ago . . . should now decline to address the substantive meaning of that right.”⁸⁷

2. Limitations of Successful State Litigation

Even when strong constitutional protections are upheld, there are limitations to the effectiveness of educational constitutional litigation. Successful litigation takes decades before state legislatures adequately respond.⁸⁸ A new judicial election may lead to uncertainty about

⁸⁴ The Texas Taxpayer & Student Fairness Coalition v. Williams, 2014 WL 4254969, at *267 (Tex. Dist. Aug. 28, 2014).

⁸⁵ Id. at 886.

⁸⁶ Koski (2017) at 1899.

⁸⁷ Campaign for Quality Educ. v. State, 209 Cal. Rptr. 3d 888, 899 (Ct. App. 2016), review denied, 209 Cal. Rptr. 3d 888, 919 (2016); see also Koski, at 1907-15 (reviewing this case).

⁸⁸ States such as Ohio, New York, Kansas, and New Jersey are among those with successful litigation taking decades with multiple rounds of litigation and often inadequate and uncooperative responses from state legislatures. See e.g. Alexandra Greif, Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate, 22 YALE L. & POL'Y REV. 615 (2004) (reviewing the decades-long Abbott litigation in New Jersey); Koski at 1909-10; ; Gannon v. State, 319 P.3d 1196, 1251 (Kan. 2014) (directing state to cure funding failures); Order at 2, McCleary v. State, No. 84362-7 (Wash. Aug. 13, 2015) (fining state for refusal to comply with school funding order).

even recent decisions upholding students’ constitutional rights, as a recent victory for plaintiffs in North Carolina illustrates.

In North Carolina, the state constitution includes a number of provisions that the North Carolina Supreme Court held “combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.”⁸⁹ The North Carolina Supreme Court affirmed this guarantee in 2004 when the Court found that the state “had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education.”⁹⁰ Accordingly, the court required the state legislature to develop a new system of education to correct the education system’s deficiencies, leading to a back-and-forth between the court and legislature that lasted eighteen years. Finally, in October 2022, the Court held that the legislature has had enough time to reform its education system.⁹¹ The Court declared that “to continue to condone delay and evasion [by the legislature] would render this Court complicit in the constitutional violation”⁹² and ordered the legislature to spend \$1.75 billion in additional funding for the State’s schools.⁹³

Even with this historic success after eighteen years, there remains uncertainty about whether this order will go into effect. The court remanded the case to the trial court to continue the proceedings, meaning the “ruling will not be the final page in the [decades-long] litigation.”⁹⁴ Then, just days after the ruling, two of the justices in the 4-3 majority lost their seats in state judicial elections, changing the court’s composition from a 4-3 majority with democratic judges

⁸⁹ *Leandro v. State*, 346 N.C. 336, 345 (1997) (*Leandro I*).

⁹⁰ *Hoke County Bd. of Educ. v. State*, 358 N.C. 605, 607, 647–48 (2004) (*Leandro II*).

⁹¹ *Hoke County Bd. of Educ. v. State*, 2022-NCSC-108 (2022).

⁹² *Id.* at 4.

⁹³ Liz Schlemmer, NC Supreme Court Orders Historic Transfer of Education Funding, WUNC (Nov. 4, 2022), <https://www.wunc.org/education/2022-11-04/nc-supreme-court-orders-historic-transfer-of-education-funding>; New judge taking over North Carolina school funding case, WUNC (Jan. 5, 2023), <https://www.wunc.org/education/2023-01-05/new-judge-taking-over-north-carolina-school-funding-case>.

⁹⁴ *Hoke County Bd. Of Educ. V. State*, 2022-NCSC-108 (2022).

controlling to a 5-2 majority with republican judges controlling.⁹⁵ The election results led some to predict this will prevent the ruling from going into effect, with one republican policy official stating the order would be blocked by a newly seated state supreme court.⁹⁶

Thus, the North Carolina case illustrates the potential for successful constitutional litigation, but also its limits. The North Carolina Supreme Court ordered a transformational amount of funding, but only after decades of litigation, and even with this significant victory, its impact remains uncertain. This potential for success through state constitutional litigation, but only after decades of successive cases has been a common challenge.⁹⁷

3. Summary of State Constitutional Litigation

Students and parents continue to bring claims alleging substantial inequities and inadequacies in state education systems. Litigation has led to significant structural changes in many states, but funding inequity and inadequacy is a nationwide problem lacking a nationwide solution. Some states do not have sufficiently strong constitutional protections or courts willing to invalidate legislative education systems. And even when successful, litigation may last decades while students continue to receive inadequate educations.

⁹⁵ Michael Wines, On North Carolina's Supreme Court, G.O.P. Justices Move to Reconsider Democratic Rulings, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/us/north-carolina-supreme-court-voting-rights.html>. The new North Carolina supreme court has already indicated a willingness to rehear recent cases in other contexts such as voting rights. *Id.*

⁹⁶ Liz Schlemmer, NC Supreme Court Orders Historic Transfer of Education Funding, WUNC (Nov. 4, 2022), <https://www.wunc.org/education/2022-11-04/nc-supreme-court-orders-historic-transfer-of-education-funding>.

⁹⁷ States such as Ohio, New York, Kansas, and New Jersey are among those with successful litigation taking decades with multiple rounds of litigation and often inadequate and uncooperative responses from state legislatures. See e.g. Alexandra Greif, Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate, 22 YALE L. & POL'Y REV. 615 (2004) (reviewing the decades-long Abbott litigation in New Jersey); Koski at 1909-10; ; Gannon v. State, 319 P.3d 1196, 1251 (Kan. 2014) (directing state to cure funding failures); Order at 2, McCleary v. State, No. 84362-7 (Wash. Aug. 13, 2015) (fining state for refusal to comply with school funding order).

The anomalous Sixth Circuit panel reviewed in the Introduction and its immediate vacateur provided a stark reminder that federal courts are not a viable alternative venue.⁹⁸

B. The Limitations of Title I to Encourage Greater Funding Equities

The federal legislature and executive branches provide significant resources to low-income students but do not do enough to provide an adequate check on state legislatures' funding systems. Neither Title I's grant structure nor its state plan requirements encourage states to promote funding equity or adequacy.

Only one of the four grant programs minimally considers funding equity⁹⁹ and existing state plan provisions do not impose requirements on states to even consider equitable funding.¹⁰⁰ States must use federal funds to “supplement” rather than “supplant” funds that would otherwise be received by low-income students,¹⁰¹ but the Act requires that no provision “shall be construed to mandate equalized spending per pupil for a State, local educational agency, or school.”¹⁰² While states are required to create their own standards and accountability programs, there is no such requirement for states to create their own plans relating to promoting equitable or adequate funding across districts despite evidence across the country of funding disparities.¹⁰³

⁹⁸ Gary B. v. Whitmer, 957 F.3d 616, 649 (6th Cir.), reh'g en banc granted, opinion vacated, 958 F.3d 1216 (6th Cir. 2020).

⁹⁹ Goodwin Liu, Improving Title I equity across states, districts, and schools, Iowa L. Rev. (2008); see also Black, Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act, BU L Rev (2010).

¹⁰⁰ Derek W. Black, Abandoning the Federal Role in Education: The Every Student Succeeds Act, 105 CALIF. L. REV. 1309 (2017).

¹⁰¹ See 20 U.S.C. §6321(b).

¹⁰² 20 U.S.C. § 6576.

¹⁰³ Some have also criticized these formulas for not paying enough attention to disparities in wealth across states. See e.g. Goodwin Liu, Improving Title I equity across states, districts, and schools, Iowa L Rev. (2008) (noting that the “most severe inequity occurs in the allocation of Title I funds across states. By allocating aid to states in proportion to state per-pupil expenditures, Title I reinforces vast spending inequalities between states to the detriment of poor children in high-poverty jurisdictions”). Although there are greater distributions of funds to districts with greater concentrations of poverty within the same states, this relationship does not hold for districts with comparable poverty concentration across states. Id.

The persistence of state litigation indicates a need for accountability on state legislatures that neither state constitutions nor the federal government sufficiently provide. Given the national interest in minimally adequate and equitable education and courts' reluctance to protect these interests, an expanded federal role among the political branches is necessary.

III. Part III: Proposals to Update Title I

Title I should be updated to promote more equitable and adequate state funding systems. Congress should (1) update Title I grants to better incentivize equitable funding; (2) update Title I state plan requirements to require states to incorporate equity and adequacy goals and plans; and (3) create more effective enforcement mechanisms to promote accountability. This Part reviews each of these proposed statutory changes and then considers the potential benefits and challenges of adopting these proposals.

A. Update Grants to Better Incentive Equitable Funding

Congress should update Title I in three ways to better incentivize states to provide more equitable and adequate funding in their financing systems.

First, Congress should adjust the Education Financing Incentive Grants (“EFIG”) to place a greater emphasis on factors that tie grant funding to “effort” and inter-district equity, and allocate a greater proportion of funds to this grant.¹⁰⁴ Of the four Title I grants, only EFIG incorporates factors that promote equity by (1) allocating additional funds to states that invest more in education relative to state income levels (with an “effort” factor) and (2) allocating additional funds to states with greater inter-district equity (with an “equity” factor). In theory, these factors encourage states to more equitably fund their districts to receive additional funds,

¹⁰⁴ Currently, EFIG grants receive approximately 25% of total Title I funds. See Rebecca Skinner, CONG. RESEARCH SERV., The Elementary and Secondary Education Act (ESEA), as Amended by the Every Student Succeeds Act (ESSA): A Primer 4-7 (2022).

but in practice their impact is relatively small with most funds tied to a state's number of low-income students and expenditures per student.¹⁰⁵

Accordingly, Congress should (1) remove the narrow constraints limiting the impact of equity and effort factors on the EFIG distribution, and (2) increase the relative impact of these factors by allocating additional funds to EFIG grants. A more significant equity factor would encourage states to direct additional funds to lower-income districts. A more significant effort factor would direct relatively greater funds to states with relatively lower income, allocating Title I funds in a manner similar to the DPE structure used by states to encourage effort in local districts.¹⁰⁶ These changes would encourage states to more equitably fund low-income districts and reward lower-income states for spending a greater amount of funds on education relative to total wealth.¹⁰⁷

Second, Congress should create a fifth Title I grant similar to the “equity grants” the Department of Education proposed in its 2022 budget request.¹⁰⁸ The Department’s proposal was light on details but encouraged Congress to create grants that would address “long-standing funding disparities between under-resourced school districts and their wealthier counterparts” in part by providing incentives to address school funding systems’ inequalities.¹⁰⁹ Unlike existing grants, the equity grants would not rely on formulas but would instead base funding on more qualitative criteria. Adopting a more qualitative grant would recognize that there are ways states

¹⁰⁵ REBECCA R. SKINNER, CONG. RESEARCH SERV., ALLOCATION OF FUNDS UNDER TITLE I-A OF THE ELEMENTARY AND SECONDARY EDUCATION ACT 13 (2018). There are narrow bounds of 95% and 105% for the effort factor and it appears the maximum impact from the equity factor is an approximately 30% benefit from additional “equity;” however, the equity factor is generally between 10 and 20%.

¹⁰⁶ See *supra*, Section I.C.1.

¹⁰⁷ Currently, Title I allocates more funds to states spending a greater total amount on schools as opposed to a greater amount of funding relative to total income.

¹⁰⁸ Department of Education, Proposed Budget Request: Fiscal Year 2022, <https://www2.ed.gov/about/overview/budget/budget22/justifications/a-ed.pdf>.

¹⁰⁹ *Id.* at A-20.

may address equity and adequacy goals separate from funding levels, including desegregating school districts or providing external resources to families that have indirect educational benefits such as promoting access to affordable housing or healthcare.

Third, Congress should give the Secretary of Education discretion to alter equity provisions tied to the EFIG grant formula and the new equity grants. A drawback of the current funding scheme is that because the formulas are statutory, the Secretary is unable to alter these grants based on improved understanding about how to more effectively promote educational equity or adequacy. Giving the Secretary discretion to adjust the EFIG formula and equity grants requirements based on the Department's expertise would allow education policy to be more responsive to the needs of low-income students. The Secretary should be able to react to changed conditions or new understandings about how to best improve equity and adequacy.

Improving funding formulas and setting equity requirements are areas that would benefit from agency discretion and expertise. Measuring funding need and effective resource allocation is complex and requires considering factors such as the number of low-income students, property values, local tax rates, total population, and how other external resources impact educational outcomes. Much of the pullback of state litigation reviewed in Section II.A has been largely due to courts' hesitancy to engage with the complexities inherent in state financing systems. An expanded role for the Secretary would fill the gap created by courts pulling back due to a lack of manageable standards and provide a necessary check on states in this complex policy area.

At the same time, the Secretary would avoid unduly interfering with state discretion to establish achievement standards and accountability metrics that accord with state principles. Equity and adequacy requirements focus on allocation of resources and are relatively more technocratic. Achievement standards, by contrast, are more likely to involve subjective interests

of local officials and parents. Title I would maintain its current form in this area that may benefit from local considerations of a given district's idiosyncratic factors that affect a student's ability to meet specified standards.

Taken together, the grant-related proposals would update funding formulas to encourage more equitable funding and increase discretion in the Secretary to create more flexibility to adjust the formulas. These changes would promote equitable funding while accounting for benefits from local control.

B. Require States to Consider Equity or Adequacy in Their State Plans

Congress should update state plan requirements to require states to establish equity or adequacy goals and plans for reaching these goals. Title I requires states to craft plans that define achievement standards as well as assessment and accountability mechanisms to track and meet these standards.¹¹⁰ While creating these plans are required, states have considerable latitude to define these standards and mechanisms. Congress should build on the current state plan framework to require states to develop equity or adequacy goals and plans for meeting these goals.

The plans would be tailored to each state's understanding of how best to achieve identifiable equity goals. Because existing state formulas and constitutional requirements may currently focus on *either* equity *or* advocacy, the proposal would allow states to choose whether to focus on either principle. This prevents states from being subject to two separate standards set by the state's constitution and the federal government.¹¹¹ Although the Secretary would not define specific equity or adequacy goals, there may be some criteria states must follow and

¹¹⁰ See *supra*, Section I.B.2.b (reviewing the Title I state plan requirements).

¹¹¹ See *supra*, Section I.B.1 (reviewing the state funding formula approaches).

minimum requirements enforceable by the Secretary to ensure the goals are sufficiently defined, as reviewed in Section III.C.

Requiring states to consider equity and adequacy requirements in their state plans would encourage states to take a holistic view of its state funding system and articulate a means of ensuring equity or adequacy across all of the state’s districts. Reforms incorporated in state plans may include funding as well as non-funding reforms shown to be effective, such as desegregation measures, targeting funds to early childhood education programs, or providing non-education resources such as nutrition or healthcare for low-income families.¹¹² With assistance from education policy experts, states may tailor plans to local conditions and determine the appropriate mix of reforms or increased funding. In this way, the proposal would “support local innovation”¹¹³ while improving accountability among state legislatures by providing transparency about state-specific equity and adequacy goals.

Incorporating equity into these plans may also provide information that promotes other reforms. It may assist the Secretary to craft grant funding formulas and requirements directly tied to funding.¹¹⁴ It may also assist state and federal courts in determining remedies when state education systems are found to be inequitable or inadequate. A persistent challenge in state litigation is the difficulty courts face when fashioning a remedy.¹¹⁵ Courts generally find an existing system inadequate then require the state to establish a new system before another review by the Court, starting a back-and-forth process that may last decades.¹¹⁶ Title I would require states to review its current system, define adequacy or equity goals, and create plans for how to

¹¹² See *supra*, Section I.A (reviewing the variety of means by which states can improve equitable school systems).

¹¹³ A stated goal of the state plan requirements relating to standards. See 20 U.S.C. 6311(a)(4)(C).

¹¹⁴ See *supra*, Section III.A.

¹¹⁵ See *supra*, Section II.A (reviewing the concern of many state courts in determining remedies in state constitutional litigation).

¹¹⁶ See *id.*

reach these goals. While the federal government does not bind states to these goals, they may be drawn upon when courts find the current system violates state constitutional or other provisions. Thus, requiring states to annually develop plans may help mitigate this significant impediment to state court litigation.

In sum, requiring state-specific plans and measures to track progress may create valuable insight into effective reforms and goals that may inform future efforts.

C. Establish Effective Accountability Mechanisms

To ensure compliance with education equity goals, Congress should amend Title I to include mechanisms to increase state accountability, specifically: (1) a private right of action allowing parents, students, and districts to bring claims against states for not meeting equity and adequacy requirements; and (2) an administrative enforcement mechanism. Both private and administrative enforcement mechanisms may draw on mechanisms used in other regulatory schemes and complement one another.

A private right of action here may provide that when state or district officials do not meet minimal equity or adequacy requirements established as part of the equity grants framework, “aggrieved” low-income students or their parents may bring claims against the state, districts or state officials.¹¹⁷ This may allow students to show that they are subject to damages from the state not meeting these requirements and that the court should enjoin such unlawful action and require the state to follow provisions established under Title I. Private rights of action may bring relief to individual claimants. To ensure such private rights of action achieve equitable results, however,

¹¹⁷ A private right of action may in this way be modeled after those provided in the 1964 Civil Rights Act. See 42 U.S.C. § 2000a–3 (Title II); 42 U.S.C. §§ 2000e–5(f)(1), (3) (Title VII). It may also draw on an enforcement action under the Individual with Disabilities Education Act (IDEA) which allows parents to bring claims to ensure that students with disabilities receive “appropriate” services from states. 20 U.S.C. §§ 1400-1482 (2006 & Supp. IV 2010).

public enforcement mechanisms are likely also necessary to provide equitable access to remedies under Title I.¹¹⁸

Accordingly, an alternative mechanism may be to model the action on the citizen suit provision included in the Federal Election Campaign Act (“FECA”). Under the FECA, individuals may bring suits against the Federal Election Commission for not enforcing campaign finance laws.¹¹⁹ Here, private individuals may bring suits against the Department of Education, challenging its provision of equity grants to states that do not sufficiently meet grant requirements or challenging approvals of state plans that do not provide sufficient information defining state equity or adequacy goals. Actions directed against the Secretary may have the advantage of requiring action from the Secretary that could impact an entire state’s financing scheme. It would effectively put the Secretary in the position of analyzing and considering remedies for state financing systems, rather than state courts. This would utilize the Secretary’s presumed expertise to craft equity plans given courts’ concerns about identifying judicially manageable standards for complex programs.¹²⁰ This would also draw on the existing power and potential of plaintiffs bringing suits to state court judges reviewing the flaws in school financing systems, but hitting consistent roadblocks with courts unable or unwilling to determine the appropriate remedy for these funding systems.¹²¹

¹¹⁸ Professor Eloise Pasachoff has written about the limits of private enforcement to enforce rights under the IDEA rights given the disparities in access to courts and enforcement mechanisms for poorer students. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011). Such criticisms of the use of private rights of action for individual students should encourage the availability of additional enforcement mechanisms that may be utilized by public actors to avoid such concerns.

¹¹⁹ 52 U.S.C. § 30109(a)(8).

¹²⁰ As reviewed further in Section III.D, there are likely administrative law challenges to schemes increasing agency power to set requirements for the receipt of funds. However, this mechanism would be in line with agency power as the Court has noted the value of agency expertise relative to courts for complex regulatory programs. See e.g. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 328–29 (2015).

¹²¹ See *infra*, Section II.B.

A parallel administrative enforcement mechanism would give the Secretary authority to ensure states meet minimal equity and adequacy requirements established in state plans. This mechanism may be modelled after the mechanism provided by the Clean Air Act (“CAA”).¹²² Under the CAA, states are required to develop State Implementation Plans (“SIPs”) to meet air quality standards under the rationale that states’ special understanding of local conditions make them more qualified to develop plans to meet federal clean air goals.¹²³ Under the CAA, the EPA then has authority to step in to force specific state actions if a state is continuously found to be out of compliance with minimal standards.¹²⁴ In this way, the CAA balances benefits of minimal national standards with benefits from state implementation. This approach could be a potential model for Title I where Congress gives additional enforcement power and discretion to the Secretary to identify and correct state plans when found persistently inadequate. It would balance state and local understanding of local conditions with a backstop mechanism that ensures students’ basic education needs are met.

A challenge to implementing this administrative enforcement mechanism is that the Secretary’s finding a violation would likely result in a reduction of Title I grant funding from the violating state. It is beyond the scope of this Article to address the means by which the Secretary may withhold funds or the degree to which it should do so for various violations to ensure compliance with Title I equity requirements. The potential to encourage state compliance with equity provisions would likely be contentious¹²⁵ and require balancing the need to enforce

¹²² See Richard K. Lattanzio, CONG. RESEARCH SERV., *Clean Air Act: A Summary of the Act and Its Major Requirements*, 3-4 (2022), <https://crsreports.congress.gov/product/pdf/RL/RL30853> (reviewing State Implementation Plans under the Clean Air Act).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ The threat of lost funding was one reason many criticized the No Child Left Behind Act in the mid-2000s. See Eloise Pasachoff, *Conditional Spending after NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 617-18 (2013).

against violations alongside concerns of reducing funds available for low-income students due to state violations. However, it is likely necessary as part of a broader scheme to encourage and require certain equity requirements to improve state financing systems.

In sum, these proposals would give significant power to plaintiffs and the Department of Education to enforce state violations based on not meeting minimal equity or adequacy requirements. At the same time, these enforcement mechanisms are aspects of a framework where states retain significant control and discretion to define and create their own education systems. In its entirety, these proposals aim to balance a need for federal and private intervention with benefits and traditions of state and local governance over education.

D. Federalism and Administrative Law Challenges

Any increase in federal agency authority, especially in a domain traditionally left to states, is subject to potential federalism and administrative law challenges. A few are briefly addressed here.

First, there may be anticommandeering challenges, claiming the program is unconstitutional under federalism principles by requiring states to implement federal policies.¹²⁶ However, this claim should fail because the federal government sets certain requirements on states tied to funding, but gives significant discretion to states in crafting their education systems. States develop their own standards and plans for how to meet these standards.¹²⁷

Second, there may be an unconstitutional condition challenge¹²⁸ arguing that the equity requirements or incentives are unconstitutional by tying existing funds to new requirements.

¹²⁶ See *Printz v. United States*, 521 U.S. 898 (1997).

¹²⁷ See also Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 97-100 (2001) (arguing that the commandeering power reviewed in *Printz* should not imply a limit on Congress's ability to place conditions on its spending power).

¹²⁸ See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

However, this claim should fail because equity grants and incentives would generally be tied to additional funds and changes to the formulas may lead to reduction of funds for some states but not nearly to the same degree as a loss of all Medicaid funds under the affordable Care Act.¹²⁹

Lastly, there may be challenges to the ability of Congress to regulate in this area at all. States may argue that given the tradition of state and local control of education, Congress may not set financing requirements on states. This challenge should fail given the history of federal education programs implemented under the Spending Clause. In its history, Title I has added various degrees of requirements on states, culminating in the now-repealed No Child Left Behind Act which imposed requirements that would be more likely to infringe on state authority in education.¹³⁰ These proposed changes afford states a relatively greater amount of discretion with the potential for federal intervention only if minimal conditions are not met.

In sum, these proposals are subject to challenge but well within Congress's power.

E. Political Considerations

Even in the most favorable political environment, poverty and education programs are difficult to implement. They draw considerable attention and are prone to political backlash. However, this Section reviews a way to frame these proposals to appeal to those who may otherwise oppose increased funding for low-income families or an increased federal role in public education. This would focus on how the proposals promote student opportunity, government accountability and encourage greater local control.

¹²⁹ For a detailed application of the coercive condition test from *NFIB* in the education policy realm, see Eloise Pasachoff, Conditional Spending after *NFIB v. Sebelius*: The Example of Federal Education Law, 62 AM. U. L. REV. 577 (2013).

¹³⁰ See *supra*, Section I.C (reviewing the NCLB and its rigid requirements imposed on states receiving Title I funding).

In this framing, the proposed changes hope to ensure children have the resources necessary to succeed academically and be socially mobile, no matter their background. In the current unequal education system, the foundation necessary to succeed is unavailable for too many students based solely on where they live and where they attend school.

Accordingly, this proposal aims to ensure governments are accountable when not providing resources necessary to ensure a basic minimum education. Because courts are unable or unwilling to remedy these violations, an expanded federal role is necessary to provide a necessary check on these state governments. This federal role focuses not on governing schools, but on providing incentives and limited requirements to ensure that state legislatures provide necessary funding for students' education.

In addition, this proposal's focus on equitable funding rather than standards would encourage even greater local participation. A primary rationale for local control is its potential to make schools more responsive to students' actual needs.¹³¹ However, to be truly responsive, a district must have a minimal amount of funds necessary to allow the local school community to address student needs.¹³² This proposal aims to ensure local communities have the resources necessary to be more responsive to student interests.

Thus, this framing may build political support by focusing on its potential to increase student opportunity by focusing on government accountability and promoting local power. However, the proposed changes are still a significant change likely to meet political roadblocks.

IV. Conclusion

¹³¹ See *supra*, Section I.B (reviewing the traditional conception of local control in education policy).

¹³² *Id.*

Education finance has been an area of considerable change in the last fifty years. Title I has gone through significant changes and state court litigation has led to significant successes but suffered from considerable limitations.

In the current environment, there are vast inequities between school districts and insufficient accountability for state legislatures responsible for designing and implementing state education systems. This Paper proposes ways Title I may play a more effective role in education finance policy by incentivizing and requiring states to pay greater attention to equity and adequacy, and providing enforcement mechanisms ensuring states do so. Problems in education financing and policy appear intractable. This Paper hopes to provide considerations for how federal policy may be changed to move towards the promotion of more equitable and adequate education systems.