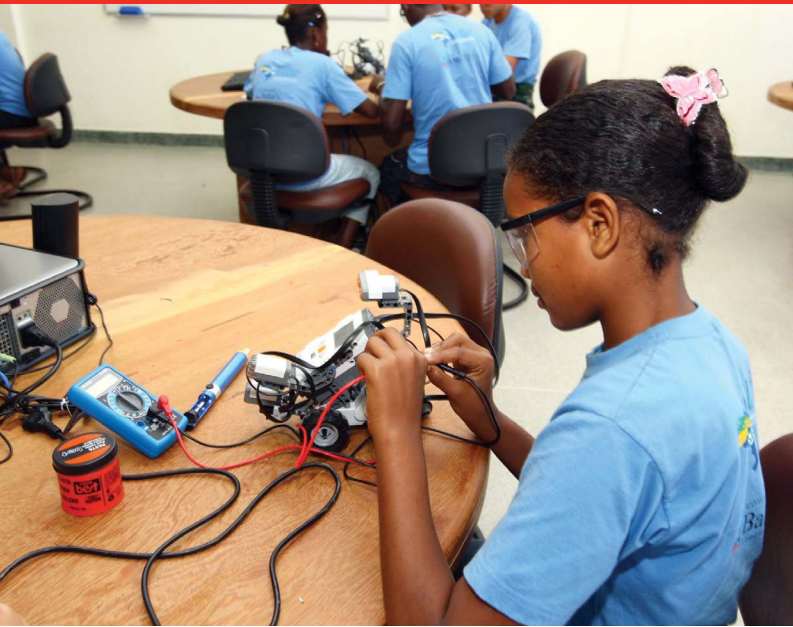


Reversing the Rising Tide of Inequality:

Achieving Educational Equity for Each and Every Child

April 2013



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Layout, Graphics & Design: Laura Drachsler

The Leadership Conference Education Fund Board: William Robinson, Mary Frances Berry, Carolyn Osolinik, John Podesta, Marilyn Sneiderman

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Introduction

Education has the power and promise to transform lives. Yet, nearly six decades after *Brown v. Board of Education*, which prohibited segregation of public schools in 1954, too many children struggle in low-performing and under-resourced schools. Despite the right to equal educational opportunity forming the basis for *Brown* and a human right to education enumerated in the Universal Declaration of Human Rights – to which the United States is a party – high-quality public education is not available to all children in the United States. Rather, vast educational inequities exist in every state in the country; as a result, millions of children do not receive the education they deserve. This has essentially created a two-tiered education system, split between schools that provide students access to resources and opportunities and those that deny them.

In retrospect, the real blow to *Brown*'s promise of equal educational opportunity came 40 years ago, when the U.S. Supreme Court decided, in a case called *San Antonio Independent School District v. Rodriguez*, that state funding formulas for public schools based on local property taxes are not unconstitutional. The Court also held that education was not a fundamental right under the U.S. Constitution.

Rodriguez forced students and school officials in under-resourced districts seeking to challenge and redress inequitable education to resort to state courts, where state constitutions guaranteed a thorough and efficient education or had strong equal protection provisions. State funding systems have been challenged in 45 states, and in 26 of those challenges, courts ruled that the funding systems were unconstitutional.

As a result of these state finance cases, along with desegregation and improvements in Title I, learning conditions for hundreds of thousands of low-income children have improved demonstrably in the decades

since *Rodriguez*. And, of course, all of these reforms came about and were buttressed with extensive advocacy and organizing on the part of civil rights, education, and community-based organizations.

But the gains have not been sufficient to address the depth of inequities in education. In the 40 years since *Rodriguez*, the American education system has continued to produce unacceptable race- and class-based achievement gaps and school funding structures that serve privileged communities over and above those students most in need. Vast educational inequities exist in every state in the country. African-American, Latino, Native American and low-income students are disproportionately assigned to under-resourced schools and classes that provide diminished prospects for academic success when compared with their more privileged peers. For example, according to the latest data from the U.S. Department of Education, more than 40 percent of schools that receive federal Title I money to serve disadvantaged students spent less state and local money on teachers and other personnel than schools that don't receive Title I money at the same grade level in the same district.¹

The U.S. faces a deepening gulf between the rich and the poor, along with staggering rates of poverty and unemployment among the least educated. According to a recent analysis by Remapping Debate, young African-American men without a high school diploma have an unemployment rate of over 50 percent, while young White men with a college degree have an unemployment rate of only 6.8 percent.² In addition, many state court victories on educational equity have been thwarted by political resistance. In most instances where plaintiffs were victorious, the state courts deferred to the political branches—the governors and legislatures—to devise new public school finance systems to remedy the viola-

tions. The political process in many of those states has been long and laborious and has yielded mixed results. In some states, like Massachusetts, New Jersey, Arkansas, Maryland, and Montana, high-poverty school districts have received additional resources as a result of the litigation. In many others, however, legislatures and governors frequently have disregarded the court orders.

The result has been a patchwork of inconsistent—and largely inequitable – funding schemes across the nation—among the states, among districts within states, and even within school districts and schools themselves—that are based more on shifting political landscapes than on a rational determination of what each child needs to succeed in school.

Brown underscored, and human rights principles recognize, that without the right to education, realization of all other rights becomes impracticable. There is broad agreement that the current systems for financing public education—which are highly dependent on local wealth—are unfair and inadequate. So how can we improve the distribution of education resources in America?

On February 19, 2013, after extensive analysis and debate, the experts that made up the Equity and Excellence Commission, a federal advisory commission established by Education Secretary Arne Duncan, came to the following broad consensus:

[T]he time has come for bold action by the states—and the federal government—to redesign and reform the funding of our nation’s public schools. Achieving equity and excellence requires sufficient resources that are distributed based on student need, not zip code, and that are efficiently used.

The purpose of this report by The Leadership Conference Education Fund is to bolster the effort to achieve both quality and fairness in our nation’s public education system. In the chapters that follow, we explain the current available state remedies for inequity; examine the Equity and Excellence Commission’s findings regarding the inequities that exist in U.S. education and its five-part agenda to address them; and conclude with recommendations designed to operationalize that agenda and make equal educational opportunity a reality *for each and every child* in the United States.

Legal Remedies for Inequity: A Mixed Record

The Elementary and Secondary Education Act of 1965 (ESEA) was a hallmark of President Lyndon B. Johnson’s “war on poverty.” That law, for the first time, provided federal dollars to schools with high concentrations of students living in poverty. The theory of action behind ESEA then and now has been that children who live in communities and attend schools beset by concentrated poverty will always need extra help – supplemental resources – to meet their needs and enable them to reach their full potential. As President Johnson said when he signed the law, “By passing this bill, we bridge the gap between helplessness and hope for more than five million educationally deprived children in America.”³

Originally, ESEA, particularly Title I of the law, was intended to provide supplemental services to children from low-income families. It required districts to use federal funds to supplement, not supplant, funding from other sources. In many cases, districts offered tutoring or remedial classes for such students, as well as textbooks and other resources. Since 1994, Title I has been aimed at improving educational academic outcomes for all students and closing achievement gaps by requiring states to set the same academic standards for all students and measuring performance against those standards. For the first time, in 1994, the law also required states to measure and report the performance of subgroups of students based on race, national origin, family income, disability, gender, English proficiency, and migrant status to see how different groups are doing relative to other groups.

Studies of the effects of Title I have found that the program did not close achievement gaps, although it might have prevented the gaps from widening.⁴ In part, this mixed result may reflect the original program’s emphasis on remediation, which might have institutionalized low expectations for the students the program was intended to benefit. This concern led directly to the shift in the

program’s emphasis in 1994.⁵ After that shift, the results might have been muted because states did not always follow through on the federal requirements.⁶ Federal enforcement was also limited.⁷

But the limited effects might also reflect the fact that Title I resources did not sufficiently alleviate inequities. In a study that examined district spending patterns based on changes in census data (which determine the allocation of Title I funds), Nora Gordon found that additional Title I dollars prompted districts to reduce local revenues for schools, despite the law’s requirement that the federal funds supplement existing funds. Thus, she concludes, Title I “does not increase education spending by the full amount of the grant, and in fact it is possible that it has no effect on education spending at all.”⁸

The other major strategy to alleviate educational inequities over the past four decades has been through the courts. Since 1971, advocates for school districts with low taxable property wealth and large concentrations of students from low-income families have repeatedly challenged state public education funding systems that they claim violate students’ rights to equal educational opportunity or to an adequate education under state law. Although many of these cases succeeded, they have not resulted in equitable systems.

Initially, advocates sought a federal remedy. But although the U.S. Supreme Court in *Brown v. Board of Education* had found that segregated schools violated the rights of children of color, the Court in 1973 found that education was not a “fundamental interest” under the 14th Amendment to the U.S. Constitution and that children in resource-poor school districts were not a “suspect class” subject to equal protection.

In that decision, *San Antonio Independent School District v. Rodriguez*, the Court acknowledged the disparities in education funding in Texas. The Edge-

wood Independent School District, where the plaintiffs in the case reside, levied a tax rate of \$1.05 per \$100 in assessed value, the highest in the area, and spent \$356 per pupil in 1967-68. The Alamo Heights School District, in another section of San Antonio, by contrast, had a tax rate of \$0.85 per \$100 in assessed value and spent \$594 per pupil. But the Court, in a 5-to-4 decision written by Justice Lewis Powell, concluded that the state's financing system did not violate the Constitution because it did not deprive low-income children of education. "[W]here wealth is involved," the decision states, "the Equal Protection Clause does not require absolute equality or precisely equal advantages."⁹

Moreover, the decision stated, education is not a fundamental right under the Constitution. Although the Court conceded that education is necessary for the exercise of the rights to speech and to vote, the Constitution does not guarantee the effective application of these rights. The decision stated:

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 educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.¹⁰

While *Rodriguez* closed the federal court door to equity cases, it opened the door to state courts. Since 1973, plaintiffs have filed suit challenging school funding systems in 43 states, and in 26 cases, they have prevailed. (See *Figure 1*)

Yet even in cases where plaintiffs prevailed, the results have been uneven. The following case studies show the arduous road plaintiffs have travelled for incomplete and inconsistent results. These examples suggest that the state-court strategy, while absolutely necessary given the constraints of federal law, will not achieve educational equity for every child in the United States.

California: A Pioneer

California was a pioneer in pursuing educational equity through litigation. The first school finance equity case in the country began in 1967, when John Coons and Stephen D. Sugarman, professors at the law school at the

University of California, Berkeley, agreed to challenge the inequities in school funding in the state. In 1971, two years before the U.S. Supreme Court's ruling in *Rodriguez*, the California Supreme Court, in *Serrano v. Priest*, found that the state system violated both the state and U.S. constitutions.

The court ruling noted that districts varied widely in the amount they spent on education, from \$407 per pupil to \$2,586 per pupil in elementary school districts and from \$722 per pupil to \$1,761 per pupil in high school districts. The court directed the state legislature to address these disparities.

The legislative changes did not appear to alleviate inequities, however, so advocates went back to court. In 1976, in a ruling known as *Serrano v. Priest II*, the court found that the revised system continued to violate the state constitution (it did not address the U.S. Constitution). Specifically, the court found, the funding system's reliance on local property taxes doubly disadvantaged low-wealth school districts. High-wealth districts, because of their affluence, could keep tax rates low and still raise sufficient funds for schools, while low-wealth districts had to keep tax rates high to pay for their schools, the court ruled. "Affluent districts can have their cake and eat it too," the court ruling stated. "They can provide a high-quality education while paying lower taxes.... Poor districts, by contrast, have no cake at all."

In response, the legislature adopted a funding formula that raised aid to low-wealth districts and discouraged high-wealth districts from raising additional revenues through property taxes. However, in 1978, California voters adopted Proposition 13, which rolled back property tax assessments and severely limited the state legislature's ability to raise taxes. The state responded by reducing aid to wealthy districts, rather than increasing aid to poorer districts. California went from fifth in the nation in per-pupil spending in 1964-65 to 42nd in 1994-95. As a documentary by the journalist John Merrow put it, the state went from "first to worst."¹¹

The relatively low levels of funding resulted in renewed suppression of educational opportunity for students from low-income families, and their advocates went back to court to address these inequities. In 1999, the American Civil Liberties Union, representing students in the low-income Inglewood Unified School District, charged that the state's failure to provide students with access to Advanced Placement (AP) courses violated the students' right to an equal education. The suit noted that Inglewood High School offered only three AP classes, while the more affluent Beverly Hills High School offered 45 AP classes in 14 subjects. The availability of AP courses is particularly significant in the state, because the University of California system awards extra points

History of Education Equity Litigation

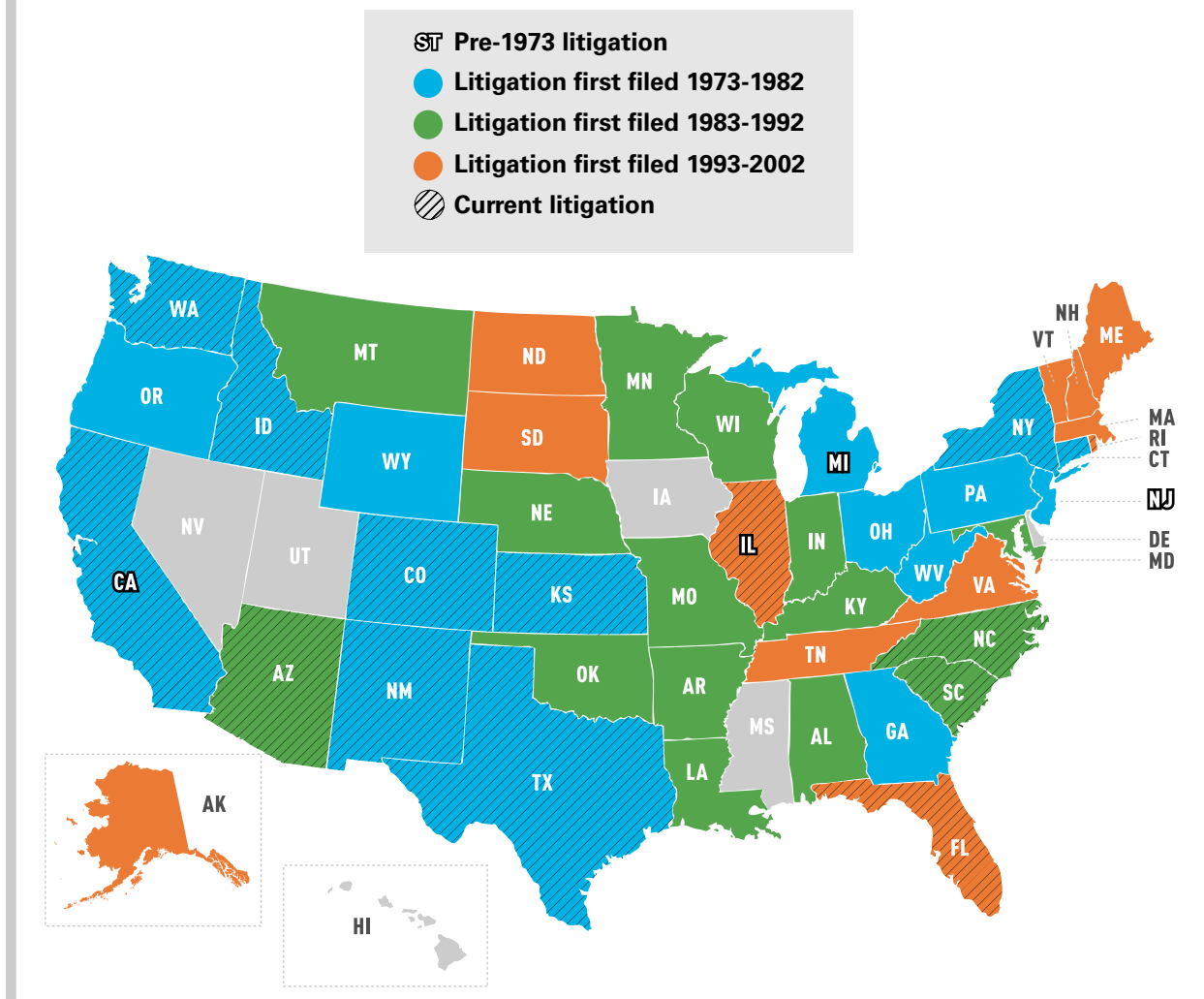


Figure 1

in the admissions process for grades in AP courses. Thus the lack of AP courses placed students in Inglewood at a disadvantage in applying to UC colleges.

The state settled the lawsuit by agreeing to increase access to AP classes, and the state legislature established an Advanced Placement Challenge Grant program to support students who wanted to take AP classes. However, the grant program ended after three years and evidence suggested that, during those years, the greatest increase in AP course taking occurred among White students, while the disparities in access remained. By 2003-04, California schools with the lowest proportion of students eligible for free and reduced-price lunch averaged 7.6 AP classes; those with the highest rates of meal eligibility averaged 2.5 AP classes. In that same

year, only 57.3 percent of Black and 60 percent of Hispanic students graduated from high school, while the graduation rates for Asian and non-Hispanic White students was 83.7 and 76.7, respectively.

In 2001, advocates for low-income students and students of color went to court again. But they did not challenge the state funding formula; rather, they charged that, by providing students with inadequate books and materials, under-credentialed teachers, and deteriorating facilities, the state denied students the necessities of learning. In their complaint, filed on May 17, 2000 (the 46th anniversary of *Brown v. Board of Education*), the plaintiffs charged that schools attended by low-income students and students of color would “shock the conscience.” The plaintiffs stated:

Many of California's public school students are consigned to overcrowded, unsafe, poorly ventilated buildings with terrible slum conditions: Some schools have bathrooms in wretched condition, with toilets that back up or leak, with faucets that do not work, and with floors that are wet and sticky and that smell of human waste. Some schools have too few toilets of any kind. Many schools lack air conditioning and/or heat, leaving children in a constant sweat in temperatures of 90 degrees and above or with a persistent chill so severe that they have to wear coats, hats, and gloves in the classroom. The growth of mold and fungus in many classrooms induces asthma attacks and leads to regular illnesses among children and teachers. Cockroaches, rats, and mice infest many school buildings, threatening disease and ensuring distraction from learning. Leaky roofs, broken windows, peeling paint, defective electrical systems, and other indicia of maintenance long deferred are all too common in many schools.

In a settlement reached in 2004, the state agreed to provide \$800 million over four years to make repairs in deteriorating facilities in low-performing schools and to inventory the facilities needs in such schools. The settlement also required the state to ensure that all schools had sufficient instructional materials and to reduce the number of out-of-field teachers in schools serving low-income students. A 2009 review found progress in all three areas. However, advocates continued to find unequal educational opportunities in the state and in 2010, two groups of plaintiffs filed two separate lawsuits, *Robles-Wong v. State* and *Campaign for Quality Education v. State*, charging that the state's funding system violated the state constitution (the cases were combined under *CQE v. State*). A trial judge upheld their claim of equal protection but rejected their claim under the state constitution's education clause; the judge found that the constitution required equal funding, but not adequate funding. The plaintiffs have filed an appeal, which is pending.

Governor Jerry Brown has filed a brief challenging the lawsuit. But in his 2013 budget, he proposed a revision to the state funding formula that would distribute funds more equitably. The budget is currently under consideration by the state legislature.

Nonetheless, more than four decades after the original lawsuit challenging inequities in education funding in California schools, advocates were still fighting for resources to address these inequities.

New Jersey: A 30-Year Case

New Jersey's school finance litigation represents the

nation's longest-running effort to address inequities in educational opportunity through the courts. From 1973, when a state court ruled the state's funding system unconstitutional, through 2011, when a court found the legislature's latest remedy inadequate, plaintiffs have gone to court more than 20 times to seek relief.

New Jersey's original school finance case was one of the nation's earliest. In 1973, two years after the first decision in California, a state judge ruled in *Robinson v. Cahill* that New Jersey's school funding system, which resulted in huge disparities in spending between wealthy and low-income districts, violated the state constitution's guarantee of a "thorough and efficient system" of education for all children. In response, the legislature in 1976 created the state's first income tax to boost spending on poor districts.

In 1981, however, plaintiffs argued that the funding system continued to be inequitable and filed a new lawsuit, known as *Abbott v. Burke*. In 1985, the state supreme court agreed that the funding system was unconstitutional and ordered sufficient funding so that children in poorer districts received the same level of quality of schooling as children in more affluent districts. The court transferred the case to an administrative law judge to oversee a remedy, and, in 1990, the court upheld the judge's remedy. The court directed the state to provide additional resources to 28 "resource-poor" urban districts, known as Abbott districts (three more districts were added to the order in later years).

To carry out the order, the court ordered the legislature to establish a "foundation" level of funding, or the base spending provided to each district, for the Abbott districts that would be equivalent to that of suburban districts and to provide "adequate" funding to meet the needs of a disadvantaged student population. The legislature crafted a reform package but did not provide the level of funding the court had recommended. The plaintiffs went back to court and the court agreed that the remedy was inadequate. The legislature then adopted a revised funding formula, which the court found unconstitutional and ordered "parity" in education funding between Abbott districts and their suburban counterparts.

In response to this last ruling, known as *Abbott V*, the state education department prepared a list of programs the additional funding would support, including early education programs and capital improvements. Although the court accepted these proposals, the plaintiffs twice went to court to seek enforcement of the order. State officials asked for a modification of the order and the plaintiffs again went to court for mediation. The two sides reached an agreement but the state three times

asked the court to limit its funding obligations.

Seeking a new remedy, the legislature in 2008 adopted a new funding formula, which the court found constitutional. However, in 2010, the legislature adopted Governor Chris Christie's proposal to cut state education aid by \$1.1 billion and plaintiffs went back to court. In 2011, the court, in *Abbott XXI*, ruled that the failure to fund the revised formula caused "instructionally and significant harm" to students and ordered the legislature to restore the funding.

This long-running legal saga has produced some results. The 2000 *Abbott VI* decision ordered that high-quality preschool be provided to all 3- and 4-year-olds in New Jersey's 31 poorest school districts. As part of this ruling, the court mandated that all lead teachers in these districts acquire a Bachelor's degree and an early childhood credential by September of 2004. Although that mandate appeared severely challenging—in 2000, only 15 percent of early childhood teachers in private settings met these criteria—by 2004, approximately 90 percent of the Abbott districts' early childhood teaching force had a Bachelor's degree and was at least provisionally certified. By 1997, 97 percent were fully certified, with Bachelor's degrees.

Further, the percentage of classrooms rated near the top of the scale on quality indicators doubled to 72 percent between 2003 and 2007. As a result, there was evidence of improved student learning as well. An assessment of more than 1,000 kindergarten students from Abbott districts in 2006 found that those who had attended two years of preschool cut the "vocabulary gap" in half. In some districts, such as Union City and West New York, where officials could track individual students over time, researchers found that those who attended preschool performed significantly better on state tests by third grade than those who did not attend preschool, actually exceeding the state average proficiency rate on English language arts tests.

These improvements notwithstanding, the achievement and opportunity gaps in many Abbott districts, such as Newark and Camden, remain large and persistent. Despite 21 court cases over nearly four decades, New Jersey has not alleviated educational inequities. Recently, too, Governor Christie proposed a budget that would have cut spending to the Abbott districts and was rebuked by the state supreme court after plaintiffs challenged the legality of his plan.

Texas: *Rodriguez* and *Robin Hood*

Texas was the site of the original federal lawsuit that challenged school funding inequities as a violation of the U.S. Constitution. After the U.S. Supreme Court

rejected that argument in *Rodriguez*, the advocates for low-income students first approached the legislature, which adopted a series of funding reform measures, most notably House Bill 72, a package of school reforms backed by the industrialist H. Ross Perot. However, the collapse of the oil boom put pressure on state budgets, and the state was unable to make up the disparities in education funding among districts.

In response, the Mexican American Legal Defense and Educational Fund (MALDEF) took advantage of language in that decision and filed suit in state court. *Edgewood Independent School District v. Kirby* was filed in 1984.

The arguments in the lawsuit showed clearly the vast discrepancies in spending among Texas districts because of the state's reliance on local property taxes as the basis for most school revenue. As with California, low-wealth Texas districts were doubly disadvantaged: they had to raise tax rates in order to provide relatively low levels of funding for schools, while more affluent districts could keep taxes low and still raise enough revenue to spend relatively lavishly. At the time the case was filed, the 100 poorest districts had an average tax rate of 74.5 cents (per \$100 valuation) and spent an average of \$2,978 per student. The 100 wealthiest districts had an average tax rate of 47 cents and spent an average of \$7,233 per student. Overall, per-pupil spending ranged from \$2,112 to \$19,333.

In 1989, the Texas Supreme Court ruled unanimously that the state's funding system was unconstitutional. The court noted the vast discrepancies in spending and pointed out that the state's foundation level, which did not cover school facilities or debt service, was inadequate. As a result, the court found, virtually all districts supplemented state funding with local funds, but while wealthy districts could pay for academic enrichment, poorer districts had to pay for basic services, such as debt service on construction bonds.

The legislature adopted a new funding system to meet the court's mandate that allocated additional funds and set a goal of ensuring that 95 percent of Texas students would be in an "equalized" system. However, the legislation did not alter the disparities in taxation that made possible large discrepancies in funding and the state supreme court ruled in 1991 that the revised system was unconstitutional as well. It suggested as possible remedies the consolidation of districts and the consolidation of tax bases.

The legislature took the court up on those suggestions and in 1991 passed Senate Bill 351, which created 188 County Education Districts that could levy taxes and

distribute those taxes to districts within them. Local districts could raise additional tax revenue; however, S.B. 351 set a cap on the tax revenue districts could raise. Thus, the bill was aimed at curbing the huge disparities that the *Edgewood* litigation identified. But a divided court ruled that S.B. 351 violated the state constitution because it was found to have levied a state tax without passing a constitutional amendment.

After a constitutional amendment to allow the taxing districts was rejected, the legislature adopted a new funding system in 1993. This system required wealthy districts to limit their wealth by one of five methods, including “recapture,” or paying credits to the state. Advocates for low-wealth districts argued that the system remained inequitable and did not address the needs of children in those districts. The wealthy districts argued that recapture was also unconstitutional. But the state supreme court in 1994 rejected all challenges and upheld the system for the first—and only—time. The structure, known as a “Robin Hood” finance system, remained in place for more than a decade.

In a shift, the funding system then came under attack in 2001 from wealthy districts, which filed to block it arguing that the funding scheme amounted to a statewide property tax. Low-wealth districts intervened initially to defend the recapture system alongside the state. Although lower courts rejected the claim on jurisdictional grounds, the state supreme court reversed them and allowed the lawsuit to go forward. The lawsuit was later amended to add an adequacy claim and several other wealthy and poor school districts, including Englewood ISD, filed suit alleging that the system was inadequate.

Although the court rejected the adequacy claim (and a separate claim of inefficiency filed by Edgewood), the court ruled that the school finance system’s cap on local property taxes violated the state constitution due to the increasing cost of education. The court emphasized, however, that so long as the state continued to rely so heavily on disparate property taxes, a wealth-sharing system such as the Robin Hood system would be needed. In response, the legislature reduced property taxes and increased state funds for local districts. While these moves were intended to increase funding equity over time, these efforts were muted because of “hold harmless” provisions and other changes in the law.

In 2011, the legislature cut funding for schools by \$5.4 billion and districts went back to court to challenge the funding system. This time, two-thirds of the state’s districts joined the suit filed by four separate groups, which argued, in part, that the cuts, coming at a time when the state raised standards for students, made it impossible for them to provide an adequate education. Three

of the plaintiff groups, including Edgewood ISD and over 400 other property-poor districts, also argued that the disparities in funding across districts were greater than at any time since 1993. For example, the poorest one-tenth of districts (which included Edgewood ISD) raised \$1,443 less per child than the wealthiest one-tenth of districts, despite taxing 11 cents more (per \$100 valuation). Edgewood ISD, home of the plaintiffs in the original lawsuit, had a tax rate at the maximum of \$1.17 per \$100 valuation and raised \$5,808 per pupil, while its neighbor, Alamo Heights, had a tax rate of \$1.04 per \$100 valuation and raised \$6,666 per pupil.

The districts were joined in the suit by charter schools, who argued that they received inadequate shares of school funding and no facilities funding. A group of interveners led by business interests challenged the system as inefficient, not on grounds of inadequate or inequitable funding, but instead targeting various statutes such as those governing teacher due process rights, teacher salary schedules and class size mandates. In February 2013, Judge John Dietz upheld each of the school districts’ claims and declared the funding system unconstitutional, but found the facilities claims of the charter schools and the interveners’ claims “nonjusticiable” or incapable of being decided by the court. In issuing his ruling, Judge Dietz said the legislature had an obligation to provide adequate funding. “There is no free lunch,” he said. “We either want increased standards and are willing to pay the price, or we don’t.”¹²

As one veteran of the litigation put it, the long saga represented “great progress, then near death by a thousand cuts.”¹³

Colorado: Falling Short

Colorado’s school finance litigation began in 2005, when Children’s Voices, a local advocacy group, filed suit on behalf parents, children and 14 school districts charging that the state’s education funding system was inadequate and deprived children of a high-quality education. The suit was later joined by seven additional districts. In addition, MALDEF filed a separate complaint and intervened on behalf of parents of English language learner (ELL) and low-income students attending school in four additional districts.

At the time the case was filed, according to a study by the Colorado School Finance Project, *none* of Colorado’s 178 school districts had sufficient funds to enable all students to reach proficiency in academic achievement, a goal of the state education system. The study found that districts needed an additional \$2.9 billion to fulfill the state’s education mandates.

The funding shortfalls were exacerbated in later years as the legislature cut spending during the Great Recession.

Between 2009 and 2011, the legislature cut education spending by more than \$1 billion.

In December 2011, trial court Judge Sheila Rappaport issued a resounding decision in favor of the plaintiffs, calling the system “irrational, arbitrary, and severely underfunded,” and ruled that it violated the state’s constitutional guarantee of a “thorough and uniform” system of education. She found that, as a result of the funding inadequacy, Colorado children were denied opportunities to graduate with the knowledge and skills they need to be successful adults. Her ruling stated:

The Court finds that all School Districts are unable to provide the early childhood and kindergarten programs that are critical to student achievement. All School Districts are unable to provide the classroom time, professional training, and instructional interventions that are critical to meet the expectations of [state education laws]. All School Districts are unable to provide the classroom time, professional training, and interventions critical to the education of underserved student populations, including students at-risk of academic failure, non-English speaking students, students with disabilities, students of minority racial and ethnic heritages, students of low-income families, and gifted and talented students.¹⁴

In addition to the low overall levels of funding, Judge Rappaport also found that the state seriously underfunds at-risk students at a time when achievement and attainment gaps in Colorado are large. Although Colorado uses a foundation formula with weights for student and district characteristics that are intended to provide additional funds to underserved students, the weights are capped and do not meet the students’ needs. For example, the state’s preschool program for at-risk 3- and 4-year-olds leaves as many as 68 percent of eligible 3 year olds and 86 percent of eligible 4 year olds unserved.

State funding has also failed to keep up with the rapid growth of the state’s English language learner population. Since 1995, the number of ELL students in Colorado has risen by 250 percent, compared with a 12 percent increase in the overall student population. Yet, Judge Rappaport stated, “the level of funding provided for ELLs in Colorado bears no relationship to the cost of meeting the standards and requirements mandated by the state. In fact, the state has no information on the total costs of ELL programs in Colorado.”¹⁵

Judge Rappaport ordered the legislature to revise the funding formula so that it is “rationally related” to the cost of providing a thorough and efficient education to

all students, and suggested that additional funding would probably be necessary.

In January 2013, the governor, legislature, and state board of education filed notice of an appeal to the state supreme court. They filed their appeal in July 2012; plaintiffs responded in September. The Colorado Supreme Court held oral argument on the appeal in March 2013.

Kansas: Keep Courts Out?

In Kansas, a two-decade-long legal battle has set up a constitutional struggle between the legislature and the judiciary. The battle began in 1991, when a state court declared the state’s school finance system unconstitutional and ordered the legislature to develop a new one. The legislature adopted the finance system in 1992.

In 2001, a group of districts challenged the formula, claiming the amount of funding provided violated the state constitution’s requirement for a “suitable” level of funding for schools. A state court first rejected the lawsuit, ruling that it was the legislature’s responsibility, not the court’s, to determine what level of funding is suitable. In 2003, however, the Kansas Supreme Court overturned that ruling and allowed the case to go to trial, and later that year, a trial court ruled that the funding system established in 1992 was unconstitutional and ordered the legislature to craft a new system. The state supreme court upheld that ruling, in *Montoy v. Kansas*, in 2005, and set a deadline for April 2005 for the legislature to act.

The legislature agreed to new funding by the deadline, but the amount provided was less than the amount recommended by a cost study that had been commissioned by the state. So the state supreme court ruled that the legislature’s response continued to violate the constitution and ordered the legislature to increase funding by July. Meeting over the July 4 weekend, the legislature agreed to provide the amount the court recommended for the 2005-06 school year.

The following year, the legislature agreed to provide an additional \$466 million, to be phased in over three years, and to earmark a third of the increase to medium and large districts with high concentrations of low-income students, students with disabilities, and English language learners. The state supreme court approved the new system and declared *Montoy* closed.

In the first years after the new funding formula was put in place, test scores rose, particularly for students of color, but when the Great Recession hit Governor Mark Parkinson and his successor, Sam Brownback, ordered cuts in education funding totaling \$511 million over four years, as well as tax cuts that reduced state revenue. In

2010, a group of 76 school districts filed suit to reopen *Montoy*, arguing that these reductions effectively wiped out the remedy the court had imposed five years earlier. The state supreme court rejected the request. Chief Justice Robert Davis argued that reopening the case would be tantamount to filing a new case.

In response, the plaintiffs did just that: filed a new case. In *Gannon v. State*, a group of 63 school districts claimed not only that the budget cuts violated the state's responsibility to provide a "suitable" level of funding for schools, but also that the cost of education had increased, as did the number of students with greater educational needs. As a result, the suit claimed, the amount needed for a suitable level of funding was even greater than before.

In January 2013, a three-judge panel unanimously upheld the plaintiffs' claims and enjoined the legislature from enacting state aid levels below those approved to comply with the court's mandate in *Montoy*. The decision was stayed pending an appeal to the state supreme court, and Governor Brownback expressed a desire for mediation to resolve the case.

But the court's ruling prompted outrage from Republicans in the state legislature, who charged that legislators, not the court, should determine education funding. "We believe they should not be appropriators and that that role should be clearly left in the hands of elected officials," said state Senate President Susan Wagle.¹⁶ In response, the state Senate in February 2013 passed a constitutional amendment that would bar state courts from ruling on school-funding decisions. The amendment must be approved by the state House of Representatives and ratified by voters. A ratification vote could take place in 2014.

An Incomplete Remedy

As these examples show, despite numerous court victories and countless hours of advocacy, organizing and litigation, the process for remedying the unfair allocation of resources to schools over the past 40 years is still not complete. Even when courts have made absolutely clear that state funding systems violate students' rights to a fair and adequate public education, many states have been unable to muster the political will to redress those violations and provide equal educational opportunities for all students, particularly those from low-income families. And some that have—like Kansas and New York—later pulled back and reverted to inequality.

The remedies are incomplete in two ways: First, as these examples make clear, the responses from the political branches of government frequently undermined the clear findings from the judiciary. Legislators

crafted finance systems that did not meet the courts' tests, as in Texas, or created an equitable system but then failed to provide sufficient funding, as in Kansas. Further, efforts by states to cut spending in times of recession, as in Kansas, New Jersey and Colorado, undermined their courts' orders and further shortchanged children. Advocates for low-income children had to go to court repeatedly to ask for reinforcements of previously issued mandates.

This strategy is unsustainable. While eternal vigilance may be the price of liberty, it should not take more than 20 court cases—and hundreds of pleadings, hearings and court orders—to force states to live up to their constitutional obligations to children. What is lacking is public and political will: a level of public support for education that would bolster legislators' efforts to provide sufficient funding to ensure equal educational opportunity for all and to resist calls for cutbacks in times of austerity. Courts should be the last resort.

Second, and equally significant, the finance lawsuits are incomplete because they are state-by-state solutions. Educational inequity is a national problem. The children of New Jersey are fortunate that their advocates have been so persistent in trying to ensure equal opportunities; children in other states are not so lucky. In fact, in some of the largest states—including California, Illinois, New York and Texas—parents, teachers and low-wealth districts are still fighting for equitable and adequate resources for their children's educations. But equal educational opportunity should not be dependent on the zip code in which a child lives, whether within a state or across states. A national problem demands a national solution.

That does not mean that the solution needs to be exclusively a federal one, although the federal government has a role to play. As the Common Core State Standards show, states can come together to craft a national initiative. But, as discussed in the next chapter, focusing the nation's attention on the issue of educational equity and excellence will require a comprehensive, long-term approach.

The Equity and Excellence Commission Report

In 2012, U.S. Secretary of Education Arne Duncan appointed The Equity and Excellence Commission to consider recommendations for promoting educational equity. The commission's report, "For Each and Every Child: A Strategy for Education Equity and Excellence," released in February 2013, is a landmark document that identifies an urgent national problem and points the way forward, much like *A Nation at Risk* did exactly 30 years ago this month. If adopted and implemented fully, the commission's recommendations could go a long way toward reversing a "rising tide" of inequality and ensuring an equitable education for every child in the United States.

One of the most important contributions of the commission's report is its stark and bold documentation of the huge inequities that exist in U.S. education in the early 21st century. (See *Figure 2*) As the commission notes, gaps in achievement between White students, on the one hand, and African-American and Hispanic students, on the other, are wide and pervasive. In mathematics, the average African-American eighth grader performs at the 19th percentile of White students, and the average Hispanic student is at the 26th percentile. If African-American and Hispanic students performed at the level White students perform on international assessments, the U.S. ranking would rise from below the average for developed nations to "a respectable position," comparable to Australia and Germany.¹⁷

What is the cause of these disparities? The commission report is blunt: the U.S. education system, it states, "is ever more segregated by wealth and income, and often again by race." It continues:

Ten million students in America's poorest communities—and millions more African American, Latino, Asian American, Pacific Islander, American Indian, and Alaska Native students who are not poor—are having their lives unjustly and irredeemably blighted by a system that consigns them to the lowest-performing teachers, the most

run-down facilities, and academic expectations and opportunities considerably lower than what we expect of other students. These vestiges of segregation, discrimination, and inequality are unfinished business for our nation.¹⁸

These inequities are unique in the world, the commission notes. "We are an outlier," it states, in how many children grow up in poverty—22 percent, far more than most industrialized countries. The U.S. is also unusual in its concentration of poverty, which isolates poor children in resource-starved schools. And, as other international research shows, the U.S. is unusual in the extent to which it concentrates resources on schools that serve relatively affluent families; according to the Organisation for Economic Cooperation and Development (OECD), the U.S. is one of only four industrialized nations (along with Israel, Slovenia, and Turkey) in which spending on teachers is higher in schools serving socioeconomically advantaged students than in schools serving socioeconomically disadvantaged students.¹⁹ As an OECD report concluded, "The financing of schools in the United States, which is dependent on local taxation and thus closely related to housing costs, may contribute to concentrations of disadvantaged pupils in poorly resourced schools."²⁰

The Equity and Excellence Commission's report lays out a five-part agenda to address these inequities and take care of unfinished business once and for all.

- First, it proposes some bold and overdue steps to improve school finance and efficiency. These include documenting and reporting the resources necessary to provide meaningful educational opportunity for all students; implementing school finance systems that provide equitable and sufficient funding for all students; targeting significant new federal funding to schools with high concentrations of low-income students; ensuring equitable distribution of federal funds; and reassessing the enforcement of school finance equity, among other steps.

- Second, the commission recommends steps for states and the federal government to strengthen teaching and leadership for all students, and to ensure that all students have access to high-quality curriculum and learning opportunities. These steps include: ensuring that all teachers have the knowledge and skills necessary to meet the needs of all students; taking necessary measures to distribute highly effective teachers equitably; devising graduation requirements to ensure that all students have access to rigorous courses; supporting the development of innovative technologies to provide specialized courses for all students; and enforcing civil rights laws to prevent the exclusion of students from challenging courses because of race, language, or disability.
- Third, the commission recommends ensuring access to high-quality early childhood education. As the commission notes, achievement and opportunity gaps begin well before students enter kindergarten, and ample research shows that high-quality early childhood educational experiences can narrow those gaps significantly. The commission proposes a bold program to ensure that, within 10 years, all low-income children, in all states, have access to resources for high-quality early learning.
- Fourth, the commission suggests steps to meet the needs of students in high-poverty communities. These include efforts to strengthen parent engagement and education, to work with communities to meet children’s health needs, to initiate and strengthen efforts to expand learning time for students, and to dedicate resources and efforts toward at-risk student populations.
- Finally, the commission proposes measures to improve governance and accountability to improve equity and excellence. These include federal efforts to give states and districts incentives to promote racially and socioeconomically diverse schools, state efforts to intervene in chronically failing districts, and efforts at all levels to overhaul accountability systems to promote equity and excellence.

A Clarion Call

The commission’s report should be a clarion call for bold and decisive action to address the corrosive inequities that threaten the futures of millions of children, as well as the future of the United States as a democracy and an economic power. Just as the dire warnings in “A Nation at Risk” were debated and ultimately spurred significant policy reforms, this report proposes an agenda that should be taken seriously.

But meeting the 2013 Equity and Excellence Commission’s goals will require some new tools. As discussed in Chapter II, the methods of addressing inequities over the past 40 years have been important but insufficient in addressing the enormity of the task. The next section will

offer recommendations to build on the momentum started by the Common Core State Standards to craft a civil and human rights solution that will ensure that the promise of the commission’s report is met.

Performance in Reading Literacy

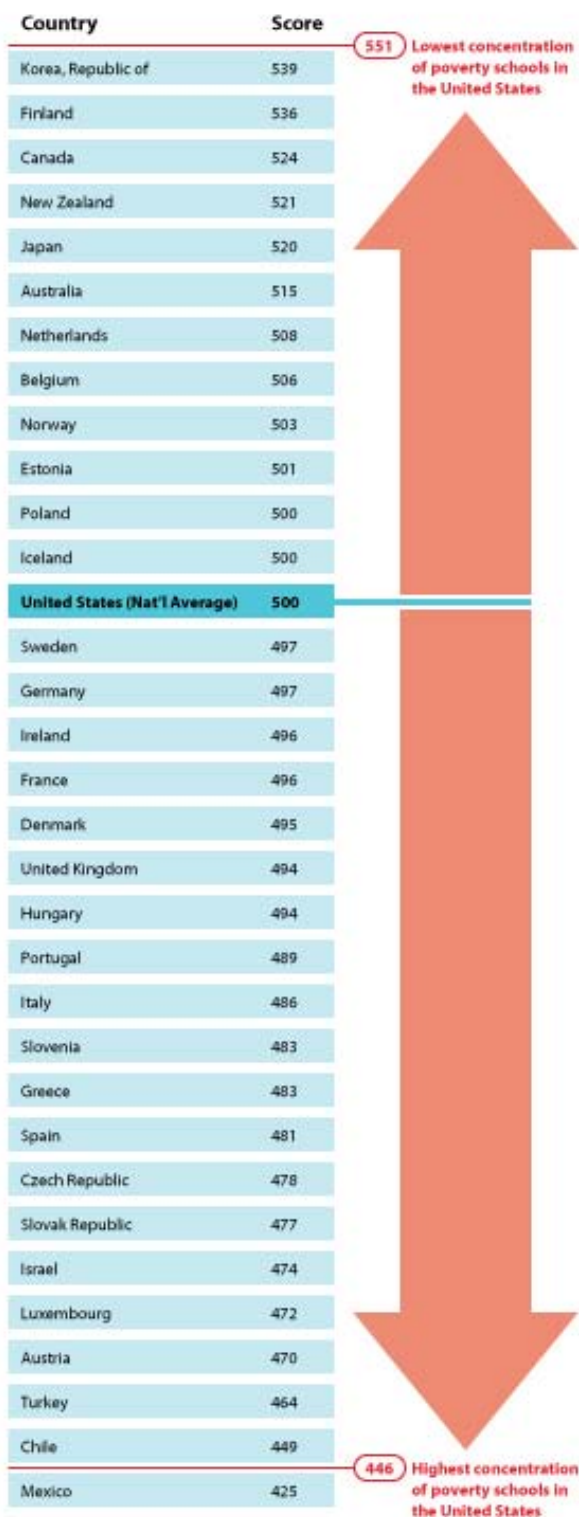


Figure 2

A Call to Action for Each and Every Child

As this report demonstrates, the patterns are clear: low-income children and children of color face inequitable educational opportunities. These opportunities obstruct their ability to develop the knowledge and skills they need to succeed in a rapidly changing world. If unaddressed, these inequities will reinforce and deepen the divisions between the educational haves and educational have-nots. This is a recipe for social strife and social and economic decline.

Now is the time to establish a new national commitment to delivering a high-quality public education for each and every child in the United States, from preschool through high school. To be clear, achieving educational equity and guaranteeing all children have access to a quality public education will require substantial public and political will. It requires the courage to rebuke our current system of education funding and delivery that effectively promotes the idea that some children deserve more than others, and instead embrace an urgent national equity agenda recognizing the collective investment in each child. The commission's most promising recommendations, especially the ones regarding school financing and early childhood education, will require politicians to buck the tide and support funding for new or existing programs, to make quality improvements in these programs, and at times to make hard choices that will not be universally popular.

Moreover, meaningful change that reaches each and every child must occur on a scale that cannot be accomplished through discrete actions by state lawmakers or advocates. It will require a variety of undertakings pursued in concert with one another to redress educational inequity and deprivation and build broad support for and investment in greater education in states and communities nationwide.

In short, it will be necessary for each and every one of us—parents, educators, policymakers, advocates, the business community, researchers, retirees, the faith community, and our youth—to build the public and political will for change.

Toward that end, we offer the following recommendations to Congress, the president, Executive Branch agencies, state policymakers, civil and human rights organizations, the philanthropic community, and the business community.

Recommendations for National Policymakers

1. The Senate Committee on Health, Education, Labor and Pensions and the House Education and the Workforce Committee should conduct hearings on the impact of fiscal inequity on underserved populations and on our nation's current and future wellbeing, and invite testimony on the Commission's report and recommendations.
2. Congress should ensure a dedicated funding stream to high-poverty high schools to remedy the disparity in federal education funding between elementary and secondary schools. At the same time, Congress should also increase funds for the Elementary and Secondary Education Act (ESEA) and Perkins Act programs that target resources to the students and communities most in need.
3. The Obama administration must continue to enforce compliance with federal civil rights laws barring discrimination and inequality.
 - i. Specifically, the U.S. Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice's Civil Rights Division must use their longstanding authority to protect every child's right to a quality public education. These

agencies' enforcement authority derives from the Equal Protection Clause of the 14th Amendment, the landmark Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, and other laws.

- ii. Compliance reviews should be directed toward states and school districts with persistent disparities in per-pupil spending and specific resources (e.g., access to college-preparatory courses, school counselors, etc.) that are associated with low achievement, poor high school completion rates and college-going rates, and continued school segregation. A critical component of these reviews should be an examination of disparities in the assignment of highly qualified and effective teachers.
4. The administration should begin to aggressively enforce provisions in ESEA that, if honored by state (SEA) and local education agency (LEA) recipients, would go a long way toward mitigating some of the worst disparities. These provisions include:
- i. The adoption and implementation of college and career-ready academic standards (including Common Core State Standards) that are taught in all schools in the state, by teachers who have been trained in and have the materials, curriculum guides and other resources necessary to teach to the standards.
 - ii. The requirements in Sections 1111 and 1112 for both states and LEAs to ensure that low-income and minority students are not taught disproportionately by unqualified, inexperienced or out-of-field teachers.
 - iii. The fiscal requirements for comparability, supplement-not-supplant, and maintenance of effort.
 - iv. Requirements for school report cards and adherence to both the letter and spirit of the law by making report cards and other important information easily accessible online, including on the websites of each SEA, LEA, and individual school, and in a language and form that is accessible to parents with disabilities or limited English proficiency.
 - v. The requirements regarding the use of fair, valid, and reliable assessments for English learners and students with disabilities, including the availability of appropriate accommodations, to determine academic proficiency in language arts, mathematics, science and other core subjects, as well as

English language proficiency levels and appropriate services for English Learners.

5. The administration should hold all states to the promises they made in their applications for ESEA waivers to improve student achievement, including by closing achievement gaps, improving the numbers and percentages of students in all subgroups who graduate high school and are college and career ready.
6. The education secretary should develop a “Race to the Top” grant program for states that demonstrate they are committed to implementing the school finance equity provisions outlined in the For Each and Every Child report.
7. Congress should reauthorize ESEA and continue to hold schools and LEAs accountable for student outcomes; and as a condition for receiving federal dollars, require states to address inequities in funding among school districts within the states, and within the districts themselves.²¹
8. Congress should reauthorize the Perkins Act to align the program with training for the modern workforce, e.g., jobs that pay a good wage in areas like STEM, green jobs, the building trades, transportation, and health professions.
9. The U.S. Constitution should be amended to comport with international human rights law by guaranteeing the right to an education that will prepare each and every child for postsecondary education, a career in a field that pays a living wage, and civic participation.

Recommendations for State Policymakers

1. Governors and state legislators, state school board members and chief state school officers, individually and collectively, should immediately and publicly reaffirm their support for and intention to comply fully with state court orders regarding equitable school financing. They should further commit to seriously study the commission's report, compendium and recommendations and develop plans to implement them as expeditiously as possible.
2. Both state and local education officials should conduct public hearings—particularly in high poverty and racially isolated communities—on the extent and impact of inequity on students, families, teachers and communities – and what it will take to ensure that all public schools have the resources necessary to serve each and every child well, including by fully implementing college and career-ready standards. Hearings should be open to the public, on the record, and provide ample time (and translation and accommodations as necessary) to enable all interested parties to be heard.

3. Those states that do not have a robust right to education in their constitutions should begin deliberations on whether and how to amend their constitutions or take other legislative action to guarantee the right to public education for all children.
4. Immediately begin the process of developing statewide examination of multiple sets of data and other evidence to determine the relative costs to fully educate each and every child in the state (aka “costing out studies”) and take legislative action to ensure the state’s financing and resource allocation systems are well-aligned with what is required to educate each child.

Recommendations for NGOs, Philanthropy & Business

1. NGOs must continue to play a prominent role in supporting public schools and in advocating for equity and justice for students. But they cannot do it alone. Most local child/parent advocacy organizations are run by volunteers. A major commitment is needed to develop the capacity of these organic organizations to effectively build the public and political will for change.
 - i. An education equity communications plan must be created by these NGOs to be responsive to public opinion and to elevate the importance of education with respect to individual growth and happiness, improving our economy, sustaining our international prominence and maintaining national security and harmony. This strategy must target not only those populations affected by inequitable access to education but also those communities that historically have had access to quality schools but nevertheless have investment in the success of each child.
2. The role of business is critical. The business community—including local chambers of commerce, major employers and small businesses—should continue and expand its efforts to ensure that the public education system is preparing each child for postsecondary education, career, and civic engagement.
3. Foundations, in particular, should invest in and support building effective coalitions and an advocacy infrastructure for and among parents, educators, community organizations (including faith-based communities), civil rights groups, and child advocacy organizations at the state and local level to support local education equity efforts over a period of time.
4. These entities should take the lead in developing and funding community-based and regional partnerships among the K-12 school system, public and private employers, higher education institutions, labor unions, and representatives of underserved communities to facilitate greater collaboration, and to coordinate advocacy to ensure the public schools receive the resources they need to: hire and retain excellent teachers, align curriculum and content with college admissions standards and readiness, provide the quality and quantity of learning time each child needs to be successful, and create stronger pathways from school to work. Partnerships should be integrally involved in the costing-out studies and in supporting full implementation of college and career-ready standards.
5. Community partnerships and state costing-out studies should include a current and prospective labor market analysis, analysis of the impact on historic patterns of inequity on the adult population (including the over-one million students who drop out every year) and carefully target GED programs, job training and workforce development aligned with labor market needs, particularly for underserved and low-skilled populations.
6. All parties should work relentlessly to build a movement “For Each and Every Child” at the national, state and local levels utilizing multiple advocacy approaches, including: media (particularly social and electronic media), model legislation, other policy development, litigation, data analysis and tools, outreach to state and local elected officials, community organizing, and convenings.

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Notes

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The Leadership Conference
Education Fund

1629 K Street, NW
10th Floor
Washington, DC
20006

202.466.3434 voice
202.466.3435 fax
www.civilrights.org

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