IMPLEMENTING COMPREHENSIVE EDUCATIONAL EQUITY:
LEGAL AND LEGISLATIVE PERSPECTIVES

MICHAEL A. REBELL

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America’s prime educational policy, at both the state and federal levels, is to raise academic standards and to prepare all students to be proficient in meeting them. The state standards reform movement of the past 15 years is premised on the conviction that if provided proper resources and supports, “[a]ll children can learn…at world class levels,”¹ and the federal No Child Left Behind Act (NCLB) holds states and school districts accountable for making sure that all children attain “proficiency on challenging State academic achievement standards” by the 2013-2014 school year.²

This policy reflects a bipartisan consensus of presidents, governors, corporate leaders, and educators that has been forged over the past two decades. It responds to fundamental economic, national security, and civic concerns that unless our schools dramatically improve, America’s ability to compete in the global marketplace and the continued vitality of our democratic institutions will be at risk.³ Elimination of the large achievement gaps between

¹ NEW YORK STATE BOARD OF REGENTS, ALL CHILDREN CAN LEARN: A PLAN FOR REFORM OF STATE AID TO SCHOOLS (1993); see also NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, FROM NEURON TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT (Jack P. Shonkoff & Deborah A. Phillips eds., 2000) (discussing recent brain development research indicating that experiential catalysts can positively impact brain development in the early years and throughout the life cycle); JOHN T. BRUER, SCHOOLS FOR THOUGHT; A SCIENCE OF LEARNING IN THE CLASSROOM (1993) (describing techniques of cognitive science that enable all students to develop higher order reasoning and learning skills.)

² NCLB, 2001 §6301.

advantaged students and the poor and “minority” students, who will soon become the majority of our public school population, is also integral to meeting these national needs. The twin goals of raising standards and expecting all children to meet them, therefore, encompass a simultaneous pursuit of both “excellence” and “equity.”

The policymakers who have committed the nation to meeting these critical goals have, however, largely ignored the huge impediment posed by the impact of concentrated poverty on large numbers of American school children. The childhood poverty rate in the United States (almost 22%) is the highest among the wealthy industrialized nations in the world. The United States also leads the industrialized world in the percentage of its population that is permanently poor (14.5%). The impact of poverty on children’s learning is profound and multidimensional. Children who grow up in poverty are much more likely than other children to experience conditions that make learning difficult and put them at risk for academic failure.


4 David C. Berliner, Our Impoverished View of Educational Research, 6 TCHR REC. 949, 956-961 (2006) (discussing the relationship between poverty and school reform). The childhood poverty rate is less than 3 percent in Denmark and Finland, the countries with the lowest rates among the rich countries in the world. See UNICEF 2005 CHILD POVERTY IN RICH COUNTRIES, INNOCENTI REPORT CARD NO. 6 (2005) at 4, http://www.unicef-irc.org/publications/pdf/repcard6e.pdf. The U.S. poverty rate for 2005 was 21.9 percent, placing it second, behind Mexico among the 24 OECD countries listed. Id. If “poverty” is defined in terms of the average income that families need to make ends meet ($42,400 for a family of 4 in 2008) rather than the artificial federal poverty level ($21,200), the poverty rate in the U.S. is actually 39%. National Center for Children in Poverty, Basic Facts About Children in Poverty (October, 2008), retrievable at http://www.nccp.org/publications/pub_845.html.
For example, children from low-income households are more likely to have a history of severe vision impairments, hearing problems, untreated cavities, exposure to lead dust and poisoning, and/or asthma, all of which affect children’s readiness and ability to learn. They are also more likely to be affected by other risk factors such as being raised by a single parent, having parents with low educational attainment, or coming from a foreign-born, non-English-speaking family, which can compound the impact of poverty. Moreover, the longer a child is poor, the more extreme the poverty, the greater the concentration of poverty in a child’s surroundings, and younger the age of the child, the more serious the effects on the child’s potential to succeed academically.⁵

In recent years, the federal government has increased substantially its level of funding for educationally disadvantaged children⁶ and state courts in dozens of states have mandated more equitable and more adequate funding for the schools attended by these students.⁷ These efforts have been directed at rectifying the highly inequitable systems for financing public education that have existed historically in most states. Although federal funding and the state court

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⁵ These issues are discussed at length in Richard Rothstein, Class and Schools: Using Social, Economic and Educational Reform to Close the Black-White Achievement Gap (2004).

⁶ Between 2001 and 2007, federal funding under Title I of the 1965 Elementary and Secondary Education Act increased by over $4 billion or approximately 45%; however, these appropriations fell far short of the $16 billion authorization increase that Congress had included in the No Child Left Behind Act of 2001, of which ESEA is a major component. Michael A. Rebell & Jessica R. Wolff, Moving Every Child Ahead: From NCLB Hype to Meaningful Educational Opportunity 99 (2008).

⁷ For a detailed discussion of the “equity” and “adequacy” litigations that have been litigated in the courts of 45 of the 50 states over the past 35 years, see Michael A. Rebell, Courts and Kids: The Role of State Courts in Meeting America’s Vital Educational Goals (forthcoming, 2009).
mandates have substantially lessened -- but not yet eliminated -- the resource gap in the public schools, relatively little has been done to ameliorate the enormous opportunity gap that results from the impact of conditions of concentrated poverty on millions of American school children even before they enter school.

What is required today is a comprehensive concept of equity in education, one that focuses not only on the resources and opportunities provided in formal school settings from kindergarten through high school, but also on the importance of high quality early childhood education, physical and mental health care, nutrition and physical activity, home, family and community support for student academic achievement and access to arts, cultural, civic and other critical nonacademic experiences. In other words, we need “a broader, bolder approach for education - one that is powerful enough to produce a large reduction in the current association between social and economic disadvantage and low student achievement.”

Although the need for such a bold, comprehensive approach to educational opportunity is widely recognized, and a number of demonstration projects have shown the dramatic gains that can result from coordinated efforts to meet children’s broad learning needs, there has been no broad-based initiative at the federal or state levels to provide comprehensive resources and services on the scale that is needed to overcome the impact of poverty on educational opportunity. The limited response to a widely acknowledged need stems from an implicit assumption that concrete action to meet these needs would require a revival and expansion of the “war on poverty” of the 1960s, a battle that the nation is not politically inclined or economically

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8 See Rebell and Wolff, supra, n. 6 at ch. 4.
equipped to undertake at this time.\textsuperscript{10} Although there are strong moral and economic arguments for mounting a major war on poverty that would deal with the entire panoply of housing, employment, health and welfare needs of impoverished adults and children, it is unrealistic to expect America at this point in time to take on that full scale challenge.

The frank reality is, however, that unless we confront the poverty factors that substantially undermine the learning potential of a growing proportion of our public school students, current achievement gaps cannot be overcome, and the national need to ensure that all students attain challenging proficiency levels will never be realized. Can we, in fact, take on this challenge? The preliminary cost analyses\textsuperscript{11} being presented at this symposium indicate that the costs of doing so need not be prohibitive if existing resources are efficiently marshaled and a manageable amount of new resources are devoted to particular high priority anti-poverty needs that directly affect students’ learning. What is doable, therefore, even without confronting the full impact of poverty in America is a limited, but still markedly ambitious, assault on those particular aspects of poverty that most directly impinge on children’s ability to succeed in school.

\textsuperscript{10} Growing awareness of these needs has, however, sparked important new initiatives like the “Half in Ten” campaign to reduce the nation’s poverty level by 50 percent over the next decade. See Center for American Progress, \textit{From Poverty to Prosperity: A National Strategy to Cut Poverty in Half} (2007)

Some may question whether any increase in educational spending can even be contemplated during the present economic crisis while state and local governments in New York and throughout the country are considering substantial reductions in current spending levels. As Robert Reich, the former Secretary of Labor recently pointed out, however,

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\text{[N]ot all deficits are equal. As every family knows, going into debt in order to send a child to college is fundamentally different from going into debt to take an ocean cruise. Deficits that finance investments in the nation’s future are not the same as deficits that maintain the current standard of living.}^{12}
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Moreover, assuming that spending even for important new initiatives proves not to be feasible for the immediate future, the current recession will be behind us a few years hence, and extensive planning needs to begin now to prepare the way for promptly and properly implementing co-ordinated programs to meet children’s comprehensive educational needs when additional resources do again become available.

A concentration on the educationally oriented effects of poverty accepts the political reality that equal educational opportunity is a prime value shared by Americans from all ends of the political spectrum. Although America’s commitment to providing social welfare services in general has lagged far behind that of other industrialized nations, the United States spends more \textit{per capita} overall on education than do most other industrialized country,\textsuperscript{13} and its actions to

\begin{footnotesize}
\textsuperscript{13} The United States ranks first among the 30 affluent OECD countries in over-all spending on education, K-16. The U.S. is 4\textsuperscript{th} among the OECD countries in per pupil spending for k-12 education, but 13\textsuperscript{th} out of the 30 OECD countries in educational spending as a percentage of GDP. "Education at a Glance 2007." Organization for Economic Co-operation and Development. 2007. OECD.<http://www.oecd.org>.\end{footnotesize}
promote educational equity have far surpassed its efforts in other social policy domains.\textsuperscript{14}

Because, as I will discuss in further detail below, equal educational opportunity is a fundamental premise of the American dream that is the ideological underpinning for our competitive political and economic culture,\textsuperscript{15} Americans are more open to providing substantial funding for education than they are for other social service sectors. An effort to obtain political support and funding to provide meaningful educational opportunities for children from backgrounds of poverty is, therefore, much more likely to succeed than would a broader anti-poverty campaign.

With sufficient effort and will, both the vision of equal educational opportunity articulated by the U.S. Supreme Court in \textit{Brown v. Board of Education} and the national commitment to substantially raising student achievement levels can be realized. The dozens of successful educational equity and adequacy cases around the country have shown that when inequities and inadequacies in the provision of resources to poor urban and rural schools are clearly demonstrated, state courts, and state legislatures generally respond stalwartly to these needs. If Congress, the courts and the public at large are convinced that equal educational opportunity also requires them to meet the comprehensive needs of children from backgrounds of poverty for certain priority services outside the usual school environment, similar positive responses should be forthcoming.\textsuperscript{16}


\textsuperscript{15} See discussion below at pp.

\textsuperscript{16} David Kirp summarized the rapid turn-around in the attitudes of policymakers and the public toward pre-school education over the past 35 years:

\begin{quote}
A third of a century ago, Richard Nixon vetoed legislation that would have underwritten child care for everyone. “No communal
To translate the widely held perception that full educational opportunity requires a comprehensive approach to children’s education into a concrete political agenda will require us to think about these issues in different way than we have in the past. In the United States, realization of major social reform generally is accomplished through the establishment and enforcement of legal rights. As the astute French observer of American culture, Alexis de Toqueville, noted almost two hundred years ago, “Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.”17 Toqueville’s description continues to hold true today as we continue “to speak of what is most important to us in terms of rights and to frame nearly every social controversy as a clash of rights.”18 If a political position is perceived as a “right,” those asserting it are in an advantageous position for laying claim to societal resources and efforts to support their ends.

approaches to child rearing,” Nixon vowed …..How times have changed. Ambitious statesmen from both sides of the political aisle …now….see the issue as a winner ---- a strategy for doing well by doing good. A recent national survey found that 87 percent of the populace supports public funding to guarantee every three- and four-year-old access to a top-notch preschool.


17 ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 290 (Vintage ed., 1945).

18 MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 3-4 (1991.) Glendon explains that this tendency toward legalization stems from the fact that our diverse society lacks a shared history, religion, or cultural tradition; therefore, we“look to law as an expression and carrier of the few values that are widely shared in our society: liberty, equality and the ideal of justice under law.” Id. at 3. Glendon is critical of these trends, which she believes squelch possibilities for community and caring. For a contrary view of the relationship between rights and community, see Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L.J.1860, 1877 (1987) (arguing that rights create a more equal community that “draws those who use it inside the community, and urges the community to pay attention to the individual claimants.”)
A “right” is an individual claim that is entitled to preference above other societal goals. A right can be “moral” (based on a moral theory or principle) or legal (prescribed by particular laws). In other words, rights may take the form of strong moral or political obligations that affect political action and social decisions, even if they are not formally articulated and enforced by the courts. In the United States, however, as de Toqueville noted, the legal culture is so pervasive that rights, even if initially formed in the political sphere, tend eventually to be set forth in statutes or constitutions that then can be enforced by courts.

19 See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977) (“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for imposing some loss or injury upon them.”); Joel Feinberg, The Nature and Value of Rights, in RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 143, 155 (1980) (“To have a right is to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles.”); Alan Gewirth, The Basis and Content of Human Rights, 23 NOMOS: Human Rights 119, 120 (1967) (“A person’s rights are what belong to him as his due, what he is entitled to, hence what he can rightly demand of others.”) reprinted in 13 Ga L. Rev. 1142, 1150 (1979).

Rights can be expressed in both negative and positive forms. (Compare, for example, a newspaper’s right not to have its writings censored with a student’s right to an adequate education). See Isaiah Berlin, “Two Concepts of Liberty,” in FOUR ESSAYS ON LIBERTY (1969).


“Human rights” are an important form of moral rights which “provide a way of reaching across the divisions of country, ethnicity, gender, and conduct in a search for what is common to all people in the world.” Id. at 17. The contemporary concept of human rights is related to the concept of “natural rights” that is emphasized in many philosophical and religious traditions; “human rights” tend to emphasize more concrete social cultural and economic benefits. Substantial progress toward implementing basic aspects of human rights has been accomplished since human rights were codified in the Universal Declaration of Human Rights and the numerous specific international social and economic covenants that have been issued to enforce it.
In short, then, “rights talk” is the language American use to focus political dialogue, galvanize social movements, and press for major reforms. If a political position is perceived as a “right,” those asserting it are in an advantageous position for laying claim to societal resources and efforts to support their ends. Much progress has been made in eliminating intentionally segregated schools, providing meaningful access to education for students with disabilities, and ameliorating inequities in state financing of education because specific rights have been articulated, acknowledged and acted upon in each of these areas. The need to overcome the barriers to school success created by conditions of poverty should, therefore, now be discussed in terms of a legal right that can be acknowledged and implemented by all three branches of government.

The purpose of this paper is to initiate a conversation to shift the widely acknowledged need for a comprehensive approach to overcome the socioeconomic barriers to school success from abstract academic discussions and limited pilot projects to the active policy sphere where effective comprehensive programs can be implemented on a broad scale. The use of “rights talk”


22 Social change tends to occur most broadly in America when rights talk inspires coordinated action by all three branches of government. For example, the great progress toward school desegregation that was achieved in the late 1960s occurred when Congress’s enactment of Title VI of the 1964 Civil Rights Act, (42 U.S.C.A § 2000d (2000)) which authorized the termination of funding to school districts that failed to desegregate their schools, was combined with active enforcement efforts by the federal Office for Civil Rights and by assiduous efforts by federal courts throughout the South to implement the Supreme Court’s decree in Brown v. Board of Education.
can help change the perception of socioeconomic barriers from being an excuse for accepting the inevitability of the status quo to a right of children to receive the resources and services they need to overcome the status quo. Establishing “comprehensive educational equity” as a “right” will focus attention on the issue, enhance understanding of the importance of the claim and lead to coordinated action to identify and deliver the resources required to meet the urgent educational needs of children from backgrounds of poverty.

The right to “comprehensive educational equity,” as it will be delineated in this paper, recognizes society’s obligation to provide students from backgrounds of concentrated poverty with the essential resources and services they need in order to have a meaningful opportunity to meet challenging state academic standards. These include both a sound basic elementary and high school education that provides them, among other things, with effective teachers, appropriate class sizes, adequate facilities and up-to-date textbooks, and also with essential resources like preschool, after school and summer programs, physical and mental health services and, family and community supports. 23

The right to comprehensive educational equity is based on a strong underlying moral and historical obligation stemming from America’s egalitarian traditions and the American dream, with its promise of equal educational opportunity, especially to those who have suffered from racial discrimination and those who are the descendants of the victims of slavery. Significant statutory and constitutional building blocks for constructing an explicit right to comprehensive educational equity have also emerged in recent years from legal developments related to state standards-based reform, the No Child Left Behind Act, state court litigations involving

23 A broader delineation of the specific in-school and out-of school essentials is set forth in Rebell and Wolff, supra n. 6 at 71-72.
challenges to inequities and inadequacies in state education finance systems, and a number of important equal protection precedents. The discussion that follows will, therefore, discuss the right to comprehensive educational equity as constituting a moral right, a statutory right, and a constitutional right.

Part I of this paper will set forth the historical, ideological and legal bases for perceiving the right to comprehensive educational equity in these three dimensions, and it will explore the implications of approaching children’s need for comprehensive resources and services in this way. The second part will set forth specific suggestions for initiating a series of executive and legislative actions, and a related public engagement campaign, to develop the political will and specific executive and legislative actions necessary to implement the right to comprehensive educational equity.

I - THE RIGHT TO COMPREHENSIVE EDUCATIONAL EQUITY

A. The Moral Right to Comprehensive Educational Equity

Egalitarian values are deeply rooted in American society. The nation’s independence was announced more than two centuries ago by a declaration that “all men are created equal.” The American republic established the concept of equality as a revolutionary, democratic principle in the eighteenth century, and egalitarianism has remained a significant thrust of American politics ever since, as evidenced by the impact of the abolitionist movement in the 19th century and of the civil rights movement of the 20th century.

America’s egalitarian tradition coexists, however, alongside a powerful ideological commitment to classical liberalism and individualism. This orientation is reflected in the
constitutional institutions of the American political system, which limit governmental authority, check and balance the powers of political institutions, and contain a strong Bill of Rights that assures individuals a broad sphere of independence and autonomy. The classical liberal heritage also supports the strong sense of competition and rewards for individual effort and accomplishment that are hallmarks of our free enterprise economic system. 24

Although both the egalitarian and liberal individualistic strands of America’s ideological heritage contribute to the vigor of American democracy, there is at the same an inherent conflict and tension between them. A prime mechanism for keeping these clashes in bounds, and maintaining a strong adherence to both egalitarian and liberal values in the American democratic ideology, is a widespread belief in the American dream.

The American dream, built on the image of boundless land and endless opportunity in a “new world” environment, is a promise of a “social order in which each man and each woman shall be able to attain to the fullest stature of which they are innately capable, and be recognized by others for what they are, regardless of the fortuitous circumstances of birth or position.”25 President Clinton summarized the essence of the American dream in contemporary terms as follows: “The American dream that we were raised on is a simple but powerful one---if you work

24 The egalitarian, classical liberal and classical Republican strands of America’s democratic tradition are discussed in more detail in Michael A. Rebell, Fiscal Equity Litigation and the Democratic Imperative, 24 J. EDU FIN. 24 (Summer, 1998).

25 James Truslow Adams, The Epic of America 404 (1933). See also, Herbert Croly, Promise of American Life 194 (1909). (“The democratic principle requires an equal start in the race while expecting at the same time an unequal finish.”)
hard and play by the rules you should be given a chance to go as far as your God-given ability will take you.”

The American dream reconciles the demands of equality and rugged individualism by premising that all who come to this bountiful new world, where the titles and entrenched hierarchical orderings of the old world no longer exist, will have an equal opportunity to advance materially or to develop their potential in whatever other ways they choose, regardless of race, national origin, or religion. During the 1800s, the vast expense of land available in the Western territories created a literal level playing field that gave everyone a roughly even start in the competitive race for personal success and advancement. “With the closing of the frontier around the turn of the century, Americans increasingly looked to education as the primary source of opportunity.”

The relationship between education and the American dream had originally emerged with the rapid spread of the “common schools” movement in the 19th century. As its name implies, the common school sought to educate in one setting all the children in a particular geographic area, whatever their class or ethnic background. Based on this heritage, schools remain today the


28 The common school “would be open to all and supported by tax funds. It would be for rich and poor alike, the equal of any private institution.” LAWRENCE CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 138 (1980).
places where “routes of access –to success, to mobility, to fulfillment of individual promise -- are
supposed to be actualized for all children.”29 In the contemporary understanding of the American
dream, the demands of egalitarianism can be met if all children are provided equal access to a
public education which prepares them to compete for material reward and social advancement
after they leave the halls of academia: “Once the government provides this framework,
individuals are on their own, according to the ideology. …Put more positively, it is up to
individuals to go as far and fast they can in whatever direction they choose.”30

Although schools today are still the prime means for attaining the American dream, it is
clear that they are not effectuating their critical role as the gateway to equal opportunity. In a
recent national survey, “poor quality public education” was listed as the most significant barrier
to obtaining the American dream today.31 The perception that schools in many urban and rural

29HEATHER BETH JOHNSON, THE AMERICAN DREAM AND THE POWER OF WEALTH: CHOOSING

30 JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC
SCHOOLS 10 (2003).

31 NATIONAL LEAGUE OF CITIES, THE AMERICAN DREAM IN 2004: A SURVEY OF THE AMERICAN
PEOPLE 7 ( 2004). Interestingly, although many African-Americans are beginning to question the
continued validity of the American dream, (see JENNIFER HOCHSCHILD, FACING UP TO THE
AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION (1995)) most whites, and
especially those at the top of the income scale, continue to voice allegiance to this powerful
ideology. In a recent in-depth survey of the Americans’ attitudes toward the American dream:

The more privileged parents interviewed acknowledge the advantages
they have received through family wealth, and acknowledge advantageous
educational opportunities they are now able to pass along to their children.
What is really intriguing, however, is that at the same time, these same
families hold close to their hearts the idea that they have earned and
deserved what they have, and they argue vehemently that their privileged
positions have resulted from their individual hard work, efforts and
achievements.
areas are unequal and inadequate and are not, in fact, providing a fair starting point for all children, has propelled strong reform initiatives to overcome this deficiency. The goals of the state standards movement and the federal No Child Left Behind Act are, in essence, to validate the American dream by seeking to bolster the quality of all of the nation’s schools and holding schools accountable for ensuring that all of their students, whatever their backgrounds, graduate at high proficiency levels so that they will be adequately prepared to enter the competitive economic world and to function productively as equal citizens in a democratic society.

The education equity and adequacy litigation movements are attempting to ensure that there is a fair funding base in all school districts for school-based essentials to accomplish these tasks. Even if these resources can be assured in all of the public schools, the core premises of the American dream still will not be realized as long as almost a quarter of our students come to school ill-equipped to take advantage of what the schools have to offer because of the impediments to learning resulting from poverty: “If education is the modern equivalent of open land in the West, then it must be widely available, at reasonable levels of quality, so that every American child has a realistic chance of fulfilling his or her dreams.”

President Lyndon Johnson recognized more than 40 years ago that

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race, and then justly believe that you have been completely fair. Thus, it is

Johnson, supra note 28, at 17.

32 Jillson, supra n. at 282 (emphasis added).
not enough just to open the gates of opportunity. All of our citizens must have the ability to walk through those gates.\(^{33}\)

To open the doors of opportunity to children who have been shackled by the burdens of poverty, the legacy of slavery, and the continuing impact of discrimination requires not only offering them adequate pedagogical services once they enter the schoolhouse gate, but also providing the additional resources and services that will allow them to actually benefit from these basic educational opportunities.

Given the centrality of the American dream in America’s past and present political ideology and the fact that equal educational opportunity is its core premise, students who come from backgrounds of poverty have a strong moral right to demand comprehensive educational equity and the full range of resources and services that they need to have a fair chance to succeed in school. The moral right to comprehensive equity has also been further enhanced in recent years by our society’s stated commitment to overcoming existing achievement gaps and substantially improving the academic achievement of all of our students in order to meet global economic competition and to perpetuate our democratic institutions.

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As long as we are able to convince ourselves that simply providing access to education is equivalent to providing equal opportunity, we will continue to …delude ourselves with the notion that the United States is a democracy based on genuine meritocratic principles: a society where social mobility is determined by individual talent and effort. We hold on to this fantasy even as quarter of the nation’s children are denied adequate educational opportunity.
B. The Statutory Right to Comprehensive Educational Equity

America’s historic promise of equal educational opportunity to all children is now essentially codified in the federal No Child Left Behind Act (NCLB). This extensive statute, enacted in 2001, and implemented beginning in 2002, has two major stated purposes: The first is that “all children have a fair, equal and significant opportunity to obtain a high quality education;” and second, that all children “reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments” by 2014.\textsuperscript{34} Six years have now passed since the enactment of this statute --that is, one-half of the time period allotted for achieving 100% proficiency -- and it is clear that only incremental progress has been made toward reaching this ambitious goal.\textsuperscript{35} The major reason we are so far from reaching the proficiency targets is that, in implementing NCLB, the federal government has put the cart before the horse by stressing proficiency outcomes before it has ensured that the necessary opportunity inputs are in place.

\textsuperscript{34} NCLB § 6301 (2001).

\textsuperscript{35} No state is on track to reach the full proficiency goal by 2014. In fact, the number of schools that are failing to make “adequate yearly progress” (AYP) toward this goal is rapidly accelerating: last year nationwide there was a 56 percent increase in the number of schools involved in sanctioned restructuring because of their repeated failures to meet AYP goals. Caitlin Scott, Center on Education Policy, \textit{A Call to Restructure Restructuring} (2008), http://www.cep-dc.org/. In terms of scores on the National Assessment of Educational Progress, the “Nation’s Report Card,” there has been incremental progress on 4th grade reading and math scores and in reducing achievement gaps, although the rate of gain in the years since NCLB was enacted does not exceed the general rate of progress registered in the decade before the law’s passage; at the 8th grade level, however, there has been virtually no gain in standardized reading scores, an indication that academic progress at the lower grades becomes stalled in middle school when higher level conceptual thinking becomes more predominant. National Center for Education Statistics, National Assessment of Educational Progress (NAEP), various years, 1992-2007 Reading Assessments; 1990-2007 Mathematics Assessments.
NCLB strongly emphasizes accountability and test-score-based outcomes. The statute requires each state to develop “challenging” academic content standards, and performance or assessment standards, in reading/language arts, math, and science. Both schools and districts must demonstrate that they are making adequate yearly progress (AYP), as reflecting in regular reading, math and science exams toward proficiency for all by 2014. These test scores are reported overall and for a number of disaggregated subgroups. If the school overall or any one of four subgroups (racial/ethnic groups, economically disadvantaged students, students with disabilities, and limited English proficient students) does not meet its improvement target (or less than 95% of the students within that subgroup take the test), the school does not make AYP.36 The Act prescribes specific sanctions for schools and districts that fail to meet these demanding AYP requirements, including allowing students to transfer out of the school, or to obtain supplemental tutoring from outside vendors, and imposing corrective action plans, replacing certain staff, and restructuring the entire school.37

In contrast to these extensive accountability provisions, the only specific resource requirement in NCLB is that all students be taught by “highly qualified teachers.” The precise definition of “highly qualified” is left to the states, and, in practice, this means that teachers need merely to pass “minimum competency” state certification exams; there is no higher federal

36 Up to 1 percent of all students or 10 percent of special education students (those with the most severe cognitive disabilities) may be exempt from the regular testing requirements, and an additional 2 percent of students with severe learning disabilities can now take tests specifically geared toward their abilities. There is also a “safe harbor” provision that allows a school to make AYP if it reduces the percentage of students who are not proficient by at least 10 percent from the previous year. This applies to the school as a whole, as well as to each subgroup.

37 A detailed discussion of the structure of the NCLB and of the background history of its passage is set forth in Rebell and Wolff, supra n.6 at .
standard to ensure that teachers are capable of teaching challenging state standards to students from diverse backgrounds.\textsuperscript{38} The statute has no provisions to ensure that schools are adequately funded and adequately equipped beyond this very basic teacher qualification requirement.

NCLB is, in essence, the latest, expanded version of the Elementary and Secondary Education Act of 1965 (ESEA), the major federal education funding statute that was enacted to provide extra services for “economically disadvantaged” students. The ESEA is subject to reauthorization every five years and, as the amount of funding provided by ESEA grew over the years, the federal government increasingly sought to develop accountability strictures to ensure that the growing federal investment would result in demonstrable improvements in student achievement. Many of NCLB’s current accountability requirements were first developed, though in less stringent form, in the predecessor statutes, especially Goals 2000 (1994) and the Improving America’s Schools Act (IASA), the 1994 version of ESEA reauthorization.

The Goals 2000 concept emerged from a presidential summit involving all 50 state governors and many leading corporate CEOs that was convened in 1989 to respond to widespread concerns about the quality of the education American students were receiving and their ability to compete effectively in the global economy. The six specific goals upon which the president, governors, and CEOs agreed called, among other things, for America to achieve a 90 percent high school graduation rate, be first in the world in math and science, and for every adult to possess the knowledge and skills necessary to compete in the global marketplace. These performance targets were accompanied by a clear recognition that to achieve these ends, substantial efforts would be required to prepare economically disadvantaged students to learn at

\textsuperscript{38} See, Rebell and Wolff, \textit{supra} n.6 at 83-89.
higher levels. Thus, the first of the six goals for the coming decade announced in 1989 was that “All children will start school ready to learn.”

The bipartisan drafting committee that produced the original version of Goals 2000 had agreed that school readiness for all could not be achieved without a national commitment to provide specific school readiness inputs, such as “all children will have access to high-quality and developmentally appropriate preschool programs that help prepare children for school” and that children will receive the nutrition, physical activity experiences and health care needed to arrive at school with healthy minds and bodies, and to maintain the mental alertness necessary to be prepared to learn, and the number of low-birth weight babies will be significantly reduced through enhanced prenatal health systems.

As the politics regarding educational policy became more partisan in the early 1990s, however, these concepts were not further developed, and, in fact, no requirements concerning children’s readiness to learn were included in the final version of the IASA or in NCLB when it was enacted in 2001.

The original drafters of Goals 2000 also assumed that a commitment to provide the resources and supports necessary to give all students an opportunity to learn the challenging new standards they were advocating would be an integral part of the reforms they were proposing. A federal task force established to propose mechanisms for implementing the “Goals 2000”


explained why “opportunity to learn” (OTL) standards must be considered a necessary part of the standards-based reform approach:

If not accompanied by measures to ensure equal opportunity to learn, national content and performance standards could help widen the achievement gap between the advantaged and the disadvantaged in our society. If national content and performance standards and assessments are not accompanied by clear school delivery standards and policy measures designed to afford all students an equal opportunity to learn, the concerns about diminished equity could easily be realized. Standards and assessments must be accompanied by policies that provide access for all students to high quality resources, including appropriate instructional materials and well-prepared teachers.42

The Clinton administration’s original Goals 2000 legislative proposal responded to this recommendation by including provisions for national opportunity to learn standards that would be developed by a National Education and Standards Council (NESIC). Because of strong opposition to the federal oversight and costs this might entail, the concept was watered down in the final Goals 2000 legislation enacted in 1994, to call only for “voluntary” national school delivery standards that states could choose to adopt or state opportunity to learn standards that states could voluntarily develop in conjunction with their own content and student performance standards. Even these minimal, voluntary opportunity to learn standards were revoked by Congress after the Republicans took control of Congress later that year, and no efforts were made to include any school readiness or opportunity to learn standards in NCLB when it was enacted in 2001.

Since Congress rejected the school readiness and opportunity to learn standards in the mid-1990s, states have felt no federal pressure or incentive to consider children’s broad learning needs or eliminate inequities in funding or to deliver any particular level of resources or school quality, and the enormous disparities between schools in affluent communities and schools in low-income communities have persisted. NCLB’s lack of emphasis on necessary resources and learning opportunities for students has, as the NCEST Task Force predicted, significantly limited the ability of disadvantaged students to meet the challenging new state standards and has perpetuated the achievement gaps.

As the original Goals 2000 drafters explicitly recognized, if NCLB is to succeed, substantial attention must be given to the resources and supports that students from backgrounds of poverty need in order to be “ready to learn” when they enter school and to continue to meet demanding academic expectations as they proceed through the elementary and secondary schooling years. Students cannot reasonably be expected to meet NCLB’s demanding outcome requirements unless they are provided the tools and the meaningful opportunities that will fairly allow them to do so.

NCLB’s unrealistic expectations and rigid accountability standards impinge most directly on students from disadvantaged backgrounds and the schools they attend. The law’s mandate that all children be proficient in challenging state standards by 2014 obviously cannot be approached unless the states provide the resources and supports necessary to meet that demanding expectation. Even though Congress has not explicitly included opportunity to learn requirements in the law, the statute has promised all students “fair, equal and significant” educational

43 Add footnote on NCLB equity incentives (§ 6337) and Fattah’s student bill of rights.
opportunities, and the inherent structure of NCLB has created an implicit statutory right for students to receive the range of adequate resources and comprehensive services they reasonably need to meet the law’s demanding performance objectives. Although the lack of an explicit opportunity to learn requirement allows states wide latitude in determining how to meet the act’s outcome requirements, the fact is that if states do not provide students from backgrounds of poverty the resources and supports they need to succeed, the mandatory outcome requirements of NCLB cannot and will not be met.

The NCLB-ESEA statute is overdue for reauthorization, and Congress is likely to renew its deliberations on revising the Act early in 2009, after the new presidential administration takes office. Although fierce criticism of NCLB in its present form has been mounting from both the right and from the left, bi-partisan support for substantially increased federal involvement in educational policy over the past two decades has been a “transformative” development; although the form and many particulars of the statute may change, some combination of increased funding, substantial initiatives to overcome the achievement gaps, and a continuing strong stress on accountability will undoubtedly emerge from the re-authorization deliberations. In this process, unless Congress is prepared to abandon its commitment to providing all students “a fair, equal and substantial opportunity to obtain a high quality education,” it needs to explicitly articulate the right of students from backgrounds of poverty to comprehensive educational equity. To do so, Congress should set forth in the statute specific requirements for the coordinated provision of the range of in-school and out-of-school resources and services that students from communities of concentrated poverty need to succeed.

44 See McGuinn, supra, n. 39 at .
In the years since the Goals 2000 drafting committees first considered readiness to learn and opportunity to learn standards, academic research, school practices and legal developments in state court adequacy litigations have substantially advanced understanding of the specific types of comprehensive resources and services that students need, their costs and improved methods for efficiently putting them into effect. Federal requirements, therefore, can be drafted in a manner that articulates the basic input standards and resource categories that need to be met while leaving the states and local school districts broad discretion to determine the specific resources and the best methods for delivering them.

C. Constitutional Rights to Comprehensive Educational Equity

I. Educational Adequacy

Over the past 35 years, litigations challenging the constitutionality of state education finance systems have been filed in 45 of the 50 states. The state courts became the sole forum for reviewing inequities in public education financing after the U.S. Supreme Court ruled in *San Antonio Independent School District v. Rodriguez* that education is not a fundamental interest under the federal constitution. Overall, plaintiffs have prevailed in 60% of these state court litigations, and, in the more recent subset of “education adequacy” cases decided since 1989, plaintiffs have won 20 of 28 (71%) of the final constitutional decisions.

The recent wave of state court cases challenging state education finance systems have been called “adequacy” cases because they are based on clauses in almost all of the state

\footnote{45 111 U.S. 1 (1973).}
\footnote{46 For a detailed overview and analysis of the state court challenges to state education finance systems, see Michael A. Rebell, *Courts and Kids*, supra n . For up-to-date information on the state court litigations, see National ACCESS Network, http://www.schoolfunding.info.}
constitutions that, although utilizing differing terms, guarantee all students some basic level of education. The contemporary courts have, in essence, revived and given major significance to the long-dormant provisions that had been incorporated into state constitutions either as part of the 18th-century emphasis on the need for education to prepare new republican citizens or through the mid-19th century common school movement for the explicit purpose of promoting equal educational opportunity.

The state defendants in many of these cases have argued that the education clauses should be interpreted to guarantee students only a “minimal” level of education. Significantly, however, the state courts that have closely reviewed students’ needs for education in contemporary society, by and large, have required the state school systems to provide substantially more than a minimum level of knowledge and skills. They have tended to insist that the states provide students an education that will equip them to obtain a decent job in our increasingly technologically complex society and to carry out effectively their responsibilities as citizens in a modern democratic polity. Accordingly, many of the cases have specified that an adequate education must include, in addition to traditional reading and mathematical skills, knowledge of the physical sciences and “sufficient knowledge of economic, social and political systems to enable the student to make informed choices” as well as “sufficient knowledge of governmental processes to enable the student to understand the issues that affect his or her community, state and nation,” and “sufficient levels of academic or vocational skills to . . . compete favorably . . . in the job market.”

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47 Rose v. Council for Better Education, 790 S.W. 2d 186 (KY 1989). These Rose standards have been explicitly adopted by courts in Massachusetts, and New Hampshire, and have substantially influenced the constitutional definitions adopted by the courts in Alabama, North Carolina and
One of the clearest rejections of a minimalist interpretation of a state constitution adequacy clause was the 2003 decision of the New York Court of Appeals, the state’s highest court. Invalidating the intermediate appeals’ court’s ruling that the state constitution required an education that would provide students only eighth-grade-level skills, the court held that New York’s schoolchildren are constitutionally entitled to the “opportunity for a meaningful high school education, one which prepares them to function productively as civic participants.”48 In doing so, the court stressed that although, in the 19th century, when the state’s adequacy clause was adopted, a sound basic education may well have consisted of an eighth- or ninth-grade education, “the definition of a sound basic education must serve the future as well as the case now before us.” 49

In focusing on the actual knowledge and skills that students need to function productively in the 21st century, some state courts have begun to recognize that students who come to school disadvantaged by the burdens of severe poverty need a more comprehensive set of services and resources in order to have a meaningful educational opportunity. Thus, in ordering that additional resources, beyond the level currently enjoyed by students in affluent suburbs, be provided to students in the state’s poorest urban districts, the New Jersey Supreme Court held:

This record shows that the educational needs of students in poorer urban districts vastly exceed those of others, especially those from richer districts. The difference is monumental, no matter how it is

49 Id at 931.
measured. Those needs go beyond educational needs; they include food, clothing and shelter, and extend to lack of close family and community ties and support, and lack of helpful role models. They include the needs that arise from a life led in an environment of violence, poverty, and despair. . . .The goal is to motivate them, to wipe out their disadvantages as much as a school district can, and to give them an educational opportunity that will enable them to use their innate ability.\textsuperscript{50}

Following up on these insights, the New Jersey Supreme Court ordered that the poor and minority students attending the urban schools covered by its decree receive a range of comprehensive services, including after-school and summer supplemental programs, school based health and social services, and preschool services for children ages 3 and 4.\textsuperscript{51}

The extensive additional services ordered by the New Jersey Supreme Court were put into effect as part of the remedy the Court ordered to cure the constitutional violations. Other courts that have focused on the importance of early childhood education for children from backgrounds of poverty have begun to establish important precedents for establishing a right to comprehensive educational equity as an integral part of the fundamental right to an adequate education guaranteed by the state constitution. Two state courts have specifically held that students from backgrounds of poverty must be given access to early childhood services in order to exercise their constitutional right to a sound basic education.

In October 2000, trial court Judge Howard Manning ruled in North Carolina’s school funding case that many disadvantaged children were unprepared for school due to the absence of pre-kindergarten opportunities and ordered the state to provide pre-kindergarten programs for all

\textsuperscript{50} Abbott v. Burke, 575 A. 2d. 359, 400 (NJ 1990)
\textsuperscript{51} Abbott v. Burke, 710 A. 2d 450 (NJ 1998)
“at-risk” four-year-olds. When the case reached the North Carolina Supreme Court in 2004, the court agreed with Judge Manning’s holdings that the state was ultimately responsible “to meet the needs of ‘at-risk’ students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education,” and that the State must provide services to such children “prior to their enrolling in the public schools.” The court held, however, that “at this juncture” of the case, a specific remedial order for particular preschool services was “premature,” and it deferred to the expertise of the legislative and executive branches in matters of education policy to determine what types of services should be provided to at-risk students to prepare them for school.

In 2005, South Carolina state circuit court Judge Thomas W. Cooper, Jr., held that poverty directly causes lower student achievement and that the state constitution imposes an obligation on the state “to create an educational system that overcomes . . . the effects of poverty.” The court described a “debilitating and destructive cycle” of poverty and poor academic achievement for low-income students “until some outside agency or force interrupts the sequence.” Based on expert testimony from both plaintiff and defendant witnesses, the court concluded that “it is essential to address the impact of poverty as early as possible in the lives of the children affected by it.” Therefore, the court ordered “early childhood intervention at the pre-kindergarten level and continuing through at least grade three” to minimize “the impact and the

52 Hoke County Bd. of Educ. v. State, 95 CVS 1158 (Superior Court Oct. 2000), at 36, 43-45.
54 Id. at 393.
55 Id. at 393-94.
effect of poverty on the educational abilities and achievements” of children from backgrounds of poverty. This case is currently on appeal before the South Carolina Supreme Court.

Trial courts in Arkansas and Massachusetts have also held that “at-risk” children from backgrounds of poverty must be provided preschool education in order to have a “realistic opportunity to acquire the education” guaranteed by the constitution and to be in a position to compete with their peers when they enter school. These rulings were, however, subsequently overruled by their state supreme courts. The high courts did not deny the value of preschool education, but they held that under constitutional separation of powers precepts it is up to the legislature to ultimately determine whether and how these services should be provided.

Significantly, the special masters subsequently appointed by the Arkansas Supreme Court to

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56 Id. at 155, 158, 160. Judge Cooper also observed that “Such early intervention not only makes educational and humanitarian sense, it also makes economic sense. The testimony in this record of experts, educators, and legislators alike is that the dollars spent in early childhood intervention are the most effective expenditures in the educational process.” Id at 161.


60 As Professor James Ryan has argued, there is a basic inconsistency to the separation of powers argument advanced by the Arkansas and Massachusetts high courts because:

If courts are willing, as they should be, to determine whether state constitutions create a right to equal or adequate educational opportunities, they must be committed to defining the content of those opportunities…..it would be unjustified for a court to determine that the decision about this particular input (preschool) must be left to the legislature, while identifying the other inputs that must be included within any definition of the right to equal or adequate educational opportunities.

enforce their adequacy ruling questioned whether the state could meet its constitutional obligation to provide students the opportunity for a “substantially equal educational opportunity… without providing pre-kindergarten for disadvantaged children.”  

Claims that an opportunity for an adequate education requires preschool services for children from backgrounds of poverty are currently pending in adequacy cases being litigated in seven additional states: Alaska, Colorado, Connecticut, Georgia, Indiana, South Dakota, and Washington. The outcome of state court litigations will vary, of course, depending on the language in the state constitution and a variety of other factors. Overall, however, as James Ryan, concludes, the legal claim for preschool as an integral part of an adequate education for children from a poverty background “is quite strong.” Courts that recognize that a right to preschool education is an integral aspect of the constitutional guarantee of an adequate education should also recognize that the same arguments and justifications apply also to after school and summer programs, health, nutrition, family support and the other essentials that are needed to


62 Information regarding the specific claims in these cases and the status of the litigations can be found at http://www.startingat3.org/news/Sa3news_080714_PreK_Litigation_Update.htm

63 Only seven state constitutions specify age limits for the right to education. In most of these states that right extends to individuals between the ages of six and 21, but two of these states (Florida and Wisconsin) specifically include 4 year olds among those eligible for free public education. Ryan, supra n.58 at 70.

64 Ryan, supra n.58 at 90. Ryan also notes that legal rulings that include a right to preschool as an aspect of adequate education are likely to be effective in practice because the value of preschool education is strongly supported by the social science research data, preschool is popular with the public, and a court decision can provide useful “political cover” for legislators who support the idea but are hesitant to provide the funding that is required to implement it on a broader scale. Id at 87-95.
provide a meaningful educational opportunity to children from backgrounds of poverty. As David Kirp has noted:

Should high-quality prekindergarten take root nationwide, it will be a major step toward improving children’s lives ---- but just a step. If the aspiration is to have a marked and sustained effect on children, especially poor children, preschool for all is much too narrow a vision. Its benefits come too late, since so much has already happened to children by the time they are four years old. And they end too early, because primary schools have to improve if their impact is to last. …. What’s more, preschool pays relatively little attention to other aspects of children’s lives, like their health, and although parents’ influence dwarfs that of the school, it is silent on the subject of parenting.65

2. Equal Protection

The U.S. Supreme Court considered the application of the equal protection clause of the fourteenth amendment of the United States constitution to issues of the funding of elementary and secondary education in San Antonio Independent School District v. Rodriguez.66 There, the Court upheld Texas’s reliance on local property taxes to fund public education, even though that system resulted in substantial inequities in the funding of schools in property poor districts. Critical to the holding in Rodriguez was the application of the three-tiered approach to the levels of scrutiny that the Supreme Court utilizes in considering challenges to government actions (or inactions) under the equal protection clause.

“Strict scrutiny” requires the government to provide “compelling” reasons for challenged governmental actions in cases that involve allegation of discrimination based on race, religion, or national origin or to matters that rise to the level of “fundamental interests” under the

65 Kirp, supra, n at 9-10.

66 411 U.S. 1 (1973)
constitution such as voting rights.67 “Intermediate scrutiny” is applied to a few other categories like gender, alienage, and legitimacy of birth, where the government is called upon to justify its actions as furthering “a substantial interest” of the state. All other claims are reviewed under the significantly more lenient “rational basis” test, which upholds the statute or state action at issue if the government can articulate any reasonable policy basis for its stance. Needless to say, the severity of the scrutiny is directly correlated with the likelihood of a plaintiff prevailing in a particular case. This is exemplified by the outcome in Rodriguez where, after the Court determined that “poverty” was not a “suspect class” and education was not a “fundamental interest” under the federal constitution, the rational basis test was applied, the court deemed local control of education a reasonable and justifiable state interest, and plaintiffs’ challenge was dismissed. 68

67 See, e.g. Harper v. Virginia Bd of Elections, 383 U.S. 663 (1966) (striking down poll tax); Bullock v. Carter, 405 U.S. 395 (1972) (invalidating filing fee requirement for primary elections.) But see Burdick v. Takushi, 504 U.S. 428, 428 (holding that only “severe” restrictions to voting rights would be subject to strict scrutiny, while “reasonable, nondiscriminatory” restrictions would be held to a lower standard.). In Crawford v. Marion County Election Board, 558 U.S. ___ (2008), the Supreme Court applied Burdick’s lower standard to uphold Indiana’s voter identification law.

68 The Court noted in Rodriguez that even though more resources were available to children in some school districts than in others, all children in the state were being provided 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.” Id at 37. Over the past three decades since that decision was issued, state court litigations in numerous education adequacy cases have found that large numbers of children throughout the country are, in fact, being denied the opportunity to acquire the basic reading and writing skills and the knowledge of economic, historical, and political issues that they need to “enjoy [] the rights of speech and of full participation in the political process.” See discussion, supra, at . This denial is especially true in regard to the large numbers of disadvantaged students who, when denied the comprehensive services they need, do not have a meaningful opportunity to obtain the skills they need to function productively as civic participants.
In a later decision involving access to educational services, the Supreme Court applied the more demanding “intermediate scrutiny” test to a claim of educational deprivation, and the plaintiffs did prevail. The issue in *Plyler v. Doe*\(^{69}\) was whether children of undocumented immigrants were entitled to a free public education. The Court held that denial of education to these students could not be considered constitutional unless it furthered some “substantial goal” of the state. It rejected each of the policy rationales put forward by the state as being insubstantial:

This law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.\(^{70}\)

The *Plyler* Court went on to conclude that any interest the State might have in preserving educational resources for its lawful residents was “wholly insubstantial in light of the costs involved to these children, the State, and the Nation.”\(^{71}\) The costs noted by the Court were “the

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\(^{69}\) 457 U.S. 202 (1982)

\(^{70}\) *Id* at 223-224.

\(^{71}\) *Id* at 230
creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”

The similarity of the situation of the children of undocumented immigrants in *Plyler* and the class of children who are substantially educationally disadvantaged by the impact of concentrated poverty is striking. These children, like the undocumented immigrant children, are not “accountable for their disabling status.” Unless they are provided the essential resources they need, many of them will be marked by “the stigma of illiteracy for the rest of their lives.” In addition, by denying many of these children access to the basic resources and services they need, we will “foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation.” Present policies clearly are creating a “subclass of illiterates” who will “lack the ability to live within the structures of civic institutions” and in addition to their personal plight, lack of attention to these needs will “surely add[] to the problems and costs of unemployment, welfare and crime.”

Research, as evidenced by the studies presented at this symposium, has clearly established the direct link between early childhood education, after school programming, health,

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72 *Id.*

73 A substantial number of undocumented immigrant children are also part of the class of children living in conditions of poverty for whom the right to comprehensive educational equity is being asserted. Children of immigrants comprise more than 26 percent of all low-income children in the United States. [http://www.nccp.org/publications/pub_657.html](http://www.nccp.org/publications/pub_657.html)

74 Unlike the Plyler class, all of whom were being totally denied access to public education, some children from poverty backgrounds are being provided some of the comprehensive services they need. (*See* discussion below at ). The precise class for whom the Plyler precedent should apply is those students from poverty backgrounds who are being systematically denied access to comprehensive resources and services that they need in order to have a meaningful opportunity to achieve educational success.
nutrition, family support, and other vital comprehensive resources and services and successful student achievement. Accordingly, if a court analyzes the situation of educationally disadvantaged students who are denied resources and services that they need to succeed with the same intermediate degree of scrutiny that the Supreme Court applied in *Plyler*, the failure to provide comprehensive educational equity to these students should also be invalidated.

The main rationale for the state’s failure to provide the full range of essential resources to educationally disadvantaged children is clearly the presumed high cost of doing so. The actual cost of providing the comprehensive set of resources and services these students need may not be as high as many people have presumed before analyzing the issue. The preliminary cost analysis presented at this symposium by Richard Rothstein and his colleagues\(^7\) indicates that providing all of the requisite services to students and their families from birth would cost on average $15,000 per year, and that much of this cost would be offset by present expenditures for health, Early Childhood and other services, and by reductions in special education referrals, compensatory education for older students, etc.

In any event, although cost is obviously a major concern for policy makers, and cost efficiency must be a priority in any practical program for providing comprehensive educational equity, cost *per se* can not excuse the denial of a constitutional right. The U.S. Supreme Court has clearly held that “the cost of protecting a constitutional right cannot justify its total denial”\(^7\).

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\(^7\) See Wilder, Allgood and Rothstein, supra n .

\(^7\) *Bounds v. Smith*, 430 U.S. 817, 825( 1977)
and that “t[]he saving of welfare costs cannot justify an otherwise invidious classification.”

Economic factors may be considered, for example, in choosing the methods used to provide meaningful access to services, but the fact that additional state resources will have to be expended cannot be a legitimate reason for denying important constitutional benefits. 78 State Supreme Courts have similarly held that the “financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty.”

The Supreme Court has not yet applied the Plyler standard to any other cases because, it has noted, Plyler involved a “unique confluence of theories and rationales.” 80 A number of lower federal courts have determined that cases denying educational opportunities to disadvantaged children do involve the confluence of theories and rationales that justify application of the Plyler’s intermediate scrutiny standard.81

77 Shapiro v Thompson, 394 U.S. 618, 633, (1969). See also, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent defendants in criminal prosecutions are entitled to counsel at state’s expense); Milliken v. Bradley, 433 U.S. 267 (1977) (students entitled to extensive remedial and compensatory programs to remedy past school segregation.)

78 Bounds, supra, at 825.

79 Rose v. Council for Better Education 790 S.W. 2d 186, 208(KY, 1989); see also, Tucker v. Toia, 390 N. Y. S. 2d 794, 803 ( S. Ct. Monroe Co., 1977, aff’d 43 N. Y. 2d 1 (1977) (“the State may not refuse persons seeking public assistance in violation of their constitutional rights and justify such action solely on the ground of fiscal responsibility or necessity.”)


Should the federal courts decline to apply intermediate scrutiny to a claim for access to comprehensive equity by educationally disadvantaged students, such plaintiffs might still prevail under the less demanding rational relationship standard. Although generally it is difficult for plaintiffs to succeed when the state need only show that a challenged policy can be justified by some legitimate public purpose, even under this lesser standard, “The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.”82 In *City of Cleburne v. Cleburne Living Center*, the Court held that negative attitudes toward the mentally retarded was not a constitutionally acceptable justification for subjecting a group home for the mentally retarded, but not boarding or lodging houses, to special zoning requirements. Once that constitutionally unacceptable justification was set aside, it was clear that there was no remaining rational basis for the zoning requirement since the mentally retarded would not pose any real threat to city’s legitimate interests.

The blunt reality here is that usually the only reason that a state fails to provide early childhood education, after school programming and other essential services and resources to all of the children who need them is to avoid the additional costs of doing so. As noted above,83 the fact that providing necessary services will compel the government to incur additional cost is not a constitutionally acceptable excuse for denying constitutional rights. Once the improper cost rationale is set aside, the denial of essential resources to educationally disadvantaged students

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83 See discussion, *supra* at     .
starkly stands out as being arbitrary, irrational, and unconstitutional.\textsuperscript{84} Analogous arbitrary categorizations have been invalidated by the Supreme Court under the rational relationship standard on a number of occasions.\textsuperscript{85}

There is an additional aspect of the denial of comprehensive education essentials to educationally disadvantaged students that violates equal protection. In regard to a major benefit like education, “where the state has undertaken to provide it, [it] is a right which must be made available to all on equal terms.”\textsuperscript{86} Most states currently provide some amount of preschool, after-school, summer programs, health, nutrition, family support, and other essential comprehensive resources and services to some of their educationally disadvantaged students, but no state makes these resources and services “available to all on equal terms.” There is no constitutionally valid

\textsuperscript{84} Because of the dramatic increases in state and federal regulation of education under state standards based reforms and NCLB, it is questionable whether “local control,” the policy rationale accepted by the Supreme Court in Rodriguez, would be as credible a justification for unequal funding schemes today as it was in 1973. In any event, whatever the continued viability of the local control defense to any possible federal constitutional equity claims, that rationale does not apply to rights grounded in state constitutional educational adequacy provisions which generally impose supervening constitutional responsibility on state governments to ensure that the local school districts they control are meeting students’ constitutional needs.

\textsuperscript{85} See e.g., Baxstrom v. Herold, 383 U.S. 107 (1966) (granting due process review of current mental status at the end of a term of commitment to those who had been civilly committed but not to those who had been criminally committed held to violate equal protection); Zobel v. Williams, 457 U.S. 55 (1982) (Alaskan dividend distribution plan that favored established residents over new residents held to violate equal protection); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (amendment to food stamp act declaring ineligible any household containing an individual who was not related to another member of the household held to violate equal protection); Romer v. Evans, 517 U.S. 620 (1996) (amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination lacked a rational relationship to legitimate state interests.)

justification for providing these vital services to a limited portion of the eligible population and not to all of them.

For example, although there has been a substantial increase in the provision of preschool services to educationally disadvantaged students, as of 2005 nationally only 40 percent of three and four year olds from families with household incomes of $20,000 -30,000 were receiving these services.\footnote{Kate Sheppard, \textit{Pre-K politics in the States} A-10, \textit{American Prospect} (Dec. 2007). With families with under $10,000 income, 52\% were receiving preschool services for their three and four year olds and with families earning $10,000-20,000, only 49\% percent were. By way of contract, 68\% of preschool aged children from families earning $75,000-100,000 per year and 80\% percent of those earning over 100\% percent were receiving services. \textit{See also,} U.S. Department of Education, National Center for Education Statistics, Early Childhood Longitudinal Study, Birth Cohort (ECLS-B), Longitudinal 9-month-Pre-School (NCES 2008-024): Table 7 (only 45\% percent of four and five year olds in the lowest 20\% percent of the population in terms of Socio-Economic Status receive either center-based or Head Start preschool services.)} In New York State, only about 40 percent of the 1 million children who need after-school services were receiving them;\footnote{New York State Afterschool Network, NYSAN Policy Brief 2 (May 2008).} nationally, only 13\% of children and adolescents in the lowest income quintile participate in after school programs.\footnote{Margo Gardner, Jodie Roth, and Jeanne Brooks-Gunn, \textit{Leveling the Academic Playing Field for Disadvantaged Youth through Participation in After-School Programs}, draft paper presented at the Symposium on “Comprehensive Educational Equity: Overcoming the Socioeconomic Barriers to School Success,” Teachers College, Columbia University, November, 2008, p.5.} In 2007, 17.6\% of children living in poverty had no health insurance coverage.\footnote{2007, U.S. Census Bureau, Income, Poverty, and Health Insurance Coverage in the United State: \url{http://www.census.gov/prod/2008pubs/p60-235.pdf}, page 24} The mapping study presented at this symposium by the Finance Project has also shown that although an array of resources and services are provided to a variety of students, the full range of vital out-of-school services is
clearly not being made available to all students in need of them. [use specific examples]. 91 The denial of services to large segments of the eligible population is similar or even greater in other states.92

Concededly, the courts have held that not every departure from strict equality in the distribution of benefits will be considered a violation of equal protection, and that a benefit program will not be ruled unconstitutional if it “is not made with mathematical nicety or because in practice it results in some inequality.”93 They have also held that “the machinery of government would not work if it were not allowed a little play in its joints.”94 Presumably, fine distinctions in the amount or quality of services being provided, like minor variations in the sizes of preschool classes or in the number of hours children can attend after school programs would not rise to a constitutional level. But providing extensive preschool or after school services to half or less of the children who need them and totally denying any such services to the other half with similar needs raises the level of deprivation well above the ambit of permissible variation allowed under *Dandridge* and *Bain Peanut Co.*95 As the U.S. Supreme Court stated in *Baxstrom*

91 See Connors-Tadros and Silloway, supra n__ .

92 [ Add citations.]


95 Although no federal court has yet been asked to consider the issue of denials of services to a large subcategory of eligible students, a trial court in Arkansas held that under the Arkansas state constitution’s equal protection clause, “the State must provide equal access to pre-school education, if the State is already either directly or indirectly financing some school districts that are providing early childhood education.” As indicated above in n__, this ruling was reversed on other (separation of powers) grounds by the Arkansas Supreme Court. *Lake View School Dist. No. 25 v. State*, 351 Ark. 31, 91 S.W.3d 472 (Ark., 2002).
v. Herold,96 “Equal protection does not require that all persons be dealt with identically, but it
does require that a distinction made have some relevance to the purpose for which the
classification is made.” Except for financial considerations, which, as noted, are constitutionally
irrelevant, there is no rational basis for providing early childhood education, after school
programming, health services, or any other essentials to some educationally disadvantaged
students, while systematically denying them to others.

II – A LEGISLATIVE FRAMEWORK FOR IMPLEMENTING
COMPREHENSIVE EDUCATIONAL EQUITY

To implement the right to comprehensive educational equity, the federal and state
governments need to 1) identify the range of essential resources and services that children from
backgrounds of poverty require; 2) establish systems for providing these resources and services
in an efficient, cost-effective manner to all students who need them and 3) ensure stable, long-
term funding of the requisite resources and services.

On both the federal and the state levels, substantial steps have been taken toward these
ends. For example, the federal 21st Century Community Learning Centers program currently
provides over $1 billion per year for state-administered after-school programs throughout the
nation.97 In 2004, 21st Century programs provided academic enrichment programs, youth-
development and support activities, and family-literacy and parental-involvement services to
more than a million youth and adult family members through 8,448 centers operating
nationwide. Nevertheless, only 28 percent of the community groups seeking funding from the

96 383 U.S. at 111
97 (http://www.ed.gov/about/overview/budget/statetables/09stbyprogram.pdf)
states were able to be accommodated under this program, and even the current funding level is subject to annual appropriations and can be reduced or eliminated at any time.

Thirty-eight states now provide some amount of state-funded early childhood services. At least seven of these -- Florida, Georgia, Illinois, Iowa, Oklahoma, and West Virginia -- have adopted “universal pre-K” policies that promise access to programs for all of their 4 year olds and three others -- Arkansas, Louisiana and Oregon, promise pre-K for all at risk children. Even in these states, however, the promise has been greater than the reality: for example, the 1997 authorizing legislation for New York’s Universal Pre-K program promised to serve all 4 year old children by 2002. But from 2001-2006 there were no increases in funding for the program and by 2005 only approximately 25 percent of the eligible children were served. The Arkansas program, although aiming to provide services to all at risk students, is funded only to the extent of “available appropriations;” in 2005-2006, only 11,820 at risk three and four year olds were served.

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100 Susan Urahn & Sara Watson, A Movement Transformed A-7, AMERICAN PROSPECT (December 2007).

olds, far less than half of the eligible at risk students and 18 percent of all 4 year olds were being served.102

With pre-K services, as with after school programming, the critical need of students from backgrounds of poverty has been widely recognized and programs to meet the need have been expanded. But the right of all children to the full range of priority services they need has not been recognized and in the absence of such recognition, children’s vital needs will continue to be subject to political currents and the vicissitudes of funding availability. A Full Service Community Schools Act, introduced in the House of Representatives last year by Rep. Steny Hoyer103 recognizes the importance of providing full range of services through the school, and would provide $200 million per year for this purpose, but thus far this promising initiative has been funded through a budget bill at a meager $5 million per year level, allowing only a few demonstration projects to be mounted with the federal funds.104

Educators, health and welfare advocates, and legislators know the services these children require and how to provide them. What we need to do now is expand and coordinate existing programs in order to accommodate all of the children who need them, focus on mechanisms to ensure cost-effective, efficient delivery mechanisms, and ensure long-range, stable funding to

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102 The Arkansas Better Chance for School Success Program ("ABC for School Success"), aims to provide high quality preschool education to low-income three- and four-year-old children residing in low-performing school districts. A program must be offered within a school district if the majority of its students score poorly on state assessments or the district has been designated as being in academic distress. To be eligible for the program, a child must have a family income not exceeding 200 per cent of the federal poverty level. Programs may also admit children that are not income eligible, but instead fall into a category such as foster children, children with a parent in jail, or children with a parent serving in the military overseas. Details of the Arkansas program are available at http://www.startingat3.org/state_laws/statelawsARdetail.htm/

103 H.R. 2323,110th Congress (2007)

104 See
meet these needs. In other words, we need to move from pilots to policy by establishing the right of all children to receive all of the comprehensive resources and services they require.

**A. Implementing the Statutory Right to Comprehensive Educational Equity**

A comprehensive statutory framework for providing meaningful educational opportunity to all students already exists in the structures that the states and the Congress have built in enacting standards-based reforms and in enacting NCLB. The state standards-based accountability systems establish challenging academic standards that define the specific knowledge and skills that students need to learn by the time they graduate from high school. For all students to meet these expectations, states should identify the specific resources, services, and supports that students from diverse backgrounds need to achieve at these levels. NCLB complements the state standards systems by adding demanding annual progress and proficiency requirements. These mandates also logically and equitably should require the states to implement systemic mechanisms for ensuring that all students are provided the resources and services they need to meet these outcome targets.

As discussed above, the original drafters of Goals 2000 and the standards-based reforms recognized that “If not accompanied by measures to ensure equal opportunity to learn, national content and performance standards could help widen the achievement gap between the advantaged and disadvantaged in our society.” \(^{105}\) Because of opposition to federal intrusions on local control of education, these strong warnings were not heeded and even the weak provisions for voluntary opportunity to learn standards that had been included in the original Goals 2000

\(^{105}\) See discussion at pp.
legislation were revoked. This fatal flaw in NCLB and many state standards systems needs to be rectified.

State courts in the overwhelming majority of education adequacy cases have recognized this fatal flaw in the standards-based reform systems -- and the inequity of the “high stakes” requirements in the 22 states that condition the receipt of a high school diploma on passage of examinations based on the state standards, but often deny many of their students any meaningful opportunities to meet them. These courts have ordered states to fill the “opportunity gaps” in their standards-based educational systems by ensuring that all students are provided sufficient resources to meet the states’ academic expectations. In responding to these court orders, a number of states have systematically analyzed the costs of providing essential school services and have improved their accountability systems to ensure that improved opportunities are actually made available to all students.106 From a national perspective, these efforts need to be expanded to cover all of the states and not just those that have been subject to state court orders. Moreover, a clear national mandate is needed to emphasize that these opportunities must encompass both school-based and necessary out-of-school services to provide meaningful opportunities to all students.

As discussed above,107 the basic statutory structure of the NCLB, which mandates demanding academic progress each year by all students and requires states to ensure that all students will be proficient in challenging state standards by 2014, implicitly requires the states to provide whatever level of resources is necessary to accomplish these tasks. In other words, although Congress refused to include opportunity to learn standards in the law, states cannot

106 These issues are discussed in more detail in REBELL & WOLFF, supra n. at Chapter 6.
107 See discussion at pp above.
meet the demanding NCLB requirements unless they ensure the availability of adequate resources and services for students from backgrounds of poverty. This implicit obligation to provide the comprehensive resources students require to succeed may be brought to the fore in the litigation that the National Education Association and a number of school districts from various parts of the country have brought against the U.S. Secretary of Education, which is now pending in the U.S. Court of Appeals for the Sixth Circuit.108

In *School District of Pontiac v. Secretary*, the plaintiff school districts claim that they need not comply fully with NCLB’s requirements because the federal funds they have received under the Act do not cover all of the increased costs of compliance. The legal issue raised by this claim, as it has been framed thus far by the Court, is “whether NCLB furnishes clear notice to the [state] official that her State, if it chooses to participate, will have to pay for whatever additional costs of implementing the Act that are not covered by the federal funding provided for under the Act.”109 The majority of the panel that heard the appeal determined that Congress had not provided sufficient notice of their obligations to the states because the extent of their liability

108 512 F.3d 252 (6th Cir, 2008). The NCLB denies school children and their parents a “private right of action” that would allow them to initiate litigation on their own behalf to protect their rights under the statute. In addition to explicitly acknowledging students’ rights to comprehensive educational equity in a re-authorized NCLB, Congress should also explicitly grant students and their parents the authority to enforce this right. *See*, Earl Warren Institute on Race, Ethnicity and Diversity, UC Berkeley Law School, Key reforms Under the No Child Left Behind Act – The Civil rights Perspective: Research-Based Recommendations to Improve NCLB 12-13 (2007).

109 512 F. 3d at 264. The school districts’ claim that they need comply with NCLB requirements where federal funds do not cover the increased costs of compliance is based on an “unfunded mandates” provision of the Act (20 U.S.C. § 7907(a)), which on its face relieves the states of an obligation to incur any costs not paid for under the Act. The lower court and the dissent, however, construed this provision to apply only to any additional requirements that federal officials administering the Act might add to the mandates set forth in text of the Act which had put the states on notice of their obligations and the likely costs of meeting them at the time they agreed to accept the federal funds that the Act provides.
to incur costs under NCLB “is anything but clear.”\textsuperscript{110} That decision, however, has been vacated because the full panel of judges of the Court of Appeals for the Sixth Circuit has decided to reconsider the case.

A final ruling in this case -- which ultimately may be decided by the U.S. Supreme Court -- could put the comprehensive equity issue squarely in focus. If the courts finally rule that the states have not been given a clear understanding of the extent of their compliance obligations under the Act, presumably Congress or the Secretary of Education will be required to do so in order to be able to continue to enforce the Act. Under such circumstances, it will be incumbent on the federal authorities to make explicit the statute’s implicit expectation that all students will be provided the resources they need to succeed. A ruling in the Secretary’s favor, on the other hand, would imply that the current implicit structure of the Act has already sufficiently advised the states and local school districts that they need to incur whatever costs are necessary to meet the adequate yearly progress targets and to bring all of their students up to full proficiency levels. Presumably the states then would need to make greater efforts to determine and provide the resource levels that are required to meet these mandates. Even under this scenario, however, it would be prudent for the Secretary to spell out explicitly the states’ funding and resource deployment obligations under the Act in order to promote full compliance.\textsuperscript{111}

\textsuperscript{110} \textit{Id} at 269.

\textsuperscript{111} The issue currently before the full complement of judges of the 6\textsuperscript{th} Circuit Court of Appeals is the Secretary’s motion to dismiss the case before trial. If the plaintiffs prevail and the case does go to trial, the trial record should provide detailed information on the actual costs of effectively meeting all of NCLB’s demanding requirements ---- which, if the act’s requirements are taken seriously, should include the costs of providing comprehensive educational equity. A trial may also trigger focused policy discussions of how much of these costs should be borne by the federal government and how much by the states.
Rather than awaiting the outcome of what may be a lengthy litigation process, Congress, in reauthorizing NCLB in 2009, should explicitly delineate the states’ cost obligations. This does not mean that Congress needs to set forth at this time the kind of detailed opportunity to learn standards that it declined to include in the initial passage of the Act. Federalism concerns and legal requirements for clearly notifying the states of the extent of their funding obligations under the Act can both be met by revising NCLB to require the states to ensure “meaningful educational opportunity” for all of their students in accordance with their own academic content and performance standards in the plans they develop for NCLB compliance purposes.

Specifically, NCLB should be amended to require the states to ensure that every local school district provides sufficient services and resources in each of the essential categories of school-based and out-of-school resources. The federal statute should define the essential resource categories only in general terms like “highly effective teachers,” “additional time on task,”

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112 Apprehension about federal regulation of local educational practices has substantially declined in the years since NCLB has been in effect. Problems of inconsistent and low quality state standards have led increasing numbers of policy makers and business leaders to recognize a need for a greater degree of federal involvement in ensuring the adequacy of state standards. See, e.g., Checker E. Finn, Liam Julian and Michael J. Petrilli, To Dream the Impossible Dream: Four Approaches to National Standards and Tests for America’s Schools 16 (Thomas Fordham Foundation, 2006), available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/f2/46.pdf (“[T]imes are a changing. Business leaders’ concerns about economic competitiveness….indicate that national standards and tests may no longer be politically taboo.”); ASPEN INSTITUTE COMMISSION ON NO CHILD LEFT BEHIND, BEYOND NCLB: FULFILLING THE PROMISE TO OUR NATION’S CHILDREN (2007) (recommending the development of national model standards that states may either adopt or use as benchmarks for developing and assessing their own standards.)

113 As discussed above at pp ..., the only essential category of resources that NCLB currently requires of the states is “highly qualified” teachers, which under the statute’s definitions, actually corresponds to “minimally qualified.” A more appropriate input requirement therefore, would be for “effective teachers,” a discussion of which is set forth in REBELL & WOLFF, supra n., Ch. 5.
“adequate facilities,” and “appropriate health services.” The determination of exactly what programs meet the needs of students in these areas and the manner in which they will be put into place should, however, be left to the discretion of individual states. The states should be responsible for developing opportunity standards that describe specifically who are “effective” teachers, what programs meet requirements for “additional time on task,” “adequate” facilities, and so on. Examples of exemplary practices that have been developed by successful states should also be disseminated and recommended, but not required, by the U.S. Department of Education.

Although the proposed federal requirement for meaningful opportunity standards inevitably will invoke recollections of the politically charged OTL discussions of the early 1990s, research advances and the pervasive state court education equity and education adequacy litigations have dramatically changed the political environment in this area. The proposal I am advocating actually emerged from the “laboratory of the states” (New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) and represents a consensus of what state courts, based on evidence of local needs, have determined to be essential elements of a basic quality education. The basic recommendation is that NCLB require each state to provide the categories of resources that emerged from the consensus of state court decisions, while leaving the determination of the precise types and levels of resources to the discretion of states and localities. 114

114 The opportunity to learn standards that were the subject of political controversy in the 1990s included both resources and the “practices, and conditions necessary at each level of the education system . . . to provide all students with the opportunity to learn…” (Goals 2000, 1994, §5802(7) (emphasis added). At the time, the major concerns about federal intervention centered on the “practices and conditions.” The proposal in the text does not call for the federal government to develop a menu of preferred educational practices and mandate them on the
This general federal requirement would place opportunity needs at the top of the policy agenda and induce each state to engage educators, academics, professional organizations, school boards, community groups, and the public at large in important debates and on-going research and evaluation about the level and combination of services that are needed to provide a meaningful educational opportunity. Each state would, in essence, develop the basket of goods, services, and practices that is most consistent with its particular academic and performance standards, needs, and perspectives. (This requirement would also further federalism concerns and the states’ own interests in ensuring that their own standards-based reform regime would be adequately funded and would, therefore, be more likely to succeed.)

As with the essential in-school resources, a general federal requirement for comprehensive out-of-school resources for students from backgrounds of concentrated poverty would maximize the ability of the states and localities to decide which specific resources, services, and supports are most critical for meeting students’ educational needs, which methods for providing these services are most effective and efficient, and which approaches are most cost effective. The anticipated public dialogue on the specific components of a “meaningful educational opportunity” and how they can best be provided by schools in collaboration with other agencies would be particularly useful in this critical, newly developing area.115 Extensive states. Effective practices and conditions, although of critical importance to meaningful educational opportunity, by their nature are context-specific, and they should be developed by the states and local school districts.

115 Some states already have in place procedures for developing “essential elements” of their K-12 curriculum through a public engagement process, which could be expanded to cover the meaningful educational opportunity elements, both in school and out of school, as recommended here. Thus, the Texas Education Code, § 28.002(c) provides:
state-based consideration of these issues may also motivate policymakers to implement other social and economic policies that might mitigate the effects of poverty on children in areas like housing, health insurance, and income maintenance.

Some states already have in place procedures that are capturing much of the information that would be required to be included in the NCLB state plans under this proposal. For example, in Arkansas a Joint Legislative Committee is charged with the responsibility to evaluate every two years “the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes.” A.C.A. § 10-3-2102 (1). The statute details the range of programs, assessments, curriculum frameworks, and financial factors that must be reviewed for the comprehensive report that the committee is required to prepare. The statute also provides that the Committee must “Review and monitor the amount of funding provided by the State of Arkansas for an education system based on need and the amount necessary to provide an adequate educational system, not on the amount of funding available, and make recommendations for funding for each biennium.” A.C.A. § 10-3-2102 (8).

In extending a framework like that already in place in Arkansas to encompass the full range of comprehensive services that children from backgrounds of poverty require, cost analyses like that presented by Richard Rothstein and his colleagues at this symposium that identify the priority services students need from birth through age 18 in each category of out-of-

The State Board of Education, with the direct participation of educators, parents, business and industry representatives, and employers shall by rule identify the essential knowledge and skills of each subject of the required curriculum that all students should be able to demonstrate....
school resources should be combined with the cost analyses of school-based services that
Arkansas and most other states are now undertaking. Such studies, whether undertaken directly
by state agencies or by consultants, should be vetted by independent policy experts and widely
disseminated to the public at large through statewide public engagement forums in order to build
a statewide consensus on the priority services and how they can be provided in a cost effective
manner.

The U.S. Department of Education, in reviewing the state plans, should ensure that
substantive steps are being taken to provide all students significant opportunities in each of the
comprehensive education essential areas, in accordance with their needs. This should essentially
be a process review, but a probing review that will ensure that action is being taken in good faith
to meet children’s needs; in other words, the Department should not have authority to second-
guess the mechanisms that the state has chosen to use or the amounts it chooses to spend in each
category as long as a credible process has been put into place to meet these needs. States would
be also be required to demonstrate that they have adopted reasonable methods and robust data
systems for assessing and enforcing compliance with their essential resource requirements, and
that the annual report cards that they distribute to the public include descriptions of the steps
being taken to provide each of the educational essentials, including the equity of the distribution
of these essentials.\textsuperscript{116}

\textsuperscript{116} The U.S. Department of Education should issue an annual report of its own that
provides comparative data from the state plans and state report cards on methods the various
states are using and the progress they are achieving. These reports, together with the state’s AYP
information will allow parents, civic and business leaders, and the interested public in each state
to evaluate the opportunities that the state is providing and the annual progress it is achieving and
to compare their state’s efforts and achievements with those of other states. With that
information, concerned citizens in states that are not making adequate progress will be able to
B. Implementing the Constitutional Right to Comprehensive Educational Equity

Because the major statutory framework for implementing educational opportunity is provided by the federal No Child Left Behind Act, the emphasis in the discussion on implementing the statutory right to comprehensive educational equity in the previous subsection was on the federal law. In the constitutional realm, the main loci for the advancement of constitutional rights to equal educational opportunity currently are the state courts, which, in more than two dozen states, have already acknowledged and implemented children’s rights to equitable state funding and/or an adequate education. The federal courts, as a result of the U.S. Supreme Court’s ruling that education is not a fundamental interest under the federal constitution, and the Court’s retreat from active enforcement of school desegregation, 117 have, for the time being at least, largely left the constitutional development of educational opportunity to the states. Even though their own precedents support the constitutional arguments set forth in the previous section, the federal courts at the moment are not likely to be the trailblazers in considering the formulation of new constitutional concepts in this area.

A number of state courts, as discussed above, 118 have already recognized that in order to have a meaningful educational opportunity, students from backgrounds of poverty need quality early childhood education, as well as adequate in-school resources. Plaintiffs in future state court press their policymakers and elected officials to improve their efforts and to consider adopting policies and practices that have proved successful in other states.


118 See discussion at pp , supra.
adequacy litigations should use these precedents to take the constitutional argument to its logical
next level and press the state courts to include in their “adequacy” definitions the full range of in-
school and out-of-school resources that these students need to truly have a meaningful
educational opportunity. Effective implementation of these extensive remedies will, of course,
require the active collaboration of courts, legislatures and governors, and executive agencies. In a
forthcoming book, I propose a comparative institutional model for utilizing the functional
strengths of each of the branches to enhance the likelihood of achieving effective and lasting
constitutional compliance in this area. 119

Ideally, not only the implementation of remedies involving constitutional rights to
education, but also the initial formulation of the parameters of newly recognized constitutional
rights, should also be undertaken collaboratively by courts, legislatures, and governors and
executive agencies. Given the strong moral and legal bases for students’ rights to comprehensive
educational equity, as well as the compelling state and national interests in advancing this right, I
would assert that especially in states where litigations are not now pending, the governors and
state legislatures should declare their commitment to fashioning such a right and take the lead in
its formulation. There is no reason that the immediate need to deal with the educational
imperatives for children from backgrounds of concentrated poverty and the strong state and
national interest in their educational achievement should await the lengthy and uncertain
unfolding of the litigation process. The executive and legislative branches of government have
strong policy justifications and independent moral and constitutional responsibilities for
considering and responding immediately to these needs.

119 See MICHAEL A. REBELL, COURTS AND KIDS, supra n.  .
Recognition and implementation of important rights, like the right to comprehensive educational equity, should not be seen as the exclusive domain of the courts. A growing number of constitutional scholars have recognized in recent years that Congress and the President, as well as state legislatures and governors, regularly engage in a substantial process of constitutional interpretation that is distinguishable from the process of constitutional interpretation carried out by the courts. These scholars have argued that the constitution imposes affirmative obligations upon both the legislative and executive branches of government and that “[T]he constitution is aimed at everyone, not simply the judges. Its broad phrases should play a role with legislatures, executive officials and ordinary citizens as well.”\(^ {120} \) Although there is disagreement regarding the extent to which legislatures and executive agencies can make constitutional decisions that conflict with specific court decisions, there is broad agreement that the legislative and executive branches can and should act to enforce constitutional mandates in areas where the courts have not ruled or will not rule.\(^ {121} \) As Laurence Tribe has put it:

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\(^ {121} \) See, e.g., Mark Tushnet, Taking the Constitution Away from the Courts (1999) (arguing that legislative and executive branches should in many situations reconsider constitutional positions articulated by the courts); Keith Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999), Louis Fisher, Constitutional Dialogues: Interpretation as Political Process, pp. 64-84 (1988) (discussing methods used by the Supreme Court to sidestep sensitive issues or to allow the other branches to reenter the field and make adjustments or revisions to court doctrines); James E. Fleming, The Constitution Outside the Courts, 86 Cornell L. Rev. 215, 242 (2000) (distinguishing between
Federal judges are not the only officials sworn to uphold the Constitution. The President and Congress, as well as the governments of the states and their political subdivisions are equally obliged to serve constitutional values and, therefore, to make good on the promise of the Civil War amendments when institutional concerns stop the judiciary from enforcing the norms contained in those amendments to their conceptual limits.  

A highly relevant example of major action taken by Congress and the state legislatures to enforce constitutional rights in the absence of any conclusive declaration or mandate from the courts was the recognition and enforcement of a right to equal educational opportunity, appropriate to their particular needs, for students with disabilities by Congress and most of the state legislatures in the 1970s and 1980s. In 1974, Congress on its own initiative enacted the Education of All Handicapped Children’s Act of 1974 (EHA), the current version of which is known as Individuals with Disabilities Act (IDEA). At this time, many states also revoked laws that kept students with disabilities out of school and enacted statutory schemes that required the schools to provide “suitable” educational opportunities to these students.

The U.S. Supreme Court has never mandated or even considered a constitutional right to suitable educational opportunities for students with disabilities. In the early 1970s, two lower

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122 Tribe, supra. at 1513; See, also, e.g., Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice (2004) (arguing that institutional limitations compel courts to “underenforce” the Constitution and that the other branches have an obligation to complete enforcement on questions involving choices of strategy and responsibility that are properly in their institutional domain); Lawrence G. Sager, Courting Disaster, 73 Fordham L. Rev. 1361, 1368-69 (2005) (“The political question doctrine, the under enforcement thesis, and the phenomenon of judicial deference all depend upon and fortify the license of non-judicial actors to apply the Constitution more stringently than would the Court.”)

123 20 U.S.C § 1401.

124 See, e.g. N.Y. Ed. Law, Art 44 [add other cites].

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federal courts had begun to consider whether students with disabilities had an affirmative right to extensive educational services to meet their individual needs, but those cases were quickly settled and never reached the federal courts of appeal or the U.S. Supreme Court. What happened instead is that Congress and many state legislatures quickly responded to the concerns of advocates for the disabled and recognized the rights of students with disabilities to appropriate educational services, even though no court had ordered them to do so, and no court had clearly articulated the substance of any constitutional right in this area.

Passage of the EHA and the IDEA under these circumstances has two major implications for present purposes. First, the fact that Congress and the state legislatures were willing to recognize a new constitutional right for a large cohort of students with disabilities, without any

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125 Mills v. Board of Education, 348 F.Supp 866 (D.D.C., 1972) and Pennsylvania Ass’n for Retarded Children (PARC) v. Pennsylvania, 334 F. Supp 1257 (E.D. Pa, 1971), modified, 343 F.Supp 279 (E.D. Pa, 1972). The plaintiffs in these cases challenged statutes in the District of Columbia and in Pennsylvania that denied certain children with disabilities the right to attend public schools. Both sets of defendants entered into consent decrees that recognized a right to equal educational opportunity for the disabled and provided the plaintiff classes with extensive procedural and substantive rights. These consent decrees applied only in Pennsylvania and the District of Columbia. No court decree obligated Congress and the state legislatures in the other 49 states to recognize these rights, and it was far from clear at the time that the U.S. Supreme Court, which had just decided the Rodriguez case, would have recognized a far-reaching new right in this area.

126 Congress was, however, directly influenced by the Mills and PARC decisions in its drafting of the original statute. Both of these district court cases had held that handicapped children had a right to “an adequate, publicly supported education” and the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See Mills, 348 F.Supp. at 878-883; 334 F.Supp. at 1258-1267, PARC, 343 F.Supp. at 303-306. The Senate Report which accompanied the 1974 statute acknowledged that the Act “incorporated the major principles of the right to education cases.” S.Rep. at 8, U.S.Code Cong. & Admin.News 1975 at 1432. Those principles in turn became the basis of the IDEA, which itself was designed to effectuate the purposes of the 1974 statute. H.R.Rep. at 5. Rowley v. Bd of Educ., 458 U.S. 176, 193-194 (1982).
binding judicial mandate to do so, creates a significant precedent for Congress and state legislatures to recognize and implement a similar right to comprehensive educational equity for educationally disadvantaged students.\textsuperscript{127} The IDEA now provides extensive procedural and substantive rights to almost six million students, constituting more than 9\% of all 6 through 21 year olds in the United States.\textsuperscript{128} The extra costs to the federal and state governments and local school districts of providing these benefits is approximately $ 63 billion per year, or approximately $10,500 per child per year.\textsuperscript{129}

Second, the fact that Congress and the state legislatures have recognized that these students have a right not merely to \textit{access} to public education, but to receive “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs”\textsuperscript{130} has major implications for considering the highly analogous individual needs of educationally disadvantaged children. As with children with disabilities, affording children from backgrounds of concentrated poverty merely the right to enter public school buildings, without providing them the special supports and services they need to overcome the impediments that inhibit their learning potential, is to deprive them of an adequate or appropriate educational

\textsuperscript{127} Congress and many state legislatures have also enacted statutes that recognize and implement a right to meaningful educational opportunity for students with limited English proficiency. See §601 of the Civil Rights Act of 1964, 42 U.S.C. s 2000d, and its implementing regulations, [EEOA and Bilingual Education Act.] The Supreme Court has relied on these statutes and regulations in enforcing these rights, and it has explicitly declined to reach the question of whether there is a constitutional basis for the students’ claims. Lau v. Nicols, 414 U.S. 563, 566 (1974).


\textsuperscript{129} See (http://www.ed.gov/about/overview/budget/statetables/09stbyprogram.pdf) [ Federal funds. Total figure based on 17\% federal share --- need further cites.]

\textsuperscript{130} 20 U.S.C. § 1400 (d) (1) (A)
Without the comprehensive resources they need, many of these students also will “sit[] idly in regular classrooms awaiting the time when they [will be] old enough to ‘drop out.’”

Clearly, it is illogical and inequitable for Congress and the state legislatures to provide students disadvantaged by physical, mental and emotional disabilities with “special education and related services designed to meet their unique needs,” while refusing to provide analogous services to meet the unique needs students who are educationally disadvantaged by concentrated poverty. The array of services guaranteed to students with disabilities include, among other things, “speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, [and] social work services…” These are clearly parallel and in many cases exceed the range of comprehensive services needed by students with educational disadvantages.


132 20 U.S.C. A. § 1401 ((26). School districts must also provide students with disabilities “an individualized educational program” (IEP) which sets forth the specific programs and services that are needed to meet the individualized need of the child, 20 U.S.C.A §§ 1413 (A) (11); 1414 (a)(5) and their parents are accorded extensive due process rights to ensure that all necessary services are included in the IEP and that they are appropriately provided. U.S.C.A §§1414, 1415.

133 Providing such services to students with severe disabilities can in many cases cost upwards of $100,000 per year. See, e.g. Clevenger v. Oak Ridge Sch. Be, 744 F. 2d 514, 517 (6th Cir. 1984) (school board held liable for residential program costing $88,000. per year in 1984 dollars). [add other examples.]
Building on the IDEA precedent, governors and state legislatures should acknowledge and act upon students’ rights to comprehensive educational equity without waiting for the issuance of any constitutional mandates by the courts. Governors should pre-empt the lengthy litigation process by declaring their understanding that an “adequate” education as guaranteed by the state constitution includes an appropriate range of both in-school and out-of-school resources and services. The state should then develop specific “meaningful educational opportunity” standards to implement that right by 2014 and include those standards and procedures for implementing it in its required NCLB compliance submission.

Many states have already recognized the importance of taking bold new steps to coordinate the services provided by all of the state agencies which relate to children’s needs, develop a common set of outcomes and collaboratively implement plans to improve children’s welfare and educational attainment. For example, Arizona’s Five Keys to Success Program seeks to ensure that all youth in the state are prepared to work, contribute and succeed in the 21st century by creating five cross-cutting supportive environments. Iowa’s Youth Development Strategic Plan 2007-2010 seeks to foster collaborative relationships among youth serving

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134 Revising the NCLB to include the provisions for meaningful educational opportunity recommended in the previous subsection would amount to an implicit recognition of the students’ constitutional rights in this area by Congress and the President. Perhaps the best way for the new President who takes office in January, 2009 to end the current impasse on NCLB reauthorization would be for him to respond to the constitutional issue left open by the Rodriguez decision and declare that in order to develop the skills needed to function productively as capable citizens in the 21st century, students need the comprehensive range of skills identified in many of the state education adequacy cases and in the task force reports that identified the services students from backgrounds of poverty need to be ready to learn. NCLB should respond to these needs by filling out its current framework to implement that right. See discussions supra at .

135 http://forumforyouthinvestment.org/node/240
systems at the state and local levels to implement a vision of ensuring that all youth have safe and supportive families, schools and communities, are healthy and socially competent, successful in school and are prepared for a productive adulthood.  

Nine child-serving agencies in New York State recently joined together to produce a “Children’s Plan” for improving the social and emotional development of children and their families. In at least 16 states, governors have created state-level “Children’s Cabinets,” which are collaborative governance structures that seek to promote co-ordination across state agencies and improve the well-being of children and families.

These efforts have created positive visions and structures for providing comprehensive services to children, but more definitive actions need to be taken to implement comprehensive educational equity as a right which will ensure that all children from poverty backgrounds consistently and systematically receive the resources and services they need to overcome achievement gaps and succeed in school. Using New York State as an example, the specific manner in which a constitutional right to comprehensive educational equity could be formulated at the state level would be for the governor to first declare his understanding that the right to a “sound basic education” guaranteed by Art XI, § 1 of the state constitution includes, not only effective teachers, small classes and adequate instrumentalities of learning, but also the early childhood, after-school, health, and family support resources and services needed to prepare

136 http://www.iowaworkforce.org/files/ICYD.pdf
137 http://www.omh.state.ny.us/omhweb/engage/
students from backgrounds of poverty to function as capable citizens and productive workers in the global economy.

In New York State, the governor’s children’s cabinet, which consists of 21 commissioners with responsibility for children’s issues, has to date been charged with responsibility for co-ordinating the implementation of universal pre-k, and extending universal health insurance plans for children who lack insurance. In order to implement the constitutional right to comprehensive educational equity, the governor should now charge the Children’s Cabinet with the broader task of developing and implementing a specific plan for identifying and providing all children in the state meaningful educational opportunity by 2014.

In order to develop such a state plan, the Children’s Cabinet should establish an interagency task force to develop standards regarding the particular school-based and out-of-school services and resources that children from backgrounds of poverty need in order to receive a meaningful educational opportunity. The particular priority services that Richard Rothstein and his colleagues identified in their 0-18 cost study that was presented at this symposium would be a good starting point for this analysis, but the Rothstein concepts, which were formulated from a national perspective, would need to be reconsidered in the context of the particular needs and priorities of the students of New York State.

Once a set of meaningful educational opportunity standards are articulated, the Children’s Cabinet should undertake a study of the extent to which the standards are currently being met throughout the state. The fiscal mapping of current state and federal expenditures in New York in

139 http://www.state.ny.us/governor/press/0614073.html

140 See Wilder, Allgood and Rothstein, supra n  .
the various areas undertaken by the Finance Project for presentation at this symposium\textsuperscript{141} would provide a good starting point for this analysis. On the basis of this study, the Children’s Cabinet should delineate the “opportunity gaps” between what the standards require and the resources and services that are currently being delivered to students in New York and elsewhere. To facilitate public understanding, these might be discussed by category in terms of “teacher quality gaps,” “health care gaps,” “early education gaps,” “class size gaps,” and the like.

Based on these analyses, the Children’s Cabinet should then develop a plan for consideration by the governor and the legislature that spells out the statutory and regulatory changes that are needed to coordinate existing services and provide necessary new services in an efficient, cost-effective manner in order to close the identified opportunity gaps. That proposal should be combined with a cost study that identifies the projected costs of phasing in the statutory and regulatory changes needed to ensure all children in the state meaningful educational opportunities by 2014. The plan should also contain specific accountability mechanisms that will ensure that children are, in fact, receiving appropriate services to the maximum extent possible; and it should propose explicit indicators of success that can be traced through a longitudinal evaluation plan that will accurately track the results of the plan’s implementation.

In developing this plan, the Children’s Cabinet should consult extensively with knowledgeable in-state and out-of-state experts in each field\textsuperscript{142} and the legislative committees

\textsuperscript{141} See Connors-Tadros and Silloway, supra n    .

\textsuperscript{142} For a number of years, the New York State Department of Education has sponsored an “Education Finance Research Consortium” that has retained leading national scholars to study and advise the Department on financial adequacy, resource
and agencies with responsibility for particular services. They should also convene a series of public engagement meetings throughout the state at each stage of the process to obtain public input on service needs, methods for effectively coordinating services and mechanisms for ensuring accountability, and in order to create public understanding and build public support for this project.143

The legislation adopted by the New York State legislature to implement the court order in *CFE v. State of New York* requires New York City and the 55 other districts in the state that are receiving substantial amounts of new funds to enter into a “Contract for Excellence” (C4E) that permits the funds to be spent on programs in six designated priority areas. The legislation also provides that up to 15% of these funds can be used for “experimental projects.” N.Y. Educ. Law § 211-d. The Syracuse School District, working with Syracuse University and Say Yes to Education, is currently mounting a major project to utilize the district’s C4E funds to provide comprehensive services to all students in the school district.

distribution in large cities, accountability and teacher policy. Over the years the research seminars in which the scholars’ works have been presented have created new knowledge and built a foundation for the Department and Regents, advocates, legislative staff, and other participants in state aid debates. This consortium provides a useful model for involving leading state and national experts in helping to formulate the state’s approach to implementing comprehensive educational equity.

143 Note in this regard that in developing the Children’s Plan for Improving the Social and Emotional Well-Being of New York’s Children and Their Families, New York’s Commissioner of Mental Health established five workgroups comprised of parents, caregivers, educators, advocates, community leaders and state policy makers and then held a series of regional forums around the state to allow a wide variety of stakeholders to provide additional feedback on the development of the plan. See Children’s Plan, supra, note 143; see also, The Children’s Mental Health Act of 2006, L. 2006, ch.667, as amended by A 06931 (2007-2008 regular Sessions) (requiring the commissioner in developing the Children’s Plan to promote the participation of consumers, and providers of services in developing the plan.)
The legislature and the state education department should encourage New York City and others districts to develop similar comprehensive educational service programs and to use C4E funds for this purpose. As in Syracuse, pre-school, after school and summer programming and many of the other comprehensive resource areas would fit within the existing priority area requirements of the C4E legislation; other areas that don’t, like certain health services, might qualify as being part of an “experimental program” or might be supported through other funding sources. These experimental projects should draw upon the research and policy analyses being developed by the Children’s Cabinet. They should test the standards and the methods for closing opportunity gaps that the Children’s Cabinet is developing, as well as other approaches to these issues that local officials and local citizens may develop on their own. Using some of the C4E funds in this way would simultaneously meet the immediate needs of children in high needs schools for comprehensive services, while, at the same time, testing the standards and methods for overcoming opportunity gaps that the Children’s Cabinet is developing in diverse, “real world” settings.

CONCLUSION

The federal government and each of the states have determined that it is vital to our national interest in remaining competitive in the global economy, and in preparing all of our students to be capable citizens in the 21st century, to eliminate current achievement gaps and allow all students to become proficient in challenging academic standards. The nation’s
egalitarian heritage and its oft-stated commitments to equal educational opportunity, as well as specific statutory mandates and constitutional precedents, entitle students from backgrounds of poverty to the essential services and resources they need to meet these expectations. “Essential” resources for these students includes both school-based categories like effective teachers and small class sizes, as well as critical out-of-school categories like early childhood education, after school and summer programs, as well as health and family support services.

The cost analyses, fiscal mappings, and evaluation methodologies presented at the Campaign for Educational Equity’s fourth annual symposium have demonstrated that the critical mandate to provide all students the comprehensive resources and services they need can be accomplished in an efficient, cost-effective manner. Other countries, and Britain in particular, have recognized and acted aggressively to respond to, the need to revamp, coordinate and expand children’s services in order to meet the nation’s competitive needs in the 21st century.\textsuperscript{144} It is time for the U.S. government and each of the states similarly to make children’s needs their highest priority and to guarantee all of their children a right to comprehensive educational equity.

\textsuperscript{144} Britain has committed itself to increasing investments in early childhood services by 1 percent of its Gross Domestic Product over the period from \textemdash\ to \textemdash\ the equivalent of $130 billion in American terms. The Rothstein and Finance Project estimates presented at the Symposium indicate that a comprehensive range of priority services could be provided in the United States for less than that amount, at least for the first five years of implementation, at which point, offsetting cost savings should start to accumulate. Although the U.S. ranks high in expenditures for education over-all, its total expenditures for elementary and secondary education trail those of three other OECD countries and its fiscal effort for education as a percentage of GDP trails 12 other OECD affluent countries. Education at a Glance 2007." Organization for Economic Co-operation and Development. 2007. OECD.<\url{http://www.oecd.org}>.