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NOTES

VIRTUAL LEARNING IN A PANDEMIC AND ITS EFFECTS ON LOWER-INCOME STUDENTS: HOW THE EDUCATION GAP IS WIDENING BEYOND REPAIR

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I. INTRODUCTION

On March 13, 2020, President Trump declared a national emergency in response to the outbreak of coronavirus (“COVID-19”) in the United States.¹ On March 16, twenty-seven states issued orders or recommendations to close all public schools, thus halting in-person learning.² By March 25, all public school buildings in the United States were closed, and by May 6, all states and Washington D.C. continued the closure for the remainder of the school year, with the exception of Wyoming and Montana.³ Before schools were to reopen in the fall for the new school year, the Centers for Disease Control and Prevention (“CDC”) released a list of considerations for mitigation strategies to protect students and staff.⁴ Among the list of things to consider were: “promoting behaviors that reduce COVID-19’s spread, maintaining healthy environments, maintaining healthy operations, [and] preparing for when someone gets sick.”⁵ There is low risk of contracting COVID-19 if students and teachers engage virtually, some risk if they engage in a hybrid style where some students participate in-person and some virtual or with smaller class sizes, and the highest

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1. Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, 85 Fed. Reg. 15337 (Mar. 13, 2020).

2. *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, Educ. Wk. (July 1, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html> [<https://perma.cc/N2RF-J36E>].

3. *Id.*

4. *Operating Schools During COVID-19: CDC’s Considerations*, Ctr. for Disease Control & Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html> [<https://perma.cc/9746-E4W8>] (last visited Oct. 31, 2020).

5. *Id.*

risk if students and teachers were to engage only in-person.⁶ With these risk levels in mind, only governors of four states—Iowa, Arkansas, Texas, and Florida—ordered their schools to reopen in the fall, while most left the decision in the hands of each individual school district within the state.⁷ Fall reopening plans varied nationwide from fully in-person to completely online, with the majority implementing a mix of both in-person and online learning.⁸ “Nearly 93% of people in households with school-age children reported their children engaged in some form of ‘distance learning’ from home [. . .].”⁹ However, participation in online learning varied by household income: 85.8% of school children living in a household with an income of \$100,000 or more reported using online resources, compared to just 65.8% of school children living in a household with an income less than \$50,000.¹⁰

A. Education in the Judiciary

In 1954, the Supreme Court of the United States stated education is a “principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”¹¹ The Court further stated “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹² With this in mind, almost every country has the term “education” in their constitution except one: the United States of America.¹³ However, while not at a federal level, all fifty states mandate public education in their individual state constitutions.¹⁴ In 1982, the Supreme Court held that, under the Equal Protection Clause of the Fourteenth Amendment, states are not allowed to deny free public education to any student residing within its borders.¹⁵ However, the Court has held it is the job of the lawmakers, not the courts, to reform the states’

6. *Id.*

7. *Map: Where are Schools Closed?*, EDUC. WK., <https://www.edweek.org/ew/section/multimedia/map-covid-19-schools-open-closed.html> [<https://perma.cc/3JWE-92DU>] (last visited Nov. 2, 2020).

8. *Id.*

9. Kevin McElrath, *Nearly 93% of Households with School-Age Children Report Some Form of Distance Learning During COVID-19*, U.S. CENSUS BUREAU (Aug. 26, 2020), <https://www.census.gov/library/stories/2020/08/schooling-during-the-covid-19-pandemic.html> [<https://perma.cc/5NRH-9HEF>].

10. *Id.*

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

12. *Id.*

13. Alia Wong, *The Students Suing for a Constitutional Right to Education*, ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/> [<https://perma.cc/459Z-CHK8>].

14. *Id.*

15. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

public education systems.¹⁶

B. Education in the Legislature

In 1965, President Lyndon B. Johnson enacted the Elementary and Secondary Education Act (“ESEA”).¹⁷ The ESEA marked the first time the federal government committed to ensuring high quality, equal education by providing additional resources to vulnerable students.¹⁸ Title I of the ESEA “provide[d] funding to states and districts to improve education for disadvantaged students.”¹⁹ In 1974, Congress declared that every citizen in the United States is entitled to an education without financial barriers.²⁰ In 2001, President Bush enacted the No Child Left Behind Act of 2001 (“NCLB”).²¹ The purpose of NCLB was to “close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.”²² Section 1001(2) of NCLB provided:

The purpose of this title is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments. This purpose can be accomplished by- (2) meeting educational needs of low-achieving children in our Nation’s highest poverty schools [. . .]²³

In 2015, President Obama enacted the Every Student Succeeds Act (“ESSA”), which replaced NCLB²⁴ and reauthorized the ESEA, including Title I.²⁵ Similar to NCLB, the purpose of the ESSA is to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”²⁶

C. School Closures Throughout History

Although not to the level of national closure seen during COVID-19, schools

16. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973).

17. Cameron Brenchley, *What is ESEA?*, HOMEROOM (Apr. 8, 2015), <https://blog.ed.gov/2015/04/what-is-esea/> [<https://perma.cc/4DWP-TQ2H>].

18. *Id.*

19. Mark Dynarski & Kirsten Kainz, *Why Federal Spending on Disadvantaged Students (Title I) Doesn’t Work*, BROOKINGS (Nov. 20, 2015), <https://www.brookings.edu/research/why-federal-spending-on-disadvantaged-students-title-i-doesnt-work/> [<https://perma.cc/CHB4-37RF>].

20. 20 U.S.C. § 1221-1.

21. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

22. *Id.*

23. *Id.* at § 1001(2).

24. *See* Every Student Succeeds Act of 2015, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

25. Dynarski & Kainz, *supra* note 19.

26. Every Student Succeeds Act § 1001.

in the United States closed in 2009 due to the novel H1N1 virus.²⁷ Schools were told by the federal government not to close, but many schools felt they needed to in order to slow the spread of H1N1.²⁸ When H1N1 first emerged, “726 K-12 schools in the United States closed, affecting 368,282 students.”²⁹ The Department of Education recommended that “educators prepare take-home assignments in advance for distribution to affected students and use the internet and telephones to post homework materials, conduct classes, share information and keep teachers, parents, and students in close touch.”³⁰ However, H1N1 and COVID-19 have one important difference: COVID-19 is much more deadly.³¹ While schools did close for H1N1, only a small number closed for just a few days in the spring and again in the fall.³² Now, the world is experiencing unprecedented times, as the United Nations has said the COVID-19 pandemic has created “the largest disruption of education systems in history.”³³

D. The Issue

While both the judiciary and the legislature strived toward ensuring equal education,³⁴ that has yet to hold true in practice. Funding for public education is mostly done at a local level, which has led schools in high-poverty areas to receive little funding.³⁵ During the 2008-2009 school year, the Department of Education conducted a study which found “45% of high-poverty schools received less state and local funding than what was typical for other schools in their district.”³⁶ Low funding leads to low-quality education.³⁷ COVID-19 has only

27. Charles Krupa, *Swine Flu Closes More Than 600 Schools in U.S.*, NBC NEWS (Oct. 28, 2009, 4:45 PM), <https://www.nbcnews.com/id/wbna33520744> [<https://perma.cc/YQ46-KSEG>].

28. *Id.*

29. See Tamar Klaiman et al., *Variability in School Closure Decisions in Response to 2009 H1N1: A Qualitative Systems Improvement Analysis*, 11 BMC PUB. HEALTH 73 (2011).

30. Press Release, U.S. Dep’t Educ., Duncan, Sebelius Unveil Recommendations for Schools on How Learning Continues in Case of Flu Outbreak (Aug. 24, 2009), <https://www.ed.gov/news/press-releases/duncan-sebelius-unveil-recommendations-schools-how-learning-continues-case-flu-outbreak> [<https://perma.cc/DK68-VQP5>].

31. Ian Richardson, *Fact Check: 2009 Swine Flu Spread Rapidly, but COVID-19 is More Deadly*, USA TODAY, <https://www.usatoday.com/story/news/factcheck/2020/08/13/fact-check-swine-flu-spread-rapidly-but-not-deadly-covid-19/5577001002/> [<https://perma.cc/D4E2-CR8M>] (last updated Aug. 16, 2020).

32. *Id.*

33. Mélissa Godin, *Children Across Europe are Going Back to School. Here’s How 3 Countries are Managing It*, TIME (Sept. 2, 2020, 10:26 AM), <https://time.com/5885554/europe-schools-reopening-germany-scotland-norway/> [<https://perma.cc/DJ5E-WPJ9>].

34. *Equity of Opportunity*, U.S. DEP’T EDUC., <https://www.ed.gov/equity> [<https://perma.cc/A728-B4L3>] (last visited Mar. 29, 2021).

35. *Id.*

36. *Id.*

37. *Id.*

intensified inequalities in education, with 94% of students worldwide being affected and 99% in low- and middle-income countries.³⁸ When COVID-19 reached the United States and schools were forced to shut down and move to online learning in March 2020, one in five students were living without a computer or internet access, disproportionately effecting African-American, Hispanic, rural area, and low-income families.³⁹

The U.S. Census Bureau conducted a study after schools closed on how the pandemic impacted children receiving education, and 71.1% of households said their children switched to online learning.⁴⁰ Of children who lived in a household with an income of below \$25,000, only 56.4% reported having a computer always available and 57% reported always having internet available.⁴¹ Of children who lived in a household with an income of \$200,000 or more, 89% reported always having a computer available and 90% reported always having internet available.⁴² With access to computers and internet becoming essential to attending school, “a failure to provide the service to students is akin to barring them from school altogether.”⁴³ “The consequences of the gap between those who [had] access to virtual learning and those who [did] not could be felt for years to come.”⁴⁴

E. Roadmap

Section II of this Note discusses the history of children in poverty in the United States and how socioeconomic status effects the quality of education for low-income students. It also addresses how the education gap among low-income and affluent students has been deepened in recent years due to the “homework gap” and how children in poverty and education have been addressed at a national level, with the enactment of the National School Lunch Act. Section III of this Note offers an analysis of how COVID-19 has widened the education gap beyond repair with the emergence of virtual learning, arguing that low-income students, and even parents, were in dire need to return to in-person learning. Additionally,

38. Godin, *supra* note 33.

39. Samantha Walravens, *Why Online Learning is Failing Our Nation's Most Vulnerable Students*, FORBES (June 8, 2020, 3:53 PM), <https://www.forbes.com/sites/geekgirlrising/2020/06/08/new-report-shows-impact-of-digital-divide-on-low-income-students/#7e58d26c1701> [<https://perma.cc/9GZN-WJW3>].

40. *Household Pulse Survey Data Tables*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2020/demo/hhp/hhp1.html> [<https://perma.cc/MJA5-QXV9>] (last visited Nov. 7, 2020).

41. *Id.*

42. *Id.*

43. Moriah Balingit, *'A National Crisis': As Coronavirus Forces Many Schools Online This Fall, Millions of Disconnected Students are Being Left Behind*, WASH. POST (Aug. 16, 2020), https://www.washingtonpost.com/education/a-national-crisis-as-coronavirus-forces-many-schools-online-this-fall-millions-of-disconnected-students-are-being-left-behind/2020/08/16/458b04e6-d7f8-11ea-9c3b-dfc394c03988_story.html [<https://perma.cc/85DZ-3R3S>].

44. *Id.*

this section analyzes various cities and states in the United States and their handling of education during the pandemic compared to that of other countries, particularly Germany, Spain, and Switzerland- asserting that the United States took a much more detrimental approach.

II. BACKGROUND

Poverty is defined as an annual income below \$25,283 for a family of four.⁴⁵ In 2017, 12,808,000 children lived in poverty, at about 17.5%.⁴⁶ Living in poverty has a negative impact on a child's education.⁴⁷ "One of the most severe effects of poverty in the United States is that poor children enter school with this readiness gap, and it grows as they get older."⁴⁸ Children living in poverty generally have poor physical health and motor skills, lack the ability to concentrate and remember information, and their attentiveness, curiosity, and motivation is greatly reduced.⁴⁹ Students living in poverty are "already trailing their more privileged peers and rarely, if ever, catch up."⁵⁰ There are several benefits for children who attend school that contribute to healthy child development, including educational instruction, the development of social and emotional skills, a safe learning environment, nutritional needs, and the facilitation of physical activity.⁵¹ Most importantly, for children living in poverty, education can help break the cycle.⁵²

A. *The Homework Gap*

Before COVID-19 reached the United States, there was already a growing divide between students who had access to internet and computers and those who did not- referred to as the "homework gap."⁵³ About 58% of eighth grade students

45. *Child Poverty in American 2017: National Analysis*, CHILD. DEF. FUND (Sept. 12, 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/09/Child-Poverty-in-America-2017-National-Fact-Sheet.pdf> [<https://perma.cc/7NM4-TMXK>].

46. *Id.*

47. *The Effects of Poverty on Education in the United States*, CHILDFUND (Nov. 4, 2013), <https://www.childfund.org/Content/NewsDetail/2147489206/> [<https://perma.cc/BFK6-JQZT>].

48. *Id.*

49. *Id.*

50. Lyndsey Layton, *Majority of U.S. Public School Students are in Poverty*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4_story.html [<https://perma.cc/8KUL-ZADH>].

51. *Operational Strategy for K-12 Schools Through Phased Prevention*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html> [<https://perma.cc/UR36-5Y8H>] (last visited Dec. 23, 2021).

52. *The Effects of Poverty on Education in the United States*, *supra* note 47.

53. Monica Anderson & Andrew Perrin, *Nearly One-in-Five Teens Can't Always Finish Their Homework Because of the Digital Divide*, PEW RSCH. CTR. (Oct. 26, 2018), <https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework->

in the United States rely on using the internet at home to complete their homework every day or almost every day and only 6% reported that they never use the internet at home for homework.⁵⁴ Black students, Hispanic students, and students in low-income households are the most likely to lack digital access.⁵⁵ A study conducted in 2018 found that, “17 [percent] of teens said they are often or sometimes unable to complete homework assignments because they do not have reliable access to a computer or internet connection.”⁵⁶ Of teens whose household income is less than \$30,000, 24% said they often or sometimes cannot complete their homework due to the lack of a computer or internet.⁵⁷ Only 9% of teens whose household income is \$75,000 or more had a similar experience.⁵⁸ Furthermore, 25% of low-income teens do not have access to a computer at home, compared to only 4% of teens whose household income is \$75,000 or more.⁵⁹

B. The National School Lunch Act

The National School Lunch Act (“NSLA”) was enacted in 1946 by President Truman.⁶⁰ The NSLA was intended to “safeguard the health and well-being of the Nation’s children . . . by assisting the States, through grants-in-aid and other means, in providing an adequate supply of foods and other facilities for the establishment, maintenance, operation, and expansion of nonprofit school lunch programs.”⁶¹ The National School Lunch Program (“NSLP”) provides free or reduced-price lunch to children who qualify each school day.⁶² Children may be eligible for the NSLP either categorically or by household income.⁶³ There are several ways for a child to be categorically eligible: participation in certain Federal Assistance Programs, homelessness, if they are a migrant, a runaway, or a foster child, or if they are enrolled in a federally-funded Head Start Program or a comparable state-funded program.⁶⁴ Children qualify for free lunch if their

because-of-the-digital-divide/ [https://perma.cc/27KD-SV36].

54. Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital ‘Homework Gap’*, PEW RSCH. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/> [https://perma.cc/RVA2-BQ6Q].

55. Anderson & Perrin, *supra* note 53.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *The National School Lunch Program*, U.S. DEP’T AGRIC., <https://fns-prod.azureedge.net/sites/default/files/resource-files/NSLPFactSheet.pdf> [https://perma.cc/K5NA-LETM] (last updated Nov. 2017).

61. 42 U.S.C. § 1751 (1946).

62. *The National School Lunch Program*, *supra* note 60.

63. *Id.*

64. *Id.*

household income is at or below 130% of the federal poverty level.⁶⁵ Children qualify for reduced-price lunch if their household income is between 130% and 185% of the federal poverty level.⁶⁶ In the program's first year, about 7.1 million students participated, and in 2016, 30.4 million participated.⁶⁷

In 1966, President Lyndon B. Johnson enacted the Child Nutrition Act of 1966 ("CNA"), which expanded the NSLP to include free or reduced-price breakfast for students.⁶⁸ The CNA assisted "the States and the Department of Defense through grants-in-aid and other means to initiate, maintain, or expand nonprofit breakfast programs in all schools which make application for assistance [. . .]."⁶⁹ In 2010, President Obama enacted the Healthy, Hunger-Free Kids Act of 2010, which updated the meal patterns and nutritional standards established by the NSLA and the CNA.⁷⁰ Eating healthy foods is important for children, as it positively effects a child's growth and development.⁷¹ The Healthy, Hunger-Free Kids Act of 2010 also "works to eliminate hunger during the school day by increasing the number of eligible children enrolled in school meal programs and removing barriers to school meals for children most in need."⁷²

III. ANALYSIS: COVID-19 IS CAUSING LOW-INCOME STUDENTS TO BE LEFT BEHIND

A. Federal COVID-19 Relief Packages

The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was enacted on March 27, 2020 in part to assist in school funding during the pandemic.⁷³ The Education Stabilization Fund allocated \$30.75 billion to the Department of Education to remain available to prevent, prepare for, and respond to COVID-19.⁷⁴ Of the \$30.75 billion, \$13.2 billion was devoted to K-12 education for the Elementary and Secondary School Emergency Relief Fund, \$14 billion for higher education, and \$3 billion for the Governors Emergency Education Relief Fund.⁷⁵ Among the list of allowable uses for the \$13.2 billion was

65. *Id.*

66. *Id.*

67. *Id.*

68. 42 U.S.C. § 1773 (1966).

69. 42 U.S.C. § 1773.

70. *See* Healthy, Hunger-Free Kids Act of 2010, Pub. L. No. 111-296, 124 Stat. 3183 (2010).

71. *Childhood Nutrition Facts*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyschools/nutrition/facts.htm> [<https://perma.cc/T4SA-GPK5>] (last visited Nov. 8, 2020).

72. 3 C.F.R. § 8733 (2012); *see also* Healthy, Hunger-Free Kids Act, 124 Stat. at 3183.

73. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

74. *Id.*

75. Phyllis W. Jordan, *What Congressional Covid Funding Means for K-12 Schools*, FUTUREED, <https://www.future-ed.org/what-congressional-covid-funding-means-for-k-12-schools/>

“activities to address the unique needs of low-income children or students [. . .].”⁷⁶ However, some states struggled to actually access the funding due to paperwork, and the states that did access the funds say the CARES Act just made up for budget cuts in prior years.⁷⁷ It was not until nine months after the CARES Act was enacted that another relief package was passed. In December 2020, Congress approved, and President Trump signed into law, the Coronavirus Response and Relief Supplemental Appropriations Act (“CRRSA”).⁷⁸ The CRRSA was a \$900 billion COVID-19 relief package, with \$54 billion designated for K-12 education.⁷⁹

President Biden was sworn into office on January 20, 2021, and his plan was to have schools safely reopened within his first 100 days. On February 5, Congress passed the budget for newly-elected President Biden’s \$1.9 trillion coronavirus relief package.⁸⁰ On March 11, President Biden signed into law the American Rescue Plan Act of 2021 (“American Rescue Plan”).⁸¹ The American Rescue Plan provided \$129 billion for K-12 public education with \$123 billion as “part of a stabilization fund for elementary and secondary education that’s distributed through the federal Title I formula for disadvantaged students.”⁸² “Local school districts will receive at least 90 percent of that stabilization fund, but they must earmark one dollar out of every five for learning recovery programs.”⁸³ The American Rescue Plan also attempted to directly reduce child poverty by temporarily changing federal tax law regarding the child tax credit, a change President Biden hopes to make permanent.⁸⁴ The American Rescue Plan raised the tax credit from \$2,000 to \$3,600 per child and is sent to families in installments over the course of the year.⁸⁵ The new law is set to reach more low-income families, whereas previously the law mostly reached middle- and high-

[<https://perma.cc/6WWU-NXSN>] (last visited July 23, 2021).

76. *Id.*

77. Kalya Belsha, *As CARES Act Helps Some Schools, Many Say It’s Just a Down Payment on What Districts Need to Avoid Financial Disaster*, CHALKBEAT (July 10, 2020, 1:50 PM), <https://www.chalkbeat.org/2020/7/10/21320206/cares-act-down-payment-on-what-schools-really-need-avoid-financial-disaster> [<https://perma.cc/CHQ9-EBP6>].

78. Jordan, *supra* note 75.

79. *Id.*

80. *Id.*

81. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (2021).

82. Andrew Ujifusa, *See What the Huge COVID-19 Aid Deal Biden Has Signed Means for Education, in Two Charts*, EDUC. WK. (Mar. 11, 2021), <https://www.edweek.org/policy-politics/see-what-the-huge-covid-19-aid-deal-biden-has-signed-means-for-education-in-two-charts/2021/03> [<https://perma.cc/V74F-QRWK>].

83. *Id.*

84. Valerie Strauss, *Biden’s American Rescue Plan is Actually a Huge New School Reform*, WASH. POST (Mar. 11, 2021, 6:21 PM), <https://www.washingtonpost.com/education/2021/03/11/biden-rescue-plan-actually-huge-new-school-reform/> [<https://perma.cc/7HLS-6HGH>].

85. *Id.*

income families.⁸⁶

B. Low-Income Areas vs. High-Income Areas

While COVID-19 affected students and schools across the nation, students in low-income areas had a harder time accessing their education than students in high-income areas.⁸⁷ Two California elementary students had two completely different experiences when COVID-19 shut down their respective schools.⁸⁸ Maria, who lives in a school district where 90% of students are from low-income families, had a difficult time accessing virtual learning.⁸⁹ She did not have a computer, so she joined class using her mother's cellphone but the connection kept dropping- she gave up trying after one week.⁹⁰ She finally received a computer in June 2020, but by that time she already felt behind.⁹¹ Another student, Cooper, lives in a school district where only 12% of students are from low-income families.⁹² Cooper's school issued him a computer and his family had access to the internet from their home.⁹³ It took Cooper's school less than one week to get class completely switched to online- equipped with agendas, online assignments, and virtual hangouts with teachers.⁹⁴ Only half of California students in low-income districts had access to a computer when California first shut down, compared to 87% of students in affluent districts- rising to 98% just three weeks after the shutdown.⁹⁵

Despite this disparity in access to online resources, 53% of low-income parents of K-12 students say their child participated in online-only schooling compared to 40% of upper-income students.⁹⁶ Of those upper-income students who participated in online learning, 19% hired someone to provide additional instruction.⁹⁷ "Gaps in access to school resources fall along racial and

86. *Id.*

87. Paloma Esquivel et al., *A Generation Left Behind? Online Learning Cheats Poor Students*, *Times Survey Finds*, L.A. TIMES (Aug. 13, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-08-13/online-learning-fails-low-income-students-covid-19-left-behind-project> [<https://perma.cc/U826-F385>].

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Juliana Menasce Horowitz & Ruth Igielnik, *Most Parents of K-12 Students Learning Online Worry About Them Falling Behind*, PEW RSCH. CTR. (Oct. 29, 2020), <https://www.pewsocialtrends.org/2020/10/29/most-parents-of-k-12-students-learning-online-worry-about-them-falling-behind/> [<https://perma.cc/H9Z4-ENBU>].

97. *Id.*

socioeconomic lines, and that gap [was] magnified during virtual schooling.”⁹⁸ While students in low-income areas struggled “to access the most basic remote learning opportunities, often without home internet services and computers, others had the benefit of private tutors or all-day virtual instruction provided by their schools.”⁹⁹ Many students in wealthy neighborhoods attended small learning pods, where they received their education from private instructors that their parents paid hundreds, sometimes thousands, of dollars for.¹⁰⁰ While those who could afford to learn from home went back in-person to school, those who needed to return in-person, continued to learn online.¹⁰¹ Of the Nation’s highest-poverty districts, 41% began the year entirely remote.¹⁰² In a survey done among every public school district in California’s Bay Area’s largest counties, 100% of school districts with a 2019 median household income of at least \$200,000 offered students some in-person learning.¹⁰³ That number dropped all the way down to 12% in districts with median household incomes of \$100,000 or less.¹⁰⁴

Public schools are funded through local property taxes, which produces significant disparities.¹⁰⁵ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court held the Equal Protection Clause does not require absolute equality where wealth is involved in regard to public education.¹⁰⁶ “Unequal funding at the state and local levels maintain well-resourced schools in mostly white neighborhoods while those serving mostly Black, Latino, and low-income white students struggle to finance basic supplies.”¹⁰⁷ “[T]he wealthiest districts spend two to three times what the poorest districts can spend per pupil.”¹⁰⁸ In 2015, only twelve states allocated more funds to districts where

98. Maya King & Nicole Gaudiano, *The Pandemic Could Widen the Achievement Gap. A Generation of Students is at Risk*, POLITICO (Sept. 23, 2020, 7:55 PM), <https://www.politico.com/news/2020/09/23/how-the-coronavirus-is-making-school-segregation-worse-420839> [<https://perma.cc/R3U7-2DYE>].

99. Katie Reilly, *Public Schools Will Struggle Even More as Parents Move Kids to Private Ones During the Pandemic*, TIME (Aug. 31, 2020, 3:32 PM), <https://time.com/5885106/school-reopening-coronavirus/> [<https://perma.cc/D8AE-7TBD>].

100. King & Gaudiano, *supra* note 98.

101. John Woolfolk, *Coronavirus: Rich Bay Area Kids Head Back to Class, Others Stay Home*, MERCURY NEWS, <https://www.mercurynews.com/2021/02/11/coronavirus-rich-kids-head-back-to-class-others-stay-home/> [<https://perma.cc/JBL3-C9HG>] (last updated Feb. 12, 2021).

102. Reilly, *supra* note 99.

103. Woolfolk, *supra* note 101.

104. *Id.*

105. Linda Darling-Hammond, *America’s School Funding Struggle: How We’re Robbing Our Future by Under-Investing in Our Children*, FORBES (Aug. 5, 2019, 1:43 PM), <https://www.forbes.com/sites/lindadarlinghammond/2019/08/05/americas-school-funding-struggle-how-were-robbing-our-future-by-under-investing-in-our-children/#775efbac5eaf> [<https://perma.cc/U8CJ-C9SV>].

106. *San Antonio Indep. Sch. Dist. et al. v. Rodriguez*, 411 U.S. 1, 24 (1973).

107. King & Gaudiano, *supra* note 98.

108. Darling-Hammond, *supra* note 105.

student poverty was higher than districts where there was little to no poverty.¹⁰⁹ The “[m]ajority of nonwhite school districts receive an average of \$23 billion less than predominately white school districts, despite serving roughly the same number of students [. . .].”¹¹⁰ In short, unequal funding creates an unequal education.

1. Private Schools

In past economic recessions, enrollment numbers for private schools declined.¹¹¹ During the Great Recession, from 2007 to 2011, enrollment in K-12 private schools decreased by 11%.¹¹² While the expectations were that private school enrollment numbers would decline when COVID-19 reached the United States, the opposite happened.¹¹³ Of 160 private schools in over fifteen states and Washington, D.C., about half reported higher enrollment in the new school year compared to the previous year.¹¹⁴ Of those who reported enrollment staying the same, the majority reported that it was because their school was already at capacity.¹¹⁵ The biggest draw for private schools during the pandemic: in-person learning.¹¹⁶ Of the same 160 private schools, 121 reported being open for full-time, in-person learning, and the other thirty-nine reported being on a hybrid schedule, partly virtual and partly in-person – none reported being fully virtual.¹¹⁷ Another study found that as of mid-October 2020, only 5% of private schools were fully online.¹¹⁸ With the money private schools receive from tuition, they generally have larger campuses but smaller class sizes.¹¹⁹ Roughly 50.8 million students are enrolled in public schools, while only 5.8 million are enrolled in private schools.¹²⁰ Having larger campuses with smaller amounts of students coupled with greater autonomy, private schools could safely reopen.¹²¹ One study found that COVID-19 infection rates among students, teachers, and education

109. *Id.*

110. King & Gaudiano, *supra* note 98.

111. Damian Kavanagh & Benjamin Scafidi, *One Sector is Flourishing During the Pandemic: K-12 Private Schools*, HILL (Nov. 29, 2020, 8:00 A.M.), <https://thehill.com/opinion/education/527623-one-sector-is-flourishing-during-the-pandemic-k-12-private-schools> [<https://perma.cc/858V-F993>].

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Jessica Dickler, *Families Jump to Private Schools as Coronavirus Drags On*, CNBC (Nov. 8, 2020, 9:45 AM), <https://www.cnbc.com/2020/11/08/coronavirus-why-families-are-jumping-to-private-schools.html> [<https://perma.cc/3H3T-ZRPX>].

119. *Id.*

120. *Id.*

121. *Id.*

staff were over 40% lower in private schools compared to public schools.¹²² However, the average cost of private schools across all grade levels is \$26,866 per year¹²³ and only about 5% of low-income students attend private schools nationally.¹²⁴ So while children returning to in-person is ideal for parents who need to return to work after leaving their jobs when their children began learning virtually, private school is not an option for most.¹²⁵

C. Effects of Low-Income Children Not Attending School In-Person

1. Food Insecurity

While the concerns for low-income students' access to learning were warranted and prominent, even more so was a concern for their access to food.¹²⁶ "Among low-income households with children who qualify for free or reduced-price school meals, only about 15 [percent] [were] getting those meals [. . .]."¹²⁷ A recent study showed that 17.4% of mothers with children ages twelve and under reported that since the pandemic started, the children in the home were not eating enough due to being unable to afford food, compared to only 7.4% in 2018.¹²⁸ "Food insecurity households with children under eighteen . . . increased by about 130 percent from 2018 to [May 2020]."¹²⁹ Many school districts tried their best to still get meals to students during the pandemic by offering curbside grab-and-go or running delivery routes.¹³⁰ Even with alternative options for students, many still missed meals.¹³¹ Of a survey conducted in the spring of 2020, 80% of school districts said they were serving less meals than when school was

122. Kavanagh & Scafidi, *supra* note 111.

123. Dickler, *supra* note 118.

124. Matt Barnum, *Fight Over Private School Aid Ends in Defeat for Betsy DeVos*, CHALKBEAT (Sept. 25, 2020, 4:27 PM), <https://www.chalkbeat.org/2020/9/25/21456591/devos-private-school-aid-cares> [<https://perma.cc/PG4C-XEXU>].

125. Dickler, *supra* note 118.

126. Cory Turner, 'Children are Going Hungry': Why Schools are Struggling to Feed Students, NPR (Sept. 8, 2020, 5:00 AM), <https://www.npr.org/2020/09/08/908442609/children-are-going-hungry-why-schools-are-struggling-to-feed-students> [<https://perma.cc/NXY3-SD4V>].

127. *Id.*

128. Lauren Bauer, *The COVID-19 Crisis Has Already Left Too Many Children Hungry in America*, BROOKINGS (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> [<https://perma.cc/4URY-W3WQ>].

129. *Id.*

130. Rachel Sugar, *The Scramble to Feed the Kids Left Hungry by the Coronavirus Crisis*, VOX (Apr. 17, 2020, 8:00 AM), <https://www.vox.com/the-goods/2020/4/17/21220016/school-lunch-coronavirus-meal-programs> [<https://perma.cc/Y4PY-754S>].

131. Turner, *supra* note 126.

in session.¹³² The “majority of districts said the number of meals had dropped by 50 [percent] or more.”¹³³

However, President Trump enacted the Families First Coronavirus Response Act (“the Act”) on March 18, 2020.¹³⁴ Included in the Act was \$1 billion in nutrition assistance.¹³⁵ The Act specifically allotted \$400 million for the Emergency Food Assistance Program and allowed for flexibility in federal nutrition programs, including school meals and the Supplemental Nutrition Assistance Program (“SNAP”).¹³⁶ “Federal nutrition programs like SNAP – the first line of defense against hunger for millions of people who are low-income – will be the cornerstone to ensuring that people facing hunger are able to get the food they need during this pandemic [. . .].”¹³⁷ Even with efforts from school officials and additional SNAP funding, students were still missing meals while being out of school.

2. Reports of Child Abuse

Teachers are the leading reporters of suspected abuse by noticing bruises, hunger, and mistreatment.¹³⁸ In 2018, about 67% of reports of child abuse to the Child Protective Services hotline came from professionals, such as teachers, pediatricians, and daycare providers.¹³⁹ About 20% came from teachers and other educational personnel, specifically.¹⁴⁰ Due to virtual learning, teachers rarely saw their students in-person.¹⁴¹ The number of reported cases of abuse in forty-three states and Washington, D.C. in April 2020 dropped by an average of 40.6% compared to April 2019.¹⁴² Since COVID-19 began in the United States, child

132. *Id.*

133. *Id.*

134. *See* Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

135. Press Release, Kate Leone, Chief Government Relations Office, Feeding America on Senate Passage of the Families First Coronavirus Response Act (Mar. 18, 2020), <https://www.feedingamerica.org/about-us/press-room/feeding-america-senate-passage-families-first-coronavirus-response-act> [<https://perma.cc/86NH-DB6P>].

136. *Id.*

137. *Id.*

138. Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities are Very Worried*, N.Y. TIMES, <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html> [<https://perma.cc/H4LA-PTXN>] (last updated Aug. 7, 2020).

139. Morgan Welch & Ron Haskins, *What COVID-19 Means for America’s Child Welfare System*, BROOKINGS (Apr. 30, 2020), <https://www.brookings.edu/research/what-covid-19-means-for-americas-child-welfare-system/> [<https://perma.cc/CG46-C4VT>].

140. *Id.*

141. Stewart, *supra* note 138.

142. Julia Ingram, *Has Child Abuse Surged Under COVID-19? Despite Alarming Stories from ERs, There’s No Answer*, NBC NEWS, <https://www.nbcnews.com/health/kids-health/has-child-abuse-surged-under-covid-19-despite-alarming-stories-n1234713> [<https://perma.cc/SS2A-AA5M>] (last updated July 27, 2020).

abuse cases in New York City declined by 51%,¹⁴³ 62% in Washington, D.C.,¹⁴⁴ and 55% in Massachusetts.¹⁴⁵ Other states such as Wisconsin, Oregon, Pennsylvania, and Illinois reported child abuse reports fell by 20-70% in March 2020.¹⁴⁶ States were forced to rely on the general public to report child abuse when suspected; however, in 2018, only about 16% of reports came from nonprofessionals such as friends, neighbors, and relatives.¹⁴⁷

Police, prosecutors, and child protection officials view the decline as an “unseen epidemic of abuse . . . spreading behind locked doors.”¹⁴⁸ Parents forced into isolation combined with lost jobs due to COVID-19 causes tensions to build up and turn into violence,¹⁴⁹ as economic downturns are generally associated with increases in child maltreatment.¹⁵⁰ “[A] study from previous financial recessions, natural disasters, and outbreaks like the Ebola outbreak in West Africa from 2014-16, revealed increased rates of child abuse, neglect, and exploitation.”¹⁵¹ In one county in China, reports of domestic violence more than tripled during their February 2020 lockdown.¹⁵² Furthermore, “sexual predators . . . [had] all-day access to children who would normally be in school [. . .].”¹⁵³ Since COVID-19 began, sexual abuse has been the most common type of arrest in the Bronx in New York City.¹⁵⁴

COVID-19 also changed the way child advocates did their job since they were no longer permitted to enter homes in an attempt to avoid spreading the virus.¹⁵⁵ Home investigations, child-parents visits, mandatory court appearances, and home-based parenting programs were paused or conducted virtually, making it harder for child welfare workers to ensure the safety of the children they work with.¹⁵⁶ In some states, including Michigan and Kentucky, in-home visits were drastically scaled back to protect child welfare workers and help slow the spread

143. Stewart, *supra* note 138.

144. Samantha Schmidt & Hannah Natanson, *With Kids Stuck at Home, ER Doctors See More Severe Cases of Child Abuse*, WASH. POST (Apr. 30, 2020, 7:00 AM), <https://www.washingtonpost.com/education/2020/04/30/child-abuse-reports-coronavirus/> [<https://perma.cc/3P2S-DDRY>].

145. Paul LeBlanc, *Child Abuse Reports are Down During the Pandemic. Experts Say That’s a Bad Sign*, CNN POLITICS (May 17, 2020, 1:30 PM), <https://www.cnn.com/2020/05/17/politics/child-abuse-pandemic/index.html> [<https://perma.cc/WZB7-CWV7>].

146. Welch & Haskins, *supra* note 139.

147. *Id.*

148. Stewart, *supra* note 138.

149. *Id.*

150. Welch & Haskins, *supra* note 139.

151. Nazish Imran et al., *Mental Health Considerations for Children & Adolescents in COVID-19 Pandemic*, 36 PAK. J. MED. SCI. S67, S67-S72 (2020).

152. *Id.*

153. Stewart, *supra* note 138.

154. *Id.*

155. *Id.*

156. Welch & Haskins, *supra* note 139.

of COVID-19.¹⁵⁷ Michigan in particular reduced in-home visits by 80%.¹⁵⁸ Face-to-face visits with children and being able to see them in their home environment are vital parts of the child welfare system. Not being able to conduct them makes the system less effective.¹⁵⁹

3. *Physical and Mental Health*

Online learning also took away a child's access to physical activity.¹⁶⁰ When children are attending school, they generally are exposed to physical activity through recess, physical education classes, walking to and from school or the bus stop, and participating in school sports teams or clubs.¹⁶¹ The recommendation for children ages six to seventeen years old is sixty minutes or more of moderate-to-vigorous physical activity each day.¹⁶² Physical activity helps keep children healthy, but it also improves their performance academically.¹⁶³ "Students who are physically active tend to have better grades, school attendance, cognitive performance (e.g., memory), and classroom behaviors (e.g., on-task behavior)."¹⁶⁴ Even before the pandemic, children from low-income communities generally had a harder time accessing physical activity.¹⁶⁵ Children from low-income communities lack affordable options, experience safety concerns, lack parental support, and lack a neighborhood environment that fosters play and physical activity.¹⁶⁶ Children in low-income communities also generally do not have private backyards or public spaces to play in and are therefore stuck inside, eliminating their ability to engage in physical activities.¹⁶⁷ For most low-income students, attending school is the only access they may have to physical activity, and if attending virtually, physical activity is severely limited.

While attending school is important for children to learn various subjects, it is equally as important for children to attend school to learn social and emotional skills.¹⁶⁸ When children attend school from home, they are not learning certain

157. *Id.*

158. Alysia Burgio, *Child Protective Services Still Protecting Kids Despite COVID-19 Crisis*, NBC NEWS (Apr. 1, 2020), <https://nbc25news.com/news/coronavirus/child-protective-services-still-protecting-kids-despite-covid-19-crisis> [https://perma.cc/8NLK-6GN7].

159. Welch & Haskins, *supra* note 139.

160. Katelyn Esmonde & Keshia Pollack Porter, *Distance Learning Means Kids are Missing Out on Exercise*, CBS NEWS (Oct. 20, 2020, 10:34 AM), <https://www.cbsnews.com/news/distance-learning-children-exercise-low-income-communities/> [https://perma.cc/TXG8-89KY].

161. *Id.*

162. *Physical Activity Facts*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 8, 2020), <https://www.cdc.gov/healthyschools/physicalactivity/facts.htm> [https://perma.cc/UTV5-3KCN].

163. *Id.*

164. *Id.*

165. Esmonde & Porter, *supra* note 160.

166. *Id.*

167. *Id.*

168. Press Release, Emma García & Elaine Weiss, Econ. Pol'y Inst., COVID-19 and Student

social skills which typically develop through personal relationships among students and teachers.¹⁶⁹ Interacting with other children provides an opportunity to learn and practice social skills, and the immediate feedback they receive from other children allows them to evaluate how effective their behaviors are.¹⁷⁰ “[S]ocial competence is primarily acquired in the play activities and social interactions with other children and youths.”¹⁷¹ Peers play an essential role in a child’s social development, and engaging in positive interactions is essential to the social development of children.¹⁷² Per psychologist Erik Erikson’s eight stages of psychosocial development, the fifth stage, identity versus role confusion, happens between ages twelve and nineteen.¹⁷³ The most important event during this stage of development is social relationships.¹⁷⁴ Those who lack positive social skills are more likely to perform poorly academically and drop out of school.¹⁷⁵ Furthermore, public health emergencies, e.g., pandemics, can affect a child’s mental health.¹⁷⁶ “Children are particularly vulnerable because of their limited understanding of the event.”¹⁷⁷ A study conducted in China on children and adolescents showed clinginess, distraction, irritability, and a fear that family members could contract COVID-19 since the pandemic began.¹⁷⁸ Closure of schools and separation from friends coupled with exposure to mass media coverage can cause mental distress among children.¹⁷⁹

4. Class Engagement

About half of all United States students attended school virtually for the 2020-2021 school year.¹⁸⁰ Due to a lack of resources, class preparedness also

Performance, Equity, and U.S. Education Policy (Sept. 10, 2020), <https://www.epi.org/publication/the-consequences-of-the-covid-19-pandemic-for-education-performance-and-equity-in-the-united-states-what-can-we-learn-from-pre-pandemic-research-to-inform-relief-recovery-and-rebuilding/> [https://perma.cc/XX5A-EEFP].

169. *Id.*

170. Juanita B. Hepler, *Social Development of Children: The Role of Peers*, 19 CHILD. & SCH. 242, 244 (1997).

171. *Id.*

172. *Id.*

173. Imran et al., *supra* note 151.

174. *Id.*

175. Hepler, *supra* note 170.

176. Imran et al., *supra* note 151.

177. *Id.*

178. *Id.*

179. *Id.*

180. Erin Richards, *Students are Falling Behind in Online School. Where’s the COVID-19 ‘Disaster Plan’ to Catch Them Up?*, USA TODAY, <https://www.usatoday.com/in-depth/news/education/2020/12/13/covid-online-school-tutoring-plan/6334907002/> [https://perma.cc/CFW9-FN9L] (last updated Dec. 17, 2020).

lacked.¹⁸¹ Class failure rates significantly increased; fewer kindergarteners met early literacy targets in Washington, D.C.; and math achievement levels dropped nationwide.¹⁸² In schools with high poverty rates, one in three teachers reported their students were significantly less prepared for grade-level work during the 2020-2021 school year compared with the previous year.¹⁸³ When schools first closed in March 2020, a majority of teachers said that fewer than half their students were attending.¹⁸⁴ The problem continued into the new school year, as was the case in Detroit, Michigan, where learning was being done virtually and only 78% of students showed up for class.¹⁸⁵ Tens of thousands of students nationwide were unaccounted for altogether.¹⁸⁶

D. Effects on Low-Income Parents

While the pandemic greatly affected children, it also greatly affected their parents. Since the pandemic began, one in four adults had trouble paying their bills, a third of adults had to dip into savings or retirement accounts, and one in six had to borrow money from friends or family or had gotten food from a food bank.¹⁸⁷ Particularly among lower-income adults, “46 [percent] say they . . . had trouble paying their bills since the pandemic started and roughly one third say it [was] hard for them to make rent or mortgage payments.”¹⁸⁸ Of the 25% of U.S. adults who said they or someone in their household was laid off or lost their job from the pandemic, lower-income adults and young adults were the most likely.¹⁸⁹ “Lower-income adults who lost their job because of the coronavirus outbreak are more likely than those with middle or upper incomes to remain unemployed.”¹⁹⁰

Once the pandemic reached the United States, governors nationwide closed businesses, allowing only “essential” businesses to stay open, such as health care, food service, and public transportation.¹⁹¹ Nearly 70% of essential workers do not

181. *Id.*

182. *Id.*

183. *Id.*

184. Abby Goodnough, *As Schools Go Remote, Finding ‘Lost’ Students Gets Harder*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/us/schools-covid-attendance.html> [<https://perma.cc/JC6R-RDJS>].

185. *Id.*

186. Richards, *supra* note 180.

187. Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [<https://perma.cc/YN9P-GAF5>].

188. *Id.*

189. *Id.*

190. *Id.*

191. Celine McNicholas & Margaret Poydock, *Who are Essential Workers?*, ECON. POL’Y INST. (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/> [<https://perma.cc/A5EV->

have a college degree and one in ten have less than a high school diploma.¹⁹² Nearly half of Americans in low-wage jobs are essential workers, with a median wage of less than fifteen dollars an hour.¹⁹³ With essential workers being made up of low-income workers and schools closed nationwide, parents struggled to find childcare.¹⁹⁴ While many parents were able to switch to work-from-home and thus able to look after their children, nearly 60% of parents said their jobs could not be done remotely.¹⁹⁵ With most child care providers closing their doors due to the pandemic or only allowing a reduced number of children, parents were forced to rely on family and friends or miss work entirely.¹⁹⁶ One mother reported leaving her first-grader home alone with the neighbor occasionally checking in, another reported setting up a webcam to watch her teenage son while she worked, and another reported relying on her adult child to help.¹⁹⁷

Those who could not find adequate childcare or did not have family or friends to rely on had to either reduce their working hours or leave the workforce all together.¹⁹⁸ Of a study conducted from May 2020 to June 2020, more than 13% of adults had lost a job or reduced their hours due to lack of childcare.¹⁹⁹ While women make up about half of all essential workers,²⁰⁰ they were more likely than men to leave their jobs because of lack of child care.²⁰¹ “One out of four women who reported becoming unemployed during the pandemic said it was because of a lack of child care – twice the rate among men.”²⁰² Women of color, women without a college degree, and women living in low-income households reported

GWTY].

192. *Id.*

193. Molly Kinder & Laura Stater, *Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a \$15 Minimum Wage*, BROOKINGS (Feb. 5, 2021), <https://www.brookings.edu/blog/the-avenue/2021/02/05/essential-workers-deserve-minimum-wage-increase/> [https://perma.cc/E6FY-5ACN].

194. Olga Khazan & Adam Harris, *What are Parents Supposed to Do with Their Kids?*, ATLANTIC (Sept. 3, 2020), <https://www.theatlantic.com/politics/archive/2020/09/limited-child-care-options-essential-workers/615931/> [https://perma.cc/28VT-WTBL].

195. Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It's Been Difficult to Handle Child Care During the Pandemic*, PEW RSCH. CTR. (Jan. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic/> [https://perma.cc/2T99-ZM8C].

196. Khazan & Harris, *supra* note 194.

197. *Id.*

198. Alicia Sasser Modestino, *Coronavirus Child-Care Crisis Will Set Women Back a Generation*, WASH. POST (July 29, 2020, 7:00 AM), <https://www.washingtonpost.com/us-policy/2020/07/29/childcare-remote-learning-women-employment/> [https://perma.cc/K74V-QKRD].

199. *Id.*

200. McNicholas & Poydock, *supra* note 191.

201. Modestino, *supra* note 198.

202. *Id.*

higher loss of hours among working parents.²⁰³ In September 2020 alone, 865,000 women left the workforce in the United States, which was four times more than men.²⁰⁴ This could affect women in the workforce for years to come, as women who leave the workforce to care for their children experience trouble getting back in.²⁰⁵

E. State by State

Since there was no federal regulation on how states should approach reopening schools, governors were to decide on a state-by-state basis how and when they would reopen schools.²⁰⁶ States had the option to order schools to reopen in the fall, order them to remain closed, or allow each school district to decide for themselves what they felt was proper given the community's number of COVID-19 cases and safety resources available.²⁰⁷ The majority of states chose to allow their school districts to make their own decisions.²⁰⁸ Florida, along with Arkansas, Iowa, and Texas, required schools to reopen in the fall, and Washington, D.C. ordered full closure for at least the first semester.²⁰⁹ While some states ordered partial closure – school closures in certain cities with high numbers of COVID-19 cases – there were no statewide closures.²¹⁰ Indiana was among those who left the decision in the hands of each school district.²¹¹ New York City started the school year remotely, switched to in-person classes, then back to remote learning, which was quickly reversed again.²¹² New York is now back to in-person learning.²¹³ Chicago, which had utilized remote learning since the shutdown in March 2020, sent its students back in-person with no real updates nor a plan in place concerning the safety of students and staff.²¹⁴ After huge push-

203. *Id.*

204. Pallavi Gogoi, *Stuck-At-Home Moms: The Pandemic's Devastating Toll on Women*, NPR (Oct. 28, 2020, 7:01 AM), <https://www.npr.org/2020/10/28/928253674/stuck-at-home-moms-the-pandemics-devastating-toll-on-women> [https://perma.cc/V55R-R27U].

205. Modestino, *supra* note 198.

206. *Where Schools are Reopening in the US*, CNN, <https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/> [https://perma.cc/VR26-DM52] (last visited Nov. 8, 2020).

207. *Id.*

208. *Where Schools are Reopening in the US*, *supra* note 206.

209. *Id.*

210. *Id.*

211. *Id.*

212. Eliza Shapiro, *N.Y.C. to Reopen Middle Schools, but Most Students Will Still Learn from Home*, N.Y. TIMES (Feb. 8, 2021), <https://www.nytimes.com/2021/02/08/nyregion/nyc-middle-schools-reopening.html> [https://perma.cc/998M-VZX7].

213. *Id.*

214. Hannah Leone et al., *Mayor Lori Lightfoot: Chicago Public Schools and the Teachers Union Reach a Tentative Reopening Deal 'At Long Last'*, CHI. TRIB. (Feb. 7, 2021), <https://www.chicagotribune.com/coronavirus/ct-chicago-public-schools-teachers-union-deal-reached-no-strike-20210207-riflckhjwnfjil5ddvbdfr75y-story.html>? [https://perma.cc/LBJ2-JLT5].

back from the Chicago Teachers Union, a plan was eventually put in place, albeit still not ideal.²¹⁵

1. Florida Ordered to Reopen

Florida was one of only four states required to reopen for the start of the fall semester of the 2020-2021 school year.²¹⁶ Governor DeSantis issued an executive order requiring all brick-and-mortar schools to be open at least five days a week by August 31, 2020.²¹⁷ The order was brought to court and the trial court judge issued an injunction on the executive order.²¹⁸ However, on August 28, 2020, a Florida state appellate court issued a stay of the trial judge's injunction, "putting the state's emergency order back in place."²¹⁹ Florida also allowed each school district to decide whether or not masks would be required among students and faculty, and while some chose to require masks, many did not.²²⁰ One month into reopening schools, the infections among school-aged children jumped by 34%. Despite Florida being third in the number of reported COVID-19 cases and fifth in total deaths at the time,²²¹ Governor DeSantis said they would not be closing schools.²²²

Florida was allotted approximately \$173.5 million as part of the Governor's Emergency Education Relief ("GEER") fund.²²³ Per Florida's GEER application to the United States Department of Education, they planned on combining their GEER funds and funds they received from the Emergency and Secondary School Emergency Relief ("ESSER") fund to "encourage school districts to invest in initiatives that close achievement gaps and ensure access to high-quality learning opportunities" in K-12 education.²²⁴ Florida intended to spend their money on: a

215. *Id.*

216. *Where Schools are Reopening in the US*, *supra* note 206.

217. *Id.*

218. *Id.*

219. *Id.*

220. Lori Rozsa & Valerie Strauss, *Coronavirus Case Spike Among School-Age Children in Florida, While State Orders Some Counties to Keep Data Hidden*, WASH. POST (Sept. 9, 2020, 8:12 PM), https://www.washingtonpost.com/local/education/florida-coronavirus-schools/2020/09/08/711fa780-eee4-11ea-ab4e-581edb849379_story.html [<https://perma.cc/X2UR-9EGE>].

221. Corky Siemaszko, *Florida Students Head Back to Class Amid Reports of More Kids Catching COVID-19*, NBC NEWS (Aug. 31, 2020, 2:32 PM), <https://www.nbcnews.com/news/us-news/florida-students-head-back-class-amid-pandemic-reports-more-kids-n1238888> [<https://perma.cc/3PC2-UVCW>].

222. Tony Pipitone, *No Matter What, Governor Says, Florida Schools Will Stay Open*, NBC NEWS SO. FLA., <https://www.nbcmiami.com/news/local/no-matter-what-governor-says-florida-schools-will-stay-open/2309556/> [<https://perma.cc/7X42-825S>] (last updated Oct. 20, 2020).

223. *GEER Fund Utilization*, HUNT INST., <https://hunt-institute.org/covid-19-resources/geer-fund-utilization/> [<https://perma.cc/4NXS-X4HB>] (last visited Mar. 29, 2020).

224. *Id.*

summer recovery program, career and technical education (“CTE”) equipment, ensuring the “B.E.S.T.” curriculum for reading and civics, telehealth, additional strategies to support summer learning, and civic literacy.²²⁵

The summer recovery program, which was designated \$64 million, would require schools to target students with significant academic needs for four to six weeks of face-to-face learning over the summer months.²²⁶ \$10.9 million was designated toward CTE equipment, which schools could apply for through a grant program, awarding \$55,000 per district and an additional \$10,000 per K-12 school.²²⁷ Ensuring the B.E.S.T. curriculum for reading and civics was allotted \$4 million of GEER funds and \$20 million of ESSER funds “to help districts and schools identify and adopt B.E.S.T. ELA Standards aligned curriculum and supplemental instructional materials for K-3.”²²⁸ Telehealth was allotted \$2 million to provide mini-grants to all local educational agencies (“LEAs”) to help deploy telehealth throughout Florida.²²⁹ Additional strategies to support summer learning, granted \$1 million, was to provide mini-grants to reinforce reading and math skills.²³⁰ Lastly, civic literacy was allotted \$1 million and would provide “matching grants for LEAs that voluntarily administer the Florida Civics HS exam.”²³¹ Florida was also allotted \$2.8 billion for local school districts from the CRRSA and \$6.3 billion from the American Rescue Plan.²³²

2. *Indiana Left the Decision in the Hands of Each School District*

The state of Indiana allowed school districts to make their own decision on whether or not to reopen in the fall.²³³ When making their decision, schools were instructed to use the color-coded map created by state health officials, which indicated the level of community spread in each county.²³⁴ Governor Holcomb mandated wearing masks in schools for staff, teachers, and students in third grade and above.²³⁵ School districts made their decision by talking with parents, students, and teachers, and were in contact with health officials.²³⁶ They considered various elements involved with returning to in-person including

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. Jordan, *supra* note 75.

233. *Where Schools are Reopening in the US*, *supra* note 206.

234. *Id.*

235. MJ Slaby, *How Districts in Central Indiana Decided What to Do for the Coming School Year*, INDYSTAR, <https://www.indystar.com/story/news/education/2020/07/29/education-indiana-how-districts-decided-reopening-plans/5492909002/> [https://perma.cc/4ZU8-PMZM] (last updated July 29, 2020).

236. *Id.*

transportation, staffing, scheduling, costs, class size, personal protective equipment, cleaning protocols, social distancing, and proper protocol in the case of a positive test.²³⁷ Most areas in Indiana offered an all-virtual option and an in-person option for families, although some districts did a hybrid schedule for middle and high school students.²³⁸

Indiana was allotted approximately \$61.5 million of the GEER fund.²³⁹ Per Indiana's application to the GEER fund, they planned to use the funding to improve remote learning for all students through device availability, internet connectivity, and training.²⁴⁰ Indiana intended to improve device availability and internet connectivity by creating a "flexible matching fund for community-level technology grants."²⁴¹ They planned to improve training and instructional materials through innovation grants to "create regional or statewide initiatives advancing/developing best practices, training, and curriculum for online . . . instruction."²⁴² Governor Holcomb's senior advisor stated that \$49.8 million of the GEER funds went to devices and connectivity for K-12 schools, including "more than 68,000 student devices, nearly 2,900 teacher devices, and more than 85,800 mobile Wi-Fi devices along with subscription plans."²⁴³ Indiana was allotted approximately \$799 million for local school districts from the CRRSA and \$1.7 million from the American Rescue Plan.²⁴⁴ Despite Indiana allowing school districts the freedom to make their own decisions, cases of COVID-19 among students began to rise.²⁴⁵ Once Indiana students returned to in-person learning in the fall, 3,507 students, 719 teachers, and 801 staff members tested positive for COVID-19.²⁴⁶ Due to Indiana's rise in numbers, several school districts chose to revert to online schooling.²⁴⁷

3. Washington, D.C. Ordered to Stay Closed

Opposite of Florida, Washington, D.C.'s Mayor Bowser announced that the District of Columbia Public Schools would remain closed with distance learning

237. *Id.*

238. *Id.*

239. *GEER Fund Utilization*, *supra* note 223.

240. *Id.*

241. *Id.*

242. *Id.*

243. Slaby, *supra* note 235.

244. Jordan, *supra* note 75.

245. Arika Herron, *School Leaders Say They Need Help to Keep Indiana Classrooms Open as COVID-19 Numbers Rise*, INDYSTAR (Oct. 30, 2020, 5:01 AM), <https://www.indystar.com/story/news/education/2020/10/30/indiana-schools-need-help-keep-classrooms-open-covid-19-cases-rise/6074802002/> [<https://perma.cc/E7ZX-KM6R>].

246. *Id.*

247. *Id.*

for at least the first term of the 2020-2021 school year.²⁴⁸ However, thirteen public school principals submitted proposals to reopen in small groups.²⁴⁹ These schools volunteered to reopen and did not force staff members to return.²⁵⁰ Parents were allowed to walk through the school buildings to see the safety features that were implemented.²⁵¹ After many false start dates, all other public schools finally reopened on February 1, 2021 in Washington, D.C..²⁵² Staggered arrival times, small cohorts, mask mandates, and strict physical distancing measures were among the safety measures put in place to protect students and staff.²⁵³

Washington, D.C. was allotted approximately \$5.8 million as part of the GEER fund.²⁵⁴ Per the District of Columbia's GEER application, they planned to use funds towards technology and social-emotional learning.²⁵⁵ Washington, D.C. wanted to "ensure parents and students can access distance learning and that schools provide effective interventions and targeted supports for special populations."²⁵⁶ They planned to accomplish this through grants to LEAs and third-party organizations "to support basic response costs (e.g., 1:1 devices, hot spots) and/or innovative models (e.g., distance learning infrastructure, blended learning strategies)."²⁵⁷ They also planned to use funds to "support school safety and promote the mental health of students, families, and educators."²⁵⁸ Washington, D.C. also spent \$34 million, mostly federal funding, on building updates to ensure a safe environment for students and education staff.²⁵⁹ They were also allotted approximately \$154.8 million from the CRRSA and \$347.6 million from the American Rescue Plan.²⁶⁰

On September 8, 2020, Mayor Bowser of Washington, D.C. announced the launch of the \$3.3 million Internet for All initiative "to provide free internet access for up to 25,000 disconnected low-income students and families from D.C.

248. *Where Schools are Reopening in the US*, *supra* note 206.

249. Perry Stein, *Some Students Will be Able to Return to D.C. Public School Buildings This Week*, WASH. POST (Sept. 28, 2020, 2:10 PM), https://www.washingtonpost.com/local/education/some-students-will-be-able-to-return-to-dc-public-school-buildings-this-week/2020/09/28/f5ecb130-0198-11eb-b7ed-141dd88560ea_story.html [<https://perma.cc/9NLA-65H6>].

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *GEER Fund Utilization*, *supra* note 223.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. Perry Stein et al., *After Months of Planning, Protests and False Starts, D.C. Students and Teachers Head to Classes for the First Time in Nearly a Year*, WASH. POST (Feb. 2, 2021, 5:33 PM), https://www.washingtonpost.com/local/education/dc-schools-reopening/2021/02/02/29bfe1c4-6514-11eb-8468-21bc48f07fe5_story.html [<https://perma.cc/CQA4-2J6S>].

260. Jordan, *supra* note 75.

Public Schools and public charter schools.”²⁶¹ The partnership launched the new Tech Together initiative by the Office of the Chief Technology Officer, which is “a partnership between public, private, and nonprofit sectors to bridge the digital divide in the District through increasing access to internet service, increasing access to internet-enabled devices and IT support, demystifying technology through awareness, training and access to opportunities, and increasing technology savviness within D.C. Government.”²⁶²

4. *New York City, New York*

Similar to Indiana, the state of New York left the decision about whether schools would be opened or closed in the hands of local school district officials.²⁶³ However, schools were required to close if the in-school COVID-19 positivity rate was higher than 9%, a threshold the state set in the summer of 2020.²⁶⁴ Although, in New York City specifically, home to the nation’s largest public school system, that threshold was lowered to 3%.²⁶⁵ In October 2020, Mayor de Blasio reopened schools in New York City for all grade levels- six weeks later, he closed schools again as cases in New York City began to rise.²⁶⁶ Mayor de Blasio then reversed his decision to close schools and reopened them for elementary school students and children with advanced disabilities, with middle school students being able to return soon after.²⁶⁷

By reopening schools, the city’s 3% positivity rate threshold was disregarded, as the average positivity rate in New York City is around 8%.²⁶⁸ However, only students who chose to attend in-person at the beginning of the school year were allowed to return.²⁶⁹ Those who initially opted out of in-person learning, roughly 70% of New York City students, remained online, most of whom were Black, Latino, and Asian-American.²⁷⁰ “Many Black families in particular have said they are distrustful of school districts, and do not believe that their children will be safe in classrooms.”²⁷¹ However, the city did have safety measures in place for staff and students in schools, including random weekly testing and requiring

261. Press Release, Executive Office of Mayor Muriel Bowser, Mayor Bowser Announces \$3.3 Million Investment to Provide Home Internet to Low Income DC Students (Sept. 8, 2020), <https://mayor.dc.gov/release/mayor-bowser-announces-33-million-investment-provide-home-internet-low-income-dc-students> [<https://perma.cc/J4CE-H6TH>].

262. *Id.*

263. *Where Schools are Reopening in the US*, *supra* note 206.

264. *Id.*

265. Shapiro, *supra* note 212.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

schools to close temporarily if they had at least two unrelated positive cases.²⁷² Mayor de Blasio referred to schools as the safest places in New York City.²⁷³ The state of New York received approximately \$164.3 million as part of the GEER fund, \$3.6 billion from the CRRSA, and \$8 billion from the American Rescue Plan.²⁷⁴ In their application, New York vowed to use the funds to support K-12 education technologically.²⁷⁵

5. *Chicago, Illinois*

Chicago Public Schools (“CPS”), the nation’s third largest public school system, the Chicago Teachers Union (“CTU”), and Mayor Lightfoot were in contentious discussions since schools closed in March 2020 on how to reopen schools, which were still closed to in-person learning until March 2021.²⁷⁶ The CTU had concerns for the safety of themselves and the safety of their students, as “the city had a \$3 billion backlog of facilities repairs on its aging school buildings . . . and teachers were concerned that poorly ventilated classrooms could encourage the coronavirus to circulate.”²⁷⁷ Tensions between CPS, the CLU, and Mayor Lightfoot came to a head when Mayor Lightfoot ordered pre-K and special education teachers to return to school on January 4, 2021.²⁷⁸ Most teachers refused, given the unsafe environment, and were consequently “deemed absent without leave, locked out of their CPS accounts, and denied pay.”²⁷⁹ A second wave of students were set to go back on February 1, 2021, which led union members to announce they would go on strike if more teachers were locked out for refusing to go back in-person.²⁸⁰

CPS, the CLU, and Mayor Lightfoot then came to an agreement on how and when to reopen schools safely after tense negotiations.²⁸¹ Still, not all members of the CTU were thrilled about the agreement and schools reopening.²⁸² President of the CTU, Jesse Sharkey, stated, “This plan is not what any of us deserve,” and, “[t]he fact that [Chicago Public Schools] could not delay reopening a few short weeks to ramp up vaccinations and preparations in schools is a disgrace.”²⁸³ The agreement addressed health and safety protocols in CPS facilities, ventilation

272. *Id.*

273. *Id.*

274. Jordan, *supra* note 75.

275. *GEER Fund Utilization*, *supra* note 223.

276. Leone et al., *supra* note 214.

277. Moriah Balingit, *Chicago Reaches Deal with Teachers to Reopen School Buildings*, WASH. POST (Feb. 10, 2021, 4:52 PM), <https://www.washingtonpost.com/education/2021/02/10/chicago-teachers-pandemic/> [<https://perma.cc/994U-SAMZ>].

278. Leone et al., *supra* note 214.

279. *Id.*

280. *Id.*

281. Balingit, *supra* note 277.

282. *Id.*

283. *Id.*

requirements, COVID-19 testing, contact tracing, operational pauses, the creation of COVID-19 committees, vaccination efforts, accommodations and staffing, when to return to in-person learning, technology for remote learning, and community support.²⁸⁴ The agreement stated that in-person learning would be paused for fourteen days and back fully remote if the COVID-19 test positivity rate in Chicago increased for seven consecutive days, the rate for each of seven consecutive days was at least 15% higher than the rate one week prior, and the rate on the seventh day was 10% or greater.²⁸⁵ Classes would resume in-person on the fifteenth day, “or when the criteria for pausing in-person learning are no longer met, whichever is later.”²⁸⁶

6. *Vaccinating Teachers in the United States*

On December 14, 2020, vaccines for the COVID-19 virus were distributed nationwide, with front-line health-care workers being the first to receive it.²⁸⁷ Although each state was to decide which groups of people qualify for the vaccine and in what order, they mostly followed the CDC’s recommendations.²⁸⁸ The CDC had separated its recommendations into three priority categories: 1a, 1b, and 1c.²⁸⁹ Priority 1a included healthcare personnel and residents of long-term care facilities, priority 1b included frontline essential workers, including those who work in education, and people aged seventy-five and older, and priority 1c was people aged sixty-five to seventy-four, people aged sixteen to sixty-four with underlying medical conditions, and other essential workers.²⁹⁰ While the CDC recommended teachers be prioritized as 1b, ultimately states were to decide whether or not teachers were going to be prioritized, and initially only twenty-six states decided they would be.²⁹¹ Florida and Indiana were among the states who did not initially prioritize teachers in getting the vaccine, while Washington, D.C.,

284. Agreement Between the Chi. Bd. of Educ. & Chi. Tchr. Union (Feb. 6, 2021), <https://www.ctulocal1.org/wp-content/uploads/2021/02/2.6.21-Framework-for-Resumption-of-In-Person-Instruction-Side-Letter.pdf> [<https://perma.cc/AY38-SFMN>].

285. *Id.*

286. *Id.*

287. Ben Guarino et al., *‘The Weapon that Will End the War’: First Coronavirus Vaccine Shots Given Outside Trials in U.S.*, WASH. POST (Dec. 14, 2020, 5:50 PM), <https://www.washingtonpost.com/nation/2020/12/14/first-covid-vaccines-new-york/> [<https://perma.cc/X5ZD-HXDF>].

288. Yon Pomrenze et al., *Here are the States Allowing Teachers to Get COVID-19 Vaccines*, CNN, <https://www.cnn.com/2021/02/05/us/teacher-vaccine-states-list-trnd/index.html> [<https://perma.cc/2ST9-R89S>] (last updated Feb. 17, 2021).

289. *CDC’s COVID-19 Vaccine Rollout Recommendations*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations.html> [<https://perma.cc/BPR7-ZF8X>] (last visited Feb. 12, 2021).

290. *Id.*

291. Pomrenze et al., *supra* note 288.

Illinois, and New York were among those that did.²⁹² In Chicago, CPS provided 1,500 vaccine doses each week to employees.²⁹³ As part of the agreement that the CTU fought for, no member would be required to work in person without having the option to be fully vaccinated²⁹⁴ and as of March 17, 2021, all CPS employees had been offered that opportunity.²⁹⁵

On March 2, 2021, the U.S. Department of Health and Human Services issued a directive requiring all states to make teachers, school staff, and childcare workers eligible for the vaccine.²⁹⁶ Those eligible included teachers and staff, licensed childcare providers, classroom aides, bus drivers, janitors, counselors, administration staff, cafeteria workers, and substitute teachers.²⁹⁷ Furthermore, President Biden instructed all states to open vaccine eligibility to all adults by May 1, 2021.²⁹⁸

F. The European Approach to Successfully Reopening Schools

1. Germany

European countries vowed to prioritize reopening, and maintaining the schools that are open.²⁹⁹ In Germany, students were divided into different cohorts with specific teachers, and each cohort was prohibited from mixing with another cohort.³⁰⁰ Students were required to wear masks while walking in the hallways and when entering classrooms but were allowed to take off their mask once they were seated at their desks.³⁰¹ Moreover, all classrooms were set up to allow for proper social distancing protocols and ventilation was improved throughout

292. *Id.*

293. Leone et al., *supra* note 214.

294. *Id.*

295. *Staff COVID-19 Vaccination*, CHI. PUB. SCH., <https://www.cps.edu/school-reopening/health-and-safety/staff-covid-19-vaccination/> [<https://perma.cc/CS45-QY8W>] (last visited Mar. 29, 2020).

296. *COVID-19 Vaccines for Teachers, School Staff, & Childcare Workers*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/teachers-childcare.html> [<https://perma.cc/NB8G-TS45>] (last visited Mar. 20, 2021).

297. *Id.*

298. Rachel Treisman, *Nearly Half of States Will Make All Adults COVID-19 Vaccine Eligible by April 15*, NPR (Mar. 26, 2021, 3:42 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/26/981680704/nearly-half-of-states-will-make-all-adults-covid-19-vaccine-eligible-by-april-15> [<https://perma.cc/E4X4-MD4X>]; *see also COVID-19 Vaccines for Children and Teens*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/adolescents.html> [<https://perma.cc/6BUT-PSKM>] (last visited July 23, 2021) (children twelve and older are now eligible to receive the vaccine).

299. Godin, *supra* note 33.

300. *Id.*

301. *Id.*

schools.³⁰² When schools first reopened in August 2020, after the initial lockdown in March, COVID-19 cases started to rise among students and teachers.³⁰³ Berlin reported at least 42 of their 825 schools that reopened had COVID-19 cases within the first two weeks of reopening.³⁰⁴ However, given Germany's use of cohorts, "the country has not yet seen any major outbreaks or long-term school closures."³⁰⁵ Germany prioritized schools remaining open, even if other public venues had to be closed down to do so,³⁰⁶ including bars, restaurants, theaters, concert halls, gyms, and tattoo parlors.³⁰⁷ "The European Center for Disease Prevention and Control found that children accounted for less than 5 percent of all cases of coronavirus reported in the [twenty-seven] countries of the European Union and Britain . . . [finding] that school closures would be 'unlikely to provide significant additional protection of children's health.'"³⁰⁸ Attendance to in-person school was generally required throughout Europe and distance learning is no longer an option.³⁰⁹

2. Spain

In Spain, schools reopened in September 2020, despite COVID-19 cases rising across the country, using cohorts similar to Germany.³¹⁰ In Catalonia, Spain, where they had the resources to conduct tracing, "87 percent of initial cases in classrooms did not spread to another person" and of the 13% that did spread, most only spread to two or three other people in the school.³¹¹ For young age groups through twelve years old, most schools went on without interruption; however, some high schools switched to part-time or full-time remote learning due to infection and transmissions rates being seemingly higher for older students.³¹² Schools in Spain were committed to making in-person learning not only possible, but maintainable.³¹³ One teacher in the Spanish city of Seville

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. Melissa Eddy, *Why is Europe Keeping Its Schools Open, Despite New Lockdowns?*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/world/europe/schools-coronavirus-europe-lockdowns.html> [<https://perma.cc/D37W-HA8W>].

308. *Id.*

309. *Id.*

310. Michael Birnbaum, *Europe's Schools Still Open, Still Relatively Safe, Through Covid-19 Second Wave*, WASH. POST (Dec. 1, 2020, 5:32 PM), https://www.washingtonpost.com/world/europe/europe-schools-covid-open/2020/12/01/4480a5c8-2e61-11eb-9dd6-2d0179981719_story.html [<https://perma.cc/DQ5D-55KM>].

311. *Id.*

312. *Id.*

313. *Id.*

bought a carbon dioxide monitor so she knew how much exhaled air was building up in the room.³¹⁴ Other measures taken among Spanish schools included new windows to increase air flow, N95 masks for teachers, and switching from textbooks to Chromebooks to make disinfecting materials easier.³¹⁵ Teachers were even given microphones to use when their voices became muffled from wearing masks, and even further, received voice lessons on how to better project their voices.³¹⁶

3. *Switzerland*

Officials in Switzerland stood firm in two beliefs during the pandemic: children are not “drivers of the pandemic” and education is best served in-person.³¹⁷ Maintaining these beliefs resulted in Switzerland schools, for the most part, remaining open.³¹⁸ Switzerland schools closed in March 2020 when the pandemic first struck, but successfully reopened in May 2020 until the end of the school year in July.³¹⁹ Students returned to in-person learning in the fall to start the new school year and have stayed open since.³²⁰ Switzerland eased students back into in-person learning by splitting classrooms into two cohorts and alternating days of in-person and virtual learning for the first two weeks.³²¹ Then, all children under the age of sixteen started in-person learning every day.³²² Those over sixteen years old had the option to attend in-person in smaller class sizes or remain online.³²³ Students twelve years and older were required to wear a mask and maintain physical distance.³²⁴ Some schools had staggered start times for younger students to avoid large gatherings of parents and generally tried to keep students of different age groups separated.³²⁵ Once schools were reopened in Switzerland, COVID-19 cases flattened and once school was dismissed for

314. *Id.*

315. *Id.*

316. *Id.*

317. Isobel Leybold-Johnson, *Swiss Schools Stay Open as Debate Over Virus Spread Continues*, SWI (Nov. 19, 2020), <https://www.swissinfo.ch/eng/swiss-schools-stay-open-as-debate-over-virus-spread-continues/46166654> [<https://perma.cc/8DXW-26D6>].

318. *Id.*

319. Ben Mussett, *Switzerland and Denmark May Offer Tips for Successful Return to School in B.C.*, CBC NEWS (Aug. 15, 2020, 11:00 AM), <https://www.cbc.ca/news/canada/british-columbia/switzerland-denmark-school-reopening-plan-covid-19-1.5683975> [<https://perma.cc/W3AV-6L9T>].

320. Isobel Leybold-Johnson, *Covid-19: School Closures ‘Could be an Option’*, SWI (Jan. 4, 2021), <https://www.swissinfo.ch/eng/covid-19--school-closures--could-be-an-option-/46259914> [<https://perma.cc/K6X8-QBRF>].

321. Mussett, *supra* note 319.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

summer break in July 2020, cases began to rise again.³²⁶ Swiss officials have stated that shutting down schools is a last resort.³²⁷

G. What Can Be Done?

Determining what K-12 public schools should or should not be doing to ensure education continues during COVID-19 was no small task. While reopening could have endangered the lives of children, the risk was extremely low. Less than 10% of COVID-19 cases in the United States have been among children aged five to seventeen.³²⁸ Children who do contract COVID-19 are likely to be asymptomatic or experience mild symptoms.³²⁹ While in-person learning had not been seen to increase the spread of COVID-19,³³⁰ virtual learning had been seen to be detrimental to students. Virtual learning leaves children in low-income areas behind. All children are entitled to their right to education and COVID-19 should not take that from them. Although the CARES Act, the CRRSA, and the American Rescue Plan cannot fix the years of disproportionate funding which led states into this position, it has the potential to ensure children are not further left behind due to COVID-19. However, the U.S. Education Department has only approved seven of the thirty-nine state plans submitted for funds from the American Rescue Plan.³³¹ Education, like in European countries, should be a priority in the United States; however, it is not. For instance, while Germany prioritized education by closing other public spaces,³³² governors across the United States allowed bars and restaurants to reopen, still with no real plan on how to reopen schools on a larger scale.³³³ While schools remained online in the new school year, few had taken steps to make it more efficient. Less than half of all school districts offered some sort of professional development over the summer for educators to learn more engaging ways to teach online.³³⁴ So, not only was there no plan on how to reopen schools safely, over six months into the pandemic, when students would normally return for a new school year, there still was no adequate training provided to teachers regarding virtual learning.

Wearing a mask and remaining socially distanced are practices that have been

326. *Id.*

327. Leybold-Johnson, *supra* note 320.

328. *Science Brief: Transmission of SARS-CoV-2 in K-12 Schools*, CTR. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html [<https://perma.cc/6WW3-2J74>] (last visited Mar. 28, 2021).

329. *Id.*

330. *Id.*

331. Jordan, *supra* note 75.

332. Godin, *supra* note 33.

333. Dana Goldstein, *Lost Summer: How Schools Missed a Chance to Fix Remote Learning*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/08/07/us/remote-learning-fall-2020.html> [<https://perma.cc/Y3M8-8G56>].

334. *Id.*

effective, especially among children, where the risk of catching and transmitting COVID-19 is already low.³³⁵ Simple safety measures, i.e., wearing a mask and maintaining distance, coupled with students attending school in cohorts, as done in European countries,³³⁶ provides for a safe learning environment for students. It is an even safer environment for students and teachers when the ventilation systems have been improved.³³⁷ Frequent testing among students and education staff and operational pauses, as seen in Chicago,³³⁸ can also be effective. When these measures are not put into place, there will be outbreaks among students and education staff, as was seen in Indiana.³³⁹

Students cannot afford to remain learning online, especially those in low-income areas. Where schools are still online, representatives and senators should be providing resources to help their students access their education. Representative Ocasio-Cortez of New York's 14th congressional district, making up parts of the Bronx and Queens, instituted a "homework helper" program.³⁴⁰ The program provides free, one-on-one English and Spanish speaking tutors, who have been vetted and trained, to students who need it;³⁴¹ over 13,000 volunteers have signed up to tutor.³⁴² Governors could have prioritized their schools by focusing on a state-wide plan, rather than overwhelming local officials with the decision. When infectious rates were low among the community, schools were safe, but when rates rise in the community, it was seen to also rise within schools.³⁴³ When infectious rates rise, the focus should have been on keeping school districts open, rather than bars and restaurants. In a panic, schools understandably closed in the Spring of 2020; however, over one year into the pandemic, it was unacceptable that there was not a realistic plan in place. The CDC has now declared reopening to in-person learning a priority for the 2021-2022 school year.³⁴⁴

335. Annie Grayer, *Schools are 2 Months into Reopening Under Covid-19 and No One's Officially Keeping Track of How It's Going*, CNN, <https://www.cnn.com/2020/10/12/us/school-year-start-in-pandemic-wellness/index.html> [<https://perma.cc/N25H-LC5K>] (last updated Oct. 12, 2020).

336. Godin, *supra* note 33.

337. Moriah Balingit, *are Schools Safe? A Growing Body of Evidence Suggests That, With the Right Measures, They Contribute Little to Virus Spread*, WASH. POST (Dec. 30, 2020, 6:00 AM), https://www.washingtonpost.com/local/education/school-coronavirus-spread/2020/12/29/bbfac9d8-3697-11eb-a997-1f4c53d2a747_story.html [<https://perma.cc/MQ9E-UHNS>].

338. Agreement Between the Chi. Bd. of Educ. & Chi. Tchr. Union, *supra* note 284.

339. Herron, *supra* note 245.

340. Cristian Benavides, *Ocasio-Cortez Launches Free Virtual Homework Help Program*, PIX 11, <https://www.pix11.com/news/local-news/ocasio-cortez-launches-free-virtual-homework-help-program> [<https://perma.cc/R9F6-N4SZ>] (last updated Dec. 15, 2020).

341. *Id.*

342. *Homework Helpers*, ALEXANDRIA OCASIO CORTEZ, <https://act.ocasiocortez.com/signup/homework-helpers/> [<https://perma.cc/2Z3W-EXVC>] (last visited Feb. 17, 2021).

343. Balingit, *supra* note 337.

344. *Guidance for COVID-19 Prevention in K-12 Schools*, CTR. FOR DISEASE CONTROL &

IV. CONCLUSION

Online learning is only widening the education gap, and if states continue to leave low-income students behind, the effects will be irremediable. Before the pandemic reached the United States, there was already a tremendous problem in access to education. Education is a right for all students in the United States, yet even before the pandemic, students in low-income areas were already at a disadvantage- the spread of COVID-19 has only exacerbated the issue. There were great disparities between the experiences of those in low-income areas versus those in affluent areas since virtual learning began in March 2020.³⁴⁵ Virtual learning took away food security, stripped students of a safe haven, affected physical and mental health, and lowered class engagement in all students, but especially those students in low-income households. Furthermore, because virtual learning forced students to learn from home, parents were put in an impossible position, having to choose between being home with their children and keeping their jobs³⁴⁶ - a problem which affected women far more than men.³⁴⁷ Although these times are unprecedented, keeping children at home cannot be the solution. A child's right to education is in jeopardy nationwide, especially for those students who are low-income. It is crucial all students return to school in-person, and it is crucial they remain in school throughout the remainder of the pandemic.

PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html> [<https://perma.cc/FUG8-UDHP>] (last visited July 23, 2021).

345. *See generally* Esquivel et al., *supra* note 87.

346. *See generally* Khazan & Harris, *supra* note 194.

347. *See generally* Gogoi, *supra* note 204.