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Addressing Funding Inequities Within Districts

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PREFACE

For the past several years, Marguerite Roza has led a series of Center on Reinventing Public Education studies on how school districts spend their money. Her reports have shown that school districts often do not know how their funds are allocated, and that common district practices often lead to lower spending in low-income neighborhood schools. Those practices include seniority-based allocation of teachers, which allows the highest-paid teachers to cluster in schools serving well-off students; salary cost averaging, which hides the spending inequalities caused by teacher placement; and distribution of central office services, which can favor schools with stable leadership and demanding or active parent groups.

A few school districts have taken these results seriously, amending practices that led to unequal spending. However, most districts have continued as before. Current district use of funds derives from local political and collective bargaining processes, which new information alone can do little to change.

Center leaders had hoped our research would be relevant to local practice and useful to those interested in improving education for the disadvantaged. We therefore asked whether there were any ways to make our research results more salient to local policymakers. To that end we considered ways the data on local spending inequalities could be used in judicial and administrative proceedings, civil rights enforcement, and federal oversight of the comparability and non-supplanting requirements of ESEA Title I.

This is the first in a series of working papers on ways people working for the disadvantaged might use evidence about within-district spending inequalities. It examines legal bases for complaints against unequal spending, including the education and equal protection clauses of state constitutions and, in some cases, the 14th Amendment of the U.S. Constitution.

This paper suggests that such litigation is possible, but it does not provide detailed tactical guidance to possible plaintiffs. The two attorneys who drafted it, Kelly Warner-King and Veronica Smith-Casem, hoped that the legal arguments would themselves be enough to inspire district action. I share that hope but recognize that local advocates for the poor might also choose to initiate legal actions based on the analysis presented here.



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ADDRESSING FUNDING INEQUITIES WITHIN DISTRICTS

Kelly Warner-King and Veronica Smith-Casem¹

INTRODUCTION

It is not news to most Americans that poor and minority students are generally not faring well in public education. Much attention has focused on the achievement gap, with research showing that these students lag behind wealthier and white students in test scores, graduation rates, and college attendance. States and the federal government have responded by raising educational standards and increasing accountability. Many of these efforts view schools as the locus of reform, providing support for schools to improve student learning, and consequences for failure. The stakes are also higher for individual students, as grade promotion and graduation are increasingly tied to students' test scores.²

At the same time, minority and poor students are becoming more isolated in public schools. The recent 50th anniversary celebration of the landmark desegregation decision, *Brown v. Board of Education*, was tempered by the fact that many schools across the nation are actually becoming less integrated. This re-segregation appears to be caused by many factors, including housing patterns, public dissatisfaction with integration remedies, and the widespread demise of court involvement and oversight. As a result, some schools, particularly those in central cities and metropolitan-area suburbs, are intensely segregated racially and economically.

Now, a growing body of research has uncovered evidence that schools serving high concentrations of poor, minority, and low-performing students receive fewer resources than other schools in the same district. Education finance researchers have revived a level of equity analysis, briefly explored in the 1970s, that focuses on how districts allocate dollars and resources to different kinds of schools and students.³ These studies have found substantial variations in school-level expenditures that disadvantage poor, non-white, and low-performing children. This degree of resource disparity has serious, negative implications for the educational opportunities afforded those students most at risk to fail.

In the first section of this article, we describe the shift that some researchers have made from examining fiscal equity at the district level to analyzing the allocation of funds to schools within a district. A general lack of school-level data has slowed the pace of this analysis, but recent studies demonstrate that fiscal inequities among schools are

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² Elissa Gootman, *New Test Scores Suggest 10,000 Will Fail 3rd Grade*, N.Y. Times, June 4, 2004, at <http://www.nytimes.com/2004/06/04/nyregion/04READ.html>.

³ See John D. Owen, *The Distribution of Educational Resources in Large American Cities*, 7 J. of Human Resources 26-38 (Winter 1972); D. Brock Hornby and George W. Holmes III, *Equalization of Resources Within School Districts*, 58 Va. L. Rev. 1119-56 (1972).

substantial. In particular, districts appear to provide fewer general, or non-categorical, resources to schools serving disadvantaged students.

The second section describes the causes of sub-district funding inequities. For the purposes of this article, the distribution of school-level resources will be referred to as sub-district allocation.⁴ District budgeting and allocation practices create variation in spending across schools. We discuss how some of this variation results in inequities that adversely affect the educational opportunity available to students. A major contributor to school-level inequity is the fact that the least qualified, lowest-paid teachers tend to congregate in schools with the highest numbers of poor, minority, and low-performing children. This uneven distribution of teachers within districts also has serious implications for student achievement and school operations.

In the third section, we analyze some of the legal and policy implications of sub-district finance inequity and suggest one possible avenue through which reform might be pursued. Sub-district inequities violate equal protection and education clauses in many state constitutions, leaving districts and states vulnerable to legal challenges through the courts. We examine state equal protection and education clause arguments that school reformers could make to enforce the rights of students to equal resources and educational opportunities within districts.

I. SUB-DISTRICT FINANCE—A RENEWED APPROACH TO EQUITY

The unit of analysis most commonly used to evaluate equity in education finance is the school district.⁵ This is because public schools in almost every state are operated by local districts and funded by a combination of locally raised property taxes and state tax revenues⁶, with relatively small amounts of federal dollars provided for specific programs and populations.⁷ Wide disparities in district education budgets result from this system because of the varying abilities of localities to tax themselves.⁸ Many states have sought to mitigate the disparity through finance equalization efforts, but inequality in terms of dollars and educational opportunity persists among districts.⁹

⁴ Cf. Robert Berne and Leanna Stiefel, “Concepts of School Finance Equity: 1970 to the Present,” in *Equity and Adequacy In Education Finance*, Helen Ladd et al., eds., 7, 11 (1999) (Berne and Stiefel use the term “intra-district equity”); Richard Rothstein, “Equalizing Educational Resources on Behalf of Disadvantaged Children,” in *A Notion at Risk: Preserving Public Education as an Engine for Social Mobility*, Richard D. Kahlenberg, ed., 31-92, 36 (2000) (Rothstein refers to variations in school-level resources as Level III inequity, with Level I and II measuring the variation between states and between districts within a state, respectively).

⁵ Ross Rubenstein, *Resource Equity in the Chicago Public Schools*, 23 J. of Ed. Fin. 468, 473 (Spring 1998).

⁶ Cf. Hawaii and other examples of states that do not. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101, 104 (1995).

⁷ The federal government provides about 7 percent of primary and secondary school funding, while state and local governments share the remaining 93 percent. Berne and Stiefel, “Concepts of School Finance Equity,” 7-33, 9. Verstegen puts the federal contribution at 6.9 percent of total education funding. Deborah A. Verstegen, *Financing the New Adequacy: Towards New Models of State Education Finance Systems That Support Standards Based Reform*, 27 J. of Ed. Fin. 749, 750 (2002).

⁸ John Dayton, “Recent Litigation and Its Impact on the State-Local Power Balance: Liberty and Equity in Governance, Litigation, and the School Finance Policy Debate,” in *Balancing Local Control and State Responsibility for K-12 Education*, Neil D. Theobald and Betty Malen, eds., 93-119, 104 (2000).

⁹ Rothstein, “Equalizing Educational Resources,” 31-92, 64. The Education Trust, *The Funding Gap: Low-Income and Minority Students Receive Fewer Dollars*, 1 (Aug. 2002). Dayton, “Recent Litigation,” 93-119, 103 (2000). U.S.

Over the past thirty years, researchers, courts, and legislatures have scrutinized the equity and adequacy of education finance through a district-level lens. The U.S. Supreme Court’s 1973 decision in *San Antonio School District v. Rodriguez* foreclosed efforts to litigate funding disparities across states by holding that education is not a fundamental right protected by the U.S. Constitution.¹⁰ Decisions by the state supreme courts of California¹¹ and New Jersey¹² focused the debate on disparities across districts within a state, and established state constitutions as the source of education finance law.¹³ The three decades of litigation and legislation that followed have concentrated mainly on state finance systems as the means to improving fiscal equity across districts and/or providing all students with an adequate education.¹⁴

Recently, researchers and litigators have exhibited renewed interest in examining the fairness of education funding using the *school* as the unit of analysis.¹⁵ In the past decade, education reform efforts have increasingly focused on individual schools as the locus of reform, shifting decision-making authority and accountability from the district to the school.¹⁶ Using this school-level approach to reform, analysts have recognized the importance of understanding resource allocations within districts.¹⁷ Analysis of sub-district finance equity is especially important in urban districts that allocate large sums of public revenue and are responsible for educating many of the country’s poor, minority, and low-performing students.¹⁸ In addition, as federal and state governments hold schools, teachers, and students to higher standards of accountability for student

General Accounting Office, *School Finance: State Efforts to Reduce Funding Gaps Between Poor and Wealthy Districts*, GAO/HEHS-97-31, 2 (1997).

¹⁰ *San Antonio School District v. Rodriguez*, 411 U.S. 45 (1972) established that education is not a fundamental right protected by the U.S. Constitution. William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 Va. L. Rev. 1639 (Nov. 1989). Enrich, *Leaving Equality Behind*, 101. “*Rodriguez* ensured that school finance litigations would flourish in state rather than federal courts and that state-by-state rather than national solutions to finance equity concerns would be pursued.” National Research Council, *Making Money Matter: Financing America’s Schools*. Committee on Education Finance, Helen F. Ladd and Janet S. Hansen, eds., 72 (1999).

¹¹ *Serrano v. Priest*, 5 C.3d 617 (Ca. 1971).

¹² *Robinson v. Cahill*, 303 A.2d. 273 (N.J. 1973).

¹³ The *Serrano* and *Robinson* cases established the viability of school finance litigation in state courts, based on the education article and equal protection clauses of state constitutions. Deborah A. Verstegen and Terry Whitney, *From Courthouses to Schoolhouses: Emerging Judicial Theories of Adequacy and Equity*, 11 Educ. Policy 330, 333 (Sept. 1997).

¹⁴ See generally, Thro, *To Render Them Safe*, 1639.

¹⁵ Carolyn Busch and Allan Odden, *Introduction to the Special Issue: Improving Educational Policy and Results With School-Level Data—A Synthesis of Multiple Perspectives*, 22 J. of Educ. Fin. 225, 225 (Winter 1997); Leanna Stiefel, Ross Rubenstein and Robert Berne, *Intra-District Equity in Four Large Cities: Data Methods and Results*, 23 J. of Educ. Fin. 447, 447 (Spring 1998); Robert Berne, Leanna Stiefel and Michele Moser, *The Coming of Age of School-Level Finance Data*, 22 J. of Educ. Fin. 246, 246 (Winter 1997); Robert Berne and Leanna Stiefel, *Measuring Equity at the School Level: The Finance Perspective*, 16 Educ. Evaluation & Policy Analysis 405, 405 (Winter 1994).

¹⁶ E.g., Margaret E. Goertz and Leanna Stiefel, *School-Level Resource Allocation in Urban Public Schools*, 23 J. of Educ. Fin. 435, 435 (Spring 1998) (Thousands of districts have implemented school-based management (SBM) in order to decentralize decision-making and accountability for student outcomes).

¹⁷ Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 447.

¹⁸ Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 467; Marguerite Roza with Karen Hawley Miles, *A New Look at Inequities in School Funding: A Presentation on the Resource Variations Within Districts*, 5 (May 2002) (Los Angeles has a budget of \$4 billion and Dade County Public Schools’ budget is in excess of \$2 billion); Patrice Iatarola and Leanna Stiefel, *School-Based Budgeting in New York City: Perceptions of School Communities*, 23 J. of Educ. Fin. 557, 560 (Spring 1998) (New York City’s public school budget was \$8.2 billion for fiscal year 1995-96).

learning,¹⁹ those concerned about equal educational opportunity cannot ignore the reality of district spending patterns.

Historically, sub-district finance inequities have had relatively little research²⁰ and only a few legal challenges²¹, largely due to a lack of accurate school-level finance data.²² School district budgeting and accounting systems are notoriously complex, in part because of fragmented data systems created to support an array of programs and revenue streams, each with their own reporting requirements.²³ And, since most districts budget and allocate costs centrally, actual costs are not assigned to individual schools.²⁴ As a result, districts usually calculate school-level costs, such as teacher salaries and per-pupil expenditures, using averages for the district as a whole.²⁵

Equity analysis within districts differs somewhat from inter-district finance inquiries. Instead of focusing on the equity or adequacy of a state’s funding formula, or a district’s capacity to tax itself in relation to others, sub-district analysis evaluates how a district distributes its education dollars and the impact that distribution has on various student populations.

Sub-district researchers have borrowed three equity concepts from inter-district analysis to evaluate school district resource allocations: horizontal equity, vertical equity, and equal educational opportunity.²⁶ Simply put, horizontal equity requires that equally situated students be treated equally. In the case of sub-district finance, horizontal equity provides a straightforward means of analyzing the school-level allocation of non-

¹⁹ See The No Child Left Behind Act of 2001, Part A, Sec. 1111(2) (State Plans- Accountability- Statewide accountability system required to ensure adequate yearly progress); see, e.g., Florida Statutes 1008.25 (Public school student progression- Each student's progression from one grade to another be determined, in part, upon proficiency in reading, writing, science, and mathematics).

²⁰ See John D. Owen, *The Distribution of Educational Resources in Large American Cities*, 7 J. of Human Resources 26-38 (Winter 1972); D. Brock Hornby and George W. Holmes III, *Equalization of Resources Within School Districts*, 58 Va. L. Rev. 1119-56 (1972).

²¹ *Hobson v. Hansen*, 269 F. Supp. 401 (1967); *Brown v. Board of Education of the City of Chicago*, 386 F. Supp. 110 (1974); *Rodriguez v. LAUSD*, Case No. C611358, Los Angeles Superior Court (1992) (resulted in consent decree).

²² William J. Fowler, Jr., “Financial Reporting in the New Millennium,” in *Education Finance in the New Millennium*, Stephen Chaikind and William J. Fowler, eds., 35-51, 36 (2001); Amy Ellen Schwartz, *School Districts and Spending in the Schools*, Selected Papers in School Finance 1997-1999; Carolyn Busch and Allan Odden, *Introduction to the Special Issue: Improving Educational Policy and Results With School-Level Data—A Synthesis of Multiple Perspectives*, 22 J. of Educ. Fin. 225, 226 (Winter 1997); Hornby and Holmes, *Equalization of Resources*, 1119, 1123.

²³ Jon Fullerton, *Mounting Debt*, Education Next 11, 18 (Winter 2003) (District budgeting systems are often disconnected from accounting and human resources systems, making it difficult to accurately link dollars to personnel). Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 447, 448; Margaret E. Goertz, *The Challenges of Collecting School-Based Data*, 22 J. of Ed. Fin. 291, 299 (Winter 1997) (School level resource data “reside in multiple and sometimes decentralized places.”).

²⁴ Berne, Stiefel and Moser, *The Coming of Age*, 246, 252; Sheree T. Speakman, Bruce S. Cooper, Robert Sampieri, Jay May, Hunt Holsomback and Brian Glass, “Bringing Money to the Classroom: A Systemic Resource Allocations Model Applied to the New York City Public Schools,” in *Where Does the Money Go?* Lawrence O. Picus and James L. Wattenbarger, eds., 106-131, 107 (1996). New York City tracks and publishes school-level expense data with some limitations, including teacher salary data reported for the sub-district rather than individual schools. Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 447, 451; Patrice Iatarola and Leanna Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 22 Economics of Educ. Review 69, 77 (2003).

²⁵ Fowler, “Financial Reporting in the New Millennium,” 35-51, 43.

²⁶ Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 70; Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 454; Roza and Miles, *A New Look at Inequities in School Funding*; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 405-6.

categorical, or general, education resources.²⁷ “Non-categorical resources” are the funds raised through local taxes and state grants in fulfillment of a state’s constitutional duty to provide a system of public education. The expectation is that non-categorical funds should be distributed evenly, since they form the base level of funding for the education of all children in a district.²⁸

The principle of vertical equity allows differently situated children to receive appropriately different levels of funding by taking into account the higher costs of educating certain students in order to bring them to a given level of output or achievement.²⁹ States and the federal government have sought to create vertical equity through categorical funding of special needs programs and weighting of state allocations according to student needs.³⁰ In evaluating vertical equity within a district, researchers analyze the distribution of non-categorical education funds plus compensatory funds and program resources designated for special populations (such as poor, special education, and gifted students) among schools and student groups identified with higher student learning costs.³¹ Student characteristics associated with higher learning costs include student and family poverty, limited English proficiency, and learning disabilities.³²

The concept of equal opportunity in resource allocation requires that districts fund schools in such a way that all students have a fair chance to succeed. Similar to vertical equity, equal opportunity analysis within districts focuses on how fairly money is allocated to schools serving historically disadvantaged students, especially non-white or minority students, or schools in certain geographic areas within a district.³³ At the state level, equal opportunity analysis also addresses the ability of districts to raise funds through taxation, an issue not applicable within districts because schools have no taxing authority.³⁴ A broad conception of equal opportunity evaluates a range of inputs beyond dollars, including teacher characteristics and course offerings, and accounts for outputs, such as student achievement scores and graduation rates.³⁵

²⁷ Berne and Stiefel, “Concepts of School Finance Equity,” 7-33, 18. The authors assert that horizontal equity is best suited to measures of educational inputs, rather than outputs. They also note that studies of school-level budgeting tend to utilize horizontal equity criterion; Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 455.

²⁸ Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources*, 69, 70; Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 454; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 406.

²⁹ Berne and Stiefel, “Concepts of School Finance Equity,” 7-33, 20.

³⁰ Berne and Stiefel, “Concepts of School Finance Equity,” 7, citing S. Gold, S. Smith and S. Lawton, eds., *Public School Finance Programs of the United States and Canada, 1993-1994, Volume One*, Albany, NY: American Education Finance Association and The Nelson Rockefeller Institute of Governance (1995).

³¹ Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 459.

³² Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 70; Karen Hawley Miles, Kathleen Ware and Marguerite Roza, *Leveling the Playing Field: Creating Funding Equity Through Student-Based Budgeting*, Phi Delta Kappan at <http://www.pdkintl.org/kappan/k0310mil.htm#1a>; Robert Berne and Leanna Stiefel, *Measuring Equity at the School Level: The Finance Perspective*, 16 *Educ. Evaluation & Policy Analysis* 405, 406 (Winter 1994).

³³ Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 454; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 406.

³⁴ Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 71; Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 454; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 406.

³⁵ Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 70; Berne and Stiefel, “Concepts of School Finance Equity,” 7-33; Julian R. Betts, Andrew C. Zau and Lorien A. Rice, *Determinants for Student Achievement: New Evidence from San Diego*, vi (2003) (evaluation of “school resources” included class size, teacher qualifications, and facilities).

Several studies that analyze actual expenditures at the school level describe substantial horizontal and vertical inequities and a lack of equal educational opportunity within districts.³⁶ A consistent theme throughout the research is that schools receive different levels of funding, in contradiction to horizontal equity principles.³⁷ Roza and Miles' analysis of a mid-sized urban district revealed that some schools received less than \$4,000 of total funding per pupil while other schools received over \$10,000 per pupil.³⁸ In California, Hertert found more inequity across schools within individual districts than across districts within the state.³⁹

The research also demonstrates that inequitable allocation of non-categorical funds undercuts the fiscal effectiveness of programs intended to provide vertical equity and equal educational opportunity. Analysis of general education fund distribution, excluding categorical funds, shows that schools serving greater numbers of disadvantaged children tend to receive fewer non-categorical resources per-pupil than schools serving more advantaged student populations.⁴⁰ Categorical funds serve only certain disadvantaged student populations, yet the schools serving many of these children receive less than their share of general education dollars.⁴¹ Therefore, the funds intended to provide extra assistance to educationally disadvantaged students end up compensating, at least in part, for inequitable base-level funding.⁴²

II. CAUSES OF SUB-DISTRICT FINANCE INEQUITIES

Although states are ultimately responsible for the provision of public education, considerable authority over resource allocation and educational programming is delegated to school districts. Local school boards are responsible for district operations, including formulating and approving budgets; negotiating and ratifying collective bargaining agreements; and adopting policies that govern educational programs, instructional materials, facilities, and school staffing.⁴³ Districts have primary authority

³⁶ See generally, Marguerite Roza and Paul T. Hill, "How Within-District Spending Inequities Help Some Schools to Fail," in *Brookings Papers on Education Policy 2004*, Diane Ravitch, ed., 201-218 (2004); Berne and Stiefel, *Measuring Equity at the School Level*, 405; Rubenstein, *Resource Equity in the Chicago Public Schools*, 468.

³⁷ In measuring resource distribution among schools in a district, Odden and Picus assert that coefficients of variation above .10 represent inequity. See generally, Allan R. Odden and Lawrence O. Picus, *School Finance: A Policy Perspective* (Third Edition, 2004); Rubenstein, *Resource Equity in the Chicago Public Schools*, 468, 485 (Chicago elementary schools found to have coefficients of variation between 0.12 and 0.27); Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 72 (Iatarola and Stiefel found coefficients above .10 in New York City schools).

³⁸ Roza and Miles, *A New Look at Inequities in School Funding*, 12.

³⁹ Lawrence O. Picus and Minaz B. Fazal, "Why Do We Need to Know What Money Buys?" in *Where Does the Money Go?* Picus and Wattenbarger, eds. 1-19, 7 (1996), citing Linda Hertert, Carolyn Bush and Allan Odden, *School Financing Inequities Among the States: The Problem and the Potential for Federal Solutions*, Paper Presented at the Annual Meeting of the American Education Finance Association, Nashville, TN (Mar. 1994).

⁴⁰ Roza and Miles, *A New Look at Inequities in School Funding*, 19; Rubenstein, *Resource Equity in the Chicago Public Schools*, 468, 485; Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 415.

⁴¹ Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 76; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 410.

⁴² See section III for further discussion of the implications of this practice for federal Title I funds.

⁴³ See M. McCarthy and N. Cambron-McCabe, *Public School Law: Teachers' and Students' Rights*, 6 (1992); Washington State School Directors Association, *Serving on Your Local School Board: A Guide to Effective Leadership*, 9-11 (2003).

for the distribution of state and local education funds to schools and are fiscally accountable for the appropriate use of categorical resources.⁴⁴ In most districts, budgeting is performed by the central office and approved by the local school board. District decisions about how to spend educational dollars are shaped, in part, by federal and state regulations, school board policies, local politics, collective bargaining agreements, and court orders.⁴⁵

Education finance researchers have begun to identify district budget practices and policies that create variations in the amount of funding allocated to schools.⁴⁶ While some variations do not result in inequitable educational opportunities, districts certainly provide some schools with less than their fair share of resources and teacher funding.⁴⁷ Research has shown that districts have unique patterns of inequity, requiring analysis of a district's actual school-level expenditures in order to identify variations and determine whether students are adversely impacted.⁴⁸

District Allocation Formulas and Practices

The following section describes various mechanisms that districts typically use to allocate funds to schools. We identify who has authority to determine how funds are distributed and some of the many factors that shape these decisions. Also we discuss how these mechanisms have been found to contribute to sub-district funding variation, and their potential for creating inequity among schools and students.

Staff-Based Budgeting

Most districts allocate personnel resources to individual schools through a set of funding formulas.⁴⁹ Funding formulas are determined in the district budget and approved by the local school board. The structure of the various formulas is influenced by state mandates, collective bargaining agreements, federal and state restrictions on the use of categorical funds⁵⁰, compliance with court orders⁵¹, and school district policies and program decisions.⁵² For example, the state legislature might establish a maximum class size, but a local school board can make a policy decision to reduce class sizes for primary

⁴⁴ James W. Guthrie, "Reinventing Education Finance: Alternatives for Allocating Resources to Individual Schools," in *Selected Papers in School Finance 1996*, 8 (1996) at <http://nces.ed.gov/pubs98/finance/98217-5.html>.

⁴⁵ See generally F. Wirt and Michael Kirst, *The Politics for Education: Schools in Conflict* (2d ed. 1989).

⁴⁶ Roza and Miles, *A New Look at Inequities in School Funding*, 19.

⁴⁷ See generally Iatarola and Stiefel, *School-Based Budgeting in New York City*, 557-576; Roza and Miles, *A New Look at Inequities in School Funding*.

⁴⁸ Roza and Miles, *A New Look at Inequities in School Funding*, 21.

⁴⁹ Iatarola and Stiefel, *School-Based Budgeting in New York City*, 557, 568; Margaret E. Goertz, *The Challenges of Collecting School-Based Data*, 22 J. of Educ. Fin. 291, 300 (Winter 1997); Berne and Stiefel, *Measuring Equity at the School Level*, 405, 406.

⁵⁰ Goertz, *The Challenges of Collecting School-Based Data*, 291, 300.

⁵¹ E.g., Denver Public Schools' resource allocation guidelines require that schools with English Language Acquisition programs assign qualified teachers "so that projected class size is approximately equal to that in the regular program, unless otherwise specified in the consent decree." Denver Public Schools, Budget Guidance Manual, Section V, 18 (2003); Goertz, *The Challenges of Collecting School-Based Data*, 291, 300 (re: influence of desegregation orders on allocation rules).

⁵² Odden and Picus, *School Finance*, 279; Iatarola and Stiefel, *School-Based Budgeting in New York City*, 557, 570.

grades⁵³, resulting in a staff-based formula that would allocate more teacher positions to elementary schools.

District funding formulas are generally staff-based, meaning that personnel are distributed in the form of staff positions or full-time equivalent (FTE), rather than by cost.⁵⁴ Teachers are allocated to schools based on the number and type of students enrolled in a school.⁵⁵ Other school personnel are assigned based on student enrollment, school staff numbers, or other school characteristics.⁵⁶ A few personnel positions, such as principals, are automatically allocated to each school, regardless of enrollment.⁵⁷

Staff-based formulas create school funding variations in several ways. By allocating personnel based on the number of positions, rather than by actual cost of staff working in a school, districts fail to account for differences in salary expenditures (see below for further discussion of teacher salary inequities). Also, staff-based formulas function like an “on-off switch”. For example, if the formula provides one guidance counselor for every 300 students, a school with 295 students does not get a counselor, while a school with just ten additional students does. If the total cost of a guidance counselor is \$60,000, the school with the slightly lower enrollment receives \$200 less per student.

Staff positions that are automatically allocated to each school have a different fiscal impact, depending on each school’s student enrollment numbers. In small schools, fixed staff costs are distributed across fewer students, resulting in higher per-pupil expenditures than larger schools that benefit from economies of scale.⁵⁸ Equity analysis of fixed staff allocations should account for these variations and evaluate whether the type of staff allocated actually impacts students’ educational opportunity. Research demonstrates that staff-based budgeting practices result in substantial inequities within districts.⁵⁹

Categorical Programs

Categorical programs provide additional funding to districts to meet the higher costs of educating certain types of students, such as children who are poor, gifted, or non-English speakers. Federal and state governments provide categorical funds to districts through grants and adjustments to state finance formulas.⁶⁰ Districts also play a role in

⁵³ Roza and Miles, *A New Look at Inequities in School Funding*, 9.

⁵⁴ Odden and Picus, *School Finance*, 273; Marguerite Roza and Karen Hawley Miles, “Moving Toward Equity in School Funding Within Districts,” in *School Communities that Work* (Annenberg), 10 (2002); Rubenstein, “Resource Equity in the Chicago Public Schools,” 468-489, 487.

⁵⁵ Odden and Picus, *School Finance*, 273; William Ouchi, *Academic Freedom*, 4 Education Next 21, 23 (Winter 2004).

⁵⁶ Odden and Picus, *School Finance*, 273.

⁵⁷ Roza and Miles, *A New Look at Inequities in School Funding*, 9.

⁵⁸ Roza and Miles, “Moving Toward Equity in School Funding,” 11.

⁵⁹ Roza and Miles, “Moving Toward Equity in School Funding,” 2; Rubenstein, *Resource Equity in the Chicago Public Schools*, 468, 487 (study found significant negative relationship between average teacher salaries and student poverty).

⁶⁰ Odden and Picus, *School Finance*, 130. Many state funding systems provide supplemental resources for certain types of students. See, e.g., Mass. Gen. Laws Ann. Ch. 70, section 2 (West Supp. 1994) (providing “expanded program allotment” in foundation budget for low-income students); *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order, District Court of Shawnee County, Kansas (2003) (describing how the Kansas funding formula weights certain students, such as those enrolled in vocational and bilingual programs).

providing additional funding for needy students through mandatory cost-sharing programs with the state or through district policy decisions to use local funds for categorical services.⁶¹

Generally, districts are responsible for distributing categorical funds to the schools. Federal and state categorical program funds are constrained by regulations governing their use and stipulating reporting requirements.⁶² However, school districts have considerable flexibility within those boundaries to determine the types and level of services provided to eligible students and schools.⁶³ For example, a district might choose to focus its Title I funds on intensive services for a sub-group of students, such as low-performing, low-income students in elementary schools. Alternatively, it could offer more general assistance to all low-income students in the district.

District policies governing the use of categorical funds have the potential to create substantial variations in funding across schools.⁶⁴ Research indicates that districts generally allocate compensatory funds to eligible students, but all eligible students in the district may not benefit.⁶⁵ Also, there is evidence that districts invest fewer state and local funds for general education services in schools that receive categorical funds (see below for discussion of Title I supplanting problem).⁶⁶

Allocations Made Outside of Funding Formulas

School boards and central offices create school-level funding variations by providing additional resources for select schools. Board policies that establish special programs, such as a technology lab or an internship program, often result in higher staff and instructional expenses for a small number of schools.⁶⁷ These special allocations are made in addition to formula-driven school allocations.⁶⁸

While local boards have authority to make such budgetary decisions for a district, special allocations create the potential for serious educational inequities. School allocations that are made outside of the standard budgeting formula might be justified from an educational and equity viewpoint, but district leaders often approve these additional investments without a full understanding of the impact they have on other school budgets or students' educational opportunities. The distribution of funds through special grants or projects often results in inequities.⁶⁹

⁶¹ Studies show that categorical grants stimulate district spending on specialized programs. Odden and Picus, *School Finance*, 194-195.

⁶² Odden and Picus, *School Finance*, 130.

⁶³ Odden and Picus, *School Finance*, 200.

⁶⁴ Odden and Picus, *School Finance*, 200, citing Goertz's findings that Chapter 1 expenditures ranged from \$300 to \$2,500 per pupil in one district studied.

⁶⁵ See generally, U.S. General Accounting Office, *Fiscal Oversight of Title I Could Be Improved*, 14 (Feb. 2003); Roza and Miles, "Moving Toward Equity in School Funding," 25.

⁶⁶ Roza and Miles, "Moving Toward Equity in School Funding," 21.

⁶⁷ Roza and Miles, "Moving Toward Equity in School Funding," 11.

⁶⁸ Denver Public Schools, Budget Guidance Manual, Section V, 28 (2003); Miles, Ware and Roza, *Leveling the Playing Field*.

⁶⁹ Paul T. Hill, *School Boards: Focus on School Performance, Not Money and Patronage*, Progressive Policy Institute 21st Century Schools Project, 12 (January 2003).

Once special allocations are made, these higher investments in select schools tend to perpetuate in the district budget year after year.⁷⁰ For example, a school that received a grant to support an extra art teacher may continue to be allocated the art teacher well after the grant has expired. Researchers have found that these historic investments often disadvantage poor, minority, and low-performing students.⁷¹

Centrally Controlled Resources

Another potential source of major sub-district inequities are the centrally administered programs and services that benefit schools. In most school systems, the central office controls 40-60% of the district's entire budget.⁷² A portion of these centrally controlled dollars are "educationally significant," meaning that they are deployed to schools in order to support the learning needs of students and the capacity of instructors.⁷³ "Educationally significant resources" include those delivered to individual schools in the form of services and programs, such as bilingual programs, special education services, and professional development.⁷⁴ Few districts track the distribution of resources from the central office to individual schools, and researchers have yet to quantify the sub-district equity implications of centrally allocated resources.⁷⁵

Facility Costs

Districts do not usually allocate facility costs to individual schools, but when calculated, facility maintenance and operation costs contribute to funding variations. Some of the variation is due to different school site characteristics. For example, utility costs differ due to the age and energy efficiency of school buildings.⁷⁶ Therefore, equity analysis of facility costs should be sensitive to school characteristics.

Some physical plant costs can have equity implications when they reflect significant differences in educational opportunity for students. For example, new schools that are wired to support the latest computer technology or have state-of-the-art science labs provide students with access to learning opportunities that older buildings might not support.⁷⁷ Another facility-related issue with finance equity implications is the problem of overcrowding that requires larger class sizes or the use of non-classroom space or portable classrooms to accommodate student learning.⁷⁸ In several states, courts have

⁷⁰ Roza and Miles, "Moving Toward Equity in School Funding," 26.

⁷¹ Roza and Hill, "How Within-District Spending Inequities Help Some Schools to Fail," 201-218.

⁷² Roza and Miles, "Moving Toward Equity in School Funding," 11; Picus and Fazal, "Why Do We Need to Know What Money Buys?" 1-19, 12.

⁷³ Picus and Fazal, "Why Do We Need to Know What Money Buys?" 1-19, 13-14.

⁷⁴ Ouchi, *Academic Freedom*, 21, 23.

⁷⁵ Roza and Miles, "Moving Toward Equity in School Funding," 11.

⁷⁶ Odden and Picus, *School Finance*, 275.

⁷⁷ Other examples include science labs, available classroom space, etc. See, generally, John Augenblick and Justin Silverstein, *Financing Facilities: Who Pays for School Construction and How Much?*, Am. School Board J. (Oct. 2002), available at <http://www.asbj.com/schoolspending/resources1002augenblick.html>.

⁷⁸ Peter D. Roos, "Intradistrict Resource Disparities," in *Strategies for School Equity*, Marilyn J. Gittell, ed., 43 (1998) (students in predominately minority elementary schools in Los Angeles had access to considerably fewer square feet of space per pupil than students in schools with lower minority populations).

considered the funding of school facilities, including modernization and repairs, in determining the equity and adequacy of state funding schemes.⁷⁹

Unequal Distribution of Teacher Resources

Researchers have identified substantial funding differences caused by the uneven distribution of teacher salaries among schools. District salary schedules, accounting practices, and assignment policies create a system in which expensive teachers tend to cluster in some schools, leaving other schools with lower-paid staff. Studies show that teachers in the neediest schools—those serving large numbers of poor, non-white, and low-performing students—have lower salaries than their counterparts serving more advantaged students.⁸⁰ Since teacher salaries constitute the majority of school-level expenditures, around 80% by some estimates⁸¹, accounting for actual teacher costs is critical for understanding school-level equity. In addition, teacher distribution has serious implications for the educational opportunity provided to students in the most disadvantaged schools.

Policies and Practices Guiding Teacher Pay and Assignment

School districts pay teachers according to a single salary schedule, usually set by law and/or union contract⁸² based on teacher experience and years of graduate study.⁸³ However, most district budgets do not account for the different salaries earned by individual teachers in each school. Staff-based formulas allocate teacher resources to schools in the form of positions, and districts assign teacher costs using an average salary figure.⁸⁴ For example, a district salary schedule might set a starting salary for a new teacher with a bachelor's degree at \$31,500 and a maximum salary of \$53,250 for an experienced teacher with a master's degree, with numerous steps in between.⁸⁵ The dollar difference between the earnings of the lowest- and highest-paid teachers in this example is \$21,750. Yet when districts calculate school-level expenses, a novice teacher

⁷⁹ Odden and Picus, *School Finance*, 333, citing *Roosevelt Elementary School v. Bishop*, 179 Ariz. 233, 877 P.2d 806 (1994), *DeRolph v. State*, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997) and *Campbell County School District v. State*, 907 P.2d 1238 (Wyo. 1995).

⁸⁰ Rubenstein, *Resource Equity in the Chicago Public Schools*, 468, 488 (Chicago schools with higher levels of student poverty had lower teacher salaries); Marguerite Roza, *Real Money for Real Teachers: The Case in Baltimore. An Investigation of Salary Differentials in The Baltimore City and Baltimore County School Districts* (Mar. 2003); Roza and Hill, "How Within-District Spending Inequities Help Some Schools to Fail," 201-218; Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 454 (lower salaries found in schools with high percentages of poor and sometimes minority students); Berne and Stiefel, *Measuring Equity at the School Level*, 405, 410 ("average teacher's salaries are very strongly and negatively related to poverty").

⁸¹ Paul T. Hill and Kacey Guin, *Baselines for Assessment of Choice Programs*, 11 Educ. Policy Analysis Archives, no. 39 (2003) at <http://epaa.asu.edu/epaa/v11n39/>. See also Roos, "Intradistrict Resource Disparities," 44.

⁸² L. Fischer, D. Schimmel and C. Kelly, *Teachers and the Law*, 353-56 (1981) (authors note that several states prescribe a minimum salary for teachers, but school districts are free to supplement that salary).

⁸³ John Augenblick, "The Status of School Finance Today," Education Commission of the States Issue Paper, 9 (2001); M. Finch and T. Nagel, *Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform*, 1984 Wisc. L. Rev. 1573, 1578 (1984).

⁸⁴ Odden and Picus, *School Finance*, 273; Berne and Stiefel, *Measuring Equity at the School Level*, 405, 412.

⁸⁵ These figures reflect the average minimum (\$31,567) and maximum (\$53,248) salary figures in 2000 for the 100 largest cities in the U.S. AFT Study of Teacher Salaries.

and a veteran with an advanced degree appear to cost the same amount—the average teacher salary for the district.⁸⁶

Seniority-based assignment policies allow higher-paid veteran teachers to cluster in schools serving fewer poor, minority, and low-achieving students. Transfer policies negotiated in union contracts give experienced teachers their first choice of schools in which to teach by permitting them to fill open positions within the district before new teachers are hired.⁸⁷ When there are staff reductions in some schools and unfilled vacancies in others, some teacher contracts require the least experienced teachers to take involuntary transfers—frequently to the lowest-income schools.⁸⁸ These practices often result in the departure of experienced teachers from the most challenging schools, leaving a disproportionate number of less experienced, lower-salaried teachers to staff those schools. Seniority provisions that provide a “way out” for many teachers have serious, detrimental effects on the funding and teacher qualifications in low-income and minority schools.⁸⁹

Individual teacher preferences contribute to the inequitable distribution of experienced teachers. Schools serving large populations of minority, poor, and low-achieving students tend to have much smaller teacher applicant pools than more advantaged schools, and therefore often end up hiring teachers with lower qualifications and less experience.⁹⁰ Research shows that teachers who work in high-poverty and low-performing schools are likely to transfer to less demanding, more affluent schools when given the option.⁹¹ Teachers in schools with large numbers of low-achieving students chose to move to higher-achieving schools.⁹² On an individual level, a teacher’s preference to work in a less challenging school might be understandable, but district policies that give effect to these preferences have a devastating cumulative effect on the neediest students.

Adverse Impact on Disadvantaged Students and Schools

⁸⁶ Kelly Warner-King, “Salary Averaging Unfair To Teachers,” *Seattle Post-Intelligencer*, B7 (May 24, 2003).

⁸⁷ Don Boyd, Susanna Loeb, Hamp Lankford and Jim Wyckoff, “Understanding Teacher Labor Markets: Implications for Educational Equity,” 4 (March 2003) available at <http://www.albany.edu/edfin/>; Rothstein, “Equalizing Education Resources,” 31-92, 79.

⁸⁸ Julian R. Betts, Kim S. Rueben, Anne Danenberg, *Equal Resources, Equal Outcomes? The Distribution of School Resources and Student Achievement in California*, Public Policy Institute, 121-122 (2000); Finch and Nagel, *Collective Bargaining in the Public Schools*, 1616.

⁸⁹ Boyd, et al., “Understanding Teacher Labor Markets,” 4.

⁹⁰ E.A. Hanushek, J.F. Kain, and S.G. Rivkin, *Why Public Schools Lose Teachers*, 39 J. of Human Resources 326-354 (April 2004).

⁹¹ For high poverty schools, Hanushek, Kain, and Rivkin, *Why Public Schools Lose Teachers*; Lankford, 1999. A descriptive analysis of the New York State and New York City teaching force. Report prepared for the New York Supreme Court case *Campaign for Fiscal Equity v. New York State*, as cited in Boyd, Loeb, Lankford and Wyckoff, “Understanding Teacher Labor Markets,” 4. California’s Class Size Reduction (CSR) law increased demand for teachers across the state, see Christopher Jepsen and Steven Rivkin, “Class Size Reduction, Teacher Quality, and Academic Achievement in California Public Elementary Schools,” Public Policy Institute of California, 2 (2002).

⁹² Betts, Rueben and Danenberg, *Equal Resources, Equal Outcomes?* 121-122. Teachers in high-poverty schools report more student misbehavior, greater safety concerns, less access to resources and less parental involvement than their peers working in low-poverty schools. Quality Counts 2003, Education Week, 17-18. Some research indicates that teachers choose to leave challenging schools due to poor working conditions and uncompetitive salaries, rather than the characteristics of the students themselves. Linda Darling-Hammond and Susanna Loeb, in Quality Counts 2003, Education Week, 14 (2003).

Districts can afford to operate some schools with more expensive staffs because they spend less on the schools with lower-salaried teachers. In other words, when certain schools spend more than their “equal share” of the salary pot, other schools end up spending less. The result is effectively a transfer of general education funds from schools serving large numbers of poor, non-white, and low-achieving students to schools with fewer disadvantaged students.⁹³ The practice of salary averaging prevents district leaders, administrators, and community members from understanding the true costs of operating individual schools.⁹⁴

Furthermore, teacher turnover negatively affects students and staff in disadvantaged schools. High rates of teacher turnover, also called “churning,” adversely impact student achievement and seriously hamper school improvement efforts in many of the neediest schools.⁹⁵ When experienced teachers leave minority, low-income schools they are often replaced by novice teachers.⁹⁶ Education researchers generally agree that novice teachers produce smaller learning gains in students than do their more experienced colleagues.⁹⁷ Further, a constant cycle of new teachers has been shown to be detrimental to general teacher effectiveness throughout a school.⁹⁸

Quality teaching is especially important for low-income students,⁹⁹ but like teacher salaries, teacher quality is not evenly distributed across schools.¹⁰⁰ Teachers have been shown to be the most significant school-level factor affecting student achievement.¹⁰¹ Regardless of the attributes used to gauge teacher quality, research has

⁹³ See Hill and Roza; Roos, “Intradistrict Resource Disparities,” 44. Cf. Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 78 (New York City schools serving needier students were allocated more teacher positions, but those positions were filled by teachers with less experience and lower pay, resulting in a trade-off between teacher pay/qualifications and student/teacher ratios).

⁹⁴ Moss Adams Advisory Services, A Division of Moss Adams LLP, *Public Schools: Financial Operations and Information Systems Audit*, 30 (Apr. 16, 2003); Berne and Stiefel, *Measuring Equity at the School Level*, 405, 412.

⁹⁵ Neil D. Theobald and Sabrina W.M. Laine, “The Impact of Teacher Turnover on Teacher Quality: Findings From Four States,” in *School Finance and Teacher Quality: Exploring the Connections. The 2003 Yearbook of the American Education Finance Association*, M.L. Plecki and D.H. Monk, eds., 36 (2003); P. Berman and M. McLaughlin, “Federal programs supporting educational change. Vol. 7. Factors affecting implementation and continuation” (Report No. R-1589/7-HEW) Santa Monica, CA: RAND Corporation (1977); M. Huberman and M. Miles, *Innovation Up Close*, New York: Plenum (1984).

⁹⁶ Berne and Stiefel, *Measuring Equity at the School Level*, 405, 410.

⁹⁷ The chief explanation for the ineffectiveness of new teachers is that they spend much of their first few years acquiring the basic skills of teaching: how to manage a classroom, plan lessons, implement a curriculum, etc. Hanushek, Kain, and Rivkin, *Why Public Schools Lose Teachers*; David Kaufman, Susan Moore Johnson, Susan M. Kardos, Edward Liu and Heather G. Peske, “Lost at Sea”: *New Teachers’ Experience with Curriculum and Assessment*, Teachers College Record, Vol. 104, No. 2, 273-300 (Mar. 2002).

⁹⁸ Research on new teachers demonstrates the importance of interaction with and support from veteran teachers, especially around issues of curriculum and instruction. Kaufman, et al., “Lost at Sea,” 273-300, 295. See also, Research for Action, *Once and For All: Placing a Highly Qualified Teacher in Every Philadelphia Classroom*, 24 (2003) (“The concentration of new teachers in particular schools presents an enormous challenge for mentoring efforts: there are simply not enough veteran teachers to go around.”).

⁹⁹ Roos, “Intradistrict Resource Disparities,” 41-42.

¹⁰⁰ William Sanders and June L. Rivers, *Research Project Report: Cumulative and Residual Effects of Teachers on Future Student Academic Achievement*, University of Tennessee Value-Added Research and Assessment Center (Nov. 1996).

¹⁰¹ Economists Rivkin and Hanushek have shown that students taught by very good teachers make one full year more of academic progress than students taught by the least effective teachers. Steven G. Rivkin and Eric A. Hanushek, *The Teacher Gap*, Quality Counts 2003, Education Week, 10 (2003); The educational impact of a teacher on his or her students lasts well beyond a single school year. Sanders and Rivers, *Research Project Report*.

shown that low-income, low-achieving, and non-white students, especially those in urban schools, are much more likely to be taught by low-skilled teachers.¹⁰²

Courts and the U.S. Congress have recognized the importance of teacher resources for low-income, minority, and low-performing students.¹⁰³ In challenging the equity and adequacy of state education systems to meet student achievement standards, courts have acknowledged the disparities in teacher qualifications across schools and districts, particularly the very low qualifications of teachers in schools serving large numbers of non-white and poor students.¹⁰⁴ Congress has also made quality teaching a hallmark of the No Child Left Behind Act, requiring states and districts that receive Title I funds to insure that poor and minority children are not disproportionately taught by unqualified or inexperienced teachers.¹⁰⁵

III. ADDRESSING SUB-DISTRICT INEQUITY—A LEGAL APPROACH

Sub-district funding inequities identified by researchers raise serious questions about the legality and fundamental fairness of district allocation practices. These concerns are increasingly important given the momentum of state and federal efforts to hold schools and individual students accountable for achievement.¹⁰⁶ Further, as more data about student performance is generated, there is a growing interest in understanding how educational inputs, including funding and teacher resources, impact school and student outcomes.¹⁰⁷ In this context, researchers and reformers have begun to ask whether districts provide all students with the appropriate resources for an equal educational opportunity.¹⁰⁸

Among researchers and courts there is general agreement that money, when spent wisely, does matter for student achievement. Most state court decisions reflect the belief that money is a significant factor in providing educational opportunity.¹⁰⁹ However, in order to impact students positively, school districts need to invest funds in a thoughtful

¹⁰² High-poverty schools are often staffed by the least experienced teachers, while better and more experienced teachers tend to cluster in schools serving wealthier students. See Boyd, et al., “Understanding Teacher Labor Markets,” 4; Hanushek, Kain, and Rivkin, *Why Public Schools Lose Teachers*; Iatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 73 (using teacher certification as a measure of quality).

¹⁰³ *Tennessee Small Schools v. McWherter*, 851 S.W.2d 139, 154-56 (Tenn. 1993).

¹⁰⁴ *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003); *Rodriguez v. LAUSD*, Case No. C611358, Los Angeles Superior Court (1992) (resulted in consent decree).

¹⁰⁵ Under NCLB, districts must “ensure, through incentives for voluntary [teacher] transfers, the provision of professional development, or other effective strategies, that low-income students and minority students are not taught at higher rates by unqualified, out-of-field, or inexperienced teachers.” 20 USC § 6312(c)(1)(L). States are required to include similar measures in their state plans and publicly report the state’s progress toward the goal. 20 USC § 6311 (b)(8)(C).

¹⁰⁶ “[E]very state and the District of Columbia now will rate schools based on whether they are making “adequate yearly progress” under the federal law.” Lynn Olson, *In ESEA Wake, Data Flowing Forth*, Education Week (Dec. 10, 2003); Nina Hurwitz and Sol Hurwitz, *Tests That Count*, American School Board J. (Jan. 2000) at <http://www.asbj.com/2000/01/0100coverstory.html> (There are 19 states that have enacted laws denying grade promotion and/or graduation to students who fail state tests).

¹⁰⁷ Michael Rebell and Joanne Wardenski, *Of Course Money Matters: Why the Arguments to the Contrary Never Added Up*, Campaign for Fiscal Equity, Inc., 35 (2004); Goertz, *The Challenges of Collecting School-Based Data*, 291-302.

¹⁰⁸ Stiefel, Rubenstein and Berne, *Intra-District Equity in Four Large Cities*, 447, 454.

¹⁰⁹ John Dayton, *Correlating Expenditures and Educational Opportunity in School Funding Litigation: The Judicial Perspective*, 19 J. of Educ. Fin. 167, 182 (1993).

and rational way.¹¹⁰ Moreover, there should be real accountability at the district and school levels to insure that funds are allocated fairly and effectively.¹¹¹

This section addresses one possible legal avenue through which reformers might pursue greater equity and accountability in school district resource allocations. Legal challenges, based on state constitutional education clauses and equal protection law, have the potential to force districts to change practices that under-fund schools serving poor and minority children.

Legal Challenges Based on State Constitutional Education Clauses and Equal Protection Guarantees

In the past thirty years, most states have faced legal challenges to their schemes for financing public school districts.¹¹² Many of these cases addressed inequities in the amount of education funding available to districts, through state and local taxation and fundraising efforts. School finance literature describes three “waves” of education finance litigation.¹¹³ The first two waves advanced the theory of equity in school funding, first under the federal constitution and later under state constitutions.¹¹⁴ The state court equity cases relied on constitutional equal protection provisions, education clauses, or both.¹¹⁵ The third wave focused on the adequacy of education provided, rather than on the comparative distribution of education resources.¹¹⁶

Sub-district resource disparities lend themselves to equity claims under state constitutions. The state action at issue is a district’s division of available public funds among its schools and students.¹¹⁷ The legal argument is that the district allocation process fails to provide an equal educational opportunity to all district students, in violation of the state’s constitutional equal protection provision or its education clause.¹¹⁸

¹¹⁰ See *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order at 127, District Court of Shawnee County, Kansas (2003) (“Dr. [Eric] Hanushek testified that money spent wisely, logically, and with accountability would be very useful indeed.”).

¹¹¹ Rebell and Wardenski, *Of Course Money Matters*, 34.

¹¹² “In the three decades since the *Rodriguez* decision, major legal challenges to state funding systems have been mounted in 45 of the 50 states.” Rebell and Wardenski, *Of Course Money Matters*, 10.

¹¹³ The “three wave” theory was first advanced in William E. Thro, *The Third Wave: The Implications of the Montana, Kentucky and Texas Decisions for the Future of Public School Finance Reform Litigation*, J. of Law & Educ. 219 (1990). Other scholars have adopted the theory. See generally Julie K. Underwood and William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 Harv. J. L. & Pub. Pol’y 517, 520-35 (1991); Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. Cin. L. Rev. 1735 (1995).

¹¹⁴ Thro, *The Third Wave*, 219.

¹¹⁵ Thro, *To Render Them Safe*, 1639, 1641-42.

¹¹⁶ Thro, *The Third Wave*, 219; National Research Council, *Making Money Matter*, 100.

¹¹⁷ Matthews provides an analogy to describe finance equity as dividing the funding “pie” fairly, whereas, adequacy asks whether the “pie” is large enough. David R. Matthews, *Lessons from Lake View: Some Questions and Answers from Lake View School District No. 25 v. Huckabee*, 56 Ark. L. Rev. 519, 523 (2003). However, where a state court or legislature has defined the components or costs of an adequate education under that state’s constitution, sub-district resource inequities might also implicate adequacy.

¹¹⁸ Alexander suggests that there is “substantial judicial flexibility in the application of both the negative constitutional prohibitions of equal protection and the positive constitutional requirements of the education provisions in redressing unequal apportionment of school funds.” Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 Harv. J. Leg. 341, 355-56 (1991). See also Molly McUsic, “The Law’s Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation,” in *Law and School Reform*, Jay P. Heubert, ed., 88-159, 103 (1999).

A state equal protection theory would assert that similarly situated students—those attending schools in the same district—should be treated alike.¹¹⁹ An education clause theory would rely on state constitutional language and case law defining a state’s duty to provide equitable educational opportunities for all children.

To establish causation in a sub-district equity case, a plaintiff would need to make the link between district policies and practices and resource disparities among schools and students. An obvious target is the district’s funding formula, including the use of staff-based allocations and average costs to account for expenditures. Plaintiffs might also challenge the policies, or lack thereof, governing non-formula allocations, such as special project allocations, centrally controlled resources, and facility funds. Teacher salary schedules and seniority transfer provisions, embodied in collective bargaining agreements, might also come under scrutiny if significant teacher resource disparities exist among schools.¹²⁰

Equity cases could be brought against both school district and state-level actors. A local school board and superintendent are empowered by the state to carry out public education functions in the district.¹²¹ In most districts, the budget is prepared by the superintendent and administrative staff and presented to the school board for approval.¹²² This process determines how much funding is to be expended at each school through funding formulas, centrally administered program budgets, and, in some cases, direct allocations to particular schools or programs.¹²³ The school board also enters into labor contracts that establish teacher salary schedules and transfer policies.¹²⁴ District superintendents, as employees of the local board, are responsible for implementing school board policies.¹²⁵

Local school districts have considerable authority to make allocation decisions, but it is ultimately the duty of the legislature to fund and manage a state’s educational system. Most state constitutions vest legislatures with the legal authority to control public schools.¹²⁶ However, states tend to delegate the actual operation of schools to local districts, with annual or biannual audits required to insure the appropriate use of state and local funds.¹²⁷ Such state deference to district decision-making is generally motivated by political, rather than legal, concerns.¹²⁸ Courts have demonstrated a

¹¹⁹ Equal protection generally stands for the premise that “all persons similarly situated shall be treated alike.” *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)); *U.S.D. No. 229*, 256 Kan. at 260 (cited in *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order, District Court of Shawnee County, Kansas (2003)).

¹²⁰ Collective bargaining agreements cannot operate where the terms are “inconsistent with constitutional, statutory, or other legal provisions.” *Brown v. Board of Education of Chicago*, 386 F. Supp. 110, 125 & n.9 (1974).

¹²¹ McUsic, “The Law’s Role in the Distribution of Education,” 88-159, 97.

¹²² Mark G. Yudof, David L. Kirp and Betsy Levin, *Educational Policy and the Law*, 3rd Edition, 663 (1992).

¹²³ See section II for description of these allocations.

¹²⁴ Finch and Nagel, *Collective Bargaining in the Public Schools*, 1573, 1578.

¹²⁵ McCarthy and Cambron-McCabe, *Public School Law*, 7.

¹²⁶ Dayton, “Recent Litigation,” 93-119, 104; McUsic, “The Law’s Role in the Distribution of Education,” 88-159, 97 (“all the decisions as to the selection of teachers, the nature of the curriculum, the length of school year, the money appropriated, and the tax rate levied – is left to the states.”).

¹²⁷ Fowler, “Financial Reporting in the New Millennium,” 35-51, 35. Richard Briffault, *The Role of Local Control In School Finance Reform*, 24 Conn. L. Rev., 733, 781 (1992).

¹²⁸ John Dayton, “Recent Litigation,” 93-119, 113; Briffault, *The Role of Local Control*, 733, 781 (The author asserts that local control over education is largely a state policy decision).

willingness to hold legislatures and their state education authorities legally responsible for correcting problems within districts, or designing a different system to insure that districts act appropriately.¹²⁹

One approach to quantifying sub-district inequity is a horizontal equity measurement based on the distribution of non-categorical resources. Non-categorical, or general, funds are those raised through state and local taxes, intended for the education of all children.¹³⁰ Plaintiffs could assert that all students in the district have an equal right to non-categorical funds and, therefore, these dollars should be allocated equally.¹³¹ Because the use of non-categorical dollars is not dictated by federal or state requirements, a district has considerable discretion over their allocation.¹³²

A second measure of inequity available to plaintiffs is equal educational opportunity, which implicates a broader range of resources and educationally relevant outputs. In state education finance cases, courts have consistently found that constitutional equity guarantees require equal educational opportunity, rather than equal dollars.¹³³ An analogous sub-district equal opportunity theory might assert that variations in expenditures among students should be justified only by variations in student educational need. Plaintiffs would submit evidence of disparate funding and other input measures—such as teacher experience and turnover,¹³⁴ course offerings, and school facilities—to demonstrate the “actual caliber”¹³⁵ of educational resources available at each school.¹³⁶ Disparity in educational outputs, such as student test scores and

¹²⁹ “If local government fails, the state government must compel it to act, and if the local government cannot carry the burden, the state must itself meet its continuing obligation.” *Robinson v. Cahill*, 303 A.2d 273 at 295 (N.J. 1973) and cited with approval in *Pauley v. Kelly*, 255 S.E.2d 859 at 873 (W. Va. 1979) and *DuPree et al. v. Alma School District No. 30*, 651 S.W.2d 90 at 95 (Ark. 1983).

¹³⁰ Tatarola and Stiefel, *Intradistrict Equity of Public Education Resources and Performance*, 69, 70. See previous discussion earlier in this article.

¹³¹ A horizontal equity case would require accounting for resources by source, a potentially laborious process made somewhat easier by the fact that categorical programs generally require districts to track and report the use of such funds.

¹³² Districts can choose to allocate general education dollars in a vertically equitable way. Thus, plaintiffs in a horizontal equity case should identify and separately analyze the vertical equity of a district’s categorical allocations, in addition to analyzing the horizontal equity of the remaining, non-categorical allocations.

¹³³ See *San Antonio v. Rodriguez*, 411 U.S. 1, 24 (1973); *Serrano v. Priest*, 557 P.2d 929, 939 (Cal. 1973); *Lujan v. Colorado*, 649 P.2d 1005, 1018 (Colo. 1982); *Robinson v. Cahill*, 303 A.2d 272, 297-298 (N.J. 1973); *Pauley v. Kelly*, 255 S.E.2d 859, 865 n.7 (W. Va. 1979); *Edgewood v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989). See also Matthews, *Lessons From Lake View*, 519, 530-31 (the author states “it is clear that “equity” in education funding means something more than “equality” in education funding.”)

¹³⁴ Courts have identified teacher pay and teacher quality as indicators of the level of educational opportunity available to students. See *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 91 S.W.3d 472 (Ark. 2002) (the court specifically noted the disadvantage that poorer districts have in attracting and retaining experienced, qualified teachers); *Tennessee Small Schools v. McWherter*, 851 S.W.2d 139, 154-56 (Tenn. 1993).

¹³⁵ Enrich, “Leaving Equality Behind,” 101, 149.

¹³⁶ Examples of state finance cases that employed resource comparisons across districts include *Abbott I*, 575 A.2d at 395-400 (comparing availability of computers, science labs, foreign language, music, art, industrial arts, and physical education programs) and *McDuffy v. Secretary of the Executive Office of Educ.*, 615 N.E.2d 516 at 520-21 and 533 (1993) (comparing class sizes, facility conditions, administration, teacher quality, advanced courses, and teacher training). See also, R. Craig Wood and Jeffrey Maiden, “Resource Allocation Patterns Within School Finance Litigation Strategies,” in *Where Does the Money Go?*, 197-211, 198 (1996); Dayton, *Correlating Expenditures and Educational Opportunity*, 167-182, 167 & n.4.

graduation rates, would strengthen allegations of inequality in the educational opportunity afforded to certain students.¹³⁷

Equal Protection Challenges to Sub-District Inequities

Although equal protection theory has had mixed results in inter-district finance litigation,¹³⁸ it is well suited to addressing sub-district resource inequity.¹³⁹ Most state constitutions contain equality provisions that parallel the federal equal protection clause of the Fourteenth Amendment to the United States Constitution¹⁴⁰ or have been interpreted to provide substantially the same protections.¹⁴¹ The federal and state provisions protect individuals from discriminatory treatment by government actors, including school districts.¹⁴² In school finance cases, the claimed right is one of equal treatment, whether it is equality of funding or equality of educational opportunity.¹⁴³

Most state courts have adopted the conventional federal framework for equal protection analysis.¹⁴⁴ Under the federal test, the level of scrutiny with which a court will analyze government's differential treatment of people hinges on several factors. The most stringent review, strict scrutiny, is applied if the difference adversely affects a group considered to be a "suspect class"¹⁴⁵ or if it detrimentally affects a "fundamental interest."¹⁴⁶ Where strict scrutiny applies, the State must show that its actions are necessary to the achievement of a compelling government interest, and that no less discriminatory means are available.¹⁴⁷ If neither a fundamental right nor a suspect class is implicated, equal protection analysis requires only that the government's actions be

¹³⁷ With increased standardized testing prompted by state and federal laws, and the detailed school-level test score reporting requirements of the federal No Child Left Behind law, outcome data is available and readily comparable across schools. See also Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 Harv. C.R.-C.L. L. Rev. 527, 530 (2001) and *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order, District Court of Shawnee County, Kansas (2003).

¹³⁸ "A review of all the cases reveals a checkered history for equal protection challenges." *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order at 9, District Court of Shawnee County, Kansas (2003). See also Enrich, *Leaving Equality Behind*, 101, 135-36.

¹³⁹ See Ferdinand P. Schoettle, *The Equal Protection Clause in Public Education*, 71 Colum. L. Rev. 1355, 1412 (1971) (noting "the protection of students from excessive discrimination (in intradistrict allocations) would seem to be a function for which the courts have peculiar institutional competence").

¹⁴⁰ U.S. Const. Amend. XIV, sect. 1 ("No state shall...deny to any person within its jurisdiction the equal protection of the laws.").

¹⁴¹ McUsic, "The Law's Role in the Distribution of Education," 88-159, 103 (1999); Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 Alb. L. Rev. 599, 604 (2003); Enrich, *Leaving Equality Behind*, 101, 105; Thro, *To Render Them Safe*, 1639, 1670.

¹⁴² "Equal protection is not addressed to minimal sufficiency but rather to the unjustifiable inequalities of state action. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 70 (1972). Marshall, J., dissenting.

¹⁴³ Enrich, *Leaving Equality Behind*, 101, 108 & n.27-28.

¹⁴⁴ Thro, *To Render Them Safe*, 1639, 1671 & n.149; Friedelbaum, *State Equal Protection*, 599, 604; Enrich, *Leaving Equality Behind*, 101, 105; Robert F. Williams, *The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1219 & n. 160 (1985).

¹⁴⁵ For cases finding suspect classifications that are subject to strict scrutiny under the federal equal protection clause, see, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971); *Loving v. Virginia*, 388 U.S. 1 (1967) and *McLaughlin v. Florida*, 379 U.S. 184 (1964).

¹⁴⁶ For federal cases applying strict scrutiny to a fundamental right, see, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Roe v. Wade*, 410 U.S. 113 (1973). Education is not considered a fundamental right for federal analysis. *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

¹⁴⁷ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995).

rationally related to a legitimate government purpose, a much lower level of scrutiny.¹⁴⁸ Finally, the Supreme Court has occasionally employed an intermediate standard of scrutiny known as the “sliding scale” test that requires a state classification be “substantially related to an important government interest.”¹⁴⁹

Some state courts have broadened the reach of the traditional equal protection framework through a more expansive application of strict scrutiny analysis.¹⁵⁰ The U.S. Supreme Court determined that the federal constitution does not establish education as a fundamental right¹⁵¹; however, some state courts have held that the education articles of their constitutions create a fundamental right to education in their states.¹⁵² In such states, plaintiffs could argue that sub-district resource disparities should be subjected to strict scrutiny, even where race is not a factor.¹⁵³ Several state courts have also held that their constitutions provide extra protection for poor people, a group not considered a suspect class under federal case law.¹⁵⁴

Although not nearly as stringent as strict scrutiny, rational basis review has been employed with some “teeth” in education finance cases.¹⁵⁵ The rational basis test requires that laws and government policies advance legitimate goals, and that the means chosen by the state must bear a rational relationship to those goals. Some courts have interpreted these limitations to amount to a requirement that “all persons similarly situated should be treated alike.”¹⁵⁶ Several state courts have employed rational basis review to find that state education funding formulas violate equal protection clauses,¹⁵⁷ although many others have declined to do so.¹⁵⁸

¹⁴⁸ “A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports that application of the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.” *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

¹⁴⁹ The intermediate test was articulated in *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451 (1976). See also *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102 (1979). Intermediate scrutiny has been used in one school finance case, *Board of Education, Levittown v. Nyquist*, 94 Misc.2d 466, 408 N.Y.S.2d 606 (1978).

¹⁵⁰ Thro, *To Render Them Safe*, 1639, 1647. See also Friedelbaum, *State Equal Protection*, 599, 604; Enrich, *Leaving Equality Behind*, 101, 105.

¹⁵¹ *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

¹⁵² See *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W.Va. 1979) (holding that the education article of the state constitution “demonstrates that education is a fundamental constitutional right in the state”); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, 332-33 (Wyo. 1980); Underwood and Sparkman, *School Finance Litigation*, 517, 529-30 & n. 42. Cf. *Serrano II*, 557 P.2d at 950-51 (stating that state constitution’s education clause does not elevate education to a fundamental interest).

¹⁵³ Roos, “Intradistrict Resource Disparities,” 40-52 (citing *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) and *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989)).

¹⁵⁴ See *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310, 334 (Wyo. 1980) (holding that wealth-based classifications are suspect, particularly when a fundamental right such as education is involved) and *Serrano II*, 557 P.2d at 951 (holding that the state equal protection clause requires that “discrimination in educational opportunity on the basis of district wealth involves a suspect classification”).

¹⁵⁵ Rational basis review is not necessarily “toothless.” *Mathews v. De Castro*, 429 U.S. 181, 185 (1976), quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). See also Friedelbaum, *State Equal Protection*, 599, 608.

¹⁵⁶ *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order, District Court of Shawnee County, Kansas (2003), citing *Unified School District Number 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (1994).

¹⁵⁷ See *Tennessee Small Schools v. McWherter*, 851 S.W.2d 139, 154-56 (Tenn. 1993) (holding that the state’s school funding program, which denied less affluent districts some of the educational opportunities provided to wealthier districts, could not pass the rational basis test) and *Dupree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90, 93 (1993) (finding “no legitimate state purpose to support” existing finance system).

¹⁵⁸ *Brown v. Board of Education of Chicago*, 386 F. Supp. 110, 125 (N.D. Ill. 1974) (holding that a school district’s unequal allocation of teacher salary and experience was rationally related to a legitimate goal of keeping experienced teachers in the district). And see McUsic, “The Law’s Role in the Distribution of Education,” 88-159, 104.

Sub-district plaintiffs alleging an equal protection violation face the additional hurdle of proving that the district intended to provide certain students with less funding than others. The Fourteenth Amendment applies only to *de jure* discrimination, that which is perpetrated by government actors through unequal treatment or the use of legal classifications.¹⁵⁹ Since 1974, cases based on allegations of unequal treatment have been required to show that the government intended to discriminate against a certain group.¹⁶⁰ In some education cases, courts have inferred intent where the government action has a foreseeable disproportionate impact.¹⁶¹ Thus, it might be sufficient for sub-district plaintiffs to demonstrate that schools serving higher proportions of disadvantaged students predictably receive fewer general education dollars than other schools in the same district, due to staffing policies and funding formulas.¹⁶² However, plaintiffs would be wise to bolster their argument with evidence that unequal funding results in inferior educational opportunities for some students.¹⁶³

Three cases provide examples for using an equal protection argument to challenge sub-district funding inequities. In *Hobson v. Hansen*,¹⁶⁴ a civil rights activist filed suit in federal district court against the District of Columbia superintendent and school board, alleging that their policies denied African American and poor children their right to equal educational opportunity under the 14th Amendment of the U.S. Constitution.¹⁶⁵ The district policies challenged by *Hobson* included faculty assignment, student tracking, and the drawing of school boundaries, all of which the court found resulted in *de facto* segregation and were reviewed with strict scrutiny. Most important to a sub-district finance inquiry, the court also examined the allocation of resources between white and minority schools.¹⁶⁶

¹⁵⁹ *De jure* discrimination is the deliberate unequal treatment of individuals by state actors, through official conduct or the enactment of discriminatory laws. See *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686 (1973).

¹⁶⁰ *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

¹⁶¹ “A disproportionate distribution of financial resources alone gives rise to a duty on the part of the legislature, if challenged, to articulate a *rational educational explanation* for the differential.” *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order at 22, District Court of Shawnee County, Kansas (2003). See also *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143, 161 (W.D. Mich. 1973), *aff’d*, 508 F.2d 178, 181-82 (6th Cir. 1974), *cert. denied*, 439 U.S. 860, 421 U.S. 963, 95 S.Ct. 1950 (1975). (Intent to segregate inferred from school board actions that have the foreseeable effect of fostering segregation.) Cf. *School Dist. of Omaha v. United States*, 433 U.S. 667, 668 (1977). (“Our cases have not embraced the proposition that a law or other official act...is unconstitutional *solely* because it has racially disproportionate impact.” (emphasis in original)).

¹⁶² In several state finance cases, the comparative underfunding of certain schools, particularly those attended by children with high educational needs, has constituted sufficient proof of disparate impact. See *Montoy v. The State of Kansas*, Memorandum Decision and Preliminary Interim Order, District Court of Shawnee County, Kansas (2003). (“This disparate impact occurs by virtue of underfunding, generally, and selective underfunding of the schools where these vulnerable and/or protected children primarily attend, specifically.”)

¹⁶³ Dayton, *Correlating Expenditures and Educational Opportunity*, 167, 167 & n.4 (The author contends that courts have found that state constitutions guarantee educational opportunity, not equal expenditures. Thus, plaintiffs must demonstrate a positive correlation between expenditures and educational opportunity in order to take advantage of the constitutional provisions).

¹⁶⁴ *Hobson v. Hansen*, 269 F. Supp. 401 (1967).

¹⁶⁵ Donald L. Horowitz, *The Courts and Social Policy*, 109 (1977).

¹⁶⁶ *Hobson v. Hansen*, 269 F. Supp. at 431-42.

Specifically, the court analyzed non-compensatory funds¹⁶⁷ and per-pupil expenditures for teachers’ salaries and benefits “in precisely those situations when the policies and purposes of distribution come squarely within [the district’s] control.”¹⁶⁸ The court found that unequal expenditures resulted in unequal teacher resources, as measured by teacher experience, advanced degrees, and temporary status.¹⁶⁹ Despite finding the district’s fiscal policies to be “relatively objective and impersonal,”¹⁷⁰ the court applied strict scrutiny to the financial resource issue because the case involved a protected class of students.¹⁷¹ The school board was unable to convince the court of a compelling state interest in the unequal distribution of per-pupil expenditures, and the court held that:

if whites and Negroes, or rich and poor, are to be consigned to separate schools, pursuant to whatever policy, the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality, at least unless any inequalities are adequately justified.¹⁷²

The district was ordered to redistribute teachers to correct for salary variations,¹⁷³ but equalization of expenditures was not immediately required. Several years later, the plaintiff returned to court seeking further relief and enforcement of the decree.¹⁷⁴ After reviewing evidence of continued inequity among white and minority schools in pupil-teacher ratios, average teacher salaries, and per-pupil expenditures, the court ordered that teacher salary expenditures be equalized within five percent for all of the district’s elementary schools.¹⁷⁵

Several years later, in *Brown v. Board of Education of Chicago*¹⁷⁶, students brought an equal protection challenge based on disparities in school-level funds caused by concentrations of higher-salaried teachers in certain schools.¹⁷⁷ The court conducted two levels of analysis according to the classification of the plaintiff school children. To analyze the equity of disparities based on the wealth of school children and their families, the court employed a rational relationship test. Where race was a factor, the court applied strict scrutiny.

Under the rational relationship test, the court held that the district’s goal of keeping experienced teachers in the district justified the practice of seniority teacher transfers. However, under strict scrutiny analysis, the court held that funding disparities caused mainly by the voluntary teacher-transfer policy were “constitutionally

¹⁶⁷ The court referred to “available educational wealth,” meaning those dollars not constrained by federal or state programmatic requirements. *Hobson v. Hansen*, 269 F. Supp. 401, 75 (1967).

¹⁶⁸ *Hobson v. Hansen*, 269 F. Supp. 401, 28 (1967).

¹⁶⁹ *Hobson v. Hansen*, 269 F. Supp. at 434-36. See also Horowitz, *The Courts and Social Policy*, 113-14.

¹⁷⁰ *Hobson v. Hansen*, 269 F. Supp. at 442.

¹⁷¹ On appeal, the Court of Appeals agreed with the district court’s findings of racial bias but declined to rule whether the socio-economic discrimination was unconstitutional. *Smuck v. Hobson*, 408 F. 2d 175 (D.C. Cir. 1969).

¹⁷² *Hobson v. Hansen*, 269 F. Supp. at 496.

¹⁷³ *Hobson v. Hansen*, 269 F. Supp. at 515.

¹⁷⁴ *Hobson v. Hansen*, 327 F. Supp. 844 (D.D.C. 1971).

¹⁷⁵ *Hobson v. Hansen*, 327 F. Supp. at 863-64.

¹⁷⁶ *Brown v. Board of Education of Chicago*, 386 F. Supp. 110 (N.D. Ill. 1974).

¹⁷⁷ *Brown v. Board of Education of Chicago*, 386 F. Supp. 110, 118-19 (N.D. Ill. 1974).

unacceptable.”¹⁷⁸ Neither “administrative convenience” nor “employee desires” were found to be compelling state interests under strict scrutiny.¹⁷⁹

In *Rodriguez v. Los Angeles Unified School District*¹⁸⁰, the parents of Latino and African American students filed a complaint alleging that minority and poor students were denied equal protection of the law under the California constitution as a result of school-level disparities in general resources, instructional staff, and facilities.¹⁸¹ The plaintiffs asserted that the inequities were not educationally justified and resulted in a denial of educational opportunities for students in schools receiving fewer resources, particularly students residing in poor and minority sections of the city.¹⁸²

The plaintiffs relied on per-pupil measurements of non-compensatory funds to support their argument that the district inequitably allocated general funds across the district’s elementary schools.¹⁸³ Evidence of disparities in school facilities included overcrowding and unequal access to libraries and materials in minority schools, particularly those with year-round schedules.¹⁸⁴ Plaintiff allegations of staff disparities were supported by statistics showing that minority schools had, on average, teaching staffs with less experience, less training, and fewer credentials than those in wealthier schools, and that minority schools had much higher numbers of substitute teachers.¹⁸⁵¹⁸⁶

The court did not rule on the merits of the case because the parties, including the teachers’ union, which intervened in the case, entered into a consent decree approved by the court.¹⁸⁷ The consent decree addressed the teacher disparity through equalization of per-pupil funding, requiring schools to purchase teachers and services within the confines of an actual budget.¹⁸⁸ The decree also addressed the facilities issues by instituting a cap on school-building populations and requiring community participation in efforts to solve overcrowding.¹⁸⁹

Local Control and Other Potential Defenses to an Equal Protection Claim

A sub-district allocation case avoids the local control arguments that fueled judicial resistance in inter-district state equal protection cases.¹⁹⁰ In those cases, some state courts upheld funding inequities between districts on the grounds that localities have

¹⁷⁸ *Brown v. Board of Education of Chicago*, 386 F. Supp. 110, 125 (N.D. Ill. 1974).

¹⁷⁹ *Brown v. Board of Education of Chicago*, 386 F. Supp. 110, 125 (N.D. Ill. 1974).

¹⁸⁰ Copy of complaint prepared by ERIC Document Reproduction Service, Document No. ED342823. Complaint for Injunctive Relief and Declaratory Relief for Violations of Article I, Section 7(a) and Article IV, Section 16 of the California Constitution: State Equal Protection Guarantee Re Allocation of Educational Resources. Filed in Superior Court of the State of California, for the County of Los Angeles, August 1986. Hereinafter called “Complaint.”

¹⁸¹ Complaint, 4.

¹⁸² Complaint, 4.

¹⁸³ Complaint, 11(c) (citing district study of per-pupil expenditures by race).

¹⁸⁴ Complaint.

¹⁸⁵ Complaint.

¹⁸⁶ Complaint, 4.

¹⁸⁷ Roos, “Intradistrict Resource Disparities,” 40-52, 44.

¹⁸⁸ See Roos, “Intradistrict Resource Disparities,” 40-52, 45-6.

¹⁸⁹ See Roos, “Intradistrict Resource Disparities,” 40-52, 46.

¹⁹⁰ See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 Harv. J. Leg. 307, 328 (1991) (stating that “some variation of the local control rationale has been used by every state court that has refused to invalidate a school spending regime on equity grounds”).

the authority to determine the level at which they choose to invest in schools.¹⁹¹ But individual schools do not have the capacity to levy taxes or raise public money,¹⁹² so the government action at issue in a sub-district case is confined to the allocation of available educational resources.¹⁹³ Because the district’s division of resources among schools and students is essentially an administrative function, court involvement does not significantly infringe upon local political autonomy.¹⁹⁴

Sub-district plaintiffs would likely face another defense often used in school finance equal protection cases, the slippery slope argument. Some courts have expressed anxiety that the application of equal protection to education funding might expand into other areas of publicly provided goods, such as municipal services.¹⁹⁵ Plaintiffs advancing an equal protection theory based on the fundamental nature of education could rebut this argument by asserting that the court’s equal protection analysis is confined to rights similarly guaranteed by the state constitution.¹⁹⁶

The distinction between *de jure* and *de facto* discrimination could also be used as a defense. If teacher disparities are at issue in a case, a district might argue that funding inequities are not caused by government action, but by the individual, private decisions of teachers, and therefore, are not remediable. Plaintiffs could respond that district policies and employment contracts are structured to permit teacher allocation to be driven by staff preferences and, therefore, such a system is illegal because the U.S. Supreme Court has ruled that government policies cannot give effect to private bias.¹⁹⁷

Equity Cases Brought Under State Education Clause

Some state courts have demonstrated a reluctance to employ equal protection analysis in education cases, choosing to rely instead on state constitutional education clauses to support children’s right to equal educational opportunity.¹⁹⁸ Almost every state constitution contains language requiring the state to operate a public school system, available to all students.¹⁹⁹ Inter-district school finance cases have increasingly relied on

¹⁹¹ See, e.g., *McDanial v. Thomas*, 285 S.E.2d 156, 167 (1981); *Kukor v. Grover*, 436 N.W.2d 568, 582 n.13 (1989).

¹⁹² Individual schools often raise funds from private sources, which can create considerable inequities among schools within a district. However, equity issues regarding non-public funds are beyond the scope of this article.

¹⁹³ “Available resources” being all public funds and resources from federal, state and local sources that the district uses to provide educational, administrative and support services.

¹⁹⁴ Ferdinand P. Schoettle, *The Equal Protection Clause in Public Education*, 71 Colum. L. Rev. 1355, 1412 (1971) (“Since partition of the municipal budget has already occurred, the court (in assessing intradistrict inequalities) need not consider the entire budgetary process... Moreover, action by the court will not entail substantial interference with the political process. Most intradistrict allocation decisions are administrative in character and therefore somewhat isolated from electoral control.”).

¹⁹⁵ Enrich, *Leaving Equality Behind*, 101, 161-2.

¹⁹⁶ Cf. Enrich, *Leaving Equality Behind*, 101, 2 (noting that many courts have dismissed such arguments, possibly because state constitutions typically encompass a broad range of subjects that could be interpreted to have similar status as the right to education).

¹⁹⁷ *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁹⁸ Enrich, *Leaving Equality Behind*, 101, 166. See, e.g., *Roosevelt Elementary School v. Bishop*, 179 Ariz. 233, 877 P.2d at 811 (1994) (plurality opinion) (the court sought to avoid a laborious equal protection inquiry by focusing solely on the state constitutional education clause argument) and *Robinson I*, 303 A.2d at 283.

¹⁹⁹ Thro, *To Render Them Safe*, 1639, 1661 & n.102 (citing Mississippi as the one state without a constitutional education clause); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 814 & n. 138 (1985) (identifying Mississippi and Alabama as the states without an education clause).

education clauses, particularly in support of education adequacy.²⁰⁰ However, plaintiffs in a sub-district finance case could use a state’s education clause to argue that the inequitable allocation of resources within a district denies some students their right to an equal educational opportunity.

Equity cases grounded in education clauses must show that the state constitution demands equality in the provision of public education. These arguments rely on the interpretation of constitutional terms such as “uniform,” “efficient,” or “system” to establish a state duty to provide an equal educational opportunity to all students.²⁰¹ Many state courts have already interpreted the unique language of their education clauses,²⁰² requiring sub-district plaintiffs to tailor their arguments to the specific case law in their state.

In theory, a sub-district education clause argument has several advantages over an argument based on equal protection theory. Chief among them is the fact that courts are not constrained by the rigid doctrinal structure of equal protection analysis. As a result, a court’s ability to scrutinize district allocation practices is not dictated by the characteristics of the plaintiff class²⁰³ or by an explicit finding that education constitutes a fundamental right. Education clause cases also have the benefit of being limited in scope, and therefore do not necessarily raise the same kinds of slippery slope concerns as do equal protection cases.²⁰⁴ Finally, given the success of recent adequacy cases,²⁰⁵ courts appear willing to engage in education clause analysis.

The state-specific nature of these cases means that there is no universal test for measuring equality of educational opportunity under education clauses. Plaintiffs must refer to legal precedent in their state when deciding how to demonstrate the link between district policies and practices that result in funding disparities and inequitable educational opportunities that offend the state constitution. Many courts have found a positive correlation between expenditures and educational opportunity,²⁰⁶ but others have not.²⁰⁷ Thus, plaintiffs should consider employing a broad definition of educational opportunity that includes inputs and outputs *infra*.

²⁰⁰ Enrich, *Leaving Equality Behind*, 109 & n. 31.

²⁰¹ Enrich, *Leaving Equality Behind*, 101, 109 & n. 32 (author provides examples of cases that analyze the meaning of such terms).

²⁰² See, e.g., *Bismarck Public School Dist. No. 1*, 511 N.W.2d at 254 (analyzing North Dakota’s constitutional requirement for a “uniform system” of public schools) and *Edgewood I*, 77 S.W. 2d at 394-96 (interpreting the use of “efficient”).

²⁰³ Where courts have found that a state’s education clause establishes a right to equal educational opportunity, that right is provided to all students. See, e.g., the Montana Supreme Court’s holding in *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684, at 690 (Mont. 1989) (“We specifically conclude that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level”).

²⁰⁴ Cf. Enrich, *Leaving Equality Behind*, 101, 161-62 (noting that slippery slope concerns appear in state constitutional cases, despite the special priority given to states’ responsibility for education).

²⁰⁵ *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003).

²⁰⁶ Dayton, “Recent Litigation,” 93-119, 106 (citing AS, CA, CT, GA, KY, MD, MA, MT, NJ, NY, ND, TN, TX, WV, WY). See, e.g., *Lake View School District No. 25 v. Huckabee*, 351 Ark. 31, 32, 91 S.W.3d 472 (Ark. 2002) (actual expenditure per student is “measuring rod for equality”).

²⁰⁷ Dayton, “Recent Litigation,” 93-119, 106 (citing CO, ID, MI, PA).

CONCLUSION

A growing body of education finance research has highlighted evidence of substantial funding inequities within school districts. These sub-district resource disparities—caused largely by district budgeting and allocation practices—raise questions of fairness and equality, and can have negative consequences for student achievement. Borrowing principles from inter-district finance equity litigation, legal challenges based on state constitutional education clauses and equal protection provisions have the potential to force school districts to address sub-district finance inequities.