Follow the Money!

Fiscal Transparency within the Federal Every Student Succeeds Act and its Potential for Educational Equity

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A paper prepared for the Education Law Association Annual Meeting, November 9-11, 2017

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Overview

There is no dearth of conversations about educational equity: how much does an adequate education cost? What matters more, adequacy or equity? Where may remedies be found, in the Courts or in the legislature? It is a rare state that has not been confronted with an educational adequacy suit, and states with such suits often find that progress toward compliance is measured in decades rather than years. Yet questions of educational access, quality, and equitable outcomes persist. With the passage of the 2015 reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA), the Federal government has opened the door to the next wave of educational equity work, through two relatively obscure new requirements. State and school district compliance with these requirements, however, has the potential to unlock previously unavailable data on a hidden but critical level of financial decision making – the decisions made by local school districts in providing funds and services to individual schools. This paper provides a brief overview of equity litigation, focusing primarily on the changes in ESEA and their potential to reshape legal and other conversations around educational equity.

Background: How Public K-12 Education is Funded

Public K-12 education is in large part financed through three major funding streams: local taxes, most typically on real property; state funds, typically utilizing a per-pupil funding formula with or without adjustments for particular student needs; and federal funds, driven by legislative formula or competition.[1] These separate funding streams converge and combine at the school district level, where they are distributed to schools or used to finance services to schools.[2] Interestingly, the funding formulas by which dollars flow from district offices into schools have only rarely been the focus of litigation and remain somewhat of a "black box." Roza points out that most school district finance systems are ill-equipped to answer fundamental questions about how such financial decisions are made.[3]

The recently settled Los Angeles education finance litigation,[4] a rare case revealing the intricacies of how a school district allocates funds to specific school buildings and students, proves the rule that generally school districts have great flexibility to allocate and distribute state and local funds as they see fit, within legislatively specified parameters. Federal funds vary in the amount of distributional flexibility districts have, with the law for some specifying

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[1] See, e.g., Marguerite Roza, *Education Economics: Where do school funds go?* Urban Institute Press, 2010.

[2] See, e.g., Kacey Guin; Betheney Gross; Scott Deburgomaster; and Marguerite Roza, *Do Districts Fund Schools Fairly?* Education Next, Fall 2007, Vol. 7, No. 4.

[3] Roza, 2010.

[4] Comm. Coalit. Of So. LA v. LAUSD, Sup. Ct. CA. LA Case No. BS156259, 2017 Downloaded from https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/07/FINAL-Verified-Petition-for-Writ-of-Mandate-Compt-LAUSD-1.pdf

percentages that must go to schools, for others specifying formulas, and for still others excluding or capping certain expenditures such as administrative or indirect costs.

The Quest for Equity

The question of where education funding originates is helpful in understanding the contours of the struggle for educational equity, both in terms of funding and outcomes. This struggle has a long, robust and persistent history in the United States.[5] Some twenty years after *Brown v. Board of Education* provided African-American students with access to public schools, the first wave of educational equity litigation sought to ensure that children not only had access to an education, but that such education was adequately financed. By bringing suit under the US Constitution, the *Rodriguez* plaintiffs sought Federal protection that would have been extended to students throughout the country.[6] However, when in its 1973 decision the Supreme Court declined to find that education was a fundamental right under the equal protection clause of the fourteenth amendment foreclosed the use of the strict scrutiny test. [7,8]

Since *Rodriguez*, education finance litigation primarily has focused on state courts, with both "second wave" (equity) and "third wave" (adequacy) cases.[9,10] These cases have turned largely on the clarity and concreteness of each state's constitutional requirements and have in many cases been reduced to questions of how, and who should control, the distribution of real estate taxes as the major education funding source, with courts often turning to state legislatures – the original authors of the funding scheme at issue – for redress.

Simultaneously, education equity advocates pursued federal legislative remedies, primarily through the addition of funds on top of those provided within states. Since 1965, the Federal government has provided additional funding intended to benefit students who attend schools

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[5] See, e.g., David Hinajosa & Karolina Walters, *How Adequacy Litigation fails to fulfill the promise of Brown [But how it can get us closer].* 575 Mich. St. L. Rev., 576-632 (2014)

[6] Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[7] San Antonio ISD v. Rodriguez, 411 U.S. 1 (1973)

[8] Recently, some have called for re-visiting the Rodriguez decision. See, for example, Michael Rebell, *The Right to Comprehensive Educational Opportunity*, Harvard Civil Rights-Civil Liberties Law Review 47 (2012).

[9] See, e.g., Brian J. Nickerson & Gerard M. Deenihan, *From Equity to Adequacy: The Legal Battle for Increased State Funding of Poor School Districts in New York*, 30 Fordham Urb. L.J. 1341 (2003); Deborah A. Verstegen & Robert C. Knoeppel, *Equal Education Under the Law: School Finance Reform and the Courts*, 14 J.L. & Pol. 555, 580 (1998);R. Craig Wood & George Lange, *Selected State Education Finance Constitutional Litigation in the Context of Judicial Review*, 207 Educ. L. Rep. 1,7 (2006).

[10] This is not to say that the federal courts have had no role in education finance litigation. However, cases brought at the federal level have tended to focus on policy rather than funding per se. Examples are cases focusing on enforcement of the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701; and enforcement of the Individuals with Disabilities Education Act, 20 U.S.C. 33.

with high concentrations of poverty through the Title I of the Elementary and Secondary Education Act (ESEA). "From its inception, the primary goal of the Title I grant program has been to provide extra resources to help high-poverty schools meet the greater challenges of educating disadvantaged students to reach the same high standards that are expected for all students."[11]

Despite their similar goals and concerns, state and federal equity work proceeded separately until relatively recently. State equity cases rarely referred to federal data, concerns or resources, focusing instead on the state and local share of funding, which comprises the majority of education resources. Simultaneously, the Federal Title I program has continued to layer its resources on top of existing state and local funds, however unequal.[12] State litigation has not impacted the calculation of funds under the Federal program, and Federal Title I revenues "tend to raise the revenue estimates for the highest-poverty districts…by about 5 percentage points."[13] In short, neither state-focused litigation nor Federal programs separately have entirely succeeded, and there is substantial variation from state to state.

However, over the past three decades state and federal education have become increasingly intertwined, such that acceptance by states of federal education funding has, over time, required states to adopt high student achievement standards;[14] identify schools failing to meet those standards;[15] and most recently, ensure that such standards are ambitious.[16] Increasing federal pressure to raise student achievement has been accompanied by complaints that federal funding is inadequate to meet the requisite requirements. "State governments have been particularly vocal critics … their hostility extending in some cases past rhetoric to legislation and lawsuit aimed at the tasks the law mandates and the level of funding it provides to accomplish those tasks."[17] In the years since the 2001 reauthorization of ESEA as No Child Left Behind, this criticism has continued, as has criticism of the very involvement of the federal

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[11] *The Potential Impact of Revising the Title I Comparability Requirement to Focus on School-Level Expenditures*. A Policy Brief from the U.S. Dept. of Ed., Pol. And Prog. Studies Svs. (2011).
[12] See, e.g., Roza 2010.
[13] Bruce D. Baker, *How Much does Federal Title I funding affect Fairness in State School Finance Systems?* School Finance 101 Blog, June 29, 2019, available at http://schoolfinance101.wordpress.com/2012/06/29/how-much-does-federal-title-i-funding-affect-fairness-i-state-school-finance-systems/ .
[14] Improving America's Schools Act, P.L. 103-382, 1994.
[15] No Child Left Behind, P.L. 107-110, 2001.
[16] Every Student Succeeds Act, P.L. 114-110, 2015.
[17] Andrew Rudalevige, *Adequacy, Accountability and the Impact of "No Child Left Behind*," Paper prepared for Adequacy Lawsuits: Their Growing Impact on American Education" conference of the Program on Education Policy and Governance, John F. Kennedy School of Government, Harvard University, 2005. P. 2

government in education. Manna captures the essence of this debate in the title of his 2011 book: "Collision Course: Federal Education Policy Meets State and Local Realities."[18]

Nevertheless, federal legislation has had an increasing impact on the conversation around the adequacy of education, not only by requiring standards and assessments, but by providing common metrics for educational outcomes.[19] When NCLB was signed into law in 2002, equity advocates were hopeful that the federal law would increase their judicial successes, especially by providing judiciable standards against which to measure adequacy, a shortfall in many state cases.[20] However, while advocates experienced some successes immediately surrounding the law's passage, this record did not survive the recession of 2008 and has not recovered subsequently. Rebell notes that "As of 2016, 25 states out of 46 for which data was available were still providing less formula funding for education per student than in 2008. In seven states, the cuts exceed 10 percent."[21]

> "Overall, then, there was a dramatic pendulum swing from more than two-thirds of the final adequacy decisions favoring plaintiffs in the period from 1989 through mid-2009 to a pattern in which 53% of the final decisions and both of the pending cases favored defendants over the past eight years. Combining the results of all highest state court adequacy decisions since indicates that plaintiffs' overall percentage of final judicial rulings dropped from 69% in the period 1989-2009 to 58% of all cases from 1989 through June, 2017."[22]

Despite initial optimism, it is not clear that ESEA either in its 1994 or 2001 iterations had a significant effect on state-level equity decisions.

Federal Funding and Equity Requirements

Title I of the ESEA, funded in fiscal year 2017 at $15.5 billion, comprises the largest part of the federal commitment to K-12 education; the entire ESEA is funded at $24.5 billion[23]. [Funds for the Individuals with Disabilities Education Improvement Act, a separate law providing resources for the additional costs of educating students with disabilities, is funded in 2017 at $13.1

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[18] Paul Manna, *Collision Course. Federal Education Policy Meets State and Local Realities*. SAGE 2011.

[19] Rudalevige, 2005.

[20] Ibid.

[21] Michael A. Rebell, *Courts & Kids: Pursuing Educational Equity through the State Courts*. University of Chicago Press, 2009. Supplement 2017, downloaded from http://schoolfunding.info/wp-content/uploads/2017/07/COURTS-AND-KIDS-2017-Supplement.-07.12.17-.pdf citing Michael Leachman et al., *Most States Have Cut School Funding, and Some Continue Cutting*, (Center on Budget and Policy Priorities, 2016), retrieved from http://www.cbpp.org/research/state-budget-and-tax/most-states-have-cut-school-funding-and-some-continue-cutting

[22] Rebell, 2017.

[23] FY 2017 Congressional Action, https://www2.ed.gov/about/overview/budget/tables.html

billion.][24] Title I provides an excellent lens to examine funding equity in education because of its intended impact on equity. Title I has since its inception had the express purpose of addressing educational equity. "Title I…is the principal embodiment of the national commitment to help education economically and educationally disadvantaged children," according to Jack Jennings, a long-time Congressional staffer and federal policy expert.[25] The statement of purpose in the original law makes this eminently clear:

> "In recognition of the special educational needs of children of low-income families and the impact that concentration of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in this title) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."[26]

Additionally, because so many schools receive Title I funds, an examination of Title I necessarily includes most of the country. In school year 2010-2011, the latest year for which such data are readily available, of the 98,817 public schools, 66,646 received Title I funding.[27]

Given the size, prominence, and somewhat problematic audit history of this program,[28] Title I was, until the 2015 reauthorization, subject to three interlocking fiscal requirements, or tests. Although not expressly intended to equalize education funding, these fiscal tests were intended to ensure that federal funds were, at the very least, supplemental to existing state and local funding. These three tests are: comparability, maintenance of effort (MOE), and supplement, not supplant (SNS). While ESSA left in place both comparability and MOE, it made major changes to SNS. This change, taken together with fiscal reporting requirements in the new law, together may create optimal conditions to re-examine education funding at not only the state level, but the district level as well. Within ESSA is the possibility of using federal requirements to (1) fully link the concepts of equity and adequacy; and (2) potentially reunite the state and federal battles. It is necessary to understand these three tests as they existed prior to ESSA to fully appreciate the shifts.

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[24] Ibid.

[25] John F. Jennings, *Title I: Its Legislative History and Its Promise*. In Geoffrey D. Borman, et. Al, *Title I. Compensatory Education at the Crossroads* (2001).

[26] Elementary and Secondary Education Act of 1965, P.L. 89-10.

[27] Numbers and Types of Public Elementary and Secondary Schools from the Common Core of Data: School Year 2010-011. Downloaded from: https://nces.ed.gov/pubs2012/pesschools10/tables/table_02.asp

[28] *Is it helping poor children?* Title I of ESEA. A Report. Washington Research Project, Washington DC. NAACP Legal Defense Fund, New York. December 1969

Comparability. ESEA requires that any district, in order to be eligible to receive Federal Title I funds, must first show that it provides services to its higher poverty schools that are at least comparable to services it provides to lower poverty schools.[29] Comparability is a same-year fiscal requirement, and focuses on the distribution of resources by a school district to individual school buildings. Under ESEA, state departments of education have significant flexibility to demonstrate compliance in various ways, such as the relative equality of pupil-to-teacher ratios, spending on instructional materials, or district-wide compensation schedules.[30] Importantly, ESEA specifically forbids the use of actual school-level expenditures on staff in comparability calculations.[31] Since staffing can account for 80-85 percent of educational expenditures, this limitation is not trivial.[32]

Maintenance of Effort. ESSA further requires that any school district that receives Title I funds show that it is maintaining its fiscal effort over time.[33] MOE is a prior-year measure, and examines whether, in the aggregate, a school district is spending roughly the same amount from year to year. This additionally protects districts from the vagaries of state budget decisions; this was particularly relevant during the recent recession. "Poorer districts receive a larger share of their operating budget from state revenues, and absent MOE requirements, states would be free to significantly reduce their expenditure beyond the current 10%. Local school districts would be left on the hook to cover the state reductions."[34]

Supplement, Not Supplant. The third ESSA fiscal requirement for school districts receiving Federal Title I funds is SNS. Monitoring SNS compliance has, until 2015, required a bifurcated

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[29] Every Student Succeeds Act. P.L. 114-95, Sec. 1118 (c).

[30] *The Potential Impact of Revising the Title I Comparability Requirement to Focus on School-Level Expenditures*. A policy brief from the US Department of Education, Policy and Program Studies Service, November 2011. https://www2.ed.gov/rschstat/eval/title-i/comparability-requirement/comparability-policy-brief.pdf

[31] P.L. 114-95, Sec. 1118(c)(2)(B).

[32] Daria Hall and Natasha Ushomirsky (2010), *Close the hidden funding gaps in our schools*, Washington, DC: Education Trust; Raegen Miller (2010), *Comparable, schmomparable: Evidence of inequity in the allocation of funds for teacher salary within California's public school districts*, Washington, DC: Center for American Progress; Lindsey Luebchow, *Equitable resources in low income schools: Teacher equity and the federal Title I comparability requirement*, Washington, DC: New America Foundation (2009); Marguerite Roza, *What if we closed the Title I comparability loophole?* In *Ensuring equal opportunity in public education: How local school district funding practices hurt disadvantaged students and what federal policy can do about it*, ed. John Podesta and Cynthia Brown, 59–71, Washington, DC: Center for American Progress (2008).

[33] P.L. 114-95, Sec. 1118 (a); and Sec. 8521.

[34] *Maintenance of Effort Requirements in Title I and IDEA*. Association of Educational Service Agencies, 2014. Downloaded at: http://www.aesa.us/conferences/2014_eca_talking_points/Maintenance_of_Effort_Requirements_in_Title_I_and_IDEA.pdf

test (one test for the district, and another for schoolwide program schools, the predominant type of program funded under Title I). Although this test had become much less complex over time, the predominant understanding, particularly at the district level, remains that each Title I expenditure needs to demonstrate that it supplements, rather than supplants, local funding that would have been available in the absence of Title I funds. Perhaps the most straightforward explanation for this operation may be found in the three presumptions of supplanting used by auditors to check this requirement at the district level. Those presumptions are:

> "Presumption #1 –Required by Law. Supplanting is presumed if a state, district or school uses Title I funds to pay for something that it is required to provide under other federal, state or local laws. For example, if state law requires a school district to maintain a specific class size, the district could not use Title I funds to pay the salary of any teacher used to meet the state's class size reduction mandate.
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> "Presumption #2 –Supported Last Year. Supplanting is presumed if a state, district or school uses Title I funds to pay for something it supported last year with state or local funds. For example, if a district used state and local funds to support reading coaches one year, it could not use Title I funds to pay for those same reading coaches the next year.
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> Presumption #3 – Provided to Everyone. Supplanting is presumed if a state, district or school uses Title I funds to pay for services to Title I students if the state, district or school uses state or local funds to provide the same services to other students. For example, a district cannot use Title I funds to offer extended day schooling to Title I students if it provides the same extended day schooling to non-Title I students with state or local funds.
>
> These presumptions can be overcome (or rebutted) in certain circumstances."[35, 36]

Taken together, these three fiscal tests were intended to ensure that states and local school districts did not take away funds from schools knowing that Title I funds would be available. While it has been widely acknowledged that these tests have not had that intended positive

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[35] Junge, Melissa and Krvaric, Sheara (March 11, 2011). *An examination of how the supplement not supplant requirement can work against the policy goals of Title I*. Paper presented at Tightening Up Title I, a conference sponsored jointly by the Center for American Progress and The American Enterprise Institute.

[36] See U.S. Department of Education Non-Regulatory Guidance, Funds under Title I, Part A of the Elementary and Secondary Education Act of 1965 Made Available Under The American Recovery and Reinvestment Act of 2009, p. 29 Q&A C-11 (2010) (available at: http://www2.ed.gov/policy/gen/leg/recovery/guidance/title-i-rev-201003.doc) .

effect, they arguably have had other, unintended effects including stifling innovative uses of funding and making the program's accounting unsustainably complex. [37,38]

Absence of Public Reporting

Despite persistent concerns and adverse audit findings particularly around SNS, little empirical data has been available. State and local systems vary tremendously, and although the Federal government historically has played a pivotal role in collecting education data, it has collected only limited financial data.[39] Since 1986, the US ED has conducted the National Public Education Financial Survey (NPEFS), but this survey includes only state-level, aggregate data on the following elements:

Revenues:

- Local sources
- Intermediate sources
- State sources
- Federal sources

Expenditures:

For each function below (after fiscal year 1988) expenditures are provided for the following objects: salaries, employee benefits, purchased services, supplies and equipment:

- Instruction
- Instructional staff support services
- Pupil support services
- General administration
- School administration
- Operations and maintenance
- Student transportation
- Other support services (such as central administration and business services)
- Food services
- Enterprise operations
- Total current expenditures
- Facilities acquisition and construction expenditures

[37] Marguerite Roza and Paul Hill 2004; Nora Gordon 2004

[38] Junge and Krvaric, 2011.

[39] The ED, then under the auspices of the Health, Education and Welfare Department, began collecting educational data in 1887. The Hawkins-Stafford Education Improvement Amendments of 1988 (P.L. 100-297) established the National Cooperative Education Statistics System, a joint program of the National Center for Education Statistics of the U.S. Department of Education and the states, to improve the comparability, quality, and usefulness of data collected from states and other education entities.

- Debt service expenditures
- Non-elementary-secondary education expenditures (such as community services, adult education, private schools etc., if funded through regular locale education agencies).[40]

The most current data available from this source is from 2013-2014, making it limited not only in scope but untimely as well.[41]

In 1994, in response to continued concerns regarding equity, Congress added a fiscal effort factor into the Title I formula, but this was not funded until 2002.[42] In 1997, nearly a decade after the onset of the NPEFS, it remained the only source of such data: "Every second year, the National Center for Education Statistics, in conjunction with the Census Bureau, collects and disseminates financial data for each … [school district]. This is the only current source of expenditure data that includes all [school districts] in all states."[43] Shortly thereafter, in 2000, the ED published a report on how federal funds were spent (based on a study that involved sampling, not universal data).[44] That study, however, did not examine equity, paying more attention to fundamental questions such as "where does the money go," and "what does the money buy."[45]

Only quite recently has the Federal government required *states* to collect and report data. Congress, under the Educational Technical Assistance Act of 2002[46] created the Statewide Longitudinal Data Systems grant program, to "enhance the ability of States to efficiently and accurately manage, analyze, and use education data, including individual student records."[47] These data systems enabled states to manage the data collection and reporting required by the then-new NCLB. In 2007, the federal America COMPETES Act codified 12 "Required Elements of a P–16 Education Data System."[48] In 2009, the federal American Recovery and Reinvestment Act (ARRA)[49] required states, as a condition of receiving State Fiscal Stabilization Funds,[50] to

[40] https://nces.ed.gov/ccd/stfisinfo.asp
[41] https://nces.ed.gov/ccd/stfis.asp
[42] Riddle, 1995.
[43] Wayne C. Riddle and Liane White, Expenditures in Public School Districts: Estimates of Disparities and Analysis of Their Causes. National Center for Education Statistics (1997). Available at https://nces.ed.gov/pubs97/97535d.pdf
[44] Jay Chambers, et. al., *Study of Education Resources and Federal Funding: Final Report*. US Department of Education, 2000.
[45] Ibid.
[46] P.L. 107-279
[47] https://nces.ed.gov/programs/slds/about_SLDS.asp
[48] P.L. 110-69
[49] P.L. 111-5

[50] State Fiscal Stabilization Funds were $48.6 billion awarded by formula to help stabilize state and local government budgets in order to minimize and avoid reductions in education and

commit to building a data system consisting of these elements. States have, as a direct consequence of Federal funding, made substantial improvements to their ability to collect and use data.[51] With the introduction of these new SNS and finance reporting requirements, the Federal government has continued its steady march toward advancing the cause of data.

Despite this steady march, the leading edge of progress remains uncertain. In 2017, ED views the collection of school-level data as "experimental."[52] Currently, the ED is running a pilot School-Level Finance Survey to determine whether school-level finance data can be efficiently and effectively collected. While state participation is voluntary, only twenty states were participating as of January 2017.[53] The data to be collected under SLFS includes personnel expenditures as well as non-personnel expenditures.

What Prefaced the ESSA Changes?

Advocates have argued against the comparability provision for years, pointing at the prohibition on using actual salary data as a fatal flaw, as well as the definition in terms of services rather than actual expenditures.[54,55] MOE, with its allowed 10 percent variance from year to year, is too lax to prevent any but the most egregious reductions in expenditures. And SNS, based on using the three presumptions, has proven to be extremely hard to enforce, as school systems have been essentially responsible for both proving a negative and arguing against a hypothetical ("the absence of Title I funds"). In 2003, the Government Accountability Office reported that "state and local program officials and auditors … cited a number of factors that made it difficult to enforce the SNS provision under certain circumstances. One of the challenges auditors faced was determining whether a school district would have removed its own funds from a program and allocated them elsewhere even if federal funds had not been available--an action that is allowable. Another challenge was applying the SNS provision in circumstances where it is difficult to track federal dollars such as in schoolwide programs--

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other essential public services. See https://www2.ed.gov/policy/gen/leg/recovery/factsheet/stabilization-fund.html

[51] Data Quality Campaign, online material, https://dataqualitycampaign.org/why-education-data/state-progress/

[52] Stephen Q. Cornman et al., The School-Level Finance Survey. Powerpoint Presentation Feb. 9, 2017.

[53] Ibid. Participating states are: Alabama, Arkansas, Colorado, Florida, Georgia, Hawaii, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, New Jersey, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, and Wyoming.

[54] Robert Hanna, Max Marchitello and Catherine Brown, Comparable but Unequal. School Funding Disparities. Center for American Progress (2015). Available at: https://cdn.americanprogress.org/wp-content/uploads/2015/03/ESEAComparability-brief2.pdf

[55] US ED, 2011.

where all funds are pooled--or in districts undergoing significant districtwide reforms--where comparisons to previous budgets are problematic."[56]

While these limitations were widely acknowledged, it was difficult to gauge their impact without empirical data. In 2008, due to a provision included in ARRA,[57] ED for the first time collected actual school-level expenditure data. By any measure, these data were shocking. In proposing a new regulation to implement the 2015 ESEA reauthorization, based on these and other expenditure data, it summarized its findings as follows:

> "More than forty years after ESEA was enacted, our nation has still not achieved the law's original promise of providing *all* students with equitable access to educational resources. The vast majority of districts—more than ninety percent—already ensure that their Title I schools receive at least as much state and local funding per student as their non-Title I schools—which does not necessarily ensure adequate funding for a high-quality education for students who often need more, but is consistent with the statute. However, 3.3 million children remain in Title I schools that receive less. Currently, schools receiving Title I funds educate more than two-thirds of our low-income children and children of color, and yet approximately 5,750 Title I schools nationwide received substantially less state and local funding than their non-Title I peers *within the same district*. **On average, these Title I schools are shortchanged by about $440,000 per year, and the federal funds spent in these schools are often, in effect, being used to make up some or all of that shortfall, instead of providing the additional resources needed in high poverty schools.** In total, these schools are underfunded compared to their non-Title I peers by $2 billion in state and local funding. In part because of those disparities, but also because of further resource inequities including disparities in funding between districts and between states, our low-income students do not have the same access to rigorous and varied coursework, excellent educators, and college-level experiences that we know are necessary for them to get a fair shot and succeed in higher education or a career.[58] [Emphasis in original]

These data allowed ED to ask, for the first time, just how much the comparability requirement masked actual variations in funding. ED used the data on actual personnel and non-personnel expenditures, which it was able to collect from more than 82,000 schools in nearly 13,000 Title I districts, to examine how comparability actually operates. It wrote,

[56] *Disadvantaged Students: Fiscal Oversight Could Be Improved*. US Government Accountability Office, GAO-03-377, 2003.

[57] The American Recovery and Reinvestment Act, P.L. 115-5, included significant funds for Title I as well as other federal educational programs.

[58] *Fact Sheet: Supplement-not-Supplant under Title I of the Every Student Succeeds Act*. August 31, 2016. Downloaded from https://www.ed.gov/news/press-releases/fact-sheet-supplement-not-supplant-under-title-i-every-student-succeeds-act

> "Because comparability was defined in terms of 'services' rather than actual school-level expenditures, the statute has long allowed school districts to demonstrate comparability among Title I and non-Title I schools through a variety of proxies for such expenditures, such as a district-wide salary schedule or student-instructional staff ratios. Moreover, when districts do calculate expenditures per pupil., or instructional salaries per pupil. The current Title I statute specifically prohibits them from taking into account the higher salaries paid to more experienced teachers. Instead, districts typically use average teacher salaries in determining per-pupil expenditures, a practice that in some districts can overstate the resources allocated to high-poverty Title I schools compared to lower-poverty non-Title I schools. This is because the district-wide average salary generally exceeds the salaries actually paid to the novice teachers who are often assigned in larger numbers to high-poverty schools, but is significantly less than the actual salaries received by the more experienced teachers who may be working in a district's low-poverty schools." [59]

Among the ED's findings were:

- Within districts that had both Title I and non-Title I schools, more than 40 percent of Title I schools had lower personnel expenditures per pupil than did non-Title I schools at the same school grade level.
- More than one-third of higher-poverty schools had lower per-pupil personnel expenditures than lower-poverty schools in their districts.
- Between 39 percent to 47 percent of Title I districts had lower per-pupil expenditures in their Title I schools than in their non-Title I schools at the same grade level.[60]

As Michael Holzman summarized, "The upshot of [this study] is that those who have, get more, and those in need, get less."[61]

The Center for American Progress, based on a study of 2011-2012 data, found that 4.5 million low-income students attend inequitably funded Title I schools; that these schools receive around $1200 less per student than comparison schools in the same districts; and that if the federal comparability loophole were closed, high-poverty schools would receive around $8.5 billion in new funds each year.[62] Its report includes state-by-state results, ranging from 5 inequitably funded schools in Vermont to 1,745 in California; and from 52 percent of districts with inequitably funded schools in Nebraska to 100 percent in Vermont.[63]

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[59] US ED, 2011
[60] Ibid.
[61] Michael Holzman, *Disparities in school funding: To each according to his income*. At http://schottfoundation.org/school-funding-disparities
[62] Center for American Progress, 2015.
[63] Ibid, Tables A1 and A2.

Despite these conclusions and significant pressure from advocacy groups, Congress did not entertain changes to the comparability formula when it reauthorized the ESEA in 2015. Instead, according to a then-legislative staffer, the reauthorized law included for the first time a requirement to report actual building-level expenditures, most notably including actual staff salaries.[64] This requirement provides data without on its face mandating change. Specifically, "State and [school district] report cards must include per-pupil expenditures of Federal, State, and local funds, disaggregated by source of funds."[65] This requirement, although it may appear to be just another addition to a relatively long list of required Federal reports, has the potential to be quite revolutionary. Marguerite Roza, an education researcher noted for her work in the area of finance, wrote

> "There's a reason there hasn't been massive public pushback against the systematic mistreatment of schools with the most vulnerable students: We've never before had the clear large-scale school-by-school evidence. … Ask a district official whether the school system spends more on one school versus another and you'll hear that district accounting practices just don't record spending that way.
>
> That's all about to change.
>
> For more than a decade, the federal government has required districts to report student outcomes by school. Spending was the missing piece. The new federal ESSA rights that wrong and will require districts to account for school-by-school spending and publicly report it."[66]

Implementing this new requirement will take significant work by state education agencies and school districts, together with oversight from advocates.

Changes to SNS

Another ESSA requirement, this one changing SNS, will contribute further to the conversation regarding education finance. ESSA simplified the compliance requirements for SNS; in ESSA, Congress removed the three legal presumptions of supplanting, forbidding their use, and replaced them with another reporting requirement: "To demonstrate compliance, the [school district] shall demonstrate that the methodology used to allocate state and local funds to each

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[64] P.L. 114-95, Sec. 1111((h)(1)(C)(x).

[65] *Every Student Succeeds Act State and Local Report Cards Non-Regulatory Guidance*. US Department of Education, January 2017.

[66] Marguerite Roza, *The sunlight effect: More equitable spending on its way regardless of ruemaking*. Brown Center Chalkboard, Brookings Institution, at https://www.brookings.edu/blog/brown-center-chalkboard/2016/04/27/the-sunlight-effect-more-equitable-spending-on-its-way-regardless-of-rulemaking/

school receiving [Title I funds] ensures that the school receives all the state and local funds it would otherwise receive if it were not receiving Title I funds."[67]

Since auditors and Title I directors alike have relied on these three presumptions for many years, it is likely that the shift in reporting will precede any change in thinking. But as with the comparability reporting, making this information public will kindle conversations about why, and how, Title I funds are spent.

It is far from clear how school districts are to comply with this new mandate, and its implementation has been significantly complicated by the change of administration after the 2016 election. ESSA was signed into law in December 2015, and the Obama administration in 2016 published draft regulations specifying several methods under which states could comply. Despite the multiple calculation options provided, the regulation was criticized for violating the law's prohibition against prescribing the "specific methodology a [school district] uses to allocate state and local funds to each Title I school." These regulations were never finalized; instead, they were withdrawn in anticipation that, given the leadership change from Democrat to Republican, the Congress would repeal them under the Congressional Review Act, which was the case with other ESSA-related regulations.[68,69]

The transition to the new SNS requirements, originally scheduled for December 2016, also was delayed to December 2017 by Congress under the 2016 Omnibus Appropriations Act.[70] This transition was subsequently pushed back again by the US ED under its general "smooth transition" authority to December 2018. In 2017, nearly two years after the passage of the law and about a year before states must report this information, the US ED has promulgated little guidance and no regulations on this requirement. There are many questions to be addressed to make these calculations meaningful, and determining how to comply will require statutory interpretation, despite the fact that Senator Lamar Alexander, chairman of the Senate education committee, and Education Secretary Betsy DeVos both have indicated that the law is largely self-explanatory and interpretation is up to the states.[71] Among those questions left unanswered are the following, posed by the US ED prior to the original negotiated rulemaking for supplement, not supplant:

- "What does it mean to 'ensure that a Title I school receives all of the State and local funds it would otherwise receive if it were not receiving assistance under this part'?

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[67] PL 114-95, Sec. 1118(B)(2).

[68] Jason Amos, ESSA's "Supplement, Not Supplant," Continue to Divide Republicans and Democrats over the Use of Title I Funds, Alliance for Excellent Education (2016).

[69] See invalidated regulation 34 C.F.R. Ss. 200.30(a)(2)(ii).

[70] P.L. 114-113, Consolidated Appropriations Act, 2016.

[71] Daarel Burnett, *Sen. Lamar Alexander Tells Governors to Hold Their Ground on ESSA*, Education Week, 2016; Joy Resmovits, *Months in, Betsy DeVos still has no answers on major education issues*, LA Times, May 24, 2017.

- What does it mean to have a 'methodology for allocating State and local funds' in a district that allocates resources such as staff positions instead of dollars?
- Should there be flexibility for small schools or allow for different allocations among grade spans?
- How should the new emphasis on allocation of funds apply to State and local funds retained at the district level?
- What enforcement action must a State take if it finds that a district has not complied with the requirement? What corrective actions should the district have to take?"[72]

These lingering questions will take time to resolve. As Roza has stated, "in many places this hasn't been done. There is no sense of how much each school spends with reference to any other."[73]

Importantly, although this paper discusses these two logically related requirements together, the two requirements were not so intended by Congress and they are authorized by separate sections of the law.[74] As such, they are subject to different timelines, and while the fiscal reporting must be done publicly, the SNS methodology calculations do not fall under the category of information that must be publicly reported. However, as districts will be required to create the calculations if only to share them with state educational agencies and auditors, this information should be available through public information requests.[75]

These calculations also are subject to audit. Such audits are required under the Uniform Grant Guidance for any entity that receives more than $750,000 annually in total Federal funds (such funds in the school district's case typically involve funds under ESEA, IDEA, Medicaid, U.S. Department of Agriculture for school lunch, thereby adding up to substantial sums and subjecting a large number of school districts to Federal single audits).[76,77] As a relatively large Federal program, Title I is frequently the target of school district audits; within Title I, SNS is

[72] US Department of Education (March 2016). Supplement not Supplant Issue Paper for Negotiated Rulemaking Committee. Downloaded at:

[73] Marguerite Roza, *Financial Transparency 101, Financial Transparency Requirement in the Every Student Succeeds Act*. 2017. Webinar archived at http://www.bscpcenter.org/ftresources/

[74] Reporting requirements are found in PL 114-95, Sec. 1111(h)(2)(B)(iii); SNS requirements are in Sec. 1118(B)(2).

[75] One useful resource on public information is FOIAdvocates, http://foiadvocates.com/records.html

[76] P.L. 104-156, Single Audit Act Amendments of 1996; as incorporated into US CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.

[77] These reports are available from the Federal Audit Clearinghouse, https://harvester.census.gov/facdissem/SearchA133.aspx

generally tested.[78] Since audits are conducted for the immediately preceding fiscal year, however, audit findings lag behind the actual timeline in which implementation is required.

SNS and Fiscal Reporting Requirements

Under SNS, districts must "demonstrate the methodology used to allocate state and local funds to each school receiving [Title I funds] ensures that such school receives all of the state and local funds it would otherwise receive if it were not receiving [Title I funds]."[79]

Under the general ESSA reporting requirements, districts must report the per-pupil expenditures of Federal, State, and local funds, disaggregated by source of funds.

Taken together with additional ESSA reporting requirements, the public reporting required under ESSA has the potential to shine a light inside the district's boundaries where there is no issue, as there is in state education finance cases, of unequal property tax values. If, as is virtually guaranteed to be the case, districts are directing funds in ways that are inequitable, it will be evident in the data.

> "When the spending data are daylighted, the evidence will be clear that many districts have hardwired systematic spending inequities in their operations. In my hometown of Seattle, when the community sees that the district is sending a larger share of its state funds and locally approved levy dollars to schools with the fewest minorities, there will be a reckoning. District officials might say it wasn't intentional and only happened because teachers make different salaries amounting to $22,000 more per teacher at the northernmost high school (where poverty is relatively low) than in the district's southernmost high school (where poverty is greatest). Or they could suggest that it doesn't matter, since salaries don't equate to quality. But some groups are unlikely to accept that rationale. That's when the negotiation will happen. Similarly, in cities where the board steers funds to a subset of well-connected schools, the daylighting can trigger productive debate and change toward equity."[80]

Importantly, financial data will not stand alone, decontextualized from student outcomes. While prior versions of ESEA have required student outcome reporting, ESSA expands these requirements to encompass extensive information on the conditions for learning as well as

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[78] Those interested in how auditors intend to grapple with the new SNS requirements may wish to consult the Office of Management and Budget (OMB) Compliance Supplement, published annually in the summer.2 CFR Part 200, Appendix XI, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A133/2017/Compliance_Supplement_2017.pdf

[79] P.L. 114-95, Sec. 1118(b)(2)

[80] Roza, 2016.

academic results. Under ESSA, beginning with the 2017-18 school year,[81] each state educational agency and each school district must produce an annual report card with these information, and must disseminate the information to parents and other stakeholders as well as posted on state and school district web sites on or before December 31 for the preceding school year.[82]

The following table, modified from Federal guidance, provides the categories of state and school district report card requirements under Title I.[83] It should be clear to any proponent of educational equity (however defined) that these data will be useful to delineate differences between and among student groups, whether divided by poverty, race/ethnicity, English language proficiency, or other variables. Some information must be provided to the public in an "easily accessible and user-friendly manner that can be cross-tabulated by student subgroup. These subgroups must include, at a minimum,

- Each major racial and ethnic group;
- Gender;
- English proficiency status; and
- Status as a child with or without disabilities."[84]

Category	Applicable Statutory Reference	State Requirement	School District Requirement
Student achievement data	ESEA Sec. 1111(h)(1)(C)(ii)	Y	Y
Percentages of students assessed/not assessed	ESEA Sec. 1111(H)(1)(C)(vii)	Y	Y
Extent of use of alternate assessments for students with the most significant cognitive disabilities	ESE Sec. 1111(b)(2)(D)	Y	Y
English language proficiency of English learners	ESEA Sec. 1111(h)(1)(C)(iv)	Y	Y
Performance on other academic indicator(s) (hereafter, the	ESEA Sec. 1111(h)(1(C)(iii)(I)	Y	Y

[81] In June 2017, the ED stated that states may request to delay this requirement until 2018-2019 as long as state education agencies and school districts include the steps they are taking toward making this information available.
https://www2.ed.gov/policy/elsec/leg/essa/perpupilreqltr.pdf
[82] P.L. 114-95, Sec. 1111(h)(2)(B)(iii).
[83] Every Student Succeeds Act State and Local Report Cards Non-Regulatory Guidance, US Department of Education, 2017.
[84] US ED, 2017

Academic Progress indicator) for schools that are not high schools[85]			
High school graduation rates	ESEA Sec. 1111(h)(1)(C)(iii)(II) ESEA Sec. 8101(23), (25) and (43)	Y	Y
Postsecondary enrollment rates	ESEA Sec. 1111(h)(1)(C)(xiii)	Y	Y
Data from the Civil Rights Data Collection[86] **-measures of school quality, climate, and safety, including** ***rates of in-school suspensions** ***out of school suspensions** ***expulsions** ***school-related arrests** ***referrals to law enforcement** ***chronic absenteeism (including both excused and unexcused absences)** **-incidences of violence, including bullying and harassment** **-the number and percentage of students enrolled in** ***preschool programs** ***accelerated coursework to earn post-secondary credit while still in high school**	ESEA Sec. 1111(h)(1)(C)(viii)	Y	Y

[85] This indicator is set by each state and is required to be described in the state's ESSA plan. These plans and related documents are available online at: https://www2.ed.gov/admins/lead/account/stateplan17/statesubmission.html

[86] Federal guidance notes that this data collection is conducted pursuant to Sec. 203(c)(1) of the Department of Education Organization Act, 20 U.S.C. 3413(c)(1)

Performance on indicator(s) of school quality or student success[87]	ESEA Sec. 1111(h)(1)(C)(v)	Y	Y
Progress toward state-designed long-term goals and measurements of interim progress	ESEA Sec. 1111(h)(1)(C)(vi)	Y	Y
Educator qualifications	ESEA Sec. 1111(h)(1)(C)(ix)	Y	Y
Per-pupil expenditures	ESEA Sec. 1111(h)(1)(C)(x)	Y	Y
State performance on the National Assessment of Educational Progress	ESEA Sec. 1111(h)(1)(C)(xii)	Y	Y
Information on school improvement funds under ESEA Sec. 1003	ESEA Sec. 1003(i)	Y	N
Description and results of state accountability system	ESEA Sec. 1111(h)(1)(C)(i)	Y	Y
Additional information (optional)	ESEA Sec. 1111(h)(1)(C)(xiv)	N	N

As comprehensive as this list may seem, the withdrawn ED regulations would have added to it, notably by additionally requiring a comparison between traditional public schools and charter schools.[88]

Under NCLB, states had to report extensive data to the US ED, but these data reside in obscure, difficult to use databases,[89] and there often has been a two- to three-year delay in publishing

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[87] As with the academic progress indicator, these are set by each state and may be found in the state's ESSA plan.

[88] See invalidated regulation 34 C.F.R. Ss. 200.30(a)(2)(ii). This regulation was overturned by the Congressional Review Act. As a statement appended to the archived document states, "Under the Congressional Review Act, Congress has passed, and the President has signed, a resolution of disapproval of the accountability and State plans final regulations that were published on November 29, 2016 (81 FR 86076). The resolution of disapproval invalidates the accountability and State plan final regulations which are no longer applicable. Available at https://www2.ed.gov/policy/elsec/leg/essa/essaaccountabilitydataspnfr.pdf

[89] These data reside in each state's Consolidated State Performance Report. These reports are available online beginning with the 2005-06 school year at https://www2.ed.gov/admins/lead/account/consolidated/index.html . Another useful directory

the data. These data, in contrast, are to be distributed directly from states and districts, within six months after the close of each school year, beginning in December 2018.

Moving Forward

The mere existence of data will not, by itself, change anything. Despite the clear Congressional intent to make at least the expenditure data publicly available, states and districts have under prior reporting requirements (most notably under NCLB), failed to make information available in a way that is understandable and useful to most lay audiences.[90] Where the Obama regulations would have added specific requirements to help lay audiences both access and understand this new information, the Congressional repeal of those regulations places such responsibility back on states and school districts.[91] It will take the intervention of others, the legal community included, to both publicize and interpret these data to spark the kinds of conversations that Roza and others advocate.

The Obama administration viewed SNS as a civil rights issue:

> "For too long, the students who need the most have gotten the least," said U.S. Secretary of Education John B. King Jr. "The inequities in state and local funding that we see between schools within districts are inconsistent not only with the words 'supplement-not-supplant' but with the civil rights history of that provision and with the changes Congress made to the law last year. No single measure will erase generations of resource inequities, and there is much more work to do across states and districts to address additional resource inequities, but this is a concrete step forward to help level the playing field and ensure compliance with the law."[92]

Under the DeVos administration, civil rights concerns are now relegated to external actors.[93] But even without the regulations expressly linking SNS to civil rights, however, the ESSA requirements remain, together with their civil rights potential.

The Obama-era regulations would have required school districts to equalize funding, which was undoubtedly beyond the letter if not the spirit of the law, by requiring that "districtwide costs

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of where Federal education data can be located is here: https://www2.ed.gov/about/inits/ed/edfacts/data-links.html

[90]James Taylor et al., *State and Local Implementation of the No Child Left Behind Act, Volume IX – Accountability Under NCLB*, Final Report. US Department of Education, 2010. Available at https://www2.ed.gov/rschstat/eval/disadv/nclb-accountability/nclb-accountability-final.pdf

[91] US ED, 2017.

[92] *Fact Sheet: Supplement-not-Supplant Under Title I of the Every Student Succeeds Act*. Press Release, US Department of Education, August 31, 2016.

[93] This position has been widely reported in the press. See, for example, Katie Reilly, *'Extraordinarily Disappointed and Alarmed:' Senate Democrats Attack Betsy DeVos on Civil Rights Enforcement*, Time Magazine, June. 27, 2017.

or services must be provided to Title I schools in a manner that is at least equal to or greater than the share received by non-Title I schools."[94] This would, at best, have been a two-edged sword. While Federal mandates provide significant political cover for institutions that want to change but lack the political will or leverage to do so, those same mandates can preempt local conversations and lasting change. Experts anticipate that there will be changes in the way that data are calculated and reported over the next few years as states and districts work through the myriad issues raised by these new requirements. It can be hoped that, as was the case with graduation rates, disparities in state definitions will spark a movement toward standardized reporting. Certainly, the greater the standardization, the simpler the resulting comparative analysis.

To some extent, views on the power and potential of these new data will vary based on whether the cumulative effect of state litigation to date is viewed as having succeeded in improving the education of poor students. Researchers disagree, with the idea that it's not just dollars, but how they are used, as common refrain throughout the discussions.[95,96] It is precisely this point that researchers and other advocates will be able to examine, at a large scale, through these new Federal data. In the path that education funding takes, whether it originates in the Federal or the state budget, lies the school district. Any link between inputs and outcomes is there, in the resource distribution decisions made by individual districts (and, to some extent, schools as well). Research on specific locations has revealed that it is within a school district's power to reinforce or to thwart both Federal and state policy goals – and this is the information that is about to be laid bare in the vast majority of school districts across the nation.[97]

It is the district "black box" that masks school-level spending inequities, as Roza explains:

> Any given school in a district has an average teacher salary used for accounting and the real average teacher salary. The former does not vary from school to school because it is the mathematical average salary for all teachers in the district. The latter, however, varies tremendously from school to school because not all schools have a mix of teacher experience that mirrors the district average.

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[94] See invalidated regulation 34 C.F.R. Ss. 200.30(a)(2)(ii).

[95] See, e.g., C. Kirabo Jackson, Ruckner Johnson, and Claudia Persico, *The Effect of School Finance Reforms on the Distribution of Spending, Academic Achievement, and Adult Outcomes*. National Bureau of Economic Research, Working Oaper Nzo. 20118, May 2014 (finding that state litigation has resulted in meaningful educational improvements);
Adequacy Lawsuits: Their Growing Impact on American Education. Papers from a conference sponsored by Harvard University, available for download at https://sites.hks.harvard.edu/pepg/PDF/events/Adequacy/Adequacy_Agenda.pdf (arguing various perspectives including that such adequacy lawsuits are ill-founded and have not resulted in significant improvements).

[97] Roza, 2010

> In reporting publicly how much is spent in any given school, most districts use the accounting average teacher salary, not the real one."[98]

To the extent that this newly required reporting under ESSA allows an examination of the continuity, or discontinuity, of how Federal and state priorities play out at an individual school level, the potential for making real change exists. To the extent that such data result, through the work of both the legal and research communities, in an end to the transfer of public funds from poorer to wealthier schools, it will be revolutionary.

In the absence of Federal guidance, working groups have begun to jointly discuss the mechanics of complying with these new requirements. States vary in the extent to which they already have the capacity to do such reporting or need to build such capacity. Among these working groups are the Building State Capacity & Resource Center and one organized by the Council of Chief State School Officers.[99] Thus far, participants appear to be limited to state-level personnel, with information from district-level personnel. As these conversations continue, and especially when the first reports begin to appear by December 2019, the legal and advocacy community must become informed and move the data from reporting to the basis of the next wave of action around educational equity.

While the fiscal reporting will provide the "what," and SNS will fill in some gaps on the "how," advocates must continue to push for answers to "why" funds are distributed in the manner that they are. Numerous data sources have shown that people largely trust the schools in their own community, making it unlikely that the hard questions that these data will enable will be asked, or answered, in the absence of solid inquiry. But the existence of these data should provide ample fodder for discussion.

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[98] Roza, 2010, p. 8

[99] See, e.g., Building State Capacity & Resource Center, http://www.bscpcenter.org/aboutus/ "The Building State Capacity and Productivity Center (BSCP Center) is one of seven national content centers supported under the U.S. Department of Education's Comprehensive Centers program. The BSCP Center focuses on providing assistance to the 15 Regional Comprehensive Centers (RCCs) and state education agencies (SEAs) throughout the country to meet the daunting challenge of improving student performance with diminishing financial resources. The BSCP Center provides technical assistance to SEAs that builds their capacity to support local educational agencies (LEAs or districts) and schools, by providing high quality information, tools, and implementation support to help them shift from a "compliance-based" to a "performance-oriented" approach. The partners in the BSCP Center are Edvance Research, Inc., the Academic Development Institute, and the Edunomics Lab (Georgetown University)."