In the Eye of the Storm: West Virginia's Uniquely Clear Opportunity to Revise Its Education Funding Formula during COVID-19

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IN THE EYE OF THE STORM: WEST VIRGINIA’S UNIQUELY CLEAR OPPORTUNITY TO REVISE ITS EDUCATION FUNDING FORMULA DURING COVID-19

Lauren Trumble*

ABSTRACT

Public school advocates in West Virginia have long voiced sharp criticism over the state’s funding of education—and justifiably so. Although more than one in four West Virginia children live in poverty, the state’s school funding formula does not account for the increased costs associated with educating low-socioeconomic status (“SES”) students. As a result, low-SES students are not receiving a constitutionally adequate and equitable education, by the state’s own standards.

Now, in the wake of COVID-19, with mounting costs and challenges, allegations of “inadequacy” and “inequity” abound. If past is prologue, districts that serve high concentrations of low-SES students will be the most impacted by inevitable budget shortfalls following the pandemic and any economic downturn. As counterintuitive as it sounds, however, COVID-19 actually provides West Virginia with a unique opportunity to adopt more equitable and adequate funding formula. Indeed, the timing is, in some respects, ideal, as multiple states—including West Virginia—have used past crises to revise their funding formulas, to improve educational equity and outcomes.

To seize this opportunity, this Article proposes that West Virginia make a permanent commitment to provide additional, targeted funding for low-SES students or increased funding for districts with high concentrations of low-SES students, following a two-prong approach: First, the state should conduct an adequacy cost study to determine how much funding each district needs to provide an adequate and equitable education. Second, the state should transition

* J.D. Recipient, West Virginia University College of Law, 2021; Master of Secondary Education, West Virginia University, 2017. I owe a great amount of credit to my mom, who instilled in me a profound respect for public education through her dedicated work as an educator, and my dad, who has been a source of invaluable guidance at every stage of my legal education and career. I also want to thank Ryan Combs for being my ever-patient sounding board. And, importantly, I owe a special thanks to Joshua Weishart for developing my understanding of education law and providing extremely integral feedback on this Article throughout the writing process. Any errors are my own.
from a resource-based funding formula to either a student-based or hybrid formula.

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I. INTRODUCTION

West Virginia has one of the highest percentages of child poverty in the nation, and more than 10,000 children in West Virginia experience homelessness. West Virginia also has one of the highest rates of foster care in the country, particularly due to the opioid crisis, and West Virginia courts are struggling to process the recent surge in abuse-and-neglect cases. As a

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2 See Amelia Ferrell Knisely, Data Shows More Than 10,000 Homeless Students in WV’s Public Schools, CHARLESTON GAZETTE (July 20, 2019), https://www.wvgazettemail.com/news/education/data-shows-more-than-10-000-homeless-students-in-wvs-public-schools/article_ec86d018-c40c-575f-85b8-1f6ba68d1509.html (explaining that “in a class of 25 students, odds are that one of the children is sleeping on a family member's couch, living in a car or RV, or residing in a shelter”).

3 Legislative Foster Care Reports, W. VA. DHHR, https://dhhr.wv.gov/bcf/Reports/Pages/Legislative-Foster-Care-Reports.aspx (last visited Oct. 8, 2021) (showing an increase of 4,000 children in about five years, West Virginia now has more than 7,000 West Virginia children in the foster care system); Sarah Catherine Williams & Kristin Sepulveda, In 2017, The Rate of Children in Foster Care Rose in 39 States, CHILD TRENDS (Jan. 3, 2019), https://www.childtrends.org/blog/2017-the-number-of-children-in-foster-care-rose-in-39-states ("West Virginia had both the highest opioid overdose death rates and foster care rates."); see also Brittany Patterson, Facing Record Number of Children in System, Foster Care Families Share Experiences at Forum, W. VA. PUB. BROAD. (Aug. 28, 2019, 4:40 PM), (explaining that “the number of West Virginia children in foster and kinship care has doubled since 2015 largely due to the opioid epidemic”).

consequence of these dire realities and other factors, West Virginia has one of the highest percentages of adverse childhood experiences in the entire country.\(^5\)

Faced with these somber circumstances, public school educational advocates in West Virginia have voiced sharp criticism for the state’s funding of education for decades. Amidst teacher strikes\(^6\) and legislative proposals,\(^7\) West Virginia’s Public School Support Program, commonly referred to as the state funding formula, in particular, has become a lightning rod for condemnation. This Article focuses solely on the outrageous reality that the funding formula does not provide increased funding for low-socioeconomic status (“SES”) students or for districts with high concentrations of low-SES students.

School districts with high levels of low-SES students must spend more money in order to provide low-SES students with an equitable education.\(^8\) Yet West Virginia, a state in which a quarter of the student population is low-SES,\(^9\) does not factor this disparity into its funding formula.\(^10\) The consequences of this oversight are apparent when looking at the state standardized test data. While all districts score proficiency rates below 50%, districts with high levels of low-SES students score significantly lower than similarly populated, wealthier districts.\(^11\) This begs the question: is the legislature violating the state constitutional requirements of providing an adequate and equitable education?

Arguably yes, and it’s going to get worse because of COVID-19. Similar to how a hurricane wreaks havoc on society, COVID-19 has wreaked havoc on the public education system. In response, the federal government enacted the Coronavirus Aid, Relief and Economic Security (“CARES”) Act, which was the largest economic stimulus in United States history.\(^12\) Within the CARES Act, $13.5 billion was specifically targeted to growing concerns of the detriment COVID-19 will have on education. Later, the American Rescue Plan and other

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\(^7\) See, e.g., Kelly Allen, Several Bills Being Considered That Could Have Sweeping Impacts on Public Education Funding, W. VA. CTR. BUDGET & POL’Y (Feb. 15, 2021), https://wvpolicy.org/several-bills-being-considered-that-could-have-sweeping-impacts-on-public-education-funding-2/.

\(^8\) See infra Part II.D.1.


\(^10\) See infra Part II.D.1.

\(^11\) See infra Part III.A.2.

acts provided additional federal relief to aid education,\(^\text{13}\) in which West Virginia received $1.2 billion in total.\(^\text{14}\)

Yet, any pragmatist will readily point out that those resource expenditures cannot be sustained once the influx of federal funding runs out.\(^\text{15}\) The cessation of COVID related federal funding combined with declining student enrollment\(^\text{16}\) will inevitably result in substantial budget cuts.\(^\text{17}\) And districts with high concentrations of low-SES students will be the most impacted because they do not have the fiscal capacity to lessen the blow, which will widen the SES-related achievement gap.\(^\text{18}\)

That is what makes hurricanes tricky, though, is that one can only see clearly when in the eye of the storm.\(^\text{19}\) And that is where we are: COVID-19 gives West Virginia a unique opportunity to revise the funding formula to allocate funding for low-SES students or districts with high concentrations of

\(^{\text{13}}\) See American Rescue Plan of 2021, Pub. L. No. 117-2; see also Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182 (2020) (providing $54 billion in emergency relief funding to support fully reopening K-12 schools). Other legislation that is not yet passed will provide additional emergency relief funding for K-12 schools, such as, The Heroes Act, H.R. 6800, 116th Cong. (2020) (providing $175 billion for stabilizing K-12 schools).


\(^{\text{19}}\) Hurricane Structure, HURRICANE SCI., http://www.hurricanescience.org/science/science/hurricanestructure/ (last visited Oct. 8, 2021) ("[L]ooking up through the eye, skies may be so clear that you might see the stars at night or the sun during the day.").
low-SES students. Like the rebuilding efforts that follow a hurricane, revising the funding formula to provide for low-SES students would restore balance and improve flaws in the system, and, once the storm passes, people could come together to recover and rebuild. This can truly be a time to build back better. West Virginia should seize that opportunity.

Part II of this Article provides the legal foundation for this revision by outlining West Virginia’s legal obligation to provide a “thorough and efficient education.” Under the Supreme Court of Appeals of West Virginia’s decisions in Pauley v. Kelly and its progeny, the funding formula should direct additional funding to low-SES students. However, the current funding formula fails to account for low-SES students. Part II concludes by illustrating this issue by discussing the effect school finance has on low-SES students’ academic achievement.

Part III argues that the West Virginia legislature is not fulfilling its legal obligation to provide a constitutionally adequate and equitable education based on its own accountability standards. The end of Part III concludes that the educational disparities are going to get worse because substantial cuts are inevitable once federal funding runs out.

Part IV starts by suggesting that West Virginia take a two-prong approach to revising its funding formula. First, the state should conduct an adequacy cost study to determine how much funding each district needs to provide an adequate and equitable education. Second, the state should transition from a resource-based funding formula to either a student-based or hybrid formula. Part IV concludes by illustrating how multiple states, including West Virginia, have revised their school funding formulas during a recession. This demonstrates how amending the funding formula right now is possible and would be effective.

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20 As well as other factors. See Bruce D. Baker, Matthew Di Carlo & Mark Weber, The Adequacy and Fairness of State School Finance Systems 5, 11 (2019) https://www.schoolfinancedata.org/wp-content/uploads/2019/03/SFID_AnnualReport_2019.pdf (“Of course, poverty is not the only measurable characteristic associated with student outcomes.”). However, “census poverty [is] an imperfect but acceptable proxy” because it is correlated with other factors that influence outcomes, such as English language learners or students with disabilities. Id.


Part V discusses how, beyond legal obligations, West Virginia also has ethical obligations to amend the funding formula in order to ensure all West Virginians can be successful. Moreover, given West Virginia’s state (and stated) interest of wanting to provide a more equitable education system, the legislature should be proactive in effectuating these changes. This discussion concludes by suggesting that, absent amending the funding formula to account for low-SES students, neither West Virginia nor its constituents can flourish. Thus, rather than waiting for the deluge of disparities, West Virginia should take the opportunity to revise its funding formula now in an effort to provide a more equitable education.

II. PAULEY v. KELLY AND ITS PROGENY

West Virginia has a rich history of legal efforts seeking to make the funding formula more equitable.\(^{24}\) To better understand the current issues and proposals in this Article, it is beneficial to review that history. This Part starts with a review of the legal foundation, including standards set forth in the state supreme court’s landmark school funding case, *Pauley v. Kelly*. From there, the funding formula is explored, with particular attention to its failure to provide additional funding for low-SES students or districts with high concentrations of low-SES students and the detrimental effects thereof.

A. Pauley v. Kelly

The West Virginia Supreme Court of Appeals’ landmark case, *Pauley v. Kelly*\(^{25}\) was “born of parents’ outrage about the poor quality of their children’s schools.”\(^{26}\) In *Pauley*, the amount of state funding was not enough on its own to adequately support schools in Lincoln County, West Virginia, one of the state’s poorest and most rural counties, because its relatively low tax base.\(^{27}\) This was true despite the county’s collection of excess levies at the maximum rates for 20 years.\(^{28}\) This lack of adequate funding led to the conditions that were “woefully


\(^{25}\) *Id.*


\(^{27}\) *Id.* at 768; *Pauley v. Bailey*, No. 75-1268 (Kanawha Cnty. Cir. Ct., May 11, 1982).

\(^{28}\) *Taylor*, supra note 26, at 768. (noting that because proceeds from excess levies are not included in the funding formula, differences in the property tax bases of different districts can produce dramatically different levels of excess levy revenue). Further, it is not always politically feasible for property-poor counties to pass excess levies, which must be approved by a majority of county voters, because unemployment, poverty, and free and reduced school lunch rates are higher. *Id.* In fact, at most times ten or more West Virginia districts have no excess levy in effect. *Id.*
inadequate,"^29 "threaten[ed] the health and safety of students,"^30 and "adversely affect[ed] the ability of students to concentrate in school."^31

Ultimately, parents of students in Lincoln County brought a class action lawsuit, attacking the state funding formula for failing to equalize spending among districts.^32 The West Virginia Constitution clearly guarantees equal protection of the laws^33 and mandates the Legislature to provide "a thorough and efficient system of free schools."^34 In Pauley, the issue was whether the state's funding formula deprived students from receiving a "thorough and efficient" education, as well as violated the guarantees of equal protection of the laws because the funding formula failed to account for the disparities between districts' due to levies and special levies.^35 Ultimately, the state supreme court found that the funding formula was unconstitutional for both reasons.^36

In doing so, the court interpreted the "thorough and efficient" clause to mean that education is a fundamental constitutional right in West Virginia,^37 meaning that every student in West Virginia has a fundamental right to an adequate and equitable education.^38 The court then defined a "thorough and efficient" school system as one that "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."^39

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^29 Pauley, 255 S.E.2d at 878.

^30 Id.

^31 The Recht Decision, slip op. at 144.


^33 W. VA. CONST. art. III, §§ 10, 17.

^34 W. VA. CONST. art. XII, § 1.

^35 Pauley, 255 S.E.2d at 878; see also Joshua Weishart, The Legacy of Pauley v. Kelly (Feb. 23, 2018), https://joshuaweishart.com/the-legacy-of-pauley-v-kelly/ (discussing the chart in the decision's appendix, which shows the funding disparities caused "in large part by differences in the yield of county taxes through levies and special levies and the failure of state aid to compensate for those differences").

^36 Pauley, 255 S.E.2d at 878.

^37 Id.

^38 Id. (explaining that, because education is a fundamental constitutional right, the equal protection guarantees of Article III, Sections 10 and 17, of the West Virginia Constitution demand equitable financing of the state's educational system).

^39 Id. at 877. In illustrating this standard, the Court provided eight capacities that a child should develop through his or her education:

1. literacy;
2. ability to add, subtract, multiply and divide numbers;
3. knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance;
4. self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work to know his or her options;
5. work-training and advanced academic training as the child may intelligently choose;
6. recreational pursuits;
7. interests in all creative arts,
The Pauley court stated that a constitutionally compliant education system requires good physical facilities, instructional materials, personnel, high quality educational standards, as well as the necessary funding to provide these resources. On remand, Circuit Court Judge Recht identified the school financing system—specifically, the funding formula’s failure to assist property-poor counties—as problematic. He explained:

The state has a legal duty to provide equal educational opportunities by allocating resources to counties according to criteria substantially related to educational needs and costs. Differences in need must be incorporated into the financing structure. The State has a legal duty to insure that school systems with greater educational needs and costs receive efficient educational resources to meet those needs.

This specifies that a thorough and efficient system of schools must include both quality and equity standards, as well as allocate resources based on the needs of each school district. Thus, together, Pauley and “the Recht decision” demanded vertical equity measures, which help assure that all students receive fair educational opportunities despite independent, uncontrollable circumstances. Otherwise, “[i]f financing criteria are not related to student need, the state is not even aiming at the proper goal.”

**B. Vertical Equity Defined**

In general, “equity” is about having a fair opportunity compared to others, and fairness takes into account the factors that both negatively and positively affect that opportunity. In the education context, “vertical equity” is based on the belief that all students should have a fair opportunity to succeed

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40 Id. at 877-78.
41 Pauley v. Bailey (The Recht Decision), No. 75-1268 (Kanawha Cnty. Cir. Ct. May 11, 1982).
42 Id. at 218 (emphasis added).
43 Taylor, supra note 26, at 783.
44 See id. at 759 n.7 (“My claim in the text is that Pauley, at least when read through the lens of the Recht Decision, embraces vertical equity.”).
45 See generally Part II.B (defining and discussing vertical equity).
46 Taylor, supra note 26, at 783.
irrespective of uncontrollable circumstances, such as socioeconomic status. Thus, vertical equity measures require providing additional resources to students with additional needs in order to mitigate natural and social disadvantages. These measures are necessary because more educational resources are required to provide a constitutionally adequate and equal education to these students as is discussed below. Put simply, vertical equity attempts to ensure equitable educational outcomes by providing more equitable inputs.

The state supreme court mandated vertical equity in Pauley v. Kelly. Judge Recht explained Pauley to mean West Virginia has a legal duty to allocate resources to counties according to criteria substantially related to educational needs and costs and ensure that school systems with greater educational needs and costs receive sufficient educational resources to meet those needs. To that extent, “[e]qual means that all factors contributing to differences in curriculum needs and costs among counties... must be incorporated into the financing structure.”

Accordingly, Pauley’s interpretation of the thorough and efficient constitutional mandate “embraces substantive equality” as opposed to just formal

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48 Julie K. Underwood, School Finance Adequacy as Vertical Equity, 28 U. Mich. J.L. Reform 493, 495 (1995) (explaining that the rationale for vertical equity measures is to treat individuals differently in an attempt to mitigate innate and environmental inequalities); see also Robert Berne & Leanna Stiefel, Concepts of School Finance Equity: 1970 to the Present, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 7, 13 (Helen F. Ladd et al. eds., 1999) (“[A]ll students should have an equal chance to succeed, with actual observed success dependent on certain personal characteristics, such as motivation, desire, effort, and to some extent ability... [, and not] on circumstances outside the control of the child, such as the financial position of the family, geographic location, ethnic or racial identity, gender, and disability.”). 49 Joshua E. Weishart, Protecting a Federal Right to Educational Equality and Adequacy, in A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRATIC DEMOCRACY 303, 304 (Kimberly Jenkins Robinson ed., 2019) (explaining that vertical equity is “achieved through remedial efforts to mitigate natural and social disadvantages by allocating greater resources to the neediest students”); Underwood, supra note 48, at 495 (“Equity and fairness should dictate that the state not create educational inequities with its own hands-through its school finance mechanisms.”); William S. Koski & Rob Reich, When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters, 56 Emory L.J. 545, 553 (2006) (comparing horizontal equity and vertical equity).
50 Weishart, supra note 49, at 5; see infra Part II.D.1.
51 Id. at 3 (“Through these more equitable inputs, vertical equity measures attempt to achieve more equitable outputs.”).
52 Pauley v. Kelly, 255 S.E.2d 859, 882 (1979) (“Our ‘thorough and efficient’ constitutional mandate requires something more than a mere equality of educational funding to the counties.”).
54 Id.
equality (i.e., nondiscrimination) and "demands vertical equity in the distribution of educational opportunities." 55

C. Watered Down Remedies

After the Recht decision, the state formed a commission that developed a "Master Plan." 56 Judge Recht approved it, noting that if the legislature chose not to follow the Master Plan, the court would determine whether its approach was a "good faith implementation of the governing constitutional principles." 57 However, after ten years, the Master Plan was never implemented. 58

After some additional litigation, 59 the state passed House Bill 4306, 60 which was different than the Master Plan. This is still our current educational funding system, and it is fairly confusing. 61 To start, education funding comes mostly from state and local governments, as well as a small percentage from the federal government. 62 To determine the state and local governments' shares, we turn to the state funding formula. 63

The state funding formula is based on a "basic foundation program," which is the dollar amount of funding per pupil that the state has determined is

55 Weishart, supra note 49, at 10 (explaining that "equal protection that embraces substantive equality demands vertical equity in the distribution of educational opportunities" and, as a result, "necessitate funding for differences in regional costs and student needs and thus tend to require that disadvantaged students receive additional resources to afford them a meaningful opportunity to meet the adequacy threshold").


57 The Recht Decision, slip op. at 7.


63 See supra note 61. There are four basic sources of funding that a district receives: (1) an amount raised from local levy on real and personal property; (2) the State foundation aid, which is money the State pays out of general revenue funds to the counties based on a formula composed of seven components; (3) State supplemental benefits; and (4) amounts raised locally by special levies by vote of the people in a county.
sufficient for each district to provide an adequate education. This amount is based on expenses from previous years, as well as student population density and sparsity and a few student factors. To meet this amount, a county first contributes its “local share,” which is obtained through property tax revenue. Then, the state supplements any shortfall by the amount necessary to meet the basic foundation program. After that, districts can raise additional money via excess levies (not to exceed 50% of the maximum regular levy rates), if possible.

Although Judge Recht approved the implementation of House Bill 4306, it was not what he had envisioned. The big difference was that the accountability standards were based on educational outputs (i.e. state standardized test scores) rather than inputs (i.e. resources). This paradigm means that adequacy “only require[s] that each school district have enough funding so that all of its students could achieve a minimum qualitative threshold.” Notably, this statute does not measure equity such as flagging when a district performs vastly better or worse than others. Thus, the standard adopted circumvents the constitutional requirement for an equitable education.

64 W. VA. CODE ANN. § 18-9A-3 (West 2021) (“The total basic foundation program for the state for any year shall be the sum of the computed costs for the counties in aggregate, as hereinafter determined, for the following: (1) Allowance for professional educators; (2) Allowance for service personnel; (3) Allowance for fixed charges; (4) Allowance for transportation cost; (5) Allowance for administrative cost; (6) Allowance for other current expense and substitute employees; and (7) Allowance to improve instructional programs.”).

65 See W. VA. CODE ANN. § 18-9A-22 (West 2021) (English-language learner programs); W. VA. CODE ANN. § 18-20-1(a) (West 2021) (special education programs); W. VA. CODE ANN. § 18-5-44 (West 2021) (preschool programs). Student-based components that are considered are: (1) English language learner/bilingual education; (2) gifted and talented education; and (3) preschool education. Id. A separate statute requires the State to provide funding to districts with students with disabilities “with high cost/high acuity special needs that exceed the capacity of county to provide with funds available.” W. VA. CODE ANN. §18-20-5(a)(3)(B) (West 2021).

66 State Policy Analysis: A Detailed Look at Each State’s Funding Policies, EDBUILD, http://funded.edbuild.org/state/WV (last visited Oct. 8, 2021) (providing that “each district is expected to contribute $1.94 for every $1,000 of assessed tangible agricultural property wealth, $3.88 for every $1,000 of assessed owner-occupied property wealth, including farms, and $7.76 for every $1,000 of other assessed local property wealth”).

67 However, it is important to note that, in a few instances, local share was sufficient to meet the foundation allowance.

68 W. VA. CONST. art. X, § 1 (providing that maximum levy rates are set for each class of property, and, while an express levy may be made by a 60% vote of the people, this is limited to 50% of the maximum regular levy rates).


70 Taylor, supra note 26, at 795.

71 Weishart, supra note 49, at 5 (internal quotes and citations omitted).

72 However, the basic foundation program could be designed to account for the additional costs to educate students with more costly educational needs. See infra Part III.A
D. The Two Problems

West Virginia’s basic foundation program is deeply flawed because it “crea[tes] a limited foundation category that does not cover all basic adequacy needs” and includes “a confusing array of categorical funding streams and additional formula programs” without actually “fund[ing] the formula at an adequate level.” Indeed, a much lengthier argument could be written on all the issues with this formula. This Article will only address two: low-SES students and a lack of research-based funding.

1. Low-SES Affects Education and Funding

A long line of social science research has shown that “a very large percentage of differential academic achievement and later social inequities” results, in part, from the socioeconomic standing of students. At a base level, students need their basic life needs (e.g. clothing, food, shelter) met before they can learn. Low-SES students “suffer more from malnutrition and poor health care; lack of parental involvement and a nurturing, stimulating home environment; frequent changes of residence; and exposure to violence and drug use.” Additionally, social-emotional skills and support influence students’ academic trajectories. Thus, school psychologists and other interventions that address social-emotional supports are often necessary.

As a result, “many poor children start school with an approximately two-year disadvantage” compared to their wealthier peers. This two-year disadvantage often increases if students progress through school without receiving additional support. Combating this disadvantage requires providing

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74 Koski & Reich, supra note 49, at 609.
75 See generally Abraham H. Maslow, A Theory of Human Motivation, 50(4) PSYCH. REV. 370 (1943) (discussing how an individual must satisfy basic physiological needs before attaining higher level growth and achievement needs); see also Nina Marie Sacco, Tackling Urban Poverty in the Secondary Learning Environment, DUQ. U. 25 (2014) (discussing Maslow’s hierarchy of needs).
78 Id.
80 See id.
highly-beneficial resources that enable students to overcome SES-related circumstances and excel academically.81

Consequently, districts with high levels of low-SES students expend more money serving those students because low-SES students "need extra support and resources to succeed."82 In fact, a recent study found that, for each student, it costs three times more to achieve average outcomes in high-poverty districts than in low-poverty districts.83

Moreover, research shows that providing more funding for higher-needs students, including low-SES students, can improve their academic achievement and chance for successful life outcomes.84 More specifically, studies have shown that "when more money is spent on education for students from low-income families, achievement and graduation rates improve."85 And, researchers and educational policy organizations have a common understanding that funding formulas should provide "substantially more per-pupil resources to districts serving greater shares of children in poverty."86 As far as where to "draw the line," evidence has shown that disadvantaged students have benefited from


“unrestricted” funding increases.\textsuperscript{87} Thus, despite claims that money will not fix education,\textsuperscript{88} school finance does affect student achievement.\textsuperscript{89}

Yet, West Virginia’s funding formula does not provide increased funding for students from low-income households or increased funding for districts with high concentration of low-income students. At face value, the importance of this failure to account for low-SES students may be looked over. However, as applied, this oversight and its destructive effects on low-SES students—one in four students in West Virginia—becomes apparent.

Take, for example, Hampshire County and McDowell County. The two counties have similar populations with Hampshire County educating approximately 3,024 students and McDowell County educating about 3,063 students.\textsuperscript{90} Accordingly, the funding computations for each county is similar: Hampshire County’s basic foundation program is $18,959,731, and McDowell County’s basic foundation program is $18,258,258.\textsuperscript{91} Hampshire County’s local share contributes $6,180,427, but McDowell County’s local share is a little less at $3,787,671.\textsuperscript{92} Nevertheless, the state supplements the difference and provides Hampshire County $12,779,304 and McDowell County $14,470,587 to reach their basic foundation programs.\textsuperscript{93} At face value, this seems fair in the sense of “equality.”

However, Hampshire County has a much lower (although still significant) poverty rate of students at 20.0%; whereas McDowell County’s poverty rate is 35.4%.\textsuperscript{94} This has a tremendous impact because in order to provide the resources needed to succeed, McDowell County should (although most likely

\textsuperscript{87} Jackson et al., supra note 84.
\textsuperscript{88} See, e.g., Nick Hanauer, Better Schools Won’t Fix America, THE ATLANTIC (July 2019).
\textsuperscript{89} See generally Kirabo Jackson, Does School Spending Matter? The New Literature on an Old Question, NW. U. (2020); Corey Turner, Can More Money Fix America’s Schools?, NPR (Apr. 25, 2016); see also Michael J. Petrilli & Brandon L. Wright, America’s Mediocre Test Scores, Educ. Next 3 (Nov. 3, 2015), http://k12accountability.org/resources/At-Risk-Students/EdNext_EdCrisis_or_PovertyCrisis.pdf (explaining that low-SES makes it “difficult (if not impossible) for parents to afford the tutoring, educational games, summer camps, afterschool activities, and other educational experiences that middle-class and upper-middle-class students take for granted”).
\textsuperscript{92} Id.
\textsuperscript{93} Id.
cannot) expend more money teaching its students than Hampshire County will. Yet, despite this increase in cost, the two counties’ basic foundation programs do not account for this difference. Consequently, in practice, McDowell County has less funds to provide a constitutionally adequate education to its low-SES students, without even factoring in excess levies.

So, consider two hypothetical students: Marty McDowell and Henry Hampshire. Marty attends school in McDowell County, and his school spends money providing basic needs and school psychologists. Meanwhile, Henry attends school in Hampshire County, and his school spends its money on highly-qualified teachers. Consequently, while Henry benefits from evidence-based best practices, Marty might have an uncertified or inexperienced teacher. Thus, Henry and Marty receive vastly different educations, and Marty cannot “compete on comparable terms for admission to higher education and high-quality jobs.” Ultimately, the boys may have exceedingly different educational opportunities and experiences because the funding formula does not account for low-SES students like Marty.

2. The Funding Formula Is Not Research-Based

One might wonder why the West Virginia’s funding formula does not account for that difference. The simple answer is that the funding formula is not based on any metric designed to assess the actual cost of providing a constitutionally adequate or equitable education. Rather, the basic foundation program is “primarily based on (i) the amount spent in previous years, with adjustments perhaps made for inflation, and (ii) changes in enrollment that affect the number of personnel allowed to be funded for each district.” Thus, it “simply has not been calibrated towards the constitutional benchmarks” identified in Pauley.

This is particularly confusing considering the Supreme Court of Appeals of West Virginia’s mandate to examine the funding formula. And, in response to any separation of powers concerns, this obligation is well within the Legislature’s legal obligations. So, the fact that an adequacy cost study, which

95 Joshua E. Weishart, Equal Liberty in Proportion, 59 WM. & MARY L. REV. 215, 292 (2017) ("So, in addition to educational outcomes, courts assessing the proportionality of the margin between adequacy and vertical equity could also consider evidence of socio-economic mobility, college admissions, and patterns of racial and class segregation.").
96 Weishart, supra note 84, at 5.
97 Id.
98 See State ex rel. Bds. of Educ. of Upshur Cnty. v. Chafin, 376 S.E.2d 113, 121 (W. Va. 1988) (explicitly stating that the basic foundation program must be examined to determine whether it is “constitutionally sufficient to meet the county’s educational needs” and to determine whether the total funding received by the county is “constitutionally sufficient to meet the county’s education needs”).
99 Professor Weishart explains:
is an analysis that assesses the cost of providing an adequate education, has not been conducted is a big issue, and West Virginians should push to require the state to “focus funding on pupil needs and the costs of meeting the state’s standards.”

In the decades that have followed Pauley v. Kelly, parents are still outraged about the poor quality of their children’s schools, and commentators continue to question the legality of the funding formula. Because students already start on unequal footing, West Virginia’s funding formula, which does not provide the additional funds necessary to teach low-SES students, exacerbates the already present academic and social inequalities. And, because the financing criteria is not related to student need, “the state is not even aiming at the proper goal.”

III. THE CURRENT FUNDING FORMULA IS UNCONSTITUTIONAL

Judge Recht relinquished jurisdiction in 2003 in response to the legislature’s adoption of House Bill 4306 in 1998. However, Judge Recht warned that we would have to “wait and see how the new accountability system would play out” before making any more changes to the state funding formula.

The State of West Virginia has not conducted a rigorous adequacy cost study to answer these essential questions, despite their constitutional significance. In this respect, the Legislature and State Board of Education lack the most basic information they need to fulfill their constitutional duties. The Legislature has “an absolute and mandatory duty” to maintain a thorough and efficient education system. The State Board of Education, “charged with the general supervision of our state’s education system, has a duty to ensure that the constitutionally mandated educational goals of quality and equality are achieved.” In furtherance of those goals, “the State Board is empowered to take whatever steps are necessary to fulfill its obligation.” The State simply cannot discharge its constitutional duties to provide an adequate education without knowing how much it actually costs.


Darling-Hammond, supra note 85, at viii (“For such an approach to work well, it is important to establish the per-pupil base so that it represents the true cost associated with providing an adequate education to meet state learning standards, and to determine the weights so that they accurately reflect the costs of meeting differential pupil needs.”).

See, e.g., id.; Weishart, supra note 84; see also Taylor, supra note 26.

Weishart, supra note 84, at 5

Taylor, supra note 26, at 783.

Id. at 761.

Id. at 796.
And, if the state’s accountability system showed any deficiencies or failures, resources would have to be “targeted specifically to correct those failures.”

A few decades have been long enough to see how the system played out. The legislative measure of a “thorough and efficient education” is standardized test scores. However, an analysis of assessment achievement over the years demonstrates two things. First, the funding formula is not constitutionally adequate. Second, the funding formula is not likely constitutionally equitable. Further, the achievement gap between low-SES students and wealthier students is going to widen due to COVID-19 complications. This will require budget cuts to education funding that will be most detrimental to low-SES students, which could impose additional legal liability on the state. Accordingly, the state needs to act quickly to remedy this constitutional violation harming children in West Virginia.

A. The Current Funding Formula Is Not Constitutionally Adequate or Equitable

The Supreme Court of Appeals of West Virginia explicitly framed Pauley v. Kelly's inquiry as “whether the State has complied with its constitutional duty to provide school financing in a manner, and at a level, that is thorough and efficient.” This requires examining the funding formula to determine whether the basic foundation program is constitutionally sufficient to meet the county’s education needs. Yet, such an examination demonstrates that the funding formula is not constitutionally adequate or equitable.

1. Standardized Tests Scores Demonstrate an Inadequate Education

Adequacy measures whether the amount of funding for schools is enough for students to reach certain education outcomes. In setting its own standards, the Legislature chose to measure adequacy by outputs, primarily consisting of standardized test scores. This system currently includes the state standardized test scores, the National Assessment of Educational Progress, and various assessments administered by the National Center for Education Statistics.

However, based on the Legislature’s own performance measures, students in West Virginia are not receiving a constitutionally adequate

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109 Id.
110 See BAKER ET AL., supra note 20, at 5.
111 W. VA. CODE ANN. §§ 18-2E-5(g)-(h) (West 2021).
education.\textsuperscript{113} As shown below, West Virginia’s state standardized tests show that students’ “proficiency in math, reading, science, and social studies fell precipitously in the last decade.”\textsuperscript{114} For the 2018–2019 school year, the proficiency rates on the statewide assessment were 39% in math, 46% in reading, and 33% in science.\textsuperscript{115} This means that “less than half of West Virginia students achieve proficiency in core subjects by the state’s own assessments of its own content standards.”\textsuperscript{116} Further, fourth, eighth, and twelfth grade students scored lower than the national average in math and reading for more than ten years on the National Assessment of Education Progress.\textsuperscript{117}

One might argue that standardized tests are not a sufficient metric of student achievement.\textsuperscript{118} However, the Legislature chose, for the most part, standardized testing as the appropriate measure for what constitutes a thorough and efficient education.\textsuperscript{119} Thus, it’s fair for West Virginians to say to the legislature, “We are not holding you to our standards of what counts as an adequate education; instead, we are holding you to your standards of what counts as an adequate education.”\textsuperscript{120}

\textsuperscript{113} See Weishart, supra note 84, at 9.

\textsuperscript{114} Id.

\textsuperscript{115} State Assessment Results, W. VA. DEP’T OF EDUC., https://zoomwv.k12.wv.us/Dashboard/dashboard/7301 (access “filter data” and select date range 2018–19) (last visited Oct. 9, 2021); see also Taylor, supra note 26, at 800 (observing that “for the 2017–18 school year, the proficiency rates on statewide assessments for all West Virginia students were 45% in reading, 37% in math, and 37% in science”).

\textsuperscript{116} Weishart, supra note 84, at 9.


\textsuperscript{118} See generally Joan Ardonino, John Hollingsworth, & Silvia Ybarra, MULTIPLE MEASURES: ACCURATE WAYS TO ASSESS STUDENT ACHIEVEMENT 8 (Corwin 2000) (arguing from the premise that “one test is inadequate to serve as the sole or even primary basis for important educational decisions because dependence on one test results in the mismeasurement of ALL learning that should be taking place in schools”); see also Sean Reardon, THE WIDENING ACADEMIC ACHIEVEMENT GAP BETWEEN THE RICH AND THE POOR: NEW EVIDENCE AND POSSIBLE EXPLANATIONS (2011), https://cepa.stanford.edu/sites/default/files/reardon%20wider%20opportunity%20chapter%2005.pdf (examining standardized test scores from 12 data sets beginning in 1960 and ending in 2007 and finding that the gap in test scores between the higher income and low-income children has grown by about 40%); Natlie Wexler, What to Do About Standardized Tests, THOMAS B. FORTHAM INST. (Nov. 20, 2018), https://forthaminstute.org/national/commentary/what-do-about-standardized-tests (“Test scores are highly correlated with family income, and the gap in scores has grown along with income inequality.”).

\textsuperscript{119} See generally W. VA. CODE ANN. §§ 18-2E-5(g)–(h) (West 2021).

\textsuperscript{120} Taylor, supra note 26, at 795 (emphasis omitted).
Further, beyond the state’s own standards, West Virginia ranks among the lowest in the nation by independent research assessments. One study calculated that West Virginia is only spending about 80% of the funds necessary to provide an adequate education. Another assessment ranked West Virginia third to last in the country for students’ “chance for success” and dead last for postsecondary educational and workforce opportunities. Yet another has graded West Virginia anywhere between a D+ and a C for the last decade. Thus, student performance over a span of many years demonstrates that “[b]y most objective assessments available, overall student performance is low in both absolute and relative terms.”

2. Standardized Test Scores Indicate an Inequitable Education

While the adequacy standard “aims to combat absolute deprivation,” the equality standard “aims to combat relative deprivation.” However, because the equal protection clause of the West Virginia Constitution applies to the thorough and efficient education clause, West Virginia students’ equal right to education is “tethered” to the adequacy requirement. This requires an equitably adequate education (satisfactory compared to their peers) and an adequately equal education (reasonably similar to their peers).

Still, data indicates that West Virginia students are not receiving an equitable education. As discussed above, adequacy is evaluated, in large part, on results from the state standardized assessments. Those same scores, analyzed on a district level indicate that the funding formula does not provide for an equitable education to districts with high concentrations of low-SES students.

Below is a chart detailing student population, poverty rate, and standardized test scores for each county in West Virginia. The first column lists

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1. See, e.g., Weishart, supra note 84, at 10 (“Education Week’s annual ‘Quality Counts’ assessment paints a dire picture of the quality of West Virginia public schools on two of its metrics: chance for success and K-12 achievement.”).
2. See Baker et al., supra note 20, at 12.
4. West Virginia, REPORT CARD ON AM. EDUC., https://www.alecreportcard.org/state/wv/ (last visited Oct. 9, 2021) (based on six factors: (1) state academic standards, (2) charter schools, (3) homeschool regulation burden, (4) private school choice, (5) teacher quality and policies, and (6) digital learning).
7. Joshua E. Weishart, Reconstituting the Right to Education, 67 ALA. L. REV. 915, 975 (2016); see also Weishart, Equal Liberty in Proportion, supra note 95, at 241 (arguing that all West Virginia students should have access to an equally adequate and an adequately equal education).
8. Weishart, supra note 127; Weishart, supra note 95, at 241 (arguing that all West Virginia students should have access to an equally adequate and an adequately equal education).
the counties, and the second column provides each county’s student population. The third column shows the percentage of students living in poverty in each county. The last three columns show the percentage of students who scored “proficient” in each subject tested on West Virginia’s statewide assessment. This makes it easy to compare test scores between counties with similar student populations, while also being able to quickly reference their differences in poverty rate.

<table>
<thead>
<tr>
<th>County</th>
<th>Student Population</th>
<th>Poverty Rate</th>
<th>Math</th>
<th>Reading</th>
<th>Science</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gilmer</td>
<td>814</td>
<td>24.8</td>
<td>33</td>
<td>38</td>
<td>32</td>
</tr>
<tr>
<td>Pendleton</td>
<td>931</td>
<td>14.6</td>
<td>38</td>
<td>45</td>
<td>32</td>
</tr>
<tr>
<td>Calhoun</td>
<td>971</td>
<td>22.8</td>
<td>31</td>
<td>46</td>
<td>28</td>
</tr>
<tr>
<td>Wirt</td>
<td>1,010</td>
<td>18.7</td>
<td>37</td>
<td>38</td>
<td>30</td>
</tr>
<tr>
<td>Tucker</td>
<td>1,013</td>
<td>13.5</td>
<td>32</td>
<td>43</td>
<td>36</td>
</tr>
<tr>
<td>Pocahontas</td>
<td>1,014</td>
<td>17.5</td>
<td>36</td>
<td>40</td>
<td>33</td>
</tr>
<tr>
<td>Pleasants</td>
<td>1,102</td>
<td>13.6</td>
<td>40</td>
<td>47</td>
<td>31</td>
</tr>
<tr>
<td>Doddridge</td>
<td>1,124</td>
<td>19</td>
<td>42</td>
<td>48</td>
<td>41</td>
</tr>
<tr>
<td>Tyler</td>
<td>1,268</td>
<td>15.5</td>
<td>41</td>
<td>37</td>
<td>44</td>
</tr>
<tr>
<td>Webster</td>
<td>1,315</td>
<td>23</td>
<td>24</td>
<td>35</td>
<td>27</td>
</tr>
<tr>
<td>Ritchie</td>
<td>1,357</td>
<td>17.2</td>
<td>43</td>
<td>47</td>
<td>33</td>
</tr>
<tr>
<td>Summers</td>
<td>1,510</td>
<td>26.9</td>
<td>26</td>
<td>37</td>
<td>29</td>
</tr>
<tr>
<td>Grant</td>
<td>1,653</td>
<td>14.9</td>
<td>38</td>
<td>51</td>
<td>39</td>
</tr>
<tr>
<td>Monroe</td>
<td>1,762</td>
<td>14.9</td>
<td>37</td>
<td>43</td>
<td>29</td>
</tr>
<tr>
<td>Clay</td>
<td>1,880</td>
<td>25.1</td>
<td>34</td>
<td>46</td>
<td>33</td>
</tr>
<tr>
<td>Braxton</td>
<td>2,013</td>
<td>21.6</td>
<td>26</td>
<td>37</td>
<td>21</td>
</tr>
<tr>
<td>Roane</td>
<td>2,093</td>
<td>22.1</td>
<td>26</td>
<td>39</td>
<td>28</td>
</tr>
<tr>
<td>Morgan</td>
<td>2,329</td>
<td>10.8</td>
<td>29</td>
<td>37</td>
<td>31</td>
</tr>
<tr>
<td>Barbour</td>
<td>2,346</td>
<td>20</td>
<td>32</td>
<td>36</td>
<td>23</td>
</tr>
<tr>
<td>Hardy</td>
<td>2,370</td>
<td>12.9</td>
<td>31</td>
<td>43</td>
<td>32</td>
</tr>
<tr>
<td>Taylor</td>
<td>2,435</td>
<td>16.1</td>
<td>42</td>
<td>48</td>
<td>30</td>
</tr>
<tr>
<td>Wetzel</td>
<td>2,511</td>
<td>18.3</td>
<td>36</td>
<td>41</td>
<td>29</td>
</tr>
<tr>
<td>Lewis</td>
<td>2,581</td>
<td>17.3</td>
<td>31</td>
<td>35</td>
<td>30</td>
</tr>
<tr>
<td>Brooke</td>
<td>2,833</td>
<td>13.7</td>
<td>33</td>
<td>35</td>
<td>27</td>
</tr>
<tr>
<td>Hampshire</td>
<td>3,024</td>
<td>20</td>
<td>40</td>
<td>47</td>
<td>34</td>
</tr>
<tr>
<td>McDowell</td>
<td>3,063</td>
<td>35.4</td>
<td>22</td>
<td>34</td>
<td>19</td>
</tr>
<tr>
<td>Lincoln</td>
<td>3,413</td>
<td>23.3</td>
<td>28</td>
<td>38</td>
<td>27</td>
</tr>
</tbody>
</table>

129 Largest School Districts in West Virginia, supra note 90.
130 West Virginia Poverty Rate by County, supra note 94.
131 State Assessment Results, supra note 115 (filter results by county). “Proficient” means the students met or exceeded the standard. Id.
That much data can be overwhelming, though. Rather, the key to determining whether students are receiving an equitable education is to identify educational disparities.\textsuperscript{132} And, as shown in the chart below, some districts with high levels of low-SES students achieve significantly lower scores on standardized tests than more affluent districts with similar student populations.

\begin{tabular}{|c|c|c|c|c|c|}
\hline
County & Student Population & Poverty & Math & Reading & Science \\
\hline
Grant & 1,653 & 14.9 & 38 & 51 & 39 \\
Summers & 1,510 & 26.9 & 26 & 37 & 29 \\
\hline
\end{tabular}

\textsuperscript{132} See Weishart, \textit{supra} note 49, at 10.
This means that our friend, Henry Hampshire, scored significantly higher than our other pal, Marty McDowell. In fact, Henry scored almost double Marty’s scores in math and science. And similar comparisons can be found between Gary Grant and Samantha Summers, Randy Randolph and Harry Hancock, Owen Ohio and Lucy Logan, Jeff Jefferson and Mary Mercer, and William Wood and Carry Cabell.

These disparities in assessment achievement indicate that, while most students in West Virginia are not receiving an adequate education, low-SES students are receiving an even worse education compared to other West Virginia students—i.e., low-SES students are not receiving an equitable education. To be fair, there are many other factors that contribute to assessment achievement, and some county comparisons do not illustrate disparities based on poverty rate. Nevertheless, the county comparisons in the second chart raise some obvious red flags. These inferences are bolstered by a national review of the equity of state funding formulas that found that West Virginia’s highest-poverty districts are “underfunded vis-à-vis predicted [funding] requirements, and, their students performed accordingly.” The same report from a previous year found that West Virginia’s funding distribution “disadvantages high poverty districts.” The significance of this cannot be overstated: West Virginia has

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133 See generally Jennifer A. Heissel, Dorainne J. Levy, & Emma K. Adam, Stress, Sleep, and Performance on Standardized Tests: Understudied Pathways to the Achievement Gap, AERA Open (July 2017), https://journals.sagepub.com/doi/pdf/10.1177/2332858417713488; W.J. Popham, Why Standardized Test Scores Don’t Measure Educational Quality, 56 EDUC. LEADERSHIP 8 (1999); see also Koski & Reich, supra note 49, at 584 (stating it is a “well-known fact” that poor students tend to perform worse on standardized assessments than their wealthier peers).

134 For example, Doddridge County scored comparable or better than similarly populated counties with lower poverty rates.

135 See Baker et al., supra note 20, at 15.

been labeled as an “emergency state” regarding funding equity because it does not provide funding for student poverty or district poverty. Accordingly, evidence suggests that low-SES students are not receiving an adequate or equitable education.

IV. A UNIQUE OPPORTUNITY

Given West Virginia’s adequacy measures, the correlation between low-SES and low test scores suggests that additional resources should be dedicated to low-SES counties to improve performance. However, the funding formula provides no dedicated mechanism for low-SES students. Accordingly, the state should amend the funding formula to provide increased funding for low-SES students or districts. Additionally, the state should conduct an adequacy cost study to ensure the formula allocates the correct amount of resources to the districts that need it most. Admittedly, the idea of increasing funding amidst a global crisis—both of which risk could strain state coffers—raises understandable objections. The following Parts discuss how and why the funding formula should be updated based on an adequacy cost study. The subsequent Part then details why funding should be increased even in the midst the COVID-19 crisis.

A. An Adequacy Cost Study Should Be Conducted to Optimize the Funding Formula

Before West Virginia’s funding formula’s structure is amended, an adequacy cost study should be conducted to determine the actual cost of providing a constitutionally adequate education in each district. The “basic foundation program” determines the amount necessary to provide a constitutionally adequate education. The foundation amount should be based on “verifiable and locally appropriate data” to ensure the amount provided actually delivers adequate funding, which can only be achieved by focusing on vertical equity. Thus, an adequacy cost study is necessary to identify the funding necessary to pursue vertical equity.
An adequacy cost study is an analysis intended to answer the question, "What will it cost to provide students the necessary resources?" There are four types of adequacy cost studies, each with pros and cons: (1) the evidence-based method; (2) the professional judgment method; (3) the successful schools method; and (4) the cost function method. However, these methodologies can be and are regularly combined.

The evidence-based method determines adequacy by looking at educational inputs. It reviews published literature on effective education to determine what resources are necessary to provide research-based "best practices." The biggest challenge with this model is that the available evidence on which best practices actually work is "limited or unreliable in many areas." Thus, this method may not match a given district's wealth, size, or other needs-based characteristic.

Similarly, the professional judgment method determines adequacy by looking primarily at educational inputs. However, this model uses professional focus groups to work backwards from the desired student outcomes to determine the "goods necessary for all children to achieve those outcomes." And equity can be infused into these calculations, for example, by providing additional funding for remedial reading programs and free meals for low-income children. The state's biggest criticism of this model would be that it "tends to produce high-cost estimates of adequacy."

Conversely, the successful schools method focuses on outcome data to estimate the cost of an adequate education. This model uses statistics from districts that achieve the state outcomes standards to estimate what amount of funding is necessary to provide an adequate education. It is not surprising that this model receives criticism for relying on assumptions about "successful schools" and the associated costs, state standards as a measure of adequacy, and therefore they cannot achieve true vertical equity.

See FUNDING GUIDEBOOK, supra note 100, at 13.
Weishart, supra note 84, at 8.
Id.
Koski & Reich, supra note 49, at 567.
FUNDING GUIDEBOOK, supra note 100, at 13; Koski & Reich, supra note 49, at 567.
Koski & Reich, supra note 49, at 567.
FUNDING GUIDEBOOK, supra note 100, at 13.
Koski & Reich, supra note 49, at 567.
Id.; 911DING GUIDEBOOK, supra note 100, at 12.
Koski & Reich, supra note 49, at 568.
Id. at 567.
Id.
Id.
old statistical data.\textsuperscript{155} Moreover, recent applications of this method have used districts that are “beating the odds” given the needs of their populations, which is problematic because few schools actually “beat the odds” in the long run.\textsuperscript{156} This can lead to an incorrect determination of an adequate foundational amount.\textsuperscript{157} Still, equity could be infused in this method if it is “corrected” for the poverty levels.\textsuperscript{158}

Lastly, the cost-function method also focuses on outcome data to determine “adequacy.”\textsuperscript{159} This model uses “regression techniques to estimate the relationship between school spending, student achievement, and such data as student demographics and the relevant teacher labor market.”\textsuperscript{160} In other words, this method draws connections between data on educational spending and measures of student need, efficiency, and outcomes based on student achievement on standardized tests.\textsuperscript{161} This allows legislatures to make decisions for districts with different needs,\textsuperscript{162} but it is also criticized for relying on assumptions.\textsuperscript{163} Thus, to be effective, the legislature would need rich data that includes proper spending data and appropriate standardized tests.\textsuperscript{164}

In addition to the criticisms with each method stated above, there is also a general concern that “applying scientific methods to complex educational and funding decisions is fraught with problems.”\textsuperscript{165} Indeed, an adequacy cost study is not an exact science that provides a precise estimate.\textsuperscript{166} However, it is still a sophisticated methodology that can inform policymakers and represents a far better alternative than the current way the basic foundation program is determined. Ultimately, one of these inexact studies is better than the alternative of “doing nothing and maintaining the status quo of failure.”\textsuperscript{167} Our state Supreme Court would likely agree with this sentiment, as the \textit{Pauley} court

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 568.
\item \textsuperscript{156} See \textit{FUNDING GUIDEBOOK}, supra note 100, at 12–13.
\item \textsuperscript{157} See \textit{id.} at 13.
\item \textsuperscript{158} Koski & Reich, supra note 49, at 568.
\item \textsuperscript{159} \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} See \textit{FUNDING GUIDEBOOK}, supra note 100, at 13.
\item \textsuperscript{162} Koski & Reich, supra note 49, at 568.
\item \textsuperscript{163} \textit{Id.}
\item \textsuperscript{164} See \textit{FUNDING GUIDEBOOK}, supra note 100, at 13.
\item \textsuperscript{165} \textbf{ERIC A. HANUSHEK & ALFRED A. LINDSETH}, \textit{SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA’S PUBLIC SCHOOLS} 171 (Princeton Univ. Press 2009).
\item \textsuperscript{166} See \textit{FUNDING GUIDEBOOK}, supra note 100, at 12.
\end{itemize}
\end{footnotesize}
reminded us that, "patriots of this State were never afflicted with an Appalachian mentality that finds nobility in ignorance."  

B. West Virginia Should Revise the Funding Formula to Account for Low-SES Student

There are three main types of state funding formulas: Student-based, resource-based, and program-based. A student-based formula determines a dollar amount to educate a student without any additional educational needs, allocates resources based on the number of students at each school, and directs extra funding for students with more expensive educational needs. A resource-based formula assesses the per-pupil cost of specific resources and inputs, mainly staffing positions, and allocates funding based on each district's total student enrollment. A program-based formula does not use a base amount or direct resources based on needs; rather, limited-use funds are allocated for particular programs, such as career and technical education programs.

Currently, West Virginia uses a primarily resource-based funding formula that does not use a base per-student amount as the basis for its funding. However, contemporary research supports student-based formulas that account for and provide additional funding for students with more needs. In this regard, West Virginia can learn from two of its neighbors, Maryland and Virginia.

1. West Virginia Could Mirror Maryland's Student-Based Formula

One possibility is for West Virginia to amend its resource-based formula to a student-based formula, like Maryland. Rather than assigning a standard dollar amount per student, Maryland's formula allocates funding based on differentiated student need. Specifically, Maryland determines the base amount needed to educate a student with no special needs or services. Then, it provides additional funding for specific categories of students, like low-SES

\[168\] Pauley v. Kelly, 255 S.E.2d 859, 884 n.44 (W. Va. 1979) (internal quotations and citations omitted).
\[171\] Key Elements of Funding, supra note 169; Funding Guidebook, supra note 100, at 15-17; Aaron Smith, Christian Barnard, & Satya Marar, Modernizing School Finance in Idaho, REASON (Jan. 11, 2021), https://reason.org/policy-brief/modernizing-school-finance-in-idaho/.
\[172\] Key Elements of Funding, supra note 169; Funding Guidebook, supra note 100, at 15-17.
\[174\] Koski, supra note 167, at 927.
\[176\] See Weishart, supra note 84, at 10.
\[177\] Maryland, supra note 175.
students.\textsuperscript{178} In other words, Maryland accounts for factors that affect the cost of educating individual students.\textsuperscript{179} This “equalize[s] funding based on a district’s wealth and target[s] more funding to high-need student groups.”\textsuperscript{180} Truly, Maryland’s student performance on the National Assessment of Educational Progress has increased dramatically in reading and math, with reduced low-SES related achievement gaps, since this funding formula was adopted.\textsuperscript{181}

The effectiveness of a student-based formula depends on the components included in the formula.\textsuperscript{182} The selection of components should come as a result of a “formalized process,” as discussed \textit{supra} Part III.A, of analyzing data to determine the particular needs of students in the state.\textsuperscript{183} It is true that West Virginia’s formula considers several student-based components.\textsuperscript{184} However, it does not consider child poverty, which “is a dominant factor in determining the costs of providing children with equal opportunity to achieve common outcome goals.”\textsuperscript{185} Thus, as shown below, 25 of the 37 states that use a student-based formula provide increased funding for low-SES students, with 13 giving higher multipliers for districts with high levels of low-SES students.\textsuperscript{186}

\textsuperscript{178} Id. (including English-language learners and students with disabilities).

\textsuperscript{179} See \textsc{Hanushek} & \textsc{Lindseth}, \textit{supra} note 165, at 25–54 (explaining that this “link[s] funding to individual students, with extra funding provided based on ‘environmental factors,’ including students “with economic disadvantages”).

\textsuperscript{180} Griffith et al., \textit{supra} note 17, at 104.

\textsuperscript{181} Id. The funding reform also coincided with new learning standards, eventually leading to comprehensive yearly master plans that describe “the goals, objectives, and strategies that will be used to improve student achievement,” and increased the number of students meeting state and local performance standards. \textit{Id}.

\textsuperscript{182} \textsc{Funding Guidebook}, \textit{supra} note 100, at 9.

\textsuperscript{183} \textit{Id}. at 15.

\textsuperscript{184} See \textit{State of West Virginia}, \textit{supra} note 61 (providing student-based components considered: (1) English language learner/bilingual education; (2) gifted and talented education; and (3) preschool education).

\textsuperscript{185} See \textsc{Baker} & \textsc{Di Carlo}, \textit{supra} note 86, at 7 (emphasis added).

\textsuperscript{186} \textsc{Funding Guidebook}, \textit{supra} note 100, at 16; cf. \textsc{Cong. Rsch. Serv.}, \textsc{State and Local Financing of Public Schools} 10–11 (Aug. 26, 2019), https://fas.org/sgp/crs/misc/R45827.pdf (citing two studies that, respectively, indicate that 35 out of 42 and 22 out of 32 states that use weighted formulas provide additional funding for low-SES students).
This is a viable option for West Virginia, as West Virginia’s formula already considers certain factors, such as English language learners. Moreover, the state measures adequacy based on performance on standardized tests, and, as mentioned above, performance improvements among differently situated students require differing levels of resources. Thus, adequacy can only be achieved by focusing on vertical equity, and West Virginia would benefit from adopting a student-based formula.

2. West Virginia Could Mimic Virginia’s Hybrid Formula

Another option is for West Virginia to amend its resource-based formula to a hybrid resource- and student-based formula, like Virginia. Like Maryland, Virginia first determines the “base amount” of delivering education to a student with no special needs or services. Then, it provides additional funding for specific categories of students, like low-SES students, depending on the concentration within a district. And, unlike West Virginia, Virginia’s fourth, eighth, and twelfth grade students scored higher than the national average in math and reading for more a decade on the National Assessment of Education Progress, with improved performance almost every year. This type of funding

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187 Weishart, supra note 82, at 373; Weishart, supra note 95, at 239 (stating “adequacy is vertical equity by a different name”).


189 Id. And, importantly, it determines that base amount from a resource-driven perspective, rather than just assign it as Maryland does.

190 Id. (applying a multiplier of between 1.01 and 1.13 to the base amount for each low-income student, with the specific multiplier depending on the concentration of low-income students in the district).

A hybrid resource- and student-based funding formula could work well in West Virginia. In fact, a hybrid formula could be incorporated into the current resource-based funding formula instead of starting from scratch because the current funding formula, which is primarily resource-based, has a degree of student-based funding for certain categories of students. For example, a district receives a flat per-district and flat per-pupil amount for each English language learner. Thus, other categories of students, such as low-SES, could be accounted for in a similar manner.

So, what would this mean for Marty McDowell? Simply put, it would increase the basic foundation formula. If the funding formula accounted for the fact Marty’s school needs funding and other resources to provide basic needs and school psychologists, the basic foundation program would be higher. Then, like his friend Henry Hampshire, Marty could also benefit from highly-qualified teachers, and his academic achievement and post-education opportunities could improve dramatically.

sub=MAT&sj=VA&fs=Grade&st=MN&year=2019R3&sg=Gender%3A+Male+vs.+Female&sg v=Difference&ts=Single+Year&sfj=NP (last visited Oct. 9, 2021). However, this author acknowledges that Virginia is a wealthier, more educated state, which likely contributes to the difference in standardized test scores.

See BAKER & Di CARLO, supra note 86, at 8.

See Weishart, supra note 84, at 12.

West Virginia, supra note 173.
3. West Virginia Should Not Adopt a Program-Based Formula

A third option is a program-based formula, which calculates the necessary funding to provide particular programs, such as career and technical education, without using either a base amount or calculations focused on resource needs.\textsuperscript{195} However, this would not be a good option for West Virginia because it is difficult to effectively provide funding based on poverty when many of the school districts have similar poverty rates.\textsuperscript{196} And, as shown below, West Virginia’s economic segregation index is very low.\textsuperscript{197} Accordingly, although program-based allocations can be included in a hybrid formula, a strict program-based formula is not a good option for West Virginia.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{progressivity_of_state_funding}
\caption{Progressivity of state funding}
\end{figure}

\textsuperscript{195} \textit{Funding Guidebook}, supra note 100, at 5. Currently, Wisconsin is the only state in the United States that uses a strict program-based formula. See \textit{National Policy Maps}, EdBUILD, http://funded.edbuild.org/national#formula-type (last visited Oct. 9, 2021).

\textsuperscript{196} \textsc{Matthew M. Chingos \& Kristin Blagg}, \textsc{Do Poor Kids Get Their Fair Share of School Funding?} (2017), https://www.urban.org/sites/default/files/publication/90586/school_funding_brief.pdf; \textit{see also} Darling-Hammond, supra note 85, at 24 (urging states to “develop a reliable base of funding without a bevy of categorical programs that come and go” because this “potpourri of start-up, wind-down programs” is wasteful).

\textsuperscript{197} Chingos \& Blagg, supra note 196, at 13.
Ultimately, the legislature, in consultation with the State Board of Education, is in the best position to decide which model to employ. What is important is that West Virginia chooses a formula type that specifically targets low-SES and/or distributes additional funding to districts based on concentration of low-SES students. Therefore, West Virginia should adopt a student-based or a hybrid resource- and student-based formula.

C. West Virginia Should Do It Now—In the Eye of the Storm

How can we expect the legislature to revise an already underfunded formula in the midst of a global pandemic and economic recession? Actually, the timing is optimal for four reasons: (1) there is currently an influx of federal aid; (2) scarcity is the mother of invention; (3) West Virginia is probably going to revise its formula anyway; and (4) it has been done before. The first three reasons will be discussed in the next Part because they have a certain degree of overlap, and the fourth reason will be discussed in detail in the Part after.

1. Long-Term Change Is Better than Short-Term Workarounds

As previously discussed, the CARES Act allocated $13.5 billion to states to bolster their education systems. States allocated 90% of that funding to districts based on the number of students in poverty, but they have flexibility on how to target the remaining 10% of funding they retain. Because of this, along with other provisions of the CARES Act and other federal relief, West Virginia has more federal funding available now than ever before.

198 Weishart, supra note 82, at 386 (“The legislature, executive agencies, and school boards are better equipped to make specific remedial decisions and more politically accountable when they do.”).
199 See Koski & Reich, supra note 49, at 562–63.
201 Id.
But, as aforementioned, these funds are going to run out.\textsuperscript{205} Even conservative estimates suggest that states will need between $200-300 billion to stabilize education budgets following COVID-19.\textsuperscript{206} So, this federal funding is not enough to cover the cost of what schools will need to operate in the upcoming school years, especially after budget cuts.\textsuperscript{207} And, this lack of funding paired with budget cuts will disproportionately hurt higher-poverty districts who depended on state revenue.\textsuperscript{208}

That is the scarcity element. So, where is our mother of invention? Why would we amend the formula now considering the short-term availability of federal funds?

The answer is simple: states can lessen the blow and dramatically increase the equitable allocation of resources by adopting more equitable funding formulas \textit{now}.\textsuperscript{209} Why now? Because research shows that additional funding can make a difference. In fact, in a recent study, it is predicted that “a policy that increases per-pupil spending $1000 for at least four years will lead to positive test-score impacts over 91 percent of the time, and positive educational attainment impacts more than 92 percent of the time.”\textsuperscript{210}

West Virginia should use the funding it has to effectuate long-term change instead of just short-term workarounds because short-term changes are just that: short term. For example, following the Great Recession, many states spent money on short-term changes that could not be sustained after the federal funding ran out due to economic conditions and state imposed tax cuts.\textsuperscript{211} Thus, “more than five years of economic recovery [was] partially squandered.”\textsuperscript{212} And, “[w]ithout a determined effort to produce a different outcome, funding cuts made
to education now could be as long-lasting as they were during and after the Great
Recession.213

Long-term changes are especially necessary now because COVID-19 will be even more challenging in terms of school financing than the Great
Recession. This is due to the fact that most states (including West Virginia) allocate funding to school districts based on expenses from previous years and
student population.214 However, the 2021–22 school year measures will not be
accurate because of the increase of students who were homeschooled, transferred
to private schools, etc. during COVID-19.215 This uncertainty about student
population will negatively affect the funding allocated to districts with high-concentrations of low-SES students, which cannot likely compensate with local
tax boosts.216 This will augment the problem that these high-poverty districts
were not receiving adequate funding even before COVID-19 hit.217

Conversely, long term changes can prepare states for what schools will
require in the years to come.218 Researchers and advocates are adamant that one
necessary change is to revise state formulas that do not equalize for local capacity
or target according to student needs.219 This is necessary for two reasons. First,
equitable and adequate funding is “a prerequisite condition for providing a high-
quality . . . education system.”220 Second, having more progressive funding, with
higher-poverty districts receiving more funding than lower-poverty districts, can
lessen the impact of “inevitable” budget cuts and harsh economic conditions.221
Thus, West Virginia should use its influx of federal funding to stabilize and fill
in the gaps of the current funding formula.

Ultimately, whether it is a good time or not, West Virginia is likely going
to revise its formula as a result of the challenges emerging from COVID-19

213 Griffith et al., supra note 17, at 98; see also BAKER & DI CARLO, supra note 86, at 8
(illustrating how many states, including West Virginia, have still not economically recovered from
the Great Recession).
215 Id.
216 Id.; see also BAKER & DI CARLO, supra note 86, at 22.
217 See id.
218 See, e.g., Griffith et al., supra note 17; see id.
219 See, e.g., BAKER & DI CARLO, supra note 86, at 3; Griffith et al., supra note 17; Heather J.
Hough et al., Lead with Equity: What California's Leaders Must Do Next to Advance Student
equity (arguing that state leaders must adopt new policies and ensure adequate monitoring, support,
and resources, all with deep attention to equity); Michael A. DiNapoli, Making School Budgets
Whole and Equitable During and After COVID-19, LEARNING POL’Y INST. (July 17, 2020),
https://learningpolicyinstitute.org/blog/covid-making-school-budgets-whole-and-equitable
(arguing that funding needs channeled “into proven strategies that close long-standing gaps in
opportunity and increase student achievement” during COVID-19).
220 BAKER & DI CARLO, supra note 86, at 5.
221 Id. at 3.
anyway.\textsuperscript{222} While it is unlikely that this reform will benefit low-SES students, West Virginia \textit{could} mitigate the looming fiscal crisis’s effects by distributing state aid more equitably.\textsuperscript{223} The need has never been direr, either, as significant financial consequences for public school funding loom in the aftermath of the Legislature’s recent authorization of the most expansive voucher program in the country and expansive charter school authorization.\textsuperscript{224}

2. It’s All Been Done Before

History—including West Virginia’s history—has shown us that it is possible to adopt a more equitable funding formula in the middle of a recession. First, Rhode Island and California amended their funding formulas following the Great Recession. Second, Maryland and West Virginia amended their funding formulas during the economic downturn following 9/11. Each is discussed in turn.

To start, like COVID-19, the Great Recession was disastrous for education funding in the United States. Similar to the CARES Act, the federal government provided funds to support states through the American Recovery and Reinvestment Act, which included the State Fiscal Stabilization Fund.\textsuperscript{225} Nevertheless, budget cuts were inevitable, and the average state and local education funding to districts dropped by about 6\%.\textsuperscript{226} Some states exacerbated the problem by providing the same funding to districts regardless of their poverty levels.\textsuperscript{227}

But Rhode Island and California took proactive measures and revised their school funding formulas.\textsuperscript{228} Rhode Island adopted a new school funding formula without any additional funding initially, but slowly distributed funding as it became available.\textsuperscript{229} As a result, students in fourth through eighth grade improved to above the national average in reading achievement.\textsuperscript{230} Similarly, California adopted a new funding formula that provided additional funds for

\textsuperscript{222} Griffith et al., \textit{supra} note 17, at 103.


\textsuperscript{225} BAKER & Di CARLO, \textit{supra} note 86, at 8.

\textsuperscript{226} \textit{Id.} at 1.

\textsuperscript{227} \textit{Id.} at 2.

\textsuperscript{228} Griffith et al., \textit{supra} note 17, at 104.

\textsuperscript{229} \textit{Id.}

\textsuperscript{230} \textit{Id.}
certain categories of students, including low-SES students. Within only a few years, all students improved from 48th and 49th in reading and math, respectively, on the National Assessment of Educational Progress, to "near the national average in reading and halfway to the national average in math." Years before, Maryland adopted the funding formula discussed above in the economic fallout following 9/11. Over the next decade, student performance on the National Assessment of Educational Progress increased dramatically in reading and math, with reduced achievement gaps. Likewise, West Virginia reformed its formula during the same time to include preschool in the formula.

The chart below shows that these changes to the funding formulas in Rhode Island, California, and Maryland have "all led to increased equity in their education finance systems over time." And, as far as West Virginia is concerned, it is considered a leader in Pre-K access as its Universal Pre-K Program ranks among the top in the nation.

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231 Id. Additional funding was provided for "each English learner, student in foster care, and student from a low-income family," as well as established "concentration" grants for districts with enrollments of "more than 55% English learners, students in foster care, and students from low-income families." Students who meet more than one eligibility criteria are only counted once. Id. at 105.

232 See id. at 105. Although it is important to note that the funding reform coincided with "the state's implementation of the Common Core State Standards and Next Generation Science Standards, implementation of the Smarter Balanced Assessment System, and development of new educator preparation and licensure standards to support the more rigorous academic goals."

233 Id. at 104.

234 Id. Although the funding reform also coincided with new learning standards, eventually leading to comprehensive yearly master plans that describe "the goals, objectives, and strategies that will be used to improve student achievement," and increased the number of students meeting state and local performance standards. Id.

235 Id. at 106. In addition, West Virginia amended its funding formula following the Recht decision, when the state was also in a recession. See Sirkin, supra note 31.

236 Griffith et al., supra note 17, at 106.

Although there are instinctive questions of feasibility due to the current COVID-19 crisis, multiple states have revised their school funding formulas during previous recessions. An illustration of these reforms demonstrates not only that amending the funding formula right now is possible, but that it would also be effective in providing a more equitable education system.

D. It Is Possible to Amend the Funding Formula Despite West Virginia’s Specific Challenges

The previous Part detailed why it is possible for any state to amend its education funding formula during a recession. However, West Virginia has specific challenges that other states may not. Notably, there are concerns that West Virginia lacks fiscal capacity and may even eliminate the state income tax, both of which could potentially make amending the funding formula more difficult. Nevertheless, it is still possible for West Virginia to amend the funding formula despite these specific challenges. First, arguments of these types of economic challenges are not necessarily new and have been overcome in the past. Second, West Virginia has the capability to enact the specific policy reforms necessary to withstand these economic challenges.

238 See Robert A. Schapiro, States of Inequality: Fiscal Federalism, Unequal States, and Unequal People, 108 CAL. L. REV. (2020), https://www.californialawreview.org/print/fiscal-federalism-unequal-states/ (discussing how West Virginia “had to use a higher percentage of their taxable resources to raise smaller amounts of money” compared to other states).

1. Similar Tax and Fiscal Capacity Challenges Were Present During Past Educational Reforms in West Virginia

To start, the argument of economic impossibility is not new to West Virginia. After *Pauley v. Kelly* and the *Recht* decisions mandated that the legislature “completely reconstruct the entire system of education,” there were laments of impossibility.240 One newspaper even predicted that West Virginia taxpayers would replace the entire judiciary and legislature before the *Recht* decision would be implemented.241 Later, the legislature again voiced concerns about the cost of adding preschool to the funding formula in 2002 during a recession.242

Further, the current economic challenges in West Virginia are not unlike those present when *Pauley v. Kelly* and the *Recht* decisions came down. Like our current situation, there were tax concerns, as the state tax commissioner estimated that implementing the *Recht* decision would cause property taxes to rise by 500%.243 Also, like our current situation, there was a recession. The state superintendent of schools said the *Recht* decision “hit at the worst possible time,” as West Virginia was in the middle of a depression, with 20% of people unemployed—the highest unemployment rate in the nation at that time.244 Nevertheless, House Bill 4306 was implemented following the *Recht* decision.245 And, years later, policymakers were also able to include preschool in the funding formula, which proved extremely successful.246 Thus, economic arguments that the timing is bad or that West Virginia does not have the funding have always been present, but, inevitably, the state has proven its ability to persevere.

2. West Virginia Has the Capability to Enact the Specific Policy Reforms Necessary to Overcome These Economic Challenges

Although West Virginia has repeatedly withstood economic obstacles to reform the educational policy, it cannot be ignored that reforming a state’s educational funding formula is a particularly challenging task.247 However, a
well-designed public policy can prevail over this highly-politicized issue, and West Virginia is in line to satisfy all the necessary requirements.

Rhode Island is a prime example of the power of public policy, as it enacted a school funding reform—without a judicial mandate—during a recession in 2010, as discussed above. Four key factors contributed to the state’s success: effective leadership, independent analysis, focus on educational purpose, and accountability and transparency. First, the state commissioner and board of education stepped up and gained gubernatorial, legislative, and stakeholder support for the funding reform. Second, years of political cynicism were toppled by sound policy paired with independent, empirical analysis. Third, funding was allocated based on local fiscal capacity and concentrated poverty, including additional support for low-income students with high needs. Fourth, the formula included data transparency measures so the public and stakeholders could access and compare spending decisions across schools and districts, which met the public demand for school accountability. These factors created a “partnership of trust, data transparency, and coordinated communication” between state actors, which overcame “seemingly insurmountable political and economic challenges.”

Thus, Rhode Island’s reform demonstrates that enacting or amending a funding formula is possible “even in a challenging fiscal climate.”

Importantly, West Virginia, like Rhode Island, has all the tools necessary to enact a sound public policy to reform the funding formula. Starting backwards, West Virginia already has data transparency measures in place to meet public demands for school accountability. Additionally, as discussed above, the next two measures—conducting an empirical analysis (i.e., an adequacy cost study) and directing funding to concentrated poverty districts and/or low-SES students—can be implemented. Consequently, the only question is whether West Virginia officials will support reforming the funding formula.

\[...\]
Thus, it is possible for West Virginia to revise the funding formula in the face of COVID-19 and other economic challenges.

V. WHY WOULD WEST VIRGINIA BOTHER?

Not to rain on the parade, but, as any legal scholar knows, just because something is possible, does not mean it is probable.259 Similarly, the existence of a law or legal obligation does not ensure compliance. Further, as many West Virginians know, the state legislature has not always demonstrated an overwhelming commitment to providing an adequate education. And, especially given the overall trajectory of education litigation,260 arguments of inadequate and inequitable education might not faze them.

Nevertheless, there are two good, nonlegal reasons West Virginia should amend the formula even if there is no legal threat. First, it is the right thing to do for West Virginians. Second, it is the right thing to do for West Virginia.

A. It's the Right Thing to Do

By many views, education is a means for preparing children to be able to live a healthy, independent life.261 Being educated allows people of all backgrounds to be free and pursue their goals.262 It is crucial for post-secondary education and workforce opportunities.263 In other words, “[a] good education has always been the key to enabling even the poorest of our citizens to achieve the American Dream.”264

Truly, without an education, people cannot “flourish.”265 More than flourish, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”266 An inadequate education

260 Weishart, Reconstituting the Right to Education, supra note 127, at 967 (discussing how “scholars have urged school finance litigants to incorporate ‘an argument that racial and socioeconomic integration are necessary components of a student’s constitutional right to an equal or adequate education.’ Alas, ‘only a handful of advocates have even attempted to make that argument, which to date has prevailed in only one state court decision’”).
262 Koski & Reich, supra note 49, at 598.
263 Id. at 597.
264 Hanushek &. Lindseth, supra note 165, at 10; see also Koski & Reich, supra note 49, at 608 (stating that education that gives each American an equal opportunity to achieve success has always been “absolutely central to the American Dream”).
265 Koski & Reich, supra note 49, at 598.
can cause “social economic, intellectual, and psychological” harms. It deprives people of “the basic tools” they need to live productive lives, and it can cause a “stigma, insult an individual’s self-worth, and undermine the social bases of self-respect.”

The risks of an inadequate, inequitable education are known, and the solution is obvious. Consequently, if the funding formula is not amended, West Virginia is simply not preparing its young citizens to succeed in life. Thus, even if there weren’t legal obligations to amend the funding formula, moral and ethical obligations still demand the funding formula be amended to include vertical equity measures.

B. It’s the Right Thing to Do for West Virginia

Still, educational disparities between low-SES students and their peers may not seem like a problem to those who do not view education as a public right. Why should they be bothered that some kids are not learning? Well, if nothing else, education is a public good that undoubtedly benefits our entire society.

Among many other benefits, education is closely associated with higher political participation, which is important because the state is dependent on citizens who are able to “participate intelligently in the political, economic, and social functions of our system.” Whereas, people who receive an inadequate education cannot compete in or contribute to society.

Undeniably, a well-

267 Weishart, Reconstituting the Right to Education, supra note 127, at 961 (explaining that some state courts have justified declaring state education funding schemes unconstitutional because “equal or adequate educational opportunities are essential to protecting children’s life chances”).

268 See Plyler v. Doe, 457 U.S. 202, 221–22 (1982) (“The inability to read and write will handicap the individual deprived of a basic education each and every day of his life.”).

269 Id. (explaining that depriving children of an education prevents them from “rais[ing] the level of esteem in which it is held by the majority”); Koski & Reich, supra note 49, at 606; Jonathan Kozol, Savage Inequalities: Children in America’s Schools 152–55 (1991) (recounting the perceptions of students from poor schools who had visited richer schools that society must not really care about them and that the rich will do whatever it takes to ensure advantages for their own children).

270 Weishart, supra note 127, at 967 (“There can be no denying the moral and political force of school policies that promote greater vertical equity overall.”).

271 Labaree, supra note 261, at 40.

272 Koski & Reich, supra note 49, at 598.


274 Abbott v. Burke, 495 A.2d 376, 390 (N.J. 1985); see also Noah Berger & Peter Fisher, A Well-Educated Workforce Is Key to State Prosperity, ECON. POL’Y INST. (Aug. 22, 2013), https://files.epi.org/2013/A%20well-educated%20workforce%20is%20key%20to%20state%20prosperity.pdf (“States can increase the strength of their economies and their ability to grow and attract high-wage employers by investing in education and increasing the number of well-educated workers.”).
educated workforce is key to state prosperity. In fact, the Supreme Court has recognized education as:

a most vital civic institution for the preservation of a democratic system of government, and as the primary vehicle for transmitting the values on which our society rests. [It] is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. And these historic perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society.

West Virginia relies on education, too. The Pauley court explained: “Our basic law makes education’s funding second in priority only to payment of the State debt, and ahead of every other State function. Our Constitution manifests, throughout, the people’s clear mandate to the Legislature, that public education is a Prime function of our State government.”

And, relevantly, West Virginia politicians have stated an interest in providing a more equitable education to students in West Virginia. Senator Shelly Moore Capito recently stated that, “The education of our youth is a crucial aspect to the future success of West Virginia.” She went on to say that, “Providing additional funding for schools has always been a top priority,” and that she “will continue to fight for the resources needed to . . . properly serve our students[]."

Berger & Fisher, supra note 274 (“States can build a strong foundation for economic success and shared prosperity by investing in education. Providing expanded access to high quality education will not only expand economic opportunities for residents, but also likely do more to strengthen the overall state economy than anything else a state government can do.”).

Plyler v. Doe, 457 U.S. 202, 221 (1982) (internal citations, quotations, and alterations omitted); Similarly, the Court explained:

[E]ducation is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.


Id.
Well, now is West Virginia's chance. Allocating resources to mitigate disadvantages from both the current funding formula and impending budget cuts "shows more concern and respect than ignoring or aggravating those disadvantages."\(^{280}\) Whereas "failing to demand equitable educational opportunities only serves to perpetuate political, economic, and social inequalities that erode human dignity."\(^{281}\)

Simply put, West Virginia cannot operate efficiently if its citizens are not educated. The United States Supreme Court and West Virginia have explicitly acknowledged this. Accordingly, all West Virginians, especially our leaders, should be concerned about revising the funding formula in order to ensure an adequate education for all students.

VI. Conclusion

Judge Recht approved the Legislature's plan because it was "designed to spend and allocate resources where they are most needed, instead of . . . with [a] hopeful expectation."\(^{282}\) He also approved it under the belief that resources would be targeted to correct any educational deficiencies or failures.\(^{283}\) Currently, the funding formula does not include vertical equity measures, and there is data to suggest that students that attend school in districts with high concentrations of low-SES students are not receiving an equitable education. To combat these discrepancies, West Virginia should revise the funding formula to provide additional funding to low-SES students. Otherwise, "perhaps the state has not yet shown that its system of free schools truly aims at a thorough, efficient, and reasonably equal education for all."\(^{284}\)

Based on the clear discrepancies in the funding formula, drop in academic achievement, and looming threats of the aftermath of COVID-19, West Virginia needs to act now. The state should conduct an adequacy cost study in order to determine the appropriate funding for each district. Additionally, the state should revise its funding formula to account for low-SES students.

No matter which specific choices the legislature makes, it needs to make them and soon. After Pauley, West Virginia had the potential to lead the country in educational adequacy and equity.\(^{285}\) Since then, the state has lost focus.

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\(^{280}\) Weishart, Reconstituting the Right to Education, supra note 127, at 967.

\(^{281}\) Id.


\(^{283}\) Id.

\(^{284}\) Taylor, supra note 26, at 799.

\(^{285}\) Id. at 757 (explaining that "Pauley v. Kelly was a decision ahead of its time . . . [It] offered the most detailed and sophisticated conception of the right to education that any court had offered at the time," and "remains one of the most insightful accounts even today"); Weishart, supra note 35 ("What makes Pauley unique is that it was the first decision in the country to actually define in substantive terms the education clause.").
Nevertheless, West Virginia has the opportunity to return to the forefront of educational adequacy and equity issues if it conducts an adequacy cost study and revises the formula. But, as Professor Weishart notes, “it will take the right mindset.”

West Virginia has certainly talked the talk, but now it is time for the state to walk the walk. As dire as things seem in the midst of COVID-19, there are still benefits to a hurricane. And this particular storm provides West Virginia a unique opportunity to restore balance and improve flaws in the education system by revising the funding formula to account for low-SES students. Once West Virginia schools weather the COVID-19 storm, the process of building back better can begin. But without a revised funding formula, it is unclear how “better” will be part of the rebuilding.