

A Civil Rights Agenda for California's Next Quarter Century



# The Case for a Right to a Racially Just Education

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## About the Series

### *A Civil Rights Agenda for the Next Quarter Century*

The Civil Rights Project was founded in 1996 at Harvard University, during a period of increasingly conservative courts and political movements that were limiting, and sometimes reversing, major civil rights reforms. In 2007 the Project moved to UCLA. Its goal was — and still is — to bring together researchers, lawyers, civil rights advocates and governmental and educational leaders to create a new generation of civil rights research and communicate what is learned to those who could use it to address the problems of inequality and discrimination. Created a generation after the civil rights revolution of the 1960s, CRP’s vision was to produce new understandings of challenges and research-based evidence on solutions. The Project has always maintained a strong, central focus on equal education and racial change.

We are celebrating our first quarter century by taking a serious look forward — not at the history of the issues, not at the debates over older policies, not at celebrating prior victories but at the needs of the next quarter century. Since the work of civil rights advocates and leaders of color in recent decades has often been about defending threatened, existing rights, we need innovative thinking to address the challenges facing our rapidly changing society. Political leaders often see policy in short two- and four-year election cycles but we decided to look at the upcoming generation. Because researchers are uniquely qualified to think systematically, this series is an attempt to harness the skills of several disciplines, to think deeply about how our society has changed since the civil rights revolution and what the implications are for the future of racial justice.

This effort includes two very large sets of newly commissioned work. This paper is one of several in a series on the potential for social change and equity policies in California, a vast state

whose astonishing diversity foretells the future of the U.S. and whose profound inequality warns that there is much work to be done. The second set of studies is national in scope. All these studies will initially be issued as working papers. They will be brought together in statewide conferences and in the U.S. Capitol and, eventually, as two major books, which we hope will help light the way in the coming decades. At each of the major events, scholars will exchange ideas and address questions from each other, from leaders and from the public.

The Civil Rights Project, like the country, is in a period of transition, identifying leadership for its next chapter. We are fortunate to have collaborated with a remarkable network of important scholars across the U.S., who contributed to our work in the last quarter century and continue to do so in this new work. We are also inspired by the nation's many young people who understand that our future depends on overcoming division. They are committed to constructing new paths to racial justice. We hope these studies open avenues for this critical work, stimulate future scholars and lawyers, and inform policymaking in a society with the unlimited potential of diversity, if it can only figure out how to achieve genuine equality.



Gary Orfield



Patricia Gándara

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The report is dedicated to Jeannie Oakes and Chris Edley, who not surprisingly were way ahead of the curve.

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## Executive Summary

California’s statewide system for public education is designed to serve a minority of its students very well, and the rest, not well at all. The “haves”—students with access to necessary educational supports—thrive, while the “have nots”—students who lack these resources due to no fault of their own—lag behind. Black, Indigenous, Latino, Pacific Islander students, immigrant children, foster youth, unhoused students, students with disabilities, and English learners are consistently underserved by our schools. Over the past 30 years, much attention has been directed at the persistence of the discredited “achievement gap,” which subtly (and not so subtly) has placed the responsibility for “not achieving” on students, their families, and their communities. Today, formally conceptualized as an “opportunity gap,” this reclassification still fails to assign responsibility where it belongs: on the State’s failure to establish a public education system that ensures (not just aspires to) a high-quality education.

This paper examines how, at its core, the California statewide education system has constructed educational pipelines that perpetuate and expand stark inequities based on race, income, and immigrant status. Despite advocates’ long and hard-fought battles on behalf of California’s historically marginalized students, the State—whose Constitution holds education as a “fundamental right,” an essential predicate for other firmly established fundamental rights like voting and speech<sup>1</sup>—has fallen far short of realizing this opportunity as a basic and absolute right.

We argue that the legal framework underpinning California students’ constitutional right to an education obligates state educational leaders to eliminate the channels responsible for California’s “haves” and “have nots.” To fix statewide inequities, we must understand the right to education as a right that affirmatively dismantles the toxic effects of channeling. This begins with changing the

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<sup>1</sup> *Butt v. State of California*, 4 Cal. 4th 668, 683 (1992); *Serrano v. Priest*, 18 Cal. 3d 728, 767 (1976).

conversation from what the California statewide education system arguably can deliver to what it *must* deliver.

This paper asserts that the main cause of California’s dysfunctional channels of public education is systemic racism. To paint this picture, we walk through the state of California’s stagnant and, in many cases, worsening, school segregation, educator workforce, school-based mental and physical health services, school discipline rates, culturally responsive curriculum, English learning instruction, academic opportunities and outcomes, and the amplified inequities due to the COVID-19 pandemic. In light of this resultant two-tiered education, an ambitious legal framework—one that defines an education as a fundamental constitutional right for all students—is an essential baseline from which California policymakers and leadership must operate. We describe litigation efforts to assert a statewide right to literacy (both in and out of California), as well as how the denial of literacy has been a principal strategy to attempt to subordinate and disenfranchise individuals of color throughout history. As a result, the constitutional right to education today requires an education that recognizes and honors the dignity of all racial and ethnic groups, rather than one that calcifies inferior access to learning and privileges white history, values, language, and norms.

We end by highlighting how issues persist in part due to chronic underfunding of schools that serve students of color, and we provide strategic recommendations that we believe necessary to dismantle the separation of “haves” and “have nots.” Students have a right of access to literacy, preparation for participation in the democracy, and acquisition of knowledge and skills to live, learn, and work successfully in California’s changing society. As long as state budgets, legislators, and decision makers continue to fail to treat education as a fundamental right and thereby ignore need—and the especially great need of BIPOC students, English learners, students with disabilities, and other high-need groups—we cannot even approach achieving an antiracist public education system.



# The Case for a Right to a Racially Just Education

Mark D. Rosenbaum and Suzanne Castillo

## Introduction

California's<sup>2</sup> statewide system for public education is designed to serve a minority of its students very well, and the rest, not well at all. The “haves”—students with access to necessary educational supports—thrive, while the “have nots”—students who lack these resources due to no fault of their own—lag behind. According to multiple measures of student success (including the California Schools Dashboard), Black, Indigenous, Latino, Pacific Islander students, immigrant children, foster youth, unhoused students, students with disabilities, and English learners are consistently and dramatically underserved by our schools.<sup>3</sup> Over the past 30 years, much attention has been directed at the persistence of the discredited “achievement gap,” which subtly (and not so subtly) has placed the responsibility for “not achieving” on students, their families, and their communities. Today, formally conceptualized as an “opportunity gap,” this reclassification still fails to assign responsibility where it belongs: on the State's failure to establish a public education system that *ensures* (not just aspires to) a high-quality education. This can only be achieved by providing all students in underserved communities with the necessary resources, opportunities, and instruction to compete and collaborate successfully with their more advantaged peers. This begins with well-trained educators in every classroom and well-trained administrators at every school. And too: sufficient mental health personnel and supports like aides, tutors and literacy coaches; a rigorous curriculum; culturally sensitive instructional materials; digital access; and the inclusion in meaningful

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<sup>2</sup> We use “California” or “the State” to indicate those officers and entities constitutionally charged with operating the statewide system for public education, namely the Governor of California, the State Board of Education, State Superintendent of Education, and the California Department of Education.

<sup>3</sup> Department of Education (2019). *California School Dashboard 2019 Reports*. Retrieved June 17, 2024, from <https://caschooldashboard.org/reports/ca/2019>.

ways of families, communities, and community-based organizations centered on educational equity are all necessary pieces of the opportunity puzzle. Without them, performance differences that are wrongly denominated as merely a “gap” will remain an opportunity chasm into perpetuity.

This paper examines how, at its core, the California statewide education system has constructed educational pipelines that perpetuate and expand stark inequities based on race, income, and immigrant status. Students and their supporters have spent decades fighting for educational policies and systems that can sensitively serve historically marginalized students. Despite these years of advocacy, the political processes of California steadfastly shirk *constitutional responsibility* for providing a high-quality education for underserved children. Stated differently, elected leaders with constitutional responsibility for delivering education are no doubt well-intentioned, yet their commitment falls far short of fashioning this opportunity—the opportunity to better one’s circumstances and become a meaningful civic participant in our democracy—as a basic and absolute right. Educational inequality in the state has become increasingly stratified by race, wealth, and English learner status, resulting in a two-tier education system that has become just as Californian as sunshine and beaches.

State leaders offer litanies of explanations for this persistent state of affairs. Fingers are pointed at the lack of resources, more pressing priorities, and assertions that the “real problems” (poverty and racism) are the true culprits of educational inequality, culprits that are assailable at the margins, but largely outside the bounds of comprehensive policy intervention. At the same time, what elected leaders do not—and cannot—proclaim is that the evidence of the system falling far short of acceptable outcomes for all children is both unknown to them and a statewide emergency. The State’s own data reveals just how shortchanged California’s already most vulnerable students are and have been for a long time. California’s statewide system for public education is a colossal failure

even when it comes to achieving basic literacy for all its students, let alone greater opportunities to learn and thrive.

The fault does not lie with California’s charter; for over a century, our Supreme Court has held that the California Constitution requires that the State treat education as every child’s individual “fundamental right,” reasoning that it is the predicate for other firmly established fundamental rights like voting and speech.<sup>4</sup>

This paper argues that the legal framework underpinning California students’ constitutional right to an education obligates state educational leaders to eliminate the channels responsible for California’s dual school system. To date, appeals to moral rightness and fairness have not worked. They never will. Similarly ineffective are policy-driven approaches that too easily allow for non-compliance with constitutional directives and lack serious accountability mechanisms. To fix statewide inequities, we must go beyond an understanding of the right to education in California defined by an expectation of a “basic,” “adequate,” or “prevailing standard” of education. Instead, we must understand the right to education as a right that affirmatively dismantles the toxic effects of channeling. This begins with changing the conversation from what the California statewide education system can or should deliver to what it *must* deliver.

Where there is an effect—here, a dual educational system that differentiates between the “haves” and the “have nots”—there must, of course, be a cause. Remarkably, California’s long-existing dual system for public education has never been the subject of a root cause analysis that dares to name the reasons for the persistence of unacceptable results. On the surface, the abysmal outcomes for the majority of the state’s children from low-income families and children of color seem mystifying. How can this be?

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<sup>4</sup> *Butt v. State of California*, 4 Cal. 4th 668, 683 (1992); *Serrano v. Priest*, 18 Cal. 3d 728, 767 (1976).

No state surpasses California when it comes to resources, diversity, intellectual firepower, community, and innovation. To deny equitable educational opportunities to these children makes no sense if California were truly committed to respecting the dignity and possibilities of every child in the state. Even more self-interestedly, such a denial makes no sense in terms of California's own well-being; it is a well-documented axiom that educational achievement correlates strongly with economic productivity at the state as well as individual level.

The California Constitution has long been construed to include a fundamental right to education and afford heightened protection to individuals of color and from low-income backgrounds. This is a testament to *stated* values of equity, fairness, and enabling achievement of personal fulfillment through public education. While poverty is no small impediment, it cannot be the all-purpose explanation unless we are prepared to give up on public education as the “great equalizer,” and be content with it serving otherwise as the “great unequalizer.” Unless we are prepared to tell the vast majority of California's children that their chances to better their circumstances are illusory or aspirational, and unless we are prepared to declare the constitutional elements of a fundamental right to education a false promise, California's low-income families of color will continue to suffer.

This paper asserts the main cause of California's dysfunctional channels of public education is systemic racism. Du Bois famously defined “the problem of the 20th century [as] the problem of the color line.”<sup>5</sup> Along with many others, this paper argues that it remains the problem of this century too, most particularly in the realm of public education. Opportunities are distributed along racial and correlative class-based channeling classifications.

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<sup>5</sup> Du Bois, W. E. B. (2015). *The Freedman's Bureau* (1901). In N. D. Chandler (Ed.), *The Problem of the Color Line at the Turn of the Twentieth Century: The Essential Early Essays* (pp. 167–188). Fordham University Press. <https://doi.org/10.2307/j.ctt1287g49.10>.

Though the landmark cases of *Brown v. Board of Education* and *Mendez v. Westminster* are over 70 years old, California's schools in 2024 are but the most contemporary version of "separate and unequal." In the aftermath of the COVID-19 pandemic, disparities in educational access and outcomes have not only underscored the two-tier education system experienced by California's most disadvantaged students, but the repercussions of pandemic learning loss and trauma have widened the gap even further.

One final introductory note: especially in California, the needs of emergent bilingual students who are learning English in addition to a primary home language are of acute importance. This point bears special emphasis. A study on English learners (ELs) published in the most recent *Getting Down to Facts* reports concluded that "[m]any ELs in California do not have equitable access to grade-level core content instruction, and the English language development (ELD) instruction they receive may fall short of state standards."<sup>6</sup> Furthermore, according to researchers Santibañez and Umansky, "the state's overall education funding still falls short of what research shows would be adequate to meet California's educational goals, particularly for the one in five students who need to learn English along with the rest of the curriculum."<sup>7</sup> While this paper leaves robust discussions of pedagogical practices and policies to serve bilingual students to experts and the communities affected, the framework for understanding the constitutional right to education and the resultant policies presented here help lay the groundwork for emergent bilingual students and advocates to demand desperately needed targeted policies and practices.

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<sup>6</sup> Santibañez, L., & Umansky, I. (2018). English learners: Charting their experiences and mapping their futures in California schools. *Policy Analysis for California Education (PACE)*, p. 9.

<sup>7</sup> Santibañez & Umansky (2018), p. 18.

## The Current State of Education in California

Research from respected experts across all manner of educational metrics agree that California schools are deeply inequitable in the opportunities that they provide for students. Despite an oft-stated commitment to equal educational opportunity for all California’s children and reforms in pursuit of more equitable school funding, data show consistent patterns of inequality of student outcomes based on race, ethnicity, income, language, immigration status, and special education status.<sup>8</sup> And while these inequities have always existed, the impact of the COVID-19 pandemic only exacerbated the “have nots.”

Accordingly, the zip code in which a young person is born forecasts their later life outcomes with alarming regularity, and firmly rooted pipelines of inequity set up California’s most privileged students for future successes while the most marginalized face an uphill battle for equal opportunities at every step throughout the statewide education system.

Extensive research has documented these deep-seated inequities. These findings are all public—in plain sight. Much of the evidence comes from California’s universities and research institutions. An intensely segregated system of schools, inequitable distribution of qualified teachers, lack of trauma-informed mental and physical health resources, racially disproportionate school discipline, lack of culturally relevant and responsive curriculum, and disproportionate levels of pandemic-era learning loss have resulted in huge and widening opportunity gaps for the historically most marginalized students in California.

Each of these areas is ripe for transformative reform, even as the pandemic only deepened the roots of this systemically racist education system. Amazing work is done every day by students,

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<sup>8</sup> Edley Jr., C., & Kimner, H. (2018). *Education equity in California: A review of Getting Down to Facts II findings*. Stanford University & Policy Analysis for California Education (PACE). Retrieved from [https://gettingdowntofacts.com/sites/default/files/GDTFII\\_Equity%20Review.pdf](https://gettingdowntofacts.com/sites/default/files/GDTFII_Equity%20Review.pdf).

parents, teachers, and advocates that has pushed the system to operate using practices that are more equitable. And yet, ongoing systemic inequities prove deep, painting a clear picture of a system of inequitable education that countenances constitutionally unequal and unfair channels that perpetuate inequities that, without targeted political or judicial intervention, will only harden across generations.

### **School Segregation**

Schools in California remain deeply segregated by race and socio-economic status, and the schools that serve the most marginalized students do not have the resources to meet their needs—needs that have existed for decades but were proven even more concrete through the widespread inaccessibility of crucial remote learning technology throughout the pandemic. On various measures, California consistently rates as one of the most segregated school systems in the country.<sup>9</sup>

Even before the pandemic, research conducted by the Getting Down to Facts research project found that intra-district segregation in California’s school districts and individual campuses, as “defined in terms of a student’s likelihood of school exposure to another [racial] group, has increased over the past few decades.”<sup>10</sup> As a result, “Latino, Black, and Native American students are more likely to be economically disadvantaged and [...] concentrated in schools with other poor children.”<sup>11</sup>

Research from the UCLA Civil Rights Project confirms this deep segregation. The report names California the most segregated state in the nation for Latino students, finding that 58% of Latino students in California attend intensely segregated schools, defined as schools that enroll 90 to 100% non-white students or 90 to 100% white students,<sup>12</sup> and the typical Latino student attends a

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<sup>9</sup> Orfield, G., & Jarvie, D. (2020). *Black segregation matters: School resegregation and Black educational opportunity*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA, p. 30.

<sup>10</sup> Edley & Kimner (2018), p. 30.

<sup>11</sup> Ibid.

<sup>12</sup> Frankenberg, E., Ee, J., Ayscue, J., & Orfield, G. (2019, May 10). *Harming Our Common Future: America's Segregated Schools 65 Years After Brown*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA, p. 21. Retrieved from <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf>.

school with only 15% white classmates.<sup>13</sup> The report explains that these measures of segregation in California “are related in part to sweeping changes in the total population structure as well as the termination of desegregation efforts, and reflect the changing realities of classroom composition.”<sup>14</sup> Some of the most extreme accounts of Latino segregation is found in Los Angeles Unified School District (LAUSD) schools, where Latino students account for half of the city’s population yet are overrepresented in LAUSD public schools, while white students comprise 28% of the city’s population yet only 10% of LAUSD enrollees.<sup>15</sup>

The segregation of Black students in California is similarly extreme, even relative to the rest of the nation. According to Civil Rights Project research, “[B]lack students have the second lowest exposure to white students in the country, and [that exposure] has declined slightly since 2011.”<sup>16</sup> Given the demographic makeup of California, and the relatively small fraction of African American students, it is typical for Black students to attend schools with twice as many Latino students than Black fellow students.<sup>17</sup>

“Black students’ segregation from whites has been growing for decades, but often not producing all-Black schools. For Black students, the share of Black classmates has been dropping as the Latine share has risen. This is most severe in the West where the typical Black student attends a school where there are more than twice as many Latines as fellow Black students—a minority within a minority.”<sup>18</sup>

The shameful result is that “just over half of [B]lack students are in 90–100% non-white schools.”<sup>19</sup>

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<sup>13</sup> Frankenberg et. al. (2019), p. 5.

<sup>14</sup> Ibid.

<sup>15</sup> Divinity, J. (2020, August 21). *Separate but unequal: School segregation in Los Angeles*. Knock LA. Retrieved from <https://knock-la.com/separate-but-unequal-school-segregation-in-los-angeles-db5108603d6e/>.

<sup>16</sup> Frankenberg et. al. (2019), p. 5.

<sup>17</sup> Frankenberg et. al. (2019), p. 26.

<sup>18</sup> Orfield & Jarvie (2019), p. 6.

<sup>19</sup> Frankenberg et al. (2019), p. 26-27.



Increasingly segregated schools drive the opportunity gap. In a study led by Stanford’s Sean Reardon, racial segregation was found “to be harmful because it concentrates minority students in high-poverty schools, which are, on average, less effective than lower-poverty schools.”<sup>20</sup> On top of this, some studies are beginning to draw connections between segregated schooling and students’ short- and long-term health outcomes. A 2022 study featured in *Pediatrics* determined that school segregation is associated with higher risks for behavioral problems and increased probability of underage drinking.<sup>21</sup> That same year, another study authored by many of the same authors discovered that school segregation was associated with a higher probability of binge drinking and heart disease in Black adults.<sup>22</sup>

Racially segregated schools often correlate with economic segregation. In LAUSD schools for example, four out of five students are from low-income families.<sup>23</sup> These geographic concentrations of economically disadvantaged students of color are not accidental. As UCLA Professor and Co-Director of the Civil Rights Project Gary Orfield describes the trends in racial and economic segregation, public and subsidized housing is “overwhelmingly concentrated in segregated school locations.”<sup>24</sup> As a result, families “are living where they’re living because there was a decision made about where to enable the rental of subsidized housing to happen.”<sup>25</sup>

Despite the stark segregation of California students, the state has dissolved all its major desegregation plans and efforts.<sup>26</sup> Desegregation is dead today in California. There is no drawing

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<sup>20</sup> Natanson, H. (2019, September 22). *Achievement gaps in schools driven by poverty, study finds*. The Washington Post. Retrieved from [https://www.washingtonpost.com/local/education/achievement-gaps-in-schools-driven-by-poverty-study-finds/2019/09/22/59491778-dd73-11e9-b199-f638bf2c340f\\_story.html](https://www.washingtonpost.com/local/education/achievement-gaps-in-schools-driven-by-poverty-study-finds/2019/09/22/59491778-dd73-11e9-b199-f638bf2c340f_story.html).

<sup>21</sup> Wang, G., Schwartz, G. L., Kim, M. H., White, J. S., Glymour, M. M., Reardon, S. & Hamad, R. (2022). *School racial segregation and the health of Black children*. *Pediatrics*, p. 149.

<sup>22</sup> Kim, M. H., Schwartz, G. L., White, J. S., Glymour, M. M., Reardon, S. F., Kershaw, K. N. & Hamad, R. (2022). *School racial segregation and long-term cardiovascular health among Black adults in the US: A quasi-experimental study*. *PLoS Medicine*, p. 19.

<sup>23</sup> Blume, H. (2022, February 1). *Economic Segregation in Schools Has Worsened, Study Says*. Los Angeles Times. Retrieved from <https://www.latimes.com/california/story/2022-02-01/economic-segregation-in-schools-has-worsened-study-says>.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

board to even explore meaningful desegregation on any dimension. The consequences of these deeply segregated schools have significant and easily foreseeable consequences for the quality of education afforded to students of color in California. There are vast resource and opportunity disparities between schools that serve affluent, predominantly white communities and those that serve the students of color who make up the vast majority of California’s public school system.

### **Educator Workforce**

The distribution of qualified, trained teachers in California schools closely tracks with the segregation of the most marginalized students into a separate channel from the students born to privileged families. Research on the makeup of the teacher workforce across California shows that schools serving the most vulnerable students often have the least experienced and least qualified teachers, as well as teachers who are also most likely to leave the teaching profession.<sup>27</sup> In schools with high concentrations of students of color in California, teachers are three times more likely to have emergency-style permits than in low-minority schools.<sup>28</sup> Unsurprisingly, just as schools with high numbers of low-income families and students of color have the least experienced teachers, those same schools have the least experienced principals.<sup>29</sup>

According to recent research conducted by current California State Board of Education President and Learning Policy Institute CEO Linda Darling-Hammond, “[t]wo-thirds of principals serving schools with high proportions (top quartile) of students of color and students from low-income families left positions vacant or hired teachers on substandard credentials while fewer than half of their peers in schools in the bottom quartile of low-income or minority students did so.”<sup>30</sup>

California’s low-income and minority children are consequently relegated to second-class students.

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<sup>27</sup> Edley & Kimner (2018), p. 11.

<sup>28</sup> Edley & Kimner (2018), p. 4.

<sup>29</sup> Edley & Kimner (2018) p. 12.

<sup>30</sup> Darling-Hammond, L., Satcher, L., & Carver-Thomas, D. (2018, October 15). *Teacher shortages in California: Status, sources, and potential solutions*. Learning Policy Institute, p. 15.

## Mental and Physical Health

The mental and physical health services provided to students across California are also profoundly inadequate and inequitable. California is near the bottom of all states in the country in terms of school-based health and mental health services offered to students.<sup>31</sup> In the 2023 rankings published by the American School Counselor Association, California's student-to-school-counselor ratio was 464:1, falling significantly below the 250:1 target ratio and making the state the 8<sup>th</sup> worst ranked school system in the country.<sup>32</sup> While this represents some improvement from California's once dead last ranking marked by an approximately 1,000:1 student-to-school-counselor ratio<sup>33</sup> (in part due to increased counselor hiring funded by the Local Control Funding Formula and more recently a \$20B pandemic recovery package), the state still has a long way to go.

As for access to school nurses, California ranked near the bottom of all states again, with approximately one nurse per 2,410 public school students.<sup>34</sup> In some rural areas of California, there are no school nurses countywide.<sup>35</sup> According to a 2013 report from California Health and Human Services, only half of California school districts employed a school nurse.<sup>36</sup> These numbers have not meaningfully improved since.

The persistent gaps and low provision of school-based health services in California are inextricably tied to lack of statewide mandated policy or expectations in these areas. According to Getting Down to Facts, "California does not require that schools employ a minimum number of

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<sup>31</sup> Reback, R. (2018). *Investments in Student Health and Mental Health in California's Public Schools. Technical Report. Getting Down to Facts II*. Policy Analysis for California Education, PACE, p. 4.

<sup>32</sup> U.S. Department of Education, National Center for Education Statistics (2023). *Common Core of Data (CCD), State Nonfiscal Public Elementary/Secondary Education Survey, 2022-23*. Retrieved from <https://nces.ed.gov/ccd/>.

<sup>33</sup> California Department of Education (2023). *Assembly Bill 722: Study of Pupil Personnel Ratios, Services, and Programs*, p. 10. Retrieved from <https://www.cde.ca.gov/ls/ec/documents/ab722report.pdf>.

<sup>34</sup> Public Policy Institute of California (2020, September 21). *Do schools have enough nurses to fight the pandemic?* Retrieved from <https://www.ppic.org/blog/do-schools-have-enough-nurses-to-fight-the-pandemic/>.

<sup>35</sup> Lambert, D. (2021, March 1). *Nurse shortage could make reopening school campuses more difficult*. EdSource. Retrieved from <https://edsources.org/2021/nurse-shortage-could-make-reopening-school-campuses-more-difficult/650403>.

<sup>36</sup> Baker, D. L., Hebbeler, K., Davis-Alldritt, L., Anderson, L. S., & Knauer, H. (2015). *School Health Services for Children with Special Health Care Needs in California. The Journal of School Nursing*, p. 318–325. <https://doi.org/10.1177/1059840515578753>.

nurses per student..., nor does it formally recommend minimum ratios.”<sup>37</sup> California also “does not require schools to offer counselors, nor does it offer targeted funding programs for counselors.”<sup>38</sup>

As students return from the extra trauma of navigating the COVID-19 pandemic and resulting school shutdowns, access to counselors and mental and physical health resources is more important than ever.<sup>39</sup> Underserved students are particularly at risk for pandemic-induced emotional and physiological stress as families navigated under-resourced remote learning, job loss, sickness, and even death. Dr. Nadine Burke Harris, California’s Surgeon General throughout the initial years of the pandemic, described these adverse COVID-19 related events as producing a trauma and stress that “has the potential to embed itself in children’s DNA, dramatically affecting their brains and other critical body systems and, as a result, their health across a lifetime.”<sup>40</sup> With the lingering impacts of COVID-19 disproportionately felt by low-income communities and communities of color, it will be essential for the state to ensure that those students have access to the social, emotional, and mental health supports they need to access education.

### **School Discipline and Criminalization of Students**

Racially disproportionate school discipline practices and the criminalization of students of color continue to be major issues across California. Evidence reveals that after controlling for race and poverty, suspensions plainly cause harm to students, predicting lower achievement, lower graduation rates, and higher risks for incarceration.<sup>41</sup> After decades of grassroots advocacy from

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<sup>37</sup> Reback (2018), p. 6.

<sup>38</sup> Ibid.

<sup>39</sup> Harris, N. B. (Aug 4, 2020). *Children will pay long-term stress-related costs of Covid-19 unless we follow the science*. STAT News. Retrieved from <https://www.statnews.com/2020/08/04/children-long-term-stress-related-costs-covid-19/>.

<sup>40</sup> Ibid.

<sup>41</sup> U.S. Government Accountability Office (2018). *Discipline disparities for Black students, boys, and students with disabilities*. Retrieved from <https://www.gao.gov/assets/700/690828.pdf>; Losen & Martinez (2020), *Is California Doing Enough to Close the School Discipline Gap?*, Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA, p. 16. Retrieved from [https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/is-california-doing-enough-to-close-the-school-discipline-gap/Final\\_CA\\_Report\\_06\\_29\\_2020-revised-for-post.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/is-california-doing-enough-to-close-the-school-discipline-gap/Final_CA_Report_06_29_2020-revised-for-post.pdf).

parents and students to end the school to prison pipeline, policymakers and school and education system leaders have only begun to take meaningful steps to address these longstanding disparities.

Recent legislation in California has sought to address at least some of these disparities. SB 419 banned the suspensions of students in grades pre-K-8 for “willful defiance,” a catch-all category that was frequently used to justify suspension of Black students and other students of color for minor disruptions or behaviors that rarely result in the suspension or discipline of white students. In the wake of the murder of George Floyd, districts in California began to make some of the changes that advocates have long pushed for, with the Los Angeles Unified School District diverting funds from school police to fund initiatives aimed at Black student achievement<sup>42</sup> and the Oakland Unified School District eliminating their school police force.<sup>43</sup>

Despite the explicit recognition of the harm of racially disproportionate discipline from state legislators and educational leaders, many of the steps taken have been incremental in the right direction, but the larger issue of the treatment and respect for students of color and low-income families persists.<sup>44</sup> And it sometimes does not take long for even these incremental steps toward progress to erode. At the Pomona and Fremont Unified School Districts, for example, commitments to deprioritize school-based police are being reversed, as district leaders come under increasing pressure from opponents to decriminalization of schools, and distance from the 2020 summer of social unrest increases.<sup>45</sup> Even LAUSD’s landmark victory recently came under threat

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<sup>42</sup> Blume, H. (2021, February 16). *LAUSD diverting school police funds to support Black students*. Los Angeles Times. Retrieved from <https://www.latimes.com/california/story/2021-02-16/lausd-diverting-school-police-funds-support-black-students>.

<sup>43</sup> McEvoy, R. (2020, June 25). *Oakland school board unanimously agrees to eliminate its police force*. EdSource. Retrieved from <https://edsource.org/2020/oakland-school-board-unanimously-agrees-to-eliminate-its-police-force/634544>.

<sup>44</sup> Nowicki, J. M. (2018, March 22). *K-12 Education: Discipline Disparities for Black Students, Boys, and Students with Disabilities*. Report to Congressional Requesters. GAO-18-258. US Government Accountability Office. Retrieved from <https://www.gao.gov/products/gao-18-258>.

<sup>45</sup> Blume, H. (2021, November 5). *Pomona schools defunded police. A shooting brings them back*. Los Angeles Times. Retrieved from <https://www.latimes.com/california/story/2021-11-05/pomona-schools-defunded-police-a-shooting-brings-them-back>.

when incidents were reported as schools reopened during the fall of 2021.<sup>46</sup> A strong multi-racial coalition led by students worked hard to protect this commitment to using alternatives to police just when students needed them.

Despite some recent reforms to prevent suspensions, recent investigations revealed “disconcerting anecdotes from community advocates in some districts in California, where their efforts have appeared to help, that some schools are finding other ways to remove students and are not actually implementing the reforms as intended. These unhealthy alternatives range from ‘off-the-books’ suspensions to an increase in the rates of referrals to law enforcement.”<sup>47</sup>

The racially disproportionate nature of school discipline persists as well. During the 2022-2023 school year, for instance, despite the discipline laws in place, Black students lost 38 days of instruction due to out-of-school suspensions per 100 students, compared to a rate of 12 days for all students.<sup>48</sup> During the 2019-2020 school year, Black students made up 15% of all students suspended despite making up only 5.4% of the overall student population in California.<sup>49</sup> By one measure, Black students with disabilities were even more disproportionately impacted by suspensions than their non-disabled peers, losing 37 more days of instruction than white students from these backgrounds, which dwarfs the overarching Black–white difference of 29 more days of lost instruction.<sup>50</sup>

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<sup>46</sup> Ibid.

<sup>47</sup> Losen, D. J., & Martinez, T. (2020). *Lost opportunities: How disparate school discipline continues to drive differences in the opportunity to learn*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA and Learning Policy Institute, p. 32. Retrieved from <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-discipline/lost-opportunities-how-disparate-school-discipline-continues-to-drive-differences-in-the-opportunity-to-learn/Lost-Opportunities-REPORT-v17.pdf>

<sup>48</sup> Flores, R., & Losen, D. J. (2024). *New Data: California School Administrators Dramatically Increased Disciplinary Exclusion of Homeless Youth to the Highest Rate in 6 Years. An Update to "Lost Instruction Time in California Schools"*. UCLA Civil Rights Project, p. 5.

<sup>49</sup> California Department of Education (Aug. 19, 2021). State Guidance for New Laws on Discipline. Retrieved from <https://www.cde.ca.gov/nr/el/le/yr21tr0819.asp>.

<sup>50</sup> Flores, R. T., & Losen, D. J. (2023). *Lost Instruction Time in California Schools: The Disparate Harm from Post-Pandemic Punitive Suspensions*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA, p. 9.

Native American students are also particularly susceptible to disproportionate school discipline, a practice heightened by cultural miscommunications as some school administrators have even been found to discipline students for cultural behaviors they deem suspicious.<sup>51</sup> A study based on 2017-2018 California data found that Native American boys are expelled at rates higher than any other student group in the state. While California’s Native student population is relatively small—30,000 students representing less than 1% of K-12 public school students throughout the state—Native student discipline still ranks at the extreme. One high school in Humboldt County was found to “suspen[d] around three-quarters of its Native American males.” In Kings County, Native American boys were 40 times as likely to be expelled than the statewide average.”<sup>52</sup>

Outside of individual racial and ethnic categories, 2023 data from the Civil Rights Project indicates that foster and homeless youth are disciplined at rates higher than all other demographic groups.<sup>53</sup> Foster youth lost 77 days of instruction due to out-of-school suspension (OSS) per 100 enrolled students, followed by homeless youth with 26 days lost per 100 students. To compare, the state average for all students stood at only 10 days lost due to OSS per 100 students.<sup>54</sup>

A 2020 analysis conducted by the UCLA Civil Rights Project “suggests that suspensions in the category of disruption/defiance still contribute to a large share of the racial difference in many districts.”<sup>55</sup> In the ten California districts showing the highest Black–white gap in the

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<sup>51</sup> See, for example, the case of a Native student denied recess for refusing to speak back to an administrator, despite the fact that within that student’s culture, silence is regarded as a sign of respect for authority figures. Another case describes that of a Native student subjected to drug inspections after attending a tribal ceremony that included the burning of sage. See Miller, C. (2021, October 12). *California schools expel and suspend Native American students at alarming rates. Districts can’t dismiss the data just because their populations are small, advocates say.* The 74 Million. Retrieved from <https://www.the74million.org/article/california-schools-expel-and-suspend-native-american-students-at-alarming-rates-districts-cant-dismiss-the-data-just-because-their-populations-are-small-advocates-say/>.

<sup>52</sup> Miller, C. (2021, October 12).

<sup>53</sup> Flories & Losen (2023), p. 5.

<sup>54</sup> Ibid.

<sup>55</sup> Losen, D. J., & Martinez, P. (2020). *Is California doing enough to close the school discipline gap?* UCLA Center for Civil Rights Remedies, p. 26.

disruption/defiance suspension category, “Black students lost between 15 and 65 more days than their white counterparts due to this minor offense category.”<sup>56</sup>

Evidence also shows that misguided efforts to increase law enforcement presence in schools has the opposite effect of the supposed goal of increased safety. Instead, “across the group of schools, an increase in the security staff-to-student ratio was related to an increase in the rate of lost instruction.”<sup>57</sup> An analysis of all high schools in California that had at least 100 Black students revealed that the positive association between an increase in the security staff-to-student ratio and an increase in rates of lost instruction for Black students was even stronger at those schools.<sup>58</sup>

## **Curriculum**

The curricula used in many schools across California fail to center the voices and perspectives of the students of color, who make up a majority of the State’s student population. Educator preparation programs also vary widely in the importance they place on courses in culturally relevant pedagogy.<sup>59</sup>

Experts agree that culturally responsive and sustaining pedagogies –when implemented faithfully –“foment critical consciousness” and “develop young children as active civic participants who critically read the injustices that characterize their lives and worlds, and actively work to problematize, challenge, and change them.”<sup>60</sup> This is of the utmost importance if California hopes to position its students to be active civic participants of the future.

Meaningful progress in this area has been slow, but there are some encouraging signs that California is moving to expand the culturally relevant and sustaining education that experts know

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<sup>56</sup> Ibid.

<sup>57</sup> Losen, D. J., & Martinez, P. (2020). *Lost Opportunities: How Disparate School Discipline Continues to Drive Differences in the Opportunity to Learn*. Learning Policy Institute, p. 33.

<sup>58</sup> Ibid.

<sup>59</sup> Bell, C. A., White, R. S., & White, M. E. (2018). *A systems view of California’s teacher education pipeline. Getting Down to Facts II*. Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles, UCLA, p. 35.

<sup>60</sup> Souto-Manning, M., & Rabadi-Raol, A. (2018). *(Re) Centering quality in early childhood education: Toward intersectional justice for minoritized children*. *Review of Research in Education*, p. 203.



works for students. The State Board of Education formally adopted an Ethnic Studies Model Curriculum in March 2021, requiring that all high school students complete at least one semester of an Ethnic Studies course in order to graduate.<sup>61</sup> The move is one of the first of its kind in the country and serves as an important step forward for a more diverse and representative curriculum that (unfortunately) required years of advocacy from students, parents, educators, and community-based organizations.

State leaders have acknowledged the importance of this step. State Superintendent of Public Instruction Tony Thurmond recognized the student advocates who “have been telling us for years that they need to see themselves and their stories represented in the classroom.”<sup>62</sup> State Board of Education President Linda Darling Hammond went further in recognizing the ways in which the state has failed to confront vestiges of racism in the education system, stating that the adoption of ethnic studies marked “an important step toward confronting and ultimately transforming racism in our society and in our state.”<sup>63</sup>

Education experts concur that such a curriculum—one that reflects and respects students’ identities, experiences, families, and communities—enhances students’ academic performance; increases their engagement with their coursework; and strengthens their self-image and their perceptions of their capacity to succeed and make positive change.<sup>64</sup> Expert in culturally responsive and sustaining pedagogies Mariana Souto-Manning explains that when implemented, these pedagogies “foment critical consciousness” and “develop young children as active civic participants who critically read the injustices that characterize their lives and worlds, and actively work to

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<sup>61</sup> California State Legislature (2021). *Assembly Bill No. 101 Pupil Instruction: high school graduation requirements: ethnic studies*. Retrieved from [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB101](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB101).

<sup>62</sup> California Department of Education (2021, March 18). *Press Release: State Superintendent Tony Thurmond announces ethnic studies model curriculum approved by State Board of Education*. Retrieved from <https://www.cde.ca.gov/nr/ne/yr21/yr211rel21.asp>.

<sup>63</sup> Ibid.

<sup>64</sup> Aronson, B., & Laughter, J. (2016). *The theory and practice of culturally relevant education: A synthesis of research across content areas*. Review of educational research, p. 163-206.

problematize, challenge, and change them.”<sup>65</sup> This means that it is crucial that first steps not be last or most recent ones.

Yet some school districts have decidedly stepped backwards. While many schools across the state prepare to offer required ethnic studies courses by 2025, a growing minority of districts are challenging fact-based curriculum under the guise of indoctrination. Political polarization across the country has fueled a fire of so-called “critical race theory bans” that effectively suppress teaching and curriculum that do not align with the personal viewpoints of local politicians. In California, this curriculum censorship has sprouted in the form of policies pushed by local school districts and city officials.

In one school district at the center of ongoing litigation, Temecula Valley Unified School District governing board members passed Resolution 21 back in December 2022, which prohibits the teaching of “topics related to race” through the lens of “Critical Race Theory or other similar frameworks.”<sup>66</sup> The reference to Critical Race Theory, just like references like it across the country, appears to operate as an umbrella term that restricts far more than the college-level legal theory, but instead encompasses topics as wide-ranging as “race and systemic racism; sex and sex discrimination; gender identity; sexual orientation; diversity, equity, and inclusion; implicit bias; culturally responsive education; and social emotional learning,” as the complaint at the center of the lawsuit describes.<sup>67</sup> Resolution 21 stands at direct odds with state standards, leaving teachers left to guess which topics are and are not permissible to instruct. For instance, California’s History-Social Science Framework mandates that educators teach “the long term costs of slavery.” Alongside Resolution 21’s ban against teaching that individuals are members of an “oppressed class because of race,” adequate

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<sup>65</sup> Souto-Manning & Rabadi-Raol (2018), p. 203, 214.

<sup>66</sup> Temecula Valley Unified School District (2022). *Resolution 21*. Retrieved from [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220AB101](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220AB101).

<sup>67</sup> Public Counsel (2023, August 2). *Mae M. v. Komrosky Complaint*, p. 5. Retrieved from <https://publiccounsel.org/wp-content/uploads/2023/08/2023.08.02-Mae-M.-v.-Komrosky-Complaint.pdf>.

instruction appears virtually impossible. In Temecula, this chilling effect has led to curricular censorship that has included the erasure of Harvey Milk and LGBTQ+ rights from 4<sup>th</sup> grade curriculum<sup>68</sup> as well as has left only one remaining teacher at Temecula Middle School (notably, the school's sole Black educator) willing to teach Mildred D. Taylor's *Roll of Thunder, Hear My Cry*.<sup>69</sup>

As civil rights litigators across the state work to establish the unconstitutionality of Resolution 21 and identical measures, school districts including Placentia-Yorba Linda Unified, Visalia Unified, and Paso Robles Joint Unified continue to fuel the fire by passing policies just like it.<sup>70</sup> These “Critical Race Theory bans” have consequences far beyond the viewpoint censorship they enable, but they also work to communicate to students of color that their history, diversity, and culture are undeserving of classroom representation. As UCLA Professor of Education Tyrone Howard writes in a declaration supporting the litigation to strike down Resolution 21, “When accurate information about the experience of Black people, other people of color, and members of the LGBTQ+ community is excised from schools, all students are deprived of an understanding of the challenges that these groups have overcome to strengthen our democracy and how these struggles continue today.”<sup>71</sup>

## **English Learners**

Within the landscape of the California education system, current and former English learners (ELs), who make up nearly 35% of California public school students,<sup>72</sup> are particularly marginalized and under-resourced by the school system. “English language learners are asked to do what is impossible, acquire a new language and learn a grade level curriculum in the same amount of time

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<sup>68</sup> *Mae M. v. Komrosky Complaint*, p. 12.

<sup>69</sup> *Mae M. v. Komrosky Complaint*, p. 17.

<sup>70</sup> Lambert, D. (2023, February 23). *National wave of anti-CRT measures trickles into California schools*. EdSource. Retrieved from <https://edsources.org/2023/national-wave-of-anti-crt-measures-trickle-into-california-schools/688862>.

<sup>71</sup> Howard, T. (2023, July). *Expert declaration of Tyrone Howard*. Public Counsel. Retrieved from <https://publiccounsel.org/wp-content/uploads/2023/07/Expert-Declaration-of-Tyrone-Howard.pdf> p. 3

<sup>72</sup> California Department of Education. *English Learners in California Schools*. Retrieved from <https://www.cde.ca.gov/ds/sg/englishlearner.asp>.

that English speakers only have to do one of these things,” UCLA Professor of Education and Co-Director of the Civil Rights Project Patricia Gandara writes as part of an expert report.<sup>73</sup> The egregious failures of the state to provide educational opportunities to one of the largest populations of students in the state is tantamount to writing off the potential and dignity of a third of the state’s student population.

The most recent Getting Down to Facts Reports concluded that “[m]any ELs in California do not have equitable access to grade-level core content instruction, and the English language development (ELD) instruction they receive may fall short of state standards.”<sup>74</sup> Furthermore, “the state’s overall education funding still falls short of what research shows would be adequate to meet California’s educational goals, particularly for the one in five students who need to learn English along with the rest of the curriculum.”<sup>75</sup>

It was not until 2016 that California passed Proposition 58, finally recognizing bilingualism and multilingualism as key assets and resources within California. Proposition 58 overturned decades old Proposition 227 that had significantly restricted bilingual and multilingual programs and instruction, “which evidence has definitively demonstrated as the most effective mode of instruction for EL students.”<sup>76</sup> Prior educational policies with respect to English learner students under Proposition 227 without doubt denied countless emergent bilingual students who passed through California’s schools of the education to which they were entitled. And while Proposition 227’s restrictions are no longer in effect, California has struggled to shift the tide and embrace policies that have proven to support the development of English language skills and other learning for emergent

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<sup>73</sup> *Cayla J. v. State of California*, Superior Court of California, County of Alameda, Case No. RG20084386, Declaration of Patricia Gandara (2021).

<sup>74</sup> Santibañez, L., & Umansky, I. (2018). *English learners: Charting their experiences and mapping their futures in California schools*. Policy Analysis for California Education, PACE, p. 9.

<sup>75</sup> Santibañez & Umansky (2018), p. 188.

<sup>76</sup> Santibañez & Umansky (2018), p. 11.

bilingual students. As with every subject matter addressed in this paper, the damning question is why.

### **Academic Outcomes**

The persistent inequities detailed above predictably leave far too many of the most marginalized students in classrooms with underprepared (and frequently uncertified) teachers, who are in turn supported by the least experienced administrators. That, combined with the persistent lack of adequate resources, racist disciplinary practices, ongoing impacts of remote learning, and inequitable curricular choices has predictable consequences on the academic outcomes for students across the state.

While standardized test scores are far from holistic, multifaceted measures of learning and/or quality education, the State of California uses the California Assessment of Student Performance and Progress (“CAASPP”) in their School Dashboard as an annual benchmark for understanding the academic progress of students in schools across the state (as required under the Every Students Succeeds Act [“ESSA”]). The results of the CAASPP assessments confirm the existence of two distinct educational channels: one that functions relatively effectively for affluent and more privileged students, and another that has overwhelmingly failed students of color, and particularly Black, Native American, Latino, English learner, and low-income students across the state.

In 2023, only 46.6% of students met or exceeded the standard for English Language Arts (ELA) and a mere 34.6% met or exceeded the standard for Math.<sup>77</sup> Within both categories, Black and Latino students fell below the statewide average, with 36.08% and 29.85% of Latino and Black students, respectively, meeting or exceeding the standard in ELA. In Math, the numbers were

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<sup>77</sup> EdSource (Referenced Jul. 17, 2024). *California Assessment of Student Performance and Progress (CAASPP) results*. Retrieved from <https://caaspp.edsource.org/sbac/california-00000000000000>.

22.69% and 16.89% of Latino and Black students, respectively, also not meeting the grade-level standards by the state. When compared with white and Asian students, of whom 60.71% and 74.7% respectively met or exceeded the standard for ELA, and 49.02% and 69.93% met or exceeded the standard for Math,<sup>78</sup> the impact of the disparate and deeply unequal educational system in California should be clear.

While overall student outcomes improved marginally in the years before the pandemic, on average California students continue to lag behind students across the country on most measures.<sup>79</sup> California's test scores, graduation rates and suspension rates have improved some, but California still lags the nation both in average outcomes and in the equality of outcomes across student groups.<sup>80</sup> The disparity between California and the nation is concentrated on average in disadvantaged districts, where pre-pandemic California students scored nearly a full grade level behind peers in other parts of the country. In affluent districts there was little difference between California and the nation.<sup>81</sup>

Statewide test scores like these are blunt measures that obscure the nuances of circumstances faced by students across the state and are not necessarily designed to measure the soft skills and intellectual curiosity that experts know to be central to a quality education. However, given the CAASPP's role in California's School Dashboard accountability system, the stark gaps along racial lines should raise alarm bells of deeper equity issues at the core of students' educational experiences and mandate immediate response. The assessment outcomes for Black and Latino students illustrate

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<sup>78</sup> Ibid.

<sup>79</sup> Brighthouse, H., Kurlaender, M., Reardon, S. F., Doss, C., Reber, S., Kalogrides, D., & Reed, S. (2018). *Outcomes and demographics of California's schools. Getting Down to Facts II*, p. 6. Research Brief. Policy Analysis for California Education and Stanford University. Retrieved from [https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII\\_Brief\\_OutcomesandDemographics.pdf](https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII_Brief_OutcomesandDemographics.pdf)

<sup>80</sup> Reardon, S. F., Doss, C., Gagné, J., Gleit, R., Johnson, A., & Sosina, V. (2018). *A Portrait of Educational Outcomes in California. Getting Down to Facts II*. Technical Report. Policy Analysis for California Education and Stanford University. Retrieved from [https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII\\_Report\\_Reardon-Doss.pdf](https://gettingdowntofacts.com/sites/default/files/2018-09/GDTFII_Report_Reardon-Doss.pdf).

<sup>81</sup> Reardon et. al. (2018), p. 10-11.

the dire need for radical changes to California’s approach to education to center and better serve these students.

### **COVID-19 & Amplified Inequities**

COVID-19 upended education for millions of students all over the United States, in the process amplifying the deep inequities of the two-tiered system of education that we see in place across California. Not surprisingly, the students most marginalized in their access to educational opportunities were the students who felt the impact of COVID-19 and the resulting educational shortcomings most severely. Decades of progress were significantly wiped out in just a couple of years.

Reports from experts have already begun to detail the educational losses suffered by students across California during the period of educational disruptions due to the pandemic. As part of an expert report provided for in support of litigation challenging California’s failure to ensure equitable education throughout the pandemic, Harvard psychometrician Andrew Ho found that COVID-19 and inequitable remote learning only further deepened the educational divide. By comparing California test score trends between 2019 and 2022 test results, Ho found that “racial inequality increased in both [Math and ELA subjects] and early grades. Economic inequality also increased within racial and ethnic categories in early grades.”<sup>82</sup> In other words, the achievement gaps between white and Latino students, as well as white and Black students, and learning loss was most severe within school districts serving California’s poorest students. “In grade 3, for example,” Ho writes, “the White-Black gap increased by 6 points in ELA and 12 points in Math, and the White-Hispanic gap increased by 11 points in ELA and 13 points in Math.”<sup>83</sup> The study also found that academic learning loss is generally largest in Math, with disproportionate effects on historically marginalized

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<sup>82</sup> Cayla J., Expert Report of Andrew Ho (2023), p.12. Retrieved from <https://www.documentcloud.org/documents/23923611-caylaj-andewho-080423>.

<sup>83</sup> Cayla J., Expert Report of Andrew Ho (2023), p. 9

groups.<sup>84</sup> In a later addendum, Ho found that the impact of the pandemic on educational inequity was more severe using spring 2023 test scores versus 2022 data.<sup>85</sup> On the whole, Black, Latino, and white students were found to score “2-6 months behind their 2019 peers, on average.”<sup>86</sup> Students who were economically disadvantaged and English learners have been found to have experienced even greater learning lag than students who were not in these groups.<sup>87</sup>

These tragic outcomes were hardly unexpected, as reports released throughout the pandemic have highlighted the ways in which existing disparities were amplified by COVID-19, with the most marginalized students suffering the brunt of the pandemic’s impact.<sup>88</sup> Early on in the pandemic, California State Superintendent of Public Instruction Tony Thurmond acknowledged that close to 1 million students lacked either computers or internet access needed to participate in distance learning.<sup>89</sup> Other reports found that a startling one-quarter of California students lacked adequate access to the internet, a majority of them Black, Latino or Native American.<sup>90</sup> Thus, many of same students already denied an appropriate education while in person were effectively left even worse off without any access to education for months. The families of English learners were also particularly impacted, with schools struggling to provide instructions and materials in the home languages of families across California.

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<sup>84</sup> Cayla J., Expert Report of Andrew Ho (2023), p. 5.

<sup>85</sup> Cayla J., Supplemental Andrew Ho Expert Report Addendum (2023). Retrieved from <https://publiccounsel.org/wp-content/uploads/2024/01/2023-10-25-Supplemental-Andrew-Ho-Expert-Report-Addendum.pdf>.

<sup>86</sup> Cayla J., Supplemental Andrew Ho Expert Report Addendum, p. 2.

<sup>87</sup> Pier, L., Christian, M., Tymeson, H., & Meyer, R. H. (2021). *COVID-19 Impacts on Student Learning: Evidence from Interim Assessments in California*. Policy Analysis for California Education, PACE.

<sup>88</sup> McKinsey & Company (2020). *Mind the gap: COVID-19 is widening racial disparities in learning, so students need help and a chance to catch up*. Retrieved from <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/mind-the-gap-covid-19-is-widening-racial-disparities-in-learning-so-students-need-help-and-a-chance-to-catch-up>.

<sup>89</sup> Johnson, S. (2020, October 15). *Up to 1 million California students still lack connectivity*. Ed Source. <https://edsources.org/2020/california-still-lacks-connectivity-for-more-than-300000-students-during-distance-learning/641537#:~:text=California%20State%20Superintendent%20of%20Public,to%20participate%20in%20distance%20learning>.

<sup>90</sup> Chandra, S., Chang, A., Day, L., Fazlullah, A., Liu, J., McBride, L., Mudalige, T., Weiss, D., (2020). *Closing the K–12 Digital Divide in the Age of Distance Learning*. Common Sense Media, Boston Consulting Group.



## Legal framework for the constitutional right to education

*Of all the civil rights for which the world has struggled and fought for 5,000 years, the right to learn is undoubtedly the most fundamental. ... The freedom to learn ... has been bought by bitter sacrifice. And whatever we may think of the curtailment of other civil rights, we should fight to the last ditch to keep open the right to learn.*

—W.E.B. Du Bois, *The Freedom to Learn* ([1949], 1970, p. 230)

These vast disparities across California’s education system are longstanding and have been worsened by the educational circumstances of the past two years during the pandemic. The time for the political process to redress them is well overdue. In light of these failures, an ambitious legal framework—one that confirms and defines education as a fundamental constitutional right for all students—is an essential baseline from which California policymakers and leadership must operate. A constitutional right to education underscores that the challenges around educational inequity confronting the State cannot be ignored or slighted. The fact that these inequities still exist after decades of attempted piecemeal reforms leads to a fundamental question: whether the education system as it currently operates in California is adequately providing students with the education to which they are legally entitled. The State must recognize and take immediate steps to realize and then protect this fundamental right for all California students.

Well-established legal precedent articulated the primary and fundamental role that public schools play in developing and promoting the values upon which society rests. Seven decades ago, in *Brown v. Board of Education*, the U.S. Supreme Court held that education “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.”<sup>91</sup>

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<sup>91</sup> *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493 (1954).

Likewise, in *Plyler v. Doe*, the landmark Supreme Court decision held that states cannot deny students a free public education on account of immigration status. The Court stated that public schools are “a most vital civic institution for the preservation of a democratic system of government.” They are “the primary vehicle for transmitting the values on which our society rests.”<sup>92</sup> The *Plyler* Court went on to explain that “[b]y denying . . . children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.”<sup>93</sup>

Despite acknowledging the unique and fundamental role of public education, the Court did not explicitly recognize a generalized federal constitutional right to education, leaving open the question of whether students deprived of a basic education might have such a right in future interpretations.<sup>94</sup> Though the composition of the current U.S. Supreme Court leaves little hope that such a right will be found within the meaning of the Fourteenth Amendment, nonetheless a recent federal court opinion upholding this right can inform California constitutional doctrine.<sup>95</sup>

Indeed, in California our Supreme Court has repeatedly recognized that all students in the state possess a constitutional right to “equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society.”<sup>96</sup> Accordingly, in California, schools cannot provide students with a program of education that “falls fundamentally below prevailing statewide standards.”<sup>97</sup> The California Supreme Court has also made explicit that the State bears the “ultimate responsibility for public education [that] cannot be delegated to any other entity,” including “ensur[ing] basic educational equality under the California Constitution.”<sup>98</sup>

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<sup>92</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982) internal quotation marks and citations omitted.

<sup>93</sup> *Plyler*, 457 U.S. at 223.

<sup>94</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

<sup>95</sup> *AC v. Raimondo*, 494 F. Supp. 3d 170 (D.R.I. 2020).

<sup>96</sup> *O’Connell v. Superior Court*, 47 Cal. Rptr. 3d 147, 141 Cal. App. 4th 1452 (Ct. App. 2006).

<sup>97</sup> *Butt v. State of California*, 842 P.2d 1240, 4 Cal. 4th 668, 685-687 15 Cal. Rptr. 2d 480 (1992).

<sup>98</sup> *Butt* (1992), p. 681; *Hall v. City of Taft*, 47 Cal. 2d 177, 302 P.2d 574, 302 P. 574 (1956); *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 926, 226 P.2d 926 (1924).

Yet, as discussed, and as California students, parents, community members, and advocates well know, for far too long many students of color and low-income students across the state have not had their education treated as a basic fundamental civil right—far from it. As a result, successful litigation has been brought to establish, as examples, that the right extends to the provision of books and other instructional materials, hiring qualified teachers, ensuring safe and sanitary facilities,<sup>99</sup> guaranteeing access to literacy,<sup>100</sup> the elimination of classroom periods without any pedagogically defensible content,<sup>101</sup> the delivery of evidence-based instruction for English learners where the state has collected information that schools are providing no instruction to achieve fluency at all,<sup>102</sup> requiring trauma-informed schools and classrooms,<sup>103</sup> and assuring digital access inside the classroom and at home along with remediation of the impact of the pandemic.<sup>104</sup>

### **The Right to Access to Literacy**

Recent efforts by students, parents, and grassroots movement leaders have sought to vindicate and advance the right to education through both the United States and California State Constitutions. Two recent litigation efforts to hold states accountable for delivering a high-quality education to all students—one on behalf of students and community-based organizations in California, the other a federal case on behalf of students in Detroit—used access to foundational literacy skills as the threshold to define what an education system must deliver as a core component of their constitutional right to education.

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<sup>99</sup> *Williams v. California*, 372 U.S. 713 (1963).

<sup>100</sup> *Ella T. v. State of California*, Superior Court of California, County of Los Angeles, Case No. BC685730; *Ella T. v. State of California* Case Information Site. Public Counsel. <https://publiccounsel.org/issues/education-equity/right-to-literacy/>.

<sup>101</sup> *Cruz et al. v. State of California et al.* Settlement Website. ACLU of Southern California. Retrieved from <https://www.aclusocal.org/en/cruz-settlement>

<sup>102</sup> *DJ v. State of California* Case Website. ACLU of Southern California. <https://www.aclusocal.org/en/cases/dj-v-state-california>.

<sup>103</sup> *Peter P. v. Compton Unified School District*, 135 F. Supp. 3d 1126 (C.D. Cal. 2015).

<sup>104</sup> *Cayla J.*, Public Counsel Case Website. Public Counsel. Retrieved from <https://publiccounsel.org/our-cases/cayla-j-california/>.

These cases emphasized what the state educational system as well as teachers, students, families, and experts all know to be beyond dispute: that literacy is a foundational skill that forms the basis for the exercise of all educational opportunities.<sup>105</sup> Absent mastery of literacy, students cannot read, write, compute or comprehend state-mandated material at state-mandated levels. Denial of access to literacy interferes with students' ability to understand not only English Language Arts instruction, but also the core content of every other subject matter, effectively fencing out students from receiving any education at all.

The legal arguments advanced in these cases were grounded in these precepts as well as the principle that literacy is the prerequisite for meaningful participation in our political processes. Our theory of democracy depends upon all children achieving literacy. Historically, those who have sought to disenfranchise citizens of color or subordinate individuals of color have weaponized illiteracy to accomplish these unconstitutional ends. As stated by Sixth Circuit Court of Appeals Judge Eric Clay in the case brought in Detroit, *Gary B*, “the history of public education in this country, as with many things, is inextricably tied to race.”<sup>106</sup> Quoting from *Plyler*, at 223-24, he stressed, on behalf of the court, the centrality of literacy to providing children with the opportunity to better their circumstances:

[M]ore is involved in these cases than the abstract question whether [the challenged policy] discriminates against a suspect class, or whether education is a fundamental right. [The policy] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic

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<sup>105</sup> Public Counsel (2020). *Right to Literacy Overview*. Public Counsel. Retrieved from <https://publiccounsel.org/issues/education-equity/right-to-literacy/>.

<sup>106</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020), p. 36.

possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of [the policy], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [Texas’s policy] can hardly be considered rational *unless it furthers some substantial goal of the State*.<sup>107</sup>

Judge Clay continues by highlighting the importance of literacy as part of meaningful participation in our political system:

Effectively every interaction between a citizen and her government depends on literacy. Voting, taxes, the legal system, jury duty—all of these are predicated on the ability to read and comprehend written thoughts. Without literacy, how can someone understand and complete a voter registration form? Comply with a summons sent to them through the mail? Or afford a defendant due process when sitting as a juror in his case, especially if documents are used as evidence against him?

Even things like road signs and other posted rules, backed by the force of law, are inaccessible without a basic level of literacy. In this sense, access to literacy “is required in the performance of our most basic public responsibilities,” *Brown*, 347 U.S. at 493, as our government has placed it “at the center of so many facets of the legal and social order,” *Obergefell*, 135 S. Ct. at 2601; *see also* Steven G. Calabresi & Michael W. Perl, *Originalism and Brown v. Board of Education*, 2014 Mich. St. L. Rev. 429, 552 (“At a minimum, children must be taught to read so they can read the laws for themselves—a task that many of the Framers would have thought was fundamental.”).<sup>108</sup>

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<sup>107</sup> *Gary B.*, p. 22.

<sup>108</sup> *Gary B.*, p. 47, 48.

California Supreme Court Justice Goodwin Liu has similarly written that “[c]itizenship requires a threshold level of knowledge and competence for public duties such as voting, serving on a jury, participating in community affairs, and the meaningful exercise of civil liberties like freedom of speech.”<sup>109</sup>

The civil rights action *Ella T. v. State of California*, filed in 2017, sought to establish a state constitutional right to access to literacy premised on the same principles undergirding Judge Clay’s opinion and set forth in California law. The complaint pointed out that 11 of the 20 lowest literacy achieving large districts in the nation were in California. Stockton, where many of the plaintiffs attended school, was third lowest, only slightly ahead of Detroit, which was the lowest achieving. Plaintiffs attended Stockton schools where the proficiency rates in certain grades were or near zero.<sup>110</sup>

The complaint went on to detail how the denial of access to literacy is inextricably intertwined with marginalization and exclusion of students of color from the school systems that are supposed to serve and support them. Students “with pronounced reading difficulties are vulnerable to marginalization in their schools” and face an increased “lifelong risk of involvement in the juvenile and criminal justice systems.”<sup>111</sup> Studies have found that “[i]lliteracy is perhaps the strongest common denominator among individuals in correctional facilities.”<sup>112</sup> “[T]he link between academic failure,” and in particular “reading failure” and delinquency is strong.<sup>113</sup> According to one survey,

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<sup>109</sup> Liu, G. (2006). *Education, Equality, and National Citizenship*. The Yale Law Journal <http://theeducatedguess.org/wp-content/uploads/2011/08/Adequacy-14thAmend-Liu080111.pdf>

<sup>110</sup> *Ella T. v. State of California*, Superior Court of California, County of Los Angeles, Case No. BC685730; Right to Literacy Overview: *Ella T. v. State of California*. Public Counsel. Retrieved from <https://publiccounsel.org/issues/education-equity/right-to-literacy/>

<sup>111</sup> Leone, P. E., Krezmien, M. P., Mason, L., & Meisel, S. (2005). *Organizing and delivering empirically based literacy instruction to incarcerated youth*. *Exceptionality*, p. 89-95.

<sup>112</sup> Drakeford, W. (2002). *The Impact of an Intensive Program to Increase the Literacy Skills of Youth Confined to Juvenile Corrections*. *Journal of Correctional Education*, p. 139–144. <http://www.jstor.org/stable/41971101>

<sup>113</sup> Brunner, M. S. (1993). *Reduced recidivism and increased employment opportunity through research-based reading instruction*. Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, p. 7, 12.

56% of incarcerated adults scored “basic” or below in prose literacy; 50% in document literacy; and 78% in quantitative literacy.<sup>114</sup>

Individuals denied access to literacy often experience significant barriers to securing economic self-sufficiency. They may be unqualified for jobs or unable to read and fill out job applications. Individuals who cannot financially support themselves due to lack of literacy often cannot complete the written application forms necessary to obtain government entitlements such as Medi-Cal, Covered California, Social Security Disability Insurance, or General Assistance/General Relief benefits.

In California, lawmakers have expressly acknowledged the importance of literacy. Literacy’s primacy is codified within the State’s definition of a basic education in several statutory provisions, acknowledging its necessity for democratic participation and economic survival. The Education Code states that “[r]eading and literacy skills are fundamental to success in our economy and our society”<sup>115</sup> and explains that of “the skills necessary to become productive members of our society,” “literacy in the English language is among the most important.”<sup>116</sup>

In a stark example of the pressing unmet literacy needs of so many California students, the lawsuit included as an exhibit a letter from a second grader at LaSalle Elementary in Los Angeles, where only eight of the school’s 430 students passed state reading exams. The letter reads: “Der Governor, I can improve the school. Supplies eras piso cupiso. Shrho pars yes. *I ned esbu blpe.*”<sup>117</sup>

Disturbingly, when students in the *Ella T.* case went to court because the political process had failed to deliver access to literacy, the State fought hard to dismiss the action, arguing that their complaint failed to state a cognizable claim for relief. Lawyers for the State of California took the

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<sup>114</sup> Greenberg, E., Dunleavy, E., & Kutner, M. (2007). *Literacy behind bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey*. National Center for Education Statistics, p. 13.

<sup>115</sup> Cal. Educ. Code § 19985.5(a) (West 2024).

<sup>116</sup> Cal. Educ. Code § 300(h).

<sup>117</sup> *Ella T.*, Complaint (2017).

position that “Students in California have a fundamental right to education, but they do not have the right to a certain level of literacy.”<sup>118</sup> During depositions in the *Ella T.* case, state officials further asserted they had no obligation to redress conditions in the schools resulting in the failure of students to achieve proficiency.

The State’s efforts to dismiss the lawsuit were unsuccessful and the case was allowed to proceed,<sup>119</sup> providing further evidence that a right to literacy must in fact exist. Ultimately, plaintiffs in *Ella T.* settled with the State agreeing to provide new resources to improve literacy outcomes at some of the state’s lowest performing schools, as well as the state adopting a holistic framework for the literacy improvement, recognizing that factors like culturally responsive curriculum, school climate, and racially disparate school discipline policies are inexorably intertwined with who receives a high-quality education and who does not.<sup>120</sup>

The 2020 settlement of *Ella T.* established \$50 million in Early Literacy Support Block Grants (ELSBG) to be distributed among 75 California elementary schools with the lowest average reading scores.<sup>121</sup> The ELSBG amounted to roughly \$1,000 per student to be used toward literacy coaches, teacher’s aides, teacher training, and culturally responsive reading materials. In order for schools to receive grants under the program, local education agencies were required to analyze their school’s low literacy proficiency and submit three-year “Literacy Action Plans” proposing how funds would be distributed. ELSBG are granted with spending flexibility under specified parameters, and implementation is guided by a newly hired statewide “Expert Lead in Literacy,” dedicated to helping schools implement research-driven curricular improvements.

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<sup>118</sup> *Ella T. v. State of California*, Superior Court of California, County of Los Angeles, Case No. BC685730, Opposition to Defendant’s Demurrer to Complaint (2018).

<sup>119</sup> *Ella T.*, Demurrer Order (2018).

<sup>120</sup> *Ella T.*, Settlement Implementation Agreement (2020).

<sup>121</sup> *ibid.*



Within two years, to the credit of the state, the results of the settlement have already proven to be a broad success. Stanford researchers Thomas Dee and Sarah Novicoff found that the block grants “increased the share of students scoring Level 2 or higher (Standard Nearly Met, Standard Met, or Standard Exceeded) on English Language Arts tests by 6 percentage points (a 20% increase).”<sup>122</sup> Additionally, ELSBG increased the mean English Language Arts test score by .14 standard deviation, “roughly 25 percent of a year of learning at this age,” as well as had spillover effects to increase Math mean test scores by .11 standard deviation.<sup>123</sup> On the ground, these numbers translate into promising interventions driven by local expertise. In San Jose, one school used ELSBG to hire a part-time literacy coach that met with teachers weekly.<sup>124</sup> In Watsonville, schools hired a Curriculum Coach and Parent Engagement Specialist to organize Family Literacy Nights and host staff training on phonemic awareness.<sup>125</sup>

Dee and Novicoff’s findings show that ELSBG has the potential to quickly and cost efficiently improve educational outcomes. While the two researchers recognize that replicating *Ella T.*’s effect is complicated by the distinct application to California shortly followed by the COVID-19 pandemic, they conclude that ELSBG “results provide a proof point for how such focused efforts can help to realize, in a cost-effective manner, the educational potential of students served by our lowest-performing schools.”<sup>126</sup> The question now is where from here.

### **Intersections of Literacy & Race**

Literacy, while unquestionably essential, is only a starting point for understanding the right to education. Tragically, but not surprisingly, denial of access to literacy has been a principal strategy

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<sup>122</sup> Novicoff, S. (2023, January 10). *California initiative offers blueprint to implement the science of reading*. Brookings. Retrieved from <https://www.brookings.edu/articles/california-initiative-offers-blueprint-to-implement-the-science-of-reading/>.

<sup>123</sup> Novicoff, S. (2023).

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

<sup>126</sup> Novicoff, S., & Dee, T. S. (2023). *The achievement effects of scaling early literacy reforms*. EdWorking Papers. Retrieved from Annenberg Institute at Brown University: <https://doi.org/10.26300/jnmt-2093>, p. 25.

to attempt to subordinate and disenfranchise individuals of color throughout history. As Justice Brennan of the United States Supreme Court stated in 1978 in *Regents of Univ. of Cal. v. Bakke*:

From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes. [[Footnote 2/51](#)] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, *Brown I*, [347 U. S. 483](#) (1954), that relegated minorities to inferior educational institutions, [[Footnote 2/52](#)] and that denied them intercourse in the mainstream of professional life necessary to advancement. *See Sweatt v. Painter*, [339 U. S. 629](#) (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. *Berea College v. Kentucky*, [211 U. S. 45](#). *See also Plessy v. Ferguson*, [163 U. S. 537](#) (1896).<sup>127</sup>

In his 2020 *Gary B.* ruling, Judge Clay expanded on this logic, stating:

Public schools are now universal in the United States, and Americans take it for granted that state-sponsored education will be provided for their children as of right. But in the face of this progress, the history of education in the United States also demonstrates a substantial relationship between access to education and access to economic and political power, one in which race-based restrictions on education have been used to subjugate African Americans and other people of color. This racial history of education in America—and the efforts subsequently taken to

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<sup>127</sup> *University of California Regents v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). p. 371.

confront it—reveals the importance earlier generations placed on education. Taken together, this history establishes that education has held paramount importance in American history and tradition, such that the denial of education has long been viewed as a particularly serious injustice.<sup>128</sup>

From the era of slavery to Jim Crow to the present day, Black people have been intentionally denied access to literacy. As Justice Brennan writes, in the antebellum South, states enacted anti-literacy laws that barred teaching enslaved people to read and write. The “Negro Act” of 1740 in South Carolina prohibited teaching of writing to an enslaved person, punishable by a fine of one hundred pounds.<sup>129</sup> Alabama, Georgia, Louisiana, Mississippi, North Carolina, and Virginia had their own versions of laws banning the education of enslaved Black people.<sup>130</sup> In the Jim Crow South, no longer able to outright ban the education of Black students, lawmakers turned to literacy tests at the polls to disenfranchise eligible Black voters who, mere years earlier, those same states had effectively barred from any access to education.<sup>131</sup>

California has been intentional too in its refusal to ensure that children of color possess a right of access to literacy under our state constitution. The undeniable relationship between race and who has access to education in this country necessitates a reckoning about how race intersects with the fundamental constitutional right to education.

### **The Right to a Racially Just Education**

Because, as the Supreme Court stated in *Plyler*, education is “the primary vehicle for transmitting the values on which our society rests,”<sup>132</sup> then in the 21st Century, the right to

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<sup>128</sup> *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020). p.41-42.

<sup>129</sup> Rasmussen, B. (2010). “Attended with great inconveniences”: *Slave literacy and the 1740 South Carolina Negro Act*. The South Carolina Historical Magazine, p. 201-203.

<sup>130</sup> Encyclopedia.com. *Literacy and Anti-Literacy Laws*. Retrieved from <https://www.encyclopedia.com/humanities/applied-and-social-sciences-magazines/literacy-and-anti-literacy-laws>.

<sup>131</sup> History.com Editors. (2021, February 2). *Jim Crow laws and Black voting rights*. History. Retrieved from <https://www.history.com/news/jim-crow-laws-black-vote>.

<sup>132</sup> *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal quotation marks and citations omitted).

education must mean much more than just access to basic literacy. No doubt, for the reasons cited above, literacy is a fundamental building block, but if the education system of California is to truly prepare all students for participation in economic and civic life today, then the right to education must include tools and resources essential to identify and dismantle racism. The constitutional right to education today requires an education that recognizes and honors the dignity of all racial and ethnic groups, rather than one that privileges white history, values, language, and norms. It demands that all children be visible and there be teachers and administrators in their schools who look like them and share the personal experiences and backgrounds to understand their histories. It requires that students develop the ability to critically assess racial and class biases and positionality, and to work empathically and collaboratively with individuals whose backgrounds differ from their own. An education that enshrines a single race—that systematically reproduces and validates the artificial racial hierarchies that structure civic, economic, and social life in the United States—cannot prepare its recipients for meaningful democratic participation.

In March 2021, a civil rights action alleging violations of a student’s right to a racially just education was filed in the Supreme Court of the State of New York, County of New York on behalf of students in the NYC school system and IntegrateNYC, a youth-led nonprofit working for racial integration and equity in New York City schools. The 81-page complaint was brought against the State of New York and New York City Department of Education, among other defendants, pursuant to the Education Article of the New York State Constitution and the equal protection clause of the New York Constitution, provisions that have been construed to closely track their counterparts in the California Constitution.<sup>133</sup> Paragraph 1 of the complaint states:

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<sup>133</sup> Footnote to CFE II at 905, holding that the Education Article requires that all students receive a “sound and basic education” that “conveys not merely skills, but skills fashioned” to “prepare students for “meaningful civic participation in contemporary society.”

No child is born with an understanding, much less acceptance, of any racial hierarchy. Rather, racial identity and hierarchy are artificially constructed, and must be taught and learned, ... The schoolhouse is the site where the State inculcates in children the society's democratic and cultural values, with the purpose of preparing them for eventual participation in common life. But it is also the site of transmission of racial hierarchy and racism, in all of its forms. Children encode social meanings as they move through the world, and nowhere so than at school. Children of color, in particular, experience and internalize the racism that is inherent in their educational experiences, which in turn hinders their educational advancement.<sup>134</sup>

The principles underlying the New York case and the relief claimed are constitutional bedrock. Where education is a fundamental right, how can it be anything other than racially sensitive and racially just? If education does not succeed in teaching our children to identify and dismantle racism, what purpose does it serve in messaging democratic values that promote civic responsibility and participation? A racially just education then is not a policy to be urged, but rather an entitlement to be recognized and enforced. To clarify further, the state must ensure an education that is free of racism—in the distribution of resources, quality of programming, and levels of student learning—and schools must also actively confront racial inequities that occur both at the individual and systemic level. In other words, it would be monumental yet still insufficient for all racial/ethnic student groups to reach, say, 80% proficiency in reading based on state tests. California public schools must also engage in the processes that Ibram X. Kendi summons us to adopt of “persistent self-awareness, constant self-criticism, and regular self-examination”<sup>135</sup> to teach students how to foster an antiracist society both inside schools and in the broader community. We must have equal

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<sup>134</sup> *MATTER OF IntegrateNYC, INC. v. State of New York*, 2023 N.Y. Slip Op 62325 (App. Div. 2023).

<sup>135</sup> Kendi, I. X. (2019). *How to Be an Antiracist*. New York, One World, p. 23.

and equitable conditions for students of color for them to be fully literate, and then those literacy skills can be leveraged to teach all student subgroups about racism and anti-racism. But of course, educators must first learn how to practice this before they can teach it.

The public education system is a critical space to actively confront and dismantle racist practices—both at the system level (state and districtwide policies and practices) and the school and classroom level (teaching practices)—because of the integral role it plays in the formation of young people and how they will grow to engage in social, political, cultural, and economic life in California. Some teachers recognize that racially just teaching requires a love that is embodied by actions like learning a new consciousness, listening to students, and pushing back on power and privilege.<sup>136</sup> A racially just education also centers healing by fostering “educational spaces that tend to the harm and violence that has been enacted against BIPOC [Black Indigenous People of Color] bodies and minds—specifically those of our children.”<sup>137</sup>

Racially just teaching is radical in that it incorporates as pedagogy the values of love, humanity, and healing.

## Finance and Governance

The National Economic and Social Rights Initiative and Community Asset Development Re-defining Education identify in their 2007 manual that in order to guarantee the human right to learning and knowledge, governments must “use the maximum amount of resources that are available to provide children with an education based on the resources that we have in our society as a whole, not only the resources in the current budget.”<sup>138</sup> Our state government has generally done

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<sup>136</sup> Pitts, J. (September 2020). *What anti-racism really means for educators*. Learning for Justice. Retrieved from <https://www.learningforjustice.org/magazine/what-anti-racism-really-means-for-educators>.

<sup>137</sup> Pitts, J. (2020).

<sup>138</sup> Dignity in Schools Campaign. (n.d.). *Bringing a human rights vision to public schools: A training manual for organizers*. Dignity in Schools, p. 13. Retrieved from <https://dignityandrights.org/resources/bringing-a-human-rights-vision-to-public-schools-a-training-manual-for-organizers/>.

the inverse by requiring schools and districts—and ultimately students and families—conform to whatever resources are politically made available in a given year. California schools have been severely under-resourced. Even an infusion of billions of dollars into school districts does not necessarily equate to increased or improved programming for students of color and students from low-income families. Having adequate funding levels to deliver a comprehensive learning program based on need should be a constitutional minimum for our public schools.

## Funding

Chronic underfunding of schools that serve students of color is a practice reflective of systemic racism. Yet California’s funding record has been to underspend on public education for decades, guaranteeing that these students will receive an inferior education.<sup>139</sup> And it is important to point out that whatever progress has been made to achieve equity in school funding only resulted after students had to take California to court twice and wage lengthy battles to obtain decisions from our Supreme Court first striking down the state’s system for school finance and then the Legislature’s stubborn and inadequate response to the ruling.<sup>140</sup> Yet, by 2018, and after years of increased state revenues and growth to the education budget,<sup>141</sup> California still only “spent \$12,498 per pupil compared with \$12,612 nationally, and well below other states like New York, Illinois, and New Jersey.”<sup>142</sup> A few weeks before schools shut down due to COVID-19, Governor Newsom acknowledged that progress on increasing per pupil funding was “not enough” as California then ranked 41<sup>st</sup> compared to other states.<sup>143</sup> Federal and state COVID-19 relief funds have given public

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<sup>139</sup> Hahnel, C. (2020, October). *California’s education funding crisis explained in 12 charts* [Infographic]. Policy Analysis for California Education. Retrieved from <https://edpolicyinca.org/publications/californias-education-funding-crisis-explained-12-charts>.

<sup>140</sup> *Serrano v. Priest*, 5 Cal.3d 584 (1971).

<sup>141</sup> Johnson, R. C., & Tanner, S. (2018). *Money and freedom: The impact of California’s school finance reform on academic achievement and the composition of district spending (Technical Report)*. *Getting Down to Facts II*. University of California, Berkeley, and Learning Policy Institute. Retrieved from <https://learningpolicyinstitute.org/product/ca-school-finance-reform-brief>.

<sup>142</sup> Johnson & Tanner (2018).

<sup>143</sup> Ring, E. (2020, March 3). *California’s K-12 spending exceeds \$20,000 per pupil*. California Policy Center. Retrieved from <https://californiapolicycenter.org/californias-k-12-spending-exceeds-20000-per-pupil>.

education a temporary yet significant boost in funding and in 2021-22 the state budget calculated that per pupil funding in California had reached \$21,152. But this infusion is one-time only, the result of an unprecedented pandemic. It is targeted at addressing necessities peculiarly arising out of COVID-19, like vaccinations and health and safety protocols, not long overdue deficiencies at campuses. School administrators consequently do not commit to long-term programs and hirings or radical changes to programming. There is no guarantee whatsoever that the necessary funds will be provided on an as needed basis in the future.

California's long criticized system for school finance is one *not* predicated upon current realistic an evidence-based assessments of what resources are required to deliver an equitable education for students of color. The American Institutes for Research (AIR) completed a funding adequacy study and found that 98% of California's students attended schools that spent less than was necessary to "provide an adequate program."<sup>144</sup> AIR also estimated that to offer adequate funding of schools the state would need to grow its education budget in 2016-17 by one-third (or \$25.6 billion).<sup>145</sup> It should be noted that since AIR's study, California's total budget for K-12 education has grown from \$88 billion<sup>146</sup> to almost \$124 billion<sup>147</sup> (an increase of 40%). These total budget figures may vary from operational budget figures and again could drop dramatically after federal funds dry up. It is critical for the California Department of Education to study this moment and assess the extent to which students are being provided with an "adequate program" this year. However, we know this oversight is not happening and we also are hearing anecdotally that even

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<sup>144</sup> Imazeki, J., Bruno, P., Levin, J., de los Reyes, I. B., & Atchison, D. (2018). *Working toward K-12 funding adequacy: California's current policies and funding levels. Getting down to facts II*. Retrieved from <https://gettingdowntofacts.com/publications/working-toward-k-12-funding-adequacy-californias-current-policies-and-funding-levels>.

<sup>145</sup> Imazeki et. al (2018).

<sup>146</sup> California Department of Finance. (2016). *California State Budget 2016-2017*. Edmund G. Brown Jr., Governor, State of California. Retrieved from <https://ebudget.ca.gov/2016-17/pdf/Enacted/BudgetSummary/FullBudgetSummary.pdf>.

<sup>147</sup> California Department of Finance. (2021). *Governor's Budget Summary — 2021-22: K-12 Education*. Gavin Newsom, Governor, State of California. Retrieved from <https://ebudget.ca.gov/2021-22/pdf/BudgetSummary/K-12Education.pdf>.



this year school sites are fundraising to grow their STEAM programming or keep a recreational aide because the funds received from the district are inadequate. Our lesson here is that as long as the amount of resources received is arrived at politically at both the state and local levels, we cannot achieve an antiracist public education system. The budget should be determined by need, and more importantly, it must fluctuate based on the greater needs of BIPOC students, English learners, students with disabilities, and other high-need groups. The California Department of Education must engage in a thorough process to evaluate what an adequate program will cost, considering the state's vast diversity, and this should be used to determine the state's annual budget for K-12 education. Sadly, we believe it is no accident that our state government does not engage in this estimation practice. The state does not know actual costs because it chooses not to.

Under the Local Control Funding Formula (LCFF) the distribution of education funding improved, especially when compared to the predecessor system, but falling far short of a formula derived by a sensitively calculated analysis of what individual schools actually require to serve their student enrollments. A recent study by Policy Analysis for California Education acknowledges both that LCFF has improved our funding system as well as how changes could significantly strengthen the law. This would include revising the funding formula's weights, accounting better for special education funding and how effective teachers are distributed, and improving community engagement, transparency, and accountability.<sup>148</sup>

In our experience monitoring local implementation of LCFF in Los Angeles County, LCFF's biggest flaw is that it operates as if race does matter to inequities defining the overall system of delivery of education. It is no answer to the problem of inadequate funding at schools constitutionally mandated to deliver an equitable education to children of color that California

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<sup>148</sup> Hahnel, C., & Humphrey, D. C. (2021). What's Next for the Local Control Funding Formula?. *Policy Analysis for California Education, PACE*. Retrieved from <https://edpolicyinca.org/publications/whats-next-local-control-funding-formula>.

cannot utilize racial classifications in its programs and policies. Obvious race neutral systems that focus on enumerating school-based needs will easily pass constitutional muster. PACE’s study also recognizes that LCFF’s high-need categories (low-income, foster youth, unhoused youth and English learner students) can be reasonable approximations for race and other categories of underserved populations, and this can limit the extent to which districts center the needs of Black, Latine, Pacific Islander, or Indigenous students.<sup>149</sup>

While it has been documented that increased school funding has corresponded with increased test scores and graduation rates, the California State Auditor concluded that racial disparities in the opportunity gap had not changed.<sup>150</sup> This audit also supported the concern of many stakeholders that districts are not required to track spending or impact on high-need students.<sup>151</sup>

This brings us to the last major flaw in LCFF—little or no quality control of programs funded by supplemental and concentration grants. No requirement exists that programs and interventions included in the budget be accompanied by evidence of their past or predicted effectiveness.<sup>152</sup> Districts are in compliance with LCFF as long as they list and describe the programs and services in their Local Control Accountability Plan (LCAP) that is an increased or improved service and need not provide evidence that high-need students are benefitting more than they would otherwise from these programmatic decisions. In some cases the improvement may be more obvious if the result is more staff to provide additional one-on-one help to high-need students, but other times communities must simply take the district’s word that a specific tutoring program or professional development strategy will result in material improvements for high-need students.

There should be a standard to conduct program evaluation for programs intended to improve and

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<sup>149</sup> Hahnel & Humphrey (2021).

<sup>150</sup> Public Policy Institute of California (2021). *Targeted K-12 funding and student outcomes*. Retrieved from <https://www.ppic.org/publication/targeted-k-12-funding-and-student-outcomes/>.

<sup>151</sup> *Targeted K-12 funding and student outcomes* (2021).

<sup>152</sup> California State Auditor (2019). *K-12 local control funding: The State’s approach has not ensured that significant funding is benefiting students as intended*. Retrieved from <https://information.auditor.ca.gov/pdfs/reports/2019-101.pdf>.

increase services for high-need students, as well as the resources and support to foster and implement those processes. Even though small fixes to LCFF require districts to track opportunity gaps, there is nothing stopping districts from legally continuing to spend on ineffective programming that may be causing or maintaining those gaps.

Local control is ultimately most effective if there is a statewide system of ensuring districts have an adequate amount of funding based on their students' needs, and that the funding will be distributed equitably in programs that work. The current system of school finance in California—a system which fails to fully fund student needs at its most underperforming schools, mistakenly omits race-conscious funding calculations, and results in consistently dismal academic performance—does not come close to satisfying the constitutional mandate for equitable education.

## Recommendations

*“The paradox of education is precisely this—that as one begins to become conscious, one begins to examine the society in which he is being educated.”<sup>153</sup>*

—J. Baldwin, *A talk to teachers*. *The Saturday Review* (1963)

California's children are educated in separate channels, some of which lead to the best public higher education in the nation, but the vast majority of which provide only an inadequate and unequal public school education, that does not prepare them for higher education or give them the basic skills needed in the economy and the society. It perpetuates stratification by race and income, separating groups in our multiracial society into different lives. The state education system of California extends from pre-K through higher education, yet quality pre-school and post high school education are not treated as concrete rights. In spite of stratified performance between California's

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<sup>153</sup> Baldwin, J. (1963). *A talk to teachers*. *The Saturday Review*. Retrieved from <https://www.commonlit.org/en/texts/a-talk-to-teachers>.

public K-12 and public higher education, the State and its local authorities are responsible for fair operation of the entire system. The state has an enforceable obligation to regulate and monitor systematic inequalities in the system. The basic principle for California educational rights should be genuinely equal opportunity regardless of race, class, immigrant status or other similar divisions. Californians have a right to the basic information showing how the system is operating with publication of key data and expenditures.

The educational system must provide fair access to all major branches of knowledge as well as foster physical and social development. Students have a right of access to literacy, preparation for participation in the democracy, and acquisition of skills to live and work successfully in California's changing society. All students must have access to real training in the prerequisite skills needed for higher education including learning how to access information and express themselves in writing. School and college sponsored activities must be made available to all students.

California students may not be segregated in unequal schools and the state should foster opportunities for schools bringing together students across lines of race and class where possible. Schools must act against prejudice and discrimination by other students and by faculty and staff. Postsecondary education is now as necessary as high school education was a century ago. It should not be allocated by income or wealth. The state should create a new master plan to provide the capacity needed for the economy of 2060, not what was adequate when the old master plan was adopted in 1960 before vast transformations of the economy. All Californians must be offered the opportunity to meet university admissions requirements (standards) in their schools. They and their parents should get clear information early about the consequences of not taking the required courses. When the state pays for programs of school choice, including charters, they must be offered fairly to all students and groups and monitored closely for accountability on this parameter. Fairness includes recruitment and accessible information for all. The schools must report applications,

admissions, and recruitment areas. When schools of choice require transportation, public funding must be provided so that low-income families are not excluded.

Boundaries or school districts and attendance areas that create racial and economic segregation in unequal schools violate equality under the law and must be subordinated to the requirement of equal opportunity. Boundary lines should not be treated as walls of inclusion or exclusion.

Though quite arguably, the California Constitution already provides this guarantee, Californians would benefit from a new civil rights law that explicitly prohibits discrimination in the operation of all of its public education institutions. Discrimination shall include practices that systematically produce unequal opportunity by race, national origin, tribal status, sex, gender identity, sexual orientation, and other protected statuses. Such a law would set up an Office for Civil Rights under the Governor and a Civil Rights Division under the Attorney General with power to file discrimination cases and to issue equal opportunity regulations. Meaningful strategies to identify and rapidly redress non-compliance with rules and court decisions need to be incorporated.

There should be an independent Commission on Educational Opportunity with members appointed for eight-year terms, one each by the Governor, the leaders of both houses of the legislature, and the deans of education of the state's leading schools of education. The commission would have a professional staff and the right to access data of all educational systems and to hold hearings and compel testimony and issue reports or referrals to the AG. This Commission would issue annual reports on the state of educational equality in California and respond to questions from legislative committees. The Commission would also have authority to review and make recommendations to the legislature and Governor about provisions added to the state constitution that have the effect of limiting educational equity in the state.

It is time for California to boldly step up and define a racially just education as the education each Californian would expect for their children. Until no Californian would trade the school their child attends with the school other children attend, the right to an education for all our children is a long way off.