BYU Education & Law Journal

Volume 2021 | Issue 1 Article 2

2021

Indiana's Uniform School System, The Right to Literacy, and Remote Learning in a Pandemic

Jesse Smith
Indiana University Robert H. McKinney School of Law

INDIANA'S UNIFORM SCHOOL SYSTEM, THE RIGHT TO LITERACY, AND REMOTE LEARNING IN A PANDEMIC

Jesse Smith*

I. SCHOOL FEES PERMITTED UNDER THE INDIANA CONSTITUTION

Indiana is one of eight states that permit schools to charge fees for student textbooks and other curricular materials.[1] While providing assistance for low-income families who meet eligibility, these fees can result in hundreds of dollars

* Jesse Smith is currently a third-year law student at Indiana University Robert H. McKinney School of Law and lives in Indianapolis with his wife and two children. Jesse currently serves on the Indiana Law Review as a Note Development Editor. He was selected as a Most Outstanding Clinical Law Student for 2020-2021. Jesse is an active member of the American Constitution Society and previously served as president of the McKinney chapter. Upon successful completion of the bar, Jesse will join Parr Richey Frandsen Patterson Kruse as an associate attorney.

[1] Matt McKinney & Stephanie Wade, *42 states don't charge you for textbooks in public schools. Indiana does.*, WRTV (Jan. 29, 2018, 10:41 AM), https://www.wrtv.com/news/politics/42-states-dont-charge-you-for-textbooks-in-public-schools-indiana-does [https://perma.cc/W7Y7-9DRD].

per student.[2] In 2017, "Evansville Vanderburgh School Corporation officials sued nearly 500 families and individuals over unpaid balances for textbook and netbook/laptop rentals, meals and daycare services."[3] These charges occur despite the Indiana Constitution stating that education is to be offered "wherein tuition shall be without charge[.]"[4] The full article 8 section 1 clause reads:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual,
>
> scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all."[5]

[2] IND. CODE ANN. § 20-33-5-3 (West 2020); Khristine Albaladejo, *Indiana: Get rid of textbook fees for public school students*, INDIANA COALITION FOR PUBLIC EDUCATION MONROE COUNTY (Oct. 17, 2018 8:55 PM), https://www.icpe-monroecounty.org/blog/indiana-get-rid-of-textbook-fees-for-public-school-students [https://perma.cc/7XNE-8UTL].

[3] Thomas B. Langhorne, *EVSC suing hundreds of student families*, COURIER & PRESS (Dec. 16, 2017, 10:59 AM), https://www.courierpress.com/story/news/2017/12/16/evsc-suing-hundreds-student-families/935142001 [https://perma.cc/BKD8-QP58].

[4] IND. CONST. art. 8, § 1.

[5] *Id.*

As will be seen in the case law that has developed, litigants have challenged what exactly the "tuition shall be without charge" means.[6]

Permissive charges have been expressly codified as the curricular materials rental program.[7] The governing bodies of each school system in Indiana select their materials which as of 2013 includes: books, hardware, software, and digital content.[8] Other than compliance with minimum educational standards set by the state board, the only stipulations on the fees charged are that "[t]he annual rental rate may not exceed twenty-five percent (25%) of the retail price of the curricular materials."[9] There is a hardship carveout for "the inability of a student's family to purchase or rent curricular materials, taking into consideration the income of the family and the demands on the family, the governing body may furnish curricular materials to the students without charge[.]"[10] Prior to the changes made to the statutes to include the technological devices and software, the statute referenced only textbooks. The relevant case law has mostly developed in reference to textbooks, starting most prominently with *Chandler v. South Bend Community School Corp.*[11]

A. Cases challenging curricular fees under the Indiana Constitution

[6] *Id.*

[7] IND. CODE ANN. §§ 20-26-12-1–20-26-12-2 (West 2020).

[8] IND. CODE ANN. § 20-18-2-2.7 (West 2020).

[9] IND. CODE ANN. § 20-26-12-2 (West 2020).

[10] IND. CODE ANN. § 20-41-2-5 (West 2020).

[11] Chandler v. South Bend Community School Corp., 312 N.E.2d 915 (Ind. Ct. App. 1974).

In 1974, the Indiana Court of Appeals interpreted what the Indiana Constitution meant by tuition being "without charge" when a schoolgirl directly challenged her South Bend Community School's policy in charging a textbook rental fee.[12] The court did not interpret "tuition" to include "textbooks used in public schools of the State."[13] Instead, the court defined tuition unambiguously as "[t]he act or business of teaching the various branches of learning . . . the act of teaching: the services or guidance of a teacher: . . . the price of or payment for instruction."[14] Notably missing is any attempt to explain or define how the act of teaching is carried out. The court dismissed *Chandler's* historical view of schools at and before the 1850 Constitutional Convention because they found no ambiguity in the term.[15]

Furthermore, this decision provides a contrast between Indiana's Education Clause and other states where it has been variably held that textbooks were considered to be provided as part of an education "free of charge."[16] Idaho, Michigan, and Montana recently held for free textbooks as part of their constitutions which "include a specific mandate that the legislature of those states establish a system of free public or common schools."[17] In contrast, but in support of the court's holding, however, was Illinois's Supreme Court finding that even the mandate requiring free schools still permits them to charge for textbooks.[18] Textbook rental fees continue

[12] *Id.* at 916.
[13] *Id.* at 920.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 917, 922.
[17] *Id.* at 921.
[18] *Id.*

as part of Indiana's education policy to date and now includes other curricular materials such as laptops and other digital devices.[19]

Where the Indiana Court of Appeals rejected the historical approach in *Chandler*, the Indiana Supreme Court embraced it in full to interpret the Education Clause in *Nagy*.[20] In *Nagy*, the Evansville-Vanderburgh School Corporation imposed a $20 fee for all students which was used to pay for a multitude of school activities.[21] If the fee was not paid, a notice was sent that legal action would be taken.[22] The Court of Appeals held that the fee amounted to a charge for tuition in violation of the Indiana Constitution's Education Clause.[23] The Indiana Supreme Court undertook a historical approach noting first the distinction between what a "free school system" would imply and what the framers provided with "tuition shall be without charge."[24] Dating back to the period of when the 1850 state constitution was written and ratified, the Court pitted Caleb Mills, "referred to as the 'father of the Indiana common school system,'" who "argued for a quality education open to all Indiana children 'without distinction of rank or color' and that 'our common schools should be free as the atmosphere we breathe,'"[25] against Indiana residents that were in opposition.[26] The Indiana Senate held a referendum during the 1848

[19] IND. CODE ANN. § 20-18-2-2.7 (West 2020).

[20] Nagy *ex rel.* v. Evansville-Vanderburgh School Corp., 844 N.E.2d 481 (Ind. 2006).

[21] *Id.* at 482-83.

[22] *Id.* at 483.

[23] *Id.*

[24] *Id.* at 484-85.

[25] *Id.* at 485 (quoting Caleb Mills, *An Address to the Legislature of Indiana at the Commencement of its Session* (Dec. 7, 1846).

[26] *Id.* at 486.

elections asking simply, "Are you in favor of free schools?"[27] Interestingly, "[v]igorous opposition came from both the wealthiest and poorest economic classes—both those who had the finest education money could afford and those who never attended school."[28] The referendum passed with 56% in support, and the framers of Indiana's second constitution assembled in 1850 within this environment and ultimately passed the language that exists today.[29]

The Court found that the text ultimately used by the committee and framers fell far short of "the establishment of free schools," but it was still not exactly clear what was meant by "tuition" being "without charge."[30] If tuition were left solely to the definition of tuition at the time, the understanding of what was meant would be that definition expressed in *Chandler*.[31] However, this understanding "loses sight of the entire free school movement debate—a central and key element of which was that public schools would be operated largely at public expense."[32] The Court held that the determination of what is provided for in a public education is left to the legislature and not the courts.[33] It stated:

> Where the legislature—or through delegation of its authority the State Board—has identified programs, activities, projects, services or curricula that it either mandates or

[27] *Id.*
[28] *Id.* at 486-87.
[29] *Id.* at 486-89.
[30] *Id.* at 488-91.
[31] *Id.* at 490.
[32] *Id. at 491.*
[33] *Id.*

> permits school corporations to undertake, the legislature has made a policy decision regarding exactly what qualifies as a part of a uniform system of public education commanded by Article 8, Section 1 and thus what qualifies for funding at public expense. And of course the legislature has the authority to place appropriate conditions or limitations on any such funding."[34]

In a footnote, the Court decided that the textbook rental fee statutory arrangement fit within these "appropriate conditions or limitations."[35] But, because the $20 fee Evansville charged was applied into the general fund and used for expenses the legislature had identified as "a part of a publicly-funded education," the fee was held to be in violation of the constitution.[36]

In 2010, facing a budget deficit, Franklin Township Community School Corporation discontinued transportation services for the majority of its students.[37] Parents were left with the option of contracting with a transportation service for $495 for a single child, or finding alternative transportation.[38] Parents brought a class action suit and shortly thereafter, the general assembly amended Ind. Code § 20-27-5-2 that provided, "no fee may be charged to a parent or student for transportation to and from

[34] *Id.* at 492.
[35] *Id.* at 492 n.12.
[36] *Id.* at 493.
[37] Hoagland v. Franklin Twp. Cmty. Sch. Corp., 27 N.E.3d 737, 739 (Ind. 2015).
[38] *Id.*

school."[39] The section also states that "a school corporation *may* provide transportation for students to and from school."[40] Relying on *Nagy*, the Indiana Supreme Court held that the legislative branch has "considerable discretion in determining what will and will not come within the meaning of a public education system[,]" and that "[the legislature], and not the courts, are to judge what is the best system."[41] The court held that because the relevant statute permitted that schools *may* provide transportation to and from school, it was the legislature that permitted for schools to choose whether or not to provide transportation altogether, but a fee would not be permitted.[42]

While *Hoagland* did not find transportation to and from school necessary to encourage knowledge and learning that is equally open to all, it did provide when and under what conditions the courts should determine if a fee is constitutionally permissive. If a fee constitutes charging tuition as in *Nagy*, one in which the legislature has already determined were "part and parcel of a public education" (or put differently: the equivalent of being charged a fee to attend school), then the fee is not permitted under the Education Clause.[43] If, however, the General Assembly has made policy decisions regarding what constitutes a public education, the Education Clause gives them wide discretion to determine what is "part and parcel."[44] If it is not "part and parcel" then a fee may be permitted.[45] However, the "wide discretion"

[39] *Id.*
[40] *Id.* at 740.
[41] *Id.* at 742
[42] *Id.* at 745.
[43] *Id.* at 744.
[44] *See id.* at 748.
[45] *See id.*

afforded to the legislature has its limits, and any reading of *Nagy* and *Chandler* would assume that such discretion that is afforded to the legislature would not include permitting a charge for instruction.

B. Technology in and out of the Classroom: Curricula or Classroom?

Technology defined broadly can refer to a number of tools relating to education.[46] The first definition listed in Merriam-Webster defines "technology" as: "the practical application of knowledge."[47] Dating back centuries, "wooden paddles with printed lessons, called Horn-Books, were used to assist students in learning verses."[48] Over time, the technological method of sharing information has taken many forms: the Magic Lantern, the Chalkboard, the pencil, radio, overhead projector, the Skinner Teaching Machine, the handheld calculator, etc.[49] Remote learning via other forms of technology is not an entirely new concept in relation to health outbreaks.[50] "In 1937, the Chicago

[46] Purdue Online, *The Evolution of Technology in the Classroom*, PURDUE UNIVERSITY ONLINE, https://online.purdue.edu/blog/education/evolution-technology-classroom (last visited Nov. 22, 2020). [https://perma.cc/W5EZ-6VF9]

[47] Technology, DICTIONARY.COM https://www.merriam-webster.com/dictionary/technology (last visited Mar. 7, 2021) [https://perma.cc/9PUD-T7WA].

[48] Purdue Online, *supra* note 45.

[49] *Id.*

[50] Katherine A. Foss, *Remote learning isn't new: Radio instruction in the 1937 polio epidemic*, THE CONVERSATION (Oct. 5, 2020) https://theconversation.com/remote-learning-isnt-new-radio-instruction-in-the-1937-polio-epidemic-143797 [https://perma.cc/T2SH-D655].

school system used radio to teach children during a polio outbreak."[51]

By the time the personal computer came to prominence, "the educational world knew that it was on the verge of greatness."[52] By 2009, ninety-seven percent of teachers had one or more computers in their classroom.[53] Ninety percent of those same teachers reported using them during instructional time.[54] By that same year, 195 cyber charter schools were in operation in twenty-five states serving over 105,000 students.[55] "These schools offer most or all of their instruction programs over the Internet, and are not restricted to officially designated, 'brick and mortar' physical locations."[56]

This overview of technology, culminating in the use of computers in the classroom, highlights the differences in utilization and capability of technology. On the one hand, the computer being used mostly as an instructional tool, and on the other as the main access point to the classroom for cyber charter schools. As computers came to prominence, the use of the computer differed significantly based on one's perspective and goals.[57] The computer could be used to teach work skills in using a computer in which

[51] *Id.*

[52] *Id.*

[53] Lucinda Gray et al., *Teachers' Use of Educational Technology in U.S. Public Schools: 2009,* NATIONAL CENTER FOR EDUCATION STATISTICS, 5 (2010), https://nces.ed.gov/pubs2010/2010040.pdf.

[54] *Id.* at 6.

[55] Kevin P. Brady et al, *Unchartered Territory: The Current Legal Landscape of Public Cyber Charter Schools*, 2010 BYU EDUC. L.J. 191, 195-96 (2010).

[56] *Id.* at 191.

[57] Michael Haran, *A History of Education Technology*, INSTITUTE OF PROGRESSIVE EDUCATION & LEARNING (May 29, 2015), http://institute-of-progressive-education-and-learning.org/a-history-of-education-technology/[https://perma.cc/N22C-526A].

schools would teach computer literacy (the basic skills of using a computer).[58] If the goal was to improve instructional efficiency, the computer could be used as a tool.[59] Or, as is now seen and exemplified first with the virtual charter school, the computer can be used to connect students to the virtual classroom and their teacher.

Most of the public had some familiarity with remote learning by the time fifty million students were pushed into eLearning by the emergence of a global pandemic.[60] Many school districts in Indiana began using eLearning days prior to the onset of the pandemic as part of an Indiana Department of Education program that permitted schools to use eLearning in lieu of losing a school day to inclement weather or planned teacher in-service days.[61] The prevalence of eLearning leads to the fundamental question: is digital technology still categorically a curricular material? Is it still used primarily as a tool for learning, or has it morphed into the actual means by which students access their education? It is difficult to argue with the idea that technology used for education underwent a paradigmatic shift from a curricular material into the sole access that students had to their classroom and thus education. Many students have been unable to access their teacher and

[58] *Id.*

[59] *Id.*

[60] Tawnell D. Hobbs & Lee Hawkins, *The Results Are In for Remote Learning: It Didn't Work*, WALL ST. J. (June 5, 2020), https://www.wsj.com/articles/schools-coronavirus-remote-learning-lockdown-tech-11591375078[https://perma.cc/V3YT-C2CS].

[61] IND. CONST., *supra* note 4. *See also* Ind. Dep't. of Educ., *eLearning Day Program*, https://perma.cc/7XSL-BH75 (June 7, 2020).

classroom unless they were connected with a computer across the Internet.[62]

Indiana currently places digital content and computer hardware and software within its curricular materials statute:

> 'Curricular materials' means systematically organized material designed to provide a specific level of instruction in a subject matter category, including: (1) books; (2) hardware that will be consumed, accessed, or used by a single student during a semester or school year; (3) computer software; and (4) digital content."[63]

This language was added to the education statutes by the legislature in 2013 in replacing the specific "textbook" rental fee statutes with the more generalized "curricular materials."[64] By doing so, it permitted schools to charge for the computers and personal devices they loaned to students. When technology is used as a supplemental tool for educational purposes, the definition Indiana uses is understandable as a categorization akin to textbooks. However, for many students in Indiana currently, the classroom doors and instruction are only accessible via a Zoom link.[65] This shift was recognized in a

[62] Hobbs, *supra* note 59.

[63] IND. CODE ANN. § 20-18-2-2.7 (West 2020).

[64] 2013 Ind. Legis. Serv. 286-2013 (West).

[65] *In-person or Online? Here's how Indiana Schools are Reopening in COVID-19 Pandemic*, WISHTV,, https://www.wishtv.com/news/indiana-news/list-how-indiana-public-schools-reopen-during-covid-19-pandemic/ (Aug. 7, 2020, 6:55 PM). [https://perma.cc/F2TK-M2ME].

release from the Indiana Department of Education.[66] The Department provided guidance to district superintendents and administrators specifically for the rental of Wi-Fi hotspots, without which many students would not have access to learning.[67]

> IDOE does not believe school officials should assess a fee to provide access to Wi-Fi or a hotspot. Curricular material rental fees are designed to provide instructed materials for a specific course and not just general Wi-Fi access. The CARES Act provides additional funds to school corporations and charter schools that affords them the flexibility on how fiscal resources are used. Because many school corporations and charter schools have transitioned to a different learning platform to provide remote learning opportunities for students, schools might consider utilizing CARES Act funds for the additional expense incurred.[68]

Put differently, the Indiana Department of Education recognized the shift that technology experienced and

[66] Ind. Dep't. of Educ., *Curricular Material Rental Related to Issues Due to COVID-19*, (Apr. 17, 2020), https://www.doe.in.gov/sites/default/files/news/april-17-curricular-materials-and-covid-19-0420.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=[https://perma.cc/HWF3-5UC9].

[67] *Id.*

[68] *Id.*

provided guidance that schools should not assess a fee to students for providing mere access to their education.[69] However, the guidance still recognizes that the current statutes would likely permit the assessment of these fees.[70]

Prior to the mandatory shift to online learning due to the public health concerns, technology was already moving towards a reality in which it was a primary vehicle or learning platform through which students accessed the classroom.[71] Importantly, many students were not being given the same opportunity to these digital learning opportunities because of concerns that students did not have the necessary resources to access them when they were home.[72] If students are not able to access the classroom except through a digital device and a connection to the Internet, technology is no longer just a curricular material or tool. It has morphed into the only means to access education, and, therefore, a necessary component.

C. Structural Inequalities

[69] *See id.*

[70] *Id.*

[71] Amina Fazlullah & Stephanie Ong, *The Homework Gap: Teacher Perspectives on Closing the Digital Divide*, COMMON SENSE MEDIA, 7 (2019), https://www.commonsensemedia.org/sites/default/files/uploads/kids_action/homework-gap-report-2019.pdf; Audio tape: Dr. Shawn Smith, held by Metropolitan School District Lawrence Township (Dec. 17, 2020) (on file with author) (Dr. Smith noted that prior to the pandemic Lawrence Township Schools were investing in digital learning resources such as Canvas and Seesaw – applications in which students were receiving their assignments, communicating with their teachers and peers, and completing their coursework).

[72] *Id.*

Many students do not have access to home internet, and many school districts were left scrambling to provide Wi-Fi hotspots in order to account for this.[73] "Broadband availability has been at the heart of the digital divide with an estimated 21.3 million people lacking access in 2019,"[74] and as many as "15 percent of all households with school-age children lack a high-speed internet connection."[75] This disproportionately falls on black, Hispanic, and low-income households.[76] "Overall, 17% of teens say they are often or sometimes unable to complete homework assignments because they do not have reliable access to a computer or internet connection," with as many as 25% of black teens responding the

[73] Olga Khazan, *America's Terrible Internet is Making Quarantine Worse*, THE ATLANTIC (Aug. 17, 2020), https://www.theatlantic.com/technology/archive/2020/08/virtual-learning-when-you-dont-have-internet/615322/.[https://perma.cc/26GQ-LBEV].

[74] Nicol Turner Lee, *What the coronavirus reveals about the digital divide between schools and communities*, BROOKINGS (Mar. 17, 2020), https://www.brookings.edu/blog/techtank/2020/03/17/what-the-coronavirus-reveals-about-the-digital-divide-between-schools-and-communities/ [https://perma.cc/6GZP-CZSM] (citing Fed. Commc'ns Comm'n, FCC-19-44, BROADBAND DEPLOYMENT REPORT (2019),https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf).

[75] Khazan, *supra* note 72; Monica Anderson & Andrew Perrin, *Nearly one-in-five teens can't always finish their homework because of the digital divide*, PEW RESEARCH CENTER (Oct. 26, 2018), https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/[https://perma.cc/PN2A-LYAE].

[76] Monica Anderson & Andrew Perrin, *Nearly one-in-five teens can't always finish their homework because of the digital divide*, PEW RESEARCH CENTER, (Oct. 26, 2018), https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/[https://perma.cc/PN2A-LYAE].

same.[77] This digital divide has come to be known as "the homework gap" as it relates to education.[78] "Roughly one-in-five black teens (21%) report having to at least sometimes use public Wi-Fi," which results in teachers in Title I schools assigning less work that requires digital devices or broadband internet.[79] This directly impacts digital literacy, which will be a growing concern as digital technology continues to pervade and become more and more a part of our daily lives.

The digital divide became front and center for many school districts that suddenly had to transition to online learning in the spring of 2020 due to the coronavirus.[80] As the pandemic unfolded, the digital divide in Indiana was apparent for Indianapolis Public Schools (IPS).[81] By their own survey, IPS estimated that close to 40% of their students did not have access to home internet to support eLearning.[82] IPS bought 14,000 Chromebooks and 7,000 iPads, and spent another $3 million for mobile hotspot

[77] *Id.*

[78] *Id.*

[79] *Id.*; Fazlullah, supra note 70.

[80] Bree Dusseault & Travis Pillow, *Still No Consistent Plan for Remote Learning for Hundreds of Thousands of Students at Some of America's Biggest School Districts*, CRPE (May 15, 2020), https://www.crpe.org/thelens/still-no-consistent-plan-remote-learning-hundreds-thousands-students-some-americas-biggest[https://perma.cc/95FD-5DLW].

[81] Arika Herron, *Schools, donors rush to fill 'digital divide' and keep students learning during closures*, INDIANAPOLIS STAR https://www.indystar.com/story/news/education/2020/04/13/coronavirus-indiana-schools-donors-rush-fill-digital-divide/5134559002/[https://perma.cc/RHF6-5VZN](Apr. 15, 2020).

[82] *Id.*

services.[83] This is not only the case for Indiana's largest school system. A study by Ball State University's Center for Business and Economic Research shows that nearly eighty-four thousand students in Indiana may lack home internet access.[84] Importantly, the study recognized that "[t]he absence of broadband access also disproportionately affected students in families with characteristics that already challenge academic success."[85] The study estimated "that the absence of internet availability resulted in a significant widening of the achievement gap between individual students and schools."[86]

Further, many students simply did not show up to remote learning in the spring, and many students are still missing as of the start of the fall semester.[87] In the fall, "73 percent of the 100 largest U.S. school districts had chosen remote learning only as their back-to-school instructional model, affecting more than 8 million students," and it left many

[83] Rafael Sánchez & Shakkira Harris, *Indianapolis Public Schools to buy 21K laptops and iPads for students*, WRTV, https://www.wrtv.com/news/coronavirus/covid-19-education/indianapolis-public-schools-to-buy-21k-laptops-and-ipads-for-students[https://perma.cc/5NNB-TP8W](Apr. 30, 2020, 6:22 PM).

[84] Srikant Devaraj et al., How Many School-Age Children Lack Internet Access in Indiana?, CTR. FOR BUS. AND ECON. RSCH., 6 (July 9, 2020), https://projects.cberdata.org/reports/Covid-InternetAccess-20200709.pdf[https://perma.cc/E4PG-3K5J].

[85] *Id.* at 8.

[86] *Id.*

[87] Mark Lieberman, *Why Students Still Can't Access Remote Learning: How Schools Can Help*, EDUCATION WEEK (Sep. 15, 2020), https://blogs.edweek.org/edweek/DigitalEducation/2020/09/students_virtual_learning_access_gaps_new_year.html[https://perma.cc/FTP6-8NF6].

districts scrambling to find devices and hotspots to distribute to their students.[88]

Differences in educational opportunities lead to different outcomes for these students. Research based on absenteeism prior to the pandemic and the typical educational losses experienced over the summer for students projected that students would return to the fall 2020 school year "with approximately 63-68% of the learning gains in reading relative to a typical school year, and with 37-50% of the learning gains in math."[89] These losses were considered to be an upper bounds that did not factor in potential home schooling and online instruction.[90] However, as demonstrated, many students did not have access to the needed resources, and many teachers have reported significant absenteeism with online learning.[91] The study evidences the expected learning losses and accounts for potential gains for the higher performing students which may further widen the existing gap.[92]

Education policies should be developed to counteract the learning losses that are expected across the board. Beyond that, policies should be developed to address the gap that may continue to widen for students that have additional resources or even the *necessary* resources (internet and a digital device) to continue to learn during virtual learning. The digital divide and the expected learning losses show that these necessary resources are just that –

[88] *Id*.

[89] Megan Kuhfeld et al., *Projecting the potential impacts of COVID-19 school closures on academic achievement*, ANNENBERG INSTITUTE AT BROWN UNIVERSITY, https://www.edworkingpapers.com/sites/default/files/ai20-226-v2.pdf[https://perma.cc/Z66S-PKYF].

[90] *Id*.

[91] Hobbs, *supra* note 59.

[92] Kuhfeld, *supra* note 88.

necessary. Indiana legislative authority should be used to ensure that these materials are provided for every student. If the legislature does not act to alleviate the disparities for students who are learning remotely, then it may be necessary to bring an action to compel the legislature to address the disparity. This brings us to the next section - whether it is constitutionally permissible in Indiana to charge students these fees under Indiana law.

D. Curricular materials or tuition under Indiana case law

With many Indiana students solely accessing their educations through eLearning, it is important to consider whether this learning platform has remained just a tool for learning or whether it has become something more akin to "the act or business of teaching the various branches of learning."[93] Put another way, can Indiana permissibly charge a rental fee for a device without which a student would not be able to access their teachers, classrooms, and instruction? Or, has it become a non-permissible charge for tuition?

Under the *Chandler* and *Nagy* holdings the Indiana Supreme Court has said that schools cannot charge a general fee for instruction or for attending school. The Indiana courts have also shown that the Education Clause defers significant discretion to the legislature to determine "what will and what will not come within the meaning of a public education system."[94] But this discretion certainly cannot be

[93] Chandler v. S. Bend Cmty. Sch. Corp., 312 N.E.2d 915, 920 (Ind. Ct. App. 1974).

[94] Nagy *ex rel.* Nagy v. Evansville-Vanderburgh Sch. Corp., 844 N.E.2d 481, 491 (Ind. 2006).

limitless, specifically where that discretion "run[s] afoul of the Constitution."[95] For example, it runs afoul of the constitution for a school district to charge a fee that goes into its general fund.[96] Likewise, it would be assumed that the legislature would run afoul of the constitution if it were to charge a general fee for students to attend school. The issue comes down to one simple question, "whether the fee constitute[s] charging tuition."[97]

The possibility of the pandemic, and, therefore, education taking place solely through virtual platforms, were clearly not on the minds of the legislature when they permitted schools to charge a rental fee for technology. In 2013, classrooms were generally using devices and technology as an educational tool similar to textbooks (provided the school was not a virtual charter school). Now, many students cannot access their education without these devices, since "when the technology is not simply instructional support . . . the technology clearly becomes essentially necessary."[98] Like *Nagy*, charging fees for technology during this period of eLearning and beyond is charging fees for something "the legislature or the State Board has already determined [is] part and parcel of a public school education and by extension qualif[ies] for public funding," because it is charging for access to

[95] Hoagland v. Franklin Township Cmty. Sch. Corp., 27 N.E.3d 737, 745 (Ind. 2015) (quoting Meredith v. Pence, 984 N.E.2d 1213, 1222 (Ind. 2013)).

[96] *Nagy*, 844 N.E.2d at 493.

[97] *Hoagland*, 27 N.E.3d at 744 (citing *Nagy*, 844 N.E.2d at 483).

[98] Taurus Myhand, *A Dream Still Deferred: The Unlawful Use of Student Fees for Instructional Technology in an Alabama Public School Causing a Disparate Impact for Minority Children*, 19 RUTGERS RACE & L. REV. 77, 84 (2018).

instruction and teaching.[99] One may have been able to argue that when technology remained a tool that aided in the education of students it remained permissible to charge a fee as found in *Chandler*. But once students could no longer access basic instruction from their teachers without this tool, the fee became a charge not only for the device but for the instruction as well. Thus, the fee became an unconstitutional charge "because it [is] equivalent to being charged for attending a public school and obtaining a public education."[100]

If schools took a complete laissez-faire approach to learning in this environment, students with resources necessary to connect them with their classrooms would be able to access their education while those without such resources would be denied access. By continuing to permit schools to charge for these devices, the legislature may as well be charging students a general fee for access to their education, because for many students there is no alternative.

II. SCHOOL FEES PERMITTED UNDER THE UNITED STATES CONSTITUTION

The Equal Protection Clause of the Fourteenth Amendment provided plaintiffs the opportunity to challenge unequal education opportunities in the first half of the twentieth century, culminating in *Brown v. Board of Education*.[101] In overturning the

[99] *Nagy*, 844 N.E.2d at 492.

[100] *Hoagland*, 27 N.E.3d at 744 (citing *Nagy*, 844 N.E.2d at 493).

[101] *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Sipuel v. Board of Regents of Univ. of Okla., 332 U.S. 631 (1948); Sweatt v. Painter, 339 U.S. 629 (1950).

separate but equal doctrine pronounced in *Plessy v. Ferguson*[102] as applied to education, the Court recognized education as "perhaps the most important function of state and local governments."[103] While recognizing "the importance of education to our democratic society," *Brown* did not recognize education as a fundamental right.[104]

Foundationally, it is imperative to understand what is meant by a fundamental right protected by the Constitution, and what is accomplished by recognizing it as such. Put simply, "constitutionalizing a right provides a constitutional floor"[105] and potentially provides "a basic set of educational necessities—from qualified teachers, to contemporary schoolbooks and buildings, to remedial programs and specialized forms of instruction—necessary to enable every child to reach a basic level of achievement."[106] Or, as the Framers may have intended, "a fundamental right to education requires the state to provide individuals with skills to comprehend the political discourse of the day, evaluate its merits, and then act thoughtfully through the ballot and other means of accountability."[107] In another way, a recognition of a fundamental right to education provided by the Constitution would provide a bare minimum protection for citizens to ensure that right.[108]

---

[102] Plessy v. Ferguson, 163 U.S. 537 (1896).

[103] Brown v. Board of Education, 347 U.S. 483, 493 (1954).

[104] *Id.*

[105] Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education,* 81 GEO. WASH. L. REV. 92, 151 (2013).

[106] *Id*. at 149.

[107] Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1109 (2019).

[108] *See id.*

A. Education Under the Fourteenth Amendment Leading to Kadrmas

Throughout the second half of the twentieth century, advocates continued to press the Supreme Court towards recognizing education as a fundamental right. In what may have been the most direct appeal for such a fundamental right, school children and parents in San Antonio challenged the unequal funding of school districts in Texas.[109] The parents challenged Texas' district-by-district property tax method which led to "notable differences in levels of local expenditure for education."[110] For comparison, the plaintiffs' schools were funded at a rate of $356 per student, while students from a neighboring district were funded at $594 per student.[111]

In determining to use rational basis instead of a stricter form of scrutiny, *Rodriguez* recognizes that education "is not among the rights afforded explicit protection under our Federal Constitution."[112] Part of that calculus was the Court's finding that the students had "not occasioned an absolute deprivation of the desired benefit."[113] The parents presented an argument that education "bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist[ed] that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to

[109] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
[110] *Id.* at 8.
[111] *Id.* at 12–13.
[112] *Id.* at 35.
[113] *Id.* at 23.

intelligent utilization of the right to vote."[114] Despite not articulating education as a fundamental right with its decision, the court left this as a possibility by noting that when "levels of educational expenditures . . . provide an education that falls short" it could be "conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [other] right[s]."[115]

In 1982, alien school children brought suit against a Texas statute that denied "undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens."[116] The difference between *Plyler* and *Rodriguez* is not difficult to discern. The plaintiffs in *Plyler* were absolutely deprived access to education unless they paid a tuition fee.[117] The Court held that "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest."[118] The Court went on to note:

> Public Education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in

[114] *Id.* at 35.
[115] *Id.* at 36–37.
[116] Plyler v. Doe, 457 U.S. 202, 205 (1982).
[117] *Id.* at 206 n.2.
[118] *Id.* at 230.

> maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction.[119]

The Court went further to say, "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system."[120] In applying a stricter form of scrutiny, the Court did not recognize the plaintiffs as a "suspect class," nor was "education a fundamental right."[121] Nevertheless, the Court held the Texas law to a stricter scrutiny when balancing countervailing "costs to the Nation and to the innocent children who are its victims," when the law "den[ies] these children a basic education."[122]

In consideration of these two rulings, the Court had not precluded the possibility of the existence to a fundamental right as distinguished later in *Papasan v. Allain.*[123] The Court in *Papasan* noted, "this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[124]

In what is perhaps the clearest case in which the Supreme Court reviewed the permissiveness of fees for education, a child and mother challenged a North Dakota policy that allowed "some local school boards, but not others, to assess a fee for transporting

---

[119] *Id.* at 221 (citations omitted).
[120] *Id.* (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972)).
[121] *Id.* at 223.
[122] *Id.* at 223–24.
[123] Papasan v. Allain, 478 U.S. 265, 285 (1986).
[124] *Id.*

pupils between their homes and the public schools."[125] The Court used rational basis scrutiny to uphold the North Dakota policy because the statute "discriminates against no suspect class and interferes with no fundamental right."[126] The Court found the fundamental right argument flawed here partly because the Court had still not "accepted the proposition that education is a 'fundamental right,'" and partly because Sarita Kadrmas, "continued to attend school during the time she was denied access to the school bus."[127] "*Kadrmas* effectively precludes a challenge to school fees in the Supreme Court, unless a child is absolutely denied the right to an education and no alternative means for protecting that right are provided."[128] Since *Kadrmas*, litigation against state statutory schemes that permit schools to charge student fees has been largely relegated to state courts.[129]

Without the recognition of a fundamental right, an equal protection claim for technology fees would necessarily have to follow what has been established under these precedents. The Court has recognized at least partially that an altogether denial of access to a basic education may invoke a stricter form of scrutiny.[130] Following *Plyler's* holding, the Court would likely invalidate a state statute that permits a school district to charge a tuition fee to a class of persons that would otherwise deny them the opportunity to attend school. The paradigmatic shift

[125] Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 452 (1988).

[126] *Id.* at 465.

[127] *Id.* at 458.

[128] Holly J. Foster, *School Fees in Public Education*, 1993 BYU EDUC. & L.J. 149, 155.

[129] *Id.* at 156.

[130] Plyler v. Doe, 457 U.S. 202, 223–24 (1982).

that technology has undergone to become the essential access point for children and their educations may be considered as tuition.[131] But, like *Kadrmas*, it may be difficult to demonstrate that the fee itself is discriminatory if the student is not actually denied receiving their education. The alternative means that a student may be provided would be what controls the outcome of the case. Like Indiana, a complete denial to the access of education is perhaps the bright line rule that both the Federal and the Indiana Constitutions protect. So, when a student continues to have access by other means, the current structure of federal education law does not protect these interests, which is yet another reason to further explore whether the Constitution provides, or should provide for, a fundamental right to education.

B. Curricular Fees with a Fundamental Right to Education following *Gary B*.

On April 23, 2020, the Sixth Circuit Court of Appeals held that "[a]ccess to a foundational level of literacy—provided through public education—has an extensive historical legacy and is so central to our political and social system as to be 'implicit in the concept of ordered liberty.'"[132] The court stated that "a basic minimum education has a longstanding presence in our history and tradition, and is essential to our concept of ordered constitutional liberty . . . this suggests it should be recognized as a

[131] *See supra* Part I.

[132] Gary B. v. Whitmer, 957 F.3d 616, 642 (6th Cir. 2020) (quoting Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

fundamental right."[133] "In short, without the literacy provided by a basic minimum education, it is impossible to participate in our democracy."[134] Subsequently, the opinion was vacated to be reheard en banc by the Sixth Circuit, but the parties settled before it was reheard.[135] "Although an en banc court vacated the ruling, the decision remains a roadmap for other federal courts if they decide to offer constitutional protection to children provided low-quality educational opportunities and outcomes."[136]

While no longer valid law, the *Gary B.* decision sets out a possible new path in challenging inadequate education by first noting, "the Supreme Court has specifically distinguished and left open 'whether a minimally adequate education is a fundamental right.'"[137] *Gary B.* provides a roadmap for future courts to answer this open question by, "[a]pplying the substantive due process framework from *Glucksberg* and *Obergefell*, and looking to the reasoning of *Rodriguez* and *Plyler* . . . ."[138] *Gary B.* may no longer be valid law in the Sixth Circuit, but it will undoubtedly serve for other similarly situated

[133] *Id.* at 649.

[134] *Id.* at 642.

[135] Gary B. v. Whitmer, 958 F.3d 1216 (6th Cir. 2020); Colter Paulson, *Sixth Circuit Vacates Right-to-Literacy Ruling*, NAT'L L. REV. (June 11, 2020), https://www.natlawreview.com/article/sixth-circuit-vacates-right-to-literacy-ruling [https://perma.cc/9D5U-DEZ2].

[136] Kimberly Jenkins Robinson, *Designing the Architecture to Protect Education as a Civil Right*, 96 IND. L. J. 51, 54 (2020) (writing that a dual federal and state approach may be needed to "work synergistically to protect education as a civil right").

[137] *Gary B.*, 957 F.3d at 644 (quoting Papasan v. Allain, 478 U.S. 265, 285 (1986)).

[138] *Id.* at 648.

students to challenge whether the Constitution provides a right to access literacy.[139]

The *Gary B.* opinion looks at the Supreme Court education cases and finds that "whether a basic education—meaning one that plausibly provides access to literacy—is a fundamental right," is still an open question under the Due Process Clause.[140] In determining whether a fundamental right exists, the court used frameworks provided in *Glucksberg* and *Obergefell*,[141] beginning by "examining our Nation's history, legal traditions, and practices."[142] The court's review of the historical record revealed "that state-provided education is ubiquitous throughout all but the earliest days of the United States, a historical fact that today leads its citizens to expect a basic public education as of right."[143] Significantly, "[a]n astonishing thirty-six out of thirty-seven states in 1868 . . . imposed a duty in their constitutions to provide a public-school education."[144] Further, the court found that "[t]he continued expansion of education through the adoption of the Fourteenth Amendment resulted in universal compulsory education by 1918," [145] such that now "it is certainly

---

[139] *See* Christine M. Naassana, Comment, *Access to Literacy Under the United States Constitution*, 68 BUFFALO L. REV. 1215 (2020).

[140] *Gary B.*, 957 F.3d at 648.

[141] *Id.*

[142] *Id.* at 649 (quoting Washington v. Glucksberg 521 U.S. 702, 710 (1997)).

[143] *Id.* at 648.

[144] *Id.* at 649–50 (quoting Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 108 (2008)).

[145] *Id.* at 650 (citing Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education,* 81 GEO. WASH. L. REV. 92 (2013)).

both so longstanding and uniform as to be taken for granted in twenty-first-century America."[146] The history of Supreme Court cases addressing the historical discriminatory practice of school segregation further illustrates the importance of recognizing education as a fundamental right, culminating in two main takeaways.[147]

> First, access to literacy was viewed as a prerequisite to the exercise of political power, with a strong correlation between those who were viewed as equal citizens entitled to self-governance and those who were provided access to education by the state. Second, when faced with exclusion from public education, would-be students have repeatedly been forced to rely on the courts for relief.[148]

The court used this analysis to affirm that the Constitution provides this right, that it gives "all students at least a fair shot at access to literacy—the minimum level of education required to participate in our nation's democracy."[149] For the students in *Gary B.*, the allegation of a lack of books and materials, lack of proficiency in statewide tests, insufficient and inadequate teachers, along with deteriorating conditions of the physical buildings, were enough to reverse the lower court's decision on the motion to

[146] *Id.*
[147] *Id.* at 651.
[148] *Id.* at 651–52.
[149] *Id.* at 660.

dismiss when alleging that they had not been provided access to a basic minimum education.[150]

Finding a fundamental right to education is only part of the process, applying it is another. The *Gary B.* court acknowledged this explicitly in that "it would be difficult to define the exact limits of what constitutes a basic minimum education sufficient to provide such access."[151] But the court did provide guidance in that "it would seem to include at least three basic components: facilities, teaching, and educational materials (e.g., books)."[152]

Access to education is the underlying theme throughout all of the federal cases, and the *Gary B.* court recognized this. Not only would the fundamental right to a bare minimum education as recognized in *Gary B.* provide a means to ensuring that children are provided access to the necessary education infrastructure during a global pandemic, but it explicitly provides for materials within its holding.

C. A Fundamental Right to a Minimum Education in Indiana

Looking to Indiana's Education Clause may provide for a similar argument to the one made in *Gary B.* for a minimum standard of education, although varying from what has been discussed relating to curricular material fees.[153] The Education Clause in Indiana's constitution provides "for a general and *uniform* system of Common Schools."[154]

[150] *Id.* at 660–61.
[151] *Id.* at 659.
[152] *Id.* at 660.
[153] *See supra* Part I.
[154] IND. CONST. art. VIII, § 1 (emphasis added).

Merriam-Webster's first definition for "uniform" is "having always the same form, manner, or degree: not varying or variable."[155] However, as *Nagy* instructs, the framers of the clause may have used "uniform" in a dramatically different connotation.[156] The *Nagy* court was more interested in deciphering what the framers intended with "tuition shall be without charge," but part of the decision is instructive.[157] "[T]he evils of the old system which were intended to be avoided by the new constitution—[were] inequality in education, inequality in taxation, lack of uniformity in schools, and a shrinking from legislative responsibilities . . . ."[158]

The Indiana Supreme Court more closely examined the uniformity in which the common school system should operate under the Education Clause in *Bonner*.[159] Public school students brought suit against Mitch Daniels, the governor of Indiana at the time, as well as against the State Superintendent of Public Instruction and several other Indiana education officials.[160] The students were seeking a declaratory judgment that the Education Clause imposes a duty to provide a standard quality education to public school students.[161] The court quickly pointed out that the

[155] *Uniform*, MERRIAM-WEBSTER (March 7, 2021), https://www.merriam-webster.com/dictionary/uniform.

[156] Nagy ex rel. Nagy v. Evansville-Vanderburgh School Corp., 844 N.E.2d 481 (Ind. 2006).

[157] *Id.* at 491.

[158] *Id.* (quoting Greencastle Twp. in Putnam County v. Black, 5 Ind. 557, 564 (Ind. 1854), *overruled in part by* Robinson v. Schenck, 102 Ind. 307, 1 N.E. 698 (Ind. 1885)).

[159] Bonner ex rel. Bonner v. Daniels, 907 N.E.2d 516 (Ind. 2009).

[160] *Id.*

[161] *Id.* at 518.

Plaintiffs' complaint did not allege a violation of the "general and uniform" requirements of the clause.[162] The court found that the Education Clause places two duties on the General Assembly.[163] "The first is the duty to *encourage* moral, intellectual, scientific, and agricultural improvement. The second is the duty to *provide* for a general and uniform system of open common schools without tuition."[164] The second duty is "more concrete" and "[j]udicial enforceability is more plausible" than the first.[165]

Despite granting that the second duty may provide for judicial enforceability, the court went on to dismiss the idea that any standard of educational achievement is mandated.[166] Put plainly, "[t]he Clause says nothing whatsoever about educational quality."[167] The *Bonner* opinion, however, does not explain what the framers meant by "uniform."[168] Justice Boehm offered in concurrence, "article 8, section 1 of the Indiana Constitution is of the same general structure as the Equal Protection Clause of the Fourteenth Amendment and the Equal Privileges Clause of the Indiana Constitution."[169] The comparison is apt in that both the Equal Protection Clause and the Education Clause have yet to hold a particular level of quality or adequacy in education to be imposed by their respective authorities.[170] The

[162] *Id.* at 520.
[163] *Id.*
[164] *Id.* (emphasis altered from original).
[165] *Id.*
[166] *Id.* at 521.
[167] *Id.*
[168] *See id.* at 520-22.
[169] *Id.* at 523. (Boehm, J. concurring) ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."(IND. CONST. art. I, § 23.))
[170] *Id.*

Education Clause should "treat citizens evenhandedly," but it does not dictate the substance of education, and, therefore "does not mandate any judicially enforceable standard of quality."[171]

Inherently, "uniform" and "equal" suggest that some semblance of likeness among schools should exist. Once a program is undertaken that is said to be equal or uniform, the nature of the words dictates by reason that there should be a non-zero irreducible minimum of likeness. On the one hand, it may be unreasonable to expect educational outcomes to be identical at every school system across the state or country. But that raises the question of what an acceptable deviation in educational outcomes could be maintained while the school systems are said to remain uniform or equal. As differences in educational attainment grow farther and farther apart, at what point are school systems no longer uniform?[172] *Gary B.* is illustrative in that systems that do not provide even a plausible chance to attain literacy would likely not be uniform to a school system that graduates nearly 80% of their students prepared for college.[173] And as *Bonner* notes, there is plausibility for judicial enforceability if the educational system the Indiana Generally Assembly prescribes does not provide for a minimum level of uniformity among the system of schools that the Education Clause mandates.[174]

---

[171] *Id.*

[172] *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 82-90 (1973) (Marshall, J., dissenting) (Dispensing with the notion of gross inadequacy or a minimum level of education, but instead focusing on inequality of educational opportunity that raises a question of denial of equal protection of the laws).

[173] *Gary B.*, 957 F.3d at 662.

[174] *Bonner*, 907 N.E.2d at 520.

While eLearning continues as a primary vehicle for education delivery, the prioritization of access to the necessary devices is a fundamental prerequisite. With local school districts taking different approaches, depending on resources available to the school and district, these approaches may be what differentiates between one class of students versus another set of students, and may end up serving as an equal protection basis to challenge fees. *Plyler*, *Rodriguez*, and *Kadrmas* may provide just enough protection to recognize that fees charged to students for mere digital access to their classrooms and teachers would be violative of the Equal Protection Clause. However, providing a constitutional right to education similar to *Gary B.,* of which educational materials are a necessary part, would provide what is actually needed in our current reality and an access to a more equal education for all in the future as well.

III. SOLUTIONS

Before jumping directly to a legal challenge, there are other potentially productive solutions that could serve as a viable option to remediate the curricular material fee issue. School districts in Indiana could, by the permissive nature of the statute, choose not to rent but to pay for the materials within their budgets.[175] Another option would be for the Indiana General Assembly to reform the statute to provide for these materials across the state for all Indiana schoolchildren.[176] If these options turn out to

[175] Ind. Code Ann. § 20-26-12-2 (West 2020).

[176] *See* H.B. 1169, 120th Gen. Assemb. Second Reg. Sess. (Ind. 2018); H.B. 1430, 121st Gen. Assemb., Second Reg. Sess. (Ind. 2020).

not be as viable as one might hope, there is always the option to bring a claim to challenge the constitutionality of the fee under both the Indiana Education Clause and the Fourteenth Amendment.

A. District-level Reforms

Within what is currently permitted under Indiana statute, there is enough room for school districts to supply the necessary technological equipment without charge. The structure of the curricular materials statute is permissive in its language, "The governing body *may* rent the curricular materials to students enrolled . . ."[177] Of course, this decision of whether the district chooses to use these rental schemes is largely a budgetary decision. For example, kindergarteners in Taylor Community School Corporation had their textbook fees waived for the 2015-2016 school year.[178] In 2019, a cross section of central Indiana elementary schools have fees that range from $50 at Madison County's Alexandria Community School Corporation to $247 for fifth-grade students at Forest Glen Elementary School.[179] Fees for the 2020 school year for Lawrence Township schools in Indianapolis range from $100 for kindergarten and go up to $248.[180]

[177] Ind. Code Ann. § 20-26-12-2 (West 2020) (emphasis added).

[178] Carson Gerber, *Indiana School District Waives Kindergartners' Textbook Fee*, ASSOCIATED PRESS, March 15, 2015.

[179] London Gibson, *These Schools Have the Highest Textbook Fees: Indiana Allows Schools to Charge for Consumable Fees*, INDIANAPOLIS STAR, Sep. 8, 2019 at A2.

[180] *Curricular Resources Fees 2020-2021*, METROPOLITAN SCHOOL DISTRICT – LAWRENCE TOWNSHIP (Nov.

Many school districts have seen donations come in from private groups to fund the device shortages they experienced in 2020, and still others may use CARES Act funding to help alleviate the financial strain.[181] Again, the Indiana Department of Education promulgated guidelines to encourage districts not to charge fees for the devices, but ultimately the discretion is left with the local governing body whether or not to assess fees.[182] This may lead to wildly different outcomes across school districts in Indiana. One school providing access to education without charging fees, with another school assessing fees for mere access, may materialize into an equal protection claim, especially if some students would otherwise have the virtual school doors closed to them.

Keeping fees low or eliminating them altogether also creates a budgetary problem, due to the fact that "it can cost between $3 to $5 million up front" for a district like Indianapolis Public Schools to update their textbooks and other curricular materials.[183] When posed with the question of whether a district the size of Lawrence Township could shoulder the financial burden of the curricular materials within the district, Superintendent of Schools Dr. Shawn Smith responded: "If we didn't charge for [those] materials, we would devastate our

27, 2020), https://www.ltschools.org/MediaLibraries/ltschools.org/Documents/District/Enrollment/2020-21-textbook-rental-fees.pdf [https://perma.cc/8SYP-T3EM].

[181] Herron, *supra* note 80.

[182] Ind. Dep't. of Educ., Curricular Material Rental Related to Issues Due to COVID-19, *supra* note 65.

[183] Gibson, *supra* note 178.

curricular programs."[184] "We would not be able to have the depth in our curriculum that we have."[185] School districts would consistently be faced with budgetary choices in making these determinations for curricula, particularly with regard to the newer and more advanced courses they can offer to their secondary school students.[186]

Dr. Smith points out the power that would be unleashed for schools if Indiana were to decide to provide for curricular materials at the state level, and notes as a result of the current statutory scheme that curriculum "is not equal in all communities."[187] Furthermore, Dr. Smith indicates that even before COVID, technology had been introduced into their daily educational instruction, and, as a result of COVID, they have already heard that some parents would prefer the school system to continue offering eLearning options moving forward.[188]

While the legislature may insist that they have permitted schools to decide whether to charge these fees or not, the evidence suggests otherwise. Schools charge these fees because they are otherwise faced with significant budgetary choices. Leaving this permissive charge at the control of local school governing bodies does not really give them the control the statute presumes them to have. This reality all but precludes this suggested reform from being a viable strategy for addressing what may fundamentally be a violation of Indiana's, and perhaps even the Federal, Constitution.

---

[184] Interview with Dr. Shawn Smith, Superintendent, Schools MSD Lawrence Twp., (Dec. 17, 2020) (recording on file with author).

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

B. Statutory Reforms

It is well within the constitutional authority of the legislature as explained by *Nagy* that if they can "place appropriate conditions or limitations on any such funding" for curricular materials, they hold the power to remove those "conditions or limitations."[189] The former State Superintendent of Schools called for Indiana to cover the cost of textbook rentals in 2014, which the Indiana Department of Education estimated would cost $109 million.[190] In 2018, Indiana State Representative Scott Pelath proposed doing just that in House Bill 1169.[191] The bill would have created a fund that would provide schools reimbursement for all curricular materials.[192] Instead, the bill died in committee, despite receiving 7,000 signatures on a Change.org petition.[193]

In 2020, Rep. Ryan Hatfield of Evansville authored House Bill 1430, which would have eliminated curricular materials fees for students.[194] The bill would amend Ind. Code § 20-26-12-1 from "rent" to "provide at no cost" the curricular materials each school provides.[195] Further, the bill would have established a "Curricular Materials Fund" which

[189] Nagy ex rel. Nagy v. Evansville-Vanderburgh School Corp., 844 N.E.2d 481, 492 (Ind. 2006).

[190] Tom LoBianco, *Ritz Proposes State Cover Cost of K-12 Texts - $70 million More for Books Proposed in Schools Budget*, THE JOURNAL GAZETTE, Sep. 6, 2014 at 3C.

[191] H.B. 1169, 120th Gen. Assemb. Second Reg. Sess. (Ind. 2018).

[192] *Id.*

[193] Gibson, *supra* note 178.

[194] H.B. 1430, 121st Gen. Assemb., Second Reg. Sess. (Ind. 2020).

[195] *Id.*

would be funded by: "(1) Appropriations by the General Assembly. (2) Donations. (3) Federal grants or other federal appropriations. (4) Interest and other earnings derived from investment of money in the fund."[196] Like HB 1169 in 2018, HB 1430 died in committee, and as of January 2021, there has been no proposed legislation in the current Indiana legislative session that would address the current structure of the curricular materials fee statute. In the meantime, students across Indiana are still accessing their classroom via Zoom, and are paying for the privilege to do so.

C. Federal and State Challenges

As has been demonstrated, the current method of accessing the classroom solely via technology would be a formidable way of presenting a claim to an Indiana court that these fees are no longer being charged only as curricular materials, but as a form of tuition.[197] The current situation is not all that different from being charged a fee before being allowed to enter a brick-and-mortar school building. This challenge might seem moot if classrooms return to something closer to what they were like prior to 2020, when technology was used as a tool more akin to textbooks. But to those ends, the use of technology in the classroom has become so pervasive that it is unlikely that computers or other digital devices will take a backseat to other curricular materials or other forms of instruction. Additionally, the current reality

[196] *Id.*

[197] *See* Chandler v. South Bend Community School Corp., 312 N.E.2d 915 (Ind. Ct. App. 1974); Nagy ex rel. Nagy v. Evansville-Vanderburgh School Corp., 844 N.E.2d 481 (Ind. 2006).

rips the veneer off of the permissible fees state constitutional argument altogether. Dichotomizing parts of education into what is part and parcel to be considered chargeable as tuition is no longer tenable. You cannot educate a child without a teacher as much as you cannot educate a child without curriculum. Requiring fees for or one and not the other is the equivalent of requiring fees for both.

If the Indiana legislature is unwilling to examine the curricular material fee statutes in the current landscape, then a state constitutional claim challenging the current fee statute should be considered. This Note provides ample evidence that the structure of the curricular materials fee statute is no longer permissible under the Indiana Constitution. As part of this claim, a challenge should also focus on whether or not the current differences in curriculum between school systems has materialized into a cognizable claim that the current structure has not provided a "uniform" system of schools. The focus of such a claim should also explicitly challenge the notion of what was meant by the framers' inclusion of a "uniform" system.

It would also be possible to consider a federal equal protection and substantive due process claim. A federal claim would need to differ significantly from *Kadrmas* to be sure, and *Plyler* and *Gary B.* provide a compass if certain students are denied the ability to access a minimum education.[198] For example, how different are the students in *Plyler* who were charged a fee just to attend school to students who don't have home internet access, are given the necessary devices, and then subsequently charged

[198] *See* Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988). *But see* Gary B v. Whitmer, 957 F.3d 616, 644 (6th Cir. 2020).

fees just to attend? Students who incidentally already have home internet access would not be charged for that particular device and are therefore not charged. This disparate treatment may be enough to materialize into an equal protection claim.

What is significantly different here from *Kadrmas* is that Kadrmas was able to access the classroom doors by alternative means, whereas some students currently may be unable to connect to the classroom, and are therefore unable to access the classroom by alternative means. Furthermore, even if a semblance of normalcy returns to the classroom, the evidence is mounting that lack of access to computer technology is causing a disparate impact for students of color and low-income households.

CONCLUSION

The COVID pandemic has undoubtedly exposed new challenges in education. However, the reality is that it has also exposed pre-existing, underlying systemic problems, and exacerbated them to the point that the only responsible thing to do would be to deal with them in earnest. For curricular fees, specifically, permitting schools to charge fees for technology and require their use to access the classroom is running counter to the statutory permissive scheme Indiana has in place, likely past the point of being constitutional. Indiana has shown a willingness in the past to demonstrate that, at least for education, there really is no such thing as a free lunch. Undeniably, it would take a concerted legislative effort to change these permissive fees.

As technology use in the classroom, or, more accurately, technology put to use as a substitute for

the classroom, continues to permeate education, it will only continue to exacerbate the disparate impact the lack of access to these resources has on certain students. If a minimum education is found to be a fundamental right, as in *Gary B.*, this will have a resounding impact on the ability for students to seek an equal educational opportunity. As a fundamental right, students will be able to enforce the minimum education that would be required. Indiana's curricular materials fee statute would not be permissive under a minimum education standard if that standard requires curricular materials to be part and parcel of a minimum education.

Education is fundamental to the functioning of our democracy, and, as democratic citizens, we should be making every effort to provide a minimum, equal education to all students. As perhaps the foremost twentieth century philosopher of education, John Dewey, put it: "a government resting upon popular suffrage cannot be successful unless those who elect and obey their governors are educated."[199] The best teachers, curriculum, and other resources could be as close as a click away if the technology develops enough to provide these resources. In the current reality, it also has the capability to produce unequal opportunities if students are effectively shut out of the classroom through lack of access. Internet and digital devices have become a pillar in the classroom and an integral component of a minimum education. If these resources are not provided to students equally, education will remain unequal as a result.

[199] JOHN DEWEY, DEMOCRACY AND EDUCATION (1916) https://www.gutenberg.org/files/852/852-h/852-h.htm#link2H_SUMM7 [https://perma.cc/99HZ-J8G6].