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PERFORMANCE GAPS AND OPPORTUNITIES FOR
GROWTH:
ADDRESSING REMOTE LEARNING IN NEVADA

Anna Dreibelbis-Colquitt*

INTRODUCTION

Although education is not a fundamental right under the United States Constitution,¹ it is nonetheless deemed as “perhaps the most important function of state and local governments.”² The importance of education is reinforced through the Nevada Constitution. Specifically, Article 11 states that “[t]he legislature shall provide for a uniform system of common schools,” which is seen through the public school system.³ However,

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¹ San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973).

² Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

³ NEV. CONST. art. XI, § 2.

this ‘uniform’ system drastically changed two years ago with the surge in online learning.

In late 2019, an unidentified strain of coronavirus made its debut in Wuhan City in China, and spread rapidly across the globe.⁴ Over half a million deaths were attributed to this virus in the United States alone.⁵ In March of 2020, Steve Sisolak, Nevada’s Governor, closed Nevada’s K-12 schools in an attempt to halt the spread of the virus.⁶ This led to a rapid transition to remote learning through online platforms.⁷ Online learning took place prior to the pandemic, but the expedited transition for hundreds of thousands of students in Nevada was shocking for most in the school system.⁸

Overall, online learning during the pandemic raised concern about the potential expansion of disparities, even though the learning loss attributed to the pandemic has yet to be fully discovered.⁹ There is a recent national report that outlines some core findings and causes of concern seen

⁴ Reghuvir Keni et al., *Covid-19 Emergence, Spread, Possible Treatments, and Global Burden*, FRONTIERS IN PUB. HEALTH (May 28, 2020), <https://www.frontiersin.org/articles/10.3389/fpubh.2020.00216/full>.

⁵ *Id.*

⁶ NEV. ADVISORY COMM. TO U.S. COMM’N ON C.R., THE IMPACT OF REMOTE LEARNING ON EDUCATION EQUITY IN NEV. 1 (2021).

⁷ *Id.*

⁸ *Id.* at 3.

⁹ U.S. DEP’T OF EDUC. OFF. FOR C.R., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA’S STUDENTS 1 (2021).

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in K-12 students.¹⁰ English language learners (ELL), students with disabilities, and African American/Latinx students were identified as those who were previously in vulnerable populations, and now face greater negative impacts from remote learning.¹¹ These findings demonstrate that the pandemic widened pre-existing disparities, specifically among these students in vulnerable populations.¹² This means the marginalized students that already had struggles in education faced greater negative effects and an exacerbation of difficulties.

Particularly among these vulnerable populations, there are specific findings that underlie the notion that the existing educational conditions are extremely poor. For example, ELL students struggled in an in-person setting due to the language barriers, but the sudden shift to online learning made it even more difficult to learn.¹³ Many of their parents/guardians, who then became co-educators, did not speak English as a primary language, so their help was limited, and their learning was restricted.¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at iii–v.

¹³ *Id.* at 18.

¹⁴ *Id.*; Javeria Salman, “A Parent-Led Effort to Close the Digital Divide,” THE HECHINGER REPORT (Sept. 24, 2020), <https://hechingerreport.org/a-parent-led-effort-to-close-the-digital-divide>.

Students of color are likely to experience a deficit of resources at home as well, as parents/guardians often work multiple jobs with unpredictable hours.¹⁵ This results in more of these students living in poverty and receiving less help while participating in online learning.¹⁶ This has been memorialized in NAEP scores which show Black students, on average, scoring 32 point lower than their white peers, and Latinx students scoring 24 points lower than their white peers.¹⁷ This alone is a cause for concern in the creation of this underclass. But these statistics cannot be fully understood without also mentioning their connection to systemic financial inequalities, and the perpetual impact these have on students of color.¹⁸ Nevada is unique in its method of school finance, as local governments are solely responsible for funding school facilities.¹⁹ Additionally, there are tax caps that restrict the funds available for these local schools.²⁰ This results in some schools having impressive new gymnasiums with unlimited programs to entertain students, and science labs that contain all of the newest technology; while other schools have warped floors, faulty wiring, exposure to asbestos, no natural sunlight, and many other concerning

¹⁵ U.S. DEP'T OF EDUC. OFF. FOR C.R., *supra* note 9, at 1, 6-7.

¹⁶ *Id.*

¹⁷ *Id.* at 10.

¹⁸ See Dania V. Francis et al., *Black Economists on Race and Policy: Contributions to Education, Poverty and Mobility, and Public Finance*, 60 J. OF ECON. LITERATURE 454 (2022).

¹⁹ NEV. REV. STAT. § 387.328, 387.335 (2021).

²⁰ *Id.*

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disparities.²¹ The racial composition, and geographic distribution, of Clark County School District (CCSD) schools implicate perpetual disparities in education quality.²²

All of this connects to online learning, as many of the students attending schools with lacking resources did not have exposure to technology that would prepare them for online learning; nor would their school's resources provide for the level of online education experienced in other schools.²³ Another critical concern is that students of color disproportionately rely on schools for mental health services. As discussed later in this article, those services were almost entirely diminished through the pandemic and online learning. It would be naive to think those impacts were not significant for these students. In order to continue with online learning, these services need to be provided, potentially in a greater magnitude.

²¹ *Nevada School Facilities Construction and Maintenance* KENNY GUINN CTR. FOR POL'Y PRIORITIES (Feb. 2016), <https://guinn-center.org/wp-content/uploads/2014/01/Nevada-School-Facilities-Construction-and-Maintenance-February-2016.pdf>.

²² *Breaking Up is Hard to Do: CCSD Demographics*, KENNY GUINN CTR. FOR POL'Y PRIORITIES, <https://guinncenter.org/photo-essay/breaking-up-is-hard-to-do-spotlight-on-ccsd-demographics> (last visited Oct 28, 2022).

²³ U.S. DEP'T OF EDUC. OFF. FOR C.R., *supra* note 9, at 1, 6–7 (2021).

Finally, students with disabilities, and their families, reported that less than a quarter received services through online learning.²⁴ These students have been left to fend for themselves while other students thrived. This will not be discussed in-depth in this article; however, the accommodations for students with disabilities is a major concern in online learning. Many of the typical accommodations given to students in-person do not naturally translate to an online setting, so this is certainly an important area for future research.

Although schools have reopened as of March/April 2021, enrollment in online programs through CCSD continues to increase. One of CCSD's primary online learning programs, Nevada Learning Academy, grew by over 70% in the first month of the 2021 school year.²⁵ In the 2020-2021 school year, Nevada Learning Academy had approximately 450 students enrolled.²⁶ As of August 6, 2021 (three days before the first day of school in CCSD), they had enrolled over 4,200 full-time students.²⁷ That number continued to grow in the following days. This massive jump led

²⁴ *Id.* at 25.

²⁵ Julie Wootton-Greener, *Online Enrollment Surges at CCSD in Early Days of School Year*, LAS VEGAS REV. J. (Aug. 23, 2021), <https://www.reviewjournal.com/local/education/online-enrollment-surges-at-ccsd-in-early-days-of-school-year-2425831>.

²⁶ *Id.*

²⁷ *Id.*

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to many detrimental impacts, such as teacher shortages, lack of resources, and quick solutions to compensate for the insufficient time to prepare.²⁸

Although many of the problems visible in this transition to online learning have existed for many years, they were exacerbated by the pandemic and will require extra effort from the school district to get back to an acceptable standing.²⁹ Post-pandemic online learning has not had enough time to demonstrate trends in enrollment, but enrollment in Nevada Virtual Academy was over 2,250 in the 2017-2018 school year, which demonstrates a desire for online learning spanning several school years.³⁰ The trend in online learning has been predominately seen in higher education, but the desire for online middle and high school is also evident. The rise in enrollment for the 2021 school year demonstrated the fact that although schools were almost entirely available in-person, remote learning was still prevalent. Students are still opting into remote learning opportunities, even if that rate is not as high as during the times of a global pan-

²⁸ *Id.*

²⁹ NEV. ADVISORY COMM. TO U.S. COMM'N ON C.R., *supra* note 6.

³⁰ *Comprehensive Academic Improvement Plan*, NEV. VIRTUAL ACAD. (2018), <https://charterschools.nv.gov/uploadedFiles/Charter-Schoolsnvgov/content/News/2018/NVA-Comprehensive-Academic-Improvement-PLan.pdf>.

demic. As long as differing modes of schooling are available, online education needs to be at the same caliber of in-person instruction, so as to not disrupt the “uniform system of common schools.”³¹

In order to close the gap between the underclass of students created by the substandard education through remote learning, intervention must occur. It is recognized that remote learning was detrimental to many students in Nevada, particularly those within vulnerable subgroups.³² For this reason, it is critical that intervention occurs in order to provide all students in Nevada with uniform schooling. This paper will analyze the history of online learning and how it has progressed through the years, the case law that supports deeming education a fundamental right, a consideration of the students who have suffered most from online learning, and conclude with proposed intervention to improve the conditions of online learning. Although education quality was vigorously discussed throughout the pandemic, and many people expressed concern for the learning loss that occurred during that time, the concern should not end there. Online enrollment numbers demonstrate the popularity of remote learning, and an underclass should not be permitted to emerge due to a system’s failure to provide their students with an adequate education.

31 NEV. CONST. art. XI, § 2.

32 See NEV. ADVISORY COMM. TO U.S. COMM’N ON C.R., *supra* note 6.

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HISTORICAL OVERVIEW OF NEVADA EDUCATION AND ONLINE
LEARNING

I. Education in Nevada

In terms of Nevada's standing nationally, the Annie E. Casey Foundation has taken the lead with creating Kids Count Profiles that compare Nevada statistics with national averages.³³ Specifically, they looked at the economic well-being (children in poverty, children whose parents lack secure employment, children living in households with a high housing cost burden, and teens not in school and not working), education (young children not in school, fourth grade reading proficiency, eighth grade math proficiency, and high school graduation rates), health (birth weight, children without health insurance, child and teen deaths, and youth obesity rates), and family/community factors (children in single-parent families, children in families where the household head lacks a high school diploma, children in high-poverty areas, and teen birth rates) to determine where Nevada ranks compared to national statistics in these same categories.³⁴

³³ *Nevada 2021 Kids Count Profile*, ANNIE E. CASEY FOUND. (2021), <https://assets.aecf.org/m/databook/2021KCDB-profile-NV.pdf>.

³⁴ *Id.*

The Annie E. Casey Foundation looked at trends in Nevada and national trends to compare prior years with the state and national averages.³⁵ The 2021 report used data from 2019 and 2010 to analyze and compare.³⁶ In Nevada the overall economic well-being of students falls below the national averages, but has improved in every sub-category since 2010.³⁷ The foundation ranked Nevada 41st nationally for the economic well-being of their students.³⁸ In terms of education, the state averages in Nevada were significantly lower than the national averages (specifically in reading and math proficiency), however these rates have improved since 2010.³⁹ The foundation ranked Nevada 46th nationally for education.⁴⁰ The health data was unique, as Nevada rates were worse than the national averages, but the rates for birth rate and youth obesity were also worse in 2019 than in 2010, which is alarming.⁴¹ Overall, Nevada ranked 34th nationally for health.⁴² Family and Community rates were worse than the national averages in most sub-categories, yet have shown improvement over the last decade in all categories other than children in single-parent

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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families.⁴³ The family and community data from Nevada placed the state 44th nationally.⁴⁴ These rankings were created using 2019 data, which is important to note, as that was pre-pandemic. This information can help serve as a baseline to identify additional areas of difficulty in how students were impacted by the pandemic.

According to the Nevada Department of Education, there were 474,885 students enrolled in Nevada public schools for the 2021-2022 school year.⁴⁵ Nevada's school system is unique in the sense that, although there were just under 500,000 students enrolled state-wide, almost 70% of those students are in a single school district – CCSD.⁴⁶ Washoe County is the second largest district, and educates approximately 13% of the state's student population.⁴⁷ The other 15 school districts are rural counties that serve the rest of the student population, and vary in size – the smallest serving less than 50 students.⁴⁸ This unique composition illuminates why most data used in this article were derived from CCSD.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ NEV. DEP'T. OF EDUC., ENROLLMENT FOR NEVADA PUBLIC SCHOOLS (2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Within this Nevada population of students, approximately 56% identify as Black or Latinx.⁴⁹ Additionally, 12% have individualized education plans, which are given to students who are eligible for disability services under IDEA.⁵⁰ Finally, approximately 14% of students in Nevada are ELL students.⁵¹ Given the national findings shared above, this is a major cause for concern in Nevada. In Nevada, over half of the students are part of one or more ‘category’ (Black/Latinx, ELL, and students with disabilities) that faced severe negative impacts from online learning. When looking at NV Virtual Academy demographics, over half of the students enrolled are minority students with economically disadvantaged households.⁵² The subject proficiency at NV Virtual Academy is around 20% in math and 40% in reading.⁵³ This means only 20% of the students enrolled in one of Nevada’s largest public online learning platforms are proficient in math and less than half are proficient in reading.⁵⁴ Without intervention, this gap will likely continue to widen, and the most vulnerable students will continue to suffer.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Nevada Virtual Academy*, U.S. NEWS & WORLD REP. (2021), <https://www.usnews.com/education/k12/nevada/nevada-virtual-academy-12219#students-teachers>.

⁵³ *Id.*

⁵⁴ *Id.*

1] Performing Gaps and Opportunities for GrowthII. *Progression of Online Learning*

Although online school became a prominent reality for most youth in the United States in 2020, online learning (or something similar) is far from a new concept. The University of Houston began offering televised college classes in 1953.⁵⁵ The University of Phoenix then launched a fully online college in 1989.⁵⁶ Since then, many other schools and universities have offered online learning options to their students. In fact, it is estimated that 25% of college students are enrolled in at least one online class.⁵⁷ Although online learning is widespread in higher education, it is less prevalent in primary and secondary schools. Prior to the pandemic, in the 2017-2018 school year, approximately 21% of public schools in the nation offered courses entirely online.⁵⁸ Charter schools were the primary source of online courses.⁵⁹ Although it is projected that online school will

⁵⁵ *The History of Online Schooling*, VISUAL ACAD., <https://www.onlineschools.org/visual-academy/the-history-of-online-schooling/>, (Nov. 1, 2022).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ U.S. Dep't of Educ., *Fast Facts: Distance Learning*, NAT'L CTR. FOR EDUC. STAT.

(2019), <https://nces.ed.gov/fastfacts/display.asp?id=79>.

⁵⁹ *Id.*

continue to be a prominent method of learning, as the flexibility is beneficial for many students, a telling mark in this trajectory is displayed by the surge in Nevada's online schooling enrollment when schools had returned to in-person instruction. As the next school year begins, the trends in online learning will likely settle from last school year, but will provide a helpful baseline in determining demand of online learning.⁶⁰

BROWN V. BOARD OF EDUCATION

Brown v. Board of Education was a consolidation of cases from multiple states across the United States.⁶¹ It was a case involving the racial segregation of public schools and was challenged under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁶² The lower courts relied on *Plessy v. Ferguson* and therefore denied plaintiffs relief.⁶³ At the Supreme Court, *Brown v. Board of Education* was

⁶⁰ Jackie Valley, *Remote Learning Enrollment Not as Robust as Expected in Clark, Washoe County School Districts*, NEV. INDEP. (June 10, 2021), <https://thenevadaindependent.com/article/remote-learning-enrollment-not-as-robust-as-expected-in-clark-washoe-county-school-districts>.

⁶¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

⁶² *Id.* at 488.

⁶³ *Id.*

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a unanimous decision, and the majority opinion was written by Chief Justice Earl Warren.⁶⁴ The Supreme Court held that racial segregation in public schools violated the Equal Protection Clause of the Fourteenth Amendment.⁶⁵ This decision is widely acknowledged as the greatest Supreme Court decision in the 20th century, however, the decision did not lead to fully desegregated education in the United States, and arguably should be expanded under the Fourteenth Amendment.

This case was brought following *Plessy v. Ferguson*, when civil rights groups desired to challenge racial segregation.⁶⁶ NAACP lawyers, representing African American schoolchildren in four states, brought a class action to desegregate schools.⁶⁷ *Brown v. Board of Education* was one of the suits brought, and was filed against the Topeka, Kansas School Board after Oliver Brown's child was denied access to Topeka's white schools, due to the child's race.⁶⁸ The argument presented was that the segregated schools were not equal to each other, which was in violation of

⁶⁴ *Id.* at 486.

⁶⁵ *Id.* at 493.

⁶⁶ *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

⁶⁷ *Brown*, 347 U.S. at 487–88 .

⁶⁸ *Id.* at 487; *Biographies of Key Figures in Brown v. Board of Education*, NAT'L ARCHIVES (June 8, 2021), <https://www.archives.gov/education/lessons/brown-v-board/bios.html>.

the Fourteenth Amendment.⁶⁹ When the district court dismissed the claim, because it constitutionally fit under the *Plessy v. Ferguson* doctrine, Brown appealed to the Supreme Court.⁷⁰ The Supreme Court held that separate but equal educational facilities were “inherently unequal”, even if the tangible features of the segregated schools were similar.⁷¹ This decision, in terms of segregation of public schools in the United States, overruled *Plessy v. Ferguson*.

Unfortunately, this decision did not fully desegregate education in the United States. In fact, in the *Brown v. Board of Education II* case, which was decided a year later, the Court ordered a sense of urgency in implementing the integration of schools, because although the decision was made, schools were not following through with the regulation.⁷² Additionally, the opposition to this decision in *Brown I* and *Brown II* was seen through the case of *Cooper v. Aaron* in 1958.⁷³ In this case, the Supreme Court held that the state of Arkansas could not circumvent the decision in *Brown*, and needed to integrate their schools.⁷⁴ The Supreme Court re-established the decision in *Brown* through this case, and also continued to demonstrate the fact that states were bound by these Supreme

⁶⁹ *Brown*, 347 U.S. at 488.

⁷⁰ *Id.*

⁷¹ *Id.* at 495.

⁷² *Brown v. Bd. of Educ.*, 349 U.S. 294, 298–99 (1955).

⁷³ *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

⁷⁴ *Id.* at 19.

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Court decisions.⁷⁵ In spite of this, integration was met with opposition, which continues to this day in various forms, and which has ongoing effects on schools and schoolchildren.

The requirement to participate in online learning, initiated by the pandemic, constituted a form of *de facto* segregation for students in vulnerable demographics, particularly Black and Latinx students, due to a variety of societal, financial, and educational factors that disproportionately affect these students and create barriers to learning – especially learning in an online setting. This segregation continues for any and all such students who find themselves in an online learning situation. If the trend of increased online learning is going to continue, then, at the very least, supports need to be put in place to protect and aid these students in their learning.

Ideally, however, the legacy of *Brown* suggests that we can and should do even better than provide supports for vulnerable student populations in their online schooling – *Brown* should be expanded to the point that education itself is classified as a fundamental right. This would cause future education cases that are brought to trigger strict scrutiny in the analysis regarding educational legislation, thus giving less deference to the

⁷⁵ *Id.* at 18.

states and providing further protections for students – especially those in the most vulnerable groups.

I. Brown v. Board of Education in Today's Society

Sixty- five years after the landmark decision of *Brown* was made, there are still visible consequences of segregation in school districts across the nation.⁷⁶ Not only is segregation still present through means of districting and red-lining, but the weights of segregation are felt in the way “public schools prepare their students for a diverse future.”⁷⁷ School integration, since *Brown*, has been completely set aside.⁷⁸ In fact, it has been decades since federal agencies funded research about proper school integration.⁷⁹ Unfortunately, one court case does not solve years of deep-rooted, systemic problems. Educational opportunity was presented as important in *Brown*, but it was not deemed a fundamental right.⁸⁰ Educational opportunity is the “key to fairness in a society that does not support broad

⁷⁶ Erica Frankenberg et al., *Harming our Common Future: America's Segregated Schools 65 Years after Brown*, C.R. PROJECT 5, 6 (May 10, 2019), <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>.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.*

⁷⁹ *Id.* at 5.

⁸⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

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social policies,” and providing a level playing field for students is a critical consideration for the education system.⁸¹

Unfortunately, the integration of schools has led to racial stigmatization in other areas.⁸² For example, school discipline policies disproportionately impact children, even from the age of four years old.⁸³ Additionally, school funding and the formulas surrounding how those funds will be allocated is a significant source of disproportionality among students of different races.⁸⁴ Although these challenges were not created by *Brown*, they are deeply interconnected to the issue of segregation discussed in the case, and are still present in society today. These issues are not central to the core solution proposed, but they are central to the issue of expanding *Brown* to protect education as a fundamental right, as they would be more easily regulated if education was deemed a fundamental right. These formulas and issues would not survive court proceedings as easily if education was a fundamental right in the United States.

⁸¹ Erica Frankenberg et al., *supra* note 76.

⁸² Sherrilyn Ifill, *A Reflection on the 60th Anniversary of Brown v. Board of Education*, NAACP LDF (May 17, 2014), <https://www.naacpldf.org/ldf-celebrates-60th-anniversary-brown-v-board-education/reflection-60th-anniversary-brown-v-board-education/>.

⁸³ *Id.*

⁸⁴ *Id.*

The correlation between income and race connects the relationship between *Brown* and the proposed solution to online learning.⁸⁵ Given that segregation still occurs in the nation's school districts, specifically in Nevada,⁸⁶ and given that wealth is not uniformly spread among these communities, this issue is prominent and needs to be addressed.⁸⁷ These issues are significant and play a great role in various aspects of education, but, more specifically, have the potential to cause great harm through remote learning.

POST-*BROWN* EDUCATION LITIGATION

The Supreme Court evaluated whether education should be a fundamental right in *San Antonio Independent School District v. Rodriguez* (*SAISD v. Rodriguez*).⁸⁸ In this case, Rodriguez brought a claim to challenge SAISD's funding scheme by arguing that the students whose families resided in poor districts were underprivileged, as their schools lacked the property taxes that other districts utilized.⁸⁹ The Court considered

⁸⁵ Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/>.

⁸⁶ Guinn Center, *Breaking Up is Hard to Do: CCSD Demographics*, GUINN CENTER, <https://guinncenter.org/photo-essay/breaking-up-is-hard-to-do-spotlight-on-ccsd-demographics/> (Date last visited).

⁸⁷ *Id.*

⁸⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1973).

⁸⁹ *Id.* at 6.

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whether the Texas public education financial scheme violated the Equal Protection Clause of the Fourteenth Amendment since it did not equally distribute the funding across school districts.⁹⁰ The Court ruled that since education was not a fundamental right, the funding scheme would not be examined under strict scrutiny.⁹¹ Given the lower level of scrutiny applied, the Court concluded that the funding scheme was not “so irrational as to be invidiously discriminatory.”⁹² The Court argued that absolute equality is not necessary within the education system and that a total lack of education is a proper claim under the Fourteenth Amendment, but that was not presented here.⁹³ Had Rodriguez been able to use the two-prong test in *Glucksberg* (cognizant of the fact this case had not yet been decided), they could have more readily formed their argument based on the standards for the Due Process Clause of the Fourteenth Amendment.⁹⁴ The Court, though, left the ruling of a basic minimum education for another day, so the door is not completely closed to this type of argument.⁹⁵

⁹⁰ *Id.*

⁹¹ *Id.* at 29–30.

⁹² *Id.* at 55.

⁹³ *Id.* at 24.

⁹⁴ *Wash. v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

⁹⁵ *Rodriguez*, 411 U.S. at 37.

I. GARY B. V. WHITMER

More recently, in the Sixth Circuit, a case was brought, and education was deemed a fundamental right.⁹⁶ The plaintiffs in *Gary B. v. Whitmer* were students in some of Detroit's lowest-performing schools.⁹⁷ The conditions of these schools included unqualified and missing teachers, lack of resources (books and materials), dangerous facilities, and poor conditions in their classrooms. These factors contributed to the low performance of the students.⁹⁸ Further, the students argued that the conditions were so poor that they deprived them of a basic minimum education.⁹⁹ The claims were based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁰⁰ To avoid being pre-empted by *SAISD v. Rodriguez*, the plaintiffs framed their argument on the students' deprived access to literacy.¹⁰¹

With an emphasis on the literacy component, as supported by the data in their claim, the plaintiffs were successful in their efforts. The educational outcomes demonstrated the prevalence of illiteracy at these schools – over ninety percent of the students were unable to meet state

⁹⁶ Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020).

⁹⁷ *Id.* at 620.

⁹⁸ *Id.* at 624.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 629.

¹⁰¹ *Id.*

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proficiency standards.¹⁰² The claim was positioned on the argument that the Michigan Constitution provided the foundation for a basic minimum education, and the conditions as they stood deprived students of that education.¹⁰³ They argued this constituted being denied a basic minimum education.¹⁰⁴

The central issue in this case was the Substantive Due Process claim of a fundamental right to a basic education.¹⁰⁵ The plaintiffs emphasized the importance of literacy, including the fact that literacy was critical for the practice of other fundamental rights, such as political participation.¹⁰⁶ Using the *Glucksberg* analysis, the plaintiffs argued that access to literacy through education had a significant historical heritage, and that it was central to the political and social system to be “implicit in the concept of ordered liberty.”¹⁰⁷ The plaintiffs claimed that without access to a minimum education, it is impossible to participate in the nation’s democracy. The court agreed with this theory and deemed education a fundamental right.¹⁰⁸

¹⁰² *Id.* at 635.

¹⁰³ *Id.* at 624.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 638–40.

¹⁰⁶ *Id.* at 642.

¹⁰⁷ *Id.*; *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

¹⁰⁸ *Gary B.*, 957 F.3d at 648.

II. The Fourteenth Amendment's Implications on Brown and Today

The *Brown* decision was rooted in the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁹ The Fourteenth Amendment states: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁰ This Amendment was enacted to ensure everyone had equal protection under the law. In *Brown*, segregation was challenged as it demonstrated unequal access to education through the law, and the plaintiffs sought protection through this clause.¹¹¹

As suggested, *Brown* should have classified education as a fundamental right. This classification would fall under the Fourteenth Amendment, and would create a suspect class for those without adequate access to education, which would trigger strict scrutiny when resolving these conflicts. Students would be protected in order to ensure an adequate education for all students. In the current perspective, this would be critical. If

¹⁰⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

¹¹⁰ U.S. CONST. amend. XIV, §1.

¹¹¹ *Brown*, 347 U.S. at 488.

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education was deemed a fundamental right, students would be in a protected class that would trigger strict scrutiny for any legislation that hinders their right to an education. *Whitmer* provides a new context to replicate in Nevada. Even if education is not deemed a fundamental right on a national level, the state can deem it a fundamental right. This would then protect the underclass of students created by the inequalities presented in remote learning.

While *Washington v. Glucksberg* focused on the contemplation of physician-assisted suicide, the court suggested a two-pronged test for determining fundamental rights under the Substantive Due Process Clause of the Fourteenth Amendment.¹¹² The two-pronged test consisted of: the protection of historical significance and/or whether it has historically been regarded as fundamental and must be clearly defined.¹¹³ This case, although seemingly irrelevant to education, plays a great role in the argument over whether education should be a fundamental right, as the Court lays out the test for deciding whether a liberty interest is indeed “fundamental.” The categorization of a fundamental right exists for liberty interests that

¹¹² *Glucksberg*, 521 U.S. at 719–21.

¹¹³ *Id.* at 720–21.

are so substantial that without a compelling state interest, the government may not restrict them.¹¹⁴

In terms of the Fourteenth Amendment, although remote learning may appear to be facially neutral, disparate impacts for protected classes is a major concern. The quick transition in Nevada to all students learning remotely may have been a facially neutral decision, as the public health concern was significant. However, the harm of this decision potentially created an underclass of a large number of students, which could lead to disparate effects.¹¹⁵ The Court in *Washington v. Davis* held that when one claims harm from a neutral law with disparate impacts they must demonstrate intent or motive to discriminate.¹¹⁶ Given the state of emergency in Nevada, as the COVID cases were rising, it would be difficult to prove motive. However, we have seen that these disparities are significant enough that they have caused an underclass. The disparities are evident whether there was intent behind them or not. Given the fact that the vulnerability of these students was well-known and recognized in every academic report prior to the abrupt switch to online learning, indirect motive could be established. There was not enough concern for the vulnerable

¹¹⁴ See *id.* at 719–21; *Planned Parenthood v. Casey*, 505 U.S. 833, 846–47 (1992).

¹¹⁵ See Carla Javier, *LAUSD Says More Middle and High School Students are Getting D's and F's*, LAIST (Nov. 2, 2020, 9:55 am), <https://laist.com/news/lausd-online-learning-failing-grades>.

¹¹⁶ *Washington v. Davis*, 426 U.S. 229, 240 (1976).

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students, and protections were not put in place to ensure this underclass was not created.

ANALYSIS BASED ON THE *BROWN* FRAMEWORK

Remote learning should not be the driving force towards an unequal education. The Nevada Constitution guarantees a uniform system of common schools.¹¹⁷ This is a Constitutional guarantee for Nevada students, and should therefore be executed as such. Remote learning cannot be allowed to ruin this uniformity and contribute to a lack of equal opportunities for education among students in Nevada. Although it is argued that the decision in *Brown* should be expanded to protect education as a fundamental right, *Brown*, as it currently stands, still provides a foundation for state application of education. Justice Warren, in the *Brown* decision proclaimed,

“Today education is the most important function of state and local governments... It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days it is doubtful that any child can be reasonably expected to succeed in life if he is denied the opportunity of an education.

117 NEV. CONST. art. XI, § 2 (amended 1938).

Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”¹¹⁸

Prior to the analysis of this statement (and particularly its latter component), it should be noted that the gender-specific ideologies expressed should be extended to fully inclusive language, as protected under the Equal Protection Clause of the Fourteenth Amendment.

Although *Brown* does not hold education as a fundamental right, it gives great power to the states, through the parameters provided, to regulate education and ensure it is meeting the state’s standards.¹¹⁹ There are three distinct shortcomings that need to be addressed in Nevada’s remote learning infrastructure that are contributing to an unequal education. These need to be addressed in order to adequately provide an education through remote learning. First, social and emotional learning (SEL) is a critical component of education that is lacking during remote learning. Students have lost the interaction needed to “adjust normally to [their] environment.”¹²⁰

Second, the critical role teachers serve as mandatory reporters is significantly hindered by remote learning, which could lead to serious con-

¹¹⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹¹⁹ *Id.*

¹²⁰ *Id.*

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sequences. Teachers need to be given adequate opportunities to report potential abuse and neglect, and online learning (as it stands) is not a sufficient forum to do so.

Finally, the mental health concerns of the students through remote learning needs to be at the forefront of educator's minds, as many students in Nevada are in great need of such services.¹²¹ The proposed solution to these three areas of focus is the implementation of a system of trainings and check-ins that would address these issues and allow for an adequate remote learning education. These factors (SEL, mandatory reporting, and mental health) will be analyzed through the above proclamation from *Brown*.

ANALYSIS BASED ON THE *WHITMER* FRAMEWORK

There is a significant correlation between wealth and success in online learning, which could create an underclass of students, similar to what was seen in *Gary B. v. Whitmer*.¹²² Families were disproportionately

¹²¹ Elizabeth Stuart & Leah Asmelash, *A Rise in Student Suicides Has Pushed the 5th Largest US School District to Speed up a Return to in-Person Learning*, CNN (Jan. 26, 2021, 10:19 PM), <https://www.cnn.com/2021/01/26/us/clark-county-school-district-covid-suicide-trnd/index.html>.

¹²² Dania Francis & Christian E. Weller, *Economic Inequality, the Digital Divide, and Remote Learning During COVID-19*, NIH (Mar. 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8914302/>; Javier,

impacted by COVID-19, and, as a result, these discrepancies need to be addressed going forward.¹²³ This disparate effect is a significant public policy concern. When analyzing the way remote learning affected students from lower incomes versus those from families with higher incomes, their outcomes produce a K-curve.¹²⁴ This demonstrates the notion that students who come from a wealthy family are more likely to thrive in remote learning, and those who come from a lower-class family tend to experience a decline in performance.¹²⁵

Similar results were seen in both *Rodriguez* and *Whitmer*, where students who came from families with a lower income were more likely to demonstrate lower academic performance.¹²⁶ Specifically in *Whitmer*, the Court noted the literacy scores and recognized the importance of literacy in participating in other fundamental rights, such as voting and participation in a democratic society.¹²⁷ These results implicate both the shortcomings in *Brown* to characterize education as a fundamental right, and also the Fourteenth Amendment in terms of equal protection. However, until

supra note 115 ; Gary B. v. Whitmer, 957 F.3d 616, 624–27 (6th Cir. 2020) (However, this case specifically mentions the underclass was created by unequal access to literacy education).

¹²³ NEV. ADVISORY COMM. TO U.S. COMM’N ON C.R., *supra* note 6.

¹²⁴ Javier, *supra* note 115.

¹²⁵ *Id.*

¹²⁶ See *Gary B.*, 957 F.3d at 620; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 6 (1973).

¹²⁷ *Gary B.*, 957 F.3d at 648.

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education is deemed a fundamental right, policies regarding education will not be reviewed with the heightened scrutiny that is argued here.

Another argument that parallels the *Whitmer* case is the preparedness of teachers and adequacy of school resources during remote learning. As mentioned previously, in the 2020-2021 school year, Nevada Learning Academy had approximately 450 students enrolled.¹²⁸ In August 2021, just a few days before school began in CCSD, enrollment jumped to over 4,200 students.¹²⁹ That number continued to grow and led to many detrimental outcomes such as teacher shortages, lack of resources, and the need for quick solutions.¹³⁰ This parallels the students in *Whitmer* who were underperforming while they attended schools with inadequate resources.¹³¹ This is a major concern for remote learning because the problems that existed in Nevada's education system, such as insufficient funding, low literacy and math scores, and the increased number of students that qualify for free

¹²⁸ Julie Wootton, *Online Enrollment Surges at CCSD in Early Days of School Year*, EDUC. (Aug. 23, 2021, 6:43 PM), <https://www.reviewjournal.com/local/education/online-enrollment-surges-at-ccsd-in-early-days-of-school-year-2425831>.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Gary B.*, 957 F.3d at 624.

and reduced lunch, were only exacerbated through the implementation of state-wide remote learning.¹³²

Learning loss from remote learning during COVID-19 is not fully known. However, it is known that the disadvantaged students will likely experience heightened learning loss.¹³³ These students are primary low-income, minority students which further points to a disparate impact.¹³⁴ It highlights the Fourteenth Amendment's Equal Protection Clause concerns that become even more relevant in the case of remote learning. Even though these data stem from school closures and remote learning during a pandemic, the disparate effects seen are relevant to remote learning that is taking place in Nevada post-COVID school closures. The learning loss studies that indicate the greater losses experienced by those in low-income households further demonstrate the need for action before it translates into a greater economic divide in generational wealth.¹³⁵

Little is known about the effectiveness of a scenario in which remote learning is mandated for every student, including how it influences

132 NEV. ADVISORY COMM. TO U.S. COMM'N ON C.R., *supra* note 6.

133 Eric A. Hanushek & Ludger Woessmann, *The Economic Impacts of Learning Losses*, OECD (Sep. 2020), <https://www.oecd.org/education/The-economic-impacts-of-coronavirus-covid-19-learning-losses.pdf>.

134 *Id.*

135 *Id.*

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students' long-term skill development. However, across the globe, preliminary data suggest that learning during the pandemic was significantly reduced.¹³⁶ In fact, nationwide in the U.S., teachers reported that their students spent perhaps half as much time learning during the pandemic, when compared with their previous experience in traditional learning environments.¹³⁷ The process of learning is dynamic and cumulative, in the sense that it builds upon prior knowledge. Therefore, stagnation leads to growing deficits that are compounded over time, since there is less new knowledge acquired and less use of already-acquired skills.¹³⁸ Thus, although some schools have gone back to in-person learning, those who have opted into remote learning are likely faced with long-term economic consequences unless intervention occurs.¹³⁹

¹³⁶ For example, early tracking data from an online mathematics application used in a number of US school districts prior to COVID-19 suggest that the learning progress of students has suffered a strong decline during the crisis, especially in schools in low-income areas. Raj Chetty et al., *How did Covid-19 and Stabilization Policies Affect Spending and Employment? A New Real-Time Economic Tracker Based on Private Sector Data*, OPPORTUNITY INSIGHTS (May 2020), <https://opportunityinsights.org/wp-content/uploads/2020/05/tracker-paper.pdf>.

¹³⁷ Megan Kuhfeld et al., *Projecting the Potential Impact of Covid-19 School Closures on Academic Achievement*, EDUC. RESEARCHER (Oct. 28, 2020), <https://journals.sagepub.com/doi/10.3102/0013189X20965918>.

¹³⁸ Philip Oreopoulos & Kjell G. Salvanes, *Priceless: The Nonpecuniary Benefits of Schooling*, 25 J. ECON. PERSP. 1, 159–84 (2011).

¹³⁹ NEV. ADVISORY COMM. TO U.S. COMM'N ON C.R., *supra* note 6.

In addition to the benefits described above (e.g. participation in civic responsibilities in a democratic society), education also provides young people with knowledge and skills that are necessary for carrying out tasks in the professional workforce.¹⁴⁰ Students are not able to develop many of these skills as easily in a remote-learning setting, which can lead to significant consequences.¹⁴¹ There are numerous studies that present the correlation between learned skills and income.¹⁴² This information, coupled with the fact that standardized test scores indicate a significant reduction in cognitive and other skills during COVID-19-mandated online learning, is a key insight indicating a large discrepancy in the education one receives in person compared to the current remote-learning education.¹⁴³

HURDLES IN ONLINE LEARNING

I. Exacerbation of Issues During Online Learning

Although the issues presented by online learning were likely exacerbated by the unique circumstances of the pandemic, there are issues innately derived from online learning that deserve to be addressed. The

¹⁴⁰ Oreopoulos & Salvanes, *supra* note 138.

¹⁴¹ Hanushek & Woessmann, *supra* note 133.

¹⁴² *See id.* at 8.

¹⁴³ *Id.*

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timeliness of transitioning to online learning, the legal backlash, and the external stressors on students and educators may have contributed to the inadequate online education during the pandemic.

Many teachers were entirely unprepared to transition to online learning, and lacked the skills and strategies to successfully teach online.¹⁴⁴ The quick transition, coupled with the fact that many teachers have never taught online, may have contributed to the lack of a quality education for many students.¹⁴⁵ Teachers had only days to prepare for teaching online, and the pandemic exposed the lack of preparedness of teachers due to the gap in training for online education.¹⁴⁶ There are trainings available, but online education training was not a part of most teachers' education, and left many teachers feeling entirely unequipped.¹⁴⁷ The scramble to prepare for online teaching in such a short amount of time may have guided the impression that the learning loss was entirely due to online learning itself. However, some of the blame may be justly ascribed to the

¹⁴⁴ Torrey Trust & Jeromie Whalen, *Should Teachers be Trained in Emergency Remote Teaching? Lessons Learned from the COVID-19 Pandemic*, 28 *J. TECH. & TCHR. EDUC.* 189, 193 (2020).

¹⁴⁵ David John Lemay et al., *Transition to online learning during the COVID-19 pandemic*, 4 *COMPUTS. IN HUM. BEHAV. REPS.* 100130 (Aug. 1, 2021).

¹⁴⁶ Trust & Whalen, *supra* note 144.

¹⁴⁷ *Id.*

way in which online learning was carried out, given the rushed transition without proper training and time for preparation.¹⁴⁸

There were also many external difficulties affecting students and teachers, which likely affected educational opportunities and success in online learning. In the first year of the pandemic, a 25% increase in anxiety and depression was reported.¹⁴⁹ Regardless of whether students or teachers were specifically a part of that statistic, this alarming increase in mental health concerns would still likely be felt, from friends, family, and home life.¹⁵⁰ The stress caused by social isolation, fear of losing housing, loneliness, loss of loved ones, and financial worries were large triggers of this mental health crises.¹⁵¹ Although these factors are external as it pertains to online learning, they could play a critical role in the perception of online learning and school success, as it is well-established that emotional well-being plays a significant role in learning.¹⁵²

¹⁴⁸ *Id.*

¹⁴⁹ *COVID-19 Pandemic Triggers 25% Increase in Prevalence of Anxiety and Depression Worldwide*, WHO (2022), [https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide#:~:text=Wake%20Dup%20call%20to%20all,mental%20health%20services%20and%20support&text=In%20the%20first%20year%20of,Health%20Organization%20\(WHO\)%20today.](https://www.who.int/news/item/02-03-2022-covid-19-pandemic-triggers-25-increase-in-prevalence-of-anxiety-and-depression-worldwide#:~:text=Wake%20Dup%20call%20to%20all,mental%20health%20services%20and%20support&text=In%20the%20first%20year%20of,Health%20Organization%20(WHO)%20today.)

¹⁵⁰ See Stuart & Asmelash, *supra* note 121.

¹⁵¹ *Id.*

¹⁵² Colleen McLaughlin, *Emotional well-being and its relationship to schools and classrooms: a critical reflection*, BRIT. J. GUIDANCE & COUNSELING 353, 365 (Nov. 1, 2008).

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The transition to online learning was not met without legal backlash. The states used their Tenth Amendment power to move schools online, based on the public health emergency. However, there have been more than 70 lawsuits brought from this exact issue – inadequate online education during the pandemic.¹⁵³ These lawsuits were primarily brought at a university level, rather than elementary and secondary as discussed here, but the great number of cases presented shows the significant concern, at various levels of education.¹⁵⁴ Most of these lawsuits were brought under Equal Protection, but given that education is not a fundamental right in the United States, it has been deemed a state issue, and the cases will be scrutinized under rational basis.¹⁵⁵

In Nevada, education was deemed a right in *Guinn*, but it has not seen many cases that present Equal Protection claims.¹⁵⁶ Three years after *Guinn* the Nevada Supreme Court overruled its holding in *Guinn* regarding procedural constitutional requirements, as the Court noted that the Nevada

¹⁵³ Anjelica Cappellino, *More Than 70 Universities Sued for Refunds Following Covid-19 Campus Closures*, EXPERT INST. (Apr. 27, 2022), <https://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Guinn v. Legislature of Nevada*, 71 P.3d 1269, 1275 (Nev. 2003).

Constitution should be read as a whole, to give influence to each provision.¹⁵⁷ An adequacy case was recently presented and dismissed, but an Equal Protection case could be the route to enacting change in the education realm, as noted by the dissent.¹⁵⁸ *Rodriguez* demonstrated the inability of a court to recognize wealth as a suspect classification, so bringing a case for socio-economic disparities resulting from online learning would likely be unsuccessful.¹⁵⁹ However, there are opportunities to bring a case under a uniformity clause or an Equal Protection case in demonstrating racial inequalities. Given that race and poverty are so highly associated, this might be a successful route for litigants.

School choice is also important to note here, because although this article is suggesting online learning cannot continue in its current state, parents have the ability to choose the method of learning (in post-pandemic times) and could choose in-person teaching if that is better-suited for their child. This notion is promising; however, there is one important missing factor: the student. The parent/legal guardian makes the education decisions, which can be made without any regard for student desires. If a parent/legal guardian wishes to enroll their child in online learning, they can do so without considering whether this is actually the best fit for the

¹⁵⁷ *Nevadans for Nevada v. Beers*, 142 P.3d 339, 348 (Nev. 2006).

¹⁵⁸ *Shea v. Nevada* (Nev. 2022).

¹⁵⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 29 (1973).

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child or if it is what the child desires. Although *Society of Sisters* involved the decision to disallow states from restricting students' education solely to public school teachers, it draws a larger conclusion.¹⁶⁰

This case memorialized the idea that parents/legal guardians have the liberty (through the Fourteenth Amendment) to educate their child in the way that they see best, (within limits, of course).¹⁶¹ This was established through the penumbral right to privacy, and has led to discussions involving standardized tests and ways to measure educational achievements.¹⁶² Therefore, although school choice is relevant in this discussion, as parents/legal guardians can choose an in-person (or remote, or charter, or private, or homeschool, or other) education for their child, there are no requirements for parents/legal guardians to account for their child's individual needs and best interest, nor are they required to analyze the issues related to different modes of educational delivery. The notion that parents/legal guardians who view online learning as problematic can choose a different method of schooling ignores the possibility that parents may not always be operating in the best interest of their child.

¹⁶⁰ *Society of Sisters v. Pierce*, 268 U.S. 510, 535 (1925).

¹⁶¹ *Id.*

¹⁶² *Id.*

II. Individualized Struggles with Remote Learning

There are individual differences in the impact of virtual learning due to the fact that different children need different things from their schooling environment, including the fact that some of them have access to those necessities in a virtual learning scenario, while others do not. These issues are independent from the struggles associated with online learning during the pandemic. First-time online students struggle far more than those who have previously taken online courses¹⁶³ This is logical; less exposure means more immediate learning is necessary. The students who have not taken online classes in the past will take some time to adjust to a new method of learning. This likely means younger students will struggle more with online school due to the fact that they likely have not already taken online classes.

College-aged students may be able to more easily adjust to the shift in learning and not experience the negative outcomes as significantly.¹⁶⁴ College-aged students have typically taken an online course in some capacity, or have been exposed to online learning in some way, so

¹⁶³ Cassandra M. D. Hart et al., *Online Learning, Offline Outcomes: Online Course Taking and High School Student Performance*, 5 AERA OPEN 1 (Feb. 27, 2019).

¹⁶⁴ *Id.*

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this transition is less significant.¹⁶⁵ Additionally, they typically have a greater capacity for social and emotional learning, due to the fact that they are at a higher level of development. However, the main concern here is with primary and secondary students, who likely have had little exposure to online learning, and who are likely at lower levels of development. Knowing this information allows educators to intervene and create solutions that account for the individual differences in learning and can allow for increased implementation of social and emotional learning.

Another consideration is that those with reduced access to technology tend to struggle more with online learning.¹⁶⁶ Reduced access to technology results in students not having as many opportunities to complete the work required or attend the virtual classes.¹⁶⁷ This is significant to online learning, because the students who are less likely to have access to technology tend to be from lower-income families.¹⁶⁸ This creates a harsh learning curve for those students because less access to technology means they likely have less experience with it.¹⁶⁹ Trying to learn how to

¹⁶⁵ *Id.*

¹⁶⁶ See generally Michael K. Barbour, *Virtual Schools: Planning for Success*, 7 Q. REV. DIST. EDUC. 215 (2005).

¹⁶⁷ *Id.*

¹⁶⁸ Kuhfeld, *supra* note 137..

¹⁶⁹ Barbour, *supra* note 166.

navigate technology at the same time as learning the content in classes can be a harsh reality for youth.¹⁷⁰ Their learning curve is then intensified and this creates more pressure on them to excel in technology use, rather than just in academic success, since the two are so tightly intermingled with online learning.¹⁷¹ Access to, and successful navigation of, technical skills and technology are increasingly important for all people, as the modern world become ever more technologically dependent.

III. Social and Emotional Learning

One of the great issues that arises with virtual learning is the lack of social and emotional learning (SEL), and the need for intentional supplementation of these domains of learning for students' future success. SEL is "the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for other, establish and maintain positive relationship, and make responsible decisions."¹⁷² The five core components of SEL, established by

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Aleisha Clarke et al., *Adolescent Mental Health: A Systematic Review on the Effectiveness of School-Based Interventions*, EARLY 42

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CASEL, are self-awareness, self-management, social awareness, relationship skills, and decision-making/problem solving.¹⁷³ These factors are all large parts of the traditional education system, and allow students to “adjust normally to [their] environment.”¹⁷⁴

Although students do learn from their teachers’ presentation of material in a classroom, research shows that a primary source of learning occurs from peer interaction.¹⁷⁵ Students learn from each other (as well as from their teachers) to create habits, build character, and learn about life skills.¹⁷⁶ Unfortunately, virtual school takes away the opportunity for much of the peer-to-peer learning in the conventional format, and is therefore a large impediment to learning from peers.¹⁷⁷ With the elimination of recess, lunch conversations, and limited peer-to-peer interaction during class, students have reduced access to this type of modeling. They still are able to observe some interaction through their virtual learning platform,

INTERVENTION FOUND. (July 21, 2021), <https://www.eif.org.uk/report/adolescent-mental-health-a-systematic-review-on-the-effectiveness-of-school-based-interventions>.

¹⁷³ *Id.*

¹⁷⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

¹⁷⁵ Amy Neff Roth, *Reopening Schools: How Online Learning Impacts Child Development*, OBSERVER-DISPATCH (Aug. 26, 2020, 12:00 PM), <https://www.uticaod.com/story/news/2020/08/26/reopening-schools-how-online-learning-impacts-child-development/113578898/>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

but it is not comparable to their in-person observation. Learning through a screen creates barriers in creating and maintaining relationships and developing communication skills,¹⁷⁸ which are known to be key features of a child's education.¹⁷⁹ Research in this area suggests that some of the significant issues with social learning on an online platform are lack of stimulation, reluctance to raise questions or provide feedback, and lack of teacher ability to lead the class emotionally as they would in a traditional classroom.¹⁸⁰ This impediment to social learning and interaction between students and teachers is recognized as problematic, but also provides an opportunity to explore new avenues for interaction in online learning.¹⁸¹

Grades are suffering as a result of remote learning, specifically for low-income students.¹⁸² This could greatly sway students' future ability to integrate into the workplace. Research has noted the particular prevalence

¹⁷⁸ *Id.*

¹⁷⁹ Hanushek & Woessmann, *supra* note 133.

¹⁸⁰ Tai-ming Wut & Jing Xu, *Person-to-Person Interactions in Online Classroom Settings Under the Impact of COVID-19: A Social Presence Theory Perspective*, 2021 ASIA PAC. EDUC. REV. 371, 371 (2021).; Karen Swan, *Building Learning Communities in Online Courses: The Importance of Interaction*, 2 EDUC., COMM'N & INFO. 23, 23 (2002).

¹⁸¹ See Wut & Xu, *supra* note 180; Robert M. Bernard et al., *Interaction in Distance Education and Online Learning: Using Evidence and Theory to Improve Practice*, J. COMPUTING IN HIGHER EDUC. (2021).; M. G. Moore, Editorial: Three types of interaction, Am. J. Distance Educ. (1989) https://eddl.tru.ca/wp-content/uploads/2019/08/EDDL5101_W9_Moore_1989.pdf.

¹⁸² Javier, *supra* note 115.

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of lower grades in middle school and high school, with more students receiving D's and F's than previously.¹⁸³ This is likely caused by many factors: failure to transition properly to online learning, a lack of understanding of material, inability to learn fully on digital platforms, and lack of resources for furthered learning, likely with detrimental impacts on these students' future integration into professional fields.¹⁸⁴ Although grades do not stem directly from SEL, they are correlated in the sense that many skills associated with SEL translate to greater academic ability.¹⁸⁵ For example, SEL emphasizes goal setting and intrinsic motivation. These skills are correlated with high-performing students¹⁸⁶. It is also important to note that those with learning disabilities or those that come from disadvantaged backgrounds have reported greater difficulties coping with online learning.¹⁸⁷ These individual differences among students need to be addressed when educating students virtually. This plays a role in SEL, as SEL considers many factors of learning that are not solely based on academic ability.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Hanushek & Woessmann, *supra* note 133.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

IV. Teachers Carrying out Their Role as Mandated Reporters

The second concern that arises through virtual learning is mandated reporting and the role teachers play in reporting abuse and neglect. Teachers are mandated reporters who, if they have reasonable cause to believe child abuse or neglect may be occurring, must make a report to Child Protective Services (CPS) or a law enforcement agency.¹⁸⁸ If a mandated reporter knows of abuse or neglect of a minor and fails to report it, they are guilty of a misdemeanor for the first violation and a gross misdemeanor for every subsequent failure to report.¹⁸⁹ In Nevada, child abuse or neglect involves a physical or mental “non-accidental injury”, sexual abuse, or negligent/maltreatment of a minor.¹⁹⁰ Specifically, this treatment must be caused or allowed by a person responsible for the child’s welfare.¹⁹¹

Physical abuse includes any non-accidental physical injuries such as dislocation of arm or leg, broken nose, fracture of bones, cuts, punctures, bites, disfigurement, and various other impairments.¹⁹² Emotional

¹⁸⁸ *Nevada Child Abuse Prevention*, NEV. DEP’T OF HEALTH & HUM. SERVS. DIV. OF CHILD & FAM. SERVS. (June 12, 2013), <https://dcfs.nv.gov/uploadedFiles/dcfsnvgov/content/Programs/CWS/ChildAbusePrevention.pdf>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

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abuse occurs when there is an injury to the intellectual, psychological, or emotional condition of the child.¹⁹³ This would be recognized by a lack of ability to function within the normal range of performance.¹⁹⁴ Sexual abuse occurs when sexual conduct is performed with a child, and sexual exploitation occurs when children are forced to engage in sexual activity such as prostitution.¹⁹⁵ Negligent/Maltreatment of a child occurs if a child is abandoned or lacks proper care, supervision, shelter, medical care, or care necessary to maintain the wellbeing of the child.¹⁹⁶ This is an important role performed by teachers, as parents are the most frequent source of child abuse, and teachers typically see their students on a consistent bases, thus placing them in a position to notice warning signs of abuse or neglect.¹⁹⁷

Unfortunately, remote learning significantly impairs a teacher's ability to be a mandated reporter. During the pandemic, many teachers had no contact with a significant portion of their students.¹⁹⁸ Education Week

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Mark Lieberman, *Taking Attendance During Coronavirus Closures: Is it Even Worth it?*, EDUC. WK. (Apr. 20, 2020), <https://www.edweek.org/leadership/taking-attendance-during-coronavirus-closures-is-it-even-worth-it/2020/04>.

conducted a national survey for teachers in April 2020 that reported 39% of teachers interacted with their students at least once a day, but most of that communication was over email.¹⁹⁹ If teachers are not regularly seeing and communicating with their students, they may miss important signs of child abuse/neglect that may have otherwise been noticed and reported. Especially during the pandemic, this issue was critical. There were heightened risks for abuse and violence during the pandemic, and a primary source of it came from those living in students' homes.²⁰⁰

V. Students' Decreased Mental Health During Online Learning

The third issue that arises with online learning is the mental health crisis. Mental health has been on the forefront of many minds in the past few years, but specifically during the pandemic.²⁰¹ According to some sources, as many as one in five people in households with children have reported feeling down, depressed, or hopeless.²⁰² This statistic demonstrates the great need for mental health services during online learning, as

¹⁹⁹ *Id.*

²⁰⁰ U.S. DEP'T OF EDUC. OFF. FOR C.R., *supra* note 9, at 1, 6-7.

²⁰¹ *Kids, Families and COVID-19: Pandemic Pain Points and the Urgent Need to Respond*, ANNIE E. CASEY FOUND. (Dec. 14, 2020), <https://assets.aecf.org/m/resourcedoc/aecf-kidsfamiliesandcovid19-2020.pdf>.

²⁰² *Id.*

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the negative mental health impacts have become more prevalent over the last two years.

Nationwide, 35 percent of youth receiving mental health services solely received these services from school.²⁰³ That is now not being provided in the same capacity, which compounds a mental health crisis for youth.²⁰⁴ If almost half of youth who were receiving those services were receiving them at school, and that delivery method has been halted in most school districts, it is not surprising that we would see a rise in students needing mental health assistance.²⁰⁵

In Clark County, there have been nineteen students who have committed suicide since switching to virtual learning.²⁰⁶ In the year before, there were nine students who committed suicide.²⁰⁷ Although neither is an acceptable number, the sharp rise during this transition to online school cannot be ignored.²⁰⁸ While there may not be a direct causal relationship between these deaths and online schooling, when considering the timing

²⁰³ Heather Stringer, *Zoom School's Mental Health Toll on Kids: Academic and Social Development are Likely to Slip During Online Learning for Many Students*, AM. PSYCH. ASS'N (Oct. 13, 2020), <https://www.apa.org/news/apa/2020/online-learning-mental-health>.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Stuart & Asmelash, *supra* note 121.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

of this statistic, in light of the larger context, it is not unreasonable to suggest that the sudden shift to online learning may have been a factor.²⁰⁹ It is possible that this sudden increase in suicides may be connected to the lack of social interaction and loneliness felt by youth during the mandatory online learning that took place during the pandemic.²¹⁰

Students' lack of motivation is also a reported issue.²¹¹ Parents are noticing that their students are sleeping more during the day, and that their desire to learn and continue on in their education seems to be decreasing.²¹² A decline in motivation is a major indication of suppressed mental health.²¹³ Especially in youth, motivation is one of the "triggers" for parents to be aware of in order to spot declining mental health in their children.²¹⁴ During this time, students and parents alike are noticing an impact on their mental health, as the depression and anxiety rates have increased drastically.²¹⁵ However, this is especially important to note for youth, be-

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Stringer, *supra* note 203.

²¹² *Id.*

²¹³ Debra Umberson & Jennifer Karas Montez, *Social Relationships and Health: A Flashpoint for Health Policy*, 51 J. HEALTH & SOC. BEHAV. S54, S54 (2010).

²¹⁴ *Id.*

²¹⁵ Alison Abbott, *COVID's Mental-Health Toll: How Scientists are Tracking a Surge in Depression*, NATURE (Feb. 3, 2021), <https://www.nature.com/articles/d41586-021-00175-z>.

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cause it can be more difficult for youth to identify their mental health status.²¹⁶ Therefore, parents and teachers are given pointers, such as motivation, to help identify a mental health decline before it gets worse.²¹⁷ In such cases, an intervention is necessary, as “waiting could lead to dire consequences.”²¹⁸

PROPOSED INTERVENTION

In order to ensure our education system does not reflect what was seen in *Whitmer*, intervention must occur. The intervention proposed here serves the role of lessening the gap so that the underclass no longer exists, and education is delivered in a uniform way. Currently, the underclass is being pushed further and further down in achievement, and this intervention would target specific known difficulties in order to set students up for success in learning.

If education were deemed a fundamental right through *Brown*, or *SAISD*, then litigation on the adequacy of remote learning would be met with less resistance, as it would trigger strict scrutiny when evaluating the

²¹⁶ Umberson & Karas Montez, *supra* note 213.

²¹⁷ *Id.*

²¹⁸ NEV. ADVISORY COMM. TO U.S. COMM’N ON C.R., *supra* note 6.

current condition of education. The suggestions presented to improve remote learning would be easier to implement with the characterization of education as a fundamental right, as the court would likely compel legislation that would mandate these regulations, or at the very least the court would protect the students who may be lacking equal opportunity to education through remote learning. The primary component of this proposed intervention would be implementing training for teachers regarding mandated reporting through an online platform, requirement of monthly mental health check-ins between a trained professional and student, and meal/material drop off services for those who qualify for Free and Reduced Lunch.

This intervention would serve many purposes, but would specifically allow for a mental-health check in, delivery of schoolwork/ worksheets, and delivery of meals. The funding for this proposed intervention will not be fully discussed in this brief; however, it would align with the goals of the American Rescue Plan (ARP) funding. Since its aim is to help youth recover from the academic impacts of COVID and online schooling, it is directly correlated with what ARP is intended to accomplish.

In terms of the SEL issue, described above, this intervention would contribute to greater interaction online through teacher training. There are many trainings available for teachers and professionals to de-

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velop strategies and use of tools for increasing social and emotional learning in an online platform. This would likely increase teacher confidence and allow teachers to utilize technology to increase the interaction among students and within their virtual classroom to deepen the educational experience for their students. This training would also work towards a solution in mandated reporting. Although the responsibility remains consistent for a teacher to report in an online setting, there are added challenges, as discussed above. Therefore, it would be beneficial to conduct a training for online teachers that pinpoints certain indicators that could warrant reporting. There are unique factors that can be considered in an online setting that are unavailable in an in-person education setting for reporting.²¹⁹ These should be known and utilized by teachers to promote safety among students.

Additionally, monthly mental health check-ins could be required for students pursuing an online education. This could be with a consistent school counselor or trained professional that has undergone mental health training. These trained professionals, who know what to look for in struggling students, could provide a forum for students to express concerns,

²¹⁹ Jeff Neal, *Will Online Schooling Increase Child Abuse Risks?*, HARV. L. TODAY (Aug. 14, 2020), <https://today.law.harvard.edu/will-online-schooling-increase-child-abuse-risks/>.

develop a relationship with a trustworthy adult, and have a set time to discuss how they are actually doing, both in school and emotionally/mentally. Such a requirement would likely also be beneficial for students in traditional school environments but would be critical for students learning online.

The food and schoolwork delivery would be a very straight-forward way of addressing an obvious need. With over half of the students participating in online learning falling below the poverty line, it is critical they have access to both food and their schoolwork. Without nutritional fuel or the materials that are required for online schooling, it is unreasonable to expect success from these students. Students in a traditional academic setting are provided meals based on their eligibility for free and reduced lunch. This should be expanded to those pursuing an online education and would help address some of the peripheral issues of food insecurity, missing communication/chronic absenteeism, and access to school resources (including class handouts or worksheets). The specific details involved with logistics have yet to be fully determined. However, the need is there, and this solution could alleviate some of the detrimental effects students are facing from remote learning.

CONCLUSION

Brown v. Board of Education did not deem education a fundamental right, but it led to a string of cases that continued to explore the same issue. If the Supreme Court had considered education a fundamental right, setting better procedures in place for online learning would be more attainable. This is critical, because it would make certain that future education cases were evaluated by the courts with strict scrutiny, and greater protections would be provided to students. *Brown* did not deem education a fundamental right, but the court left the opportunity open for future decisions. Crucially, *Brown* provided a foundation for emphasizing the importance of education and the role it plays in society. In his opinion, Chief Justice Warren stated that “education is the most important function of state and local governments... It is the very foundation of good citizenship.”²²⁰ Even though education has not been deemed a fundamental right, the court has long-recognized its importance. Therefore, it needs to be a priority today in the case of online learning as well.

With the recent surge in online learning, it is critical that the quality of education provided to students is adequate. Ensuring online students’

²²⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

academic success is one major concern, but their mental health, social and emotional learning, and safety (monitored through mandated reporting) need to be addressed as well, in order to prevent a further creation of an underclass. Similar to the case of *Whitmer*, students in Nevada are facing large obstacles in receiving an education, and one that is far from uniform. In fact, the congruence of the facts of *Whitmer* and the current state of education in Nevada is so egregious, it is appalling that it continues without intervention.

Even after most classrooms returned to in-person instruction, many students (or their parents) continued to opt into online learning. Yet, it has become clear that the online learning experience of many of these students is not 'uniform,' nor is it of the same caliber as the in-person learning that takes place across the state. Therefore, the importance of this issue is only increasing, not decreasing. Here it is proposed that in order to increase the uniformity and caliber of virtual learning in Nevada, changes must be implemented that will protect the following imperative factors which contribute to student success: mental health, social and emotional learning, and safety of students through mandated reporting. The proposed change is a system of trainings and deliveries that account for check-ins, food delivery, and relationship-building, which will address some of the greatest issues that arise during online schooling.