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Federal Standards for Public K–12 Education in America: A Proposal Based on *Gary B. v. Whitmer*

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**FEDERAL STANDARDS FOR PUBLIC K–12
EDUCATION IN AMERICA: A PROPOSAL BASED
ON *GARY B. V. WHITMER***

*Callie Ives**

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INTRODUCTION

Even though Isabelle Perticone received an amazing childhood education, she had an especially exceptional opportunity during her senior year of high school. Perticone is a recent graduate of Darien High School.¹ Darien is a town and school district near Stamford, Connecticut,² which is also a suburb of New York City.³ In 2019, students in fourth, eighth, and twelfth grade from the Darien Public School System exceeded the national average in both reading and math skills.⁴ Perticone’s high school experience culminated with a semester interning at Facebook’s headquarters in Manhattan.⁵ She described her experience as a personal highlight as well as an academically “eye-opening and exciting experience” that she thinks every high school senior should undergo.⁶ Perticone has since received her high school

1. Tom Vander Ark, *Experiencing Success at Work: High School Internships*, EDUC. WK. (Jan. 5, 2015), <https://www.edweek.org/education/opinion-experiencing-success-at-work-high-school-internships/2015/01> [<https://perma.cc/E5G4-SV27>].

2. *Welcome to Darien*, COMPASS, https://www.compass.com/neighborhood-guides/greenwich_ct/darien/ [<https://perma.cc/3CGJ-B7L6>] (last visited Jan. 31, 2023).

3. *See id.*

4. CONNECTICUT ST. DEP’T OF EDUC., DISTRICT PROFILE AND PERFORMANCE REPORT FOR SCHOOL YEAR 2019–20 (2022), https://edsight.ct.gov/Output/District/HighSchool/0350011_201920.pdf [<https://perma.cc/J7MP-RLH7>].

5. Vander Ark, *supra* note 1.

6. *Id.*

diploma and begun her Freshman year of college at Tulane University, a four year university located in New Orleans, Louisiana.⁷

While Perticone’s experience at a top tier high school internship is shared by some, others have had subpar educational opportunities with limited access to career development experiential opportunities.⁸ Since 2017, 30 states have seen an increase in the number of eighth grade students who do not surpass basic literacy requirements.⁹ These reading struggles span across all racial and socioeconomic groups,¹⁰ compound over time, and have the potential to severely limit students’ opportunities after high school graduation.¹¹

D’Leisha (Nene) Dent had a much different educational experience than Perticone. Dent grew up in Tuscaloosa, Alabama.¹² Even though she is an honors student at Central High School since middle school, she has slim prospects for college or any other form of higher education.¹³ In fact, during Dent’s senior year of high school, one of her peers, another one of Central High’s brightest, was concerned about Dent’s struggle with vocabulary and spelling.¹⁴ These academic issues are due to an education system that failed Dent. This is especially concerning given her school’s reputation; Central High School has historically been considered “a renowned local high school” despite its declining effectiveness.¹⁵ The school grew prestigious after it was a site of early racial integration among schools in the South.¹⁶ Dent’s entire family attended this school, and while it had been declining in the decades since her grandfather was a student, it is now considered “a struggling school.”¹⁷

These contrasting anecdotes exemplify the issue this Note seeks to address. The schools mentioned above are in different states and thus are

7. See *id.*; U.S. News & World Report, *Tulane University*, US NEWS, <https://www.usnews.com/best-colleges/tulane-university-2029/overall-rankings> [<https://perma.cc/LVY4-26GH>] (last visited Oct. 25, 2022).

8. See Nikole Hannah-Jones, *Segregation Now*, PROPUBLICA (Apr. 16, 2014), <https://www.propublica.org/article/segregation-now-full-text> [<https://perma.cc/3AB7-PKXS>]

9. Sarah Sparks, *Is the Bottom Falling Out for Readers Who Struggle the Most?*, EDUC. WK. (June 15, 2021), <https://www.edweek.org/teaching-learning/is-the-bottom-falling-out-for-readers-who-struggle-the-most/2021/06> [<https://perma.cc/Y535-778Y>].

10. See *id.*

11. See *id.*

12. Hannah-Jones, *supra* note 8.

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

likely to have differing standards as to what they teach.¹⁸ This is in part because setting standards for public education is currently a matter primarily reserved to state governments.¹⁹ Both Perticone and Dent appear to be exceeding their school's standards. Perticone earned a prestigious internship and Dent was an honors student for over four years.²⁰ However, Perticone is continuing on to a highly ranked four-year private college and Dent, realistically, has "marginal college prospects."²¹ The disparate outcomes of these two students highlight the effect of schools having differing standards as to what is taught. While other factors may be present in this situation, such as differing socioeconomic statuses and the extremely high price of college in the United States, disparate educational standards are also a significant contributing factor.²²

Currently, there are no federal or state standards requiring a specific level of K–12 public education.²³ President George W. Bush's administration passed the No Child Left Behind Act, which held schools accountable for students's reading and math proficiency.²⁴ However, Congress eliminated this piece of legislation in 2015.²⁵ Moreover, while federal "Common Core" standards were created during the Obama administration, states were never required to adopt them.²⁶ "Common Core" standards were merely guidance and they only became mandatory when a state's Board of Education voted to accept the standards.²⁷ The standards were not universally accepted and states were free to terminate programs as they saw fit.²⁸ Furthermore, even

18. *See supra* notes 1, 12.

19. *See infra* Part I.B.

20. *See supra* notes 5, 13 and accompanying text.

21. *See supra* notes 7, 13 and accompanying text.

22. *See* Linda Darling-Hammond, *Unequal Opportunity: Race and Education*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [<https://perma.cc/BDP4-52ZM>]

23. Diane Ravitch, *50 States, 50 Standards: The Continuing Need for National Voluntary Standards in Education*, BROOKINGS (June 1, 1996), <https://www.brookings.edu/articles/50-states-50-standards-the-continuing-need-for-national-voluntary-standards-in-education/> [<https://perma.cc/D455-QR3S>].

24. *See* Andrew Lee, *What is No Child Left Behind (NCLB)?*, UNDERSTOOD, <https://www.understood.org/en/articles/no-child-left-behind-nclb-what-you-need-to-know> [<https://perma.cc/JU3M-6CNG>] (last visited Oct. 25, 2022).

25. *See id.*

26. *See* Morgan Polikoff & Andy Porter, *The Common Core Explained*, CONVERSATION (Mar. 24, 2016), <https://theconversation.com/the-common-core-explained-56484> [<https://perma.cc/5ACM-5YZ6>].

27. Libby Nelson, *Everything you need to know about the Common Core*, VOX (May 13, 2015, 1:36 PM), <https://www.vox.com/2014/10/7/18088680/common-core> [<https://perma.cc/R4G7-F3YG>].

28. *Common Core States 2022*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/common-core-states> [<https://perma.cc/5N42-SDPT>] (last visited Oct. 9, 2022).

in states where “Common Core” was adopted, the states voted on their own version of the standards.²⁹ State governments have failed to create a comprehensive and uniform method of regulation in this area.³⁰ This failure is one of the primary causes of the massive disparity in the quality of education that public schools provide.³¹ Nonetheless, the United States has a long history of prioritizing schooling as a key element of childhood development.³² Thus, the government has a continuing interest in maintaining high-quality schools across the nation.

This Note proposes a means of mitigating the disparities between the quality of education that different public schools in cities across the United States provide. Specifically, this Note argues that the United States Department of Education should promulgate a rule that conditions Title I funding on satisfying criteria related to teaching, facilities, and materials.³³ Importantly, this recommendation retains the control states have over their K–12 educational systems. However, it sets minimum thresholds that state plans must satisfy.³⁴ The ultimate goal of this rule is to incentivize schools to teach students to read at or above their respective grade level. Because literacy has the potential to elevate one’s professional and social capabilities, implementing reading level standards may be the best way to ensure students are prepared for their future endeavors.³⁵

Part I explains the current lack of both federal guidance and standards regarding K–12 public schools across the United States, as well as the

29. *See id.*

30. John Haughey, *How 2021 State Legislatures Could Change the Future of Education*, FISCALNOTE (Apr. 1, 2021), <https://fiscalnote.com/blog/how-2021-state-legislatures-could-change-the-future-of-education> [<https://perma.cc/SD8F-JQVN>] (explaining the states’s differing approaches to educational assessments and testing).

31. *See* Nelson, *supra* note 27.

32. This is illustrated by U.S. Supreme Court cases, investment of federal aid, attendance laws, and societal norms. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (requiring students to attend school until eighth grade despite parental religious desires); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 230 (1963) (prohibiting state governments from requiring students to participate in prayer while in school); *People of Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (reinforcing separation of church and state principles); *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 534 (1925) (limiting state power to create curriculum); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (holding that states cannot heavily restrict daily operations of the classroom); *Interstate Consol. St. Ry. Co. v. Massachusetts*, 207 U.S. 79, 87 (1907) (requiring transportation companies to provide half price transportation for children to attend school); *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that states must provide free public-school education to all children).

33. *See infra* Part II.C.

34. *See infra* Part I and Part III.A.

35. *Reading Opens the World*, AM. FED’N OF TCHRS., <https://www.aft.org/read> [<https://perma.cc/WEN3-96XP>] (last visited Apr. 30, 2022).

resulting disparities.³⁶ Part II proposes that the Department of Education promulgate federal standards on this matter and outlines specific requirements the standard should include.³⁷ Part III highlights some of the challenges that the agency rule would need to overcome to foster success.³⁸

I. DISCUSSION OF FEDERAL PUBLIC SCHOOL REFORM EFFORTS

This Part examines Supreme Court precedent on education standards with a specific focus on *San Antonio Independent School Districts v. Rodriguez*, and highlights how the holding must coexist with state law.³⁹ This Part also summarizes *Gary B. v. Whitmer*, which is a Sixth Circuit case that this Note uses to formulate an agency regulation.⁴⁰

A. *San Antonio Independent School Districts v. Rodriguez*: The Binding Supreme Court Precedent

The Supreme Court held in *San Antonio* that there is no federal constitutional right to education.⁴¹ The Court reasoned that to do otherwise would raise federalism concerns.⁴² Additionally, the Court could not find a constitutional right here because it was unable to classify this as either an equal protection or due process violation.⁴³

San Antonio was a class action lawsuit brought by low-income Mexican-American parents living in the impoverished, urban Edgewood School District.⁴⁴ The plaintiffs in this class action suit, as well as the community as a whole, suffered from conditions of poverty.⁴⁵ The plaintiffs alleged that their school district's minimal federal government funding violated the equal protection clause because it reflected disparate treatment,⁴⁶ and it inhibited

36. *See infra* Part I.

37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part I.A, B.

40. *See infra* Part I. C.

41. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (stating that there is no federal right to education and explaining reasons, such as federalism, as to why one should not be optimistic that the Court would find in the alternative).

42. *See id.* at 58.

43. *See id.*

44. *See id.* at 5. Edgewood School District is located in San Antonio, Texas. *Id.*

45. *See id.* (highlighting how the Edgewood Independent School District had a low property tax base, which indicates the homes had a proportionately low value).

46. Disparate treatment refers to intentional discrimination, while disparate impact refers to unintentional discrimination. *See Disparate Impact*, BALLOTPEdia, https://ballotpedia.org/Disparate_impact#:~:text=Disparate%20impact%20is%20a%20legal,is%20no%20intent%20to%20discriminate [https://perma.cc/T5WK-HYGU] (last visited Jan. 31, 2023).

their participation in the nation's democracy.⁴⁷ The school funding schema was one where some districts received significantly more tax money from the more populated areas, while other districts were encompassed with farmland and thus received less tax money.⁴⁸ The district court held that the funding was unconstitutional, stating in its opinion that education is a fundamental right.⁴⁹ A court of appeals did not hear the case. The school district appealed the district court's decision directly to the Supreme Court. The Supreme Court reversed the district court findings and held that this case did not require an equal protection analysis nor any other Constitutional doctrine.⁵⁰

The Supreme Court held that there is no fundamental right to education⁵¹ even though the plaintiffs showed massive fiscal disparities among school districts.⁵² The Court further stated that nothing in its holding minimizes the significance and need for public school K–12 education.⁵³ However, the Court was concerned that a constitutional right to education may upset the balance of power between states and the federal government.⁵⁴ Thus, the Court held that education is not a fundamental right⁵⁵ and is a matter reserved for state legislatures.⁵⁶

B. The Problems of the State Law Landscape

A United States student's right to a basic education, including reading, math, social sciences, and the arts, are defined by state laws, which vary drastically.⁵⁷ Federal silence on this matter abets a fundamentally flawed and unfair public education system. The disparities of a state-run public education system are clear, and the examples of unequal outcomes can be found throughout the country.

Currently, educational rights stem from state constitutions. Some state constitutions have virtually no standards for public education, mandating only that a free public school system must be maintained.⁵⁸ This places no

47. *See Rodriguez*, 411 U.S. at 18, 37.

48. *See id.*

49. *See id.* at 18.

50. *See id.* at 18, 35.

51. *See id.* at 18.

52. *See id.* at 7–9.

53. *See Rodriguez*, 411 U.S. at 30.

54. *See id.* at 44.

55. *See id.* at 37.

56. *See id.* at 58.

57. Haughey, *supra* note 30 (explaining the states's differing approaches to educational assessments and testing).

58. *See* SCOTT DALLMAN & ANUSHA NATH, FED. RSRV. BANK OF MINNEAPOLIS, EDUCATION CLAUSES IN STATE CONSTITUTIONS ACROSS THE UNITED STATES 1 (2020),

value on the quality of education provided, resulting in reports of urban classrooms being taught by uncertified teachers, classes led by teachers teaching in areas they were not trained for, teachers quitting their jobs in the middle of the year and thus leaving the class without a teacher, and classrooms having inadequate access to academic materials.⁵⁹ Specifically, the state constitutions of Oregon and Virginia do not define any academic standards.⁶⁰ Some state constitutions, such as Florida and New Mexico, contain a handful of piecemeal items such as class size and teacher training.⁶¹ While this is an improvement, it is not nearly sufficient to meet the goal of having students perform at grade level. Federal law is needed here to provide one framework for all public-school students. Further, while it is true that improving a state constitution can lead to improved education in that specific state, there is no indication that many states would be able to drastically improve their constitution to the level necessary for meaningful change.⁶² Thus, federal law should become the governing body.

C. *Gary B. v. Whitmer*

In May 2020, a Sixth Circuit panel held that the Fourteenth Amendment's due process clause provides students with a fundamental right to a basic minimum education and access to literacy.⁶³ Access to literacy was found to be a fundamental right because it is a necessary condition for voting and other future participation in the democratic process.⁶⁴

Plaintiffs in *Gary B.* were students in Detroit Public Schools, which is a district that serves mostly low-income students of color.⁶⁵ The students alleged that they suffered due process and equal protection violations because of abysmal conditions in their public schools and classrooms.⁶⁶ The

<https://www.minneapolisfed.org/~media/assets/articles/2020/education-clauses-in-state-constitutions-across-the-united-states/education-clauses-in-state-constitutions-across-the-united-states.pdf?la=en#:~:text=The%20education%20clause%20states%20that,education%20and%20mandates%20that%20it> [https://perma.cc/R94-4T83].

59. Natalie Wexler, *Why A 'Constitutional Right To Education' Won't Mean Much*, FORBES (Apr. 27, 2020), <https://www.forbes.com/sites/nataliewexler/2020/04/27/why-a-constitutional-right-to-education-wont-mean-much/?sh=338e209475b9> [https://perma.cc/ELB5-FP8L]. See generally *Gary B. v. Whitmer*, 957 F.3d 616 (6th Cir. 2020).

60. See DALLMAN & NATH, *supra* note 58, at 2.

61. See *id.*

62. See *id.*

63. See *Gary B.*, 957 F.3d at 621.

64. See *id.* at 652.

65. See *id.* at 621.

66. See *id.* Plaintiffs report reading books five years below grade level because “they were the only books available.” *Id.*

plaintiffs asked for injunctive relief instead of monetary damages;⁶⁷ rather than seeking financial compensation, they instead sought an improvement in the quality of education. Plaintiffs introduced a comprehensive proposal for minimum educational standards to be granted to all students.⁶⁸

The District Court dismissed the plaintiffs' complaint,⁶⁹ noting that plaintiffs failed to highlight how the state policy was "not supported by a rational basis."⁷⁰ Additionally, the court stated that "education is not a fundamental right," and thus there could not be a due process violation.⁷¹ However, the Sixth Circuit reversed, holding that the opportunity to receive a basic public K–12 education is a fundamental right.⁷² In 2020, the Sixth Circuit, sitting en banc,⁷³ voted to rehear the case after a political party shift in the federal government, a legislative proposal, and a settlement between the parties to the suit.⁷⁴ Upon rehearing, the court dismissed the case as moot due to the agreed upon settlement.⁷⁵ Thus, while the court temporarily held that a minimum education is a fundamental right, it ultimately did not create binding federal precedent in favor of the plaintiffs and their proposal for K–12 public education.

At first glance, it may appear that the *Gary B.* court went against precedent established by the Supreme Court in *San Antonio*.⁷⁶ However, the Sixth Circuit held that these two cases were distinguishable.⁷⁷ The circuit court took the position that *San Antonio* had not yet decided this precise issue, because the plaintiffs in *San Antonio* were not facing the same total denial of educational opportunity that the *Gary B.* plaintiffs did.⁷⁸

67. *See id.* at 629.

68. *See id.* at 624–27.

69. *See Gary B.*, 957 F.3d at 621.

70. *See id.*

71. *See id.*

72. *See id.* at 642.

73. En banc means that the court heard the case while sitting as a full bench, with all Judges present, as opposed to the traditional assignment of a panel of three Judges to hear a case. *See En Banc*, BLACK'S LAW DICTIONARY (9th ed. 2009).

74. *See Gary B.*, 957 F.3d at 631; Alyssa Evans, *The Other Branch: Outcomes of Gary B. v. Snyder*, EDNOTE (July 15, 2020), <https://ednote.ecs.org/the-other-branch-outcomes-of-gary-b-v-snyder/#:~:text=Michigan%20Gov.,DPSCD%20for%20literacy%2Drelated%20programs> [https://perma.cc/SB27-TLB6].

75. *See Evans, supra* note 74. This means that the holding is no longer precedent, and that the case was essentially dismissed due to the out-of-court settlement.

76. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that there is no federal constitutional right to education).

77. *See Gary B.*, 957 F.3d at 646 (stating that the case only applied to situations where there was not a complete denial of education).

78. *See id.*; Rocco Testani, *A Short-Lived Constitutional Right to Education*, EDUC. NEXT (May 21, 2020), <https://www.educationnext.org/short-lived-constitutional-right-to-education-sixth-circuit-rehear-gary-b-whitmer/> [https://perma.cc/57UJ-3H69].

D. Review and Recent Development

A federal right to a basic education ensuring students can read is unlikely to be found through impact litigation. The Supreme Court has already stated in *San Antonio* that education is not a fundamental right, and the court has only gotten more conservative since that decision. The Sixth Circuit *Gary B.* decision was vacated in part due to unfavorable Supreme Court views on the matter.⁷⁹ Additionally, Texas Governor Greg Abbott is considering an attempt to overturn Supreme Court precedent regarding the right to education, at the time of writing this Note.⁸⁰ He has taken recent issue with *Plyler v. Doe*, which held that states must provide a free public-school education to all children unless there is a substantial government interest in the alternative.⁸¹ If *Plyler* is overruled, there would be an opportunity to severely alter the public schooling system.⁸²

The impact of *San Antonio*, the vacated Sixth Circuit decision in *Gary B.*, and the potential reversal of *Plyer* may lead to more children attending private schools,⁸³ which furthers the concern of disparate standards that this Note aims to address. Private schools set their own learning standards and there is little uniformity between states or even neighboring towns.⁸⁴ The Supreme Court, in an alleged challenge to *Plyler*, may also opt to allow the legislature to decide how each state should conduct their schooling. This deference to the elected representatives is similar to the level of control the

79. See *Gary B. v. Whitmer*, 958 F.3d 1216, 1216 (6th Cir. 2020) (vacating the district court decision in *Gary B.*).

80. Jack Crosbie, *Greg Abbott Reveals the GOP's Plan After Killing Roe v. Wade: Killing Public Education*, ROLLING STONE (May 5, 2022), <https://www.rollingstone.com/politics/politics-news/greg-abbott-plyler-doe-public-education-1348208/> [<https://perma.cc/3FYE-G7HJ>].

81. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Texas was the original party that sued in *Plyler*. See Crosbie, *supra* note 80. Governor Abbott's state was unhappy about the premise of free public education in the 1980s, and Abbott thought that the Court will rule differently now, particularly due to the Court's current six-to-three conservative majority. See *id.* Abbott is likely unhappy with *Plyler's* requirement that states fund free public K–12 education for undocumented migrant children. See *id.* He advocates for *Plyler* to be overruled for that reason and wants the federal government to fund education for this group of students rather than his state. See *id.* However, the concern is that if *Plyler* is overruled, there would be an opportunity to severely decrease or even abolish the public schooling system. See *id.*

82. See Crosbie, *supra* note 80.

83. See *id.*

84. See Kate Barrington, *A Quick Guide to U.S. Public and Private School Options*, PUB. SCH. REV. (May 22, 2022), <https://www.publicschoolreview.com/blog/a-quick-guide-to-us-public-and-private-school-options> [<https://perma.cc/U3XK-3XJ6>]; Shandy Cole, *Do Private Schools Have Higher Academic Standards*, FOUNTAINHEAD MONTESSORI (Mar. 15, 2022), <https://blog.fms.org/do-private-schools-have-higher-academic-standards> [<https://perma.cc/4AZG-7X2B>] (discussing how each individual school defines success differently).

states currently have in their public K–12 education. This option would also further the disparate standards between states.

Although the Court in *Gary B.* ultimately did not hold that there is a federal right to education, the plaintiffs did propose a plan to reduce disparities in education. This Note proposes that the Department of Education adopt certain educational standards based on the guidelines enumerated in *Gary B.* Unlike judges, the Department of Education is not bound by concerns of settlement or conflicting precedent, and they have the power to act here where the Supreme Court likely would abstain from doing so. Federal officials should utilize conditional funding through the Department of Education to create a minimum threshold for public education quality across the United States.

II. A PROPOSAL FOR AGENCY ACTION TO SET FEDERAL MINIMUM STANDARDS FOR PUBLIC SCHOOLS IN THE UNITED STATES

The Department of Education should use the plaintiffs’s arguments in *Gary B. v. Whitmer*⁸⁵ as a partial model for a rule that requires K–12 public schools to provide students with a basic minimum education. The *Gary B.* plaintiffs brought suit to test if the Supreme Court would be willing to revise its precedent on a federal right to education.⁸⁶ While the holding does not prevent the Supreme Court from reconsidering its position on this issue, there is no incentive for the Court to reverse its position. The relief sought by the *Gary B.* plaintiffs may be better achieved via agency regulation.

One way of achieving that goal would be if the Department of Education made Title I funding contingent on students achieving certain reading proficiency. Title I allocates funds from the federal government to public schools that serve students meeting relevant criteria. The proposed agency action should specify requirements for teaching, facilities, and materials that schools must follow to ensure that students can read at proper grade levels.⁸⁷ This Part examines concerns that the proposed agency action would need to overcome such as federalism challenges and enforcement.⁸⁸

This Part begins by explaining the societal role of education, introducing Title I, and explaining how the congressional enabling statute can be interpreted to give the Department of Education the authority implement the proposed rule.⁸⁹ Then, this Part will outline the specific requirements the

85. See 957 F.3d 616, 621 (6th Cir. 2020).

86. See Testani, *supra* note 78.

87. See *infra* Part III.C.

88. See *infra* Part III.

89. See *infra* Part II.B.

rule would set forth.⁹⁰ Finally, it will explain the two potential types of rulemaking and illustrate how both may be successful here.⁹¹

A. The United States's Value on Education Cannot End Here

Because United States culture greatly values education, the federal government should be concerned that children enrolled in various public schools across the country are receiving disparate levels of education. The “American dream” of attending college and continuing on to a professional career illustrates how integral education is in the United States.⁹² For example, California has a state funded program providing low-income children with money to be saved for a college education.⁹³ Education, and specifically literacy, is key to activate participation in democratic systems and professional success.⁹⁴ Yet, disparate educational outcomes stand in the way of achieving that dream for many students. Some students are being denied a path towards democratic participation and an opportunity for upward mobility in society.

The United States's culture of valuing education⁹⁵ is exemplified by a plethora of Supreme Court decisions⁹⁶ and legislative initiatives. Most notably, the Supreme Court upheld the need for educational standards in *Brown v. Board of Education*.⁹⁷ In *Brown*, the Court held that unequal funding leads to unequal educational outcomes.⁹⁸ Some of the unequal outcomes that the Court found unacceptable in *Brown* are identical to those that the proposed agency rule aims to address here.⁹⁹ Attendance laws are another manner in which society shows dedication to educational opportunities. Under the Elementary and Secondary Education Act (ESEA),

90. See *infra* Part II.C.

91. See *infra* Part II.D.

92. See Mark McCoy, *College Plays a Powerful Role in Achieving the American Dream*, HILL (Apr. 9, 2018, 8:00 AM), <https://thehill.com/opinion/education/382171-college-plays-a-powerful-role-in-achieving-the-american-dream> [<https://perma.cc/XWR6-FV6Q>].

93. Jon Healey, *Free Cash for College: How California Parents Can Access CalKIDS Funds*, L.A. TIMES (Aug. 10, 2022, 11:20 AM), <https://www.latimes.com/california/story/2022-08-10/cal-kids-free-cash-for-college-how-california-parents-can-access-funds> [<https://perma.cc/52PZ-Z35S>].

94. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29–30 (1973).

95. Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, ATLANTIC (Oct. 16, 2013), <https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/> [<https://perma.cc/GRS7-8KJ9>].

96. See *supra* note 32 (collecting cases demonstrating the country's history of prioritizing education).

97. See *Rodriguez*, 411 U.S. at 29–30.

98. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1955).

99. See *id.* at 490.

states were required to share data with the federal government of students who were excessively absent.¹⁰⁰ This legislation highlights how being present in school is critical to student development.

Finally, New York recently adopted an approach similar to the one proposed in this Note. In September 2022, the New York Board of Regents enacted a law requiring private Hasidic public schools to “prove” to the government that they are meeting certain minimum teaching standards.¹⁰¹ Failure to comply with this reporting will lead to a loss of government funding.¹⁰² This law remedies a report alleging a lack of “basic education.”¹⁰³ The Young Advocates for Fair Education group applauded this new law.¹⁰⁴ This recent New York action paves the way for the federal government to follow.

B. The Importance of Title I’s Inclusion in the Proposed Agency Action

Title I is the main federal statute governing public schools in America.¹⁰⁵ It was amended by ESEA in 2015, and provided conditions that a school must satisfy to qualify for funding from the federal government.¹⁰⁶ While the 2015 ESEA statute was reauthorized as the ESSA, it initially illustrated Congress’s vested interest in quality education.¹⁰⁷ However, ESEA merely required compliance with the disparate standards that individual states create. As such, these standards were still insufficient to ensure quality education for students throughout the United States.

100. *New Federal Education Law Includes Chronic Absence Tracking, Training, ATTENDANCE WORKS* (Dec. 10, 2015), <https://www.attendanceworks.org/new-federal-education-law-includes-chronic-absence-tracking-training/> [<https://perma.cc/BJ9J-AT7X>].

101. See Brian M. Rosenthal & Eliza Shapiro, *New State Rules Offer Road Map for Regulating Private Hasidic Schools*, N.Y. TIMES (Sept. 13, 2022), <https://www.nytimes.com/2022/09/13/nyregion/new-york-rules-yeshivas.html> [<https://perma.cc/CHV3-AFZL>].

102. See *id.*

103. See *id.*

104. See *id.*

105. See PTA, TITLE I SUMMARY: PTA AND THE EVERY STUDENT SUCCEEDS ACT (ESEA) I (2016), <https://www.pta.org/docs/default-source/uploadedfiles/advocacy/essa-memo-on-title-i-webpage-ed.pdf> [<https://perma.cc/D9UG-MPMA>].

106. U.S. Dep’t of Educ., *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP’T OF EDUC. (Oct. 24, 2018), <https://www2.ed.gov/programs/titleiparta/index.html> [<https://perma.cc/24HL-9G86>].

107. See *id.*; *Every Student Succeeds Act*, U.S. DEP’T OF EDUC., <https://www.ed.gov/essa?src=ft> [<https://perma.cc/N986-D3JS>] (last visited Aug. 17, 2022); PTA, *supra* note 105.

Title I is one provision of ESEA. It provides funding to schools when their students meet certain criteria.¹⁰⁸ Not all schools receive Title I funding, and generally, urban schools with high populations receive a higher portion of Title I funds.¹⁰⁹ Additionally, Title I funding is widely used, with more than 25 million United States students benefitting from these pay-outs.¹¹⁰ While not every school is a Title I school, more than half of all students receive Title I benefits.¹¹¹ Further, every school that has Title I students receives some level of Title I funding for those individuals.¹¹² Thus, the overwhelming majority of schools are invested in retaining this source of funding. The Department of Education should therefore tie the proposal in this Note to the existing Title I legislation due to its high usage and importance. Non-Title I schools should also feel compelled to comply with Title I because their Title I students have needs that must be met, regardless of how many of them are present in the building.

ESEA required states to create their own standards regarding public K–12 education.¹¹³ Title I is one provision of the ESEA.¹¹⁴ While ESEA was a necessary and formative step in the education landscape, it did not do enough to ensure universal schooling standards. This law permitted states to decide any standard of their choosing in providing students with a sufficient education.¹¹⁵

Title I Section 205(a)(1) requires schools to have education programs of “sufficient size, scope, and quality to give reasonable promise of substantial

108. See *ESSA Resources*, HACKENSACK PUB. SCHS., <https://www.hackensackschools.org/domain/50> [https://perma.cc/6FZE-9T82] (last visited Oct. 9, 2022).

109. See *Revenue, Expenditures, Poverty Rate, and Title I Allocations of Public School Districts Enrolling More than 15,000 Students: 2015-16 and Fiscal Year 2018*, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d18/tables/dt18_215.20.asp [https://perma.cc/G3H6-CQTM] (last visited Mar. 15, 2022).

110. See Sarah D. Sparks, *Title I Explained: 5 Things Educators Need to Understand About Federal Money for Students in Poverty*, EDUC. WK. (May 9, 2019), <https://www.edweek.org/leadership/title-i-explained-5-things-educators-need-to-understand-about-federal-money-for-students-in-poverty/2019/05#:~:text=In%20the%20end%2C%20about%2011.6,students%20receive%20Title%20I%20services> [https://perma.cc/GXF9-HGRW].

111. See Becky L. Spivey, *What is Title I*, HANDY HANDOUTS, http://www.handyhandouts.com/viewHandout.aspx?hh_number=386&nfp_title=What%20is%20 [https://perma.cc/ATY3-Y39S] (last visited Oct. 9, 2022).

112. U.S. Dep’t of Educ., *supra* note 106.

113. See generally Cynthia G. Brown, *Federal Nagging: How Congress Should Promote Equity and Common High Standards in Public Schools*, 116 YALE L.J. POCKET PART 163 (2006).

114. See *ESSA Resources*, *supra* note 108.

115. See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 333 (2006).

progress”¹¹⁶ in the students’s learning. The Department of Education is charged with interpreting this language when issuing rules to satisfy the statute. Currently this phrase is undefined. This means that if the agency were to bring an enforcement action upon a school for violating the language, the school could provide any valid argument of their choosing to persuade the agency that they have satisfied the statutory language of Title I. States are currently failing to provide satisfactory defining language. The American Federation of Teachers, one of the two largest teacher unions in the nation, lists student reading as its goal;¹¹⁷ however, they provide no specific requirements or guidelines on how to achieve it.¹¹⁸ This Note’s proposed rule would set forth specific criteria that schools would need to satisfy to have students reading at grade level, and thus to not lose their Title I funding.¹¹⁹

Promulgating federal Department of Education regulations that outline criteria for public K–12 education will likely be the most efficient means to achieve the desired result. In *Gary B.*, the Dissent notes that expert agency action is a better vehicle for implementing these reforms because the Court is not an educational policy expert.¹²⁰ Further, Congress itself lacks the specific knowledge, as evidenced by the inadequacy of the act encompassing Title I.¹²¹

C. Logistics of Agency Regulations

An agency can issue a rule when it is interpreting language in its own organic statute, which is the statute that gives the agency power to act.¹²² Here, Title I is the organic statute of the Department of Education because it grants legislative power to the agency.¹²³ Thus, the agency can issue either an interpretive or substantive rule when advising regulated parties on the agency’s reading of the statute or its interpretation of the text.¹²⁴

Section 205(a)(1) of Title I requires schools to have education programs of “sufficient size, scope, and quality to give reasonable promise of

116. See Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

117. See *Reading Opens the World*, AM. FED’N OF TCHRS., <https://www.aft.org/read> [<https://perma.cc/WEN3-96XP>] (last visited Apr. 30, 2022).

118. See *id.*

119. See *infra* Part II.C.

120. See 957 F.3d 616, 670 (6th Cir. 2020) (Murphy, J., dissenting).

121. See PTA, *supra* note 105.

122. See JARED COLE, CONG. RSCH. SERV., AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 16 (2016), <https://sgp.fas.org/crs/misc/R44699.pdf> [<https://perma.cc/96C8-JXPE>].

123. See *Drake v. F.A.A.*, 291 F.3d 59, 62 (D.C. Cir. 2002) (describing the scope of judicial review permitted by the agency’s “organic statute”).

124. See *infra* Part II.D.

substantial progress.”¹²⁵ The Department of Education can interpret this phrase to require baseline requirements in the areas of teaching, facilities, and materials in order to help students read on their grade level.¹²⁶ This Note proposes that the Department of Education condition Title I funds on students reading at grade level, and that such an action is within the scope of the agency’s power.

D. Proposal Based on Plaintiffs’s Argument in *Gary B.*

Originating from the plaintiffs’ argument in *Gary B v. Whitmer*,¹²⁷ this proposed piece of agency regulation includes requirements for teaching, facilities, and materials. This proposal has a higher degree of bureaucratic realism and potential for effectiveness than other frequently discussed options, such as a constitutional amendment, legislation, and Supreme Court litigation.¹²⁸

While this Note advocates for many aspects of the proposal originating from plaintiffs’ argument in *Gary B.*,¹²⁹ some suggestions are unworkable, and some suggestions are missing. All are described below.

I. Teaching

Teaching is the most important portion of the rule. In short, the rule should require that teachers are certified, receive effective evaluations, and communicate with the student’s caregivers.

The agency rule should require that there be certified teachers working in their respective field of certification.¹³⁰ At a minimum, schools must have teaching staff that are certified to effectively lead a classroom of students to meet literacy requirements.¹³¹ This is unfortunately not the status quo in

125. See Elementary and Secondary Education Act of 1965, *supra* note 116.

126. Reading on grade level is somewhat a term of art. It means that the student is progressing in an age-appropriate manner and can read specific books that the teacher/school has marked as aligning with the student’s expected ability. See *supra* Part II.C.

127. See generally 957 F.3d 616 (6th Cir. 2020).

128. See generally Eloise Pasachoff, *Doctrine, Politics, and the Limits of Limit a Federal Right to Education*, in *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 84, 84–108 (Kimberly Jenkins Robinson ed., 2019). One case study of why federal action through agency regulation is needed is Texas Governor Greg Abbott’s desire to overturn the Supreme Court precedent regarding the right to education. See Crosbie, *supra* note 30. He has taken recent issue with *Plyler*, which held that states must provide a free public-school education to all children. See *id.*; *Plyler v. Doe*, 457 U.S. 202, 230 (1982). The only way the education can be withheld is through a showing of a substantial government interest. See *Plyler*, 457 U.S. at 230.

129. See generally 957 F.3d 616.

130. See *id.* at 625.

131. See *id.* at 624–25.

many states. For example, some teachers in Kansas and Arizona are not required to have college degrees, let alone certification.¹³² Florida appears to be inching towards this same dwindling requirement.¹³³ This lack of consistency in certification highlights the need for a federal rule on the matter. To make matters worse, states have been reported to have eased certification requirements even further due to the strain that the Covid-19 pandemic caused.¹³⁴ This means that unqualified teachers are leading classes due to the dire need of teachers.

Additionally, teachers must be limited in the amount of time that they can teach a course without the appropriate certification. Currently, most states permit teachers to be assigned one class per day that is outside of their area of certification.¹³⁵ It means that teachers can be teaching for their entire careers in an area for which they lack certification. If a good faith situation arose where schools were short-staffed, a short-term interim license should be granted for no longer than three years.¹³⁶ This is sufficient time for the teacher to obtain the necessary credentials to receive a license in a given subject area.¹³⁷ This shortened time period is a necessary step towards sufficient educational experiences for students and towards students reading at grade level. States also certify teachers upon mere completion of coursework and/or an exam.¹³⁸ This is an inappropriate standard and the threshold should be increased.

Teachers must also receive effective evaluations from both their colleagues and supervisors.¹³⁹ The plaintiffs in *Gary B.* leave this important

132. See Amelia Nierenberg & Giulia Heyward, *The Fight for Substitute Teachers*, N.Y. TIMES (Jan. 26, 2022), <https://www.nytimes.com/2022/01/26/us/substitute-teachers-staffing-schools.html> [<https://perma.cc/S2LH-NRA7>]; Moriah Balingit, *Wanted: Teachers. No Training Necessary.*, WASH. POST (Sept. 13, 2022, 2:51 PM), <https://www.washingtonpost.com/education/2022/09/13/teacher-requirements-shortage-jobs/> [<https://perma.cc/KQP2-FXUE>].

133. See Balingit, *supra* note 132.

134. See Mackenzie Mays, *How to Find Out If Your Child's Classes Have Teachers with Proper Credentials. Many Don't*, L.A. TIMES (July 1, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-07-01/amid-staffing-shortage-46-700-teachers-in-california-classrooms-lack-proper-credentials> [<https://perma.cc/B9S5-RHSK>].

135. See *Certification*, UNITED FED'N OF TCHRS., <https://www.uft.org/teaching/certification> [<https://perma.cc/J8M4-KTW7>] (last visited Apr. 30, 2022).

136. See *id.*

137. Candidates generally complete the program within 1–2 years. *How Long Does it Take to Get a Teaching Certificate*, TCHR. BUILDER (May 22, 2019), <https://www.teacherbuilder.com/blog/how-long-does-it-take-to-get-a-teaching-certificate/> [<https://perma.cc/T8VZ-3MDK>]

138. See *id.*

139. Madeline Will, *Effective Teachers Are Needed 'More Than Ever Before,' New NCTQ President Says*, EDUC. WK. (Mar. 11, 2022), <https://www.edweek.org/teaching->

element of the “teaching” category out of their argument. Colleagues can provide a hands-on perspective of how specific methods can be changed in the classroom while the supervisor’s perspective is of the big picture learning that is taking place. The feedback creates a “support” and “accountability” perspective on teachers’ teaching methods and their effectiveness.¹⁴⁰ One of the largest teacher’s unions, United Federations of Teachers, endorses this argument.¹⁴¹ They state that two evaluations per year are warranted, and each instance should only be made known to the teacher 24 hours in advance.¹⁴²

Teachers should also be sending information home to the child’s caregivers, informing them of what is expected.¹⁴³ In order for children to be reading at grade level, some out of school involvement is necessary as students need to incorporate these skills into their daily routines and lifestyles. Not all children have a home life that allows for parents sitting and reading with them daily. However, there is a potential middle ground. Teachers should send home information about activities students can do at home, even if they are done individually.¹⁴⁴ This information will help students achieve their reading goals and will help foster a connection between the student’s caregiver and the activities the student should be doing.¹⁴⁵

Teaching requirements are the most important aspect of the proposed rule.¹⁴⁶ Having a framework for educators to follow is virtually useless if the teachers implementing the program are ineffective. This is the case with almost all programs; the personnel implementing a system are the most important part of the respective system.

However, this is also the most difficult category to monitor. People are subjective, and their success cannot be as easily measured as the other metrics discussed in this proposal. Additionally, some people argue that students’ test and reading scores are not an accurate or appropriate data point

learning/effective-teachers-are-needed-more-than-ever-before-new-nctq-president-says/2022/03 [https://perma.cc/K7ER-R2LB].

140. *Id.*

141. *See Teacher Evaluation*, UNITED FED’N OF TCHRS., <https://www.uft.org/teaching/teacher-evaluation> [https://perma.cc/G7C4-K2J5] (last visited Apr. 30, 2022).

142. *See id.*

143. *See Reading Opens the World*, *supra* note 35.

144. *See id.*

145. *See id.*

146. *See generally* Irene C. Fountas & Gay Su Pinell, *Teachers, More Than Programs, Make for Great Reading Instruction*, EDUC. WK. (Sept. 8, 2021), <https://www.edweek.org/teaching-learning/opinion-teachers-more-than-programs-make-for-great-reading-instruction/2021/09> [https://perma.cc/27N9-MNAZ]; Will, *supra* note 139.

with which to measure their intelligence. The same argument is made regarding how those metrics are inappropriate to measure teacher success. While this point of view may have merit, the need to implement tangible education benchmarks across the United States outweighs any difficulties that may arise with more subjective standards.

2. Facilities

The rule must mandate that school facilities satisfy the respective building code of their locality. This is clearly an issue, as evidenced by the Detroit Public Schools Community District's recent allegations of facilities failures.¹⁴⁷ Several Detroit public schools buildings reportedly have inhumane temperatures, are infested with bugs and animals, and lack clean drinking water.¹⁴⁸ Notably, in May 2022 the Detroit Public Schools Community District's School Board approved a \$700 million facility plan — including \$125 million allocated to bring heating and air conditioning to nearly all of the district's school buildings.¹⁴⁹ As of May 2022, just 35% of school buildings had functioning air conditioning.¹⁵⁰ These conditions do not facilitate learning and are unacceptable for a public-school building, or any building.

However, the *Gary B.* court takes an unnecessary approach and suggests the requirement that the facilities must be physically safe.¹⁵¹ The requirement of *Gary B.* is duplicative of building codes already in existence. The agency rule does not need to spell out the requirements here in such depth. It need only require that the local health and safety laws are satisfied by conditioning the school's Title I funding on satisfying the local building code. This is an appropriate place to defer to state laws and interpretation of language in the respective laws. Doing so will also help quell any federalism fears that arose in *San Antonio*.¹⁵² There is little controversy over appropriate building conditions. Schools are highly invested in receiving their Title I funds, and likely would not jeopardize that by failing to satisfy the agency rule. However, if states try to set very low requirements to evade substantial standards, the Department of Education should step in at that point and specify exact building terms that need to be satisfied.

147. See *Gary B. v. Whitmer*, 957 F.3d 616, 626 (6th Cir. 2020).

148. See *id.*

149. See Ethan Bakuli, *Detroit's Half Day for Heat Spotlights District's Air Conditioning Problem*, CHALKBEAT DETROIT (June 1, 2022, 7:43 PM), <https://detroit.chalkbeat.org/2022/5/31/23149312/detroit-public-schools-air-conditioning-heat-advisory-facility-plan> [https://perma.cc/3KCB-SGFF].

150. See *id.*

151. See *Gary B.*, 957 F.3d at 625–26.

152. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

3. *Materials*

Finally, the federal agency rule surrounding public schools must include standards for the classroom materials educators provide to their students, such as textbooks and workbooks. The materials must be appropriate to grade level and in sufficient condition so that they can be adequately used.¹⁵³ If the materials are too easy or advanced for the students, teachers are not optimally educating the students. Additionally, the materials need to be legible and physically intact so that students can easily utilize them.

Teachers need adequate curricula and materials to impart literacy to students.¹⁵⁴ These materials must be plentiful enough for teachers to assign work to each student. For example, each student needs to be able to bring home books or the other materials needed for nightly homework. If there are an insufficient number of textbooks or other homework materials, students would need to share and alternate nights on which they can bring the book home to complete homework. It is ineffective to have students alternating nights on which they can learn.

Classrooms must also have books appropriate for the grade level, a consistent literary instruction plan, and staff to implement this plan.¹⁵⁵ Here, substantial materials are needed to effectively allow students to complete homework, reference texts, and follow the plans the teachers promulgate. Teachers must provide the materials necessary to continue propelling students forward in their educational growth.

One “material” not mentioned in *Gary B* deserves special attention: teachers must have access to a database in which they can obtain resources to help with their daily lesson plans.¹⁵⁶ This resource can help teachers ensure that ideas they have are in general accordance with industry standards. It can also help teachers who may be new to their positions or otherwise in need of assistance to plan for a successful day in the classroom. Collaboration creates a sounding board where teachers can crowdsource best practices and recommendations.

iv. Unworkable and Unnecessary Portions of Gary B.

Gary B. suggests a requirement that teachers have an employment contract for at least one year.¹⁵⁷ At face value, it may appear that this eliminates mid-

153. *See id.* at 626–27.

154. *See id.* at 625.

155. *See id.*

156. *Funding Classroom Projects*, UNITED FED’N OF TCHRS., <https://www.uft.org/teaching/classroom-resources/funding-classroom-projects> [<https://perma.cc/XGZ6-C8YC>] (last visited Apr. 30, 2022).

157. *See* 957 F.3d at 625.

year vacancies where paraprofessionals, who lack teaching certifications, would need to take over the classroom.¹⁵⁸ This issue of vacancies is, unfortunately, a common occurrence at schools that lack funding and rely on Teach for America educators.¹⁵⁹ However, the ramifications of teachers breaching their employment contracts in most states is not severe.¹⁶⁰ This means that an employment contract for a set amount of time between a teacher and school district would not deter the teacher from quitting his or her job at any time.

E. Methods of Promulgation

The rule described in this Note can either be adopted as an interpretive or legislative rule. While there are some technical differences between these options, both end in the promulgation of a rule. Regulated entities have a strong incentive to follow both interpretive and legislative rules because they do not want to risk the possibility of the agency bringing an enforcement action against them. Thus, rules promulgated by both options have the force of law in practice, even if some argue that interpretive rules do not technically have such force.¹⁶¹

1. Interpretive Rule

Implementing this reform via interpretive rule would better allow the Department of Education to efficiently implement this rule, because it permits them to skip the notice and comment requirement of substantive rules.¹⁶² And here, time is of the essence. If the agency spends years

158. *See id.*

159. *See id.* Teach for America is a program where individuals can sign an employment contract to be a teacher immediately following their undergraduate graduation. *Our Program*, TFA, <https://www.teachforamerica.org/experience/our-program> [https://perma.cc/83ZW-VWAT] (last visited Jan. 31, 2023). Generally, these teachers are placed in low-income schools where educators are needed. *See id.*

160. *See* Jason Cheung, *Paying Penalties for Quitting Your Job*, LEGALMATCH, <https://lawblog.legalmatch.com/2020/08/31/paying-penalties-for-quitting-your-job/> [https://perma.cc/MJ23-T4VU] (last visited Apr. 4, 2020); *Educator Resignations and Requests for Contract Release*, ASS'N OF TEX. PRO. EDUCS., <https://www.atpe.org/Legal-Benefits/Common-Legal-Questions/Resignations> [https://perma.cc/TN8Y-ZWRP] (last visited Apr. 4, 2020); *Resignations by Certified Personnel*, TEX. ASS'N OF SCH. BDS. (Sept. 2021), https://www.tasb.org/services/legal-services/tasb-school-law-source/personnel/documents/resignations_by_certified_personnel.aspx [https://perma.cc/V4RV-CAXX].

161. *See infra* Section II.E.1.

162. *See* COLE, *supra* note 122, at 23.

undergoing notice and comment rulemaking, as is typically the case,¹⁶³ many children will have passed through the public school system in the meantime. Some of those children will have missed out on the opportunity to receive a quality education and become literate.

Unlike legislative rules, proposed interpretive rules do not need to have been promulgated with notice and comment to be valid.¹⁶⁴ The Administrative Procedure Act (APA) requires agencies to notify the public about upcoming substantive rules and allow them the opportunity to comment.¹⁶⁵ However, this requirement does not apply to interpretive rules.¹⁶⁶ Thus, an interpretive rule can take effect without undergoing this onerous notice and comment process and remain procedurally valid. This is of critical importance because notice and comment rulemaking typically takes two to three years to complete.¹⁶⁷ Indeed, children currently passing through the public school system need this rule to be instated as soon as possible in order to enhance their educational opportunities.

American Mining Congress v. Mine Safety & Health Administration set forth four factors to determine if a rule is substantive or interpretive.¹⁶⁸ The four prongs are connected by “or,” meaning that if one of them is satisfied, the rule is legislative and thus, requires notice and comment.¹⁶⁹ Here, none are satisfied.

The first prong asks if there would be a basis for an enforcement action without this rule.¹⁷⁰ This prong is the most helpful in determining if a rule is substantive or legislative because it does not look to how the agency itself defines the rule. Here, it can be argued that there is no legislative gap that requires this rule to enforce Title I. The regulated entities will likely argue that Title I has been enforced for many years, and thus, there is no gap. The agency can combat this argument in two ways. First, the agency could simply switch to a notice and comment rule, as discussed below, although

163. The notice and comment period typically takes two to three years. *See About the Rulemaking Process*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process> [https://perma.cc/U9BQ-HKGX] (last visited Jan. 31, 2023).

164. *See* Brian Wolfman & Bradley Girard, *Argument Analysis: “Interpretive Rules,” Notice-and-Comment Rule Making and the Tougher Issues Waiting in the Wings*, SCOTUSBLOG (Dec. 3, 2014, 9:50 AM), <https://www.scotusblog.com/2014/12/argument-analysis-interpretive-rules-notice-and-comment-rule-making-and-the-tougher-issues-waiting-in-the-wings/> [https://perma.cc/U5ST-96RG].

165. *See* 5 U.S.C. §§ 553(b)–(c).

166. *See id.* § 553(b)(3)(A).

167. *See* Wolfman & Girard, *supra* note 164.

168. 995 F.2d 1106, 1112 (D.C. Cir. 1993).

169. *See id.*

170. *See id.*

this is not necessary. Second, the agency can argue that the states' failure to create uniform standards in this area creates such a gap.

Likely, the Department of Education's strongest argument on this point would come from *Biden v. Missouri*.¹⁷¹ In *Biden*, the Supreme Court held that COVID-19 vaccination mandates for healthcare employees were not an issue that should be left to the states.¹⁷² The Court stressed how the decision of vaccination in healthcare workplaces had implications that greatly impacted civilians seeking healthcare.¹⁷³ The same can be said in this context of education. The decision of universal, federal education standards has implications that severely impact the students seeking their free, public-school education in order to be able to participate in democratic society. Thus, the Department of Health and Human Services in *Biden* promulgated a rule that listed requirements a facility must meet in order to receive their Medicaid funding.¹⁷⁴

Here, the same approach is suggested: the Department of Education would promulgate a list of conditions that must be met in order for schools to receive their Title I funding. Both Medicaid and Title I are major sources of federal funding for the respective institutions. These facilities cannot afford to operate without the funding. Thus, the Department of Education likely has a strong claim that any enforcement action would be warranted, so the rule can be interpretive.

The second prong of the test asks if the agency has published this rule in the Code of Federal Regulations (CFR).¹⁷⁵ Legislative rules are required to be published in the CFR while interpretive rules are not.¹⁷⁶ Thus, if the agency published its rule there, this would be a factor leaning towards the rule being legislative. This prong is not as helpful because it looks to the agency's own determination of what category the rule falls into. Regardless, the proposed rule should not be published in the CFR as to avoid an issue.¹⁷⁷

171. See generally 142 S. Ct. 647 (2022) (permitting President Biden's vaccine mandate to stand regarding healthcare workers).

172. See *id.* at 8.

173. See *id.* at 3–4.

174. See *id.* at 2–3.

175. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

176. See 5 U.S.C. §§ 553(b), (b)(3)(A).

177. It is important to note that the APA uses the term Federal Register (FR) and *American Mining* uses Code of Federal Regulations (CFR), but these terms are interchangeable. See *Federal Regulations: FR v. CFR*, MICH. L. LIBR., <https://libguides.law.umich.edu/c.php?g=1005584&p=7284939> [https://perma.cc/2NV6-T8FL] (last visited Feb. 3, 2023). Both include the final publication of the regulation. See *id.*

The third prong asks if the agency has explicitly invoked its general legislative authority.¹⁷⁸ Promulgating a rule via notice and comment rulemaking invokes general legislative authority and is a sign of a legislative rule. This prong is not as helpful for the same reason that the second prong was not helpful; it looks to the agency's own determination of what category the rule falls into. Regardless, under this method of promulgation the Department of Education would not use notice and comment to promulgate the above proposed rule. Accordingly, this means that the agency would not be invoking its general legislative authority and thus, this is not a substantive rule.

The final prong asks if the agency rule effectively amended a prior rule.¹⁷⁹ If an agency effectively amended a previous substantive rule, then the current rule would also be substantive. While the meaning of "effectively" is unclear, resolving the proper definition is unnecessary here because this proposal does not amend a prior substantive rule.

Thus, the four *American Mining* factors show that this proposed agency rule is interpretive. Since the rule is not legislative, it does not require notice and comment to be procedurally valid.¹⁸⁰

Interpretive rules are attractive because they can be promulgated faster than legislative rules, but there are important negative aspects to be cautious of. While interpretive rules are easier to promulgate, they are also easier to reverse.¹⁸¹ This means that if the political views of the agency changed, the agency secretary could easily promulgate a new interpretive rule overruling the one proposed in this Note. Additionally, interpretive rules are not guaranteed to receive *Chevron* deference during judicial review.¹⁸² If *Chevron* deference is granted, the Court will find that the agency's interpretation was appropriate as long as it was not unreasonable.¹⁸³ This would be an immense asset if this proposed rule were challenged in court.

Despite the detriments of notice and comment, interpretive rules are highly favorable. They can be promulgated significantly faster than legislative rules due to the lack of the notice and comment period required by legislative rules. The faster a rule can be promulgated, the faster that students' education can be enhanced.

178. *See Am. Mining Cong.*, 995 F.2d at 1112.

179. *See id.*

180. *See* 5 U.S.C. § 553(b)(3)(A).

181. *See Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 97, 100 (2015) (stating that interpretive rules do not require notice-and-comment to be reversed).

182. *See COLE*, *supra* note 122, at 14.

183. *See id.* at 13.

2. Legislative Rule

While many agencies are hesitant to attempt to issue a legislative rule due to the cumbersome notice and comment requirement,¹⁸⁴ there are some aspects of legislative rules that may be helpful to agencies. For example, if a rule was promulgated with notice and comment, it is entitled to *Chevron* deference under the *Mead* safe harbor provision.¹⁸⁵ This means that the agency's interpretation of the statute, expressed in the rule it promulgates, would stand unless it was grossly inappropriate.¹⁸⁶ Legislative rules are also more difficult to overturn.¹⁸⁷ This is attractive in that if a future administration wanted to eliminate the rule, they would need to promulgate another notice and comment rule to do so.¹⁸⁸ The time-consuming process is an asset in this scenario.

Timeline within the political cycle is an important consideration in deciding how a rule should be promulgated. For example, if the president is in the last year of his or her term, it may not be wise to begin the legislative rulemaking process. Assuming that the political party in power will most likely switch after the next election, the new administration would likely not favor the substance of the rule. The new president could pull the rule from the promulgation process on his or her first day in office because the agency is exercising executive power. This makes the notice and comment requirement hard to fulfill in the final months of a presidency.

Another consideration agencies will make when deciding on rule promulgation is whether or not the rule will be reviewed by the Office of Information and Regulatory Affairs (OIRA). OIRA is a part of the executive branch that has final budget authority on government actions. No rule can proceed without OIRA approval. Because some interpretive rules are not reviewed by OIRA, it may be tempting to promulgate an interpretive rule in order to avoid OIRA review. However, OIRA reviews all *substantial* interpretive rules, which this most likely is.¹⁸⁹ Therefore, OIRA review should not be a factor in the decision between interpretive or legislative rule.

184. See generally *A Guide to the Rulemaking Process*, OFF. OF THE FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [<https://perma.cc/P924-89ZF>] (last visited Apr. 30, 2022).

185. See *COLE*, *supra* note 122, at 14.

186. See *id.*

187. See *Perez*, 575 U.S. at 97.

188. See *A Guide to the Rulemaking Process*, *supra* note 184.

189. See *id.*

3. Recommendation

Overall, an interpretive rule is preferable here due to its potential for timely promulgation. It is worth helping as many students as possible get a sufficient public education and thus there is an incentive to proceed quickly. While it is a slight cause for concern that the rule could easily be reversed in the future, there are practical reasons that reversal would not be a complete fatality. During its time in effect, some children will have benefited from its standards. For example, even if the interpretive rule is only in effect for a short amount of time, it will show school leaders the type of high-quality education they should be providing. These standards will have become institutionalized and commonplace. Regardless, both an interpretive and legislative rule are beneficial here and neither has astounding benefits or drawbacks.

III. CHALLENGES THIS REGULATION MUST OVERCOME TO BE SUCCESSFUL

While the proposed rule in this Note is a promising step towards a stronger educational system, it is certainly not devoid of obstacles ahead. This Part will explain some of the issues the proposed rule must overcome, such as concern for states' rights, agency expertise, defining success, properties of the types of rule, and when exceptions to this proposed Department of Education rule should be granted.

A. The States' Rights Argument

The Supreme Court in *San Antonio* was concerned about holding that there is a constitutional right to education because education is an area where the states have not delegated their authority to the federal government.¹⁹⁰ This Note's proposal would alleviate some of those concerns. Through this agency action, the states would still retain sufficient power. For example, the states can decide not to accept Title I funding. Declining to utilize the funding would exempt the states from the conditions that this proposal creates.

Notably, the proposed rule does not face the same constraints regarding coercion that are articulated in *South Dakota v. Dole*.¹⁹¹ In *Dole*, the Petitioner was concerned that the federal funding being challenged was so large that states had virtually no choice other than to comply with the

190. See 411 U.S. 1, 58 (1973).

191. See 483 U.S. 203, 211 (1987) (stating that conditions must be satisfied in order for pieces of legislation to not be coercive upon states).

allegedly optional conditions.¹⁹² However, the Court disagreed with the Petitioner because only 5% of funds otherwise available were in question.¹⁹³ Here, the amount of funding in question would sometimes be even smaller than 5%. For example, there are some schools that receive very little or no Title I funding. Additionally, Georgetown Law Professor Eloise Pasachoff has discussed how, based on recent spending clause case law, not many other programs will be held unconstitutional.¹⁹⁴ Accordingly, there is no coercion concern here in the manner that the party in *Dole* presented.

Additionally, this reform can be preserved through a limited federal government enforcement mechanism. A combination of federal and state government power will enforce this rule. States must report to the federal government on a regular basis and the federal government will do research to determine how to best spend its money. This allows the states to retain control by deciding how to enforce the law. The federal government would only intervene if there were an ongoing issue that warranted its attention.

Finally, local school districts retain control over school decisions that go beyond the standard that the Department of Education promulgates. The school districts decide the curriculum they teach in order to have students reading at grade level. They also decide if they would like to surpass the minimum threshold that the federal standard requires. This helps states, but more specifically the specific school district, retain power. It is ideal for school districts to make these decisions since they have expertise in the field and know their population the best. However, although it is less ideal, state legislatures could also make decisions regarding these details. If state legislatures decided curriculum and education levels, the Department of Education proposal would remain as a nationally uniform minimum threshold.

B. Is This a True Area of Expertise Where Courts Should Defer to the Agency?

Some may be hesitant to find that the Department of Education is an expert on matters of classroom learning. Courts will defer to the agencies as experts in their field as it is assumed the agency has more knowledge on its respective area of governance and thus is better equipped to make the law unless the agency is acting outside its authority.¹⁹⁵ Here, it is true that the

192. *See id.* at 211.

193. *See id.*

194. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. UNIV. L. REV. 577, 651–62 (2013) (discussing the post-NFIB spending clause).

195. *See COLE, supra* note 122, at 13.

Department of Education focuses more on educational policy than the day-to-day details of educating.¹⁹⁶ Additionally, this rule is slightly more subjective than, for example, an Environmental Protection Agency (EPA) regulation or Centers for Medicaid and Medicare Services (“CMS”) specifying what constitutes a “facility.”¹⁹⁷ Other agency regulations may rely more heavily on data that requires an expert’s interpretation. However, the absence of heavy scientific data in this rule does not justify overriding the conventional understanding that agencies are experts in their field. The Department of Education looks similar to the EPA and CMS in that it interprets data regarding students, their reading levels, and their school’s performance.

C. Interpretive Rules Do Not Have the Force of Law

Some argue that interpretive rules do not have the force of law and merely serve as guidance from the agency.¹⁹⁸ However, even if this statement was widely accepted as the truth, which it is not,¹⁹⁹ this proposed rule still has immense value as an interpretive rule. Even as mere guidance, the regulated entities reading the rule understand that it is in their best interest to follow the rule in order to survive an agency enforcement action targeting them when they are not in compliance. The rule reflects the agency’s position, and the agency is the party who would be enforcing its view of the statute. Thus, schools will comply with the interpretive rule’s objectives because failure to do so would threaten their Title I funding.

D. Exceptions to the Proposed Rule

Instances may arise in practice where a school needs to request an exception to the standard set forth in the proposed Department of Education rule, for example if a group of classroom materials are destroyed and

196. See *An Overview of the U.S. Dep’t of Educ.*, U.S. DEP’T OF EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html#:~:text=The%20U.S.%20Department%20of%20Education%20is%20the%20agency%20of%20the,implementing%20laws%20enacted%20by%20Congress> [<https://perma.cc/5LNX-TFQT>] (explaining that the Department of Education focuses on policy and funding to schools).

197. See generally *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) (briefing arguments on both sides of the issue regarding pollution emissions and respectful limits); *Biden*, 142 S. Ct. 647 (2022) (specifying what requirements need to be satisfied in order for a hospital to receive Medicaid funding).

198. See COLE, *supra* note 122, at 14.

199. See *Administrative Conference Recommendation 2019-1: Agency Guidance Through Interpretive Rules*, ADMIN. CONF. OF THE U.S. (June 13, 2019), <https://www.acus.gov/recommendation/agency-guidance-through-interpretive-rules> [<https://perma.cc/PQCS-ULTD>] (discussing the debate, and origins thereof, regarding whether interpretive rules are binding).

replacements are on backorder or the entire teaching staff would need to be terminated to hire certified teachers. These are situations which technically would violate the proposed regulation, but in reality, should not lead to an enforcement action. As long as these issues are asserted in good faith, born from sources of exigency, and can be remedied reasonably quickly, the Department of Education could decline to enforce these matters as was done with Deferred Action for Childhood Arrivals (DACA).²⁰⁰ DACA recognizes that some children are not in current legal immigration status, but states that the government will not be prosecuting or seeking their removal from the country if certain criteria are satisfied.²⁰¹ The same acknowledgement of status but temporary lack of enforcement can be applied here. However, these situations must be alleged in good faith and the school must return to compliance within the near future as the lack of prosecution will not be indefinite.

E. Achieving This Outcome Can Still Mean a School is Failing in Other Regards

It is the unfortunate truth that a school can have students performing at grade level in reading, but still be “failing” in other ways. For example, some schools have achieved higher math performance after cancelling all social studies classes to use the time to extend their math classes.²⁰² The agency regulation proposed in this Note must specify that schools may not limit other classes to achieve the standards it sets out.

Some educational studies take this preference against cancelling one class to benefit another even further by saying that all topics in school should be integrated.²⁰³ For example, they propose that math and social studies should not be two separate hours in the day, but rather, both integrated into one broader, longer classroom discussion.²⁰⁴ While this Note argues that this fluid approach to the school day takes the concern too seriously, it should not be the case that one subject is taught all day simply to meet a previously set benchmark and receive Title I funding. This requirement in the agency

200. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 14 S. Ct. 1891 (2020) (explaining the DACA logistics and how the failure to prosecute works).

201. See *id.*

202. See Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES (Mar. 26, 2006), <https://www.nytimes.com/2006/03/26/education/schools-cut-back-subjects-to-push-reading-and-math.html> [<https://perma.cc/FY5F-T6LA>].

203. See Hailey Gibbs, Elias Blinkoff & Kathy Hirsh-Pasek, *Time for Bin Busting: Teach Math, Reading, and Social Skills Together*, EDUC. WK. (Dec. 15, 2021), <https://www.edweek.org/teaching-learning/opinion-time-for-bin-busting-teach-math-reading-and-social-skills-together/2021/12> [<https://perma.cc/58UK-P542>].

204. See *id.*

rule will also protect classes in the arts and humanities from being cancelled in the name of these standards.

Despite the protections against cancelling classes, it is still possible that grade level performance in reading is not indicative of a ‘successful’ education. This proposal is not a magic cure which ensures across-the-board success. However, it is a significantly better and higher benchmark than current regulations under ESEA and Title I. This standard should act as a starting point towards a brighter future for public K–12 students in the United States and can be amended in the future as further research reveals new or different measures that appropriately enhance education.

CONCLUSION

A Department of Education agency regulation is the most promising method of promulgation to create a federal standard regarding public K–12 education. This Note’s proposed rule will end the current framework of individual states having varying levels of education provided to K–12 students, a system that leads to immense disparities. Because United States culture places a high value on education, the federal government must act to help implement a standard that all students receive a baseline quality education.

This by no means solves the educational inequality in the United States, but it is a promising step towards both a better system and a better education for children enrolled in the public school system. This proposed regulation, whether it be a substantive or interpretive rule, can be amended as more appropriate data markers beyond reading at grade level are researched in the future.