

EQUAL EDUCATION MEANS EQUAL EDUCATION:  
CONFRONTING EDUCATION ACCESS DISPARITIES  
FOR NEW YORK STUDENTS AMID THE COVID-19  
PANDEMIC DURING THE 2020-2021 SCHOOL YEAR

*By Sara Gruber<sup>†</sup>*

I. INTRODUCTION .....	390
II. BACKGROUND .....	391
<i>The Coronavirus Outbreak and Mandated Isolation</i> .....	391
<i>The Impact of the Coronavirus on the Education System</i> .....	394
III. PROBLEM.....	395
<i>Lack of Access to Learning Devices with Internet Connectivity</i> ....	396
<i>The Shift to Online Learning Perpetuates the Preexisting Digital Divide</i> .....	399
<i>Current Legislation in New York Does Not Properly Account for the Electronic Education Model Adopted in Response to the COVID-19 Pandemic</i> .....	402
IV. PROPOSAL .....	405
<i>The Dignity for All Students Act Should be Extended</i> .....	406
<i>Case Law Acknowledging the Digital Divide and the Entitlement to Connectivity</i> .....	408
<i>New York Education Law § 3604 as Further Support for Amending the Dignity Act</i> .....	410
V. CONCLUSION .....	410

---

<sup>†</sup> Sara Gruber graduated from the Pennsylvania State University in 2019, where she earned a Bachelor of Science degree in Criminology (Legal Studies) with a minor in Business Studies. Sara is currently a third-year student at the Benjamin N. Cardozo School of Law. In addition to serving as the Notes Editor for Volume 28 of the Cardozo Journal of Equal Rights and Social Justice, Sara also serves as the Trademark Chair for the Cardozo Intellectual Property Law Society. Sara previously served as the Secretary for the Cardozo Business Law Society. After graduating in May of 2022, Sara hopes to pursue a career in media and intellectual property.

## I. INTRODUCTION

A child's first day of kindergarten is supposed to be a monumental day for their personal development. Kindergarten is supposed to be a place for young students to socially interact, learn primary educational objectives, and grow as human beings. For the children of Tierra Jones\* however, their first day was tremendously different (pseudonym\*).<sup>1</sup> In response to the outbreak of the debilitating Coronavirus (also known as "Covid-19") illness, all of the schools in New York transitioned to mandated online learning in place of in-person education.<sup>2</sup> Instead of walking into a classroom on their first day of school and being greeted by enthusiastic teachers and potential new friends, Jones's two kids had to log into a virtual classroom from the discomfort of their very own home.<sup>3</sup>

Jones lives in a small Brooklyn, New York, apartment with her grandmother and four children.<sup>4</sup> Two of her kids are not old enough to attend school yet, but the other two are in kindergarten and first grade.<sup>5</sup> Since Jones does not own a laptop or iPad, her kids have been attending class and completing their assignments by using her personal iPhone.<sup>6</sup> Even though Jones was able to request iPads for her children from the New York Department of Education, the Department was slow to start distributing the devices and, like 77,000 other students in New York City alone,<sup>7</sup> her kids have yet to receive theirs.<sup>8</sup> The prolonged lack of adequate accessibility to their virtual classrooms, along with the distractions that come with attending virtual school from a small, crowded apartment without reliable access to controlled learning spaces, have made it incredibly difficult for Jones's children to maintain the intended pace of their education.<sup>9</sup>

The interruptions posed by the Coronavirus pandemic have lasted much longer than society expected them to. As of January 2022, remote education is still highly prevalent throughout the education system. This Note,

---

<sup>1</sup> Anna North, *The shift to online learning could worsen educational inequality: As school goes digital, low-income students are being left behind*, Vox (Apr. 9, 2020, 1:10 PM), <https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-covid-new-york>.

<sup>2</sup> Executive Order [A. Cuomo] No. 202.4 [9 CRR-NY 8.202].

<sup>3</sup> North, *supra* note 1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> David Cruz, *NYC Schools Still Missing 77,000 Devices That Students Need For Learning*, GOTHAMIST (Oct. 16, 2020, 8:14 PM), <https://gothamist.com/news/nyc-schools-still-missing-77000-devices-students-need-learning> (quoting the Department of Education deputy chief operating officer Lauren Siciliano).

<sup>8</sup> North, *supra* note 1.

<sup>9</sup> *Id.*

however, will focus on the Coronavirus related climate during the initial outbreak of the illness, which occurred during the 2020-2021 school year. In Section II, this Note will study the characteristics and communicable nature of the Coronavirus illness, and then subsequently consider the impact that the illness has had on the New York education system. Next, in Section III, this Note will continue by considering how the transition to online learning, prompted by mandated school closures, has impacted students and how society as a whole has responded to these impacts. Section III will continue by reflecting upon the relevant legislation in New York, which reveals that current education based anti-discrimination legislation fails to account for the discrimination occurring in response to the Coronavirus pandemic. Finally, Section IV will argue that, in order to adequately protect the constitutional right to obtain an education for students across the state, New York must expand its current legislation to account for the obstacles imposed on low-income and minority students by the Coronavirus pandemic.

## II. BACKGROUND

### *The Coronavirus Outbreak and Mandated Isolation.*

Covid-19 is an especially communicable disease that first entered the United States early in the year 2020.<sup>10</sup> Covid-19 is spread from person to person through respiratory droplets which can be transmitted orally or by touch.<sup>11</sup> People diagnosed with Covid-19 have reported experiencing mild to severe symptoms.<sup>12</sup> Mild presentations typically have little to no symptoms, while severe presentations can result in serious complications.<sup>13</sup> Most people diagnosed with the Coronavirus report experiencing headaches, body aches, loss of smell, loss of taste, and general congestion.<sup>14</sup> Anyone who has been potentially exposed or has received a test result indicating exposure to the virus is expected to quarantine, to personally track their symptoms, and to notify anybody whom they have come into close contact

---

<sup>10</sup> *Frequently Asked Questions: What is COVID-19?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://web.archive.org/web/20210208200048/https://www.cdc.gov/coronavirus/2019-ncov/faq.html> (last updated Feb. 8, 2021); *Frequently Asked Questions: Why is the disease being called coronavirus disease 2019, COVID-19?*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://web.archive.org/web/20210208200048> (last updated Feb. 8, 2021).

<sup>11</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, WHAT YOU SHOULD KNOW ABOUT COVID-19 TO PROTECT YOURSELF AND OTHERS (2020).

<sup>12</sup> *Id.*

<sup>13</sup> *Symptoms of COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html> (last updated Feb. 22, 2021).

<sup>14</sup> *Id.*

392 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

with.<sup>15</sup> While most people who experience the illness are protected from reinfection, it is still possible to contract the illness a second time.<sup>16</sup> The outbreak of the Coronavirus prompted New York to close every public, private, and charter school on or prior to March 18, 2020 and transition to an exclusively online learning model.<sup>17</sup>

Between January 21, 2020, when the Centers for Disease Control and Prevention (the “CDC”) began aggressively tacking Covid-19 cases, and February 16, 2021, about one year later, there were 27,524,421 cases of Covid-19 reported in the United States.<sup>18</sup> The State of New York (inclusive of New York City) comprised at least 1,551,266 of those cases.<sup>19</sup> While this amount of cases initially seems very sizable, studies have found that even more cases have gone unreported, meaning that the correct number of cases is actually much higher.<sup>20</sup> In order to understand the illness, one must have an accurate understanding of its impact.<sup>21</sup> Accounting for the underreporting of cases helps to bridge such a gap in information.<sup>22</sup>

It has been estimated based on a research study spanning across ninety-one nations that the actual number of Covid-19 cases is eight and a half times higher than the amount reported.<sup>23</sup> Based on statistics provided by the CDC, this would mean that there could have been as many as 13,185,761 cases of Covid-19 in New York between January of 2020 and February of 2021 alone. Cases of Covid-19 are not being reported for a variety of reasons, but researchers have identified asymptomatic infections and low testing capacities as two of the primary explanations.<sup>24</sup>

As of January 2021, two prominent pharmaceutical companies, Pfizer and Moderna, have created separate double-dose Covid-19 vaccines which

---

<sup>15</sup> *Quarantine and Isolation*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://web.archive.org/web/20210825232426/https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fif-you-are-sick%2Fquarantine.html](https://web.archive.org/web/20210825232426/https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fif-you-are-sick%2Fquarantine.html) (last updated Jul. 29, 2021).

<sup>16</sup> *Reinfection with COVID-19*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html> (last updated Aug. 6, 2021).

<sup>17</sup> 9 CRR-NY 8.202; Letter from Shannon L. Tahoe, Interim Commissioner of Education, to School Dist. Superintendents et. al. (Mar. 17, 2020) (on file with N.Y. State Education Dept.).

<sup>18</sup> *COVID Data Tracker*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100k](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k) (last updated Feb. 16, 2021).

<sup>19</sup> *Id.*

<sup>20</sup> Hazhir Rahmandad, Tse Yang Lim, and John Sterman, *Behavioral dynamics of COVID-19: estimating under-reporting, multiple waves, and adherence fatigue across 91 nations*, MASS. INST. OF TECH. (Nov. 26, 2020).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

2022] *EQUAL EDUCATION MEANS EQUAL* 393

are available to certain eligible groups of people, however, the vaccine will not be available to the entirety of the New York population until the summer of 2021.<sup>25</sup> The vaccines are being distributed to the most high-risk individuals first, including the elderly and those with compromised immune systems.<sup>26</sup> The next round of vaccines are reserved for essential workers, including health care professionals and front line workers.<sup>27</sup> Eventually the vaccine will be available for anybody who wants it, but until herd immunity<sup>28</sup> is achieved, the CDC urges people to maintain a social distance from each other and wear face mask coverings when in public.<sup>29</sup>

The most effective way to combat infection is to avoid exposure altogether.<sup>30</sup> In accordance with the CDC's recommendations during the initial outbreak of the illness across New York, Governor Andrew Cuomo issued a stay-at-home order as an attempt to slow the spread of the illness.<sup>31</sup> The purpose of slowing the spread of the illness was to provide healthcare professionals with the time they needed to assess and care for the massive influx of patients who needed COVID-19 related treatment.<sup>32</sup> This practice has been consistently referred to as "flattening the curve."<sup>33</sup> "The capacity of the health system can be exceeded if too many people seek healthcare at the same time. . . . The flatter the curve, the more likely it is that hospitals can continue to deliver care to the people they serve. . . . The way we flatten the curve is by slowing down transmission of COVID-19."<sup>34</sup> Social distancing and wearing face covering masks has proved to play an essential role in slowing down the spread of the illness and providing healthcare

<sup>25</sup> *COVID-19: Vaccine Eligibility*, NYC HEALTH, <https://www1.nyc.gov/site/doh/covid/covid-19-vaccine-eligibility.page> (last accessed Feb. 17, 2020).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19*, WORLD HEALTH ORG. (Dec. 31, 2020), [https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19?gclid=Cj0KCQjwPaCBhDkARIsAISZN7S7RIF12u-mAtZDRh7eSc\\_MA9s-fESNEKbHgfc5mLaHk3nXWpQJw0aAmRcEALw\\_wcB#](https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19?gclid=Cj0KCQjwPaCBhDkARIsAISZN7S7RIF12u-mAtZDRh7eSc_MA9s-fESNEKbHgfc5mLaHk3nXWpQJw0aAmRcEALw_wcB#). (Defining "herd immunity" as "the indirect protection from an infectious disease that happens when a population is immune either through vaccination or immunity developed through previous infection.")

<sup>29</sup> *COVID-19: Vaccine Eligibility*, *supra* note 25; CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

<sup>30</sup> CENTERS FOR DISEASE CONTROL AND PREVENTION, *supra* note 11.

<sup>31</sup> *New York State on PAUSE*, NEW YORK STATE GOV'T, <https://coronavirus.health.ny.gov/new-york-state-pause> (last visited Sept. 21, 2020).

<sup>32</sup> *Id.*

<sup>33</sup> *Coronavirus disease 2019 (COVID-19) WHO Thailand Situation Report – 19 March 2020*, WORLD HEALTH ORG. (2020), [https://www.who.int/docs/default-source/searo/thailand/2020-03-19-tha-sitrep-26-covid19.pdf?sfvrsn=6f433d5e\\_2#:~:text=A%20flatter%20curve%20is%20created,that%20occur%20each%20day](https://www.who.int/docs/default-source/searo/thailand/2020-03-19-tha-sitrep-26-covid19.pdf?sfvrsn=6f433d5e_2#:~:text=A%20flatter%20curve%20is%20created,that%20occur%20each%20day).

<sup>34</sup> *Id.*

394 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

workers with the time they needed to react to the persistent flood of Covid-19 related cases.<sup>35</sup>

Governor Cuomo issued the executive order which mandated the prompt closure of all public, private, and charter schools in New York on March 16, 2020.<sup>36</sup> Six days later, on March 22, 2020, he issued the general stay-at-home restricting the rest of the public.<sup>37</sup> This mandate not only required all New York public, private, and charter school districts to cease in-person classes, but it also prompted the closure of all retail stores, restaurants, and business offices located within the state.<sup>38</sup> These closures have inadvertently impacted the global economy as a whole, creating direct implications on the financial markets and disruptions in supply chains.<sup>39</sup> Further impacts of these closures has become evident in both the petroleum oil and agriculture sectors, and have been exacerbated by the influx of “panic buying,” a social phenomenon where people are further complicating existing shortages by purchasing more than what they currently need out of fear of supplies running out.<sup>40</sup> The manufacturing industry is also expecting a sharp decline in turnover as most manufacturing companies cannot operate remotely.<sup>41</sup> Overall, the societal closures prompted by attempts to prevent the transmission of Covid-19 have had substantial impacts on the global economy.<sup>42</sup> These societal closures had the effect of requiring adult employees to work from home, which contributed to the existing stressors surrounding learning from home. Parents became responsible for facilitating their children’s online learning, while simultaneously working their own jobs remotely as well.

*The Impact of the Coronavirus on the Education System*

Despite Covid-19’s massive global impacts across a diverse array of industries, one of the most notable impacts of Covid-19 is located within the

---

<sup>35</sup> Laura Matrajt & Tiffany Leung, *Evaluating the Effectiveness of Social Distancing Interventions to Delay or Flatten the Epidemic Curve of Coronavirus Disease*, 26 CENTERS FOR DISEASE CONTROL AND PREVENTION: EMERGING INFECTIOUS DISEASES (Aug. 2020).

<sup>36</sup> *Governor Cuomo Signs Executive Order Closing Schools Statewide for Two Weeks*, NEW YORK STATE GOV’T (Mar. 16, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-closing-schools-statewide-two-weeks#:~:text=Meal%20Program%20Contingencies,Governor%20Andrew%20M.,the%20180%2Dday%20instructional%20requirement>.

<sup>37</sup> *New York State on PAUSE*, *supra* note 31.

<sup>38</sup> 9 CRR-NY 8.202.

<sup>39</sup> Maria Nicola, Zaid Alsafi, Catrin Sohrabi, Ahmed Kerwan, Ahmed Al-Jabir, Christos Iosifidis, Maliha Agha, and Riaz Agha, *The socio-economic implications of the coronavirus pandemic (COVID-19): A review*, ELSEVIER PUBLIC HEALTH EMERGENCY COLLECTION, Apr. 17, 2020.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

education system.<sup>43</sup> The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) estimates that “close to 900 million learners have been affected by the closure of educational institutions” and that “over 100 countries have imposed a nationwide closure of educational facilities.”<sup>44</sup> Every school in the State of New York with students in kindergarten through twelfth grade experienced mandated closures.<sup>45</sup> While it may seem obvious that these closures would have a direct impact on students, they also had a large impact on the teachers and staff who worked in those schools, thus creating an additional indirect impact on students. The mandated lockdowns prompted most educators in the state to engage in “Emergency Remote Teaching” (“ERT”), which is the shifting of classrooms from the typical physical setting to a virtual one.<sup>46</sup> ERT, as distinguished from pre-planned curriculum originally designed to be taught via electronic learning, consists of rapidly developed course instruction without the benefit of time to plan ahead and ensure cohesiveness.<sup>47</sup> These types of unprecedented disruptions are difficult for both educators and students to adapt to in such a short amount of time.

### III. PROBLEM

The American education system, and the students enrolled in it, were not prepared for such a rapid and drastic change in circumstances.<sup>48</sup> The mandatory lockdowns stripped children not only of their access to school, but also of their access to extracurricular activities.<sup>49</sup> Therefore, not only has academic performance deteriorated over the course of the pandemic, but so has the progression of certain developmental skills that are typically matured through social integration in schools.<sup>50</sup> Students and their families across the nation, and across New York State in particular, have been doing their best to adapt to the sudden change in circumstances, but the abrupt transition to online learning has nonetheless presented many new challenges, and exacerbated many pre-existing problems.

---

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Governor Cuomo Signs Executive Order Closing Schools Statewide for Two Weeks*, *supra* note 36.

<sup>46</sup> Nicole Johnson, George Veletsianos & Jeff Seaman, *U.S. Faculty and Administrators’ Experiences and Approaches in the Early Weeks of the COVID-19 Pandemic*, *ONLINE LEARNING JOURNAL* (June, 2020).

<sup>47</sup> *Id.*

<sup>48</sup> EMMA GARCIA & ELAINE WEISS, *COVID-19 AND STUDENT PERFORMANCE, EQUITY, AND U.S. EDUCATION POLICY* (Sept. 10, 2020).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

*Lack of Access to Learning Devices with Internet Connectivity.*

Low-income and minority students do not have the tools necessary to access their online classrooms.

In New York, many elementary, middle, and high school students are facing a significant disadvantage in response to the online learning transition. In order to obtain an online education, students must use computers, laptops, or iPads to log into class to meet with their teachers and classmates. In order to connect to the virtual classroom, however, students also need reliable and adequate internet access. During the 2018-2019 school year, 2,598,921 students were enrolled in the public education system in New York.<sup>51</sup> According to a study conducted in 2017, about 18.22 percent of New York households with children in kindergarten through twelfth grade did not have access to a broadband internet connection, which is a type of internet connection that functions at high-speeds and is beneficial when streaming online classes as they are being taught.<sup>52</sup> Further, 5.72 percent of households with children in kindergarten through twelfth grade did not have access to the internet at all.<sup>53</sup> 15.31 percent of these households also did not have access to the computers necessary for attending online classes.<sup>54</sup> This overarching problem of lacking computer devices and internet connection is amplified for students who come from low-income families, and for students who are of racial minorities.<sup>55</sup> By no fault of their own, students without reliable internet access are more likely to be minorities, and come from low-income families.<sup>56</sup> Disparities in education achievement among minority students based on their associated level of family income already exist in modern society, but the current disparities, in response to the home learning mandate, are even more harrowing, and have been said to stand at the same level as “when black people didn’t have books.”<sup>57</sup> Transitioning to online education unfairly exacerbates these pre-existing gaps in the achievement spectrum at an extraordinary rate.<sup>58</sup>

---

<sup>51</sup> *NY State Public School Enrollment (2018-19)*, NY STATE EDUCATION AT A GLANCE, <https://data.nysed.gov/enrollment.php?year=2019&state=yes> (last visited Sept. 28, 2020).

<sup>52</sup> The Associated Press, ‘Homework gap’ shows millions of students lack home internet, *NEWSDAY* (June 10, 2019, 12:01 AM), <https://www.newsday.com/business/technology/internet-schools-homework-computer-1.32096937>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis, and Ellen Viruleg, *COVID-19 and student learning in the United States: The hurt could last a lifetime*, MCKINSEY & COMPANY (June 1, 2020).



2022] *EQUAL EDUCATION MEANS EQUAL* 397

Wi-Fi is a wireless network that provides a speedy connection from a device such as a laptop or iPad to the internet.<sup>59</sup> Dial up, on the other hand, is a much slower form of connecting to the internet, which operates by making a call from a landline phone.<sup>60</sup> A 2015 study conducted by the National Center for Education Statistics (“NCES”) revealed that, in the United States, only seven percent of White students did not have reliable home access to Wi-Fi, or only had dial up internet access.<sup>61</sup> In contrast, seventeen percent of Hispanic students and nineteen percent of Black students faced the same problem.<sup>62</sup> This straightforward comparison exhibits a clear delineation in access to reliable internet connection across racial boundaries, and contributes to the notion that a digital divide exists already in modern society.<sup>63</sup>

According to the same NCES study, in the United States, twenty-six percent of students living below the poverty line either lack home Wi-Fi access completely, or only have dial up internet access.<sup>64</sup> The number one reason identified for a student not having reliable and adequate Wi-Fi internet accessibility at home was due to its expensive cost.<sup>65</sup> On average, access to basic Wi-Fi connectivity across the state of New York costs roughly \$400 per year.<sup>66</sup> The third most identified reason for not having internet access was because the families surveyed did not even own a computer that they could use to access the internet, rendering the possession of internet access useless.<sup>67</sup> In the pre-Covid-19 world, where people commuted to physical workspaces and school facilities, there was not as great of a need for home computers and stable internet connection. Instead, people could use the computers and internet connectivity provided to them through their place of work or their school.

---

<sup>59</sup> *Wireless Fidelity (Wi-Fi)*, TECHOPEDIA, <https://www.techopedia.com/definition/10035/wireless-fidelity-wi-fi#:~:text=Wi%2DFi%20is%20a%20type,radios%20are%20encountered%20during%20transmission> (last updated Dec. 5, 2016).

<sup>60</sup> *Dial-Up Connection*, TECHOPEDIA, <https://www.techopedia.com/definition/25953/dial-up-connection> (last updated June 25, 2020).

<sup>61</sup> *The Digital Divide: Differences in Home Internet Access*, NATIONAL CENTER FOR EDUCATION STATISTICS BLOG, THE INSTITUTE OF EDUCATION STATISTICS, (Oct. 31, 2018), <https://nces.ed.gov/blogs/nces/post/the-digital-divide-differences-in-home-internet-access>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Internet providers in New York state*, ALLCONNECT, <https://www.allconnect.com/local/ny> (last updated Nov. 1, 2021).

<sup>67</sup> *The Digital Divide: Differences in Home Internet Access*, *supra* note 61.

398 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

Private party and public service intervention is beneficial, but not conclusive.

In response to the drastic shift to an online education system, leading private Wi-Fi providers announced that they will offer their services free of charge for sixty days to households with students in grades K-12.<sup>68</sup> These generous providers include companies such as Spectrum, Xfinity, and AT&T.<sup>69</sup> In addition to providing free high-speed internet access to these homes, the providers have also pledged to open their public Wi-Fi networks for free use so that students who need their services can continue to pursue their education.<sup>70</sup> The New York City Mayor's Office for People with Disabilities has also arranged for the provision of free internet services from companies such as Comcast, Spectrum, and Altice USA.<sup>71</sup> While these philanthropic acts of private party intervention are certainly beneficial in the short term, they do not solve the persistent problem of Wi-Fi accessibility needed in the long term while schools remain closed, as they only provide Wi-Fi access for 60 days and only to households which do not already have service subscriptions.<sup>72</sup> Unfortunately, households with pre-existing service subscriptions, even if they are facing financial hardships due to the costs associated with the Coronavirus pandemic, are not eligible for the free services.<sup>73</sup> Students who are disproportionately impacted by the virus are therefore further disadvantaged because they used to be able to afford these services, and now they no longer can. The pandemic has lasted well over a year, and while helpful, sixty days of conditional Wi-Fi access does not provide enough help to students who need it.

The New York Department of Education allows students in need of a virtual education device to submit a request to obtain a loaned iPad.<sup>74</sup> In the spring of 2020, the Department of Education pledged to loan out the 320,000 iPads that they owned to public school, charter school, and private school

---

<sup>68</sup> Angélica Acevedo, *Student households can sign up for free Wi-Fi via Spectrum while DOE works to deliver 25,000 iPads next week*, QNS, (Mar. 17, 2020), <https://qns.com/2020/03/student-households-can-sign-up-for-free-wifi-via-spectrum-while-doe-works-to-deliver-25000-ipads-next-week/>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *COVID-19 Resources for People with Disabilities: List of Providers Offering Free Wi-Fi or Special Accommodations for 60 Days*, NYC MAYOR'S OFFICE FOR PEOPLE WITH DISABILITIES, <https://www1.nyc.gov/site/mopd/resources/list-of-providers-offering-free-wifi.page> (last visited Dec. 18, 2020).

<sup>72</sup> Acevedo, *supra* note 68; *See also COVID-19 Resources for People with Disabilities: List of Providers Offering Free Wi-Fi or Special Accommodations for 60 Days*, *supra* note 71.

<sup>73</sup> Acevedo, *supra* note 68; *See also COVID-19 Resources for People with Disabilities: List of Providers Offering Free Wi-Fi or Special Accommodations for 60 Days*, *supra* note 71.

<sup>74</sup> *iPad Requests*, NYC DEP'T OF EDUC., <https://www.schools.nyc.gov/learning/learn-at-home/technical-tools-and-support/ipad-requests>, (last visited Sept. 17, 2020).

students.<sup>75</sup> While this may seem like a positive step in the progression of attaining education, that notion is discredited when considering the fact that in New York alone, the public school system alone has more than 2,500,000 students enrolled.<sup>76</sup> The 2,500,000 students do not account for the thousands of additional students enrolled in private and charter schools.<sup>77</sup> Forty-three percent of the 2,500,000 public school students are of a racial majority, while the remaining students are of a racial minority.<sup>78</sup> In a national study conducted by the NCES, research results showed that “[a]mong children ages 3-18, 17% live in households without a laptop or desktop computer.”<sup>79</sup> If this seventeen percent of children without access to a distance learning device is representative of the amount of students in New York without a distance learning device, it would mean that 425,000 students ages three to eighteen do not have access to distance learning devices. Thus, the Department of Education would be deficient by over 100,000 iPads, and thousands of students would be left behind in their education. Thus, this act of governmental intervention is insufficient in its attempt to meet the needs of New York students.

*The Shift to Online Learning Perpetuates the Preexisting Digital Divide.*

The transition to online learning has exacerbated the preexisting digital divide found within the education system.<sup>80</sup> The term “digital divide” serves as an all-encompassing description for the inequities that exist in the modern digital and online worlds.<sup>81</sup> Before the term “digital divide” was widely recognized and commonly used throughout society, the concept was referred to as the “knowledge gap.”<sup>82</sup> The digital divide is defined as the “gap between those who have and do not have access to computers and the Internet.”<sup>83</sup> Researchers have identified several necessary prerequisites to combat the expansion of the digital divide.<sup>84</sup> These requirements include

---

<sup>75</sup> *Id.*

<sup>76</sup> *NY State Public School Enrollment (2018-2019)*, *supra* note 51.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *4.4 million households with children don't have consistent access to computers for online learning during the pandemic*, USA FACTS (Sept. 28, 2020 at 4:00 PM), <https://usafacts.org/articles/internet-access-students-at-home/>.

<sup>80</sup> UNITED NATIONS: POLICY BRIEF: EDUCATION DURING COVID-19 AND BEYOND (2020).

<sup>81</sup> PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE 40 (2001).

<sup>82</sup> JAN VAN DIJK, THE DIGITAL DIVIDE (John Wiley & Sons, Inc. eds., 2020).

<sup>83</sup> Jan A.G.M. van Dijk, *Digital Divide Research, Achievements and Shortcomings*, 34 *POETICS* 221 (2006).

<sup>84</sup> NORRIS, *supra* note 81.

400 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

awareness, access, affordability, availability, and adaptability.<sup>85</sup> Being aware of the problem and working against it by making accessibility easier for everyone are some of the first important steps in combatting the expansion of the digital divide.<sup>86</sup>

The digital divide has served as a popular subject of research since the rise of digital presence in the modern world. One of the main presentations of inequality emanating from digital divide research has been identified within the education system.<sup>87</sup> Taking into consideration the 2020-2021 state of society, where instead of experiencing a socialized education where students interact with their peers and educators on a daily basis, students are required to spend their school days attending class online and staring at a computer screen from within their own homes, it becomes evident that the digital divide will only further perpetuate certain pre-existing inequalities.<sup>88</sup> Students who lacked digital learning devices and Wi-Fi connectivity before the pandemic began were not as negatively impacted then as they are now, where the livelihood of their education depends on the qualified use of such devices and tools. Prior to Covid-19 pandemic conditions, the digital divide in the education system was not as impactful because the vast majority of educational activities and lessons were taking place in-person, within a physical classroom. Unless provided by the school, digital devices such as computers or iPads were typically not needed. If any homework was assigned that needed access to a digital device, it was still only a limited homework assignment, rather than a full day's worth of educational content and material.

The consequences of the digital divide include negative impacts on the prospect of continued education, future employment, and even the personal lives of students.<sup>89</sup> The Executive Director of the United Nations Children's Fund ("UNICEF") stated that despite American youth presenting with a great resistance to infection from the actual virus, the societal impact of the virus is so large that "[t]he future of an entire generation is at risk."<sup>90</sup> Children are experiencing the most formative years of their existence during this global pandemic. The feelings they are experiencing—helplessness, anxiety, stress,

---

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Dijk, *supra* note 83.

<sup>88</sup> Anita Ramsetty & Cristin Adams, *Impact of the Digital Divide in the Age of COVID-19*, 27 J. AM. MED. INFORM. ASSOC. 1147 (2020).

<sup>89</sup> RICHARD L. VENEZKY, *THE DIGITAL DIVIDE WITHIN FORMAL SCHOOL EDUCATION: CAUSES AND CONSEQUENCES* (2000).

<sup>90</sup> Press Release, UNICEF, UNICEF calls for averting a lost generation as COVID-19 threatens to cause irreversible harm to children's education, nutrition and well-being (Nov. 18, 2020), <https://www.unicef.org/press-releases/unicef-calls-averting-lost-generation-covid-19-threatens-cause-irreversible-harm>.

fear, and general irritability—are shaping their future development.<sup>91</sup> Further, the divide can have an extreme impact on how a person communicates with others, how they align themselves politically, and how involved they are within their community.<sup>92</sup> Failing to address these emerging psychological and societal aggressions that are aggravating the digital divide will only allow for the divide to grow, thus leading to even more detrimental impacts on society at large.<sup>93</sup> Psychologists have urged officials to consider the harmful impacts of the quarantine on mental health in comparison to the benefits that can be provided by it.<sup>94</sup> The digital divide can be seen throughout an array of facets in modern day society, but its' presence in the education system is aggravated in response to confined education conditions.

#### New York State Acting as a Perpetuator of the Digital Divide.

The claim that New York State is acting as a perpetrator in exacerbating the digital divide is supported by an analysis of the Federal and State budget adjustments in response to the novel Coronavirus.<sup>95</sup> Prompted by the massive influx and impact of the Coronavirus, the United States Congress passed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act in late March of 2020. The CARES Act provided schools across the country with over thirteen billion dollars in emergency funding.<sup>96</sup> It was presumed that this financial supplement would be used to assist in the transition to online learning and provide resources to students such as internet access, iPads and computer devices.<sup>97</sup>

On April 2, 2020, almost immediately after the CARES Act was passed, New York State Governor Cuomo signed and approved the FY21 State Budget for public education funding.<sup>98</sup> The “pandemic adjustment” made by New York, despite its initial presumed appearance as an increase in funds to schools in the State in response to the hardships posed by the global pandemic and disruption in schooling, was actually a *reduction* of over one

---

<sup>91</sup> Valeria Saladino, Davide Algeri & Vincenzo Auriemma, *The Psychological and Social Impact of COVID-19: New Perspectives of Well-Being*, FRONTIERS IN PSYCHOL. (Oct. 2, 2020), <https://www.frontiersin.org/articles/10.3389/fpsyg.2020.577684/full>.

<sup>92</sup> Carmen Steele, *The Impacts of Digital Divide*, DIGITAL DIVIDE COUNCIL (Sept. 20, 2018), <http://www.digitaldividecouncil.com/the-impacts-of-digital-divide/>.

<sup>93</sup> See, *id.*

<sup>94</sup> Saladino, *supra* note 91.

<sup>95</sup> Coronavirus Aid, Relief, and Economic Security (“CARES”) Act, 15 U.S.C. § 116 (2020).

<sup>96</sup> *Id.*

<sup>97</sup> Sharon Krengel, *New York's Pandemic Adjustment: Depriving Resources to Students Impacted by COVID-19*, EDUC. L. CENTER (Apr. 22, 2020), <https://edlawcenter.org/news/archives/new-york/new-york%E2%80%99s-pandemic-adjustment-depriving-resources-to-students-impacted-by-covid-19.html>.

<sup>98</sup> *Id.*

402 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

billion dollars in funding.<sup>99</sup> The funds provided by the CARES Act were diverted elsewhere. The amount quantified in the reduction made by New York was exactly equal, to the dollar, to the amount guaranteed by Congress in the CARES Act.<sup>100</sup> The budget cuts disproportionately impacted impoverished school districts, and school districts needing the most Covid-19 related assistance, at a much higher rate.<sup>101</sup> The decision to cut State funding at an amount equal to the Federal supplement effectively served to provide zero assistance to the schools in need of it.<sup>102</sup>

The vast majority of school districts in New York have never experienced any situation where the entirety of the education must be conducted online. The Covid-19 pandemic has placed every public, private, and charter school district in New York in an unprecedented situation with very little guidance or support. These school districts, and the students enrolled in them, deserve more support than the State has provided them with. With the support of the CARES Act, the State could have provided these schools with the tools necessary for success in continued education. By neglecting to take action, the State is acting as a perpetrator in expanding the digital divide vis-à-vis their Covid-19 budgeting scheme, and action must be taken in opposition. Expanding the scope of the Dignity for All Students Act to include instances of off-campus discrimination, discussed later in Section IV, could serve as motivation for the State of New York to restructure their budgeting plan and thus bridge the digital divide amongst students instead of further perpetuating it.

*Current Legislation in New York Does Not Properly Account for the  
Electronic Education Model Adopted in Response to the COVID-19  
Pandemic.*

Every student enrolled at a public school in the United States of America is entitled to an equal education.<sup>103</sup> Under the Equal Education Opportunities Act of 1974, this entitlement exists regardless of the sex, race, color, or national origin of the student.<sup>104</sup> Entities that receive federal funding, such as public schools, are further bound by the Civil Rights Act of 1964 and are prohibited from discriminating based on sex, race, color, or

---

<sup>99</sup> *Id.*

<sup>100</sup> Mary McKillip, *Tracking State School Aid Cuts in the Pandemic*, EDUC. L. CENTER (Aug. 25, 2020), <https://edlawcenter.org/news/archives/school-funding-national/tracking-state-school-aid-cuts-in-the-pandemic.html>.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701.

<sup>104</sup> *Id.*

2022] *EQUAL EDUCATION MEANS EQUAL* 403

national origin in their organized programs and activities.<sup>105</sup> Such entities risk forfeiture of their federal assistance and could face possible legal action should they partake in discrimination.<sup>106</sup> President John F. Kennedy, in adopting the Civil Rights Act, reasoned that, “[s]imple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial [color or national origin] discrimination.”<sup>107</sup> These laws and the rationales behind their enactment evidence the fact that the federal government has attempted to combat and limit instances of discrimination in the context of public education.

In response to the Covid-19 pandemic, the United States Department of Education issued a fact sheet newsletter which explained that no student would be denied access to their education on the basis of their race.<sup>108</sup> However, this notice was limited to the context of prohibiting educators from making assumptions about a given student’s Covid-19 risk status because of the students race.<sup>109</sup> This analysis did consider how a certain student’s race may implicate disadvantages in the context of online learning.<sup>110</sup> The American Bar Association commented that this newsletter served as a reminder to school administrators and educators that they have a duty not to discriminate against their students on the basis of their race, but failed to go as far as to ensure that the message was explicitly delivered in the relevant context of the virtual learning environment.<sup>111</sup>

In New York State, public education entities are further bound by both the New York State Constitution and the Dignity for All Students Act.<sup>112</sup> The Constitution of the State of New York expressly declares that the State shall provide free common schools for all students to attend in their pursuit of obtaining an education.<sup>113</sup> The State is responsible for the maintenance and

---

<sup>105</sup> Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; U.S. Dep’t of Just. *Federal Coordination and Compliance* Section <https://www.justice.gov/crt/fcs/TitleVI-Overview#:~:text=Title%20VI%2C%2042%20U.S.C.,activities%20receiving%20federal%20financial%20assistance.&text=Title%20VI%20itself%20prohibits%20intentional%20discrimination> (last visited Feb. 17, 2021).

<sup>108</sup> U.S. DEP’T OF EDUC., *FACT SHEET: ADDRESSING THE RISK OF COVID-19 IN SCHOOLS WHILE PROTECTING THE CIVIL RIGHTS OF STUDENTS* (Mar. 2020).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Janice V. Arellano, *How Will COVID-19 Affect Equity in Education?*, AM. BAR ASS’N. (Mar. 23, 2020) <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2020/covid-19-coronavirus-equality-education/>.

<sup>112</sup> N.Y. CONST. art. XI, § 1; *The Dignity Act*, N.Y. ST. EDUC. DEP’T, <http://www.p12.nysed.gov/dignityact/> (last updated Oct., 8, 2021).

<sup>113</sup> N.Y. CONST. art. XI, § 1.

support necessary to the viable functioning of each school.<sup>114</sup> In light of mandated school closures, it is necessary to truly consider what it means to “provide” free common schools to the students of New York. While these virtual classrooms have been created very cleverly, they are surely not what the Framers of the State Constitution had in mind when they decided to provide common schools to the people.

The New York Constitution also calls attention to the fact that supporting those in need is a primary obligation of the State, and asserts that the State will work to provide assistance for those in need as the legislature deems it necessary and by means rationally related to those goals.<sup>115</sup> In regards to the Covid-19 pandemic, students without consistent and reliable access to their online education can be categorized as being in need of assistance, thus qualifying under this social welfare protection.<sup>116</sup> While the New York State Constitution does not explicitly reference the manner in which education ought to be conducted, both public policy and statutory interpretation of existing legislation support the notion that an online education should be comparable to an in-person education, and students in need of support in obtaining such an education are entitled to receive assistance. The detrimental current and future effects of perpetuating the digital divide support a public policy argument, while the textual interpretation of the State Constitution and the Dignity for All Students Act support the statutory argument that an online education should be equally accessible to all students within the state in the same way that in-person common schools were before the pandemic began.

The New York Dignity Act and Human Rights Law as Examples of Current  
Legislation Failing to Adequately Account for Online Education  
Discrimination.

In 2010, New York enacted the Dignity for All Students Act (also known as “the Dignity Act”).<sup>117</sup> The policy, effective since 2012, applies to both public and charter schools located within the State.<sup>118</sup> The Dignity Act sought to provide students with a safe place to learn and be free from any type of discrimination relating to their education.<sup>119</sup> This Act was passed with the intention of ensuring that the educational mission of both students and educators was not to be compromised due to the presence of

---

<sup>114</sup> *Id.*

<sup>115</sup> N.Y. CONST. art. XVII, § 1.

<sup>116</sup> *Id.*

<sup>117</sup> *The Dignity Act, supra* note 112.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*



2022] *EQUAL EDUCATION MEANS EQUAL* 405

discrimination or harassment.<sup>120</sup> The New York State Senate has publicly acknowledged that a student's ability to learn, as well as an educator's ability to teach, are compromised when there is evidence of such harassment or discrimination within the learning environment.<sup>121</sup> One of the biggest setbacks within New York education laws is that, unfortunately, the laws limit their jurisdiction to instances of discrimination occurring *on school property*.<sup>122</sup> The term "school property," as defined in the Act, means "in or within any building, structure, athletic playing field, playground, parking lot, or land contained within the *real property boundary* line of a public elementary or secondary school" (emphasis added).<sup>123</sup> Taking into consideration the mandated state-wide closure of all public schools in response to the Covid-19 pandemic, this limitation does not properly account for instances of discrimination emanating from a student's lack of resources to obtain the tools requisite to pursue their online, and consequently, off-campus, education. Given the global change in how education is offered and the means by which it is offered, something must change in order for students to receive the education they are entitled to.

In July 2019, only six months prior to the massive influx of Covid-19 related illnesses and societal adjustments, Governor Cuomo signed legislation which extended the New York State Human Rights Law into the realm of public schools.<sup>124</sup> Previously, the law afforded New Yorkers with "an equal opportunity to enjoy a full and productive life."<sup>125</sup> Governor Cuomo extended this law as a gesture of good faith, "building on New York's legacy of equality and fairness and guaranteeing public school students get the protections they deserve."<sup>126</sup> The intent to provide a discrimination-free education environment for students in New York is clear, but the practical execution of it does not go far enough to protect students in the 2020-2021 school years' Covid-19 created climate.

## IV. PROPOSAL

The impact of the Coronavirus illness on society as a whole is evident, and the general public has made a plethora of lifestyle adjustments in response to it, but the impact of the illness on the education system stands as

---

<sup>120</sup> N.Y. EDUC. LAW § 10.

<sup>121</sup> *Id.*

<sup>122</sup> N.Y. EDUC. LAW § 11.

<sup>123</sup> *Id.*; *N.Y. Education Law 11 – Definitions*, LAW SERVER, [https://www.lawserver.com/law/state/new-york/ny-laws/ny\\_education\\_law\\_11](https://www.lawserver.com/law/state/new-york/ny-laws/ny_education_law_11) (last updated 2020).

<sup>124</sup> *Governor Cuomo Signs Legislation Extending Anti-Discrimination Protections to Cover Public Schools*, NEW YORK STATE GOVERNMENT (July 25, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-extending-anti-discrimination-protections-cover-public-schools>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

an unparalleled disruption.<sup>127</sup> A successful education system is indispensable in the creation of a peaceful and prosperous society.<sup>128</sup> Low-income students and students with minority backgrounds are significantly more likely to lack the resources requisite to pursuing a successful online education, and if the education system is not swiftly rectified, not only are students going to continue suffering in the present, but “[l]earning losses also threaten to extend beyond this generation and erase decades of progress. . . .”<sup>129</sup>

Students in kindergarten through twelfth grade in New York are being discriminated against by the State’s actions towards the public school system in facilitating a discriminatory transition to distance learning, and they are being left behind in the educational curve because of its exacerbation of the digital divide.<sup>130</sup> Remediating this impeding problem by expanding the Dignity Act to account for instances of racial and financial discrimination taking place off of school property is vital in preserving and maintaining a society that can properly function throughout future generations. If prompt action is not taken, the resulting impact on society could be detrimental.

*The Dignity for All Students Act Should be Extended.*

The hardships that students face in the pursuit of obtaining their constitutionally protected right to a sound and basic education throughout the Covid-19 pandemic, and the lack of intervention to combat these hardships from the State, constitute discrimination by the State against minority and low-income students who lack the same resources that other students have. Expansion of relevant legislation is necessary to combat this discrimination. One of the most current antidiscrimination law pertaining to education in the State of New York is the Dignity for All Students Act, which purports to maintain the integrity of the education system by prohibiting on-campus discrimination and harassment.<sup>131</sup>

While the Dignity Act does not explicitly define the term “discrimination,” the Merriam-Webster Dictionary defines it as “prejudiced or prejudicial outlook, action, or treatment” and “the act, practice, or an instance of discriminating categorically rather than individually.”<sup>132</sup> An elementary interpretation and appropriate application of the term would include a denial of equal treatment or access to public school programming on the basis of, among other things, the students race, ethnic origin, or

---

<sup>127</sup> UNITED NATIONS, *supra* note 80.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *The Dignity Act*, *supra* note 112.

<sup>132</sup> *Discrimination*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/discrimination> (last visited Feb. 17, 2021).

2022] *EQUAL EDUCATION MEANS EQUAL* 407

gender.<sup>133</sup> New York Education Laws further prohibit these types of discrimination in holding that students will not be denied admission to or be excluded from New York public schools on account of their race, ethnic origin, or gender.<sup>134</sup> Further, they assert that no student shall be compelled to attend any specific school on account of the same considerations.<sup>135</sup>

Aside from a post-ratification amendment to the Act which purported to include off-campus instances cyberbullying, specifically pertaining to threats and injuries occurring via social media, the Dignity Act is limited to instances of discrimination that occur “on school property.”<sup>136</sup> In order to properly account for the Covid-19 related change in circumstances, where students are compelled to learn from home and attend all of their classes by logging in to a virtual classroom, the Dignity Act must be extended. Extending the Dignity Act can properly protect against instances of discrimination, including but not limited to, infringements on the rights of students to obtain an education based on their race, national origin, or level of income. These instances of discrimination are taking place outside of school property because students are logging into class remotely, and stem from the student’s inability to afford the technology requisite to obtaining an equal online education. Thousands of public, private, and charter school students do not have adequate and reliable access to Wi-Fi or digital learning devices.<sup>137</sup> Even if students qualify to receive an iPad from the Department of Education,<sup>138</sup> it is possible that they will face undue delays, and further, that students who have never used an iPad will face hardship due to their lack of familiarity with the technology and general inexperience with obtaining digital literacy. Discrimination in providing equal access to obtaining an education has the consequential impact of further perpetuating the digital divide.<sup>139</sup> Before the pandemic, educators and school administrators were able to witness most instances of discrimination and harassment against students since such occurrences took place on school campus, but, in response to the 2020 Covid-19 mandated school shut-downs, effectively no aspect of the education process is occurring in person. The physical separation of students and educators from the classrooms has made it easier for students to experience discrimination; especially now, where the State is acting as a perpetrator.

---

<sup>133</sup> *Discrimination: What is it, and how to cope*, AMERICAN PSYCHOL. ASS’N (Oct. 31, 2019), <https://www.apa.org/topics/discrimination>.

<sup>134</sup> N.Y. EDUC. LAW §3201.

<sup>135</sup> *Id.*

<sup>136</sup> The Dignity Act, *supra* note 112.

<sup>137</sup> The Associated Press, *supra* note 52.

<sup>138</sup> iPad requests, *supra* note 74.

<sup>139</sup> Dijk, *supra* note 83.

*Case Law Acknowledging the Digital Divide and the Entitlement to Connectivity.*

The state of New York has acknowledged that a lack of consistent access to internet connection and computer services can have a negative impact on people's ability to access pertinent information.<sup>140</sup> This concession on the prevalence of the digital divide can be analogized to the many students who are lacking the tools to access to information needed for their education.

In May of 2020, the United States District Court for the Southern District of New York, in *Martinez v. Cuomo*, ruled in favor of a group of Plaintiffs who argued that they were being negatively impacted by the digital divide.<sup>141</sup> The Plaintiffs were a group of deaf individuals who were unable to understand the important announcements made by the New York State Governor about updated Covid-19 regulations and protocols which were being broadcasted on television.<sup>142</sup> The Plaintiffs conceded that Governor Cuomo was producing similar informational material online and also used closed captioning on certain televised announcements, but asserted that they did not have adequate access to American Sign Language ("ASL") interpretations of the online material because they lacked access to Wi-Fi, and could not read the closed captioning on television since they did not understand English.<sup>143</sup> The court held for the Plaintiffs and granted a preliminary injunction requiring Governor Cuomo to provide an in-frame ASL translator during all Covid-19 related announcements.<sup>144</sup>

Accordingly, even though the Plaintiffs were able to access cable television at some points, they still struggled with obtaining access to Wi-Fi, which was pertinent to understand these important announcements. While providing an in-frame ASL translator is not immediately related to the education system in New York, the court's ruling is indicative of its preference for bridging the digital divide in situations where they have the ability to do so. The Plaintiffs in *Martinez v. Cuomo* were being denied access to important information because they were deaf and unable to read in English,<sup>145</sup> just like how the students in New York are being denied access to their education because of reasons linked to their racial backgrounds and familial financial situations. Both the deaf individuals in *Martinez* and students across the state of New York generally had their pre-existing

---

<sup>140</sup> See *Martinez v. Cuomo*, No. 20-CV-3338 (VEC), 2020 WL 2393285 at \*3 (S.D.N.Y. May 12, 2020).

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See *id.*

problems amplified due to the fact that they could not consistently maintain access to Wi-Fi.

In another case, the state of New York explained in court that each and every student is entitled to the opportunity to obtain a sound and basic education.<sup>146</sup> The Court of Appeals of the State of New York, in *Board of Education, Levittown Union Free School District v. Nyquist* dealt with a state-wide school financing plan that undisputedly impacted a large percentage of impoverished students in addition to the seven-hundred thousand minority students.<sup>147</sup> The court explained that “poor children, no less than rich, and the Nation of which both are a part, are entitled to an education that prepares today’s students to face the world of today and tomorrow.”<sup>148</sup> This is similar to the hundreds of thousands of low-income and minority students who are being impacted by the Covid-19 online learning initiatives, and it has been argued that States must “expand the definition of the right to education to include connectivity entitlement.”<sup>149</sup> In order to provide this connectivity entitlement, New York must ensure that all students, regardless of their personal circumstances, have the ability to obtain the equal education that they have the right to. Expanding the Dignity Act to include instances of off-campus discrimination could encourage New York officials to place a higher value on students’ connectivity entitlement.

New York has contextualized what it means to qualify as a sound and basic education by describing it as the type of education that could make a present elementary student fit for success in high school, and later on, fit to serve on a civil jury.<sup>150</sup> The New York Court of Appeals has consistently reaffirmed their dedication to upholding the Education Article of the New York Constitution, yet, because of the Covid-19 pandemic, many students lacking the requisite resources are not being afforded the right to maintain the sound and basic education they once had. The implications associated with the online learning initiative are difficult to reconcile in terms of a sound and basic education. While it is true that a majority of students enrolled in New York public schools are not experiencing a substantial amount of educational interference, a significant proportion of students are nonetheless being faced with difficulty in their access to an education.<sup>151</sup> The past amendments made by the New York Legislature indicate a potential for future amendments. As such, the New York State Legislature should meet

---

<sup>146</sup> Bd. of Educ., *Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (1982).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (Fuchsberg, J., dissenting).

<sup>149</sup> UNITED NATIONS, *supra* note 80.

<sup>150</sup> *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003).

<sup>151</sup> *The Associated Press*, *supra* note 52.

410 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 28:2]

to discuss the prospective benefits that would result from expanding the scope of the Dignity Act to include instances of off-campus discrimination.

*New York Education Law § 3604 as Further Support for Amending the Dignity Act.*

New York Education laws require that schools be open and in session for at least 180 days during any given school year in order to receive funding from the State.<sup>152</sup> Schools that fail to host at least 180 days during the school year risk forfeiture of aid from the State in the proportion of yearly funding as compared to the days of school actually missed.<sup>153</sup> For example, a school that misses one school day out of the required 180 days would be faced with a decrease of 1/180<sup>th</sup> in their specific state funding allowance.<sup>154</sup> However, certain exceptions to this rule exist.<sup>155</sup> Schools that close because of a declared state or local emergency and thus do not achieve 180 days in session are exempt from forfeiture of State aid.<sup>156</sup> On June 17<sup>th</sup>, 2020, Governor Cuomo signed a Bill proposed by the Senate which included in the exemption an apportionment of State funding for school districts which have closed in response to the Covid-19 pandemic.<sup>157</sup> This systematic expansion of the exemption amendments indicates an understanding that Covid-19 is altering the ways in which society functions, specifically within the educational environment, and solicits a need for adjustment in the State education system. Further amendments can and should include expanding the Dignity Act to include instances of off-campus discrimination.

## V. CONCLUSION

Low-income students and students of racial minorities are significantly more likely to lack the resources they need to continue with their education in light of the shift to online learning prompted by the Covid-19 pandemic. The state is discriminating against these students by continuing to educate the rest of the more privileged students who have better access to the tools needed for success, such as iPads or computers and Wi-Fi, without addressing the underlying problems being faced by the less privileged students. New York is perpetuating the digital divide by failing to amend existing legislation to account for the extensive changes being experienced by so many students within the education system as a result of the Covid-19 pandemic. Expanding the current Dignity for All Students Act to include

---

<sup>152</sup> N.Y. EDUC. LAW § 3604.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> S. 7996B, 2020 Leg., Reg. Sess. (N.Y. 2020).

2022]      *EQUAL EDUCATION MEANS EQUAL*      411

instances of off-campus discrimination within its realm of protection will account for certain discrepancies in the existing New York education system. Amending this piece of legislation will serve to provide all students, regardless of their socioeconomic class, with an equal opportunity to access their education.