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Hannah Cholewinski

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***Die Ähnlichkeiten*¹: Learning from Similarities and Key Differences Between U.S. and German Education Policy in the Time of COVID-19**

*Hannah Cholewinski*²

INTRODUCTION

The spread of COVID-19 brought to light a number of fissures in societal functions both in the United States and abroad.³ What began as a two-week lockdown quickly spiraled into a seemingly never-ending plea for people to stay in their homes to flatten the curve.⁴ While a multitude of areas have been hard hit, the United States has consistently placed one crucial aspect of society on the backburner when it comes to COVID-19 policy decisions: how we handle the education of our children. Where other countries around the world took steps to reintroduce children to the school environment in 2020, citizens and politicians alike in the United States largely focused on how to get the economy back up and running before anything else.⁵ Prior to the start of the 2020–2021 school year, a study indicated that 52% of American children would be in a purely virtual learning environment, while just 25% would return full time to the school setting, and 19% would participate in some sort of hybrid learning model.⁶ Meanwhile, data points provided by the United Nations revealed that a number of European and Asian countries reopened daycares, universities, and schools full time for the 2020–2021 school year.⁷ Why were children in the United States unable to return to school during the same time frame? And how can remote learning be avoided during possible future COVID-19 spikes? The solution may lie in looking to other countries' handling of the pandemic; specifically, countries with economies that closely mirror our own, such as Germany.

In spite of the seemingly large gap between German and American political systems, they are similar in their federal makeup and treatment of education. Both the

¹ Translated: The Similarities

² Hannah Cholewinski is a 2022 J.D. candidate at Loyola University Chicago School of Law. She is a *Civitas* ChildLaw Fellow and the Managing Editor for the 2021-2022 volume of the *Children's Legal Rights Journal*. She would like to extend her thanks to her au pair host mother, Nicole Wahl, for all of her help with this article, and thank Nicole, Carsten, Carl, Helena, and Elise Wahl for welcoming her into their family and sparking her interest in comparative studies of international education systems.

³ See, e.g., Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>.

⁴ Kara Gavin, *The Curve Is Fattening, Not Flattening. What Can We Do?*, MICH. HEALTH (Oct. 16, 2020), <https://healthblog.uofmhealth.org/wellness-prevention/curve-fattening-not-flattening-what-can-we-do>.

⁵ See *Economy and COVID-19 Top the Public's Policy Agenda for 2021*, PEW RSCH. CTR. (Jan. 28, 2021), <https://www.pewresearch.org/politics/2021/01/28/economy-and-covid-19-top-the-publics-policy-agenda-for-2021/>.

⁶ Steve Liesman, *Half of U.S. Elementary and High School Students Will Study Virtually Only This Fall, Study Shows*, CNBC (Aug. 11, 2020), <https://www.cnbc.com/2020/08/11/half-of-us-elementary-and-high-school-students-will-study-virtually-only-this-fall-study-shows.html>.

⁷ *Global Monitoring of School Closures Caused by COVID-19*, UNESCO, <https://en.unesco.org/covid19/educationresponse#schoolclosures> (last visited Apr. 29, 2021).

United States and Germany leave major educational decisions to states, with federal oversight of general policies, procedures, and funding.⁸ However, the emergence of COVID-19 has created a sharp gap between the previously mirrored policies of the two federalist countries—while Germany enacted near-immediate education measures via both funding and procedures, the United States dragged its feet in releasing uniform and strong directives to American schools.⁹ The result is a stark difference in pandemic education between the two countries—while German children have been, for the most part, back to a “normal,” in-person schedule, the United States has struggled to deliver effective education through online platforms and only recently made moves towards returning to in-person learning. By learning from the German model of education during the COVID-19 lockdowns, the United States could hasten the return to a full in-person educational model and prevent or limit periods of remote learning in the future, thereby fully serving school-aged children before they suffer even greater blows to their educational development.

This article will explore key points in stabilizing education delivery in the United States in light of the COVID-19 pandemic by using Germany’s system as a model. The article will have a particular focus on the delivery of special education services both prior to and during the pandemic and the procedures that Germany and the United States put in place to ensure the continuation of services and address the increased possibility of adverse effects stemming from remote learning for children with special education needs. Part I addresses the pre-pandemic models of education in both Germany and the United States. Part II analyzes the countries’ responses to the pandemic, including a closer look at online education delivery, funding models, and policy implementation. Finally, Part III discusses best practices for the return to school and provides a number of suggestions for U.S. policy makers to consider in successfully transitioning to in-person learning models and preparing for the possibility of future remote learning periods.

I. MODELS OF EDUCATION: PRE-PANDEMIC

A. Germany

Germany¹⁰ has a compulsory education requirement through ninth grade for all students.¹¹ The school system is largely one of tracked education, in which students attend years one through four at a general primary school, and then are separated from the fifth year on according to academic abilities.¹² Alternatively, children may choose to attend the

⁸ See *infra* Sections I.A., I.B.

⁹ See *infra* Sections II.A., II.B.

¹⁰ When this article discusses German policy prior to October 3, 1990, the policies of West Germany are the main focus. While East Germany engaged in education policy making, West Germany is more reflective of the current policy and presents a more streamlined history of decisions and mandates. See *The Reunification of Germany*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Germany/The-reunification-of-Germany> (last visited Oct. 25, 2020).

¹¹ Martina Schüttler-Hansper, *This Is How the German School System Works*, DEUTSCHLAND.DE (July 11, 2019), <https://www.deutschland.de/en/topic/knowledge/overview-of-the-german-school-system>.

¹² *Id.*

Gesamtschule.¹³ *Gesamtschule* is a comprehensive school combining all levels of education that does not require students to separate from their peers based on academic ability at a young age.¹⁴ Instead, *Gesamtschule* prepares them through more of a U.S.-style “total education” system; however, this is a newer concept and not available in all German states.¹⁵

For German children following the traditional tracked system, they will attend a general primary school for the first four years of their education.¹⁶ From their fourth year of education, German students who are not enrolled in the *Gesamtschule* are divided into *Hauptschule*, *Realschule*, and *Gymnasium*.¹⁷ *Hauptschule* provides a basic education for students through ninth grade.¹⁸ Following graduation from ninth grade, students receive a *Hauptschulabschluss*, or a secondary schooling certificate, and then may either enter into a form of vocational training or apply to continue higher education.¹⁹ The second tier of the German tracking system is called *Realschule* and goes until the tenth grade.²⁰ Following graduation, students receive a *Realschulabschluss* and, similar to *Hauptschule*, may enter into a vocational training program or apply to continue their education via the transfer process.²¹ *Gymnasium* is the track for students who intend to pursue university degrees and runs until twelfth or thirteenth grade.²² These students receive an *Abitur* certificate, which is the German equivalent of a high school diploma, and are entitled to study at the university level.²³

However, German children with disabilities have not always followed the same path and were often stuck in institutions instead of schools. Just before the fall of the Berlin Wall in 1989, the German government acknowledged that children with special needs did not need to be wholly relegated to institutionalized settings, and began the process of integrating students with disabilities into mainstream schools via pilot programs in the 1980s.²⁴ By the 1990s, the method of mainstreaming became more standard for the education of children with disabilities.²⁵ Between 2005 and 2015, learners with specialized

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Was ist die Gesamtschule [What Is the Comprehensive School]*, BILDUNGSPERTEN NETZWERK [EDUC. PRO. NETWORK], <https://www.bildungxperten.net/wissen/was-ist-die-gesamtschule/> (Ger.) (last visited Oct. 12, 2020).

¹⁶ Schüttler-Hansper, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Country Information for Germany - Systems of Support and Specialist Provision*, EUROPEAN AGENCY FOR SPECIAL NEEDS & INCLUSIVE EDUC. [hereinafter *Country Information for Germany*], <https://www.european-agency.org/country-information/germany/systems-of-support-and-specialist-provision> (last visited Sept. 6, 2020).

²⁵ *Id.*

educational plans increased from 14% of the students to 38%.²⁶ Statistics show this number has been growing steadily each year.²⁷

This policy change towards inclusion began in the 1960s through a series of decisions adopted by the Ministers of Education and Cultural Affairs.²⁸ The collective decisions were known as the *Kultusministerkonferenz* (KMK).²⁹ A directive in 1988 delineated a series of qualification categories for special education learners as a means to transition away from the institutionalization of children with special needs.³⁰ This move towards individual services was part of a wider change in the country's political landscape, progressing from a focus on group intervention to individual interventions via a special education program for children with exceptional needs, known as a *Sonderpädagogischer Förderbedarf*.³¹ Following reunification, this model of educational delivery meant that German officials were responsible for the provision of individualized education, instruction, therapy, and care to each student's individual physical and mental needs as far as the learning institution allowed.³²

Modern-day special education programs in Germany deliver special education in an integrated environment after qualifying the student under one or more categories of disability, similar to the qualification system in the United States.³³ The German school system defines special education as "specific support for pupils with disabilities," with children identified and placed in one or more of the following categories: blindness, visual impairment, deafness, hearing impairment, intellectual disability, physical disability, learning difficulties, behavioral problems, speech impairment, and illness or medical needs.³⁴ Students qualified for special education are entitled to a comprehensive assessment, a state-supported "individual support plan," education with supplementary supports and modifications, cooperation and joint teaching in special education and general education environments across some or all lessons, specified treatment plans for the individual needs of the student, therapy-oriented assessments, and diagnosis of specific impairments.³⁵ However, German schools still reserve the right to move a student from an integrative classroom directly into a separate school, known as a *Förderschule*.³⁶ This decision is based on the student's perceived ability to progress at a rate commensurate with their peers in the same educational environment.³⁷ In this case, parents have a limited number of protections for their child, but can seek relief via arbitration or through the court

²⁶ *Country Information for Germany*, *supra* note 24.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*; Martin Kock, *Disability Law in Germany: An Overview of Employment, Education and Access Rights*, 5 GER. L.J. 1373, 1387 (2004).

³⁷ *Country Information for Germany*, *supra* note 24; Kock, *supra* note 36, at 1387.

system.³⁸ Although Germany has grown into a more inclusive environment since its reunification in 1990, there are still limitations to what each track may provide, including that schools only must provide supports for students “as far as the institutional setting allows,” indicating that schools must only provide the standard curriculum and accommodations.³⁹

B. United States

The American school system has remained largely stable over the last century, with power given to states to make specific educational decisions for their citizens.⁴⁰ Unlike Germany, the United States allows states to make their own determinations for the compulsory school age, with maximum age limits ranging from sixteen to eighteen years old.⁴¹ Because of this wide variance, it is beneficial to look at federal guidance from the U.S. Department of Education for serving exceptional learners, which must be applied throughout the states.

Much like Germany, the United States institutionalized a large number of individuals with disabilities prior to the 1970s. In 1967 alone, data indicates that close to 200,000 children and adults lived in state institutions for people with significant disabilities.⁴² Beginning in the 1950s, activists helped move legislation through Congress to implement specific training requirements for those working in institutions, which would improve programming and services for children with disabilities.⁴³ By 1975, Public Law 94-142 was passed.⁴⁴ Commonly known as the Education for All Handicapped Children Act of 1975 (EAHCA), the law guaranteed a “free and appropriate public education” to all children ages three to twenty-one years in every state across the country.⁴⁵ Accessing and providing public education to children with disabilities became the driving issues behind special needs-based legislation over the last half of the twentieth century.⁴⁶

EAHCA morphed over the years via a number of amendments and eventually became known as the Individuals with Disabilities Education Act (IDEA).⁴⁷ IDEA

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See Carla Wright, *History of Education: The United States in a Nutshell*, LEADERINME (June 9, 2019), <https://www.leaderinme.org/blog/history-of-education-the-united-states-in-a-nutshell/>; U.S. DEP'T OF EDUC., INT'L AFFS. STAFF, EDUCATION IN THE UNITED STATES: A BRIEF OVERVIEW (2005), <https://www2.ed.gov/about/offices/list/ous/international/edus/index.html>.

⁴¹ *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/statereform/tab5_1.asp (last visited Apr. 15, 2021).

⁴² *Id.*

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ *Id.* at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

functions via six pillars of special education⁴⁸—individualized education programs (IEP),⁴⁹ free appropriate public education (FAPE),⁵⁰ least restrictive environment (LRE),⁵¹ comprehensive evaluations per the federal requirements laid out under evaluation procedures,⁵² parent participation,⁵³ and procedural safeguards.⁵⁴ These pillars work together to ensure a minimum level of education is provided to children with special learning needs and children with disabilities.⁵⁵ Under IDEA, states are allotted decision-making power for their special education programs, which includes a number of funding provisions and allocation requirements to improve and assist in disability-related education for students.⁵⁶ However, federal law provides procedural safeguards for children and their parents in order to ensure that all children qualified under IDEA receive a FAPE, defined as an educational program “reasonably calculated to enable a child to make progress appropriate in light of” their educational difficulties.⁵⁷ FAPE is essentially a means of protection for children in special education programs, ensuring that some educational benefit is conferred to children via their IEP.⁵⁸

In order to receive special education, a child must qualify under one of thirteen special education eligibility categories: specific learning disability, other health impairment, autism spectrum disorder, emotional disturbance, speech or language impairment, visual impairment (including blindness), deafness, hearing impairment, deaf-blindness, orthopedic impairment, intellectual disability, traumatic brain injury, or multiple disabilities.⁵⁹ The general goal of special education, however, is inclusion in the LRE, or the environment that is most integrated with the general education population.⁶⁰

Of course, despite the best intentions of both countries in serving both their general and special education youth, the COVID-19 pandemic has left gaps in learning for most children due to the instability the pandemic brought forth.

⁴⁸ *The Individuals with Disabilities Education Act*, PRC, <https://www.prentrom.com/caregivers/the-individuals-with-disabilities-education-act-idea> (last visited May 2, 2021).

⁴⁹ 34 C.F.R. § 300.22 (2020).

⁵⁰ *Id.* § 300.17.

⁵¹ *Id.* § 300.114.

⁵² *See id.* § 300.304 (describing expectations for an appropriate evaluation under the IDEA).

⁵³ *Id.* § 300.322.

⁵⁴ *Id.* § 300.121.

⁵⁵ *See generally* 20 U.S.C. §§ 1400-1450 (2018).

⁵⁶ *Id.* § 1407.

⁵⁷ *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017); 20 U.S.C. § 1415.

⁵⁸ *See Andrew F.*, 137 S. Ct. at 999-1001.

⁵⁹ 34 C.F.R. § 300.8 (2020).

⁶⁰ *Id.* § 300.114.

II. MODELS OF INTERVENTION: RESPONSES TO EDUCATION IN THE TIME OF COVID-19

A. Germany

A robust response to the COVID-19 pandemic allowed Germany to control the virus spread, which positively impacted its educational response. Germany's first recorded case was in the Bavarian region of southern Germany on January 27, 2020.⁶¹ Quickly following the confirmation, the German government developed COVID-19 tests to be used across the country and implemented extensive contact tracing measures.⁶² A month after the first case, Germany had twenty-six confirmed cases of COVID-19.⁶³ Shortly thereafter, the various ministerial departments of the German government created an inter-ministerial crisis group and released a number of response measures, which included restrictions on travelers entering from high risk countries and distribution of free testing to anyone covered by the national healthcare plan with an epidemiologic indicator of infection.⁶⁴ Beginning March 16, 2020, schools across Germany's sixteen states were closed in a bid to slow the infection rates.⁶⁵ Within a week, German Chancellor Angela Merkel also imposed a "contact ban," which limited public gatherings to two people outside of family members.⁶⁶ Following roughly a month of contact restrictions, Germany's infection numbers decreased three-fold, down to 2,000 daily confirmed cases from March's peak of 6,000.⁶⁷ The following weeks saw a promisingly low infection rate, and schools began the reopening process, with classrooms opening for a few hours in May for a symbolic show of support.⁶⁸ Children participated in online learning and home schooling while school buildings were closed.⁶⁹

According to the Federal Ministry of Education and Research, Germany's initial reaction to the pandemic was to infuse millions of euros in funding for digital learning upgrades, STEM education at home, online learning portals, and funding for drug and vaccine developments to combat COVID-19.⁷⁰ Following the emergency closure of

⁶¹ Lothar H. Wieler et al., *Emerging COVID-19 Success Story: Germany's Strong Enabling Environment*, OUR WORLD DATA (Mar. 20, 2021), <https://ourworldindata.org/covid-exemplar-germany>.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *UPDATE: All German States Announce School and Kita Closures*, LOCAL (Mar. 13, 2020), <https://www.thelocal.de/20200313/coronavirus-bavaria-and-saarland-to-close-all-schools/>.

⁶⁶ Wieler et al., *supra* note 61.

⁶⁷ *Id.*

⁶⁸ *Id.*; Henrik Müller, *Corona Pandemie und Schulen so darf es Nicht Weitergehe [Corona Pandemic and Schools so It Must Not Go On]*, DER SPIEGEL (Sept. 8, 2020) (Ger.), <https://www.spiegel.de/wirtschaft/unternehmen/corona-pandemie-und-schulen-so-darf-es-nicht-weitergehen>.

⁶⁹ ETIENNE ALBISER ET AL., ORG. FOR ECON. CO-OPERATION & DEV., GERMANY - COUNTRY NOTE: SCHOOL EDUCATION DURING COVID-19, WERE TEACHERS AND STUDENTS READY? 1 (2020), <https://www.oecd.org/education/Germany-coronavirus-education-country-note.pdf>.

⁷⁰ *Coronavirus: Was tut das BMFB? [Coronavirus: What Is the BMFB Doing?]*, BUNDESMINISTERIUM FÜR BILDUNG UND FORSCHUNG (BMFB) [FED. MINISTRY OF EDUC. & RSCH.] (July 20, 2020) (Ger.) [hereinafter *What Is the BMFB Doing?*], <https://www.bmbf.de/de/coronavirus-was-tut-das-bmbf-11069.html>.

schools, Germany released 500 million euros in funding to assist pupils and teachers in accessing digital devices for online learning.⁷¹ An additional 100 million euros for digital support services was released soon after, to ease the transition for the six-week move to the online learning model.⁷² Government funding also included 750 million euros for acceleration of vaccine development and 45 million euros for development of drugs to treat COVID-19.⁷³

The ministry was able to release funding for both schools *and* scientific research concurrently. This move was largely lauded by the international community for the positive impacts created by the swift response to the pandemic across all sectors.⁷⁴ The German government has prioritized keeping children in schools, citing the important role schools play in both the well-being of children and the contributions schools have in mitigating social issues, such as instances of familial domestic violence.⁷⁵ As evidenced by the funding infusions, returning and keeping children of all ages in school was a top priority for Germany.⁷⁶

Germany's successful return of children to schools is best illustrated by the northwest state of North Rhine-Westphalia. As the most populous state in Germany, North Rhine-Westphalia plays a leading role in the German economy with notable industrial cities such as Dusseldorf (the state capital), Frankfurt, and Cologne.⁷⁷ Between school-aged youths and adult university students, approximately 3.5 million students receive education services in North Rhine-Westphalia.⁷⁸ After the initial school closures in March of 2020 and following the summer holidays, the state's Ministry for Schools and Education

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See generally Wieler, et al., *supra* note 61 (discussing the positive impact across society that Germany's swift response to COVID-19 created); see also *Germany Excels Among its European Peers*, ECONOMIST (Apr. 25, 2020), <https://www.economist.com/europe/2020/04/25/germany-excels-among-its-european-peers> (discussing the positive impacts Angela Merkel's decisions surrounding COVID-19 response have had on the economy).

⁷⁵ Melissa Eddy, *Why Is Europe Keeping Its Schools Open, Despite New Lockdowns?*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/world/europe/schools-coronavirus-europe-lockdowns.html>; *German Schools and Kindergartens Reopen for the First Time in Two Months*, STUDY INT'L (Feb. 23, 2021), <https://www.studyinternational.com/news/german-schools-reopen/>. See also MINISTERIUM FÜR SCHULE UND BILDUNG DES LANDES NORDRHEIN-WESTFALEN (MSB NRW) [MINISTRY FOR SCHS. & EDUC. OF THE STATE OF NORTH RHINE-WESTPHALIA], HANDREICH ZUR LERNFÖRDERLICHEN VERKNÜPFUNG VON PRÄSENZ – UND DISTANZUNTERRICHT [HANDOUT FOR LINKING CLASSROOM AND DISTANCE TEACHING FOR GENERAL EDUCATION SCHOOLS IN A WAY THAT IS CONDUCIVE TO LEARNING] 3 (2020) (Ger.) [hereinafter MSB NRW HANDOUT], https://xn--broschren-v9a.nrw/fileadmin/Handreichung_zur_lernfoerderlichen_Verknuepfung/pdf/Handreichung-Distanzunterricht.pdf (discussing the safety measures put in place for schools to continue teaching in the classroom); Müller, *supra* note 68 (arguing that German authorities should do “whatever it takes” to always keep schools open during the pandemic).

⁷⁶ *What Is the BMFB Doing?*, *supra* note 70.

⁷⁷ *North Rhine-Westphalia*, BRITANNICA, <https://www.britannica.com/place/North-Rhine-Westphalia> (last visited Oct. 25, 2020).

⁷⁸ *Nordrhein-Westfalen*, CITY POPULATION, https://www.citypopulation.de/en/germany/admin/05__nordrhein_westfalen/ (last updated Dec. 31, 2019).

released a graduated plan for Fall 2020–Summer 2021 that included information on how students and teachers should expect the school year to progress.⁷⁹ The government's general release was accompanied by an *Elternbrief*, or parent letter, detailing specifics of each individual school's plan for a safe return to school.⁸⁰ One such letter relayed the following precautions to students and parents:⁸¹

- Masks must be worn in the hallways at all times. Students may remove masks in their classrooms, but teachers are required to have a face covering on during school hours.
- Students will be designated a “pod” to stay with throughout the day. They will remain with their pod in one classroom, and the teachers will rotate to them to deliver lessons.
- Handwashing stations will be installed outside each classroom.
- Class sizes will be decreased in order to provide larger margins of physical distancing within classrooms.
- Temperature checks will be carried out multiple times a day for all students.
- Contact tracing will be implemented for all students.
- Schools will continue to use online platform delivery of education for any students diagnosed with COVID-19, or who have health complications that impact attendance.

Despite remote learning, parents of children with special needs in Germany reported in a study that their children spent an average of thirty-five hours per week learning at home during school closures.⁸² The same study reported that parents of children with special needs gave a higher approval of school supports than children in general education classrooms during virtual learning.⁸³ However, it should be noted that the study indicated parents of children with special needs generally report higher levels of self-efficacy and feelings of school support, which may play a role in the higher levels of reported satisfaction.⁸⁴

⁷⁹ MASTERPLAN GRUNDSCHULE [MASTERPLAN FOR GRADE SCHOOLS], MINISTERIUM FÜR SCHULE UND BILDUNG DES LANDES NORDRHEIN-WESTFALEN [MINISTRY OF SCH. & EDUC. OF NORTH RHINE-WESTPHALIA] 4, 9 (2020) (Ger.)

<https://www.schulministerium.nrw/system/files/media/document/file/Masterplan%20Grundschule.pdf>.

⁸⁰ *E.g.*, Elternbrief von Freiherr-vom-Stein-Gymnasium [Letter from Freiherr-vom-Stein Grammar School to Parents] (Aug. 11, 2020) (Ger.) (on file with author).

⁸¹ *Id.*; see also MSB NRW, WIEDERAUFNAHME EINES ANGEPASSTEN SCHULBETRIEBS IN CORONA-ZEITEN ZU BEGINN DES SCHULJAHRES 2020/2021 [RESUMPTION OF ADAPTED SCHOOL OPERATIONS IN CORONA TIMES AT THE BEGINNING OF THE 2020/2021 SCHOOL YEAR] 2-4 (2020) (Ger.) [hereinafter MSB NRW RESUMPTION], <https://www.schulministerium.nrw/system/files/media/document/file/Konzept.pdf>.

⁸² Lena Nusser, *Learning at Home During COVID-19 School Closures - How Do German Students With and Without Special Educational Needs Manage?*, 36 EUR. J. SPECIAL NEEDS EDUC. 51, 56 (2021).

⁸³ *Id.* at 57.

⁸⁴ *Id.* at 60.

B. United States

The United States produced a less robust response to the pandemic in early 2020, a response frequently maligned by the international community.⁸⁵ The first widely-reported COVID-19 case in the United States was in Washington state on January 21, 2020.⁸⁶ Ten days later, President Donald Trump restricted travel from one country—China—a day after the U.S. Department of State issued travel warnings for the country.⁸⁷ The United States reported its first death on February 29, 2020, one month after the initial case.⁸⁸ However, the United States did not declare a national emergency until March 13, 2020, approximately a month and a half after the WHO declared COVID-19 a global health emergency.⁸⁹ The announcement allowed a release of \$50 billion in federal funding for states and territories to “combat the coronavirus.”⁹⁰ By March 15, 2020, the Centers for Disease Control and Prevention (CDC) issued recommendations limiting gatherings to less than fifty people.⁹¹ The next day, the New York City public school system, the largest in the country serving 1.1 million students, closed and moved to an online learning model, joining thousands of other school systems across the world in the struggle to deliver effective education in the midst of a global health crisis.⁹²

Despite the move to an online learning model across the country, states received little federal guidance. The U.S. Department of Education, under the direction of former Secretary of Education Betsy DeVos, released a mere four press releases in March that directly related to K-12 education in the United States.⁹³ These press releases mainly focused on reducing assessment obligations and higher education loan repayment

⁸⁵ Richard Wike et al., *U.S. Image Plummets Internationally as Most Say Country Has Handled Coronavirus Badly*, PEW RSCH. CTR. (Sept. 15, 2020), <https://www.pewresearch.org/global/2020/09/15/us-image-plummets-internationally-as-most-say-country-has-handled-coronavirus-badly/>.

⁸⁶ Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Dec. 10, 2020), <https://nyti.ms/3afns4U>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (indicating that the WHO global health emergency was declared on January 30, 2020); Joseph R. Biden, *Notice on the Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, THE WHITE HOUSE (Feb. 24, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/24/notice-on-the-continuation-of-the-national-emergency-concerning-the-coronavirus-disease-2019-covid-19-pandemic/#:~:text=The%20COVID%2D19%20pandemic%20continues,effect%20beyond%20March%201%2C%202021> (stating that the United States declared COVID-19 a national health emergency on March 13, 2020).

⁹⁰ Adam Edelman et al., *Trump Declares National Emergency to Combat Coronavirus, Authorizes Waiving of Laws and Regulations*, NBC NEWS (Mar. 13, 2020), <https://www.nbcnews.com/politics/donald-trump/trump-hold-friday-afternoon-press-conference-coronavirus-n1157981>.

⁹¹ Taylor, *supra* note 86.

⁹² *Id.*; Christopher J. Thomas, *Coronavirus and Challenging Times for Education in Developing Countries*, BROOKINGS (Apr. 13, 2020), <https://www.brookings.edu/blog/education-plus-development/2020/04/13/coronavirus-and-challenging-times-for-education-in-developing-countries/>.

⁹³ Archive of March 2020 Press Releases, U.S. DEP'T OF EDUC., <https://www.ed.gov/news/press-releases/monthly/202003> (last visited Oct. 10, 2020).

structures under the federal regulations rather than providing guidance to states on how to handle the challenges presented by the pandemic.⁹⁴

The U.S. Department of Education was also initially slow to release strong guidance for the new frontier of digital education for students with disabilities. In July of 2020, the Department released a letter stating that evaluation timelines for special education would not change and that evaluations are expected to take place.⁹⁵ In fact, the release granted limited exceptions to the evaluation timeline, and never explicitly mentioned difficulties attributed to the pandemic school model as a reason for a timeline extension.⁹⁶ In a separate letter the Department also made clear that children's IEPs must be adjusted to reflect changes for distance learning.⁹⁷

Without strong federal guidance, states and local school systems have taken the lead in handling the impacts of remote learning on students with IEPs. The Chicago Public School system released guidance for assessment and planning following the summer of 2020 that initiated the creation of a "Remote Learning Plan" (RLP) in order to account for changes made to children's IEPs during distance learning.⁹⁸ However, these RLPs are often provided with a severe reduction of direct service minutes, per the Illinois State Board of Education's guidance that not all services may be available and guidance to work with the school board to decide what is best under the circumstances.⁹⁹ Chicago Public Schools released guidance prior to the 2020–2021 school year that only provided for remote assessments rather than creating a plan for in-person special education testing.¹⁰⁰ This guidance includes caution that assessments should be used only under a very specific set of circumstances, and if a child cannot meet such circumstances, alternative means such as simple record reviews and interviews should be considered.¹⁰¹ The change in assessment procedure can greatly impact the validity of the assessments, which runs the risk of providing inaccurate services to children in special education.¹⁰² The ability of the district to avoid responsibility for comprehensive assessments stems largely from the failure of the

⁹⁴ *Id.*

⁹⁵ U.S. OFF. OF SPECIAL EDUC. PROGRAMS, U.S. DEP'T OF EDUC., PART C EVALUATION AND ASSESSMENT TIMELINES IN THE COVID-19 ENVIRONMENT Q&A DOCUMENT (2020), <https://sites.ed.gov/idea/idea-files/part-c-evaluation-and-assessment-timelines-in-the-covid-19-environment-qa-document-07062020/>.

⁹⁶ *Id.*

⁹⁷ U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON PROVIDING SERVICES TO CHILDREN WITH DISABILITIES DURING THE CORONAVIRUS DISEASE 2019 OUTBREAK 3, 5 (2020), <https://sites.ed.gov/idea/idea-files/q-and-a-providing-services-to-children-with-disabilities-during-the-coronavirus-disease-2019-outbreak/>.

⁹⁸ CHI. PUB. SCHS. (CPS), SCHOOL REOPENING 2020: ODLSS REMOTE LEARNING GUIDANCE 12 (2020), https://www.cps.edu/globalassets/cps-pages/services-and-supports/special-education/odlss_remote_learning_guidance.pdf.

⁹⁹ ILL. STATE BD. OF EDUC., FREQUENTLY ASKED QUESTIONS FOR SPECIAL EDUCATION DURING REMOTE LEARNING 2 (2020), <https://www.isbe.net/Documents/SPED-FAQ-04-20-20.pdf>.

¹⁰⁰ CPS, *supra* note 98, at 2-5.

¹⁰¹ *See id.* at 41-43 (directing clinicians to consider four factors when choosing to evaluate remotely and cautioning these choices).

¹⁰² Sascha Zuger, *Screen Test: The Challenges of Special Needs Assessments During Remote and Hybrid Learning*, TEACH & LEARNING (Nov. 20, 2020), <https://www.techlearning.com/news/screen-test-the-challenges-of-special-needs-assessments-during-remote-and-hybrid-learning>.

Department of Education to release additional information on assessment procedure and expectations, leaving special education students at a severe disadvantage.

However, like Germany, the United States took steps to provide funding support to schools during this difficult time. The Coronavirus Aid, Relief, and Economic Security (CARES) Act funding package, passed with bipartisan support, released aid across both the private and public sectors, with \$11 billion pledged for diagnostics, treatments, and vaccines and \$13 billion in aid to be distributed to K-12 schools across the country.¹⁰³ Education awards from the CARES Act were to be allocated on the same basis governing Part A of Title I funding, which is disbursed according to the percentage of low-income students within a school district.¹⁰⁴ However, the CARES Act allocates funding to cover a wide range of activities, from cleaning and sanitizing schools, to assisting in technology purchases, to providing students with emergency funding for food, housing, and other basic essentials.¹⁰⁵ Yet there is an expectation that the CARES money will support equitable services for students and staff via the distribution methods.¹⁰⁶ This poses difficulties, as there were clear disparities in funding of schools even before the impact of COVID-19.¹⁰⁷ Adding in the complication of providing students with the technology to access their education begs the question of how CARES Act funding actually assisted in the delivery of education during the pandemic.¹⁰⁸ Additional releases of funding during the 2020–2021 school year have also fallen short, leaving the neediest children without access to wireless connections that have now become vital to learning.¹⁰⁹ A final flaw in the CARES Act funding can be found in the distribution plan, in that the amount of money allotted to schools is on the basis of *past* reports of income and needs as identified by Title I fund

¹⁰³ Barbara Sprunt, *READ: \$2 Trillion Coronavirus Relief Bill*, NPR (Mar. 25, 2020), <https://www.npr.org/2020/03/25/820759545/read-2-trillion-coronavirus-relief-bill>; Kelsey Snell, *What's Inside the Senate's \$2 Trillion Coronavirus Aid Package*, NPR (Mar. 26, 2020), <https://www.npr.org/2020/03/26/821457551/whats-inside-the-senate-s-2-trillion-coronavirus-aid-package>; Press Release, Off. of Elementary & Secondary Educ. (OESE), Elementary and Secondary School Emergency Relief Fund (Jan. 13, 2021), <https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/> [hereinafter OESE Press Release].

¹⁰⁴ OESE Press Release, *supra* note 103; *Improving Basic Programs Operated by Local Educational Agencies (Title I, Part A)*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/programs/titleiparta/index.html> (last updated Oct. 24, 2018).

¹⁰⁵ HOUSE COMM. ON EDUC. & LABOR, FACT SHEET ON CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (CARES) ACT: EDUCATION PROVISIONS 1 (2020), [https://edlabor.house.gov/imo/media/doc/2020-03-31%20CARES%20Act%20Education%20Fact%20Sheet\[2\].pdf](https://edlabor.house.gov/imo/media/doc/2020-03-31%20CARES%20Act%20Education%20Fact%20Sheet[2].pdf).

¹⁰⁶ CARES Act Programs, 85 Fed. Reg. 39479, 39484 (July 1, 2020) (to be codified at 34 C.F.R. pt. 76.665).

¹⁰⁷ EDBUILD, \$23 BILLION, at 1-2 (2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

¹⁰⁸ Erin Richards et al., *A Year into the Pandemic, Thousands of Students Still Can't Get Reliable WiFi for School. The Digital Divide Remains Worse than Ever*, USA TODAY (Feb. 4, 2021), <https://www.usatoday.com/story/news/education/2021/02/04/covid-online-school-broadband-internet-laptops/3930744001/>.

¹⁰⁹ *Id.*

qualification.¹¹⁰ Given the continued changes that COVID-19 has produced, these numbers are not likely to show an accurate reflection of needs.

At the time of writing, more than a year after the CARES Act, the CDC has released new and updated guidelines for schools as they entered into various stages of return plans.¹¹¹ There has been a recent push from the Biden administration to return to in-person learning, with an increase in students returning to in-person learning by the week.¹¹² Despite the hopefulness that the new guidance has created, there is concern that schools with a higher percentage of children attending in person are linked to see higher percentages of COVID-19 infections.¹¹³

The picture of U.S. education during COVID-19 is one of great concern, with much work still to be done for a full return to in-person learning and to deal with the repercussions of long-term remote learning.

III. RECOMMENDED PRACTICES FOR EDUCATION DURING AND AFTER COVID-19

In the U.S., economic concerns have been pitted against all other pandemic-caused problems, but this is a false dichotomy. In fact, focusing on the education of children actually benefits the economy. According to a United Nations (UN) policy brief, a student who has a disruption in school past the third grade is 72% more likely to drop out prior to reaching the tenth grade, and students who drop out prior to tenth grade lose an average of \$16,000 over the course of their lifetime.¹¹⁴ Looking to the number of students impacted by COVID-19 across the world and the anticipated increase in the dropout rate, there is concern that a total of \$10 trillion in global earnings stand to be lost.¹¹⁵ This indicates that

¹¹⁰ Andrew Ujifusa, *Some Districts Due to Miss Out on Primary Source of COVID-19 Aid for Schools*, EDUC. WEEK (May 19, 2020), <https://www.edweek.org/education/some-districts-due-to-miss-out-on-primary-source-of-covid-19-aid-for-schools/2020/05>.

¹¹¹ Shawn Hubler, *A Majority of School Districts Are Now Open. But Not Everyone Wants to Return*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/29/us/long-beach-schools-reopen-covid.html>; see also *Operational Strategy for K-12 Schools Through Phased Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html#print> (last updated Mar. 19, 2021) (showing extensive safety measures put in place at schools and highlighting the frequent changes throughout that school year).

¹¹² Lauren Camera, *Percentage of Students Learning in Remote or Hybrid Classes Drops Amid Reopenings*, U.S. NEWS & WORLD REP. (Mar. 29, 2021), <https://www.usnews.com/news/education-news/articles/2021-03-29/percentage-of-students-learning-in-remote-or-hybrid-classes-drops-amid-reopenings>.

¹¹³ Michael B. Henderson et al., *Pandemic Parent Survey Finds Perverse Pattern: Students Are More Likely to Be Attending School in Person Where COVID Is Spreading More Rapidly*, 21 EDUC. NEXT 1, 7 (2021), <https://www.educationnext.org/pandemic-parent-survey-finds-perverse-pattern-students-more-likely-to-be-attending-school-in-person-where-covid-is-spreading-more-rapidly/>. But see *Science Brief: Transmissions of SARS-CoV-2 in K-12 Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 19, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/transmission_k_12_schools.html#print (indicating that “in-person learning has not been associated with substantial community transmission”).

¹¹⁴ UNITED NATIONS (UN), POLICY BRIEF: EDUCATION DURING COVID-19 AND BEYOND 9 (2020) [hereinafter UN POLICY BRIEF], https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sg_policy_brief_covid-19_and_education_august_2020.pdf.

¹¹⁵ *Id.*

pandemic-related school disruption is not only an issue of educational benefit for children, but is a grave concern for the wider global economy.

The United States will need to take certain steps forward to effectively return children to in-person schooling and strengthen schooling for all children, especially during times of crisis. The UN recommends four main components for countries on this path.¹¹⁶

First, suppressing transmission of the virus is essential in returning children to schools.¹¹⁷ National outbreaks must be placed under control in order to allow large numbers of students to safely return to in-person learning, as Germany successfully did.¹¹⁸ Once the national numbers are relatively under control, inclusive opening plans should be created with the input of community groups and stakeholders in order to ensure the lowest possible transmission rates between school children.¹¹⁹ It is especially important to focus on planning for the return of children with special needs, and making sure that additional assessments are completed as needed in order to address learning gaps that arose from the online learning model.¹²⁰ The U.S. government should implement an effective, nation-wide plan to curb transmission rates, including nation-wide mask mandates and possibly stricter lockdowns such as those seen in Germany in order to stop the spread of the virus.¹²¹ The U.S. government should also consider providing all citizens with vouchers to purchase medical-grade face masks to negate financial concerns, as Germany did in January of 2021.¹²²

Second, the U.S. government should take steps to ensure the protection of education funding and effectively plan for the predicted global recession in order to ensure longevity of education for students across the country.¹²³ It should make efforts to preserve the money needed to fund education on a yearly basis, and the Department of Education should work to improve cost-effective education services while developing a financial plan to continue these changes after the pandemic.¹²⁴ The UN also suggests re-evaluating education spending in order to address insufficiencies and inequities,¹²⁵ a move long-needed in the United States.¹²⁶ The U.S. government should make plans now, through working groups and task forces, to effectively address these questions at a federal level and release guidance for states and local governments.

¹¹⁶ *Id.* at 19-25.

¹¹⁷ *Id.* at 19.

¹¹⁸ *Id.* at 19-20.

¹¹⁹ *Id.* at 20.

¹²⁰ *Id.*

¹²¹ *Prevent Getting Sick*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/index.html> (last updated Jan. 7, 2021); Tommy Beer, *Germany Mandates Medical-Grade Masks*, FORBES (Jan. 20, 2021), <https://www.forbes.com/sites/tommybeer/2021/01/20/germany-mandates-medical-grade-masks/?sh=123a80602596>.

¹²² Beer, *supra* note 121.

¹²³ UN POLICY BRIEF, *supra* note 114, at 20.

¹²⁴ *Id.* at 20-21.

¹²⁵ *Id.* at 21.

¹²⁶ EDBUILD, *supra* note 107.

Third, the U.S. government must continue to push for education systems that build resilient learners by addressing children most at risk through specific and targeted plans to assist them in continuing their education, even in a state of crisis.¹²⁷ The UN suggests focusing on creating plans for educational inclusion of at-risk and high-needs learners in case another world health crisis or other crisis emerges.¹²⁸ Leadership is key, and the U.S. government must focus on delivering effective supports for states to cultivate strong community leadership to immediately act in the case of a subsequent spike in COVID-19 or another international health crisis.

Finally, the UN suggests a re-imagining of the current system of education by targeting at-risk needs groups, strengthening the practice of data-driven decision making, and creating entitlements to connectivity, among other suggestions.¹²⁹ The United States should look for ways to address educational issues highlighted by the pandemic, including the long-standing barrier to technology and bandwidth that has forced many students to miss school or, worse, drop out.¹³⁰ Along the same vein, the Department of Education should continue to encourage low tech or no tech options for learning even after the pandemic in order to reach households that may not have the connectivity required to continue with online or hybrid learning.¹³¹ The Department of Education should also provide updated guidelines that clearly identify the priorities of inclusive education for all children across remote, hybrid, and full in person learning.¹³² Overall, the United States should use this pandemic as a chance to overhaul the education system to adequately and equitably serve children across all levels of socioeconomic status and academic functioning.

As mentioned previously, with the election of President Biden came a renewed push to return children to school as quickly as possible in the United States.¹³³ In fact, recent figures indicate that around half of all children in the United States had returned to the classroom full time by the end of March 2021.¹³⁴ At time of writing, Germany has also made changes to their education plan, shifting back to online schooling in response to the rapidly rising numbers of infections and new variants of the COVID-19 virus.¹³⁵ This move seems to be based on data-driven decision making to determine what is likely to halt the spread of the virus.¹³⁶ Because the German Federal Ministry of Education and Research is housed under one roof, it is perhaps of little surprise to see that analysis of scientific data

¹²⁷ UN POLICY BRIEF, *supra* note 114, at 22.

¹²⁸ *Id.*

¹²⁹ *Id.* at 23-24.

¹³⁰ *Id.* at 24.

¹³¹ *Id.*

¹³² *Id.* at 25.

¹³³ Dana Goldstein, *Biden Is Vowing to Reopen Schools Quickly. It Won't be Easy*, N.Y. TIMES (Jan. 25, 2021), <https://www.nytimes.com/2021/01/25/us/biden-schools-reopen-coronavirus.html>.

¹³⁴ Camera, *supra* note 112.

¹³⁵ *Latest Coronavirus Updates*, DEUTSCHLAND.DE (Apr. 23, 2021),

<https://www.deutschland.de/en/news/coronavirus-in-germany-informations>; *Germany Reports Cases of Indian COVID Variant*, MEDICALXPRESS (Apr. 29, 2021), <https://medicalxpress.com/news/2021-04-germany-cases-indian-covid-variant.html>.

¹³⁶ *Id.*

is driving choices in education in Germany.¹³⁷ The United States should consider a similar approach, and require the Department of Education to work in tandem with the various federal scientific research agencies. This type of relationship between departments may also encourage updated research on best practices for educating differently abled students, a change in line with the fourth point of the UN's release on global school re-entry.¹³⁸

The United States should also consider boosting COVID-19 testing in schools as Germany has recently done, which would help to identify and isolate cases at a faster pace.¹³⁹ However, the United States should work to release specific testing protocols, which would lessen the confusion that Germany currently faces due to a lack of uniform rules across its states.¹⁴⁰

Moving forward, education should continue to be made a top priority in the United States' response to the COVID-19 pandemic and to the potential long-term consequences of the health crisis. Although not perfect, Germany has made relatively successful strides in returning and keeping children in school and has also been relatively successful in swiftly responding to rising case numbers or clustered outbreaks with minimal reports of spread in the school setting, provided enhanced safety measures, such as physical distancing, were being used.¹⁴¹ The United States may benefit from looking to the German response, including its issuance of robust guidelines for schools and parents. Moving forward, children's best interest should be the lens through which plans for education are viewed—a lens Germany appeared to use from the beginning of the pandemic and a lens encouraged by the UN in improving education both during and beyond the COVID-19 pandemic.

¹³⁷ BUNDESMINISTERIUM FÜR BILDUNG UND FORSCHUNG [FED. MINISTRY OF EDUC. & RSCH.] (Ger.) (2021).

¹³⁸ UN POLICY BRIEF, *supra* note 114, at 23.

¹³⁹ *German Teachers Call for Uniform COVID Rules in Schools Nationwide*, LOCAL (Apr. 8, 2021), <https://www.thelocal.de/20210408/german-teachers-call-for-uniform-covid-rules-in-schools-nationwide/>.

¹⁴⁰ *Id.*

¹⁴¹ *E.g.*, Loveday Morris & Fiona Weber-Steinhaus, *German Schools, Reopened a Month Ago, Have Seen No Major Coronavirus Outbreaks*, WASH. POST (Sept. 11, 2020), https://www.washingtonpost.com/world/europe/covid-schools-germany/2020/09/10/309648a4-ceedf-11ea-bd08-1b10132b458f_story.html. *See also* *Transmissions of SARS-CoV-2 in K-12 Schools*, *supra* note 113.