

NOTES

The “Free College” Illusion: How State Tuition Support Programs Are Widening the Opportunity Gap

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I. INTRODUCTION: THE OPPORTUNITY GAP AND NEW "FREE-COLLEGE" PROGRAMS

In recent years, educational efforts nation- and state-wide have been focused on closing the gap between the opportunities available to different groups of students.¹ One such gap is the income achievement gap²: Average performing middle-income students graduating college at a rate of almost three times that of an average performing low-income student.³ States across the country are seeking

1. Campaigns across the country have proposed closing this gap by providing tuition-free college—an idea most recently thrust into the spotlight by Senator Bernie Sander's presidential primary campaign. Senator Sanders' most recent bill was proposed on April 3, 2017. The Act, which mirrors New York's Excelsior Scholarship, would make public senior colleges and universities free for families that make up to \$125,000 and community colleges free for all. *See* College for All Act of 2017, S. 806, 115th Cong. (2017). Other campaigns, such as *Heads Up America* and the *College Promise Campaign*, led by Dr. Jill Biden, Martha Kanter, and other prominent figures in higher education, seek to build public support for making the first two years of public higher education free and accessible. *See generally* COLLEGE PROMISE CAMPAIGN, <https://collegepromise.org/> (last visited Apr. 10, 2017). Other educational programs and policies—such as universal Pre-K, funding after-school programs, and addressing wealth disparities among public schools—are being put into place with the same goal in mind: Closing the achievement gap. While these efforts support the likelihood that a low-income student may go from low- to high-performing, high-performing low-income students are still less likely than low-performing high-income students to complete college. Elise Gould, *High-Scoring, Low-Income Students No More Likely to Complete College Than Low-Scoring, Rich Students*, ECON. POLICY INST. (Mar. 9, 2012), <http://www.epi.org/blog/college-graduation-scores-income-levels/>.

2. *See* Sean F. Reardon, *The Widening Income Achievement Gap*, 70 EDUC. LEADERSHIP 10, 10–16 (May 2013) [hereinafter *Widening Income Achievement Gap*].

3. Travis Waldron, *CHART: How Income Inequality Contributes to a Growing Education Gap That Is Jeopardizing Our Middle Class*, THINKPROGRESS (May 17, 2012), <https://thinkprogress.org/chart-how->

to close this gap by providing tuition-free college.⁴ Few programs,⁵ however, fully consider the unique obstacles that prevent low-income students from persisting to graduation.⁶ While the idea of “free college” equates to accessibility and attainability, often these new programs only remove obstacles for students, or the families of students, who are already highly likely to obtain a college degree.⁷ Informed by legal, economic, and student engagement experience, this Note argues that many “free college” laws, as they have been put forward in New York specifically, effectively widen the achievement gap by increasing educational opportunities for middle-income students while maintaining the status quo for low-income students.

Achievement and opportunity gaps exist when one group of otherwise similarly situated students outperforms another group in a way that is statistically significant.⁸ Achievement gaps exist across several demographic factors, including race, gender, and socio-economic status (SES).⁹ While problematic in any sense, the gap has been found to exist more prominently across SES.¹⁰ The income achievement gap, “the average achievement difference between a child from a family at the ninetieth percentile of the family income distribution and a child from a family at the tenth percentile[,] is now nearly twice as large as the black-white achievement gap.”¹¹ The SES gap is exacerbated by school segregation, where students of low SES tend to attend schools with other low SES students, resulting in underfunded schools with larger classes, fewer resources, and the exclusion of educator talent that tends to be attracted to better funded, higher-paying districts.¹²

income-inequality-contributes-to-a-growing-education-gap-that-is-jeopardizing-our-middle-53474941284f#r.ndy0unn9 (citing Gould, *supra* note 1).

4. See generally COLLEGE PROMISE CAMPAIGN, *supra* note 1.

5. See, e.g., Katie Lobosco, *Most of Oregon’s Free-Tuition Dollars Aren’t Going to Poor Students*, CNN MONEY (Mar. 6, 2017) <http://money.cnn.com/2017/03/06/pf/college/oregon-free-tuition/index.html?iid=EL> (discussing how Oregon’s legislation is primarily benefiting middle and upper-income students. Only students with a 2.5 GPA immediately going on to college from high school or a GED program are eligible); but see Katie Lobosco, *Tennessee Makes Community College Free for All Adults*, CNN MONEY (May 11, 2017), <http://money.cnn.com/2017/05/11/pf/college/tennessee-free-community-college/index.html> (explaining that eligibility for free tuition—funded by the State lottery—simply requires a student be a resident, be enrolled part-time, and maintain a 2.0 GPA); Katie Lobosco, *San Francisco Is Taxing the Rich to Pay for Free Community College*, CNN MONEY (Feb. 10, 2017), <http://money.cnn.com/2017/02/10/pf/college/san-francisco-free-community-college/index.html?iid=EL> (discussing the real estate tax funded program that provides free tuition to students regardless of income or the number of credits they are taking. Further, the program offers eligible low-income students additional money to pay for other expenses: \$500 a year for full-time students and \$200 for part-time).

6. Programs vary greatly from state to state. This Note focuses on the particular pitfalls of New York’s laws that are seen more broadly and are applicable to other states.

7. See *infra* Section III.A.

8. See *Achievement Gaps*, NAT’L CTR. FOR EDUC. STATS. (Sept. 22, 2015), <https://nces.ed.gov/nationsreportcard/studies/gaps/>.

9. See *id.*; see generally *Widening Income Achievement Gap*, *supra* note 2.

10. Sean Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* (Greg J. Duncan & Richard J. Murnane eds., 2011) [hereinafter *Possible Explanations*].

11. *Id.*

12. See Rachel R. Ostrander, *School Funding: Inequality in District Funding and the Disparate Impact on Urban and Migrant School Children*, 2014 B.Y.U. EDUC. & L.J. 271, 272 (2015) (stating that

The resulting funding disparities raise the question whether children in low-income areas are being adequately educated.¹³ The disparity between high schools tends to remain as inadequately-educated people with less earning potential generally continue to live in the same geographic areas.¹⁴ Breaking the inadequate-education cycle requires affirmative opportunity for low-income families to gain higher education credentials.

The increase in income inequality over time has also resulted in high- and middle-income families having far more resources than their low-income peers to invest in their children's education.¹⁵ As of 2016, a median upper-income family holds seventy-five times the wealth and makes more than three times the annual income of a low-income family.¹⁶ As a result, families in the lowest quintile of the income distribution are spending over a third of their income on their children's tuition.¹⁷ Upper-income families, on the other hand, only needed to allocate about 2.5% of their previous year's income for tuition costs.¹⁸

The sentiment behind, work put into, and outcomes of the state free college campaigns are admirable, but many programs¹⁹ fail to fully consider how the requirements and processes they promulgate may exacerbate the challenges faced by low-income students that ultimately prevent persistence to graduation.²⁰ New York's "tuition-free college" initiative, the Excelsior Scholarship—touted as a "first of its kind" national program²¹—has been closely scrutinized and criticized for failing to live up to its promise.²² As applied to the reality faced by many students, the requirement structure of Excelsior and similar programs may decrease

"migrant, low income, and inner city urban families are entrapped in lower funded schools because of low property values in those areas, the demographic of students becomes increasingly homogenous, and more affluent families move to better communities with better schools and more resources").

13. *Id.*

14. *Id.* at 273.

15. See *Widening Income Achievement Gap*, *supra* note 2, at 10–16.

16. Lydia DePillis, *America's Wealth Gap Is Bigger than Ever*, CNN MONEY (Nov. 3, 2017), <http://money.cnn.com/2017/11/03/news/economy/wealth-gap-america/index.html> (citing Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed in the U.S. Since the Great Recession, By Race, Ethnicity and Income*, PEW RESEARCH CTR. (Nov. 1, 2017), <http://www.pewresearch.org/fact-tank/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/>).

17. Michael Mumper, *The Future of College Access: The Declining Role of Public Higher Education in Promoting Equal Opportunity*, 585 ANNALS AM. ACAD. POL. & SOC. SCI. 97, 99 (2003).

18. *Id.*

19. See *supra* note 6.

20. Programs vary greatly from state to state. This Note focuses on the particular pitfalls of New York's laws that are seen more broadly and are applicable to other states.

21. *Governor Cuomo Presents 1st Proposal of 2017 State of the State: Making College Tuition-Free for New York's Middle Class Families*, WEBSITE FOR GOVERNOR ANDREW CUOMO (Jan. 3, 2017), <https://www.governor.ny.gov/news/governor-cuomo-presents-1st-proposal-2017-state-state-making-college-tuition-free-new-york-s> [hereinafter WEBSITE FOR GOVERNOR ANDREW CUOMO].

22. See, e.g., Douglas Webber, *This U.S. State's Free College Plan Isn't All It's Cracked Up to Be*, FORTUNE (Apr. 13, 2017), <http://fortune.com/2017/04/13/free-college-tuition-new-york-excelsior-scholarship-pay-education-bill/>; Kaitlin Mulhere, *New York's Free Tuition Proposal Isn't Quite as Good as It Looks*, TIME (Jan. 4, 2017), <http://time.com/money/4622007/new-york-free-college-tuition/>; Anya Kamenetz, *"Biggest-Ever Free College" Program Reaches 6 Percent of New York Students*, NPR (Oct. 3, 2017), <https://www.npr.org/sections/ed/2017/10/03/555067038/new-york-state-s-new-free-college-program-reaches-6-percent-of-students>.

the financial burden of middle and upper-income students obtaining a degree, but do not remove comparable barriers for their low-income peers.²³

While once a priority, policies focused on financing higher education have shifted away from subsidizing education for the lowest-income students in recent years.²⁴ By offering the façade of “free college” to students, but raising the stakes for eligibility just high enough to be out of reach for a large part of them,²⁵ the State “effectively rigs the contest,” keeping college unattainable for many low-income students.²⁶ “[W]hen two competitors are running a race,” Justice Sotomayor acknowledged, “one may not require the other to run twice as far or to scale obstacles not present in the first runner’s course.”²⁷

New York’s “Tuition-Free College”²⁸ initiative serves as a robust illustration of how “free college” laws are rigging the contest. Recognizing these access and opportunity gaps, this Note argues that “free college” laws, as they are being put forward in New York, effectively widen the achievement gap in several ways. First, the laws tend to increase educational opportunities for middle-income students but do not remove any barriers for low-income students. While college debt for middle-income students remains a significant economic problem for the city and state—a problem New York’s “free college” plan seeks to tackle—only less than six percent of New York State’s college students will meet eligibility requirements for the new program in its first semester.²⁹ Second, the newer policies to provide “free college” further complicate the already complex financial aid processes, adding barriers for those navigating the system on their own.³⁰ Third, the laws are particularly problematic for some of the most vulnerable student populations, because (1) they give little support to working students and students with family responsibilities who need to attend college on a part-time basis;³¹ (2) the proposals do not cover the full population of students eligible for in-state tuition in many states by excluding undocumented and DACA³² students; and (3) the

23. See *infra* Section III.

24. See generally Mumper, *supra* note 17.

25. Eric Neutch, *The Excelsior Scholarship’s Academic Requirements Are Far Too High*, GOTHAM GAZETTE (Jul. 21, 2017), http://www.gothamgazette.com/opinion/7065-the-excelsior-scholarship-s-academic-requirements-are-far-too-high?mc_cid=390d80ceec7&mc_eid=e884160d14.

26. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1670 (2014) (Sotomayor, J., dissenting).

27. *Id.* (quoting *BAMN v. Regents of Univ. of Mich.*, 701 F. 3d 466, 474 (6th Cir. 2012)).

28. WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

29. Kamenetz *supra* note 22.

30. See N.Y. EDUC. LAW § 669-h (McKinney 2017); Meredith Kolodner, *Why Are Low-Income Students Not Showing up to College, Even Though They Have Been Accepted?*, HECHINGER REP. (Aug. 14, 2015), <http://hechingerreport.org/why-are-low-income-students-not-showing-up-to-college-even-though-they-have-been-accepted/>.

31. CTR. FOR AN URBAN FUTURE, TAPPED OUT 5 (Dec. 2014), <https://nycfuture.org/pdf/Tapped-Out.pdf>.

32. Deferred Action for Childhood Arrivals. See Memorandum from Janet Napolitano, Secretary of Homeland Sec., to David Aguilar, Acting Commissioner, U.S. Customs and Border Protection et. al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. As of September 5, 2017, DACA was rescinded by the Trump administration, and will expire in 2018. Letter from Attorney General Sessions to Acting Secretary Duke on the Rescission of DACA (Sept. 5, 2017), https://www.dhs.gov/sites/default/files/publications/17_0904_DOJ_AG-letter-DACA.pdf.

program structures often result in students with remedial or developmental needs timing out of the funding streams.³³ While beyond the scope of this article, it should be noted that the populations discussed—those most adversely affected by the laws—are disproportionately students of color.³⁴ Given the historical inequities in providing quality education to students of color, this presents an even larger justification for taking more immediate steps to address the pitfalls in the laws and move to a more equitable structure.³⁵

“Historically, state need-based aid has been the largest area of state investment in student financial aid.”³⁶ Such a large investment by the State deserves to be looked at through a critical lens to consider how their programs affect their most vulnerable populations. Informed by legal, economic, and student engagement experience,³⁷ Part II of this Note explores the statutory and regulatory framework for the current educational and financial aid system in New York State. This Part analyzes the current structure of the laws providing financial aid in New York State, their most prominent regulations, and their intent and history. Part III, using the City University of New York (CUNY) as a microcosm of the types of state policies and challenges faced nationwide, critiques how the laws as a whole are not serving the goals they originally sought to accomplish. Part IV, on the other hand, acknowledges what the laws have done right. The Note then outlines several recommendations for consideration in Part V, most applicable for New York State, but also relevant to other jurisdictions as they consider new laws to finance higher education.

II. FINANCING COLLEGE: HOW FINANCIAL AID IS LAID OUT FOR NEW YORK RESIDENTS

New York’s “free college” announcements seem to overlook the students that have been receiving similar support for over fifty years.³⁸ Since the 1960s, New

33. See *infra* pp. 20.

34. YOUNG INVINCIBLES, RACE AND ETHNICITY AS A BARRIER TO OPPORTUNITY: A BLUEPRINT FOR HIGHER EDUCATION EQUITY 15 (2017) (explaining that college costs take up a greater part of total income for families of color, “controlled for the type and price of institutions they choose”: sixty-three percent of African Americans’ family income and fifty-three percent of Hispanic’s family income versus forty-four for White families).

35. “[P]roposals . . . do not account for this country’s long history of race-based discrimination which often explain why certain communities have excelled and others struggled to succeed.” *Id.* at 7 (referencing Ta-Nehisi Coates, *My President Was Black: A History of the First African American White House—and of What Came Next*, THE ATLANTIC (Jan. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/>). “[O]ne cannot legislate goodwill, prevent all discrimination, or force changes to chilly campus climates that students of color have challenged for years.” *Id.*

36. Jennifer A. Delaney, *The Role of State Policy in Promoting College Affordability*, 655 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 56, 65 (2014).

37. The author of this article, in addition to pursuing a Juris Doctor, works in higher education, managing programs that support retention and graduation in New York community colleges. She has a Master of Science degree in the Administration of Academic Advising in Higher Education and has worked as a student counselor, administrator, and researcher on law and policy that affect student development and degree completion.

38. Compare WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21, with *Need-Based Tuition-Free Education*, CITY UNIV. OF N.Y., <http://www.cuny.edu/about/resources/value/needbased.html> (last

York State has been providing financial aid to its resident college students above the federal aid³⁹ grants they may receive.⁴⁰ First, tuition for residents of New York State and New York City, like many places, is offset by appropriations from state and local government.⁴¹ Next, scholarships, grants, and loans are available to further subsidize college costs. To determine eligibility for aid, students in New York apply first for federal aid through the Free Application for Federal Student Aid (FAFSA), then for state aid by applying for the Tuition Assistance Program (TAP).⁴² Starting in fall 2017, students are required to file an additional application to qualify for the Excelsior Scholarship.⁴³ Federal aid includes grants—primarily the Pell Grant—that students do not need to repay, plus a combination of loans and work study opportunities.⁴⁴ The amount of aid received is based on the Expected Family Contribution of the student, essentially a calculation of what the government feels a family should be expected to be able to pay towards tuition.⁴⁵ An Expected Family Contribution calculation takes into account the income and assets of the student and parent or spouse, and a federal need analysis formula generates an amount the family can be expected to contribute towards tuition.⁴⁶ Students whose Expected Family Contribution is up to \$5,000 per year may receive some form of Pell.⁴⁷ Additionally, TAP provides a sliding-scale amount of funding for in-state colleges for families making up to \$80,000.⁴⁸ While students receiving the full amount of aid may receive a small extra stipend to use towards books and other costs, the aid is primarily used for tuition and fee coverage only.⁴⁹

In 2017, Governor Cuomo introduced the New York State Excelsior Scholarship.⁵⁰ The Governor is touting the program as “free college,” but in reality

visited Nov. 11, 2017) (stating that over half of CUNY students qualify for federal and New York State aid, most of whom receive enough aid to cover their entire tuition bill).

39. The Pell Grant is federal aid of up to \$5,920 awarded to undergraduate students that does not need to be repaid. *See Federal Pell Grants*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/grants-scholarships/pell> (last visited Aug. 15, 2017).

40. *See generally* Governor’s Messages to the Legislature, 1961 N.Y. LEGIS. ANN. 366 (Jan. 4, 1961).

41. Linda Gorman, *State Education Subsidies Shift Students to Public Universities*, NAT’L BUREAU OF ECON. RESEARCH, <http://www.nber.org/digest/dec03/w9720.html> (last visited Nov. 5, 2017).

42. *Apply for Aid—Start Here*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/apply-for-financial-aid/apply-for-aid-start-here.html> (last visited Nov. 5, 2017).

43. The first step is to submit the FAFSA, the second is to fill out the TAP application, and then students are to submit applications for “other New York State awards and scholarships,” which includes Excelsior. *See id.*

44. *See generally Grants and Scholarships*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/types/grants-scholarships#federal> (last visited May 7, 2017).

45. Robert Kelchen, *Financial Need and Aid Volatility Among Students with Zero Expected Family Contribution*, 44 J. FIN. AID 179, 179–80 (2015).

46. “Students whose EFC is below 90% of the maximum Federal Pell Grant . . . can qualify for a Federal Pell Grant . . . which is the typical proxy used for low-income status. Students with the greatest financial need receive an EFC of zero, qualifying them for the maximum Pell Grant award . . .” *Id.*

47. FED. PELL GRANT PROGRAM, PAYMENT SCHEDULE FOR DETERMINING FULL-TIME SCHEDULED AWARDS FOR THE 2015–2016 AWARD YEAR (2015), <https://ifap.ed.gov/dpccletters/attachments/GEN1601Attach.pdf>.

48. N.Y. EDUC. LAW § 667(3)(a)(ii) (McKinney 2017).

49. *See Receiving Aid*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/fafsa/next-steps/receive-aid> (last visited Nov. 5, 2017) (noting that once tuition and fees are covered with a Pell grant, any leftover money is paid to the student for other expenses).

50. WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

it means free for students of families with a certain income that fulfill certain stringent requirements.⁵¹ The scholarship supplements the existing aid structures; it covers the gap between the amount of financial aid a student already receives through TAP and Pell, and the total amount of tuition applicable to students of families with a federal adjusted gross income of up to \$125,000.⁵² This means that a student in a family with an adjusted gross income of \$70,000 a year that was previously eligible for some state aid now can apply to have the remainder of the tuition costs covered; and a student in a family with an adjusted gross income of up to \$90,000, who was previously ineligible for TAP, can now attend college for free. Providing additional resources towards residents' educational pursuits clearly has its benefits, but additional resources are not being put towards the students most at risk of not completing their degrees.⁵³ The group of students that the additional funding has been allocated to were already three times as likely to attain a college degree as their low-income peers, even before the Excelsior Scholarship.⁵⁴ These resources now increase the likelihood that the Excelsior Scholarship recipients will obtain a degree, while the percentage of low-income students who will persist to graduation remains steady.⁵⁵

A. Tuition Subsidy for All New Yorkers: Resident Tuition

Aside from income-based aid programs, New York is one of many states—and New York City one of the many cities—in the United States to subsidize the tuition of its residents.⁵⁶ An often overlooked resource of student aid for college, public universities generally charge their in-state students at a rate that does not cover the full cost of their education. Appropriations from state and local government provide funding that offsets the costs to their residents.⁵⁷ For example, prior to charging its residents tuition beginning in 1976, CUNY was charging students who were not residents of New York City \$1,400 per year at its senior colleges.⁵⁸ New York City supported CUNY through its tax levy funds, something no other municipality in the state was doing at the time, covering the cost of tuition

51. *Id.*; *Excelsior Scholarship Program*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/financial-aid/types-of-financial-aid/nys-grants-scholarships-awards/the-excelsior-scholarship.html> (last visited Nov. 5, 2017).

52. N.Y. EDUC. LAW § 669-h (McKinney 2017).

53. *Compare* Gould, *supra* note 1 (explaining that low income students are less likely than their middle and high-income peers to complete their college degrees), *with* WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

54. *Compare* Waldron, *supra* note 3, *with* WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

55. *Compare* Waldron, *supra* note 3 (highlighting the strong ties between a student's ability to pay for college and their chances of completing their degree), *with* WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 22.

56. Gorman, *supra* note 41.

57. JASON DELISLE & KIM DANCY, BROOKINGS INST., DO STATE SUBSIDIES FOR PUBLIC UNIVERSITIES FAVOR THE AFFLUENT? 2 (2016), <https://www.brookings.edu/research/do-state-subsidies-for-public-universities-favor-the-affluent/>.

58. Memoranda of Assemblyman Irwin J. Landes re: A. 9850-B, Ch. 345 of 1976, 1976 N.Y. LEGIS. ANN. 134 (1976).

for its residents.⁵⁹ With the imposition of tuition for City residents the following year, CUNY maintained its commitment to subsidizing resident tuition.⁶⁰

Currently, the resident subsidy is automatic for students who have lived in the City of New York or State of New York⁶¹ for at least one year preceding the time of enrollment at a City or state school, respectively.⁶² Students who choose to leave the state or attend a private college effectively “opt out” of receiving the indirect subsidy.⁶³ The in-state tuition is approximately one-third of the out-of-state tuition at both City and state schools in New York.⁶⁴

B. The Origins of the Tuition Assistance Program

TAP is New York State’s primary financial aid program that “helps eligible New York residents pay tuition at approved schools in New York State.”⁶⁵ In the 2016–2017 academic year, over 336,000 of New York State’s undergraduates received some amount of TAP, totaling an estimated \$917 million.⁶⁶ Creating TAP was a step in the right direction, as it provided college access to New York’s most vulnerable New Yorkers at a time where education increasingly became a necessity.⁶⁷ The growing gap between wealthy and low-income families, however, calls for a critique on how to equitably serve students from all income levels.⁶⁸

New York’s history as an innovator in supporting access to college education began in 1991, when Governor Nelson Rockefeller laid out the vision for financing education to promote economic mobility in a letter to the legislature.⁶⁹ The letter expressed a commitment to freedom, democracy, and keeping New York a pioneer state in serving its people.⁷⁰ He charged the legislature with addressing several great challenges, including the education of youth: “There is no greater or more

59. *Id.*

60. *Id.*

61. Additionally, for the 2017–2018 academic year, students from Puerto Rico and the U.S. Virgin Islands displaced by Hurricanes Maria and Irma were approved to attend CUNY at the in-state rate. *CUNY Board Approves Tuition Break for Students from Puerto Rico, Virgin Islands*, CITY UNIV. OF N.Y. (Oct. 23, 2017), <http://www1.cuny.edu/mu/forum/2017/10/23/cuny-board-approves-tuition-break-for-students-from-puerto-rico-virgin-islands/>.

62. N.Y. COMP. CODES R. & REGS. tit. 8, § 302.1(a)(5) (2017) (“A person whose domicile has been in the State of New York for a period of at least one year immediately preceding the time of registration for any period of attendance shall be a New York resident for the purpose of determining the tuition rate payable for such period. All other persons shall be presumed to be out-of-state residents for such purpose, unless domiciliary status is demonstrated in accordance with guidelines adopted by the Chancellor or designee.”).

63. See DELISLE & DANCY, *supra* note 57, at 4–5.

64. *Tuition & Fees*, CITY UNIV. OF N.Y., <http://www2.cuny.edu/financial-aid/tuition-and-college-costs/tuition-fees/> (last visited May 7, 2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 302 (2017).

65. *The New York State Tuition Assistance Program (TAP)*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/apply-for-financial-aid/nys-tap.html> (last visited Mar. 12, 2017).

66. N.Y. STATE HIGHER EDUC. SERVS. CORP., 2016–2017 ANNUAL REPORT (2017), <https://www.hesc.ny.gov/images/HESCCorporate/HESCAAnnual2017011718.pdf>.

67. Governor’s Messages to the Legislature, *supra* note 40, at 331.

68. See DePillis, *supra* note 16.

69. Governor’s Messages to the Legislature, *supra* note 40, at 331.

70. *Id.*

crucial task for a free nation than to prepare its youth for citizenship in a democracy. . . . If we wish, as a nation, to endure, we must educate.”⁷¹ The Governor addressed concerns about the growing need for higher education, pointing out that in the past it had been a privilege of few, but it had become a necessity for many.⁷² At that time, across the nation more and more people were pursuing a college degree. Enrollment in college rose from fifteen to twenty-four percent of the general population of the United States during the 1950s.⁷³ In 1959, 376,508 students were enrolled in college in New York.⁷⁴

The Governor proposed the first iteration of state financial aid, the Scholar Incentive Program (SIP).⁷⁵ The State put forward SIP to support the individual development and self-realization of New Yorkers, which would increase the state’s leadership, productivity, innovation, and growth.⁷⁶ The Governor believed this goal relied most upon “educational opportunity for all who have the desire and the capacity to make use of it.”⁷⁷ He called upon the state to continue to promote economic growth and increase job opportunities—which depend on education—“for all its citizens.”⁷⁸ SIP provided tuition grants to each full-time, tuition-paying undergraduate student who resided and attended school in New York.⁷⁹ The bill had two purposes. First, it sought to encourage students of “modest means”—to whom the rising levels of tuition lifted a barrier beyond their reach—to pursue higher education.⁸⁰ Second, it sought to ensure that no young person with the ability and ambition for a higher education would be deprived of the opportunity because of lack of money.⁸¹ While not termed as such at the time, the intention of laying the groundwork for state financial aid was essentially to close the opportunity gap.

As budgets tightened but the need for student aid increased, a need arose for an agency to develop and administer student aid policies.⁸² Established in 1974 under section 652 of the New York Education Law, the New York Higher Education Services Corporation (HESC) was created within the State Education Department and the University of the State of New York,⁸³ and was established

71. *Id.*

72. *Id.* at 332.

73. U.S. DEP’T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 66 (Thomas D. Snyder et al. eds., 1993); *see id.* at 8 (demonstrating a strong racial opportunity gap existed at the time: about ten percent of the white male population over twenty-five years old had completed a four-year degree, compared to about only three percent of men of color).

74. *Id.* at 78.

75. Governor’s Messages to the Legislature, *supra* note 40, at 367.

76. *Id.* at 366, 368.

77. *Id.* at 366.

78. *Id.* at 367.

79. *Id.* at 368.

80. “Modest means,” in context, refers to low-income students. *See id.* at 369.

81. *Id.*

82. Governor’s Memorandum approving S 10844, Ch. 940 of 1970, 1974 N.Y. LEGIS. ANN. 409 (1974); *see also* *When Tuition Was Free at CUNY, Sort of*, CUNY NEWSWIRE (October 12, 2011), <http://www1.cuny.edu/mu/forum/2011/10/12/when-tuition-at-cuny-was-free-sort-of/> [hereinafter *When Tuition Was Free*].

83. N.Y. EDUC. LAW § 652 (McKinney 2017); *see generally* N.Y. EDUC. LAW §§ 651–694 (McKinney 2017) (providing statutory authority for the Higher Education Services Corporation to create rules and

under and made accountable to the Board of Regents.⁸⁴ This hierarchy highlights the uniqueness of New York’s educational governance structure—with ties to both legislators and the executive branch. The Board of Regents—a unique governmental body established by the New York Constitution⁸⁵—is selected by the state legislature.⁸⁶ The Board of Regents “has special authority over a combination of state education policy, educational institutions, and professional licensing.”⁸⁷ Under the authority of the Regents, the HESC was assigned the duty of centralizing the administration of State aid programs with the purpose of “improv[ing] post-secondary educational opportunities of eligible students . . .”⁸⁸ The president of the HESC also has the responsibility of proposing rules and regulations, including applications for and granting of student aid programs and procedures to be followed by institutions participating in aid programs.⁸⁹

The legislature passed TAP in that same year.⁹⁰ The intent of the bill, which would gradually replace SIP with TAP, was to “continue and strengthen the State’s commitment to provide full educational opportunity for all those with the desire and capacity to pursue post-secondary education.”⁹¹

C. Requirements for the Tuition Assistance Program

Although intending to provide higher education access for all students with the “desire and capacity,”⁹² the receipt of aid under TAP carries stringent eligibility requirements. Both the State Education Law and regulations promulgated under the authority of the statute lay out the eligibility requirements for state awards.⁹³ To apply for TAP, a student must complete the FAFSA, then submit her TAP application through HESC.⁹⁴ Requirements for TAP include students’ income, their status as a citizen or eligible non-citizen, academic standing, credit load, and time-to-degree.⁹⁵

regulations under Title VIII of the NYCRR); *accord* N.Y. COMP. CODES R. & REGS. tit. 8, § 2000.1 (2017) (defining the scope of the HESC); *accord* N.Y. COMP. CODES R. & REGS. tit. 8, §§ 2201–2202 (2017) (outlining the rules and regulations of the New York State aid programs, including the Tuition Assistance Program).

84. N.Y. EDUC. LAW §§ 651–694.

85. Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State’s Socio-Economic Interests*, 8 COLUM. J. RACE L. 33, 50 (2018) (citing N.Y. CONST. art. XI, § 2).

86. *Id.*; *see also* *About the Board of Regents*, N.Y. STATE EDUC. DEP’T, <http://www.regents.nysed.gov/about> (last visited Nov. 21, 2017).

87. Calvo, *supra* note 85, at 14.

88. N.Y. EDUC. LAW § 652.

89. *Id.* § 655.

90. *See generally id.* § 661.

91. Governor’s Memorandum, *supra* note 82, at 410.

92. *Id.*

93. *See generally* N.Y. EDUC. LAW § 661; N.Y. COMP. CODES R. & REGS. tit. 8, § 2201.1 (2017).

94. *Apply for TAP*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/apply-for-financial-aid/nys-tap/apply-for-tap.html> (last visited Mar. 12, 2017).

95. *TAP Eligibility & Income Limits*, N.Y. STATE HIGHER EDUC. SERVS. CORP. OF N.Y., <https://www.hesc.ny.gov/pay-for-college/financial-aid/types-of-financial-aid/grants/tap-eligibility.html> (last visited Nov. 5, 2017).

1. Initial Eligibility

First and foremost, the amount of TAP a student receives is based on the student's individual or family income.⁹⁶ Income is defined as the total of combined net taxable income and any income from pensions, from the applicant, the applicant's spouse, and the applicant's parents,⁹⁷ with exceptions made for emancipated students.⁹⁸ For dependent students, independent students who have dependents, and students considered orphans, foster children or wards of the state, the current maximum taxable income limit for which a student may still receive TAP is \$80,000.⁹⁹ For a single, independent undergraduate student, that limit is \$40,000.¹⁰⁰ Currently, the net taxable income used in TAP calculations is only slightly adjusted for family size.¹⁰¹ For instance, a student from a family with both a gross income of \$41,000 and three children in college "receives a TAP award only \$240 greater than a family with the same income and only one child" in college.¹⁰²

To be eligible for TAP, an applicant must be a citizen of the United States or fall within certain classes of non-citizens. Eligible non-citizens include those lawfully admitted for permanent residence, or "an individual of a class of refugees paroled by the attorney general of the United States under his parole authority pertaining to the admission of aliens to the United States."¹⁰³ The classes of non-citizens included are lawful permanent residents, refugees, those granted asylum, Cuban-Haitian entrants,¹⁰⁴ conditional entrants or parolees, T-visa holders (victims of human trafficking), "battered immigrant-qualified aliens," and citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau.¹⁰⁵ These categories exclude the roughly 4,550 undocumented students who graduate from New York State high schools each year, and have

96. See N.Y. EDUC. LAW § 663 (McKinney 2017).

97. *Id.*

98. A student is considered emancipated if she has not and will not (1) reside with her parents for more than six weeks of the year, (2) receive financial assistance valued at more than \$750, and (3) be claimed as a dependent by either parent for the purposes of federal or state taxes; or the applicant is thirty-five years or older in June before the semester begins; or the applicant was enlisted in full-time active military and was honorably discharged. See N.Y. EDUC. LAW § 663(3)(b).

99. *Id.*; N.Y. EDUC. LAW § 667(3)(a)(ii) (McKinney 2017).

100. *Programs, Policies, and Procedures: Guide to Grants and Scholarship Programs*, N.Y. STATE HIGHER ED. SERVS. CORP., <https://www.hesc.ny.gov/partner-access/financial-aid-professionals/programs-policies-and-procedures-guide-to-grants-and-scholarship-programs.html> (last visited Jan. 10, 2018) [hereinafter HESC POLICY GUIDE].

101. See STATE UNIV. OF N.Y., AN ANALYSIS OF THE TUITION ASSISTANCE PROGRAM 8 (2015) (noting that current state tax law permits exemptions for each child).

102. See *id.*

103. N.Y. EDUC. LAW § 661 (McKinney 2017).

104. While previously considered lawful permanent residents, the Trump administration announced it will not renew Temporary Protected Status (TPS) for Haitian Immigrants, and it will expire early 2019. Karen DeYoung & Nick Miroff, *Trump Administration to End Provisional Residency Protection for 60,000 Haitians*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/world/national-security/trump-administration-to-end-provisional-residency-protection-for-50000-haitians/2017/11/20/fa3fdd86-ce4a-11e7-9d3a-bcbe2af58c3a_story.html.

105. *Non-U.S. Citizens*, FED. STUDENT AID OF THE U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/eligibility/non-us-citizens> (last visited May 17, 2017) [hereinafter *Non-U.S. Citizens*].

already received educational investment from the state.¹⁰⁶ In addition, the eligibility categories exclude groups of non-citizens who are here with permission, such as those with non-immigrant visas, individuals who have been granted relief from deportation under the Family Unity Program, temporary residents allowed to live and work in the U.S. under the Legalization or Special Agricultural Worker programs, students with “Temporary Protected Status,” DACA recipients, and U-Visa holders.¹⁰⁷

2. Ongoing Requirements for Eligibility

Beyond meeting initial eligibility qualifications, students must maintain eligibility by meeting other requirements related to time-to-degree, grades, and credit load.¹⁰⁸ Students qualify for up to four years of undergraduate study for programs designated as four-year programs.¹⁰⁹ For programs designated as two-year programs, a student is eligible for payment for no more than three academic years of study.¹¹⁰

Receiving TAP depends on the student’s program enrollment and the number of credits that the student takes in a semester. First, a student must be enrolled in a degree program and taking credits that lead to a degree.¹¹¹ The student also must be enrolled full-time—generally deemed to be at least twelve credits a semester¹¹²—with some exceptions.¹¹³ The student’s minimum full-time course load must consist of courses applicable to the academic program in which the student is enrolled.¹¹⁴ Several sources of New York law and policy provide exceptions to the full-time study requirement. Exceptions are made for students

106. These students have received an educational investment from the State both by attending New York City high schools and attending CUNY at the subsidized in-state rate. *New York State DREAM Act*, N.Y. PUB. INTEREST RESEARCH GRP., http://www.nypirg.org/higher_ed/dreamact/ (last visited May 6, 2017) (citing Jackie Vimo, *New York State DREAM Legislation Update*, N.Y. IMMIGRATION COAL. (Dec. 5, 2011), http://www.thenyic.org/sites/default/files/NYS_DREAMUpdate_Dec52011_FINALFINAL.pdf. [hereinafter *New York State DREAM Act*].

107. *See Non-U.S. Citizens*, *supra* note 105.

108. *See infra* pp. 16–22.

109. Students may qualify for an additional year of aid if the program has been designated by the State Education Department as a program that requires more than four years to complete. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 145-2.7(a), (b) (2017). Additionally, students enrolled in organized programs of study such as Higher Education Opportunity Programs (HEOP), Educational Opportunity Programs (EOP) and Search for Education, Elevation and Knowledge (SEEK) are also eligible for a five-year program of study. *See id.* §§ 145-2.7(c).

110. N.Y. EDUC. LAW § 667(2) (McKinney 2017).

111. *See* N.Y. EDUC. LAW § 661(4) (McKinney 2017); *see generally* HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01 (d) (explaining that non-matriculation occurs when a student is taking a course for credits, but is not enrolled in a program that leads to a degree).

112. *See* N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1 (a)(1)(i) (2017) (defining full-time as enrollment in at least twelve semester hours for a term of at least fifteen weeks, and for trimesters—terms of at least ten weeks—eight semester hours are required to be considered full-time).

113. *Id.* §§ 145-2.1(a)(4); (a)(3)(f).

114. *Cf.* HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(e) (identifying an exception for the student’s final semester of study if fewer than twelve credits are required to graduate).

with disabilities¹¹⁵ or a mental or physical illness,¹¹⁶ and for students in accelerated remediation programs.¹¹⁷

In 1984, New York State Assemblyman Jose E. Serrano put forward a bill to establish a tuition assistance program for part-time undergraduate students, acknowledging the growing proportion of students who needed funding to pursue a college degree.¹¹⁸ Governor Mario Cuomo approved the bill, highlighting that part-time students are often working full-time, and attending school at night and on weekends.¹¹⁹ Because part-time students face a unique set of challenges that full-time students do not, the Governor stated, they “deserve [the State’s] help.”¹²⁰ The part-time tuition support was intended to assist students seeking to advance in their careers or retrain for new careers, and improve access for the students that need to attend on a part-time basis.¹²¹ At the time it was proposed, the State appropriated \$11 million towards the program from the Executive budget, and it was codified as section 666 of the New York Education Law.¹²²

The implementation of the law, however, requires that institutions apply to the HESC to participate on an annual basis, and funding has become very limited.¹²³ Aid for Part-Time Study (APTS) is funded by an annual state appropriation, and is distributed to select institutions based on their part-time enrollment during the previous fall term.¹²⁴ Institutions wishing to apply for APTS must designate an individual to serve as the APTS official and program coordinator, and must apply each year by the deadline identified by the HESC.¹²⁵ Once an institution is accepted as a participant in the aid for part-time study program, institutions then select recipients from among eligible students, and “shall consider those . . . who demonstrate the greatest amount of financial need remaining . . . and shall give preference . . . to students who would be otherwise unable to attempt or continue post-secondary education.”¹²⁶ The maximum annual award allowed per student is \$2,000 or the cost of tuition, whichever is less.¹²⁷ The award amount is determined by the school and is based on the amount of student need, the school’s allocation, and the number of students eligible for APTS.¹²⁸ Students are notified whether they have been selected as a recipient within forty-five days of the last day to add or

115. *See id.* (“Effective with the 1998–99 academic year, students who are disabled, as defined by the 1990 federal Americans with Disabilities Act (ADA), do not have to attend school full time to be eligible for TAP awards.”); N.Y. EDUC. LAW § 661(4)(g) (McKinney 2017).

116. *See generally* N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1 (f).

117. *See generally id.* §§ (a) (2)–(3).

118. Memorandum of Assemblyman Jose E. Serrano, Ch. 110, 1984 N.Y. LEGIS. ANN. 82 (1984).

119. Governor’s Approval Memorandum, Ch. 110, 1984 N.Y. LEGIS. ANN. 83 (1984).

120. *Id.*

121. *Id.*

122. *Id.*; N.Y. EDUC. LAW § 666 (McKinney 2017).

123. *See* N.Y. EDUC. LAW § 666(8) (providing the method of calculation for institutional allocation of program funds).

124. N.Y. STATE HIGHER EDUC. SERVS. CORP., APTS HANDBOOK, Ch. 1 (2017) [hereinafter APTS HANDBOOK].

125. *Id.*

126. N.Y. EDUC. LAW § 666(8); *see also* APTS HANDBOOK, *supra* note 124 (emphasizing that institutions have broad discretion in the selection of students to receive the award).

127. APTS HANDBOOK, *supra* note 124, at Ch. 2.9.

128. *Id.*

drop classes,¹²⁹ which is mostly after they are already well into the semester and have incurred a tuition bill. In addition to the regular FAFSA and TAP applications, students wishing to study part-time must also apply for APTS each year an award is sought, by a deadline established by the institution.¹³⁰ The law was promulgated to “promote access to post-secondary education for [students] who are unable to enroll on a full-time basis and [cannot] afford to attend part-time with currently available aid.”¹³¹ Although the bill memorandum acknowledged the growing population of students that fit into this category,¹³² the state budget has decreased the funding to support this law over time.¹³³

More recently, in 2007–2008, the State announced a part-time TAP program.¹³⁴ Eligibility requirements, aside from credit load, are the same as full-time TAP. Students are only eligible for part-time TAP, however, after they have completed two consecutive semesters on a full-time basis.¹³⁵

An additional statutory requirement to continue receiving TAP is good academic standing,¹³⁶ which is often difficult to satisfy for students struggling to maintain the credit load outlined above. To continue receiving awards once granted based on these criteria, students must achieve minimum academic requirements.¹³⁷ These minimum academic requirements are determined by Pursuit of Program requirements laid out by the HESC, and include maintaining “Satisfactory Academic Progress” towards a degree.¹³⁸ Pursuit of Program requires students to complete at least fifty percent of the minimum full-time requirement in their first year, seventy-five percent in their second, and one hundred percent in their fifth semester and beyond.¹³⁹ Satisfactory Academic Progress requires that each student accrue a certain number of credits each semester and maintain a certain GPA as he or she progresses toward a degree.¹⁴⁰ There is a slight variance in credit accrual between programs identified as four-year and two-year, and requirements vary

129. *Id.* at Ch. 3.4.

130. *Id.* at Ch. 3.1.

131. Memorandum of Assemblyman Jose E. Serrano, *supra* note 118, at 82.

132. *Id.*

133. The percentage of State aid allocated to APTS decreased from 2.9% in 1999–2000 to 1.2% in 2017–2018. Compare N.Y. STATE DIV. OF BUDGET, FY 2017 ENACTED BUDGET FINANCIAL PLAN 94 (2016), <https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/FY2017FP.pdf>, with N.Y. STATE DIV. OF BUDGET, 1999–2000 EXECUTIVE BUDGET 67 (1999), <https://www.budget.ny.gov/pubs/archive/fy990archive/990appd1/append1.pdf>.

134. *Part-Time TAP*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/apply-for-financial-aid/nys-tap/part-time-tap.html> (last visited Dec. 30, 2017); See also *Part-Time TAP Program*, HOSTOS COMMUNITY COLLEGE, <http://www.hostos.cuny.edu/Administrative-Offices/Office-of-Financial-Aid/New-York-State-Programs/Part-Time-TAP-Program> (last visited Dec. 30, 2017).

135. HESC POLICY GUIDE, *supra* note 100, at Appendix M.

136. N.Y. EDUC. LAW § 665 (6)(c) (McKinney 2017).

137. *Id.*

138. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g).

139. *Id.*

140. *Id.*

based on whether the student requires remedial work¹⁴¹ or is disabled.¹⁴² Once a thirty-credit threshold is hit—by the end of a student’s fourth semester if not requiring remedial work—a GPA of at least 2.0 is required.¹⁴³

For the many students whose K-12 schools fail to prepare them adequately for college-level work, there are additional financial-aid requirements to navigate. If a student’s college entrance exam score falls below a certain level, colleges interpret this to mean that a student is not college-ready, and places them in remedial—or developmental¹⁴⁴—coursework.¹⁴⁵ Remedial courses are considered to “jump start” students in their academic careers, intending to help students develop the skills they need to succeed in college.¹⁴⁶ Because the schools that fail to adequately prepare students for college tend to be those from under-resourced communities,¹⁴⁷ stringent TAP requirements regarding remedial coursework disproportionately affect low-SES students. Remedial courses do not earn a student credit, but are often pre-requisites to many required courses, and minimum proficiency is required to graduate.¹⁴⁸ Although not credit-bearing or counting towards a degree, remedial coursework bears the same costs as a credit-bearing course. According to regulations promulgated under the New York Education Law, noncredit or remedial courses may count towards a full-time course load “if the student effort required is the same as would be required for a credit-bearing course.”¹⁴⁹ In a student’s first semester, a full-time student only needs to be

141. A student enrolled in remedial study is “a student: (a) whose scores on a recognized college placement exam or nationally recognized standardized exam indicated the need for remediation for at least two semesters . . . ; or (b) who was enrolled in at least six semester hours of non-credit remedial courses . . . in the first term they received a tuition assistance program award in an approved program; or (c) who is or was enrolled in the higher education opportunity program (HEOP), the educational opportunity program (EOP), the search for education, elevation and knowledge (SEEK) program, or the college discovery (CD) program.” *Remedial Definition for SAP*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/partner-access/financial-aid-professionals/tap-and-scholarship-resources/tap-coach/88-remedial-definition-sap.html> (last visited Nov. 26, 2017); N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1(a)(1)(iii) (2017).

142. “Disabled” is defined by the American Disabilities Act of 1990, 42 U.S.C. § 12101 (2012); N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1(a)(4).

143. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g).

144. Because of the stigma imposed by the word “remediation”—that a student is sick and needs to be made better—many higher education professionals prefer to use the word “developmental” to describe courses intended to overcome academic deficiencies. For the purposes of this article, however, “remedial” will be used to refer to CUNY’s non-credit, pre-college courses as it is a term of art distinguished from “developmental” courses. *See* SALLY RENFRO & ALLISON ARMOUR-GARB, MAYOR’S ADVISORY TASK FORCE ON THE CITY UNIV. OF N.Y., OPEN ADMISSIONS AND REMEDIAL EDUCATION AT THE CITY UNIVERSITY OF NEW YORK 73 (1999) (noting that both “remedial” and “developmental” are used as “terms of art” at CUNY, where “remedial” is a non-credit, pre-college level course that carried “equated credits” based on classroom time, and a “developmental” course is a hybrid between pre-college and college-level work, and may carry a combination of degree credits and equated credits).

145. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g).

146. RENFRO & ARMOUR-GARB, *supra* note 144, at 105.

147. *See* Ostrander, *supra* note 12; BRUCE D. BAKER, ALLIANCE FOR QUALITY EDUC., SCHOOL FUNDING FAIRNESS IN NEW YORK STATE: AN UPDATE FOR 2013–14 25 (Jan. 24, 2014), <http://www.aqeny.org/wp-content/uploads/2012/03/School-Funding-Fairness-in-New-York-State-An-Update-for-2013-14.pdf>.

148. *See* RENFRO & ARMOUR-GARB, *supra* note 144, at 81–83.

149. N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1 (2017).

enrolled in three credits of non-remedial coursework to receive TAP, but that number increases to six credits of non-remedial coursework after the first semester.¹⁵⁰ The catch, however, is that these remedial courses do not count towards a student’s degree, requiring additional “credit hours”¹⁵¹ above what is required for a student to graduate; they also do not count towards Satisfactory Academic Progress.¹⁵² Students, as a result, often lose their TAP eligibility, or require more than the four years allowed for TAP eligibility—widening the gap between students attending well-funded and under-resourced K-12 schools.¹⁵³ In an effort to ameliorate this issue, the Supplemental Tuition Assistance Program (STAP) was passed in 1981.¹⁵⁴ STAP was intended to provide two semesters of TAP to educationally-disadvantaged undergraduate students with a heavy remedial workload.¹⁵⁵ It would preclude their Pursuit of Program requirement, ensuring that the academic standing requirements for TAP do not disproportionately impact students with remedial needs.¹⁵⁶ However, current regulations only allow for STAP payments in the summer immediately preceding a student’s first semester.¹⁵⁷

Students with developmental needs are faced with additional TAP challenges, as the overwhelming nature of their course loads affect their academic progress.¹⁵⁸ Students who fail to meet the academic standing requirements laid out by the statute lose their TAP eligibility and do not receive aid in the following semester.¹⁵⁹ Once a student loses TAP because of her academic progress, it may only be regained if the student (1) makes up the academic deficiencies by completing courses at the student’s own expense, (2) is readmitted to school after a year,¹⁶⁰ (3) transfers to another institution, or (4) applies for and is granted a waiver.¹⁶¹ Waivers are permitted once in an undergraduate career, and requirements for granting waivers must be identified and adhered to by the institution as laid out in title 8, section 145-2.2(b) of the New York Code of Rules

150. *Id.*

151. Although remedial courses do not accumulate credits, they are assigned a number of “credit hours” equivalent to the workload and time spent in the classroom for a credit-bearing course. *Noncredit Study*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/tap-coach/74-noncredit-study.html> (last visited May 6, 2017); *see also* RENFRO & ARMOUR-GARB, *supra* note 144, at 77–78.

152. *Noncredit Study*, *supra* note 151.

153. *See generally* BAKER, *supra* note 147, at 25 (stating that, for example, only 39.2% of students in high-poverty post-secondary schools were proficient in math, versus 83.5% of students in low-poverty school districts).

154. Governor’s Approval Memorandum, Ch. 724, 1981 N.Y. LEGIS. ANN. 390 (1981).

155. *Id.*

156. *See id.* (explaining that the TAP requirements preclude educationally-disadvantaged students who require a heavy remedial workload, and the STAP funding ensured those students would continue to receive State aid despite their remedial course requirements).

157. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 145-2.1(a)(2)–(3) (2017).

158. *See* RENFRO AND ARMOUR-GARB, *supra* note 144, at 77–80 (explaining that students take more credits than they may be able to handle to meet financial aid requirements, and have reported feeling overwhelmed. This results in students “writ[ing] off” courses as an F grade to focus on other courses, which causes issues with their Pursuit of Program requirements).

159. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g).

160. *See generally* N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.2(b)(ii) (laying out the requirements for regaining admission).

161. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g).

and Regulations.¹⁶² Separately, there is a waiver for the required 2.0 grade point average that can be granted for undue hardship, and it may be granted more than once if circumstances warrant.¹⁶³

A review of the TAP eligibility laws highlight the gaps in legislative intent versus the reality in their application. Despite the clear intention to support educational attainment for low-income students, the opportunity gap has increased since the financial aid programs were implemented in the early 1960s. While the college completion rate of the top-income quartile of Americans born in the 1980s increased eighteen percent from those born in 1960, it only increased four percent for those in the bottom quartile.¹⁶⁴ The law, however, remained largely the same, with small amendments in 1975 and 1978.¹⁶⁵

D. The Excelsior Scholarship

An additional step towards the effort to support degree attainment in New York, the Excelsior Scholarship, was announced in January 2017.¹⁶⁶ The Excelsior Scholarship was designed to fill the gaps in tuition aid after state and federal grants have been applied.¹⁶⁷ The goals of the program include alleviating student debt and placing more New Yorkers on the path to financial security.¹⁶⁸ The structure of the scholarship supports more students graduating on time and improved graduation rates.¹⁶⁹ According to Governor Andrew Cuomo, the Excelsior Scholarship “will ensure that students statewide, regardless of their socio-economic status, have the opportunity to receive a quality education and gain the skills they need to succeed in our global economy.”¹⁷⁰ The implementation of the new law highlights the fact that a degree is no longer a luxury, but has become a necessity for any chance for economic mobility in an economy that requires a highly-qualified workforce.¹⁷¹ This message mirrors the Governor’s fifty-six-year old language outlining the intent of New York’s original aid laws, an indication that little progress has been made in economic justice through education.¹⁷²

162. *Id.* (referencing N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1).

163. *Id.* (stating that undue hardship must be based on (a) the death of a student's relative; (b) a student’s personal illness or injury; or (c) other extenuating circumstances, and that documentation must be provided).

164. Martha J. Bailey & Susan M. Dynarski, *Gains and Gaps: Changing Inequality in U.S. College Entry and Completion* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 17633, 2011).

165. See Memoranda of Assemblyman Irwin J. Landes, et al. re: A.6529-A, Ch. 844 of 1975, 1975 N.Y. LEGIS. ANN. 166 (1975); Governor’s Memorandum approving S 8911, Ch. 72 of 1978, 1978 N.Y. LEGIS. ANN. 100 (1978).

166. See WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

167. See *Excelsior Scholarship Program*, *supra* note 51.

168. WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

169. *Id.*

170. *Id.*

171. *Id.* (highlighting that a person with a college degree on average earns sixty-six percent more over their lifetime than a person without a degree. Approximately 3.5 million jobs in New York State are anticipated to require an associate’s degree or higher by 2024).

172. See Governor’s Messages to the Legislature, 1961 N.Y. LEGIS. ANN. 366 (Jan. 4, 1961).

The new law is advertised as “free college” for New York State public institutions.¹⁷³ It supplements federal and state aid—covering the gap between financial aid received under other grants—including Pell and TAP—and the total amount of tuition for students in families that have an adjusted gross income of up to \$125,000 by 2019.¹⁷⁴ At the launch of the Excelsior Scholarship, the Governor’s office estimated that 940,000 middle-class families would receive funding for their children to attend New York State and City schools, making college tuition-free for up to four years.¹⁷⁵ Since the regulations have been promulgated, however, significantly fewer students than anticipated are receiving an award.¹⁷⁶

Many lawmakers have highlighted the attention-getting effect of calling the program “free college.” “For young people who have written college off because they assume they can’t afford it, they’ll hear about this and think, ‘Maybe college isn’t out of reach for me,’” said SUNY Chancellor Nancy Zimpher.¹⁷⁷ A closer look at the laws outlined below, however, renders the title “free college” largely illusory for students who—often rightly—assume they cannot afford college.

Eligibility for TAP is a minimum criterion for the Excelsior scholarship, which has additional stringent guidelines.¹⁷⁸ Beginning in fall 2017, to qualify for the Excelsior scholarship at a public institution,¹⁷⁹ students must be matriculated in an approved program that leads to an undergraduate degree at a public New York college.¹⁸⁰ If already enrolled in college, upon applying for the scholarship, a student must have completed at least thirty total credits—applicable to her program of study—per year, since starting college.¹⁸¹ This means a student entering junior year who only completed twenty-eight credits in the first year of college would not be eligible to receive the Excelsior funding for her remaining two years.¹⁸² In fact, the average percentage of current CUNY students who would have met the credit threshold requirement in 2014–2015 is only 32.9% at senior colleges, and 17.7% at community colleges.¹⁸³ In 2014, the average number of credits earned in one year by associate-degree-pursuing full-time first-time freshmen was twenty-one.¹⁸⁴

173. See WEBSITE FOR GOVERNOR ANDREW CUOMO, *supra* note 21.

174. N.Y. EDUC. LAW § 669-h (McKinney 2017).

175. *Tuition-Free Degree Program: The Excelsior Scholarship*, N.Y. STATE, <https://www.ny.gov/programs/tuition-free-degree-program-excelsior-scholarship> (last visited Nov. 26, 2017).

176. See *infra* Section III.D.

177. Katie Lobosco, *New York Republicans Have an Alternative to “Tuition-Free” College*, CNN MONEY (Feb. 24, 2017), <http://money.cnn.com/2017/02/24/pf/college/new-york-free-tuition-republicans/>.

178. See N.Y. EDUC. LAW § 669-h.

179. Eligibility for the award at a private institute remains the same, but the formula for the award amount changes. The award amount will be based on the amount of TAP received and the matching award the private institution provides, with the sum of the three not totaling more than \$6,000 annually. See *id.* § 667-d.

180. *Id.* § 669-h.

181. *Id.*

182. *Excelsior Scholarship FAQs*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/financial-aid/types-of-financial-aid/nys-grants-scholarships-awards/the-excelsior-scholarship/excelsior-scholarship-faqs.html> (last visited Nov. 11, 2017) (stating that “a student who fails to complete 30 credits in any year is ineligible for any future payments under the Program”).

183. CITY UNIV. OF N.Y. OFFICE OF INSTITUTIONAL RESEARCH & ASSESSMENT, PERFORMANCE MANAGEMENT PROCESS DATA BOOK: 2015–2016 YEAR-END UNIVERSITY REPORT 10, 15 (2016).

184. *Id.* at 14.

An eligible student must then continue to enroll in at least twelve credits a semester, completing a total of at least thirty credits per year, except in limited circumstances.¹⁸⁵ If a student fails to complete the thirty credits at the end of the year, she will be eligible for receipt of the award for the first semester, but will be ineligible for any further payments under the Excelsior scholarship.¹⁸⁶ For example, consider a student who completes fifteen credits in her first semester, then, in her second semester and summer, is only able to complete an additional twelve. The student will have completed a total of twenty-seven credits that year, three credits short of the required thirty to receive the Excelsior Scholarship. The first semester will remain covered under the scholarship, but the tuition for the spring and summer courses will become the liability of the student.¹⁸⁷ The student will not be eligible to receive the scholarship in additional semesters.¹⁸⁸ These requirements present disproportionate obstacles to under-prepared and low-income students, who have less resources than their middle-income peers to allocate in unforeseen circumstances. The full-time requirement becomes more complicated for students in need of remedial coursework. While students needing remedial classes are eligible for the scholarship, they must take those remedial courses—which are often prerequisites for credit-bearing courses—in addition to the thirty requisite credits.¹⁸⁹ Again, this presents additional obstacles for students who are already starting college in a disadvantaged position.

Students in families making up to an adjusted gross income of \$100,000 qualify for this award in 2017–2018, increasing to a maximum adjusted gross income of \$125,000 by 2019–2020.¹⁹⁰ The amount of the award is intended to cover the remaining tuition bill up to \$5,500, after Pell and TAP grants and other scholarships are applied, for eligible students.¹⁹¹ The recipient may receive the award for four years of undergraduate study,¹⁹² or two years for an associate degree.¹⁹³ The GPA minimum will be established by school policy, to equate with the minimum for successful completion of the degree.¹⁹⁴

The scholarship also requires a contractual agreement between students and the Higher Education Services Corporation.¹⁹⁵ The student must commit to reside

185. Students disabled as defined by the Americans with Disabilities Act may be eligible under modified criteria. N.Y. EDUC. LAW § 669-h.

186. *Excelsior Scholarship FAQs*, *supra* note 182.

187. *Id.*

188. *Id.*

189. See N.Y. COMP. CODES R. & REGS. tit. 8, § 2201.18(a)(2) (2017) (“Noncredit courses shall not be considered as contributing toward full-time attendance.”).

190. N.Y. EDUC. LAW § 669-h.

191. See *id.* (explaining that the Excelsior Scholarship is applied to the tuition balance after the application of payments received from TAP, Pell, and any other program funding sources the student receives).

192. Up to five years are covered if the program normally takes five years. *Id.*

193. *Id.*

194. *Id.* This is a 2.0 (“C” average) at most City University of New York institutions. See, e.g., *My Degree*, HUNTER COLL. OFFICE OF ADVISING, <http://www.hunter.cuny.edu/advising/my-academic-path> (last visited Nov. 11, 2017); *Grading Policies*, BOROUGH OF MANHATTAN CMTY. COLL., <http://www.bmcc.cuny.edu/academics/page.jsp?pid=1068&n=Grading%20Policies> (last visited Nov. 11, 2017); *Commencement*, LAGUARDIA CMTY. COLL., <https://www.laguardia.edu/Academics/Grad-Requirements/> (last visited Nov. 11, 2017).

195. N.Y. EDUC. LAW § 669-h(e).

in New York State, and only work only in New York after graduation for the number of years equal to the duration of years receiving the award.¹⁹⁶ If a student were to break this contract, the award would be converted to a student loan.¹⁹⁷ The intent of this is obvious; the state is making an investment in education that will pay off by way of a better-educated workforce and more income tax going back to the state. The repercussions, however, are yet to be fully understood given that the program has just launched.

Although the primary focus of the scholarship is to encourage full-time attendance, the Excelsior Scholarship does include some funding for part-time study. The New York State Part-Time Scholarship (PTS) provides awards to community college students taking six to twelve credits per semester who maintain a 2.0 GPA.¹⁹⁸ Students who meet the criteria outlined for eligibility may receive up to \$1,500 per semester for up to two years under the Excelsior Scholarship funding.¹⁹⁹ Further, the law outlines that because of limited funding, priority for funds should be given to applicants in descending order based on financial need.²⁰⁰ For the Excelsior Scholarship, in the event there are more applicants with the same priority than there are remaining scholarships, schools may elect to “distribute[] the remaining number of scholarships by means of lottery or other form of random selection.”²⁰¹

III. THE INSTITUTIONS AND FINANCIAL AID STRUCTURE: NEW YORK CITY AS A CASE STUDY

As noted, the state aid programs were introduced to ensure that no young person with the ability and desire for a higher education was deprived of the opportunity because of lack of money. Data evaluation for current college completion trends, however, leaves no doubt that a large gap exists in educational attainment between low-income and high-income families.²⁰² The most recent addition to New York’s financing of higher education seems to be investing additional money in a familiar format that has proven ineffective for decreasing the gap, largely for the reasons listed below. “Free college” is an illusion more than a reality for much of New York’s most vulnerable students, an issue that could be attended to by understanding the obstacles faced by these students.

While this section is applicable to institutions in any state with similar funding structures, CUNY is used to make the law’s effects more tangible. New York City has long been considered a city of opportunity for its diverse residents. CUNY is one of the country’s largest public university systems.²⁰³ This note uses CUNY as a microcosm to explore the issues that come up in offsetting college costs for

196. *Id.*

197. *Id.* (noting that exceptions will be made for students to complete undergraduate study or attend graduate school on an at-least half-time basis).

198. *Id.* § 667-c-1.

199. *Id.*

200. *Id.*

201. *Id.*

202. See generally *Widening Income Achievement Gap*, *supra* note 2.

203. YALE DAILY NEWS, THE INSIDER’S GUIDE TO THE COLLEGES 514 (40th ed. 2014).

students, and to serve as an example to better understand the applied implications for student aid programs of many states and public universities. Although the analysis and recommendations put forward below specifically address changes to the laws in New York State, it raises points that other states should consider when drafting or amending legislation.

CUNY is the City's publicly-funded network of higher education facilities serving over 245,000 degree-seeking undergraduate students.²⁰⁴ CUNY originated as the "Free Academy" in 1847, providing a free education for all, regardless of background or financial means.²⁰⁵ As the program expanded, however, an evening baccalaureate program was formed in 1909, for which students had to pay.²⁰⁶ Some attended at night because they had to work during the day, a struggle during a time when there was no financial aid.²⁰⁷ Others, however, attended in hopes that their GPA would earn them a spot in the day—and free—program.²⁰⁸ As of 1957, about 36,000 students attended CUNY's then four senior colleges for free, but another 24,000 students attended and paid tuition.²⁰⁹ This merit-based program lasted until 1970, when the focus shifted from lifting academically gifted students to supporting educational opportunity for low-income students.²¹⁰ For a brief period of six years, CUNY was free for all who had a high school diploma.²¹¹ New York later abandoned this tuition-free policy, however, in order to lift the City out of a dire financial crisis.²¹²

Although not free, CUNY has remained an affordable option, and has continued to grow and thrive. On the undergraduate level, it now consists of seven community colleges and eleven bachelor's degree granting institutions.²¹³ CUNY's demographics are diverse—thirty-one percent Hispanic, twenty-six percent Black, and twenty percent Asian—with thirty-six percent of the student population being born outside of the U.S. mainland, and speaking a total of 186 languages.²¹⁴ The average age of a CUNY undergraduate student is twenty-four, and thirty-four percent of the students are attending part-time.²¹⁵ Approximately thirty-nine percent of all CUNY undergraduate students reported a household income of less than \$20,000, and thirty percent report working for pay more than twenty hours per week.²¹⁶ Forty-two percent of this population are first-generation

204. CUNY OFFICE OF INSTITUTIONAL RESEARCH & ASSESSMENT, A PROFILE OF UNDERGRADUATES AT CUNY SENIOR AND COMMUNITY COLLEGES: FALL 2015 (2016), http://www2.cuny.edu/wp-content/uploads/sites/4/media-assets/ug_student_profile_f15.pdf [hereinafter CUNY UNDERGRADUATE PROFILE].

205. *When Tuition was Free*, *supra* note 82.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *See id.*; NATHAN J. DAUN-BARNETT ET AL., COLLEGE COUNSELING FOR ADMISSIONS PROFESSIONALS: IMPROVING ACCESS AND RETENTION 92 (2014).

211. *When Tuition was Free*, *supra* note 82.

212. *Id.*

213. *See Academic Programs*, CITY UNIV. OF N.Y., <http://www2.cuny.edu/admissions/undergraduate/explore/programs/> (last visited Jan. 16, 2018).

214. *Id.*

215. *Id.*

216. *Id.*

college students, meaning they are in the first generation of their families to attend college.²¹⁷ In 2012, approximately eighty-two percent of CUNY community college students entered the system with remedial needs.²¹⁸ The six-year graduation rate for CUNY senior colleges is about fifty-four percent, and eighteen percent for community colleges in three years.²¹⁹

Full-time New York City resident tuition for CUNY senior colleges is \$6,530 per year, and \$4,800 per year for community colleges.²²⁰ Part-time attendees are charged on a per-credit basis, \$285 per credit at senior colleges and \$210 per credit at community colleges.²²¹ The CUNY system’s senior colleges are largely state-funded, but the community colleges are funded by the city.²²²

A. CUNY as a Microcosm: The Additional Funding Provides Little Support to the Students Most in Need

Vulnerabilities in CUNY’s student aid structure illustrate why state financial aid laws are inadequate for the most at-risk students. The additional program being implemented in fall 2017—the Excelsior Scholarship—is expanding access to grants for middle-income families, but does not expand funding or flexibility for low-income students who are already receiving TAP in full.²²³ The intent of the original state financial aid laws was to lift barriers so low-income students could have the same educational opportunities as their peers.²²⁴ While the new scholarship aligns with its stated intent—to aid middle-income families in paying for college—it is designed to work in step with existing aid structures and results in thwarting the progress of the TAP law’s original intent.²²⁵

Students in the income bracket that qualifies for full aid without Excelsior are still dropping out for financial reasons.²²⁶ The aid provided does not take into account additional cost requirements of attending college. For example, consider a student who receives enough TAP and federal grants to cover CUNY’s annual tuition at a senior college, \$630.²²⁷ In addition to tuition, a full-time student pays fees up to \$625.²²⁸ CUNY’s estimated school year budget for a student living at home or with relatives is \$9,762, including books, supplies, transportation, lunch, personal expenses, and room and board—but even with just books, supplies,

217. *See id.*

218. OFFICE OF ACAD. AFFAIRS, CITY UNIV. OF N.Y., CUNY START: ANALYSIS OF STUDENT OUTCOMES 1 (2013), <https://www.cuny.edu/academics/evaluation/reports/CUNYStartStudyFall13.pdf>.

219. *System Retention and Graduation Rates of Full-Time First-Time Freshmen in Baccalaureate Programs by Year of Entry: Total University*, OFFICE OF INST’L RESEARCH & ASSESSMENT, CITY UNIV. OF N.Y. (last updated May 9, 2017), http://www.cuny.edu/irdatabook/rpts2_AY_current/RTGS_0001_FT_FTFR_ASSOC_TOT_UNIV.rpt.pdf.

220. *Tuition & Fees*, *supra* note 64.

221. *Id.*

222. *CUNY’s Funding Sources*, PROF’L STAFF CONG. - CITY UNIV. OF N.Y., <http://www.psc-cuny.org/cunys-funding-sources> (last visited Nov. 11, 2017).

223. *See supra* Section II.D.

224. Governor’s Messages to the Legislature, *supra* note 40, at 366.

225. *Excelsior Scholarship Program*, *supra* note 51; *see also supra* Section II-B.

226. Kolodner, *supra* note 30.

227. *Tuition & Fees*, *supra* note 64.

228. *Id.*

transportation and lunches, the total required beyond tuition is \$3,684 a year.²²⁹ For students who are self-sufficient, paying for their own costs of living and housing, the nine-month academic year can cost over \$20,512.²³⁰ Given the TAP requirements of maintaining Satisfactory Academic Process and being enrolled full-time, a large proportion of a student's time is consumed by class and studying. The remaining time a student has available to work often does not provide sufficient income to meet the cost demands of being a full-time student.

Further, while research shows that living on campus supports student success, no aid program in New York State covers this expense. This is an additional barrier under the current funding structure that continues to widen the opportunity gap. Studies have shown a GPA increase of up to one letter grade in semesters where a student is living on campus.²³¹ Increasing funding for students already highly likely to graduate from college increases the chances that they will be able to go away to school, and, as a result, will more likely perform better in their studies.²³² Without a change in funding for low-income students, they continue to lack the ability to live in campus housing. Of the schools considered most accessible by New York City students because of their location and cost—CUNY campuses—only four provide the opportunity to live on campus. This creates a limited list of options for high-achieving students in New York City from low-income families. State University options outside of CUNY, SUNY colleges, are mostly beyond a commutable distance, making CUNY schools the only option for students that can't afford the high price tag of dormitories.

Living at home, on the contrary, does not necessarily equate to saving money. There is a general assumption that a young adult student can live “at home” and will have her living costs largely subsidized by her family. The reality, however, is that living “at home” is often unstable for low-income families, and many low-income families look to their young adult children to assist them financially.²³³ A 2010 survey showed that 41.7% of CUNY students had experienced housing instability within the course of the academic year,²³⁴ with low-income students being more than twice as likely to experience instability in their housing situation.²³⁵ Further, students who supported themselves financially were twice as likely to experience housing instability.²³⁶ Comparing this information with New York City census data indicates that the percentage of CUNY students living in

229. *Id.*

230. *Id.*

231. Pedro de Araujo & James Murray, *Estimating the Effects of Dormitory Living on Student Performance* 7 (Ctr. for Applied Econ. & Policy Research, Working Paper No. 002-2010, 2010).

232. *Id.*

233. ROBERT I. LERMAN, URBAN INST., ARE TEENS IN LOW-INCOME AND WELFARE FAMILIES WORKING TOO MUCH? 2 (2000).

234. EMMA TSUI ET AL., CAMPAIGN FOR A HEALTHY CUNY, HOUSING INSTABILITY AT CUNY: RESULTS FROM A SURVEY OF CUNY UNDERGRADUATE STUDENTS 3 (Apr. 2011), https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Centers/Center%20for%20Human%20Environments/cunyhousinginstability.pdf.

235. Here, low income is considered an annual household income of less than \$50,000. *Id.* at 4 (defining housing instability as “difficulty paying rent, undergoing frequent moves, living in overcrowded conditions or doubling up with friends or relatives, and spending more than 50% of household income on housing”).

236. *Id.*

government-subsidized housing developments is about five times higher than that of the general population of New York, and the percentage of CUNY students living in homeless shelters was almost three times that of New York City residents as a whole.²³⁷ The high level of housing instability further implicates the necessity for low-income students to decrease their working hours in order to maintain a course load that qualifies them for financial aid.

As middle-income students enjoy an increased opportunity for achieving higher academic success with the new scholarship, lower-income students continue to face great challenges overcoming costs of living—further increasing the gap of opportunity between the two groups.

B. CUNY as a Microcosm: The Complicated, Bureaucratic Scheme Required to Receive Aid Results in Loss of Aid and Unclaimed Funds

Approximately forty percent of low-income students accepted to college never make it to the first day of class, which some attribute to the sticker shock of tuition prices and the complicated array of paperwork requirements.²³⁸ In addition to a school’s own system of required paperwork and the FAFSA and TAP applications, about one-third of students are selected for a complicated verification process that prevents grant distribution until completed.²³⁹ Students are often discouraged by requirements and terminology used in the process. This is particularly true for first-generation students whose parents are unfamiliar with the higher education bureaucracy.²⁴⁰ Among the lowest-income students identified by the FAFSA, there is a significant difference in persistence-to-graduation rates of first-generation college students and those who have had at least one parent attend college.²⁴¹ These gaps are likely due to a lack of support in navigating complicated bureaucratic systems to receive the aid to which the students are entitled.²⁴² Most high school students overestimate the costs of college attendance, thinking it is out of reach because of high costs.²⁴³ This misconception is of greater consequence to low-income students who lack confidence in their families’ abilities to pay for college regardless.²⁴⁴ Research shows that complexity seems to be at the center of why financial aid access does not increase schooling for the targeted populations.²⁴⁵

Students who do make it to the first day of class, and even through the first year, often lose aid for a variety of reasons they do not understand, causing a high rate of attrition. An initial challenge is gathering the documentation necessary to

237. *Id.* at 5.

238. Kolodner, *supra* note 30.

239. *Id.*

240. *Id.*

241. See Mary K. Feeney & John Heroff, The Effects of Need-Based Aid on College Enrollment and Success Among Low-Income Students 14 (July 13, 2010) (unpublished manuscript), <https://ssrn.com/abstract=1639596>.

242. Kolodner, *supra* note 30.

243. Susan M. Dynarski & Judith E. Scott-Clayton, *The Cost of Complexity in Federal Student Aid: Lessons from Optimal Tax Theory and Behavioral Economics*, 64 NAT’L TAX J. 319, 320 (2006).

244. *Id.*

245. *Id.*

complete the application process.²⁴⁶ The assumption behind the applications is that families have properly retained and filed all the required tax information, and that students have access to it, which unfortunately is not always the case. Students who may be independent as far as living on their own and being self-sufficient are considered dependent unless they are over twenty-five or have proof that they are not claimed as a dependent on anyone else's taxes.²⁴⁷ The reality is that many low-income students in New York City are not privy to their parents' tax situation, or may not have a relationship with them at all. It is not rare to meet a community college student who left a toxic home situation at the first opportunity, and is taking steps to become self-sufficient and improve her life circumstances. The current system requires this student not only to find her estranged parents, but to reach out to them for documents that they often do not have or refuse to share. In the case that the student gets the required information, there is a thirty-three percent chance she will be selected for verification after classes start and required to file additional—and often more difficult to obtain—documents.²⁴⁸ Many students will give up at this point, and thus the grants they are eligible for are not dispensed. Consequently, the balance that would have been covered by aid is now the student's account balance—preventing registration for upcoming semesters.²⁴⁹

The complicated rules and regulations required to maintain aid are also an obstacle for low-income students. There are very few programs that clearly lay out the ongoing requirements to maintain aid throughout the college experience. A student often loses aid for failing to understand a number of things including the requirement of reapplying annually, potentially needing to change enrollment status (from full-time to part-time), Satisfactory Academic Progress and Pursuit of Program requirements, and the separate applications that need to be filed for a variety of aid programs.²⁵⁰ The attrition of students resulting from the complicated processes required for financial aid already existed without the new, additional steps that will be required with the Excelsior Scholarship.²⁵¹ The HESC has stood by its commitment to produce a simple application,²⁵² but the requirements include potential traps for students.²⁵³ A thorough understanding of these requirements and risks is another challenge the student must consider and navigate. These requirements are complicated to understand for the average, college-educated

246. See Kolodner, *supra* note 30.

247. N.Y. EDUC. LAW § 663 (3) (b) (McKinney 2017).

248. Kolodner, *supra* note 30.

249. Students with unpaid balances have holds placed on their accounts and are unable to register until the balance has been paid. See, e.g., *Past Due Balances and Collections*, BROOKLYN COLL., <http://www.brooklyn.cuny.edu/web/about/offices/bursar/collections.php> (last visited Nov. 11, 2017).

250. See *supra* Section II.C.2.

251. See *Excelsior Scholarship Program*, *supra* note 51.

252. Financial Aid Counselors have indicated the application takes about 15–20 minutes to complete. See Ben Beagle & Jim Krencik, *Excelsior Scholarship Applications Keep School Counselors Busy*, LIVINGSTON CNTY. NEWS (July 18, 2017), <http://www.thelcn.com/lcn01/excelsior-scholarship-applications-keep-school-counselors-busy-20170718>.

253. For instance, students are required to complete thirty credits by the end of the summer following an academic year in which they received the scholarship. If a student has not been able to accomplish that because of unforeseen circumstances, the first semester will be covered, but the rest of the scholarship—for spring and summer—may be clawed back. This leaves students with a balance that was not anticipated, and loss of eligibility for any future awards. N.Y. EDUC. LAW § 669-h (McKinney 2017).

adult; yet the expectation is that incoming students with nothing more than a high school diploma or GED, often needing remediation in reading comprehension, are able to navigate the need-based student financing system. Research by behavioral economists applying principles of Optimal Tax Theory to the financial aid system reflects an equally abysmal conclusion: “[C]omplexity disproportionately burdens those with the least ability to pay and undermines redistributive goals . . . The U.S. system for subsidizing college students hides information about the affordability of college behind a thicket of paperwork.”²⁵⁴

C. CUNY as a Microcosm: The Financial Aid Difficulties Are Exacerbated for Specific, Vulnerable Populations

The lack of opportunity for low-income students paired with the complicated system they are required to navigate poses issues across the board with providing access to education for traditionally marginalized groups. For particular groups of students, however, these difficulties are exacerbated. This section highlights how the above pitfalls are just the starting point for working students, non-citizens, and students who have not been adequately prepared for college by their K-12 institutions.

1. Part-Time, Working Students

As policy-driven programs and laws expand to improve the retention and graduation rate of college students, all eyes are on *what works*. Student support programs that provide additional resources to support retention and graduation generally require full-time participation because students who attend college full-time are more likely to become engaged, complete gateway courses, and persist to graduation.²⁵⁵ What many of these programs and research fail to consider are the reasons why part-time students are not persisting to graduation; perhaps it is the overwhelming amount of attention given to full-time students that perpetuates part-time student’s failure to persist.

History shows a lack of support for this population of students dating as far back as 1909, when tuition was free for the day students but not for those in the evening program at CUNY.²⁵⁶ Students who attend part-time are often in a position where they need to work to support themselves, and therefore take fewer credits to maintain life balance, limiting their aid eligibility.²⁵⁷ Programs geared towards engaging students and creating community, attributes well known to support persistence, often fail to consider the working professional and part-time student schedules—creating a feeling of detachment from the campus environment.²⁵⁸

254. Dynarski & Scott-Clayton, *supra* note 243, at 319, 344.

255. CTR. FOR CMTY. COLL. STUDENT ENGAGEMENT (CCSSE), EVEN ONE SEMESTER: FULL-TIME ENROLLMENT AND STUDENT SUCCESS 2017 NATIONAL REPORT 2 (2017) [hereinafter CCSSE].

256. *When Tuition was Free*, *supra* note 82.

257. *See supra* pp. 270–71.

258. *See* Christine P. Nguyen, *Challenges of Student Engagement in Community Colleges*, 32 VT. CONNECTION 58, 59–60 (2011).

Full-time schedules have a significant effect on a student's income potential. In most cases, students are only eligible to receive aid as a full-time student, a schedule that would minimize the number of hours they can work.²⁵⁹ Thirty percent of all students at CUNY report working for pay for over twenty hours a week.²⁶⁰ A student working twenty hours a week making \$13 an hour, however, is taking home less than \$8,000 in that same nine-month period. These students are often required to take fewer classes to increase their ability to pay for their expenses. Dropping to just eleven credits causes a student to be part-time, losing her eligibility for TAP and the Excelsior Scholarship.²⁶¹ Accreditation boards generally require that a class meet one hour per credit, with a minimum of two hours of out-of-classroom student work.²⁶² Therefore, an eleven-credit schedule requires thirty-three hours per week of a student's time, minimizing the number of hours a student can work to support herself.

Next, very little tuition funding is available to support the working student. Despite the availability of APTS, the percentage of State aid allocated to it decreased from 2.9% in 1999–2000 to 1.2% in 2017–2018.²⁶³ While the law lays out the groundwork for part-time TAP, only 0.2% of part-time students were receiving TAP at CUNY community colleges in 2015.²⁶⁴ A TAP law pre-requisite for receiving part-time aid is at least one-year of full-time study.²⁶⁵ This pre-requisite assumes a student is able to quit or decrease her work hours with a potentially steady job to attend school full-time for one year before being able to resume her work schedule. A decrease in work hours may result in the loss of the income a family is accustomed to, the loss of benefits, and quite possibly the termination of the position.

The Excelsior Scholarship does make an effort to include part-time students. The scholarship provides for up to \$1,500 per semester, but only for up to four semesters.²⁶⁶ For a sixty-credit degree, the average requirement for an associate's, taking six credits per semester can take a student up to five years to complete.²⁶⁷ This leaves a student with more than half her degree unpaid for, whereas the student who can afford to attend full-time, whose family makes \$90,000 a year, is able to have her education fully funded. The law clearly states that the awards will be granted "pursuant to future appropriations for the continuance of [the program]."²⁶⁸ As TAP support for part-time students shows,²⁶⁹ there is a strong

259. *See supra* pp. 270–71.

260. CUNY UNDERGRADUATE PROFILE, *supra* note 204.

261. *Excelsior Scholarship Program*, *supra* note 51.

262. *See, e.g.*, MIDDLE STATES COMM. ON HIGHER EDUC., CREDIT HOUR POLICY (rev. Oct. 30 2012), <http://www.msche.org/documents/CreditHourPolicyRev112012.pdf>.

263. *Compare* STATE DIV. OF BUDGET, FY 2017 ENACTED BUDGET FINANCIAL PLAN 94 (2016), <https://www.budget.ny.gov/pubs/archive/fy17archive/enactedfy17/FY2017FP.pdf>, *with* N.Y. STATE DIV. OF BUDGET, 1999–2000 EXECUTIVE BUDGET 67 (1999), <https://www.budget.ny.gov/pubs/archive/fy990archive/990appd1/append1.pdf>.

264. CTR. FOR AN URBAN FUTURE, *supra* note 31, at 5.

265. *Part-Time TAP*, N.Y. STATE HIGHER EDUC. SERVS. CORP., *supra* note 134.

266. N.Y. EDUC. LAW § 667(c)(1) (McKinney 2017).

267. Ten semesters with six credits per semester, not including summer and winter terms, which are generally disqualified from financial aid awards.

268. N.Y. EDUC. LAW § 669-h (McKinney 2017).

269. *See supra* p. 271.

likelihood that the part-time component of the scholarship will take more of a back seat over time as budgets are constrained. It is also yet to be seen whether the HESC will require students to receive APTS—an additional application—in order to receive the Excelsior Scholarship.

2. A Broad Spectrum of Non-Citizens

The above challenges increase for students with specific immigration statuses. Minimizing access to financial aid for students who fall outside of the eligibility requirements while expanding aid to middle-income families continues to ensure that many immigrant students live as secondary to their peers. As discussed in Section II.C.1, eligibility for TAP and Excelsior excludes many immigrants, including those that are residing under the color of law,²⁷⁰ defining groups of legally-residing non-citizens with access to in-state tuition and state professional licenses, but no aid to support the financing of their college degree.²⁷¹ The laws exclude the roughly 4,550 undocumented students graduating from New York high schools each year, who have already received educational investment from the state.²⁷² The additional funding that the state is now providing to immigrant students’ U.S. citizen peers is exacerbating the gap in eligibility for basic funding between middle-income and lower-income students.

Currently, all non-citizen students are eligible for in-state tuition in New York State if they graduated from a New York high school or received a GED in the state.²⁷³ Most of these students are ineligible to receive aid towards tuition, however, making the in-state tuition largely a façade in the face of reality. In 2002, the Assembly amended New York Education Law sections 6206 and 6301 to allow all classes of immigrants to be charged resident tuition at CUNY and SUNY schools, so long as they met the requisite residency requirements.²⁷⁴ The aim of the amendment was to extend the benefit to those students similarly situated to their peers, “who had lived in New York, have a relationship to the community, and have strong Educational ties to New York State.”²⁷⁵ The effort sought to recognize the contribution immigrant students have made to the state by allowing them to “receive a higher education at the same tuition rate charged to other New Yorkers.”²⁷⁶ The language makes clear, however, that students are receiving in-state tuition rates, and are not considered New York residents. Congress’ passing of section 505 of the Illegal Immigration Reform and Immigrant Responsibility

270. This covers a variety of immigration statuses that allow the individual to live in the United States legally. *See, e.g., In re Aliessa v. Novello*, 96 N.Y.2d 418, 422 (N.Y. 2001) (explaining the ways in which immigrants may reside in the United States legally).

271. *Non-U.S. Citizens*, *supra* note 105.

272. *New York State DREAM Act*, *supra* note 106.

273. OFF. OF THE ST. COMPTROLLER, THE NEW YORK STATE DREAM ACT, REPORT 1-2014 2 (May 2013) [hereinafter DREAM ACT REPORT].

274. Act of June 20, 2002, CH. 327, 2002 N.Y. SESS. LAW NEWS 7784 (McKinney) (amending law concerning payment of tuition and fees by non-resident students).

275. Governor’s Program Bill Memorandum #127, Ch. 327, 2002 N.Y. LEGIS. ANN. 187 (2002).

276. *Id.*

Act of 1996 prohibited the conferral of residency-based benefits to undocumented immigrants if that same benefit is not available to non-resident U.S. citizens.²⁷⁷

The aim of extending in-state tuition rates to non-citizens, to offer the “same tuition rate” for those students as their peers, is increasingly empty. Under the Excelsior Scholarship, a DACA-eligible CUNY student is paying almost \$30,000 for a four-year degree, while the same degree is free for her peers.²⁷⁸ A free degree for some, and a \$30,000 degree for non-citizens, is hardly extending a benefit supporting a group “similarly situated to their peers.” Additionally, New York allows professional licensing for thirty-six professions to a broad category of non-citizens lawfully present in the United States, many of which have higher education requirements.²⁷⁹ This clearly supports the notion that New York State encourages non-citizens to pursue an education and contribute to the state economy like their citizen peers.

While in-state tuition saves a student approximately \$10,500 a year in tuition costs, the \$30,000+ total price tag for a four-year degree is still out of reach for most families, particularly those with limited work eligibility. It is estimated that, only five to ten percent of the undocumented students graduating from New York high schools each year are able to attend college due to costs and their ineligibility for aid.²⁸⁰ Overall, undocumented and DACA students make up approximately 2.8% of the CUNY student body,²⁸¹ but only half attended full-time.²⁸² Further, at CUNY, in order to qualify for in-state tuition, students must sign an affidavit attesting to their immigration status, and commit to pursue legalization if the option were to become available.²⁸³ While much of the data is anecdotal, CUNY staff and faculty have indicated that undocumented students tend to be some of the most motivated and high-performing students.²⁸⁴

277. Laura A. Hernández, *Dreams Deferred: Why In-State College Tuition Rates Are Not a Benefit Under the IIRIRA and How This Interpretation Violates the Spirit of Plyler*, 21 CORNELL J.L. & PUB. POL. 525 (2012) (explaining that although eleven states currently allow undocumented immigrants to pay an in-state tuition rate if they meet certain requirements, such as graduating from a state high school, critics say it is a de facto residency requirement violating section five of the IIRIRA).

278. For a student with a family income up to \$100,000. See *Tuition & Fees*, *supra* note 64.

279. See *New York State Licensed Professions*, N.Y. STATE EDUC. DEP'T, <http://www.op.nysed.gov/prof/> (last visited Jan. 17, 2018).

280. Press Release, N.Y. State Assembly, Assembly Passes the New York State DREAM Act (June 6, 2016), <http://assembly.state.ny.us/Press/20160606/>.

281. DREAM ACT REPORT, *supra* note 273, at 2.

282. *Id.* at 4.

283. See, e.g., BOROUGH OF MANHATTAN CMTY. COLL., RESIDENCY FORM - PART C: AFFIDAVIT OF INTENT TO LEGALIZE IMMIGRATION STATUS (2015), <https://www.bmcc.cuny.edu/registrar/upload/ResidencyFormPartCRevised10.2015.pdf>.

284. See Dylan Conger & Colin C. Chellman, *Undocumented College Students in the United States: In-State Tuition Not Enough to Ensure Four-Year Degree Completion*, 8 EDUC. FINANCE & POL'Y 364 (2013) (stating “undocumented students perform well in the short-term, earning higher grades and higher rates of course and associate degree completion than their U.S. citizen counterparts”); AMY HSIN & FRANCESCA ORTEGA, THE EFFECTS OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS ON THE EDUCATIONAL OUTCOMES OF UNDOCUMENTED STUDENTS 6–7 (IZA–Inst. Labor Econ., Discussion Paper 11078, 2017) (“Undocumented youth who enroll in higher education tend to be more positively selected; they are academically gifted, motivated and resilient individuals with exceptionally high educational aspirations.”); Carolina Bank Muñoz, *A Dream Deferred: Undocumented Students at CUNY*, 84 RADICAL

3. Underprepared Students

The need for remediation—developmental work to bring students to a level considered college ready—imposes considerable costs on students and their families.²⁸⁵ Students are spending an average of \$12,000 extra to effectively catch up to others who were more academically prepared from high school,²⁸⁶ and the costs are more than financial. Bachelor degree-seeking students with remedial needs are seventy-four percent more likely to drop out of college than non-remedial students.²⁸⁷ Unfairly, the costs and burdens of remedial work fall on the student, despite often being a product of underfunded and insufficient K-12 public schools.²⁸⁸

As discussed in Section II.C of this article, accessing funding from TAP and the Excelsior Scholarship is highly difficult for students who need remedial coursework. In a student’s first semester, a full-time student only needs to be enrolled in three credits of non-remedial coursework to receive TAP,²⁸⁹ but must be enrolled in at least twelve non-remedial credits to receive the Excelsior Scholarship.²⁹⁰ The number required for TAP increases to six credits of non-remedial coursework after the first semester.²⁹¹ The courses also do not count towards the Satisfactory Academic Progress requirement, often resulting in a student losing her aid.²⁹²

Although some remedial work is included in the required full-time load for TAP, time-to-degree can be delayed significantly by a student’s remedial needs.²⁹³ For example, consider Borough of Manhattan Community College, a CUNY school where approximately seventy-three percent of entering students require math remediation.²⁹⁴ Several associate’s degrees require the completion of Calculus.²⁹⁵ To take Calculus, which is worth four credits, a student must complete Pre-calculus, worth an additional four credits.²⁹⁶ Pre-calculus is not a requirement for the degree, but a student not placing directly into Calculus will need to fit it

TEACHER 8, 12 (2009) (“In my experience, undocumented students are among the most self-motivated and focused students I have had.”).

285. *Supra* p. 276

286. Editorial, *Guess Who’s Taking Remedial Classes*, N.Y. TIMES (May 10, 2016), <https://www.nytimes.com/2016/05/10/opinion/guess-whos-taking-remedial-classes.html>.

287. *Id.*

288. In 2016, the Office of the Bronx Borough President made initial efforts to explore shifting the financial responsibility of academic deficiencies caused by New York City Schools to the New York City Department of Education. Telephone Interview with Victoria Reing, Director of Policy, Office of the Bronx Borough President (Dec. 2015).

289. N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1 (2017).

290. *Id.* § 2201.18(a)(2).

291. *Id.* § 145-2.1.

292. *Noncredit Study*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/tap-coach/74-noncredit-study.html> (last visited May 6, 2017).

293. *Supra* p. 276.

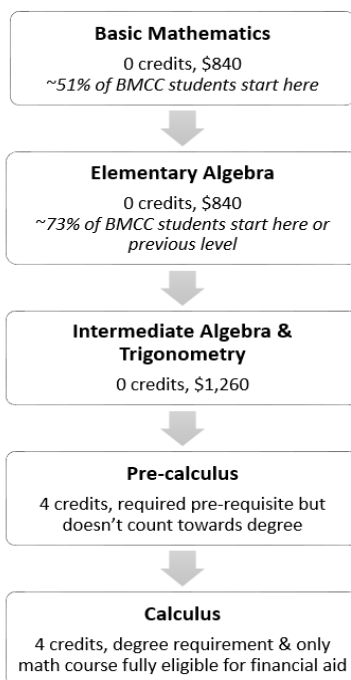
294. OFFICE OF INST’L EFFECTIVENESS & ANALYTICS, BOROUGH OF MANHATTAN CMTY. COLL., ENROLLMENT, RETENTION, AND COMPLETION REPORT 28 (2017) [hereinafter ERC REPORT].

295. *See Academic Programs*, BOROUGH OF MANHATTAN CMTY. COLL., <http://www.bmcc.cuny.edu/academics/programs.jsp> (last visited Nov. 11, 2017).

296. *Mathematics Course Listings*, BOROUGH OF MANHATTAN CMTY. COLL., <http://www.bmcc.cuny.edu/math/courses.jsp> (last visited May 8, 2017).

into her course sequence. A prerequisite for placing into Pre-calculus is Intermediate Algebra and Trigonometry, a remedial course that is worth zero credits but costs the equivalent of six credits, \$1,260.²⁹⁷ This is an additional course not required for the degree that a student will have to add to the sixty credits already required to graduate. Most students do not even place into Intermediate Algebra and Trigonometry, and need to start with the pre-requisite for that course, which is again zero credits, but costs the equivalent of four credits, \$840, or potentially an even lower basic math.²⁹⁸

Figure 1. Required Courses for Calculus.²⁹⁹



Therefore, a student pursuing an Associate in Arts degree in Economics who has entered college underprepared for college-level math work has started college in a hole. If the student places into Elementary Algebra, not even the most basic of math courses, she is required to take that course and Intermediate Algebra, worth a total of eight credit hours and \$2,100, without accumulating any credits for the work.³⁰⁰ A working student who is taking the required twelve credits to be full-time is now looking at only taking eight credits that count towards her degree for the first two semesters, a total of sixteen credits in the first year. That leaves the student with a remaining forty-four credits of degree requirements. The student will now likely require a total of two-and-a-half to three years to graduate—barring

297. *See id.*

298. *See* ERC REPORT, *supra* note 294, at 29.

299. *Id.*; *Mathematics Course Listings*, *supra* note 296.

300. *Mathematics Course Listings*, *supra* note 296.

any unforeseen circumstances resulting in a withdrawn course or an unsatisfactory grade—for what has traditionally been considered a two-year degree. This scenario also does not take into consideration that eighty-eight percent of Borough of Manhattan Community College students require remediation in at least two areas.³⁰¹ The student in the above scenario, then, is likely taking at least an additional six credit hours, \$1,260, for writing or reading courses that also do not count towards her degree.

As stated above, New York Education Law section 665(6)(c)’s “Pursuit of Program” requires an accumulation of a certain percentage of credits each semester for a student to maintain financial aid eligibility.³⁰² Taking twenty-four “credit hours,” where twelve of those credits are remedial, the student only receives twelve credits towards her degree and financial aid,³⁰³ which can result in loss of financial aid. Students are then required to pay out-of-pocket until they are able to catch up and regain Satisfactory Academic Progress.³⁰⁴ This is a costly and exhausting process for a student that often results in her dropping out—an expensive price to pay for what is often a failure of preparation by primary and secondary schools.³⁰⁵

What has made this uphill climb even steeper are the new regulations put forward for the Excelsior Scholarship. As discussed in Section II.D, eligibility for the scholarship requires the completion of thirty credits per year. Non-credit remedial courses do not count towards these thirty credits,³⁰⁶ a structure requiring students who are considered unprepared for college work to take more classes than a better-prepared student. For example, consider the above scenario, where a student needs Elementary Algebra and Intermediate Algebra—both non-credit courses—prior to taking Pre-calculus. In her first semester, she is required to take twelve credits of credit-bearing coursework towards her degree, plus the four-credit hour, zero-credit course in order to pursue Excelsior scholarship eligibility. If she also needs a remedial writing course, which is worth zero credits and six credit hours,³⁰⁷ she is looking at a total of twenty-two credit hours in her first semester. The more proficient student only needs to take twelve credits, and on average takes fifteen. Twenty-two credit hours is the equivalent of twenty-two hours in the classroom, and based on expert recommendations, at least forty-four hours of coursework outside of the classroom.³⁰⁸ For the student who also needs to work, this requirement essentially disqualifies her from Excelsior Scholarship eligibility. Considering that under-preparedness tends to be a result of a student’s K-12 education,³⁰⁹ this is a hefty request of a student who may be trying to use education to rise out of his circumstances.

301. See ERC REPORT, *supra* note 294, at 28.

302. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(g); N.Y. EDUC. LAW § 665(6)(c) (McKinney 2017).

303. HESC POLICY GUIDE, *supra* note 100, at Ch. 3.01(e).

304. *Id.* at Ch. 3.01(g).

305. See Neutch, *supra* note 25.

306. N.Y. COMP. CODES R. & REGS. tit. 8, § 2201.18 (a)(2) (2017).

307. *English Course Listings*, BOROUGH OF MANHATTAN CMTY. COLL, <http://www.bmcc.cuny.edu/english/courses.jsp> (last visited July 29, 2017).

308. See MIDDLE STATES COMM., *supra* note 262.

309. See Ostrander, *supra* note 12; BAKER, *supra* note 147, at 25.

D. Initial Results

Halfway through its first semester, the Excelsior Scholarship is serving fewer students than initially anticipated.³¹⁰ Governor Cuomo's office announced that approximately 22,000 CUNY and SUNY students, 5.3% of the in-state population, qualified for the Excelsior Scholarship.³¹¹ Of CUNY's approximately 245,000 undergraduate students, however, only 4,700—1.9% of students—are estimated to be receiving aid through the Excelsior Scholarship.³¹² Numbers are still an estimate as of November 2017, pending the completion of a total of thirty credits by the end of summer 2018.³¹³ Experts anticipate that this will eliminate a significant number of students from eligibility in future semesters.³¹⁴ While many more students are receiving enough aid to cover tuition, this is from previously existing programs, Pell and TAP, and not a result of the new scholarship.³¹⁵ In fulfillment of one hopeful prediction,³¹⁶ community colleges have reported an increase in applications related to what they believe to be the Excelsior Scholarship, although most applicants did not and will not qualify for Excelsior.³¹⁷

IV. WHAT THE NEW YORK FINANCIAL SUPPORT LAWS HAVE GOTTEN RIGHT

Despite its pitfalls, New York State offers the second-largest and one of the most generous needs-based aid programs in the country.³¹⁸ The maximum awards relative to the low in-state tuition costs have propelled almost six times as many low-income residents into the middle-class than did all eight Ivy League campuses plus Duke, MIT, Stanford, and the University of Chicago combined.³¹⁹ Recom-

310. See *Excelsior Scholarship Program Overview*, POLITICO, <http://www.politico.com/states/f/?id=0000015b-cb3e-d0b0-afdb-dfff20e0001> (last visited Nov. 29, 2017) (estimating that approximately 31,300 of 413,000 CUNY and SUNY students would be eligible as of May 2017).

311. *Governor Cuomo Announces Approximately 53% of Full-Time SUNY & CUNY In-State Students Will Go to School Tuition Free*, WEBSITE FOR GOVERNOR ANDREW CUOMO (Oct. 1, 2017), <https://www.governor.ny.gov/news/governor-cuomo-announces-approximately-53-full-time-suny-cuny-state-students-will-go-school>.

312. Blair Horner, *NY's "Tuition-Free" Scholarship Gets Its First Grade*, WAMC NORTHEAST PUBLIC RADIO (Dec. 18, 2017), <http://wamc.org/post/blair-horner-nys-tuition-free-scholarship-gets-its-first-grade>.

313. *Excelsior Scholarship FAQs*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/financial-aid/types-of-financial-aid/nys-grants-scholarships-awards/the-excelsior-scholarship/excelsior-scholarship-faqs.html> (last visited Nov. 11, 2017) (stating that "a student who fails to complete 30 credits in any year is ineligible for any future payments under the Program").

314. See Monica Disare, *New York's Free-College Program Comes with a Big Catch: Students Who Fall off Track Risk Losing Their Scholarships*, CHALKBEAT (Dec. 6, 2017), <https://www.chalkbeat.org/posts/ny/2017/12/06/new-yorks-free-college-program-comes-with-a-big-catch-students-who-fall-off-track-risk-losing-their-scholarships/>.

315. See Horner, *supra* note 312.

316. See *infra* p. 26.

317. Darren Johnson, *Free Community College . . . For Some*, CAMPUS NEWS (Sept. 12, 2017), <http://ccnews.info/2017/09/12/cover-story-free-community-college-for-some/> (highlighting interviews with two community college executives discussing an increase in enrollment for fall 2017).

318. DAUN-BARNETT ET AL., *supra* note 210.

319. See David Leonhardt, *America's Great Working Class Colleges*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/opinion/sunday/americas-great-working-class-colleges.html> (based

mendations to address the gaps that remain are addressed in Part V, but this part acknowledges the particular aspects of the aid programs that New York has gotten right.

A. Money Towards Open Source Resources

Although TAP and Excelsior funding do not help students with the cost of textbooks, the state has set aside money that will hopefully offset these costs in the future. The recently-passed state budget committed \$4 million to the development of open source resources such as e-books for CUNY students to help offset the prohibitive costs of textbooks.³²⁰ The budget provision commits this money to “expanding open educational resources . . . targeting high-enrollment courses . . . with the highest cost-savings potential for students.”³²¹ Books and supplies can cost over \$1,300 a year,³²² a huge barrier for a low-income student. By encouraging the use of open access resources, the state has removed one more obstacle for students overwhelmed by the cost of college and limited work hours.

B. The Part-Time Scholarship

Under the Excelsior Scholarship, the Governor has included funding to help offset costs for students attending community colleges on a part-time basis.³²³ The scholarship amounts to a maximum total of \$6,000 over two years,³²⁴ less than half of what it costs for a student taking six credits a semester.³²⁵ It is commendable, however, that at least consideration is given to this student population as the number of non-traditional students continues to climb.³²⁶

C. Funding Policy and Research-Based Accelerated Programs

New York’s commitment to CUNY’s policy-based Accelerated Study for Associates Program (ASAP) has been a continuing and commendable endeavor. Launched in 2007, ASAP is a comprehensive support program intended to help more community college students graduate more quickly—and it is working.³²⁷ In

on a cohort of students born in 1980 who moved from the bottom fifth of income distribution and ended up in the top three-fifths).

320. CAPITAL PROJECTS BUDGET, 2017 N.Y. Laws ch. 54.

321. *Id.*

322. *Tuition & Fees*, *supra* note 64.

323. *New York State Part-Time Scholarship (PTS) Award Program*, N.Y. STATE HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/pay-for-college/financial-aid/types-of-financial-aid/nys-grants-scholarships-awards/new-york-state-part-time-scholarship-pts-award-program.html> (last visited Nov. 11, 2017).

324. N.Y. EDUC. LAW § 667(c)(1) (2017).

325. *Tuition & Fees*, *supra* note 64.

326. Between 2010 and 2015, part-time enrollment only decreased by less than half of full-time enrollment. Part-time enrollment is expected to increase by fifteen percent between 2015 and 2026. *Undergraduate Enrollment*, NAT’L CTR. FOR EDUC. STATISTICS (May, 2017), https://nces.ed.gov/programs/coe/indicator_cha.asp.

327. *See generally* SUSAN SCRIVENER ET AL., MDRC, DOUBLING GRADUATION RATES: THREE-YEAR EFFECTS OF CUNY’S ACCELERATED STUDY IN ASSOCIATE PROGRAMS (ASAP) FOR DEVELOP-

response to the high number of young adults living in poverty in New York City,³²⁸ Mayor Michael R. Bloomberg developed the Center for Economic Opportunity (CEO), and then passed an Executive Order formally establishing it a year later.³²⁹ New York created CEO to implement innovative strategies to combat poverty, and it is funded by a combination of public and private resources.³³⁰ Almost immediately, CEO created ASAP to address multiple potential barriers that have been shown to prevent retention and graduation, perpetuate the poverty cycle, and keep young people out of the workforce.³³¹

First, ASAP offers research-proven holistic supports. It provides students with dedicated and focused advisors, enhanced career services, and targeted tutoring for remedial coursework.³³² Next, but definitely not least, it removes significant financial barriers for students. Although it requires full-time enrollment, it provides the resources needed to compensate for the potential loss of revenue that results in taking more credits.³³³ As the executive order recognized:

It is one thing to tell students to attend full time and hope that they can find the resources to do so; it is an entirely different thing to tell them to attend full time while also covering their tuition, books, and transportation, and providing an array of student services to support them in school.³³⁴

The program requires students to file for financial aid, and if they qualify for even one dollar worth of aid, ASAP covers the rest of the tuition.³³⁵ ASAP also provides funding for students to take courses during winter and summer intersessions, decreasing time-to-degree.³³⁶ It also provides funding to eliminate or significantly reduce the cost of books and gives each student an unlimited Metrocard, which provides free access to New York City's public transportation system.³³⁷ A key feature of the program's success is tying the receipt of the Metrocard to compliance with the program's requirements, including monthly visits with the student's advisor, tutoring for remedial courses, and maintaining full-time enrollment, supporting the return on investment.³³⁸

MENTAL EDUCATION STUDENTS (2015), https://www.mdrc.org/sites/default/files/doubling_graduation_rates_fr.pdf.

328. N.Y.C. CTR. FOR ECON. OPPORTUNITY, EARLY ACHIEVEMENTS & LESSONS LEARNED 7 (Jan. 2009), http://www1.nyc.gov/assets/opportunity/pdf/early_achievement_report_2008.pdf.

329. Ctr. for Econ. Opportunity, N.Y.C. Exec. Order No. 117 (June 13, 2008), http://www.nyc.gov/html/records/pdf/executive_orders/2008EO117.pdf.

330. CEO manages an annual "Innovation Fund" that includes new City funds, funding from the Childcare Tax Credit, City education funds, State and Federal funding as well as private grants. N.Y.C. CTR. FOR ECON. OPPORTUNITY, EARLY ACHIEVEMENTS, *supra* note 328, at 5.

331. *See generally id.*

332. *Id.* at iii.

333. *Id.* at 9.

334. *Id.*

335. *See id.* at iii.

336. *Id.* at 9.

337. *See id.* at iii.

338. *See SCRIVENER ET AL.*, *supra* note 327, at ES-10.

High program costs seem to be the biggest inhibitor for the adoption of similar programs, but considering that ASAP is graduating over fifty percent of its students in three years, more than double the average for similar community colleges, it is worth the investment.³³⁹ The substantial increase in the number of three-year graduates resulted in a \$6,500 decrease in cost per completed degree for ASAP students.³⁴⁰ “When converted into overall benefits generated by the . . . enrollees, the considerably higher productivity of ASAP in producing associate degrees would provide fiscal benefits to the taxpayers of \$46 million dollars beyond those of investing an approximately equal amount in the conventional degree program.”³⁴¹

D. Supplemental Tuition Assistance Program for Remedial Coursework

Although limited in scope, the New York Regulations of the State Education Commissioner provide for extra funding to remedy academic deficiencies that would otherwise prevent a student from successfully completing a degree.³⁴² The Supplemental Tuition Assistance Program (STAP) provides coverage for a full-time summer load of remedial courses in the session immediately preceding the initial year of matriculated study.³⁴³ STAP was originally created in 1981 to “ensure the continuance of financial assistance to educationally disadvantaged students.”³⁴⁴ It provided one additional year of tuition support for underprepared undergraduate students, and did not penalize them for not meeting the Pursuit of Program requirements.³⁴⁵ Although currently less comprehensive than the original vision, programs covered by STAP generally immerse students in developmental work that gets students through remediation as quickly as possible.³⁴⁶ Provisions such as these decrease the possibility that a student will eventually lose TAP eligibility as a result of failing Satisfactory Academic Progress.³⁴⁷

V. RECOMMENDATIONS

As additional states debate legislation to decrease student debt and improve access to education, lawmakers should consider how to implement programs in an equitable way. An overall recommendation would be to include students and those closest to students in the conversation. Advisors, financial aid representatives, and faculty are often privy to the situations that prevent persistence, and anecdotally

339. *See id.* at 2.

340. HENRY M. LEVIN & EMMA GARCIA, CTR. FOR BENEFIT-COST STUDIES OF EDUC., COLUMBIA UNIV., BENEFIT-COST ANALYSIS OF ACCELERATED STUDY IN ASSOCIATES PROGRAMS (ASAP) OF THE CITY UNIVERSITY OF NEW YORK 4 (2013), http://www1.nyc.gov/assets/opportunity/pdf/Levin_ASAP_Benefit_Cost_Report_FINAL_05212013.pdf.

341. *Id.* at 39.

342. N.Y. COMP. CODES R. & REGS. tit. 8, § 145-2.1(a) (2017).

343. *Id.*

344. Governor’s Approval Memorandum, Ch. 724, 1981 N.Y. LEGIS. ANN. 390 (1981).

345. *See Supplemental Tuition Assistance Program*, HIGHER EDUC. SERVS. CORP., <https://www.hesc.ny.gov/partner-access/financial-aid-professionals/tap-and-scholarship-resources/tap-coach/101-supplemental-tuition-assistance-program.html> (last visited May 21, 2017).

346. *See id.*

347. *See supra* Section II.C.2.

may be able to shift the conversation to better consider the needs of a diverse set of students. The list of recommendations in this article incorporates the perspective of higher education professionals and students.

The recommendations below are most directly associated with the higher education financing structure of New York State, but are applicable considerations for other states as they expand funding and access to college education.

A. Breaking the Cycle of Poverty by Disassociating a Student's Ability to Succeed Academically from the Financial Resources of Her Family

First, the State should seek to rectify the disparity between low- and high-income students' college attendance rates. Increasing aid for middle-income students who are already more likely to graduate from college than their lower-income peers will not provide the biggest return on investment for the state economy in the long run. Investing in resources that will allow low-income, high-achieving students the same opportunities as high-achieving students from other income quartiles is more likely to reduce disparities. As discussed previously, it is not just the cost of tuition that prevents low-income students from completing college. Programs that offset the costs of books, transportation, and meals would help low-income, high-achieving students focus on their studies, comparable to the way that their higher-income peers can.³⁴⁸ Amending the New York Education Laws for TAP and Excelsior to cover incidental education costs for low-income students will increase persistence to graduation and help even the playing field.

Increasing availability of on-campus work-study opportunities would enable full-time students who do need to work a significant number of hours to do so. On-campus jobs support persistence by affording students a manager who understands the importance of a student's academic obligations, decreasing commute time, increasing class attendance, and fostering a stronger tie to the college community. The additional experience will also help level the playing field after graduation, where first-generation college students tend to make twelve percent less than their peers.³⁴⁹ Implemented under the Higher Education Act of 1965, the Federal Work Study Program provides part-time, on-campus employment to qualified students who need to work to offset the cost of their education.³⁵⁰ The school or employer pays up to fifty percent of the student worker's wages, and federal funding provides the rest.³⁵¹ In addition to financially supporting the student worker, at least seven percent of the placements must be in a role that supports the community³⁵²—creating a win-win situation for the institution and the student. State legislators should consider creating legislation that would fund additional

348. *See supra* Section IV.C.

349. Louisa Eismann, *First-Generation Students and Job Success*, NAT'L ASS'N OF COLLEGES & EMPLOYERS (Nov. 1, 2016) <https://www.nacweb.org/job-market/special-populations/first-generation-students-and-job-success/>.

350. *Federal Work-Study (FWS) Program*, OFFICE OF FED. STUDENT AID, U.S. DEP'T OF EDUC., <https://www2.ed.gov/programs/fws/index.html> (last visited Nov. 29, 2017).

351. *Id.*

352. *Id.*

positions throughout the university system, creating student jobs and decreasing the need for reliance on grants.

Investing in college housing will aid in removing housing insecurities from the equation for students, and allow them to focus on their studies. With research showing that living on campus is linked to higher academic success, on-campus housing that is only attainable for students with greater means widens the opportunity gap.³⁵³ Consider, for example, co-op model housing, a shared equity model in which a student’s room and board is linked to her commitment and service to the living community.³⁵⁴ Creating co-op programs would decrease financial strain on low-income students.³⁵⁵ An additional approach would be the development of a clear pathway to scholarships that would support living costs and on-campus housing.

B. Investing in Opportunities for Part-Time Students

Future legislation cannot continue to penalize the students who have financial obligations limiting their ability to fulfill a full-time course load. Funding for part-time aid programs should be parallel to full-time programs, involving the same application and the same percentage of cost coverage. Current processes in New York State require part-time students—who are often not able to be on campus during operating hours of financial aid offices—to submit an additional application beyond what is required of full-time students.³⁵⁶ They then wait to find out if they will get aid, given budgetary limits.³⁵⁷ By allowing the main state aid application to serve as a blanket application to TAP, regardless of credit load, New York would simplify an already burdensome process for students who are balancing more responsibilities than the average student. To align with the original intent of part-time aid, and provide additional help for a student population that faces a unique set of challenges that full-time students do not, the state should make support for part-time students accessible.³⁵⁸

At some point, students need to be given deference as the experts about their own lives, allowing them to identify a credit load that enables them to learn at a pace that is best for them. There is understandably hesitation to support part-time attendance in light of research showing that full-time attendance is linked to persistence,³⁵⁹ but this is information that can be shared with the students at a time where they are making their decisions. The state could provide advising resources and personnel specific to this population who are trained in understanding working students’ needs, and able to have a productive and informed discussion with students about their decision to take more or fewer credits. To further address persistence concerns, the state can consider shifting resources to serve the part-time student population. Providing part-time students with access to the advisors,

353. Araujo & Murray, *supra* note 231, at 7.

354. See *The Case for Affordable Student Housing Co-Ops*, N. AM. STUDENTS COOPERATION, <https://www.nasco.coop/development/case-for-co-ops> (last visited July 29, 2017).

355. See *id.*

356. APTS HANDBOOK, *supra* note 124, at Ch. 2.9.

357. *Id.*

358. Memorandum of Assemblyman Jose E. Serrano, *supra* note 118, at 82.

359. CCSSE, *supra* note 255.

counselors, social resources, tutoring, professors' office hours, and community-building activities that full-time students have increases the possibility that the graduation outcomes would be more aligned. CEO, under the control of the New York City Mayor, would be in a position to analyze the needs for better-funded part-time support programs, and advocate for Executive Orders to create them.

Lastly, it is arbitrary to create a schema for determining who is neediest among a student group that is only differentiated by the number of credits each student is taking. The HESC's annual budget recommendations could do more to consider how to fairly allocate funds across the student groups, and make it more conducive to the original intent of part-time aid. The current system mirrors a time in the early twentieth century when the part-time, working students were required to pay tuition while their full-time counterparts were attending for free.³⁶⁰ The HESC's policies for institutions to receive part-time aid is therefore open to a challenge for arbitrariness.

C. Simplifying the Process to Receive Aid

With the wealth of technology available, it is inexcusable that state and federal tax forms are not configured to automatically generate a student's expected family contribution and eligibility for aid. As noted, the current process is a weighty bureaucratic obstacle that prevents many students from attending college. This need not be the case, as "[b]ehavioral economics suggests that minor differences in program design can have profound impacts upon the equity and efficiency of student aid."³⁶¹

There are already digital mechanisms in place to pull tax information into FAFSA, and FAFSA information into the TAP application, but it is still a laborious process to complete all three.³⁶² Administrators understandably rely on FAFSA to determine need: Information provided through FAFSA is verified by the federal government and crosschecked with tax documents.³⁶³ It seems unnecessary, however, to require students to re-enter already-submitted tax information into FAFSA, then re-enter that same information into both the TAP and Excelsior applications. Further requiring approximately one-third of the student population to verify information that had been verified by the federal government through FAFSA is an additional and cumbersome process.

One process that economists have introduced to simplify the FAFSA application is the simplified needs test—where certain qualifications make a family eligible for the automatic-zero Expected Family Contribution formula.³⁶⁴

360. *When Tuition was Free*, *supra* note 82.

361. Dynarski & Scott-Clayton, *supra* note 243, at 343.

362. At the time this note was written, the mechanism for students to pull IRS information into the FAFSA was offline due to a security breach. Little elaboration was provided, with no end date. The tool is one of only a few shortcuts provided to students and their families to simplify a complicated process. Concerned lawmakers have expressed concerns to Secretary of Education Betsy DeVos that the loss of the tool could discourage many eligible low-income students from applying for aid. Emily Wilkins, *Lawmakers Fret over IRS Decision to Suspend Student Aid Application Tool*, CQ ROLL CALL WASHINGTON DATA PRIVACY BRIEFING, 2017 WL 1044015 (Mar. 20, 2017).

363. *See id.*

364. Dynarski & Scott-Clayton, *supra* note 243, at 343.

But even under this simplified process, ninety percent of applicants responded to questions they were not required to answer.³⁶⁵

On September 14, 2015, President Barack Obama took a step toward simplifying the aid process.³⁶⁶ Starting in 2017–2018, students are allowed to file their FAFSA for the coming fall as early as October of the previous year.³⁶⁷ Additionally, students can file using tax information from an earlier year, meaning students can use 2015 income information to complete the 2017–18 FAFSA.³⁶⁸ Research shows that over the course of a student’s college career his or her reported family income generally remains stable,³⁶⁹ which justifies the use of earlier taxes, but also demonstrates that an annual re-verification process is not necessary.

States could also further simplify calculation practices and adopt policies that allow for automatic qualification for full aid if students have confirmed eligibility for other means-tested benefits such as food subsidies or public housing. The formal verification process to qualify for the other benefits would help ensure accuracy and would reduce the likelihood of a student dropping out because of the complex aid application process. Proposed calculation processes include just using income, assets, and family structure, using income and family structure while dropping assets from the calculation, using income and family structure while dropping both assets and student earnings, and using only income.³⁷⁰ Under simplified systems, some families that do not “deserve” aid will receive it; however, behavioral economists consider these additional awards “compliance costs,” and identify them as having a rightful place in the cost-benefit calculation of simplified aid processes that will ultimately achieve the intended goals of financial aid.³⁷¹

Additionally, providing more transparency into the process and available funding will enable students to improve their financial planning. The financial aid laws have several uncertainties that do not allow students to plan for college costs. First, the Part-Time Financial Aid process results in varying amounts of aid for part-time students semester-to-semester.³⁷² Second, the Excelsior Scholarship’s legislation includes a lottery provision wherein students enter a lottery to determine who will receive funds “any given year there are insufficient funds to cover the needs of all the applicants.”³⁷³ A lottery raises concerns for those in the higher education field, such as Community College Research Center Assistant Melinda Karp, who reads the provision to say “We don’t have to make everyone eligible a recipient.”³⁷⁴ A more straightforward process for determining aid availability and

365. *Id.*

366. FAFSA CHANGES FOR 2017–2018, U.S. DEPT. OF EDUC. (Sept. 2015), <https://studentaid.ed.gov/sa/sites/default/files/fafsa-changes-17-18.pdf>.

367. *Id.*

368. *Id.*

369. Kelchen, *supra* note 45, at 195.

370. *See generally* Dynarski & Scott-Clayton, *supra* note 243.

371. *Id.* at 342–43.

372. APTS HANDBOOK, *supra* note 124, at Ch. 2.9.

373. Emma Whitford, *Cuomo’s Tuition-Free College Plan Could Turn into a Lottery if Funding Falls Short*, GOTHAMIST (Apr. 12, 2017), http://gothamist.com/2017/04/12/cuomo_tuition_lottery.php.

374. *Id.*

eligibility will allow more students to plan how they will pay remaining tuition after aid is disbursed.

D. Expanding the Eligible Categories of Non-Citizen Students

Providing aid for non-citizen students who have already received the State's investment in their education will incentivize college completion and help them make a strong contribution to the state—and national—economy. For example, undocumented immigrants make up approximately ten percent of New York City's labor force, paying taxes to support local services and strongly contributing to the New York economy.³⁷⁵ Given that more than three-quarters of CUNY graduates remain in New York State, enabling undocumented immigrants to attend college will result in a better-educated workforce—likely increasing economic potential and tax contributions significantly.³⁷⁶ Many of the students who qualify already for in-state tuition in New York are DACA-eligible, meaning they have work authorization.³⁷⁷ The cost of extending TAP to undocumented students attending college would likely be less than two percent of TAP aid.³⁷⁸

New York State has made several proposals to extend TAP to undocumented students meeting the eligibility requirements to receive in-state tuition. New York Senate Bill S1251B, which is currently active and has passed in the State Assembly, would enact the “New York State DREAM Act.”³⁷⁹ The act would make graduates of New York high schools and persons otherwise eligible for in-state tuition at CUNY eligible to receive TAP rewards, regardless of their immigration status.³⁸⁰ The bill would repeal New York Education Law section 661 subsection 3, which outlines the citizenship requirements for TAP.³⁸¹ The bill also adds New York Education Law section 609, creating the New York Dream Fund Commission and committing it to advancing the educational opportunities of immigrants.³⁸²

Governor Cuomo's January 13, 2017 Fiscal Year 2018 Executive Budget proposal for Education, Labor and Family Assistance included not only the Excelsior Scholarship, but the New York State DREAM Act.³⁸³ This portion was ultimately removed before the budget was passed, however.³⁸⁴ If the state were to reconsider, it would likely support the state economy. The New York State Comptroller estimates that a person who earns an associate's degree will end up paying over \$35,000 in additional state taxes over her life time, compared to a

375. *New York State DREAM Act*, *supra* note 106.

376. DREAM ACT REPORT, *supra* note 273, at 4.

377. *See Calvo*, *supra* note 85.

378. DREAM ACT REPORT, *supra* note 273, at 4.

379. New York State DREAM Act, S-1251B, S. Reg. Sess. 2015–2016 (N.Y. 2015).

380. *Id.* (elaborating that to comply with federal law, it would also extend the same eligibility to non-residents of the state if meeting the same requirements).

381. *Id.* It would also amend sections 661, 355, 6206, 6305, 6451, 6452, 6455 and 695-e. *See id.*

382. *Id.*

383. GOV. ANDREW CUOMO, *Education, Labor, and Family Assistance (ELFA) Bill*, in FY 2018 N.Y. STATE EXEC. BUDGET (2017), https://www.budget.ny.gov/pubs/archive/fy18archive/exec/fy18artVIIbills/ELFA_ArticleVII.pdf.

384. *Compare id.* with CAPITAL PROJECTS BUDGET, *supra* note 320.

person who earns only a high school diploma.³⁸⁵ A bachelor’s degree holder is expected to pay more than \$60,000 more, balanced against a maximum TAP investment of only \$20,000.³⁸⁶ The investment in extending aid to undocumented students not only aligns with the state’s “commitment to being a beacon of freedom and opportunity for immigrants,” but it makes economic sense.³⁸⁷ The current structure invests in undocumented students’ K-12 education, subsidizes their college education through in-state tuition, and allows them to hold professional licenses in the state for jobs that will contribute to the economy—but does not provide them with the same access to educational opportunities as some of their citizen and non-citizen peers.³⁸⁸ Passing the New York State DREAM Act would be a significant step in addressing the widening achievement gap in the state.

Additionally, the time may be ripe to litigate an extension of aid programs to non-citizens. Excluding students with protected status and work eligibility from need-based programs is counter to the goals of offering in-state tuition, and the principles established by the U.S. Supreme Court in *Plyler v. Doe*.³⁸⁹ In *Plyler*, the Court held that putting up barriers to undocumented students because of the actions of their parents “impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status.”³⁹⁰ Although the Supreme Court has not expressly extended the reasoning in *Plyler* to higher education, it has become increasingly applicable to financial support for college. A college-level degree has become a necessity for meaningful employment and economic opportunity, similar to the role of a high school diploma in 1982. Providing affordable college access to some groups and not others “takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual” and perpetuates an “underclass” that is counter to the principles of *Plyler*³⁹¹ and the intent of the 2002 amendments to New York Education Law sections 6206 and 6301.³⁹² To truly uphold the principles expressed in *Plyler*, the education access provided to some students should be extended to all.

E. Improving Student Readiness for College Level Work Without Penalization

Removing penalties for developmental needs is one of the most equitable of the recommendations because the need for remediation exists at all income levels. When revising or developing financial aid laws or requirements for “free college,” the state should consider how the funding structure and credit accumulation will vary for students with remedial needs.

One viable recommendation could be to adjust the statutory Satisfactory Academic Progress and Pursuit of Program scheme outlined in N.Y. Education

385. DREAM ACT REPORT, *supra* note 273, at 4.

386. *Id.*

387. NEW YORK STATE DREAM ACT, S-1251B, *supra* note 379.

388. *See* Calvo, *supra* note 85.

389. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that it was unconstitutional under the Fourteenth Amendment for a state to deny funding for the education of children unlawfully present in the United States).

390. *Id.* at 202.

391. *Id.*

392. Governor’s Program Bill Memorandum #127, Ch. 327, 2002 N.Y. LEGIS. ANN. at 187 (2002).

Law section 665 (6)(c) and the regulations for the Excelsior Scholarship to exclude credit hours for remediation. The formula could only include credit-bearing degree requirements in the ratio for credits attempted versus credits accrued. Under this approach, the state would hold students accountable for completing the courses the state has paid for, while allowing room for students to develop the skills required for college level work without penalization.

Further, New York should consider revisiting the original intent of STAP. The program's original intent, to provide one additional year of tuition support for underprepared undergraduate students, served to remediate deficiencies caused by K-12 education.³⁹³ The population put at risk by the need for remediation has not decreased, yet the funding for the STAP program has.³⁹⁴ The amended STAP law only allows for summer remediation immediately preceding a student's first semester, significantly limiting the program's scope.³⁹⁵ As an alternative to STAP, states should consider the model CUNY Start uses. CUNY Start offers a low-cost (\$75) alternative to traditional remediation at community colleges by allowing students entering college with remedial needs to begin their skill development in advance of matriculation.³⁹⁶ This semester-long program delays matriculation to the next semester, and focuses primarily on testing out of remedial courses.³⁹⁷ The fee includes the cost of books, coursework, advising, and college readiness seminars.³⁹⁸ At the end of the semester, seventy-five, seventy, and sixty-eight percent of students requiring remediation in writing, reading and math, respectively, achieved proficiency.³⁹⁹ These results allow a student to enter her first semester of college, and start using her TAP funds, in a position to successfully accumulate more credits at a faster pace.

An approach that is gaining popularity in progressive schools such as CUNY's Stella and Charles Guttman Community College (GCC) is to tie remedial work into credit-bearing courses.⁴⁰⁰ GCC, which opened in 2012, has built developmental work into its first-year curriculum for all students.⁴⁰¹ "The idea is to treat college readiness not as a binary distinction—either students are ready or not—but as a continuum that students enter at a variety of skill levels."⁴⁰² The program offers the same first-year classes to all students, regardless of their pre-college assessment test results.⁴⁰³ Students accumulate credits in all courses, and develop college-ready skills at the same time.⁴⁰⁴ For instance, a first-semester course, City Seminar, is a three-credit course that takes an inter-disciplinary research approach

393. See *Supplemental Tuition Assistance Program*, *supra* note 345.

394. N.Y. COMP. CODES R. & REGS. tit. 8, §145-2.1(a)(2), (3) (2017).

395. *Id.*

396. CUNY START: ANALYSIS OF STUDENT OUTCOMES, *supra* note 218, at 1–2.

397. *Id.*

398. See generally *id.*

399. *Id.* at 7.

400. Sarah Butrimowicz, *Why This Community College Is Getting Rid of Remedial Classes*, PBS (Jan. 31, 2017, 11:57 AM), <http://www.pbs.org/newshour/rundown/community-college-getting-rid-remedial-classes/>.

401. *Id.*

402. *Id.*

403. See *id.*

404. See *id.*

to a current social issue.⁴⁰⁵ This three-component course is worth three credits, but requires 10.5 hours a week of classroom time, incorporating developmental reading, writing, and mathematical content.⁴⁰⁶ Successful completion of City Seminar signifies that students are at college-level proficiency and have satisfied their remedial requirements.⁴⁰⁷ The college is also reconsidering what it requires students to complete to be “proficient”—for instance, the college does not require a Human Service major to spend money and time to place into and pass algebra to graduate.⁴⁰⁸ This approach has been both cost- and time-saving, resulting in a three-year graduation rate of almost fifty percent.⁴⁰⁹

Needless to say, an underlying recommendation is to address the problem at its root and support skill development where it should be happening—at the high school level. But in the absence of significant long-term developments in K-12 education, college financing programs should be considerate of remedial coursework when mandating credit requirements for college financing.

VI. CONCLUSION

Sixty-five years after the New York Governor initiated funding to ensure that no young person “with the ability and desire for a higher education [would be] deprived of the opportunity because of lack of money,”⁴¹⁰ it often is still not desire and ability that determine college graduation, but socio-economic status.⁴¹¹ States are taking steps to make college more accessible through unique funding programs that promote “free college,” but efforts need to be made to do so in a more socially responsible way that supports the most vulnerable students. To make the illusion of “free college” more of a reality, it is important that legislators consider additional access to resources for all students, not just those who have the privilege of attending school on a full-time basis. Bureaucratic obstacles to obtaining funding need to be removed to make funding more accessible to those navigating the complicated systems on their own or for the first time. Lawmakers should consider the economic justification of allowing the most vulnerable of our population to attend college and increase earning potential. Lastly, revamping the way in which students become “college ready” in a way that does not penalize the victims of sometimes inadequate public schools should become a priority. Overall, financially supporting the graduation of students who are not otherwise likely to persist will provide the state with the largest return on investment. To shrink the opportunity gap, legislators should build programs that provide economic mobility to the lowest-income students through quality education.

405. Nicole Saint-Louis, Naveen Seth & Karla Smith Fuller, *Curriculum Integration: The Experience of Three Founding Faculty at a New Community College*, 27 INT’L J. TEACHING & LEARNING IN HIGHER EDUC. 423, 424 (2015).

406. *Id.*

407. *Id.*

408. See *College Bulletin 2017–2018*, GUTTMAN COMMUNITY COLLEGE 65 (2017), <http://guttman.cuny.edu/wp-content/uploads/page-assets/about/college-bulletin-policies/Guttman-Community-College-Bulletin-2017-2018.pdf> (last visited Nov. 30, 2017).

409. Butrimowicz, *supra* note 400.

410. Governor’s Messages to the Legislature, *supra* note 40, at 366.

411. See generally *Possible Explanations*, *supra* note 10.