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## Equal Protection for the Gifted Student in the Public School System.

Monica Aguon

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# COMMENT

## EQUAL PROTECTION FOR THE GIFTED STUDENT IN THE PUBLIC SCHOOL SYSTEM

MONICA AGUON\*

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\* St. Mary's University School of Law, Candidate for Juris Doctorate, May 2010, Trinity University, B.A. Religion, May 2005. To my father, Jose Hernandez Aguon, your enduring strength and quiet selflessness continues to inspire me. I miss your voice. To my loving mother, Victoria Quinene Aguon, and the rest of my family, *hu guiaya ham todos*. Thank you for your love and support in all my endeavors. Special thanks to my brother, Joseph Aguon, for suggesting this Comment topic. To my friends, especially Cesar Iglesias, Mary Ann Notestine, and Rigoberto Flores, Jr., thank you for enriching my law school experience. To my fellow staff writers and the editorial board of *The Scholar: St. Mary's Law Review on Minority Issues*, I sincerely appreciate all of your hard work on this piece. Special thanks to my Comment advisor, Hayley Ellison, for being so helpful, flexible, and encouraging throughout the writing process.

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## I. INTRODUCTION

A forty-two-year-running gifted and talented summer intensive educational program was cut from Maryland's budget for the year 2010.<sup>1</sup> Funding for all kinds of gifted educational programs is being reduced or even eliminated nationwide.<sup>2</sup> Despite the obvious need to meet budgetary constraints during these tough economic times, one must lament the loss

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1. Donna St. George, *A Summer Vacation of Intensive Learning; Supporters Try to Save Centers Program*, WASH. POST, June 25, 2009, at GZ03, available at <http://washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062401056.html>.

2. See, e.g., Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline; Parents, Advocates Decry Budget Cuts*, MILWAUKEE J. SENTINEL, June 21, 2004, at B, available at 2004 WLNR 4671485 (stating that programs for gifted students in Wisconsin are being threatened); Editorial, *Shortchanging High Achievers: Summer Programs for Gifted Students Are on the Chopping Block*, WASH. POST, July 3, 2009, at A26 (bemoaning the decrease in funding for programs that target gifted students in Maryland). Gifted students are not getting "the attention that would enable them to really thrive." Editorial, *Short-*

of programs like the Maryland Summer Centers Program, which exposes children to interesting areas of study, such as physics, jazz, languages, robotic design, musical theater, aerospace, and paleontology.<sup>3</sup> Educators recognize the value of such gifted programs, declaring that they have the potential to make “‘a huge difference in kids’ lives.’”<sup>4</sup>

Many of the gifted students who have had the opportunity to take advantage of programs like the Maryland program have gained experiences that benefit them not only academically, but also personally.<sup>5</sup> In addition to gaining intense lessons in areas of education not often covered by ordinary public school curricula, gifted students also gain experiences that can help them choose career paths.<sup>6</sup> A student with a broader range of experiences is better able to make personal and educational decisions that will put that student on a path to success in a chosen career field.<sup>7</sup> This sort of personal confidence and stability translates on a national level to a more informed citizen population and, particularly in the case of gifted

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*changing High Achievers: Summer Programs for Gifted Students Are on the Chopping Block*, WASH. POST, July 3, 2009, at A26.

3. Donna St. George, *A Summer Vacation of Intensive Learning; Supporters Try to Save Centers Program*, WASH. POST, June 25, 2009, at GZ03, available at <http://washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062401056.html>; cf. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1325 (1997) (“For students with high-mental-processing abilities and previous mastery of content and skills, the regular curriculum lacks challenge and suppresses unique interests.”).

4. Donna St. George, *A Summer Vacation of Intensive Learning; Supporters Try to Save Centers Program*, WASH. POST, June 25, 2009, at GZ03, available at <http://washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062401056.html> (quoting Maryland’s state superintendent of schools).

5. *Id.*

6. *Id.* (“Neil D. Goldberg, a gastroenterologist who practices in Towson, Md., said that he was one of the program’s earliest participants [forty]-some years ago and that it inspired him at an important time in his life, solidifying his interest in science just before eighth grade.”).

7. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 498 (2005).

A high-quality education involves more than just learning basic skills; it involves opportunities for individual creativity and discovery, not memorization of isolated material. Students need to see the broader picture and how what they are learning fits into that big picture. They need opportunities to apply their knowledge to real world experiences and make connections between subjects. Moreover, quality education allows for personal development. Education can be found outside of textbooks and should include exposure to a wide variety of experiences. Students should be given opportunities to discover who they are and be encouraged to try new things. A standardized test cannot measure any of these indicia of quality education.

*Id.*

students, a strong body of intellectually gifted and well-trained individuals who have the potential to become national leaders.<sup>8</sup>

Given the monumental importance of public education in the lives of so many Americans and the need to replenish the nation's supply of educated leaders, providing legal protection for the interests of gifted children is an issue worthy of national attention.<sup>9</sup> Some might argue that the interests of gifted kids must be, or even should be, subordinated to the needs of underachieving students.<sup>10</sup> Some might find proposals to teach advanced math to some students—while so many others cannot even add or subtract—hard on the ears.<sup>11</sup> Most will agree that state educational programs should focus on ensuring that students graduate with a basic education that allows them to function as contributing members of American society.<sup>12</sup>

But the goal of advocating on behalf of academically gifted children in public schools is not to promote the creation of a publicly funded class of intellectual elitists.<sup>13</sup> Instead, the objective is to demand that the law recognize the particular needs and unique potential of gifted students.<sup>14</sup>

8. See Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1057 (1991) (urging that gifted students be properly educated to remedy the educational gap between America's students and those in other countries); Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 556 (2009) (arguing that the No Child Left Behind Act forces "students who have the greatest potential to achieve and be tomorrow's leaders and innovators . . . into a lockstep educational system in which they often underachieve"); Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 501 (2005) (asserting that schools are responsible for addressing the educational and developmental needs of our future leaders).

9. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 505–06 (2005).

10. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 145 (1995) ("Many complain that it is too expensive to educate gifted and talented children and that education dollars can be stretched no further. We can no longer afford to be so short-sighted." (footnote omitted)).

11. *Id.* at 143 ("Public school officials hesitate to embrace funding enrichment programs for the brightest students because it seems politically incorrect to seek money and attention for the best students when so many other students are failing.").

12. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (discussing the critical importance of basic education in a democratic society).

13. See Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1338–39 (1997) (explaining that because many "gifted programs" are designed to accommodate only above-average learners and often mislabel ordinary-learners as "gifted," many view gifted program students as "elitists, 'the lucky ones'" (footnote omitted)).

14. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 500–01 (2005) (noting that individualized educa-

Like disabled students, gifted students have unique academic and psychological needs that require that their educations be specially tailored to encourage proper psychological development and to facilitate effective academic instruction.<sup>15</sup>

Perhaps because empirical studies of the effectiveness of gifted education methods yield conflicting results, current programs for gifted education utilize a variety of strategies.<sup>16</sup> Some highlight the educational benefits of grouping gifted students according to similar intellectual aptitudes or interests.<sup>17</sup> Providing this sense of community, some argue, is the greatest benefit of such gifted programs.<sup>18</sup> Some gifted students receive exposure to colleges and universities through public gifted and talented programs.<sup>19</sup> Those programs are often especially beneficial to gifted students from underprivileged backgrounds because exposure to higher education makes a college degree seem more attainable.<sup>20</sup>

While advocating for greater attention to the needs of gifted students, one must recognize that a great deal of progress has been made in this area.<sup>21</sup> Many gifted and talented programs like the Maryland program described above have noted significant improvements in the ethnic and

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tion has been successful for many gifted students who went on to become national leaders). "By holding back our country's potential leaders, we are jeopardizing the future of America." *Id.* at 500.

15. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 139–44 (1995).

16. Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How "Equity" Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL'Y & L. 249, 273 (1996) (identifying four basic strategies for educating gifted children). These strategies include "enrichment, acceleration, homogeneous grouping, [and] individualization." *Id.*

17. Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L.J. 913, 918–19 (2001).

18. Donna St. George, *A Summer Vacation of Intensive Learning: Supporters Try to Save Centers Program*, WASH. POST, June 25, 2009, at GZ03, available at <http://washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062401056.html>.

19. *Id.*; see also Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1322–23 (1997) (highlighting the benefits of enrollment in college classes for gifted students between the ages of twelve and sixteen).

20. Many recognize that increased exposure to college, whether through posters, signs, or personal campus visits, helps students understand that college is within reach. See Andrew Strong, *To Whom Much Is Given, Much Is Expected*, 65 TEX. B.J. 736, 736 (2002) (encouraging lawyers to participate in a statewide program that invites at-risk middle school children to "live" as a college student for one day). The goal of the program is to show the children that college is an achievable goal. *Id.*

21. Donna St. George, *A Summer Vacation of Intensive Learning; Supporters Try to Save Centers Program*, WASH. POST, June 25, 2009, at GZ03, available at <http://washingtonpost.com/wp-dyn/content/article/2009/06/24/AR2009062401056.html>.

racial diversity of their participants.<sup>22</sup> The national interest in promoting racial and ethnic diversity in schools can be extended to a national interest in increasing racial and ethnic diversity within particular school programs, namely gifted and talented programs.

Many suggest that these national goals may be achieved through federal legislation that creates standards for accountability in the education of gifted children.<sup>23</sup> For example, the federal Individuals with Disabilities Education Act (IDEA)<sup>24</sup> could be used as a model for legislation intended to address the needs of gifted students or may simply be expanded to include gifted students.<sup>25</sup> In the absence of proper federal legislation, I suggest that individual states adopt a modified version of Pennsylvania's model for gifted education, which treats gifted students and disabled students similarly as "exceptional students."<sup>26</sup> Although Pennsylvania requires its school districts to address the needs of its gifted students, their duty is limited to the use of their existing educational resources.<sup>27</sup> I suggest rejection of this limitation under a modified model that uses a subjective standard in evaluating whether the district has fulfilled its duty to provide a free and appropriate public education to the gifted student through an Individualized Education Program.

Part II of this Comment discusses the right to a free public education and then moves on to the specific treatment of gifted public school students. Part III highlights the need for a reformulation of the definition of public education. More specifically, public education should focus on individualized progress rather than proficiency. Part IV outlines how reliance on an improper conception of education allows the persistence of inequities in the public school system, which results in the violation of

22. *Id.*

23. See, e.g., Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 557–60 (2009) (proposing federal legislation to "curtail the harm caused to public gifted education programs by the current rendition of [the No Child Left Behind Act]").

24. 20 U.S.C. §§ 1400-1482 (2006).

25. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 141–42 (1995).

26. 24 PA. CONS. STAT. § 13-1371(1) (2006) (requiring specially designed instruction for all "children with exceptionalities"). Several other states treat gifted students similarly to disabled students by including them in the definition of "exceptional children" and/or providing them with Individualized Educational Programs (IEPs). E.g., COLO. REV. STAT. § 22-20-103(13) (2008) (acknowledging the need for special provisions for "gifted children" in order to meet their exceptional educational needs); KAN. STAT. ANN. § 72-962(h) (2008) (defining "gifted children" as members of "the gifted category of exceptionality"); TENN. CODE ANN. § 49-6-3111 (2002) (allowing gifted middle and high school students to take college level courses); W. VA. CODE § 18-2E-3b (2008) (providing IEPs for gifted high school students).

27. *Centennial Sch. Dist. v. Penn. Dep't of Educ.*, 539 A.2d 785, 789–90 (Pa. 1988).

gifted students' rights to equal protection. Part V suggests that states adopt a modified version of the Pennsylvania model, which would reject the Pennsylvania Supreme Court's limitation on the duty of the school district and instead require proof that the district's curricular offerings are reasonable. This would make a judicial remedy available to gifted students whose reasonable needs are not being addressed because of unjust allocations of or disparities in district resources. The availability of a judicial remedy is especially crucial for gifted students who are already disadvantaged by disparities in educational resources. Part VI lists several issues to keep in mind as we attempt to cure inequities in the public education system while also acknowledging the financial and pedagogical realities of that system.

I do not seek to evaluate working definitions for the legal concept of giftedness, as that is a significant task beyond the scope of this Comment. A great deal of debate—both in the legal and education communities—has revolved around how to properly define and identify giftedness.<sup>28</sup> I am writing specifically on the rights of academically gifted students, who have been identified in many ways but have traditionally been recognized as those students who have IQs of 130 or higher.<sup>29</sup> Although I limit the scope of this Comment to issues concerning academically gifted students and exclude questions regarding proper definitions for giftedness, I note that students may be gifted in other ways. For example, the legal rights of disabled students who are also academically gifted have received a great deal of scholarly attention.<sup>30</sup> Also, talented athletes and fine artists in public schools are another unique set of gifted students.<sup>31</sup> Although these students also possess superior abilities, discussion of their possible legal interests in public education is beyond the scope of this Comment.

Also beyond the scope of this Comment are issues regarding particular funding strategies for public school districts and the national budget, al-

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28. See Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1338–39 (1997) (describing how gifted programs themselves may convolute the meaning of “gifted”).

29. Cynthia Marie-Martinovich Lardner, *From Counselor to Counselor: Helping Gifted Children Reach Their Potential*, 83 MICH. B.J. 18, 19 n.1 (2004).

30. E.g., Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L.J. 913, 918 (2001) (discussing how states have denied gifted but disabled students the opportunity to reach their full potential because the students' grades were above average).

31. Patricia A. Schuler, *Gifted Kids at Risk: Who's Listening?* (Oct. 2002), at 1, available at [http://www.sengifted.org/articles\\_social/Schuler\\_GiftedKidsAtRiskWhosListening.pdf](http://www.sengifted.org/articles_social/Schuler_GiftedKidsAtRiskWhosListening.pdf). These individuals “have the capacity for intensified thinking and feeling,” and, as a result, “they may have higher levels of emotional development due to greater awareness and intensity of feeling.” *Id.*



though underfunding and inconsistent annual budgeting exacerbate problems in public gifted education.<sup>32</sup> I also will not address issues concerning school choice<sup>33</sup> and alternative educational opportunities.<sup>34</sup> Despite the difficulty and complexity of the issues involved, the needs of gifted students in the public school system are so unique as to demand legal attention.

## II. LEGAL BACKGROUND

### A. *Right to Free Public Education*

The American educational system began as a radical effort to provide all children with at least an eighth-grade public education.<sup>35</sup> Despite the significance of public education in the lives of so many Americans, United States citizens do not have a federal right to a free public education.<sup>36</sup> In *San Antonio Independent School District v. Rodriguez*, the United States Supreme Court acknowledged the importance of education, but the Court declared that education is not a fundamental right.<sup>37</sup> Later, in *Papasan v. Allain*, the Court explicitly stated that *Rodriguez* did not preclude the Court from a future finding “that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote].”<sup>38</sup> Until the Court or Congress recognizes a federal right to a free public education, the issue of whether to provide a free public education is left to the states.<sup>39</sup>

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32. Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How “Equity” Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL’Y & L. 249, 270 (1996) (noting that gifted education is seen as a fad or unnecessary frill and is generally given only cyclical attention); Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1337 (1997) (explaining how inconsistent provisions for gifted education from year to year lead to instability in those educational programs).

33. Certainly, the lack of school choice exacerbates problems in gifted education. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Board of Education*, 29 CONN. L. REV. 1319, 1336–38 (1997).

34. “These alternatives include charter schools, magnet schools and other mission-driven schools.” *Id.* at 1360–61.

35. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 541 (2009).

36. 411 U.S. 1, 37 (1973).

37. *Id.* at 35, 37. The Court found that the right to a free public education is neither explicitly nor implicitly guaranteed by the Constitution. *Id.* at 35.

38. 478 U.S. 265, 284 (1986) (quoting *Rodriguez*, 411 U.S. at 37) (alteration in original).

39. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people.”); *The Federal Role in Education*, <http://www.ed.gov/about/overview/fed/>

Once a state undertakes to provide a free public education, courts have held that the state must comply with federal constitutional requirements.<sup>40</sup> After a state creates a right to a free public education, whether by statute or state constitution, that state must adhere to the federal requirements of due process.<sup>41</sup> To do so, the state must provide notice and an opportunity to be heard before rescinding the state-given right to a free public education.<sup>42</sup> In addition to meeting the requirements of due process, a state must also satisfy the federal Equal Protection Clause by not arbitrarily discriminating against any particular group.<sup>43</sup> In *Brown v. Board of Education*, the United States Supreme Court held that education, “where the state has undertaken to provide [it], must be made available to all on equal terms.”<sup>44</sup> This holding was later reaffirmed in *Plyler v. Doe*, in which the Court held that undocumented children in the United States have the right to receive a public education.<sup>45</sup> Therefore, the Court has interpreted the requirements of the federal Constitution to require that students in state public school systems be treated fairly.

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role.html (last visited Dec. 14, 2009) (“Education is primarily a [s]tate and local responsibility in the United States.”).

40. *Knight v. Bd. of Educ.*, 48 F.R.D. 108, 111 (E.D.N.Y. 1969).

41. *Johnpoll v. Elias*, 513 F. Supp. 430, 431 (E.D.N.Y. 1980).

42. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

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

44. *Id.* The majority cited the social importance of education as support for this stringent requirement:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

*Id.*

45. 457 U.S. 202, 226 (1982). See Justice Brennan’s observations in *Plyer*, 457 U.S. at 221–24 for a summary of the devastating hardships that children stand to face if public school systems are free to treat them according to their immigration status. Children who are invidiously isolated from receiving public education have a bleak chance at becoming productive members of society. *Id.* at 223.

### B. *Historical Efforts to Address the Needs of Gifted Students in Public Schools*

Public education began with one-room schoolhouses in which each student worked through the material at the student's own pace.<sup>46</sup> Since all students were in the same room, educating gifted students did not require a great deal of specialized effort.<sup>47</sup> After World War II, school districts started to consolidate junior high and high schools.<sup>48</sup> Grouping students according to age resulted in a ceiling effect for advanced students.<sup>49</sup> The problem of the ceiling effect can be likened to "trying to measure the heights of [twelve-year-old] children using a measuring stick that is only [five] feet long. Many children can be measured using the stick, but we cannot differentiate among those who are [five] feet tall and those who are almost [seven] feet tall."<sup>50</sup> Therefore, a ceiling effect prevents accurate assessments of ability.<sup>51</sup>

Interest in the systematic education of gifted students emerged as early as the 1870s.<sup>52</sup> Between 1920 and 1950, Lewis Terman studied the idea of giftedness.<sup>53</sup> Terman discussed the usefulness of the Stanford-Binet IQ test, chronicled the development of high-IQ individuals throughout their lives, and argued that ability-grouping should be used as a method of racially segregating schools.<sup>54</sup> The Stanford-Binet IQ test is generally used less than the Wechsler Scales, which came later, but the Stanford-Binet IQ test is being used more frequently to evaluate gifted children.<sup>55</sup> Males

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46. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 541 (2009).

47. *Id.*

48. *Id.* at 541–42.

49. *Id.* at 542.

50. Jan Hansen, *Discovering Highly Gifted Students*, 4 UNDERSTANDING OUR GIFTED 4, Mar./Apr. 1992, available at [http://www.davidsongifted.org/db/Articles\\_id\\_10150.aspx](http://www.davidsongifted.org/db/Articles_id_10150.aspx). Identifying highly gifted children via testing is problematic because of the ceiling effect, which is generally referred to "as the clustering of scores at the upper limit of the test." *Id.*

51. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 542–43 (2009).

52. *Id.* at 542.

53. Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 520–21 (1999).

54. *Id.* After *Brown* was decided, Terman's grouping recommendation for gifted students was used as a means to maintain segregation in schools, especially in Southern states. *Id.* at 521.

55. The Stanford-Binet Intelligence Scales—Fifth Edition, <http://www.amendpsych.com/resources/stanfordbinet.html> (last visited Dec. 14, 2009).

The SB-V [Stanford-Binet Intelligence Scales—Fifth Edition] is a standardized measure comprised of ten subtests (verbal and nonverbal sections in each of five core areas). This instrument provides a Full Scale Intelligence Quotient (IQ) as well as a Verbal IQ, a Nonverbal IQ Score, and five Composite Scores in areas assessed. Scores

generally score higher on IQ tests than females, although the variance for females is smaller.<sup>56</sup> Also, African-Americans tend to score approximately one standard deviation below the average, which suggests to some that the tests are biased.<sup>57</sup>

During the 1920s, schools began tracking students.<sup>58</sup> Tracking, now a common practice,<sup>59</sup> is the assignment of pupils to a specific curriculum based on ability.<sup>60</sup> Early attempts at systematically educating gifted students often locked students into tracked curricula according to their presumed ability or previous accomplishments.<sup>61</sup> Some argue that, even where racist measures of ability and achievement are not involved, tracking can be harmful to students who are placed in low-level learning tracks.<sup>62</sup> Those students tend to have lower goals and have “their plans for the future frustrated more often.”<sup>63</sup> Some contend that tracking has “perpetuated a permanent under-class” that mainly consists of African-American students.<sup>64</sup> Some ask why any student, regardless of background or race, is assigned to a class that generates lesser achievement.<sup>65</sup> Given these problems with the origins and implementation of tracking,<sup>66</sup>

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are provided as standard scores with a mean of 100 and a standard deviation of 15, meaning approximately two-thirds of the general population will obtain a Full Scale IQ Score between 85 and 115 on the SB-V.

*Id.*

56. John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320.

57. *Id.*

58. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 470 (1996).

59. Kevin G. Welner, *Ability Tracking: What Role for the Courts?*, 163 EDUC. L. REP. 565, 565 (2002).

60. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 470 (1996).

61. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 542 (2009).

62. Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 521-22 (1999). Ability-grouping is a significant factor in American students' poor math and science skills. *Id.* at 521. In addition, high-tracked American students do not perform as well as heterogeneously grouped foreign students. *Id.*

63. *Id.* at 522. In addition, low-track students have a higher dropout rate and participate less in extracurricular activities. *Id.* But, proponents of tracking argue, if high-tracked students are lumped together with low-track students, the high-track students will become bored and their development will suffer. *Id.*

64. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 505 (1996).

65. Kevin G. Welner, *Ability Tracking: What Role for the Courts?*, 163 EDUC. L. REP. 565, 567-68 (2002).

66. Even opponents of tracking acknowledge that it is “a potentially neutral practice.” Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 501 (1996). Like tracking,

ability-based grouping in general has been stigmatized by “a perception of socioeconomic elitism, racial disparities, and the mistaken belief that the gifted are able to meet their educational potential on their own.”<sup>67</sup>

This stigma has led to a shift away from ability-grouping toward heterogeneous classrooms, which disadvantage gifted students and lead them to much smaller academic gains.<sup>68</sup> Because “[g]ifted students have mastered from [thirty-five percent] to [fifty percent] of the curriculum to be offered in five basic subjects before they begin the school year,” instruction regarding up to half of the curriculum in those basic subjects could be eliminated without impacting the learning of those students.<sup>69</sup> Therefore, since schools force gifted students to sit through instruction geared toward their lower-performing peers, schools waste valuable instructional time for gifted students.<sup>70</sup> Some gifted students in heterogeneous classes may participate in enrichment programs, in which they leave their regular classrooms to receive advanced instruction for several hours each week.<sup>71</sup> Although commonly used, these pull-out programs are not effective.<sup>72</sup> Cooperative learning is another popular teaching method that is ineffective for gifted students.<sup>73</sup> When high- and low-level learners are grouped together, the high-level students often get frustrated and feel as if they are doing all of the work.<sup>74</sup>

On the other hand, instruction geared toward gifted students may be inappropriate for other children in the same age group.<sup>75</sup> Generally, “[o]rdinary learners will find these programs to be too fast-paced, too deep, presented too early, for too long a period of time, and at too high a

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ability-based grouping in general is not in itself discriminatory; problems with practical implementation are distinct issues. *Id.*

67. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 543 (2009) (footnote omitted).

68. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1323–25 (1997). Some of the disadvantages of putting gifted students into heterogeneous classrooms are that “regular curriculum lacks challenge and suppresses unique interests.” *Id.* at 1325. As a result, some gifted students feel hostile towards the school community and may even engage in disruptive behavior. *Id.* at 1338.

69. *Id.* at 1323–24.

70. *Id.* at 1324–25.

71. *Id.* at 1335–36.

72. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 507 (2005).

73. *Id.* at 508.

74. *Id.*

75. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1325 (1997).

level of abstraction or complexity.”<sup>76</sup> Therefore, the trend toward heterogeneous grouping (or “mainstreaming”) can cause negative consequences for all groups of children.<sup>77</sup>

Another method of providing gifted instruction is acceleration.<sup>78</sup> This method allows gifted students to study more advanced material than the rest of the class.<sup>79</sup> Acceleration then allows the gifted child to “move at his/her own pace through individualized course material; test out of any unit with a high enough score on a unit pre-test; take above-level coursework in the age-level classroom; move to a higher grade-level class for one or more subjects; [or even] skip one or more grades.”<sup>80</sup>

Grade-skipping is an easy and inexpensive way to address the needs of gifted students.<sup>81</sup> Grade-skipping is administratively convenient because it involves little to no individualization for the student, but critics argue that it can cause social maladjustment and leave gaps in the student’s education.<sup>82</sup> Research conducted over the past fifty years has indicated, however, that grade-skipping can be an effective way to address the needs of some gifted students.<sup>83</sup> Limited forms of part-time acceleration provide some individualized education while allowing gifted students to remain among students in their age group for most of the day.<sup>84</sup>

In the 1930s, ability-grouping decreased because research showed little or no resulting academic progress.<sup>85</sup> In 1931, the United States Department of Education created a special division for Exceptional Children

76. *Id.* (footnote omitted).

77. Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY’S L.J. 913, 918 (2001).

78. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 546–47 (2009).

79. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 509 (2005).

80. *Id.* (alteration in original) (footnote omitted).

81. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 546 (2009).

82. *Id.*

83. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 509 (2005). Sandra Day O’Conner, Martin Luther King, Jr., and other national leaders graduated early from school. *Id.* at 500; John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320 (“Many school systems are wary of [grade-skipping] even though research shows that it usually works well both academically and socially for gifted students—and that holding them back can lead to isolation and underachievement.”).

84. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 546–47 (2009).

85. Daniel J. Losen, Note, *Silent Segregation in Our Nation’s Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 521 (1999).

and Youth for the benefit of gifted students.<sup>86</sup> In 1950, Congress enacted the National Science Foundation Act (NSFA) in response to public criticism of the lack of legislative attention to the needs of gifted students.<sup>87</sup> This act empowered President Truman to establish the National Science Foundation to encourage the study of math and science through research and scholarship.<sup>88</sup> Although the NSFA was not specifically aimed at educating gifted students, its effect was to direct gifted students to those areas of study.<sup>89</sup>

After *Brown*, which prohibited de jure racial segregation in public schools,<sup>90</sup> ability-grouping increased in an effort to continue de facto racial segregation.<sup>91</sup> This practice was especially popular in the Southern states, but Northern school districts also used tracking to respond to the influx of Black students caused by the massive migration of Blacks out of the South.<sup>92</sup> One scholar argues that “[t]he merits of programs intended to improve education by grouping students according to ‘intelligence’ or other measures of academic ‘ability’ are suspect because the original push for such programs was heavily rooted in racist conceptions of intelligence and jingoistic public education policy.”<sup>93</sup> Where racist values affected perceptions about student ability and achievement, ability-grouping often resulted in racially segregated tracks.<sup>94</sup>

Modern interest in gifted education increased as a result of the launch of Sputnik in 1958.<sup>95</sup> Americans were concerned about the possibility of

86. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1325 (1997).

87. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 548 (2009).

88. *Id.*

89. *Id.* at 548–49.

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

91. Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 521 (1999).

92. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 472 (1996).

93. Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 520 (1999).

94. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 542–43 (2009). Gifted programs continue to foster social and economical elitism, as “gifted children from higher income households are more likely to be identified and admitted to gifted programs” based on their previous achievement. *Id.* at 543 (footnote omitted). At the same time, economically disadvantaged students are disproportionately less likely to be admitted to gifted programs, as these students tend to score lower on IQ tests and other standardized exams. *Id.* at 543–44.

95. Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517, 521 (1999).

falling behind the Soviets in the realm of such impressive technological developments.<sup>96</sup> This national fear prompted more direct attention to gifted education as part of a “total talent mobilization.”<sup>97</sup> In response to this fear, the National Defense Education Act (NDEA)<sup>98</sup> provided almost one billion dollars for gifted education.<sup>99</sup>

Later, President Lyndon Johnson’s “War on Poverty” led to the passage of the Elementary and Secondary Education Act of 1965 (ESEA 65),<sup>100</sup> which shifted funds from gifted programs to programs for “educationally disadvantaged and economically deprived” students.<sup>101</sup> Although the funds were available, little was actually spent on the education of gifted children.<sup>102</sup> Congress created an office within the Bureau for the Education of the Handicapped, now the Department of Education, in an effort to meet the needs of gifted students.<sup>103</sup> Congress then passed the federal Gifted and Talented Education Act of 1969,<sup>104</sup> which “provides technical assistance and limited funding” to gifted programs, rather than “a substantive right to a specific type or level of education.”<sup>105</sup>

Budget cuts and the Reagan administration’s philosophy of “new federalism” led to the Omnibus Budget Reconciliation Act (OBRA), which undid previous provisions for gifted students,<sup>106</sup> including the ESEA 65 amendment of 1970,<sup>107</sup> the Gifted and Talented children’s Education Act of 1978,<sup>108</sup> and the IDEA.<sup>109</sup> In 1981, the Office of Gifted and Talented,

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96. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 542 (2009).

97. *Id.* (footnote omitted).

98. Pub. L. No. 85-864, 72 Stat. 1580 (1958).

99. *Id.*; Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 549 (2009).

100. 20 U.S.C. §§ 6301-7941 (2006).

101. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 549 (2009).

102. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1325 (1997).

103. *Id.*

104. Pub. L. No. 91-230, 84 Stat. 121.

105. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1052 (1991) (footnotes omitted).

106. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1327 (1997) (discussing budget cuts to federally funded gifted programs and the dismantling of the Office of the Gifted and Talented in the 1980s); Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 550 (2009) (“The federal government was uninvolved in gifted education efforts for much of the 1980s.”).

107. 20 U.S.C. §§ 1226a-1-14910o (2006).

108. Pub. L. No. 95-561, 92 Stat. 2143 (repealed 1982).

109. 20 U.S.C. §§ 1400-1482 (2006).



created in 1974, was terminated, and funds were redirected to economically disadvantaged and disabled students.<sup>110</sup> State funding frameworks attempting to equalize spending and funding for particular groups of students based on need decreased during this time.<sup>111</sup> Additionally, a conservative United States Supreme Court shifted the approach to education from focusing on general ideas about the purpose and significance of education to the need for authority and discipline in schools.<sup>112</sup> The federal government was largely inattentive to the needs of gifted students for the rest of the 1980s.<sup>113</sup>

In 1993, the Department of Education reported that gifted students were not being properly educated.<sup>114</sup> This report served as the catalyst for the passage of the Jacob K. Javits Gifted and Talented Students Act of 1994,<sup>115</sup> which revised and reinstated some of the programs that had been eliminated in 1981.<sup>116</sup> In March 1994, Congress passed the Goals 2000 Act<sup>117</sup> to promote broad changes in America's educational system.<sup>118</sup> Increasing concern about the need for overall improvement in the public

110. Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 *FORDHAM URB. L.J.* 727, 740 (2001). The Jacob K. Javits Gifted and Talented Students Act of 1988 brought back the Office of the Gifted and Talented and set aside some funds for demonstration grants, national leadership activities, and a national research center. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Bradley v. Meriden Bd. of Educ.*, 29 *CONN. L. REV.* 1319, 1328 (1997).

111. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 *CHI.-KENT L. REV.* 1035, 1054 (1991).

112. *Id.* In the 1980s, the Court ruled conservatively on a variety of cases dealing with educational policy. *Id.*; Ronald T. Hyman, Commentary, *Educational Beliefs of Supreme Court Justices in the 1980s*, 59 *EDUC. L. REP.* 285, 285 (1990). The Court "acknowledge[d] and quote[d] with approval the broad, liberal proclamations presented in earlier Court decisions about the role and importance of education and the fundamental rights of students," yet still managed to reform educational policy in a more conservative fashion. Ronald T. Hyman, Commentary, *Educational Beliefs of Supreme Court Justices in the 1980s*, 59 *EDUC. L. REP.* 285, 294 (1990).

113. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 *CHI.-KENT L. REV.* 1035, 1053 (1991).

114. U.S. DEP'T OF EDUC., NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA'S TALENT (1993), <http://www.ed.gov/pubs/DevTalent/intro.html>.

115. 20 U.S.C. §§ 8031-8037 (2006) (amended 2001).

116. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 *WASH. U. J.L. & POL'Y* 539, 550-51 (2009).

117. Pub. L. No. 103-227, 108 Stat. 125-91 (codified as amended in scattered sections of 20 U.S.C.).

118. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 *S. TEX. L. REV.* 119, 149 (1995). Goals 2000: Educate America Act called for national reform of education and proposed to accomplish that by providing a coherent policy framework. *Id.*

school system overshadowed any discussion about the specific needs of gifted students.<sup>119</sup>

C. *Recent Developments and the Present State of Gifted Education in Public Schools*

More recently, a few schools have started using Individualized Education Plans (IEPs) for gifted students that mirror those used for disabled students.<sup>120</sup> An IEP for a disabled student is a written statement that includes the student's current level of educational achievement, how the disability impacts the student's ability to learn in the normal curriculum, annual and short-term goals, what services and special instruction are needed to reach those goals, and a statement as to why the student will not participate in regular classroom activities.<sup>121</sup> All parties have the right to appeal decisions at each phase in the process of creating and implementing the IEP.<sup>122</sup> Although IEPs are expensive to administer, laws that treat gifted students and disabled students in the same way are beneficial to gifted students because they provide individualization and procedural due process protections for parents or guardians who want to challenge an inadequate IEP on the student's behalf.<sup>123</sup>

Currently, no federal law adequately addresses the needs of gifted students.<sup>124</sup> The federal government broadly defines the "gifted and talented" as "students, children, or youth who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or

119. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 551 (2009) (explaining that the need for general improvement in public school systems was legislators' primary concern).

120. *Id.* at 547 ("An IEP allows for an individualized curriculum that can be particularly useful for students who do not fit the typical educational mold." (footnote omitted)).

121. Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L.J. 913, 927 (2001).

122. Individuals with Disabilities Education Act § 615(g)(1), 20 U.S.C. § 1415(g)(1) (2006).

123. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 547-48 (2009).

124. *Id.* at 551 ("Currently, there is no federal mandate for states to address needs of gifted children, resulting in a patchwork of state policies." (footnote omitted)). Congress has been ambivalent toward gifted education because of two opposing societal values. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1328 (1997). Americans have traditionally valued equality and have felt uneasy about hierarchies that might limit the success of hardworking, though not necessarily intellectually superior, people. *Id.* Conversely, American values also reflect the idea that individuals should be encouraged to reach their full potential, or "be all that they can be." *Id.*

leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities.”<sup>125</sup>

While some states have accepted the federal definition, others define giftedness more specifically.<sup>126</sup> Still others leave the term undefined.<sup>127</sup> Today, most states have legislation specifically addressing the educational needs of gifted children.<sup>128</sup> The purpose stated for such special provisions is that these students need specialized teaching to facilitate the realization of their “full potential, and that the state has an obligation to challenge students.”<sup>129</sup>

The No Child Left Behind Act of 2001 (NCLB),<sup>130</sup> a reauthorization of ESEA 65, does not provide the challenging educational instruction gifted students require.<sup>131</sup> The NCLB was created to ensure that all students are able to meet minimum educational standards.<sup>132</sup> The foundation of the NCLB “is increased accountability through regular testing and reporting of student achievement, broken down into subgroups by race, ethnicity, gender, English proficiency, economic background, and disabil-

125. Elementary and Secondary Education Act of 1965 § 9101(22), 20 U.S.C. § 7801(22) (2006).

126. Kim Millman, Comment, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 476–78 (2007). For example, several states such as Mississippi have “very general definitions of gifted,” while other states such as North Carolina “have extremely precise definitions.” *Id.* at 476.

127. *Id.* at 476 n.118 (noting that New Hampshire, Massachusetts, Minnesota, and South Dakota have not defined giftedness).

128. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1038 (1991). In fact, some states require that the educational system provide “quality” curriculum, rather than minimal education. *Id.*; Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1333 (1997) (“State legislators generally support gifted education in two ways: by mandating special education, and/or by funding programs.”); Rachel Piven-Kehrle, Annotation, *Special Education Requirements of Gifted Students*, 115 A.L.R.5th 183 (2004) (describing differences among the states in the treatment of gifted education).

129. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1038 (1991) (footnotes omitted).

130. Pub. L. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

131. See Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 552–53 (2009) (“NCLB only minimally addresses gifted education by providing very limited funding for research, professional developments, program development, and curriculum for gifted education.” (footnote omitted)).

132. Andrea Rodriguez, *Revealing the Impurities of Ivory Soap: A Legal Analysis of the Validity of the Implementation of the No Child Left Behind Act*, 10 SCHOLAR 75, 79 (2007).

ity.”<sup>133</sup> Data on gifted students is not reported.<sup>134</sup> The NCLB provides limited funding for various aspects of gifted education.<sup>135</sup> The Jacob K. Javits Gifted Education Act of 2001 provides the only funding for gifted education under the NCLB.<sup>136</sup> Programs that serve gifted students who are disabled, have a limited English proficiency, or come from lower socioeconomic classes receive priority funding.<sup>137</sup> Many states divert funding and attention from gifted education due to underfunding and the NCLB’s inadvertent disincentives to appropriately educate gifted students.<sup>138</sup> Moreover, the NCLB imposes no penalty on schools whose gifted students reach a “learning plateau,” so long as those students are still proficient.<sup>139</sup> The NCLB, like other federal legislation, fails to provide gifted students with an appropriate education.

### III. REDEFINING THE LEGAL CONCEPT OF PUBLIC EDUCATION: PROGRESS, NOT JUST PROFICIENCY

Public education seems to be based on a policy decision to focus on proficiency; public schools are obligated to teach basic skills, rather than to teach children to maximize their individual potentials.<sup>140</sup> Helping regular and disabled children work toward proficiency in these basic skills is absolutely an appropriate educational goal. Focusing on meeting profi-

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133. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 552 (2009) (footnote omitted).

134. *Id.*

135. *Id.* at 552–53.

136. *Id.* at 559.

137. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1328 (1997).

138. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL’Y 539, 556 (2009). Many states struggle with the funding requirements of their education programs and face difficult choices about how to spend money. *Id.* Because the NCLB is not focused on gifted education as much as proficiency standards for all students, the meager sums dedicated for gifted education are often cut by the state to provide additional resources to meet NCLB standards. *Id.*

139. *Id.* at 555–57 (noting that because funding has disappeared, most schools lack incentives to teach and research gifted education programs beyond basic proficiency standards). “The efforts may be felt most by gifted low-income minority pupils whose parents don’t have the option of shifting them to private schools or providing outside enrichment to compensate for cutbacks.” Daniel Golden, *Brain Drain: Initiative to Leave No Child Behind Leaves Out Gifted; Educators Divert Resources from Classes for Smartest to Focus on Basic Literacy*, WALL ST. J., Dec. 29, 2003, at A1, available at <http://www.pulitzer.org/archives/6756>.

140. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1351–52 (1997).

ciency standards is appropriate for most students because proficiency standards are meant to correspond with reasonable learning potential.

Similarly, gifted education should focus on helping students fulfill their learning potential.<sup>141</sup> A student cannot learn what the student already knows.<sup>142</sup> In facilitating the progress of gifted students, public schools need not provide the best education possible.<sup>143</sup> For fear of placing impractical standards for the education of gifted children on public schools, courts and legislatures accept inadequate or even nonexistent standards with regard to gifted education.<sup>144</sup> The government is properly concerned with the need for limitations on public education, given the finite resources of the system and the often subjective nature of educational instruction.<sup>145</sup> Despite the difficulties of developing appropriate priorities for educational resources and identifying acceptable educational guidelines, those tasks must be accomplished for all students.<sup>146</sup>

In outlining limitations for gifted educational programs, one should note that a broad range of learning abilities exists even among gifted students.<sup>147</sup> I am not suggesting that we require all public schools to meet

141. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 499 (2005) (“[E]quity should mean that every child has an equal opportunity to maximize his individual education rather than having all students learn the same information.”).

142. Roseann G. Padula, Note and Comment, *The Plight of Connecticut’s Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1348 (1997). By focusing on material that gifted students already know, the regular classroom environment suppresses the unique interests of those students. *Id.* at 1325. A relevant starting point for schools should be assessing “the level of knowledge and skill a child brings with him when he steps into the classroom.” *Id.* at 1348. Instead, an “uneasy fit” exists between the educational system, which is designed for the masses, and the individual guarantees and rights found in state constitutions. *Id.*

143. See *Centennial Sch. Dist. v. Penn. Dep’t of Educ.*, 539 A.2d 785, 791 (Pa. 1988) (limiting a school district’s obligation to provide for its gifted students).

144. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1036–50 (1991).

145. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (recognizing that, especially in light of the complexity of local issues involved, courts must acknowledge practical limitations on a school’s district’s duty).

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

147. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 490 (2005) (describing the different types of gifted learners). The “successful” gifted student rarely has behavioral problems and has learned how to meet the expectations of adults. *Id.* The “autonomous learner” has learned how to work within the system, even creating opportunities for his or herself. *Id.* at 491. “Challenging” gifted students are often mislabeled because of behavioral problems, rather than because of their giftedness. *Id.* “Underground” gifted students are usually middle school students who try to hide their talents to fit in with their peers. *Id.* “[D]ropout” gifted students are usually unchallenged high school students who think of school as an irrelevant waste of time. *Id.* at 492. The final type falls under the “double-

all of the needs of all of our country's geniuses. I do, however, support the reformation of the public educational system to identify and address the academic and personal needs of this unique population by providing it with the most appropriate public education possible.

#### IV. FAILURE TO PROVIDE ADEQUATE PUBLIC EDUCATION AS VIOLATION OF CIVIL RIGHTS OF GIFTED STUDENTS

##### A. Denial of Public Education as Due Process Violation

Although the issue of whether to provide a free public education is one that has been left to the states, once a state undertakes to provide a free public education that state must abide by the requirements of the Fourteenth Amendment to the United States Constitution.<sup>148</sup> More specifically, the state must comply with the Equal Protection Clause and due process.<sup>149</sup> To comply with the minimum requirements of due process, a state may not deprive a student of public education without notice and an opportunity to be heard.<sup>150</sup> For purposes of equal protection analysis, the state may not arbitrarily discriminate against groups that are similarly situated.<sup>151</sup> Despite these constitutional protections, most states are depriving their gifted children of a meaningful education.<sup>152</sup>

##### 1. Denial of Proper Academic Instruction for Gifted Students

Some reject the claim that public schools are not properly educating gifted students because gifted students meet and exceed minimum standards of proficiency more quickly than their classmates.<sup>153</sup> But gifted students often do not receive proper encouragement to move even further beyond proficiency.<sup>154</sup> Some may even be purposefully given inappropri-

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labeled" category. *Id.* These students have both a gifted intellectual ability and a learning disability. *Id.* Schools, however, tend to focus more on the learning disability, ignoring the superior intellectual ability. *Id.*

148. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

149. *Id.*; *Rodriguez*, 411 U.S. at 17.

150. *Goss*, 419 U.S. at 579, 583 (“[R]equiring notice and [an] informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action.”).

151. *Rodriguez*, 411 U.S. at 17.

152. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1322–25 (1997).

153. Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131, 137 (1998) (arguing that this contention is based on an improper conception of a “normal” education).

154. Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How “Equity” Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL’Y & L. 249, 256 (1996) (labeling gifted students as “America’s largest group of underachievers”).

ate class assignments to raise group scores for NCLB reporting.<sup>155</sup> Since classroom resources are limited and teachers generally focus on teaching the masses of students, students in need of individual attention are often at a disadvantage.<sup>156</sup> This is a result of several factors, including the natural human tendency to be more sympathetic to less fortunate individuals<sup>157</sup> and the need to meet the requirements of NCLB.<sup>158</sup>

In regular classes, the needs of gifted students are often left unaddressed.<sup>159</sup> Gifted students have few chances to answer higher-level questions and are given little time for creative responses.<sup>160</sup> Most of the questions asked in the regular classroom focus on knowledge and comprehension, not higher levels of thinking.<sup>161</sup> These teaching practices prevail regardless of geography or community size.<sup>162</sup> While most would reject a policy that requires students in the general population to waste time idly at school, many gifted students are forced into that predicament.<sup>163</sup>

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155. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 555 (2009) (explaining that the failures of NCLB leave many gifted students in improper education environments). To take advantage of their abilities, some schools and teachers keep gifted students in lower level classes. *Id.* This helps inflate the proficiency ratings of schools and teachers but limits the growth of gifted students. *Id.*; Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 486 (2005) (stating that many school systems benefit from gifted students' test scores but are reluctant to make any expenditure for adequate education for these high-achievers). The test-centric system encourages school administrators to retain top students solely for their test scores, thus eliminating or minimizing specialized instruction. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 486 (2005).

156. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 555 (2009).

157. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 139–40 (1995).

158. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 555 (2009) (suggesting that the requirements of NCLB are to blame for improper education of gifted students); Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline Parents, Advocates Decry Budget Cuts*, MILWAUKEE J. SENTINEL, June 21, 2004, at B News, available at 2004 WLNR 4671485 (noting that gifted programs are being cut due to tight state budgets and schools' struggle to comply with NCLB mandates).

159. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1322–25 (1997).

160. *Id.* at 1324.

161. *Id.*

162. *Id.*

163. *See id.* at 1323–24 (1997) (stressing that the shift away from ability-grouping results in lower degrees of academic gains for gifted students and more wasted class time).

Of the gifted students who are properly instructed and encouraged to push forward academically, many fail to progress because of inadequate or nonexistent gifted programs.<sup>164</sup> Participation in gifted education can lead to dramatic academic gains.<sup>165</sup> For example, gifted students mastered Algebra I after a mere eighteen hours of instruction during a summer Saturday mathematics class.<sup>166</sup> Schools that fail to provide adequate academic instruction violate the due process rights of gifted students.<sup>167</sup>

## 2. Inattention to Unique Psychological Needs of Gifted Students

In addition to academic instruction, public schools are also concerned with the psychological development of their students.<sup>168</sup> In the short-term, gifted students who are not properly educated feel anger, boredom, frustration, and isolation.<sup>169</sup> Those students are often hostile toward school, perform inconsistently on assignments, and engage in distracting behavior.<sup>170</sup> According to one professor of gifted education, gifted students are at high risk for failing.<sup>171</sup> In the long-term, those children have self-esteem and self-efficacy problems.<sup>172</sup> Unchallenged gifted students

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164. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 546 (2009).

165. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students*: Broadley v. Meriden Bd. of Educ., 29 CONN. L. REV. 1319, 1323 (1997).

166. *Id.* at 1322.

167. *Id.* at 1352–53 (contending that gifted children may have substantive due process claims when they are only offered typical school programs, as “they are essentially excluded from obtaining an appropriate education because the typical school program is so unsuitable for them”). Though the U.S. Supreme Court has held that there is no fundamental right to education under the Constitution, the states may consider the right to education to be a fundamental right. See *id.* at 1353. For example, the Connecticut Supreme Court has held that a child’s right to education is fundamental under the Connecticut constitution. *Id.*

168. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

169. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students*: Broadley v. Meriden Bd. of Educ., 29 CONN. L. REV. 1319, 1338 (1997).

170. *Id.*

171. Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline Parents, Advocates Decry Budget Cuts*, MILWAUKEE J. SENTINEL, June 21, 2004, at B News, available at 2004 WLNR 4671485. Professor Pamela Clinkenbeard witnessed this potential negative side effect firsthand while working with an advanced seventh-grader. *Id.* School officials did not allow her to accelerate and, in turn, she became depressed and started skipping classes. *Id.* But after receiving support from Purdue professors, the student enrolled in college calculus and earned an A. *Id.*; see also Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 512 (2005) (detailing the effects the lack of gifted and talented programs has on gifted students who may be predisposed to becoming underachievers).

172. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students*: Broadley v. Meriden Bd. of Educ., 29 CONN. L. REV. 1319, 1338 (1997).



drop out of high school at high rates, often suffer from depression, and are at greater risk for committing suicide than other students.<sup>173</sup> Since states largely fail to address the special psychological and academic needs of gifted students, they deny those students the right to an adequate public education in violation of their due process rights.<sup>174</sup>

*B. Denial of Equal Protection for Exceptional Students Because of Exceptional Ability*

States violate the Equal Protection Clause of the Fourteenth Amendment by failing to treat gifted students in the same way as the general student population.<sup>175</sup> Gifted students should not be denied equal protection under the law simply because they require advanced instruction.<sup>176</sup> Congress has recognized that another group of students, namely, the disabled student population, requires special legislative attention.<sup>177</sup> To combat the inequities confronting disabled students in the public school system, Congress enacted the IDEA.<sup>178</sup> The passage of the IDEA indicates that Congress recognized that certain student populations require individualized instruction without which their public education

173. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1035 (1991). "For some students, . . . an adequately challenging education is a matter of life and death." *Id.* at 1035–36 (emphasis added).

174. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1352–53 (1997).

175. *Id.* at 1347–52. *But see* Broadley v. Bd. of Educ. of Meriden, 639 A.2d 502, 506 (Conn. 1994) (rejecting the argument that gifted students are so similarly situated to disabled students as to make the Connecticut legislature's disparate treatment of the two groups a violation of the state's equal protection clause).

176. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 140 (1995).

177. Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L.J. 913, 919–27 (2001).

178. *Id.*

The legislative history of the IDEA establishes that Congress was concerned with mislabeling, placement in restrictive environments, and the stigma that results from placement of the disabled child into special programs. Due to these concerns, educating children in the least restrictive environment and mainstreaming disabled children developed into important components of the [a]ct. In designing the IDEA, the framers of the [a]ct wanted to ensure that schools regarded children with disabilities as learners. Subsequently, the [a]ct entitles every child, regardless of the type or severity of the disability, to a free, appropriate education. The IDEA encompasses the concept that a free, appropriate public education provides disabled children with equal educational opportunities.

*Id.*

would be meaningless.<sup>179</sup> In focusing on individualized needs and personal progress, Congress rejected the idea that public education is solely about meeting standards of proficiency.<sup>180</sup> Many disabled students, due to natural limitations and even despite receipt of the best educational instruction available, will be unable to meet proficiency standards.<sup>181</sup> The goal of special education for disabled students is to help those students reach their full potential; the same should apply to gifted students.<sup>182</sup>

## V. MODIFYING PENNSYLVANIA'S MODEL FOR GIFTED EDUCATION

### 1. Equal Protection for Children Leads to Equal Opportunity as Adults

Federal interest in gifted education is based on concern for the underachievement of highly capable students, rather than the idea of equal educational opportunity.<sup>183</sup> The lack of equal educational opportunity represents an important part of the problem of resegregation of society in general.<sup>184</sup> While president of the Wisconsin Association for Talented and Gifted, teacher Ruth Robinson stated, "Affluent families still will be able to give their students enrichment by sending them to camps or special weekend programs. Gifted students from poor families will be able to get the help they need only if it is offered through the public school system."<sup>185</sup> By failing to provide a meaningful education to gifted stu-

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179. Individuals with Disabilities Education Act § 601(d)(1)(A), 20 U.S.C. § 1400(d)(1)(A) (2006).

180. *See id.* § 601(c)(5)(A)(i) (outlining various changes that will improve the education offered to children with disabilities). Congress accepted research and experience demonstrating that the education of disabled children can be improved by "having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, *to the maximum extent possible*, in order to meet developmental goals and, *to the maximum extent possible*, the challenging expectations that have been established for all children." *Id.* (emphases added).

181. *See id.* § 601(c)(4) ("[T]he implementation of this chapter has been impeded by low expectations . . .").

182. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 506 (2005) ("The overall goal of education should be continuous growth and maximizing the capacity of every learner.").

183. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1325 (1997).

184. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 556 (2009).

185. Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline Parents, Advocates Decry Budget Cuts*, MILWAUKEE J. SENTINEL, June 21, 2004, at B News, available at 2004 WLNR 4671485 ("[O]ne of the most difficult tensions permeating American society, and hence its schools, is between equity and excellence.").

dents who do not come from privileged backgrounds, public schools further limit these students' opportunities for the future.<sup>186</sup>

This is particularly troublesome because students who come from lower socioeconomic classes, minority ethnic backgrounds, and rural or urban areas already face many other problems.<sup>187</sup> For example, urban gifted students—particularly those from minority ethnic backgrounds—are often ridiculed and humiliated for their academic prowess.<sup>188</sup> Public schools should work to assist those students through their personal and academic endeavors, rather than contribute to their problems.

For example, prestigious institutions of higher learning are often pushed out of reach for gifted students who do not receive proper instruction in public schools.<sup>189</sup> In a landmark sixty-year longitudinal study, researchers found:

[Gifted students who skipped grades in elementary school] got better marks and more honors in high school and college, were more likely to go to graduate school, and were more likely to hold professional and executive jobs [than qualified gifted students who were not allowed to skip]. The social and emotional adjustments of the two groups were roughly equal as determined by survey responses.<sup>190</sup>

In making certain higher educational opportunities less accessible to disadvantaged and underrepresented groups, we are denying diversity in national leadership positions.<sup>191</sup> In a piece entitled *Gifted Students and the Right to an Ability-Appropriate Education*, Anne Scholtz Heim writes, “To be led by only the privileged few from the higher socioeconomic echelons mocks the values of egalitarianism in American educational theory . . . . Furthermore, a ‘ruling elite’ that does not share common roots or common goals with the general population is not representative of the

186. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1336–37 (1997).

187. Spencer C. Weiler & Susan Walker, *Desegregating Resegregation Efforts: Providing All Students Opportunities to Excel in Advanced Mathematics Courses*, 2009 BYU EDUC. & L.J. 341, 351 (discussing the particular problems of large, urban school districts). These school districts must utilize their finite budgets to satisfy “demands in the areas of special education, limited English proficiency, security, remediation, and intervention efforts.” *Id.* (footnote omitted).

188. Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How “Equity” Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL’Y & L. 249, 259 (1996).

189. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1323 (1997).

190. *Id.* (footnote omitted).

191. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1057 (1991).

American public.”<sup>192</sup> Even those gifted students who perform well in public schools and afford themselves prestigious higher educational opportunities often find themselves less prepared than their peers at those institutions.<sup>193</sup> This negatively impacts those individual students and perpetuates the myth that those gifted students were only selected for those positions due to affirmative action rather than ability.<sup>194</sup>

On an individual level, gifted children who do not develop psychologically may become poorly adjusted adults.<sup>195</sup> For example, poor work habits resulting from a failure to meet academic challenges during school may continue.<sup>196</sup> Gifted adults often face feelings of isolation and depression.<sup>197</sup> By failing to address the particular emotional issues of their gifted students, public schools leave long-term scars with those talented individuals.<sup>198</sup>

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192. Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131, 134 (1998); Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1056–57 (1991).

The failure of our society to meet the needs of all gifted students creates a class of elite gifted, drawn from the ranks of the affluent, because only the affluent elite have the means to develop to their potential by seeking private education when the public education system fails to meet their needs.

Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1056–57 (1991) (footnote omitted).

193. For a moving story about a Black inner city student who, after overcoming tremendous obstacles and earning admission to an Ivy League university, found himself unprepared for immediate competition with his peers in his entering class, see RON SUSKIND, *A HOPE IN THE UNSEEN: AN AMERICAN ODYSSEY FROM THE INNER CITY TO THE IVY LEAGUE* (rev. ed 1999) (1998).

194. See Lisa W. Foderaro, *The Whole Applicant*, N.Y. TIMES, Nov. 1, 2009, at ED25, available at 2009 WLNR 21793048 (describing the consequences of a national shift toward a more holistic evaluation of college applicants).

195. John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320. A study conducted by the University of South Wales examined sixty students who scored a minimum of 160 on IQ tests. *Id.* It was further determined that the young students found “it very difficult to sustain friendships because, having been to a large extent socially isolated at school, they have had much less practice . . . in developing and maintaining social relationships.” *Id.*

196. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 505–06 (2005).

197. John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320.

198. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (discussing the emotional implications of racial segregation on elementary and high school children). There, the Court eloquently stated: “[S]eparat[ing] [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Id.* (emphasis added). The same standard the Court used in analyzing the psychological effects of racial segregation should be applied to the unequal education administered to

In the spirit of *Brown*, integration and equality of educational opportunity in public schools is crucial to the achievement of national equality.<sup>199</sup> One scholar writes, “For a nation that prides itself on equality of opportunity, education is the foundation for socioeconomic advancement and self-realization.”<sup>200</sup> Public education remains a useful tool for upward mobility, but we may not deny its shortcomings in the area of gifted education.<sup>201</sup>

a. Suggesting that Gifted Students Be Treated Similarly to Special Education Students Nationwide

Since gifted students, like disabled students, have unique academic and personal needs that require special attention, the needs of both groups of students should be properly addressed to afford them an equal opportunity to a progressive education and to promote healthy social and psychological development.<sup>202</sup> Few people disagree with the contention that students “with IQs at least three standard deviations below the mean . . . require ‘special’ education. But students with IQs that are at least three standard deviations above the mean . . . often have just as much trouble interacting with average kids and learning at an average pace.”<sup>203</sup>

Although some reject the comparison of gifted students to disabled students because disabled students have a particular propensity to become

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gifted students. Cynthia Marie-Martinovich Lardner, *From Counselor to Counselor: Helping Gifted Children Reach Their Potential*, 83 MICH. B.J. 18, 19 (2004) (“[T]he gifted, whether child or adult, have a unique set of needs.” (footnote omitted)); John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320 (describing the problems that result from schools’ failure to appropriately care for the needs of their most gifted students).

199. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (concluding that separate schools creates a feeling of inferiority in minority children, which can lead to continued underachievement and segregation into adulthood).

200. Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 134 (1995) (footnote omitted).

201. See Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89, 100-01 (2005) (advocating for improvement in the area of gifted education). “Though gifted children stand to gain much from improved education, the benefits of gifted education extend far beyond the benefits to the particular child.” *Id.* at 100. Because of recent national security threats, there is a need to “put forth more effort to provide proper education for all students, particularly gifted students.” *Id.* at 101.

202. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1064 (1991).

203. John Cloud, *Failing Our Geniuses*, TIME, Aug. 27, 2007, at 40, available at 2007 WLNR 15887320.

public charges if not properly educated,<sup>204</sup> gifted students may be deemed similarly predisposed.<sup>205</sup> Much research indicates that gifted students who are not properly engaged at school often act out while on campus and while away.<sup>206</sup> Additionally, despite the common perception of gifted children as model students, gifted students constitute up to twenty-five percent of dropouts nationwide.<sup>207</sup> These students may continue to get into trouble, which could lead to their becoming public charges as inmates.<sup>208</sup> As a nation, therefore, we must strive to keep our gifted children on acceptable tracks of learning and growth.<sup>209</sup>

b. Individualized Educational Programs Facilitating Individual Excellence

We can facilitate the progress of our gifted children by, as Pennsylvania does, providing gifted students with IEPs that afford the same educational protections available to disabled students.<sup>210</sup> Given the broad range of giftedness and the variety of subjects for which students may exhibit talent, gifted education would be well-served by individualization.<sup>211</sup> Some studies have indicated that homogenous grouping is especially beneficial for gifted students.<sup>212</sup> By requiring an IEP for gifted students, those students are not required to work in isolation. Instead, educators may create an educational program with the optimum amount of individual and group study to facilitate the development of each gifted student.<sup>213</sup> The benefit of the IEP is that it brings the needs of each indi-

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204. *Broadley v. Bd. of Educ.*, 639 A.2d 502, 506 (Conn. 1994) (rejecting the argument that gifted students are similarly situated to disabled students and finding no violation of the state constitution's equal protection clause in the Connecticut legislature's disparate treatment of the two distinct groups).

205. Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 *APPALACHIAN J.L.* 89, 97 (2005).

206. *Id.*

207. Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline Parents, Advocates Decry Budget Cuts*, *MILWAUKEE J. SENTINEL*, June 21, 2004, at B News, available at 2004 WLNR 4671485.

208. Gwen E. Murray, Note, *Special Education for Gifted Children: Answering the "Right" Question*, 15 *QUINNIPIAC L. REV.* 103, 136 (1995).

209. *Id.*

210. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 *WASH. U. J.L. & POL'Y* 539, 559 (2009).

211. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 *CAP. U. L. REV.* 485, 490 (2005).

212. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 *CONN. L. REV.* 1319, 1335 (1997).

213. Robert J. Sternberg, *Equal Protection Under the Law: What Is Missing in Education*, 2 *PSYCHOL. PUB. POL'Y & L.* 575, 578 (1996). Employing various teaching methods

vidual gifted student to the attention of the developing team so that those needs may be properly addressed.<sup>214</sup>

Research with regard to the most effective manner in which to educate gifted children varies a great deal. Some argue that the key to education is not individualized instruction or homogeneous grouping according to ability; instead, they suggest employing a variety of learning styles so that all students may develop their strengths and weaknesses.<sup>215</sup> Although use of a variety of teaching styles may be beneficial to all students, including gifted students, IEPs increase district accountability while offering the flexibility of administration and personalization needed to address the various needs of gifted students.<sup>216</sup> Given these recognizable benefits, the use of IEPs seems more promising for gifted students than a blanket mandate of proper instruction. With regard to instructional methods specifically for gifted children, the Pennsylvania Supreme Court held that participation in generalized enrichment programs might be appropriate for some of Pennsylvania's gifted students, but more specialized programs are needed for truly intellectually gifted students.<sup>217</sup> The court's holding, therefore, reinforces the notion that many gifted students benefit from increased individualization in their educations.

Individualization recognizes that different gifted students excel in different academic subjects.<sup>218</sup> Individualization also allows the gifted child's education program to reflect the manner in which she learns best.<sup>219</sup> Administrators, teachers, and parents can work together to provide the best education possible.<sup>220</sup> In this way, individualization may be

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ensures that every student will be able to locate a certain method that works best for him. *Id.*

214. Cf. Spencer C. Weiler & Susan Walker, *Desegregating Resegregation Efforts: Providing All Students Opportunities to Excel in Advanced Mathematics Courses*, 2009 BYU EDUC. & L.J. 341, 358–59 (stating that allowing students to self-select a course in advanced mathematics yielded a class that was not only successful, but more diverse than if administrators decided which students should enroll).

215. E.g., Robert J. Sternberg, *Equal Protection Under the Law: What Is Missing in Education*, 2 PSYCHOL. PUB. POL'Y & L. 575, 581 (1996).

216. See Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 513 (2005) (“Underachievers report that the factors that lead to their boredom with school include lack of ‘control, choice, challenge, complexity, and caring.’” (footnote omitted)).

217. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1335–36 (1997) (citing *centennial Sch. Dist. v. Dep't of Educ.*, 539 A2d. 785, 791 (Pa. 1988)).

218. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 509 (2005).

219. *Id.*

220. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1069–70 (1991).

more practical than requiring creation of specialized schools or even classes for gifted students, since districts may not have enough students to make such investments cost-effective.<sup>221</sup>

While giving the school district flexibility to meet the needs of its students, the IEP also demands accountability for the district's decisions.<sup>222</sup> Parents and guardians of gifted children will be afforded more opportunity for involvement in their children's educations.<sup>223</sup> For example, in *Centennial School District v. Department of Education*, the parents successfully challenged their gifted child's IEP in a due process hearing.<sup>224</sup> The rights of gifted children will be protected by procedural due process, including the right to challenge the IEP, seek administrative remedies, and then pursue litigation.<sup>225</sup>

2. Subjective Standard for Reviewing Adequacy of IEP: Giving School Districts a Legal Incentive to Use Resources Properly While Creating a Judicial Remedy for Violations of Civil Rights of Gifted Students
  - a. Improperly Limited Duty of District Provides No Incentive for District to Provide Proper Educational Options

Pennsylvania's treatment of gifted children in its public education system is very progressive.<sup>226</sup> By classifying gifted students as "exceptional children" and providing them with IEPs, Pennsylvania facilitates the success of these unique students by individualizing their educations as necessary. In *Centennial*, the Pennsylvania Supreme Court declared:

We agree that "gifted" students are entitled to special programs as a group to bring their talents to as complete a fruition as our facilities allow. We do not, however, construe the legislation as authorizing individual tutors or exclusive individual programs outside or beyond

221. Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131, 138 (1998).

222. Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L. J. 913, 928 (2001).

223. Since the general decline in public education has corresponded with reduced parental involvement over the past fifty years, perhaps increased parental involvement in gifted education would improve public education of gifted students. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1069-70 (1991).

224. *Centennial Sch. Dist. v. Pa. Dep't of Educ.*, 539 A.2d 785, 786, 791 (Pa. 1988).

225. *Id.*; Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1042, 1070 (1991).

226. Rachel Piven-Kehrle, Annotation, *Special Education Requirements of Gifted Students*, 115 A.L.R.5th 183 (2004).



the district's existing, regular and special education curricular offerings.<sup>227</sup>

I agree that the duty of the district is "not without limits" because financial limitations are a legitimate concern.

But Pennsylvania's limitation on the duty of school districts provides no legal incentive for districts to reevaluate or expand current curricular offerings to meet the needs of gifted students.<sup>228</sup> Under *Centennial*, a Pennsylvania school district may fulfill its legal duty to provide an appropriate education to its gifted students, regardless of the actual inadequacy of the education, so long as the district purports to have utilized all relevant existing resources in the IEPs of those students.<sup>229</sup> But courts should not only evaluate whether the district has effectively exhausted its educational resources to provide an adequate education to its gifted students; it should also consider the type, quality, and distribution of those resources.<sup>230</sup>

In *San Antonio Independent School District v. Rodriguez*, the U.S. Supreme Court stated, "It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live."<sup>231</sup> Although the *Rodriguez* Court held that unequal distribution of public services does not necessarily make a state's method of allocating resources unconstitutional, states should formulate policies for gifted education that provide districts with a legal incentive to offer adequate and updated services to gifted students.<sup>232</sup> This is in keeping with the notion that equal protection requires equality of opportunity for all students in the public school system.

In evaluating the appropriateness of a gifted student's IEP, courts should use a subjective standard. Gifted students should not be left to fend for themselves because their districts have inferior gifted education programs. The courts should be available to protect those students by asking not just whether the district has exhausted its existing educational

227. *Centennial Sch. Dist.*, 539 A.2d at 791.

228. *See id.* (limiting a school district's obligation to the district's existing curricular offerings).

229. *Id.*

230. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955) (requiring courts to "consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles").

231. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54 (1973).

232. *Id.* at 55.

resources, but also whether those educational offerings are adequate.<sup>233</sup> Once the gifted student has shown that her IEP is inadequate, the district should have to show that its educational offerings are reasonable.<sup>234</sup> Shifting the burden of proof to the district would provide a legal incentive for districts to ensure that their gifted programs are not neglected and are reasonably tailored to challenge their students.

b. Implementation of a Subjective Standard for the Evaluation of the Appropriateness of IEPs

One relevant factor for consideration in the evaluation of the appropriateness of the IEP is the district's efforts to meet the needs of the student within its resources. For example, the court might ask how long the student has lived in that district, when the district identified the student's giftedness, and all relevant efforts to meet the needs of that student before the student exhausted the benefits of existing curricular offerings. Relevant efforts might include appropriate recognition and documentation of the student's likely need for supplemental or alternative educational opportunities and corresponding attempts to create those opportunities.

Another relevant factor for consideration is the individual student's level of giftedness. The *Centennial* court was certainly correct in declaring that "a school district may not be required to become a Harvard or a Princeton" for its gifted students.<sup>235</sup> If, for example, the student is a genius who has exhausted an already extraordinarily advanced course of study within the district, perhaps it would be unreasonable to ask the district to provide more.<sup>236</sup> If, on the other hand, the student has exhausted

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233. Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1352 (1997).

234. See Gwen E. Murray, Note, *Special Education for Gifted Children: Answering the "Right" Question*, 15 QUINNIPIAC L. REV. 103, 116 (1995) (citing *Horton III*, 486 A.2d 1099, 1106 (1985)) (describing a similar modified strict scrutiny standard employed in a school financing case in Connecticut). Under *Horton III*, the plaintiff bears the initial burden of proving that disparities in spending are not de minimis. *Id.* If the plaintiff is successful, the burden shifts to the State, which must prove the existence of a legitimate policy and that these inequities are not so substantial that they are unconstitutional. *Id.* This modified strict scrutiny standard might apply only to equal protection challenges based on unequal funding. *Id.* Although adequacy of funding would likely be an important consideration under my proposed standard of review, I suggest the use of a more comprehensive approach that focuses not solely on educational expenditures, but rather on adequacy of available resources in general.

235. See *Centennial Sch. Dist. v. Pa. Dep't of Educ.*, 539 A.2d 785, 791 (Pa. 1988) (acknowledging a school district's legitimate cost concerns).

236. Indeed, *Scott S. v. Pennsylvania Department of Education* involved a gifted student who had exhausted all the mathematics courses offered at his high school by his sophomore year. 512 A.2d 790, 792 (Pa. Commw. Ct. 1986). The student's parents then

a relatively simple course of study, the district should be required to meet the reasonable needs of the student.

Failure to meet the reasonable needs of gifted students is particularly troublesome because students who are already disadvantaged are disproportionately affected.<sup>237</sup> More specifically, students with limited resources and those who are already neglected by district policy and budget-makers suffer more.<sup>238</sup> Those students enrolled in school districts in which educators are unresponsive to their needs should not be trapped in that closed system. Similarly, those students whose potential is improperly restricted by the inadequacy of tangible district resources, including facilities, instructional materials, and instructors, should not be forced to accept such inequities.

Some might argue that requiring proof of the adequacy of resources penalizes already struggling districts for shortcomings beyond their control.<sup>239</sup> But who should bear the burden of unconstitutional disparities in public education? Regardless of possible hardships for school districts, those public institutions should bear the burden of remedying unequal opportunities for innocent gifted students.

Others might argue that my suggestion will open the floodgates of litigation and divert valuable district resources from education to litigation defense.<sup>240</sup> Some might argue that my suggestion would cost the entire district and adversely affect many more students.<sup>241</sup> Although the possibility of frivolous lawsuits and difficulties because of litigation are worthy of concern, they should not determine whether to provide a legal remedy for the enforcement of legitimate rights. This is especially true where

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challenged the district's individualized education program when it did not include additional mathematics instruction. *Id.* The court ultimately decided that the student's IEP was appropriate even though it did not include advanced instruction in mathematics. *Id.* at 793.

237. Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 *FORDHAM URB. L.J.* 727, 731-32 (2001).

238. *Id.*

239. See *Centennial*, 539 A.2d at 789-90 (acknowledging the district's concerns about limited financial resources).

240. Some are also concerned that programs for gifted students are "sapping" special education funds. Barri Bronston, *Schools' Gifted Classes Under Scrutiny: Critics Say Programs Sap Special Ed Funds*, *NEW ORLEANS TIMES PICAYUNE*, Sept. 27, 2009, available at 2009 WLNR 19033970. In Louisiana, 23,000 gifted and talented students are entitled to "special education" along with 85,000 other children who have "neither elevated gifts nor talents but disabilities." *Id.* Therefore, the Louisiana Association of Special Education Administrators is concerned that money appropriated for disabled children is being used for gifted programs, and it is recommending that gifted education no longer compose a part of special education programs. *Id.*

241. See *Centennial*, 539 A.2d at 789-90 (acknowledging the argument that unchecked costs of education for the gifted would force entire school districts into bankruptcy).

civil rights are concerned. I argue that the civil rights of children should be guarded with even more vigilance.<sup>242</sup>

Although both state and federal courts recognize the complexity of issues facing educators<sup>243</sup> and are, thus, extremely deferential to educators' expertise, courts must do their part to ensure that the public school system addresses the reasonable needs of gifted students. Courts should use a fact-based evaluation of whether a particular school system offers an appropriate education to its gifted students, rather than continue to deny gifted students their civil rights due to a desire for more formalistic standards of judicial review. I also take this opportunity to reiterate the need for standardization of American gifted education by lawmakers, preferably at the federal level.<sup>244</sup> In the meantime and in the interest of justice, courts cannot persist in their reluctance to evaluate challenges to educational inequities, though the issues presented are complex.

## VI. CONCLUSION

In an effort to move toward equality of educational opportunity for gifted students, states should adopt a modified version of the Pennsylvania model for gifted education. The modified model should provide a legal incentive for school districts to ensure that their course offerings are reasonably able to meet the needs of their gifted students while making a judicial remedy available for gifted students in school districts that fail to do so. As we move toward equality of educational opportunity for gifted students, we should keep several issues in mind. Gifted students should be identified as a unique subset of students worthy of statistical

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242. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); Angela Marie Shimek, *The Road Not Taken: The Next Step for Texas Education Finance*, 9 SCHOLAR 531, 532 (2007) (“Even before the United States was founded, Americans recognized the importance of education in society.” (footnote omitted)).

243. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (“The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect.” (citation omitted)).

244. See Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1051 (1991) (explaining the need for a new federal Talented and Gifted Act); see also Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 131 (1995) (comparing the decentralized educational system of the United States to centralized systems elsewhere). “[T]he United States regulates its mail more than it does education. Apparently it is more important that documents, rather than good pedagogy, travel across the country.” Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 131 (1995).

attention.<sup>245</sup> Additionally, empirical research regarding effective teaching strategies and program models for gifted education should be facilitated.<sup>246</sup> Third, instructor and administrator qualifications for gifted educators should be monitored.<sup>247</sup> Finally, university educational programs should become a more active part of the solution to this civil rights problem.<sup>248</sup>

### A. Reporting

To properly address the needs of gifted children, we must identify them and monitor their progress.<sup>249</sup> Moreover, within the subset of gifted students, we need regularly reported information about socioeconomic class, urban or rural locales, and minority status to ensure that the students who have been historically educationally disadvantaged do not continue to be underserved by the public education system.<sup>250</sup> These statistics will help us to evaluate how trends in education are affecting gifted children.<sup>251</sup>

### B. Empirical Research

I also support government funding for empirical research on how best to identify and evaluate giftedness. Some argue that the concept of academic achievement should include not only extraordinary memory and analytical ability, but also special creativity and skills in practical applications.<sup>252</sup> Research from the fields of psychology and education may help

245. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 559 (2009).

246. Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89, 104 (2005).

247. See Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 495–96 (2005) (arguing that the teacher qualifications required by the NCLB should apply to educators of gifted students as well).

248. Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 756 (2001).

249. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 559 (2009).

250. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 494 (2005).

251. *Id.*

252. Robert J. Sternberg, *Equal Protection Under the Law: What Is Missing in Education*, 2 PSYCHOL. PUB. POL'Y & L. 575, 583 (1996). Students who succeed in creative and practical processes are often overlooked “at three crucial points—in the assessment of their abilities, in instruction, and in assessment of their achievement . . . . We need to break out of this loop and adopt policies that will enable students with all kinds of strengths to fulfill their educational . . . potential.” *Id.*

policymakers properly define and evaluate giftedness in its many forms.<sup>253</sup>

With regard to the evaluation of giftedness, further empirical research regarding standardized tests would continue to be helpful.<sup>254</sup> Since many different types of educational institutions rely on such examinations,<sup>255</sup> empirical research regarding their effectiveness in evaluating the skills that they purport to test would be beneficial. Research might suggest ways to improve standardized testing or more effectively evaluate giftedness in a subjective manner.<sup>256</sup> Proper evaluations of giftedness are crucial for policymakers because the first step in addressing the needs of gifted students is to identify those students.<sup>257</sup>

Finally, studies concerning the effectiveness of various instructional methods would also be useful.<sup>258</sup> Since districts must meet the needs of many gifted students, empirical research would help districts create gifted programs and keep them challenging.<sup>259</sup> In this way, research would help to maximize the utility of the district's limited resources.<sup>260</sup>

253. Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How "Equity" Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL'Y & L. 249, 278 (1996). Benbow's and Stanley's goal is for educational policy to reach "a better balance between equity and excellence." *Id.* The goal is to not focus on a blanket mentality for dealing with students, but "to be responsive to individual differences." *Id.* at 278-79 (footnote omitted).

254. See Robert J. Sternberg, *Equal Protection Under the Law: What Is Missing in Education*, 2 PSYCHOL. PUB. POL'Y & L. 575, 576-77 (1996) (explaining that standardized tests currently in use evaluate only a narrow set of abilities and, therefore, fail to identify gifted students with unusual abilities).

255. *Id.*

256. See Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1362 (1997) (advocating for identification of giftedness based on observation of talent, rather than just test scores).

257. *Id.*

The ideal gifted program begins with an identification system which: seeks variety by looking throughout a range of disciplines for students with diverse talents; uses many assessment measures; is free of bias and provides opportunity to students of all backgrounds; is fluid so that it can accommodate students who develop at different rates and whose interests may change as they mature; identifies potential, and assesses the drive and passion that play a key role in accomplishment.

*Id.* (footnote omitted).

258. Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89, 104-05 (2005).

259. *Id.*

260. Adequate research could help districts use funds to meet the needs of all students. *Id.*

### C. *Instructor and Administrator Qualifications*

Gifted education teachers, program specialists, and administrators are valuable resources for gifted students. Therefore, they should be qualified to address the educational and psychological needs of these unique students.<sup>261</sup> Gifted educators should be trained to address the special behavioral and social issues that may arise when dealing with gifted students.<sup>262</sup> Additionally, instructors should be academically qualified to teach advanced courses.<sup>263</sup> Their credentials should be monitored, perhaps in a manner similar to the way that the credentials of special education instructors are monitored.<sup>264</sup>

### D. *University Involvement*

Finally, universities should encourage future educators to work with gifted students and even obtain specialized training in gifted education.<sup>265</sup> Similarly, current teachers, program specialists, and administrators should keep current with their studies in an effort to meet the needs of these unique students. Ideally, commitment to gifted education would begin even before the educator's first day on the job. Early and continued commitment to gifted education will facilitate progress toward equality in education.

To achieve equality in education, we must provide properly challenging coursework for gifted students.<sup>266</sup> As professor Pamela Clinkenbeard stated, "It's hard to measure what you lose by *not* challenging them."<sup>267</sup>

261. Elizabeth A. Siemer, Note, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 558 (2009) (suggesting that NCLB's requirement that teachers be "highly qualified" be amended to include teacher training in the needs and talents of gifted students).

262. Although educators for higher-level learners tend to be more experienced than those who teach lower-level learners, experience does not equate with proper training. Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469, 478 (1996).

263. Mary Lou Herring, Note, *Model Federal Statute for the Education of Talented and Gifted Children*, 67 CHI.-KENT L. REV. 1035, 1069 (1991) ("In 1988, only [twenty percent] of gifted education teachers were sufficiently trained to teach in a gifted curriculum." (footnote omitted)).

264. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 510 (2005).

265. Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 756 (2001) (noting that this training should be overseen by university officials in conjunction with state legislatures).

266. Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 510 (2005).

267. Anne Davis & Nicole Sweeney, *Gifted Students Losing Lifeline Parents, Advocates Decry Budget Cuts*, MILWAUKEE J. SENTINEL, June 21, 2004, at B News, available at 2004 WLNR 4671485 (emphasis added).

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We can only wonder how properly challenging coursework would have improved the personal lives of gifted students, and we can only speculate on the value of the intellectual breakthroughs and technological innovations that might have been but for our national neglect of gifted education. By improving gifted education, we can move confidently into a future of national innovation and imagination.