

GIFTED EDUCATION IN NEW YORK CITY

An Analysis of Segregation in New York City's Gifted Programs

August 5, 1998

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FOREWORD

There is no single definition of giftedness.¹ School districts throughout the country have been given the flexibility to create programs to enhance their educational programs to meet the needs of children with exceptional abilities and talents. All fifty states have developed gifted programs in their school systems.² Nevertheless, despite the rhetoric of many regulations about inclusiveness and recognition of multiple talents, gifted programs throughout the country remain segregated. The Office for Civil Rights estimated that African-American and Latino students are underrepresented in gifted programs by as much as 70% nationally.³

This report does not propose to dismantle the gifted programs throughout the country. An evaluation of the necessity of or benefits derived from gifted programs is beyond the scope of this report. Instead, this report presents a critical examination of New York City's gifted programs. It both addresses the problems of African-American and Latino underrepresentation in New York City's gifted programs and suggests solutions to these problems.

INTRODUCTION

“Giftedness appears in many different forms in every cultural group at every level of society. It is the source of power which has contributed most to progress at all times and in all places. Yet, like other human resources, it remains a potentiality until it has been discovered and developed.”⁴

Nationally, experts estimate that black and Latino students in gifted programs are underrepresented from fifty to seventy percent.⁵ Consequently, while an African-American student is three times more likely than a white student to be placed in a special education class, a white student is three times more likely than an African-American student to be placed in a class for the gifted.⁶ In New York City, black and Latino students comprise seventy-three percent of the public school population, but only twenty percent of the enrollment at Bronx High School of Science and nine percent of the population at Stuyvesant High School.⁷ In addition, a small number of schools (private schools as well as districts 2, 25, and 26) send 53.3% of the total number students to Stuyvesant and Bronx Science. The ten districts that send the fewest number of students to Stuyvesant and Bronx Science send only 1.2% of the schools' enrollment.⁸ Although New York does not calculate statistics for its gifted programs, a Division of Assessment and Accountability Report made an effort to compare the racial backgrounds of students in gifted programs with students citywide, finding significant underrepresentation of Latinos in New York City's gifted programs.⁹

Although the Chancellor's Regulations state that "there are many forms and aspects of giftedness ... which are important to society and which should be developed"¹⁰ New York City's gifted programs continue to serve a homogenous group of students and exclude the vast majority of students from receiving the best that New York schools have to offer. When the District 26 Board of Education attempted to make its gifted program more accessible by delaying admissions testing until after kindergarten, the district received heavy criticism from parents with children enrolled in the program.¹¹ The change was made to provide improved access for children who are not completely fluent

in English, are not ready to take an IQ test, or have parents who might be unaware of the gifted program. Nevertheless, some parents saw the increased opportunities for other children as a step in the dismantling of the district's gifted program, and resisted the change.¹² Change comes slowly.

Despite pressure from community groups such as ACORN and promises of new regulations, the Chancellor's office has been reluctant to implement systemic changes to address the underrepresentation of African-Americans and Latinos in the gifted program.¹³ Some individual schools, however, have designed programs that have taken initial steps to overcome the segregative effects of traditional gifted programs. Both Mott Hall (PS 223) and PS 163 have expanded their gifted programs to serve a more heterogeneous group than can be found elsewhere. Mott Hall, located in Harlem, serves a population which is ninety-nine percent black or Latino.¹⁴ Their selection process de-emphasizes IQ tests and focuses upon achievement tests, interviews and recommendations.¹⁵ While some may argue that movement away from IQ tests dilutes the standards of gifted programs, Mott Hall's success can not be easily dismissed. Over seventy percent of their students who apply for admission to the specialized science schools are successful.¹⁶

Located in District 3, on W. 97th Street, Manhattan's PS 163 has developed over the past eight years a gifted program which is both heterogeneous and integrated. In 1990, white students made up ten percent of PS 163's overall population, but half of the gifted population. Latinos were half the overall population but only twenty percent of the gifted population.¹⁷ While District 3 still identifies gifted students using only an IQ test, they have adopted several procedural safeguards which enabled them to achieve a more

racially balanced ratio of students in their gifted program. District principals search kindergarten classes to insure that no gifted child is unidentified. PS 163's gifted coordinators hold parent tours of the school twice a month. Non-native English speakers may take advantage of the dual-language gifted curriculum and students with learning disabilities are not excluded from the program. Gifted education teachers also plan collaborative projects with regular education teachers.¹⁸ Latino students now occupy approximately forty-one percent of PS 163's gifted population.¹⁹

New York City's gifted programs theoretically serve students who are "intellectually superior."²⁰ Unfortunately, theory rarely comports with reality. If all New York City School districts ran their gifted programs like Mott Hall and PS 163, this report would not be necessary. Most schools and school districts, however, are not like Mott Hall and PS 163.²¹ This report contends that despite the rhetoric of the Chancellor's regulations, New York City's gifted programs are still remarkably segregated. It examines the collection of practices which operates to sort New York City's students into those with access to gifted programs, and those without.

The first part of this article details the laws and regulations related to gifted education. Federal regulations and New York state laws are analyzed. The current regulations of the Chancellor for New York City schools are also explained. New York's laws and the Chancellor's Regulations are then compared with the laws of other states. The second part then discusses barriers which limit underrepresented children's access to gifted programs. This part examines to what extent these barriers are posed by the current regulations and structure of gifted programs. This part also examines the success some schools and districts have had in overcoming barriers. The third part looks at legal

challenges which might be brought against the current system. A brief history of segregation law is presented. An analysis of recent school segregation cases regarding tracking and gifted programs is also presented. This part also evaluates the applicability of Title VI of the Civil Rights Act of 1964 ("Title VI") in a legal challenge to segregated gifted programs. The final part of this article suggests possible changes to gifted programs. It analyzes other models of gifted education and considers the suggestions from experts in the field of education.

PART ONE:
GIFTED EDUCATION AND THE LAW

A. FEDERAL LAW

Although there is no federal law mandating that states develop gifted programs, all fifty states have developed gifted programs, and forty-nine states have state regulations governing their gifted programs.²² The regulations of these forty-nine states, however, vary tremendously.²³ Most states mandate that students identified as gifted be provided services.²⁴ Nineteen, including New York, do not require districts to provide services to students identified as gifted.²⁵ Therefore, access to gifted education is even more tenuous in these nineteen states.

The Jacob K. Javits Gifted and Talented Students Education Act of 1994 (“Javits Act”) authorizes the U.S. Department of Education to provide funding to States, local education agencies, and universities to enhance gifted education through research, training, or program development.²⁶ One priority of the Javits Act is to fund programs designed to improve “identification of and the provision of services to gifted and talented students who may not be identified and served through traditional assessment methods”²⁷ While the act takes the steps of both recognizing and addressing the problem of lack of diversity in the country’s gifted programs, it provided only \$10,000,000 in funding in 1995.²⁸ Compared with the estimated \$400,000,000 spent by the states themselves on gifted programs, this amount is relatively insignificant.²⁹ In essence, the Javits Act is well intentioned, but its impact upon the problem of underrepresentation is somewhat limited.

While there are not specific federal statutes regulating the implementation of gifted programs, federal law indirectly creates limitations upon states. Brown v. Board of Education stated clearly that education “must be made available to all on equal terms.”³⁰

Brown held that racially segregated schools were inherently unequal, and, therefore, violated the equal protection clause of the U.S. Constitution.³¹ New York's Constitution reflects this requirement.³² Local school districts are thus obligated to ensure that each pupil receives a minimum level of education.³³ Likewise, Title VI imposes an obligation upon schools that receive federal funds not to discriminate upon the basis of race.³⁴ In addition, the Individuals with Disabilities in Education Act ("IDEA") mandates that every individual with disabilities receive a "free and appropriate public education" in the least restrictive environment.³⁵ While Brown, Title VI, and the IDEA are powerful weapons to combat harmful segregation, they do not directly address segregation created by traditional gifted programs.

B. NEW YORK REGULATIONS

New York's gifted programs are funded through the Education Article of the New York Constitution.³⁶ In addition, the gifted education statute authorizes the State Education Department to provide information to the district regarding the development and implementation of gifted programs.³⁷ The state department is authorized to provide technical assistance and inservice training for teachers and administrators in the implementation of local school districts' gifted programs.³⁸ More importantly, the State Education Department must maintain a record of local gifted programs³⁹ as well as develop, maintain, and distribute a handbook for parents of gifted pupils.⁴⁰ In creating the guidelines for gifted education, the legislature declared that "the state has a duty to provide a quality education for all pupils in accordance with their needs and abilities."⁴¹ Nevertheless, nothing in the state regulations requires that a district educate all gifted

students.⁴² Consequently, under New York law, a student is not entitled to receive gifted education.

The guidelines and definitions under which gifted programs are to be developed authorize the State Commissioner of Education to make recommendations to the school districts regarding the structure of their gifted programs.⁴³ Likewise, the State Education Department has published guidelines outlining suggestions for the implementation of gifted programs.⁴⁴ The state regulations, however, do not mandate any certain type of program.⁴⁵ Instead, districts are given tremendous discretion to operate and manage their curricula and programs in the manner they determine is best for their students.⁴⁶

C. THE CHANCELLOR'S REGULATIONS

The Chancellor of the City School District for the City of New York promulgates regulations governing the New York City public school districts. These regulations may expand upon, but not violate the statutory regulations of the State. Despite promises to revise the regulations, the Chancellor has not completed any revision.⁴⁷ The current regulations continue to impose significant barriers limiting access to gifted programs for underrepresented populations. Discussion of these, and other, barriers may be found in the second part of this article.

The Chancellor's Regulations for the City School District of New York recognize that a student may be gifted not only intellectually but also in areas such as art, music, dance, public speaking, leadership, and athletics.⁴⁸ Furthermore, the Regulations state that each school district has a responsibility to provide opportunities for all children to develop their special gifts.⁴⁹ Classes for Intellectually Gifted Children (I.G.C. classes) and Special Progress Classes (S.P. classes) are to be only an "additional opportunity

within a total program for the gifted.”⁵⁰ This description of the gifted program is patterned after one provided by the Morland Report, issued in 1971 by Congress, to increase access to gifted programs for underrepresented groups.⁵¹ Despite the promises presented in the introduction to the regulation governing gifted programs, the remaining portion of the regulation deals with the structure and formation of I.G.C. and S.P. classes. In essence, these promises are empty. They speak of multi-disciplinary, heterogeneous programs for the gifted, but nothing in the regulations insures that districts create such programs.⁵²

Unlike the state regulations, the Chancellor’s Regulations, however, require every New York City School Districts to provide either I.G.C. or S.P. classes, or to develop an alternative gifted program.⁵³ If districts choose not to organize I.G.C. or S.P. classes, the local Superintendent must show evidence, both written and observable, that they are providing alternate programs for the gifted.⁵⁴ In addition, if a parent whose child meets the admissions requirement for I.G.C. or S.P. classes is not satisfied with the alternative gifted program established by a district, they have the right to place the child in the I.G.C. or S.P. programs of a neighboring district.⁵⁵ Therefore, a parent of a child in a New York City School District does have a limited right to place their child in a gifted program.

The limits upon this right, however, are problematic. The child must meet the Chancellor’s criteria for placement in an S.P. or I.G.C. class.⁵⁶ While the regulation begins by suggesting that achievement on standardized math and reading tests do not “adequately measure the intellectual capacity of large numbers of students,” those achievement tests are precisely what the Regulation uses to determine placement.⁵⁷ The Regulations recognize the importance of identifying all gifted students, but they also state

that it is “essential that only those children who meet the selection criteria” be admitted into the program.⁵⁸ New York City’s gifted programs are, thus, exclusionary, rather than inclusionary.

The Regulations suggest that the admission criteria can be grouped into the broad categories of achievement and personal characteristics. While the regulations continue to provide very specific indicators on standardized achievement tests for selection criteria, they identify personal characteristics with the nebulous concept of “teacher judgments.”⁵⁹ Indeed, seven New York City School districts use only IQ tests as their sole selection criteria.⁶⁰ Consequently, the promise to identify all students with special gifts becomes empty rhetoric, good for policy statements and press conferences, but not good for the majority of New York City’s school children.

A final important component of the Chancellor’s regulations is the promise to disseminate information regarding gifted programs. The regulations provide that all staff members, students, parents and the community-at-large shall be made aware of the city wide standards for placement in I.G.C. and S.P. classes.⁶¹ In addition, the regulations state that parents of intellectually gifted students shall be informed as early as possible of the educational opportunities for their children.⁶² While such a requirement seems helpful, the only obligation imposed on the schools is to inform parents *of intellectually gifted students*, not every parent. Consequently, if a local school district fails to identify a child who is gifted, the district is not required to inform the parent of the program. The parents, rather, must not only recognize that their child is gifted but also bear the burden of investigating their rights and the district’s program. As the ACORN study demonstrates, this burden is not necessarily an easy one.⁶³

In sum, the Chancellor's Regulation regarding gifted children simply does not provide equal access to the City's gifted programs to all students. It imposes no obligation to design programs for students who are gifted in areas other than traditional intelligence. Its evaluation procedures are one-dimensional, focusing almost entirely upon achievement tests that, by the Regulation's own admission, do not adequately measure the intellectual capacity of large numbers of students. It contains no safeguards to ensure that schools and school districts inform parents of their programs. Each of these failures contributes to the continuing segregation of New York's school children.

D. REGULATIONS OF OTHER STATES

The efforts of New York to insure that their gifted programs are available to all students seem meager when New York's regulations are compared with those of other states. While the New York regulations contain rhetoric regarding "a duty to provide quality education," they do little to mandate that local districts diversify their programs. Likewise, nothing in the Chancellor's regulations insures that districts actually create multi-disciplinary and heterogeneous programs. While other states continue to struggle with the problems of underrepresentation in gifted programs, the statutes of other states take a more definite approach to creating heterogeneous, multi-disciplinary gifted programs, accessible to all students.

North Carolina's statute regulating gifted programs perhaps provides the best example of a statute that does more than promise rhetoric in its efforts to create accessible gifted programs.⁶⁴ North Carolina's statute first recognizes that gifted students can be found in "all cultural groups, across all economic strata, and in all areas of human endeavor."⁶⁵ The recognition that giftedness transcends culture and class is the first step

in combating underrepresentation of disadvantaged groups in gifted programs. North Carolina's statute, however, does not end there. Unlike New York's regulations, North Carolina requires each district to develop a plan to serve gifted education. Moreover, North Carolina requires the participation of parents and representatives of the community in the development of these plans.⁶⁶ These plans are to provide a clear statement of the gifted program which includes "different types of services provided in a variety of settings to meet the diversity of ... gifted students."⁶⁷ North Carolina also requires the plan to have a procedure to resolve disagreements between parents and school administrators when a child is not identified as gifted.⁶⁸ The involvement of parents in the plan is a critical step in making districts accountable to those whom they serve, as well as making gifted programs more accessible to diverse populations. Finally, to avoid underrepresentation, North Carolina also limits the effect of any given plan to three years, after which a new plan must be developed.⁶⁹ This insures that North Carolina's gifted programs do not stagnate, and that problems with any program must be continually addressed.

While North Carolina's regulations still afford districts some flexibility in their implementation of gifted programs, Alabama's regulations have taken a more structured approach. Alabama begins by requiring a 130 score on one of the standard IQ tests, the Wechsler Intelligence Scale for Children-Revised ("WISC-R"), Stanford-Binet Intelligence Test ("S-B"), or Kaufman Assessment Battery for Children ("K-ABC").⁷⁰ While reliance on a standard intelligence test alone would not promote accessibility to gifted programs, Alabama makes a number of significant modifications. First, children may also be tested on a test created for special populations, such as the adapted WISC-R,

the adapted S-B, or the Raven Progressive Matrices (“RPM”).⁷¹ Second, a student with outstanding achievement on an achievement test (such as the Stanford Achievement Test) may be admitted if his or her IQ test is within the standard error of the admission criteria.⁷² A student who scores a 120 on any IQ test, as well as a 130 on the Torrance Test of Creative Thought and a 65 on the Torrance Verbal Test also qualifies.⁷³ Finally, a student who qualifies as disadvantaged under a state checklist must only score one standard deviation above the mean (115) on any of the IQ tests to gain admission to a gifted program.⁷⁴ Thus, Alabama not only recognizes the need for alternative testing, recognition of creative thinking in addition to intellectual ability, and the inability of standardized tests to adequately measure certain populations, but also takes steps to insure that underrepresented populations have more equitable access to their gifted programs.

North Carolina and Alabama stand as two models which both take initial steps in developing heterogeneous gifted programs. Other state regulations provide more equitable access to gifted programs for underrepresented populations by recognizing diverse forms of giftedness in their definitions or enacting safeguards to improve access to programs. For example, California specifically identifies several areas of giftedness, noting the following categories: intellectual, creative, specific academic ability, leadership ability, high achievement, and performing and visual arts talent.⁷⁵ Likewise, Michigan lists recognizes several forms of giftedness. Michigan gifted students may be intellectually gifted, have outstanding school achievement, or have outstanding abilities in “particular areas of human endeavor, including the arts and humanities.”⁷⁶

California's efforts to identify gifted students do not end with definitions. The code declares that "special efforts be made to ensure that pupils from economically disadvantaged and varying cultural backgrounds be provided with full participation in these unique opportunities."⁷⁷ Illinois recognizes the need to identify gifted students and imposes a duty on the State Board of Education to support a statewide program of early identification of gifted students.⁷⁸

New York's gifted program could benefit from the identification of different forms of giftedness, the effort to identify students from divergent backgrounds, and the statewide standardization of identification procedures. Although the differences between other states' codes and New York's code are subtle, their importance to developing a gifted program that is able to meet the needs of all New York students can not be undervalued. Rather than the hollow promises which fill the Chancellor's Regulations, the New York legislature should revise the gifted education statute to promote the diversification of New York's gifted programs based upon the models enacted by other states.

The regulations adopted by North Carolina, Alabama, California, Michigan, and Illinois provide initial steps in creating heterogeneous gifted programs. Nevertheless, they do not entirely address several significant barriers faced by underrepresented populations. They remain initial steps. The next part of this paper examines the significant barriers beyond those imposed by limited regulations which parents of underrepresented children face in securing appropriate education for their children.

PART TWO: BARRIERS

“The problems of underrepresentation of minority and economically disadvantaged gifted students are intrinsically related to the more general problems of the education and schooling of these populations.”⁷⁹

A. DEFINITION OF GIFTEDNESS

Although educational experts agree that even extremely bright children vary at the rate in which they learn and the areas in which they excel, many districts in New York City still define giftedness in terms of academic capability, as measured by tests or high levels of achievement.⁸⁰ Although, there is great variation in the definitions of giftedness from district to district, many districts do at least acknowledge that “giftedness” does not include any single ability.⁸¹ However, in several cases, the culturally biased admissions procedures and the one dimensional gifted programs available are based on that narrow definition, do not account for that acknowledgement, and therefore, result in the underrepresentation of African-Americans and Latinos in the gifted programs.

B. BARRIERS TO THE NYC GIFTED PROGRAM

The testing and identification procedures for admission to New York City’s gifted programs and science high schools, the inability of parents to obtain information on gifted programs, the inadequacy of many public schools’ curricula, and the one dimensional focus of several districts’ gifted programs create insurmountable barriers for many bright children. Thus, those barriers may account for the underrepresentation of African-Americans and Latinos in the gifted programs in elementary and middle schools, and the science high schools.

C. TESTING PROCEDURES

For example, the use of standardized testing as the sole or major component of the admissions process contributes to the exclusion of African-American and

Latino children from existing gifted programs. Many districts use IQ tests as a threshold for admission to the gifted program.⁸² Moreover, seven districts actually use the test as the sole criterion for admission.⁸³ Additionally, districts use other standardized achievement tests as criterion for access to gifted classes.⁸⁴

Specifically, the accuracy of standardized tests or IQ tests given to a child of any age may be deficient because of language or cultural barriers, and other limitations inherent in written tests. Experts agree that many standardized tests simply do not address linguistic and cultural differences between children.⁸⁵ Moreover, experts contend IQ tests only serve to measure underprivileged children's assimilation into dominant society.⁸⁶ Thus, those tests may be biased against those who are from a lower socioeconomic or culturally diverse background.⁸⁷ Notwithstanding, many standardized tests also fail to test for creativity or a variety of giftedness. For example, because that "creative intellectual" has insight into several correct answers, the creative intellectual may have difficulty choosing one correct multiple choice answers.⁸⁸

Furthermore, only a handful of districts even offer testing in a language other than English.⁸⁹ Written and oral tests are obviously prejudiced against students who cannot clearly express themselves in English. For example, for a student whose first language is not English, standardized test scores may be a better reflection of that student's knowledge of English and grammatical structure, rather than their general intellectual potential.⁹⁰ Thus, these standardized tests clearly fail to tap the academic potential of all students yet, several New York City districts continue to use IQ or other achievement test scores as the sole or main criterion for admission into the gifted program.

Moreover, IQ tests given to young children are not only often inaccurate, but may be especially biased against culturally diverse or economically disadvantaged children. Many educational experts agree that intelligence is developmental.⁹¹ Thus, experts contend that early testing can lead to inaccurate results, and may be biased against young children from a lower socioeconomic background who may not be as cognitively developed as other children.⁹² Additionally, early testing of non-native English speakers is unfair because the children are still gaining proficiency in the English language.

Nonetheless, many districts administer IQ tests to children before Kindergarten and use that as the sole criterion for admission to the gifted program.⁹³ Findings show that in many districts there is little turnover in the gifted program after Kindergarten.⁹⁴ For example, in District 26, more than 300 of the 360 students in the gifted program were admitted before Kindergarten.⁹⁵

D. EARLY GIFTED PROGRAMS

Early gifted programs may contribute to the homogeneity of gifted programs and the exclusion of many bright children in general in such programs. To begin, early programs may not give districts enough time to inform parents about the entrance requirements. Moreover, if admittance to the program is based on inaccurate testing, schools may wrongly and irreparably label children as “gifted” or “non-gifted.” A child may turn out to be quite talented, but is initially a slow learner. However, labeling children can have a lasting effect on a student’s self esteem and consequently, their academic efforts.⁹⁶ Thus, it is likely that as a result of labels, many students fail to

achieve their true potential. Nonetheless, 11% of the districts have pre-kindergarten gifted programs and 40% of the districts have gifted programs in kindergarten.⁹⁷

E. FAILURE OF DISTRICTS TO TEST EVERY STUDENT FOR ADMISSION

The existing Chancellor’s regulations that provide that a child should be tested for the gifted program upon the request of a teacher or parent, fail to direct districts to test every pupil for admissions to the gifted program and thus, contribute to African-American and Latino underrepresentation in gifted programs.⁹⁸ An immigrant child’s parents may not understand what a “gifted program” is due to language or inherent cultural differences.⁹⁹ Thus, even if parent does receive information in their native language, they may not truly understand the purpose of such a program.¹⁰⁰ Moreover, because of cultural differences, parents may not appreciate the value of education in this country and fail to have their children tested for the gifted program.

Likewise, a teacher may fail to recognize a candidate for the gifted program because that child is shy or culturally different. A teacher may not be familiar with the qualities that other cultures recognize as gifted.¹⁰¹ Moreover, it has been shown that teachers use the following factors as evidence of giftedness when referring students to gifted program: neatness, cooperation, and punctuality.¹⁰² Furthermore, research shows that traditional conceptions of intelligence, which are also the focus of most standardized tests, appear to most strongly influence a teacher’s perception of students.¹⁰³

A teacher may not be aware that multi-cultural children may have different listening, learning, and response styles.¹⁰⁴ For example, individual competition, initiative, and self-direction, which are valued qualities in American society, are not

always valued in other cultures.¹⁰⁵ Likewise, a teacher may simply not recognize a child as gifted due to racial stereotypes. In essence, teachers may fail to recognize that children should not be measured against a white norm.¹⁰⁶

F. INABILITY OF PARENTS TO OBTAIN INFORMATION

The inability of parents to obtain information on gifted programs is a contributing factor to the homogeneity of gifted programs. Even if a student meets the district's standards for admission to the gifted program and would benefit from the classes, the parents may be unable to obtain the information necessary to apply to the program.¹⁰⁷ Moreover, schools and districts often fail to publicize vital information regarding admission.¹⁰⁸ Additionally, Chancellor Crew's review of each district program confirmed that many parents had limited or no access to information about gifted classes.¹⁰⁹

Information availability and dissemination varies considerably from district to district.¹¹⁰ Although a central office for gifted programs was created in the early 1980's, the office was eliminated in 1995 due to budget cuts.¹¹¹ There is a considerable difference in the magnitude of effort to inform parents about the gifted program from district to district.¹¹² Some districts do not even have pamphlets for the gifted program available upon request. For example, District 6, 9, 22, and 7 do not currently have written material available on their gifted programs.¹¹³ Moreover, District 22 only advertises for the gifted program by placing a small advertisement in the local paper.¹¹⁴ Additionally, District 7 reported that information regarding the gifted program is only available through a school which was closed for the summer.¹¹⁵

Information regarding gifted programs is only available in languages other than English in some New York City districts. District 2, 22, 24, 25 publish notices in a several languages regarding admission to the gifted program.¹¹⁶ However, last year, several districts only published test information in English.¹¹⁷ Thus, non-English speaking parents had no way of knowing that there were programs available for their children.

For example, when parents inquire about the programs available, school personnel is often unhelpful, uninformative or rude. Moreover, according to the ACORN study, many schools would not provide the requested information over the phone thus, ignoring the time constraints of working parents.¹¹⁸ The ACORN study also found that the some school offices would not provide all the information solicited.¹¹⁹ Additionally, many school employees actually refused to help the “parent” and suggested he or she call the district office (which was also found to be unhelpful).¹²⁰

Specifically, it also may be especially hard for African-American and Latino parents to obtain the necessary information. The ACORN study found that many African-American and Latino parents were not given the same information as other parents.¹²¹ The personnel tended to give white parents more information, encouragement, offer tours, and better answer their questions.¹²² Moreover, several African-American or Latino parents at PS 26 insisted that they had never been informed about the gifted program.¹²³

G. INADEQUACY OF SOME PUBLIC SCHOOL'S CURRICULUM

The inadequacy of many elementary and middle schools, especially those schools with a predominantly African-American or Latino population, contributes to their underrepresentation in the science high schools.¹²⁴ Not to mention, new immigrants may have had no prior schooling at all. However, in order to pass the entrance exam to the science schools, the student must have a “sound basis” in language and math skills.¹²⁵

Thus, at the very least, a student must have had a good Math and English curriculum available.¹²⁶ The necessary coursework is simply not available to most blacks and Latinos at public schools.¹²⁷ Many poor schools have bigger classes, less resources, as well as, less qualified and motivated teachers.¹²⁸

Moreover, according to the ACORN study, the coursework available to students on the Regents track is likely to lead to success on the admissions exam to the science high schools.¹²⁹ For example, those students who took Sequential Math are better prepared for the entrance examination than those students who did not take Sequential Math. The students on the Regents track are likely to have a stronger basis in mathematics for the following reasons: well-trained teachers, more practice, and more testwise.¹³⁰ Specifically, it is likely that higher tracked students have also had better teachers available since teachers are often promoted from lower to higher tracks.¹³¹ Moreover, because there is evidence that teacher expectations may be the greatest predictor of success, lower tracked students may also have less motivation.¹³²

Thus, due to the inadequacy of their elementary or middle schooling, many students were not provided a fair chance to compete for entry to the science schools. The

ACORN study sets forth some disturbing statistics. The schools that dominate admission to the science schools differ in racial composition from the districts that send the least.¹³³ Moreover, the schools that send the most students to the science high schools have higher percentages of students taking Regents level classes.¹³⁴ However, the nine low sending districts to the science schools, which were 97 % non-white, had no eighth graders studying Sequential Math.¹³⁵

H. LACK OF VARIETY IN GIFTED PROGRAMS

The lack of variety and one-dimensional focus of many gifted programs fails to maximize the potential of all students. Many districts acknowledge that there are opportunities for special education and Limited English Proficient (“LEP”) students to participate in their gifted programs, but most of those districts do not have either of those groups represented in the gifted programs.¹³⁶ Moreover, many programs include all curriculum areas, but some emphasize academic enrichment, and other programs focus on mathematics, science or the performing arts.¹³⁷ The goals of the gifted programs also vary from district to district.¹³⁸

Specifically, although many districts say that there are opportunities for LEP students in the gifted programs, districts fail to alter the admissions procedure or the method of instruction for those students.¹³⁹ These districts account for the lack of LEP students in the gifted programs by maintaining that the students not only need advanced achievement in Math and English, but also that the instruction of these gifted classes is only available in English.¹⁴⁰

Additionally, the focus and instruction of many gifted programs fails to recognize that special education students may have gifts worth developing.¹⁴¹ Many

districts said there were opportunities for special education students to participate in the program. However, the districts accounted for the lack of special education students represented, by claiming that there are no special education instructors in the school or that those students failed to meet the existing criteria.¹⁴²

**PART THREE: GIFTED PROGRAMS
AND SEGREGATION LAW**

“Gifted programs are the last bastion of segregation”¹⁴³

Despite the failure of New York City's gifted programs to include the diverse populations of the city, scholars have suggested that gifted programs serve an additional purpose: preventing white flight from city school systems.¹⁴⁴ In doing so, it segregates and isolates New York City's students.¹⁴⁵ This part of the paper examines the possible legal challenges which might be brought to the NYC gifted program. It first explains briefly the history of segregation law related to the schools and the subsequent limitations placed upon Brown v. Board of Education.¹⁴⁶ This part then analyzes challenges to school district's tracking, brought under Equal Protection theories. It also analyzes challenges to tracking that might be brought under Title VI of the Civil Rights Act of 1964.¹⁴⁷ This part then concludes by distinguishing between challenges of tracking systems and challenges of gifted programs, noting special considerations that must be brought in challenges of gifted programs.

A. BROWN, SCHOOL DESEGREGATION, AND SUBSEQUENT LIMITATIONS

In 1954, the U.S. Supreme Court condemned segregation within the public schools in Brown v. Board of Education ("Brown I").¹⁴⁸ The Court noted that segregation in the schools "generate[d] a feeling of inferiority as to [blacks'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."¹⁴⁹ A year later, in the second Brown decision ("Brown II"), the Court ordered schools that operated dual systems to begin desegregation "with all deliberate speed."¹⁵⁰ Theoretically, Brown I and Brown II promised to put an end to the notion that separate schools could be equal. During the fourteen years following Brown II, schools continued

to interpret the “all deliberate speed” mandate to give them latitude to delay and frustrate desegregation.¹⁵¹ In 1969, the Court charged school systems that operated dual systems of education with “the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”¹⁵² Thus, Brown’s promise began to take form.

In 1973, however, Keyes v. School District No. 1¹⁵³ distinguished between intentional segregative acts and segregation caused by social conditions not directly tied to purposeful action.¹⁵⁴ The Court noted that the former was reachable, but the latter was not, regardless of the interplay between governmental and societal forcers.¹⁵⁵ Keyes represented the beginning of a substantial limit placed on the promise of Brown I and Brown II to end racial segregation in the public schools. Three years later, in Pasadena City Board of Education v. Spangler,¹⁵⁶ the Court held that once a desegregation plan was issued the school was not required to adjust it annually for migration and factors outside government influence or control.¹⁵⁷ While Brown specifically precluded states from operating dual systems of education, subsequent decisions began to place limitations upon its application. These two decisions established a narrow channel through which plaintiffs had to traverse in order to demonstrate prohibited segregation. Plaintiffs had to show that the segregation was intentionally caused by the school, rather than caused by some uncontrollable societal force. As time passed from the original desegregation order, demonstrating this intention became more difficult.¹⁵⁸

The promise of Brown I continues to be only a promise, not a reality. Recent segregation cases have expanded the limitations placed upon Brown I by Keyes and Spangler to dramatically curb the impact of Brown I in the effort to end segregation in

America's schools.¹⁵⁹ Dowell v. Board of Education of Oklahoma City Public Schools¹⁶⁰ and Freeman v. Pitts¹⁶¹ solidify the distinction made in Keyes and Spangler between segregation caused by intentional discrimination and that caused by societal forces. Dowell and Freeman categorize segregation as either *de jure* or *de facto*.¹⁶² *De jure* segregation is that in which the school, by law, operates a dual system.¹⁶³ Conversely, *de facto* segregation is simply the existence of segregative effects, not caused by any actions or policies of the school.¹⁶⁴

In Freeman, the DeKalb County School District had a population approximately evenly divided between whites and blacks, fifty percent of its black students attended schools with higher than ninety percent black populations.¹⁶⁵ Nevertheless, the Court concluded that the segregation was caused by patterns in the racial composition of neighborhoods.¹⁶⁶ Thus, the Court reasoned, the segregation was a natural condition that was not the product of state action, but of private choices.¹⁶⁷ Because the school was not responsible for the choices parents made to live in segregated neighborhoods, the segregation was *de facto*.

In Dowell, the Court held that federal supervision of local school districts was to be a temporary measure.¹⁶⁸ The Dowell Court reasoned that the need for local control dictated that federal supervision not extend beyond the time necessary to eliminate intentional discrimination.¹⁶⁹ Even though the Oklahoma schools were still remarkably segregated, the Court declared the system unitary, holding that the "vestiges" of prior discrimination had been eliminated.¹⁷⁰ Therefore, only the "vestiges" of *de jure* segregation became reachable. Although Dowell did not undertake the task of defining vestiges, in U.S. v. City of Yonkers,¹⁷¹ a New York district court defined vestige as "a

policy or practice which is traceable to the prior *de jure* system of segregation and which continues to have discriminatory effects.¹⁷²

In these holdings, the Supreme Court reasoned that racial balance is not an end in and of itself, but rather, that schools are only obliged to eliminate racial imbalances which have been caused by Constitutional violations.¹⁷³ While the Court recognized that vestiges from a history of intentional discrimination may linger on, we can not “overstate [their] consequences in fixing legal responsibility.”¹⁷⁴ In essence, this reasoning assumes that segregation caused by societal forces is distinguishable and separable from intentional segregation. This treatment views segregation as a inevitable product of society, rather than as a problem to be eliminated regardless of its source.¹⁷⁵

Consequently, once a school has been declared unitary, a plaintiff must show a causal nexus between current segregation and past segregative practices.¹⁷⁶ This imposes a heavy burden upon any plaintiff bringing a claim that a school’s practices violate the equal protection clause. The plaintiff must demonstrate not only that segregation was caused by a school policy or practice, but also that the policy or practice was intended to effect such segregation.¹⁷⁷ In this manner, even though the Freeman Court acknowledged the potential for new and subtle forms of discrimination to emerge, the possibility of ensuring that such forms of discrimination do not hinder our children seems small.¹⁷⁸

B. TRACKING AND SEGREGATION

Tracking¹⁷⁹ is the systematic practice of sorting students into different levels, kinds of classes, or programs based upon students’ perceived abilities.¹⁸⁰ Students’ ‘abilities’ may be measured by achievement tests, intelligence tests, grades, or teacher

assessments.¹⁸¹ Students who are placed in high tracks are commonly given access to an enriched curriculum, gifted classes, magnet programs, advanced placement classes, and other programs designed to enable students to succeed in high school and prepare themselves for college. Students who are placed in the low tracks, however, receive a curriculum slowed down to match low expectations of the students.¹⁸² The results are not surprising. Eighty-five percent of students in the upper tracks attend college, while only fifteen percent of students in the lower track attend college.¹⁸³ Experts estimated that approximately ninety percent of ninth graders are tracked.¹⁸⁴ Studies also suggest tracking sorts students by race, with African-American or Latino students disproportionately placed in the lower tracks and underrepresented in the higher tracks.¹⁸⁵ Gifted programs represent one kind of tracking, as students with perceived exceptional abilities are offered differentiated instruction.¹⁸⁶

As a practice, tracking began in the early part of the twentieth century as both a response to increasing levels of immigration and as a by product of ‘scientific’ efforts to identify a causal relationship between intelligence and race.¹⁸⁷ The development of intelligence testing at the beginning of the century enabled schools to rationalize the differences between students as caused by differences in innate abilities.¹⁸⁸ As research began to demonstrate the ineffectiveness of tracking, however, its prevalence began to decline.¹⁸⁹ Nevertheless, Brown I brought with it a resurgence in tracking, as school districts adopted tracking systems as a means to maintain segregated systems.¹⁹⁰ Despite the segregation festering in today’s tracking procedures as well as the historically racist roots of tracking, courts have recently declined to find Constitutional violations absent any intentional segregation.¹⁹¹

In addition, the Court has placed a second substantial limitation upon the ability to challenge tracking systems with its decision in San Antonio Independent School District v. Rodriguez.¹⁹² The Supreme Court in Rodriguez held that education is not a fundamental right explicitly protected by the Constitution.¹⁹³ The Court refused to apply strict scrutiny to examine the validity of the San Antonio school district's method of funding schools with property taxes, which left schools in impoverished neighborhoods woefully underfunded.¹⁹⁴ Instead, the Court held that strict scrutiny was a standard reserved for state action which impinges upon a fundamental right protected by the Constitution or which disadvantages a suspect class.¹⁹⁵ Therefore, because Rodriguez casts education as something less than a fundamental right, the standard of review for challenges to school tracking systems is lowered. Schools must only show that their system of classification bears a rational relationship to further an educational goal.¹⁹⁶

Subsequently, the Court held that education occupies a special position, where, although it is not a fundamental right, it has special importance in American society.¹⁹⁷ Because education occupied this special position, the Court invoked heightened scrutiny, a standard of review approaching strict scrutiny.¹⁹⁸ In order for a regulation to be upheld, it must have a fair relation to a legitimate public purpose of the state.¹⁹⁹ Nevertheless, in Kadrmas v. Dickinson Public Schools, the Court upheld a statute permitting North Dakota school districts to charge students a fee for using school transportation.²⁰⁰ Rodriguez and the cases that follow cast education as something less than a fundamental right. Consequently, challenges to tracking systems, including gifted programs, must invoke claims of racial discrimination in order to avoid application of the reasonable relation standard.

Initially, courts looked favorably upon discrimination claims brought against schools that began tracking to circumvent segregation orders, as it was relatively simple to show that the prior system of segregation adversely impacted African-American students.²⁰¹ For example, when the District of Columbia placed blacks in disproportionately lower tracks after it had been ordered to desegregate, the court noted that the district's system was unable to accurately measure or predict ability.²⁰² In addition, the court held that the tests were culturally biased and the school system's low expectations of black students undermined the school's estimations of the students' ability.²⁰³ The district court held that "the tracking system amounted to unlawful discrimination."²⁰⁴ Upon appeal, however, only the tracking system at issue, and not all tracking systems, was held to violate the equal protection clause.²⁰⁵ Consequently, tracking as a procedure was not invalidated.

In the early 1970's a series of cases, mostly from the south in the Fifth Circuit, prohibited schools which had recently desegregated from adopting tracking systems that had racially disparate impacts.²⁰⁶ Although these decisions prevented schools from circumventing desegregation orders, like Hobson, they did not declare racially disparate tracking *per se* invalid. Ultimately, relying on logic like that used in Keyes, the Fifth Circuit designed a test to determine whether past school segregation caused the disparate results of the tracking system. In McNeal v. Tate County School District, the Fifth Circuit held that tracking systems with racially disparate effects were invalid, unless the school could show that "the assignment method [was] not based on the present results of past segregation or [that it would] remedy such results [by providing] better educational opportunities."²⁰⁷ Thus, tracking systems were not invalid unless past segregation, rather

than societal forces, created the disparate results. In this holding, the Fifth Circuit began to cast the segregative results of tracking as a form of ‘unintentional’ segregation.

As time passes, it becomes more difficult to demonstrate a direct impact of past segregation upon present tracking systems. Consequently, school districts have recently been able to demonstrate their tracking systems do not violate the equal protection clause.²⁰⁸ In Quarles v. Oxford Municipal Separate School District, the court tried to disengage its analysis of tracking from the issue of segregation, holding that “educators, rather than courts...are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved.”²⁰⁹ Similarly, in Georgia State Conference of Branches of NAACP v. Georgia, the court held that achievement grouping was “accepted pedagogical practice,” and consequently, a plaintiff who challenges tracking practices must demonstrate that the segregation which resulted was intentional.²¹⁰ Both courts upheld tracking systems where the racial disparities were significant.²¹¹

In addition to the separation of tracking from issues of segregation, courts can also be seen to minimize the segregative practices themselves. One manner in which courts minimize the segregative practice is by minimizing the effect of the tracking system. For example, in Quarles, the degree of mobility, the allowance for placement based upon teacher recommendations rather than test scores, and the acceptance of parental requests for transfer convinced the court to validate the school’s tracking system.²¹² Likewise, in Montgomery v. Starkville Municipal Separate School District, the court held that evidence that African-American students were not “‘locked into’ their

achievement groups, but instead are likely to move upward and improve over the years ... ” was sufficient to satisfy the requirements of the McNeal test.²¹³

Courts have also minimized the segregative effect of tracking by minimizing the degree of segregation. The Montgomery court noted that the segregative effect of the district’s achievement grouping was minimal, concluding that the minimal segregative effect is outweighed by better educational opportunities afforded the students.²¹⁴

Likewise, in NAACP, the court ruled that the degree of differences were not substantial enough to draw an inference of intentional segregation.²¹⁵ These conclusions, however, mimic the logic used in 1850 by the Massachusetts Supreme Court, that held that the school had “plenary authority ... to arrange, classify, and distribute pupils ... as they think best adapted to their general proficiency and welfare.”²¹⁶

These decisions rest upon three faulty assumptions. First, the notion that educational benefits can outweigh the harmful effects of segregation violates Brown I’s holding that “separate educational facilities are inherently unequal.”²¹⁷ As courts have continued to raise the walls which distinguish between *de jure* and *de facto* segregation, they have neglected the mandate of Brown I to end segregation in the schools.

Second, the assumption that schools can accurately identify their students’ intelligence has been questioned by both courts and educators. The assumption that schools can accurately test for students’ intelligence itself implies that intelligence is indeed measurable.²¹⁸ Moreover, even if intelligence can be measured, it is doubtful that current practices measure it accurately. Several courts have recognized the inaccuracy of intelligence testing.²¹⁹ Likewise, studies have shown that standardized IQ tests

underpredict the IQ of African-American or Latino students by as much as one standard deviation.²²⁰

Finally, school districts are not necessarily in the best position to determine the educational needs of their students as well as the systems best suited to meet these needs. Federal funding of education is spending clause legislation.²²¹ Thus, while local districts have some degree of control over their activities, they may be limited by federal regulations. In addition, students ought to have some measure of protection from district policies resulting in segregation.²²²

Nevertheless, courts continue to adhere to the notion that “tracking practices are legitimate educational conventions which can be used by school systems if they are not subterfuges for racial discrimination.”²²³ In Montgomery, the court determined, despite the racial imbalance among the tracks and the absence of any studies demonstrating student mobility or improvement, that the school district employed tracking for the purpose of assisting student learning, rather than as a way to maintain a segregated system.²²⁴ Therefore, any challenge brought to tracking practices that segregate students within or between schools must demonstrate not only that the schools’ tracking practices have a discriminatory effect, but also that the school intended for the adopted tracking practice to have a discriminatory effect.

C. CHALLENGES UNDER TITLE VI

Title VI of the Civil Rights Act of 1964 states that “[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal assistance.”²²⁵ Unlike the Fourteenth Amendment, Title VI

uses the passive voice. Rather than imposing a duty upon the state not to pass discriminatory laws, Title VI requires that no person be denied the benefits of a program receiving Federal assistance, regardless of the reason. In addition, a recipient of federal funds must take affirmative action to overcome the effects of prior discrimination.²²⁶

These distinctions are important because they appear to make a demonstration of discriminatory intent unnecessary.²²⁷ In addition, the Department of Education has further implemented regulations under Title VI which state that districts may not use

criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect to individuals of a particular race, color, or national origin.²²⁸

Consequently, while demonstrating a disparate impact is not sufficient to show discrimination under the Equal Protection clause, Title VI litigants may advance a disparate impact theory of discrimination.²²⁹ Therefore, Title VI may provide a more accessible avenue for litigation against schools' tracking practices or gifted programs.²³⁰

Under the disparate impact analysis, the plaintiff must first show that the tracking practice has a disparate effect upon a protected class. Once this disparate effect has been demonstrated, the burden shifts to the school to prove that the tracking practice has "substantial legitimate justification" to a legitimate educational interest.²³¹ Even when defendant meets this burden, a plaintiff may prevail if a less discriminatory method of achieving the objective exists.²³² In NAACP, the litigants advanced a Title VI theory in addition to the equal protection challenge.²³³ Although the court declined to invalidate the tracking system based upon Title VI grounds, it did state that, although tracking and achievement grouping was not *per se* undesirable, certain methods may be undesirable.²³⁴

In addition, in Larry P. v. Riles,²³⁵ a successful Title VI challenge was brought against a system of classification that disproportionately placed African-Americans in special education classes based on IQ tests, without requiring a showing of a discriminatory purpose.²³⁶ Nevertheless, courts may continue to accept tracking as an accepted pedagogical practice, necessary to achieve a legitimate educational need.²³⁷

D. CHALLENGING GIFTED PROGRAMS: THE LAST BASTION OF SEGREGATION

Challenging gifted programs poses different problems than challenging tracking systems. Although gifted programs may be one component of tracking systems, they typically affect only a small portion of the total student population.²³⁸ In addition, while education has been stated to be of fundamental importance by the Supreme Court, gifted programs are typically cast as an enrichment.²³⁹ Finally, while students placed in lower tracks often receive inadequate education, students who are not selected for gifted programs do not necessarily receive an inadequate education. Because of these differences, courts may be more likely to accept pedagogical reasons to justify gifted programs and their practices as a necessary, or even beneficial, educational policy. Therefore, a challenge to a gifted program should address more than simply a disparate impact upon underrepresented students, but also the discriminatory procedures that work to create the disparate impact.

Two cases provide an interesting framework to compare challenges to gifted programs.²⁴⁰ In Berkelman v. San Francisco Unified School District, the district's method of admitting academically superior students to a specialized, college-preparatory high school was challenged.²⁴¹ Selection was made on the basis of past academic

achievement.²⁴² Relatively few members of culturally diverse groups were selected to the specialized high school.²⁴³ Nevertheless, the court held that the legitimate interest in establishing such a school outweighed any harm suffered by students denied admission because they still received an adequate education at one of the city's other high schools.²⁴⁴ In other words, the Berkelman court distinguished the San Francisco selection procedure from tracking systems that were struck down because, while the tracking systems failed to provide all students with adequate education, San Francisco's system did provide adequate education.²⁴⁵ This decision rests upon two implicit assumptions: that the selection method actually was unbiased and that the specialized schools actually were beneficial.

In Montgomery, however, the first of these assumptions was questioned.²⁴⁶ The Starkville school district admitted students into its PEAK gifted program using the Stanford Achievement Test and the WISC-R test.²⁴⁷ In the five years preceding the filing of the suit, only four African-American students had been placed in the PEAK program, compared with 334 white students placed in the program.²⁴⁸ The court reasoned that because African-American children test lower than white children on standardized intelligence tests, the process of using these intelligence tests to select students amounted to unlawful discrimination.²⁴⁹ Although Montgomery did not question the benefits of the gifted program, it did question the selection procedure.

The differences between Berkelman and Montgomery are critical. While students were admitted into the program in San Francisco based upon their school achievement, students were admitted into the program in Starkville based upon IQ tests. This suggests that even though courts have declined to rule gifted or specialized school programs

invalid, they may find certain *procedures* of selection to be invalid.²⁵⁰ In addition, although there was a racial disparity in Berkelman, it was not nearly as glaring as the disparity in Montgomery, where virtually no African-American students were represented in the gifted program. This suggests that the *degree* of segregation created by gifted programs is an important consideration.

New York courts have not made any decisions on gifted programs alleged to perpetuate racial discrimination.²⁵¹ Nevertheless, two New York cases involving challenges to admission to gifted programs on other grounds, indicate limitations upon possible challenges to gifted programs.²⁵² In Johnpoll v. Elias, a student who was admitted to a gifted program was not allowed to attend the school of his choice.²⁵³ The court, relying upon Rodriguez, held that the court was not a “vehicle to review fundamental administrative decisions such as student placement which do not directly and sharply implicate basic constitutional values.”²⁵⁴ The court thus applied the reasonable relation standard of Rodriguez, rather than strict scrutiny, which would have required the school to demonstrate that the method of selection was necessary to achieve educational objectives.²⁵⁵ Likewise, in Bennett, the school system used a lottery system to select students for its gifted program from a pool of identified students.²⁵⁶ The court held that the use of the lottery system to deny gifted services to a student identified as gifted did not amount to a violation of due process.²⁵⁷

Johnpoll and Bennett establish the rule that in New York, no entitlement to gifted programs exists.²⁵⁸ As gifted programs are thus cast as an enrichment, courts may tend to apply the more liberal reasonable relation standard to challenges to the gifted programs. In addition, the recent willingness of courts to defer to schools regarding the benefits of

various educational practices, such as tracking or placement in gifted programs, make challenges to gifted programs difficult.²⁵⁹ Even when a suspect classification is demonstrated by showing disparate placement in gifted programs or lower tracks based upon race, courts have still been willing to defer to schools' findings that gifted programs and tracking procedures are part of an educational necessity intended to benefit students.²⁶⁰ Nevertheless, lessons can be learned from past challenges to tracking practices and gifted programs. While courts have been reluctant to rule that tracking or gifted programs are *per se* invalid, courts have been willing to invalidate certain selection procedures.²⁶¹ This suggests that any challenge to New York's gifted programs should closely examine the selection procedures for evidence of discrimination.²⁶² In the next part of this paper, we present suggestions to improve the gifted programs in New York City so that they might provide more access to all students, perhaps making legal challenges unnecessary.

PART FOUR: SUGGESTIONS

“In elementary and secondary education, a decision or characterization that will have a major impact on a test taker should not automatically be made on the basis of a single test score.”²⁶³

A. INCLUDE GIFTED STUDENTS IN ALL CLASSROOMS

The easiest, most certain way to eliminate underrepresentation in New York City's gifted programs is to include gifted students in all classrooms. The Chancellor should require that New York City districts operate heterogeneous classrooms. For example, District 12 includes all children in one class, and no longer segregates "gifted" and "non-gifted" students.²⁶⁴ In all schools, all students should be in one classroom and should learn from each other. If necessary, the "gifted" children can have some additional services available for accelerated learning. However, all children's potential should be maximized. Thus, all children should have the special trips, projects, and resources that the children in gifted classes have had available.

Because not all populations are fairly represented in the gifted programs, the gifted programs logically result in de facto segregation. The city can immediately halt this segregation by employing heterogeneous classroom settings in all districts. Likewise, the school system should stop labeling children and work to develop the potential of all children. Moreover, whenever possible, children should not be segregated from each other.

B. THERE SHOULD BE CITY WIDE MINIMUM STANDARDS FOR EACH DISTRICT'S GIFTED PROGRAM

If gifted programs continue to be available in elementary and middle schools in New York City, at the very least, the Chancellor's regulations should outline minimum standards for all districts regarding content, focus, information dissemination, and admissions procedures of all gifted programs.

- **the districts should disseminate information** to parents annually in several languages regarding admission to the gifted program
- **all students** should be tested for the gifted program
- the districts should be required to rely on **subjective criteria** in addition to test scores
- all districts should **postpone gifted programs** or at least testing until the 1st grade
- the city should utilize different types of examinations for admission
- upon request, **tests must be available in other languages besides English**
- **districts should administer tests that decrease cultural and socioeconomic bias**
- the science high schools should **set aside space** for students from each district

C. BROADEN THE DEFINITION OF GIFTEDNESS

Giftedness should not merely be defined as academic capability, as measured by tests or high levels of achievement.²⁶⁵ Thus, programs for the gifted should not only focus on those who are “generally gifted” or “academically gifted”, as such programs traditionally have.²⁶⁶ All New York City districts should take special care to include those students in the definition of “gifted” who are academically, artistically, or technically proficient and talented in areas that include leadership or creativity. More importantly, districts’ programs and admissions policy should actually account for a broadened definition of giftedness. For example, districts in Texas changed the admissions procedure to gifted program in order to account for a broadening of the definition of giftedness, which includes a variety of giftedness.²⁶⁷

D. ALTERNATIVE ASSESSMENT PROCEDURES

- STANDARDIZED TESTS SHOULD NOT BE PRIMARY SCREENING INSTRUMENT

Because IQ tests and most standardized tests do not measure a student's creative ability, include cultural and linguistic biases, and fail to measure more than the student's knowledge, those types of standardized tests should not be a primary screening instrument for admission to gifted programs.²⁶⁸ For example, cities like Detroit, San Francisco, and Houston rely on standardized tests less in order to accurately identify a variety of giftedness, guard against biases, and insure equitable treatment of all students.²⁶⁹ At least, due to the inherent inaccuracy of the IQ test, those test scores should only be used to include students and should not be used to exclude students who failed to meet the requisite score during the screening process.²⁷⁰

- DISTRICTS SHOULD USE TESTS THAT DECREASE CULTURAL AND LINGUISTIC BIASES

Districts should administer non-verbal tests to decrease linguistic bias and thus, boost representation of LEP students in gifted programs. Districts in Texas administer non-verbal, analytical reasoning examinations.²⁷¹ Districts in Los Angeles also use non-verbal IQ tests for non-native English speakers.²⁷² Moreover, since San Diego began to administer a non-verbal examination to the students, diversity in the gifted programs has significantly increased.²⁷³

However, if standardized written tests are administered as a component of the admission's procedure, at least the tests must be available to students in a language other than English. Bilingual entrance examinations for gifted programs are

only available in a handful of districts, but should be mandatory in all districts in order to insure adequate representation of LEP students in gifted programs.²⁷⁴ For example, districts in Texas offer bilingual abilities testing to insure that gifted students with limited English proficiency are not passed over for selection to the gifted program, due to the inability to express themselves in English.²⁷⁵

Tests measuring a variety of giftedness and creativity should also be mandatory in order to test for more than academic achievement and, thus, decrease cultural or socioeconomic bias. For example, in one California district, examinations are specifically designed to measure a student's ability, not merely the student's knowledge.²⁷⁶ Moreover, in Los Angeles, the schools distribute tests designed to measure creativity ability and leadership skills.²⁷⁷ Additionally, in Texas, districts test for creativity.²⁷⁸ Alabama's districts also use an adapted IQ test that emphasizes creativity.²⁷⁹ In North Carolina, the entrance examination was specifically designed to eliminate socioeconomic bias and use of the examination has resulted in many bright students from low socioeconomic families being admitted to the gifted program.²⁸⁰

- **SUBJECTIVE CRITERIA SHOULD BE USED TO EVALUATE ALL STUDENTS FOR ADMISSION TO THE GIFTED PROGRAMS**

In order to minimize the inherent biases of standardized testing, districts should be required to use a multiple assessment procedure including subjective criteria to evaluate all students for admission to gifted programs. Subjective criteria should be compulsory in order to avoid the exclusion of deserving students.

All districts in New York City should give substantial weight to such criteria as interviews, recommendations, and samples of the student's work as mandatory

alternative assessment techniques. . For example, Mott Hall, a mainly African-American and Latino “gifted” school in Harlem, strives to eliminate the biases and inaccuracies of standardized testing by seeking to identify students who may not necessarily test well but, who are persistent and aggressive learners.²⁸¹ In addition to administering their own tests, Mott Hall heavily relies on subjective criteria such as teacher recommendations and interviews for admission to the school.²⁸² Districts in Texas also use such subjective criteria as following: work samples, observational data, students self inventory, and grades.²⁸³

- TEACHERS SHOULD BE TRAINED TO IDENTIFY GIFTED PUPILS

Districts should train teachers to identify “gifted pupils” and to be aware of multi-cultural learning styles. For example, District 18 utilizes trained Kindergarten teachers in order to select students for the gifted program.²⁸⁴ Many educational experts agree that teachers are poor identifiers of “gifted pupils” unless they are properly trained.²⁸⁵ Thus, in order to eliminate inherent biases and stereotypes and better use teachers as a resource, teachers should be trained to not measure students against the dominant white norm.

- DISTRICTS SHOULD TAKE INTO ACCOUNT THAT STUDENTS MAY HAVE DISADVANTAGES

Alabama relies on standardized test, but in order to promote equity, districts use a checklist so that some students can qualify as a “disadvantaged student.”²⁸⁶ For example, a disadvantaged student may be a student who is from a one-parent household or who suffers from poverty. If the student does not meet the requisite score on the IQ test but, comes close and can be classified as a “disadvantaged student”, the student still may

qualify for admission to the gifted program.²⁸⁷ Additionally, for example, District 15 gives priority to traditionally underprivileged students who meet the threshold score on the administered standardized tests in order to increase diversity in the gifted program.²⁸⁸ Moreover, districts in Texas give a few extra points to low income African-American and Latino students when considering them for admission to the gifted programs.²⁸⁹

- TESTS FOR ADMISSION SHOULD BE ADMINISTERED TO ALL PUPILS

Tests for admission to the district's gifted programs should be administered to every pupil. The essential examinations should not merely be available to students upon the request of a parent or teacher. In San Diego, every pupil is tested for the gifted program in order to prevent inequity.²⁹⁰ District 29 should be used as an example for all New York City districts because District 29 tests all the students in second grade.²⁹¹ Similarly, in all districts in New York City, although standardized testing may not identify every "gifted" student, testing of all students may result in more culturally heterogeneous gifted classes.

Although opponents may argue that testing every pupil would be very expensive because it would significantly increase the number of gifted pupils, that is simply not true. The goal would be to make the gifted program more inclusive, not larger. That goal could be met by putting a cap on the number of pupils permitted to participate in the gifted program. Moreover, universal testing would help to provide equal opportunities to those pupils who have not been identified as gifted, but who would benefit from such a program.

E. POSTPONE THE GIFTED PROGRAM, OR AT LEAST ELIMINATE EARLY TESTING

- THE GIFTED PROGRAM SHOULD NOT BEGIN UNTIL AT LEAST THE FIRST GRADE

Districts should postpone the gifted program until at least the first grade to give all children the opportunity to develop cognitively, avoid labeling children early in their careers and thus, limiting their potential. For example, District 26 defers the gifted program until first grade to improve the chance of admission for the students that are learning English as a second language.²⁹² Moreover, postponing gifted programs would also give districts more time to inform parents about the available gifted programs.²⁹³

- DISTRICTS SHOULD POSTPONE EARLY TESTING

Since early testing can be inaccurate and exclude children who are not yet fluent in English, districts should be banned from basing admission entirely on an early IQ test or using the test as a critical first hurdle. All districts should postpone IQ tests until at least first grade. Inaccurate tests are simply a waste of time and money. Later testing would give non-native English speakers the ability to obtain a firmer grasp of the English language. As one district in Queens determined, later testing would also give children from a lower socioeconomic background time to develop cognitively.²⁹⁴ For example, District 8 uses teacher recommendations as criterion of admission up until the third grade and uses standardized tests later in the student's career to combat the problems of early testing.²⁹⁵

- DISTRICTS SHOULD PERIODICALLY TEST STUDENTS

If an early IQ test was administered, the districts should also test students in later grades. Periodic testing prevents cognitively immature children, who would actually benefit from the gifted program, from being overlooked. For example, San Diego's districts test all students in the second, fourth, fifth, seventh grade, and all new students entering the school for the gifted program.²⁹⁶

F. DISTRICTS SHOULD HAVE A VARIETY OF GIFTED PROGRAMS

AVAILABLE

- GIFTED PROGRAMS SHOULD OFFER BILINGUAL INSTRUCTION

Gifted programs should be designed to specifically include LEP students within the program by providing bilingual instruction. For example, at PS 163 the students in the gifted program can choose a curriculum that is taught in both English and Spanish.²⁹⁷ Moreover, a gifted program in Hartford, Connecticut, “Encendiendo Una Llama” was designed to include native English speakers as well as LEP students.²⁹⁸ In addition to emphasizing high level thinking skills and development of creative thinking, the program also emphasizes language development in Spanish and English for all students.²⁹⁹

- MENTOR PROGRAMS FOR LEP GIFTED STUDENTS SHOULD BE AVAILABLE IN THE COMMUNITY

Special services utilizing community resources should be provided for culturally diverse and LEP gifted students. For example, in Washington, DC, LEP gifted students from low-income neighborhoods are tutored by volunteer mentors twice a week.³⁰⁰ Likewise, such a program in districts in New York City would not be expensive if community resources are expended and the mentors are volunteers. In a mentor program, not only would students have an opportunity to develop better language and study skills, but students would also have an opportunity to form a relationship with a role model.

- DISTRICTS SHOULD ALSO OFFER EXTENDED OPPORTUNITIES TO LEP AND GIFTED AND TALENTED STUDENTS

Districts should employ programs that offer extended opportunities to underprivileged students. For example, a New York City public school, Louis Brandeis High, provides opportunities for LEP students to learn about American culture by taking students to museums, operas, and other culturally enriching activities.³⁰¹ Additionally, the Hartford program, “Encendiendo Una Llama” provides extra academic and social opportunities for LEP students by offering sports programs, homework assistance programs, resource room, and parent involvement programs to bright, LEP students before, during, and after school hours.³⁰²

- **VARIETY OF PROGRAMS FOR ALL STUDENTS**

Because children’s talents and interests are diverse, the opportunities and the classes available to children should also be diverse. The classes available should include more than just traditional academics, but some districts only provide gifted classes for those who are gifted in traditional academic areas. For example, only some students who are talented in the arts have gifted programs available to them in their districts. However, some districts have employed a wide variety of classes for children who are artistically talented, have strong leadership skills or have a particular skill like, a special knack for telling a story.³⁰³ Nonetheless, all districts should move beyond merely providing gifted classes for those who are gifted in traditional academics.

G. INFORMATION AVAILABILITY

- NEW YORK CITY DISTRICTS SHOULD HAVE A CENTRAL CITY OFFICE

In order to prevent underrepresentation in gifted programs, information regarding such programs should be available in a central office. A central office is necessary so that all parents can easily obtain relevant information about the gifted programs available in their districts. Since districts differ in their dissemination of information, a central office would promote uniformity and, thus, equity between districts.

- INFORMATION ABOUT THE GIFTED PROGRAMS SHOULD BE AVAILABLE IN SEVERAL LANGUAGES

Moreover, in order to promote diversity in gifted programs, information should be available in languages other than English from all districts or ideally, a central office. This would insure that all parents could obtain information regarding the gifted program.

- DISTRICTS SHOULD BE REQUIRED TO DISSEMINATE WRITTEN INFORMATION

If a central office is not created, the districts should be required to disseminate written material. At least, districts should be required have written information to send parents, upon request.

H. ADMISSION STANDARDS SHOULD BE REVISED TO INCREASE DIVERSITY IN THE SCIENCE SCHOOLS

- SET ASIDE SPACE IN SPECIALIZED HIGH SCHOOLS FROM EACH DISTRICT

The specialized high schools should set aside spaces for students from each district to ensure that students from all high schools have an equal opportunity to compete for admission. In light of the fact that many students have had inferior curriculums available, the science high schools should be required to accept a certain amount of students from each district. However, if some students lack the requisite scores, but are very close and meet the other criteria for admission, the school could group those students in classes together for the first year to bring them up to par. For example, in San Diego, half of the gifted program consists of students who came close to meeting the requirements, but demonstrated superior performance in another way.³⁰⁴ Those students are grouped together in “cluster classes”.³⁰⁵

CONCLUSION

“[I] refuse to believe that the American public intends to have its children sorted before their teens into clerks, watchmakers, lithographers, telegraph operators, masons, teamsters, farm laborers, and so forth, and treated differently in their schools according to these prophesies of their appropriate life careers. Who are we to make these prophesies?”³⁰⁶

The primary failure of New York City's gifted programs is the failure to make the opportunity to receive rigorous, enriching education available to all children. New York's gifted programs serve predominantly white students with a program tailored to white, upper middle class cultural norms. Because New York City's gifted programs exclude many talented African-American, Latino, and LEP students, these programs have contributed to unacceptable segregation in New York City public schools. Therefore, the Chancellor should develop regulations to rectify the shortcomings of the existing gifted programs.

This report has outlined the existing law, the barriers that limit access to the gifted program, and challenges that might be brought against New York City's gifted program. However, the policy suggestions for revised gifted regulations are the culmination of this report. We strongly urge the Chancellor to carefully examine the current status of the gifted program and take steps to overcome the problems we have discussed.

APPENDIX A:

HELPFUL CONTACTS

Name/Organization	Address/Office	Phone	Information Available
Mary Daley	NY State Education Department-Gifted Education Room 981 EBA Albany, NY 12234	518-474-8773	State Education Department guidebook for parents on gifted education.
OCR	U.S. Dept of Education 26 Federal Plaza Room 33-170 NY, NY 10278		Freedom of Information Requests regarding current OCR review of NYC schools; report discrimination
Betty Arce	Chancellor's Office 110 Livingston St Brooklyn, NY 11201	718-935-2777	Information about Chancellor's Regulations on Gifted Programs
Dr. Lori Mei	Division of Assessment and Accountability Board of Education of the City of New York 110 Livingston St, Room 740 Brooklyn, NY 11201		Division of Assessment Report on New York's gifted programs (95-96)
Council of State Directors of Programs for the Gifted	c/o Gifted and Talented Education Texas Education Agency 1701 Congress Avenue Austin, TX 78701	512-631-1777	Information about various state gifted programs
National Association for Gifted Children	1155 15 th St, NW Suite 1002 Washington, DC 20005	202-785-4268	General information on giftedness
Gifted and Talented Office	U.S. Department of Education 555 New Jersey Ave NW Room 504 Washington, DC 20209-5643	202-219-2187	General information on giftedness
AGATE	Advocacy for Gifted and Talented Education in NY State 4790 Burrstone Rd Syracuse, NY 13215	315-468-0709	Information about NY gifted programs, general information on giftedness.
National Research Center on the Gifted and Talented	University of Connecticut 362 Fairfield Road, U-7 Storrs, CT 06269-2007	860-486-4826 www.gifted.uconn.edu	General information about giftedness

APPENDIX B:

DESCRIPTION OF DISTRICT GIFTED PROGRAMS

District	Program Coordinator	District Phone	Pamphlet Available	Admission Requirements	Program Description
1	Joan Rahee	212-602-9767			District One did not return phone calls regarding the gifted program
2	Ilene Friedman	212-330-9407	No	Performance based Screenings	Mixture of gifted and heterogeneous classes
3		212-678-2880			District Three did not return phone calls regarding the gifted program
4		212-828-3500			District Four did not return phone calls regarding the gifted program.
5	Dr. Anthony Dede	212-769-7523	No		District Five did not send information materials after request.
6	Maria Fraga	212-795-4111	No		Elementary Program run as a discovery school within PS 98. Intermediate Level gifted program has separate school, IS 223.
7		718-292-0481	No		District Seven had no information available.
8		718-409-8100			District Eight did not return phone calls.
9	Susan Colfield	718-681-6160	No		District Nine had no information available
10	Christine Berman	718-584-7070			District Ten did not return phone calls.
11	Barbara Neuner	718-904-5563			District Eleven Did not return phone calls.
12	None	718-328-2310	No	None	No gifted program. Identified students served in regular classrooms.

DESCRIPTION OF DISTRICT GIFTED PROGRAMS

District	Program Coordinator	District Phone	Pamphlet Available	Admission Requirements	Program Description
13		718-636-3204			District 13 did not return phone calls.
14	David Bliss	718-963-4800			District 14 did not return phone calls.
15	Donna Baker	718-330-9300			District 15 did not return phone calls.
16		718-919-4112			District 16 did not return phone calls.
17		718-604-4200			District 17 did not return phone calls.
18	Joel Rubenfeld	718-927-5125	Yes	IQ Test, parent, teacher and administrative judgment, reading and mathematics achievement tests, teacher recommendation, locally developed screening instrument	Enrichment and acceleration.
19	Thelma Lubetsky	718-642-1513			District 19 Did not return phone calls.
20	Jack Gursky	718-692-5241	Yes	School Ability Test, Recommendation for testing by Classroom Teachers and Principals	Thematic Instruction, Differentiated Instruction, Focus on creativity, decision making, and analytical thinking.
21	Sheila Nelson	718-714-2500			District 21 did not return phone calls.
22	Lila Edlekind	718-368-8000	No		Program is only advertised through word of mouth and advertisements in local paper. District 22 had no other information available.
23	Ed Newman	718-270-8600			District 23 did not return phone calls.
24	Dr. Joseph Piro	718-574-1125			District 24 did not send requested information and materials.

DESCRIPTION OF DISTRICT GIFTED PROGRAMS

District	Program Coordinator	District Phone	Pamphlet Available	Admission Requirements	Program Description
25	Debbie Fiebert	718-281-7647	No	Given IQ Test upon Teacher Recommendation	Alpha Program: Gifted students in separate, accelerated class. District 26 had no information available.
26		718-631-6900			District 27 did not send requested information and materials.
27	Helene Stein	718-642-5725			Must make requests for information in writing. District 28 did not send requested information and materials.
28	Janice Schwarz	718-830-8848	No		Program design based on Renzulli Triad Model and Theory of Multiple Intelligences. Components include: thematic units, junior great books, cultural arts, independent study, computer, writing instruction, and theater.
29	Adrienne Pershyn	718-978-5900	Yes	Every student is tested in the 2 nd Grade, writing sample, Slosson, and teacher recommendations.	Accelerated enrichment program.
30	Stephanie Their	718-777-4600	Yes	Renzulli-Hartman Checklist, Standardized Test Scores, Writing Sample, Review of Report cards, Structure of Intellect Assessment given to all kindergarten children	
31	Mrs. Emory	718-390-1685	No	None	Did away with gifted program because of budgetary cuts
32	Dr. Daisy O'Gorman	718-574-1104			District 32 did not return phone calls.

APPENDIX C:

TIPS FOR PARENTS

- **Obtain a copy of the handbook for parents of gifted pupils distributed by the State Education Department.** The State Education Department has developed and distributes a handbook for parents of gifted pupils. See Appendix A for a number to contact.
- **Inspect the type of program your district has created.** The Chancellor's Regulations require New York City school districts to develop either I.G.C. classes, S.P. classes, or alternate gifted programs. Each district has a gifted coordinator. Attached at appendix B is a list of all district gifted coordinators. The State Education Department also maintains a record of all gifted programs.
- **Become familiar with the different types of programs possible.** I.G.C. and S.P. classes are not necessarily the same. Different districts will have different standards and objectives for their gifted programs. Inspect the programs of several different districts to be sure that the program in your district meets your child's needs.
- **Sequential Math is an important class for success on the admissions tests to the science high schools.** When examining gifted programs, note the number of Sequential Math classes offered. ACORN's study indicates not only that Sequential Math is extremely important for success on the science high schools admissions tests, but also that the number of sequential math courses offered by districts varies tremendously.

- **Parents have a right to information about gifted programs.** Chancellor's regulations require districts to inform parents of gifted children of opportunities that exist within the district. As the ACORN study shows, districts too often refuse to provide such information to parents who request it.
- **Parents have the option of sending their child to a neighboring district's I.G.C. or S.P. program if their home district offers an alternative program which does not satisfy the parent.** The Chancellor's regulations require neighboring districts to admit your child to their I.G.C. or S.P. program if your child meets the criteria for eligibility in I.G.C. or S.P. programs and your home district offers only an alternative gifted program.
- **Become familiar with the testing procedures of your district as well as those of neighboring districts.** Many districts use an I.Q. test as the sole criteria for admission into their program. Some use only achievement tests, given to students in the spring.
- **Become familiar with the criteria for eligibility.** The Chancellor's Regulations impose minimum criteria for eligibility in gifted programs. These criteria are based largely upon the citywide achievement tests given each spring. Individual districts may impose other criteria for eligibility into their program. Contact the coordinator of gifted programs in your district for these requirements.
- **Testing for admission to gifted programs is often done before kindergarten.** Several districts test students for giftedness before they even enter kindergarten. In those that do, admission into the program past this date is relatively rare. For

example, before they began delaying testing District 26 filled over 300 of its 360 slots in their gifted program with tests given to students before kindergarten.

- **Referrals to gifted programs may be made by parents, teachers, or administrators.** New York law affords parents the right refer their children for evaluation for giftedness. Although the Chancellor's Regulations state that principals and teachers have the responsibility to select students for placement in gifted programs, this does not abrogate parents' rights to refer their children. This does not, however, mean that the districts must test your child.
- **Parents are not to be charged a fee for the administration of diagnostic tests or evaluations to determine giftedness.** New York law was amended in 1997 to ensure that parents are not deprived of an opportunity to discover their child's giftedness because of a lack of financial means.
- **The Office for Civil Rights is currently investigating New York's Gifted Programs.** The Office for Civil Rights is examining New York's gifted programs for evidence of discrimination based on race. This examination has caused a delay in the new version of the Chancellor's regulations.
- **Parents who believe that their local school district has committed a violation of Title VI may file a complaint with the Office for Civil Rights.** Title VI prohibits schools from discriminating based upon race. The Office for Civil Rights in the Department of Education is the agency responsible for ensuring compliance with Title VI. If you believe your school is discriminating in its tracking or gifted program based upon race, you may contact the OCR. See Appendix A for the number. Your

complaint must be filed within 180 of any alleged violation and it must describe the alleged violation and the discriminatory effect.

APPENDIX D:

DEMOGRAPHICS OF STATE GIFTED PROGRAMS³⁰⁷

State	% Enrollment African-American	% Gifted Enrollment African-American	% Enrollment Latino	% Gifted Enrollment Latino	% Enrollment White	% Gifted Enrollment White
Florida	24.5	6.2	13.6	5.4	60.0	85.4
Illinois	21.5	12.3	10.4	4.2	65.2	77.6
Louisiana	44.5	16.7	----	----	52.9	79.7
N. Carolina	30.2	8.0	----	----	66.0	89.2
Pennsylvania	13.4	1.3	3.0	.97	81.7	85.2
Texas	14.3	8.1	34.9	19.2	48.3	68.4
Virginia	25.5	11.1	2.5	1.3	68.5	77.3

¹ See D. Y. Ford, *The Recruitment and Retention of African-American Students in Gifted Programs: Implications and Recommendations*, at 13 (1994), *microformed on* Eric Document 388012; A. Harry Passow & Mary M. Frasier, *Toward Improving Identification of Talent Potential Among Minority & Disadvantaged Students*, 18 *Roeper Review* 198, 198-99 (1996); Bella Kranz, *Identifying Talents Among Multicultural Children*, *microformed on* Eric Document 370320, at 8-11 (1994); James J. Gallagher, *Education of Gifted Students: A Civil Rights Issue?*, 76 *Phi Delta Kappan* 408, 409 (1995). See also Hoard Gardner, *FRAMES OF MIND*, (1983). Gardner here presents his seminal work on multiple intelligences. He identifies seven forms of intelligence: linguistic, logical-mathematical, musical, bodily-kinesthetic, spatial, interpersonal, and intrapersonal. *Id.*

² A. Harry Passow & Rose A. Rudnitski, *STATE POLICIES REGARDING EDUCATION OF THE GIFTED AS REFLECTED IN LEGISLATION AND REGULATION*, at 19-20 (1993), *microformed on* Eric Document 379849

³ Dennis P. Saccuzzo, Nancy E. Johnson, and Tracey L. Guertin, *Identifying Underrepresented Disadvantaged Gifted and Talented Children: A Multifaceted Approach*, at 2 (1994), *microformed on* Eric Document 368095.

⁴ Passow & Frasier, *supra* note 1, at 197 (quoting W.H. Bristow, M.C. Craig, G.T. Hallock, & S.R. Baycock, *Identifying Gifted Children*, at 10 in *THE GIFTED CHILD* (P. Witty Eds 1951).

⁵ Ford, *supra* note 1, at 1; Ernesto M. Bernal, *Finding and Cultivating Minority Gifted and Talented Students*, at 1 (1994), *microformed on* Eric Document 391345; Saccuzzo, Johnson, & Guertin, *supra* note 3, at 2 (noting that OCR statistics reveal that African-American and Latino students are underrepresented in the nations cities by as much as 70%); Angelia Dickens, Project, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 *Colum. J.L. & Soc. Probs.* 469, 499-500 (1996) (citing KENNETH J. MEIER ET. AL., *RACE, CLASS, AND EDUCATION, THE POLITICS OF SECOND-GENERATION DISCRIMINATION* 5 (1989) (hereinafter MEIER)). See also, Brent Staples, *The Battle for 'Gifted' Education*, *N.Y. TIMES*, May 3, 1997, §1, at 22 (noting that black and Latino children make up approximately twenty-seven percent of the public school population, but only thirteen percent of the population in gifted programs).

⁶ Dickens, *supra* note 5, at 499 (citing MEIER, *supra* note 5, at 5).

⁷ See NEW YORK ACORN SCHOOLS OFFICE, *SECRET APARTHEID: A REPORT ON RACIAL DISCRIMINATION AGAINST BLACK AND LATINO PARENTS AND CHILDREN IN THE NEW YORK CITY PUBLIC SCHOOLS*, 5 (1996) (citing data from a March 16, 1995 memorandum to the Board of Education from then Chancellor Ramon C. Cortines, Re: Program to Increase Diversity in Specialized Science High Schools) (hereinafter ACORN I). Bronx Science and Stuyvesant high school are specialized magnet schools, considered to be the crown jewels of the New York City public school system.

⁸ NEW YORK ACORN SCHOOLS OFFICE, *SECRET APARTHEID II: RACE, REGENTS AND RESOURCES*, at 24-25 (1997) (citing Internal Board of Education bar graph describing number of students sent by each district to Booklyn Tech, Bronx Science, and Stuyvesant) (hereinafter ACORN II).

⁹ DIVISION OF ASSESSMENT AND ACCOUNTABILITY, OFFICE OF THE CHANCELLOR, CITY SCHOOL DISTRICT FOR THE CITY OF NEW YORK, *PROGRAMS SERVING GIFTED AND TALENTED STUDENTS IN NEW YORK CITY PUBLIC SCHOOLS 1995-1996*, 6 (1996) (hereinafter CITY REPORT). The report estimated the Latino population citywide at 37.3, the African American at 35.9, and the White at 17.4. The City Report estimated the population in gifted programs as 21.7 percent Latino, 35.7 percent African-American, and 27.4 percent white. *Id.* While the City Report found significant underrepresentation of Latino students in gifted programs, as well as overrepresentation of white students in the gifted programs, it did not find any underrepresentation of African-American students. However, not all districts responded and some of those

which did respond did not include statistics regarding the racial composition of their programs. These absences make the findings somewhat suspect. A district failing to report which ran gifted programs with significantly high numbers of white students would tremendously alter the findings. In addition, if the reporting districts had significant minority populations, this too would skew the results. Rather than drawing a comparison to the citywide population, the City Report should have only drawn the comparison to the population of those districts which reported. Because of the incentive to report information which makes districts appear discrimination free, and the correlating disincentive to report information which evidences discrimination, we suspect that those districts which had more balanced programs reported, while those who had programs which were unbalanced did not. Consequently, we estimate that the actual underrepresentation is more in line with the national estimates. A table demonstrating the racial composition of gifted programs throughout the country can be found at appendix D.

¹⁰ Regulation of the Chancellor of the City School District for the City of New York, A-520 (I).

¹¹ Somini Sengupta, *Neighborhood Report: Northeast Queens; District 26 to Defer Gifted Program to Give More a Chance*, N.Y. TIMES, FEB. 2, 1997, § 13, at 9.

¹² *Id.* (quoting Pete Hirdt, co-president of Concerned Citizens for the Education of Gifted and Talented Children in New York City). See also, Alfie Kohn, *Only for My Kid: How Privileged Parents Undermine School Reform*, 79 Phi Delta Kappan 568 (1998). Kohn argues that gifted programs and grades serve not so much to provide better education but to meet admission criteria at selective colleges and universities, and therefore the middle class parents whose children are in the gifted programs fight to keep exclusionary standards as admission criteria for gifted programs. *Id.* at 568-572.

¹³ See ACORN I, *supra* note 7; Raphael Sugarman, *PS 163's Gift of Balance Program Treats All Students as Talented*, N.Y. TIMES, June 8, 1997, § (Suburban) at 1.

¹⁴ Staples, *supra* note 5.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Sugarman, *supra* note 13.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Regulation of the Chancellor for the City School District of the City of New York, A-520 (I).

²¹ See ACORN I, *supra* note 7 (noting that members posing as parents often had difficulty obtaining information about gifted programs).

²² See Mary Ruth Coleman & James Gallagher, *State Identification Policies: Gifted Students from Special Populations*, 17 Roeper Review 268, 270 (1995); COUNCIL OF STATE DIRECTORS OF PROGRAMS FOR THE GIFTED, STATE OF THE STATES GIFTED AND TALENTED EDUCATION (1994), *microformed on* Eric Document 373459 (hereinafter COUNCIL); Passow & Rudnitski, *supra* note 2.

²³ See Mary Ruth Coleman & James Gallagher, *supra* note 22, at 270; COUNCIL, *supra* note 22; A. Harry Passow & Rose A. Rudnitski, *supra* note 2.

²⁴ COUNCIL, *supra* note 22, at 18-19 (1994).

²⁵ *Id.*

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- ²⁶ Jacob K. Javits Gifted and Talented Students Education Act of 1994 § 10202 (b).
- ²⁷ Jacob K. Javits Gifted and Talented Students Education Act of 1994 § 10205 (a)(1).
- ²⁸ Jacob K. Javits Gifted and Talented Students Education Act of 1994 § 10207.
- ²⁹ See COUNCIL, *supra* note 22, at 12-14.
- ³⁰ *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).
- ³¹ *Id.* at 494. U.S. CONST. Amend. 14.
- ³² N.Y. CONST. Art. XI. § 1. Specifically, the New York Constitution requires that: “The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” *Id.*
- ³³ Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 48 (N.Y. 1982).
- ³⁴ 42 U.S.C. § 2000 (1994).
- ³⁵ 20 U.S.C. § 1412 (a)(1).
- ³⁶ N.Y. Educ. Law § 4451 et seq (Consol. 1985); N.Y. Educ. Law §3602 (Consol. 1985). New York provided approximately \$13,000,000 for gifted education funding in 1993. Compared with the \$33,000,000 spent by North Carolina, this amount seems dreadfully small. COUNCIL, *supra* note 22, at 12-14.
- ³⁷ N.Y. Educ. Law § 4451 (1).
- ³⁸ N.Y. Educ. Law § 4451 (2).
- ³⁹ N.Y. Educ. Law § 4451 (3).
- ⁴⁰ N.Y. Educ. Law § 4451 (4). Parents who wish to obtain a copy of the handbook should examine appendix A, which contains a list of contacts regarding gifted education.
- ⁴¹ N.Y. Educ. Law § 4451 (Notes).
- ⁴² See *In re Bennett v. City Sch. Dist. of New Rochelle*, 14 A.D.2d 58 (N.Y. App. Div. 1985). See also, *Johnpoll v. Elias*, 513 F.Supp. 430, 431 (E.D.N.Y. 1980) (holding that denial of gifted student’s choice of schools did not amount to a denial of education).
- ⁴³ N.Y. Educ. Law § 4452 (1)(c). See also *Bennett*, 114 A.D.2d at 63.
- ⁴⁴ UNIVERSITY OF THE STATE OF NEW YORK, THE STATE EDUCATION DEPARTMENT, LOCAL GUIDELINES FOR EDUCATING GIFTED STUDENTS 7 (hereinafter LOCAL GUIDELINES). These guidelines recommend a variety of different types of programs including acceleration, inclusion, mentor programs, cluster grouping, pullout programs, and homogenous grouping. *Id.*
- ⁴⁵ N.Y. Educ. Law § 4452
- ⁴⁶ *Bennett*, 114 A.D.2d at 64 (citing *Matter of Ackerman v. Rubin*, 35 Misc. 2d 707, *aff’d* 17 A.D.2d 796).
- ⁴⁷ See ACORN I, *supra* note 7; Sugarman, *supra* note 13.

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- ⁴⁸ Regulation of the Chancellor for the City School District of the City of New York, A-520 (I).
- ⁴⁹ Regulation of the Chancellor for the City School District of the City of New York, A-520 (I).
- ⁵⁰ Regulation of the Chancellor for the City School District of the City of New York, A-520 (I).
- ⁵¹ See S.P. MORLAND JR., EDUCATION OF THE GIFTED AND ALENTED VOLUME 1, REPORT TO THE CONGRESS OF THE U.S. BY THE COMMISSIONER OF EDUCATION (1971) (hereinafter MORLAND REPORT). While most school districts have patterned their descriptions of giftedness after the description provided in the Morland Report, few districts have developed programs which actually implement diverse, heterogeneous gifted programs. Passow & Frasier, *supra* note 1, at 198.
- ⁵² See CITY REPORT, *supra* note 9. Latino students are significantly underrepresented in NYC gifted programs. The flaws in the Report make the purported equitable representation of African-American students in New York's gifted programs suspect.
- ⁵³ Regulation of the Chancellor for the City School District of the City of New York, A-520 (II.C)
- ⁵⁴ Regulation of the Chancellor for the City School District of the City of New York, A-520 (III.B)
- ⁵⁵ Regulation of the Chancellor for the City School District of the City of New York, A-520 (II.D).
- ⁵⁶ Regulation of the Chancellor for the City School District of the City of New York, A-520 (II.D).
- ⁵⁷ Regulation of the Chancellor for the City School District of the City of New York, A-520 (I) & (IV).
- ⁵⁸ Regulation of the Chancellor for the City School District of the City of New York, A-520 (IV).
- ⁵⁹ Regulation of the Chancellor for the City School District of the City of New York, A-520 (IV). The Regulation requires that a student score 4.8 on the city Reading Achievement test administered in April of the student's 3rd grade year to be placed in an I.G.C. class for fourth grade. *Id.* The Regulation requires a student score a 7.2 on the Metropolitan Intermediate Achievement Reading Test and a 6.5 on the Arithmetic Test in the spring of fifth grade to continue placement in I.G.C. classes into sixth grade. *Id.*
- ⁶⁰ Lawrence Goodman, *Queens Rift on Gifted Ed: Criteria Changes Drawing Criticism*, N.Y. TIMES, April 20, 1997, § (News), at 29. Appendix B contains a table identifying the structure of New York City's gifted programs.
- ⁶¹ Regulation of the Chancellor for the City School District of the City of New York, A-520 (II.E).
- ⁶² Regulation of the Chancellor for the City School District of the City of New York, A-520 (II.F).
- ⁶³ See ACORN I, *supra* note 7 (noting that members posing as parents were often denied information about gifted programs).
- ⁶⁴ N.C. GEN. STAT. § 115c-150.5 et seq. (1997).
- ⁶⁵ N.C. GEN. STAT. § 115C-150.5
- ⁶⁶ N.C. GEN. STAT. § 115C-150.7 (a).
- ⁶⁷ N.C. GEN. STAT. § 115C-150.7 (b)(2).
- ⁶⁸ N.C. GEN. STAT. § 115C-150.7 (b)(7).

⁶⁹ N.C. GEN. STAT. § 115C-150.7 (d).

⁷⁰ Alabama Administrative Policy Manual, *cited in* A. Harry Passow & Rose A. Rudnitski, *supra* note 2, at 25.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Cal. Ed. Code § 52202 (West 1997). Although the code states that districts shall use one or more of the categories, creating the list for districts to select from is a tangible step towards recognizing multifarious forms of giftedness. Moreover, the California Code requires schools to “consider identifying as gifted or talented any pupil who has transferred from a district in which he or she was identified as a gifted and talented pupil.” Cal. Ed. Code § 52202.

⁷⁶ MICH. COMP. LAWS § 388.1092 (1997).

⁷⁷ Cal. Ed. Code § 52200 (West 1997).

⁷⁸ 105 ILL. COMP. STAT. 5/14A-2 (West 1997).

⁷⁹ Passow & Frasier, *supra* note 1, at 199-200

⁸⁰ *See* CITY REPORT, *supra* note 9 at 12-13.

⁸¹ *Id.*

⁸² *Id.* at 9-11.

⁸³ *See* Goodman, *supra* note 60.

⁸⁴ *See* CITY REPORT, *supra* note 9 at 9-11.

⁸⁵ Linda M. Cohen, *Meeting the Needs of Gifted and Talented Minority Students* at 1 (1990) Eric Digest #E480.

⁸⁶ *Id.*

⁸⁷ Raphael Sugarman & Dean Chang, *Bright Kids – Big City Rift: Programs for Gifted Elicit Cries of Elitism, Racial Bias*, N.Y. DAILY NEWS, Mar. 23, 1997, § (news) at 6.

⁸⁸ Vivian W. Owens, *Motivating ‘Underachievers’*, N.Y. VOICE, Jan. 14, 1998 v. XXXIX; N. 41

⁸⁹ *See* Sugarman, *supra* note 13.

⁹⁰ *See* Cohen, *supra* note 85, at 2.

⁹¹ James J. Gallagher, *Education of Gifted Students: A Civil Rights Issue?* 76 PHI DELTA KAPPAN 408, 409 (1995).

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- ⁹² Pam Belluck, *Gifted Programs' Criteria Vary Widely*, N.Y. TIMES, Feb. 28, 1997 § B at 4.
- ⁹³ Somini Sengupta, *New York's Chancellor Seeking Wider Access to Gifted Programs*, N.Y. TIMES, Feb. 28 1997 § B at 8.
- ⁹⁴ See Sengupta, *supra* note 11.
- ⁹⁵ *Id.*
- ⁹⁶ Elia V. Gallardo, *Comment, Hierarchy and Discrimination: Tracking in Public Schools*, 15 CHICANO-LATINO LAW REVIEW 74 (1994).
- ⁹⁷ See CITY REPORT, *supra* note 9 at 3.
- ⁹⁸ Regulation of the Chancellor for the City School District of the City of New York, A-520.
- ⁹⁹ Carol Ruth Harris, *Identifying and Serving Recent Immigrant Children Who are Gifted* at 1-2 (1993) Eric Digest # E520.
- ¹⁰⁰ *Id.*
- ¹⁰¹ See Cohen, *supra* note 85, at 1.
- ¹⁰² See Harris, *supra* note 99, at 2 (citing E. Wei, *The Vietnamese refugee child: Understanding cultural differences*. In D. Omark & J. Erickson (eds.) *THE BILINGUAL EXCEPTIONAL CHILD*. San Diego: College Hill Press).
- ¹⁰³ Andrew S. Latham, *Quantifying MI's Gains* 55 Educ. Leadership 1, available on westlaw, WL 10388489 (1997).
- ¹⁰⁴ See Harris, *supra* note 99, at 1.
- ¹⁰⁵ See Cohen, *supra* note 85, at 2.
- ¹⁰⁶ Susan W. Graybill, *Questions of Race and Culture: How They Relate to the Classroom for African-American Students*, 70 The Clearing House 6, available on westlaw, WL 10824680, JULY 17, 1997.
- ¹⁰⁷ See ACORN II, *supra* note 8, at 18-22.
- ¹⁰⁸ *Id.*
- ¹⁰⁹ See Sengupta, *supra* note 11.
- ¹¹⁰ See CITY REPORT, *supra* note 9, at 7.
- ¹¹¹ See Sengupta, *supra* note 11.
- ¹¹² Rapheal Sugarman, *Rift Arises on Gifted Program Hit as Biased*, N.Y. DAILY NEWS, Mar. 1, 1997 § (news) at 8.
- ¹¹³ Interview with District, 6, 9, 22 & 7 personnel (July 1998).
- ¹¹⁴ See Interview, *supra* note 113.
- ¹¹⁵ See Interview, *supra* note 113.

¹¹⁶ See Sugarman, *supra* note 13.

¹¹⁷ *Id.*

¹¹⁸ See ACORN II, *supra* note 8, at 18-22.

¹¹⁹ *Id.*

¹²⁰ See Goodman, *supra* note 60.

¹²¹ See ACORN II, *supra* note 8, at 18-22.

¹²² *Id.*

¹²³ See Goodman, *supra* note 60.

¹²⁴ See ACORN II, *supra* note 8, at 10-17.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Robert J. Sternberg & Pamela R. Clinkenbeard, *The Triarchic Mode Applied to Identifying, Teaching, and Assessing Gifted Children*, 17 *Roeper Rev.* 255 (1995).

¹²⁹ See ACORN II, *supra* note 8, at 10-15.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Owens, *supra* note 88.

¹³³ See CITY REPORT, *supra* note 9, at 13.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 4-7.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Ernesto Bernal, *The Implication of Academic Excellence for the Culturally Diferent Gifted*, in ACADEMIC EXCELLENCE: ITS ROLE IN GIFTED EDUCATION, 65 (Kanevsky, ed. 1984).

¹⁴⁴ See Kohn, *supra* note 12 (noting that detracking schools would be an invitation to white flight) (citing Ellen Brantlinger, et. al., *Self-Interest and Liberal Educational Discourse: How Ideology Works for Middle-Class Mothers*, 33 Am. Ed. Res. J. 571 (1996) & Amy Stuart Wells & Irene Serna, *The Politics of Culture: Understanding Local Political Resistance to Detracking in Racially Mixed Schools*, 66 Harv. Ed. Rev. 93 (1996)).

¹⁴⁵ See ACORN I, *supra* note 7; ACORN II, *supra* note 8; CITY REPORT, *supra* note 9.

¹⁴⁶ 347 U.S. 483 (1954) (hereinafter *Brown I*).

¹⁴⁷ 42 U.S.C. § 2000 et seq.

¹⁴⁸ 347 U.S. 483, 494 (1954).

¹⁴⁹ *Id.*

¹⁵⁰ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (hereinafter *Brown II*).

¹⁵¹ See *Freeman v. Pitts*, 112 S.Ct 1430, 1436 (1992) (noting that the DeKalb County School System was one such district).

¹⁵² *Green v. County Sch. Bd.*, 391, U.S. 430, 438 (1969)

¹⁵³ 413 U.S. 189 (1973).

¹⁵⁴ *Id.* at 208.

¹⁵⁵ *Id.*

¹⁵⁶ 427 U.S. 424 (1976).

¹⁵⁷ *Id.*

¹⁵⁸ Harvard Note, *Teaching Inequality: The Problem of Public School Tracking*, 102 Harv. L. Rev. 1318, 1325-26 (noting a series of cases where plaintiff's were not able to demonstrate that current segregation was directly impacted by past practices).

¹⁵⁹ *Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 111 S. Ct 630 (1991); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992).

¹⁶⁰ 111 S. Ct. 630 (1991).

¹⁶¹ 112 S. Ct. 1430 (1992).

¹⁶² *Dowell* 111 S. Ct at 637-38; *Freeman* 112 S. Ct. at 1447-48.

¹⁶³ *Dowell* 111 S. Ct at 637-38

¹⁶⁴ *Id.*

¹⁶⁵ *Freeman* at 1446-47.

¹⁶⁶ *Id.* at 1448.

¹⁶⁷ *Id.*

¹⁶⁸ *Dowell* 111 S. Ct at 637.

¹⁶⁹ *Id.* at 638.

¹⁷⁰ *Id.*

¹⁷¹ 833 F. Supp. 214 (S.D.N.Y. 1993).

¹⁷² *Id.* at 218.

¹⁷³ *Freeman*, 112 S. Ct. at 1447.

¹⁷⁴ *Freeman*, 112 S. Ct. at 1448.

¹⁷⁵ Robert L. Hayman Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 Wis. L. Rev. 627, 651-653 (1993).

¹⁷⁶ *Freeman*, 112 S. Ct at 1448. The standards set forth by the Court in *Freeman* and *Dowell* are by no means new. See *McNeal v. Tate County School District*, 508 F.2d 1017 (5th Cir. 1975) (holding that even when achievement grouping produces segregation, it is still permissible in an otherwise unitary school system if the school district can demonstrate that the classroom assignment method is (i) not based on the present results of past segregation or (ii) will remedy such results through better educational opportunities).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1445.

¹⁷⁹ Although many texts may treat the terms grouping, achievement grouping, grouping systems, or tracking interchangeably, we choose not to here. The differences between these words are more than ability simply semantic. The term ‘ability grouping’ assumes that a student’s abilities can not only be measured accurately, but also neatly categorized and labeled. In addition, the use of the term ‘grouping’ does not suggest any measure of permanence. Tracking, however, implies a rigid system, within which there is little movement between tracks as well as little contact between students of differing tracks. We feel that this term more accurately captures the system found in the NYC public schools, some of which begin testing for giftedness sometimes before kindergarten.

¹⁸⁰ See NATIONAL COALITION OF ADVOCATES FOR STUDENTS, *A GATHERING STORM* 8, (1997) (hereinafter NCAS); Dickens, *supra* note 5, at 470 (citing JOSEPH BRYSON, *ABILITY GROUPING OF PUBLIC SCHOOL STUDENTS* 9 (1980)).

¹⁸¹ See NCAS, *supra* note 180, at 8; Dickens, *supra* note 5, at 470 (citing JOSEPH BRYSON, *ABILITY GROUPING OF PUBLIC SCHOOL STUDENTS* 9 (1980)); Harvard Note, *supra* note 158, at 1318 (citations omitted). See also, Coleman & Gallagher, *supra* note 22, at 269 (noting that 49 states use some form of standardized IQ test or achievement test to select students for gifted programs).

¹⁸² NCAS, *supra* note 180, at 8; Dickens, *supra* note 5, at 475 (citing Linda Darling-Hammond, *Inequality and Access to Knowledge*, in *HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION* 465, 484 (James A Banks & Cherry A. McGee Banks eds., 1995)). Along with low expectations of students, students in low tracks often receive rote instruction, inexperienced teachers, and inadequate facilities and resources. *Id.* at 477-478 (citations omitted). In comparison, students in the higher tracks receive a curriculum which requires critical thinking, the more experienced teachers, and access to more resources and facilities. *Id.*

¹⁸³ Dickens, *supra* note 5, at 478 (citing Linda Darling-Hammond, *Inequality and Access to Knowledge*, in HANDBOOK OF RESEARCH ON MULTICULTURAL EDUCATION 465, 473 (James A Banks & Cherry A. McGee Banks eds., 1995)).

¹⁸⁴ Harvard Note, *supra* note 158, at 1318 n.1 (citing Warren, *Grouping Students by Ability Comes Under Fire*, N.Y. TIMES, Dec. 21, 1988, at B8, col. 3). *See also*, NATIONAL EDUCATION ASSOCIATION, SURVEY OF SCHOOL PROGRAMS AND PRACTICES OF PUBLIC SCHOOL STUDENTS (1980) (*cited in* Harvard Note, *supra* note 158, at 1318 n.1); J. Coldiron, R. Braddock & J. McPartland, A Description of School Structures and Classroom Practices in Elementary, Middle and Secondary Schools, paper presented at the annual meeting of the American Educational Research Association 1987 (*cited in* Harvard Note, *supra* note 158, at 1318 n.1).

¹⁸⁵ Dickens, *supra* note 5, at 499 (noting that an African American student is more than three times as likely to be placed in a special education class than a white student) (citing MEIER, *supra* note 5, at 5). *See also, supra* note 5.

¹⁸⁶ *See, e.g.*, Dickens, *supra* note 5, at 474-79; Kohn, *supra* note 12.

¹⁸⁷ Harvard Note, *supra* note 158, 1321-23. The article provides an extensive account of both legal and scientific information on the introduction of tracking systems in the public schools. It notes that Detroit was the first city to develop a tracking system for its public schools in 1919, classifying students into relatively permanent tracks based on their test performance (citing T. Noland, *The Effects of Ability Grouping: A Meta-Analysis of Research Findings 23-24* (1985) (unpublished Ph.D. thesis, University of Colorado)). *See also*, a 1914 model school code recommending separate schools for “defective, delinquent, or ... negro children” E. Cubberley, *State and County Educational Reorganization 4* (1914) (*cited in* Harvard Note, *supra* note 158, at 1321 n.23).

¹⁸⁸ Harvard Note, *supra* note 158, at 1322.

¹⁸⁹ *Id.* at 1323 (citing J Bryson & C. Bentley).

¹⁹⁰ *Id.* (citing Battlehiem, *Sputnik, and Segregation: Should the Gifted be Educated Separately?*, 26 *Commentary* 322 (1958)). *See also* U.S. v. Tunica County Sch. Dist., 421 F.2d 1236, 1236 (5th Cir.), *cert. denied*, 398 U.S. 951 (1970) (invalidating a school submitted, free-choice plan where students would be assigned to a school based upon their test scores); *Moses v. Washington Parish Sch. Bd.* 330 F. Supp. 1340, 1342 (E.D. La. 1971), *aff'd* 456 F.2d 1285 (5th Cir.1972), *cert denied*, 409 U.S. 1013 (1972) (noting that “testing was first imposed on blacks at the time of full integration.”).

¹⁹¹ *Quarles v. Oxford Mun. Separate. Sch. Dist.*, 868 F.2d 750 (5th 1989); *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487 (N.D. Miss. 1987); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F. 2d 1403 (11th Cir. 1985); *People Who Care v. Rockford Bd. of Educ.*, 111 F. 3d 528, 536 (7 th Cir. 1997) (stating that the general view is that tracking does not benefit minority students but holding that enjoining tracking is proper only when tracking is adopted as a form of discrimination).

¹⁹² 411 U.S. 1 (1973).

¹⁹³ *Id.* at 35.

¹⁹⁴ *Id.* at 56.

¹⁹⁵ *Id.* at 16-17.

¹⁹⁶ *Id.* at 17; *cf Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995) (holding that racial classifications must serve a compelling government interest and be narrowly tailed to further that interest).

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- ¹⁹⁷ Plyler v. Doe, 457 U.S. 202, 221 (1981).
- ¹⁹⁸ *Id.* at 216.
- ¹⁹⁹ *Id.*
- ²⁰⁰ Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 461-62 (1988).
- ²⁰¹ Hobson v. Hanson, 269 F. Supp. 401 (D.D.C. 1967).
- ²⁰² *Id.* at 514.
- ²⁰³ *Id.*
- ²⁰⁴ *Id.*
- ²⁰⁵ Smuck v. Hobson, 408 F.2d 175, 188-89 (D.C. Cir. 1969).
- ²⁰⁶ *See, e.g.,* Singleton v. Jackson Mun. Separate Sch. Dist., 419 F.2d 1211, 1219 (5th Cir.) (holding that school district may not use testing to group students until unitary systems are established), *vacated in part and reversed in part sub nom*, Carter v. West Feliciana Parish Sch. Bd., 396 U.S. 226 (1969); United States v. Tunica County Sch. Dist., 421 F.2d 1236 (5th Cir.) (holding that district court erred in approving assignment of students by achievement scores), *cert denied*, 398 U.S. 951 (1970); United States v. Sunflower County Sch. Dist. 430 F.2d 839, 841 (5th Cir. 1970); Lemon v. Bossier Parish Sch. Bd., 444 F.2d 1400, 1401 (5th Cir. 1971); Larry P. v. Riles, 495 F. Supp. 926, 989 (N.D. Cal. 1979) (enjoining use of IQ tests for placement until tests are shown not to be culturally biased); Morales v. Shannon, 516 F.2d 411, 414 (5th Cir.) (holding that if results of achievement grouping are statistically abnormal, than an inference of discrimination may be drawn) *cert. denied*, 423 U.S. 1034 (1975). *But see*, Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264, 1268 (9th Cir. 1974) (distinguishing San Francisco's tracking system from the tracking system struck down in Hobson); Copeland v. Sch. Bd. of the City of Portsmouth, 464 F.2d 932 (4th Cir. 1972) (holding that despite racial disparities, tracking system was intended to benefit students).
- ²⁰⁷ McNeal v. Tate County Sch. Dist., 508 F.2d 1017, 1020 (5th Cir. 1975).
- ²⁰⁸ Quarles v. Oxford Mun. Separate. Sch. Dist., 868 F.2d 750 (5th 1989); Montgomery v. Starkville Mun. Separate Sch. Dist., 665 F. Supp. 487 (N.D. Miss. 1987); Georgia State Conference of Branches of NAACP v. Georgia, 775 F. 2d 1403 (11th Cir. 1985).
- ²⁰⁹ *Quarles*, 868 F.2d at 755 (quoting *Castanada v. Pickard*, 648 F.2d 989, 996 (5th Cir. 1981). Although the court recognized that a plaintiff may be able to show that achievement grouping may have the effect of establishing a dual school system, that burden is upon the parents rather than the schools. *Id.* *See also*, *People Who Care v. Rockford* 111 F. 3d 528, 536 (7th Cir. 1997) (stating that judges and lawyers are not competent to resolve the controversy over tracking).
- ²¹⁰ *NAACP*, 775 F.2d at 1417.
- ²¹¹ *Quarles*, 868 F.2d at 755; *NAACP*, 775 F.2d at 1412.
- ²¹² *Quarles*, 868 F.2d at 755.
- ²¹³ *Montgomery*, 665 F.Supp at 498.

²¹⁴ *Id.* at 502. The court noted that the grouping was only applied in grades 1-6. It occurred for only 40% of the school day. *Id.*

²¹⁵ *NAACP*, 775 F.2d at 1412.

²¹⁶ 59 Mass. (5 Cush.) 198 (1850).

²¹⁷ *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954). *See also*, ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 78 (1976) (interpreting *Brown I's* statement as a mandate to integrate education, regardless of the cause of the segregation).

²¹⁸ *See* Sylvia T. Johnson, *Test Fairness and Bias: Measuring Academic Achievement Among Black Youth*, in *BLACK EDUCATION: A QUEST FOR EQUITY AND EXCELLENCE* 76, 87, Willy DeMarcell Smith & Eva Wells Chunn eds., (1991). Johnson argues that intelligence, as an abstract, can not be captured or ranked by a construction such as I.Q. *Id.* (“We do not measure minds the way we measure the length of a room.”); Saccuzzo et al, *supra* note 3, at 70; Kranz, *supra* note 1, at 9 (stating that describing intelligence by an IQ is an oversimplification of the complexity of human ability).

²¹⁹ *See, e.g.*, *Larry P. v. Riles* 495 F. Supp. 926, 989 (N.D. Cal. 1979) (enjoining use of IQ tests for placement of black children until tests were shown not to be culturally biased); *In re William L.*, 383 A.2d 1228, 1243 n.26 (1978) (“Experts generally agree that socially and culturally disadvantaged people tend to score lower on standardized intelligence tests....”); *Sharif v. N.Y. State Educ. Dep’t* 709 F. Supp. 345 (S.D.N.Y. 1989) (enjoining use of SAT for merit scholarships because tests underpredict achievement and academic performance for females); *Simmons v. Hooks*, 843 F. Supp. 1296, 1300 (E.D. Ark. 1994) (stating that tests had cultural bias).

²²⁰ Saccuzzo et al, *supra* note 3, at 70 (noting that even when risk factors, such as poverty, single-parent families, or health problems, are controlled the scores are still off by five IQ points); Ford, *supra* note 1, at x-xi, 1 (noting that IQ tests don’t measure African-Americans properly and that 9% of gifted students were from the lowest income bracket, while 47% were from the highest income bracket); Frasier et. al., *A Review of Assessment Issues in Gifted Education & Their Implication for Identifying Gifted Minority Students*, *microformed on*, Eric Document 388024, at 3 (1995) (noting that IQ tests have cultural biases) (citing J.H. Borland, *IQ Tests: Throwing out the Bathwater, Saving the Baby*, 8 *Roeper Review* 163 (1986)). *See also*, Kranz, *supra* note 1, at 14 (noting that teachers are poor identifiers of gifted students unless they have training).

²²¹ U.S. CONST., Art. 1, Sec. 8.

²²² *See, e.g.*, Coleman & Gallagher, *supra* note 22, at 268 (suggesting that repressive state policies are one obstacle to identifying gifted students from special populations); Ronald G. Marquardt & Frances A. Karnes, *Gifted Education and Discrimination: The Role of the Office for Civil Rights*, 18 *Jnl for Educ. of the Gifted* 87 (1994) (noting that there were 37 letters of finding issued by the OCR from 85-91 concerning discrimination against African Americans and access to gifted programs); Saccuzzo et al, *supra* note 3, at 6 (finding that when a school that had previously refused to test any students for giftedness was forced to test the top 10% of its students, one third were found to qualify for the gifted program); Kohn, *supra* note 12 (describing efforts of administrators to detrack school populations and resulting backlash from local school boards despite educational success).

²²³ *Bd. of Educ. v. Dept. of Health, Educ., and Welfare*, 396 F.Supp. 203, 221 (S.D. Ohio 1975), *rev’d on other grounds*, 532 F.2d 1070 (6th Cir. 1976).

²²⁴ *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487, 502 (N.D. Miss. 1987).

²²⁵ 42 U.S.C. § 2000d (1994). Title VI empowers the Department of Education to seek the termination of federal assistance to violators. 42 U.S.C. §2000 (1994). When a school district has committed a violation

of Title VI, a person may file a Title VI complaint with the Office of Civil Rights (OCR) in the Department of Education. 34 C.F.R. §100.7 ff (1987). The complaint must be filed within 180 days of the violation and detail the alleged practice and its effect. 34 C.F.R. §100.7 ff (1987).

²²⁶ Stanley v. Darlington County Sch. Dist., 879 F.Supp. 1341, 1365 (D.S.C. 1995) (quoting 34 C.F.R. § 100.3 (b)(6)).

²²⁷ See Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (stating that “Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation,” and that “good intent or absence of discriminatory intent [does not] redeem” practices that burden the advancement of minorities). Although *Griggs* dealt with a Title VII employment issue, the wording of Title VI and Title VII are similar, both using the passive voice. Compare 42 U.S.C. 2000d with 42 U.S.C. 2000e. Subsequent Title VI cases have imported much of the reasoning used in *Griggs*. See, e.g., Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985). The Supreme Court, however, held in Guardians Ass’n v. Civil Service Comm’n, 463 U.S. 582 (1983), that Title VI prohibits only intentional discrimination, but that it does grant federal agencies the authority to promulgate regulations which prohibit conduct with racially disparate effects.

²²⁸ 34 C.F.R. § 100.3 (b)(2).

²²⁹ Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985) (stating that a disparate impact theory may be brought if the suit is brought under a regulation promulgated under Title VI (citing 34 C.F.R. §100.3 (b)(2))). See also *In re Dillon County Sch. Dist. No. 1, Administrative Proceeding in the United States Dept. of Educ. No. 84-VI-16*, at 2 (1984), cited in Harvard Note, *supra* note 158, at 1335 n.110, for a successful challenge to a tracking system based upon a disparate impact theory

²³⁰ See Marquardt, *supra* note 222, at 87 (noting between 1985-1991 there were twelve successful challenges to gifted programs based upon Title VI claims of discrimination).

²³¹ NAACP, 775 F.2d at 1417. See also, *New York Urban League v. New York*, 71 F.3d 1031 (2nd Cir. 1995) (citing to NAACP).

²³² NAACP, 775 F.2d at 1417.

²³³ *Id.*

²³⁴ *Id.* (stating that measuring achievement by ability in subject is a valid method of grouping and that grouping according to test scores is valid if the tests are non-discriminatory (citing *Scott v. City of Anniston*, 597 F.2d 897, 901-2 (5th Cir. 1979)).

²³⁵ 793 F.2d 969 (9th Cir. 1984).

²³⁶ *Id.* at 982-83.

²³⁷ See *Quarles v. Oxford Mun. Separate Sch. Dist.*, 868 F.2d 750, 755 (5th Cir. 1989) (holding that “educators, rather than courts...are in a better position ultimately to resolve the question whether such a practice is, on the whole, more beneficial than detrimental to the students involved”) (quoting *Castaneda v. Pickard*, 648 F.2d 989, 996 (5th Cir. 1981).

²³⁸ See, e.g., COUNCIL, *supra* note 22, at 28-30 (noting that nationally approximately 3.5% of the student population is enrolled in gifted programs). In New York, 6% of the student population is enrolled in gifted programs. *Id.*

²³⁹ See *Plyler v. Doe*, 457 U.S. 202 (1981); In the Matter of *Bennett v. City Sch. Dist. of New Rochelle*, 114 A.D.2d 58, 62-63 (N.Y. App. Div. 1985).

²⁴⁰ *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974); *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487 (N.D. Miss. 1987).

²⁴¹ *Berkelman*, 501 F.2d at 1268.

²⁴² *Id.* at 1266.

²⁴³ *Id.* at 1267

²⁴⁴ *Id.* at 1266-67.

²⁴⁵ *Id.* This reasoning is similar to that in *Bennett*, see, *infra* note 191-192 and accompanying text.

²⁴⁶ *Montgomery v. Starkville Mun. Separate Sch. Dist.*, 665 F. Supp. 487 (N.D. Miss. 1987). See also, *Simmons v. Hooks*, 843 F. Supp. 1296, 1301 (E.D.Ark. 1994) (holding that the use of parent and student referrals, non-linguistic assessments, and inservice programs on recognition of gifted students reduced the bias of a district's selection procedure).

²⁴⁷ *Id.* at 503.

²⁴⁸ *Id.* at 503 n.19

²⁴⁹ *Id.* at 503.

²⁵⁰ See, *supra* note 220, and accompanying text.

²⁵¹ Currently the OCR is investigating the New York City gifted programs. The OCR investigated New York City's tracking procedures in 1977 and found that minorities were placed in predominately lower tracks in the New York City public schools. See, M. REBELL & A. BLOCK, *EQUALITY AND EDUCATION* 114-15 (1985).

²⁵² *Johnpoll v. Elias*, 513 F. Supp. 430 (E.D.N.Y. 1980); In the Matter of *Bennett v. City Sch. Dist. of New Rochelle*, 114 A.D.2d 58, 62-63 (N.Y. App. Div. 1985).

²⁵³ *Johnpoll*, 513 F.Supp. at 432

²⁵⁴ *Id.* at 431.

²⁵⁵ In this respect, the decision in *Johnpoll* is like that of *Quarles* which stated that educators, not courts, are best able to determine what practices are beneficial for the students. See, *supra*, note 189 and accompanying text.

²⁵⁶ *Bennett*, 14 A.D.2d at 60.

²⁵⁷ *Id.* at 61-62. In this respect, the decision in *Bennett* is like that of *Berkelman*. So long as the student receives adequate education, there is not a constitutional violation. See, *supra* notes 241-245, and accompanying text.

²⁵⁸ *Johnpoll v. Elias*, 513 F. Supp. 430 (E.D.N.Y. 1980); In the Matter of *Bennett v. City Sch. Dist. of New Rochelle*, 114 A.D.2d 58, 62-63 (N.Y. App. Div. 1985).

²⁵⁹ See, *supra* notes 209-211 and accompanying text.

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- ²⁶⁰ See, *supra* notes 209-211 and accompanying text.
- ²⁶¹ See, *supra* notes 234 and accompanying text. See also, *People Who Care v. Rockford Bd. of Educ.*, 111 F. 3d 528, 536 (suggesting that if a district were discriminating with its tracking system, that a court could forbid the district from categorizing students in a way other than in accordance “with criteria that have been validated as objective and nonracist”).
- ²⁶² Currently, no New York City school district (of those that provided information) gives IQ tests which have been normed on minority students, such as the Raven or the adapted Wechsler.
- ²⁶³ Saccuzzo et. al., *supra* note 3, at 45.
- ²⁶⁴ Interview with District personnel (July 1998).
- ²⁶⁵ See CITY REPORT, *supra* note 9, at 12-13 (noting 51% districts define in terms of academic capability).
- ²⁶⁶ John F. Feldhusen, *Programs for the Gifted Few or Talent Development for the Many*, 79 PHI DELTA KAPPAN 10, (1998).
- ²⁶⁷ Jodi Berls, *Parents Debate Change in Gifted Program*, AUSTIN-AMERICAN STATESMAN, JAN. 21, 1998, §A at 1 (noting that districts in Texas decided to rely less on standardized tests during the admissions process and try to test for different kinds of giftedness).
- ²⁶⁸ See Bernal, *supra* note 5, at 2.
- ²⁶⁹ See Beluck, *supra* note 92.
- ²⁷⁰ See Borland, *supra* note 220.
- ²⁷¹ See Berls *supra* note 267.
- ²⁷² See Beluck, *supra* note 92.
- ²⁷³ See Saccuzzo, *supra* note 3 (noting that after administering the Raven test, the amount of identified gifted and talented Hispanic children rose from 8% of the 29% student population to 19%. The amount of African American identified children rose from 7% of the 20% population to 15%. Additionally, the overrepresentation of white children decreased from 80% of 40% to 50%).
- ²⁷⁴ See Sugarman, *supra* note 13.
- ²⁷⁵ See Berls, *supra* note 267.
- ²⁷⁶ Jennifer Lauer, *District Hopes Gate Will Open to Minorities*, THE PRESS-ENTERPRISE, Mar. 11, 1998, § B at 1.
- ²⁷⁷ See Beluck, *supra* note 92.
- ²⁷⁸ See Berls, *supra* note 267.
- ²⁷⁹ See Passow & Rudnutski, *supra* note 2, at 25-28.
- ²⁸⁰ Carol Reid & Brenda Romanoff, *Using Multiple Intelligence Theory to Identify Gifted Children*, 55 EDUC. LEADERSHIP 1, September 1, 1997 (noting that the purpose of eliminating socioeconomic bias was

accomplished in that 29% of the students admitted into the gifted program were from low socioeconomic families).

²⁸¹ See Staples, *supra* note 5.

²⁸² *Id.*

²⁸³ See Berls, *supra* note 267.

²⁸⁴ See Beluck, *supra* note 92.

²⁸⁵ See Kranz, *supra* note 1, at 14.

²⁸⁶ See Passow & Rudnitski, *supra* note 2.

²⁸⁷ *Id.*

²⁸⁸ See Beluck, *supra* note 92.

²⁸⁹ Melanie Markley, *HISD Outlines New Vanguard Selection Policy*, HOUSTON CHRONICLE, Jan. 19, 1998.

²⁹⁰ Mauren Magee, *San Diego to Test all Pupils for Advanced Classes*, SAN DIEGO UNION TRIBUNE, May 1, 1998, § (local).

²⁹¹ Letter from Adrienne Pershyn, Coordinator of Special Programs, District 29, to Patrick Alexander, Intern, Advocates for Children, Inc. of New York City, (Jul. 10, 1998).

²⁹² Rose Kim, *Gifted Program Alters Standards*, NEWSDAY, NOV. 26, 1997, § A at 8.

²⁹³ *Id.* (noting that District 26 postponed the gifted programs to give schools additional time to inform parents about the gifted program).

²⁹⁴ See Beluck, *supra* note 92.

²⁹⁵ *Id.*

²⁹⁶ See Magee, *supra* note 29.

²⁹⁷ See Sugarman, *supra* note 13.

²⁹⁸ See Cohen *supra* note 85.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ See Beluck, *supra* note 92.

³⁰⁴ See Magee, *supra* note 290.

³⁰⁵ *Id.*

³⁰⁶ JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 24 (1985) (quoting Charles Elliot, Chair of the Committee of Ten on Secondary Studies of the National Education Association 1892).

³⁰⁷ COUNCIL, *supra* note 22, at 28-30. Many states, including New York, failed to provide statistics regarding the racial composition of their gifted program. The table highlights the racially disparate placement of students in gifted programs across the country. *Id.*