

2001

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### Recommended Citation

Charles J. Russo, *UNEQUAL EDUCATIONAL OPPORTUNITIES FOR GIFTED STUDENTS: ROBBING PETER TO PAY PAUL?*, 29 Fordham Urb. L.J. 727 (2001).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol29/iss2/11>

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# UNEQUAL EDUCATIONAL OPPORTUNITIES FOR GIFTED STUDENTS: ROBBING PETER TO PAY PAUL?

Charles J. Russo\*

*If an unfriendly foreign power had attempted to impose on America the mediocre education performance that exists today, we might well have viewed it as an act of war.*<sup>1</sup>

With these provocative words, the National Commission on Excellence in Education's seminal report, *A Nation at Risk: The Imperative for Educational Reform*,<sup>2</sup> gave birth to a plethora of reform reports aimed at reinvigorating the quality of American schools.<sup>3</sup> Previously, the Supreme Court's monumental decision in *Brown v. Board of Education*<sup>4</sup> served as the impetus to propel local and national leaders to take steps to ensure equal educational opportunities for all students by recognizing that "[t]oday, education is perhaps the most important function of state and local governments."<sup>5</sup>

*Brown* ushered in an era that has led to admirable, yet arguably incomplete, gains in equal educational opportunities for all chil-

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1. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 3 (1983) [hereinafter *A NATION AT RISK*].

2. *Id.*

3. By the end of the 1980s, the era of reform reports seemed to draw to a close. For representative major reports, see, for example ERNEST L. BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA* (1983); CARNEGIE COUNCIL ON ADOLESCENT DEV., *TURNING POINTS: PREPARING AMERICAN YOUTH FOR THE 21ST CENTURY* (1989); CARNEGIE FORUM ON EDUC. AND THE ECON., *A NATION PREPARED: TEACHERS FOR THE 21ST CENTURY* (1986); JOHN GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* (1984); HOLMES GROUP, *TOMORROW'S TEACHERS: A REPORT OF THE HOLMES GROUP* (1989); and THEODORE SIZER, *HORACE'S COMPROMISE: THE DILEMMA OF THE AMERICAN HIGH SCHOOL* (1984).

4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that segregation was a denial of the equal protection of the laws under the Fourteenth Amendment and that separate educational facilities were inherently unequal).

5. *Id.* at 493.

dren, most notably minorities,<sup>6</sup> females,<sup>7</sup> and students with disabilities.<sup>8</sup> However, despite the progress that has been made in the struggle for educational equality, many exceptional students are not being fully served.<sup>9</sup> *A Nation at Risk* cogently observed that “[o]ver half of the population of gifted students do not match their tested ability with comparable achievement in school.”<sup>10</sup> The report further suggested that “most gifted students, for example, may need a curriculum enriched and accelerated beyond the needs of other students of high ability.”<sup>11</sup>

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6. See, e.g., GARY ORFIELD & SUSAN EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (discussing difficulties in implementing desegregation decisions); GARY ORFIELD, SARA SCHLEY, DIANE GLASS & SEAN REARDON, *THE GROWTH OF SEGREGATION IN AMERICAN SCHOOLS: CHANGING PATTERNS OF SEPARATION AND POVERTY SINCE 1968* (1993) (same).

7. See Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. § 1681-1968 (1994)) (guaranteeing access to sports programs and prohibiting sexual harassment in schools); e.g., Frank Brown & Charles J. Russo, *Single-Sex Schools, the Law, and School Reform*, 31 EDUC. & URB. SOC'Y 145 (1999) (examining the recent history of school reform and analyzing the legal status of single-sex schools); Diane Heckman, *Title IX Tapestry: Threshold and Procedural Issues*, 153 EDUC. L. REP. 849 (2001) (focusing on recent decisions that impact on threshold and procedural aspects of Title IX); Albert S. Miles, David L. Dagley, & Charles J. Russo, *University Student-Athlete Codes After Monroe v. Davis County Board of Education*, 138 EDUC. L. REP. 969 (1999) (examining the application of Title IX principles to sexual assault by student-athletes); Brian A. Snow et al., *The Problem of Determining Title IX Liability*, 154 EDUC. L. REP. 1 (2001) (exploring the federal judiciary's solutions to the problem of determining Title IX liability).

8. The passage of the Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1485 (1994)), has had a profound impact on American schools. See also, e.g., Larry D. Bartlett & Scott McLeod, *Inclusion and the Regular Class Teacher Under the IDEA*, 128 EDUC. L. REP. 1 (1998) (clarifying the duty and role of the regular classroom teacher in the provision of special education programming and services in the classroom as provided in the IDEA); Ralph D. Mawdsley, *Standard of Care and Students with Disabilities*, 148 EDUC. L. REP. 553 (2001) (exploring the effect of standards of care under tort liability on providing services under Individuals with Disabilities Education Act); Charles J. Russo et al., *The Delivery of Special Education Services in Catholic Schools: One Hand Gives, the Other Hand Takes Away*, 3 CATHOLIC EDUC. J. INQUIRY & PRAC. 375 (2000).

9. This neglect is contrary to the express wishes of Congress. See 20 U.S.C. § 1400(c)(5)(E)(ii) (Supp. IV 1998) (noting that Congress intended that all children with disabilities should “be prepared to lead productive, independent, adult lives to the maximum extent possible”); 20 U.S.C. § 1221 (1994) (declaring that National policy is “that every citizen is entitled to an education to meet his or her full potential”). In light of these statements, Congressional inaction in safeguarding the rights of the gifted is, at best, perplexing.

10. *A NATION AT RISK*, *supra* note 1, at 8.

11. *Id.* at 24.

Aside from commission reports and rhetoric, little has been done at either the federal or state level to offer appropriate programming for gifted and talented children's<sup>12</sup> educational needs. The poor state of gifted education is reflected in the fact that the most recent federal study on gifted students reports that states spent only two cents out of every one hundred dollars in education on programs for gifted students.<sup>13</sup> It is questionable whether educational leaders and policy makers have taken sufficient steps to meet the educational needs of gifted children.

This Article discusses various challenges in meeting the educational needs of gifted students. Part I provides a brief overview of educational perspectives on gifted students. Part II examines statutory developments in the United States dealing with the rights of

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12. The term gifted was first used by Lewis Terman who defined gifted students as those who placed in the top one percent in general intelligence ability on the Stanford-Binet Intelligence Scale or a similar test. LEWIS Terman, *MENTAL AND PHYSICAL TRAITS OF A THOUSAND GIFTED CHILDREN* (1925). For later definitions of gifted, see, for example, J.A. BORLAND, *PLANNING AND IMPLEMENTING PROGRAMS FOR THE GIFTED* (1989); RAYMOND B. CATTELL, *ABILITIES: THEIR STRUCTURE, GROWTH, AND ACTION* (1971); ROBERT F. DEHAAN & ROBERT J. HAVINGHURST, *EDUCATING GIFTED CHILDREN* (1957); HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* (1983); JANE PIIRTO, *TALENTED CHILDREN AND ADULTS: THEIR DEVELOPMENT AND EDUCATION* (1999); VALERIE RAMOS-FORD ET AL., *GROWING UP GIFTED* 54 (5th ed. 1997); ABRAHAM J. TANNENBAUM, *GIFTED CHILDREN: PSYCHOLOGICAL AND EDUCATIONAL PERSPECTIVES* (1983); Nicholas Colangelo & Garry A. Davis, *The Meaning and Making of Giftedness*, in *HANDBOOK OF GIFTED EDUCATION* 27 (1997); Nicholas Colangelo & Garry A. Davis, *Toward a Differentiated Model of Giftedness and Talent*, in *HANDBOOK OF GIFTED EDUCATION* 65 (1997); Joseph Renzuli, *What Makes Giftedness? Reexamining a Definition*, *PHI DELTA KAPPAN*, Nov. 1978, at 180; Francoys Gagné, *From Giftedness to Talent: A Developmental Model and Its Impact on the Language of the Field*, 18 *ROEPER REV.* 103 (1995); and *A Proposal for Subcategories Within Gifted and Talented Populations*, *GIFTED CHILD Q.*, Apr. 1998, at 87. For a discussion of many of these definitions, see Kristen F. Stephens & Frances A. Kearns, *State Definitions for the Gifted and Talented Revisited*, *EXCEPTIONAL CHILD.*, Jan. 1, 2000, at 219, 220-22. For earlier versions of this article, see Frances A. Kearns & E.C. Collins, *State Definitions of the Gifted and Talented*, 1 *J. EDUC. GIFTED* 44 (1977) and Frances A. Kearns & Susan F. Koch, *State Definitions of the Gifted and Talented: An Update and Analysis*, 8 *J. EDUC. GIFTED* 285 (1985). For purposes of consistency and brevity, unless otherwise specified, the term "gifted" refers to students who are both "gifted" and "talented."

13. PAT O'CONNELL ROSS, U.S. DEP'T OF EDUC., *NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA'S TALENT: PART 2: THE CURRENT STATUS OF EDUCATION FOR THE NATION'S MOST TALENTED STUDENTS* 2 (1993), available at <http://www.ed.gov/pubs/DevTalent/part2.html> [hereinafter *NATIONAL EXCELLENCE: PART 2*]. See also Jacob K. Javits Gifted and Talented Students Education Act of 2001, H.R. 490, 107th Cong. § 2(a)(8) (2001) (noting that "in 1990, fewer than 2 cents out of every \$100 spent on elementary and secondary education in the United States was devoted to providing challenging programming for the Nation's gifted and talented students").

gifted students. Part II focuses predominantly on the author's belief that the federal government must protect the educational rights of gifted students. The author recommends the passage of a bill enabling systematic protection of the educational rights of gifted children modeled after the Education for All Handicapped Children Act<sup>14</sup> (now the Individuals with Disabilities Education Act (IDEA)).<sup>15</sup> Part III reviews the growing body of case law dealing with rights of gifted children. Part IV discusses various proposals aimed at providing equitable programming for gifted students.

## I. THE EDUCATIONAL NEEDS OF GIFTED STUDENTS

The subject of programming for gifted students is a contentious issue in America. In an egalitarian nation, where all are considered equal,<sup>16</sup> critics are reluctant to support special programming for gifted students because of the fear and suspicion that intellectualism<sup>17</sup> may lead to elitism.<sup>18</sup> On the other hand, there is the American ideal, most notably reflected in *Brown*,<sup>19</sup> Title IX,<sup>20</sup> and the

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14. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version codified at 20 U.S.C. § 1400-1491 (1994)).

15. Education for All Handicapped Children's Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1485 (1994)); see also STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL EDUCATION LAW: ISSUES AND IMPLICATIONS FOR THE 90'S 40-46 (1995) (detailing the poor condition of special education programs prior to the adoption of the Education for All Handicapped Children Act).

16. PAT O'CONNELL ROSS, U.S. DEP'T OF EDUC., NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA'S TALENT: PART 1: A CASE FOR DEVELOPING AMERICA'S TALENT 5 (1993) [hereinafter NATIONAL EXCELLENCE: PART 1] (referring to Alexis de Tocqueville's depiction of the early "United States as a society with low levels of interest in education and intellect . . . that values equality . . . [and is] uncomfortable with social or intellectual distinctions or with hierarchies that they believe can stand in the way of success for industrious individuals." (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 124 (Univ. of Chicago Press 2000) (1840))).

17. NATIONAL EXCELLENCE: PART 1, *supra* note 16, at 5-6 ("[A]gain and again, it has been noticed that intellect in America is presented as a kind of excellence, as a claim to distinction, as a challenge to egalitarianism, as a quality which almost certainly deprives a man or woman of the common touch." (quoting RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 211 (Knopf 1963))).

18. Abraham J. Tannenbaum, *Programs for the Gifted: To Be or Not to Be*, 22 J. EDUC. GIFTED 3 (1998) (discussing the conflict between egalitarianism and excellence in the context of gifted education); Mary F. Toll, *The Importance of Teacher Preparation Programs To Appropriately Serve Students Who Are Gifted*, UNDERSTANDING OUR GIFTED, Winter 2000, at 14 (offering examples to counter the notion that classes for the gifted are elitist).

19. *Supra* note 4.

20. *Supra* note 7.

IDEA,<sup>21</sup> of helping all to succeed and reach their full potential.<sup>22</sup> As noted in this Article, this ambivalence is far from resolved.

Regardless of one's attitude toward the subject of giftedness, research indicates that gifted students have unique educational needs and require special programs.<sup>23</sup> In addition, it is important to consider the value of gifted student programs, since many gifted children not only fail to succeed on their own,<sup>24</sup> but indeed may underachieve,<sup>25</sup> experience learning disabilities,<sup>26</sup> and drop out of school<sup>27</sup> because their potential is stifled by the traditional school curriculum.<sup>28</sup> Moreover, although data is typically not tracked consistently,<sup>29</sup> it indicates that gifted children from low income fami-

21. *Supra* note 15.

22. See, e.g., James R. Delisle, *Neither Freaks Nor Geeks: The Gifted Among Us*, EDUC. WEEK, Oct. 27, 1999, at 36, 39 (discussing the new NBC program "Freaks and Geeks" and pondering whether the sitcom can reverse America's "artificial show of egalitarianism"); Jonathan A. Plucker, *Is Gifted Education Still Viable?*, EDUC. WEEK, March 11, 1998, at 33-34.

23. See Juan A. Alonso, *The Differentiated Program: Significant Curriculum Adaptations*, 14 GIFTED EDUC. INT'L 80 (1999); see also A NATION AT RISK, *supra* note 1, at 24 ("[M]ost gifted students . . . may need a curriculum enriched and accelerated beyond the needs of other students of high ability.").

24. See, e.g., Joseph Harrington et al., *The Marland Report: Twenty Years Later*, 15 J. EDUC. GIFTED 31 (1991); see also Donna Y. Ford & J. John Harris, *On Discovering the Hidden Treasure of Gifted and Talented African-American Children*, 13 ROEPER REV. 27 (1990).

25. See JOANNE RAND WHITMORE, GIFTEDNESS, CONFLICT, AND UNDERACHIEVEMENT (1980); Susan M. Baum, Thomas P. Hebert & Joseph S. Renzulli, *Reversing Underachievement: Creative Productivity as A Systematic Intervention*, GIFTED CHILD Q., Fall 1995, at 224; Sally M. Reiss & D. Betsy McCoach, *The Underachievement of Gifted Students: What Do We Know and Where Do We Go?*, GIFTED CHILD Q., July 2000, at 152; Sylvia B. Rimm, *Why Do Bright Children Underachieve?*, GIFTED CHILD TODAY, Nov.-Dec. 1987, at 30; Ellen Winner, *The Miseducation of Our Gifted Children*, EDUC. WEEK, Oct. 16, 1996, at 44-45.

26. See Linda E. Brody & Carol J. Mills, *Gifted Children with Learning Disabilities: A Review of the Issues*, 30 ROEPER REV. 282 (1997); Scott Norton et al., *The Learning Disabled/ Gifted Student*, CONTEMP. EDUC., Fall 1996, at 36.

27. See Joseph S. Renzulli & Sunghee Park, *Gifted Dropouts: The Who and The Why*, GIFTED CHILD Q., Oct. 1, 2000, at 261 (2000).

28. Carolyn M. Callahan & J.M. Kaufman, *Involving Gifted Children's Parents: Federal Law is Silent But Its Assumptions Apply*, 33 EXCEPTIONAL EDUC. Q. 50 (1982).

29. NATIONAL EXCELLENCE: PART 2, *supra* note 13, at 2 ("Programs for gifted and talented students exist in every state and in many school districts, but it is difficult to determine the exact number of students served because not all states and localities collect this information."). This report points out that while about 8.8% of all eighth grade students in public schools participated in programs for the gifted, disparities abound: "[f]or example, 4 states identify more than ten percent of their students as gifted and talented, while in 21 states fewer than 5 percent [sic] are identified as such." *Id.* at 3.

lies,<sup>30</sup> minority families, or families living in urban areas<sup>31</sup> are in even greater need of programming than their middle-income peers because of the greater risk of failure, poor achievement, or underachievement.<sup>32</sup>

In response to various reports and commissions calling for educational excellence, there has been growing,<sup>33</sup> albeit far from unanimous,<sup>34</sup> support for programs for the gifted. The next section of this Article reviews the legislative history of programs for gifted students.

## II. LEGISLATION ON GIFTED EDUCATION

### A. Federal Legislation

#### 1. Early History

It is well settled that students do not have a constitutionally protected right to receive an education<sup>35</sup> absent a constitutional violation<sup>36</sup> or a clear statutory entitlement.<sup>37</sup> Even so, Congress has

30. See Paul D. Slocumb & Ruby K. Payne, *Identifying and Nurturing the Gifted Poor*, PRINCIPAL, May 2000, at 28 (discussing the needs of gifted students from poorer backgrounds).

31. See, e.g., Thomas P. Herbeet, *Defining Belief in Self: Intelligent Young Men in an Urban High School*, GIFTED CHILD Q., Apr. 2000, at 91 (discussing a case study of six talented males in an urban high school).

32. See J. John Harris & Donna Y. Ford, *Identifying and Nurturing the Promise of Gifted Black Children*, 60 J. NEGRO EDUC. 3 (1991); Donna Y. Ford, *Determinants of Underachievement as Perceived by Gifted, Above-Average, and Average Black Students*, 14 ROEPER REV. 130 (1992).

33. See, e.g., Joetta L. Stack, *Support Building for Renewed Focus On Gifted Education*, EDUC. WK., Mar. 29, 2001, at 32; *National News Roundup*, EDUC. WK., Dec. 9, 1992, at 2 (indicating that results of a Gallup poll indicated that 84% of respondents would favor programs for the gifted as long as they did not reduce funding for other students and that 61% were of the opinion that schools should do more to challenge the "very smartest" children). The poll also revealed that 35% of respondents indicated that schools should continue to act as they have with regard to the gifted while 2% were of the opinion that schools should do less for these students. NATIONAL EXCELLENCE: PART 2, *supra* note 13, at 2.

34. See, e.g., Lowell C. Rose et al., *The 29th Annual Phi Delta Kappan / Gallup Poll Of the Public's Attitudes Toward the Public Schools*, PHI DELTA KAPPAN, Winter 1997, at 53 (indicating that a narrow majority of respondents favored separate classes for gifted students).

35. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a case involving the constitutionality of a state funding plan in relation to equality of educational opportunities, the Supreme Court declared that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." *Id.* at 35.

36. If, for example, as in *Brown v. Board of Education*, 347 U.S. 483 (1954), a party can allege that state action has led to the deprivation of a constitutionally protected right, such as equal protection, then a lawsuit may proceed in federal court.

taken a leadership role in safeguarding the educational rights of minorities, women, and children with disabilities. However, the history of federal programming for gifted students has been sporadic.

The earliest federal program on gifted education was created in 1931 when the United States Department of Education instituted a Section on Exceptional Children and Youth.<sup>38</sup> Similar to later federal legislative actions, most notably the Jacob K. Javits Gifted and Talented Students Act,<sup>39</sup> this program lacked specific legislative or fiscal authority, but laid a foundation for later federal actions regarding the gifted.<sup>40</sup>

After World War II, with the threat of Soviet aggression and the spread of communism to China, federal interest in the gifted was essentially present, although unstated, when Congress enacted the National Science Foundation Act of 1950.<sup>41</sup> This historic act "not only directed resources toward the development of the sciences and basic research, but for the first time focused federal attention on the nation's gifted and talented."<sup>42</sup> Previously, Congress directed its attention mostly towards higher education of the gifted in basic and applied science areas related to the general welfare.<sup>43</sup> However, under this act, programs and projects were geared toward improving the curriculum in schools and encouraging gifted students to seek careers in mathematics and the physical sciences.

Even as federal interest in the gifted was evolving, two research studies<sup>44</sup> revealed a decreased interest in programs for the gifted.

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37. For a brief review of major federal statutes on education, see Charles J. Russo, *Know Your Federal Statutes*, 67 SCH. BUS. AFFAIRS 46 (2001).

38. Perry A. Zirkel, Paul L. Stevens, *The Law Concerning Public Education of Gifted Students*, 34 ED. LAW REP. 353, 353 (1986).

39. See *infra* notes 90-90 for a discussion of the Javits Act.

40. Jeffrey J. Zettel, *The Education of Gifted and Talented Children from a Federal Perspective*, in JOSEPH BALLARD ET AL., *SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 51 (1982).

41. National Science Foundation Act of 1950, Pub. L. No. 81-507, 64 Stat. 149 (1950) (codified as amended at 42 U.S.C. § 1871 (1988)).

42. Zettel, *supra* note 40, at 52.

43. See Derek Bok, *What's Wrong with Our Universities*, 14 HARV. J.L. & PUB. POL'Y 305, 306-07 (1991).

44. The first report, a 1948 follow-up on a 1929 survey, found that while nearly two-thirds of school districts with populations of over 25,000 had some form of ability grouping, only fifteen reported having special classes for gifted students. The second report, from Ohio, revealed that only two percent of schools reported providing specialized services for gifted students. Zettel, *supra* note 40 at 52-53 (citing ARCH OLIVER HECK, *THE EDUCATION OF EXCEPTIONAL CHILDREN* (1953) and OHIO COMM'N ON CHILDREN AND YOUTH, *THE STATUS OF THE GIFTED IN OHIO* (1951)).



This declining interest was exacerbated by anti-intellectualism<sup>45</sup> during the McCarthy era when "intellectuals" were often viewed with suspicion. For example, discussing President Eisenhower's 1952 defeat of Adlai Stevenson, one commentator noted "an alarming fact long suspected: there is a wide and unhealthy gap between the American intellectuals and the people."<sup>46</sup> Not surprisingly, concerns for gifted education was overshadowed by the much larger debate over school desegregation during the early part of the 1960s.

## 2. *Equal Educational Opportunities: A Brief, But Necessary, Excursus*

Amid the ebb and flow of support for programs for gifted students, the much larger and far-reaching debate over school desegregation came to a head in *Brown v. Board of Education*<sup>47</sup> and its progeny.<sup>48</sup> Indeed, *Brown* is the cornerstone of all subsequent legal developments ensuring the rights of disenfranchised groups. Consequently, reviewing the development of special education is relevant because, like students with disabilities, gifted students have individualized needs and should be entitled to some protection.<sup>49</sup>

A major impetus in protecting the rights of students with disabilities was provided by *Pennsylvania Ass'n for Retarded Children v.*

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45. For further background on this notion of anti-intellectualism, see RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* (Knopf 1963).

46. Zettel, *supra* note 40, at 53 (citing JOEL SPRING, *THE SORTING MACHINE-NATIONAL EDUCATIONAL POLICY SINCE 1945* 5 (1976)).

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

48. For a review of Supreme Court cases on school desegregation see Charles J. Russo et al., *Brown v. Board of Education at 40: A Legal History of Equal Educational Opportunities in American Public Education*, 63 J. NEGRO EDUC. 297 (1994).

49. For commentary on the nexus between special education and gifted education, see Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131 (1998); Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119 (1995); Laura Kettermann, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L. J. 913 (2001); Renee Vintzel Loidas, Comment, *Equal Educational Opportunity for the Gifted and Talented: Is It Illusory Without the Right to a Free Appropriate Public Education?*, 1980 DET. C. L. REV. 957; Gawn E. Murray, Note, *Special Education for Gifted Children: Answering the "Right" Question*, 15 QUINNIPIAC L. REV. 103 (1995); Roseann G. Padula, Notes and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Board of Educ.*, 29 CONN. L. REV. 1319 (1997).

*Pennsylvania*<sup>50</sup> and *Mills v. Board of Education*.<sup>51</sup> Consistent with the reasoning in *Brown*, both cases were decided on the basis of equal protection and due process. Viewed together, these cases stand for two principles that permeate later developments. First, children with disabilities have the substantive due process right to receive a public school education based on their unique, individual needs. Second, students with disabilities are entitled to the protection of procedural due process before they can be classified as being disabled, placed in a non-regular classroom, or transferred to a new placement.

One year after *Mills*, Congress enacted Section 504 of the Rehabilitation Act.<sup>52</sup> This was the first major federal law to offer broad based protection for otherwise qualified individuals with impairments.<sup>53</sup> Although not originally intended to assist students, Section 504 has had a profound impact on schools. The law required that individuals who are otherwise qualified must be permitted to participate in school programs or activities as long as it is possible to do so by means of a "reasonable accommodation."<sup>54</sup>

In 1975, Congress enacted the Education for All Handicapped Children Act, now the IDEA,<sup>55</sup> as the most comprehensive federal law protecting the rights of students who have disabilities. Among its provisions, the IDEA guarantees all children between the ages

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50. 334 *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, F. Supp. 1257 (E.D. Pa. 1971) (recognizing the right to appropriate education for the mentally retarded in the least restrictive environment possible in light of their needs and prescribing due process safeguards prior to their being placed outside the regular classroom).

51. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) (holding that a school board had an affirmative duty to provide mentally retarded children with publicly supported education suited to each child's needs, including special education and tuition grants, and a constitutionally adequate prior hearing with periodic review).

52. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in relevant part at 29 U.S.C. § 794 (1994)) (prohibiting discrimination under federal grants and programs).

53. 29 U.S.C. § 794(a) (1994) ("No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance.").

54. *Id.*; see also 34 C.F.R. § 104.39 (2000) ("A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided with an appropriate education, as defined within [34 C.F.R. §] 104.33(b)(1), within the recipient's program.").

55. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified as amended at Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1491 (1994)). In order to avoid inconsistency, unless otherwise noted, from this point on, the article uses the acronym IDEA throughout.

of three and twenty-one<sup>56</sup> with specifically identified disabilities<sup>57</sup> a "free appropriate public education"<sup>58</sup> in the least restrictive environment<sup>59</sup> in conformance with an Individualized Education Program (IEP).<sup>60</sup> However, in *Board of Education v. Rowley*,<sup>61</sup> the first Supreme Court case reviewing the IDEA, the Court held that the Act "did not impose any greater substantive educational standard than would be necessary"<sup>62</sup> to provide access to a public education for children with disabilities. The Court ruled that the Act established a floor of educational opportunity below which public schools could not fall rather than creating an open-ended continuum maximizing available programs.<sup>63</sup> Given the Court's reduc-

56. 20 U.S.C. § 1412(a)(1)(B)(i)(ii) (1995).

57. 20 U.S.C. § 1401(3) (1995) offers the following definition:

(3) Child with a disability—

(A) In general

The term "child with a disability" means a child —

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and related services.

(B) Child aged 3 through 9

The term "child with a disability" for a child aged 3 through 9 may, at the discretion of the State and the local educational agency, include a child—

(i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development; and

(ii) who, by reason thereof, needs special education and related services.

The IDEA makes no references to gifted students.

58. 20 U.S.C. § 1401 (8) (2001):

The term "free appropriate public education" means special education and related services that:

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

59. 20 U.S.C. § 1412(62) (1994).

60. 20 U.S.C. §§ 1401 (11), 1414 (d) (1995); 34 C.F.R. § 300.340-350 (1999) (providing additional details on IEPs).

61. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

62. *Id.* at 192.

63. Although states must adopt policies and procedures that are consistent with the IDEA, they may provide greater benefits than those required by federal law. Further, if a state does establish higher standards, courts will consider them when evalu-

tionist interpretation of the broadly supported IDEA, it is not surprising that the rights of gifted students were not assigned a higher priority.

### 3. *Modern History of Federal Legislation*

On October 4, 1957, the Soviet Union successfully launched the world's first artificial satellite, Sputnik. This led to a swift federal response in the form of the National Defense Education Act of 1958 ("NDEA").<sup>64</sup> Although the NDEA was not adopted specifically to address the needs of gifted students, its emphasis on mathematics, science, and foreign languages served as a precursor to the development of programs for the gifted. Furthermore, the Act and the local response it elicited to it implicitly made gifted students the prime targets of curricular reforms that were designed to redress underachievement among students who were capable of success.<sup>65</sup> Consequently, as the 1950s came to a close, there was an increased recognition that since gifted students had the ability to make significant contributions to the Nation's welfare, especially in the essential areas of science and technology, it was vital to develop programs to assist them in achieving their full potential.

The promise to the gifted of the late 1950s that might have flowered under President Kennedy's leadership<sup>66</sup> waned under President Johnson's Great Society programs, which emphasized services for the educationally disadvantaged and economically deprived. Although the Elementary and Secondary Education Act of 1965 ("ESEA")<sup>67</sup> was vital and necessary in looking after the needs of

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ating the appropriateness of an IEP. *See e.g.*, *David D. v. Dartmouth Sch. Comm'n.*, 775 F.2d 411, 420 (1st Cir. 1985) (holding that "[where] a state has chosen to provide by law greater benefits to handicapped children than the Federal law requires, . . . Congress explicitly mandated . . . that both federal and state [courts] determine whether those standards have been met"); *Geis v. Bd. of Educ.*, 774 F.2d 575, 581 (3d Cir. 1985) (holding that the Education of the Handicapped Act confers on federal courts authority to enforce standards of education for handicapped children under federal question jurisdiction).

64. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified at scattered sections of 20 & 42 U.S.C. (1994)). Although the gifted were not the focal point of the Act, Congress indicated that "the Nation had to increase its efforts to identify and educate more of our talented individuals." Zettel, *supra* note 40, at 54.

65. *See generally* JOHN GOODLAD, *SCHOOL CURRICULUM REFORM IN THE UNITED STATES* (1964); James J. Gallagher, *National Agenda for Educating Gifted Students: Statement of Priorities*, *EXCEPTIONAL CHILD.*, Oct. 1988, at 107.

66. Zettel, *supra* note 40, at 55.

67. Elementary & Secondary Education Act of 1965, Pub. L. No. 89-750, 80 Stat. 1191, 1204 (codified in part as amended at scattered sections of 20 U.S.C. and partially repealed by Pub. L. No. 91-230, 84 Stat. 173 (1970)).

disadvantaged students,<sup>68</sup> it may have hindered development of programs for the gifted. Federal resources that would otherwise have been earmarked for programs for the gifted were diverted to other programs under the auspices of the ESEA.<sup>69</sup> The federal government adopted a policy that essentially robbed Peter to pay Paul by providing resources for one group of deserving students at the expense of another. Even though the adoption of the ESEA meant that scant resources were reserved for the gifted, advocates continued to lobby Congress. Two years later, while some funds were allocated for innovative and exemplary programs under the 1967 Amendments to the ESEA,<sup>70</sup> very little was spent on programs for the gifted.<sup>71</sup>

The lobbying efforts on behalf of the gifted were rewarded when versions of a bill were introduced in the Senate and House in January of 1969.<sup>72</sup> The bill, proposed as a result of the White House Task Force on the Gifted and Talented, was initially defeated but later won passage as The Gifted and Talented Children's Education Assistance Act. The Act was passed as Section 806 of the Elementary and Secondary Education Amendments of 1969, "Provisions Related to Gifted and Talented Children."<sup>73</sup> President Nixon signed the bill into law on April 13, 1970.<sup>74</sup> This law gave the first federal statutory definition of the term "gifted," called for the development of model programs, and made programs eligible

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68. For a history of this comprehensive statute, see STEPHEN K. BAILEY & EDITH K. MOSHER, *ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW* (1968).

69. Zettel, *supra* note 40, at 55.

70. Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 704, 81 Stat. 783, 817 (1968).

71. See Lynn Pollins, Comment, *Legal Rights of Gifted Students: Special Education at the Other End*, 19 CONN. L. REV. 145, 149 (1986) (citing Thomas Pledgie, *Has E.S.E.A. Fostered Innovative and Exemplary Programming for the Gifted?*, 20 GIFTED CHILD Q. 466, 466 (1976)) and noting that although more than 1500 projects were funded under Title III of the ESEA during the 1975 fiscal year, only 28 were for gifted students).

72. Zettel, *supra* note 40, at 55.

73. "The act amended Section 1201 of the Higher Education Act of 1965 by adding the following definition: The term 'gifted and talented children' means in accordance with objective criteria prescribed by the Commissioner, children who have outstanding intellectual ability or creative talent, the development of which requires special activities or services not ordinarily provided by local education agencies." Zettel *supra* note 40, at 56; The Gifted and Talented Children's Act, Pub. L. No. 91-230, 84 Stat. 121 (1969).

74. Zettel, *supra* note 40, at 58.

for federal financial assistance under Titles III and IV of the ESEA.<sup>75</sup>

At the outset of the 1970s, the federal government had assumed a much more active role in providing for the educational needs of the gifted. On October 6, 1972, Commissioner of Education Sidney Marland submitted his national assessment of programs for the gifted to Congress.<sup>76</sup> Not surprisingly, the Marland Report urged Congress to provide ongoing support for the development and maintenance of programs for gifted students not only because of their unique needs, but also because the federal government had virtually no role in this process.<sup>77</sup>

Following the impetus of the Marland Report, three similar bills were introduced in Congress in February of 1973.<sup>78</sup> The final bill, signed into law by President Ford on August 21, 1974, as part of the 1974 Amendments to the ESEA,<sup>79</sup> called for federal involvement in four major areas. First, it created the Office of Gifted and Talented within the United States Office of Education. Previously, this Office had been created administratively and was housed in the United States Bureau of Education for the Handicapped.<sup>80</sup> Second, it called for the creation of a National Clearinghouse for the Gifted

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75. Given the role that Senator Jacob Javits of New York played in this and other laws for the gifted, *see* Zettel, *supra* note 40, at 55 (in 1969), 59 (in 1973), 62 (in 1978), it was only fitting that a subsequent statute was named in his honor.

76. The Marland Report contains a definition of giftedness that has been and continues to be the one most widely adopted by state and local education agencies:

Gifted and talented children are those identified by professionally qualified persons who by virtue of outstanding abilities, are capable of high performance. These are children who require differentiated educational programs and/or services beyond those normally provided by the regular school program in order to realize their contribution to self and society. Children capable of high performance include those with demonstrated achievement and/or potential ability in any of the following areas, singly or in combination:

1. general intellectual ability;
2. specific academic aptitude;
3. creative or productive thinking;
4. leadership ability;
5. visual and performing arts;
6. psychomotor ability.

Sidney Marland, *Education of the Gifted and Talented: Report to the Congress of the United States by the U.S. Commissioner of Education* 2 (1972).

77. For a follow up on the Marland Report, see Joseph Harrington et al., *The Marland Report: Twenty Years Later*, 15 J. EDUC. GIFTED 31 (1991).

78. Zettel, *supra* note 40, at 59.

79. ESEA Amendments of 1974, Part IV, § 404, Pub. L. 93-80, 88 Stat. 503 (codified at 20 U.S.C. § 1863 (1976) (repealed 1978)).

80. *See* Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 704, 81 Stat. 783, 817 (1968).

and Talented. Third, the Act made funds available to state and local education agencies along with grants for training, research, and projects for the gifted. Fourth, the Act authorized an annual federal appropriation not to exceed \$12.5 million for programs on the gifted.<sup>81</sup> Insofar as the original draft of the bill called for an annual federal authorization of \$80 million for programs for the gifted,<sup>82</sup> it is not surprising that advocates were disappointed since this amounted to about one dollar a year for each eligible student.<sup>83</sup>

An era of ongoing progress appeared to be on the horizon when the Gifted and Talented Children's Education Act of 1978<sup>84</sup> became law. This act extended the funding provisions of the Special Projects Act. Unlike the IDEA, which was designed to place children with disabilities in fully inclusive educational settings, the Gifted and Talented Children's Act was intended to provide separate programs for gifted students.<sup>85</sup> The Gifted and Talented Children's Education Act provided financial assistance to states to plan, develop, operate, and improve programs for gifted students and allowed the United States Commissioner to provide discretionary funding for such programs.<sup>86</sup>

The promise of the Gifted and Talented Children's Education Act of 1978 was short-lived since it was repealed in 1981 when President Reagan signed the Omnibus Budget Reconciliation Act ("OBRA").<sup>87</sup> OBRA also closed the Office of Gifted and Talented, eliminated categorical funding from federal sources, and combined authorizations for gifted education and twenty-one other programs into a single block grant while reducing funding by more than forty percent.<sup>88</sup> As a result, the federal government completely suspended its direct involvement in programs for gifted students during much of the 1980s.

Amid concerns of "a rising tide of mediocrity,"<sup>89</sup> education reform swept the Nation in the early 1990s. The passage of the Jacob

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81. Zettel, *supra* note 40, at 61.

82. *Id.*

83. FRANCES A. KARNES & RONALD G. MARQUARDT, GIFTED CHILDREN AND THE LAW 8 (1991).

84. Gifted and Talented Children's Education Act of 1978, Pub. L. No. 95-561, Title IX-A, 92 Stat. 2143, 2292 (codified at 20 U.S.C. §§ 3311-3318 (1978)) (repealed 1982).

85. H.R. REP. NO. 95-1137, at 76 (1978).

86. Zettel, *supra* note 40, at 61-3.

87. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 2175, 95 Stat. 357, 809 (codified as amended at 42 U.S.C. § 1396n (1994)).

88. Zettel, *supra* note 40, at 83-84.

89. A NATION AT RISK, *supra* note 1, at 5.

K. Javits Gifted and Talented Students Act of 1994 marked the culmination of the efforts of supporters of gifted education.<sup>90</sup> This Act, which incorporated many of the recommendations of the Marland Report, reinstated, expanded, and updated earlier programs while offering priority funding for programs to serve gifted students who are economically disadvantaged, speak limited English, or have disabilities.<sup>91</sup>

As significant as the Javits Act is, it has three major shortcomings. First, although the Act provides some modest resources,<sup>92</sup> it does not offer enough assistance to help create widespread programs. Second, the Act does not mandate the creation of programs for gifted students. Third, the Act does not include substantive or procedural due process safeguards similar to those available to students with disabilities under the IDEA. Consequently, its good intentions aside, the Javits Act can virtually be ignored by states that do not place a priority on programs for gifted children.

Most recently, The Gifted and Talented Education Act of 2001 was introduced in both houses of Congress<sup>93</sup> and sent to Committee.<sup>94</sup> This Act proposes to assist state educational agencies to develop or expand programs for gifted students. These programs can take the form of professional development programs, technical assistance, innovative programs and services, or emerging technolo-

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90. Jacob K. Javits Gifted and Talented Students Act of 1994, Pub. L. No. 89-10 (1965), as added Pub. L. No. 103-382, 108 Stat. 3820 (current version at 20 U.S.C. §§ 8031-37). The Javits Act was designed "to provide financial assistance to State and local educational agencies . . . to initiate a coordinated program of research . . . designed to build a nationwide capability in elementary and secondary schools to meet the special educational needs of gifted and talented students." 20 U.S.C. § 8032 (b)(1). According to the Act,

The term "gifted and talented," when used with respect to students, children and youth . . . who give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields and who require services or activities not ordinarily provided by the school in order to fully develop such capabilities.

20 U.S.C. § 8801 (16) (1994). Unlike earlier versions, the Act not only eliminated specific references to preschool, elementary and/or secondary education, but also excluded any reference to performing arts.

91. 20 U.S.C. § 8035(a)(1) (1994) (setting the Act's priorities).

92. For example, in 1992 the Javits Act provided just under \$10 million to support programs. NATIONAL EXCELLENCE: PART 2, *supra* note 13, at 3. More recently, in 2001, the Javits Act only provided \$7.5 million for research grants. Lisa Fine, *Advocates Say Bill Leaves Gifted Students Behind*, EDUC. WK., June 13, 2001, at 21, 23.

93. H.R. 490, 107th Cong. (2001); S. 421, 107th Cong. (2001).

94. The House version was referred to the House Committee on Education and the Workforce, H.R. 490, 107th Cong. (2001), while the Senate version was sent to the Senate Committee on Health, Education, Labor and Pensions, 147 Cong. Rec. S1746 (2001).



gies.<sup>95</sup> Amid controversy and politics,<sup>96</sup> versions of the Act were ultimately approved in the House,<sup>97</sup> but the bill faces an uncertain future in Senate Committee.<sup>98</sup>

Regardless of whether Congress adopts a new version of the Javits Act, it is clear that since gifted students have special needs, only states can provide appropriate programs.<sup>99</sup> Yet, as reflected in the next section of this Part, inconsistencies in state responses necessitate a federal legislative response.

## B. State Action

Information on state programs for the gifted is elusive since state laws and regulations defy accurate, fully up-to-date compilation.<sup>100</sup> With this caveat in mind, this brief review examines state definitions of the term "gifted," the degree to which state programs are mandated and funded, and the requirements regulating educators of the gifted.

The most recent study reported that forty-five states categorize gifted students under a variety of rubrics such as "gifted," "gifted and talented," "learner of high ability," "highly capable students," and "exceptional student." Five states have no definitions or cate-

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95. For a discussion of this bill see Fine, *supra* note 90 at 21, 23. See also Kristen B. Stephens, *Gifted Education and the Law*, GIFTED CHILD TODAY, Jan./Feb. 2001, at 30, 31-32 (2001).

96. Although both the House and Senate adopted versions of the Javits Act, it may still face an uncertain future in the Senate and in forthcoming conference committee meetings designed to reconcile both versions. Supporters fear that the Javits Act seems to have little chance of surviving since it was not originally contained in President Bush's proposed education plan contained in the House version and was reinstated late in the process. Moreover, the chair of the House Education and Workfare Committee, Rep. John Boehner, R-Ohio, is not opposed to a consolidation of the Javits Act, even though he was responsible for the version of the bill that kept the Act. Lisa Fine, *Advocates Say Bill Leaves Gifted Students Behind*, EDUC. WEEK, June 13, 2001, at 21, 23. See also Joetta L. Sack, *Advocates Unite to Block Bush Consolidation Plan*, EDUC. WEEK, May 2, 2001, at 26, 30 (including a discussion of efforts to save Javits grants for the gifted).

97. H.R. 490, 107th Cong. (2001); see also Lisa Fine, *ESEA Minus Vouchers, Easily Passes House*, EDUC. WEEK, May 30, 2001, at 24, 26.

98. See Lynn Olson & Erik W. Robelen, *ESEA Passage Unlikely Before Fall*, EDUC. WEEK, July 11, 2001, at 1, 38-39.

99. FRANCES A. KARNES & RONALD G. MARQUARDT, GIFTED CHILDREN AND LEGAL ISSUES 4 (2000).

100. E.g., Mary S. Lamdrum et al., *A National Survey of Current Legislation and Policy Trends in Gifted Education: Life After the National Excellence Report*, 21 J. EDUC. GIFTED 352 (1998) (offering data from the forty-two states that responded to the survey instrument); Kristen F. Stephens & Frances A. Kearns, *State Definitions for the Gifted and Talented Revisited*, EXCEPTIONAL CHILD., Jan. 1, 2000, at 219 (providing a comprehensive review of all states).

gories of gifted students.<sup>101</sup> Presently, at least thirty-one states mandate programs for gifted students.<sup>102</sup> At least twelve of these states mandate programs under their own education laws. Other states deal with this issue separately.<sup>103</sup>

Twenty-nine states reported that they provided various levels of support funding while another thirteen<sup>104</sup> did not provide any financial support.<sup>105</sup> Even among those states providing support, tremendous levels of disparity exist. Texas, for example, reported spending \$56 million on gifted education while Massachusetts only reported spending \$437,970.<sup>106</sup>

At least twenty-eight states require certification for individuals who teach in programs for the gifted while an additional three provide it as an option.<sup>107</sup> The remaining twenty-two states reported that they had no specific certification requirements for working with gifted students.<sup>108</sup>

### III. LITIGATION INVOLVING GIFTED STUDENTS

Litigation concerning gifted children is increasing rapidly.<sup>109</sup> However, courts are still reluctant to grant gifted students additional rights absent statutory mandates.<sup>110</sup> Before reviewing the

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101. Stephens & Kearns, *supra* note 100, at 236. Only Massachusetts, Minnesota, New Hampshire, New Jersey, and South Dakota did not have definitions for gifted. *Id.* at 222.

102. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 66 tbl. 55 (2000) (reviewing state legislation on gifted and talented programs and number and percent of students receiving services in public elementary and secondary schools in 1993-94 and 1995-96); *see also* Lamdrum et. al., *supra* note 100, at 355 (reporting that of the thirty-three states that reported having legislation on the gifted, seventeen mandated programming).

103. Lamdrum, et. al., *supra* note 100, at 355.

104. *Id.* Ohio, however, only mandates the identification of gifted students and does not provide funding for programs. OHIO REV. CODE ANN. §§ 3324.10-3324.07, 3324.04 (West 1994) (providing for identification of gifted students).

105. U.S. DEP'T OF EDUC., *supra* note 102, at 66 (indicating that as of July 1997, sixteen states had provided discretionary state-supported programs).

106. Fine, *supra* note 100, at 21.

107. Frances A. Karnes et al., *Certification and Specialized Competencies for Teachers in Gifted Education Programs*, 22 ROPER REV. 201 (2000). *See also* Frances A. Karnes & James E. Whorton, *Teacher Certification and Endorsement in Gifted Education: A Critical Need*, 19 ROPER REV. 54, 54 (1996); *see also* Landrum et al., *supra* note 100, at 356 (reporting that twenty states had certification requirements).

108. Karnes et al., *supra* note 107, at 202.

109. Perry A. Zirkel & Paul L. Stevens, *The Law Concerning Public Education of Gifted Students*, 34 EDUC. L. REP. 353, 366 (1986).

110. *But see* Centennial Sch. Dist. v. Commonwealth, 503 A.2d 1090 (Pa. Commw. Ct. 1986), *aff'd*, 539 A.2d 785 (Pa. 1988) (upholding the Education Secretary's determination that student was entitled to individualized educational program, apart from

case law pertinent to gifted students, it is worth reiterating that elitism is a concern often raised in connection with gifted education,<sup>111</sup> which appears to exclude other children, suggesting tracking or ability grouping.<sup>112</sup> Tracking is the practice of examining school children at a young age, typically by IQ tests, and then assigning them to curricular "tracks," frequently to the detriment of poor and minority students.<sup>113</sup> This article does not review the litigation on tracking<sup>114</sup> because states have typically avoided challenges to their gifted programs on the basis that they have learned their lessons and have adopted expansive definitions of giftedness that employ multiple criteria for inclusion in programs.<sup>115</sup>

This section of the article reviews the case law involving gifted students.<sup>116</sup> This section discusses cases focused on admissions and placement, transportation, federal claims, and race.

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enrollment in district's approved enrichment program); *Woodland Hills High Sch. Dist. v. Commonwealth*, 516 A.2d 875 (Pa. Commw. Ct. 1986) (ruling that gifted students had a right to transportation to their programs).

111. For discussions of these criticisms, see Abraham J. Tannenbaum, *Programs for the Gifted: To Be or Not to Be*, 22 J. FOR THE EDUC. OF THE GIFTED 3 (1998) and Mary F. Toll, *The Importance of Teacher Preparation Programs To Appropriately Serve Students Who Are Gifted*, UNDERSTANDING OUR GIFTED, Winter 2000, at 1.

112. The leading case challenging tracking is *Hobson v. Hansen*. *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (finding that defendants' policies denied equal opportunity to students and requiring the school board to end ability tracking, provide bus transportation for desegregation, integrate teacher assignments, and abolish optional attendance zones).

113. See, e.g., *Simmons v. Hooks*, 843 F. Supp. 1296 (E.D. Ark. 1994) (holding that school district's use of ability grouping violated children's constitutional rights).

114. For recent commentaries on tracking, see Angelia Dickens, *Revisiting Brown v. Board of Education: How Tracking Has Resegregated America's Public Schools*, 29 COLUM. J.L. & SOC. PROBS. 469 (1996) and Daniel J. Losen, Note, *Silent Segregation in Our Nation's Schools*, 34 HARV. C.R.-C.L. L. REV. 517 (1999).

115. See Stephens & Kearns, *supra* note 100, at 219.

116. Even though this article focuses on the rights of gifted students, it is worth noting that teachers in gifted programs have engaged in litigation to protect their rights. See, e.g., *Dilley v. Slippery Rock Area Sch. Dist.*, 625 A.2d 153 (Pa. Commw. Ct. 1993) (upholding the RIF of a staff member with greater seniority where the school board demonstrated the need to retain a gifted teacher with less seniority); *Egan v. Bd. of Educ.*, 406 S.E.2d 733 (W. Va. 1991) (directing a school board to hire a teacher with certification in gifted education to replace a faculty member who lacked certification in this area); *Dallap v. Sharon City Sch. Dist.*, 571 A.2d 368 (Pa. Commw. Ct. 1990) (reversing a board's decision to retain the coordinator of a gifted program while subjecting teachers with greater seniority to a RIF); *Rosen v. Montgomery County Intermediate Unit No. 23*, 495 A.2d 217 (Pa. Commw. Ct. 1985) (permitting RIFs of teachers in a program for gifted students); *Degener v. Governing Bd.*, 136 Cal. Rptr. 801 (1977) (upholding a reduction in force (RIF) where one of the employees was a teacher in a program for the gifted).

### A. Admissions and Placement

Absent an express statutory or regulatory mandate, when a school board employs a rational method of selection, such as a lottery, that gives all qualified children an equal opportunity to enter a program with a limited number of openings<sup>117</sup> or a program restricted to students of a certain age,<sup>118</sup> courts have generally adopted an all or nothing approach to the extent that a student is either admitted or excluded from gifted education.

The earliest case on admission to a program for gifted students was *Ackerman v. Rubin*.<sup>119</sup> In *Ackerman*, a state appellate court affirmed that the New York City Board of Education did not act improperly in denying a student admission to a special progress class that accelerated the regular three-year junior high school curriculum into two years. The court reasoned that in light of a board directive that admissions decisions had to be based on factors beyond academics, such as students' emotional, social, and physiological development and maturity, educators did not act arbitrarily or capriciously in finding that the child was not qualified because he failed to reach the appropriate age cut-off.<sup>120</sup> Interestingly enough, in the context of this discussion, the trial court acknowledged that "[i]t appears that the Board of Education initiated special progress classes more than forty years ago."<sup>121</sup>

In *Central York School District v. Commonwealth*,<sup>122</sup> an appellate court rejected a school board's argument that it did not have to provide a placement for a gifted student since doing so was contin-

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117. *Bennett v. City Sch. Dist.*, 114 A.D.2d 58 (App. Div. 1985) (affirming, inter alia, that a gifted child was not entitled to admission to a full-time program for gifted students where school officials employed a lottery for selecting a limited number of applicants from a pool of qualified students; the student was one of 112 applicants for 27 openings in the program).

118. *Zweifel v. Joint Dist.*, 251 N.W.2d 822 (Wis. 1977) (affirming that the state constitution did not require a school board to grant early admission to a bright four-year old). Although regarding it irrelevant, the dissent noted that one of the reasons why the board refused to admit the child was that it did not have special programs for gifted students. *Id.* at 828. See also *Wright v. Ector County Indep. Sch. Dist.*, 867 S.W.2d 863 (Tex. App. 1994) (affirming that since a Texas law requiring school boards to create programs for gifted students required a child to be six years old in order to be enrolled in a first grade gifted program, a five year-old gifted student did not have a right to enter first grade).

119. *Ackerman v. Rubin*, 231 N.Y.S.2d 112 (Sup. Ct. 1962), *aff'd*, 232 N.Y.S.2d 872 (App. Div. 1962) (mem.).

120. *Ackerman v. Rubin*, 231 N.Y.S.2d 112, 113 (Sup. Ct. 1962) (noting that the student was going to be 10.7 rather than the required 11.3 years of age at the start of the school year in Sept. 1962).

121. *Id.*

122. *Ctr. York Sch. Dist. v. Commonwealth*, 399 A.2d 167 (Pa. Commw. Ct. 1979).

gent on receiving state funding.<sup>123</sup> The court responded that because state funding was not a condition precedent to providing the child with an educational program, the child was entitled to an appropriate placement.

Pennsylvania has had more litigation than any other state with regard to the rights of gifted students<sup>124</sup> and has the most significant case safeguarding the statutory rights of these children. In *Centennial School District v. Commonwealth*,<sup>125</sup> the Supreme Court of Pennsylvania unanimously affirmed that, pursuant to a Commonwealth statute<sup>126</sup> and regulations<sup>127</sup> requiring an IEP<sup>128</sup>

123. For a similar state case unsuccessfully challenging special education as an unfunded mandate, see *City of Worcester v. Governor*, 625 N.E.2d 1337 (Mass. 1994).

124. For a discussion of administrative determinations in Pennsylvania as well as a general review of case law, see Perry A. Zirkel & Paul L. Stevens, *The Law Concerning Public Education of Gifted Students*, 34 EDUC. L. REP. 353 (1986).

125. *Centennial School District v. Commonwealth*, 503 A.2d 1090 (Pa. Commw. Ct. 1986), *aff'd*, 539 A.2d 785 (Pa. 1988) (upholding the statute and regulation by a six-to-zero margin as one of its members did not participate in the case). For a discussion of *Centennial*, see Ronald G. Marquardt & Frances A. Karnes, *The Courts and Gifted Education*, 50 EDUC. L. REP. 9 (1989).

126. 22 PA. CONS. STAT. CODE § 13.1 (1994). In its most relevant part, the statute which "requires special treatment for exceptional students" read

(1) Standards for Proper Education and Training of Exceptional Children.

The State Board of Education shall adopt and prescribe standards and regulations for the proper education and training of all exceptional children by school districts or counties singly or jointly . . . .

(2) Plans for Education and Training Exceptional Children. Each intermediate unit, cooperatively with other intermediate units and with school districts shall prepare and submit to the Superintendent of Public Instruction, on or before the first day of August . . . for his approval or disapproval, plans for the proper education and training of all exceptional children in accordance with the standards and regulations adopted by the State Board of Education. Plans as provided for in this section shall be subject to revision from time to time as conditions warrant, subject to the approval of the Superintendent of Public Instruction.

*Centennial Sch. Dist. v. Commonwealth*, 503 A.2d 1090 (Pa. Commw. Ct. 1986) (citing 22 PA. CONS. STAT. CODE § 13.1(ii)), *aff'd*, 539 A.2d 785, 788 (Pa. 1988).

127. In their most relevant parts, the regulations read:

22 [Pa.Code] § 341.1. Definitions.

(iv) Mentally gifted.—Outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program. Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

22 [Pa.Code] § 341.15. Individualized Education Program.

The Individualized Education Program for each person assigned to special education programs or services shall include:

(1) A statement of the present level of educational performance of the person.

for each gifted student, a child had a right to gifted education. The court reasoned that a school board's provision of a 150 minute-a-week pull-out program was insufficient for a gifted child because the enrichment program did not address his need for accelerated instruction in reading and mathematics.<sup>129</sup> However, similar to *Rowley*,<sup>130</sup> where the Supreme Court ruled that the IDEA provides a floor of opportunity, the court held that "instruction to be offered need not 'maximize' the student's ability to benefit from an individualized education program"<sup>131</sup> as long as what a school board makes available is appropriate to a child's needs.<sup>132</sup> Follow-

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(2) A statement of annual goals which describes the expected behaviors to be achieved through the implementation of the Individualized Education Program of the person.

(3) A statement of short-term instructional objectives.

(4) A statement of specific educational services to be provided to the child, including a description of special education and related services required to meet the unique needs of the child, a special instructional media and materials to be provided, and the type of physical education program in which the child will participate.

(5) A description of the extent to which the child will be able to participate in regular education programs.

(6) The projected date for initiation and the anticipated duration of services.

(7) Appropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the instructional objectives are being achieved.

22 PA. CODE § 341 (1994).

128. This is virtually identical to the requirement under federal law that an IEP be developed for each child with a disability. 20 U.S.C. §§ 1401 (11) (1994), 1414 (d); 34 C.F.R. §§ 300.340-350 (2000).

129. Between the intermediate and appellate decisions in *Centennial*, in *Scott. S. v. Commonwealth*, 512 A.2d 790 (Pa. Commw. Ct. 1986), an appellate court affirmed that a gifted student with a state-mandated IEP was not entitled to his parents' preference for further instruction in mathematics after he completed the district's final and most advanced course.

130. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

131. *Centennial Sch. Dist. v. Commonwealth*, 539 A.2d 785, 791 (Pa. 1988), *aff'g* 503 A.2d 1090 (Pa. Commw. Ct. 1986).

132. *See also* *Gateway Sch. Dist. v. Commonwealth of Pa. Dep't of Educ.*, 559 A.2d 118 (Pa. Commw. Ct. 1989) (relying on *Centennial* in disallowing the school district's appeal and holding that the district had waived the issue of whether it should be required to develop an IEP that included the student's college courses).

ing *Centennial*,<sup>133</sup> not all cases<sup>134</sup> in Pennsylvania have been resolved in favor of gifted students.<sup>135</sup>

*Broadley v. Board of Education* is more typical of the states' treatment of gifted children.<sup>136</sup> In *Broadley*, the Supreme Court of Connecticut unanimously affirmed that a gifted child's state constitutional right to a free public education did not include the right to special education.<sup>137</sup> The court also decided that the legislature's failure to mandate a program for a gifted child did not violate rights under the equal rights and equal protection provisions of the state constitution.<sup>138</sup>

## B. Transportation

Absent transportation, a child, gifted or otherwise, may be unable to participate in any educational program. This section reviews cases where the controversy was whether gifted children were entitled to transportation to special programs.<sup>139</sup> All three of the main

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133. For a discussion of *Centennial's* subsequent application, see Ronald G. Marquardt & Frances A. Karnes, *The Courts and Gifted Education Revisited*, 113 EDUC. L. REP. 539 (1996).

134. See *Sch. Dist. of Phila. v. Commonwealth*, 547 A.2d 520 (Pa. Commw. Ct. 1988) (directing a school board to provide tuition and transportation to a learning center for a gifted student with a hearing impairment); *Conrad Weisner Area Sch. Dist. v. Dep't of Educ.*, 603 A.2d 701 (Pa. Commw. Ct. 1992) (affirming that the success of a student identified as mentally gifted in regular education did not preclude his classification as an exceptional child with a specific learning disability who was entitled to special education).

135. See, e.g., *New Brighton Area Sch. Dist. v. Matthew Z.*, 697 A.2d 1056 (Pa. Commw. Ct. 1997) (denying a gifted student's request for tuition reimbursement and transportation costs in connection with his taking college courses not listed in his IEP where the school provided an appropriate placement); *Huldah A. by Anderson v. Easton Area Sch. Dist.*, 601 A.2d 860 (Pa. Commw. Ct. 1991) (affirming that the parent of a gifted child who was maintained in a "pull-out" program rather than being placed in an enrichment class that was open to gifted and non-gifted students pending completion of her state-mandated IEP was not entitled to attorney fees and costs since the student failed to comply with the IDEA's definition of disabled).

136. *Broadley v. Bd. of Educ.*, 639 A.2d 502 (Conn. 1994).

137. *Broadley*, 639 A.2d at 505.

138. *Id.* at 507. See generally, Gawn E. Murray, Note, *Special Education for Gifted Children: Answering the Right Question*, 15 QUINNIPIAC L. REV. 103 (1995); Roseann G. Padula, Notes and Comment, *The plight of Connecticut's Brightest Students: Broadley v. Meriden Board of Educ.*, 29 CONN. L. REV. 1319 (1997).

139. For a case peripherally involving gifted education and transportation, see *O'Campo v. School Bd.*, 589 So. 2d 323 (Fla. Dist. Ct. App. 1991). *O'Campo* reversed a grant of summary judgment that had been entered in favor of a school board where a student who was waiting in front of her school at 6.55 A.M. to be transported to a special arts program for gifted children was raped. The court noted that school officials had been notified that suspicious persons had been observed on school grounds prior to the rape.

cases involved students in non-public schools, although the type of school attended was not dispositive in any of the cases.

The earliest case on transportation was *Sands Point Academy v. Board of Education*<sup>140</sup> in which a trial court ruled that a school board did not have to provide bus transportation for children attending a non-public school that was “universally recognized as one of the most important centers for the education of gifted children.”<sup>141</sup> As a prelude to its holding, the court observed that the board had never deviated from its twenty-eight-year-old policy which set a five mile limit for all school bus routes (other than those for children with disabilities),<sup>142</sup> including those for schools outside of the New York City limits. The court concluded that since the school was located 8.69 miles from the New York City line in neighboring Nassau County, the board properly exercised its discretion in refusing to provide bus transportation for these gifted students.<sup>143</sup>

In the first of two cases from Pennsylvania, *Woodland Hills High School District v. Commonwealth*,<sup>144</sup> a state court safeguarded the rights of gifted children.<sup>145</sup> The court granted the state department of education’s request for summary judgment in a dispute over whether eligible children who attended non-public schools had a right to midday transportation to public schools so that they could attend, and participate in, programs for the gifted. In rejecting the local board’s argument that it was only obligated to transport gifted students under the state’s general transportation statute, the court essentially reasoned that the right to gifted education was meaningless without transportation to the midday programs. The court concluded that parental decisions “to have their children attend a nonpublic school and to be dually enrolled in the District’s gifted program should not impose on them the choice between a duty to provide midday transportation or in the alternative forego their children’s right to gifted special education.”<sup>146</sup>

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140. *Sands Point Acad. v. Bd. of Educ.*, 311 N.Y.S.2d 588 (Sup. Ct. 1970).

141. *Id.* at 590.

142. The court pointed out that “[a] different rule pertains to the transportation of the physically handicapped, emotionally disturbed or children with retarded mental development.” *Id.*

143. *Id.* at 591.

144. *Woodland Hills High Sch. Dist. v. Commonwealth*, 516 A.2d 875 (Pa. Commw. Ct. 1986).

145. *See also* *Sch. Dist. v. Commonwealth*, 547 A.2d 520 (Pa. Commw. Ct. 1988) (directing a school board to provide tuition and transportation to a learning center for a gifted student with a hearing impairment).

146. *Woodland Hills*, 516 A.2d at 878.



Conversely, in *Ellis v. Chester Upland School District*,<sup>147</sup> an appellate court in Pennsylvania affirmed a hearing officer's denial of a parent's request for transportation and tuition reimbursement so that her daughter could attend a private, out-of-state program for gifted students.<sup>148</sup> The court was satisfied that since the IEP developed by school personnel was appropriate to meet the child's educational needs, there was no reason to disturb the hearing officer's determination. In the alternative, the court explained that state law did not entitle a gifted student to placement in a private or out-of-state school.<sup>149</sup>

### C. Federal Claims

Insofar as it can be argued that gifted students and children with disabilities tend to reflect disparate points on a continuum of exceptionality, advocates of the gifted had hoped that the IDEA and federal claims would have offered support in their quest to obtain programming for gifted students. However, this has typically not been the case.

Apparently the earliest reported case alleging a violation of a student's "constitutional and statutory 'rights to a decent education'" was *Johnpoll v. Elias*<sup>150</sup> in which a father sought an injunction permitting his gifted son to enroll in the high school of his choice. A federal trial court in New York City rejected the father's claim on the basis that he failed to raise serious questions on the merits and was unable to demonstrate how his son would have suffered irreparable harm had he not been admitted to the school. Further, while the father neither adequately clarified the nature of his constitutional claim as, for example, equal protection or due process or whether the alleged violations were of state or federal rights, the court examined these issues in disposing of the claim. The court also rejected the father's claim that his son was covered by the IDEA.<sup>151</sup>

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147. *Ellis v. Chester Upland Sch. Dist.*, 651 A.2d 616 (Pa. Commw. Ct. 1994).

148. *See also* *New Brighton Area Sch. Dist. v. Matthew Z.*, 697 A.2d 1056 (Pa. Commw. Ct 1997) (denying a gifted student's request for transportation (and tuition reimbursement) costs in connection with his taking college courses not listed in his IEP where the school provided an appropriate placement).

149. *Ellis*, 651 A.2d at 619-20. Further, the court rejected the parent's request for attorney fees. *Id.* at 620.

150. Plaintiff's Memo of Law at 1, *Johnpoll v. Elias*, 513 F. Supp. 430 (E.D.N.Y. 1980).

151. *Id.* at 432.

At issue in *Student Roe v. Commonwealth*<sup>152</sup> was whether a local school board's refusal to place a child in a program for gifted students violated the child's rights to equal protection or due process.<sup>153</sup> The plaintiff unsuccessfully claimed that the Commonwealth of Pennsylvania violated her federal constitutional and statutory rights under the IDEA, but the court found that the dispute was "solely a matter of state law."<sup>154</sup> The court declared that school officials did not violate the student's rights since she did "not have a property interest in being placed in gifted education"<sup>155</sup> or a liberty interest insofar that she failed "to identify any information or ideas which she has been precluded from receiving."<sup>156</sup>

In *Hope v. Cortines*,<sup>157</sup> the Second Circuit affirmed a district court's refusal to grant relief to a gifted student in New York with dyslexia who filed suit under the Americans with Disabilities Act.<sup>158</sup> The student claimed that a local school board unlawfully engaged in discrimination on the basis of disability and race by refusing to provide him with appropriate educational services.<sup>159</sup> The court was satisfied that the student's claim was without merit be-

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152. *Student Roe v. Commonwealth*, 638 F. Supp. 929 (E.D. Pa. 1986), *aff'd* 813 F.2d 398 tbl. (3d Cir. 1987).

153. *See also* *Student Roe v. Commonwealth*, 593 F. Supp. 54 (E.D. Pa. 1984) (dismissing a claim for injunctive relief challenging the constitutionality of the procedures by which a student was denied participation in a class for gifted students on the basis that her rights to equal protection were not violated and that she could not claim a violation of procedural due process since she did not avail herself of available state remedies); *Lisa H. v. State Bd. of Educ.*, 447 A.2d 669 (Pa. Commw. Ct. 1982), *aff'd* 467 A.2d 1127 (Pa. 1983) (mem.) (holding that while all students in Pennsylvania have a property interest in the educational process, only exceptional children have a right to an individualized level or quality of education).

154. *Student Roe*, 638 F. Supp. at 929, 931.

155. *Id.*

156. *Id.* at 932.

157. *Hope v. Cortines*, 69 F.3d 687 (2d Cir. 1995), *aff'g* *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y. 1995).

158. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994), was adopted in 1990 to provide "a comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Although the Americans with Disabilities Act applies primarily to the private sector, it has implications for public entities such as schools.

159. The IDEA and accompanying regulations contain extensive procedural due process requirements, including the requirement that an aggrieved party exhaust administrative remedies before filing suit. 20 U.S.C. § 1415(f)(g), 34 C.F.R. §§ 300.500-300.517.

cause he failed to exhaust administrative remedies pursuant to the IDEA.<sup>160</sup>

In a case initially resolved prior to the enactment of the 1997 Amendments to the IDEA, the Tenth Circuit, in *Fowler v. Unified School District*,<sup>161</sup> ruled that a school board in Kansas was not required to provide an on-site sign language interpreter for a gifted student who attended a private non-sectarian school if doing so cost more than delivering a similar service at a public school. On remand, in a case that only peripherally involved the child's being gifted and which is of much greater significance for special education, the Tenth Circuit affirmed that since the 1997 IDEA Amendments were not applicable retroactively, the court's original judgment stood with respect to events that took place before the Amendments went into effect on June 4, 1997.<sup>162</sup> Conversely, as to actions after June 4, 1997, the court explained that the school board's sole obligation was to spend a proportionate amount of federal funds on students in non-public schools.

*J.D. v. Pawlet School District*<sup>163</sup> was a lawsuit filed on behalf of a gifted student in Vermont with emotional and behavioral problems who unsuccessfully alleged that his school board refused to place him in special education because his parents and educators could not agree on whether his disability affected his school performance. The suit also claimed that school officials failed to accommodate the student's needs by not reimbursing his parents for tuition and costs at an out-of-state residential school. The Second Circuit affirmed that insofar as the student was ineligible for special education under the IDEA, he was not entitled to its procedural protections.<sup>164</sup> In addition, the court affirmed that the school board's proposed IEP (offering the student access to programming such as college-level courses at a nearby college) was more appropriate to

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160. See also *Huldah A. v. Easton Area Sch. Dist.*, 601 A.2d 860 (Pa. Commw. Ct. 1991) (affirming that the parent of a gifted child was not entitled to attorney fees where the child was kept in a "pull-out" program rather than being placed in an enrichment class open to gifted and non-gifted students pending completion of her state-mandated IEP costs because the student failed to comply with the IDEA's definition of disabled).

161. *Fowler v. Unified Sch. Dist.*, 107 F.3d 797 (10th Cir. 1997), *vacated and remanded*, 521 U.S. 1115 (1997) (mem.).

162. *Fowler v. United Sch. Dist.*, 128 F.3d 1431 (10th Cir. 1997) (on remand).

163. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000). For a discussion of this case, see Laura Kettermann, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L. J. 913 (2001).

164. 224 F.3d at 60.

his needs and thus a reasonable accommodation within the parameters of Section 594 of the Rehabilitation Act. The court conceded that while the accommodations were not "optimal," the school board was only required to provide the student with "the same access to the benefits of a public school education as all other students,"<sup>165</sup> and therefore did not grant relief.<sup>166</sup>

#### D. Race

All three of the cases directly implicating race and gifted education could arguable have been placed under the heading of "Admissions and Placement." However, these cases are examined under their own heading in order to emphasize the still unfulfilled promise of *Brown v. Board of Education*.<sup>167</sup>

In *Board of Education v. Sanders*, a local school board in Illinois challenged the state board of education's withholding of funding from the local board's program for gifted students on grounds that since minority students were under-represented in the programs, then the programs must be being operated in a discriminatory fashion.<sup>168</sup> An appellate court affirmed that since neither the state board's general supervisory authority over the gifted program nor federal anti-discrimination policy authorized it to withhold funding based on its unilateral determination that the local board engaged in racial discrimination, it had to provide the funding.<sup>169</sup>

In *Simmons ex rel. Simmons v. Hooks*,<sup>170</sup> an African-American mother claimed that a school board violated her children's rights through its use of ability grouping.<sup>171</sup> In Reviewing the board's policies on ability grouping at various times, a federal trial court court concluded that the "old policy of ability grouping and the new policy, in so far as it groups by ability entire classes of children in kindergarten through third grade." had violated the student's Fourteenth Amendment rights.<sup>172</sup> However, in turning to gifted education specifically, the court found that while the board's past

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165. *Id.* at 71.

166. *See also* Punxsutawney Area Sch. Dist. v. Kanouff, 663 A.2d 831 (Pa. Commw. Ct. 1995) (holding, in a case only incidentally involving a child's being gifted, that a school board failed to provide an appropriate place for her, and another child, after officials were notified of their potentially disabling conditions).

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

168. *Bd. of Educ. v. Sanders*, 502 N.E.2d 730 (Ill. Ct. App. 1986), *appeal denied*, 508 N.E.2d 208 (Ill. 1987).

169. *Id.*

170. *Simmons v. Hooks*, 843 F. Supp. 1296 (E.D. Ark. 1994).

171. *Id.* at 1298.

172. *Id.* at 1303.

actions had a segregative effect on students, there was no evidence that it continued to engage in intentional discrimination with regard to admitting students into its gifted programs.<sup>173</sup> The court concluded that since the board has taken active steps to overcome the past effects of segregation in identifying minority students and increasing their participation in gifted programs, it no longer operated to continue results of past discrimination.<sup>174</sup>

*Keyes v. Congress of Hispanic Educators*,<sup>175</sup> an extension of the long-running school desegregation litigation in Denver, Colorado,<sup>176</sup> was a complex case with gifted education being only one component. Employing a rationale not unlike the one in *Simmons*, the federal trial court acknowledged that the current disparities with regard to the low level of "participation [of minority students] in gifted and talented programs may be remaining vestiges of the dual system."<sup>177</sup> Even so, the court refused to grant relief in light of *Missouri v. Jenkins*,<sup>178</sup> the most recent Supreme Court case on school desegregation, since *Jenkins* "defeats the plaintiffs' call for compelling additional action to investigate and redress racial disparities in student achievements [sic] and participation in special programs for gifted and talented pupils."<sup>179</sup> More specifically, the court was convinced that although disparities remained with regard to gifted students' programming, since school officials had adopted reasonable, if not entirely successful, steps to equalize participation

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173. *Id.*

174. *Id.*

175. *Keyes v. Cong. of Hispanic Educators*, 902 F. Supp. 1274 (D. Colo. 1995).

176. *Keyes v. Sch. Dist.*, 413 U.S. 189 (1973) (holding that since the school board's actions gave rise to a prima facie case of intentional segregation, the burden of proof shifted to it to prove that other segregated schools in the district were not created deliberately). In *Keyes*, for the first time, the Court ruled that another minority group, Mexican-Americans, should be placed in the same category as African-Americans because both groups suffered from the same educational inequities.

177. *Keyes*, 902 F. Supp. at 1282 (D. Colo. 1995).

178. *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding that a determination as to whether students in district are at or below national norms was not appropriate test to determine whether previously segregated district has achieved partially unitary status). For a discussion of this case, see Charles J. Russo & Lawrence F. Rossow, *Missouri v. Jenkins Redux: The End of the Road for School Desegregation Or Another Stop on an Endless Journey?* 103 EDUC. L. REP. 1 (1995). For a discussion of later developments in this dispute, see Floyd G. Delon & Charles J. Russo, *The Implementation of Missouri v. Jenkins III: The New Missouri Compromise?* 125 EDUC. L. REP. 263 (1998).

179. *Keyes*, 902 F. Supp. 1274, 1282 (D. Colo. 1995).

between and among various racial and ethnic groups, it would not grant relief.<sup>180</sup>

#### IV. RECOMMENDATIONS

Advocates, parents, educational leaders, and policy makers as well as all others who are interested in meeting the needs of gifted students might wish to consider the following suggestions.<sup>181</sup> As reflected in *National Excellence: A Case for Developing America's Talent: Part 3: The Future of Education for the Nation's Most Talented Students*, the challenge of meeting the needs of "students with exceptional talent must be shared by many sectors of society and levels of government."<sup>182</sup>

First, advocates must work to ensure legislative action at the national level. If gifted students are ever to receive the special education that they deserve, then their supporters must encourage Congress to strengthen and expand existing federal legislation pertinent to the gifted. Such legislative reform at the national level should be the priority because gifted students, much like their peers with disabilities, will not receive protection of their rights without the passage of federal legislature. Moreover, while states should and will retain the option of providing greater services than federal law might dictate, unless a national standard is enacted, it is unlikely many states will take these steps on their own. While more than thirty states require the identification of gifted students, not all of them provide funding for such programs.<sup>183</sup> At a mini-

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180. The Tenth Circuit dismissed an appeal, addressing gifted education only in a footnote. *Keyes v. Sch. Dist.*, 119 F.3d 1437, 1441 n.4 (10th Cir. 1997).

181. For earlier discussions of some of these recommendations, see Donna Y. Ford et al., *Meeting the Educational Needs of the Gifted: A Legal Imperative*, 17 ROEPER REV. 223 (1995); Charles J. Russo et al., *The Educational Rights of Gifted Students: Lost in the Legal Shuffle?* 16 ROEPER REV. 67 (1993); Charles J. Russo et al., *The Kentucky Education Reform Act and Gifted Education: Overlooked or Ignored?* KY. CHILDREN'S RIGHTS J., Fall 1994 at 1, 1.

182. PAT O'CONNELL ROSS, U.S. DEP'T OF EDUC., NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA'S TALENT: PART 3: THE FUTURE OF EDUCATION FOR THE NATION'S MOST TALENTED STUDENTS 2. This report makes five specific recommendations, all of which are addressed to some degree in this section of the article: establish challenging curricular standards; establish high-level learning opportunities; ensure access to early childhood education; expand opportunities for economically disadvantaged and minority children; encourage appropriate teacher training and technical assistance; and ensure that high-achieving students in the United States match or exceed the performance of high-achieving students anywhere in the world. *Id.* at 2-3.

183. If the IDEA is to serve as an example, it is worth noting that as of July 1, 1974, about one year prior to the Act's passage, the Bureau for the Education of the Handicapped estimated that 78.5% of eligible children nationwide received some form of

mum, federal legislation should provide a comprehensive definition of giftedness, install substantive and procedural<sup>184</sup> safeguards,<sup>185</sup> mandate the identification of gifted students, require the delivery of programs, and offer financial support to states and local school systems that exceeds the paltry sums that have been allocated to date.<sup>186</sup>

Second, state legislatures, working in conjunction with their departments of education and colleges of education, must marshal their efforts to meet the needs of all gifted students. A central goal of cooperation between these key players should be to strengthen certification and licensing standards for all prospective teachers<sup>187</sup> and administrators. This should assist all prospective educators to better serve gifted children. At the same time, schools and colleges of education, in accordance with the standards of appropriate accrediting agencies, should expand existing course work and field experiences so that all prospective educators can have better exposure to gifted children and their needs. While it may not be feasible to require separate courses on gifted students in general formation programs, at the very least, especially for colleges and universities that are located in states that do not require teacher certification for educators who will work with the gifted, an intro-

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public education. However, only 47.8% of these children received both special education and related services, while 30.7% did not receive related services and 21.5% did not receive any special education services. H.R. REP. NO. 94-332, 94th Cong. (1975).

184. See generally Donna Y. Ford & Michelle Frazier, *The Office for Civil Rights and Non-Discriminatory Testing, Policies, and Procedures: Implications for Gifted Education*, 23 ROEPER REV. 109 (2000) (discussing the role of the Office of Civil Rights in securing the rights of culturally and linguistically diverse students); Frances A. Karnes et al., *The Office of Civil Rights and the Gifted: An Update*, 19 ROEPER REV. 162 (1997) (reviewing thirty-eight investigations of the Office of Civil Rights, the agency responsible for monitoring educational activities for a variety of programs, including those for the gifted); Frances A. Karnes & Ronald G. Marquardt, *The Fragmented Framework of Legal Protection for the Gifted*, 72 PEABODY J. EDUC. 166 (1997) (discussing dispute procedures employed in resolving disagreements related to gifted students).

185. For a study of state due process actions protecting the rights of the gifted, see Frances A. Karnes et al., *Due Process in Gifted Education*, 20 ROEPER REV. 297 (1998) and Frances A. Karnes et al., *A Survey of Mediation Opportunities in Gifted Education*, GIFTED CHILD TODAY MAG., May-June 1998, at 46.

186. For further support of this position, see Mary Lou Herring, Note, *Model Federal Statute for the Education of the Talented and Gifted*, 67 CHI.-KENT L. REV. 1035 (1991).

187. See Frances A. Karnes & James E. Whorton, *Teacher Certification and Endorsement in Gifted Education: A Critical Need*, 19 ROEPER REV. 54, 54 (1996); Mary F. Toll, *The Importance of Teacher Preparation Programs To Appropriately Serve Students Who Are Gifted*, 12 UNDERSTANDING OUR GIFTED, Winter 2000, at 14.

ductory course on exceptionality should devote a significant amount of time and interest to gifted children.

Third, at the school level, educational leaders should provide professional in-house preparation programs to assist school personnel to identify and assess gifted students while still providing them with challenging course work and other educational experiences to assist them to reach their full potential. Concomitantly, educators should deliver programs for children of all ages,<sup>188</sup> beginning in pre-school,<sup>189</sup> to address, and redress past and on-going inequities by paying particular attention to the needs of poor,<sup>190</sup> urban,<sup>191</sup> and minority<sup>192</sup> children who have been historically under-represented in programs for the gifted. Schools, especially in states that do not follow the lead of jurisdictions such as Pennsylvania, which provides written IEPs for gifted students,<sup>193</sup> should make ADA-like curricular accommodations designed to challenge the gifted to

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188. The IDEA, for example, includes specific provisions dealing with pre-school children. 20 U.S.C. §§ 1471-1474 (1994); Early Intervention Programs for Infants and Toddlers with Disabilities, 34 C.F.R. §§ 303.1-303.654 (1994).

189. For a discussion of this approach, see Naomi Sankar-DeLeeuw, *Gifted Preschoolers: Parent and Teacher Views on Identification, Early Admission and Programming*, 21 ROEPER REV. 174 (1999).

190. NATIONAL EXCELLENCE: PART 2, *supra* note 13, at 2 (noting that "[o]nly nine percent of students in gifted and talented education programs were in the bottom quartile of family income, while forty-seven percent of program participants were from the top quartile in family income"). See, e.g. Paul D. Slocumb & Ruby K. Payne, *Identifying and Nurturing the Gifted Poor*, PRINCIPAL, May 2000, at 28 (discussing the needs of gifted students from poverty backgrounds).

191. See, e.g., Donna Y. Ford, *The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention*, J. OF SPECIAL EDUC., May 1998, at 4 (focusing in particular on students in urban settings); Sally M. Reis & Eva I. Diaz, *Economically Disadvantaged Urban Female Students Who Achieve in Schools*, URB. REV., Mar. 1999, at 31 (examining the experiences of nine high ability, high achieving students).

192. For discussions of the under-representation of minority students, in programs for the gifted, see Cynthia N. Brown, *Gifted Identification as a Constitutional Issue*, 19 ROEPER REV. 157 (1997) (noting specifically that African-American Hispanic, and Native American children were under-represented in thirty-four states in data from 1980 and 1992); Donna Y. Ford, *Desegregating Gifted Education: A Need Unmet*, 64 J. NEGRO EDUC. 52 (1995); James J. Gallagher, *Education of Gifted Students: A Civil Rights Issue?*, PHI DELTA KAPPAN, Jan. 1995, at 408; J. John Harris & Donna Y. Ford, *Hope Deferred Again: Minority Students Underrepresented in Gifted Programs*, EDUC. & URB. SOC'Y, Feb. 1999, at 225; June C. Maker, *Identification of Gifted Minority Students: A National Problem, Needed Changes and A Promising Solution*, GIFTED CHILD Q., Winter 1996, at 41; Donna Y. Ford & Karen S. Webb, *Desegregation of Gifted Educational Programs: The Impact of Brown on Underachieving Children of Color*, 63 J. NEGRO EDUC. 358 (1994) and Ronna Vanderslice, *Hispanic Children and Giftedness: Why the Difficulty in Identification?* 64 DELTA KAPPA GAMMA BULL., Spring 1998, at 18.

193. See *supra* notes 127-127 for the discussion of the regulation.



reach their full potential. Among the accommodations that educators might consider are adding additional classes and appropriate assignments for students who are deprived of a right to a full program of gifted education.

Finally, given the key role of parents in the growth and development of their children, school officials should work with them to assist them in nurturing the development of their children.<sup>194</sup> In particular, and as appropriate, school officials should offer a range of services including classes on parenting, child development, and working with children to enhance their chances for success. Further, school officials, perhaps in conjunction with local, regional, and state associations as well as local colleges and universities, might wish to consider bringing in outside experts on the gifted who can offer workshops to parents of gifted children

### CONCLUSION

As the nation stands poised on the brink of the new millennium, it is time to redress the ongoing inequity of failing to provide equal educational opportunities for gifted children. If these children are to reach their full potential, then educational leaders and policy makers need to consider ways to assist these children in their development for their own good and the welfare of the nation.

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194. For articles in support of this position, see for example Mary Radaszowski-Byrne, *Parents as Instructional Partners in the Education of Gifted Children: A Parent's Perspective*, GIFTED CHILD TODAY, Spring 2001, at 32; Kristin R. Stephens, *Parents of the Gifted and Talented: The Forgotten Partner*, GIFTED CHILD TODAY, Sept.-Oct. 1999, at 38; Carol Strip & Gretchen Hirsch, *Trust and Teamwork: The Parent-Teacher Partnership for Helping the Gifted Child*, GIFTED CHILD TODAY, Spring 2001, at 26.