NO CHILD LEFT BEHIND . . . UNLESS A STUDENT IS GIFTED AND OF COLOR: REFLECTIONS ON THE NEED TO MEET THE EDUCATIONAL NEEDS OF THE GIFTED

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I. INTRODUCTION

The educational rights of the estimated one to five million children in the United States who are gifted and talented is an issue of enduring significance for all who are interested in schooling, but especially for students of color who are disproportionately under-represented in such

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programs.[3] As important as this issue is, the status of the rights of gifted students remains a topic that has received scant attention in academic law reviews.[4]

On the one hand, the United States has endeavored to make major, if imperfect, strides in providing equal educational opportunities for minority students following *Brown v. Board of Education*.[5] Using *Brown* as the impetus, the federal government subsequently addressed the rights of children from economically disadvantaged backgrounds under the Elementary and Secondary Education Act of 1965, presently incorporated in the No Child Left Behind Act (NCLB).[6] The federal government then aimed to prevent sex discrimination in education under Title IX of the Education Amendments of 1972.[7] Finally, the rights of students with disabilities received significant and far-reaching protection under the 1975 enactment of the Education for All Handicapped Children's Act, now known as the Individuals with Disabilities Education Act (IDEA).[8]

Surprisingly, though, little has been done under federal or state laws to ensure the educational rights of the 6.7% of American students, regardless of race, who are identified as gifted, a rate that has remained consistent in recent years.[9] Interestingly, these data, from 2004 and 2006,

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3. For example, in its 2012 Civil Rights Data Collection (CRDC) Report, the Office of Civil Rights reported that Black students were only 10% and Hispanic students were only 16% of children who were identified gifted students, meaning that they were under-represented by about 50% and 35%, respectively. *See* CIVIL RIGHTS DATA COLLECTION, http://ocrdata.ed.gov/; *The Office for Civil Rights: The Transformed Civil Rights Data Collection (CRDC),* U.S. DEP'T EDUC., (Dec. 18, 2013) (unpaginated original) http://www2.ed.gov/about/offices/list/ocr/docs/crdc-2012-data-summary.pdf; *see also* NATIONAL ASSOCIATION OF GIFTED CHILDREN, 2012-2013 STATE OF THE STATES IN GIFTED EDUCATION: NATIONAL POLICY AND PRACTICE DATA (2013) at 3 [Hereinafter NAGC Report].

4. *See* Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421 (2005); Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89 (2006); Laura Ketterman, Comment, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v. Pawlet*, 32 ST. MARY'S L.J. 914 (2001); Charles J. Russo, J. John Harris, & Donna Y. Ford, *The Kentucky Education Reform Act and Gifted Education: Overlooked or Ignored?* 3-FALL KY. CHILD. RTS. J. 1 (1994).

5. Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan., 347 U.S. 483 (1954).

6. 20 U.S.C. §§ 6301 *et seq*. (2002).

7. 20 U.S.C. § 1681 (2010).

8. 20 U.S.C. § 1400 (2010).

9. National Center for Education Statistics, *Table 50: Percentage of Gifted and Talented Students in Public Elementary and Secondary School, by sex, race/ ethnicity, and state: 2004 and 2006,* DIGEST OF EDUC. STATISTICS, http://nces.ed.gov/programs/digest/d11/tables/dt11_050.asp (last visited Dec. 18, 2013).

are the most current on students who are gifted, a tacit indication of the neglect they face in American schools.

Thirty years ago the authors of *A Nation at Risk* observed that "[o]ver half of the population of gifted students do not match their tested ability with comparable achievement in school."[10] The authors of this report observed that "most gifted students, for example, may need a curriculum enriched and accelerated beyond the needs of other students of high ability."[11] Sadly, educational leaders and lawmakers have yet to take adequate steps to meet the needs of gifted children, especially insofar as many of these students become bored, drop out, or do not reach their full potential because they are not sufficiently challenged by existing programming.[12] The upshot is that the educational needs of children who are gifted and talented, especially those from two racial and ethnic groups, are neglected with the result that they have been left behind in terms of being identified and served equitably.

In light of issues surrounding the educational needs of gifted students, mainly those who are under-represented in existing programs, the remainder of this article, which is divided into four substantive sections, reflects on why educators, lawmakers, and policymakers need to do more to respond equitably to the needs of gifted children, especially gifted students of color. The first section briefly examines the legislative history and status of federal programming for the gifted. The article next provides an overview of litigation on the rights of the gifted.[13]

The third part of the article reviews *McFadden v. Board of Education for Illinois School District U-46*[14] wherein, in its most relevant substantive holding for the purpose of this article, a federal trial court found that the gifted program offered by a local school board discriminated against minority students. *McFadden* ultimately serves as a departure point for the fourth section's reflections on the state of gifted education. This fourth part of this article also offers recommendations for practice in terms of what educational leaders and their lawyers can, and should, do to ensure equitable treatment of all students who are gifted,

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10. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM 11 (1983).

11. *Id.* at 24.

12. DONNA Y. FORD, REVERSING UNDERACHIEVEMENT AMONG GIFTED BLACK STUDENTS: THEORY, RESEARCH AND PRACTICE (2nd ed., 2010).

13. For a much more detailed review of the legislative history and litigation discussed and adapted in part herein, *see* Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URBAN L. J. 727 (2001).

14. McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46, 984 F. Supp. 2d 882 (N.D. Ill. 2013).

especially children of color. The article rounds out with a brief conclusion.

II. LEGISLATIVE HISTORY OF GIFTED EDUCATION

A. Federal Legislation

The earliest federal program for gifted students was initiated in 1931 when the United States Department of Education instituted a section on Exceptional Children and Youth.[15] Like later federal and state initiatives, this program lacked specific legislative or fiscal authority. However, it laid the foundation for later federal developments designed to serve the needs of the gifted. In the years following World War II, federal interest in the gifted re-emerged when Congress enacted the National Science Foundation Act of 1950, the first federal statute focusing attention on gifted students.[16] The goal of this law was to improve curricula and encourage gifted students to seek careers in mathematics and the physical sciences.

In response to the Soviet Union's October 4, 1957 launch of the first artificial satellite, Sputnik, Congress enacted the National Defense Education Act of 1958 (NDEA).[17] While conceding that the NDEA was not adopted with the intent of focusing on the needs of gifted students, its emphasis on mathematics, science, and foreign languages was a precursor to later developments. More specifically, the NDEA, combined with state responses, implicitly made gifted children the prime targets of curriculum reforms designed to redress underachievement among students who were capable of success.[18]

Programs for the gifted waned under President Johnson's Great Society initiatives, especially in light of the programs offered by the Elementary and Secondary Education Act, a comprehensive statute initially enacted in 1965.[19] The ESEA overshadowed the needs of the gifted because it diverted federal resources earmarked for their

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

16. 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)).

17. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended in scattered sections of 20 & 42 U.S.C. (1994)).

18. *See generally* James J. Gallagher, *National Agenda for Educating Gifted Students: Statement of Priorities*, 55 EXCEPTIONAL CHILD No. 2 at 107 (1988); JAMES J. GALLAGHER, PUBLIC POLICY IN GIFTED EDUCATION (2004).

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

educational needs to other programs. Lobbying efforts on behalf of the gifted were rewarded when a bill introduced as a result of the White House Task Force on the Gifted and Talented was enacted as the Gifted and Talented Children's Education Assistance Act, part of the ESEA Amendments of 1969.[20] This law offered the first federal statutory definition of the term "gifted," called for the development of model initiatives, and made programs eligible for federal financial assistance under the ESEA.

During the 1970s, the federal government resumed a more active role in seeking to meet the educational needs of the gifted. On October 6, 1972, Commissioner of Education Sidney P. Marland submitted his national assessment of programs for the gifted to Congress.[21] The *Marland Report* urged Congress to provide ongoing support for the development and maintenance of programs for gifted students not only in light of their unique needs, but also because the federal government had virtually no role in this process.[22]

Following the impetus of *The Marland Report*, Congress enacted another law on the gifted as part of the 1974 Amendments to the ESEA. This law called for federal involvement in four key areas impacting on the gifted.[23] First, the law authorized the creation of the Office of Gifted and Talented in the United States Office of Education, an office that had been housed in the United States Bureau of Education for the Handicapped, a tacit recognition that students with disabilities and the gifted are on the same continuum. Second, the act mandated the creation of the National Clearinghouse for the Gifted 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 limited annual federal appropriations for gifted programs.[24]

As a result of these federal advancements, it appeared that the needs of the gifted were about to be addressed adequately when the Gifted and Talented Children's Education Act of 1978 became law.[25] Unlike the

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20. Zirkel & Stevens, *supra* note 15, at 56; The Gifted and Talented Children's Act, Pub. L. No. 91-230, 84 Stat. 121 (1969).

21. SIDNEY P. MARLAND, EDUCATION OF THE GIFTED AND TALENTED: REPORT TO THE CONGRESS OF THE UNITED STATES BY THE U.S. COMMISSIONER OF EDUCATION (1972).

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

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

24. Zirkel & Stevens, *supra* note 15, at 61.

25. 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).

IDEA, enacted three years earlier,[26] which was designed to place children with disabilities in fully inclusive educational settings, this Act was intended to provide separate programs for the gifted.[27] The Act did allow the United States Commissioner to provide limited discretionary funding to assist state officials as they planned to develop, operate, and improve programs for gifted students. When the Act was repealed in 1981,[28] the federal office of the Office of Gifted and Talented was closed, categorical federal funding was eliminated, and authorizations for gifted education and twenty-one other programs were combined into a single block grant which reduced funding by more than forty percent.[29] In short, the federal government suspended its direct involvement in programs for gifted students during much of the 1980s.

The efforts of supporters of the gifted met with success at the federal level when the Jacob K. Javits Gifted and Talented Students Act originally became law in 1988.[30] This Act, which incorporated many of the recommendations of *The Marland Report*, reinstated, expanded, and updated earlier federal programs while offering limited funding for programs supporting gifted students who were from lower income families, of limited English proficiency, or had disabilities.[31]

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26. 20 U.S.C. §§ 1400 *et seq.* (2013).

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

28. 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)).

29. Zirkel & Stevens, *supra* note 15, at 83-84.

30. 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) (the 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.") (The Act, 20 U.S.C. § 8801 (16) (1994) was repealed by Pub. L. 107-110, Title X, § 1011(5)(C), 115 Stat. 1986 (Jan. 8, 2002)).

31. In 1992, the Javits Act provided just under $10 million to support such programs. *See* 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, 3 (1993), *available at* http://www.ed.gov/pubs/DevTalent/part2.html; *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"); In 2001, its last year as a standalone statute, the Javits Act provided a mere $7.5 million for research grants. Lisa Fine, *Advocates Say Bill Leaves Gifted Students Behind*, EDUC. WK., June 13, 2001, at 21, 23.

The Javits Act, the only federal statute on gifted education, is now incorporated as part of the NCLB.[32] This Act is designed "to initiate a coordinated program of scientifically based research, demonstration projects, innovative strategies, and similar activities designed to build and enhance the ability of elementary schools and secondary schools nationwide to meet the special educational needs of gifted and talented students."[33] According to the Act's current iteration, the term gifted and talented "means students, children, or youth who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities."[34]

As incorporated into the NCLB, the Javits Act still lacks specific references to performing arts or to address the needs of the students it purports to serve for three primary reasons. First, the law does not mandate the creation of programs for gifted students. Second, while the Act provides some resources, like the statutes in most states, it does not offer sufficient assistance to develop widespread programs, especially for communities where children have long been under-represented.[35] Third, the law fails to include procedural due process safeguards analogous to those available under the IDEA, especially for children who have historically been underserved.

B. State Laws

Forty-seven states define gifted students in statutes or regulations under a variety of rubrics,[36] employing terms such as "gifted,"[37] "gifted

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32. For a full description of programs available under the Javits Act, *see Jacob K. Javits Gifted and Talented Students Education Program,* U.S. DEP'T OF EDUC. (Dec. 22, 2013), http://www2.ed.gov/programs/javits/index.html.

33. 20 U.S.C. § 7253a (2002).

34. 20 U.S.C. § 7801(22) (2002).

35. If anything, the NCLB follows the lead of states such as Ohio which requires school board officials to identify, but not offer funding to develop, programs to serve gifted students. OHIO REV. CODE ANN. § 3324.04 (1999).

36. For a complete list of the definitions, *see* National Association for Gifted Children (March 1, 2013) *State Definitions of Giftedness*, http://www.nagc.org/uploaded Files/Advocacy/State%20definitions%20(8-24-10).pdf; *See also* General State Page, http://www.nagc.org/uploadedFiles/Gifted_by_State/state_of_states_2012-13/ Table%20%20A%20(general).pdf.

37. Definitions, KAN. STAT. ANN. § 72-11a03(h) (2008); MISS. CODE ANN. § 37-23-175(a) (1993); N.Y. EDUC. LAW (MCKINNEY) § 4452(1)(a) (1997); OH REV. CODE ANN. § 3324.01(B) (1999).

and talented,"[38] "gifted or talented,"[39] "highly gifted,"[40] "high ability student,"[41] "talented and gifted,"[42] "gifted and/ or academically talented,"[43] and "profoundly gifted."[44] Even so, program offerings vary markedly.

The most recent version of an extensive annual study on the current status in the field, by the leading professional group, the National Association of the Gifted, compiles responses from forty-two states, the District of Columbia, and Guam.[45] As to programs for gifted students, the report revealed that of thirty-two jurisdictions[46] operating under mandates related to identifying and or serving these children, twenty-eight require their identification and twenty-six direct local school boards to offer programs.[47] In an apparent conflict in the data, the report specifies that five jurisdictions mandate identification but not services while three require services but not identification.[48]

Of the thirty-two respondents with gifted education mandates, four indicated that they provide full funding, eighteen offer partial support, and eight fail to support programming for the gifted.[49] Further, "between 2010-11 and 2012-13, [six jurisdictions] decreased funding for gifted education, while [twelve] increased it, though most by slight increments."[50] Out of thirty-six responses received, officials in twenty seven jurisdictions reported that they provide funding for gifted services either to local (twenty-five) or state level (two) agencies.[51] As to dollars spent, respondents in four jurisdictions indicated that they spent more than fifty million dollars, nine spent between one and nine million, and three spent less than one million.[52] Per pupil expenditures in gifted programs ranged from a low of less than $5 to more than $2,200 for each

38. *See*, *e.g.*, CAL. EDUC. CODE § 52201(a) (2008); ILL. COMP. STAT. ANN. 105 § 5/14A-20 (2010); IOWA CODE ANN. § 257.44(1) (2010); MONT. CODE. ANN. § 20-7-901(1979); OKLA. STAT. ANN. Tit. 70 § 1210.301 (1994); TEX. EDUC. CODE ANN. § 29.121 (1995).

39. DEL. CODE ANN. tit. 14 § 3101(6) (2010).

40. CAL. EDUC. CODE § 52201(b) (2011).

41. IND. CODE ANN. § 20-36-1-3 (2012).

42. OR. REV. STAT. § 343.395(4) (2011).

43. MICH. COMP. LAW ANN. § 388.1092(2)(a) (2012).

44. NEV. REV. STAT. § 392A.030 (2005).

45. NAGC Report, *supra* note 3, at 8.

46. While the NAGC Report uses the more generic terms state or states, this article refers to respondents as jurisdictions because not all are states.

47. NAGC Report, *supra* note 3, at 14.

48. *Id.* at 15.

49. *Id.* at 7.

50. *Id.*

51. *Id.*

52. *Id.*

student.[53] Fourteen of forty-two respondents did not provide funding any to local school boards.[54]

Teachers of the gifted must have credentials in seventeen of thirty responding jurisdictions.[55] In the twenty-seven responses received, estimates of those who earned credentials ranged from 0-2% in seven to 100% in eight jurisdictions.[56] Only five jurisdictions require teachers of gifted students to receive annual professional development.[57] Thirty-two jurisdictions do not obligate local boards to have administrators for gifted programs and of the ten that do, only two require them to have specific preparation for working with this population of students.[58]

Among respondents, only Kentucky reported that it requires teacher candidates to receive instruction about serving the gifted, albeit as part of a larger program for special education and diversity. [59] Two jurisdictions obligate regular teachers to have "some" preparation for working with "special" populations, not necessarily gifted while twenty-four provide varying levels of professional development.[60] Moreover, only two of forty-one respondents obligate administrators to have preparation on meeting the needs of the gifted students in their endorsement/certification and two of forty have a similar requirement for counselors.[61]

Finally, as to accountability and effectiveness, thirty-four states do not publish annual data on gifted education but of the ten that do, eight were available online when the NAGC Report went to press.[62] Officials in nineteen jurisdictions released indicators of giftedness, fifteen of which enumerated the population of gifted children in district report cards. Another eight jurisdictions made information available about the achievement and performance of these gifted students as a separate group on district report cards or as part of other reporting data while seven published this information separately.[63] In addition, twenty-six of the forty-two responding jurisdictions monitor or audit local programs for students who are gifted.[64]

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53. *Id.*
54. *Id.* at 12.
55. *Id.* at 31.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 214.
60. *Id.*
61. *Id.*
62. *Id.* at 17.
63. *Id.*
64. *Id.*

In a related development, The Connections Academy, a network of virtual charter schools in fourteen states, along with independent charter schools in Indiana and South Carolina, serve gifted students.[65] Yet laws in Louisiana, New Jersey, and Oklahoma, for example, forbid the use of IQ tests or admissions criteria that discriminate on the basis of intellectual ability, effectively militating against the creation of special charter schools for the gifted.[66]

III. LITIGATION INVOLVING GIFTED STUDENTS

Absent express statutory entitlements, the judiciary remains reluctant to grant children who are gifted rights to educational programming exceeding what is available to general student populations. In this regard, Pennsylvania has done more than other jurisdictions with regard to meeting the educations needs of students who are gifted. In *Centennial School District v. Commonwealth*,[67] the Supreme Court of Pennsylvania unanimously affirmed that, pursuant to a commonwealth statute and regulations requiring Individualized Education Programs[68] (IEPs) for gifted students, a child had a right to gifted education. The court reasoned that a board's provision of a 150 minute-a-week pull-out enrichment program was insufficient for a gifted child because it failed to address his need for accelerated instruction in reading and mathematics.[69] The court held that "instruction to be offered need not

65. Janet R. Decker, Suzanne E. Eckes, & Jonathan A. Plucker, *Charter Schools Designed for Gifted and Talented Students: Legal and Policy Issues and Considerations*, 259 EDUC. L. REP. 1, 4-6 (2010).

66. *Id.* at 7.

67. Centennial Sch. Dist. v. Commonwealth Dept. of Ed., 539 A.2d 785 (Pa. 1988); see Ronald G. Marquardt & Frances A. Karnes, *The Courts and Gifted Education,* 50 EDUC. L. REP. 9 (1989), for a discussion of *Centennial*.

68. Under the IDEA, 20 U.S.C. §§ 1401(14), an IEP "means a written statement for each child with a disability that is developed, reviewed, and revised" consistent with the student's unique educational needs"; *See also* 20 U.S.C. § 1414(d)(1)(A)(i); as to Pennsylvania law, the *Centennial* court explained that "22 Pa. Code § 341.15 [now reserved], which sets forth the elements of an IEP, requires that the IEP include a statement of the specific educational services that are to be provided to the child, including a 'description of all special education and related services required to meet the unique needs of the child.'" Moreover, 22 Pa. Code § 13.22 [now reserved] specifies that "[c]urricula for gifted and talented school-aged persons shall be conducted in accordance with standards established by the Secretary and shall include provisions for…amount of supervision and special teaching, determined by the type and degree of mental abilities or talents." 539 A.2d at 787-88.

69. *Centennial*, 539 A.2d at 786-87.

'maximize' the student's ability to benefit from an individualized education program" but must be appropriate to a child's needs.[70]

In pre-*Centennial* litigation, appellate courts in Pennsylvania reached like results. Courts agreed that the commonwealth had to reimburse local boards for costs associated with providing programming for the gifted[71] and provide transportation for students in nonpublic elementary schools who participated in a program for the gifted.[72]

Following *Centennial*, though, appellate courts in Pennsylvania reached mixed results over the duty of local school boards to meet the educational needs of children who are gifted. One court refused to provide for transportation and tuition reimbursement so that a child could attend a private, out-of-state program for gifted students[73] while another denied 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.[74] Conversely, an appellate court in Pennsylvania affirmed that a board had the duty to provide a gifted student with an education tailored to meet his unique IEP needs.[75] However, another appellate panel clarified that the Pennsylvania statute did not obligate a board to provide children with individual tutors or exclusive programs exceeding existing, regular, and special, curricular offerings.[76]

Broadley v. Board of Education,[77] a case from the Supreme Court of Connecticut, represents the usual treatment of children who are gifted. The court affirmed that the state constitution does not guarantee gifted students a right to specialized programming. The court added that the legislature's refusal to afford gifted students access to specialized programs did not violate their educational rights under the state

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70. *Id.* at 791.

71. Central York Sch. Dist. v. Commonwealth, 399 A.2d 167 (Pa. Commw. Ct. 1979).

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

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

74. New Brighton Area Sch. Dist. v. Matthew Z., 697 A.2d 1056 (Pa. Commw. Ct 1997).

75. York Suburban Sch. Dist. v. S.P., 872 A.2d 1285 (Pa. Commw. Ct. 2005). For an earlier case reaching the same outcome, *see* School Dist. v. Commonwealth, 547 A.2d 520 (Pa. Commw. Ct. 1988) (directing a board to provide tuition and transportation to a learning center for a gifted student with a hearing impairment).

76. Abington Sch. Dist. v. B.G., 6 A.3d 624 (Pa. Commw. Ct. 2010).

77. Broadley v. Meriden Bd. of Educ., 639 A.2d 502 (Conn. 1994). For commentary on this case, *see generally*, Gwen E. Murray, *Special Education for Gifted Children: Answering the Right Question,* 15 QUINNIPIAC L. REV. 103 (1995); Roseann G. Padula, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Board of Educ.,* 29 CONN. L. REV. 1319 (1997).

constitution. A federal trial court in Georgia reached a like outcome under state law.[78] Previously, in a case restricting access rights, an appellate court in New York affirmed that a board could use a lottery to make random selections of limited numbers of students to participate in its gifted program.[79]

Turning specifically to gifted programs and children of color, a federal trial court in Mississippi, in an opinion that the Fifth Circuit affirmed on other grounds, decided that one of two programs for the gifted in a school system violated the Fourteenth Amendment rights of students to equal protection. In *Montgomery v. Starkville Municipal Separate School District*,[80] the trial court found that admitting significantly fewer minority students based on their standardized test results was unconstitutional in one program because the tests had not been fully vetted to remove racial and cultural bias. Also, the court was satisfied that the second program was acceptable because children were admitted based on nominations rather than test scores and all students who were African American were admitted.[81]

IV. MCFADDEN V. BOARD OF EDUCATION FOR ILLINOIS SCHOOL DISTRICT U-46

McFadden v. Board of Education for Illinois School District U-46[82] is the latest round of litigation in an eight-year old class action suit over the educational rights of minority students, including those who are gifted, and children who are of limited English proficiency. At the same time, *McFadden* is part of a line of cases from Illinois over the rights of gifted students of color.[83] In this iteration of *McFadden*, a judgment on

78. Long v. Fulton Cnty. Sch. Dist., 807 F. Supp. 2d 1274 (N.D. Ga. 2011) (rejecting the claim of a student and her parents that she had a right to gifted education).

79. Bennett v. City Sch. Dist. of New Rochelle, 497 N.Y.S.2d 72 (N.Y. App. Div. 1985).

80. 665 F. Supp. 487 (N.D. Miss. 1987), *aff'd on other grounds*, 854 F.2d 127 (5th Cir. 1988).

81. In an unreported order, a federal trial court in Alabama approved a settlement agreement about a program for the gifted because it was convinced that school board officials took adequate steps to protect the rights of minority students. Lee v. Butler County Bd. of Educ., 2000 WL 33680483 (M.D. Ala. 2000).

82. *McFadden*, 984 F. Supp. 2d 882 (2013).

83. For earlier cases from Illinois, *see* Johnson ex rel. Johnson v. Bd. of Educ. of Champaign Unit Sch. Dist. No. 4, 188 F. Supp. 2d 944 (C.D. Ill. 2002) (a consent decree resolving a school desegregation case by approving a plan including the elimination of racial disparities in assignments to gifted programs). Earlier, the Supreme Court of Illinois denied the state board's motion to appeal on the basis that although the program at issue did, in fact, discriminate against minority children officials lacked the authority to withhold reimbursement for a gifted program due to these racial imbalances. Bd. of

the merits of some of two of four claims as a result of a twenty-seven-day bench trial that was supplemented by plus post-trial stipulations of fact, a federal trial court concisely began its rational by laying out the four issues before it as:

(1) Do the named plaintiffs have standing?

(2) Did the 2004 student assignment plan by defendant School District U–46 (the "District") discriminate against Minority Students by concentrating inferior mobile classrooms ("mobiles") at Minority Schools?

(3) Does the English Language Learners ("ELL") program established by the District violate the Equal Education Opportunity Act, 20 U.S.C. § 1701 *et. seq.*[84]

(4) Does the District's gifted program unlawfully discriminate against Minority Students?[85]

The court answered the first and fourth questions in the affirmative while rejecting the second and third claims. As such, while the primary focus of this article is on the educational rights of minority students who are gifted, this section briefly reviews the results to the first three questions before focusing the lion's share of its attention and the ensuing discussion in the next part on the fourth.[86]

The court began its rationale by acknowledging that this round of litigation in *McFadden*, which was actually the sixth case between the parties,[87] involved claims that shifted during discovery and pre-trial motions. In this regard, the court noted that discovery ended in 2009 and the testimony of the expert witnesses was gathered by 2010. Still, the court lamented that insofar as the trial was delayed by an array motions

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Educ. of City of Peoria v. Sanders, 508 N.E.2d 208 (Ill. 1987), *cert. denied*, 484 U.S. 926 (1987).

84. In an earlier case from Illinois involving language rights, the Seventh Circuit held that Spanish-speaking students who were identified as being of limited English proficiency could enforce the EEOA in a class action suit against the state board of education. Gomez v. Ill. State Bd. of Educ., 811 F.2d 1030 (7th Cir. 1987); on remand, a federal trial court granted the plaintiffs' request for certification as a class. Gomez v. Ill. State Bd. of Educ., 117 F.R.D. 394 (N.D. Ill. 1987).

85. *McFadden*, 984 F. Supp. 2d at 886.

86. *See* Daniel v. Bd. of Educ. for Ill. Sch. Dist. UCV46., 2009 WL 6611223 (Expert Report and Affidavit) (N.D. Ill. 2009) (Report or Affidavit of Donna Y. Ford).

87. For the earlier cases, *see* Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46, 379 F. Supp. 2d 952 (N.D. Ill. 2005) (rejecting the board's motion to dismiss); McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46, 2006 WL 681054 (N.D. Ill. 2006) (denying the plaintiffs' motion for class status), 2006 WL 6284486 (N.D. Ill. 2006) (largely rejecting motions to dismiss amended complaints); McFadden ex rel. McFadden v. Bd. of Educ. for Ill. Sch. Dist. U-46, 2008 WL 4877150 (N.D. Ill. 2008) (granting class status to the students of limited English proficiency), 2009 WL 4544670 (N.D. Ill. 2009) (accepting expert reports filed on behalf of the plaintiffs).

such as those over the class status of the parties and the qualifications of the expert witnesses, it was unfortunate that the children and their parents, along with the district's professional staff, had to wait so long for the resolution of the case.

A. Standing

As its threshold issue, the *McFadden* court rejected, for the fourth time, the school board's attempt to have the case dismissed due to the alleged lack of plaintiffs' lack of standing. In so deciding, the court applied precedent from the Seventh Circuit, and the general rule that the plaintiffs suffered an injury in fact rather than in the abstract because children were deprived of equal educational opportunities, that a causal connection was present between the board's actions and the harms suffered by the children, and a favorable outcome was likely to have redressed the injury.[88]

Skipping over its detailed analysis as to why the families of LEP students had standing, the court examined the issue as it applied to the children who are gifted. The court determined that while none of the named plaintiffs presented evidence identifying them as gifted, they all had standing to proceed due to irregularities in the way theirs abilities were tested. More specifically, the court pointed out that the board's testing procedures essentially eliminated minority students, especially those who are Hispanic, because they did so based on verbal skills it was too late to address whether they might have been identified as gifted because they had already been subjected to faulty measurements of their skills.

B. Student Assignment Plan

In a matter of ancillary importance at best to this article on the needs of the gifted, the court rejected the claims of the plaintiffs that the school board's student assignment plan for minority children violated the Equal Protection Clauses of the Federal and Illinois Constitutions. Accordingly, the court rebuffed the plaintiffs' arguments that the board improperly relied on a geographic school neighborhood model in setting boundaries as part of its 2004 redistricting plan and that its use of mobile units resulted in inferior classrooms for minority students.[89]

Starting with the latter claim, the court decided that the plaintiffs failed to prove that the mobile classroom units the board used to provide

88. *McFadden*, 984 F. Supp. 2d at 886 (internal citations omitted).
89. *Id.* at 890.

classroom space to educate minority children were of an inferior quality. The court added that these facilities lacked the requisite discriminatory impact on the students to make this claim actionable, a standard that could have been met under the Illinois Civil Rights Act[90] without proof of an evil intent, a matter discussed in more detail under the gifted program because the plaintiffs succeeded on that claim.

If anything, the court recognized that the mobiles, which were built for the very purpose for which they were used, were not only larger than most interior classrooms but also had heating and air conditioning systems typically unavailable in regular schools. Additionally, the court rejected the plaintiffs' clam that having students use mobile units placed them in danger while walking to and from main buildings because they were unable to provide evidence that any children were disparately impacted in the process. Further, the court observed relied in part on the fact that such mobile units are used nation-wide in denying the charge that they were inferior.[91] Even in conceding that the mobile units may have been less than optimal, the court concluded its rationale on this issue by declaring that the plaintiffs failed to prove either that the units were so inferior as to have had a substantial disparate impact on student learning as to be discriminatory or that the board acted with the requisite discriminatory intent.[92]

As to the attendance zone question, rather than engage in a full review of the arguments raised by the plaintiffs because they are beyond the full scope of this article, suffice it to say that the court believed that the plaintiffs failed to prove that the board intentional discriminated against minority students. In light of its financial situation as a result of having had to construct three new schools, the court was satisfied that insofar as some residents would have been unhappy regardless of what the board did, the board's actions were not objectively unreasonable.[93]

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90. 740 ILCS 23/5 (2008) states:
(a) No unit of State, county, or local government in Illinois shall:
(1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender; or
(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender.

91. *McFadden*, 984 F. Supp. 2d at 890-92.

92. *Id.* at 892.

93. *Id.* at 892-95.

C. English Language Learners

As to English Language Learners (ELLs), a topic beyond the scope of this article, it is sufficient to note that the court was not convinced that the school board did violated the Equal Education Opportunities Act which obligated it to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[94] Following a review of the statute that is not germane to the rest of this manuscript, the court was of the view that board officials complied with the statute's collection and maintenance procedures.[95]

D. Gifted Program

Turning to the subject that is at the heart of this article, and the lengthiest portion of the court's rationale, the court began with the language of equal protection analysis. In this regard, the court noted that insofar as racially or ethnically segregated public schools are inherently suspect, they are subject to strict scrutiny.[96] Consequently, the court held

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94. *Id.* at 895 (citing 20 U.S.C. § 1703(f)).

95. In its only case involving bilingual education, Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court ruled that a class of non-English speaking students of Chinese origin in San Francisco were entitled to relief from the school board's policy of providing special English instruction for only about 1,000 of the over 2,800 eligible children. In rejecting the board's claim that it lacked the funds to implement a program, the Court responded that students who neither understand English nor received specialized instruction were effectively precluded from obtaining a meaningful education. The Court sidestepped the dispute on equal protection grounds, instead relying on Title VI of the Civil Rights Act of 1964, which bars discrimination under federally assisted programs on a ground of "race, color, or national origin." 42 U.S.C.A. §§ 2000d *et seq*. The Court concluded that federal guidelines required instruction for correction of language deficiencies with which the board contractually agreed to abide by in order to receive federal funds.

96. When courts apply the three different levels of equal protection analysis, the constitutional standard for the acceptability of classifications depends on the extent to which they are related to legitimate governmental objectives. In the first category, "... if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 632 (1996). Conversely, if classifications are based on constitutionally suspect factors such as race, legislatively protected categories such as age in some instances, or fundamental constitutional rights, they are unlikely to survive judicial scrutiny unless they serve compelling governmental interests that are narrowly tailored to achieve their goals. When courts apply the compelling interest test, governmental actions typically fail. *See*, *e.g.*, Parents Involved in Community Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (seeking to use race in school admissions). A third set of classifications, not at issue here, based on illegitimacy, alienage, and gender, which fall in between, are subject to intermediate scrutiny. This standard is not as difficult for the government to meet as the compelling interest test insofar as it involves

that the board had the duty to demonstrate that "'that the reasons for any racial classification are clearly identified and unquestionably legitimate,'"[97] a standard it met as to the ELLs.

In reviewing the nature of the gifted program, the court noted that children are tested in the second and third grades for elementary school programs that operate from the fourth through sixth grades. Further, the court identified two different programs. In the first, the mainstream "school within a school" (SWAS) program; SWAS was offered in three schools. The second program, "Spanish English Transition," referred to as SET/SWAS, was developed for Hispanic students with classes taught in Spanish by bilingual gifted teachers; SET was present in two schools with predominately minority student bodies. The curricula in both programs were the same according to the district with the exception that SET/SWAS students were to be taught in both English and Spanish.[98]

Based on data presented on behalf of the school board, virtually all participants in the SET/SWAS programs were Hispanic students who completed ELL Programs and were proficient enough to participate in English-only classes. In the district, Hispanic students who exited ELL program, whether gifted or not, were considered English proficient or no longer in need of language supports in Spanish. The witness further testified that very few of the SET/SWAS Hispanic students participated in the regular SWAS program in elementary school, that they interacted with students who are not gifted in non-core classes such as physical education but not with participants in the regular SWAS program, and that they almost never transition into the regular SWAS middle school program.[99] At the same time, the court reported that SET/SWAS ended in grade 6. At the middle school level, though, the board offered only the SWAS program. The court was troubled by the fact that White students from SWAS in grades four to six were automatically placed in the middle school gifted SWAS program while Hispanic students from SET/SWAS had to be re-tested for admission for this same program.

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less deference to legislation than rational relations. Under this test, the Supreme Court invalidates classifications unless they bear "substantial relationships" to "important" governmental interests. The case that comes closest to applying this standard in an educational context was Plyler v. Doe, 457 U.S. 202 (1982) (upholding the rights of children who were undocumented residents to attend public schools), *reh'g denied*, 458 U.S. 1131 (1982), even though the majority did not clearly indicate that it was applying this test.

97. *McFadden*, 984 F. Supp. 2d at 897 (citing Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 505 (1989)).

98. *Id.* at 897-98.

99. *Id.* at 898.

The court next rejected the school board's claim that it created the segregated programs to better serve the children because insofar as many of the Hispanic students lacked adequate skills in English to succeed in a gifted program, they would have benefitted from the SET/SWAS approach. The court responded that the board failed to prove that the SET/SWAS program was sufficiently narrowly tailored to achieve a compelling governmental interest, commenting that it was the only district in the country offering such a segregated program. The court explained that students who participated in the SWAS program were selected as a result of scoring 92% or higher on the MAP achievement test which, a witness for the plaintiffs described as favoring children with higher verbal skills and thus disadvantaging minorities. The court responded that even though the parties disagreed over the extent to which it was used, the results were inevitable that children for whom English was a second language would have done poorly on the MAP test and that other, more appropriate tests and criteria.[100]

Turning to specific data, the court pointed out that during the 2006-2007 year, Hispanic students represented 43.8% of the district's elementary school population and that African Americans accounted for 6.3% of the student body but only 2% of students in the SWAS program were Hispanic and two children, amounting to less than 1% were African American. The court added that similarly low disparate rates of participation were present for the 2007 to 2009 school years and in the district's middle schools. The court remarked that while the board expressed its disagreement with some of the methodologies used in presenting these data, it was clear that minority students were not proportionately represented in the SWAS program. [101]

Before continuing its analysis, the court reviewed the backgrounds and status of the two expert witnesses, the primary conduits of evidence as to the gifted program, noting that while were both highly qualified, it credited the testimony presented on behalf of the plaintiffs "over that of [the board] in the many areas about which they disagree."[102] The court asserted that it placed the greater weight on testimony from the expert for the plaintiffs not only because the board's witness "appeared to be totally biased" in its favor but also because she "demonstrated a superior knowledge of the subject."[103]

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100. *Id.* at 898-99.

101. *Id.* at 899.

102. *McFadden*, 984 F. Supp. 2d at 899 (In the spirit of full disclosure, we would be remiss if we failed to note that the lead author served of this article was the expert witness on behalf of the plaintiffs with regard to the gifted programs).

103. *Id.*

In this regard, the court cited testimony from the witness of the plaintiffs that reliance on a single test such as the MAP could skew assessment results and have a disproportionate impact on minority students. In other words, the court agreed with the perspective that there are anomalous situations where students who are high achievers are not identified as gifted while some can be classified as gifted even though they are not high achievers. Moreover, the court accepted the evidence that the best way to measure the intelligence of non-native speakers of English is to rely on non-verbal measures and or that if a test such as the MAP is used, to reduce the threshold to 80%.[104]

Explicitly reiterating its reliance on the evidence presented by the expert witness for the plaintiffs,[105] the court agreed that even allowing for variances based on cultural differences and voluntary exclusions, the disproportionately low rate of minority participation, resulting in a disparate impact, with only 2% of Hispanic students represented in the SWAS program, was proof that the board discriminated. Moreover, the court declared that both parties agreed that children for whom English is a second language would acquire greater vocal proficiency by interacting with native speakers. The court thus ruled that placing most of the gifted Hispanic students in segregated classrooms due to their ethnicity deprived them of equal educational opportunities.[106]

The court conceded, arguendo, that some African Americans who attended segregated schools in the South before *Brown v. Board of Education* were successful. Even so, the court rejected out of hand the board's approach that the gifted programs because anecdotal evidence of the success of Hispanic students in the district notwithstanding, the result was a serious disparate impact on these children. The court buttressed its position by relying on evidence from the plaintiffs that the board had other options available. Instead, rather than implement what it described as "the most prominent and obvious of which is a single, elementary program that provides individual students with language support . . . when needed,"[107] the court described how the board chose to implement a separate program that segregated Hispanic students from their white peers. This approach, the court explained, cut the Hispanic students off from diverse learning opportunities that could have served as the gateway to gifted programs in middle and high school. As evidence of lost opportunities, the court highlighted a story that the board presented about one successful Hispanic student, wondering whether how many of

104. *Id.* at 900.
105. *Id.* ("In Dr. Ford's opinion, which the court credits…").
106. *Id.*
107. *McFadden*, 984 F. Supp. 2d at. 901.

her peers, and even she, may have missed out on opportunities because they were placed in segregated rather than integrated settings with other students from their school community.[108]

Rounding out its analysis by turning to what it identified as "the hotly contested issue of intent,"[109] the court repeated its earlier assertion that Illinois law did not require proof of discrimination, that disparate impact can be established without proof of a motive.[110] Conceding that it was unable to uncover racial or cultural animosity by school officials, the court observed that they placed students in the segregated SET/SWAS placements based only on their cultural identities, an act of intentional discrimination. In crucial language, the court agreed with the plaintiffs that while the disparate impact created by the SET/SWAS program alone was inadequate to establish discriminatory intent, it was strong evidence to this effect because officials knew of its impact but allowed it to continue. The court thus reasoned that the plaintiffs proved that the board violated the Equal Protection Clauses of the Federal and Illinois Constitutions as well as the state's Civil Rights Act of the students who wished to participate in the gifted program.[111]

As part of its brief conclusion, the court ordered the parties to appear before it for further discussions on possible remedies. The court ended its order by writing that "[s]hould the court find that, consistent with the holdings of this opinion, the District's gifted program continues to violate the constitutional and statutory rights of the plaintiff class, the court will direct the District to submit a remedial plan."[112] Neither party has sought further judicial review.

V. DISCUSSION

McFadden's serving as the primary focus of this article notwithstanding, Black and Hispanic students are under-represented in the majority of the more than 14,000 school systems in the United States.[113] For decades, studies have reported that these two groups have long been inadequately represented in gifted education.[114] As noted,

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108. *Id.*

109. *Id.* at 902.

110. *See*, *e.g.*, Oliver v. Mich. State Bd. of Educ., 508 F.2d 178, 182-183 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

111. *McFadden*, 984 F. Supp. 2d at 902.

112. *Id.* at 903 (internal citation omitted).

113. *School Districts*, U.S. Census Bureau, http://www.census.gov/did/www/school districts/.

114. *See*, *e.g.*, Alfredo J. Artiles, Stanley C. Trent, & John D. Palmer, *Culturally Diverse Students in Special Education: Legacies and Prospects*, *in* HANDBOOK OF

these two groups of students are under-represented by an average of 40-50% nationally with the result that as many as 500,000 Black and Hispanic students are not identified as gifted or receiving educational services designed to advance their exceptionalities.[115] In order to avoid future inequity and litigation, educational leaders and their boards, working in conjunction with their attorneys, must learn from *McFadden* while remediating issues and barriers that deny access to gifted education for such students of color.

As an initial issue with regard to national trends, it is important to note four important propositions. First, most of past and current efforts to redress the status of gifted students generally and the under-representation of minority children specifically have been inadequate, resulting in what may be the most segregated and elitist programs in American public schools. Second, gifted education ought not be used as a form of segregation as it was in *McFadden*. By not being identified as gifted, Hispanic and Black students are being denied school-based opportunities to develop their gifts and talents or to reach their full potentials. Third, no racial group has a monopoly on "giftedness," being intelligent, academically able, or capable of success. Consequently, there should be little or no under-representation of Hispanic and Black students in gifted education.

The fourth proposition is that giftedness is a social, cultural, and even political construct. Descriptions of giftedness combine subjectivity along with economic, social, and cultural capital guide definitions, assessments, and perceptions of giftedness.[116] This subjectivity contributes to segregated gifted education programs, leading up to what transpired in litigation such as *McFadden*. If anything, "[t]he ways in which gifted education is defined, constituted, and enacted lead directly to increased segregation, limited educational opportunities for the majority of students, and damage to children's social and political developments."[117] Accordingly, educators and legal professionals must

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RESEARCH ON MULTICULTURAL EDUCATION 716-35 (James A. Banks & Cherry. A. McGee Banks eds., 2004); MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION (M. Suzanne Donovan, & Christopher T. Cross eds., (2002); Donna Y. Ford, *The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention*, 32(1) J. SPECIAL EDUC. 4–14 (1998); DONNA Y. FORD, INTELLIGENCE TESTING AND CULTURAL DIVERSITY: CONCERNS, CAUTIONS, AND CONSIDERATIONS (2004).

115. CIVIL RIGHTS DATA COLLECTION, *supra* note 3.

116. FORD, *supra* note 12; HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (2nd ed., 1983); Steven I. Pfeiffer, *Challenges and Opportunities for Students Who Are Gifted: What the Experts Say*, 47(2) GIFTED CHILD Q. 161-69 (2003).

117. Mara Sapon-Shevon. *Beyond Gifted Education: Building a Shared Agenda for School Reform*., 19 J. FOR THE EDUC. OF THE GIFTED 194, 196 (1996).

examine their beliefs about the purposes of gifted education and the reasons for under-representation that can only be remedied by comprehensive, proactive, aggressive, and systematic efforts to recruit and retain Black and Hispanic students in gifted education in particular. To this end, educators, families, and students themselves need to work together to ensure to ensure access and equity.[118]

Against this backdrop, the remainder of this part of the article is divided into two sections. The first part raises issues about recruitment and identification of minority students for inclusion in programs for the gifted. The second section follows up to these educational issues identified by offering recommendations as to how educators can effectively recruit and retain students in gifted education while ensuring that programs are equitable regardless of the race and ethnicity of children who are admitted.

A. Recruitment Issues

A key issue in remedying under-representation of minority students involves identification or recruitment for participation in programs for the gifted. The first step in addressing this under-representation is to focus on recruitment, a process which refers to screening, identifying, and placing students. Perceptions about Black and Hispanic students, combined with a lack of cultural understanding and competence, significantly undermine efforts to recruit children of color.

In order to be identified as gifted, students typically are subjected to screenings during which they are administered tests and evaluated using checklists with predetermined criteria such as cutoff scores, an issue that was present in *McFadden*. If students meet the initial screening requirements, they may be given additional tests and/or instruments, which are used to make final placement decisions. In most schools, entering the screening pool is based on teacher referrals.[119] Despite decades of data demonstrating the ineffectiveness of this practice, it continues. The upshot is that this approach hindering the equitable screening of Hispanic and Black students as was evidenced in *McFadden* because these children are seldom referred by teachers for screening.[120]

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118. J. John Harris III, Elinor L. Brown, Donna Y. Ford, & Jeanita W. Richardson, *African Americans and Multicultural Education: A Proposed Remedy for Disproportionate Special Education Placement and Underinclusion in Gifted Education*, 36 EDUC. & URBAN SOC'Y 304 (2004).

119. Donna Y. Ford, Tarek C. Grantham, & Gilman W. Whiting, *Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues*, 74(3) EXCEPTIONAL CHILDREN 289; FORD, *supra* note 12.

120. Ford, Grantham, & Whiting, *supra* note 119; FORD, *supra* note 12.

As in *McFadden*, Hispanic students may meet the board criteria for gifted education but be overlooked because their teachers have not referred them for screening. When this occurs, due to their own deficit thinking, teachers may not refer these students because of their own biases and stereotypes, some of which they may even be unaware of, about Hispanic populations. Intuitively, it makes sense to use teacher referrals as part of the screening and decision-making processes. However, if not used carefully, teacher referrals can often negatively and disproportionately affects Black and Hispanic students. Sadly, this reality has been borne out in a comprehensive review of the literature which demonstrated that every study on teacher referral for gifted education screening and placement revealed that teachers under-refer African American students more than any other group.[121]

A significant hindrance in placing children who are gifted in appropriate educational settings involves test scores because these play a dominant role in identification, assessment, and placement even as concerns remain over cultural bias. In a manner similar to what is done in special education, testing for students who are gifted must be free of cultural and linguistic bias.[122] Yet, just about all school boards use intelligence and achievement tests, more than other measures, to identify and label children.[123] Further, more than 90% of school boards use scores from these types of tests for labeling and placement.[124] These tests measure verbal skills, abstract thinking, skills in mathematics and other areas considered indicative of giftedness, intelligence, or achievement by laypersons and educators. Unfortunately, these tests ignore skills and abilities that may be also valued by other cultures and groups such as creativity, interpersonal skills, group problem-solving skills, navigational skills, and musical skills.

Monolithic definitions of giftedness resulting in the adoption of one-dimensional, ethnocentric tests contribute significantly to racially homogeneous or segregated classes in a manner consistent with what

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121. Ford, Grantham, & Whiting, *supra* note 119.

122. Pursuant to the IDEA, testing and evaluation materials and procedures must be selected and administered in a manner that is not racially or culturally biased, while students whose language or other mode of communication is not English need to be evaluated in their native language or other mode of communication (20 U.S.C. §§ 1412(a)(6)(B), 1414(b)(3)(A)(i-ii)).

123. For litigation on point, *see*, *e.g.*, Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd* 502 F.2d 963 (9th Cir. 1974), *further action* 495 F. Supp. 926 (N.D. Cal. 1979), *aff'd* 793 F.2d 969 (9th Cir. 1984) (rejecting the use of standardized IQ tests as inappropriate because they had not been validated). *But see* Parents in Action on Special Educ. v. Hannon, 506 F. Supp. 831
(N.D. Ill. 1980) (upholding the validity of tests).

124. NAGC Report, *supra* note 3.

occurred in *McFadden*. This raises a concern related to the extensive use of cutoff scores on tests, another issue that emerged in *McFadden*. The most frequently used cutoff score for placement in gifted education programs involves the use of IQ scores.[125] Data indicate that Black and Hispanic students have mean/average tested IQ scores lower than White children; the same holds true for children who live in poverty, regardless of their racial background.[126]

In a collaborative effort designed to address the issue, the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education[127] examined the myriad of problems of interpreting test scores. This study noted the harmful effects of misinterpreting test results, especially with racial and ethnic minority groups: "The ultimate responsibility for appropriate test use and interpretation lies predominantly with the test user. In assuming this responsibility, the user must become knowledgeable about a test's appropriate uses and the populations for which it is appropriate."[128] This report advises test users to collect extensive data on students to complement test results and use a comprehensive approach in the identification, testing, and assessment process. Test administrators must consider the validity of given instruments or procedures as well as the cultural characteristics of the students when evaluating their performances.[129]

As discussed in the following recommendations, assessments should be made with the best interests of students in mind, allowing the principle of "do no harm" to prevail. "In any testing situation, but particularly high stakes assessments, examinees must have an opportunity to demonstrate the competencies, knowledge, or attributes

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125. *Id.* at 22.

126. Janet E. Helms, *Why is there no study of cultural equivalence in standardized cognitive ability testing?*, 47 AM. PSYCHOLOGIST 1083 (1992); Jack A. Naglieri & Donna Y. Ford. *Addressing Underrepresentation of Gifted Minority Children Using the Naglieri Nonverbal Ability Test* (*NNAT*). 47 GIFTED CHILD Q. 155 (2003). Jack A. Naglieri & Donna Y. Ford. *Increasing Minority Children's Representation in Gifted classes using the NNAT: A Response to Lohman*. 49 GIFTED CHILD Q. 29 (2005); DONNA Y. FORD, INTELLIGENCE TESTING AND CULTURAL DIVERSITY: CONCERNS, CAUTIONS, AND CONSIDERATIONS, *supra* note 114.

127. AMERICAN EDUCATIONAL RESEARCH ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, & NATIONAL COUNCIL ON MEASUREMENT IN EDUCATION, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (1999).

128. *Id.* at 112.

129. *Id.*; In addition, extensive information on equity and testing can be found at the National Center for Fair and Open Testing website, www.fairtest.org.

being measured."[130] Few equitable opportunities exist when assessments are one-dimensional, unimodal, and biased in favor of one group of students.

B. Recommendations for Practice

In considering how to respond to the needs of gifted students, educational leaders who manage district resources, in conjunction with their lawyers, might wish to ponder the following points. First, even acknowledging that education is a state, rather than federal, concern under the Tenth Amendment,[131] if change is to occur, it needs to start nationally due to the lack of action by individual jurisdiction. As with the IDEA, if gifted children are going to receive special programming designed to meet their unique needs, then their supporters should encourage Congress to strengthen and expand existing federal legislation.

Put another way, while states should retain the option of providing greater services than federal law might dictate, absent national standards, it is unlikely many states will act independently. At a minimum, federal legislation should, in a manner similar to IDEA, mandate the identification of gifted students while adopting substantive and procedural safeguards, including the use of testing that is free from cultural bias, programming, and adequate financial support to states and local school boards.

Second, state legislatures and departments of education should increase their efforts to meet the needs of gifted students by taking three inter-related actions. Initially, states should strengthen certification and/or licensing standards for educators. Next, perhaps most importantly, in light of the generally poor level of support provided for programs for students who are gifted and talented, state and local officials should provide adequate funding so that the educational needs of these children are served adequately. Lastly, state level officials should raise performance expectations for serving gifted students by developing accountability standards for local school boards.

Third, given the woeful lack of preparation of most educators in this regard, college and university officials should expand existing course work and field experiences so that educators can have better exposure to

130. TEST INTERPRETATION AND DIVERSITY: ACHIEVING EQUITY IN ASSESSMENT (Jonathan Sandoval et al. eds., 1988) at 183.

131. San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("[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").

gifted children and their needs. A great deal of this preparation needs to focus on increasing access to gifted classes for under-represented groups, as well as how to service such students in equitable ways. Thus, both gifted education and multicultural education training are necessary.

Fourth, if educational leaders at the local level offer programs for the gifted, especially if they exceed state requirements, then they should involve representatives of key constituencies in crafting policies, both when they are initially developed and when they are revised because ensuring cooperation can be of invaluable assistance. At a minimum, committees, which should be racially and ethnically diverse, ought to include school board members, board lawyers, administrators, teachers, staff, parents, and community members. It might also be wise to include a student, particularly from a secondary school, or graduate to give students' points of view on the quality and value of programming, especially as it may have helped in preparing individuals for higher education and/ or life outside of school.

Fifth, in a closely related point, if referral processes and forms ignore cultural differences as to how giftedness manifests itself differently in various cultures, then children who are culturally different may receive low ratings that do not accurately capture their strengths, abilities, and potential. To the extent that educators should be aware how the core attributes of giftedness vary by culture,[132] they should thus create referral and assessment processes that define and evaluate giftedness with each group's cultural differences in mind.

Sixth, as discussed earlier, data collection on all students who are being tested for giftedness should be multidimensional, meaning that again, as under the IDEA, that a variety of information should be collected from an array of sources.[133] In other words, data must not be weighted as was done in *McFadden*. In this era of high-stakes testing, educators should err on the side of having "too much" information rather than too little to make informed, educationally sound, and equity-based decisions about the education of children.

At the same time the data collected should also be multimodal, meaning that it is gathered in a variety of ways. Information should be collected verbally, such as interviews, focus groups and conversations, along with such illustrative measures as observations, writing, and performances. Further, officials should gather both subjective and

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132. MARY M. FRASIER ET AL., A NEW WINDOW FOR LOOKING AT GIFTED CHILDREN (1995); *see also* ROBERT J. STERNBERG, BEYOND IQ: A TRIARCHIC THEORY OF HUMAN INTELLIGENCE (1985).

133. 20 U.S.C. § 1414(b)(2)(B) (Under the IDEA, no single procedure can be the sole criterion for determining student eligibility or placement).

objective information, keeping in mind associated advantages and disadvantages of both. Moreover, if students speak first languages other than English, then educators may have to use interpreters and adopt instruments translated into their primary or preferred language.

Seventh, policy development teams should consider such key questions as what kind of programs to provide, whether as pull-out offerings or standalone programs either system-wide or at building levels or in conjunction with local and regional boards; funding; and teacher qualifications. These items are particularly important so that boards can help identify costs and budget accordingly.

Eighth, given their key role in the growth and development of their children, educators should assist parents in enhancing student development by placing a concerted focus on Hispanic and Black families, especially in light of ongoing issues of under-representation. As such, school officials should work with local, regional, and state associations as well as colleges and universities to offer services for parents to help them to better understand the needs of their children. In so doing, a key lesson from *McFadden* is that local officials must strive to develop integrated, inclusive programs for all students.

Ninth, policies should offer professional development programs to assist staff to identify, assess, and serve gifted students while helping to ensure that educators are culturally sensitive.[134] Even if school boards are in states that do not provide statutory rights for gifted students, officials should make curricular accommodations designed to challenge children to reach their full potential by adding classes and/ or encouraging teachers to develop appropriate assignments for qualified children.

Tenth, school boards, educational leaders, and their lawyers should regularly re-visit and update their policies to ensure that they are up-to-date with developments in gifted education and the law.

VI. CONCLUSION

One can only wonder how many other highly talented and gifted Hispanic children in particular were educated in unlawfully segregated settings rather than integrated with the full range of children in *McFadden*. The fight for or journey to equity has been a long one for gifted students of color because they are often left behind. To this end, while researchers and lawyers have devoted their lives to desegregating gifted programs, nationally, they have yet to see the fruits of their labor.

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134. For a discussion of this, and related points, *see* Donna Y. Ford, *Ensuring Equity in Gifted Education: Suggestions for Change (Again)*, 35 GIFTED CHILD TODAY 74 (2012).

For sure, there are pockets of success, but they are few and far in between.

McFadden represents a clarion call to all school boards, state departments of education, and gifted advocacy organizations whether national, state, or local, to live up to their mission statements and goals, and to fulfill both the promise and intent of *Brown v. Board of Education*. As the *McFadden* court reiterated, segregated programs are inherently unequal. While, sadly, it is impossible to turn back the clock in *McFadden* and other districts where under-representation exists, perhaps officials in other school systems can learn from the mistakes that occurred here and improve programming for students who are gifted.

All who are interested in gifted education must live up to their promise and mission to advocate for all students who have been identified as qualified to receive programming. A crucial part of this work consists of taking proactive, intentional, and aggressive steps to eliminate barriers contributing to the under-representation of Hispanic and Black students in programs for children who are gifted education.