

## **Ending Discrimination in Gifted Education in the New York City Public Schools**

### **Introduction**

- Midway through her child's first year of public school, the mother of a kindergartener is surprised to discover that one of the school's four kindergarten classes (not her child's) is designated as a gifted program. When she inquires about the program, she is informed that the deadline for applications for the program is during the year prior to kindergarten, and that the program is currently full.
- Parents of a four-year old visit their neighborhood elementary school to get a sense of the programs and staff. As they tour the predominantly minority school, they are surprised to notice that one of the classrooms is almost entirely white. They are told that this is the gifted class, and that admission to it is based on scoring above the 95<sup>th</sup> percentile on an IQ test.
- Spanish-speaking parents wish to have their five-year old, whose first language is Spanish, apply for admission to their district's gifted program. They are told at the district office that testing for the program is only done in English, and that there is a \$50 fee for the testing.
- A four-year-old child labeled as speech impaired scores sufficiently high on an IQ test to qualify for the district's gifted program. He applies for a gifted kindergarten class in a school that has plenty of openings, but his parents are told that the school lacks the special education staff to provide the support that he needs.

For the past several years, the Office for Civil Rights of the United States Department of Education (“OCR”) and the New York City Department of Education (“the Department”; formerly the Board of Education of the City of New York City) have been engaged in a series of on-again, off-again discussions intended to resolve a pair of civil rights complaints that were filed with OCR in 1997. The complaints allege systemic discrimination in the manner in which gifted education programs are administered in some of the Department’s thirty-two community school districts. In particular, the complaints (which were combined post-filing into a single OCR “compliance review”) allege that minority and limited English proficient (“LEP”) students are denied equal access to gifted programs.<sup>1</sup> These allegations are of great concern because admission to a gifted program is often seen as entrée to a public education experience of higher expectations, greater achievement, and ultimately, access to competitive high schools and colleges.

Despite having the authority to do so, the Department has failed to promulgate and enforce regulations regarding nondiscrimination and use of best practices in gifted programs. And, despite significant evidence of violations of Title VI of the Civil Rights Act of 1964 and its implementing regulations, as well as Section 504 of the Rehabilitation Act of 1973 and its implementing regulations,<sup>2</sup> OCR has failed to take any kind of enforcement action against the Department, or even to issue any findings regarding its investigation.

The Association of the Bar of the City of New York (“the Association”) urges the Department and OCR, in consultation with relevant stakeholders and experts, to move

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<sup>1</sup> As will be seen in this report, there are also significant issues regarding access to gifted programs for students with disabilities. Meaningful reform must address these issues as well.

quickly toward a monitored resolution resulting in equitable access to gifted programs. This Report consists of an overview of the legal standards applicable to gifted programs, an analysis of some of the problems with gifted programs in New York City, a description of elements of model programs, and recommendations for resolving the OCR case and remedying discriminatory practices relating to gifted education in the City.

### **Legal Standards**

The determination of whether a student should be placed in a gifted education program is a high stakes educational decision and a form of educational tracking – the systematic practice of sorting students into different levels, classes, or programs, based on their perceived abilities.<sup>3</sup> Ways of measuring student abilities may include, but are not limited to, achievement tests, intelligence tests, grades, and/or teacher or parent recommendations. Students placed in high tracks are often afforded access to enhanced educational opportunities that enable them to succeed in high school and prepare for college, while students in lower tracks may suffer the consequences of low expectations that they will achieve academically.<sup>4</sup> Gifted programs are essentially a form of tracking that provides “students with perceived exceptional abilities” with “differentiated instruction.”<sup>5</sup>

Black and Latino students nationwide are disproportionately placed in lower tracks and under-represented in higher tracks.<sup>6</sup> Similarly, gifted children with disabilities

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<sup>2</sup> Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against students with disabilities

<sup>3</sup> See Advocates for Children, *Gifted Education in New York City: An Analysis of Segregation in New York City's Gifted Programs* at 33-34 (1998) (hereinafter “AFC Report”).

<sup>4</sup> *Id.* at 34.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

are frequently underserved and understimulated.<sup>7</sup> Federal constitutional, statutory, and regulatory principles form the legal framework applicable to the determination of whether a school district's process of identifying and placing students in gifted and talented programs is racially discriminatory.<sup>8</sup> The Equal Protection Clause of the 14<sup>th</sup> Amendment prohibits intentional discrimination based on race, color, or national origin. Title VI of the Civil Rights Act of 1964 also prohibits discrimination on the basis of race, color, or national origin by recipients of federal funding.<sup>9</sup> While the text of Title VI itself reaches only instances of intentional discrimination, the statute's implementing regulations prohibit policies or practices that have a discriminatory disparate impact on students based on their race, color, or national origin.<sup>10</sup> Therefore, Title VI claims may be proven under two primary theories: intentional discrimination or disparate impact.

### **Intentional Discrimination**

Courts employ the same legal analysis to claims of intentional discrimination under Title VI and the Equal Protection Clause of the 14<sup>th</sup> Amendment.<sup>11</sup> Both Title VI and the Equal Protection Clause require educational institutions to apply their policies and practices consistently to similarly situated individuals or groups, regardless of their race or national origin.<sup>12</sup> A plaintiff alleging intentional discrimination must demonstrate

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<sup>7</sup> Colleen Willard-Holt, *Recognizing Talent: Cross-Case Study of Two High Potential Students with Cerebral Palsy (CRS 94308)* (Sept. 1994), available at <http://www.gifted.uconn.edu/nrconlin.html>.

<sup>8</sup> U.S. Department of Education Office for Civil Rights, *The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers* 13, 51 (December 2000) (hereinafter "OCR Resource Guide").

<sup>9</sup> 42 U.S.C.S. § 2000d.

<sup>10</sup> OCR Resource Guidance at 14 (citing 34 C.F.R. § 100.3(b)(2)).

<sup>11</sup> *Elston v. Talladega County Board of Education*, 997 F.2d 1394, 1406 n.11 (11<sup>th</sup> Cir. 1993); *Guardians Assoc. et al. v. Civil Service Commission*, 463 U.S. 582 (1983).

<sup>12</sup> *See People Who Care v. Rockford Bd. Of Educ.*, 851 F. Supp. 905, 958-1001 (N.D. Ill 1994), remedial order rev'd in part, 111 F.3d 528 (7<sup>th</sup> Cir. 1997) (finding that school district treated students differently on

that the defendant intentionally discriminated against the plaintiff because of his or her race or national origin.<sup>13</sup> Therefore, educational placement decisions that expressly classify persons on the basis of race are discriminatory on their face.<sup>14</sup>

### **Disparate Impact**

While Title VI's implementing regulations do not specifically address testing and assessment, they prohibit recipients of federal funds from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination."<sup>15</sup>

Therefore, Title VI's regulations recognize that discrimination may occur when the use of neutral criteria results in racial disparities and those criteria lack educational justification.<sup>16</sup> Consequently, Title VI may provide the most accessible avenue for challenging the legality of a school system's policies regarding student placement in gifted and talented programs.<sup>17</sup>

The elements of a disparate impact claim under Title VI's regulations are substantially similar to those applicable in Title VII employment discrimination claims.<sup>18</sup> The party challenging the educational practice has the burden of establishing disparate impact. However, demonstrating the existence of disparities alone does not establish a Title VI violation. Instead, after the challenging party establishes the existence of

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the basis of race because minority students with test scores qualifying them for two or more ability levels were more likely to be assigned to the lower level class than similarly situated white students without explanatory reason; district had to adopt objective, non-racial criteria to assign students to classes, but was not required to abolish tracking system).

<sup>13</sup> *Elston v. Talladega County Bd. of Educ.*, 997 F.2d at 1406.

<sup>14</sup> *See Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999).

<sup>15</sup> 34 CFR § 100.3(b)(2).

<sup>16</sup> OCR Resource Guide at 15, 53.

<sup>17</sup> *See AFC report* at 40.

<sup>18</sup> *See Georgia State Conf. Of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11<sup>th</sup> Cir. 1985); *Elston v. Talladega*, 997 F.2d 1394, 1407 (11<sup>th</sup> Cir. 1993).

disparate impact, the burden shifts to the educational institution, which must show that the challenged practice is educationally justified.<sup>19</sup> If the educational institution establishes sufficient educational justification, the party challenging the test must show that an alternative practice with less disparate impact is equally effective in meeting the institution's educational goals or that the defendant's proffered justification is a pretext for discrimination.<sup>20</sup>

A plaintiff generally meets the burden of establishing a *prima facie* case of disparate impact by identifying the challenged facially neutral educational policy and showing that it is causally related to an adverse impact on his or her race, color or national origin. While no rigid mathematical formula exists for establishing disparate impact through statistical data, the disparities must be substantial enough to raise an inference that the challenged practice caused the disparities.<sup>21</sup> To establish causation, a plaintiff must offer statistical evidence of the kind and degree sufficient to raise the inference of causation.<sup>22</sup>

In cases alleging disparate impact in educational programs, a defendant satisfies the substantial legitimate justification burden by demonstrating the educational necessity of the challenged practice by showing that it "bears a manifest, demonstrable relationship to classroom education[ ]."<sup>23</sup> An educational necessity is an action that is necessary to meet an important educational goal.<sup>24</sup> Courts usually give deference to educational

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<sup>19</sup> Elston, 997 F.2d at 1407.

<sup>20</sup> *Id.*

<sup>21</sup> Groves v. Alabama State Bd. of Educ., 776 F. Supp. 1518, 1526-28 (MD Ala. 1991).

<sup>22</sup> See Georgia State Conference of Branches of NAACP, 775 F.2d at 1417; Elston v. Talladega, 997 F.2d 1394, 1407 (11<sup>th</sup> Cir. 1993); Sharif v. New York State Educ. Dep't, 709 F. Supp. 345, 354-55, 364 (S.D.N.Y. 1989) (granting preliminary injunction where court found that state's use of SATs as the sole basis for decisions awarding college scholarships was not educationally justified).

<sup>23</sup> Georgia State Conference, 775 F.2d at 1418.

<sup>24</sup> *Id.*

institutions to define their goals and instead focus their analysis on whether the challenged tests actually support these goals.<sup>25</sup> In making this determination, courts consider the basic requirements of professional testing practices -- the “validity, reliability and fairness” — of the test in question “provided by the test developer and test user to determine the acceptability of the test for the purpose used.”<sup>26</sup> Deference is given to testing practices within professionally accepted standards.<sup>27</sup>

If the educational institution presents sufficient evidence that the challenged practice is educationally justified, the plaintiff can demonstrate the existence of an equally or comparably effective alternative practice that meets the institution’s goals and that would eliminate or reduce the adverse impact.<sup>28</sup> Factors that the court considers in evaluating the feasibility of the proposed alternative practice include costs and administrative burdens.<sup>29</sup>

In December 2000, OCR published “The Use of Tests As Part of High Stakes Decision-Making for Students,” (“OCR Resource Guide”) in order to help educators and policy-makers “frame strategies and programs that promote learning to high standards in ways consistent with nondiscrimination laws.”<sup>30</sup> The OCR Resource Guide offers guidance regarding professional standards for high stakes testing, particularly those set forth in the “Standards for Educational Psychological Testing,” which were developed by a committee of the American Psychological Association, and the National Council on Measurement in Education, and applicable federal laws that apply to high stakes testing

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<sup>25</sup> *See id*; Sharif, 709 F. Supp.at 354-55.

<sup>26</sup> OCR Resource Guide at 56.

<sup>27</sup> *Id.*

<sup>28</sup> Georgia State Conference of Branches of the NAACP, 775 F.2d at 1417.

<sup>29</sup> *See* Sharif, 709 F. Supp. at 363-64.

<sup>30</sup> OCR Resource Guide at iii.

practices<sup>31</sup> The OCR Resource Guide emphasizes that, together, “sound testing practices and federal nondiscrimination laws can work to ensure student achievement and that educational policies do not deny students equal educational opportunity on the basis of race, color, national origin, gender, or disability.”<sup>32</sup>

The OCR Resource Guide states that “[w]hen making high stakes decisions that involve the use of tests, it is important for policy-makers and educators to consider the intended and unintended consequences that may result from the use of test scores.”<sup>33</sup> Moreover, the OCR Resource Guide cautions against the use of a single test score to make high stakes decisions about individuals.<sup>34</sup>

### **Special Issues for Limited English Proficient (LEP) Students**

High stakes testing for LEP students raises special issues. In *Lau v. Nichols*, the United States Supreme Court held that a school district’s policy of teaching national origin minority group children only in English and without any special assistance, deprived them of the opportunity to benefit from the districts educational program, including meeting the English language proficiency standard required for a high school diploma.<sup>35</sup> Later, in *Castaneda v. Pickard*, the Fifth Circuit, relying on language of the Equal Educational Opportunities Act (EEOA) set forth the steps that school districts must take to ensure that LEP students overcome language barriers and can meaningfully participate in the district’s educational programs.<sup>36</sup> Under the standards set forth in

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<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at iv.

<sup>33</sup> *Id.* at 12.

<sup>34</sup> *Id.* at iv.

<sup>35</sup> *Lau v. Nichols*, 414 U.S. 563, 566-68 (1974).

<sup>36</sup> *Castaneda v. Pickard*, 648 F.2d 989, 1005-1006, 1009-1012 (5<sup>th</sup> Cir. 1981).



*Castaneda*, “school districts have broad discretion in choosing a program of instruction for limited English proficient students. However, the program must be based on sound educational theory, must be adequately supported so that the program has a realistic chance of success, and must be periodically evaluated and revised, if necessary to achieve its goals.”<sup>37</sup>

Title VI’s disparate impact framework may be applied to determine whether high stakes testing practices have a discriminatory effect on students with limited English proficiency. Title VI requires school districts to provide equal educational opportunities to national origin minority students whose inability to speak and understand the English language excludes them from effective participation in the educational program offered by the district.<sup>38</sup> Depending upon the purpose of the educational testing and the “characteristics of the population being tested, accommodations or other forms of assessment of the same construct may be necessary.”<sup>39</sup> According to the OCR Resource Guide, there are three “particularly important” areas involving high stakes testing for LEP students:

1. tests used to determine a student’s proficiency in the area of speaking, listening, reading, or writing English for the purpose of determining whether the student should be provided with a program or services to enable the student to acquire English language skills (and later, for the purpose of determining whether the student is ready to exit the program or services);
2. tests used to determine if the student meets the criteria for specialized programs, such as gifted and talented, or vocational education programs; and
3. system wide tests, including graduation tests, administered to determine if students have met performance standards.<sup>40</sup>

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<sup>37</sup> OCR Resource Guide at 58.

<sup>38</sup> *See Lau v. Nichols* 414 U.S. at 566-68.

<sup>39</sup> OCR Resource Guide, at 59.

<sup>40</sup> *Id.*

The OCR Resource Guide explicitly states that “tests used by schools to help select students for specialized instructional programs, including programs for gifted and talented students, should not screen out [LEP] students unless the program itself requires proficiency in English for meaningful participation.”<sup>41</sup>

### **Special Issues for Students with Disabilities**

Under Section 504 of the Rehabilitation Act of 1973 (Section 504) and its implementing regulations, students with disabilities must be provided with equal access to programs and activities run by federally-funded educational institutions.<sup>42</sup> Section 504 prohibits the exclusion of otherwise qualified students from gifted programs on the basis of disability and requires that districts provide reasonable accommodations to ensure that students with disabilities can meaningfully participate in such programs.<sup>43</sup>

Moreover, the Individuals with Disabilities Education Act entitles each child with a disability to a “free appropriate public education.”<sup>44</sup> This entitlement also appears in the implementing regulations for Section 504.<sup>45</sup> A “free appropriate public education” means “educational instruction specially designed to meet the unique needs of the handicapped child.”<sup>46</sup> If a school system can meet the child’s unique needs only in a gifted program, admittance to that gifted program is legally required.<sup>47</sup>

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<sup>41</sup> *Id.* at 59.

<sup>42</sup> Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; 34 C.F.R. § 104.4.

<sup>43</sup> 34 C.F.R. § 104.4.

<sup>44</sup> 20 U.S.C. § 1412(a).

<sup>45</sup> 34 C.F.R. § 104.33(a).

<sup>46</sup> *Board of Educ. v. Rowley*, 458 U.S. 176, 188-189 (1982).

<sup>47</sup> *See, e.g.,* In re Department of Educ. of the City of New York, 28 Individuals with Disabilities Educ. Law Rep. (LRP Publications) 1093 (January 9, 1998) (decision of Impartial Hearing Officer)(finding that student is entitled to remain in gifted program because he “requires” the stimulation it offers).

## The New York City Context

There have been a significant number of articles and studies providing varying levels of detail about New York City's public school gifted programs. In 1995, the New York Times published an article critiquing the gifted program in Brooklyn's District 15,<sup>48</sup> one of the then thirty-two community school districts serving elementary and middle school students.<sup>49</sup> The District's gifted program, which at that time served about 450 students, determined admission solely through an IQ test; students with IQ scores of at least 129 were eligible for admission to the program.<sup>50</sup> Although District 15's overall student enrollment was only 21.5% white, the enrollment of the gifted program was 79.2% white.<sup>51</sup> In odds ratio terms, this meant that a white student was about fifteen times more likely to be in the program than a minority student. The article raised the spectre of discrimination, but did not indicate whether the problems identified (use of sole criterion for admission decisions, enormous racial disparities) existed in other districts in the City.

In early 1997, a complaint was filed with OCR alleging that District 15's gifted program was administered in a manner that violated Title VI of the Civil Rights Act of 1964. Also in 1997, the Puerto Rican Legal Defense and Education Fund ("PRLDEF") filed a similar Title VI complaint with OCR, but on a citywide basis, and particularly focusing on the alleged exclusion of LEP students from gifted programs. Approximately one year later, OCR closed both complaints, stating that it was instead initiating a proactive, citywide compliance review of the issues raised in the complaints. Meanwhile,

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<sup>48</sup> District 15 includes the neighborhoods of Boerum Hill, Carroll Gardens, Cobble Hill, Kensington, Park Slope, Red Hook, Sunset Park, and Windsor Terrace.

<sup>49</sup> *A Way to Nurture the Gifted? Or Privileges for the Elite?*, N.Y. Times, February 26, 1995, § 13 at 8..

<sup>50</sup> *Id.*

then-Chancellor Rudolph Crew announced his intention to implement citywide regulations to ensure that gifted programs were administered fairly, but no lasting effort was made during his tenure to impose citywide requirements regarding gifted program administration.

The flurry of attention to gifted education was largely inspired by the New York City chapter of the Association of Community Organizations for Reform Now (“ACORN”), which in 1996 issued the first of its “Secret Apartheid” reports.<sup>52</sup> The 1996 report described visits to New York City public schools by minority and nonminority testers posing as parents of 4-year olds and seeking information about kindergarten and elementary school programs. While the number of visits conducted by the testers was limited (about one hundred visits were conducted), and some of the findings may have lacked statistical significance, the overall picture that emerged was a disturbing one. Black participants were provided with access to the educators half as often as their white counterparts.<sup>53</sup> White participants were given tours of school buildings more than twice as often as Black participants.<sup>54</sup> There were significant differences between the groups when it came to the attitude and behavior of school personnel as well.<sup>55</sup> ACORN concluded that, whether by design or bad management, “racial steering” begins as early

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<sup>51</sup> *Id.*

<sup>52</sup> See New York ACORN Schools Office, *Secret Apartheid: A Report on Racial Discrimination Against Black and Latino Parents and Children in the New York City Public Schools* (1996), available at <http://www.acorn.org/ACORNarchives/studies/secretapartheid/text.html> (hereinafter “ACORN I”).

<sup>53</sup> *Id.* At 7.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 10.

as kindergarten.<sup>56</sup> Because gifted programs often commence in kindergarten, differential access to information about these programs based on race raised great concern.

Spurred in large part by the ACORN report, on June 23, 1997, the New York City Council's Committee on Education held an oversight hearing on Department policies regarding elementary school gifted programs.<sup>57</sup> Among the Council's preliminary findings were:

- Some districts used an IQ test as the sole criterion for admission.
- Grade level of entry varied among districts.
- Some districts required parents to pay for admissions testing.
- Citywide, Latino students were greatly underrepresented in gifted programs; white and Asian students were highly overrepresented.<sup>58</sup>

The Council also noted that then-Chancellor Rudy Crew had “issued a draft memorandum to District Superintendents that outlines new proposed regulations regarding access to gifted programs in the local community school districts.”<sup>59</sup> As noted above, the regulations were neither finalized nor implemented.

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<sup>56</sup>*Id.* at 11.

<sup>57</sup> The Council noted that about 34,000 of the more than 744,000 elementary and middle school students were enrolled in gifted programs (about 4.6% of the student population), with selection processes and criteria varying greatly among districts, and with some districts not offering gifted programs. New York City Council, *Board of Education Policies Regarding Elementary School Gifted Programs* 1-2 (1997) (*hereinafter* “the City Council Report”).

<sup>58</sup> While black students were proportionately represented based on citywide numbers, this was largely due to the existence of some sizable gifted programs in one or more districts that were nearly 100% black in their overall enrollment. By contrast, in districts in which whites were represented in greater numbers, black students were greatly underrepresented in the gifted programs. Office of Systemwide Evaluation and Accountability, Division of Assessment and Accountability, New York City Board of Education, *Comparison by Community School Districts of Findings Pertaining to Disproportionate Applications and Acceptances to Gifted and Talented Programs in New York City Community School Districts in 1996-1997 and 1997-1998* (February 24, 2000) (*hereinafter* “the second Department Report”).

<sup>59</sup> The City Council Report at 3. Crew's proposed regulations would have: required the posting of information about district gifted programs in district offices and other locations frequented by parents; required Districts to submit explanations of the admissions tests used to the central Department; prohibited

In 1998, the third of ACORN's reports found that a number of New York City gifted programs create segregated pockets of white students within racially diverse general school populations.<sup>60</sup> In fact, ACORN found that in at least 14 of the City's gifted programs, half or more of the school's white students were enrolled in its gifted program.<sup>61</sup>

Over the past six years, the Department has prepared several internal reports (some in response to the OCR compliance review) regarding gifted programs. The first such report analyzed data from the 1995-1996 school year, received by the Department after a request for information was made by the Chancellor's office.<sup>62</sup> Only 24 of the 32 community school districts responded to the request.<sup>63</sup> The Department identified numerous gifted programs, varying in size from 28 to over 3,000 students.<sup>64</sup> Of the more than seventy programs identified, "some relied exclusively on IQ scores" as a screening

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Districts from charging fees for admissions testing; and recommended that Districts refrain from using a single test for determining admission. *Id.* at 4.

<sup>60</sup> The report noted that at PS 105 in District 20 (in Brooklyn), all of the school's white students were enrolled in its gifted program, where they represented 75% of student enrollment in the program. White students, however, represented only 24% of the school's total enrollment. Another example of white student segregation in gifted programs was Intermediate School 54 in District 3 (in Manhattan), where 88% of the school's white students were enrolled in its gifted program, even though they represented only 13% of the school's population. New York ACORN Schools Office, *Secret Apartheid III: Follow Up to Failure 17-18* (1998), available at <http://www.acorn.org/ACORNarchives/studies/secretapartheid3/> (hereinafter "ACORN III")

<sup>61</sup> *Id.* at 18.

<sup>62</sup> Office of Systemwide Evaluation and Accountability, Division of Assessment and Accountability, New York City Board of Education, *Programs Serving Gifted and Talented Students in New York City Public Schools, 1995-1996* (undated report) (hereinafter "the first Department Report").

<sup>63</sup> *Id.* at i. This lack of response from many districts to requests for information that should be publicly available (even when those requests come from the Chancellor's office) is disturbing and all too common. The AFC Report noted that its authors had contacted all 32 community school district offices for information about their gifted programs. 22 out of the 32 districts either did not return phone calls inquiring about their gifted programs or failed to provide informational materials about the programs after such materials were requested. AFC Report at 63-65.

<sup>64</sup> First Department Report at 3.

device for entry,<sup>65</sup> 8% of the programs required parents to pay a testing or application fee,<sup>66</sup> and there was great variability in notice and dissemination practices.<sup>67</sup>

The first Department Report concluded that there was “minimal effort on the part of some districts/schools to familiarize parents with the existence of gifted programs and admission requirements,” and criticized the “limited conception of ‘giftedness’ by some who defined it primarily in terms of intellectual ability as demonstrated by test scores.”<sup>68</sup> The Report recommended that the Department focus on data collection; issue regulations establishing standards for notice, admission requirements, and application procedures; and ensure selection criteria “that are clearly related to their respective goals and educational objectives.”<sup>69</sup>

The second Department Report was issued in February 2000 in response to OCR’s then two-year-old compliance review.<sup>70</sup> Again, many school districts responded with incomplete data, leading the authors to focus only “on the 12 CSDs [community school districts] for which complete data were available for non-ELL [“ELL” stands for “English language learner,” a term that is synonymous with LEP] students for either 1996-1997 or the 1997-1998 school years.”<sup>71</sup> The study was based on only 9 districts for the 1997-1998 school year, and only twelve for the 1996-1997 school year, out of the thirty-two districts.<sup>72</sup>

Even this limited data response showed many troubling statistics. For example, in District 2 (in Manhattan), whites were 3.6 times more likely to apply for admission to the

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<sup>65</sup> *Id.* at 9.

<sup>66</sup> *Id.* at 12.

<sup>67</sup> *Id.* at 8-9.

<sup>68</sup> *Id.* at i.

<sup>69</sup> *Id.* at i-ii.

<sup>70</sup> *See* Second Department Report.

<sup>71</sup> *Id.* at 2.

gifted program than blacks, 4.4 times more likely to apply than Latinos, and 3.9 times more likely to apply than Asians.<sup>73</sup>

In District 15, whites were 9.6 times more likely to apply than blacks, and white applicants were 4.9 times more likely to be admitted than black applicants.<sup>74</sup> This meant that a white student was 47 times more likely to both apply and be admitted to the district's gifted program than a black student.

Working with the same data, obtained through a request to OCR under the Freedom of Information Act, PRLDEF conducted its own analysis,<sup>75</sup> and made the following observations:

- Two districts<sup>76</sup> stated that they did not have race enrollment figures for their gifted programs; other districts failed to provide the central Department with breakdowns of enrollment data by race or LEP status.
- Sixteen districts, collectively enrolling over 45,000 LEP students, did not admit a single LEP student to their gifted programs.<sup>77</sup>
- Two districts<sup>78</sup> admitted to using an IQ test as the sole criterion for admission to their gifted programs<sup>79</sup>; other districts used an IQ test as a screening device.<sup>80</sup>

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 8-10.

<sup>74</sup> *Id.* at 8, 11.

<sup>75</sup> Puerto Rican Legal Defense and Education Fund, *PRLDEF Analysis of NYC Gifted Program Information* (undated) (*hereinafter* "PRLDEF Analysis").

<sup>76</sup> Districts 3 (located in Manhattan) and 13 (located in Brooklyn).

<sup>77</sup> Some of these districts primarily advertised their programs through word of mouth; some districts only tested students in English for admission to their programs; some gifted programs were provided only in English.

<sup>78</sup> Districts 4 (located in Manhattan) and 15 (Brooklyn).

<sup>79</sup> According to a 1997 New York Times article, seven districts used IQ tests as the sole criterion for admission to their gifted programs. Somini Sengupta, *New York's Chancellor Seeking Wider Access to Gifted Programs*, N.Y. Times, Feb. 28, 1997, at B4.



- In many districts, white and non-LEP applicants were most likely to apply for the programs; at the same time, many of the same districts had informal or limited outreach efforts to notify parents about their programs.<sup>81</sup>

The third, most recent Department report collected information regarding 112 gifted programs in 31 community school districts. The report acknowledged that gifted programs “must use multiple measures to determine program eligibility, acceptance, and participation,” that “[n]o single measure may be used as a program gatekeeper,” and that “districts and schools may not establish a minimum IQ score as a sole condition for program eligibility, acceptance, or participation.”<sup>82</sup> Unlike previous Department reports, the third report did not collect enrollment data regarding the 112 programs; instead, districts were asked a series of survey questions describing the characteristics of their programs. Accordingly, the third report did not address race enrollment issues.

Despite the lack of specific enrollment data, the third report found a “successive decline in the percentage of respondents indicating ELL eligibility, consideration, acceptance and placement,” and concluded that ELL students were significantly underrepresented in gifted programs throughout the City.<sup>83</sup> This led the Department to recommend that program personnel consider “when feasible, increasing instrument

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<sup>80</sup> In other words, these districts used an IQ test as a sole criterion “gatekeeper” to be met before applicants are eligible to be selected based on other criteria.

<sup>81</sup> PRLDEF Analysis at 2.

<sup>82</sup> Division of Assessment and Accountability, Office of Systemwide Evaluation and Accountability, New York City Board of Education, *Gifted and/or Talented Program Evaluation 2000-2001* (2002) at 1.

<sup>83</sup> *Id.* at 6, 9-11. While more than three-quarters of the community school districts surveyed acknowledged that LEP students were eligible for their gifted programs, only 60% of the 112 programs indicated that LEP students had actually been considered for gifted programs in last application period. Moreover, fewer than half of the districts reported that ELL students had been accepted into gifted programs during the 2000-01 school year, and only 17% of school districts offer eligibility instruments in languages other than English; of those, 80% stated that the non-English eligibility assessments were conducted only in Spanish.

administrations in languages that are frequently spoken by NYC public school students (e.g., Chinese, Haitian-Creole, Russian).”<sup>84</sup>

The third Department Report also found that special education students are largely excluded from gifted programs. While more than three-quarters of respondent districts stated that special education students were eligible for gifted programs and half indicated that they had been considered for program admission, less than one-third actually accepted special education students in gifted programs during the 2000-2001 school year.<sup>85</sup>

The third Report made clear the continued reliance on IQ tests in determining eligibility for gifted programs.<sup>86</sup> Other standardized tests were also used as sole admission criteria or as gatekeeper criteria.<sup>87</sup>

Finally, the third report demonstrated significant inconsistencies in the ways in which gifted programs were publicized to the families of potential applicants. About three-quarters of respondents to the third Report indicated that gifted programs are advertised in the schools.<sup>88</sup> A much smaller proportion of programs used other means of informing prospective applicants,<sup>89</sup> a particularly disturbing pattern given the frequent use of kindergarten as an entry point for the programs.

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<sup>84</sup> *Id.* at 11.

<sup>85</sup> *Id.*

<sup>86</sup> Eight out of 31 respondent school districts (26%) indicated that IQ tests were very important in assessing whether students are eligible for gifted programs. Strangely, the Department declined to identify these eight districts.

<sup>87</sup> Eighty-five percent of respondents surveyed indicated that scores on city-wide/state reading tests served as gatekeeper requirements for gifted programs, and nearly 80% reported that these scores determined a student’s eligibility for gifted programs; 10.7% indicated that IQ scores were a gatekeeper requirement.

<sup>88</sup> Additionally, 37.5% reported that programs were publicized in district offices. By limiting outreach efforts to posting information at schools and/or school districts, school districts ignore opportunities for parent outreach that might reap greater representation of students of color.

<sup>89</sup> Less than ten percent of respondents indicated that they publicized their gifted programs in newspapers targeted on people from specific ethnic groups, and only 8% reported publicizing gifted programs in

The third Report concluded with a set of modest recommendations:

providing administrations of eligibility instruments in languages other than English and Spanish, increasing the awareness of program personnel of programs that accept talented special education students, and establishing written guidelines to assist programs in using multiple eligibility measures jointly rather than successively.<sup>90</sup>

The Report did not suggest that the Department impose centralized requirements regarding the use of nondiscriminatory best practices in dissemination of information about programs, and selection and admission criteria.

Given the evidence -- inequitable access to information about New York City gifted programs, use of IQ tests as a sole or a gatekeeper criterion for admission in a number of programs, use of a single standardized test score as a gatekeeper criterion in many programs, underrepresentation of black and Latino students in some programs, and widespread underrepresentation of LEP students and students with disabilities – the need for more stringent Department-imposed requirements and oversight is clear. The evidence strongly suggests violations of Title VI<sup>91</sup> and Section 504.

The inequities described above are aggravated by retention practices. Children admitted to gifted programs in kindergarten typically gain a *de facto* tenure through at least fifth grade. There is no year by year consideration as to whether there are other children who are significantly more qualified for the limited seats in the programs. Consequently, there are few if any openings in the elementary school grades and beyond.

Because of these retention practices, virtually excluded from the programs are: a) gifted children who recently moved into the City or the Community School District; b)

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newspapers written in languages other than English. In addition, less than a quarter of respondents indicated that they posted information about gifted programs at local community centers.

<sup>90</sup> *Id.* at Abstract.

<sup>91</sup> Particularly under the Title VI regulations' disparate impact standard.

gifted students seeking transfers from private and parochial schools; c) gifted children whose parents did not apply for admission for kindergarten placement; and d) gifted children who did not achieve the highest scores on IQ tests when they were four or five years old, but who later demonstrated superior abilities in the classroom and on tests.

This problem can be alleviated in several ways. Kindergarten programs can be eliminated, with resources shifted to the higher grades. For example, in the Spring of 1997, Community School Department 26 voted to change the entry level grade from kindergarten to grade one. Under the old system, initial admission to kindergarten was based solely on IQ scores. Under the new system, initial admission to grade one was based on a matrix of IQ scores, standardized academic achievement scores and teacher ratings.<sup>92</sup> Also, the programs could start out smaller for the youngest children, with resources shifted to add seats in later grades. For example, a district might start out with 50 places in first grade and end up with 75 places in fifth grade. Finally, fair and uniform retention policies can be implemented which result in the removal of lower achieving students from gifted programs to open places for students who can make better use of the special services.

## **Best Practices**

### **Definitions and Theories of Giftedness**

There is no single theory of giftedness.<sup>93</sup> In their 1994 report, “Towards a New Paradigm for Identifying Talent Potential,” Mary M. Fraiser and A. Henry Passow stated: “For decades, . . . a narrow definition of giftedness—one limited to intelligence,

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<sup>92</sup> Freedom of Information Law Response dated December 23, 1998, from DSD 26 to Arthur Block, Esq.

<sup>93</sup> Mary M. Fraiser and A. Harry Passow, *Towards a New Paradigm for Identifying Talent Potential* at 6, National Research Center on the Gifted and Talented, Research Monograph 94112 (1994).

academic aptitude, and academic achievement—guided identification procedures.”<sup>94</sup>

Fraiser and Passow asserted that, while the definition of giftedness had expanded since the 1970s, to take into account such things as creative thinking and leadership ability, a focus on academic aptitude still predominates.<sup>95</sup> The federal No Child Left Behind Act of 2001 defines gifted and talented students as those “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.”<sup>96</sup> Similarly, regulations enacted under New York’s Education Law state that gifted pupils “show evidence of high performance capability and exceptional potential in areas such as general intellectual ability, special academic aptitude and outstanding ability in visual and performing arts.”<sup>97</sup>

Researchers maintain that gifted children generally share certain characteristics including the ability to develop and express original ideas and insights, think logically, and act independently.<sup>98</sup> Gifted students often have very well developed memories and advanced language, reading, comprehension, and leadership skills.<sup>99</sup> Dr. Joseph S. Renzulli, Director of the National Research Center on the Gifted and Talented notes that research in the field has distinguished “schoolhouse giftedness,” which is defined as “test-taking or lesson-learning giftedness,” from “creative-productive giftedness,” which describes “those aspects of human activity and involvement where a premium is placed

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<sup>94</sup> *Id.* at 9.

<sup>95</sup> *Id.*

<sup>96</sup> P.L. 107-110, 115 Stat. 1425, § 9101(22) (2002).

<sup>97</sup> 8 N.Y.C.R.R. § 142.2.

<sup>98</sup> Fraiser and Passow, *supra* note 93 at 47.

<sup>99</sup> *Id.*

on the development of original material and products that are purposefully designed to have an impact on one or more target audiences.”<sup>100</sup> Renzulli further distinguishes the concept of “gifted” from that of “potentially gifted.”<sup>101</sup> He states:

The general approach to the study of gifted persons could easily lead the casual reader to believe that giftedness is a condition that is magically bestowed on a person in much the same way that nature endows us with blue eyes, red hair, or a dark complexion. This position is *not* supported by the research. Rather, what the research clearly and unequivocally tells us is that *giftedness can be developed* in some people if an appropriate interaction takes place between a person, his or her environment, and a particular area of human endeavor. . . . Implicit in this concept of the potentially gifted, then, is the idea that giftedness emerges or “comes out” at different times and under different circumstances. Without such an approach there would be no hope whatsoever of identifying bright underachievers, students from disadvantaged backgrounds, or any other special population that is not easily identified through traditional testing procedures.<sup>102</sup>

(Emphasis in original).

Evolving definitions of giftedness also include multicultural perspectives in an attempt to focus on traits that are valued among different cultural and economic groups.<sup>103</sup> For example, Jaime A. Castellano points out that certain characteristics are common among gifted Hispanic-American children, including the ability to learn English quickly once exposed to the language, leadership ability, intelligent risk-taking behavior, and acceptance of responsibility normally reserved for older children.<sup>104</sup> Moreover, it is

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<sup>100</sup> Joseph N. Renzulli, *The Three-Ring Conception of Giftedness* at 4-5, The National Research Center on the Gifted and Talented, University of Connecticut (1998), available at <http://www.sp.uconn.edu/~nrcgt/sem/semart13.html>.

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.*

<sup>103</sup> Fraiser and Passow, *supra* note 93 at 11.

<sup>104</sup> Jaime A. Castellano, *Identifying and Assessing Gifted and Talented Bilingual Hispanic Students* at 2 (1998) ERIC Digest 423104, available at [http://www.ed.gov/databases/ERIC\\_Digests/ed423104.html](http://www.ed.gov/databases/ERIC_Digests/ed423104.html).

quite possible for a student to be both disabled and gifted.<sup>105</sup> Often students' disabilities conceal their giftedness and these students are never recognized for their talents.<sup>106</sup> In fact, gifted children with disabilities are one of the most unrecognized and underserved groups of gifted students in the United States.<sup>107</sup>

### **Dissemination of Information About Gifted Students and Point of Entry**

Information about gifted programs should be widely distributed and easily available. For example, parents of children with disabilities should receive information about gifted programs through the Committees on Special Education, which are charged with recommending classroom placement in the special education system. In addition, information about gifted programs should be provided in languages other than English.

By contrast, studies have shown that access to information about gifted programs in New York City remains problematic for minority and non-English speaking families.<sup>108</sup> The ACORN Reports found that the methods of disseminating information about specialized programs and schools failed to reach parents and students of color to the same extent as white parents and students.<sup>109</sup> In addition, problems arise when, as in New York City, some school districts require parents to apply for a position in a gifted program prior to kindergarten. In many cases, this effectively denies access to gifted programs to children whose parents do not learn about the programs until after their

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<sup>105</sup> ERIC Clearinghouse on Disabilities and Gifted Education, GT-Disable FAQ (updated March 2001), available at <http://www.ericec.org/faq/gt-disab.html>.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Advocates for Children, *AFC-Resources*, available at <http://www.advocatesforchildren.org/resource/gifted.php3>.

<sup>109</sup> New York ACORN Schools Office, *Secret Apartheid: A Report on Racial Discrimination Against Black and Latino Parents and Children in the New York City Public Schools* at 2, available at <http://www.acorn.org/ACORNarchives/studies/secretapartheid/text.html>.

children have entered school, as well as those children who thrive after one or more years of development in a regular education classroom.

### **Identification of Gifted Students**

Sole criterion identification procedures generally use scores on standardized tests, such as IQ tests, to determine which students qualify for gifted programs. Renzulli argues that, in light of the recognition of multiple theories of intelligence and giftedness, the use of single scores alone will always be a questionable identification method.<sup>110</sup> In addition, critics argue that these tests are culturally biased.<sup>111</sup>

Multiple criteria procedures often include “culture-free” tests or require educators to analyze traditional tests for cultural bias.<sup>112</sup> Non-verbal tests may be administered to reduce bias against Limited English Proficiency (“LEP”) students and tests may be given in languages other than English.<sup>113</sup> Educators also review students’ performances in school activities, examine work samples, and accept input from teachers, students, parents, and community members. An example of this approach is Renzulli’s Total Talent Portfolio, which reviews: (1) a student’s abilities as shown through: (a) scores on standardized and teacher-made tests; (b) evaluations and grades; and (c) levels of participation and interaction with others; (2) areas of interest; and (3) style preferences, including a student’s preferred: (a) method of instruction; (b) learning environment; (c)

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<sup>110</sup> Renzulli, *supra* note 100 at 3.

<sup>111</sup> Fraiser and Passow, *supra* note 93 at 13-17.

<sup>112</sup> *Id.* at 14.

<sup>113</sup> Patrick Alexander and Amy Kleitman, Advocates for Children, Inc., *Gifted Education in New York City* at 49 (1998).



thinking style; and (d) method of expression.<sup>114</sup> The Total Talent Portfolio also focuses on how a student reacts to learning experiences.<sup>115</sup>

Checklists and rating scales have been developed, which focus on the behaviors of gifted minority students and on LEP students.<sup>116</sup> For example, Castellano explains that many school districts serving gifted and talented bilingual Hispanic students use, *inter alia*, the following multiple criteria for screening and identification purposes:

(a) ethnographic assessment procedures (the student is observed in multiple contexts over time), (b) dynamic assessment (the student is given the opportunity to transfer newly acquired skills to novel situations), (c) portfolio assessment, (d) the use of test scores (performance based and/or nonverbal) in the native or English language (depending on the child's level of fluency), (e) teacher observation, (f) behavioral checklists, (g) past school performance, (h) parent interview, (i) writing samples and other samples of creativity and/or achievement, and (j) input from the cultural group with which the student identifies in the local school community.<sup>117</sup>

Another alternative to using standardized tests is assessment in the student's native language.<sup>118</sup>

With respect to students with disabilities, such children should be explicitly included in initial screenings for gifted programs.<sup>119</sup> Since students with disabilities are rarely identified, they are not included in most standardized testing norms, which compounds the problems with traditional gifted assessment procedures.<sup>120</sup> Therefore, evaluators should look beyond numerical test scores to more nontraditional signs of

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<sup>114</sup> Joseph S. Renzulli, *The Total Talent Portfolio: A Plan for Identifying and Developing Gifts and Talents* at 2-5. The National Research Center on the Gifted and Talented, University of Connecticut, available at <http://www.sp.uconn.edu/~nrcgt/sem/semart09.html>.

<sup>115</sup> *Id.*

<sup>116</sup> Fraiser and Passow, *supra* note 93 at 53-55.

<sup>117</sup> Castellano, *supra* note 104 at 2.

<sup>118</sup> Linda M. Cohen, *Meeting the Needs of Gifted and Talented Minority Language Students* at 3, available at [http://www.ed.gov/databases/ERIC\\_Digests/ed321485.html](http://www.ed.gov/databases/ERIC_Digests/ed321485.html).

<sup>119</sup> Colleen Willard-Holt, *Dual Exceptionalities*, ERIC EC Digest #E574 at 4 (May 1999), available at [http://www.ldonline.org/ld\\_indepth/gt\\_ld/ericE574.html](http://www.ldonline.org/ld_indepth/gt_ld/ericE574.html).

<sup>120</sup> *Id.* at 1.

intelligence.<sup>121</sup> Likewise, evaluators need to be aware that disabilities can depress certain scores.<sup>122</sup> Thus, with respect to scoring, separate subtest scores are often better measures of a child's strengths, than a total composite score.<sup>123</sup> It is also suggested that nonverbal intelligence tests and other nonverbal assessment measures help to lessen the unequal treatment of gifted disabled children.<sup>124</sup>

Gifted and talented programs do not always involve separating advanced students from other students. Inclusion, a very common model of gifted education, allows gifted students to remain in the general education classroom.

The two most common models of inclusion programs are differentiation and cluster-grouping.<sup>125</sup> In the differentiation model, curriculum goals are developed and students are given an opportunity to demonstrate their proficiency in a particular subject matter.<sup>126</sup> Once students demonstrate proficiency in a subject matter, through some type of assessment such as a pre-test, they can study the material in greater depth than the other students in the classroom.<sup>127</sup>

In the cluster-grouping model, three to five students of a significantly higher level are placed in the same classroom, rather than split between different classrooms of that same grade.<sup>128</sup> Lower-functioning students are split between the remaining classrooms,

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<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> ERIC Clearinghouse on Disabilities and Gifted Education, GT-Disable FAQ, *supra* note 92.

<sup>125</sup> Telephone Interview with Susannah Richards, Research Assistant, National Research Center on the Gifted and Talented, University of Connecticut, January 2, 2003.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

thereby tightening the range of the classroom in which the cluster-group is placed.<sup>129</sup> The cluster-group then works on assignments appropriate for their advanced level.<sup>130</sup>

Theories of giftedness and methods of gifted instruction can also be used to help every student develop individual talents and achieve his or her maximum potential. In the Schoolwide Enrichment Model (“SEM”), students are provided a broad range of services “from general enrichment for all students, to highly specialized grouping arrangements, advanced courses, supplementary programs in and out of school, and even special schools and summer programs on college campuses.”<sup>131</sup> The SEM does not eliminate the need for special programs for highly gifted students, however.<sup>132</sup>

The process of identifying gifted students using all of the best practices described above can be expensive and burdensome. Consideration should be given to available resources in determining the appropriate mix of practices to ensure nondiscriminatory identification.

### **Conclusion and Recommendations**

It is possible to maintain high standards for gifted programs while also providing greater equity and access to under-represented groups of students. The Department, with input from OCR and relevant stakeholders, should move quickly toward the

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> Joseph S. Renzulli, *What is This Thing Called Giftedness, and How Do We Develop It? A Twenty-Five Year Perspective* at 24. The National Research Center on the Gifted and Talented, University of Connecticut, available at [www.sp.uconn.edu/~nrcgt/sem/semart14.htm](http://www.sp.uconn.edu/~nrcgt/sem/semart14.htm).

implementation of Chancellor's regulations governing the operation of gifted programs.

At a minimum, the Chancellor's regulations should cover the following areas:

- Clear, effective communication to parents, in the parent's native or primary language (or via an equally effective mode of communication), regarding the range of gifted programs in Department schools, their respective eligibility criteria, areas of focus, and ages of entry.
- Eligibility requirements that consist of multiple, age-appropriate criteria, with the criteria designed to actually measure the potential skills or talents that the program seeks to foster, including, but not limited to areas such as achievement, mental ability, creativity, and motivation.
- A prohibition on the use of a single test as a gatekeeper or sole criterion, and a focus on multiple paths to eligibility.
- Systematic, annual data collection and analysis,<sup>133</sup> including information for each program regarding applicants, students admitted, matriculants, and persistence/

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<sup>132</sup> See Richards Interview, *supra* note 125.

<sup>133</sup> The Department's ability to collect basic data about gifted programs from individual school districts is by no means certain, though its authority to do so is clear. The third Department report implicitly acknowledged this problem when describing the lengths that Department staff had to go to merely to collect survey responses from districts:

One month after the deadline DAA [the Department's Division of Assessment and Accountability] set for respondents to return the surveys, DAA compiled a list of districts that did not submit surveys and who failed to provide an explanation for not submitting at least one survey. DAA called these districts and reminded them to complete the surveys and, in some instances, DAA faxed additional surveys to districts. After waiting another few weeks and having received surveys from several additional districts, DAA provided a revised list, to the legal department at the BOE, of districts that did not respond to requests for information. At this point, the legal department at the BOE intervened and contacted the remaining districts and DAA made a second round of phone calls to districts. District offices that were still unresponsive were contacted until they provided the requested information.

Third Department Report at 2. These difficulties suggest that persistence in data collection must be accompanied by penalties for nonresponsive districts.

discontinuance, disaggregated by grade level or age, race/ethnicity, LEP status, disability status, and gender.

- An increased focus on part-time and “push-in” as opposed to self-contained or “pull-out” models, allowing greater opportunities for heterogeneous instruction and the modeling of gifted education best practices (including high student expectations and challenging learning standards) to the entire student population.<sup>134</sup>
- Mandated non-discriminatory access for LEP and special education students, with the creation of dual language gifted programs (serving both English-speaking and LEP students) and guidelines for the provision of testing and program accommodations for students with disabilities, and for testing in primary or home language for LEP students.
- Training of Committees on Special Education to ensure that gifted programs are considered as placement options for special education students when appropriate.
- Procedures for scrutiny by the Department of programs that show significant disproportion in applicants, admitted students, or enrollees for particular demographic groups, and procedures for effective intervention by the Department in districts and schools that violate the Chancellor’s regulations.

The recently announced changes in governance and structure for the Department, in which the policy-making roles of local school boards is significantly diminished, should better enable the Department to effectively implement these proposals. Enough reports have been issued, and more than enough years have passed, to warrant prompt action by

the Department and OCR to ensure that our gifted programs are consistent with the goal of nondiscrimination.

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<sup>134</sup> This emphasis would also serve to reduce the degree in within-school segregation created by some programs. *See infra* at 13-14. The third Department report noted that more than three quarters of the City's public gifted programs are full-day, self-contained programs. Third Department Report at 9.

## APPENDIX

### **Model Gifted Programs**

In preparing this Report, the Committee examined efforts in other jurisdictions to improve gifted program oversight. Below, we summarize key features of gifted education reforms implemented in the late 1990s in Georgia and Alabama. With public education systems comparable in size to New York City's, these two states provide good examples of efforts to ensure nondiscrimination in public gifted programs.

Prior to 1997, eligibility for gifted programs throughout Georgia was based solely on standardized test scores, predominantly IQ scores.<sup>135</sup> From kindergarten to second grade, students could qualify for gifted programs only by scoring in the 99<sup>th</sup> percentile on a standardized test of mental ability.<sup>136</sup> In grades three through twelve, students could qualify only by scoring in the 99<sup>th</sup> percentile on a standardized test of mental ability or in the 96<sup>th</sup> percentile on a standardized test of mental ability and the 90<sup>th</sup> percentile in "Total Reading or Total Math or the 85<sup>th</sup> [percentile] on the Total Battery of a standardized achievement test."<sup>137</sup>

Through regulations enacted in 1995 and effective since 1997, Georgia revised its requirements governing gifted programs.<sup>138</sup> Under Georgia's current gifted standards, school districts must notify parents or guardians of, *inter alia*, "[t]he gifted education program operated by the local school system, referral procedures and eligibility requirements"; "[i]nitial consideration of a student for gifted education services; and "[t]he student's eligibility status after an evaluation at which time the parents or

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<sup>135</sup> Email interview with Dr. Sally C. Krisel, Gifted Education Specialist, Georgia Department of Education, May 14, 2002.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

guardians shall be afforded an opportunity for a conference to discuss student eligibility criteria and placement.”<sup>139</sup> Students may be referred for consideration in gifted programs “by teachers, counselors, administrators, parents or guardians, peers, self and other individuals with knowledge of the student’s abilities.”<sup>140</sup> There is also an automatic referral procedure for students who score at set levels, designated by school districts, on a “norm referenced test.”<sup>141</sup>

Students may qualify for gifted services in two ways.<sup>142</sup> First, a student may qualify on the basis of mental ability and achievement assessment results.<sup>143</sup> A student must achieve a composite mental ability test score in the 99<sup>th</sup> percentile for students in kindergarten through second grade and in the 96<sup>th</sup> percentile for students in the third through twelfth grades.<sup>144</sup> They must also score in the 90<sup>th</sup> percentile on the “total battery, total math or total reading section(s)” of standardized achievement tests, or they must produce a superior product or performance.<sup>145</sup> A student may also qualify for gifted programs by meeting the standards in any three of the following four categories: mental ability, achievement, creativity, and motivation, “at least one of which must be on a nationally-normed standardized test.”<sup>146</sup>

Finally, local Departments of education must “collect and maintain statistical data on the number of students’ referred for evaluation of eligibility for gifted education

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<sup>138</sup> *Id.*

<sup>139</sup> GA Comp. R. & Regs. § 160-4-2-.38(2)(a).

<sup>140</sup> GA Comp. R. & Regs. § 160-4-2.38(2)(b)(1).

<sup>141</sup> GA Comp. R. & Regs. § 160-4-2-.38(2)(b)(2).

<sup>142</sup> GA Comp. R. & Regs. § 160-4-2-.38(2)(e)(1).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*; see Georgia Department of Education, Gifted Education, *Frequently Asked Questions About Gifted Education* at 2, available at <http://www.doe.k12.ga.us/sla/gifted/faq.html>.

<sup>146</sup> *Id.*



services, the number of students determined eligible for services, and the number of students actually served during the school year.”<sup>147</sup> The data must be kept by “grade level, gender, and ethnic group of the students.”<sup>148</sup> The Georgia Department of Education also evaluates the effectiveness of gifted programs every three years.<sup>149</sup>

According to Dr. Sally C. Krisel, Gifted Education Specialist at the Georgia Department of Education, since 1997, the overall gifted population has increased from 4.5% to 6.5% of Georgia’s students in kindergarten through twelfth grades.<sup>150</sup> There has been a 135% increase and a 193% increase in the numbers of African-American students and Hispanic students, respectively.<sup>151</sup> The increase of students with an ESOL designation has also been substantial.<sup>152</sup>

According to Linda Grill, Education Specialist at the Alabama Department of Education, eligibility for gifted programs in Alabama also used to be determined solely by IQ scores.<sup>153</sup> Through some initial changes made in 1996 and regulations enacted in 1999, the standards governing gifted programs were amended.<sup>154</sup> In kindergarten through twelfth grade, students may be referred for evaluation “by teachers, counselors, administrators, parents or guardians, peers, self, and other individuals with knowledge of the students abilities.”<sup>155</sup> However, in second grade, teachers consider all students for eligibility in gifted programs.<sup>156</sup>

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<sup>147</sup> GA Comp. R. & Regs. § 160-4-2-.38(2)(f)(1).

<sup>148</sup> *Id.*

<sup>149</sup> GA Comp. R. & Regs. § 160-4-2-.38(2)(f)(2).

<sup>150</sup> See Krisel Interview, *supra* note 135.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Telephone Interview with Linda Grill, Education Specialist, Alabama Department of Education, May 21, 2002.

<sup>154</sup> *Id.*; see Ala. Admin. Code r. 290-8-9-.14.

<sup>155</sup> See Ala. Admin. Code r. 290-8-9-.14(2)(b).

<sup>156</sup> See Ala. Admin. Code r. 290-8-9-.14(2)(a).

All school districts must establish Gifted Referrals Screening Teams ("GRST"), which "should consist of at least three individuals including someone knowledgeable about the student and someone knowledgeable about gifted education."<sup>157</sup> In some school districts the GRST processes referral information, while in others it conducts additional screening.<sup>158</sup> Students are then considered for gifted programs by Eligibility Determination Teams which "should consist of at least three individuals including someone knowledgeable about the student being assessed, someone knowledgeable about gifted students in general, and someone able to interpret the assessment information gathered."<sup>159</sup>

A student may qualify for gifted programs in Alabama in two ways. First, a student is automatically eligible for gifted services if: (1) "[t]he obtained full scale/composite IQ score on an individually administered test of intelligence . . . is two standard deviations above the mean or higher"; or (2) [e]ither the Verbal Average Standard score of Figural Creativity Index of the Torrance Tests of Creative Thinking is at or above the 97<sup>th</sup> national percentile."<sup>160</sup> Students who are not automatically eligible may still qualify for gifted programs based on a "matrix of multiple criteria," comprised of the following categories: (1) aptitude; (2) performance; and (3) characteristics.<sup>161</sup> "Aptitude" is based on "an individual or group test of intelligence or creativity," while "characteristics" consists of "a behavior rating scale designed to assess gifted

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<sup>157</sup> See Ala. Admin. Code r. 290-8-9-.14(2)(c).

<sup>158</sup> See Grill Interview, *supra* note 153.

<sup>159</sup> See Ala. Admin. Code r. 290-8-9-.14(5).

<sup>160</sup> See Ala. Admin. Code r. 290-8-9-.14(5)(c).

<sup>161</sup> See Ala. Admin. Code r. 290-8-9-.14(5)(d).

behaviors."<sup>162</sup> With respect to "performance," school districts consider things such as portfolios, work samples, grades, and leadership and motivation.<sup>163</sup>

School districts must gather information "to determine if there are any environmental, cultural, economic, language differences, or a disabling condition that might mask a student's true abilities," and districts are directed to select tests and evaluative materials that are "sensitive to cultural, economic, and linguistic differences."<sup>164</sup> Finally, "[f]or special populations such as the sensory impaired, LEP, or physically impaired, assessments must be appropriate for their special needs."<sup>165</sup>

School districts must submit child count data by race and grade to the Alabama Department of Education each year and the Department of Education compiles data to determine the standards being used for assessment.<sup>166</sup> In 1996, 8.61% of Alabama's gifted students were African-American and .35% were Hispanic.<sup>167</sup> In 2001, 13.74% of gifted students were African-American and .73% were Hispanic.<sup>168</sup>

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<sup>162</sup> See Ala. Admin. Code r. 290-8-9-.14(4)(a)(2), (4).

<sup>163</sup> See Ala. Admin. Code r. 290-8-9-.14(4)(3).

<sup>164</sup> See Ala. Admin. Code r. 290-8-9-.14(4)(a)(5), (b).

<sup>165</sup> See Ala. Admin. Code r. 290-8-9-.14(4)(c).

<sup>166</sup> See Grill Interview, *supra* note 153; see also Revised Monitoring Procedures for Gifted Education Programs 2001-2002, available at

<http://www.alsde.edu/html/sections/documents.asp?section=65&sort=8&footer=sections>.

<sup>167</sup> See State of Alabama, Department of Education, *Special Education Tracking System, Racial Representation in the Gifted Program - State Totals*, April 23, 2002.

<sup>168</sup> *Id.*

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\* Member of Subcommittee which drafted Report

\*\* Abstained from vote on Report

April 2003

