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No "Gift" Giving Here: The Inadequate Gifted Education Programs in New York State and the Need for Gifted Education Reform

Jamie M. Kautz

NO "GIFT" GIVING HERE: THE INADEQUATE GIFTED EDUCATION PROGRAMS IN NEW YORK STATE AND THE NEED FOR GIFTED EDUCATION REFORM

*Jamie M. Kautz**

Gifted Education is a topic that is often not at the forefront of educational issues throughout federal and state discussions and legislative actions. However, while there are a large number of students in classrooms across the country who are "gifted," the number of individual states with comprehensive gifted programs within their public school districts is small. As a result, gifted programming is limited and gifted students are not guaranteed any sort of academic assistance beyond that of a standard classroom curriculum for their designated grade levels. More importantly, in the majority of states, including New York, the legal protections offered to gifted students are extremely limited, translating to the reality that those students are sitting in classrooms unengaged for years. Eventually, many gifted students are no longer within the four walls of the classroom because they have resorted to dropping out of school all together.

This Note argues that New York's current laws covering gifted education are inadequate and need to be reformed in order to adequately protect gifted students within the state. A proposal is made for New York to amend its laws and follow the Pennsylvania approach to gifted education. The Pennsylvania model mandates the implementation of a Gifted Individualized Education Program as well as the requirement that all public school districts within the state maintain gifted programs for students in kindergarten through twelfth grade. This amendment to the law would help ensure that gifted students in New York receive educational services tailored to their individualized learning needs. It will also afford adequate legal recourse to help guarantee that such gifted services are provided, much like the protections afforded to special education students in the state and nationwide.

INTRODUCTION

Most parents want their child to do well in school, but far too often, parents receive calls that their child is having trouble in the classroom and in social circles. Your child may display "inconsistent classroom performance and distracting behaviors,"[1] but not the typical signs of a learning disability. Or, maybe your child is like "Mike," a fourth grader with suffering grades, who is uninterested in school and often teased by his peers for his "overreactions."[2] These are typical signs of giftedness, which are often overlooked in setting appropriate educational goals. While some school districts offer gifted education programs, the reality is that far too many do not. Moreover, the screening policies implemented by these district programs have proven ineffective as children are often overlooked for a gifted education evaluation because they do not display the traditional "high-achieving, cooperative, wunderkind image that some teachers look for[.]"[3] Without appropriate programs, gifted children generally continue to struggle through their adolescent years unless the parents advocate on their behalf.[4] However, depending on the state you live in, advocating for your child may not be as simple as placing a few phone calls to the school office.

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* J.D. Candidate, Brooklyn Law School, 2018; B.S. in Secondary Education - English and Communications, The Pennsylvania State University, 2013. I would like to thank my husband, Scott Robinson, for your continuous support and reassurance throughout law school, my family for always encouraging me and supporting me, and to all of the members of the *Journal of Law and Policy* for your recommendations and assistance with this Note.

[1] Centennial Sch. Dist. v. Commonwealth Dep't of Educ., 539 A.2d 785, 787 (Pa. 1988).

[2] David Palmer, *Is Your Child Gifted? What to Look for and Why You Should Know . . .* , PSYCHOL. TODAY (May 1, 2011), https://www.psychologytoday.com/blog/gifted-kids/201105/is-your-child-gifted-what-look-and-why-you-should-know.

[3] *Id.*

[4] *See* Ann Lupkowski-Shoplik, *Tips for Parents: Advocacy – Working with Your Child's School*, DAVIDSON INST. (2015), http://www.davidsongifted.org/Search-Database/entry/A10558.

It turns out that Mike and many students like him test in the "Gifted IQ" range,[5] and certain classroom behaviors are the result of boredom or remaining unchallenged.[6] Gifted students are diverse and do not necessarily fit into the prototypical mold of the "smart kid" formed by society.[7] The National Association for Gifted Children[8] describes the diversity of gifted children in the following statement:

> Gifted children may develop asynchronously: their minds are often ahead of their physical growth, and specific cognitive and social-emotional functions can develop unevenly. Some gifted children with exceptional aptitude may not demonstrate outstanding levels of achievement due to environmental circumstances such as limited opportunities to learn as a result of poverty, discrimination, or cultural barriers; due to physical or learning disabilities; or due to motivational or emotional problems. This dichotomy between potential for and demonstrated achievement has implications for schools as they design programs and services for gifted students.[9]

Unfortunately, "little has been done under federal or state laws to ensure the education rights of the 6.7% of American students,

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[5] *See* Eleanor Munson, *The Five Levels of Giftedness*, ELEANOR MUNSON, PHD (Jan. 30, 2011), http://eleanormunsonphd.com/2011/01/the-five-levels-of-giftedness/ (explaining that the range required for a child to be classified as gifted is an IQ level between 120–140+, typically measured by the Wechsler tests).

[6] *See* Palmer, *supra* note 2.

[7] For the purposes of this note, gifted students are defined as, "those who demonstrate outstanding levels of aptitude . . . or competence . . . in one or more domains [which] include any structured area of activity[.]" *Definitions of Giftedness*, NAT'L ASS'N FOR GIFTED CHILD., http://www.nagc.org/resources-publications/resources/definitions-giftedness (last visited Aug. 8, 2017).

[8] The National Association for Gifted Children provides support, guidance, and state by state resources to parents, families, and educators about gifted education programs and supports throughout the United States. *Who We Are*, NAT'L ASS'N FOR GIFTED CHILD., https://www.nagc.org/about-nagc/who-we-are (last visited Aug. 8, 2017).

[9] *Definitions of Giftedness*, *supra* note 7.

regardless of race, who are identified as gifted[.]"[10] Adding to this problem is the fact that many gifted children remain unidentified,[11] and even those who are identified do not enjoy the benefit of legally protected gifted education in the majority of states.[12] New York is part of that majority,[13] and while it is mandated to protect special education[14] students under the Individuals with Disabilities Education Act ("IDEA"),[15] no such protections exist for gifted education students. Under the IDEA, states are required to provide a Free Appropriate Public Education ("FAPE")[16] and implement an Individualized Education Program ("IEP")[17] for students with a classified disability. These mandates help ensure that those students

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[10] Donna Y. Ford & Charles J. Russo, *No Child Left Behind . . . Unless a Student is Gifted and of Color: Reflections on the Need to Meet the Educational Needs of the Gifted*, 15 J. L. SOC'Y 213, 214 (2014).

[11] *See* Palmer, *supra* note 2.

[12] *See Gifted Education Mandates, By State or Province*, HOAGIE'S GIFTED EDUC. PAGE, http://www.hoagiesgifted.org/mandates.htm (last updated Feb. 1, 2017) [hereinafter *Gifted Education Mandates*].

[13] *See id.*

[14] 20 U.S.C. § 1401(29) (2015) (defining, in subsection 29, special education as, "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education").

[15] Individuals with Disabilities Education Act, 20 U.S.C. §1400 (2010).

[16] *See id.*; The Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701 (2010); *see also Free Appropriate Public Education for Students With Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC. (Aug. 2010), http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html ("The Section 504 regulation requires a school district to provide a 'free appropriate public education' (FAPE) to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability.").

[17] U.S. DEP'T. OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (Lisa Kupper ed., 2000), https://www2.ed.gov/parents/needs/speced/iepguide/iepguide.pdf ("Each public school child who receives special education and related services must have an Individualized Education Program (IEP). Each IEP must be designed for one student and must be a truly *individualized* document. The IEP creates an opportunity for teachers, parents, school administrators, related services personnel, and students (when appropriate) to work together to improve educational results for children with disabilities. The IEP is the cornerstone of a quality education for each child with a disability.").

who qualify for special education are taught through specialized programs and techniques, tailored to their individual learning needs.[18] Unfortunately for students who classify as gifted and have equally unique learning needs, there are no universally mandated legal protections.[19]

This Note calls for the New York State legislature to amend Section 4452 of the New York Education Law,[20] which currently governs education programs in New York, to require that those students identified as "Gifted and Talented"[21] within the state be entitled to two key things: (1) a gifted education program within their school district and (2) a gifted IEP[22] to better protect their educational interests. These modifications are essential to ensure that gifted and talented students receive appropriate educational services, tailored to their specific needs, within New York public school systems.

Part I of this Note provides a general overview of the laws governing special and gifted education issues, both at the federal level and in New York. This Part first outlines the history of special education law in the United States, briefly examines the current state of special education law, and then compares it to the current state of gifted education protections at the federal level. It then introduces the relevant New York law governing gifted education and provides an overview of gifted education within the state. Part II explains the significance of a Gifted Individualized Education Program ("GIEP"),[23] which is mandated in states like Pennsylvania, but is not

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[18] *See id.*; *see also Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of The Rehabilitation Act of 1973*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html (last modified Aug. 2010) [hereinafter *FAPE for Students with Disabilities*] (discussing FAPE and the requirement that a school district must provide appropriate education to qualified persons with disabilities).

[19] *See Gifted Education Mandates*, *supra* note 12.

[20] N.Y. EDUC. LAW § 4452 (McKinney 1997).

[21] *Gifted and Talented*, N.Y. ST. EDUC. DEP'T, http://www.p12.nysed.gov/ciai/gt/define.html (last updated June 1, 2009) [hereinafter *NYSED Gifted and Talented*].

[22] Todd McIntyre & Wayne Mery, *Parent's Unofficial Guide to Gifted IEPs and Gifted IEP Meetings*, HOAGIE'S GIFTED EDUC. PAGE, http://www.hoagiesgifted.org/unofficial_guide.htm (last visited Aug. 8, 2017).

[23] 22 PA. CODE §§ 16.31–16.33 (2008).

available in the majority of states, including New York.[24] This Part also identifies those states that have more developed legal protections for gifted students and surveys some of the protections they provide to their students. Part III highlights the problems with New York's current system for gifted education, including the lack of gifted programs, the lengthy evaluation process, and the failure to provide an GIEP for its gifted students. Finally, Part IV offers a solution for New York's inadequate gifted education programs. This part proposes legislative action, modeled after Pennsylvania's successful approach, [25] mandating gifted and talented education programs throughout every district within the state, as well as the implementation of GIEP's for all students identified as gifted within the state.

I. THE PUBLIC EDUCATION SYSTEM AND LEGAL PROTECTIONS

In addressing the issue of gifted education, it is important to distinguish between protections for students at the federal level and at the state level, in order to demonstrate how in the absence of federal protections, New York fails to do anything further to protect its gifted student population. To understand the lack of protections at the federal level, it is essential to briefly discuss the history and current state of education laws in the United States, particularly as they pertain to special education and gifted education. Because decisions about education are largely left up to individual states, an examination of the current New York law as it applies to gifted education is also relevant and will lend to the discussion about the need for legal reform.[26]

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[24] *See Gifted Education Mandates*, *supra* note 12.

[25] *See generally* 22 PA. CODE §§ 16.3–16.7, 16.21–16.23, 16.31–33 (2008) (establishing the requirements for education of gifted children).

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

A. Federal Protections for Education and the History Behind Them

The federal government implements some laws to protect students,[27] but those protections are not sufficient. The recently enacted Every Student Succeeds Act ("ESSA")[28] was passed during President Obama's administration to help fix the unworkable No Child Left Behind Act ("NCLB").[29] Two important goals of the ESSA are to help ensure that "critical protections for America's disadvantaged and high-need students" are in place, and "that all students in America be taught to high academic standards that will prepare them to succeed in college and careers."[30] The goal of protecting those students who are "disadvantaged and high-need" is broad, and can extend to all students, including gifted children.[31] However, the federal government has failed to meet ESSA's mandates. By failing to enact further legislation to protect gifted students by requiring IEPs and services as they do for special education students, the federal government has been unsuccessful in fully promoting these goals.[32] Additionally, it appears that gifted mandates are left up to states because "the judiciary remains reluctant to grant children who are gifted rights to educational programming exceeding what is available to general student populations,"[33] even though gifted students have a variety of needs that are quite different from those of general education students.[34] Therefore, overlooking the rights of gifted students seems to be a

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[27] *See Laws & Guidance*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/landing.jhtml?src=pn (last visited Aug. 8, 2017).

[28] Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015) (codified as amended in 20 U.S.C. §§ 6301–6311).

[29] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in 20 U.S.C. §§ 6301–6311); *see* Siemer, *supra* note 26, at 548, 552–56.

[30] *See Every Student Succeeds Act (ESSA)*, U.S. DEP'T OF EDUC., http://www.ed.gov/essa?src=rn (last visited Aug. 8, 2017).

[31] *Id.*

[32] *See Gifted Education in the U.S.*, NAT'L ASS'N FOR GIFTED CHILD., https://www.nagc.org/resources-publications/resources/gifted-education-us (last visited Aug. 8, 2017).

[33] Ford & Russo, *supra* note 10, at 222.

[34] *Definitions of Giftedness*, *supra* note 7.

violation of the government's own policy under the ESSA's mandate to educate *all* students according to proper academic standards.

The discrepancy that exists between the protections afforded at the federal level between special and gifted education students, groups who share equally unique learning needs, is hard to ignore.[35] In 1975, Congress passed the Education of the Handicapped Act,[36] later renamed the Individuals with Disabilities Education Act ("IDEA"),[37] which sought to end discrimination against disabled students through special education programs that ensure, "that children with disabilities have the opportunity to receive a free, appropriate public education,"[38] otherwise known as FAPE.[39] As the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley* declared, "a 'free appropriate public education' is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction."[40] The IDEA requires an IEP for each qualified student with a disability in order to implement FAPE.[41] No such accommodations exist for gifted students, thus demonstrating a large discrepancy between the way in which the federal government views the importance of education for gifted students in comparison to disabled students.

The IEP remains one of the most crucial legal documents in special education and is mandated in every state by the IDEA for

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[35] Perry A. Zirkel, *Gifted Education*, NAT'L ASS'N ELEMENTARY SCH. PRINCIPALS 57, 57–59 (2009), https://www.naesp.org/resources/2/Principal/2009/M-J_p57.pdf.

[36] Education For All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975).

[37] Individuals with Disabilities Education Act, 20 U.S.C. §1400 (2010).

[38] *IDEA – The Individuals with Disabilities Education Act*, CTR. FOR PARENT INFO. & RESOURCES, http://www.parentcenterhub.org/repository/idea/ (last updated May 2014).

[39] The Rehabilitation Act of 1973 § 504, 29 U.S.C. § 701 (2010); *see FAPE for Students with Disabilities*, *supra* note 18.

[40] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188–89 (1982).

[41] *See FAPE for Students with Disabilities*, *supra* note 18.

students receiving special education services.[42] After it is determined that a student has a disability under the IDEA, parents, teachers, administrators, and sometimes lawyers meet to develop the IEP and ensure that the child is receiving adequate services and an education individually tailored to his or her learning needs.[43] The IEP is a written document containing vital information about the child's learning needs, including: "the child's present levels of academic achievement and functional performance, statement of measurable annual goals, including academic and functional goals, related services and supplementary aids, [and] individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments."[44] The IEP must also be updated at least one time per year to remain compliant with the IDEA mandates.[45] Furthermore, if at any point a parent is unhappy with his or her child's IEP, he or she has "the legal right to call an IEP meeting at any time," even if the yearly review has already been conducted.[46]

Parents also retain the right to challenge the IEP's validity and whether the district followed proper procedures in developing the IEP in court, claiming a denial of FAPE.[47] Parents are entitled to request a due process hearing where the issue is presented to an administrative hearing officer, whose decision can be appealed all the way up to the Supreme Court of the United States, if necessary.[48]

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[42] *See* U.S. DEPT. OF EDUC., *supra* note 17.

[43] *Id.*

[44] U.S. DEP'T. OF EDUC., IDEA REGULATIONS: INDIVIDUALIZED EDUCATION PROGRAM 1–2 (Oct. 4, 2006), http://idea-b.ed.gov/uploads/IEP_10-4-06.pdf.

[45] *Id.*

[46] Kristin Stanberry, *Understanding Individualized Education Programs*, UNDERSTOOD, https://www.understood.org/en/school-learning/special-services/ieps/understanding-individualized-education-programs (last visited Aug. 8, 2017).

[47] *See* Robert C. Thurston, *Making a Complaint about Your Child's Special Education*, SPECIAL EDUC. GUIDE (Dec. 5, 2013), http://www.specialeducationguide.com/blog/making-a-complaint-about-your-childs-special-education/.

[48] *Understanding IEP Due Process*, UNDERSTANDINGSPECIALEDUCATION.COM, http://www.understandingspecialeducation.com/IEP-due-process.html (last updated 2016).

Parents whose children have experienced a violation of the IEP are able to seek tuition reimbursement for their decision to unilaterally place the child in a private school setting that they believe is better suited to manage the child's individualized educational needs than their home school district.[49] In this situation, the administrative hearing officer will review the IEP and circumstances of the case utilizing a three-part test developed from two key Supreme Court special education cases, *School Community of the Town of Burlington v. Department of Education of Massachusetts* and *Florence County School District Four v. Carter*.[50] If the hearing officer determines that the school did not meet its obligations under the IDEA, including providing FAPE, and the parents' unilateral placement was appropriate, then the child is permitted to attend the school selected by the parent, at the expense of the state.[51] This, in turn, helps to ensure that school districts are providing adequate services for special education students and are complying with the mandates set forth by the IDEA. However, while the implementation of the IDEA and IEP proved groundbreaking for special education students, the IDEA did not extend any protections to gifted students, unless those students also had a classified disability under the IDEA.[52]

Furthermore, the laws regarding special education continue to evolve and improve to provide legal protections to special education students. For example, the Supreme Court vacated and remanded

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[49] *See* Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 369–70 (1985) (holding that the IDEA allows a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act.").

[50] *See* Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 11–16 (1993) (establishing a three-part inquiry for tuition reimbursement which considers the following questions: (1) Was a "free appropriate public education" provided by the school district through the IEP, (2) Was the parental placement appropriate under the IDEA, was "it reasonably calculated to enable the child to receive educational benefits", and (3) a consideration of the equities and fairness); *Sch. Comm. of Burlington*, 471 U.S. at 374; Perry A. Zirkel, *Tuition Reimbursement for Special Education Students*, 7 FUTURE CHILD. 122, 124 (1997).

[51] *See Sch. Comm. of Burlington*, 471 U.S. at 369–70.

[52] *See* Zirkel, *Gifted Education*, *supra* note 35, at 57–59.

Endrew F. v. Douglas County School District on March 22, 2017.[53] In the unanimous decision led by Chief Justice Roberts, the Court clarified that the educational benefit afforded to disabled students from their educational services, must be "more demanding than the 'merely more *de minimis*' test," in order to provide them with FAPE.[54] This decision widens the gap between the protections afforded to special education students and gifted students, and while the future looks promising for special education, gifted education in the United States is much less progressive.[55]

The lack of federal protections for gifted students poses challenges for students because without adequate services, gifted students "become bored, drop out, or do not reach their full potential because they are not sufficiently challenged by existing programming."[56] The absence of federal laws to guarantee these services leaves much discretion up to each state with respect to providing gifted education support and programs.[57] This discretion is problematic because the majority of states fail to provide adequate programs or services for their gifted students,[58] leaving students across the country sitting in classrooms, unengaged.

B. New York Public Education and "Gifted and Talented" Students

The New York State Education Department oversees public education programs within the state for students in pre-kindergarten through twelfth grade,[59] including the state's Gifted and Talented ("G&T") programs.[60] Under New York Education Law, gifted students are defined as "pupils who show evidence of high

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[53] Endrew F. v. Douglas Cty. Sch. Dist., No. 15-827, slip op. at 3 (U.S. Mar. 22, 2017). *See* SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/endrew-f-v-douglas-county-school-district/ (last visited Aug. 8, 2017).

[54] *Id.*

[55] *See* Zirkel, *Gifted Education*, *supra* note 35, at 57.

[56] Ford & Russo, *supra* note 10, at 215.

[57] *See Gifted Education Mandates*, *supra* note 12.

[58] *See* Ford & Russo, *supra* note 10, at 219–21.

[59] *See About the New York State Education Department*, N.Y. ST. EDUC. DEP'T, http://www.nysed.gov/about (last visited Aug. 8, 2017).

[60] *NYSED Gifted and Talented*, *supra* note 21.

performances capability and exceptional potential in areas such as general intellectual ability, special academic aptitude and outstanding ability in visual and performing arts."[61] The Education Department, however, classifies this definition of gifted students as "broad" and leaves much discretion to individual school districts so long as the "district's philosophy of gifted education, identification practices, and program remains consistent with the State definition."[62] For example, the New York City Department of Education ("NYC DOE") oversees the G&T programs implemented within the city's public schools, which includes both District and Citywide programs.[63] But, because there is no significant guidance from the state or federal government, gifted education programs can vary tremendously from district to district.[64] And, if a school district does not have adequate funding, the district may not have a gifted education program at all.[65]

These shortcomings highlight problems with New York's aloof approach to gifted education, including the fact that any student who is classified as "gifted" is not necessarily entitled to a gifted education, tailored to their individual needs, and may not have a gifted program available to them.[66] For example, the NYC DOE indicates that regardless of how an individual scores on the gifted and talented entrance exams, there is no guarantee that the student will be placed into one of the district's gifted and talented programs.[67] This is extremely troubling because gifted students, like

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[61] *Id.*

[62] *Id.*

[63] *Gifted & Talented*, NYC DEP'T OF EDUC., http://schools.nyc.gov/Choices Enrollment/GiftedandTalented/default.htm (last visited Apr. 6, 2017) (distinguishing District G&T programs as those available in elementary school which prioritize students who live in the surrounding community, from, Citywide G&T programs that accept students from any of the boroughs and are not dependent on where the student lives).

[64] *See FAQs*, AGATE NYS, http://www.agatenys.org/for-parents/faqs-2/ (last visited Aug. 8, 2017).

[65] *See* Elizabeth A. Harris, *New York to Expand Gifted Offerings as Disparities Remain*, N.Y. TIMES (Apr. 14, 2016), https://www.nytimes.com/2016 /04/15/nyregion/on-new-yorks-gifted-tests-children-in-wealthy-districts-again-do-well.html.

[66] *See FAQs*, *supra* note 64.

[67] *Gifted and Talented*, *supra* note 63.

special education students, have unique education needs that differ from a typical grade level, general education program.[68] However, unlike those students in special education, gifted students have no federal guarantee of a gifted education.[69] So, the fate of these students and the decision about whether or not to accommodate them, is left to the individual states.[70] While some states have opted to protect their gifted students through legislative action, state laws, and mandates of Gifted Individualized Education Programs ("GIEP(s)"),[71] New York has not, placing gifted students at a disadvantage in the public education system within the state.[72]

II. LEGAL DOCUMENTS IN GIFTED EDUCATION AND INDIVIDUAL STATE APPROACHES

One of the most crucial tools of states who have successfully implemented laws to protect gifted students is the GIEP, or some form of an individualized education plan for gifted students. Understanding the importance of the GIEP and how certain states have successfully used the document, coupled with gifted education programs, to protect their students, is key to recognizing the need for reform to current laws governing gifted education in New York state.

A. The GIEP: What it is and Why It's Important

While students who receive special education services are legally protected under the IDEA and entitled to an IEP, no such protections are afforded to students who classify as gifted, unless the student's home state provides further protections through legislative provisions for gifted education.[73] But, the provisions across state

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[68] *See Myths about Gifted Students*, NAT'L ASS'N FOR GIFTED CHILD., https://www.nagc.org/resources-publications/resources/myths-about-gifted-students (last visited Aug. 8, 2017).

[69] *See Gifted Education in the U.S.*, *supra* note 32.

[70] *See Gifted Education Mandates*, *supra* note 12.

[71] *See* 22 PA. CODE §16.32 (2008).

[72] *See FAQs*, *supra* note 64.

[73] *See* PERRY A. ZIRKEL, NAT'L RESEARCH CTR. ON THE GIFTED & TALENTED, THE LAW ON GIFTED EDUCATION 1, 6, 17 (2005),

laws for gifted students have a broad range in the protections they offer and the majority of the states do not reach a level of protection similar to that provided for students with disabilities under the IDEA.[74] A 2013 study of gifted education programs indicated that, "of the thirty-two respondents with gifted education mandates, [only] four indicated that they provide full funding, eighteen offer partial support, and eight fail to support programming for the gifted" altogether.[75] Also, because of the lack of federal protections and increased focus on state test scores, some states have been forced to "reallocate funds from gifted programming toward achieving better test scores among at risk populations."[76] The inconsistency between the states not only produces varying results for the students, but also starkly contrasts the goals of the ESSA, which seek to help students across the country achieve college readiness and academic success.[77] However, many states are not in compliance with the ESSA because students in states with well-developed gifted education programs are more prepared for college course work, when compared to their gifted counterparts in states without appropriate gifted programs.[78] Thus, in order to achieve equitable results under ESSA with respect to gifted students, states should universally mandate both programming and an individualized gifted education plan to help these students work towards academic success and overall achievement, just as they do for special education students.

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http://files.eric.ed.gov/fulltext/ED505480.pdf [hereinafter ZIRKEL, THE LAW ON GIFTED EDUCATION].

[74] *Id.* at 6.

[75] Ford & Russo, *supra* note 10, at 220 (citing NAT'L ASS'N OF GIFTED CHILD., 2012–2013 STATE OF THE STATES IN GIFTED EDUCATION: NATIONAL POLICY AND PRACTICE DATA 3 (2013)).

[76] Caryn Talty, *Gifted Students Need New Federal Gifted Legislation*, HEALTHY FAM. MAG., http://healthy-family.org/federal-gifted-students-legislation-needed/ (last visited Aug. 8, 2017).

[77] *Every Student Succeeds Act (ESSA)*, *supra* note 30.

[78] *See* Chester E. Finn, Jr. & Amber M. Northern, *Can Gifted Education Survive the Common Core?*, THOMAS B. FORDHAM INST., https://edexcellence.net/articles/can-gifted-education-survive-the-common-core (last visited Aug. 8, 2017).

An example of a legal protection provided by some states is the GIEP,[79] which functions similarly to the IEP, but for gifted students.[80] The GIEP, like the IEP, sets forth measurable goals, helps to monitor progress, and lists the child's strengths in particular subject areas so that the child may be placed in an appropriate academic setting.[81] The GIEP's design, and even its name, can vary between states and districts, but the overall goal is to help provide gifted education students with an "individualized" education.[82] States who mandate GIEPs, "put teeth in laws that may only otherwise provide lip service,"[83] and give legal protections to students and their families in mediation, or in court proceedings in the event that a hearing must take place to discuss the GIEP.[84] Unfortunately, the majority of states do not have GIEPs or similar plans in place to provide legal protections to their gifted student population.[85] A 2005 study of state statutes and regulations for gifted education detailed such findings:

> First, less than half of the states have specific provisions at the state level of responsibility, with the highest frequencies in descending order being in terms of standards, funding, and technical assistance. Such state-level responsibilities are helpful but not sufficient, particularly where in light of the changing priorities and commitment of succeeding political administrations. Second, the state laws most frequently focus at the local level of responsibility on identifying and providing group programming for gifted students. Third, the IDEA mainstays of mandatory individualized programming (via individualized education programs, or "IEPs") and

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[79] *See* 22 PA. CODE §16.1 (2008).

[80] *See* PA. ASS'N FOR GIFTED EDUC., A PARENT'S GUIDE GIFTED EDUCATION IN PENNSYLVANIA 1, 6, 12 (2016), http://www.giftedpage.org/wp-content/uploads/2016/12/Parents-Guide.pdf; *see* McIntyre & Mery, *supra* note 22.

[81] *See Gifted Education: Tips for Teachers*, NEMOURS FOUND., http://kidshealth.org/en/parents/gifted-students.html# (last visited Aug. 8, 2017).

[82] *See id.*

[83] ZIRKEL, THE LAW ON GIFTED EDUCATION, *supra* note 73, at 7.

[84] *Understanding IEP Due Process*, *supra* note 48.

[85] *See Gifted Education Mandates*, *supra* note 12.

> impartial dispute resolution (via due process hearings, or "DPHs") are the exception rather than the rule.[86]

Also, with many states using the Common Core Standards[87] in an attempt to streamline student achievement across the country, "some states cap how far students can progress within the curriculum in one school year," putting gifted students at an extreme disadvantage because they often exceed the typical progress expected for a student at their grade level and even surpass enrichment work provided to them.[88] Unfortunately, students in New York are at a disadvantage as New York aligns with the majority of states lacking adequate gifted education programs.[89] As a result, the gifted students of New York State remain unprotected and unengaged in many of the public school systems.

B. The States That Are "Ahead" in Gifted Education

When it comes to gifted education, inconsistent state doctrines show that there is a problematic lack of uniformity in the accommodations provided to gifted students. This inconsistency is the result of a lack of specific directives from Congress and the federal government on gifted education, which gives state governments a great deal of discretion regarding how to protect gifted students.[90] Unfortunately, many states choose not to provide further protections for their gifted student populations, or only provide some programming that is not guaranteed, typically because

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[86] ZIRKEL, THE LAW ON GIFTED EDUCATION, *supra* note 73, at 6–7.

[87] *See Read the Standards*, COMMON CORE ST. STANDARDS INITIATIVE, http://www.corestandards.org/read-the-standards/ (last visited Aug. 8, 2017) (defining Common Core State Standards as, "standards [that] clearly demonstrate what students are expected to learn at each grade level, so that every parent and teacher can understand and support their learning").

[88] Finn & Northern, *supra* note 78.

[89] *See Gifted Education Mandates*, *supra* note 12.

[90] *See Gifted Education: Tips for Teachers*, *supra* note 81.

of funding issues.[91] But, there are some states setting promising precedent.[92]

Pennsylvania is one such state that is far outperforming the majority when it comes to gifted education.[93] Chapter Sixteen of the Pennsylvania Code is devoted entirely to the "Special Education of Gifted Students" and requires, "that gifted students be provided with quality gifted education services and programs…according to their intellectual and academic abilities and needs."[94] Perhaps one of the most important protections Pennsylvania provides is the implementation of the GIEP for its gifted students.[95] This statutory entitlement was upheld in the Pennsylvania Supreme Court case, *Centennial School District v. Commonwealth*, where the Court "unanimously affirmed that, pursuant to a commonwealth statute and regulations requiring Individualized Education Programs for gifted students, a child had a right to gifted education."[96] In its decision, the Court clarified that the GIEP and "instruction to be offered need not 'maximize' the student's ability to benefit from an individualized education program but must be appropriate to a child's needs."[97] Through the GIEP, Pennsylvania ensures that all public school districts within the state provide placements for gifted students in which they can receive individualized instruction and work to achieve appropriate learning goals throughout the year.[98] Similarly to the requirement for IEPs, Pennsylvania's GIEP requires school districts to set, "the present levels of educational

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[91] *See id.*; NYC DEP'T OF EDUC., GIFTED AND TALENTED HANDBOOK FOR STUDENTS BORN IN 2012 1, 14 (2016), http://schools.nyc.gov/NR/rdonlyres/6BCA4297-B77E-4388-AC0C-72454A5F6DD4/0/2017GTHandbookforStudentsBornin2012ENGLISH.pdf.

[92] *See* 22 PA. CODE §16.2 (2008).

[93] *Gifted Education Mandates*, *supra* note 12.

[94] *See* §16.2.

[95] *See* 22 PA. CODE §16.32 (2008).

[96] Ford & Russo, *supra* note 10, at 222; *See* Centennial Sch. Dist. v. Commonwealth Dep't of Educ., 539 A.2d 785, 788 (Pa. 1988).

[97] Ford & Russo, *supra* note 10, at 222–23 (quoting *Centennial Sch. Dist.*, 539 A.2d 785).

[98] *See* §16.32.

performance…annual goals…short-term learning outcomes… specially designed instruction…support services…[and] dates."[99]

Georgia is another state that has codified rights for its gifted students, but has done so within the context of special education. Under Title 20, Chapter 2-152(a), "special education shall include children who are classified as intellectually gifted…"[100] With Georgia endeavoring to help its gifted education students achieve academic success that correlates with their intellectual abilities, the state is taking the right steps to help ensure that their gifted student population is protected and learning at a level that will promote engagement in the classroom dependent on their own academic abilities.[101] Florida also protects its gifted students by mandating that, "each school district shall provide for an appropriate program of special instruction, facilities, and services for all exceptional students," which shall include "diagnosis and evaluation"[102] and through implementing an Educational Plan ("EP") to "address the academic needs of the student."[103] New Jersey also has state mandates for gifted education.[104] The state requires that "all public schools must have a board approved gifted and talented program," which "require[s] district boards of education to develop appropriate curricular and instructional modifications for gifted students," and "[p]rograms must address appropriate content, process, products, and learning environment."[105] Finally, Oregon has the Talented And Gifted program ("TAG") which requires school districts to identify gifted students and provide those students with "curriculum and

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[99] PA. ASS'N FOR GIFTED EDUC., *supra* note 80, at 12.

[100] GA. CODE ANN. § 20-2-152(a) (2012).

[101] *See* Brenna Ferrick, Note, *The Wicked Smaht Kids: Seeking an Adequate Public Education for Gifted Elementary and Secondary Students in Massachusetts*, 10 U. MASS. L. REV. 464, 488 (2015).

[102] FLA. STAT. § 1003.57(2)(b) (2016) (defining gifted students as "exceptional" in the Florida Education Laws).

[103] BUREAU OF CURRICULUM & INSTRUCTION, FLA. DEP'T. OF EDUC., EDUCATION OF GIFTED STUDENTS IN FLORIDA 12 (2013), http://www.fldoe.org/core/fileparse.php/7567/urlt/stategiftedplan.pdf.

[104] *See New Jersey Student Learning Standards: Gifted and Talented Requirements*, ST. N.J. DEP'T OF EDUC., http://www.state.nj.us/education/aps/cccs/g_and_t_req.htm (last visited Aug. 8, 2017).

[105] *Id.*

instruction…[that] address[es] their accelerated rate of learning and their advanced level of learning as determined by assessments."[106] Because these states have been proactive in the area of gifted education and provided funding at the state level, the students in these states are afforded educations tailored to their specific learning needs.

As is the case nationwide with special education, these states have recognized the importance of providing educational accommodations for gifted students; these students have unique learning needs, and without appropriate individualized attention, they may begin to suffer academically and even "drop out of school because their potential is stifled by the traditional school curriculum."[107] These states' progressive policies should serve as workable models and guidelines for other states to follow in developing more comprehensive gifted education programs and laws to protect each state's gifted students. However, Pennsylvania's laws and programs protecting gifted students seem to be the most comprehensive and should be adopted in New York to provide students with adequate legal protections and gifted services.

III. INADEQUATE GIFTED EDUCATION IN NEW YORK

When the gifted programs and protections in New York are compared to those of more progressive states, like Pennsylvania, it is clear that New York is falling short in its efforts to protect the gifted student population within the state. Both the existing statutory law and case law addressing issues with gifted education is quite limited in New York, and the programs implemented in the school districts, specifically in New York City, also have many downfalls.[108] A discussion of these inadequacies not only

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[106] *What Does it Mean to be Identified as TAG?*, OR. ASS'N FOR TALENTED & GIFTED, http://www.oatag.org (last visited Aug. 8, 2017).

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

[108] *See* Amy Zimmer, *7 Things to Know About Sending Your Kid to a Gifted and Talented School*, DNA INFO (May 18, 2015), https://www.dnainfo.com/new-york/20150518/carroll-gardens/7-things-know-about-sending-your-kid-gifted-talented-school.

demonstrates the dire need for gifted education reform in New York, but also reiterates the greatest issue: the students are the ones who are suffering.

A. New York's Limited Statutory Law and Case Law on Gifted Education

New York is a state that prides itself on having "one of the most complete, interconnected systems of educational services in the United States."[109] While this may be true in some respects, gifted education programs are often a missing or broken link in the system's chain.[110] Under the New York Education Law, any school which chooses to implement a gifted program and receives funding from the state for gifted education, must use the funding for services like "identification, instructional programs, planning, inservice education and program evaluation."[111] Most school districts offer services to their gifted students under the New York Education Law, but many times those services are limited and offered only at select grade levels or in certain academic areas.[112] For example, the goal of the New York City Department of Education's Gifted and Talented programs is "to deliver accelerated, rigorous, and specialized instruction aligned to Common Core Learning Standards (CCLS)."[113] However, not every school overseen by the NYC DOE offers such a program.[114]

The state law of New York "[only] requires that every public school district test to determine who the gifted are in their population."[115] However, following such determinations, "there is no requirement that every student who has been identified as gifted must be served with a specially designed program, [and] some identified gifted students may not be offered such a program."[116] This translates to the reality that many gifted students in New York,

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[109] *About the New York State Education Department*, *supra* note 59.

[110] *See id.*

[111] N.Y. EDUC. LAW § 4452(1)(c) (McKinney 1997).

[112] *NYSED Gifted and Talented*, *supra* note 21.

[113] *Gifted and Talented*, *supra* note 63.

[114] *See id.*

[115] *FAQs*, *supra* note 64.

[116] *NYSED Gifted and Talented*, *supra* note 21.

depending on their district or grade level, will not receive any type of individualized gifted education and may not receive gifted education services at all if their district does not have the proper programs or funding.[117] While the NYC DOE's goal is, "to provide leadership for a system that yields the best educated people in the world," the state certainly seems to be falling short of achieving the very values it prides itself on. [118]

Despite recognizing the significant educational needs of gifted students, New York is startlingly not doing more to legally protect its gifted education students as it does its special education students. While the lack of guidance from the federal government on gifted education or inadequate funding may be rationales for New York's inattention to gifted education, this argument loses strength when other states have successfully implemented gifted programs and legal, "IDEA-like" protections.[119] Gifted students in New York are at the mercy of their assigned school's programs to determine whether they will be engaged in the classroom or learn the same amount of content as their general education peers, and because of the lack of statutory protections, their parents are left without adequate legal recourse in which to advocate on behalf of their children.[120] For example, one report recounts two failed attempts by parents in New York to advocate on behalf of their gifted child, reporting that both a federal court "rejected the due process claim of a gifted student, concluding that he did not have a constitutional right to a gifted program or placement," and a "New York appellate court…concluded that a lottery method of selection of qualified gifted students for the limited number of district slots for full-time education met [the]…relaxed rational-relationship test for equal protection."[121] Courts' hesitancies, especially in New York, to grant any relief to gifted students demonstrates that parents advocating on behalf of their gifted child under the current New York legal regime are at a disadvantage when compared to parents of special education

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[117] *See id.*

[118] *See About the New York State Education Department*, *supra* note 59.

[119] *See* Zirkel, *Gifted Education*, *supra* note 35, at 57–59.

[120] *Id.*

[121] ZIRKEL, THE LAW ON GIFTED EDUCATION, *supra* note 73, at 3–4.

children, and that the current gifted education laws are not doing enough for the students.

B. Gifted & Talented Programs: Admissions and Pitfalls

Admission to gifted education programs within public school districts across New York state varies depending on the district guidelines and identification strategies.[122] As the largest public school district in the state and in the United States,[123] the NYC DOE provides extensive guidelines and testing prerequisites for students wishing to enter its G&T programs.[124] The testing process is lengthy and adheres to strict deadlines which must be met in order to have the child tested.[125] While the test is designed to be academically demanding for students, it presents a particular set of challenges in the way in which it is administered for the youngest test-takers, four-years-old testing for kindergarten G&T placement.[126] The child must sit through an hour or more of testing where a proctor reads various questions to the child, but is only permitted to ask them once, and the child is expected to both sit still and correctly hear each question.[127] Depending on the mood of the child that day, he or she could either pass or fail the G&T test, which suggests that the current testing in New York City does not necessarily take into account subjective variables that could affect test performance.[128] One mother recounted such an experience when her son, a child who was to enter kindergarten the following school year, left the room halfway through the G&T exam stating, "he just didn't want to be

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[122] *See FAQs*, *supra* note 64.

[123] *About Us*, NYC DEP'T. OF EDUC., http://schools.nyc.gov/AboutUs/default.htm (last visited Aug. 8, 2017).

[124] NYC DEP'T. OF EDUC., *supra* note 91, at 2.

[125] *See id.* at 2–4.

[126] *Id.*

[127] *See* Karol Markowicz, *Lunatic Exams: City's Unfair 'Gifted' Tests*, N.Y. POST (Jan. 19, 2015), http://nypost.com/2015/01/19/lunatic-exams-citys-unfair-gifted-tests/; *see also* NYC DEP'T. OF EDUC., *supra* note 91, at 8–10 (explaining an account of a young child taking the G&T tests and becoming both frustrated and upset, to the point that he had to forego the testing process for the day).

[128] *See* Markowicz, *supra* note 127.

away from me too long."[129] When the child was slightly older, the parents had him take the G&T test again and he scored within the 98th percentile,[130] suggesting that the testing conditions and requirements for very young children are suboptimal and even arbitrary.

There are also demonstrated testing disparities with minority or economically disadvantaged students where the G&T testing "usually amounts to school segregation in practice, where it becomes beneficial to students that have [socioeconomic] educational advantages to start with."[131] Because school districts have discretion regarding the gifted programming, a disproportionate impact often results with minority students barred from gifted and talented programs.[132] Also, "despite having the authority to do so the Department [of Education] has failed to promulgate and enforce regulations regarding nondiscrimination and use of best practices in gifted programs."[133] The NYC DOE also employs the controversial lottery system,[134] and unlike students who classified as special education and are guaranteed both placement and services, the G&T students of New York City are left to the determination of the lottery system if they rank in an eligible percentile, which can make it even more difficult for students who are at a socioeconomic disadvantage to place into a G&T program.[135]

The NYC DOE has two types of G&T programs within New York City school districts.[136] The first types are the districtwide

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[129] Jenn Choi, *How Gifted and Talented Programs Are Failing Our Kids*, QUARTZ (Sept. 22, 2014), http://qz.com/250467/how-gifted-and-talented-programs-are-failing-our-kids/.

[130] *Id.*

[131] Kristine Walker, *School Segregation: Why New York's 'Gifted and Talented' Admissions Test Is Not a Good Idea*, PARENT HERALD (Apr. 28, 2016), http://www.parentherald.com/articles/39705/20160428/school-segregation-why-new-york-gifted-and-talented-admissions-test-not-good-idea.htm.

[132] *See Ending Discrimination in Gifted Education in the New York City Public Schools: The Committee on Education and the Law*, 58 RECORD 174, 175 (2003) [hereinafter *Ending Discrimination in Gifted Education in NYC*].

[133] *Id.*

[134] *See* NYC DEP'T OF EDUC., *supra* note 91, at 2.

[135] *See id.* at 14.

[136] *See id.* at 2–13.

G&T Programs, where the "child must obtain an overall G&T score of 90 or above" to be eligible for an admission application.[137] The second types are the citywide G&T Programs where the "child must obtain an overall G&T score of 97 or above," in order to apply.[138] A child's score is calculated through combining raw scores from both the verbal and nonverbal components of the G&T test.[139] Even when the child tests in the one of the eligible ranges for a G&T program, "there is no guarantee that a student will receive an offer to a G&T program" because, "the number of eligible students typically exceeds the number of seats available."[140] For example, "[i]n 2012, 1,600 kids scored in the 99th percentile for only 400 available seats."[141] The most recent data, as detailed in the following chart from the 2016 school year, demonstrates the disproportionate ratio of seats to eligible students even further:[142]

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[137] *Id.* at 2 ("District G&T programs are offered within district elementary schools and prioritize students for admission who live in the local communities served by the school. District G&T programs begin in Kindergarten and end in fifth grade. G&T students who attend District G&T programs do so alongside students who attend these schools in the non-G&T classes. Students in District G&T programs are served together for major subject areas but may be scheduled for other classes with students who are not in the program, e.g. physical education, and art.").

[138] *Id.* ("Citywide G&T schools accept students from all boroughs with no priority given for district of residence. All students in these schools are enrolled in the G&T program; there are no zoned students attending these schools. These programs are school-wide models that implement curricula and instructional practices specifically targeted towards Gifted & Talented students for all the students in the school.").

[139] *Id.* at 12.

[140] *Id.* at 14.

[141] Markowicz, *supra* note 127.

[142] NYC DEP'T OF EDUC., *supra* note 91, at 2 (providing a summary of 2016 Gifted & Talented admissions in New York City).

Grade	Tested	Eligible	Applicants	Offers
Kindergarten	14,513	4,539	3,606	2,507
First Grade	9,021	2,541	1,866	1,066
Second Grade	6,903	2,049	1,412	432
Third Grade	5,616	1,813	1,336	387
Total	**36,053**	**10,942**	**8,220**	**4,392**

Even if your child is fortunate enough to earn a spot in one of the City's G&T programs, he or she will not have "priority for that seat [in his or her] zoned school,"[143] which can lead to a variety of issues like transportation expenses and safety concerns. And if they are not offered a seat based upon the lottery system employed by the NYC DOE for its G&T programs, students "must re-test to determine eligibility each year they are interested in pursuing a G&T placement."[144] Retesting can be both personally and academically discouraging to the G&T students, and if a child is never chosen for placement, he or she may go through their entire academic career without any G&T enrichment or services. Further highlighting the problematic gifted education programs in New York, is the general lack of available programs. The G&T programs, specifically in New York City, "vary widely by district" and sometimes there are not enough students to have a G&T program within certain schools in areas like the Bronx and Bedford-Stuyvesant.[145] While Manhattan has three citywide G&T schools, the Bronx does not have a citywide school at all, forcing young children in that area to commute, potentially at great lengths, to attend a citywide G&T program if they are accepted to one.[146]

There is also a disproportionate impact on economically disadvantaged communities as a result of New York's current gifted education program.[147] Many of the schools in low-income areas lack

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[143] Zimmer, *supra* note 108.

[144] NYC DEP'T OF EDUC., *supra* note 91, at 13.

[145] Zimmer, *supra* note 108.

[146] NYC DEP'T OF EDUC., *supra* note 91, at 17.

[147] *See* P. Olszewski-Kubilius & D. Thomson, *Gifted Programming for Poor or Minority Urban Students: Issues and Lessons Learned*, 33 GIFTED CHILD TODAY 58, 58–64 (2010), http://www.davidsongifted.org/Search-Database/entry/A10670.

funding and adequate resources to implement large G&T programs and they may not even have enough students to enroll in the programs because they are being "overlooked."[148] The procedures used to screen students and offer them out of class assistance are many times inadequate to support gifted students and support from the home can also have a huge impact on student performance.[149] This phenomenon is described in an 2015 Education Week article stating:

> In a school filled with other students living in poverty, teachers and administrators may not have time or financial resources for advanced enrichment when other students need help to meet basic standards. Meanwhile, a poor, bright student in a wealthier school with the resources to support advanced courses and enrichment for gifted students may still find him—or herself outcompeted for a program slot by students who had more home support.[150]

Students also may not be tested because their parents are unaware of the gifted program offerings and are not adequately informed about testing arrangements and deadlines.[151] There are reports that show "access to information about gifted programs in New York City remains problematic for minority and non-English speaking families."[152] Without access to important information, both parents and students could be uninformed for years about both the child's intellectual ability and possible programs offered to gifted students.

Furthermore, while private school may be an alternative[153] to gifted programs that are inadequate within the public school

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[148] *See id.*

[149] Sarah D. Sparks, *Poorest Students Often Miss Out on Gifted Classes*, EDUC. WK. (May 19, 2015), http://www.edweek.org/ew/articles/2015/05/20/poorest-students-often-miss-out-on-gifted.html.

[150] *Id.*

[151] *Ending Discrimination in Gifted Education in NYC*, *supra* note 132, at 192–93.

[152] *Id.*

[153] *See Private Schooling – What Is a Private School?, History of Private Schools in the United States*, STATEUNIVERSITY.COM, http://education.stateunive

systems, the reality is many individuals cannot afford the cost of private schools, especially in cities like New York.[154] Unlike the case for special education, gifted students' parents are not entitled to tuition reimbursement for failure to provide adequate gifted services should they choose to move their child out of the public school system.[155]

Charter schools[156] may also seem like a good alternative option for gifted students because they may have gifted programs, can provide more individualized enrichment, and may even target gifted students. However, "the quality of education in charter schools varies: some are very successful, while others are no better or are even worse than the ordinary public schools with which they compete for students."[157] Even if a charter school does have an adequate gifted and talented program, they too operate on a lottery system, so there is no guarantee of entrance for the child into a gifted and talented program, let alone the school.[158]

The failure of New York State lawmakers to provide any definitive gifted education programs for students enrolled in its public school system comes at the expense of the students the state seeks to protect. The specific learning needs of students are not met, or even attended to, within the gifted programs, and there are absolutely no legal documents like the GIEP mandated by the state in order to provide some protections and recourse for the gifted and

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rsity.com/pages/2334/Private-Schooling.html (last visited Apr. 6, 2017) (stating that, in 1999, private schools represented approximately "10 to 11 percent of the total elementary and secondary enrollment in the United States.").

[154] *See* Jenny Anderson & Rachel Ohm, *Bracing for $40,000 at New York City Private Schools*, N.Y. TIMES (Jan. 27, 2012), http://www.nytimes.com/2012/01/29/nyregion/scraping-the-40000-ceiling-at-new-york-city-private-schools.html?_r=0.

[155] *See* Florence Cty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12–16 (1993); Kristen R. Stephens, *Gifted Education and The Law*, 23 GIFTED CHILD TODAY 30, 30–37 (2000).

[156] *What Are Your Options?*, INSIDESCHOOLS, http://insideschools.org/elementary/gifted-a-other-options (last visited Apr. 6, 2017) (defining a charter school as "free, experimental public schools that operate independently of the local districts under a 'charter' from the state Board of Regents or the State University of New York" ("SUNY")).

[157] *Id.*

[158] *Id.*

talented students.[159] Furthermore, it appears that New York is not achieving the ESSA's goals, which are aimed at protecting "America's disadvantaged and high-need students" and ensuring "that all students in America be taught to high academic standards that will prepare them to succeed in college and careers."[160] Students who are disengaged in the classroom are not adequately prepared for college and careers and this becomes an even further concern if those students become so disengaged that they resort to dropping out.[161] Therefore, without legal reform to develop more well-rounded laws governing gifted education within the state, gifted students will continue to suffer, while those students who can afford private school will continue to succeed. As a result, the education gap naturally widens, ensuring that a majority of gifted students in the public school system will remain overlooked and unengaged.

IV. A SOLUTION FOR NEW YORK: GIFTED EDUCATION REFORM

It is apparent that in its current state, the New York public education system is in dire need of reform to its laws governing gifted education. Teachers, like high school English teacher Megan Tomlinson, have expressed their concern for New York's current approach to gifted education stating, "[I have] seen too many talented students have their potential squandered because their school doesn't foster growth."[162] Tomlinson went on further:

> It's frustrating, as a teacher, to watch students who could and should be challenging themselves, earning great grades, and potentially being rewarded with scholarships and entry into great colleges simply settle for doing 'well enough' to earn good grades because they're bored, unmotivated or have learned

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[159] *See FAQs*, *supra* note 64.

[160] *Every Student Succeeds Act (ESSA)*, *supra* note 30.

[161] *See* Mayflor Markusic, *Social Factors That Make Gifted Students Fall Behind*, BRIGHT HUB EDUC., http://www.brighthubeducation.com/teaching-gifted-students/44856-social-factors-contributing-to-gifted-students-dropout-rate/ (last updated Jan. 17, 2012).

[162] Chris Weller, *America Hates Its Gifted Students*, NEWSWEEK (Jan. 16, 2014), http://www.newsweek.com/america-hates-its-gifted-kids-226327.

> how to 'do school' without putting forth much effort.[163]

Unfortunately, this is becoming the norm in schools across New York and the country.

To help mitigate this problem, Section 4452 of the New York Education Law[164] should be amended to include two key provisions to ensure that students who qualify as gifted within the state are adequately protected and entitled to an individually tailored gifted education. The first provision would add a section to the law requiring all public school districts within the state, regardless of whether they receive state funding for gifted education, to provide a gifted and talented program to all eligible students in pre-kindergarten through twelfth grade. A second provision would require all districts to provide a GIEP specifically tailored to students' learning needs for students who are classified as gifted and talented and/or participating in a gifted program within a state public school. These proposed new provisions to the law should be modeled after the Pennsylvania gifted education system which has proven to be successful.[165]

The first requirement would help ensure that all students who test as gifted and talented within the state are provided with the opportunity to take part in a program designed to help them receive an "educational benefit."[166] The "educational benefit" standard would align with what is mandated for special education students under *Rowley*—that they receive some sort of educational benefit from the services provided to them.[167] Modeling the New York legal reform after Pennsylvania's approach, the purpose of such a

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[163] *Id.*

[164] *See* N.Y. EDUC. LAW § 4452 (McKinney 1997).

[165] *See* 22 PA. CODE §16.32 (2008); *see also Gifted Education Mandates*, *supra* note 12 (demonstrating that Pennsylvania has a comprehensive system in place for gifted students, including the requirement of a GIEP, which provides gifted students with legal recourse and rights for their gifted academic needs).

[166] *See* Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200 (1982) (The Supreme Court has held that implicit in legislative efforts to provide funds for the education of handicapped children is that the programs provide some "educational benefit." So too, should programs intended for the benefit of gifted students).

[167] *Id.*

program would be to ensure that every school district within the state would provide the following to its gifted and talented students:

> (1) Services and programs planned, developed and operated for the identification and evaluation of each gifted student.
> (2) Gifted education for each gifted student which is based on the unique needs of the student, not solely on the student's classification.
> (3) Gifted education for gifted students which enables them to participate in acceleration or enrichment programs, or both, as appropriate, and to receive services according to their intellectual and academic abilities and needs.[168]

A mandate for all districts, statewide, to provide gifted education services either through the school district itself or through another agency,[169] would help to eliminate the problematic and unfair lottery system currently used in some of the state's G&T programs.[170] Under this model, all students who test as eligible for a G&T program would have the opportunity to participate in an appropriate program within their school district.[171] Furthermore, without a lottery system, students would be able to avoid retesting for G&T programs each year and would evade the disappointment of not being selected for a program due to the lottery system, specifically in the state's largest system of public schools in New York City.[172]

The second proposed provision would require all students who participate in a gifted program within a state public school to have a GIEP specifically tailored to the their individualized learning needs.[173] Implementation of the GIEP should be modeled after Section 16.32 of the Pennsylvania Code, which requires a GIEP for every student classified as gifted and talented.[174] The GIEP, like the IEP, would set forth measurable student goals, indicate the student's

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[168] 22 PA. CODE § 16.2(d) (2008).
[169] *See id.*
[170] *See* NYC DEP'T OF EDUC., *supra* note 91, at 14.
[171] § 16.2.
[172] *See* NYC DEP'T OF EDUC., *supra* note 91, at 14.
[173] 22 PA. CODE § 16.32(d)(2) (2008).
[174] *Id.*

present levels of performance, and list gifted education and related services to be provided for the student to help achieve an educational benefit.[175] Development of the GIEP would involve individuals including the student himself, the parent(s), a district representative, the student's general education teachers, a gifted education teacher, and any other individuals on behalf of the district or parents, including attorneys.[176] The GIEP would also need to be implemented within a specific number of school days.[177] In Pennsylvania, the current law requires the GIEP to be implemented within ten school days, but the New York lawmakers should determine a reasonable amount of time depending on its student populations across the state.[178] This would help ensure that the gifted students receive services in a timely and efficient manner and would not remain waiting for several months or school semesters before receiving appropriate services.

The existence of a GIEP would not only help to provide teachers and parents with a clear picture of the student's educational performance and goals, but it would also serve to hold districts and the state accountable for providing adequate gifted education services for those students who need them. In the event that the district does not properly implement the GIEP, similarly to the IEP, the student or parent would have the GIEP as legal recourse where they could challenge the adequacy of the GIEP itself and obtain appropriate modifications to the GIEP through the courts.[179] Pennsylvania already has case law on the books to further this point.[180] In the Supreme Court of Pennsylvania case, *Centennial School District v. Commonwealth Department of Education*, parents prevailed on a claim that their child's GIEP was both inappropriate

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[175] *See* U.S. DEP'T OF EDUC., *supra* note 17.

[176] *See* § 16.32(b).

[177] *See id.* at § (g)(2).

[178] *See id.*

[179] *See* Centennial Sch. Dist. v. Commonwealth Dep't of Educ., 517 Pa. 540, 542–43 (1988).

[180] *See id.*; Brownsville Area Sch. Dist v. Student X, 729 A.2d 198, 199 (Pa. Commw. Ct. 1999); B.C. v. Penn Manor Sch. Dist., 906 A.2d 642, 649 (Pa. Commw. Ct. 2006).

and inadequate.[181] The hearing officer, finding a violation of the GIEP, provided the following reasoning:

> In the case of Terry, his current educational program is neither appropriate nor adequate in terms of his intellectual potential and levels of academic achievement reflected by considerable evaluation. His inconsistent classroom performance and distracting behaviors can be viewed as indications of boredom and cries for attention from a child whose intellectual development has far exceeded his emotional social [sic] development. In meeting his educational needs, this imbalance must be remembered. Therefore, as much of his educational program as possible should be provided in age-appropriate normalized settings. Although this will undoubtedly present administrative and instructional difficulties and challenges to the school staff, it is consistent with both Terry's needs and the legal mandate for education within the least restrictive environment.[182]

After many appeals by the school district, the Supreme Court of Pennsylvania affirmed the finding and held in favor of the parents and child.[183] Unlike New York's current regime, where parents and students have no legal recourse to ensure the student receives gifted education services, the GIEP would allow just that, by providing the opportunity to challenge the procedures in which it was implemented or the substantive content of the GIEP itself.[184] Requiring a GIEP for all gifted education students also further supports the first proposed provision to the law which would require all districts to have a gifted program, because it provides an extra "backbone" for ensuring districtwide compliance.[185] This may help to even the playing field for gifted education students in the state

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[181] *Centennial*, 517 Pa. at 550.

[182] *Id.* at 543–44.

[183] *Id.* at 544–45, 553.

[184] *See FAQs*, *supra* note 64.

[185] *See* ZIRKEL, THE LAW ON GIFTED EDUCATION, *supra* note 73, at 7 (noting that deference to school districts within various states often leads to inconsistent gifted programs).

because it would ensure that students are protected statewide, regardless of whether they move between districts. This, in turn, could help to make the often challenging transition process for moving to a new school, smoother, for both the child and parent.[186] From an administrative standpoint, if things looked relatively the same in regards to gifted education across the state, this too could make accepting and transitioning gifted students into new schools an easier process.

These proposed provisions to Section 4452 of the New York Education Law[187] would help ensure that the New York State Education Department's goal "to provide leadership for a system that yields the best educated people in the world"[188] is successfully achieved through producing students whose education matches their intellectual abilities as gifted students. This proposed change would also help mitigate the disproportionate impact on economically disadvantaged students who otherwise may not have access to a gifted education program in their district or, if they have been placed in a wealthier school, are nonetheless outcompeted by other students with more resources.[189] Gifted education students would be provided with the services they need to succeed in school and to remain engaged in the classroom, thus helping deter drop-outs and issues among peer groups.[190] It also would help to ensure that those students who are "gifted alone," and otherwise not part of a minority group or do not also have an IEP for a classified disability, have legal protections.[191] A GIEP would also provide minority students classified as gifted, both the ability to challenge the GIEP, and to bring a Fourteenth Amendment Equal Protection claim under Title VI of the Civil Rights Act against the school district for

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[186] Gail Robinson, *Your Child Is Gifted . . . Now What?*, GREAT! SCHOOLS (May 19, 2016), http://www.greatschools.org/gk/articles/gifted-and-talented-education-and-program/.

[187] *See* N.Y. EDUC. LAW § 4452 (McKinney 1997).

[188] *About the New York State Education Department*, *supra* note 59.

[189] *See* Sparks, *supra* note 149.

[190] *See id.*

[191] *See* ZIRKEL, THE LAW ON GIFTED EDUCATION, *supra* note 73, at 3 (discussing how equal protection and due process arguments fail to address gifted students who are neither minorities nor disabled).

discrimination based on racial classifications.[192] While these challenges are not always successful, it does provide the student with another form of legal recourse which they may use to help guarantee better gifted education rights.[193] Unfortunately, those students who do not qualify under one of the two mentioned categories are passed over in a state like New York that does not offer any legal protections and even G&T programs in some schools.[194]

Regardless of a student's identity or their socioeconomic background, without reform to the laws, or lack thereof, governing gifted education in New York, gifted students will continue to suffer as a result of the state's inaction. It is crucial to the success of gifted students, who have unique learning needs, to safeguard their educational needs through GIEPs and mandating gifted education programs in New York schools. Without addressing these issues and reforming the current laws, the dropout rate for the students in the state may increase and the goals of the ESSA[195] and the New York State Education Department[196] will remain unmet.

CONCLUSION

The absence of laws governing gifted education in the majority of states, including New York, is a serious problem greatly impacting our nation's students and education systems. The lack of a federal mandate on the matter also leaves it up to state action—better described as state inaction—thus creating a need for legal reform. Without more proactive efforts from the states, it is likely that gifted education will remain lost and unimportant in the funding

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[192] *Id.*

[193] *Id.*

[194] *See FAQs*, *supra* note 64.

[195] *Every Student Succeeds Act (ESSA)*, *supra* note 30 (discussing the goal of the ESSA as helping to ensure "critical protections for America's disadvantaged and high-need students" are in place, and "that all students in America be taught to high academic standards that will prepare them to succeed in college and careers.").

[196] *About the New York State Education Department*, *supra* note 59 (stating the goal is "to provide leadership for a system that yields the best educated people in the world.").

of education. New York, however, can earn a spot as a progressive advocate of gifted education through adopting new laws to require that all students eligible to participate in gifted programs, are given the opportunity to do so, and not subjected to an arbitrary lottery system. It also should require that a GIEP be implemented for every student who is classified as "gifted and talented," which will help ensure that the student receives an appropriate education, the parent(s) have adequate legal protections, and that the schools are held accountable in providing services tailored to the individualized need of each gifted student. The GIEP will also give the parents and students legal recourse in the event that a GIEP violation occurs. Without this reform, students and parents are left without any substantive way to advocate for the student's gifted education, and schools are permitted to sit back and allow students to fall between the cracks within New York State's large public education system.