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Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children

Elizabeth A. Siemer*

INTRODUCTION

The No Child Left Behind Act¹ (“NCLB”) was scheduled for review and reauthorization in 2007.² Many educators, parents, legislators, and commentators criticize NCLB for its insufficient funding for the programs it mandates,³ unrealistic standards,⁴ consequences that are too harsh⁵ and create inappropriate incentives,⁶ and its difficulty to understand and apply.⁷ Others continue to support NCLB as a step in the right direction toward improving educational

* J.D. (2009), Washington University in St. Louis School of Law; B.S. (1998), Truman State University. Many thanks to the staff of the *Journal of Law & Policy* for all of their hard work. I would also like to thank my parents, Gary & Cathi Merkel, for their constant support of me; all of the family and friends who lovingly cared for my children while I worked on this Note; and my wonderful, supportive husband, Rob, and two amazingly gifted little girls, Alex & Sam.

1. No Child Left Behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

2. COMM’N ON NO CHILD LEFT BEHIND, BEYOND NCLB: FULFILLING THE PROMISE TO OUR NATION’S CHILDREN 9 (2007). The Act will continue in its current form even though it was not reauthorized by Congress in 2007. *See id.*

3. Trisha Loscalzo Yates, *A Criticism of the No Child Left Behind Act: How the Convention on the Rights of the Child Can Offer Promising Reform of Education Legislation in America*, 5 WHITTIER J. CHILD & FAM. ADVOC. 399, 408–11 (2006).

4. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 649–62 (2006). Particularly criticized as unrealistic is the requirement that 100% of students with disabilities who are tested meet the same standards as their general education peers. *Id.* The virtual impossibility of meeting every requirement of NCLB has caused some to speculate that the legislation is not actually intended to improve public schools but rather to lead to the eventual privatization of education. *Id.*

5. Gershon M. Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 U. D.C. L. REV. 1, 13–29 (2007).

6. *Id.* at 16–17; Yates, *supra* note 3, at 425–26.

7. Yates, *supra* note 3, at 402.

opportunities for all children in America.⁸ With such varying levels of support for the Act, reauthorization discussions have been heated, likely resulting in a stall on a vote for years.⁹

The original Act, passed in 2001, is designed to “clos[e] for good the nation’s achievement gap between disadvantaged and minority students and their peers.”¹⁰ The focus of the Act is on steady academic gains for students who are below proficiency in math and reading, and the Act includes very little to address the needs of gifted and talented students.¹¹ Many decry the negative effects NCLB’s focus on low-achieving students has had on gifted education throughout the country.¹² Yet, in the discussions for reauthorizing

8. See, e.g., COMM’N ON NO CHILD LEFT BEHIND, *supra* note 2, at 9–10, 13; Stijepko Todic, Comment, *Examining the Big Picture Regarding the Importance of the No Child Left Behind Act: Is It Worth Giving a Chance?*, 32 T. MARSHALL L. REV. 311, 335 (2007); Tommy Thompson & Roy Barnes, *NCLB in Waiting*, WASH. TIMES, Dec. 19, 2007, available at <http://www.stand.org/Document.Doc?id=634>; Press Release, U.S. Dep’t of Educ., Secretary Spellings Highlights Gains Made on the Nation’s Report Card Under No Child Left Behind (Sept. 25, 2007), available at <http://www.ed.gov/news/pressreleases/2007/09/09252007.html>. Margaret Spellings, Secretary of Education under President Bush, famously told reporters that “No Child Left Behind [is] like Ivory soap: It’s 99.9 percent pure or something There’s not much needed in the way of change.” *Education Chief: No Child Nearly Perfect*, MSNBC, Aug. 30, 2006, <http://www.msnbc.msn.com/id/14589472/>. So far, President Obama’s Secretary of Education, Arne Duncan, has not been as laudatory, but has promoted funding the law and toughening standards for education. See Sam Dillon, *Education Standards Likely to See Toughening*, N.Y. TIMES, Apr. 15, 2009, http://www.nytimes.com/2009/04/15/education/15educ.html?_r=1&partner=rss&emc=rss.

9. James C. Capretta, *Reforming Education: NCLB Changes Things for the Better*, WASH. TIMES, Jan. 17, 2008, available at <http://www6.lexisnexis.com/publisher/EndUser?Action=UserDisplayFullDocument&orgId=574&topicId=25066&docId=1:730044446&start=1>.

10. U.S. DEP’T OF EDUC., BUILDING ON RESULTS: A BLUEPRINT FOR STRENGTHENING THE NO CHILD LEFT BEHIND ACT 1 (2007), available at <http://www.ed.gov/policy/elsec/leg/nclb/buildingonresults.pdf>.

11. *Id.* The Jacob K. Javits Gifted and Talented Students Education Act of 2001, 20 U.S.C. § 7253 (2002), is the only portion of the Act that addresses gifted students.

12. See, e.g., John Cloud, *Are We Failing Our Geniuses?*, TIME, Aug. 16, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1653653,00.html>; Editorial, *Leaving the Gifted Behind: But Reno-Area School Runs Counter to the Trend*, LAS VEGAS REV. J., Aug. 26, 2007, available at <http://www.lvrj.com/opinion/9380541.html>; Daniel Golden, *Initiative to Leave No Child Behind Leaves Out Gifted*, WALL ST. J., Dec. 29, 2003, available at <http://online.wsj.com/public/resources/documents/golden6.htm>; Susan Goodkin & David G. Gold, *The Gifted Children Left Behind*, WASH. POST, Aug. 27, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/26/AR2007082600909.html>; Susan Goodkin, *Leave No Gifted Child Behind*, WASH. POST, Dec. 27, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/26/AR2005122600553.html>; Michael Winerip, *No Child Left Behind? Ask the Gifted*, N.Y. TIMES, Apr. 5, 2006, available at <http://www.nytimes.com/2006/04/05/nyregion/05education.html>.

NCLB, very little has even been suggested to help the Act better address the needs of gifted students.¹³ Assuming NCLB will eventually be reauthorized, it must be modified to address the needs of gifted students.

In this Note, I will first discuss the histories of gifted education practice, federal gifted education policies, and NCLB. Second, I will discuss the impact of NCLB on gifted education and address proposals for modifications to NCLB to improve gifted and talented education policies and perceptions nationwide.

I. HISTORY

A. *History of Gifted Education Practice*

America's education system began as a revolutionary, egalitarian attempt to make public education, at least through eighth grade, available to all children.¹⁴ The schools were one-room schoolhouses where children of all ages and ability levels were together in one classroom.¹⁵ Children of all ability levels could work through the curriculum at their own paces until they completed all material that was available.¹⁶ Because the entire curriculum was housed in one building, accommodations for high-ability children required little effort.¹⁷ Those who were academically and financially able could continue their educations at secondary school or college.¹⁸ After World War II, school districts began building consolidated junior

13. See *infra* notes 99–100 and accompanying text.

14. Nicholas Colangelo & Gary A. Davis, *Introduction and Historical Overview*, in HANDBOOK OF GIFTED EDUCATION 3, 5 (Nicholas Colangelo & Gary A. Davis eds., 3d ed. 2003). For an interesting criticism of universal compulsory education, see Barry Grant, *Education Without Compulsion: Toward New Visions of Gifted Education*, 29 J. EDUC. GIFTED 161 (2005).

15. See 1 NICHOLAS COLANGELO ET AL., A NATION DECEIVED: HOW SCHOOLS HOLD BACK AMERICA'S BRIGHTEST STUDENTS 11 (2004), available at <http://nationdeceived.org/NDv1.pdf>; DEBORAH L. RUF, LOSING OUR MINDS: GIFTED CHILDREN LEFT BEHIND 233 (2005); Dawn M. Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 500 (2005).

16. RUF, *supra* note 15, at 233; COLANGELO ET AL., *supra* note 15, at 11.

17. RUF, *supra* note 15, at 233.

18. Colangelo & Davis, *supra* note 14, at 5.

high and high schools.¹⁹ For the first time, children were grouped exclusively with age-mates, creating a ceiling effect for the fastest learners.²⁰

Both research into ability grouping and improved intelligence testing²¹ led to an initial interest in a systematic approach to gifted education as early as the 1870s.²² The modern concept of systematic gifted education was spurred in the 1950s by the Russian launch of Sputnik.²³ Americans feared falling behind the Russians in technology and education and, through the federal government,²⁴ supported more targeted efforts to educate the gifted.²⁵ Homogenous grouping and acceleration of advanced students began as a part of the overall “total talent mobilization” that marked the aftermath of Sputnik.²⁶

Unfortunately, early efforts resulted in tracked curriculums where students could be locked into the “low,” “average,” or “high” track based on presumed ability or prior achievement.²⁷ These wholesale tracking practices often resulted in segregated programs, particularly

19. RUF, *supra* note 15, at 234.

20. *Id.*

21. Pioneering researchers and writers in the areas of intelligence and intelligence testing include Sir Francis Galton, Alfred Binet, Henry Goddard, Lewis Terman, and Leta Stetter Hollingworth. Colangelo & Davis, *supra* note 14, at 6–7. A thorough discussion of each of their contributions is, however, beyond the scope of this Note. For an overview of individual contributions to the modern practice of gifted education, see *id.*; GARY A. DAVIS & SYLVIA B. RIMM, *EDUCATION OF THE GIFTED AND TALENTED* 4–8 (5th ed. 2004); and Jennifer L. Jolly, *Foundations of the Field of Gifted Education*, 28 *GIFTED CHILD TODAY* 14 (2005).

22. See Colangelo & Davis, *supra* note 14, at 5–6. These first efforts in America to systematically educate the gifted were exceptions and occurred as early as 1870 in St. Louis, Missouri; 1886 in Elizabeth, New Jersey; 1891 in Cambridge, Massachusetts; 1902 in Worcester, Massachusetts; 1916 in Los Angeles, California, and Cincinnati, Ohio; 1919 in Urbana, Illinois; and 1922 in Manhattan, New York, and Cleveland, Ohio. *Id.*

23. Kim Millman, Comment, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 *PEPP. L. REV.* 455, 468–69 (2007).

24. See discussion *infra* Part I.B.

25. Colangelo & Davis, *supra* note 14, at 7.

26. *Id.*; DAVIS & RIMM, *supra* note 21, at 8; Lynn H. Fox & Jerrilene Washington, *Programs for the Gifted and Talented: Past, Present, and Future*, in *THE GIFTED AND TALENTED: DEVELOPMENTAL PERSPECTIVES* 197, 200 (Frances Degen Horowitz & Marion O’Brien eds., 1985).

27. Susan Demirsky Allan & Ellen D. Fiedler, *Continuing the Discussion of Ability Grouping*, *DUKE GIFTED LETTER*, Aug. 29, 2006, http://www.dukegiftedletter.com/articles/vol6no3_ef.html.

when placement was influenced by culturally biased assessments.²⁸ Updated practices of ability grouping or readiness grouping have suffered because of the stigma of tracking: a perception of socioeconomic elitism, racial disparities, and the mistaken belief that the gifted are able to meet their educational potential on their own.²⁹

The perception of socioeconomic elitism in gifted education programs stems from the well-known reality that “socioeconomic status, most commonly measured by parental education and income, is a powerful predictor of school achievement and dropout behavior.”³⁰ Thus, to the extent that access to gifted programs depends on past achievement, gifted children from higher income households are more likely to be identified and admitted to gifted programs.³¹ Additionally, the economically disadvantaged tend not to score as well as their wealthier counterparts on IQ tests or other standardized achievement tests.³² Since scores from these exams are

28. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1431 (2007); Kristie L. Speirs Neumeister et al., *Fourth-Grade Teachers’ Perceptions of Giftedness: Implications for Identifying and Serving Diverse Gifted Students*, 30 J. EDUC. GIFTED 479, 480 (2007).

29. Grant, *supra* note 14, at 163–64 (“Gifted education is . . . [b]uffed by charges of elitism, favoritism, discrimination, and ineffectiveness and doubts about the reality of ‘giftedness.’”). Even in more modern gifted programs, African-American, Native-American, and Hispanic children are still consistently underrepresented. Neumeister et al., *supra* note 28, at 480.

30. Henry M. Levin, *On the Relationship Between Poverty and Curriculum*, 85 N.C. L. REV. 1381, 1387 (2007); Russell W. Rumberger, *Dropping Out of Middle School: A Multilevel Analysis of Students and Schools*, 32 AM. EDUC. RES. J. 583, 587 (1995); see also, Emily Suski, *Actually, We Are Leaving Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students’ Needs*, 14 GEO. J. ON POVERTY L. & POL’Y 255, 256 n.8 (2007) (citing a recent study by the Institute for Research on Poverty at the University of Wisconsin which “concluded that income has ‘a significant effect on a child’s math and reading test scores’”). At least one writer has suggested that it is not as much the socioeconomic status of the individual family as the socioeconomic status of the school population that leads to poor academic achievement. Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL’Y 413, 414 (2003) (citing increases in achievement for low-income students placed in higher-income school populations as evidence that it is the economic condition of the school as a whole rather than the individual that is determinative of academic achievement).

31. See E. Susanne Richert, *Excellence with Justice in Identification and Programming*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 146, 146–49.

32. See *id.* at 148; William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 584

used as a factor in determining entrance to most gifted programs, there tend to be fewer economically disadvantaged students involved in the programs.³³

Certain minorities also tended to be underrepresented in gifted programs.³⁴ Issues of race and class are often closely tied, which explains some of the differences in representation as discussed above.³⁵ But, even when socioeconomic status is controlled, gaps in

(2006) (“[It is a] well-known fact that poor and minority students tend to perform worse on standardized assessments than their wealthier and white peers.”).

33. Donna Y. Ford, *Equity and Excellence: Culturally Diverse Students in Gifted Education*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 506, 511 (“More than 90% of school districts use intelligence or achievement test scores for placement decisions.”).

34. *See, e.g.*, JAN DAVIDSON & BOB DAVIDSON WITH LAURA VANDERKAM, GENIUS DENIED: HOW TO STOP WASTING OUR BRIGHTEST YOUNG MINDS 73 (2005); *see also* Ford, *supra* note 33, at 506 (“Although dated, the most comprehensive data on the demographics of gifted programs come from the U.S. Department of Education (1993), which reported that African-American, Hispanic-American, and Native-American students are underrepresented in gifted programs by 50% to 70%.”). Researchers have not come to an agreement on the reason for lower IQ scores of lower-income and some culturally diverse children. Abraham J. Tannenbaum, *Nature and Nurture of Giftedness*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 45, 48–49. There are many who have suggested that the test instruments are flawed or biased. *See, e.g.*, DAVIS & RIM, *supra* note 21, at 278–80; James J. Gallagher, *Issues and Challenges in the Education of Gifted Students*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 11, 14. Others suggest that, politically incorrect as it may be, “the major mental tests are *not* biased against native-born, English speaking Americans . . . [but instead] represent real differences in the higher-order thinking skills that people have developed.” Linda S. Gottfredson, *The Science and Politics of Intelligence in Gifted Education*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 24, 31.

One author summarizes the dilemma succinctly:

We don't know what part of intelligence is due to nature or nurture. We do know that children who grow up in homes without books and homes in which adults rarely speak to and interact with children will likely perform lower on IQ tests than children from more stimulating environments. We know that some cultures value intellectual ability in children more than others.

DAVIDSON & DAVIDSON, *supra*, at 74; *see also* William J. Turnier, *Theory Meets Reality: The Case of the Double Tax on Material Capital*, 27 VA. TAX REV. 83, 97 (2007) (“[R]ecent scholarship has demonstrated quite convincingly that both genetics and environment play a significant role in developing the IQ of an individual.”).

35. Zamora, *supra* note 30, at 414; *see also* Nancy M. Robinson, *Two Wrongs Do Not Make a Right: Sacrificing the Needs of Gifted Students Does Not Solve Society's Unsolved Problems*, 26 J. EDUC. GIFTED 251, 256 (2003) (suggesting that differences between racial groups on tests of cognitive ability, and subsequent placement in gifted programs, are the result of class rather than race). *But see* Carolyn M. Callahan, *Searching for Answers or Creating More Questions? A Response to Robinson*, 26 J. EDUC. GIFTED 274, 277 (2003) (“[W]e should not be too quick to attribute the issues of underidentification of minority students to poverty alone [F]actors beyond socioeconomic status must be considered.”).

average test scores between races differ.³⁶ Additionally, when selection for gifted programs is based on subjective criteria such as parent and teacher recommendations, the possibility of racial biases, cultural values, and environmental pressures could lead to gifted minority students going unidentified.³⁷ Because of these potential abuses, several surges in educational reform have pushed toward classroom mainstreaming in order to keep children from being improperly placed in a remedial track.³⁸ Research in mainstreaming, however, has shown no significant improvement in the performance of lower-performing children and great losses in performance of gifted children.³⁹

The misconception that gifted children are able to meet their educational potential without help is prevalent.⁴⁰ Studies, however,

36. Ford, *supra* note 33, at 511.

37. DAVIS & RIM, *supra* note 21, at 281–82; Neumeister et al., *supra* note 28, at 480. Additionally, one study has shown that teachers may equate giftedness with productivity rather than ability. *Id.* at 486. Thus, students who underachieve or act out due to lack of a challenging curriculum may not be identified and recommended for gifted services. *Id.*

38. See RUF, *supra* note 15, at 237; Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 142 (1995).

39. RUF, *supra* note 15, at 252; Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131, 133 (1998). Intuitively this also makes sense because, though advocates for mixed ability classrooms assume lower-ability children will be spurred on by seeing their higher-ability classmates achieve, it seems much more likely for a lower-ability child to think less of him or herself in this situation. The potential benefits for lower-ability children from mixed-ability classrooms seem more likely the result of teacher expectations than the social and academic interaction with children who are constantly outperforming them. Additionally, meta-analysis of research studies on the effects of grouping and tracking practices observing achievement, self-esteem, and attitudes revealed that academic achievement generally improves for all ability levels with grouping that uses curricula adjusted to the skill levels of the students. James A. Kulik, *Grouping and Tracking*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 268, 278–79. It should be noted that some researchers relying on ethnographic studies concluded that no achievement gains are made by tracking and that ability-based curricula are unfair. *Id.* at 279. Under the current proficiency-testing regime, empirical research in this area is difficult because many gifted children still perform well on standardized tests that measure proficiency only. These tests do not, however, measure how well children perform relative to their capabilities, but rather whether they meet a certain proficiency standard expected for their age. A child who enters a grade already having mastered the majority of the curriculum, as many gifted children do, could sleep through the entire school year without showing a decrease in performance on a standardized proficiency test. See, e.g., RUF, *supra* note 15, at 238 (“[G]ifted students score well on achievement tests regardless of what they study in school.”).

40. See, e.g., Scott A. Chamberlin et al., *Serving Twice-Exceptional Preschoolers: Blending Gifted Education and Early Childhood Special Education Practices in Assessment*

have indicated that many gifted students do not make it on their own.⁴¹ And those who “make it,” by achieving good grades relative to their peers, are often still underachieving relative to their potential.⁴² It is difficult to imagine that these students, who are poised to be the leaders of the next generation, will have the skills needed to face issues of the globalizing economy. Additionally, these unchallenged students have high drop out rates,⁴³ often experience depression, and have a greater suicide risk than their peers.⁴⁴

In addition to or instead of tracked curriculums, schools have also instituted policies of acceleration⁴⁵ to address the needs of gifted children. In the past, the grade-skipping form of acceleration was frequently used to address the educational needs of gifted children because it involved relatively little administrative expense or effort.⁴⁶ Now, however, there is much resistance to acceleration due to beliefs that it could lead to social maladjustment and gaps in a child’s education.⁴⁷ Research in acceleration over the last fifty years has shown that while acceleration is not the best choice in every situation, it is often a successful and inexpensive alternative for meeting both the academic and social needs of gifted children.⁴⁸ Additionally, more

and Program Planning, 30 J. EDUC. GIFTED 372, 373 (2007); Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421, 429 (2005); Ann Hassenpflug, *A Case of Irony*, 37 J.L. & EDUC. 1, 1–2 (2008); Viggiano, *supra* note 15, at 505–06.

41. DAVIS & RIM, *supra* note 21, at 2–3; Colangelo & Davis, *supra* note 14, at 5; Chamberlin et al., *supra* note 40, at 373–74; Viggiano, *supra* note 15, at 506–07.

42. Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89, 97 (2005).

43. See Joseph S. Renzulli & Sunghee Park, *Gifted Dropouts: The Who and the Why*, 44 GIFTED CHILD Q. 261, 261–62 (2000) (finding that though the exact number and percentage of gifted dropouts is difficult to name, it is universally believed to be high). The impact of gifted students dropping out is especially felt among racial minorities and students of low socioeconomic status who are more likely to drop out than white students and students from families with higher income levels. *Id.* at 268.

44. Bittick, *supra* note 38, at 126–28; Heim, *supra* note 39, at 132.

45. Acceleration is used to refer to a variety of educational practices including early entrance to kindergarten or college, grade skipping, part-time grade acceleration (where students receive instruction for part of the day in a higher grade level), and telescoping curriculum (where students complete material at a faster pace). Shirley W. Schiever & C. June Maker, *New Directions in Enrichment and Acceleration*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 163, 165–66.

46. COLANGELO ET AL., *supra* note 15, at 11–13.

47. Schiever & Maker, *supra* note 45, at 167.

48. COLANGELO ET AL., *supra* note 15, at 43, 53.

refined forms of part-time acceleration (allowing students to move to a higher grade-level for certain subjects) are an inexpensive option available to schools that allow students to remain with their age-mates for the majority of the day.⁴⁹

More recently, a small number of schools have implemented Individualized Education Plans (“IEPs”) for gifted students,⁵⁰ similar to those in place for students with disabilities.⁵¹ An IEP allows for an individualized curriculum that can be particularly useful for students who do not fit the typical educational mold.⁵² Gifted children whose educational needs were addressed through an IEP anecdotally report overwhelming success.⁵³ Additionally, because of their widespread

The grade-skipping form of acceleration alone is not, however, ideal for gifted students. Schiever & Maker, *supra* note 45, at 166–67. While it is better for the gifted child than relearning material she already knows, it does not address the needs for content enrichment of high-ability children. *Id.*

49. RUF, *supra* note 15, at 241.

50. Pennsylvania, for example, currently has a statewide requirement for IEPs for gifted students and provides judicial remedies for gifted students whose educational needs are not met. 22 PA. CODE §§ 16.1–16.65 (2001); see Perry A. Zirkel & Paul L. Stevens, Commentary, *The Law Concerning Public Education of Gifted Students*, 34 ED. LAW REP. 353, 356–62 (1986).

51. The Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400–1419 (2004), specifies that each disabled student subject to the IDEA must receive an IEP tailored to the unique needs of the child. *Id.* Interestingly, gifted children who also have special educational needs, so-called “twice-exceptional” or “twice-blessed” children, may receive IEPs to address their special educational needs brought about by their disabilities. Millman, *supra* note 23, at 466–67. If schools and parents are well-informed and willing, the IEP can address their gifted education needs as well. *Id.* at 494. Unfortunately, most schools force students to choose between the benefits of services for special education and services for gifted students. *Id.* at 458. These students may now face an increased hurdle to receive services to achieve their potential because the focus of NCLB is on grade-level proficiency by reference to the average student rather than the student’s potential. Nicholas L. Townsend, *Framing a Ceiling as a Floor: The Changing Definition of Learning Disabilities and the Conflicting Trends in Legislation Affecting Learning Disabled Students*, 40 CREIGHTON L. REV. 229, 232 (2007). The “twice-exceptional” student may perform at grade-level because her exceptional giftedness compensates for or even masks her disability. *Id.* at 231. For that child, however, grade-level performance is significantly below her potential. *Id.* “Measuring learning disability by comparison to the average person instead of an individual’s potential is underinclusive, excluding those learning disabled students with high potential from receiving the accommodations they need to realize it.” *Id.* at 232. Additionally, these students can remain unidentified because education personnel are not trained to spot gifted-disabled learners. Barbara Clark, *Enabling the Gifted-Disabled Learner*, 222 N.J. LAW. 62, 63 (2003).

52. See Bittick, *supra* note 38, at 141–42.

53. While there has not been an empirical study to demonstrate results of IEP use for gifted students, anecdotally, they have been observed to be generally successful. See DAVIDSON & DAVIDSON, *supra* note 34, at 34.

use in special education, IEPs are a known commodity and would not be logistically difficult to implement for gifted children, though they are costly to implement and maintain.⁵⁴

B. History of Federal Gifted Education Policy

The federal government historically has played a very limited role in education policy, viewing education as better left to state and local control.⁵⁵ Research efforts aimed at gifted education were largely private or state-funded until the United States Office of Education⁵⁶ established a special section on exceptional children in 1931.⁵⁷ This was an administrative action, not one directed by the legislature.

Congress's first attempt to address federally the needs of gifted students came indirectly in 1950 with the passage of the National Science Foundation Act ("NSFA").⁵⁸ In response to public criticism by the Educational Policies Commission for lack of congressional support for gifted education,⁵⁹ Congress passed the NSFA, which authorized the President to establish the National Science Foundation to promote science and math through scholarships and research.⁶⁰ Though the Act did not directly provide for gifted education per se, it

54. Sharon E. Rush, *Lessons from and for "Disabled" Students*, 8 J. GENDER RACE & JUST. 75, 77 (2004). One study showed that in special education "the costs for IEPs was almost twice that of the per student costs in general education: \$12,474 versus \$6,556 per student, respectively." *Id.* These costs include the services provided under the IEP and would likely be much lower for gifted students.

55. Koski & Reich, *supra* note 32, at 572.

56. The first Department of Education was created in 1867 and quickly demoted to the Office of Education. Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 372–73 (2006). The Office was created in a post civil war effort to recognize that the quality and availability of education is a national concern. *Id.* The Office had little official power in the federal government, yet did have significant influence in framing the debate of the role of the federal government in public education. *Id.* at 374. The Office was later merged with other offices to form the current cabinet-level Department of Education in 1980. Department of Education Organization Act, 20 U.S.C. §§ 3401–3510 (1979). For an interesting discussion of the rise of the role of the federal government in education policy, see Liu, *supra*.

57. Miller, *supra* note 42, at 90; Charles J. Russo, *Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 733 (2001).

58. National Science Foundation Act of 1950, ch. 171, 64 Stat. 149 (1950) (current version at 42 U.S.C. § 1861–75 (2006)); Miller, *supra* note 42, at 91.

59. Miller, *supra* note 42, at 91.

60. National Science Foundation Act of 1950 § 3.

had the effect of encouraging gifted students to seek careers in mathematics and the physical sciences.⁶¹

After the Russians launched Sputnik in 1958, many Americans feared the educational system still was not cultivating genius in a manner that would allow the United States to protect itself in the increasingly technologically advanced field of national defense.⁶² By way of response to this “educational emergency,” Congress passed the National Defense Education Act (“NDEA”).⁶³ The NDEA allocated almost one billion dollars for research, training, and curriculum development aimed at gifted students.⁶⁴ Most U.S. schools adopted some form of gifted program or ability grouping at this time.⁶⁵

At the same time, following *Brown v. Board of Education*⁶⁶ in 1954, the focus in education moved toward desegregation and equality for disenfranchised groups.⁶⁷ As part of President Johnson’s “War on Poverty” in the mid-1960s, Congress passed the Elementary and Secondary Education Act of 1965⁶⁸ (“ESEA 65”). In implementing ESEA 65, funding was diverted from gifted programs to services for the “educationally disadvantaged and economically deprived.”⁶⁹ Additionally, social pressure led to identical classroom treatment for all children and the dismantling of many of the gifted programs that had begun as part of the NDEA.⁷⁰

61. Russo, *supra* note 57, at 733.

62. Millman, *supra* note 23, at 469.

63. National Defense Education Act of 1958, Pub. L. No. 85–864, § 101, 72 Stat. 1581 (1958); see Miller, *supra* note 42, at 91.

64. National Defense Education Act of 1958 §§ 501–504 (allocating funding for testing to identify gifted students and academic counseling for the students so identified); §§ 301–305 (allocating funding for improvements in science and math curriculums and facilities); §§ 601–603 (allocating funding for improvements in foreign language curriculum and participation); see Miller, *supra* note 42, at 91.

65. Miller, *supra* note 42, at 91.

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

67. Russo, *supra* note 57, at 734 (“Brown is the cornerstone of all subsequent legal developments ensuring the rights of disenfranchised groups.”).

68. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in part as amended at scattered sections of 20 U.S.C. and partially repealed by Pub. L. No. 91-230, 84 Stat. 173 (1970)); see Koski & Reich, *supra* note 32, at 573.

69. Russo, *supra* note 57, at 737.

70. Miller, *supra* note 42, at 91.

Federal support for gifted education increased in 1970 when the Elementary and Secondary Education Amendments⁷¹ (“ESEA 70”) were signed into law. ESEA 70 added a federal definition of “gifted and talented” and provided for federal assistance for gifted programs.⁷² Then, in 1974, the Office of Gifted and Talented⁷³ was established in the United States Office of Education, and ESEA 65 was amended to provide limited federal funding for gifted education.⁷⁴

Even these minimal federal efforts supporting gifted education were undone as part of the Omnibus Budget Reconciliation Act⁷⁵ (“OBRA”) under the Reagan administration. In 1981, the Office of Gifted and Talented was closed, funding was cut, and incentives to research gifted education disappeared.⁷⁶ The federal government was uninvolved in gifted education efforts for much of the 1980s.⁷⁷

In 1993, the Department of Education released a report concluding that gifted students received inadequate education and calling for a massive overhaul of the educational system as it relates to gifted students.⁷⁸ Congress responded to this and several other reports showing that America’s schools were failing by passing the Jacob K. Javits Gifted and Talented Students Act of 1994,⁷⁹

71. Elementary and Secondary Education Amendments of 1970, Pub. L. No. 91-230, 84 Stat. 121 (1970).

72. Elementary and Secondary Education Amendments of 1970 § 142 (adding “gifted and talented” as potential recipients of Title V grant funding under § 503 of ESEA 65); § 162 (adding that “‘gifted and talented children’ means, in accordance with objective criteria prescribed by the Commissioner, children who have outstanding intellectual ability or creative talent the development of which requires special activities or services not ordinarily provided by local educational agencies” to § 801 of ESEA 65); see Miller, *supra* note 42, at 91; Russo, *supra* note 57, at 738.

73. Miller, *supra* note 42, at 91; Russo, *supra* note 57, at 739–40.

74. Miller, *supra* note 42, at 91; Russo, *supra* note 57, at 740. The amendment authorized federal expenditures not to exceed \$12.5 million, slashed from \$80 million in the original draft. Miller, *supra* note 42, at 91. The authorized expenditures amounted to about one dollar per year per eligible child. *Id.*

75. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2175, 95 Stat. 357 (codified as amended at 42 U.S.C. § 1396n (2006)).

76. Russo, *supra* note 57, at 740.

77. *Id.*

78. PAT O’CONNELL ROSS, U.S. DEP’T OF EDUC., NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA’S TALENT (1993); Miller, *supra* note 42, at 92.

79. Jacob K. Javits Gifted and Talented Students Education Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (current version at 20 U.S.C. § 7253 (2006)).

reinstating and updating some of the programs cut in 1981.⁸⁰ General concern over the mediocrity of American education was increasing, but the attention given to raising overall standards superseded any attention to raising standards for gifted education in particular.⁸¹

Currently, there is no federal mandate for states to address needs of gifted children, resulting in a patchwork of state policies.⁸² The federal government broadly defines “gifted and talented” as “students, children, or youth who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities.”⁸³ Each state is also free to adopt its own definitions of giftedness.⁸⁴ Many states do not mandate gifted education programs, many do not provide funding for gifted education,⁸⁵ and many do not allow acceleration options for gifted students.⁸⁶

80. *Id.* This Act still only provided modest funding and still did not mandate gifted education. Russo, *supra* note 57, at 740–41.

81. Miller, *supra* note 42, at 92. The rising concern prompted Congress to pass Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994), which allocated funding for states to implement programs to raise academic standards for all children, but did not address the needs of gifted education. Miller, *supra* note 42, at 92.

82. A comprehensive review of the gifted education policies for each state, while relevant, is beyond the scope of this Note. Updated information for each state is available at Davidson Institute’s GT-Cybersource, <http://www.gt-cybersource.org> (last visited Mar. 30, 2009). See also Miller, *supra* note 41, at 92–95 (summarizing variations in some state policies).

83. 20 U.S.C. § 7801 (2006).

84. Millman, *supra* note 23, at 476–78. Some states have adopted the federal definition, some have written more precise definitions, and some have not adopted a definition of giftedness at all. *Id.*

85. Currently only eight states both mandate and provide full funding for gifted education: Alaska, Arizona, Georgia, Iowa, Kansas, Louisiana, Mississippi, and Oklahoma. Davidson Institute, Gifted Education Policies, <http://www.davidsongifted.org/db/StatePolicy.aspx> (last visited Mar. 30, 2009). Four states mandate but do not provide funding for gifted education: Maryland, New Jersey, Oregon, and Pennsylvania. *Id.* Nine states do not mandate but do provide funding for gifted education: California, Connecticut, Illinois, Massachusetts, Michigan, Nevada, North Dakota, Washington, and Wyoming. *Id.* Seven states and the District of Columbia neither mandate nor provide funding for gifted education: Delaware, Missouri, New Hampshire, New York, Rhode Island, South Dakota, and Vermont. *Id.* And the remaining twenty-two states mandate gifted education and provide partial funding. *Id.*

86. Viggiano, *supra* note 15, at 504.

C. History of the No Child Left Behind Act

NCLB was signed into law in 2002 as a reauthorization of ESEA 65.⁸⁷ The foundation of the legislation is increased accountability through regular testing and reporting of student achievement, broken down into subgroups by race, ethnicity, gender, English proficiency, economic background, and disability.⁸⁸ Gifted students are not a reported subgroup.⁸⁹ The reported data must meet state standards for Adequate Yearly Progress (“AYP”), ultimately bringing all students to “proficiency” as defined by the state by the 2013–2014 school year.⁹⁰ NCLB provides consequences for schools and teachers when goals are not met.⁹¹ NCLB also requires teachers to be “highly qualified” by requiring bachelor’s degrees, certification, and core competency.⁹² Teachers are not, however, required to have particular training in pedagogy or identification of students with special needs, including gifted students.⁹³

The well-intentioned focus of NCLB is improving public education by raising the achievement level of all students to proficiency.⁹⁴ NCLB only minimally addresses gifted education by providing very limited funding for research, professional developments, program development, and curriculum for gifted

87. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U.L. REV. 932, 937 (2004); Viggiano, *supra* note 15, at 493.

88. 20 U.S.C. § 6311(h)(1)(C)(i) (2006) (requiring data be “disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged, except . . . in a case in which the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student”); see Ratner, *supra* note 5, at 8–9; Viggiano, *supra* note 15, at 494.

89. 20 U.S.C. § 6311(h)(1)(C)(i) (2006).

90. 20 U.S.C. § 6311(b)(2)(F) (2006); see Viggiano, *supra* note 15, at 494.

91. 20 U.S.C. § 6316(b)(1) (2006). Consequences of not meeting AYP include losing federal funding, being required to develop and submit a plan for improvement, being required to offer students the choice of another public school in the district, providing tutoring services and after-school programs, and restructuring or state takeover if progress goals continue to go unmet. *Id.*; see Ratner, *supra* note 5, at 9–11; Viggiano, *supra* note 15, at 494.

92. 20 U.S.C. § 7801(23)(B) (2006); see Viggiano, *supra* note 15, at 494.

93. 20 U.S.C. § 7801(23)(B).

94. 20 U.S.C. § 6301 (2006) (“The purpose of this subchapter is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”).

education.⁹⁵ But, since NCLB was enacted in 2002, only \$27 million in federal grants were awarded under this provision⁹⁶ and appropriations cuts resulted in no funding awards for 2006 or 2007.⁹⁷ By comparison, in the same timeframe, over \$165.6 billion was spent by the federal government on other aspects of the Act.⁹⁸ That amounts to less than \$.02 of every \$100 spent by the federal government on NCLB going toward gifted education.

Congress is currently debating different possibilities for reforming and reauthorizing NCLB,⁹⁹ but very little is being discussed that would modify the Act to better address the needs of gifted children.¹⁰⁰

95. 20 U.S.C. § 7253 (2006). The Jacob K. Javits Gifted and Talented Students Education Act of 2001 provides in part:

The purpose of this subpart is to initiate a coordinated program of scientifically based research, demonstration projects, innovative strategies, and similar activities designed to build and enhance the ability of elementary schools and secondary schools nationwide to meet the special educational needs of gifted and talented students.

....

The Secretary . . . is authorized to make grants to . . . agencies . . . to assist . . . in carrying out programs or projects authorized by this subpart that are designed to meet the educational needs of gifted and talented students, including the training of personnel in the education of gifted and talented students and in the use, where appropriate, of gifted and talented services, materials, and methods for all students.

Id.

96. Under the Jacob K. Javits Gifted and Talented Students Education Program, \$8.8 million was awarded in 2002, \$8.17 million in 2003, \$6.58 million in 2004, \$3.5 million in 2005, and \$0 in 2006 and 2007 due to appropriation cuts. U.S. Dep't of Educ., Awards—Jacob K. Javits Gifted and Talented Students Education Program, <http://www.ed.gov/programs/javits/awards.html> (last visited Mar. 30, 2009).

97. *Id.*

98. U.S. Dep't of Educ. Budget Table, Summary of Discretionary Funds, FY 2008 Cong. Action (Jan. 3, 2008), available at <http://www.ed.gov/about/overview/budget/budget08/08bylevel.pdf>. \$22.0 billion was spent in 2002, \$23.6 billion in 2003, \$24.3 billion in 2004, \$24.4 billion in 2005, \$23.3 billion in 2006, and \$23.5 billion in 2007. *Id.*

99. The current Congressional “working draft” of revisions to NCLB is not available to the public. The Commission on No Child Left Behind, a bi-partisan commission tasked with reviewing the law and making recommendations for improvement, published its seventy-five recommendations to improve NCLB. COMM’N ON NO CHILD LEFT BEHIND, *supra* note 2, at 161–69. Additionally, The U.S. Department of Education published its twenty-five proposals to improve NCLB. U.S. DEP’T OF EDUC., *supra* note 10. Outside the confines of NCLB, Senator Chuck Grassley of Iowa has been making noise as an advocate for gifted education by including provisions for gifted education in various appropriations bills. Press Release, United States Senator Chuck Grassley of Iowa, Grassley Initiatives Included in Higher Ed Bill (July 24, 2007), available at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=10490 (providing that any teacher preparation institution receiving a grant under the Higher

II. ANALYSIS AND PROPOSALS

A. *Effects of NCLB and Public Perceptions on Gifted Education*

While many educators, legislators, parents, and commentators criticize NCLB for its insufficient funding for the programs it mandates,¹⁰¹ unrealistic standards,¹⁰² consequences that are too punitive in nature¹⁰³ and that create inappropriate programming and

Education Bill must reform its curriculum to ensure prospective teachers develop skills to identify and meet the specific learning needs of gifted and talented students); Press Release, United States Senator Chuck Grassley of Iowa, Grassley Amendment to Help Students Remain Competitive in Global Economy Clears Senate (Oct. 24, 2007), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=5225 (providing funding for the Jacob Javits Gifted and Talented Students Education Act and the American Competitiveness Scholarship Program).

100. Of the seventy-five recommendations made by the Commission on No Child Left Behind and the twenty-five proposals put forth by the Department of Education, not a single recommendation addresses the needs of gifted children. COMM'N ON NO CHILD LEFT BEHIND, *supra* note 2, at 161–69 (summarizing the recommendations of the Commission); U.S. DEP'T OF EDUC., *supra* note 10.

101. Yates, *supra* note 3, at 408–11.

102. Richard Rothstein, *Leaving "No Child Left Behind" Behind* (Dec. 17, 2007), *available at* http://www.prospect.org/cs/articles?article=leaving_nclb_behind.

Even with inordinate attention to math and reading, it is practically conceptually ludicrous to expect all students to be proficient at challenging levels. Even if we eliminated all disparities based on socioeconomic status, human variability prevents a single standard from challenging all. The normal IQ range, 85 to 115, includes about two-thirds of the population. "Challenging" achievement for those at 115 would be impossibly hard for those at 85, and "challenging" achievement for those at 85 would be too easy for those at 115.

The law strongly implies that "challenging" standards are those of the National Assessment of Educational Progress (NAEP), periodic federal tests of national student samples. But while NAEP tests are excellent, their proficiency cut-points have no credibility. Passing scores are arbitrary, fancifully defined by panels of teachers, politicians, and laypeople. Many children in the highest-scoring countries don't achieve them. Taiwan is tops in math, but 40 to 60 percent of Taiwanese students are below proficient by NAEP standards. Swedish students are the best readers in the world, but two-thirds are not NAEP-proficient.

Id. Particularly criticized as unrealistic is the requirement that 100% of students with disabilities who are tested meet the same standards as their general education peers. Rentschler, *supra* note 4, at 649–62. The virtual impossibility of meeting every requirement of NCLB has caused some to speculate that the legislation is not actually intended to improve public schools but rather to lead to the eventual privatization of education. *Id.*

103. Ratner, *supra* note 5, at 13–29.

teaching incentives,¹⁰⁴ and the Act's difficulty to understand and apply,¹⁰⁵ the Bush administration supported the Act.¹⁰⁶ At the time of this Note's publication, it appeared the Obama administration would also continue supporting the Act.¹⁰⁷ NCLB must be modified to address the needs of gifted students. Because NCLB affects all American education, it impacts gifted education whether or not the impact is intended.¹⁰⁸ With NCLB's focus on proficiency, there is great incentive for teachers and schools to "teach to the test" in order to artificially inflate their statistics.¹⁰⁹ This focus is especially harmful to gifted students who require a more challenging environment to achieve their potential.¹¹⁰ Because gifted students are not a subgroup measured for progress,¹¹¹ there is incentive for teachers and administrators to retain these children in inappropriate educational environments in order to retain their high test scores. Currently, schools are not in danger of losing funding or being put on the at risk list if gifted students' needs are not met.¹¹²

104. Schools have many inappropriate teaching and programming incentives under NCLB, such as (1) allowing (or even encouraging) under-performing students to drop out of school, Yates, *supra* note 3, at 425–26; (2) "teaching a scripted, narrowed and dumbed-down curriculum concentrated on memorizing of facts and the lower-level thinking skills needed to pass standardized tests," Ratner, *supra* note 5, at 16–17; (3) ignoring the needs of children far below proficiency to focus on those who can be brought to proficiency in short order, Rothstein, *supra* note 102, at 3; and (4) particularly ignoring the needs of the severely cognitively disabled, Cory L. Shindel, Note, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025, 1065–69 (2004).

105. Yates, *supra* note 3, at 402.

106. Press Release, U.S. Dep't of Educ., *supra* note 8; President George W. Bush, President Bush Discusses No Child Left Behind Reauthorization (Sept. 26, 2007), available at <http://www.whitehouse.gov/news/releases/2007/09/20070926-1.html>.

107. See Dillon, *supra* note 8.

108. See Gallagher, *supra* note 34, at 21.

109. See COMM'N ON NO CHILD LEFT BEHIND, *supra* note 2, at 19; Levin, *supra* note 30, at 1409; Ratner, *supra* note 5, at 16–17.

110. Miller, *supra* note 42, at 97–98; see also Levin, *supra* note 30, at 1381 (suggesting that the remediation approach and focus on proficiency is even more harmful to children on the low end of the achievement spectrum because it neglects breadth, depth, and meaningful application of information in favor of basic skills and rote memorization); Suski, *supra* note 30, *passim* (suggesting that the focus on test scores is particularly harmful to disadvantaged students because it relieves schools of the responsibility, and practically speaking even the ability, to use Title I funds to address needs of students that indirectly affect their achievement in school including mental health and medical services).

111. 20 U.S.C. § 6311(h)(1)(C)(i) (2006).

112. Yates, *supra* note 3, at 410–11.

While ideological policy is debated, students who have the greatest potential to achieve and be tomorrow's leaders and innovators are forced into a lockstep educational system in which they often underachieve. The next generations will face serious issues concerning globalization, overpopulation, the environment, and the national debt¹¹³ that will be better addressed by leaders from different backgrounds coming together to form solutions. Unfortunately, when the needs of gifted children are not met by public education, it is then only those with resources to move their children to private schools who can obtain appropriate education for their gifted children.¹¹⁴

In their recent book, *Genius Denied: How to Stop Wasting Our Brightest Young Minds*, Jan and Bob Davidson lament the impression that publicly supported gifted education is harmful to minorities and the poor.¹¹⁵ They contend that ignoring the needs of gifted students in public education only creates a greater socioeconomic disparity in the educational opportunities of the brightest because those with greater means can afford private schools, tutors, and other enrichment opportunities while the poor are stuck with what is available for free.¹¹⁶ It is only by supporting public gifted education that all gifted students will have the opportunity to reach their potential. To the extent that public education fails gifted students, students in families with lower incomes will feel the greater losses.

If the only impact of NCLB on gifted education was the lack of affirmative support, that would be harm enough, but the impact is far worse. Because NCLB has requirements that are underfunded and disincentives for appropriately educating the gifted, many states have cut funding for gifted students in order to meet those requirements.¹¹⁷

113. Miller, *supra* note 42, at 101.

114. DAVIDSON & DAVIDSON, *supra* note 34, at 75; Heim, *supra* note 39, at 134.

115. DAVIDSON & DAVIDSON, *supra* note 34, at 75.

116. *Id.*; Heim, *supra* note 39, at 134.

117. See, e.g., Viggiano, *supra* note 15, at 503–05 (“Illinois, New York, and Oregon have recently cut all state funding for gifted programs When [Missouri] cut funding, at least twenty-seven districts cut their gifted programs entirely Michigan cut funding by . . . 95% California cut funding by . . . \$10 million 22% of [Connecticut] school districts reduced or eliminated programs.”); Yates, *supra* note 3, at 411 (“According to a study by the Wisconsin Association of School District Administrations . . . [sixty percent] of the 344 superintendents responding said they cut or eliminated gifted and talented programs [in 2003].”).

Thus, gifted education is not merely ignored by the Act, it is undermined.

B. Proposals

In order to curtail the harm caused to public gifted education programs by the current rendition of NCLB, Congress must implement changes to the Act.

First, Congress must adopt a more quantifiable baseline federal definition of gifted students.¹¹⁸ Currently each state has its own definition,¹¹⁹ which results in gifted students not being identifiable at a federal level.¹²⁰ A definition such as that provided by the Oklahoma

118. Identifying a more specific federal definition of giftedness would be met with much resistance as any means of measuring intelligence are fraught with controversy. *See, e.g.*, Robert J. Sternberg, *Giftedness According to the Theory of Successful Intelligence*, in HANDBOOK OF GIFTED EDUCATION, *supra* note 14, at 88, 94–95 (advocating a non-quantifiable definition of giftedness based on the combination of analytic, synthetic, and practical giftedness); Tannenbaum, *supra* note 34, at 45–56 (advocating a psychosocial approach to defining giftedness rather than a purely psychological approach). There will also always be difficulty around the borders of any numeric definition. For example, with an IQ cutoff to qualify for a gifted program of 130, a child with an IQ of 131 who qualifies for a gifted program is not “appreciably brighter” than a child with an IQ of 129 who does not qualify. DAVIDSON & DAVIDSON, *supra* note 34, at 18. Recognizing that intelligence testing is controversial, it is still the best testing available. In the same way that IQ is used to identify children in need of special education, it should also be used to identify gifted children. High test scores still identify students who have gifted potential and should be used to include them in gifted programs; lower test scores, however, should not be used to exclude students who have gifted potential but may not test well. *See* Richert, *supra* note 31, at 146–49. We must shift the perspective from seeing numeric IQs as a means for excluding students, that is, creating cutoffs, to seeing numeric IQs as a means for seeking out those who need educational help to achieve their potential because of their special abilities. Unfortunately, the disagreement about a definition causes many to give up and leave even those for whom there is no doubt of exceptional giftedness to flounder in the system. We cannot wait until we all agree on a definition to address the needs of these children.

119. Currently forty-six of the fifty states have defined what it means to be “gifted or talented.” *See* Educ. Comm’n on the States, State Notes: State Gifted and Talented Definitions as of June 2004, available at <http://www.ecs.org/clearinghouse/52/28/5228.htm> (listing each state’s definition of giftedness as defined by either the state legislature or state agency as of 2004).

120. Having the ability to identify gifted students at a federal level could help with incorporating accountability for the education of gifted students in NCLB. Additionally, a comprehensive federal definition of giftedness would introduce the possibility of substantive and procedural safeguards similar to those available for students with disabilities under the IDEA. *See* Russo, *supra* note 57, at 755–56.

legislature,¹²¹ which incorporates both objective (scores in the top 3% on any national standardized test) and subjective (teacher referrals) criteria, could lead to more consistent treatment of gifted students.¹²² Of course, states should retain the freedom to expand the definition to include more students, but they should not be able to contract the definition to include fewer students.

Second, teachers must be better trained to identify and work with gifted students.¹²³ Often, gifted children who are not challenged seem to act out or appear lazy, which leads to mistreatment by teachers rather than recognition of giftedness and appropriate intervention.¹²⁴ Teacher training in the abilities and needs of gifted children should be part of NCLB's "highly qualified teacher" requirement. This

121. OKLA. STAT. ANN. tit. 70, § 1210.301 (West 2007).

"Gifted and talented children" means those children identified at the preschool, elementary and secondary level as having demonstrated potential abilities of high performance capability and needing differentiated or accelerated education or services. For the purpose of this definition, "demonstrated abilities of high performance capability" means those identified students who score in the top three percent (3%) on any national standardized test of intellectual ability. Said definition may also include students who excel in one or more of the following areas:

- a. creative thinking ability,
- b. leadership ability,
- c. visual and performing arts ability, and
- d. specific academic ability.

A school district shall identify children in capability areas by means of a multicriteria evaluation. Provided, with first and second grade level children, a local school district may utilize other evaluation mechanisms such as, but not limited to, teacher referrals in lieu of standardized testing measures.

Id.

122. In particular, having a partially quantified definition of giftedness to identify those with special needs and committing to educating them appropriately would help reduce the possibility of bias entering the decision-making process. DAVIDSON & DAVIDSON, *supra* note 34, at 76.

123. Neumeister, *supra* note 28, at 492. Such training may be particularly beneficial to identifying minority and economically disadvantaged gifted students who may not exhibit the same productivity characteristics as higher income students. *Id.* at 492-93.

124. DAVIS & RIMM, *supra* note 21, at 93; *see, e.g.*, Hassenpflug, *supra* note 40, at 1 (suggesting that a lawsuit involving gifted students' rebellion by wearing an ironic t-shirt could have been avoided had teachers and administrators been better trained to understand the needs and behaviors of gifted students).

training could come both in the form of seminars or conferences for current teachers and as a course in teacher training programs.

Third, gifted students should be included as a subgroup in NCLB reporting to ensure they are maintaining adequate yearly progress.¹²⁵ Subgroup reporting requirements should reduce incentives for teachers and administrators to retain these children in inappropriate educational environments in order to raise the average test scores. Currently, subgroup reporting is required for race, gender, economic disadvantages, and disability.¹²⁶ By also requiring subgroup reporting for gifted students, Congress would be acknowledging that these students have special educational needs that are not addressed in the traditional classroom setting and that it is not acceptable for schools to turn a blind eye to those needs.

Fourth, Congress must commit to funding the Jacob Javits Gifted Education Act of 2001. This is the only funding provision for gifted education in NCLB. It supports research efforts, the development of gifted programs, and the development of teacher training programs.

Finally, Congress should commit to excellence and flexibility in gifted education by encouraging states to adopt provisions for IEPs and acceleration for gifted students. Though Congress should not federally mandate the state requirements, a recommendation based on the significant research in this area¹²⁷ might encourage states to rethink policies that forbid grade skipping.¹²⁸

125. Of course, requiring progress from the gifted as a subgroup would likely meet resistance since many of these children currently test well on standardized tests and “progress” then is difficult to show. But that argument only demonstrates all the more that the entire concept of yearly progress is lost on high-achieving students. We should be as concerned that these students are progressing year after year as we are about any student. If students are topping out the current tests, that only demonstrates that the tests are not challenging enough to ensure educational progress in high-achieving students.

126. 20 U.S.C. § 6311(h)(1)(C)(i) (2006).

127. COLANGELO, *supra* note 15 *passim*.

128. While grade-skipping is not an ideal stand-alone solution for many gifted students, see discussion *supra* note 48, it would offer an option not currently available to most that has been demonstrated to be more effective by decades of empirical research than remaining lockstep with age-mates. COLANGELO, *supra* note 15 *passim*.

CONCLUSION

In reauthorizing NCLB, the focus must shift from mere proficiency to excellence and appropriately educating children according to their level of ability. We cannot continue to allow gifted children to slip through the cracks because teachers and administrators have an incentive to retain gifted children in inappropriate school environments in order to bolster their test scores, or because teachers are unaware of gifted students' needs. If we are going to have true accountability from NCLB, gifted children must be tracked as a separate subgroup so they are not allowed to skate through on their high test scores without being challenged to reach their educational potential.

Encouraging both grade-skipping and telescoping curriculum at the federal level could also encourage states to more appropriately educate gifted children rather than divert funding from gifted education to proficiency programs. The laudable goal of closing the achievement gap between our lowest-achieving and highest-achieving students should not be met by allowing the achievement of students with the highest ability to be lowered. The ramifications of this strategy are most deeply felt by those who do not have the means to access a more appropriate education. These are the children who, with appropriate education and training, might have a shot at making inroads in problems of urban poverty and globalization. As NCLB stands, the message these children receive is that because they are poor, we as a nation only care if they meet the bare minimum academic skill level for children their age. Is that really the message we want to send?