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MODEL FEDERAL STATUTE FOR THE EDUCATION OF TALENTED AND GIFTED CHILDREN

MARY LOU HERRING*

INTRODUCTION

Melinda’s history of drug and alcohol abuse began in junior high school. She often thought of suicide and even tried it once. John had been labeled a “trouble maker” in his school days. He had been considered for placement in a class for behaviorally disabled students. What do Melinda and John have in common? Both of these children are gifted.¹

While the mention of “gifted” normally brings to mind a model student, one who is attentive and well-behaved, studies indicate that many gifted persons² display behavioral problems because they are inappropriately or inadequately served by the schools.³ Failure to satisfy the educational needs of gifted students endangers the tremendous potential these people have to contribute to our society.⁴ Because of insufficient attention to this valuable resource, the full potential that rests within gifted students is never realized. Tragically, too often, that potential is lost forever. The boredom, frustration and anger experienced by gifted children who feel uncomfortably different from other children causes a higher suicide rate for gifted students than for any other group of students.⁵ For some

* I am grateful to Professor Molly Lien for her thoughtful comments and encouragement throughout the various stages of this Note, and to Professor Ralph Brill for the initial suggestion to propose a new statute. I am especially grateful to my family for their support throughout this entire process.

1. These students are described in Gail Hanninen et al., Gifted Students Are at Risk Too, in CURRICULUM IN CONTEXT, Spring/Summer 1990, at 12-13.

2. The Jacob K. Javits Gifted and Talented Students Education Act of 1988, the current federal talented and gifted education act, defines talented and gifted children as those children who “give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields.” 20 U.S.C. § 3063 (1988). For further discussion on the definition of “gifted,” see infra notes 236-41 and accompanying text.

3. Hanninen, supra note 1, at 12. See also Flyer from Illinois Council for the Gifted (research has indicated that up to twenty percent of high school drop-outs may be gifted students).

4. Juanita S. Sorenson, The Gifted Program: An Overview, in THE GIFTED PROGRAM HANDBOOK 1, 2 (Juanita S. Sorenson ed., 1988) (in proportion to the total population, the gifted population contributes more to society in all areas of human endeavor). See also Fund for the Advancement of Education, A SUMMING UP, in EDUCATING THE GIFTED, ACCELERATION AND ENRICHMENT 138, 161 (William C. George et al. eds., 1979) (in fact, the health and vigor of our society depends on utilizing each individual’s capacity).

5. Flyer from Illinois Council for the Gifted. See also THE AMERICAN ASSOCIATION FOR GIFTED CHILDREN, ON BEING GIFTED, 34 (1978) (“[Y]ou often feel that life is futile, . . . that you might just commit suicide.”); Hanninen, supra note 1, at 12 (a study conducted in four Texas counties found that sixteen percent of teenage suicides were committed by gifted students).
students, then, an adequately challenging education is a matter of life and death.

It is estimated that gifted children constitute three to twenty percent of the population. It is estimated that gifted children constitute three to twenty percent of the population.6 Currently, the federal government has addressed gifted education by providing grants to state and local educational agencies and to public and private agencies to assist in establishing and strengthening talented and gifted (TAG) programs.7 Almost all of the states have some statutory provisions for TAG education.8 Despite these statutory provisions, estimates indicate that up to fifty percent of gifted students are unidentified or underserved.9

This Note proposes a new federal TAG Act. Part I of this Note discusses state constitutional provisions for education and state statutes that provide gifted education in varying degrees. Judicial interpretations of state education statutes demonstrate the minimal educational standards that are acceptable throughout the country. Varying statutory provisions and a judiciary that is reluctant to challenge minimal educational standards frustrate attempts to better meet the actual educational needs of gifted children. The urgent need to address gifted education on a federal level is discussed in Part II. Potential constitutional challenges to the proposed federal TAG Act also are examined in Part II. Finally, Part III will present a proposed model federal statute for the education of talented and gifted children.

I. CURRENT STATE STATUTORY AND JUDICIAL PROVISIONS FOR GIFTED EDUCATION

A. State Constitutional and Statutory Education Requirements

Many states have recognized the need to address the educational needs of gifted students and have enacted statutes to address those needs. As commendable as those efforts have been in some states, the overall impact of these statutes is unimpressive. The inadequacy of many statutes in meeting the critical educational needs of gifted students has al-

6. STEVEN S. GOLDBERG, SPECIAL EDUCATION LAW 113 (1982) (the author believes that TAG children represent ten percent of the total population). But another author states that educators generally agree that between three to five percent of school-age children are gifted or talented. When using the IQ test as the definition of “gifted,” approximately ten percent of the population should be considered gifted. In fact, gifted students represent ten to twenty percent of the general population, when all factors are considered. See Sorenson, supra note 4, at 3.

7. 20 U.S.C. § 3064 (1988). But see GOLDBERG, supra note 6, at 114 (since the federal TAG Act is a grant program, not a civil rights law, the funding does not hinge on nondiscrimination against the beneficiaries).

8. See infra notes 23-24 and accompanying text.

ollowed a precious resource to continue to be untapped and wasted. This inadequacy in state TAG acts supports federal involvement in the education of America's gifted students.

The authority to provide public education is provided by state constitutions. While the constitutions mandate some public education, they are usually silent regarding the quality of education that must be provided, although some of the constitutions specifically identify the policies underlying governmental support of education. Some state constitutional provisions for public school systems include terms such as "thorough," "adequate," "efficient," "general," or "uniform." Some state constitutions specifically provide for a "quality" education, while others merely require the establishment of a public school system.

State statutes do, however, establish the requirements of the school

10. See, e.g., Ark. Const. art. 14, § 1 ("Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government..."); Idaho Const. art. IX, § 1 ("The stability of a republican form of government depending mainly upon the intelligence of the people..."); Kan. Const. art. 6, § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement..."); La. Const. art. VIII, preamble ("The goal of the public educational system is to provide learning environments... designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential"); Me. Const. art. VIII, § 1 ("A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people..."); Mont. Const. art. X, § 1 ("It is the goal of the people to establish a system of education which will develop the full educational potential of each person"); N.C. Const. art. IX, § 1 ("... knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged"); N.D. Const. art. VIII, § 1 ("A high degree of intelligence... on the part of every voter in a government by the people being necessary in order to insure the continuance of that government and the prosperity and happiness of the people..."); Tex. Const. art. VII, § 1 ("A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people...").

11. See, e.g., Idaho Const. art. IX, § 1; Md. Const. art. VIII, § 1; Minn. Const. art XIII, § 1; Ohio Const. art. VI, § 2.


13. See, e.g., Ark. Const. art. 14, § 1; Del. Const. art. X, § 1; Ky. Const. § 183; Md. Const. art. VIII, § 1; Minn. Const. art XIII, § 1; N.J. Const. art. 8, § IV, § 1; Ohio Const. art. VI, § 2; Tex. Const. art. VII, § 1.

14. See, e.g., Ariz. Const. art. XI, § 1; Del. Const. art. X, § 1; Idaho Const. art. IX, § 1; Minn. Const. art XIII, § 1; N.C. Const. art. IX, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2.

15. See, e.g., Ariz. Const. art. XI, § 1; Fla. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Minn. Const. art XIII, § 1; Nev. Const. art. 11, § 2; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 2; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2; Wis. Const. art. X, § 3; Wyo. Const. art. 7, § 1.

16. See, e.g., Mont. Const. art. X, § 1 ("The legislature shall provide a basic system of free quality public elementary and secondary schools"); Va. Const. art. VIII, § 1 ("The General Assembly... shall seek to ensure that an educational program of high quality is established and continually maintained").

17. E.g., Ala. Const. art. XIII, § 1; IowA Const. art. IX, § 12; La. Const. art. VIII, § 1; Me. Const. art. VIII, § 1; Miss. Const. art. 8 § 201 (leaves to the discretion of the legislature); Mo. Const. art. IX, § 1(a); Neb. Const. art. VII, § 1; N.Y. Const. art. XI, § 1; Okla. Const. art. 13 § 1; S.C. Const. art. XI, § 3; Tenn. Const. art. 11, § 12. Cf. R.I. Const. art. XII, § 1 (rather than providing a school system, the general assembly has the duty to adopt all means to secure to the people the "advantages and opportunities of education").
curriculum, which vary from state to state. These statutes provide a range of standards from merely providing a curriculum to requiring a curriculum that is adapted to the needs of the students. Some state statutes have actually provided for a quality, rather than a minimal, education.

In addition to general education statutes, most state legislatures also have enacted statutes that specifically address the unique educational requirements of gifted children. Generally, the states are recognizing that gifted students require some instruction other than that offered to the general student population. The reasons stated for gifted education recognize that special instruction is required for a gifted student to reach his or her full potential, and that the state has an obligation to challenge students.

The variation in general educational standards from state to state also is present in the Talented and Gifted Education (TAG) statutes. In states that have TAG laws, the statutes may range from permissive to mandatory. Permissive statutes authorize the state department of education to address the unique educational requirements of gifted children.

18. See, e.g., GA. CODE ANN. § 20-2-151(b)(4)(A) (Michie 1987) (one of the primary purposes of high school programs is to prepare students for entry into their chosen career fields); N.J. STAT. § 18A:7A-5(c) (West 1989) (the intention of instruction is merely the "attainment of reasonable levels of proficiency in basic communications and computational skills").

19. MISS. CODE ANN. § 37-1-2(g) (1972) (the educational policy in Mississippi is to provide quality education with excellence and high achievement of all students as the ultimate goal).

20. MD. EDUC. CODE ANN. § 8-202 (1989). See also MISS. CODE ANN. § 37-23-173 (1972) (gifted students "require additional opportunities to allow them to develop their capabilities to their fullest potential").

21. ARIZ. REV. STAT. ANN. § 15-761(4) (Supp. 1990). See also CAL. EDUC. CODE § 52200(c)(2) (West Supp. 1990) (learning environments should provide TAG children with the opportunity to acquire skills and understanding equal to their potential); IND. CODE ANN. § 20-10.1-7-4.5 (Burns 1985) (programs should encourage gifted children to develop to their greatest potential in intellectual, social and artistic skills); KAN. STAT. ANN. § 72-961 (1985) (educational opportunities should contribute to the development of each gifted child in accord with his or her abilities); ME. REV. STAT. ANN. tit. 20, § 8101 (West 1983) (the legislature recognized that TAG education is necessary for a realization of the educational potential of TAG students and their potential contribution to themselves and to society); NEB. REV. STAT. § 79-339 (1987) (gifted children need special facilities or educational services to assist the development of their potential, which may increase the contribution they make to society); N.Y. EDUC. LAW § 4452(1)(a) (McKinney Supp. 1990); N.D. CENT. CODE § 15-59-01(2) (Supp. 1989); WIS. STAT. ANN. § 118.35 (West Supp. 1990) (services not ordinarily provided in a regular school program are needed in order to fully develop the capabilities of gifted students).


23. ARK. CODE ANN. § 6-42-102 (Michie 1987); CAL. EDUC. CODE § 52206 (West Supp. 1990); COLO. REV. STAT. § 22-20-102.5 (1988); DEL. CODE ANN. tit. 14, § 3126 (1981); IOWA CODE § 257.43 (West Supp. 1990) (repealed effective July 1, 2001); MD. EDUC. CODE ANN. § 8-203 (1989); MICH. COMP. LAWS ANN. § 388.1647 (West Supp. 1990) (Michigan funds districts that develop and provide comprehensive programs and support services for TAG students); MO. ANN. STAT. § 162.720(1) (Vernon Supp. 1990) (gifted programs may be established when a sufficient number of children need the programs for their development); MONT. CODE ANN. § 20-7-902
The decision to provide education designed for gifted children remains with the respective state departments of education, or the local school districts. However, the mandatory statutes require each school district to provide educational programs to all identified gifted children.24

State TAG statutes generally authorize the state boards of education to promulgate rules and regulations related to TAG education, such as identification of gifted children,25 or the approval of programs that are developed for gifted education.26 The statute also may create a section within the department of education or an advisory council to assist the school system in the development, implementation and administration of gifted programs.27 Or, it may authorize the state department of education to purchase educational services from private organizations.28 Most of the development of the actual program for gifted education takes place in local school districts.29 The statutes themselves do not contain any specific guidelines for establishment of gifted programs.

The school district may directly provide the program, join in a coop-
ervative program with another district, or develop the program in cooperation with a private or public institution within the district. One statute requires that a gifted curriculum at least more adequately meet the needs of gifted students than the regular curriculum, while another emphasizes that the programs must be designed to educate children in relation to their individual capacities and needs. This can be accomplished by supplementing and supporting the regular educational program.

However, state statutory provisions for education of gifted children are not enough. A close look at the statutes causes some concern about what is really being offered as gifted education. In Alaska, a gifted child is entitled to an appropriate education that permits a child to benefit educationally. But, the goal of educational benefit for any one individual student is not necessarily obtained merely by saying that a gifted program is offered. Several states provide education programs to meet the needs of gifted students. These programs include some combination of special curriculum or adaptation of the regular curriculum. Frequently, program guidelines provide for grouping gifted students to facilitate teaching gifted students. In some states, the district school board may develop an educational center at the local university or community.


33. See, e.g., WASH. ADMIN. CODE § 392-170-080 (1986) ("... student shall be provided an educational opportunity which takes into account such students unique needs and capabilities"); W. VA. CODE § 18-20-1 (1988).

34. OKLA. STAT. ANN. tit. 70 § 1210.301(2) (West 1989).


36. See, e.g., ARIZ. REV. STAT. ANN. § 15-764(C) (Supp. 1990) (a gifted program may require expanding academic course offerings); CAL. EDUC. CODE § 52206 (West Supp. 1990) (gifted programs may consist of special classes, enrichment activities, or independent study).

37. See, e.g., ARIZ. REV. STAT. ANN. § 15-764(D) (the statute allows, but does not mandate, course modification and adaptation of teaching methods and then qualifies the benefit so that it can only be offered to a group of gifted students, effectively reducing the danger of requiring each school district to "become a Harvard or a Princeton to all who have IQ's over 130." Centennial Sch. Dist. v. Dept' of Educ., 539 A.2d 785, 791 (Pa. 1988)); IND. ADMIN. CODE tit. 511 r. 6-9-6 (Supp. 1990) (Indiana specifically requires modification of the standard curriculum in areas of goals, objectives, content, pace and product to create a TAG curriculum).

38. See, e.g., IND. ADMIN. CODE tit. 511 r. 6-9-2(b) (Supp. 1990) (programs may be arranged by using magnet schools, homogeneous grouping, or honors classes). See also Morris Meister & Harold A. Odell, What Provisions for the Education of Gifted Students?, in EDUCATING THE GIFTED 67, 81-82 (William C. George et al. eds., 1979) (homogeneous grouping is arranging students in divisions according to proficiency, rather than chronological age); id. at 69 (honors classes, organized around specific subject areas, provide an opportunity to offer enriched curriculum and higher standards of achievement).
Since the social, emotional and educational problems of gifted children can be as complicated as those of the physically and mentally handicapped, the challenge is to develop programs that meet the unique educational needs of a diverse student population.

Under existing statutory frameworks, the fact that a student may need special instruction to achieve his or her potential does not guarantee that special instruction will be available in sufficient quantity or quality. Since funding for TAG programs is often limited, TAG programs may limit the number of students served, or the program hours. Also, if the school district's efforts to meet the needs of gifted children has focused on development of an acceleration program, this may not be appropriate for students who would benefit more from enrichment. Those students who would be better challenged in a group environment will be frustrated if the district only offers independent study. Thus, absent clear guidelines, there is no guarantee that a gifted curriculum will be appropriate for most gifted students.

Some states have attempted to meet the needs of gifted children by including them in the definition of "exceptional children" found in statutes designed to answer the adequacy of programs that serve physically or learning disabled children. Even in these states, programs for gifted children are not necessarily mandated, or there may be additional benefits or requirements for the disabled that are not available or required for

39. ILL. REV. STAT. ch. 122 para. 14A-6 (1989). See also FLA. STAT. ANN. § 233.0677 (West 1988) (the university provides the facilities and educational services such as the library, laboratory facilities, and audio-visual materials and the school district is responsible for the personnel and the program).


41. See, e.g., TEX. EDUC. CODE ANN. § 16.159(c) (West Supp. 1990) (no more than five percent of the district's students are eligible for TAG funds).

42. See, e.g., CAL. EDUC. CODE § 52206 (West Supp. 1990) (TAG programs qualify for state funding by merely providing 200 minutes of class time per week to the gifted curriculum); PRISCILLA L. VAIL, THE WORLD OF THE GIFTED CHILD, 23-24 (1979) (One characteristic of some gifted students is concentration. Children capable of long concentration must be given opportunities to work for long periods of time in order to grow).

43. See, e.g., IND. ADMIN. CODE tit. 511 r.6-9-8(a)(2)(B) (Supp. 1990) (Indiana addresses this issue by providing that appropriate educational services must be based on each student's needs and characteristics).

44. Exceptional children also include the retarded, students with physical disabilities, including speech, hearing or vision disabilities, the emotionally disturbed, and students with learning disabilities. See, e.g., ALA. CODE § 16-39-2 (1987); ALASKA STAT. § 14.30.350 (1987); ARIZ. REV. STAT. ANN. § 15-761(S) (Supp. 1990); FLA. STAT. ANN. § 228.041(18) (West Supp. 1990); GA. CODE ANN. § 20-2-152(a) (Michie Supp. 1989); KAN. STAT. ANN. § 72-962(f) (Supp. 1989); LA. REV. STAT. ANN. § 1941 (West Supp. 1990) ("exceptional children" differ in physical, mental, social, emotional or educational characteristics to the extent that special education is necessary to enable them to develop to their maximum abilities); W. VA. CODE § 18-20-1 (Supp. 1990).
the gifted.45 However, the categorization of gifted children with other exceptional children can provide for an individualized education program46 and the procedural safeguards47 that go hand in hand with the federal Education of the Handicapped Act.48 This categorization can greatly enhance the educational opportunities of the gifted child. A major advantage of acts that have treated gifted children in the same way as handicapped children is that procedural due process is available to parents or guardians who wish to challenge the education the child is receiving. For example, in Centennial School District v. Commonwealth of Pennsylvania Department of Education,49 the result of a due process hearing was that a gifted child was entitled to the general enrichment program for gifted children and to individualized instruction within an age appropriate class setting in subjects where his academic performance was well beyond grade level.50

Fulfilling the educational needs of gifted children requires a carefully written statute that provides for an adequately challenging educational environment. Although there are many statutes throughout the fifty states, and even a federal statute, that authorize gifted education programs, fifty percent of the gifted students continue to be underserved and even unidentified.51 While a model gifted statute must be carefully drafted to balance the limited education funds and the critical educ-

45. See, e.g., ARIZ. REV. STAT. ANN. § 15-764(D) (Supp. 1990) (special education for gifted students does not require course modification or adaptation of teaching methods); COLO. REV. STAT. § 22-20-103 (1988) (every handicapped child must be served, but programs for the gifted, although encouraged, are voluntary); KAN. STAT. ANN. § 72-977 (1985) (exceptional children, except for gifted, are required to enroll for and attend special education services); N.C. GEN. STAT. § 115C-110(d)(2) (1987) (exceptional children, other than gifted or pregnant students, are entitled to an individualized education program. The minimum standard for the education of gifted students is a group educational program); N.D. CENT. CODE § 15-59-04 (Supp. 1989) ("exceptional children included handicapped and gifted children. School districts must provide special education for handicapped children, but special education for gifted students is optional"); 22 PA. CODE § 13.11(d) (1990) (handicapped persons may be placed in an approved private school program to meet their appropriate needs); 22 PA. CODE § 13.23 (1990) (gifted programs can be provided by co-operative arrangements with other districts, but there is no provision for programs in private schools).


47. See e.g. ALASKA STAT. § 14.30.272 (1987); ARIZ. REV. STAT. ANN. § 15-766(E) (Supp. 1990); KAN. STAT. ANN. § 72-973 (Supp. 1989); LA. REV. STAT. ANN. § 1952 (West 1982); N.C. GEN. STAT. § 115C-113(g) (1987); 22 PA. CODE § 13.21 (1990). In addition, some states require the parents’ consent prior to evaluation or placement. See e.g. ALASKA STAT. § 14.30.191 (1987); ARIZ. REV. STAT. ANN. § 15-766(E) (Supp. 1990); LA. REV. STAT. ANN. § 1945(A) (West 1982).

48. See infra notes 119-138 and accompanying text.

49. 539 A.2d 785 (Pa. 1988).

50. Id. at 790. This case represents a major victory for gifted education. The court recognized that merely offering an enrichment course did not relieve the school district from its duty to provide for the individual need of the gifted student.

51. See infra Part II and supra note 9 and accompanying text.
tional needs of gifted students, more importantly, the statute must encompass all gifted students in the United States.

B. The Inadequate Judicial Response to the Need for Quality Education

A review of some judicial decisions in the area of education indicate a reluctance, in the absence of statutory standards, to expand minimal education standards. In fact, one court stated that a state constitutional provision that required the legislature to provide a system of public schools did not create a duty to individual students to insure even a minimum level of education. The judicial systems, both state and federal, are reluctant to interfere with what is considered to be primarily an administrative function. To insure protection of the needs of gifted students and to provide the desirable quality of education, a TAG statute must specifically provide an educational standard that will survive judicial challenge.

1. Educational Malpractice

When a school system has failed to provide an adequate education, students have filed educational malpractice suits. Malpractice suits have been filed because of the lack of quality of the education offered or negligent placement of a child in a special education environment.

53. See, e.g., Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979) ("[T]he courts of this State may not substitute their judgment, or the judgment of a jury, for the professional judgment of educators and government officials . . ."); Donohue, 391 N.E.2d at 1354 (Control and management of educational affairs is vested in the Board of Regents and the Commissioner of Education, not in the courts). See also John Elson, A Common Law Remedy for the Educational Harms Caused by Incompetent or Careless Teaching, 73 Nw. U.L. Rev. 641, 645 (1978).
55. See, e.g., Peter W., 60 Cal. App. 3d 814 (1976) (high school graduate could not read above the fifth grade level and the minimum requirement of the Education Code was an eighth grade reading level); Torres v. Little Flower Children's Serv., 474 N.E.2d 223 (N.Y. 1984), cert. denied, 474 U.S. 874 (1985) (a child care agency fulfilled its duty to the child when the child was in attendance at a public school. Because of public policy, the court would not extend the agency's liability to include judgments concerning the child's education); Donohue, 391 N.E.2d 1352 (N.Y. 1979) (although a high school graduate, plaintiff was unable to adequately read employment applications).
56. See, e.g., D.S.W. v. Fairbanks North Star Borough Sch. Dist., 628 P.2d 554 (Alaska 1981) (Nothing in the education of exceptional children act authorized a damage claim, but corrective tutorial programs may be appropriately mandated); Doe v. Board of Educ., 453 A.2d 814 (Md. 1982) (The court system is not the proper forum to test the validity of a student's placement in a particular educational program even when a student has been improperly placed in a mentally retarded program for seven years); Hunter v. Board of Educ., 439 A.2d 582 (Md. 1982) (The court dismissed the counts of negligent evaluation of a child's learning abilities, but remanded the case for trial on the issue of whether liability could be found for willfully and maliciously injuring a child in an educational context); DeRosa v. City of New York, 132 A.D.2d 592 (1987) (Even when a child is
However, the courts have repeatedly rejected "educational malpractice" as a cause of action in both types of cases. In fact, courts have indicated that they will only intervene in the administration of a public school system when there are "gross violations" of public policy.

In general, courts have disallowed causes of action for education malpractice for several reasons, mostly related to public policy. First, judicial decisions indicate that state constitutions directing the maintenance of a public school system do not create a duty of the school district owed to each individual child. Second, courts are very reluctant to substitute their own judgments for that of the school board. In explaining this reluctance, the courts have indicated that the courtroom is not the place to evaluate varied theories of learning. If a court determines that one teaching method is invalid, or one teacher's actions caused an injury, the court is in effect creating school policy. Courts have also indicated that judicial decisions related to education are improper interferences with the responsibilities of the school administrative agencies. The placed in a class for mentally deficient children because of a failure to perform physical tests that would have indicated a hearing loss, the court will not hear a challenge to the defendant's "professional" judgment; Hoffman, 400 N.E.2d 317 (1979) (As a matter of public policy, the court dismissed a complaint against the school system for a failure to retest a student that was retained in a program for mentally retarded children, even when the original evaluator had recommended the placement with some reservation).


58. See, e.g., Hunter v. Board of Educ., 439 A.2d 582, 587 (Md. 1982) (an individual educator engaging in intentional torts against children entrusted to his educational care would not be shielded from liability because of public policy considerations); Bennett v. City Sch. Dist., 497 N.Y.S.2d 72, 78-79 (N.Y. 1985) (the court will not order a school district to spend left-over funds in any particular manner, even though some gifted students are enrolled in part-time programs because of the limited availability of enrollment in the full-time program); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1354 (N.Y. 1979) (the courts would be obliged to recognize and correct broad educational policies that are gross violations of defined public policy (quoting In re New York City Sch. Bds. Ass'n v. Board of Educ., 347 N.E.2d 568, 574 (N.Y. 1976)).


60. See, e.g., Peter W., 60 Cal. App. 3d at 824 (a duty exists when the plaintiff is entitled to protection and the wrongs and injuries can be resolved within the existing judicial framework. Educational misfeasance does not meet these criteria); Donohue, 391 N.E.2d at 1353 (the state's obligation to provide a public school system is not the type of duty owed to an individual student, the breach of which would entitle the student to monetary damages).

61. See, e.g., Donohue, 391 N.E.2d at 1354 (in fact, the purpose of administrative reviews of the school system is to remove controversies from the courtroom); Ackerman v. Rubin, 231 N.Y.S.2d 112, 114 (1962) (the court will not substitute its judgment in the area of the educator's expertise).


63. Elson, supra note 53, at 645-46.

64. See, e.g., Hunter v. Board of Educ., 439 A.2d 582, 585 (Md. 1982) (the state department of
third reason for rejecting a cause of action for educational malpractice is the difficulty in determining the proximate cause of a child's lack of progress. Many factors outside of the classroom, especially economic and domestic matters, can have a profound effect on a child's ability to learn. Finally, the courts have stated that it is inappropriate to award damages for educational malpractice, especially because sufficient remedies are available through the administrative channels. Therefore, it is unnecessary for the courts to hear "educational malpractice" suits.

Even in special education environments, educational malpractice suits charging negligent placement in special education classes have been predominantly rejected by the courts. It has been argued that negligent placement in special education classes creates liability because of a misfeasance, rather than a nonfeasance. The courts have nearly unanimously rejected this theory, clinging to the argument that even educational malpractice in special education placement offends public policy. However, in one case liability was found for negligent misplacement by invoking a medical malpractice theory. In another jurisdiction, a successful suit was brought for misclassification in special education programs. In B.M. v. Montana, the Montana Supreme Court held that "the state has a duty to use due care in placing students in special education and the local school boards, not the courts, are responsible for formulating the governing policies of the educational process). See also Donohue, 391 N.E.2d at 1354; Ackerman, 231 N.Y.S.2d at 114.

66. See, e.g., Peter W., 60 Cal. App. 3d at 824 (factors outside of the school's control that subjectively affect the student include physical, neurological, emotional, cultural, and environmental issues); Donohue v. Copiague Union Free Sch. Dist., 391 N.E.2d 1352, 1355. (N.Y. 1979) (Wachtler, J., concurring) (a student's attitude, motivation, temperament, and home environment are all factors that affect learning).
68. See, e.g., D.S.W., 628 P.2d at 557; Hunter, 439 A.2d at 586 (the General Assembly has provided a comprehensive process for reviewing placement decisions of handicapped children).
69. E.g., Hunter, 439 A.2d 582.
70. E.g., Hoffman v. Board of Educ., 400 N.E.2d 317, 320 (N.Y. 1979) (an argument was put forth distinguishing a negligent failure to educate properly (nonfeasance) and an affirmative act that resulted in the improper evaluation of a student's intellectual capacity (misfeasance)).
71. See, e.g., DeRosa v. City of New York, 132 A.D.2d 592, 593-94, (1987) (there was no distinction between educational malpractice and educational negligence when a deaf child was diagnosed as mentally deficient due to a failure to perform any physical tests that would have revealed the plaintiff's hearing loss); Hoffman, 400 N.E.2d at 320 (policy considerations apply with equal force to educational malpractice suits based upon educational misfeasance and nonfeasance).
72. E.g., Snow v. New York, 98 A.D.2d 442, (1983) (negligent re-evaluation of the plaintiff's intelligence level caused the plaintiff to remain institutionalized. Because the plaintiff was institutionalized, the standard of care was that of the medical profession, and medical malpractice was found for the negligent evaluation and treatment of the plaintiff).
tion programs." The state was liable for failing to follow the statutory and regulatory policies of the state superintendent of public instruction.

2. Judicial Interpretation of Statutory Education Standards

Even statutes guaranteeing "appropriate" education are not necessarily sufficient to achieve the objective of allowing each student to develop his or her potential. Judicial interpretation of the federal Education of Handicapped Act (EHA) has reflected the reluctance of courts to address quality of education. The EHA provides that all handicapped children have a right to a free, appropriate education. However, in Board of Education v. Rowley, the U.S. Supreme Court interpreted an "appropriate" education very narrowly. A review of the legislative history of the Act convinced the Court that the intent of the EHA was to open the doors of public education to the more than 1.75 million handicapped children who were not receiving any educational benefit. The Court held that an "appropriate" education under the EHA was a guarantee of educational benefit, but not a guarantee of maximizing a child's potential. The disparity between the actual academic achievement and the educational potential of the deaf plaintiff did not have to be lessened by requiring the school district to provide a qualified sign-language interpreter in the classroom. It was sufficient for the school district to provide some tutoring and speech therapy as long as the plaintiff was progressing in school.

Even with state gifted statutes, gifted children generally have not fared much better than the general education students in the courtroom. In Ackerman v. Rubin, parents of a child who had reached 10.7 years of age challenged the 11.3-year age requirement for admission into an accelerated junior high course of study. The court determined that the opin-

74. Id. at 426.
75. Id. at 427.
78. 458 U.S. 175 (1982).
79. Id. at 192.
80. Id. at 201.
81. Id. at 199.
82. Id. at 210.
83. Id.
84. 231 N.Y.S.2d 112 (1962).
85. Ackerman, 231 N.Y.S.2d at 113. The board of education offered three different junior high courses. Admittance into the accelerated and enriched programs required superior scholarship grades. In addition, the accelerated program had a minimum age requirement. The plaintiff was
ions and policies of the experienced educators were superior to the biased opinion of the parents. This was in spite of the fact that the child previously had been accelerated in school and was academically well qualified for the program. Finding no evidence to negate the presumption of reasonableness, the court upheld the school board's decision to require a minimum age for acceptance into the accelerated program.

In New York, the state code provides that the state department of education should assist local school districts in establishing programs for gifted children. This is an enabling statute, allowing the school districts to meet the educational needs of the gifted students. It does not mandate the development or establishment of gifted programs. In 1984, a New York school district offered both full-time and part-time gifted programs. The full-time program could only accommodate twenty-seven gifted students. The part-time program was instituted to provide some gifted education to the gifted students that could not be accepted in the full-time gifted program. In Bennett v. City School District of New Rochelle, a qualified student challenged the exclusion from the full-time gifted program when she was not one of the twenty-seven accepted students. Since the statute made the establishment of gifted programs optional, the court found in favor of the school board. Establishing full-time or part-time programs, determining the nature and type of programs, and defining the size and population of the programs are decisions left to the discretion of the local school district. Again, a court refused to use the judicial system to test the validity of educational decisions in the absence of public policy violations.

Even when gifted education is mandated by statute, a school district is still likely to be given considerable deference for the programs that are offered to the students. For example, in Pennsylvania, where gifted stu-

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86. Id. at 113.
87. Id. at 113.
88. Id. at 115.
89. N.Y. EDUC. LAW § 4451 (McKinney Supp. 1990) ("Subject to the availability of funds, the state education department is hereby authorized and empowered to assist districts in meeting the educational needs of gifted pupils. ...").
91. Id. at 76.
92. Id. at 75, (Plaintiff was one of 109 students qualified for 27 openings in the program. Students were selected for the full-time gifted program via a lottery; those not selected participated in a part-time TAG program).
94. Id. at 80.
95. Id. at 76.
96. Id. at 78.
Students are one classification of exceptional students,\textsuperscript{97} this classification entitles gifted students to an individual education plan (IEP).\textsuperscript{98} In \textit{Scott v. Commonwealth of Pennsylvania Department of Education},\textsuperscript{99} the parents of a gifted student challenged an IEP that did not include math instruction for their mathematically gifted son. Following administrative procedures outlined in the statute,\textsuperscript{100} the parents challenged the IEP. The IEP recommended by a hearing officer was then challenged by the local school district,\textsuperscript{101} and subsequently overruled by the secretary of education. Ultimately, the school district's IEP for the plaintiff was upheld by the civil courts because of a statutory provision\textsuperscript{102} providing that in the absence of an agreement between the school district and the parents, the final authority for determining an appropriate education rests with the state department of education.\textsuperscript{103} The Pennsylvania court confirmed the secretary of state's decision to uphold the school district's IEP for the plaintiff because of statutory requirements that required deference to the secretary of state's decision.\textsuperscript{104} The school district was not required to develop an educational program that maximizes the student's abilities, when the plaintiff had already completed the school district's most advanced mathematics course.\textsuperscript{105}

\textit{Centennial School District v. Department of Education}\textsuperscript{106} is another case in which the local school district challenged an IEP that was recommended by a hearing officer. However, in this case, the hearing officer's recommended IEP was confirmed by the secretary of education.\textsuperscript{107} The secretary of state ruled that an enrichment program did not relieve the district of its duty to provide an appropriate education that meets the

\textsuperscript{97} 22 PA. CODE § 13.1 (1989) (exceptional children are defined as school-age persons who deviate from the average, either physically, mentally, emotionally, or socially. This classification includes handicapped children, gifted and talented children, and children placed in detention homes).

\textsuperscript{98} 22 PA. CODE § 13.1 (1989) (exceptional school-aged persons are entitled to an appropriate educational program that meets their individual needs).


\textsuperscript{100} 22 PA. CODE § 13.33 (1989).

\textsuperscript{101} Scott S., 512 A.2d at 792.

\textsuperscript{102} 22 PA. CODE § 13.1 (1989) (the statute provides for appeals to the secretary of education).

\textsuperscript{103} Scott S., 512 A.2d at 793.

\textsuperscript{104} Id. at 792 n.1 (citing Centennial Sch. Dist. v. Dep't of Educ. 503 A.2d 1090 (Pa. Commw. Ct. 1986) (when a suit is subsequently filed in civil court, the court must defer to the decision of the secretary of education unless there has been a violation of constitutional rights, an error of law, or lack of evidence to support the finding)).

\textsuperscript{105} Id. at 792 (citing Centennial Sch. Dist. v. Dep't of Educ. 503 A.2d 1090 (Pa. Commw. Ct. 1986)).

\textsuperscript{106} 539 A.2d 785 (Pa. 1988).

\textsuperscript{107} Centennial, 539 A.2d at 790 (as the result of a due process hearing, the hearing officer's recommendation regarding the plaintiff's individual education plan (IEP) included individualized instruction, in addition to the enrichment program offered by the school district).
needs of individual students. The Pennsylvania Supreme Court recognized the statutory authority of the state board of education to define and regulate education of gifted students. The state board of education found that an enrichment program for gifted children was not enough to meet an individual student's educational need. Since the state board required individualized education, the student's IEP that required specialized instruction in mathematics and reading, in addition to the enrichment program, was lawful.

In Scott, the secretary of state did not require the school district to provide accelerated mathematics to a high school senior beyond what was legally required for the curriculum. In Centennial, the secretary of state required modification of a required curriculum to meet the educational needs of a second grade student. Essentially, the issue raised by challenging a gifted curriculum is how far a school district must go to meet the needs of the gifted student. In Pennsylvania, the existent curriculum must be stretched around the student in an attempt to meet his or her needs, but the curriculum does not have to be expanded to meet those needs. Both of these Pennsylvania cases illustrate judicial deference to decisions made by education authorities in the administrative appeals process. In both cases, the court upheld the administrative rulings. Ultimately, the court does not interpret the educational standard, but rather reviews the administrative process for compliance with the statute.

Currently, gifted statutes and judicial decisions are not enough to adequately address the educational requirements of the gifted students. The issue in the general educational malpractice suits is the failure to adequately educate the student. That is, the student graduates with an education that falls short of the minimal education that should have been acquired. The results of educational malpractice suits primarily have been to defer to the educational policy decisions made by the school system. The judicial system has been reluctant to broadly interpret state statutes and state constitutional provisions to include more than a right to attend a classroom. The reluctance of the courts to address the issue

108. Centennial, 539 A.2d at 790.
109. Id. at 788-89.
110. Id. at 787.
111. Id. at 791.
112. See supra text accompanying notes 99-105.
113. See supra text accompanying notes 106-11.
114. See supra notes 55-56 and accompanying text.
115. See cases cited supra note 55.
of quality of education can be attributed to statutes that inadequately address the quality of education. Even if the judicial system were to accept educational malpractice as a cause of action, in the absence of specific statutory language, it is unlikely that the court's interpretation of an educational standard would be broadened to the point that the maximization of the student's potential would be guaranteed.

In addition, the educational malpractice environment generally involves bringing suit against one school teacher or administrator. But the lack of quality education for gifted children is not caused by individual school teachers or limited to any one school district. It is the result of an entire educational system that has failed to address the quality of education provided to the students.

Also, most educational malpractice cases are brought to recover damages, such as the tutoring costs incurred to bring the child to a minimal level of education. An adequate solution for gifted students must address the educational needs of the student when currently enrolled, not after dropping out or underachieving for twelve years in an inappropriate educational program. The solution for a gifted child is to provide an adequately challenging education, not money damages. The source of the solution will be a statute that specifically addresses educational needs and provides procedural safeguards that allow parental intervention in the educational process before irreparable damage occurs.

II. REASON FOR FEDERAL INTERVENTION

A. Federal Interest in Education

Although educational policy is primarily a state function, the federal Education of the Handicapped Act (EHA) demonstrates the tremendous impact that can be effected by enactment of a federal educational statute. This statute addressed the federal government's concern for children whose disabilities prevented them from having a successful educational experience within the public school system. Before the enactment of the EHA, estimates indicated that up to one million handicapped children were receiving no education at all while another

118. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.") Since the Constitution does not provide for education as a federal power, it is considered to be a power reserved to the state under the tenth amendment.
120. 20 U.S.C. § 1400(b) (1988) ("the special educational needs of such [handicapped] children are not being fully met")
four million handicapped children were not receiving an appropriate education. In order to receive federal funds for education of the handicapped, a state must have a program that assures a free, appropriate public education to all handicapped children. Under the EHA, the school system is required to evaluate each child and to determine an individual education program (IEP). An IEP includes the child's current level of educational performance, short-term objectives listed within an annual educational plan, and a statement of the specific educational services to be provided.

The EHA also guarantees procedural safeguards to protect disabled children from actions of the school district that parents may not believe are in the child's best interest. The procedural safeguards provide that parents or guardians may be involved in all phases of their child's education. The parents or guardians are entitled to examine all records relevant to their child's identification, evaluation, or placement, to present complaints regarding the identification and placement of the child, to attend the meetings where the IEP for their child is developed, and to propose or oppose any changes in their child's placement.

When there are disagreements between the school system and the parents or guardians, the parents or guardians have the right to a due process hearing, as determined by state law. If the hearing is conducted by a local or intermediate educational unit, the decision can be reviewed by the state educational agency. Either party, having exhausted the administrative appeal process without reaching a satisfactory ruling, has a right to bring a civil action in either the state or federal court system. The court tries the case based on the evidence presented in order to determine whether the state has complied with the procedures set forth in the act and whether the IEP enables the child

121. ROSEMARY C. SALOME, EQUAL EDUCATION UNDER LAW 137-38 (1986).
122. 20 U.S.C. § 1412(1) (1988) (An appropriate education is defined as special education and related services that meet the standards of the state educational agency and conform to the individualized education program that the EHA requires).
134. Id.
to receive educational benefit.\footnote{Board of Educ. v. Rowley, 458 U.S. 176, 204-07 (1982).} The parents' ability to take their case to court is an important factor in dispute resolution at the administrative level.\footnote{SALOME, supra note 121, at 155. See also, Zirkel & Stevens, supra note 9, at 362 (in Pennsylvania, only four of nineteen special educational appeals decided by the secretary of education were appealed in court).} It is the parents' involvement in the development and maintenance of the child's education that affords the child protection from the state and local educational agencies.\footnote{Rowley, 458 U.S. at 208.} The conditions that the EHA attached to the funding, especially the right to an IEP and due process hearings, indicate the Congressional concern with the reluctance of the state to adequately address the educational needs of the handicapped.\footnote{20 U.S.C. § 1400(b) (1988) (one million handicapped children were entirely excluded from the public school system, and many children who did attend the schools were prevented from a successful educational experience because of their handicap).}

Although in 1969 Congress began to recognize the importance of legislation for the education of gifted children,\footnote{S. REP. No. 222, 100th Cong., 2d Sess., 1988 reprinted in U.S.C.C.A.N. 101, 135 ("In light of our concern that we strengthen our trade position, it is particularly important that we identify all such students and provide them with instruction that will challenge them to the full limits of their potential").} the federal TAG Act\footnote{GOLDBERG, supra note 6, at 114 (a significant difference between the EHA and the TAG Act is that the EHA is a civil rights law, while the TAG Act is a grant program); Zirkel & Stevens, supra note 9, at 366 (the federal statute is largely a symbolic recognition).} lacks the substance of the EHA.\footnote{20 U.S.C. §§ 3061-68.} Instead of providing for a substantive right to a specific type or level of education,\footnote{20 U.S.C. § 3064(b) (1988) (funds can be used for personnel training, establishing model projects for the identification and education of TAG children, strengthening the state educational agencies in providing programs to local school districts, and developing programs to disseminate information.)} the TAG Act merely provides technical assistance and limited funding.\footnote{S. REP. No. 297, 100th Cong., 2d Sess., 1988 reprinted in U.S.C.C.A.N. 101, 135 (districts spent an average of $1,000 on TAG programs).} The funds are provided to state agencies for TAG personnel development and establishment of programs that identify and educate gifted children.\footnote{20 U.S.C. § 3064(a) (1988) (after a state organization submits an application for a program designed to meet the educational needs of TAG students, the federal government contracts with the state and assists with the funding of the program.)} Even though Congress recognized that gifted children are a vital national resource critical to the future of the nation,\footnote{20 U.S.C. § 3062 (1988) ("The Congress finds and declares that - (1) gifted and talented students are a national resource vital to the future of the Nation and its security and well-being.")} the TAG Act does not address any specific gifted education issues or mandate delivery of services related to individual gifted children.\footnote{Zirkel & Stevens, supra note 9, at 354.} Compared to the EHA, the federal TAG Act is notably limited in scope. Congress feared that the spe-
cial potential of gifted children to contribute to the national interest would be lost unless state and local agencies provided educational services and programs that are appropriate to the needs of gifted children. The lack of substance of the TAG Act, when compared to the EHA, indicates Congress' preference to allow the states to address educational issues initially. However, a review of the state gifted statutory provisions indicate that now it is time for a more substantive federal TAG Act.

Although many state codes reflect the federal intent to provide an appropriate public education to gifted children, the current state statutory provisions for gifted education inadequately further the federal goal of ensuring that education fully develops the potential of gifted children. Less than half of the estimated three million gifted school-age children are participating in public school gifted programs. Gifted programs are still optional in some states, and there is a wide variety of programs that are offered in various states, some more extensive than others. Only seventeen states offer individual education plans or the due process safeguards. Even if the state does provide these safeguards, it is not a guarantee of an adequately challenging education. In the only significant court interpretation of a gifted statute, the Pennsylvania Supreme Court ruled that the school district did not have to "maximize" a gifted student's capabilities. This limiting of the required programs to those currently within the district's present curriculum substantially narrowed the benefits to which a gifted student was entitled.

Gifted benefits were also reduced during the 1980s, when there was a federal retreat from investment in the public schools. Funds for twenty-nine discretionary programs were consolidated into one block

147. 20 U.S.C. § 3062(a)(2) (1988) (unless recognized and developed, the special potential of TAG children to contribute to the national interest is likely to be lost).
148. See supra notes 20-24 and accompanying text.
149. Stencel, supra note 40, at 125 (estimates are that three-fourths of potentially gifted students do not reach their academic capability).
150. Zirkel & Stevens, supra note 9, at 353. See also Stencel, supra note 40, at 119 (only twelve percent of gifted students receive all of the educational services that they require).
152. See supra notes 27-39 and accompanying text.
153. Zirkel & Stevens, supra note 9, at 355.
155. Id. The school district in this case provided an enrichment program for gifted students. The plaintiff's IEP required accelerated course work in an age-appropriate setting. Id. at 786. While stating that a school district did not have to go beyond existing curricular offerings, the court held that a student's need for acceleration could not be ignored merely because the school district offered an enrichment program. Id. at 791.
156. SALOME, supra note 121, at 169.
This was intended to improve education, reduce administration and vest program responsibility in local school districts. One of the results of this retreat was to decrease federal funding of several major programs, with a disproportionate burden falling on urban areas. Another undesirable consequence of the consolidation was that the funds were not distributed in accordance with the national objectives embodied in the programs. In 1981, many gifted students lost their specific educational programs when the appropriated funds were rolled into the Chapter 2 education block grant.

At the same time, state funding structures, attempting to equalize the spending in property rich and property poor school districts, failed to target additional funds to specific student populations within the district based on need. In addition, a generally conservative Supreme Court had caused a shift in educational policy from an emphasis on the role and importance of education to the importance of discipline and authority. These legislative and judicial trends reduce the likelihood that gifted students will receive the educational benefits needed to realize their potential.

Studies have indicated that education in the United States is in a state of crisis. At a time when many cry out for reform and accountability, the local school districts are responding to local pressures re-

157. Id. at 176-77.
158. Id.
159. Id. at 172. Urban school districts, normally with a higher percentage of disadvantaged and handicapped students, rely heavily on federal funds to assist them with the high-costs of educating those students with special needs.
160. Id. at 176-77. See also, Lynne Sametz & Caren S. McLoughlin, Educators, Children and the Law, 16 (1985) (if the program for education of handicapped children were consolidated into a block grant, the procedural guidelines required by EHA would be lost).
161. Zirkel & Stevens, supra note 9, at 354 (gifted funding was consolidated with the funds of twenty-eight other programs).
162. Salome, supra note 121, at 173-75. This type of funding burdens those categories of students with a higher per pupil cost of education. See, e.g., Ala. Code § 16-39-3 (1987) (in Alabama, if funds for the education of exceptional children impair the classes and services offered to nonexceptional children, then all funds are prorated on a per capita basis); Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 688 (Mont. 1989) (many poor school districts did not offer a Gifted and Talented Program).
165. See, e.g., Morganthau, supra note 164, at 34-35 (quoting Colorado Governor Romer, "This nation ... must [push forward with reform] if it's going to stay economically competitive"); Tom Morganthau, The Future is Now, Newsweek, Fall/Winter 1990 at 72 (governors, legislators, CEOs of major U.S. corporations are asking for decisive action on education reform).
166. Tom Morganthau, The Future is Now, Newsweek, Fall/Winter 1990 at 72, 73-74 (it is
In some cases, this has resulted in fewer funds devoted to the educational curriculum. \(^\text{167}\) Unfortunately, whenever there are budget cuts and other belt-tightening measures, special programs are normally the first to be eliminated. Several states are already proposing to cut back their gifted programs, \(^\text{169}\) while some local school districts have already done so. \(^\text{170}\)

However, failure to meet the educational needs of the gifted students is a serious omission. The deletion and reduction of gifted programs are "justified" in several ways. These include the presumption that gifted children will learn by themselves, \(^\text{171}\) the fear that labeling children as gifted has a detrimental effect on other children, \(^\text{172}\) and a concern about providing some benefit, such as better instruction or better instructors, to one class of students that is not available to all students. \(^\text{173}\)

These concerns, however, should not justify inadequate educational opportunities for gifted students. First of all, the common perception that bright students do not need special education because they learn automatically is false. In fact, these students will not reach their full potential without some attention to, and investment in, their unique educational needs. \(^\text{174}\) Fulfillment of these needs requires acceleration, \(^\text{175}\) enrichment generally accepted that the best way of evaluating the quality of schools is to measure the result. Then successes and failures of the system must be reported back to the policymakers. Accountability helps the policymakers determine what teaching methods are working and which ones should be eliminated.

\(^\text{167}\) Goodwin, supra note 164, at 949 n.59 (citing E.D. Hirsch, Cultural Literacy 20 (1987) (in 1894, high schools offered 40 different subjects. Sixty years later, 274 subjects were offered to high school students)).

\(^\text{168}\) Id. at 949 n.54 (citing William Bennett, American Education: Making It Work 46 (1988) (former Secretary of Education noted that a smaller share of the school dollar was being spent on classroom instruction that at any other time in recent history)).

\(^\text{169}\) Renee Loth, Two-Edged Budget Dilemma For State, Boston Globe, July 29, 1990 at 20 (part of the solution for the fiscal crisis was to cut back programs for gifted students); Rick Pluta, House Approves School Aid Spending That Would Limit Retirement Payments, United Press International, May 21, 1990 (Michigan's House of Representatives approved a $700 million school aid bill that included the elimination of some funds earmarked for gifted and talented education); Laurie J. Storey, Gifted Student Programs Among Those Facing Cuts, Boston Globe, March 11, 1990 at 7 (budget cuts in New Hampshire threaten the gifted and talented programs).

\(^\text{170}\) Casey Banas, Students Tell How Poor Schools Hurt Them, Chi. Trib., March 15, 1991 at 2 (deficiencies in Illinois schools caused by funding problems include eliminating honors courses for college-bound students and gifted and remedial summer school programs).

\(^\text{171}\) Sorenson, supra note 4, at 1.


\(^\text{173}\) Id. (gifted education segregates the advantaged from the less advantaged, the elite from the non-elite).

\(^\text{174}\) One author fears the danger that imagination and ambition can be "educated" out of a TAG student, causing harm to the student and society. Fund for the Advancement of Education, supra note 4, at 160.

\(^\text{175}\) Stencil, supra note 40, at 125 (acceleration is moving a rapid learner through the grades based on interest and ability, not age).
ment or a combination of both. Also, many gifted students have other special needs that must be addressed in order to tap their learning potential. Giftedness is a natural resource that must be nurtured to be reaped.

However, to reap its benefits, giftedness must first be identified. A necessary by-product of identification is a label to recognize what has been distinguished. The risks of abusing and of misunderstanding labels, such as "gifted," are insufficient reasons to totally avoid them. Determining that a child is "gifted" in math, does not suggest that the child is "ungifted" in reading with inadequate reading skills. It simply proposes that the child has a special talent in math, and identifies the fact that this academic area may need some special attention in order to fully develop. Just as students are labeled "first graders," "dyslexic," or "mentally retarded" so that the education can be focused on the needs of the group, some students are labeled as "gifted" for the same purpose. As imperfect as labels may be, the alternative to avoiding the labels is not desirable either. Too often, ignoring the educational needs of gifted students results in students that underachieve academically or completely drop out of school.

Finally, the concern about providing some benefit to one class of students, such as better instruction or better instructors, must be considered. Critics of gifted education fear that gifted courses create an elite group by segregating the advantaged from the less advantaged. Yet, total segregation of gifted students is not always necessary. Acceleration can be accomplished within the school curriculum, without any additional cost, by simply relaxing age related requirements. In these situations, gifted students receive the same instruction from the same instructors. But even when segregation is necessary, for example for the provision of enrichment programs, the segregation does not create an elite group. Gifted children include rich and poor, black and white, and healthy and physically disabled children. The failure of our society to

176. Enrichment keeps a student in an age-level class. In addition to the regular curriculum, programs are offered that provide additional learning experiences, such as in-depth exploration of a subject. See, id.
177. Karen M. Thomas, Teacher Helps Refine Inner-City Students Unique Gifts, CHI. TRIB., February 4, 1991, at I (Gifted children with poor economic backgrounds or with major gaps in their personal lives oftentimes need remedial work first, because they haven't learned to read. However, once placed in appropriate programs, their significant potential can be tapped).
178. See, e.g., Stencel, supra note 40, at 124 (mounting evidence indicates that bright students do not necessarily thrive without special attention); S. REP. NO. 222, supra note 139, at 135 ("[M]any [gifted students], offered an unchallenging curriculum [sic] and unaware of their educational talent, drop out of school.").
179. Meyers, supra note 172.
180. For an excellent tale of a teacher's diligence in working with a gifted student who was
meet the needs of all gifted students creates a class of elite gifted, drawn from the ranks of the affluent, because only the affluent elite have the means to develop to their potential by seeking private education when the public education system fails to meet their needs. When the public education system meets the educational needs of all gifted students, then the opportunity to excel will not be limited to the affluent elite, but all gifted students from every background will have an opportunity to excel.

Maintenance of gifted programs is critical when considering the potential contribution of gifted students to society. As the twenty-first century approaches, global problems in need of global solutions are numerous. For example, these problems encompass environmental, medical and economical issues. However, academically, U.S. students seriously lag behind students in other countries. Changes in teaching methods, especially for gifted students, must be initiated to eliminate this educational gap. Because of the potential contribution to society of gifted students, several authors believe that a federal mandate for gifted education should be a top priority. To be effective, a gifted curriculum must be systematic and continuous. Current optional state TAG stat-

stubborn, brilliant, severely disabled, and a product of a low-income single parent household, see VAIL, supra note 42, at 31-35.

181. Stencel, supra note 40, at 134 (inner-city school officials rarely identify gifted students or establish gifted programs).

182. A school for gifted children located in Illinois charges $5,500 per year tuition. THE AVERY COONLEY SCHOOL, ADMISSIONS INQUIRY CARD.

183. See, e.g., S. REP. No. 297, 100th Cong. 2d Sess., reprinted in 1988 U.S.C.C.A.N. 101, 135. (the future of the country rests largely in the hands of talented and gifted children); Stencel, supra note 40, at 135 (without gifted programs, the country risks shortchanging the development of tomorrow's leadership).

184. Jerry Adler, Survival, NEWSWEEK, December 31, 1990 at 30, 33 (the global environment is attacked underground by radioactive wastes and is threatened by holes in the ozone shield in the sky. Other global environmental problems include developing clean air and water standards, disposing toxic-waste products, and protecting wild-life habitat).

185. For example, AIDS research must be continued until a cure is found.

186. See, e.g., Robert S. Samuelson, Debt, NEWSWEEK, December 31, 1990 at 23 (the U.S. debt problem could trigger a global recession); Sorenson, supra note 4, at 2 (the transition in the U.S. from an industrial to a high technology society places the U.S. in "worldwide intellectual competition for economic survival").

187. Morgenthalau, supra note 166, at 72 (American high-school seniors' math and science test scores are much lower than the scores of their counterparts in almost every other industrialized nation).

188. Id. at 74.

189. See, e.g., Marquardt & Carnes, supra note 151, at 14; Sorenson, supra note 4, at 2 ("The need for helping gifted students has never been stronger than it is today."); Stencel, supra note 40, at 135 (lack of support for gifted education is a risk that Americans cannot afford to take).

190. Stencel, supra note 40, at 132 (the lack of systematic and suitable curriculum delays the educational advancement of the gifted student).
utes do not provide this continuity, and the federal TAG Act is ineffective as well. Since the programs have been predominantly written at the local school district level, the programs are likely to be inconsistent even within a state.

The judiciary's reluctance to intervene in state educational policy, especially in the absence of federal and state legislation, has left many gifted students without a remedy when pursuit of an education appropriate to their needs is futile. Experience with the education of disadvantaged and handicapped students indicates that little will be done for the education of gifted students until the federal government stimulates the action. Some believe that federal leadership and direction is necessary to bring about any meaningful reform in the education system, because the current condition of education is a crisis. Relief for gifted students will have to come from a statute that directly addresses their needs. Since the inconsistent state gifted education statutes do not substantially further the federal interest in gifted education, a federal TAG statute must be adopted.

B. Constitutionality of a Federal TAG Statute

Since the government's obligation to provide education to the population is not specifically stated in the U.S. Constitution, the authority to provide education rests with the states. However, the federal government has created educational policies under the general welfare clause of the constitution. When Congress passes any statute, it must have the authority to act and the statute cannot violate the U.S. Constitution. This section will examine the authority for the proposed federal TAG Act and the constitutionality of the Act under the due process clause of

191. Thomas, supra note 177 (the gifted program developed by one teacher ended when that teacher was transferred to another school).
192. See supra notes 84-105 and accompanying text.
193. Stencel, supra note 40, at 132.
194. See, e.g., Goodwin, supra note 164, at 938, 950 ("The existing crisis in public education provides legal justification for the removal of critical public school curriculum decisions from local control and for the implementation of a mandatory national policy on curriculum and related matters." Sixteen thousand school administrators facing sixteen thousand constituencies have not been able to achieve meaningful curriculum reform); Morganthau, supra note 166, at 74 (quoting Ernest Boyer, president of the Carnegie Foundation for the Advancement of Teaching, "83,000 schools, acting on their own, will not make this a competitive nation.").
195. U.S. CONST. amend. X ("The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.")
196. NEWTON EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS, 2 (1971) (the federal government has enacted educational legislation through the years, even though the extent and limit of the authority has never been clearly defined).
the Fifth Amendment. This section will also generally consider the state constitutionality of acceptance of federal funds under the proposed Act.

1. Federal Authority to Intervene and the Constitutionality of Federal Intervention in Education

Since Congress does not have any express constitutional authority to support and control education, the authority for federal educational legislation has been found in the general welfare clause of the Constitution. It is not disputed that Congress has the authority to make reasonable appropriations for the support of education. It is the federal control of education through the general welfare clause that is limited. Congress' spending power cannot be used to purchase state conformity to a policy that is strictly within an area of state jurisdiction. But, if a nationwide social need is presented, Congress can induce states to cooperate with the federal government to meet the need.

Since states generally have accepted federal intervention attached to federal grants, the federal government exerts a powerful influence in state educational systems through the provisions that accompany federal funding. Since education is a matter of national concern, Congress can collaborate with the states to promote education, without acting outside the scope of the general welfare clause. For example, the Education of the Handicapped Act (EHA) is permissible because of the national need to address the educational needs of handicapped children. A federal statute for gifted education would be very similar to the Education of the Handicapped Act. The purpose of both statutes is to assist the states in promoting education of a group of students with unique needs. Therefore, the authority for the proposed federal TAG Act likewise can be grounded in the general welfare clause.

The proposed federal TAG Act classifies a segment of the student population and confers benefits that are not available to other students. Opponents of the statute may argue that this is a violation of the equal

198. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the power to lay and collect taxes, ... to pay the debts and provide for the common defence and general welfare of the United States").
200. Id.
201. Id. at 5.
202. See U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 1989, 148 (1989) (for the 1986-87 school year, federal funds were almost 6.5% of all school revenues. Eleven states received over 10% of their revenue from federal sources).
203. Edwards, supra note 196, at 5.
204. 20 U.S.C. § 1400(b)(9) (1988) ("It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children . . .").
protection component of the Fifth Amendment's due process clause.\textsuperscript{205} Generally, a statute violates equal protection if it denies equal treatment to a class of persons without a rational basis.\textsuperscript{206} If, however, the classification is a suspect classification,\textsuperscript{207} or restricts the exercise of a fundamental right to a specific group,\textsuperscript{208} then the state must have a compelling reason for the classification, in order to be in compliance with the equal protection clause.

The proposed TAG Act classifies students based on capability, which is not a suspect classification,\textsuperscript{209} for educational benefit, which is not a fundamental right.\textsuperscript{210} Absent a suspect class or invasion of a funda-

\textsuperscript{205} U.S. Const. amend. V (... nor be deprived of life, liberty, or property, without due process of law).
\textsuperscript{206} Laurence H. Tribe, American Constitutional Law § 16-2, at 1441 (1988)
\textsuperscript{207} See, e.g., Marcia Pearce Burgdorf & Robert Burgdorf, A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause, 15 Santa Clara L. Rev. 855, 903 (1975) (a suspect classification is normally only found when the classification is based on race, nationality or alienage, sex, handicap, or age and the classification has no rational relationship to the goal of the statute); Tribe, supra note 206, § 16-33, at 1614-15 (the courts will usually find a suspect classification if it involves a discrete and insular minority, or the classification indicates a stereotype or stigma).
\textsuperscript{208} Tribe, supra note 206, § 16-7 (of particular concern are the fundamental rights related to voting, litigating and exercising intimate personal choices).
\textsuperscript{209} Given that the proposed statute does not create a suspect class or invade a fundamental right, the statute will survive an equal protection challenge if the classification it creates has a rational basis. Clearly, the act exceeds that standard. The federal Education of the Handicapped Act (EHA), 20 U.S.C. § 1400-85 (1988), is an example of creating a classification in order to provide more benefits for some than for others. When persons are situated so that equal treatment causes unequal governmental protection, the legislative branch is obligated to create classifications. Most of the legislative effort involves classification in order to better serve the public interest. Tribe, supra note 206, § 16-1, at 1437-38. For example, if all voters were required to come to the polls to vote, regardless of their physical capacity to do so, the legislative branch would be required to classify this group of individuals so that their right to vote was protected. See id. Usually, the legislative classification is presumed to be constitutional if the government has a rational purpose for the legislation and the classification is reasonably legitimate in relation to the stated purpose. See, e.g., Glen E. Thrope, The Declaration of Independence and the Equal Protection of the Laws, in Still The Law of the Land 121 (Joseph S. McNamara & Lissa Roche, eds. 1988); Tribe, supra note 206, § 16-2, at 1440. The proposed federal TAG Act is attempting to relax some state educational restrictions and to improve the level of public education for students identified as talented or gifted, benefits that are not available for all students. However, gifted students would not be considered a suspect classification because the classification is not based on race, age or other suspect classifications. See supra note 207. Even if the identification process for gifted education resulted in a disproportionate exclusion of minority students, the statute could still be held to be constitutional. The statute is neutral on its face, and serves a purpose for which the government is authorized to act. To be found unconstitutional, there must be evidence that the government acted with an intent to discriminate. See, e.g., Washington v. Davis, 426 U.S. 229, 246 (1976). The classification is based on a need for an adequately challenging education. This classification is reasonably related to the legitimate purpose of improving the education of gifted students. In the absence of a suspect classification, the statute will not be subject to strict scrutiny since education is not a fundamental right afforded explicit constitutional protection. See San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). Therefore, the proposed TAG Act would be constitutional, because the classification has a rational basis for furthering the purpose of the state to provide an adequately challenging education for gifted students.
\textsuperscript{210} At one point, many commentators thought that education might be viewed as a fundamen-
mental right or privilege, the government clearly can demonstrate a rational reason for the classification, specifically, to provide a level of education that better meets the needs of the students in order to obtain the full capability of their contribution to society. Therefore, the statute should meet any equal protection challenge.

Since the suggested federal TAG Act is proposed under the general welfare clause, acceptance of funds by each state would be voluntary. If a state agrees to accept funds provided under the proposed TAG Act, then it is bound by the terms of the statute. Each state may accept the funds as long as the terms of the statute do not violate the state constitution. Since the terms of state constitutions can be more restrictive than the federal Constitution, the proposed TAG Act could be in compliance with the federal Constitution and in violation of a state constitution simultaneously. Therefore, acceptance of federal funds under the proposed TAG Act may be subject to state constitutional restrictions.

2. The State Constitutional Challenge

Public schools are funded by local, state and federal funds. A potential right, based on the Supreme Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954). The Supreme Court ruled that "separate but equal" facilities in the public school systems were not allowed. Although some state constitutions required racial segregation, the Brown Court found that segregation had no place in the public school system. Recognizing the role of education as critical to the realization of success in life, the Brown court stated that when the state undertakes the provision of education, the education provided becomes "a right which must be made available to all on equal terms." Next, the Court reasoned that when segregation was sanctioned by the law, Afro-American children developed a sense of inferiority that affected their motivation to learn. Thus, state sanctioned segregation deprived Afro-American children of some of the benefits they would receive in an integrated school system by causing an adverse affect on the child's motivation to learn. Although not a total deprivation, since the segregated schools provided some educational benefits, this deprivation was a violation of the equal protection clause of the Fourteenth Amendment. Thus, after Brown, it was presumed that education was a constitutionally protected fundamental right. Only twenty years later, however, the Supreme Court clarified its position on the right to educational benefit. In San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court expressly refused to recognize education as a constitutionally protected fundamental right or liberty. The court reasoned that in the absence of a suspect classification, an educational system does not violate the equal protection clause when the system provides each child with an opportunity to acquire the basic minimal skills necessary to enjoy the rights of speech and full participation in the political process. So, the Court limited Brown to a rule invalidating suspect racial classifications in education and held there was no constitutional right to a specific level of education.

211. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.").

212. Id. (the state agrees to comply with federally imposed conditions when the federal funds are accepted).


214. Pauley v. Kelly, 255 S.E.2d 859, 864 (W. Va. 1979) (a state constitution can be interpreted "to require higher standards of protection than afforded by comparable federal constitutional standards").
tial state constitutional challenge for the proposed federal TAG Act could be the funding of gifted education. Lawsuits have been filed in some states challenging particular means of financing education as being unconstitutional because some students receive more funds than others. Challenges to the methods of funding education have claimed unconstitutional failure to provide an efficient school system, failure to implement a basic program of education, failure to provide equal educational opportunity, violation of equal protection and violation of uniform taxation.

For example, the Texas Supreme Court has held that when the state depends heavily on local property taxes, the taxes must be levied on property at a substantially similar rate, in order to fulfill that state's constitutional mandate of providing an efficient system. In Kentucky, the Supreme Court held that the state had provided an efficient school system when the common schools were substantially uniform throughout the state and were available to all children in the state. Once an efficient system is in place that meets the minimum quality of education, the legislature can authorize supplementation of the state system. Similarly, the Washington Supreme Court held that the state cannot require local school districts to resort to special excess levy elections to supplement inefficient state funding. By doing so, the state had failed to meet its constitutional duty to "make ample provision for the education of all children residing within its borders." Gifted education programs would only violate an efficiency clause if providing gifted education inter-

219. Buse v. Smith, 247 N.W.2d 141 (Wis. 1976) (A district power equalization factor was introduced into the school district financing procedure. Instead of receiving state aid, certain school districts paid property tax revenues into the state fund. This violated WIS. CONST. art. VIII, sec. 1 which required that "the rule of taxation shall be uniform..." A county tax must be used for county purposes; it cannot be used to support the state government).
220. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991) (interpreting TEX. CONST. art. VII, § 1 (The legislature has a duty to maintain an efficient public school system). The court never addressed education as a fundamental right).
221. Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989). (Although this case dealt with the efficiency clause of the constitution, the court recognized "that education is a fundamental right in Kentucky.") Id. at 206.
222. Id.
223. Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 98-99 (Wash. 1978) (since the special excess levies were neither dependable nor regular, they failed to fulfill the state's constitutional duty to "make ample provision for basic education.").
224. Id. at 78 (citing WASH. CONST. art. 9, § 1. The court went on to say that this constitutional duty created a right, the right of the state's children "to have the state make ample provision for their education.").
ferred with the state's minimum quality of education. Since the proposed TAG Act does not take anything away from the minimum education requirements, it would not be unconstitutional under a state efficiency clause.

In state jurisdictions where education is not considered to be a fundamental right, the acceptance of federal funds under the proposed federal TAG Act would be constitutional. For example, in Pennsylvania, a state TAG statute was challenged as unconstitutional in *Lisa H. v. State Board of Education*.225 The plaintiff believed that her education was inferior to that provided for students in the exceptional programs. She argued because fewer dollars were spent on her education than what was spent on students in the TAG programs, there was a denial of equal educational opportunity.226 The Pennsylvania constitution requires the legislature to “provide for the maintenance and support of a thorough and efficient system of public education.”227 The court interpreted this clause as creating a duty upon the legislature to provide for education generally, not as an individual right of each student.228 Since that court viewed education as a statutory right, not a fundamental right, the right could be limited by the statutory provisions without violating the state constitutional equal protection clause.229

Even in states, however, like Kentucky and West Virginia, where education is considered to be a fundamental right,230 acceptance of federal funds under the proposed federal TAG Act would pass an equal protection challenge. An equal protection requirement does not prohibit the state from spending unequal amounts.231 Equal protection, in a structure viewing education as a fundamental right, requires a compelling interest when financing is based on a classification in providing a challenging education to gifted students.232 The need to develop the high quality education needed by each student to act in conformity with those states' constitutional guarantees of a thorough and efficient education233 provides that compelling interest. Therefore, acceptance of federal funds under the proposed federal TAG Act would be acceptable under state

226. Id. at 671.
228. 447 A.2d at 673.
229. Id. at 673-74.
232. Id. at 878.
233. Id.
constitutional challenges, whether or not education is considered to be a fundamental right.

III. TALENTED AND GIFTED EDUCATION ACT

A. Purpose, Definition, and Identification

In order to fully develop the potential of gifted children, all factors of the educational process must be firmly addressed in the proposed federal TAG statute. First, the students in need of TAG education must be defined and then properly identified. Then, the statute must very specifically state its intent to provide an adequately challenging education. Finally, factors affecting the educational environment such as program development, teaching standards, parental involvement, adequate funding, and program evaluation must clearly reflect the intent of the statute.

Having established that a federal statute is necessary to provide for the educational needs of gifted children, the ultimate question is how to insure that the statute addresses these needs. The proposed federal TAG statute should be similar to the EHA by providing funds on the condition of providing specific procedural safeguards that guarantee gifted children a challenging education. The proposed TAG statute replaces the IEP guaranteed by the EHA with more specific guidelines, such as providing for a flexible learning structure and a variety of educational environments and programs. This allows the federal government a stronger voice in establishing the minimal requirements of the program and standardizes the educational programs of the country while eliminating the IEP burden for each gifted student. The establishment of procedural safeguards allows parental involvement in the educational process to better insure that the individual child is appropriately placed within the gifted program. Ideally, educational control that can continue to reside with the states should be maximized, given the variety of school districts and educational requirements that are unique to each district. Since the size of the district affects the cost of instruction, the pool of teacher talent, and program flexibility, accommodation for these differences, within certain federal guidelines, must reside with the state.

In spite of "talented or gifted" classifications for children in many school programs, the definition of gifted is vague. Some statutes define

234. There are 15,577 school districts in the U.S. The student enrollment per district, ranges from under 300 students to more than 25,000 students per district. NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 1989, at 90 (1989). These districts serve students in rural, urban, small town and suburban areas.

235. Meister & Odell, supra note 38, at 68.
talented and gifted children as those children that exhibit outstanding intellect, ability, or creative talent.\textsuperscript{236} The definition has also been broadened to include leadership ability,\textsuperscript{237} specific academic strength,\textsuperscript{238} high-level thought processes,\textsuperscript{239} advanced learning ability\textsuperscript{240} and divergent thinking.\textsuperscript{241} Some state statutes provide special education for talented and gifted students, without defining talented or gifted.\textsuperscript{242}

The definition of gifted will determine how many children are served by TAG programs. A narrow definition that simply considers academic achievement may exclude those students with creative giftedness or exceptional leadership abilities. A broader definition insures that a broad spectrum of students will be included in the program. This variety of students not only enhances the educational experience of each student, but also lessens the image of an elite group. As the identification process improves, the number of students receiving gifted education will increase. However, involvement in the gifted program will vary depending on the


\textsuperscript{239} A high level thought process is the ability “to make valid generalizations about events, people of things.” ILL. ADMIN. CODE tit. 23 § 227.10 (1989).

\textsuperscript{240} ARIZ. REV. STAT. ANN. § 15-761(4) (Supp. 1990). See also MO. ANN. STAT. § 162.675(1) (Vernon Supp. 1990) (gifted children are defined as children who exhibit the development of mental capacity and learning potential).

\textsuperscript{241} Divergent thinking is the ability “to identify and consider multiple, valid solutions to a given problem.” ILL. ADMIN. CODE tit. 23 § 227.10 (1989).

\textsuperscript{242} See, e.g., ALA. CODE 16-39-2 (1987); FLA. STAT. § 236.1225 (West 1989); GA. CODE ANN. § 20-2-152 (Supp. 1989); ME. REV. STAT. ANN. tit. 20, § 8102 (1983); MINN. STAT. § 122.94 (West Supp. 1990). See also ARIZ. REV. STAT. ANN. § 15-770(A)(1) (Supp. 1990) (Arizona’s school districts must provide special education to students who score at or above the ninety-seventh percentile on a state board approved test); ARK. STAT. ANN. § 6-42-106(b)(1) (1987) (in Arkansas, talented and gifted is not defined, but program eligibility requirements are developed by the local school district and approved by the state board of education). Many states may give a broad definition, such as intellectually gifted or outstanding in school achievement or other areas of endeavor, and then stipulate that the state department of education must promulgate rules and regulations for more specific criteria. See, e.g., COLO. REV. STAT. § 22-26-104 (1988); LA. REV. STAT. ANN. § 1943 (West Supp. 1990); VA. Code Ann. § 22.1-253.13:1(D)(7) (Supp. 1989).
student’s needs. For example, a student may be solely gifted in music. Therefore, the student will be involved in gifted music instruction. On the other hand, a child that has an overall high intellect or a divergent thought process may be in gifted programs for the entire school day. Another gifted student may need both remedial math programs and gifted language enrichment programs.

After the statutory definition of the kinds of students that should be in the program, the challenge becomes the specific identification of those gifted children in need of this special education. Identification of gifted children is not an easy process.\textsuperscript{243} State codes delegate the identification process to the department of education.\textsuperscript{244} Then the state departments of education delegate the identification process to the local school boards, usually with some regulatory standards. These standards may include minimum criteria that the student must meet, usually comparing the gifted candidate with the general student population.\textsuperscript{245} The regulations may also require evidence of the validity of the identification process and some specific identification devices to be utilized.\textsuperscript{246}

Identification methods are critical to the success of the program. The identification methods used must be non-discriminatory and capable of identifying those students that would otherwise be unidentified, such as those with learning disabilities, lower socio-economic backgrounds, or those with limited English proficiency.\textsuperscript{247} Traditional identification processes have overlooked many gifted characteristics.\textsuperscript{248} Today, there are many reasonable testing alternatives that can be used to identify gifted students. However, the identification process must weigh the cost of the testing process with the likelihood of correctly identifying the gifted students. Testing for some characteristics, such as academic achievement, is easier than testing for others, such as creativeness.

Specific identification techniques are subject to change, as better

\begin{itemize}
\item \textsuperscript{243} One reason for the establishment of The National Center for Research and Development in the Education of Gifted and Talented Children and Youth by the Federal Gifted and Talented Act is to carry out research for identification of talented and gifted students. 20 U.S.C. § 3064 (1988).
\item \textsuperscript{244} ALASKA STAT. § 14.30.274 (1987); CAL. EDUC. CODE § 52202 (West Supp. 1990); COLO. REV. STAT. § 22-26-104 (1988); OKLA. STAT. tit. 70, § 1210.301 (West 1991); ILL ADMIN. CODE tit. 23, § 227.50 (Supp. 1987).
\item \textsuperscript{245} ILL ADMIN. CODE tit. 23, § 227.40 (Supp. 1987).
\item \textsuperscript{246} Id.
\item \textsuperscript{247} Underachievers, and students that are economically disadvantaged or culturally different are difficult to spot if they are withdrawn, passive, aggressive, hostile, or disruptive. Sorenson, supra note 4, at 11.
\item \textsuperscript{248} Identification processes normally consider teacher nominations of students for gifted programs. These nominations are often erroneous. One study suggested that teachers often identify average students as gifted and fail to nominate more than fifty percent of the TAG students that should be in TAG programs. Sorenson, supra note 4, at 13.
\end{itemize}
techniques are developed, and they are too complex to be specifically defined in a statute. The process of identifying giftedness in a child with a learning disability is different than that employed to identify a child with no disabilities from an environment where education is emphasized. The key to a good identification process is variety and flexibility. Selection for a TAG program can include standardized intelligence or achievement tests, and teacher, parent or peer nominations. If specific identification processes exclude an identifiable group, such as a racial or ethnic group, then the identification process must be reviewed for legitimacy.

Another consideration of the identification process is to determine when children should be tested, who should be tested and how often students should be tested. Some gifted characteristics do not manifest themselves in the first grade. Consideration should be given to testing the student population at specific intervals, such as every three years. Flexibility for identification purposes should also allow students to be evaluated on the request of the parent, teacher, or student. The ultimate goal of the identification process is to include most of the children with gifted characteristics, no matter how evident or hidden that characteristic may be, or when the characteristic manifests itself.

Under the proposed federal TAG statute, the responsibility for development of identification guidelines will rest with a Federal TAG Committee to be created within the federal department of education. Identification is the critical factor to insuring that the students who need the gifted programs are brought into them. It is more likely that non-discriminatory testing methods will be developed on the federal level. The Federal TAG Committee also will be responsible for the promulgation of rules and regulations regarding the identification process, including the specifics of who actually tests and identifies the gifted students and what identification methods are used. In addition, this committee must monitor the demographics of the students served by the gifted programs to determine the validity of the identification methods that are promulgated.

**B. Structure, Programs, and Teacher Requirements**

While definition and identification provide the student body for the TAG programs, the educational benefit is actually derived from the curriculum and other educational programs. One of the critical factors of a TAG program is flexibility. Gifted children represent a broad range of talents and capabilities. A child may be musically gifted, but an average

249. Sorenson, supra note 4, at 11-14.
or below average student in English. Or, a child exceptionally gifted in math may have a learning disability that requires special education. Some children and strengths benefit from acceleration, while other children and strengths benefit from enrichment. Some learn better in groups, others require independent study.

The first step to a flexible curriculum is to exempt the gifted student from state laws that may actually stifle the learning process. These are the laws related to age and time requirements. For example, mandatory attendance in a school between two specific ages, such as from age 5 through age 16, may not be relevant to a child who has completed twelve years of study in eight years and has completed curriculum requirements by age 13. Time requirements, such as first grade at age 6, second grade at age 7, etc., are detrimental when a gifted child has mastered the course material in seven months. Even required minutes to be spent in a classroom may not be relevant to a student who is involved in an independent study project, or who is involved in researching and observing first hand some facet of industry.

The proposed federal statute provides two optional educational environments. These are an Honor School within a school or an entire school that is dedicated to providing faculty, curriculum and equipment to gifted students. Within either of these two structures, the student's progression must be based on course comprehension, not on chronological age. This essentially provides for ability grouping; each classroom represents a particular level of students in the coursework, rather than representing a particular age of students.

In addition, flexibility means that a variety of learning environments are offered. For example, a child gifted in math may be adequately challenged with accelerated courses. A child gifted in language may need enrichment courses. Some children are gifted in a very focused area, and an independent study course may be ideal to provide an adequately challenging school environment. Other students may share a gifted trait, and group work may need to be provided. With the variety of student needs, the actual placement and offering of courses must be determined by the local district. The success of the proposed TAG program depends on several options being available to gifted students.

The goal of this TAG program is to provide an adequately challenging learning environment for gifted students. The EHA uses an "appropriate" education as the standard for measuring the effectiveness of

250. The learning process is more efficient and students are challenged to a greater degree when students are grouped by ability, rather than age. Meister & Odell, supra note 38, at 82.
programs. The focus of this standard is whether the student is receiving some personalized educational services. Later applications of this standard have modified the standard from "some benefit" to some "meaningful benefit." There should be no doubt that a model TAG statute should provide for more than a minimal education. The goal is that virtually all students will be challenged by the educational process. This does not mean that the potential of all gifted students must be maximized. However, the environment should provide for growth of the student’s learning, rather than stifling the desire to learn.

Additionally, the benefits of any program are very dependent on the qualifications of the teachers involved with gifted students. Some states provide for special training for the personnel involved in TAG programs. These special qualifications range from college credit in TAG education classes to training seminars. In 1988, only 20% of gifted education teachers were sufficiently trained to teach in a gifted curriculum. Many of the educational approaches used with gifted children are very different from traditional schools. Educating teachers about what is to be expected from gifted students should help reduce some of the friction that may otherwise result. It should be emphasized that not only the "best" teachers are required as part of a successful TAG program. With the proper motivation, and the necessary training, most teachers could be successful TAG instructors.

C. Procedural Safeguards, Funding and Oversight

Parental involvement in education has been significantly reduced over the last fifty years. This certainly could be considered a factor in the decline of education quality. As the educational structure has changed from one-room schools to consolidated school districts, parental

251. See supra notes 76-83 and accompanying text.
254. Gifted children who possess capability and talents that are above the top 2% may not have their potential maximized. The cost of maximizing all children’s potential would probably be prohibitive. These children could still be adequately challenged in the other areas of the learning process. In other words, a musical prodigy will not receive private tutoring. But, the other areas of study that this person must pursue will be in an environment that will encourage him or her to excel.
256. E.g., ILL. ADMIN. CODE tit. 23 § 227.50(a) (1989).
257. S. REP. NO. 222, supra note 139, 135.
258. Ralph D. Mawdsley, Parental Rights and Public Education, 59 EDUC. LAW REP. 271 (1990). The issue of the parents’ role in their children’s education presupposes that the parents’ and the children’s interest in education is identical. Id. Development of students’ rights and the broadening role of the school board to impose requirements on students has caused a decline in the parents’ role in the education of their children. Id. at 273-74 n8.
involvement in teacher and curriculum selection has become more distant.259 Except in unusual cases, parents should still be considered a major factor in determining what is right for their children.260 Parents may recognize the giftedness in a child that tests and other evaluation methods overlook.261 Input from parents can be an important factor in identifying the gifted student.

The necessary role of the parents in a child's education is recognized in the procedural safeguards provided in the EHA. Although the IEP is not a part of the model TAG statute, there are still areas that should allow for parental input. Specifically, testing, evaluation and placement should be subject to review and agreement by the parents. A parent's permission must be required for testing. After a child is placed in a particular program, the parents must be able to contest the appropriateness of that educational environment for their child, particularly when there are other options offered within their district that a parent believes are more appropriate. For example, a parent may be the best judge regarding whether acceleration is appropriate for the gifted student. However, as with the EHA, the ultimate decision regarding placement of the child would be resolved through a civil action in either the state or federal court system when a due process hearing, as determined by state law, fails to satisfy both parties.

The federal government will fund all additional costs that are related to the programming required under this Act. States would be free to provide any additional funding they desire to further the TAG education program. The only major cost related to TAG education is the testing required for identification purposes. The additional costs per student should not be a significant factor. In fact, for students who successfully complete the twelve-year curriculum in less than twelve years, costs may actually be less.

Overview of the proposed TAG program is provided by the creation of state, regional, and federal TAG committees. There are two major objectives for the creation of these committees. First, it is more efficient to have a central group at the federal level gather and evaluate information regarding particular gifted programs. Currently almost 50 states have delegated program development to almost 15,000 local school dis-

260. Some statutes specifically recognize the significance of parental involvement. California TAG programs include procedures that assure the participation of parents in the planning and evaluation of TAG programs. CAL. EDUC. CODE § 52208 (West Supp. 1990).
261. VAIL, supra note 42, at 52.
districts. The Federal TAG Committee, with appointed experts in education, should be able to make sound, practical and effective course recommendations.

The second major objective is to allow some objectivity in program administration. For example, if identification proceedings are not conducted in a fair manner in one state, a regional council is more likely than a state committee to find a violation.

In conclusion, it has been shown that there is sufficient federal interest in the education of our gifted students to warrant federal involvement in that education. Congress is authorized to create the proposed federal TAG statute. It is time to tap a major resource of this nation and to enter the next century with well-educated leaders who are prepared to safeguard the future of this nation.
APPENDIX

FEDERAL TALENTED AND GIFTED EDUCATION ACT

§ 1. STATEMENT OF PURPOSE.

The purpose of this act is to provide assistance to the states in providing an adequately challenging education for all talented and gifted students.

§ 2. DEFINITIONS WITHIN THIS ACT.

(A) Adequately challenging refers to educational programs and environments that are within the range of the student's ability but difficult enough to require considerable effort.

(B) Gifted and talented students are those children enrolled in the public elementary or secondary schools who are capable of high performance in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who require services not ordinarily provided by the schools to fully develop such capabilities. Specific guidelines for students who qualify for educational programs under this Act must be defined by the state TAG committees. These definitions are subject to the approval of the Regional TAG Council.

(C) Honors School is a learning environment within a school that is offered exclusively to students identified as talented or gifted.

(D) Talented and Gifted Schools are those schools that offer a special curriculum to students identified as talented or gifted.

§ 3. IDENTIFICATION OF TALENTED AND GIFTED STUDENTS.

Methods of identification of talented and gifted students shall be provided by the Federal TAG Committee, as provided in § 9(A) of this Act. Methods of identification must ensure that talented and gifted students are identified regardless of race, sex, creed, national origin, or religion. The identification process should also ensure that students from economically disadvantaged and varying cultural backgrounds and physically handicapped children are identified.

§ 4. STRUCTURE FOR IMPLEMENTATION OF EDUCATIONAL PROGRAMS FOR TALENTED AND GIFTED STUDENTS.

(A) The educational environment for talented and gifted education shall be determined by the local school districts, subject to approval by
educational programs shall be provided in one of two educational environments.

1. Talented and Gifted Schools. Talented and Gifted Schools can be provided where the faculty, curriculum, and facilities are provided exclusively for talented and gifted students.

2. Honors School. An Honors School can be organized within a school. A portion of the faculty and a section of the facilities should be allocated to the talented and gifted students in the Honors School. The curriculum offered in the Honors School consists of the approved talented and gifted programs.

(B) Classes within both educational environments must be offered as individual education courses. Students must be allowed to progress on an individual basis for each course. Classes must be structured by course level and not by age.

(C) The local public school system shall, to the extent practicable and allowable by law, allow the students of a Talented and Gifted School, as defined in § 4(A)(1) to participate in any extracurricular activities that the Talented and Gifted School cannot offer.

§ 5. EDUCATIONAL PROGRAMS FOR TALENTED AND GIFTED STUDENTS.

(A) The success of programs for talented and gifted students is dependent on the recognition of the uniqueness of each student’s talents and abilities. Provision for each student’s uniqueness shall be accomplished through flexible programs and exemption from the following state requirements:

1. Mandatory attendance. Talented and gifted students who have completed the equivalent of twelve years of general education (Grades 1-12) as provided by each state shall be exempt from age related mandatory attendance requirements.

2. Time allocations. All state education requirements that include minimum and maximum time requirements, including but not limited to minimum and maximum number of days or hours of instruction, shall be waived for students enrolled in approved talented and gifted education programs.

(B) A minimum number of general education courses, as determined by each state, must be completed by all students.

(C) At least one foreign language must be offered to all talented and gifted students. Each student is required to complete the equivalent of at least four years of one foreign language.
(D) Educational programs must be offered in various ways, including but not limited to, enrichment programs, independent study, acceleration, and postsecondary education opportunities. Each school district must offer some combination of acceleration and enrichment.

§ 6. MINIMUM REQUIREMENTS FOR TEACHERS OF TALENTED AND GIFTED STUDENTS.

(A) Minimum qualification of all teachers of talented and gifted students include the following:

1. Minimum licensing requirements of each state in which the teacher is teaching.
2. Six college credit hour courses, or the equivalent, in the education of talented and gifted students.
3. Annually, eight hours of continuing education, such as workshops, in the education of talented and gifted students must be completed.

(B) Exceptions to these qualifications may be granted by the individual state departments of education to instructors such as scientists, mathematicians, visual and performing artists and community leaders who are obtained from the community to teach in areas of special concentration.

§ 7. FEDERAL FUNDS FOR TALENTED AND GIFTED STUDENTS.

(A) Local school districts are eligible for federal funds for:

1. The average cost per pupil of educating each child who attends a talented and gifted school as defined in § 4(A)(1), less the average cost per pupil of educating each such child at the public school that the child would otherwise have attended.
2. The additional cost of each hour of gifted instruction received by a student in an honors school as defined in § 4(A)(2).

(B) The cost of transportation for each child attending a school as defined in § 4(A) shall also be eligible for reimbursement to the local school district.

(C) The necessary costs of planning, construction, reconstruction, enlargement, rehabilitation, or other improvement for the talented and gifted school facility shall be eligible for federal funds, but for no more than twenty percent of the cost.

(D) Funds will be provided for the additional educational requirements of educators of talented and gifted students under §§ 6(A)(2) and 6(A)(3) of this Act.
(E) Funds will be provided for reimbursement of reasonable transportation and lodging expenses, as otherwise allowed by the state, of all advisory council members serving under the requirements of § 9 of this Act.

(F) All costs directly related to the identification process mandated by the Federal TAG Committee will be reimbursed by the federal government.

§ 8. PROCEDURAL SAFEGUARDS.

(A) All educational agencies receiving funds under this Act must establish and maintain the procedures in this section to assure that talented and gifted children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of adequately challenging educational environments. Parents or guardians must be fully informed, in their native language, of all of the procedural safeguards provided in this section.

(B) Permission of the parents or guardians is required in order to test or otherwise evaluate a child for placement in a talented and gifted educational environment.

(C) Parents or guardians must be provided an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of a child who is receiving or may be eligible to receive education in a talented and gifted environment. The complaint may be presented at an impartial due process hearing, conducted in accordance with state law.

(D) All decisions are subject to review by a committee selected by the Regional TAG Council for Talented and Gifted Education.

(E) If any party is aggrieved by the Regional TAG Council's decision, that party shall have the right to bring a civil action with respect to the complaint presented pursuant to this section. The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

§ 9. TAG COMMITTEES.

(A) A Federal TAG Committee shall be created within the department of education to carry out research and to promulgate rules and regulations regarding methods of identifying talented and gifted students and to evaluate the effectiveness of the identification process and the talented and gifted programs.

(B) The Regional TAG Council shall consist of state representatives from each state that accepts funds under this Act. This Council will
report directly to the Federal TAG Committee. The number of repre-
sentatives from each state shall be determined by the number of tal-
ented and gifted students served by the state programs. The
representatives must be members of the state TAG committees. The
purpose of the Regional TAG Council is to centralize the development
of talented and gifted programs and to approve the state definition of
talented and gifted. The Council's responsibilities include summariz-
ing the talented and gifted programs within the region, reviewing the
number and type of students served by each type of program, and mak-
ing recommendations to state TAG committees regarding the pro-
grams that could be offered.

(C) Composition of the state TAG committee will be determined by
the state department of education within each state. All talented and
gifted programs must be approved by the state TAG committees. An
advisory council to this committee must be created. The advisory
council must be composed of educators and parents of talented and
gifted students and at least two talented and gifted students.