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Chelsea E. Connery

Preston C. Green III

James C. Kaufman

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**THE UNDERREPRESENTATION OF CLD STUDENTS
IN GIFTED AND TALENTED PROGRAMS:
IMPLICATIONS FOR LAW AND PRACTICE**

CHELSEA E. CONNERY*

PRESTON C. GREEN III**

JAMES C. KAUFMAN***

INTRODUCTION

According to the U.S. Department of Education’s Office of Civil Rights (OCR), gifted and talented programs offer special educational opportunities, such as enhanced curricula to students who demonstrate “a high degree of mental ability” or an “unusual physical coordination, creativity, interest, or talent.”¹ Culturally and Linguistically Diverse (CLD) students are underrepresented in gifted programs.² Although this group makes up eleven percent of the students in schools offering gifted programs, fewer than three percent of gifted students nationwide are CLD students.³

State and local gifted identification policies contribute significantly to the underrepresentation of CLD students in gifted education

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* Ph.D. student, Neag School of Education, University of Connecticut.

** Professor of Educational Leadership and Law, Neag of Education, University of Connecticut.

*** Professor of Educational Psychology, Neag School of Education, University of Connecticut.

¹ U.S. DEP’T EDUC. OFF. C.R., 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 11 (last updated Oct. 28, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf> [hereinafter CIVIL RIGHTS DATA COLLECTION]

² See ROGER J. GONZALEZ ET AL., INT’L CTR. LEADERSHIP EDUC., SUPPORTING ELL/CULTURALLY AND LINGUISTICALLY DIVERSE STUDENTS FOR ACADEMIC ACHIEVEMENT xiii (2011), https://www.brown.edu/academics/education-alliance/teaching-diverse-learners/sites/brown.edu/academics/education-alliance/teaching-diverse-learners/files/uploads/ELL%20Strategies%20Kit_Intl%20Ctr%20for%20Leadership%20in%20Educ%2011.pdf (defining “Culturally and linguistically diverse” or CLD students as those enrolled in education programs who are either non-English proficient (NEP) or limited-English proficient (LEP) and students from homes where English is not the primary language of communication and noting that CLD encompasses both the language and cultural needs of the students); Sarah D. Sparks & Alex Harwin, *Too Few ELL Students Land in Gifted Classes*, EDUC. WK. (June 20, 2017), <https://www.edweek.org/ew/articles/2017/06/21/too-few-ell-students-land-in-gifted.html>.

³ CIVIL RIGHTS DATA COLLECTION, *supra* note 1, at 7.

programs.⁴ The second section of this article identifies several such identification barriers.⁵ The third section discusses practices that state and local education agencies, such as school districts, can adopt to counteract this lack of representation.⁶ The final section analyzes legal strategies to compel such action.⁷

II. STATE AND LOCAL IDENTIFICATION POLICIES THAT CAUSE UNDERREPRESENTATION OF CLD STUDENTS

Due to the minimal role the federal government has played in the development of gifted education, state and local agencies have taken the lead in this area.⁸ Twenty-eight states have mandates for identifying and providing services to gifted students, while four states require only identification.⁹ Although some states dictate identification and/or services through state policy or law, school districts generally have significant flexibility to establish criteria for these matters.¹⁰ The remainder of this section discusses the ways in which state and local gifted identification policies may contribute to the underrepresentation of CLD students.

A. *Definitions of Giftedness*

The definitions used for identifying giftedness is one factor that has contributed to the underrepresentation of CLD students in gifted programs.¹¹ According to the report *2014-2015 States of the States in*

⁴ See Meghan Ecker-Lyster & Christopher Niileksela, *Enhancing Gifted Education for Underrepresented Students: Promising Recruitment and Programming Strategies*, 40 J. EDUC. GIFTED 79, 80–83 (2017) (discussing the “identification and recruitment methods,” such as intelligence tests and teacher referrals, which “perpetuat[e] the underrepresentation of minority . . . students in gifted programs”); Stephen T. Schroth & Jason A. Helfer, *Identifying Gifted Students: Educator Beliefs Regarding Various Policies, Processes, and Procedures*, 32 J. EDUC. GIFTED 155, 158 (2008) (noting that schools in the United States use “various identification processes to identify children as gifted”).

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ See *infra* Part IV.

⁸ Donna Y. Ford et al., *Culturally and Linguistically Diverse Students in Gifted Education: Recruitment and Retention Issues*, 74 EXCEPTIONAL CHILD. 289, 290 (2008).

⁹ NAT’L ASS’N FOR GIFTED CHILD. & COUNCIL OF STATE DIRECTORS OF PROGRAMS FOR THE GIFTED, 2014-2015 STATE OF THE STATES IN GIFTED EDUCATION: POLICY AND DATA PRACTICE 24 (Nov. 2015), [https://www.nagc.org/sites/default/files/key%20reports/2014-2015%20State%20of%20the%20States%20\(final\).pdf](https://www.nagc.org/sites/default/files/key%20reports/2014-2015%20State%20of%20the%20States%20(final).pdf) [hereinafter STATE OF THE STATES IN GIFTED EDUCATION].

¹⁰ *Id.* at 23.

¹¹ Valentina I. Kloosterman, *The Schoolwide Enrichment Model: Promoting Diversity and Excellence in Gifted Education*, in REACHING NEW HORIZONS: GIFTED AND TALENTED

Gifted Education, thirty-seven responding states had their own definitions of giftedness.¹² Most of these states had definitions that embraced academics or intellect: thirty-four states included “intellectually gifted”; twenty-four states included “academically gifted”; twenty-four states included the “performing/visual arts”; twenty-one states included “creatively gifted”; and twenty states included “specific academic areas.”¹³ Definitions of giftedness that emphasize academics or intellect may serve as a barrier to the recruitment of CLD students because these qualities are more aligned with middle-class, White-American values and resources.¹⁴

B. Identification Assessment Instrumentation

The use of intelligence quotient (IQ) tests and other traditional standardized test methods as the sole measure for identifying giftedness also has a detrimental impact on CLD students.¹⁵ One problem with these tests is that they are primarily dependent on English oral and written language.¹⁶ If CLD students are forced to take tests in a language in which they are not yet proficient, they may be unable to demonstrate their abilities and achievements.¹⁷ This problem is especially true when the tests favor highly verbal students.¹⁸

Traditional measures of academic achievement might also contribute to the underrepresentation of CLD students in gifted programs because they are often culturally biased.¹⁹ A test is defined as biased if

EDUCATION FOR CULTURALLY AND LINGUISTICALLY DIVERSE STUDENTS 175, 181–82 (Jamie A. Castellano & Eva I. Díaz eds., 2002).

¹² STATE OF THE STATES IN GIFTED EDUCATION, *supra* note 9, at 27.

¹³ *Id.*

¹⁴ Ford et al., *supra* note 8, at 293–94.

¹⁵ Kloosterman, *supra* note 11, at 182.

¹⁶ *Id.* (noting that the assessment “should always take into account the cultural and linguistic background of the child and should be conducted in the student’s native language”).

¹⁷ See Robert J. Sternberg, *Multicultural Issues in the Testing of Abilities and Achievement*, in CREATIVITY AND GIFTEDNESS IN CULTURALLY DIVERSE STUDENTS 105, 105–106 (Giselle B. Esquivel & John C. Houtz eds., 2000).

¹⁸ Donna Y. Ford, *The Underrepresentation of Minority Students in Gifted Education: Problems and Promises in Recruitment and Retention*, 32 J. SPECIAL EDUC. 4, 8 (1998).

¹⁹ See Jaime A. Castellano, *Renavigating the Waters: The Identification and Assessment of Culturally and Linguistically Diverse Students for Gifted and Talented Education*, in REACHING NEW HORIZONS: GIFTED AND TALENTED EDUCATION FOR CULTURALLY AND LINGUISTICALLY DIVERSE STUDENTS 94, 94, 99–100, 110 (Jamie A. Castellano & Eva I. Díaz eds., 2002) (noting that “most of the identification procedures used” are “really a measure of conformity to middle class academic values and achievement” resulting in the “exclu[sion]”

it “systematically underpredicts or overpredicts” for any one group.²⁰ Tests that are insensitive to the linguistic and cultural backgrounds of the students taking them place CLD students at a disadvantage.²¹ Due to differential socialization experiences, different cultural groups tend to have “different distributions of style,” resulting in abilities or achievements being “confounded with styles because the person scoring the material will generally be unable to separate stylistic preference from the abilities or achievements supposedly being measured by the tests.”²²

Moreover, CLD students’ results on traditional measures of achievement have questionable validity.²³ When CLD students who are still in the process of learning English are tested in English, their proficiency in English is also tested, irrespective of the content or objective of the assessment.²⁴ These students may have the content knowledge and the cognitive ability needed to perform successfully on assessment tasks, but are not yet able to demonstrate in English what they know.²⁵ Thus, the use of standardized assessments may yield invalid results for CLD students.

of “disadvantaged students”); *see also* Sternberg, *supra* note 17, at 105–06 (discussing the “challenge” students face when “forced to take tests in a language that is not fully their own”).

²⁰ Sternberg, *supra* note 17, at 113.

²¹ *See* Castellano, *supra* note 19, at 100 (noting that standardized tests discriminate against students whose linguistic and perceptual orientation . . . and cultural or social backgrounds differ from the norm group – White, middle class, native-English-speaking populations”); Emilia C. Lopez, *Identifying Gifted and Creative Linguistically and Culturally Diverse Children*, in *CREATIVITY AND GIFTEDNESS IN CULTURALLY DIVERSE STUDENTS* 125, 125–26 (Giselle B. Esquivel & John C. Houtz eds., 2000) (discussing the “importance of identifying” CLD students in order to “cultivate and nurture” their gifted abilities because they are “directly influenced by their cultural background”).

²² Sternberg, *supra* note 17, at 115. *See* James C. Kaufman, *Using Creativity to Reduce Ethnic Bias in College Admissions*, 14 *REV. GEN. PSYCHOL.* 189, 194 (2010).

²³ Lopez, *supra* note 21, at 129.

²⁴ Annela Teemant, *ESL Student Perspectives on University Classroom Testing Practices*, 10 *J. SCHOLARSHIP TEACHING & LEARNING* 89, 90 (2010) (noting that students feel they are “forced into demonstrating knowledge in a language over which they have only partial . . . control”) (citing Elizabeth Bernhardt et al., *Assessing Science Knowledge in an English/Spanish Bilingual Elementary School*, 4 *COGNOSOS* 4, 6 (1995)).

²⁵ *Id.* at 92, 96 (discussing the concept that CLD students feel their content knowledge is “trapped” in their native language in such a way that they could not adequately access that knowledge to demonstrate mastery in test situations” and how current test practices “fail to ‘capture’” CLD students’ content knowledge).

C. Teacher Referrals

In addition, teacher referral policies contribute to the underrepresentation of CLD students in gifted programs.²⁶ Specifically, teachers systematically under-refer CLD students for gifted services.²⁷ This finding is problematic because teacher referrals serve as gatekeepers, opening or closing doors to gifted education classrooms.²⁸

There are several reasons why teachers fail to identify CLD students as gifted. The first stems from the deficit-thinking paradigm: Some teachers have negative stereotypes and inaccurate perceptions about the abilities of CLD students, which lead to low expectations.²⁹ Second, teachers are more effective at identifying giftedness among students with whom they are culturally similar. The majority of teachers are White, which results in teachers more effectively identifying giftedness in White students and less effectively identifying giftedness in CLD students.³⁰ Finally, these White teachers might fail to identify CLD students because they lack intercultural competency.³¹ Specifically, these teachers may have low levels of awareness of the cultural and linguistic behaviors of potentially gifted CLD students, insensitivity to the differences within and among groups, and an inability to recognize “gifted behaviors” exhibited by CLD students.

III. RECOMMENDATIONS FOR CORRECTING IDENTIFICATION POLICIES

A. Definition of Giftedness

If states and school districts are committed to improving the representation of CLD students, they should develop broader, more encompassing understandings and definitions of giftedness. For example, states should do away with static definitions and theories of giftedness that fail to consider cultural differences and disregard ways in which

²⁶ Ford et al., *supra* note 8, at 295.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 293.

³⁰ *Id.* at 295.

³¹ Brian L. Wright et al., *Ignorance or Indifference? Seeking Excellence and Equity for Under-Represented Students of Color in Gifted Education*, 4 GLOBAL EDUC. REV. 45, 57–58 (2017) (“Educators who lack cultural competence risk misinterpreting or worse undermining the educational experiences of Black and Hispanic students, and thus contribute to segregated gifted education programs”).

students' backgrounds influence their opportunities to show skills and abilities.³² Because giftedness is a social construct, definitions and views of giftedness vary among cultures.³³ Thus, policymakers should look to theories that are inclusive, comprehensive, and culturally sensitive.³⁴ Donna Ford and associates suggest two possible alternatives.³⁵ The first is Robert Sternberg's Triarchic Theory of Intelligence (also called the Theory of Successful Intelligence), which presents intelligence as multidimensional and dynamic and asserts that no type of intelligence or talent is superior to another.³⁶ The second is Howard Gardner's Theory of Multiple Intelligences, which differentiates among seven types of intelligences: linguistic, logical-mathematical, interpersonal, intrapersonal, bodily kinesthetic, spatial, musical, and natural.³⁷

Definitions of giftedness should also be built around the concept of talent development because this conceptualization recognizes that many CLD students, unlike their White counterparts from high socioeconomic backgrounds, have had inadequate opportunities to develop and perform at high academic levels.³⁸ Considering talent development as part of the definition is also important because it may help draw attention to underachievers.³⁹ Programs guided by definitions that equate giftedness with high achievement or demonstrated performance will overlook gifted underachievers in the recruitment process.⁴⁰ This oversight has key implications for CLD students, many of whom have lower grades and achievement scores than their White classmates.⁴¹ Further, the concept of talent development acknowledges that some CLD students face greater barriers in life than others due to the impact that discrimination and prejudice have on their motivation, ambition, and

³² Ford et al., *supra* note 8, at 301 (discussing the importance of "multicultural preparation for educators" to increase the "recruitment and retention of CLD students in gifted education").

³³ See Robert J. Sternberg, *Who Are the Bright Children? The Cultural Context of Being and Acting Intelligent*, 36 EDUC. RESEARCHER 148, 151–53 (2007); Ford et al., *supra* note 8, at 298–99.

³⁴ Ford et al., *supra* note 8, at 299.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., Ford et al., *supra* note 8, at 298; Donna Y. Ford & Tarek C. Grantham, *Providing Access for Culturally Diverse Gifted Students: From Deficit to Dynamic Thinking*, 42 THEORY INTO PRACT. 217, 219 (2003).

³⁹ Ford et al., *supra* note 8, at 299.

⁴⁰ *Id.* at 298–300; Donna Y. Ford & Tarek C. Grantham, *Providing Access for Culturally Diverse Gifted Students: From Deficit to Dynamic Thinking*, 42 THEORY INTO PRACT. 217, 219 (2003).

⁴¹ Ford et al., *supra* note 8, at 300.

mental health.⁴² Discrimination increases the risk of low achievement, academic disengagement, school failure, and other social difficulties.⁴³

B. Identification Assessment Instrumentation

School districts should also adopt culturally sensitive instruments that have minimal cultural and linguistic demands.⁴⁴ The instruments with the most potential for assessing the strengths of CLD students are nonverbal tests of intelligence such as the Naglieri Non-Verbal Ability Test, Universal Non-Verbal Intelligence Test, and Raven's Progressive Matrices.⁴⁵ These assessments are considered less culturally loaded than traditional assessments and thus may be more effective means of evaluating cognitive strengths of CLD students.⁴⁶ These nonverbal assessments also provide CLD students with opportunities to exhibit their intellect and skills without the confounding impact of language, vocabulary, and academic experience.⁴⁷

It is important to not rely on one measure alone. Rather, data collection of students who are being assessed for giftedness should be multidimensional and gathered in a variety of ways.⁴⁸ Information should be collected verbally, such as through interviews, focus groups, and conversations, along with illustrative measures such as observations, writing, and performances.⁴⁹ In implementing verbal data collection with CLD students who are not yet proficient in English, educators may have to use appropriately trained interpreters or adopt instruments translated into students' dominant language.⁵⁰ Further, the educators involved in gifted identification should gather both subjective and objective information, keeping in mind associated advantages and disadvantages of both.⁵¹ Among the informal cognitive and academic measures recommended to assess potentially gifted CLD students are observation scales, checklists, inventories, product judgments,

⁴² *Id.* at 298.

⁴³ *Id.*

⁴⁴ *Id.* at 300.

⁴⁵ *Id.*

⁴⁶ Ford et al., *supra* note 8, at 300.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Donna Y. Ford & Charles J. Russo, *No Child Left Behind . . . Unless a Student is Gifted and of Color: Reflections on the Need to Meet the Educational Needs of the Gifted*, 15 J. L. Soc'y 213, 238–39 (2014).

⁵¹ *Id.* at 239.

interviews, portfolios, biographical data, and case studies.⁵² Additionally, informal creativity measures can be used as an additional source of assessment data with CLD students.⁵³ Such methods of assessing creativity include divergent thinking tests, rated creative products, problem solving tasks, self-report inventories, checklists, and rating scales.⁵⁴

It may also be helpful for educators to assess the language skills of potentially gifted CLD students. Formal tools are available to assess CLD students' language-proficiency skills, but they have several limitations.⁵⁵ Interviews, observations, language samples, and checklists are some of the informal tools recommended to gauge proficiency levels.⁵⁶ Language assessment is important because gifted CLD students often exhibit strength in language skills.⁵⁷ For example, linguistically gifted CLD children often "demonstrate rapid and significant growth in English acquisition."⁵⁸ Furthermore, empirical research suggests that bilingual students "demonstrate cognitive and creative strengths in concept formation, classification, and metalinguistic awareness."⁵⁹ Thus, special talents in language-related areas is a criterion that can be applied to the identification of CLD students as gifted.⁶⁰

C. Teacher Referrals

Finally, the teacher referral process can be improved by encouraging referrals from multiple sources. For example, the referral process should involve a wider variety of educators. Possibilities include English as a Second Language teachers, bilingual teachers, counselors, and school psychologists.⁶¹ Research suggests training targeted toward helping the school's various educators to identify potentially gifted CLD students results in increased referrals related to more diverse manifestations of talents and abilities.⁶² Referral sources who are familiar

⁵² *Id.* at 238.

⁵³ *Id.*

⁵⁴ Lopez, *supra* note 21, at 133.

⁵⁵ *Id.* at 135 (commenting that most formal tools are "not available in languages other than Spanish and English" and they "evaluate a limited range of domains").

⁵⁶ *Id.* at 133–34 (noting the use of "case studies, performance-based products (e.g., tape recording of a musical performance), and portfolio assessment" for identifying students with special talents in music and sports).

⁵⁷ *Id.* at 134.

⁵⁸ See JAMES C. KAUFMAN ET AL., *ESSENTIALS OF CREATIVITY ASSESSMENT* 158 (2008).

⁵⁹ Lopez, *supra* note 21, at 135.

⁶⁰ *Id.* at 134–35.

⁶¹ *Id.* at 134.

⁶² *Id.* at 134–35.

with CLD students' level of language proficiency and with their progress in acquiring English are often able to better identify particular strengths in language related areas.⁶³

Families can also be effective sources for referrals because they can identify strengths that CLD students exhibit at home and in the community.⁶⁴ Using family referrals requires effective communication on the part of the school.⁶⁵ Educators and administrators must be proactive in building trust, open dialogue, and relationships with CLD families.⁶⁶ They must ensure that CLD families understand the purposes and benefits of gifted education and are meaningfully informed of the school's gifted program and identification policies and procedures.⁶⁷

IV. ANALYSIS OF LEGAL OPTIONS FOR CORRECTING IDENTIFICATION BARRIERS

While the previous section has identified a number of measures that states and school districts can take to correct the policies that have contributed to the underrepresentation of CLD students in gifted education, it must be acknowledged that many local and state education agencies have failed to take action.⁶⁸ Consequently, CLD students and the federal government have resorted to legal action to compel the adoption of identification policies that would improve the representation of CLD students in gifted programs. This section analyzes the possible effectiveness of three legal provisions: (1) the Equal Protection Clause; (2) Title VI of the Civil Rights Act of 1964; and (3) the Equal Education Opportunities Act of 1974.

A. *Equal Protection Clause*

The Equal Protection Clause, which forbids states to “deny to any person within its jurisdiction the equal protection of the laws,”⁶⁹ provides a vehicle for CLD students and federal agencies to challenge identification policies that serve as obstacles to their participation in

⁶³ *Id.* at 132.

⁶⁴ Lopez, *supra* note 21, at 132.

⁶⁵ *Id.* at 139.

⁶⁶ *Id.* at 132.

⁶⁷ *Id.*

⁶⁸ See Ford et al., *supra* note 8, at 290.

⁶⁹ U.S. CONST. amend. XIV, § 1.

gifted education. For instance, courts have the authority to treat the underrepresentation of Latino students in gifted programs as a vestige of a district's intentional, or *de jure*, segregation. Such findings would make it difficult for school districts to justify the use of identification policies, such as standardized test scores, that contribute to this problem.

An analysis of desegregation jurisprudence supports this assertion. In *Brown v. Board of Education*,⁷⁰ the Supreme Court ruled that the *de jure*, or official, segregation of Black students violated the Equal Protection Clause.⁷¹ The Court extended the holding of *Brown* to Latino students in *Keyes v. School District No. 1, Denver*.⁷² In *Green v. County School Board of New Kent County, Virginia*,⁷³ the Court held that school districts had a heavy burden to justify ineffective desegregation strategies if more effective measures were available.⁷⁴ The Court also established a standard, known as the *Green* factors,⁷⁵ for determining when school districts had achieved constitutional compliance and could thus be released from their desegregation decrees. Districts had to achieve desegregation to the extent practicable with respect to facilities, faculty, staff, student body, extracurricular activities, and transportation.⁷⁶ In addition to the *Green* factors, some courts have considered other indicia, including gifted education.⁷⁷

It follows that courts have the authority to require school districts to take affirmative action to correct the *de jure* segregation of Latino students from gifted education. In accordance with this authority, courts could order school districts to abandon the use of standardized tests that contribute to their exclusion from gifted education. Nonetheless, in *Keyes v. Congress of Hispanic Educators*,⁷⁸ the court refused to extend a desegregation decree over the Denver school system to address the underrepresentation of Latino students in the school system's gifted programs. The plaintiffs acknowledged that the Denver system had

⁷⁰ 347 U.S. 483 (1954).

⁷¹ *Id.* at 495.

⁷² 413 U.S. 189, 213–14 (1973).

⁷³ 391 U.S. 430 (1968).

⁷⁴ *Id.* at 439.

⁷⁵ *Id.* at 435. See *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) (applying the “*Green* factors”).

⁷⁶ *Green*, 391 U.S. at 435.

⁷⁷ See *Goodwine v. Taft*, No. C-3-75-304, 2002 WL 1284228 at *3 (S.D. Ohio Apr. 15, 2002) (considering “student achievement, student discipline, assignment of students to special education classes, honors classes and gifted programs or graduation rates” in addition to the *Green* factors).

⁷⁸ 902 F. Supp. 1274 (D. Colo. 1995).

achieved compliance with the *Green* factors, but argued that racial disparities in the gifted programs showed that the system was still unconstitutionally segregated.⁷⁹ The court rejected this claim because it had never found that the racial and ethnic disparities in the district's gifted programs were the result of the district's prior discriminatory actions.⁸⁰ Additionally, there were no findings of any new discriminatory conduct that caused Black and Latino students to be underrepresented in gifted programs.⁸¹ In fact, the court observed that school officials had adopted reasonable procedures to improve its identification of Latino gifted students, including parent inventories and peer nomination.⁸² As a result of these strategies, the participation of Black and Latino students in Denver's gifted programs increased.⁸³ For these reasons, the court refused to extend its desegregation order to address the underrepresentation of Latino students in gifted educational programming.⁸⁴

The U.S. Department of Justice also has the authority to address the underrepresentation of Latino students in gifted education programs through voluntary consent decrees with school districts to eliminate the vestiges of de jure segregation.⁸⁵ In *United States v. Midland Independent School District*, the department exercised this power.⁸⁶ In 1999, the parties entered into a consent decree, which required the district to provide "staff development for bilingual education faculty on identifying and enrolling [gifted, limited-English-proficient] students, including use of the portfolio approach used to identify students for the elementary [gifted] program."⁸⁷ As a result of the district's compliance with the consent decree, minority enrollment in its gifted education program increased.⁸⁸ The court found that the district had achieved unitary status (i.e., eliminated the vestiges of its past segregation to the extent practicable) and dismissed the case in 2002.⁸⁹

⁷⁹ *Id.* at 1282.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 1300.

⁸³ *Id.*

⁸⁴ *Keyes*, 902 F. Supp. at 1300, 1307.

⁸⁵ See Randolph D. Moss, *Participation and Department of Justice School Desegregation Consent Decrees*, 95 YALE L.J. 1811, 1818–21 (1986).

⁸⁶ *Consent Order and Settlement Agreement*, U.S. DEP'T JUST., <https://www.justice.gov/crt/united-states-district-court-10> (last visited Mar. 11, 2019) (U.S. v. Midland Indep. Sch. Dist., C.A. No. MO 70 CA 67 (W.D. Tex. 1999)).

⁸⁷ *Id.*

⁸⁸ *Case Summaries*, U.S. DEP'T JUSTICE, <https://www.justice.gov/crt/case-summaries> (last visited Mar. 12, 2019).

⁸⁹ *Id.*

Nevertheless, it is highly unlikely that Latino students can avail upon the federal judiciary or the Department of Justice to correct their underrepresentation in gifted education programs that is the result of *de jure* segregation in the present time. The federal courts are rapidly dismantling their desegregation decrees,⁹⁰ and the Department of Justice, under President Donald Trump has not indicated a willingness to advance the educational interests of Latino students.⁹¹

CLD students who do not live in *de jure* segregated school districts can also mount challenges to their underrepresentation in gifted programs pursuant to the Equal Protection Clause. The success of these claims would depend upon the level of judicial scrutiny. In *McFadden v. Board of Education for Illinois School District U-46*,⁹² the court, applying strict scrutiny review, invalidated a gifted education program, which segregated Latino students in their core academic classes. Strict scrutiny is the highest standard of judicial review and the most difficult for a governmental entity to establish.⁹³ This test required the school district to prove that its racial classification was “narrowly tailored” to satisfy a “compelling governmental interest.”⁹⁴ The district claimed that it operated a “separate, segregated” gifted program for Latino students because they were not sufficiently proficient in English to perform well in the regular gifted program classes.⁹⁵ Students chosen for the “School within a school” (SWAS) program were identified by scoring ninety-two percent or above on the Measurement for Achievement (MAP) test, a standardized achievement test.⁹⁶ The court rejected the use of the MAP

⁹⁰ See Reed Jordan, *Frustrating Barriers to School Desegregation*, URBAN INST. (Sept. 23, 2013), <https://www.urban.org/urban-wire/frustrating-barriers-school-desegregation>.

⁹¹ See Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> (discussing the Justice Department’s “internal announcement” to investigate intentional race-based discrimination in college admissions which has been viewed as “targeting admissions programs that can give members of generally disadvantaged groups, like black and Latino students, an edge over other applicants with comparable or higher test scores”); Vivian Yee, *Affirmative Action Policies Evolve, Achieving Their Own Diversity*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/us/affirmative-action-justice-department.html> (noting that Justice Department signaled to have marshal lawyers “to investigate and perhaps sue colleges over ‘intentional race-based discrimination’ . . . favoring blacks and Latinos”).

⁹² 984 F. Supp. 2d 882, 897–98 (N.D. Ill. 2013).

⁹³ David H.K. Nguyen et al., *Strict Scrutiny & Fisher: The Court’s Decision and Its Implications*, 299 EDUC. L. REP. 355, 356 (2014).

⁹⁴ *McFadden*, 984 F. Supp. 2d at 897.

⁹⁵ *Id.* at 898.

⁹⁶ *Id.*

test in this fashion because there were less discriminatory means of identifying gifted children, such as measuring intelligence non-verbally through tests that were culturally neutral with language supports for CLD students.⁹⁷

It is important to recognize that District U-46 was the only district in the United States to operate a separate gifted program for Latino students.⁹⁸ Because the district had “singled out” Latino students to be treated in this manner, the court found that the school district had operated the program with racially discriminatory intent, which triggered strict scrutiny analysis.⁹⁹ Without evidence of such intent, other courts would probably apply a rational basis analysis, which is a much more favorable standard for governmental entities.¹⁰⁰ Under this standard of review, discriminatory treatment will be held constitutional, as long as the classification is rationally related to a legitimate governmental objective.¹⁰¹

As *Doe v. Commonwealth of Pennsylvania* demonstrates, school districts can justify the use of gifted identification policies that discriminate on the basis of scores on standardized assessments under the rational basis test.¹⁰² In this case, a high school student claimed that a school district violated the Equal Protection Clause by using a minimum cutoff score on a standardized aptitude test to determine admission into gifted classes.¹⁰³ The court found that the testing policy was rationally related to the legitimate goal of identifying gifted children.¹⁰⁴ While the use of minimum cutoff scores was not the best available method, the court could not conclude that it was unreasonable.¹⁰⁵ Thus, the Equal Protection Clause is an ineffective legal tool for plaintiffs who are trying to challenge gifted identification policies that negatively impact CLD students.

⁹⁷ *Id.* at 898, 900.

⁹⁸ *Id.* at 898.

⁹⁹ *Id.* at 902.

¹⁰⁰ See Darren Lenard Hutchinson, “Unexplainable on Grounds Other Than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 664–65 (2003).

¹⁰¹ See Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 402 (2016).

¹⁰² 593 F. Supp. 54, 57 (E.D. Pa. 1984).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

B. Title VI of the Civil Rights Act of 1964

At one time, Title VI of the Civil Rights Act of 1964 seemed to provide a more promising vehicle for CLD students who wished to challenge the discriminatory effects of standardized assessments on their access to gifted programs. Section 601 of this statute prohibits entities that receive federal funding from discriminating on the basis of race, color, or national origin.¹⁰⁶ The Supreme Court interpreted the statute as requiring plaintiffs to prove discriminatory intent.¹⁰⁷

However, Section 602 authorizes federal agencies to adopt regulations to enforce Section 601.¹⁰⁸ In response to this authority, the U.S. Department of Education implemented regulations that prohibits recipients of federal funding from taking actions that had a disparate impact on protected groups.¹⁰⁹ Several federal appellate courts held that plaintiffs have a private right of action to enforce the regulatory provisions that prohibited disparate impact against protected classes.¹¹⁰ In analyzing these claims, the courts applied the disparate impact analysis used in Title VII employment.¹¹¹ First, the plaintiffs had to establish a *prima facie* case of disparate impact.¹¹² If the plaintiffs established disparate impact, the burden shifted to the defendants to show that the challenged practice was justified.¹¹³ If the defendants met this burden, the plaintiffs would have to identify alternative practices that had less discriminatory

¹⁰⁶ 42 U.S.C. § 2000d (2017) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹⁰⁷ *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 584 (1983).

¹⁰⁸ 42 U.S.C. § 2000d-1 (2017) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of [§ 601] of this title . . . by issuing rules, regulations, or orders of general applicability. . .”).

¹⁰⁹ 34 C.F.R. § 100.3(b)(2) (2017) (“[A recipient of federal funding] may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”).

¹¹⁰ *See, e.g., City of Chicago v. Lindley*, 66 F.3d 819, 828–29 (7th Cir. 1995); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Elston v. Talladega Cty. Bd. of Educ.* 997 F.2d 1394, 1407 (11th Cir. 1993); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969, 982–83 (9th Cir. 1984).

¹¹¹ *Powell v. Ridge*, 189 F.3d 387, 393 (3d Cir. 1999).

¹¹² *Id.*

¹¹³ *Id.* at 393–94.

impact on the protected class, or show that the defendants' justifications were a pretext for discrimination.¹¹⁴

Larry P. v. Riles best illustrates how CLD students could have used the implementing regulations to challenge the use of standardized assessments in placement in gifted programs.¹¹⁵ In *Larry P.*, the Ninth Circuit ruled that the California school system's requirement that students who obtained IQ test scores of seventy points or less be placed in classes for the educationally mentally retarded (E.M.R.) violated Title VI.¹¹⁶ The plaintiffs established a *prima facie* case by showing that Black children scored ten points lower on the placement tests than White students, while the percentage of Black children in E.M.R. classes was significantly higher than the percentage of whites, and the scores were used to remove Black students from regular education classes and place them in E.M.R. classes.¹¹⁷ The court then rejected the defendants' claim that the IQ test had been validated for the purpose of predicting the educational performance of students.¹¹⁸ The question of predictive validity was not whether the IQ test generally predicted the educational performance of students, but whether the test predicted that Black students who scored at or below seventy points on an IQ test could not learn in the general education curriculum.¹¹⁹

Similarly, CLD students could have asserted that gifted education policies that relied on standardized tests violated Title VI's implementing regulations under a disparate impact theory. CLD students would have established a *prima facie* case by showing that the reliance on standardized tests caused them to be underrepresented in gifted classes. As shown in Section II of this article, standardized tests have served as a major barrier to CLD-student access to gifted education.¹²⁰ By contrast, defendants would have had a difficult time establishing an educational necessity for the use of standardized tests because of their questionable validity.¹²¹ Because these tests are generally in English, they

¹¹⁴ *Id.* at 394.

¹¹⁵ 793 F.2d 969 (9th Cir. 1984).

¹¹⁶ *Id.* at 976, 983.

¹¹⁷ *Id.* at 982–83.

¹¹⁸ *Id.* at 983.

¹¹⁹ *Id.* at 980.

¹²⁰ See *supra* Section II.

¹²¹ See Sternberg, *supra* note 17, at 115 (discussing the validity issues caused by assessing the giftedness of CLD students with assessments in English); Lopez, *supra* note 21, at 129 (noting the “questionable validity” of “normed cognitive and academic tools” for CLD students because their scores may “reflect English-language knowledge instead of academic or cognitive functioning”).

may fail to measure the cognitive ability of CLD students – especially those who are not yet proficient in English.¹²² Even if the defendants established an educational necessity, the CLD students could have identified less discriminatory non-verbal assessments of intelligence.

Unfortunately for CLD students, the Supreme Court in *Alexander v. Sandoval*¹²³ severely hampered the effectiveness of Title VI as a litigation tool for combating the use of standardized assessments for placement in gifted programs. In *Sandoval*, the Court held that Title VI did not create a private right of action for plaintiffs to enforce the statute’s implementing regulations.¹²⁴ As a consequence of the *Sandoval* ruling, a CLD-student plaintiff would have to prove that the standardized assessments were established with discriminatory intent to prevail under a Title VI claim.

As a result of *Sandoval*, the Department of Education’s Office for Civil Rights (OCR) provides the only means for correcting school district policies that have a disparate impact on CLD-student access to gifted programs under Title VI.¹²⁵ Under the administration of President Barack Obama, the Department signaled that it would take such action. In 2011, OCR entered into an agreement with the Los Angeles Unified School District (LAUSD) that, *inter alia*, required the district to develop a plan “to address the disproportionate participation of . . . Hispanic students and ensure that [gifted] identification reflect[s] the demographics of a school.”¹²⁶ This plan would include the following: (1) “[a]n annual analysis of [gifted] students, including proportionate number of student[s], and equity of access to inform future modification of program policies, procedures and practices”; and (2) “[p]rofessional development that embraces new constructs of giftedness that are multi-faceted, multi-cultural and multi-dimensional for various stakeholders.”¹²⁷

In 2014, OCR further indicated its commitment to addressing the underrepresentation of CLD students in gifted programs by issuing

¹²² *Id.*

¹²³ 532 U.S. 275 (2001).

¹²⁴ *Id.* at 293.

¹²⁵ *See id.* at 289–90 (discussing the power of federal agencies to enforce their Title VI implementing regulations); 34 C.F.R. § 100 et seq. (2017).

¹²⁶ Resolution Agreement between Los Angeles Unif. Sch. Dist. & U.S. Dep’t of Educ., OCR No. 09-10-5001 (Oct. 11, 2011). *See also Education Department Announces Resolution of Civil Rights Investigation of Los Angeles Unified School District*, U.S. DEP’T OF EDUC. (Oct. 11, 2011), <https://www.ed.gov/news/press-releases/education-department-announces-resolution-civil-rights-investigation-los-angeles-unified-school-district>.

¹²⁷ *Id.*

a Dear Colleague Letter spelling out the obligations that Title VI placed on recipients of federal funds.¹²⁸ With respect to disparate impact investigations, the OCR proclaimed that it would “consider the school district’s decision to provide a particular resource to students, such as . . . a gifted and talented program, as evidence that the district believes [it] is important.”¹²⁹ The letter also signaled OCR’s commitment by citing statistics illustrating the lack of access that CLD students had to gifted education. For instance, the letter noted that during the 2011-12 school year, schools offering gifted education programs “had an aggregate enrollment [of] 25 percent Latino, but their gifted and talented enrollment . . . was . . . 17 percent Latino.”¹³⁰ The letter further observed that “the percentage of non-English language learners participating in gifted and talented programs was three-and-a-half times greater than the percentage of English language learners participating in these programs.”¹³¹

However, President Donald Trump has signaled that remedying policies that result in the disparate impact of CLD students in gifted education is not a priority of OCR. In June 2017, the Department of Education indicated in an internal memo that it would scale back investigations into civil rights violations.¹³² The memo also stipulated that regional offices would “no longer be required to alert department officials in Washington of all highly sensitive complaints on issues such as the disproportionate disciplining of minority students.”¹³³ Thus, it is unlikely that the Department of Education will fight against policies that limit CLD-access to gifted and talented programs.

C. *Equal Education Opportunity Act of 1974*

The Equal Educational Opportunity Act of 1974 (EEOA) provides the best legal means for CLD students to obtain access to gifted programs.¹³⁴ The EEOA forbids a state from denying a person equal

¹²⁸ Catherine E. Lhamon, Assistant Sec’y for Civil Rights, Office of Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter: Resource Comparability* (Oct. 1, 2014), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf>.

¹²⁹ *Id.* at 9.

¹³⁰ *Id.* at 3–4.

¹³¹ *Id.* at 4.

¹³² Erica L. Green, *Education Dept. Says It Will Scale Back Civil Rights Investigations*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/politics/education-department-civil-rights-betsy-devos.html>.

¹³³ *Id.*

¹³⁴ 20 U.S.C. § 1703 (2017).

opportunity on the basis of national origin.¹³⁵ Educational agencies can violate this statute by failing “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”¹³⁶ In *Castaneda v. Pickard*,¹³⁷ the Fifth Circuit established an influential three-part test for determining whether an educational agency had taken appropriate action.¹³⁸ First, courts must examine the soundness of the program’s educational theory or principles.¹³⁹ Second, courts must determine whether the actual practices of the program are reasonably calculated to implement the theory adopted by the program.¹⁴⁰ Finally, courts must analyze whether the program has actually helped students overcome language barriers.¹⁴¹

While the *Castaneda* test grants educational agencies flexibility to address the identification policies that limit the participation of CLD students in gifted education programs, it provides no protection for agencies that fail to take action. *Gomez v. Illinois State Board of Education*¹⁴² supports this assertion with respect to state-level education agencies. In *Gomez*, the plaintiffs claimed that the Illinois state board of education had violated the EEOA by failing to require school districts to establish minimum standards for identifying and placing CLD students in transitional bilingual education programs.¹⁴³ The district court dismissed the plaintiffs’ case for failure to state a claim.¹⁴⁴ The Seventh Circuit reversed the district court on this ground.¹⁴⁵ In doing so, the court rejected the defendants’ contention that the EEOA applied only to school districts, noting that the Fifth Circuit had subsequently applied the *Castaneda* guidelines to the Texas school system.¹⁴⁶

The *Gomez* court went on to observe that the application of the *Castaneda* test would be less intense for state-level education agencies than their local counterparts.¹⁴⁷ In the case of school districts, analysis

¹³⁵ *Id.*

¹³⁶ *Id.* § 1703(f).

¹³⁷ 648 F.2d 989 (5th Cir. 1989).

¹³⁸ *Id.* at 1009–10.

¹³⁹ *Id.* at 1009.

¹⁴⁰ *Id.* at 1010.

¹⁴¹ *Id.*

¹⁴² 811 F.2d 1030 (7th Cir. 1987).

¹⁴³ *Id.* at 1033–34.

¹⁴⁴ *Id.* at 1034.

¹⁴⁵ *Id.* at 1044.

¹⁴⁶ *Id.* at 1042 (citing *United States v. State of Tex.*, 680 F.2d 356, 370–71 (5th Cir. 1982)).

¹⁴⁷ *Id.*

of what happened in the classroom would be appropriate.¹⁴⁸ By contrast, state education agencies would be subject to a lesser standard of review because they “are obviously not directly involved in the classroom education process.”¹⁴⁹ As such, state education agencies merely had to establish general guidelines for ensuring the implementation of their states’ programs.¹⁵⁰ Even these general standards had to comply with *Castaneda*’s guidelines for determining appropriate action.¹⁵¹

The court then applied the *Castaneda* test to the plaintiffs’ allegations.¹⁵² It concluded that the plaintiffs’ claim was not based on the first prong because the plaintiffs had no issue with the transitional bilingual educational program that the state had selected.¹⁵³ Rather, the plaintiffs asserted that the defendants had violated the second prong of *Castaneda*, which related to implementation.¹⁵⁴ By failing to establish minimum guidelines for identifying and placing CLD students in the program, the plaintiffs alleged that the defendants “have only gone through the motions of solving the problems of language barriers.”¹⁵⁵ Because the plaintiffs had alleged that the defendants had failed to establish even minimum standards for identifying and placing CLD students, the court found that the plaintiffs had stated a valid claim, and, thus reversed the lower court’s dismissal of the complaint.¹⁵⁶ As the court explained: “Although the meaning of ‘appropriate action’ may not be immediately relevant...it must mean something more than ‘no action.’”¹⁵⁷

However, the Supreme Court seemed to limit the scope of a statewide remedy in *Horne v. Flores*.¹⁵⁸ In this case, English Language-Learner (ELL) students and their parents from the Nogales Unified School District (Nogales) claimed that the state of Arizona violated the EEOA by failing to take appropriate action to overcome language barriers.¹⁵⁹ A federal district judge ruled that the state had violated the

¹⁴⁸ *Gomez*, 811 F.2d at 1042.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1041.

¹⁵² *Id.* at 1042.

¹⁵³ *Id.*

¹⁵⁴ *Gomez*, 811 F.2d at 1042.

¹⁵⁵ *Id.* at 1042–43.

¹⁵⁶ *Id.* at 1043.

¹⁵⁷ *Id.*

¹⁵⁸ 557 U.S. 433 (2009).

¹⁵⁹ *Id.* at 439–41.

EEOA and applied the declaratory judgment statewide.¹⁶⁰ The Supreme Court reversed, finding that a statewide remedy was unwarranted.¹⁶¹ The Court pointed out, *inter alia*, that there were no factual findings that any school district other than Nogales had failed to provide equal educational opportunities to ELL students.¹⁶² Thus, *Horne* suggests that the plaintiffs could not prevail on a statewide EEOA claim in the absence of a statewide deprivation of equal educational opportunities for CLD students.¹⁶³

While *Horne* dramatically limits CLD challenges at the statewide level, this case still leaves open the possibility of challenges to local educational agencies, such as school districts, that fail to take action to address barriers to the participation of CLD students in gifted education.¹⁶⁴ *Methelus v. School Board of Collier County, Florida*¹⁶⁵ further supports this claim. In *Methelus*, the plaintiffs initiated a class action lawsuit claiming that a school board policy, which excluded persons from attending high school who were seventeen years or older and who could not graduate by the time they were nineteen years old, violated the EEOA by failing to provide foreign-born students free public education.¹⁶⁶

The court rejected the defendants' motion to dismiss the case for failure to state a claim.¹⁶⁷ As the court explained, "Plaintiffs allege that Defendants took *no* action—let alone appropriate action—to overcome language barriers that impeded their equal participation in public schools."¹⁶⁸ Consequently, the court decided that it did not have to look toward *Castaneda* because the plaintiffs were not asking "the Court to substitute its judgment for that of the School District's in terms of how to design, implement, or fund its ELL plan."¹⁶⁹ Rather, the court continued, the plaintiffs' allegation "attacks a frontline inquiry—whether Plaintiff Children were denied access to free public education available to other non-ELL children."¹⁷⁰

¹⁶⁰ *Id.* at 439.

¹⁶¹ *Id.* at 470–72.

¹⁶² *Id.* at 470.

¹⁶³ *Id.* at 470–72.

¹⁶⁴ See *Horne*, 557 U.S. at 470–72.

¹⁶⁵ 243 F. Supp. 3d 1266 (M.D. Fla. 2017).

¹⁶⁶ *Id.* at 1269–70.

¹⁶⁷ *Id.* at 1283 (dismissing only the Title VI claim and 42 U.S.C. § 1983 claims).

¹⁶⁸ *Id.* at 1276 (emphasis in the original).

¹⁶⁹ *Id.* at 1277.

¹⁷⁰ *Id.*

Similarly, CLD students could claim that a school district's failure to design and implement policies that failed to address the language barriers to their participation in gifted programs would violate the EEOA. At the outset, it must be acknowledged that this claim is different from *Methelus*¹⁷¹ in one key aspect. In *Methelus*, the plaintiffs alleged a lack of access to basic education programs.¹⁷² By contrast, the EEOA challenge to access to gifted education programs is obviously not a challenge to the denial of basic education. This distinction should not matter because of the plain language of the EEOA, which requires education agencies "to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."¹⁷³ This statutory language does not include a limitation to basic educational programming. Indeed, the Department of Justice's discussion of the EEOA supports this claim. According to the Department, one type of discrimination that would violate the statute was the "exclu[sion of] ELL students from gifted and talented programs based on their limited English proficiency."¹⁷⁴ Therefore, the failure to take action to eliminate the language barriers that block access to gifted education would violate the EEOA.

CONCLUSION

This article has shown that CLD students are underrepresented in gifted programs.¹⁷⁵ State and local agencies can address this underrepresentation by addressing identification policies that cause this underrepresentation.¹⁷⁶ CLD students can also take legal action to compel state education agencies and school districts to take appropriate action.¹⁷⁷ This article concludes that the EEOA provides the best legal vehicle for CLD students to address the language barriers that keep them out of gifted education programs.¹⁷⁸

¹⁷¹ 243 F. Supp. 3d 1266 (M.D. Fla. 2017).

¹⁷² *Id.* at 1269.

¹⁷³ 20 U.S.C. § 1703(f) (2017).

¹⁷⁴ *Types of Educational Opportunities Discrimination*, U.S. DEP'T JUSTICE (Oct. 18, 2018), <https://www.justice.gov/crt/types-educational-opportunities-discrimination>.

¹⁷⁵ *See supra* Part II.

¹⁷⁶ *See supra* Part III.

¹⁷⁷ *See supra* Part IV.

¹⁷⁸ *See supra* Part III-C.