

January 2015

The Wicked Smaht Kids: Seeking an Adequate Public Education for Gifted Elementary and Secondary Students in Massachusetts

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Ferrick, Brenna (2015) "The Wicked Smaht Kids: Seeking an Adequate Public Education for Gifted Elementary and Secondary Students in Massachusetts," *University of Massachusetts Law Review*: Vol. 10: Iss. 2, Article 7.

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The Wicked Smaht Kids: Seeking an Adequate Public Education for Gifted Elementary and Secondary Students in Massachusetts

Brenna Ferrick

10 U. MASS. L. REV. 464

ABSTRACT

This Note argues that the Massachusetts legislature underserves highly intellectually gifted students by neither identifying nor supporting the unique needs of such a population. The legislature is both enabled by the state constitution and charged by the Education Reform Act to provide an adequate education to all elementary and secondary students. The stated intent of the Commonwealth's education directive purports to provide every child "the opportunity to reach their full potential," when in reality there are only statutory entitlements and procedural safeguards for those who qualify for federal mandates due to qualifying disabilities. This issue is ripe for judicial interpretation and/or legislative review to identify and support this population of students. This Note proposes that legislation should be adopted that identifies gifted students and encourages local school districts to provide opportunity for challenge and engagement matched to their unique potential. Such proposed legislation has numerous public policy advantages.

AUTHOR

Juris Doctor Candidate, May 2015, University of Massachusetts School of Law–Dartmouth. I would like to thank Cathy O'Neill for her time and guidance on this Note. She was taken from us much too soon, but her compassion and the value she placed on education for all will not be forgotten. Thank you to my father, Mark Carney, for babysitting every single time I needed him throughout my four years in law school; to Griffin and Delaney, my beautiful, funny, spirited children for teaching me every day; and most especially to my husband, Mike, for his endless love and support.

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I: INTRODUCTION

This Note is concerned with the exceptionally small fraction of gifted students whose intellectual abilities are so out of sync with their chronological peers that the general curriculum for their grade level, without differentiation, would not provide them the opportunity to have meaningful learning experiences.¹ This Note considers this population's unique learning needs, rather than assuming gifted students have a privilege or advantage simply because they have a greater ability to achieve academic success. These children—because of their differences—require differentiated and/or specialized instruction to make steady progress in school. Thus, these children need support at an early age to realize their potential as advanced thinkers.

Massachusetts is one of only three states in the nation² that neither identifies nor provides programmatic support for gifted students; to wit there is no legislative definition that identifies a population of students with exceptionally high cognitive abilities that requires differentiated instruction or services beyond those being provided in the regular school program.³ Furthermore, there is essentially no state funding⁴ for gifted programming through the Commonwealth.⁵

¹ *Infra* Part III.

² The others are South Dakota and New Hampshire. *State Definitions of Giftedness*, NATIONAL ASSOCIATION FOR GIFTED CHILDREN (Aug. 1, 2013), [http://www.nagc.org.442elmp01.blackmesh.com/sites/default/files/Advocacy/State%20definitions%20\(8-1-13\).pdf](http://www.nagc.org.442elmp01.blackmesh.com/sites/default/files/Advocacy/State%20definitions%20(8-1-13).pdf).

³ As will be discussed *infra*, the vast majority of states have at least a definition of giftedness whereas Massachusetts has no such legislation. *See e.g.*, N.J. ADMIN. CODE § 6A:8-1.3 (2011) (stating that “‘Gifted and talented students’ means students who possess or demonstrate high levels of ability in one or more content areas when compared to their chronological peers in the local school district and who require modifications of their educational program if they are to achieve in accordance with their capabilities.”).

⁴ In the FY2015 budget, there is a line item for \$1,410,000 “[f]or grants or subsidies for after-school and out-of-school programs,” which gives provisions and examples of programs “including but not limited to” six examples and seven sub-examples, one of which is “advanced study for the gifted and talented.” COMMONWEALTH OF MA., HOUSE COMM. ON WAYS AND MEANS, FINAL HOUSE BUDGET, H.4001 (2014), *available at* <https://malegislature.gov/Budget/FY2015/House/WaysAndMeans>. It is this author's assertion that since the amount available as grant money covers all types of enrichment programs—including athletics—and accounts for 0.0003% of the total Department of Elementary and

What, then, becomes of the rare student who enters third grade in September, reading at a sixth-grade level and able to pass all of the end-of-year benchmarks required of a fifth grader? If he is lucky enough to live in one of the two percent of Massachusetts school districts⁶ where giftedness is recognized and cultivated, then he might have a chance at staying engaged in school. For the ninety-eight percent of Massachusetts school districts that do not have programs for their gifted students, those who may otherwise be able to stretch themselves beyond the curriculum offered instead bide their time in the classroom.

This Note argues that the Massachusetts legislature underserves gifted students enrolled in public schools within the Department of Early and Secondary Education (hereinafter “DESE”) by avoiding identification of highly advanced students and neglecting their unique educational needs. A plain-language interpretation of the Commonwealth’s education directive, the Education Reform Act (hereinafter “ERA”),⁷ which purports to provide every child “the opportunity to reach their full potential,”⁸ suggests that students whose potential far exceeds their chronological age in terms of innate intelligence, ought to have the opportunity to realize their strengths in the classroom setting. Highly gifted students should be entitled to progress monitoring to ensure that individual annual goals are appropriately matched to their unique potential. In this Note, Part II provides background on the current applicable Massachusetts laws and statutes for public education. Part III demonstrates that gifted students have educational needs that are not being met in Massachusetts and outlines the reasons why this is a problem. Part IV suggests three

Secondary Education budget, the allocation cannot be used to suggest systematic support for a gifted population of students.

⁵ *Total Expenditure Per Pupil, All Funds, By Function*, MASSACHUSETTS DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, http://profiles.doe.mass.edu/state_report/ppx.aspx (last visited Jan. 2, 2015).

⁶ *Massachusetts Districts with Gifted Programs*, MASSACHUSETTS ASSOCIATION FOR GIFTED EDUCATION, <http://www.massgifted.org/education> (listing nine districts with published programs, compared with the 444 Public School Districts listed by visiting <http://profiles.doe.mass.edu/search/search.aspx?leftNavId=>, selecting “Public School Districts,” which yields 529 schools, and omitting the 80 that are charter schools).

⁷ See MASS. GEN. LAWS ch. 69-71 (2003).

⁸ MASS. GEN. LAWS ch. 69, § 1 (2003).

theories for change: one of judicial review and two models for amended legislation.

II: MASSACHUSETTS PUBLIC SCHOOLS

A. Whose Responsibility is it to Educate Students?

1. Massachusetts Constitution

It is well established that there is no federal constitutionally protected right to an education.⁹ Instead, each state asserts the value placed on education, and the delegation of duties for such, within their state constitutions. State constitutions are generally more protective of individual rights than their federal counterpart.¹⁰ Massachusetts' constitution places an emphasis on the value of public education for the Commonwealth's citizens in chapter V, §2, which states the following:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties. . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to *cherish the interests* of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns;. . .¹¹

However, although the constitution establishes a legislative duty to “cherish the interests” of education, there is no fundamental right to an education. The Massachusetts Supreme Judicial Court (hereinafter “SJC”) interpreted the above language in the 1993 landmark case of *McDuffy v. Secretary of the Executive Office of Education*¹² and found that members of the Commonwealth have a “right to be educated,”¹³

⁹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973) (stating that “education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we [the Supreme Court] find any basis for saying it is implicitly so protected”).

¹⁰ *See Goodridge v. Department of Public Health*, 798 N.E.2d 941, 959 (2003) (stating that “[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”).

¹¹ Mass. Const. pt. 2, ch. 5, § 2 (emphasis added).

¹² *McDuffy v. Sec’y of the Exec. Office of Education*, 415 Mass. 545 (1993).

¹³ *Id.* at 566.

but the court has clarified that this is not a “fundamental right” that grants a property interest.¹⁴

2. *McDuffy*

The plaintiffs in *McDuffy*, students and their parents in sixteen property-poor school districts,¹⁵ claimed that the Commonwealth failed to fulfill its state constitutional duty to provide them an adequate education, based on several quality measures as well as finance schemes.¹⁶ The claim for relief was to enforce the mandated “equal access to an adequate education.”¹⁷ Ultimately, the Court found that by delegating the funding and operations of schools entirely to local communities, the legislature effectively abdicated its duty to educate.¹⁸

Within its thorough analysis, the SJC addressed the question of whether the education clause in the constitution “is merely hortatory, or aspirational, or imposes instead, a constitutional duty on the Commonwealth to ensure the education of its children in the public schools.”¹⁹ In a seventy-nine page opinion, the SJC carefully analyzed the constitutional language and found that “according to common usage in the late Eighteenth Century, a duty to cherish was an obligation to support or nurture.”²⁰ Further, the Court found that “it is reasonable therefore to understand the duty to ‘cherish’ public schools as a duty to ensure that the public schools achieve their object and educate the people.”²¹ The Court clarified that the authority over education belongs not to the judiciary but instead that “[t]his duty lies squarely on the executive (magistrates) and legislative (Legislatures) branches of this Commonwealth” and “[w]hile it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty to local governments, such power does not include a right to abdicate the obligation. . . placed on them by the Constitution.”²²

¹⁴ *Doe v. Superintendent of Sch. of Worcester*, 421 Mass. 117, 129 (1995).

¹⁵ *See McDuffy* 415 Mass. at n.1. The sixteen cities were Brockton, Belchertown, Berkley, Carver, Hanson, Holyoke, Lawrence, Leicester, Lowell, Lynn, Rockland, Rowley, Salisbury, Springfield, Whitman, and Winchendon. *Id.*

¹⁶ *Id.* at 545.

¹⁷ *Id.* at 558; Mass. Const. Pt. II, C. 5, § 2, and arts. 1 and 10.

¹⁸ *McDuffy*, 415 Mass. at 606.

¹⁹ *Id.* at 550.

²⁰ *Id.* at 564.

²¹ *Id.*

Consequently, the standard entitlement is to an “adequate” education.²³ To define this, the Court adopted language from a similar education reform decision in Kentucky, four years prior.²⁴

In *McDuffy*, the Court found that the Commonwealth was in violation of its duty to educate Massachusetts school children and directed “the Commonwealth [to] fulfill its duty to remedy the constitutional violations.”²⁵ The *McDuffy* decision, however, came at a time in which the Legislature was already developing legislation for school reform.²⁶

3. Education Reform Act

As a result of the *McDuffy* holding, just a few days after the decision, on July 18, 1993, the Legislature enacted the Education Reform Act (hereinafter “ERA”).²⁷ Thus, once the governor signed the resulting legislation, it represented all three branches of state government working harmoniously toward a common goal of improving the public education system.²⁸ Under the ERA, students

²² *Id.* at 606.

²³ *Id.* at 545.

²⁴ The *McDuffy* court identified the following language to define an adequate education. “An educated child must possess” at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) *sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.*” *Id.* at 618-19, (emphasis added) (as developed from *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky.1989)).

²⁵ *McDuffy*, 415 Mass. at 618.

²⁶ The *McDuffy* decision was released “with the court’s knowledge that the Legislature was poised to enact the Education Reform Act of 1993 (ERA).” *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 473 (2005).

²⁷ See MASS. GEN. LAWS ch. 69-71.

²⁸ *Id.*

became entitled to statutory rights of public education in Massachusetts.²⁹ The act was intended to be a “comprehensive reform of our public schools,” meant to “ensure[] that all of our children will be prepared to *compete in the global economy*.”³⁰ Specifically of interest in this Note is the following statutory language. The ERA asserts as its “Intent”:

It is hereby declared to be a paramount goal of the commonwealth to provide a public education system of sufficient quality to extend to all children...*the opportunity to reach their full potential* and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy.³¹

The directive goes on to enumerate further specified intents of the Act, including “to ensure: (1) that each public school classroom provides the conditions for all pupils *to engage fully in learning* as an *inherently meaningful* and enjoyable activity. . . .”³² The financing scheme put forward in the ERA established a formula for calculating a “foundation” that would theoretically allow for a “sufficient” quality education in a district.³³

The ERA radically changed the way public schools were financed and also established accountability standards for schools.³⁴ It remains in place as the Commonwealth’s legislative directive under which the Department of Elementary and Secondary Education must operate.³⁵

²⁹ MASS. GEN. LAWS ch. 69, §1.

³⁰ Sch. Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 759, (2003), (emphasis added) (quoting Education Reform Act of 1993, Conference Committee Report **17 (May 24, 1993)). See also MASS. GEN. LAWS ch. 69, § 1 (2003).

³¹ MASS. GEN. LAWS ch. 69, § 1 (emphasis added).

³² *Id.* (emphasis added).

³³ MASS. GEN. LAWS ch. 70, § 3 (2003).

³⁴ The ERA “radically restructured the funding of public education across the Commonwealth based on uniform criteria of need, and dramatically increased the Commonwealth’s mandatory financial assistance to public schools. The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.” Hancock v. Comm’r of Educ., 443 Mass. 428, 432, (2005).

³⁵ See MASS. GEN. LAWS ch. 69-71.

4. *Hancock*

Twelve years later, in 2005, the SJC considered the claims of a new set of nineteen public school district plaintiffs *vis a vis* a “Motion for Further Relief”³⁶ claiming that the education received was still not “adequate” by *McDuffy* standards.³⁷ In this case, *Hancock v. Commissioner of Education*, the Court acknowledged overwhelming evidence gathered at the Superior Court hearing³⁸ that “sharp disparities in the educational opportunities, and the performance, of some Massachusetts public school students persist”³⁹ since *McDuffy*. Nevertheless, the SJC found that the mere establishment of the ERA, and evidence of positive trends since its implementation were enough for the plurality opinion to deny the plaintiffs’ claims.⁴⁰ Citing the education clause of the state constitution,⁴¹ the chief justice held that the Commonwealth was “meeting its constitutional charge to ‘cherish the interests of ... public schools.’”⁴²

Further, C.J. Roberts reiterated that the duty of the legislature to provide adequate education for all is subject to judicial review.⁴³

Nothing I say today would insulate the Commonwealth from a successful challenge under the education clause in different circumstances. The framers recognized that “the content of the duty to educate ... will evolve together with our society,” and that the education clause must be interpreted “in accordance with the

³⁶ *Hancock*, 443 Mass. at 428.

³⁷ *Id.* at 432.

³⁸ Justice Botsford, the single Massachusetts Superior Court justice who spent twelve months finding facts and hearing testimony, summarized her findings in favor of the plaintiffs in over 150 pages in *Hancock ex rel. Hancock v. Driscoll*, No. CIV.A. 02-2978, 2004 WL 877984 (Mass. Super. Apr. 26, 2004). She found “the factual record establishes that the schools attended by the plaintiff children are not currently implementing the Massachusetts curriculum frameworks for all students, and are not currently equipping all students with the *McDuffy* capabilities.” However, the SJC summarily dismissed her findings and recommendations in *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 429 (2005).

³⁹ *Hancock*, 443 Mass. at 433.

⁴⁰ *Id.*

⁴¹ Mass. Const. pt. 2, ch. 5, § 2.

⁴² *Hancock*, 443 Mass. at 434.

⁴³ *Id.* at 434; *id.* at n.4.

demands of modern society or it will be in constant danger of becoming atrophied and, in fact, may even lose its meaning.”⁴⁴

So while the Court will grant “substantial deference”⁴⁵ to the Department of Education for carrying out the specifics within the ERA, it will retain jurisdiction if “called on to interpret the equal protection and due process provisions of the Massachusetts Constitution”⁴⁶ or if evidence were presented of the legislature acting in an “arbitrary, nonresponsive, or irrational way to meet the constitutional mandate.”⁴⁷

What we have learned from *McDuffy*, the ERA, and *Hancock* is that the legislature is responsible for providing an adequate⁴⁸ public education as codified by the ERA. Additionally, the adequacy of such is subject to judicial review.⁴⁹ Finally, by using the *Hancock* decision as a model, it is clear that judicial review bears a heavy burden of proof since the court defers⁵⁰ to the legislature in matters of public education. However, the court will not allow the legislature to entirely abdicate its duty to local communities.⁵¹

B. How Are Students Educated Adequately in Massachusetts?

Progressive education trends in Massachusetts have consistently established national standards.⁵² Massachusetts citizens and legislators

⁴⁴ *Id.* at 435, (quoting *McDuffy v. Sec’y of the Exec. Office of Education*, 415 Mass. 545 (1993), quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wash.2d 476, 516, (1978)).

⁴⁵ *Hancock*, 443 Mass. at 444.

⁴⁶ *Id.* at 457.

⁴⁷ *Id.* at 435.

⁴⁸ *McDuffy*, 415 Mass. at 545.

⁴⁹ *Hancock*, 443 Mass. at 434.

⁵⁰ *Id.* at 444.

⁵¹ *McDuffy v. Sec’y of the Exec. Office of Education*, 415 Mass. 545, 606 (1993).

⁵² “Massachusetts has been home to many educational firsts throughout American history.” Maura M. Pelham, *Promulgating Preschool: What Constitutes A “Policy Decision” Under Hancock v. Commissioner of Education?*, 40 NEW ENG. L. REV. 209 (2005). Massachusetts opened the first public school and the first college. See PHILLIP MARSON, BREEDER OF DEMOCRACY 1-5 (1963) (stating that Boston Puritans organized the Boston Latin School, the first public school in the United States, in 1635); see Ellwood P. Cubberley, PUBLIC EDUCATION IN THE UNITED STATES 16 (1958) (stating that Harvard College was founded in 1636 and is the nation’s first college). In addition, Massachusetts was the first state constitution containing an education clause. See, e.g., Kate

value high quality education, as inferred by the accolades it has earned in national rankings.⁵³ Additionally, Massachusetts schools are exemplary in how they serve their populations of students with disabilities through federal, state, and local programs.⁵⁴

The following brief excursus considers the ubiquitous understanding that our most struggling students are owed additional

Strickland, Note, *The School Finance Reform Movement, A History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105, 1160 (1991) (stating that the Massachusetts Constitution was ratified in 1780 and served as “the model for the Federal Constitution of 1787.”); S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 TEMP. L. REV. 883, 883 (1997). Finally, Massachusetts enacted the first compulsory education law. See, e.g., Daniel J. Rose, Note, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C. L. REV. 861, 868 (1989) (stating Massachusetts enacted the first compulsory education law in 1852, which required children between the ages of eight and fourteen to attend public school at least twelve weeks each year (citing Mass. Gen. Laws ch. 24, §§ 1, 2, 4 (1852))).

⁵³ Given the geographical saturation of many top-tier colleges and research facilities, much of the Massachusetts population is made of academics. For example, thirty-eight percent of Massachusetts residents hold a bachelor’s degree, which is the highest percentage of any state in the country and fourteen percent higher than the national average. Bob Oakes, *Mass. Census Numbers Show Highly Educated Residents, Racial Disparities*, WBUR, Dec. 16, 2010, <http://www.wbur.org/2010/12/16/census-fofo>. Among tracking of standardized tests both nationally and internationally, Massachusetts’ K-12 students are consistently impressive when considered in aggregate. See Paul E. Peterson et al., *Globally Challenged: Are U.S. Students Ready to Compete?*, HARVARD KENNEDY SCHOOL, p. 10 (Aug. 2011), http://www.hks.harvard.edu/pepg/PDF/Papers/PEPG11-03_GloballyChallenged.pdf (finding that Massachusetts ranks highest among U.S. states in both math and reading proficiency); see also *State Report Cards*, EDUCATION WEEK, Vol. 33, Iss. 16, http://www.edweek.org/ew/qc/2014/state_report_cards.html (last visited on Jan 2, 2015) (ranking Massachusetts first in the nation for the 2013 report cards for K-12 achievement); see also NAEP State Comparisons, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/nationsreportcard/statecomparisons/withinyear.aspx?usrSelections=1%2cSCI%2c5%2c1%2cwithin%2c0%2c0> (last visited on Dec. 29, 2013) (finding Massachusetts to have the highest 8th grade science scores nationally); see generally Kenneth Chang, *Expecting the Best Yields Results in Massachusetts*, NEW YORK TIMES, (Sep. 2, 2013), available at http://www.nytimes.com/2013/09/03/science/expecting-the-best-yields-results-in-massachusetts.html?_r=0 (noting that “If Massachusetts were a country, its eighth graders would rank second in the world in science, behind only Singapore.”).

⁵⁴ *Infra* Part II.

resources in their educational endeavors in order that they may participate on equal footing with their non-disabled peers to every extent possible.⁵⁵ Documentation of qualifying disabilities⁵⁶ under the Individuals with Disabilities Education Act⁵⁷ (hereinafter “IDEA”) entitles a student to special education services or accommodations from the public school system.⁵⁸ Delivery of special education services may include modification of the content, methodology, or delivery of instruction, through an Individualized Education Plan (hereinafter “IEP”). An IEP is a written contract between the school and the family ensuring that the student achieves measurable progress toward individual annual goals.⁵⁹ An IEP entitles a disabled student to a property interest⁶⁰ called a “free appropriate public education” (hereinafter “FAPE”).⁶¹

⁵⁵ No suggestion of this author challenges the very worthy cause of ensuring statutory entitlements to students with disabilities so that their educational experience is *at least* adequate. Rather, the existing special education structure may provide for common parlance in some of the proposed solutions *infra*.

⁵⁶ “The term ‘child with a disability’ means a child—(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.” 20 U.S.C. § 1401 (2010).

⁵⁷ 20 U.S.C. § 1400 (2010).

⁵⁸ 20 U.S.C. § 1400(c)(5)(D).

⁵⁹ 20 U.S.C. § 1414(d)(1)(A) (2005).

⁶⁰ *See* *BD v. DeBuono*, 130 F. Supp. 2d 401, 431 (S.D.N.Y. 2000) (citing *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2d Cir.1983) (denial of “free appropriate education” constitutes deprivation of property right).

⁶¹ 20 U.S.C. § 1412(a)(1), (3) (2006). The United States Supreme Court’s decision in *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 (1982) is the most cited case in the field of special education law. Amy J. Goetz et. al., *The Devolution of the Rowley Standard in the Eighth Circuit: Protecting the Right to A Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 *HAMLIN L. REV.* 503, 504 (2011). *Rowley* was the first Supreme Court case to interpret the now-IDEA legislation, by specifying the requirement of a FAPE. *Rowley*, 458 U.S. 176, 177. According to Justice Rehnquist, FAPE is satisfied when a state provides personalized instruction with “sufficient” support services to permit the disabled child to receive “some educational benefit” from that instruction. *Id.* at 199. However, after thorough analysis, the Court did not find that a disabled child’s potential must be “maximized.” Debra Chopp, *School Districts and Families*

The Act establishes a floor, but not a ceiling. States may exceed the federal minimum standards, just as Massachusetts did up until 2002.⁶² For instance, there was a time in Massachusetts when an IEP had to be reasonably calculated to assure the child's *maximum possible development* in the least restrictive environment,⁶³ rather than providing an "adequate" education.⁶⁴ However, the statute was amended in 2002, reducing the Commonwealth's standard to align with the basic standard of "adequate."⁶⁵

When considering the framework of individualized goal-setting and progress-monitoring for students with qualifying disabilities to ensure measurable growth from year to year, it seems reasonable that the most academically promising students, whose potential is also out-of-sync with the general curriculum, might be afforded some degree of growth insurance. Instead, schools are not required to ensure any annual growth beyond grade-level benchmarks. State-wide, Massachusetts schools are staffed with 8,784 qualified special education teachers,⁶⁶ representing over twelve percent of the entire faculty workforce in the Commonwealth.⁶⁷ In stark contrast however,

Under the Idea: Collaborative in Theory, Adversarial in Fact, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 423, 427 (2012) (citing a more thorough history of special education by Marvin Lazerson, *The Origins of Special Education*, in SPECIAL EDUCATION POLICIES 38 (1983)).

⁶² MASS. GEN. LAWS ch. 71B, § 2 (2009). See *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773 (1st Cir.1984), *aff'd*, 471 U.S. 359 (1985). See also discussion of procedural aspects in *Norton Sch. Comm. v. Massachusetts Dep't. of Educ.*, 768 F.Supp. 900 (D. Mass.1991).

⁶³ *Frank S. v. Sch. Comm. of Dennis–Yarmouth Regional Sch. Dist.*, 26 F.Supp.2d 219, 226 (D. Mass. 1998); MASS. GEN. LAWS ch. 71B, § 2 (2009).

⁶⁴ Commonly referred to as the *Rowley* standard in reference to *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176 (1982). *Frank S. v. Sch. Comm. of Dennis–Yarmouth Regional Sch. Dist.*, 26 F.Supp.2d 219 (D. Mass. 1998); MASS. GEN. LAWS ch. 71B, § 2 (2009).

⁶⁵ MASS. GEN. LAWS ch. 71B § 3 (2000) *amended by* 2000 Mass. Acts ch. 159 §§ 166-67 (removes "to the maximum extent feasible" qualification for review of child special education programs in the sixteenth paragraph of section 3 of chapter 71B).

⁶⁶ *Teacher Program Area Report by Full-time Equivalent (2013-14)*, MASSACHUSETTS DEP'T. OF ESE, <http://profiles.doe.mass.edu/profiles/teacher.aspx?orgcode=00000000&orgtypecode=0&leftNavId=830&>, (last visited Jan. 2, 2015).

⁶⁷ *Id.* (This figure was obtained by dividing the number of special education teachers by total number of teachers).

“[c]urrently, there are only 19 educators in the Commonwealth who hold a license as teachers for the Academically Advanced.”⁶⁸

Since the Commonwealth does not define giftedness, our brightest learners cannot be identified as having special learning needs, and thus are *not* statutorily entitled to a Free *Appropriate* Public Education.⁶⁹ Students who have aptitudes far beyond their chronological grade-level peers must simply go through the motions of the coursework in the academic year, even if it means they will disengage or develop mental lethargy. As a result, this subset of the Commonwealth’s student population does not currently have “the opportunity to reach their full potential,” to which the ERA suggests all students should be entitled.

III: GIFTED STUDENTS

A. Who are “gifted” students?

It is important to define the population of students for which this Note is intended. There is not a universally-accepted definition of gifted students,⁷⁰ nor are there any federal mandates to provide gifted education.⁷¹ As such, virtually every state’s definition of giftedness is different, if one exists at all.⁷² Furthermore, the process of identifying gifted students who may require special gifted programs varies widely.⁷³ Some define giftedness by a comparison to others of the same chronological age or grade, while others focus on an individual’s

⁶⁸ MASSACHUSETTS DEP’T OF ESE, ADVISORY COUNCILS TO THE BOARD OF ELEMENTARY AND SECONDARY EDUCATION: ANNUAL REPORTS FOR 2011-2012: GIFTED AND TALENTED ADVISORY COUNCIL 30 (2012), *available at* <http://www.doe.mass.edu/boe/sac/12annual.pdf>.

⁶⁹ Unless they also have a qualifying disability.

⁷⁰ *See e.g. Definitions of Giftedness*, NATIONAL ASSOCIATION FOR GIFTED CHILDREN, <http://www.nagc.org/resources-publications/resources/definitions-giftedness> (last visited May 5, 2015).

⁷¹ 20 U.S.C. § 1412 (2005).

⁷² *Definitions of Giftedness*, NATIONAL ASSOCIATION FOR GIFTED CHILDREN, *supra* note 70.

⁷³ *See* Student Roe by Roe v. Pennsylvania. 638 F. Supp. 929 (E.D. Pa. 1986); *see also* Rachel Piven-Kehrle, Annotation, *Special Education Requirements of Gifted Students*, 115 A.L.R.5th 183, 209 (2004).

needs beyond the regular classroom.⁷⁴ Particularly confusing is whether such identification should represent those students with innate talent, achievement, performance, motivation, or potential. Just three states, including Massachusetts, ignore the need for a definition of giftedness entirely.⁷⁵

Numbers and percentages of students who qualify for gifted programming also differ greatly from state to state. When surveyed by the National Association for Gifted Children, West Virginia reported less than two percent of their public school population was identified as gifted, where over sixteen percent of Kentucky's public school students enjoyed the same status.⁷⁶

No state uses IQ⁷⁷ as the sole, qualifying factor in gifted programming, but at least seventeen states do include IQ as part of the identification process.⁷⁸ The problem with relying only on achievement data from state standardized tests designed for general education is that students who achieve very high scores on state tests may not be demonstrating their full potential, since standardized tests are designed for teasing out differences among average students. Any test has a highest possible score or "ceiling," so several high-ability students may have identical scores despite having differences in their

⁷⁴ See *Student Roe by Roe v. Pennsylvania*, 638 F. Supp. 929 (E.D. Pa. 1986); see also Rachel Piven-Kehrle, Annotation, *Special Education Requirements of Gifted Students*, 115 A.L.R.5th 183, 209 (2004).

⁷⁵ *Supra* note 1.

⁷⁶ NATIONAL ASSOCIATION FOR GIFTED CHILDREN, STATE OF THE STATES IN GIFTED EDUCATION REPORT, TABLE A: GENERAL STATE INFORMATION, available at: <http://www.nagc.org/sites/default/files/Gifted-by-State/Table%20%20A%20%28general%29.pdf> (finding that during the 2012-13 school year, the number of identified GT students enrolled in the state were 3,568 of 88,351 total public school students for West Virginia and 102,695 of 638,000 for Kentucky).

⁷⁷ *Intelligence*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2015), www.apa.org/topics/intelligence.index.aspx.

⁷⁸ NATIONAL ASSOCIATION FOR GIFTED CHILDREN, *State of the States in Gifted Education Survey*, Table B: Identification, available at: <http://www.nagc.org/sites/default/files/Gifted-by-State/Table%20B%20%28identification%29.pdf>.

The term "at least," is used since the cited survey allowed one response to be "multiple criteria model," which could also include IQ in addition to other factors. The states that indicated that IQ was one "required" factor for identification are: Alabama, Arizona, Colorado, Florida, Georgia, Indiana, Louisiana, Mississippi, Nebraska, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Washington, and West Virginia.

relative cognitive abilities.⁷⁹ Most IQ-like assessments begin to lose accuracy toward the end of the third standard deviation from the average score.⁸⁰ This creates a “ceiling effect” on measuring potential with standardized testing.⁸¹ To better assess cognitive abilities, high-ability students require additional testing through specialized tests with high ceilings.^{82, 83}

The term “gifted children” was first used in 1869 by Francis Galton.⁸⁴ He used the term to refer to children who could inherit the potential to become a gifted adult from high-achieving parents.⁸⁵ Lewis Terman expanded Galton’s view of gifted children to include those with IQs of 140 or more.⁸⁶ His study found that IQ alone could not predict success in adulthood.⁸⁷ Leta Hollingworth expanded the understanding further by adding consideration of the child’s environment and placing value on a nurturing home and school to develop gifted potential.⁸⁸ Her work has left a lasting impression, as today’s “gifted child” references typically regard high potential.⁸⁹

⁷⁹ *IQ Tests and Gifted Children*, DUKE UNIVERSITY TALENT IDENTIFICATION PROGRAM (Aug. 28, 2006), <http://tip.duke.edu/node/754>.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ It is important at this juncture to point out one inherent problem with reliance on standardized and IQ testing. Students with dyslexia, processing delays, or English language learners (ELL) may test poorly but in fact have exceptionally high IQs. Additionally, state standardized tests do not assess all subject areas where a student may have exceptional gifts, like visual art, for instance. With these concerns in mind, the proposed solution *infra* will suggest use of standardized data as just one of many factors, with faculty recommendations weighing heavily in the identification process.

⁸⁴ SIR FRANCIS GALTON, *HEREDITARY GENIUS* 64 (Macmillan and Company 1869).

⁸⁵ *Id.*

⁸⁶ EDWIN G. BORING, NAT’L ACAD. OF SCIENCES, LEWIS MADISON TERMAN, A BIOGRAPHICAL MEMOIR 428-29 (1959).

⁸⁷ Carol Bainbridge, *Definitions of Gifted from Different Perspectives*, ABOUT.COM <http://giftedkids.about.com/od/gifted101/a/definitions.htm> (last visited Apr. 13, 2015).

⁸⁸ *See generally* LETA STETTER HOLLINGWORTH, *GIFTED CHILDREN: THEIR NATURE AND NURTURE*, Macmillan, (1926); Bainbridge, *supra* note 87.

⁸⁹ *Supra* note 70.

Some states draw on theoretical approaches to giftedness. For instance, Francoys Gagné's *Differentiated Model of Giftedness and Talent*,⁹⁰ distinguishes between giftedness and talent, whereby "giftedness" designates an untrained and spontaneously expressed natural ability, but "talent," refers to a mastery of systematically developed abilities.⁹¹ Another theoretical approach comes from the work of Joseph Renzulli,⁹² whose three-ring approach describes children possessing above-average general and/or specific abilities, high levels of task commitment (motivation), and high levels of creativity.⁹³ Finally, a popular modern approach yields from Howard Gardner's Multiple Intelligence theory,⁹⁴ which outlines seven distinct intelligences: visual-spatial, bodily-kinesthetic, musical, interpersonal, intrapersonal, linguistic, and logical-mathematical.

B. Why should we worry about kids who are already "privileged" with giftedness?

After defining the unique qualities of this population, it is important to consider the risks associated with allowing so-called "gifted students" to float by from grade to grade without being afforded the opportunity to tap into their potential. "The misconception that gifted children are able to meet their educational potential without help is prevalent."⁹⁵ However, as the national directive on education reform stated in the early 1980s, "most gifted students... may need a

⁹⁰ Francoys Gagné, *Giftedness and Talent: Reexamining a Reexamination of the Definitions*, 29 GIFTED CHILD Q. 103-12 (1985).

⁹¹ NAGC, *supra* note 70.

⁹² Joseph Renzulli, *What Makes Giftedness? Re-examining a Definition*, 60 PHI DELTA KAPPA 180-81 (1978).

⁹³ NAGC, *supra* note 70.

⁹⁴ *See generally* HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993).

⁹⁵ *See generally* Elizabeth A. Siemer, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 545 (2009), fn 40; *See, e.g.*, Scott A. Chamberlin et al., *Serving Twice-Exceptional Preschoolers: Blending Gifted Education and Early Childhood Special Education Practices in Assessment and Program Planning*, 30 J. EDUC. GIFTED 372, 373 (2007); Suzanne E. Eckes & Jonathan A. Plucker, *Charter Schools and Gifted Education: Legal Obligations*, 34 J.L. & EDUC. 421, 429 (2005); Ann Hassenpflug, *A Case of Irony*, 37 J.L. & EDUC. 1, 1-2 (2008); Dawn M. Viggiano, *Comment, No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 505-06 (2005).

curriculum enriched and accelerated beyond the needs of other students of high ability.”⁹⁶ As a DESE’s Advisory Council noted about Massachusetts’ own students, “[f]ar too often, the brightest and most promising students learn early in their academic careers that for them the current education system will foster boredom, disengagement, and mediocrity rather than excellence, relevance, and authentic learning.”⁹⁷ Furthermore, the lack of academic challenge in regular education classrooms can very realistically lead to higher dropout rates,⁹⁸ depression,⁹⁹ or a greater suicide risk.¹⁰⁰

Since the No Child Left Behind Act (NCLB)¹⁰¹ was authorized in 2000, the bottom ten percent of students have made steady gains in

⁹⁶ NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 3, 24 (1983).

⁹⁷ MASSACHUSETTS DEP’T OF ESE, *ADVISORY COUNCILS TO THE BOARD OF ELEMENTARY AND SECONDARY EDUCATION: ANNUAL REPORTS FOR 2012-2013: GIFTED AND TALENTED ADVISORY COUNCIL* Gifted and Talented Advisory Council, 2013 Annual Report, 19-20 (2013), available at: <http://www.doe.mass.edu/boe/sac/13annual.pdf>. Interestingly, this quote comes from an advisory report from the DESE’s “Gifted and Talented Education Advisory Council.” The Council does not meet regularly, has not successfully implemented systematic change for gifted students in Massachusetts, nor have there been any meeting dates schedules since the 2013-14 school year. *See The Board of Education Advisory Councils, Gifted and Talented Education Advisory Council*, MASSACHUSETTS DEP’T OF ESE, <http://www.doe.mass.edu/boe/sac/gifted/> (last visited Apr. 13, 2015).

⁹⁸ *See* Joseph S. Renzulli & Sunghee Park, *Gifted Dropouts: The Who and the Why*, 44 *GIFTED CHILD Q.* 261, 261-62 (2000) (showing that even without exact statistics of gifted dropout rates, it is universally believed to be high, and that racial minorities and students of low socioeconomic status are more likely to drop out than white students and students from families with higher income levels); *Id.* at 268.

⁹⁹ *See* Susan Jackson & Jean Peterson, *Depressive Disorder in Highly Gifted Adolescents*, 14(3) *J. SECONDARY GIFTED EDUC.* 175 (2004).

¹⁰⁰ Elizabeth A. Siemer, *supra* note 137 at 560, fn 44 (citing Peggy S. Bittick, *Comment, Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 *S. TEX. L. REV.* 119, 126-28 (1995)); Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 *J.L. & EDUC.* 131, 132 (1998).

¹⁰¹ Pub. L. No. 107-110, 115 Stat. 1425 (2002). The NCLB Act is the 2001 federal legislation which was a reauthorization of the Elementary and Secondary Education Act (ESEA), which was signed into law in 1965 by President Lyndon Johnson.

academic achievement.¹⁰² However, there have not been noticeable improvements in the top ten percent of student achievement.¹⁰³ NCLB has admirably directed the nation's focus to helping the lowest performers over baseline hurdles. However, critics often demonstrate the negative effects of the legislation on higher-achieving students, whose unique learning needs are neglected when the focus is fixed solely on getting lower-achieving students over benchmarks.¹⁰⁴

One of the primary public policy arguments for supporting a population of exceptionally gifted students focuses on keeping America competitive in the global marketplace. There have been many national initiatives¹⁰⁵ toward buttressing education in the fields of science, technology, engineering, and mathematics (hereinafter STEM fields) in order to protect the future of our national security and defense.¹⁰⁶ In the most recent Program for International Student Assessment (PISA)¹⁰⁷ results, the United States ranks between 30th and 38th place of the sixty-four participating countries measured for mathematics competency among fifteen-year-old test takers.¹⁰⁸ In science literacy, the U.S. scores were not measurably different from

¹⁰² THOMAS B. FORDHAM INSTITUTE, HIGH ACHIEVING STUDENTS IN THE ERA OF NCLB, 2, available at: http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/20080618_high_achievers_7.pdf, (last accessed on Jan. 2, 2015).

¹⁰³ *Id.*

¹⁰⁴ See e.g. Dawn Viggiano, Comment, *No Child Gets Ahead: The Irony of the No Child Left Behind Act*, 34 CAP. U. L. REV. 485, 505-06 (2005).

¹⁰⁵ See generally *Resources*, STEM EDUCATION COALITION, <http://www.stemedcoalition.org/reports/> (last visited Jan 2, 2015).

¹⁰⁶ *STEM: Meeting a Critical Demand for Excellence*, NATIONAL ASSOCIATION OF GIFTED CHILDREN, <http://www.nagc.org/resources-publications/resources/timely-topics/stem-meeting-critical-demand-excellence> (last visited on Jan 2, 2015).

¹⁰⁷ The Program for International Student Assessment (PISA) is an international assessment that measures fifteen year-old students' reading, mathematics, and science literacy every three years. PISA is coordinated by the Organization for Economic Cooperation and Development (OECD), an intergovernmental organization of industrialized countries, and is conducted in the United States by NCES. NATIONAL CENTER FOR EDUCATION STATISTICS, <http://nces.ed.gov/surveys/pisa/>.

¹⁰⁸ "The U.S. average was lower than 29 education systems, higher than 26 education systems, and not measurably different than 9 education systems." *Selected Findings from PISA 2012*, NATIONAL CENTER FOR EDUCATION STATISTICS, http://nces.ed.gov/surveys/pisa/pisa2012/pisa2012highlights_1.asp (last visited on Jan 2, 2015).

the average of the sixty-four countries, which was lower than twenty-two countries' education systems.¹⁰⁹

In higher education, only fifty-two percent of physical science doctoral degrees and forty-two percent of engineering doctoral degrees were awarded to U.S. citizens.¹¹⁰ This means international students with visas make up more than half the seats for engineering doctoral programs in the U.S. The National Science Foundation stated that “[t]he growing numbers of doctorates awarded to foreign students on temporary visas has accounted for virtually all of the overall growth in the numbers of doctorate recipients since 1973.”¹¹¹

Advancing this perspective to the U.S. workforce, there is a shortfall of U.S. citizens who are capable of filling highly technical STEM fields of employment.¹¹² Employers in these industries instead rely on hiring international individuals on visas.

As it stands today, businesses say they cannot find the skills they need in the domestic labor pool and need access to a global pool of STEM workers. Bolstering their contention are a number of studies that suggest that STEM jobs exhibit characteristics of under-supply: high wages and low unemployment.¹¹³

Although it may be easy to discount the unique needs of gifted students by assuming they would fare better than their peers if left without educational supports in place, such short-sightedness does not consider broader implications. Rather, we must consider the risk of adverse effects to the individuals and the broader public policy concerns that may result by allowing the most intellectually capable

¹⁰⁹ *Id.*

¹¹⁰ *Science and Engineering Doctorates Data Tables*, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/statistics/sed/2013/data/tab17.pdf> (last visited on Jan. 4, 2015).

¹¹¹ *Doctorate Recipients from United States Universities: Summary Report 2003*, 17, NATIONAL SCIENCE FOUNDATION, <http://www.nsf.gov/statistics/doctorates/pdf/sed2003.pdf> (last visited on Jan. 4, 2015).

¹¹² *Department of Defense Needs Overhaul of Recruitment Practices, Faces Shortfall of STEM Workers: Report*, HUFFINGTON POST (Oct. 25, 2012), available at http://www.huffingtonpost.com/2012/10/25/citing-shortfall-in-quali_n_2017331.html.

¹¹³ Jonathan Rothwell & Neil Ruiz, *H-1B Visas and the STEM Shortage*, THE BROOKINGS INSTITUTION, <http://www.brookings.edu/research/papers/2013/05/10-h1b-visas-stem-rothwell-ruiz> (last accessed on Jan 2, 2015).

students to disengage.¹¹⁴ As a result, it becomes clear that academically gifted students have unique learning needs that legitimately require differentiated support from their schools.

C. Gifted students in Massachusetts

Because Massachusetts schools are not accountable to the DESE for identifying or providing special education to gifted students, it can be assumed that there is inconsistency among many school districts in the Commonwealth as to whether or not highly advanced learners receive differentiated instruction that allows them to “reach their full potential.” In fact, there are only nine public school districts¹¹⁵ out of 444¹¹⁶ that publish records of programs for gifted students, the structure of which varies dramatically. Brockton,¹¹⁷ Brookline,¹¹⁸ Framingham,¹¹⁹ and Quincy¹²⁰ are some of these districts.

¹¹⁴ According to the Gifted and Talented Advisory Council to DESE, “Particularly in grades K-8 and in low-income communities, gifted students are chronically underserved in schools. They are then unprepared for the rigors of high school, college, and career. Educators waste their potential by creating disengaged, risk averse learners who may be talented, but who have lost the drive and resilience they will need for continued success.” *Supra* note 99, at 20.

¹¹⁵ They are: Arlington, Bedford, Beverly, Brookline, Cambridge, Fitchburg, Framingham, Quincy, and Waltham, *Massachusetts Districts with Gifted Programs*, MASSACHUSETTS ASSOCIATION FOR GIFTED EDUCATION, <http://www.massgifted.org/education>.

¹¹⁶ Organization Search, MASSACHUSETTS DEP’T OF ESE, <http://profiles.doe.mass.edu/search/search.aspx?leftNavId=#Y> (select “Public School District,” then click on “Get Results” to see total number of districts, but subtract the 80 charter schools from the list).

¹¹⁷ *Talented and Gifted*, BROCKTON PUBLIC SCHOOLS, <http://www.brocktonpublicschools.com/page.cfm?p=26> (last visited on Jan 2, 2015).

¹¹⁸ *Teaching and Learning*, BROOKLINE PUBLIC SCHOOLS, http://www.brookline.k12.ma.us/index.php?option=com_content&view=article&id=231%3Ateaching-and-learning-enrichment-and-challenge-supporprogram&catid=135&Itemid=71 (last visited on Jan. 2, 2015).

¹¹⁹ *Office of Gifted and Talented*, FRAMINGHAM PUBLIC SCHOOLS, http://www.framingham.k12.ma.us/gifted_talented_programming.cfm (last visited on Jan 2, 2015).

¹²⁰ *Elementary Laboratory Center Information*, QUINCY PUBLIC SCHOOLS, <http://quincypublicschools.com/blog/2012/01/31/elementary-laboratory-center-information/> (last visited on Jan. 2, 2015).

For instance, the Brookline school district does not formally identify students for a separate program.¹²¹ Instead, they use a “consulting teacher model, which means that [the] emphasis is on supporting classroom teachers in extending and enriching the Brookline curriculum in order to provide for academically and intellectually advanced students.”¹²² In other words, classroom teachers have a core lesson for the whole class, which they then adapt and differentiate to provide additional enrichment opportunities for higher-level learners. This system allows for more fluidity than the other districts sampled below, but also requires teachers who are skilled in differentiating lessons for a wide variety of learners.¹²³

In stark contrast, Brockton has created separate classrooms for seventy-five selected advanced students in each of grades four through eight.¹²⁴ These students have a full-time gifted classroom for their core subjects and are “*integrated* with the rest of the school population” for art, music, physical education, and health.¹²⁵ The selection process for entry is not published, but the “top performing”¹²⁶ students in each grade are invited to enter the Talented and Gifted Program.¹²⁷ The students in this program receive “an observably different academic setting. . . [that]. . . provides a substantially differentiated program which takes into consideration the individual learning styles, special abilities and interests” of the students.¹²⁸ This is a surprising model since it differs from the modern special education trends that favor mainstreaming students with accommodations whenever possible, rather than creating separate classrooms for students with special

¹²¹ *Teaching and Learning*, “A Word about Identification,” PUBLIC SCHOOLS OF BROOKLINE, http://www.brookline.k12.ma.us/index.php?option=com_content&view=article&id=231%3Ateaching-and-learning-enrichment-and-challenge-support-program&catid=135&Itemid=71 (last visited on Jan 2, 2015).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Talented and Gifted*, BROCKTON PUBLIC SCHOOLS, <http://www.brocktonpublicschools.com/page.cfm?p=26> (last visited on Jan 2, 2015).

¹²⁵ *Id.* (emphasis added).

¹²⁶ *School View*, *A guide to the Brockton Public Schools*, BROCKTON PUBLIC SCHOOLS, http://www.brocktonpublicschools.com/uploaded/Parents-Community/SchoolView/SchoolView_2011_12.pdf, 5 (last visited on Jan 2, 2015).

¹²⁷ *Talented and Gifted*, BROCKTON PUBLIC SCHOOLS, <http://www.brocktonpublicschools.com/page.cfm?p=26> (last visited on Jan. 2, 2015).

¹²⁸ *Id.*

needs.¹²⁹ Additionally perplexing is why this program removes the “top performers” from the general classroom where their intellectual abilities may contribute to the general classroom setting.

Quincy’s public school district has an elaborate qualification system for their Elementary Laboratory Center, which gives identified gifted fifth graders a one-day-per-week academic and enrichment program.¹³⁰ For entry, fourth graders must initially qualify with a score of 120 or higher on the Otis-Lennon School Ability Test, and advanced third grade scores on the Massachusetts Comprehensive Assessment System (MCAS).¹³¹ Those who meet these qualifications are invited to take a further screening test using the Screening Assessment for Gifted Elementary and Middle School Students (SAGES-2).¹³²

Framingham Public School district, on the other hand, relies on referrals from teachers to identify gifted learners.¹³³ “Framingham Public Schools defines giftedness as a combination of high academic ability, abstract thinking, and a differentiated learning style.”¹³⁴ The program offers both pull-out services as well as classroom differentiation, depending on a student’s individual needs.¹³⁵

Inconsistent as they may be, at least these districts have identified a need and are making an effort to support their advanced students’ learning needs. For the many districts that do not identify or provide enrichment for students with exceptional aptitude, it is unclear how these districts provide “meaningful activities”¹³⁶ if the content or speed of the curriculum does not engage or provide value for their most advanced students.

¹²⁹ 20 U.S.C. § 1412(a)(5) (2014).

¹³⁰ *Elementary Laboratory Center Information*, QUINCY PUBLIC SCHOOLS, <http://quincypublicschools.com/blog/2012/01/31/elementary-laboratory-center-information/> (last visited on Jan. 2, 2015).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Accessing Sage Services*, FRAMINGHAM PUBLIC SCHOOLS, available at http://www.framingham.k12.ma.us/gifted_talented_programming.cfm, click on language link under “Accessing Sage Services”.

¹³⁴ *How Framingham Defines Giftedness*, FRAMINGHAM PUBLIC SCHOOLS, http://www.framingham.k12.ma.us/gifted_talented_how_framingham_defines_giftedness.cfm (last visited on Jan. 2, 2015).

¹³⁵ *Accessing Sage Services*, *supra* note 155.

¹³⁶ MASS. GEN. LAWS, ch. 69, § 1 (2003).

D. Gifted students in other states

The needs of gifted students may be addressed through many different adaptations to the general curriculum. For instance, gifted programming may include (a) “Acceleration,” which includes grade-advancement;¹³⁷ (b) “Grouping,” “clustering,” or creation of separate classes and/or curricula for gifted students;¹³⁸ (c) “Curriculum Compacting,” or streamlining core grade-level curriculum into one semester to create time for advanced or enrichment opportunities;¹³⁹ (d) Advanced Placement¹⁴⁰ classes for high-ability high school students that teach in preparation for national exams and may earn high-achieving students college credits; (e) Dual-enrollment for high school students in college courses;¹⁴¹ and (f) Pull-Out Programs, or independent studies, which keep a student mainstreamed for the general curriculum, but allow extra enrichment opportunities on a daily or weekly basis.¹⁴²

Not all states mandate a particular form of programming, and those that require gifted programming generally leave the specific programming details to the discretion of the local districts.¹⁴³ Some

¹³⁷ See e.g. Ohio gifted services, which may include “[e]arly admission to kindergarten or first grade, whole grade acceleration, subject acceleration, or other forms of acceleration. . .” OHIO ADMIN. CODE 3301-51-15 (D)(3)(b)(i)(vii).

¹³⁸ See e.g. 1 COLO. CODE REGS. § 301-1:2202-R-1.49.

¹³⁹ See e.g. FLA. STAT. § 1002.3105 (1)(a), (2)(a)(2).

¹⁴⁰ Note that Massachusetts *does* offer Advanced Placement classes for high school students in most public high schools. However, since this option is generally not available until the last few years of a student’s career in the public school setting, it hardly qualifies as a comprehensive gifted program for high-ability students throughout DESE. Furthermore, since over 45,000 students took AP exams in Massachusetts last year (MASSACHUSETTS DEPT. OF ESE, 2013-14 *Advanced Placement Participation Report*, http://profiles.doe.mass.edu/state_report/ap_part.aspx), it also does not represent the very small percentage of truly “gifted” students by commonly accepted definitions of such.

¹⁴¹ See e.g. HAW. REV. STAT. § 302A-401 (2015). “There is created in the department the running start program to permit eligible students to enroll in any qualified course offered by the University of Hawaii system.”

¹⁴² See *Educational Options for Gifted Learners*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT (2004), http://www.davidsongifted.org/db/Articles_id_10287.aspx.

¹⁴³ See e.g. OR. REV. STAT. § 343.409 (2015), “School districts shall provide educational programs or services to talented and gifted students enrolled in public schools under rules adopted by the State Board of Education.”

states provide state funding for gifted programming,¹⁴⁴ while others do not.¹⁴⁵ What follows is a brief sampling of how some states recognize and support their gifted students.

Some states, such as Georgia and Oklahoma, fund gifted programming through the state.¹⁴⁶ The state of Georgia mandates that “[s]pecial education shall include children who are classified as intellectually gifted”¹⁴⁷ and provides state funds for gifted programming.¹⁴⁸ The Georgia definition of a gifted student is “a student who demonstrates a high degree of intellectual and/or creative ability(ies), exhibits an exceptionally high degree of motivation, and/or excels in specific academic fields, and who needs special instruction and/or special ancillary services to achieve at levels commensurate with his or her abilities.”¹⁴⁹ In the 2011-2012 academic year, Georgia identified approximately thirteen percent of their K-12 population as “gifted” and allocated almost \$370 million dollars for 2012-2013 toward programming for this population.¹⁵⁰

Most states partially fund gifted programming at the state level and leave the rest to the local districts.¹⁵¹ For example, Maine identified just over three percent¹⁵² of their K-12 student population as

¹⁴⁴ See e.g. OR. REV. STAT. ANN. § 343.399 (1). “Any school district may apply for state funds for special programs and services for talented and gifted children identified in the district.”

¹⁴⁵ See e.g. *Broadley v. Board of Educ. of City of Meriden* 639 A.2d 502 (1994), (finding that “[g]ifted child did not have constitutional right to free public special education under statutes which established program of special education for certain schoolchildren; although special education statutes include gifted children among those “exceptional” children who do not progress effectively without special education, special education was mandatory only for children with disabilities”).

¹⁴⁶ OKLA. STAT. tit. 70, § 1210.305; GA. CODE § 20-2-152.

¹⁴⁷ GA. CODE § 20-2-152.

¹⁴⁸ *Id.*

¹⁴⁹ GEORGIA COMP. R. & REGS. r. 160-4-2-.38.

¹⁵⁰ Survey responses indicated that in school year 2011-2012, Georgia identified 208,978 students as Gifted and Talented of the 1,612,216 enrolled in K-12 that year *Georgia Statistics*, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT, http://www.davidsongifted.org/db/state_policy_georgia_10011.aspx (last visited on Dec. 29, 2013).

¹⁵¹ *Educational Options*, *supra*, note 140.

¹⁵² Survey responses indicated that in school year 2012-2013, Maine identified 6,324 students as Gifted and Talented of the 175,676 enrolled in K-12 that year.

“gifted,”¹⁵³ but budgeted over \$10 million toward gifted and talented programming in the 2012-2013 academic year.¹⁵⁴ Some states, such as Oregon¹⁵⁵ and Arizona,¹⁵⁶ mandate gifted programming and provide funding at the state level.

In Pennsylvania, gifted students are entitled to a Gifted Individual Education Plan (GIEP),¹⁵⁷ much like a student who qualifies for IDEA services is entitled to an IEP. Pennsylvania defines “mentally gifted” as having “[o]utstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.”¹⁵⁸ The most recent estimates on the percentage of Pennsylvania’s public student population being identified as gifted is 4.3 percent, from the 2009-2010 academic year.¹⁵⁹ “Pennsylvania public school districts expend over \$110 million annually for gifted education services...With about 70,000 gifted students statewide, this equates to about \$1,600 per gifted student statewide.”¹⁶⁰

Main Statistics, DAVIDSON INSTITUTE FOR TALENT DEVELOPMENT, http://www.davidsongifted.org/db/state_policy_maine_10022.aspx.

¹⁵³ Maine’s definition of gifted students is “those children in grades k-12 who excel, or have the potential to excel, beyond their age peers, in the regular school program, to the extent that they need and can benefit from programs for the gifted and talented. Gifted and talented children shall receive specialized instruction through these programs if they have exceptional ability, aptitude, skill, or creativity in one or more of the following categories: 1) General Intellectual . . . 2) Specific Academic . . . 3) Artistic Ability NOTE: Children with exceptional General Intellectual Ability and/or Specific Academic Aptitude usually comprise five percent of the school population. Children in the top two percent of the school population may be considered highly gifted.” MAINE CODE ME. R. § 5-071-104.02.

¹⁵⁴ MAINE DEP’T OF EDUCATION, *Annual Budget Approvals*, available at <http://www.maine.gov/doe/gifted/programcomponents/annualbudget/index.html>.

¹⁵⁵ OR. REV. STAT. § 343.396 (2015).

¹⁵⁶ ARIZ. REV. STAT. § 15-779.01 (2014).

¹⁵⁷ 22 PA. CODE § 16.31 (2015).

¹⁵⁸ 22 PA. CODE § 16.1 (2015).

¹⁵⁹ Maryann Nardone, *The Status of Special Education for Gifted Students in the Commonwealth*, LEGISLATIVE BUDGET & FIN. COMM. 1 (Dec. 10, 2013), available at <http://lbfc.legis.state.pa.us/reports/2013/75prs.PDF>.

¹⁶⁰ *Id.* at 6.

Some states, such as Nebraska, do not mandate gifted programming, but do provide state funding for such.¹⁶¹ The Nebraska legislature may hire consultants of gifted education to “encourage, advise, and consult with each school of the state in the development and implementation of plans for education of learners with high ability and shall monitor [programs].”¹⁶² Although the programmatic choices are left to local districts to develop and implement, “[l]ocal systems may apply to the [state] department [of education] for base funds and matching funds . . . to be spent on approved accelerated or differentiated curriculum programs [for gifted students].”¹⁶³

Finally, some states neither mandate nor provide earmarked state funding for gifted programming.¹⁶⁴ Massachusetts is in this last category, but as mentioned in the introduction, it is also one of only three states that fail to even acknowledge that there is such a population.¹⁶⁵

IV: THEORIES FOR CHANGE

A. Judicial Review

Generally speaking, the court will not consider issues that are within the purview of the legislature since it would be a violation of the separation of powers¹⁶⁶ for the court to engage in judicial policy-making.¹⁶⁷ However, one theory of judicial review considers legislative neglect. The *Hancock* court stressed that its holding was due to considerable changes the legislature made to remedy the enumerated problems in the *McDuffy* plaintiff districts.¹⁶⁸ The Court

¹⁶¹ NEB. REV. STAT. §§ 79-1106, 1108.02 (2014).

¹⁶² NEB. REV. STAT. § 79-1105 (2014).

¹⁶³ NEB. REV. STAT. § 79-1108.02 (2014).

¹⁶⁴ *See, e.g.*, 105 ILL. COMP. STAT. 5/14A-15 (2014).

¹⁶⁵ *Supra*, note 1.

¹⁶⁶ MASS. CONST. Pt. 1, art. XXX.

¹⁶⁷ The *Hancock* decision specified that the court shall not be in the position of making programmatic decisions for public education. “Even assuming that the education clause imposes some continuing duty on the Commonwealth to support a public education system, it clearly does not guarantee any particular level of educational success or mandate specific programmatic choices.” *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 465 (2005) (Cowan, J., concurring).

¹⁶⁸ *Id.* at 433-34.

admitted that there was much more work to be done.¹⁶⁹ But regarding the focus districts' purported violation of the constitution's education clause, C.J. Marshall said, "I emphasize that this is not a case where the Legislature reasonably could be said to have neglected or avoided a constitutional command."¹⁷⁰ Inferring that neglect¹⁷¹ or avoidance may be appropriate challenges that the court will consider, what follows is a theory to present the issue for judicial review.

With regard to avoidance or neglect as a form of abandonment, it can be said that the Legislature has failed to provide the "opportunity to reach their full potential"¹⁷² to gifted students. No case in Massachusetts has requested the court to interpret the ERA's "full potential" language to include that of gifted students. However, the SJC has found that the Legislature may not entirely abdicate its duty to educate to local school districts.¹⁷³ It follows that by leaving it entirely to local districts to choose *whether or not* to identify and support the unique needs of a particular set of students whose potential is far out-of-sync with the general curriculum, the legislature is effectively abdicating its duty to educate these students adequately.

When interpreting a statute's meaning, the SJC uses a plain-language approach.¹⁷⁴ When considering the ERA's purpose to ensure that students may "engage" with material in an "inherently meaningful way,"¹⁷⁵ the court may use a dictionary definition for "engage," meaning "to hold the attention of" or "to attract and hold by influence or power"¹⁷⁶ and find this to be a standard for differentiated instruction

¹⁶⁹ *Id.* at 451.

¹⁷⁰ *Id.* at 445.

¹⁷¹ This is not to suggest the legal term of tortious negligence, since C.J. Marshall's language seems to use the plain language meaning, akin to abandonment, throughout the decision. The legal term of art "negligence" does not appear in the decision, nor is that the claim in this argument.

¹⁷² Mass. Gen. Laws ch. 69, § 1 (2003).

¹⁷³ *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545, 606 (1993).

¹⁷⁴ "Except where a particular word or phrase has a technical meaning, we interpret words and phrases in statutes in accordance with their common and approved usage." *Sch. Comm. of Springfield v. Bd. of Ed.*, 362 Mass. 417, 439 (1972) (citing *Canton v. Bruno*, Mass., 282 N.E.2d 87, n. 8. G.L. c. 4, s 6 Third (1972), which provides that words in statutes shall be construed in accordance with "the common and approved usage of the language").

¹⁷⁵ MASS. GEN. LAWS, ch. 69, § 1 (2003).

¹⁷⁶ MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 413 (11th ed. 2004).

for students working well beneath their abilities in the general curriculum.

The duty imposed upon the legislature is to provide an “adequate” education.¹⁷⁷ To define adequacy, the *McDuffy* court outlined the seven capabilities adopted directly from the Supreme Court of Kentucky.¹⁷⁸ Of particular interest is the seventh capability “an educated child must possess,” which is a “sufficient level of academic...skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics...”¹⁷⁹ By using the term “counterpart,” rather than “students,” a plain-language interpretation would suggest that the intent was not to consider such competition in aggregate, but rather on an individual level.¹⁸⁰ As such, students with potential for high academic achievement in Massachusetts should be as well suited to engage in academic challenges as those with similar potential for high achievement in the states that surround Massachusetts.

Massachusetts’ legislature’s avoidance of identifying and supporting this group of students becomes more obvious as the legislative directives for gifted programming are considered for those states that “surround” Massachusetts. In the states surrounding Massachusetts, Table 1 shows that all states but New Hampshire have some legislation that at least identifies, if not mandates, special academic support for gifted students.

¹⁷⁷ *McDuffy*, 415 Mass. at 545.

¹⁷⁸ *Id.* at 618 (citing *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky.1989)).

¹⁷⁹ *Id.* at 619.

¹⁸⁰ This conclusion is reached by considering the definition from American Heritage dictionary, 4th ed., which defines “counterpart” as “1a. One that closely resembles another. b. One that has the same functions and characteristics as another; a corresponding person or thing.” AMERICAN HERITAGE DICTIONARY 417 (4th ed. 2000).

Table 1: Surrounding states' definitions and legislation for gifted elementary and secondary students	
Definition	Legislation
Maine	
<p>The Legislature recognizes that gifted and talented students, who comprise approximately 3% to 5% of Maine's students, require differentiated education programs that are aligned with the system of learning results as established in section 6209, beyond those normally provided by the regular school program in order to realize their educational potential and contribution to themselves and to society.</p> <p>Me. Rev. Stat. tit. 20-A, § 8101</p>	<p>Each school administrative unit shall implement a gifted and talented education program. The commissioner may provide technical assistance to a school administrative unit in planning and implementing its gifted and talented education program.</p> <p>Me. Rev. Stat. tit. 20-A, § 8101-A</p>
New Hampshire	
N/A	N/A
Vermont	
<p>(a) "Gifted and talented children" means children identified by professionally qualified persons who, when compared to others of their age, experience or environment, exhibit capability of high performance in intellectual, creative or artistic areas, possess an unusual capacity for leadership or excel in specific academic fields.</p>	<p>(b) It is the intent of the general assembly that those who provide educational services to children be encouraged to apply for any available funding that will help to provide teacher training and other services for the benefit of gifted and talented children.</p> <p>(c) Nothing in this section shall create an additional entitlement to educational or other services.</p> <p>Vt. Stat. Ann. tit. 16, § 13</p>

Rhode Island	
<p>“a child eligible to attend elementary or secondary schools who is either gifted or talented to an extent that a standard educational program would not foster potential development”</p> <p>R.I. Gen. Laws Ann. § 16-42-1 (West)</p>	<p>(a) In any city or town where there is a child eligible to attend elementary or secondary schools who is either gifted or talented to an extent that a standard educational program would not foster potential development, the school committee of the city or town may provide the type of educational program that will satisfy the needs of the gifted or talented child in grades pre-kindergarten through twelve (12), the program to be approved by the commissioner of elementary and secondary education.</p> <p>R.I. Gen. Laws Ann. § 16-42-1.</p>
Connecticut	
<p>(5) “A child requiring special education” means any exceptional child who (A) meets the criteria for eligibility for special education pursuant to the Individuals With Disabilities Education Act, 20 USC 1400, et seq., as amended from time to time, (B) has extraordinary learning ability or outstanding talent in the creative arts, the development of which requires programs or services beyond the level of those ordinarily provided in regular school programs but which may be provided through special education as part of the public school program, or (C) is age three to five, inclusive, and is experiencing developmental</p>	<p>The State Board of Education shall provide for the development and supervision of the educational programs and services for children requiring special education and may regulate curriculum, conditions of instruction, . . . class composition and size, admission of students, and the requirements respecting necessary special services and instruction to be provided by local and regional boards of education.</p> <p>Conn. Gen. Stat. Ann. § 10-76b (a).</p>

<p>delay that causes such child to require special education. Conn. Gen. Stat. Ann. § 10-76a (West) (8) “Extraordinary learning ability” and “outstanding creative talent” shall be defined by regulation by the commissioner, subject to the approval of the State Board of Education, after consideration by said commissioner of the opinions of appropriate specialists and of the normal range of ability and rate of progress of children in the Connecticut public schools. Conn. Gen. Stat. Ann. § 10-76a (West)</p>	
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Finally, although it would not qualify as a “surrounding state,” it is interesting to note that Kentucky, the state whose Supreme Court authored the qualities that Massachusetts adopted as its model of an adequate education, has one of the most comprehensive Gifted and Talented legislative directives in place.¹⁸¹

The court may be presented with the individual needs and public policy arguments in favor of gifted education along with the evidence of nearly ubiquitous state recognition of gifted populations not only in “surrounding states,” but across the country. Such evidence may allow the court to conclude that the dearth of legislation in Massachusetts in

¹⁸¹ 704 KAR 3:285; Kentucky’s definition of a “[g]ifted and talented student” is “a pupil identified as possessing demonstrated or potential ability to perform at an exceptionally high level in general intellectual aptitude, specific academic aptitude, creative or divergent thinking, psychosocial or leadership skills, or in the visual or performing arts.” KY. REV. STAT. § 157.200 (West 2015). Further, the state both mandates local education agencies to identify and support gifted students and provides funding specifically earmarked for such programming. KY. REV. STAT. §§ 157.224, 157.230 (West 2015).

support of gifted students amounts to legislative avoidance. Such neglect is in violation of the legislature's constitutional duty to provide all students with a "sufficient level of academic. . .skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics."¹⁸²

B. Legislative Enactment

In the absence of a judicial determination, a state administrative agency charged with the administration of a statute may define or interpret statutory terms or provisions by promulgating a rule or regulation.¹⁸³ There are two theories under which the legislature may modify or amend the ERA to avoid a claim of legislative neglect of gifted students. First is to develop legislation that identifies and supports gifted students, as will be outlined below. The alternate theory is to amend the language in the ERA so it is no longer aspirational or hortatory, since currently the DESE clearly does not have procedural safeguards in place to ensure that "all children" have the opportunity to reach their full potential.

1. Definition of Giftedness

First, the Massachusetts legislature must create a definition of giftedness. Just as students with cognitive disabilities require specialized instruction, so too do students with cognitive superabilities in order to "engage fully in learning as an inherently meaningful. . .activity."¹⁸⁴ What follows is a proposed definition, which draws from several adopted legislative definitions. Using the National Association of Gifted Children's definition as a foundation, gifted children may demonstrate "outstanding levels of aptitude (defined as an exceptional ability to reason and learn) or competence (documented performance or achievement in the top ten percent or rarer) in one or more domains."¹⁸⁵ By focusing on capability and capacity, the definition would capture both potential and demonstrated

¹⁸² *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. at 618-19 (item (vii) of the seven capabilities of students with an adequate education).

¹⁸³ See KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE*, §§ 5.03 to 5.05 (1958).

¹⁸⁴ MASS. GEN. LAWS ch. 69, § 1 (2003).

¹⁸⁵ *Definitions of Giftedness*, NATIONAL ASSOCIATION OF GIFTED CHILDREN, <http://www.nagc.org/resources-publications/resources/definitions-giftedness> (last visited Apr. 24, 2015).

performance. By including creative and artistic intelligence in addition to traditional academic fields, it broadens the definition to match modern-day understandings of gifts. For example, this definition of gifted would include musical abilities.

Next, looking to Tennessee's regulations, "'Intellectually Gifted' means a child whose intellectual abilities and potential for achievement are so outstanding the child's educational performance is adversely affected. 'Adverse effect' means the general curriculum alone is inadequate to appropriately meet the student's educational needs."¹⁸⁶ Vermont adds a provision that identification must be made "by professionally qualified persons."¹⁸⁷ Together, these two provisions may perhaps discourage *some* of the social and political jockeying inevitable in creating intellectual distinctions in a state which prides itself on its intellectual achievements.¹⁸⁸ Both of these components tend to require evidence and accountability for selection of gifted students.

Finally, in New Jersey the definition includes "high levels of ability in one or more content areas when compared to their chronological peers in the local school district and who require modifications of their educational program if they are to achieve in accordance with their capabilities."¹⁸⁹ A local outlier provision such as this puts the onus on local school districts to determine eligibility either by a percentage threshold, such as top five percent performers on an assessment, or through a recommendation or nomination system.

As a result, the proposed definition of "gifted student" in Massachusetts is:

A school age child, as defined by Mass. Gen. Laws 71B § 1,¹⁹⁰ who demonstrates outstanding levels of aptitude or competence in one or more domains, when compared to his or her chronological peers in the local school district, as identified by professionally qualified persons. Domains may include intellectual, creative, artistic, or musical capacity, or in specific academic fields. Gifted

¹⁸⁶ TENN. COMP. R. & REGS. 0520-01-09-.02 (11) (2012).

¹⁸⁷ VT. STAT. ANN. tit. 16, § 13 (2014).

¹⁸⁸ Michelle Williams, *Massachusetts Named Smartest State in the Nation*, MASSLIVE (May 27, 2014 at 2:06 PM), http://www.masslive.com/news/index.ssf/2014/05/massachusetts_named_smartest_s.html.

¹⁸⁹ N.J. ADMIN. CODE § 6A:8-1.3 (2015).

¹⁹⁰ Which reads, "any person of ages three through twenty-one who has not attained a high school diploma or its equivalent." Mass. Gen. Laws 71B § 1 (2015).

students possess intellectual abilities and potential for achievement so outstanding that the child's educational performance is adversely affected by the general curriculum.

2. Gifted Student Identification and Programming

As discussed above, the legislature may not abdicate its duty entirely onto local districts.¹⁹¹ If the legislature implements a definition of giftedness and a minimum requirement of identification, it may then allow local school districts to determine broader factors for identification and programming for their gifted populations.¹⁹² For instance, in Colorado, local districts are “strongly encouraged to include in the program plan a universal screening, as defined by state board rule, of enrolled students no later than second grade to identify gifted children and a second screening of gifted children in conjunction with the creation of each child's individual career and academic plan.”¹⁹³ Such a directive allows districts to consider the mandate a floor rather than a ceiling and to support more gifted students than those identified by the state identification process.

Programming may take on many forms at the local level, such as acceleration, curriculum compacting, enrichment opportunities such as independent study, private tutoring or apprenticeships, or dual enrollment in middle/high school or high school/college courses.¹⁹⁴ Specific programming choices may be delegated to the local level.¹⁹⁵ Once a child is identified, the local school district can work together with the student, his/her family, the school's qualified faculty, and any

¹⁹¹ *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545, 606 (1993).

¹⁹² For instance, if the DESE were to determine that the minimum requirement for identification of gifted students is the equivalent of 1/10 of one percent of the student population in grades 3-12, then this would account for approximately 700 students in grades 3-12 in the Commonwealth. (According to DESE Enrollment data, available at <http://profiles.doe.mass.edu/profiles/student.aspx?orgcode=00000000&orgtypecode=0&>, in school year 2014-2015 there were 715,368 students enrolled in grades 3-12.) Some form of measurement, likely beginning with state standardized tests may be a starting point, but additional measures would be necessary. In this scenario, some school districts may have multiple students in this “mandated” sample while others would not have any. All school districts, however, could consider the proposed regulation a floor rather than a ceiling and expand upon gifted programming for their constituents.

¹⁹³ COLO. REV. STAT. § 22-20-204 (2014).

¹⁹⁴ *Supra* notes 137-140.

¹⁹⁵ *See* 22 PA. CODE § 16.31 (2008).

additional advocates to determine the unique support needed, much like schools already do in IEP team meetings.¹⁹⁶ As the initiative develops, professional development opportunities may evolve for faculty to identify and understand not only the academic needs of the intellectually gifted child, but their social and emotional needs as well. In many cases, differentiated instruction and interdisciplinary product demands may allow for a gifted child to learn appropriately in the general education classroom when led by a qualified teacher.¹⁹⁷

3. Alternative Theory: Legislative Repeal

Alternatively, the legislature may repeal the ERA or amend its language so that it is not aspirational or hortatory. As it currently reads, using a plain-language interpretation, the legislature purports to measure and track “potential” for every student. Further, it suggests that schools will provide an environment for maximum realization for each student’s individual potential. Since only students with federal statutory entitlement for academic tracking receive such progress monitoring, it would be inaccurate to suggest that the “potential” of all students is measured and monitored. It follows that the alternate suggestion is to change the ERA language to read that the “paramount goal of the commonwealth [is] to provide a public education system of sufficient quality to extend to all children. . . [an adequate education] and to lead lives as participants in the political and social life of the commonwealth and as contributors to its economy.”¹⁹⁸

C. Concerns

The greatest concern with a gifted and talented program, of course, is properly identifying students who have unrecognized natural gifts and talents, but who come from environments that do not understand or nurture them. “Some gifted children with exceptional aptitude may not demonstrate outstanding levels of achievement due to environmental circumstances such as limited opportunities to learn as a result of poverty, discrimination, or cultural barriers.”¹⁹⁹

¹⁹⁶ See 20 U.S.C. § 1414 (c)(1) (2004).

¹⁹⁷ See *e.g.* COLO. REV. STAT. § 22-20-204 (2014).

¹⁹⁸ MASS. GEN. LAWS ch. 69, § 1 (2003).

¹⁹⁹ *Definitions of Giftedness*, NATIONAL ASSOCIATION FOR GIFTED CHILDREN, <http://www.nagc.org/resources-publications/resources/definitions-giftedness> (last visited March 27, 2015).

Additionally, because gifted children often develop asynchronously,²⁰⁰ meaning their cognitive development is often much more advanced than their social and emotional maturity, untrained observers may misunderstand them to simply have behavior problems that result from their disequilibrium.

Massachusetts legislators must be cognizant of this dichotomy to ensure that undue reliance on demonstrated achievement does not overshadow the undiscovered talents in underperforming districts. This is why the faculty recommendation piece is an essential component, and professional development that allows teachers insight into recognizing indications of giftedness will be important.

V. CONCLUSION

For the state that leads the country in education for K-12 students, it is uncharacteristic that Massachusetts does not acknowledge that there are some students whose academic abilities far exceed those of their peers. In 1840, Alexis de Tocqueville's *Democracy in America* text shaped an understanding of democracy still present today: Equality is valued above all else, and sometimes we are so "uncomfortable with social or intellectual distinctions,"²⁰¹ that we are willing to hold some back to ensure we all fare similarly. Are we so afraid of intellectual elitism that we are willing to hold back our most naturally gifted students from reaching their full potential to avoid a little social discomfort?

While some districts in the Commonwealth have made significant efforts to serve their populations of gifted students, there is no consistency of definition or services available.²⁰² Instead, a child born with extraordinary talent in Massachusetts is subject to the fate of his

²⁰⁰ Lisa Rivero, *Many Ages at Once: The science behind the asynchronous development of gifted children*, CREATIVE SYNTHESIS (4/4/2015 5:22 PM), <http://www.psychologytoday.com/blog/creative-synthesis/201201/many-ages-once>.

²⁰¹ Pat O'Connell Ross et al., *National Excellence: A Case for Developing America's Talent*, OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT (Oct. 1993), available at <http://files.eric.ed.gov/fulltext/ED359743.pdf>; see ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 37 (Barnes & Noble Books, 2003) (1840) ("A middling standard is fixed in America for human knowledge. All approach as near to it as they can; some as they rise; others as they descend.").

²⁰² See *supra* Part III: Gifted students in Massachusetts.

local district's choice in whether or not to identify or support his unique needs.

“[T]he words [of the education clause in the Massachusetts constitution] are not merely aspirational.”²⁰³ We must cherish the interests of education for all. The ERA intends to ensure “that all of our children will be prepared to compete in the global economy.”²⁰⁴ But for our most intellectually competitive students to become prepared, gifted students in Massachusetts should have academic work and aptly trained teachers that sufficiently engage and challenge them to find deeper meaning and understanding of the complicated subject areas they are uniquely able to master.

By the very definition of the Commonwealth's Education Reform Act, Massachusetts' exceptionally gifted elementary and secondary students are currently underserved, since there are no statutory entitlements that ensure they have “the opportunity to reach their full potential.”²⁰⁵ The legislature can remedy this by creating a definition, earmarked funding, statutory entitlements to specialized education, and procedural safeguards for each.

²⁰³ *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545, 606 (1993).

²⁰⁴ *Sch. Comm. of Pittsfield v. United Educators of Pittsfield*, 438 Mass. 753, 759 (2003) (quoting EDUCATION REFORM ACT OF 1993, CONFERENCE COMMITTEE REPORT (1993)).

²⁰⁵ MASS. GEN. LAWS ch. 69 § 1 (2003).