

State Laws for Gifted Education: An Overview of the Legislation and Regulations

Section: Gifted Legislation

To fill a gap in the literature, this article provides a comprehensive, concise, and current overview of the state laws--specifically, statutes and regulations--concerning gifted education for K-12 students. The models for these laws form two broad categories. The first model is premised on a group orientation, whether on a permissive or mandatory basis. The vast majority of state statutes and regulations for gifted education fits in this category. The features are limited to state-and local level responsibilities for group programming. The second category, analogous to the Individuals with Disabilities Education Act (IDEA) and only proposed in the literature for the federal level, is mandatory and individually oriented. It includes the additional distinctive features of an individualized program requirement and an impartial dispute-resolution mechanism. The second model may yield case law to fill in the gaps, but the equally potential tradeoffs include adversarial relationships between, and high transaction costs for, parents and districts. Thus far, only a handful of states have chosen this model, usually with partial differentiation from the framework for students with disabilities. This article identifies the prevailing categorical trends and the remarkable variations. It also points out the policy choices for states.

The law on gifted education is primarily a matter of state legislation and regulations. In states that do not have legislation or regulations providing specific and strong requirements for gifted education (i.e., individually defined and enforceable rights akin to those under the Individuals with Disabilities Education Act [IDEA]), the "case law"--the published hearing/review officer and court decisions concerning who is eligible as gifted and, for those who are eligible, what is their educational entitlement--has been adverse to plaintiff-parents (Zirkel, 2004). Moreover, although of undisputed practical significance, "guidelines" and other state agency policy interpretations that have not been subject to the applicable administrative procedures for regulations are, at most, entitled to deference by, not binding effect on, the courts (e.g., Zirkel, 2002).

Literature Review

The professional literature lacks a current and comprehensive canvassing of the statutes and regulations specific to gifted education. Rather, the published compilations mix the statutes and regulations specific to gifted education with sources that do not have the full force of law, such as state policies and practices. Some sources are limited to particular aspects of gifted education and extend well beyond the pertinent legislation and regulations. For example, focusing on identification policies and practices, researchers at the University of North Carolina (Coleman, Gallagher, & Foster, 1994) requested and analyzed a whole host of state policies and practices, including "state laws, mandates, regulations, and guidelines," "statements of philosophy and/or goals," and "procedural information." Neither their survey nor their results differentiated binding rules of law from their interpretation and implementation in the other requested sources. The line of successive studies limited to the definition or identification of gifted students (Cassidy & Hossler, 1992; Karnes & Collins, 1977; Karnes & Koch, 1985; Stephens & Karnes, 2000) more closely adhered to state statutes and regulations. However, this research did not expressly exclude state guide lines or other such policy interpretations, and it also had the limitations of survey methodology.

Other sources were more comprehensive in focus. For example, Passow and Rudnitski (1993) analyzed various components of state gifted education policies, including philosophy or rationale, identification procedures, and program elements. Although the title of their work focused on legislation and regulations, their study was based on "documents dealing with policies, legislation, regulations, handbooks and other materials guiding gifted education in [the 49 responding] states" (p. xix). Moreover, their definitions of these terms, particularly "policy," reflected at least partial confusion, and their findings were not differentiated by source or by state. Similarly, Landrum, Katsiyannis, and DeWaard (1998) surveyed the state directors for gifted education, using a relatively short questionnaire and requesting supporting

materials for three items: legislation, funding sources, and current initiatives or trends. They obtained completed questionnaires from 40 states and supplemental documentation from only 31 states. Moreover, their single survey item regarding "legislation" did not include regulations, and their reported results referred additionally to "policies" and "policy documents" without any definition or differentiation. Similarly, the most recent biannual survey of the state directors reported the number of states with mandated funding, data-collection practices, identification procedures, district participation, and teacher certification or training requirements; however, it too is based on indiscriminately mixed sources and additionally has the limitations of survey research, such as a lack of response from 16 of the 50 states (Council of State Directors of Programs for the Gifted & National Association for Gifted Children, 2001).

In a more recent survey, Shaunessy (2003) categorized state gifted education "policies" without specifically defining this generic term, in relation to various selected features of the IDEA. Finally, a Tennessee advocacy organization's survey of the 50 states, which had more comprehensive data and a higher response rate, was based on policies and practices, not just laws (Swanson, 2002).

In contrast, very few studies have specifically canvassed state statutes for gifted education (Ackerman & Weintraub, 1969; Zettel 1980) or their combination with state regulations (Mitchell, 1981) exclusive of state guidelines and practices. Moreover, these analyses are not sufficiently in-depth or up-to-date.

State Statutes and Regulations

To fill this gap on the bookshelf in gifted education, the National Research Center on the Gifted and Talented has recently published an exhaustive, impartial, and yet relatively compact synthesis of the law specific to gifted education. In addition to summarizing the case law, the monograph includes an appendix that provides a tabular analysis, excerpted provisions, and legal citations of the pertinent statutes and regulations (Zirkel, 2003). It is currently being updated for a new edition. This article provides an overview of this updated detailed tabulation, with a more specific discussion about this legislative and regulatory framework. Unlike the previously cited sources, this article is limited to these binding sources of law and is not subject to the limitations of survey research.

[Overall Models](#)

A state-by-state review of state statutes and regulations for gifted education on the books as of May 2005, reveals a pattern of wide variability. At one extreme, a few states have no or negligible laws specific to gifted education. Specifically, New Hampshire is the only state with no mention in either its legislation or its regulations of gifted education; South Dakota recently repealed its legislation requiring the state board to issue regulations for identification and programming for gifted students; Minnesota merely mentions gifted children as one aspect of staff development and gifted education as one example of inter-district services; and Hawaii has brief provisions defining gifted and talented students and permitting a statewide flexible system based on three factors, starting with "the availability of financial and physical resources" (Zirkel, 2003), p. 84.

On the other extreme, a larger but still limited group of states -- Alabama, Florida, Kansas, Louisiana, New Mexico, Pennsylvania, Tennessee, and West Virginia -- has laws that approach the strength and specificity of the primary federal legislation for students with disabilities -- the IDEA. This Act establishes various school district obligations at the individual eligible student level, such as an individualized special education program and an impartial dispute-resolution mechanism. Only Tennessee provides undifferentiated treatment from students with disabilities by statute. The other states in this group provide varying degrees of differentiation by statute or, in Alabama and Florida, by regulation. In either event, these requirements provide individually enforceable legal rights for gifted education, serving as the springboard for published case law that clarifies the ambiguities and fills in the gaps.

The vast majority of states fit in the broad, group-oriented category, of specifying various state-level and/or district/school responsibilities that support and encourage group-based programs for gifted students.

Although the specification of state and local responsibilities also characterize the laws in the IDEA-type category, those in the group oriented model lack the hallmarks of Individualized Education Program (IEP)-type documents and the impartial adjudicatory dispute resolution.

State-Level Responsibilities

First, almost all states have specific provisions at the state level of responsibility, usually in terms of standards and/or funding. The typical template for "standards" is enabling legislation that either mandates or permits gifted education and that delegates to the state education department the specific procedures and criteria via regulations. Colorado, for example, has permissive legislation that charges the state agency with the responsibility of issuing regulations that specify procedures and criteria for program approval, admissions, teaching, and services. Illustrating unusual variations, Maine's statute estimates that 3% to 5% of the state's students are gifted and talented; Mississippi's legislation instructs the state agency to maximize local flexibility and parental involvement in its regulations; and West Virginia's law provides for the participation of non-qualifying students upon two conditions: "the recommendation of a principal, counselor, teacher and parent" and "available" classroom space (Zirkel; 2003, p. 140).

Similarly, state-level funding provisions are relatively frequent and flexible. A minority of states specify a formula that would appear to guarantee a minimum funding base or increase at the state level, typically pending local contribution. For example, Iowa's legislation specifies a \$38 annual increase, presumably per eligible student, that shall "increase in subsequent years by each year's state percent of growth" (Zirkel, 2003, p. 88) and conditioned on the local district providing at least one fourth of the costs of the gifted program. Mississippi provides an added allotment based on the number of state-approved teachers. Texas's legislation does not appear to require a local contribution, entitling the district to a minimum multiplier of .12 in relation to the state's per pupil allocation. On the other hand, in June, 2003, Maine repealed its 2:1 match of state to local funding.

The third and least frequent of the legislatively specified state responsibilities is for technical assistance. Some states (e.g., Arkansas, Illinois and Iowa) require the state education department to have a specialized staff member or office for such purposes. Others (e.g., Illinois and New Jersey) additionally provide for intermediate units to share in this responsibility. Ohio's statutory provision for technical assistance is unusual in terms of being targeted to noncompliant districts, with reduction of funds being the next step.

Local Responsibilities

The statutes or regulations of all of the states in both the IDEA and intermediate categories have one or more specific provisions at the local level of responsibility. The highest frequency of these provisions addresses the criteria and/or procedures for identification. Of these state laws, only a limited group (e.g., Arkansas, Florida, Georgia, Kentucky, Maine, Ohio, Pennsylvania, and Virginia) have specific provisions for nondiscrimination with regard to racial, linguistic, and/or other such grounds. Arkansas' law is notable for requiring the list of "nominated" students to be "representative of the entire student population in terms of race, sex, and economic status" (Zirkel, 2003, p. 65). These provisions vary widely in other respects as well. For example, along with estimates that 5% of the school population has exceptional academic aptitude and that 5% has exceptional artistic ability, Maine's law provides that "children in the top 2% of the school population, may be considered 'highly gifted'" (Zirkel, p. 99). California also legislatively recognizes this subcategory but limits it to 2% of the pupil population and requires an IQ of at least 150 or "demonstrated extraordinary aptitude and achievement in language arts, mathematics, science, or other academic subjects" (Zirkel, p. 71). Kentucky's identification procedures include peer nominations as one of the acceptable assessment options for identification at grades 4-12. Georgia's law requires consideration of four "data categories" -- mental ability, achievement, creativity, and motivation -- and specifies a grade point average of 3.5 as an alternative for a 90th percentile score on a standardized instrument for the motivation category. It also provides for inter-district reciprocity once a child is found eligible and a probationary period before removing the child from the program. Resonating with Gardner's (1983) work on multiple intelligence, Indiana's law employs "high ability" rather than gifted and predicates eligibility on exceptionality in at least

one "domain," including "general intellectual, general creative, specific academic, technical and practical arts, visual and performing arts, and interpersonal" (Zirkel, p. 87). Finally, Texas' legislation is unique in addressing dual exceptionality in the identification process, prohibiting discrimination in granting eligibility to a "student [who] would otherwise be qualified ... but for the student's learning disability" (Zirkel, p. 134).

The second most frequent feature of local responsibility is programming. This provision, whether in the group-oriented or individual-oriented categories, is typically characterized by flexibility rather than narrow prescriptiveness. For example, Idaho's law provides for "a variety of flexible approaches ... that may include administrative accommodations, curriculum modification and special programs" (Zirkel, 2003, p. 84). Kentucky's law requires multiple service delivery options from a wide and nonexhaustive list including grade-skipping, advanced courses, collaborative teaching and consultation, special counseling services, distance learning, mentorships; travel study, and, at grades 4-12 only, self-contained classes or special schools. Arkansas' law is probably the most detailed, specifying a minimum of 150 minutes per week of programming and providing, as "descriptions of ways to organize program options, not prescriptions" (Zirkel, p. 66), a long list of administrative arrangements at the elementary and secondary levels. Other noteworthy variations include provisions authorizing early admission to kindergarten (Louisiana); establishing a maximum teacher-student ratio of 12:1 (Georgia); providing for excusal from the physical education requirement (Iowa); permitting college coursework on a part-time (Tennessee) or early-entrance (Washington) basis; requiring counseling services for gifted students, with a priority on those who are "educationally disadvantaged" (Texas); and authorizing fellowships for full-time graduate education in gifted teaching (Illinois). At the other extreme, a requirement for programming occasionally does not accompany one for identification. For example, Connecticut's law only obligates local districts to provide "identification, referral and evaluation services," expressly leaving the provision of program services as a district option.

The less frequent characteristic local-level responsibilities are teacher training, data collection, and program evaluation. For teacher training, Texas' law is unusually strong, requiring districts to assure 30 hours of staff development in gifted education prior to or within one semester of teaching in the local program, an additional 6 hours on an annual in-service basis for the teachers, and a total of at least 6 hours for "administrators and counselors who have authority for program decisions" (Zirkel, 2003, p. 134). Supplementing local level in-service teacher training, several laws (e.g., Arkansas, California, Florida, Kentucky, Nebraska, Nevada, North Dakota, South Dakota, Texas, and Wisconsin) provide for specific state certification or at least endorsements for gifted teachers. A few other states -- Connecticut, Iowa, and Virginia -- require a course component in gifted education as part of preservice preparation for teacher certification generally.

The provisions for data collection are rather routine. Ohio, which has the aforementioned technical assistance provision for noncompliance, similarly is remarkable for requiring the state education department to audit each local district's annual report of identification numbers no less than triannually and authorizing the department to "select any district at random or upon complaint or suspicion of noncompliance for a further audit to determine compliance with [statutory requirements]" (Zirkel, 2003, p. 112).

The provisions for program evaluation are also relatively conventional, with the primary variation being the level of specification. On an approximate continuum, Arkansas' regulations represent the detailed extreme; Kentucky's regulations illustrate moderate specifications; and New Jersey's regulations serve as an example of the more common, cryptic formulation of the requirements for program evaluation.

The boundary between the majority, group-based model and the minority, individual-oriented model is not a bright line. For example, North Carolina is at the margin, mandating Group Education Programs (GEPs), permitting individualization of the GEPs, requiring a locally determined procedure for resolving disputes about identification or programming, and providing for the state's impartial hearing mechanism as a second dispute resolution stage, but limited to identification and implementation issues and without judicial appeal. West Virginia is also at the margin, mandating an IEP for students in grades 9-12 who are "exceptionally

gifted," defined as being eligible as not only gifted but also at least one of the following: behavior disorder, specific learning disability, psychological adjustment disorder, underachieving, or economically disadvantaged. On the other hand, if the student at the secondary school level is gifted without one of these conditions, West Virginia's regulations require the IEP team to develop "a four year plan that addresses the student's educational needs, including honors/advanced education" (Zirkel, 2003, p. 142). As another such example, Mississippi's regulations give local districts the choice between an IEP or an undefined but apparently group-oriented Instructional Management Plan.

The IDEA-Type Model

Finally, at least partially incorporating the distinctive features of the model of the IDEA, approximately 12 states have specific provisions that establish one or more individual substantive and/or procedural rights. The most frequent are provisions for procedural safeguards (n=11), usually parental consent for individual evaluation and/or programming but rarely the full panoply specified under the IDEA, and individualized program documents (n=10), which universally lack a substantive standard customized for gifted students, such as maximization. The dispute-resolution mechanism of an impartial due process hearing, which is accompanied by the option for mediation and serves as the leading edge of the litigation process, is less frequent (n=8). With the exception of Pennsylvania, all of this less frequent group also offers the alternate individual enforcement mechanism of the state's complaint resolution process. Coming close to the special IDEA impartial hearing mechanism, New Jersey and North Carolina provide for access to a more general administrative law judge procedure available for certain other regular education issues. More limited options for dispute resolution include parental consultation (e.g., Georgia and Virginia) or appeals internal to the district (e.g., Alaska, Arkansas, Maine, Nebraska, and Oklahoma) rather than requiring impartial third parties. Kentucky's provision for an internal grievance procedure is unusual in terms of requiring "the participation of the parent or guardian, a regular education teacher of the student, a gifted education teacher or coordinator administrator, and a counselor in addressing a grievance" (Zirkel, 2003, p. 97). Virginia illustrates a final variation, providing for private mediation.

Across the board, as previously mentioned, a relatively small group of states--Alabama, Florida, Kansas, Louisiana, New Mexico, Pennsylvania, and Tennessee, and West Virginia--has binding frameworks that approximate the full individualized and legalized model of the IDEA. Of this group, only Tennessee treats gifted students as a subgroup of students with disabilities, but the majority provides only limited separation and customization. Pennsylvania, which remains by far in the leading position in terms of the frequency of litigation, changed to a differentiated approach approximately 3 years ago by dropping selected features of the IDEA model, such as the manifestation determination' requirement for placement changes and state complaint resolution mechanism for alternative enforcement. However, like the provisions in Alabama and Florida, the Pennsylvania "law" is in the form of regulations, which are easier to change and weaker than legislation.

In the final miscellaneous category, various state laws have other provisions that are notable. Several provide for a state school for gifted students on a general basis (Louisiana and Rhode Island) or for the specialized subjects of math and science (Alabama, Arkansas, Mississippi, Oklahoma, South Carolina, and Texas), the arts (Mississippi and South Carolina), or -- unusually -- vocational education (West Virginia). However, these provisions vary in their strength and specificity. For example, Louisiana only expresses "the intent of the legislature to establish an independent residential school for certain high school ..." gifted and talented children" (Zirkel, 2003, p. 98). Some states provide for one or more statewide special summer schools (Arkansas, California, Georgia, Illinois, Indiana, Louisiana, and Maine). Rhode Island's law is unusual in creating an academy for gifted and talented Limited English Proficient students. Similarly, several states provide for state advisory councils for gifted education (e.g., Alaska, Arkansas, Delaware,; Illinois, Iowa, Kansas, Minnesota, New York, Oklahoma, and Rhode Island), while New Jersey and Tennessee have recently established special state committees or commissions. Iowa's law is remarkable in establishing an "international center for talented and gifted education" (Zirkel, p.91), with a defined mission and endowment.

Conclusions

This analysis of "pure" law in terms of statutes and regulations for gifted education provides information not available in this separated and purified form elsewhere. Nevertheless, its limitations are notable. First, such legal analyses defy complete exactitude in light of the changing nature of law, the subjectivity of categorization, and the existence of pertinent provisions in more general legislation, such as funding provisions (Baker & McIntire, 2003). Second, it does not include the second binding source of applicable law, published hearing/review officer and court decisions, which require tandem attention (e.g., Zirkel, 2003). Third, it does not take into consideration guidelines and standards that provide practically significant, albeit less legally forceful, effect in several states. Fourth, it does not take into account the prevailing practices, which provide a measure of the extent of implementation of these state laws. Fifth, it provides a broad based overview rather than an intense focus on a single issue, such as identification (e.g., Cassidy & Hosler, 1992). Thus, these conclusions invite circumspect assessment, allied literature, and further research on the micro level but usefully advance the knowledge base on the macro level.

Overall, the models for gifted-education legislation and regulations fit into two broad categories. The first model is premised on a group orientation, either on a permissive or a mandatory basis. The vast majority of state statutes and regulations for gifted education fit in this category with varying degrees of strength and specificity. The primary characteristic is specification of state- and local-level responsibilities, but without individualized substantive and procedural requirements that serve as the basis and avenue for litigation.

The literature to date also tends toward this approach, with emphasis on mandatory provisions (Purcell, 1992). For example, the researchers at the University of North Carolina recommended model legislation that featured a broad definition of gifted and talented students, a state coordinator and advisory board for gifted and talented programs, and sufficient funding for the state office and a local programs (Foster, Gallagher, & Coleman, 1994). However, its only requirements at the local level were group-based broad funding criteria, such as a multi-criteria, nondiscriminatory selection process and a system for delivering differentiated services, otherwise expressly leaving eligibility and program matters to the discretion of local districts. Other commentators have proposed such permissive but supportive legislation at the federal level (Bittick, 1995), with "underwhelming" results to date (Russo, Ford, & Harris, 1993, p. 67).

The second model, analogous to the federal IDEA, is not only mandatory, as the strings attached to funding, but also individual-oriented. It includes an individualized program requirement, which in the IDEA is "appropriate" education as documented in an individualized education program (IEP), and an impartial dispute-resolution mechanism, which in the IDEA includes at least a due process hearing and judicial review. The second model may yield a body of case law to fill in the gaps, but, to the extent that parents of gifted children follow the path of parents of students with disabilities, the tradeoffs include parent-district adversariness and high transactions costs (Zirkel, 1994). Thus far, only a handful of states, including Pennsylvania, have fully opted for this model, usually with partial differentiation from the frame work for students with disabilities. A puzzling question is why the vast majority of the hearing/review officer and court decisions have taken place in Pennsylvania (Zirkel, 2004). Perhaps, the litigious culture of the northeast provides at least a significant part of the explanation.

The literature to date includes few proposals of an IDEA model for gifted education and then only at the federal level. For example, Herring (1991) advocated a federal statute that included certain features more typical of the group-based model, such as federal and state committees for the identification and implementation process, group programs at the local level (here, completely separate "talented and gifted schools" and intra-school separate programs called "honors schools"), and no IEP requirement. On the other hand, she incorporated and customized various features of the IDEA, such-as a substantive standard of "adequately challenging" and the procedural safeguards of an impartial due process hearing and judicial review.

For those who seek the adjudicatory model of the IDEA for gifted education, the critical areas that require careful customization are: 1) the IDEA's floor-based substantive standard of "appropriate" education (e.g., Zirkel, 1983); 2) its accompanying strong emphasis on integration or inclusion (e.g., Zirkel, 1998); 3) the narrow definition of "special education" that has led to restrictive interpretation by hearing/review officers and courts for both gifted-only students and those gifted-plus students who are often characterized as

having "dual exceptionality" (Zirkel, 2004); and 4) the overly costly and time-consuming aspect of the IDEA's dispute-resolution mechanism (Zirkel, 1994, 2005). Another key question is whether the enabling legislation should include a provision for attorneys' fees for prevailing parents, which the IDEA -- unlike most state laws for gifted education to date -- provides.

Thus, for states that opt for the IDEA model, the need is for thoughtful customization to the needs of gifted students. Conversely, for those who judge this IDEA model to be either unfavorable as a philosophical and methodological matter or infeasible in light of political and economic realities, the challenge is to fashion a binding framework that provides for support and guidance at the state level and that fosters creative and positive action at the local level.

In either event, careful examination of the legislative/regulatory choices made in other states (with updates available from the Web site of the Education Commission of the States, www.ecs.org) and in the related case law trends, which are both detailed in the recent monograph (Zirkel, 2003) available from the National Research Center on the Gifted and Talented, may well prove beneficial. In doing so, interested parties should avoid the problem of failing to distinguish between the group-oriented and individual-oriented models, even when the first category is limited to mandatory, not permissive, states (e.g., Purcell, 1995). This problem, like the more frequent failure to separate legislation and regulations from guidelines, other nonbinding policies, and practices, obfuscates rather than facilitates informed decision making.

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