

Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High Schools Admissions Process

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Admission to New York City's eight Specialized High Schools is based solely on one test, as is mandated by a facially neutral state statute. That single test has a significant disparate impact on African American and Latino students. The NAACP Legal Defense Fund (LDF) filed a civil rights complaint in 2012 challenging the admissions policy that relies solely on this test. The complaint has yet to be resolved and is complicated by the statute mandating the discriminatory policy. This Note will explore resolution options available to the United States Department of Education's Office of Civil Rights (OCR). It explains the background of the Specialized High Schools and the LDF complaint; discusses typical OCR complaint resolution procedures, the surrounding legal landscape in light of the 2015 Supreme Court decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., and other areas of federal enforcement that have run into state law conflicts; and applies these laws and procedures to the LDF complaint to analyze potential strategies for resolution by OCR. This Note argues that OCR is able to improve the admissions policy to reduce or eliminate the disparate impact, and it should take one or more of its available options to do so.

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I. INTRODUCTION

The transition from middle school to high school is a stressful time for many students. For eighth graders in New York City hoping to attend one of eight Specialized High Schools the following fall, the admissions process is particularly stressful, with all of their hopes pinned on a single admissions test mandated by a state statute.¹ These eight schools are consistently ranked among the top high schools in the nation.² The overall acceptance rate is under 20% for all eight schools.³ Yet, for African American and Latino students who apply, the acceptance rates are even lower, at just 5% and 7% respectively, although these students make up about 30% and 40% of total public school students in New York City.⁴ Some schools have rates as low as 2% and 3% for these groups.⁵

The NAACP Legal Defense and Education Fund (LDF), with LatinoJustice PRLDF and The Center for Law and Social Justice at Medgar Evers College, filed a federal civil rights complaint (LDF complaint) on behalf of ten organizations with the United

1. *Specialized High Schools*, N.Y.C. DEPT OF EDUC. (Nov. 2014), <http://schools.nyc.gov/ChoicesEnrollment/High/specialized/default.htm> [https://perma.cc/2TK6-8SE9].

2. Two of the eight schools ranked in the top 25 public high schools in the country by U.S. News & World Report in 2015, with four in the top 50 and all eight ranking in the top 100. These rankings evaluated over 21,000 public schools across the country. BEST HIGH SCHOOLS RANKINGS, U.S. NEWS & WORLD REPORT (2015), <http://www.usnews.com/education/best-high-schools/national-rankings> [https://perma.cc/6PXS-ASLU]. All eight rank in the top fifteen public high schools in New York State. TOP NEW YORK HIGH SCHOOLS, U.S. NEWS & WORLD REPORT (2015), <http://www.usnews.com/education/best-high-schools/new-york/rankings?int=983308> [https://perma.cc/AD4R-KEKF]. The schools are also generally recognized as producing extremely talented graduates. See William Lynch III, *Toward a Fairer Admissions Process*, HUFFINGTON POST (July 8, 2014), http://www.huffingtonpost.com/-william-lynch-iii/toward-a-fairer-admission_b_5568204.html [https://perma.cc/BNN7-BZ57] (“These elite schools . . . have produced some of the best and brightest minds in history.”).

3. NAACP LEGAL DEF. & EDUC. FUND, NEW YORK CITY SPECIALIZED HIGH SCHOOL COMPLAINT app. A.1 (Sept. 27, 2012, 5:08 PM), http://www.naacpldf.org/files/case_issue/All%20Appendices.pdf [https://perma.cc/QD4E-SHTM] [hereinafter Appendix A.1].

4. Sophia Rosenbaum & Erica Pearson, *45% of New York City 8th-graders got into top high school choice: Education Dept.*, N.Y. DAILY NEWS (Mar. 11, 2014, 5:15 PM), <http://www.nydailynews.com/new-york/education/45-city-students-1-high-school-choice-article-1.1717700> [https://perma.cc/JGJ2-S52D].

5. Stuyvesant High School admitted only 19 (2%) African American students for their Fall 2012 Freshman Class and 32 (3.3%) Latino students out of 967 total offers. In the same year, Staten Island Technical High school admitted only 8 (2.2%) African American students and 10 (2.7%) Latino students out of 367 total offers. Appendix A.1, *supra* note 3, at 4.

States Department of Education's Office of Civil Rights (OCR). The LDF complaint alleges that the admissions process to New York City's eight Specialized High Schools causes a disparate impact on African American and Latino students in violation of Title VI of the Civil Rights Act.⁶ OCR began an investigation into the admissions process within months of the complaint's filing.⁷ OCR's traditional approach to resolving a complaint is to investigate the claim for which there is evidence of discrimination, issue a letter of findings regarding their investigation, and if necessary, work toward a voluntary agreement with the entity accused of discrimination that will resolve the substance of the complaint. These procedures have become more informal over time.⁸ The last time OCR commented publicly on the LDF complaint was in 2012 when they announced that they would be opening a federal investigation into potential civil rights violations alleged in the LDF complaint.⁹ The current status of this investigation and whether there are ongoing attempts to resolve any discrimination discovered by the investigation is unknown. Should OCR's investigation find merit in the LDF complaint, it will likely pursue some form of agreement with the Specialized High Schools, New York City, or New York State to rectify the discrimination.

Admission to the eight Specialized High Schools is based solely on one test, as mandated by a facially neutral state statute.¹⁰ Because of this, OCR's typical approach of working with schools and districts to negotiate a solution to harmful and discriminatory policies is curtailed at best, and may be entirely unavailable.¹¹ This Note will look at other instances where federal agencies have faced obstacles from state laws in enforcement proceedings, and analogize to the current complaint in order to explore the range of options available to OCR to resolve the complaint.

6. See NAACP LEGAL DEF. & EDUC. FUND, NEW YORK CITY SPECIALIZED HIGH SCHOOL COMPLAINT (Sept. 27, 2012), http://www.naacpldf.org/files/case_issue/Specialized%20High%20Schools%20Complaint.pdf [<https://perma.cc/KYD7-SVUY>] [hereinafter COMPLAINT].

7. Editorial, *The Elite Eight, on the Federal Radar*, N.Y. TIMES (Nov. 11, 2012), <http://www.nytimes.com/2012/11/12/opinion/the-elite-eight-high-schools-on-the-federal-radar.html?ref=opinion> [<https://perma.cc/WJS6-5G4L>].

8. See Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 500–02 (1987).

9. Editorial, *The Elite Eight, on the Federal Radar*, *supra* note 7.

10. N.Y. EDUC. LAW § 2590-g(12) (McKinney 1996).

11. See *infra* Part III.

Part I will provide background on the complaint, exploring the extent of the disparate impact caused by the admissions process to New York City's Specialized High Schools, as well as the arguments and proposed solutions in the LDF complaint. Part II will discuss the means by which OCR typically resolves complaints; the legal questions surrounding the LDF complaint, particularly in light of the recent Supreme Court decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹² and what relevant lessons can be applied from the enforcement actions of the United States Department of Housing and Urban Development (HUD) and the Environmental Protection Agency (EPA). Finally, Part III will identify potential strategies OCR can use to adjudicate the complaint effectively and increase access to the Specialized High Schools for African American and Latino students. This Note will conclude that OCR can and should take action to resolve the LDF complaint, despite the restrictions on resolution imposed by the state statute, and that the best option for resolution with minimal disruption to New York City and New York state students will be to reach an agreement implementing policies that increase the opportunity for admission of African American and Latino students.

II. A HISTORY OF EXCLUSION: BACKGROUND ON NYC'S SPECIALIZED HIGH SCHOOLS AND THE LDF COMPLAINT

Part I will discuss the history of New York City's Specialized High Schools and the LDF complaint. Part I.A will provide a brief history of the schools and the Specialized High Schools Admissions Test (SHSAT) including the civil rights investigation in the early 1970s that led to the passage of the state statute mandating the test-in method of admissions. It will conclude with a discussion of recent efforts by the city to address the racial disparities in these schools. Part I.B will take a closer look at the racial disparities in these schools compared with New York City schools at large and consider the arguments and proposed solutions in the LDF complaint.

12. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project*, 135 S. Ct. 2507 (2015).

A. THE SPECIALIZED HIGH SCHOOLS

The New York City high school admissions process is “the most extensive system of school choice in the country.”¹³ Students are not assigned to a school based on where they live; instead, all students wishing to attend high school in New York City must apply to at least one and up to twelve schools.¹⁴ That means 75,000 students apply to spots at 426 public high schools over the course of their 8th or 9th grade year, depending on what year the students conclude middle school.¹⁵ The different schools have various entry criteria: some select students based on grades or attendance requirements, others conduct a lottery, still others accept all students from a specific area of the city.¹⁶ The application system was revamped in 2004 to reduce the number of students who went “unmatched,” meaning they were not admitted to any school to which they had applied.¹⁷ That number dropped from 31,000 students during the application cycle in 2003 to 3,000 in 2004.¹⁸ Although a vast majority of students have been placed in their first-, second-, or third-choice schools since the reform, prospective students’ fear of not being placed in a high-performing school will likely always remain.¹⁹ As *The New York Times* has observed, “Good schools remain a scarce resource, especially in poor neighborhoods, and low-income and low-performing children are still more likely to end up in underfunded schools.”²⁰

Thus the appeal of the Specialized High Schools: they are a set of exceptionally prestigious, academically-rigorous public schools, with an admissions process separate from the city’s apply, rank, and match system. There are nine schools designated as Specialized High Schools, but eight are specialized for academics. All eight of these schools use the Specialized High School Admissions

13. *How to Apply*, INSIDESCHOOLS: THE CENTER FOR NEW YORK CITY AFFAIRS AT THE NEW SCHOOL (Jan. 5, 2014), <http://insideschools.org/high/how-to-apply> [https://perma.cc/4DQR-FJWL].

14. N.Y.C. DEP’T OF EDUC., HIGH SCHOOL (Jan. 5, 2014), <http://schools.nyc.gov/ChoicesEnrollment/High/default.htm> [https://perma.cc/Y5CS-MU5A].

15. Tracy Tullis, *How Game Theory Helped Improve New York City’s High School Application Process*, N.Y. TIMES (Dec. 5, 2014), <http://www.nytimes.com/2014/12/07/nyregion/how-game-theory-helped-improve-new-york-city-high-school-application-process.html> [http://perma.cc/K34H-WNHN].

16. *How to Apply*, *supra* note 13.

17. Tullis, *supra* note 15.

18. *Id.*

19. *Id.*

20. *Id.*

Test (SHSAT) as their sole criteria for admission.²¹ The ninth, Fiorello H. LaGuardia High School of Music & Art, has an admissions system involving the evaluation of portfolios and auditions.²² Of all the Specialized High Schools, Brooklyn Technical High School (Brooklyn Tech), Stuyvesant High School (Stuyvesant), and The Bronx High School of Science (Bronx Science) are the oldest, all founded before 1940.²³ They are the only three identified by statute as Specialized High Schools.²⁴ The other five were founded or designated as Specialized High Schools in the 2000s or later.²⁵

For the fall 2014 class, about 28,000 students applied for just over 5,000 admissions spots across the eight schools.²⁶ Bronx Science, Stuyvesant, and Brooklyn Tech are the three largest of the schools, collectively serving five times as many students as

21. *Specialized High Schools*, *supra* note 1.

22. As it does not use the same admissions procedures as the other eight, Fiorello will not be discussed in the remainder of this paper. The other eight schools referenced are: Brooklyn Technical High School; Stuyvesant High School; Bronx High School of Science; Staten Island Technical High School; Queens High School for the Sciences at York College; High School for Mathematics, Science, and Engineering at City College; High School for American Studies at Lehman College; and Brooklyn Latin School.

23. Brooklyn Tech has been operating since 1922, Stuyvesant since 1904, and Bronx Science since 1938. Though Bronx Science admitted women in the mid-40s, Stuyvesant and Brooklyn Tech did not go co-ed until the late 60s and early 70s. *School History*, BROOKLYN TECHNICAL HIGH SCHOOL (Nov. 2014), www.bths.edu/school_history.jsp [<https://perma.cc/ZRJ2-L8S9>]; *History of the School*, STUYVESANT HIGH SCHOOL (Nov. 2014), www.stuy.edu [<https://perma.cc/NL4C-T2V2>]; *History*, THE BRONX HIGH SCHOOL OF SCIENCE (Nov. 2014), http://www.bxscience.edu/apps/pages/index.jsp?uREC_ID=219378&type=d&termREC_ID=&pREC_ID=433038&hideMenu=false [<https://perma.cc/Q6GB-7756>].

24. N.Y. EDUC. LAW § 2590-h (McKinney 2013).

25. Brooklyn Latin opened in 2006; The High School for Math, Science and Engineering at City College, Queens High school for the Sciences at York College, and the High School for American Studies at Lehman College in 2002; Staten Island Tech in 1988 (though it was not designated a Specialized High School until 2005). *About TBLS*, THE BROOKLYN LATIN SCHOOL (Nov. 2014), <http://www.brooklynlatin.org/podium/default.aspx?t=118531> [<https://perma.cc/TU9A-XRWP>]; *Principal's Message*, THE HIGH SCHOOL FOR MATH, SCIENCE & ENGINEERING AT THE CITY COLLEGE OF NEW YORK (Nov. 2014), <http://www.hsmse.org/school-information/principals-message/> [<https://perma.cc/8DSK-FAUY>]; QUEENS HIGH SCHOOL FOR THE SCIENCES AT YORK COLLEGE (Nov. 2014), www.qhss.org/home [<https://perma.cc/4YCG-KA82>]; *HSAS: Brief Description of School*, HIGH SCHOOL OF AMERICAN STUDIES (Nov. 2014), <http://www.hsas-lehman.org/about/mission.html> [<https://perma.cc/3YMQ-929F>]; *History*, STATEN ISLAND TECHNICAL HIGH SCHOOL (Nov. 2014), http://www.siths.org/apps/pages/index.jsp?uREC_ID=170343&type=d [<https://perma.cc/6QM3-EM2U>].

26. N.Y.C. DEPT OF EDUC., 2014–2015 SPECIALIZED HIGH SCHOOLS STUDENT HANDBOOK 5–8 (Jan. 15, 2015), http://schools.nyc.gov/NR/rdonlyres/1FDB8183-E675-42D9-A17C-237C18E4C255/0/SHSAT_StHdbk_201415.pdf [<https://perma.cc/B9ZD-T7L7>] [hereinafter HANDBOOK].

the other five schools combined.²⁷ All eight schools are widely recognized as prestigious, promising excellent outcomes for their students. As New York City's Comptroller noted, "[a]dmittance to these schools is a ticket to success. They bring an almost certain guarantee of high school graduation, in a city where the graduation rate is 65 percent, and an almost certain guarantee of college acceptance," and over twenty-five percent of students go on to an Ivy League or "other top tier" college.²⁸

1. *Codifying Low Enrollment: The Specialized High Schools Admissions Test*

Under New York State Education Law § 2590-h(1)(b), admission to the Specialized High Schools "shall be solely and exclusively by taking a competitive, objective and scholastic achievement examination . . ."²⁹ The single test used is the SHSAT, a two-and-a-half hour multiple-choice exam that measures verbal and mathematics skills.³⁰ By statute, no other criteria can be created or evaluated. The method of determining admission based on students' scores is explained clearly in the LDF complaint:

As part of the application process, each student is asked to list the Specialized High Schools he or she wants to attend in order of preference before taking the SHSAT. Once the composite scores on the SHSAT are finalized, the scores of all the thousands of test-takers are ranked in descending order, from highest to lowest. Beginning with the highest scorer, the NYCDOE offers each student admission to his or

27. COMPLAINT, *supra* note 6, at 6. This is important to the consideration of potential solutions discussed in Part III. The three schools that serve the largest number of students are named specifically in the statute requiring the use of a single test, which further restricts the options available to reform their admissions process. N.Y. EDUC. LAW § 2590-h(1)(b) (McKinney 1996).

28. John C. Liu, *Bringing Diversity to New York City's Specialized High Schools*, HUFFINGTON POST (Mar. 30, 2012, 5:34 PM), http://www.huffingtonpost.com/john-c-liu/nyc-specialized-high-schools_b_1391712.html [<https://perma.cc/8EWK-92QH>]. See also Lynch III, *supra* note 2.

29. N.Y. EDUC. LAW § 2590-g(12) (McKinney 1996). For a clear compilation of all relevant laws, including older provisions to which the main provisions refer, see NAACP LEGAL DEF. & EDUC. FUND, NEW YORK CITY SPECIALIZED HIGH SCHOOL COMPLAINT app. C (Sept. 27, 2012), http://www.naacpldf.org/files/case_issue/All%20Appendices.pdf [<https://perma.cc/QD4E-SHTM>].

30. COMPLAINT, *supra* note 6, at 1.

her first-choice school if that school has seats available. . . . If all seats in the student's first-choice school have already been offered to higher scorers, the student is offered admission to his or her second-choice school, if seats are available and so on. The NYCDOE proceeds down the list of students and schools until there are no remaining open seats in any of the eight Specialized High Schools. . . . Students who are not offered admission to any Specialized High School fall back into the general pool of students vying for admission to other New York City high schools.³¹

As early as 1969, Bronx Science was the target of student protests demanding better support for African American and Puerto Rican students, including curriculum changes and reforms to offer admission to more students of color.³² In January 1971, a Manhattan community board filed a complaint with the New York City Board of Education, seeking to change the admissions policies because the "culturally' oriented" admissions exam was "screen[ing]' out black and Puerto Rican students who could succeed at the school" and "90 percent of [Bronx High School of Science's] 3,200 students were white."³³ The Chancellor of the New York City Department of Education launched an investigation into the admissions process at the three Specialized High Schools in existence at the time, although he denied the allegations made in the complaint brought forth by the Manhattan community board.³⁴

While the investigation was ongoing, the New York State legislature passed the current law mandating a single admissions test as the sole basis for admissions. The law was passed under the guise of preventing a "lowering of standards."³⁵ Yet the surrounding circumstances and other actions by the legislature raise questions as to the true motive behind the law's adoption. It may be that the legislature codified the single-test admissions policy in order to continue the limited enrollment of African American

31. COMPLAINT, *supra* note 6, at 8.

32. Andrew H. Malcolm, *Bronx Science School Undaunted by Radicals' Moves*, N.Y. TIMES, Apr. 29, 1969, at 47, 90.

33. M.S. Handler, *Bronx High School of Science Accused of Bias in Admissions*, N. Y. TIMES, Jan. 22, 1971, at 44.

34. *Id.*

35. Fred M. Hechinger, *Challenge to the Concept of the Elite*, N.Y. TIMES, May 23, 1971, at E12.

and Latino students in light of the Chancellor's civil rights investigation into minority enrollment. Further, the legislature also attempted to eliminate Discovery Programs, which functioned to create opportunities for students from disadvantaged backgrounds to gain admission to the schools, but was only successful in capping the percentage of students that could be admitted to Stuyvesant High School through the program at 14%.³⁶ In November 1971, the investigatory committee released its recommendations stating "admissions to these schools 'should be based on multiple criteria that are objective and equitable in nature,'" but it was too late.³⁷ The state legislation had already gone into effect and has not been overturned since.

2. *A Limited Gateway for Disadvantaged Students: Discovery Programs*

The statute authorizing the Specialized High Schools also permits the schools to run Discovery Programs, which prepare disadvantaged students for the SHSAT and assist them in gaining admission to the Specialized High Schools.³⁸ To meet the statutory criteria for participation through the Discovery Program, a student must: (1) take the SHSAT and obtain a score "below the cut-off score;" (2) be "certified by his local school as disadvantaged;" (3) be "recommended by his local school as having high potential" for success at the Specialized High School sponsoring the program; and (4) successfully participate in "a summer preparatory program administered by the special high school, demonstrating thereby his ability to successfully cope" with the rigors of the Specialized High School.³⁹ To be certified as disadvantaged, a student must meet one of several criteria, including attending a Title I school and being individually eligible for free or reduced lunch, having a family income below a threshold set by the Department of Social Services, or recently immigrating to the United States and belonging to a household with a primary language other than English.⁴⁰

36. *Id.* For a discussion of Discovery Programs, see *infra* Part I.A.2.

37. Leonard Buder, *New Entry Policy at 4 Special Schools is Urged: Group Appointed by Scribner Against Competitive Tests as the Sole Criterion*, N.Y. TIMES, Nov. 24, 1971, at 29.

38. N.Y. EDUC. LAW § 2590-g(12)(d) (McKinney 1996).

39. *Id.*

40. HANDBOOK, *supra* note 26, at 19.

Unfortunately, schools are not required to run these programs, and the number of participating students is very small. Most notably, neither Stuyvesant nor Bronx Science have run a Discovery Program since the early 2000s.⁴¹ For schools that do run the program, larger percentages of African American and Latino students participate than those in the general admissions pool. Among Discovery Program participants seeking admission to the Fall 2011 class at Specialized High Schools, nearly 23% were African American and nearly 22% were Latino, percentages roughly even to the percentages of each group that took the SHSAT.⁴² Yet, there were only ninety-two participants across all Discovery Programs that year, and “the number of students admitted through the Discovery Program has decreased over time” due to several schools ending their participation and overall reductions in the program.⁴³

B. RACIAL DISPARITIES IN ADMISSIONS AND RECENT ATTEMPTS TO ADDRESS THEM

Between 30% and 35% of white and Asian-American students who take the SHSAT receive an offer to one of the eight Specialized High Schools, compared to only 5–7% of African American and Latino students.⁴⁴ The demographics of these eight schools do not reflect New York City’s public high school system, where African American students make up almost 30% of the student population and Latino students almost 39%, compared to 13% white students and 17% Asian American students.⁴⁵ The proportions of students taking the test are not representative of the overall student population, though; African Americans made up 23% of test-takers, Latinos 22%, Asian Americans 26%, and white

41. Megan Finnegan & Stephon Johnson, *Benign Neglect?: Who Killed the Discovery Program*, OUR TOWN (May 12, 2011), <http://issuu.com/ourtown/docs/051111/8> [https://perma.cc/V7FC-B2TN].

42. COMPLAINT, *supra* note 6, at 26.

43. *Id.* at 26–27.

44. COMPLAINT, *supra* note 6, at 16; Rosenbaum & Pearson, *supra* note 4, at 2.

45. Press Release, The Education Trust, Statement from The Education Trust in Support of the NAACP Legal Defense and Educational Fund and Others’ Complaint Against New York City’s Specialized High Schools Admission Process (Nov. 29, 2012), https://edtrust.org/press_release/statement-from-the-education-trust-in-support-of-the-naacp-legal-defense-and-educational-fund-and-others-complaint-against-new-york-citys-specialized-high-schools-admission-process [https://perma.cc/UV9G-8ADX].

students 15%.⁴⁶ Yet, even when the reduced proportions of African American and Latino students taking the test are taken into account, the difference between proportions of acceptances and applicants is large for these racial groups as compared to those same differences for white and Asian American students.

The Specialized High Schools are not the only public schools with selective admissions processes in New York City. Other selective high schools use multiple measures for admissions, rather than the single test measure used by the Specialized High Schools; these schools have higher percentages of African American and Latino students than the Specialized High Schools.⁴⁷ One editorial author explains that African American students “make up 9% of the enrollment in multiple measure schools — slightly higher than the 6% at the test schools. Latinos comprise 18% (a jump from the 7% at the test-in schools), while Asians account for 31% (down from 60% at test-in schools.)” of the “collective student bodies” of certain multiple-measure schools, specifically the Townsend Harris, Bard Manhattan, Bard Queens, Eleanor Roosevelt, Beacon, Lab School for Collaborative Studies, Baccalaureate School for Global Education and Millennium schools.⁴⁸ Though it has been argued that these multiple-measures schools are “whiter and wealthier” than the Specialized High Schools, the larger percentages of white students are offsetting lower percentages of Asian students, while still resulting in higher percentages of African American and Latino students.⁴⁹ Importantly, the 9% and 18% representations of African American and Latino students, respectively, in these schools’ student body populations is still well below their proportions in New York City’s overall public school population.⁵⁰

The dynamics causing the dramatic discrepancies are complicated and have been discussed at length by both academics and journalists. Several journalists and researchers have explored the test preparation and tutoring pursued within low-income Asian immigrant communities, as well as the high pressure to

46. COMPLAINT, *supra* note 6, at 9.

47. Editorial, *A Cram Course for Bill*, N.Y. DAILY NEWS (Oct. 27, 2014, 4:10 AM), <http://www.nydailynews.com/opinion/editorial-cram-bill-de-blasio-high-school-admissions-article-1.1986542> [<https://perma.cc/5QZ3-R64K>].

48. *Id.*

49. *Id.*

50. African American and Latino students comprise 30% and 40%, respectively, of the general public school population in New York City. Appendix A.1, *supra* note 3.

succeed that is prevalent among these communities.⁵¹ Some have argued that bias against Asian-Americans may be motivating the LDF complaint at the expense of providing equal opportunity to all New York City students.⁵² Research has also been conducted into the social and political dynamics operating among various racial and ethnic groups in the education context and the psychological effects of affirmative action policies on students of color.⁵³ Others have called into question whether the New York City Department of Education is providing adequate guidance for low-income Latinos navigating the high school admissions process.⁵⁴

51. See, e.g., Wei-Ting Lu, *Confucius or Mozart? Community Cultural Wealth and Upward Mobility Among Children of Chinese Immigrants*, 36 QUALITATIVE SOC. 303, 303 (2013) (arguing that Chinese immigrant communities “pursue enrollment in prestigious colleges by utilizing high cultural capital in classical music” rather than “sustain[ing] ethnic culture to foster educational success”); Kyle Spencer, *For Asians, School Tests Are Vital Steppingstones*, N.Y. TIMES (Oct. 26, 2012), http://www.nytimes.com/2012/10/27/education/a-grueling-admissions-test-highlights-a-racial-divide.html?pagewanted=all&_r=0 [https://perma.cc/P54E-69TD] (exploring the test preparation done by children of Asian immigrants and the pressure to succeed); Beth Fertig, *Around Sunset Park, Tutoring is Key to Top High Schools*, WNYC (Mar. 12, 2013, 4:00 AM), <http://www.wnyc.org/story/301916-around-sunset-park-tutoring-is-key-to-top-high-schools> [http://perma.cc/J24U-FEDD] (reporting that even among families living in areas with low average incomes, tutoring and test preparation are seen as necessary to gain admission to the Specialized High Schools).

52. See, e.g., Curtis Chin & Adam Wolman, *A Case of T.M.A.?*, HUFFINGTON POST (Oct. 22, 2013, 1:03 PM), http://www.huffingtonpost.com/curtis-chin/a-case-of-tma_b_4143283.html [https://perma.cc/C9MN-4C3W] (looking at whether a perception of “too many Asians” has influenced the LDF complaint, and requesting that solutions “take into account all disadvantaged minorities, including poor Asian American families, who probably shouldn’t be lumped in with those considered to have unfair advantages when it comes to academic success”); Michael Meyers, *The Civil Rights Wrong of Blaming The Elite High School Admission Test*, HUFFINGTON POST (Nov. 26, 2012, 11:56 AM), http://www.huffingtonpost.com/michael-meyers/race-and-high-school-admissions_b_1968445.html [https://perma.cc/8KF7-95UB] (arguing that the SHSAT provides an equal opportunity to all eighth grade students, and Asian American students who are better prepared score higher).

53. See, e.g., Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998) (discussing the potentially negative intergroup relations that may result from affirmative action policies, concluding that affirmative action policies are still better than the alternative solutions to underrepresentation of certain groups); Allison Roda & Amy Stuart Wells, *School Choice Policies and Racial Segregation: Where White Parents’ Good Intentions, Anxiety, and Privilege Collide*, 119 AM. J. EDUC. 261 (2013) (presenting qualitative research that although white, privileged parents value diversity in their children’s schools, they are more concerned with gaining admission to the “best” schools and leverage any network or other advantage they have to do so); Carol L. Schmid, *Educational Achievement, Language-Minority Students, and the New Second Generation*, 74 SOC. OF EDUC. 71 (2001) (examining factors contributing to the “open absorption and educational achievement” of children of immigrants since the 1980s who are predominantly Asian American and Latino).

54. See, e.g., CAROLYN SATTIN-BAJAJ, *INFORMING IMMIGRANT FAMILIES ABOUT HIGH SCHOOL CHOICE IN NEW YORK CITY: CHALLENGES AND POSSIBILITIES* (2009),

While there are numerous complicated, interdependent factors at play in the admissions gap faced by African American and Latino students, one point worth emphasizing is that poverty cannot be the sole cause of the gap. Of the top twenty zip codes in New York City with the highest admissions rates to the Specialized High Schools, three — those including the Sunset Park, Borough Park, and Dyker Heights neighborhoods in Brooklyn — have average family incomes that range from \$35,000–\$40,000 for a family of four.⁵⁵ A student from a family in that income range would qualify for the free lunch program, a common placeholder for low income status among public school students.⁵⁶ In fact, fifty-two percent of Specialized High Schools students qualify for free or reduced lunch.⁵⁷ One Asian parent who has two children enrolled in Specialized High Schools explained that “even the lowest paid immigrants scrape up enough money for tutoring because those high schools are seen as the ticket to a better life,” demonstrating that the importance of access to tutoring cannot be ignored, even for low-income students.⁵⁸ Despite the complex social and cultural factors at play, the LDF complaint focused narrowly on the disparities faced by African American and Latino students. These disparities are not in dispute, even if their underlying causes may be. As such, this Note will focus narrowly on the options available to OCR to remedy the negative impact of the current admissions policy on African American and Latino students.

C. CHALLENGING LOW ENROLLMENT OF AFRICAN AMERICAN AND LATINO STUDENTS: THE LDF COMPLAINT

Recognizing the disparity in admission of African American and Latino students as compared to their peers, LatinoJustice PRLDEF, and The Center for Law and Social Justice at Medgar Evers College filed a complaint with the U.S. Department of Education’s Office of Civil Rights alleging illegal racial discrimination under Title VI of the Civil Rights Act of 1964 in the admissions

http://www.vanderbilt.edu/schoolchoice/conference/papers/Sattin_COMPLETE.pdf
[<https://perma.cc/85NF-EXQG>].

55. Fertig, *supra* note 51.

56. *Id.*

57. Editorial, *A Cram Course for Bill*, *supra* note 47.

58. Fertig, *supra* note 51.

process for the eight Specialized High Schools.⁵⁹ The relevant federal regulation promulgated under Title VI states that federal fund recipients may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin.”⁶⁰ LDF argues that this Title VI regulation permits OCR enforcement for disparate impact claims, even without the presence of discrimination motivating the policy in question.⁶¹ The complaint identifies the following three-pronged test used in case law to analyze disparate impact claims: (1) “a prima facie case of a Title VI disparate-impact violation is established if a recipient of federal funds uses selection criteria that have the effect of disproportionately excluding students of a particular racial or ethnic group”;⁶² (2) if a prima facie case exists, the burden is on the respondent to “demonstrate that the selection criteria are ‘required by educational necessity’”;⁶³ and (3) there must be no alternatives to an educationally necessary but discriminatory practice that would meet respondent’s needs with a less discriminatory effect in order for the institution to escape liability under Title VI.⁶⁴

The complaint advances a theory of discrimination under the disparate impact framework above, and suggests alternatives to the current SHSAT that could be adopted to address the racial inequalities.⁶⁵ First, as discussed above, the complaint discusses the “extreme disparity in acceptance rates” that “translates into a profound lack of access and a long-standing lack of diversity in

59. The complaint was filed on behalf of Alliance for Quality Education, Black New Yorkers for Educational Excellence, the Brooklyn Movement Center, Community Service Society of New York, DRUM — Desis Rising Up and Moving, Garifuna Coalition USA Inc., La Fuente, Make the Road New York, New York Communities for Change, NYC Coalition for Educational Justice, and UPROSE. Nineteen individuals and organizations have also published letters in support of the complaint and a thorough investigation by the Office of Civil Rights. COMPLAINT, *supra* note 6.

60. 34 C.F.R. § 100.3(b)(2).

61. COMPLAINT, *supra* note 6, at 14.

62. *Id.* (citing *Larry P. ex rel. Lucille P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984); U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL 49–50 (2001) [hereinafter TITLE IV LEGAL MANUAL]).

63. COMPLAINT, *supra* note 6, at 14 (citing *Riles*, 793 F.2d at 982 & nn.9–10).

64. *Id.* at 15 (citing *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Young By and Through Young v. Montgomery Cty. Bd. of Educ.*, 922 F. Supp. 544, 550 (M.D. Ala. 1996); TITLE VI LEGAL MANUAL, *supra* note 62, at 53; U.S. DEP’T OF EDUC., THE USE OF TESTS AS PART OF HIGH-STAKES DECISION-MAKING FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICY-MAKERS 25 (2000)).

65. COMPLAINT, *supra* note 6, at 22.

student enrollment.”⁶⁶ Second, it argues there can be no educational necessity requiring the use of single-test admissions because the New York City Department of Education has not proven the validity of this process.⁶⁷ Further than this, the complaint contends it would be legally impossible to prove the validity due to statistical uncertainty, the administration of several versions of the test, and an unusual scoring method that advantages students who can access test preparation services.⁶⁸ Additionally, the complaint questions whether the SHSAT is aligned to the curricula of public middle schools serving “high concentrations of low-income African American and Latino students” who may not have access to courses covering material on the exam.⁶⁹ Finally, the complaint identifies four other methods of conducting admissions, some combination of which would be less discriminatory than solely using the SHSAT, fulfilling the third prong of the test: employing multiple measures in the admissions process, evaluating scores on verbal and math sections separately (in place of the current composite score and rank-ordering of students), providing alternative methods of admission like the Discovery Program, and saving seats for the top students at each public middle school in New York City.⁷⁰

Opponents of the LDF complaint see the SHSAT as an objective test that is a measure of a child’s potential for success at a school for academically-gifted students. These opponents believe that moving toward holistic admissions will reduce the academic

66. *Id.* at 16.

67. *Id.* at 18.

68. *Id.* at 18–20 (“The SHSAT ranks students based on a single, ‘composite score,’ which combines the scaled score results of the verbal and math sections. Because the scaling of SHSAT scores awards more points per question as a test-taker approaches a perfect score on either the verbal or the math section, this unorthodox system of using only the composite score to rank students advantages those with a very high score on one section and a lower score on the other; in fact, such unbalanced scorers have a better chance of admission to a top-ranked school than students with relatively strong performance on both sections.”); see also David Herszenhorn, *Admission Test’s Scoring Quirk Throws Balance into Question*, N.Y. Times (Nov. 12, 2005), <http://www.nytimes.com/2005/11/12/nyregion/admission-tests-scoring-quirk-throws-balance-into-question.html> [<https://perma.cc/H6DY-ZWFB>] (noting that a student scoring in the 90th percentile on both sections would not gain admittance to his or her first choice schools, but a student scoring in the 99th percentile on one section and only the 50th percentile on the other, likely would).

69. COMPLAINT, *supra* note 6, at 21.

70. *Id.* at 22–28.

caliber of the students attending the Specialized High Schools.⁷¹ However, this argument ignores that educational resources are inequitably distributed across the city — African American and Latino students are more likely to attend schools that are under-resourced, have more inexperienced teachers, and face lower per-student funding.⁷² African American males are less likely to be tested for gifted and talented programs at a young age.⁷³ Without intervention, the inequalities African American and Latino students experience in elementary and middle school will continue through their high school experience.⁷⁴ Without access to adequate preparation for the SHSAT, whether through their middle schools or programs like Discovery Programs, these students are unable to have their ability to succeed at a Specialized High School accurately assessed by the test. If adequate preparation cannot be provided to all students, a test is no longer a fair, objective assessment of students' abilities.

On November 11, 2012, over a month after the complaint was filed, OCR announced it was opening an investigation into the admissions process for the eight Specialized High Schools in response to the LDF complaint.⁷⁵ No further federal action or announcements have been made regarding this complaint, so the current status of the investigation or whether any negotiation is underway are unknown. However, in September 2014, the New York City Department of Education, under the direction of Mayor de Blasio, announced a request for proposals to design and administer a new Standardized High School Admissions Test that would test skills taught under the Common Core State Standards.⁷⁶ Additionally, the New York Post reported that the revised

71. See generally Kate Taylor, *Despite Racial Disparity, Alumni Group Backs Test-Only Policy for Elite Schools*, N.Y. TIMES (Aug. 26, 2014), <http://www.nytimes.com/2014/08/27/nyregion/despite-racial-disparity-alumni-group-backs-test-only-policy-for-elite-schools.html> [<https://perma.cc/RKF6-7KVP>]; Dennis Saffran, *The Plot Against Merit*, CITY JOURNAL (Summer 2014), http://www.city-journal.org/2014/24_3_nyc-specialized-high-schools.html [<https://perma.cc/5495-ACET>].

72. MICHAEL HOLZMAN, SCHOTT FOUND. FOR PUB. EDUC., *A ROTTING APPLE: EDUCATION REDLINING IN NEW YORK CITY 9–12* (Ann Beaudry et al. eds., 2012), <http://schottfoundation.org/resources/education-redlining-new-york-city> [<https://perma.cc/NE4N-HFCT>].

73. *Id.* at 13–14.

74. *Id.* at 15.

75. Editorial, *The Elite Eight, on the Federal Radar*, *supra* note 7.

76. Request for Proposals, N.Y.C. Dep't of Educ., Specialized High Schools Admissions Test (SHSAT), RFP Number R1061, <http://schools.nyc.gov/Offices/DCP/Vendor/rfp/Default.htm> [<https://perma.cc/YB5T-WXYR>].

exam “would be vetted to ensure there’s no bias against African Americans, Latinos and other minorities,” would be available in twelve languages, and would include an essay.⁷⁷ While a new test could be an important step toward closing admissions gaps, it is not likely to remedy the disparate impact on African American and Latino students entirely. Many of the LDF complaint’s arguments would still merit investigation with a new version of the SHSAT. A single-test admissions policy disadvantages students who cannot access test preparation services, so the importance of the use of multiple measures and the development/expansion of alternative admissions programs remain crucial to remedying the disparate impact, regardless of what form a single test takes.

Finally, New York City Council Members introduced measures in late October 2014 that would address the diversity gaps at the Specialized High Schools.⁷⁸ These proposals would require public reporting of diversity data, ask the New York City Department of Education to recognize school diversity as a priority, and urge the State Legislature to amend the statute requiring the single-statute admissions policy.⁷⁹ Though limited in options for reforms due to the single-test requirement of New York State Education Law § 2590-h(1)(b), the proposals indicate an awareness of the gaps facing African American and Latino students seeking admission to the Specialized High Schools, and a critical determination to tackle the issue.

The Office of Civil Rights should take steps to ensure that the disparity in enrollment across the Specialized High Schools be rectified, given the questionable circumstances surrounding the statutory adoption of the test mandate and the clear data demonstrating the disparities that exist for African American and Latino students. The fact that the state mandates the use of a single test complicates the options available to OCR to rectify this disparity. The remainder of this Note will explore other areas of law from which OCR can learn in determining how best to resolve this complaint, and analyze the options available in light of these findings.

77. Aaron Short, *City’s Elite High School Test Getting a Major Overhaul*, N.Y. POST (Sept. 18, 2014, 3:44 AM), <http://nypost.com/2014/09/18/citys-elite-high-school-test-getting-a-major-overhaul> [<https://perma.cc/ED84-C73F>].

78. Elizabeth A. Harris, *New York City Council to Look at School Segregation*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/22/nyregion/new-york-city-council-to-look-at-school-segregation.html> [<https://perma.cc/P6QQ-A9D3>].

79. *Id.*

III. LEGAL AND ADMINISTRATIVE CONTEXT SUPPORTS OCR'S ABILITY TO RESOLVE THE LDF COMPLAINT

This Part will provide background that will be used in Part III to analyze the resolution approaches available to OCR. Part II.A will explore the two main legal concerns surrounding the LDF complaint: how recent Supreme Court decisions in *Alexander v. Sandoval* and *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* could affect the LDF complaint resolution, and how federal Title VI regulations preempt New York State Education Law § 2590-h(1)(b). Part II.B will discuss enforcement strategies currently used by OCR, and Part II.C will explore enforcement options used by the Department of Housing and Urban Development and the Environmental Protection Agency.

A. LEGAL CONCERNS DO NOT PREVENT OCR RESOLUTION OF THE COMPLAINT

There are two primary legal concerns surrounding the LDF complaint: whether disparate impact claims are permitted under Title VI of the Civil Rights Act and its associated regulations, and whether federal Title VI regulations preempt New York State Education Law § 2590-h(1)(b)'s requirement for one test for admission to the Specialized High Schools. Neither of these legal concerns should pose a significant obstacle to OCR's options for resolving the LDF complaint.

1. *Disparate Impact Claims Are Recognizable Under Title VI Regulations*

As discussed above, LDF has pursued its claim under Title VI of the Civil Rights Act of 1964, which prohibits racial, ethnic, and national origin discrimination in federally-funded programs. The claim is specifically brought under the Title VI regulations promulgated by the United States Department of Education, applicable to all programs receiving money from the Department.⁸⁰ Two types of legal claims are possible under Title VI and its accompanying regulations: (1) claims alleging disparate treatment, also

80. See *supra* Part I.C.

known as intentional discrimination, and (2) claims alleging disparate impact.⁸¹ Intentional discrimination claims are viewed by courts as being definitively within the scope of Title VI's statutory authority.⁸² Disparate impact claims under Title VI have been more controversial, as they are not expressly permitted within the text of the statute, which states "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."⁸³ In contrast, other titles of the Civil Rights Act — such as Title VII, focused on employment discrimination — do include explicit provisions for disparate impact claims. Further confounding the statutory ambiguity is the holding in *Regents of University of California v. Bakke* that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."⁸⁴ This has been explicitly stated in later cases as signifying that § 601 of Title VI bans solely intentional discrimination, though the Court has assumed without holding that a regulation prohibiting disparate impact may be valid under § 602.⁸⁵

Nevertheless, most federal agencies, including the Department of Education, have promulgated regulations under Title VI prohibiting policies that perpetuate a disparate impact against a protected group.⁸⁶ The Department of Education's Title VI regulation in 34 C.F.R. § 100.3(b)(2) prohibits recipients of Department of Education funding from "utiliz[ing] criteria or methods of

81. Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1776 (2003) [hereinafter *After Sandoval*].

82. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (stating "it is . . . beyond dispute . . . that § 601 [of the Civil Rights Act] prohibits only intentional discrimination.").

83. 42 U.S.C. § 2000d (2012).

84. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978).

85. *Alexander v. Sandoval*, 532 U.S. 275, 279–81 (2001).

86. See, e.g., 34 C.F.R. § 100.3(b)(2), (3) (2015) (Department of Education); 40 C.F.R. § 7.35(b) (2015) (Environmental Protection Agency); 24 C.F.R. § 1.4(b)(2) (2015) (Department of Housing and Urban Development); 7 C.F.R. §§ 15.3(b)(2) (2016), 1901.202(a)(2)(vii) (Department of Agriculture); 32 C.F.R. § 195.4(b) (2015) (Department of Defense); 10 C.F.R. § 1040.13(e), (d) (2015) (Department of Energy); 45 C.F.R. § 80.3(b)(2), (3) (2015) (Department of Health and Human Services); 24 C.F.R. § 42.104(b)(2), (3) (2015) (Department of Justice); 29 C.F.R. § 31.3(b)(2), (3) (2015) (Department of Labor); 49 C.F.R. § 21.5(b)(2), (3) (2015) (Department of Transportation); 38 C.F.R. § 18.3(b)(2), (3) (2015) (Department of Veterans Affairs); 14 C.F.R. § 1250.103-2(b) (2016) (National Aeronautics and Space Administration); see also *After Sandoval*, *supra* note 81, at 1776; Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1156 n.8 (2000).

administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”⁸⁷ The text of regulations promulgated by other federal departments for their funding recipients is substantially similar to this text.⁸⁸

The Department of Education regulation was promulgated two years after the decision in *Bakke*, and has not been amended by Congress to remove disparate impact prohibitions in light of any of the court cases holding a narrow reading of Title VI.⁸⁹ Despite *Bakke*, the Supreme Court also has not ruled explicitly in a majority opinion on the validity of these regulations.⁹⁰ While there was no majority opinion in *Guardians Ass’n v. Civil Service Commission of New York City*,⁹¹ the Court later recognized that case as holding “that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI.”⁹² More recently, for the purposes of deciding *Alexander v. Sandoval*, the Court assumed that disparate impact regulations are within the scope of authority of an agency enforcing Title VI.⁹³ In *Sandoval*, the Court held that there is not a private right of action to enforce disparate impact regulations, citing lack of Congressional intent to create such an action.⁹⁴ This holding eliminated private enforcement as a mechanism for Title VI disparate impact claims, forcing OCR to take a significantly more active enforcement role if it wants to continue to prevent discrimination through disparate impact.⁹⁵ Whether *Sandoval* alone means the Supreme Court does not look favorably on disparate impact claims generally is difficult to say; on one hand, the Court did assume for the purpose of deciding the case that the regulations were valid. On the other, it made such claims substantially more difficult to bring.

87. 34 C.F.R. § 100.3(b)(2) (2015).

88. See sources cited *supra* note 86.

89. *Bakke* was decided in 1978, the regulations were promulgated in 1980. See 45 Fed. Reg. 30918 (May 9, 1980).

90. After *Sandoval*, *supra* note 81, at 1777.

91. *Guardians Ass’n v. Civil Serv. Comm’n of N.Y.C.*, 463 U.S. 582 (1983).

92. *Alexander v. Choate*, 469 U.S. 287, 293 (1985).

93. *Alexander v. Sandoval*, 532 U.S. 275, 281–82 (2001).

94. *Id.* at 293.

95. See generally *After Sandoval*, *supra* note 81.

In *Ricci v. DeStefano*, decided in 2009, the Court demonstrated reluctance toward policies set in place to avoid creating a disparate impact.⁹⁶ The case was brought to prevent New Haven, Connecticut from instituting policies that would intentionally discriminate against white firefighters in order to prevent a disparate impact on African American firefighters under Title VII employment discrimination provisions.⁹⁷ Unlike Title VI, Title VII recognizes a disparate impact claim explicitly and sets forth the burden of proof necessary to establish such a claim.⁹⁸ The Court held that despite the existence of a disparate impact, the city did not demonstrate sufficient evidence that it would be subject to disparate impact liability because the test was connected to job responsibilities and there was no evidence of the availability of a test that did not produce such a disparate impact.⁹⁹ Further, the Court viewed its role at the core of the case as resolving the discrepancy created in Title VII's recognition of both disparate impact and intentional discrimination claims when preventing a disparate impact may entail intentional discrimination, stating that intentional discrimination liability would be a valid defense against disparate impact liability.¹⁰⁰ In resolving this conflict in favor of intentional discrimination claims, it raised questions regarding the future of disparate impact claims generally. If policies to avoid disparate impacts can only be developed when there is strong evidence of likely liability for statutorily-provided disparate impact claims, a burden higher than the simple existence of a disparate impact, it does not bode well for enforcement of disparate-impact regulations that no longer entail a private right of action after *Sandoval*.

In deciding *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court spoke to the question of whether disparate impact regulations are enforceable under Title VI directly.¹⁰¹ The Inclusive Communities Project assists African Americans with low-income housing vouchers in obtaining housing in communities that are predomi-

96. *Ricci v. DeStefano*, 557 U.S. 557 (2009).

97. *Id.* at 574–75.

98. 42 U.S.C. § 2000e-2(a), (k) (2012).

99. *Ricci*, 557 U.S. at 592–93.

100. *Id.* at 593.

101. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

nantly white.¹⁰² The Inclusive Communities Project filed a claim that the housing tax credit policies of the Texas Department of Housing and Community Affairs cause a disparate impact on African Americans in violation of the Fair Housing Act, and the court for the Northern District of Texas agreed.¹⁰³ The tax credit produces a disparate impact on African Americans, as it results in more low-income housing in predominantly African American neighborhoods, perpetuating segregated communities and making their attempts to place African Americans in predominantly white communities more difficult.¹⁰⁴ The trial court did not find intentional discrimination, but did rule in favor of Inclusive Communities on the disparate impact claim and approved a remedial plan.¹⁰⁵ The Fifth Circuit reversed and remanded for further proceedings in accordance with the U.S. Department of Housing and Urban Development's guidelines for establishing a disparate impact claim.¹⁰⁶ These guidelines employ a three-prong approach that is the functional equivalent of that used by OCR in the Department of Education.¹⁰⁷ The Texas Department of Housing and Community Affairs filed a writ of certiorari with the U.S. Supreme Court challenging the validity of disparate impact regulations promulgated under the Fair Housing Act.¹⁰⁸ The Supreme Court held that disparate impact claims could be brought under the Fair Housing Act, but reversed and remanded the Fifth Circuit's decision for further investigation of the reasons behind the policy decisions made by the Texas Department of Housing. The Court held that liability for disparate impact could not be "based solely on a showing of statistical disparity," requiring that the party whose policies are challenged be given the opportunity to offer legitimate reasons for choosing a policy that resulted in a disparate impact.¹⁰⁹ The Court warned that disparate impact

102. *Inclusive Cmty. Project, Inc. v. Texas Dep't of Hous. & Cmty. Affairs*, 747 F.3d 275, 277 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 46 (2014).

103. *Id.* at 278–79.

104. *Id.* at 279.

105. *Id.* at 280.

106. *Id.* at 282–83.

107. *Id.* at 282 (citing 24 C.F.R. § 100.500(c)). For a discussion of the standard used to evaluate OCR's regulations, see *infra* Part I.C.

108. *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 747 F.3d 275 (5th Cir. 2014), *petition for cert. filed*, 2014 WL 1989121 (U.S. May 13, 2014) (No. 13-1371).

109. *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2522–23 (2015).

litigation should not “second-guess which of two reasonable approaches” should be followed in making a policy determination.¹¹⁰ Despite this limitation, the decision bodes well for the future of disparate impact cases, and specifically for the LDF complaint.

Finally, claims under New York City and New York State law are unlikely to provide a remedy. New York City human rights law does expressly recognize a right of action for policies that produce a disparate impact against a protected class of individuals, but contains an explicit exception for standardized tests.¹¹¹ At the state level, the New York Court of Appeals has held that disparate impact claims are insufficient to violate the state Equal Protection clause.¹¹² Thus, while the policy of the SHSAT may be challenged at the city level, both the standardized test exception and state-law preemption would likely be triggered, and the disparate impact claim would not be successful. Federal-level enforcement is left as the best option for resolution of the subject matter of the LDF complaint.

2. *Title VI Preempts New York State Education Law § 2590-h(1)(b)*

Article VI, Clause 2 of the U.S. Constitution recognizes the Constitution and the laws made under it as “the supreme Law of the Land.”¹¹³ The Court has interpreted this to mean that whenever a state and federal law on the same topic are in conflict, the state law “must yield to the superior authority of the United States.”¹¹⁴ This principal applies to regulations promulgated pursuant to federal statutes as well.¹¹⁵ There are two ways for preemption to occur: if Congress passes legislation with “an intent to occupy a given field” or if state law makes it impossible to comply with federal law or “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.”¹¹⁶ New York State Education Law § 2590-h(1)(b) is not within a field occupied by Title VI, as it is a facially neutral law pertaining only

110. *Id.* at 2522.

111. N.Y.C. ADMIN. CODE § 8-107(4)(e) (2015).

112. *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 321 (1995).

113. U.S. CONST. art. VI, cl. 2.

114. *Gibbons v. Ogden*, 22 U.S. 1, 129 (1824).

115. *See, e.g., United States v. Locke*, 429 U.S. 89 (2000); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

116. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984).

to the Specialized High Schools in New York City, while Title VI is an anti-discrimination statute only applicable to programs receiving federal funds.¹¹⁷ In practice, should the disparate impact claim made by the LDF complaint be recognized despite the legal uncertainty of the validity of disparate impact claims under Title VI regulations, the conflict between New York State Education Law § 2590-h(1)(b)'s effects and the intent of OCR's regulations would become apparent under the second type of preemption. This is because the Supreme Court has held that when determining state and federal law conflicts, it must "consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."¹¹⁸ Under this concept, the New York State Education Law § 2590-h(1)(b) is preempted because the statute as currently enforced is in violation of Title VI.

New York State, like all states, currently receives funding through Title I of the Elementary and Secondary Education Act, placing it within the purview of OCR enforcement of Title VI's prohibition against discrimination in federally-funded programs.¹¹⁹ Any action to eliminate this funding as a means of enforcement could also render Title VI entirely inapplicable to New York Specialized High Schools. If Title VI no longer applies to the Specialized High Schools admissions process, there would no longer be a conflict between New York State Education Law § 2590-h(1)(b) and Title VI, and the claim of discrimination would be moot under federal law. This concern must be kept in mind when evaluating potential enforcement methods.

B. OCR'S ENFORCEMENT PROCEDURES AND STRATEGIES PROVIDE OPPORTUNITY TO RESOLVE THE COMPLAINT

OCR's mission is "to ensure equal access to education and to promote education excellence throughout the nation through vigorous enforcement of civil rights."¹²⁰ Toward this end, the office

117. N.Y. EDUC. LAW § 2590-h (McKinney 2015); 42 U.S.C. § 2000d (2012).

118. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

119. U.S. DEP'T OF EDUC., ESEA TITLE I LEA ALLOCATIONS — FY 2013 (Jan. 17, 2014), <http://www2.ed.gov/about/overview/budget/titlei/fy13/index.html> [https://perma.cc/Q7W3-GCZE].

120. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, OCR CASE PROCESSING MANUAL 2 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [https://perma.cc/TKQ2-V5HS] [hereinafter MANUAL].

receives complaints alleging civil rights violations, which it evaluates, investigates, and attempts to resolve.¹²¹ Under the formal, traditional approach to resolving a complaint, after completing an investigation that reveals that a party is out of compliance, OCR traditionally issues a letter of finding that also suggests a method or methods of coming into compliance without losing federal funding.¹²² After a letter of findings, should the party out of compliance fail to reach an agreement with OCR to come into compliance within a specified time frame, OCR begins enforcement proceedings that may include a referral to the Department of Justice for prosecution or withdrawal of federal funds.¹²³ These formal processes promote compliance with the ultimate resolution and create norms and precedents that can be used and referred to in future complaint adjudications. However, these processes also come at a high cost, financially and in terms of resource allocation, to both the federal government and other involved parties.¹²⁴

In recent years, OCR adjudication has grown increasingly informal, moving away from the formal procedures that were similar to litigation.¹²⁵ Such extreme measures as a formal letter of finding and referral to the Department of Justice are rarely necessary.¹²⁶ Most commonly, OCR allows entities under investigation to enter voluntary predetermination settlement agreements or the relevant complaint will be resolved without a formal settlement, due to an agreement with the investigated entity or withdrawal of the complaint.¹²⁷ These types of voluntary agreements have the benefit of being generated in cooperation with the noncompliant party, which indicates a willingness on its part to take the desired actions. They also save both the federal government and the noncompliant party significant time and resources in avoiding a lengthy investigation or court proceedings.¹²⁸ However, without the involvement of a court, they offer

121. *Id.*

122. Silver, *supra* note 8, at 501–03.

123. MANUAL, *supra* note 120, at 28.

124. Silver, *supra* note 8, at 589, 592.

125. *Id.* at 498 (discussing the rise of alternative dispute resolution, arguing that adjudication by OCR and the Equal Employment Opportunity Commission has grown increasingly informal).

126. *Id.* at 509.

127. *Id.* at 503.

128. *Id.* at 516–17.

little to hold the parties to the agreement outside the threat of further OCR investigation.¹²⁹

Scholarly opinions differ on the value of various methods of complaint resolution. One view, advanced by former OCR attorney Marjorie Silver, advocates for procedures that vary to fit the issue in any specific complaint. The procedure chosen for any given complain would take into account a variety of factors including whether the complaint was brought by an individual or class, the availability of retrospective and prospective remedies, and the intent of the statute in question.¹³⁰ This view argues against negotiations prior to the initiation of an investigation or prior to the announcement of the results of an investigation, as there is little incentive for adherence to an agreement achieved prior to an investigation, and the secrecy surrounding agreements reached prior to the announcement of results of an investigation does little to deter future discrimination.¹³¹ Although Silver recognizes the benefits of the finality and enforceability of litigation at the cost of expediency and high expense, she prioritizes the benefits of flexibility and buy-in from both parties that result from mediation.¹³² She argues in favor of an approach that begins with voluntary mediation, and turns to enforcement or litigation only when an agreement cannot be reached.¹³³

In contrast, Olatunde Johnson, a Columbia Law professor who has written extensively on civil rights law, has written about the potential for private enforcement actions under Title VI, like the complaint in question here.¹³⁴ She recognizes the limitations imposed by the courts on bringing disparate impact claims, most notably in *Alexander v. Sandoval*.¹³⁵ She also notes that Title VI was originally intended to provide “an alternative to litigation” for civil rights enforcement.¹³⁶ Within this context, Johnson argues that lawyers should play an important role in shaping Title VI enforcement through advocacy and administrative procedures, despite the curtailing of private litigation in *Sandoval*.¹³⁷ Her

129. See MANUAL, *supra* note 120, at 15.

130. Silver, *supra* note 8, at 528–35.

131. *Id.* at 591–94.

132. *Id.* at 589–92.

133. *Id.* at 590–91.

134. Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293 (2014).

135. 532 U.S. 275 (2001).

136. Johnson, *supra* note 134, at 1298.

137. *Id.* at 1332.

approach encourages civil rights lawyers to file administrative complaints, and her paper specifically mentions the LDF complaint as an example of this type of lawyering. She explains that the LDF complaint is significant as one part of a larger advocacy movement bringing attention to the Specialized High Schools admissions process, regardless of whether the issue is ultimately resolved at the agency level.¹³⁸ While the complaint may have been a tactical advocacy decision by LDF, that fact does not undermine its substantive merits discussed in Part I.C. The LDF complaint is precisely the type of “alternative to litigation” intended under Title VI, and the Department of Education should not miss the opportunity to resolve it.

Finally, another scholar suggests conducting pre-decision disparate impact analyses, requiring public participation in the development of solutions, and ensuring solutions respond to the results of the disparate impact analyses and the views expressed during public participation as potential avenues for disparate impact enforcement post-*Sandoval*.¹³⁹ Such measures would fit in well with proposed mediation or negotiation approaches, and highlight potential avenues for lawyer involvement around Title VI. Yet it is unclear whether these policy outcomes would be upheld in face of intentional discrimination charges after *Ricci v. DeStefano*. Additionally, such measures would not help resolve the LDF complaint, where students face an entrenched system perpetuating inequalities, rather than a new potential policy that has yet to be implemented.

C. ENFORCEMENT STRATEGIES FROM OTHER AREAS OF LAW SUPPORT OCR’S ABILITY TO RESOLVE THE COMPLAINT

Many other federal agencies enforce regulations similar to OCR’s disparate impact regulations, and other areas of law provide broader lessons from which OCR may draw in deciding how to resolve the LDF complaint. Part II.C.1 will look at the U.S. Department of Housing and Urban Development as an example of an agency that has successfully withheld funds from noncompliant parties. Part II.C.2 will look at how the Environmental

138. *Id.* at 1326–27.

139. *After Sandoval*, *supra* note 81.

Protection Agency handles both its civil rights complaints and federal-state preemption conflicts.

1. *The Department of Housing and Urban Development Has Successfully Withheld Funds from Noncompliant Entities*

The U.S. Department of Housing and Urban Development (HUD)'s Office of Fair Housing and Equal Opportunity, like OCR, accepts complaints of civil rights law violations (including violations under Title VI) and investigates those which it believes may have merit.¹⁴⁰ If discrimination is found, it attempts to negotiate an agreement; if an agreement is not reached, it withdraws the funding it provides to the violating party.¹⁴¹ HUD also frequently reaches negotiated enforcement agreements for those claims resolved on the merits.¹⁴²

Unlike OCR, HUD has withheld funding from two noncompliant offenders in recent years. Beginning in Fiscal Year 2011, HUD had been withholding funds from the city of Joliet, Illinois after determining the city was discriminating against African Americans in violation of both the Fair Housing Act and the Housing and Community Development Act. Funds were reinstated upon reaching a settlement agreement in November 2013.¹⁴³ Similarly, HUD continues to withhold a variety of funds from Westchester County, New York for source-of-income discrimination in violation of the Fair Housing Act and other civil rights laws. It is currently reallocating only certain funds, while withholding additional funding. It has insinuated that the additional funds could also be reallocated.¹⁴⁴ The county must demonstrate that that it is now in compliance with requirements under Affirmatively Furthering Fair Housing regulations to avoid further withholding and reallocating of its funds.¹⁴⁵

140. FAIR HOUSING LAWS AND PRESIDENTIAL EXECUTIVE ORDERS, U.S. DEP'T OF HOUS. & URBAN DEV. (2016), http://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/FHLaws [<http://perma.cc/N856-32DF>].

141. April Kuehnhoff, *Holding on to Home: Preventing Eviction and Termination of Tenant-Based Subsidies for Limited English Proficiency Tenants Living in Housing Units with HUD Rental Assistance*, 17 GEO. J. ON POVERTY LAW & POL'Y 221 (2010).

142. U.S. DEP'T HOUS. & URBAN DEV., ANNUAL REPORT ON FAIR HOUSING 29 (2014), <http://portal.hud.gov/hudportal/documents/huddoc?id=2012-13annreport.pdf> [<http://perma.cc/583B-MDAL>].

143. *Id.* at 9–10.

144. *Id.* at 9.

145. *Id.*

These two examples demonstrate that it is possible for an agency to actually withhold funds to induce compliance, as Title VI suggests. It is important to note that these two claims were brought primarily under the Fair Housing Act and the amount of funds at stake are much smaller than those at stake under OCR's Title VI enforcement.¹⁴⁶ The larger amount of funds at stake for OCR both puts more pressure on the offending party to come into compliance and makes it more politically difficult to withhold the funds, as the impact on services will be larger. Nonetheless, these examples show that withholding of funds is a viable option, despite OCR's historical reluctance to use such means of enforcement.

2. *The EPA Enforces Title VI and Has Successfully Used Federal Preemption of State Law in its Enforcement*

In 1998, the EPA issued guidance reiterating that its regulations prohibit disparate impacts in environmental permitting and stated that the agency would accept complaints alleging such disparate impacts. The guidance, codified in its final form in 2006,¹⁴⁷ also specified what must be done to rectify instances of discrimination.¹⁴⁸ This guidance was issued based on EPA regulations similar to those enforced by OCR.¹⁴⁹ These regulations are, of course, subject to the same concern post-*Sandoval* and post-*Ricci* as those of OCR: that a private right of action is not available to enforce prohibitions on disparate impact and a court may hold plaintiffs to the higher bar of proving legal liability for disparate impact discrimination, rather than proving the simple existence of a disparate impact.

146. Compare the roughly \$1.5 million at stake annually in the Joliet, IL case to the \$84 million received by New York (Manhattan) County and nearly \$226 million by Bronx County in Title I funding. Karen Sorenson, *HUD Ends Fight with City over Evergreen Terrace Condemnation*, JOLIET PATCH (Nov. 5, 2013, 11:21 PM), <http://patch.com/illinois/joliet/hud-drops-opposition-to-citys-evergreen-terrace-condemnation-suit> [perma.cc/458B-AA4U]; U.S. DEP'T OF EDUC., YEAR 2013 TITLE I GRANTS TO LOCAL EDUCATIONAL AGENCIES — NEW YORK (2013), <http://www2.ed.gov/about/overview/budget/titlei/fy13/newyork.pdf> [perma.cc/VGV3-95VF].

147. Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance), 71 Fed. Reg. 14207, 14209 (Mar. 21, 2006).

148. Gregory L. Maxim, Comment, *The EPA's Title VI Bout — Remediating One Injustice With Another*, 30 MCGEORGE L. REV. 1091, 1100 (1999).

149. 40 C.F.R. § 35(b) (2015); 34 C.F.R. § 100.3(b)(2) (2015).

The EPA processes Title VI complaints, and maintains a list of complaints and their statuses.¹⁵⁰ Many of these complaints are rejected, ongoing, or referred to other agencies.¹⁵¹ Recent cases demonstrate the EPA's success in negotiating agreements to Title VI claims. One claim was investigated for both intentional discrimination and disparate impacts from a power plant proposal affecting residents of color in Avenal and Kettleman City, California.¹⁵² The parties involved the matter reached a settlement agreement resulting in the withdrawal of the complaint in 2013.¹⁵³ Like OCR, the EPA takes a significant amount of time to investigate and resolve complaints. This is exemplified by the fact that this complaint took over two years to reach a conclusion.¹⁵⁴ Most importantly, the EPA continues to accept disparate impact complaints for investigation.¹⁵⁵

Laws and regulations enforced by the EPA conflict with state and local laws in various ways. For example, in *Boundary Backpackers v. Boundary County*, the Supreme Court of Idaho held that a local ordinance limiting federal agency ability to manage federal land was preempted by several federal environmental laws.¹⁵⁶ The *Environmental Law Practice Guide* states that when dealing with federal-state preemption claims in the field “[t]he practitioner should closely examine the language of the two laws to see whether they can be harmonized.”¹⁵⁷ Based on the facts presented above, the SHSAT in its present form cannot be harmonized with the federal regulation prohibiting “methods of administration which have the effect of subjecting individuals to

150. U.S. ENVTL. PROT. AGENCY, COMPLAINTS FILED WITH EPA UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 (2016), <http://www2.epa.gov/ocr/complaints-filed-epa-under-title-vi-civil-rights-act-1964> [perma.cc/5SBW-4AYK].

151. *Id.*

152. U.S. Env'tl. Prot. Agency, Off. of Civ. Rts., Partial Acceptance and Referral of Administrative Complaint No. 11R-09-R9 (Aug. 6, 2010), http://www2.epa.gov/sites/production/files/2014-07/documents/11r-09-r9_accept-refer_complainant_redacted.pdf [perma.cc/P5P2-ZPGK].

153. U.S. Env'tl. Prot. Agency, Settlement Agreement for Administrative Complaint No. 11R-09-R9 (Feb. 1, 2013), http://www2.epa.gov/sites/production/files/2014-07/documents/11r-09-r9_settlement_redacted.pdf [perma.cc/LM9Y-BTNF].

154. *Id.*

155. U.S. Env'tl. Prot. Agency, Acceptance of Administrative Complaint No. 12R-13-R4 (Jun. 27, 2013), http://www2.epa.gov/sites/production/files/2014-05/documents/12r-13r4_accept_cmplt_redacted_0.pdf [perma.cc/S98Y-6XYM].

156. 913 P.2d 1141, 1148 (Idaho 1996) (holding that the state law “requirement stands as an obstacle to the accomplishment of the full purposes and objectives of Congress”).

157. Phillip Weinberg, *Federal-State Relationships*, in ENVIRONMENTAL LAW PRACTICE GUIDE: STATE AND FEDERAL LAW § 41.02 (Michael B. Gerrard ed., 1992).

discrimination because of their race, color, or national origin.”¹⁵⁸ The single-test admissions policy mandated by New York State Education Law § 2590-h(1)(b) has the effect of subjecting African American and Latino students to discrimination in direct contradiction to Title VI, as evidenced by their disproportionately low admissions rates under the SHSAT. The language of New York State Education Law § 2590-h(1)(b) leaves no room for an admissions policy other than a single test for three of the Specialized High Schools. Should OCR be unable to reach a negotiated agreement to remedy the disparate impact, the state statute would be preempted by Title VI, just as state laws only tangentially related to the EPA’s work have been preempted nonetheless by federal law that falls under the EPA’s enforcement.

IV. WHAT IS OCR’S BEST OPTION FOR RESOLVING THE COMPLAINT?

Short of an administrative closure, in which no findings are issued and for which none of the requisite conditions seem to apply to LDF complaint at the moment, OCR will issue a letter of findings or negotiate an informal negotiated agreement to resolve the LDF complaint.¹⁵⁹ While the letter of findings could state that OCR has found “insufficient evidence to support a conclusion of noncompliance,”¹⁶⁰ that would be a hugely detrimental outcome for African American and Latino students in need of better opportunities for admission to the Specialized High Schools. As discussed in Part I, the Specialized High Schools’ admissions process leads to disproportionately low enrollment of African American and Latino students, and alternative student selection processes could remedy this disparity. Some combination of these alternatives should be implemented and enforced through either a voluntary agreement before the conclusion of the investigation or through a formal negotiated agreement after an investigation yields factual findings. Part III.A will discuss the options available to improve the admissions process and remedy the disparate

158. 34 C.F.R. § 100.3(b)(2) (2015).

159. Instances include referral to another agency, prior resolution of a similar complaint, withdrawal of the complaint, and moot allegations made in the complaint. For the full list of instances for which administrative closure may be used, see MANUAL, *supra* note 120, at 10.

160. MANUAL, *supra* note 120, at 20.

impact under a negotiated agreement with the New York City Department of Education, such as the reinstatement of programs like the Discovery Programs and changes to the admissions process within the confines of New York State Education Law § 2590-h(1)(b). Part III.B will discuss the potential of withholding federal funds as a means of inducing compliance with a new regulation. Part III.C will explore resolution options available should OCR refer the case to the Department of Justice for litigation. This Part will demonstrate that the best option to improve African American and Latino students' opportunity for admission to these schools with minimal negative effects on New York City and State students generally is to reach an agreement that will reinstate Discovery Programs and to pursue alternative admissions procedures when possible.

A. A NEGOTIATED AGREEMENT TO IMPLEMENT PROGRAMS TO INCREASE AFRICAN AMERICAN AND LATINO ENROLLMENT IS POSSIBLE AND SHOULD BE PURSUED

Some form of negotiation with schools and districts that are pending or currently under investigation is one of the Department of Education's most commonly used methods of adjudicating a complaint.¹⁶¹ Here, several trends appear to indicate a high likelihood of successful resolution through negotiation. First, both the New York City mayor and City Council members have indicated a desire to address the problem of low enrollment of African American and Latino students at the Specialized High Schools, which bodes well for a positive outcome to negotiations to the maximum extent of the City's ability to resolve the issue.¹⁶² Second, as discussed in Part II.B, both the EPA and HUD have been able to successfully negotiate agreements to resolve Title VI complaints under their authority. Though a negotiated agreement could not completely eliminate the single-test admissions policy due to New York State Education Law § 2590-h(1)(b), an agreement nonetheless seems possible. There are several viable options available to the New York City Department of Education that in combination would reduce the disparate impact without overturning New York State Education Law § 2590-h(1)(b), in-

161. Silver, *supra* note 8, at 509.

162. See *supra* Part I.C.

cluding reinstatement of the Discovery Programs and adjustments to the admissions process that would be permitted despite the state statute.

1. *Reinstating Discovery Programs Would Provide Disadvantaged Students with Better Opportunity for Enrollment*

Discovery Programs allowing an alternative path to admission for disadvantaged students near the scoring cutoff on the SHSAT are explicitly permitted under the New York State statute requiring a single test as the sole admission criteria for the Specialized High Schools.¹⁶³ They have the potential to increase access for African American and Latino students, yet not all of the Specialized High Schools currently operate such programs. As the programs are clearly permitted within the provisions of the state statute, reinstating or creating them at each of the eight Specialized High Schools could be the easiest way to boost enrollment for African American and Latino students. A city policy or law requiring all eight Specialized High Schools to establish or re-establish these or similar programs could be an important part of a negotiated agreement that falls within the scope of the state statute.

However, the appropriateness and effectiveness of these programs as a remedy for racial enrollment disparities remains in dispute. On the one hand, as the programs are not linked explicitly to race, they will not be subject to intentional discrimination claims from non-African American and non-Latino students as a racially-targeted program could be.¹⁶⁴ On the other, reinstating these programs does not guarantee that higher numbers of African American and Latino students will enroll in the Specialized High Schools. There are many low-income students living in New York City, and it is possible that other students will also take advantage of these programs, potentially reducing space available to African American and Latino students. Further, even if the programs are reinstated, it is unlikely that there will be space for all students who wish to take advantage of them, given the budget constraints that pushed the city to eliminate the programs in the first place.¹⁶⁵ While these programs are an im-

163. N.Y. EDUC. LAW § 2590-g(12)(d) (1996).

164. For an example of such a claim, see *Ricci v. DeStefano*, 557 U.S. 557 (2009).

165. See Finnegan & Johnson, *supra* note 41.

portant step toward increasing enrollment opportunities for African American and Latino students, they will not erase the current enrollment disparity on their own.

2. *Changing the Current Admissions Process for the Schools Not Named in the Statute Would Reduce the Number of Noncompliant Schools*

Addressing the admissions process itself would be a more direct method of resolving the LDF complaint than reinstating and expanding Discovery Programs. There are two main options for doing so: developing a new test that will not produce the same types of disparities as under the current system and expanding the admissions process to include other evaluation criteria at five of the eight Specialized High Schools not explicitly bound by New York State Education Law § 2590-h(1)(b).

The statute states only that admissions must be based on a “competitive, objective and scholastic achievement examination” but does not specify the content or type of examination.¹⁶⁶ The current examination is not aligned to the city’s curriculum, ensuring that students without access to tutoring or preparation for the content of the test have little or no means of preparing for it.¹⁶⁷ This is an inherently unfair means of developing a curve that allows for differentiation among candidates, if meaningful differentiation is the intent of using such an approach. By designing a new test that is aligned to what students actually learn in New York City’s middle schools, the test would better reflect knowledge to which all students have access, a standard that is objectively fairer than a test on content not taught in schools. This would reduce the knowledge gap caused when some students have access to tutoring or test preparation services and others do not, resolving the limited-capacity issue of Discovery Programs. Yet, this option also has its limits. African American and Latino students are disproportionately placed in schools of lower quality in classrooms with inexperienced teachers.¹⁶⁸ Even if all middle school experiences were equal, there will always be students with access to tutoring or test prep services above what is provided in their classroom every day. Yet, by changing the content of the

166. N.Y. EDUC. LAW § 2590-g(12) (1996).

167. See COMPLAINT, *supra* note 6, at 21.

168. See HOLZMAN, *supra* note 72, at 9, 11.

test to reflect the middle school curriculum, the advantage currently given to students with access to extracurricular text preparation will diminish, if not disappear; in combination with Discovery Program expansion, this strategy could eliminate that advantage. Aligning the SHSAT to the middle school curriculum is an adjustment that is inherently fairer to all students, and should be included in a negotiated agreement.

Additionally, not all eight of the Specialized High Schools are required to use a single test. Only the three schools originally named in the statute must remain Specialized High Schools.¹⁶⁹ The New York City Department of Education can simply remove the Specialized High School designation from the five non-statutorily-named high schools to avoid the admissions test required in New York State Education Law § 2590-h(1)(b).¹⁷⁰ As discussed in Part I.A, the City opted to designate these schools as Specialized High Schools; it was not statutorily required to do so. It logically follows that the New York City Department of Education can remove this designation. Once no longer designated as Specialized High Schools, the state statute would no longer apply to these five schools, and they would implement an alternative admissions process under the direction of the New York City Department of Education and a negotiated agreement with OCR.

The only easily-identifiable benefits of being designated a Specialized High School is the prestige associated with that designation and the use of the single admissions test rather than an independent, rigorous admissions process. Though the five schools may object to removal of their designation, arguably, these five schools have already reaped its benefits in building their reputations since being named Specialized High Schools, as designated by recognition on numerous “Best High Schools” lists year after year.¹⁷¹ By maintaining high standards in new, holistic admissions procedures, they could continue to build this reputation without the encumbrance of the state-mandated test.¹⁷² It is pos-

169. See, COMPLAINT, *supra* note 6, at 5.

170. See *supra* Part I.A.

171. *Id.*

172. For example, two of the multiple measures schools discussed in Part I.B also made the list of the top fifteen schools in New York State: the Baccalaureate School for Global Education at #5 and Townsend Harris at #8. Eleanor Roosevelt High School was #17. See TOP NEW YORK HIGH SCHOOLS, U.S. NEWS & WORLD REPORT (2015), <http://www.usnews.com/education/best-8high-schools/new-york/rankings?int=983308> [<https://perma.cc/AD4R-KEKF>] The Baccalaureate School for Global Education was also ranked #28 in the country, and Townsend Harris #61, above several of the eight special-

sible the schools prefer the simplicity of using the SHSAT for their admissions process. But ease is no excuse for clinging to discriminatory procedures, especially when all other non-Specialized High Schools in the city are making do with alternate admissions procedures. This option is limited in its ability to remedy the disparate impact, in that it is not available to three of the eight schools. Nevertheless, removing five of the eight schools from the jurisdiction of New York State Education Law § 2590-h(1)(b) would reduce the number of schools out of compliance with federal law, and reduce the number of African American and Latino students subject to the disparate impact caused by the SHSAT.

B. WITHDRAWAL OF TITLE I FUNDS WOULD LIKELY INDUCE COMPLIANCE, POSSIBLY EVEN BY REPEAL OR SUITABLE AMENDMENT OF NEW YORK STATE EDUCATION LAW § 2590-H(1)(B)

If negotiating agreement with New York City's Department of Education proves difficult, the final option available to the OCR is to threaten to withhold or actually withhold Title I funds from any or all of the following: the Specialized High Schools, all New York City schools, or all New York State schools. This is the proverbial "stick" carried by all federal agencies for Title VI enforcement.

Although historically OCR has been reluctant to wield this power, two factors point to the possibility of its use in this instance. First, the current Assistant Secretary for Civil Rights, Catherine Lhamon, has said that she is "prepared to withhold federal funds" from noncompliant colleges and universities facing Title IX investigations for possible mishandling of sexual assault claims.¹⁷³ There has been nothing to suggest that she would not be willing to take a similarly strong approach to findings of disparate impact in violation of Title VI if it could greatly assist in pressuring the target toward an agreement. Second, HUD's recent successes in withholding funds from noncompliant entities

ized high schools. BEST HIGH SCHOOLS RANKINGS, U.S. NEWS & WORLD REPORT (2015), <http://www.usnews.com/education/best-high-schools/national-rankings?int=974b08>.

173. Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NPR.ORG (Aug. 12, 2014), <http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention> [<https://perma.cc/Q8YA-SDWY>].

demonstrate that, despite OCR's reluctance, withholding funds can be a real means of compelling compliance.¹⁷⁴ Actually withholding federal funding from schools could incentivize them to create or reinstate Discovery Programs; withholding funds from the City as a whole could push it to re-designate the five non-original Specialized High Schools or to design a test aligned to middle school curricula; and withholding funds from the state could push New York's legislature to repeal the law without necessitating drawn-out litigation.

However, withdrawal of federal funds could do even more damage to students in these schools, New York City, or the state as a whole. Title I funds are used to provide additional services to students most in need around the country.¹⁷⁵ Withholding these funds could prevent these students from receiving important services that give them a better chance of academic achievement at the same level as their more affluent peers. Additionally, if funds were withheld from the entire state to push for improvement from just eight high schools, the political backlash from the other schools in the state would be enormous, potentially reducing any public support that may exist for reforming the Specialized High Schools' admissions policies. Finally, withholding all funds from the Specialized High Schools, New York City schools, or New York State entirely would remove OCR's jurisdiction to enforce Title VI. Title VI is only applicable to entities receiving federal funds. Once those funds are removed, the entities are no longer subject to Title VI requirements. This last theoretical possibility may not be a practical reality, however. Given the large dependence on Title I funding, it is unlikely that the schools, city, or state would elect to go without them, even if it meant removing themselves from OCR's jurisdiction.

To use this strategy effectively, OCR would have to employ it thoughtfully. Obviously, it should negotiate and attempt to reach an agreement without resorting to withholding funds first. Given City officials' openness to remedying the SHSAT's disparate im-

174. See *supra* Part II.B.

175. Title I funds provide "additional academic support and learning opportunities to help low-achieving children master challenging curricula and meet state standards in core academic subjects. For example, funds support extra instruction in reading and mathematics, as well as special preschool, after-school, and summer programs to extend and reinforce the regular school curriculum." U.S. DEP'T OF EDUC., TITLE I, PART A PROGRAM: PARTICIPATION (Jun. 4, 2014), <http://www2.ed.gov/programs/titleiparta/index.html> [<https://perma.cc/T8YX-XPMC>].

pact, a negotiated agreement does seem entirely possible. Yet, if an agreement cannot be reached, OCR should begin by withholding some, but not all, of the funds to ensure the continued applicability of Title VI throughout the enforcement procedures. As discussed above, HUD used such a ratcheting of withholding funds in Westchester County. OCR should begin similarly by targeting the schools in question, expanding to the city, and only withholding funds from the entire state as a last resort.

C. REFERRAL TO THE DEPARTMENT OF JUSTICE COULD RESULT
IN THE INVALIDATION OF NEW YORK STATE EDUCATION LAW
§ 2590-H(1)(B)

If a negotiated agreement cannot resolve the complaint, OCR could refer it to the Department of Justice for litigation. OCR would lose control over the complaint process at that point, ceding responsibility to the Department of Justice.¹⁷⁶ What would such a court challenge look like?

The first question is which entity the Department of Justice would sue: the schools, the city, or the state. And would any of these entities even defend the current process or law? With the previously discussed request for proposals for a new test, and City Council members' introduction of measures to address the admissions gap, it does not look like city administrators would be interested in defending the state statute or current process.¹⁷⁷

The Department of Justice could choose to bring a limited lawsuit in which the remedy would be to task the City and the Specialized High Schools with identifying an alternative admissions process within the confines of the New York statute. On this front, it is also worth noting that in a lawsuit challenging the admission process to the City's Gifted & Talented program available to students enrolling in kindergarten, the New York City Department of Education argued, and the judge agreed, that the test used to determine admission eligibility was not able to accurately evaluate one child's academic ability over another's, although the court upheld the admissions procedures.¹⁷⁸ A test used

176. Silver, *supra* note 8, at 511.

177. See *supra* Part I.C.

178. Jeff Wise, *Too Many Geniuses*, N.Y. MAG. (Jun. 30, 2013), <http://nymag.com/news/intelligencer/gifted-and-talented-2013-7> [perma.cc/7542-NJP4]. See also Lisa Fleisher, *City Scores on Selection of 'Gifted'*, WALL ST. J. (June 7, 2014, 4:13 PM),

to evaluated four-year-olds is obviously different from the SHSAT, but if a court is ready to recognize the unreliability of a standardized test for one group of talented students, it may be receptive to a challenge of the SHSAT as well.

Assuming that the City and schools are both open to resolving the disparity but are hemmed in by the state statute, the State would be the best target for a lawsuit so that the statute can be repealed. When called to defend New York State Education Law § 2590-h(1)(b), would state-level actors defend it or acquiesce to demands to repeal? If the law is repealed by the legislature under threat of litigation, this tactic would still be considered successful in resolving the complaint. Assuming the State defends the law, the Department of Justice would need to structure a lawsuit such that the statute would be overturned as preempted by Title VI regulations.

The EPA has fought for its right to enforce regulations over conflicting laws or state regulations primarily through the court system.¹⁷⁹ Through these cases, we see that so long as a federal regulation clearly conflicts with state law, such that the state law prevents the effective enactment of the federal regulation, the federal regulation must be seen as controlling and displace the state law.¹⁸⁰ The true challenge for the Department of Justice will be in demonstrating that the statute is in violation of Title VI regulations such that New York City cannot comply with both, despite its facially neutral status.

Texas Department of Housing and Community Affairs v. Inclusive Communities Project strengthened the potential for successful disparate impact litigation, despite the murky history of disparate impact under Title VI.¹⁸¹ With the affirmation of dispar-

<http://www.wsj.com/articles/SB10001424127887324299104578531630989618830> [perma.cc/9D3K-3PJY].

179. For a general discussion of preemption in various areas of environmental regulation and how courts have ruled across these areas, see Weinberg, *supra* note 157.

180. “If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *Boundary Backpackers v. Boundary Cty.*, 913 P.2d 1131, 1146 (Idaho 1996) (quoting *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572 (1987)) (holding that a local ordinance limiting federal agency ability to manage federal land was preempted by several federal environmental laws).

181. *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (holding that “disparate-impact claims are cognizable under the Fair Housing Act”).

ate impact regulations under the Fair Housing Act in *Inclusive Communities*, even with the restriction that legitimate policy interests may outweigh the disparate impact harm, a legal challenge to the admissions policy has a good chance of success in overturning the law. The statute as carried out blatantly interferes with the Specialized High Schools' ability to comply with federal regulations prohibiting disparate impacts based on race, ethnicity, or national origin. There is a chance the Supreme Court would use the case as an opportunity to invalidate disparate impact regulations under Title VI entirely in light of *Bakke* and subsequent cases. Yet, the holding in *Bakke* was explicitly based on legislative history surrounding Title VI.¹⁸² Since Congress has let many regulatory prohibitions on disparate impact under Title VI stand for over 35 years despite the *Bakke* decision, invalidating them now would seem to contradict Congress's implied approval, undermining the basis for the *Bakke* holding in the first place.

Given the conflict with federal law — not to mention the schools' history of racial disparities in admission, the use of various other admissions policies by other selective New York City high schools, and City officials' stated interest in addressing the racial disparity — a disparate impact claim against the schools rises above the mere "second-guess[ing]" of "two reasonable approaches" the Supreme Court warned against in *Inclusive Communities*. With disparate impact regulations newly-affirmed and re-legitimized in that decision, the time is ripe for strong negotiations and even litigation, if necessary, against the Specialized High Schools' current admissions policy.

V. CONCLUSION

The LDF complaint identifies a deeply problematic disparate impact on African American and Latino students from the SHSAT, the exam which determines admission to New York City's eight Specialized High Schools. Though a single-test admissions procedure is required for Specialized High Schools by New York State Education Law § 2590-h(1)(b), OCR nonetheless can and should take action to remedy this disparate impact and

182. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978) ("In view of the clear legislative intent, Title VI must held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.").

provide better admissions opportunities to African American and Latino students. OCR can learn from the EPA and HUD in structuring creative negotiated agreements without resorting to litigation, even in the face of a complicating conflict between state statute and federal law and regulations. OCR has options to negotiate around the state statute and force compliance without resorting to litigation that should be pursued to the fullest extent of the agency's abilities. Most promising is the opportunity to negotiate an agreement that would include the reinstatement of Discovery Programs and removal of Specialized High School status from the five schools that are not statutorily required to be designated as such, thus removing the single-test admissions requirement from those schools. Withholding federal funds until the state repeals New York State Education Law § 2590-h(1)(b) is a potential avenue that could be just as, if not more, damaging for students than drawn out litigation. At least litigation would maintain the status quo, while withdrawing federal funds could remove students from school. Nevertheless, should a negotiated agreement fail to come to fruition, the Department of Education should not hesitate to use every tool at its disposal, including litigation and withdrawal of funds if necessary, to ensure African American and Latino students are afforded an equal opportunity for admission at these highly competitive schools.