

# CONSTITUTIONAL DIVERSITY IN NEW YORK'S SPECIALIZED HIGH SCHOOLS: THE SHSAT, THE DISCOVERY PROGRAM, AND THE FOURTEENTH AMENDMENT

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## TABLE OF CONTENTS

INTRODUCTION .....	1628
I. BACKGROUND.....	1631
A. <i>The SHSAT and Its Origins</i> .....	1631
1. The Debate over the SHSAT .....	1633
2. The 2012 Legal Defense Fund Complaint.....	1635
3. Title VI of the Civil Rights Act of 1964.....	1636
4. The Legal Defense Fund's Argument.....	1637
5. Historic Efforts to Change Specialized Admissions.....	1640
B. <i>The Discovery Program</i> .....	1642
1. The Discovery Program's Origins .....	1642

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2. Mayor de Blasio's Proposed Changes to the Discovery Program .....	1644
II. ANALYSIS .....	1646
A. <i>The Equal Protection Clause</i> .....	1646
B. <i>The Discovery Program</i> .....	1648
1. Strict Scrutiny.....	1649
2. The Discovery Program, Exclusionary Admissions Programs, and <i>Bakke</i> .....	1652
3. <i>Gratz, Grutter, and Fisher</i> .....	1655
4. New York's Discovery Program Will Likely Survive Strict Scrutiny .....	1658
C. <i>The SHSAT</i> .....	1659
III. PROPOSAL.....	1662
A. <i>Possible Objections</i> .....	1665
CONCLUSION.....	1667
APPENDIX .....	1668

## INTRODUCTION

Out of the 27,521 eighth graders in New York City who applied in December of 2018 to New York's nine specialized high schools, only 4,798 were offered seats.<sup>1</sup> Black and Latinx students received less than ten percent of these offers though they comprised forty-four percent of applicants.<sup>2</sup> On the other hand, Asian-American and white students received a combined eighty percent of offers even though they accounted for only forty-nine

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<sup>1</sup> See Christina Veiga, *By the Numbers: New York City's Specialized High School Offers*, CHALKBEAT (Mar. 19, 2019), <https://www.chalkbeat.org/posts/ny/2019/03/19/by-the-numbers-new-york-citys-specialized-high-school-offers> [https://perma.cc/VV5N-HG63]; see also Leslie Brody, *Who Got into Stuyvesant and New York's Other Elite Public High Schools*, WALL ST. J. (Mar. 7, 2018, 6:27 PM), <https://www.wsj.com/articles/who-got-into-stuyvesant-and-new-yorks-other-elite-public-high-schools-1520465259> [https://perma.cc/N33D-4BH7] (28,333 students applied in December of 2017 and only 5,067 were offered seats).

<sup>2</sup> See Veiga, *supra* note 1; see also Tyler Blint-Welsh, *What Is the SHSAT Exam? And Why Does It Matter?*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/nyregion/what-is-the-shsat-exam-and-why-does-it-matter.html> [https://perma.cc/54HH-H4RD] (Black and Latinx students composed forty-three percent of test-takers in 2018 but only received ten percent of offers).

percent of applicants.<sup>3</sup> These statistics are neither representative of the demographic makeup of New York City's public school system<sup>4</sup> nor its general citizenry.<sup>5</sup> The question that Mayor Bill de Blasio's office now faces is how to improve the diversity of its specialized schooling system to accurately reflect the City's demographic makeup while retaining high academic standards.<sup>6</sup>

In 2018, Mayor de Blasio and Schools Chancellor Richard A. Carranza proposed a two-part plan to increase enrollment of Black and Latinx students in specialized high schools.<sup>7</sup> The first step of Mayor de Blasio's plan is to change the size and eligibility criteria for the "Discovery Program," a summer program created by New York's legislature in 1971 to help students in high-poverty areas gain entry into specialized schools.<sup>8</sup> Students eligible for the program have already taken an entry examination—the Specialized High School Admissions Test (SHSAT)—and will have a test score threshold below a specialized school's cutoff score and be from "high-poverty" middle schools which are at or above sixty percent of the City's Economic Need Index (ENI).<sup>9</sup> These changes are expected to increase the

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<sup>3</sup> See Veiga, *supra* note 1; see also Tyler Blint-Welsh, *supra* note 2.

<sup>4</sup> See Alex Zimmerman, *New Data Show How Few Black and Hispanic Students Benefit from New York City's Specialized High School Diversity Program*, CHALKBEAT (Aug. 14, 2018), <https://www.chalkbeat.org/posts/ny/2018/08/14/discovery-program-data-shsat> [https://perma.cc/RQH2-BHFK].

<sup>5</sup> New York City is 42.7% white, 24.3% Black, 13.9% Asian, and 29.1% Hispanic. *QuickFacts: New York City*, New York, U.S. CENSUS BUREAU (July 1, 2017), <https://www.census.gov/quickfacts/newyorkcitynewyork> [https://perma.cc/8R7T-AJYH].

<sup>6</sup> Lindsey Christ, *De Blasio Calls for an End to Admissions Test for the NYC Specialized High Schools*, SPECTRUM NEWS N.Y. 1 (June 2, 2018, 6:28 PM), <https://www.ny1.com/nyc/all-boroughs/news/2018/06/02/nyc-mayor-bill-de-blasio-calls-for-an-end-to-specialized-high-school-admissions-test> [https://perma.cc/S4AL-DWL7].

<sup>7</sup> See *Mayor de Blasio and Chancellor Carranza Announce Plan to Improve Diversity at Specialized High Schools*, CITY OF N.Y. (June 3, 2018), <https://www1.nyc.gov/office-of-the-mayor/news/281-18/mayor-de-blasio-chancellor-carranza-plan-improve-diversity-specialized-high/#/0> [https://perma.cc/TFF5-LC78]; see also N.Y.C. DEP'T OF EDUC., SPECIALIZED HIGH SCHOOLS PROPOSAL: MAKING ADMISSIONS TO THE SPECIALIZED HIGH SCHOOLS MORE EQUITABLE FOR ALL STUDENTS (2018), <https://www.schools.nyc.gov/docs/default-source/default-document-library/specialized-high-schools-proposal> [https://perma.cc/NQZ9-LDM2].

<sup>8</sup> See *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>9</sup> *Id.* For information on the City Economic Need Index, see *Equity and Excellence for All: Diversity in New York City Public Schools*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/docs/default-source/default-document-library/diversity-in-new-york-city-public-schools-english> [https://perma.cc/FNU4-73N].

number of Black and Latinx students in specialized schools from nine to sixteen percent.<sup>10</sup>

The second step of Mayor de Blasio's proposal is to eliminate the use of a single admissions test for specialized high schools.<sup>11</sup> Currently, the SHSAT is the only way to gain admission to specialized high schools.<sup>12</sup> Under Mayor de Blasio's plan, the SHSAT would be replaced with a cut-off system where students are designated as "top performers" based on their seventh grade course grades and seventh grade state examination performance.<sup>13</sup> City officials argue that if this proposal is passed by New York's legislature, then specialized high schools would become forty-five percent Black and Latinx.<sup>14</sup> This Note evaluates the possible constitutional pitfalls of Mayor de Blasio's decision to change the eligibility parameters of the SHSAT and Discovery Program.

While changes to the structure of admissions for specialized high schools provide a new means for Black and Latinx students to earn their seats, they also open the City of New York up to new legal challenges. This Note considers the constitutionality of Mayor de Blasio's changes to the Discovery Program and removal of the SHSAT under the Equal Protection Clause of the Fourteenth Amendment. This Note proceeds in four Parts. Part I describes the origins of the SHSAT and its appeal as a form of standardized admissions. Part II analyzes, under the Equal Protection Clause, the constitutionality of Mayor de Blasio's proposal to change the Discovery Program and remove the SHSAT. This Part suggests that while

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<sup>10</sup> *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>11</sup> *Id.*; see Elizabeth A. Harris, *As Calls for Action Crescendo, de Blasio Takes on Segregated Schools*, N.Y. TIMES (June 3, 2018), <https://www.nytimes.com/2018/06/03/nyregion/de-blasio-segregation-schools.html> [https://perma.cc/YH4K-UD8U]; see also *Specialized High School Admissions Test*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/school-life/learning/testing/specialized-high-school-admissions-test> [https://perma.cc/VD5J-EQSQ].

<sup>12</sup> See Winnie Hu, *Does Admissions Exam for Elite High Schools Measure Up? No One Knows*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/nyregion/shsat-new-york-city-schools.html> [https://perma.cc/5BPE-BSGQ]; see also Harris, *supra* note 11.

<sup>13</sup> See *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7; see also Assemb. A10427A, 2018 Legis. Sess. (N.Y.); S. S8503A, 2018 Legis. Sess. (N.Y.). For more information on the ELA, see *N.Y. State English Language Arts Test (ELA)*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/school-life/learning/testing/specialized-high-school-admissions-test> [https://perma.cc/W9WA-DJFW].

<sup>14</sup> The Editorial Board, *Opinion, It's Time to Integrate New York's Best Schools*, N.Y. TIMES (June 24, 2018), <https://www.nytimes.com/interactive/2018/06/24/opinion/editorials/new-york-specialized-school.html> [https://perma.cc/BN3D-9VT7].

changes to the Discovery Program could raise several constitutional challenges due to a possible racial bias, they ultimately pass a strict scrutiny examination under the Fourteenth Amendment. Part III compares admissions strategies in high schools nationwide to identify potential holistic components New York City can add to its specialized high school admissions process. This Note concludes that the Mayor's proposals do not violate the Fourteenth Amendment and urges the City of New York to add holistic components to the admissions process to make the specialized high school system more accessible for Black and Latinx students while remaining constitutionally sound.

## I. BACKGROUND

### A. *The SHSAT and Its Origins*

The SHSAT resulted from a 1971 state law, the Hecht-Calandra Act,<sup>15</sup> which called for a test-based admissions process for specialized high schools.<sup>16</sup> The first test model was developed by Stuyvesant High School and Bronx High School of Science in cooperation with Columbia University professors,<sup>17</sup> and was administered by the two schools to screen applicants.<sup>18</sup> In 1983, the test was taken over by American Guidance Systems, a company that was later acquired by Pearson,<sup>19</sup> which currently administers the test.<sup>20</sup>

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<sup>15</sup> See N.Y. EDUC. LAW § 2590 (McKinney 2020); *see also infra* notes 95–96 and accompanying text.

<sup>16</sup> See N.Y. EDUC. LAW § 2590-h(b) (providing for a “discovery” program for specialized high schools). For more on the history of merit-based examination in America, see NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 52 (2000) (“[A] governing elite selected on the basis of merit, not parentage” was the “most deep-seated wish in American culture” in combination with “opportunity for everyone” and formed into a “new kind of educational system”); *see also* MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY 1870–2033*, at 31, 72 (2d ed. 2017) (a narrative essay on the historical transition from feudalistic traditions of prestige to recognition of merit in British trade unions).

<sup>17</sup> See Hu, *supra* note 12; *see also* Eugene Blaufarb, *History of Stuyvesant High School*, in *STUYVESANT HIGH SCHOOL PARENT HANDBOOK*, app. I (2017), <https://stuy-pa.org/wp-content/uploads/2017/10/Parent-handbook-Revised-Sept-2017.pdf> [<https://perma.cc/7JVM-659M>].

<sup>18</sup> See Hu, *supra* note 12.

<sup>19</sup> See *supra* note 12.

<sup>20</sup> See *supra* note 12. Pearson currently has a six-year, thirteen-million dollar contract with New York City. *See* Christina Veiga, *Education Department Recommends that Pearson Continue to Provide Specialized High School Admissions Test*, CHALKBEAT (Sept. 19, 2016), <https://www.chalkbeat.org/>

The SHSAT is the sole criterion for admission to eight of the nine specialized high schools.<sup>21</sup> Offers of admission are determined by means of a “cut-off” score—a minimum score which students must achieve to obtain a seat.<sup>22</sup> Cut-off scores are decided each year “by the [New York City] Department of Education [(NYCDOE)] based on the number of applicants and . . . seats available at each school.”<sup>23</sup>

Specialized high schools often are more attractive to students and parents than traditional public high schools due to their academic rigor<sup>24</sup> and international reputation.<sup>25</sup> Students are expected to spend upwards of three hours each night on homework, participate in academic honors programs, and attend a four-year college.<sup>26</sup> Moreover, students generally score in the 99th percentile of the Scholastic Assessment Test.<sup>27</sup> School staff, parents, and alumni help students enter prestigious universities and the national workforce.<sup>28</sup> For these reasons, specialized schools are more highly

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posts/ny/2016/09/19/nyc-department-of-education-recommends-that-pearson-continue-to-provide-specialized-high-school-admissions-test [https://perma.cc/9EK9-7QQJ].

<sup>21</sup> See N.Y.C. DEP’T OF EDUC., *supra* note 7.

<sup>22</sup> See Blint-Welsh, *supra* note 2.

<sup>23</sup> *Id.*; see N.Y.C. DEP’T OF EDUC., 2018–2019 SPECIALIZED HIGH SCHOOLS STUDENT HANDBOOK 4 (2018), <https://www.schools.nyc.gov/docs/default-source/default-document-library/2019-shsat-student-handbooks.pdf> [https://perma.cc/DVJ2-EUW2] (“Entrance into these schools is determined by the SHSAT, except for LaGuardia High School, which is based on a competitive audition and review of academic records.”).

<sup>24</sup> *About Us*, BROOKLYN TECH. HIGH SCH., [https://www.bths.edu/apps/pages/index.jsp?uREC\\_ID=229356&type=d](https://www.bths.edu/apps/pages/index.jsp?uREC_ID=229356&type=d) [https://perma.cc/GFC4-WJD6]; see also *Mission Statement*, STUYVESANT HIGH SCH., [https://stuy.enschool.org/apps/pages/index.jsp?uREC\\_ID=126631&type=d&pREC\\_ID=251661&hideMenu=1](https://stuy.enschool.org/apps/pages/index.jsp?uREC_ID=126631&type=d&pREC_ID=251661&hideMenu=1) [https://perma.cc/PW26-JEWW].

<sup>25</sup> Syed Ali & Margaret M. Chin, *What’s Going on with New York’s Elite Public High Schools?*, ATLANTIC (June 14, 2018), <https://www.theatlantic.com/education/archive/2018/06/new-york-high-schools-stuyvesant-brooklyn-bronx/562772> [https://perma.cc/E8JZ-FEGD].

<sup>26</sup> See, e.g., *Mission*, BROOKLYN LATIN SCH., [https://www.brooklynlatin.org/apps/pages/index.jsp?uREC\\_ID=288254&type=d](https://www.brooklynlatin.org/apps/pages/index.jsp?uREC_ID=288254&type=d) [https://perma.cc/5XAZ-JZBS].

<sup>27</sup> See, e.g., *Stuyvesant High School*, COLLEGESIMPLY, <https://www.collegesimply.com/k12/school/stuyvesant-high-school-new-york-ny-10282>.

<sup>28</sup> See *Welcome*, HIGH SCH. FOR MATH, SCI. & ENGINEERING CITY C. N.Y., <http://hsmse.org/about-us/welcome> [https://perma.cc/9U3Y-TZ3L]; see also *Mission Statement*, PTA HSAS, <https://www.hsas-lehman.org/parents/pta/about-us> [https://perma.cc/F76J-BX6E]; *Mission*, BRONX HIGH SCH. SCI., <https://www.bxscience.edu/mission.jsp> [https://perma.cc/QD4L-LW5W].

sought after by New York residents than normal public schools.<sup>29</sup> However, the only way to enroll in these schools is by taking the SHSAT.

### 1. The Debate over the SHSAT

Mayor de Blasio's proposal to end the use of a single test-based admissions system for specialized high schools highlights an ongoing debate regarding the fairness of the SHSAT.<sup>30</sup> According to the NYCDOE, "[t]he SHSAT assesses knowledge and skills . . . consist[ing] of the ability to comprehend English prose," edit and revise writing, and solve mathematical problems.<sup>31</sup> The Department suggests that the best preparation for the exam is to keep up with schoolwork.<sup>32</sup> However, there is a widely held view that New York's public elementary and middle schools in low-income areas do not adequately prepare students for the SHSAT, and applicants have an unequal opportunity to succeed.<sup>33</sup> Substandard preparation in the classroom forces students to find external test preparatory classes years in advance.<sup>34</sup>

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<sup>29</sup> See Ali & Chin, *supra* note 25; see also Peter Gibbon, *Teaching at Stuyvesant*, 188 J. EDUC. 81, 89 (2007) ("[A]t Stuyvesant, high expectations push kids to excel and peer culture favors academic achievement.").

<sup>30</sup> See The Editorial Board, *supra* note 14; see also Hu, *supra* note 12. See generally Dennis Saffran, *To Make Elite Schools 'Fair,' City Will Punish Poor Asians*, N.Y. POST (July 19, 2014, 2:57 PM), <https://nypost.com/2014/07/19/why-nycs-push-to-change-school-admissions-will-punish-poor-asians> [<https://perma.cc/VF63-4PE5>]; Grace Segers, *A Guide to the Controversy Around NYC's Specialized High Schools*, CITY & ST. N.Y. (June 7, 2018), <https://www.cityandstateny.com/articles/policy/education/new-york-city-specialized-high-schools-admissions-guide.html> [<https://perma.cc/7KL5-PLPC>]; Christina Veiga, *Fair and Objective or Useless and Biased? A Chalkbeat Guide to the Case for and Against New York City's Specialized High School Test*, CHALKBEAT (Aug. 13, 2018), <https://www.chalkbeat.org/posts/ny/2018/08/13/fair-and-objective-or-useless-and-biased-a-chalkbeat-guide-to-the-case-for-and-against-new-york-citys-specialized-high-school-test> [<https://perma.cc/U9ZU-GHAE>].

<sup>31</sup> *Specialized High School Admissions Test*, N.Y.C. DEP'T EDUC. <https://www.schools.nyc.gov/school-life/learning/testing/specialized-high-school-admissions-test> [<https://perma.cc/U372-ZDHQ>].

<sup>32</sup> *Id.*

<sup>33</sup> The Editorial Board, *supra* note 14; see Alvin Chang, *The Fraught Racial Politics of Entrance Exams for Elite High Schools*, VOX (June 14, 2018, 9:10 AM), <https://www.vox.com/2018/6/14/17458710/new-york-shsat-test-asian-protest> [<https://perma.cc/SQQ6-XB7G>]; Hu, *supra* note 12; Veiga, *supra* note 30.

<sup>34</sup> See Lindsey Christ, *Parents, Alumni Slam Proposal to Change Admissions for NYC Specialized High Schools*, SPECTRUM NEWS N.Y. 1 (June 4, 2018, 8:40 PM), <https://www.ny1.com/nyc/all-boroughs/news/2018/06/05/nyc-parents-alumni-asian-american-groups-slam-bill-de-blasio-push->

These programs can be expensive and unaffordable for lower-income families.<sup>35</sup> But, students who have taken preparatory courses show much stronger understanding of solving the questions presented in the SHSAT.<sup>36</sup> A 2016 survey of Stuyvesant students found that the school's white and Asian-American student populations "started studying for the exam months [to] years before their Black and Latin[x] peers."<sup>37</sup> Out of those students surveyed, seventy-three percent of Asian-Americans used a preparatory class for the SHSAT, in comparison to fifty-six percent of Black and Latinx students.<sup>38</sup>

The validity of the SHSAT as a test of aptitude for higher education has also recently come into question.<sup>39</sup> The SHSAT is divided into two sections, English Language Arts (ELA) and Mathematics, with 400 points available in each category for a total score of 800 points.<sup>40</sup> The raw scores of each of these two sections are independently, rather than jointly, compared to all applicants to determine a student's overall rank.<sup>41</sup> Lori Mei, the director of

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to-scrap-shsat [<https://perma.cc/K879-P8J8>] (detailing a student's reliance on external supports in an embedded video).

<sup>35</sup> See Savannah Robinson, *Everybody Is Talking About the Specialized High Schools Admissions Test. Here's What It Looks Like*, CHALKBEAT (June 4, 2018), <https://chalkbeat.org/posts/ny/2018/06/04/everybody-is-talking-about-the-specialized-high-schools-admissions-test-heres-what-it-looks-like> [<https://perma.cc/AYP6-SYUG>]; see also Al Baker, *Charges of Bias in Admissions Test Policy at Eight Elite Public High Schools*, N.Y. TIMES (Sept. 27, 2012), <https://www.nytimes.com/2012/09/28/nyregion/specialized-high-school-admissions-test-is-racially-discriminatory-complaint-says.html> [<https://perma.cc/D9X7-D5ST>]. Preparatory courses can cost more than \$999 and personalized tutoring programs start at \$1,999. *SHSAT Prep, Your Way*, KAPLAN, <https://www.kaptest.com/shsat> [<https://perma.cc/N7TN-4ZTK>].

<sup>36</sup> See Hu, *supra* note 12.

<sup>37</sup> See Eliza Shapiro, *De Blasio Has Means, If Not Will, to Reform Specialized School Admissions*, POLITICO (Mar. 15, 2018, 07:13 PM), <https://www.politico.com/states/new-york/albany/story/2018/03/15/de-blasio-has-means-if-not-will-to-reform-specialized-school-admissions-317675> [<https://perma.cc/2733-2N3S>].

<sup>38</sup> See *Spectator Surveys 2016*, SPECTATOR (June 2, 2016), <https://cdn.rawgit.com/darthbeep/SpecSurvey/master/Survey.html> [<https://perma.cc/D56U-MH9C>].

<sup>39</sup> See Veiga, *supra* note 30.

<sup>40</sup> See Robinson, *supra* note 35; see also *What Is the SHSAT*, KAPLAN, <https://www.kaptest.com/shsat/what-is-the-shsat> [<https://perma.cc/R4XH-9WVG>]; Glyn Caddell, *Scoring on the SHSAT*, CADDELL PREP (May 16, 2018), <https://caddellprep.com/scoring-on-the-shsat> [<https://perma.cc/JF84-8A8Q>].

<sup>41</sup> See *The SHSAT: A Study Guide*, SPECTRUM NEWS N.Y. 1 (June 19, 2018, 10:25 AM), <https://www.ny1.com/nyc/all-boroughs/education/2018/06/19/specialized-high-schools-admissions-test-shsat-study-guide> [<https://perma.cc/XKT2-EY8M>]; see also *Secret Standards: How Is the SHSAT*



testing for New York City schools, maintains that parents and students should have nothing to fear in relation to the reliability of the SHSAT.<sup>42</sup> However, Jonathan Taylor, a research analyst at Hunter College, argues that city education officials have never explicitly stated what the test measures.<sup>43</sup>

Further, *The New York Times* has corroborated research by Joshua N. Feinman, the chief economist of Deutsche Asset Management, who found a critical flaw in the SHSAT's scoring system.<sup>44</sup> Specifically, a student with an extremely high score in one part of the exam has a sharp advantage over a student with a balanced score in both subjects.<sup>45</sup> For example, a student who scores approximately in the ninety-seventh percentile in math will only need a score in the fifty-seventh percentile in ELA to have a greater combined score than a student who scores in the eighty-fifth percentile in ELA and the eighty-seventh percentile in math.<sup>46</sup> This system allows students with very limited language skills to earn admission through exceptional math scores and, alternatively, students with limited mathematical ability to succeed with extraordinary language scores because sections are ranked separately instead of as a combined score.<sup>47</sup>

## 2. The 2012 Legal Defense Fund Complaint

In response to issues of educational validity and equal opportunity raised by the SHSAT,<sup>48</sup> the National Association for the Advancement of

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Graded?, FIVE POINTS LEARNING, <https://fivepointslearning.com/shsat/secret-standards-how-is-the-shsat-graded> [<https://perma.cc/59B7-TLP9>].

<sup>42</sup> See David M. Herszenhorn, *Admissions Test's Scoring Quirk Throws Balance into Question*, N.Y. TIMES (Nov. 12, 2005), <https://www.nytimes.com/2005/11/12/nyregion/admission-tests-scoring-quirk-throws-balance-into-question.html> [<https://perma.cc/72UG-7YND>].

<sup>43</sup> See Hu, *supra* note 12 (“[Mr. Taylor] called the SHSAT ‘a black box’ because city education officials have never explicitly stated what it means to be successful at the specialized high schools, or what the test is actually supposed to be measuring.”).

<sup>44</sup> See JOSHUA FEINMAN, EDUCATION AND THE PUBLIC INTEREST CENTER & EDUCATION POLICY RESEARCH UNIT, HIGH STAKES, BUT LOW VALIDITY? A CASE STUDY OF STANDARDIZED TESTS AND ADMISSIONS INTO NEW YORK CITY SPECIALIZED HIGH SCHOOLS 5 (2008), [https://nepc.colorado.edu/sites/default/files/pb-feinman-nyc-test\\_final.pdf](https://nepc.colorado.edu/sites/default/files/pb-feinman-nyc-test_final.pdf) [<https://perma.cc/69D7-E42Y>]; see also Hu, *supra* note 12; Herszenhorn, *supra* note 42.

<sup>45</sup> Herszenhorn, *supra* note 42; see The Editorial Board, *supra* note 14.

<sup>46</sup> FEINMAN, *supra* note 44, at 12–13.

<sup>47</sup> See The Editorial Board, *supra* note 14.

<sup>48</sup> See generally *supra* notes 30, 33–35 and accompanying text.

Colored People's (NAACP) Legal Defense Fund (LDF) filed a civil rights complaint with the U.S. Department of Education in 2012.<sup>49</sup> The NAACP LDF argued that the SHSAT violated Title VI of the Civil Rights Act of 1964<sup>50</sup> and asserted that determining admission based on a single test score yielded a racially disparate impact in violation of the law.<sup>51</sup> The complaint noted that few Black and Latinx students received offers of admission and cited a lack of evidence showing that the SHSAT was valid or "integral" to the educational mission of specialized high schools.<sup>52</sup> If the allegations in the complaint were proven true, then Title VI would likely prohibit New York from using the SHSAT for admissions because it is not a properly validated predictor of student performance.<sup>53</sup>

### 3. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 provides that no individual in the United States shall, on the ground of "race, color, or national origin," be excluded from participating in programs or activities which receive federal financial assistance.<sup>54</sup> Specifically, any recipients of federal funds, such as public schools, may not "directly" or through contract or other arrangement, use "criteria" of administration that subject individuals to discrimination based on "their race, color, or national origin."<sup>55</sup> When pursuing a cause of action under Title VI, a plaintiff need not provide proof of discriminatory intent as a prerequisite for equitable relief.<sup>56</sup> Rather, redress is available in a

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<sup>49</sup> *New York City Specialized High School Complaint*, NAACP LEGAL DEF. & EDUC. FUND (Sept. 27, 2012) [hereinafter *LDF Complaint*], <https://www.naacpldf.org/wp-content/uploads/Specialized-High-Schools-Complaint.pdf> [<https://perma.cc/Z2ZB-R6Z4>].

<sup>50</sup> Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified as amended in scattered sections of 42 U.S.C.).

<sup>51</sup> See *LDF Complaint*, *supra* note 49, at 2.

<sup>52</sup> *Id.* at 9, 14.

<sup>53</sup> *Id.* at 3. On changes made by the NYCDOE due to the *LDF Complaint*, see *infra* Section I.A.5. As of March 3, 2019, there has been no determination of the legal merits of the LDF Complaint.

<sup>54</sup> Civil Rights Act of 1964.

<sup>55</sup> 34 C.F.R. § 100.3(b)(2) (2019).

<sup>56</sup> See *Groves v. Ala. State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991) ("Proof of discriminatory intent is not a prerequisite to equitable relief in a private cause of action under Title VI." (citing *Franklin v. Gwinnett Cty. Pub. Schs.*, 911 F.2d 617, 620 (11th Cir. 1990))).

claim based on a federal regulation created under Title VI for a facially neutral action which has an “unjustifiable disparate impact on minorities.”<sup>57</sup>

Courts use a three-prong test to determine whether recipients of federal funds, like New York’s specialized high schools, have a policy or practice which violates the Title VI disparate-impact regulation.<sup>58</sup> First, the court asks whether there is an adverse effect of a policy or practice which disproportionately affects members of a group identified by race, color, or national origin.<sup>59</sup> Second, the court asks whether a recipient of federal funding can demonstrate a substantial legitimate justification for the practice.<sup>60</sup> Third, the court asks whether there is an alternative practice that would achieve the same legitimate objective with less of a discriminatory effect.<sup>61</sup> To establish a *prima facie* case of a violation, a plaintiff must show that a challenged practice has a disproportionately adverse impact on a minority group.<sup>62</sup>

#### 4. The Legal Defense Fund’s Argument

In its complaint, the NAACP LDF argued that the NYCDOE disproportionately excluded Black and Latinx students from public educational programs by using scores on the SHSAT as the only criterion for admission.<sup>63</sup> Data on acceptance rates show that white and Asian-American applicants for specialized high schools in admissions periods from 2008 through 2011 were approximately five times more likely to be accepted than Black or Latinx applicants.<sup>64</sup> The complaint argues that this statistical measure passes under the “four-fifths test” because the selection rates for

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<sup>57</sup> *Id.* (citation omitted).

<sup>58</sup> See U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL § VII, at 6–7 (2018) [hereinafter TITLE VI LEGAL MANUAL].

<sup>59</sup> See *id.*; see also Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969, 982 (9th Cir. 1984).

<sup>60</sup> See TITLE VI LEGAL MANUAL, *supra* note 58, at 6–7; see also *Riles*, 793 F.2d at 982–83.

<sup>61</sup> See TITLE VI LEGAL MANUAL, *supra* note 58, at 6–7; see also *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

<sup>62</sup> See *Groves*, 776 F. Supp. at 1523, 1526 (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994–95 (1988) (plurality)); see also *Riles*, 793 F.2d 969 at 982; TITLE VI LEGAL MANUAL, *supra* note 58, at 6–7.

<sup>63</sup> LDF Complaint, *supra* note 49, at 15.

<sup>64</sup> *Id.* at 16.

Black and Latinx students are less than eighty percent of the selection rates of Asian-Americans or whites.<sup>65</sup>

If the NAACP LDF could demonstrate by a preponderance of the evidence that New York City's admissions system had a disparate impact on Black and Latinx students, the burden would then fall on the City to provide a legitimate justification for the practice.<sup>66</sup> The City must show that "the challenged practice bears a manifest relationship to an objective that is 'legitimate, important, and integral to [its] educational mission.'" <sup>67</sup> A violation is still established if the record shows that the justification offered by the recipient is only pretextual.<sup>68</sup> The reasons advanced by the recipient are pretextual if they are not the real reasons for its actions, and instead the real reason was discrimination based on race, color, or national origin.<sup>69</sup> In regard to specialized school admissions, the City must show that the criteria used are valid, essential to successful participation in the schools, and that equally valid alternative criteria which do not produce a disproportionate adverse effect are not available.<sup>70</sup>

The NAACP LDF's complaint argued that the SHSAT was not justified by educational necessity because the NYCDOE had not performed a "predictive ability study of the SHSAT."<sup>71</sup> Nor had the NYCDOE shown that

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<sup>65</sup> 29 C.F.R. § 1607.4(D) (2019); see Nicole Tortoriello, Note, *Dismantling Disparities: An Analysis of Potential Solutions to Racial Disparities in New York City's Specialized High Schools Admissions Process*, 49 COLUM. J.L. & SOC. PROBS. 417, 418–21 (2016) (discussing the legal questions surrounding the LDF complaint and suggesting several actions the NYCDOE can take in light of enforcement actions taken by the U.S. Department of Housing and Urban Development and the Environmental Protection Agency regarding Title VI complaints).

<sup>66</sup> See *Talladega Cty.*, 997 F.2d at 1407 ("If the plaintiff makes such a prima facie showing, the defendant then must prove that there exists a substantial legitimate justification for the challenged practice in order to avoid liability." (citing *Ga. State Conference Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985))).

<sup>67</sup> *LDF Complaint*, *supra* note 49, at 14 (quoting *Talladega Cty.*, 997 F.2d at 1413).

<sup>68</sup> See TITLE VI LEGAL MANUAL, *supra* note 58, at 6–8; see also *Talladega Cty.*, 997 F.2d at 1407 (citing *Ga. State Conference*, 775 F.2d at 1417).

<sup>69</sup> See TITLE VI LEGAL MANUAL, *supra* note 58, at 19 (citing *Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1162–63 (11th Cir. 2006) (addressing a Title VII race discrimination claim)); see also Barbara J. Fick, *Pretext or Pretext-Plus: What Must a Plaintiff Prove to Win a Title VII Lawsuit?*, 1992 PREVIEW SUP. CT. CASES 356, 357 (1992).

<sup>70</sup> See 34 C.F.R. pt. 100 app. B, at subdiv. III.K (2019).

<sup>71</sup> *LDF Complaint*, *supra* note 49, at 17 (emphasis omitted); see also *Feinman*, *supra* note 44 ("No studies [up until 2018] have ever been done to see if the SHSAT is subject to prediction bias across gender and ethnic groups.").

the material tested was aligned with the New York City public middle school curriculum,<sup>72</sup> or that mastery of the New York public curriculum would be an effective predictor of academic success.<sup>73</sup> In 2018, the NYCDOE released a 2013 study conducted by Metis Associates in response to the complaint that showed a strong positive relationship between success on the SHSAT and high school academic performance.<sup>74</sup> Still, the study did not offer particular evidence that the SHSAT was a better admissions method than middle school grades.<sup>75</sup> Even more, Tonya Holness, a spokeswoman for the NYCDOE, noted that the study missed the fact that students who do not do well on the test still have a strong chance of being successful in specialized high schools if they are given the opportunity.<sup>76</sup>

Even if the SHSAT was an educational necessity, it would still violate disparate impact regulations if there was an alternative available that achieved the same objective with a less discriminatory impact.<sup>77</sup> The NAACP LDF found that a multi-measured approach to admissions based on quantitative and qualitative portions of an application would be equal to

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<sup>72</sup> See *LDF Complaint*, *supra* note 49, at 21.

<sup>73</sup> *Id.* at 21–22.

<sup>74</sup> See METIS ASSOCS., THE SPECIALIZED HIGH SCHOOL ADMISSION TEST AND HIGH SCHOOL ACADEMIC ACHIEVEMENT (2013), [https://www.ms54.org/uploads/4/8/4/5/48453461/metis\\_study.pdf](https://www.ms54.org/uploads/4/8/4/5/48453461/metis_study.pdf) [<https://perma.cc/PZ4U-C4FJ>]; Tyler Pager, *SHSAT Predicts Whether Students Will Succeed in School, Study Finds*, N.Y. TIMES (Aug. 3, 2018), <https://www.nytimes.com/2018/08/03/nyregion/admissions-test-shsat-high-school-study.html> [<https://perma.cc/BX7PVAZ8>]; see also Leslie Brody, *Study Shows Scores on Elite High School Test Predict Success*, WALL ST. J. (Aug. 4, 2018), <https://www.wsj.com/articles/2013-study-shows-scores-on-elite-high-school-test-predict-future-success-1533387600> [<https://perma.cc/N6B3-BRET>].

<sup>75</sup> See Alex Zimmerman, *New York City Released Its Study of the SHSAT. Here's Why It Won't End the Admissions Debate*, CHALKBEAT (Aug. 3, 2018), <https://chalkbeat.org/posts/ny/2018/08/03/new-york-city-released-its-study-of-the-shsat-heres-why-it-wont-end-the-admissions-debate> [<https://perma.cc/HDQ6-Y62L>]; see also Jonathan Taylor, *Policy Implications of a Predicative Validity Study of the Specialized High School Admissions Test at Three Elite New York City High Schools* 76–78 (2015) (unpublished Ph.D. dissertation, City University of New York) (on file with CUNY Academic Works, City University of New York), [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2168&context=gc\\_etds](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=2168&context=gc_etds) [<https://perma.cc/8RHC-YPMH>]; Jonathan Taylor, *Opinion, New Research Shows SHSAT Less Valuable Predictor than Middle School Grades*, GOTHAM GAZETTE (Aug. 16, 2018), <https://www.gothamgazette.com/opinion/7871-new-research-shows-shsat-less-valuable-predictor-than-middle-school-grades> [<https://perma.cc/SKD8-MLP3>].

<sup>76</sup> See Pager, *supra* note 74 (Larry Cary, the president of the Brooklyn Tech Alumni Foundation board disagreed with Ms. Holness and argued it was a scandal the City had “sat on a predictive study” which was a good metric for admission).

<sup>77</sup> See TITLE VI LEGAL MANUAL, *supra* note 58, at 6.

or more effective than the SHSAT and would have a smaller discriminatory impact.<sup>78</sup> While middle school grades could be a major component of an application, “teacher recommendations, proven leadership skills, a commitment to community service,” and demographic profiles could be used to assess a candidate’s academic and individual capabilities.<sup>79</sup> To supplement a multi-measured approach, the NAACP LDF advocated for changes to the Discovery Program or adoption of a system which reserved seats for top students from middle schools around the City.<sup>80</sup>

### 5. Historic Efforts to Change Specialized Admissions

The NAACP’s complaint led the Office for Civil Rights in the U.S. Department of Education to launch an investigation to re-examine the testing process for specialized high schools.<sup>81</sup> Prior to this investigation, there were two previously investigated complaints regarding specialized high schools brought under very different circumstances.<sup>82</sup> In 2013, only four percent of 5,826 Black students who sought admission to specialized schools received offers.<sup>83</sup> At the same time, the NAACP LDF stressed that New Yorkers would not see a change in admissions until the SHSAT was

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<sup>78</sup> See *LDF Complaint*, *supra* note 49, at 22.

<sup>79</sup> *Id.* at 23–24.

<sup>80</sup> *Id.* at 27–28.

<sup>81</sup> See *Office for Civil Rights in the U.S. Department of Education Launches Investigation into the NYC Specialized High School Complaint*, NAACP LEGAL DEF. & EDUC. FUND (Nov. 15, 2012), <https://www.naacpldf.org/update/office-civil-rights-u-s-department-education-launches-investigation-nyc-specialized-high-school-complaint> [perma.cc/37VM-PYFP].

<sup>82</sup> See *LDF Complaint*, *supra* note 49, at 29 (the first investigation was in 1977 and occurred when there was a substantially higher proportion of Black and Latinx students in specialized high schools); see also Ari L. Goldman, *Grouping by Ability of Students Upheld for New York City*, N.Y. TIMES (June 16, 1978), [www.nytimes.com/1978/06/16/archives/new-jersey-pages-grouping-by-ability-of-students-upheld-federal.html](http://www.nytimes.com/1978/06/16/archives/new-jersey-pages-grouping-by-ability-of-students-upheld-federal.html) [perma.cc/VU4E-K76V] (the second investigation occurred in the 1990s regarding the dissemination of information of school district program offerings to minority parents); Norma V. Cantu, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Statement Before the House Appropriations Subcommittee on Labor, Health & Human Services and Education on the Fiscal Year 1999 Budget Request for the Office for Civil Rights (Apr. 1, 1998).

<sup>83</sup> See *Latest Admissions Data Re-Ignites Debate over Access to Opportunity in NYC’s Specialized High Schools*, NAACP LEGAL DEF. & EDUC. FUND (Mar. 18, 2013), <http://www.naacpldf.org/update/latest-admissions-data-re-ignites-debate-over-access-opportunity-nyc%E2%80%99s-specialized-high-school> [https://perma.cc/6P6X-9NLN].

replaced with a multi-measured approach.<sup>84</sup> In 2013, the NAACP LDF compared New York City's specialized school admissions with school systems nationwide.<sup>85</sup>

In 2014, the New York State Senate introduced Senate Bill S7738, designed to amend the education law and replace the SHSAT with a standard for admission consisting of multiple measures, including grade point averages, school attendance records, school admissions test scores, and state Regents Examination scores.<sup>86</sup> In 2017, New York Senator Jamaal T. Bailey introduced Senate Bill S7983, which proposed the expansion of the Discovery Program to all of New York City's specialized high schools.<sup>87</sup> In 2018, New York Senator Kevin S. Parker introduced Senate Bill S8503A, proposing that offers of admission to specialized high schools should be given first to students who are in the top seven percent of their eighth grade class, and subsequently given to students in the top twenty-five percent through a multiple-measures approach.<sup>88</sup> Finally, in June of 2018, Mayor de Blasio set out his own proposal to replace the SHSAT and revitalize the Discovery Program for eight of the nine specialized high schools.<sup>89</sup>

Currently, Mayor de Blasio's proposal to replace the SHSAT has stalled in the New York legislature.<sup>90</sup> His changes to the Discovery Program have

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<sup>84</sup> See *id.*

<sup>85</sup> See NAACP LEGAL DEF. & EDUC. FUND, *THE MEANING OF MERIT: ALTERNATIVES FOR DETERMINING ADMISSION TO NEW YORK CITY'S SPECIALIZED HIGH SCHOOLS* (2013), [http://www.naacpldf.org/files/case\\_issue/CSS\\_MeaningOfMerit\\_finalWeb.pdf](http://www.naacpldf.org/files/case_issue/CSS_MeaningOfMerit_finalWeb.pdf) [perma.cc/MAG9-5EUL] (finding that several schools in the United States use multi-measured approaches to increase classroom diversity while retaining high academic standards); see also *infra* notes 255–260 and accompanying text.

<sup>86</sup> See Assemb. A9989, 2013–2014 Legis. Sess. (N.Y.); S. S7738A, 2014 Legis. Sess. (N.Y.); see also *New York City Councilmembers Introduce Measures to Expand Access to Specialized High Schools*, NAACP LEGAL DEF. & EDUC. FUND (Oct. 22, 2014), <https://www.naacpldf.org/update/new-york-city-councilmembers-introduce-measures-expand-access-specialized-high-schools> [perma.cc/U884-8T9P]. Regents Examinations are standardized tests required to graduate from public New York high schools. Students must pass Regents exams in ELA, math, science, and social studies. See *N.Y. State High School Regents Exams*, N.Y.C. DEP'T EDUC., <https://www.schools.nyc.gov/school-life/learning/testing/specialized-high-school-admissions-test> [https://perma.cc/7JFF-HNFR].

<sup>87</sup> See S. S7983, 2017–2018 Legis. Sess. (N.Y.).

<sup>88</sup> See Assemb. A10427, 2017–2018 Legis. Sess. (N.Y.); S. S8503A, 2017–2018 Legis. Sess. (N.Y.).

<sup>89</sup> *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>90</sup> See Alex Zimmerman, *Union Chief Says de Blasio's Plan to Scrap the SHSAT Is Going Nowhere in Albany*, CHALKBEAT (Aug. 23, 2018), <https://chalkbeat.org/posts/ny/2018/08/23/michael-mulgrew-shsat-bill-de-blasio-albany> [https://perma.cc/Q2UG-DXQA] (discussing how the proposal was

also come under fire from members of New York City's Asian-American community.<sup>91</sup> Community leaders fear that expanding the Discovery Program discriminates against Asian-American students by eliminating potential seats for admission.<sup>92</sup> On December 13, 2018, Christa McAuliffe Intermediate School PTO (Christa PTO) filed a federal lawsuit in the United States District Court for the Southern District of New York seeking an injunction pursuant to the Fourteenth Amendment against the implementation of de Blasio's changes to the Discovery Program.<sup>93</sup> United States District Judge Edgardo Ramos wrote an amended opinion and order on March 4, 2019, which denied Plaintiff McAuliffe's motion for a preliminary injunction because it would place an undue burden on the NYCDOE for the upcoming admissions cycle.<sup>94</sup>

## B. *The Discovery Program*

### 1. The Discovery Program's Origins

The Discovery Program was introduced by the Hecht-Calandra Act<sup>95</sup> in May of 1971 to "give disadvantaged students" with high potential an opportunity to earn a seat in a specialized high school.<sup>96</sup> Specialized high schools could opt-in to the program by creating a preparatory summer class

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"fraught with mistakes" and would not pass in the next legislative session because it has "been so highly politicized").

<sup>91</sup> See Andrew Boryga, *The Complex Disadvantages Underlying New York City's Specialized-High-School Dilemma*, NEW YORKER (June 15, 2018), <https://www.newyorker.com/news/news-desk/the-complex-disadvantages-underlying-new-york-citys-specialized-high-school-dilemma> [https://perma.cc/8ULH-GPPJ].

<sup>92</sup> See Chris Fuchs, *Plan to Diversify New York's Top High Schools Divides Asian-American Groups*, NBC NEWS (June 18, 2018), <https://www.nbcnews.com/news/asian-america/plan-diversify-new-york-s-top-high-schools-divides-asian-n884316> [perma.cc/L4N7-XPJF].

<sup>93</sup> Complaint, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657).

<sup>94</sup> *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019).

<sup>95</sup> N.Y. EDUC. LAW § 2590-g(12) (McKinney 1996).

<sup>96</sup> *Id.* ("The special schools shall be permitted to maintain a Discovery Program to give disadvantaged students of demonstrated high potential an opportunity to try the special high school program without in any manner interfering with the academic level of those schools.").



for eligible students.<sup>97</sup> Students were eligible if they had a lower score on the SHSAT than the school cut-off and they were certified by their local school as disadvantaged.<sup>98</sup> In 1972, the program selected 352 students to attend preparatory summer classes at Bronx High School of Science, Brooklyn Technical High School, Stuyvesant High School, and the High School of Music and the Arts.<sup>99</sup> Over the next fifty years, the program began to slowly dwindle<sup>100</sup> and, in the early 2000s, Stuyvesant and Bronx Science terminated their summer programs.<sup>101</sup> In 2015, the program decreased to 120 students and its eligibility requirements were expanded to any student who the Education Department certified as “economically disadvantaged.”<sup>102</sup> In

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<sup>97</sup> See *id.* (stating that each school considered candidates based on test scores and could admit up to “fourteen (14) per cent of the number of students . . . admitted under the regular examination procedure”); see also Floyd M. Hammack, *Paths to Legislation or Litigation for Educational Privilege: New York and San Francisco Compared*, 371 AM. J. EDUC. 371, 380–81 (2010) (discussing public debate on the Discovery Program’s use of a quota. Proponents of the program were deemed racists because it set limits on poor and minority youth).

<sup>98</sup> See Winnie Hu, *Elite New York High Schools to Offer 1 in 5 Slots to Those Below Cutoff*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/discovery-program-specialized-schools-nyc.html> [<https://perma.cc/N4MF-WVTH>].

<sup>99</sup> Fred Hechinger, *Education: High School: Challenge to the Concept of the Elite*, N.Y. TIMES (May 23, 1971), <https://www.nytimes.com/1971/05/23/archives/education-high-school-challenge-to-the-concept-of-the-elite.html> [<https://perma.cc/AFW5-AZY6>].

<sup>100</sup> The decreasing size of the discovery program was precipitated, in part, by the growing number of Black and Latinx applicants who were accepted to specialized high schools due to the legislature creating new educational opportunities. See Larry Cary, Opinion, *Time to Diversify New York City’s Discovery Program*, CITY & ST. N.Y. (June 23, 2017), <https://cityandstateny.com/articles/opinion/diversify-new-york-city-discovery-program.html> [<https://perma.cc/3UQF-JWLW>]; see also Katrina Shakarian, *The History of New York City’s Special High Schools*, GOTHAM GAZETTE, <http://www.gothamgazette.com/government/5392-the-history-of-new-york-citys-special-high-schools-timeline> [<https://perma.cc/LN4T-6YD5>].

<sup>101</sup> See Hu, *supra* note 98. To compensate for the discovery program’s decreasing size, Chancellor Ramon Cortines created a new math and science institute in 1995 to coach Black and Latinx students to take the SHSAT. For more on the institute, see Maria Newman, *Cortines Has Plan to Coach Minorities into Top Schools*, N.Y. TIMES (Mar. 18, 1995), <https://www.nytimes.com/1995/03/18/nyregion/cortines-has-plan-to-coach-minorities-into-top-schools.html?pagewanted=1> [<https://perma.cc/GR5F-G8ES>].

<sup>102</sup> See *id.* In 2018, seventy-four percent of students in the New York City school system were considered “economically disadvantaged.” See *Data at a Glance*, N.Y.C. DEP’T EDUC., <https://www.schools.nyc.gov/about-us/reports/doe-data-at-a-glance> [<https://perma.cc/6ZX8-7RUQ>].

2016, City officials increased the program to 220 students<sup>103</sup> and, in 2017, the program was reinstated in Stuyvesant and Bronx Science.<sup>104</sup> In 2018, the program consisted of 270 students.<sup>105</sup>

## 2. Mayor de Blasio's Proposed Changes to the Discovery Program

Mayor de Blasio and City officials previously used the Discovery Program as a means to increase the diversity of public schools to a point where they can be racially representative of the City's population.<sup>106</sup> However, the program has not properly served these goals because it is open to all economically disadvantaged students, rather than specifically Black or Latinx students in New York City.<sup>107</sup> For example, this year, the Discovery Program took a majority of its students (sixty-four percent) from Asian-American communities in disadvantaged areas while Black and Latinx students combined made up only twenty-two percent of the Program.<sup>108</sup>

As such, Mayor de Blasio has made significant changes to the eligibility and size of the Discovery Program to increase representation of Black and Latinx students. De Blasio aims, by 2020, to reserve twenty percent of seats in specialized high schools (a total of 800 seats)<sup>109</sup> for students who qualify as economically disadvantaged (an increase from only five percent in

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<sup>103</sup> See Amy Zimmer, *City Announces Programs to Boost Diversity at Specialized High Schools*, DNA INFO (June 9, 2016), <https://www.dnainfo.com/new-york/20160609/battery-park-city/city-announces-programs-boost-diversity-at-specialized-high-schools> [https://perma.cc/ES9D-T8TY].

<sup>104</sup> See Hu, *supra* note 98.

<sup>105</sup> See *id.*

<sup>106</sup> Christina Veiga, *Digging into Details of Mayor's Diversity Plan, Critics See Easy Goals and Iffy Approaches*, CHALKBEAT (June 7, 2017), <https://www.chalkbeat.org/posts/ny/2017/06/07/digging-into-details-of-mayors-diversity-plan-critics-see-easy-goals-and-iffy-approaches> [https://perma.cc/9G XK-TJXL].

<sup>107</sup> Alex Zimmerman & Monica Disare, *After Long Wait, de Blasio Backs Plan to Overhaul Admissions at New York City's Elite High Schools*, CHALKBEAT (June 2, 2018), <https://www.chalkbeat.org/posts/ny/2018/06/02/after-long-wait-de-blasio-backs-plan-to-overhaul-admissions-at-new-york-citys-elite-high-schools> [https://perma.cc/9RW9-34ZH].

<sup>108</sup> See Alex Zimmerman, *New Data Show How Few Black and Hispanic Students Benefit from New York City's Specialized High School Diversity Program*, CHALKBEAT (Aug. 14, 2018), <https://www.chalkbeat.org/posts/ny/2018/08/14/discovery-program-data-shsat> [https://perma.cc/8S3D-Y8JL].

<sup>109</sup> See Hu, *supra* note 98.

2018).<sup>110</sup> Further, the Discovery Program's eligibility criteria will be changed to accept students from only "high-poverty schools" which are at or above sixty percent of New York City's ENI.<sup>111</sup> By restricting the program to high-poverty schools, which tend to enroll more Black and Latinx students, Mayor de Blasio's program gives Black and Latinx students a "fair shot" at securing seats in specialized schools.<sup>112</sup> City officials predict that changing the Discovery Program by targeting high-poverty schools will lead to an increase in Black and Latinx students in specialized high schools from six percent to sixteen percent.<sup>113</sup>

However, Mayor de Blasio's proposed Discovery Program has come under fire from students of specialized schools and members of New York City's Asian-American community.<sup>114</sup> Kenneth Chiu, the chairman of the New York City Asian-American Democratic Club, said that the Mayor's plan is "pitting minority against minority."<sup>115</sup> Boaz Weinstein, a graduate of Stuyvesant High School and a board member of its alumni association, argued that Mayor de Blasio's plan will send unqualified students to specialized schools.<sup>116</sup> Christa PTO argued that de Blasio is engaging in "racial balancing" in specialized schools.<sup>117</sup> These arguments stand in contrast to the Southern District's initial findings that Mayor de Blasio's changes further a compelling City interest in achieving a racially diverse

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<sup>110</sup> See *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> See *id.*; see also *supra* note 102 and accompanying text.

<sup>114</sup> See Andrew Boryga, *The Complex Disadvantages Underlying New York City's Specialized-High-School Dilemma*, NEW YORKER (June 15, 2018), <https://www.newyorker.com/news/news-desk/the-complex-disadvantages-underlying-new-york-citys-specialized-high-school-dilemma> [https://perma.cc/S2HZ-7T9Q]; see also Chris Fuchs, *Plan to Diversify New York's Top High Schools Divides Asian-American Groups*, NBC NEWS (June 18, 2018), <https://www.nbcnews.com/news/asian-america/plan-diversify-new-york-s-top-high-schools-divides-asian-n884316> [https://perma.cc/F33P-EUVB].

<sup>115</sup> Boryga, *supra* note 114.

<sup>116</sup> Boaz Weinstein, *Opinion, No Ethnic Group Owns Stuyvesant. All New Yorkers Do.*, N.Y. TIMES (June 13, 2018), <https://www.nytimes.com/2018/06/13/opinion/de-blasio-stuyvesant-school.html> [https://perma.cc/U52D-5A9T].

<sup>117</sup> *Christa McAuliffe PTO v. de Blasio: Stopping New York's Attempt to Discriminate Against Asian-American Students*, PACIFIC LEGAL FOUND., <https://pacificlegal.org/case/christa-mcauliffe-ptov-de-blasio> [https://perma.cc/UT2B-ZWC2].

classroom.<sup>118</sup> This Note takes additional steps to further investigate and evaluate the possible constitutional pitfalls of Mayor de Blasio's decision to change the eligibility parameters of the Discovery Program.

## II. ANALYSIS

### A. *The Equal Protection Clause*

The Equal Protection Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>119</sup> To establish a violation of the Equal Protection Clause, a plaintiff must demonstrate that a challenged action was motivated by an intent or purpose to discriminate.<sup>120</sup> Discriminatory intent may be established through the facts of the case by evidence of substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from general norms, and discriminatory statements in the legislative or administrative history of the decision.<sup>121</sup> Discriminatory intent may be found “even where the record contains no direct evidence of bad faith, ill will or any evil motive on the part of public officials.”<sup>122</sup>

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<sup>118</sup> *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019). Judge Ramos concluded in his brief opinion that, even pursuant to a strict scrutiny analysis, the court would not grant Plaintiff's motion for a preliminary injunction because the Discovery Program was an alternative, race-neutral means to increase racial diversity in the classroom without racial balancing. *Id.* at 277–84. While the court's opinion briefly examined the legal merits of an Equal Protection claim against the Discovery Program, it relied heavily on the Supreme Court's opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), and did not propose any additional means to which New York City could increase racial diversity through its admissions system. *Christa McAuliffe Intermediate Sch. PTO*, 364 F. Supp. 3d at 277–84.

<sup>119</sup> U.S. CONST. amend. XIV, § 1.

<sup>120</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239–48 (1976); see also *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973); *Akins v. Texas*, 325 U.S. 398, 403–04 (1945).

<sup>121</sup> See *Davis*, 426 U.S. at 242 (“Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact it is true, that the law bears more heavily on one race than another.”); see also *Metro. Hous.*, 429 U.S. at 265–69; *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Keyes*, 413 U.S. at 208. For jury selection, see *Akins*, 325 U.S. 398.

<sup>122</sup> See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

When faced with a state or federal law allegedly violating the Equal Protection Clause, courts will determine the level of review by choosing one of three “tiered” tests: rational basis, heightened scrutiny, and strict scrutiny.<sup>123</sup> For a law to pass the rational basis test, there must be a reasonable relationship between the law and a legitimate government purpose.<sup>124</sup> Heightened, or “intermediate,” scrutiny requires that the law have a substantial relationship to an important governmental purpose.<sup>125</sup> Strict scrutiny is the highest level of review and requires that the law be narrowly tailored to meet a compelling governmental interest.<sup>126</sup>

The Supreme Court has held that strict scrutiny is absolutely necessary when the state uses a remedial affirmative action program which has any racial classification as an operative category, subjecting a person to unequal treatment.<sup>127</sup> The reason behind this level of scrutiny is that any experiment by the state which deprives an individual of a basic liberty is an irreparable injury.<sup>128</sup> Still, classifications are presumed to be constitutional unless they trample on a fundamental personal right or create inherently suspect distinctions based on race, religion, or alienage.<sup>129</sup> A state policy that does not circumscribe a particular class of persons via any racial trait does not create or reflect a special likelihood of bias.<sup>130</sup>

The Supreme Court identifies public education as one of the most, if not the most, important functions of state and local governments.<sup>131</sup> It is

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<sup>123</sup> See Evan Gerstmann & Christopher Shortell, *The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases*, 72 U. PITT. L. REV. 1, 3 (2010).

<sup>124</sup> See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>125</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976).

<sup>126</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *Grutter v. Bollinger* 539 U.S. 306, 326 (2003).

<sup>127</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 224 (1995) (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989); see also *id.* at 519 (Kennedy, J., concurring in part and concurring in judgment) (“[A]ny racial preference must face the most rigorous scrutiny by the courts.”); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>128</sup> See *Peña*, 515 U.S. at 220; see also *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

<sup>129</sup> See *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

<sup>130</sup> See *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592–93 (1979) (some disagreement remains regarding the arbitrary status of blanket exclusions); see also *id.* at 610 (White, J., dissenting) (regarding a blanket exclusion for employment of individuals using methadone).

<sup>131</sup> *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954); see *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 804 (2007) (Breyer, J., dissenting); *Franchise Tax Bd. of California*

therefore unsurprising that litigation surrounding the Equal Protection Clause runs deeply through the formation of educational systems in the United States.<sup>132</sup> Beginning in the late nineteenth century, the Court used the Fourteenth Amendment as a tool for desegregating public education.<sup>133</sup> The Court recognized that minority communities studying in historically segregated educational systems felt a constant sense of inferiority which permanently effected their mind and well-being.<sup>134</sup> To counter this effect, the Court used racial quotas and attendance zones to eliminate this state-imposed segregation.<sup>135</sup> However, the Court's remedies have been limited only to state-imposed de jure intentional segregation.<sup>136</sup> This has led to difficulties in fully eliminating de facto segregation through metro-area wide desegregation efforts.<sup>137</sup>

### B. *The Discovery Program*

Mayor de Blasio's proposed revisions to the Discovery Program bring new constitutional issues and challenges under the Equal Protection Clause.<sup>138</sup> Many Asian-American parents, students, and alumni of the nine specialized high schools claim that Mayor de Blasio's changes to the

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v. Hyatt, 538 U.S. 488, 499 (2003); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 466 (1998) (Marshall, J., dissenting).

<sup>132</sup> See JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 8–14 (2018) (examining the Supreme Court's path "toward establishing that students retained a wide array of constitutional rights within public schools").

<sup>133</sup> See *Plessy v. Ferguson*, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

<sup>134</sup> See *Brown I*, 347 U.S. at 493–94 ("To separate [black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status . . . that may affect their hearts and minds in a way unlikely ever to be undone.").

<sup>135</sup> See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

<sup>136</sup> See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198, 208–10 (1973); see also *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15–16 (1971) ("If school authorities fail in their affirmative obligations . . . [t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution."); cf. Eric S. Stein, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2004 (1990).

<sup>137</sup> See *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>138</sup> See N.Y. EDUC. LAW § 2590-g(12) (McKinney 1996); see also *supra* notes 114–115 and accompanying text.

admissions process discriminate against Asian-American applicants.<sup>139</sup> In light of possible upcoming litigation, the City must address whether the Discovery Program will be reviewed by the court under strict scrutiny or another level of scrutiny. Further, if the court reviews the Program under strict scrutiny, the City must determine that the Program is constitutionally sound under the Equal Protection Clause.

### 1. Strict Scrutiny

To trigger strict scrutiny on a claim of discrimination, a plaintiff must show that the challenged act either infringes on a fundamental right,<sup>140</sup> or is employed for “suspect classification” (classifying individuals based on race or national origin).<sup>141</sup> In this case, a plaintiff may claim that the change in admissions either infringes on a child’s fundamental right to public education or is a pretext for racial classification against Asian-Americans.<sup>142</sup> However, a claim that Mayor de Blasio’s changes infringe on a basic constitutional right of education will likely encounter a severe constitutional hurdle due to the lack of a recognized right to education.<sup>143</sup>

Specifically, while the Court has alluded to education as “the most important function of state and local governments,” the Court has never directly recognized a positive constitutional right to education.<sup>144</sup> Rather, the

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<sup>139</sup> See Christ, *supra* note 34; see also Complaint at 16–17, Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657).

<sup>140</sup> See Zablocki v. Redhail, 434 U.S. 374, 381 (1978) (requiring strict scrutiny because a classification created by a statute infringed upon the fundamental right to marry).

<sup>141</sup> Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (stating that the classifications race, alienage, or national origin “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest”).

<sup>142</sup> See Complaint, Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657).

<sup>143</sup> Alia Wong, *The Students Suing for a Constitutional Right to Education*, ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901> [https://perma.cc/A944-AF3N].

<sup>144</sup> See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 493 (1954). There have been several cases brought to the Supreme Court pursuant to the Equal Protection Clause regarding admissions systems. See generally *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Gutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Brown I*, 347

Court in *San Antonio Independent School District v. Rodriguez*<sup>145</sup> explicitly explained that education is not among the rights afforded by the Constitution.<sup>146</sup> Further, there is no basis for a right to education to be implicitly protected by the Constitution.<sup>147</sup> Therefore, it cannot safely be assumed that a claim brought on behalf of individuals alleging a violation of their right to education would be subject to strict scrutiny, especially in light of *Rodriguez*.<sup>148</sup>

The second option for a plaintiff when bringing a claim of discrimination under the Equal Protection Clause is to allege that a challenged act is a racial classification.<sup>149</sup> In this regard, a plaintiff could argue that removal of the SHSAT, or an increase in the number of seats retained by the Discovery Program, is a racial classification against Asian-American students. A court will apply strict scrutiny to any challenged state or federal remedial affirmative action program which has a “racial classification” subjecting any individual to “unequal treatment.”<sup>150</sup>

Prior to 2019, the Discovery Program accepted economically disadvantaged students from all middle schools in New York City.<sup>151</sup>

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U.S. 483. The right to education has also been recognized in worldwide forums. See *Right to Education*, UNESCO, <https://en.unesco.org/themes/right-to-education> [<https://perma.cc/6A3B-V9P9>].

<sup>145</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>146</sup> See *id.* at 35. This case involved members of minority groups and the poor who challenged the Texas school finance system as unconstitutional because it collected its money through local property taxation and created a disparity in the level of education proportional to wealth of neighborhoods. *Id.* at 4–17. The Court found the system to be constitutional because the poor are not a suspect class and the opportunity to receive an education remained. *Id.* at 28–29. The Court, however, did apply rational basis review. *Id.* at 54–55.

<sup>147</sup> See *id.* at 34–35.

<sup>148</sup> Lee C. Bollinger, *Educational Equity and Quality: Brown and Rodriguez and Their Aftermath*, COLUM. U. CITY N.Y. (Nov. 3, 2003), <http://www.columbia.edu/cu/president/docs/communications/2003-2004/031103-educationalequity.html> [<https://perma.cc/5WEH-VPF5>].

<sup>149</sup> *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (stating that the classifications race, alienage, or national origin “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy . . . . These laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest”).

<sup>150</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 299 (1978); *Grutter v. Bollinger*, 539 U.S. 326 (2003); *supra* text accompanying note 126; see also Henry L. Chambers Jr., *Retooling the Intent Requirement Under the Fourteenth Amendment*, 13 TEMP. POL. & CIV. RTS. L. REV. 611 (2004).

<sup>151</sup> See Zimmerman, *supra* note 108; see also *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7; N.Y.C. DEP’T OF EDUC., *supra* note 102.



However, this eligibility criterion failed to produce a diverse class.<sup>152</sup> In 2017, seventy-eight percent of the 202 students admitted to the Discovery Program were white and Asian-American students.<sup>153</sup> In recognition of the lack of diversity achieved by the Discovery Program, Mayor de Blasio restricted the Program to only admit students from high-poverty schools at or above sixty percent of New York City's ENI.<sup>154</sup>

In response to Mayor de Blasio's proposed changes to the Discovery Program, the Christa PTO, alongside several Asian-American students and families, filed a federal lawsuit on December 13, 2018.<sup>155</sup> The suit alleged that Mayor de Blasio's decision to restrict admission to the Discovery Program through the ENI excludes Asian-American students from competing for the seats offered.<sup>156</sup> Plaintiffs argued that, based on the restriction, eleven of the twenty-four majority Asian-American schools with eight-grade enrollment in New York City will lose their eligibility for the program while only a small portion of majority Black and Latinx schools would lose eligibility.<sup>157</sup>

This argument is further supported by recent research from The New School Center for New York City Affairs in the form of an interactive map of New York City's middle schools.<sup>158</sup> When filtering the map for middle schools at or above the ENI of 0.6 (sixty percent or greater need), the map identifies 196 schools which qualify for the Discovery Program.<sup>159</sup> Out of the 196 schools, 141 schools (seventy-two percent) are at or above ninety percent Black and Latinx,<sup>160</sup> forty-nine schools (twenty percent) are between

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<sup>152</sup> See Alex Zimmerman, *NYC Is Expanding a Program to Boost Diversity at Its Elite High Schools. But It Isn't Making a Dent*, CHALKBEAT (Apr. 9, 2018), <https://www.chalkbeat.org/posts/ny/2018/04/09/nyc-is-expanding-a-program-to-boost-diversity-at-its-elite-high-schools-but-it-mostly-helps-white-and-asian-students> [<https://perma.cc/B3E5-NGCL>].

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See Complaint, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657).

<sup>156</sup> See Agnes Constante, *Advocates Allege NYC School Plan Discriminates Against Asian Americans*, NBC NEWS (Dec. 17, 2018), <https://www.nbcnews.com/news/asian-america/parents-allege-plan-diversify-new-york-s-top-high-schools-n948726> [<https://perma.cc/J2SQ-6LRX>].

<sup>157</sup> See *id.*

<sup>158</sup> See Nicole Mader & Ana Carla Sant'Anna Costa, *No Heavy Lifting Required: New York City's Unambitious School 'Diversity' Plan*, NEW SCH. CTR. FOR N.Y. CITY AFFAIRS, <http://www.centernyc.org/diversity-plan> [<https://perma.cc/WQH5-7RCD>].

<sup>159</sup> See *id.*; *infra* Appendix of images and datasets used for notes 159–162.

<sup>160</sup> See Nicole Mader & Ana Carla Sant'Anna Costa, *supra* note 158.

fifty and ninety percent Black and Latinx,<sup>161</sup> and only six schools (three percent) are below fifty percent Black and Latinx.<sup>162</sup> With this in mind, the complaint may have footing to argue that the Discovery Program is designed to exclude Asian-American students or to unconstitutionally benefit Black and Latinx students.<sup>163</sup> As this will likely be considered a suspect classification under the Equal Protection Clause, it therefore warrants a strict scrutiny analysis.<sup>164</sup>

## 2. The Discovery Program, Exclusionary Admissions Programs, and *Bakke*

To understand the Discovery Program's ability to survive strict scrutiny, it is necessary to evaluate case law relevant to the classification presented by the Program's eligibility criteria. On its face, the Discovery Program looks similar to an exclusionary admissions program such as that considered in *Regents of University of California v. Bakke*.<sup>165</sup> In *Bakke*, the Supreme Court found that a special admissions program which reserved seats to the University of California Davis School of Medicine for applicants who were members of a minority group and "economically and or educationally disadvantaged" was unconstitutional under the Equal Protection Clause.<sup>166</sup> Applicants who self-identified as members of a disadvantaged minority would not have to meet a 2.5 GPA cut-off requirement and were not ranked against candidates in the general admissions process.<sup>167</sup> These applicants were interviewed separately and competed for a spot within the sixteen seats reserved for the special class of

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<sup>161</sup> See *id.*

<sup>162</sup> See *id.*

<sup>163</sup> See Complaint, Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657); see also *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 320 (1978) ("But when a State's distribution of benefits or imposition of burden hinges on ancestry of the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest.").

<sup>164</sup> See *Bakke*, 438 U.S. at 299 (stating that when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest").

<sup>165</sup> *Id.* at 265.

<sup>166</sup> *Id.* at 272-74.

<sup>167</sup> See *id.* at 272-73.

applicants out of the 100-person class.<sup>168</sup> Allan P. Bakke, a white male, brought suit under the Equal Protection Clause alleging that the special admissions program operated to exclude white applicants based on their race.<sup>169</sup> The trial court held that the program was a “racial quota” because minority applicants competed against one another, rather than with the general pool of applicants.<sup>170</sup>

On appeal, the Supreme Court held that the admissions system was inherently discriminatory and unconstitutional under the Equal Protection Clause.<sup>171</sup> The Court stated that the Fourteenth Amendment is not a “two-class theory” with different standards for white and Black individuals.<sup>172</sup> Rather, the Equal Protection Clause extends to all persons, and racial and ethnic distinctions of any kind “are inherently suspect and thus call for the most exacting judicial examination.”<sup>173</sup> Moreover, allowing classifications based on an individual’s racial and ethnic background to “ebb and flow” with political forces would permit “[d]isparate constitutional tolerance” which may exacerbate, rather than alleviate, racial and ethnic antagonisms.<sup>174</sup> In this particular situation, the special admissions system favored minority groups by reserving seats from the general admission pool and denying general applicants the ability to compete for those seats. When minority applicants are allowed to compete for all seats in the class while general applicants are excluded from competition, the state must show that the program is necessary to promote a substantial state interest.<sup>175</sup> While the

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<sup>168</sup> See *id.* at 289.

<sup>169</sup> See *id.* at 276–78.

<sup>170</sup> *Id.* at 279.

<sup>171</sup> See *id.* at 320. On whether race-based affirmative action should be used on an individual or class-wide basis, see Owen Fiss, *Arguing Affirmative Action*, N.Y. REV. BOOKS (Feb. 7, 2019), <https://www.nybooks.com/articles/2019/02/07/arguing-affirmative-action> [https://perma.cc/ZL65-2DV6] (responding to Noah Feldman, *Justifying Diversity*, N.Y. REV. BOOKS (Dec. 6, 2018), <https://www.nybooks.com/articles/2018/12/06/justifying-diversity> [https://perma.cc/38TS-9JQ2]).

<sup>172</sup> *Bakke*, 438 U.S. at 295; see *Hernandez v. State of Tex.*, 347 U.S. 475, 478 (1954) (“[C]ommunity prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection . . . . The Fourteenth Amendment is not directed solely against discrimination due to a ‘two-class theory’—that is, based upon differences between ‘white’ and Negro.”).

<sup>173</sup> *Bakke*, 438 U.S. at 290–91.

<sup>174</sup> *Id.* at 298–99.

<sup>175</sup> See *id.* at 305 (“[T]he operation of petitioner’s special admissions program . . . prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition . . . .”); see also *id.* at 320 (“But when a State’s distribution of benefits or imposition of

state in *Bakke* had a legitimate and substantial interest in eliminating identified discrimination, the University of California could not justify the imposition of disadvantages on general applicants for seats.<sup>176</sup>

In the same vein, the Discovery Program excludes certain students from a large portion of seats in specialized high schools.<sup>177</sup> The Program reserves twenty percent of 4,000 seats in public schools, 800 seats in total, to students from high-poverty schools.<sup>178</sup> By requiring schools to reserve 800 seats, New York City prevents applicants from competing for all of the seats in a class for any specialized high school.<sup>179</sup> Additionally, Mayor de Blasio's restriction on the Program to schools with an ENI of 0.6 or greater will have the effect of excluding multiple schools with a majority of Asian-American or white applicants, while promoting recruitment from schools with a majority of Black and Latinx students.<sup>180</sup> Mayor de Blasio has even stated in an op-ed<sup>181</sup> and on Twitter<sup>182</sup> that the Discovery Program is to be used as a

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burden hinges on ancestry of the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest.”).

<sup>176</sup> See *id.* at 310; see also *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Justices Stewart, Powell, and Stevens))).

<sup>177</sup> See Hu, *supra* note 98 (“By 2020, 20 percent of the ninth-grade seats in every specialized high school will be set aside for Discovery students, according to city education officials. Currently, only 5 percent of the 4,000 ninth-grade seats are filled through Discovery.”).

<sup>178</sup> See *id.*; see also *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>179</sup> See Hu, *supra* note 98.

<sup>180</sup> See *id.*; see also *Constante*, *supra* note 156.

<sup>181</sup> Bill de Blasio, *Our Specialized Schools Have a Diversity Problem. Let's Fix It.*, CHALKBEAT (June 2, 2018), <https://chalkbeat.org/posts/ny/2018/06/02/mayor-bill-de-blasio-new-york-city-will-push-for-admissions-changes-at-elite-and-segregated-specialized-high-schools> [https://perma.cc/TF6P-VUGQ].

<sup>182</sup> Bill de Blasio (@NYCMayor), TWITTER (June 3, 2018, 4:15 PM), <https://twitter.com/nycmayor/status/1003414958464487425?lang=en> [https://perma.cc/HPT3-JXTW] (“Stuyvesant High School just admitted almost a thousand students, but only ten of those students were African American and less than thirty were Latino. In a city that is majority African American and Latino.”); Bill de Blasio (@NYCMayor), TWITTER (June 3, 2018, 4:18 PM), <https://twitter.com/NYCMayor/status/1003415609915400192> [https://perma.cc/56DX-RH5X]. While the discovery changes may be considered facially race-neutral, it is possible to take from these public statements that the Mayor has an implicit intent to racially balance specialized high schools. See *Complaint at 14*, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657).

means to diversify New York's school system.<sup>183</sup> For the purposes of an Equal Protection Clause analysis, these statements go to prove that Mayor de Blasio made changes to the Discovery Program with the purpose of benefitting students of color while discriminating against Asian-American students.<sup>184</sup>

While the Discovery Program may look like the admissions system in *Bakke*, it is distinct in several respects. In *Bakke*, the University of California had a clear and express policy of segmenting seats for students based on their race.<sup>185</sup> In this case, there is a more attenuated connection between the Discovery Program's criteria for acceptance and an applicant's race.<sup>186</sup> Mayor de Blasio has not explicitly stated that he is only accepting Black and Latinx students through the Discovery Program.<sup>187</sup> Rather, the Program is presented as one that will target high-poverty schools.<sup>188</sup> Further, the general admissions system in *Bakke* evaluated multiple factors, including both objective and holistic criteria, and still violated the Equal Protection Clause,<sup>189</sup> while the admissions system for specialized high schools relies solely on the SHSAT.<sup>190</sup> Still, some argue that this is a roundabout way to target schools with higher numbers of Black and Latinx students, and lower numbers of Asian-American students.<sup>191</sup>

### 3. *Gratz, Grutter, and Fisher*

Looking further into relevant case law helps clearly highlight the differences and similarities between *Bakke* and the Discovery Program. In *Gratz v. Bollinger*,<sup>192</sup> the Supreme Court held that an admissions policy automatically awarding "points" to applicants based on whether they were

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<sup>183</sup> See Complaint, *Christa McAuliffe Intermediate Sch. PTO, Inc.*, 364 F. Supp. 3d 253.

<sup>184</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

<sup>185</sup> See *id.* at 319 (stating that the Davis admissions program explicitly told applicants "who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class").

<sup>186</sup> See *Mayor de Blasio and Chancellor Carranza Announce Plan*, *supra* note 7.

<sup>187</sup> See *id.*

<sup>188</sup> See *id.*

<sup>189</sup> See *Bakke*, 438 U.S. 265 at 274.

<sup>190</sup> See *id.*

<sup>191</sup> See *id.*; see also *supra* notes 155–164 and accompanying text.

<sup>192</sup> 539 U.S. 244, 250–51 (2003).

from an underrepresented racial or ethnic minority group was unconstitutional.<sup>193</sup> The University of Michigan provided twenty points to every applicant from an underrepresented racial or ethnic group out of a total of 100 points necessary for admission and nearly all of these applicants were admitted.<sup>194</sup> This method was strictly scrutinized by the Court under the Equal Protection Clause due to its use of racial classifications.<sup>195</sup> The Court found that this process of admissions was not “narrowly tailored” to achieve an interest in educational diversity.<sup>196</sup> While an admissions program that deemed racial or ethnic backgrounds as a “plus” would be reasonable, the use of a numerical value for racial or ethnic minority groups violated the Equal Protection Clause.<sup>197</sup>

However, the Court has allowed racial preferences without numerical value. Specifically, in *Grutter v. Bollinger*,<sup>198</sup> the Supreme Court held that an official admissions policy which included “soft-variables,” such as the interest in inclusion of underrepresented minorities, was constitutional under the Equal Protection Clause.<sup>199</sup> The University of Michigan Law School’s admissions policy stressed that “the highest possible score does not guarantee admission to the law school” and that soft-variables would be used to assess “an ‘applicant’s likely contributions to the intellectual and social life of the institution.’”<sup>200</sup> Moreover, the Court found that the law school had a substantial interest in obtaining a diverse class of students as it would better prepare students for an “increasingly diverse workforce and society.”<sup>201</sup> The Court held that the Equal Protection Clause did not prohibit the law school’s policy because it was narrowly tailored and used to further a compelling interest in obtaining educational benefits from diversity.<sup>202</sup>

Likewise, in *Fisher v. University of Texas*,<sup>203</sup> the Supreme Court heard arguments regarding the University of Texas at Austin’s “Ten Percent

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<sup>193</sup> *See id.*

<sup>194</sup> *See id.* at 266.

<sup>195</sup> *See id.* at 270.

<sup>196</sup> *See id.* at 276.

<sup>197</sup> *Id.* at 270–71 (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

<sup>198</sup> 539 U.S. 306, 314 (2003).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 315–16.

<sup>201</sup> *Id.* at 330.

<sup>202</sup> *Id.* at 343.

<sup>203</sup> *Fisher I*, 570 U.S. 297 (2013).

Plan.”<sup>204</sup> The Ten Percent Plan, enacted by the Texas State legislature, admitted the top ten percent of graduates from every Texas high school which increased the racial diversity of public university classes.<sup>205</sup> This was in addition to a holistic metric called the “Personal Achievement Index,” which measured a student’s leadership and work experience, extracurricular activities, service, and background.<sup>206</sup> The Court looked to *Bakke*, *Gratz*, and *Grutter* to guide its decision in *Fisher*.<sup>207</sup> While any racial classification must withstand strict scrutiny, the educational benefit that flows from a diverse student body is such a strongly compelling governmental interest that it could justify its use.<sup>208</sup> Still, a race-conscious admissions policy cannot become a racial quota.<sup>209</sup>

The Court remanded the case to the Court of Appeals to apply strict scrutiny to the admissions program and, in 2016, the Court once again reviewed the admissions program after the Fifth Circuit affirmed entry of summary judgment for the university.<sup>210</sup> On appeal, the Court held that the admissions program did not violate the Equal Protection Clause.<sup>211</sup> The Court found that the university had not obtained educational benefits of diversity before instituting the Top Ten Percent Plan<sup>212</sup> and was unable to achieve such a goal through extended outreach efforts and enhanced consideration of economic factors.<sup>213</sup> The Court ultimately upheld the admissions system<sup>214</sup> but placed a continuing obligation on the university to

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<sup>204</sup> *Id.* at 331 (Scalia, J., dissenting).

<sup>205</sup> *See id.* at 305 (majority opinion); *see also* *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206 (2016) (“[W]hile the Plan continues to be referenced as a ‘Top Ten Percent Plan,’ a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted . . . .”); *id.* at 2213 (“[P]etitioner overlooks the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment.”).

<sup>206</sup> *Fisher I*, 570 U.S. at 304.

<sup>207</sup> *See id.* at 307 (“Among the Court’s cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university’s admissions process . . . .”).

<sup>208</sup> *See id.* at 307–08.

<sup>209</sup> *See id.* at 309.

<sup>210</sup> *See Fisher II*, 136 S. Ct. at 2202.

<sup>211</sup> *See id.* at 2215.

<sup>212</sup> *See id.* at 2211.

<sup>213</sup> *See id.* at 2212–15 (“[T]he Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence.”).

<sup>214</sup> *See id.* at 2207.

reassess its admissions system and tailor its use of race to satisfy the strict scrutiny burden.<sup>215</sup>

#### 4. New York's Discovery Program Will Likely Survive Strict Scrutiny

New York City will likely be able to prove that its proposed admissions process is constitutional under the Equal Protection Clause. While New York City's Discovery Program does have many similarities to *Bakke* and segments a significant proportion of seats (twenty percent) in the admissions process for low-income students, it does not explicitly segment to students of specific minority backgrounds.<sup>216</sup> Further, Asian-American students composed sixty-four percent of applicants who were admitted to the 2017 Discovery Program.<sup>217</sup> Still, the Program will draw from a significant portion of schools that are ninety percent or more Black and Latinx students due to use of the ENI.<sup>218</sup> This may push the burden onto the City to show that the Program furthers a significant governmental interest.<sup>219</sup>

However, the Discovery Program will likely pass under the strict scrutiny standard because it furthers a significant governmental interest in the diversity of the student body.<sup>220</sup> In particular, the City's goal of destroying stereotypes, promoting cross-racial understanding, and preparing its students to lead a diverse workforce is a narrowly tailored objective.<sup>221</sup> Moreover, the City might argue that a public school may create a race-conscious admissions system to obtain the benefits of a diverse

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<sup>215</sup> See *id.* at 2209–10.

<sup>216</sup> See Mayor de Blasio and Chancellor Carranza Announce Plan, *supra* note 7.

<sup>217</sup> See Zimmerman, *supra* note 108.

<sup>218</sup> See Mader, *supra* note 158.

<sup>219</sup> *Fisher I*, 570 U.S. 297, 310 (2013) (“Strict scrutiny is a searching examination, and it is the government that bears the burden to prove ‘that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate . . . .’” (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 535 (1989) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–35 (1980) (Stevens, J., dissenting)))).

<sup>220</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299, 315 (1978) (“[T]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”); see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“[R]acial classifications imposed by government . . . are constitutional only if they are narrowly tailored to further compelling governmental interests.”). The Court in *Grutter* found that the University of Michigan Law School's use of holistic review which did not mechanically assign points to race was constitutional. See *id.* at 337, 343–44.

<sup>221</sup> *Fisher II*, 136 S. Ct. 2198, 2223 (2016).



student body,<sup>222</sup> and that the Discovery Program is sufficiently tailored to meet this legitimate state interest.<sup>223</sup> Critics may argue that, like the University of Texas in *Fisher*, Mayor de Blasio has not provided concrete or precise goals designed to encourage diversity in order for his Program to withstand strict scrutiny.<sup>224</sup>

New York City can also point to its previously unsuccessful use of race-neutral policies to diversify specialized high schools as a major reason for the changes to the Discovery Program.<sup>225</sup> By providing a wider and more diverse pool of students who may be admitted to specialized high schools through the Program, Mayor de Blasio's proposal helps public schools fulfill their use as "laboratories for experimentation."<sup>226</sup> In this regard, the Discovery Program advances a significant and compelling government interest, which is narrowly tailored for approval under the Equal Protection Clause and should be deemed constitutional.<sup>227</sup> New York City will still have a continuing obligation to satisfy the burden of strict scrutiny through periodic reassessment of the constitutionality and efficacy of its admissions program.<sup>228</sup> Moreover, if the City does attribute a numerical value to race in the future, then it will face a much more difficult challenge of overcoming the Court's holdings in *Gratz* and *Bakke*.<sup>229</sup>

### C. *The SHSAT*

While the federal complaint filed by the Christa PTO seeks only injunctive relief for Mayor de Blasio's changes to the Discovery Program, it

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<sup>222</sup> *Id.* at 2210.

<sup>223</sup> *See Bakke*, 438 U.S. at 305.

<sup>224</sup> *See Fisher II*, 136 S. Ct. at 2211 ("[A] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.").

<sup>225</sup> *See id.* at 2214.

<sup>226</sup> *Id.*

<sup>227</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulate each category of applicants with certain desired qualification from competition with all other applicants.'" (citing *Bakke*, 438 U.S. at 315)). In this case, the system designed by New York replicates the Texas Ten Percent Program which was considered sufficiently narrowly tailored by the Court in *Fisher* and *Fisher II*. *See Fisher I*, 570 U.S. 297, 337 (2013); *Fisher II*, 136 S. Ct. at 2214.

<sup>228</sup> *Fisher II*, 136 S. Ct. at 2209–10.

<sup>229</sup> *See Gratz v. Bollinger*, 539 U.S. 244, 255, 275–76 (2003); *see also Bakke*, 438 U.S. at 318.

would be helpful to briefly investigate a potential claim under the Equal Protection Clause against the elimination of the SHSAT.<sup>230</sup> The argument that can be posed under the Fourteenth Amendment against the removal of the SHSAT is that it will disproportionately affect Asian-American students.<sup>231</sup> By eliminating the SHSAT, the NYCDOE would cut the number of Asian-American students admitted to specialized high schools by almost half.<sup>232</sup> This would undermine the ability of lower-income Asian-Americans to stand out as meritorious<sup>233</sup> and may give wealthier students a greater opportunity to obtain seats through better classroom education.<sup>234</sup> Finally, this change fails to appreciate the diversity within the Asian-American community.<sup>235</sup>

Despite these arguments, there will likely be no constitutional remedy available for the discontinuation of the SHSAT under the Fourteenth Amendment. This is because the SHSAT will be replaced with a grade-based cut-off system similar to the one used by the University of Texas.<sup>236</sup> Like the University of Texas, New York City's admissions policy will fill a significant majority of its class with students who are in the top seven percent of their classes.<sup>237</sup> The Court in *Fisher* explained that while the Top Ten Percent Plan was facially neutral, its basic purpose was to boost minority enrollment—like Mayor de Blasio's proposal to replace the SHSAT with seventh grade scores.<sup>238</sup> However, the Court noted that an admissions system based exclusively on class rank is not effective and must be complemented with a

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<sup>230</sup> Complaint, *Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. 2019) (1:18-cv-11657). Plaintiffs seek a preliminary and permanent injunction prohibiting the City from implementing their changes to the Discovery Program. *See id.* at 18.

<sup>231</sup> *See Saffran, supra* note 30.

<sup>232</sup> *Id.*; *see* N.Y.C. INDEP. BUDGET OFFICE, ADMISSIONS OVERHAUL: SIMULATING THE OUTCOME UNDER THE MAYOR'S PLAN FOR ADMISSIONS TO THE CITY'S SPECIALIZED HIGH SCHOOLS (2019), <https://ibo.nyc.ny.us/iboreports/admissions-overhaul-simulating-the-outcome-under-the-mayors-plan-for-admissions-to-the-citys-specialized-high-schools-jan-2019.pdf> [<https://perma.cc/H8TD-ZPV7>] ("The number of Asian students receiving admissions offers would have fallen by about half . . .").

<sup>233</sup> *See Weinstein, supra* note 116. Forty-four percent of Stuyvesant graduates are currently eligible to qualify for free or reduced lunch and for Human Resources Administration benefits. *Id.*

<sup>234</sup> *See id.*

<sup>235</sup> *See id.*

<sup>236</sup> *See* N.Y.C. DEP'T OF EDUC., *supra* note 7.

<sup>237</sup> *See Fisher II*, 136 S. Ct. 2198, 2206 (2016).

<sup>238</sup> *See id.* at 2213.

holistic admissions process to further the goal of increasing diversity.<sup>239</sup> In this regard, replacing the SHSAT with seventh grade scores will likely be constitutional under the Fourteenth Amendment because it is narrowly tailored to further diversity in the classroom<sup>240</sup> when combined with the Discovery Program.<sup>241</sup>

An additional argument which should be noted in this vein is that there is an inherent requirement of intent to bring a claim under the Equal Protection Clause.<sup>242</sup> In this case, the City of New York will replace the SHSAT with seventh grade New York State math and ELA exam scores and course grades in English, math, social studies, and science.<sup>243</sup> Seventh grade math and ELA examinations undergo a rigorous internal and external evaluation by the City to review the degree to which the test is consistent and valid.<sup>244</sup> Additionally, middle school grades are arguably more valuable of a predictor than the SHSAT.<sup>245</sup> Therefore, seventh grade examination scores and grades are a readily available race-neutral alternative to the SHSAT and further the legitimate state interest of diversifying the classroom.<sup>246</sup> This system of admission would be even more narrowly tailored than the system in *Grutter*, which the Court upheld as constitutional.<sup>247</sup> Thus, a claim brought under the Fourteenth Amendment against the removal of the

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<sup>239</sup> See *id.* at 2214.

<sup>240</sup> See *supra* notes 219–220, 225–226; see also *Grutter v. Bollinger*, 539 U.S. 306, 334, 337, 343–44 (2003). In this case, the system designed by New York replicates the Texas Ten Percent Program which was considered sufficiently narrowly tailored by the Court in *Fisher I* and *Fisher II*. See *Fisher I*, 570 U.S. 297, 337 (2013); *Fisher II*, 136 U.S. at 2214.

<sup>241</sup> See *Grutter*, 539 U.S. at 337, 343–44. Like the Court in *Fisher I*, the Court in *Grutter* found that the University of Michigan Law School's use of holistic review which did not mechanically assign points to race was constitutional under the Fourteenth Amendment. *Id.*

<sup>242</sup> See *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239–48 (1976); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973); *Akins v. Texas*, 325 U.S. 398, 403–04 (1945).

<sup>243</sup> See N.Y.C. DEP'T OF EDUC., *supra* note 7.

<sup>244</sup> See PEARSON, NEW YORK STATE TESTING PROGRAM 2015: ENGLISH LANGUAGE ARTS AND MATHEMATICS GRADES 3–8 (2015), <http://www.p12.nysed.gov/assessment/reports/ei/tr38-15w.pdf> [<https://perma.cc/G8AG-K75P>]. School grades are also a particularly good indicator because all New York City public schools are required to follow a uniform common core curriculum. For more on the New York Common Core system, see *Common Core Curriculum*, ENGAGE N.Y., <https://www.engageny.org/common-core-curriculum> [<https://perma.cc/PST4-4Z2D>].

<sup>245</sup> See Taylor, *supra* note 75.

<sup>246</sup> See *Grutter*, 539 U.S. at 337.

<sup>247</sup> See *id.* at 339.

SHSAT would likely fail because the claim would fail to show an intent to discriminate, since seventh grade scores are readily available, narrowly tailored, objective, and race-neutral criteria.<sup>248</sup>

### III. PROPOSAL

Diversifying New York's classrooms is a critical step towards helping students of color attain higher levels of education and become part of the country's elite workforce.<sup>249</sup> To improve the diversity of classrooms in specialized high schools, New York City should implement a multi-measured approach to admissions in addition to the use of seventh grade scores. This admissions system would use several external "soft" factors, including essays and letters of recommendation, to supplement a student's academic profile.<sup>250</sup> Although the top seven percent plan works towards the need for increased racial, ethnic, and socio-economic diversity in the classroom, a supplemental multi-factor admissions approach will resonate more with case law<sup>251</sup> and public opinion in the Black and Latinx communities.<sup>252</sup> This system of admissions is also supported by several examples of successful schools nationwide.<sup>253</sup> Moreover, this system has

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<sup>248</sup> See *id.*; see also Tortoriello, *supra* note 65, at 431–32.

<sup>249</sup> See Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 681–93 (1998) (describing the utility of modest affirmative action programs for integrating minority groups into higher education systems). For more on the educational goals of specialized high schools, see *supra* notes 25–29 and accompanying text.

<sup>250</sup> See *Grutter*, 539 U.S. at 315 (describing how requisite evaluations of all information available for a candidate, including a personal statement and letters of recommendation, were the "hallmark" of the law school's upheld policy).

<sup>251</sup> See *id.*; see also *Fisher I*, 570 U.S. 297, 304 (2013).

<sup>252</sup> Arva Rice, Opinion, *Scrap the SHSAT for Diversity's Sake: Mayor de Blasio Is Right About Selective High Schools*, DAILY NEWS (Sept. 6, 2018, 4:40 PM), <https://www.nydailynews.com/opinion/ny-op-ed-scrap-shsat-for-diversity-sake-20180905-story.html> [<https://perma.cc/4CXU-YQAX>].

<sup>253</sup> See NAACP LEGAL DEF. & EDUC. FUND, *supra* note 85, at 17–20. The NAACP's publication details ten publicly funded schools with similar academic rankings, preparatory programs, and college acceptance rates to specialized high schools. All of these schools use multiple measures in addition to an entrance examination and have a higher percentage of Black and Latinx students than specialized high schools. Still, four of these schools are located in New York State or New York City. *Id.*

previously been recommended by the U.S. Department of Education and Department of Justice to achieve racial diversity and avoid racial isolation.<sup>254</sup>

Letters of recommendation have a positive correlation to multiple aspects of performance in post-secondary education and provide information about a candidate's motivation to succeed.<sup>255</sup> Recommendations also offer insight into a student's emotional intelligence and character.<sup>256</sup> Several schools in New York and California use recommendations in their admissions process.<sup>257</sup> For example, the City Honors School is composed of twenty-six percent Black and Latinx students and their performance on the New York Regents Examinations was thirty percent higher than the district average.<sup>258</sup> Likewise, essays can provide useful insights into the lives and experiences of students who apply to specialized schools.<sup>259</sup> Millennium High School in New York City uses essays in its admissions process and garners a student body composed of twenty-

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<sup>254</sup> See U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf> [<https://perma.cc/UR79-XE8G>]. While the current administration has moved towards race-blind admissions standards, Education Secretary Betsy DeVos has explained that the Supreme Court's decisions on affirmative action are the best guides for schools in offering equal opportunities to all students. See Erica L. Green et al., *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html> [<https://perma.cc/Y2G8-QG82>].

<sup>255</sup> See Nathan R. Kuncel et al., *A Meta-analysis of Letters of Recommendation in College and Graduate Admissions: Reasons for Hope*, 22 INT'L J. SELECTION & ASSESSMENT 101 (2014).

<sup>256</sup> See PAUL TOUGH, HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER 1 (2012); see also NAACP LEGAL DEF. & EDUC. FUND, *supra* note 85, at 21.

<sup>257</sup> See NAACP LEGAL DEF. & EDUC. FUND, *supra* note 85, at 19.

<sup>258</sup> See *City Honors School at Fosdick Masten Park*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/new-york/districts/buffalo-city-school-district/city-honors-school-at-fosdick-masten-park-13548/test-scores> [<https://perma.cc/3DVK-BEEJ>]. Likewise, the California Academy of Math and Science has a ninety-one percent total minority enrollment rate, which is composed of forty-five percent Black and Latinx and thirty percent Asian-American students. See *California Academy of Mathematics and Science*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/california/districts/long-beach-unified/california-academy-of-mathematics-and-science-2500/student-body> [<https://perma.cc/4DP5-L9WF>].

<sup>259</sup> See Valerie Strauss, Opinion, *Five Myths About College Admissions*, WASH. POST (Mar. 24, 2017), [https://www.washingtonpost.com/opinions/five-myths-about-college-admissions/2017/03/24/673a03a2-0f2a-11e7-9d5a-a83e627dc120\\_story.html?noredirect=on&utm\\_term=.37034f44141f](https://www.washingtonpost.com/opinions/five-myths-about-college-admissions/2017/03/24/673a03a2-0f2a-11e7-9d5a-a83e627dc120_story.html?noredirect=on&utm_term=.37034f44141f) [<https://perma.cc/5MY6-TQDT>].

five percent Black and Latinx students who score much higher than state averages on Regents Examinations.<sup>260</sup>

All of these “soft” variables would be considered constitutionally permissible under the Fourteenth Amendment. In *Fisher*, the Court upheld the University of Texas’ use of a Personal Achievement Score based on required essays and letters of recommendation under the Equal Protection Clause because they highlighted an applicant’s potential contribution to the university.<sup>261</sup> Further, the Court in *Grutter* upheld the University of Michigan Law School’s admissions program, which incorporated personal statements, letters of recommendation, and an essay, because it bore the “hallmarks of a narrowly tailored plan.”<sup>262</sup> Use of essays and letters of recommendation as supplemental components to specialized high school admissions does not “insulate” minority applicants from evaluation<sup>263</sup> or make race a decisive factor for “virtually every” applicant.<sup>264</sup> In all, Mayor de Blasio and New York’s legislature should integrate essays and letters of recommendation into specialized high school admissions through future bills and educational policies.

Additionally, the City should meet and speak with representatives of minority communities in New York to discuss the systematic educational issues which will be unresolved by the Mayor’s proposed changes to specialized high school admissions. New York’s Asian-American, Black, and Latinx communities have all explained that Mayor de Blasio’s changes are only a minor solution to a greater issue of deterioration of public schools serving communities of color in New York City.<sup>265</sup> Community leaders from

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<sup>260</sup> *Millennium High School*, U.S. NEWS & WORLD REP., <https://www.usnews.com/education/best-high-schools/new-york/districts/new-york-city-public-schools/millennium-high-school-13103/test-scores> [<https://perma.cc/85SY-FVTE>].

<sup>261</sup> *Fisher II*, 136 S. Ct. 2198, 2206 (2016).

<sup>262</sup> *Grutter v. Bollinger*, 539 U.S. 306, 309–15 (2003).

<sup>263</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 317 (1978).

<sup>264</sup> *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003).

<sup>265</sup> Larry Cary, *Don’t Mess with the Test for the City’s Top High Schools—Fix the Real Problem*, N.Y. POST (May 16, 2018, 7:53 PM), <https://nypost.com/2018/05/16/dont-mess-with-the-test-for-the-citys-top-high-schools-fix-the-real-problem> [<https://perma.cc/ZN7M-S2X8>]. For example, the Coalition for Asian American Children and Families (CACF), alongside thirty-six non-profit organizations, released a response to Mayor de Blasio’s proposed changes to the SHSAT admissions process urging the NYCDOE to address inequalities in education from Pre-K through twelfth grade for historically disenfranchised communities in New York. Press Release, Asian Pacific American Organizations, Response to Proposed Changes to the NYC SHSAT Process (July 30, 2018, 9:00 AM), <http://cacf.org/>

the Black and Latinx populations in New York City are concerned with addressing the barriers to equitable education for Black and Latinx students.<sup>266</sup> All three groups desire open and clear communication with City leaders on these issues and feel deprived of the opportunity to discuss the City's proposal.<sup>267</sup> In this respect, the City must find new ways to communicate with community leaders. For example, Mayor de Blasio and Schools Chancellor Carranza should attend monthly town hall meetings organized by the City Council<sup>268</sup> and ask non-profit organizations for guidance on education policies.<sup>269</sup>

### A. Possible Objections

A multi-measured approach will raise concerns similar to those regarding the Discovery Program because of the subjective nature of holistic evaluations of applicants. Specifically, opponents of Mayor de Blasio's proposal find that a more "holistic" and subjective admissions criteria would be more likely to benefit children of New York's wealthy professional elite,

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dev/wp-content/uploads/2015/03/30July18-APA-Orgs-Response-NYC-SHSAT-Reform-Press-Release.pdf [https://perma.cc/JD8T-T4DF].

<sup>266</sup> See *Black Parent Response to Mayor de Blasio's SHSAT Proposal*, ACTION NETWORK, <https://actionnetwork.org/letters/black-parent-response-to-mayor-de-blasios-shsat-proposal?source=email&> [https://perma.cc/GN2V-EWZ6].

<sup>267</sup> See Mark Hallum, *De Blasio Proposal to Phase Out SHSAT Fails to Resonate with Queens Lawmakers*, TIMES LEDGER (June 13, 2018), [https://www.timesledger.com/stories/2018/23/shsat\\_2018\\_06\\_08\\_q.html](https://www.timesledger.com/stories/2018/23/shsat_2018_06_08_q.html) [https://perma.cc/M32B-5SU2].

<sup>268</sup> Mayor de Blasio has previously attended town hall meetings on school safety. See Alex Zimmerman, *Convened by de Blasio to Talk School Safety, New York City Students Tell Him His Latest Solution is Misguided*, CHALKBEAT (Mar. 8, 2018), <https://chalkbeat.org/posts/ny/2018/03/08/convened-by-de-blasio-to-talk-school-safety-new-york-city-students-tell-him-his-latest-solution-is-misguided> [https://perma.cc/HY2C-H5PN]. Schools Chancellor Richard Carranza has also previously attended town hall meetings on the topic of education. See Jay Dow, *NYC Schools Chancellor Holds Town Meeting in Harlem*, PIX 11 (Oct. 29, 2018, 11:11 PM) <https://pix11.com/2018/10/29/nyc-schools-chancellor-holds-town-hall-meeting-in-harlem> [https://perma.cc/TPJ2-EUF3].

<sup>269</sup> The Benjamin N. Cardozo School of Law's Center for Rights and Justice recently held a panel on the future of affirmative action. At the panel, Ms. Rachel M. Kleinman, a Senior Counsel for the LDF, said that, as of November 26, 2018, the Mayor's office had not contacted the LDF regarding the new changes to specialized high school admissions. Rachel M. Kleinman, Senior Counsel, NAACP Legal Def. & Educ. Fund, Inc., *Students for Fair Admissions v. Harvard College* and the Future of Affirmative Action (Nov. 26, 2018).

and penalize lower-middle-class Asian-American students.<sup>270</sup> Specifically, a multi-measure approach may exclude lower-income Asian-Americans without finances to participate in diverse experiences like “service” trips or costly extracurricular activities.<sup>271</sup> An appropriate response to this valid argument is that the multi-measure system will only include “soft” variables (like recommendations and essays) which are beneficial, but not essential, to an applicant’s candidacy.<sup>272</sup> Essays and recommendations can be used to select candidates in situations where candidates have identical or near identical GPAs and exam scores. In this way, a multi-factor approach will only supplement grades and exam scores, the main component of an application.<sup>273</sup>

Many community members also worry that, under the new Discovery Program system, students will arrive in specialized high schools unprepared to excel academically.<sup>274</sup> Critics of the proposal suggest that improving the quality of education offered in Black and Latinx communities will be more productive than removing the exam or adding subjective admissions criteria.<sup>275</sup> A critical response to this critique is that the Discovery Program is a curriculum specifically designed by the NYCDOE and conducted by specialized high schools to prepare applicants for the academic rigor of a specialized high school curriculum.<sup>276</sup> Further, students who score below a school’s SHSAT cut-off are not automatically academically unprepared to succeed in school.<sup>277</sup> Rather, these students could have excellent seventh grade scores, but are prevented from attending a school due to their testing ability.<sup>278</sup>

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<sup>270</sup> See Saffran, *supra* note 30.

<sup>271</sup> See *id.*; Weinstein, *supra* note 116.

<sup>272</sup> See *Gutter v. Bollinger*, 539 U.S. 306, 315 (2003).

<sup>273</sup> See Taylor, *supra* note 75.

<sup>274</sup> See Boryga, *supra* note 114.

<sup>275</sup> See Cary, *supra* note 265; see also Boryga, *supra* note 114.

<sup>276</sup> Hu, *supra* note 98 (explaining that students in the Discovery Program must take and pass classes over the summer identical to traditional high school courses). Schools also continue to support successful participants during the school year. *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> See *supra* notes 82–88 and accompanying text.



## CONCLUSION

The Equal Protection Clause has historically served as a constitutional safeguard against intentional racism codified through the law.<sup>279</sup> The judiciary is routinely tasked with defending minority citizens against de facto discrimination.<sup>280</sup> While private biases are beyond the reach of courts, “the law cannot, directly or indirectly give them effect.”<sup>281</sup> Though state and federal education systems have diversified their classrooms over the past sixty years,<sup>282</sup> the Court continues to see a wave of litigation based on affirmative action programs.<sup>283</sup> Education officials must now understand the importance of racially non-discriminatory admissions systems.<sup>284</sup>

Without programs that work towards diversifying the classroom, such as the Discovery Program, students of color will have great difficulty obtaining opportunities in higher education.<sup>285</sup> In this vein, school administrators must be also able to supplement pipeline programs by creating multi-factor admissions systems which resonate closely with public opinion.<sup>286</sup> Developing a multi-measured admissions system with the addition of “soft” criteria such as essays and letters of recommendation will help New York City further diversify specialized high schools in a more reliable, constitutional, and policy-focused way.<sup>287</sup>

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<sup>279</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

<sup>280</sup> See *Anderson v. Martin*, 375 U.S. 399 (1964) (a designation of minority status on a general election ballot was deemed discriminatory under the Equal Protection Clause due to its “purely racial character and purpose”); see also *Pace v. State*, 106 U.S. 583 (1883); *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>281</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

<sup>282</sup> See generally *Fisher I*, 570 U.S. 297 (2013); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Brown I*, 347 U.S. 483 (1954).

<sup>283</sup> See Carrie Jung, *Harvard Discrimination Trial Ends, But Lawsuit Is Far from Over*, NPR (Nov. 2, 2018, 6:00 AM), <https://www.npr.org/2018/11/02/660734399/harvard-discrimination-trial-is-ending-but-lawsuit-is-far-from-over> [https://perma.cc/KR83-4SDD].

<sup>284</sup> See *id.*

<sup>285</sup> See N.Y.C. DEP’T OF EDUC., *supra* note 7; see also Issacharoff, *supra* note 249.

<sup>286</sup> See *supra* notes 265–266.

<sup>287</sup> *Grutter*, 539 U.S. at 312.

## APPENDIX



