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## Equal Protection and the Gifted and Talented Program

Deirdre Cicciaro

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## EQUAL PROTECTION AND THE GIFTED AND TALENTED PROGRAM

### SUPREME COURT OF NEW YORK NEW YORK COUNTY

Matter of R.B. v. Department of Education of the City of New York<sup>1</sup>  
(decided August 1, 2013)

The parents of children who were seeking admission into the “Gifted and Talented” (“G&T”) program in the New York City public school system claimed that the admission process “violate[d] the Equal Protection [C]ause of the New York State Constitution by giving preference to applicants who already ha[d] siblings in the G&T program.”<sup>2</sup> The New York Supreme Court held that there was no violation of the Equal Protection Clause of the State Constitution.<sup>3</sup> The court stated, “a policy withstands a constitutional challenge if it ‘rationally furthers some legitimate, articulated state purpose . . . .’”<sup>4</sup> The court concluded that the Department of Education’s policy of admitting students into the G&T program was within its discretion.<sup>5</sup>

#### I. HISTORY

In 1931, the United States Department of Education created the first federal program for gifted education.<sup>6</sup> The program laid the foundation for future programs but lacked specific legislative authority.<sup>7</sup> In 1950, the National Science Foundation Act was enacted by

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<sup>1</sup> No. 100738-13, 2013 N.Y. Misc. LEXIS 3412, at \*1 (Sup. Ct. Aug. 1, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at \*14.

<sup>4</sup> *Id.* at \*15.

<sup>5</sup> *Id.* at \*17.

<sup>6</sup> Charles J. Russo, *Unequal Educational Opportunities For Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J., 727, 733 (2001).

<sup>7</sup> *Id.*

Congress.<sup>8</sup> The act “not only directed resources toward the development of the sciences and basic research, but for the first time focused federal attention on the nation’s gifted and talented.”<sup>9</sup> The act encouraged careers in mathematics and physical sciences.<sup>10</sup> However, from the late 1950s to the early 1960s, the focus was on desegregation in schools, not gifted education.<sup>11</sup> In the 1950s, programs for the gifted were diverted because of the focus on disadvantaged students and the passage of the Elementary and Secondary Education Act.<sup>12</sup> Finally, in 1970, The Gifted and Talented Children’s Education Assistance Act was passed.<sup>13</sup> The act “gave the first federal statutory definition of the term ‘gifted,’ called for the development of model programs, and made programs eligible for federal financial assistance.”<sup>14</sup>

The Commissioner of Education assessed the programs for the gifted and submitted his report to Congress in October of 1972.<sup>15</sup> The report pushed for the support and development of gifted programs.<sup>16</sup> As a result, the Office of the Gifted and Talented was created in 1974.<sup>17</sup> Additionally, funds were made available to education agencies for the gifted.<sup>18</sup> Then, in 1978, The Gifted and Talented Children’s Education Assistance Act extended funding to provide separate programs for gifted students.<sup>19</sup> However, the act was repealed in 1981 by President Reagan when the Omnibus Budget Reconciliation Act was passed, and the Office of Gifted and Talented was closed.<sup>20</sup>

Education reform was brought back into Congress’s focus in

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<sup>8</sup> 42 U.S.C. § 1871 (1950).

<sup>9</sup> *Id.* (quoting Jeffrey J. Zettel, *The Education of Gifted and Talented Children from a Federal Perspective*, in JOSEPH BALLARD ET AL., *SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 51 (1982)).

<sup>10</sup> *Id.*

<sup>11</sup> Russo, *supra* note 6, at 734.

<sup>12</sup> *Id.* at 737-38 (stating that this act was “vital and necessary in looking after the needs of disadvantaged students”); 20 U.S.C. § 6391 (2002) (stating the purpose was to support migratory children).

<sup>13</sup> Russo, *supra* note 6, at 738.

<sup>14</sup> *Id.* at 738-39.

<sup>15</sup> *Id.* at 739.

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

<sup>17</sup> *Id.*

<sup>18</sup> Russo, *supra* note 6, at 740.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

the 1990s when the Jacob Javits Gifted and Talented Students Act (“JGTSA”) of 1994 was passed.<sup>21</sup> The JGTSA updated and expanded previous acts and provided “priority funding for programs to serve gifted students who are economically disadvantaged, speak limited English, or have disabilities.”<sup>22</sup> The JGTSA, however, did not mandate that gifted programs be created.<sup>23</sup> The most recent piece of legislation was The Gifted and Talented Education Act that was proposed in 2001.<sup>24</sup> Since then, the states have taken over the support and funding of gifted programs.<sup>25</sup>

## II. BACKGROUND

The New York City Department of Education (“DOE”) proposed two changes to the G&T program in the New York City public schools.<sup>26</sup> First, the DOE proposed to eliminate preferential treatment given to children that had siblings already in the G&T program (“sibling preference”).<sup>27</sup> Second, the DOE proposed to change the way in which the percentile scoring was to be calculated.<sup>28</sup> The DOE followed Education Law § 2590-g<sup>29</sup> and posted notice to the public on its website of the proposed changes and invited public comment about such changes.<sup>30</sup> The changes were also posted in the G&T Handbook for the 2012-2013 academic year.<sup>31</sup> The proposed change

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<sup>21</sup> 20 U.S.C. §§ 8031-37 (repealed Jan. 8, 2002).

<sup>22</sup> Russo, *supra* note 6, at 741.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 742.

<sup>26</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*3-4.

<sup>27</sup> *Id.* at \*4.

<sup>28</sup> *Id.*

<sup>29</sup> N.Y. EDUC. LAW § 2590-g(8)(a) (McKinney 2009):

Prior to the approval of any proposed item listed in subdivision one of this section, undertake a public review process to afford the public an opportunity to submit comments on the proposed item. Such public review process shall include notice of the item under city board consideration which shall be made available to the public, including via the city board’s official internet website, and specifically circulated to all community superintendents, community district education councils, community boards, and school based management teams, at least forty-five days in advance of any city board vote on such item.

*Id.*

<sup>30</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*4.

<sup>31</sup> *Id.*

to the scoring methodology received negative public comments; therefore, the DOE decided not to implement the change until further analysis was completed.<sup>32</sup> The proposed elimination of the sibling preference also largely received comments of opposition.<sup>33</sup> The DOE notified the interested parties, all families who had submitted a request for testing, of its decision to “use the ‘same process and policy’ that had been used” in the previous year.<sup>34</sup> This admission process consisted of placing, in citywide programs, siblings in or above the 97th percentile of currently enrolled students first, and in district programs, siblings in or above the 90th percentile of currently enrolled students first.<sup>35</sup> Once all eligible siblings were placed, then all non-sibling applicants were placed based on their percentile rank.<sup>36</sup> If there was a tie or an insufficient number of seats, there would be a random drawing to determine who would receive an offer.<sup>37</sup>

In *Matter of R.B.*, the parents (“petitioners”) of the children that wanted to be accepted into the G&T program brought suit against the DOE for violating the Equal Protection Clause. Under the Equal Protection Clause of the New York State Constitution Article I, § 11, “[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof.”<sup>38</sup> The court stated that the Equal Protection Clause was no broader than the Fourteenth Amendment of the United States Constitution.<sup>39</sup> The petitioners classified their children as a “suspect” class in order to receive a strict scrutiny review.<sup>40</sup> However, the court stated the classification for strict scrutiny “refers to a party’s racial or national background, and not to the child’s status as a sibling.”<sup>41</sup> If there is no “suspect” classification, the level of judicial scrutiny does not rise and rational basis

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<sup>32</sup> The G&T Handbook provides the community with information about the program. *Id.* at \*5, \*7.

<sup>33</sup> *Id.* at \*5.

<sup>34</sup> *Id.* at \*7.

<sup>35</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*7-8.

<sup>36</sup> *Id.* at \*8.

<sup>37</sup> *Id.*

<sup>38</sup> N.Y. CONST. art. I, § 11.

<sup>39</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*14-15.

<sup>40</sup> *Id.* at \*15. Strict scrutiny is when the court reviews a classification to determine whether the law or regulation is supported by a compelling state interest and is narrowly tailored to advance that interest. Strict scrutiny is applied when a fundamental right is at issue or involves a suspect class. *Korematsu v. United States*, 323 U.S. 214 (1944); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 290 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>41</sup> *Id.*

review applies, which provides that “a policy withstands a constitutional challenge if it ‘rationally furthers some legitimate, articulated state purpose . . . .’”<sup>42</sup>

The petitioners challenged the DOE’s admission process, claiming that it was arbitrary and capricious and that it violated the Equal Protection Clause.<sup>43</sup> The petitioners specifically asserted that “the DOE’s methodology gives ‘preferential treatment’ to children with siblings already enrolled in G&T programs in violation of the Equal Protection Clause of the State Constitution.”<sup>44</sup> The court recognized that the DOE only needed to “demonstrate a rational basis for its admission policy.”<sup>45</sup> The court reasoned that the DOE’s rational, legitimate state purpose was that the sibling preference was in place to reduce the burden on families with two or more siblings having to attend two different schools.<sup>46</sup> Therefore, there was no violation of the Equal Protection Clause.<sup>47</sup>

The petitioners’ argument that the admission process was arbitrary and capricious, according to § 7803(3) of the New York Civil Practice Law and Rules,<sup>48</sup> was rejected by the court.<sup>49</sup> The court stated that the statutory right of the petitioners was a “right to a ‘sound basic education’ and not to a particular type of educational program.”<sup>50</sup> Additionally, the court found that the school administrators had broad discretion in determining the design of educational programs<sup>51</sup> and that the judiciary should not interfere unless there was a violation of the law.<sup>52</sup> The court concluded that the sibling preference and scoring methodology were “an educational policy that f[e]ll[] within the DOE’s discretion.”<sup>53</sup> The court held that although the policies “may not be perfect,” the petitioners did not establish that

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<sup>42</sup> *Id.* (quoting *Archbishop Walsh High School v. Section VI of the N.Y. State Pub. High School Athletic Ass’n*, 666 N.E.2d 521 (1996)).

<sup>43</sup> *Id.* at \*9.

<sup>44</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*10.

<sup>45</sup> *Id.* at \*15.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at \*14.

<sup>48</sup> N.Y. C.P.L.R. § 7803(3) (McKinney 2003).

<sup>49</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*15-16.

<sup>50</sup> *Id.* at \*16 (citing *New York City Liberties Union v. State of New York*, 824 N.E.2d 947 (N.Y. 2005)); *see also* N.Y. EDUC. LAW § 3202 (McKinney 2013).

<sup>51</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*16.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*17.

the policies were arbitrary or capricious.<sup>54</sup>

The court in *Matter of R.B.* cited the case *Korematsu v. United States*.<sup>55</sup> In *Korematsu*, the Court stated that “the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.”<sup>56</sup> The court in *Matter of R.B.* also referred to the case *Esler v. Walters*,<sup>57</sup> which established that the State’s Equal Protection Clause is no broader than the Fourteenth Amendment.<sup>58</sup> Additionally, the court in *Matter of R.B.* cited the case *Archbishop Walsh High School v. Section VI of the New York State Public High School Athletic Association*.<sup>59</sup> In *Archbishop*, the court found that absent a “suspect” classification that raised the level of judicial scrutiny, a policy withstands a constitutional challenge if it “rationally furthers some legitimate, articulated state purpose and therefore does not . . . violat[e] the Equal Protection Clause.”<sup>60</sup>

The DOE argued that relief should not be granted to the petitioners because they failed to exhaust administrative remedies.<sup>61</sup> The DOE claimed that pursuant to Education Law § 310(7),<sup>62</sup> the petitioners should have appealed to the State Commissioner of Education.<sup>63</sup> The court disagreed with the DOE.<sup>64</sup> The court stated that the language in the statute suggested a remedy; it did not mandate the petitioner to seek relief from the State Commissioner of Education.<sup>65</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> 323 U.S. 214 (1944).

<sup>56</sup> *Id.* at 216.

<sup>57</sup> 437 N.E.2d 1090 (N.Y. 1982).

<sup>58</sup> *Id.* at 1094.

<sup>59</sup> 666 N.E.2d 521 (N.Y. 1996).

<sup>60</sup> *Id.* at 523.

<sup>61</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*11.

<sup>62</sup> N.Y. EDUC. LAW § 310(7) (McKinney 2013);

Any party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action: By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

*Id.*

<sup>63</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*11.

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

<sup>65</sup> *Id.* at \*11-12.

The court also recognized that there was an exception to seeking relief from the State Commissioner of Education where “pursuit of the administrative remedy may be futile or lead to irreparable harm due to processing delays.”<sup>66</sup> The court stated that there was a “need for prompt certainty as to the schooling arrangements for their children for th[at] September.”<sup>67</sup> Thus, the court held that the petitioners did not need to pursue administrative remedies before commencing the proceeding.<sup>68</sup>

### III. FEDERAL APPROACH

#### A. Supreme Court

In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>69</sup> a Seattle school district voluntarily adopted a student assignment plan to determine which schools certain children could attend when too many students listed the same school as their first choice for attendance.<sup>70</sup> The district had three “tiebreakers” to select the students who would attend the oversubscribed school.<sup>71</sup> The first tiebreaker gave children who already had a sibling enrolled in the chosen school admission to that school.<sup>72</sup> The second tiebreaker was dependent on the racial composition of the chosen school and the race of the individual student.<sup>73</sup> If the chosen school was not within the percentage of 41% white and 59% “non-white,” then the tiebreaker selected the student whose race “w[ould] serve to bring the school into balance.”<sup>74</sup> The final tiebreaker, if necessary, was the student’s geographic proximity of the school to their residence.<sup>75</sup>

Parents Involved in Community Schools (“Parents Involved”) was a nonprofit corporation of the parents of children who had been or could be denied admission to their chosen school because of their

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<sup>66</sup> *Id.* at 12 (citing *Matter of Cmty. Sch. Bd. Nine v. Crew*, 648 N.Y.S.2d 81 (App. Div. 1st Dep’t 1996)).

<sup>67</sup> *Id.*

<sup>68</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*12.

<sup>69</sup> 551 U.S. 701 (2007).

<sup>70</sup> *Id.* at 709-10.

<sup>71</sup> *Id.* at 711.

<sup>72</sup> *Id.* at 711-12.

<sup>73</sup> *Id.* at 712.

<sup>74</sup> *Parents Involved*, 551 U.S. at 712.

<sup>75</sup> *Id.*

race.<sup>76</sup> The Ninth Circuit held that the Seattle school district's plan was "narrowly tailored to serve a compelling government interest."<sup>77</sup> The Supreme Court recognized that when "the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny."<sup>78</sup>

The Court found two interests that qualify as compelling for purposes of the strict scrutiny test.<sup>79</sup> The first is the compelling interest of remedying the effects of past intentional discrimination, and the other is the interest in diversity in higher education.<sup>80</sup> The Court found that race was the determinative factor alone and race was not "considered as part of a broader effort to achieve 'exposure to widely diverse people, cultures, ideas and viewpoints.'"<sup>81</sup> The school districts were using racial balancing for the purpose of improving demographic equality, not educational benefits.<sup>82</sup> The Supreme Court overruled the Ninth Circuit's decision stating, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>83</sup> The Supreme Court held that the school district did not "carr[y] the heavy burden of demonstrating that we should allow this . . . ."<sup>84</sup>

In 2003, the Supreme Court decided *Grutter v. Bollinger*.<sup>85</sup> The University of Michigan Law School had an admission policy that sought to achieve diversity in the student body.<sup>86</sup> The policy required admissions officials to assess applicants based on a range of information, including the applicant's essay, which explained how he or she would contribute to law school life and diversity; letters of recommendation; the Law School Admission Test; and undergraduate grade point average.<sup>87</sup> The admission policy "reaffirm[ed] the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in mean-

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<sup>76</sup> *Id.* at 713.

<sup>77</sup> *Id.* at 715.

<sup>78</sup> *Id.* at 720.

<sup>79</sup> *Parents Involved*, 551 U.S. at 720.

<sup>80</sup> *Id.* at 720-22.

<sup>81</sup> *Id.* at 723 (citing *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

<sup>82</sup> *Id.* at 726.

<sup>83</sup> *Id.* at 748.

<sup>84</sup> *Parents Involved*, 551 U.S. at 747.

<sup>85</sup> 539 U.S. 306 (2003).

<sup>86</sup> *Id.* at 306.

<sup>87</sup> *Id.*

ingful numbers.”<sup>88</sup> The Law School claimed that “[b]y enrolling a ‘critical mass’ of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School’s character and to the legal profession.”<sup>89</sup> The petitioner, a white female, claimed that the respondents violated the Fourteenth Amendment because the Law School had discriminated against her based on her race.<sup>90</sup> The petitioner alleged that “the Law School use[d] race as a ‘predominant’ factor, giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups; and that respondents had no compelling interest to justify that use of race.”<sup>91</sup>

The Court stated that “all racial classifications imposed by government ‘must be analyzed by a reviewing court under strict scrutiny.’”<sup>92</sup> Furthermore, the Court reasoned that strict scrutiny is applied to racial classifications “to ‘smoke’ out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.”<sup>93</sup> The Court recognized that it was following its precedent by showing deference to the university’s academic decisions.<sup>94</sup> The Court found that the Law School’s admission policy considered many factors, race only being one of those factors, to create a diverse student body.<sup>95</sup> Finally, the Court held that the Law School’s use of race in its admission policy furthered the compelling interest of the educational benefits that flow from a diverse student body.<sup>96</sup> Justice Thomas stated, in his concurring and dissenting opinion, that the Equal Protection Clause does not prohibit the use of unseemingly “legacy preferences” or many other kinds of arbitrary admissions procedures, but it does prohibit classifications made on the basis of race.<sup>97</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Grutter*, 539 U.S. at 306.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 326 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. at 227).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 328.

<sup>95</sup> *Grutter*, 539 U.S. at 340.

<sup>96</sup> *Id.* at 343.

<sup>97</sup> *Id.* at 368 (Thomas, J., concurring in part, dissenting in part).

## B. Lower Courts

The lower federal courts have addressed admission policies, such as a past academic achievement and a sibling preference. The Ninth Circuit reviewed an admission standard in *Berkelman v. San Francisco United School District*.<sup>98</sup> The question before the court in *Berkelman* was whether an admission standard substantially furthered the school's purpose.<sup>99</sup> The admission policy was based on the students' past academic achievement standard.<sup>100</sup> The court held that the school district's past academic achievement standard substantially furthered the purpose of providing the best education possible for the students in the school district.<sup>101</sup> The court recognized that "[t]he cutoff is the result of space and budget limitations, not the result of a perfect determination of who can and who cannot benefit from the program."<sup>102</sup> Students who were not admitted to the program were not "denied a quality education nor relegated to an inadequate school."<sup>103</sup>

In 1986, the district court decided *United States v. Yonkers Board of Education*.<sup>104</sup> The Yonkers Board of Education created an Educational Improvement Plan, which the plaintiffs objected to.<sup>105</sup> The Board then submitted a modified plan.<sup>106</sup> The modified plan included a sibling preference for admission to magnet schools.<sup>107</sup> When an applicant met all of the admission criteria, preference would be given to siblings of children already enrolled in magnet schools.<sup>108</sup> The court ordered the Board's modified plan effective.<sup>109</sup> Both of the Federal lower courts found that the admission policies were acceptable.

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<sup>98</sup> 501 F.2d 1264 (9th Cir. 1974).

<sup>99</sup> *Id.* at 1267.

<sup>100</sup> *Id.* at 1268.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Berkelman*, 501 F.2d at 1268.

<sup>104</sup> No. 80 Civ. 6761, 1986 WL 4894, at \*1 (S.D.N.Y. April 22, 1986).

<sup>105</sup> *Id.* at \*8.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at \*13.

<sup>108</sup> *Id.*

<sup>109</sup> *Yonkers Bd. Of Ed.*, 1986 WL 4894, at \*31.

#### IV. STATE APPROACH

##### A. New York Court of Appeals

The New York Court of Appeals has not addressed the specific issue of a sibling preference based admission policy, however the Court has reviewed the Equal Protection Clause. Although the facts in *People v. Parker*<sup>110</sup> are not exactly the same as the facts of *Matter of R.B.*, the court in *Matter of R.B.* addressed the Equal Protection Clause. The court stated that “[t]he [E]qual [P]rotection [C]lause does not mandate absolute equality of treatment but merely prescribes that, absent a fundamental interest or suspect classification, a legislative classification be rationally related to a legitimate state purpose.”<sup>111</sup>

In 1976, the New York Court of Appeals, in *Alevy v. Downstate Medical Center*,<sup>112</sup> also looked at the Equal Protection Clause in relation to a medical school’s admission policy.<sup>113</sup> The plaintiff applied to Downstate Medical Center, the defendant, for admission to the 1974 to 1975 program.<sup>114</sup> The admission committee gave each applicant a “screening code,” which determined whether the applicant would be considered for a personal interview; however, persons that claimed to be from a minority group were given a preliminary screening by the committee regardless of their “screening code.”<sup>115</sup> The minority applicants that were interviewed exceeded the amount of other applicants by 12%.<sup>116</sup> The admission committee looked at whether the minority applicant was financially or educationally disadvantaged, and the committee placed a high priority on those factors.<sup>117</sup> The plaintiff was placed on the second waiting list.<sup>118</sup> There were sixty-six minority students that were accepted to the program, and the plaintiff had a higher Medical College Admission Test (“MCAT”) score than every one of the accepted minority students.<sup>119</sup>

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<sup>110</sup> 359 N.E.2d 348 (N.Y. 1976).

<sup>111</sup> *Id.* at 350-51.

<sup>112</sup> 348 N.E.2d 537 (N.Y. 1976).

<sup>113</sup> *Id.* at 542.

<sup>114</sup> *Id.* at 540.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Alevy*, 348 N.E.2d at 541.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 542.

The plaintiff claimed that the admission policy that “g[ave] less qualified minority applicants a greater opportunity for acceptance [wa]s violative of the [E]qual [P]rotection [C]lause.”<sup>120</sup> The plaintiff urged that the strict scrutiny test be applied in this case, but the court refused to do so.<sup>121</sup> The court decided to apply a middle ground analysis between the strict scrutiny test and the rationally-related test.<sup>122</sup> The court stated,

In determining whether a substantial State interest underlies a preferential treatment policy, courts should inquire whether the policy has a substantial basis in actuality, and is not merely conjectural. At a minimum, the State-sponsored scheme must further some legitimate, articulated governmental purpose. However, the interest need not be urgent, paramount or compelling. Thus, to satisfy the substantial interest requirement, it need be found that, on balance, the gain to be derived from the preferential policy outweighs its possible detrimental effects.<sup>123</sup>

The court stated that if there was a substantial interest, it must look at whether the objectives of the policy could be achieved alternatively.<sup>124</sup> Although the court did not determine the ultimate issue in this case because the plaintiff did not set out a prima facie case, the court did set out a test to review an admission policy.<sup>125</sup>

### B. Lower Courts

The lower courts in New York have reviewed the Equal Protection Clause. In *Bradstreet v. Sobol*,<sup>126</sup> the plaintiff’s daughter was home schooled and was not enrolled in a public school.<sup>127</sup> Her daughter wanted to participate in the local school’s interscholastic sports program.<sup>128</sup> However, the school did not allow her to partici-

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 542.

<sup>122</sup> *Alevy*, 348 N.E.2d at 544.

<sup>123</sup> *Id.* at 545.

<sup>124</sup> *Id.* at 546.

<sup>125</sup> *Id.* at 547.

<sup>126</sup> 650 N.Y.S.2d 402 (App. Div. 3d Dep’t 1996).

<sup>127</sup> *Id.* at 403.

<sup>128</sup> *Id.*

pate because in order to be a part of the school's interscholastic sports program, the child had to be enrolled in their school.<sup>129</sup> The court reviewed the issue of the eligibility requirement based on whether there was a "rational relationship to a legitimate state purpose" because the daughter was classified as a non-suspect class.<sup>130</sup> The daughter's classification was based on her lack of enrollment in the public school where she wanted to participate in the sports program.<sup>131</sup> The defendant's justification for requiring enrollment was that it promoted school spirit and loyalty.<sup>132</sup> The court found nothing irrational about the requirement and held that there was no violation of the Equal Protection Clause.<sup>133</sup> The court reasoned that it was "rational to require that a student who seeks to represent a school in interscholastic athletic competition be enrolled in the school . . . [and the] plaintiff ha[d] no legitimate claim that her daughter [wa]s an appropriate representative of the public school for competition with other schools."<sup>134</sup>

The Supreme Court in New York County addressed the issue of equal protection in *In re Downey*.<sup>135</sup> The court held that equal protection "does not require that all persons be dealt with identically."<sup>136</sup> However, it does require "that distinction among classes must be reasonable."<sup>137</sup> Although the Supreme Court and Appellate Division of New York did not address admission policies, the courts analysis did review the Equal Protection Clause.

## V. EVALUATION

After evaluating the federal approach and the New York State approach on the issue of an admission policy under the Equal Protection Clause, it is reasonable to conclude the court in *Matter of R.B.* followed the proper level of scrutiny when determining whether the sibling preference admission policy violated the Equal Protection Clause. New York courts have dealt with the Equal Protection

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Bradstreet*, 650 N.Y.S.2d at 403.

<sup>132</sup> *Id.* at 404.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 340 N.Y.S.2d 687 (Fam. Ct. 1973).

<sup>136</sup> *Id.* at 690.

<sup>137</sup> *Id.*

Clause, but *Matter of R.B.* was the first case in which the addressed an admission policy to a G&T program. *Matter of R.B.* is important because the court identified that the admission policy was within the DOE's discretion and did not violate the Equal Protection Clause.<sup>138</sup>

The plaintiffs in *Matter of R.B.* brought this case because they claimed the DOE's admission policy violated the Equal Protection Clause by giving preference to children with siblings already in the program.<sup>139</sup> The court cited *Korematsu* as authority to state that the plaintiffs' children were not to be classified as a suspect class because "[t]hat classification refers to a party's racial or national background."<sup>140</sup> The court in *Grutter* stated that the Equal Protection Clause does not prohibit different types of arbitrary admission procedures, such as "legacy preferences."<sup>141</sup> The court in *Matter of R.B.* correctly ruled that the sibling preference did not violate the Equal Protection Clause because, as stated in *Grutter*, the classification was not based on race, but instead was analogous to a legacy preference.

Further, *Parents Involved* is distinguishable from *Matter of R.B.* because the Court in *Parents Involved* reviewed the case under strict scrutiny, whereas the court in *Matter of R.B.* reviewed the case based on the rational basis test.<sup>142</sup> The Court in *Parents Involved* reviewed the case under strict scrutiny because the student assignment plan was based on race.<sup>143</sup> The court in *Matter of R.B.* appropriately applied the rational basis test instead of reviewing the case under strict scrutiny because the admission policy was based on sibling preference, not race. The New York Court of Appeals in *Parker* addressed the issue of the level of scrutiny to be used by courts.<sup>144</sup> The court in *Matter of R.B.* properly followed the precedent set out in *Parker* because there was no fundamental interest or suspect classification.<sup>145</sup> Thus, the court looked at whether the classification was rationally related to a legitimate state purpose.<sup>146</sup> Additionally, in *Bradstreet* the court reviewed the case based on the rational relationship to a legitimate state purpose and determined that the school's

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<sup>138</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*17.

<sup>139</sup> See *supra* note 2 and accompanying text.

<sup>140</sup> *Matter of R.B.*, 2013 LEXIS 3412, at \*15.

<sup>141</sup> See *supra* note 58 and accompanying text.

<sup>142</sup> See *supra* notes 78-80, 45 and accompanying text.

<sup>143</sup> See *supra* notes 73, 74, 78 and accompanying text.

<sup>144</sup> See *supra* note 110 and accompanying text.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

policy promoted school spirit and loyalty.<sup>147</sup> Therefore, in *Matter of R.B.*, the court properly recognized that the admission policy rationally furthered a legitimate purpose by showing that the policy intended to relieve the burden on families with two or more siblings having to attend two different schools.<sup>148</sup>

The court's decision in *Matter of R.B.* is consistent with the Court's recognition in *Berkelman* that there was no perfect determination of who could and could not benefit from the program.<sup>149</sup> In *Matter of R.B.*, the court correctly determined that the admission policy did not violate the Equal Protection Clause because the court followed the precedent of the Southern District of New York, when it upheld an admission policy that included a sibling preference in *Yonkers Board of Education*.<sup>150</sup>

## VI. CONCLUSION

This case was brought up to the Appellate Division, First Department.<sup>151</sup> This court affirmed the lower court's decision that the sibling preference policy did not violate the Equal Protection Clause.<sup>152</sup> This court followed the same reasoning stating that "the policy 'rationally furthers some legitimate, articulated state purpose.'"<sup>153</sup>

The court's decision in *Matter of R.B.* was a fair one. The court correctly applied the rational basis test to determine whether the sibling preference of the admission policy violated the Equal Protection Clause. Although this case was not decided by the New York Court of Appeals, it will have future implications. No matter the specific admission program preference, future courts will be able to apply the same test as this court. The courts will be able to review the admission policy preference and determine if it has a legitimate state purpose, just as the court in *Matter of R.B.* did. This court's decision was not outrageous or inconsistent that it would be overturned and not followed by future courts.

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<sup>147</sup> See *supra* note 117 and accompanying text.

<sup>148</sup> See *supra* notes 45-46 and accompanying text.

<sup>149</sup> See *supra* note 101 and accompanying text.

<sup>150</sup> See *supra* notes 103-08 and accompanying text.

<sup>151</sup> *R.B. v. Dep't of Educ. of the City of New York*, 981 N.Y.S.2d 413 (App. Div. 1st Dep't 2014).

<sup>152</sup> *Id.* at 414.

<sup>153</sup> *Id.*

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*Deirdre Cicciaro*\*

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\* J.D. Candidate 2015, Touro College Jacob D. Fuchsberg Law Center; B.S. 2011 in Business Administration, St. Joseph's College. I would like to thank Professor Jeffrey Morris for his considerate comments on this Note, and my family for all of their love and support.