

## **A Chance at the Arts: Assessment of NYC Department of Education's ArtsCount as a Violation of Title VI Implementing Regulation**

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### **INTRODUCTION**

The City of New York has historically struggled with equitable funding in its public education system.<sup>1</sup> As a result, funding for arts education in New York City public schools has steadily declined.<sup>2</sup> This trend further perpetuates a widespread cultural attitude that undervalues the academic benefits of arts education for students. This lack of support for the arts has particularly impacted schools located in low-income neighborhoods which suffer from low engagement with—and participation in—arts programs and arts instruction.<sup>3</sup> Rocco Landesman, Former Chairman of the National Endowment for the Arts, wrote in his study on arts and achievement for at-risk youth that “the only outcomes we should need to measure for a music class is whether the

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1. ALL FOR QUALITY EDUC., RECORD SETTING INEQUALITY: NEW YORK STATE'S OPPORTUNITY GAP IS WIDER THAN EVER 3, <http://www.aqeny.org/wp-content/uploads/2015/01/final-final-record-setting-inequality.pdf> [<https://perma.cc/Q7LC-C2ZL>] [<https://web.archive.org/web/20230404190146/http://www.aqeny.org/wp-content/uploads/2015/01/final-final-record-setting-inequality.pdf>] (“New York State has long been a national leader in educational inequity and the inequality gap is growing.”).

2. Sarah Cascone, *New York City's 2021 Budget Slashes Already Modest Funding for Public Schools Arts Education by 70 Percent*, AMERICANS FOR THE ARTS (July 6, 2020), <https://www.americansforthearts.org/news-room/new-york-citys-2021-budget-slashes-already-modest-funding-for-public-school-arts-education-by-70> [<https://perma.cc/8PJF-EV32>] [<https://web.archive.org/web/20230310045626/https://www.americansforthearts.org/news-room/new-york-citys-2021-budget-slashes-already-modest-funding-for-public-school-arts-education-by-70>].

3. Jacoba Urist, *The Country's Cultural Capital Has a Big Arts-Education Problem*, THE ATLANTIC (May 28, 2014), <https://www.theatlantic.com/education/archive/2014/05/the-countrys-cultural-capital-has-a-big-arts-education-problem/371658> [<https://perma.cc/86TL-8K44>] [<https://web.archive.org/web/20221206070616/https://www.theatlantic.com/education/archive/2014/05/the-countrys-cultural-capital-has-a-big-arts-education-problem/371658>] (“Arguably, students in lower-income schools need exposure to creative subjects the most, but . . . the city's arts programs are sharply divided by neighborhood.”).

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child had the chance to create, enjoy, and understand music.”<sup>4</sup> The New York City Department of Education has attempted to offer all students the chance to participate in arts education through various policy initiatives. In particular, New York City’s Blueprint for the Arts curriculum initiative and its supplemental accountability program, ArtsCount, were implemented to enhance students’ access to arts instruction.<sup>5</sup> The decade following their implementation, however, revealed obvious shortcomings and failures. Moreover, the lack of reform of these initiatives perpetuates the culture of unequal access that is so commonly associated with arts education.

Title VI of the 1964 Civil Rights Act states: “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>6</sup> Particularly, Title VI imposes regulations for the implementation of federal funds. Such regulations require that recipients may not “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”<sup>7</sup>

In 2014, the NYC Comptroller released a report describing the failures of ArtsCount, focusing in part on inequities in the distribution of arts instruction across New York City school districts.<sup>8</sup> The results demonstrate a positive correlation between the presence of art instructors, art classrooms, and art programs to socioeconomic status and racial makeup of particular districts.<sup>9</sup> These results are especially problematic as the very purpose of these initiatives is to enhance access to arts education for New York City students. This Note will explore several possible explanations for these failures, including societal and policy-based influences on school leaders in low-income neighborhoods, and how those influences were exacerbated by inefficient systems of reporting such as New York City’s ArtsCount.

Prior to the implementation of BluePrint for the Arts and ArtsCount, New York City provided arts funding through Project ARTS, a grant program that provided schools with dedicated arts funding. This program required that Project ARTS funding

4. JAMES S. CATTERALL ET AL., NAT’L ENDOWMENT FOR THE ARTS, *THE ARTS AND ACHIEVEMENT IN AT RISK YOUTH: FINDINGS FROM FOUR LONGITUDINAL STUDIES* (2012), <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf> [https://perma.cc/CG7K-S42E] [https://web.archive.org/web/20230215214515/https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf].

5. N.Y.C. DEP’T OF EDUC., *ARTSCOUNT: A GUIDE FOR PRINCIPALS* (2006), [https://www.wetechnyc.org/media2016/filer\\_public/00/72/00722669-5051-4b19-9744-4cae979a1932/arts\\_count\\_principals\\_guide.pdf](https://www.wetechnyc.org/media2016/filer_public/00/72/00722669-5051-4b19-9744-4cae979a1932/arts_count_principals_guide.pdf) [https://perma.cc/64K9-MWM2] [https://web.archive.org/web/20230310050421/https://www.wetechnyc.org/resources/resource/artscount-a-guide-for-principals].

6. 42 U.S.C. § 2000d.

7. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

8. SCOTT M. STRINGER, BUREAU OF POLICY AND RESEARCH, *STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS* (2014).

9. *Id.* at 9–12.

was spent in areas related directly to the arts.<sup>10</sup> Transitioning to Blueprint for the Arts and ArtsCount allows the New York City Department of Education to take a passive approach to implementing arts education funding. With ArtsCount, funding that would have previously been dedicated to the arts is now provided to school leaders through general school budgets using ArtsCount as a method to ensure accountability for investing in arts programs.<sup>11</sup> However, the inadequacy of ArtsCount has led to many students in areas of lower socioeconomic status—primarily students of color—having to go without the necessary arts education curriculum as put forth by BluePrint for the Arts, the very curriculum that ArtsCount was meant to ensure.

The inadequacy of this accountability program poses the question of possible Title VI violations. The several years following the Comptroller report have seen little change, despite recommendations for how to mitigate such discriminatory effects.<sup>12</sup> In order to prove a violation of Title VI's implementing regulations, proof of discriminatory *effect* will suffice to establish liability and proof of discriminatory *intent* is not needed.<sup>13</sup> While it could be argued that such a funding structure is necessary and justified, offering less discriminatory alternatives would demonstrate that this structure is still indeed a Title VI violation. This Note explores potential alternatives to the current accountability framework, including reframing how arts education should and may be spent, and rethinking the way that data regarding arts education instruction is collected.

Overall, the goal of this Note is to assess the current status of arts education in New York City Public Schools and how its current funding structure and accountability program impacts the presence of arts education across New York City school districts. This assessment will focus primarily on the New York City public school system, as New York City is a cultural hub of the world with communities of different races, ethnicities, and many socioeconomic backgrounds. Part I of this Note provides background information on Title VI of the Civil Rights Act, societal conceptions on the value of arts education, the history of arts education funding in New York City, and

10. OFF. COMPTROLLER, N.Y.C., STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS 5 (2014), [https://comptroller.nyc.gov/wp-content/uploads/documents/State\\_of\\_the\\_Arts.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf) [<https://perma.cc/4PQ7-3FC6>] [[https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State\\_of\\_the\\_Arts.pdf](https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf)] (“Project ARTS funds were targeted for direct instruction in core arts areas, related equipment, resource materials and supplies and partnerships with arts and cultural services.”).

11. *Id.* at 5.

12. See Isabel Song Beer, *New York City Teachers Push for More Arts Education Funding in School Budget*, AMNY (May 10, 2022), <https://www.amny.com/politics/teachers-push-for-more-arts-education-funding-in-school-budget> [<https://perma.cc/8MT4-99WT>] [<https://web.archive.org/web/20230202182346/https://www.amny.com/politics/teachers-push-for-more-arts-education-funding-in-school-budget>]; Becky Stern, *Coalition Rallies for Arts Education Funding in the City Budget to Improve Student Well Being*, READMEDIA (Mar. 30, 2023), <http://readme.readmedia.com/Coalition-Rallies-for-Arts-Education-Funding-in-the-City-Budget-to-Improve-Student-Well-Being/19238422> [<https://perma.cc/F6AX-7P96>] [<https://web.archive.org/web/20230330180404/http://readme.readmedia.com/Coalition-Rallies-for-Arts-Education-Funding-in-the-City-Budget-to-Improve-Student-Well-Being/19238422>] (demonstrating how further change is needed, especially while navigating the impact of COVID-19).

13. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

the implementation of ArtsCount. Part II of this Note assesses New York City's current accountability framework in context of Title VI's implementing regulation, considering the history of race disparities within arts education at the national and local levels. Part III of this Note proposes an alternative which may mitigate such discriminatory implications and increase access to arts education among New York City Public School students. This solution involves a more detailed system of reporting, a mid-level compromise for discretion offered to school leaders over arts funding, and education initiatives offering incentives to increase arts integration in daily common core subject areas. Essentially, this Note articulates the need for reform of the current framework meant to create equal access to arts education for New York City public school students. While focusing on the prevalent racial and socioeconomic disparities that continue under this regime, this Note utilizes the protection offered by Title VI of the 1964 Civil Rights Act to validate the right to reformation.

## I. BACKGROUND INFORMATION

### A. THE CIVIL RIGHTS ACT OF 1964, TITLE VI, AND IMPLEMENTING REGULATIONS

The Civil Rights Act of 1964 was enacted in response to the race and gender discrimination engrossed in daily American culture.<sup>14</sup> Sections of this Act address discrimination broadly, though they apply in various contexts to the American education system. Generally, Title VI of the Civil Rights Act of 1964 focuses on discrimination within federally funded programs.<sup>15</sup> First, in Section 601, Title VI prohibits discrimination based on "race, color, or national origin" within any program or activity that receives funding from the Federal government, or other types of federal financial aid.<sup>16</sup> Secondly, in Section 602, Title VI authorizes federal agencies to provide funding for programs and is "directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability."<sup>17</sup>

Discriminatory practices are separated into two primary categories: intentional discrimination and disparate impact. Intentional discrimination requires that the recipient of federal funding acts "because of the actual or perceived race, color, or national origin of the alleged victims of discriminatory treatment."<sup>18</sup> Disparate impact focuses on less explicit factors and pertains to the consequences of the recipient's actions rather than the motivation behind them. Specifically, Title VI prohibits practices that have "the effect, even if unintentional, of subjecting individuals to discrimination

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14. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq. (2006)).

15. Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.

16. *Id.*

17. *Id.*

18. *Id.*

because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the program's objectives."<sup>19</sup>

A discriminatory practice that yields disparate impact alone is not prohibited, though it will require an assessment of “whether [the] challenged practice has a *sufficiently adverse racial impact*—in other words, whether it falls significantly more harshly on a minority group than on the majority—and, if so, whether the practice is nevertheless adequately justified.”<sup>20</sup> Several factors may be taken into account when assessing the disparate impact of a practice, including “statistics comparing benefit distribution or access patterns among members of the protected class and the overall population.”<sup>21</sup> Further, in this assessment, even if there is a sufficient justification for the discriminatory practice, if a less discriminatory alternative is provided, it must be considered. Not considering such an alternative, or sufficiently justifying lack of consideration, would constitute disparate impact under Title VI.<sup>22</sup>

Implementing regulations for this Title describe specific discriminatory practices that are prohibited. Included in those practices is the act of “restricting an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.”<sup>23</sup> As enforced by the Supreme Court in the 2001 case *Alexander v. Sandoval*, there is no private right to action under Title VI of the 1964 Civil Rights Act for discrimination of disparate impact. The Court noted in *Sandoval*, however, that “it must be assumed for purposes of deciding this case that regulations promulgated under § 602 may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601.”<sup>24</sup> Thus, while there is no private right to action under section 601, federal agencies are directed to implement regulations enforcing disparate impact claims according to the protections offered under section 601.<sup>25</sup> In fact, as described in “Title

19. *Civil Rights Requirements- A. Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d et seq. (“Title VI”), U.S. DEP’T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html> [<https://perma.cc/V6PP-E5WA>] [<https://web.archive.org/web/20230310051505/https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html>].

20. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

21. *Id.* at 670.

22. U.S. DEP’T OF TRANSP., WHAT TYPES OF DISCRIMINATION ARE PROHIBITED BY TITLE VI? <https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Types%20of%20Discrimination.pdf> [<https://perma.cc/G56R-6YAJ>] [<https://web.archive.org/web/20230213224614/https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Types%20of%20Discrimination.pdf>].

23. *Title VI and Education*, FINDLAW (July 12, 2017), <https://corporate.findlaw.com/litigation-disputes/title-vi-and-education.html> [<https://perma.cc/U3PQ-T2CN>] [<https://web.archive.org/web/20230310071053/https://corporate.findlaw.com/litigation-disputes/title-vi-and-education.html>].

24. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

25. U.S. DEP’T OF JUST., THE CIVIL RIGHTS DIVISION’S TITLE VI LEGAL MANUAL (2021), <https://www.justice.gov/crt/book/file/1364106/download> [<https://perma.cc/ZA7J-6ZT8>] [<https://web.archive.org/web/20230310074239/https://www.justice.gov/crt/book/file/1364106/download>] (stating that “[t]he agencies’ Title VI disparate impact regulations continue to be a vital administrative enforcement mechanism.”). *But see* Sarah Hinger & Jennifer Bellamy, *Trump Administration Recommends Slashing Civil Rights Protections for Students of Color*, ACLU (Dec. 19, 2018), <https://www.aclu.org/blog/juvenile-justice/school-prison-pipeline/trump-administration-recommends-slashing-civil-rights> [<https://perma.cc/PZT3-MNRQ>].

VI Legal Manual,” a report by the U.S. Department of Justice, “federal funding agencies play a vital role in enforcing the prohibition on disparate impact discrimination through complaint investigations, compliance reviews, and guidance on how to comply with Title VI.”<sup>26</sup>

### 1. Arguing Disparate Impact Discrimination in the Education Context

In the context of education, the Office of Civil Rights (OCR) is responsible for enforcing Title VI and regulating funding provided by the Education Department.<sup>27</sup> Previous cases employ Title VI of the Civil Rights Act as a source of redress in the education context to promote equal access through disparate impact claims.<sup>28</sup> While arguing disparate impact, especially in the context of education, “fewer or inferior resources or benefits” have been recognized by the courts as a sufficient adversity/harm under Title VI.<sup>29</sup> Within the state of New York, fewer or inferior resources as sufficient adversity under Title VI is demonstrated by the case of *Campaign for Fiscal Equity v. The State of New York*.<sup>30</sup>

The Campaign for Fiscal Equity was an organization that primarily fought to protect the constitutional right to education for all students.<sup>31</sup> In *CFE*, Campaign for Fiscal Equity argued that the State’s funding system underfunded New York City public schools, thus violating the New York State Constitution, as well as Title VI of the Civil Rights Act.<sup>32</sup> Specifically, the “complaint challenges the manner in which the State allocates education aid, alleging that the present methodology has a disparate impact on the state’s racial and ethnic minorities, the vast majority of whom attend New York

[<https://web.archive.org/web/20230310074456/https://www.aclu.org/news/juvenile-justice/trump-administration-recommends-slashing-civil-rights>].

26. *Id.*

27. *Education and Title VI*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> [<https://perma.cc/5YVY-LRPT>] [<https://web.archive.org/web/20230214014539/https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html>]; *Title VI and Discrimination in Education*, JUSTIA, <https://www.justia.com/education/discrimination-in-education/title-vi> [<https://perma.cc/K2MF-QNJH>] [<https://web.archive.org/web/20230214014427/https://www.justia.com/education/discrimination-in-education/title-vi>].

28. *See Ga. State Conf. of Branches of NAACP v. State of Georgia* 775 F.2d 1403 (1985) (stating that plaintiffs in a claim against the State of Georgia met their burden of establishing a prima facie case using statistics that demonstrate inequities in racial composition of classrooms in comparison to compositions derived by random distribution); *see also Sharif v. N.Y. State Dep’t of Educ.*, 709 F. Supp. 345 (S.D.N.Y. 1989) (meeting this standard with “persuasive statistical evidence and credible expert testimony that the composition of scholarship winners tilted decidedly toward males and could not have occurred by a random distribution.”).

29. *Section VII—Proving Disparate Impact*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fcs/T6Manual7#8> [<https://perma.cc/6ZYS-SG8J>] [<https://web.archive.org/web/20230217220510/https://www.justice.gov/crt/fcs/T6Manual7>].

30. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

31. *Equity*, ALL. FOR QUALITY EDUC., <https://www.aqeny.org/equity> [<https://perma.cc/NUM4-AJW8>] [<https://web.archive.org/web/20230405123736/https://www.aqeny.org/equity>].

32. *Campaign for Fiscal Equity*, 655 N.E.2d at 663.

City public schools.”<sup>33</sup> The New York Court of Appeals ruled that the plaintiffs stated a cause of action in that the adversity suffered by students of color was sufficient under Title VI.<sup>34</sup> This ruling was supported by statistical evidence supplementing the plaintiffs’ allegations which serve to meet the plaintiff’s burden of proof. This evidence consisted of “statistics comparing benefit distribution or access patterns among members of the protected class and the overall population.”<sup>35</sup> While this Title VI claim was ultimately dismissed under *Sandoval*, as this was brought as a private claim, this case demonstrates the relative level of adversity needed to establish a valid disparate impact claim in the context of education. Further, this case demonstrates the use of statistical evidence to show requisite adversity. Had this case been brought through legally viable means under *Sandoval*—as Title VI enforcement by an administrative agency and not a private action claim— the court may have decided differently.

Further cases demonstrate the use of Title VI as a method to pursue educational equity. The case of *Larry v. Riles* establishes improper placement of students into special education classes based on race as sufficient adversity under Title VI.<sup>36</sup> Additionally, in the case of *Meek v. Martinez*, sufficient adversity was established when minority seniors received less financial aid for their community service work than their non-minority peers.<sup>37</sup> These cases demonstrate the broad reach of “sufficient adversity,” allowing us to confidently explore the possibility that the discriminatory impact left by New York City’s current arts education funding structure may also constitute sufficient adversity under Title VI. Further, these cases collectively demonstrate the relationship between education access and civil rights, as a struggle between the two has existed consistently throughout this country’s history. To properly assess New York City’s funding structure in context of Title VI, this Note will discuss societal treatment of arts education as it impacts students of different socioeconomic backgrounds.

#### **B. APPROACHING TITLE VI IN CONTEXT OF ARTS EDUCATION— WHY SHOULD WE CARE?**

To appropriately address regulatory concerns under Title VI, it is necessary to sufficiently recount the sociocultural setting which surrounded arts education decades prior to the implementation of ArtsCount. Throughout history, there have been consistent disparities in arts education among schools that correlate strongly with the socioeconomic profile of their surrounding neighborhoods.<sup>38</sup> Based on a study conducted by the National Assessment of Educational Progress, national disparities in

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33. *Id.* at 670.

34. *Id.* at 663.

35. *Id.* at 670.

36. *Larry P. v. Riles*, 793 F.2d 969 (1981).

37. *Meek v. Martinez*, 724 F. Supp. 888, 906 (1989).

38. Maya Pottiger, *Black Students Deserve Equitable Access To Arts Education*, WORD IN BLACK (Feb. 6, 2023), <https://wordinblack.com/2023/02/black-students-deserve-equitable-access-to-arts-education> [https://perma.cc/QA52-2SEV] [https://web.archive.org/web/20230405124810/https://wordinblack.com/2023/02/black-students-deserve-equitable-access-to-arts-education].

access to arts education persist across racial groups.<sup>39</sup> This study took place in 2016 and compared the arts fluency of students during that year to that of students in the year 2008. This study administered an assessment to eighth grade students across the country, measuring their proficiency in arts-related topics.<sup>40</sup> The assessment prompted students to answer questions analyzing, describing, or judging music or art and students were graded on a points-based scale.<sup>41</sup> Responses regarding music and visual arts were recorded on a scale of 0–300, with average scores of 150. The results showed a gap between white and black students that was statistically significant: black students scored twenty-nine points lower in music and thirty points lower in visual arts.<sup>42</sup> This report also recognized that exposure to the arts outside of school may have played a role, as such luxuries are often unavailable to children from low-income families unless provided through their schools.

Further pervading a culture which neglects arts instruction is the devaluation of the arts across varying cultural groups. Common notions of what it means to be “an artist” in particular racial groups have impacted the readiness of youth to engage in arts instruction.<sup>43</sup> On the one hand, societal perceptions which distance financial success from careers in the arts dissuade individuals from financially disadvantaged backgrounds from seriously pursuing artistic passions. On the other hand, cultural capital that comes with arts education and exposure perpetuates social structure that associates fine art exploration with the upper class.<sup>44</sup>

These factors together demonstrate a sociological concept relevant in arts education disparities, that “arts education operates as a mechanism of White privilege through socioeconomic and racialized sorting that helps to maintain a two-tiered, separate but unequal system of schooling and reproduce social inequalities.”<sup>45</sup> Overall, lack of arts instruction, particularly in low-income neighborhoods, further supports a culture of elitism and separation that already exists beyond the classroom.

From this assessment, a history of racial disparities in arts education is clear. While it is widely accepted that arts education provides benefits to students in several areas of academic achievement,<sup>46</sup> the arts are still treated with neglect in terms of funding and

39. *The Nation's Report Card*, ARTS ASSESSMENT (2016), [https://www.nationsreportcard.gov/arts\\_2016/#](https://www.nationsreportcard.gov/arts_2016/#) [<https://perma.cc/V3QG-MTFJ>] [[https://web.archive.org/web/202302180113756/https://www.nationsreportcard.gov/arts\\_2016](https://web.archive.org/web/202302180113756/https://www.nationsreportcard.gov/arts_2016)].

40. *Id.*

41. *Id.*

42. *Id.*

43. Amelia M. Kraehe, Joni B. Acuff & Sarah Travis, *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220, 238 (2016).

44. *Id.*

45. *Id.* at 231.

46. Andrew Warner, *The Benefits of Arts Education for K–12 Students*, U.S. NEWS & WORLD REP. (Aug. 30, 2022, 4:55 PM), <https://www.usnews.com/education/k12/articles/the-benefits-of-arts-education-for-k-12-students> [<https://web.archive.org/web/20230405125634/https://www.usnews.com/education/k12/articles/the-benefits-of-arts-education-for-k-12-students>]; Randy Kennedy, *Guggenheim Study Suggests Arts Education Benefits Literacy Skills*, N.Y. TIMES (July 27, 2006), <https://www.nytimes.com/2006/07/27/books/27gugg.html> [<https://perma.cc/T9ZT-JSSF>] [<https://web.archive.org/web/20230405130020/https://www.nytimes.com/2006/07/27/books/27gugg.html>]; Grace Chen, *How the Arts Benefit Your Children*



accountability at the city level, as well as across socioeconomic groups. This neglect of arts education by said groups allows accountability programs like ArtsCount to continue unchallenged as other areas of academic development are deemed more productive and valuable.

### C. UNDERSTANDING THE NEW YORK EDUCATION HIERARCHY AND FUNDING STRUCTURE

In order to productively assess the inequities of New York City arts education funding, a high-level understanding of the Department of Education is necessary. The 10th Amendment of the United States Constitution establishes the authority of state and local governments over the function and structure of education in their state.<sup>47</sup> State and local governments also serve as the primary source of funding for education in their state, allocating funds from state, local, and private resources.<sup>48</sup> However, the federal government also provides funding for education systems through the Department of Education and other federal agencies.<sup>49</sup> Although contributing a minority amount of funding, the role of the federal government is described as an “emergency response system” to fill gaps between state and local support.<sup>50</sup> Further, as previously described, the federal government has authority to implement statutes that place responsibilities on state and local governments (e.g., No Child Left Behind, Every Student Succeeds). However, primary control over the function of local governments is maintained by individual states.<sup>51</sup>

The New York State Department of Education functions with a similar hierarchical structure. The New York State Constitution establishes the authority of the Board of Regents and Legislature to “provide for the maintenance and support of public schools.”<sup>52</sup> The State government delegates particular authority over educational functions to local governments and school districts. New York City is one of five City School Districts in New York—their “boundary lines are identical with that of a city.”<sup>53</sup> Further, New York City is one of few major cities whose educational system is

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*Academically and Behaviorally*, PUB. SCHOOL REV. (Feb. 13, 2023), <https://www.publicschoolreview.com/blog/how-the-arts-benefit-your-children-academically-and-behaviorally> [<https://perma.cc/FZD6-HPUY>] [<https://web.archive.org/web/20230405130526/https://www.publicschoolreview.com/blog/how-the-arts-benefit-your-children-academically-and-behaviorally>].

47. *The Federal Role in Education*, U.S. DEP’T OF EDUC. (June 15, 2021), <https://www2.ed.gov/about/overview/fed/role.html> [<https://perma.cc/UEB9-UDLK>] [<https://web.archive.org/web/20230217053932/https://www2.ed.gov/about/overview/fed/role.html>]; U.S. CONST. amend. X.

48. Melanie Hanson, *U.S. Public Education Spending Statistics*, EDUC. DATA INITIATIVE (June 15, 2022), <https://educationdata.org/public-education-spending-statistics> [<https://perma.cc/X88Y-DHET>] [<https://web.archive.org/web/20230405131521/https://educationdata.org/public-education-spending-statistics>].

49. *Id.*

50. U.S. DEP’T OF EDUC., *supra* note 47.

51. *Structure of NY State School System*, LEXIS NEXIS, <http://www.lexisnexis.com/schoollaw/images/Sample.pdf> [<https://perma.cc/35S5-CMED>] [<https://web.archive.org/web/20210124131838/http://www.lexisnexis.com/schoollaw/images/Sample.pdf>].

52. N.Y. Const. art. XI, § 1.

53. *Id.* at 7.

controlled by the city's mayor, granting the mayor the right to appoint the school Chancellor and a majority of members to the Panel for Educational Policy that oversees the New York City Department of Education ("NYCDOE").<sup>54</sup> This centralized authority is called "Mayoral Control" and shifts control of the local education system from the Board of Education and local school districts to the city Mayor.<sup>55</sup>

While education in New York City functions under this centralized framework, local schools are still expected to meet Instructional Requirements set by the New York State Education Department ("NYSED"). The NYSED publishes *Instructional Requirements for the Arts* that outline the "continuum of educational experiences students need for their academic and social development."<sup>56</sup> New York City Schools' compliance is assessed annually through a series of review processes and qualitative reports. These standards for the arts provide guidance on the percentage of weekly hours students should spend receiving arts instruction, allocated evenly throughout various art disciplines, including dance, music, theater, and visual arts.<sup>57</sup> School leaders and administrators are responsible for complying with these standards through the implementation of in-school and out-of-school programming, hiring and retaining arts teachers, and allocating necessary school funding to these goals.

Similar to other regions, New York City public schools receive funding for arts education—and education in general—from various sources, including New York City government (providing fifty-one percent), New York State (providing thirty-four percent), and the federal government (providing fifteen percent) for the 2021–2022 fiscal year.<sup>58</sup> School budgets are created with money from these sources using two mechanisms: Fair Student Funding ("FSF") and School Allocation Memoranda ("SAM").<sup>59</sup> Generally, FSF funding differs from SAM funding in that it allows school leaders to determine how such funds will be spent based on the specific educational

54. Amanda Luz Henning Santiago, *Understanding Mayoral Control*, CITY AND STATE N.Y. (2020), <https://www.cityandstateny.com/politics/2020/12/understanding-mayoral-control/175347> [https://perma.cc/N982-LLKM] [https://web.archive.org/web/20230218010522/https://www.cityandstateny.com/politics/2020/12/understanding-mayoral-control/175347].

55. The current NY governor has proposed to extend Mayoral Control for another 4 years to newly inaugurated NYC Mayor, Eric Adams. There is continued controversy over the fairness of Mayoral Control, and local campaigns to end this centralized power and return it to the local school boards. See Laura Nahmias, *NYC Mayor To Keep Control of City Schools in State Proposal*, BLOOMBERG (Jan. 18, 2022), <https://www.bloomberg.com/news/articles/2022-01-18/nyc-mayor-to-retain-control-of-city-schools-under-state-proposal> [https://perma.cc/6P8W-55GP] [https://web.archive.org/web/20230425044542/https://www.bloomberg.com/news/articles/2022-01-18/nyc-mayor-to-retain-control-of-city-schools-under-state-proposal]; COALITION TO FINALLY END MAYORAL CONTROL, RESOLUTION ON NEW YORK CITY SCHOOL GOVERNANCE (2022), <https://www.nycmayoralcontrolnot.org/resolution> [https://perma.cc/63NF-MT62] [https://web.archive.org/web/20230217024410/https://www.nycmayoralcontrolnot.org/resolution].

56. N.Y.C. DEP'T OF EDUC., ANNUAL ARTS IN SCHOOLS REPORT (2023), <https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports> [https://perma.cc/N2DU-EMF7] [https://web.archive.org/web/20230217024721/https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports].

57. *Id.*

58. N.Y.C. DEP'T OF EDUC., FUNDING OUR SCHOOLS (2023), <https://www.schools.nyc.gov/about-us/funding/funding-our-schools> [https://perma.cc/Q7ZH-JLSD] [https://web.archive.org/web/20230217024721/https://infohub.nyced.org/reports/academics/annual-arts-in-schools-reports].

59. *Id.*

needs of their students. SAM funding is allocated to schools for specific purposes, each coming with a SAM report describing the required usage of the funds.<sup>60</sup>

Arts education funding is allocated to New York City public schools through Fair Student Funding, which allows school leaders to decide which art programs their schools will engage in. As enforced by the New York State Education Department, school leaders are required to direct funding as to fulfill arts education mandates set for each grade level. As previously explained, the NYSED mandates specific percentages of weekly instruction time that should be allocated to arts classes and requires schoolteachers to cover a standard arts education curriculum. While these mandates are required at the state level, leeway and discretion in funding—as well as lack of accountability for arts education—allow many schools to operate out of compliance with these standards.

#### D. PRE-ARTSCOUNT FUNDING IN PUBLIC SCHOOLS

In 1997, former Mayor Rudy Giuliani implemented Project ARTS (Arts Restoration to the Schools) with the intention of enhancing the arts education for New York City students of all grades.<sup>61</sup> Project ARTS provided schools with funding dedicated specifically to the arts, requiring that such grants were spent on “direct instructional services, professional development for educators, curriculum development, equipment, art materials and supplies, as well as cultural services.”<sup>62</sup> Funding for arts education through Project ARTS peaked at \$75 million in the 2000–2001 fiscal year.<sup>63</sup>

In 2002, President George W. Bush passed the No Child Left Behind Act as an attempt to increase federal intervention in the public school system and hold teachers accountable for the academic development of all students. No Child Left Behind enforced Common Core State Standards (“CCSS”) in the form of initiatives meant to establish “a national set of criteria where all students are solely knowledgeable making them college and career ready.”<sup>64</sup> CCSS subject areas include mathematics and English

60. James W. Guthrie, *United States Education Policy: The Basics of Educational Policy, the Pressure for Reform in American Education, Defining Policy*, EDUCATION.STATEUNIVERSITY.COM (2023), <https://education.stateuniversity.com/pages/1937/Educational-Policy-United-States.html> [<https://perma.cc/WV7F-EV23>] [<https://web.archive.org/web/20230217030124/https://education.stateuniversity.com/pages/1937/Educational-Policy-United-States.html>].

61. Project ARTS: A Brief History, STUDYLIB, <https://studylib.net/doc/5856222/project-arts-a-brief-history> [<https://perma.cc/CG3P-WYNL>] [<https://web.archive.org/web/20230217030319/https://studylib.net/doc/5856222/project-arts-a-brief-history>].

62. New York City, N.Y., Res. No. 158-2010 (2017).

63. BETSEY GOTBAUM, *OUT OF TUNE: A SURVEY ON NYC STUDENTS' ACCESS TO ARTS EDUCATION* (2008).

64. Toni Ann Hernan, *The Impact of No Child Left Behind Act and Common Core Standards on Curriculum and the Diverse Learner*, 2 INT'L J. EDUC. & HUM. DEV. 15, 15 (2016).

language arts (“ELA”).<sup>65</sup> States that did not comply with these mandates would risk losing federal funding.<sup>66</sup>

No Child Left Behind negatively impacted several aspects of art education, including curriculum, instructional practice, teacher workloads, and resource allocation. In a study conducted by the National Art Education Foundation, No Child Left Behind negatively impacted art teachers by decreasing their resources, increasing their workloads, and modifying their curricula by requiring them to teach common core subjects in place of the arts.<sup>67</sup> Sixty-seven percent of teachers surveyed reported to have been teaching fewer art classes because they were required to teach language arts, provide remediation, or conduct test preparation. Further, funds were redirected from their art programs toward test preparation for core subjects.<sup>68</sup> A key element of No Child Left Behind was the pressure on states to measure these standards through state implemented examinations.<sup>69</sup> Ultimately, increased funding was directed toward programs that trained students in taking and succeeding on these tests, and attention and resources were diverted away from the arts. No Child Left Behind resulted in racially discriminatory effects, as well. Examination benchmarks and CCSS proved to widen, instead of close, the achievement gap between students of diverse backgrounds and their counterparts.<sup>70</sup>

#### E. BLUEPRINT FOR THE ARTS AND ARTSCOUNT: WHAT ARE THEY?

In 2004, closely following the passage of No Child Left Behind, the New York City Department of Education implemented city-wide standards for arts education in New York City public schools called Blueprint for the Arts. Blueprint of the Arts provides subject specific curriculum standards in several areas of the arts including visual arts, theater, music, dance, and moving image. The purpose of Blueprint for the Arts is to “provide teachers with a path to follow for developing curriculum in all arts disciplines, and provide benchmarks for what children should know, understand, and be able to do.”<sup>71</sup> Blueprint for the Arts standards provides recommendations to art teachers similar to those of the NYSED Instructional Requirements—including recommended

65. *Common Core State Standards*, CCSSO, <https://learning.ccsso.org/common-core-state-standards-initiative> [<https://perma.cc/USN7-NVPH>] [<https://web.archive.org/web/20230405132417/https://learning.ccsso.org/common-core-state-standards-initiative>].

66. Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), <https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04> [<https://perma.cc/4GMM-L7EH>] [<https://web.archive.org/web/20230217031657/https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04>].

67. F. ROBERT SABOL, *NO CHILD LEFT BEHIND: A STUDY OF ITS IMPACT ON ART EDUCATION* (2010).

68. *Id.* at 10.

69. Hernan, *supra* note 64, at 16.

70. *Id.* at 17.

71. N.Y.C. DEP’T OF EDUC., *BLUEPRINT FOR TEACHING AND LEARNING IN THE ARTS*, <https://www.weteachnyc.org/resources/collection/blueprint-for-teaching-and-learning-in-the-arts> [<https://perma.cc/ZRD3-QWK5>] [<https://web.archive.org/web/20230217032610/https://www.weteachnyc.org/resources/collection/blueprint-for-teaching-and-learning-in-the-arts>].

hours of arts instruction, detailed curriculum, and recommended measurements for student benchmarks. These standards serve as recommendations to school leaders as a way to comply with NYSED Instructional Requirements and are not specifically mandated.

In 2007, as a supplement to Blueprint for the Arts, New York City Department of Education eliminated Project ARTS and implemented ArtsCount. By replacing Project ARTS with ArtsCount, funding was no longer dedicated specifically to arts education but instead was provided through general school budgets. ArtsCount is meant to serve as an accountability framework for arts education in public schools specifically because of the newly given discretion provided to school leaders in how to allocate their general school budgets.

The system of reporting within ArtsCount is referred to as the Annual Arts in Schools Report, which consists of a System-Wide Report and Individual School Reports.<sup>72</sup> The System-Wide Report consolidates data pertaining to the retention of art teachers, budgeting, partnerships with cultural organizations, and parent involvement. Individual School Reports provide “baseline information for arts education accountability,” and are meant to demonstrate areas of potential development for individual schools.<sup>73</sup> In the Individual School Reports, schools are required to provide a ‘School Arts Program Description,’ allowing a level of detail at the school’s discretion describing their involvement in the arts. They are also required to provide the number of “Arts Learning Opportunities” that took place at their school as well as at off-campus locations during that fiscal year, the number of full-time and part-time art teachers, the names of partnered cultural organizations, and number of classrooms used for arts education. Nowhere in this report are schools required to provide dollar amounts allocated toward the arts. Further, while this new form of reporting addresses specifically arts education access, during this time, the New York City Department of Education decided to omit arts education review from the broader school accountability system.<sup>74</sup> This broader accountability system during this time was School Progress Reports, which was narrowed to assess the progress of schools in the common core No Child Left Behind subject areas—ELA and math.<sup>75</sup>

The funding structure of ArtsCount consists of several measures, including empowerment through the Fair Student Funding formula, as previously described, and Children First supplemental funding.<sup>76</sup> The premise behind this format is to empower school leaders with discretion over their budgets. Principals have the ability to decide

72. N.Y.C. DEP’T OF EDUC., ANNUAL ARTS IN SCHOOLS REPORT, *supra* note 56.

73. *Id.*

74. OFF. COMPTROLLER, N.Y.C., STATE OF THE ARTS: A PLAN TO BOOST ARTS EDUCATION IN NEW YORK CITY SCHOOLS 5 (2014), [https://comptroller.nyc.gov/wp-content/uploads/documents/State\\_of\\_the\\_Arts.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf) [<https://perma.cc/4PQ7-3FC6>] [[https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State\\_of\\_the\\_Arts.pdf](https://web.archive.org/web/20230213220615/https://comptroller.nyc.gov/wp-content/uploads/documents/State_of_the_Arts.pdf)].

75. *Quality Review*, NYC DEP’T OF EDUC., <https://www.schools.nyc.gov/about-us/reports/school-quality/quality-review> [<https://perma.cc/N46N-DSME>] [<https://web.archive.org/web/20230228015106/https://www.schools.nyc.gov/about-us/reports/school-quality/quality-review>].

76. *Id.*

the programs in which they will invest in order to meet the NYSED standards for arts education. As an incentive, New York City informs school leaders that failure to meet the guidelines articulated in ArtsCount would “factor into principal’s eligibility for bonuses.”<sup>77</sup>

Although ArtsCount was meant to address the disparities within arts education programs, reports and academic feedback demonstrate that it did not fulfill such high standards. In 2008, Public Advocate for the City of New York published *A Survey on NYC Students’ Access to Arts Education*, which noticed immediate declines in arts education funding just one year after the implementation of ArtsCount.<sup>78</sup>

Shortcomings are also seen through an assessment of the first Annual Arts in Schools Report published for the fiscal year 2006–2007. This report highlights that the lack of detail included in the Annual Arts in Schools report raises concerns over the accuracy and relevance of its data. Specifically, this report claims that while the Annual Arts in Schools report provides information regarding the availability of programs, it does not require information on the length of time students spend receiving arts instruction.<sup>79</sup> Because of this, “it is impossible to judge whether the reported availability of an arts discipline in a school has any significant bearing on students’ access to arts education.”<sup>80</sup> To further prove this point, the Office of the Public Advocate conducted a survey soliciting additional information from New York City public schools regarding arts education access. This information specifically included the number of hours that students spend receiving arts instruction of all disciplines at varying grade levels. Through this survey, the Office of the Public Advocate found that “the vast majority of schools surveyed are in violation of New York State arts education requirements.”<sup>81</sup> This survey took place in January of 2008, just one year following the implementation of ArtsCount, and the same year the first Annual Arts in Schools Report was published.

Approximately six years later, in April of 2014, the New York City Comptroller, Scott Stringer, published his “State of the Arts” report detailing the failures of ArtsCount.<sup>82</sup> This report also includes statistics exposing the disproportionate presence of arts programs throughout the city by analyzing data after six years of arts education being funded under ArtsCount. It was clear that the very mechanisms put in place to ensure accountability demonstrated that ArtsCount was yielding the opposite of its desired results. Specifically, the Annual Arts in Schools report during this time showed a “47 percent decline in spending to hire arts and cultural organizations to provide educational services for students.”<sup>83</sup> Additionally, there was an eighty-four percent drop in spending on supplies and equipment for arts programs between 2006 and 2013.<sup>84</sup>

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77. ARTSCOUNT: A GUIDE FOR PRINCIPALS, *supra* note 5, at 10.

78. GOTBAUM, *supra* note 63.

79. *Id.*

80. *Id.* at 14.

81. *Id.* at 15.

82. STRINGER, *supra* note 8.

83. *Id.* at 1.

84. *Id.* at 3.

Further, this report emphasizes the inequities based on poverty rates and income. It was found that neighborhoods in the South Bronx and Central Brooklyn consistently fell short in measurements of compliance, including retaining a full-time or part-time certified arts teacher, engaging in arts or cultural partnerships, and having dedicated arts rooms. Specifically, “of the 22 Bronx schools and 21 Brooklyn schools that have no arts or cultural organization partnerships and no certified arts teacher, 68 percent are in the South Bronx and 86 percent are in Central Brooklyn, respectively.”<sup>85</sup> South Bronx and Central Brooklyn are home to some of the lowest median household incomes in New York City.<sup>86</sup> To state it plainly, this report articulated that ArtsCount proved “ineffective at ensuring that schools provided children with robust education in the arts.”<sup>87</sup>

This report directly credits the lack of accountability in funding for these stark declines.<sup>88</sup> Specifically, the elimination of Project ARTS left arts education without guaranteed funding or accountability necessary to ensure optional funding would be allocated to the arts. Additionally, restricting arts education accountability to the Annual Arts in Schools Report and removing arts from the broader, higher-stakes School Progress Report forces school leaders to “make difficult choices about where to invest scarce resources.”<sup>89</sup>

The city responded to the Comptroller report with a \$23 million boost to Arts education, but no changes in accountability infrastructure.<sup>90</sup> Further, the former mayor, Bill DeBlasio, pledged to hire 120 new art teachers. This increase is likely to counter the statement made by the Comptroller that “supplying a full-time, state-certified art teacher to every school that does not have one would cost about \$26 million, which represents about a tenth of a penny for every dollar spent by the Education Department.”<sup>91</sup> This money was meant to help pay for “improving studio facilities, auditoriums, and dance floors, as well as on art supplies for teachers.”<sup>92</sup> However, due to the lack of accountability in reporting, it is unclear whether that money served its intended purpose. Responding to these failures with more money and no accountability reform does not address the core issues present.

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85. *Id.* at 11.

86. Andy Kiersz, *Here's a Block-by-Block Look at Who's Making How Much Across NYC's 5 Boroughs*, BUS. INSIDER (Dec. 11, 2014, 5:37 PM), <https://www.businessinsider.com/new-york-city-income-maps-2014-12> [<https://perma.cc/R3UP-C2AQ>] [<https://web.archive.org/web/20230228021915/https://www.businessinsider.com/new-york-city-income-maps-2014-12>].

87. STRINGER, *supra* note 8, at 5.

88. *Id.* at 1.

89. *Id.*

90. Sarah Cascone, *Mayor DeBlasio Gives \$23 Million Dollar Boost to arts Education in NYC*, ARTNET NEWS (July 3, 2014), <https://news.artnet.com/art-world/mayor-de-blasio-gives-23-million-boost-to-arts-education-in-nyc-54635> [<https://perma.cc/R6N9-ZTFV>] [<https://web.archive.org/web/20230228022428/https://news.artnet.com/art-world/mayor-de-blasio-gives-23-million-boost-to-arts-education-in-nyc-54635>].

91. *Id.*

92. *Id.*

## II. PROBLEM: ARTSCOUNT AS A VIOLATION OF THE CIVIL RIGHTS ACT OF 1964'S TITLE VI IMPLEMENTING REGULATION

### A. THE PROBLEMS WITH ARTSCOUNT AND THE FAILURE TO ADEQUATELY RESPOND

The implementation of Blueprint for the Arts and ArtsCount in conjunction with No Child Left Behind presented unique issues for students of color that require adequate accountability to be solved. While pressures to sufficiently perform on state-wide standardized testing were minimized through the replacement of No Child Left Behind with the Every Student Succeeds Act, lack of accountability in arts education funding allows these disparities to continue.

Looking to the present, reform of this accountability structure has yet to take place and funding for arts education continues to decrease. The budget for the 2021–2022 fiscal school year included a \$15 million cut from the \$21.5 million budget for the arts.<sup>93</sup> These budget cuts arise essentially due to the devastating impacts of the COVID-19 pandemic and loss in tax revenue that resulted from the pandemic shutdown.<sup>94</sup>

It is an unfortunate reality that arts education is one of the first to lose funding in moments of financial crisis. This reality further perpetuates the secondary status of arts instruction in the grander institution of education. An implication of this structure is that with budget cuts in any of the other core curriculum areas, arts education will suffer. The schools that struggle the most in any area will struggle the most in supporting arts education. This structure does not support a sustainable statewide arts education program. With further 2021 budget cuts due to Covid, because arts education funding is easily reallocated in other places, it will be the first to deteriorate.

Similar to the previously described negative impact of No Child Left Behind, the culture of “teaching to the test” was further perpetuated through the ArtsCount framework.<sup>95</sup> With discretion over budgets and funding in the hands of school leaders, there is little incentive to dedicate funding to the arts over programs that target students test-taking skills directly. The NYC Comptroller said in an interview with the New York Times that “we’ve spent so much time over the last 10 years teaching to the test, and lost in the shuffle were arts teachers, arts curriculum and arts space.”<sup>96</sup> This

93. Cascone, *supra* note 2.

94. Hakim Bishara, *NYC's Public Arts Education Budget Reduced to 70% of Previous Year*, HYPERALLERGIC (July 2, 2020), <https://hyperallergic.com/574726/nyc-2021-budget-arts> [<https://perma.cc/S9K3-R8AZ>] [<https://web.archive.org/web/20230228022738/https://hyperallergic.com/574726/nyc-2021-budget-arts>].

95. Jennifer L. Jennings & Jonathan Marc Bearak, “Teaching to the Test” in the NCLB Era: How Test Predictability Affects Our Understanding of Student Performance, EDUC. RESEARCHER (Nov. 2014), <https://teacherprep.princeton.edu/sites/g/files/toruqf5276/files/pdf/Jen%20Jennings%20Teaching%20to%20the%20Test%20Educational%20Researcher%20Nov.%202014.pdf> [<https://perma.cc/M38C-88TZ>] [<https://web.archive.org/web/20230405133107/https://teacherprep.princeton.edu/sites/g/files/toruqf5276/files/pdf/Jen%20Jennings%20Teaching%20to%20the%20Test%20Educational%20Researcher%20Nov.%202014.pdf>] (demonstrating the counterproductive effects of “teaching to the test” on student learning).

96. Vivian Yee, *Arts Education Lacking in Low Income Areas of New York City, Report Says*, N.Y. TIMES (Apr. 7, 2014), <https://www.nytimes.com/2014/04/07/nyregion/arts-education-lacking-in-low-income-areas-of-new-york-city-report-says.html> [<https://perma.cc/P58L-Y4CG>] [<https://web.archive.org/web/>



emphasis on teaching students based on meeting state exam requirements creates a unique impact on students in low-income neighborhoods. As previously explained in the context of No Child Left Behind, low-income schools face greater challenges regarding statewide exams. In conjunction with greater discretion over funding, arts education programs are naturally a low priority in schools focusing on preparing students for these examinations.

In addition to teaching to the test, schools in low-income neighborhoods also face the additional challenge of hiring and retaining arts-certified teachers to implement Blueprint for the Arts curriculum. Several societal forces impact the shortage of quality certified teachers, including “rising poverty, segregation, and insufficient public investment.”<sup>97</sup> Specifically for teachers in high-poverty schools, additional challenges reported consist of “threats to physical safety and attacks, lack of supportive relationships, and little autonomy in the classroom.”<sup>98</sup> In the context of arts education, with this restraint, it is increasingly difficult for school leaders in low-income communities to retain arts-certified teachers. Aside from fulfilling curriculum and arts instruction recommendations, retention of such teachers also opens the door to additional arts funding. The schools that are unable to attract and retain talented arts educators, such as those within low-income neighborhoods, are naturally at a significant disadvantage.

Demonstrated by previous reports and scholarship, it is clear that disparities exist between schools and neighborhoods based on socioeconomic status. New York City neighborhoods are historically segregated based on income and, ultimately, based on race.<sup>99</sup> A Center for Urban Research report demonstrates that the exact areas which arts education is lacking are those with the highest concentrations of black and brown residents. These areas include neighborhoods within Central Brooklyn and South Bronx, as well as Central Harlem and Southeast Queens.<sup>100</sup> Ultimately, ArtsCount yields discriminatory results not only based on socioeconomic status through low-income communities, but also on the bases of race. The inadequate system of reporting and the extreme discretion given to school leaders allows principals in lower-income, academically disadvantaged school districts to redistribute funds away from the arts and

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20230228023003/<https://www.nytimes.com/2014/04/07/nyregion/arts-education-lacking-in-low-income-areas-of-new-york-city-report-says.html>].

97. EMMA GARCÍA & ELAINE WEISS, ECONOMIC POLICY INSTITUTE, CHALLENGING WORK ENVIRONMENTS (‘SCHOOL CLIMATES’) ESPECIALLY IN HIGH-POVERTY SCHOOLS, PLAY A ROLE IN THE TEACHER SHORTAGE (May 30, 2019), <https://www.epi.org/publication/school-climate-challenges-affect-teachers-morale-more-so-in-high-poverty-schools-the-fourth-report-in-the-perfect-storm-in-the-teacher-labor-market-series> [<https://perma.cc/ZX46-Z7LX>] [<https://web.archive.org/web/20230228023205/https://www.epi.org/publication/school-climate-challenges-affect-teachers-morale-more-so-in-high-poverty-schools-the-fourth-report-in-the-perfect-storm-in-the-teacher-labor-market-series>].

98. *Id.*

99. Richard Alba & Steven Romalewski, *The End of Segregation? Hardly*, CUNY GRADUATE CENTER, <https://www.gc.cuny.edu/center-urban-research/research-projects/end-segregation-hardly> [<https://perma.cc/LBM9-6XFT>] [<https://web.archive.org/web/20230228023341/https://www.gc.cuny.edu/center-urban-research/research-projects/end-segregation-hardly>].

100. *Id.*

towards more traditional, common core subjects. ArtsCount is inadequate at holding New York City public schools accountable for essentially limiting the ability of students to participate in arts instruction largely because of factors prohibited by Title VI of the Civil Rights Act.

Amelia Kraehe, in her article *Equity, the Arts, and Urban Education: A Review*, explained that “making the arts accessible does not necessarily mean that historically underrepresented groups and those peripherally involved in the arts will automatically avail themselves of arts educational opportunities as they are currently configured.”<sup>101</sup> To succeed, ArtsCount must demand a level of accountability that would sustain participation in the arts by school leaders for all students.

### B. ARTSCOUNT IN CONTEXT OF TITLE VI OF THE CIVIL RIGHTS ACT

As previously described, elements of a Title VI Implementing Regulation claim include “whether a challenged practice has a sufficiently adverse racial impact—in other words, whether it falls significantly more harshly on a minority group than on the majority—and, if so, whether the practice is nevertheless adequately justified.”<sup>102</sup> While carrying out a Title VI investigation, agencies must assess whether the identified harm is enough to be actionable.<sup>103</sup> This threshold has previously been met in education-related Title VI cases—including *CFE*, *Larry v. Riles*, and *Meek vs. Martinez*. In addition to sufficient adversity, it is also necessary to demonstrate causation. In the context of Title VI, causation may be demonstrated with statistical evidence, and must be strong enough to “raise an inference of causation.”<sup>104</sup> Cases which use statistical evidence to demonstrate causation involve quantitative assessments that do not require inquiry into external societal factors or factors outside of the education process.<sup>105</sup>

Similar to these cases, the discriminatory effects imposed by ArtsCount demonstrate fewer or inferior services or benefits. Further, causation between the implementation of ArtsCount—as a supplement to Blueprint for the Arts and replacement of Project ARTS—is demonstrated through the previously discussed reports. While ArtsCount and additional efforts to encourage arts instruction across public schools may be justified in some way, Title VI provides that if there is an equally effective alternative which results in less racial disproportionality, that is sufficient to demonstrate disparate impact. The following section will explore potential elements of reformation which may counteract societal forces and mitigate current discriminatory results.

101. Amelia M. Kraehe et. al, *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220, 224 (2016).

102. *Campaign for Fiscal Equity v. New York*, 655 N.E.2d 661 (N.Y. 1995).

103. U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL § C(1)(B) (2021), <https://www.justice.gov/crt/fcs/T6Manual7#F> [<https://perma.cc/T6WU-5HQN>] [<https://web.archive.org/web/20230228023830/https://www.justice.gov/crt/fcs/T6Manual7>].

104. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1424 (9th Cir. 1990).

105. See *Campaign for Fiscal Equity*, 655 N.E.2d; *Larry P. v. Riles*, 793 F.2d 969, 983 (1981). See also *Lau v. Nicholes*, 414 U.S. 563, 569 (1974).

### III. SOLUTION: RECONFIGURING ARTSCOUNT AS A LESS DISCRIMINATORY ALTERNATIVE

After demonstrating sufficient adversity in a Title VI violation claim, an agency will look for less discriminatory alternatives to mitigate this harm. This Note proposes an alternative framework that would support the reformation necessary to minimize these discriminatory effects. The proposed methodology behind a reformed accountability program would involve a reformed system of funding arts education for schools and modifying the reporting system associated with ArtsCount. Essentially, these two primary elements contribute to the inadequacy of ArtsCount at the high level. The discretion given to school leaders in terms of arts education funding allows them to willingly opt out of arts education investment for traditionally higher-stake subject areas—this must be addressed through the current system of funding. The lack of detailed reporting keeps parents and the central Department of Education from highlighting the issues and lack of access present. Further, this lack of detailed reporting perpetuates the culture that remaining out of compliance with arts education standards is not as serious a violation as non-compliance with other more traditional school requirements—progress in common-core subjects. This should be addressed through a modified system of reporting. Together, this alternative may address, at least in part, the system failures that contribute to the lack of arts education access throughout New York City Public Schools.

Historically, the New York City Department of Education has gone through several phases of implementing various initiatives, particularly those that have garnered popularity and excitement during their time. Such initiatives include discrete trial instruction, the workshop model, and the balanced literacy approaches.<sup>106</sup> Currently, there is a continued emphasis on data-driven instruction and social-emotional learning incorporated into everyday curriculum.<sup>107</sup> These forms of teaching employ the use of data and socio-cultural backgrounds, respectively, to enhance student learning.<sup>108</sup>

106. Discrete trial instruction is “an educational strategy based on the principles of applied behavior analysis.” See *Fact Sheet—Discrete Trial*, FLORIDA ATLANTIC UNIVERSITY, <https://www.fau.edu/education/centersandprograms/card/documents/discretetrial.pdf> [<https://perma.cc/U4XG-KFGK>] [<https://web.archive.org/web/20230310152742/https://www.fau.edu/education/centersandprograms/card/documents/discretetrial.pdf>]. The workshop model is “an instructional practice that consists of three parts: a mini-lesson, a workshop, and a debrief.” See Paul Emerich France, *How to Use the Workshop Model to Foster Independence*, EDUTOPIA (Nov. 11, 2020), <https://www.edutopia.org/article/using-workshop-model-foster-independence> [<https://perma.cc/Q722-9ADX>] [<https://web.archive.org/web/20230310152955/https://www.edutopia.org/article/using-workshop-model-foster-independence>]. And language balancing literacy is a method of teaching that balances “explicit language instruction with independent learning and language exploration. It aims to strike a balance between both whole language and phonics when learning to read.” See *What is the Balanced Literacy Approach*, PROF. LEARNING BD., <https://k12teacherstaffdevelopment.com/tlb/what-is-the-balanced-literacy-approach> [<https://perma.cc/VDX9-AWVN>] [<https://web.archive.org/web/20230310153402/https://k12teacherstaffdevelopment.com/tlb/what-is-the-balanced-literacy-approach>].

107. See generally Anne Gregory & Edward Fergus, *Social & Emotional Learning & Equity*, 27 FUTURE CHILD. 113 (2017).

108. See Emily Tate, *Why Social Emotional Learning is Suddenly in the Spotlight*, EDSURGE (May 7, 2019), <https://www.edsurge.com/news/2019-05-07-why-social-emotional-learning-is-suddenly-in-the-spotlight>

ArtsCount, as well as Blueprint for the Arts, was developed during an era where arts education was extremely popular and highly favored by the most influential figures in New York City public education. During this time, funding for these programs was at a historic high. Though currently, with the popularity of the aforementioned teaching methods, emphasis on the arts has decreased. However, with the ever-changing nature of public-school education, arts education does not have to suffer, it can grow. Restructuring ArtsCount instead to focus on and emphasize a broader, intersectional implementation of arts education would allow arts education to thrive in conjunction with these popular methods of teaching. Thorough methods of reporting and modified funding structure would provide the environment conducive for that growth.

Ultimately, this proposed structure would differ from ArtsCount, and the previously implemented Project ARTS, in that it would serve as a middle ground of discretion for school leaders when it comes to arts education funding. Further, this framework would increase information gathered through reporting compared to that of ArtsCount, promoting a culture of higher stakes for school leaders to develop and sustain access to arts education.

#### A. RESTRUCTURED SYSTEM OF FUNDING TO MITIGATE ARTSCOUNT'S DISCRIMINATORY EFFECTS

This proposed alternative would include a system of reporting that dedicates money to arts education programs. This funding structure would align more closely to New York City's previously implemented Project ARTS, however discretion for school leaders will be maintained. As previously discussed, there are various mechanisms through which school leaders receive funding from the central NYC Department of Education—including Fair Student Funding and School Allocation Memoranda. Through this alternative, arts education funding would be given to schools with a school allocation memorandum requiring it to be spent in areas of arts instruction. This alternative would serve as a middle ground with the goal of guaranteeing investment in the arts, transferring money for arts education from general school budgeting to dedicated school funding.

Empowerment for school leaders to decide where their funds were going was a major element of the implementation of ArtsCount.<sup>109</sup> The proposed alternative would maintain this feature by continuing to allow school leaders to decide the programs in which they will invest their funds. However, opposed to providing arts education through general school budgets, New York City will enforce a system which requires arts education funding to be spent in arts related programming. It may be essential, however, to emphasize a broad scope regarding what may qualify as arts programming—broad, though defined. Requiring schools to spend money directly on the arts would not mitigate the difficulties previously discussed that schools face in

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[<https://perma.cc/2CNJ-LZJH>] [<https://web.archive.org/web/20230310153520/https://www.edsurge.com/news/2019-05-07-why-social-emotional-learning-is-suddenly-in-the-spotlight>].

109. GOTBAUM, *supra* note 63.

preparing their students for state-wide examination in common core areas. In addition to arts programming which targets arts education directly through various arts mediums, school leaders are encouraged to invest in arts education programming that utilizes teaching through arts integration. Arts integration is a method of learning in which students obtain an understanding of one subject through the use of art.<sup>110</sup> Through this process, students are able to utilize their creative abilities while also expanding knowledge of more traditional subjects, like reading and language arts, math, science, and social studies. Arts integration programming may include professional development for common core teachers focusing on the use of arts mediums in traditional subject areas, and the implementation of an arts-integrated curriculum. By maintaining a broad scope of arts education programming, school leaders maintain an even stronger level of discretion while still being required to dedicate this funding to arts specific areas and activities.

The proposed structure would prioritize professional development for teachers of all subjects with emphasis on arts integration. Professional development is a strategy for “schools to strengthen teacher’s performance levels” and typically involves a “formal process, such as a conference, seminar, or workshop; collaborative learning among members of a work team.”<sup>111</sup> In the context of education, professional development provides teachers with tools to improve their skills overtime and enhance the classroom experience for all students.<sup>112</sup> In the context of arts integration, professional development would arm teachers with tools to integrate arts education in their daily lesson plans and curriculum. As part of this alternative, and as an incentive to participate in arts integration professional development initiatives, teachers will be given general Continuing Teacher and Leader Education (“CTLE”) credits. The CTLE Requirement is a standard to which educators holding particular certificates are held where they must complete 100 clock hours of instruction with CTLE-approved sponsors.<sup>113</sup> Teachers are required to complete this number of hours per every five-year period. Offering such credit in exchange for participation may encourage teachers to gain this form of arts instruction training.<sup>114</sup>

Additionally, as an incentive for administrators to endorse teacher participation in these programs, additional funding could be offered for participating schools. This funding will come with SAM reports requiring that it is spent only on arts-related programs as well. This practice will essentially, in part, return to the pre-ArtsCount

110. *What is Arts Integration?*, North Central Educational Service District (Aug. 26, 2021), <https://www.ncesd.org/news/what-is-arts-integration> [<https://perma.cc/4XCE-NCFA>] [<https://web.archive.org/web/20230310153823/https://www.ncesd.org/news/what-is-arts-integration>].

111. HAYES MIZELL, *LEARNING FORWARD, WHY PROFESSIONAL DEVELOPMENT MATTERS* 5 (2010).

112. *Id.* at 6.

113. *Continuing Teacher and Leader Education (CTLE) Requirement*, NYSED, <https://www.highered.nysed.gov/tcert/resteachers/ctle.html> [<https://perma.cc/Z4JM-E7K5>] [<https://web.archive.org/web/20230405134607/https://www.highered.nysed.gov/tcert/resteachers/ctle.html>].

114. *Fulfilling Your CTLE Credits*, UNITED FED’N TCHRS. (Dec. 17, 2020), <https://www.uft.org/news/you-should-know/qa-on-issues/fulfilling-your-ctle-requirements> [<https://perma.cc/4U5P-AUGU>] [<https://web.archive.org/web/20230310154234/https://www.uft.org/news/you-should-know/qa-on-issues/fulfilling-your-ctle-requirements>].

funding structure that directed funding specifically for arts education. Mandating initiatives for school and district leaders to endorse implementation of arts education in their daily instruction would encourage participation at the school and district levels, while maintaining school leader discretion and allowing teachers to simultaneously prepare their students in common core areas.

#### **B. RESTRUCTURED SYSTEM OF REPORTING TO MITIGATE ARTSCOUNT'S DISCRIMINATORY EFFECTS**

As previously explained, the current system of reporting lacks thorough inquiries that provide the Department of Education, as well as parents and school district leaders, with information on arts education available to students in the area. A restructured system of reporting would modify the current Arts in Schools Report as well as incorporate arts education assessments into current, high-stakes, yearly reports. Maintaining the current yearly Arts in Schools Report is essential as a tool to provide the great New York City public with insight into the arts education available to students. Incorporating arts education into additional, high-stakes reports would increase accountability for principals regarding investing in arts programming.

The current Arts in Schools Survey solicits general information on the makeup of each school that completes the survey. This information is consolidated in the school summary section. In the alternative framework, the Annual Arts in Schools Report, which summarizes the information collected by each school's survey and is published yearly, would include the socioeconomic and racial makeup of each school in the distribution of this information. While this report provides information of all schools at the large scale, it is difficult to address the issues of inequity and accessibility when they are provided out of that socioeconomic context. By including a racial assessment of all responding schools, this would essentially provide a report similar to the Comptroller's, but on a yearly basis. Effectively, the way the Comptroller report highlighted inequities and need for change, this element of the Annual Arts in Schools report would emphasize the importance of arts education equity and access as well as keep those socioeconomic needs at the forefront beside the other metric and assessments included in the yearly report.

This proposed framework would also expand upon both the qualitative and quantitative nature of this survey, requiring more detail in the School's Arts Program Description, as well as more detail as to what students are engaging in during individual arts programs. Schools are required to provide the names of partner organizations, arts events attended, and rooms dedicated to these activities, but the survey lacks substantive information on what these activities truly are. Further, this survey would require more thorough quantitative information, specifically about the amount of money being spent on arts programming and a breakdown of the distribution of those funds, as well as the percentage of weekly hours spent dedicated to the arts, as required by the NYS Arts Education standards. As reflected in the responses immediately following the Comptroller Report, such specific data highlights areas of needed growth and creates room for public scrutiny. If these specific data points are never recorded,

shortcomings and discriminatory impact may go unnoticed. The proposed framework aims to highlight this growth through detailed reporting, as the Comptroller Report did, on a frequent basis.

### C. THE PROPOSED STRUCTURE IN COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT

In agency Title VI administrative investigations, the evidentiary burden rests with the investigating agency rather than with the complainant.<sup>115</sup> The agency carrying out the investigation is responsible for inquiring potential alternatives that may mitigate the discriminatory effects of the agency funded program. Thus, while this less-discriminatory alternative may be considered, it is by no means necessary in establishing a valid claim of adversity imposed on the protected group as a Title VI violation. However, in assessing the adequacy of a less discriminatory alternative, agencies should “thoroughly review the evidence provided regarding potential alternatives.”<sup>116</sup>

This proposed structure would serve as a valid alternative to ArtsCount under Title VI of the Civil Rights Act. As previously described, a less discriminatory alternative under Title VI would “adequately meet the established need.”<sup>117</sup> Further, previous case law demonstrates that less discriminatory alternatives may take the form of “mitigation measures to be applied to the original challenged practice.”<sup>118</sup> The established need in the context of New York City’s ArtsCount is to address the disparities of access to arts education among students in neighborhoods of varying socioeconomic backgrounds through budgeting accountability. The proposed alternative meets the established need by addressing the lack of accountability by reforming the current framework to address the system failures specifically pertaining to access on the basis of racial and socioeconomic makeup of students. The proposed framework takes the form of mitigation efforts, requiring school leaders to dedicate funding to arts and reporting to include assessments of disparities based on race on a yearly basis to reflect the impact of this change.

### D. POLICY CONSIDERATIONS

Several policy considerations are taken into account while attempting to reform ArtsCount, especially the use of arts integration in everyday subjects. A primary

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115. TITLE VI LEGAL MANUAL, *supra* note 25.

116. *Id.*

117. TITLE VI: INTENTIONAL DISCRIMINATION AND DISPARATE IMPACT, FED. HIGHWAY ADMIN. <https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Intentional%20Discrimination%20and%20Disparate%20Impact.pdf> [https://perma.cc/LJC7-B7CV] [https://web.archive.org/web/20230215211438/https://www.fhwa.dot.gov/civilrights/programs/docs/Title%20VI%20-%20Intentional%20Discrimination%20and%20Disparate%20Impact.pdf].

118. TITLE VI LEGAL MANUAL, *supra* note 25; Nat’l Ass’n For Advancement of Colored People v. Med. Ctr., Inc., 657 F.2d 1322, 1325 (3d Cir. 1981).

difference between this proposed alternative and the currently existing ArtsCount is the treatment of the arts as an individual subject necessitating its own instruction time, as opposed to an emphasis on incorporation of the arts into daily curriculum. The two schools of thought expressed are defined as the aesthetic view and instrumentalist view, respectively.<sup>119</sup> A proposed alternative to the discriminatory implications of ArtsCount would endorse an instrumentalist view of arts education. Instead of treating arts education as a separate subject, to be utilized and taught mainly by those with arts education certification, arts education could be implemented at every level of education by all educators.<sup>120</sup> An instrumentalist view would allow the allocation of funds to support already existing programs and teachers, with art being incorporated into the already existing structure.

In fact, this funding structure, which endorses the instruction of the arts in daily curriculum, demonstrates extremely efficient use of funds as the arts are proven to contribute greatly to topics and initiatives currently popular within the New York City public education regime. Two widely recognized teaching frameworks—social emotional learning and culturally responsive-sustaining education (“CR-S”)—can both be supported through incorporation of the arts.

Social emotional learning is an educational framework meant to provide students with learning environments that “affirm cultural identities and . . . develop students’ ability to connect across lines of difference, (and) elevate historically marginalized voices.”<sup>121</sup> An element of this framework is creating a welcoming and affirming environment that “highlight[s] works of art designed by students and members of the broader community.”<sup>122</sup> It is seen through many studies, however, that the impact of arts education on social emotional learning goes far beyond the appreciation of artworks.<sup>123</sup> A 2017 study conducted by the William Penn Foundation explores the impact of arts education on social emotional development of children.<sup>124</sup> Particularly, this study focused on areas of development within children of color, with a student sample including 32% African American students and 29% Latinx students. This study

119. *Learning Through the Arts: A Guide to the National Endowment for the Arts and Arts Education*, NAT’L ENDOWMENT ARTS (2002).

120. Emily H. Plotkin, *Arts Education: A Fundamental Element of Public School Education*, 26 COLUM. J. L. & ARTS 75, 89–90 (2002) (stating that “In this approach to arts education, the arts are infused into every subject in the curriculum, with the intent to develop ‘high order thinking skills, such as comparison, restructuring, and innovation.’ An arts education is then a vehicle for learning other subjects, but in the process students learn foundational skills in art as well.”).

121. *Culturally Responsive-Sustaining Education Framework*, NYSED.GOV, <http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf> [https://perma.cc/3Z8F-BE7T] [https://web.archive.org/web/20230405135909/http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf].

122. *Id.* at 33.

123. Steven J. Holochwost et. al, *The Social Emotional Benefits of the Arts: A New Mandate for Arts Education*, THE WILLIAM PENN FOUND. (Apr. 2017), [https://williampennfoundation.org/sites/default/files/reports/Socioemotional%20Benefits%20of%20the%20Arts\\_Summary.pdf](https://williampennfoundation.org/sites/default/files/reports/Socioemotional%20Benefits%20of%20the%20Arts_Summary.pdf) [https://perma.cc/C8FP-7P9Y] [https://web.archive.org/web/20230215212834/https://williampennfoundation.org/sites/default/files/reports/Socioemotional%20Benefits%20of%20the%20Arts\_Summary.pdf].

124. *Id.*



found that students who participated in arts programs experienced “increases in their tolerance for others’ perspectives[,] . . . areas of growth mindset and academic goal orientation.” This impact was seen especially among younger students.

CR-S is an educational framework that emphasizes the importance and usefulness of multiple expressions of diversity in the process of teaching and learning.<sup>125</sup> Elements of the CR-S framework address the presence of cultural diversity in all aspects of the classroom. A welcoming and affirming environment requires “collective responsibility to learn about students’ cultures and communities.”<sup>126</sup> High expectations and rigorous instruction require critical examination of power structures, inclusive curriculum and assessment require students as co-designers of curriculum, and Diversity, Equity, and Inclusion training necessitate ongoing professional and learning support. Essentially, CR-S instruction will “identify gaps where current curriculum does not address multiple perspectives, cultures, and backgrounds [and] advocate for fair representation of these absent backgrounds.”<sup>127</sup> Several strategies for implementing arts instruction within the CR-S framework demonstrate the benefits that such collaboration could have for the enhancement of student learning. Artistic activities such as painting, drawing, movement, and music, all contribute to the cultural competence of students through their ability to inform in “ways that do not heavily rely on language.”<sup>128</sup>

Overall, there is great impact that arts instruction can have on currently popular and well supported educational initiatives. Redirecting funding to support arts education, especially in ways that incorporate arts instruction in daily common core subjects, would also prove to be a further investment in many respected and prioritized initiatives.

### E. CONCERNS

Concerns of practicality regarding this alternative may be posed. As New York City has the largest public school system in the country, how could policy reformation of this scale take place? However, similar structures of funding have been implemented in the past, at the national level, for arts instruction training programs, in addition to other types of arts-related grants. For example, the Arts in Education – Model Development and Dissemination Grants Program implemented a similar structure at the national level. This program was implemented from 2004–2014, and offered grants to organizations with arts expertise to “further create and develop materials for the replication or adaptation of current comprehensive approaches to integrating a range of arts disciplines into elementary and middle school curricula.”<sup>129</sup> Essentially, this

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125. *Id.*

126. *Id.* at 12.

127. *Id.*

128. Sarah Travis & Emily Jean Hood, *Troubling Socio Cultural Narrative Pedagogy: Implications of Arts Educators*, 57 I. ISSUES & RSCH. 318 (2016).

129. *Arts in Education Model Development Dissemination Grants Program*, U.S. DEP’T EDUC. (2017) <https://www2.ed.gov/programs/artsedmodel/index.html> [<https://perma.cc/XM6T-T5HR>] [<https://web.archive.org/web/20230215213907/https://www2.ed.gov/programs/artsedmodel/index.html>].

program consisted of key elements of what this reformed ArtsCount would include, specifically regarding its funding to New York City-based consulting companies for partnering with public schools to offer instruction training. This element of the framework existed at the national level for a decade, demonstrating its practicality.

Other elements of this proposed framework are seen in their individual capacity in previous implementation efforts by other state departments. For example, a 2009 study assessed arts integration professional development with K-12 teachers in Washington, D.C. They found that integration of arts-based learning in the common core curriculum allowed teachers a deeper understanding and appreciation of their own and their students' artistic capabilities.<sup>130</sup> Further, teachers expressed that utilizing art helped facilitate "understanding of abstract concepts among previously struggling students."<sup>131</sup> This demonstrates that integration of arts instruction in the common curriculum could coincide with the standard objectives of common core mandates while sustaining exploration in the arts.

What this newly imagined framework proposes is a less discriminatory alternative to the current accountability program, ArtsCount. In context of Title VI of the 1964 Civil Rights Act, this alternative demonstrates that, although it may be argued our current funding structure and accountability programs are justified, they are not necessary. The discriminatory implications they yield are not inevitable and can be avoided with a more instrumentalist approach that narrows the chain between funding being allocated and funding being spent.

#### IV. CONCLUSION

Ultimately, we return to the words of Rocco Landesman, Former Chairman for the National Endowment for the Arts: "As the arts are forced to compete for scarce resources, there is no harm in pointing out once again that an investment in the arts will pay extensive dividends."<sup>132</sup> A reassessment of the current accountability framework, ArtsCount is necessary in reforming access to arts education for children at all levels. This reassessment will not only provide our education system with a refreshed view of the impact funding accountability has on arts education, but it will also provide all children with a supported and unthreatened chance at the arts.

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130. Amelia M. Kraehe, Joni B. Acuff, & Sarah Travis, *Equity, the Arts, and Urban Education: A Review*, 48 URBAN REV. 220 (2016).

131. *Id.* at 235.

132. CATTERALL ET AL., *supra* note 4.