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TWICE-EXCEPTIONAL STUDENTS UNDER THE INDIVIDUAL WITH DISABILITIES EDUCATION ACT^{a1}

“Twice-exceptional,” or “2E,” students are those who qualify not only as having a disability but also as gifted.¹ From a legal perspective, the qualification would primarily be under one or more of the enumerated classifications, such as specific learning disability (SLD), in the federal special education law--the Individuals with Disabilities Education Act (IDEA).² Correspondingly, the qualification for giftedness would be under a state gifted education law, which vary widely but are largely group- rather than individually-oriented.³ These two alternative legal frameworks do not connect with the limited exception of approximately ten states, led by Pennsylvania, that have IDEA-supplementing special education laws that provide individually-oriented requirements for both sides of the exceptionality spectrum.⁴

Pertinent Literature

The education literature contains a continuing line of articles on 2E students.⁵ Illustrating the focal areas of attention during the previous twenty *2 years, a literature review in 2011 found the following frequencies of empirical investigations for the disabilities connected with giftedness: learning disabilities--twenty-one; ADHD--seventeen, and autism spectrum disorder--five.⁶ Another literature review, which covered the overlapping period of 2000 to 2018, found forty-four research studies that addressed five themes across the various disability categories: (a) academic or learning strategies, (b) strength-based approach, (c) support interventions, (d) technology, and (e) art and music interventions.⁷ Even though an occasional article in the education literature mentions the IDEA,⁸ none has addressed the case law under the IDEA or other applicable legislation.

The legal literature has not come close to filling the gap. The rare law review articles that have addressed 2E students advocated legal reform but failed to canvass the specifically applicable case law. For example, Millman's proposal for the use of the federal disability discrimination law, Section 504 of the Rehabilitation Act (Section 504),⁹ or state gifted education laws only incidentally mentioned one court decision specific to 2E students, which was in 1990 under the IDEA.¹⁰ Much more recently, Bell proposed adding a requirement for gifted IEPs to state laws, but her analysis only incidentally included one court decision specific to 2E students under the IDEA.¹¹

Gap-Filling Purpose

The purpose of this article is to canvass the court decisions specific to 2E students under the IDEA and its corollary state special education laws. This is the primary locus of the pertinent case law with any precedential weight. Thus, the coverage does not extend to decisions under the administrative adjudication and investigation avenues under the IDEA, which respectively are (a) hearing and review officer decisions and (b) state complaint decisions. *3 ¹² Similarly, it does not extend to the potential

but thus far only marginal activity under Section 504, which includes investigation decisions and resolution agreements via the U.S. Department of Education's Office for Civil Rights (OCR).¹³

Legal Framework

The two successive components of the IDEA that are central to the case law for 2E students are: (a) identification, which includes the school district's overlapping obligations of child find and eligibility evaluation;¹⁴ and (b) free appropriate public education (FAPE), which includes both its applicable procedural and substantive aspects.¹⁵

For identification, child find refers to the ongoing obligation to conduct a comprehensive evaluation of the child within a reasonable time after having reasonable suspicion that the child may be eligible for services under the IDEA. The ultimate issue of whether the child is eligible depends on (a) meeting the criteria of one or more classifications specified in the IDEA, such as emotional disturbance (ED), other health impairment (OHI), or specific learning disabilities; and, (b) having a resulting need for special education.¹⁶ Serving as a bridge between these two essential elements of eligibility is an adverse effect on educational performance.¹⁷ Finally, adding successive potential nuances are (a) the overlapping IDEA regulations that provide that the initial child find and ultimate FAPE obligations apply “even though [the child is] advancing from grade to grade;”¹⁸ (b) corollary state special education laws that further define the elements of eligibility; and (c) federal agency interpretations, which are not legally binding but may be persuasive. In the interpretive guidance specific to identification, the U.S. Office of Special Education Programs (OSEP) has repeated its position that although the IDEA is silent regarding 2E students, “students with high cognition” may qualify based on ADHD, Asperger syndrome, or SLD and an appropriately broad interpretation of the need for special education.¹⁹ In its interpretive guidance specific to the connected but separable area of FAPE, OSEP has opined that this obligation (a) extends to a student with high cognition who qualifies “even though the child is advancing from grade to *4 grade,” and (b) the specially designed instruction must not only ensure access to the general curriculum but also address the child's individual disability-based needs, “which could include classroom behavior and social skills.”²⁰

If the 2E child is eligible under the IDEA, FAPE ultimately has four dimensions, or faces. The procedural dimension of FAPE requires a two part adjudicative analysis: (a) did the district violate one or more procedural requirements of the IDEA? and, if so, (b) did the violation(s) result in a substantive loss to the child or a significant interference with the opportunity for parental participation?²¹ Whether arising as the child loss at the second-step of procedural FAPE or arising as a separate claim, the substantive dimension of FAPE, according to the Supreme Court, focuses on whether the IEP is reasonable, not optimal.²² More specifically, in its original decision addressing the IDEA the Supreme Court held that the IEP must be “reasonably calculated to enable the child to receive educational benefits.”²³ More recently, a Supreme Court decision refined the predicate part of the reasonable calculation standard by replacing educational benefit with “progress appropriate in light of the child's circumstance.”²⁴

Finally, two additional applicable aspects of FAPE, in addition to the basic procedural and substantive dimension, have emerged in recent years. Although not yet uniformly crystallized by Congress or the Supreme Court, the lower courts have gradually recognized dimensions concerning the implementation of the IEP in the recent past and immediate future.²⁵ More specifically, these third and fourth faces of FAPE are whether the district failed to implement the IEP and whether the district was capable of implementing the IEP.²⁶

Method

The search for court decisions specific to 2E students under the IDEA and corollary state special education laws was based on three sources: (a) the 2E cases identified within the few previous case law articles addressing gifted students more generally,²⁷

(b) the case blurbs mentioning “gifted” or “twice exceptional” within an annotated list of national compilation of IDEA court decisions; and (c) a Boolean search of the Westlaw and SpecialEdConnection® electronic databases based on “gifted” or “twice exceptional” in combination with “Individuals with Disabilities Education Act” or “special education.” The selection criteria were: (a) a child who was gifted in the court's recitation of the factual background, regardless of whether having *5 qualified under a state gifted education law; (b) a ruling, not just mention, on IDEA identification or IDEA FAPE; and (c) issuance of the decision before January 1, 2021.

Consequently, the selection excluded cases specific to remedies, such as tuition reimbursement, in the absence of any ruling on identification or FAPE.²⁸ Similarly, the exclusion extended to cases limited to tangential issues in which the child's giftedness was not at least a potentially distinctive decisional factor, such as hearing officer proceedings,²⁹ supplemental evidence,³⁰ or attorneys' fees claims.³¹ More clearly, the coverage did not extend to legal bases beyond the IDEA, such as Section 504,³² Fourteenth Amendment due process,³³ or even gifted regulations in the relatively few states in which the child is entitled to dual coverage.³⁴ Finally, the scope did not extend to decisions issued in 2021.³⁵

Findings

Identification

Table 1 consists of a compilation of thirteen 2E cases with identification rulings that met the selection criteria.

***6 Table 1: Identification Case Rulings for 2E Students**

1 CASE NAME	2 CITATION	3 COURT/YEAR	4 ISSUE(S)	5 ROLE OF 2E	6 OUT-COME	COMMENTS (BY COL. NO.)
<i>Doe v. Bd. of Educ. of Conn.</i>	753 F. Supp. 65	D. Conn. 1990	eligibility as ED	2	S	5,6-not requisite adverse effect based on at least satisfactory grades and test scores
<i>Conrad Weiser Area Sch. Dist. v. Dep't of Educ.</i>	603 A.2d 701	Pa. Commw. Ct. 1992	eligibility as SLD	1 or 2	P	5,6-need prong preponderantly proven for written expression
<i>Roane County Sch. Sys. v. Ned</i>	22 IDELR 574	E.D. Tenn. 1995	eligibility as ED	2	S	5,6-not requisite adverse effect based on A average and high standardized test scores
<i>J.D. v. Pawlet Sch. Dist.</i>	224 F.3d 60	2d Cir. 2000	eligibility as ED	2	S	5,6-not requisite adverse effect based on grades, achievement tests, and teacher opinions
<i>Austin Indep. Sch. Dist. v. Robert M.</i>	168 F. Supp. 2d 635 54 F. App'x 413	W.D. Tex. 2001 5th Cir. 2002	eligibility as ED or OHI	2	S	5,6-need prong: blistering court opinion that parents

						were to blame + dicta about gifted program
<i>Venus Indep. Sch. Dist. v. Daniel S.</i>	36 IDELR ¶ 185	N.D. Tex. 2002	eligibility as OHI or ED	2	P	4-ADHD; 5,6-need prong extends to behavioral and social performance, not just academics
<i>Mr. I. v. Me. Sch. Admin. Dist. 55</i>	480 F.3d 1	1st Cir. 2007	eligibility as autism, ED, or OHI	2	P	4-Asperger syndrome; 5,6-broad state law scope of educational performance
<i>Williamson Cnty. Bd. of Educ. v. C.K.</i>	52 IDELR ¶ 40	M.D. Tenn. 2009	child find & eligibility as OHI or SLD	2	P	4-ADHD; 5,6-inconsistent academic performance + deference to hearing officer's credibility determinations + strained use of FAPE
<i>P.P. v. W. Chester Area Sch. Dist.</i>	585 F.3d 727	3d Cir. 2009	child find as SLD	3	S	5,6-delay but no loss - marginal case
<i>Mowery v. Bd. of Educ. of Sch. Dist. of Springfield R-12</i>	56 IDELR ¶ 126	W.D. Mo. 2011	eligibility as OHI	2	S	4-multiple diagnoses; 5,6-"reasonably well" academically and socially/ behaviorally ← report cards primarily (+ standardized tests and discipline)
<i>Q. W. v. Bd. of Educ. of Fayette Cnty.</i>	630 F. App'x 580	6th Cir. 2015	eligibility as autism	2	S	5,6-educational performance as not limited to academic but limited to school/ classroom context
<i>Lawrence Cnty. Sch. Dist. v. McDaniel</i>	72 IDELR 118	E.D. Ark. 2018	evaluation - autism	1	P	4-unclear re need prong; 5,6-OSEP interpretation but w/o determining eligibility
<i>Indep. Sch. Dist. No. 283 v. E.M.D.H.</i>	960 F.3d 1073	8th Cir. 2020	child find & eligibility as ED or OHI	1	P	4-"plethora of diagnoses"; 5,6-confusion of intellect with educational performance ← major connected attendance issues
<p><i>Note.</i> The listing of the cases is in chronological order. The entries in the "Role of 2E" column are in these Likert-type categories: 1=primary, 2=secondary and indirect, and 3=negligible at most. The entries in the "Outcome" column are limited to the rulings for the "Issue(s)" column according to this scale: P= conclusively for the parent/child; Inc.=Inconclusive (subject to further proceedings); S=conclusively for the school district.</p>						

*7 Overall, Table 1 shows that the focus of the identification cases is eligibility under the IDEA, not under a separate state gifted education law. Column #3 of Table 1 shows that since 1990 these cases have been scattered without any notable upward or

downward trajectory and without pronounced clustering within any of the federal courts. Column #4 reveals that (a) eligibility was at issue in all but two of the cases, which were limited to either child find or evaluation, and (b) the frequency of the IDEA classifications, either alone or in combination, at issue was ED (n=7), OHI (n=6), and SLD (n=3) or autism (n=3). The entries in column #5 indicate that the decisional role of the gifted side of the child's 2E status was limited, with few exceptions, to an indirect and generally district-favorable role of the child's progress, usually in terms of grades and test scores. Finally, column #5, as clarified in the Comments column, reveals that the rulings were in favor of the districts in seven (54%) of these thirteen cases and that the basis in most of the opposing, parent-favorable rulings was the scope of the educational performance link to the need prong.

***8 FAPE**

Table 2 compiles the seventeen cases that had FAPE rulings for 2E students.

Table 2: FAPE Case Rulings for 2E Students

1 CASE NAME	2 CITATION	3 COURT/YEAR	4 ISSUE(S)	5 ROLE OF 2E	6 OUT-COME	COMMENTS (BY COL. NO.)
<i>B.A. v. Sch. Bd. for Charlotte Cnty.</i>	27 IDELR 1035	M.D. Fla. 1998	failure-to-implement	3	P	4-marginal - interpreter did not meet state standards; 6-preliminary injunction
<i>D.B. v. Craven Cnty. Bd. of Educ.</i>	210 F.3d 360	4th Cir. 2000	procedural substantive	2	S	4,6-benefit/progress; 5-unmotivated but "did well" in the assignments in which he was interested"
<i>Adam J. v. Keller Indep. Sch. Dist.</i>	328 F.3d 804	5th Cir. 2003	procedural substantive	2	S	4,6-no loss-benefit/progress; 5-rejected (reasonable floor>challenging)
<i>Lewisville Indep. Sch. Dist. v. Charles W.</i>	81 F. App'x 843	5th Cir. 2003	substantive	2	S	4,6-grades and standardized test scores and stretched behavioral progress; 5-rejected (<i>Keller</i>)
<i>A.B. v. Lawson</i>	354 F.3d 315	4th Cir. 2004	substantive	2	S	4,6-modest standard; 5-rejected experts' "worldview" w/ o requisite dual deference
<i>Hjortness v. Neenah Joint Sch. Dist.</i>	507 F.3d 1060	7th Cir. 2007	procedural substantive	3	S	4,5,6-customary analysis (e.g., "basic floor" per <i>Rowley</i>) w/

						o any consideration of giftedness
<i>Lewellyn v. Sarasota Cnty. Bd. of Educ.</i>	53 IDELR ¶ 288 442 F. App'x 446	M.D. Fla. 2009 11th Cir. 2011	substantive	2	S	4,6-cursory analysis; 5-"even" gifted in language arts as evidence of benefit/progress
<i>J.P. v. L.A. Unified Sch. Dist.</i>	2011 WL 12697384	C.D. Cal. Feb. 16, 2011	procedural	3	P	4,6-parental participation; 5-only at reimbursement stage (specialized 2E school)
<i>Klein Indep. Sch. Dist. v. Hovem</i>	690 F.3d 390	5th Cir. 2012	substantive	2	S	4,5,6-holistic perspective - passing grades and promotions including graduation
<i>G.B.L. v. Bellevue Sch. Dist.</i>	60 IDELR ¶ 186	W.D. Wash. 2013	procedural + failure-to-implement	3	S	5-failure in gifted program was separate (and unsuccessful) claim under Section 504
<i>Sneitzer v. Iowa Dep't of Educ.</i>	796 F.3d 942	8th Cir. 2015	procedural substantive	3	S	4,5,6-cursory and focus on parents' primary focus on show choir
<i>J.K. v. Missoula Cnty. Pub. Sch.</i>	68 IDELR ¶ 68 713 F. App'x 666	D. Mont. 2016 9th Cir. 2018	procedural substantive	3	S	4,6-"very low 'floor of opportunity'" standard; 5-not even mentioned at all in the appeal decision
<i>P.C. v. Rye City Sch. Dist.</i>	232 F. Supp. 3d 394	S.D.N.Y. 2017	procedural + substantive	2	S	4,6-reasonable, not best; 2-bolstered secondarily by gifted program component
<i>N.P. v. Maxwell</i>	711 F. App'x 713	4th Cir. 2017	substantive	3	Inc.	5,6-remanded for <i>Andrew F.</i> standard (replacing 4th Circuit's "some benefit" standard)
<i>C.W. v. Denver Cnty. Sch. Dist.</i>	75 IDELR ¶ 66	D. Colo. 2019	procedural	3	P	4,6-failure to identify residential placement; 5-recognized complexity but w/o gifted aspect
<i>Wong v. Bd. of Educ.</i>	478 F. Supp. 3d 229	D. Conn. 2020	procedural + substantive	2	S	4,6-reasonable, not ideal; 5-grades as important factor of progress (<i>Andrew F.</i>)
<i>W.S. v. District of Columbia</i>	F. Supp. 3d	D.D.C. 2020	substantive?	3	Inc.	4,5,6-failure of the hearing officer

										to sufficiently address whether the proposed placement was capable of responding to the child's aggressiveness
<p><i>Note.</i> The listing of the cases is in chronological order. The entries in the "Role of 2E" column are in these Likert-type categories: 1=primary, 2=secondary and indirect, and 3=negligible at most. The entries in the "Outcome" column are limited to the rulings for the "Issue(s)" column according to this scale: P= conclusively for the parent/child; Inc.=Inconclusive (subject to further proceedings), S=conclusively for the school district.</p>										

*9 Specifically, column #3 of Table 2 reveals that the cases started in 1998, as compared to 1990 for the identification cases, but the frequency and jurisdictional distribution were similarly without a particularly pronounced skew. In turn, column #4 shows that substantive FAPE (n=13) was the most frequent "face" of FAPE at issue. Procedural FAPE was in relatively close second place (n=10) but most often on a combined rather than sole basis. Failure-to-implement was in distant third place (n=2), and capability of implementation did not surface at all. Next, column #5 shows that the decisional role of the gifted side of the child's 2E status was even more limited for the FAPE rulings as compared to those for identification, with the majority being negligible and none reaching the primary level. Finally, column #6 reports that the ruling was in the district's favor in 70% of the cases, with 18% in favor of the parents and 12% being inconclusive. The Comments column clarifies that with the limited exception of the first case, which was based on state standards for interpreter services for hearing impaired students, the parent-favorable rulings were based on procedural FAPE, and any outcomes-based effect of the refined substantive standard of *Andrew F.* was limited to one inconclusive ruling.³⁶

Discussion

The overall finding of thirteen identification cases and seventeen FAPE cases is, when considered against the overall body of court decisions under *10 the IDEA,³⁷ unsurprising in its infrequency, reflecting the relatively low incidence and incomplete recognition of 2E status. Yet, it is surprising that the ratio between these two categories is much closer than the approximate 1:7 ratio between identification and FAPE cases in IDEA litigation more generally. This closer ratio suggests that the priority of parents and other advocates of 2E students is more in getting in the door of the IDEA than in increasing the level of services once inside its legal protections.

A contributing reason for the prioritization of identification is that the standard for FAPE is akin to a floor, thus decreasing the odds of a favorable ruling. More specifically, the basis for the Supreme Court's formulation of the "reasonable calculation" standard was the legislative history that emphasized access (i.e., the door) but only a "basic floor of opportunity."³⁸ In its relatively recent refinement of this substantive standard, the *Andrew F.* Court not only generalized to integrated eligible students *Rowley's* "passing marks and advance[ment] from grade to grade" indicator for the reasonable calculation,³⁹ but also appeared to countenance a lower, albeit "appropriately ambitious," progress standard for other eligible students.⁴⁰

The strong skew in favor of defendant districts in the overall outcomes of the FAPE cases for 2E students, which is similar to the corresponding trend for court IDEA FAPE rulings more generally,⁴¹ reinforces this floor-based impediment for the parent-plaintiffs. Yet, the much less daunting 54% district-favorable outcomes distribution for the identification cases leads into a closer examination of the findings for each of these two respective categories.

Identification

In reverse order of the findings in the Table 1 columns, the converse 46% in favor of the plaintiff-parents warrants moderate reduction because two of the six pro-parent rulings were limited to either child find or evaluation, thus not reaching a conclusion that the child was eligible. The less parent-friendly outcomes skew in the identification cases seem, in significant part, to reflect the split views of the bridging element of “educational performance” and the overlapping, ultimate special education “need prong” for IDEA eligibility. Although neither view is exclusively limited to an academic scope of these eligibility elements, they differ in their overall application.

*11 The majority and traditional view, which favors the defendant districts, is the primarily academic interpretation for these definitional components, which often runs counter to the gifted side of 2E students. The focus in this view, as reflected in the Comments entries in Table 1 for most of the “S” outcomes, is principally on the grades and standardized test scores of the student. For example, in *Doe v. Board of Education of Connecticut*, the court concluded that “despite the evidence of the plaintiff’s behavioral difficulties ... [his] academic performance (both his grades and his achievement test results) before, during, and after his [mental health] hospitalization were satisfactory or above.”⁴² At its extreme, this traditional view disqualifies the student based on academic ability, regardless of actual performance. In an unusually transparent example of this extreme view, the federal judge in *Austin Independent School District v. Robert M.*, whose decision was summarily affirmed on appeal, issued a blistering rejection of the eligibility of an eleventh grader in a magnet program for gifted students.⁴³ Assuming for the sake of argument, although expressing “grave doubts,” that the student met the criteria of ED or OHI based on ADHD, the judge concluded that he did not need special education: “What Robert needed was to commit to doing more homework and regularly attending classes at [the magnet program].”⁴⁴ Although hedging on the fit between gifted education and special education programs, the judge decried the student’s lack of motivation as the basis for IDEA eligibility. Finally, confusing eligibility with FAPE, the judge ended his diatribe as follows:

Schools are not required to force or motivate students to take advantage of the education they offer--this is the parents' role. Schools are also not required to spoonfeed students or to maximize their potential. They simply must offer a program that is reasonably calculated to confer an educational benefit upon the student. [The District] clearly fulfilled this responsibility in Robert's case as evidenced by, *inter alia*, Robert's achieving academic distinction on his [statewide proficiency exam].⁴⁵

The analog for the opposing view is another federal court decision in Texas, *Venus Independent School District v. Daniel S.*⁴⁶ In this case, the indisputably gifted student similarly exhibited motivational and behavioral problems, including an ADHD diagnosis, although he was a seventh grader rather than an eleventh grader and not in a gifted magnet program. Concluding that educational need extended beyond academics to behavior, this judge concluded that the student was eligible as OHI or ED in light of his continuing problems “with completing his homework assignments and with *12 his misbehavior.”⁴⁷ Yet, this court also failed to sufficiently differentiate eligibility and FAPE, citing *Rowley* as characterizing passing marks and grade-to-grade advancement as only one factor in determining need, whereas the *Rowley* Court was specifically addressing the “benefit” part of its FAPE formulation.⁴⁸

Another example of the opposing, or nontraditional, view is *Conrad Weiser Area School District v. Department of Education*, in which a Pennsylvania state appeals court ruled that a gifted child qualified as SLD.⁴⁹ However, although OSEP cited this case in support of its broad interpretation of the need prong,⁵⁰ it is of limited significance because (a) the court relied on a state regulation that no longer exists; (b) SLD, unlike the other disabilities, allows for eligibility on any one of several enumerated discrete areas, such as written expression, and in the majority of states has a severe-discrepancy framework that is more favorable to a broader conception of the need prong; and (c) the court’s rationale was rather cryptic, not specifically addressing the scope of educational performance or need.

Instead, the most parent-favorable identification case is *Independent School District No. 283 v. E.M.D.H.*⁵¹ In this recent, officially published federal appeals court decision, the Eighth Circuit concluded that a gifted eleventh grader with a plethora of mental health diagnoses, such as school phobia, ADHD, and major depressive disorder, was eligible as OHI and ED. Rejecting the school district's reliance on "high standardized test scores and her exceptional performance on the rare occasions that she made it to class," the court inveighed: "The District confuses intellect for an education."⁵² Although she may not represent "the paradigmatic case of a special-education student,"⁵³ the court explained, her need for special education was evident from her falling well behind in credits for graduation as a result of her disability-based chronic absenteeism despite private tutoring and online learning.

However, per the finding based on column #5,⁵⁴ the prevailing judicial treatment in these identification cases was cursory with regard to the complexities of 2E students. Rather than the professional nuances of interaction of giftedness, including its scope and degree, and the disability classification(s), with their equally wide individual variance, the courts tend to focus on gross academic and behavioral indicators in relation to the blurred boundaries of educational performance and special education need. Moreover, the aforementioned OSEP policy interpretations⁵⁵ also do not appear in a direct decisional role in these cases thus far,⁵⁶ which fits with the general *13 IDEA case law trend. As a result, unless the child's social-emotional sequelae are so severe as to cause an academic deficiency in relation to grade-level norms, the masking or compensating effect of the child's giftedness limits the outcome odds at the court level for overcoming a non-eligibility determination at the school level.

Finally, although the relatively small number of cases is an overall limitation for all of these conclusions, the frequency of the IDEA classifications at issue in these cases did not reflect the aforementioned predominance of scholarly research on the SLD connection.⁵⁷ Instead, partially aligned with the second-place position of ADHD in the empirical literature, the predominant classifications at issue in these cases were ED and OHI. The respective positions of ED, OHI, and SLD may be partly attributable to the steady growth of the OHI classification and the corresponding, shorter decline in the proportion of special education students in the SLD category, although the un-parallel ED demographics show the limit of this factor.⁵⁸ The role of response to intervention (RTI), or what more often is referred to in recent years as multi-tier system of supports (MTSS), is less clear due to its relatively recent and incomplete prevalence and also its varying implementation models. Moreover, RTI/MTSS continues to play a limited role, as compared with severe discrepancy and special education need, in the SLD identification case law.⁵⁹

The overriding explanation, which is a limitation pervading this case law analysis, is the iceberg effect. More specifically, practice and research, although not at all identical, are both well below the surface of the proverbial litigation iceberg, whereas the published court decisions are up at the limited tip.⁶⁰ The intervening filtering levels include not only due process hearing and other administrative decisions but also settlements. Although these court decisions help shape the boundaries for district-level policies and practices, many intervening variables affect their inter-correlation. Thus, the fit between this systematic analysis of case law and corresponding empirical analyses of IDEA identification of 2E students⁶¹ is far from simple.

*14 FAPE

The FAPE findings warrant a prefatory clarification. The sizeable segment of procedural FAPE rulings and the small segment of failure-to-implement rulings have no special distinctiveness for 2E students. Instead, the courts merely analyze them the same way as for any other eligible students under the IDEA, without the child's connecting gifted-exceptionality being of any particular significance. For example, in *J.P. v. Los Angeles Unified School District*, the court ruled that the district's failure to provide a formal written offer of a specific placement denied the parents a meaningful opportunity to participate in the IEP process.⁶² In doing so, the court examined the applicable precedent in that jurisdiction in relation to the pertinent facts of the case, which did not include the child's 2E status. The only role that the child's gifted status played was in the separate issue of the reimbursement remedy, which was not within the aforementioned selection criteria.⁶³

Consequently, the substantive FAPE rulings, which are the most frequent ones, are the ones that merit discussion in the 2E context. Once successfully through the door of identification, the problems for the parent plaintiffs in the cases in this focal category are twofold. First, because the legal basis is the IDEA, the child's giftedness only plays an indirect role at best-in its proven effects on the child's disability. Indeed, the child's giftedness may make a defeating rather than bolstering contribution. For example, in *Lewellyn v. Sarasota County School Board*, the court ruled in the district's favor, reasoning that the student had not just passing grades and test scores but even qualified as gifted in the area of Language Arts.⁶⁴ Moreover, as the column #5 findings show, in the majority of the substantive FAPE rulings, the role of 2E has been negligible at the court level. Perhaps at the due process hearing level, the parents' attorney or advocate and any expert witnesses, whether privately engaged or, less likely, within the district's personnel, may have set forth the nuances of the child's dual status and the need for an appropriately customized IEP. However, the successive levels of the litigation iceberg, including the seemingly callous legal process of the congested courts, filtered out such professional nuances and norms. For example, in *A.B. v. Lawson*, the Fourth Circuit reversed the lower court's substantive FAPE ruling that had "adopted the worldview of [the parents'] experts and their perspectives on proper educational policy" rather than following the well-established judicial deference to the hearing officer and the school district authorities.⁶⁵

Second and on an overlapping basis, the applicable substantive standard under *Rowley* and *Endrew F.* is geared to the floor rather than the ceiling, thus not being particularly responsive to the giftedness of the child. In rejecting the best-practice recommendations of the parents' experts in *A.B. v. Lawson*, for example, the Fourth Circuit Court of Appeals characterized the IDEA's substantive standard as "far more modest than to require that a child excel or thrive."⁶⁶ Similarly, in *Adam J. v. Keller Independent School District*, *15 the Fifth Circuit rejected the parents' assertion that their 2E child needed a more challenging curriculum, explaining that the applicable focus was more restrictive--"a FAPE need not be the best one possible, or the one calculated to maximize the child's educational potential."⁶⁷ In *Lewisville Independent School District v. Charles W.*, repeating the *Adam J.* caveat in another 2E decision six months later, the Fifth Circuit pointed to this middle school student's grades ranging from 77 to 92 as evidencing the requisite academic advancement.⁶⁸ Moreover, although joining the other substantive decisions to ignore the above mentioned OSEP guidance about FAPE extending beyond academic advancement,⁶⁹ the *Lewisville* court deferred to the school district authorities regarding the student's behavioral progress despite his increase in disciplinary notices.

As a consequence of the double whammy, parents did not conclusively prevail in any of the thirteen substantive FAPE rulings, and the single inconclusive ruling was rather marginal, because it was based on the hearing officer's failure to sufficiently explain his legal conclusion that the district's proposed placement was able to manage the student's aggressive behaviors.⁷⁰ Thus, this single ruling may alternatively have fit in either the limited FAPE-capability category or even the hearing officer proceedings exclusion. In any event, the role of the child's 2E status appeared to be negligible, and the eventual outcome may be in favor of either party.

Conclusion

In sum, the court rulings specific to identification and FAPE for 2E students under the IDEA, although not at all previously canvassed in the literature, have not been particularly extensive or effective in addressing the complexity of this dual status. As is often the case but not sufficiently realized in the field, the discrepancy between legal requirements and professional recommendations is severe. Although more concerted advocacy is needed from the profession in terms of sufficiently specialized attorneys and affordably available expert witnesses, the expectation of significant advances via litigation warrants tempering. Even the Supreme Court's refinement of the substantive standard for FAPE in *Endrew F.*, as the *Wong v. Board of Education* ruling illustrates,⁷¹ is not likely to improve the judicial outcomes for 2E students under the IDEA. As recent systematic analyses of the FAPE case law reveal, the outcome effect of *Endrew F.* in substantive FAPE rulings more generally has been insignificant.⁷² In her advocacy of legislative reform at the state level, Bell acknowledged that "[its] impact on twice-exceptional *16 students has been minimal."⁷³ The reference to the child's "potential" is entirely peripheral in the *Endrew F.* opinion.⁷⁴ Its

much more integral role in applying the *Rowley* standard more generally⁷⁵ has not yielded any notable leverage for 2E students in the case law to date.

The avenue for a legislative solution would be the expansion in the limited number of state laws that provide gifted students with individualized protections and services similar to the IDEA model. However, to provide the foundation for effective litigation, such state laws would need two additional attributes: (a) the provision for attorneys' fees for prevailing parents, which is a feature of the IDEA, and (b) a ceiling-oriented substantive standard for FAPE, such as the opportunity to maximize the child's full potential commensurate with the opportunity provided to nondisabled children, which the *Rowley* Court found to lack a statutory foundation.⁷⁶ However, such expansion in the number and nature of gifted education laws is unlikely based on the negligible movement to date. Moreover, without uniform coverage and standards, the interactive effects of disabilities and giftedness may fall into the gaps, and litigation remains a costly, ponderous process.

The concluding recommendations are several. For scholars, follow-up research in the aforementioned alternative forums and bases of legal activity is recommended. Such exploration should include qualitative studies of the lower levels of the litigation process, including due process hearings and settlements. For advocates, the results of this analysis of judicial rulings provides a springboard for customized litigation strategies and legislative reform. For practitioners, the findings have a two-sided message. On the one side, they reveal the opportunity and need for providing specialized expertise for adjudicative and policy-making forums. On the other side, however, they reveal the limits of litigation and the more productive potential of professional norms, including collaboration among general educators, specialized personnel, and parents for evidence-based best practices for 2E students.

Consequently, legal literacy for scholars and practitioners in the 2E field is useful but only as a foundation for ultimately higher and more productive activity. The focus should remain on professional research and development more than on litigation or even legislative battles. Like the dual nature of 2E status, the profession's actions warrant due differentiation from, as well as effective interaction with, the courts' activity.

Footnotes

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¹ This broad definition suffices for this legal analysis. However, for a nuanced operational definition in the professional education community, see Sally M. Reis, Susan M. Baum, & Edith Burke, *An Operational Definition Twice-Exceptional Learners: Implications and Applications*, 58 *Gifted Child Q.* 217, 222-23 (2014).

² 20 U.S.C. §§ 1400 *et seq.* (2018). For the two-part eligibility definition, see *id.* § 1401(3) (defining "child with a disability as one or more enumerated classifications plus a resulting need for special education). For the definition of the classification of SLD, see *id.* § 1401(30).

³ See, e.g., Perry A. Zirkel, *State Laws for Gifted Education: An Overview of the Legislation and Regulations*, 27 *Roeper Rev.* 228 (2005) (canvassing state laws for gifted education, finding that most only provide group-oriented provisions rather than the individually enforceable eligibility and program model of the IDEA).

⁴ *Id.* at 230 (identifying eight states--Alabama, Florida, Kansas, Louisiana, New Mexico, Pennsylvania, Tennessee, and West Virginia--that approximate the full IDEA model); see also Perry A. Zirkel, *Legal Update of Gifted Education*, 39 *J. Educ. Gifted* 315, 320-22

(2016) (finding limited changes in the state gifted education laws, with the almost all strengthening or weakening those with the group-oriented model).

- 5 *E.g.*, Susan M. Baum & Steven V. Owen, *To Be Gifted and Learning Disabled: Meeting the Needs of Gifted Students with LD, ADHD, and More* (2004); Beverly A. Trail, *Twice Exceptional Gifted Children: Understanding, Teaching, and Counseling Gifted Students* (2010); Anie Al-Hroub & David Whitebread, *Dynamic Assessment for Identification of Twice-Exceptional Learners Exhibiting Mathematical Giftedness and Specific Learning Disabilities*, 41 *Roeper Rev.* 129 (2019); Lois Baldwin, Stuart M. Omdal, & Daphne Pereles, *Beyond Stereotypes: Understanding, Recognizing, and Working with Twice Exceptional Learners*, 47 *Teaching Exceptional Child.* 216 (2015); Lucy Barnard-Brak, Susan K. Johnsen, Alyssa Pond Hennig, & Tianlan Wei, *The Incidence of Potentially Gifted Students within the Special Education Population*, 37 *Roeper Rev.* 74 (2014); Megan Foley-Nicpon, Susan G. Assouline, & Nicholas Colangelo, *Twice-Exceptional Learners: Who Needs to Know What*, 57 *Gifted Child. Q.* 16 (2013); Danika L.S. Maddocks, *Cognitive and Achievement Characteristics of Students from a National Sample Identified as Potentially Twice Exceptional*, 64 *Gifted Child Q.* 3 (2020); Reis, *supra* note 1.
- 6 Megan Foley-Nicpon, Allison Almon, Barbara Sieck, & Rebecca D. Stinson, *Empirical Investigation of Twice Exceptionality: Where Have We Been and Where Are We Going?* 55 *Gifted Child Q.* 3, 6, 9, 12 (2011).
- 7 Hannah A. Amran & Rosadah A. Magid, *Learning Strategies for Twice-Exceptional Students*, 33 *Int'l J. Special Educ.* 954 (2019).
- 8 *E.g.*, Susan G. Assouline & Claire S. Whitman, *Twice-Exceptionality: Implications for School Psychologists in the Post-IDEA 2004 Era*, 27 *J. Applied Sch. Psych.* 380 (2011).
- 9 29 U.S.C. § 794 (2018).
- 10 Kim Millman, Note, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of Twice-Exceptional Students*, 34 *Pepperdine Law Rev.* 455 (2007) (citing *Doe v. Bd. of Educ.*, 753 F. Supp. 65 (D. Conn. 1990)).
- 11 Catherine A. Bell, Note, *Andrew's Impact on Twice-Exceptional Students*, 61 *Wm. & Mary L. Rev.* 845, 848 (2020) (starting as an example with *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir 2012)).
- 12 *See, e.g.*, Perry A. Zirkel, *A Comparison of the IDEA's Decisional Dispute Resolution Processes-Complaint Procedures and Impartial Hearings: An Update*, 369 *Ed. Law Rep.* 550 (2019) (providing a systematic analysis of the contours of the hearing officer and state complaint processes under the IDEA).
- 13 *See, e.g.*, U.S. Dep't of Educ. Off. for Civ. Rts., OCR Complaint Processing Procedures (Nov. 2018), <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html>).
- 14 *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 *Ed. Law Rep.* 30, 30-31 (2018).
- 15 *See, e.g.*, Perry A. Zirkel, *An Adjudicative Checklist of the Criteria for the Four Dimensions of FAPE under the IDEA*, 346 *Ed. Law Rep.* 18 (2017).
- 16 Zirkel, *supra* note 14, at 31.
- 17 *See, e.g.*, Robert A. Garda, *Untangling Eligibility Requirements under the Individuals with Disabilities Education Act*, 69 *Mo. L. Rev.* 441, 460-85 (2004).
- 18 34 C.F.R. § 300.101(c), § 300.111(c) (2019).
- 19 *See, e.g.*, Memorandum to State Directors of Special Education, 65 IDELR ¶ 181 (OSEP 2015); Letter to Delisle, 62 IDELR ¶ 240 (OSEP 2013); Letter to Anonymous, 55 IDELR ¶ 172 (OSEP 2010).
- 20 Letter to Anonymous, 60 IDELR ¶ 47, at *2 (OSEP 2012).
- 21 20 U.S.C. § 1415(f)(3)(E)(ii) (2018).
- 22 *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (“Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.”).

- 23 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).
- 24 *Andrew F.*, 137 S. Ct. at 999.
- 25 Zirkel, *supra* note 15, at 20.
- 26 *Id.*
- 27 *See, e.g.*, Zirkel, *supra* note 4, at 328-30 (characterizing 2E students as “gifted plus” as contrasted from the category of “gifted alone”).
- 28 *E.g.*, *Ashland Sch. Dist. v. Parents of Student E.H.*, 587 F.3d 1175, 251 Ed.Law Rep. 36 (9th Cir. 2009).
- 29 *E.g.*, *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 259 Ed.Law Rep 740 (Pa. Commw. Ct. 2010).
- 30 *E.g.*, *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 105 Ed.Law Rep. 23 (3d Cir. 1995).
- 31 *E.g.*, *Bethlehem Area Sch. Dist. v. Zhou*, 58 IDELR ¶ (E.D. Pa. 2012), *further proceedings*, 63 IDELR ¶ 186 (E.D. Pa. 2014).
- 32 *E.g.*, *K.K. v. Pittsburgh Pub. Sch.*, 590 F. App'x 148, 313 Ed.Law Rep. 71 (3d Cir. 2014).
- 33 *E.g.*, *Doan v. Downingtown Area Sch. Dist.*, 77 IDELR ¶ 36 (E.D. Pa. 2020).
- 34 *E.g.*, *Downingtown Area Sch. Dist. v. K.D.*, 69 IDELR ¶ 162 (Pa. Comm. Ct. 2017).
- 35 This exclusion was marginal for a magistrate's R&R issued in 2020 but adopted with additional discussion 9n 2021. *J.B. v. Frisco Indep. Sch. Dist.*, 2020 WL 9219409 (E.D. Tex. Nov. 24, 2020), *adopted*, 78 IDELR ¶ 137 (E.D. Tex. 2021) (ruling that IEP for 2E student was appropriate under the IDEA).
- 36 *Supra* text accompanying note 24 for the substantive standard in *Andrew F.*
- 37 *See, e.g.*, Perry A. Zirkel, National Compilation of Case Law 1998 to Present under the IDEA and Section 504/ADA (2020), <https://www.perryzirkel.com>
- 38 *Bd. of Educ. v. Rowley*, 458 U.S. at 200-01.
- 39 *Andrew F.*, 137 S. Ct. at 999-1000.
- 40 *Id.* at 1001. For an explanation of this conclusion, see Perry A. Zirkel, *The Supreme Court's Decision in Andrew F. v. Douglas County School District RE-1: A Meaningful Raising of the Bar?*, 341 Ed. Law Rep. 545, 552 (2018).
- 41 *See, e.g.*, Perry A. Zirkel, *The Aftermath of Andrew F.: An Outcomes Analysis Two Years Later*, 364 Ed. Law Rep. 1 (2019); Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 Ed. Law Rep. 731, 746 (2002) (finding continuing pro-district outcomes trend in judicial FAPE rulings under the IDEA).
- 42 *Doe v. Bd. of Educ.*, 753 F. Supp. 65, 65 Ed.Law Rep. 109 (D. Conn. 1990).
- 43 *Austin Indep. Sch. Dist. v. Robert M.*, 168 F. Supp. 2d 635, 158 Ed.Law Rep. 352 (W.D. Tex. 2001), *aff'd mem.*, 54 F. App'x 413 (5th Cir. 2002).
- 44 *Id.* at 639.
- 45 *Id.* at 640.
- 46 *Venus Indep. Sch. Dist. v. Daniel S.*, 36 IDELR ¶ 185 (N.D. Tex. 2002).
- 47 *Id.* at *10.
- 48 *Bd. of Educ. v. Rowley*, 458 U.S. at 207 n.28.
- 49 *Conrad Weiser Area Sch. Dist. v. Dep't of Educ.*, 603 A.2d 701, 73 Ed.Law 170 (Pa. Commw. Ct. 1992).

- 50 Letter to Pawlisch, 24 IDELR 959 (OSEP 1996).
- 51 *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 377 Ed.Law Rep. 539 (8th Cir. 2020).
- 52 *Id.* at 1082.
- 53 *Id.*
- 54 See, e.g., Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 Ed. Law Rep. 671 (2017) (finding that less than five percent of the IDEA court decisions from 2000 to 2017 cited OSEP policy interpretations, usually for a supporting role but in some cases rejecting their persuasiveness altogether). In contrast, it may well be that IDEA stakeholders, including state and local education officials, perceive these agency pronouncements as effectively having the force of law.
- 55 *Supra* notes 19-20.
- 56 As a limited exception, one of the court decisions cited OSEP's 2010 Letter to Anonymous (*supra* note 19) in concluding that the school district's per se determination of non-eligibility based on the 2E student's strong academic performance was a procedural violation. However, the court expressly declined to determine whether the child was eligible for an IEP, instead only upholding the hearing officer's order for further evaluation. *Lawrence Cnty. Sch. Dist. v. McDaniel*, 72 IDELR ¶ 8, at *5-*6 (E.D. Ark. 2018).
- 57 Foley-Nicpon et al., *supra* note 6 and accompanying text.
- 58 See, e.g., Nat'l Ctr. for Educ. Statistics, *How Many Students with Disabilities Receive Services?* (2019), <https://nces.ed.gov/fastfacts/display.asp?id=64> (showing incidence rates from 1977-77 that include marked increase for OHI since 1990, relatively moderate decline for ED since 2000, and marked decline in incidence of SLD since 2000 though leveling off in last eight years).
- 59 See, e.g., Perry A. Zirkel, *The Legal Meaning of Specific Learning Disability Eligibility: The Latest Case Law*, 46 *Communications* 14 (May 2018).
- 60 See, e.g., Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 *J.L. & Educ.* 483 (2012).
- 61 E.g., Barnard-Brak et al., *supra* note 5, at 76 (identifying potential 2E students among the special education population via a score at the 90th percentile or above on a standardized achievement test); Maddocks, *supra* note 5, at 7-8, (identifying potential 2E students specific to SLD via a more nuanced combination of standardized test scores, with results including compensation and masking).
- 62 *J.P. v. L.A. Unified Sch. Dist.*, 2011 WL 12697384 (C.D. Cal. Feb. 16, 2011).
- 63 See *supra* text accompanying note 28.
- 64 *Lewellyn v. Sarasota Cnty. Sch. Bd.*, 53 IDELR ¶ 288 (M.D. Fla. 2009), *aff'd mem.*, 442 F. App'x 446 (11th Cir. 2011).
- 65 *A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 327, 184 Ed.Law Rep. 37 (4th Cir. 2004).
- 66 *Id.* at 330.
- 67 *Adam J. ex rel. Robert J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 810, 176 Ed.Law Rep 83 (5th Cir. 2003).
- 68 *Lewisville Indep. Sch. Dist. v. Charles W.*, 81 F. App'x 843, 846, 183 Ed.Law Rep. 355 (5th Cir. 2004).
- 69 Letter to Anonymous, 60 IDELR ¶ 47 (OSEP 2012).
- 70 *W.S. v. District of Columbia*, — F. Supp. 3d —, — Ed.Law Rep. — (D.D.C. 2020).
- 71 *Wong v. Bd. of Educ.*, 478 F. Supp. 3d 229, 248, 385 Ed.Law Rep. 537 (D. Conn. 2020).
- 72 E.g., William Moran, *The IDEA Demands More: A Review of FAPE Litigation after Endrew F.*, 22 *N.Y.U. J. Leg. & Pub. Pol'y* 495 (2020) (finding that *Endrew F.* has not had a significant effect on the subsequent substantive FAPE judicial rulings).

- 73 Bell, *supra* note 10, at 885.
- 74 *Andrew F.*, 137 S. Ct. at 999.
- 75 *E.g.*, *Kenton Cnty. Sch. Dist. v. Hunt*, 384 F.3d 269, 281, 192 Ed.Law Rep. 55 (6th Cir. 2004); *T.R. v. Kingwood Bd. of Educ.*, 205 F.3d 572, 578, 142 Ed.Law Rep. 656 (3d Cir. 2000).
- 76 *Bd. of Educ. v. Rowley*, 458 U.S. at 213.

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