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Perry A. Zirkel, Ph.D., J.D., LL.M.^{aa1}

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TRENDS IN THE LEGAL ISSUES OF GIFTED EDUCATION^{a1}

The legal issues of gifted education fit within two distinguishable categories: (1) those specific to “gifted-alone” students, and (2) those specific to “twice-exceptional” students.¹ The primary legal basis for the gifted-alone students is a state gifted-education law, whereas that for the twice-exceptional category most often is the Individuals with Disabilities Education Act (IDEA),² with Section 504 of the Rehabilitation Act (Section 504)³ being in a distant second place.

Gifted-Alone

In the absence of a federal mandate, the state laws for gifted education, which are on the books in all but a few states, range along a broad continuum from those that are group-oriented to those that, like the IDEA and Section 504, are oriented to the individual student. The group-oriented model accounts for the vast majority of these laws, with less than a dozen in the individual-oriented group. Moreover, only a handful, led by Pennsylvania, approach the full IDEA model, which includes not only an IEP but also procedural safeguards, including the impartial hearing and state complaint mechanisms. Finally, the relatively recent changes in state statutes and regulations have been limited and without an overall weakening or strengthening direction.⁴

The case law specific to gifted-alone students is markedly limited. An analysis during the initial period, ending in approximately 2003 revealed that the court decisions shifted rather quickly from constitutional and other unsuccessful grounds to state gifted education laws. The outcomes reflected limited success even in the few states that included the right to a due process hearing, with Pennsylvania being in the predominant position.⁵ In the period of the second published analysis, which ended in approximately 2016, the number of adjudications remained at a low level, averaging approximately 1.5 per year, with the majority at the *19 hearing or review officer level. The primary issues were eligibility and free appropriate public education (FAPE), and the outcomes were skewed in the direction of the defendant districts, particularly at the court level.⁶ Finally, a search of the WestLaw and SpecialConnection databases for the most recent five years yielded de minimis case law in the gifted-alone category, revealing a waning trend in the already limited frequency of decisional activity at the administrative and judicial levels.⁷

Twice-Exceptional

“Twice-exceptional,” or “2E,” for students refers to those identified as gifted who qualify as having a disability under the IDEA or the broader eligibility coverage under Section 504.⁸ As a result, the applicable case law arises primarily under the IDEA, with the child's giftedness usually playing a secondary or incidental role.

Again, the case law fits in successive stages based on the published analyses to date. For the initial period, ending in approximately 2003, the case law under the IDEA tended to ignore the nuances of the child's giftedness in determining the predominant issues of identification and FAPE. The case law under Section 504 was even more limited and non-nuanced.⁹

For the subsequent period ending in approximately 2016, the same pattern continued, although with an increase in the number and proportion of court decisions. The increased concentration of court decisions made clear a skew in favor of the defendant districts, which was particularly pronounced for FAPE under the IDEA.¹⁰ More specifically, the judicial rulings specific to identification, which consists of the overlapping subcategories of child find and eligibility, revealed a split between the traditional, majority view and the emerging but still minority view with regard to the essential element of the need for special education, whereas those specific to FAPE rarely recognized the potentially relevant complexities of dual exceptionality.¹¹

Finally, in more recent years, the court decisions concerning twice-exceptional students under the IDEA increased in their frequency but not their issues or outcomes. First, a systematic synthesis for the overlapping period of 1990-2020 found thirteen court rulings *20 specific to identification and seventeen specific to FAPE, with the district-favorable skew much more pronounced for the FAPE cases.¹² Second, for the remaining two or so years, the eligibility cases continued to have mixed results,¹³ whereas the FAPE decisions were almost entirely in favor of the defendant districts.¹⁴

Discussion

As a prefatory matter, a limitation of any such analysis of case law, especially when primarily focused on court decisions, is the so-called iceberg effect. More specifically, these visible court decisions are only the tip of the proverbial iceberg, which for litigation includes successive subsurface levels of (a) court rulings that are not within the customary databases, (b) administrative adjudications, and (c) the widest and least well-known stratum of settlements and abandonments.¹⁵ For gifted education, in light of the absence of a federal mandate and the small number of state laws with individual rights and remedies, the iceberg also has a vertical partition. The face that is specific to identification and interventions for gifted-alone students is a relatively thin veneer, whereas the bulk of the litigation is connected to the IDEA or, much less frequently, Section 504.

The low frequency and success rate for gifted case law is largely attributable to a handful of overlapping factors. First, the absence of a federal mandate reflects the lack of a particular priority for gifted-alone students.¹⁶ Second, most of the limited cluster of states with IDEA-like protections for gifted-alone students--Alabama, Florida, Kansas, Louisiana, New Mexico, Pennsylvania, Tennessee, and West Virginia--are relatively non-litigious under the IDEA.¹⁷ Third, none of these state laws clearly authorizes attorneys' fees for prevailing *21 parents.¹⁸ Fourth, the ultimate goal of an individually appropriate program for the gifted-alone child is defeated by the failure of these state laws to change the floor-based substantive standard for FAPE of students with disabilities to a ceiling-oriented standard customized for giftedness.¹⁹ Finally, even in the limited cluster of states with IDEA-model laws, it is difficult to find parent-side attorneys who are knowledgeable about and specialized in gifted-alone students.²⁰

The higher frequency of the case law for twice-exceptional students is still a very limited segment of IDEA litigation more generally, and the outcomes are similarly skewed in favor of districts. For the identification cases, the traditional and still majority view does not provide due recognition to the masking effects of giftedness and the full scope of special education in applying the critical "need prong"²¹ for child find and eligibility cases. For the FAPE cases, the courts have not been even sensitive to the complexities of twice-exceptionality, instead often only noting the child's giftedness incidentally in the background of the factual findings. The disparity between the nuanced and best-practice norms of specialized professionals and the relatively callous and minimalistic rulings of our congested and generalist courts is part and parcel of IDEA case law more generally.²²

Recognizing the limits of law, advocates for and educators of gifted students need to consider whether the current focus on professional collaboration and creativity is effective as compared to putting a priority on legislation and litigation. Regardless of the path that is chosen, the distinction between gifted-alone and twice-exceptional may be a useful starting point.

Footnotes

- a¹ *Education Law Into Practice* is a special section of the Education Law Reporter sponsored by the Education Law Association. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association. Cite as 400 Educ. L. Rep. 18 (July 7, 2022).
- aa¹ Dr. Zirkel is University Professor Emeritus of Education and Law at Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.
- 1 “Twice-exceptional,” often abbreviated as “2-E,” is a widely recognized term, whereas “gifted-alone” is the author's customized term for the contrasting category.
- 2 20 U.S.C. §§ 1400-1482.
- 3 29 U.S.C. § 794.
- 4 Perry A. Zirkel, *Legal Update of Gifted Education*, 39 J. Educ. Gifted 316, 319-322 (2016) (hereinafter referred to as “Legal Update 2016”); Perry A. Zirkel, *State Laws for Gifted Education*, 27 Roeper Rev. 228 (2005). A review of state statutes and regulations, using the search term “gifted,” reveals even more limited movement in the five years since the coverage of these previous articles.
- 5 Perry A. Zirkel, *The Case Law on Gifted Education: A New Look*, 48 Gifted Child Q. 309, 310-12 (2004).
- 6 Legal Update 2016, *supra* note 4, at 322-28. The available decisions under the alternative dispute resolution avenue of the state complaint process were negligible. *Id.* at 328.
- 7 The very few decisions were of negligible import. *E.g.*, *Doe v. Knox Cnty. Bd. of Educ.*, 80 IDELR ¶ 276 (E.D. Tenn. 2022) (requiring exhaustion of FAPE claim of a purportedly 504-eligible student based on the court's treatment of the student as potentially IDEA eligible); *Poore v. Indianapolis Pub. Schs.*, 155 N.E.3d 643, 383 Educ. L. Rep. 442 (Ind. Ct. App. 2020) (rejecting negligence, contract, and state consumer protection act claims for payment of private advanced math class); *K.C. v. Fairfax Cnty. Sch. Bd.*, 2021 WL 345592 (Va. Cir. Ct., Jan. 28, 2021) (denying preliminary injunction challenging school district change in its requirements for admission to state schools for gifted students due to absence of applicable state legislation or regulations); *Sumner Cnty. Schs.*, 122 LRP 1061 (Tenn. SEA 2022) (cryptic state complaint decision finding violation for failing to provide properly certified gifted teacher without clarifying whether the child was gifted-alone or twice-exceptional or providing other details).
- 8 This broad definition suffices for this legal analysis. However, for a nuance 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).
- 9 Zirkel, *supra* note 5, at 313-14. Additionally, under the broader rubric of “gifted plus,” which extends beyond the legal coverage of disability to that for race and ethnicity, the case law concerning disproportional representation of minority students in the gifted category was limited in frequency or success. *Id.*

- 10 Legal Update 2016, *supra* note 4, at 329-35.
- 11 *Id.* at 10-16.
- 12 Perry A. Zirkel, *Twice-Exceptional Students under the Individuals with Disabilities Education Act*, 389 Educ. L. Rep. 1 (2021).
- 13 *E.g.*, *R.B. v. N.E. Indep. Sch. Dist.*, 80 IDELR ¶ 162 (W.D. Tex. 2022) (ruling that district violated child find but that the student was not eligible under the IDEA); *L.B. v. Radnor Twp. Sch. Dist.*, 78 IDELR ¶ 186 (E.D. Pa. 2021) (rejecting challenges under state law, IDEA, and Section 504 to evaluation that determined that student with IEP was not eligible also as gifted); *A.P. v. Pasadena Unified Sch. Dist.*, 78 IDELR ¶ 139 (C.D. Cal. 2021) (ruling that the district violated child find while reserving the relief for further proceedings); *cf.* *E.P. v. Twin Valley Sch. Dist.*, 517 F. Supp. 3d 347, 393 Educ. L. Rep. 319 (E.D. Pa. 2021) (ruling that district violated child find under Section 504).
- 14 *E.g.*, *A.B. v. Smith*, 81 IDELR ¶ __ (D. Md. 2022) (ruling that proposed IEPs in district's gifted SLD program met the *Endrew F.* standard for FAPE); *Bradley v. Jefferson Cnty. Pub. Schs.*, 80 IDELR ¶ 275 (W.D. Ky. 2022) (ruling that FAPE does not extend to residential dual enrollment at a state university due to state law definition of postsecondary coursework); *J.S. v. District of Columbia*, 80 IDELR ¶ 212 (D.D.C. 2022) (ruling that the district's proposed residential placement was capable of implementing the student's IEP, thereby discontinuing reimbursement for the unilateral placement); *N.H. v. Phoenixville Area Sch. Dist.*, 80 IDELR ¶ 39 (E.D. Pa. 2021) (ruling that district's reevaluation and interim IEP of student in faraway unilateral placement did not amount to a denial of FAPE); *J.B. v. Frisco Indep. Sch. Dist.*, 528 F. Supp. 3d 614, 395 Educ. L. Rep. 631 (E.D. Tex. 2021) (ruling that the IEP met the applicable substantive standard for FAPE); *cf.* *Spring Branch Indep. Sch. Dist. v. O.W.*, 79 IDELR ¶ 101 (S.D. Tex. 2021) (remanding to hearing officer the determination of whether the IDEA violations resulted in specific educational deficits and, if so, the specific compensatory education owed under a qualitative approach); *A.C. v. Owen J. Roberts Sch. Dist.*, 79 IDELR ¶ 94 (E.D. Pa. 2021) (ruling that discontinuation of 504 plan for gifted student was harmless procedural FAPE violation due to teachers' continuation of needed accommodations).
- 15 For an example within the IDEA context, see Perry A. Zirkel & Amanda C. Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & Educ. 483 (2012).
- 16 The limited funding under the Javits Act part of the Every Student Succeeds Act is a far cry from the individual requirements, including adjudicatory rights, of the IDEA.
- 17 Pennsylvania is the only one in this handful of states that is in the top group of states for the frequency of hearing officer or court decisions under the IDEA. *See, e.g.*, Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions under the Individuals with Disabilities Education Act*, 28 J. Special Educ. Leadership 1, 13 (Mar. 2015); Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Educ. L. Rep. 870 (2020).
- 18 Ala. Admin. Code r. 290-8-9-.12(10); Fla. Admin. Code r. 6A-6.03313(7)(j); La. Admin. Code tit. 28, Pt. XLIII, §§ 517, 1516; N.M. Admin. Code R. § 6.31.2.13(I)(24); Pa. Code § 14.162(o), 16.63(I), *Huldah A. v. Easton Area Sch. Dist.*, 601 A.2d 860, 862 (Pa. Commw. Ct. 1992) (no); Kan. Stat. Ann. § 72-3430(b)(12); Tenn. Comp. R. & Regs. 0520-01-09-.19; W. Va. Code R. § 126-16-3; Policy 2419(o), <https://wvde.us/special-education/policies-and-compliance/policy-2419/> (ambiguous).
- 19 *E.g.*, Legal Update 2016, *supra* note 4, at 335.
- 20 Even in Pennsylvania, which is the leader for gifted-alone litigation, most of the parent-side attorneys in special education are oriented to the legal nuances and specialized experts for the other side of the student spectrum.

- 21 *E.g.*, Perry A. Zirkel, *Through A Glass Darkly: Eligibility under the IDEA--The Blurry Boundary of the Special Education Need Prong*, 49 J.L. & Educ. 149 (2020); Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Educ. L. Rep 30 (2018).
- 22 *See, e.g.*, Lauren W. Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. Positive Behav. Interventions 180 (2017); Perry A. Zirkel, *The “Peer-Reviewed Research” Provision of the IDEA: A Current Comprehensive Snapshot*, 397 Educ. L. Rep. 422 (2022).

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