

NOTES

ENDREW'S IMPACT ON TWICE-EXCEPTIONAL STUDENTS

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INTRODUCTION

Approximately 2 to 5 percent of the American student population qualifies as both gifted and learning disabled.¹ These students, labeled by educators as “twice-exceptional,” generally demonstrate superior cognitive ability, yet also present profound weaknesses in seemingly basic skills.² This disconnect in twice-exceptional students’ abilities produces great difficulties for America’s public schools.³

Twice-exceptional students, as a result of their disability, can generally qualify for special education services under the federal Individuals with Disabilities Education Improvement Act of 2004 (IDEIA).⁴ Once a student qualifies for services under the IDEIA, he is entitled to receive a Free and Appropriate Public Education (FAPE).⁵ The IDEIA defines a FAPE as an education that is “provided at public expense ... meet[s] [state] standards ... [is] appropriate ... and [is] provided in conformity with [a student’s individualized education program].”⁶ Given the general nature of this statutory guidance, the courts have been largely responsible for determining what constitutes a FAPE.⁷ And, while the courts have created relatively clear standards, applying these standards to twice-exceptional students has proven problematic.⁸

1. See MONTGOMERY CTY. PUB. SCH., A GUIDEBOOK FOR TWICE EXCEPTIONAL STUDENTS: SUPPORTING THE ACHIEVEMENT OF GIFTED STUDENTS WITH SPECIAL NEEDS C-1 (2004), <http://www.wrightslaw.com/info/2e.guidebook.pdf> [<https://perma.cc/TRK8-7AFZ>] [hereinafter TWICE EXCEPTIONAL GUIDEBOOK].

2. BEVERLY A. TRAIL, TWICE-EXCEPTIONAL GIFTED CHILDREN: UNDERSTANDING, TEACHING, AND COUNSELING GIFTED STUDENTS 1-3 (Lacy Compton ed., 2011).

3. See NAT’L EDUC. ASS’N, THE TWICE-EXCEPTIONAL DILEMMA 1 (2006) [hereinafter TWICE-EXCEPTIONAL DILEMMA].

4. See *infra* notes 25-27 and accompanying text.

5. See *infra* Part I.B.2.

6. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2653-54.

7. See PETER W.D. WRIGHT & PAMELA DARR WRIGHT, WRIGHTSLAW: SPECIAL EDUCATION LAW 51 n.23 (2d ed. 2006).

8. See Carrie Lynn Bailey & Valija C. Rose, *Examining Teachers’ Perceptions of Twice Exceptional Students: Overview of a Qualitative Exploration*, VISTAS ONLINE 9-10 (2011), https://www.counseling.org/resources/library/VISTAS/2011-V-Online/Article_07.pdf [<https://perma.cc/44CJ-HMQ3>].

Consider the following case: Per Hovem is a twice-exceptional high school senior in the Klein Independent School District who qualifies for services under the IDEIA.⁹ He has superior cognitive ability, as shown through intelligence testing, and he makes above-average grades in his general education courses.¹⁰ Yet, despite this, Per's writing ability is subpar, falling around a second-grade level.¹¹ In fact, Per and his teachers assert that he takes multiple hours to write paragraphs and fill out one-page forms.¹² Despite these deficiencies, however, Per can read and comprehend at an age-appropriate level.¹³ Given Per's mix of abilities, what supports should the Klein Independent School District provide in order to meet its obligation to provide Per with a FAPE? Would minor accommodations, such as extra time on written assignments, suffice? Or is the school district required to do more?

In making its decision in Per's case, the Fifth Circuit applied the prevailing standard at the time, *Board of Education of Hendrick Hudson Central School District v. Rowley*, which held that a school district met its FAPE obligation when a student's educational program was "reasonably calculated to enable the child to receive educational benefits."¹⁴ Since Per advanced grade-to-grade in his general education courses, the Fifth Circuit held that minimal accommodations and services were enough to provide Per with a FAPE.¹⁵ Moreover, the Fifth Circuit refused to consider arguments that the school district failed to meet its FAPE requirements based on Per's inability to meet his full academic potential.¹⁶

The Fifth Circuit's holding represented a typical decision under the *Rowley* standard.¹⁷ Nevertheless, many special education and disability advocates suggested that such results were problematic.¹⁸

9. This discussion is based on twice-exceptional student Per Hovem. See *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 392 (5th Cir. 2012).

10. See *id.*

11. See *Klein Indep. Sch. Dist. v. Hovem*, 745 F. Supp. 2d 700, 751 (S.D. Tex. 2010).

12. See *id.* at 718-19, 721.

13. See *id.* at 751.

14. 458 U.S. 176, 207 (1982).

15. See *Hovem*, 690 F.3d at 398-400.

16. See *id.* at 398.

17. See *infra* Part I.C.1.

18. See Emma Brown, *Supreme Court to Decide: What Level of Education Do Public Schools Legally Owe to Students with Disabilities?*, WASH. POST (Jan. 10, 2017), <https://www.washingtonpost.com/news/education/wp/2017/01/10/supreme-court-to-decide-what-level-of-education-do-public-schools-legally-owe-to-students-with-disabilities/>.

These advocates claimed that the *Rowley* standard was too lenient, allowing school districts to satisfy FAPE requirements without fully addressing students' needs.¹⁹ Thus, these advocates called for the creation of a more rigorous standard—one that would require school districts to do more for their disabled students.²⁰

Advocates' pleas were seemingly answered when the Supreme Court handed down its 2017 decision in *Endrew F. v. Douglas County School District RE-1*.²¹ Though *Endrew* dealt with a "traditionally" disabled, non-twice-exceptional student, *Endrew* clarified the *Rowley* decision and, by most accounts, raised the FAPE standard by placing a greater emphasis on the student's individual abilities.²² Specifically, *Endrew* held that a student's educational program should be "reasonably calculated to enable a child to make progress *appropriate in light of the child's circumstances*."²³ Yet, despite advocates' general belief that *Endrew* will raise the FAPE standard for disabled students as a whole, there is some evidence that the new standard will have only a slight impact on twice-exceptional students specifically.²⁴

To address this claim, this Note will proceed in three main parts. Part I describes the twice-exceptional student population in greater detail. In addition, this Part discusses education law generally, highlighting federal special education law, the FAPE standard, and gifted education. Part II explains why the *Endrew* decision may not impact twice-exceptional students to the same level it could affect nongifted, disabled students. Part III then suggests that twice-exceptional students should receive greater protection. This Part argues that amending the IDEIA is unlikely to be successful. Additionally, it proposes that the states individually adopt Gifted Individualized Education Provisions to supplement students' protection under the IDEIA and ensure that twice-exceptional

washingtonpost.com/local/education/supreme-court-to-decide-what-level-of-education-do-public-schools-legally-owe-to-students-with-disabilities/2017/01/10/3e8e14ca-d690-11e6-9f9f-5cdb4b7f8dd7_story.html [https://perma.cc/CWR7-PEFK] (explaining advocates' general position).

19. *See id.*

20. *See id.*

21. *See* 137 S. Ct. 988, 999-1000 (2017); *infra* Part II.A.

22. *Endrew F.*, 137 S. Ct. at 999.

23. *Id.* (emphasis added).

24. *See infra* Part II.B.

students' weaknesses and strengths are both appropriately considered.

I. FACTUAL AND LEGAL BACKGROUND

To qualify for services under the IDEIA, a student needs to fit into one of thirteen disability categories listed in 20 U.S.C. § 1401(3)(A)(i).²⁵ Notably, “twice-exceptional” is not a listed disability category.²⁶ Nevertheless, twice-exceptional students can (and do) qualify for services so long as their disability falls within the IDEIA’s disability categories and the student can demonstrate that, as a result of the disability, he “needs special education and related services.”²⁷ Additionally, given that twice-exceptional students are gifted or cognitively superior in at least some academic areas, twice-exceptional students may also qualify for a school’s gifted programming.²⁸

Because twice-exceptional students present both disability and giftedness, their educational needs stretch across different educational laws and policy areas.²⁹ Thus, to provide a complete overview of the legal landscape, this Part will provide a basic introduction to both federal special education law as well as relevant federal and state gifted education programs.

25. Andrew M.I. Lee, *The 13 Disability Categories Under IDEA*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/special-education-basics/conditions-covered-under-idea> [<https://perma.cc/6GQJ-AYAL>].

26. The disability categories include “intellectual disabilities, hearing impairments ... speech or language impairments, visual impairments ... serious emotional disturbance ... orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C. § 1401(3)(A)(i) (2012).

27. WRIGHT & WRIGHT, *supra* note 7, at 21; U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS (Q&A) ON U.S. SUPREME COURT CASE DECISION ENDREW F. V. DOUGLAS COUNTY SCHOOL DISTRICT RE-1 8 (Dec. 7, 2017), <https://sites.ed.gov/idea/files/qa-endrewcase-12-07-2017.pdf> [<https://perma.cc/DAD3-2G2N>] [hereinafter Q&A].

28. Peg Rosen, *Gifted Children’s Challenges with Learning and Attention Issues*, UNDERSTOOD, <https://www.understood.org/en/friends-feelings/empowering-your-child/building-on-strengths/gifted-childrens-challenges-with-learning-and-thinking-issues> [<https://perma.cc/SZ8C-6REX>].

29. *See infra* Part I.A.

A. What Is a Twice-Exceptional Student?

The term “twice-exceptional student” (at its most basic level) refers to students who are both gifted and disabled.³⁰ In other words, these students meet traditional qualifications for giftedness—that is, high cognition and potential for high achievement—but these students also qualify as disabled under the IDEIA.³¹

Due to this unique spread of giftedness and disability, twice-exceptional students are often overlooked and can be difficult to identify.³² In fact, twice-exceptional students have been described by educators as “the most misjudged, misunderstood, and neglected segment of the student population.”³³ Commentators illustrate the difficulties of identifying twice-exceptional students by dividing these students into three general categories: (1) students whose giftedness largely masks their disability, (2) students whose disability masks their giftedness, and (3) students whose giftedness and disability cancel each other out, making these students appear “average.”³⁴

These identification difficulties matter because twice-exceptional students face great difficulty in the classroom if their divergent needs are not met.³⁵ For instance, if a student’s giftedness is overlooked he may become disinterested or face feelings of frustration; likewise, if a student’s disability is overlooked, he may become overwhelmed and develop a low self-esteem.³⁶ Moreover, research suggests that these feelings, if not addressed, may prompt a twice-exceptional student to act out and develop other behavioral issues

30. Kim Millman, Comment, *An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child*, 34 PEPP. L. REV. 455, 456-57 (2007).

31. Parents, educators, and courts use the term “twice-exceptional” slightly differently. Since this Note discusses the application of *Endrew*, it will employ a narrow definition: a student who qualifies for services under the IDEIA and has demonstrated capacity for high cognition.

32. See Leah M. Christensen, *Law Students Who Learn Differently: A Narrative Case Study of Three Law Students with Attention Deficit Disorder (ADD)*, 21 J.L. & HEALTH 45, 52 (2008).

33. JOANNE RAND WHITMORE & C. JUNE MAKER, INTELLECTUAL GIFTEDNESS IN DISABLED PERSONS 204 (1985).

34. Millman, *supra* note 30, at 478; see also Rosen, *supra* note 28.

35. See Rosen, *supra* note 28.

36. See Millman, *supra* note 30, at 480.

in the classroom—resulting in a potential loss of instructional time for both the student and his peers.³⁷

Perhaps most problematic, however, are these students' academic progress. A twice-exceptional student, due to his giftedness, often has the ability (at least in some academic areas) to learn at an accelerated pace.³⁸ And, unlike “traditionally” disabled students, twice-exceptional students can often mask their deficits by developing coping mechanisms.³⁹ Thus, two general problems can easily arise if a student's education programming is not tailored correctly: (1) a student may experience regression (or stagnation) in an area of strength if he is not pushed appropriately and (2) a student may pass grade-to-grade without learning fundamental skills if he uses his gifts to mask his deficits.⁴⁰

Twice-exceptional student classroom placement also proves difficult.⁴¹ Within a traditional public school environment, disabled students have two general placement options: mainstream classrooms (general education classrooms with nondisabled peers) or self-contained classrooms (classrooms that contain only disabled students).⁴² If neither of these options proves wholly appropriate, a student may also receive intermediary “push-in” or “pull-out” services, where a student receives a mixture of mainstream and special education.⁴³ Given twice-exceptional students' cognitive

37. *See id.*

38. *See, e.g.,* Downington Area Sch. Dist. v. K.D., No. 1485, 2017 WL 877316, at *1 (Pa. Commw. Ct. Mar. 6, 2017); TRAIL, *supra* note 2, at 26.

39. *See* Micaela Bracamonte, *Twice-Exceptional Students: Who Are They and What Do They Need?*, TWICE-EXCEPTIONAL NEWSL. (Mar. 2010), http://www.2enewsletter.com/article_2e_what_are_they.html [<https://perma.cc/GSE7-NBXD>].

40. *See* Dawn Beckley, *Gifted and Learning Disabled: Twice Exceptional Students*, NAT'L RES. CTR. ON GIFTED & TALENTED NEWSL., (Renzulli Ctr. for Creativity, Gifted Educ., & Talent Dev., Storrs, Conn. 1998), <https://nrcgt.uconn.edu/newsletters/spring984/> [<https://perma.cc/ST86-F3S6>]; *Twice-Exceptional Students*, NAT'L ASS'N FOR GIFTED CHILDREN, <https://www.nagc.org/resources-publications/resources-parents/twice-exceptional-students> [<https://perma.cc/8FHM-BCS8>].

41. *See* Beth Arky, *Twice-Exceptional Kids: Both Gifted and Challenged*, CHILD MIND INST., <https://childmind.org/article/twice-exceptional-kids-both-gifted-and-challenged/> [<https://perma.cc/BMN7-GRC8>].

42. *See, e.g.,* Grace Chen, *Understanding Self-Contained Classrooms in Public Schools*, PUB. SCH. REV. (Dec. 7, 2018), <https://www.publicschoolreview.com/blog/understanding-self-contained-classrooms-in-public-schools> [<https://perma.cc/7CTJ-2CG9>].

43. Generally speaking, students receive push-in services when they spend time in the self-contained, special-education environment, but get “pushed-into” the mainstream

abilities and IDEA requirements that a student be placed in the least restrictive environment,⁴⁴ many twice-exceptional students participate primarily in the mainstream environment.⁴⁵

B. An Overview of Federal Special Education Law

Special education is regulated through federal law.⁴⁶ All states currently receive funding through the federal IDEA, meaning that the states must meet minimum requirements, such as providing disabled students with a FAPE.⁴⁷ The following discussion will track the history of this law as well as discuss its current provisions.

1. Special Education Law Between 1960 and 2004

Beginning in the mid-1960s, Congress began to develop legislation to support disabled students.⁴⁸ These early legislative efforts resulted in the creation of federal grant programs.⁴⁹ The grant programs were meant to motivate the states to dedicate resources

environment for certain classes or activities; conversely, students receive pull-out services when they spend time in the general education environment, but get “pulled-out” for extra support. See Amanda Morin, *The Difference Between Push-In and Pull-Out Services*, UNDERSTOOD, <https://www.understood.org/en/school-learning/special-services/special-education-basics/the-difference-between-push-in-and-pull-out-services> [<https://perma.cc/KAV9-5FSM>].

44. The “least restrictive environment” provision requires that schools educate disabled students with nondisabled students “[t]o the maximum extent appropriate.” 20 U.S.C. § 1412(a)(5)(A) (2012).

45. See Bracamonte, *supra* note 39 (suggesting that exclusive special education is not appropriate for twice-exceptional students); Barbara Probst, *Finding a School that Fits*, DAVIDSON INST. (2006), <https://www.davidsongifted.org/Search-Database/entry/A10439> [<https://perma.cc/GEZ9-KUFU>]; TWICE EXCEPTIONAL GUIDEBOOK, *supra* note 1, at K-1 to K-2 (suggesting that twice-exceptional students are typically mainstreamed, especially in later grades).

46. See 20 U.S.C. § 1400 (2012).

47. See KYRIE E. DRAGOO, CONG. RESEARCH SERV., R44624, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) FUNDING: A PRIMER 1, 17-18, Table 2 (2018) [hereinafter IDEA PRIMER].

48. See WRIGHT & WRIGHT, *supra* note 7, at 13-15.

49. See Education of the Handicapped Act of 1970, Pub. L. No. 91-230, §§ 611-12, 84 Stat. 178-79; Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 203(a)-(b), 79 Stat. 28-29.

to students with disabilities.⁵⁰ Despite congressional intent, however, the grant programs proved largely ineffective.⁵¹ In fact, approximately ten years after the passage of the first grant program, the Elementary and Secondary Education Act, a congressional investigation revealed “that of the more than 8 million children ... with handicapping conditions requiring special education and related services, only 3.9 million such children [were] receiving an appropriate education [, and additionally] 1.75 million handicapped children ... receiv[ed] *no* educational services at all.”⁵²

In response to these staggering statistics, Congress renewed its efforts to provide educational opportunities to disabled students and passed the Education for All Handicapped Children Act of 1975 (EAHCA).⁵³ Unlike the previous grant programs, the EAHCA offered federal funds to the states *only* if a state committed to comply with the conditions of the Act.⁵⁴

The EAHCA was amended several times.⁵⁵ Each amendment expanded the scope of the law and offered disabled students further protections.⁵⁶ In 1990, the EAHCA was reauthorized, and Congress renamed it the Individuals with Disabilities Education Act (IDEA).⁵⁷ Throughout the 1990s, Congress continued to amend the IDEA.⁵⁸ Again, these amendments continued to expand the scope of the Act,

50. See Lex Frieden, *School Vouchers and Students with Disabilities*, NAT'L COUNCIL ON DISABILITY (Apr. 15, 2003), <https://www.ncd.gov/publications/2003/April152003> [<https://perma.cc/Q9T8-7BJJ>].

51. Unlike modern special education funding, these grant programs did not include “specific mandates” for the funds, which likely contributed to the programs’ failure. *Id.*

52. S. REP. NO. 94-168, at 8 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1432 (emphasis added).

53. *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180-81 (1982).

54. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat. 780-82.

55. *See* Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145; Education of the Handicapped Act Amendments of 1983, Pub. L. No. 98-199, 97 Stat. 1357.

56. *See History: Twenty-Five Years of Progress in Educating Children with Disabilities Through IDEA*, U.S. OFFICE OF SPECIAL EDUC. PROGRAMS (July 19, 2007), <https://www2.ed.gov/policy/speced/leg/idea/history.pdf> [<https://perma.cc/44VT-U4R2>].

57. *See id.*

58. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, 111 Stat. 37; Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587.

most notably shifting the focus from disabled students' access to the school building to these students' access to the general education curriculum.⁵⁹

The most recent reauthorization occurred in 2004.⁶⁰ As part of this reauthorization, Congress renamed the statute, calling it the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA),⁶¹ and continued to expand the law by providing an increased focus on accountability and improved student outcomes.⁶²

2. *The IDEIA*

The IDEIA is an “ambitious” law.⁶³ Like its earlier iterations, the IDEIA provides states with federal funds earmarked for disabled students so long as the state commits to complying with the IDEIA's statutory requirements.⁶⁴

Though complex, the IDEIA is best understood as a law that sets forth a comprehensive procedural framework for the purpose of ensuring disabled students' substantive rights.⁶⁵ The right to a FAPE is a critical substantive right protected by the IDEIA.⁶⁶

The FAPE requirement has been in place since the passage of the EAHCA.⁶⁷ Despite the FAPE requirement's long existence in federal law, however, the language describing FAPE has not meaningfully changed.⁶⁸ Thus, pre-IDEIA cases (such as *Rowley*) remain relevant. The IDEIA currently describes FAPE as:

59. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982).

60. See Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; IDEA PRIMER, *supra* note 47, at 10.

61. See Pub. L. No. 108-446, 118 Stat. 2647.

62. See WRIGHT & WRIGHT, *supra* note 7, at 15-16.

63. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

64. See 20 U.S.C. § 1400(d) (2012).

65. See *Back to School on Civil Rights*, WRIGHTSLAW, https://www.wrightslaw.com/law/reports/IDEA_Compliance_1.htm [<https://perma.cc/GP2G-7KFG>].

66. *Endrew F.*, 137 S. Ct. at 993.

67. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 2(c), 89 Stat. 775.

68. Compare *id.*, with Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 602, 118 Stat. 2653-54. Despite the twenty-nine-year gap, the current FAPE definition is almost identical to its 1975 counterpart.

[S]pecial education and related services that—
 (A) have been provided at public expense, under public supervision and direction, and without charge;
 (B) meet the standards of the State educational agency;
 (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
 (D) are provided in conformity with the individualized education program required under section 614(d).⁶⁹

Commentators note that the IDEIA's FAPE requirement is nonspecific.⁷⁰ Thus, FAPE's definition is largely drawn from case law.⁷¹ That said, the statutory definition does provide some guidance. Specifically, the IDEIA's definition requires that special education be "provided in conformity with the *individualized education program*," or "IEP."⁷² Importantly, an IEP is the main avenue for determining whether a student has been denied a FAPE.⁷³

An IEP is a written document that is created by a student's school team (generally consisting of a regular education teacher, a special education teacher, and school or district administrators) and his parent or guardian.⁷⁴ An IEP is a document that is tailored to the specific student for whom it is written, though it must comport with § 1414(d) of the IDEIA.⁷⁵ The document contains a statement of the student's current level of academic and functional performance and, based on this, lists out specific goals for that student and the various special education and related services that the student will

69. § 602(9)(A)-(D), 118 Stat. at 2653-54.

70. See, e.g., WRIGHT & WRIGHT, *supra* note 7, at 51 n.23; Grant Simon, "Hardly Be Said to Offer an Education at All": Endrew and Its Impact on Special Education Mediation, 2018 J. DISP. RESOL. 133, 137-38. The federal regulations include an equally vague definition. See 34 C.F.R. § 300.17 (2017).

71. See WRIGHT & WRIGHT, *supra* note 7, at 51 n.23.

72. § 602(9)(D), 118 Stat. at 2654 (emphasis added).

73. See Millman, *supra* note 30, at 466; Jamie Lynne Thomas, Comment, *Decoding Eligibility Under the IDEA: Interpretations of "Adversely Affect Educational Performance"*, 38 CAMPBELL L. REV. 73, 78 (2016).

74. See 20 U.S.C. § 1414(d)(1)(B) (2012); *Who Writes the School-Age IEP?*, CTR. AUTISM RES. (July 5, 2016), <https://www.carautismroadmap.org/who-writes-the-school-age-iep/> [<https://perma.cc/L5LJ-GT6L>].

75. 20 U.S.C. § 1401(14).

receive.⁷⁶ An IEP is updated annually and therefore changes and develops as the student progresses through his schooling.⁷⁷

C. *The FAPE Standard*

Despite its length and complexity, the IDEA provides only minimal guidance to the states in regard to the FAPE requirements.⁷⁸ Thus, school districts largely rely on the courts' interpretation of the FAPE standard.⁷⁹

The United States Supreme Court first reviewed the FAPE standard in *Rowley*.⁸⁰ Administrative law judges and federal courts relied on *Rowley's* interpretation of the FAPE standard for thirty-five years.⁸¹ Then, in 2017, the Court readdressed and clarified the FAPE standard in *Endrew*.⁸² Importantly, *Endrew* did not overturn *Rowley*.⁸³ The Court did signal some alterations to the *Rowley* standard for some students, however.⁸⁴ The next two Sections will provide a brief overview of *Rowley* and *Endrew* and, more importantly, will discuss how the Court modified the FAPE standard.

1. *Standard Adopted in Rowley*

At issue in *Rowley* was whether plaintiff Amy Rowley—a deaf first-grade student who was succeeding academically—was receiving a FAPE.⁸⁵ Amy's parents believed that she was denied a FAPE

76. See, e.g., *Endrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 994 (2017).

77. See *id.*

78. See *supra* note 70 and accompanying text.

79. See WRIGHT & WRIGHT, *supra* note 7, at 51 n.23.

80. *Endrew F.*, 137 S. Ct. at 994.

81. See, e.g., Kathleen Conn, *Rowley and Endrew F.: Discerning the Outer Bounds of FAPE?*, 345 EDUC. L. REP. 597, 597 (2017).

82. See L.A. Unified Sch. Dist., OAH No. 2017041138 26, 27 (Cal. Office of Admin. Hearings Nov. 8, 2017), <https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Services/-media/Divisions/OAH/Special-Education/SE-Decisions/2017---November/2017041138.pdf> [<https://perma.cc/W39Y-JA6E>].

83. See *Endrew F.*, 137 S. Ct. at 998-1001; Ruth Colker, *Did the Fry Decision Under the IDEA Overturn Rowley?*, 46 J.L. & EDUC. 443, 443 (2017).

84. See *infra* Part II.B.

85. See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. *Rowley*, 458 U.S. 176, 184-87 (1982).

because her IEP offered a hearing aid (and other services) rather than a sign-language interpreter.⁸⁶

To resolve the issue, Amy's parents began due process proceedings.⁸⁷ Both an independent examiner and the New York Commissioner of Education held that Amy was not denied a FAPE.⁸⁸ Amy's parents then brought an action in United States District Court, which held that Amy was denied a FAPE.⁸⁹ Specifically, the court found that even though Amy "perform[ed] *better* than the average child in her class and ... advanc[ed] easily from grade to grade," that Amy "underst[ood] considerably less of what [went] on in class than she could if she were not deaf."⁹⁰ The court held that this "disparity between Amy's achievement and her potential" was enough to constitute a FAPE violation.⁹¹ Thus, the district court held that a student was denied a FAPE if his IEP allowed disparities between his performance and his potential.⁹² The school district appealed the ruling, but the Second Circuit affirmed the district court's decision.⁹³

The United States Supreme Court reversed the Second Circuit—holding that Amy was not denied a FAPE.⁹⁴ The Court explicitly rejected the idea that a FAPE required a student's full potential to be realized and further noted that states did not need to ensure equality of services or opportunities between its nondisabled and disabled students.⁹⁵

Though the Supreme Court restricted its analysis to the specific factual scenario in *Rowley*, future courts derived a general standard from the decision: namely, that in order to comply with its FAPE

86. *See id.* at 184-85.

87. Due process is a procedural safeguard under the IDEIA. *See* 20 U.S.C. § 1415(f) (2012). Due process proceedings are heard by administrative law judges, and they have many special safeguards that distinguish them from general federal litigation. *See* Andrew M.I. Lee, *What to Expect at a Due Process Hearing*, UNDERSTOOD, <https://www.understood.org/en/school-learning/your-childs-rights/dispute-resolution/what-to-expect-at-a-due-process-hearing> [https://perma.cc/RG96-5MQ8]. A litigant can appeal a due process decision to the U.S. District Courts. *See id.*

88. *Rowley*, 458 U.S. at 185.

89. *Id.* at 185-86.

90. *Id.* at 185 (emphasis added).

91. *Id.* at 185-86.

92. *See id.*

93. *Id.* at 186.

94. *See id.* at 209-10.

95. *See id.* at 198-99.

requirements, a school must ensure that a disabled student's IEP is "reasonably calculated to enable the child to receive educational benefits."⁹⁶ More specifically, the Court held that as a general rule, academically successful disabled students—that is, disabled students in general education courses who passed from grade-to-grade—could largely be monitored by "the system itself."⁹⁷ In other words, the Court suggested that when a disabled student was able to pass his courses in a general education environment that he almost certainly was not denied a FAPE, regardless of the disparity between his potential and his actual performance.⁹⁸

2. *Standard Adopted in Endrew*

After the Court's *Rowley* decision, a circuit split emerged regarding the amount of "educational benefit[]" the FAPE standard required.⁹⁹ The majority of circuits held that disabled students needed to have only "some educational benefit" in order to receive a FAPE.¹⁰⁰ A minority of the circuits, on the other hand, used a "heightened 'meaningful educational benefit standard.'"¹⁰¹ The Supreme Court granted certiorari to *Endrew* in order to resolve this split and to determine what level of educational benefit was required for a school to satisfy its FAPE requirements.¹⁰²

Endrew F., a fifth-grade student with autism, attended public school from preschool through fourth grade.¹⁰³ Unlike Amy Rowley,

96. *Id.* at 207; Martin W. Bates, Note, *Free Appropriate Public Education Under the Individuals with Disabilities Education Act: Requirements, Issues and Suggestions*, 1994 BYU EDUC. & L.J. 215, 216. The Court also used the phrase "some educational benefit[s]." *Rowley*, 458 U.S. at 200. Several lower courts latched on to that language; however, the Supreme Court later clarified that "some" was not the correct standard. See Holly T. Howell, Note, *Neil Gorsuch, a Unanimous SCOTUS, and a Circuit Split Resolved: What Is the Big "IDEA"?*, 40 AM. J. TRIAL ADVOC. 603, 607-09 (2017).

97. *Rowley*, 458 U.S. at 202-03, 210.

98. *See id.*

99. *See* Petition for Writ of Certiorari at 9-15, *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (No. 15-827); Holly T. Howell, Comment, *Endrew F. v. Douglas County School District: How Much Benefit Is Enough When Evaluating the Educational Needs of Disabled Students in Federally-Funded Public Schools?*, 40 AM. J. TRIAL ADVOC. 347, 376-92 (2016).

100. Howell, *supra* note 96, at 607-09.

101. *See id.* (quoting Howell, *supra* note 99, at 377).

102. *See* *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993 (2017).

103. *Id.* at 996.

however, Endrew was not a strong student and, according to his parents, he had stopped growing academically and functionally.¹⁰⁴ His IEPs corroborated his parents' concerns, since his annual IEP goals were stagnant and reflected little to no academic advancement.¹⁰⁵

After receiving a similar IEP for Endrew's fifth grade year, Endrew's parents decided to unilaterally remove him from public school and place him in a private day school for students with disabilities.¹⁰⁶ Endrew's parents then began due process proceedings, arguing that they were entitled to reimbursement for private school costs since their son had been denied a FAPE.¹⁰⁷ A state administrative law judge held that Endrew had not been denied a FAPE.¹⁰⁸ This decision was affirmed by the United States District Court for the District of Colorado and eventually by the Tenth Circuit.¹⁰⁹

The Tenth Circuit specifically noted that Endrew received a FAPE since he had demonstrated at least "some progress."¹¹⁰ The court, using *Rowley* to justify its decision, held that so long as a disabled student's IEP was written to create more than a *de minimis* educational benefit, the IEP was adequate.¹¹¹

The Supreme Court reversed the Tenth Circuit, holding that the "merely more than *de minimis*" standard failed to ensure that students received a FAPE.¹¹² The Court proposed a new standard drawn heavily from *Rowley*: "To meet its substantive obligation under the [IDEIA], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹¹³ Given the highly personalized nature of IEPs, the

104. *Id.* In a recent report, the U.S. Department of Education analyzed *Endrew's* scope, stating that the *Endrew* standard "applies ... to any [IDEIA]-eligible child with a disability ... regardless of the child's disability, the age of the child, or the child's current placement." See Q&A, *supra* note 27, at 5. *Endrew* has been applied in cases involving twice-exceptional students. See *infra* note 198 and accompanying text.

105. See *Endrew F.*, 137 S. Ct. at 996.

106. See *id.*

107. See *id.* at 997.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1001-02.

113. *Id.* at 999.

Court explained that it could not define what “appropriate” progress” looked like in each case.¹¹⁴ The Court did, however, provide several general suggestions.¹¹⁵ Throughout its ruling, the Court suggested that, as in *Rowley*, grade-to-grade advancement of disabled students in mainstream classrooms may be enough; however, the Court also noted that disabled students “should have the chance to meet challenging objectives.”¹¹⁶

D. An Overview of Gifted Education

Unlike special education for disabled students, which has received much federal attention, gifted education is largely within the exclusive purview of state law.¹¹⁷ This Section describes the limited federal policy in addition to providing an overview of state gifted education law.

1. Federal Gifted Education

Federal legislation, such as the IDEIA, has helped ensure that disabled students receive at least some protection.¹¹⁸ Unlike disabled students, gifted students have not received such federal attention.¹¹⁹ And, though there have been some attempts to establish federal gifted programs, these programs (at least at the federal level) have waned in and out of favor over time.

Gifted education was a high priority in the late 1950s.¹²⁰ As part of the National Defense Education Act of 1958, Congress allocated federal funding to the states in an effort to provide gifted education programming.¹²¹ In the 1960s, interest in gifted education waned; however, the Elementary and Secondary Education Act of 1965 did

114. *Id.* at 1001.

115. *See id.* at 999-1001.

116. *Id.*

117. *See* Monica Miller, *Taking a New Look at Gifted Education: A Response to a Changing World*, 4 APPALACHIAN J.L. 89, 107 (2005).

118. *See supra* Part I.B.2.

119. *See* Miller, *supra* note 117, at 95-98; Patrick Haney, Comment, *The Gifted Commitment: Gifted Education's Unrecognized Relevance in "Thorough and Efficient" Public Schools*, 64 CASE W. RES. L. REV. 279, 280-82 (2013).

120. *See* Haney, *supra* note 119, at 281.

121. *See* Millman, *supra* note 30, at 468-69.

provide some funding for gifted students.¹²² In 1969, Congress renewed its interest in gifted education and passed The Gifted and Talented Children's Education Assistance Act of 1969.¹²³ This Act, like its predecessor, provided federal funding for gifted programming.¹²⁴ Interest in gifted education continued to rise during the early 1970s.¹²⁵ One of the most significant legislative victories for gifted education occurred as part of the Elementary and Secondary Education Act of 1974.¹²⁶ This Act created the Office of the Gifted and Talented and authorized appropriations for gifted and talented education.¹²⁷ These advances were further supplemented by the 1978 Gifted and Talented Children's Education Act.¹²⁸ Unfortunately for advocates of gifted and talented education, much of the advances of the 1970s were lost as a result of the 1981 Omnibus Budget Reconciliation Act, which repealed the 1978 Gifted and Talented Children's Education Act and closed the Office of the Gifted and Talented.¹²⁹

Currently, the Jacob K. Javits Gifted and Talented Students Education Act (Javits Act) governs federal gifted and talented education.¹³⁰ Unlike the IDEIA, which provides substantive and procedural safeguards for disabled students,¹³¹ the Javits Act is a funding program that supports programs, projects, and research that help schools better identify and serve gifted and talented students.¹³² In other words, though the Javits Act supports educational programming for gifted and talented students, it neither provides nationwide standards nor implements safeguards for students whose needs are not met.¹³³

122. *See id.* at 469.

123. *See id.*

124. *See id.*

125. *See id.* at 469-70.

126. *See id.*

127. *See Haney, supra* note 119, at 282.

128. *See Millman, supra* note 30, at 471.

129. *See id.*

130. *See* 20 U.S.C. § 7294 (2012); Millman, *supra* note 30, at 471-73.

131. *See supra* notes 63-66 and accompanying text.

132. *See* 20 U.S.C. § 7294(a).

133. Additionally, programs under the Javits Act, unlike the IDEIA, receive limited funding. Between 2010 and 2016, Javits Act funding peaked at approximately twelve million dollars. *Jacob K. Javits Gifted and Talented Students Education Program: Funding Status*, U.S. DEP'T OF EDUC. (Apr. 3, 2017), <https://www2.ed.gov/programs/javits/funding.html> [<https://>

2. State Gifted Education

Since the federal government does not require that the states have gifted programs or policies in place, the overall scope of gifted education varies widely at the state level.¹³⁴ Given the relative dearth of gifted programming at the federal level, one might assume that the states would have relatively comprehensive gifted education programming to fill in the gap. Such an assumption, however, is largely inaccurate. A substantial number of states have no mandatory gifted education policy and, furthermore, those states that have policies in place often provide only limited funding to support gifted programs.¹³⁵ This diversity in programming has led to wide “disparities in services” across the states, leading to criticism from some education advocacy groups.¹³⁶ Of the states that mandate gifted education, a range of programs and policies have been instituted, including: (1) Gifted Individualized Education Programs (GIEPs), (2) special classes for gifted students, and (3)

perma.cc/YKD3-XD25]. Comparatively, the states received over thirteen billion dollars in IDEA funding in 2017. IDEA PRIMER, *supra* note 47, at 2.

134. See Miller, *supra* note 117, at 92-94; *Gifted by State*, NAT'L ASS'N FOR GIFTED CHILDREN, <https://www.nagc.org/information-publications/gifted-state> [<https://perma.cc/KQ6V-K2AT>].

135. See *Support for Gifted Programs Vary Greatly from State to State*, DAVIDSON INST., <https://www.davidsongifted.org/Search-Database/entryType/3> [<https://perma.cc/K97H-8NXX>] [hereinafter *Support for Gifted Programs*]. A recent report of thirty-nine states' gifted education funding found that twelve states provided no funds for gifted education. NAT'L ASS'N FOR GIFTED CHILDREN & COUNCIL OF STATE DIRS. OF PROGRAMS FOR THE GIFTED, 2014-2015 STATE OF THE STATES IN GIFTED EDUCATION 7 (2015), <http://www.nagc.org/sites/default/files/key%20reports/2014-2015%20State%20of%20the%20States%20summary.pdf> [<https://perma.cc/LHN4-YYQE>]. Of those states that did fund gifted education, the amount ranged from approximately \$150,000 to \$157.2 million. See *id.* Even assuming consistent funding, however, state gifted programs would still differ given that state-based definitions of giftedness vary. States that focus exclusively on “academically gifted” students, for instance, capture a different student population than those that recognize “creative[] giftedness,” for instance. See *id.* at 13-14.

136. Haney, *supra* note 119, at 287. The lack of comprehensive state support for gifted programming likely stems, at least partly, from funding concerns. Compared to other students, gifted students' needs appear less critical. This perception, however, is largely inaccurate. Studies suggest that “gifted students do not make it on their own [and] ... underachiev[e] relative to their potential.” Elizabeth A. Siemer, *Bored Out of Their Minds: The Detrimental Effects of No Child Left Behind on Gifted Children*, 30 WASH. U. J.L. & POL'Y 539, 545-46 (2009). This, in turn, contributes to many issues, notably high drop-out rates and depression. See *id.* at 546.

acceleration programs.¹³⁷ In addition to focusing on specific student programming, states have also created a variety of procedural requirements.¹³⁸ Some states, for instance, have parental notification requirements, teacher training requirements, or provisions that require the hiring of a gifted education administrator.¹³⁹

II. THE PROBLEM: DID *ENDREW* MODIFY THE FAPE STANDARD FOR TWICE-EXCEPTIONAL STUDENTS?

After the Supreme Court decided *Endrew*, many advocates suggested that the decision would have a significant impact on America's disabled student population since the new standard would "dramatically expand[]" the FAPE requirement.¹⁴⁰ While it is true that *Endrew* could have a notable impact on many of America's disabled students, the fact remains that *Endrew*'s FAPE standard will have a more modest effect on twice-exceptional students.¹⁴¹ This Part begins by summarizing advocates' main arguments regarding *Endrew*'s impact on disabled students and twice-exceptional students. The remainder of this Part will discuss why these views, especially those attributed to twice-exceptional students, are overstated.

A. Advocates' Reading of *Endrew*

Endrew, on the whole, failed to add meaningful protections for twice-exceptional students. Nevertheless, some advocates (namely parent groups and disability rights organizations) have begun to

137. Jamie M. Kautz, Note, *No "Gift" Giving Here: The Inadequate Gifted Education Programs in New York State and the Need for Gifted Education Reform*, 25 J.L. & POL'Y 687, 699-706 (2017).

138. See *Support for Gifted Programs*, *supra* note 135.

139. See *id.*

140. See, e.g., Conn, *supra* note 81, at 612 (outlining typical reactions to *Endrew*); Laura McKenna, *How a New Supreme Court Ruling Could Affect Special Education*, ATLANTIC (Mar. 23, 2017), <https://www.theatlantic.com/education/archive/2017/03/how-a-new-supreme-court-ruling-could-affect-special-education/520662/> [<https://perma.cc/YPE5-5HU3>] (outlining advocates' views on *Endrew*); see also Chin-Wen Lee & Jennifer A. Ritchotte, *Seeing and Supporting Twice-Exceptional Learners*, 82 EDUC. F. 68, 73-74 (2018) ("[*Endrew*] holds merits for providing educational services to twice-exceptional students [because schools must now] afford them the opportunity to achieve to their full potential in school." (emphasis added)).

141. See *infra* Part II.B.

suggest otherwise.¹⁴² Since advocates' opinions provide a useful starting point for considering the *Endrew* standard, this Section will consider some of the most common arguments and readings advocates have made post-*Endrew*. Importantly, advocates' readings are often supported by the text of *Endrew* (and may even be accurate when considering traditionally disabled students).¹⁴³ However, the opinions are often steeped in a narrow comparison of the new and old FAPE standards and tend to highlight specific, isolated language from *Endrew* without considering the decision as a whole.¹⁴⁴

Advocates accurately cite *Endrew's* central holding that “a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”¹⁴⁵ And, advocates reasonably suggest that this holding heightened the “appropriate” prong of the FAPE standard since the Court in *Endrew*—unlike that in *Rowley*—established that “some” or “*de minimis*” progress is insufficient.¹⁴⁶ To advocates, this (at a minimum) removed lower court reliance on *Rowley's* “some educational benefit” language, meaning that trivial academic progression will no longer satisfy a school’s FAPE requirement.¹⁴⁷ This interpretation of the law, especially when considering nongifted, disabled students, is largely correct. Issues arise, however, when advocates attempt to use this framework to assess the impact on twice-exceptional students.¹⁴⁸ Since twice-exceptional students have the ability to progress through the curriculum at grade-level (or above grade-level) rates,¹⁴⁹ the move from *Rowley* to *Endrew* largely fails

142. See *Advocating for Your Child Using Endrew F.*, PARTNERS RES. NETWORK (Oct. 19, 2018), <http://prntexas.org/advocating-for-your-child-using-endrew-f/> [https://perma.cc/P32C-Q6MC]; J. Mark Bade, *Advocating for Twice-Exceptional Children*, 2E NEWSL. (2018), <http://www.nagc.org/sites/default/files/Advocacy/Advocating%20for%20e.pdf> [https://perma.cc/J3XF-HYLK]; *supra* note 141 and accompanying text.

143. See *supra* Part I.C.2.

144. See, e.g., *Advocating for Your Child Using Endrew F.*, *supra* note 142 (citing “challenging objectives” language as evidence that the standard changed for twice-exceptional students).

145. Adam Dayan, *SCOTUS Decides Endrew F. Case and Establishes New Legal Standard*, LAW OFFS. OF ADAM DAYAN (Mar. 29, 2017, 3:12 PM) (emphasis omitted), <http://blog.dayanlawfirm.com/2017/03/scotus-decides-endrew-f-case-and.html> [https://perma.cc/58J3-J5VG].

146. See *supra* notes 112, 141-44 and accompanying text.

147. See *supra* notes 100, 141-44 and accompanying text.

148. See *infra* Part II.B.

149. See Millman, *supra* note 30, at 479.

to affect twice-exceptional students, at least to the degree advocates would suggest.

A potential advocate's reading of the *Endrew* holding can be best understood by considering a hypothetical: Suppose that a twice-exceptional student with dyslexia has historically received high scores in mainstream math courses. In his current math course, however, the student struggles due to the high number of word problems used. Thanks to the student's high cognitive ability, the student is able to pass, albeit with a "D" average. Reviewing the aforementioned FAPE standard alone, an advocate may suggest that *Endrew* requires the school to provide the student with extra services or accommodations despite his passing grade. After all, when viewing the student's historical data, one could surmise that his low (but passing) score is not "appropriate" given his former success in mathematics. Moreover, one could argue that the student is only exhibiting trivial progress and, theoretically, may be regressing.

This particular reading of the *Endrew* FAPE standard is further bolstered by specific, isolated language from *Endrew*, which—at first glance—appears to raise the FAPE standard for twice-exceptional students like the student in the hypothetical.¹⁵⁰ First, *Endrew*, more so than *Rowley*, highlights the importance of actual, observable progress, noting that an IEP's purpose is to enable a disabled student to progress academically and/or functionally.¹⁵¹ In this vein, advocates often cite *Endrew*'s call for a "markedly more demanding" standard.¹⁵² These advocates then juxtapose this with some lower courts' interpretations of *Rowley*, including the Tenth Circuit's *de minimis* standard, which, in effect, allowed for negligible student progress.¹⁵³

150. See *Endrew F. v. Douglas Cty. Sch. Dist.*, RE-1, 137 S. Ct. 988, 1000-01 (2017).

151. See *id.* at 999 ("The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement."). Though *Rowley* is not inconsistent with this sentiment, the *Rowley* Court did not emphasize this.

152. See Courtney Hansen, *Endrew F. in Action*, INCLUSION EVOLUTION (March 19, 2018), <https://www.inclusionrevolution.com/endrew-f-in-action/> [https://perma.cc/LJ6D-MJFD]; *Landmark Supreme Court Decision Raises the Bar*, MATRIX PARENT NETWORK & RES. CTR., <http://www.matrixparents.org/community-news-and-events/whats-happening/landmark-supreme-court-decision-raises-bar/> [https://perma.cc/D5XD-7N9R].

153. See, e.g., Dayan, *supra* note 145; *Landmark Supreme Court Decision Raises the Bar*, *supra* note 152.

Second, advocates focus on particular passages in *Endrew*. These passages, advocates suggest, give bite to the individualized nature of FAPE, stating not only that students should make “appropriate[]” progress based on their unique traits and circumstances, but also that students should be given “the chance to meet challenging objectives.”¹⁵⁴ As advocates suggest, this language in *Endrew*, at least when considered in isolation, could make a difference for twice-exceptional students.¹⁵⁵ In the hypothetical, for instance, an advocate could argue that the student’s passing grade is not enough to dismiss his FAPE claim since a court would need to consider whether the material appropriately “challeng[ed]” the twice-exceptional student.¹⁵⁶ Assuming the student’s issues are with the reading of word problems rather than the math itself, this language from *Endrew* could theoretically support a holding that the hypothetical student be placed in an accelerated program. Similarly, language from *Endrew* could support a twice-exceptional student’s participation in a dual enrichment/specialized instruction program, especially if the student’s reading deficit was causing limited progress or a regression in his math skills.¹⁵⁷

Finally, when viewed in isolation, the language in *Endrew* could support advocates’ position since the language appears to raise *Rowley*’s “floor of opportunity,”¹⁵⁸ and thereby increase the level of progress required. The “floor of opportunity” language in *Rowley* suggested that very little was required of the states—namely, that disabled students had “access” to the physical school building.¹⁵⁹ *Endrew* hints that the *Rowley* fact situation and the governing law at the time, the EAHCA, rendered a focus on actual academic benefit unnecessary.¹⁶⁰ And, though *Endrew* fails to comprehensively describe the shift from the EAHCA to the modern IDEA, scholars have recognized that the various amendments and reauthorizations

154. See, e.g., *Advocating for Your Child Using Endrew F.*, *supra* note 142 (quoting *Endrew F.*, 137 S. Ct. at 1000).

155. See *id.*; see also Dayan, *supra* note 145.

156. *Endrew F.*, 137 S. Ct. at 1000.

157. See Lee & Ritchotte, *supra* note 140, at 73-74; *Advocating for Your Child Using Endrew F.*, *supra* note 142; Dayan, *supra* note 145.

158. See *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201 (1982).

159. See *id.* at 200-02.

160. *Endrew F.*, 137 S. Ct. at 999-1000 (citing *Rowley*, 458 U.S. at 202).

of the IDEIA may raise the FAPE standard. This is because the IDEIA (as opposed to the EAHCA) focuses on disabled students' access to the general educational curriculum as opposed to their ability to access physical school buildings.¹⁶¹

Taken together, advocates' reading of *Endrew* is a potential windfall for the twice-exceptional student. Under such a constricted reading, students must progress at a pace that far exceeds the *de minimis* standard and other "some" progress standards. Considering the historic academic gains of twice-exceptional students, this new standard may require more than mere grade-to-grade progress. Though such a reading is theoretically possible, a holistic understanding of the opinion suggests that it is not what the Court intended.

B. A Holistic Reading of Endrew

Twice-exceptional students are unlikely to experience significant change as a result of the Supreme Court's *Endrew* opinion. This claim is supported by three points: (1) the heightened language in *Endrew* is directed at students who are not progressing in a general education environment, (2) the *Endrew* opinion reaffirms *Rowley*'s assumptions and central holding, and (3) the purpose of the IDEIA and other fairness concerns will prevent heightened *Endrew* language from dramatically increasing the FAPE standard for twice-exceptional students.

1. The Heightened Language in Endrew Is Directed at Students Not Progressing in a Mainstream Environment

The heightened language scattered throughout *Endrew* (for example, "challenging objectives," "markedly more demanding," and "ambitious in light of [the child's] circumstances") is not presented in isolation.¹⁶² Take the "challenging objectives" language, for in-

161. Compare *O.S. v. Fairfax Cty. Sch. Bd.*, 804 F.3d 354, 358-59 (4th Cir. 2015) (suggesting that IDEIA amendments did not raise the FAPE standard), with Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 578-80 (suggesting that IDEIA amendments did raise the FAPE standard).

162. *Endrew F.*, 137 S. Ct. at 1000.

stance.¹⁶³ On its own, a student's right "to meet challenging objectives" appears to raise the FAPE standard for twice-exceptional students.¹⁶⁴ Such language could mean that a twice-exceptional student is placed in gifted courses with supports, or perhaps, that a student's IEP goals are written to require a higher level of accuracy and precision, not just a passable understanding of a concept.¹⁶⁵ The issue with such a reading is that the "challenging objectives" language, when read in its full context, retains the restrictive mainstreaming and grade-to-grade advancement language from *Rowley*.¹⁶⁶ This section of the *Endrew* opinion, in full, reads: "[The student's] educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives."¹⁶⁷ Here, the Court juxtaposes grade-to-grade advancement as the standard on the high end of the spectrum with "challenging objectives" as a lower alternative.¹⁶⁸ Thus, read in its broader context, it appears that the Court intended this language to affect disabled students outside of the general education curriculum (that is, nonmainstreamed students) who, additionally were unable to meet grade-level standards. In other words, if a student in a self-contained, special education environment is not able to make yearly grade-level growth, the Court will accept his limited progress so long as the student was offered "the chance to meet challenging objectives."¹⁶⁹

The "challenging objectives" language loses even more of its force when considering twice-exceptional students' placement. Twice-exceptional students, compared to their nongifted, disabled peers, are more likely to be mainstreamed.¹⁷⁰ As previously mentioned, IDEIA provisions mandate that a student be placed in the least restrictive environment.¹⁷¹ Thus, given twice-exceptional students'

163. *Id.*

164. *Id.*

165. *See id.*

166. *See id.*

167. *Id.*

168. *See id.*

169. *See id.*

170. *See supra* notes 44-45 and accompanying text.

171. *See supra* note 44 and accompanying text.

giftedness (or, at the very least, their general ability to develop coping mechanisms), many will participate in mainstream courses—meaning that grade-to-grade level advancement will be the basic test to determine whether a student received a FAPE.¹⁷²

Yet, even for those nonmainstreamed, twice-exceptional students (or those twice-exceptional students who are not progressing grade-to-grade each year in all courses), this “challenging objective” language may still fail to provide much benefit since some lower courts have occasionally utilized a “holistic” approach when reviewing a student’s progress.¹⁷³ The holistic approach considers a disabled student’s “overall academic record,” not the student’s individual deficiencies, when determining if a FAPE violation has occurred.¹⁷⁴ Under this approach, a student’s deficiencies may be disregarded if he has made “appropriate” progress in his other courses,¹⁷⁵ meaning that a student need not even pass all courses to be considered advancing from grade-to-grade. This is problematic for twice-exceptional students, many of whom excel in certain academic areas but need intense support in others.¹⁷⁶

Thus, while *Endrew*’s heightened language scattered throughout the opinion is certainly helpful for low-performing students and those in wholly special education courses, it is unlikely that this language will help twice-exceptional students’ arguments that they have been denied a FAPE, since the language seems specifically written to deal with students on the lower end of the spectrum.

2. *Endrew Reaffirms Rowley’s Assumptions and Central Holding*

Importantly, *Endrew* declined to overturn *Rowley*.¹⁷⁷ Instead, the Court minimized *Rowley*’s applicability when handling “close[] cases”—such as *Endrew*—while reaffirming some of *Rowley*’s major tenets,¹⁷⁸ notably: (1) the educational system’s ability to effectively

172. See *supra* note 45 and accompanying text.

173. See *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 391, 396-400 (5th Cir. 2012); *Renee J. v. Hous. Indep. Sch. Dist.*, 333 F. Supp. 3d 674, 683-84, 688, 691-92 (S.D. Tex. 2017).

174. *Hovem*, 690 F.3d at 397, 399-400.

175. See *supra* Part I.A.

176. See *supra* Part I.A.

177. See *Colker*, *supra* note 83, at 443.

178. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 998 (2017).

monitor students in mainstream courses,¹⁷⁹ (2) the appropriateness of grade-to-grade advancement,¹⁸⁰ and (3) the belief that lower-functioning disabled students should receive more protections and services than higher-functioning disabled students.¹⁸¹ Given this, *Rowley's* general standard still stands, albeit with the caveat that if grade-to-grade advancement in mainstream courses is not made that the student's progress should *at least* be "appropriate in light of [his] circumstances."¹⁸²

Yet, despite *Endrew's* general endorsement of *Rowley*, some commentators and advocates have noted that dicta from *Endrew* could limit *Rowley's* applicability.¹⁸³ Unlike the *Rowley* decision, which clearly emphasized that mainstream grade-to-grade progress generally meant that a student received a FAPE,¹⁸⁴ *Endrew* seemingly placed less weight on this contention, even going so far as to state that grade-to-grade progress "should not be interpreted as an inflexible rule" and, moreover, that just because a disabled child progresses grade-to-grade does not mean that he automatically receives a FAPE.¹⁸⁵ Theoretically, commentators suggest, this language could be used to twice-exceptional students' advantage since twice-exceptional students are the very students who could advance grade-to-grade without achieving "appropriately ambitious" goals.¹⁸⁶

Nevertheless, this language is unlikely to raise the FAPE standard for twice-exceptional students since this dicta does not distinguish *Endrew* from *Rowley*.¹⁸⁷ Though rarely cited by commentators interpreting *Endrew*, *Rowley* contains a footnote with similar language: "We do not hold today that every handicapped child who is advancing from grade to grade ... is automatically receiving a

179. *See id.* at 999.

180. *See id.* at 999-1000.

181. *See id.* at 996, 1000.

182. *Id.* at 998-99.

183. *See* Dayan, *supra* note 145; Brian T. Pearce, *The Endrew Decision: A Better Educational Standard for Special Needs Students*, NEXSEN PRUET (Mar. 23, 2017), <https://www.nexsenpruet.com/insights/the-endrew-decision-a-better-educational-standard-for-special-needs-students> [<https://perma.cc/YUN2-2RJM>].

184. *See* Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. *Rowley*, 458 U.S. 176, 204, 209-10 (1982).

185. *Endrew F.*, 137 S. Ct. at 1000 n.2.

186. *Id.* at 1000; *see supra* note 185 and accompanying text.

187. *Compare Endrew*, 137 S. Ct. at 1000 n.2, *with Rowley*, 458 U.S. at 203 n.25.

[FAPE].”¹⁸⁸ Thus, even though the *Endrew* dicta, on its face, seems promising, it will not actually change how the lower courts interpret *Endrew* since similar language has existed for over thirty years.¹⁸⁹

It is possible, however, that the language was meant to apply to twice-exceptional students who, like the student in the earlier hypothetical,¹⁹⁰ progress at a grade-to-grade level, but even with advancement may be regressing over time. Such an issue has not yet been discussed at length by the courts, possibly because proving regression could be difficult. However, even if regression was proven, such an interpretation still seems unlikely.¹⁹¹ *Rowley*, lower court cases, and *Endrew* all adopt the logic that systematic advancement is all that is really promised to any student—disabled or not.¹⁹² Thus, as will be discussed below, it seems unlikely that the Court would promise twice-exceptional students *more* protections (or better educational outcomes) than their nondisabled peers by holding that a certain level of proficiency is required for the FAPE standard to be met.¹⁹³ More likely, the Court’s dicta was included as a placeholder to prevent bad behavior from school districts.¹⁹⁴ For

188. *Rowley*, 458 U.S. at 203 n.25.

189. The rejection of the “automatic” rule did little for twice-exceptional students in the thirty years post-*Rowley*. See, e.g., *N.P. v. Maxwell*, No. 16-1164, 2017 U.S. App. LEXIS 24803, at *1-5 (4th Cir. Dec. 8, 2017) (failing to use dicta for twice-exceptional student who apparently was progressing grade-to-grade); *Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390 (5th Cir. 2012) (failing to use dicta for twice-exceptional student who was advancing grade-to-grade, but lacked basic skills). The post-*Rowley* cases generally drew a hard line between successful, cognitively advanced students such as Amy Rowley and struggling students with lower cognition such as *Endrew F.* Compare *Hovem*, 690 F.3d at 398-400, with *J.M. v. Morris Sch. Dist. Bd. of Educ.*, No. 10-cv-06660, 2011 WL 6779546, at *15 (D.N.J. Dec. 23, 2011). Given the *Endrew* Court’s explicit discussion of these students’ differences, it appears that the *Endrew* decision will not support a different understanding. See *Endrew F.*, 137 S. Ct. at 996, 999-1000.

190. See *supra* Part II.A.

191. Generally, under *Rowley*, some level of regression or failure has been acceptable. See *supra* note 191 and accompanying text. Under *Endrew*, there is some minor indication that regression is not acceptable; however, individuals primarily bring this claim at the administrative law judge level. See *Student v. Prince George’s Cty. Pub. Sch.*, OAH No. MSDE-PGEO-OT-18-01010, at 47 (Md. Office of Admin. Hearings May 3, 2018), https://decisions-oah.maryland.gov/Hearing%20Documents/172532_Redacted.pdf [<https://perma.cc/23AQ-RCMS>]. Also, these discussions fail to mention *Endrew*’s dicta. See *id.* at 47.

192. See *Endrew F.*, 137 S. Ct. at 999; *Rowley*, 458 U.S. at 203.

193. See *infra* Part II.B.3.

194. See *J.M.*, 2011 WL 6779546, at *11-15.

instance, this language could likely be used if a school district artificially raised a child's grades to ensure that he passed.¹⁹⁵

Of course, it should be noted that some post-*Andrew*, twice-exceptional student decisions have slightly softened on the grade-to-grade language previously discussed.¹⁹⁶ However, a review of these decisions, at least as of early 2019, suggests that the reduced reliance on grade-to-grade language only occurs when a twice-exceptional student's abilities are so out of balance with his progress that the student's IEP objectives must have been patently unsuitable from the beginning.¹⁹⁷ For instance, in *Student v. Prince George's County Public Schools*, a state administrative law judge held that a twice-exceptional student was denied a FAPE because the school did not consider the student's advanced cognitive abilities.¹⁹⁸ This student had an IQ of 121 (superior range) and was identified as having "superior verbal comprehension, superior perceptual reasoning or nonverbal reasoning and gifted verbal abstract thinking."¹⁹⁹ Despite the student's clear cognitive abilities and some supports in the classroom, however, the student was approximately one year behind in his reading abilities.²⁰⁰ The state administrative law judge suggested, in line with advocates' opinions, that the student's giftedness needed to be taken into consideration and further that he should have been advancing at a quicker rate.²⁰¹ However, it should be noted that this situation was unique in that (1) the school provided *no* reading goals despite the student's obvious needs and (2) the school did not ever consider the student's unique status as twice-exceptional (demonstrated by the school's placement of the student in the lowest-level reading class and his teachers' commentary that they had low expectations of the student's abilities).²⁰² Had the school done the bare minimum (e.g., created an IEP that addressed all needs and trained teachers on twice-exceptionality) it is

195. See Pearce, *supra* note 183 ("[T]his footnote serves to protect children from a system that will advance children to a higher grade simply to meet IDEA.").

196. *Prince George's Cty. Pub. Sch.*, OAH No. MSDE-PGEO-OT-18-01010, at 32.

197. See *id.* at 32-40 ("[The school failed to] acknowledge[] ... [a student's individual circumstance of being twice exceptional].").

198. See *id.* at 38.

199. *Id.* at 11.

200. See *id.* at 38.

201. See *id.* at 51-52.

202. See *id.* at 38-39, 41, 44.

likely that the administrative law judge would not have reached the same conclusion.²⁰³ After all, in several similar cases post-*Endrew*, the courts have ruled that twice-exceptional students behind grade-level are receiving a FAPE when some minimum action is taken.²⁰⁴

Thus, there may be some slight shift post-*Endrew* when considering cases such as *Student v. Prince George's County Public Schools*. Such a shift, however, appears to mainly occur when a school fails to consider a student as an individual.²⁰⁵ Otherwise, the lower courts' post-*Endrew* cases do not substantially differ from those decided post-*Rowley*.²⁰⁶ As noted, however, this is not completely surprising given the Court's general adoption of *Rowley's* major tenets.

3. *The IDEIA's Purpose and Other Fairness Concerns Will Prevent Heightened Endrew Language from Increasing the FAPE Standard*

Endrew, like *Rowley*, wholly rejects the "equal opportunity" argument raised by student petitioners, claiming that the IDEIA does not demand equality between disabled students and their non-disabled peers.²⁰⁷ Since the Court rejected an equality standard, it can also be assumed that the Court would similarly reject any standard that requires that disabled students receive *more* than their nondisabled peers.

Endrew's FAPE standard clearly addresses and protects disabled students in self-contained environments and students who are not advancing grade-to-grade.²⁰⁸ Specifically, *Endrew* suggests that these students should receive extra support until they are progress-

203. *See id.*

204. *See, e.g.,* N.P. v. Maxwell, No. 16-1164, 2017 U.S. App. LEXIS 24803, at *7 (4th Cir. Dec. 8, 2017); *Student v. Montgomery Cty. Pub. Sch.*, OAH No. MSDE-MONT-OT-17-05289, at 45-48, 85-87, 90 (Md. Office of Admin. Hearings July 12, 2017), <http://marylandpublicschools.org/programs/Documents/Special-Ed/FSDR/HearingDecisions/2018/1/17-H-MONT-05289.pdf> [<https://perma.cc/5TVU-SV5R>].

205. *See supra* notes 200-203 and accompanying text.

206. *See supra* note 206 and accompanying text.

207. *See* *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 995 (2017); *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198-99 (1982).

208. *See Endrew*, 137 S. Ct. at 1000-01 ("It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.").

ing at individually appropriate levels.²⁰⁹ Thus, *Endrew* allows disabled students to receive services that help them reach the progress that nondisabled students make (namely, grade-to-grade advancement).²¹⁰ But, the Court is also clear that schools are not required to help disabled students progress at rates exceeding those to which a nondisabled student is entitled.²¹¹ Therefore, given that twice-exceptional students largely participate in the general educational curriculum, it is highly unlikely that *Endrew* would ever mandate services that help a student meet “challenging objectives” or make “appropriate” progress if these objectives or progress required more than grade-to-grade advancement.²¹² In other words, a twice-exceptional student (like a nondisabled student) will be confined to services and supports that get him to progress at a grade level rate.²¹³ Once the twice-exceptional student progresses at a more advanced rate, however, a school will likely not provide services—even if this means that the student is trivially progressing or experiencing regression in some skills.²¹⁴

Such a conclusion is perhaps unsurprising. After all, the IDEIA does not include “giftedness” as a category for eligibility, and thus, it should come as no surprise that giftedness will not be supported.²¹⁵ Moreover, even if a particular judge believed that a student deserved more than grade-to-grade advancement, his decision would likely be overturned on the longstanding premise highlighted in both *Endrew* and *Rowley* that judges cannot substitute their own beliefs when considering school policy.²¹⁶

209. *See id.* at 999-1001.

210. *See id.*

211. *See id.* at 995-96, 999-1001.

212. *See id.* at 1000-01.

213. *See id.*

214. *See supra* note 206 and accompanying text. Though decided before *Endrew*, the *Downington* case suggests that issues of giftedness, enrichment, and acceleration will not be decided under the IDEIA. *Downington Area Sch. Dist. v. K.D.*, No. 1485 C.D. 2016, 2017 WL 877316, at *1, *4 n.7 (Pa. Commw. Ct. Mar. 6, 2017).

215. *See* 20 U.S.C. § 1401(3)(A)(i) (2012).

216. *See Endrew F.*, 137 S. Ct. at 1001; *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

III. A POTENTIAL SOLUTION: FOCUSING ON TWICE-EXCEPTIONAL STUDENTS' GIFTS

Andrew's substantive FAPE standard largely failed to produce meaningful change for the twice-exceptional student population.²¹⁷ Grade-to-grade progress is still generally considered sufficient, and, given the language in *Andrew*, it appears that a twice-exceptional student could experience inconsistent progress—or even some regression—while still receiving a FAPE.²¹⁸

Given this reality, what can be done to ensure that twice-exceptional students are actually progressing at individually appropriate levels? Furthermore, how can school districts and state legislatures ensure that twice-exceptional students' academic deficiencies are actually addressed? There is no perfect solution, especially given the variation between individual twice-exceptional students.²¹⁹ Nevertheless, a state statutory creation—Gifted Individualized Education Plans (GIEPs)—could offer additional protections for twice-exceptional students and ensure that these students,²²⁰ like their traditionally disabled counterparts, progress at levels “appropriate in light of [their] circumstances.”²²¹ And, since GIEPs are state creations, they are not tied to the IDEIA and, therefore, can function independently from *Andrew* and *Rowley's* substantive FAPE standard.²²²

A. What Is a GIEP?

A GIEP is a document that is similar in form and substance to an IEP.²²³ A notable distinction, of course, is that a GIEP provides specialized education to assist giftedness whereas an IEP provides specialized education to assist a disability.²²⁴ This means that unlike an IEP, which will regularly include services and accommodations

217. See *supra* Part II.

218. See *supra* Part II.B.

219. See TWICE-EXCEPTIONAL DILEMMA, *supra* note 3, at 5.

220. See *infra* Part III.A.

221. See *Andrew*, 137 S. Ct. at 999.

222. See *infra* Part III.A.

223. See Kautz, *supra* note 137, at 701.

224. See *id.* at 701.

to support deficiencies (for example, shorter assignments, a one-on-one aide, or speech services),²²⁵ a GIEP will include enrichment-based services and accommodations (for example, accelerated courses, cluster grouping with gifted peers, or online education).²²⁶

Like an IEP, a GIEP is an annual document that, under most frameworks, contains (1) a statement describing the student's current performance; (2) a list of tailored, measurable academic goals; and (3) a list of accommodations and services that the school district will provide in order to help the student progress in the classroom and meet his annual goals.²²⁷ Depending on the state statute, the GIEP may share other similarities with the IEP.²²⁸ For instance, a GIEP statute can be written to provide a student and his parents with certain legal protections, safeguards, and causes of action when the GIEP is not implemented correctly or when the student fails to receive an appropriate education.²²⁹

Of course, GIEPs, unlike IEPs, are not mandated by the IDEA or any other federal law.²³⁰ Rather, GIEPs are created via state statute or regulation.²³¹ Currently, only a handful of states offer GIEPs.²³² Importantly, this means that the actual implementation and effectiveness of GIEPs will be based on the state's statutory language and state court interpretation of such language.²³³ Yet, despite some minor state-by-state variation, states that utilize GIEPs have a consistent goal: to provide gifted students a tailored, individualized, and appropriate education.²³⁴

225. See *Supports, Modifications, and Accommodations for Students*, CTR. FOR PARENT INFO. & RES. (Feb. 8, 2017), <https://www.parentcenterhub.org/accommodations/> [<https://perma.cc/TB49-Z3ZR>].

226. See *TWICE EXCEPTIONAL GUIDEBOOK*, *supra* note 1, at C-2; *Gifted Education Guidelines*, PA. DEPT EDUC. (May 2014), <https://www.education.pa.gov/Documents/K-12/Gifted%20Education/Gifted%20Program%20Guidelines.pdf> [<https://perma.cc/6TSH-FPBD>].

227. See Kautz, *supra* note 137, at 701, 703-04.

228. Compare 22 PA. CODE § 16.32 (2019) (describing required GIEP team members), with 20 U.S.C. § 1414(d)(1)(B) (2012) (describing required IEP team members).

229. See 22 PA. CODE § 16.61-65; see also Kautz, *supra* note 137, at 717-18.

230. See Kautz, *supra* note 137, at 699.

231. See *id.*

232. See Carolyn K., *Gifted Education Mandates, by State or Province*, HOAGIES' GIFTED EDUC. PAGE (June 1, 2019), <http://www.hoagiesgifted.org/mandates.htm> [<https://perma.cc/5ZYZ-MYBJ>] [hereinafter *Gifted Education Mandates*].

233. See Kautz, *supra* note 137, at 703, 717-18.

234. See 22 PA. CODE § 16.31(a) (2019); Kautz, *supra* note 137, at 699-702.

B. How Can GIEPs Assist Twice-Exceptional Students?

Using a GIEP to ensure that a twice-exceptional student is receiving an appropriate education may seem counterintuitive. After all, if the student is regressing or declining academically, how is specialized *gifted* education going to support him? The question is a good one, yet it ignores a crucial fact about twice-exceptional students. Namely, these students' gifts and deficits are intertwined and, without a holistic understanding of the student (his strengths and his weaknesses), he may not make appropriate progress.²³⁵

Consider a student with a specific learning disability. Perhaps the student excels in reading comprehension but cannot write proficiently. According to *Andrew*, this twice-exceptional student's IEP should consider the student as an individual, clarify where the student struggles, and develop goals to help the student progress in that area.²³⁶ Since the student struggles in writing, the student's IEP goal may read as follows: "When given a topic, the student will use complete sentences with 80 percent accuracy in four out of five trials." Additionally, the student may receive services, such as pull-out instruction, where a special education teacher remediates certain writing skills. These measures will help the student overcome his writing deficit. While focusing on this writing goal, however, it is possible that the student may experience regression in his area of strength—reading comprehension.²³⁷ This is especially likely if the student is placed or grouped in a lower-level class that matches his writing ability or if the student's teachers do not challenge the student appropriately.²³⁸

235. TWICE EXCEPTIONAL GUIDEBOOK, *supra* note 1, at D-1, D-2, F-2; Marcy J. Douglass, *Twice-Exceptional: Gifted Students with Learning Disabilities Considerations Packet* (Carol Tieso ed., 2008), WM. & MARY TRAINING & TECH. ASSISTANCE CTR. (Apr. 2008), <https://education.wm.edu/centers/ttac/documents/packets/twiceexceptional.pdf> [<https://perma.cc/R64S-5KZ7>].

236. *See supra* Part I.C.2.

237. *See supra* note 141 and accompanying text.

238. *See* Barbara Jackson Gilman et al., *Critical Issues in the Identification of Gifted Students with Co-Existing Disabilities: The Twice-Exceptional*, SAGE OPEN, July-Sept. 2013, at 11-12 (July-Sept. 2013); Office for Exceptional Children, *Identifying and Serving Twice Exceptional Children: Best Practices and the Bottom Line*, OHIO DEP'T EDUC. (Feb. 29, 2016), <https://education.ohio.gov/getattachment/Topics/Other-Resources/Gifted-Education/Teaching-Gifted-Students-in-Ohio/Presentations-on-Gifted-Children/Twice-Exceptional-2016.pdf.aspx> [<https://perma.cc/XK4D-G298>] [hereinafter *Best Practices*] (noting that twice-exceptional

By supplementing this student's IEP with a GIEP, it is possible that the student's strengths can also be addressed, allowing the student's education to truly focus on his "unique circumstances."²³⁹ While the student receives writing remediation via his IEP, he could also, per his GIEP, be placed in enrichment activities, pull-out instruction with a gifted teacher, or online instruction to ensure that his reading comprehension abilities do not stagnate. Though the exact mix of supports and services may vary, what is clear is that, with a GIEP and IEP, the twice-exceptional student can actually receive what *Andrew* promised: appropriate progress throughout the curriculum.²⁴⁰ This sentiment is mentioned in a Philadelphia City School District case that described the interaction between a student's GIEP and IEP:

[O]ne of the remarkable characteristics of the IEP and GIEP is how craftily the district has weaved specialized education across Student's entire regular and gifted education programs, assuring the very structure and continuity Student requires ... while remaining fluid enough to identify and accommodate the ever changing intellectual, emotional, and social needs unique to Student as an individual.²⁴¹

It is important to briefly recognize that adding a GIEP will not necessarily result in a wholly "equal" education and may still not provide a student with the ability to maximize his potential.²⁴² In fact, the Pennsylvania Supreme Court, when analyzing GIEPs, came to the same conclusion as federal courts analyzing IEPs, stating that a GIEP's implementation does not imply that a student will receive the best, most desirable education.²⁴³ Rather, the addition of a GIEP, like an IEP, helps provide a twice-exceptional student with the opportunity to make appropriate progress through-

students may experience regression if not taught appropriately).

239. *Andrew F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 1001 (2017).

240. *See Kautz, supra* note 137, at 719-20.

241. *See Student v. Phila. City Sch. Dist.*, 106 LRP 20576, at 5 (Pa. State Educ. Agency Sept. 8, 2003).

242. *See Centennial Sch. Dist. v. Commonwealth Dep't of Educ.*, 539 A.2d 785, 791 (Pa. 1988) ("[GIEPs] need not 'maximize' the student's ability.").

243. *See id.*

out the curriculum.²⁴⁴ Additionally, a GIEP could help ensure that the student's progress in one academic area is not stymied by a weakness in another academic area.²⁴⁵

Moreover, the addition of the GIEP helps promote the general purpose of the IDEIA (and prior special education laws).²⁴⁶ The EAHCA, a predecessor of the current IDEIA, was originally enacted to prevent disabled students from "sitting idly in [the] classroom[] awaiting the time when they were old enough to 'drop out.'"²⁴⁷ Studies of twice-exceptional students show that without instruction that addresses their needs holistically, they are at an increased risk of growing frustrated, developing behavior problems, and even dropping out.²⁴⁸ Thus, implementing a GIEP requirement that helps meet these students' needs only further serves the original purpose of special education law.²⁴⁹

C. Implementing GIEPs

To give GIEP provisions legally binding force, and to best help twice-exceptional students, state legislatures should incorporate the provisions into their current education laws. Several states have GIEP provisions in their state codes.²⁵⁰ Such provisions could be used as model legislation. Of these several provisions, Pennsylvania's is perhaps the most comprehensive and has been praised by commentators and parents.²⁵¹ Thus, a state seeking to utilize and incorporate GIEPs into its current education laws should model its state laws after Pennsylvania Code section 16.32. Section 16.32 details, among other things, (1) what a GIEP must include, (2) what rights attach to a GIEP, and (3) what timeline schools must follow when preparing and implementing GIEPs.²⁵²

244. See Kautz, *supra* note 137, at 701.

245. See *Best Practices*, *supra* note 238.

246. See *supra* Part I.B.2.

247. Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 191 (1982).

248. Millman, *supra* note 30, at 456-57; see also TWICE-EXCEPTIONAL DILEMMA, *supra* note 3, at 15.

249. See *supra* Part I.B.2.

250. See *Gifted Education Mandates*, *supra* note 232.

251. See Kautz, *supra* note 137, at 703-04, 716-20.

252. See 22 PA. CODE § 16.32(d)-(g) (2019).

Pennsylvania's gifted education provisions constitute an entire, independent chapter within the state code.²⁵³ This means that, unlike some states, Pennsylvania's gifted provisions are not embedded within the state's general education provisions or within the state's special education provisions.²⁵⁴ Thus, a state could easily append a similar GIEP provision to its current gifted education laws or education laws generally. Furthermore, a state could easily tailor the Pennsylvania provisions to meet its unique needs.

Once GIEP legislation is in place, actual implementation of the law would be relatively simple. Since GIEPs are functionally and substantively similar to IEPs, implementation would not be difficult for a state's schools.²⁵⁵ All states currently receive IDEIA funding.²⁵⁶ This means that all states are responsible for following the IDEIA provisions, including the implementation of IEPs.²⁵⁷ Thus, since schools are already familiar with IEPs, there should be little confusion if GIEP provisions are adopted by a state legislature.

D. Potential Issues

Adding GIEPs to a state's laws could certainly help many twice-exceptional students. Yet, despite this, there are several reasons why a state may choose not to enact GIEP laws. These reasons could include (1) the expense of implementing such legislation and (2) a general lack of concern for twice-exceptional students.

First, costs may bar state implementation of GIEPs. Though the writing and creation of the GIEP document is not expensive, the services and accommodations promised in such a document could be costly.²⁵⁸ Screening students for eligibility, creating enrichment opportunities, and providing access to online education, among other things, could prove to be expensive; likewise, any procedural safeguards created in GIEP legislation could prove expensive, especially if parents frequently exercise these rights.²⁵⁹ These costs

253. Gifted provisions are included in Title 22, Chapter 16 of the Pennsylvania Code. See generally *id.* § 16.

254. See, e.g., GA. CODE ANN. § 20-2-152 (2019).

255. See Kautz, *supra* note 137, at 701.

256. See IDEA PRIMER, *supra* note 47, at 17-18.

257. See 20 U.S.C. § 1400 (2012).

258. See IDEA PRIMER, *supra* note 47, at 4.

259. See *id.*

are likely to be noticeable, especially if a state does not already fund gifted education.²⁶⁰

Though these concerns are legitimate, especially given that gifted education, unlike special education, is not federally funded, costs need not be exorbitant. The exact language of a state's GIEP provisions would determine the cost, and the costs could be tailored state-by-state. In an effort to reduce costs, states could decide to limit the number of students eligible for a GIEP. In other words, a state with a broad, generalized definition of giftedness could adjust its current provisions to require that a student demonstrate certain test scores or achievements.²⁶¹ Importantly, narrowing the definition of giftedness could exclude some twice-exceptional students who fail to meet the statutory requirements.²⁶² However, a state hoping to benefit twice-exceptional students specifically could easily overcome this by writing a separate definition of giftedness for students qualifying under the IDEIA. Alternatively, states could limit GIEP provisions solely to twice-exceptional students by requiring IDEIA eligibility in order to qualify under GIEP provisions.²⁶³ Though perhaps less effective, a state could also limit costs without cutting the number of eligible students by restricting the types of accommodations and services it offers or by limiting students' causes of action under GIEP provisions.

Additionally, states could design GIEP provisions with their current laws in mind. Currently, over two-thirds of states mandate gifted education in some form.²⁶⁴ Thus, these states could likely tailor GIEP legislation in a way that utilizes the programs and policies that these states have already designed. Likewise, approximately two-thirds of the states either partially or fully fund gifted

260. See *Support for Gifted Programs*, *supra* note 135 (listing states that do not fund gifted education).

261. Definitions of giftedness vary state-by-state. Compare ALASKA ADMIN. CODE tit. 4, § 52.890 (2019), with *Gifted and Talented Defined*, ME. EDUCATORS GIFTED & TALENTED, <http://megat.org/gifted-in-maine/> [<https://perma.cc/2K2V-V78X>].

262. This is especially true since many twice-exceptional students' disabilities mask their gifts. See Millman, *supra* note 30, at 478.

263. As the Pennsylvania GIEP provisions are written, all gifted students—twice-exceptional and traditionally gifted—are eligible. See 22 PA. CODE § 16.21 (2019).

264. See *Support for Gifted Programs*, *supra* note 135.

education.²⁶⁵ These states could redesign their current spending in a way that comports with GIEP legislation.

Second, a general lack of concern for twice-exceptional students could lead a state not to implement GIEP provisions.²⁶⁶ This lack of concern is generally steeped in either a lack of awareness or a belief that gifted students generally do not need support, regardless of their disabilities.²⁶⁷ Unfortunately, these beliefs may be difficult to overcome. Yet, since every state implements the IDEIA and, therefore, has some interest in serving America's special education students, it would stand to reason that states would be willing to fully support this subset of students as well.

E. Alternative Strategies

As previously mentioned, GIEP legislation does not offer a perfect solution for twice-exceptional students.²⁶⁸ Though there are perhaps options that could better serve twice-exceptional students, these options are either unrealistic or present the same challenges described above.²⁶⁹ Nevertheless, for comparative purposes, some alternative solutions will briefly be discussed.

Another way to serve twice-exceptional students would be to amend the IDEIA and include either giftedness (or twice-exceptionality) as a disability category.²⁷⁰ As of now, the IDEIA does not explicitly identify either.²⁷¹ If giftedness were recognized as a category, the courts may demand that schools accommodate more than mere grade-to-grade progress.²⁷² The fact is, however, that giftedness is unlikely to be recognized as a category. Special education law has recognized the same thirteen categories since

265. *See id.*

266. *See* Christensen, *supra* note 32, at 73.

267. *See* Miller, *supra* note 117, at 95-99.

268. *See supra* Part III.D.

269. *See supra* Part III.D.

270. This solution could be preferable to the implementation of GIEPs since leaving GIEP implementation to the states would create a nationwide patchwork of regulations related to twice-exceptional students.

271. 20 U.S.C. § 1401(3)(A)(i) (2012).

272. This is, of course, speculative. It is possible that the addition of "giftedness" or "twice-exceptionality" as an IDEIA category would, beyond student identification, result in few practical changes.

1990.²⁷³ And, based on the legislative history of the IDEIA, which appeared to prioritize the lowest-functioning disabled students, it is unlikely that giftedness will be recognized in the near future.²⁷⁴

Some states, however, have incorporated giftedness as an eligibility category within their special education law.²⁷⁵ Unfortunately, the effect of these statutes on twice-exceptional students is difficult to determine since, at the time of this writing, there are no published cases fully examining how twice-exceptional students are treated under such provisions. The effect would likely be similar to GIEP provisions in Pennsylvania, where a twice-exceptional student's GIEP and IEP are merged into one cohesive document.²⁷⁶ It would appear that a state that has giftedness as an eligibility category would do the same. There are two drawbacks to this approach, however. First, states would have a more difficult time narrowing gifted education provisions since, presumably, giftedness would be treated like all other eligibility categories. This, as previously mentioned, may increase costs.²⁷⁷ Second, states using this approach most likely use *Andrew* and *Rowley* as guidelines for their gifted provisions. This may mean that the level of progress would be no different than how twice-exceptional students are currently treated under federal law.²⁷⁸

Compared to these possible approaches, using a GIEP provision to ensure twice-exceptional students' needs are met provides perhaps the most workable solution for the states. Unlike the alternative approaches briefly discussed here, GIEP provisions permit state courts the freedom to interpret and expand gifted provisions beyond what is allowed in *Andrew*.

CONCLUSION

While the *Andrew* decision positively affected special education students on the whole, the decision's impact on twice-exceptional

273. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 101(a), 104 Stat. 1103, 1103.

274. *See Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 180-83 (1982).

275. *See, e.g.*, GA. CODE ANN. § 20-2-152 (2019).

276. *See Kautz, supra* note 137, at 703-04.

277. *See supra* Part III.D.

278. This is speculative since cases from these states are not published.

students is less clear. As of this writing, the impact on twice-exceptional students has been minimal—unless a school district clearly fails to recognize a student's twice-exceptional nature.²⁷⁹ It appears, however, that the *Endrew* decision will fail to bring about substantial change or live up to some advocates' expectations. The language of the decision, its adherence to *Rowley*, and fairness concerns all suggest this.²⁸⁰

Even if *Endrew* fails to bring about monumental change, states can still better serve their twice-exceptional student populations. State-based provisions, such as Gifted Individualized Education Plans, can help twice-exceptional students by addressing their gifts and weaknesses collectively and by ensuring that these students receive an “appropriately ambitious” education.²⁸¹

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279. See *Student v. Prince George's Cty. Pub. Sch.*, OAH No. MSDE-PGEO-OT-18-01010, at 47 (Md. Office of Admin. Hearings May 3, 2018), https://decisions-oah.maryland.gov/Hearing%20Documents/172532_Redacted.pdf [<https://perma.cc/X2C5-RZDB>].

280. See *supra* Part II.B.

281. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017).

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