Endrew's Impact on Twice-Exceptional Students

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NOTES

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INTRODUCTION

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

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). Once a student qualifies for services under the IDEIA, he is entitled to receive a Free and Appropriate Public Education (FAPE). 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].” Given the general nature of this statutory guidance, the courts have been largely responsible for determining what constitutes a FAPE. And, while the courts have created relatively clear standards, applying these standards to twice-exceptional students has proven problematic.

4. See infra notes 25-27 and accompanying text.
5. See infra Part I.B.2.
7. See Peter W.D. Wright & Pamela Darr Wright, Wrightslaw: Special Education Law 51 n.23 (2d ed. 2006).
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.\footnote{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).} He has superior cognitive ability, as shown through intelligence testing, and he makes above-average grades in his general education courses.\footnote{See id.} Yet, despite this, Per’s writing ability is subpar, falling around a second-grade level.\footnote{See id. at 718-19, 721.} In fact, Per and his teachers assert that he takes multiple hours to write paragraphs and fill out one-page forms.\footnote{See id. at 751.} Despite these deficiencies, however, Per can read and comprehend at an age-appropriate level.\footnote{See id. at 751.} 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, \textit{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.”\footnote{458 U.S. 176, 207 (1982).} 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.\footnote{See Hovem, 690 F.3d at 398-400.} 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.\footnote{See id. at 398.}

The Fifth Circuit’s holding represented a typical decision under the \textit{Rowley} standard.\footnote{See infra Part I.C.1.} Nevertheless, many special education and disability advocates suggested that such results were problematic.\footnote{See Emma Brown, \textit{Supreme Court to Decide: What Level of Education Do Public Schools Legally Owe to Students with Disabilities?}, WASH. POST (Jan. 10, 2017), https://www.}
These advocates claimed that the Rowley standard was too lenient, allowing school districts to satisfy FAPE requirements without fully addressing students’ needs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{19} See id.
  \item \textsuperscript{20} See id.
  \item \textsuperscript{21} See 137 S. Ct. 988, 999-1000 (2017); infra Part II.A.
  \item \textsuperscript{22} Endrew F., 137 S. Ct. at 999.
  \item \textsuperscript{23} Id. (emphasis added).
  \item \textsuperscript{24} See infra Part II.B.
\end{itemize}
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). Notably, “twice-exceptional” is not a listed disability category. 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.” 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.

Because twice-exceptional students present both disability and giftedness, their educational needs stretch across different educational laws and policy areas. 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.


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).


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. 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. Due to this unique spread of giftedness and disability, twice-exceptional students are often overlooked and can be difficult to identify. In fact, twice-exceptional students have been described by educators as “the most misjudged, misunderstood, and neglected segment of the student population.” 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.”

These identification difficulties matter because twice-exceptional students face great difficulty in the classroom if their divergent needs are not met. 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. Moreover, research suggests that these feelings, if not addressed, may prompt a twice-exceptional student to act out and develop other behavioral issues.

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.
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.\(^3^7\)

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.\(^3^8\) And, unlike “traditionally” disabled students, twice-exceptional students can often mask their deficits by developing coping mechanisms.\(^3^9\) 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.\(^4^0\)

Twice-exceptional student classroom placement also proves difficult.\(^4^1\) 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).\(^4^2\) 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.\(^4^3\) Given twice-exceptional students' cognitive

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37. See id.


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 IDEIA requirements that a student be placed in the least restrictive environment, many twice-exceptional students participate primarily in the mainstream environment.

B. An Overview of Federal Special Education Law

Special education is regulated through federal law. All states currently receive funding through the federal IDEIA, meaning that the states must meet minimum requirements, such as providing disabled students with a FAPE. 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. These early legislative efforts resulted in the creation of federal grant programs. The grant programs were meant to motivate the states to dedicate resources 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].


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).


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].


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,


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.


57. See id.

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:

62. See Wright & Wright, supra note 7, at 15-16.
66. Endrew F., 137 S. Ct. at 993.
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.
Special 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).
75. 20 U.S.C. § 1401(14).
receive. An IEP is updated annually and therefore changes and develops as the student progresses through his schooling.

C. The FAPE Standard

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

The United States Supreme Court first reviewed the FAPE standard in Rowley. Administrative law judges and federal courts relied on Rowley’s interpretation of the FAPE standard for thirty-five years. Then, in 2017, the Court readdressed and clarified the FAPE standard in Endrew. Importantly, Endrew did not overturn Rowley. The Court did signal some alterations to the Rowley standard for some students, however. 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. Amy’s parents believed that she was denied a FAPE...
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.
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,

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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).
98. See id.
100. Howell, supra note 96, at 607-09.
103. Id. at 996.
however, Endrew was not a strong student and, according to his parents, he had stopped growing academically and functionally.\textsuperscript{104} His IEPs corroborated his parents’ concerns, since his annual IEP goals were stagnant and reflected little to no academic advancement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{107} A state administrative law judge held that Endrew had not been denied a FAPE.\textsuperscript{108} This decision was affirmed by the United States District Court for the District of Colorado and eventually by the Tenth Circuit.\textsuperscript{109}

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

The Supreme Court reversed the Tenth Circuit, holding that the “merely more than \textit{de minimis}” standard failed to ensure that students received a FAPE.\textsuperscript{112} The Court proposed a new standard drawn heavily from \textit{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.”\textsuperscript{113} Given the highly personalized nature of IEPs, the

\begin{enumerate}
\item \textsuperscript{104} Id. In a recent report, the U.S. Department of Education analyzed \textit{Endrew’s} scope, stating that the \textit{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, \textit{supra} note 27, at 5. \textit{Endrew} has been applied in cases involving twice-exceptional students. See \textit{infra} note 198 and accompanying text.
\item \textsuperscript{105} \textit{See Endrew F.}, 137 S. Ct. at 996.
\item \textsuperscript{106} \textit{See id.}
\item \textsuperscript{107} \textit{See id. at 997.}
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id. at 1001-02.
\item \textsuperscript{113} Id. at 999.
\end{enumerate}
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.
118. See supra Part I.B.2.
120. See Haney, supra note 119, at 281.
121. See Millman, supra note 30, at 468-69.
provide some funding for gifted students. In 1969, Congress renewed its interest in gifted education and passed The Gifted and Talented Children's Education Assistance Act of 1969. This Act, like its predecessor, provided federal funding for gifted programming. Interest in gifted education continued to rise during the early 1970s. One of the most significant legislative victories for gifted education occurred as part of the Elementary and Secondary Education Act of 1974. This Act created the Office of the Gifted and Talented and authorized appropriations for gifted and talented education. These advances were further supplemented by the 1978 Gifted and Talented Children's Education Act. 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.

Currently, the Jacob K. Javits Gifted and Talented Students Education Act (Javits Act) governs federal gifted and talented education. Unlike the IDEIA, which provides substantive and procedural safeguards for disabled students, the Javits Act is a funding program that supports programs, projects, and research that help schools better identify and serve gifted and talented students. 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. 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.
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 IDEIA funding in 2017. IDEA PRIMER, supra note 47, at 2.  
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-8NXK] [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. In addition to focusing on specific student programming, states have also created a variety of procedural requirements. Some states, for instance, have parental notification requirements, teacher training requirements, or provisions that require the hiring of a gifted education administrator.

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. 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. 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


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/5290662/ (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. 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). 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.

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.” 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. 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. 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. Since twice-exceptional students have the ability to progress through the curriculum at grade-level (or above grade-level) rates, the move from Rowley to Endrew largely fails


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).


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.\(^\text{150}\) 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.\(^\text{151}\) In this vein, advocates often cite *Endrew*’s call for a “markedly more demanding” standard.\(^\text{152}\) 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.\(^\text{153}\)

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\(^\text{151}\). 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.


\(^\text{153}\). 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.” As advocates suggest, this language in *Endrew*, at least when considered in isolation, could make a difference for twice-exceptional students. 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. 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.

Finally, when viewed in isolation, the language in *Endrew* could support advocates’ position since the language appears to raise *Rowley*’s “floor of opportunity,” 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. *Endrew* hints that the *Rowley* fact situation and the governing law at the time, the EAHCA, rendered a focus on actual academic benefit unnecessary. And, though *Endrew* fails to comprehensively describe the shift from the EAHCA to the modern IDEIA, scholars have recognized that the various amendments and reauthorizations

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.
159. See id. at 200-02.
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.\textsuperscript{161}

Taken together, advocates’ reading of \textit{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 \textit{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.

\textbf{B. A Holistic Reading of Endrew}

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

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

The heightened language scattered throughout \textit{Endrew} (for example, “challenging objectives,” “markedly more demanding,” and “ambitious in light of [the child’s] circumstances”) is not presented in isolation.\textsuperscript{162} Take the “challenging objectives” language, for in-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{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, \textit{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).
\item \textsuperscript{162} \textit{Endrew F.}, 137 S. Ct. at 1000.
\end{itemize}
\end{footnotesize}
stance. On its own, a student’s right “to meet challenging objectives” appears to raise the FAPE standard for twice-exceptional students. 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. 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. 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.” 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. 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.”

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. As previously mentioned, IDEIA provisions mandate that a student be placed in the least restrictive environment. 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.\footnote{172. See supra note 45 and accompanying text.}

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.\footnote{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).} 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.\footnote{174. Hovem, 690 F.3d at 397, 399-400.} Under this approach, a student’s deficiencies may be disregarded if he has made “appropriate” progress in his other courses,\footnote{175. See supra Part I.A.} 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.\footnote{176. See supra Part I.A.}

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.\footnote{177. See Colker, supra note 83, at 443.} Instead, the Court minimized Rowley’s applicability when handling “close[,] cases”—such as Endrew—while reaffirming some of Rowley’s major tenets,\footnote{178. Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 998 (2017).} notably: (1) the educational system’s ability to effectively
monitor students in mainstream courses,\textsuperscript{179} (2) the appropriateness of grade-to-grade advancement,\textsuperscript{180} and (3) the belief that lower-functioning disabled students should receive more protections and services than higher-functioning disabled students.\textsuperscript{181} Given this, \textit{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 \textit{at least} be “appropriate in light of [his] circumstances.”\textsuperscript{182}

Yet, despite \textit{Endrew}’s general endorsement of \textit{Rowley}, some commentators and advocates have noted that dicta from \textit{Endrew} could limit \textit{Rowley}’s applicability.\textsuperscript{183} Unlike the \textit{Rowley} decision, which clearly emphasized that mainstream grade-to-grade progress generally meant that a student received a FAPE,\textsuperscript{184} \textit{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.\textsuperscript{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.\textsuperscript{186}

Nevertheless, this language is unlikely to raise the FAPE standard for twice-exceptional students since this dicta does not distinguish \textit{Endrew} from \textit{Rowley}.\textsuperscript{187} Though rarely cited by commentators interpreting \textit{Endrew}, \textit{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

\textsuperscript{179} See id. at 999.
\textsuperscript{180} See id. at 999-1000.
\textsuperscript{181} See id. at 996, 1000.
\textsuperscript{182} Id. at 998-99.
\textsuperscript{185} \textit{Endrew F.}, 137 S. Ct. at 1000 n.2.
\textsuperscript{186} Id. at 1000; see \textit{supra} note 185 and accompanying text.
\textsuperscript{187} \textit{Compare Endrew}, 137 S. Ct. at 1000 n.2, with \textit{Rowley}, 458 U.S. at 203 n.25.
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. It is possible, however, that the language was meant to apply to twice-exceptional students who, like the student in the earlier hypothetical, 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. *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. 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. More likely, the Court’s dicta was included as a placeholder to prevent bad behavior from school districts.

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

Of course, it should be noted that some post-\textit{Endrew}, twice-exceptional student decisions have slightly softened on the grade-to-grade language previously discussed.\textsuperscript{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.\textsuperscript{197} For instance, in \textit{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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

\textsuperscript{195}. See Pearce, \textit{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.”).


\textsuperscript{197}. See id. at 32-40 (“The school failed to acknowledge[ ] ... [a] student’s individual circumstance of being twice exceptional.”).

\textsuperscript{198}. See \textit{id.} at 38.

\textsuperscript{199}. \textit{Id.} at 11.

\textsuperscript{200}. See \textit{id.} at 38.

\textsuperscript{201}. See \textit{id.} at 51-52.

\textsuperscript{202}. See \textit{id.} at 38-39, 41, 44.
likely that the administrative law judge would not have reached the same conclusion. 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.

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. Otherwise, the lower courts’ post-Endrew cases do not substantially differ from those decided post-Rowley. 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. 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. Specifically, Endrew suggests that these students should receive extra support until they are progress-

203. See id.
205. See supra notes 200-203 and accompanying text.
206. See supra note 206 and accompanying text.
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. Thus, Endrew allows disabled students to receive services that help them reach the progress that nondisabled students make (namely, grade-to-grade advancement). 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. 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. 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. 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.

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. 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.

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.
III. A Potential Solution: Focusing on Twice-Exceptional Students’ Gifts

*Endrew*’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 *Endrew*, 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 *Endrew* 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 *Endrew*, 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). A GIEP will include enrichment-based services and accommodations (for example, accelerated courses, cluster grouping with gifted peers, or online education).

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. Depending on the state statute, the GIEP may share other similarities with the IEP. 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.

Of course, GIEPs, unlike IEPs, are not mandated by the IDEIA or any other federal law. Rather, GIEPs are created via state statute or regulation. 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. 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.

227. See Kautz, supra note 137, at 701, 703-04.
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/5YZF-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 Endrew, 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

236. See supra Part I.C.2.
237. See supra note 141 and accompanying text.
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.”\footnote{Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).} 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 Endrew promised: appropriate progress throughout the curriculum.\footnote{See Kautz, supra note 137, at 719-20.} 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.\footnote{See Student v. Phila. City Sch. Dist., 106 LRP 20576, at 5 (Pa. State Educ. Agency Sept. 8, 2003).}

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.\footnote{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.”).} In fact, the Pennsylvaniana 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.\footnote{See id.} Rather, the addition of a GIEP, like an IEP, helps provide a twice-exceptional student with the opportunity to make appropriate progress through-

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students may experience regression if not taught appropriately).
\footnote{Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017).}
\footnote{See Kautz, supra note 137, at 719-20.}
\footnote{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.”).}
\footnote{See id.}
\end{flushleft}
out the curriculum. 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.

Moreover, the addition of the GIEP helps promote the general purpose of the IDEIA (and prior special education laws). 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.’” 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. Thus, implementing a GIEP requirement that helps meet these students’ needs only further serves the original purpose of special education law.

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. 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. 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.

244. See Kautz, supra note 137, at 701.
245. See Best Practices, supra note 238.
246. See supra Part I.B.2.
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. 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. 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. All states currently receive IDEIA funding. This means that all states are responsible for following the IDEIA provisions, including the implementation of IEPs. 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. 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. These costs

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253. Gifted provisions are included in Title 22, Chapter 16 of the Pennsylvania Code. See generally id. § 16.
255. See Kautz, supra note 137, at 701.
256. See IDEA PRIMER, supra note 47, at 17-18.
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.\footnote{260}{See Support for Gifted Programs, supra note 135 (listing states that do not fund gifted education).}

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.\footnote{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].}

Importantly, narrowing the definition of giftedness could exclude some twice-exceptional students who fail to meet the statutory requirements.\footnote{262}{This is especially true since many twice-exceptional students’ disabilities mask their gifts. See Millman, supra note 30, at 478.}

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.\footnote{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).}

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.\footnote{264}{See Support for Gifted Programs, supra note 135.} 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
education. 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. 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. 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.

\textbf{E. Alternative Strategies}

As previously mentioned, GIEP legislation does not offer a perfect solution for twice-exceptional students. Though there are perhaps options that could better serve twice-exceptional students, these options are either unrealistic or present the same challenges described above. 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. As of now, the IDEIA does not explicitly identify either. If giftedness were recognized as a category, the courts may demand that schools accommodate more than mere grade-to-grade progress. The fact is, however, that giftedness is unlikely to be recognized as a category. Special education law has recognized the same thirteen categories since

\begin{itemize}
  \item[265.] See id.
  \item[266.] See Christensen, supra note 32, at 73.
  \item[267.] See Miller, supra note 117, at 95-99.
  \item[268.] See supra Part III.D.
  \item[269.] See supra Part III.D.
  \item[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.
  \item[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.
\end{itemize}
1990.\textsuperscript{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.\textsuperscript{274}

Some states, however, have incorporated giftedness as an eligibility category within their special education law.\textsuperscript{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.\textsuperscript{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.\textsuperscript{277} Second, states using this approach most likely use Endrew 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.\textsuperscript{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 Endrew.

**CONCLUSION**

While the Endrew decision positively affected special education students on the whole, the decision’s impact on twice-exceptional
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.\textsuperscript{279} It appears, however, that the \textit{Endrew} decision will fail to bring about substantial change or live up to some advocates’ expectations. The language of the decision, its adherence to \textit{Rowley}, and fairness concerns all suggest this.\textsuperscript{280}

Even if \textit{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.\textsuperscript{281}

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\textsuperscript{280.} See supra Part II.B.


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