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An Argument for Cadillacs Instead of Chevrolets: How the Legal System Can Facilitate the Needs of the Twice-Exceptional Child

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I. INTRODUCTION

"The [Individuals with Disabilities] Act requires that the . . . schools provide the educational equivalent of a serviceable Chevrolet . . . [and] [a]ppellant, however, demands that the . . . school system provide a Cadillac . . ." stated the Court in *Doe v. Board of Education of Tullahoma City Schools.*[1] In so doing, the *Tullahoma* Court explained why the Individuals

1. 9 F.3d 455, 459 (6th Cir. 1993).

with Disabilities Education Act ("IDEA"),[2] which benefits special needs children, was not applicable to the gifted yet disabled child. But why must a child be provided with either a Chevy or a Cadillac? Why can't the gifted disabled child be treated appropriately to his or her needs—both gifted and disabled?

Throughout the evolution of United States education law, the goal of both legislators and educators has been to balance the needs of the child, the needs of society and the benefits a successful education can create for all parties.[3] The government, at both the state and federal levels, has made great strides to improve the educational experiences for all children. Specifically, they have enacted extensive legislation to strengthen the educational rights of disabled children through the enactment of both the IDEA and Section 504 of the Rehabilitation Act of 1973.[4] Additionally, although the rights of the disabled student are considerably more far-reaching than the rights of gifted students, for more than thirty years Congress has recognized and acknowledged a need to supply gifted children with an enhanced educational experience.[5] More recently, the federal government reasserted its commitment to education by enacting the No Child Left Behind Act ("NCLB"), ushering in sweeping changes to education in order to "close the achievement gap with accountability, flexibility, and choice, so that no child is left behind."[6]

However, despite the federal government's attempts to improve education for all of America's students, one group in particular seems to be caught in a struggle for how to best satisfy their distinctive needs. These children are known as the "twice-exceptional" children.[7] They are gifted and highly intelligent. Yet, they have some type of disability that prevents them from reaching their potential. They may have a physical disability, such as deafness, blindness or cerebral palsy. Or, they may have a learning disability such as Attention Deficit Hyperactivity Disorder ("ADHD") or dyslexia.[8] Or, they may have an emotional disability such as anxiety or

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2. 20 U.S.C. §§ 1400-1419 (2004) [hereinafter IDEA 04]. The Act the court referred to in *Tullahoma* is the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) [hereinafter EAHCA], which is the precursor to the IDEA. *See infra* note 45 and accompanying text.

3. *See infra* Part II.

4. *See* Pub. L. No. 93-112, 87 Stat. 355 (1973) [hereinafter RA504]; *see also infra* Part II.B.2.

5. *See* SIDNEY MARLAND, EDUCATION OF THE GIFTED AND TALENTED: REPORT TO CONGRESS OF THE UNITED STATES BY THE U.S. COMMISSIONER OF EDUCATION (1972) [hereinafter THE MARLAND REPORT]; *see also infra* Part II.C.

6. Pub. L. No. 107-110, 115 Stat. 1425, 1425 (2002) [hereinafter NCLB]. The stated purpose of NCLB is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." *Id.* § 1001, 115 Stat. at 1439.

7. *See infra* Part III.

8. Attention-Deficit/Hyperactivity Disorder ("ADHD") is defined as "a persistent pattern of inattention and/or hyperactivity-impulsivity that is . . . typically observed in individuals at a

conduct disorder.[9] Some may even have multiple disorders, comprised of any conceivable combination of physical, learning and emotional disorders—all of which seriously impede their ability to function and perform in the traditional classroom. Yet, as previously mentioned, they are intellectually gifted and likely bored and/or frustrated by the pace and structure of the traditional classroom, much less any remedial programming that might take place in a standard special education program.[10]

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comparable level of development . . . ." AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 85 (4th ed. 2000) [hereinafter DSM-IV-TR]. The disorder is manifested in social situations, as well as academic and occupational situations. *Id.* Generally, symptoms of hyperactivity are fidgetiness, squirming, inappropriate running and climbing, and inability to remain seated. *Id.* at 86. Impulsivity is manifested by impatience, frequent interruptions, and difficulty in delaying responses. *Id.* ADHD is frequently defined in subgroups of ADHD, Combined Type (both attention deficit and hyperactive behavior), ADHD, Predominantly Inattentive, and ADHD, Predominantly Hyperactive-Impulsive. *Id.* at 87. The International Dyslexia Association has defined dyslexia as "a neurologically based . . . disorder which interferes with the acquisition and processing of language. Varying in degrees of severity, it is manifested by difficulties in receptive and expressive language, including phonological processing, in reading, writing, spelling, handwriting, and sometimes in arithmetic." DAPHNE M. HURFORD, TO READ OR NOT TO READ: ANSWERS TO ALL YOUR QUESTIONS ABOUT DYSLEXIA 36-37 (First Touchstone ed. 1999).

9. Anxiety Disorder is a general term encompassing a wide variety of distinct disorders such as: 1) Panic Attack (sudden onset of "intense apprehension, fearfulness, or terror"); 2) Specific Phobia (significant anxiety generated by exposure to a specific feared object or situation); 3) Social Phobia (significant anxiety brought about by exposure to "social or performance situations"); 4) Obsessive-Compulsive Disorder ("obsessions (which cause marked anxiety or distress) and/or by compulsions (which serve to neutralize anxiety)"); and 5) Generalized Anxiety Disorder (persistent anxiety or distress lasting at least six months). DSM-IV-TR, *supra* note 8, at 429. Conduct disorder, which can range from mild, to moderate to severe, is defined as "a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated." *Id.* at 93. Primary diagnostic criterions for conduct disorder are: 1) aggression towards people and/or animals; 2) destruction of property; 3) theft and deceitfulness; and 4) serious violations of rules. *Id.* at 98-99.

10. It is additionally important to recognize that children, in general, have different areas of strengths and weaknesses and different learning styles. Dr. Mel Levine has identified eight distinct learning "systems" that feed into the mind's overall "Neurodevelopmental System" which works as different skills and tools that enable the child to learn. MEL LEVINE, M.D., A MIND AT A TIME 28-30 (2002). Dr. Levine's eight systems are: 1) Attention Control System (working as the "administrative bureau of the brain" to regulate, control and distribute the "mental energy" necessary to learn); 2) Memory System (the mind's ability to remember – either in short term memory, active working memory, or long term memory - the vast amounts of knowledge and facts required to succeed in school); 3) Language System (a broad based system comprised of the ability to decode and recognize language sounds, understanding various vocabulary concepts, mastering expressive and written language skills, and written and spoken comprehension); 4) Spatial Ordering System (the ability to "deal with or create information arranged in a gestalt, a visual pattern, or a configuration" so that the child can understand how things "fit together" to form recognizable patterns and shapes); 5) Sequential Ordering System (the ability to comprehend "chains of information" in a sequentially organized pattern); 6) Motor System (comprised of both fine motor skills and gross motor skills, this system is "supposed to govern the very precise and complex network of tight connections between the brain and various muscles all over the body"); 7) Higher Thinking System ("the ability to

Regrettably for these students, many will be forced to choose between services for special education and services for gifted education. This is true, in large part, because the United States Supreme Court has held that the school's responsibility for special education under the IDEA is to deliver services "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[11] Obviously, an intellectually gifted child, despite his or her disability, is capable of far more than simply achieving passing marks and advancing to the next grade. Thus, pursuant to the Supreme Court's holding, under the IDEA the gifted and disabled learner is not fully able to benefit from the educational services offered.

Furthermore, a large percentage of twice-exceptional students will not receive any services because, as this comment will show, they will never be identified as either gifted or disabled and subsequently, will not qualify for any special services.[12] In what is perhaps the most ironic twist in the tale of these children, the current iteration of the gifted education statute (which is currently included as a subsection of NCLB) expressly dictates that a large portion of the funding for servicing gifted children is designated to specifically search for and include the gifted/disabled learner within the gifted program.[13]

Part II of this comment sets forth the history of federal education law, and the history and evolution of special education law and gifted education law.[14] Part III defines and discusses the twice-exceptional child, including the educational experiences and legal dilemmas confronted by these children and their families.[15] Part IV discusses the legal choices and approaches families of twice-exceptional children have in trying to best accommodate their children's educational needs.[16] Part V concludes the comment.[17]

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problem-solve and reason logically, to form and make use of concepts . . . to understand how and when rules apply, and to get the point of a complicated idea."); and 8) Social Thinking System (the ability to act or perform appropriately in social situations and to correctly understand and interpret social queues and norms). *Id.* at 30-35, 92. Furthermore, a child's ability to learn is impacted by their "Neurodevelopmental Profile" which is comprised of genetic factors, environmental influences, temperament/emotional factors, family factors, influence of peers, cultural values, educational experiences and the child's physical health. *Id.* at 42. Taking all of these elements together, both parents and educators can then recognize the child's various areas of strengths and weakness and use this information to structure the child's academic experience for success. *Id.* at 299-300.

11. Bd. of Educ. v. Rowley, 458 U.S. 176, 204 (1982).
12. *See infra* Part III.
13. *See* NCLB, Pub. L. No. 107-110, § 5465, 115 Stat. 1425, 1828 (2002).
14. *See infra* notes 18-105 and accompanying text.
15. *See infra* notes 106-55 and accompanying text.
16. *See infra* notes 156-203 and accompanying text.
17. *See infra* notes 204-08 and accompanying text.

II. HISTORY OF EDUCATION LAW

A. General Education

Although most, if not all state constitutions contain a state constitutionally recognized right to education,[18] there is no such federal constitutional right.[19] However, where public education is provided by the State, the United States Supreme Court has defined narrow categories of people worthy of special constitutional protections on education: specifically race, gender, and alienage.[20]

In the landmark case of *Brown v. Board of Education*, the Supreme Court held that racial segregation of public school students violated the Equal Protection Clause of the Constitution.[21] The Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the

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18. *See* Roni R. Reed, *Education and the State Constitutions: Alternatives for Suspended and Expelled Students*, 81 CORNELL L. REV. 582, 582 (1996) (explaining that all state constitutions have an education clause and that most of these clauses have been found to create a fundamental right to education). *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (holding education is a fundamental interest); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (finding the right to an adequate education is fundamental); Skeen v. State, 505 N.W.2d 299, 313 (Minn. 1993) (holding education is a fundamental right); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997) (holding that a constitutionally adequate public education is a fundamental right); Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) (holding the state constitution guarantees the right to an education); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 256 (N.D. 1994) (finding education is a fundamental right); Scott v. Commonwealth, 443 S.E.2d 138, 142 (Va. 1994) (holding education is a fundamental right); Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979) (holding education is a fundamental constitutional right).

19. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (holding education is not a right afforded protection under the United States Constitution); *see also infra* notes 176-79 and accompanying text.

20. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 556 (1996) [hereinafter VMI] (applying constitutional protections in the area of gender); Plyler v. Doe, 457 U.S. 202, 230 (1982) (applying constitutional protections in the area of alienage); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (applying constitutional protections to education in the area of race). *See generally*, PERRY A. ZIRKEL, ET AL. A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION (2001) [hereinafter Zirkel, DIGEST] (presenting a thorough accounting and summary of United States Supreme Court cases affecting education).

21. *See Brown*, 347 U.S. at 495. *Brown*, one of the seminal cases in both civil rights and education law was part of a group of five cases brought by students residing in Kansas, South Carolina, Virginia and Delaware. *Id.* at 486. In all of the states, the issue concerned the constitutionality of the segregated education of black and white students generated by the *Plessy v. Ferguson*, 163 U.S. 537 (1896) ruling of "separate but equal." *Brown*, 347 U.S. at 488. The *Brown* Court overruled *Plessy* and held, "in the field of public education the doctrine of 'separate but equal' has no place." *Id.* at 495.

> great expenditures for education both demonstrate our recognition of the importance of education to our democratic society . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[22]

In *Plyler v. Doe*, the Court held that discrimination based on alienage, absent a "substantial state interest," violated the Equal Protection Clause of the Fourteenth Amendment.[23]

And finally, in *United States v. Virginia ("VMI")*, the Supreme Court held that discrimination in public education based upon gender, although not worthy of strict scrutiny review, was nonetheless subject to a standard of "exceedingly persuasive justification."[24] The Court found that the State did not meet this standard under the Virginia statute that forbade women from enrolling at the Virginia Military Institute.[25] Thus, discrimination based on gender was also found to be a violation of the Fourteenth Amendment's Equal Protection Clause absent such a justification.[26]

Moreover, in addition to the decisions in the federal courts, the Federal Government has influenced state education policies through various federal funding grants. One of the first and most influential of these was the Elementary and Secondary Education Act of 1965 ("ESEA 65"),[27] which granted the states federal funding for education, provided that the state's educational agencies complied with specific directives promulgated by the federal government.[28] Congress has continued to influence the state's education policies with a variety of funding measures affecting a wide assortment of programs, including but not limited to, school performance, treatment of disadvantaged students, testing methods and measures, special education, and gifted education.[29]

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22. *Brown*, 347 U.S. at 493.

23. *Plyler*, 457 U.S. at 230. The question addressed in *Plyler* was whether or not children of Mexican nationals who had entered the country illegally were entitled to the same free public education offered to children of American citizens or legally admitted aliens. *Id.* at 205-06. Although the Court reiterated its position that education was not a fundamental right, it nonetheless held that the State had not met its burden of showing a substantial state interest as a justification to deny the children access to public education. *Id.* at 230; *see also infra* notes 140-142 and accompanying text.

24. *VMI*, 518 U.S. at 533-34. The Virginia Military Institute ("VMI"), which was established in 1839 and had an impressive record of "producing leaders," was the "sole single-sex school among Virginia's 15 public institutions of higher learning." *Id.* at 520. Accordingly, women desirous of the services and educational opportunities offered by the school initiated litigation alleging a violation of their equal protection rights. *Id.* at 523.

25. *Id.* at 533-34.

26. *Id.* at 534.

27. *See* Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 [hereinafter ESEA 65].

28. *See* James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004); *see also* ESEA 65; Chemerinsky, *infra* note 47, at 204.

29. *See, e.g.*, ESEA 65 (requiring schools to meet specific standards with regards to remedial and

B. Origin and Evolution of Special Education Law

1. Case Law

Early court cases regarding education for disabled students were not particularly favorable to the students. Rather, disabled students were deemed to be a distraction to the teachers and fellow students, and were banished from the classroom and either institutionalized or ignored.[30] However, just as *Brown v. Board of Education*[31] sparked an equal protection interest in education with regards to race, it also opened the door to an equal protection interest in favor of education services for the disabled, as the courts soon realized that disabled students were being denied equal protection as well.[32] The legacy of *Brown* could be seen, for example, in

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disadvantaged students); Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970) [hereinafter EHA] (initiating an attempt to provide services to disabled youngsters); EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (creating a more comprehensive program for the nation's disabled students); Individuals with Disabilities Education Act, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142 (1990) (codified at 20 U.S.C. § 1400 (1990)) [hereinafter IDEA 90] (further expanding and defining the goals and procedures to provide educational services to disabled youth); Jacob K. Javits Gifted and Talented Students Education Act of 1994, Pub. L. No. 103-382, § 10201, 108 Stat. 3518, 3820 (1994) [hereinafter Javits 94] (creating a program to increase educational services to the nation's gifted and talented students); Improving America's School's Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) [hereinafter IASA] (revising the ESEA to improve educational standards and testing policies for all students); NCLB, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (the federal government's latest attempt at a comprehensive education program geared at bridging the education gap between the nation's poor and the nation's affluent neighborhoods and students); *see also infra* notes 34-105 and accompanying text. With the exception of the IDEA, this comment cites to session laws for all statutes in order to avoid confusion to the reader.

30. *See* Watson v. City of Cambridge, 32 N.E. 864, 864 (Mass. 1893) (holding that the child was validly excluded from school because "he is so weak in mind as not to derive any marked benefit from instruction, and, further, that he is troublesome to other children, making unusual noises, pinching others, etc. He is also found unable to take ordinary, decent, physical care of himself."); Beattie v. Bd. of Educ., 172 N.W. 153, 154-55 (Wis. 1919) (holding that because his "physical condition and ailment produce[d] a depressing and nauseating effect upon the teachers and school children; [and] that by reason of his physical condition he [took] up an undue portion of the teacher's time and attention, [and] distract[ed] the attention of other pupils," he was rightfully excluded from participation in public education.).

31. 347 U.S. 483 (1954).

32. *See* LAURA F. ROTHSTEIN, SPECIAL EDUCATION LAW 36 (2d ed. 1995) (explaining that the "theory underlying the mainstreaming goal [of special education] includes the 'separate is not equal' principle of *Brown v. Board of Education*."); H. RUTHERFORD TURNBULL III, FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES 59-60 (1986) [hereinafter Turnbull, FAPE] (explaining that "right-to-education" cases post-*Brown* "expanded *Brown's* equal opportunities doctrine by establishing that the exclusion of handicapped children from any opportunities to learn . . . is unconstitutional under the equal protection clause"). *But see* Perry A. Zirkel, *Does Brown v. Board of Education Play a Prominent Role in Special Education Law?* 34 J.L. & EDUC. 255, 269-71 (2005) [hereinafter Zirkel, *Brown*] (stating that *Brown* is "more like a distant

1971 when the United States District Court for the Eastern District of Pennsylvania issued a consent decree, stating *inter alia*, "[h]aving undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training."[33]

2. Statutes

a. The Rehabilitation Act of 1973

Congress expanded civil rights to protect the disabled with the passage of Section 504 of the Rehabilitation Act of 1973.[34] Specifically, Section 504 states: "no otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[35] Thus, in order to remain eligible to receive federal funding for education, states and school districts were required to comply with the Act's mandates regarding nondiscrimination towards disabled students.[36] Put simply, if a student was capable of completing the curriculum "but for" the disability, because of the protections created by Section 504, the school could not discriminate against him or her because of the disability.

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relative" to special education considerations because: 1) most post *Brown* cases have been statutory interpretation decisions, rather than the constitutional interpretations that were the basis for *Brown*; 2) *Brown*, as a race-based decision was held to the strict scrutiny standard of constitutional review, which is not the standard of review in disability cases; 3) "*Brown* represents an equality version, whereas the IDEA is more an equity version, of equal opportunity;" and 4) in contrast to Brown, which rejected "separate but equal" and resulted in desegregation, IDEA's least restrictive environment (LRE) goal "include[s] separate, special classes."); *see also infra* notes 68-73 and accompanying text.

33. Pa. Assoc. for Retarded Children v. Pennsylvania, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971); *see also*, Mills v. Bd. of Educ., 348 F. Supp. 866, 872 (D.D.C. 1972) (holding "no child eligible for a publicly supported education . . . shall be excluded from a regular public school assignment . . . unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing. . . .").

34. *See* Jennifer R. Rowe, *High School Exit Exams Meet IDEA – An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU EDUC. & L.J. 75, 79 (2004); *see also* RA504, Pub. L. No. 93-112, 87 Stat 355 (1973).

35. RA504 § 504.

36. *See* Rowe, *supra* note 34, at 80; *see also* PERRY A. ZIRKEL, SECTION 504 STUDENT ISSUES, LEGAL REQUIREMENTS, AND PRACTICAL RECOMMENDATIONS 1 (2005) [hereinafter Zirkel, RECOMMENDATIONS].

b. The Education of the Handicapped Act ("EHA"), The Education for All Handicapped Children Act ("EAHCA") and The Individuals with Disabilities Education Act ("IDEA")[37]

Congress first attempted to provide better educational services to disabled students in 1970 when it passed the Education of the Handicapped Act.[38] The Act authorized the Commissioner of Education to make grants to the states for the purpose of "assisting the States in the initiation, expansion, and improvement of programs and projects for the education of handicapped children at the preschool, elementary school, and secondary school levels."[39] The Act also authorized the Commissioner to, among other things, make grants regarding research of education for the disabled, teacher training, and to establish a fifteen member National Advisory Committee on Handicapped Children as part of the Office of Education.[40]

However, when the EHA did not result in the desired protections for disabled students, Congress broadened the protections even more in 1975 with the passage of the Education for All Handicapped Children Act of 1975 ("EAHCA").[41] The EAHCA created a source of federal funding for special education, and placed specific restrictions upon the states as conditions for receiving such funding.[42] Congressional intent with the enactment of the EAHCA was to allow disabled children access to education and access to due process of law.[43] Before the EAHCA's passage, millions of disabled children were denied an education because: "(A) the children did not receive appropriate educational services; (B) the children were excluded entirely from the public school system . . . (C) undiagnosed disabilities prevented the children from having a successful educational experience; [and] (D) a lack of adequate resources within the public school system forced families to find services [elsewhere]."[44] The EAHCA, which established the current

37. EHA, Pub. L. No. 91-230 § 601, 84 Stat. 121,175 (1970); EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975); IDEA 04, 20 U.S.C. §§ 1400-1419 (2004).

38. *See* EHA § 601.

39. *Id.* § 601, 84 Stat. at 178.

40. *Id.* § 601, 84 Stat. at 177, 184, 187.

41. *See* EAHCA, 89 Stat. 773.

42. *See* Rowe, *supra* note 34, at 81. In order to receive federal funds, states were required to submit a plan showing how the state's policies regarding special education complied with the requirements set forth in the EAHCA. *Id.* Initially, all states except New Mexico submitted plans that complied with the Act. *Id.* Unfortunately for New Mexico, the provisions of Section 504 of the Rehabilitation Act of 1973 required the states to provide a free and appropriate education for disabled students regardless of each state's adoption of the EAHCA. *Id.* Accordingly, New Mexico agreed to comply with Act as well. *Id.*

43. PETER D. WRIGHT & PAMELA D. WRIGHT, WRIGHT'S LAW: IDEA 2004 30 n.10 (2005).

44. IDEA 04, 20 U.S.C. § 1400(c)(2).

framework for special education law, was broadened in scope yet again in order to more adequately deal with the needs of disabled students and was renamed the Individuals with Disabilities Education Act ("IDEA 90") in 1990.[45] Proving the federal government's commitment to special education was still strong, Congress recently reauthorized the IDEA in 2004 ("IDEA 04").[46]

States may elect whether or not to adopt the IDEA, but in order to receive federal funding for education, the state must agree to accept and implement the IDEA's provisions.[47] Because every state wishes to receive federal funds for education and every state adopted IDEA 90, it is likely that all states will adopt IDEA 04 as well.

IDEA 04 is an expansive act with multiple components. The Act's stated purpose is "to ensure that all children with disabilities have available to them a free appropriate public education [("FAPE")] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living."[48] Several key components of the IDEA, such as "disabled child," "free appropriate public education," "individualized education program," "related services" and "special education" are specifically defined within the Act.[49] IDEA 04 defines a child with a disability as a child with one of several enumerated conditions[50] "who, by reason thereof, needs special education and related services."[51] Additionally, IDEA 04 defines special education as, "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability."[52]

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45. IDEA 90, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142 (1990).

46. *See* IDEA 04, 20 U.S.C. §§ 1400-19. IDEA 04 is substantially the same as IDEA 90, but there are a few notable changes, including but not limited to: 1) an increased focus on accountability for the districts and an attempt to bring the teacher qualification requirements, research based instruction rules, and research methods into conformity with the requirements promulgated by NCLB; 2) changing parental involvement to include "strengthening the role and responsibility of parents;" 3) adding 'further education' to the goals of the IDEA; and 4) requiring children identified as disabled to participate in all state and district assessments, albeit with any and all appropriate accommodations as needed by the child. WRIGHT, *supra* note 43, at 30-33.

47. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 204 (1997) (explaining that the Supreme Court held in *New York v. United States*, 505 U.S. 144, 166-67 (1992), that "although Congress cannot directly compel state legislative or regulatory action, it can induce behavior by putting conditions on grants.").

48. 20 U.S.C. § 1400(d).

49. 20 U.S.C. § 1401. There are actually thirty-six defined terms within the Act, but it is not necessary to address all of the terms in this discussion. For a complete list of expressly defined terms for use within IDEA 04, see 20 U.S.C. § 1401(1)-(36).

50. *Id.* § 1401(3)(A)(i) (stating "[t]he term 'child with a disability' means a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.").

51. *Id.* § 1401(3)(A)(ii).

52. *Id.* § 1401(29).

In general, the statute noted that the adoption of IDEA 04 and its provisions generates a benefit for society for several reasons most notably that by fulfilling the stated purpose of IDEA 04, the disabled student grows into an adult that is capable of self-sufficiency, employment, and further education.[53] This, of course, eliminates the need for society to take care of the individual by enabling the individual to care for him or herself and to become a fully productive member of society.[54]

IDEA 04 is comprised of six distinct principles which govern the State's actions regarding special education.[55]

The first of these principles is the principle of Zero Reject.[56] Zero Reject holds that all students must be provided a free and appropriate education, regardless of disabilities.[57] This provision holds true even if the child is suspended or expelled for discipline problems, as long as the child's behavior which resulted in the discipline is a manifestation of the child's disability.[58]

The second principle addressed by IDEA 04 is that of Nondiscriminatory Evaluation.[59] Prior to the provision of special education services, the state or local education agency must conduct a "full and individual initial evaluation."[60] The evaluation must be conducted within sixty days of receipt of parental consent for the evaluation, and must "use a variety of assessment tools and strategies to gather relevant functional,

53. *See* 20 U.S.C. § 1400(d).

54. *See* S. REP. NO. 94-455 (1975) (Conf. Rep.) (stating that "[t]he Senate bill and the House amendments find that it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children.").

55. H. Rutherford Turnbull, III, et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445, 447 (2001) [hereinafter Turnbull, *IDEA*].

56. *See id.*

57. *Id.*; *see* 20 U.S.C. § 1412(a)(1)(A).

58. *See* 20 U.S.C. § 1415(k). The school "may remove a child with a disability who violates a code of student conduct" and either place the child in an alternative educational setting and/or suspend the child for a period of not more than ten days. *Id.* § 1415(k)(1)(B). Further, "a child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall (i) continue to receive educational services as provided in section 1412(a)(1) of this title." *Id.* § 1415(k)(1)(D). However, if the suspension lasts for more than ten days and the school determines that the behavior is not a manifestation of the child's disability, the school may treat the child as if the child was not disabled, and may, as necessary, expel or suspend the child and will not be required to supply FAPE. *Id.* § 1415(k)(1)(E). If, however, the behavior is found to be a manifestation of the disability, and the suspension exceeds ten days in duration, the district must continue to offer FAPE and its related services, in addition to "functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur." *Id.* § 1415(k)(1)(D).

59. *See* Turnbull, *IDEA, supra* note 55, at 447.

60. 20 U.S.C. § 1414(a)(1)(A).

developmental, and academic information, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability; and (ii) the content of the child's individualized education program."[61] Additionally, the assessment and the evaluation materials used may not be "discriminatory on a racial or cultural basis" and must be "administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible."[62]

The third principle is that of Free and Appropriate Education.[63] Free appropriate public education ("FAPE") is:

> special education and related services[64] 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 1414(d) of this title.[65]

As a result, each disabled child that is subject to the provisions of the IDEA is to be given an Individualized Education Plan ("IEP") which is defined as, "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title."[66] Thus, the "linchpin" of the IDEA is the IEP that is tailored to the

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61. *Id.* § 1414(a)(1)(C)(i), (b)(2)(A).

62. *Id.* § 1414(b)(3)(A).

63. *See* Turnbull, *IDEA, supra* note 55, at 448.

64. The Act defines "related services" as "transportation, and such developmental, corrective and other supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26). The Act further defines "other supportive services" as "speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation . . . social work services, school nurse services . . . counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that medical services shall be for diagnostic and evaluation purposes only." *Id.* at § 1401(26)(A).

65. *Id.* § 1401(9).

66. *Id.* § 1401(14). The Act defines an IEP as a written document developed by the IEP Team, which is comprised of the child's parents, at least one regular education teacher of the child, at least one special education teacher, a representative of the local education agency, an individual who can interpret and evaluate the educational implications of various education evaluations, any experts the agency or the child's parent wish to include, and whenever appropriate, the disabled child. 20 U.S.C. § 1414(d)(1)(B). The document must then address the following: 1) the child's "present levels of academic achievement and functional performance;" 2) "a statement of measurable annual goals, including academic and functional goals;" 3) a "description of how the child's progress . . . will be measured;" 4) a statement defining which special education supplementary aids and supports will be necessary for the child's academic success; 5) an explanation describing to what extent "the child will not participate with non-disabled children in the regular class;" 6) a statement of any accommodations necessary for the child's academic achievement; 7) the projected start date for the

unique needs of the child so as to ensure the best educational experience in order to facilitate the ultimate IDEA goals of education, employment and independent living.[67]

The fourth principle addressed by IDEA 04 is that of Least Restrictive Environment ("LRE").[68] LRE holds that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled."[69] The primary objective of LRE is to include disabled children with non-disabled children so as to promote inclusion for the benefit of both the disabled and non-disabled child.[70] The disabled child benefits from inclusion because he can model behaviors and abilities from the non-disabled students, and the non-disabled student benefits by both exposure to and tolerance of diversity.[71] Furthermore, the IDEA provides for supplemental aids and services in order to accommodate the disabled student's additional needs in the regular classroom.[72] The concept of LRE exists within a continuum that ranges from full inclusion in the regular classroom to a completely segregated environment for the disabled child, with the ultimate goal of placing the child in the environment that is most similar to the environment of the non-disabled child.[73]

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commencement of services; 8) the "anticipated frequency, location and duration of services;" and 9) a statement of "appropriate measurable postsecondary goals based on age appropriate transition assessments" (once the disabled child reaches the age of sixteen). *Id.* § 1414(d)(1)(A).

67. *See* Turnbull, *IDEA*, *supra* note 55, at 448.

68. *See id.*

69. 20 U.S.C. § 1412(a)(5).

70. *See* Rowe, *supra* note 34, at 84. The courts have generally seen LRE as a means toward mainstreaming disabled children with non-disabled children, viewing the phrases of "to the maximum extent appropriate" and "are educated with children who are not disabled" as dispositive of the Act's intentions. Anne Proffitt Dupre, *Disability and the Public Schools: The Case Against "Inclusion,"* 72 WASH. L. REV. 775, 794-97 (1997). Furthermore, the Supreme Court has not defined the LRE element and/or how to test if a school has fulfilled this requirement of the IDEA. *Id.* at 795; *see also* Beth B. v. Van Clay, 282 F.3d 493, 498 (7th Cir. 2002); Kathryn E. Crossley, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U.J.L. & POL'Y 239, 252 (2000); Sarah E. Farley, *Least Restrictive Environments: Assessing Classroom Placement of Students with Disabilities Under the IDEA*, 77 WASH. L. REV. 809, 809 (2002).

71. *See* Rowe, *supra* note 34, at 84.

72. *See* Turnbull, *IDEA*, *supra* note 55, at 448-49.

73. *See* Dupre, *supra* note 70, at 792-93; *see also* Richard Tompkins & Pat Deloney, Sw. Educ. Dev. Lab, *Inclusion: The Pros and Cons*, ISSUES . . . ABOUT CHANGE, Vol. 4, No. 3, http://www.sedl.org/change/issues/issues43.html.

The fifth principle is that of Procedural Due Process.[74] Under IDEA 04, students with disabilities and their parents are guaranteed specific procedural safeguards to ensure the provision of FAPE to the disabled student.[75] Included in these procedures are opportunities for the parents to: 1) examine all of their child's educational records; 2) participate in all meetings regarding educational matters such as evaluations, placement and programming; 3) obtain an independent educational evaluation ("IEE") at district expense; 4) receive prior written notice of any changes to the student's programming; 5) receive all district notifications in the "native language of the parents, unless it clearly is not feasible;" and 6) submit a complaint and/or participate in mediation and/or due process.[76]

Lastly, the sixth principle is Parent and Student Participation.[77] Many of the provisions stipulated in IDEA 04 include the involvement of the disabled student's parents, and, when appropriate, the disabled student him or herself. For example, in addition to the parental notification provisions, IDEA 04 requires that: 1) the initial evaluation of an IEP can be initiated upon request of either the State Agency or the parent, and special education services cannot be conducted if the parent refuses consent;[78] 2) the IEP Team is comprised of a group containing "the parents of a child with a disability;"[79] 3) when the IEP is developed, the team must consider "the concerns of the parents for enhancing the education of their child;"[80] and 4) the IEP must be periodically reviewed in order to address, *inter alia*, "information about the child provided to, or by, the parents."[81]

C. *Origin and Evolution of Gifted Education Law*

Many scholars credit the Russian launch of Sputnik on October 4, 1957 as the true impetus for the United States' foray into gifted education.[82] As a

74. *See* Turnbull, *IDEA*, *supra* note 55, at 449; *see also* 20 U.S.C. § 1415.

75. 20 U.S.C. § 1415(a).

76. *Id.* § 1415(b)(1), (3)-(7).

77. *See* Turnbull, *IDEA*, *supra* note 55, at 449; *see also* Rowe, *supra* note 34, at 85.

78. 20 U.S.C. § 1414(a)(1).

79. *Id.* § 1414(d)(1)(B).

80. *Id.* § 1414(d)(3)(A).

81. *Id.* § 1414(d)(4)(A).

82. Marcia B. Imbeau, *A Century of Gifted Education: A Reflection of Who and What Made a Difference*, GIFTED CHILD TODAY, Nov.-Dec. 1999, at 40, 41. It is generally accepted by scholars in the field of gifted education that the Russian deployment of Sputnik resulted in two concerns for the United States: 1) the United States was threatened by our largest communist enemy's advancing technology; and 2) the United States had been "upstaged" in the space race by the Russian technology; *see also* Patricia A. Haensly, *My View of the Top 10 Events That Have Influenced the Field of Gifted Education During the Past Century*, GIFTED CHILD TODAY, Nov.-Dec. 1999, at 33, 35; Mary Ruth Coleman, *Back to the Future: The Top 10 Events that Have Shaped Gifted Education in the Last Century*, GIFTED CHILD TODAY, Nov.-Dec. 1999, at 16, 17; Perry A. Zirkel, *The Law Concerning Public Education of Gifted Students*, 34 WEST EDUC. L. REP. 353, 354 (1986)

result of the Russian space program's advances, the United States Congress passed the National Defense Education Act of 1958 ("NDEA"), which made federal funding available to create educational programming for gifted and talented students.[83] Thus, during the late 1950s, the government viewed gifted and talented students as having "the ability to make significant contributions to the Nation's welfare, especially in the essential areas of science and technology." [84] Unfortunately for gifted students, the goals of improving academics for children in order to win the space race gave way to President Johnson's Great Society programs, and with the passage of the Elementary and Secondary Education Act of 1965 ("ESEA 65"), the emphasis on education (and its related federal funding) shifted to identifying and helping disadvantaged students.[85] There was a slight return to funding for gifted education when the ESEA was reauthorized in 1967 ("ESEA 67").[86] Those who lobbied on behalf of gifted students persevered and eventually succeeded in their efforts to secure greater funding for gifted education when, in 1970, President Nixon signed The Gifted and Talented Children's Education Assistance Act of 1969 ("Gifted 69") which allowed for federal funding for gifted programs under ESEA 70.[87]

Just as educational scholars cite the launch of Sputnik as one of the most influential historical events impacting gifted education, scholars universally credit former Commissioner of Education Sidney Marland with launching governmental recognition of the educational needs of gifted children.[88] In

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[hereinafter Zirkel, *Law Concerning*].

83. Julia Link Roberts, *The Top Ten Events Creating Gifted Education for the New Century*, GIFTED CHILD TODAY, Nov.-Dec. 1999 at 53, 53. NDEA was intended to emphasize the development of programming in the sciences, mathematics and foreign languages, and was not necessarily viewed as benefiting only gifted students. Charles Russo, *Education Law and Policy: Unequal Educational Opportunities for Gifted Students: Robbing Peter to Pay Paul?*, 29 FORDHAM URB. L.J. 727, 737 (2001); *see also* National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 [hereinafter NDEA].

84. Russo, *supra* note 83, at 737.

85. *See id.* at 737-38; *see also* ESEA 65, Pub. L. No. 89-10, 79 Stat. 27.

86. *See* Russo, *supra* note 83, at 738, n.71 (explaining that, although ESEA 67 returned some funding to gifted programming, out of a total of 1500 education projects funded, only twenty-eight were for gifted students); *see also* Elementary and Secondary Education Act Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 783 (1968) [hereinafter ESEA 67].

87. *See* Russo, *supra* note 83, at 738-39; *see also* Zirkel, *Law Concerning*, *supra* note 82, at 355. Public Law Number 91-230 (1970) was quite important in the area of education. Elementary and Secondary Education Assistance Programs Extensions, Pub. L. No. 91-230, 84 Stat. 121 (1970) [hereinafter ESEA 70]. Although it was fundamentally just another amendment to the ESEA, it also contained section 601, which created the EHA. EHA, Pub. L. No. 91-230, § 601, 84 Stat. 121, 175 (1970). It also contained section 806, which permitted funding in the area of gifted and talented education. Gifted and Talented Education Act of 1969, Pub. L. No. 91-230, § 806, 84 Stat. 121, 192 [hereinafter Gifted 69].

88. *See* Haensly, *supra* note 82, at 35; Roberts, *supra* note 83, at 53; Imbeau, *supra* note 82, at

submitting his report (known as "The Marland Report") to Congress in 1972, Commissioner Marland created a definition of gifted and talented which continues to be used by many state and local agencies to this day.[89] The Marland Report defined gifted and talented children as:

> those identified by professionally qualified persons who by virtue of outstanding abilities, are capable of high performance. These are children who require differentiated educational programs and/or services beyond those normally provided by the regular school program in order to realize their contribution to self and society.
>
> Children capable of high performance include those with demonstrated achievement and/or potential ability in any of the following areas, singly or in combination:
>
> 1) general intellectual ability
>
> 2) specific academic aptitude
>
> 3) creative or productive thinking
>
> 4) leadership ability
>
> 5) visual and performing arts
>
> 6) psychomotor ability.[90]

The recommendations of The Marland Report were included in the 1974 Amendments to the ESEA, which generated four major elements for gifted education legislation: 1) the creation of the Office of Gifted and Talented (a part of the U.S. Department of Education); 2) the creation of a National Clearinghouse for the Gifted and Talented; 3) allowances for federal funding grants in the area of gifted and talented education; and 4) authorization for an annual federal appropriation for gifted programming, not to exceed $12.5 million [sic].[91]

41; James R. Delisle, *A Millennial Hourglass: Gifted Child Education's Sands of Time*, GIFTED CHILD TODAY, Nov.-Dec. 1999, at 26, 28; Emily D. Stewart, *An American Century of Roots and Signposts in Gifted and Talented Education*, GIFTED CHILD TODAY, Nov.-Dec, 1999, at 56, 56.

89. *See* EDUCATION COMMISSION ON THE STATES, STATE NOTES: STATE GIFTED AND TALENTED DEFINITIONS (June 2004) [hereinafter ECS], http://www.ecs.org/clearinghouse/52/28/5228.htm (last visited Feb. 10, 2006) (listing state-by-state definitions of gifted and talented qualifications).

90. THE MARLAND REPORT, *supra* note 5, at 2.

91. *See* Russo, *supra* note 83, at 739-40. Although this created federal funding in the area of

The next major development for gifted education came in 1978 with the passage of the Gifted and Talented Children's Education Act ("Gifted 78").[92] In Gifted 78, Congress declared, "the Nation's greatest resource for solving critical national problems in areas of national concern is its gifted and talented children."[93] Despite the purposes and objectives created by the passage of the Act, its existence was brief, for the Act was repealed in 1981, and along with its repeal came the closing of the Office of Gifted and Talented and a suspension of federal involvement in gifted education for quite some time.[94]

There was renewed legislative support for gifted programs almost fifteen years later when Congress passed the Jacob K. Javits Gifted and Talented Students Education Act of 1994 ("Javits 94").[95] In Javits 94 Congress stated, "gifted and talented students are a national resource vital to the future of the Nation and its security and well being."[96] Congress further declared, "unless the special abilities of gifted and talented students are recognized and developed during such students' elementary and secondary school years, much of such students' special potential for contributing to the national interest is likely to be lost."[97] The stated purpose of Javits 94 was

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gifted education, proponents felt the $12.5 million [sic] annual budget was woefully short of the $80 million budget requested, as the $12.5 million [sic] represented an annual expenditure of only $1.00 per gifted child. *Id.* at 740; *see also* Elementary and Secondary Education Act Amendment of 1974, Pub. L. No. 93-380, § 404, 88 Stat. 484, 547-49 [hereinafter ESEA 74] (indicating a $12.25 million grant for fiscal year 1978).

92. *See* Russo, *supra* note 83, at 740; *see also* Gifted and Talented Children's Education Act of 1978, Pub. L. No. 95-561 § 901, 92 Stat. 2143, 2292 [hereinafter Gifted 78].

93. Gifted 78, § 901(a)-(b)(1), 92 Stat. at 2292. The Act further explained that:

> [i]t is the purpose of this part to provide financial assistance to State and local educational agencies, institutions of higher education, and other public and private agencies and organizations, to assist such agencies, institutions and organizations to plan, develop, operate, and improve programs designed to meet the special educational needs of gifted and talented children.

Id. § 901(c).

94. *See* Russo, *supra* note 83, at 740. In 1981, President Reagan introduced the concept of "New Federalism" which generated the Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, § 2175, 95 Stat 357, 809 (codified as amended at 42 U.S.C. § 1396n (1994)) [hereinafter OBRA]. *Id.* OBRA effectuated a 40 percent reduction in funding, as well as eliminating and/or combining several different grants into a single block grant. *Id.* Specifically, the Reagan Administration sought to reduce federal control of education and return that control to the states. *See* Neal Devins & James B. Stedman, *New Federalism in Education: The Meaning of the Chicago School Desegregation Cases*, 59 NOTRE DAME L. REV. 1243, 1254 (1984). The administration argued that the multiple federal education spending grants and programs then in effect were cumbersome, difficult, and inflexible for the states, and that it was not the role of the federal government to tell the states how to use the educational resources granted. *Id.* at 1255; *see also* Zirkel, *Law Concerning*, *supra* note 82, at 354.

95. *See* Javits 94, Pub. L. No. 103-382, § 10201, 108 Stat. 3519, 3820.

96. *Id.* § 10202(a)(2).

97. *Id.* § 10202(a)(4).

virtually the same as the stated purpose of the Gifted and Talented Children's Act of 1978; namely, to provide funding sources for state and local educational agencies in the development and implementation of gifted programming.[98] Javits 94 did, however, add to Gifted 78 in that it gave "highest priority" to "the identification of and the provision of services to gifted and talented students who may not be identified and served through traditional assessment methods (including economically disadvantaged individuals, individuals of limited-English proficiency, and individuals with disabilities)."[99]

In 2001, education law in the United States underwent a major overhaul in general with the passage of the No Child Left Behind Act ("NCLB").[100] With the passage of NCLB, Javits 94 was repealed and reauthorized as Subpart 6 of NCLB ("Javits 01").[101] As with Javits 94, the purpose was "to initiate a coordinated program of scientifically based research, demonstration projects, innovative strategies, and similar activities designed to build and enhance the ability of elementary schools and secondary schools nationwide to meet the special educational needs of gifted and talented students."[102] The 2001 Javits Act again held that the Secretary shall give

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98. *Id.* § 10202(b). The Act identifies its statement of purpose as:

> (1) to provide financial assistance to State and local educational agencies, institutions of higher education, and other public and private agencies and organizations, to initiate a coordinated program of research, demonstration projects, personnel training, and similar activities designed to build a nationwide capability in elementary and secondary schools to meet the special educational needs of gifted and talented students; (2) to encourage the development of rich and challenging curricula for all students through the appropriate application and adaptation of materials and instructional methods developed under this part; and (3) to supplement and make more effective the expenditure of State and local funds, for the education of gifted and talented students.

Id.

99. *Id.* § 10205(a)(1). However, educational scholars felt Javits 94 was deficient in that: 1) its funding was not large enough to create and support "widespread" programming; 2) because the grants were voluntary, there was no requirement or mandate to states to create gifted programming; and 3) unlike the IDEA, there were no procedural or substantative due process safeguards to protect gifted students. *See* Russo, *supra* note 83, at 741.

100. NCLB, Pub. L. No. 107-110, 115 Stat. 1425 (2002). NCLB was actually an expansion of a prior attempt to overhaul the Nation's schools, the Improving America's Schools Act of 1994 [hereinafter IASA] (which, in turn, was an outgrowth of the ESEA). *See* Ryan, *supra* note 28, at 937; *see also* IASA, Pub. L. No. 103-382, 108 Stat. 3518 (1994). The ESEA initially created the concept of Title I schools and Title I funding which was primarily used to create remedial classes for disadvantaged pupils. Ryan, *supra* note 28, at 937-38. However, this concept was found to be ineffective, and subsequently under the IASA, federal funding for education was based on improving standards and contents for all students and not only disadvantaged students. *Id.* at 938-39. Like the IASA, NCLB encourages schools (through the grant of federal funds) to improve their performance on standardized tests, and the schools, districts and states must improve their performance in specific tested areas year over year. *Id.* at 939-940.

101. Jacob K. Javits Gifted and Talented Students Education Act of 2001, Pub. L. No. 107-110, § 5461, 115 Stat. 1425, 1826 (2002) [hereinafter Javits 01]. Section 5461 of the NCLB states, "[t]his subpart may be cited as the 'Jacob K. Javits Gifted and Talented Students Education Act of 2001.'" *Id.*

102. *Id.* at § 5462. Under Javits 01, funds could be used to: 1) conduct scientific research for

"highest priority" to developing programs and projects serving students who may not be identified through "traditional assessment methods."[103] Javits 01 further expanded on this provision by stating a service priority which held, "[t]he Secretary shall ensure that not less than 50 percent of the applications approved under section 5464(a)(2) in a fiscal year address the priority described in subsection (a)(2)."[104]

Despite the more than fifty-year history of attempts to increase federal recognition and federal funding for gifted education, due to today's current budgetary constraints, we are right back to where we started. Although Javits 01 currently has provisions for funding in place, as a result of federal budget cuts, per the current budget for fiscal year 2006, there will not be any funding grants under Javits 01.[105]

III. DEFINING THE TWICE EXCEPTIONAL CHILD

A. Who Are They and Where Are They?

"The educational needs of gifted students with disabilities differ significantly from the needs of most students."[106] Disabled students, independent of whether their challenges are based in physical, emotional or

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identification and teaching methods for gifted students; 2) conduct evaluations, surveys and data analysis in gifted education; 3) conduct professional development in the field of gifted education; 4) establish projects and programs for gifted students; 5) develop and establish innovative learning techniques for gifted students; 6) develop technical programs that could also be adapted for use by non-gifted students; 7) utilize State regional educational service centers; and 8) develop programs (such as remote or distance based education) that could be used by students that would not normally have access to such programming. *Id.* § 5464(b).

103. *Id.* § 5465. As with Javits 94, students who "may not be identified and served through traditional assessment methods" are defined as "economically disadvantaged individuals, individuals with limited English proficiency, and individuals with disabilities." *Id.* § 5465(a)(2).

104. *Id.* § 5465(b).

105. As explained by the Department of Education, "[d]ue to FY 2006 budget constraints, a new discretionary grant competition will not be held this year for the Jacob K. Javits Gifted and Talented Students Education Program. Future grant competitions are contingent upon available funding." There may be hope for the future as the site further instructs potential applicants to "check this site periodically for updates." U.S. Dep't of Educ. website, http://www.ed.gov/programs/nrdcjavits/gtenpnrdcjavits.pdf (last visited Aug. 30, 2006). However, it should be noted that the program was funded in 2005 as discretionary/competitive grants in the amount of $11,022,122 and cooperative agreements in the amount of $2,163,248.00 were allocated. U.S. Dep't of Education website, http://web99.ed.gov/GTEP/Program2.nsf (last visited Feb. 10, 2006).

106. L. Dennis Higgins & M. Elizabeth Nielsen, *Responding to the Needs of Twice-Exceptional Learners: A School District and University's Collaborative Approach*, *in* UNIQUELY GIFTED: IDENTIFYING AND MEETING THE NEEDS OF TWICE-EXCEPTIONAL STUDENTS, 287, 287 (Keisa Kay ed., 2000).

learning disabilities, are generally accommodated in their schooling by applications of the provisions of the IDEA.[107] Gifted students, similarly, have a selection of opportunities ranging from advanced placement classes, honors classes and enrichment programs.[108] However, the gifted yet disabled child—the twice-exceptional child—is caught in the middle of an educational battle that he is likely to lose because gifted programming and special education programming are generally viewed as mutually exclusive.[109] This is true partly because of the plethora of misconceptions surrounding twice-exceptional children, and/or the budgetary constraints inherent within the school districts.[110] According to a 1979 census by the U.S. Office of Gifted and Talented, approximately 300,000 students were identified as twice-exceptional, and it is likely that the number is actually closer to 540,000.[111] Moreover, approximately seven to ten percent of gifted students have some type of educational handicap, which is approximately the same ratio of educationally handicapped students in the regular student population.[112]

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107. *See, e.g.*, Espino v. Besteiro, 520 F. Supp. 905, 913-14 (S.D. Tex. 1981) (holding that in order for the district to be in compliance with the provisions of the EAHCA, the school was required to create an air conditioned classroom for a physically handicapped student); Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1108 (C.D. Cal. 2000) (holding that a physically disabled child is entitled to physical therapy, occupational therapy and speech and language services in order to prevent a "loss of educational opportunity.").

108. *See* Thomas Oakland & Eric Rossen, *A 21st Century Model for Identifying Students for Gifted and Talented Programs in Light of National Conditions: An Emphasis on Race and Ethnicity*, GIFTED CHILD TODAY Fall 2005, at 56, 57, 61 (stating an estimated 81% of school districts currently offer gifted and talented programs, and estimating that "GT programs are most likely to survive, even flourish, when they help support prevailing broader education efforts, including the promotion of achievement in light of the NCLBA"). However, unlike special education, there is no federal legislation that creates an entitlement of gifted education. *See* PERRY A. ZIRKEL, THE LAW ON GIFTED EDUCATION, THE NATIONAL RESEARCH CENTER ON THE GIFTED AND TALENTED 4 (2005) [hereinafter Zirkel, MONOGRAPH]. Additionally, although most states have recognized the need for gifted education, and as previously identified, most have distinct definitions and requirements for eligibility for gifted education, very few states have created a state constitutional right to gifted education. *Id.*

109. *See* Frances A. Karnes et al., *Gifted Students with Disabilities: Are We Finding Them?*, GIFTED CHILD TODAY, Fall 2004, at 16, 17 (citing multiple state studies in which gifted students with disabilities were either not identified and/or not served); *see also* Dawn Beckley, *Gifted and Learning Disabled: Twice Exceptional Students*, 1998 Spring Newsl. (Nat'l Research Ctr. For the Gifted and Talented, Storrs, Conn.), Spring 1998, http://www.gifted.uconn.edu/nrcgt/newletter/spring98/sprng984.html. Prior to 1981, gifted and learning disabled were viewed as contradictory terms; however, experts in the field of education gathered at a colloquium held at The Johns Hopkins University in 1981 to discuss, evaluate and review the twice-exceptional child. *See* Linda E. Brody & Carol J. Mills, *Gifted Children with Learning Disabilities: A Review of the Issues*, 30 J. LEARNING DISABILITIES 282, 282 (1997).

110. *See infra* notes 125-138 and accompanying text.

111. *See* Barbara Clark, *Enabling the Gifted-Disabled Learner*, NEW JERSEY LAWYER, THE MAGAZINE, June 2003, at 62. It is likely that the majority of these twice-exceptional students are gifted and learning disabled. *Id.*

112. *See* Stuart Dansinger, *Integrating Gifted and Special Education Services in the Schools*, GIFTED CHILD TODAY, May-June 1998, at 38, 38.

IDEA 04 has defined a child with a disability as a child "(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (. . . referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services."[113] However, because education is maintained at the state level, each state has its own definition of and criteria for special education. Some states, such as Oklahoma, simply define children with disabilities as "children, as defined in the Individuals with Disabilities Education Act (IDEA)."[114] Some states use the IDEA as a starting point, and add additional specific disabilities to the IDEA "list."[115] Still other states do not specifically list disorders, and instead define a child with disabilities broadly, such as Nevada's definition of, "'[a] pupil with a disability' means a person . . . who deviates either educationally, physically, socially or emotionally so markedly from normal patterns that he cannot progress effectively in a regular school program and therefore needs special instruction or special services."[116] Thus, although the federal government

113. 20 U.S.C. § 1401(3)(A).

114. OKLA. STAT. tit. 70, § 13-101 (2005); *see also* N.M. STAT. ANN. § 22-13-6 (West 2005); MD. CODE ANN. EDUC. §8-401(a)(2) (LexisNexis 2004) (identifying a child with a disability as one who conforms to the IDEA definition).

115. *See, e.g.*, LA REV. STAT. ANN. § 17:1943(4) (2001 & Supp. 2006) (adding minimal brain dysfunction, developmental aphasia and dyslexia, brain injury, and perceptual disabilities to the list); ARIZ. REV. STAT. ANN. § 15-761(2) (2002 & Supp. 2005) (adding multiple disabilities with severe sensory impairment, preschool moderate delay, and preschool severe delay to the list from the IDEA); N.J. STAT. ANN. §18A:46-1 (West 1999) (adding neurologically or perceptually impaired, chronically ill, socially maladjusted, and pre-school handicapped). Perhaps the most startling addition is North Carolina's definition, which besides adding epileptic and cerebral palsied children to the definition of children with disabilities, adds pregnancy as a disability as well. *See* N.C. GEN. STAT. § 115C-109 (2003).

116. NEV. REV. STAT. § 388.440 (2003). Approximately twenty states have definitions of special education which do not list specific disabilities. *See, e.g.*, COLO. REV. STAT. § 22-20-103(1.5) (2003) (defining disabilities as "long-term physical impairment or illness; significant limited intellectual capacity . . . persons . . . whose presence in the ordinary educational program is detrimental to the education of others."); HAW. REV. STAT. § 302A-101 (Supp. 2004) (defining "exceptional children" as those who "by reason of physical defects cannot attend regular public school classes with normal children; and . . . who are certified by a licensed physician eligible for membership in the state medical society as being emotionally maladjusted or intellectually incapable of profiting from ordinary instructional methods."); R.I. GEN. LAWS § 16-24-1(a) (1996) (defining a child needing special education as any child "who is either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development are prevented."); WYO. STAT. ANN. § 21-2-501 (2005) (stating, "[e]very child of school age in the state of Wyoming having a mental, physical or psychological disability which impairs learning, shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities."). Some states, such as Vermont, have such minimalist definitions as to include virtually any health or

has established a uniform policy for the education of special needs children, the ability for children to qualify for access to such services is largely dependent upon which state they live in.

Likewise, the federal government has defined "gifted and talented" as "students, children, or youth who give evidence of high achievement capability in areas such as intellectual, creative, artistic, or leadership capacity, or in specific academic fields, and who need services or activities not ordinarily provided by the school in order to fully develop those capabilities."[117] Similar to each state's unique definition of a "child with a disability," individual states also have their own specific definitions of "gifted."[118] Some states, such as Mississippi have very general definitions of gifted, stating only, "'[g]ifted children' shall mean children who are found to have an exceptionally high degree of intellect, and/or academic, creative or artistic ability."[119] Conversely, some states, such as North Carolina, have extremely precise definitions, explaining gifted students as follows:

> The General Assembly believes the public schools should challenge all students to aim for academic excellence and that academically or intellectually gifted students perform or show the potential to perform at substantially high levels of accomplishment when compared with others of their age, experience, or environment. Academically or intellectually gifted students exhibit high performance capability in intellectual areas, specific academic fields, or in both intellectual areas and specific academic fields. Academically or intellectually gifted students require differentiated educational services beyond those ordinarily provided by the regular educational program. Outstanding abilities are present in

learning issue. *See, e.g.*, VT. STAT. ANN. tit. 16, § 2942(1) (2004) (stating that a "'[c]hild with a disability' means any child in Vermont eligible under state regulations to receive special education.").

117. NCLB, Pub. L. No. 107-10, § 9101(22), 115 Stat. 1425, 1959 (2002).

118. *See* Zirkel, MONOGRAPH, *supra* note 108, at 25; *see also* ECS, *supra* note 89. However, whereas all fifty states have some definition for a disabled child, only forty-six states have definitions for gifted (Massachusetts, Minnesota, New Hampshire and South Dakota do not have a specific definition of gifted). *Id.* Additionally, in twenty-five states, the definition was developed by the state legislature, while in twenty-one states, the definition was developed by the State Educational Agency. *Id.*

119. MISS. CODE ANN. § 37-23-175 (1973); *see also* ALASKA ADMIN. CODE tit. 4 § 52.890 (defining gifted as "exhibiting outstanding intellect, ability, or creative talent."); LA. ADMIN. CODE tit. 28, § 909 (2006) (defining gifted as "students who demonstrate abilities that give evidence of high performance in academic and intellectual aptitude."); 22 PA. CODE § 16.1 (2006) (stating, "[m]entally gifted – [o]utstanding intellectual and creative ability the development of which requires specially designed programs or support services, or both, not ordinarily provided in the regular education program.").

students from all cultural groups, across all economic strata, and in all areas of human endeavor.[120]

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120. N.C. GEN. STAT. § 115C-150.5 (2003); *see also* 8 VA. ADMIN. CODE § 20-40-20 (2006); CAL. CODE REGS. tit. 5, § 3822 (2005) (showing examples of very precise definitions of gifted); The Virginia Code defines gifted students as follows:

> [T[hose students in public elementary and secondary schools beginning with kindergarten through graduation whose abilities and potential for accomplishment are so outstanding that they require special programs to meet their educational needs. These students will be identified by professionally qualified persons through the use of multiple criteria as having potential or demonstrated abilities and who have evidence of high performance capabilities, which may include leadership, in one or more of the following areas:
>
> 1. Intellectual aptitude or aptitudes. Students with advanced aptitude or conceptualization whose development is accelerated beyond their age peers as demonstrated by advanced skills, concepts and creative expression in multiple general intellectual ability or in specific intellectual abilities.
>
> 2. Specific academic aptitude. Students with specific aptitudes in selected academic areas: mathematics; the sciences; or the humanities as demonstrated by advanced skills, concepts, and creative expression in those areas.
>
> 3. Technical and practical arts aptitude. Students with specific aptitudes in selected technical or practical arts as demonstrated by advanced skills and creative expression in those areas to the extent they need and can benefit from specifically planned educational services differentiated from those provided by the general program experience.
>
> 4. Visual or performing arts aptitude. Students with specific aptitudes in selected visual or performing arts as demonstrated by advanced skills and creative expression who excel consistently in the development of a product or performance in any of the visual and performing arts to the extent that they need and can benefit from specifically planned educational services differentiated from those generally provided by the general program experience.

8 VA. ADMIN. CODE § 20-40-20. The California Code defines gifted programming and identification policies as:

> Each district shall use one or more of these categories in identifying pupils as gifted and talented. In all categories, identification of a pupil's extraordinary capability shall be in relation to the pupil's chronological peers.
>
> (a) Intellectual Ability: A pupil demonstrates extraordinary or potential for extraordinary intellectual development.
>
> (b) Creative Ability: A pupil characteristically:
>
> (1) Perceives unusual relationships among aspects of the pupil's environment and among ideas;
>
> (2) Overcomes obstacles to thinking and doing;
>
> (3) Produces unique solutions to problems.
>
> (c) Specific Academic Ability: A pupil functions at highly advanced economic levels in particular subject areas.
>
> (d) Leadership Ability: A pupil displays the characteristic behaviors necessary for extraordinary leadership.
>
> (e) High Achievement: A pupil consistently produces advanced ideas and products and/or attains exceptionally high scores on achievement tests.
>
> (f) Visual and Performing Arts Talent: A pupil originates, performs, produces, or responds at extraordinarily high levels in the arts.
>
> (g) Any other category which meets the standards set forth in these regulations.

Moreover, some states, such as Delaware and Oregon simply use the original definition for gifted created by the Marland Report in 1972.[121] Thus, access and eligibility to gifted education and programming is, like special education, different depending on the state of residence of the child.[122]

The twice-exceptional student, on the other hand, is the student who has the unique circumstance of meeting the definitions of both "child with a disability" and "gifted."[123] The National Research Center for the Gifted and Talented ("NRC/GT") has identified three distinct subgroups of gifted and learning disabled students: 1) the "identified gifted underachiever" is the identified gifted student who routinely underperforms in school as related to his intellect and is generally not suspected of having learning challenges; 2) the "identified special education student" is the student who has been identified as needing special education services, but whose innate intellect has been overlooked or masked because of the disability; and 3) the "overlooked general education student" is likely the largest of the three groups, and is the student who is placed in a general education classroom, and is perceived to be a normal child with neither gifted nor special education needs because the two different exceptionalities counteract each other.[124]

CAL. CODE REGS. tit. 5, § 3822

121. *See* DEL. CODE ANN. tit. 14, § 3101(3) (1993) which defines gifted as such:

> "Gifted or talented person" means a person in the chronological age group 4 through 20 years inclusive, who by virtue of certain outstanding abilities is capable of high performance in an identified field. Such an individual, identified by professionally qualified persons, may require differentiated educational programs or services beyond those normally provided by the regular school program in order to realize his or her full contribution to self and society. A person capable of high performance as herein defined includes one with demonstrated achievement and/or potential ability in any of the following areas, singularly or in combination:
>
> a. General intellectual ability;
> b. Specific academic aptitude;
> c. Creative or productive thinking;
> d. Leadership ability;
> e. Visual and performing arts ability;
> f. Psychomotor ability;

and OR. REV. STAT. § 343.395 (2003); *see also* MARLAND REPORT, *supra* note 5, at 2.

122. *See generally* Zirkel, MONOGRAPH, *supra* note 108 for an excellent analysis of state-by-state application of state legislation and regulations for gifted education.

123. *See* Clark, *supra* note 111 at 62. The gifted disabled child is known by several different terms. *See, e.g.*, Zirkel, MONOGRAPH, *supra* note 108, at 15 (referring to gifted and disabled student as "gifted plus"); SUSAN BAUM, ET AL., TO BE GIFTED AND LEARNING DISABLED 2 (1991) (referring to gifted and disabled children as "GLD"); and Colleen Willard-Holt, *Dual Exceptionalities*, THE ERIC CLEARINGHOUSE ON DISABILITIES AND GIFTED EDUCATION, ERIC EC DIGEST E574 (1999), http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/2a/2d/aa.pdf (referring to the gifted and disabled child as one with "dual exceptionalities").

124. *See* Beckley, *supra* note 109. The "gifted underachievers" underachievement is oftentimes attributed to low self-esteem, lack of appropriate motivation, and laziness. *See* Brody & Mills, *supra* note 109, at 282. This student may make it all the way through the educational system and never be

The twice-exceptional student as described in group three is frequently overlooked and/or misdiagnosed for one or both of their exceptionalities because the child's intelligence often masks the learning disability; and conversely, the disability can frequently mask the child's giftedness.[125] For example, a child with an IQ of 140 (identified at the 99th percentile) who was reading at grade level would be performing at the 50th percentile.[126] Because he would be performing at an acceptable level for the regular classroom, he would not be suspected as a child in need of special education services, nor would he be a child identified as "gifted."[127] Thus, although the child could, and should be able to perform at a level commensurate with his intellectual abilities (i.e. substantially above grade-level), because of his disabilities, his performance is far below this expectation.[128] If, on the other hand, the child is identified as gifted (as a result of some other performance test), because of his grade-level performance, he is likely to be labeled as either "lazy" and/or "underachieving."[129] This misdiagnosis causes gifted children to fall far short of their true potential.[130]

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identified as disabled, with the giftedness continuing to mask the disability. *Id.* As assessment and evaluation pertains to the second group of students, it has been estimated that as many as one-third of the special education students actually have superior intelligence. *Id.* at 283. However, like their identified gifted counterparts, these students may never be revealed as twice-exceptional because their disability masks their intellect. *Id.* In the case of the third group of students, this child too may complete their entire academic experience while thought of as an "average" student, never realizing their giftedness or their need for special education services. *Id.* Thus, this student is likely to finish school never realizing their true academic potential. *Id.*

125. *See* Clark, *supra* note 111, at 63.

126. Steven G. Zecker, *Underachievement and Learning Disabilities in Children Who are Gifted*, http://www.ctd.northwestern.edu/resources/socemoachieve/underachieveld.html.

127. *Id.*

128. *Id.*

129. Lisa Fine, *Diamonds in the Rough*, EDUCATION WEEK, Oct. 24, 2001 at 38, 39; *see also* Willard-Holt, *supra* note 123. Willard-Holt describes a variety of challenges involved in assessing the gifted disabled child, such as: 1) hearing impaired children would not effectively respond to oral test directions and/or have a reduced vocabulary that is not commensurate with their intelligence; 2) children with speech and language delays do not adequately respond to tests that require a verbal response; 3) visually impaired children may not adequately respond to testing criterion that is dependent on understanding of visual concepts (such as color); 4) physically handicapped children may have reduced scores as a result of a limited exposure to certain life experiences; and 5) twice-exceptional children may have elevated comprehension but poor reading skills, or elevated critical thinking but poor expressive skills, resulting in a skewed and incorrect testing result. *Id.* Accordingly, in order to properly identify gifted students in the physically disabled population, modifications should be made in the testing, evaluation and identification processes. *See* Clark, *supra* note 111, at 65.

130. *See* Laura Ketterman, *Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities? An Analysis of J.D. v Pawlet*, 32 ST. MARY'S L.J. 913, 919 (2001).

Physical disabilities, such as blindness, deafness, or orthopedic impairments are also disabilities which would result in the necessity for the child to receive special education services.[131] However, although these children are physically disabled, they are very likely to be academically normal, if not gifted.[132]

IDEA 04, along with many states, also recognizes an emotional disturbance under the definition of "child with a disability."[133] Students exhibiting emotional disturbances experience "frustration, boredom, alienation, apathy, and hopelessness," in addition to acting out with "passive resistance as well as aggressive behavior at school."[134]

Perhaps the largest challenge faced by the twice-exceptional child is the child's own perception of his failings. Twice-exceptional children frequently suffer from frustration and low self-esteem which in turn leads to poor classroom performance and behavioral problems.[135] Undiagnosed and/or underserved twice-exceptional children can become aggressive, defensive, careless and can oftentimes cause disruptions in the classroom.[136] Ultimately, the gifted yet disabled child who is not intellectually stimulated will not only fail to reach their full academic potential, but, quite possibly will regress and develop such characteristics as learned helplessness[137] and lack of motivation.[138] Thus, it behooves the child, the school and society to

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131. *See* IDEA 04, 20 U.S.C. § 1401(3)(A).

132. *See* Kielbus v. N.Y. City Bd. of Educ., 140 F. Supp. 2d 284, 287 (E.D.N.Y. 2001) (involving a gifted child who is hard of hearing). Furthermore, the physically disabled child population (unless the disability is one that results in a mental or cognitive deficiency) is generally likely to have the same percentage of gifted students as one would find in the non-disabled population. *See* Clark, *supra* note 111, at 65.

133. 20 U.S.C. § 1401(3)(A)(i). Many states also include emotional disturbances in their definition of disabled. *See, e.g.*, ALA. CODE § 16-39-2(1) (2001); ALASKA STAT. § 14.30.350(2) (2004); ARIZ. REV. STAT. § 15-761(2) (2002); ARK. CODE ANN. § 6-41-302(2) (1997-1999); CAL EDUC. CODE § 8208(L) (WEST 2002); CONN. GEN. STAT. § 10-76A(5) (2002); GA. CODE ANN. § 20-2-152(A) (2005); IDAHO CODE ANN. § 33-2001(3) (2001); ILL. ADMIN. CODE tit. 23, § 226.75 (1998); KAN. STAT. ANN. § 72-962(Z) (2002); KY. REV. STAT. ANN. § 157.20(1) (1996); MD. CODE ANN. EDUC.§ 8-401(A)(2) (2004); MINN. STAT. § 125A.02 (2000); N.H. REV. STAT. ANN. § 186-C:2 (1999); N.J. STAT ANN. § 18A:46-1 (West 1999); N.C. GEN. STAT. § 115C-109 (2003); N.D. CENT CODE § 15.1-32-01 (2003); ORE. REV. STAT § 343.035(1) (2003); TENN. CODE ANN. § 49-10-102 (2002); TEX. EDUC. CODE ANN. § 29.003(B) (Vernon 1996); UTAH STATE BOARD OF EDUCATION, SPECIAL EDUCATION RULES, I.E. (52) (2000); VA. CODE ANN. § 22.1-213 (2003); WIS. STAT. § 115.76(5) (2004).

134. J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 63 (2d Cir. 2000); *see also* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804, 807 (5th Cir. 2003) (involving a "bright young man who suffer[ed] from serious behavioral problems," which ultimately resulted in his placement at a private residential treatment facility.).

135. *See* Beckley, *supra* note 109.

136. *Id.*

137. "Learned helplessness" is a term used to indicate the situation that results when the underlying problem is not properly addressed and the child feels "that they have no control over their lives and that it is not in their power to master the tasks before them." LAWRENCE E. SHAPIRO, PH.D., AN OUNCE OF PREVENTION 89 (2001).

138. *See* Clark, *supra* note 111, at 62, 64. Twice-exceptional children exhibit a wide array of

address the twice-exceptional child's unique educational needs so as to avoid these social and behavioral issues.

Although the Supreme Court had previously held that education was not a "fundamental right,"[139] the Court, nonetheless held in *Plyler v. Doe* that "education has a fundamental role in maintaining the fabric of our society."[140] "We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[141] In affirming the value of education to all, Justice Brennan noted that "[lack of education] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[142] *Plyler* came twenty-eight years after *Brown v. Board of Education*, and essentially reiterated the Court's holding in *Brown* that education is "perhaps the most important function of state and local governments."[143]

On the heels of the *Plyler* decision, the Supreme Court came out with a vastly different holding in *Board of Education v. Rowley*.[144] Amy Rowley was a deaf kindergarten student who, aside from her deafness, performed

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behaviors, such as, "lack of social skills, social isolation, unrealistic self-expectations, perfectionist tendencies, distractibility, frustration in response to school demands, low self-esteem, and failure to complete assignments." *Id.* at 64.

139. San Antonio Indep. Sch. Dist. v Rodriguez, 411 U.S. 1, 35 (1973).

140. Plyler v. Doe, 457 U.S. 202, 221 (1982). *Plyler* dealt with a challenge to a Texas Statute (§ 21.031) that denied children of illegal aliens access to public education. *Id.* at 205. In a five-four decision, the Court held, "[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here." *Id.* at 230.

141. *Id.* at 221. Justice Brennan also commented, "[t]he American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

142. *Id.* at 223.

143. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

144. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982). *Plyler* was argued before the Court on December 1, 1981, and decided on June 15, 1982. *Plyler*, 457 U.S. at 202. The Court split five-four in *Plyler*, with Justice Brennan writing for the majority, and joined by Justices Marshall, Blackmun, Powell and Stevens. *Id.* at 203. Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, filed a dissenting opinion. *Id. Rowley*, on the other hand, was argued on March 23, 1982 and was decided on June 28, 1982, a mere two weeks after the *Plyler* decision was issued. *Rowley*, 458 U.S. at 179. In what amounted to a game of judicial musical chairs, the Justices rearranged their positions. The Court split six-three with the opinion written by Justice Rehnquist and joined by Chief Justice Burger, and Justices Powell, Stevens, and O'Connor. *Id.* Justice Blackmun filed a concurring opinion. *Id.* Justice White, joined by Justices Brennan and Marshall, wrote a dissenting opinion. *Id.* Of particular note is the fact that the *Rowley* decision did not mention the *Plyler* decision at all, leaving the reader to wonder why the opinions are so different from each other. *See* Bd. of Educ. v. Rowley, 458 U.S. 176 (1982).

well in school.[145] Although Amy was an "excellent lipreader" [sic], performed "better than the average child," and had established an "extraordinary rapport" with both teachers and students, the district court found that as a result of Amy's hearing deficit, Amy "'understands considerably less of what goes on in class than she could if she were not deaf' and thus 'is not learning as much, or performing as well academically, as she would without her handicap.'"[146] When the school district refused Amy's parents' request that the district provide a sign language interpreter for Amy, the Rowleys challenged Amy's IEP.[147] The Rowleys' contention was that, because Amy was not being given an opportunity to perform to her full potential, she was not being granted FAPE under the EAHCA.[148] The Supreme Court however disagreed and reversed, holding that the legislative intent of the EAHCA was only to provide handicapped students with the "'basic floor of opportunity'" that "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."[149]

B. Chevys v. Cadillacs

Rowley has since become the standard for establishing FAPE under the IDEA.[150] Courts routinely evaluate the child's IEP and placement as necessary only to provide the *Rowley* "floor of opportunity."[151] In *John Doe v. Board of Education of Tullahoma City Schools*, the Sixth Circuit stated that even though *Rowley* created the "floor for education of the handicapped . . . [and] states may impose a higher standard if they choose . . . we do not find such a holding to be justified in this case."[152] The court further clarified their holding with the following colorful analogy:

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

146. *Id.* at 184-85 (citing Rowley v. Bd. of Educ., 483 F. Supp. 528, 532 (S.D.N.Y. 1980)).

147. *Rowley*, 458 U.S. at 184-85.

148. *Id.* at 186. The District Court agreed with the Rowleys, defining FAPE as "an opportunity to achieve her full potential commensurate with the opportunity provided to other children," and further stating "[FAPE] requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by non-handicapped children." *Id.* (citing Rowley, 483 F. Supp. at 534). Additionally, although divided, the United States Circuit Court for the Second Circuit affirmed. *Id.* (citing Rowley v. Bd. of Educ., 632 F.2d 945, 947 (2d Cir. 1980)).

149. *Rowley*, 458 U.S. at 201, 204.

150. Judith DeBerry, Comment, *When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?*, 34 ST. MARY'S L. J. 503, 523 (2003).

151. *Rowley*, 458 U.S. at 201; *see also* A.B. v. Lawson, 354 F.3d 315, 325 (4th Cir. 2004) (holding that the district court "correctly recognized that [the district] offered A.B. an IEP that was reasonably calculated to provide him some educational benefit, thus providing a FAPE and satisfying IDEA's modest requirement.").

152. Doe v. Bd. of Educ. of Tullahoma City Sch., 9 F.3d 455, 457-58 (6th Cir. 1993). Student John Doe was evaluated for learning issues and was found to have an IQ of 130, as well as a "neurological impairment that hinders his ability to process auditory information and engage in

> The Act requires that the Tullahoma schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. Appellant, however, demands that the Tullahoma school system provide a Cadillac solely for appellant's use. We suspect that the Chevrolet offered to appellant is in fact a much nicer model than that offered to the average Tullahoma student. Be that as it may, we hold that the Board is not required to provide a Cadillac, and that the proposed IEP is reasonably calculated to provide educational benefits to appellant, and is therefore in compliance with the requirements of the IDEA.[153]

Part of the problem with creating the twice-exceptional child's IEP is the difficulty satisfying the IDEA's "least restrictive environment" ("LRE") concern.[154] LRE dictates that disabled children should, whenever possible, be educated with non-disabled children; however twice-exceptional children would likely benefit more from, "a class for students with dual exceptionalities [which] would allow the kind of ongoing support such children need."[155] Thus, the twice-exceptional child will likely perform better in a segregated environment, which is an environment completely at odds with the LRE goal of the IDEA.

IV. GETTING THE TWICE EXCEPTIONAL CHILD THE CADILLAC HE DESERVES

"Teachers wouldn't want to overlook the next Albert Einstein or Thomas Edison, for instance. Both had trouble in school, but, as history and

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normal language and thinking skills," which entitled him to services for special education. *Id.* at 456. Although the school district convened to create an IEP for the student, the parents chose to enroll their child in a private school prior to the completion of the IEP, claiming that the private school was the "only appropriate placement." *Id.* Alleging that the private school was the only way for the student to receive FAPE, the parents sued the district for funding for the private school. *Id.* at 456-57. After analyzing the "least restrictive environment" element of the public school versus the private school, the court concluded that even though the private school was "certainly an appropriate, and in some respects even a superior, placement, it is clearly far more restrictive than the IEP proposed by the [school district]." *Id.* at 460.

153. *Tullahoma*, 9 F.3d at 459-60. Not only have courts routinely followed *Rowley*, but several courts have adopted the *Tullahoma* court's Chevrolet-Cadillac analogy as well. *See, e.g.*, Troy Sch. Dist. v. Boutsikaris, 250 F. Supp. 2d 720, 735 (E.D. Mich. 2003); Nein v. Greater Clark County Sch. Corp., 95 F. Supp. 2d 961, 977 (S.D. Ind. 2000); Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist., No. 512, 959 F. Supp. 1338, 1351 (D. Kan. 1997); Hudson v. Bloomfield Hills Pub. Sch., 910 F. Supp. 1291, 1305 (E.D. Mich. 1995).

154. *See* Clark, *supra* note 111, at 65; *see also Tullahoma*, 9 F.3d at 460 (commenting that the IEP that was developed for the student represented a "less restrictive alternative" and thus satisfied the Act's LRE requirement).

155. Clark, *supra* note 111, at 65; *see also supra* notes 68-73 and accompanying text; IDEA 04, 20 U.S.C. § 1412(5)(A).

two lifetimes of towering scientific achievement demonstrated, they fit comfortably within any definition of 'gifted.'"[156] Additionally, as Secretary of Education Marland commented, "Helen Keller was a member of several minorities, yet unquestionably gifted."[157] Hence, history has shown that "disabled" does not necessarily translate into unintelligent or unsuccessful.[158]

But, when children are given low expectations for their academic success, they will likely sink to the lowest common denominator and return exactly what is expected of them; put simply, low expectations garner low results.[159] Overcoming low expectations in educational performance is a fundamental goal of IDEA 04.[160] Similarly, the Marland Report explained

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156. Fine, *supra* note 129, at 39.

157. THE MARLAND REPORT, *supra* note 5, at 93. History is replete with brilliant authors, scientists, politicians and statesmen who were known (or, depending on their time in history, retroactively believed to be) learning disabled. *See* Hurford, *supra* note 8, at 20-25. Just a brief sampling of twice-exceptional historical figures would include: 1) Leonardo da Vinci (although he could solve any scientific or artistic problem, he had trouble with both reading and writing and he always wrote in "mirror writing," which was backwards from normal writing); 2) Winston Churchill (Churchill commented, "I was on the whole considerably discouraged by my school days. Except in Fencing, in which I had won the Public School Championship, I had achieved no distinction."); 3) Hans Christian Anderson, who was reported to be dyslexic; 4) Investment broker Charles Schwab, who though he may not yet be a historical figure, is certainly considered an example of a 20th century successful and highly intelligent person who, as an "unidentified dyslexic . . . went through Stanford University reading at . . . half the speed of other students;" and 5) Nelson Rockefeller, who is cited as "the first famous dyslexic to 'go public' with his difficulties." *Id.* at 20-21, 25.

158. Although these examples of twice-exceptional students succeeded despite their adversities, they are in a select group that was able to do so. It seems undisputed that these individuals had enormous intellect which certainly contributed to their ability to compensate for their deficits. The brighter the child, the more likely they are to come up with their own compensating techniques. Unfortunately for the vast majority of twice-exceptional students, the ability to self-compensate is also detrimental in that it is not generally sufficient and it serves to mask the underlying problem afflicting the child. *See generally,* Linda K. Silverman, Ph.D., *The Two-Edged Sword of Compensation: How the Gifted Cope with Learning Disabilities, in* UNIQUELY GIFTED: IDENTIFYING AND MEETING THE NEEDS OF TWICE-EXCEPTIONAL STUDENTS, 153, 153-65 (Keisa Kay ed., 2000) (defining and explaining how gifted disabled children compensate, and how it both helps and hinders their educational performance).

159. *See* Hugh O'Donnell, *What's Wrong With the Picture: The Other Side of Representing Parents in Child Protection Cases*, 4 APPALACHIAN J.L. 73, 84 (2005).

160. 20 U.S.C. § 1400(c)(3)-(5). The Act states that:

> (3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.
>
> (4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.
>
> (5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by--
>
> > (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to--
> >
> > > (i) meet developmental goals and, to the maximum extent possible, the

that when gifted children are properly stimulated and challenged, they succeeded; yet when they are not sufficiently challenged, they "performed far below their capacity, [and] . . . found their educational experiences frustrating."[161] Thus, it would seem that the goals of both special education and gifted education are similar in their objective to improve both the academic and social development and success of the child by raising the expectations of performance. Accordingly, it would seem that it is in the best interest of the twice-exceptional child to partake in services from both programs.[162] Given the nearly identical goals of the two acts, and the fact that Javits 01 specifically calls for inclusion of special education children in its programming, it is most unfortunate that courts routinely find that the *Rowley* "floor" is all that is necessary when faced with a twice-exceptional student.[163]

A. Impact Significance

Plaintiff John Doe, Jr. was so "emotionally deteriorated" that his parents felt the need to hospitalize him for five months during his sixth-grade year.[164] Moreover, he was described as "depressed and violent" and John's psychiatrist testified that John "felt very pressured and could be aggressive and destructive to other children."[165] Yet, the court held, "[d]espite the evidence of the plaintiff's behavioral difficulties . . . he was not a handicapped child entitled to special education."[166] The sole reason? "The

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challenging expectations that have been established for all children; and
(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible.

161. THE MARLAND REPORT, *supra* note 5, at 88. Secretary Marland went on to explain that "[t]he *highly* gifted received little understanding and emotional support from school and community." *Id.* Yet, when the students were properly challenged and given a chance to "satisfy their desires for knowledge and performance, their own sense of adequacy and well-being improve[d]." *Id.*

162. Although educational scholars have recommended that twice-exceptional students be offered services simultaneously, with the current legal interpretation, it is likely that the twice-exceptional student will receive services in "one or the other area, but not both." *See* Brody & Mills, *supra* note 109, at 284.

163. *See* Javits 01, Pub. L. No. 107-110, § 5465, 115 Stat. 1425, 1828; *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 201 (1982); Doe v. Bd. of Educ., 9 F.3d 455, 459 (6th Cir. 1993) (commenting that the Act "provides no more than a basic floor of opportunity") (quoting *Rowley*, 458 U.S. at 201); A.B. v. Lawson, 354 F.3d 315, 330 (4th Cir. 2004) (asserting that "IDEA's FAPE standards are far more modest than to require that a child excel or thrive.").

164. John Doe, Jr. v. Bd. of Educ., 753 F. Supp. 65, 66 (D. Conn.. 1990).

165. *Id.* at 66, 70.

166. *Id.* at 70.

plaintiff's academic performance . . . before, during, and after his hospitalization [was] satisfactory or above."[167]

As this case shows, the court's application of the IDEA in cases of a twice-exceptional child frequently defeats the goal of raising expectations in educating the child. The conflict can be summarized as a "contradiction between the floor-like standard of appropriateness under the IDEA and the ceiling-like needs of gifted students."[168]

Hence, parents of twice-exceptional children wishing to challenge their school districts to address their child's unique needs could attempt two different approaches (although, as this comment will show, one approach has a much greater chance of success).[169] The first argument that parents can attempt would be one based in the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[170] The second, and arguably stronger argument, is based on the statutory law of Section 504 of the Rehabilitation Act of 1973.[171]

B. Equal Protection Approach

Perhaps Chief Justice Warren stated this argument best when he posited in dicta, "[educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[172] One could logically argue that the educational opportunity of a gifted education, if offered to one student, should be offered to all eligible students. Conversely, if a special education opportunity were to be offered to one student, that opportunity also should be offered to all eligible students. Thus, one could argue, that as long as a state offers both of these types of educational services, the twice-exceptional child has an equal protection right to both.

Let us assume that the parents of Albert Einstein (one of history's most celebrated twice-exceptional students) brought an equal protection action to

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167. *Id.* The court further clarified that "[i]n order to qualify as a seriously emotionally disturbed child, the condition must exist over a long period of time and must 'adversely affect[] educational performance.'" *Id.* at 70 n.9 (quoting 34 C.F.R. § 300.5(b)(8)); *see also* Jan C. Costello, *"The Trouble is They're Growing, The Trouble is They're Grown": Therapeutic Jurisprudence and Adolescents' Participation in Mental Health Care Decisions*, 29 OHIO N.U. L. REV. 607, 612 (2003) (depicting a hypothetical twice-exceptional child and resulting at risk scenarios).

168. *See* Zirkel, MONOGRAPH, *supra* note 108, at 16. Professor Zirkel identifies the primary problem as the court's inability to recognize the concept of twice-exceptional children (primarily due to the element of the two exceptionalities masking each other). *Id.*

169. *See infra* Part IV.B-C.

170. U.S. CONST. amend. XIV, § 1 (stating "[n]o state shall . . . deny . . . any person within its jurisdiction the equal protection of the laws."); *see also infra* Part IV.B.

171. *See* RA504, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973); *see also infra* Part IV.C.

172. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see also* Allen W. Hubsch, *Education and Self-Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 102 (1989) (commenting on the prevalence of education litigation in the federal courts).

satisfy Albert's educational needs (assuming, *arguendo*, that the Einsteins lived in present day United States during Albert's youth).

The first hurdle Mr. and Mrs. Einstein need to get over is the "right to education." However, as has been previously noted, there is no fundamental right to education.[173] Forging ahead, the Einsteins can argue that the Supreme Court found an equal protection right to education in *Brown v. Board of Education*.[174] *Brown*, however, is based on race, which is a suspect class and therefore subject to strict scrutiny.[175] However, since disability rather than race is the issue for Albert, he is unlikely to prevail under the same terms as *Brown*.

While *Brown* is the preeminent case for equal protection in the field of education, it is by no means alone. Equal protection in education was also argued before the Supreme Court in *San Antonio Independent School District v. Rodriguez*.[176] In assessing the level of scrutiny applicable to the *Rodriguez* case, Justice Powell held, "we find neither the suspect-classification nor the fundamental-interest analysis persuasive."[177] The Court commented that the holding did not "detract[] from [the Court's] historic dedication to public education[;]" but rather, the Court held education was not "fundamental for purposes of examination under the Equal Protection Clause."[178] Having determined that education was not subject to strict scrutiny evaluation, the Court held, "the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution . . . [e]ducation . . . is not among the rights

173. *See supra* note 19 and accompanying text.

174. *See Brown*, 347 U.S at 495. Chief Justice Warren held, "[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal . . . we hold that the plaintiffs [are] . . . deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment." *Id.*

175. *See* Chemerinsky, *supra* note 47, at 525, 529. Strict scrutiny review, the highest level of constitutional review, requires the government to prove that the government action requested is the "least restrictive or least discriminatory alternative." *Id.* at 416. Litigation addressing Equal Protection that is analyzed under strict scrutiny review is usually found to be unconstitutional because: 1) the Government has the burden of proof, and 2) the government must show that the law is "necessary to achieve a compelling government purpose." *Id.*

176. 411 U.S. 1 (1973). *Rodriguez* involved a class action suit by citizens residing in poorer communities in Texas. *Id.* at 4-5. The plaintiffs contended that the Texas educational funding scheme discriminated against poorer communities and subsequently brought an action under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 5-6.

177. *Id.* at 18. Justice Powell expounded further, "[t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection." *Id.* at 28.

178. *Id.* at 30.

afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."[179]

Having determined that education is not a fundamental right and is not subject to strict scrutiny review, the Einsteins must now make an equal protection argument using a lower level of scrutiny, such as rational basis review.[180] Additionally, since cases involving disabilities are judged under a rational basis review (as disability is not considered a suspect class), Albert's disability does not affect the level of scrutiny used for the Einstein's case.[181]

Accordingly, in response to the Einstein's contention that Albert is being denied an equal opportunity to both gifted education services and special education services, the State would only need to show that its basis for denying Albert access to both forms of educational services satisfies any conceivable legitimate governmental purpose.[182] The government will most likely contend that the expenses involved in finding, identifying, and servicing the twice-exceptional child are cost prohibitive.[183] Unfortunately for the Einsteins, case law has shown that budgetary constraints are sufficient grounds to find a statute or law constitutional under the rational basis test.[184] For that reason, the Einsteins are unlikely to prevail under this

179. *Id.* at 33-35. Justice Powell further explained the holding, commenting, "[a]s we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." *Id.* at 35.

180. The Supreme Court has held, "[u]nless a classification involves suspect classes or fundamental rights, judicial scrutiny under the Equal Protection Clause demands only a conceivable rational basis for the challenged state distinction." Nordlinger v. Hahn, 505 U.S. 1, 27 (1992). Rational basis review is the lowest level of review for constitutional litigation involving equal protection. *See* Chemerinsky, *supra* note 47, at 414-415. In order for the law to survive a constitutional challenge, the government must show the law is "rationally related to a legitimate government purpose." *Id.* at 415. Additionally, the disputed legislation need only show "any conceivable legitimate purpose." *Id.*

181. *See* Chemerinsky, *supra* note 47, at 631 (explaining that the "Supreme Court . . . has ruled that only rational basis review should be used for discrimination based on disability."). However, Professor Chemerinsky did point out that, although the rational basis level of review creates a difficult test for an equal protection claim to overcome, the disabled plaintiffs in *City of Cleburne, Texas v. Cleburne Living Centers, Inc.* did just that when the Court found a "city ordinance that required a special permit for the operation of a group home for the mentally disabled" to be both discriminatory and unconstitutional. *Id.* (citing City of Cleburne v. Cleburne Living Ctrs., 473 U.S. 432 (1985)).

182. *See* Chemerinsky, *supra* note 47, at 415.

183. *See* Davalene Cooper, *The Death of Common Sense: How Law is Suffocating America*, 29 SUFFOLK U. L. REV. 669, 674 (1995) (reviewing PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994)).

184. *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 237-38 (1981) (In determining the constitutionality of reducing Medicaid funds to a certain class of individuals, the Court held, "Medicaid funds [are] 'rationally related to the legitimate legislative desire to avoid spending federal resources on behalf of individuals whose care and treatment are being fully provided for by state and local government units;" and that "Congress rationally may elect to shoulder only part of the burden of supplying this allowance."); Ackerman v. Columbus, 269 F. Supp. 2d 1354, 1360-61 (M.D. Ga. 2003) (holding that budgetary restraints which limit the City's ability to grant raises to a certain class

argument.[185] As a final word of advice regarding a potential equal protection claim, the Einsteins would be wise to heed the cautionary words of Allen Hubsch, who explained that:

> Significantly, success upon an equal protection claim, whether based on suspect class categorization, fundamental right, or rational basis contains a further limitation. The equal protection clause does not impose an affirmative duty upon any state to provide its students with an assured quality education. The equal protection clause only requires that states, once they determine the quality of education to provide, offer that level of quality equally to all children. In response to an equal protection challenge, the state might theoretically lower the quality of education or the level of expenditure in all its school districts to that provided in the school district attended by the suspect class.[186]

C. *Rehabilitation Act of 1973, Section 504 Approach*

Before commencing an argument based on Section 504 of the Rehabilitation Act of 1973, the Einsteins must first exhaust all administrative remedies available to them under the IDEA.[187] Once the

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of city employees have a rational basis and "do not result in an unconstitutional denial of Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution"); Little v. Terhune, 200 F. Supp. 2d 445, 452 (D.N.J. 2002) (holding that "the disparate availability of educational programming between inmates in the general population at NJSP and inmates in administrative segregation at [New Jersey State Prison] is rationally related to overlapping security concerns and budgetary constraints").

185. *See Nordlinger*, 505 U.S. at 26 ("[N]ot every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another." (quoting Snowden v. Hughes, 321 U.S. 1, 8 (1944))).

186. *See* Hubsch, *supra* note 172, at 106.

187. *See* Zirkel, MONOGRAPH, *supra* note 108, at 20 (stating that in order to bring a claim under Section 504, plaintiffs must first exhaust the due process rights afforded them under the IDEA). Further, the IDEA provides: .

> (A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.
>
> (B) Limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.
>
> (C) Additional requirements. In any action brought under this paragraph, the court
>
> (i) shall receive the records of the administrative proceedings;
>
> (ii) shall hear additional evidence at the request of a party; and

Einsteins have done so, they can bring a claim alleging that Albert is a victim of discrimination under Section 504.[188] Specifically, Section 504 states, "[n]o otherwise qualified handicapped individual in the United States, as defined in section 7(6),[189] shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[190] Thus, the Einsteins' argument would be that since Albert is "otherwise qualified" as gifted, he cannot be denied the benefits of a gifted education on the basis of his disability. Likewise, since Albert is "otherwise qualified" as disabled, he cannot be denied the benefits of special education on the basis of his giftedness.

In order for the Einsteins to bring a claim under Section 504, Albert must meet the three-pronged eligibility requirement: 1) "physical or mental impairment," 2) "major life activity," and 3) "substantial limitation."[191] A glance at Albert's childhood reveals that he would most likely meet the qualifications of Section 504: 1) he did not speak until age three, 2) he had difficulty with memorization, 3) he would frequently sit alone and do nothing for long periods of time, and 4) he "couldn't learn by rote, and ignored whatever bored him."[192] Thus, it is likely that he will be eligible for accommodations under Section 504. Students who qualify for services under Section 504 may potentially receive district funding for specialized

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> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

IDEA 04, 20 U.S.C. § 1415(i)(2).

188. *See* RA504, Pub. L. No. 93-112 § 504, 87 Stat. 355, 394 (1973). The Rehabilitation Act of 1973 is a federal civil rights act designed to protect the civil rights of the disabled. *See* Todd A. Mitchell, *Employment, the Law, and the Community College: A Primer*, 192 WEST EDUC. L. REP. 613, 626 (2004). Section 504 of the Act is a civil rights statute that is monitored by the United States Department of Education's Office for Civil Rights [hereinafter OCR]. *Id.*

189. Section 7(6) of RA504 provides:

> The term 'handicapped individual' means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this act."

190. RA504 § 504; *see also* Ketterman, *supra* note 130, at 920-21 (explaining that public schools are subject to the provisions of the Act).

191. *See* Perry A. Zirkel, *Conducting Legally Defensible § 504/ADA Eligibility Determinations*, 176 WEST EDUC. L. REP. 1, 2 (2003) [hereinafter Zirkel, *Defensible*]. "The pertinent statutory definition, which is identical in Sec. 504 and the ADA, is 'physical or mental impairment which substantially limits one or more . . . major life activities." *Id.* (citing 29 U.S.C. § 705(20)(B)). Per the OCR, this definition shall be used to determine eligibility for FAPE, "which is the entitlement under § 504." Zirkel, RECOMMENDATIONS, *supra* note 36, at 33.

192. Keisa Kay, *Albert Einstein's Brain: Atypical Anatomy and Implications for Twice Exceptionality, in* UNIQUELY GIFTED: IDENTIFYING AND MEETING THE NEEDS OF TWICE-EXCEPTIONAL STUDENTS 172, 172-73 (Keisa Kay ed., 2000). Although there was no definitive diagnosis given during Einstein's lifetime, it is relatively accepted that Einstein's behavior was indicative of the twice-exceptional student. *Id.* Kay further theorizes, "[n]ew research into the structure of Einstein's brain reveals neurological anomalies that indicate twice exceptionality." *Id.* at 172.

private schooling, or various special accommodations provided by the district and delivered to the student at the local school.[193]

The Einsteins are quite likely to prevail in their request for accommodations for Albert's unique needs. In *Borough of Palmyra, Board of Education v. F.C.*,[194] parents claimed the school district failed to offer their child FAPE; as a result, the parents removed their child from the public school, placed him in a private school and requested reimbursement for the expense.[195] The court found for the parents, explaining that the legislative intent, the clear meaning of the statute, and prior court holdings all demanded that schools make reasonable accommodations to provide FAPE to a qualified disabled student, even if it meant modifications to the school or placement of the student in private school at district expense.[196]

Additionally, in *Palmyra*, the court specifically disallowed any budgetary argument the district might have had, stating, "[t]he Board's calculus of financial harm presents a misleading dichotomy, since the alternative to placement at [the private school] is not a zero expenditure, but rather the commitment of other Board resources to fulfilling the Act's mandate of an appropriate education for F.C."[197] Thus, the rational basis test, and its corresponding budgetary-based argument, which is likely to cause the Einstein's argument to fail on an equal protection claim, will not be problematic for a Section 504 based claim.

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193. *See* Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 WEST EDUC. L. REP. 761, 763 (2000) [hereinafter Zirkel, *Top 10*]; *see also* W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995) (examining the types and availability of damages to plaintiffs with Section 504 claims).

194. 2 F. Supp. 2d 637 (D.N.J. 1998).

195. *Id.* at 639-40. The C Family prevailed in their hearing before the administrative law judge, and the district was ordered to both reimburse the C's for the money originally expended and to pay the outstanding balance directly to the private school. *Id.* at 639-40.

196. *See Palmyra*, 2 F. Supp. 2d at 642. The court explained that when Section 504 applies, schools must "'provide a free appropriate education to [] qualified handicapped [students] . . . .'" (quoting *Matula*, 67 F. 3d at 492-93). The court further explained that:

> Such free education "may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program."

Palmyra, 2 F. Supp. 2d at 642 (quoting 34 C.F.R. § 104.33(c)(1)). In explaining the degree of deference that should be given to legislative intent, the court acknowledged that "[Section 504's] regulations particularly merit deference in the present case: the congressional committees participated in their formulation, and both these committees and Congress itself endorsed the regulations in their final form." Palmyra, 2 F. Supp. 2d at 642 (quoting Consol. Rail Corp. v. Darrone, 465 U.S. 624, 634 (1984)).

197. *Palmyra*, 2 F. Supp. 2d at 644.

Similarly, since it is likely that Albert will be identified as gifted,[198] if the Einsteins reside in a state where the public school code and regulations require schools to provide gifted education, Albert will likely qualify to receive services and programming at an accelerated educational level.[199] In *Centennial School District v. Commonwealth of Pennsylvania, Department of Education*,[200] the court held that where the State Board of Education mandated the specialized education of gifted students, the districts must supply "mentally gifted students . . . with a plan of individualized instruction (an 'appropriate program') designed to meet the 'unique needs of the child.'"[201]

Further, in *Central York School District v. Commonwealth of Pennsylvania, Department of Education*, the court held that when the district

198. As a child, Einstein was fascinated by mathematics, science and nature, and taught himself Euclidean geometry when he was just twelve years old. MSN ENCARTA, http://encarta.msn.com/encyclopedia_761562147/Einstein_Albert.html (last visited Oct. 19, 2006). Given Albert's childhood behaviors, it is most likely that Albert would be classified as a gifted underachiever. *See* Kay, *supra* note 192, at 172-73. It should be noted that parents of twice-exceptional children who have not yet been identified as gifted would need to procure an intelligence evaluation that would comply with the requirements of their state and local school districts. This would especially be true for the "identified special education student" and the "overlooked general education student." *See supra* notes 124-30 and accompanying text.

199. Pennsylvania, for example, has identified public education as both a statutory right, as well as a state constitutional right. *See, e.g.*, 24 PA. STAT. ANN. §5-501(1) (West 1992) ("Right to public education in Pennsylvania is statutory right, and, as such, is limited by statutory provisions." (citing O'Leary v. Wisecup, 364 A.2d 770 (1976))); 24 PA. STAT. ANN. § 5-502 (West 1992) (noting that Pennsylvania "Const. Art. 3, § 14, "requires that the General Assembly provide for the maintenance and support of a public education system."). Pennsylvania further defines "'children with exceptionalities'" as "children of school age who have a disability or who are gifted and who, by reason thereof, need specially designed instruction." 24 PA. STAT. ANN.§ 13-1371(1) (West 1992 Supp. 2005). In addition to Pennsylvania, a few other states – Alabama, Florida, Kansas, Louisiana, New Mexico, Tennessee and West Virginia – have laws "that approach the strength and specificity of . . . the IDEA." Perry A. Zirkel, *State Laws for Gifted Education: An Overview of the Legislation and Regulations*, 27 ROEPER REVIEW 228, 229 (2005) [hereinafter Zirkel, *State Laws*]. However, although a majority of states define gifted education, and many even have funding and specific educational responsibilities, most states do not have statutory protections and/or due process rights for dispute resolution. *Id.* at 229-30.

200. 539 A.2d 785 (Pa. 1988)

201. *Id.* at 789. The court further defined the elements as follows:

> *Appropriate program*-A program of education or training for exceptional school-aged persons which meets their individual needs as agreed to by a parent, school district or intermediate unit personnel; or as ordered by a hearing officer; or upon appeal as ordered by the Secretary of Education.
>
> *Exceptional persons*-Persons of school-age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational programs, facilities or services and shall include school-aged persons in detention homes and State schools and hospitals.
>
> ...
>
> ...*Gifted and talented school-aged persons*-Those who, in accordance with criteria prescribed in standards developed by the Secretary of Education, have outstanding intellectual or creative ability, the development of which requires special activities or services not ordinarily provided to regular children by local educational agencies.

Id. at 789 (citing Pa. Code § 13.1).

and/or school is required to supply gifted programming to a qualified student, the district cannot deprive that student of the programming because of budgetary constraints and/or lack of financial resources.[202] Accordingly, if a particular state's education code mandated services for gifted education, any argument the district might make based on budgetary concerns would likely fail here as well.

Accordingly, Albert would likely be identified as eligible for gifted education under the state statutes and he would also be entitled to special education accommodations under Section 504 of the Rehabilitation Act of 1973. As an "otherwise qualified" student for both programs, but for the ramifications of being twice-exceptional, Albert should be able to obtain services from both programs.[203]

V. CONCLUSION

When the level of expectation for performance is high, children respond to the challenge; however, when the bar is low, underachievement is the

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202. 399 A.2d 167, 168-69 (Pa. 1979). The Court explained that:

> We agree with the Secretary of Education that this provision does not make State reimbursement a condition precedent to the duty of school districts to provide special education for exceptional students required by Section 1372. To the contrary, we believe that the School District's duty set forth in Section 1372 to establish an educational program for the gifted is mandatory and a condition to its right to receive reimbursement from the Commonwealth.

Id. The court further emphasized, "'[t]he District's duty to provide appropriate educational services in accordance with a plan, and the Superintendent's duty to enforce that obligation, are not contingent upon the Legislature's full funding of reimbursable costs or upon the Superintendent's approval of the District's budget request.'" *Id.* (citing Fredrick L. v. Thomas, 419 F. Supp. 960, 974-75 (E.D. Pa. 1976)).

203. *See* Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996). Tracy Schramm was a gifted high school student who suffered from cerebral palsy and had been receiving services under the IDEA as a result of her disability. *Id.* at 1370-71. Tracy's high school only required that students complete two years of physical education class. *Id.* at 1371. Because Tracy's disability did not impact her academic performance, upon completion of Tracy's second year of physical education, the district determined that Tracy no longer required an IEP and was no longer eligible under the IDEA. *Id.* Although Tracy ultimately prevailed in her claim for services and was able to reinstate her IEP under the IDEA, the court acknowledged that:

> Although an individual who is eligible for services under IDEA may also qualify for assistance under the Rehabilitation Act of 1973, the school district must comply with both statutes. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in a variety of programs and activities receiving federal aid . . . Both § 504 and IDEA have been interpreted as requiring states to provide a free appropriate public education to qualified handicapped persons . . . Under the statutory scheme, the school district is not free to choose which statute it prefers, as Yankton School District acknowledges in its reply brief.

Id. at 1376 (citation omitted).

result.[204] In 1994, the United States Department of Education stated, "[l]earning is cumulative; all students, including the gifted, develop to their full potential only when their special strengths are identified and supported throughout their lives."[205]

For more than thirty years, America has worked to improve the educational opportunities for its disabled youth and for its gifted youth in order to help them develop that "full potential."[206] Unfortunately, what America has neglected to address was its disabled gifted youth.[207] In doing so, the government is potentially depriving the twice-exceptional child, the child's family, and, one could argue, America itself, from the benefits that child could bring to society.

America, on both the federal and state level has the ability to remedy this wrong – it has procedures, statutes and laws that identify, assist, and educate the disabled student. Similarly, it has procedures in place to identify and educate gifted students. Additionally, through the statutory protections afforded all Americans under Section 504 of the Rehabilitation Act of 1973, it has the ability to combine these procedures to properly and sufficiently identify and educate the twice-exceptional child.[208] Quite simply, it can be done. Do you want to be the government that overlooks the next Albert Einstein, or do you want to be the government that produces Cadillac educations?

Kim Millman[209]

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204. *See* PAT O'CONNELL ROSS, PROJECT DIRECTOR, UNITED STATES DEPARTMENT OF EDUCATION – OFFICE OF EDUCATIONAL RESEARCH AND IMPROVEMENT, NATIONAL EXCELLENCE: A CASE FOR DEVELOPING AMERICA'S TALENT, PART I (1993), available at www.ed.gov/pubs/DevTalent/toc.html.

205. *Id.*

206. *See supra* Part II.

207. *See supra* Part III.

208. *See supra* Part IV.

209. Dedication: J.D. Candidate, Pepperdine University School of Law, December 2006. This comment is dedicated to my very own twice-exceptional child, Scot Bujarski, whose ability to adapt to and work with his own giftedness and dyslexia never ceases to impress and amaze me. His difficulties and his successes were truly the inspiration for my exploration into the legal challenges in this area. I would also like to thank my family; my husband Ron Bujarski, my sons Spencer, Scot and Sean, and my mother, Mary Millman for their never-ending love, support and patience for my "disappearing into the cave" of law school.