

Legal Issues in Identifying and Serving Twice-Exceptional Gifted Learners

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Introduction

The Council for Exceptional Children (CEC) estimates that there are approximately 3 million academically gifted children in grades K–12 in the United States. There is a subset in this population—those students who evidence the potential for high achievement in areas such as specific academics, general intellectual ability, creativity, leadership, and/or visual, spatial or performing arts, but who also have an educational disability that makes some aspect of achievement in school difficult. CEC estimates that there are approximately 360,000 students in this category nationwide (<http://www.cec.sped.org/Special-Ed-Topics/Specialty-Areas/Gifted>). These students are considered to be “twice-exceptional.” It is important to note that there is great variability within the population and their concomitant exceptionalities often mask each other. The one common characteristic of this group, however, is that they simultaneously possess attributes of giftedness as well as an area(s) of disability, which could include issues of general learning, or physical, sensory, attention, social/emotional, or behavioral functioning.

Although not explicitly stated, the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) supports the identification of twice-exceptional students. The IDEA includes 15 different areas in which a student can be found eligible as a result of his or her disability, including learning disabilities, emotional disturbance, autism, and other health impairments (IDEA, 2010). Twice-exceptional students who qualify under the IDEA as having one or more of these disabilities must be accorded the same gifted instructional opportunities as their non-disabled peers. That equal access to gifted instruction requires that:

- gifted students with educational disabilities are identified as both gifted and as having an educational disability;
- gifted students with educational disabilities have access to Gifted and Talented (GT) instructional opportunities in their areas of strength;
- gifted students with educational disabilities receive ap-

propriate individualized instruction, accommodations, and supplementary aids to enable them to succeed in GT and general education instruction.

A study by the U.S. Department of Education’s Office for Civil Rights (2014) concluded that only 1% of students who receive IDEA services are in gifted and talented education programs, compared with 7% of their general education peers (see <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-college-and-career-readiness-snapshot.pdf>). In this article, we discuss why this is so, by examining the legal requirements and statutory framework that ensure that gifted students with disabilities are identified, have access to GT instruction, and are provided with the specialized instruction, accommodations, and supplementary aids that allow them to succeed in school (IDEA, 2010).

The concepts of gifted and talented and educationally disabled are defined in federal and state laws. Students who are twice-exceptional certainly show evidence of a high achievement capability if those gathering the evidence know how and where to look. It is crucial that those who are making the decisions about these capabilities understand how the disability may mask the gift and what these capabilities may, in fact, look like in students who are twice-exceptional.

There is no explicit legal mandate in federal law to serve twice-exceptional students, but a close look at the legal authorities related to both giftedness and educational disabilities reveals consistent support for such an entitlement as well as support and guidance that parents and staff can access to effectively advocate for services. A brief discussion of these authorities, including case law, statutes, regulations, and interpretations by the U.S. Department of Education (USDOE), can provide clarity and direction as parents and educators work to provide appropriate educational services for twice-exceptional students.

Who Are the Gifted and Talented?

Federal education policy defines gifted and talented as those:

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. (Strengthening and Improvement of Elementary and Secondary Schools, 2012, para. 7)

This definition is also utilized by CEC (<https://www.cec.sped.org/Special-Ed-Topics/Who-Are-Exceptional-Learners>).

In addition, more than 30 states have adopted definitions of gifted and talented students, which focus on a student's potential for performing at high levels when compared with other students of his or her age, experience, or environment. The National Association for Gifted Children's (NAGC) definition of giftedness includes the word "potential," which is often key for twice-exceptional students; many of their assessments provide evidence of their potential, while their actual classroom performance might be adversely impacted due to educational disabilities (NAGC, 2013).

The services that are offered for gifted and talented students vary widely from state to state, with some, such as Pennsylvania and Kansas, going as far as providing an Individualized Education Program (IEP) for gifted students, while others offer little to no guidance for gifted instruction. Several states have the same or similar legal requirement of "Child Find" found in the IDEA for identifying all gifted students who reside within their jurisdiction, regardless of public or private school enrollment. Parents and school personnel should check with their state department of education to see where their state stands in relation to gifted mandates and Child Find requirements (IDEA, 2005).

How Are the Gifted and Talented Identified?

NAGC (2008) maintained that the process for identifying students for gifted and talented programs must include: (a) defensible measurement practices aligned with program goals and objectives, (b) administration and interpretation of assessments by properly trained persons, and (c) ethical decision-making in program placement. NAGC also noted that assessments must be appropriate for, and sensitive to, students who have been traditionally underrepresented in gifted programs. The use of varied criteria in the identification of gifted students, as well as participation of multiple stakeholders, including teachers, parents, and other gifted advocates in decision-making is also supported. Clearly, decisions should never be based on a single assessment (NAGC, 2008).

Many school districts conduct a broad-based gifted screening process for their students during the elementary years, usually between grades 2 and 5. It is important that

no student be excluded from this process because of a disability. From both an educational as well as a legal basis, there are some important principles that should be in place to ensure the screening procedures are accurate and thorough. First, schools should choose a committee that represents classroom teachers, special educators, art, or music teachers, and others, including guidance counselors and media specialists. These varied perspectives are essential in compiling a complete picture of each student (Weinfeld, Barnes-Robinson, Jeweler, & Shevitz, 2013).

Second, effective screening and selection procedures use multiple criteria. Parents, teachers, and other school staff should be part of the process, and tests should include those that measure critical thinking, problem solving, and verbal and nonverbal reasoning. Recommendations from different venues and student work samples also provide valuable information. Some of the best information may come from nontraditional sources, like portfolios and community nominations. It is important not to rely solely on test data or to exclude a student because of one low indicator. Nor should there be rigid cutoffs when evaluating performance on test data, but rather analyses of ranges of scores in relationship to all the other data can also be informative (Weinfeld et al., 2013). The Council for Exceptional Children—The Association for the Gifted (CEC-TAG) and NAGC (2010) have jointly endorsed the [Pre-K–Grade 12 Gifted Education Programming Standards](#) that also recommend the use of "non-biased and equitable approaches for identifying students with gifts and talents which may include using locally developed norms" (para. 5).

Unidentified twice-exceptional students often do not do well in this screening process. Teachers and even parents may see these students as lazy or unmotivated, and therefore not good candidates for rigorous instruction. Gilman (2013) noted, "Intellectual advancement may hide significant disability, disability may conceal giftedness, or the child's strengths and weaknesses may appear average when combined" (para. 17). Often, it is only after an IQ test has been administered that the patterns of strengths and weaknesses indicative of twice-exceptional students may emerge. Because broad scores may hide a student's gifts, it is crucial that they be viewed in context. The individual scores that make up the broad score may be more indicative of a student's strengths and challenges. It is critical that children from different backgrounds and experiences, including those with special needs and learning difficulties, have a fair chance to be considered for gifted programs. School personnel should be ever mindful that they must continually assess children, for they grow and mature at different rates through their school years. For many of these students, the gift may only be evident when their abilities can no longer mask their disabilities, as the academic demands increase. At this point, a psychoedu-

cational assessment may not only reveal the nature of the challenges, but the extent of the gift (Weinfeld et al., 2013).

What Does It Mean to Have an Educational Disability?

To understand how these gifted students are recognized and assisted by special education law and policy, we need to understand the basics of the foundational federal statute and interpretive case law. The IDEA is a federal statute that provides a plethora of rights and protections to students with disabilities and their families. A child who is found eligible under the IDEA as a child with a disability is entitled to a free and appropriate public education (FAPE), which is delivered through an Individualized Education Program. Through the IEP, a school system is charged with delivering specialized instruction to meet the unique needs of the child with a disability.

The USDOE has made it clear that while not explicitly stated, twice-exceptional children do qualify for services under the IDEA, by explaining, "It remains the Department's position that students who have high cognition, have disabilities and require special education and related services are protected under the IDEA and its implementing regulations" (Posney, 2010, para.3). Having a twice-exceptional student found eligible is sometimes a challenge, but once under the umbrella of the IDEA, it is important to understand how to ensure that the student is being afforded all of his or her rights.

Prior to the enactment of the IDEA, students with disabilities were routinely subject to discrimination. The earliest approaches to the education of children with disabilities in America—during colonial times and for some time thereafter—had little to do with education and more to do with management. Children with physical or developmental disabilities were often cared for by the family and generally excluded from society. From the early 19th through the mid-20th centuries, a number of movements arose that offered more educational approaches for specific disability groups such as deaf students or those with visual impairments, although often in isolated settings. In somewhat of a contrast, the education of children with developmental or behavioral impairments was still more a function of social management. These children were frequently separated from the mainstream and provided with no meaningful educational services.

It was not until the 1970s that scientific and pedagogical advances and the expansion of Civil Rights combined to literally rewrite the very definition of the education of children with disabilities. Building directly on the Supreme Court's 1954 decision in *Brown v. Board of Education of Topeka, Kansas*, coalitions of advocacy groups for persons with disabilities turned to the federal courts for recognition and definition of special education rights. They primarily

based their claims on the Equal Protection and Due Process Clauses of the U.S. Constitution, the same legal mandates that had ended "separate but equal" education based on race.

In 1972, the United States District Court in the District of Columbia heard *Mills v. Board of Education of District of Columbia*, where several students with disabilities were denied access to any public education because of their disabilities. The Court, relying on *Brown* and the Due Process Clause, found that children with disabilities were denied Due Process of Law and were entitled to publicly supported education. From that decision, along with the 1971 *PARC* (Pennsylvania Association of Retarded Citizens) decision in Philadelphia, came the Education of All Handicapped Children Act in 1975, which eventually was retitled the Individuals with Disabilities Education Act.

The IDEA has gone through several reauthorizations, most recently in 2004 when it was renamed the Individuals with Disabilities Education Improvement Act, and changes have been made as society's knowledge and understanding of students with disabilities has grown. Today, the IDEA (2010) seeks "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living" (p. 118). Therefore, students with disabilities, including twice-exceptional students, have the right to an individualized education that meets their unique needs.

How Are Learning Disabilities Identified?

The IDEA leaves a number of critical terms, such as *appropriate* and *education* undefined. This has led to decades of court battles between parents and school systems, but the statute does, in fact, provide a definition of learning disabilities. Because so many twice-exceptional students are "GTLT," or gifted and talented with learning disabilities, this definition is of importance. The term *specific learning disability* indicates a disorder in one or more of the basic psychological processes involved in understanding or using language, including spoken and written language. Federal law notes that the disability may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations (IDEA, 2004). One important change in the IDEA 2004 was the recognition that students with otherwise adequate reading skills may qualify for the learning disability designation if their reading fluency is impaired. Many twice-exceptional students have learned the rules of reading but cannot read fluently.

As Alexa Posny, acting director of the Office of Special Education Programs, pointed out in her January 2010 letter, including reading fluency in the IDEA 2004 increases the likelihood that students who are gifted will be identified as

having a learning disability.

The 2004 amendments to the IDEA brought a major change in the method for determining whether a child has a specific learning disability, which may be problematic for the identification of twice-exceptional students. Eligibility teams are no longer required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability, but may use a process that determines if the child has responded to scientific, research-based interventions (RTI):

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3) (Individuals with Disabilities Education Improvement Act, 2005, p. 97).

This change can greatly impact twice-exceptional students since testing and their performance in the classroom can sometimes lead to different conclusions. It is critical to not rely solely on RTI when identifying twice-exceptional students.

For example, one student who has been identified as gifted may not be performing at that advanced level, while another might have abilities that mask each other. In the former case, without assessment, we may miss that the gifted student is not performing because of a previously unidentified disability. In the latter case, without assessment, we may miss both the gift and the disability and, consequently, provide the student services for neither (Weinfeld et al., 2013). Although the IDEA now relieves school systems from the requirement to perform assessments in order to determine if a student's school performance may be discrepant from the student's superior to very superior ability, school systems may still choose to do this type of testing and may also consider these discrepancies if they see evidence in either their own assessments or a private assessment provided by the student's parents. And, in fact, the IDEA 2004 states that a disability may either be identified through RTI or by analyzing a pattern of strengths and weaknesses that are indicative of a learning disability (Individuals with Disabilities Act, 2005).

More than ever, it will be crucial to document the interventions that are being used and the evidence of how the child is responding to indicated interventions. The law now leads to the use of specific timetables that describe when and how the effectiveness of the interventions will be measured, and the type of documentation being used. Parents may want to collect their own samples of the child's work over a period of time that will demonstrate whether or not targeted skills are being acquired. Curriculum-based assessments, district and statewide testing, and the traditional psychoeducational assessments can all still be a part of this documentation. Parents and educators of students who have

demonstrated evidence of giftedness, but are performing at or below average in some or all of their academics, should be aware that there may be a specific learning disability present.

Who Are Twice-Exceptional Students?

As previously noted, the identification of twice-exceptional students can be very challenging as the gift may mask the disability, the disability may mask the gift or quite often, the gift and disability may mask each other. Teachers and parents may only see an "average" student who demonstrates neither the gift nor the disability, a disabled student who is getting a great deal of remediation but no recognition or development of her strengths, or a gifted student who seems unmotivated or lazy because he is not performing well. It is crucial that we do comprehensive assessment of both the suspected disability and the suspected gift in order to fully understand and program appropriately.

Federal education policy has addressed these basic factors. In a letter to the Learning Disabilities Association of North Carolina, the U.S. Department of Education offered guidelines for the identification of twice-exceptional students, including:

- No child's IQ can be too high for that child to be considered eligible for special education services.
- Children can be considered for special education if they are not working at their ability level. To determine this, they must be given the opportunity to work at that ability level.
- Consideration of special education eligibility must include an analysis of what the child's performance would be without the help and support of parents and outside providers like tutors and therapists. (T. Hehir, personal communication, April 5, 1995)

Identification of twice-exceptional students requires comprehensive assessment in both the areas of giftedness and disability. Educational services must address both the high achievement potential and the deficits that are revealed through the evaluation process. Twice-exceptional students often require differentiated instruction, accommodations and/or modifications, direct services, acceleration options, and opportunities for talent development. Many twice-exceptional students require an IEP with goals, accommodations, and strategies that enable them to achieve growth at a level commensurate with their abilities, develop their gifts and talents, and learn compensatory skills and strategies to address their disabilities (Weinfeld et al., 2013).

The IDEA is now explicit in ensuring that students are provided with a FAPE that meets their unique needs and prepares them for further education, employment and independent living (Individuals with Disabilities Education Improvement Act, 2010). This definition mandates a broad

view of education. For example, the United States Court of Appeals for the First Circuit described educational services under the IDEA as targeting, "all of [their] special needs, whether they be academic, physical, emotional, or social" (*Lenn v. Portland Sch. Comm.*, 1993). This definition speaks to an expanded view of the eligibility criteria for twice-exceptional students and clarifies that all areas of needs are being met, including social/emotional and behavioral issues that might be adversely impacting education. For a twice-exceptional student, this could include problems with communication, peer interaction, emotional issues, or behavior (Assistance to States for the Education of Children with Disabilities, 2006).

The same Federal court took a closer look at the broad definition of education in *Mr. I and Mrs. I v. Maine Sch. Administrative District* (2007), when considering the special education eligibility of a child with Asperger's syndrome. The student excelled academically, but demonstrated difficulty with emotional and behavioral regulation, including social skills and pragmatics. This led to difficulty with peers; lack of problem solving, communication, and flexible thinking; as well as depression—all resulting in several suicide attempts. However, the school system refused to find her eligible because of her strong academic skills. The Court overturned that conclusion, focusing on her lack of communication skills, finding that her poor pragmatic skills and social deficits impaired her ability to communicate and adversely impacted her educationally. Moreover, the Court found that the services recommended for the student, such as social pragmatics instruction and speech services, fell within the definition of special education (*Mr. and Mrs. I*, 2007).

The First Circuit's analysis is helpful in understanding how the needs of many twice-exceptional students should be addressed. For example, students at the upper end of the Autism Spectrum are often capable of high performance, but due to their Autism have weaknesses in communication and social interaction. These students might also be at advanced risk for depression. While these areas may not be seen as "academic," they do fall within the definition of education and must be addressed through special education services.

Under the IDEA, school systems are required to offer a continuum of services and placements to students with disabilities in the least restrictive environment (LRE) that is appropriate to meet the identified needs (Assistance to States for the Education of Children with Disabilities, 2006). Some students are placed in a general education classroom setting with support provided through inclusion services, while others receive their academic services in small, self-contained classrooms with a lower student-to-teacher ratio. The IDEA provides for services as intensive and restrictive as residential schools for those students that

require it. However, school systems (and the IDEA itself in recent revisions) are focused more and more toward inclusion services and placement of students with disabilities in the general education environment based on the LRE. Of course, once placed in an inclusion setting, the school must provide students with disabilities with the supports they require to access the curriculum.

If students under the IDEA must be provided with services that meet their "unique needs," it follows that twice-exceptional students be provided with high level or GT instruction. If a student is gifted in the area of math, it would be inconsistent with the IDEA to prevent that child from being placed in an advanced math class, if she qualified through performance. To be even more specific, students who have advanced math reasoning abilities should be placed in the advanced math class even if the impact of their learning disability means that their math computation skills require accommodations. Placement in a lower level class would deny the student the right to have his or her "unique needs" met under the IDEA. In addition, such a denial is almost certainly a violation of Section 504 (see discussion of Section 504 Plans below) and Title II of American with Disabilities Act. These laws prohibit discrimination on the basis of disability, and specifically require that school systems do not deny individuals with a disability the opportunity to participate in or benefit from programs. They also ensure that individuals with disabilities are provided opportunities to participate in such programs in a manner that is equal to that offered to individuals without disabilities (Nondiscrimination on the Basis of Disability in State and Local Government Services, 2011; Nondiscrimination on the Basis of Handicap in Program or Activities Receiving Federal Financial Assistance, 2000).

The guidance that the Supreme Court provided 35 years ago for implementation of Section 504 of the Rehabilitation Act of 1973 remains appropriate today for inclusion of twice-exceptional students in higher level courses (Vocational Rehabilitation and Other Rehabilitation Services, 2002). In *Southeastern Comm. College v. Davis* (1979), the Court found that the mere possession of a disability was not a permissible reason for assuming that a student could not function in a particular educational program, and that there existed an affirmative duty to modify programs and provide individualized supports to disabled students in order for them to effectively participate in the program. However, the Court also found that the modifications and supports had to be reasonable and not fundamentally lower the educational standards or academic integrity of the particular program.

Clearly, the *Davis* holding has particular significance in considering the educational needs of twice-exceptional students. Under both the IDEA and Section 504, school

systems have that same affirmative obligation to modify and support higher-level general education courses for the twice-exceptional. However, modifications and supports need to be reasonable. If it is determined that the modifications impact the general education class to a degree where by the integrity of the content or delivery of instruction is significantly compromised, then the twice-exceptional student may not be appropriate for the higher level general education setting.

As the Supreme Court accurately observed in *Davis*, the line between a lawful refusal to modify or accommodate and discrimination based on disability is not always clear. Certainly, as twice-exceptional students continue to be recognized and programmed for, setting such lines will occupy more deliberative time of IEP teams, due process hearings and court.

Sections of the law requiring that individuals with disabilities are provided with the opportunity to participate in programs equal to individuals without disabilities are similarly important in ensuring that twice-exceptional students are provided with IEPs that meet their needs. Once a student is placed in an advanced class, the school system must provide the supports necessary for the same opportunity to access the curriculum as any other student. This could include anything from accommodations, such as extra time on tests or preferential seating, to the presence of a special education teacher who can provide direct instruction. As long as they appear reasonable, a school system cannot refuse to provide these services to twice-exceptional students in any setting, especially one that provides GT or advanced instruction.

What Constitutes Appropriate Instruction for Twice-Exceptional Students?

Research and a review of successful programs for twice-exceptional students reveals that one of the most important components of the education of these students is providing rigorous or GT instruction in each student's areas of strength. If these students are to become functional, successful, independent adults, it will be because their strengths have been identified and developed. This GT instruction will likely include differentiated, enriched and/or accelerated programming in elementary and middle school, and participation in appropriate honors, and/or Advanced Placement classes in high school. In order to fully participate in GT instruction and develop strengths, a twice-exceptional student also needs to have opportunities for the instruction of skills and strategies in areas that are impacted by the student's disability, an appropriately differentiated program including adaptations and accommodations, and comprehensive case management to coordinate all aspects of the educational program (Weinfeld et al., 2013).

The Supreme Court has held that the IDEA does not provide a maximizing standard: while a school system must provide services that afford meaningful educational benefit, it need not confer maximum benefit or the "best" education available. Rather, education that is offered must be "sufficient to confer some educational benefit upon the handicapped child" or a "basic floor of opportunity." (*Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 1982). The Court defined the "basic floor of opportunity" as access to specialized instruction and related services, which are individually designed to provide educational benefit to the disabled child.

The *Rowley* concept of educational benefit has been the subject of decades of debate and case law. When considering twice-exceptional students, school systems have often relied on this standard to argue against eligibility or the provision of services to a student who is meeting grade-level standards. Historically, school systems often have maintained that meeting grade-level standards satisfies the *Rowley* requirement (Johnson, 2003). In many instances, they thereby have failed to consider a student's specific cognitive ability in view of grade-level performance. Recently, courts have "raised the floor" set by the Supreme Court and better defined the standard applicable to evaluating educational progress (Zirkel, 1983).

The new standards are particularly helpful in addressing the needs of twice-exceptional students because they focus on providing a student-by-student analysis that focuses on each individual's abilities. Some federal courts have been particularly vocal in this regard. For example, as early as 1988, the United States Court of Appeals for the Third Circuit held that the IDEA, "calls for more than a trivial educational benefit" and requires that a student's IEP provide significant learning" and "meaningful benefit" (*Polk v. Central Susquehanna Intermediate*, 1988). Ten years later, the same Court revisited the concept, finding that, "when students display considerable intellectual potential, IDEA requires a great deal more than a negligible benefit" (*Ridgewood Board of Education v. N.E.*, 1999). Relying on *Rowley*, the Third Circuit adopted an approach that requires a court to consider the potential of the particular student with disabilities before it. Although the Court's analysis is of course applicable to all children with disabilities, it has particular force for the twice-exceptional population. In fact, *Ridgewood* specifically found that a lower court had violated the IDEA by failing to analyze the type and amount of learning a twice-exceptional student was capable of achieving.

The next year, the United States District Court for the Southern District of Indiana applied *Ridgewood* in *Nein v. Greater Clark County School Corporation* (2000). The Court focused on the language of the IDEA and the state-

ments made by Congress that an IEP should meet a child's unique needs and that services must be personalized. In an analysis particularly useful to an understanding of twice-exceptional children, *Nein* looked at a student's IEP in terms of the child's capacity to learn. Clearly, if a student's high cognitive ability and "capacity to learn" must be provided for in the IEP, the school system has a better defined responsibility to address the individualized needs of twice-exceptional students.

One promising part of the IDEA 2004 update is that twice-exceptional students were included in the groups of students whose needs have priority in U.S. Department of Education grants to guide research, personnel preparation, and technical assistance. This is the first time that the IDEA specifically acknowledges the needs of twice-exceptional children, potentially opening the door to more attention and more services for them. States, local school districts, and universities are now eligible to receive federal money to study and promote promising practices for these students. Unfortunately, there has been little real funding of research in this area, to date.

In December of 2007, Stephanie Monroe, Assistant Secretary for Civil Rights in the USDOE, wrote a "Dear Colleague Letter: Access by Students with Disabilities." She discussed the fact that some schools and school districts had refused to allow otherwise qualified students with disabilities to participate in challenging academic programs, such as Advanced Placement and International Baccalaureate (Monroe, 2007). She also noted that other schools and school districts had required students to give up IEP and 504 services that had been designed to meet their individual needs, as a condition of participation in challenging academic programs (Monroe, 2007). She emphasized that denying a student the opportunity to participate in an accelerated program based on his disability is a violation of federal law. In addition, she made it clear that students with disabilities must be able to receive appropriate accommodations and services while participating in these accelerated programs (Monroe, 2007).

What Role Might Section 504 Play for Twice-Exceptional Students?

Twice-exceptional students may also be eligible for services under Section of the Rehabilitation Act of 1973 (Vocational Rehabilitation and Other Rehabilitation Services, 2002). Although education of disabled students with a 504 Plan could include scheduled special education and related services, in practice it does not typically provide the direct special education that comes with an IEP, but rather, solely, general education accommodations.

Although the IDEA is an education funding statute, Section 504 is a civil rights law aimed at ensuring that all people with disabilities have reasonable access to any

programs and services that receive federal funding. It applies not only to services during the school day, but also to services outside of the school day such as a publicly funded homework club, sports activity, or drama club.

In order to qualify for or be eligible for a 504 Plan, a disabling condition must be identified which significantly impairs one or more major life activities. That disabling condition does not need to be defined as one of the IDEA disability categories. In qualifying for a 504 Plan, the questions are whether the student has a disabling condition and whether it substantially limits the student. In contrast, the questions in an IEP determination are whether there is a disability, whether there is an educational impact to the disability, and whether the student thereby requires special education services. IEPs deal with special education until the end of high school or the age of 21, whichever comes first. 504 Plans can still be appropriate in postsecondary education and in the workplace.

The Office for Civil Rights (OCR) of the U.S. Department of Education has emphasized the importance of 504 Plans for gifted students with disabilities by instructing:

If the protections of 504 . . . are to have any meaning for a qualified handicapped person of superior intelligence, then the student must be entitled to implementation of a Section 504 Accommodation Plan which allows him to achieve educational success reasonably commensurate with his ability . . . even if a child is receiving A or B grades in classes, but is having difficulty paying attention in class, with behavior at school, or at home with home work, the child may still be eligible for accommodations. The deciding factor will be to what extent the AD/HD impacts the student's ability to learn or behave in class. (Durheim, 2012, p. 12)

Because many twice-exceptional students may be bright enough to earn a high grade in a class even though their disability impacts their attention and/or behavior in that class, this guidance from the Department of Education is particularly helpful.

Conclusion

It is important to keep in mind that experts have estimated that as many as 2%–5% of all students are likely to fit the classification of twice-exceptional (Dix & Schafer, 1996; Whitmore, 1981). These figures were substantiated in Montgomery County, MD, where 2% of all students have been identified as simultaneously gifted and disabled. (Weinfeld et al., 2013). "Without appropriate identification and services, the gifts of these students may never be developed" (NAGC, 1998, para. 6).

It is becoming more evident, and more generally accepted, that "the gifts of these students" must be developed, according to the IDEA and its interpretive case law. As the IDEA moves to embrace language such as, "to ensure

that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for future education,” and as the U.S. Department of Education advises that no child’s IQ can be too high for that child to be found eligible under the IDEA, twice-exceptional students should find the path to special education easier to travel. This should surprise no one since the IDEA came into existence as a result of the denial of appropriate educational opportunities to all disabled children. As courts are recognizing, twice-exceptional children have disabilities and must be served just like their peers.

It is also very important to keep in mind that education itself under the IDEA is broadly defined. It certainly is not bound by grade-level reading, writing, and mathematics. The Supreme Court recognized that reality in its first interpretation of the statute in *Rowley* when it observed that appropriate education necessarily means different things to different students. *Rowley*, however, did not involve a twice-exceptional child, so the holding is only helpful by reference.

But courts and hearing officers have since made it clear that appropriate education concerns social skills, study skills, fluency, pragmatic language, issues of self concept, executive function, and attention, at least to the extent that they relate to the obtaining of educational benefit. The cases concerning twice-exceptional students frequently deal with these deficits, and how they detract from a bright child’s classroom performance. What the cases are usually holding is that twice-exceptional children have the same right to IEPs or 504 Plans as their peers because their unique needs require that type of support. Whether they are on, under or right at grade level is simply one more fact to consider, but the legal and educational logic is plain and convincing.

In the end, the growing recognition of special education rights for twice-exceptional students returns us to the earliest days of the IDEA. In determining whom the landmark statute would benefit, the drafters provided three requirements for eligibility. The student had to have a disabling condition, an adverse impact of educational performance because of the condition, and a requirement for special education because of the adverse impact.

The first two requirements are seldom an issue with the twice-exceptional, although the effect of masking can make it challenging to discover the disabilities or see the impact. However, the “requirement for special education” has been problematic. What does it mean “to require” special education? “Require” it for what purpose? If the answer to that is merely to obtain grade-level achievement in academics, then many twice-exceptional students would not qualify for IDEA services. However, if “require” means something more, whether that be learning according to a student’s

unique needs and that student’s progression toward further education, or whether it connotes learning to work with others in the classroom and with teachers—then the provision of appropriate special education to twice-exceptional students will continue to grow as a meaningful and valuable part of the American educational environment.

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