



1-1-2001

Does the Individuals with Disabilities Education Act Exclude Gifted and Talented Children with Emotional Disabilities - An Analysis of *J.D. v. Pawlet*.

Laura Ketterman

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Environmental Law Commons](#), [Health Law and Policy Commons](#), [Immigration Law Commons](#), [Jurisprudence Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Military, War, and Peace Commons](#), [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

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. (2001). Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol32/iss4/4>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

COMMENT

DOES THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT EXCLUDE GIFTED AND TALENTED CHILDREN WITH EMOTIONAL DISABILITIES? AN ANALYSIS OF *J.D. V. PAWLET*

LAURA KETTERMAN

I. Introduction.....	914
II. Background	917
A. History of the Individuals with Disabilities Education Act	919
1. The Rehabilitation Act of 1973.....	919
2. The Education for All Handicapped Children Act of 1975	921
3. The Individuals with Disabilities Education Act as Currently Enforced.....	922
III. Dichotomy: Gifted and Talented but Disabled	927
A. Individualized Education Programs.....	927
B. <i>J.D. v. Pawlet</i>	928
IV. Why Standards Set for Special Education Under the Individuals with Disabilities Education Act Fail Gifted and Talented Children Who Exhibit Disabilities	931
A. Minimum Educational Standards Prevent Gifted and Talented Children with Disabilities from Receiving an Appropriate Education Under the Individuals with Disabilities Education Act	931
1. Emotional Disturbance.....	933
2. Adverse Affect.....	934
B. Mainstreaming Gifted and Talented Children Is Not an Appropriate Goal	936
V. Proposal	937
VI. Conclusion	938

Appendix A	939
Appendix B	941

I. INTRODUCTION

Disabled children benefit from federal legislation that guarantees a free, appropriate education.¹ Although no federal mandate requires providing special education for gifted and talented children, the government encourages schools, through grant money, to offer gifted and talented programs.² Unfortunately, gifted and talented children with emotional disabilities often fall in between these two groups and, therefore, do not qualify for special education under any legislation.

When a child enjoys an intellectual gift, identifying a disability becomes more difficult.³ Some critics refuse to believe such children can have learning disabilities.⁴ Indeed, the complexity of this issue causes problems in understanding how both giftedness and learning disabilities co-exist in a child.⁵ Even educators and special education professionals do not always understand the concept.⁶ Accordingly, many educators consider only below average performance as indicative of a learning disability.⁷ Unfortunately, in many gifted and talented children with disabili-

1. See 20 U.S.C. § 1400(d)(1)(A) (Supp. IV 1998) (insuring all children with disabilities a free, appropriate public education); 34 C.F.R. § 104.33(a) (1999) (mandating public schools to make available a free, appropriate education to qualified handicapped students).

2. Jacob K. Javits Gifted and Talented Students Education Act of 1994, 20 U.S.C.A. §§ 8031-8037 (2000); see also TEX. EDUC. CODE ANN. § 29.123 (Vernon 1996).

3. See Lynda E. Brody & Carol J. Mills, *Gifted Children with Learning Disabilities: A Review of the Issues*, 30 J. OF LEARNING DISABILITIES 2, ¶ 4 (May/June 1997) (noting that gifted students with learning disabilities often go unrecognized since they rarely demonstrate consistent high achievement), at http://www.ldonline.org/ld_indepth/gt_ld/jld_gtld.html.

4. See Lynda Conover, *Gifted and Learning Disabled? It Is Possible!*, 17 VA. ASS'N FOR THE EDUC. OF THE GIFTED NEWSL. 3, ¶ 2 (Summer 1996) (asking "how is it possible to be gifted and learning disabled?"), at http://www.ldonline.org/ld_indepth/gt_ld/conover.html.

5. See Linda E. Brody & Carol J. Mills, *Gifted Children with Learning Disabilities: A Review of the Issues*, 30 J. OF LEARNING DISABILITIES 3, ¶ 1 (May/June 1997) (expressing the difficulties associated with the identification of gifted and talented children with disabilities), at http://www.ldonline.org/ld_indepth/gt_ld/jld_gtld.html.

6. See Susan Baum, *Gifted But Learning Disabled: A Puzzling Paradox* ¶ 3 (1990) (noting that both gifted and disabled behaviors often exist simultaneously), at <http://eric.org/digests/e479.html>.

7. See *id.* ¶ 2 (asserting that even experts do not agree on how to educate the gifted child with disabilities).

ties, the gift hides the disability or the disability hides the gift.⁸ The dichotomy lies in the fact that both behaviors can manifest in a child.⁹

Gifted children, like all children, have the possibility of suffering physical, emotional, mental, or learning disabilities.¹⁰ Physical and mental disabilities allow for easy identification, and once identified, federal legislation assures the availability of a free, appropriate education.¹¹ Learning and emotional disabilities, however, are not as obvious, especially in gifted children.¹² The usual methods of identifying these children, such as standardized tests and observational checklists, do not appropriately identify the hidden potential within these children.¹³ Consequently, because gifted children will often avert attention away from the disability by using their intellect, neither the disability nor the giftedness is readily apparent in all instances.¹⁴ Because the educator does not recognize or note the disability, these children do not receive an education appropriate for their intellect.¹⁵

8. *See id.* ¶ 7 (claiming that students who can hide their disabilities remain unidentified).

9. *See id.* ¶ 3 (noting that gifted and talented children with learning disabilities can have strengths in some areas and weaknesses in other areas). Gifted children with learning disabilities are grouped into three categories. These are (1) identified gifted students with subtle learning disabilities, (2) unidentified gifted and disabled students masked by average achievement, and (3) students in which learning disabilities have been identified who are also gifted. *Id.*

10. *See* Colleen Willard-Holt, *Dual Exceptionalities*, ERIC EC DIGEST #E574, ¶ 2 (May 1999) (noting that gifted and talented children with disabilities are often not identified as gifted or disabled), at <http://ericec.org/digests/e574.html>.

11. *See* 20 U.S.C. § 1400(d)(1)(A) (Supp. IV 1998) (assuring all children with disabilities a free, appropriate education); *see also* 42 U.S.C. § 12132 (1994) (stating that no public entity can exclude a qualified disabled person from public services); 28 C.F.R. § 35.130(a) (1999) (requiring that no public entity discriminate because of a disability); 34 C.F.R. § 104.33(a) (1999) (indicating that public schools need to make available a free, appropriate education to qualified handicapped students).

12. *See generally* Colleen Willard-Holt, *Dual Exceptionalities*, ERIC EC DIGEST #E574, ¶ 2 (May 1999) (explaining the difficulty of identifying disabilities in gifted children), at <http://ericec.org/digests/e574.html>.

13. *See id.* (determining that standardized tests need modifications to properly identify gifted children with disabilities).

14. *See id.* (warning that both the disability and the giftedness appear less extreme when children try to hide their disability by using their intelligence).

15. *See id.* (addressing the problem of discrepancies between potential and actual performance of disabled children in the classroom); *see also* James T. Webb & Diane Latimer, *ADHD and Children Who Are Gifted*, ERIC EC DIGEST #E522, ¶ 2 (1993) (noting that gifted children are often mislabeled as children with Attention Deficit Hyperactivity Disorder), at <http://ericec.org/digests/e522.html>. Parallel behaviors exist in ADHD and giftedness. *See id.* ¶ 7. Behaviors commonly associated with ADHD are:

1. Poorly sustained attention in almost all situations
2. Diminished persistence on tasks not having immediate consequences

To compound the problem, legislation and recent court decisions fail to recognize that gifted and talented children have unique needs that should be considered when planning an appropriate education.¹⁶ When a child suffers a disability, the Individuals with Disabilities Education Act ("IDEA") requires that public schools implement an Individual Education Program ("IEP").¹⁷ This requirement ensures that the child receive a free, appropriate public education ("FAPE").¹⁸ An IEP typically includes the child's present educational performance, goals for future performance, and a strategy for achieving these goals.¹⁹ Courts rely on the

-
3. Impulsivity, poor delay of gratification
 4. Impaired adherence to commands to regulate or inhibit behavior in social contexts
 5. More active, restless than normal children
 6. Difficulty adhering to rules and regulations.

Id.

Behaviors associated with giftedness include:

1. Poor attention, boredom, daydreaming in specific situations
2. Low tolerance for persistence on tasks that seem irrelevant
3. Judgment lags behind development of intellect
4. Intensity may lead to power struggles with authorities
5. High activity level; may need less sleep
6. Questions rules, customs and traditions.

Id. ¶ 8.

16. See Jacob K. Javits Gifted and Talented Students Education Act of 1994, 20 U.S.C.A. §§ 8031-8037 (2000) (encouraging support for gifted and talented children through grants, a research center, and leadership activities yet not mandating that any services be provided to gifted and talented children); see also *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 72 (2d Cir. 2000) (holding that J.D., a gifted student with an emotional and behavioral disability, was not eligible for special education under the Individuals with Disabilities Education Act because his individualized education program was appropriate); *Doe v. Bd. of Educ.*, 9 F.3d 455, 460-61 (6th Cir. 1993) (holding that appellant's parents were not entitled to reimbursement for a private school because the individualized educational program constructed for appellant was adequate). Doe had an IQ of 130, but also suffered from a neurological impairment that affected his processing skills in language and thinking. *Id.* at 456; *Broadley v. Bd. of Educ.*, 639 A.2d 502, 506 (Conn. 1994) (holding that Connecticut's special education laws do not violate a gifted student's constitutional right to an equal education).

17. 20 U.S.C. § 1414(d)(2)(A) (Supp. IV 1998); 34 C.F.R. § 300.341 (a)(1) (1999); see also TEX. EDUC. CODE ANN. § 29.005 (Vernon Supp. 2000).

18. 20 U.S.C. § 1401(8) (Supp. IV 1998); see also TEX. EDUC. CODE ANN. § 29.003 (Vernon 1996).

19. 20 U.S.C. § 1401(8)(D) (Supp. IV 1998); see also Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 300 (1993) (noting that an IEP also describes the related instruction and services that the child will need to meet the goals set forth in the IEP).

IEP when making decisions regarding whether a child is receiving a free, appropriate public education.²⁰

In *J.D. v. Pawlet School District*,²¹ the United States Court of Appeals for the Second Circuit failed to consider J.D.'s gifted status and the possibility that an average performance is substandard for him.²² Bound by both federal and state legislation, the Second Circuit failed to recognize that gifted and talented children with disabilities will not satisfy the current IDEA or state qualifications necessary for special education. Children such as J.D. need a different criteria for evaluation; one that enables schools to provide these students with an appropriate education.

This Comment focuses on the plight of J.D. and other gifted and talented children with disabilities. Part II provides the history and background of the Individuals with Disabilities Education Act. Part II also discusses the IDEA's precedents, the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975. Part III begins by explaining the purpose and inadequacies of the IEP. Part III also includes an analysis of the Second Circuit's decision in *J.D. v. Pawlet*. Working within the scope of legislation and precedent that does not incorporate the unique needs of gifted and talented children, the Second Circuit was tethered to one decision: denying J.D. the right to a free, appropriate education. Part IV explains why standards set for special education under the IDEA fail gifted and talented children with disabilities. Part VI proposes that these standards must be adjusted to fit the unique needs of gifted and talented children by expanding the definition of "education." Finally, Part VII proposes changes to the IDEA and to a student's IEP that would allow more educational opportunities for more students.

II. BACKGROUND

The history of the IDEA is rooted in legislation mandating equal educational opportunity for all children.²³ Congress passed the IDEA intending to provide equality and to impart self-sufficiency upon disabled

20. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 210 (1982) (upholding the lower courts' decisions that Rowley's individualized educational program substantially complies with legislation); see also *Gillette v. Fairland Bd. of Educ.*, 932 F.2d 551, 552 (6th Cir. 1991) (requiring that an individualized educational program be changed to provide a free, appropriate education); *Socorro Indep. Sch. Dist. v. Angelic Y.*, 107 F. Supp. 2d 761, 767 (W.D. Tex. 2000) (denying reimbursement for private education because there was no flaw in the student's IEP).

21. 224 F.3d 60 (2d Cir. 2000).

22. See *id.* at 68 (relying on the statutory definition of "educational performance" to determine whether a student suffers from a disability).

23. See 29 U.S.C. §§ 701-702 (Supp. IV 1998).

children.²⁴ After federal lawsuits successfully challenged the denial of a free, appropriate education to disabled children, the IDEA gave these children a right similar to other school age children—a free public education.²⁵ In an opinion written by Justice Rehnquist, the Supreme Court interpreted the IDEA to require states to provide some form of specialized education.²⁶ The court emphasized, however, that the holding did not require schools to maximize the education offered to meet the potential of the child.²⁷ Although the goals of a free, appropriate education are a threshold requirement, the IDEA does not specifically address maximizing the potential of each child.²⁸

This Comment categorizes children into four groups: disabled children (those with mental or physical disabilities that impede their learning capacity), average children (no disabilities and not identified as gifted and talented), gifted and talented children without disabilities, and gifted and talented children with disabilities. In recognizing that no public educational system can provide individualized education for each child enrolled in school, the trend toward mainstreaming (heterogeneous grouping)²⁹ can have a deleterious effect on all groups of children.³⁰ Each group re-

24. See Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 720 (1997) (asserting that, with an appropriate education, many disabled students would become less dependent on society).

25. See Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 298-99 (1993) (noting that courts started the trend toward equal education for all). Ms. Glennon refers to *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972) and to *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) as two cases that prompted Congress to enact legislation requiring public schools to provide a free education to disabled children. *Id.*

26. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180-81 (1982).

27. See *Rowley*, 458 U.S. at 200 (identifying congressional intent by examining the legislative history of the IDEA). The Supreme Court subsequently held that *Rowley*, a deaf student, did not require the services of a sign language interpreter because “she performs better than the average child in her class and is advancing easily from grade to grade.” See *id.* at 210.

28. See *id.* at 200-01 (noting that Congress, “sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education”). *But see* 20 U.S.C. § 1400(c)(5)(E)(ii) (Supp. IV 1998) (presenting the findings of Congress in passing the IDEA and indicating that children should “be prepared to lead productive, independent, adult lives, to the maximum extent possible”); 20 U.S.C. § 1221 (1994) (stating that it is the policy of the United States “that every citizen is entitled to an education to meet his or her full potential”).

29. See Peggy S. Bittick, Comment, *Equality and Excellence: Equal Education Opportunity for Gifted and Talented Children*, 36 S. TEX. L. REV. 119, 132 (1995) (identifying the current mainstreaming trend as analogous to de Toqueville’s theory).

30. See *id.* (asserting that mainstreaming creates a “middle standard”).

quires different levels of teaching depending on intellect and abilities. Therein lies the problems: gifted and talented children with disabilities often have the intellect to hide their disability by performing above average, thereby precluding coverage under the IDEA, yet these same children fail to achieve the limits of their intellect because of a disability.³¹

A. *History of the Individuals with Disabilities Education Act*

Congress took legislative action upon finding that millions of Americans possessed one or more physical or mental disabilities and that these individuals comprised one of the most disadvantaged groups in the United States.³² In order to correct discrimination against individuals with disabilities, and empower disabled individuals, Congress passed The Rehabilitation Act of 1973.³³ Specifically, Congress recognized that disabled individuals encounter assorted forms of discrimination in such critical areas as employment, education, housing, health services, voting, public accommodations, transportation, public services, public accommodations, communication, and institutionalization.³⁴ Determining that employment opportunities can be increased through individualized training, educational, and support services, Congress endeavored to implement programs, projects, and activities to achieve the goal of empowering individuals with disabilities to maximize economic self-sufficiency and independence.³⁵

1. The Rehabilitation Act of 1973³⁶

The Rehabilitation Act of 1973 constituted the first major legislation passed by Congress dealing with discrimination of the disabled.³⁷ This Act prohibits discrimination against any person with a disability by any

31. See BRAZOSPORT ISD, *SEEKING EXCELLENCE THROUGH ABILITY, RESPONSIBILITY, CREATIVITY, AND HONOR* (Revised 1999) (using the acronym SEARCH as the title of the gifted and talented program in Lake Jackson, Texas). This program adjusts time spent in special classrooms with the age of the child. *Id.* Kindergarten students receive seventy-five minutes a week of "modified instruction," grades 1-3 receive 150 minutes per week, grades 4-5 spend one day a week, grades 6-8 may qualify per individual subject area, and grades 9-12 are offered advanced placement classes. *Id.*

32. 29 U.S.C. § 701(a)(1) (Supp. IV 1998) (outlining the purpose and policy behind the Rehabilitation Act of 1973).

33. Pub. L. No. 93-112, § 2, 87 Stat. 357.

34. 29 U.S.C. § 701(a)(5) (1994).

35. 29 U.S.C. § 701(b)(1) (1994).

36. 29 U.S.C. § 701 (Supp. IV 1998).

37. See Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 612-15 (1995) (noting that the Rehabilitation Act requires that public schools reasonably accommodate disabled students).

program receiving federal funds or assistance,³⁸ including public schools.³⁹ Until the early 1970s, when legislation legally gave disabled children access to public schools, the public education system often excluded disabled children from receiving a free, adequate education.⁴⁰ States placed mildly disabled children in regular classrooms without any special education, moderately disabled children in custodial settings rather than educational settings, and severely disabled children in institutions.⁴¹ In 1972, two class action suits brought against school districts by mentally retarded and disabled children challenged the students' exclusion from free public education.⁴² Relying on *Brown v. Board of Education*,⁴³ the parents and advocates of these children claimed that disabled children have a right to an equal opportunity education.⁴⁴

In *Pennsylvania Association for Retarded Children v. Commonwealth*,⁴⁵ the Pennsylvania Association for Retarded Children ("PARC") and parents of thirteen mentally retarded children brought suit on behalf of all mentally retarded persons of school age.⁴⁶ The plaintiffs claimed that public schools violated the students' due process and equal protection rights by excluding these children from public education.⁴⁷ The federal district court held that states could not deny mentally retarded children between the ages of six and twenty-one "access to a free public program of education and training appropriate [for their individual] learning ca-

38. 20 U.S.C. § 1400(d)(1-4) (Supp. IV 1998).

39. See Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 614 (1995) (noting that the Rehabilitation Act requires pre-school, elementary, and secondary schools to provide a free, appropriate public education to disabled students).

40. See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 246-47 (1994) (claiming that children with disabilities were only educated if they could "survive" the regular classroom instruction), WL 20 UDTNLR 243.

41. See *id.* (recognizing that most states did not require special programs for disabled students).

42. See *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (determining that each school age child shall receive a free education regardless of the child's disability); see also *Pa. Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972) (enjoining the state from applying statutes that deny a free public education to retarded children).

43. 347 U.S. 483 (1954).

44. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 487-88 (1954); see also Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 605-06 (1995) (indicating that early advocates of a free public education relied on the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment).

45. 638 F. Supp. 929, 933 (E.D. Pa. 1986).

46. *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 281.

47. *Id.*

pacities.”⁴⁸ This holding enjoined the State of Pennsylvania from enforcing state statutes that previously excluded mentally retarded children from the public school system.⁴⁹

Similar to the *PARC* lawsuit, *Mills v. Board of Education*⁵⁰ also challenged the exclusion of school age children with disabilities from a free public education.⁵¹ The *Mill's* plaintiffs included children with behavioral problems, mental retardation, hyperactivity, and emotional disabilities.⁵² Comparable to the *PARC* court, the *Mills* court also held that the District of Columbia must provide every school age child a free public education appropriate to that child's level of functioning.⁵³ The holdings in *PARC* and *Mills* led to state and federal legislation extending the right of free public education to children with disabilities.⁵⁴ Subsequently, the Rehabilitation Act of 1973⁵⁵ established that no agency receiving federal funding shall deny an education to children with disabilities solely because of the child's disability.⁵⁶

2. The Education for All Handicapped Children Act of 1975

In 1974, Congress required states receiving federal funding to provide educational opportunities to all handicapped children.⁵⁷ During this period, Congress examined the issue of education for the handicapped and, in 1975, passed the Education for All Handicapped Children Act

48. *Id.* at 302.

49. *See id.* (proclaiming that “[t]oday, with the following Order, this group of citizens will have new hope in their quest for a life of dignity and self-sufficiency”).

50. 348 F. Supp. 866 (D.D.C. 1972).

51. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868 (D.D.C. 1972).

52. *Id.*

53. *Id.* at 874.

54. *See* Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 249 (1994) (reporting that by 1974, all states had implemented some type of program to provide a public education for handicapped children).

55. 29 U.S.C. § 794 (Supp. IV 1998).

56. *See id.* § 794(a); *see also* Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 249 (1994) (explaining that the Rehabilitation Act of 1973 prohibited discrimination against the handicap).

57. *See* *Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 (1982) (asserting that Pub. L. No. 93-380, 88 Stat. 579, 583 requiring states to adopt goals of providing educational opportunities to disabled children, was an interim measure so that Congress could see if any additional federal assistance was needed).

("EAHCA").⁵⁸ The Act required states to provide a free, appropriate education for all handicapped children.⁵⁹ Congress promulgated this Act based on the discovery that the educational needs of children with disabilities were not satisfactorily met.⁶⁰ The EAHCA endeavored to define and protect a child's educational rights.⁶¹ Additionally, the Act implemented procedural safeguards that ensure a free, appropriate education.⁶² These safeguards include the parents' participation in the formation of an Individualized Education Program and allows parents to challenge an IEP with which they disagree.⁶³ Eventually this Act served as a basis for the Individuals with Disabilities Education Act.⁶⁴

3. The Individuals with Disabilities Education Act as Currently Enforced

The IDEA covers a wide range of disabilities including children who need special assistance.⁶⁵ Congress defined "disability" to include such impediments as mental retardation, hearing impairments, speech or lan-

58. *See id.* (declaring that the Education for All Handicapped Children Act of 1975 was passed after Congress studied "if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children").

59. 20 U.S.C. § 1412(1) (Supp. IV 1998); *see also Rowley*, 458 U.S. at 180-81 (noting that states must submit their plans for the education of the handicapped to the Secretary of Education to qualify for federal assistance); Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 251 (1994) (emphasizing that states are responsible, through local educational agencies, for locating disabled children who may need special education or related services), WL 20 UDTNLR 243.

60. Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 615 (1995), WL 44 DPLLR 599.

61. *See* Susan Keiser, *Private Practice Workshop Track: Securing Special Education Services for Children*, in CRIMINAL LAW AND URBAN PROBLEMS 1998, at 21, 31 (PLI Litig. & Admin. Practice Course, Handbook Series No. C0-000C, 1998) (indicating that now the primary concern is not to define and protect a disabled child's educational right but to assure a quality education).

62. 20 U.S.C. § 1415(a) (Supp. IV 1998); *see also Sch. Comm. of Burlington, Mass. v. Dep't of Educ.*, 471 U.S. 359, 361 (1985) (stressing that one of the procedural safeguards in place to protect the rights of handicapped children is the right to challenge an IEP in which the parents and student disagree).

63. 20 U.S.C. § 1415(b) (Supp. IV 1998). *But see Sch. Comm.*, 471 U.S. at 361 (noting that challenging an IEP can take years in the courts and that these years are critical to a child's development).

64. *See* Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 615 (1995) (explaining the transition from the Education for All Handicapped Children Act of 1975 to the Individuals with Disabilities Education Act), WL 44 DPLLR 599.

65. 20 U.S.C. § 1401(3)(A)(ii) (Supp. IV 1998).

guage impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, learning disabilities, brain injury, and any other impairments.⁶⁶ Specific to children with disabilities, the IDEA uses Individualized Education Programs to determine the types of education and training a child will need.⁶⁷

In determining the need for the IDEA, Congress examined and reviewed several factors.⁶⁸ Congressional findings conclude that improving education for children with disabilities ensures equal opportunity.⁶⁹ By stressing the importance of these findings and the inequalities present at the time, Congress partially dedicated the first section of the IDEA to identifying the inadequacies relating to the education of children with disabilities.⁷⁰ Before the passage of the EAHCA, Congress found that:

- more than one-half of the children with disabilities in the United States did not receive appropriate educational services;⁷¹
- 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system;⁷²
- there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected;⁷³
- families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense; [and]⁷⁴
- [a] more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.⁷⁵

The legislative history of the IDEA establishes that Congress was concerned with mislabeling, placement in restrictive environments, and the stigma that results from placement of the disabled child into special pro-

66. *Id.* § 1401(3)(A)(i). The Texas Education Code criteria for special education almost reiterates the criteria set forth in the IDEA. TEX. EDUC. CODE ANN. § 29.003 (Vernon 1996). The Texas criteria are physical disability, mental retardation, emotional or learning disability, speech disability, and autism or traumatic brain injury. *Id.*

67. 20 U.S.C. § 1414(d)(1)(A)(i) (Supp. IV 1998).

68. *See id.* § 1400(c).

69. *See id.* § 1400(c)(9).

70. *See id.* § 1400(c)(2).

71. *See id.* § 1400(c)(2)(B).

72. 20 U.S.C. § 1400(c)(2)(C) (Supp. IV 1998).

73. *See id.* § 1400(c)(2)(D).

74. *See id.* § 1400(c)(2)(E).

75. *See id.* § 1400(c)(7)(A).

grams.⁷⁶ Due to these concerns, educating children in the least restrictive environment and mainstreaming disabled children developed into important components of the Act.⁷⁷ In designing the IDEA, the framers of the Act wanted to ensure that schools regarded children with disabilities as learners.⁷⁸ Subsequently, the Act entitles every child, regardless of the type or severity of the disability, to a free, appropriate education.⁷⁹ The IDEA encompasses the concept that a free, appropriate public education provides disabled children with equal educational opportunities.⁸⁰ Because the IDEA only establishes minimum guidelines for providing FAPE to disabled children, however, the meaning of free, appropriate public education remains open to interpretation.⁸¹

In *Board of Education v. Rowley*,⁸² Justice Rehnquist interpreted FAPE to mean that the education provided to disabled children need not “maximize each child’s potential ‘commensurate with the opportunity

76. See Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 616 (1995) (indicating that similar concerns were raised in *PARC*), WL 44 DPLLR 599.

77. See *id.* at 616-17 (summarizing that congressional intent in mainstreaming is to have children grow up accepting handicapped children, not as a disability, but as having a disability).

78. See Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 TENN. L. REV. 295, 364 (1993) (explaining that all children can learn, but that learning has to be tailored to the child’s individual needs), WL TNLR 295.

79. 20 U.S.C. § 1400(c) (Supp. IV 1998); see also Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 253 (1994) (reiterating the rights of disabled children addressed in the IDEA), WL 20 UDTNLR 243. In compliance with federal law, Texas mandates that the Education Agency “shall develop . . . a statewide design, consistent with federal law, for the delivery of services to children with disabilities . . . so that a free, appropriate public education is available to all of those children between the ages of three and 21.” TEX. EDUC. CODE ANN. § 29.001 (Vernon Supp. 2000).

80. See *Kozak v. Hampton Township Sch. Dist.*, 655 A.2d 641, 643 (Pa. Commw. Ct. 1995) (indicating that Pennsylvania has set up regulations and standards to comply with the IDEA).

81. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 186-87 (1982) (expressing that this is the first time the Court has interpreted what is meant by free, appropriate public education); TEX. EDUC. CODE ANN. § 29.003 (Vernon 1996); see also *Kozak*, 655 A.2d at 643 (recognizing that Pennsylvania has promulgated its own state regulations in regard to educating the handicapped); Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 726-27 (1997) (acknowledging the absence of Supreme Court guidelines for interpreting the IDEA until the *Rowley* decision).

82. 458 U.S. 176 (1982).

provided other children.’”⁸³ This decision overruled district court and Second Circuit decisions in which courts interpreted FAPE to mean that each disabled child should receive an education with the opportunity to achieve their full potential.⁸⁴ In *J.D. v. Pawlet School District*,⁸⁵ the Second Circuit, in analyzing J.D.’s Rehabilitation Act claim, applied the statutory definition of FAPE,⁸⁶ which mandates that education, related aides, and services adequately meet the needs of disabled students.⁸⁷

The IDEA defines FAPE as:

special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, 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.⁸⁸

The Code of Federal Regulations also similarly defines FAPE.⁸⁹ Courts, however, decide which rights disabled children have available when considering both the Rehabilitation Act and the IDEA.

The Supreme Court in *Smith v. Robinson*⁹⁰ recognized that legislation in regard to a free, appropriate education under the Rehabilitation Act does not reach as far as the Education for All Handicapped Children Act (later incorporated into the IDEA) in specifying the rights and remedies

83. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (deciding that congressional intent was not “to achieve strict equality of opportunity or services”).

84. *See id.* at 200 (stating that congressional intent is to identify and provide a free, appropriate public education to handicapped children); *see also Rowley v. Bd. of Educ.*, 632 F.2d 945, 948 (2d Cir. 1980) (interpreting free, appropriate public education to mean that the educational opportunity afforded handicapped students must be equal to the educational opportunity offered to non-handicapped students); *Rowley v. Bd. of Educ.*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980) (interpreting an appropriate education to mean that “each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children”); Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 727 (1997) (detailing that the district court found this standard to most comport with federal regulations).

85. 224 F.3d 60 (2d Cir. 2000).

86. *See J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70 (2d Cir. 2000) (asserting the duty to provide handicapped students a free, appropriate education has limits).

87. 34 C.F.R. § 104.33(a) (1999).

88. 20 U.S.C. § 1401(a)(8) (Supp. IV 1998).

89. *Compare* 20 U.S.C. § 1412(1) (Supp. IV 1998), *with* 34 C.F.R. § 300.1 (1999).

90. 468 U.S. 992 (1984).

available to a disabled child.⁹¹ When a child is eligible for benefits under both the IDEA and the Rehabilitation Act, the school district should comply with both statutes and may not choose compliance with one without the other.⁹² The IDEA takes precedence in requiring an individualized education program for each child qualified under this Act.⁹³ This measure helps assure that a disabled child receives the free, appropriate education Congress intended.⁹⁴ In conforming with the mandates of the IDEA, schools must address the needs of the individual, educate in the least restrictive environment, develop an IEP for each qualifying child, and consider the due process rights of parents in evaluating and placing their children.⁹⁵

Today, the IDEA seeks to protect and enhance the rights of disabled students and their parents.⁹⁶ The IDEA accomplishes this goal by preserving due process protections; emphasizing the responsibility of parents, teachers, administrators and government in improving education for disabled students; and by intervening early to provide services for dis-

91. See 20 U.S.C. § 1415(i)(3)(B) (Supp. IV 1998) (awarding attorney's fees as a remedy available to a disabled child); see also *Smith v. Robinson*, 468 U.S. 992, 1019 (1984) (holding the Education of Handicapped Children's Act ("EHCA"), in its rights and remedies available for a disabled child, did not have a provision for attorney's fees). *Smith* was overruled when Congress amended the EHCA in 1986 to include attorney's fees. See *Fontenot v. La. Bd. of Elementary and Secondary Educ.*, 805 F.2d 1222, 1224-25 (5th Cir. 1986) (noting that Congress made the amendments to the EHCA, which included attorney fees, retroactive).

92. See *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996) (adding that only the IDEA mandates the development of an IEP); see also *Muller v. Comm. on Special Educ.*, 145 F.3d 95, 105 (2d Cir. 1998) (quoting *Yankton* in its reiteration that a school district is not free to decide which statute to follow). The *Muller* court held that the school district did not provide Muller with an appropriate IEP under the IDEA. See *id.* at 105-06 (holding that the school district had to reimburse Muller's parents for her placement in a private special education program).

93. See *Muller*, 145 F.3d at 105 (indicating that another plan, rather than an IEP under the IDEA, would not suffice as a substitute).

94. See 20 U.S.C. § 1414(b)(3)(D) (Supp. IV 1998) (holding that the state must be better equipped to serve the educational needs of a child prior to appropriating money from a local educational agency).

95. See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 253 (1994) (noting that controversy has surrounded these rights during the last twenty years). Ms. Goldman states that litigation regarding these rights has not yet produced a "national consensus among the judiciary or within the public at large." *Id.*

96. See Judith E. Heumann & Tom Hehir, "Believing in Children—A Great IDEA for the Future," EXCEPTION PARENT, Sept. 1997 (noting that the reauthorization of the IDEA provides for greater parent and student involvement in determining eligibility), at <http://www.ed.gov/offices/OSERS/IDEA/article2.html>.

abled students.⁹⁷ The reauthorization of the IDEA targets equity, accountability and efficiency.⁹⁸ Since the IDEA declares that all disabled children deserve a free, appropriate education, the legislative focus centralizes on how to include students with disabilities in regular classrooms while still providing the special services often required.⁹⁹

III. DICHOTOMY: GIFTED AND TALENTED BUT DISABLED

The IDEA does not provide disabled children with the ability to reach their potential.¹⁰⁰ This leaves gifted and talented children with disabilities even more vulnerable in seeking an appropriate education that meets the students' needs. The IDEA protects the disabled child on the lower end of the spectrum;¹⁰¹ however, no law protects the disabled child capable of achieving more than what the standard curriculum offers.¹⁰² The Second Circuit addressed this problem in *J.D. v. Pawlet School District*.¹⁰³ Before the outcome of *J.D.* can be understood fully, the Individualized Education Program and its role in the education of disabled students must be addressed.

A. Individualized Education Programs

The Individualized Education Program (IEP) is a written statement developed for each child with a disability.¹⁰⁴ This statement includes the child's current level of educational performance, how the disability affects the child's progress in the normal curriculum, annual goals and short-term objectives, what services and special education are needed to meet the child's educational goals, and an explanation of why the child will not participate in the regular classroom.¹⁰⁵ The team that evaluates and creates the IEP consists of the child's parents, a special education

97. *See id.* (stressing that the IDEA will put more emphasis on accountability of parents and educators).

98. *See* Julie F. Mead, *The Reauthorization Process of the Individuals with Disabilities Education Act: Expressions of Equity*, J. FOR A JUST & CARING EDUC., Oct. 1, 1999 (discussing the new standard of equity and how educators need to develop and implement policies consistent with the IDEA), 1999 WL 10146091.

99. *See id.* (noting that parents no longer have to fight in obtaining an education for their disabled children).

100. *See* Gilbert Henoeh & Roslyn Roth, *Should the Special Education Law Cover Schooling for Child Prodigies?*, NEWSDAY, Jan. 17, 1999 (stating only that a free, appropriate education is mandated), 1999 WL 8153874.

101. *See id.* (noting that gifted children with disabilities can qualify under the IDEA).

102. *See id.* (asserting that schools should not be required to provide more programs for gifted children than the curriculum has to offer).

103. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (2d Cir. 2000).

104. 20 U.S.C. § 1414(d)(1)(A) (Supp. IV 1998).

105. *Id.* § 1414(d)(1)(A)(i)-(iv).

teacher, a regular classroom teacher, a qualified representative of the local school agency, the child, and other experts.¹⁰⁶ The success of the IEP hinges upon the achievement of several underlying goals.¹⁰⁷ Accordingly, the IEP represents "the baseline mechanism of the IDEA."¹⁰⁸ Due to the importance of the IEP, any party may appeal a decision in each phase of the process.¹⁰⁹ Unfortunately, the objectives of the IEP remain unclear, and interpreting the goals of the IEP often falls to the courts.¹¹⁰ This method of interpretation has resulted in many disabled children not receiving an appropriate education.¹¹¹

B. J.D. v. Pawlet

J.D. is an academically gifted child with emotional and behavioral problems.¹¹² When given an IQ test in the seventh grade, J.D. "scored in the top two percent of his age group."¹¹³ While in the eighth grade, J.D. scored at advanced grade levels ranging from tenth through twelfth grade for reading, language, and mathematics.¹¹⁴ Although J.D. took advanced classes above his grade level, his grades ranged consistently from B to A+.¹¹⁵ J.D., however, is also a student with emotional and behavioral disabilities.¹¹⁶ When his parents requested an evaluation for special education, J.D.'s evaluation and planning team could not agree on whether the disability affected his school performance.¹¹⁷ As a result, the School District denied special education services.¹¹⁸

106. *Id.* § 1414(d)(1)(B)(i)-(vii).

107. See Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. DAYTON L. REV. 243, 275 (1994) (indicating that goals are expressed in measurable criteria).

108. See Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 723 (1997) (noting that the IEP specifically establishes a child's educational program); see also TEX. EDUC. CODE ANN. § 29.005 (Vernon Supp. 2000).

109. 20 U.S.C. § 1415(g) (Supp. IV 1998).

110. See Robert Caperton Hannon, Note, *Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency*, 50 VAND. L. REV. 715, 724 (1997) (stating that Congress has not set explicit goals for the IEP).

111. See *id.* (declaring that uncertainty regarding the objectives of the IEP effectuate inadequate educational goals).

112. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 62 (2d Cir. 2000).

113. *Id.* at 63.

114. *Id.*

115. *Id.*

116. *Id.* (describing the recommendations stemming from a psychological evaluation by Dr. Roger Meisenhelder).

117. *J.D.*, 224 F.3d at 63.

118. *Id.*

J.D.'s evaluators then sought to determine whether J.D. qualified under the Rehabilitation Act.¹¹⁹ The team determined J.D. was eligible for special accommodations and recommended a program in which J.D. would have individual and peer relationship counseling.¹²⁰ The determination of J.D.'s academic placement, however, was postponed until another meeting.¹²¹ J.D.'s parents decided not to wait for the determination and enrolled J.D. in an out-of-state boarding school for the academically gifted.¹²²

Acting upon recommendations of the evaluation team, the School District decided that J.D. could stay in the public school system, take advanced high school courses, or courses at a nearby college.¹²³ Dissatisfied with the School District's offered program, J.D.'s parents sought reimbursement for the tuition of J.D.'s out-of-state boarding school.¹²⁴ When the state denied reimbursement, J.D.'s parents appealed and received a due process hearing with the state hearing officer.¹²⁵

The hearing officer granted "partial summary judgment for the School District on the substantive IDEA claim."¹²⁶ Unhappy with the decision, J.D.'s parents appealed to the district court, which affirmed the decision of the hearing officer.¹²⁷ The hearing officer and the district court indicated that J.D. was not eligible for special education under the IDEA¹²⁸ because J.D.'s educational performance was at or above the average for his age and grade.¹²⁹ J.D.'s parents again appealed and the Second Circuit reviewed the issue *de novo*.¹³⁰

Quoting the earlier Supreme Court decision in *Rowley*, the Second Circuit recognized that a free, appropriate education means that the instruction must "meet the State's educational standards, approximate the grade

119. *Id.* (emphasizing that the evaluation under the Rehabilitation Act came after it was determined that J.D. was not eligible for benefits under the IDEA); The Rehabilitation, Comprehensive Services, and Development Disabilities Act of 1978, 29 U.S.C. § 794 (Supp. IV 1998); *see also* 34 C.F.R. § 104.35 (1999).

120. *See J.D.*, 224 F.3d at 63-64.

121. *Id.* at 64.

122. *Id.*

123. *See id.* (stating that the evaluation team met at a subsequent meeting and decided the accommodations for J.D.).

124. *Id.*

125. *J.D.*, 224 F.3d at 64.

126. *Id.*

127. *See id.* (stating the district court held that J.D. was provided an appropriate education by the school district).

128. *See id.* at 71-72 (explaining that the district court and the hearing officer believed the school district had provided J.D. with an appropriate education under the Rehabilitation Act).

129. *See id.* at 64 (noting that there are eight basic skill areas in which J.D. excelled).

130. *J.D.*, 224 F.3d at 64.

levels used in the State's regular education, and comport with the child's IEP."¹³¹ The Second Circuit deferred to the Vermont State Department of Education by noting that Congress did not set any substantial standard for what an appropriate education entails because education has primarily been a state and local function.¹³²

The Vermont Department of Education has established three eligibility criteria to qualify for special education.¹³³ These parallel the criteria established in the IDEA, as the student must "(a) meet[] one or more disability categories . . . ; (b) exhibit[] the adverse effect of the disability on educational performance; and (c) [be] in need of special education."¹³⁴ After evaluating all the evidence, including the Vermont Special Education Regulations, the Second Circuit determined that J.D.'s educational performance was not adversely effected by his disability and therefore, he did not qualify for special education services under the IDEA.¹³⁵

The standards created for special education under the IDEA failed J.D. because he was not performing below average for his age and grade level.¹³⁶ Because J.D. is gifted, his educational performance was consistently above average.¹³⁷ Resultingly, and despite suffering a diagnosed emotional disability, J.D. did not qualify for special education under the IDEA.¹³⁸

131. *Id.* at 65; *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982); 20 U.S.C. § 1401(8)(A)-(D) (Supp. IV 1998); *see also* *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 68 (1999).

132. *See J.D.*, 224 F.3d at 65 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) for stating the intent of Congress was "only 'to open the door of public education to handicapped children on appropriate terms'").

133. *Id.* at 66.

134. *Id.* The IDEA includes children with a serious emotional disturbance as a category of children with disabilities. 20 U.S.C. § 1401(3)(A)(i) (Supp. IV 1998). The federal regulations also list "serious emotional disturbance" as a disability in children. 34 C.F.R. § 300.7(a)(1) (1999).

135. *J.D.*, 224 F.3d at 66-67.

136. *See id.* at 67 (noting that J.D. was evaluated according to Vermont Special Education Regulations which are consistent with the criteria under the IDEA).

137. *See id.* at 63 (noting that J.D. took the Comprehensive Test of Basic Skills on which he scored above his grade and age level and was in the top two percent of his age group).

138. *See id.* at 68-70 (requiring, under the IDEA, an adverse effect on grades and performance before being eligible for special education).

IV. WHY STANDARDS SET FOR SPECIAL EDUCATION UNDER THE
INDIVIDUALS WITH DISABILITIES EDUCATION ACT FAIL
GIFTED AND TALENTED CHILDREN WHO
EXHIBIT DISABILITIES

Unfortunately, the IDEA only seeks to provide a minimum education for individuals with disabilities, not to have each child reach their potential.¹³⁹ Because of this minimum goal, states have denied J.D. and other similarly situated students an appropriate education either because these students' grades exceeded the average or a court relied on the student's IEP to determine that the education offered was appropriate.¹⁴⁰ Courts fail to realize that gifted children with disabilities continue to fail at reaching their potential in regular classrooms.¹⁴¹

A. *Minimum Educational Standards Prevent Gifted and Talented Children with Disabilities from Receiving an Appropriate Education Under the Individuals with Disabilities Education Act*

As mentioned, gifted students, such as J.D, who exhibit emotional or behavioral disabilities require specialized attention in order to effectively

139. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982) (stating that maximizing each individual child's educational opportunities reaches further than Congress intended); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37 (1973) (holding that there is no fundamental right to more than a minimally adequate education).

140. See *Rowley*, 458 U.S. at 209-10 (denying a student a sign-language interpreter because her IEP complied with Education of the Handicapped Act's regulations and, therefore, she is receiving an appropriate education); see also *Cefalu v. E. Baton Rouge Parish Sch. Bd.*, 117 F.3d 231, 233 (5th Cir. 1997) (denying a sign language interpreter to a student because his IEP was appropriate); *Doe v. Bd. of Educ.*, 9 F.3d 455, 459 (6th Cir. 1993) (deciding that a student's IEP was calculated so that he received an adequate education); *Socorro Indep. Sch. Dist. v. Angelic Y.*, 107 F. Supp. 2d 761, 767 (W.D. Tex. 2000) (denying private school reimbursement because the IEP in Angelic's school district provides an appropriate education); *New Brighton Area Sch. Dist. v. Matthew Z.*, 697 A.2d 1056, 1058 (Pa. Commw. Ct. 1997) (holding there is no obligation to provide an IEP that is beyond the scope of the regular curriculum). Cf. *Roe v. Commonwealth*, 638 F. Supp. 929, 933 (E.D. Pa. 1986) (stating that children with high IQs do not "deviate from the average" and thus do not qualify for special education); *Broadley v. Bd. of Educ.*, 639 A.2d 502, 506 (Conn. 1994) (denying the right for a gifted child to have an IEP). But see *Cedar Rapids Cmty. Sch. Dist. v. Garrett F.*, 526 U.S. 66, 79 (1999) (ordering the school district to provide an extra employee that cares for the medical needs of student so the purpose of the IDEA is fulfilled); *Fowler v. Unified Sch. Dist. No. 259*, 128 F.3d 1431, 1439 (10th Cir. 1997) (holding that school districts may provide more in disabled services than is required under the IDEA).

141. See Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131 (1998) (comparing gifted with disabled students in whom courts realize that the regular classroom may not be appropriate), WL 27 JLEDUC 131.

maximize that child's natural potential as a productive member of society.¹⁴² Once the need for individualized treatment arises under the IDEA, the evolving issue centers around defining the parameters of the district's responsibility in providing a FAPE. In construing the EAHCA, the IDEA's predecessor, the *Rowley* Court observed that neither the IDEA nor its legislative history set definite standards defining the minimum level of education that constitutes a free, appropriate education.¹⁴³ The *Rowley* Court, in a matter of first impression, recognized the EAHCA's failure to establish definitive parameters regarding the protection afforded by a free, appropriate education.¹⁴⁴ In responding to the legislative inadequacies surrounding a free, appropriate education, courts have routinely defined an appropriate education as one offered within the bounds of the normal curriculum.¹⁴⁵ As interpreted by the *Rowley* Court, a disabled child's entitlement to a free, appropriate education does not require the states to provide mechanisms to maximize that child's potential.¹⁴⁶ Specifically, the IDEA interprets free, appropriate public education as "special education and related services" that, at public expense, satisfy the state's educational agency requirements, approximate the grade levels, and conform to an individualized education program.¹⁴⁷ Yet, once again in challenging a gifted child with disabilities to reach his or her potential and to avoid the trend toward mediocrity, more than the standard curriculum is often required.¹⁴⁸ An enrichment program is needed that replaces, extends or supplements the normal curriculum.¹⁴⁹

As previously discussed, a gifted child who exhibits emotional disabilities is in need of IDEA protection through some avenue of individualized education. Furthermore, each qualifying child under the IDEA is entitled to a free, appropriate public education. Admittedly, prior precedent

142. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 63 (2d Cir. 2000).

143. *See id.* at 189 (asserting that an IEP's compliance with procedures determining an adequate education conform with the intent of Congress); *see also* *Cordrey v. Euckert*, 917 F.2d 1460, 1464 (6th Cir. 1990).

144. *Rowley*, 458 U.S. at 187.

145. *See* *New Brighton Area Sch. Dist. v. Matthew Z.*, 697 A.2d 1056, 1058 (Pa. Commw. Ct. 1997) (holding that forcing a school district to pay for private school expenses when an appropriate education is being offered per the normal curriculum "would constitute more than a free, appropriate public education").

146. *See Rowley*, 458 U.S. at 204 n.26.

147. 20 U.S.C. § 1401(8) (Supp. IV 1998).

148. *See* Anne Scholtz Heim, *Gifted Students and the Right to an Ability-Appropriate Education*, 27 J.L. & EDUC. 131, 131 (1998) (noting that special needs of a gifted child need to be met for the natural talents of the child to emerge), WL 27 JLEDUC 131.

149. Joseph Mas, *Elementary and High School Education of the Gifted*, in *THE GIFTED CHILD, THE FAMILY, AND THE COMMUNITY* 163 (Bernard Miller & Merle Price eds., 1981) (proposing specialized programs that facilitate the optimum in all disciplines in order to amplify particular aspects of giftedness in each child).

confines this threshold protection to fall short of maximizing a qualifying child's potential. This Comment now contends, by working under the judicial confines of free, appropriate education and in consideration of a gifted disabled child's need for individualized treatment, that children similar to J.D. should qualify under a proposed amended version of the IDEA. There are two threshold prerequisites to qualification under the IDEA.¹⁵⁰ J.D. and similarly situated children must demonstrate that they have a cognizable emotional disturbance that "over a long period of time and to a marked degree . . . adversely affects [their] educational performance."¹⁵¹

1. Emotional Disturbance

In reviewing the qualification requirements underlying the IDEA, J.D. undisputably satisfies the first hurdle in exhibiting an emotional disturbance. J.D. underwent a psychological evaluation conducted by clinical psychologist Dr. Roger Meisenhelder.¹⁵² Dr. Meisenhelder's findings included an opinion that J.D. experienced "frustration, boredom, alienation, apathy, and hopelessness."¹⁵³ Yet, Dr. Meisenhelder further concluded that J.D. exhibited "'superior' verbal and language skills, [coupled] with good concentration and 'highly developed' conceptual . . . thinking skills."¹⁵⁴ In considering J.D.'s dual competing attributes, Dr. Meisenhelder recommended that J.D. be classified as exhibiting an emotional and behavioral disability.¹⁵⁵ The doctor further recommended that the school should educate J.D. in an environment among his intellectual peers.¹⁵⁶ Finally, Dr. Meisenhelder requested that the school provide J.D. with individual and family counseling.¹⁵⁷ Subsequently, the School District recognized J.D.'s disability status and honored the doctor's request for counseling, yet the dispute arose over the District's refusal to place J.D. in a private school setting that amplifies his intellectual capabilities.¹⁵⁸ The doctor's recommendations coupled with the school's partial acquiescence illustrates that all pertinent players in J.D.'s psychological evaluation undisputably recognized that J.D. exhibited an emotional and behavioral disability.¹⁵⁹

150. 34 C.F.R. § 300.7(4)(i) (1999).

151. *Id.*

152. *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 63 (2d Cir. 2000).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *J.D.*, 224 F.3d at 63.

158. *Id.* at 64.

159. *See generally id.*

As mentioned, IDEA qualification first hinges upon a recognizable disability.¹⁶⁰ Emotional disturbance falls within the ambit of IDEA protection.¹⁶¹ Specifically, under the IDEA, emotional disturbances can manifest in a variety of ways such as: inhibiting a child's ability to establish "interpersonal relationships with peers and teachers," inappropriate behavior or feelings, and depression.¹⁶² As substantiated by the earlier findings, J.D. clearly experienced unhappiness, exhibited inappropriate types of behavior, and most significantly, underwent difficulty in building relationships with his peers in the mainstream setting.¹⁶³

2. Adverse Affect

In addition to identifying a disability, the IDEA presents an additional hurdle to federally funded assistance. The emotional disturbance must not only manifest, but must also adversely affect the child's performance.¹⁶⁴ The "adversely affect" requirement identifies the central dispute raised by emotionally disabled gifted students. This element of IDEA qualification presents two separate barriers that face J.D. and students like J.D. in his fight for an appropriate education.

Undisputably, J.D.'s educational performance was not inadequate in comparison to the average child his age.¹⁶⁵ The Second Circuit asserted that the "adversely affect" prong is substantiated by "'two or more measures of school performance,' including . . . grades and 'other test results.'"¹⁶⁶ Thus, in order to qualify under the IDEA, J.D. must contend that his emotional disabilities impede other measurable criteria associated with educational performance. The second obstacle facing J.D. in his battle to connect the disability with his educational performance concerns the judiciary's continued reluctance to equate an appropriate education with an environment that maximizes the child's potential.¹⁶⁷ The Supreme Court has specifically established a distinction between the state's responsibility to appropriately educate each student and the state's goal to maximize each students' potential.¹⁶⁸

For students like J.D., the courts' current interpretation of free appropriate education raises one disturbing question: Why does an undisputably emotionally disturbed child who performs adequately from an

160. 34 C.F.R. § 300.7 (1999).

161. *Id.* § 300.7(a)(4).

162. *Id.* § 300.7(a)(4)(i)(B)-(D).

163. *J.D.*, 224 F.3d at 63.

164. 34 C.F.R. § 300.7(a)(4)(i) (1999).

165. *J.D.*, 224 F.3d at 63.

166. *Id.* at 67.

167. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 n.26 (1982).

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

intellectual standpoint receive discriminatory treatment under a statute whose very remedial purpose is to level the playing field?¹⁶⁹ All emotionally disturbed children, who suffer educational consequences attributable to their emotional disturbance, should receive remedial protection under the IDEA. In the future when the judiciary once again construes the IDEA, courts should view “adversely affects the child’s educational performance” in a broader sense.

Within a broader application of the IDEA, two distinct elements became important: adversely affects and educational performance.¹⁷⁰ J.D.’s emotional disability effectuates an adverse impact on his daily educational endeavors at Pawlet School District.¹⁷¹ According to expert Meisenhelder’s report, J.D.’s emotional problems create alienation from his peers, apathy, and hopelessness.¹⁷² As previously mentioned, the emotional disturbance encompasses unhappiness and an inability to establish peer relationships.¹⁷³ J.D.’s hopelessness certainly causes unhappiness and his alienation definitely impedes upon the creation of peer relationships. The mere existence of these various manifestations, indicating an emotional disturbance, by themselves adversely affect J.D.’s daily educational routine. J.D.’s emotional downfalls do adversely affect his general well being and, therefore, his productiveness in society.

The intent of the IDEA was to create a well-rounded individual, *i.e.*, a productive member of society.¹⁷⁴ Therefore, educational performance must include more than a review of standardized test scores and/or yearly grades. Educational performance must consider each diverse interest and goal that modern educational institutions serve to accomplish. An emotional disability that adversely affects a child’s well-being and relationships with others must be considered as an adverse affect upon the educational goal of creating productive members of society. In accordance with the plain language of the IDEA, students like J.D. who are emotionally or behaviorally disabled but not academically challenged,

169. Even though the *Pawlet* court found J.D. did not qualify under the IDEA, it recognized the discrimination being applied in this situation and found J.D. qualified under the Rehabilitation Act, which is intended to prevent discrimination. *J.D.*, 224 F.3d at 72.

170. 34 C.F.R. § 300.7(4)(i) (1999).

171. *See generally J.D.*, 224 F.3d at 60.

172. *Id.* at 63.

173. 34 C.F.R. § 300.7(4)(i)(B), (D) (1999).

174. *See* 34 C.F.R. § 300.1(a) (1999) (stating that “[t]he purposes of this part are—(â) 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 *employment and independent living*”) (emphasis added).

should receive individualized treatment no different than their peers whose academic abilities fall below average.

B. *Mainstreaming Gifted and Talented Children Is Not an Appropriate Goal*

One of the major goals of the IDEA is to provide a free, appropriate education in the least restrictive environment.¹⁷⁵ Researchers have concluded that the regular classroom can hamper the achievement of gifted and talented children.¹⁷⁶ The movement away from ability grouping and towards mixed classrooms results in gifted students making smaller academic achievement gains.¹⁷⁷ The regular classroom does not challenge the gifted student, with or without disabilities, who has a higher mental-processing ability and has previously mastered much of the content offered by the class.¹⁷⁸ Unfortunately, the achievements of gifted students have declined over the past three decades.¹⁷⁹ There are several reasons for this:

[T]he pitting of equity against excellence rather than promoting both equity and excellence, anti-intellectualism, the 'dumbing-down' of the curriculum, equating aptitude and achievement testing with elitism, the attraction to fads by schools, and the insistence of schools to teach all students from the same curriculum at the same level.¹⁸⁰

Mainstreaming produces less academic achievement for gifted and talented children while homogeneous grouping improves their achievement.¹⁸¹

175. 20 U.S.C. § 1414(a)(1)(C)(iv) (Supp. IV 1998).

176. See Roseann G. Padula, Note and Comment, *The Plight of Connecticut's Brightest Students: Broadley v. Meriden Bd. of Educ.*, 29 CONN. L. REV. 1319, 1322 (1997) (comparing gifted children who were in gifted programs with gifted children who were not in gifted programs), WL 29 CTRLR 1319.

177. See *id.* at 1323 (noting gifted students have mastered up to half of the curriculum before the school year starts).

178. See *id.* at 1324 (illustrating that teachers do not give gifted children the same amount of time to respond to questions as they do other children).

179. See Camilla Persson Benbow & Julian C. Stanley, *Inequity in Equity: How "Equity" Can Lead to Inequity for High-Potential Students*, 2 PSYCHOL. PUB. POL'Y & L. 249, 249 (1996) (contributing this decline to the American desire for egalitarianism), WL 2 PSYPPL 249.

180. See *id.* (claiming that American students rank low in comparison to students of other industrialized nations in math and science).

181. See *id.* at 266 (claiming that adults, who were identified as gifted as children, favor homogeneous grouping).

V. PROPOSAL

Unfortunately, emotional disabilities not yet affecting a child's educational performance can potentially hinder learning potential. In satisfying the IDEA requirements for a child with an emotional or behavioral disability, the child must meet two conditions: (1) fall under one of the disability categories and (2) the condition must adversely affect his educational performance. In order to provide special education services for the gifted and talented student whose grades mask the disability, a parent must insist that schools consider other factors when determining the child's qualification under the IDEA.

Under this broad definition, Congress must recognize that special education is advantageous even when grades are at or above average. The IDEA does not state that a child is solely evaluated by his grades; however, a determination must consider whether the disability adversely affects the child's educational performance. In order to overcome this hurdle, the IDEA, as amended, would include disabilities that affect a child's learning potential.¹⁸²

To ensure that gifted, yet disabled, children receive the services needed, the IEP form should be revised as well. Gifted and talented children should be assessed with their disability in mind and include an appropriate IEP that involves more than just academic performance. While schools have different IEP forms, each form must comply with the IDEA requirements and are, therefore, similar in their construction.

The section of the IEP with regard to eligibility should be revised to meet the newly proposed language of the IDEA,¹⁸³ which revises the language stating that the disability must "adversely affect a child's educational performance."¹⁸⁴ The new language should provide special education to children with disabilities that adversely affect their educational performance *and/or learning potential*.¹⁸⁵ The *learning potential* IDEA amendment provides the gifted and talented child performing at the above-average level with special education or counseling services that maximizes their educational performance and social skills.

In addition, schools should consider extrinsic evidence to qualify a disability adversely affecting the child's learning potential. Schools should allow a parent, psychologist, teacher, or other adult involved with the child's IEP to provide evidence explaining that, although the child performs at the same level as the other children in his class, he is not per-

182. See Appendix A for the language of the current IDEA regulations and Appendix B for the proposed language for an amendment to the IDEA.

183. See Appendix B.

184. See Appendix A, 34 C.F.R. § 300.7(9)(ii) (1999).

185. See Appendix B.

forming to his potential. Such a showing would then provide the student coverage under the expanded umbrella of the IDEA.

VI. CONCLUSION

Many education professionals do not recognize that a child can be both gifted and disabled.¹⁸⁶ For example, many educators consider only a below average performance in the classroom as a criteria for the diagnosis of a learning disability.¹⁸⁷ The disability, however, often hides the giftedness.¹⁸⁸ The usual methods of identifying children with disabilities are not appropriate for identifying the hidden potential of disabled, gifted and talented children.¹⁸⁹ A disabled child is afforded the IDEA to assure them an appropriate education, yet a gifted and talented child with a disability, whose grades are at or above average, has no such legislative protection to ensure an appropriate education.¹⁹⁰ Thus, the disability may be perceived as not having an adverse effect on the child's educational performance.¹⁹¹ Since one of the requirements to receive benefits under the IDEA is that the disability has to adversely affect the performance of the child, gifted children with disabilities are often excluded from the IDEA. Every child needs to be educated with a method that allows that child to reach their full potential; otherwise, mediocrity remains the goal of American schools.

186. See Lynda Conover, *Gifted and Learning Disabled? It Is Possible!*, 17 VA. ASS'N FOR THE EDUC. OF THE GIFTED NEWSL. 3, ¶ 2 (1996) (noting that even teachers do not realize that children can be gifted and learning disabled), at http://www.ldonline.org/ld_indepth/gt_ld/conover.html.

187. See Susan Baum, *Gifted but Learning Disabled: A Puzzling Paradox*, ERIC EC DIGEST #E479, ¶ 2 (1990) (claiming that gifted students with disabilities can "slip through the cracks of available services because [they are] not failing"), at <http://ericecorg/digests/e479.html>.

188. See *id.* ¶ 7.

189. See Colleen Willard-Holt, *Dual Exceptionalities*, ERIC EC DIGEST #E574, ¶ 2 (1999) (citing examples such as a hearing impaired student not responding to oral instructions), at <http://ericec.org/digests/e574.html>.

190. *Id.*

191. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 210 (1982) (holding that Rowley's hearing impairment did not adversely affect her grades).

APPENDIX A

Excerpts from *Current IDEA, Section 1401. Definitions*

(3) Child with a disability

(A) In general. The 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 (hereinafter 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.

Excerpts from *Current C.F.R. Part 300. Assistance to States for the Education of Children with Disabilities*

Subpart A-General

Sec. 300.7. Child with a disability.

...

(c) *Definitions of disability terms.* The terms used in this definition are defined as follows:

(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(ii) A child who manifests the characteristics of “autism” after age 3 could be diagnosed as having “autism” if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child’s educational performance.

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

...

(9) *Other health impairment* means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) *Adversely* affects a child's educational performance.

APPENDIX B

Proposed C.F.R. Part 300. Assistance to States for the Education of Children with Disabilities

Subpart A-General

Sec. 300.7. Child with a disability.

(c) *Definitions of disability terms.* The terms used in this definition are defined as follows:

(1)(i) *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance [, and/or learning potential.] Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(ii) A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) *Deaf-blindness* means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance[, and/or learning potential].

(4) *Emotional disturbance* is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance [, and/or learning potential:]

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

...

(9) *Other health impairment* means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance [, and/or learning potential.]