



## **TWICE EXCEPTIONAL (2E) STUDENTS**

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# FAPE FOR 2E STUDENTS

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## INTRODUCTION

Developing Educational programming for Students who are gifted and disabled or twice exceptional can be one of the most challenging endeavors for educational professionals. This outline is intended as a guide to provide general information regarding potential legal issues when developing programming for twice exceptional students. When in doubt or if you have specific questions be sure to contact your legal counsel.

### I. APPLICABLE DEFINITIONS

- “Twice-exceptional” or “2E” is a “gifted student who also has a learning disability.” (Special Education Dictionary, LRP Publications.)
- A student is “gifted” if he or she possesses superior abilities in the areas of general academics, specific academic aptitudes or the arts.

Thus, twice-exceptional is essentially a description educators may use for students who have outstanding talents in some academic areas and significant learning difficulties in other areas. As such, twice-exceptional learners may qualify for gifted programs, as well as special education services.

- Disability. The legal definitions for who qualifies as a 2E student are not well defined. Although definition of “disabled” is straight forward and can mean a student who qualifies for special education under IDEA in (or more) of the eligibility categories as defined under Title 5 CCR § 3030(b) or under the definition stated under Section 504.

As provided in 34 CFR § 300.8(a), in order to qualify for special education and related services, a student must be between the ages of 3 and 21 and must satisfy both parts of a two-part test:

- (1) The student must meet the definition of one or more of the categories of disabilities which include: an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as “emotional disturbance”), an orthopedic impairment, autism, traumatic brain

injury, other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities; and

(2) The student must be shown to be in need of special education and related services as a result of his disability or disabilities.

- **Gifted.** The former definitions of gifted that were found in Education Code section 52201(a) and (b) and Education Code section 52202 have been repealed and in their place, the California Department of Education (“CDE”) has provided the following definition with regard to students who have “high performance capability.”

“High performance capability is defined by each school district governing board. Each school district shall use one or more of the following categories in defining the capability: intellectual, creative, specific academic, leadership, high achievement, performing and visual arts talent, or any other criterion proposed by the school district and approved by the State Board of Education in the school district’s GATE application.”

(CBEDS-CDIF) (<http://www.cde.ca.gov/ds/sd/cb/glossary.asp#gate>)

The characteristics often associated with gifted students include the following:

- Intellectual Ability-High IQ
- Creative Ability shown as one or more of the following:
  - Perceiving an unusual relationship among aspects of the pupil’s environment and among ideas - overcomes obstacles to thinking and doing or produces unique solutions to problems.
  - Specific Academic Ability-functioning at highly advanced academic levels in particular subject areas.
  - High Achievement: Produces advanced ideas and products and/or attains exceptionally high scores on achievement tests.
  - Visual and Performing Arts Talent: Originating, performing, producing, or responding at extraordinarily high levels in the arts.

## II. ELIGIBILITY

Although giftedness may not be fully legally defined, what is clear is that giftedness is not a disabling condition that meets the IDEA two-part test for eligibility. (Letter to Anonymous, 55 IDELR 172 (OSEP 2010).) As such, gifted student still must independently meet the eligibility criteria found in 5 CCR § 3030 irrespective of any gifted status.

Not all disabled students will qualify for special education. Generally, a student is in need of special education services when the student's disability impacts the student's educational performance. Special education services are not required where the disability does not have an adverse effect on the student's educational performance. (*C.M. v. Department of Educ., State of Hawaii*, 58 IDELR 151 (9th Cir. 2012, unpublished).) As such, students who are both gifted and disabled may not qualify for special education and, instead, gifted students with a disability may independently qualify under Section 504. (Ferguson-Florissant R-II (MO) Sch. Dist., 56 IDELR 56 (OCR 2010); and Lake Oswego (OR) Sch. Dist., 50 NDLR 117 (OCR 2014).)

Generally, 2E Students will be found eligible for either special education under the IDEA or Section 504 under the following scenarios:

- *Gifted Students with Physical Disabilities/Sensory Disabilities.* In these cases, there is a physical disability that is unrelated to the student's cognitive ability. Students can be gifted, but still in need of services under the IDEA or Section 504 due to deafness, blindness or orthopedic impairment. Stephen Hawking, a Nobel prize-winning physicist who has ALS, is an example of a gifted person who also has a physical disability.
- *Gifted Students with High Functioning Autism (Formally Asperger Syndrome).* As defined under 5 CCR § 3030(b)(1), "Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting 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." Amongst other issues, gifted students with Autism will have deficits in social functioning, pragmatic communication, and ability to tolerate change in routine. However, these students can also demonstrate a greater passion for acquiring knowledge and advanced skills in a variety of areas. Dr. Temple Grandin, Assistant Professor of Animal Science at Colorado State University and accomplished author and designer of animal facilities, has written of her experiences as an individual with Autism.
- *Gifted Students with Emotional Disturbance.* The social-emotional aspects of giftedness indicate that gifted students are no more or less likely than their non-identified peers to experience emotional or psychosocial difficulties. (Robinson, N.M., Reis, S.M., Neihart, M., & Moon, S.M. (2002); *Social and Emotional Issues Facing Gifted and Talented Students: What Have We Learned and What Should We Do Now?*; In M. Neihart, S.M. Reis, N.M. Robinson & S.M. Moon (Eds.), *The Social and Emotional Development of Gifted Children: What Do We Know?* (pp. 267-289); Waco, TX: Prufrock Press.) However, it is possible

that potential giftedness goes unrecognized as attention is focused only on their disruptive behaviors. Princeton University professor and Nobel prize-winning mathematician John Nash, Jr., whose struggle with schizophrenia was the subject of the movie “A Beautiful Mind,” is an example of a gifted individual who has an emotional disorder.

- *Gifted Students and OHI.* Gifted students with ADHD have difficulty focusing their attention, completing their work, following directions, and organizing their school materials. (Kaufmann, F., Kalbfleisch, M.L., & Castellanos, F.X. (2000); Attention Deficit Disorders and Gifted Students: What Do We Really Know?.) At the same time, they can mirror their gifted peers by being advanced in ability and capable of high levels of performance, particularly when their interest is high and tasks are challenging. Nikola Tesla, a foremost inventor who helped usher in the age of electrical power in 1887 with his patent on alternating current motors, would also be characterized as having ADHD today.
- *Gifted Students with Learning Disabilities.* Potentially, a large subgroup of twice-exceptional students is those who are gifted and also have a specific learning disability. For these students, giftedness overcomes or relates to disabilities that impact learning (such as dyslexia, receptive and expressive language disorders). Many students with this type of profile have the potential to be unidentified as either gifted or disabled because their areas of strength and weakness can move them toward average performance and, as such, they appear to be in need of neither gifted nor special education services. An example of an individual who was gifted and had a learning disability was Albert Einstein who gave the world the theory of relativity even though he struggled to learn how to read.

It is worth noting that a student that is eligible as a “student with a disability” is eligible under the IDEA regardless of the student’s academic success and a student’s academic achievement is irrelevant when the student otherwise meets the eligibility criteria. (*Williamson County Bd. of Educ. v. C.K.*, 52 IDELR 40 (M.D. Tenn. 2009) (holding that despite a 143 IQ and passing grades, the student’s ADHD adversely affected his educational performance, qualifying the student for special education.) Implementing a categorical exclusion from SLD eligibility based on identification as gifted under state law or district policy violates the IDEA. A student classified as mentally gifted may nonetheless meet IDEA eligibility criteria. (Letter to Ulissi, 18 IDELR 683 (OSEP 1992); see also District of Columbia Pub. Schs., 49 IDELR 82 (SEA DC 2007); and City of Chicago Sch. Dist. 299, 62 IDELR 310 (SEA IL 2013).)

### **III. ASSESSMENTS OF GIFTED STUDENTS**

“In fifth grade, after an SST meeting, District informed Mother that Student was too bright for special education and recommended that Student be evaluated for the Gifted and Talented Program (GATE). Student was enrolled in GATE with Mother’s approval.” (*Rialto*

*Unified School District v. Student*, OAH Case No. 2006080715.) Given how this decision ultimately resulted in due process litigation, it is clear that the idea of “too bight for special education” is not a wise strategy when confronted with the challenge of assessing gifted students.

Although the IDEA is silent on gifted students, what is clear is that school districts must conduct an initial evaluation of any student who is suspected of having a disability and needing special education and related services because of the impairment. (Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 2015).)

The mere fact student exhibits a disability in a subcategory (say an auditory processing disorder) does not mean any specific testing tool must be used. (*Parent v. Oakland Unified School Dist.*, OAH Case No. 2015120810) - evidence showed that school district’s speech and language, psychoeducational and academic assessments were sufficient to determine the nature and extent of any auditory processing deficits for educational purposes.) Like any other student, when assessing paternally 2E students, a school district should follow all of the criteria listed in Education Code section 56320. This should include IQ testing<sup>1</sup>. (*Parent v. Poway Unified School Dist.*, OAH Case No. 2013020661.) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 CFR § 300.304(c)(6).)

When assessing gifted students to see if they qualify for service under Section 504 or the IDEA, the best practice would indicate testing the full assessment under the IDEA in lieu of just assessing for eligibility for 504 accommodations. (*Student v. Newport-Mesa Unified School Dist.*, OAH consolidated Case Nos. 2015050430 and 2016010309.)

#### **IV. EDUCATION PROGRAMMING FOR 2E STUDENTS**

##### **A. Introduction**

The practice of denying, on the basis of disability, a qualified student with a disability the opportunity to participate in an accelerated program violates both Section 504 and Title II. Discrimination prohibited by these laws includes, on the basis of disability, denying a qualified individual with a disability the opportunity to participate in or benefit from the recipient’s aids, benefits or services, and affording a qualified individual with a disability with an opportunity to participate in, or benefit from, the aid, benefit or service in a manner that is not equal to that offered to individuals without disabilities. (34 CFR § 104.4(a)(b)(1)(i)(b)(1)(ii); 28 CFR § 35.130(a)(b)(1)(i)(b)(1)(ii); see Dear Colleague Letter: Access by Students with a Disability to Accelerated Programs.)

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<sup>1</sup> However, even in the case of a 2E student, the prohibitions on IQ testing of African-American students established under *Larry P. v. Riles* still apply regardless of a child’s gifted status.

This Dear Colleague Letter is not requiring you to develop gifted student programs specifically for 2E students. However, if a student would be offered an accelerated program BUT FOR his or her disability, AND that disability can be addressed without modification of the accelerated program, then the school district is likely required to allow the disabled student to attend an accelerated program.

The easiest example would be a 2E student. We will name her Stephanie. Stephanie is intelligent, but has ADHD, the inattentive type. She is capable of succeeding in an accelerated program, but requires preferential seating. If allowing Stephanie preferential seating and it does not alter the accelerated program, then the school district should offer the accelerated program with a 504 plan. If Stephanie also requires additional time to complete work (due to her inability to focus on what is in front of her), she may also need a 504 plan or an IEP to provide those modifications. Again, if the “tweaks” do not change the fundamental nature of an accelerated program, then the school district should allow the student to attend. A more detailed discussion of 504 versus IEP follows below.

## **B. 2E Students 504 Plan Versus IEP**

In determining if a gifted child needs an IEP versus a 504 plan, the heart of the analysis should be whether a student’s unique needs required specialized instruction or services which could not be provided through the general education program. Case law has held that a child is not considered a “child with a disability” for the purposes of the IDEA if it is determined that a child needs only a related service and not special education. (*W.H. v. Clovis Unified School District* (E.D. Cal 2009) 2009 WL 1605356, \*21, citing 34 CFR § 300.8(a)(2)(i).) The Ninth Circuit Court of Appeals determined that a child may have a qualifying disability, yet may not be found eligible for special education, where the child’s needs can be met with modification of the general education classroom. (*Hood v. Encinitas Union School District* (9<sup>th</sup> Cir. 2007) 486 F.3d 1009, 1107-1108, 1110.)

However, when deciding whether a 2E student needs a 504 or an IEP, best practice under current legal standards would be to not just examine the need for special education, but also the level and intensity of proposed accommodations and related services. This can be determined by examining the child’s individual disabilities.

## **C. Specific Examples of Disabilities and Programming Options to Consider**

- **ADHD** - Given that ADHD does not negatively affect a student’s cognitive ability, ADHD can be commonly seen in many 2E students. Inattention, inability to focus and distractibility are common symptoms of ADHD and can be addressed through a 504 plan, making 504 plans extremely helpful in 2E students’ educational programming.

Common 504 plan accommodations include small group instruction, preferential seating, incentives for work completion and attendance, counseling, modified assignments and classwork broken down into smaller sections. If these types of

accommodations can be used and do not change the structure of the program, then these would be ideal for the average 2E ADHD student.

However, once the level of related services becomes extensive, case law may require an IEP. As an example, in *L.J. v. Pittsburg Unified School Dist.* (9<sup>th</sup> Cir. 2016) 850 F.3d 996, student was diagnosed with Bipolar Disorder, Oppositional Defiant Disorder and ADHD, and was a very bright student. He was successful in school due to his 1:1 aide, mental health counseling services and a behavior plan. Although the student was enrolled in general education classes, the Ninth Circuit found that the level of accommodations and related services warranted a finding of eligibility under the IDEA and an IEP.

- **AUTISM** - 2E students with high functioning Autism may only need a 504 plan to accommodate their disability, even despite a history of Autism diagnosis. By way of example, in *Parents v. Tustin Unified Sch. Dist.*, OAH Case No. 2015080076, it was found that a third grade student with Autism, who had a superior cognitive ability, did not need an IEP even though student was socially immature for his age, did not comprehend social cues or consequences, defied everyone he knew or was acquainted with as his “friend,” even without any social connection, and had a history of being bullied. What the school district was able to demonstrate was that in this case, student advanced academic output and overall student displayed a range of appropriate social responses, as well as use of verbal and non-verbal behaviors for reciprocal social interchange. As such, these deficits did not appear to significantly impact his educational performance and/or social interaction. The Office of Administrative Hearings (“OAH”) found that the school district’s offer of a 504 plan consisting of general education with accommodations was appropriate. In such cases, the school district should be very diligent in outlining both quantitative and qualitative data to establish why an Autistic and gifted student’s educational program would be sufficient with “only” a 504 plan.

- **BEHAVIORAL PROBLEMS** - It is worth noting that gifted children may develop asynchronously - their minds are often ahead of their physical and emotional growth, and specific cognitive and social-emotional functions can develop unevenly. (See National Association for Gifted Children, <http://www.nacg.org>.) As such, gifted children can also have significant struggles with their social emotional development. Further, research states that hypersensitivity to sensory stimuli is common for both students who are gifted and also for those with Autism. (*Neinhart*, p. 230, *Gifted Child Quarterly*.)

Ironically, in some cases, school districts may be justified in holding a gifted student back a grade level to address issues of socialization. In one case, a school district was justified in retaining a student with a 158 IQ in kindergarten to address behavioral issues. (*Parents v. Oakland Unified School Dist.*, OAH Case No. 2015120810.)

Additionally, gifted children with an emotional disturbance can present several unique challenges. By way of example, in *Anaheim City School District*, OAH Case No. 2013040142, a fifth grader with ED would not only engage in emotional outbursts at school, but because of her intelligence was able to manipulate other students and teachers in her GATE program.

As such, when developing an IEP for a 2E student, the team should be sure to discuss and address the unique behavior issues associated with gifted children.

- **OTHER CONSIDERATIONS** - A final consideration in programming is whether *Endrew* requires a review of a current 2E student's programming. You may already have a child in mind that you know is 2E, and while the program you developed was FAPE under *Rowley*, would it still be FAPE under *Endrew*?

#### **D. 2E Students and FAPE Pre-*Endrew***

The Supreme Court in *Rowley*, held that the IDEA did not require a school district to maximize student's potential. Instead, the IDEA required that a student's program be reasonably calculated to allow him to obtain some educational benefit. (*Board of Education v. Rowley* (1982), 458 U.S. 176 at pp. 200, 203-204.) Under the former, "some educational benefit standard districts were not required to cater to or attempt to maximize a gifted student's potential."

In *Parents v. Oakland Unified School Dist.*, OAH Case No. 2015120810, an autistic student with a nonverbal IQ of 158 was offered a general education kindergarten class with a 2:1 behavior aid and speech and other related services. For the most part, student received the same kind of curriculum as his classmates. Parents filed for due process arguing that due to his intelligence, student should receive an accelerated and differentiated curriculum with individualized lessons that would be individualized for him and directed to his unusual levels of ability. Additionally, parents believed that since student's levels of academic achievement varied by subject, they wanted Oakland to individualize his academic instruction in each subject to the highest level of which he is capable and taught individually by tutors. Additionally, parents argued that student should receive instruction using the "strength-based model" to remediate student's weaknesses.

OAH summarily rejected all of these arguments finding that under *Rowley*, IDEA did not require that Oakland maximize student's potential. Instead, Oakland was simply required to offer student a program reasonably calculated to allow him to obtain some educational benefit. Additionally, OAH held that as long as a school district otherwise provides FAPE, the choice of methodology is left to the school district.

Similarly, in *Parents v. Hermosa Valley*, OAH Case No. 2011081019, the student was cognitively gifted with diagnoses of Asperger's and ADHD. The school district had student in general education with instructional service supports. The parents want a private school which

caters to twice the exceptional students. Student received 20 minutes SAI/week; 30 minutes/week direct SAI; S&L 30 minutes/week; OT consult for fidgets 20 minutes/month; pull-out counseling and guidance for 30 minutes/week - quite a bit of services.

OAH noted that while the expert opined that Bridges could provide student a meaningful and more suited education (to his needs), a school district has the right to select the program; and, as long as that program meets the child's needs, more is not necessary. Although much more might be done to maximize student's accomplishments, no legal authority exists that school district had a legal obligation to do so. To the contrary, under *Rowley* a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child." (*Hermosa Valley*, OAH Case No. 2011081019.)

It is also important to note that in *Hermosa*, OAH followed that analysis with:

An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progression, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2<sup>nd</sup> Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. \_\_\_ at p. 197, fn. 21.) Instead, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program." (*Thompson R2-J School v. Luke P.* (10<sup>th</sup> Cir. 2008) 540 F.3d 1143, 1155.)

## **E. 2E Student and E-FAPE (FAPE Post-*Andrew*)**

Thus, under the "Pre-*Andrew* FAPE" there was no obligation to offer accelerated classes to a gifted student. But has that changed now with *Andrew*?

### **1. Introduction**

An understanding of the *Andrew* case will help our analysis. *Andrew* was diagnosed with Autism at age two. *Andrew* attended the same school district through the fourth grade. Although student displayed a number of strengths, his progress was

stalling. He would still scream in class, climb over furniture and run away from school. He had severe fears of flies, spills and public restrooms.

The issue came after his fourth grade year IEP offer. His IEPs largely carry over the same basic goals and objectives from year-to-year, indicating he was failing to make meaningful progress toward his aims. Parents believed that the only way to achieve success was to do a thorough overhaul and reverse the trend.

Parents moved him to a private school that provided him with a BIP and he was able to make significant academic progress.

The lower courts focused on the fact that Andrew was making “minimal progress” in the school district, and used that rule to evaluate Andrew’s case. The Supreme Court in *Andrew* reminded us that although the IEP may not be “ideal,” it must provide more than minimal progress and it referred the case back to the Tenth Circuit to determine if Andrew’s programming was more than de minimus.

## **2. *Andrew Did Not Re-Define FAPE; It Simply Clarified Rowley***

*Andrew* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807, \*\*16-18.)

The Supreme Court revisited and clarified the *Rowley* standard in *Andrew*. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, Slip Op. at pp. 13-14, citing *Rowley*, 458 U.S. \_\_\_ at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Andrew*, Slip Op. at p. 12.)

*Rowley*’s focus was on a child fully integrated in the regular classroom and advised that a typical IEP in that setting should be “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.” (*Rowley*, 458 U.S. \_\_\_, at 204.)

*Rowley* did not provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. A child’s IEP need not aim for grade-level advancement if that is not a reasonable prospect. But that child’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

The *Endrew* standard is more demanding than the “merely more than *de minimis*” test applied by the Tenth Circuit. But, that’s all it is. FAPE is simply more than *de minimus*.

### **3. While *Endrew* Does Not Require Maximization, It Does Require More**

Parents in *Endrew* argued that FAPE requires “an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.” The court rejected that argument.

*Endrew* does not require an IEP to maximize educational benefit. It does, however, require that “a student’s educational program be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” (*Id.*, 580 U.S. \_\_\_, 137 S. Ct. at p. 1000.) In so clarifying “some educational benefit,” however, the Court stated that it would not attempt to elaborate on what appropriate progress will look like from case to case. “It is in the nature of the Act and the standard we adopt to resist such an effort: the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.” (*Id.*, 580 U.S. \_\_\_, 137 S. Ct. at p. 1001.)

For school districts, this balance means an honest in-depth discussion should be held at the IEP when considering programming for 2E students. Without some significant discussion, a court will not find that the school district carefully consider the individual needs of the student in regards to his or her academics. School districts need to seriously consider what is appropriate in light of the student’s abilities.

ADHD for example - Student has a diagnosis of OHI pursuant to ADHD, combined type. Student struggles with organization, completing homework assignments and classroom behavior. His behaviors in the classroom cause him to miss classroom instruction time because he is sent out of the classroom when he cannot sit still. On the other hand, student has above average cognition and when student is focused on his work, he receives high marks. For the student to have appropriately ambitious goals as part of the student IEP, the school district may need to consider placing the child in advanced classes with appropriate supports and services which allow him to remain in the classroom and focus on his work, while addressing his behaviors.

SLD, for example, is a child with a specific learning disability, say Dyslexia. Let’s say this child is extremely talented at performing mathematical equations and used to receive high marks in mathematics. This year, the child is taking Algebra as a freshman and is barely passing. The word problems in his Algebra class are causing him to answer incorrectly when he is perfectly capable of completing the equation otherwise. This is an example of “masking,” which is when a student’s disability “masks” his gifted abilities. This student’s Dyslexia and difficulty with words is impeding his ability to

succeed in mathematics, although he is perfectly capable of succeeding in math. This student will need accommodations with word problems to succeed in future math classes and should not be omitted from them. He is capable of succeeding in an accelerated program.

ASPERGERS/AUTISM - This student has advanced reading skills and can read three levels above his grade level. He prefers nonfiction and can recite facts, dates and details about his favorite subject, U.S. Presidents. He can tell you birthdates, dates of presidency, first wives' names, and each president's legacy. However, in a recent reading comprehension test based on fictional characters and stories, he scored below average. This is another example of "masking."

Because the student has Asperger's, he has difficulty digesting fiction and understanding human relationships, human dynamics and inferences based on emotion. This student has trouble pointing out the metaphors, irony and following themes; he can understand the action of the plot, but not the nuances of character. Therefore, his ability to understand the literature is impeding his ability to score high, though he is an excellent reader otherwise. This student needs interventions to assist him in understanding, but should remain in a challenging reading course.

These three students would need accelerated programs in order for their educational program to be appropriately ambitious in light of the student's circumstances.

## V. CONCLUSION

Although *Endrew* does not require maximization, school districts should consider 2E for accelerated programs, ***If Not for Endrew, Then for OCR***. Omitting 2E Students from accelerated classes may or may not violate *Endrew's* definition of FAPE, but school districts may find themselves having to defend against discrimination allegations. Keep in mind that because each child's education is a different experience for each child, school districts will need to consider how they can address a gifted student's abilities. If a 504 plan or an IEP can assist a gifted child in succeeding, without changing the accelerated program, then the school district likely has an obligation to offer the accelerated program.