Gifted Education

The law on gifted students tends to take a back seat to the law on students with disabilities. One major reason is that gifted education lacks a specific legal mandate at the federal level, in comparison with the Individuals with Disabilities Education Act (IDEA) and the twin civil rights acts, Section 504 and the Americans with Disabilities Education Act. Nevertheless, eligibility and entitlement for gifted students, and their appropriate education, have been the subjects of a long but rather thin line of case law in those states that have specific legislation or regulations in this area (Zirkel, 2005b). In addition, some gifted students have been designated as "dually exceptional," leading to litigation under IDEA and Section 504. The following case and accompanying question-and-answer discussion illustrate recent developments.

"Litigation specific to identification and individualized programs for gifted students has not been particularly frequent or forceful largely because there is no federal mandate comparable to IDEA."

The Case

In September 2005, after attending a private preschool during the previous year, E.N. skipped kindergarten by entering the first grade in a Pennsylvania school district. In February 2006, the parents of E.N. sent a letter to the district requesting an evaluation to determine if E.N. was eligible under the Pennsylvania regulations that mandate identification and individualized education programs for gifted students. The regulations require an IQ of 130 or higher; other criteria that are both objective (e.g., achievement level a year or more above grade level in one or more subjects) and subjective (e.g., excellence in one or more academic areas, according to "criterion-referenced team judgment"); and the need for specially designed instruction.

In the letter, the parents claimed that the Johns Hopkins Center for Talented Youth had identified E.N. as being gifted and asserted that E.N. had "repeatedly complain[ed] of boredom" in class, explaining that their child did not "require repeated exposure to information as many children do."

In June 2006, after obtaining written parental permission and conducting formal testing, the district's school psychologist issued a written report concluding that E.N. was not eligible but recommending re-evaluation in one year. The objective findings included IQ scores of 130 and 124 on the Kaufman Brief Intelligence Scale, Second Edition, and the WISC-IV, respectively, and "superior" and "very superior" results on the reading comprehension and capitalization/punctuation parts of the Woodcock Johnson Test of Achievement, Third Edition. The subjective finding was that "there are behavioral indicators that suggest that [E.N.] is struggling to effectively cope with the academic demands that [the parents have placed on E.N. and that E.N. is placing on self] to excel."

For example, the school psychologist noted that E.N. became visibly upset during the more difficult items on the WISC-IV and reported the classroom teacher's observations of difficulties interacting with peers and moderating emotions. The psychologist also summarized the Johns Hopkins Center report, which found a full-scale IQ of 122, noting "some anxiety and … signs of perfectionism," and recommended both a "rigorous first grade curriculum" and "consider[ation] for gifted and talented programs." E.N. earned 20 out of 40 points on the district's overall scoring matrix, whereas the cutoff score was 32.

In September 2006, after conducting four sessions, the hearing officer ordered the district to administer an appropriate IQ test to E.N. other than the WISC-IV, and that if the resulting score was 130 or more, the district should identify E.N. as eligible for gifted programming. Both parties appealed, and in November 2006 the appeals panel reversed the hearing officer's order, concluding that E.N. was "not in need of specially designed instruction and, therefore, does not meet the criteria as a student eligible [under the state regulations] for … gifted services."

The parents, proceeding *pro se* (i.e., without legal representation), filed an appeal in the Commonwealth Court, seeking immediate identification of E.N. as a gifted student, with eligibility for a gifted individual education plan, compensatory education for the programming missed since February 2006, reimbursement of expert witness fees, and orders for staff training and revised procedures for screening and assessment.

Questions and Answers

What do you think the Commonwealth Court's decision was in this case?

The court found sufficient evidence to affirm the appeals panel's decision (E.N. v. M. School District, 2007), citing the panel's conclusion that the need for gifted services should be determined in relation to E.N.'s current grade, not age, and therefore that E.N. did not need "enrichment beyond what [E.N.] received as a de facto accelerated student." The court also considered the credible testimony about E.N.'s reluctance to engage in challenging material, and the Johns Hopkins Center's corroborative recommendations.

Do states other than Pennsylvania have strong laws for gifted education?

Although the operational meaning of "strong" varies, the leading states appear to include Alabama, Florida, Kansas, Louisiana, New Mexico, Tennessee, and West Virginia (Zirkel, 2005a). These states, like Pennsylvania, have the hallmark IDEA-type rights of individual programming, procedural safeguards, and impartial hearings. None of these states, however, has a similarly analogous provision for attorneys' fees for prevailing parents. Moreover, all of them lack a distinguishable ceiling-type substantive standard of maximization for "appropriate" education.

Inasmuch as appropriate gifted education, rather than eligibility, is a more frequent issue in published decisions, what has been the trend in those cases?

The overall trend in the case law appears to be that parents have won where the district did not sufficiently individualize the program to the eligible child, but that districts have largely won beyond that threshold in terms of the sufficiency of services (Zirkel, 2004, 2005b). For example, in the most recent pertinent published decision, the Pennsylvania appeals panel upheld the hearing officer's ruling in favor of the parent, noting that the district "offered a one size fits all program that was not individually tailored to fit the Student's particular needs and ability" (West Chester Area School District, 2006).

In those cases where the parent prevailed, was compensatory education an available remedy? If so, what is the basis for calculating the amount of compensatory education?

In those jurisdictions where compensatory education is the prevailing remedy under IDEA, hearing/review officers and courts have tended to afford this relief to gifted students under analogous state laws. However, the limit and method for calculation do not necessarily follow. In *Brownsville Area School District v. Student X* (1999), Pennsylvania's Commonwealth Court ruled that in the context of gifted education compensatory education is limited to that available within the curriculum of the school district.

More recently, in *B.C. v. Penn Manor School District* (2006), the same court held that the applicable method of calculating the amount of compensatory education for gifted students is not the "cookie cutter" approach of counting the number of hours of denial of appropriate education for students with disabilities. Instead, the court adopted the qualitative approach of providing "an amount of compensatory education reasonably calculated to bring [the student] to the position that he would have occupied but for the school district's failure to provide [an appropriate program]."

Has gifted education been the subject of legal developments in other areas?

Yes, in at least four separate areas. First, the case law under IDEA where students with disabilities have also been gifted has approximated the frequency level of cases under state gifted education laws. The outcomes for these allegedly "dually exceptional" students have varied widely, with IDEA eligibility less likely and denial of appropriate education more likely due to the masking and complicating effects, respectively, of giftedness (Zirkel, 2005b).

For recent examples, in terms of eligibility, a Missouri appeals panel affirmed a hearing officer's decision that a student who had earned A's, B's, and C's in his gifted program did not need special education under IDEA despite a private psychiatrist's diagnoses of pervasive developmental disorder, Asperger Syndrome, generalized anxiety disorder, obsessive compulsive disorder, oppositional defiant disorder, and attention-deficit hyperactivity disorder (School District of Springfield R-12, 2007). Yet, reflecting the continuing variance in such decisions, a hearing officer in another jurisdiction ruled that a district was liable for tuition reimbursement and private placement because its evaluation of a gifted child as ineligible under IDEA failed to sufficiently consider the effects of his specific learning disability and attention-deficit hyperactivity disorder (District of Columbia Public Schools, 2007).

For a recent example in terms of the IDEA requirement of free appropriate public education for eligible students, the 7th Circuit Court of Appeals ruled, in a 2-to-1 decision, that the IEP for a child with multiple psychiatric diagnoses and an IQ of 140 met the reasonableness standard for substantive appropriateness and that the district's procedural violations were not prejudicial (Hjortness v. Neenah Joint School District, 2007).

A second area of legal activity concerns the intersection of gifted education with the overlapping coverage of Section 504. Recent examples are an Office for Civil Rights finding that a district did not violate Section 504 in its determination that a gifted student with a dysfunctional autonomic nervous system was not eligible as a student with a disability (Albuquerque Public School District, 2007) and an Office for Civil Rights memorandum (2007) to school districts warning that denying, on the basis of disability, a qualified student the opportunity to participate in accelerated programs violates both Section 504 and the Americans with Disabilities Education Act.

The third area is the continuing line of desegregation decisions in which racial underrepresentation in gifted programs has been a sub-issue. For example, in *Lee v. Lee County Board of Education* (2007), the court concluded that the Alabama state education department had achieved unitary status in the Macon County school system, noting that "African American representation in gifted programs has more than doubled" since implementation of an agreement with the Office for Civil Rights in 1999.

In the final, catchall category, gifted students have been the plaintiffs in miscellaneous decisions that are either

specific to, or only incidental to, gifted education. The most recent example specific to gifted education is a parent's unsuccessful claim that her gifted child, who passed the California high school exit exam at age 9 and started attending UCLA at age 13, was entitled to college tuition at public expense, based on state or federal law (Levi v. O'Connell, 2006).

In the most recent example where gifted education was only incidental, the parents of gifted children were unsuccessful in claiming that First Amendment freedom of speech protected their children's right to display the word "gifties" on their T-shirts (Brandt v. Board of Education, 2007).

Conclusion

Litigation and other legal developments concerning gifted students have been various and continuing, although relatively infrequent in comparison to—and sometimes intersecting with—case law under IDEA. In particular, litigation specific to identification and individualized programs for gifted students has not been particularly frequent or forceful largely because there is no federal mandate comparable to IDEA, and the relatively few state laws comparable to IDEA lack attorneys' fees and a customized maximization standard for free and appropriate public education. The other legal developments serve as a reminder that gifted students present complicated situations for educational and legal decision-making in applying sources of law not specific to gifted education itself. On balance, reflecting the lack of societal commitment to gifted students, the legal activity to date has been only to a limited extent favorable to them. P

Perry A. Zirkel is University Professor of Education and Law at Lehigh University.

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