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Asperger's Syndrome and Eligibility under the IDEA: Eliminating the Emerging "Failure First" Requirement to Prevent a Good IDEA from Going Bad

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ASPERGER'S SYNDROME AND ELIGIBILITY UNDER THE IDEA:
ELIMINATING THE EMERGING "FAILURE FIRST"
REQUIREMENT TO PREVENT A GOOD IDEA FROM
GOING BAD*

Lisa Lukasik**

ABSTRACT

Establishing a child's eligibility for services and protections under the Individuals with Disabilities Education Act (IDEA) requires "a difficult and sensitive analysis." This is particularly true when a child's family and her school agree that she has a disability that could qualify her for special educational benefits under the Act, but disagree about whether that disability in fact renders her eligible for those benefits. Such disagreements highlight a gap in the federal law that several circuit courts of appeal recently filled with a requirement that children with disabilities who also receive passing grades in school, like many children with Asperger's Syndrome, "fail first" academically before they may qualify as "a child with a disability" eligible for services and protections under the Act.

This Article is among the first to consider the Asperger's Syndrome example in the context of these decisions. It argues that recent restrictive constructions of regulatory definitions of IDEA-eligible disabling conditions frustrate the purpose of the IDEA, create an unnecessary constitutional vulnerability in the Act, and fly in the face of public policy supporting preparation of "all children with disabilities" not only to get good grades in school, but also for "employment[] and independent living" as productive citizens in their communities. It also proposes a more inclusive understanding of the phrase "child with a disability" under the IDEA to better serve the statute's expressed educational and societal goals.

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I. INTRODUCTION

Establishing a child's eligibility for services and protections under the Individuals with Disabilities Education Act requires "a 'difficult and sensitive' analysis."¹ This is particularly true when a child's family and his school agree that he has a disability that *could* qualify him for special education under the Act, but disagree about whether that disability *in fact* renders him eligible for it.²

¹ Mr. *I ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1st Cir. 2007) (quoting *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 162 (1st Cir. 2004)).

² Parents and school systems may disagree about whether a child with a recognized disability qualifies for special education under the IDEA for either of two reasons: (1) because they disagree about whether that disability adversely affects educational performance under the regulatory definitions of all but one of the qualifying disabilities or (2) because they disagree about whether the child with a recognized disability needs special education services under the statute. This Article addresses the first of these two reasons. *See, e.g., C.B. v. Dep't of Educ.*, 322 F. App'x 20, 21 (2d Cir. 2009) (recognizing that "[n]either party contests that [the child's] ADHD and bipolar disorder could qualify as disabling conditions" under the IDEA but also that the parties disagree about whether these disorders qualify as "disabling conditions" in *this* child who

Consider “A.J.’s” case.³ When A.J. entered preschool, his teachers recognized “significant delays in A.J.’s fine motor and social emotional functioning.”⁴ They informed A.J.’s parents of their son’s apparent developmental deficits and sought consent to conduct a special education evaluation.⁵ A.J.’s parents gave their consent.

After A.J.’s school-based evaluation was complete, the district’s Committee of Preschool Special Education informed A.J.’s parents that their son should be classified “as a preschool student with a disability.”⁶

received passing grades and tested “above grade-level” in school); *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007) (recognizing that “there is no dispute that [the child’s] ADHD is considered an ‘other health impairment,’ a recognized qualifying disability,” but also recognizing that the school district contends that the child does not qualify as disabled for purposes of special education services “because his educational performance is adequate without them”); *Mr. I*, 480 F.3d at 4 (recognizing that all “parties agree that [the child] suffers from Asperger’s, manifested in her poor pragmatic language skills and social understanding difficulties, as well as from a depressive disorder brought on by the stress of managing these problems,” but that “[t]he parties disagree, however, on whether these conditions have adversely affected [the child’s] educational performance in light of her strong grades”); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (recognizing that “[t]he School District does not contest that one or more of [the child’s] disorders [which included Asperger’s Syndrome] could qualify as a disabling condition under IDEA” and also that the district disagreed that the disorders *in fact* qualified the child because the child excelled academically, refuting, in the district’s view, “proof that [his] condition has adversely affected his . . . academic performance”); *A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist.*, 679 F. Supp. 2d 299, 302, 307 (E.D.N.Y. 2010) (recognizing that “[w]hether or not [the child] has Asperger’s, which is on the Autism spectrum, is not seriously in dispute” because there is “no evidence suggesting that [the child] does not have Asperger’s” but also concluding that the parties disagree about whether the child with Asperger’s Syndrome has a “disabling condition” for purposes of eligibility under the IDEA because, despite behavioral and emotional disruptions at school, he was “fine” academically).

³ The facts of A.J.’s case as depicted in this introduction are taken largely from those in *A.J. v. Board of Education, East Islip Union Free School District*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010) (considering the IDEA eligibility of a child with Asperger’s Syndrome).

⁴ *A.J.*, 679 F. Supp. 2d at 302.

⁵ *See id.* at 302; *see also* 34 C.F.R. § 300.300(a)(1) (2011) (establishing the regulatory obligation to “obtain informed consent . . . from the parent of the child before conducting the evaluation” to determine the child’s eligibility for special education services under the IDEA).

⁶ *Id.* Children with autism spectrum disorders, including Asperger’s Syndrome which is the focus of this Article, may require diagnosis by developmental pediatricians or psychiatrists and services of special education teachers/aides, speech therapists, behavioral therapists, occupational therapists, physical therapists, counselors, and psychologists. *See* U.S. GOV’T ACCOUNTABILITY

Although concerned that this disability designation could “stick” with their son and stigmatize him to a lifetime of limitations,⁷ A.J.’s parents accepted the school district’s “preschool student with a disability” label to secure critical early-intervention, in-school assistance recommended by those who evaluated A.J.⁸ With these accommodations in place, A.J. functioned appropriately in the mainstreamed preschool environment by the time he approached kindergarten age.⁹

As soon as he accomplished this milestone, however, the accommodations upon which he relied to reach it were taken away. The committee that originally designated A.J. as a “preschool child with a disability” now determined that A.J. was “not [] eligible to receive preschool special education services for the [coming] school year” in part “due to teacher reports of steady progress.”¹⁰

Without accommodations for his disabilities, A.J. “beg[an] to ‘fall apart’ as a regular education student.”¹¹ At the first parent-teacher conference following the removal of special educational services, A.J.’s “teachers reported[] . . . that A.J. was ‘fine’ academically, but that his behavior was ‘disruptive, compulsive, and all-consuming.’”

While the published decision in A.J.’s case did not offer examples of his “disruptive, compulsive, and all-consuming” behavior, A.J.’s teachers likely observed common symptoms of A.J.’s disability: an “immature . . . [in]ability to manage emotions”; unique “attention problems” requiring regular redirection; an “unusual learning style” demanding hands-on

OFFICE, GAO-05-220, SPECIAL EDUCATION: CHILDREN WITH AUTISM 22 (2005), <http://www.gao.gov/new.items/d05220.pdf>.

⁷ See ELLEN NOTBOHM, TEN THINGS EVERY CHILD WITH AUTISM WISHES YOU KNEW 1 (2005) (recognizing that those “who live with . . . autism also live with the frustrating lack of knowledge and unfair stereotypes assigned by the larger world. Whether we like it or not, ‘autistic’ does not yet inspire general reactions of a favorable nature, does not yet stir the casual bystander to look beyond the label to see a whole person, splendidly full of both gifts and gaffs. The broader reaction, ‘Uh-oh. Silent, withdrawn head-banger,’ is still too common; the first assumption is one of limitations”).

⁸ See Sheryl Dicker & Emily Bennett, *Engulfed by the Spectrum: The Impact of Autism Spectrum Disorders on Law and Policy*, 45 VAL. U. L. REV. 415, 438 (2011) (stating that “[e]arly identification of ASDs [autism spectrum disorders] is critical to the most effective management of ASDs and optimal outcomes for children” and recognizing that “[t]he American Academy of Pediatrics (“AAP”) recently issued a report recommending that all pediatricians screen every child in their care for signs of ASD at 9, 18, and either 24 or 36 months”).

⁹ *A.J.*, 679 F. Supp. 2d at 302 (noting that as accommodations for his still-unspecified disability, A.J. received occupational therapy in a sensory-integrated gym at school and special educational services in his preschool classroom).

¹⁰ *Id.*

¹¹ *Id.*

attention; “problems with motor coordination” resulting in indecipherable handwriting; an inability to “notice or understand the non-verbal signals” that convey messages in the classroom; and persistent “interrupting and not responding” in a manner inappropriate in the social context in a classroom.¹² A.J. also may have exhibited meltdowns during unexpected in-school transitions or in busy sensory-simulating environments¹³ and he may have engaged in unexplained repetitive, whole-body movements that were disruptive to others in the classroom.¹⁴

Given “concerns regarding his socialization behaviors,” A.J.’s parents requested that A.J. be reconsidered for special educational services.¹⁵ The classroom teacher and the school psychologist agreed to refer A.J. for reevaluation.¹⁶ The school district’s special education teacher observed A.J. in class.¹⁷ She concluded that A.J. “exhibited inappropriate behaviors [in a regular education classroom] and required frequent redirection.”¹⁸ She also emphasized that A.J.’s “interactions with his peers were often inappropriate.”¹⁹ On the other hand, A.J. demonstrated “above[-]average skills” in language development according to the school’s speech therapist and “average verbal and nonverbal abilities” according to the school psychologist.²⁰

Outside school, A.J.’s parents sought input from three specialized medical providers.²¹ Each of these doctors independently diagnosed A.J. with Asperger’s Syndrome on the autism spectrum.²² A.J.’s occupational therapist indicated in support of the Asperger’s Syndrome diagnosis that

¹² See TONY ATTWOOD, *THE COMPLETE GUIDE TO ASPERGER’S SYNDROME* 15 (2007) (describing ways in which “experienced teachers” might recognize Asperger’s Syndrome in their students in the “early school years”).

¹³ See NOTBOHM, *supra* note 7, at 8 (recognizing that in autistic children, “[s]eemingly inexplicable behavior such as aggression, excessive silliness, clumsiness, over- or under-reaction to injury . . . tantrums and meltdowns” may all be explained through “sensory overload”); ATTWOOD, *supra* note 12, at 271 (stating that “one of the attributes of Asperger’s Syndrome . . . is hyper- and hyposensitivity to specific sensory experiences”).

¹⁴ See AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS FOURTH EDITION* 74–77 (4th ed. 1994) [hereinafter *DSM-IV*].

¹⁵ *A.J.*, 679 F. Supp. 2d at 302.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 302–03.

²¹ *Id.* at 302.

²² *Id.* at 302, 306 (noting that in addition to Asperger’s Syndrome, A.J.’s doctors also diagnosed him with attention deficit hyperactivity disorder, and stating that the school district agreed with the Asperger’s Syndrome diagnosis).

“A.J. had ‘serious social issues that need consistent intervention.’”²³ Additionally, A.J.’s behavioral doctor affirmed that A.J. “[would] require services when he enter[ed] school . . . most significantly services that [would] support development of pragmatic social skills.”²⁴

After all the evaluations and observations were completed, the school district agreed with A.J.’s parents and the medical practitioners that had evaluated A.J.: A.J. was a child with Asperger’s Syndrome on the autism spectrum.²⁵ Additionally, the school district agreed with A.J.’s parents that A.J.’s disability manifested itself at school in bothersome ways. The school district agreed that A.J. demonstrated inappropriate social interaction and exhibited inappropriate school behavior that drew attention and rebuke in class.²⁶ The school district disagreed, however, that A.J.’s disability rendered him a “child with a disability” for purposes of the Individuals with Disabilities Education Act (IDEA).²⁷ The school district concluded that although A.J.’s school behavior and social interactions were inappropriate, he was “fine” academically, and thus did not qualify for special education.²⁸

Situations in which parents disagree with their child’s public educators about eligibility for special education under circumstances like A.J.’s present particularly challenging cases.²⁹ In many such cases, this disagreement highlights a gap in the federal law that leaves children with disabilities who receive passing grades in school, like many children with Asperger’s Syndrome,³⁰ dependent upon jurisdiction-specific

²³ *Id.* at 302.

²⁴ *Id.*

²⁵ *Id.* at 306.

²⁶ *Id.* at 302.

²⁷ *Id.*

²⁸ *Id.* Ultimately, the court agreed with the school district that because A.J. was progressing academically, he did not qualify for and was not eligible for special education or related services. *Id.*

²⁹ See, e.g., *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 636 (7th Cir. 2010) (stating directly that “[t]his is a complicated case” when all parties agreed that the child at issue had a disability, Ehlers-Danlos Syndrome, but disagreed about whether that disability required special educational services under the IDEA); *Mr. I ex rel. L.I. v. Me. Sch. Admin.* Dist. No. 55, 480 F.3d 1, 4 (1st Cir. 2007) (stating that a “difficult and sensitive analysis” is required when all parties agree that a child has Asperger’s Syndrome but disagree about whether the child is eligible for special education to support social and behavioral challenges (quoting *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 162 (1st Cir. 2004))).

³⁰ See *ATTWOOD*, *supra* note 12, at 232 (noting that children with Asperger’s Syndrome “may have an IQ that suggests intellectual potential to achieve good grades in school work”); *JAMES T. WEBB ET AL., MISDIAGNOSIS AND DUAL DIAGNOSES OF GIFTED CHILDREN AND ADULTS* 94 (2005) (stating that in contrast with other autism spectrum disorders in which children “show major

interpretations of the IDEA to determine whether they are eligible in their state for the services and protections offered by the Act.³¹

Through its consideration of the Asperger's Syndrome example, this Article demonstrates that narrow constructions of the IDEA's definitions of disabling conditions to exclude children like A.J., who experience significant challenges at school without receiving failing grades in school, frustrate the purpose of the IDEA, create an unnecessary constitutional vulnerability in the Act, and fly in the face of public policy in support of ensuring that "all children with disabilities" are prepared not only to get good grades, but also for "employment[] and independent living" as productive citizens in their communities.³²

This Article presents its principal thesis in three parts. Part I offers an overview of the relevant portions of the IDEA and examines the development of divergent interpretations of the phrase "adversely affects . . . educational performance" in the regulations defining the statutorily-enumerated disabling conditions. It also demonstrates the gap in scholarship on Asperger's Syndrome and eligibility and offers a brief overview of the disabling characteristics of autism spectrum disorders with a focus on Asperger's Syndrome.³³ Part II demonstrates, through the Asperger's Syndrome example, that a narrow construction of "adversely affects . . . educational performance" is inconsistent with the IDEA's expressed objectives and educational mandates.³⁴ Part III examines the constitutional vulnerability created by courts' reliance upon state law to limit access to the IDEA's services and protections.³⁵

handicaps in intellect and in their ability to think and learn, people with Asperger's Disorder typically do not have such problems" and that "they may score quite highly on intelligence or achievement tests"); Christy Marlette, *The Effects of the IDEA Reauthorization of 2004 and the No Child Left Behind Act on Families with Autistic Children: Allocation of Burden of Proof, Recovery of Witness Fees, and Attainment of Proven Educational Methods for Autism*, 18 KAN. J.L. & PUB. POL'Y 53, 58 (2008) (stating that children with Asperger's Syndrome "may receive good grades" but still have considerable difficulty with other aspects of education).

³¹ Compare *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont's regulatory law to hold that a child with emotional and behavioral disabilities was *not* eligible for special education services under the IDEA because the child received passing grades) with *Mr. I*, 480 F.3d at 11–13 (applying Maine's regulatory law to hold that a child with emotional and behavioral disabilities associated with Asperger's Syndrome *was* eligible for special education services under the IDEA even though the child had "excelled academically").

³² 20 U.S.C. § 1400(d)(1)(A) (2006).

³³ See *infra* notes 132-69 and accompanying text.

³⁴ See *infra* notes 185-284 and accompanying text.

³⁵ See *infra* notes 285-330 and accompanying text.

Finally, this Article concludes that the Individuals with Disabilities Education Act, the Constitution, and public policy all embrace an open-door approach to disability designation and eligibility under the IDEA. Children with Asperger's Syndrome, and others with disabilities *and* passing grades, ought to receive a more hospitable welcome within the Act when they seek its shelter. To ensure this future, either Congress or the courts must clarify that neither the IDEA nor the Department of Education regulations implementing the IDEA permit schools to require children with disabilities to "fail first." Instead, schools comply with the IDEA and fulfill its purpose on behalf of all children only when the IDEA's definition of "child with a disability" is given its plain – inclusive – meaning.

II. PUTTING THE PIECES OF THIS PUZZLE TOGETHER: REVIEWING THE IDEA, KEY COMPONENTS OF THE DEFINITIONS OF DISABLING CONDITIONS, AND ASPERGER'S SYNDROME

A. BACKGROUND ON THE IDEA AND ELIGIBILITY

For over three decades, it has been clear that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity. . . ."³⁶ Congress established this national priority in 1975 when it passed the Education for All Handicapped Children Act (now renamed the Individuals with Disabilities in Education Act or IDEA).³⁷ This landmark legislation became the first federal legislation guaranteeing the nation's public schools would be open to and accommodating of children with disabilities,³⁸ and it signaled the beginning of the end of the historic

³⁶ 20 U.S.C. § 1400(c)(1) (2006).

³⁷ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (codified as amended at 20 U.S.C. §§ 1400–1491 (2006 & Supp. 2011)).

³⁸ Prior to 1975 families of children with disabilities had little access to public education for their children. State laws "either permitted or explicitly required the exclusion of the 'weak minded' or physically disabled." MARK C. WEBER ET AL., SPECIAL EDUCATION LAW: CASES AND MATERIALS 1 (3d ed. 2010); *see also* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 355–56 (1990) (summarizing legislative, administrative, and judicial activity from the late 1800s through the 1960s that either required or permitted the exclusion of children with disabilities from public schools). Some states even punished parents criminally if they tried to insist upon public education for their child previously deemed excluded by the superintendent. *See, e.g.*, Act of May 18, 1965, 1965 N.C. Sess. Laws 641, 643–44.

segregation of these children from and within America's public schools.³⁹

Congress has re-visited and re-enforced the terms of this breakthrough legislation multiple times in the nearly four decades since the passage of the Education for All Handicapped Children Act.⁴⁰ Each time, it has affirmed the importance of the Act's fundamental goal of improving educational results for children with disabilities. Although Congress has expressed appropriate concern about improper over-diagnosis of children with disabilities,⁴¹ it has never resolved those concerns through eligibility restrictions excluding from the Act children with disabilities affecting school performance. Instead, Congress addressed concerns about over-diagnosis through amendments targeted at eliminating monetary incentives to classify children with a diagnosis,⁴² opening the door to eligibility for some children exhibiting

³⁹ Two early cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 282 (E.D. Pa. 1972) (resolving a claim based upon "exclusions of retarded children . . . based upon four State statutes . . . reliev[ing] the State Board of Education from any obligation to educate a child whom a public school psychologist certifies as uneducable and untrainable[, and] allow[ing] indefinite postponement of admission to public school of any child who has not attained a mental age of five years") and *Mills v. Board of Education*, 348 F. Supp. 866, 868 (D.D.C. 1972) (resolving a claim based upon students' challenge to their "exclu[sion] . . . from the District of Columbia Public Schools and/or den[ial] . . . [of] publically supported education"), effectively describe the state of educational access for children with disabilities prior to 1975, and they demonstrate how advocates for these children began to build on the momentum established by African American children in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954), in seeking equal access to schools.

⁴⁰ See, e.g., Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1162 (2007) ("The legislative history of the term 'child with a disability' largely reflects an expansion of coverage over the last thirty years . . .").

⁴¹ See, e.g., S. REP. NO. 94-168, at 26-27 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1450 (acknowledging at the time of the initial passage of the Education for All Handicapped Children Act that members of the Senate Labor and Public Welfare Committee were "deeply concerned . . . about the practices and procedures which result in classifying children as having handicapping conditions when, in fact, they do not have such conditions"); H.R. REP. NO. 108-77, at 84 (2003) (expressing at the time of the most recent reauthorization of the IDEA a continuing concern that the over-identification of children "takes valuable resources away from students who are truly disabled").

⁴² See H.R. REP. NO. 104-614, at 9 (1996); S. REP. NO. 105-17, at 8-9 (1997); Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 611(e), 111 Stat. 37, 49 (codified as amended at 20 U.S.C. § 1411(a)(2)(B)(iii)(I)-(II) (2006)).

developmental delays without any diagnosis at all,⁴³ and requiring reports specifically addressing issues of over-identification for study by the United States Secretary of Education.⁴⁴

At the same time, Congress has improved the Act's ability to accomplish its optimistic goal through amendments expanding the legislation's reach in 1986,⁴⁵ in 1990 (when the Education for All Handicapped Children Act was renamed the Individuals with Disabilities Education Act (IDEA) and when Congress added autism as a specific category of eligibility),⁴⁶ in 1991,⁴⁷ in 1997,⁴⁸ and in 2004.⁴⁹ Today, Congress continues to support the IDEA and its goal of ensuring equal, publically-supported educational opportunities for all – including children with disabilities – as it debates the IDEA Fairness Restoration Act of 2011.⁵⁰

⁴³ 20 U.S.C. § 1401(3)(B)(i) (2006) (including as a “child with a disability” within the protection of the Act children aged three through nine who are “experiencing developmental delays” even though those children are not diagnosed with a disability specified under 20 U.S.C. § 1401(3)(A)(i) (2006 & Supp. 2011)).

⁴⁴ 20 U.S.C. §§ 1412(a)(24) (2006), 1416(a)(3)(C) (2006 & Supp. 2011) (requiring states to have “policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities” and requiring the Secretary of Education to prioritize monitoring the states to ensure that “[d]isproportionate representation of racial and ethnic groups in special education” is not “the result of inappropriate identification”).

⁴⁵ Education of the Handicapped Act Amendments of 1986, Pub. L. No. 99-457, 100 Stat. 1145 (1986).

⁴⁶ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990).

⁴⁷ Individuals with Disabilities Education Act Amendment of 1991, Pub. L. No. 102-119, 105 Stat. 587 (1991).

⁴⁸ Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997) (codified as amended at 20 U.S.C. §§ 1400–1491 (2006 & Supp. 2011)).

⁴⁹ Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified at 20 U.S.C. §§ 1400–1491 (2006 & Supp. 2011)). Some refer to this legislation as IDEIA or the 2004 Reauthorization. For purposes of this Article, it will be referred to as the IDEA, the acronym established for this legislation in 1990 with the passage of the Individuals with Disabilities Education Act Amendments of 1990.

⁵⁰ IDEA Fairness Restoration Act, S. 613, 112th Congress (2011), *available at* <http://www.opencongress.org/bill/112-s613/show>; IDEA Fairness Restoration Act, H.R. 1208, 112th Cong. (2011), *available at* <http://www.opencongress.org/bill/112-h1208/show>. This legislation was initially introduced in 2007. *See* IDEA Fairness Restoration Act, H.R. 4188, 110th Cong. (2007). It was later reintroduced in 2009 and 2011. *See* IDEA Fairness Restoration Act, H.R. 2740, 111th Congress (2009); IDEA Fairness Restoration Act S. 613, 112th Congress

To implement the legislative imperative to improve educational results for children with disabilities, the IDEA affords such children “a free appropriate public education . . . designed to meet their unique needs and prepare them” for their futures, including futures in “further education, employment, and independent living.”⁵¹ From the perspective of parents of children with disabilities, this legislative mandate offers promise. However, after nearly four decades of continued progress toward improving educational opportunities for children with disabilities, some now say this legislative entitlement in favor of children with disabilities offers *too much* promise.

Recently, popular commentators have begun to wring their hands over a concern that the IDEA has become too much, both in terms of numbers of qualifying individuals and in terms of cost.⁵² These critics of the IDEA’s growth suggest that Congress has opened “the door to special education services . . . too widely and too indiscriminately, placing at risk the ability of school districts to respond to the needs of students in general education.”⁵³

(2011), IDEA Fairness Restoration Act H.R. 1208, 112th Congress (2011). In 2011, it was referred to the Senate Committee on Health, Education, Labor and Pensions and the House Committee on Education and the Workforce on March 17, 2011, and the House Subcommittee on Early Childhood, Elementary, and Secondary Education. Once passed, this legislation would update the IDEA to authorize the recovery of expert’s fees along with attorney’s fees for prevailing parties in litigation over the provision of special educational services under the IDEA. *See* IDEA Fairness Restoration Act, S. 613, 112th Cong. (2011); IDEA Fairness Restoration Act, H.R. 1208, 112th Cong. (2011); *cf.* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006) (declining to extend the IDEA’s existing terms to authorize an award of expert witness fees in addition to attorneys’ fees for prevailing parties in special education litigation).

⁵¹ 20 U.S.C. § 1400(d)(1)(A) (2006).

⁵² *See, e.g.,* Robert Worth, *The Scandal of Special-Ed*, WASH. MONTHLY, June 1999, available at <http://www.washingtonmonthly.com/features/1999/9906.worth.scandal.html> (stating that “the real scandal is not simply that we spend too much to educate handicapped kids” but also that “the special education law has inflated the meaning of ‘disability,’ encouraging wealthier families to capitalize on their weaknesses at the expense of their peers” such that in the author’s estimation “[m]ore than 80 percent of all school children in the United States could qualify as learning-disabled under one definition or another”). While there are a number of reasons that schools, families of children with disabilities, and taxpayers criticize the IDEA and its implementation, this Article focuses on those criticisms associated with the increasing number of children included under the IDEA umbrella.

⁵³ *See* Hensel, *supra* note 40, at 1149 (citing as examples of commentators expressing this concern, Wade F. Horn & Douglas Tynan, *Time to Make Education “Special” Again*, in *RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY* 23, 26 (Chester E. Finn, Jr. et al., eds. 2001) and Gregory F. Corbett, *Special Education, Equal Protection and Education Finance: Does the*

There is no dispute that the number of children diagnosed with disabilities has increased significantly following passage of the Education for All Handicapped Children Act in 1975. During the 1976-1977 school year, on the heels of the Act's passage, public schools provided 3,694,000 children,⁵⁴ or 8.3% of the total enrollment in the nation's public elementary and secondary schools,⁵⁵ with special educational services. Thirty years later, during the 2007-2008 school year, public schools served 6,606,000 children, or 13.4% of the total enrollment in the nation's public elementary and secondary schools, under the IDEA.⁵⁶

Similarly, there is no dispute that federal spending on special education has increased, and the services provided under the IDEA have grown to become "the second largest federal K-12 program."⁵⁷ In fiscal year 2006, the federal budget provided a total of \$37.6 billion for primary and secondary education.⁵⁸ Of this amount, \$11.1 billion, or nearly thirty percent of the total national expenditure for primary and secondary education, was provided directly to state and local governments to implement the IDEA.⁵⁹

Individuals with Disabilities Act Violate a General Education Student's Right to Education?, 40 B.C. L. REV. 633, 634 (1999)).

⁵⁴ THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2010-013, DIGEST OF EDUCATION STATISTICS, 2009, at 84 tbl.50 (2010), http://nces.ed.gov/pubs2010/2010013_2a.pdf.

⁵⁵ *Id.*

⁵⁶ *Id.* While this represents an increase of just over five percent of the total student population over thirty years, it is worth noting that "[t]he overall percentage of students being served in programs for those with disabilities remained relatively stable from 2002-03 (13.5 percent) and 2007-08 (13.4 percent)." *Id.* at 55.

⁵⁷ U.S. Department of Education, *10 Facts about K-12 Education Funding* (2005), <http://www2.ed.gov/about/overview/fed/10facts/10facts.pdf>.

⁵⁸ *Id.* at 4. Total taxpayer spending on primary and secondary education in the 2004-05 school year was \$536 billion, even though the federal government provided only 8.3 percent of that sum. *Id.* at 2. This is because public education is primarily the responsibility of state and local government, which provide the overwhelming majority – 45.6 percent and 37.1 percent respectively in the 2004-05 school year – of funding for public schools. *Id.* Private sources also provide some funding for primary and secondary education, but this contribution is primarily for private schools. *Id.*

⁵⁹ *Id.* at 4. Notably, however, the IDEA remains under-funded today. See Glen Chang, Note, *Caring for New Jersey's Children with Autism: A Multifaceted Struggle for Parity*, 60 RUTGERS L. REV. 997, 999 (2008) (recognizing that although the IDEA authorizes the federal appropriations for up to 40% of the Act's costs, federal funds have thus far covered no more than 17-18% at the most, leaving state and local governments to foot the bill for the legislation); see also Antonis Katsiyannis et al., *Reflections on the 25th Anniversary of the Individuals with Disabilities Education Act*, 22 REMEDIAL AND SPECIAL EDUC.

With this statistical reality, concerns that the IDEA may now reach too far – to too many children and to too many public dollars – cannot be ignored. The stated reasons for the concern about the IDEA’s growth vary widely.⁶⁰ Significant for purposes of this Article are accusations that “highly educated and affluent parents are fueling the rise in numbers by aggressively seeking eligibility for modestly impaired children as a way to secure from districts expensive services that are not otherwise available to children in the general school population.”⁶¹ Or, put another way, the IDEA (despite Congress’s best efforts) now creates an incentive to stretch diagnoses to include individuals with mild or disputed symptoms such that children qualify for an “array of often expensive services and accommodations” offered at the expense of children without disabilities in the general education population.⁶²

324, 329 (2001) (recognizing that although Congress established a goal of paying 40% of the costs incurred in educating students with disabilities, “[t]he actual levels of funding to the states . . . have usually amounted to approximately 8% to 10% of states’ total expenditures on special education”).

⁶⁰ Some are concerned about financial inequity. Some are concerned about the adverse impact of improper diagnoses. Another significant criticism beyond the scope of this Article is that the IDEA’s rapid expansion is responsible for the disproportionate numbers of minority children identified as eligible for special educational services under the IDEA’s “mentally retarded” and “emotionally disturbed” eligibility categories. Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 84–85 (2009). Disproportionate identification of minority children as children with disabilities means that some of these children were improperly identified. Their “misplacement into special education [may] stigmatize[] students, den[y] them a high quality education, limit[] their future opportunities, and take[] valuable resources away from truly disabled students.” Robert R. Garda, *Who Is Eligible under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 293 (2006). Because Congress recognized the significance of this concern about mis-diagnosis of minority children as eligible for special education services, it made resolving this mis-diagnosis concern one of the focuses of the 2004 amendments to the IDEA and its resolution remains the focus of educators at local and national levels today. The IDEA now requires public schools to implement “policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities.” 20 U.S.C. § 1412(a)(24)(C) (2006). Additionally, the IDEA requires the United States Secretary of Education to make it “a priority” to monitor the identification of racial minorities as children with disabilities to avoid inappropriate identifications. *Id.* § 1416(a)(3) (2006 & Supp. 2011). A comprehensive examination of the effectiveness of these measures is beyond the scope of this Article.

⁶¹ Hensel, *supra* note 40, at 1150. *But see* CHILDREN WITH AUTISM: A PARENT’S GUIDE 47 (Michael D. Powers ed., 2d ed. 2000) (making clear that no parent would seek a diagnosis for their child absent necessity because “[v]ery few things indeed are worse than learning that your child has autism”).

⁶² Horn & Tynan, *supra* note 53, at 30.

In reality, government statistics belie such concerns in three ways. First, data suggests that the number of students with disabilities in public schools has now leveled off. Despite initial growth in provision of special educational services after they were first required in 1975,⁶³ growth has not been unlimited. According to the United States Department of Education, “[t]he overall percentage of students being served in programs for those with disabilities remained relatively stable between 2002–2003 (13.5 percent) and 2007–2008 (13.4 percent).”⁶⁴ In fact, overall provision of special education service was down one tenth of a percent in 2007–2008 compared to the prior year.⁶⁵ This suggests, generally speaking, that over the last five years the feared increase in questionably-diagnosed children receiving special educational programming has not materialized.

Second, although there were some “patterns of change in the percentages served with some specific conditions between 2002–[20]03 and 2007–[20]08,”⁶⁶ including in the autism category, even these numbers have begun to level off over the most recent three years of data.⁶⁷ From 2004–2005 to 2007–2008, “the percentage [of children eligible for services under the IDEA after a diagnosis] with autism rose from 0.3 to 0.6 percent.”⁶⁸ This fact is not surprising, of course, given

⁶³ SNYDER & DILLOW, *supra* note 54, at 84 tbl.50.

⁶⁴ *Id.*

⁶⁵ *Id.* at 84.

⁶⁶ *Id.* at 55.

⁶⁷ It merits mentioning here that proposed changes to the diagnostic criteria for autism spectrum disorders in the Diagnostic and Statistical Manual of Mental Disorders has raised questions about whether the numbers of individuals diagnosed in this eligibility category will decrease significantly going forward. See, e.g., Benedict Cary, *New Definition of Autism will Exclude Many*, N.Y. TIMES (Jan. 19, 2012), available at http://www.nytimes.com/2012/01/20/health/research/new-autism-definition-would-exclude-many-study-suggests.html?_r=2&hp=&pagewanted=print. On the other hand, others suggest that numbers of eligible children with autism should continue to grow because evidence suggests that “racial and ethnic minorities, women and girls, adults and individuals from rural and low-income communities” remain under-diagnosed in this category “even where they clearly fit criteria under the DSM-IV.” Autism Society & ASAN, *The Joint Statement of the Autism Society and Autistic Self Advocacy Network on the DSM-5 and Autism*, AUTISM SOCIETY (Jan. 31, 2012), <http://www.autism-society.org/news/in-the-news/the-joint-statement-of-the.html>; see also *infra* 134–40 and accompanying text (discussing the proposed changes to the diagnostic criteria for autism spectrum disorders and their impact on the analysis in this Article).

⁶⁸ *Id.* Some children with Asperger’s Syndrome are designated as “other health impaired,” a category of eligibility that is also on the rise:

The percentage of children identified as having other health impairments (limited strength, vitality, or alertness due to

that autism and Asperger's Syndrome are relative newcomers to the IDEA eligibility discussion.⁶⁹ The Act became law in 1975, but autism was not added as a qualifying disability under the IDEA until 1990,⁷⁰ and Asperger's Syndrome was introduced to the Diagnostic and Statistical Manual of Mental Disorders as a discrete diagnosis within the autism spectrum for the first time four years later in 1994.⁷¹ As diagnosticians and educators have been introduced to autism and Asperger's Syndrome in recent years, diagnosis of each has increased as familiarity with these disabilities has increased. The same pattern of growth and leveling off has proven true with other diagnoses and eligibility categories introduced into the IDEA through amendments after passage of the original legislation.⁷² In any event, government data also suggests that the percentage of children served under the autism eligibility category may have leveled off at approximately one-half-of-one percent of the total public school population in the most recent three years of data collection.⁷³ Thus, although the numbers of children diagnosed under the autism eligibility category grew during the first decade after the category

chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes) rose from 0.8 to 1.3 percent of total public school enrollment.

Id.

⁶⁹ It has been common for IDEA's eligibility categories to experience growth following the addition of new diagnoses or categories of children within them. For example, in the two IDEA-eligibility categories experiencing growth, "other health impaired" and "developmental delays," there have been new diagnoses or categories of children recently recognized within each. Under the "other health impairment" category in which data shows the most growth in recent years, attention deficit hyperactivity disorder was newly-included in the regulations interpreting the IDEA in 2006 after the completion of a study of this disability begun in 1990. Assistance to States for the Education of Children with Disabilities, 71 Fed. Reg. 46, 450 (Aug. 14, 2006) (now codified at 34 C.F.R. § 300.8(c)(9)) (2011). The other growing category, developmental delays, was expanded in 1986 (for children from infancy to age two) and again in 1997 (for children between the ages of three and nine). 20 U.S.C. § 1401(3)(B) (2006).

⁷⁰ 20 U.S.C. § 1401(3) (2006) (reflecting the addition of autism).

⁷¹ ATTWOOD, *supra* note 12, at 36 (documenting that the American Psychiatric Association included Asperger's Syndrome for the first time in the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS in 1994 when it published its fourth edition and also documenting that the World Health Organization (WHO) included Asperger's Syndrome for the first time in the INTERNATIONAL CLASSIFICATION OF DISEASES in 1993 when it published its tenth edition).

⁷² See SNYDER & DILLOW, *supra* note 54, at 84 tbl.50.

⁷³ *Id.*

was added to the IDEA, this growth appears to have peaked at approximately .6% of the total public school population.⁷⁴

Third, despite the general growth in the nation's special education programming (which now appears to have leveled off or to be leveling off), the corollary concern that education for children without disabilities has suffered as a result of this growth remains unjustified. General education students in the nation's public schools have shown improved ability in reading and mathematics in national assessments from the mid-1970s when the Education for All Handicapped Children Act first became effective through today.⁷⁵ According to the most recent standardized assessments of the nation's public school students, general education and special education have improved and grown together.

In reading [according to the United States Department of Education's 2008 general education assessments], average scores increased at all three ages [tested]. . . . Average scores were 12 points higher than in 1971 for 9-year-olds and 4 points higher for 13-year-olds. The average reading score for 17-year-olds was not significantly different from that in 1971.

In mathematics, average scores for 9- and 13-year-olds increased since 2004, while the average score for 17-year-olds did not change significantly. . . . Average scores were 24 points higher than in 1973 for 9-year-olds and 15 points higher for 13-year-olds. The average mathematics score for 17-year-olds was not significantly different from that in 1973.⁷⁶

National educational assessments thus do not support allegations that special education has grown at the expense of general education. In no measure and in no age group has learning deteriorated for general education students since the 1970s as children with disabilities have begun to enjoy access to an appropriate education for the first time.

⁷⁴ *Id.* This disability designation stability under the IDEA exists even though the identified prevalence of autism spectrum disorders in general increased from approximately one in 150 children in 2002, to 1 in 125 children in 2004, to 1 in 110 children in 2006, and to 1 in 88 children in 2008. John Baio, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2008*, CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT (March 30, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6103a1.htm?s_cid=ss6103a1_w.

⁷⁵ NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NAEP 2008 TRENDS IN ACADEMIC PROGRESS: THE NATION'S REPORT CARD 2–3 (2008), http://nces.ed.gov/nationsreportcard/pdf/main2008/2009479_1.pdf.

⁷⁶ *Id.* at 2.

Instead, general education students are continuing to learn at the same levels and in most cases at even higher levels than before.⁷⁷

Not only do government statistics demonstrate the fallacy of assumptions that “too many” children may now receive diagnoses for mild autistic symptoms creating improper growth in this disability diagnosis, but social science data (and its absence in critical places) and common sense also confirm the fallacy.⁷⁸ Initially, of course, it bears recognizing that there is no research or data to support this fear of improper over-diagnosis of autism.⁷⁹ Even scholars seeking anecdotal evidence to justify the existence of this popular concern have come up with nothing.⁸⁰

Additionally, there is ample evidence demonstrating, contrary to the fears of special education critics, that parents affirmatively resist diagnosis in their children and grieve when a child receives a disability diagnosis.⁸¹ In the context of Asperger’s Syndrome, the focus of this

⁷⁷ *See id.*

⁷⁸ *See, e.g.,* Weber, *supra* note 60, at 126–27 (stating in the context of dyslexia that “for those who understand [disability] and its tremendous costs to the individual, the very idea that someone would willingly seek such a diagnosis is absurd” and that “the stigma of the label makes it something no one would accept unless a severe underlying problem led the person to seek help”).

⁷⁹ Weber, *supra* note 60, at 126 (stating that “[i]t has also become clear that . . . the charge that rich parents buy [learning disability] diagnoses for their children in order to secure accommodations that confer a competitive advantage in school, is an urban legend”); Hensel, *supra* note 40, at 1191 (“There is little evidence, however, that the number of children identified as IDEA-eligible . . . reflects improper classification rather than a heightened awareness of rights and acceptance of disability in education.”). In fact, some contend that “[c]ontrary to assertions that ASD [autism spectrum disorder] is over diagnosed, evidence suggests that the opposite is the case – namely, that racial and ethnic minorities, women and girls, adults and individuals from rural and low-income communities face challenges in accessing diagnoses, even where they clearly fit criteria under the DSM-IV.” Autism Society & ASN, *The Joint Statement of the Autism Society and Autistic Self Advocacy Network on the DSM-5 and Autism*, AUTISM SOCIETY (Jan. 31, 2012), <http://www.autism-society.org/news/in-the-news/the-joint-statement-of-the.html?>

⁸⁰ *See* SALLY SHAYWITZ, *OVERCOMING DYSLEXIA* 164 (2003) (“I am puzzled by the often-repeated notion that some students *pretend* to be dyslexic. When asked about this, I always respond by asking in turn, ‘Do you know this for a fact? Are you personally aware of such a case?’ Invariably the person shakes her head and replies, ‘Oh no, it’s just something I’ve heard.’ Such notions are nonsense.”).

⁸¹ “Very few things indeed are worse than learning that your child has autism.” CHILDREN WITH AUTISM: A PARENT’S GUIDE, *supra* note 61, at 47; *see also* Hensel, *supra* note 40, at 1193–97 (recognizing the powerful stigma associated with diagnosis of a disability as an effective deterrent against seeking a diagnosis where it is not warranted); Weber, *supra* note 60, at 126–27 (stating in the context of dyslexia that “for those who understand [disability] and its

Article, diagnosis of an autism spectrum disorder in a child often is “a devastating shock to parents” that causes “pain so searing that even years later, the memory automatically causes tears.”⁸²

Finally, even if parents would and could obtain unjustified diagnoses of Asperger's Syndrome or autism in non-disabled children, the total eligibility analysis remains sufficiently stringent that a parent's privately-obtained diagnosis would not qualify the child for special education under the IDEA on its own.⁸³ Instead, a parent's privately-obtained diagnosis would merely set in motion a comprehensive eligibility determination by an Individualized Education Program Team, including both regular and special educators in most cases.⁸⁴ Only if the team were to agree that the child satisfied the many requirements of a qualifying disabling condition, including that it adversely affected educational performance, *and* that the child needed special education and related services because of that qualifying disability, would the child ultimately earn eligibility. Further, even if a handful of mildly symptomatic students satisfy this comprehensive eligibility analysis after a close case, it “is unlikely to loose the torrent of IDEA claims forecast” by critics.⁸⁵ Nonetheless, criticism that too many mildly-disabled children find protection in the Act continues, and scholars now recognize that “[a]t the heart of the [IDEA's] eligibility debate is the question of which children are ‘disabled enough’ to qualify for protection and services under the statute”⁸⁶

tremendous costs to the individual, the very idea that someone would willingly seek such a diagnosis is absurd” and that “the stigma of the label makes it something no one would accept unless a severe underlying problem led the person to seek help”).

⁸² CHILDREN WITH AUTISM: A PARENT'S GUIDE, *supra* note 61, at 47.

⁸³ See 20 U.S.C. § 1414 (2006 & Supp. 2011).

⁸⁴ *Id.*

⁸⁵ Mr. I *ex rel.* L.I.v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 14 (1st Cir. 2007).

⁸⁶ Hensel, *supra* note 40, at 1151; *see also, e.g.*, Weber, *supra* note 60, at 84 (“Many difficult issues with [the IDEA's] interpretation have been resolved, and others have developed into clear splits of authority, but few areas are so thoroughly unsettled, with so few guideposts, as eligibility for special education services under the statute.”); Garda, *supra* note 60, at 292 (“Courts, hearing officers, and eligibility teams often misapply [the IDEA's] intricate eligibility requirements, leading to both over-identification and under-identification of IDEA eligible children.”); Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 451 (2004) (asserting that the “overriding question” of eligibility under the IDEA is “whether children passing from grade to grade may still be IDEA eligible” or whether those children are not sufficiently disabled).

B. BACKGROUND ON REGULATORY DEFINITIONS OF DISABLING
CONDITIONS AND “ADVERSE EFFECTS” ON “EDUCATIONAL
PERFORMANCE”

The question of which children are “disabled enough” to qualify for protection and services under the IDEA has presented itself to the courts with increasing frequency in recent years.⁸⁷ Although Congress consistently has declined to limit the reach of the Act, instead expanding the Act’s coverage to more children, some courts now do otherwise through restrictive interpretations of the Department of Education’s definitions of a “child with a disability.” In cases where school districts agree with parents that the child at issue has a disability that *could* qualify for eligibility for special education services, courts narrowly construe the IDEA’s eligibility requirements in one of two ways: (1) they narrowly construe the Department of Education regulations requiring qualifying disabilities to “adversely affect[] . . . educational performance”⁸⁸ to exclude those children with passing grades,⁸⁹ or (2) they narrowly construe the IDEA’s requirement that children with

⁸⁷ See, e.g., *Marshall Joint Sch. Dist. v. C.D.*, 616 F.3d 632 (7th Cir. 2010) (considering the question of whether a child with Ehlers-Danlos Syndrome, hypermobile type, along with attention deficit hyperactivity disorder, inattentive type, qualified for special educational services under the IDEA when he was performing at grade level in his academic classes); *C.B. v. Dep’t of Educ.*, 322 F. Appx. 20 (2d Cir. 2009) (considering the question of whether a child with bipolar disorder and attention deficit hyperactivity disorder but who tested above grade level on academic assessments qualified for special educational services under the IDEA); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010) (considering the question of whether a child on the autism spectrum with Asperger’s Syndrome and attention deficit hyperactivity disorder who experienced behavioral and social challenges at school but had average to above average grades was sufficiently disabled to qualify for services under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282 (S.D.N.Y. 2010) (considering the question of whether a child with Asperger’s Syndrome, attention deficit disorder, dysgraphia, and several other diagnosed disabilities was eligible for special education services under the IDEA when he had impaired social and emotional development, but otherwise excelled academically in school).

⁸⁸ 34 C.F.R. § 300.8(c) (2011) (including a requirement in the definitions of IDEA-eligible disabilities that those disabilities “adversely affect[] . . . educational performance” in each case except with specific learning disabilities as defined in subsection (c)(10)).

⁸⁹ See, e.g., *C.D.*, 616 F.3d 632 (applying a restrictive definition of the IDEA eligibility standard to deny the IDEA’s protections to a child with several disabling conditions); *C.B.*, 322 F. Appx. 20 (same); *A.J.*, 679 F. Supp. 2d 299 (same); *Maus*, 688 F. Supp. 2d 282 (S.D.N.Y. 2010) (same). *But cf. Mr. I.*, 480 F.3d at 1 (declining to adopt a restrictive construction of the IDEA’s eligibility terms).

qualifying disabilities “need special education and related services.”⁹⁰ This Article focuses on the first of these.⁹¹

As has been well-documented elsewhere, the IDEA provides that children with disabilities are eligible for special educational services and protection if they (1) meet the statute’s age requirements,⁹² (2) have one (or more) of the disabling conditions listed in the statute⁹³ as defined by the Department of Education,⁹⁴ and (3) by reason of that condition need “special education and related services.”⁹⁵ This Article focuses on courts’ constructions of the second element – having a disabling condition enumerated under the IDEA and defined by the Department of Education⁹⁶ – as applied to children who have Asperger’s Syndrome and receive passing grades in school.

⁹⁰ See, e.g., *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 382 (5th Cir. 2007) (concluding that a child with an ADHD was not eligible for services because he did not “need special education services because his educational performance [was] adequate without them” under the third prong of the eligibility analysis).

⁹¹ For a discussion of courts’ construction of the second, see Hensel, *supra* note 40, at 1174–78.

⁹² 20 U.S.C. § 1412(a)(1)(A) (2006) (“In general[,] [a] free appropriate education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”); see also 20 U.S.C. § 1412(a)(1)(B) (2006) (limiting the eligibility of children between the ages of 3 and 21 inclusive under particular circumstances such as when a child is incarcerated in an adult correctional facility and was not identified as a child with a disability prior to that incarceration); 34 C.F.R. § 300.102(a), (a)(3)(i) (2011) (limiting the eligibility of children with disabilities to those that have *not* already received a regular high school diploma).

⁹³ 20 U.S.C. § 1401(3)(A)(i) (2006 & Supp. 2011) (establishing that a child with a disability may be a child “with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . ., orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities”); see also 20 U.S.C. § 1401(3)(B)(i) (2006) (establishing that a child with a disability may also include children aged 3 through 9 who are “experiencing developmental delays . . . in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development”).

⁹⁴ 34 C.F.R. § 300.8(c)(1)–(13) (2011) (providing the regulatory definitions and additional requirements necessary to qualify as “having” one of the disabling conditions identified in 20 U.S.C. § 1401(3)(A)(i) (2006 & Supp. 2011)).

⁹⁵ 20 U.S.C. § 1401(3)(A)(ii), (3)(B)(ii) (2006).

⁹⁶ Not all scholars characterize the eligibility standards under the IDEA such that the second element of the eligibility analysis is the “having-a-disabling-condition” element. While most scholars recognize the three eligibility components as noted here (see, e.g., Weber, *supra* note 60, at 89 (“Children with disabilities are eligible for services under the Act if they [1] meet age standards,

Under the second element of this analysis, the Act defines “child with a disability” to include a child with any one or a combination of twelve specified disabling conditions⁹⁷ or, under some circumstances with children ages three through nine, certain types of developmental delays that do not qualify as one of the twelve statutorily-enumerated impairments.⁹⁸ The IDEA does not further define any of the twelve conditions. The regulations implementing the IDEA, however, define each of the enumerated disabling conditions, except “specific learning disability,” to require, *inter alia*, an “adverse[] affect[] . . . [on] educational performance.”⁹⁹

[2] have a condition listed in the statute, and [3] by reason of the condition, need ‘special education and related services.’”)), they may also focus on three slightly different elements. *Id.* at 103. When scholars refocus the eligibility analysis, they de-emphasize the age requirement (which is rarely at issue in litigation) and separate the components of the “having-a-disabling-condition” element into two parts. *See, e.g.*, Hensel, *supra* note 40, at 1163 (stating that “[t]aken together, a child must show three things to qualify under the IDEA: (1) an enumerated impairment which (2) adversely affects educational performance and creates (3) a need for special education and related services,” without emphasizing the age requirement); Garda, *supra* note 86, at 459 (stating that in order to qualify for special education services an eligibility team must find that “the child is of qualifying age and (1) has an enumerated disability, (2) the disability adversely affects educational performance, and (3) by reason thereof the child needs special education.”). Though these leading scholars shift focus away from the age requirement and specifically enumerate the “adversely effects educational performance” regulatory requirement as a separate “element” in the eligibility analysis, this Article does not do that because the “adversely effects educational performance” regulatory requirement does not apply in *all* cases. *See* 34 C.F.R. § 300.8(c)(10) (2011) (defining specific learning disabilities without a separate requirement that children with specific learning disabilities demonstrate that their disabling conditions adversely effect their educational performance).

⁹⁷ 20 U.S.C. § 1401(3)(A)(i) (2006 & Supp. 2011) (defining “child with a disability” to include children with (1) intellectual disabilities, (2) hearing impairments, (3) deafness, (4) speech or language impairments, (5) visual impairments, (6) blindness, (7) serious emotional disturbance, (8) orthopedic impairments, (9) autism, (10) traumatic brain injury, (11) other health impairments, or (12) specific learning disabilities).

⁹⁸ 20 U.S.C. § 1401(3)(B)(ii) (2006) (defining “child with a disability” to include children ages three through nine who are “experiencing developmental delays as defined by the State . . . in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development”).

⁹⁹ *See* 34 C.F.R. § 300.8(c)(1)(i) (2011) (defining “autism” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(3) (2011) (defining “deafness” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(4) (2011) (defining “emotional disturbance” to require that the condition “adversely

On its face, this qualification on the definition of each disability *for purposes of the Act* makes intuitive sense. Broadly understood, it is consistent with the goal of the IDEA to ensure that “all children with disabilities” receive an appropriate education.¹⁰⁰ The regulatory qualification – that in order to be recognized as a disabling condition *for purposes of the Act* a disability must negatively impact performance at school – aligns with the IDEA’s purpose because if a disability does not have *any* negative impact on school, the child does not require the individualized services and protections afforded by the IDEA in order to succeed and receive an appropriate education there.

However, because neither the IDEA nor the regulations implementing the Act define “adversely affect” or “educational performance,” federal courts have been called upon to give these words precise meanings. Courts have turned to state law¹⁰¹ or, in the absence of

affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(5) (2011) (defining “hearing impairment” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(6) (2011) (defining “mental retardation” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(8) (2011) (defining “orthopedic impairment” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(9)(ii) (2011) (defining “other health impairment” to require that the condition “[a]dversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(11) (2011) (defining “speech or language impairment” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(12) (2011) (defining “traumatic brain injury” to require that the condition “adversely affects a child’s educational performance”); 34 C.F.R. § 300.8(c)(13) (2011) (defining “visual impairment including blindness” to require that the condition “adversely affects a child’s educational performance”); *cf.* 34 C.F.R. § 300.8(c)(10) (2011) (defining “specific learning disability” *without* requiring that the condition adversely affects a child’s educational performance but recognizing that inherent in a specific learning disability diagnosis is a determination that there is a “disorder in one or more of the basic psychological processes involved in understanding or using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations” which may accomplish the same thing as the “adversely affects” requirement contained in the definitions of the other disabling conditions).

¹⁰⁰ 20 U.S.C. § 1400(d)(1)(A) (2006).

¹⁰¹ *See, e.g., J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont’s law to narrowly construe the meaning of the eligibility requirements under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York’s law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require that a disability have an “adverse impact on academic performance as opposed to social development or integration”) (citing *C.B. ex rel. Z.G. v. Dep’t of Educ.*, No. 08-0881, 2009 WL 928093, at * 1 (2d Cir. Apr. 7, 2009) and *Mr. N.C. v. Bedford Cent. Sch. Dist.*,

state law, to convenient canons of statutory construction¹⁰² to build that meaning. State-law definitions and statutorily-implied definitions of “adversely affects” and “educational performance” in many cases have restricted eligibility under the IDEA in a manner inconsistent with the Act.¹⁰³

Although a handful of courts conclude that the words “adversely affect” mean *any* adverse effect without qualification,¹⁰⁴ others require *significant* adverse effects on a child’s educational performance before a child may be eligible for services under the IDEA based upon that child’s disabling condition.¹⁰⁵ Similarly, while some courts conclude that the

No. 07-1077, 2008 WL 4874535, at *1–2 (2d Cir. Nov. 12, 2008)); Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1110 (9th Cir. 2007) (relying on California law to narrowly construe the meaning of eligibility requirements under the IDEA to determine that if a child makes adequate academic progress in school with services offered outside an obligation under the IDEA, that child cannot suggest that he does not make academic progress to secure the same protections under the IDEA); A.J. v. Bd. of Educ., 679 F. Supp. 2d 299, 302 (E.D.N.Y. 2010) (applying New York law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require an adverse academic affect on school performance rather than an adverse social or behavioral impact on school performance); *cf.* Mr. I. *ex rel.* L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 11–13 (1st Cir. 2007) (applying Maine’s law to read the IDEA’s eligibility requirements broadly to be inclusive).

¹⁰² See, e.g., Alvin Indep. Sch. Dist. v. A.D., 503 F.3d 378, 384 (5th Cir. 2007) (relying on statutory construction and decisions on non-eligibility matters to conclude that passing grades ranging from an A to a D disqualified a child with a recognized disability who had previously been served under the IDEA and who currently suffered admitted behavioral and emotional challenges in school from eligibility under the IDEA, but doing so under the “needs” element of the eligibility analysis rather than under the “has-a-disabling-condition” element); Hood, 486 F.3d at 1107 (relying on statutory construction and a decision of the Supreme Court in the non-eligibility context to bolster a conclusion that state laws restrict eligibility under the IDEA to situations in which the child with a disability cannot make academic progress with supports offered outside the IDEA).

¹⁰³ See *infra* notes 104, 106, and 182–85 and accompanying text.

¹⁰⁴ See, e.g., Mr. I., 480 F.3d at 13 (declining to “infer such a limitation from Maine’s regulatory silence”); A.J., 679 F. Supp. 2d. at 311 (stating that “the term ‘adversely affects’ should be given its ordinary meaning and that no qualifier such as ‘severe’ or ‘significant’ should be inferred”); see also Garda, *supra* note 86, at 483–86 (surveying the case law on the meaning of “adversely affects”).

¹⁰⁵ See, e.g., Gregory M. *ex rel.* Ernest M. v. State Bd. of Educ., 891 F. Supp. 695, 698–702 (D. Conn. 1995) (requiring a child’s education to be “significantly impeded” to be adversely affected and holding that receiving Cs and Ds was not a significant impediment even though the child was “oppositional, disruptive, and distractible” and his grades had deteriorated); see also Garda, *supra* note 86, at 483–86 (surveying the case law on the meaning of “adversely affects”).

words “educational performance” include any performance at school (including academic performance, behavioral performance, social performance, emotional performance, attendance, etc.),¹⁰⁶ others interpret the words “educational performance” to include only *one kind* of performance at school, namely academic performance reflected by grades.¹⁰⁷ Most courts today opt for constructions that restrict eligibility through one or both of these critical regulatory terms.¹⁰⁸

When courts restrict eligibility, they employ one of two analytical approaches. After recognizing the lack of legislative or administrative guidance about the meaning of “adversely affect” or “educational performance,” they then turn either to state law to fill in the gap¹⁰⁹ or to other, unrelated provisions of the IDEA in search of meaning.¹¹⁰ The flawed outcome arising from each of these options is addressed in Parts II and III of this Article.

Regardless of the expressed justification, opting for a limiting interpretation of “adversely affects” or “educational performance” typically restricts access to the IDEA to children with disabilities who experience *significant* adverse effects on *academic* performance at school.¹¹¹ Under this interpretation, courts have held, for example, that “there is insufficient evidence that [a child’s] educational performance

¹⁰⁶ See, e.g., *Mr. I.*, 480 F.3d at 17.

¹⁰⁷ See, e.g., *Hood*, 486 F.3d at 1110 (9th Cir. 2007) (relying on California law to narrowly construe the meaning of eligibility requirements under the IDEA to determine that if a child makes adequate academic progress in school with services offered outside an obligation under the IDEA, that child cannot suggest that he does not make academic progress to secure the same protections under the IDEA); *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont’s law to narrowly construe the meaning of the eligibility requirements under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York’s law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require that a disability have an “adverse impact on academic performance as opposed to social development or integration”) (citing *C.B. ex rel. Z.G. v. Dep’t of Educ.*, No. 08-0881, 2009 WL 0881, at *1 (2d Cir. Apr. 7, 2009) and *Mr. N.C. v. Bedford Cent. Sch. Dist.*, No. 07-1077, at *1–2 (2d Cir. Nov. 12, 2008)); *A.J.*, 679 F. Supp. 2d at 302 (E.D.N.Y. 2010) (applying New York law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require an adverse academic effect on school performance rather than an adverse social or behavioral impact on school performance).

¹⁰⁸ Hensel, *supra* note 40, at 1169 (“More commonly . . . courts have taken a narrow approach and equated ‘educational performance’ strictly with ‘academic performance.’”).

¹⁰⁹ See *supra* notes 104–108 and *infra* note 127.

¹¹⁰ See *supra* notes 104–108 and *infra* note 247.

¹¹¹ See *supra* notes 104–108 and accompanying text.

was adversely affected” when a child’s grade-point average declined by nine points in a single school year, but the child did not receive an “F” in any of his classes.¹¹² With “only” a nine-point drop in GPA, the disabling condition’s impact on educational performance was insufficiently adverse, rendering a child ineligible for services and protection under the Act.¹¹³ This threatens the ability of the Act to accomplish its goal of improving educational results and securing preparation for “employment . . . and independent living” for all children with disabilities,¹¹⁴ particularly those children with disabilities who may also have average to above-average cognitive functioning, as is by definition the case for children with Asperger’s Syndrome.¹¹⁵

C. BACKGROUND ON ASPERGER’S SYNDROME

A wide range of children with a wide range of disabilities may and do, of course, have average to above-average cognitive functioning and receive passing grades in school, potentially rendering them ineligible for services under the IDEA under recent constructions of the requirement that disabling conditions “adversely affect[] . . . educational performance.” In fact, of those disabilities specifically enumerated in the IDEA, the overwhelming majority of them may co-exist with average to above-average cognitive function and passing grades in school.¹¹⁶

¹¹² *Mr. N.C.*, No. 07-1077, 2008 WL at *1-2 (declining to qualify a child as emotionally disturbed and concluding that even if he met other requirements necessary to qualify as emotionally disturbed, he would nonetheless be ineligible for special education on that basis because the adverse effect on educational performance standard required proof of a greater adverse impact on grades than a nine-point drop in GPA, particularly when the child had not failed a class).

¹¹³ *Id.*

¹¹⁴ 20 U.S.C. § 1400(d)(1)(A) (2006).

¹¹⁵ DSM-IV, *supra* note 14, at 75–77 (stating that a diagnosis of Asperger’s Syndrome requires, *inter alia*, that “[t]here [is] no clinically significant delay in cognitive development”).

¹¹⁶ For example, Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, Amputation, Asthma, Autism, Blindness, Cancer, Cerebral Palsy, Deafness, Diabetes, Dyslexia, Emotional Disturbance, Epilepsy, Hearing Impairment, Heart Condition, Hemophilia, Lead Poisoning, Leukemia, Nephritis, Orthopedic Impairment, Poliomyelitis, Rheumatic Fever, Sickle Cell Anemia, Speech/Language Impairment, Stuttering, Tourette Syndrome, Tuberculosis, and Visual Impairment are all identified in the IDEA as disabilities within the contemplation of the Act, and none of these disabilities requires any cognitive impairment. *See* 34 C.F.R. § 300.8(c)(1)–(10) (2011). (identifying these diagnoses, among others, as covered under particular circumstances under the IDEA). Thus, a child with any one of these disabilities might have cognitive impairment, a child with one of these disabilities might also receive passing grades through their own hard work or exceptional ability such that they are excluded from the services afforded through the IDEA. This

However, Asperger's Syndrome is the rare disability that has as one of its diagnostic criteria an affirmative requirement that the child subject to the diagnosis does *not* have any cognitive delay.¹¹⁷

Asperger's Syndrome is the focus of the analysis here for three reasons. First, understanding the IDEA's eligibility requirements in this context is increasingly important given that recognition of autism spectrum disorders has increased quite significantly over the last decade.¹¹⁸ The number of school-age children with autism spectrum disorders served in the public schools increased from 42,000 in the 1997-1998 school year to 296,000 in 2007-2008 school year,¹¹⁹ a 605% increase over the course of this ten-year period.¹²⁰ The Center for Disease Control estimates that 1 in 88 children is now born with an

Article focuses on Asperger's Syndrome because average to above-average ability is a necessary component of the diagnosis for that disability.

¹¹⁷ DSM-IV, *supra* note 14, at 77 (identifying as one of the diagnostic criteria for Asperger's Syndrome that "[t]here is no clinically significant delay in cognitive development").

¹¹⁸ See Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 489-90 (2010) (recognizing that "[t]he figures illustrating both incidence and prevalence of autism are alarming" and "[w]hether or not autism qualifies as an epidemic" today, the "numbers are unsettling"); Ka-Yuet Liu et al., *Social Influence and the Autism Epidemic*, 115 AM. J. SOC. 1387, 1389-40 (2010) (discussing the debate surrounding proportions of autism).

¹¹⁹ NAT'L CTR. FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., NCES 2011-015, DIGEST OF EDUCATION STATISTICS, 2010, at tbl.45, *available at* <http://nces.ed.gov/fastfacts/display.asp?id=64> [hereinafter DIGEST OF EDUC. STATISTICS] (identifying the numbers of students served with special education over time and in each eligibility category). It is worth noting that some children with autism spectrum disorders are served under categories other than the autism category. See, e.g., *Pohorecki v. Anthony Wayne Local Sch. Dist.*, 637 F. Supp. 2d 547, 551 (N.D. Ohio 2009) (addressing a case in which the school district agreed that a child with Asperger's Syndrome was eligible under the "emotional disturbance" category of eligibility, but not under the "autism" category of eligibility, because the child's primary difficulties were "maintaining relationships, inappropriate behaviors and feelings, and pervasive depression").

¹²⁰ The total number of children served under the IDEA increased by only 11.8% over the last decade – from 5,908,000 children in the 1997-1998 school year to 6,606,000 children in the 2007-2008 school year. DIGEST OF EDUC. STATISTICS, *supra* note 119, tbl.45 (identifying the numbers of students served with special education as percentages of the total public education population). Notably, this increase does not mean that there was an 11.8% increase in the total percentage of special education students in the public school population because the percentage of "typical" children increased over the same period at a similar, though slightly lower, rate.

autism spectrum disorder,¹²¹ and some estimate that 1 in 250 children is now born with Asperger's Syndrome.¹²²

The suspected reasons for the increase in the number of children diagnosed with autism spectrum disorders vary.¹²³ Some believe that the increase in recognition of autism exists because the current "diagnostic criteria for autism . . . are the most stringent and the clearest ever" creating "greater understanding of the behaviors associated with autism . . . [and] lead[ing] to an increase in the rate of diagnosis."¹²⁴ Others suggest that it is the "improved sophistication of professionals who diagnose autism" creating a broader community of experts better able to discern autism when it appears in children.¹²⁵

Regardless of the reason for the increase in the number of children recognized as on the autism spectrum, there has been a simultaneous increase in the amount of special education litigation arising out of provision (or not) of services to these children. Over the last decade, there have been approximately 700 federal court cases involving special education and individuals on the autism spectrum.¹²⁶ In this context, it becomes particularly important to clarify the IDEA's eligibility requirements to reduce the amount of time and energy families and educators spend on litigation and permit them to shift their attention to where it ought to be – on the child's education.

Second, Asperger's Syndrome merits focused attention because recently several courts have restricted the definition of qualifying disabilities in a manner that has particular relevance to Asperger's

¹²¹ John Baio, *Prevalence of Autism Spectrum Disorders – Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2008*, CENTERS FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WEEKLY REPORT (March 30, 2012), http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6103a1.htm?s_cid=ss6103a1_w; see also Veronica Zysk, *Autism 101: New to Autism?*, AUTISM-ASPERGER'S DIG., June-July 2011, at 9 (recognizing that before the March 2012 Center for Disease Control report it was estimated that "[a]utism affects 1 in every 110 children" and is "consistently prevalent around the globe, and within different racial, social, and ethnic communities").

¹²² ATTWOOD, *supra* note 12, at 10 (gauging that "the prevalence of Asperger's syndrome is about 1 person in 250").

¹²³ See *supra* notes 67-74 and accompanying text (explaining the origin of this disability designation in the context of special education eligibility and demonstrating that despite early increases in autism designations, the numbers have stabilized over the most recent three years of data collection).

¹²⁴ CHILDREN WITH AUTISM: A PARENT'S GUIDE, *supra* note 61, at 27 (offering explanations for the perception that autism is "on the rise").

¹²⁵ *Id.*

¹²⁶ Dicker & Bennett, *supra* note 8, at 416 (2011).

Syndrome.¹²⁷ This disability on the autism spectrum is one of the rare diagnoses that *require* an absence of any delay in cognitive development in order to qualify for the diagnosis.¹²⁸ This means that children with Asperger's Syndrome have average to above-average cognitive functioning and the intellectual ability to "pass" at grade level.¹²⁹ While children with many other diagnoses also have average to above-average cognitive functioning and the intellectual ability to "pass" at grade level, this characteristic is not *required* of other diagnoses.¹³⁰ Because *all*

¹²⁷ See, e.g., *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York's law in an Asperger's Syndrome case to deny eligibility by narrowly construing the meaning of the eligibility requirements to require that a disability have an "adverse impact on academic performance as opposed to social development or integration"); see also *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 302 (E.D.N.Y. 2010) (applying New York law in an Asperger's Syndrome case to deny eligibility by narrowly construing the meaning of the eligibility requirements under the IDEA to require an adverse academic effect on school rather than an adverse social or behavioral impact on school performance). Notably, however, judicial interpretations of the definitions of disabling conditions under the IDEA to exclude children who receive passing grades from access to the Act's services and protections affect children with a wide range of disabilities, not only children with Asperger's Syndrome. See, e.g., *C.B. v. Dep't of Educ.*, 322 Fed. Appx. 20 (2d Cir. 2009) (holding that a child with *bipolar disorder* and *attention deficit hyperactivity disorder* was ineligible for services and protections under the IDEA because the child managed to get good grades and test "above grade-level" despite his disabilities and was therefore not disabled for purposes of the Act); see also *Garda*, *supra* note 86, at 463 (emphasizing the impact of restrictive construction of eligibility requirements on emotionally-disturbed students and recognizing that "[t]he narrow meaning of educational performance is one reason that emotionally disturbed children are the most under-identified category of disabled children[;] [t]hese children can often perform well academically but cannot form social relations, control their behavior or attend the regular classroom consistently"). While it is clear that a narrow construction of the IDEA's qualifying disabilities impacts students with a variety of diagnoses and disabilities, this Article focuses on Asperger's Syndrome as an example for the three reasons identified.

¹²⁸ See DSM-IV, *supra* note 14, at 77 (identifying as one of the diagnostic criteria for Asperger's Syndrome that "[t]here is no clinically significant delay in cognitive development").

¹²⁹ See, e.g., *Marlette*, *supra* note 30, at 58 (stating that children with Asperger's Syndrome "may receive good grades"); *ATWOOD*, *supra* note 12, at 232 (noting that children with Asperger's Syndrome "may have an IQ that suggests the intellectual potential to achieve good grades in school work"); *Caruso*, *supra* note 118, at 518 (recognizing that many children with Asperger's Syndrome and high-functioning autism "have average or high intelligence" and thus have been denied the need for individualized instruction in schools).

¹³⁰ Of course, a child with an emotional disability, a learning disability, or almost any other type of disability is just as likely as a child without such a disability to have average, above-average, or below-average cognitive ability. Many children with an emotional disability or a learning disability, for example,

children with Asperger's Syndrome are without cognitive delay by definition, they are disproportionately vulnerable to any construction of eligibility for special education that would exclude children who receive passing grades in school.¹³¹

Finally, this Article focuses on Asperger's Syndrome because there is a shortage of scholarship on the effect of the IDEA's eligibility terms in this context.¹³² Several authors have addressed important concerns associated with under-identification (or disproportionate exclusion) of children who ought to qualify for special educational services in the "emotionally disturbed," "other health impaired," and "learning disabled" categories of eligibility.¹³³ Still others have addressed critical concerns associated with the improper over-identification (or disproportionate inclusion) of African-Americans in particular eligibility categories (not autism).¹³⁴ This Article offers a comparably in-depth consideration of the recent constructions of the IDEA's eligibility

often can and do pass at grade level. Occasionally, however, a child with one of these disabilities does not have this ability and cannot pass at grade level. Average to above-average cognitive ability is not *required* to co-exist with other disorders.

¹³¹ See Melissa J. Sullivan, *Brilliantly Disabled*, 29 CHILD. LEGAL RTS. J. 49 (2009) (discussing three cases in which children with Asperger's Syndrome experienced problems with eligibility for special education services under the IDEA because they found themselves able to perform academically despite their disabilities).

¹³² *But see* Caruso, *supra* note 118, at 518 (generally discussing the impact of autism on the law in a variety of contexts and asserting briefly that special education "[e]ligibility can also pose thorny problems [because] [e]ven in the presence of an autism spectrum disorder (most often, Asperger's Syndrome), schools have denied the need for individualized instruction"); Sullivan, *supra* note 131, at 49 (discussing three cases in which children with Asperger's Syndrome were excluded from special educational services at least initially and proposing educational and advocacy solutions).

¹³³ See, e.g., Garda, *supra* note 86, at 450 (addressing serious emotional disturbance); Hensel, *supra* note 40, at 1164-67 (addressing serious emotional disturbance, specific learning disability, and briefly other health impairments); Weber, *supra* note 60, at 109-14, 123-27 (addressing emotional disturbance and social maladjustment, and learning disabilities respectively).

¹³⁴ See Daniel J. Losen & Gary Orfield, RACIAL INEQUITY IN SPECIAL EDUCATION vi, xxiii, 1, 3 (Daniel J. Losen & Gary Orfield eds., 2002) (addressing data and theory on disproportionate over-representation of racial minorities in special education); Weber, *supra* note 60, at 143-51 (addressing African American over-representation in the mentally retarded and emotional disturbance categories); see also Garda, *supra* note 86, at 450 ("The confusion surrounding eligibility standards leads to the disastrous results of both over-identification and under-identification of IDEA eligible children.").

requirements as applied to children on the autism spectrum with Asperger's Syndrome.¹³⁵

As background, this section begins with a discussion of Asperger's Syndrome and its place within the autism spectrum.¹³⁶ At this time, there are five primary diagnoses within the autism spectrum: Autistic Disorder, Rett's Disorder, Childhood Disintegrative Disorder, Pervasive Developmental Disorder Not Otherwise Specified, and Asperger's Disorder (or Syndrome).¹³⁷ These five diagnoses on the autism spectrum form a continuum with Autistic Disorder being the most "severe" form of autism and Asperger's Syndrome having the most promising prognosis on the spectrum.¹³⁸ Generally speaking, however, autism in each of its five types "is a developmental disorder, typically diagnosed during the first three years of life. It is neurological in nature, affecting the brain in four major areas of functioning: language/communication, social skills, sensory systems, and behavior."¹³⁹ It has no cure and is a lifelong condition.¹⁴⁰

Given that all five types of autism are "defined by a common set of behaviors" and that "differentiation of autism spectrum disorder[s] from typical development and other 'nonspectrum' disorders is done reliably and with validity[,] while distinctions among [sub-categories of autism] have been found to be inconsistent over time," the American Psychiatric Association is considering merging the multiple autistic types into a single diagnosis when it releases the Fifth Edition of its Diagnostic and Statistical Manual of Mental Disorders in 2013.¹⁴¹ This consolidation of

¹³⁵ Others, however, have addressed autism spectrum disorders with respect to other components of the IDEA. *See, e.g.,* Caruso, *supra* note 118; Dicker & Bennett, *supra* note 8; Marlette, *supra* note 30.

¹³⁶ *See supra* notes 118–25 and accompanying text (offering data regarding the numbers of children diagnosed with autism spectrum disorders who are served under the IDEA and the volume of special education litigation involving individuals on the autism spectrum).

¹³⁷ DSM-IV, *supra* note 14, at 66–78 (identifying the diagnostic criteria for each of the five diagnoses on the autism spectrum).

¹³⁸ NAT'L INST. FOR MENTAL HEALTH, AUTISM SPECTRUM DISORDERS: PERVASIVE DEVELOPMENTAL DISORDERS 2 (2007), <http://wwwapps.nimh.nih.gov/health/publications/autism/nimhautismspectrum.pdf> ("The pervasive developmental disorders, or autism spectrum disorders, range from a severe form, called autistic disorder, to a milder form, Asperger syndrome.").

¹³⁹ Zysk, *supra* 121, at 9.

¹⁴⁰ *See* CHILDREN WITH AUTISM: A PARENT'S GUIDE, *supra* note 61, at 29 (stating that although a hope of a "cure" or "recovery" is "seductive," "[g]iven our current state of knowledge of the biological, genetic, and neurological nature of this disorder, however, an emphasis on cure and recovery is ill-advised").

¹⁴¹ American Psychiatric Association, *A 09 Autism Spectrum Disorder*, DSM-V DEVELOPMENT (2010), <http://www.dsm5.org/proposedrevision/pages/proposed>

multiple existing autism spectrum disorder diagnoses under a single diagnostic label is not final, however, and Asperger's Syndrome and its particular collection of neurological features will continue to exist in children even if its label changes over time.¹⁴²

Asperger's Syndrome in particular has been defined in courts as "a developmental disability on the autism spectrum that is associated with significant misperceptions of otherwise routine elements of daily life. It is a permanent condition that is not treatable with medication."¹⁴³ The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders provides that "[t]he essential features of Asperger's Disorder are severe and sustained impairment in social interaction . . . and the development of restricted, repetitive patterns of behavior, interests, and activities. . . . The disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning."¹⁴⁴ "Recent research studies and review papers [also] have confirmed an unusual pattern of sensory perception and reaction" particularly in individuals diagnosed with Asperger's Syndrome.¹⁴⁵ Some now consider the sensory challenges of children with Asperger's Syndrome to be their most significant, and believe that "sensory integration dysfunction is at the root of many of the core

revision.aspx?rid=94# (also stating that the "[n]ew name for [the] category, autism spectrum disorder, [] includes autistic disorder (autism), Asperger's disorder, childhood disintegrative disorder, and pervasive developmental disorder not otherwise specified" and that the DSM-V will be released in May 2013); see also Benedict Cary, *New Definition of Autism May Exclude Many*, N.Y. TIMES, Jan. 19, 2012, available at http://nytimes.com/2012/01/20/health/research/new-autism-definition-would-eclude-many-study-suggests.html?_r=2&hp=&pagewanted=print (recognizing that the new definition of autism being considered by the American Psychiatric Association for inclusion in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders would "consolidate all three diagnoses under one category, autism spectrum disorder, eliminating Asperger Syndrome and P.D.D.-N.O.S. from the manual").

¹⁴² See Autism Society & ASAN, *Joint Statement of the Autism Society and the Autism Self Advocacy Network on the DSM-V and Autism*, AUTISM SOCIETY (Jan. 31, 2012), <http://www.autism-society.org/news/in-the-news/the-joint-statement-of-the.html> (emphasizing that "it is essential that the DSM-5's criteria are structured in such a way to ensure that those who have or would have qualified for a diagnosis under the DSM-IV maintain access to an ASD diagnosis" and clarifying that this is important even for higher-functioning individuals on the spectrum "who may have managed to discover coping strategies and other adaptive mechanisms which serve to mask traits of ASD prior to a diagnosis").

¹⁴³ *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 154 (1st Cir. 2004).

¹⁴⁴ DSM-IV, *supra* note 14, at 75.

¹⁴⁵ ATTWOOD, *supra* note 12, at 271.

difficulties of autism spectrum disorders.”¹⁴⁶ For this reason, some scholars are “frustrated by the fact that some teachers and therapists still do not recognize the importance of sensory over sensibility” in children on the spectrum.¹⁴⁷ Significantly for purposes of this Article, in addition to the significant social, behavioral, communication, and sensory impairments associated with Asperger's Syndrome, this disability also by definition *excludes* any “clinically[-]significant delay in cognitive development” or any “clinically[-]significant general delay in language.”¹⁴⁸ Because children with Asperger's Syndrome by definition have average to above-average cognitive functioning, children with Asperger's Syndrome often receive “passing” academic marks despite their significant disabilities.¹⁴⁹

“Although the person with Asperger's [S]yndrome may achieve academic success” in school, when children with Asperger's Syndrome become adults, “difficulties with social skills” may impact their ability to “get[] and keep[] a job.”¹⁵⁰ Scholars recognize the likelihood of “a high rate” of chronic unemployment in individuals with Asperger's Syndrome.¹⁵¹ Without special education in social skills, pragmatic communication, and behavior, individuals with Asperger's Syndrome may have difficulty communicating in job interviews, working with teams in employment, understanding social conventions like standing too close to others or looking at them too long or not at all, and discerning and accepting the organizational hierarchy.¹⁵²

Likewise, the acute sensory responses of individuals with autism spectrum disorders can create challenges for high-functioning adults with autism in the workplace. One scholar recounts the case of Cathleen Comber, an individual with autism who found initial success in employment and got along with most of her fellow workers until overwhelmed by a sensory challenge at work.¹⁵³ When she was asked to drive a company van, Ms. Comber refused because the van smelled like deodorant and triggered in her an atypical olfactory reaction due to her

¹⁴⁶ ELLEN NOTBOHM AND VERONICA ZYSK, 1001 GREAT IDEAS FOR TEACHING & RAISING CHILDREN WITH AUTISM OR ASPERGER'S xxii, 3 (2d ed. 2010).

¹⁴⁷ TEMPLE GRANDIN, THINKING IN PICTURES: MY LIFE WITH AUTISM 82 (2d ed. 2006).

¹⁴⁸ DSM-IV, *supra* note 14, at 77.

¹⁴⁹ Marlette, *supra* note 30, at 58 (“These children . . . may receive good grades but have difficulty learning adequate social skills, an important component of the education provided by schools.”).

¹⁵⁰ ATTWOOD, *supra* note 12, at 22.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Caruso, *supra* note 118, at 512–13.

hyper-sensitive olfactory perception, a common symptom of autism.¹⁵⁴ Upon her refusal, Ms. Comber was reproached by a supervisor, then Ms. Comber reacted in a socially atypical manner (throwing a fit and kicking a chair across the hall), and was fired promptly the next day.¹⁵⁵ Ms. Comber “was penalized, vis-à-vis other ADA-eligible workers, because of her extraordinary ability to navigate her way through life [in most instances] – a feature that is common among persons with high functioning autism, but does not diminish the severity of the impairment” when not accommodated by an employer and beyond the individual’s power to address through self-coping strategies.¹⁵⁶ This example illustrates that “integrating this particular disability in the workforce remains plagued by the endemic fuzziness of ADA standards, exponentially complicated by the fuzziness of autism science itself.”¹⁵⁷

Before reaching adulthood, of course, children with Asperger’s Syndrome experience practical impacts of their disability on non-academic performance at school, even though they “may achieve academic success.”¹⁵⁸ Symptoms of Asperger’s Syndrome present challenges to a child’s ability to manage the “routine elements” of school life.¹⁵⁹ For example, children with Asperger’s Syndrome may face challenges processing oral instructions from teachers through the diversity of competing sounds in their hyper-sensitive ears, including the sounds of chairs scraping, papers rustling, children whispering, air-conditioning units humming, feet shuffling, pencils sharpening, pages turning, and even lawn mowers mowing outside, airplanes flying

¹⁵⁴ *Id.* Hyposensitive (or even nonresponsive) sensory perception is also a possible symptom of autism spectrum disorders. *See, e.g.*, NOTBOHM & ZYSK, *supra* note 146, at 2 (recognizing that individuals with autism spectrum disorders may have either “hyper-acute” or “hypo-active” sensory systems that “require[e] major effort to alert their bodies”). Hyposensitivity was not the issue with Ms. Comber here. *See* Caruso, *supra* note 116, at 513 (describing Ms. Comber as having “particularly acute” sensory responses and a “hypersensitivity to smell”).

¹⁵⁵ *Comber v. Prologue, Inc.*, No. CIV.JFM-99-2637, 2000 WL 1481300, at *1–2 (D. Md. Sept. 28, 2000).

¹⁵⁶ Caruso, *supra* note 118, at 513.

¹⁵⁷ *Id.*

¹⁵⁸ ATTWOOD, *supra* note 12, at 22. It may also impact academic performance, particularly in instances where nonacademic needs are not met in school resulting in additional co-morbid concerns, like depression and high anxiety, arising out of the stress of coping with Asperger’s Syndrome without support. *See Mr. I ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 17 (1st Cir. 2007) (recognizing that plaintiff had a “depressive disorder brought on by the stress of managing” her Asperger’s Syndrome and the pragmatic language skill and social understanding difficulties brought about by that disability).

¹⁵⁹ *See Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 154 (1st Cir. 2004) (stating that children with Asperger’s Syndrome experience “significant misperceptions of otherwise routine elements of daily life”).

overhead, people talking or walking in the hallways, and so on at school.¹⁶⁰ Quite basic tasks like walking down the hallway may pose challenges for a child with Asperger's: "The corridors and halls of almost any mainstream school are a constant tumult of noises echoing, fluorescent lights (a particular source of visual and auditory stress for people on the autistic spectrum), bells ringing, people bumping into each other, the smells of cleaning products and so on," that push typical people with autism "perilously close to sensory overload."¹⁶¹ Additionally, children with Asperger's Syndrome face challenges processing and participating in social interactions at school;¹⁶² developing appropriate peer relationships;¹⁶³ using or reading nonverbal cues such as eye-to-eye gaze, facial expression, body postures, and gestures essential to daily life at school;¹⁶⁴ managing behavior and emotions appropriately at school;¹⁶⁵ communicating effectively at school;¹⁶⁶ adjusting to changes in daily routine at school for field trips, special programs, in-class celebrations, or assemblies;¹⁶⁷ escaping a preoccupation with a particular interest to engage in classroom activities;¹⁶⁸

¹⁶⁰ See NOTBOHM, *supra* note 7, at 10–12 (describing the effects of hyper-acute hearing on children with autism and explaining that "neuro-typical children in the classroom are listening to what the teacher is saying. But the child with autism cannot identify the voice of the teacher as the primary sound to which he should be attuned. To him it's indistinguishable from the grinding of the pencil sharpener, the fly buzzing on the windowsill, the lawn mower chugging outside, the child with the constant cough behind him and the class next door tromping down the halls to the library.").

¹⁶¹ ATTWOOD, *supra* note 12, at 272 (quoting Claire Sainsbury, MARTIAN IN THE PLAYGROUND: UNDERSTANDING THE SCHOOLCHILD WITH ASPERGER'S SYNDROME 101 (2000)).

¹⁶² See DSM-IV, *supra* note 14, at 77 (identifying as part of the diagnostic criteria for Asperger's Syndrome a "lack of spontaneous" exchange with others as well as an "encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus").

¹⁶³ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome a "failure to develop peer relationships appropriate to developmental level").

¹⁶⁴ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome a "marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction").

¹⁶⁵ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome a number of symptoms that could produce inappropriate behavior at school).

¹⁶⁶ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome an impairment in communication through inability to use nonverbal cues and through a lack of social or emotional reciprocity).

¹⁶⁷ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome an "apparently inflexible adherence to specific, nonfunctional routines or rituals").

¹⁶⁸ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome an "encompassing preoccupation . . . that is abnormal either in intensity or focus").

discontinuing stereotyped and repetitive motor mannerisms (which may include hand or finger flapping or twisting or complex whole-body movements) associated with Asperger's Syndrome and inappropriate for school;¹⁶⁹ and engaging in team or group activities at school,¹⁷⁰ among other things.

Given that a child with Asperger's Syndrome, like A.J. in the introductory example, is likely to find academic work at school within his inherent ability but find behavior, social interaction, and/or pragmatic communication beyond his inherent ability, these children are at the heart of the eligibility debate. Are they "disabled enough"? Parents, school districts, administrative law judges, hearing officers, and courts all recognize that a child with Asperger's Syndrome has an enumerated disability with "clinically significant" effects on some aspects of performance at school, but some school systems (with the support of some courts) nonetheless assert that the child is *not* eligible for services under the IDEA because the effect is not sufficiently *significant* or because the child has maintained adequate academic marks.

Why would educators avoid educating a child in areas in which it is agreed that the child most needs help? School systems lack resources and special education services for a child on the autism spectrum can be expensive. According to estimates contained in a report of the United States Government Accountability Office, "the average per pupil expenditure for educating a child with autism was more than \$18,000 in the 1999-2000 school year[, and] [t]his amount is almost three times the average per pupil expenditure of educating a child who does not receive any special education services."¹⁷¹ More specifically, the cost of educating a child with autism was \$18,790 during the 1999-2000 school year, while the cost of educating a child without any disability was \$6,556 during that same year.¹⁷² Unfortunately, while acknowledging the high cost of educating children on the autism spectrum (and of educating children with other disabilities), the federal government has never fully funded the IDEA.¹⁷³ Under these circumstances, state and local

¹⁶⁹ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome "stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)").

¹⁷⁰ See *id.* (identifying as one of the diagnostic criteria for Asperger's Syndrome a "[q]ualitative impairment in social interaction").

¹⁷¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-220, SPECIAL EDUCATION: CHILDREN WITH AUTISM 10 (2005), <http://www.gao.gov/new.items/d05220.pdf>.

¹⁷² *Id.* at 27. While it is possible that children with Asperger's Syndrome do not require the same expense as children with more severe diagnoses on the autism spectrum, the government report did not break down costs in this manner.

¹⁷³ See IDEA FUNDING COALITION, IDEA FUNDING: TIME FOR CONGRESS TO LIVE UP TO THE COMMITMENT 2-3 (2006), <http://www.nassp.org/portals/0/content/53654.pdf> ("With 6,878,000 students served under IDEA [in 2006],

governments struggle to find funding to provide educational supports they know their students with disabilities require, but may also exclude children, especially when they are doing fine academically, in an attempt to “save” money. The irony in schools’ attempt to “save” money in this manner is that when schools deny IDEA eligibility to children with disabilities, they do not receive federal IDEA funding to serve those children and may not be able to recover as much state government special education funding either.¹⁷⁴ As a result, in an attempt to “save” money, schools may relinquish it.

Ultimately, without adequate resources flowing into special education programming, many children with Asperger's Syndrome, like A.J., find themselves disabled by all accounts, but not disabled enough to be recognized as such for purposes of the IDEA. This outcome harms not only a child with the disability, but also society at large. When school systems make decisions in their own short-term financial interests to deny special education to children with disabilities, they shift the economic burden of these disabilities back to society at large at a higher price. In explaining why the legislature requires investment in special education, the Supreme Court recognized that

[t]he long range implications of [failing to provide special education] are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to our society instead of being forced to remain burdens.¹⁷⁵

The costs of providing educational supports for children with disabilities are modest when compared to the cost to society to support an improperly-educated person with a disability as an adult.¹⁷⁶ Further,

schools are qualified to receive \$23.8 billion in federal funds. Unfortunately, school districts are only receiving \$10.6 billion. In other words, states and school districts are currently receiving roughly 17.73 percent rather than the federal commitment of 40 percent of APPE”).

¹⁷⁴ See 20 U.S.C. § 1411(a)(2) (2006) (explaining that the amount of special education funding available to states depends upon “the number of children with disabilities in the State who are receiving special education and related services”); see also THOMAS PARRISH ET AL., STATE SPECIAL EDUCATION FINANCE SYSTEMS, 1999-2000, at 3-12 (2004) (describing and providing data on types of state financing systems).

¹⁷⁵ Bd. of Educ. v. Rowley, 458 U.S. 176, 201 n.23 (1982) (internal quotations and citations omitted).

¹⁷⁶ Glen Cheng, Note, *Caring for New Jersey's Children with Autism: A Multifaceted Struggle for Parity*, 60 RUTGERS L. REV. 997, 1005 (2008)

the “cost of lifelong care [for adults] can be reduced by 2/3 with early diagnosis and intervention [in children].”¹⁷⁷

Accordingly, the debate over the perimeters of special education eligibility should not focus on whether the additional costs associated with educating the moderately impaired should be incurred; instead, the focus should be on who is going to bear these costs and when. To the extent school districts are granted permission to treat these students indifferently, costs are merely transferred from the district to society at large. For example, students whose educational needs are ignored will have a difficult time finding employment, resulting in dependence on government benefits and welfare programs.¹⁷⁸

This is one reason why Congress invests money in early intervention and childhood education for children with disabilities through the IDEA. Another, of course, is that “Constitutional rights must be afforded citizens despite the greater expense involved . . . [and the Constitution requires that] available funds must be expended . . . [to provide a child with a disability] a publicly supported education consistent with his needs and ability to benefit therefrom.”¹⁷⁹ While the IDEA requires a significant financial investment, it is an investment that yields valuable

(“Basing their estimate on [a] UK study, the Autism Society of America estimated the annual U.S. societal cost of autism to be \$90 billion per year, with 90% of the costs being for adult services. Lifespire Inc. estimated the total costs for an autistic disabled adult to be \$ 225,000 per year.”) (footnotes omitted).

¹⁷⁷ *Facts and Statistics*, AUTISM SOCIETY, <http://www.autism-society.org/about-autism/facts-and-statistics.html> (last visited January 11, 2012).

¹⁷⁸ Hensel, *supra* note 40, at 1190.

¹⁷⁹ *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972). There is question today about whether federal courts would continue to recognize an Equal Protection Clause claim like the one brought by the plaintiffs in *Mills* given that the Supreme Court held that people with mental retardation do not form a suspect or quasi-suspect class for purposes of Equal Protection Clause claims in *Texas v. Cleburne Living Center*, 473 U.S. 432 (1985). However, Congress embraced the *Mills* holding and rationale in the Education for All Handicapped Children Act and later the Individuals with Disabilities Education Act. Then in *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court “interpreted Fourteenth Amendment due process and a regulation promulgated under title II of the Americans with Disabilities Act . . . to require placement in the least restrictive environment for people with disabilities in publicly run institutions.” Taken together, these legal realities raise the possibility that a new type of constitutional claim based upon a deprivation of a fundamental right continues to exist when public schools fail to educate children with disabilities in the least restrictive environment or exclude them from access to education completely. WEBER, *supra* note 38, at 264.

dividends, embraces our legislatively-formalized national interest in equality of opportunity, and avoids greater expense down the road. In other words, it is a sound investment that pays off.

Recalling the case of A.J., one sees an example of a child with Asperger's Syndrome who required accommodations for his disability as a pre-school child, but who, despite significant behavioral and social problems, ended up managing the academic work of kindergarten, rendering him ineligible for critical, early-intervention special education services in his jurisdiction. A.J. is for now at least temporarily excluded from the IDEA because his "strengths . . . mask [his] areas of lesser ability" allowing him to "pass" academically.¹⁸⁰

Through courts' restrictive interpretation of "adversely affects" and "educational performance," many children like A.J. face great misfortune when their disabilities are not recognized simply because they are "able to cover up or compensate for their problems" through academic output.¹⁸¹ Ironically, these children with early academic success in school *may* – through these early achievements – lay the foundation for future failures in school and life unless their parents can afford privately to provide the special education services they are denied in public schools.¹⁸² While one cannot predict the path of any particular child, it is likely that A.J. will be considered for special educational services again. He is, of course, despite the court's technical conclusion to the contrary, a child with a disability. He is a child with autism, and particularly with Asperger's Syndrome. As time goes on, he may become eligible for special education services should he fall again to the point of academic failure as he struggles alone to accommodate his disability in school.¹⁸³ Children with Asperger's Syndrome who are denied accommodations to support their pragmatic language and behavioral challenges in highly sensory environments also are vulnerable to developing co-morbid emotional disabilities, such as depression or high anxiety, arising out of the stress associated with coping with the effects of their Asperger's Syndrome without special education.¹⁸⁴ Requiring

¹⁸⁰ UNIQUELY GIFTED: IDENTIFYING AND MEETING THE NEEDS OF THE TWICE-EXCEPTIONAL STUDENT vii (Kiesa Kay ed., 2000).

¹⁸¹ WEBB ET AL., *supra* note 30, at xix.

¹⁸² *Id.*; *see also* ATTWOOD, *supra* note 12, at 136–42 (identifying a number of potential co-morbid diagnoses that may develop in children with Asperger's Syndrome particularly if their triggers are not addressed and accommodated appropriately during development).

¹⁸³ Alternatively, he may drop out of school and disappear from the statistics entirely.

¹⁸⁴ *See* Mr. I. *ex rel.* L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 17 (1st Cir. 2007) (recognizing that failure to appropriately support a child with Asperger's Syndrome's poor pragmatic language and social understanding skills led to development of a co-morbid depressive disorder in the child); *see also*

failure first for A.J., or any child with a disability, in order to access the IDEA's services places children at risk for development of additional complications and is inconsistent with the plain requirements of the IDEA, public policy as expressed in the Act, and the Constitution.

III. FACING THE JUDICIALLY-IMPOSED ACADEMIC "FAILURE FIRST"
REQUIREMENT: COMING UP EMPTY-HANDED IN THE SEARCH FOR
STATUTORY SUPPORT FOR A RESTRICTIVE UNDERSTANDING OF
REGULATORY DEFINITIONS OF DISABLING CONDITIONS IN THE IDEA

To keep in perspective this consideration of the "adversely affects . . . educational performance" component of the Department of Education's definitions of disabling conditions, recall that of the three IDEA-eligibility requirements – age, a disabling condition, and need – only the second is under review here. Even when a child with passing grades satisfies the second element, having a disabling condition, as this Article argues should be the case, the child remains subject to the third eligibility requirement, that she "need" special education. Thus, just because the IDEA provides (under the argument here) that a child with a disability should be recognized as such even if that child earns passing grades at school, does not mean that children with disabilities who do not otherwise "need" special education will get it. Instead, this merely moves these children past the second eligibility requirement and gives them an opportunity to demonstrate "need" under the third requirement to render them fully eligible for services and protection under the IDEA.

Whether federal courts turn to state law or whether they "glean a federal definition . . . from parts of IDEA that do not deal with eligibility,"¹⁸⁵ judicial rationales that narrowly interpret "adversely affect" and "educational performance" to exclude children with disabilities and passing grades sink under the Act's scrutiny. In every corner of the IDEA, this legislation expresses an inclusive understanding of disability and embraces children with all types of disabilities having all types of effects at school.

Nothing in the IDEA requires academic failure before a child can be recognized as a "child with a disability." On the contrary, both the plain language and the legislative history of the IDEA establish that this

ATTWOOD, *supra* note 12, at 136–42 (identifying a number of potential comorbid diagnoses, including the depressive disorder at issue in *Mr. I*, that may develop in children with Asperger's Syndrome particularly if their triggers are not addressed and accommodated appropriately during development); WEBB ET AL., *supra* note 30, at xix (recognizing that bright children and adults are vulnerable to the "misfortune" of having "[t]heir disorders . . . obscured because, with their intelligence, they are able to cover up or compensate for their problems").

¹⁸⁵ Garda, *supra* note 86, at 464.

legislation welcomes all children whose disabilities impact a range of school performance – academic or otherwise.¹⁸⁶ Further, the policy expressed by the IDEA and by Supreme Court decisions interpreting the Act's post-eligibility provisions demand an inclusive understanding of "child with a disability."¹⁸⁷ Likewise, the Office of Special Education Compliance, the entity tasked with enforcing the IDEA, has issued multiple opinion letters, over three decades, each of which expresses its position that the words "adversely affects . . . educational performance" do *not* require that a child's disability result in bad or failing grades in school in order to be eligible under the Act.¹⁸⁸

A. *THE IDEA'S LEGISLATIVE HISTORY AND PLAIN LANGUAGE*

From the beginning, Congress's purpose in the Education for All Handicapped Children Act, and later in the Individuals with Disabilities Education Act, has been to secure for "all children with disabilities" access to public education in which they can make meaningful progress on a wide range of performance measures.¹⁸⁹ Congress consistently has recognized that children with disabilities have unique strengths and weaknesses, and not all children with disabilities have the same needs, making a single metric (like academic performance) for eligibility under the IDEA inappropriate.¹⁹⁰ The testimony presented to Congress as it contemplated the Education for All Handicapped Children Act in the early 1970s, as well as prominent judicial decisions contemplating the

¹⁸⁶ See *supra* notes 190-245 and accompanying text.

¹⁸⁷ See *supra* notes 246-68 and accompanying text.

¹⁸⁸ See *supra* notes 269-84 and accompanying text.

¹⁸⁹ 20 U.S.C. § 1400(d)(1)(A) (2006); see also Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 775 (1975) ("It is the purpose of this Act to assure that *all* handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.") (emphasis added). Despite multiple references throughout the IDEA to provision of special education services for "all" children with disabilities, not "all" children with disabilities are covered by the Act. Only those children with disabilities who satisfy all three eligibility requirements find their way into the world of special education offered through this legislation.

¹⁹⁰ See 20 U.S.C. § 1414(b)(2)(A)–(B) (2006 & Supp. 2011) (requiring that when local educational agencies conduct evaluations for purposes of determining eligibility under the IDEA they must "use a variety of assessment tools and strategies to gather relevant functional, developmental, *and* academic information" and that they may "*not* use any single measure or assessment as the sole criterion for determining whether the child is a child with a disability") (emphasis added).

Constitutional underpinnings of rights of children with disabilities in school, recognized the wide-ranging impacts disabilities have on children at school. This broad understanding of disability was incorporated into the Act.

Statistics compiled for Congress in the early 1970s as it considered the Education for All Handicapped Children Act drew Congress's attention to a range of handicapping conditions, each of which might or might not prohibit a child from earning passing grades. The Department of Education at that time reported that 82% of "emotionally disturbed" children, 82% of "hard-of-hearing" children, 67% of "deaf-blind" and "other multi-handicapped" children, and 88% of children classified as "learning disabled" required protection through the Act either because they were receiving inappropriate education without it or because they were being excluded from public schools entirely.¹⁹¹ At regional hearings held in 1973 and 1974, the Senate Subcommittee on the Handicapped of the Committee on Labor and Public Welfare put these statistics in context as it heard testimony about the failure of states to support children with disabilities of varying impact – from mild to severe.¹⁹² The Senate Subcommittee on the Handicapped then discussed provision of support services to meet wide-ranging schooling needs. The needs considered at the time included, *inter alia*, behavior help, individualized tutoring, self-care training programs, specialized diagnostic evaluations, and speech therapy.¹⁹³ Plainly, needs in "self care" or "behavior" are not traditionally considered "academic," yet Congress recognized from the beginning that the range of disabilities requiring protection under the Act would impact these important, non-academic components of learning necessary for children to make meaningful progress in school toward becoming independent and self-sufficient adults.

The spirit and holdings of two prominent anti-discrimination cases brought on behalf of children excluded from public schools as a result of asserted disabilities, *Pennsylvania Association for Retarded Children v. Pennsylvania*¹⁹⁴ and *Mills v. Board of Education of the District of Columbia*,¹⁹⁵ also inspired the current federal statutes. Both recognized that disabilities impacted non-academic components of education.¹⁹⁶

¹⁹¹ *Education for All Handicapped Children, 1973–74: Hearings Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare*, 93d Cong. 8-9 (1973).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

¹⁹⁵ *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

¹⁹⁶ *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 180 n.2 (1982) (recognizing that "[t]wo cases, *Mills* . . . and [*PARC*] . . . , were . . . identified as the most prominent of the cases contributing to Congress' enactment of the Act"); *see*

Neither *PARC* nor *Mills* focused exclusively on disabilities that impacted grades. Instead, in *Mills* in particular, the court considered claims brought on behalf of children, including the named plaintiff, whose disabilities created a “behavior problem” rather than a “grade problem” at school.¹⁹⁷ The court held that the Constitution protected the right of this behaviorally-impaired plaintiff to educational services in the public schools irrespective of his academic performance.¹⁹⁸ Reflecting on this holding during hearings on the passage of the Education of All Handicapped Children Act, Senator Mondale stated that in light of “[r]ecent court decisions,” the new legislation would ensure that “each handicapped child be treated as an individual with *unique strengths and weaknesses, and not as a member of a category of children all presumed to have the same needs.*”¹⁹⁹ All children may not experience adverse academic impacts requiring academic support; instead, some, like the plaintiff in *Mills*, may experience adverse behavioral impacts requiring “behavioral” support. This truth was embraced in the earliest versions of the IDEA.²⁰⁰

also WEBER, MAWDSLEY & REDFIELD, *supra* note 38, at 16 (recognizing that “*P.A.R.C.* and *Mills* provided the court-made law which became the basis for the rights which are now afforded by federal and state statutes to students in need of special services”).

¹⁹⁷ *Mills*, 348 F. Supp. at 869 (stating that plaintiffs and defendants admit that the named plaintiff, Peter Mills, for example, was excluded from school in the fourth grade because “Peter allegedly was a ‘behavior problem,’” not because Peter received poor grades, and holding that “defendants are required by the Constitution of the United States . . . to provide a publicly-supported education for these ‘exceptional’ children” without examining academic performance and that “insufficient funds” does not justify a failure to fulfill this obligation).

¹⁹⁸ *Id.* at 875–76. It is worth noting that several of the plaintiffs in *Mills* had been excluded from public school for “behavior” problems that may have been manifestations of unaccommodated disabilities as has happened with unaccommodated children with Asperger’s Syndrome. *See, e.g., Mr. I. ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4–6 (1st Cir. 2007) (considering the IDEA eligibility of a young girl who was denied IDEA eligibility and accommodations because she was excelling academically but who was ultimately removed from public schools by her parents after she began cutting herself, skipping school, and attempted suicide).

¹⁹⁹ *Education for All Handicapped Children, 1973-74: Hearings on S.6 Before the Subcomm. on the Handicapped of the S. Comm. on Labor and Public Welfare*, 93d Cong. 1153–54 (1973) (statement of Sen. Mondale, Member, S. Comm. on Labor and Public Welfare).

²⁰⁰ *See Rowley*, 458 U.S. at 180 (stating that Congress was “spurred by two District Court decisions [*Mills* and *PARC*] holding that handicapped children should be given access to a public education” when it passed the Education for All Handicapped Children Act and increased federal funding for children with disabilities).

Not only does this early legislative history support an inclusive understanding of disability under the IDEA as a whole and specifically within the regulatory requirement that disabilities “adversely affect[] . . . educational performance,”²⁰¹ but recent legislative action also reflects Congress’s continuing support for this original understanding. Members of Congress have expressed concern that children might be diagnosed with disabilities “when, in fact, they do not have such conditions.”²⁰² For this reason, Congress has been mindful to craft this legislation carefully to prevent non-disabled children from being designated disabled for purposes of the Act. In working toward this goal, however, Congress specifically declined to accomplish it through a requirement that disabling conditions significantly affect academic performance. Instead, over time, Congress repeatedly opened wider the door to eligibility under the IDEA, inviting in broader groups of children with increasingly diverse needs.

For example, in 1986, Congress opened the door to infants between birth and age three with developmental delays even when these infants had no history of academic or “grade” failure.²⁰³ In 1990, Congress specifically invited children with autism and traumatic brain injuries into the family of disabilities enumerated by the statute as qualifying for services and protection under the Act.²⁰⁴ In so doing, Congress chose not to require that children with these disabilities “fail first” in order to be recognized as having a qualifying disability. In 1997, Congress further opened the door to the services and protections afforded under the IDEA to children *without any diagnosed disability* at all so long as they experienced “developmental delays” between the ages of three and nine.²⁰⁵ Congress did not require these developmental delays to be measured in cognitive development or academic achievement.²⁰⁶ Instead, the IDEA expressly provides that these developmental delays might be measured in “physical development; . . . communication development; social or emotional development; or adaptive development,” in addition to *or instead of* cognitive development.²⁰⁷ In 2004, Congress again

²⁰¹ 34 C.F.R. § 300.8(c) (2011) (defining IDEA’s eligibility categories to require proof that the designated disabilities “adversely affect[] . . . education performance” except in the case of specific learning disabilities where this requirement is not imposed affirmatively, but may be implied in the diagnosis).

²⁰² S. REP. NO. 94-168, at 26–27 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1450.

²⁰³ See 20 U.S.C. §§ 1431–35 (2006 & Supp. 2011).

²⁰⁴ Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103 (1990); 20 U.S.C. § 1401(3)(A)(i) (2006 & Supp. 2011).

²⁰⁵ Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 11 Stat. 37 (1997) (codified in relevant part as amended at 20 U.S.C. § 1401(3)(B) (2006)).

²⁰⁶ 20 U.S.C. § 1401(3)(B) (2006).

²⁰⁷ *Id.*

broadened the ability of state and local governments to support students in need of special educational services through the IDEA by permitting use of up to 15% of IDEA funding for children in any grade from kindergarten through twelfth grade “who have not been identified as needing special education or related services [thus not satisfying the third prong of the standard IDEA-eligibility test] but who need additional academic and behavioral support to succeed in a general education environment.”²⁰⁸ Again, when Congress opened up IDEA’s resources to children *without* disabilities, it continued to recognize that demonstrated need for both “academic *and* behavioral support” at any level (not only at failure) justify some coverage under the Act.²⁰⁹ By repeatedly expanding the ways by which individuals might gain access to services and protections under the IDEA, and by consistently recognizing that performance can be measured more than just by academics at school, the legislative history of the IDEA belies judicial interpretations of the Act that limit eligible conditions to those that significantly affect grades or test scores.

The language of the IDEA itself also contradicts judicially-imposed eligibility limitations that require children to experience significant negative impacts on academic performance (failing grades) prior to being recognized as a “child with a disability” under the Act.²¹⁰ The IDEA defines a “child with a disability.” It provides that a child between

²⁰⁸ *Id.* § 1413(f)(1) (2006).

²⁰⁹ *Id.* (emphasis added).

²¹⁰ For examples of decisions in which courts have narrowly construed the IDEA’s eligibility requirements, see, e.g., *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont’s law to narrowly construe the meaning of the eligibility requirements under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York’s law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require that a disability have an “adverse impact on academic performance, as opposed to social development or integration”) (citing *C.B. ex rel. Z.G. v. Dep’t of Educ.*, No. 08-0881, 2009 WL 928093, at *1 (2d Cir. Apr. 7, 2009) and *Mr. N.C. v. Bedford Cent. Sch. Dist.*, No. 07-1077, 2008 WL 4874535, at *1–2 (2d Cir. Nov. 12, 2008)); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1106–09 (9th Cir. 2007) (relying on California law to narrowly construe the meaning of eligibility requirements under the IDEA to determine that if a child makes adequate academic progress in school with services offered outside an obligation under the IDEA, that child cannot suggest that he does not make academic progress to secure the same protections under the IDEA); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 308–11 (E.D.N.Y. 2010) (applying New York law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require an adverse academic effect on school rather than an adverse social or behavioral impact on school performance).

the ages of three and twenty-one,²¹¹ with one of the statutorily enumerated disabling conditions,²¹² who needs special education and related services “by reason thereof,”²¹³ is a “child with a disability” under the statute. That is it. The IDEA does not require that a child fail a course or a grade prior to being recognized as having a disability under the IDEA.

Of course, imposing a one-size-fits-all eligibility test or requiring a pre-determined grade-point average or test score as necessary for eligibility would simplify the IDEA-eligibility analysis, but Congress has never opted for simplicity. Instead, Congress consistently elected over time to require consideration of the complexity of unique needs and abilities in each individual child to facilitate their “full participation”²¹⁴ in school toward the goal of improving not only academic achievement, but also the “functional performance of children with disabilities”²¹⁵ as they prepare for a lifetime of “independent living, and economic self-sufficiency” through school.²¹⁶

Congress recognizes what society continues to work to understand: “Disability is a natural part of the human experience and in no way diminishes the rights of individuals to participate in or contribute to society.”²¹⁷ Education is “more effective” under the IDEA when we have “high expectations”²¹⁸ across the board and “provid[e] . . . aides and supports in the [inclusive] regular classroom . . . whenever appropriate” to facilitate children’s progress toward full community integration with independence and self-sufficiency, not exclusively when necessary to ensure passing grades.²¹⁹

Toward this end, eligibility determinations must be made by a team, not a test, using a variety of assessment tools and strategies not limited to academic assessments.²²⁰ The IDEA requires that Individualized Education Program Teams conducting evaluations for eligibility under the Act “use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information,” not limited to grades or test scores.²²¹ In making eligibility determinations,

²¹¹ 20 U.S.C. § 1412(a)(1)(A) (2006).

²¹² *Id.* § 1401(3)(A)(i) (2006 & Supp. 2011).

²¹³ *Id.* § 1401(3)(A)(ii) (2006).

²¹⁴ *Id.* § 1400(c)(1) (2006).

²¹⁵ *Id.* § 1400(c)(5)(E) (2006).

²¹⁶ *Id.* § 1400(c)(1) (2006).

²¹⁷ *Id.*

²¹⁸ *Id.* § 1400(c)(5)(A) (2006).

²¹⁹ *Id.* § 1400(c)(5)(D) (2006).

²²⁰ *Id.* § 1414(b)(2)(A)–(B) (2006 & Supp. 2011).

²²¹ *Id.* § 1414(b)(2)(A) (2006 & Supp. 2011); *see also* 34 C.F.R. § 300.306(a)(1) (2011) (providing that “[a] group of qualified professionals and the parent of the

the team must “[d]raw upon information from a variety of sources” with no particular source given greater weight than any other.²²² Recognized developmental delays identified through this evaluation process that can form the foundation for eligibility include delays in “communication[,] . . . social[,] . . . emotional[,] . . . or adaptive development,” not only delays in “cognitive development.”²²³ These statutory requirements raise the following rhetorical question: Why did Congress require schools to invest in diverse eligibility-assessment tools and to consider a diverse range of developmental delays if eligibility is to be established by a single measure—academic performance?

Some courts and critics of the IDEA’s inclusive understanding of disability point to the special education regulation stating that a child who has a recognized disability under the Act – autism, mental retardation, a hearing impairment, a speech or language impairment, a visual impairment, serious emotional disturbance, orthopedic impairment, traumatic brain injury, other health impairment, specific learning disability, deaf-blindness, or multiple disabilities²²⁴ – “but only needs a related service and not special education” is “not a child with a disability” for purposes of the IDEA.²²⁵ These critics conclude that this regulation means that a child with a disability who experiences adverse communication, social or behavioral consequences of the disability at school, but who receives passing academic marks, does not need special education, but only related services, and is not therefore a “child with a disability.”

This conclusion in this context (in determining whether a child will be recognized as having a disabling condition) has two flaws. First, when courts determine that a child does not fall within one of the statutorily enumerated disabling conditions for lack of academic failure under the regulatory requirement that disabilities “adversely affect . . . educational performance,”²²⁶ they resolve the second eligibility requirement under the IDEA – having a disabling condition – against the child. Analysis of this second element does *not* involve consideration of whether a child “by reason [of the disabling condition] needs special

child determines whether the child is a child with a disability” for purposes of eligibility under the Act); 34 C.F.R. § 300.321(a) (2011) (establishing the required members of the “IEP Team” for each child with a disability, including the parents of the child, a regular education teacher (if the child might participate in a regular education classroom), a special education provider, and a school system representative).

²²² 34 C.F.R. § 300.306(c) (2011).

²²³ 20 U.S.C. § 1401(3)(B)(i) (2006) (describing areas in which the IDEA covers developmental delays in children between the ages of three and nine).

²²⁴ 34 C.F.R. § 300.8(a)(1) (2011).

²²⁵ *Id.* § 300.8(a)(2)(i) (2011).

²²⁶ *Id.* § 300.8(c) (2011).

education and related services.”²²⁷ That is the precise question presented under the *third* eligibility requirement. In superimposing this “needs special education” requirement upon the definitions of disabling conditions, courts and critics render meaningless any independent requirement that the child have a disabling condition.²²⁸

Second, it does not follow from the regulation providing that a child must “need special education” in order to enjoy eligibility under the IDEA (as is also required under the third element of the statutory eligibility analysis) that only a single type of instruction – academic instruction to prevent academic failure – counts as “special education.” A conclusion of this sort is inconsistent with the IDEA’s definition of “special education” and “related services.” The IDEA defines “special education” to include *any* “specially designed instruction . . . to meet the *unique needs of a child* with a disability,” whether those needs are academic or otherwise.²²⁹ The Act further provides that this specially-designed instruction may be provided “in the classroom, in the home, in hospitals and institutions and in other settings” and may include “instruction in physical education.”²³⁰ Nothing in this definition suggests that only services necessary to produce good grades in school count as “special education.” Instead, recognition that special education is any instruction designed to meet the “unique needs of the child with a disability” means that when the child’s disability creates a “unique need” in communication, social integration, or behavior management, instruction designed to meet those needs falls squarely within the definition of special education under the Act.

This understanding of special education is consistent with the Act’s definition of “related services.” Related services are defined as a complement to special education. More specifically they include “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”²³¹ Examples of such services can include:

speech-language pathology services and audiology
services, interpreting services, psychological services,

²²⁷ *Id.* § 300.8(a)(1) (2011).

²²⁸ 34 C.F.R. § 300.8(c) (2011); *see also* Hensel, *supra* note 40, at 1197 (concluding that while it would be a positive future should disability labels and classifications become unnecessary as schools understand and automatically serve a continuum of needs and abilities without federal mandates, schools do not do this now, and “[t]o create a world where disability does not matter, educators and policy makers must begin with the recognition that it does”).

²²⁹ 20 U.S.C. § 1401(29) (2006) (emphasis added).

²³⁰ *Id.*

²³¹ *Id.* § 1401(26)(A) (2006).

physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services.²³²

Significantly, these are only examples, and they become “related services” under the act when they “assist a child . . . to benefit from special education.”²³³ On the other hand, when they are part of the “specially designed instruction . . . to meet the unique needs of a child with a disability” in the first instance, they are within the definition of “special education,” not “related services,” even if they might also qualify as a related service under other circumstances.²³⁴ On this point, the regulations are clear.

Eliminating any implication that non-academic instruction might automatically be characterized as exclusively “related services,” the regulations clarify that “special education” and “related services” are not mutually exclusive. They state that special education includes “any . . . related service, if the service is considered special education rather than a related service under State standards.”²³⁵ If the service is “specially designed . . . to meet the unique needs of a child with a disability” it is “special education,” whether or not it may also be a “related service.”²³⁶

The regulations offer a concrete example of this duality. “Speech-language pathology services” are listed as an example of a “related service” in the definition of that term.²³⁷ However, the regulations also specifically state: “Special education includes . . . [s]peech-language pathology services” under some circumstances.²³⁸ More generally, again, the regulations provide that “[s]pecial education includes . . . *any other related service*, if the service is considered special education rather than a related service under State standards.”²³⁹

²³² *Id.*

²³³ *See id.* § 1401(26)(A) (2006).

²³⁴ 34 C.F.R. § 300.39(a)(2)(i) (2011) (recognizing that special education includes “related service[s], if the service is considered special education rather than a related service”).

²³⁵ *Id.* § 300.39(2)(i) (2011).

²³⁶ 20 U.S.C. § 1401(29) (2006); *see also* 34 C.F.R. § 300.39(a)(2)(i) (2011).

²³⁷ *See* 20 U.S.C. § 1401(26)(A) (2006).

²³⁸ 34 C.F.R. § 300.39(a)(2)(i) (2011).

²³⁹ *Id.* (emphasis added).

For purposes of this Article's consideration of Asperger's Syndrome, "directly teaching social skills and pragmatic language . . . amounts to [special education] adapting the content of the usual instruction to address the unique needs of [the child with Asperger's Syndrome]."²⁴⁰ Teaching social skills and pragmatic language to an autistic child is teaching precisely to one of the areas in which the child experiences the impact of her disability most significantly.²⁴¹ This special instruction is necessary to ensure the child's ability to make meaningful progress in "educational performance [including] 'communication' and . . . career preparation."²⁴² Teaching "social skills and pragmatic language" is not a "related service" in educating most children on the autism spectrum.

Looking closely at the IDEA's definitions of "special education" and "related services," therefore, confirms that the regulation limiting eligibility to those students who require "special education" and not merely "related services," does not support a conclusion that children are required to fail on academic measures prior to being recognized as having a disabling condition under the Act. Looking further at the type of services required by the IDEA for children post-eligibility affirms that the IDEA contemplates initial eligibility of students who require more than academic support in order to make meaningful progress.²⁴³ The IDEA requires post-eligibility support specifically for "nonacademic and extracurricular services and activities" as well as "physical education"—areas of plainly "nonacademic" educational performance.²⁴⁴ The regulations also make clear that states must provide a free appropriate education to a child with disabilities who needs special education "even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade."²⁴⁵

Taken together, the legislative history underlying the original Education for All Handicapped Children Act, Congressional action expanding eligibility over time under the IDEA, the plain language of the IDEA's definition of a "child with a disability," and the post-eligibility recognition that special education requires support of children who have "not failed" and who "advanc[e] from grade to grade" all support a conclusion that the "adversely affect[] . . . educational performance" requirement attached to many of the disabling conditions under the Act is *not* synonymous with negative effects on academic performance.

²⁴⁰ *Mr. I ex rel. L.I. v. Me. Sch. Admin. Dist. No. 55*, 480 F.3d 1, 20–21 (1st Cir. 2007).

²⁴¹ See *supra* notes 143–70.

²⁴² *Mr. I*, 480 F.3d at 20–21.

²⁴³ 20 U.S.C. § 1400(d)(1)(A) (2006).

²⁴⁴ 34 C.F.R. § 300.107 (2011); see also 20 U.S.C. § 1401(29)(B) (2006) (defining special education to include "instruction in physical education").

²⁴⁵ 34 C.F.R. § 300.101(c)(1) (2011).

B. *THE POLICY IN THE IDEA AND THE SUPREME COURT'S
INTERPRETATION OF THE ACT*

Like the legislative history and the text of the IDEA, Supreme Court decisions interpreting the Act recognize that children may have disabling conditions under the Act even if they receive passing test scores and passing grades at school. Nevertheless, some lower courts have relied on the Court's decision in *Board of Education v. Rowley*²⁴⁶ to conclude otherwise.²⁴⁷ Reliance upon *Rowley* in the eligibility context is misplaced because *Rowley* did not raise or address a question of eligibility. It instead resolved the meaning of "appropriate education" for a child who indisputably satisfied the eligibility requirements under the IDEA.²⁴⁸ However, even when one takes the *Rowley* decision out of context and applies it to understandings of the IDEA's eligibility requirements, it fails to support a conclusion that children must fail first before becoming eligible for special education under the Act.

Rowley established, in the context of an IDEA-eligible child with a hearing impairment, that schools are not required to "furnish[] . . . every special service" available to "maximize [the] . . . child's potential."²⁴⁹ Instead, the IDEA requires schools to provide a "basic floor of opportunity" consisting of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction."²⁵⁰ In reaching this conclusion, however, the Court recognized that neither specific disabling conditions nor eligibility at large are limited to those children who do poorly on academic measures. From the outset, the Court accepted as a "child with a disability" who "needs special education and related services" a plaintiff who "performs better than the average child in her class and is advancing easily from grade to grade."²⁵¹ In fact, the IDEA-eligible child in *Rowley* was also "a remarkably well-adjusted child" who "interact[ed] well with her classmates" and "developed an extraordinary rapport with her

²⁴⁶ 458 U.S. 176 (1982).

²⁴⁷ See, e.g., *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007) (relying on *Rowley* to conclude that grades ranging from an A to a D disqualified a child with a recognized disability who had previously been served under the IDEA and who currently suffered admitted behavioral and emotional challenges in school from eligibility under the IDEA, but doing so under the "needs" element of the eligibility analysis rather than under the "has-a-disabling-condition" element); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1107 (9th Cir. 2007) (relying on *Rowley* to bolster a conclusion that state laws restrict eligibility under the IDEA to situations in which the child with a disability cannot make academic progress with supports offered outside the IDEA).

²⁴⁸ *Rowley*, 458 U.S. at 185.

²⁴⁹ *Id.* at 199.

²⁵⁰ *Id.* at 201, 203.

²⁵¹ *Id.* at 185.

teachers.”²⁵² In other words, the Court accepted that the plaintiff had a disabling condition *and* “need[ed] special education and related services” despite the fact that she outperformed her classmates academically, advanced “easily from grade to grade,” and otherwise thrived in the academic environment at school.²⁵³ This supports a conclusion that academic failure is not a prerequisite to eligibility under either the second (having-a-disabling-condition) or third (needing-special-education-and-related-services) elements of the eligibility analysis.

Additionally, the *Rowley* Court specifically stated, “We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a ‘free appropriate education.’”²⁵⁴ Instead, the Court concluded that “grading and advancement” constitute one “factor in determining educational benefit.”²⁵⁵ Through this recognition that grade advancement does not equal “appropriate education,” the Court implicitly acknowledged that successful academic performance is not the only measure of educational performance at school. In other words, a child advancing from grade to grade due to strong academic performance may not be advancing in other areas of educational performance, making the child’s education insufficient overall.

This understanding of the IDEA’s broad inclusion of children with a variety of educational needs is supported by other Supreme Court decisions as well. While the Court has never interpreted the regulatory “adversely affects . . . educational performance” standard under the Act, it has considered other statutory provisions in a manner that sheds relevant light on the overall legislation. For example, in *Honig v. Doe*, the Court held that schools must provide social and behavioral support to children with emotional impairments to allow them to benefit from regular educational instruction, even when the behavioral and social challenges posed by their disabilities create a potential safety risk.²⁵⁶ Similarly, in *Cedar Rapids v. Community School District v. Garret F.*, the Court held that a school must provide practical support in the form of “continuous one-on-one nursing service” to support a child’s “ventilator dependency” such that he could remain in school during the school day.²⁵⁷

These Supreme Court decisions recognize that the “Act requires participating States to educate a wide spectrum of handicapped children,

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 203 n.25.

²⁵⁵ *Id.* at 203.

²⁵⁶ 484 U.S. 305, 307 (1988).

²⁵⁷ 526 U.S. 66, 67, 70, 76 (1999).

from the marginally hearing-impaired to the profoundly retarded and palsied.”²⁵⁸ Similarly, they recognize that different children require different services in order to access the education provided in the public schools. “One child may have little difficulty competing successfully in the academic setting with non-handicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills.”²⁵⁹ While some children with disabilities may experience academic failure and require academic support services through the IDEA, other children with disabilities, like the plaintiffs in *Honig* and A.J. in the introductory case, may receive fine academic assessments but experience setbacks in behavioral and social performance at school requiring support services in those areas. Other children with disabilities, like the plaintiff in *Cedar Rapids Community School*, may also enjoy fine cognitive capacities, but yet require extensive practical support services in order to remain in school.

Any interpretation of the disabling conditions under the IDEA to exclude children unless and until they first fail academically flies in the face of this inclusive understanding of disability reflected in the Act and in the Supreme Court decisions interpreting it. Congress intended and the Court has recognized “that handicapped children [should] be enabled to achieve a reasonable degree of self-sufficiency . . . to become productive citizens, contributing to society instead of being forced to remain burdens.”²⁶⁰ “[P]roviding appropriate educational services now [while children remain children] means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.”²⁶¹

To become independent and self-sufficient members of society, children with disabilities must often master skills that other children without their disabilities learn in their homes with the support of their families and without formal education at school. For example, some children with significant impairments, in order to become independent and self-sufficient members of society, must work hard to master basic living skills including toileting, dressing, and feeding themselves.²⁶² Most children without significant disabilities develop these skills in their homes. For children with significant impairments, however, instruction

²⁵⁸ *Rowley*, 458 U.S. at 202.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 201 n.23 (internal quotations and citations omitted).

²⁶¹ *Id.* (internal quotations and citations omitted).

²⁶² See *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir. 1988) (recognizing that provision of a free appropriate public education to a child who contracted encephalopathy as a child and who had at fourteen years of age “the functional and mental capacity of a toddler” requires special education consisting of “learning basic life skills such as feeding himself, dressing himself, and using the toilet”).

and support in learning these skills must become part of their special educational program.²⁶³ No one suggests that these children, with educational needs of this sort, are not entitled to this special educational instruction under the IDEA.²⁶⁴

Likewise, children without significant cognitive deficits but with other disabilities (like children with Asperger's Syndrome) in order to become independent, self-sufficient, and employable members of society, must work hard to master social living and pragmatic communication skills, such as making eye contact with others, engaging in reciprocal conversation, tolerating group interaction and touch, interpreting nonverbal communication cues, or avoiding verbal outbursts.²⁶⁵ Most children without disabilities develop these skills in their homes with the support of their families and without formal education. For children with Asperger's Syndrome, however, instruction and support in learning these skills must become part of a special education program.²⁶⁶ The IDEA includes these children with disabilities just as much as it includes children with impairments impacting their abilities to master other basic living skills regardless of whether they have satisfactory academic performance.²⁶⁷ By doing so, the IDEA increases the likelihood that children with Asperger's Syndrome "will be able to become a contributing part of our society, and . . . will not have to depend on subsistence payments from public funds."²⁶⁸

²⁶³ *Id.* at 173 (recognizing that provision of a free appropriate public education to a child who contracted encephalopathy as a child and who had at fourteen years of age "the functional and mental capacity of a toddler" requires special education consisting of "learning basic life skills such as feeding himself, dressing himself, and using the toilet").

²⁶⁴ *Id.*

²⁶⁵ *See supra* notes 153-57 (discussing the case of Cathleen Comber, an adult with high-functioning autism, and the employment consequences she faced when confronted by an employer who refused to accommodate a symptom of her autism resulting in a verbal outburst (also a symptom of autism arising out of communication and social perceptive challenges associated with the disability) leading to her termination).

²⁶⁶ *See supra* notes 3-24 (discussing the case of A.J., a child with Asperger's Syndrome who performed well as a kindergartener on academic tasks, but who experienced significant social and behavioral performance deficits in the classroom when compared to his non-disabled peers).

²⁶⁷ OSEP Letter to Anonymous, 110 LRP 52277 (January 13, 2010) (recognizing that the IDEA entitles a child with "high-cognition" and with Asperger's Syndrome to "special education and related services" to address his needs in "the affective areas, [including] social skills and classroom behavior, as appropriate").

²⁶⁸ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 n.23 (1982); *see also supra* notes 153-57 (highlighting the case of an adult with high-functioning autism who lost her job at least in part because she did not have effective pre-employment

C. OSEP INTERPRETATIONS OF THE IDEA

The United States Department of Education, Office of Special Education Programs (OSEP), administers the IDEA and provides guidance on issues of special education to state and local governments.²⁶⁹ As part of this responsibility, it answers questions from state and local governmental officials who have concerns about the IDEA. Although OSEP's opinion letters amount to informal guidance and are not legally binding, they represent the position of the United States Department of Education on the meaning of the legislation it administers.

Over the course of three decades, OSEP has repeatedly and consistently interpreted the phrase "adversely affect[] . . . educational performance" in the regulations defining autism and other disabling conditions with an inclusive understanding of disability.²⁷⁰ Specifically, in letters from 1980 through 2010, OSEP has confirmed that children may be children "with" specified disabling conditions without first failing in academic performance.²⁷¹ OSEP has made clear its position that "[t]he [eligibility] assessment is more than the measurement of the child's academic performance as determined by standardized measures."²⁷²

In 1980, in response to a request for clarification of the "adversely affects . . . educational performance" provision within the regulatory definition of a speech impairment, OSEP "stated that academic achievement was not the sole benchmark of an adverse affect on educational performance."²⁷³ OSEP opined that "experts should determine whether a speech impairment" has adverse effects on educational performance in each particular case under *all* the circumstances.²⁷⁴

training in non-academic performance areas impacted by her autism, including effective pragmatic communication, social skills, and behavior skills).

²⁶⁹ *OSEP Mission Statement*, ED.GOV, <http://www2.ed.gov/about/offices/list/osers/osep/mission.html> (last updated July 8, 2004).

²⁷⁰ *See, e.g.*, OSEP Letter to Lillie/Felton, 23 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 714 (April 5, 1995); OSEP Letter to Pawlisch, 24 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 959 (March 6, 1996); OSEP Letter to Clarke, 48 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. (March 8, 2007); OSEP Letter to Anonymous, *supra* note 267 (also considering gifted children with a handful of other disabilities, notably ADHD and specific learning disabilities).

²⁷¹ *See supra* note 260.

²⁷² OSEP Letter to Pawlisch, *supra* note 270.

²⁷³ *Mary P. v. Ill. State Bd. of Educ.*, 919 F. Supp. 1173, 1176 (N.D. Ill. 1996).

²⁷⁴ *Id.*

In 1995, OSEP reiterated that students who make progress in the regular educational environment, including students with physical impairments who perform well in school, may require special educational services. OSEP explained that the phrase “adversely affects . . . educational performance” is not subject to precise definition.²⁷⁵ This phrase, according to OSEP, must instead be established on a case-by-case basis taking into account the totality of facts and circumstances in each instance.²⁷⁶

In 2007, OSEP responded to a “request [for] guidance and/or clarification” about whether “the policy on . . . ‘adversely affects educational performance’ as described in [the 1980 OSEP letter] remains the policy of the U.S. Department of Education, Office of Special Education Programs.”²⁷⁷ OSEP responded, “It remains the Department’s position that the term ‘educational performance’ as used in the IDEA and its implementing regulations is not limited to academic performance.”²⁷⁸ Further, OSEP reemphasized that “whether a[n] . . . impairment adversely affects a child’s educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas.”²⁷⁹ OSEP also reiterated that eligibility determinations require consideration of a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information . . . [and are] not limited to information about the child’s academic performance.”²⁸⁰

Most recently in 2010, OSEP addressed specifically whether children with Asperger’s Syndrome and high cognitive function or “giftedness” are eligible for special educational services under the IDEA when they “struggle to timely complete grade-level work and have difficulties with organizational skills, homework completion, affective areas, social skills, classroom behavior, reading and math fluency, [or] writing and math operations” but otherwise do well academically.²⁸¹ OSEP responded with unwavering clarity and consistency: “It remains the Department’s position that students who have high cognition, have disabilities[,] and require special education and related services *are protected* under the IDEA and its implementing regulations.”²⁸² OSEP

²⁷⁵ OSEP Letter to Lillie/Felton, *supra* note 270.

²⁷⁶ *Id.*

²⁷⁷ OSEP Letter to Clarke, *supra* note 270.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ OSEP Letter to Anonymous, *supra* note 267 (also considering gifted children with a handful of other disabilities, notably ADHD and specific learning disabilities).

²⁸² *Id.* (emphasis added).

explained that “a child with high cognition and . . . with Asperger’s Syndrome could be addressed under the disability category of autism[,] and the individualized evaluation would address the special education and related services needs in the affective areas, social skills and classroom behavior, as appropriate,” rather than in academic performance.²⁸³ Ultimately, this 2010 OSEP letter concluded in now-familiar terms: “the IDEA and its regulations *do* provide protections for students with high cognition and disabilities who require special education and related services to address their individual needs.”²⁸⁴

In the end, taking together the IDEA’s legislative history, the terms of the IDEA itself, Supreme Court interpretations of the Act, and OSEP’s guidance, there can be little doubt that judicial interpretations of “adversely affects . . . educational performance” limiting disabling conditions to those that result in failing academic performance are contrary to the IDEA’s mandate throughout its thirty-five year history.

IV. FACING THE JUDICIALLY-IMPOSED ACADEMIC “FAILURE FIRST” REQUIREMENT: CONFRONTING THE CONSTITUTIONAL VULNERABILITY IT CREATES.

When federal courts define the regulatory phrase “adversely affects educational performance” narrowly, they not only create inconsistencies with the IDEA’s statutory mandate, they also raise constitutional concerns. While it is unlikely that equal protection claims like those originally raised in *Mills*²⁸⁵ and *PARC*²⁸⁶ might be revitalized by children with disabilities who are once again excluded from appropriate educational services through narrow constructions of the statute, a new constitutional concern arises out of courts’ reliance on state law to interpret the federal statute. When state law definitions of the IDEA’s terms exclude children with disabilities who would otherwise be covered by the Act, those state law definitions must be preempted by the IDEA under the Supremacy Clause.²⁸⁷

When federal courts turn to state laws to define the federal regulatory phrase “adversely affects . . . educational performance,” they raise a Supremacy Clause concern. The Supremacy Clause in Article VI of the Constitution provides that the “Constitution, and the Laws of the

²⁸³ *Id.*

²⁸⁴ *Id.* (emphasis added).

²⁸⁵ *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

²⁸⁶ *Pa. Ass’n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972).

²⁸⁷ U.S. CONST. art. VI, cl. 2; *see also* Weber, *supra* note 60, at 117–18 (introducing this Supremacy Clause concern and concluding that state regulations restricting the IDEA’s eligibility provisions are pre-empted by the IDEA under the Supremacy Clause).

United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”²⁸⁸ Pursuant to this language, “[s]tate law provisions that restrict entitlements established by federal statutes are void under the Supremacy Clause of the Constitution.”²⁸⁹

In the IDEA context, some scholars have advocated in favor of turning to state law to give meaning to the “adversely affects . . . educational performance” requirement despite this federal preemption concern. These scholars argue that states and localities are “recognized experts in education” who have authority to make decisions about educational programming for purposes of the IDEA’s “free appropriate public education” standard.²⁹⁰ As a result they argue that states are best suited to fill in gaps throughout the IDEA, including in the eligibility provisions.²⁹¹ Some courts follow this reasoning and rely on state law to interpret the “adversely affects educational performance” standard in the IDEA.

Other scholars assert that reliance on state law in the eligibility context, as opposed to the determining-free-appropriate-public-education-standards context, is inappropriate. These scholars make the case that states cannot determine “who is to be served under a federally[-]funded program designed to address the national problem of children with disabilities who are out of school or in inappropriate programs.”²⁹² This determination, they argue, was made by Congress in the IDEA.

This Article does not take a position on the question of whether it is ever appropriate to turn to state law to illuminate the meaning of the IDEA’s undefined eligibility requirements – like the “adversely affects educational performance” requirement in the regulatory definitions of some disabilities.²⁹³ Such a position is unnecessary for purposes of this Article. Any comprehensive assessment of states’ expectations about student performance at school must recognize that all states impose behavioral, social, communication, and sensory expectations on students, in addition to academic performance expectations, through statutes or

²⁸⁸ U.S. CONST. art. VI, cl. 2.

²⁸⁹ Weber, *supra* note 60, at 117–18.

²⁹⁰ See Garda, *supra* note 86, at 465.

²⁹¹ *Id.*

²⁹² See Weber, *supra* note 60, at 117–18.

²⁹³ Of course, it is entirely appropriate to turn to state law under certain circumstances outside the eligibility context, and Congress has expressly identified such circumstances. See, e.g., 20 U.S.C.A. § 1401(9)(B) (2006) (defining FAPE to include satisfying standards of the state educational agency); *Id.* at § 1401(3) (2006) (allowing states some discretion in defining developmental delay).

policies.²⁹⁴ While many states do not require teachers to spend time affirmatively teaching each of these performance expectations as part of the academic curriculum, they exist “on the books” so to speak, and students must satisfy them or receive negative consequences in the form of school discipline or bad grades or otherwise, depending upon the circumstances. Thus, students whose disabilities adversely impact their ability to satisfy expectations in *any* performance area, even if their disability does not adversely impact their ability to perform in *all* of them, are children with disabilities who require special education in the impacted area(s). If state laws are considered in this manner, they are consistent with the IDEA’s terms, history, and expressed purpose.²⁹⁵ As such, this broad view of state law for purposes of understanding “adversely affects educational performance” in the IDEA’s disability definitions would not conflict with the federal law or raise a Supremacy Clause concern.

This Article *does* take a position on the question of whether courts may constitutionally consider select provisions in state special education law or policy rather than the totality of state public school law or policy to interpret federal IDEA eligibility provisions narrowly, limiting access to the IDEA exclusively to students whose disabilities result in academic failure.²⁹⁶ A narrow look at state law in this manner is impermissible and

²⁹⁴ Each state has adopted policies or statutes establishing behavioral performance expectations by requiring, for example, that students avoid getting in fights or bringing weapons to class. *See, e.g.*, N.C. GEN. STAT. § 115C-390.1 - .11 (2012); *see also* Eric Blumenson & Eva S. Nilsen, *One Strike and You're Out? Constitutional Constraints on Zero Tolerance in Public Education*, 81 WASH. U. L. Q. 65, 69 (2003) (recognizing that after Congress passed the Gun Free Schools Act “all fifty states enacted the required zero tolerance policies, [and] a large majority of states chose to go further”). Likewise, each state has adopted policies or procedures establishing communication performance expectations by requiring, for example, particular types of social communication to be socially respectful and prohibiting other types of communication (sexually harassing communications, bullying communications, gang communications, threatening communications, for example) understood to be socially inappropriate. *See, e.g.*, N.C. GEN. STAT. § 115C-407.15-.17 (2011). Naturally, by providing education in an active multi-sensory environment, states expect students to be able to manage multiple sensory stimuli simultaneously. Of course, states also establish the curriculum through which children are expected to learn, but this is only one of many areas of expected educational performance.

²⁹⁵ *See* discussion *supra* Parts II.A, II.B.

²⁹⁶ *See, e.g.*, *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont’s special education rule 2362(2) & (3) to narrowly construe the meaning of the eligibility requirements under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*, 688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York’s law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require that a

does raise a Supremacy Clause concern. In other words, even if it is permissible for courts to rely on state law to understand undefined IDEA-eligibility terms in some situations, a limited look at less than the totality of a state's public school laws to limit eligibility violates the Supremacy Clause when doing so produces an outcome in conflict with federal law.²⁹⁷

As the Supreme Court has recognized: “[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’”²⁹⁸ The difficulty in pre-emption law is, of course, determining whether a particular state or local law “interferes with or is contrary to” a federal law on the same question. The Supreme Court has recognized a variety of circumstances in which state or local laws interfere with or are contrary to federal law for purposes of pre-emption doctrine. Of the multiple means by which a state or local law may be pre-empted by federal law, the most relevant in this context is “implied conflict pre-emption.”

Pre-emption may be either express or implied, and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose. Absent explicitly pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the

disability have an “adverse impact on academic performance as opposed to social development or integration”) (citing *In re C.B. ex rel. Z.G. v. Dep’t of Educ.*, No. 08-0881, 2009 WL 928093, at *1 (2d Cir. Apr. 7, 2009) and *Mr. N.C. v. Bedford Cent. Sch. Dist.*, No. 07-1077, 2008 WL 4874535, at *1–2 (2d Cir. Nov. 12, 2008)); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099 (9th Cir. 2007) (relying on California law to narrowly construe the meaning of eligibility requirements under the IDEA to determine that if a child makes adequate academic progress in school with services offered outside an obligation under the IDEA, that child cannot suggest that he does not make academic progress to secure the same protections under the IDEA); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 302 (E.D.N.Y. 2010) (applying New York law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require an adverse academic affect effect on school performance rather than an adverse social or behavioral impact on school performance); *cf. Mr. I ex rel. L.I. v. Me. Sch. Admin. Unit No. 55*, 480 F.3d 1, 11–13 (1st Cir. 2007) (applying Vermont’s law to give the IDEA’s eligibility requirements broadly to be inclusive).

²⁹⁷ *Townsend v. Swank*, 404 U.S. 282, 285 (1971) (holding also “that the Illinois statute and regulation conflict with [section] 406(a)(2)(B) [in the federal Social Security Act’s Aid to Families with Dependent Children Program] and for that reason are invalid under the Supremacy Clause”).

²⁹⁸ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (internal citations omitted).

scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and *conflict pre-emption*, where compliance with both federal and state regulations is a physical impossibility or *where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*.²⁹⁹

While multiple means exist through which a state or local law may be pre-empted by a federal law, the Court has emphasized in each of these contexts that “[t]he exercise of federal supremacy is not lightly to be presumed.”³⁰⁰ In fact, any pre-emption analysis must “start with the assumption that the historic powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.”³⁰¹ Nonetheless, “the current Supreme Court, with its commitment to federalism and protecting states’ rights, has been quite willing to find preemption.”³⁰² In fact, “[e]ven if Congress has not expressly preempted state law, and even if federal law does not occupy the field and there is no conflict between the federal and state laws, preemption still can be found if a court concludes that the state law interferes with a federal goal.”³⁰³

This occurs when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”³⁰⁴ This can happen readily – and has happened – in instances

²⁹⁹ *Id.* at 98 (emphasis added) (internal citations and quotations omitted).

³⁰⁰ *N.Y. State Dep’t of Soc. Servs. v. Dublino*, 413 U.S. 405, 413 (1973) (citations and quotations omitted).

³⁰¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

³⁰² ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 405 (4th ed. 2011); *see also* *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (finding federal law to preempt state law); *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341 (2001); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363 (2000); *Grier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). *But see* *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (“I cannot join the majority’s implicit endorsement of far-reaching implied pre-emption doctrines. . . . I have become increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law [I]mplied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution.”).

³⁰³ CHERMERINSKY, *supra* note 302, at 423.

³⁰⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

in which federal legislation creates a system of cooperative federalism.³⁰⁵

“IDEA is frequently described as a model of cooperative federalism.”³⁰⁶ Cooperative federalism is “a system in which . . . divided authority is brought together . . . [to] enable[] the cooperating governments to benefit from one another’s special capacities while still preserving the value of political pluralism.”³⁰⁷ Through cooperative federalism, a national program is “financed largely by the Federal Government . . . and is administered by the States. States are not required to participate . . . but those which desire to take advantage of the substantial federal funds available for distribution . . . are required to submit” to the federal law.³⁰⁸

In the specific context of the IDEA, “the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, [but] it imposes significant requirements to be followed in the discharge of that responsibility.”³⁰⁹ Compliance by the states with the federal requirements “is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act . . . and by the provision for judicial review.”³¹⁰ When states enforce state laws, regulations, or policies in conflict with provisions or the purpose of the controlling federal legislation, the state laws are invalid.³¹¹

³⁰⁵ See, e.g., *Rosado v. Wyman*, 397 U.S. 397 (1970) (finding state law preempted by federal law that established a system of cooperative federalism with the state); *King v. Smith*, 392 U.S. 309 (1968).

³⁰⁶ *Schaffer v. Weast*, 546 U.S. 49, 52 n.1 (2005) (internal citations and quotations omitted).

³⁰⁷ Lara Gelbwasser Freed, *Cooperative Federalism Post-Schaffer: The Burden of Proof and Preemption in Special Education*, 2009 BYU EDUC. & L.J. 103, 114 (2009) (quoting MARTHA DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS: PUBLIC ASSISTANCE IN MASSACHUSETTS* 220 (1970)).

³⁰⁸ *King*, 392 U.S. at 316.

³⁰⁹ *Bd. of Educ. v. Rowley*, 458 U.S. 176, 183 (1982).

³¹⁰ *Id.*

³¹¹ See, e.g., *King*, 392 U.S. at 333 (holding that a state regulation was “invalid because it defines ‘parent’ in a manner that is inconsistent with [a particular provision in the federal Social Security Act]”); *Nash v. Fl. Indus. Comm’n*, 389 U.S. 235 (1967) (finding that a state law denying unemployment benefits to individuals who filed an unfair labor practice charge with the National Labor Relations Board was preempted by the National Labor Relations Act because the state law imposed a punishment for doing something the Court inferred was a key purpose of the Act).

In both *King v. Smith*³¹² and *Rosado v. Wyman*,³¹³ the Supreme Court held that state-law definitions of undefined federal terms in a federal statute through which federal and state governments shared a cooperative federalism relationship were unconstitutional because those state-law definitions “impermissibly lowered” the benefit federal law intended to provide. Both *King* and *Rosado* arose in the context of states’ provision of welfare benefits pursuant to the Aid to Families with Dependent Children provisions of the Social Security Act.

In *King*, the Court considered a state’s definition of the word “parent,” an undefined word within the federal definition of “dependent child” in the Social Security Act. The state law included a “substitute father,” any able-bodied man who “cohabits” with a natural or adoptive mother of the dependent child at any place, either in the child’s home permanently or as an occasional visitor or outside the child’s home, within its definition of “parent” for purposes of administering the federal law.³¹⁴ Under the state law, “substitute fathers” were considered “parents” even if they had no legal obligation to support the children at issue and did not in fact support the children at issue.³¹⁵ A family who would have qualified for benefits under the federal program but for the state’s definition of “parent” (as the mother was cohabiting with a man who had no financial obligation to her children and who was not offering any financial support) challenged the constitutionality of the state definition precluding them from benefits.³¹⁶

In considering this challenge, the Court first interpreted the word “parent” in the federal law independently of the state law and concluded that under the federal law the word “parent” included only individuals with a legal obligation to support the dependent child.³¹⁷ The Court then considered the effect of the state law on this interpretation of the federal law and recognized that the state-law definition of “parent” significantly restricted the reach and benefit of the Aid to Families with Dependent Children program under the Social Security Act.³¹⁸ As a result, the state-

³¹² 392 U.S. at 309.

³¹³ 397 U.S. 397 (1970).

³¹⁴ *King*, 392 U.S. at 314.

³¹⁵ *Id.* at 313–314.

³¹⁶ *Id.* at 311, 315.

³¹⁷ *Id.* at 329.

³¹⁸ *Id.* at 329–33. Similarly, in *Rosado*, the Court held that a state law provision redefining its standard for need and setting benefit amounts under the Aid for Families with Dependent Children program established under the Social Security Act failed to conform to the requirements of the federal law under the Court’s interpretation of the otherwise undefined federal provisions. “The impact of the new system [under state law] has been to *reduce substantially* benefits paid to families of these petitioners and of those similarly situated” 397 U.S. at 416 (emphasis added). “When (federal) money is spent to promote

law definition was preempted by the federal law under the Supremacy Clause.

In both *King* and *Rosado*, the Court emphasized that “[t]here is no question that [s]tates have considerable latitude”³¹⁹ and “a great deal of discretion”³²⁰ with respect to welfare standards within their borders. Likewise, the Court acknowledged that matters of morality and family, like the ones at issue in *King*, typically are within states’ “general power.”³²¹ As such, the Court did “not . . . question . . . [states’] general power to deal with conduct it regards as immoral and with the problem of illegitimacy.”³²²

However, despite states’ general authority over issues of morality and family within their borders, and despite their general discretion to set standards for welfare benefits, a restrictive state-law definition of an undefined federal term effectively limiting access to a federal benefit was constitutionally impermissible. The Court emphasized that through passage of the Act “Congress [] determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children [when] protection of such children is the paramount goal of [the Aid for Families with Dependent Children program].”³²³ The Court then determined from the “pattern of [the] legislation” that its goal was “clear[.]”³²⁴ The state law definition of “parent” to include “substitute fathers” who had no legal obligation to support dependent children was inconsistent with that goal and deprived needy children of support to which they were entitled under the federal law and was “therefore invalid.”³²⁵

The facts of *King* and *Rosado* parallel the facts presented in this Article’s introductory example case and subsequent analysis. Just as the restrictive state law definition of “parent” in *King* disqualified needy children who were otherwise within the scope of the federal law’s reach, the restrictive state law definitions of “educational performance” at issue

the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states.” *Id.* at 423 (quoting Justice Cardozo in *Helvering v. Davis*, 301 U.S. 619, 645 (1927)) (internal quotation marks omitted). Thus, the Court ruled that federal funds could not be used pursuant to the state statute as written. *Id.* at 421–22. For a further discussion of the applicability of the *Rosado* and *King* analysis to restrictive interpretations of the IDEA’s eligibility provisions under state laws, see Weber, *supra* note 60, at 118–19.

³¹⁹ *King*, 392 U.S. at 318.

³²⁰ *Rosado*, 397 U.S. at 408.

³²¹ *King*, 392 U.S. at 320.

³²² *Id.*

³²³ *Id.* at 325.

³²⁴ *Id.* at 332.

³²⁵ *Id.* at 333.

in IDEA-eligibility cases disqualify children with disabilities who would otherwise be within the scope of the IDEA's protections.

While it is true that education is typically within the province of state law,³²⁶ the same can be said of morality and family, which were at issue in *King*. The Court in *King* held that states' "general power" and "discretion" to govern in a particular area do not preclude Congress from limiting states' ability to do so when they accept federal funds to administer a federal program, like the Aid to Families with Dependent Children program or, in the case under consideration here, the IDEA's special education program. Thus, the fact that states have "general power" and "discretion" over education does not prevent a conclusion that state-law definitions of "educational performance" limiting the reach of the IDEA are in violation of the Supremacy Clause of the Constitution.

"When (federal) money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states."³²⁷ Likewise, when federal money is spent to promote improvement of educational results for "children with disabilities," the concept of "children with disabilities" is shaped by Congress, not the states. Thus, under the IDEA, just as under the Aid to Families with Dependent Children program, when states attempt to shape this benefit in a manner that diminishes or conflicts with the Congressional purpose, the state attempt is invalid.³²⁸ More specifically for purposes of this Article, when state laws define "adversely affects educational performance" to require significant effects on academic performance amounting to failure, the state laws impermissibly deny the benefits of the IDEA to some children with disabilities who would otherwise enjoy the benefits of the Act, like A.J. and many other children with Asperger's Syndrome.

While children with Asperger's Syndrome often experience the negative effects of their disabilities at school,³²⁹ restrictive state laws have impermissibly denied them benefits otherwise afforded to them by Congress under the IDEA.³³⁰ Thus, under the analysis in *King* and

³²⁶ See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 183 (1982) (recognizing that even in this specialized context Congress "leaves to the States the primary responsibility for developing and executing educational programs for handicapped children").

³²⁷ *Rosado v. Wyman*, 397 U.S. 397, 423 (1970) (quoting *Helvering v. Davis*, 301 U.S. 619 (1937)) (internal quotation marks omitted).

³²⁸ See *King*, 392 U.S. at 320, 332–33.

³²⁹ See *supra* notes 158–70 and accompanying text.

³³⁰ See, e.g., *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66–68 (2d Cir. 2000) (applying Vermont's law to narrowly construe the meaning of the eligibility requirements under the IDEA); *Maus v. Wappingers Cent. Sch. Dist.*,

Rosado, these restrictive interpretations of “adversely affects educational performance” ought be constitutionally preempted by the IDEA under the Supremacy Clause.

CONCLUSION

The conclusion is clear: The IDEA envisions, and the Constitution and public policy support, an open-door approach to disability designation for purposes of eligibility under the Individuals with Disabilities Education Act. In fact, the IDEA and its regulations, when properly understood, *require* educators and courts to enforce the Act on behalf of all school-age children who need special educational services in any performance area, even when some of those children earn passing grades in class. The IDEA’s optimistic goal to improve “educational results for children with disabilities” as a matter of “equality of opportunity” is advanced only when this mandate is embraced in full.

Narrow interpretations of the IDEA’s eligibility provisions that require children *with recognized disabilities* to “fail first” academically in order to be included as disabled for purposes of the Act dilute the Act’s power to promote its goal of ensuring all children with disabilities an equal opportunity for success in school. They also place at risk the long-term achievement of those children with disabilities who, at least temporarily, earn passing grades. More specifically, when courts narrowly construe the IDEA’s eligibility requirements to close the door on children like A.J. and others with Asperger’s Syndrome whose disabilities place them close to the perceived border between general and special education, they create an illusory crater between “regular” and “special” education students. This illusory crater risks entrenching the concept of the disabled as “other,” enhancing the stigma associated with disability, and ultimately making it less likely that *any* children with

688 F. Supp. 2d 282, 294 (S.D.N.Y. 2010) (applying New York’s law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require that a disability have an “adverse impact on academic performance, as opposed to social development or integration”) (citing *In re C.B. ex. rel. Z.G. v. Dep’t of Educ.*, No. 08-0881, 2009 WL 928093, at *1 (2d Cir. Apr. 7, 2009) and *Mr. N.C. v. Bedford Cent. Sch. Dist.*, No. 07-1077, 2008 WL 4874535, at *1–2 (2d Cir. Nov. 12, 2008)); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1106–09 (9th Cir. 2007) (relying on California law to narrowly construe the meaning of eligibility requirements under the IDEA to determine that if a child makes adequate academic progress in school with services offered outside an obligation under the IDEA, that child cannot suggest that he does not make academic progress to secure the same protections under the IDEA); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299, 308–11 (E.D.N.Y. 2010) (applying New York law in an Asperger’s Syndrome case to narrowly construe the meaning of the eligibility requirements under the IDEA to require an adverse academic effect on school rather than an adverse social or behavioral impact on school performance).

disabilities will find themselves fully integrated into society and able to engage in meaningful work toward our collective good.

To prevent this future of failure, courts need only embrace the IDEA as it is written and enforce its inclusive understanding of disability. With consistent enforcement in this manner over time, educators and school children may come to embrace the natural continuum of human ability and grow to consider it in the ordinary course of planning and experiencing life. When this happens, Americans will have taken a significant step forward toward fulfillment of our national policy of ensuring “equality of opportunity” for all children, including those with a range of differing abilities.