

No. 22-1280

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

COALITION FOR TJ,
Plaintiff-Appellee,

v.

FAIRFAX COUNTY SCHOOL BOARD,
Defendant-Appellant.

On Appeal from a Judgment of the United States District Court
for the Eastern District of Virginia
(Hon. Claude M. Hilton) No. 1:21-cv-00296-CMH-JFA

**BRIEF OF AMICI CURIAE FAIRFAX COUNTY PARENTS
ASSOCIATION AND FAIRFAX COUNTY ASSOCIATION FOR THE
GIFTED IN SUPPORT OF PLAINTIFF-APPELLEE**

Shawna M. Yashar



Counsel of Record

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INTERESTS OF AMICI

The Fairfax County Parents Association and Fairfax County Association for the Gifted (hereinafter “Parents”) submit this brief as *amici curiae* under Fed. R. App. P. 29(a)(2) in support of Appellee, Coalition for TJ to urge this Court to accept the District Court’s reasoning and decision below. We submit this brief because Parents have a vital interest in the quality of children’s public education.

The new admissions policy does not meet the stated purpose of Virginia Governor’s School Program. The Virginia Governor’s School Program was created to assist public school divisions in meeting the needs of a small population of students whose learning levels are remarkably different from their age-level peers.¹

Second, the public school system in Virginia is responsible for providing a free and appropriate public education to all children who need special education and related services from age two to 21. *See* 8VAC20-81-100. The new admissions policy that Appellant has implemented at Thomas Jefferson High School for Science and Technology (“TJHSST” or “TJ”) contains no system for the identification of students whose base school cannot meet their needs under federal and state disability laws, *i.e.*, the students that are sometimes referred to as twice exceptional or 2E.²

¹ Virginia Department of Education website at https://www.doe.virginia.gov/instruction/governors_school_programs/academic_year/index.shtml

² The term “twice-exceptional” or “2E,” describes gifted children who give evidence of one or more disabilities as defined by federal or state eligibility criteria. These disabilities may include learning disabilities, speech and language disorders,

Parents have an interest in ensuring that children who are either twice exceptional or whose learning levels exceed those of their peers are given the opportunity to attend a school specifically designed and funded by the Commonwealth of Virginia for them. We thus urge this Court to reject the admissions process designed by Appellant and uphold the lower court's decision.

ARGUMENT

Noticeably absent from the Appellant's public statements, e-mails, text messages, and policies is any discussion about the exceptional students that presently make up the TJHSST student body and the impact that altering the admissions process is having on them. Spend a day at the school and you will see hallways and classrooms full of students who are self-described as "different." They learn differently, they pick up on subject matter differently than their societal peers, and strikingly, many are significantly younger than their grade equivalent counterparts.

It is not uncommon for a TJ student to have skipped a grade in elementary school and sometimes even two grades. Their elementary education simply did not challenge them and, as a result, teachers and school administrators recommended the controversial and socially often unacceptable step of grade skipping.³ At a time in our

emotional/behavioral disorders, physical disabilities, autism spectrum, or other impairments such as attention deficit hyperactivity disorder.

³ Only 4% of Kindergarteners were age 6 in 1998 versus 17% in 2008. Compare Nicholas Zill, et al., *Entering Kindergarten: A Portrait of American Children When They Begin School*, NAT'L CENTER FOR EDU. STATS. (2000), <https://nces.ed.gov/pubs2001/2001035.pdf> with Pamela Paul, *The Littlest Redshirts Sit*

history where many parents are delaying the start of formal schooling, *i.e.*, “redshirting” kids, for reasons as diverse as increased cognitive development,⁴ improvements in emotional maturity,⁵ avoidance of an ADHD diagnosis,⁶ giving them an edge in sports,⁷ or simply because families can afford to do so,⁸ TJHSST has numerous students, especially boys, who are labeled “young for their grade” (the modern euphemism for a child skipping a grade).

Why would a parent today, knowing all that we know about the brain being underdeveloped until 25⁹ and with the tremendous amount of societal pressure¹⁰ to

Out Kindergarten, NEW YORK TIMES (Aug. 22, 2010),

<https://www.nytimes.com/2010/08/22/fashion/22Cultural.html>.

⁴ Ashlesha Datar, *Delaying Kindergarten: Effects on Test Scores and Childcare Costs*, RAND CORPORATION (2005),

https://www.rand.org/pubs/research_briefs/RB9082.html.

⁵ Thomas S. Dee, *The gift of time? School starting age and mental health*, HEALTH ECONOMICS (2018) available at

<https://onlinelibrary.wiley.com/doi/epdf/10.1002/hec.3638>.

⁶ Timothy J. Layton, et al., *Attention Deficit–Hyperactivity Disorder and Month of School Enrollment*, N ENGL J MED (Nov. 2018).

⁷ Samantha Pell, *In search of an edge, elite basketball prospects are repeating a grade — in middle school*, WASH. POST. (May 5, 2019),

<https://www.washingtonpost.com/sports/2019/05/13/search-an-edge-elite-basketball-prospects-are-repeating-grade-middle-school/>.

⁸ Christina A. Samuels, *Delaying Child’s Starting Age for School a Tough Call for Parents*, ED WEEK (Aug. 2017),

<https://www.edweek.org/teaching-learning/delaying-childs-starting-age-for-school-a-tough-call-for-parents/2017/08>.

⁹ *Brain Maturity Extends Well Beyond Teen Years*, NPR TELL ME MORE (Oct. 10, 2011), <https://www.npr.org/templates/story/story.php?storyId=141164708>.

¹⁰ Less than one percent of students skip grades. See Matthew C. Make, et al., *How Can So Many Students Be Invisible? Large Percentages of American Students Perform Above Grade Level*, JOHNS HOPKINS SCHOOL OF EDUCATION (Aug. 16, 2016),

delay starting Kindergarten until age 6 or even 7¹¹, agree to skip their child a grade or even two grades? The answer is simple: they do so because their child is different, and the parent knows it.

Children can be considered smart, talented, even “gifted” without grade skipping, however. There are a multitude of advanced academic courses offered at public high school in Fairfax County, Virginia. Smart, driven children wanting a math-and science-focused education have the opportunity to do just that at their individual base schools and can even petition to transfer to another high school if their local one fails to offer the preferred curriculum.¹² Also, several children participate in Advanced Academic Programming throughout elementary school and middle school completing math courses two to three years ahead of their peers.

But those programs and options are not enough for a very small number of students. The schools ran out of material long ago to teach a handful of kids and thus, Governor’s Schools like TJ were born. Appellant’s new admission policy fails to

<https://edpolicy.education.jhu.edu/how-can-so-many-students-be-invisible-large-percentages-of-american-students-perform-above-grade-level/>.

¹¹Valerie Strass, *Delaying kindergarten until age 7 offers key benefits to kids — study*, WASH. POST (Oct. 7, 2015),

<https://www.washingtonpost.com/news/answer-sheet/wp/2015/10/07/delaying-kindergarten-until-age-7-offers-key-benefits-to-kids-study/>.

¹² In Fairfax County Public Schools, a student that wants to enroll in course offerings in an AP, IB, or World Language course sequence, or Academy not available at the student’s base school can apply to transfer. *See* <https://www.fcps.edu/registration/student-transfer-information/high-school-curricular-program-ap-ib-and-world-languages>.

ensure that these accelerated students, for whom their local high school cannot adequately accommodate their learning needs, are admitted. Doing so is contrary to both federal and state regulations.

I. Exceptional Students Need Specialized Schools.

In a utopian world, we would not need specialized schools for children with unique needs. Each school would be able to offer an individualized curriculum that meets the distinct needs of each student. But that is not reality. There is not an infinite amount of money, the Commonwealth of Virginia does not have an abundance of extra teachers waiting in the wings to teach advanced courses to a handful of students, and there is simply not enough classroom space to teach multiple curriculums in one building. So, instead Virginia created specialized programs such as the Governor’s School Program.

Virginia’s Board of Education (“VA DOE”) “Regulations Governing Educational Services for Gifted Students” mandates differentiated instructional opportunities for gifted students in grades K-12, and the Governor’s School Program is a critical component to offering that differentiated instruction. 8VAC20-40. Most school divisions incorporate Governor’s Schools as an option for their gifted students; however, each locality is expected to provide additional options for students who choose not to attend or are unable to attend Governor's Schools. Sometimes, however, those additional options are not enough and the only real option for the gifted child is the Governor’s School.

The Commonwealth further requires that each school division “establish uniform procedures for screening, referring, identifying, and serving students in kindergarten through twelfth grade who are gifted in general intellectual or specific academic aptitude.” 8VAC20-40. Students identified through this process are required by VA DOE to “be offered service options with appropriately differentiated curriculum and instruction by the school division.” *Id.* “Appropriately differentiated curriculum and instruction” is defined as “curriculum and instruction adapted or modified to accommodate the accelerated learning aptitudes of identified students in their areas of strength.” *Id.* By failing to create an admissions process that allows for the identification and selection of these students first, before considering other factors such as parental income, native language, and the percentage of students being admitted from each middle school, Appellant is failing to meet the academic needs of certain gifted students whose base high school lacks enough of an appropriately differentiated curriculum and instruction.

The Virginia General Assembly and VA DOE have stated that “the fundamental goal of the public schools of this Commonwealth must be to enable each student to develop the skills that are necessary for success in school, preparation for life, and reaching their full potential.” VA Code §22.1-253.13:1.A. In furtherance of this goal, the school districts are instructed to enroll gifted students in appropriately differentiated instructional programs. VA Code §22.1253.13:1.D.6. Contrary to these requirements the Appellant’s new admissions process fails to meet these legal

requirements for a portion of students for which TJHSST is the only option for appropriately differentiated instruction.

II. Failing to Admit Twice Exceptional Students Invites Further Discrimination Litigation.

The Individuals with Disabilities Education Act (IDEA) makes available a free appropriate public education to eligible children with disabilities throughout the nation. 20 U.S.C. § 1400(d)(1)(A); *see also Burlington School Comm. V. Mass. Dept. of Ed.*, 471 U.S. 359, 369 (1985) (noting that the act requires that such education be provided in public schools as much as possible). IDEA has a “child find” requirement that obligates states to “identif[y], locat[e], and evaluat[e]. . . [a]ll children with disabilities residing in the State” to ensure that they receive needed special-education services. 20 U.S.C. § 1412(a)(3)(A); *see* § 1412(a)(10)(A)(ii). “To meet its substantive obligation under the IDEA, a school must offer an IEP [Individualized education Plan] reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999 (2017). Furthermore, school districts are prohibited from using “any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.” 34 C.F.R. § 300.304(b)(2). The United States Department of Education has interpreted this regulation to say that “twice exceptional” or “2E,” may

qualify for special education. *See* U.S. Dep’t Educ., Off. Special Educ. Programs, Letter to Anonymous (Jan. 13, 2010), 55 IDELR 172.

No appeals process has been established for a twice exceptional child who fails to be accepted to TJHSST under the new admissions process—i.e., there is no remedy. While special education is listed as an “experience factor” under the new process, the cap of 1.5% of a middle school’s 8th grade student population for “Allocated Seats” creates the potential for a 2E child to be denied admission depending on their applicable pool. In fact, a twice exceptional student may not even make it into the pool depending on the new point system. The special education “experience factor” is only worth an additional 45 points under the new system, while 90 points are awarded if the student qualifies for free or reduced-price meals. JA0146-49.

The IDEA Act mandates that Appellant identify and provide services for each applicable child. *Forest Grove Sch. Dist. v. T. A.*, 557 U.S. 230, 244-245 (2009). The Appellant’s new admissions process that awards additional points for familial income, English Language Learner status, and mere attendance at an underrepresented middle school risks excluding students previously identified as in need of special education services offered only by TJHSST.

III. Identification of Twice Exceptional Students Is Done Through Standardized Testing.

To qualify for special education services, students are routinely evaluated with a series of standardized tests.¹³ Unlike college admissions tests or, in the case, here a high school admissions test, there is no public outcry calling for the removal of special education testing. In fact, testing is routinely, if not always used. According to the VA DOE, “The process for determining whether a student is eligible for special education and related services involves reviewing information and observations about the student, determining the need for additional data, reviewing and interpreting the results of any assessments, and making an eligibility determination.”¹⁴ Assessments are so routinely used as part of the special education identification process that the Virginia Administrative Code has an entire Part devoted to ensuring their consistency. *See* 8VAC20-81-70.

Standardized testing is also a tool used for the identification of gifted students.¹⁵ A test alone, however, is not dispositive. As the special education assessment process

¹³ *See* Common Educational Tests Used for Assessments for Special Education available at https://dredf.org/wp-content/uploads/2021/06/Assesments_chart.pdf (identifying over 30 standardized tests commonly used in assessing whether a child needs special education services).

¹⁴ *Evaluation & Eligibility for Special Education & Related Services*, VA. DEP’T OF EDU., https://www.doe.virginia.gov/special_ed/evaluation-and-eligibility/index.shtml

¹⁵ “Testing provides an objective and systematic way for identifying gifted children. Ability and achievement tests provide numbers or scores to describe a student's performance in relation to others. Tests are often used as benchmark requirements for entrance into specific programs or if a discrepancy in learning is suspected. However, formal assessments are only one tool in determining giftedness. Tests should be used

demonstrates, many tools must be at the disposal of educators to properly identify students requiring assistance. The same goes for identification of gifted students that require the differentiated instruction of TJ. The Appellant's removal of the standardized testing tool from its toolbox and replacing it with a preference program based on underserved middle schools was an error. The new process risks excluding students whose educational needs cannot be met by their base schools. While the new process may create a unique opportunity for many students, it does so at the cost of others who are failing to have their academic needs met as required by federal and state law.

CONCLUSION

TJHHST is not simply a science, technology, engineering, and mathematics (STEM) school. It is a school specifically designated for gifted education. All public school students should have the opportunity for a STEM education if that is what interests them. But not every student interested in STEM is gifted in a way that necessitates a different curriculum for them to achieve their full potential. Moreover, twice exceptional students sometimes need TJ as part of their special education curriculum as it is the only local public school program able to meet their needs. Appellant's new admission process fails to adequately ensure that these two categories

in conjunction with subjective assessment tools.” Tests & Assessments, NAT'L ASS'N FOR GIFTED CHILDREN, <https://www.nagc.org/resources-publications/gifted-education-practices/identification/tests-assessments>.

of students are admitted and, as such, is contrary to both federal and state law. If Appellant wishes to provide more opportunities for students from each middle school to participate in STEM education, they should do so by improving program offerings at the base high schools and not by utilizing seats needed for gifted and 2E education at TJHHST.

June 21, 2022

Respectfully submitted,

/s/ Shawna M. Yashar
Shawna M. Yashar
Counsel of Record

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 2,376 words (as counted in Microsoft Word), excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14- point Times New Roman font.

June 21, 2022

/s/ Shawna M. Yashar

Shawna M. Yashar
Counsel of Record