2018

Educational Accommodation and Distributive Equity: The Principle of Proportionate Progress

Talha Syed

CONNECTICUT
LAW REVIEW

VOLUME 50 MAY 2018 NUMBER 2

Article

Educational Accommodation and Distributive Equity: The Principle of Proportionate Progress

TALHA SYED

What do we owe students who, on account of disability, have differential needs and capacities from others? What, for that matter, do we owe all students? A central claim of the present Article is that we cannot answer the former question without also considering the latter. Moreover, a satisfactory answer requires reaching beyond notions of "equality of opportunity," to probe our deepest commitments regarding distributive equity, or substantive fairness in access to the good of educational development. This Article offers a novel understanding of these deepest commitments, to advance a new principle of distributive justice, the principle of proportionate priority. It pursues the implications of this principle in depth for the specific setting of educational accommodation for disability—to provide a comprehensive answer to a question recently before the Supreme Court. Its ramifications extend, however, far more widely, not only for educational policy in general, but also for other areas of law and policy.

ARTICLE CONTENTS

Educational Accommodation and Distributive Equity: The Principle of Proportionate Progress

TALHA SYED *

INTRODUCTION

What does fair educational opportunity mean for students who, on account of disability, have differential needs and capacities from others? For more than thirty years, this question has stymied courts and commentators in their efforts to determine the appropriate scope and guiding principles of the Individuals with Disabilities Education Act (IDEA).[1] While the law entitles eligible students to individualized education programs that provide "adequate" educational benefit,[2] what counts as adequate has never been satisfactorily answered. Indeed, the question was recently again before the United States Supreme Court, which had decided—in the face of unflagging controversy and a circuit split over its landmark 1982 decision, *Board of Education v. Rowley*[3]—to revisit its own prior efforts in this regard.[4]

---

* University of California, Berkeley School of Law. This Article has had a long period of gestation. The principle of distributive justice advanced here was first presented at the Petrie-Flom Bioethics and Health Law & Policy Seminar at Harvard Law School in 2008, and I thank the Petrie-Flom Center for its generous support of that research. Subsequent iterations of the argument have been presented at faculty talks at the University of Colorado, University of Seattle, Emory University, UCLA, UC Berkeley, UC Davis, University of Michigan, USC Gould and UT Austin law schools, as well as the Bay Area Forum for Law & Ethics (BAFFLE), the Law & Politics seminar at Tel Aviv University, and health law seminars at Harvard University, the University of Colorado, and the University of Tulsa. Thanks to participants on those occasions for helpful feedback and discussion. For specific comments on prior presentations of the argument, thanks to Afra Asharipour, Yishai Blank, Anupam Chander, Norm Daniels, Einer Elhauge, Leslie Francis, Jasmine Harris, Niko Kolodney, Roy Kreitner, Chris Kutz, Gillian Lester, David Lieberman, Orly Lobel, Arnulf Becker Lorca, Lisa Ikemoto, Arti Rai, Eric Rakowski, Larry Sager, Shayak Sardar, Anita Silvers, Sarah Song, Madhavi Sunder, Jay Wallace, and Dennis Ventry. For helpful feedback on a written draft, thanks to Yochai Benkler, Glenn Cohen, Meir Dan-Cohen, Terry Fisher, Darien Shanske, Steve Sugarman, and Aaron Tang. Oren Bracha, Anna di Robilant, and Roni Mann went above and beyond in their extremely close engagement with the argument of the Article, and for that I owe a very special thanks. My deepest gratitude is to Saki Bailey.

[1] 20 U.S.C. §§ 1400–82 (2012).

[2] *See infra* note 23 and accompanying text.

[3] Bd. of Educ. v. Rowley (*Rowley II*), 458 U.S. 176 (1982). *See generally infra* Part I.A (reviewing the circuit split and controversy in the wake of *Rowley II*).

[4] Endrew F. *ex rel*. Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 137 S. Ct. 988 (2017). This Article was completed before the Supreme Court handed down its decision in *Endrew*. As discussed in the Afterword, the Court's decision only serves to underline the significance of the Analysis offered here.

This Article offers a comprehensive answer, by advancing a new principle of distributive justice. It first reconceives the issue of adequate benefits as one of distributive equity, rather than nondiscrimination or equality of opportunity. The central problem posed by adequate benefits is neither: (a) to secure similar treatment for those similarly situated by removing illegitimate barriers to formal equality of opportunity; nor even, (b) to secure "fair" equality of opportunity by tailoring otherwise-legitimate procedural requirements for those differentially situated.[5] Rather, it is to secure students *effective access to a substantive benefit*: educational development. When it comes to formative education, our aspiration is best conceived in terms not only of "leveling the playing field" to ensure a truly fair process of competition, but also of securing *fair access* to educational development, seen as an intrinsically valuable good for each student. Students with a disability are differentially situated in respect of that purpose because, in the language of distributive justice, they face a "conversion deficit": a deficit in translating a given bundle of means (educational resources) into valuable ends (educational development).[6] Our aim is to correct for the insensitivity of *formal equality* of resources to their special needs, so as to secure them *substantively fair access* to educational development. And in doing so, there is no plausible alternative to addressing this head-on as a question of distributive equity: a question, that is, of prioritizing among similarly legitimate claims to resources—both the special needs of students with disability and the needs of other students—for the sake of securing all students fair access to the good of educational development.[7]

What, then, is a fair distribution of educational resources—one that provides students with disability equitable access to the good of educational development, by attending simultaneously both to their special needs and to the similarly legitimate claims of other students?

The Article first examines existing answers to this question, reconstructing current judicial standards and scholarly proposals into principles of distributive equity. Does fair access require equality in overall educational development? Does it require equality in access to educational improvements? Does it require maximizing overall levels—either of all students, those worst off, or those with disability? Does it require maximizing improvements across students? Or, does it simply require ensuring that each student can attain a decent basic level of development and, if so, how robust or minimal a level should we aim for?

---

[5] As may be the case, for example, with accommodating disability in employment settings. *See infra* notes 106, 117 and accompanying text.

[6] *See* AMARTYA SEN, INEQUALITY REEXAMINED 28–29, 33–34 (1992).

[7] This might be thought to overlook the "disparate impact" branch of antidiscrimination law, but, as discussed below, disparate-impact analysis as it has developed in the context of disability accommodation sheds little added light here. *See infra* Part I.B.2.

Versions of each of these principles presently lurk within the existing legal standards, as stated in their current, ambiguous forms. Rendering these standards' tacit distributive directives more explicit and precise allows us, first, to identify more clearly and thus assess more crisply their concrete implications in different cases. Even more importantly, it enables us to go deeper and unearth and reflect upon the underlying notions of fairness upon which these standards ultimately rest.

Subjecting existing principles to such critical examination, we find that each founders on its troubling implications in an important subset of cases. Some fail to give adequate consideration to the costs of further educational improvements for those with disability; others, to the greater urgency of improvements for those remaining much worse off than others; and still others, to both. And in each case these defects on the surface stem, ultimately, from deeper flaws in the premises underlying the principles—in their most basic commitments concerning distributive fairness. Reflecting the reigning views in distributive justice theory more generally, each of these principles rests ultimately on one of three commitments: equality, sufficiency, or maximization.

This Article advances a new answer to the question, in contrast to the reigning principles grounded in equality, sufficiency, or maximization.[8] It does so by arguing for a deep shift at the level of our most fundamental commitments in matters of distributive fairness—to generate, at the surface, a new principle of distributive justice that persuasively handles the full range of cases we face.

The central claim of the Article is that, in matters of distributive justice, our general commitment to equal concern in political morality is best understood not to require, even as a default, *any* commitment to equalizing as valuable for its own sake.[9] Rather, it should be understood as a commitment to enabling each person's life to go *as well as is possible and fair*. And what is fair is that those who are, through no fault of their own, worse off than others be given priority *because* they are worse off. This is *not* because we aim to decrease inequality for its own sake,[10] but rather because gains for a person, or improvements in her or his life, have greater

[8] This includes "prioritarian" principles, which generalize the sufficiency view with their notion of non-comparative priority. See *infra* note 161 and accompanying text.

[9] This is in contrast to the most influential views in distributive justice theory. *See* JOHN RAWLS, A THEORY OF JUSTICE 54–55, 130–31 (Harvard Univ. Press rev. ed. 1999) (1971) (adopting as a default premise a commitment to distributional equality); RONALD DWORKIN, SOVEREIGN VIRTUE 11–14 (2000) (analyzing distributive justice in terms of two competing theories of distributional equality); SEN, *supra* note 6, at 12–16 (justifying equality as the starting premise for distributive justice). *See generally infra* Part II.A.1 (critically evaluating the "telic equality" view that distributional equality is valuable in itself).

[10] Inequality may remain important for instrumental reasons. *See infra* note 142 (identifying distinct reasons why distributional equality may remain instrumentally valuable even after rejection of its intrinsic value).

moral significance the lower her or his overall level is compared to that of other potential recipients. Why? Because it speaks directly to the question of fairness, of what it is reasonable to ask separate persons, leading distinct lives, to expect from and sacrifice for each other. Although equalizing does not hold out any intrinsic value, nevertheless when deciding between two potential recipients of resources, it is only reasonable that one whose life is already going better than another's understand that improvements for the latter matter more—are of greater significance or urgency—precisely because they are improvements to a life that is going less well.[11]

Moreover, just as equalizing for its own sake holds no value, so maximization for its own sake—irrespective of its impact across distinct lives—is implausible. And while a focus on ensuring that all persons attain a sufficiently "decent" threshold level is initially more plausible, it finally proves untenable as well, because what is decent is ultimately contextual to what is possible for others and hence to what is fair.

Making this shift in the fundamental reason for our special concern for those with disability sheds new light in determining the extent of that concern, or *how much* priority is merited. Since students with disability are given priority *because* they are worse off, they are to be given priority *to the extent that* they are worse off. They are to be given, in other words, *comparative priority*: their claims on educational resources are greater the worse off they are compared to other potential student recipients.

This then issues in the *principle of proportionate progress*: students with disability should have priority in access to educational resources so long as (a) the progress that these resources would enable them to realize, as a proportion of their existing level of development, is greater than or equal to (b) the progress such resources would enable alternative recipients to realize, as a proportion of their existing levels of development. Under the principle, those who are at comparatively lower levels are given greater priority, which priority is applied to their respective potentials for improvement. Where the two factors of comparative priority and potentials converge, the recipient is given especially strong priority.

What matters on this view is neither to equalize the overall levels of all students, nor to maximize or "sufficientize" the levels of students with disability; nor, for that matter, is it to equalize or maximize improvements across all students. Rather, it is to ensure that all students have access to *meaningful* improvements. And the meaning of improvements is to be understood inter-subjectively, within and across different students' educational lives, in terms *both* of how well or badly they are already doing

[11] As elaborated below, it is precisely adoption of a comparative view, but now on grounds of fairness rather than equalizing, that distinguishes the present position not only from "equality" views on one side, but also, on the other, from non-comparative "priority" and "sufficiency" views. *See infra* notes 143 and 161 and accompanying text.

and of how much or little they stand to improve. Educational gains are to be understood, that is, in terms of their interpersonal significance: what they signify for each person in the context of her or his own development, compared to what the alternative gains for others would signify for them, in the context of their own development.

How does the principle make sense of existing law? Very well. Competing legal standards each emphasize, in a one-sided manner, some partial set of considerations, including: the infeasibility of maximal benefits, especially in cases of severe disability; the implausibility of modest benefits, especially in cases of great potential; the need to be sensitive to costs; and the need to be sensitive to student diversity.[12] By contrast to any alternative principle, the proportionate-progress view organically gives—internal to its own commitments—each consideration its due, and thus takes them all into account in a *systematic*—that is, comprehensive and consistent—way.[13] Moreover, it does so *in the right way*: evaluating levels in terms of comparative priority and improvements in terms of comparative potential, so as to integrate them into an analysis of equitable opportunity costs.

The Article turns, in its final part, to consider how the principle may apply in complex cases of educational accommodation. This requires taking up the second fundamental debate in distributive justice theory—concerning not the appropriate *principle* of distributive equity, but the appropriate *space* of distributive concern. In core cases of accommodation, disability causes the student to perform below the average. But what if, as is sometimes the case, the student is able to make up for the disadvantage, to achieve results on par with, or even superior to, the average? Do there remain grounds for special accommodation in such cases? Most courts think not, taking the view that when students are average or above, their disabilities can no longer be said to "adversely affect" their "educational performance" for purposes of IDEA eligibility.[14] Some, however, disagree, taking the view that so long as the disability may be discerned to have *any* detrimental effect on performance, it "adversely affects" it so as to merit accommodation even if the student is overall performing at an average or higher level.[15] Both positions, so stated, are unsatisfactory and the debate between them lacks traction—starting and ending on rival premises concerning the meaning of "adversely affect." Is there a way beyond the impasse? Yes. Seen through the lens of distributive justice theory, each position inchoately tracks a distinct view of the appropriate "index" of educational advantage for distributive concern. Evaluating each in light of the larger debate on that

---

[12] As reviewed *infra* Part I.

[13] *See infra* Part II.B.4.

[14] *See infra* notes 193–196 and accompanying text (providing examples of cases that find above-average students to be ineligible for special educational services).

[15] *See infra* notes 198–201 and accompanying text (providing examples of cases that allow even above-average students to receive special educational services).

score—featuring the rival candidates of welfare, resources, and capabilities—clarifies the substantive stakes of their disagreement and works toward its resolution, by specifying more precisely the target space of educational advantage to which the principle of proportionate priority should apply.

The Article intervenes at two fundamental levels. First, at the level of normative first principle, it offers a new elaboration of our deepest commitments of distributive fairness, to result in a new principle of distributive justice that persuasively addresses the full range of cases—with implications for many areas of law and policy. Second, at the level of legal-institutional analysis, the Article develops in depth the implications of this principle for a specific domain of legal policy, to provide a persuasive and comprehensive answer to a question recently before the Supreme Court. It does so by reconceiving educational opportunity as an issue of "equitable access," requiring an analysis sounding in distributive equity.

The reconceptualization itself offers three significant contributions. The first is to locate the source of the longstanding intractability of the problem of adequate benefits—one that has stymied both courts and commentators for more than thirty years—in the failure to confront the distributive the character of the question, and hence to adopt the mode of analysis needed for its satisfactory resolution. Second, viewing existing legal positions through the lens of distributive justice allows us to formulate more precisely the actual directives lurking within them, and thus to evaluate more crisply—with greater clarity and depth—their requirements across the range of cases. This applies *both* to different standards for core cases of accommodation—which are best understood as inchoately embodying different *principles* of distributive equity—and the debate in complex cases, where the contending views are best understood as inchoately tracking distinct positions concerning the appropriate *space* of distributive concern. For both, the analytical framework of distributive justice theory throws floodlights of clarity on the substantive stakes of the problem and normative premises underpinning different solutions. Finally, the particular *way* in which educational opportunity is reconceived—as requiring equitable access to educational development—resonates with widely held, if inarticulate, commitments in this area. Rethinking our aim here in terms of *equity of access* moves us beyond precisely the impasse articulated by the Supreme Court in *Rowley*, namely that our aspirations in this context are not well captured by either *equality of opportunity* or *equality of outcome*.[16]

Each of these fundamental arguments—of reconceiving a question of legal policy as one of delimited distributive equity and advancing a new principle of distributive justice to aid in its resolution—bear significance for many areas of law and policy besides educational accommodation for

[16] *See infra* note 119 and accompanying text.

disability. The Conclusion briefly canvasses three: educational policy in general, disability accommodation outside of education, and equitable access to healthcare.

The Article proceeds as follows. Part I analyzes the current landscape of law and policy in educational accommodation. It reviews the intractability of the problem of adequate benefits from *Rowley* to today, diagnoses its source in the failure of courts and commentators to confront its distributive character, and reconceives the question as one of distributive equity. Part II then reconstructs existing and proposed legal standards as principles of distributive equity, and evaluates them using an in-depth illustrative case of IDEA accommodation. It next advances the principle of proportionate priority, as rooted in the most compelling elaboration of our deepest commitments in this area, and as providing the most persuasive resolution across the full spectrum of cases. Part III examines the principle's application in complex cases of accommodation, taking up the second fundamental debate in distributive justice theory, concerning the proper index of advantage for distributive concern. The Conclusion points to the wider significance of the new principle of distributive justice, for other areas of law and policy.[17]

I. THE CURRENT LANDSCAPE IN EDUCATIONAL ACCOMMODATION

Students with learning disabilities are entitled, under the IDEA, to a "free appropriate public education," in the form of an "individualized education program" (IEP) that provides "special education" and "related services."[18] Developed in consultation with the child's parents, an IEP is to be devised by the local educational agency upon a thorough evaluation of the student's educational needs.[19] It must be suitably tailored to the student's particular needs, and place her or him in the "least restrictive environment" appropriate to meeting such needs.[20] Removal from the regular classroom environment is to occur only when the character or severity of the student's disability means that simply adding supplementary aids and services to the regular classroom will not suffice.[21]

Alongside these formal and procedural requirements, an IEP must also satisfy a more substantive obligation, of providing access to some positive amount of educational benefit.[22] Each IEP must, that is, be reasonably

---

[17] Following the Conclusion is a brief Afterword that considers how the Article's analysis bears on the recently delivered Supreme Court opinion in the *Endrew* case.

[18] 20 U.S.C. §§ 1400(d)(1), 1401(3)(A), 1401(9), 1412(a)(1), 1412(a)(4) (2012).

[19] *Id.* at § 1414(a)–(c).

[20] *Id.* at § 1414(d); § 1412(a)(5).

[21] 34 C.F.R. §300.114(a)(2)(ii) (2016).

[22] *See Rowley II*, 458 U.S. 176, 206–07 (1982) (articulating a two-pronged test for IDEA compliance: "First, has the State complied with the procedures set forth in the Act? And second, is the

calculated to provide the student access to an "adequate" educational benefit.[23] It is on this question—access to what amount of educational benefit should be deemed adequate for purposes of the IDEA—that our attention is trained. And it is one that has been subject to intense and unflagging judicial and scholarly controversy.

A. *The IDEA's Persistent Puzzle: How Much is "Adequate"?*

1. Rowley *and Its Aftermath*

Leading the way is the Supreme Court's 1982 decision in *Rowley*. At issue was the suitability of an IEP for first-grader Amy Rowley, a deaf student with minimal residual hearing and excellent lip-reading skills.[24] Placed in a regular first-grade classroom, Amy was provided with the supplements of a hearing aid, one hour of special instruction each day from a tutor for the deaf, and three hours per week of speech therapy.[25] Although she was achieving above-average grades under this plan, Amy's parents nevertheless believed that she was failing to reach her full potential on account of missing too much of what was going on in class by relying on lip reading (notwithstanding her proficiency in that regard).[26] Accordingly, they requested that the school provide her an interpreter for all her classes.[27] The school refused, pointing to Amy's satisfactory, indeed above-average, progress.[28]

---

individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"); *cf.* Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997) (glossing *Rowley II*'s second prong into four factors: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders'; and (4) positive academic and non-academic benefits are demonstrated").

[23] *Rowley II*, 458 U.S. at 202, 207. Courts and commentators often use the terms "adequate" and "appropriate" interchangeably when referring to the type of special education an IEP must provide to satisfy the IDEA's requirements. In this Article, however, the terms will be taken to have distinct meanings. "Appropriate" will be taken as the more general term, to refer to an IEP that is overall satisfactory, meeting both the formal and substantive requirements involved in providing a "free and appropriate education." "Adequate," on the other hand, will be used in a more restrictive sense, to single out the substantive element of the IDEA, regarding the required *amount* of educational benefit to be provided, as distinct from requirements concerning the process (e.g., stakeholder consultation) and manner (e.g., least-restrictive environment) for determining and providing such benefits. *Cf.* Roland v. Concord Sch. Comm., 910 F.2d 983, 991, 993–94 (1st Cir. 1990) (discussing under the heading of "adequacy and appropriateness" the distinct roles of the amount of benefit and manner in which it is provided).

[24] *Rowley II*, 458 U.S. at 184.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

A federal district court disagreed with the school. Despite her above-average performance, Amy, the court found, "understands considerably less of what goes on than she could if she were not deaf."[29] Consequently, there was ample room for improvement with an interpreter. Since on the court's view an "appropriate education" was one that afforded Amy "an opportunity to achieve [her] full potential,"[30] failure to provide her an interpreter fell considerably short of the required standard.

In overturning, the Supreme Court rejected the district court's "full potential" standard,[31] declaring that the IDEA did not require "strict equality of opportunity or services;"[32] or, indeed, mandate access to *any* "particular level of education."[33] Rather, it aimed simply to ensure a "basic floor of opportunity," so as to provide students with disability effective, rather than merely formal, "access" to public education.[34] Lest this "opportunity" language be taken in a purely procedural vein, the Court did clarify that there was a substantive component to the Act's requirements.[35] Although a focus on any required maximum or minimum level of educational attainment was misplaced, nevertheless an IEP did need to be "reasonably calculated"[36] to confer access to "*some* educational benefit."[37]

What satisfies this "some benefit" test was, however, left unclear. The Court explicitly declined to specify "any one test for determining the adequacy of education benefits."[38] And although one factor featured prominently in the Court's discussion—namely, whether the IEP "enable[d] the child to achieve passing marks and advance from grade to grade"—this was expressly stated not to be conclusive as sufficient in all cases (nor, perhaps, even always necessary).[39] The Court held only that in the case before it, the fact that Amy was not only passing but also in the upper half of her class, did indicate enough of a benefit.[40] Going forward, the Court left the "difficult problem" of specifying "when handicapped children are receiving sufficient educational benefits" to case-by-case determination.[41]

---

[29] Rowley v. Bd. of Educ. (*Rowley I*), 483 F. Supp. 528, 532 (S.D.N.Y. 1980).

[30] *Id.* at 534.

[31] *Rowley II*, 458 U.S. 176, 186 (1982).

[32] *Id.* at 198.

[33] *Id.* at 192.

[34] *Id.* at 200.

[35] *See id.* at 200–01 ("It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education.").

[36] *Id.* at 204.

[37] *Id.* at 200 (emphasis added).

[38] *See id.* at 202 ("We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.").

[39] *Id.* at 204.

[40] *Id.* at 209–10.

[41] *Id.* at 202.

Courts have, in the wake of *Rowley*, struggled to interpret and apply its standard. Three main positions have emerged.[42]

A slight majority of circuits have hewed closely to the "some benefit" formulation.[43] Central to this approach is an emphasis against any requirement that schools provide students with disability an optimal education, one that would maximize their potential,[44] or that schools enable them to attain any other substantive level, such as "self-sufficiency."[45] Rather, so long as access is provided to a serviceable set of benefits—a "Chevrolet not a Cadillac"[46]—the requirement is deemed to be met, even if an alternative IEP would secure the student greater progress.[47]

---

[42] *See* Ronald D. Wenkart, *The* Rowley *Standard: A Circuit by Circuit Review of How* Rowley *Has Been Interpreted*, 247 WEST'S EDUC. L. REP.1, 1–4 (Oct. 1, 2009) (describing how the circuit courts have interpreted the *Rowley* standard in a series of cases).

[43] *See id.* at 1–4 (collecting sources establishing that the "majority of the circuits courts, the First, Fourth, Seventh, Eighth, Tenth, Eleventh and District of Columbia, have exclusively applied the 'some educational benefit' standard"). The pattern has largely held in subsequent case law, with the possible exception of the First Circuit. *See* Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1332 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017); TM *ex rel.* SM v. Gwinnet Cty. Sch. Dist., 646 F. App'x 763, 764 (11th Cir. 2016) (affirming the district court's application of the "some" benefit standard); D.B. *ex rel.* Elizabeth B. v. Esposito, 675 F.3d 26, 38 (1st Cir. 2012) (applying "meaningful" benefit standard, but also invoking cases and language associated with the "some" benefit standard); M.B. *ex rel.* Berns v. Hamilton S.E. Sch., 668 F.3d 851, 860 (7th Cir. 2011) (applying "some educational benefit" standard); Sumter Cty. Sch. Dist. 17 v. Heffernan *ex rel.* TH, 642 F.3d 478, 483–84 (4th Cir. 2011) (applying "some educational benefit" standard); CB *ex rel.* BB v. Special Sch. Dist. No. 1 Minneapolis, Minn., 636 F.3d 981, 989 (8th Cir. 2011) (applying "some educational benefit" standard).

[44] *See* C.B. *ex rel.* B.B., 636 F.3d at 989 ("The statute does not require a school district to 'maximize a student's potential or provide the best possible education at public expense.'"); Hartmann *ex rel.* Hartmann v. Loudoun Cty. Bd. of Educ.*,* 118 F.3d 996, 1001 (4th Cir. 1997) ("States must . . . confer some educational benefit upon the handicapped child, but the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential.") (internal citations omitted); Kerkam *ex rel.* Kerkam v. Superintendent, D.C. Public Sch., 931 F.2d 84, 86 (D.C. Cir. 1991) ("The Act does not require that a placement maximize the potential of the handicapped child.").

[45] *Rowley II*, 458 U.S. 176, 201 n.23 (1982); Thompson R2-J Sch. Dist. v. Luke P. *ex rel.* Jeff P., 540 F.3d 1143, 1151 (10th Cir. 2008).

[46] *See* Doe *ex rel.* Doe v. Bd. of Educ., 9 F.3d 455, 459–60 (6th Cir. 1993) (noting that the IDEA requires that "schools provide the educational equivalent of a serviceable Chevrolet to every handicapped student. . . . [T]he Board is not required to provide a Cadillac"); J.L. v. Francis Howell R-3 Sch. Dist., 693 F. Supp. 2d 1009, 1014 (E.D. Mo. 2010) ("The Act requires only that a student receive sufficient specialized services to benefit from his education." (citing *Doe*, 9 F.3d at 459–60)); Fayetteville-Parry Local Sch. Dist., 20 IDELR 1289, 1302 (SEA Ohio March 8, 1994) ("The argument has been made that, under *Rowley*, public schools are not required to maximize the potential of handicapped children. Stated another way, 'public schools are not required to provide a Cadillac when a Chevrolet will do.'" (citations omitted)).

[47] *See* O'Toole *ex rel.* O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233, 144 F.3d 692, 708 (10th Cir. 1998) ("The fact that [the student] made more progress, and by her parents' account was happier, at the CID, does not compel the conclusion that the CID was the appropriate placement for her under the IDEA and Kansas law, and that her IEP as implemented at SEC was inappropriate."); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 133 (2d Cir. 1998) (holding an IEP is not inadequate "simply because parents show that a child makes better progress in a different program"); *Kerkam*,

What this precisely means in particular cases has, however, remained very unclear.[48] For instance, although courts under this standard have often relied on advancement from grade to grade as a strong indicator of adequate benefit,[49] others have distanced themselves from any such proxy test,[50] pointing to the explicit language and facts of *Rowley* that suggest the contrary.[51]

A second position has been staked out by the Third Circuit, which has emphasized that it is not enough for a school to provide *de minimis* or "trivial" benefits, especially in cases where the student shows considerable potential.[52] Rather, the benefits must be "meaningful" rather than merely "some."[53] The leading case, *Polk v. Central Susquehanna Intermediate Unit 16*, drew support for its "meaningful benefits" formulation from the IDEA's legislative history and the following statement in *Rowley*: "Congress did not impose upon the States any greater substantive educational benefit than would be necessary to make such access *meaningful*."[54] Clearly, the shift from "some" to "meaningful" is meant to signal a strengthening of the requirement. Especially since it is accompanied by a shift in emphasis,

---

931 F.2d at 86 (holding that the view that where a student is "making progress . . . any inferior placement was not appropriate" is "inconsistent with the 'some educational benefit' standard of *Rowley*").

[48] Scott F. Johnson, *Reexamining* Rowley*: A New Focus in Special Education Law*, 2003 BYU EDUC. & L.J. 561, 565 (2003) ("Despite a myriad of court decisions on the topic, school districts, parents, and courts still have little guidance on how to assess FAPE or educational benefit.").

[49] *See* Todd v. Duneland Sch. Corp., 299 F.3d 899, 905–06 (7th Cir. 2002) (concluding that an IEP satisfies the IDEA when the disabled child advances "from grade level to grade level while at [public] school"); MM *ex rel.* DM v. Sch. Dist. of Greenville Cty., 303 F.3d 523, 532 (4th Cir. 2002) ("[A]n important measure of an IEP's success is whether the disabled child has made progress on the basis of objective criteria" such as "passing marks and advancement from grade to grade"); Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 613 (8th Cir. 1997) (finding that advancement from grade to grade was an important factor in proving that the disabled child received some benefit from his public education); Doe v. Ala. State Dep't. of Educ., 915 F.2d 651, 666 (11th Cir. 1990) (noting that the "IEP afforded substantial educational benefits in that John received tutoring in several subject matter areas and received passing grades in those areas"); Parent *ex rel.* Student v. Osceola Cty. Sch. Bd., 59 F.Supp.2d 1243, 1249 (M.D. Fla. 1999) (noting that the student "progressed through the educational system earning passing grades in all his courses").

[50] *See In re* Conklin v. Anne Arundel Cty. Bd. of Educ., 946 F.2d 306, 314 (1991) ("[A] child's ability or inability to achieve such [passing] marks and progress does not automatically resolve the inquiry where the 'free appropriate public education' requirement is concerned.").

[51] *See* R.B., *ex rel.* F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 940 (9th Cir. 2007) (observing that *Rowley* holds "merely advancing from grade to grade does not automatically satisfy the IDEA"); Hall *ex rel.* Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985) (noting that *Rowley* holds "no single substantive standard can describe how much educational benefit is sufficient to satisfy" the IDEA).

[52] *See* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182 (3rd Cir. 1986) (the IDEA "calls for more than a trivial educational benefit" with an adequate IEP being one that provides "significant learning," and where a student displays considerable intellectual potential there must be "a great deal more than a negligible" benefit provided).

[53] *Id.* at 182, 184.

[54] *Id.* at 184 (emphasis added) (citing *Rowley II*, 458 U.S. 176, 192 (1982)).

underlining the inadequacy of minimal benefits[55] rather than the non-necessity of maximal ones (which it still affirms).[56] Thus, courts applying the standard have tended to underscore that grade advancement does not by itself signal adequate benefits.

Nevertheless, ambiguities similar to those facing the "some" standard continue to haunt its "meaningful" alternative. These principally concern the point at which benefits, while falling short of maximal, become significant enough to count as "meaningful" as opposed to merely minimal or modest. Additionally, while most courts applying the standard tend to agree on the importance of explicitly factoring in a student's potential,[57] they have been less forthcoming about *how* such potential should be factored in—and even the need to do so is not always mandated.[58]

Finally, five circuits have at times used both the "some" and "meaningful" benefit standards.[59] In some circuits, courts tend to use the standards interchangeably, or at least to go back and forth between them in

---

[55] *See* Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 247 (3rd Cir. 1999) (rejecting any "bright-line rule" or "single standard" in favor of gauging adequacy of benefits "in relation to the child's potential").

[56] *See* Adams v. Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) (the "IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the [plan] in place be reasonably calculated to confer a meaningful benefit on the child"); *Polk*, 853 F.2d at 178–79 ("However desirable the goal of maximizing each child's potential may be in terms of individuals, the Court obviously recognized that achieving such a goal would be beyond the fiscal capacity of state and local governments, and that Congress had realized that fact as well.").

[57] *See* Deal v. Hamilton Cty. Bd. of Educ., 392 F.3d 840, 864 (6th Cir. 2004) ("Only by considering an individual child's capabilities and potentialities may a court determine whether an educational benefit provided to that child allows for meaningful advancement."); *Ridgewood*, 172 F.3d at 247 ("When students display considerable intellectual potential, IDEA requires 'a great deal more than a negligible [benefit].'" (quoting *Polk*, 853 F.2d at 182)).

[58] *See* D.B. *ex rel* Elizabeth B. v. Esposito, 675 F.3d 26, 36–37 (1st Cir. 2012) (Although "[i]n most cases, an assessment of a child's potential will be a useful tool for evaluating the adequacy of his or her IEP[,] . . . there can still be an assessment of . . . a meaningful educational benefit" without it, so that "a determination as to a child's potential for learning and self-sufficiency does not have to precede a determination that the child's IEP complies with the IDEA").

[59] *See* Wenkart, *supra* note 42, at 2–3 (collecting sources establishing that "[f]our circuits, the Second, Fifth, Sixth and Ninth circuits, have at times used both the 'some educational benefit' and 'meaningful educational benefit' standards"). The First Circuit seems recently to have joined this camp. *See Esposito*, 675 F.3d at 34 (discussing both the "some educational benefit" and "meaningful benefit" standards).

different cases.[60] In others, there seems to be a gradual drift toward the "meaningful" approach.[61]

The amorphous language of both standards, and the ambiguities confronting their respective proxy factors, have led some observers to doubt whether any substantive, as opposed to merely terminological, difference exists between them, especially given their common roots in *Rowley*.[62] Moreover, that five circuits have shifted from one standard to the other may be taken as a signal of further erosion of the distinction between them.[63] Others, however, continue to debate the competing merits of the standards, on the premise that a significant difference between them remains.[64]

In principle, there does seem to be a substantive difference between the two standards—over and above their differing labels—at least on a point of emphasis. Although both standards reject the need for maximal benefits, as well as the adequacy of merely trivial ones, it is the former that is leaned on heavily by the "some" benefit standard (especially in cases of "severe"

---

[60] This seems to be the case for the Fifth Circuit. *See* Klein Independent Sch. Dist. v. Hovem, 690 F.3d 390, 397 (5th Cir. 2012) (invoking both the "meaningful" and "some" educational benefit standards). There are similar ambiguities in the Ninth and perhaps also First Circuit. *See* R.B., *ex rel.* F.B. V. Napa Valley Unified Sch. Dist., 496 F.3d 932, 946 (9th Cir. 2007) (citing *Rowley* to adopt the "basic floor" language of "some" benefit); N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1209 (9th Cir. 2008) (adopting "meaningful" benefit language); J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 951 n.10 (9th Cir. 2010) (expressly stating that its use of the "meaningful" standard remains aligned with the mainstream interpretation of *Rowley*); *Esposito*, 675 F.3d at 37–38 (ostensibly applying "meaningful" standard in a First Circuit decision while also invoking "some" benefit language and cases).

[61] This seems to be the case for the Second and Sixth circuits. *See* Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 215 (2d Cir. 2012); Woods v. Northport Pub. Sch., 487 Fed. App'x 968, 974–75 (6th Cir. 2012) (adopting "meaningful" standard).

[62] *See* Blake C. *ex rel.* Tina F. v. Dep't of Educ., State of Haw., 593 F. Supp. 2d 1199, 1206 (D. Haw. 2009) (declaring, "various opinions have left it ambiguous as to what the precise difference, if any, is between 'meaningful' benefit and 'some' benefit"); Andrea Kayne Kaufman & Evan Blewett, *When Good Is No Longer Good Enough: How the High Stakes Nature of the No Child Left Behind Act Supplanted the* Rowley *Definition of a Free and Appropriate Public Education*, 41 J.L. & EDUC. 5, 20–21 (2012) (stating, "[i]t is unclear whether or not there is any real difference" between the standards or if it is merely "semantics"); Wenkart, *supra* note 42, at 4, 29 ("[T]he use of different terminology does not appear to create different substantive standards or lead to different results" and thus "there appears to be very little substantive difference between the use of the two terms . . . .").

[63] Wenkart, *supra* note 42, at 3 (stating that "[t]he use of both terms in these circuits has further clouded the distinction between 'some educational benefit' and 'meaningful educational benefit'").

[64] *Compare* Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After* Rowley*?*, 39 SUFFOLK U.L. REV. 1, 25 (2005) (stating that the "some educational benefit" is the appropriate standard), *with* Cali Cope-Kasten, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 538 (2013) (stating that the "some benefit" standard is much too low a bar), *and* Scott Goldschmidt, *A New IDEA for Special-Education Law: Resolving the "Appropriate" Educational Benefit Circuit Split and Ensuring a Meaningful Education for Students with Disabilities,* 60 CATH. U.L. REV. 749, 775 (2011) (arguing that "meaningful benefit" is the more appropriate and fair standard), *and* Scott F. Johnson, Rowley *Forever More? A Call for Clarity and Change*, 41 J.L. & EDUC. 25, 25–26 (2012) (arguing that the some-benefit standard is "counter-intuitive and can create an adversarial atmosphere between parents and schools that can lead to litigation").

disability),[65] while its "meaningful" alternative takes pain to underscore the latter (especially in cases of significant potential).[66]

Nevertheless, in practice neither standard provides much guidance. Moreover, at times their application suggests a convergence, hovering around a middle ground between "trivial" and "maximal" benefits.[67] Indeed, the overlap—and attendant uncertainties—can take a disconcerting form. Thus, in one case, a court applying the "meaningful" standard upheld an IEP as yielding "demonstrable academic . . . benefits" where a dyslexic student showed average gains in most educational areas but only very modest ones in the areas most directly affected by the condition (reading and writing).[68] Yet in another case, an IEP enabling similar progress was held to be inadequate under the *lower* "some" benefit standard.[69]

2. *Post*-Rowley *Developments*

Two sets of developments subsequent to the *Rowley* decision bear on its continued authority in this area. First, at the state level, *Rowley* established a federal floor, not a ceiling, for access to educational benefits for students with disability. States are free to legislate more stringent requirements than those of the IDEA if they wish.[70] And while in practice the vast majority of states have implemented language similar to the IDEA, "many deferring or

---

[65] *See* Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629, 636 (4th Cir. 1985) (for "the most severely handicapped" students, even "minimal" benefits may be adequate).

[66] *See* Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 182 (3rd. Cir. 1986) (where a student displays considerable intellectual potential there must be "a great deal more than a negligible" benefit provided).

[67] Although even here one may wish to stake out a subtle, perhaps elusive, difference concerning the desired middle ground, between "modest" versus "significant" benefits. *Compare* Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (applying the "some" benefit standard to state that the IDEA sets "modest goals" in pursuit of "an appropriate rather than an ideal, education"), *with Polk*, 853 F.2d at 182 (applying the "meaningful" benefit standard to state that the IDEA calls for "significant learning"), *and* D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3rd Cir. 2010) ("Although a state is not required to supply an education to a handicapped child that maximizes the child's potential, it must confer an education providing 'significant learning' [. . . and . . .] 'the provision of merely more than a trivial educational benefit' is insufficient.").

[68] Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 343, 347, 349–350, 349–350 n.3 (5th Cir. 2000).

[69] *Hall*, 774 F.2d at 630, 632, 636. *See* Johnson, *supra* note 48, at 566–67 (pointing to *Houston* and *Hall* as instances where courts "produced varying results with similar information" regarding students' educational improvements, and attributing the variance "to the fact that courts do not have a substantive standard" to guide their assessment of "whether a gain of a certain amount is sufficient progress or not").

[70] *See* Town of Burlington v. Dep't. of Educ. Com. of Mass., 736 F.2d 773, 792 (1st Cir. 1984) ("*Burlington II*"), *aff'd*, 471 U.S. 359 (1985) ("[A] state is free to exceed, both substantively and procedurally, the protection and services to be provided to its disabled children."). States may also adopt laxer standards if they forgo federal funding, but no state has. Tyce Palmaffy, *The Evolution of the Federal Role*, *in* RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 6 (Chester E. Finn, Jr., et al. eds., 2001).

referring explicitly to the Act,"[71] a few states have gone further. At one point in time, Massachusetts had legislated a "maximum possible development" standard.[72] And courts in North Carolina have interpreted its legislative mandate of "full educational opportunity" to require the "full potential" standard rejected in *Rowley*.[73]

On top of legislative requirements, many state constitutions also contain clauses relating to education. And numerous state courts have interpreted these to require the affirmative provision of a certain level of "adequate education" to all students, one going beyond a merely "minimal" amount.[74] Two decisions in particular, having broad influence on other state courts, merit special mention. In *Pauley v. Kelly*, the West Virginia Supreme Court held that the state had an obligation to develop "every child to his or her capacity" along eight dimensions, from literacy, math and creative arts, to knowledge of government and "social ethics," to "self-knowledge," work skills and recreational pursuits.[75] And in *Rose v. Council for Better Education*, the Kentucky Supreme Court held that the state was required to equip each student with "sufficient" capacity in each of seven similar dimensions.[76] Any such requirements are, under the IDEA, incorporated into the conditions that an IEP must comply within that state.[77]

Second, at the federal level, since its initial passing the IDEA has undergone a successive series of statutory amendments, the cumulative

---

[71] Andrea Blau, *The IDEIA and the Right to an "Appropriate" Education*, 2007 BYU EDUC. & L.J. 1, 15 (2007).

[72] *See* Mass. Gen. Laws Ann. ch. 71B, § 2 (West) (2017) (requiring public schools to "assure the maximum possible development" of handicapped students, which was amended on January 1, 2002 to conform to the federal standard of "free and appropriate public education"); Stock v. Mass. Hosp. Sch., 467 N.E.2d 448, 453 (Mass. 1984); Roland v. Concord Sch. Comm., 910 F.2d 983, 987 (1st Cir. 1990) (Massachusetts has "elected to go considerably above the federal floor" by "defin[ing] an appropriate education as one assuring the maximum possible development of the child" (internal quotation marks omitted)).

[73] *See* N.C. Gen. Stat. § 115C-106.1 (providing that the goal of the State is "to provide full educational opportunity to all children with disabilities"); Burke Cty. Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir. 1990) (stating that North Carolina requires that students with disability be given the opportunity to realize their "full potential commensurate with the opportunity given other children").

[74] Johnson, *supra* note 48, at 568–69.

[75] Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979); *see also* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1025 n.23 (Colo. 1982); Abbott v. Burke, 495 A.2d 376 (N.J. 1985).

[76] *See* Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (enumerating the seven dimensions as: oral and written communication; knowledge of economic, social, and political systems; understanding of government processes; self-knowledge; arts; academic or vocational training; academic or vocational skills); *see also* Gannon v. State, 319 P.3d 1196, 1202 (Kan. 2014); Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1359 (N.H. 1997); McDuffy v. Sec'y of Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993).

[77] 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)–(bb) (2016); Individualized Education Program (IEP), U.S. DEP'T OF EDUC. (Oct. 4, 2006), https://idea.ed.gov/explore/view/p/,root,dynamic,TopicalBrief,10,.html [https://perma.cc/4AEV-WMEZ].

effect of which suggests an evolution in overall Congressional purpose toward stronger, and more substantive, requirements—one that, according to many observers, renders the *Rowley* "some benefit" standard outdated and in need of an upgrade.[78] Principal among these are amendments in 1997 that expressed the importance of upholding "high expectations" for students with disability, to ensure that "to the maximum extent possible" such students "meet developmental goals and . . . the challenging expectations that have been established for *all children*," so to equip them "to lead productive and independent adult lives."[79] In 2001, the No Child Left Behind Act required schools to report on students' "yearly progress" as part of "ensuring that all children have a fair, equal, and significant opportunity to obtain a high-quality education," one that includes "reaching, at a minimum, proficiency on challenging state academic achievement standards."[80] And in 2004 these were consolidated by amendments stipulating more stringent standards for special-education teacher training, and for measuring, evaluating, and reporting student progress.[81]

For many observers, then, the upshot of these federal developments is twofold. First, to the extent that *Rowley*'s "basic floor of opportunity" language had been interpreted in a largely procedural vein of simply making "some" benefit formally available, these changes clearly signal a substantive focus on actual outcomes, or effectively enabling real "progress."[82] A shift,

---

[78] *See* Regina R. Umpstead, *A Tale of Two Laws: Equal Educational Opportunity in Special Education Policy in the Age of the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 263 ED. L. REP. 1, 1 (Mar. 3, 2011) [hereinafter "Umpstead, *A Tale of Two Laws*"] (stating, "each update has been more of a tinkering with the original blueprint of the laws in order to advance [Congress'] broader goals"); Regina R. Umpstead, *Special Education Assessment Policy Under the No Child Behind Act and the Individuals with Disabilities Education Act*, 7 RUTGERS J.L. & PUB. POL'Y 145, 149 (2009) (stating that Congress is in fact attempting to modify the IDEA and is "critical" to policy making surrounding IDEA); Andrea Valentino, *The Individuals with Disabilities Education Improvement Act: Changing what Constitutes an "Appropriate" Education*, 20 J.L. & HEALTH 139, 152–55 (2007) (arguing that the legislature is trying to adopt a new "appropriate education" substantive standard, overturning the Court's "some educational benefit" standard).

[79] 20 U.S.C. § 1400(c)(5)(A) (emphasis added). *But cf.* L.T. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004) (rejecting the argument that these amendments change the *Rowley* standard to one requiring "maximum benefit;" interpreting them instead as "simply articulat[ing] the importance of teacher training, [not] as overruling *Rowley*").

[80] *See* 20 U.S.C. §§ 6311(b)(2), 6301 (2015) (requiring yearly reports).

[81] *See* Valentino, *supra* note 78, at 158–60 (summarizing 2004 amendments).

[82] *See* Philip T.K. Daniel and Jill Meinhardt, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education?*, 222 ED. LAW REP. 515, 535 (stating that the standards-based approach of the statutory modifications "shifts the focus from process to outcome and results"); Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 377 (2008) (stating that the 1997 and 2004 statutory updates to IDEA have an increased focus on "assessing academic progress" and have "clarified the expectations for FAPE"); Umpstead, *A Tale of Two Laws*, *supra* note 78, at 1 (stating that the No Child Left Behind Act was a "unique" shift indicating Congress' focus on progress assessments); H.R. REP. 105-95 at 83–84 (May 13, 1997) ("This Committee believes that the critical issue now is to place greater emphasis

that is, from "some benefit" to "some *progress*," at the least. And perhaps going further, a second shift to "*meaningful* progress."[83]

The storm clouds, long gathering, have now burst. Last summer, the Tenth Circuit declined the invitation to shift, in the face of mounting criticism, from the "some" to the "meaningful" standard.[84] The Supreme Court recently granted certiorari in the case, to revisit the question and, perhaps, its own answer in *Rowley*.[85]

We may summarize the existing legal landscape as follows. At the federal level there exist competing standards of *some benefit/progress* versus *meaningful benefit/progress*, with ongoing debate concerning the precise meaning of each and the differences between them, with the Supreme Court now re-entering the fray. Some states, meanwhile, have adopted more stringent standards (typically, for all students, not just for those with disability), which require the development of student potential up to *maximal* or at least *sufficient* levels.

B. *Rethinking Our Aim: from "Equality of Opportunity" to "Equity of Access"*

1. *The Distributive Character of the Question*

The *Rowley* "some benefit" standard has come in for voluminous criticism, both on substantive grounds, for embodying too modest a commitment and, more formally, for providing too little guidance as to what

---

on improving student performance and ensuring that children with disabilities receive a quality public education."); Philip T.K. Daniel, *"Some Benefit" or "Maximum Benefit": Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities*, 37 J.L. & EDUC. 347, 352–53 (2008) (explaining that 1997 and 2004 IDEA amendments, No Child Left Behind, and Federal Regulations finalized in 2006 all put greater emphasis on the need for substantive progress). *See generally* Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed* Rowley *and Raised the Substantive Standard for "Free and Appropriate Public Education"?*, 28 NAT'L ASS'N ADMIN. L. JUDICIARY 397 (2008); Perry A. Zirkel, *Is It Time for Elevating the Standard for FAPE Under IDEA?*, 79 EXCEPTIONAL CHILD. 497 (2013).

[83] Reinforcing this is the view taken by some commentators that the federal circuit split heralds an evolution toward the meaningful benefit standard. *See* David Ferster, *Broken Promises: When Does a School's Failure to Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 82 (2010) (stating that the circuit shift illustrates the "evolving views of special education and the purpose of IDEA"); Amy J. Goetz et al., *The Devolution of the* Rowley *Standard in the Eighth Circuit: Protecting the Right to a Free and Appropriate Public Education by Advocating for Standards-Based IEPs*, 34 HAMLINE L. REV. 503, 514 (2011) (arguing that some circuits' adoption of the "meaningful benefit" standard is evidence of a substantive "evolution" from *Rowley*).

[84] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 798 F.3d 1329, 1340 (10th Cir. 2015), *vacated*, 137 S. Ct. 988 (2017).

[85] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 137 S. Ct. 988 (2017). For discussion of the Court's recently delivered opinion, see the Afterword.

should be taken to satisfy it.[86] The alternative "meaningful benefit" standard, while ostensibly signaling a more robust commitment, has proven similarly difficult to apply. Indeed, the vagueness of each has led some to collapse them together.[87] For others, the standards retain a clear-enough difference, but the ongoing conflict between them is its own cause for lament, increasing uncertainty and producing horizontal inequity for similarly situated students across different jurisdictions.[88]

Academic commentators have similarly struggled with the question, many simply embracing one or the other side of the circuit split, but with little guidance on how to make either standard more determinate, much less principled.[89] Others, despairing of any substantive resolution, have turned their attention to improving procedural mechanisms.[90]

---

[86] *See* Cope-Kasten, *supra* note 64, at 522–38 (commenting that the *Rowley* decision "sets a pretty low bar" and that the courts "do not produce good outcomes for students because of the low standard set by the *Rowley* decision"); Valentino, *supra* note 78, at 154–55 (arguing that the "some educational benefit" standard is no longer viable); *see also* references cited in *supra* notes 78, 82–83 (arguing against the *Rowley* "some benefit" standard).

[87] *See supra* notes 59–60 and accompanying text.

[88] *See* Aron, *supra* note 64, at 6, 25 (noting the "definitional difference [which] has led to divergent results for students in different parts of the country" and, further, to district courts and state hearing officers "struggling with the existing circuit split"); Goldschmidt, *supra* note 64, at 752 (stating that a clear definition is necessary to resolve the current issue of students receiving "different levels of education depending on where they live in the United States"); Johnson, *supra* note 64, at 25 (arguing the circuit split must be resolved because "application of these different standards has produced vastly different results for students with disabilities").

[89] *Compare* Johnson, *supra* note 64, at 31 (advocating "meaningful" benefit as moving a child toward self-sufficiency and thus a case-specific inquiry gauged in relation to a child's potential), *and* Goetz et al., *supra* note 83, at 514 (rejecting notion that what is an appropriate education can be reduced to a single standard; instead, IEP must be reasonably calculated to enable a child to receive meaningful educational benefits in light of her or his potential), *with* Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. LEGAL COMMENT. 675, 832 (2004) (interpreting meaningful to mean "effective results" and "demonstrable improvement" as a working standard). *See also* references cited in *supra* note 61 (criticizing the lack of substance to the standard).

[90] *See* Perry A. Zirkel, *Building an Appropriate Education from* Board of Education v. Rowley*: Razing the Door and Raising the Floor*, 42 MD. L. REV. 466, 469–70 (1983) ("[T]he bewildering variation among the handicapped . . . def[ies] a single substantive standard and require[s] instead experimentation, variation, and evolution of a multifactor concept of appropriateness."); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. LEGIS. 415, 466 (2011) (calling for better "collaboration, individualization and contractualization" in IEPs); Anne E. Johnson, Note, *Evening the Playing Field: Tailoring the Allocation of the Burden of Proof at IDEA Due Process Hearings to Balance Children's Rights and Schools' Needs*, 46 B.C. L. REV. 591, 615–16 (2005); Michele L. Beatty, *Not a Bad IDEA: The Increasing Need to Clarify Free Appropriate Public Education Provisions Under the Individuals with Disabilities Education Act,* 46 SUFFOLK L. REV. 529 (2013) (arguing that some interpretations of the FAPE, namely the Eighth Circuit's decision in *Doe* ex rel. *Doe v. Todd county School District*, 625 F.3d 459 (8th Cir. 2010) violates procedural due process rights); Cope-Kasten, *supra* note 64, at 502, 538 (arguing that "due process is not a fair mechanism for special education dispute resolution").

Why has the issue of adequate benefits proved so intractable? The most elemental difficulty is as easy to state as it is to overlook: it is simply unclear what our guiding aim here is (or should be). Quite apart, that is, from the fact that the language used in formulating the standards is vague, what is also, and more importantly, left unclear is the underlying aspiration: by what yardstick are we to assess when benefits suffice to be "some," rather than "too little" or "too much"? What is our goal? And, in pursuing it, what competing concerns do we face? Similarly, for "meaningful": what makes benefits "meaningful" rather than merely "some," and at what point do they pass into the impermissibly "maximal"? Again, what are our underlying criteria for meaningfulness, and what competing concerns, if any, do we face in achieving it?

Ostensibly, our aim might be to secure "equality of opportunity" for students with disability, a notion finding some support in the language of both the statute and case law.[91] But as we shall see momentarily, that norm provides little guidance when our task is not to remove illegitimate barriers to procedural fairness, but rather to adjudicate between similarly legitimate claims in the affirmative provision of resources, for the sake of ensuring all are fairly given effective access to a substantive benefit.

And therein lies the nub of the problem. The question posed by adequate benefits is fundamentally a distributive one: What distribution of educational resources will *fairly* provide students with disability *effective access* to educational development, taking into account the similarly legitimate, competing uses of such resources for the educational development of others? Yet forthright recognition of the distributive character of the issue (i.e., of the need to weigh the claims of students with disability on educational resources against the similarly legitimate claims of other students) has been conspicuously absent in the discussions of courts and commentators.[92] Indeed, judicial evaluations of the adequacy of IEP benefits routinely

[91] As reviewed *infra* Part I.B.2.

[92] For an important exception, and criticism of the general lacuna in this regard, see MARK KELMAN & GILLIAN LESTER, JUMPING THE QUEUE 6–9, 14–15, 199ff (1997). For one of few sources that mention the distributive character of the issue, and even then only in passing, see Bonnie Poitras Tucker, Board of Education of the Hendrick Hudson Central School District v. Rowley*: Utter Chaos*, 12 J.L. & ED. 235 (1983) ("The obvious rationale for the [*Rowley*] Court's blatant disregard of Congressional intent was its unspoken fear that a contrary result would have opened the floodgates . . . [and] place[d] overwhelming constraints on the states' ability to provide educational services to all children . . . ."). Other observers mentioning the issue of cost do so one-sidedly, focusing solely on the effectiveness of different programs for students with disabilities, without regard to the distributive effects on other students. *See* Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 126 EDUC. L. REP 1, 9 (1998) (focusing on the Supreme Court's language that "it would do no good for Congress to spend millions of dollars in providing access to public education only to have the child receive no benefit from that education"). Finally, for a discussion of quite distinct distributive issues in this context, see Daniela Caruso, *Autism in the U.S.: Social Movement and Legal Change*, 36 AM. J.L. & MED. 483, 519–21 (2010) (emphasizing cost barriers facing families of students with disability in pursuing claims under the IDEA).

proceed without so much as a mention of the social opportunity costs involved in securing students with disability access to additional educational benefits, in terms of the potential educational benefits for other students from the same resources.[93]

Despite this official silence—indeed, partly because of it—the distributive character of the issue clearly lies at the heart of the trouble facing existing legal approaches. Concerns over costs are the omnipresent backdrop against which *Rowley* and its progeny have struggled to articulate an appropriate standard. They are most obviously present in decisions hewing closely to the "some" benefits pole, underlying these courts' reluctance to stray too far from a purely procedural vein, and into the terrain of substantive gains. But they can also be glimpsed in the emphasis placed by "meaningful" courts on not cutting off benefits too quickly for students with high potential—these being the students most apt to reap significant gains at relatively low cost. Yet remaining unacknowledged, such cost concerns inform courts' decisions inchoately at best, with no explicit reflection on any guiding principles to assist in their satisfactory resolution. Moreover, even if they were to be made explicit, courts would remain ill equipped to address such concerns so long as they continued to view them solely through the prism of equality of opportunity.

2. *Educational Opportunity: From Nondiscrimination to Equitable Access*

Equality of opportunity, framed against a backdrop of nondiscrimination, has long been the predominant lens in coming to grips with the IDEA.[94] In one respect this is understandable. The IDEA may be

---

[93] For a few of the overwhelming majority of judicial opinions evaluating the adequacy of IEP benefits by focusing solely on the student with the disability, see J.L. v. Mercer Island School Dist., 592 F.3d 938, 953 (9th Cir. 2009) (analyzing, in isolation, whether failure to specify the minutes per week of individualized education violated the student's IEP); C.B. *ex rel*. BB v. Special Sch. Dist. No. 1, 636 F.3d 981, 989 (8th Cir. 2011) (holding that the IEP revolves around the "individualized" educational needs of handicapped child alone); Petit v. U.S. Dep't of Educ., 675 F.3d 769, 773 (D.C. Cir. 2012) (setting out the responsibilities of IEP Teams for providing services to students with disabilities without any mention of needing to attend to the opportunity costs involved); D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 557 (3d Cir. 2010) (holding that the IEP is comprised of a student's abilities, goals for improvement, and services needed to meet these goals, taken in isolation).

[94] *See* Umpstead, *A Tale of Two Laws*, *supra* note 78, at 4–5 ("Varying conceptions of equal educational opportunity have driven the debate over the provision of educational services to disadvantaged students since the common school movement."); Valentino, *supra* note 78, at 157 ("[C]hildren with disabilities [should] be afforded the same opportunities" to learn as nondisabled children); Daniel & Meinhardt, *supra* note 82, at 515, 521–22, 524 (analyzing various interpretations of FAPE standards against the "equal opportunity" language of the state constitutions); Goldschmidt, *supra* note 64, at 774 (concluding that IDEA amendments were Congress' attempt to ensure "equal educational opportunity designed to realize [students'] full academic potential"); Eyer, supra note 92, at 5–6 (tracing the role of "equal educational opportunity" pre-*Rowley*, to the *Rowley* interpretation, to more recent IDEA amendments).

seen as part and parcel of a more general scheme of federal disability antidiscrimination law, alongside the 1973 Rehabilitation Act (RA)[95] and its 1990 successor The Americans with Disabilities Act (ADA)[96]—a scheme widely understood to extend to disability the reach of traditional civil-rights concerns with combating invidious discrimination.[97] Yet, ultimately, the lenses of nondiscrimination and equality of opportunity are of limited help in the IDEA context—and need supplementing by an analysis of distributive equity.[98]

The central question posed by the issue of adequate benefits is simply not well handled by the standard tools of antidiscrimination law. Aiming principally to secure similar treatment for similarly situated individuals, these tools focus primarily on rooting out illegitimate considerations marring procedural fairness. But at issue in the IDEA context is precisely that students with disability are not similarly situated, so that formally equal treatment—by way of the standard educational plan—fails to accord them substantively fair treatment. What is needed, rather, is *differential* treatment, tailored to such students' special needs, in the form of individualized educational plans. Moreover, in determining the adequacy of such plans, our principal task is neither: (a) to filter out the (perhaps hidden) role of illegitimate considerations—such as illicit beliefs or attitudes concerning those with disability;[99] nor (b) simply to adjust procedural requirements to

---

[95] 29 U.S.C. § 701 (2013).

[96] 42 U.S.C. § 12101 (2013).

[97] *See, e.g.*, Sch. Bd. of Nassau Cty., Fla. v. Arline, 480 U.S. 273, 277 (1987) (stating that from the language of the statute, Section 504 of the Rehabilitation Act was evidently patterned after Title VI of the Civil Rights Act of 1964 to "address[] the broader problem of discrimination against the handicapped"); Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 801 (1999) (characterizing the ADA as "seek[ing] to eliminate unwarranted discrimination against disabled individuals in order . . . to guarantee those individuals equal opportunity"); *see also* Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 415 (1991) (describing ADA as "a second-generation civil rights statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law"); Michael Ashley Stein & Penelope J.S. Stein, *Beyond Disability Civil Rights*, 58 HASTINGS L.J. 1203, 1207 (2007) (explaining that "American disability rights proponents . . . pursued an antidiscrimination approach modeled after previous civil rights statutes, most notably Title VII" of the Civil Rights Act of 1964).

[98] Readers already convinced that the distributive character of the problem elucidated in the previous section—namely, the need to prioritize among similarly legitimate claims to resources so as to fairly provide effective access to the good of educational development—requires for its satisfactory resolution an analysis sounding in distributive equity, rather than nondiscrimination or equality of opportunity, may wish to proceed directly to Part I.B.3. For important earlier treatments of the distributive character of the questions raised by disability accommodation, now in the ADA rather than IDEA context, see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 227, 230–31 (2000) (discussing employment accommodation as a distributive question); David A. Weisbach, *Toward a New Approach to Disability Law*, 2009 U. CHI. LEGAL. REV. F. 47, 47–50 (2009) (applying welfarist theories of distributive justice to the issue of disability accommodation).

[99] *See infra* note 102 and accompanying text (discussing "discriminatory disparate impact" analysis).

the special circumstances of "otherwise qualified" individuals with disability.[100] Rather, it is to weigh, in the provision of resources, the meeting of their special needs against the similarly legitimate claims of other students for the express purpose of securing for all access to a substantive benefit, namely educational development. Traditional antidiscrimination analysis is bereft of satisfactory criteria to guide us in this respect.[101]

This might be thought to overlook the "disparate impact" branch of antidiscrimination law, with its focus on impermissible effects rather than illegitimate processes.[102] But analysis of "discriminatory disparate impact," as it has developed under the RA and ADA, sheds little added light here. The central question in such cases is whether, despite there being no facial discrimination—so that neutral rules have been applied even-handedly—the effects of such formally equal treatment on those with disability are nevertheless uneven, and, more to the point, uneven in a way that is impermissible, so as to merit redress.[103] And in answering this question we face a fork in the road: (a) shall we continue to look to "discrimination" as our lodestar, so that uneven effects are only impermissibly so when they likely reflect some illegitimate consideration, one perhaps slipping past the filter of facial discrimination analysis, and thus become permissible when a legitimate or "rational" basis for them can be adduced?;[104] or (b) should we reach beyond such analysis and deem some uneven effects impermissible even when they are not "discriminatory" (i.e., when they can be traced entirely to legitimate considerations), if in the pursuit of such legitimate

---

[100] *See infra* note 98 and 106 and accompanying text (discussing "reasonable accommodation" in employment contexts under ADA).

[101] At best, the procedural focus of such an analysis will tend to issue in the following limited prescriptions: (a) counseling only that tailoring which can be fashioned within the expenditure of formally equal resources per student, so as to adapt some pedagogic techniques to special needs, but without provision for any supplementary learning aids requiring extra expenditures; or (b) mandating only those extra expenditures that can be vindicated on "rational" criteria of educational merit (see *infra* note 104 and accompanying text)—meaning where students with disability stand to reap greater marginal improvements in their educational performance than would other students from the same further resources. Neither of these has been taken as adequate by the courts, and for good reason: neither one satisfies the IDEA's legislative mandate, as discussed *infra* notes 113–115 and accompanying text, or principled requirements of equitable access, as discussed *infra* Part II, and especially Part II.B.3.

[102] Leslie Pickering Francis & Anita Silvers, *Debilitating* Alexander v. Choate*: 'Meaningful Access' to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447 (2008) (arguing that courts have identified two types of discrimination claims for purposes of relief under the RA and ADA: (1) discriminatory intent and (2) discriminatory disparate impact).

[103] *Cf.* Alexander v. Choate, 469 U.S. 287, 290 (1985) (noting that not "all action disparately affecting the handicap" is "unjustifiable").

[104] *See, e.g.*, EEOC, *Interim Enforcement Guidance on the Application of the Americans with Disabilities Act of 1990 to Disability-Based Distinctions in Employer Provided Health Insurance* (1993) (holding that disability-based distinctions are allowed as non-discriminatory if a sound "actuarial" rationale may be adduced for them); Doe v. Mutual of Omaha Ins. Co., 179 F.3d 557, 558–59 (7th Cir. 1999) (applying EEOC's "actuarial rationale" test to evaluate insurance company's disability-based distinction).

interests there was nevertheless a failure to factor in the special circumstances of those with disability? And if we wish to so broaden our concern beyond "discriminatory" to simply "inequitable" disparate impact, what are the relevant considerations of equity to guide our analysis?

Here, however, the case law has stalled in analogous fashion to IDEA jurisprudence. Although courts have signaled a willingness to go beyond traditional "discriminatory" analysis—so that simply failing to take into account the uneven effects of a program or policy on those with disability may qualify for a disparate-impact claim[105]—they have not provided much guidance regarding when such uneven effects suffice or fall short for making out a successful claim. Guidance, in other words, on what it would mean to attend equitably to the special circumstances of those with disability. Rather, in language strikingly resonant of the "some" and "meaningful" standards of IDEA jurisprudence, they have fallen back on broadly phrased standards of providing (some) "reasonable accommodation" within "manageable bounds," or ensuring "meaningful access" short of making "substantial" or "fundamental" modifications to programs and policies.[106] And so we circle back to the same problems facing IDEA case law: standards not only vague in their linguistic phrasing but, more troubling, unmoored in any underlying aim to orient the analysis, and lacking, even, a crisp sense of relevant considerations.[107]

To answer what it might mean to attend equitably to the special circumstances of those with disability, we need to bear clearly in mind two pointers: what is our purpose in a given context and how, in respect of that purpose, are persons with disability differentially situated? Only then can we know what sort of tailored treatment might be merited. In the IDEA setting, our purpose, again, is to secure access to a substantive benefit, the good of educational development. Students with disability are differentially situated in respect of that purpose because they face, in the language of distributive

---

[105] *See Choate*, 469 U.S. at 295–99 (redressing discrimination resulting from "thoughtlessness and indifference" as opposed to discriminatory animus or intent); Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) (distinguishing disparate impact and disparate treatment claims).

[106] *Choate*, 469 U.S. at 299–301; *see id.* at 299 (determining "which disparate impacts § 504 [of the Rehabilitation Act] might make actionable" requires an inquiry into the balancing of "countervailing considerations" of ensuring access while staying "within manageable bounds"); *see also id.* at 301 ("[A] benefit cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made."). Subsequently, of course, this language has been codified in numerous statutory requirements—not only under the ADA, 42 U.S.C. §§12112(b)(5)(A), 12181–12183 (2012), but also laws such as the Fair Housing Act, 42 U.S.C. §3604—that are applicable to a range of public and private entities, including providers of "public accommodations" as well as universities and employers who need, when fashioning their eligibility requirements, to make "reasonable accommodation" short of "undue hardship" for "otherwise qualified" individuals with disability.

[107] A sense, that is, of concretely what sorts of factors or concerns are or are not germane to "manageability" of accommodation, "substantiality" of modifications, etc.

justice, a "conversion deficit": a deficit in translating a given bundle of means (educational resources) into valued ends (educational development).[108] And, so, formal equality of resources fails to secure them *substantively fair* treatment—treatment that is fair in terms of its effects—because it fails to take into account their differential capacity for converting such resources into educational benefit. And in deciding how to tailor treatment to their differential needs, there is no plausible alternative to addressing it head on as a question of distributive equity; as a question, that is, of prioritizing among similarly legitimate claims to resources—i.e., the special needs of students with disability and the needs of other students—for the sake of fairly providing to all effective access to educational development.[109]

Strong support for this view of educational accommodation, as requiring *substantive equity* beyond procedural equality of opportunity, is found in the language of the IDEA itself. In contrast to the RA[110] and ADA,[111] the IDEA conspicuously avoids any mention of "discrimination."[112] The Act speaks instead of "the right" of persons with disability "to participate in or contribute to society."[113] It then underscores that those with disability have, however, "unique needs," which must be "appropriately" met if they are to

---

[108] *See* SEN, *supra* note 6, at 28–29, 33–34 (discussing how disabilities can affect the ability to convert resources into results).

[109] Some might contend that, even accepting its resource-intensive character, nevertheless such tailoring should be seen in terms not "merely" of distributive justice between similarly legitimate claims, but, rather, of a more imperative form of corrective justice—to "right the wrongs" of the invidious discrimination involved in configuring the built and social-institutional environment in ways that disadvantage the disabled. Such an argument would draw on the important insights, discussed below, of the "social model" literature on disability, concerning the ways in which departures from the statistical mean that we commonly associate with disabilities are not necessarily "disadvantages" but only become so in light of the way in which individuals having them interact with their specific architectural and institutional environments. *See infra* notes 206–208 and accompanying text (discussing the social model's conceptions of impairment and disability). However, even accepting the strongest social constructivist view of the disadvantages from disability (and, hence, of the sources of the "conversion deficit" at issue here), we would still need normative guidance concerning what social configuration of architectural and institutional arrangements would be just, either in the past or today. *See* Weisbach, *supra* note 98, at 48–49 (discussing how the social model's causal claims do not settle the normative question). And even if we wished to approach that question through the lens of corrective justice, as a matter of "redressing the wrongs" involved in a discriminatory configuration, to answer what would "make things right" or undo the discrimination would ultimately involve some baseline inquiry into what would have been the right thing to do in the first place and thus how far an unjust deviation took place (whether measured in terms of "impermissible harm" to those with disability or "unjust enrichment" to those without). And in settling *that* question, we would have to turn our mind to a normative evaluation of the tradeoffs facing decision makers back then, in terms of the social opportunity costs involved in the various alternative courses of action. We would have to, that is, turn again to a distributive-justice framework, only now pushed back in time.

[110] 29 U.S.C. § 794 (2012).

[111] 42 U.S.C. § 12101–12182 (2012).

[112] 20 U.S.C. § 1400–1482 (2012).

[113] *Id.* at § 1400(c)(1) (2012).

be effectively enabled to so participate and contribute.[114] In the specific context of educational needs, its aim is to ensure access to "improve[d] educational *results*" seen as an intrinsically valuable, indeed constitutive good, for the development of personhood and citizenship.[115]

Why, then, have courts and commentators—and indeed the IDEA itself to some extent[116]—continued to speak in terms of "equality of opportunity" as the guiding ideal, with its procedural overtones and roots in nondiscrimination? Part of the answer lies, no doubt, in the pull of equality of opportunity as a bulwark against a slide into an undesirable "equality of outcome." However, substantive *equity* aims at a target distinct from *both* procedural fairness *and* substantive equality.

Equity of access is neither *equality of opportunity* nor *equality of outcome*, departing from both in two ways. First, as opposed to *opportunity* or *outcome*, its focus is on *access to* outcomes. Second, as opposed to *equality* of access, it aims to achieve *equity* or fairness in access.

Regarding the first, *access* goes, on the one hand, beyond the focus of *opportunity* on redressing procedural defects for the sake of ensuring that competitive processes are fair—be it through the removal of illegitimate barriers to ensure formal equality or, even, the tailoring of otherwise legitimate procedural requirements to those differently situated, to ensure truly fair equality of opportunity. Access, by contrast, has its eye trained directly on a substantive good, seen as valuable in itself.[117] On this view, our aim in the IDEA context of formative K–12 education is *not only* to "level the playing field" so as to ensure a truly "fair process" of competition for grades, but also to secure each student "fair access" to the good of educational development, seen as intrinsically valuable. And to ensure that such access is effective rather than merely formal, we need to attend to involuntary differences in individual needs and capacities. At the same time, and from the other direction, *access* stops short of a direct focus on

---

[114] *Id.* at § 1400(d)(1)(A).

[115] *Id.* at § 1400(d)(3) (emphasis added).

[116] *Id.* at § 1400(c)(1). It should be noted that, on the other hand, the Act also makes reference to the goal of enabling "self-sufficiency," which, as discussed below at Part II.A.3, is best understood as a principle of distributive equity, albeit one facing considerable difficulties. It is also a standard that courts have shied away from adopting as a yardstick for the adequacy of benefits. *See supra* note 45 and accompanying text.

[117] That is, our aim in the IDEA setting is *both* to move beyond formal equality, by tailoring treatment for differentially-situated persons, *and* to do so for a substantive purpose, of directly enabling access to a good, namely educational development. By contrast, one might seek to move beyond formal equality, and tailor treatment for those differently situated, but do so while still retaining a purely procedural aim, such as, say, ensuring truly "fair competition" for jobs by reasonably accommodating to the special circumstances of "otherwise qualified" individuals, as may be thought to be the case in employment settings under the ADA. Although, for the view that even in such settings, accommodation requires attending to "distributive considerations," see Jolls, *supra* note 98, at 251.

outcomes, sharing *opportunity's* sensitivity to leaving a role for individual choice and responsibility in determining end results.[118]

Second, in the place of *equality*—whether of a procedural or substantive kind—we aspire to *equity* or fairness. Our aim, to recall, is to correct for the insensitivity of formal equality of resources to the conversion deficit facing students with disability, so as to ensure them substantively fair access to educational development. But does equitably adapting resource provision to their conversion deficit mean aiming to eliminate all disparities in access to development—so as to prescribe equalized access to outcomes? Not necessarily. Whether *fair* access requires, as a matter of distributive justice, *equalized* access is a key point of contention taken up below. For now, it suffices to say that our orienting focus is *not* on eliminating all disparities in access but rather on redressing *unjustified* or inequitable disparities. Leaving open for the moment how disparities may be justified or impugned on grounds of distributive equity, here we simply observe that equitable access may, but need not, issue in equalized access.

Equity of access, so conceived, is strongly consonant with the Supreme Court's own hesitations in *Rowley* concerning the aptness of "equality" thinking in this context. Taking merely formal or nondiscriminatory equality of opportunity as insufficient, and substantive equality of outcome as too demanding, the Court observed that the IDEA's aspiration may simply be "too complex to be captured by the word 'equal.'"[119] Quite so. Lacking, however, any conceptual alternative, the Court settled upon the unsatisfactory "some benefit" standard, as an ad-hoc—unmoored and vaguely specified—"midway" between procedural and substantive equality.[120] But we now have to hand precisely the alternative conceptual frame needed—one that requires not only departing from *equality*, but also moving past *opportunity* versus *outcome*. *Equity of access* sites us in the right frame: an analysis of distributive priority that reaches beyond all procedural concerns to focus directly on effective access to substantive benefits, while jettisoning any commitment to equalizing, aiming instead to secure *fair* access to all.

---

[118] As elaborated below, *infra* notes 137 and 212–214 and accompanying text.

[119] *See Rowley II*, 458 U.S. 176, 198–99 (1982) ("[F]urnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of 'free appropriate public education;' to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of 'equal' services in one instance give less than what is required by the Act and in another instance more. The theme of the Act is 'free appropriate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services.").

[120] *Id.* at 195, 198, 200.

3. *Distributive Equity* within *Educational Opportunity*

Equitable access in this sense also fits squarely within a distinct meaning of "opportunity" in education, over and above one that simply signals procedural fairness or a desire to steer clear of equality of outcome. In this distinct sense, "opportunity" may be taken to indicate a more important—higher order or simply more urgent—normative commitment than that of general distributive justice. On this view, opportunity points to a domain of special goods—such as K–12 education (health is commonly thought to be another)—that are taken to be more important than other, more generic goods subject "merely" to general distributive justice. Why? Because such special goods are thought either to meet especially urgent needs or to serve as enabling preconditions for attaining most other goods, and as such to be requisites for persons to form a sense of self and take an active part in society as citizens and participants in the economy.[121] Consequently, straight tradeoffs between these special goods and other generic goods are to be curbed.

Within, however, any one domain of such special goods, questions of a distributive character will still arise—due, among other reasons, to the challenges posed by disability. And to tackle these will still require recourse to principles of distributive priority, even if these are now cabined in their application, serving to evaluate across competing claims only as they arise within a delimited domain. Thus, rather than a rejection of distributive equity, what issues from this view of "opportunity goods" is instead a restriction on its scope: tradeoffs in the provision of resources for enabling access to such special goods should take place internally, between the goods themselves, rather than externally, against "outside" goods.

Support for such a restriction may also be found in a view based on somewhat distinct premises, but having similar implications here. Some theorists see goods such as health and education as "incommensurable" with, even if not necessarily normatively prior to, other goods. On this view education and health—and perhaps other goods as well—go to fundamentally distinct components of the good life, each having an "irreducible" value—one not sensibly compared to, or directly traded off against, others.[122] Consequently, distributive principles should only operate

---

[121] For such a view concerning education, see Christopher Jencks, *Whom Must We Treat Equally for Educational Opportunity to be Equal*, 98 ETHICS 518 (1988). Regarding health, see NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY 29–63 (2007). For the theoretical foundations of both views, see John Rawls, *Reply to Alexander and Musgrave*, 88 Q. J. ECON. 633, 641–43 (1974); RAWLS, supra note 9, at 37–38 n.23 and accompanying text, 263–67, 475–76.

[122] *See, e.g.*, MICHAEL WALZER, SPHERES OF JUSTICE 95–103 (1983) (advancing a pluralist, "sphere-specific" conception of distributive principles on communitarian grounds, as the best interpretation of our historical practices); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH (2002) (advancing a substantive view of human flourishing, as relevant to questions of justice, consisting of ten, irreducibly distinct, "spaces" of valuable states of being and doing).

to prioritize or make tradeoffs within, but not across, such distinct domains.[123]

The upshot of these views, for present purposes, is to restrict the focus of our distributive analysis to the *provision of educational resources for* the sake of enabling equitable access to *the good of educational development*. Our analysis will not, in other words, be one of distributive justice writ large—looking to ameliorate various kinds of disadvantage, using various means of amelioration, lying inside and outside the sphere of education. Rather, it will be an analysis of distributive equity cabined to the domain of educational opportunity—aiming to redress disparities in *educational advantage* through the expenditure of *educational resources*.[124]

Two more prudential considerations reinforce the case for so cabining our analysis. First, doing so hews closely to the IDEA's stated ambit, which is precisely circumscribed to addressing educational disadvantages associated with disability, through the expenditure of educational resources.[125] The Act targets, that is, only a subset of disabilities—namely, "learning disabilities," those that "adversely affect educational performance"—and it uses circumscribed means to ameliorate these— namely, the provision of the "special education and related services" of an IEP.[126] Closely following on from this is a second consideration: practical limitations on the capacities of those charged with implementing the IDEA, even if its statutory mandate were amenable to a more expansive interpretation. As we will see next, the information and resources lying at the disposal of those responsible for making priority decisions in real-world settings—i.e., local educational authorities (in consultation with parents) and the courts reviewing them—are largely restricted to the evaluation and

---

For further discussion and references on "incommensurability," see *infra* notes 237–242 and accompanying text.

[123] Allocation decisions across spheres or spaces would need to be made in some other fashion, such as, perhaps, through rough political judgments concerning adequate global budgets.

[124] It bears clarifying that so cabining our analysis of distributive equity to the domain of education does not entail downgrading the significance of distributive justice writ large. In particular, it is important to keep in mind that even after the full realization of distributive equity internal to specific domains like education and health, there likely will remain a strong case for pursuing "general" distributive justice in order to redress residual or overall forms of involuntary disadvantage. For further discussion, see *infra* at notes 230, 247.

[125] 20 U.S.C. § 1401(3)(A) (2012); 34 C.F.R. § 300.8(c)(1) (2016).

[126] 20 U.S.C. § 1401(3)(A) (2012); 34 C.F.R. § 300.8(c)(1) (2016). As we will see below in Part III, both the questions of how to measure and evaluate "educational performance" and of when a disability may be said to "adversely affect" such performance so as to render it eligible for an IEP, have generated great controversy among courts and commentators. And as we will also see there, that controversy is most clearly illuminated and resolved using the tools of distributive-justice theory; in particular, analysis of the proper index of advantage for distributive concern.

improvement of educational performance through provision of educational resources.[127]

II. JUSTICE IN THE DISTRIBUTION OF EDUCATIONAL RESOURCES

A. *Existing Standards Recast as Distributive Principles*

What, then, is a fair distribution of educational resources—one that provides students with disability equitable access to the good of educational development, attending simultaneously both to their special needs and to the similarly legitimate claims of other students?[128] We begin by evaluating, as candidate answers, the most prominent existing or proposed legal standards, now reconstructed as distributive principles.

To ground our discussion, consider the following composite drawn from the case law.[129] Jamie is a third-grade student with severe dyslexia that significantly impairs his reading and writing ability. He otherwise operates at a high level of intellectual ability, scoring above average on the standardized IQ tests commonly used to measure such ability. At the time of the initial evaluation of his disability, Jamie's test scores in different skills and knowledge areas were as follows (the numbers indicate the grade level he is performing at): 3.3 for math, 3.1 for general information, 0.8 for reading and 1.2 for written language. That is, despite being slightly above his own grade-three level for math and general information, he is below the grade-one level for reading and just above it for writing.

Suppose our options for devising an appropriate IEP are the following: (a) supplementing his regular classroom time with remedial small group instruction; (b) further adapting his learning materials and tests into multisensory format; (c) taking the multisensory modifications to the next level with a specialized Alphabetic Phonics (AP) program that involves more interaction with a specialized AP teacher (that a school may have to train or bring in from the outside); and (d) finally, shifting him to a full-time or majority-time alternative placement outside the regular classroom, where

---

[127] This is not to say that more centralized administrative decisions could not play a larger role in implementing IDEA commitments. *See infra* note 133. But even for those decision-makers, the information and resources at their disposal will plausibly remain tied to the improvement of educational outcomes through educational resources.

[128] This way of posing the question limits consideration of available resources to those lying within the domain of education, and it also limits consideration of the possible uses of educational resources to the purpose of improving student access to educational development as the relevant metric of the good (or index of advantage) for purposes of distributive concern. The reasons for so cabining tradeoffs are given immediately above, in Part I.B.3. Refinements to "overall educational development" as our index of advantage are considered below, in Part III.C.

[129] D.S. v. Bayonne Bd. of Educ., 602 F.3d 553, 556 (3d Cir. 2010); C.B. *ex rel.* B.B. v. Special Sch. Dist. No. 1, Minneapolis Minn., 636 F.3d 981, 989 (8th Cir. 2011); Hall v. Vance City Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999); Hous. Indep. Sch. Dist. v. Joyce, 200 F.3d 341, 350 (5th Cir. 2000).

he would receive a slower, more methodical and highly structured approach to learning as his normal course of instruction.

Naturally, within each option there exists a range of variation—there can be more or less supplemental instruction, adaptation of materials, exposure to AP, or even time spent in an alternative instructional environment. Nevertheless, the basic point is clear enough: each successive option along the spectrum involves a more extensive use of educational resources, while also holding out the promise of greater educational progress for Jamie; at least in terms of reading and writing, but also perhaps more generally if, as may often be the case, improvements in one area catalyze those in others.[130]

Suppose further that Table 1 contains reasonable estimates of the extent of annual progress held out by each option in its standard guise. Such figures may be available before we decide on which IEP to adopt, as estimates of the benefits different plans are "reasonably calculated" to hold out. Or they may only emerge after the fact, as different IEPs are tried out in the search for determining which is adequate.[131] Naturally, the specific numbers given here are simplifications, offered for illustrative purposes only. But similar figures are typically used by both schools and courts in assessing the adequacy of IEPs, and these particular ones are drawn from the case law.[132]

---

[130] Such spillovers can take a more straightforward form, whereby, for instance, enhanced reading ability directly improves learning in other areas (such as "general information"). Or they may operate more diffusely, such as by increasing Jamie's overall confidence and enthusiasm for learning and participating in school-related activities more generally. *Cf. Hall*, 774 F.2d at 630–33 (describing how a lack of progress in reading ability resulted in a student with dyslexia "develop[ing] significant emotional difficulties because of his failures," including a "'school phobia' characterized by frequent absences" and a general "restricting [of] his activities").

[131] IEPs are often retrospectively deemed appropriate and eligible for public reimbursement, even when the parents have sought out the plan on their own initiative. *See* Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369 (1985) (holding that a federal court's authority to grant "appropriate" relief under IDEA §1415(i)(2)(C)(ii) includes "the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act"); Forest Grove Sch. Dist. v. T.A, 557 U.S. 230, 244 n.11 (2009) (clarifying that *Burlington* applies to extend IDEA statutory authority to "hearing officers as well as courts to award reimbursement notwithstanding the provision's silence with regard to hearing officers").

[132] *See supra* note 129 (citing cases used to form a composite on which the discussion is based).

Table 1: Annual Progress Under Different Plans

	Initial Level	No IEP	Plan A	Plan B	Plan C	Plan D
Reading & Writing	1.0	0	0.2	0.4	0.8	1.0
All Other Areas	3.2	0.8	1.0	1.0	1.1	1.1

Thus, it is supposed that Jamie would make no progress in reading and writing without an individualized program, while the extent of his progress with a program depends significantly on the specific IEP chosen. Plan C, for instance, enables twice the progress of Plan B, but still falls short of enabling an improvement of a full grade level per year. For that, we would need Plan D, which enables Jamie to make roughly average annual progress—remaining at a lower overall capacity compared to others, but perhaps not widening the gap. In all other learning areas, it is supposed that Jamie would still need at least a minimal individualized program to make average annual progress.

Which plan—or modification or combination of them—is or ought to be required under the IDEA?[133] A number of alternative answers to this question have been advanced over the years. Some of these may be seen as simply specifying with greater precision the "some" or "meaningful" standards, in order to provide more determinate guidance. Others may be seen more plausibly as substitute standards. The main candidates contend that an IEP should enable students with disabilities to realize one of the following: (a) "equal results" with other students; (b) their "maximum potential"; (c) a "minimal level" of achievement; (d) the "same progress" as other students; or (e) "efficient progress." We take up each of these in turn, evaluating their appeal and drawbacks. In the course of doing so, we will

[133] Posing the question this way may seem to imply an institutional preference for case-specific implementation of IDEA commitments—by contrast, say, to more administratively coordinated approaches such as centralized school finance decisions that compare and evaluate commitments across categories of disabilities or students. However, nothing in what follows should be taken to commit to one or another view of the best mode of institutionally implementing IDEA commitments. Rather, it is engaged in the somewhat prior task of exploring, at the level of normative first principle, what those commitments should be—by way of a systematic analysis both of candidate principles of distributive equity and of candidate indices of educational advantage to which such principles should apply. It is for the sake of grounding that theoretical discussion that we consider here a specific case of the sort routinely faced by local educational authorities and the courts. This leaves open, for future work, the equally significant task of exploring, at the level of institutional design, how best to implement our normative commitments in this area. I thank Jasmine Harris and Aaron Tang for helpful discussion of this issue.

also begin to develop an alternative, the principle of "proportionate progress," which we will then consider more fully in the Section following.

1. *Equalized Access: Telic Equality*

On a first view, the appropriate aim for an IEP is to equalize educational results for students with and without disabilities.[134] This was the aspiration attributed, by the Supreme Court in *Rowley,* to the district court's standard of providing students with disabilities a "full opportunity" to develop their abilities. The higher Court interpreted (and rejected) this as a call for achieving "strict" or "absolute" equality in outcomes.[135]

Equality of outcome is, of course, a notoriously unpopular ideal.[136] We should, however, take care to distinguish between several different difficulties it faces. To the extent that it is taken simply to mandate equalizing results across students, with great precision and irrespective of students' own efforts and cooperation, it is of course a plainly unattainable and unattractive ideal. But few if any intend it that way. Virtually all prominent views within distributive justice theory give some role to individual responsibility, and thereby focus on securing individuals effective *access to* the means for responsibly attaining outcomes, rather than on realizing the end outcomes themselves.[137] Moreover, a moment's reflection reveals that our focus should be on access to outcomes that are "reasonably calculated" to occur, allowing for various imperfections in measurement. Thus, a refined statement of the ideal would be to provide students with disability educational benefits that are "reasonably calculated" to give them "equalized access to outcomes."

Even so refined, however, the ideal remains unattractive and it is important to see that this is so for three distinct reasons. First, the aspiration

---

[134] *See* Nicholas C. Burbules & Brian T. Lord, *Equity, Equal Opportunity and Education*, 4 EDUC. EVALUATION & POL'Y ANALYSIS 169, 182 (1982) ("[I]t is easy to see why this interpretation is appealing. First, its goal is the full equality of outcomes . . . in the case of education, such a view would be especially appealing because we value so highly the attainment of education."); Umpstead, *A Tale of Two Laws*, *supra* note 78, at 6–7.

[135] *Rowley II*, 458 U.S. 176, 198–99 (1982).

[136] Indeed, its unpopularity is likely what pushes many away from distributive justice altogether, and back into equality of opportunity as an alluring "midway" between formal equality and equality of outcome. That reaction, however, fails to register two key points made in Part I.B, *supra*, namely: (a) that distributive justice views also focus on a midway between formal equality and equality of outcome, namely "equitable access" to effective means; and (b) to the extent that equality of opportunity is understood, in the present context, as a distinct norm from that of distributive justice (as opposed to being a vaguely specified distributive aspiration itself), it provides limited guidance here given the distributive character of the question posed.

[137] *E.g.*, Ronald Dworkin, *What is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981); Amartya Sen, *Well-being, Agency and Freedom: The Dewey Lectures 1984*, 82 J. PHIL. 4, 169 (1985); Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 PHIL. STUD. 77 (1989); G.A. Cohen, *On the Currency of Egalitarian Justice*, 99 ETHICS 906 (1989). This point is elaborated below, with added references, *infra* note 212 and accompanying text.

seems unattainable, at least in many instances of significant or severe disability. This is likely so even in the case of Jamie, of a single impairment directly affecting a single learning area for an otherwise slightly above-average student.[138] And it holds true even more strongly for the many cases that involve much more severe, and often multiple, impairments with impacts on a wider range of learning areas.

However, the unattainability of the aspiration is only apparent, and seeing why reveals the deeper flaws with the ideal. If we wished truly to provide access to equal results, we could "level down": i.e., once the ceiling of improvements for students with disabilities has been hit, so that additional educational resources would confer upon them no benefit, we could nevertheless continue with the program of equalization by reducing the educational resources devoted to those without disability, until their levels had sufficiently dropped. That is, we could reduce the level of the better off even when doing so does nothing to improve the level of the worse off, but does bring the two closer, simply for the sake of equalizing.[139]

Now, of course most proponents of an equalized-access view would stop short of counseling such leveling down, and insist that their commitment to equality is not unqualified or absolute, so that all things considered the harm of reducing benefits for some without corresponding gains for others may not be worth the increase in equality. What is important to notice, however, is that even where leveling down is rejected in practice, it remains in principle a matter of regret for this view that unequal access to outcomes ensues (even if that regret is not a sufficient reason for action).[140] On an alternative view, however, the inequality in access is not, even in principle, a matter of regret. While it is regretful that some students are not able to achieve a higher level, it is *not* regretful that other students are able to do so.

This then points to the deepest flaw with the equalized-access view, namely its "telic equality" notion that distributive equality is in itself a goal, something valuable for its own sake.[141] What is wrong with that view is that

---

[138] Thus, after three years of education under Plan D, Jamie would still, in grade six, reach just a fourth-grade level of reading. Presumably, additional supplements to Plan D could accelerate his progress even further, but even so, it is unclear whether any amount of additional benefit would bring him to the level of the most advanced readers in his class.

[139] *See* DEREK PARFIT, EQUALITY OR PRIORITY? LINDLEY LECTURE 17–18, 23 (1991) (advancing the "Levelling Down Objection" to equalizing).

[140] *See, e.g.*, ERIC RAKOWSKI, EQUAL JUSTICE 100 (1991) (asserting that although "it would obviously be wrong to pursue equality by injuring those who are better endowed" and thus "[p]erfect equality of resources [where "resources" include personal "physical or mental powers"] may not always be achievable at an acceptable cost . . . it nevertheless remains the ideal"). *See generally* LARRY TEMKIN, INEQUALITY 245–82 (1993).

[141] The term "telic equality" comes from Derek Parfit, to designate the view that "[i]t is in itself bad if some people are worse off than others." PARFIT, *supra* note 139, at 4. Parfit criticizes this view primarily on the foregoing ground, namely that it is vulnerable to the leveling-down objection. This is distinct from the following, deeper-going criticism, that the focus on sameness is fundamentally

it conflates a commitment to taking all persons' lives to matter equally, and thus to giving each person equal concern in political morality, with a commitment to placing intrinsic value on achieving "sameness" in outcomes.[142] On an alternative view, the commitment to equal concern is best understood as a commitment to enabling each person's life to go *as well as is possible and fair*. And what is fair is that those who are, through no fault of their own, worse off than others be given priority because (and to the extent that) they are worse off. This is *not* for the sake of equalizing, but rather because their lower level gives them a more urgent moral claim to improvements. And the urgency of that claim is always a comparative matter, a question of how much worse off they are than other claimants or potential recipients.[143] With this change in perspective, differences in access to outcomes are not by themselves a matter of regret, nor does leveling down hold out any appeal, even prima facie.[144] What distributive principle might result from this alternative elaboration of the commitment to equal concern? We return to this shortly, after reviewing the other major alternatives currently available.

2. *Maximized Potential: Maximin/Leximin*

A close cousin to equal results, but one shorn of its leveling-down implication, is that we should seek not to equalize access to outcomes, but

misplaced—so that it is no answer simply to address leveling-down concerns by, say, qualifying our commitment to telic equality by allowing Pareto improvements (the "leximin" view discussed shortly). *See infra* note 149 (describing "leximin" approach to equalizing outcomes). The deeper point is that this commitment itself needs to be jettisoned and replaced by another to fundamentally reorient our perspective and change entirely the basis and character of special concern owed to those worse off through no fault of their own. *See infra* Part II.B.1. By contrast, Parfit takes the amended, "leximin," view just canvassed as reconcilable with his argument. PARFIT, *supra* note 139, at Appendix.

[142] To avoid misunderstanding, it bears emphasizing that what is being rejected here is *distributive* equality as *intrinsically* valuable. Distributive equality may still be *instrumentally* valuable, due, for instance, to the impact of distributive inequality on access to positional goods, relative purchasing power, or "relative deprivation" effects. And a commitment to equality in a more abstract (nondistributive) sense, of affirming the equal moral worth or dignity of each person, and according each member of the political community equal concern, is not in question. Rather, what is being questioned here is whether, in matters of distributive justice, equal concern should mean we focus on "sameness" as valuable for its own sake. (This also sets to one side the possibility that, for other questions of political morality, such as political participation by citizens in democratic decision making, equalization may well be of intrinsic importance.)

[143] This emphasis on the moral significance of comparative levels—on the significance of some persons being *worse off* than others, rather than simply *badly off* in some absolute sense—differentiates the position being advanced here from that of others who also reject the telic equality commitment to distributive equality as valuable in itself. *See infra* note 161 (differentiating the present view from non-comparative sufficiency and priority views).

[144] Nor, to anticipate the following position, would we single-mindedly pursue only improvements for the worse off, with no regard to what is possible and fair for others. That would only be sensible if equalizing were our aim, which it is not even if it were attainable.

rather to maximize the level of the worst off.[145] This is the most common interpretation of the *Rowley* district court's "full opportunity" standard, with "maximizing potential" being the formulation most frequently advanced—and typically rejected—by the courts as an alternative to the "some" and "meaningful" benefit standards.[146] Instances of the position include the mandate, formerly under Massachusetts' law and still in force in North Carolina, to provide students with disability access to "maximum possible development" or "full opportunity" to develop their potential, and *Pauley*'s interpretation of the West Virginia Constitution as requiring that each student be developed up "to his or her capacity."[147]

What these standards require is that we continue to devote educational resources to the needs of students with disability so long as they remain worse off than others and have any room for improvement. Once a ceiling has been hit, we stop and use any remaining resources to benefit those students who are already doing better.[148] The appeal of such a "maximin"

---

[145] *See* Michael A. Rebell, *Structural Discrimination and the Rights of the Disabled*, 74 GEO. L.J. 1435, 1473 (1986) (describing the "maximum potential" standard as a possible approach to equal protection). This may be seen as a particular application of John Rawls's "difference principle" of distributive justice, which endorses only those inequalities that redound to the maximum benefit of the worst off. Rawls, *supra* note 121, at 65. However, Rawls himself cautioned against such particularized applications of the principle, restricting it to matters of overall distribution resulting from the "basic structure" of society—to counsel maximizing the lifetime expectations in income and wealth of those least advantaged in that respect. Moreover, he explicitly ruled out taking those with disabilities as the "least advantaged" or "worst off" for purposes of applying "maximin"—understanding the principle to be either undersolicitous, by focusing on income/wealth holdings without regard for conversion deficits, or, if taking such deficits into account, untenable. The two main attempts to handle disability in the face of the gap left by Rawls's theory are those extending Rawls's "resource" focus to handle disability, and, what Rawls himself pointed to, the capability approach of Sen and Nussbaum. Both are evaluated, *infra*, in Part III.B.

[146] *See* Kerkam v. Superintendent, D.C. Pub. Sch., 931 F.2d 84, 87 (D.C. Cir. 1991) (holding *Rowley* precludes analysis of where the student would have made the most progress so long as the public school confers "some educational benefit"); Hartmann v. Loudoun County Bd. of Ed., 118 F.3d 996, 1001 (4th Cir. 1997) ("States must . . . confer some educational benefit upon the handicapped child, but the Act does not require the furnishing of every special service necessary to maximize each handicapped child's potential."); C.B. v. Special Sch. Dist. No. 1, Minneapolis, Minn., 636 F.3d 981, 989 (8th Cir. 2011) ("The statute does not require a school district to maximize a student's potential or provide the best possible education at public expense."); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 178 (3rd Cir. 1986) (stating that "[h]owever desirable the goal of maximizing each child's potential, . . . such a goal would be beyond the fiscal capacity of state and local governments" and is not required either by the IDEA or *Rowley*"); Adams v. Oregon, 195 F.3d 1141, 1150 (9th Cir. 1999) ("IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the [plan] in place be reasonably calculated to confer a meaningful benefit on the child.").

[147] *Supra* notes 72, 73, and 75 and accompanying text.

[148] Although the judicial formulations are open to alternative readings, this "maximin" interpretation does seem the most plausible and apt. One alternative reading is to take the standards to be urging that we simply seek to maximize, simultaneously, the potential of *all* students, with or without disability. Given, however, that available educational resources will not suffice to enable all students to maximize their potential, this view simply returns us to where we started, in search of priority rules to decide between those falling short. Another possible interpretation is that we should focus on maximizing

position is that it gives strong, indeed absolute, priority to the needs of those students worst off due to disability, but without any attempt to achieve the unattainable, or unattractive, equalization of access to outcomes.[149]

Yet this view still faces a distinct problem: taken strictly, the injunction to enable Jamie's "maximum possible development" means that so long as we can achieve *any* improvement in his capacities through added supplements to his educational program, we should continue to do so no matter how small the improvements, nor how consuming of educational resources the supplements. The concern this raises is clear, especially when we consider, again, cases of more severe impairments that impact a wider range of learning areas, thereby multiplying the areas of deficit and the possible interventions for improvement: some students will have potentially "insatiable needs," presenting a so-called "bottomless pit" problem requiring us to devote increasingly large amounts of educational resources in pursuit of increasingly small, but still positive, educational gains.[150] At

---

the potential of students with disability, continuing to do so even if their level surpasses that of other students, without regard to the needs or potentials of others. This, then, would not be a "maximin" view, but rather one that simply singles out one subset of students, those with disability, for maximization. Indeed, this may well be what many courts discussing this standard in the IDEA context have in mind. Such an approach, however, would still remain subject to the criticisms adduced in the text against the maximin interpretation. And it would also face an additional burden: that of having to justify priority to students with disability even when they are doing better than other students—a matter which we turn to in Part III. We note in passing here that one important benefit of adopting a distributive-justice lens is the sharper analytical purchase it provides, enabling us incisively to distinguish and evaluate the alternative substantive positions plausibly lurking within any one formulation of an existing or proposed legal standard.

[149] Strictly speaking, this is perhaps better understood as a "leximin" rather than "maximin" view. Maximin stipulates that departures from equality are only justified when they improve the absolute levels of the worst off. *See* Rebell, *supra* note 145, at 1473 (describing the "maximum potential" standard). Hence, even gains to the second-worst-off, which do not come at the expense of the absolute level of the worst off but do increase the relative gap or inequality between the two, would not be justified. In other words, maximin retains some leveling-down aspects. Leximin, on the other hand, allows such further departures from equality, so long as the absolute level of the worst off is still maximized (i.e., it allows Pareto improvements to qualify its commitment to telic equality). PARFIT, *supra* note 139, at 38. Leximin counsels, then, that once the worst off have been maximized, we then move to improve the second-worst-off, and so on. What matters here, however, is that both views share the commitment to giving absolute priority to the worst off, maximizing their level. And for that commitment "maximin" is the more familiar moniker, one that also resonates better with the "maximized potential" formulation. In any case, the considerations advanced against this view here apply equally to maximin and leximin variants.

[150] *See* Jaime Ahlberg, *Educational Justice for Students with Cognitive Disabilities*, *in* EDUCATION: IDEALS AND PRACTICES 150, 160 (David Schmidtz ed., 2014). Although this is frequently referred to as the "bottomless pit" problem, that is somewhat of a misnomer analytically, as well as being an unfortunate choice of words. A truly bottomless pit is one in which resources are essentially "thrown away," producing no benefit. Here however, the injunction is not to continue to devote resources to those worse off even when it produces no benefit, simply because they are worse off—although such a view does seem to have been taken by at least one court. *See* Timothy W. v. Rochester, N.H., Sch. Dist., 875 F.2d 954, 960–61 (1st Cir. 1989) (holding the IDEA does not contain a "prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will benefit" (internal quotation

the limit, a small number of students with very high needs may exhaust a school's budget. And, indeed, such concerns have been expressed by courts in jurisdictions governed by the "maximal potential" standard, to restrict benefits in the face of what that standard, strictly interpreted, would seem to require, although without any principled guidance as to how to do so.[151]

One might think that this takes too literal a view of "maximum possible development," and that a more sensible reading is to interpret "possible" in a looser sense: as pointing to a notion of "plausible" or "feasible" maximal development, one requiring some judgment of what is practical or reasonable. Perhaps. Indeed, we will soon consider one such "reasonable" reinterpretation of the standard.[152] But what bears underlining here is that any such alternative interpretation would need to identify what further considerations are relevant to such judgments of reasonableness. And the premises underlying the "maximin" approach are bereft of any such additional criteria. By giving absolute priority to the worst off, it directs us to focus solely on their levels, as the only relevant consideration. This, in turn, is only plausibly anchored in the same normative orientation as the equal-results view, namely the telic equality aspiration toward equalizing outcomes, although now advanced in more muted form. The result remains a single-minded focus on improvements for the worse off, with no regard to what is possible and fair for others. The view discloses, in other words, no other values relevant to determining when to stop short of maximin, nor is it clear how any values brought in "from the outside" might be weighed against its valuation of equalizing access to outcomes.

---

marks omitted)). Rather, the injunction is to continue so long as there is *some*, no matter how miniscule, positive gain. A more apt alternative characterization of the issue, offered by Mark Stein, is that of "insatiable needs." Mark Stein, *Nussbaum: A Utilitarian Critique*, 50 B.C. L. REV. 489, 500 (2009). To this should be appended "potentially" insatiable needs, to underline the point that, in principle, there may be a limit or ceiling on such needs, even if it is unlikely to be reached in practice.

[151] *See* Harrell v. Wilson Cty. Sch., 293 S.E.2d 687, 688, 691 (N.C. Ct. App. 1982) (holding that a school need not reimburse funding to cover the cost of sending a hearing impaired student to "one of the leading institutions in the world which teach deaf students" even under North Carolina's "full potential" standard, which, "as progressive as it may be, was not designed to require the development of a utopian-educational program for handicapped students any more than the public schools are required to provide utopian educational programs for non-handicapped students").

[152] *See infra* note 182 and accompanying text.

3. *Minimum Achievement: The Sufficiency View*

In the face of these difficulties confronting equalization views, many may be drawn to an altogether distinct notion of what it means to give each person equal concern: what matters is not equality, but *sufficiency*, so that our aim should be simply to ensure that each student is enabled to reach a decent basic threshold level of achievement, irrespective of what level others are able to reach. What matters, on this view, is that each student has access to *enough*, not to *the same*.[153]

The nub, of course, is stipulating what should count as enough, in terms of a decent threshold level of sufficient educational attainment. Among the array of possible answers, the main options in this camp may be grouped into two clusters: those settling on a more *minimalist* view, such as the federal court decisions interpreting *Rowley*'s "some" benefit standard as being satisfied by provision of some non-trivial benefit (most commonly, enabling grade advancement),[154] and those adopting a more *robust* conception, such as those state courts interpreting their constitutions to require that each student be equipped to realize a high degree of competence across a range of dimensions deemed necessary for active participation in social, economic, and political life.[155] The central difficulty facing this approach is plainly stated: any truly decent threshold will likely be too high to be reached by many students with significant disability (or reachable only at exorbitant cost), while any broadly attainable level will likely be too low to satisfy us that, upon meeting it, we need show no further special concern for those with disability. A robust sufficiency standard, in other words, will tend to be over-inclusive, while a minimalist one will tend to be under-inclusive.[156]

To illustrate, if we use grade advancement as our cut-off, then Jamie may only merit Plan A, depending on the extent to which his scores in other areas are able to compensate for the low ones in reading, enabling him to attain a passing grade overall. To be sure, low reading ability might also affect his performance in other dimensions, in which case the requirement

---

[153] *See* Harry Frankfurt, *Equality as a Moral Ideal*, 98 ETHICS 21, 21–22 (1987) (advancing the "sufficiency view" that "[w]ith respect to the distribution of economic assets, what is important from the point of view of morality is not that everyone should have the same but that each should have enough. If everyone had enough, it would be of no moral consequence whether some had more than others"); Elizabeth Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288–89 (1999). *See also* references cited in note 249, *infra* (discussing sufficiency approaches to educational equity).

[154] *See supra* note 49 and accompanying text.

[155] *See supra* note 76 and accompanying text.

[156] A similar assessment was offered by the Supreme Court in *Rowley* with respect to one possible threshold level, "self-sufficiency": "Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, 'self-sufficiency' as a substantive standard is at once an inadequate and an overly demanding requirement." *Rowley II*, 458 U.S. 176, 200 n.23 (1982).

of grade advancement may have some bite. But even so, supposing that this means Jamie now merits Plan B, should we really be satisfied when a dyslexic student performing above average in other areas has, by grade five, reached a reading and writing level that remains below that of a second grader (1.8)? Or that at this rate by grade twelve his reading will hover in the range between that of a fourth or fifth grader (4.6)? Does it not matter what his potential is for further improvement under Plans C and D?[157]

Perhaps the problem lies, however, not with the minimum-achievement approach but its application to the wrong zone of achievement. What if, that is, instead of looking to overall grades/educational achievement in setting the sufficiency threshold, we restricted our focus to those specific areas that are impaired by the disability, and ensured that each of these reaches a decent minimum? What would that decent minimum be here? Under Plan D, Jamie's reading/writing level in grade five will be at just that of a third-grader (3.0). Does that suffice? If we think not, on the view that a decent minimum should be attaining one's grade level in each distinct area, then we have likely transitioned from the problems facing a minimalist view to those facing a robust conception. That is, while enabling students to attain their grade level across all core areas of skills and knowledge may be a more adequate conception of a decent level,[158] such a threshold will likely be reachable for some students in some areas only at exorbitant cost, if at all.

Now in the case of Jamie, it may turn out to be reasonably reachable, by supplementing Plan D with further assistance so as not only to maintain steady grade-level progress but also gradually close the overall gap of two grade levels. But to determine that, we would need to know what considerations are relevant to assessing said reasonableness. And the sufficiency approach, like the maximin view, is bereft of any such criteria, being an "all-or-nothing" stance: those remaining below the threshold continue receive, as with maximin, absolute priority ("all"), while once those who can reach the threshold do so, they receive no further special concern ("nothing")—irrespective, in both cases, of the students' potentials for further improvement. Whether or not such restricted absolute priority would be concerning in the case of Jamie, it is clear that for any decently robust

---

[157] *Cf.* Polk v. Cent. Susquehanna Intermediate Unit, 853 F.2d 171, 185 (3d Cir. 1988) (criticizing approaches that evaluate adequacy of benefits under a "single standard" such as grade advancement, and calling instead for adequacy to "be gauged in relation to [each] child's potential"); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238, 247 (3d Cir. 1999) (emphasizing the same critique explained in *Polk*, 853 F.2d at 185). These passages may be read not only to criticize a "single standard" view for ignoring students' potentials, but also to advocate looking solely to such potentials in determining adequacy. However, the two points are distinct, and the latter position, which often devolves into a quasi-utilitarian view, is critically evaluated *infra* Part II.B.3.

[158] Although it would likely still fall short of the robust citizenship levels held by some state courts as constitutionally required. *See* Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (outlining eight dimensions of learning and skills in which all students must be robustly equipped); *see also* Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1025 n.23 and accompanying text (Colo. 1982) (citing *Pauley*, 255 S.E.2d at 859).

threshold there will be some students with severe impairments, raising the same "bottomless pit" concerns of potentially insatiable needs as under the maximin view.

The appeal of the sufficiency approach lies in its identification of a distinct reason, apart from the aspiration to equalize access, for according special concern to students with disability: namely, that such students may fall short of achieving what we think is some objectively important threshold of educational capacity. The trouble, however, lies *both* in specifying what that threshold is and in the blunt "all-or-nothing" attitude taken toward its realization, with its corresponding disregard of any other considerations, such as what students' potentials for improvement may be, below or above the threshold.

B. *The Principle of Proportionate Progress*

1. *A New Fairness Premise*

There is an another way forward from the commitment to equalize, besides the sufficiency view. And this is to base our special concern for students with disability not on their falling short of some objective threshold of educational capacity, but rather on their doing comparatively less well than others. Priority, on this view, is due to students with disability, not because they are *badly off* according to some absolute yardstick, specified independently of how other students might be doing. Rather, it is *because, and to the extent that*, they are *worse off* than others as a result of their disability. And importantly, to recall our earlier discussion, this basis remains distinct from any commitment to equalize or give any significance to distributive equality as valuable in itself.[159] That commitment was rejected as embodying a flawed understanding of what it means to give each person equal concern, taking it to require a focus on "sameness" as somehow intrinsically important, such that it is of value in itself that one person's life go as well as another's. By contrast, on the present view, our commitment to equal concern is better understood as a commitment to enabling each person's life to go *as well as is possible and fair*. And what is fair is that those who are, through no fault of their own, worse off than others be given priority—*not* because we aim to decrease inequality for its own sake[160]—but because gains for a person, or improvements in their life, have greater moral significance the lower their overall level is compared to that of other potential recipients. Why? Because it speaks directly to the question of fairness—of what it is reasonable to ask separate persons, leading distinct

---

[159] *See supra* note 142 and accompanying text (critically evaluating the "telic equality" commitment).

[160] Although we may still wish to do so for various indirect or instrumental reasons, as discussed above. *See supra* note 142.

lives, to expect from and sacrifice for each other. Although equalizing does not hold out any value, nevertheless, when deciding between two potential recipients of resources, it is only reasonable that one whose life is already going better than another's understands that improvements for the latter matter more—are of greater significance or urgency—precisely because they are improvements to a life that is going less well.[161]

With this change in the normative *basis* for our concern comes a change in the *character* of that concern: as opposed to giving students with disability absolute priority (as under both the maximin and sufficiency principles), the priority is now a matter of degree, being a function of *how much worse off* such students are relative to others. The shift, that is, in the reason for our concern sheds new light in determining the extent of that concern, or *how much* priority is merited: since students with disability are given priority *because* they are worse off, they are to be given priority *to the extent that*

---

[161] Further, as discussed next, they matter more *not only because of* the respective gap in their overall levels, *but also*, correspondingly, *to the extent of* that gap. This emphasis on the intrinsic moral significance of comparative levels—on the significance of some persons being *worse off* than others, rather than simply *badly off* in some absolute sense—distinguishes the present position from that of sufficiency and non-comparative priority views that also reject telic equality. *See* Frankfurt, *supra* note 51, at 21–22 (advancing the "sufficiency view" that only absolute levels of wellbeing matter); PARFIT, *supra* note 139, at 23 ("On the Priority view, we are concerned only with people's absolute levels."); *id.* at 25 (putting forward the non-comparative priority view as a "more general version" of the "sufficiency view" on which there is greater moral concern for benefiting people when "these people are at a lower absolute level," and not because "these people are worse off *than others*").

The view being advanced here, then, carves out a distinct position in conceptual space from the rival views widely thought to exhaust our options in distributive premises, namely: (a) the telic equality view that equalizing is in itself of value, making relative levels matter; or (b) sufficiency and non-comparative priority views that equalizing is not valuable in itself, and so what matters are absolute not relative levels. It does so by arguing that (c) relative levels *do* intrinsically matter, *pace* sufficiency and non-comparative priority, but not, *pace* telic equality, because we should care about equalizing per se in matters of distribution. Rather, it is because even though there is no value to equalizing in itself (*pace* telic equality), distributive equity remains irreducibly relational (*pace* non-comparative views), since gains for one are at the expense of sacrifices by another and comparative levels of wellbeing directly speak to the fairness of such sacrifices, to what is reasonable for persons to expect from each other.

A representative statement of the standard view that our options are exhausted by the choice between telic equality and non-comparative views is the following: "Prioritarians are concerned with the absolute position of the worse off. A concern for equality, on the other hand, is concerned with people's position relative to others in some respect and that they be equal in that respect." Dan Brock, *Ethical Issues in Applying Quantitative Models for Setting Priorities in Prevention*, *in* ETHICS, PREVENTION AND PUBLIC HEALTH (Angus Dawson & Marcel Verweij eds., 2007); *see also* G.A. COHEN, ON THE CURRENCY OF EGALITARIAN JUSTICE AND OTHER ESSAYS 69–72 (Michael Ostuka ed., 2011) ("egalitarians think inequality is intrinsically bad or wrong, and prioritarians do not"; the latter are concerned only with "priority to the worst off," making "comparativity strictly irrelevant" such that "distributive patterns are of no *intrinsic* interest" (emphasis in original)). *See generally* Marc Fleurbaey, *Equality Versus Priority: How Relevant Is the Distinction?*, 31 ECON. & PHIL. 203 (2015) (framing the debate at the level of normative first principles as between telic equality and non-comparative priority views, even while querying its policy relevance); Daniel Hausman, *Equality Versus Priority: A Misleading Distinction*, 31 ECON & PHIL. 228 (2015) (same).

they are worse off.[162] They are to be given, in other words, *comparative priority*: their claims on educational resources are greater the worse off they are compared to other potential student recipients.

This, then, is the *principle of proportionate progress*. Students with disability should have priority in access to educational resources so long as: (a) the progress these resources would enable them to realize would, as a proportion of their existing levels of development, be greater than or equal to (b) the progress such resources would enable alternative recipients to realize, as a proportion of their existing levels of development.

Under the principle, that is, those who are at comparatively lower levels are given greater priority, which priority is applied to respective potentials for improvement. Where the two factors, of comparative priority and potentials, converge, the recipient is given especially strong priority.[163]

The principle directs us, to reiterate, to give priority to students with disability not for the sake of equalizing, nor simply because they are badly off in some non-comparative sense, but *because, and to the extent that*, they are *comparatively worse off*. So long as a student remains at a lower level of development than others, their gains continue to receive priority. At the same time, however, the extent of the priority is a function of *how much worse off* they are, and so, being a comparative matter, it is a relative, not absolute, priority.

What would this principle mean in the case of Jamie? In determining which plan is merited, it calls on us to compare two sets of relations. First, by how much would each plan reasonably be calculated to improve Jamie's educational progress over his existing level? Second, how much educational progress would the same resources reasonably be calculated to secure for an average student without dyslexia, as a proportion of her or his level? For each contemplated IEP (i.e., Plans A through D), in other words, we ask whether the further proportionate progress it would enable Jamie to realize is at least equal to the proportionate progress that would be realized by an average student were the additional resources required for that IEP devoted to them. Before receiving any special educational assistance, Jamie's reading and writing is at one-third the level of his peers on average (he is at a grade-one level in grade three). Plan D, to take an example, would enable Jamie to improve his reading and writing by a full grade level, a 100 percent

---

[162] By contrast, if the reason for our concern is the aspiration to equalize, then the extent of that concern or priority either remains unclear or, as under the maximin/leximin principles, is absolute. Similarly for sufficiency views: if the reason for concern is that some are below an objective threshold, then the extent of that concern or priority will tend either to be absolute (until they are brought up to the threshold), or to remain unclear.

[163] As may be the case, for instance, with early-stage accommodations like hearing aids, braille modifications, and the like, that enable students with disabilities to make major gains in significant dimensions of learning by addressing large, very salient barriers at comparatively low cost.

increase in the first year.[164] So long as its costs were not so high as to tie up resources that would otherwise enable an average student to double her or his level (moving up three grades), it would be merited.[165]

As we move forward under such an IEP, the gap between Jamie's overall level and those of others will hopefully diminish, and so, correspondingly, would the priority given to his further improvements. To be clear, so long as Jamie's level remained below that of the average non-dyslexic student, gains to him would continue to receive priority. Nevertheless, for that priority to justify further accommodations, his additional improvements would also need to be substantial enough: if his further progress from additional accommodation decreases to the point of him realizing a smaller proportional improvement over his level relative to the progress that an average student would realize over her or his level from the same resources, then we stop short of that further accommodation.[166]

In three fundamental respects, then, the proportionate progress view differs from "equalized outcomes," "maximized potential" and "minimal achievement" positions. First, its basis for giving priority to students with disability lies solely in their being worse off than others, rather than for the sake of equalizing or because they are simply badly off in some non-comparative sense. Correspondingly, and second, this priority is not absolute but relative, in accordance with how much worse off such students are compared to other potential recipients. Finally, flowing out of this form of comparative priority is consideration of an additional factor that the other views do not take into account, namely students' *comparative potential* for progress, or their marginal improvements relative to other students.

Accordingly, the proportionate progress approach resolves the bottomless-pit problem confronting these other views: students with severe disability *are* given strong priority, reflecting the extent that their impairment reduces their level of educational capacity below that of other students, *but* that priority results in further accommodations only to the extent that such students' ability to reap gains, or realize progress, remains comparatively significant. To be clear, such students will continue to get priority even if their progress is modest, but only so long as the gap between

---

[164] Possible refinements to this metric of comparison are explored *infra* Part III.

[165] To keep the exposition simple, we evaluate Plan D against a baseline of doing nothing. In reality, of course, the assessments will be more incrementally fine-grained, involving for instance comparison of the *further* proportionate progress enabled for Jamie by Plan D over Plan C, with the proportionate progress that would be enabled for an average student by the *additional* resources required by Plan D over C. These real-world complications do not, however, affect the underlying substantive point.

[166] For instance, suppose Plan D was implemented at the outset and Jamie continued to improve under it by one grade level each year until grade five, bringing him up to a third-grade reading and writing level as he enters grade six. At that point, his overall level is now one-half, rather than one-third, of the average. Supposing the improvement enabled by Plan D remains constant at one grade level, the costs of Plan D must be lower than the resources required to secure an average student a proportionate increase, now, of two grade levels (as opposed to three). Continuing in this vein, it may become justified at some point in time to shift Jamie to a lower-cost IEP, such as Plan C.

their modest progress and the more substantial progress of other students remains less than the gap between their respective overall levels.

This view also obviates the inverse problem to that of the bottomless pit, namely the under-inclusiveness of those minimalist sufficiency views that, in seeking to avoid robust sufficiency's bottomless pit, over-correct in the opposite, but equally rigid, direction. Opposite because they adopt a relatively low (rather than robust) threshold; equally rigid because, below the threshold, students are again accorded absolute priority, while above it they get none. Here, the glaring problem is not with the absolute priority accorded to students below the threshold, irrespective of their potentials for further progress, but rather the absence of *any* priority for those above it, despite their remaining worse off than other students (and again without any regard for their potential). Comparative priority overcomes, in one sweep, both sides of this "all-or-nothing" rigidity, and its concomitant defect of ignoring comparative potentials.

2. *Why not "Equal Progress"?*

That the proportionate progress principle gives consideration not only to students' existing levels of achievement, but also to their potentials for further improvement, is one feature that distinguishes it from the foregoing alternatives. *The way* it factors in such potentials for improvement, however, is also importantly distinct from other views that also look to improvements. One such prominent alternative is the "same progress" or "equal added benefits" view.[167] Our aim, on this view, should be to ensure that students with disability are enabled to realize the same absolute gains or improvements, going forward, as other students, regardless of their respective starting levels.

As should be readily apparent, this position will run into its own variant of the "bottomless pit" problem facing the maximin and robust sufficiency views: although the aim now is to equalize improvements or progress (rather than overall results or attainment of a robust threshold), nevertheless for many students with severe and/or multiple impairments, enabling them to realize the same educational gains as other students going forward will likely be prohibitively costly. Moreover, the underlying source of the difficulty is the same: although the equal progress view does look to improvements, unlike maximin and sufficiency views, it nevertheless fails, like these other

[167] Such a view is advanced by Professors Silvers and Francis in their important effort to rehabilitate disability accommodation under the ADA. *See* Leslie Pickering Francis & Anita Silvers, *Debilitating* Alexander v. Choate*: 'Meaningful Access' to Health Care for People with Disabilities*, 35 FORDHAM URB. L.J. 447, 453 (2008) (developing an interpretation of "meaningful access" to education, health and mobility services under the ADA as requiring programs to provide something roughly akin to equal added benefits for persons with and without disability, as an interpretation of "equal opportunities to use"); *see also* Burbules and Lord, *supra* note 134, at 183 (formulating the "same progress" alternative); Umpstead, *A Tale of Two Laws*, *supra* note 78, at 6–7 (same).

views, to consider *potentials* for improvement. And it is potentials for improvement, i.e., students' promise of educational gains from a given amount of educational resources, that, when compared across students, reveal the educational opportunity costs of a given unit of expenditures, and thereby provide one set of criteria relevant to determining the reasonableness of such expenditures.

This failure to factor in potentials for improvement also leads the same progress view to face its own version of an additional problem: inadequate assistance to students who, despite realizing the same absolute improvements as others, nevertheless remain worse off than these others while still having significant potential for further improvements.[168] The same progress view, then, is in the odd position of being *simultaneously* over- and under-inclusive.[169]

This stems from the fact that, unique among the alternatives, this view is concerned with *neither* overall levels *nor* potentials for improvement. Rather its focus is on a somewhat arbitrary third factor, added absolute improvements, which are then mandated to be equalized. This is a view without analogue in distributive justice theory. Indeed, the position seems to be somewhat of a makeshift, an attempted "equality of opportunity" compromise between formal equality of resources and substantive equality of outcomes. More promising, however, than settling upon an arbitrary "equal added benefits" as a stand-in for "equal opportunity," would be to reorient our entire focus, and forthrightly aim at ensuring substantive *equity of access* to resources for educational development, and then specify the considerations of distributional fairness relevant to such equitable access.

3. *Why not "Efficient Progress"?*

A final alternative that also looks to improvements, and indeed to comparative potentials for improvements, is an "efficient progress" view. Here the aim is to maximize, rather than equalize, progress across students. A quasi-utilitarian approach, this view counsels departing from formal equality of resources in tailoring educational plans for students with disability only when the further resources provided such students would yield for them greater marginal gains or progress than if the same resources were expended on students without disability.[170] Thus, for instance, the provision of early-stage accommodations such as hearing aids, braille modifications and the like, may be justified (even if they are quite costly) on a plausible assessment that such accommodations will, by attending to such

[168] This is a variation on the problem facing the minimal sufficiency view that, in response to the over-inclusive character of a robust sufficiency standard, swings over to the other, under-inclusive, side of the pendulum.

[169] By contrast, the sufficiency view has *two distinct variants*, with the minimalist variant being under- and the robust variant being over-inclusive.

[170] *C.f.* MARK STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY: UTILITARIANISM AGAINST EGALITARIANISM (2006).

salient barriers, enable students with the affected disabilities to make major gains in significant aspects of learning and skills. Additional expenditures of similar magnitude on students without disability may well not yield as high a set of marginal benefits.

Limiting assistance to such "high yield" interventions, however, would fall considerably short of the sort of accommodations that most courts and commentators routinely agree are merited.[171] The reason? Stopping at that point would leave most students with disability still much worse off than others across a range of educational dimensions, in a manner that seems clearly unsatisfactory. For instance, in our case it is unclear whether even the lowest-cost Plan A, of supplemental remedial instruction, would be merited since it improves Jamie's reading only by 0.2 grade levels.[172]

The underlying problem here is the flaw with the utilitarian approach to distributive justice more generally: namely, that it takes an implausibly one-sided view of equal concern, treating persons equally solely in terms of their ability to reap added, marginal benefits, with no consideration given to how they are faring overall. And what propels this one-sided principle is, ultimately, an underlying commitment to maximization for its own sake.[173] In, however, the context of separate persons leading distinct lives, such a "telic efficiency" commitment to maximization of some aggregate as valuable in itself, makes as little sense as the "telic equality" commitment to sameness as valuable in itself.[174]

4. *A New View of Fairness*

Just as the proportionate progress view departs, then, from equalizing and sufficiency approaches on how to evaluate overall levels, so it departs from the same and efficient progress views in how to evaluate added

---

[171] *See supra* text accompanying notes 129–131 (explaining options for devising an appropriate IEP based on a composite of case law).

[172] *See supra* Table 1.

[173] RAWLS, *supra* note 9, at 23.

[174] Why? Because it is ultimately premised on a mistaken personification of society, as if there were some supra-personal being that experiences the sum of benefits net of costs maximized across persons. *See id.* at 19–24. But actually there are only individual persons, across whose distinct lives the benefits and costs are traded off. And in evaluating such tradeoffs, it is highly implausible that we should not care about how well or badly, overall, such persons' distinct lives are going relative to one another.

Similar to telic equality, the telic efficiency commitment may find more or less qualified expression in different distributive principles, each pursuing the commitment to a different extent. In parallel, that is, with telic equality giving rise to equalized access, maximin, and leximin principles—with each successive principle further muting its pursuit of the underlying commitment so as to take in account additional difficulties it faces—so telic efficiency may generate principles of maximizing: (a) a sum total; (b) the average; or (c) at the margins. In both cases, however, what is needed is not to qualify the commitment with various ad-hoc adjustments to manage each new difficulty as it crops up, but rather to jettison it altogether in favor an alternative underlying commitment that better captures our deeper sense of what ultimately matters. The import of making that deeper shift is brought out in the following Section.

improvements. Integrating these dual sets of departures, a new view of fairness comes into focus.

On this view, our commitment at the deepest level of distributive justice should be to give priority to those who are worse off through no fault of their own *because and to the extent that* they are worse off. *Not* because we want to equalize, but because it speaks to fairness, to what is reasonable to expect separate persons leading distinct lives to expect from and sacrifice for one another. Equalizing, for its own sake, is of no value. Similarly implausible is maximization for its own sake. And while a focus on an absolute threshold level of "decency" is initially more plausible, it finally proves untenable as well, because what is decent is, ultimately, contextual to what is possible for others and hence to what is fair—precisely, that is, to what comparative priority directs our attention to.

Effecting such a fundamental shift at the level of our deepest commitments generates, on the surface, a principle that provides more persuasive prescriptions across the entire range of accommodation cases. The principle does so because, being rooted in a more compelling foundation, it organically—internal to its own commitments—identifies all the relevant considerations, and so takes them into account in a systematic—that is, comprehensive and consistent—fashion. By contrast to each of the alternative principles, which focus one-sidedly on either levels or improvements, the principle of proportionate priority automatically gives consideration to both. Moreover, it does so in the right way—evaluating levels in terms of comparative priority and improvements in terms of comparative potentials—so as to integrate the two into an analysis of *equitable opportunity cost*.[175] The superiority of the proportionate priority view resides, then, not only in the range of considerations it identifies as relevant, but also in the way it handles them. And in both respects this owes, ultimately, to the deeper reason it takes these considerations to matter.

What matters on this view is neither to equalize the overall levels of all students, nor to maximize or "sufficientize" the levels of students with disability; nor, for that matter, to equalize or maximize improvements across

[175] Rival principles, by contrast, not only fail to take into account all the relevant considerations, they also give inapt treatment to the ones they do single out for attention—with both these surface defects stemming from deeper flaws, in their underlying commitments. Thus, maximin and sufficiency views not only focus single mindedly on overall levels, but also give them absolute priority—thereby not only failing to supply any criteria for how to factor in the costs of improvements, but flatly rejecting their relevance altogether. Behind both shortcomings is an untenable concern with equality or decency, as opposed to fairness as a comparative matter—for the latter, a focus on levels as a matter of comparative priority automatically integrates a concern with improvements in terms of comparative potentials. From the other direction, efficiency not only disregards levels to focus one sidedly on improvements, but also pursues only cost-effective ones at that—this undergirded by its implausible devotion to the pursuit of a maximized sum or average as valuable for its own sake, irrespective of fairness across persons. Finally, equal progress's aim of equalizing improvements—irrespective *either* of levels (or equity as comparative priority) *or* of costs (equity as comparative potential)—stems from its lingering attachment to an "equality" midway between formal opportunity and substantive outcomes.

all students. Rather, it is to ensure that all students have access to *meaningful* improvements. And the meaning of improvements is to be understood inter-subjectively, within and across different students' educational lives, in terms *both* of how well or badly they are already doing *and* of how much or little they stand to improve. Educational gains are to be understood, that is, in terms what they signify for each person in the context of her or his own development, compared to what the alternative gains for others would signify for them in the context of their development.

5. *How the Principle Makes Sense of Current Law*

How does the proportionate progress view square with existing legal formulations of the appropriate standard for IDEA benefits? For reasons just given, it offers an especially attractive elaboration of the "meaningful" standard, spelling out what considerations are relevant to determining whether a benefit is "meaningful," and, correspondingly, identifying specific factors to structure the inquiry. In particular, the principle fills in the crucial gap facing this standard, namely *how* to factor in what the standard rightly emphasizes as a central consideration: students' diverse potentials for improvement. And it does so by bringing to light, for explicit consideration, two further factors that, in its current form, the standard either outright misses or implausibly leaves in the shadowy background: the "severity" of a disability, in terms of the extent of its impact on a student's educational level,[176] and the role of opportunity costs, which are now accounted for in a principled way, to equitably discipline our pursuit of the aspiration to enable students with disability to realize their full potential.

In a similar vein, the proportionate progress view also provides a new lens with which to revisit a long-standing, and controversial, standard: the one originally articulated by the district court in *Rowley*, that an IEP should provide students with disability the "opportunity to achieve [their] *full potential* commensurate with the opportunity provided to other children."[177] As we have seen, the Supreme Court in *Rowley* rejected this "full opportunity" view, interpreting it as a call for equalization of outcomes.[178] Nevertheless, the formulation has proved influential, being adopted by Justice White in his dissent in *Rowley* and continuing to exert a pull on state legislatures and courts.[179] Its sway is likely due to the promise held out by

---

[176] Courts often overlook this factor to focus one sidedly on potentials for improvement and thus, slide imperceptibly toward an "efficient progress" view.

[177] *Rowley I*, 483 F. Supp. 528, 534 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982) (emphasis added).

[178] See *supra* note 31 and accompanying text.

[179] *See* N.C. GEN. STAT. § 115C-106.1 (LEXIS through Session Laws 2017-56) (providing that "[t]he goal of the State is to provide full educational opportunity to all children with disabilities"); *Rowley II*, 458 U.S. 176, 215 (1982) (White, J., dissenting); Cone *ex rel.* Cone v. Randolph Cty. Sch.,

the clause modifying "full opportunity," a clause often dropped in restatements of the standard but one that is clearly crucial to its meaning: namely, that such full opportunity for students with disability should be "commensurate with the opportunity provided to other children."[180] The promise of this clause lies in its aspiration to take care, in giving priority to students with disability, to recognize the legitimate needs of others.

The proportionate progress view fulfills that promise by interpreting "commensurate with others" to mean "taking into account the similarly meaningful gains of others." Any notion of "commensurate" gains involves, that is, some sort of inter-subjective measure or assessment of the gains, an evaluation of their significance across persons. And proportionate priority offers a particularly apt way of undertaking that evaluation, directing us to understand the interpersonal significance of students' respective educational gains by embedding them in the comparative context of how each student's educational development is going overall. In doing so, it articulates a notion of *commensuration as reciprocity*: recipients of educational resources are asked to compare what the further progress they might realize would signify for them, in the context of their own lives, to what the alternative gains for others would signify for *them*, in the context of their lives.[181]

Finally, the principle also provides, and for similar reasons, an attractive elaboration of the "maximum possible development" standard, at least on a non-literal reading of it that gestures toward some notion of "plausible" or "feasible" maximal development.[182] Proportionate progress supplies the missing element of such a view, namely criteria for when further educational developments for a student, despite being "possible," cease to be "plausible" or "feasible." What is "plausible" for any one student should be understood

---

302 F. Supp. 2d 500, 509–10 (M.D.N.C. 2004) (citing the North Carolina statute and Justice White's dissenting opinion in *Rowley* to declare North Carolina's policy as being to "ensure every child a fair and full opportunity to reach his full potential"); Harrell v. Wilson Cty. Sch., 293 S.E.2d 687, 690 (N.C. App. 1982) (citing the North Carolina statute and Justice White's dissenting opinion in *Rowley* to state that "a handicapped child should be given an opportunity to achieve his full potential commensurate with the opportunity given other children").

[180] *Rowley I*, 483 F. Supp. at 534.

[181] To prevent misunderstanding, it is of course not being claimed that the construal offered here—how to give all students "full opportunity commensurate with others"—is the only plausible interpretation of the "full opportunity" standard. Indeed, the standard has typically been construed in rather different ways. Thus, on one common interpretation, it is a synonym for the "maximum possible development" view in its strict, literal sense. And on another interpretation, it mandates accommodations only so long as students with disability are able to reap greater marginal improvements than others. Indeed, this latter, quasi-utilitarian view, may well often be the one that courts articulating the standard have in mind, given that the cases where it is invoked often involve facts, such as in *Rowley*, where the student with disability does seem to have comparatively greater potential for further marginal gains. The claim being made here is that the proportionate priority view is not only reconcilable with the standard but also, moreover, that it offers a particularly compelling elaboration of it.

[182] *See supra* text accompanying note 152 (suggesting such a reading as "a more sensible" interpretation of the standard).

in terms of what is possible for *other* potential student recipients, and, moreover, what is *reasonably* or *fairly* possible, meaning that we compare not only the students' respective potential gains, but also the overall levels against which such gains are made.[183] Such an elaboration dovetails precisely with the gloss that some courts have given this standard, namely that it be taken to require the maximal development of students with disability in light of what is "reasonably possible [or] fair"[184]—but while supplying, what these courts have been reticent to do, the considerations relevant to determining when constraints on possible development are reasonable or fair.

What of the "some" benefit standard? Clearly, the proportionate progress principle is a move away from it, in the direction of a more robust "meaningful," or even "full" or "maximal" benefits standard, as many have urged is both justified in principle as well as required by recent federal legislative developments and under the constitutional and statutory law of some states.[185] Only now, that departure is made in a more principled way, one that reinterprets and fleshes out these alternatives in a more determinate and persuasive form.

Moreover, the principle also addresses the concerns that originally animated the adoption of the "some" benefit standard to begin with, centering on the need to place limits on the extent of accommodation required. The Supreme Court's emphasis in *Rowley* on the language of equal opportunity—of a "basic floor of opportunity"[186] or "open . . . door" of access rather than "any particular level" of benefits[187]—and its adoption of the amorphous "some" benefit criterion, was undergirded by two central worries. The first was an uneasy sense that the only alternative to equality of opportunity is a dreaded "equality of outcome."[188] As shown above, however, the appropriate theoretical alternative, or supplement, to "equality of opportunity" is not "equality of outcome," but rather "equity of access" to educational resources, analyzed in terms of distributive justice.[189] And,

---

[183] As opposed, say, to taking plausible or feasible to mean what is "efficiently possible," which would confer additional resources on a student only when they would yield greater marginal gains than for any other student, without any consideration of the students' respective overall levels.

[184] Burke Cty. Bd. of Educ. v. Denton, 895 F.2d 973, 983 (4th Cir. 1990) (citations omitted).

[185] *See supra* text accompanying notes 82–83 (discussing the commentary around state and federal statutes and cases that have advocated or required for states to go beyond the "some benefit" standard in *Rowley II*).

[186] *Rowley II*, 458 U.S. 176, 198, 200 (1982).

[187] *See id.* at 192 (explaining that the intent of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside").

[188] *See id.* (citation omitted) (explaining that Congress recognized that "providing special education . . . is not guaranteed to produce any particular outcome").

[189] *See supra* Part I.B.

within that frame, virtually no distributive justice position endorses equality of outcome. The proportionate progress view, in particular, rejects it on multiple grounds.[190] A second, related but distinct, concern was that of costs, of how to legitimately impose a "ceiling" on expenditures for students with disability once we go beyond a "basic floor."[191] Proportionate progress shows precisely how to do so, in a disciplined yet principled way, bringing to light the competing considerations and weighing them fairly.

Finally, a third concern appears to animate a number of courts that have adopted the "some benefit" standard. Such courts emphasize the "severity" of certain disabilities as a reason not only to shy away from more demanding standards (even those short of "maximized development," such as "sufficient development"), but also for accepting as adequate only "minimally" discernable benefits.[192] In light of the foregoing analysis, we can now see these courts to be, on the one hand, properly highlighting the impact that severe disability may have on students' *comparative potential* (that is: if the severity of a disability prevents a student from making much progress even at great expense, this is indeed a relevant factor weighing against the expenditure). Yet on the other hand these courts should also now be seen as having neglected to consider that severity also affects these students' *comparative priority* (the more severe the disability, the worse off the student is, and hence the more urgent our concern). Proportionate progress gives both considerations their due.

---

[190] *See supra* pp. 34–38 (explaining that even when the ideal is adjusted to factor in individual responsibility—thus shifting from equality of outcome to equality of *access to* outcomes—it remains unattractive for three reasons: (1) its equalized access and maximin variants counsel "leveling down," i.e., reducing educational benefits for some without any corresponding gains for others, "simply for the sake of equalizing"; (2) its leximin variant, while abstaining from leveling down, remains untenable in giving absolute priority to the worst off, irrespective of the costs involved, for which it provides no guidance on how to address; and (3) most fundamentally, lying at the root of its difficulties, is its mistaken "telic equality" commitment to "distributive equality [as] . . . something valuable for its own sake," so that sameness rather than fairness is taken to be what matters (citations omitted)).

[191] *See* Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 612 (8th Cir. 1997) (citations omitted) (emphasizing resource constraints in holding that the IDEA "does not require a school district either to maximize a student's potential or provide the best possible education at public expense"); Lunceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1583 (D.C. Cir. 1984) (citations omitted) (rejecting the "best education money can buy" view on the grounds that "resources are not infinite, and many other demands compete for limited public funds").

[192] *See, e.g.*, Hall *ex rel*. Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629, 636 (1985) (suggesting that minimal results are acceptable for the most severely handicapped children).

III. EDUCATIONAL DISADVANTAGE & THE SPACES OF DISTRIBUTIVE JUSTICE

A. *Complex Cases*

Our discussion until now has focused on what may be considered a core or central case: a student with a disability (such as dyslexia) who, on account of that disability, is at a lower academic level than the average non-disabled student, both in the specific learning area(s) directly affected by the disability (such as reading and writing) and in her or his overall academic performance (test scores or grades averaged across all subjects). But what if a student, despite the disability, nevertheless performs at an average or above-average level—either overall or, even, perhaps, in the specific domain(s) negatively affected by the disability? Should he or she continue to receive priority in the line for educational resources? If so, why and to what extent?

Cases of this sort are not uncommon. Indeed, in *Rowley*, Amy's above-average grades were a major reason why the Court held that she did not merit any further accommodation by way of an in-class interpreter.[193] Similar holdings include:

- a dyslexic student found ineligible for IDEA benefits on account of making the honor roll in junior high and high school, since that indicated he "was performing . . . on average or above average . . . even before the accommodations";[194]
- a "very bright" third-grade student with a "non-specific learning disability [that] affected his development of reading skills" held not to merit special education because, even "without any modifications to the curriculum or any specialized instructions," he was "performing above grade level expectations in math and spelling, between third and fourth grade levels in reading and at the third grade level in writing";[195] and
- a student with ADHD held ineligible on the grounds that "the educational challenges the Student does have are not sufficiently affecting her educational performance such as to keep her from staying within the range of her peers."[196]

---

[193] *Rowley II*, 458 U.S. 176, 209–10 (1982).

[194] Grant v. Saint James Parish Sch. Bd., No. CIV. A.99–3757, 2000 WL 1693632 at *1, *2, *5 (E.D. La. Nov. 8, 2000) (footnote omitted), *aff'd*, 273 F.3d 1102 (5th Cir. 2001).

[195] Weston Pub. Sch. Dist., 34 Individuals with Disabilities L. Rep. (Labor Relations Press) ¶ 75, at 272–74 (Mass. Bureau of Special Educ. Appeals Feb. 2, 2001).

[196] Northshore Sch. Dist., 35 Individuals with Disabilities L. Rep. (Labor Relations Press) ¶ 144, at 567, 574 (Wash. State Educ. Agency July 18, 2001).

Decisions like these represent the prevailing view: the "vast majority of hearing officers and courts find that above average educational performance means special education is not needed."[197]

A contrary position has, however, been taken in some cases. These include:

- a student suffering from a "neurological impairment . . . hinder[ing] his ability to process auditory information and engage in normal language and thinking skills," held eligible for special education despite the fact that, due to having a "full scale IQ of 130," he performed at an overall average to above-average level;[198]
- a "gifted child with very superior cognitive abilities" who, despite performing well academically, was deemed eligible on account of having "perceptual deficits" that "impact on educational progress," whereby his "language and cognition skills surpass his [existing, perceptual-impaired] performance skills";[199]
- a "mentally gifted" student who, despite having overall success in regular education, was deemed eligible for special education on account of being diagnosed with a "specific learning disability in the area of written expression" that resulted in "problems with the rate and degree of completion of his written work";[200] and
- a student with ADD who was denied special education by the school district on account of performing average to above-average, but was deemed eligible upon judicial review due to his dropping from "Level I" to "Level III" courses, with the court holding that "entitlement to IDEA services must be gauged in relation to the child's potential," so that the school district "erred in focusing on [his] grades while disregarding his potential."[201]

What lies behind these different positions? The majority view, on its face, is simply that when a student is above average, her or his disability can no longer be said to "adversely affect" her or his "educational performance," as is required for eligibility for special education under the IDEA.[202] The minority, for its part, takes the view that so long as the disability may be discerned to have *any* detrimental effect on performance, it is eligible for

---

[197] Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 502 (2004).

[198] Doe *ex rel.* Doe v. Bd. of Educ. of Tullahoma City Sch., 9 F.3d 455, 456 (6th Cir. 1993).

[199] Benjamin R., 508 Educ. of the Handicapped L. Rep. 183, 185 (Mass. State Educ. Agency Aug. 8, 1986).

[200] Conrad Weiser Area Sch. Dist. v. Dep't of Educ. 603 A.2d 701, 702, 705 (Pa. Commw. Ct. 1992).

[201] W. Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d 417, 418–19, 421 (E.D. Pa. 2002).

[202] *See* 34 C.F.R. § 300.8 (2017) (defining as a "disability" an impairment that "adversely affects a child's educational performance"); Garda, *supra* note 197 at 502ff (discussing majority position).

redress under the IDEA.[203] Stated on their own terms, neither position seems very satisfactory: the majority view seems premised on a highly implausible reading of "adversely affect"—surely a disability may still be said to be a drag on performance even where a student is able to rise above it—while the minority view seems impossibly demanding—when can the effect of a disability ever be shown to have been eliminated or "fully remedied?" Further, the debate between them lacks traction, starting and ending on rival premises concerning the meaning of "adversely," without any purposive criteria offered by which to judge the substantive merits of their competing interpretations.

Is there a way beyond the impasse? Yes. When viewed through the lens of distributive justice theory, both the majority and minority positions can be seen in fact to track, albeit inchoately, distinct positions concerning the appropriate "space" or "index" of advantage for distributive concern. Reconstructing these positions, then, in terms of their underlying distributive premises offers a promising way forward, both for clarifying the substantive stakes and for working toward a satisfactory resolution.

The distributive premises underlying the majority position are most plausibly reconstructed as follows: The reason students with disability are owed special concern is because we suppose that their disability disadvantages them, vis-à-vis other, non-disabled, students, in terms of educational development. The disability renders them, in other words, "worse off" than others in the domain of educational development. When, however, that no longer obtains—i.e., when such students are performing at an average or higher academic level—then our basis for special concern ceases and so, accordingly, should their eligibility for any priority in the queue for educational resources.

The minority view, on the other hand, is most plausibly understood as embracing a narrower, disability-specific, target space of concern than "educational development" writ large. Here, the focus of special concern for students with disability is simply the disability itself, as a source of disadvantage vis-à-vis otherwise similar students who do not have that disability. On this view, then, students with disability should remain eligible for priority so long as some hampering effects of the disability remain (i.e., so long as the disability's deficits have not been fully remedied).

How should we decide between these views? Adopting the principle of proportionate progress does not by itself conclusively resolve the matter. It might seem on first glance that the principle fits better with the majority view, given that the principle's basis for priority is precisely that students

---

[203] *See, e.g.*, *Rowley II*, 458 U.S. 176, 215 (1982) (White, J., dissenting) (arguing that the IDEA language that "special education" be "specifically designed . . . to meet the unique needs of a handicapped child" should be interpreted as "intended to eliminate the effects of the handicap, at least to the extent . . . reasonably possible"); Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 408 (5th Cir. 2012) (Stewart, J., dissenting) (advocating "disability remediation").

with disability are, as a result of their disability, worse off than the average non-disabled student in some relevant respect, here overall educational development. And so, when students with disability are not, or are no longer, worse off than the average in that respect, then, correspondingly, our special concern and priority should cease.

But this simply begs the question: should "overall educational development" be the relevant respect in which students with disability are to be worse off, or disadvantaged, as to merit special concern and hence be eligible for priority? Or should we instead adopt a more fine-grained view of the relevant disadvantages associated with disability and, correspondingly, continue to deem eligible for priority those with disability so long as they remain worse off in these more narrowly-targeted dimensions? Taking this latter route, the principle of proportionate progress may fit quite well with the minority view.[204]

The principle of proportionate progress, in other words, is a distributive *principle*, one that may be applied to different target *spaces* of distributive concern. But the debate between the majority and minority views turns not, at least in the first instance, on the appropriate principle of distributive equity to apply in cases of disadvantage, but rather on what sort of disadvantage is the appropriate focus of distributive concern. Their disagreement centers, in other words, not on the extent of special concern or priority to be accorded those who are worse off, but rather on the relevant respect in which students are to be worse off as to be eligible for priority in the first place. And that disagreement goes to a second, distinct, debate within distributive justice theory from the one that has occupied us thus far.

Lying at the heart of distributive justice theory, that is, are two distinct (albeit related) fundamental questions: What *space(s)* of the good, or advantage, should it be our ultimate concern to provide access to as a matter of distributive justice? And what *principle(s)* of distributive equity should we apply to our chosen space(s) of concern, to ensure that access is fairly provided for all?[205] Our focus in this Article has been on the latter. In the course of evaluating candidate answers to it in the preceding part, we simply assumed—implicitly and provisionally—a particular answer to the question regarding the space of concern, namely that "overall educational development" was the appropriate index of advantage to which our candidate principles were to apply. Shifting, however, from the core to more complex cases requires us now to reconsider that provisional answer, and to

---

[204] Although application of the principle to the minority's target space would still fall short of counseling what the minority position does in its main guise, full "disability remediation." *See infra* note 243 (noting that applying the distributive principle to the minority view counsels continued priority only to the degree called for by a student's disability-specific capacity for improvement compared to that of other students).

[205] Or, put another way: what is the appropriate *metric* of advantage for distribution, and what is the appropriate *distributive function*?

reflect more explicitly on the question: what kinds of disadvantage should it be our concern to redress in the context of expending educational resources?

B. *Disability and the Spaces of Distributive Justice*

That question ultimately resolves, as we shall soon see (in Section C below), into two sub-parts: (a) how should we measure and compare particular dimensions of educational progress or development; and (b) what barriers to educational progress should we seek to ameliorate? And lying at the back of each of these is a farther-reaching, more abstract query: (a) what is the appropriate index of advantage for distributive justice; and (b) which sources of disadvantage are eligible for distributive redress? Since the considerations relevant to answering these have been forged in the course of more general debates on distributive justice and disability, a brief distillation of those general debates is in order before turning to the questions as they are specifically posed in the educational context.

Disability is best conceived in terms of a three-way relationship, between: (a) individuals' physical and mental constitution; (b) their natural, built and institutional environment; and (c) social policy.[206] An *impairment*, on this view, is any significant "loss of"[207]—or, perhaps better, simply "departure from"—"normal" or "species-typical" mental or physical functioning.[208] Such impairment becomes a *disability* when, through the course of a person's interaction with his or her architectural and institutional environment, the departure translates into a disadvantage vis-à-vis those

206 *See* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 423–24 (2006) (drawing on disability literature to distill a conceptualization broadly along these lines); SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 18–20, 34 (2009) (adumbrating the social model).

207 NUSSBAUM, *supra* note 206, at 423 n.5.

208 To speak of disability in terms of a "departure from"—rather than a "loss of"—typical functioning is to register the insights of the social model of disability, concerning the potentially naturalizing and stigmatizing ways in which certain deviations from statistical averages and social norms are characterized. *See, e.g.*, BAGENSTOS, *supra* note 206, at 18–19 ("Where disability is treated as a medical condition or functional deficit, it is readily seen as a 'personal tragedy' . . . . [T]he view of disability as a personal tragedy obscures the social practices that exclude 'the disabled' from the opportunity to participate fully in society."); MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability*," 86 VA. L. REV. 397, 436 (2000) ("[S]ocial practices that attach systematic disadvantage to particular impairments are what *create* the category of people with disabilities.") (emphasis in original); Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 633 (1999) ("[S]tereotypes about disability may be as much a barrier to individuals with disabilities as the impairments themselves."); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 599 (2004) (contrasting the social and medical models of disability). The language of "normal" functioning is used in NUSSBAUM, *supra* note 206, at 432, and is further explicated by Norm Daniels as "species-typical" functioning. NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY 37 (2008).

without the condition.[209] And said disability becomes a *handicap* if the disadvantage is not socially redressed.[210] The upshot of this view, then, is an aspiration for social policy: to limit the extent to which departures from the norm (impairments) become injustices (handicaps), by providing equitable redress when such departures show up as disadvantages (disabilities).

To pursue this aspiration with clear-sighted principle, however, we need to bring into sharper relief which precise forms of disadvantage from disability properly fall within the ambit of distributive justice. Doing so requires linking up the foregoing with a wider analysis of the dimensions and sources of disadvantage that, more broadly, are germane to distributive justice. Debate on that score in the philosophical literature has yielded three main candidates of the appropriate index of advantage—welfare, resources, and capabilities—deficits in which are eligible for distributive redress.[211]

Prosecuted at a high level of conceptual refinement, the upshot of that debate for present purposes is two-fold: convergence on one important set of issues and division over some remaining, subtle yet significant, points of contention. First, convergence: proponents of each of the main candidates agree that fairness requires holding individuals reasonably responsible in certain respects, principally: for which of their powers or capacities they develop and exercise, for which of their traits and preferences they cultivate and pursue, and for the prudent management of their affairs.[212] All sides

---

209 This causal emphasis on the role of interactions between a person and their built and social environment in transforming departures into disadvantages—as opposed to a view that sees disadvantages as stemming solely from a person's own constitution—is a central theme of the social model literature cited above.

210 *Cf.* NUSSBAUM, *supra* note 206, at 423 (defining a "handicap" as the competitive disadvantage resulting from a disability).

211 A significant catalyst of this debate has been the set of issues raised by disability and related cases of differential needs. *See* Amartya Sen, Equality of What?, Address at The Tanner Lecture on Human Values, 203–04, 215, 217–18 (May 22, 1979) (drawing on examples of special-needs individuals to launch a debate between welfare, resource, and capability views).

212 Taking the lead in this regard are advocates of "resources." *See* RAKOWSKI, *supra* note 140; Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 297 (1981), *reprinted in* RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 86 (2000). For agreement by defenders of welfare, see Arneson, *supra* note 137, at 77; Cohen, *supra* note 137, at 907. For capability theorists, see G.A. Cohen, *Equality of What? On Welfare, Goods and Capabilities*, *in* THE QUALITY OF LIFE 9–10 (Martha Nussbaum & Amartya Sen eds., 1993); Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199–1203 (1997); Amartya K. Sen, *Plural Utility*, 81 PROC. ARISTOTELIAN SOC'Y 193, 209 (1981). Rawls is famously thought to be an important exception, and to reject any role for individual responsibility in distributive justice on deterministic grounds. But this is slightly misleading, in two respects. First, Rawls believed individuals should be held reasonably responsible for the tastes they cultivate and pursue. John Rawls, *Social Unity and Primary Goods*, *in* UTILITARIANISM AND BEYOND 159, 168–69 (Amartya Sen & Bernard Williams eds., 1982). And, second, although Rawls discounted any role in his theory for responsibility over the development and exercise of one's capacities, his reasons for doing so were not a flat rejection of *any* such responsibility, but rather that it was simply "impracticable" to disentangle the (likely small) role of responsibility from other factors lying outside of individuals' control. *See* RAWLS, *supra* note 9, at 89, 274. For criticisms of Rawls

agree, that is, that the locus of distributive concern should be on unchosen or "involuntary" sources of advantage and disadvantage.[213] We may signal this, as we have throughout, by describing our aim in the language of enabling effective *access to* valuable outcomes, rather than in terms of securing the realization of outcomes *per se*.[214]

Where disagreement enters is in specifying the precise dimension(s) of advantage in which involuntary deficits are to be equitably redressed. A complex dialectic divides the three camps on this front; its central thread may be radically compressed as follows. For one group, the only sensible ultimate aim is to enable people to realize happiness according to their own lights, and so the proper index of advantage—to which all persons should be given equitable access—is subjective "utility" or "welfare," understood as either preference satisfaction or hedonic enjoyment.[215] Two objections facing this view, in particular, have been fundamental in prompting the search for alternatives.[216] One is the long-standing difficulty of obtaining any reliable measure of such subjective utility, one that enables not just ordinal or qualitative rankings internal to a person, but cardinal comparisons of quantitative intensity, across persons.[217] The other is a sense that, in any case, a focus on subjective end-states is ultimately misplaced for two distinct sets of reasons: (1) It holds hostage the value of an array of goods widely held to be important across different plans of life (from physical mobility to occupational opportunity) to the vagaries of persons' subjective mental reactions or preferences—something especially troubling when such

---

in this latter respect, see Cohen, *supra* note 137, at 915, and Dworkin, *supra*, at 343. For Rawlsian criticism, in turn, of the emphasis placed on individual responsibility by theorists in the line of Dworkin and Cohen, see Anderson, *supra* note 153, at 308–11.

213 This is not to say that all those cited above agree on the precise respects in which individuals should be held reasonably responsible (or, where responsibility is a relevant consideration, on how to factor it in). But any such local differences are of less moment, for present purposes, than their broad areas of agreement on this front. *Cf. infra* note 244.

214 *See supra* text accompanying notes 118, 137.

215 *See* John C. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309, 315–16 (1955); Arneson, *supra* note 137, at 82 ("I take welfare to be preference satisfaction. The more an individual's preferences are satisfied, as weighted by their importance to that very individual, the higher her welfare."); Kenneth J. Arrow, *Some Ordinalist-Utilitarian Notes on Rawls's Theory of Justice*, 70 J. PHIL. 245, 252–54 (1973) (book review); Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, 116 PHIL. REV. 603 (2007).

216 Two other important criticisms of the view—namely, that it is prone to giving weight to "offensive" and "expensive" preferences—are addressed by those who propose to launder or filter these out, on the basis of holding individuals reasonably responsible for not cultivating or pursuing them, or for shouldering the burden of their disregard in social policy. Arneson, *supra* note 137, at 78–80; Cohen, *supra* note 137, at 912–14.

217 *See* RAWLS, *supra* note 8, at 78–79 (motivating the case for "primary goods"—in particular, the resources of income and wealth—as the index of advantage for distributive justice based in substantial part on the need for an externally verifiable metric of advantage that has lower informational demands than interpersonal comparisons of cardinal utility).

reactions or preferences either (a) reflect a low valuation of the good, on account of adapting to its dearth (in adverse or oppressive circumstances),[218] or (b) are subject to being shaped by the very policy decision at hand (such as with the education of the young);[219] and (2) it disconcertingly threatens to overextend the reach of distributive justice, making it a matter of political concern whether, for instance, someone happens to be unlucky in love.[220]

United in their criticisms of these perceived defects, partisans of the alternative camps divide over their proposed remedies. For both groups, the basic picture of persons as vessels of utility is entirely too passive and in need of replacement, by a conception of persons as active agents, responsibly authoring their own lives. Our focus, that is, should not be on providing access to end-states of happiness, but rather on effectively equipping persons with the means necessary for freedom or flourishing.[221]

One camp takes this to require that all persons be equitably furnished with "resources": general, all-purpose means valuable for the pursuit of any of a wide array of diverse life plans.[222] These consist primarily of income and wealth, but such "external" resources may also be used to address involuntary deficits in "internal" or personal resources, meaning mental and physical powers, and traits relevant to the effective pursuit of diverse life plans.[223] This, of course, reintroduces the thorny problem of measurement or valuation: how should various deficits in personal powers and traits be valued for purposes of monetary redress? In theory, the resourcist ideal is to retain a subjectivist view, anchored in individuals' own valuations of personal resources, in terms of opportunity costs in foregone external resources.[224] In practice, however, the difficulties with directly implementing this ideal mean that we will have to rely on rough, often counterfactual, conjectures of inter-subjective averages as our guides—

---

[218] *See* MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT 129–30, 136–37 (2000) (discussing adaptation to oppressive circumstances); Cohen, *supra* note 137, at 943 (arguing that adapting to adverse or oppressive circumstances should not void one's claim to compensation).

[219] *See* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1733–34, 1733 n.316 (1988) (discussing endogenous preferences).

[220] Anderson, *supra* note 153, at 287–88.

[221] *But see* Cohen, *supra* note 212, at 22–26 (criticizing the "overly athletic" language of freedom used by resource and capability camps, as either mistaken if it means not redressing deficits in "traits" along with those in "powers," or misleading if it does).

[222] RAKOWSKI, *supra* note 140, at 19; Dworkin, *supra* note 212, at 307, 343–44; Rawls, *supra* note 210.

[223] Broadening the ambit of "resources" to include personal powers and traits is an extension of this view, undertaken by Dworkin and Rakowski to fill a gap in its original formulation by Rawls—who put to one side the problem of personal differences to focus on what he considered the "basic case" of "normal" persons. RAKOWSKI, *supra* note 140, at 99–101; Dworkin, *supra* note 212, at 300–01; JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (2001).

[224] We are to ask, that is, what individuals with these deficits would themselves, in light of their particular ambitions and tastes, give up in external resources—and hence, in the pursuit of their other projects and preferences—to have these deficits ameliorated.

asking, in essence, how much value would individuals, on average, across a diverse range of life plans, place on ameliorating such deficits.[225]

Disagreement on this last count is the main pivot of debate between the resource and capability views. Capability theorists agree with (indeed, largely initiated) the critique of the welfare view as too focused on subjective end-states.[226] But in their reaction against subjective end-states, resourcists, on the capability view, swing too far in the other direction, of "fetishizing" generic external means independent of what they can actually do for specific persons.[227] The right locus of concern, on this view, lies midway between external means and subjective end-states: states of valuable "functioning"—of "being" (e.g., well-fed) and "doing" (e.g., reading, mobility)—that are tailored to individual persons and yet externally measurable and not reducible to their subjective satisfaction or enjoyment. Thus, for example, with respect to being well-fed, our focus should be neither on a generic quantity of external resources (be it dollars or food), nor on a person's desire for or pleasure from a meal, but rather on a nutritional target (say, daily caloric needs), reaching which may require calibration to individual differences in, say, physiology.[228] And what value should we place on meeting such targets? The capability answer is that we cannot shrink from—because there is no plausible alternative to—straightforwardly making substantive social judgments, concerning the contribution of various different states of being and doing to the good life, a life of "truly human"

---

[225] *See* Dworkin, *supra* note 212, at 293, 296–99; RAKOWSKI, *supra* note 140, at 88–89, 92, 98–100, 120–23, 126. At the center of both Dworkin's and Rakowski's proposals are hypothetical insurance devices that ask how much people would insure, on average, against the bad "brute luck" of an involuntary disability or health condition. Dworkin, *supra* note 212, at 315; RAKOWSKI, *supra* note 140, at 132. Reliance on "offer" prices under ex ante uncertainty is, however, only one way to obtain conjectural (inter-)subjective valuations, and this particular method will tend to counsel only cost-effective ameliorations, to result in a distributive principle along the lines of the "efficient progress" view. *See supra* pp. 46–47 (criticizing the efficient-progress view). Both authors express reservations about the method (and Rakowski proposes to supplement it with additional resource transfers of an indeterminate amount for the case of childhood, as opposed to adult-onset, disability)—but they urge it as superior to attempting full equalization or compensation. RAKOWSKI, *supra* note 140, at 99–101, 105; Dworkin, *supra* note 212, at 300–02. The trouble here lies not with the authors' chosen space of concern—personal resources valued on a subjective basis—but, of course, with their telic-equality premise that the default is equalization in that space. The unattractive implications of that premise then drive them to adopt a method of subjective valuation that results in a concededly unsatisfactory alternative distribution. A better way forward, on the argument presented in Part II, would be to simply abandon the commitment to equalizing and instead embrace the commitment to giving comparative priority, so as to apply the principle of proportionate progress to their space of concern, i.e., personal resources, now (inter-)subjectively valued in a suitably revised way. *See supra* p. 44.

[226] *See supra* notes 216–17 and accompanying text.

[227] Sen, *supra* note 191, at 216, 218. As discussed in note 230, *infra*, this criticism may be restricted to cases of significant differences in individual powers and traits, or it may be pitched more broadly.

[228] Sen, *supra* note 191, at 216–18; Cohen, *supra* note 212, at 18–20.

functioning.[229] All persons, then, should be fairly equipped with "capabilities" for such functioning—meaning, equitably enabled to realize a diverse array of valuable states of being and doing deemed fundamental to human flourishing.[230]

To be sure, the gap between resource and capability views, as well as the distance between them and the welfare position, may be challenged or bridged in various ways.[231] But for present purposes, the central contours of the competing positions are clear enough for us to turn to their concrete implications here.[232] Involuntary disadvantages from disability are, then,

---

[229] SEN, *supra* note 6, at 1–2, 4–5; Nussbaum, *supra* note 218; Cohen, *supra* note 212, at 21–28. For the contemporaneous development in legal theory of a view along similar lines to the capability approach, see Fisher, *supra* note 219, at 1744–66.

[230] This is not to say that capability views need leave no room in distributive justice for subjective valuations over generic resources. That depends on the extent of their departure from resource views, which may proceed along any one of three broad levels. The most basic is to restrict the capability approach to those cases where both camps agree that differences in personal powers and traits render inadequate reliance on generic external resources—with the disagreement turning on how best to address that gap (i.e., via more subjective or more substantive valuations). An intermediate position is to expand the zone of substantive evaluations to various other states of being and doing that are also deemed fundamental to human flourishing and not to be left solely to subjective valuations (on account, say, of adaptive or endogenous preference-formation)—while still leaving room for the residual application of principles of distributive equity to generic resources left to subjective valuation. The most expansive view would be to limit the scope of distributive justice only to capability spaces, evaluated in substantive terms.

[231] Thus, with respect to redressing deficits in personal "powers," to the extent that the resource position moves away from any purely subjectivist valuation, it can be seen to converge with the capability view—or, as some resourcists have it, the capability view converges with theirs. *Compare* Sen, *supra* note 211, at 217–18 (discussing the relation between utility, resource and capability views), *with* Dworkin, *supra* note 137, at 241–42 (same), Cohen, *supra* note 137, at 918 (same), DWORKIN, *supra* note 222, at 288, 296–98 (same), *and* AMARTYA SEN, THE IDEA OF JUSTICE 264–65 (2009) (commenting on Dworkin's argument against capability). As we will see below, however, an important difference of sensibility in valuation—concerning "fungibility"—remains between these positions, one with significant implications in the educational setting. *See infra* notes 237–39 and accompanying text. Another prominent controversy, passed over as too tangential to our purposes here, concerns the extent to which, under the resource and capability views, redress should be available not only for deficits in personal "powers" but also in "traits" (such as having a gloomy disposition or unchosen "expensive tastes")—and, if redress for the latter is available, whether this does not collapse these positions, at least in this regard, into something like a welfare view. For resources, see Dworkin, *supra* note 212, at 301–04; Cohen, *supra* note 137, at 922–31; RAKOWSKI, *supra* note 140, at 47–54; G.A. Cohen, *Expensive Taste Rides Again*, *in* DWORKIN AND HIS CRITICS: WITH REPLIES BY DWORKIN 3, 5 (Justine Burley ed., 2004). For capability, see Cohen, *supra* note 212, at 26–28. This is tangential to our focus because all parties to this debate agree that deficits in traits associated with disability should be addressed by resource and capability views and can be done so in a manner retaining their distinction from the welfare position—although, again, not perhaps their distinction from each other. *Cf.* Cohen, *supra* note 212, at 22–26 (agreeing that the capability view may remain distinct from the welfare view in redressing deficits in traits, but arguing that when dealing with traits or "beings"—as opposed to powers or "doings"—the language of "capability" for "functioning" is inapt, because misleadingly "athletic," and proposing instead access to "midfare" as more suitable in such cases).

[232] We may note for completeness that one final front of debate concerns, naturally, the appropriate principle of distributive equity to apply to these competing spaces of concern—to ensure that access to advantage, however specified, is indeed provided fairly for all. Virtually all participants in this debate

germane targets for distributive concern when they implicate persons' access to one or another of these three ultimate goods: welfare, resources or capabilities. And in the specific context of education, to which we now return, the key questions concern the ways and extent to which different forms of educational (dis)advantage may be measured and compared or traded off against one another, in light of competing views on what dimensions and sources of (dis)advantage should be our focus of concern in the educational setting.

C. *Accommodation Beyond the Core Case*

1. *Trading Off Across Educational Spaces*

We return to the issue posed by the more complex cases: should a student with a disability be eligible to receive IEP benefits even when he or she is performing at an overall academic level that is average or above?[233]

---

have adopted—either as overall principles for their spaces of concern or specifically to address disadvantages from disability—variations of the maximin/leximin, sufficiency or efficiency principles criticized in Part II, *supra*. The burden of that Part, of course, was to argue for the superiority of the principle of proportionate priority to these alternatives—and the central thrust of its argument continues to apply irrespective of one's view of the appropriate index of advantage to which equitable access should be provided.

[233] The question itself may arise under either of two aspects of the IDEA. A first is where the student is performing at an average or higher level prior to any IEP, in which case the issue is whether they should be eligible to receive *any* special education benefits at all. The second is when the student reaches that level only after some special educational assistance, in which case the question becomes whether they merit any *further* assistance.* While this difference—between "eligibility" for any benefits and "adequacy" of existing benefits—may matter in certain contexts, we can abstract from it here to focus on the core substantive question presented in either setting: should any (further) special-educational resources be devoted to a student with a disability when her or his overall educational development is already at an average or above-average level?

* To be more precise, the issue may arise under any of three distinct legal provisions of the IDEA, falling within two broad areas of IDEA analysis, namely: (1) whether a student is eligible for an IEP's "special education and related services," and (2) whether the benefits provided by a mandated IEP are adequate. *Rowley II*, 458 U.S. 176, 187–88, 192–94 (1982). For eligibility, (1) a student must suffer from a statutorily enumerated "learning" disability (or fall within a limited exception where states may at their discretion so designate children aged three to nine who are "experiencing developmental delays") and (2) the disability must (a) "adversely affect" her or his "educational performance" (b) such that she or he "by reason thereof, needs special education and related services." 20 U.S.C. §§ 1401(3)(A)(i)–(ii) (2012); *id.* at § 1401(3)(B)(i); 34 C.F.R. §§ 300.8(a)(1), (c)(1) (2016); *see also* Garda, *supra* note 197, at 457–58 (describing how IDEA defines a "child with a disability"). Eligibility analysis serves, then, as a first filter for special educational benefits, by determining who is entitled to receive *any* such benefits. Adequacy analysis then operates as a second filter, prescribing *how much* benefits are due for those passing the first hurdle.

The eligibility filter, in turn, may operate in either of two ways. One is where the requirement that a learning disability "adversely affect" a student's educational performance is given a restricted meaning, not to require something more than simply making the student educationally worse off than they would otherwise be without the disability, but rather something along the lines of the student being educationally worse off than the average student, either overall or in specific areas of learning and skills. Alternatively, we might take a relaxed or expansive view of what counts as "adversely affecting" educational

So far we have encountered two broad answers. A reconstructed majority view says "no," on the grounds that students with disability should be eligible for special concern or priority only so long as they are overall worse off than the average, non-disabled, student. And a reconstructed minority view says "yes," on the grounds that students with disability should be eligible for special concern or priority so long as they are worse off than they would otherwise be, without the disability (i.e., so long as they are detrimentally affected by the disability, even if their overall level is average or above).

Both these responses, however, may be too coarse-grained when we take into account the variety of cases that can arise. Consider the following, illustrative of the main types of distinct cases possible here:

- Case (A): The disability makes the student below average in many, even most, areas of learning or skills, but still not overall, due to her or him being *very* above average in one or a few areas (e.g., a student with autism having extremely high math and related skills).
- Case (B): The disability makes the student below average in one or a few concentrated areas (e.g., reading or writing) but not overall, due to her or him being above average enough in other areas.
- Case (C): The disability causes deficits in one or more capacities (such as in processing auditory information or perceptual skills) but these are not tightly linked or severe enough to show up as discrete deficits in any specific educational area sufficient to make her or him below average in that isolated respect. Rather, the disability has a diffuse impact that, nevertheless, does not result in he or she being below-average overall (due to he or she having compensating above-average capacities in other respects). [234]

On first impression, the majority view would seem to counsel the same position in all three cases, against the student being eligible for any special concern or priority, on the same grounds that they are overall average or above average. Why? Because, although students with disabilities may still face deficits or disadvantages in some capacities that are relevant to educational development and distributive concern, the fact that on the whole they are nevertheless average or above suggests that in other respects they are "gifted." They enjoy, that is, in these other educational respects—that are also relevant to distributive concern—surpluses or advantages vis-à-vis

---

performance (to include any detrimental effect on the student's performance), but then take a more stringent view of when the student is deemed to "need" special education, as requiring something more than simply deriving any benefit from such education, but rather something along the lines of needing it to attain an average level of overall or disability-specific performance. *See* Garda, *supra* note 197, at 481–91 (reviewing authority for each of the two approaches and advocating for the latter as the key filter in eligibility analysis).

[234] *See* Conrad Weiser Area Sch. Dist. v. Dep't of Educ., 603 A.2d 701, 702, 704 (Pa. Commw. Ct. 1992) (discussing a student who was "gifted" but deficient in "the area of writing expression").

other students, advantages that, on the whole, more than offset their disability deficits. As a result, they are no longer disadvantaged, "overall."

Even for those who find this view generally persuasive, however, case (A) may give some pause. (A)-type cases, involving very lopsided development of skills and learning, raise doubts about the propriety of using a raw average across all areas, due to the potential distortion from a huge surplus in one area. An overall average, that is, may sometimes be deceptive due to raw educational scores not properly tracking the underlying value of attainments in different educational domains, as these might be assessed on any plausible theory of the educational good. By analogy to the diminishing marginal utility value of money, there may be a diminishing "marginal goodness value" of raw educational scores, whether "goodness" is understood in terms of capabilities, personal resources or welfare.[235] Therefore, before trading off deficits and surpluses across educational areas to determine a student's overall score and position vis-à-vis others, we may first need to ensure that each area is being properly valued or adjusted. This may be achieved more qualitatively, by making rough judgments of when there seems to be too high an imbalance across areas—i.e., a concentration of surpluses or deficits in one or a few that merits some adjustment before averaging—or more quantitatively, by applying some discounting function to raw scores before averaging them.

Suppose, then, that we have properly valued or adjusted distinct educational areas before comparing deficits and surpluses across them to yield an overall average. This already provides some distance from the majority view in its initial, unrefined version. Do there remain any further grounds for departing from that view, so as to accord eligibility for priority to students with disability even when they are average or above in the, now properly valued or adjusted, space of overall educational performance? A refined majority view would say to stop here.

Some, however, may want to press further and argue for continued eligibility in at least some type-(B) cases, where a student is doing well enough in most areas but quite poorly in one or a few, albeit not so poorly as to bring down her or his overall average to below the median (even after we have made any plausible adjustments to raw scores before averaging).[236]

---

[235] To forestall misunderstanding, it is worth emphasizing that this question—of how properly to measure the benefits secured by an expenditure of educational resources—is sharply distinct from the question at the heart of our discussion of distributive principles in Part II, namely what kind of priority to accord to benefits (so measured) for students with disability vis-à-vis benefits for other students. By way of analogy: within welfarist analysis, the (positive) question of what utility curves are most plausibly associated with money is distinct from the (normative) question of what distribution of utility should be deemed fair, for purposes of adopting a specific social-welfare function.

[236] *Cf.* Klein Indep. Sch. Dist. v. Hovem, 690 F.3d 390, 392, 400, 408–09 (5th Cir. 2012) (student scoring quite well in most areas, including math and social studies, but consistently poorly in writing

What might lie behind this position, of basing eligibility not on disadvantage in overall educational development, but on disadvantages specific to discrete areas of learning and skills? Most plausibly, a sense that not only should we make adjustments in our valuation of raw scores before averaging them across areas, but also that in fact we should go farther and sharply curb tradeoffs across areas of learning or skills altogether, even when they are duly adjusted or valued. Why? Because such skills and learning are "incommensurable," going to fundamentally distinct aspects of educational development, each having independent qualitative value that is not sensibly compared or traded off against the others.[237] In other words, this position counsels that we adopt a kind of "sphere-specificity" approach to areas *within* educational advantage, as opposed only to between education and other domains (e.g., health), as was discussed above.[238]

Proponents of two of the three prominent candidate metrics of distributive justice—welfare and resources—are unlikely to be moved by such a position. These camps tend, by and large, to eschew any such sharp forms of incommensurability.[239] And although practical considerations might lead them to accept boundaries between education and other domains for purposes of real-world policy decisions, these are unlikely to extend to restrictions on comparisons and tradeoffs within education, across discrete areas of skills and learning.

By contrast, a distinguishing feature of the capability camp is precisely its insistence on an irreducibly plural set of capacities as the relevant foci for distributive concern, so that distributive principles apply primarily within, rather than across, such capacities.[240] Does this lend support for barring *all*

---

composition, held to merit further accommodation by the district court and dissent on appeal, but not by the majority).

[237] *See* MARGARET RADIN, CONTESTED COMMODITIES (1993); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993); INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON (Ruth Chang ed., 1997); JOSEPH RAZ, THE MORALITY OF FREEDOM 321 (1986).

[238] *See supra* Part I.B.3.

[239] Both camps adopt metrics of advantage that assume, explicitly or implicitly, more or less full commensurability or fungibility across different goods. To be sure, many welfarists have expressed theoretical reservations about commensurable—or cardinal and interpersonally comparable—notions of utility, and such reservations have also played an important part in motivating the development of the resourcist alternative. Rawls, *supra* note 121, at 91–92; Arrow, *supra* note 215, at 246; Harsanyi, *supra* note 215, at 309. Nevertheless, for any workable form of the welfare view, some way of making interpersonal comparisons of utility is needed, and typically such comparisons are made in a cardinal or "as if" quasi-cardinal fashion, along a single-scale measure of quantitative intensity. *See* Kaplow, *supra* note 215, at 603 (discussing whether metrics can be used to convert resources into a single dimension). Resourcists, for their part, rely on income and wealth as a fungible, all-purpose means for measuring social opportunity costs across goods and persons. *See supra* note 196 and accompanying text.

[240] Sen, *supra* note 212; Cohen, *supra* note 212, at 9; Martha Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199–1203 (1997). Whether this commits capability views to eschew "general" distributive justice—meaning, the redress of overall or residual forms of disadvantage via generic or fungible means, such as money—depends on their scope of divergence from resource views, as discussed above in note 230.

intra-educational tradeoffs, across any areas of skills and learning? Likely not. Although sphere-specificity between education and other domains such as health is given stronger support by the capability view (as a matter of principle, not just practical policy), this is because such boundaries likely track (even if only roughly) fundamental underlying distinctions between discrete kinds of human goods. Any such correspondence, however, is unlikely to obtain within the educational sphere. It is doubtful, that is, that the large number of different subject areas in which schools regularly assign educational scores tightly map on to the—typically quite few—capacities plausibly specified by capability theorists as fundamentally distinct goods or spaces of concern.[241]

More plausible is that, stimulated to further theoretical reflection by the kinds of complex cases presented by disability accommodation, we might begin to carve out *a few* core aspects of educational development as going to distinct, fundamental forms of knowledge and skills, such that each merits its own, independent valuation for distributive purposes. For those drawn to this position, suggestive leads in this regard might be provided by those state-court constitutional decisions that have identified a series of discrete dimensions of learning, skills and activities, in each of which schools are charged with ensuring all students are effectively equipped.[242]

Taking stock, we can now distinguish between three main variants of the majority position. A pure view rejects eligibility in all three cases, including type-(A) cases of lopsided development. A first refinement accepts the need to adjust valuations in cases of lopsided development, but otherwise sticks to its guns. A second refinement, propelled by type-(B) cases, accepts a further need to draw lines between fundamentally distinct, independently valuable, spaces of educational development, and curb the application of priority principles to within, rather than across, such spheres.

---

[241] *Cf.* NUSSBAUM, *supra* note 122, at 78–79 (within a total of ten irreducibly distinct capability spaces, specifying four areas plausibly relevant to educational policy, each characterized in very broad terms: "senses, imagination and thought," "emotions," "practical reason," and "affiliation").

[242] *See* Pauley v. Kelly, 255 S.E.2d 859, at 877 (W. Va. 1979) (specifying eight dimensions in which schools must enable students' development up to their full capacity: literacy, math, creative arts, knowledge of government, social ethics, self-knowledge, work skills, and recreational pursuits); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (specifying seven dimensions for sufficient development: oral and written communication; knowledge of economic, social, and political systems; understanding of government processes; self-knowledge; arts; academic or vocational training; academic or vocational skills). As discussed *supra* Part II.B, the distributive principles these decisions are most plausibly seen to instantiate—maximin and robust sufficiency, respectively—face serious drawbacks. However, nothing prevents us from adapting their views and applying instead the principle of proportionate progress to their conceptions of the appropriate spaces of distributive concern (or to any suitably revised versions of such conceptions we settle upon after further reflection).

What, finally, of a fourth position, one that would make further refinements so as to accommodate type-(C) cases, involving a diffuse effect of disability across many areas but not one so strong as to make the student worse off than the average in any specific significant area (due to he or she having compensating above-average capacities in other respects)? To embrace this would be to argue for so fine-grained a view of the relevant spaces of distributive concern as to dovetail with the heart of the minority position: namely, to adopt a narrowly targeted, disability-specific space for distributive concern *and* either to ignore, or to bar tradeoffs against, other, non-disability-specific sources of advantage and disadvantage.

2. *Disability and Other Sources of Educational Disadvantage*

What might be the justification for the minority view just stated, one sometimes going under the label of "disability remediation"?[243] Reconstructed as a view of distributive justice, its premises run as follows: (a) the relevant target space for distributive concern is a narrow, disability-specific capacity, such that a person with that disability is virtually by definition relevantly worse off than others, so as to merit distributive priority; and (b) we should not factor in any other respect in which such a person may be educationally advantaged or better off, so as to reduce the degree of priority they should be accorded. Or, in a qualified version of (b): we should not factor in any non-disability sources of educational advantage or disadvantage, deeming them irrelevant to the task at hand, of according distributive priority purely on the basis of disability.

Such a position—of disregarding as irrelevant to distributive concern any other source of involuntary educational disadvantage (such as socio-economic status, family context, cultural or linguistic background or innate differences in ability not classified under disability)—is difficult to defend in principle.[244] And although some more practical considerations may be marshaled in its favor, none of these is ultimately persuasive.

One might seek to justify restricting our focus to disability-based sources of disadvantage on the ground that we are working here within a disability-specific legislative scheme. But it seems inconsistent, even unprincipled, to advance a robust interpretation of that scheme's

---

[243] *Rowley II*, 458 U.S. 176, 215 (1982) (White, J., dissenting); Klein Indep. Sch. Dist. v. Hovem, 690 F.3d. 390, 398–99 (5th Cir. 2012). It bears noting that the label of "disability-remediation" is somewhat misleading, at least for that variant of the minority position being considered here. Even adopting the position that students with disability should be eligible for special concern so long as their disability is not fully remedied, the form that special concern would take here is priority according to the principle of proportionate progress (applied to the minority's target space for distributive concern, namely a narrow, disability-specific capacity). And this distributive principle does not counsel full remediation, but rather continued priority only so long as the student's potential for improvement, in the disability-specific capacity, remains significant enough that her or his proportionate gain in that space continues to be comparatively greater than that of other potential recipients.

[244] In particular, it would find no support from any of the main contending views on the appropriate locus of distributive concern. *See supra* Part III.B.2.

commitments toward students with disability on the basis of an analysis of distributive justice, but then fail to follow through on that analysis's implications when they run in a contrary direction.

A second argument may be that disability tracks particularly salient forms of educational disadvantage, ones that tend to be especially urgent compared to other, perhaps more nebulous, sources of disadvantage. Indeed, it might be thought that with these other sources, unchosen aspects of advantage and disadvantage entangle more inextricably with factors held reasonably to lie within students' personal responsibility, making them less eligible candidates for redress on most views of distributive fairness. Yet, it is precisely this salience of the disadvantages from disability—and its potential for abuse through expansive diagnoses of "disability"—that critics of IDEA accommodation point to as fostering an unjustified, and potentially distorting, form of "special treatment."[245] One that unfairly vaults a particular set of educational disadvantages over others that are, at least in principle, equally germane.

Finally, disabilities may often pose "extra-educational" hurdles, i.e., disadvantages outside the educational setting. And so, a third argument might run, any extra solicitousness shown toward the disadvantages of disability in educational policy might be justified, or at least excused, on grounds of partially compensating for these "outside" deficits. The main trouble[246] with this position is that it bumps up against all the reasons canvassed above for why analysis of the fair distribution of educational resources should remain internally cabined, restricting its comparisons and tradeoffs to the domain of educational development.[247]

To sum up: both the majority and minority positions, in their initial form, merit reconsideration once we sift them through a more fine-grained analysis of the appropriate space(s) of distributive concern. The upshot? Considerable support for one or both of two possible refinements to the majority view: (a) adjusting our valuations of raw educational scores before making priority comparisons across students; and (b) drawing distinctions between discrete spaces of educational development deemed independently valuable, to restrict the application of priority principles to within, rather

---

[245] *See* KELMAN & LESTER, *supra* note 92.

[246] A secondary problem is that some nondisability sources of disadvantage may also present hurdles outside of education that merit redress.

[247] *See supra* Part I.B.3; *supra* text accompanying notes 237–242. This is not to say that extra-educational deficits associated with disability should remain unaddressed; only that they are not best addressed through the diversion of educational resources as a compensating medium. In this connection, it bears emphasizing that even after *all* "sphere-specific" deficits—i.e., deficits in various individual domains like education and health—have been equitably redressed internally, there may well be persons who remain in a state of "residual" (unaddressed) or "overall" (composite) disadvantage that merits further priority, as a matter of "general" distributive justice. This, however, is likely best pursued through more generic means, such as monetary transfers (leaving open here the question of what institutional mechanism may be most apt for effecting such transfers).

than across, such zones. Adopting these would take us some way toward the minority view, but still stop significantly short of it. Further steps in that direction, so as to single out disability as the sole source of educational disadvantage meriting distributive concern, would seem unjustified.

CONCLUSION: DISTRIBUTIVE EQUITY IN LAW AND POLICY

What might the principle of proportionate priority mean for other areas of law and policy besides educational accommodation for disability? To ask this backs us into a prior question: does distributive justice have any direct bearing on the modes of analysis used in different areas of law and policy?

This Article has suggested that the answer may be "yes" more often than is commonly thought. It has done so by tackling the two fundamental obstacles to the pursuit of distributive equity in law and policy. First, from a legal-institutional perspective it has shown that, contrary to a common perception, questions of distributive equity—or of prioritizing across similarly legitimate claims to resources in order to ensure fair access to a substantive benefit for all—may not only arise organically, internal to the distinct concerns of a particular field of law and policy, but also sometimes lie at its very center. Second, from a philosophical perspective, the Article has confronted head-on the two fundamental normative questions of distributive justice—namely, "what is fairness" in access, and "fair access to what"—by advancing a new principle of distributive equity and examining its application to different candidate spaces of distributive concern.

For what other areas of law and policy might these arguments be germane? Where else, that is, might questions currently viewed through other lenses—such as antidiscrimination, equality of opportunity, rights, corrective justice, efficiency or cost-effectiveness—be better conceived as ones of *delimited distributive equity*, or fair access to substantive benefits in accord with claims of distributive priority cabined to that domain? Although detailed consideration of further applications is clearly beyond our present scope, a few suggestive illustrations may be ventured—less as definitive conclusions than as possibly fruitful lines for future inquiry.

Two extensions of the argument, closely adjacent to our central focus here, may have been glimpsed already: educational justice besides disability and disability accommodation outside of education. Should educational justice in general be viewed in terms of distributive equity, with redress guided by proportionate priority? Doing so would advance distinct answers to two of the central questions of educational policy, namely: what sources of educational disadvantage should we seek to redress as a matter educational equity (e.g., income, minority status, family background, innate differences in ability not classified under disability); and what distributive principle should guide our expenditure of resources in pursuing such redress? A central lesson of the present analysis is that our answers to these

two are more deeply intertwined than is often thought. Specifically, if, in our answer to the first question, we reach beyond fair equality of opportunity to pursue distributive equity—in contrast to one prominent group of scholars[248]—then neither of the prominent answers to the second question—equality or sufficiency[249]—retains much appeal. Once our focus shifts, that is, from correcting imperfections to a fair competition for grades to redressing involuntary barriers accessing to educational development, then the attractions both of equality (as "leveling the playing field") and of sufficiency (as less demanding than equality) fall away. While their respective drawbacks—implausibility for equality and indeterminacy for sufficiency—come to the fore. Perhaps more promising than trying to "blend" the two in an unstable compromise—one unsure in its footing in underlying principle and indeterminate in practical guidance—is to jettison both commitments, and adopt in their stead comparative priority.[250]

How about accommodation of disability outside of education? Should it enter a new phase, progressing from *facial* discrimination to discriminatory *disparate impact* to, now, *inequitable* disparate impact? This possibility was briefly sketched above, where a parallel impasse to the one facing courts under the IDEA was shown to face courts under the RA and ADA.[251] Does it call for a parallel resolution? Arguably yes, although surely the precise contours—and even perhaps the general aptness—of the resolution will depend on the aims specific to the diverse settings of employment, housing, transportation, architecture, and so forth. In one setting, however, we can be confident of strong parallels: health. As in education, so in health our aim is to secure effective access to a substantive good of fundamental importance. And again, persons with disability are differentially-situated in respect of that aim on account of a conversion deficit, in translating a given bundle of

---

[248] Jencks, *supra* note 121, at 520; Harry Brighouse & Adam Swift, *Putting Educational Equality in Its Place*, 3 EDUC. FIN. & POL'Y 444, 445–46 (2008).

[249] *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 345–47 (2006) (reviewing debate between equality and sufficiency views); William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 606–13 (2006) (arguing for equality against sufficiency); Joshua Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 478–79 (2014) (reviewing debate between equality and sufficiency views).

[250] *See* Liu, *supra* note 249, at 345–47 (offering a blend of equality and sufficiency); Weishart, *supra* note 249, 478–479 (offering a blend of equality and sufficiency). Notably, neither Professors Liu nor Weishart focus on what this Article identifies as the fundamental difficulties facing equality and sufficiency views—namely, the basic implausibility of equalizing-as-sameness in matters of distribution and the under- or over-inclusive difficulties stemming from sufficiency's eschewal of a comparative focus. Underpinning both authors' discussions is their acceptance of the equation of a comparative focus with the aim of equalizing—an equation that, as discussed in *supra* note 161, is common to the philosophical literature more generally and which, of course, it has been the central thrust of the present argument to pry apart.

[251] *See supra* text accompanying notes 102–07.

means (healthcare) into valuable ends (positive health outcomes). So our task, again, is to correct for the insensitivity of any merely formal equality to their special needs. And in so doing there is no plausible alternative to tackling it as a question of distributive equity, of prioritizing across similarly legitimate claims to healthcare—the special needs of those with disability and the needs of other patients—to ensure equitable access to health for all.

Ensuring equitable access to health for all, more generally, points to a significant third extension. Persons with disability represent only one subset of a larger group of individuals with "differential needs" in health—others include patients with pre-existing conditions or "high risk" individuals more generally. A cornerstone of many healthcare reforms at the state and federal level in recent decades has been to ensure *access* to healthcare for such individuals, via guaranteed enrollment in private plans or expanded eligibility for public ones, alongside assurance that they receive, under such plans, non-discriminatory and "adequate" coverage for their individual healthcare needs.[252] At the same time such reforms typically retain, as part of their mandate to keep *costs* under control, the use of "reasonable" cost containment methods, including cost-sensitive screening of different categories of care and courses of treatment.[253] This poses in sharp form a dilemma long playing a central, if often underground, role in healthcare policy: at what point does a course of treatment, while providing *some* medical benefit to the patient, nevertheless provide too small a benefit at too great a cost to qualify for coverage? Recourse to the notions commonly deployed—of facial discrimination, discriminatory disparate impact, "actuarial fairness," "medical necessity," and cost-effectiveness—are unlikely to be of much help in satisfactorily resolving it. Just as with the subset of patients with disability, so with the larger group of those with differential needs: the only plausible approach is one sounding in distributive equity. And among distributive principles, only proportionate priority attends simultaneously to both *access* and *cost* sides of the problem.

Indeed, a central message of the proportionate priority view is its insistence that neither the "access" nor the "cost" dimensions of a problem can be addressed independently of the other. *Equitable access*, that is, integrates the two in a way making it indistinguishable from an analysis of *equitable opportunity cost*. The upshot of such an analysis—applicable to a wide range of fields—is to give clear articulation in law and policy to what

---

[252] Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18001 *et seq*. (2012); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.); An Act Providing Access to Affordable, Quality, Accountable Health Care, 2006 Mass. Acts ch. 58, § 1; Individual Health Coverage, MASS. GEN. LAWS ch. 111M (2006).

[253] *Id.*

should be our deepest commitments of principle: enabling all persons to have their lives go *as well as is possible and fair*.

AFTERWORD: *ENDREW*—SIGNS OF HOPE, MISSED OPPORTUNITIES

Shortly after this Article was completed, the Supreme Court handed down its decision in the *Endrew* case referred to above,[254] involving a challenge to the Tenth Circuit's minimalist interpretation of the "some benefit" standard deriving from *Rowley*.[255] This Afterword briefly evaluates, from the vantage of the argument set forth in this Article, the implications of *Endrew* for educational accommodation in this country.

In an unanimous opinion written by Chief Justice Roberts, the Court's decision in *Endrew* consisted primarily of three planks: (a) an affirmation of *Rowley*'s insistence that the IDEA's requirements for a satisfactory IEP do indeed contain a strong substantive component;[256] (b) a rejection of both minimalist and maximalist views of when such substantive benefits should be deemed "adequate" for purposes of the IDEA,[257] which the Court also took *Rowley* to stand for;[258] and (c) the articulation of a new "appropriate progress" standard for evaluating the adequacy of benefits,[259] one ostensibly distinct from either the "some" or "meaningful" benefit standards that had been widely taken to be the prevailing options in the wake of *Rowley*.[260]

---

[254] *See supra* text accompanying notes 4, 43, 84–85.

[255] Endrew F. *ex rel.* Joseph F. v. Douglas Cty. Sch. Dist. Re-1, 137 S. Ct. 988, 997–98 (2017).

[256] *Id.*

[257] *Id.* at 992, 997–99.

[258] *Id.* at 995–96.

[259] *See id.* at 999 ("To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."); *see also id.* ("[T]he progress contemplated by the IEP must be appropriate in light of the child's circumstances . . . ."); *id.* at 1001 ("The IDEA demands more [than merely exceeding *de minimis* benefits]. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.").

[260] Three points bear noting regarding the relationship of *Endrew*'s "appropriate progress" standard to *Rowley*. First, the *Endrew* Court took the view that *Rowley* did not articulate *any* standard, emphasizing in this regard *Rowley*'s statement that it "declined to establish any one test for determining the adequacy of educational benefits." *Id.* at 997. Although the *Endrew* Court cited this statement in rejection of the Tenth Circuit's interpretation of *Rowley* as having articulated a "some" benefit standard (an interpretation shared by a majority of circuits), the Court's rebuke would also seemingly apply to that minority of circuits, most prominently the Third, that have derived a "meaningful" benefit standard from *Rowley* (this latter went unmentioned by the Court). For a review of the longstanding pedigree, amongst both circuit courts and commentators, of the derivation of the "some" and "meaningful" standards from *Rowley*, see *supra* Part I.A. Second, the *Endrew* Court offered its "appropriate progress" standard as simply an elaboration of *Rowley*, being a more concrete specification of the "general approach" that *Rowley* and the IDEA already "point[ed] to." *Id.* at 999. Nevertheless, and third, it is clear that, substantively, the "appropriate progress" standard is more demanding in its requirements than the more minimalist "some benefit" interpretation of *Rowley*. The latter's relation to more demanding versions of the "meaningful benefit" interpretation remains, at present, unclear.

In respect of each of its first two prongs, the Court's decision is a welcome clarion call moving forward. Both of these elements—namely, reaffirmation of a substantive view of the IDEA's requirements and rejection of both minimalist and maximalist views of these—find strong support in the analysis given above.[261]

In its articulation of a new standard, however, the Court's performance was more mixed. On the one hand, the Court's standard may be seen to dovetail with the one advanced in the preceding pages: that students with disabilities should be enabled to realize "appropriate progress" may be thought to fit hand in glove with the view that they be enabled to realize "proportionate progress." What is "appropriate," the Court declared, is a matter of what is "reasonable" in "light of the child's circumstances."[262] And while the Court did not specify how "reasonably" to factor in students' diverse circumstances, proportionate progress steps in to fill precisely that gap—by offering a view of what is reasonable in terms of what is *fair across students*, so that "appropriateness" is determined by looking to *two sets of comparative circumstances*: how well each student is already faring and by how much each stands to improve.

However, on the other hand, it must be admitted that not only did the Court not say this, but it also did not say much of anything at all. It is not just that the Court left unstated how to weigh or evaluate those circumstances it deemed relevant to factor in; it did not even pinpoint which aspects of students' circumstances it deemed relevant to consider in the first place. What lies behind these silences? A fundamental lack of clarity, once again, on what our basic aim here should be. As with the "some" or "meaningful" standards, so here we need to ask: "appropriate" in light of what end? In pursuit of what guiding ideal, given which underlying commitments?

The commitments underlying the proportionate progress are, of course, anchored in a specific conception of *distributive fairness*, of what it means to give all students *equitable access to a substantive benefit*, educational development. But the Court in *Endrew*, despite its clear embrace of a substantive view of the IDEA's requirements, shied away from articulating this—or any other—guiding ideal to orient its efforts in meeting those requirements. As a result, its new standard faces difficulties parallel to those long plaguing the some and meaningful yardsticks it replaces: (a) not only is the language used to couch the standard quite vague—"appropriate" not being much of an improvement over "some" or "meaningful" in this

[261] For the first element, see *supra* text accompanying notes 30–32 and 73–78; for the second, see *supra* Parts II.A.1–3.

[262] *Endrew*, 137 S. Ct. at 992.

respect;[263] (b) but also, more importantly, absent any orienting purpose, we lack guidance on how to make the standard's language more determinate in application, whether by resolving ambiguities through direct appeal to our underlying commitments or, even, by identifying serviceable proxy factors that may render it more workable in practice.[264]

The Court's reticence in this regard is surely the greatest missed opportunity of the decision, a failure to meet the challenge set out over thirty years ago in *Rowley*: namely, to articulate an ideal that captures our "complex aspirations" under the IDEA, where both "equality of opportunity" and "equality of outcome" fail.[265] That ideal, this Article has argued, is "equity of access": reaching beyond all procedural concerns to focus directly on access to substantive benefits, it jettisons *any* commitment to equalizing, aiming instead to ensure all students *fair* access. Neither procedural *nor* substantive equality, our aspiration should be to achieve *substantive equity*, understood as a matter of distributive justice.

[263] Thus, if we substituted the terms "appropriate," "some," or "meaningful" for each other in the following, there would not seem to be any appreciable gain or loss in precision: "Each student must be enabled to realize ____ progress, that which is reasonable in light of the child's circumstances."

[264] For discussion of the parallel difficulties facing existing standards, see *supra* Part I.A.1.

[265] See *supra* note 119 and accompanying text.