NO CHILD LEFT BEHIND AND THE INHERENT CONFLICT WITH THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: LEAVING SPECIAL EDUCATION STUDENTS FURTHER BEHIND

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INTRODUCTION

On January 8, 2002, Congress reauthorized and President Bush signed the Elementary and Secondary Education Act. In a shrewd political move to become the “education president,” the act was publicly renamed the No Child Left Behind Act (NCLB).

The goal of this re-branded educational reform act was to “ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.” While the aims of No Child Left Behind are noble goals of improving American public education, the methods of achieving these goals have created an even greater disparity in the quality of education for many students, particularly for students with disabilities.

Not only have the NCLB methods of assessment widened the gap between the performance levels of regular education students and their disabled peers, but, even more significantly, NCLB directly and substantially conflicts with the Individuals With Disabilities Education Act (IDEA).

It has been seven years since the initial implementation of NCLB, the bill that provides for federal educational funding, and it is currently up for reauthorization by Congress. Consequently, there is much discussion regarding the successes and failures of the legislation since it was enacted in 2002.
A key facet of reauthorization is the interplay between the law and IDEA. This article will examine the unintended consequences of NCLB, with a specific focus on the effects on and consequences for students with disabilities. It begins with an exploration of the inherent conflict(s) between NCLB mandated standardized assessments and the individualized focus of special education provided for by the Individuals with Disabilities Education Act. Additionally, beyond the inherent philosophical conflicts with IDEA, the way in which NCLB requires schools to test students’ progress may lead to a very specific violation of a student’s right to a free and appropriate education (FAPE) under IDEA. If elected officials and policymakers truly wish to improve public education in the United States, they must seriously consider this last and vital element of the law.

I. A BRIEF HISTORY OF NCLB: STANDARDS AND REQUIREMENTS

A. Accountability: What are the standards required by NCLB, and how are they established?

Driven by the concept of accountability, NCLB specifically enumerates its mission as one of holding schools, local educational agencies, and States accountable for improving the academic achievement of all students, and identifying and turning around low-performing schools that have failed to provide a high-quality education to their students while providing alternatives to students in such schools to enable the students to receive a high-quality education . . . .

If a state chooses to receive federal funding, it must comply with five key elements of NCLB: (1) setting challenging academic standards, (2) showing Adequate Yearly Progress (AYP) (complying with statewide benchmarks for achievement), (3)

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9 While No Child Left Behind has been criticized for many of its failures, most recently as an unconstitutionally unfunded mandate, the scope of this article will be limited to the serious shortfalls of NCLB for students with disabilities. For more information on the pending litigation surrounding the funding of NCLB see Sch. Dist. of City of Pontiac v. Sec’y of U.S. Dept. of Educ., 512 F.3d 252 (6th Cir. 2008). See also Sam Dillon, Judge Dismisses Connecticut’s Challenge to Education Law, N.Y. TIMES, Apr. 30, 2008, at A13.
using high quality student academic assessments to measure progress toward proficient levels, (4) adhering to strict requirements concerning the preparation, hiring and retention of highly qualified teachers, and (5) being subject to wide range of accountability measures.\(^{13}\)

As a result of the accountability provision of NCLB, each state is required to develop and implement statewide standardized assessments with measurable levels of proficiency.\(^{14}\) While NCLB leaves the development of assessments and the establishment of academic standards to the discretion of each respective state, the federal government requires that at least 95% of students participate in the assessments each year, with the ultimate goal of all students achieving 100% proficiency in all assessed areas by 2013-2014.\(^{15}\)

Specifically, by the 2005-2006 school year, states were required to annually assess math and language arts for students in grades three through eight.\(^{16}\) Schools must also administer the math and language arts assessment to one grade from tenth through twelfth annually.\(^{17}\) In addition to math and language arts, NCLB requires an annual science assessment for at least one grade in grades three through five, six through nine, and ten through twelve.\(^{18}\)

To comply with NCLB, each state was required to develop an approved plan for a statewide accountability system.\(^{19}\) This system must be applied to all schools in all districts within the state and must be based on challenging academic standards and

\(^{13}\) See generally 20 U.S.C. § 6311.

\(^{14}\) 20 U.S.C. § 6311(b)(2).  See also Alex Duran, Factors to Consider When Evaluating School Accountability Results, 34 J.L. & EDUC. 73, 80-99 (2005) (explaining and deconstructing the challenges of the NCLB assessment system). See also Stephenson, supra note 12 (providing an explanation of the NCLB assessment mechanism by which student progress is measured and describing NCLB’s challenges).


\(^{17}\) 20 U.S.C. § 6311(b)(3)(C)(v)(I); DeVITO, supra note 16.

\(^{18}\) 20 U.S.C. §§ 6311(b)(1)(C), 6311(b)(3)(C)(v)(II); DeVITO, supra note 16.

assessments.\textsuperscript{20} Although states were free to develop their own
tests, each individual school district was required to comply with
the established state standards and to administer the statewide
standardized assessments.\textsuperscript{21} States were also required to
establish a system of sanctions and rewards, which must hold
local school districts accountable for student achievement.\textsuperscript{22} This
system of school achievement is measured by Adequate Yearly
Progress (AYP), a standard that is defined and evaluated by each
state.\textsuperscript{23}

To determine whether or not individual schools have achieved
AYP benchmarks, schools must report the results of the
assessments to the state’s department of education.\textsuperscript{24} Such
reporting must be disaggregated by specific categories and must
also be an analysis of levels of proficiency: basic, proficient, or
advanced.\textsuperscript{25}

Additionally, states are required to establish standards for
identified subgroups which include: racial/ethnic groups, students
with limited English proficiency, economically disadvantaged
students, and students with disabilities.\textsuperscript{26} In accordance with the
stated local accountability goals of NCLB, states must publicly
report data on the achievement of these identified subgroups.\textsuperscript{27}
Corresponding with the accountability focus of NCLB, each local
educational agency (LEA) which receives federal funds must
publicly report this data.\textsuperscript{28}

However, in determining AYP, states are not required to use
disaggregated data when “the number of students in a category is
insufficient to yield statistically reliable information or the
results would reveal personally identifiable information about an
individual student.”\textsuperscript{29} Therefore, larger schools with more

\textsuperscript{24} 20 U.S.C. § 6311(b)(2).
\textsuperscript{26} 20 U.S.C. § 6311(b)(2)(C)(v)(II). See generally ART CERNOSIA, LEGAL ISSUES
UP-DATE FOR SCHOOL ADMINISTRATORS 1-2 (2002) (outlining the important
subgroups for which states must establish standards and report as a component
of the AYP accountability standard).
\textsuperscript{27} 20 U.S.C. §§ 6311(b)(8)(C), 6316(c)(1)(B).
Services: Assessment: State and National Data,
Apr. 20, 2009) (providing up-to-date examples of student assessment data and
other assessment resources).
\textsuperscript{29} 20 U.S.C. § 6311(b)(2)(C)(v). See also Letter from Rod Paige, U.S. Sec’y of
students in the designated subgroups may be identified as failing, yet a smaller school whose special education subgroup did not meet the standard would not be identified.\textsuperscript{30} Although it is critical to adhere to a reporting system that is statistically valid and reliable, smaller schools may be viewed inaccurately by the public as serving subgroup students more effectively than larger schools.

\textbf{B. What happens when a school is identified? What are the consequences of failing to meet AYP?}

Because NCLB is accountability driven, it establishes a framework of consequences for schools that fail to meet AYP.\textsuperscript{31} A school that fails to meet AYP, as defined by NCLB, for two consecutive years will be identified as a school in need of improvement (SINI).\textsuperscript{32} When a school obtains school improvement status, local educational agencies (LEAs/school districts)\textsuperscript{33} are required to provide technical assistance to schools to raise proficiency levels and provide supplemental services;\textsuperscript{34} however, sanctions will also be triggered.\textsuperscript{35} The systematic scheme of consequences includes, among other corrective actions:

\begin{itemize}
  \item The term “local educational agency” means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.
  
  20 U.S.C. § 1401(19)(A). \textit{But see} U.S. Dep’t of Educ., No Child Left Behind: Glossary of Terms, http://www.ed.gov/nclb/index/az/glossary.html (last visited Apr. 20, 2009) (“Local Education Agency, (LEA) is a public board of education or other public authority within a State which maintains administrative control of public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state.”).
  
administrative restructuring, parental school choice, and eventually, a loss of federal funding for schools that continue to fail to meet AYP.\textsuperscript{36} Specifically, if a school is identified as “in need of improvement,” parents may choose to remove their children from the identified “failing school” and enroll them in another public school served by the same LEA.\textsuperscript{37}

While NCLB attempts to improve academic achievement throughout the United States, the homogenized assessments and strict consequences for failing to meet identified benchmarks do little to actually improve the daily educational experience of all students. “Failing school” status affects all students. However, students with disabilities face more of the damaging social stigma that inevitably attaches to all students and their schools that are identified as failing.\textsuperscript{38}

II. INHERENT IDEOLOGICAL CONFLICTS BETWEEN IDEA AND NCLB

Although the stated purpose of NCLB is to raise the academic standards for all students, its homogenized system of assessment and accountability inevitably leaves many students behind. This issue is particularly acute among the country’s nearly six million students with disabilities.\textsuperscript{39} Students with disabilities who are required to perform at the same academic level, on the same grade level assessments as their non-disabled peers are being systematically set up for academic failure.\textsuperscript{40} While NCLB does incorporate provisions to comply with IDEA, the educational intentions of these acts are inherently at odds.\textsuperscript{41} Additionally, the


\textsuperscript{38} See Nat’l Educ. Assoc., 2008-09 Adequate Yearly Progress (AYP) Results: Many More Schools Fail in Most States (Oct. 20, 2008), available at http://www.nea.org/home/16107.htm (providing the most recent data for AYP, and explaining that virtually every reporting state had an increase of schools failing to meet AYP, indicating that NCLB is truly not working).

\textsuperscript{39} See generally Plain, supra note 5 (highlighting the effects of NCLB’s short-sightedness and failures for students with disabilities). For additional data on students with disabilities in the United States, see DATA ACCOUNTABILITY CENTER, U.S. DEP’T OF EDUC., DATA TABLES FOR OSEP STATE REPORTED DATA (2006), https://www.idea.data.org/arc_toc8.asp (last visited Apr. 20, 2009).

\textsuperscript{40} See Plain, supra note 5, at 257-582.

\textsuperscript{41} See Rentschler, supra note 1, at 639 (noting the inherent conflict between the individualized nature of IDEA and the “mass-testing, standardized nature of NCLB.”); see also Plain, supra note 5, at 249 (“[T]he NCLB directives encroach upon testing participation rights previously afforded students under the IDEA.”).
practical implementation of NCLB may lead to a very specific violation of IDEA by failing to provide a “free appropriate education” (FAPE) for special education students.\footnote{20 U.S.C. § 1410(9) (2006); Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 201 (1982) (holding that each child eligible for special education was entitled to receive services under an IEP which consists of a meaningful “educational benefit”). See also Perry A. Zirkel, Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for “Free Appropriate Public Education?” 28 J. NAT’L ASSOC. ADMIN. L. JUDICIARY 397 (2008) (providing a comprehensive discussion of the educational rights granted by IDEA and the subsequent case law).}

Reauthorized as the “Individuals with Disabilities Education Improvement Act of 2004,” one of IDEA’s stated purposes is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”\footnote{20 U.S.C. § 1400(d)(1)(A).} While IDEA provides students in need of special education services with individualized supports and services, the intent is to allow all children access to the general education curriculum, with specific goals tailored to their individual needs.\footnote{See generally 20 U.S.C. §§ 1400-1419. See also MELINDA BAIRD, IDEA 2004: HOW DOES THE “WEDDING” OF THE NCLB ACT AND THE IDEA AFFECT YOUR SCHOOL DISTRICT? (2004).}

NCLB stands in marked contrast to IDEA’s focus on the unique needs of individual students. The newer, assessment driven law requires states to set academic standards for all students according to their grade level, and the standardized tests are issued accordingly.\footnote{§ 20 U.S.C. 6316(a) -(h). For an additional explanation see NAT’L ASS’N OF SECONDARY SCH. PRINCIPALS, CONGRESS TO THE SCHOOL HOUSE: TESTING AND ACCOUNTABILITY UNDER THE NO CHILD LEFT BEHIND ACT OF 2001 (2002).} Specifically, NCLB mandates that all children meet the same standards by 2014.\footnote{20 U.S.C. § 6311(b)(2)(F); COLEMAN & PALMER, supra note 35, at 8.} Because NCLB requires all students to participate in the common assessments, whether students limited in English proficiency, low income students, or students with disabilities, the statute is written to make “reasonable adaptations and accommodations” for these students to comply with IDEA.\footnote{See 20 U.S.C. §§ 6301, 6311(b)(3)(O)(I)(II).} However, most disabled students’ current academic performance is below grade level \textit{because} of their disability, or unique abilities. This makes accommodations nominal at best.
In contrast to NCLB’s stringent participation requirements for standardized tests, IDEA affords students with disabilities the right to participate in the district-wide testing in accordance with their individual educational plan (IEP), which is developed to meet their individual disability and academic need, and might even include an exemption from participation.48 By requiring all students to participate in mandatory standardized testing, NCLB blatantly conflicts with the IDEA provided rights of students with disabilities to learn through individualized, targeted education plans.49

The individualized nature of IDEA further requires the development of an IEP, with an emphasis on unique and individualized goals, to allow all students access to the general education curriculum.50 Students are identified as eligible for special education services (and therefore federal IDEA protections) if they have a learning disability as defined by IDEA.51 According to the federal regulations, a student “may be considered to have a learning disability if he or she does not ‘achieve adequately for the child’s age or . . . meet state-approved grade-level standards’ in one or more of eight listed areas.”52 Highlighting this inherent conflict is the way in which special education eligibility is determined. For example, the State of Vermont identifies a student as eligible for special education services if s/he has a specifically enumerated disability which results in an adverse effect on the child’s educational performance in one or more of the basic skill areas . . . and . . . [t]he student needs special education services to benefit from his or her educational program and this support cannot be provided through the educational support system, standard instructional conditions or supplementary aids and services provided in the school.53

Vermont determines whether or not the disability has an “adverse effect” on the student’s education if the student is “functioning significantly below grade norms compared to grade peers in one or more of the basic skills.”54 The very criteria that

49 See Plain, supra note 5, at 251 (discussing the specific conflicts between NCLB’s mandatory participation in standardized tests and with the rights afforded students with disabilities under IDEA).
52 LAWRENCE M. SIEGEL, THE COMPLETE IEP GUIDE: HOW TO ADVOCATE FOR YOUR SPECIAL ED CHILD 74 (5th ed. 2007) (citing 34 C.F.R. §§ 300.8(c)(10), 300.309).
53 22-000-006 VT. CODE R. § 2362(a) (2007).
54 22-000-006 VT. CODE R. § 2362(d)(1).
defines a student’s eligibility for special education services necessarily means that a student is not performing at grade-level. Why, then, does NCLB require students to be assessed according to their age appropriate grade level, when IDEA and state regulations specifically require supports and services for students who, because of their disability, have barriers to academic success at that grade level? Simply – the law was intended for the masses not specific.

As required by IDEA, and because not all students with disabilities require the same supports and services, each student’s IEP must contain goals and measurable objectives uniquely tailored to their individual academic needs. Pursuant to IDEA, each student’s IEP will govern if, and how, the student will participate in standardized tests. To meet each student’s “unique needs,” the IEP team (which must include the special education teacher, a regular education teacher, members of the administration, and the student’s parent(s)), will determine if there should be modifications to the test, accommodations for the testing procedure, or if the student should participate in an alternative assessment.

Thus, based on the logic of state educational regulations, which identify students for special education services, it would follow that students who receive special education services may never meet the homogenized goals of NCLB. Nor should students with more significant disabilities be expected to do so. This is especially true because the focus of IDEA, and the purpose of an IEP, is to identify individualized goals and tools of assessment to

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56 See Plain, supra note 5, at 252-53 (emphasizing the purpose of IDEA as a tool to “meet the ‘unique needs’ of students with disabilities.”).
57 20 U.S.C. § 1414(d)(1)(B) (requiring the IEP team to include the parent of a student with a disability, at least one regular education teacher, at least one special education teacher, a knowledgeable representative of the LEA, an individual qualified to interpret the results of evaluations (this does not require another individual, and another member of the team can fulfill this role), any other individuals who have special knowledge of the child as determined by the parent or the LEA, and where appropriate, the child with a disability may participate in any IEP team meetings).
help each student overcome his/her unique barriers to benefit from public education.\textsuperscript{60} While NCLB does include measures that purportedly comply with IDEA,\textsuperscript{61} each law approaches education in very different ways. The clear focus of NCLB is accountability for the performance of a homogenized group of students, while IDEA addresses the unique needs of each individual learner. Because of this dichotomy, it was inevitable that these competing theories led to adverse educational effects for special education students.\textsuperscript{62}

III. ACCOMMODATIONS: DO THEY ONLY NOMINALLY COMPLY WITH IDEA? IF SO, DOES THAT LEAD TO A VIOLATION OF FAPE?

For students eligible for special education services, IDEA requires that they receive a “free appropriate public education.”\textsuperscript{63} As defined in the landmark case, \textit{Board of Education of the Hendrick Hudson Center School District v. Rowley}, FAPE, at its core, requires that the “child’s IEP [be] ‘reasonably calculated to enable the child to receive educational benefits.’”\textsuperscript{64} It is important to remember that FAPE does not necessarily mean the best possible education, but it does require an educational program that is structured to meet the educational needs of the student with the appropriate supports and services.\textsuperscript{65} Beyond the philosophical conflicts with IDEA, the way in which NCLB

\begin{itemize}
\item \textsuperscript{60} See \textit{Rowley}, 458 U.S. at 189.
\item \textsuperscript{62} \textit{See generally} Plain, supra note 5 (supporting the theory that requiring a student with a disability, and therefore protected by IDEA educational safeguards, to participate in NCLB mandated testing may not only violate IDEA, but may be detrimental to the student’s academic performance).
\item \textsuperscript{63} 20 U.S.C. § 1400(d)(1)(A).
\item \textsuperscript{64} Michele Kule-Korgood, \textit{The Anachronism of Rowley: Using a Chisel and Tablet in the Digital Age, in PRACTICING LAW INST., SEVENTH ANNUAL SCHOOL LAW INSTITUTE 83, 87 (2007) (quoting Rowley, 458 U.S. at 207).}
\item \textsuperscript{65} \textit{Rowley}, 458 U.S. at 188-89. \textit{See also} THOMAS F. GUERNSEY \& KATHE KLARE, \textit{SPECIAL EDUCATION LAW 33-39 (3d ed. 2008) (defining and describing the requirements of a “free appropriate public education”); MARK WEBER, RALPH MAWDSELY, \& SARA REDFIELD, \textit{SPECIAL EDUCATION LAW: CASES AND MATERIALS 141 (2004).}
\end{itemize}
requires schools to assess their progress may lead to a very specific violation of a student’s right to a FAPE under IDEA.\textsuperscript{66}

While it may be true that the strict accountability focus of NCLB has improved curricula and standards for some students, including special education students, the question arises: at what cost do these improvements come? Is forcing students with disabilities to be measured by one test, on the same level as their non-disabled peers, simply setting these students (who need individualized supports and services more than ever) up for failure?\textsuperscript{67} Additionally, if the consequence of not meeting the high arbitrary state standard is that disabled students are to be labeled “failing students” and their schools “failing schools,” how can such a school system provide an “appropriate education?” One school administrator from Maine articulated the dichotomy of NCLB for special education students: “we’ve identified them as failures, [a]nd worse, what we have done, because of the structure of No Child Left Behind, is we’ve identified their school as a failure.”\textsuperscript{68}

\textbf{A. What kind of accommodations may states allow students with disabilities who, like all students, must participate in standardized assessments?}

Currently 95% of all students in public schools must participate in NCLB statewide standardized assessments.\textsuperscript{69} However, in accordance with IDEA, a small percentage of students may take the assessments with “reasonable adaptations and accommodations for students with disabilities (as defined


\textsuperscript{67} See generally Rentschler, supra note 1 (discussing the benefits to special education students as a results of NCLB’s push to improve education for all students, but weighing the possible detrimental effects).


under section 602(3) of the Individuals with Disabilities Education Act\textsuperscript{70} necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards.”\textsuperscript{71} The extent to which accommodations will be reasonably provided is determined by each individual state.\textsuperscript{72}

For example, the State of Vermont has defined IEP accommodations for students with disabilities accommodations as, “those evaluation procedures, curricula, materials or programmatic adaptations, behavior management interventions, and supplemental aids and services that are necessary for an eligible student to benefit from his or her regular education or to participate in non-academic or extra-curricular activities.”\textsuperscript{73}

While the language of NCLB seems to suggest that the academic testing needs of students with disabilities can be met by these accommodations, the reality is that the allowable accommodations provide merely nominal support for most special education students. This dilemma is exemplified by the struggles of almost eighty-percent of all special education students who have difficulty with reading.\textsuperscript{74} For these students, their disability affects their ability to not only perform on the writing and reading assessments, but also their ability to comprehend the directions for the math and science skills assessments. Because NCLB treats all students the same, during assessments students with a reading disability are evaluated on the same scale as their non-disabled peers, yet they have a much bigger barrier to overcome to even participate in the evaluation, let alone prove their cognitive abilities.\textsuperscript{75} While allowable accommodations differ from state to state, what is incredibly clear is that if students


\textsuperscript{71} 20 U.S.C. § 6311(b)(3)(C)(ix)(II). \textit{See also} 20 U.S.C. § 1401(3); Plain, \textit{supra} note 5, at 258 (providing helpful data from Rhode Island illustrating how many special education students were exempt from standardized assessments under IDEA, but who are forced to participate under NCLB).

\textsuperscript{72} 20 U.S.C. § 6311(b)(3)(C)(viii). \textit{See also} Rentschler, \textit{supra} note 1, at 659 (discussing the authority each state has to determine the specific allowable accommodations and providing examples).

\textsuperscript{73} Vt. Dep’t of Education, Special Education Regulations § 2360.3(1) (2007).

\textsuperscript{74} Lynn Olson, \textit{Enveloping Expectations}, \textit{Educ Week.}, Jan. 8, 2004, at 8, 10.

\textsuperscript{75} \textit{See} Rentschler, \textit{supra} note 1, at 659; \textit{see also} Jennifer R. Rowe, \textit{High School Exit Exams Meet IDEA--An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers}, 2004 B.Y.U. Educ. \\& L.J. 75, 127-28 (2004) (discussing the importance of structuring the accommodations such that the test isn’t testing the student’s disability, but their academic abilities).
with disabilities are prohibited from participating in the assessments with accommodations, as specified by their IEP, it is highly likely that they will not reach proficiency standards. Notwithstanding the purported purpose of the legislation to “leave no child behind,” NCLB’s assessment standards clearly leave behind those students who need supports and services the most, subjecting them to lower class status and potential discrimination.

1. Allowable Accommodations

NCLB permits each state to determine what level of accommodations they will allow for students with disabilities who must participate in state-wide assessments. For states participating in the New England Common Assessment Program, allowable accommodations include, “changes in format, administration, response, setting, timing, or scheduling” of the assessment. Format accommodations may include: providing the assessment in large print or Braille, signing the directions to the student, or allowing the student to read the test aloud to him/or herself. Students in need of format accommodations may have the test read aloud to them, but only for the math portion and one specific element of the writing section. If demonstrated as a need in their IEP, students may also take the test in a smaller location, with better lighting or acoustics or even in a non-school setting. Regardless of which accommodations are allowed for a student, such accommodations must not “alter in any significant way what the test measures or the comparability of results.”

Additionally, to utilize these accommodations, students must prove that the accommodations are necessary according to their IEP, or Section 504 plan of the 1973 Vocational Rehabilitation Act, and are consistent with accommodations used during a

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78 Id. at 5.
79 Id.
80 Id.
81 Id. at 2.
student’s regular classroom activity. Furthermore, very few of the participating students currently use such accommodations, which can be read as a clear sign that the allowable accommodations truly do not meet the academic needs of students with disabilities. While these accommodations claim to “remove barriers to participation in the assessment and provide students with diverse learning needs an equitable opportunity to demonstrate their knowledge and skills,” for most students they do not even begin to level the playing field.

2. Alternative Assessments for Students With Severe Cognitive Delays

Although NCLB essentially requires all students to participate in the assessments, a very small segment of students with disabilities may be exempt from the standard assessments. In Vermont, one percent of students with severe cognitive delays can be assessed through “lifeskills portfolios.” New York has established that two percent of students may be exempt from the standard assessments because of severe cognitive delays. Only this small percentage of identified students may participate in the New York State Alternative Assessment.

By allowing alternative assessments for students with severe cognitive delays, NCLB has recognized that the mandated “one-size fits all” assessments really do not fit the academic needs of all students. Yet, the United States Department of Education under President Bush refused to expand this logic to more than this minimal percentage of severely cognitively disabled students. One can only speculate that the Department did not take the logical step of providing for off-level or alternative testing for fear

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83 NEW ENGLAND COMMON ASSESSMENT PROGRAM, supra note 77, at 2.
84 Id.
88 See id. at 1.
of backing down on the political rhetoric of high standards.\textsuperscript{89} Relying so heavily on political rhetoric in education policy is not only shortsighted; it is fatal to the academic success of all American students.

3. Off-Level Testing

Pursuant to NCLB, students with disabilities must participate in the statewide assessments.\textsuperscript{90} Students with disabilities must either fall into the narrow category of severely cognitively delayed students and participate in a lifeskills portfolio assessment, or participate in the statewide assessment at their designated age appropriate grade level.\textsuperscript{91}

The U.S. Department of Education contends that the revised accommodation provision (of alternative portfolio assessments) allows for “more flexibility” for students. Former Secretary of Education Margaret Spellings contended that, “No Child Left Behind has put the needs of students with disabilities front and center, and this regulation helps continue to drive the field forward in developing better tests for students with disabilities.”\textsuperscript{92} While the Department speaks of the need to more appropriately challenge and assess students with disabilities, under no circumstances does NCLB allow for off-level testing.\textsuperscript{93}

Supporters of NCLB argue that the only way to raise the

\textsuperscript{89} See Press Release, White House, President Bush Discusses No Child Left Behind Reauthorization (Sept. 26, 2007) (“And so my call to the Congress is, don’t water down this good law. Don’t go backwards when it comes to educational excellence. Don’t roll back accountability.”). See also Sheryl Gay Stolberg & Dana Jean Schemo, Bush Prodding Congress to Reauthorize His Education Law, N.Y. TIMES, Oct. 10, 2007, at A16 (noting that President Bush met with civil rights leaders and “issued a public call for Congress to act”).


\textsuperscript{91} See U.S. DEP’T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES, NON-REGULATORY GUIDANCE 9-10 (2005) [hereinafter ALTERNATIVE ACHIEVEMENT STANDARDS]. See also Cort & Stevens, supra note 87, at 1 (“[S]tudents designated ‘ungraded’ [will participate] consistent with the student’s chronological age”).


\textsuperscript{93} See ALTERNATIVE ACHIEVEMENT STANDARDS, supra note 91, at 10 (explaining the four categories of assessments allowable under NCLB, such as: “[1] The regular grade-level State assessment[; 2] The regular grade-level State assessment with accommodations, such as changes in presentation, response, setting, and timing. . . . [; 3] Alternate assessments aligned with grade-level achievement standards [; 4] Alternate assessments based on alternate achievement standards.”).
academic achievement of all students is to hold them to the highest standard.\textsuperscript{94} However, for many students with disabilities in specific academic areas, off-level testing is the only way to appropriately challenge them to meet achievable goals. With IDEA protected support and services, special education teachers and school districts are working tirelessly to provide their students with the tools to overcome their unique barriers to academic success and to one day be on the same academic level as their peers.\textsuperscript{95} Furthermore, as required by IDEA, each individual IEP provides for specific content goals and assessments goals for each student.\textsuperscript{96} Requiring students to be tested on material to which they have not been exposed, or which does not comply with their federally mandated IEP, seems to be a direct violation of FAPE.\textsuperscript{97} Although the provision might force schools to develop IEP’s with on-level curriculum, such a move would be a total contradiction of IDEA.

At face value, the political rhetoric speaks of higher achievement for all students.\textsuperscript{98} However, when one looks more closely at the affect of standardized assessments on individual students, the disconnect between accountability and appropriately challenging academic standards is quite apparent.

\textsuperscript{94} See Press Release, White House, \textit{supra} note 89 (defending his legislation President Bush calls on rhetoric of hate to gain support for his educational policy. “Well, that’s not acceptable in America, to shuffle children through school. That’s what I have called the soft bigotry of low expectations. Through the No Child Left Behind Act, we have challenged that soft bigotry.”).

\textsuperscript{95} See \textit{Rich}, \textit{supra} note 4, at 41-42 (highlighting the “disproportionate negative effect” of failing standardized tests for students with disabilities).

\textsuperscript{96} See \textit{generally} 20 U.S.C. § 1414(d) (2006) (providing the requirements and established benchmarks necessary for an IEP to comport with IDEA).

\textsuperscript{97} IDEA states that FAPE:

(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the individualized education program required under section1414(d) of this title.

20 U.S.C. § 1401(9). See 20 U.S.C. § 1400(d)(1)(A) (“[t]he purposes of this chapter (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living”).

\textsuperscript{98} \textit{E.g.}, 20 U.S.C. § 6301 (“The purpose . . . is to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”).
For example, consider a fifth grade special education student identified as eligible for special education services because he has an auditory processing delay and can only read at a second grade level. Simply requiring him to read a fifth grade content level with “supports and services” would automatically be setting him up for failure. Students such as this particular student need off-level instruction combined with the appropriate corresponding assessments. This educational plan will allow the student to gain the necessary skills allowing him to progress and eventually benefit from the general education curriculum at grade level. Furthermore, providing supports and services for students with disabilities as a method to remove barriers to the general education curriculum is a key purpose of IDEA, as well as a direct conflict with NCLB.99

Critics of off-level testing contend that it fails to hold teachers and students accountable.100 However, this approach does establish an academic goal, one which requires rigorous academic standards, which is exactly what NCLB purportedly is designed to accomplish. It simply recognizes the importance of unique individual instruction coupled with appropriate goals and benchmarks, as provided for by an individual IEP, required by IDEA.101

B. Students’ participation in standardized tests without meaningful accommodations is not appropriate within the protections of IDEA

Requiring special education students to participate in testing that is well above their academic level (and most likely in violation of their IEP) over a two week span cannot be an “appropriate education,” as a right protected by IDEA’s requirement of a free and adequate public education.102 While Rowley does not require that all students receive a perfect

99 See 20 U.S.C. § 1414(d)(1)(A)(i)(II) (stating that the requirements for an IEP include “a statement of measurable annual goals, including academic and functional goals, designed to . . . meet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum”).
education, one that maximizes each student’s potential, it paved the way for the standard that all students are entitled to receive a meaningful educational benefit.\textsuperscript{103}

While the specific implications of FAPE continue to be litigated throughout the country, one can hardly argue that forcing a student to endure weeks of testing that does little more than emphasize their disability, constitutes a “meaningful education.” Goals are an important part of the educational process; however, time spent suffering through homogenized tests could be better spent preparing the student to meet their individual goals, targeted to their unique abilities and challenges, rather than highlighting their academic weaknesses. What would truly provide a “meaningful educational benefit” is a system of assessment that targets the specific educational goals and objectives of each student with a disability.

IV. ADDITIONAL CONFLICTS BETWEEN NCLB AND IDEA LEAD TO SEVERE CONSEQUENCES FOR STUDENTS WITH DISABILITIES

\textit{A. Highly qualified teachers}

The “highly qualified” teacher (HQT) requirements of NCLB, which are determined at the state level, are not only impractical for special education, but can lead to a poorer quality education for special education students.\textsuperscript{104} For example, if a seventh grade student’s IEP calls for math instruction at a fifth grade level because she or he cannot be appropriately served in the seventh grade math classroom, the special educator is then designated to provide those services at the fifth grade instructional level. Under the HQT provisions of NCLB, that teacher must also be qualified as a fifth grade level math teacher.\textsuperscript{105} Such a requirement is beyond impractical or inconvenient; it is nearly impossible. A special educator is responsible for educating numerous students with many different educational needs. It would effectively require special educators to be certified in all


\textsuperscript{104} See Gordon, \textit{supra} note 68, at 220-21 (providing a clear and brief description of the “highly qualified” teacher requirements of NCLB).

possible subject areas at all educational levels. The final consequence of such a requirement would be a severe shortage of talented special educators if they are required to be certified in every possible subject for every possible grade level.

B. Public reporting of achievement of identified subgroups and the domino effect

Special education subgroups’ inability to meet the NCLB mandated yearly and long term (2014) standards have negative consequences for all students. When a school fails to meet the yearly standards established by NCLB for two consecutive years, the school is then labeled as an identified school, which then triggers sanctions. As part of NCLB’s accountability scheme, schools must publicly report student performance data in an annual report card. Additionally, schools must also publicly report data for identified subgroups, if the school meets the state established requirement for the proportion of students in a subgroup. These subgroups include students with disabilities, economically disadvantaged students, students from major ethnic or racial groups, and students for whom English is a second language. If a school meets that requirement for the special education subgroup, it is extremely likely that that group will not meet the yearly goals. Such information will then be published and the school’s reputation as a “failing” school will have hazardous social and educational consequences for all students, especially those in need of special education services.

Because the current assessments fail to allow meaningful accommodations for students in an identified special education subgroup, these students as a group will rarely meet the NCLB standard. Thus, a school with a large enough subgroup will continue to develop the reputation and the federal consequences of being an identified school, labeled by the public as a “failing school.” Some supporters of NCLB might argue that making an exception for special education students automatically sets the standards lower and places a cap on their academic achievement. However, for students with disabilities whose education is protected by IDEA, the conflict is not that the standards are too

108 Stephenson, supra note 12.
high, but that they are inappropriate. Furthermore, because they are not appropriate, the standards lead to a skewed identification of schools as failing.

V. SUGGESTIONS FOR AMENDMENTS TO NCLB BEFORE REAUTHORIZATION

This is an exciting time for education in the United States. With the inauguration of Barack Obama as our forty-fourth President and the subsequent appointment of Arne Duncan as the Secretary of Education, improvements to No Child Left Behind are likely. Throughout the 2008 Presidential Campaign, there were many proposals for the improvement of American education. The Republican nominee John McCain endorsed the rhetoric of the Bush Administration by refusing to “back down” on accountability. Additionally, now-Secretary of State Hilary Clinton vowed to completely dispose of the current legislation, while President Barack Obama called for a “fundamental overhaul.”

Additionally, because NCLB is up for reauthorization, legislators are proposing changes to the legislation. This might include off-level testing and additional accommodations for ESL students. One current proposal for modification of the law will allow for more substantive testing accommodations. Judicial progress is also being made in the fight against an NCLB unfunded mandate. In January, 2008, the Sixth Circuit agreed to hear a case brought by school districts in Vermont, Michigan, and Texas, along with the National Education Association, claiming that federal government has failed to provide sufficient funding for NCLB’s requirements. The mere fact that these modifications are being proposed and cases are being heard illustrates that educators, politicians, and judges are recognizing the failure of and discriminatory nature of NCLB.

If Congress truly wishes to improve our public education system, incorporating a system of meaningful accommodations is vital to the success of our students. The accommodations proposed herein are not a free pass, but are simply designed to

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112 Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ., 512 F.3d 252, 257 (6th Cir. 2008).
challenge the unique skills and cognitive abilities of special education students, rather than testing their disability. The message currently sent by NCLB to these students, their parents, teachers, and school districts is one of discouragement, defeat and failure. However, the proposed accommodations will send a clear message of encouragement and hope.

**CONCLUSION**

When it was passed by Congress in 2002, NCLB purported to be the answer to all of the problems in public education. It aimed to “leave no child behind.” However, the practical result has not been to increase standards and performance of public school students, but to create an unbearably complicated and counter-intuitive set of regulations and requirements, that differ from state to state and put the educational rights of students with disabilities at risk.

Improving our public education system will be vital to the success of future generations. However, the system must be one in which all students can not only thrive, but be challenged according to their own unique abilities. No Child Left Behind purported to improve accountability and standards for all students, but it has done nothing but put in jeopardy the standards and legal rights provided by the Individuals with Disabilities Education Act. Rather than improve the quality of education for our most vulnerable populations, students with disabilities, and students from lower socio-economic classes, a student’s right to a “free appropriate education” has been “left behind.”

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113 Rowe, supra note 75, at 127-28.