September 28, 2009

IDEA and NCLB; Is There a Fix to Make Them Compatible?

Rebekah Gleason Hope, *Florida Coastal School of Law*

IDEA AND NCLB;
IS THERE A FIX TO MAKE THEM COMPATIBLE?

Rebekah Gleason Hope[*]

INTRODUCTION

Daniel has an IQ of 141, and had always been above grade level in reading. He struggled, however, with math and organization so much that he was identified as eligible for special education services under the IDEA as a student with learning disabilities. His learning disability affected his academic progress to the point that his local education agency (Washington D.C.) placed him in a school for children with learning disabilities in a neighboring district located in the state of Maryland. In order to graduate with a Maryland State diploma, Daniel was required to pass the state standardized test in both reading and math. Despite high quality teaching and intensive math classes aimed at teaching Daniel how to pass the test, he was not able to do so in the seven years he attempted to do so. Ironically, however, his math scores on independently administered standardized tests improved every year. He begrudgingly accepted a Washington D.C. diploma which did not require passing a standardized test in math, and went on to earn both a B.A. and M.B.A. from small liberal arts college in New England.[1]

Since the time Daniel was in school Congress passed, and the President signed the No Child Left Behind Act (NCLB). A cornerstone of the Act is the requirement for states to implement standardized testing as a means of measuring annual yearly progress (AYP). As a result, most states require passing these assessments to graduate. It is likely this student with a 141 IQ

---

[*] Rebekah Gleason Hope is an Associate Professor at Florida Coastal School of Law. I want to thank Julia Halloran McLaughlin for countless hours of proofing, editing and general support and encouragement throughout the process of writing this article. Additionally, I would like to thank Kristin (Kiki) Grossman, and Amber Williams, for the research that they have done to make this article possible. I would finally like to thank countless others who have provided insight and guidance on this topic through informal conversations along the way.

[1] Daniel is the fictitious name of a real student of the author's while the author was a teacher for special education students in a school for the learning disabled in Maryland. While the No Child Left Behind Act had not yet been enacted, the situation as described highlights the plight of many similar students. He was forced to sacrifice one class to the dedication of learning how to pass a test that in the end did not predict his ability to function as contributing member of society.

and gift in language would not have graduated high school, and therefore would not have earned a B.A., never mind a MBA.

Despite this obvious flaw in the Act, it is quite possible that NCLB could possibly be the missing link to the success of the Individuals with Disabilities Education Act (IDEA), especially in light of the attempts Congress has made in aligning the two statutes. Scholars and litigators have argued since the 1997 Amendments to IDEA that the standard has risen for children with disabilities. The courts, however, have routinely declined to accept the changes in the language as an affirmative step in requiring a higher standard than the *Rowley* Court's floor of opportunity. Since most of that litigation, however, the No Child Left Behind has been enacted, and the IDEA has been reauthorized yet again. The most recent reauthorization of the IDEA in 2004 was an intentional attempt to align both statutes, which on their faces, would otherwise be competing statutes.

This article will explore those differences, as well the attempts by Congress to align them, and discuss how the NCLB Act could actually be the best thing for children with disabilities. First the article will describe the history, purpose and standards, and the mechanics of the IDEA. Next, the article will discuss the purpose and mechanics of the NCLB. Third, the article will identify and discuss the conflict between the two statutes, followed by attempts to reconcile NCLB with the IDEA. Finally, the article concludes by recognizing that Congress could have, and probably should have spoken more clearly on whether it intended for the two statutes to complement each other when it reauthorized the IDEA, but regardless, the statutes affect the same population of students and will need to work together. The only case on the relationship of the two Acts, *Bd. of Educ. of Ottawa Township H.S. District v. Spellings et al.*,[2] interprets the relationship as not in conflict, and where they are in conflict NCLB supersedes as the last in time statute enacted because the IDEA has merely been reauthorized and amended, not re-enacted. Therefore, the standard imposed on the schools for <u>all</u> children is indeed dictated by NCLB, and by incorporation, the IDEA must follow.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT

[2] *Bd. of Educ. of Ottawa Township H.S. District v. Spellings et al,* 517 F3d 922, (2008).

The Individuals with Disabilities Education Act (IDEA) is the first major piece of legislation requiring states and local education agencies to provide free appropriate public education for all students with disabilities who qualify for services. This section will discuss the background of the Act, the traditional standard as well arguments for why that standard has risen since 1997, and the very least since the enactment of NCLB, and why the standard matters.

A. Background

Throughout the early 20th century, students who did not progress at an appropriate rate were considered "mentally deficient." These students were separated from their peers to remove them from the classroom because they were a distraction to their classmates and took too much of the teachers' time, not because they required special instruction.[3] Students with "mild" disabilities who did not pose problems were left in the classroom, but given no support or intervention; they often floundered and dropped out of school at the first opportunity.[4]

Although it would take another twenty years or so for an effective statute in the area of special education to be passed, 1954 marked the beginning of a trend with the decision of *Brown v. Bd. of Educ.*[5] In following decades, this holding has lead to equal opportunity in education for students with disabilities.[6]

Nowhere in the Constitution is there a guaranteed right to education, neither are children a suspect class.[7] However, such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms;[8] "all" citizens included those with disabilities, and in 1963 Congress finally attempted to address this concern with the Education of Handicapped Act (EHA). The passive nature of this law cannot be underscored. The grant merely provided funds for the instruction of teachers. It did not make the training mandatory, nor did it require any state to accept the responsibility of educating students with disabilities. In 1965, the Elementary and Secondary Education Act (ESEA)

---

[3] Michael A. Rebell and Robert L Hughes, "Special Education inclusion and the courts: a proposal for a new remedial approach." 25 J.L. and Educ. 523, 529 (1996).

[4] Sara Tarver, "How Special Education Has Changed, " Changing Perspectives in Special Education, Charles E. Merrill Publishing, 1977.

[5] Brown v Board of Educ., 347 US 483 (1954).

[6] Mills v. Bd. of Educ. of the District of Columbia, 348 F.Supp. 866, 874-875 (DDC 1972).

[7] *San Antonio Sch. Dist. V. Rodriquez,* 411 U.S. 1 (1973).

[8] 347 US 483, 493 ("if states have undertaken to provide an education to their citizenry, then they must do so for all their citizens.")

primarily focused on improving the instructional programming of the educationally disadvantaged including the handicapped, and the following year, 1966 the Education of the Handicapped Act was passed.

Despite this federal legislation, states continued to exclude students with disabilities from public school programs. Two state class action suits shaped meaningful legislation for the disabled. In the first of two cases, Pennsylvania excluded students with mental retardation from public school and excluded them from attendance requirements. The Pennsylvania Association for Retarded Citizens (PARC) brought an action against the state where the court required Pennsylvania "to provide . . . to every retarded person between the ages of six and twenty-one . . . access to a free public program of education and training appropriate to his learning capacities."[9] The decision also included specific notice and hearing rights afforded to parents and guardians of children with mental retardation.

Later that same year, the District of Columbia District Court heard a similar case involving seven children that were denied education by the District of Columbia Public Schools.[10] As in *PARC*, the students in *Mills* were not afforded an education, nor were they afforded due process procedural rights to appeal decisions of the board of education in expulsions, reassignments, or other denials of education to their children. The seven named plaintiffs in this case had a variety of disabilities ranging from mental retardation, to behavioral, emotional, and physical disabilities. One student "was excluded because he wandered around the classroom."[11] The students were all poor and without financial means to obtain private placements, although some had promises of placements at appropriate private programs if funding became available.

The District of Columbia blamed the inadequacies of the system on insufficient funds and personnel. But, whether or not it was occasioned by insufficient funding or administrative inefficiency, it certainly could not be permitted to bear more heavily on the student with a disability than on the child without a disability.[12] The *Mills* court, like *PARC*, set out a detailed structure for procedural safeguards, including notice and hearing requirements. The *Mills* and *PARC* decisions became the framework for future legislation.

In 1975 Congress passed the Education for All Handicapped Children Act (EAHCA), signed into law as P.L. 94 – 142. The EAHCA defined a free appropriate public education, structured primarily on the

---

[9] Pennsyl. Assoc. for Retarded Citizens v Commonwealth of Penn., 343 F.Supp. 279, at 303 (1972).

[10] Mills v. Bd. of Educ., 348 F.Supp. 866 (1972).

[11] Id. at 869.

[12] Id. at 876.

PARC and Mills decisions, by mandating that states take responsibility for their intermediate and local education agencies in the education of their children with disabilities. This federal spending statute requires states to ensure that the students with disabilities were educated as much as possible with their non-disabled peers, but not to the detriment of educational progress, appropriate evaluation procedures, and assurances that individualized education programs (IEPs) would be reviewed at least annually. In addition, the parents were to be afforded procedural safeguards for due process, including notice requirements.[13] In 1990, the Act was amended and renamed the Individuals with Disabilities Education Act, in part to emphasize the importance of the individual over the disability.

While the focus on results for students with disabilities has emerged more clearly in the most recent reauthorizations, the original focus on the individual student has remained consistently the foremost priority. The free and appropriate public education afforded to students with disabilities through the IDEA is tailored to the unique needs of the child by means of an "individualized education program (IEP)."[14] The IEP requires a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 USC § 1414(d).[15] The IEP represents an individual education program that sets out the child's current level of performance, including how that child's disability affects the child's involvement and progress in the general education curriculum, and a statement of measureable annual 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, as well as meet each of the child's other educational needs that result from the child's disability.[16]

The emphasis of the Act is on the *individual* child's educational needs, and how that specific child's disability affects their success in the general education curriculum. When or if their disability no longer affects their achievement in the general education curriculum and when or if the child's "other education needs that result from the child's disability" are ameliorated, the child will no longer qualify as eligible for special education services as a "child with a disability" under the IDEA.[17] But, so long as the

---

[13] P.L. 94-142.

[14] 458 US 176, 182.(citing 20 USC § 1401(9). (the original cite to the Education for All Handicapped Children have slightly different numbers, but the text remains the same in this provision.)

[15] 20 USC § 1401(14).

[16] 20 U.S.C. § 1414(d)(A)(i)(I) – (II). (2009)

[17] See 20 U.S.C. § 1401(3). (Definition of a "child with a disability" means a child with any one or more of the listed disabilities; and who, by reason of the disability, needs special education and related services.)

child's disability does affect the child's achievement in the general curriculum, the child will continue to require special education services, and an individualized education program.

Courts have routinely recognized the importance of individualizing instruction for students with disabilities. For example, in the 2000 case *Houston Indep. Sch. Distr. v. Bobby R,* the 5th Circuit harked back to the first Supreme Court decision interpreting the IDEA, and said that the Court stressed that the IEP created through the Act's procedures must produce an education that is "specifically designed to meet the child's *unique* needs". . . with "specialized instruction and related services which are *individually designed* to provide educational benefit."[18] Likewise, in the 1st Circuit, the court also emphasized the individualization of the IEP by pointing out that the substance of the "IEP must be something different than the normal school curriculum and something more than a generic, one-size-fits-all program for children with special needs."[19] In fact, in evaluating whether an IEP is reasonably calculated to provide meaningful educational benefit in the 5th Circuit, the very first factor is whether the program is individualized on the basis of the student's assessment and performance.[20]

B. Mechanics of the IDEA

Recognizing that neither Congress nor the courts is made up of educational experts, from its inception, Congress drafted the Act in a manner that it could competently oversee by placing the bulwark of the Act in procedures for the State and Local Education Agencies to follow such that if they followed them, should produce an appropriate program for each individual student who qualified for services. The Court recognized the importance of the procedures as early as the Rowley decision, and as recently as the *Schaffer* decision.

> The core of the statute, however, is the cooperative process that it establishes between parents and schools. State educational authorities must identify and evaluate disabled children, §§ 1414(a)-(c), develop an IEP for each one, § 1414(d)(2), and review every IEP at least

---

[18] *Houston Indep. Sch. Distr. v. Bobby R.,* 200 F.3d 341, 347 (5th Cir. 2000)(emphasis provided)(referencing . Bd. of Educ. Hendrick Hudson Central School Dist. v. Rowley, 458 US 176, 188 (1982) .

[19] *Lessard v. Wilton-Lyndeborough Cooperative School District et al.,* 518 F.3d 18 (1st Cir.2008); *L.T. v. Warwick*, 361 F.3d 180 (1st Cir.2004);

[20] *K.C. v. Mansfield Independent School District*, 2009 WL 804129 (N.D.Tex.) (citing at 6. (citing *Cypress-Fairbanks Indep. Sch. Dist. V. Michael F.* 118 F.3d 245, 253 (5th Cir. 1997).

> once a year, § 1414(d)(4). Each IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide.[21]

Despite indications to the contrary, the majority of circuits hold the *Rowley* standard as the one to follow. If that does indeed continue to be the case, then the language so often cited still applies. "When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. . .We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirement that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP."[22] The Court described the Act as an input based mechanism. So long as the procedures were followed, the outcome would be adequate. In fact, the standard upon which courts would judge all cases involving an IDEA claim reflect this emphasis on procedure. "Therefore, the court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"[23]

Also of significance, are the significant procedural safeguards contained in the IDEA, especially in light of the contrary under the No Child Left Behind Act. Under §1415 of the IDEA, Congress sets forth a comprehensive and detailed explanation of the procedural safeguards afforded the parents of children with disabilities, as well as children when the parents are unknown.[24] The procedures set forth the opportunity for any party to present a complaint "with respect to any matter relating to the

---

[21] *Schaffer ex. Rel. Schaffer v. Weast,* 546 US 49, 126 S.Ct. 528 U.S.,2005.(citing *Rowley,* at 205 – 206. ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, ... as it did upon the measurement of the resulting IEP against a substantive standard")). (citing 20 U.S.C. § 1414(d)(1)(A).

[22] *Rowely* at 205-206.

[23] *Id.* At 206-207.

[24] 20 U.S.C. § 1415 generally.

identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[25] They also provide clear details for notification requirements, due process complaint requirements, opportunity for mediation, as well the requirement for a resolution meeting, all in preparation for an opportunity to be heard by an independent hearing officer.[26] This is in stark contrast to the No Child Left Behind Act that does not include an individual's right to a cause of action.

C. Standard and Purpose

A debate has been brewing that the standard and purpose of the IDEA has evolved since the inception of the original Act. The Supreme Court first elucidated the purpose of the Act in Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley.[27] In acknowledging the impact that both PARC and Mills' had on Congress as the origins of the Act, the Court recognized that the principles identified in these cases became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 Statute.[28] Keeping in mind the principle focus of these "right to education cases" as the Court describes PARC and Mills, the new provisions to the Act at that time required States to "establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped; … and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory."[29] As recently as June, 2009, the Court echoed that the IDEA was enacted to "ensure that all children with disabilities are a provided 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'"[30]

---

[25] 20 U.S.C. § 1415(b)(6)(A).(2009).

[26] 20 U.S.C. § 1415(a) – (i)(2009).

[27] Bd. of Educ. Hendrick Hudson Central School Dist. v. Rowley, 458 US 176 (1982).

[28] 458 US 176 at 194 (citing H.R.Rep.No. 94-332, 5 (1975)).

[29] 458 US 176, 194 (citing S. Rep., at 8, U.S. Code Cong. & Admin. News 1975, p. 1432).

[30] *Forest Grove* at 8 (citing *Burlington,* 471 U.S., at 367 (quoting 20 U.C.S § 1400(c) (1982 ed.), now codified as amended at § 1400(d)(1)(A),(B).(quotations and insertions from original).

The *Rowley* Court went on to explain that the Act was the mechanism for students with disabilities to be afforded a "basic floor of opportunity" that they had not been afforded in the past.[31] Furthermore, the Court explained that Congress, in passing this Act to provide specialized services to students with disabilities, "cannot be read as imposing any particular substantive educational standard upon the States."[32]

Arguably, the bar has risen in the last 30 years since the Supreme Court's interpretation of the Act's purpose. In amending the Act in 1997, Congress made substantial changes in the Act, including the findings section, which were again embellished in the reauthorization in 2004. In direct contrast to the *Rowley* Court's assertion that Congress imposed no substantive standard upon the states, the findings in IDEA 2004 specifically recognizes that after 30 years of research and experience in this area, education of children with disabilities can be more effective by having high expectations for these children.[33] These higher expectations are in place in order for the students to meet their developmental goals as well as the challenging expectations that have been established for all children; and to be prepared to lead productive, independent, adult lives, to the maximum extent possible.[34] Writing in reference to the 1997 Amendments to the Act, the direct predecessor to the most recent reauthorization, Scott Johnson proffers that those amendments change the focus of the IDEA from simply an equal access statute to one requiring improved results and achievement.[35] Even more compelling however, is the endorsement of the *Forest Grove* Court, when it explained that the "1997 Amendments were intended 'to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education."[36] This is even more the case with the emphasis on aligning the IDEA and the NCLB with the reauthorization of IDEA in 2004.

To be fair, Circuits are split on the interpretation of this shift in the 1997 Amendments.[37] Whether the FAPE definition has been raised will

---

[31] Id at 200. (Rowley)

[32] Id at 200 (Rowley)

[33] 20 USC § 1400(c)(5).

[34] 20 USC § 1400(c)(5)(A)(i).

[35] Johnson, Scott F., Reexamining Rowley: A new Focus in Special Education Law, 2003 BUY Educ. & L.J. 561, 578. (2003).

[36] *Forest Grove*, ___US___ at 8? (2009). (citing S. Rep. No. 105 – 17, p.3 (1997).

[37] See eg, *J.L. and M.L. v. Mercer Island School District,* 2006 WL 3628033 (W.D. Wash.)) 46 IDELR 273 (US Dist Wash, 2006). (finding that the 1997 are a substantial departure from previous legislative schemes, and that the 1997 IDEA amendments are no longer simply about "access;" it is focused on "transition services, . . . an *outcome orientated* process, which promotes movement from school to post-school activities.)(citing 20 U.S.C. § 1401(30); 34 C.F.R. § 300.29(emphasis in original); cf *L.T. v. Warwick School Committee*, 361 F.3d 80 (1st Cir.), 2004(finding that 1997 Amendments

directly impact the interplay between the IDEA and NCLB. On the one hand, if the purpose of the IDEA has been raised from a statute focused simply about "access," to one that is focused on "transition services, . . . an *outcome-based* process, which promotes movement from school to post-school activities . . . taking into account the student's preferences and interests,"[38] then the IDEA and NCLB complement each other. If, on the other hand, the IDEA continues to adhere to *Rowley's* holding "that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually to provide educational benefit to the handicapped child,"[39] then the two statutes are in direct conflict with one another. Since the outcome of the debate between the standards reflected in the statute will likely dictate Congress' next move on both of these statutes, it bears a more thorough discussion.

1. Raised level of expectations.

This section will explore the possibility that the standard set in the Supreme Court case *Hendrick Hudson Central School District v. Rowley*, has been at most overturned, or at the least refined since the 1997 Amendments to the IDEA as evidenced more convincingly with the 2004 Amendments. While a number of circuits have maintained the status quo of the *Rowley* decision with the "basic floor of opportunity" standard, still others have re-examined this standard since the '97 Amendments.[40] Probably the most illustrative is the *Deal* case for the 3rd circuit. Also

---

language "simply articulates the importance of teacher," and that it does not overrule *Rowley*.); *K.C. v. Mansfield Independent School District*, 2009 WL 804129 (N.D.Tex.) (agreeing with *Warwick* and stating that other courts have stated that had Congress intended to displace *Rowley* by its amendments to the IDEA it would have been much more explicit (citing).

[38] *Mercer* at (4)(citing 20 USC § 1401(30); 34 C.F.R. § 300.29)(2009).

[39] *Rowley* at 201.

[40] *See eg, Deal v. Hamilton Cty Bd. Of Educ.*, 392 F.3d 840 C.A. 6 (Tenn.) 2004., *J.L. and M.L. v. Mercer Island Sch. Dist.,* 2006 WL 3628033 (W.D.Wash.), 46 IDELR 273., *Blanchard v. Morton Sch. Dist.,* 2009 WL 481306 (W.D. Wash.)(citing both *Rowley* and *Mercer* as standards required to meet.), *Blake C. v. Dept. of Educ., State of Hawaii*, 593 F. Supp. 2d 1199 (D. Hawaii, 2009)(finding *Rowley* still applies, but its meaning has been refined by subsequent statutory changes and corresponding case law, as well as citing *Deal* with favor.),*J.R. v. Sylvan Union Sch. Dist.*, 2008 WL 682595 (E.D. Cal.)(finding "to the extent that the Supreme Court at that time was interpreting a statute which had no requirement (1) that programming for disabled students be designed to transition them to post-secondary education, independent living or economic self-sufficiency or (2) that schools review IEPs to determine whether annual goals were being attained, the Court must consider that opinion superseded by later legislation.").

illustrative is the *Mercer* case from the Western District of Washington, which relied somewhat on *Deal,* but temporarily set precedent for other cases within the 9th circuit.[41] While the *Mercer* case was overturned by the 9th Circuit Court of Appeals, the district court decision was the basis for similar decisions and warrants discussion.

The *Deal* case involves a student, Zachary, who has autism.[42] The school system offered Zachary an "eclectic" program for teaching children with autism, rather than a Lovaas style ABA method for 30 hours a week.[43] The ALJ found that the eclectic program offered by the school provided little to no chance of self-sufficiency, while the Lovaas style approach did.[44] The district court, on appeal, did not conclude that the parents' placement was inappropriate, but instead placed the focus on the appropriateness of the school system's placement, without comparison.[45] The district court found that the program offered by the school was an acceptable methodology.[46] The court of appeals found that the ALJ and district court ultimately took different views of the facts, but more importantly, their opinions "evince[d] a fundamental legal disagreement regarding the level of education that must be provided to a disabled child."[47]

The court recognized that it and other courts had indeed decided that school systems were not required to provide the Lovaas method to autistic children because the school district is only required to provide educational programming that is reasonably calculated to enable the child to receive educational benefit, and the Lovaas method goes beyond that.[48] The *Deal* court, however, challenged this "facile" answer given both the legislative history supported in the *Rowley* decision along with Congress' shift in statutory language that compliments the underlying standard mentioned, but not followed in *Rowley* because the facts did not lend themselves to it.[49] It recognized that "there is a point at which the difference in outcomes between two methods can be so great that provisions of the lesser program could amount to denial of FAPE."[50] While the school district is not required to "maximize each child's potential commensurate with the opportunity provided other children,"[51] an IEP must confer meaningful benefit gauged

---

[41] *See Blake C. v. Dept. of Educ. State of Hawaii*, *J.R. v. Sylvan Union Sch. Dist.*
[42] *Deal* at 845
[43] *Id* at 861.
[44] Id.
[45] Id.
[46] Id.
[47] *Deal* at 861.
[48] Id.
[49] Id at 863 and 864.
[50] *Deal* at 862.
[51] *Rowley* at 198.

in relation to the child's potential.[52]

The analysis for this higher standard actually begins with the *Rowley* decision, itself. *Rowley* does not preclude setting a higher standard, and in fact, it favorably cites legislative history explaining that proper educational intervention now can result in these children growing up to become productive citizens, contributing to society, rather than continuing to be a burden, and would then rely less on subsistence payments from public funds.[53] In further support of the *Dean* court's position, the *Rowley* Court specifically stated "[w]e do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."[54] It went on to say that it confined its decision to the facts in front of them that day – the facts surrounding Amy Rowley's situation,[55] a situation involving a highly functioning girl who required relatively less intervention to make educational progress. As stated above, the case of Zachary Deal, however, presented quite a different situation. In Zachary's case, evidence was presented that under the Lovaas method self-sufficiency was a real possibility, but the program offered by the school provided little or no chance of self-sufficiency.

The *Deal* court supported its break from past precedent in this area by pointing out the change in statutory language of the IDEA 1997 Amendments. Unlike the courts that have steadfastly held on to the *Rowley* standard across the board, this court found that Congress was indeed explicit when it found that the previous Act had shortcomings, including expectations for children with disabilities that were too low, and "an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."[56] The *Deal* court found "at the very least, the intent of Congress appears to have been to require a program providing a meaningful educational benefit towards the goal of self-sufficiency, especially where self-sufficiency is a realistic goal for a particular child."[57] It further found that a court may determine the educational benefit provided to a child only by first determining that child's potentialities, and "[i]n conducting this inquiry, courts should heed the

---

[52] *Deal* at 862.(citing *Polk* at 185)

[53] *Deal* at 863 (citing *Rowley* at 198(citing S. Rep., at 9, U.S. Code Cong. & Admin. News 1975, p. 1433))("The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.")

[54] *Rowley* at 202.

[55] *Id.*

[56] *Deal* at 864(citing 20 USC § 1400(a)(4)).

[57] *Id.*

congressional admonishment not to set unduly low expectations for disabled children."[58]

Finally, this court recognized that the obvious objection for raising the standard is the expense involved, which is especially evident in a case such as Zachary's. If possible, a school system is likely to attempt to balance its budget, "even if the end result of the system's indifference to a child's individual potential is a greater expense to society as a whole."[59]

Not long afterward, the *Mercer* district court similarly found that in the '97 Amendments, Congress specifically recognized that "access" had been achieved, and the new focus was on the implementation. Also emphasized in the case was Congress' clearly stated commitment to "our national policy of ensuring equality of opportunity, full participation, *independent living, and economic self-sufficiency,* for individuals with disabilities."[60] This court similarly emphasized that *Rowley* interpreted a statute that did not include the same requirements as the current IDEA.[61] On the contrary, the EHA, the predecessor to the IDEA, was an "access" to education statute, aimed merely at allowing children with disabilities *access* to an education. The IDEA, since the 1997 Amendments, however, is not simply focused on "access," it is focused on "transition services,… an *outcome oriented process,* which promotes movement from school to post-school activities . . taking into account the student's preferences and interests."[62] Accordingly, this significant departure in the language of the statute from the previous legislative scheme makes any citation prior to 1997 completely null and void, but it does cast a shadow on its ability to continue to set the standard and interpret a statute that has so drastically changed since its decision.[63]

The court also recognized that the federal regulations and the comments accompanying the interpretation the 1997 Amendments speak directly to the increased focus on the self-sufficiency aspect.[64]

For example:

> Purposes. The purposes of this part are – (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 employment and independent living; . . .[65]

Further,

---

[58] *Id.*
[59] *Id at* 864-5.
[60] *Mercer* at 4 (citing 20 U.S.C. § 1400(c)(1)). (emphasis in the original)
[61] *Mercer* at 4.
[62] *Mercer* at 4 (citing 20 USC § 1400(30); 34 C.F.R. § 300.29.)
[63] *Mercer* at 4.
[64] Id.
[65] 1999 Federal regulation language: 34 C.F.R. § 300.1.

> III. Preparing Students With Disabilities for Employment and Other Post-School Experiences "One of the primary purposes of the IDEA 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 employment and independent living . . ." * * *
>
> Similarly, one of the key purposes of the IDEA Amendments of 1997 was to "promote improved educational results for children with disabilities through early intervention, preschool, and educational experiences that prepare them for later educational challenges and employment."[66]
>
> Thus, throughout their preschool, elementary, and secondary education, the IEPS for children with disabilities must, to the extent appropriate for each individual child, focus on providing instruction and experiences that enable the child to prepare himself or herself for later educational experiences and for post-school activities, including formal education, if appropriate, employment, and independent living.[67]

The *Mercer* court points out that the school district relied heavily on accommodations such as someone to read or write for the student, K.L.[68] This allowed her to "progress" through the material, but missed the purpose of the 1997 IDEA goals of self-sufficiency and independent living, which would require increasing a student's skill level in order for him or her to progress independently. "It is not sufficient to simply 'escort' an educationally challenged student through the school system."[69]

The Court of Appeals for the ninth circuit reversed the district court decision in August, 2009.[70] The court astutely observes that the district court had mistakenly partially based its decision on a portion of the statute that it thought was just added in the 1997 Amendments, but had actually been in the statute since the 1990 Amendments.[71] The court of appeals also

---

[66] H.Rep. No. 105 – 95, p. 82 (1997); S. Rep. No. 105-17, p. 4 (1997)).

[67] Federal Register/Vol. 64, No. 48/Friday March 12, 1999/Rules and Regulations.(at page 12474).

[68] *Mercer* at 6.

[69] *Mercer* at 6.

[70] 2009 WL 2393323 C.A.9 (Wash.).

[71] 2009 WL 2393323 C.A.9 (Wash.), 9 -10.

relies, as many other courts do, on Congress' lack of clear intent to change the *Rowley* standard.[72]It does however, make clear that its holding is based only on its interpretation of the 1997 Amendments, because the parents filed their claim prior to the effective date of July 1, 2005 for IDEA 2004, and further does not go into any kind of detailed discussion on why it finds the legislative history vague.[73] Rather, it discusses how Congress could have made it clearer if the standard had evolved and in, legislation enacted pursuant to the spending clause "evolutionary" theories are disfavored.[74]

While that may be true, it is also important to remember that the very reason statutes such as the IDEA are reauthorized and amended on a regular basis is because the state of affairs surrounding the law does indeed evolve. Congress, itself, so stated that the situation for children with disabilities has changed in the most recent re-authorization of the IDEA.[75] As is discussed more deeply below, the IDEA 2004 was enacted to coordinate with the No Child Left Behind Act. And while Congress may be less clear than it intends, the intent from Congress as well as the President could not have been clearer when it passed the Individuals with Disabilities Education Improvement Act of 2004. Upon signing the bill, President Bush stated: "In the bill I sign today, we're raising the expectations for the students … We're applying the reforms of the No Child Left Behind Act to the Individuals with Disabilities Education Improvement Act so schools are accountable for teaching every single child."[76] Furthermore, the author of the bill, himself, aligned the IDEIA with the NCLB when he testified:

> Today I would like to pay particular attention to reforms in H.R. 1350 that will focus on academic progress and efforts to reduce over-identification. One of the great benefits of the No Child Left Behind Act is that we have raised expectations that will hold school districts accountable for the annual progress of all of their students, including students with disabilities.
>
> Although we have made great progress in including students with disabilities in the regular classroom, we now must make equally great progress in ensuring that they receive a quality education in the regular classroom. We have

---

[72] Id at 11.

[73] Id at 12.

[74] 2009 WL 2393323 C.A.9 (Wash.)at 10(citing *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 US 291, 296 (2006).)

[75] 20 U.S.C. § 1400(c)(3) – (5).(2009)

[76] Statement by President George W. Bush Upon Signing H.R. 1350, 40 Weekly Compilation of Presidential Documents 2897, December 3, 2004. 2004 U.S.C.C.A.N. S43, 2004 WL 3670985.

> therefore carefully aligned IDEA with No Child Left Behind to ensure students with disabilities are included in the accountability system of States and school districts.[77]

Despite this clear intent from the drafters, controversy over the standard expected for students with disabilities continues to exist.

2. Rowley continues to be the standard in interpreting the IDEA

Several circuits have continued to endorse the *Rowley* standard as good law, despite the change in the language of the IDEA in the 1997 Amendments.[78] Some courts have continued to follow *Rowley* because that is what has always been done in past, and therefore that is what should continue, with little discussion or justification for doing so. For example, the *Lessard* court simply did not address the debate at all. It endorsed the *Rowley* standard in its 2008 decision by explaining the standard as "the obligation to devise a custom-tailored IEP does not imply that a disabled child is entitled to the maximum education possible."[79]

Other courts have similarly continued to follow precedent merely to follow precedent, but have also recognized a few justifications for doing so.[80] For example, the *Warwick* court explains the change in the statute as simply articulating the importance of teacher of training, instead of overruling *Rowley.* It justified its maintenance of the standard because the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods.[81] Deference to school officials is not a new concept in education law, but in the special education arena where the purpose of the law is to impart structure and checks and balances onto the LEAs, complete deference seems misplaced. While these arguments may be low on substance, they do make it clear that courts are reluctant to give up a standard that has been ingrained for so long without more clarity from Congress on its intent to actually set the standard higher. Indeed, the courts

---

[77] 150 Cong. Rec. H10006-01, 2004 WL 2636792. Statement by Mr. Castle, chairman of the Subcommittee on Education Reform.

[78] *Lessard v. Wilton-Lyndeborough Cooperative School District et al.,* 518 F.3d 18 (1st Cir.2008); *L.T. v. Warwick*, 361 F.3d 180 (1st Cir.2004); *Mr. and Mrs. C v. Maine Sch. Admin. Distr.*, 538 F.Supp.2d 298, (D. Maine 2008); *K.C. v. Mansfield Independent Sch. Distr.*, 2009 WL804129 (N.D. Tex), 52 IDELR 103 (2009).

[79] *Lessard* at 23. (citing *Rowley* at 206-208).

[80] *Warwick*, at 83 ("this court as well as others circuits have continued to apply *Rowley* standard since 1997 Amendments").

[81] *Warwick* at 83; *MISD* at 4.(crediting the 1st Circuit's view of maintaining the *Rowley* standard).

in *Mr. and Mrs. C.* as well as *MISD* both expressed reluctance in applying a new standard without explicit language in the statute that overturns *Rowley* or amends the statutory definition of FAPE.[82]

Additionally, the *MISD* court dismissed the argument that recent decisions have adopted the language of "meaningful benefit," and that that adoption has set a higher standard. "Meaningful" benefit is not a shift in the standard because it has been used in explaining the *Rowley* standard. *Rowley*, itself, stated that access alone is not enough; instead States must "make such access meaningful."[83]

If the *Rowley* standard is maintained, the chasm between NCLB and IDEA continues to exist at a fundamental level. The *Rowley* Court, focusing on the need for access to education and emphasizing process over outcome is diametrically opposed to the outcome focused NCLB. However, if the standard reflects the changes made in the 1997 Amendments, as well as the 2004 Amendments, the two statutes appear to be more in line with each other. If this is the case, and Congress truly intended the IDEA to become more of an outcome based statute, than school districts, indeed, will be held quite a higher standard than in the past. As with NCLB, educators will be responsible for the performance of their students. Whether this is ultimately beneficial to the students depends on which side of the table you may sit.

NO CHILD LEFT BEHIND ACT

In 2001, Congress enacted the No Child Left Behind Act (NCLB). The stated purpose of the NCLB Act 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."[84] The primary vehicle for ensuring that his purpose is achieved is a state-wide assessment particular to each individual state.[85] This section will explore the population this Act addresses, the purpose of the Act, and mechanism by which it does.

A. Purpose and Population Affected

The population and purpose of the Act are integrally related. Unlike the IDEA, NCLB specifically targets *all* students, and its stated purpose is for all students to obtain the same high-quality education and reach the same

---

[82] *Mr. and Mrs. C,* at 301. ("the failure to amend the statutory definition of FAPE weighs strongly against finding a Congressional intent to alter the *Rowley* standard. . . Indeed, given the ubiquity of *Rowley* in the context of IDEA proceedings, one would expect Congress (or the Department of Education) to speak clearly f the intent were to supersede it."); *see also, MISD* at 4.

[83] *MISD* at 5. (citing *Rowley* at 192).

[84] 20 U.S.C. §6301(emphasis provided) (2009).

[85] 20 U.S.C. § 6301(6), 20 U.S.C. § 6311(b)(2).(2009).

minimum proficiency level. In order to accomplish this lofty goal the Act holds school, 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 high-quality education to their students, while providing alternatives to students in such schools to enable the students to receive a high-quality education.[86] Because it was enacted pursuant to the spending clause, states are required to take certain actions in order to receive the funds from Congress. First, each State must submit a plan demonstrating "that the State has adopted challenging academic content standards and challenging student academic achievement standards that will be used by the State, its local educational agencies, and its schools to carry out this part."[87] The State plans also demonstrate unanimity throughout each individual state by requiring the States to develop a "single, statewide accountability system that will be effective in ensuring that all local educational agencies, public elementary schools, and public secondary schools make adequate yearly progress."[88] The State, further, must use the same accountability system for all public elementary and secondary schools within the state that are participating in the program.[89] Finally, the State Plan must include sanctions and rewards to hold elementary and secondary schools as well as local educational agencies accountable for student achievement.[90]

B. Mechanics of NCLB

The mechanics of the NCLB driven by the state-wide assessments each state is required to administer to their students, an out-come based accountability structure.[91] Additionally, however, it is important to understand the ramifications of underperforming; who can hold schools accountable and how. This section will explore the accountability scheme of the NCLB.

---

[86] *Newark Parents Assoc. v. Newark Public Schools,* 547 F.3d 199 (C.A. 3rd 2008). (citing 20 U.S.C. § 6301(4)).

[87] 20 U.S.C. § 6311(b)(1)(A)(2009).

[88] 20 U.S.C. § 6311(b)(2)(A)(2009).

[89] 20 U.S.C. § 6311(b)(2)(A)(ii)(2009).

[90] 20 U.S.C. § 6311(b)(2)(A)(iii)(2009).

[91] 20 U.S.C. § 6301(6).("This purpose can be accomplished by – improving and strengthening accountability, teaching, and learning by using State assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards and increasing achievement overall, but especially for the disadvantaged . ..")

1. Measuring Adequate Yearly Progress

Adequate Yearly Progress (AYP) is measured by the State academic assessments as well as other indicators described in the State plan.[92] It shall be defined by each State in a manner that complies with seven enumerated requirements. The same high standards must apply to all schools involved.[93] They must be statistically valid and reliable.[94] It must also result in continuous and substantial academic improvement for *all* students.[95] Adequate yearly progress must primarily be measured by academic assessments.[96] But, also AYP must include separate measurable annual objectives for the improvement in achievement of both all students as well as four distinct student subgroups, including: a) economically disadvantaged students; b) students from major racial and ethnic groups; c) *students with disabilities;* and d) students with limited English proficiency.[97] It should be noted that if any of the above four groups do not have enough students to yield statistically reliable and unidentifiable information, those groups will not be included.[98] AYP is also measured by graduation rates for public secondary students, and finally, any other academic indicators at the State's discretion.[99]

The two recurring themes in this Act is the emphasis on measuring all students, and doing so primarily through the use of standardized assessments. So much is the emphasis on measuring all students that the Act specifically requires "not less than 95 percent of each group [mentioned above] who are enrolled in the school" to take the assessments.[100] As will be discussed in more detail below, there are exemptions and alternate assessments for some students, but by and large NCLB's ultimate goal is to get all students to perform at a proficient rate in at least reading, mathematics, and science. The Act further requires assessing students periodically throughout their education at least once in grades 3-5, 6-9, and 10-12.[101] While there is no requirement by NCLB to require passage of the

---

[92] *Newark Parents Assoc.* at 201.

[93] 20 U.S.C. § 6311(b)(2)(C)(i)(2009).

[94] 20 U.S.C. § 6311(b)(2)(C)(ii)(2009).

[95] 20 U.S.C. § 6311(b)(2)(C)(iii)(2009)(emphasis added).

[96] 20 U.S.C. § 6311(b)(2)(C)(iv)(2009).

[97] 20 U.S.C. § 6311(b)(2)(C)(v)(2009)(emphasis added).

[98] While outside the scope of this piece, it should be noted as an emerging controversy that schools, in order to avoid counting students in the above mentioned sub groups, have been allegedly controlling the numbers of the students in the groups. If the group is small enough, the group does not have to be counted, and it is the fear of some that students are not found eligible for services in order to keep them numbers below the aggregate needed to count the group as a whole. (*see* 20 U.S.C. §6311(b)(3)(C)(xiii)(2009)).

[99] 20 U.S.C. § 6311(b)(2)(C)(vi)-(vii)(2009).

[100] 20 U.S.C. § 6311(b)(2)(I)(ii)(2009).

[101] 20 U.S.C. § 6311(b)(3)(C)(v)(2009).

assessments to graduate, many states do.

2. Ramifications of not reaching AYP

If a State fails to meet the requirements of the Act, the Secretary may withhold funds for State administration until the State has fulfilled those requirements.[102]

If a local educational agency determines that a school has failed to make AYP for two consecutive years, the agency shall identify the school as one in need of "school improvement."[103] If, after having been identified in the category of a school that requires "school improvement" that school continues to fail to achieve AYP, the agency shall then identify the school for "corrective action."[104] If that same school that has then been identified in the "corrective action" category, continues to fail to make AYP for one full school year, the agency shall identify the school for "restructuring."[105]

One of the selling points of NCLB is that the Act would provide options to parents of students who were in low performing schools. If a school has been identified in any of the three categories listed above, the LEA is required to notify the parents of the children of the option to transfer to another public served by the LEA (including a charter school) that has not been identified as low performing.[106] In doing so, the LEA is required to give priority to the lowest achieving students from low-income families.[107]Additionally, parents have the option of obtaining supplemental education services if their child's school has failed to make adequate yearly progress.[108]

If a school has been identified as a school for corrective action, in addition to continuing to provide transfer options, and supplemental education service options the LEA must take at least one of the following actions: 1) replace the relevant school staff; 2) institute and implement a new curriculum that is based on scientifically based research and offers promise of improving educational achievement of low-achieving students; 3) significantly decrease the management authority at the school level; 4) appoint and outside expert to advise the school on its progress based upon its original plan; 5) extend the school year or school day; or 6) restructure the internal organization of the school.[109] Further, if the school continues to fail to make AYP and is identified for restructuring, the school will be

---

[102] 20 U.S.C. § 6311(g)(2).(2009).
[103] *Newark Parents Assoc.* at 201.
[104] *Newark Parents Assoc.* at 201.(citing 20 USC § 6316(b)(7)(C)).
[105] *Newark Parents Assoc.* at 201. (citing 20 USC § 6316(b)(8)(A)(B).
[106] 20 U.S.C. § 6316(b)(1)(E), (7)(C)(i), (8)(A)(i). (2009)
[107] 20 U.S.C. § 6316(b)(1)(E)(ii).
[108] 20 U.S.C. §6316(e).
[109] 20 U.S.C. §6316(b)(7)(C)(iv)(I) – (V).

required to continue to offer the options of transferring schools and providing supplemental education services, while it also prepares a plan to make arrangements to carry out a plan for an "alternative governance."[110] An alternative governance requires the LEA to more drastically replace the program of the failing school in one of 5 ways. First, the LEA could reopen the school as a charter school.[111] Second, it could replace all or most of the personnel who are relevant to the failure of the school to make AYP, which could include the principal.[112] Or, third, the LEA could enter into a contract with an entity such as a private management company, to operate the school.[113] The LEA, if permitted under state law, could turn the school over to the State Education Agency.[114] And, finally, the LEA could make any other major restructuring arrangement that would make "fundamental reforms, such as significant changes in the school's staffing and governance, to improve student academic achievement in the school and that has substantial promise of enabling the school to make adequate yearly progress."[115] Notably, however, nowhere in the statute is there an individual right of action against the LEA, the SEA or a school by an individual.

THE CONFLICT BETWEEN IDEA AND NCLB

A. Private Right of Action

Congress spoke unambiguously when it provided a private right of action under the IDEA.[116] The No Child Left Behind Act, however, has no such unambiguous language. As stated above, if local education agencies and public schools fail to make AYP, sanctions such as restructuring the schools can be used against them. The provision does not, however, offer any remedy to parents in the event of noncompliance by a State or local educational agency with any of the terms in NCLB.[117] The *Newark Parents Association* case squarely takes this issue on when parents of children enrolled in Newark city's public schools filed an action to enforce various provisions of the NCLB Act.[118]

The issue in *Newark* is whether NCLB provides aggrieved individuals an enforceable right. For its answer, the 3rd circuit court of appeals relies on

---

[110] 20 U.S.C. §6316(b)(8)(A)(iii).
[111] 20 U.S.C. §6316(b)(8)(B)(i).
[112] 20 U.S.C. §6316(b)(8)(ii).
[113] 20 U.S.C. §6316(b)(8)(iii).
[114] 20 U.S.C. §6316(b)(8)(iv).
[115] 20 U.S.C. §6316(b)(8)(v).
[116] 20 U.S.C. § 1415(b)(6)(2009).
[117] *Newark Parents Assoc.* at 202.
[118] *Newark Parents Assoc.* at 200.

both the Supreme Court case of *Gonzaga*[119] as well its own decision in *Sabree.*[120] The *Gonzaga* case was a FERPA case where the pertinent statutory language stated: "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents to any individual, agency, or organization."[121] Like *Newark*, *Gonzaga* was based on a statute enacted pursuant to the spending clause. The Court in *Gonzaga* noted that statutes enacted by Congress under its spending power will rarely provide a private cause of action to individuals. Indeed, "unless Congress speak[s] with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement by § 1983."[122] The *Gonzaga* Court went on to address the apparent confusion that some opinions could have been read to suggest that something less than unambiguous language was adequate, but most importantly, ultimately held that FERPA failed to confer enforceable rights.[123] The Court held that the various provisions concerned had an aggregate focus in that they did not concern "whether the needs of any particular person have been satisfied, and they cannot give rise to individual rights."[124] Finally, the *Gonzaga* Court found that the enforcement mechanism in the statute vested sole enforcement power in the Secretary of Education. "Congress expressly authorized the Secretary of Education to 'deal with violations' of the Act, and required the Secretary to 'establish or designate [a] review board' for investigating and adjudicating such violations."[125]

The 3rd Circuit Court of Appeals in the *Newark Parents* case then analyzed a situation even more closely aligned with the NCLB cooperative federal-state program, in a Medicaid Act case. In the *Sabree* case the Third Circuit used the three prong *Blessing* test.[126] Under that test, in order for a statute to confer an individual right the "statute must (1) be intended by Congress to benefit the plaintiff, (2) not be 'vague and amorphous,' and (3) impose an unambiguous 'binding obligation on the States.'"[127] The court further clarified the test in light of the *Gonzaga* decision by emphasizing the need for the "statute to create rights enforceable directly from the statute

---

[119] *Gonzaga University v. Doe,* 536 US 273, (2002).
[120] *Sabree ex rel. Sabree v. Richman,* 367 F.3d 180 (3d Cir.2004).
[121] *Newark* at 205 (citing *Gonzaga* at 279.).
[122] *Newark* at 205-206 (citing *Gonzaga* at 279(internal quotes omitted).)
[123] *Newark* at 206.
[124] *Gonzaga* at 287.
[125] *Newark* at 207(citing *Gonzaga* at 289(citations omitted)).
[126] *Blessing v. Freestone,* 520 U.S. 329 (1997).
[127] *Sabree,* 367 F.3d at 186 (quoting *Blessing*, 520 U.S. at 340-341).

itself under an implied private right of action."[128] After analyzing the language of the statute that had the same "comply substantially" phrasing that was used in both *Gonzaga* and *Blessing,* the court, nevertheless, found that there was an individual right because the Medicaid Act conferred rights that the plaintiffs could enforce.[129]

Turning to the NCLB, however, the court found that the notice and supplemental educational provisions did not confer a private right of action upon aggrieved individuals.[130] While no other federal court of appeals had decided the specific issue of whether these provisions conferred individual rights of action, every district court that has decided the question has held, that whatever the provision at issue, the Act does not confer a right of action enforceable by individuals.[131] Although the court found that the provisions under NCLB passed the *Blessing Test,* it found that the language in NCLB is materially distinguishable from the language in the Medicaid Act. The command used in the comparable statutes of Titles VI and IX provided "No person … shall … be subjected to discrimination."[132] The language clearly makes its one and only subject a "person."[133] Under NCLB, however, the primary subject is the State and local educational agency, while the parents of the students receive benefit from the provision, but only as a result or regulations imposed upon the State and LEAs.[134] Additionally, where there is mention of "a person," it is in the aggregate, with specificity towards low-achieving students. For example, the statute refers to students from low-income families, not the individual.[135] A significant factor for the decision in *Sabree* was the monetary entitlement that is not at issue in NCLB. The *Gonzaga* Court explained that since the Medicaid Act conferred specific monetary entitlements upon individuals as well as required States to pay

---

[128] *Newark* at 208 (quoting *Gonzaga*, 536 U.S. at 283(internal quotes omitted)).

[129] *Newark* at 209(citing *Sabree* at 192).

[130] *Id at* 209.

[131] *Newark* at 209. *See, Simmons v. Santa Cruz County Dep't of Educ.*, No. 07-04064, 2008 WL 1777384, at *2 (N.D.Cal. Apr. 18, 2008); *Catapult Learning, Inc. v. Bd. Of Educ. of St. Louis,* No. 4:07-935, 2007 WL 2736271, at *4 (E.D.Mo. Sept.17, 2007); *Holder v. Gienapp,* No. 06-221, 2007 WL 952039, at *2 (D.N.H. Mar.28 2007); *Alliance for Children, Inc. v. City of Detroit Pub. Schs.,* 475 F.Supp.2d 655, 662-63 (E.D.Mich.2007); *Blanchard ex rel. Blanchard v. Morton Sch. Dist.,* No. 06-5166, 2006 WL 2459167, at *4 (W.D. Wash. Aug.25, 2006); *Stokes ex rel. K.F. v. U.S. Dep't. of Educ.,* No. 05-11764, 2006 WL 1892242, at *2 (D.Mass. july 10, 2006); *Coachella Valley Unified sch. Dist. v. California* No. 05-02657, 2005 WL 1869499, at *2 (N.D.Cal. Aug. 5, 2005); *Fresh Start Acad. v. Toledo Bd. Of Educ.,* F.Supp.2d 910 (N.D.Ohio 2005); Ass'n *of Cmty. Orgs. v. N.Y. City Dep't of Educ.* F.Supp.2d 338, 344-47 (S.D.N.Y.2003).

[132] *Newark* at 210.

[133] *Id.*

[134] *Newark* at 210.

[135] *Id. at* 211.

objective amounts on their behalf to health care providers, an efficient means of enforcement was necessary. That is not the case with NCLB, where the direct benefits to the parents and students are in the form of notice and information.[136]

Finally, the overall structure of NCLB speaks in terms of an "agreement between Congress and a particular State." Where the *Sabree* court found that various provisions of the Medicaid Act also spoke in terms of an "agreement between Congress and a particular State," it also found that other provisions carried rights-creating language that could not be "neutralized" by the those more general provisions.[137] The NCLB Act, however, has no such "rights-creating" language, and thus, the language pertaining to the "agreement between Congress and a particular state" carry the day and reinforce the conclusion that Congress did not intend to confer enforceable individual rights under those provisions.[138]

B. Inputs vs. Outcome

As Paolo Annino so aptly describes, this "provides a social model of educational improvement."[139] That is to say that NCLB socializes education by aiming to provide all students with same model of education. This may sound like an over generalized view of the Act, which is merely trying to raise the performance expectations of students across reading, mathematics, and science.[140] Since the tests are standardized and are predicated on the same grade level material, the material must be presented at the same rate in order for all students to have access to the material before the assessment, in order for the test to be fair.[141] The essence of the Act is that it assumes that all children would directly benefit from this approach, and that any child that does not rise to the level expected is therefore being left behind.[142] In other words, "a rising tide raises all ships," and the NCLB will raise the tide of the educational expectations and all children will follow.[143] But what

---

[136] *Newark* at 211 (referencing *Gonzaga* at 185).

[137] *Newark* at 212. (citing *Sabree* at 192).

[138] *Newark* at 212.

[139] Paolo G. Annino, *Final Regulations on School Asessments: An Attempt to Align the NCLBA and the IDEIA,* 31 MPHYDLR 830. (2007).

[140] 20 U.S.C. § 6311(b)(1)(C).(2009).

[141] Michael Metz-Topodas, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act,* 79 Temp. L. Rev. 1387, 1397 (winter 2006)[coment?] See also, *Debra P. v. Ralph D. Turlington*, 644 F.2d 397, 402 (CA 5th Cir. 1981)(finding "if the test covers material not taught the students, it is unfair and violates the Equal Protection and Due Process clauses of the United States Constitution.") .

[142] Paolo G. Annino, *Final Regulations on School Asessments: An Attempt to Align the NCLBA and the IDEIA,* 31 MPHYDLR 830. (2007).

[143] *Id.*

about those children who can't?

A child with a disability, as defined under the IDEA, is a child with one of the enumerated disabilities and "who, by reason thereof, needs special education and related services."[144] If a student with a disability is able to learn in a cookie cutter program, it is assumed that the student's disability is not affecting his or her education, and no services (or IEP) under the IDEA would be needed. Because that child would not need special education services, it follows then, that those children who are found eligible are determined so precisely because they are unable to progress at the same rate and/or by the same manner as their peers.[145]

To complicate matters more for children with disabilities, the simple act of taking standardized tests is sometimes more the problem than the material on the test.[146] From all indications from the statute, however, the intention of the test is to measure yearly performance of students in each State and local educational agency – not test taking skills per se.[147] For students with disabilities, though, it has the unintended effect of placing additional burdens on the whole system by requiring these students to master both the material and, separately, the test taking skill itself.[148] The end result of preparing a student with a disability for these standardized assessments requires extended and more comprehensive preparation to expose them to grade-level material and teach them how to apply the skills to the general classroom in order for them to access the grade-level material that is presented to them, and to teach them the test taking skills they will need so that indeed, they will be tested on the material, not the skill of taking a test.

The irony is, in order to provide students with disabilities additional preparation targeted especially for these statewide assessments, these students are placed in classes such as "intensive test-preparation classes" or more specifically in states such as Florida "intensive reading" or "intensive

---

[144] 20 U.S.C. § 1401(3)(A).(2009).

[145] *See Plaintiff's Brief, Bd. Of Educ. Of Ottawa Township High School District v. Margaret Spelling (US Dept. of Educ.)*, 517 F.3d 922, (CA 7th 2008)("In essence, the No Child Left Behind Act is making these districts treat students with disabilities as if they were regular education students.")

[146] Personal experience of the author with student/client that continually failed the state-wide FCAT (Florida's statewide assessment) in mathematics despite performing well on an individually administered Key Mathematics Assessment (get formal name). After determining that perhaps it was the manner in which the test was administered to him, the administration was altered and he passed. (2005)

[147] See 20 U.S.C. § 6311(b)(3)(A).

[148] While it is true that students who have both a 504 plan and an IEP qualify for various accommodations for taking tests, many of the accommodations are not acceptable under the NCLB for the statewide assessments. See 34 C.F.R. § 300.160.

math."[149] While these classes are aimed at improving test scores, they do not address the underlying problem that inhibits the student from benefitting from the general education program that originally provided the exposure to the grade-level material. For instance, if a child has a reading disability and has not mastered the skill of decoding words, the class of "intensive reading" addresses the discreet skills necessary for improving test scores in the reading section of the test – not the skills that particular student needs to learn in order to read independently.[150]

ATTEMPTS TO RECONCILE THE TWO

As was stated briefly discussed above, the IDEA 2004 was an intentional attempt on Congress' part to align NCLB with IDEA.[151] Since the passage of the IDEA 2004, further attempts to reconcile the two statutes have been made. This section will address the initial IDEA 2004 as well as the modifications that the regulations implementing the statute since that time.

A. IDEA 2004

The reauthorization of the Individuals with Disabilities Act of 2004 was the most sweeping attempt by Congress to align IDEA and NCLB. While the 1997 Amendments to the IDEA may or may not have raised the expectations of the students with disabilities, the IDEA 2004 was an intentional break from the previous reliance on process over outcome.[152] "The goal of the IDEA 2004 amendments was to improve educational services to students with disabilities, with the focus on improving student performance. In addition, the reauthorization emphasized the alignment of IDEA with the No Child Left Behind Act. . ."[153] While there were a number

---

[149] See Michael Metz-Topodas at 1399.(citing Keele, 72 U.Mo. –Kan. City Law review 1111, 1112).

[150] Michael Metz-Topodas at 1398, and interview with Kathleen P, in reference to her son Z.P. (July 30, 2009, Atlantic Beach, Florida).

[151] Infra § I(B)(2), at 12.

[152] 150 Cong. Rec. S11653-01, Friday, November 19, 2004. (Mr. Gregg: "The report shifts focus away from compliance with burdensome and confusing rules, and places a renewed emphasis on our most fundamental concern making sure that children with disabilities receive a quality education. Specifically, the report: ensures States focus on improved academic results and functional performances for students with disabilities; clarifies methods for measuring student progress by replacing arbitrary benchmarks and short-term objectives with academic assessments under NCLB, including alternate assessments; provides for a national study of valid and reliable alternate assessment systems and how alternate assessments align with State content standards ...")

[153] "Key Changes in the Individuals with Disabilities Education Act (IDEA) 2004

of significant changes to the IDEA, three are worth noting in reference to the purposeful alignment with NCLB. First, the definition of "highly qualified teacher" was amended to directly correlate with the language under the NCLB.[154]

Second, performance goals are required to be defined as the same for all students, and are the same as in the State's definition of adequate yearly progress as found under 20 U.S.C. § 6311(b)(2)(C).[155] The performance goals and indicators under the prior version of the IDEA required states to have performance goals for children with disabilities that were "consistent, to the maximum extent appropriate, with other goals and standards for children established by the state" and to establish indicators to measure performance.[156] The new language, again, requires states to link performance indicators to NCLB requirements, which is primarily measured by performance on state-wide assessments.[157]

Third, all students are required to be included in district-wide and state-wide assessments, including those require under NCLB.[158] In the previous version of IDEA, states were required to include children with disabilities "in general State and district-wide assessment programs, with appropriate accommodations, where necessary."[159] In order to comply with the above referenced requirement of holding states accountable for making AYP for all students, it was therefore necessary, for all students to take any assessment that was required to measure AYP.

So, in a nutshell, the NCLB has as its primary goal that all children will achieve proficient levels of academic achievement, and display such achievement through standardized assessments. The IDEA, on the other hand, had as its primary goal as enunciated in the *Rowley* decision, for

---

Amendments." Committee on Education And Labor, United States House of Representatives, April 2007.

[154] "Key Changes in the Individuals with Disabilities Education Act (IDEA) 2004 Amendments." 1- 2. (see also 20 U.S.C. § 1401(10)(2009)). (The "highly qualified teacher" requirement is outside the scope of this article, but bears recognition in that it is another example of a direct attempt on the part of Congress to more closely align the two statutes, and is important when looking at the statutory change as a whole.)

[155] "Key Changes in the Individuals with Disabilities Education Act (IDEA) 2004 Amendments." at 2, 20 U.S.C. § 1412(a)(15). (2009).

[156] Apling, Richard N, Jones, Nancy Lee, "Individuals with Disabilities Education Act (IDEA): Analysis of Changes Made by P.L. 108-446," CRS report for Congress, January 5, 2005. at 15, (referencing P.L. 105 – 17 §612(a)(16)(A)(ii) and (B). [20 U.S.C. § 1412(a)(16)(A)(ii) and (B).(1997)].

[157] 20 U.S.C. § 6311(b)(2)(C)(iv).(2009).

[158] "Key Changes in the Individuals with Disabilities Education Act (IDEA) 2004 Amendments." at 2.

[159] Apling, et. al. at 15.(referencing P.L. 105 – 17 §617(a)(17)(A). [20 U.S.C. § 1417(a)(17)(A).(1997)].

children with disabilities to receive "educational benefit;" and that it was measured primarily through compliance with the heavily procedural statute. In other words, if the school district created an IEP that was adequate, and the school district complied with it, it was assumed that the child would be receiving "educational benefit." In 2004, Congress attempted to align the two statutes so that the input-based IDEA reflected a higher standard of accountability of performance, which the NCLB already required. This had to be done by requiring students with disabilities to take the same assessments as their peers. As is discussed in more detail below, it became apparent that it was not realistic for all students to take the same assessment

B. Band Aids since 2004

This shift from in-put to outcome based accountability is a double edged sword. On the one hand, parents of students with disabilities have sought results for their children from the schools and LEAs, and the most efficient way of measuring whether a student has made progress is through independent and individualized evaluation. On the other hand, many students with disabilities typically are not able to take the same standardized assessment as their peers, nor would it be appropriate for them to do so. The Department of Education, was apparently not blind to this and has made two significant adjustments to the school accountability for academic achievement for students with disabilities under NCLB.

1. Alternative Assessment for the most significantly cognitively impaired

Until 2003, NCLB required that the assessment results for all students (including students with disabilities, among other groups) who had been enrolled in a school for a full academic year be used in calculated AYP for the school, as well as all students who had been in the district for a full academic year, likewise would be counted towards the AYP for the district.[160] The IDEA, section 504 of the Rehabilitation Act of 1973, and title I all require the inclusion of students with disabilities in statewide assessments. Prior to this requirement, students with disabilities were excluded from assessments and accountability systems.[161] Consequently, without a system-wide accountability to indicate whether they were learning, they were often not provided access and exposure to the general curriculum.[162] One theory is that when students with disabilities are part of an accountability system, educators are more likely to increase their

[160] Federal Register, Vol. 68, no. 236, 34 C.F.R. Part 200, Part II 68 FR 68698, Tuesday, December 9, 2003. (Background)

[161] Fed. Reg. 68, No. 236 (at 2).

[162] Fed. Reg. 68, No. 236 (at 2).

expectations, and include them more into the general curriculum. In fact, research had shown in increase in rates of referral of students to special education when students with disabilities were excluded from assessments.[163] On the other hand, when students are forced to be included in these assessments, the focus on the educator's part is shifted from meeting the student's individual goals and objectives as specified in the IEP, to meeting the generic standards of the general education population, in preparation for these tests. A problem for the students involved is the likelihood of failure and the feeling of defeat that comes with it.

Generally, as discussed in more detail above, under NCLB there are three critical elements that ensure that schools are held accountable for educational results: 1) academic content standards; 2) academic achievement standards; and 3) assessments aligned to those standards. States are required to hold all students to the same standard, except that in 2003, the DOE passed regulations permitting States to measure the achievement of students with the most significant cognitive disabilities based on *alternate achievement standards*.[164]

The regulation does not limit the number of students who may take the alternate assessments; but it does limit the number of students who achieve proficient or advanced levels that can be counted towards the calculation of AYP. Three concepts warrant discussion on how this regulation is meant to work.

First, what does alternate assessment mean? The assessments are aimed for the small population of students with disabilities who are unable to participate in the regular State assessment, even with appropriate accommodations.[165] In order to comply with AYP calculating requirements, the assessments must be aligned with the State's content standards, must yield results separately for both reading/language arts and math, and must be able to yield results in a manner usable for calculating AYP.[166] The assessment itself may include materials collected in a number of ways, including: 1) teacher observation of the student; 2) samples of student work produced during regular classroom instruction that demonstrates mastery of specific instructional strategies in place of performance on a computer-scored multiple-choice test covering the same content and skills; or 3) standardized performance tasks produced in an "on-demand" setting, such as completion of an assigned task on test day.[167]

Second, alternate assessments may assess skills in relation to grade-

---

[163] Fed. Reg. 68, No. 236 (at 2).
[164] Fed. Reg. 68, No. 236 (at 2)(emphasis provided).
[165] Fed. Reg. 68, No. 236 (at 4).
[166] Id.
[167] Id.

level standards, or, in the case of students with the most significant disabilities, against alternate achievement standards. [168] States are not limited to setting a single alternate achievement standard, but if the State chooses to define multiple standards, it must employ commonly accepted professional practices to define the standards.[169] It must, also, document the relationship among the alternate achievement standards in its coherent assessment plan and must include in the 1% cap (discussed at more length below), scores resulting from all assessments based on achievement standards.[170]

Out-of-level assessments previously had not been considered alternate assessments, but as of the 2003 regulations, are now considered as alternate assessments. As such, they must also be counted in the 1% cap for purposes of calculating AYP.[171]

Finally, a large source of confusion during the NPRM comment period was the understanding of the 1% cap placed on the recording of the proficient and advanced scores of students taking the alternate assessments based on alternate achievement standards. The regulation does not limit the number of students that can take the alternate assessment, but those above 1% of the entire population of students in that grade will not be counted as proficient or advanced for purposes of making AYP.[172] This does not mean that the scores of those students that are not counted toward AYP as proficient are lowered. The regulations make clear that the parents of those students whose scores are not recorded as proficient for AYP purposes, but whose actually scores are proficient or advanced are notified of the actual achievement level of their child.[173]

The cap of 1% itself drew controversy during the comment period. Some thought the cap was too low, others said it was appropriate, and some said that there should be no cap at all.[174] The purpose for a cap is to impose a limit on the schools or LEAs to ensure thoughtful application of the option, rather than allowing IEP teams to assign lower performing students inappropriately to assessments and curricula that are not challenging, thus limiting educational opportunities for these marginal students.[175] The rationale for the 1% rather than a larger or smaller percentage is that 1% of the total population at any given grade level represents approximately 9% of the students with disabilities over the nation, which closely approximates

---

[168] Id.
[169] Id.
[170] Id.
[171] Id. at 6.
[172] 34 C.F.R. § 200.13(c)(2)(i).
[173] Fed. Reg. 68, No. 236 (at 8)(34 C.F.R. §200.13(c)(7)(v).
[174] Fed. Reg. 68, No. 236 (at 11).
[175] Fed. Reg. 68, No. 236 (at 11).

the percentage of students with significant cognitive disabilites. The actual percentage varies from state to state, and in order to compensate for that the regulations allow states to request a higher cap. Additionally, localized differences can be caused by a number of factors, including small populations that could be affected by just one additional student or localities that include specialized facilities, and therefore would have a higher concentration of students with significant cognitive disabilities.[176] These localities, too, may apply for variances on the cap.[177]

The goal for this 1% alternate assessment seems to be a balance between the recognition that some students with disabilities who have severe cognitive impairments should not be assessed on grade level assessments and the desire for all students to be held to high standards.

2. Alternative Assessments based on Modified Academic Achievement Standards (AA – MAAS)

Building on the assessments on alternate achievement standards, the most recent attempt to align NCLB with IDEA on the part of the Department of Education was in 2007, with the implementation of another alternative assessment. This one is not based on *alternate* academic achievement standards, but on *modified* academic achievement standards (AA – MAAS).[178]

The purpose of the amended regulations is to provide additional flexibility regarding accountability for the achievement of a narrow group of students with disabilities.[179] This narrow group of students is not so cognitively impaired that they require the alternate academic achievement standards, but at the same time, a grade – level assessment would also be inappropriate. Neither of these options provides data about the student's abilities or information that would be helpful to plan appropriate instruction.[180] One is too low, and the other too high. A critical difference between the two groups discussed is that the assessment for the group targeted in this provision is based on *modified academic achievement standards*, but covers grade – level content.[181] The material on the alternate academic achievement standards does not cover grade – level content. This is to ensure that these students are given an opportunity to have access to

[176] Fed. Reg. 68, No. 236 (at 12).

[177] Id.

[178] 34 C.F.R. § 200.11(c)(2)(ii)(2009).

[179] 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 1.

[180] 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 2.

[181] 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 3.

grade – level content in preparation for the assessment.[182]

The DOE stresses the distinction between the AA – MAAS and the initial alternate assessment based on alternate achievement standards, or the 1% group.[183] The latter are assessed on different content standards altogether, while the former are assessed on standards that are aligned with grade – level content. The assessments are modified in their breadth or depth, and are less rigorous, but are based on the State's grade – level content.[184] Like the grade – level academic achievement assessments, the modified assessments must be aligned with the State's academic content standards, include at least three levels of achievement, with descriptions of the competencies associated with each level of achievement and the "cut scores" that differentiate among the levels.[185] In other words, the AA – MAAS are just that; assessments that are modified in difficulty level, but based on the same content.

The initial version of the regulations which stated that a student must have had direct instruction in grade – level content resulted in confusion.[186] People thought that in order to qualify for the AA – MAAS, a student would have had to have been achieving close to grade level.[187] That was not the intent of the DOE. Its intent was to target students with a wide range of abilities and may be in any of the disabilities categories listed in the IDEA.[188] At the same time, the DOE was concerned that all the students, including those that would qualify for the AA – MAAS, would have access to grade – level content, which was intentionally meant to align with the IDEA's provision of access to the general curriculum.[189] The current requirement that a student's IEP include goals that are based on grade – level content standards for those goals that are a subject assessed under 34 C.F.R. § 200.2 is a compromise from the language taken out that required students to have received direct instruction in grade – level content.[190]

The regulations do not prescribe which students with disabilities would be eligible, but leaves it up to the IEP team to determine whether each student would be appropriate for AA – MAAS based on criteria developed by the State.[191] At a minimum the criteria must include three requirements.

---

[182] 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 3.
[183] Id at 4.
[184] Id.
[185] Id.
[186] Id.
[187] Id.
[188] Id.
[189] Id at 4(relying on 20 U.S.C. 1414(d)(1)(A)(i)(II)(aa) and (IV)(bb)).
[190] Id at 4.
[191] Id.

First, there must be objective evidence that the student's disability has precluded the student from achieving grade – level proficiency.[192] Second, the IEP team must use multiple measures to assess the student's progress in response to appropriate instruction, including special education instruction. Given the appropriate instruction, the IEP team's assessment is that the student will not achieve grade – level proficiency within the year that the IEP covers.[193] Third, if the students' IEP includes goals of subject matter that is assessed under 34 C.F.R. § 200.2, the goals must be based on the academic content standards for the grade in which the student is enrolled.[194]

To further ensure that students participating in the AA – MAAS have the opportunity to learn grade – level content, the regulations were amended to require States to establish clear guidelines for IEP teams to develop IEPs for students who are assessed based on modified academic achievement standards that must include, among other things, goals that are based on academic content standards for the grade in which the students is enrolled.[195] Additionally, States must ensure that these students have access to the curriculum, including instruction, for the grade in which the students are enrolled, and that they are not precluded from attempting to complete the requirements as defined by the State, for a regular high school diploma.[196] States must also ensure that each IEP team review annually for each subject its decision to assess a student based on modified academic achievement standards to ensure that those standards remain appropriate.[197]

While this final provision appears redundant in light of IDEA's requirement to annually review each student's IEP,[198] it is relevant for two reasons. First, in an effort to reduce the paperwork in special education, Congress enacted a pilot program for a select number of states that allows for a multi-year IEP.[199] For students participating in this pilot program, it appears that this more recent regulation would require an annual review of at least those goals associated with the alternate or modified academic achievement standards. Second, it highlights the focus on the temporary nature of students' participation in these assessments.

In an effort for full disclosure, for students who are assessed either based on modified or alternate academic achievement standards, the State is required to provide IEP teams with a clear explanation of the difference

---

[192] Id at 4.
[193] Id at 5.
[194] Id at 5.
[195] 34 C.F.R § 200.1(f)(2)(ii)(A).
[196] 34 C.F.R. § 200.1(f)(2)(iii), (iv). See also, 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 5.
[197] 34 C.F.R. § 200.1(f)(2)(v).
[198] 20 U.S.C.. § 1414(d)(4)(A)(i), 34 C.F.R. § 300.324((b)(i).
[199] 20 U.S.C. § 141(d)(5).(2009).

between the alternate or modified academic achievement assessments and the assessments based on grade – level academic achievement standards. These include any implications those assessments may have on state or local policies on a student's education, such as graduation implications.[200] A State must also ensure that parents of those students selected to participate in assessments based on alternate or modified academic achievement standards are informed.[201]

3. Measuring AYP

Working on the assumption that many students eligible and appropriate for this assessment based on modified academic achievement standards would be educated in regular classrooms with children of the same chronological age, and would be receiving instruction in grade – level curriculum, the number of students would be small.[202] Therefore, for purposes of calculating AYP, up to 2% (approximately 20% of students with disabilities) of the proficient and advanced scores from alternate assessments based on modified academic achievement standards may be included. This is not to say that more than 2% of the total population cannot take the assessment based on modified academic achievement standards, but only up to 2% of the proficient or advanced scores will count towards AYP. Combined with the 1% cap on reporting advanced and proficient scores on the Assessments based on alternate academic achievement standards, the total number of students reported as achieving AYP on both of these alternative assessments cannot exceed 3% of the total population of those students enrolled in the same grade. If the number of students taking the AA – MAAS exceeds 2% of the total population of students in the grade, those proficient and advanced scores that exceed that 2% will not count towards AYP.

The Department of Education has provided some flexibility in this reporting requirement. As discussed above, the 1% cap may be waived within an LEA if granted an exception by the SEA. An LEA may only exceed the 2% if the scores reported on the alternate academic achievement standards is less than 1% and even then only to the extent that the total does not exceed 3% of the population. Important to note is that a State may not request an exception to exceed any of the caps mentioned herein, except that it may report more than 2% for the AA – MAAS assessment if the 1%

---

[200] 34 C.F.R. § 200.1(f)(1)(iii). See also, 72 FR 17748, Rules and Regulations, Department of Education, 34 C.F.R. 200 and 300.(April 9, 2007) at 5.

[201] 34 C.F.R. § 200.1(f)(1)(iv).

[202] It is important to note that there is a dearth of information supporting the 2% figure itself, unlike the 1% which roughly reflects the actual number of students who would qualify.

alternate academic achievement standards does not reach 1% of the population, and not to exceed 3% total, as clarified more easily in the table below:[203]

WHEN MAY A STATE OR LEA EXCEED THE 1% AND 2% CAPS?

	Alternate academic Achievement standards – 1%	Modified academic achievement standards – 2%	Alternate and Modified academic achievement standards – 2%
State	Not permitted	Only if the State is below 1% cap, but cannot exceed 3%.	Not permitted
LEA	Only if granted an exception by SEA.	Only if LEA is below 1% cap, but cannot exceed 3%.	Only granted an exception to the 1% cap by the SEA, and only by the amount of the exception.

In short, an SEA may grant an LEA an exception to the 1% cap if the LEA provides very specific information supporting its request.[204] A State may grant and be granted an exception to the 2% cap only if the 1% cap is not reached, and only to the extent that it was not reached.[205]

Is the AA—MAAS the answer? It may be too early to tell. While many states have administered a form of AA—MAAS, at this time, only Texas is actually approved to administer the AA – MAAS.[206] Anecdotally, California department of education has reported that the new test has generally increased the percentage of students at the proficient level for students taking AA – MAAS test.[207] Additionally, given the options, the AA – MAAS test is the best test for some special education students, but more than 2% of the students in the grades tested have taken the AA—MAAS test, some at the Department think that the cap should be higher.[208]

There are a few important differences between the AA – AAAS (1%) and AA – MAAS (2%) populations that make this fix more problematic for

[203] 34 C.F.R. § 200.13, App.(2009).
[204] 34 C.F.R. § 200.13(c)(5)(i) and (ii).(2009).
[205] 34 C.F.R. § 200.13(c)(3) and (4).(2009).
[206] "U.S. Department of Education OKs Modified Texas Assessment," 7/15/09 Educ. Wk., 2009 WLNR 14493870.
[207] Email from "Bob," Monday, March 9, 2009, California Department of Education, at AAU@cde.ca.gov.
[208] Id.

the 2% population. One overriding difference is that the 1% population, more or less remains the same through the students' educational career. It is based on factors that will not likely change much after the child reaches a certain age. The 2% population, however, can be very fluid. One determining factor is that the parents and the LEA agree that that child will not *likely* reach grade level achievement that given year. This means, and appropriately so, in any other given year, those students *may* reach grade level achievement. In fact with a raised standard for the IDEA, the purpose is to get those students out of the AA – MAAS population and the educators are held liable to do so. This makes that population a moving target, and the puts tremendous pressure on the schools to correctly identify those students each year.

Indeed, what are we trying to accomplish with the AA-MAAS option? We acknowledge that there is a section of the population of students with disabilities for whom the state-wide standardized test would be unfair to take. Unlike the 1% population, who are not ever expected to reach grade level achievement, the students who are targeted for this "2% fix" are expected to ultimately reach grade-level achievement. One question is whether 2% is the right cap. As stated earlier, the fluidity of the 2% group is an inherent difference from the 1% population; and it should be. If school districts are held to a higher standard than they will be more conscious of the outputs of all students with disabilities, not just because NCLB requires for its annual AYP, but also, and perhaps more importantly, because IDEA does. It is more important under IDEA because of the individual remedies available under the IDEA that are not available under NCLB.

CONCLUSION

While there is no shortage of NCLB critics, it may be important to remember the overwhelming support this bill had from rather unlikely bedfellows, including support from one of the biggest champions of the underserved, the late Senator Ted Kennedy, the chief author of the NCLB Act.[209] The NCLB Act may be up for reauthorization, but it is not likely to go away. This is evident in the intentional merging of the IDEA and NCLB statutes. It is also evident that focus on the part of the Department of Education in promulgating the AA – MAAS was a direct attempt to better align the NCLB with the IDEA, and clearly with the belief that the IDEA

[209] Kennedy, Edward, "Kennedy on No Child Left Behind Reauthorization," press release, Monday, March 26, 2007; A15 as it appeared in the Washington Post. (on file with author)

required higher standards than merely accessing an educational opportunity.

With the combination of the NCLB standard and IDEA right to individual remedies, schools will be forced to more carefully scrutinize the IEPs of those students with disabilities that would likely fall into the 2% category for fear of two distinct ramifications. One ramification for failure to produce measurable progress as evidenced by a student's participation in AA-MAS evaluations rather than progressing to the grade-level evaluations by a reasonable amount of times is the traditional due process proceedings available under IDEA. Additionally, there is still the fear of not making AYP under NCLB, and all the ramifications that holds for each school and LEA.

From all indications, Congress' intention is to raise the standards for students eligible under the IDEA, and hold schools, LEAs and States accountable for all students, including students with disabilities, to make adequate yearly progress. Parents of children with disabilities, their attorneys, and scholars in the area have made the argument for years that the IDEA has indeed moved from the *Rowley* standard of access to education to a higher standard.[210] Courts, however, have declined to go so far as to recognize this risen standard without more direct language from Congress.[211] Since the 1997 amendments, however, Congress has spoken in its actions through a series of moves that have all pointed towards higher expectations for students with disabilities. First is the change in the statutory language in the 1997 amendments to the IDEA, as the *Deal* court recognized.[212] Then, in 2001, the NCLB Act very clearly raised expectations for all children.[213] Following this general legislation targeted at all children, the IDEA was reauthorized in 2004, and, arguably more directly raised the expectations for children with disabilities.[214] In an effort to further align the two, the Department has attempted to fill in two gaps that have plagued school systems when it amended the regulations to include the aforementioned 1% and 2% alternative assessments. Clearly, the intent is to merge the statutes. In so doing, the bar will have been raised for students with disabilities. This lofty goals is commendable, but unachievable without support for the school systems, and without support for the parents of children with disabilities in the form of rights of action under NCLB.

Courts have requested Congress to speak clearly, and Congress has a chance to speak clearly as both the IDEA and NCLB are up for

---

[210] See generally, Philip T.K. Daniel 37 J.L. & Educ. 347.
[211] *Mr. and Mrs. C v. MISD* at 301.
[212] *Deal* at 864.
[213] 20 U.S.C. §6301 (2009).
[214] Infra section "Attempts to reconcile the Two" A.

reauthorization soon. It is now time for Congress to speak clearly. The problem with the two statutes that needs to be addressed by Congress in both is that one, NCLB has high expectations without meaningful accountability by the parties affected – the parents of students; and the other, the IDEA has individual procedural protections, but no clear level of expectation. The narrow answer would be that the IDEA must clearly address *Rowley* and refine its definition of FAPE to correlate with NCLB's higher expectations. A more sweeping solution would allow individual actions under NCLB, but this may open the floodgates of litigation.

It seems clear from the Department's focus on students with disabilities that a main focus has been on the population of students with disabilities. Therefore, the reauthorizations of each statute should focus more closely, clearly, and consciously on merging the goals of each statute to the goals and expectations of the other. While the court in *Mills* over 35 years ago recognized that funding should not be an excuse for not addressing the needs of students with disabilities,[215] higher expectations will require more services, which will require more funds. IDEA has never been fully funded,[216] and to require more without supporting the LEAs and schools is setting the schools up for failure. So, one important element is to fully fund IDEA.

Schools are required, under NCLB to assess students on grade-level content. Even if the student qualifies for the AA—MAAS, the expectation is that those students have access to grade-level content, which means that they are expected to have had access to the general curriculum. What the Department seems to be emphasizing for these students is an inclusive education. Inclusion has been a hotly debated pedagogy for students with disabilities.[217] True inclusion requires bringing support and services to the child in the regular education classroom, rather than moving the child to the service.[218] A successful inclusion practice depends on the flexibility in the entire school, not just the special education department. Under ideal inclusive environments, all students work toward the same overall educational outcomes, as is required under NCLB.[219] The difference, however, is the level of achievement and the amount of support required by each student in achieving that level success. "A restructured system that merges special and regular education must also employ practices that focus

---

[215] *Mills v. Board of Educ. of the Dist. of Columbia*, 348 F.Supp. 866 at 876. (1972).

[216] 150 Cong. Rec. H10006-01. Friday, November 19, 2004, Mr. McGovern.

[217] "Special Education Inclusion," Wisconsin Education Association Council, http://www.weac.org/Issues_Advocacy/Resource_Pages_On_Issues_One/Special_Education/special_education_inclusion.aspx. (last visited September 26, 2009).

[218] Id.

[219] Id.

on high expectations for all and rejects the prescriptive teaching, remedial approach that leads to lower achievement."[220]

Currently, few schools employ a truly inclusive model. Most schools share special education teachers between regular education classrooms. During any given period, one special education teacher is responsible for a number of different children in several different classrooms.[221] For a true inclusion program to work, more funding will be required to hire more special education teachers. While that sounds like political suicide, the ramifications of not providing the appropriate support to students with special needs are far more dire when the schools and LEAs do not make AYP. And, as more states develop the AA—MAAS evaluation, more students will require access to grade – level curriculum, which should occur in regular education classrooms. These students, however, will still require services and support, which will require an inclusion model as the most effective method of providing both grade – level content and services for students with disabilities in the classroom.

Each statute strives for the same thing, for every child with a disability to make educational progress and for them to become productive members of society. On the surface, they seem to go about it in directly opposite directions. With more clarity from Congress this can be resolved. And, with more financial support, which could easily be resolved merely through fully funding IDEA, the higher expectations that each statute requires could be attained. And, at the end of the day, with compliance of both the IDEA and NCLB, indeed, even the students with disabilities will no longer be left behind.

---

[220] Id. (citing Guess and Thompson, 1989, Heshusius, 1988).

[221] Personal experience from the author over years of representing parents of children with disabilities in IEP meetings.