

NO CHILD LEFT BEHIND: ADMIRABLE GOALS, DISASTROUS OUTCOMES

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I. INTRODUCTION

As President Bush signed into law the re-authorization of the Elementary and Secondary Education Act on January 8, 2002,¹ he cast a new challenge to state governments and public education. The challenge was concisely explained by the re-authorized law's new title—No Child Left Behind (“NCLB”).² The 669 pages of NCLB federal legislation heightened the federal government and public expectations of student and public school performance. The law demanded an increase in the quality of education in America's public schools as determined by yearly assessments of student progress.

Renaming the re-authorized Elementary and Secondary Education Act to the now familiar No Child Left Behind moniker was an act of political genius. No one could argue that it is acceptable to leave some children behind³ while their peers find current academic and future social success. In a shrewd political move, the President could claim the mantle of the “Education President,” while he and other NCLB proponents could paint those who questioned the law's methods and procedures as obstructionists, indifferent to the plight of children, or those afraid of accountability.⁴ Outgoing Secretary of Education, Rod Paige, referred to the National Education Association (“NEA”) (the largest teacher union) as “terrorists”⁵ due to the organization's opposition to NCLB's punitive nature and NEA complaints concerning the

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1. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301 - 7941 (2005).

2. *Id.*

3. “Some critics of President Bush's policy regarding elementary and secondary education have an alternative. It is: Let's leave lots of children behind.” George F. Will, *A Genuine Education President*, WASH. POST, Mar. 11, 2004, at A27. In response to the argument that requiring 100% of students to reach certain goals is excessive, Representative John Boehner (R-Ohio) replies, “What number would you substitute? Ninety-five? That means you can throw five percent of the children overboard.” *Id.* Statements such as these oversimplify the massive challenge and statistical improbability of having 100% of any student population being rated proficient on the basis of a one-shot standardized examination.

4. Jack Jennings & Nancy Kober, *Talk Tough, But . . . Put the Money Where Your Mouth Is*, WASH. POST, Oct. 3, 2004, at B03; William Raspberry, *No Child's Failure*, WASH. POST, May 3, 2004, at A21.

5. John King, *Paige Calls NEA 'Terrorist Organization'* (2004), <http://www.cnn.com/2004/EDUCATION/02/23/paige.terrorist.nea>.

federal government's subsequent under-funding of NCLB by approximately eight billion dollars.⁶ Although later apologizing for his comments, the Secretary's sentiments would be repeated. Clearly, the President and his aides were taking the approach that either you are "with us or against us" in the attempt to reform the country's elementary and secondary public schools.

While NCLB's stated goal of leaving no child behind appears laudable, the legislation ignores many facets in education that make the mandated goal of having virtually all children being rated as "proficient" and at their grade level by the 2013-2014 school year virtually impossible.⁷ Some argue that the NCLB's draconian and inflexible provisions for failure to reach its stated goals, will result in leaving behind those who are in the greatest need.⁸

This paper will focus on three major issues raised by NCLB. The first issue focuses on the balance of power between the federal and state governments regarding public education. A brief overview of this balance of power will be presented followed by an introduction of NCLB terms and procedures. Title I of NCLB will be the focus, because this title provides federal funding for at-risk student populations.⁹ The impact of NCLB in shifting the balance of power in educational policy to the federal government will be examined along with the issue as to whether this pre-emption of states' rights in education is justifiable under the Constitution and the Spending Clause.¹⁰ Some states, including those with Republican legislatures, are now pushing back against what is seen as a prohibitively expensive, under-funded federal law that is paid for primarily with state and local tax dollars.¹¹

6. Tom Allen, *No School Left Unscathed*, 85 PHI DELTA KAPPAN 396, 397 (2004).

7. NCLB states that each local education agency ("LEA") shall use the results of student academic assessments to review annually "whether all of the schools [within the LEA] are making the progress necessary to ensure that *all students* will meet the State's proficient level of achievement on the State academic assessments . . . *within 12 years from the end of the 2001-2002 school year.*" 20 U.S.C. § 6312(c)(1)(M) (emphasis added).

8. M. Hayes Mizell, *From Muck to Mountaintop*, 33 J.L. & EDUC. 261 (2004).

9. 20 U.S.C. §§ 6331-6339.

10. U.S. CONST. art. I, § 8, cl. 1. Historically, public education has been firmly placed in the sphere of state and local governments. This extended to colonial America where the Massachusetts School Laws of 1644 placed the burden on communities of more than fifty families to provide for a public education for the children of the town. The country followed this state/local model for over three hundred years. In the 20th century, the genesis of federal involvement in education began after the launch of Sputnik and the perceived threat of Soviet missile power. This led the Eisenhower administration to push for federal funds to create stronger math and science programs in secondary schools. See THOMAS A. BAILEY, DAVID M. KENNEDY & LIZABETH COHEN, *THE AMERICAN PAGEANT* 75-76, 923 (11th ed. 1998).

11. Greg Toppo, *States Fight No Child Left Behind, Calling it Intrusive*, USA TODAY, Feb. 11, 2004, available at http://www.usatoday.com/news/education/2004-02-11-no-child-usat_x.htm. Virginia and Utah are examples of two states with Republican controlled legislatures that oppose the costs that NCLB imposes on their states. *Id.* Jim Dillard, the GOP chairman of Virginia's Education Committee, calls the law both "a massive federal intrusion" and "utopian nonsense." *Id.*

The second major issue discussed is the impact of NCLB on special education. The starting point for this section is a brief overview of special education in the twentieth century followed by a discussion of the *Brown v. Board of Education*¹² decision. In many ways, the *Brown* decision not only marked the beginning of the end of racial segregation in American schools; it also provided the impetus to bring about the end of segregation for special education students in public schools as well. From the 1970's to the 1990's, this movement made great strides in ensuring greater equality and learning opportunities for children with disabilities culminating with the Individuals with Disabilities Education Act ("IDEA").¹³ Today, the fight over educational access has been won. The issue now is how to fairly and accurately treat children with disabilities in light of the conflict between the individualized nature of special education and the NCLB focus on mass testing and systemic accountability of schools and school districts.¹⁴

Finally, the paper will examine the intersection of NCLB and special education laws such as IDEA. An inherent conflict exists between the individualized instruction and assessment goals contemplated by IDEA and the mass-testing, standardized nature of NCLB. NCLB's emphasis on assessments for NCLB purposes, and the resulting pressures now placed on special education students, is of particular importance to the schools which will face being labeled as failures depending upon the results of special education students on a one-size fits all standardized test.

II. NCLB—A MAJOR SHIFT OF POWER IN EDUCATION

The first serious attention to public education paid by the federal government occurred during the Cold War. The United States felt vulnerable due to the perceived Soviet threat created by the launch of Sputnik.¹⁵ President Eisenhower and Congress supported the National Defense Education Act of 1958, which devoted federal money to improve math and science programs in secondary schools.¹⁶ This federal commitment to education was furthered by the passage of the Elementary and Secondary Education Act ("ESEA"), which was part of President Johnson's Great Society legislation.¹⁷ Title I of ESEA provides supplemental federal aid to disadvantaged children and provided the statutory basis for early special

12. 347 U.S. 483 (1954).

13. Individuals with Disabilities Education Act, 20 U.S.C. § 1400 – 1487 (2000).

14. Christin E. Keele, *Is The No Child Left Behind Act the Right Answer for Children with Disabilities?*, 72 UMKC L. REV. 1111, 1116 (2004); Lynn Olson, *Enveloping Expectations*, EDUC. WEEK, Jan. 8, 2004, at 8; Mark Littleton, *High Stakes Testing*, 187 EDUC. LAW REP. 389, 394-95 (2004); Perry A. Zirkel, *NCLB: What Does it Mean for Students with Disabilities?*, 185 EDUC. LAW REP. 805 (2004).

15. BAILEY, KENNEDY & COHEN, *supra* note 10, at 923.

16. *Id.*

17. PETER W. D. WRIGHT, PAMELA DARR WRIGHT & SUZANNE WHITNEY HEATH, *WRIGHTSLAW: NO CHILD LEFT BEHIND* 9 (2004).

education funding.¹⁸ Congress has reauthorized this law several times and in each instance, political leaders emphasized the federal government's commitment to education.¹⁹ In 1983, interest in education was heightened by the National Commission on Excellence in Education's report titled *A Nation at Risk*, which detailed how our educational failings were imperiling our nation's economic competitiveness and future prospects.²⁰

In 1994, Congress reauthorized the ESEA as the Improving America's Schools Act.²¹ For the first time, schools accepting Title I funds were required to adopt proficiency standards and assessments to measure whether students receiving Title I services reached those standards.²² Although states began developing these tools, no significant punitive measures were placed on schools if students failed to meet the goals established by the individual states.²³

This all changed with the reauthorization of the ESEA as the No Child Left Behind Act of 2001.²⁴ The NCLB's statement of purpose is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging state academic achievement standards and state academic assessments."²⁵ While retaining the 1994 law's requirements concerning proficiency standards and assessments, the 2001 reauthorization ordered states to create at least three levels of student competencies²⁶ and required that virtually all students attain a proficiency rating in reading and math²⁷ by the 2013-2014 school year.²⁸ In order to

18. WRIGHT, WRIGHT & HEATH, *supra* note 17, at 9.

19. *Id.*

20. NATIONAL COMMISSION ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983), <http://www.ed.gov/pubs/NatAtRisk/index.html>. This report highlights the numbers and percentages of Americans who are functionally illiterate and who do not have basic math skills. It also examined the typical school day in America and found it to be lacking in terms of time and content to other industrialized countries. Of importance, the Commission called for *higher, measurable* standards of academic performance. This could be considered the beginning of the push toward state based content standards and assessments which are the backbone of NCLB.

21. The Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C. §§ 6301 – 7941 (2003) was enacted on October 20, 1994, to reauthorize the ESEA.

22. *See* WRIGHT, WRIGHT & HEATH, *supra* note 17, at 11.

23. *See* Will, *supra* note 3. By 2001, only eleven states were in compliance with the 1994 ESEA. Waivers were often granted to states that failed to comply with the law's requirements.

24. 20 U.S.C. §§ 6301 – 7941 (2003).

25. 20 U.S.C. § 6301.

26. 20 U.S.C. § 6311(b)(1)(D)(ii). The three levels of competency that states must describe are advanced, proficient, and basic. Students must be rated as proficient or advanced in order for schools to be making adequate progress toward NCLB goals.

27. 20 U.S.C. § 6311(b)(1)(C).

28. 20 U.S.C. § 6312(c)(1)(M).

assess student achievement of the standards, the law requires annual proficiency tests in grades three to eight and students to be tested at least once in grades nine to twelve.²⁹ Schools must test at least ninety-five percent of all students, including ninety-five percent of students within each subgroup.³⁰ Testing less than ninety-five percent of students overall or within one of the subgroups automatically designates a school as failing.³¹ Schools are rated on their Adequate Yearly Progress (“AYP”) based on the percentages of students rated as proficient on the state assessment tests.³² Included in the AYP determination are the scores from non-aggregated subgroups such as disabled, minority, or limited English proficiency students.³³ Schools failing to meet AYP targets are subject to increasingly punitive measures for each year that the school does not attain the state mandated percentage of proficient students.³⁴ Failure to meet AYP standards for an entire school, however, can be triggered simply by the failure of one or more subgroups failing to meet their AYP target. Essentially, a special needs subgroup can cause an entire high school to be labeled as “failing.”³⁵ These new AYP standards and punitive measures for failing to meet them have placed significant pressures on states and local education agencies (“LEA”) to meet NCLB provisions.

Upon signing the NCLB legislation on January 8, 2002, President George Bush made the federal government a major power player in the formation and execution of the country’s educational policies. NCLB went far beyond the federal government’s role in providing supplementary funds to the states under Title I of ESEA to assist in paying for the education of special needs or “at-risk” students. Gone are the days when the federal government’s influence was solely measured by the amount of federal dollars provided to the states.³⁶

29. See WRIGHT, WRIGHT & HEATH, *supra* note 17, at 21.

30. Ralph D. Mawdsley & J. Joy Cumming, *School District Accountability, Special Education Students, and the Dilemma of High Stakes Testing: An Australia-United States Comparison*, 188 EDUC. LAW REP. 1, 3 (2004).

31. See Keele, *supra* note 14, at 1115.

32. 20 U.S.C. § 6311(b)(2)(C) defines AYP in a manner that (i) “applies the same high standards of academic achievement to all public elementary school and secondary school students in the State;” (ii) “is statistically valid and reliable;” (iii) “results in continuous and substantial improvement for all students;” (iv) “includes separate measurable annual objectives for continuous and substantial improvement.”

33. See Center on Education Policy, *My School Didn’t Make Adequate Yearly Progress—So What Does That Mean?* (2004), <http://www.cep-dc.org/pubs/TestTalk/CEPTalk3.pdf> [hereinafter Center on Education Policy], for a description of the multiple ways a school can fail to make AYP, including, but not limited to, the failure of one subgroup to meet required proficiency standards.

34. 20 U.S.C. § 6316(b)(7)(C).

35. Recently, the high school where the author teaches was labeled as failing to meet AYP due to the special education subgroup not meeting the standards required of all students. This is understandable, because if the students were meeting the standards of all students, one might wonder why they are in special education. However, an argument might be made that the more individualized instruction in special education should enable those students to meet the state mandated goals.

36. See Will, *supra* note 3.

The federal government has now set an agenda of standards and assessments that states must meet, or they will suffer consequences established by Congress.

For the first time, NCLB established significant penalties upon states and public schools for “leaving” any child behind educationally.³⁷ The federal law provides for increasing punitive measures for each year that a school fails to meet the mandatory level of AYP. For schools classified as in need of improvement, after two years of not making satisfactory progress, the school must allow parents the right to transfer their children to another public school.³⁸ In the third year, students are eligible for tutoring and other supplemental instructional assistance.³⁹ In the fourth year, the district must take certain measures which may include replacing the school staff, instituting a new curriculum, and appointing an outside expert to advise the school on its progress toward making AYP.⁴⁰ Finally, in the fifth year, penalties include reopening the school as a public charter school, replacing all or most of the school staff, and/or entering into a contract with a private management company to take over the public school’s operation.⁴¹

Some critics argue that the NCLB is merely a backdoor route to private school vouchers and the privatization of public education by demonstrating the failure of the public schools. These critics claim that NCLB’s lofty goals are intentionally impossible to meet, and the end result will be massive numbers of public schools failing across the country.⁴² Already, many states have found that significant numbers of schools have failed to reach the NCLB targets, and some states have re-adjusted the required scores in order to reduce the number of failing schools.⁴³

The massive shift in federal power over education created by NCLB is remarkable in light of the Constitution’s silence on either a national right to an education or a federal government role in education. This constitutional silence deprives Congress of any enumerated powers regarding education.⁴⁴

37. 20 U.S.C. § 6316(b)(7)(C).

38. 20 U.S.C. § 6316(b)(1)(A) & (b)(1)(E). In addition to making public school transfers available, the public school must pay for transportation costs thus draining money away from educational purposes. 20 U.S.C. §6316(b)(9).

39. 20 U.S.C. § 6316(b)(5).

40. 20 U.S.C. § 6316(b)(7)(C).

41. 20 U.S.C. §6316(b)(8).

42. Stan Karp, Editor, Rethinking Schools, Talk given at the meeting on The No Child Left Behind Hoax (Nov. 7, 2003), *available at* http://www.rethinkingschools.org/special_reports/bushplan/nclb-hoax.pdf.

43. Center on Education Policy, *supra* note 33, at 3. According to this report, an estimated 28,134 schools failed to make AYP in school year 2002-2003. Of this group, an estimated 6,565 schools failed to make AYP for two consecutive years and thus faced NCLB sanctions.

44. MICHAEL W. LAMORTE, SCHOOL LAW: CASES AND CONCEPTS 2-3 (2002); *See* Mawdsley & Cumming, *supra* note 30, at 2.

The Tenth Amendment has been construed historically as reserving the powers involving education to the individual states' domain.⁴⁵ While the balance of power was firmly in the states' favor, the federal government influenced education through the more limited aforementioned legislation and, more significantly, through federal court decisions.⁴⁶ These court decisions were often based on the Fourteenth Amendment's Due Process and Equal Protection clauses.⁴⁷

Now, the federal government has a clearly defined, and far more powerful, role in education by providing larger sums of money to the states, requiring standardized assessments and standards within a state, and accompanying sanctions for unacceptable outcomes. NCLB critics have called the new federal role an intrusion or encroachment into the traditional preserve of state and local government.⁴⁸ According to some, this federal intervention has short-circuited successful local or state initiatives to create a better educational model and to bring greater accountability to local educational systems.⁴⁹

Public education funding in the United States is by a vast majority conducted from taxes collected at the state and local levels.⁵⁰ In Pennsylvania, approximately thirty-seven percent of education funding comes from state taxes.⁵¹ The bulk of Pennsylvania school funding, however, does not come from the state or federal government. Instead, fifty-eight percent of school funding comes through a local property tax and, to a much lesser extent, a local earned income tax.⁵² In spite of the clear dominance of state and local funding of public education, the federal government shifted the balance of educational power to its side with a rather modest federal outlay for education.

Federal education funds are intended to supplement, rather than replace, state and local tax revenues provided to the public schools.⁵³ Since the inception of NCLB in 2002, the President and Congress have not fully funded Title I programs to the extent allowed under the NCLB.⁵⁴ Nationally, NCLB is under-funded by \$9.4 billion and in Pennsylvania, for example, the federal

45. LAMORTE, *supra* note 44; *See* Mawdsley & Cumming, *supra* note 30, at 2.

46. Mawdsley & Cumming, *supra* note 30, at 2.

47. *Id.* at 11-14.

48. *For President: Despite Missteps, Bush is Better Able to Steer Nation Through Difficulties Ahead*, COLUMBUS DISPATCH, Oct. 24, 2004, at 8B, available at http://www.dispatch.com/print_template.php?story=dispatch/2004/10/24/20041024-B8-00.html.

49. *Id.*

50. Kevin Carey, *The Funding Gap 2004: Many States Still Shortchange Low-Income and Minority Students* (2004), <http://www.vsba.org/fundingGAP2004.pdf>.

51. Pennsylvania Economy League, *School Funding Equity, Part I: How Pennsylvania Funds its Public Schools*, ISSUES PA (2003), <http://www.issuespa.net/articles/view.do?id=5003>.

52. *Id.*

53. WRIGHT, WRIGHT & HEATH, *supra* note 17 at 9; Federal Requirements to Supplement, Not Supplant, National Association of State Boards of Education Policy Brief, http://www.nasbe.org/Educational_Issues/Federal_Edu.html (last visited Apr. 19, 2006).

54. Federal Education Funding in Pennsylvania Falls Short, The National Priorities Project, <http://www.nationalpriorities.org> (last visited Nov. 19, 2004).

government has under-funded Title I programs by almost \$244 million.⁵⁵ In order to meet NCLB goals for special education students, the National Priorities Project estimates that Title I programs are under-funded by \$11.4 billion, and Pennsylvania would require an additional \$426 million to properly assist special education students in meeting NCLB targets.⁵⁶

The federal government held out the carrot of money to the states in the form of Title I funding. What the states (and perhaps some original NCLB supporters in Congress, like Senator Kennedy) did not realize was that the carrot would be smaller⁵⁷ than promised and that the stick was going to be very powerful and inflexible.⁵⁸ Contrary to the NCLB's language that state governments would not have to pay for any additional costs created by the legislation, the Bush administration has taken the position that any extra costs of complying with NCLB requirements are a state and local responsibility.⁵⁹ For an investment of less than ten percent in public elementary and secondary education, the federal government now demands one hundred percent accountability from the states.⁶⁰ This is quite a return on the federal government's investment.

For their ten percent stake, the federal government "will now be involved in setting the tone, direction and priorities of public education in every school in the United States."⁶¹ The federal government now can demand each state to create a plan addressing academic standards, academic assessments, and accountability.⁶² The "academic standards must apply to all public schools and public school students in the state including public schools and public school students served with Title I funds and *must include the same knowledge, skills and levels of achievement expected of all students.*"⁶³ States can opt out of NCLB by refusing to accept any Title I funds, but once they accept these funds, the states must use them according to conditions imposed by Congress.⁶⁴ In light of population pressures and increased educational

55. *Id.*

56. *Id.* The National Priorities Project used estimates from the NEA and Department of Education budget tables to reach these national and state estimates.

57. See Jennings & Kober, *supra* note 4. President Bush has not fully funded the authorized amounts of NCLB, and he has offset increased educational funding with proposals to cut early childhood literacy programs, dropout prevention, and after school programs. *Id.*

58. *Id.* Even though NCLB legislation provides that states do not have "to spend any funds or incur any costs not paid for under this Act," the estimated increase in Ohio's state costs to meet NCLB are \$1.5 billion annually, while Hawaii estimates the costs to be an added \$30 million per year. *Id.*

59. *Id.*

60. See Jennings & Kober, *supra* note 4.

61. Ronald D. Wenkart, *The No Child Left Behind Act and Congress' Power to Regulate Under the Spending Clause*, 174 EDUC. LAW REP. 589 (2003).

62. *Id.* at 591.

63. *Id.* at 590 (emphasis added).

64. *Id.* at 590; Mawdsley & Cumming, *supra* note 30, at 3.

demands, it is difficult for states and local school districts to refuse this funding.

At a minimum, NCLB requires states to develop standards and assessments for reading, mathematics, and science.⁶⁵ The assessments for these subjects measure whether schools are meeting the targets set by the state as required under NCLB and have acceptable AYP toward having all students meet or exceed proficiency standards by the 2013-2014 school year.⁶⁶

Due to the absence of a congressionally enumerated power regarding education, states traditionally have held plenary power regarding public education.⁶⁷ In the famous *Brown* decision, which altered education and individual rights beyond merely outlawing segregated schools, the Supreme Court noted that education was one of the most important, if not the most important, endeavors of state and local governments.⁶⁸

Although Congress can claim no enumerated power in NCLB legislation, Congress can justify the act in the interest of promoting the general welfare of the United States.⁶⁹ The Spending Clause of Article I, Section 8, Clause 1 of the Constitution provides for federal spending that promotes the general welfare of the citizens.⁷⁰ Promoting the general welfare is a powerful justification for federal education spending because our country and its leaders have long proclaimed that education is the important leveler in our society and is the key to our continued growth and prosperity.⁷¹ Under this rationale, Congress may attach conditions on the states in exchange for the receipt of federal funds.⁷² This carrot and stick method had been previously used to entice states to raise their drinking age to twenty-one in exchange for federal funding for highway construction.⁷³

When attaching strings to legislation passed under the Spending Clause, the conditions imposed by Congress may exceed its enumerated powers.⁷⁴ This funding theory has been approved by the federal courts since 1936.⁷⁵

65. Wenkart, *supra* note 61, at 590. Pennsylvania has exceeded the minimum and has standards for Social Studies, Family and Consumer Sciences, Technology Education, and for Guidance. Pennsylvania Department of Education, http://www.pde.state.pa.us/stateboard_ed/cwp/view.asp?a=3&Q=76716 (last visited April 19, 2006) (click on each link to view the standards).

66. Wenkart, *supra* note 61, at 591.

67. Jennifer R. Rowe, *High School Exit Exams Meet Idea -- An Examination of the History, Legal Ramifications, and Implications for Local School Administrators and Teachers*, 2004 BYU EDUC. & L.J. 75, 95 (2004) (citing STEPHEN B. THOMAS & CHARLES G. RUSSO, SPECIAL EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE 90'S 157 (1995)).

68. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954).

69. U.S. CONST. art. I, § 8, cl. 1.

70. *Id.*

71. Horace Mann, *End Poverty Through Education, Twelfth Annual Report to the Massachusetts Board of Education*, in ON THE CRISIS IN EDUCATION 121-124 (Louis Fuller ed., Antioch Press 1965) (1848).

72. See Wenkart, *supra* note 61, at 594.

73. *Id.*

74. *Id.*

75. *United States v. Butler*, 297 U.S. 1, 66 (1936).

However, federal courts have characterized federal spending under the Spending Clause to be in the nature of a contract.⁷⁶ In *Pennhurst*, the court delineated the power of Congress under the Spending Clause as such:

The legitimacy of Congress' power to legislate under the spending power thus rests on whether the state voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a state is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.⁷⁷

States can legitimately raise the question as to whether the federal government is upholding its part of the contract with its repeated under-funding of NCLB. States have ceded quite a bit of their authority to the federal government in return for a relatively small amount of federal Title I dollars as compared to the state and local levels of funding for public education.

In *South Dakota v. Dole*, Justice O'Connor, in a dissenting opinion, elucidated a line between permissible and impermissible conditions on federal monies distributed under the Spending Clause.⁷⁸ According to O'Connor, "Congress has no power under the Spending Clause to impose requirements on a grant that goes beyond specifying how the money should be spent."⁷⁹ Any other condition that Congress sets is a regulation which is permissible only if it falls within the domain of the enumerated power of Congress.⁸⁰

The Fourth Circuit Court of Appeals applied the O'Connor test in *Commonwealth of Virginia v. Riley*.⁸¹ The Appeals Court held that the federal government had overstepped its authority by failing to unambiguously state the conditions of the "contract" involving funding for special education for the Commonwealth of Virginia.⁸² The federal government withheld one hundred percent of special education funding, which totaled \$60 million, due to the state's failure to provide continuing education services to less than one-tenth of one percent of disabled students in the state.⁸³ The excluded students were special education students who had been expelled from their public schools and were not provided with continuing public education.⁸⁴ The Court

76. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

77. *Id.* (internal citations omitted).

78. *South Dakota v. Dole*, 483 U.S. 203, 215 (1987) (O'Connor, J., dissenting).

79. *Id.* at 216 (citation omitted).

80. *Id.* (citation omitted).

81. 106 F.3d 559 (4th Cir. 1997).

82. *Id.* at 561

83. *Id.* at 569.

84. *Riley*, 106 F.3d at 569.

of Appeals concluded that the federal government over-reached its constitutional authority by withholding the entire special education grant to the state and further violated the Tenth Amendment by seeking to coerce Virginia into providing a public education for the expelled, disabled students.⁸⁵

A comparable argument can be made that Congress went beyond merely telling the states how to spend the money they received under NCLB. Instead, much of the federal legislation details what states must do if they choose to accept the money (i.e. standards, assessments, annual yearly progress) and the consequences that the federal government will impose on those states and schools that do not meet NCLB's stated goals.

Second, the states might argue that the federal government has failed to fulfill its part of the contract by consistently under-funding NCLB programs.⁸⁶ However, this argument will likely be unsuccessful, as it was in *Reading School District v. Department of Education*.⁸⁷ In that case, the Pennsylvania Commonwealth Court ruled against the school district's claim that the state improperly classified thirteen of the district's schools as not meeting AYP under NCLB.⁸⁸ The school district claimed that the failure to achieve AYP was due in part to the Department's failure to provide native language testing on Pennsylvania's assessment test, and in part to the fact that state improvement plans for the school district amounted to triple the current Title I funds available.⁸⁹ The court rejected the school district's arguments, placing pressure on similar urban districts, like Reading, with high populations of "English as a Second Language students."⁹⁰

Unfortunately, urban schools, like those in the Reading District, are caught in a double bind regarding NCLB. While underfunded by Congress to meet NCLB demands, urban districts are often underfunded by their state governments and the lack of a sufficient local tax base as well. According to the latest data available, the national average spent per student is \$7,734,⁹¹ while the state of Pennsylvania exceeds the national average per student spent by \$1,100 per student.⁹² Reading School District, meanwhile, spends \$5,017 per student.⁹³ Suburban Wyomissing spends \$7,568 per student, and Schuylkill Valley spends \$7,131 per student.⁹⁴ Not only does Reading have far more subgroups that need to meet AYP, it has far less funds per student to try

85. *Id.* at 561.

86. See Jennings & Kober, *supra* note 4 for a discussion of NCLB school underfunding.

87. 855 A.2d 166 (Pa. Commw. Ct. 2004).

88. *Id.* at 168-69.

89. *Id.* at 170.

90. Asher Hawkins, *Challenge to No Child Left Behind Act Rejected*, LEGAL INTELLIGENCER, Aug. 12, 2004, at 1.

91. Adam Wilson, *State Scores Poorly on School Funding*, READING EAGLE, Jan. 6, 2005, at A1.

92. *Id.*

93. *Id.*

94. Wilson, *supra* note 91.

to meet these goals. It will be very difficult for Reading to meet the NCLB challenge.

At this point, it seems unlikely that the United States Supreme Court or any other federal court would rule that NCLB violates the Spending Clause. Unless a federal court takes this major step, it is apparent that a massive shift in the balance of power between the federal and state governments has occurred. Although state and local governments still fund the vast majority of public schools, the federal government's comparably small contribution to education allows it to hold the power to set educational policies and punishments to be applied to states and local school districts.

In one of the cruel ironies of NCLB, the federal Department of Education has prohibited states and local school boards from developing assessments that measure student achievement by considering a portfolio of student work in order to assess whether AYP requirements have been met.⁹⁵ Some state officials claim that NCLB has pre-empted state accountability systems that are working well and are superior to the NCLB approach.⁹⁶ A typical portfolio would include student writing samples, test scores, projects, homework, graduation projects, and other measures of classroom performance.⁹⁷ The federal government's objection to this approach is that it does not lend itself to standardization across a particular state.⁹⁸ NCLB encourages what Anne Lewis refers to as the testing "cult of efficiency."⁹⁹ Using a standardized test is much less time consuming and less expensive than using professional judgment to assess student achievement.

NCLB removes power from the people closest to the learning process in determining student progress. Instead, power is given to state bureaucracies to create a "one size fits all" testing regimen in order to determine the success, or more likely failure, of the public schools. To demonstrate the difficulty of meeting AYP, in 2003, 28,134 schools did not make adequate yearly progress, and approximately 6,565 schools failed for two years in a row.¹⁰⁰

95. Allen, *supra* note 6, at 397.

96. *See* Center on Education Policy, *supra* note 33, at 12. The confusion that NCLB can create is evidenced by sixty-eight percent of Florida schools earning an A or B ranking on the state assessments, while seventy-seven percent of schools failed to make the AYP required by NCLB. *Id.* *See also* Allen, *supra* note 6, at 397 describing Maine's assessment efforts that have been derailed by NCLB.

97. Allen, *supra* note 6, at 397. Tom Allen is a Democratic member of the U.S. House of Representatives who decries the effects of NCLB on his state. *Id.* at 396-97. Maine is considered to be a state with high academic standards and success, but under NCLB, many of its highly regarded schools have been placed on the failing list. *Id.* at 396. Allen asks whether Maine should lower the state's standards to reach NCLB targets as many states have done or administer an easier test to students. *Id.* at 397.

98. *Id.*

99. Anne C. Lewis, *An 'Incomplete' for the New Brand of Federalism*, 85 PHI DELTA KAPPAN 3 (2003).

100. *See* Center on Education Policy, *supra* note 33, at 3.

NCLB critics do not believe that the move toward NCLB's uncompromising requirements is meant solely as a means to improve public school performance. Some believe that NCLB is a Trojan Horse put up by President Bush and conservatives in order to knock down public education and provide an opening for private school vouchers.¹⁰¹ NCLB criticism is broad and varied. Included are criticisms of NCLB's reliance on a fixed standard rather than measures of improvement to judge a school; basing school success on a single annual test; narrowly judging a school based solely on reading and math scores; the emphasis of math and English to the detriment of other subjects;¹⁰² and measuring special education students by the same standard used for non-disabled students.¹⁰³

Critic Alfie Kohn is quite direct in his view of the intent of NCLB when he writes:

People with an animus against public schooling typically set the stage for their demolition plans by proclaiming that there isn't much there worth saving. Meanwhile, those who object are portrayed as apologists for every policy in every school. It's a very clever gambit: Either you're in favor of privatization—which is what some on the right now refer to as “reform”—or you are inexplicably satisfied with mediocrity.¹⁰⁴

Interestingly, private schools are not subject to the testing required under NCLB, so supporters of privatization do not have to worry about comparisons between public and private schools using the methods of NCLB. While some would dismiss the Trojan Horse theory as ridiculous, a senior advisor to the Republican governor of Colorado admitted that publishing school test scores was to “greatly enhance and build pressure for school choice.”¹⁰⁵ United States Senator James Jeffords, who chaired the Senate committee overseeing education from 1997 to 2001, described NCLB “as a

101. Lowell C. Rose, *Public Education's Trojan Horse?*, 85 PHI DELTA KAPPAN 2 (2003). This theory has roots before NCLB. When Pennsylvania instituted its PSSA testing under then Governor Tom Ridge, one of his proposals was to allow students to have vouchers to attend private school in order to escape “failing” public schools. This proposal had an estimated cost of \$587 million over five years. David Gondak, *Vouchers are an Expensive, Flawed Experiment*, PSEA INTERACTIVE, <http://www.psea.org/article.cfm?SID=11> (last visited Apr. 19, 2006). Some suggested that passing scores were set extremely high to assist in the failure of public schools in the state. Kellie B. Gormly, *Does State's Assessment Process Set Schools Up for Failure?*, PITTSBURGH TRIBUNE-REVIEW, Feb. 23, 2003, available at http://www.pittsburghlive.com/x/tribunereview/specialreports/enterprise2003/technology/s_119184.html.

102. Two years ago, the school district located next to mine ended social studies instruction in the fifth grade for over five weeks in order to prepare students for the PSSA. See Kristen Loschert, *Curtain Call*, NEA TODAY, Nov. 2004, at 20-29, available at <http://www.nea.org/neatoday/0411/coverstory.html>. Loschert details the reduction of the arts and other non-tested subjects in response to the pressures of standardized testing. *Id.*

103. Rose, *supra* note 101.

104. Alfie Kohn, *Test Today, Privatize Tomorrow*, EDUC. DIGEST, Sept. 2004, at 14, available at <http://www.alfiekohn.org/teaching/testtoday.htm>. (condensed from Phi Delta Kappan).

105. *Id.* at 17.

back-door maneuver ‘that will let the private sector take over public education, something the Republicans have wanted for years.’¹⁰⁶ The opportunities that NCLB provides to create failing schools are numerous and Kohn believes that this is by design.

NCLB regulations can create failing schools in a multitude of ways. By breaking out non-aggregated subgroups¹⁰⁷ (such as students with disabilities, distinct minority subgroups, students in poverty) and requiring each subgroup to meet the ninety-five percent participation rate along with the required proficiency score, NCLB will likely doom any school districts with diverse populations, such as those located in urban areas, to failure.¹⁰⁸ The bigger the school district, the more subgroups that will have to be reported, increasing the chances of failure.

To demonstrate the impact of subgroups, a hypothetical school with seven subgroups would need to meet thirty-three different standards to be able to make the AYP requirement of NCLB. The following chart illustrates these standards.¹⁰⁹

Subgroup	Reading	Reading Participation	Math	Math Participation	Attendance
All students	Met	Met	Met	Met	Met
White	Met	Met	Met	Met	
Black	Met	Met	Met	Met	
Hispanic	Met	Met	Met	Met	
Asian	Met	Met	Met	Met	
Economically Disadvantaged	Met	Met	Met	Met	
Students with Disabilities	Not Met	Met	Met	Met	

One “Not Met” anywhere in this grid would result in this hypothetical school failing to make AYP and being designated as a school in need of

106. *Id.* Jeffords is the Independent in the Senate whose defection from the GOP led to a deadlocked Senate and his removal as chair of this committee. Alan Fram, *Jeffords Bashers Bush Education Plan*, May 25, 2001, available at http://www.washingtonpost.com/wp-srv/aponline/20010525/aponline020257_000.htm.

107. States can select a reasonable size for subgroups, according to NCLB. Most states have set the subgroup level at as little as thirty students. Monty Neill, *Leaving Children Behind: How No Child Left Behind Will Fail Our Children*, 85 PHI DELTA KAPPAN 225, 226 (2003). However, a Brookings Institute study recommends subgroup size be set no lower than sixty-seven students in order to create greater reliability in the subgroup scores. *Id.* at 226.

108. *Id.*

109. See Center on Educational Policy, *supra* note 33, at 9. Chart was adapted from the charted presented there.

improvement. Failure to meet *all* thirty-three marks the next year would result in further penalties, and the school would be labeled as failing. Because NCLB requires science to be tested in the near future, fourteen more slots will be added to the grid, where a single “Not Met” results in a failure to achieve AYP. This hypothetical school is by no means an extraordinary school in terms of the number of subgroups and total number of targets needed to be met. NCLB identifies thirty-five distinct subgroups that schools must report for AYP purposes if a school’s subgroup size exceeds the number selected by the state for reporting purposes.¹¹⁰ This places an extreme burden on larger school districts because they are more likely to have multiple subgroups than smaller schools.¹¹¹ For example, Cherry Creek school district in Colorado had 118 different subgroup targets and hit ninety-six percent of them last year (113/118) but was still considered a “failing school” under NCLB.¹¹² This is an absurd outcome that has impacted several large school districts in Colorado and in all other states across the country.

Small schools also suffer under NCLB.¹¹³ Assessment results are compared to the class that took the exam in the prior school year.¹¹⁴ Because student populations may be small, there may be great variation between the test scores from year to year. The tests do not track the same children over time. Instead, they compare different groups of children from year to year to each other in order to evaluate whether a school is failing. This apples to oranges comparison of a school’s performance is misleading at best.

One of the “reforms” of NCLB is actually a trap to hurt public schools according to Kohn.¹¹⁵ By allowing parents to transfer their children from failing schools to other public schools, Kohn argues that NCLB will sandbag the schools receiving the transferring students.¹¹⁶ Under NCLB, transfer priority is to go to the students who are the lowest achieving in the failing school. The receiving school will have to count those transferring students in the next testing cycle, regardless of when they enter the school. The likely result is a decrease in the percentage of “successful” scores thus endangering the receiving school’s status as a successful school.¹¹⁷

110. See Keele, *supra* note 14, at 1113-14.

111. Holly Yettick, *Big Districts Flunk Federal Test: Progress Required By Law Unrealistic, School Systems Say*, ROCKY MTN. NEWS, Oct. 20, 2004, at 4A.

112. *Id.*

113. Center on Education Policy, *Rule Changes Could Help More Schools Meet Test Score Targets for The No Child Left Behind Act 2* (2004), available at <http://www.ctredpol.org/nclb/StateAccountabilityPlanAmendmentsReportOct2004.pdf>.

114. *Id.* at 2-3

115. See Kohn, *supra* note 104, at 18-19.

116. *Id.*

117. Although not related to this particular cause, nineteen “Blue Ribbon” schools recognized by U.S. Department of Education during President Bush’s tenure have found themselves labeled as failing schools. See Neill, *supra* note 107, at 226. In fact, a Michigan school touted by President Bush during his visit to that school as an outstanding school was placed on the list of failing schools as well. *Id.* When truly good schools find themselves on the

Ironically, one of the most serious criticisms of NCLB is that it allows individual states to set its own standards, assessments, required proficiency rates (until 2013-2014 when the proficiency rate required will be one hundred percent in all public schools), and passing scores instead of a national curriculum standard and assessment.¹¹⁸ This concession to states' rights in the realm of education has led to some bizarre results. States setting high academic standards for its students are at greater risk of receiving NCLB punishments and "reforms". States setting low academic standards have a better chance of escaping NCLB sanctions. NCLB manages to set the stage for an educational race to the bottom.¹¹⁹ For example, Texas and North Carolina use a minimum standards competency test with high passing rates that are considered to be less than rigorous.¹²⁰ In Ohio, ninety-eight percent of all students passed their high school graduation test.¹²¹ Does this mean that these three states have done an outstanding job in educating their students? On the other hand, only twenty-eight percent of Massachusetts eighth-graders were proficient on their state's science exam.¹²² Obviously, this state has poorly educated these children, until one looks at these same students' scores on an international science test. Here, if Massachusetts was ranked as a country, only perennially high-ranked Singapore tops the scores of the Massachusetts' students.¹²³ Massachusetts is second in the world, but a failure

failure list, it appears that NCLB does create some perverse results as noted by Representative Allen.

118. Allen, *supra* note 6, at 397.

119. NCLB is based purportedly on the "Texas Miracle" that occurred when Education Secretary Paige was Superintendent of Houston schools. CBS News, The 'Texas Miracle' (2004), <http://www.cbsnews.com/stories/2004/01/06/60II/printable591676.shtml>.

Unfortunately, the claims of great school improvement were uncovered by *60 Minutes*, which discovered the methods used to achieve their higher scores. *Id.* Over 3,000 drop-outs were unreported by the district. *Id.* Other drop-outs were intentionally misclassified as transferring to other schools when they dropped out of school. *Id.* Unofficial school policy was to fail at risk students in the grade prior to testing in the hopes that they would drop out. *Id.* When one female student was held back for three years in order to keep her from being tested, she finally gave up and dropped out. *Id.* Another approach was to encourage dropping out among students predicted to score poorly on the assessment. *Id.* Ironically, the NCLB model district, Houston, left many children behind by eliminating them sometimes fraudulently from the public school system. The assistant principal who blew the whistle was promptly reassigned to a different position in the district to try to force his resignation. *Id.*

120. Deborah Meier, *Standardization Versus Standards*, 84 PHI DELTA KAPPAN 190, 194 (2002). This article, even though written in the early life of NCLB, clearly points out the dangers of using mass, standardized testing to evaluate children and schools. Meier, an accomplished urban educator who has led schools in New York City and Boston also prescribes alternatives to create better schools. *Id.* Unfortunately, her ideas are not as simplistic as NCLB and as easy to implement as a one size fits all testing regimen like NCLB's "cult of efficiency" testing model.

121. *Id.*

122. *Id.* at 194.

123. *Id.*

under NCLB for not reaching the state proficiency standards created as a result of NCLB legislation. This is but one example of the many perverse effects of NCLB.

These are just a few of the realities of NCLB that have led critics to dub it not as a reform for public schools, but rather as a way to destroy public schools. Although it would be hard to prove the existence of a cabal dedicated to replacing public schools with private schools, the inflexible nature of NCLB rules and its punitive approach to school reform does raise some valid concerns.

One area of great concern to public schools is the impact of NCLB on special education. Although NCLB has had some positive effects on special education, the law's testing requirements regarding students with disabilities is another way for schools to be designated as failing.

III. THE DEVELOPMENT OF SPECIAL EDUCATION LAW IN THE UNITED STATES

A. Historical Background of Special Education

At the turn of the Twentieth Century, special education as an educational program existed primarily as manual training for children living in city slums. It was believed that this type of training would cure delinquency and moral ills of the children while teaching self-discipline and will power.¹²⁴ Often, however, children with physical or mental disabilities were shut out of public education or "frequently institutionalized or segregated in 'special schools' that suffered from inadequate funding, inferior educational curricula, and deplorable conditions."¹²⁵

The breaking down of the educational barriers for students with disabilities began in 1954. In *Brown*, the unanimous opinion noted that:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be *made available to all on equal terms*.¹²⁶

Although the *Brown* decision is most often discussed in the terms of ending racial *de jure* segregation in public schools, it also sparked the drive within the special education community to break down barriers keeping disabled children out of public schools.

124. WRIGHT, WRIGHT & HEATH, *supra* note 17, at 7.

125. ROBERT HAYMAN, *DISABILITY LAW* ch. XIII, p.1. This text was provided to students in Professor Hayman's Disability Law class.

126. *Brown v. Bd. Of Educ.*, 347 U.S. 483, 493 (1954) (emphasis added).

For the next two decades, however, millions of children were still denied an appropriate education or any education at all.¹²⁷ In 1971, a major victory was reached in *Pennsylvania Assn. for Retarded Children v. Commonwealth* (“P.A.R.C.”).¹²⁸ This case required Pennsylvania to *provide every child* with access to a free public education.¹²⁹ P.A.R.C. was expanded upon the next year in *Mills v. Bd. of Education of the District of Columbia*,¹³⁰ where the court held that “every school age child was entitled to a free public education regardless of the nature or severity of the individual’s disability.”¹³¹ Within three years of P.A.R.C. and *Mills*, Congress passed Public Law 94-142, which at the time was known as the Education for All Handicapped Children Act of 1975.¹³² When the 1975 law was reauthorized in 1990, it became known as the IDEA.¹³³ This legislation ensured that all handicapped children were provided with educational services within the context of the public school setting. The legislation also ordered that:

[t]o the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled ... [and the] removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.¹³⁴

This section of the 1975 law created the requirement that disabled students must be educated in the least restrictive environment to minimize their segregation from the general student population. The least restrictive environment is popularly referred to as “mainstreaming” disabled students.¹³⁵ Another important concept introduced in this law was the individualized education plan (“IEP”) which requires schools to tailor services, including appropriate accommodations in the learning and evaluation settings, to meet

127. *United States Code Congressional and Administrative News 1975 (U.S.C.C.A.N. 1975)* noted that of the approximately eight million children requiring special education, 1.75 million received no educational services, and 2.5 million received an inappropriate education.

128. 334 F. Supp. 1257 (E.D. Pa. 1971).

129. *Id.* at 1258.

130. 348 F. Supp. 866 (D.D.C. 1972).

131. DORIS ZAMES FLEISCHER & FREIDA ZAMES, *THE DISABILITY RIGHTS MOVEMENT: FROM CHARITY TO CONFRONTATION* 184 (2001).

132. Priscilla Pardini, *The History of Special Education*, RETHINKING SCHOOLS ONLINE (2002), http://www.rethinkingschools.org/archive/16_03/Hist163.shtml.

133. *Id.*

134. 20 U.S.C. § 1412(a)(5)(A) (2005).

135. For a discussion of the least restrictive environment (“LRE”) and mainstreaming, see the Wrightlaw website, <http://www.wrightslaw.com/info/lre.index.htm> (last visited Apr. 19, 2006). This site provides many links to statutory and case law requirements of mainstreaming students with special needs into the LRE.

the educational needs of a child with a disability.¹³⁶ While the 1975 law was a major step forward for children with disabilities, the Supreme Court would step into the fray with its first decision considering special education in *Bd. of Education v. Rowley* in 1982.¹³⁷

While the *Rowley* decision reaffirmed the broad goals of the Education for All Handicapped Children Act of 1975, Justice Rehnquist's *Rowley* opinion created tensions within special education. The Court held that a "free appropriate public education" did not require the schools to provide an opportunity to handicapped children "commensurate with the opportunity provided to other children."¹³⁸ Instead, schools were merely required to provide such access to public education to make such access meaningful.¹³⁹ A "basic floor of opportunity" was established where the education the handicapped child received was sufficient to confer some educational benefit to the child.¹⁴⁰ Schools did not have to deliver educational services designed to maximize a disabled child's potential. Rather, the school merely had to supply educational services that "should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."¹⁴¹ This portion of the *Rowley* decision, along with the IEP principles, collides with NCLB expectations for special education students.

B. Special Education Today

Prior to 1975, special education advocates fought in the courts and legislative bodies to end the public school segregation of approximately one million children with disabilities. These battles dramatically reshaped the face of public education and resulted in increased costs for local school districts.¹⁴² Students receiving special education services are no longer relegated to their own distinct classroom or curricula. Many are integrated into the regular school program while receiving some pull-out services from the special

136. 20 U.S.C. § 1414(d) (2005).

137. *Bd. of Educ. V. Rowley*, 458 U.S. 176 (1982).

138. *Id.* at 189-90.

139. *Id.* at 192.

140. *Id.* at 200.

141. *Id.* at 204. As a thirteen year veteran of teaching, I can attest that providing services reasonably calculated to enable a child to advance from grade to grade is not difficult. In a regular education classroom that is designed with assessments including tests, projects, papers, homework and participation, it is not that difficult for a student to pass with a grade of sixty percent. Depending on the weighting of the grading components, it is not impossible for a student to flunk every test given during the year and still successfully move from grade to grade. Justice Rehnquist's requirements in *Rowley* provide very little to guarantee that special education students will have a chance to be truly educated.

142. One of the biggest demands for teachers today is in special education classrooms. In my school, there are four special education teachers with three aides, while the math department has four fulltime teachers and the social studies department has five full-time teachers. While a typical social studies teacher instructs 120-145 students per day, the special education teacher may provide direct instruction to fifteen to thirty students per day in addition to providing additional services for mainstreamed students.

education teachers.¹⁴³ These changes have benefited disabled students and have been good for public education generally. However, by integrating special education students into least restrictive learning environments, the expectations of what these students can accomplish have been elevated as well. Special education advocates have secured access to appropriate educational services and programs, but now NCLB demands the same academic standards and achievement level for students with disabilities as that required of students without disabilities.

This process began in 1997 when IDEA required school districts to establish to the maximum extent appropriate educational goals for special education students that are consistent with those for other children.¹⁴⁴ Special education students also were now to be included in state and district testing, and their results on the tests were to be reported.¹⁴⁵ Failure to comply with these mandates on a state or district level held few consequences.¹⁴⁶ NCLB dramatically changed that, regarding the academic success of special education students.

IV. THE CONVERGENCE OF NCLB AND SPECIAL EDUCATION (IDEA)

The successes of special education advocates over the past quarter century have resulted in approximately ninety-six percent of students with disabilities now receiving their education in regular school buildings.¹⁴⁷ As Judy Elliot, assistant superintendent for special education in California's Long Beach Unified School District, exclaimed, "This is fantastic. For the first time, we don't have to fight to be at the table. This is for all kids, including kids with disabilities. How long have we been struggling for that?"¹⁴⁸ In this way, NCLB has had a positive effect on special education. Measures are now in place at the state level to examine the effectiveness of special education services for students, and the quality of the curriculum has been improved.

143. Olson, *supra* note 14, at 9. As Olson notes, fewer than twelve percent of special education students have disabilities associated with significant cognitive developments. *Id.* at 10. Approximately eighty percent of the children with a specific learning disability struggle, with reading. *Id.* As a regular classroom teacher who has been adjacent to three of my schools special education teachers for the past seven years, I have taught many of their students in the regular education classroom, while they go to the special education teacher during study halls or for test accommodations as part of their special education "pull-out" services. Additionally, I am the parent of two elementary school students who have IEP's. They are mainstreamed students who both receive itinerant services from an itinerant teacher. These services on average comprise five to ten percent of their weekly school time.

144. *Id.*

145. *Id.* at 9.

146. See Will, *supra* note 3.

147. Olson, *supra* note 14, at 9.

148. Olson, *supra* note 14, at 10 (quoting Judy Elliot, assistant superintendent for special education in the Long Beach Unified School District, California).

Unfortunately, the evaluation of these students ignores the gains that disabled (and non-disabled) students make over time, but instead requires them to achieve a somewhat arbitrary score on a one-shot examination in order to avoid being labeled as a failing student.¹⁴⁹ This is a cruel reality for both students with disabilities and schools with high percentages of children living in poverty.¹⁵⁰

As the difficulties of measuring the achievement of special education students by the use of one standardized test are becoming apparent,¹⁵¹ a new attitude has hit those involved with special education. The old adage; be careful what you ask for, you just might get it, comes to mind.¹⁵² As the percentage of students required to be proficient continues to rise to one hundred percent by 2013-2014, special education students may become a “major lightning rod” as more schools fail to meet the required level of proficient students.¹⁵³

NCLB requires schools to test ninety-five percent of special education students to pass the first hurdle in NCLB compliance. Any school not meeting this level automatically fails to meet NCLB standards, regardless of student scores. From the latest data available on participation of special education students on NCLB required assessments, only thirteen out of thirty-seven states that reported complete data had participation rates of ninety-five percent or better for students with a disability.¹⁵⁴ Participation rates in the thirty-seven states ranged from forty percent to one hundred percent.¹⁵⁵ According to NCLB requirements, even before examining the performance of any students, twenty-four states and many individual schools would fail to attain AYP based on the insufficient participation of children with disabilities on the state assessment.

The NCLB requirement that states must report non-aggregated sub-group scores has caused great concerns for special education instructors. One NCLB goal is to ensure that the quality of special education continues to improve. Special education students have the same right to be included in state standards, assessments and accountability systems in order to assess how well they are performing and how well the public school is meeting their needs.¹⁵⁶ While this is a worthy goal, the method to accomplish this involves

149. For instance, if a student scored a thirty-five on a grade level exam in grade three, and followed that with a sixty-nine on a grade level exam in grade four, if the required score to be proficient was seventy, this student would go into the failing column, thus negating an apparently impressive gain on his part.

150. See John Ambrosio, *No Child Left Behind: The Case of Roosevelt High School*, 85 PHI DELTA KAPPAN 709 (2004).

151. Paul T. O'Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 627-34 (2003).

152. Olson, *supra* note 14, at 10.

153. *Id.* at 9.

154. *Id.* at 15.

155. *Id.*

156. *Special Needs, Common Goals*, EDUC. WEEK, Jan. 2004, at 7 [hereinafter *Special Needs*].

measuring special education students according to the same standards and assessments as their general education peers. While schools will no longer be able to hide their special education students' performance, there is a legitimate debate about the fairness and appropriateness of requiring special needs students to meet the same standards and pass the same assessments as their non-disabled peers. On the one hand, it seems to be a natural extension of the drive toward mainstreaming and the least restrictive environment trends in special education, while on the other hand, it seems to contradict the IEP concept of the IDEA of 1997.

One of the difficulties of NCLB is that it utilizes a large-scale testing approach rather than a broader system of assessment(s). This NCLB assessment protocol creates unique challenges for special education students. The terms "special education" or "disabled" student are not easily or narrowly defined. Of the 6.6 million students currently receiving special education services, sixty-seven percent have a specific learning disability, speech, or language impairment.¹⁵⁷ Fewer than twelve percent have disabilities that present significant cognitive impairments such as mental retardation or traumatic brain injury.¹⁵⁸ Students with disabilities range across all levels of academic performance.¹⁵⁹ The federal Special Education Elementary Longitudinal Study of students with disabilities aged six to twelve found that some disabled students scored near the top of standardized tests, but that overall scores for these students were weighted in toward the lower half of the score distribution.¹⁶⁰ This has led Martha Thurlow, Director of the National Center on Educational Outcomes, to reject a blanket statement that students with disabilities cannot meet the achievement levels of other students. In fact, she goes as far to say that she believes a broad majority of students with disabilities can reach those standards.¹⁶¹ Therein, however lies a major problem. NCLB does not ask for a majority of students with disabilities to reach the standards; it requires virtually *all* students with a disability to reach the target, regardless of their personal circumstances and the nature of their disability.

Because the assessment of whether a child has reached the required standard is based on the results of a one-time narrow, rigid standardized test (a paper and pencil assessment as the *only measure*) rather than a broader measure of student achievement (of which paper and pencil assessment is just one of *several measures*), the odds are stacked against students with disabilities. In fact, NCLB has derailed many state and local initiatives to create innovative

157. *Id.*

158. *Id.* See also Olson, *supra* note 14, at 10.

159. *Special Needs*, *supra* note 156.

160. *Id.*

161. *Id.*

assessments of student learning that go beyond the old, traditional approach of a standardized test required by the federal law.¹⁶²

Pennsylvania's assessment, the Pennsylvania System of School Assessment ("PSSA"), currently tests three subjects—math, reading, and writing.¹⁶³ The lengthy test regimen often produces "test fatigue" in students across all academic levels.¹⁶⁴ To make matters more difficult for students with disabilities, approximately eighty percent of students with a specific learning disability struggle with reading.¹⁶⁵ Because reading comprises currently half of the PSSA evaluation and half of the required student assessment under NCLB, students with disabilities must overcome their disability and be evaluated according to the same scale as non-disabled students.¹⁶⁶ NCLB makes no distinction among students. Many students with disabilities can reach the proficiency levels expected by NCLB. However, for NCLB purposes this is not sufficient. While it may be admirable to expect all students with disabilities as a whole to achieve at the same level as non-disabled students, this approach grossly ignores the struggles of many students with disabilities.

NCLB does allow states latitude in determining how students with disabilities will have their assessments administered to them.¹⁶⁷ Generally, special education students are able to take advantage of accommodations based on their IEP's. Accommodations are adjustments to how tests are administered to special education students in order to ameliorate the effects of their disabilities on what the test is designed to measure.¹⁶⁸ Every state has written guidelines covering which accommodations are acceptable in administering the state assessment test to students with disabilities.¹⁶⁹ However, just like the lack of uniformity in the structure and difficulty levels

162. See Allen, *supra* note 6 at 397.

163. Pennsylvania Department of Education, Assessments (2001), available at http://www.pde.state.pa.us/a_and_t/site/default.asp?g=0.

164. Pennsylvania schools are given a two week window in which to complete the tests and are given latitude in how they will schedule the tests within the two week period. Pennsylvania Department of Education, Preliminary PSSA Testing Windows http://www.pde.state.pa.us/a_and_t/cwp/view.asp?A=106&Q=103995 (last visited Apr. 19, 2005). My school schedules the tests over four days in three hour blocks. It is not uncommon to see test fatigue among high school juniors of all academic levels. On more than one occasion, I have witnessed students who are either unwilling to take the exams or finish a fifty minute segment in less than five minutes. On one occasion, a student encouraged me to commit an unnatural act upon myself, threw a desk in my direction and stormed out of the room with expletives flying in all directions. Needless to say, he took the remainder of the PSSA under the direct supervision of the school's principal.

165. See Olson, *supra* note 14, at 10.

166. The Department of Education does allow one percent of students with disabilities to take alternative assessments. See Center on Education Policy, *supra* note 113, at 5-6.

167. See Olson, *supra* note 14.

168. See *Special Needs*, *supra* note 156, at 7.

169. *Id.*

among state assessments and standards, no uniformity exists among the states in what constitutes an acceptable accommodation.¹⁷⁰

A major difficulty arises when a student's disability is directly linked to what the assessment is attempting to measure. For example, in some states it may be acceptable to read portions of a test out loud to a student with a severe decoding handicap (affecting reading skills), while in other states this practice is banned.¹⁷¹ In states where this accommodation is banned, this practice is referred to as a non-standard accommodation or a modification.¹⁷² It is alleged that the modification directly changes the nature of the test or provides an unfair advantage to the student with a disability.¹⁷³ Unfortunately, the very point of an IEP is to enable a student to eliminate the effects of his or her disability in order to demonstrate how their learning has progressed. The school is caught in a bind. Not using the non-standard accommodation greatly increases the possibility that the student(s) needing them will fail the state evaluation, causing the school to be labeled a failing school. Remember, NCLB's goal is that *no child* will be left behind.

If the school opts to use non-standard accommodations, the results are equally harsh. In fifteen states, students are prohibited from using any non-standard accommodations, while in eighteen states an automatic zero or a score below the proficient level is assigned to that student.¹⁷⁴ Ten states exclude the results of tests taken with non-standard accommodations in determining proficiency rates of students.¹⁷⁵ No matter what approach these states use regarding non-standard accommodations, the risk to schools being labeled as failing is greatly increased. If students with disabilities are prohibited from using needed accommodations, they are likely to fail the assessment. If the non-standard accommodations are used, the students automatically fail the assessment, or their tests will not be counted, causing the school to miss the ninety-five percent participation rate on the test for the special education student subgroup. NCLB places schools in a no win situation with special education students and the required assessments.

Accommodations are important in increasing the participation of students with disabilities.¹⁷⁶ Typical accommodations for a student with an IEP include the use of a Braille exam for a blind student, a larger print version of the test for students with vision problems or decoding problems, extended time for test completion, having an aide read test directions or the test itself to the student, having the student dictate answers to a scribe, and allowing frequent

170. Lynn Olson, *All Means All*, EDUC.WEEK, Jan. 8, 2004, at 46.

171. *Id.*

172. See Olson, *supra* note 14.

173. *Id.* at 45.

174. *Id.* at 46.

175. *Id.*

176. *Id.* at 45.

breaks during testing for children with attention difficulties.¹⁷⁷ All of these accommodations and more are typically found in IEP's for students with disabilities. A three-year study at the University of Dayton found that the number of accommodations permitted on a test impacted the participation of students with disabilities.¹⁷⁸ In states with twenty-five or more permitted accommodations, about seventy-five percent of students took elementary reading tests, compared with fifty-eight percent of students in states with fewer accommodations.¹⁷⁹ Similar results were found regarding state math tests, where seventy-seven percent of students participated in the states with more accommodations, and sixty percent of students with disabilities participated in states with fewer accommodations.¹⁸⁰

However, determining what accommodations are to be used on a state assessment test is not a simple task. Ultimately, each state determines what accommodations are or are not permitted on their state assessments. However, if the state does not allow an accommodation that is typically found in a student's IEP, that student is at a double disadvantage. If the school decides not to provide the student with the needed accommodation, the student does not get the very educational services required under IDEA in order to have a better chance to pass the NCLB mandated assessment. If the school opts to provide the needed accommodation, the student will likely fare better, but his test score for NCLB purposes will either be recorded as zero or another score that is lower than proficient. Either way, the student and the school lose under this conflict between IDEA and NCLB.

Even if participation levels of students with disabilities are overcome, a major hurdle is having all of these students reach the proficiency levels required under NCLB. Initial failure rates of thirty to forty percent of the student population are not unusual for the student population being tested.¹⁸¹ Failure rates then decline over time, level off, and then begin to rise again. This is a typical progression of results for any standardized test.¹⁸² This pattern does not bode well for states attaining and then maintaining proficiency rates by 2014. While this pattern exists for all student populations, students with a disability are starting out at a major disadvantage in meeting the scores required by NCLB.

Significant achievement gaps exist between students with disabilities and their non-disabled peers.¹⁸³ For example, of thirty-nine states that provided complete data to the *Education Week 2004 State of the States* education survey, thirty had achievement gaps of thirty percentage points or more between special and general education students on fourth grade reading tests. In six

177. Olson, *supra* note 14, at 44-5.

178. *Id.* at 45.

179. *Id.*

180. *Id.*

181. See O'Neill, *supra* note 151, at 657.

182. *Id.*

183. See *Special Needs*, *supra* note 156, at 7.

states, the gap exceeded fifty percentage points.¹⁸⁴ As students aged, the gap between students with disabilities and their peers grew wider. By eighth grade, thirty-four out of thirty-nine states had gaps of greater than thirty percentage points.¹⁸⁵ Finally, on high school reading exams, thirty-two states out of thirty-six had gaps greater than thirty percentage points.¹⁸⁶ Regardless of the debate over what accommodations are appropriate, as a group, students with disabilities will have an extremely difficult time meeting the requirements of NCLB. The law which has had some benefit in improving special education will ultimately by its own terms label both the special education students and schools that serve them as failures, in spite of the progress that has been made in special education.

A seemingly reasonable suggestion for some special education students is to allow them to undergo out-of-level testing. Special education students often move from grade to grade based on their chronological age rather than their reading or math skills.¹⁸⁷ For instance, a student who is in eighth grade who reads at a fifth grade level would be tested at the fifth grade level for proficiency. This approach is currently not allowed under NCLB¹⁸⁸ and it is unlikely that this approach would be adopted in the future. One obvious criticism of out-of-level testing is that this approach would not challenge these students at their chronological grade level and could reflect low expectations on some students who could do better.¹⁸⁹

What this criticism misses is that out-of-level testing is intended as an alternative assessment for students with severe cognitive disabilities.¹⁹⁰ To require these students to perform on grade level tests at the same level as students without disabilities seems cruel and will likely result in frustrated and discouraged children. As Marjorie Gray, director of special education for a school district in Maine, stated, "We've identified them as failures, [a]nd worse, what we have done, because of the structure of No Child Left Behind, is we've identified their school as a failure."¹⁹¹ In yet another way, NCLB is unfair to children with disabilities and the schools in which they are taught.

V. CONCLUSION

While many critics of NCLB concede that it has laudable goals, the practical implementation of NCLB is fraught with problems. The law's quest to ensure

184. *Id.*

185. *Id.*

186. *Id.*

187. *See* Olson, *supra* note 170, at 50.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

that “No Child is Left Behind” smacks of the Lake Wobegon effect where everyone’s child is above average. The law ignores the realities of education and the improbability of one hundred percent of students mastering a single standardized test that is anything more than a minimum competency test. It is not impossible to envision that if NCLB remains unchanged, within a few years the vast majority of public schools will be failing under the federal law.

NCLB’s testing protocol is clearly a disservice to many children at risk, including students with disabilities. As the rate of student and school failures grow, challenges to NCLB may begin to multiply. While judicial challenges to NCLB at this point seem likely to be unsuccessful, political pressure at the state and local levels appear to be the more likely route to bring change to this federal law. This pressure will build as more “top” schools find themselves on the failing list and, at the same time, see their children being accepted and succeeding at the country’s universities.

If NCLB is left in its current state as an uncompromising, underfunded, punitive measure, it will result in a public school train wreck in the next few years. With some reasonable adjustments to the law, it is possible that it can be a force in a truly noble and key purpose—to improve the educational outcomes for all students in public schools. Certainly, NCLB has ignited a debate about standards and has created a drive to improve education for children on the edges of educational success. This has been a positive effect of this seriously flawed law. If national political leaders honestly examine the impact of this legislation and its likely effects on all public schools in the country, hopefully they will have the courage to act to make the law responsive to the legitimate concerns of the law’s shortcomings. Unfortunately, the political considerations will likely trump rational arguments to revise NCLB in order to create a more realistic, practical policy to improve our schools.¹⁹²

192. Tom Rentschler, the author, is a thirteen-year veteran of public schools. Currently, I teach at a small 600 student, grade 9-12 high school. I have seen many changes over the past years regarding a greater focus on curricular standards in all subject areas. Unfortunately, the over-emphasis on standardized testing as the means to judge both teaching and learning runs counter to what I believe makes education exciting. Education is not an exact science: it is an art. It is impossible to measure learning based on a single test, and the end result is that NCLB will take education into the past. As Deborah Meier said, NCLB is merely repackaging the old educational ideas as the new. By 2014, if NCLB stays intact in its current form, public education will be deemed as a failure when in reality, it has been for many years one of the sources of our country’s great success.