

*The Impact of No Child Left Behind on IDEA's Guarantee of Free, Appropriate Public Education for Students with Disabilities: A Critical Review of Recent Case Law*

By Lauren Kraus

When the No Child Left Behind Act (“NCLB”) was passed into law in 2002, it was met with mixed reviews from the education community. Now over seven years later, on the eve of the Act’s expiration, it is still as controversial as it was when it was first passed. One criticism that has been particularly forthcoming is NCLB’s treatment of students with disabilities, specifically in regard to standardized testing. Recent cases have illustrated the potential conflict between NCLB and the Individuals with Disabilities in Education Act (“IDEA”) stemming from their requirements and expectations for students with disabilities. Rather than shedding light on a solution, these cases illustrate that these two acts, as currently applied, may be irreconcilable. An elimination of strict regulations for NCLB is needed to bring the two pieces of legislation in-line and to ensure that students with disabilities continue to receive free, appropriate public education.

Background

The Individuals with Disabilities Education Act is the primary legislation regarding the education of students with disabilities.<sup>1</sup> Like its predecessor, the Education of the Handicapped Act (“EHA”), the IDEA focuses on addressing the unique learning challenges of students with disabilities by creating Individual Education Plans (“IEPs”). An IEP is a written plan that set achievement goals specific to each child’s individual needs.<sup>2</sup> By tailoring educational programs to individual students, schools and parents can ensure that students with disabilities receive free, appropriate public education (“FAPE”).<sup>3</sup> IDEA creates a private right of action for parents who

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<sup>1</sup> 20 U.S.C. § 1400 et seq.

<sup>2</sup> 20 U.S.C. § 1414(d).

<sup>3</sup> 20 U.S.C. § 1401(9).

believe either the school is not following their student's IEP, or that the IEP is not reasonably calculated to provide FAPE.<sup>4</sup>

What constitutes the receipt of FAPE has long been a contentious issue. The seminal case discussing the meaning of free, appropriate public education is *Board of Education of Hendrick Hudson Central School District v. Rowley*.<sup>5</sup> In *Rowley*, the Supreme Court held that in order to comply with the requirements set forth in the EHA, schools must provide “educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to ‘benefit’ from the instruction.”<sup>6</sup> However, the Court stopped short of both the District Court and Court of Appeals in holding that under the Act, schools were not required to take all measures to ensure that students *maximized* their potential.<sup>7</sup> The Court determined that the intent of Congress in passing the Act was merely to ensure that students with disabilities had access to education and not to require schools to provide more than a “basic floor of opportunity.”<sup>8</sup> In the 20 years since *Rowley* there has been considerable debate as to how to define the expectations for schools in providing FAPE.<sup>9</sup> While the definition continues to expand to include more than just a “basic floor of opportunity, the goal behind FAPE is still to provide individualized education to fits the needs of students with disabilities.

In contrast to IDEA's individualized approach, No Child Left Behind focuses on a standardizing approach to student achievement.<sup>10</sup> Through the promise of federal funding for

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<sup>4</sup> 20 U.S.C. § 1415(i)(2)(A)

<sup>5</sup> 458 U.S. 176 (1982)

<sup>6</sup> *Id.* at 188-89.

<sup>7</sup> *Id.* at 189-90.

<sup>8</sup> *Id.* at 200.

<sup>9</sup> Aron, Lester. *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?* 39 SUFFOLK U. L. REV. 1 (2005).

<sup>10</sup> Paolo G. Annino, *Final Regulations on School Assessments: An Attempt to Align the NCLBA and the IDEIA*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 830, 830 (2007).

schools that comport with the Act's requirements, NCLB purports to raise the level of achievement for all students by requiring "proficiency on challenging State academic achievement standards and state academic assessments."<sup>11</sup> Specifically, it requires that all students reach a level of proficiency on state standardized achievement exams in literacy, math, and science by 2014. In order to reach this final goal of one-hundred percent proficiency, public schools are required to meet Adequate Yearly Progress (AYP) as defined by each state.<sup>12</sup> Included in the assessment of a school's AYP is a breakdown of achievement scores based on sub-groups including "economically disadvantaged students; students of major racial and ethnic groups; students with disabilities; and students with limited English proficiency."<sup>13</sup> Students in these sub-groups must meet AYP independent of the entire school population in order for the school to meet AYP.<sup>14</sup> At least ninety-five percent of the students in each sub-group must take the assessment tests in order for the AYP determination to be considered valid.<sup>15</sup> The benefit of this disaggregation of scores is that it provides greater accountability to ensure that all students, not just the majority, are progressing. The detraction is that special education students, for one, are subjected to the same standards as other non-disabled students and these test results are determinative of whether an otherwise well-performing school can meet AYP.

NCLB and subsequent Department of Education regulations do permit schools to exclude 1% of students with the "most significant cognitive disabilities" from general assessments<sup>16</sup> and allow other disabled students to take alternative assessments based on modified academic

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<sup>11</sup> 20 U.S.C § 6301.

<sup>12</sup> 20 U.S.C §§ 6311(b)(2)(B) and (C).

<sup>13</sup> 20 U.S.C §§ 6311(b)(2)(C)(v)(II)(aa)-(dd).

<sup>14</sup> 20 U.S.C. § 6311(b)(2)(I)(i).

<sup>15</sup> 20 U.S.C. § 6311(b)(2)(I)(ii).

<sup>16</sup> 34 C.F.R. § 200.13(c)(2)(i).

standards, permitting up to 2% of passing score to be counted towards a school's AYP.<sup>17</sup> While the 1% students' test "may include substantially simplified content", the test for the additional 2% of students must cover the same grade-level content as their peers, but the schools may set modified achievement standards.<sup>18</sup> For example, a 3rd grade student with special needs who falls into the 2% category will take a test that covers the same content as her 3rd grade peers, but her test may be modified in ways such as having only three choices instead of four on the multiple choice section.<sup>19</sup> The IEP team determines which students are eligible for this alternative assessment, and once the determination is made it becomes part of a student's IEP and is therefore legally enforceable under IDEA.<sup>20</sup>

In 2004, IDEA was amended to bring the original act in line with NCLB.<sup>21</sup> The amendments require that all children with disabilities be included in state and district-wide assessments "with appropriate accommodations"<sup>22</sup> and that those accommodations be included as part of a student's IEP.<sup>23</sup> However, even though these accommodations are provided for in IDEA, the NCLB regulations still only permit 3% of students with disabilities to be counted for the purpose of determining if a school is meeting AYP. Therefore, many schools have had to make major changes in their curriculum in order to bring "gap" students, students who do not fit within the 3%, up to proficiency level so that the school will pass AYP.<sup>24</sup> Such changes in curriculum raise issues as to whether schools are violating FAPE by placing such an emphasis on

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<sup>17</sup> 34 C.F.R. §200.1(e)(2)(ii)(A). More than 2% of students may take alternative tests, however only 2% of the scores can count towards AYP meaning that the other students' scores are considered non-proficient. *Annino, supra* note 10, at 832.

<sup>18</sup> *Id.* at 200.6(a)(3)(ii).

<sup>19</sup> *Annino, supra* note 10, at 830.

<sup>20</sup> *Id.* at 830-31.

<sup>21</sup> Judith N. Levitan, *The Impact of the No Child Left Behind Act on Special Education: An Unlikely Alliance*, 28 CHILD. LEGAL RTS. J. 29, 30 (2008).

<sup>22</sup> 20 U.S.C. § 1412(a)(16)(A).

<sup>23</sup> 20 U.S.C. § 1414(d)(1)(A)(i)(VI).

<sup>24</sup> Michael Metz-Topodas, Comment, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 79 TEMP. L. REV. 1387, 1418-19 (2006).

passing standardized tests which will likely be different from the appropriate curriculum as determined for the student in his or her IEP.

### Recent Case Law

The tension created between a school's pressure to meet AYP under NCLB and a student's right to receive FAPE under IDEA is evident in recent case law addressing the interaction between the two acts. In *Board of Education for Ottawa Township High School District 140 v. Spelling*, two Illinois school districts and parents of disabled students challenged the legality of NCLB's testing requirements in light of IDEA's mandate to provide students with individualized education.<sup>25</sup> Both school districts, Ottawa Township High School District 140 and Ottawa Township Elementary School District 141, failed to meet AYP in 2004 because "most of their students with disabilities were tested at grade level standard rather than based on their IEP determined educational needs and abilities. If the achievement scores of the students with disabilities were excluded from those [district's] AYP calculations, both of those [districts] would have achieved AYP."<sup>26</sup> The districts and parents sued because they feared that the remedial action required of schools that failed to meet AYP would necessitate action that would deprive disabled students of the free, appropriate public education that they are legally entitled to under IDEA.<sup>27</sup> Specifically, the plaintiffs were concerned that the mandate for failing schools to "institut[e] and fully implement[] a new curriculum" would force the school districts to ignore disabled students' IEPs and instead create curriculum designed to improve performance of the state standardized test.<sup>28</sup>

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<sup>25</sup> 517 F.3d 922 (7th Cir. 2008).

<sup>26</sup> Board of Ottawa Twp. High Sch. v. United States Dep't of Educ., No. 05 C 00655, 2007 WL 1017808 at \*2 (N.D. Ill. March 31, 2007).

<sup>27</sup> *Id.* at \*4

<sup>28</sup> Complaint for Declaratory Judgment, *Ottawa*, No. 05 C 00655.

The district court, without reaching the merits, dismissed the suit for lack of standing and ripeness.<sup>29</sup> The court stated that while the districts were on watch status for failing to meet AYP, remedial action complained of by the districts would not be necessary unless the districts failed to meet AYP for four consecutive years.<sup>30</sup> Further, the court pointed out that even if the districts failed to meet AYP for four consecutive years, implementing new curriculum was one of six possible remedial measures for school improvement.<sup>31</sup> And even if the districts were required to change the curriculum, there was no evidence, according to the court, that such a change would necessarily harm students or conflict with IDEA.<sup>32</sup> Rather, both IDEA and NCLB require that students with disabilities be included in standardized testing and NCLB has provisions that allow alternative testing.<sup>33</sup> Thus the court concluded that the chance that the districts would need to implement remedial measure that would conflict with the IEPs was “purely speculative, dependent on the occurrence of too many intervening events, and too far off into the future to be ripe for adjudication” and therefore the plaintiffs lacked standing.<sup>34</sup>

The 7th Circuit Court of Appeals disagreed with the district court in regard to the standing issue, but ultimately came to the same conclusion.<sup>35</sup> The court held that the plaintiffs had standing because the cost of implementing NCLB was enough to constitute an injury, but found that a remand to assess the merits was unnecessary because “plaintiff’s claim is too weak to justify continued litigation.”<sup>36</sup> The court found that if there was a conflict between NCLB and

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<sup>29</sup> *Ottawa*, No. 05 C 00655, 2007 WL 1017808, at \*8.

<sup>30</sup> *Id.* at \*5

<sup>31</sup> The five alternative remedial measures are (1) replacing the school staff who are relevant to the school’s failure to make AYP; (2) significantly decreasing management authority at the school level; (3) appointing outside experts; (4) extending the school day or year for the school; or (5) restructuring the internal organization of the school. 20 U.S.C. §6316(b)(7)(C).

<sup>32</sup> *Ottawa*, No. 05 C 00655, 2007 WL 1017808, at \*6.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*8

<sup>35</sup> *Board of Educ. of Ottawa Twp. High Sch. Dist. 140 v. Spellings*, 517 F.3d 922 (7th Cir. 2008).

<sup>36</sup> *Id.* at 925

IDEA, which it neglected to directly address, NCLB, as the more recently enacted statute, would trump IDEA.<sup>37</sup>

While *Ottawa* focused on NCLB and IDEA as fundamentally at odds, other case law has interpreted the relationship between the two differently. Specifically, cases have addressed whether NCLB is incorporated into IDEA such that it raises the standard for determining FAPE. A recent case to explore this issue is *Leighy v. Laurel School District*,<sup>38</sup> in which parents of learning disabled student Amy Leighy brought suit against the school district under IDEA for failure to provide Amy with free, appropriate public education.<sup>39</sup>

Amy, a sixth grade student who suffers from a moderate neurological impairment, was identified as having a learning disability and was given speech and language therapy; learning support in reading, English and geography; and a study hall.<sup>40</sup> However, despite these accommodations, a private psychologist determined that Amy was not making reasonable progress in reading, writing, and math, based on Amy's standardized test scores that had either stayed the same or gone down between 2002 and 2003.<sup>41</sup> The psychologist recommended that Amy attend a private school where she could receive specialized training.<sup>42</sup> A hearing officer determined that Amy was not entitled to compensation for the private school services because the public school had provided her FAPE.<sup>43</sup> Amy's parents filed suit challenging this finding.

Specifically Amy's parents claimed that NCLB creates new quantitative benchmarks by which schools must measure a student's receipt of FAPE.<sup>44</sup> In other words, a student's failure to meet standardized testing proficiency was strong evidence that the student was not receiving

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<sup>37</sup> *Id.* at 926.

<sup>38</sup> 457 F.Supp.2d 546 (W.D. Pa, 2006).

<sup>39</sup> *Id.* at 549.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 550.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 560.

FAPE. Amy, while advancing through the school's curriculum, was not improving on her standardized test scores, and therefore her parents argued, her grades were poor indicators of her progress.<sup>45</sup> A Pennsylvania district court disagreed with the Leighys, holding that while IDEA does incorporate NCLB testing requirements for students with disabilities, it does not change the standards for FAPE.<sup>46</sup> The court stated that standardized test score or progress may be looked at as one factor for assessing FAPE, but that NCLB does not create a determinative standard.<sup>47</sup> Therefore, because Amy was making progress as demonstrated by her grades, the school had not failed to provide her with FAPE.<sup>48</sup>

#### Can IDEA and NCLB Work Together?

Reading these two cases in conjunction illustrates strong disconnect between the legislation and the practice of educating students with disabilities. On the one hand, schools are required to pass AYP including the scores of disabled students and yet on the other hand, the assessment of whether a student is receiving a free, appropriate education does not necessarily include that student's success of standardized test scores. If this is the case, then what is the purpose of including students with disabilities in a school's AYP? This is not to suggest that standardized test scores should replace the IEP as a measure of FAPE, but rather that including students with disabilities in NCLB testing under the current restrictions creates unnecessary tension for schools who must balance providing FAPE and passing AYP. If schools were either relieved from having to include the scores of students with disabilities or were able to count a greater percentage of alternative assessments, this tension would be significantly relieved.

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<sup>45</sup> *Id.* at 557.

<sup>46</sup> *Id.* at 562.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*



Supporters of NCLB tout the Act as a means of holding schools accountable to their special education students and heightening the standards for such students. However, schools are already accountable for the progress of students with disabilities under IDEA. This safeguard should not eliminate the need to move toward further accountability and heightened achievement standards. However, it must be considered when determining the usefulness of including test scores of students with disabilities in determining if a school is meeting AYP, particularly considering the extreme consequences facing failing schools. Many schools, like the schools in the Ottawa districts, have failed to meet AYP solely because of the test scores of their students with disabilities.<sup>49</sup> Under the current regulations the passing scores of only 3% of students taking alternative assessments go towards a schools measurement of AYP. If this cap were eliminated and the number of students who could be counted depended on the number of students who qualified based on their IEPs, schools would be relieved of the stress providing “gap” students with special instruction specifically so they can pass state tests.

Eliminating the cap would still require special education students to meet achievement standards, but prevent schools from having to choose which students to permit to take alternative assessments. It would eliminate the possibility that schools would have to choose between implementing a student’s IEP thereby denying them FAPE or passing AYP and becoming a failing school. Most importantly, it would continue to hold schools accountable for the progress of their disabled student population and at the same time ensure that schools are not failing solely because their special education students cannot meet unrealistic goals.

The potential abuse of eliminating the cap on alternative assessments would be that IEP teams could request alternative testing for students for whom it might not be appropriate, merely to improve the chances that the school meets its AYP. However, over inclusion of students in

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<sup>49</sup> Center on Education Policy, *From the Capital to the Classroom: Year 4 of No Child Left Behind* (2006), at 36-37.

alternative assessments is much less disruptive to the learning when compared with the lengths some schools currently go to to ensure that they meet AYP.<sup>50</sup> For example, under the current regulations, schools have an incentive to falsify testing result or giving students answers in order to prevent from being labeled a failing school.<sup>51</sup>

There is significant research that shows that students with learning disabilities are likely to never reach grade level proficiency on standardized exams.<sup>52</sup> In light of this, the goals of NCLB as they apply to special education students must be modified. Eliminating the cap on alternatives assessments is only the first step. The use of standardized testing in general to assess the educational development of these students must also be reevaluated.

### Conclusion

NCLB's goal of holding school accountable for the achievement of all their students is certainly praiseworthy. However, regardless of how noble its goals, it should not be allowed to override the need for individualized education and assessment for students with disabilities. A short term fix to alleviate the tension between the two acts is to remove limitations on schools as to the number of students eligible for alternative assessments. This it will return the power to decide what is appropriate for students back to those most qualified to make that individual determination, the IEP team. For the long term, educators and legislators must work together to determine if standardized testing is the most appropriate way to determine the academic achievement of students with disabilities.

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<sup>50</sup> See Richard C. Herrera, Note, *Policing State Testing Under No Child Left Behind: Encouraging Students with Disabilities to Blow the Whistle on Unscrupulous Educators*, 80 S. CAL. L. REV. 1433 (2007).

<sup>51</sup> *Id.* at 1453-54.

<sup>52</sup> Kevin S. McGrew & Jeffrey Evans, Univ. of Minn., Nat'l Ctr. on Educ. Outcomes, *Expectations for Students With Cognitive Disabilities: Is the Cup Half Empty or Half Full? Can the Cup Flow Over?* (NCEO Synthesis Report 55), 1, 5, available at <http://www.osepideasthatwork.org/toolkit/pdf/ExpectationsStudentsCogDisabilities.pdf>