

*Children Left Behind: Conflicting Special Education Legislation and Their Affect on the Increase of Children with Disabilities in the Juvenile Justice System*

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**I. INTRODUCTION**

The numbers are startling: approximately 34 percent, or 35,000, of youth offenders in the juvenile justice system have a disability and receive special education services.<sup>1</sup> In stark contrast, only 8.8 percent of children in the public school system are children with disabilities.<sup>2</sup> Further, 66 percent of male children and 75 percent of female children arrested in Cook County, Illinois meet the diagnostic criteria for a mental disorder.<sup>3</sup> As illustrated, children with disabilities are grossly overrepresented in the juvenile justice system.

The overrepresentation of children with disabilities in the juvenile justice system is traditionally explained by several theories, including the school failure theory, susceptibility theory, differential treatment theory, and meta-cognitive deficits theory.<sup>4</sup> However, all of these theories fail to reflect on the current legal issues children with disabilities face.

Many legal issues that children with disabilities face involve the growing body of legislation and case law that affects the availability of appropriate education for children with disabilities. Central to this legal framework are two pieces of legislation: The No Child Left Behind Act of 2001 (“NCLB”) and the Individuals with Disabilities Education Act (reauthorized as the Individuals with Disabilities Education Improvement Act of 2004) (“IDEA”). NCLB targets America’s failing public education system while IDEA focuses on the improvement of education for children with disabilities. Moreover, NCLB mandates improved school performance, determined by standardized tests, for all

children, including children with disabilities.<sup>5</sup> Additionally, the 2004 reauthorization of IDEA intended to reconcile the two legislations by adding provisions to align with NCLB.<sup>6</sup>

However, despite the 2004 amendments to IDEA, critics assert that NCLB and IDEA conflict with each other and create a separate set of issues that children with disabilities must face. A particularly vulnerable population affected by this suggested conflict are the children with disabilities entering the juvenile justice system. This paper will examine the perceived conflict between NCLB and IDEA and its affect on the increasing number of youth offenders with disabilities in the juvenile justice system. Specifically, the author suggests that the conflicting special education mandates have a correlating relationship to the growing population of youth with disabilities in juvenile detention facilities. Part II explores the two mandates separately, while Part III discusses the conflict between the mandates. Part IV describes the conflict's effect on children with disabilities entering the juvenile justice system; and Part V concludes with the author's brief summation. The author recognizes the depth of the issue and thus forewarns that this paper is meant to provide a brief analysis of the issues addressed.

## **II. LEGISLATION AFFECTING THE EDUCATION OF CHILDREN WITH DISABILITIES**

### *The Individuals With Disabilities Education Act*

The Constitution deliberately limits Congress' power to create legislation affecting the public education system.<sup>7</sup> However, pursuant to the Spending Clause, Congress may enforce legislation affecting public education.<sup>8</sup> In the mid-1970s and in the face of nearly one million disabled children excluded from public education,

Congress enacted the Individuals With Disabilities Education Act (originally authorized as “The Education for All Handicapped Children Act of 1975”).<sup>9</sup>

IDEA, a spending program, encourages the improvement of appropriate education for children with disabilities. In doing so, IDEA permits the federal government to fund state efforts to improve education for disabled children.<sup>10</sup> In order to receive federal funding, states must create a procedural framework in which all disabled students receive a “free and appropriate education” (FAPE).<sup>11</sup> Moreover, IDEA charges schools to provide disabled students with “special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”<sup>12</sup>

To receive services under IDEA, a child must show, on a formal evaluation, that he has a disability recognized by IDEA.<sup>13</sup> Once a child is identified as eligible for IDEA services, IDEA requires the school to create an “individualized education program” (IEP) for the student.<sup>14</sup> Generally, the IEP specifies the services to be provided to the child, how often the services should be provided, and accommodations and modifications to be provided for the student.<sup>15</sup> In addition, the IEP details the student’s present levels of performance and how the student’s disabilities affect his academic performance.<sup>16</sup> The IEP is created by a team of individuals including parents; teachers (general and special education); a person to interpret the educational implications of the child’s evaluation; and an administrator with knowledge of services available in the district who has the authority to commit those services on behalf of the child.<sup>17</sup> The IEP must also provide that the student is placed in his “least restrictive environment” (LRE) for learning.<sup>18</sup>

Further, a student's IEP must detail any testing accommodations required by the student.<sup>19</sup> The 2004 IDEA amendments assert that all schools must include students with disabilities in NCLB-mandated assessments.<sup>20</sup>

*The No Child Left Behind Act of 2001*

Promulgated in 2002, the No Child Left Behind Act serves as Congress' most progressive attempt to improve America's failing public education system. Under NCLB, each state must implement a comprehensive accountability system that measures the "adequate yearly progress" (AYP) of all students in elementary and secondary schools.<sup>21</sup> NCLB's framework assesses each student based on the same academic and content standards.<sup>22</sup> Consequently, general education students and students with disabilities are examined under the same AYP rubric despite their cognitive or behavioral learning differences.<sup>23</sup> Moreover, in order to receive funds under NCLB, a state is required to show that each school is making sufficient AYP.<sup>24</sup>

In examining AYP, NCLB also mandates that each student within a subgroup, including race/ethnicity, students with disabilities, and economically disadvantaged students, maintain sufficient AYP.<sup>25</sup> Supporters of NCLB argue that NCLB encourages accountability in schools and improves test scores for all students. However, the school's 'accountability' largely depends on the progress (or lack thereof) of students within these subgroups. Unlike IDEA, which creates an individualized program for each child, NCLB puts special education students into a subgroup, and their standardized test scores then help determine whether a school makes AYP.

Additionally, NCLB requires at least 95 percent of disabled and limited English proficiency students' scores in math and reading to be included in a state's AYP. Also, in

2006, the Department of Education announced that eligible states may exclude up to 1 percent of students from any assessment testing, and expand the percentage of students taking alternative assessments to 2 percent.<sup>26</sup>

### **III. THE CONFLICT BETWEEN NCLB & IDEA**

In a 2006 survey of Indiana educators, 82% of respondents agreed or strongly agreed that NCLB and IDEA were conflicting mandates.<sup>27</sup> The 2004 reauthorization of IDEA presented significant amendments to the legislation, intended to reconcile itself with provisions of NCLB. However, critics contend that despite the 2004 IDEA amendments conflict between the two laws still exist and have an adverse affect on children with disabilities.

Generally, NCLB promotes “assessment-based” evaluation whereby states administer state-wide standardized tests to monitor students’ AYP. If a school fails to make AYP, the school is at risk of losing its federal (Title I) funding and is put on a list of “failing schools” published in a local newspaper. Further, the “failing school” must also provide special tutoring to its students, despite the loss of its federal funding. In 2008, 31 percent, or 1,196, of Illinois schools failed to meet NCLB’s AYP standards.<sup>28</sup>

As previously discussed, under NCLB, students with disabilities are tested to the same content and cognitive standards as general education students. Since a school’s attainment of sufficient AYP depends heavily on whether its students pass standardized tests, the pressure falls on students with disabilities to reach proficiency on state assessments.<sup>29</sup>

Although IDEA and NCLB provide sufficient protections for the most severely disabled children and mildly disabled students, the mandates neglect the needs of “gap

students.” Gap students are the students who are significantly learning disabled and “whose abilities exceed the need for alternative assessment, but for whom mere testing accommodations or minor IEP changes will not provide an adequate opportunity to meet state assessment standards.”<sup>30</sup> The ‘gap student’ issue is triggered by NCLB’s restrictions on the number of disabled students allowed to take alternative assessments to meet state standards. As previously noted, NCLB only allows two percent of special education students to take alternative assessments. The IEPs of the most severely disabled students typically already have provisions regarding their participation in alternative assessments.<sup>31</sup> However, because the number of disabled students allowed to take alternative assessments is grossly limited, the ‘gap students’ cannot take alternative assessments, and tend to fail the general education state assessments.<sup>32</sup>

Furthermore, the increased content standards of NCLB forces schools to modify children with disabilities’ IEPs to ensure their success on state standardized tests. Opponents of NCLB contend that the modification of IEPs violates IDEA’s guarantee of a FAPE. This issue has been litigated in several courts around the nation, and the question as to whether NCLB violates IDEA is a pertinent issue to educators, parents, and children alike.

Recently, the Seventh Circuit addressed the conflict between NCLB and IDEA in *Bd. of Educ. of Ottawa Township v. Spellings*.<sup>33</sup> The plaintiffs, a school district, in this case asserted that NCLB violates IDEA by forcing schools to change children with disabilities’ IEPs and mandating their proficiency in general education assessments (standardized tests).<sup>34</sup> The lower court determined that the plaintiffs lacked standing on the grounds that their claim fails on the merits.<sup>35</sup> Although the Court affirmed the

judgment of the lower court, the Court affirmed on separate grounds – the plaintiffs lacked a concrete injury.<sup>36</sup> The Court held that because the school district met its targets under NCLB without problems achieving AYP, and merely anticipated future problems in continuing to achieve AYP, the school district lacked standing.<sup>37</sup> The Court noted in dicta, however, that even if the NCLB is in conflict to IDEA, “IDEA must give way” because NCLB is a newer statute.<sup>38</sup> More, the Court notes that the 2004 amendments to IDEA were put in place to reconcile the two laws, and conflict should no longer exist.<sup>39</sup>

Although the Court’s decision in *Ottawa* rests on the issue of standing, the underlying merits of the plaintiffs’ case are real and hold water. Schools fearfully face the conflicting mandates because they are forced to choose between providing appropriate education that benefits their students with disabilities or receiving federal funding to support all of their students. Moreover, in attempting to satisfy both mandates, schools are missing their AYP mark because children with disabilities are taking state assessments in a method not in accordance with their IEPs. In response, special education teachers are “teaching to the test” for special education students. Even more, some schools “push” children with disabilities out of school or into alternative educational placements in order to achieve AYP (and keep federal funding).<sup>40</sup> In the next section, the author suggests that the effect of the conflict between NCLB and IDEA on schools increases higher drop-out or school failure rates of children with disabilities. Additionally, the author suggests that this increased population is at a high risk of entering the juvenile justice system.

#### **IV. THE CONFLICT'S EFFECT ON YOUTH WITH DISABILITIES ENTERING THE JUVENILE JUSTICE SYSTEM**

Approximately twice as many students with disabilities drop out from school as typical students.<sup>41</sup> When compounded with the number of children with disabilities suspended (temporarily or permanently) for disruptive behavior, the rates of children with disabilities leaving school early are alarming. Accordingly, when children with disabilities leave school they face significant hardships including the inability to obtain meaningful employment and increased exposure to delinquency.<sup>42</sup>

Similarly, the conflicting NCLB and IDEA mandates exacerbate the potential for children with disabilities to drop-out and become exposed to delinquency. First, schools' incentive to "push" children with disabilities out of school in order to achieve AYP lends itself to higher drop out rates among special needs students. Moreover, the drop out rate is aggravated by school districts' adoption of zero tolerance policies that fail to consider mitigating circumstances for children with disabilities.<sup>43</sup> Such considerations include students with behavioral or emotional disorders whom cause disruptions during class. To illustrate, the highest drop-out rates of students with disabilities is among students with behavioral and emotional disorders.<sup>44</sup>

Second, NCLB and IDEA's effect of teachers "teaching to the test" fails to afford an appropriate education for children with disabilities. When students with disabilities are not given an education taught in a meaningful way in accordance with their IEPs, they are not likely to be engaged in the curriculum; and thus, more likely to drop out of school. Furthermore, students with disabilities who drop out have high arrest rates. Approximately one-third of students with disabilities who drop out of high school have spent at least one night in jail.<sup>45</sup> In light of the conflict between NCLB and IDEA and its



affect on students with disabilities, more children with disabilities likely become involved in the juvenile justice system.

Finally, once children with disabilities are involved in the juvenile justice system, it becomes exponentially harder for them to receive appropriate services relating to their disabilities. Specifically, if a child with disabilities has not been previously diagnosed with a disability under IDEA, then the child may face difficulties in getting an initial assessment, appropriate counseling, an attorney that understands and will adequately advocate for the child's special needs, and judicial confusion as to the child's true issues.

In sum, the conflict between NCLB and IDEA makes the above discussed hardships and difficulties a close reality for many children with disabilities.

## V. CONCLUSION

The overrepresentation of children with disabilities in the juvenile justice system is related to the conflict between the two mainstays of special education legislation. Children with disabilities are suffering from the conflict and Congress must take notice to prevent further injury against this vulnerable population. In light of the adverse affect of both NCLB and IDEA mandates on schools, Congress must advocate for modifying the requirements of assessment content standards implemented by NCLB. Despite the steam of NCLB, Congress should find that this group of children is being left behind – and finding refuge in juvenile detention centers. Accordingly, NCLB and IDEA are in dire need of true reconciliation and reform.

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<sup>1</sup> See MARY DALE BOLSON ET AL., NAT'L CTR. ON EDUC., DIS. & JUV. JUST., MEETING THE EDUCATIONAL NEEDS OF STUDENTS WITH DISABILITIES IN SHORT-TERM DETENTION FACILITIES 8 (2004); see also U.S. DEP'T. OF JUST., OFF. OF JUV. JUST. & DELINQ. PREV., JUVENILE IN CORRECTIONS 1997-PRESENT DATA (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/corrections/qa08201.asp?qaDate=2006> (last visited May

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13, 2009) (data chart provides number of children in the juvenile justice system nationally in 2006).

<sup>2</sup> Mary Magee Quinn et al., Council for Exceptional Children, *Youth With Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPT. CHILD. 339, 342 (2005).

<sup>3</sup> *Id.* at 343 (cited from L.A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCH. OF GEN. PSYCHIATRY 1133, 1133-1143 (2002)).

<sup>4</sup> Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389, 389 (1995).

<sup>5</sup> See No Child Left Behind Act of 2001, 20 U.S.C. §§ 6311(b)(2)(A)-(B) (2002).

<sup>6</sup> See Megan Roberts, *The Individuals With Disabilities Education Act: Why Considering Individuals One At A Time Creates Untenable Situations For Students and Educators*, 55 UCLA L. REV. 1041, 1052 (2008).

<sup>7</sup> See U.S. CONST. art. I § 8 (the authors of the Constitution expressly limiting Congress' power. Article X of the Constitution reserved all non-delegated powers to the sovereign states, including education.).

<sup>8</sup> U.S. CONST. art. I § 8.

<sup>9</sup> See MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, EDUCATION, LAW, POLICY, AND PRACTICE: CASES AND MATERIALS, 603-604 (Erwin Chemerinsky et al. ed., Aspen Publishers 2005).

<sup>10</sup> *Id.* at 604.

<sup>11</sup> *Id.*

<sup>12</sup> Individuals With Disabilities Education Act, 20 U.S.C.A. § 1400(d)(1)(A) (West 2006).

<sup>13</sup> 20 U.S.C.A. §§ 1401(3); also Michael Metz-Topodas, *Testing – The Tension Between The No Child Left Behind Act And The Individuals With Disabilities Education Act*, 79 TEMP. L. REV. 1387, 1404 (2006).

<sup>14</sup> 20 U.S.C.A. § 1414(d)(1)(A).

<sup>15</sup> 20 U.S.C.A. § 1414(d)(1)(A).

<sup>16</sup> See 20 U.S.C.A. § 1414(d)(1)(A).

<sup>17</sup> 20 U.S.C.A. § 1414(d)(1)(A).

<sup>18</sup> See 20 U.S.C.A. § 1412.

<sup>19</sup> 20 U.S.C.A. § 1414(d)(1)(A).

<sup>20</sup> See Metz-Topodas, *supra* note 13, at 1405.

<sup>21</sup> 20 U.S.C. §§ 6311(b)(2)(A)-(B).

<sup>22</sup> Cory L. Shindel, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J. L. & POL'Y 1025, 1025 (2004).

<sup>23</sup> *Id.*

<sup>24</sup> 20 U.S.C. §§ 6311(b)(2)(A)-(C).

<sup>25</sup> W. JAMES POPHAM, AMERICA'S "FAILING" SCHOOLS: HOW PARENTS AND TEACHERS CAN COPE WITH NO CHILD LEFT BEHIND 30 (2004).

<sup>26</sup> 34 C.F.R. 200.13(c)(2); also Press Release, U.S. Dep't. of Educ., Raising Achievement: Alternate Assessments for Students with Disabilities (Apr. 7, 2005).

<sup>27</sup> Cassandra Cole, Ctr. for Eval. & Educ. Pol. & the Indiana Inst. on Disability & Community, Indiana U., *Education Policy Brief: What is the Impact of NCLB on the*

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*Inclusion of Students with Disabilities?*, Vol. 4, Number 11, (2006), available at [http://www.ceep.indiana.edu/projects/PDF/PB\\_V4N11\\_Fall\\_2006\\_NCLB\\_dis.pdf](http://www.ceep.indiana.edu/projects/PDF/PB_V4N11_Fall_2006_NCLB_dis.pdf); also Judith N. Levitan, *The Impact of the No Child Left Behind Act on Special Education*, 28 CHILD. LEGAL RTS. J. 29, 31 (2008).

<sup>28</sup> Matt Arado, *More Illinois Schools Fail to Meet No Child Left Behind Goals*, DAILY HERALD, Oct. 22, 2008.

<sup>29</sup> Metz-Topodas, *supra* note 13, at 1417-18.

<sup>30</sup> *Id.* at 1418.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 1419.

<sup>33</sup> *Board of Education of Ottawa Township High School District 140 v. Spellings*, 517 F.3d 922 (7th Cir. 2008).

<sup>34</sup> *See id.*

<sup>35</sup> *Id.* at 924.

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

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

<sup>38</sup> *Id.* at 926.

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

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

<sup>41</sup> BRIAN COBB ET AL., NAT'L DROPOUT PREV. CTR. FOR STUDENTS WITH DISABILITIES, THE EFFECTS OF COGNITIVE BEHAVIORAL INTERVENTIONS ON DROPOUT FOR YOUTH WITH DISABILITIES 8 (2004).

<sup>42</sup> Peter E. Leone et al., Nat'l Ctr. On Educ., Disability, and Juv. Just., *School Failure, Race, and Disability: Promoting Positive Outcomes, Decreasing Vulnerability for Involvement with the Juvenile Delinquency System 2* (2003), available at [http://www.edjj.org/Publications/list/leone\\_et\\_al-2003.pdf](http://www.edjj.org/Publications/list/leone_et_al-2003.pdf).

<sup>43</sup> <http://www.ruraledu.org/resources.php?id=1955>

<sup>44</sup> COBB ET AL., *supra* note 41, at 8.

<sup>45</sup> Newman Wagner et al., *An Overview of Findings From Wave 2 of the National Longitudinal Transition Study-2* (2006), available at [http://ies.ed.gov/ncser/pdf/NLTS2\\_W2\\_overview\\_082906.pdf](http://ies.ed.gov/ncser/pdf/NLTS2_W2_overview_082906.pdf) (last visited May 14, 2009).