

# Note

## Leaving Behind a Good Idea: How No Child Left Behind Fails to Incorporate the Individualized Spirit of the IDEA

Allison S. Owen\*

### *Introduction*

Thomas hates that he cannot understand.<sup>1</sup> As far back as he can remember, he was unable to complete even the so-called simple lessons. Thomas would watch as the other students in his class easily formed the letters of their names on their papers while he struggled to do the same. Now that he is older, Thomas dreads taking tests. He even fails open book tests because he never understands what the questions are asking. Thomas often feels alone and sad that he cannot understand assignments the way his classmates can. In fact, Thomas has trouble making friends and his interactions with others often end badly. Sometimes he throws temper tantrums, unable to manage his anger because he always feels so frustrated.

Thomas is a learning-disabled student. His brain works differently, making learning more difficult for him than it is for his peers. Not only is Thomas under a lot of pressure to do well for his own benefit, but when it comes to mandated statewide assessments, he also carries the weight of his school on his shoulders. The No Child Left

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\* J.D., expected May 2010, The George Washington University Law School.

<sup>1</sup> Thomas's difficulties are drawn from the testimonials of various individuals, including Leia G., Charles Z., Eli L., Shannon W., and Carlos L., in Katherine Abramson & Blake Weinberg, National Center for Learning Disabilities, *Reflections on the Social/Emotional Aspects of LD*, formerly available at <http://www.nclld.org> (on file with author).

Behind Act<sup>2</sup> (“NCLB”), a federal school-reform law, holds states accountable for student proficiency in various academic subjects. Thomas attends a school that improved significantly in its performance on the assessments, yet the school still failed to meet the standards set forth under NCLB. This is because Thomas, as a student with a learning disability, is separately accounted for under NCLB. Although Thomas did his best, he was still one of three disabled students in his school who failed to meet proficiency on the NCLB assessment. Well over two-thirds of his 500-student school reached proficiency level in both reading and math, yet three students effectively caused the failure of the entire school.

Thomas’s story and the story of his school are not unique. Over six and a half million school-age children, nearly fourteen percent, receive some type of additional educational services through special education.<sup>3</sup> And all of them face difficult odds: compared to nondisabled students, between nineteen and forty-two percent fewer students with disabilities are able to pass state proficiency examinations; their drop-out rate is double that of nondisabled students; only fifty-five percent, as opposed to seventy-five percent of students within the general school population, receive a regular high school diploma; they are half as likely to attend college; they often avoid the “painful experience of school” and therefore have poor attendance; and according to the Census Bureau, only fifty percent of disabled individuals are employed, compared to the eighty-four percent of nondisabled individuals.<sup>4</sup>

Although enacted with good intentions, NCLB compounds the plight of disabled children and risks stripping them of their right to an individualized education under the Individuals with Disabilities Education Act<sup>5</sup> (“IDEA”). By imposing standardized testing on all students as a means of measuring a school’s progress, NCLB problematically shifts the IDEA’s focus on individualized programs that contemplate academic as well as social and developmental goals to mere performance-driven results. NCLB fails to recognize the limi-

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<sup>2</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301–7941 (2006)).

<sup>3</sup> CANDACE CORTIELLA, NAT’L CTR. FOR LEARNING DISABILITIES, REWARDS & ROADBLOCKS: HOW SPECIAL EDUCATION STUDENTS ARE FARING UNDER NO CHILD LEFT BEHIND 4 (2007) [hereinafter CORTIELLA, REWARDS & ROADBLOCKS], available at <http://www.nclb.org/images/stories/OnCapitolHill/PolicyRelatedPublications/RewardsandRoadblocks/RewardsandRoadblocks.pdf>.

<sup>4</sup> 149 CONG. REC. E644 (daily ed. Apr. 2, 2003) (statement of Rep. Stark).

<sup>5</sup> Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1482 (2006).

tations of disabled students in taking these assessments, the different pace at which many learn, and the other skills integral to their success. NCLB also fails to take nonacademic factors into account, including social, behavioral, developmental, and functional skills.

This Note proposes amending NCLB to align it with the individualized spirit of the IDEA. First, for those disabled students whose individualized education programs include a social, behavioral, developmental, or functional component, this Note proposes that these skills be included in the NCLB assessment. Second, the standards of the academic portion of the NCLB assessment should be modified to measure a disabled student's progress at a rate determined by the team responsible for the student's education.

Part I of this Note discusses the relevant provisions of NCLB and the IDEA, as well as the tension between the statutes. Part II describes how the interplay between the statutes creates negative consequences for disabled students. Part III details the proposed amendment to NCLB, and Part IV describes how the proposal addresses each of the NCLB consequences discussed in Part II.<sup>6</sup>

### *I. The Relevant Statutory Law: The IDEA and NCLB*

#### *A. The Individuals with Disabilities Education Act*

In 1990, Congress amended the Education for All Handicapped Children Act of 1975 (“EAHCA”) and renamed it the Individuals with Disabilities Education Act,<sup>7</sup> which was most recently reauthorized by Congress and President George W. Bush in 2004.<sup>8</sup> The stated purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services.”<sup>9</sup> The crux of

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<sup>6</sup> This Note does not argue that NCLB violates the IDEA and is therefore invalid. The Court of Appeals for the Seventh Circuit has already rejected this argument. *See Bd. of Educ. v. Spellings*, 517 F.3d 922, 925–26 (7th Cir. 2008) (holding that even if NCLB and the IDEA are irreconcilable in some respects, the earlier enactment (the IDEA) must yield to the newer enactment (NCLB), although this conclusion does not preclude the invalidation of state or federal regulations that claim to rely on NCLB). Rather, this Note seeks to remedy the tension between the objectives of both statutes by amending NCLB to encompass the ideals of the IDEA.

<sup>7</sup> Individuals with Disabilities Education Act, Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1141–42 (1990).

<sup>8</sup> Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; *see also* U.S. DEP'T OF EDUC., RAISING THE ACHIEVEMENT OF STUDENTS WITH DISABILITIES: NEW IDEAS FOR IDEA (2006), <http://www.ed.gov/admins/lead/speced/ideafactsheet.pdf>.

<sup>9</sup> 20 U.S.C. § 1400(d).

the IDEA lies in the “free appropriate public education” model,<sup>10</sup> the requirements of which have been interpreted by various courts, focusing on the meaning of “appropriate.”<sup>11</sup> The determination of whether a disabled student’s education is “appropriate” hinges on an individualized assessment of the student’s needs and what services were afforded to meet those needs.<sup>12</sup>

To receive the benefits the IDEA affords, a child must be formally identified as a student with a disability, as defined by the IDEA.<sup>13</sup> To determine whether a child is eligible for special education

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<sup>10</sup> The IDEA defines the term “free appropriate public education” as: special education and related services that—(A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [the Act].

*Id.* § 1401(9).

<sup>11</sup> Courts have made generalized statements concerning what constitutes an appropriate education. For example, a free appropriate public education “consists of educational instruction specially 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.” *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188–89 (1982). In addition, the educational benefit must be “meaningful” and not “trivial” or “*de minimis*.” *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 182, 184 (3d Cir. 1988).

<sup>12</sup> Parents of disabled students who bring suit often allege that their child has not been afforded an appropriate education. Courts make individualized assessments about the appropriateness of the education the disabled student received. *See, e.g., Strawn v. Mo. State Bd. of Educ.*, 210 F.3d 954, 956, 958–59 (8th Cir. 2000) (holding that student with multiple disabilities did not receive a free appropriate public education where her education with respect to sign language instruction was “wholly deficient,” given that years of evaluations of the student demonstrated “an intensive need for a language-based program that adequately considered her profound deafness”); *Mackey v. Bd. of Educ.*, 373 F. Supp. 2d 292, 297–98 (S.D.N.Y. 2005) (holding that learning disabled student’s Individual Education Program (“IEP”) afforded him a free and appropriate public education where the IEP recommended his enrollment in special classes, life skills instruction, and community-based vocational training).

<sup>13</sup> The IDEA defines a child with a disability, in general, as a child

(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1401(3)(A). It further states that children between the ages of three and nine may, at the discretion of the State and the local educational agency, include a child (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and (ii) who, by reason thereof, needs special education and related services.

services under this section, he or she will be given a formal evaluation, where a team of qualified professionals and the parents of the child will determine whether the child has a disability under the IDEA definition.<sup>14</sup> If the “disability is such that the [child] requires additional services and supports,” the child will be eligible for special education.<sup>15</sup>

Once a child is formally determined eligible for special services under the IDEA, he will receive an Individualized Education Program (“IEP”) at the beginning of each school year outlining a plan of action for his education that considers his academic, developmental, and functional needs.<sup>16</sup> The IEP is written by an IEP team, which includes the student’s parents, at least one of the student’s regular education teachers, at least one of the child’s special education teachers, a representative of the local education agency that is knowledgeable about special education and the school’s general curriculum, an individual to interpret the instructional implications of evaluation results, and whenever appropriate, the disabled student.<sup>17</sup>

An IEP describes the child’s “levels of academic achievement and functional performance” and explain how his disability “affects [his] involvement and progress in the general education curriculum.”<sup>18</sup> The IEP must also include a statement of measurable annual goals, both academic and functional, and how progress towards these goals will be measured.<sup>19</sup> Any supplementary aids and services or program modifications and supports are also described in the IEP.<sup>20</sup> These program modifications and supports are geared towards attaining annual goals, encouraging involvement in extracurricular nonacademic activities, and facilitating education and participation in these activities with other disabled and nondisabled children.<sup>21</sup> The appropriate individu-

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*Id.* § 1401(3)(B).

<sup>14</sup> *Id.* § 1414(a)(1)(A), (b)(4).

<sup>15</sup> CORTIELLA, REWARDS & ROADBLOCKS, *supra* note 3, at 5. A student must meet two requirements to establish eligibility for services under the IDEA. First, the student “must be determined to have one (or more) of the 13 disabilities listed in the IDEA.” CANDACE CORTIELLA, NAT’L CTR. FOR LEARNING DISABILITIES, IDEA PARENT GUIDE 32 (2006) [hereinafter CORTIELLA, IDEA PARENT GUIDE], available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/28/05/9a.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/28/05/9a.pdf). Second, as a result of his disability, the student must “need special education in order to make progress in school and . . . to receive benefit from the general educational program.” *Id.*

<sup>16</sup> 20 U.S.C. § 1414(d)(2)(A), (d)(3)(A)(iv).

<sup>17</sup> *Id.* § 1414(d)(1)(B).

<sup>18</sup> *Id.* § 1414(d)(1)(A)(i)(I).

<sup>19</sup> *Id.* § 1414(d)(1)(A)(i)(II), (III).

<sup>20</sup> *Id.* § 1414(d)(1)(A)(i)(IV).

<sup>21</sup> *Id.*

alized accommodations that the student will receive are also contained in the IEP.<sup>22</sup> These accommodations are those “necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments.”<sup>23</sup> If the IEP team determines that the student will use an alternate assessment, the IEP will set forth the reasons why the regular assessment is inappropriate and why the alternate assessment chosen is appropriate.<sup>24</sup> In developing the IEP, the IEP team will consider the strengths of the child, parents’ concerns, the results of the initial or most recent evaluation of the child, and “the academic, developmental, and functional needs of the child.”<sup>25</sup>

The driving force behind the shaping of IEPs is the “least restrictive environment” philosophy.<sup>26</sup> This philosophy mandates that, to the “maximum extent appropriate,” disabled children be mainstreamed—that is, educated in the same setting as children without disabilities.<sup>27</sup> Only when the nature or severity of a child’s disability, even with supplementary aids and services, precludes the child from being successful in regular education classes should the child be placed in special classes, separate schooling, or removed from the mainstream environment.<sup>28</sup>

When combined, these provisions create a mechanism by which disabled students’ needs are accounted for on an individualized basis. Under the IDEA, every disabled student has a program in place to measure his progress and to help him strive for academic, social, behavioral, developmental, and functional achievement.

### *B. No Child Left Behind*

Enacted in 2002 and signed into law by President George W. Bush, NCLB was the reauthorization of the Elementary and Secondary Education Act of 1965.<sup>29</sup> Although NCLB applies to all students and schools, the statute carves out certain conditions that affect disabled students.<sup>30</sup>

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<sup>22</sup> *Id.* § 1414(d)(1)(A)(i)(VI)(aa).

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

<sup>24</sup> *Id.* § 1414(d)(1)(A)(i)(VI)(bb).

<sup>25</sup> *Id.* § 1414(d)(3)(A).

<sup>26</sup> *Id.* § 1412(a)(5)(A).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified at 20 U.S.C. §§ 6301–7491 (2006)).

<sup>30</sup> *See* 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc).

NCLB is a performance-driven initiative that was enacted “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.”<sup>31</sup> Under NCLB, reaching this goal entails measuring progress against “common expectations for student academic achievement.”<sup>32</sup> NCLB mandates that each state compose a State Plan that “adopt[s] challenging academic content standards and challenging student academic achievement standards” that will apply to all schools and children.<sup>33</sup> Each state must have challenging academic standards in at least math, reading or language arts, and, beginning in the 2005–2006 school year, science.<sup>34</sup> These standards must describe three levels of achievement: basic, proficient, and advanced.<sup>35</sup>

The NCLB testing regime mandates that all students in a state be tested under the same standards—including disabled students.<sup>36</sup> Each state must make “adequate yearly progress” (“AYP”) toward reaching 100% proficiency by 2014.<sup>37</sup> AYP is calculated for each school as a whole as well as for various subgroups disaggregated from the general school population.<sup>38</sup> These subgroups are evaluated by separate measurable annual objectives and include economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.<sup>39</sup> To qualify as a subgroup, the number of students must allow for statistically reliable results as well as results that would not reveal personally identifiable information about any student.<sup>40</sup> No less than ninety-five percent of students in each subgroup must take the assessments.<sup>41</sup>

To measure progress, states must establish statewide annual measurable objectives.<sup>42</sup> Thus, the state will determine a minimum per-

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<sup>31</sup> *Id.* § 6301.

<sup>32</sup> *Id.* § 6301(1).

<sup>33</sup> *Id.* § 6311(b)(1)(A)–(B).

<sup>34</sup> *Id.* § 6311(b)(1)(C).

<sup>35</sup> *Id.* § 6311(b)(1)(D)(ii).

<sup>36</sup> *Id.* § 6311(b)(1)(B).

<sup>37</sup> *Id.* § 6311(b)(2)(F).

<sup>38</sup> *Id.* § 6311(b)(2)(C)(v)(I), (II).

<sup>39</sup> *Id.* § 6311(b)(2)(C)(v).

<sup>40</sup> *Id.* § 6311(b)(2)(C)(v)(II). In Washington, D.C., for example, ten students are required to ensure reporting privacy. To ensure statistical reliability, forty students must participate. D.C. OFFICE OF THE STATE SUPERINTENDENT, D.C. CONSOL. STATE APPLICATION ACCOUNTABILITY PLAN 28–29 (2009), available at <http://www.ed.gov/admins/lead/account/stateplans03/dccsa.pdf>.

<sup>41</sup> 20 U.S.C. § 6311(b)(2)(I)(ii).

<sup>42</sup> *Id.* § 6311(b)(2)(G).

centage of students—referred to in this Note as *N%*—that must meet or exceed the proficient level on state-selected academic assessments.<sup>43</sup> This percentage will apply separately to each disaggregated subgroup.<sup>44</sup> Because each subgroup must be tested on its own, the failure of any subgroup to meet the *N%* objective will result in the failure of the entire school to meet AYP, regardless of the school's overall performance.<sup>45</sup> A school's failure may then result in the withholding of funds for state administration.<sup>46</sup>

Although NCLB mandates that the same academic assessments be used for all children, it does allow for “reasonable adaptations and

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<sup>43</sup> *Id.* § 6311(b)(2)(G)(iii). The *N%* varies among states. For example, the *N%* for the 2008–2009 school year in Massachusetts is as high as 85.4% for reading and 76.5% for math. U.S. DEP'T OF EDUC., COMMONWEALTH OF MASS. CONSOL. STATE APPLICATION ACCOUNTABILITY WORKBOOK 24 (2009), available at <http://www.ed.gov/admins/lead/account/stateplans03/macsa.pdf>. In Pennsylvania, on the other hand, the 2008–2009 *N%* for reading is 63% and 56% for math. U.S. DEP'T OF EDUC., PA. CONSOL. STATE APPLICATION ACCOUNTABILITY WORKBOOK 31–32 (2007), available at <http://www.ed.gov/admins/lead/account/stateplans03/pacsa.pdf>. Other examples of 2008–2009 *N%* values include 67% for reading, 58% for math in Texas; 65% for reading, 68% for math in Florida; and 60% for reading, 59% for math in Oregon. U.S. DEP'T OF EDUC., TEX. CONSOL. STATE APPLICATION ACCOUNTABILITY WORKBOOK 11 (2009), available at <http://www.ed.gov/admins/lead/account/stateplans03/txcasa.pdf>; U.S. DEP'T OF EDUC., STATE OF FLA. CONSOL. STATE APPLICATION ACCOUNTABILITY WORKBOOK 95–96 (2009), available at <http://www.ed.gov/admins/lead/account/stateplans03/flcsa.pdf>; U.S. DEP'T OF EDUC., OR. CONSOL. STATE APPLICATION ACCOUNTABILITY WORKBOOK (2008), available at <http://www.ed.gov/admins/lead/account/stateplans03/orcsa.pdf>.

<sup>44</sup> 20 U.S.C. § 6311(b)(2)(G)(iii).

<sup>45</sup> A safe harbor provision provides that a school can still make AYP despite the failure of a subgroup if the percentage of students in the subgroup that failed decreased by ten percent from the previous year and the subgroup made progress on one or more other academic indicators. *Id.* § 6311(b)(2)(I)(i).

<sup>46</sup> *Id.* § 6311(g)(2). The U.S. Department of Education has withheld funds for noncompliance with various requirements of NCLB. For example, both Maine and Nebraska were deemed “Not Approved” when the Department decided that they would be unable to administer a fully approved assessment in the 2006–2007 school year. See Lynn Olson, *Department Raps States on Testing*, EDUC. WK., July 12, 2006, at 36, available at <http://www.edweek.org/ew/articles/2006/07/12/42peer.h25.html?status=6#apv> (updated Jan. 17, 2008); *Federal Approval by State*, EDUC. WK., <http://www.edweek.org/media/2006/07/10/42peer-map.jpg> (last visited Jan. 9, 2010). Twenty-five percent of Maine and Nebraska's fiscal year 2006 Title I, Part A administrative funds were withheld, totaling \$113,883 and \$126,741, respectively. Olson, *supra*, at 36–37. If, after entering into a compliance agreement with the Department, either state fails to meet the timelines set forth in its plan, an additional ten percent of the state's funds will be withheld. *Id.* at 36. Eight other states deemed “Approval Pending, Withholding Funds” had three or more fundamental components that were missing or that did not meet requirements. *Id.* at 36–37. Each state was to provide a timeline for meeting these requirements by the end of the 2006–2007 school year, the goals of which must be met to avoid the withholding of an additional ten percent of funds. States in this category included: Hawaii, \$46,179 withheld; Illinois, \$540,228 withheld; Kansas, \$81,754 withheld; Kentucky, \$183,956 withheld; Minnesota, \$109,437 withheld; Montana, \$41,020 withheld; South Dakota, \$38,864 withheld; and Texas, \$1,188,392 withheld. *Id.*



accommodations for students with disabilities”<sup>47</sup> and “accommodations, guidelines, and alternative assessments provided in the same manner as those provided under . . . the Individuals with Disabilities Education Act.”<sup>48</sup>

Alternate assessments for students with “the most significant cognitive disabilities” are also permitted.<sup>49</sup> This benefit is, however, of limited use. There is a one-percent cap on the number of passing scores, which includes proficient and advanced scores, based on alternate academic-achievement standards that can be used in calculating AYP.<sup>50</sup> Any passing scores exceeding one percent of all students will be counted as nonproficient.<sup>51</sup>

States must also put forth criteria for the IEP team to utilize in determining whether disabled students may use modified academic achievement standards.<sup>52</sup> At a minimum, these criteria must include a finding that the disability has precluded the student from reaching grade-level proficiency and the IEP team’s reasonably certain determination that the student will not achieve grade-level proficiency within the year.<sup>53</sup> There is a restriction on students using modified academic achievement standards as well. The number of students who pass when using modified academic achievement standards may be counted towards AYP as long as that number does not exceed two

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<sup>47</sup> 20 U.S.C. § 6311(b)(3)(C)(ix). Accommodations are “tools and procedures that provide equal access to instruction and assessment for students with disabilities.” CORTIELLA, IDEA PARENT GUIDE, *supra* note 15, at 37. Accommodations generally fall into the following categories: “Presentation (e.g., repeat directions, read aloud, use of larger bubbles on answer sheets, etc.); [r]esponse (e.g., mark answers in book, use reference aids, point, use of computer, etc.); [t]iming/[s]cheduling (e.g., extended time, frequent breaks, etc.); and [s]etting (e.g., study carrel, special lighting, separate room, etc).” *Id.*

<sup>48</sup> 20 U.S.C. § 6311(b)(2)(I)(ii).

<sup>49</sup> 34 C.F.R. § 200.1(d) (2008). These assessments must be derived from alternate academic standards that “(1) [a]re aligned with the State’s academic content standards; (2) [p]romote access to the general curriculum; and (3) [r]eflect professional judgment of the highest achievement standards possible.” *Id.* § 200.1(d)(1)–(3). An alternate assessment may come in five forms: assessment of a student performing a specified task, review of a student’s work portfolio, IEP-linked body of evidence, checklists, and traditional tests. 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, 1052 (2004).

<sup>50</sup> 34 C.F.R. § 200.13(c)(2)(i).

<sup>51</sup> *Id.* § 200.13(c)(7)(ii).

<sup>52</sup> *Id.* § 200.1(e)(1).

<sup>53</sup> *Id.* § 200.1(e)(2). These modified standards also must be “aligned to grade-level content standards” and “meet the requirements for high technical quality including validity and reliability.” *Id.* § 200.1(e)(1).

percent of all students.<sup>54</sup> If that number does exceed two percent, the excess proficient scores will be counted as nonproficient.<sup>55</sup>

In general, NCLB strives to hold schools accountable for all of their students, including the historically low-scoring subgroups. As noted below, however, it fails to recognize the individualized attention necessary for disabled students to succeed.

### C. *Tension Between the Statutes*

Although enacted with good intentions, the performance-driven nature of NCLB has a deleterious effect on the ideals behind the IDEA. NCLB contemplates benchmarked progress at a rate that applies across the board to all students. Disabled students, however, are either unable to learn at the same rate as others or need to be tested in a different manner.<sup>56</sup> The IDEA recognizes the need to assess disabled students' strengths and weaknesses individually, and puts forth a mechanism designed to accommodate disabled students in the classroom, in their assessments, in their social interactions with other students, and in their functional development.<sup>57</sup> NCLB distracts teachers and students alike from these individualized goals by making standardized performance the most important priority.<sup>58</sup> As a consequence, disabled students are likely to receive educational services based on meeting proficiency, rather than meeting their individualized needs—academic and otherwise.<sup>59</sup> NCLB therefore risks violating the

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<sup>54</sup> *Id.* § 200.13(c)(2)(ii).

<sup>55</sup> *Id.* § 200.13(c)(7)(ii).

<sup>56</sup> See Christina Fiedorowicz, *Neurobiological Basis of Learning Disabilities: An Overview*, CANADIAN CHILD CARE FEDERATION (1999), available at <http://www.ldac-taac.ca/Research/pdf/neurobio.pdf>. Scientific evidence demonstrates that there are neurobiological bases for learning disabilities, such as differences in brain structure and brain function. *Id.* These differences cause inefficiencies in the learning process, such as low accuracy or low speed, but are not signals that individuals with learning disabilities cannot learn. *Id.* Rather, “the educational process, learning strategies, compensatory techniques, and remedial intervention can significantly impact the learning process.” *Id.* Educators must therefore acknowledge the scientific evidence and create effective and efficient methods of teaching and learning, including appropriate instructional goals, content, and pace of teaching tailored specifically to the learning needs of individuals with learning disabilities. *Id.*

<sup>57</sup> See 20 U.S.C. § 1400(d)(1)(A) (2006) (“The purposes of this chapter are . . . to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”).

<sup>58</sup> 149 CONG. REC. E644 (daily ed. Apr. 2, 2003) (statement of Rep. Stark) (“[T]he current system primarily provides incentives for schools to focus on following the letter of the law rather than implementing education policies to improve students’ performance.”).

<sup>59</sup> See 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, 1398

“least restrictive environment” philosophy of the IDEA in that many students may be removed from mainstream education for remedial, strictly test-based help.

#### *D. The Importance of Nonacademic Factors*

One of the primary objectives of the IDEA is to aid disabled students in mastering nonacademic skills.<sup>60</sup> Under NCLB teachers may be forced to make these skills a low priority in exchange for focusing on NCLB-tested subjects when, as discussed below, these nonacademic skills can be integral to disabled students’ success.

##### *1. Social and Behavioral Skills*

No child learns exclusively academics in school. School is a place for social interaction and where students can learn life skills. Often, how well a child is developing social and emotional skills can be a proxy for his overall success.<sup>61</sup> Social and emotional skills, even more so than academic factors, are often accurate indicators of a learning disabled student’s success in the classroom.<sup>62</sup> Difficulty with academic subjects can breed low self-esteem, frustration, and “social alienation from teachers and classmates.”<sup>63</sup> This highlights the need for disabled children to develop social and emotional skills to sustain overall student achievement.<sup>64</sup>

Interacting with others is not merely incidental to schooling; it is one of the most important aspects of development and has far-reaching implications.<sup>65</sup> Most children learn social skills by example; however, children with learning disabilities may have trouble making and keeping friends.<sup>66</sup> Learning-disabled adolescents also interact less

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(2006) (arguing that in preparing for state assessments, disabled students may receive decreased instruction in life and social skills).

<sup>60</sup> See 20 U.S.C. § 1400(d)(1)(A) (noting that the purpose of the statute is to provide special education to children with disabilities that is designed to meet their unique needs and prepare them for further education, employment, and independent living).

<sup>61</sup> Sheldon H. Horowitz, Nat’l Ctr. for Learning Disabilities, *The Social/Emotional Side of Learning Disabilities* (Dec. 1, 2007), <http://www.ncl.org/ld-basics/ld-aamp-social-skills/social-aamp-emotional-challenges/the-socialemotional-side-of-learning-disabilities>.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* (“While the building blocks of emotional intelligence are important for all students, they are particularly important for students with [learning disabilities] . . .”).

<sup>65</sup> *Id.*

<sup>66</sup> Betty Osman, Nat’l Ctr. for Learning Disabilities, *Developing Social Skills and Relationships* (Mar. 9, 2009), <http://www.ncl.org> (search “Developing Social Skills and Relationships”).

with their peers, spending more time alone.<sup>67</sup> Many are addicted to television, computer games, and the Internet.<sup>68</sup> A lack of “social competence” keeps learning disabled children from handling social situations.<sup>69</sup> These children lack the skills necessary to achieve effective interpersonal functioning—that is, socially-valued verbal and nonverbal behaviors that elicit positive reactions from others.<sup>70</sup> Because children with learning disabilities are less able to determine how to act in social situations and are less cognizant of others’ reactions to their own actions, they often act without consideration of social consequences and suffer from a feeling of being overcriticized by others.<sup>71</sup> Understanding how children’s social difficulties relate to their disabilities is important in helping these children.<sup>72</sup> This way, disabled students can receive instruction on how to handle social situations. Increased acceptance from their peers and a greater feeling of self-confidence will likely translate into more academic success.

In forming a disabled student’s IEP, it may be appropriate for the IEP team to create a plan for developing and evaluating social skills as well. In evaluating and addressing, for example, problematic behaviors, an IEP team may use a “functional behavioral assessment,” an “approach that incorporates a variety of techniques and strategies to diagnose the causes [of problem behaviors] and to identify likely interventions intended to address problem behaviors.”<sup>73</sup> By identifying why a student is misbehaving, a behavior intervention plan can be created that helps to address the underlying problem.<sup>74</sup> The IDEA itself advises using a functional behavioral assessment approach.<sup>75</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> CTR. FOR EFFECTIVE COLLABORATION & PRACTICE, ADDRESSING STUDENT PROBLEM BEHAVIOR: AN IEP TEAM’S INTRODUCTION TO FUNCTIONAL BEHAVIORAL ASSESSMENT AND BEHAVIOR INTERVENTION PLANS 3 (2d ed. 1998) [hereinafter ADDRESSING STUDENT PROBLEM BEHAVIOR], available at [http://www.fape.org/idea/what\\_idea\\_is/osher/ideaiep.htm#necessary](http://www.fape.org/idea/what_idea_is/osher/ideaiep.htm#necessary).

<sup>74</sup> *Id.*

<sup>75</sup> Pursuant to the IDEA Amendments of 1997, “in the case of a child whose behavior impedes the child’s learning or that of others, [the IEP team] consider[s] the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” 20 U.S.C. § 1414(d)(3)(B)(i) (2006). Thus, although the above discussion of functional behavioral analysis is used in the context of disciplinary action, its existence as a means of evaluation and strategy development demonstrates the ability of IEP teams to address students’ needs individually with endorsed, sound methods.

The functional behavioral assessment can aid the IEP team in gaining information necessary to the development of IEP strategies.<sup>76</sup> In addition, this assessment will enable the IEP team to create a plan for teaching and encouraging “replacement behaviors,” such as replacing inappropriate attention-seeking behaviors with more acceptable ones.<sup>77</sup> The IEP may also contain strategies for decreasing opportunities for the student to engage in behavior detrimental to academic success; for example, by ensuring that the student receives assignments appropriate to his abilities.<sup>78</sup>

There are various techniques that can be used to perform a functional behavioral analysis. For example, the IEP team may employ an indirect assessment, which uses structured interviews with the disabled student or students, teachers, and other adults who are directly responsible for the disabled student.<sup>79</sup> Questions are designed to elicit specific information about when inappropriate behavior occurs and the circumstances surrounding it.<sup>80</sup> Commercial student questionnaires, motivational scales, and checklists are also used.<sup>81</sup> Direct assessment, another technique, entails observing and recording the situational factors surrounding the inappropriate behavior and analyzing the patterns between certain factors and the student’s responses.<sup>82</sup> This data will help determine the function of the inappropriate behavior and aid the IEP team in creating strategies to address it.<sup>83</sup> As demonstrated by the functional behavioral analysis process, IEP teams have methods available to them to evaluate the nonacademic issues disabled children face.

## 2. *Non-NCLB Subjects*

The arts, though not tested on NCLB assessments, can be integral to a disabled student’s academic and social development. Music, art, crafts, and dance give students with learning disabilities an alternate means of expressing themselves and gaining confidence.<sup>84</sup> Each of the arts involves complex thinking and problem solving skills, yet the arts

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<sup>76</sup> ADDRESSING STUDENT PROBLEM BEHAVIOR, *supra* note 73, at 3.

<sup>77</sup> *Id.* at 3–4.

<sup>78</sup> *Id.* at 4.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 6–7.

<sup>83</sup> *Id.* at 7–8.

<sup>84</sup> NAT’L CTR. FOR LEARNING DISABILITIES, LEARNING DISABILITIES AND THE ARTS (2004), [http://www.ldonline.org/article/Learning\\_Disabilities\\_and\\_the\\_Arts#](http://www.ldonline.org/article/Learning_Disabilities_and_the_Arts#).

present these skills in a different way than other traditional subjects and teaching methods.<sup>85</sup> For example, drawing and painting help with motor skills, spatial relations, and other math concepts; music aids with phonological awareness and provides an alternate method of learning, such as with repetitive songs containing academic facts; dance develops coordination, motor control, and directionality, which aid in distinguishing between left and right or between similar looking letters; and crafts allow children to express themselves in two- and three-dimensional media, helping develop problem-solving skills.<sup>86</sup>

Not only are these subject areas helpful in developing skills, but they are a good means of assessment. Tests and written reports can present more of a challenge for learning disabled students; however, projects that entail creativity and the arts allow these students to demonstrate their knowledge of a subject in a different, less constraining form.<sup>87</sup> As noted by the National Center for Learning Disabilities, simply “[b]ecause a person has difficulty learning through hearing alone or seeing alone does not mean they cannot learn. The arts offer individuals with learning disabilities dynamic ways of learning, and just as importantly, a way to fully discover their own self-worth.”<sup>88</sup>

NCLB risks taking time away from these important subjects to focus on passing NCLB tests. Allowing disabled students to take part in the arts will help them on many levels and can aid them in developing the foundational skills—such as problem-solving, critical thinking, and confidence—needed to pass more traditional tests. This is only one of the consequences NCLB has for disabled students. The next Part of this Note discusses other ways in which NCLB negatively impacts disabled students.

## *II. Consequences of NCLB That Conflict with the Ideals of the IDEA*

The NCLB testing regime has inadvertent but harmful consequences for disabled students that contradict the spirit of the IDEA. Upon reauthorizing EAHCA as the IDEA, Congress made various findings concerning the state of disabled students’ public education.<sup>89</sup> These findings shaped the purpose and provisions of the IDEA.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> 20 U.S.C. § 1400(c) (2006).

Many provisions of NCLB, however, directly conflict with remedying the problems identified by Congress.

A. *Neutralizing Up or Down to Avoid Subgroup Consideration*

1. *Neutralizing Up: Increase the Minimum, Decrease the Risk*

Because subgroups such as disabled students are considered for AYP separately, thereby increasing a school's risk of failure, schools have an incentive to increase the minimum number of students required to be considered a subgroup.<sup>90</sup> For example, in May 2006, the Commission on No Child Left Behind ("Commission") reported that only eleven percent of California schools were required to make AYP for the special education subgroup in the 2004–2005 school year.<sup>91</sup> California accomplished this by setting the subgroup minimum number at one-hundred students per grade in a particular school, or fifty students per grade in a particular school if the subgroup population was at least fifteen percent of the total school enrollment, a tactic that largely minimized school accountability.<sup>92</sup> If California were to reduce the minimum subgroup size to twenty, however, a subsequent report of the Commission revealed that 38,165 more special education students and 5,574 more schools would be held accountable under NCLB.<sup>93</sup>

Although the 2007 Regulations of the Office of the Department of Education attempted to stop this practice by requiring that each subgroup have the same minimum number of students,<sup>94</sup> states can

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<sup>90</sup> See Diana Jean Schemo, *School Achievement Reports Often Exclude the Disabled*, N.Y. TIMES, Aug. 30, 2004, at A10 (noting that approximately twelve states have increased the minimum number of disabled students before the school must report their progress as a separate group); see also CORTIELLA, REWARDS & ROADBLOCKS, *supra* note 3, at 18 (detailing how "large percentages of schools [have] escap[ed] accountability for student subgroups" by manipulating subgroup sizes, with twenty-seven states requesting an increase in their subgroup size in the years 2004–2006 alone); Paolo G. Annino, *Final Regulations on School Assessments: An Attempt to Align the NCLBA and the IDEIA*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 830, 831 (2007) ("To avoid [holding the school accountable for subgroup failure], some schools in the past have, in bad faith, artificially increased the minimum number of students required for a group of students to be considered a subgroup.").

<sup>91</sup> CORTIELLA, REWARDS & ROADBLOCKS, *supra* note 3, at 19. Because California enrolls ten percent of all public school students in the United States, this low reporting is particularly problematic. *Id.*

<sup>92</sup> *Id.* (noting that by requiring a subgroup of this size, it was unlikely that schools would have enough special education students to be held accountable for their scores).

<sup>93</sup> *Id.*

<sup>94</sup> 34 C.F.R. § 200.7(a)(2)(iv) (2008) ("[A] State may not establish a different minimum number of students under paragraph (a)(2)(i) of this section for separate subgroups under § 200.13(b)(7)(ii) or for the school as a whole.").

circumvent this regulation by increasing the minimum number of students for all subgroups for the benefit of a particularly low-performing subgroup. Increasing the minimum size of a subgroup effectively decreases state accountability for these students.<sup>95</sup>

## 2. *Neutralizing Down: No Students, No Subgroup*

In reauthorizing the IDEA, Congress found that before the enactment of the EAHCA the educational needs of millions of disabled children were not being fully met due to undiagnosed disabilities.<sup>96</sup> The IDEA was enacted in response to the issue of students going undiagnosed. Under NCLB, however, schools are incentivized to neutralize down—that is, to avoid achieving a statistically significant number of disabled students that could be disaggregated into a subgroup.<sup>97</sup>

To do so, schools may completely and inappropriately mainstream a student out of special education once he or she reaches proficiency.<sup>98</sup> Schools may also fail to diagnose a student as disabled at all, only making achievement more difficult for the student.<sup>99</sup>

There is a loophole in the IDEA itself that can aid in this type of neutralization. Under the IDEA, a student will not be formally identified as disabled if the determinant factor for such a conclusion is a lack of appropriate instruction in reading, including the essential components of reading instruction as defined by NCLB;<sup>100</sup> lack of instruction in math; or limited English proficiency.<sup>101</sup> Although this provision, new to the 2004 reauthorization of the IDEA, was intended to prevent a student from being inappropriately identified as a child

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<sup>95</sup> CORTIELLA, REWARDS & ROADBLOCKS, *supra* note 3, at 18 (“[A] 2005 study of five geographically representative states conducted by the Center for Assessment determined that once a state’s [subgroup minimum] reaches 20 or 30 students, significant percentages of special education students are not accounted for as a separate subgroup in AYP determinations.”).

<sup>96</sup> 20 U.S.C. § 1400(c)(2)(C) (2006).

<sup>97</sup> Metz-Topodas, *supra* note 59, at 1399.

<sup>98</sup> *Id.*

<sup>99</sup> See 2 PSYCHOLOGICAL & EDUCATIONAL ASSESSMENT OF CHILDREN 475 (Cecil R. Reynolds & Randy W. Kamphaus eds., 2003) (discussing the problems with diagnosis that have been noted since the passage of the IDEA and their negative effects on both schools and children); see also 150 CONG. REC. E2183 (daily ed. Dec. 7, 2004) (statement of Rep. McCollum) (“When a child is identified as having a disability at an early age, their parents and teachers are better able to address their needs and ensure they are integrated into the regular educational setting and curriculum. . . . Further efforts to increase early identification, as [the IDEA] will accomplish, will save our schools millions more in special education costs.”).

<sup>100</sup> For NCLB’s definition of the “essential components of reading instruction,” see 20 U.S.C. § 6368(3).

<sup>101</sup> 20 U.S.C. § 1414(b)(5).



with a disability,<sup>102</sup> it is susceptible to abuse. Under this provision, a school can avoid formally recognizing a student as disabled by falsely using this loophole to prevent or delay deeming the child disabled.

Avoiding acknowledgment of disability can occur on a school-wide level as well. For example, a California special education school was labeled a “program,” rather than a “school,” in order to avoid providing the school’s information on the state report card.<sup>103</sup> Although each of these practices may resemble a form of cheating, true cheating occurs within schools and classrooms as well, as the next Section details.

### *B. Teachers Cheating Under Pressure*

Teachers are under great pressure from school administrators and the state in which they teach to produce proficient students. A school may be identified for school improvement if it fails to achieve AYP for two consecutive years.<sup>104</sup> If the school again fails to achieve AYP upon completion of the second full school year after being identified, the local education agency must identify the school for corrective action.<sup>105</sup> One of the options for schools that must take corrective action is replacing the school staff that are relevant to the school’s failure to make AYP.<sup>106</sup> Although this is not an option unless the school fails for four consecutive years, teachers are still under pressure not to reach or move toward this point.

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<sup>102</sup> CORTIELLA, IDEA PARENT GUIDE, *supra* note 15, at 33.

<sup>103</sup> See Schemo, *supra* note 90 (noting that some schools do not disclose required information, such as the percentage of disabled education students that graduate high school, and that ten states have not fully reported how students perform on achievement tests tailored to disabled students).

<sup>104</sup> 20 U.S.C. § 6316(b)(1)(A).

<sup>105</sup> *Id.* § 6316(b)(7)(C). “Corrective action” entails action taken that “substantially and directly” addresses a school’s consistent academic failure as well as underlying staffing, curriculum, or other problems. Corrective action is designed to substantially increase the likelihood that all students will meet proficiency on State academic assessments. *Id.* § 6316(b)(7)(A).

<sup>106</sup> *Id.* § 6316(b)(7)(C). Other options for corrective action include the following:

Institute and fully implement a new curriculum, including providing appropriate professional development for all relevant staff, that is based on scientifically based research and offers substantial promise of improving educational achievement for low-achieving students and enabling the school to make adequate yearly progress[;] . . . [s]ignificantly decrease management authority at the school level[;] . . . [a]ppoint an outside expert to advise the school on its progress toward making adequate yearly progress, based on its school plan under paragraph (3)[;] . . . [e]xtend the school year or school day for the school[; or] . . . [r]estructure the internal organizational structure of the school.

*Id.* § 6316(b)(7)(C)(II)–(VI).

Teachers, both on their own and pursuant to directions from school administrators, have engaged in misconduct to pass AYP.<sup>107</sup> Teachers who will not cheat may be moved to nontesting grades.<sup>108</sup> Forms of cheating “rang[e] from the subtle coaching of students to the overt manipulation of test results,”<sup>109</sup> and include:

asking weak students to stay home on test day, driving weak students out of school, moving students likely to attain low test scores to a different classroom so that they can receive special assistance, extending testing time limits, providing students with correct answers during the testing period, giving students answers to test questions in advance, doctoring students’ answer sheets, and failing to submit a student’s answer sheet for scoring.<sup>110</sup>

Although a school may be able to pass AYP for the year it cheats, cheating merely produces superficial results of progress that circumvent accountability and benefit no one in the long run.

### C. Neglecting Nonacademic Goals

One of the stated purposes of the IDEA is improving educational results for disabled children and fulfilling the “national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency” for disabled individuals.<sup>111</sup> This was based on Congress’s finding that disability is a “natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society.”<sup>112</sup>

Due to the performance-driven nature of NCLB, however, disabled students may lose out on other types of IDEA-mandated in-

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<sup>107</sup> Incidences of cheating “appear to be widespread and organized . . . [E]ducators at all levels—teachers, principals, and school district officials—are all in on it.” Richard C. Herrera, *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, 1444 (2007). A study that analyzed answer booklets for Chicago public school students in grades three through eight for assessments taken from 1993 to 2000 found that cheating occurred in approximately four to five percent of classes in the study’s sample and noted that this was likely an understatement. *Id.* at 1445 (citing Brian A. Jacob & Steven D. Levitt, *Rotten Apples: An Investigation of the Prevalence and Predictors of Teacher Cheating*, 118 Q.J. ECON. 843, 846 (2003)).

<sup>108</sup> *Id.* at 1444 (describing the situation of one Texas teacher who was moved midyear from a fourth-grade testing classroom to a second-grade nontesting classroom when she raised the issue of cheating with the school principal because, according to her, “school administrators didn’t want someone asking questions”).

<sup>109</sup> *Id.* at 1443.

<sup>110</sup> *Id.* at 1443–44.

<sup>111</sup> 20 U.S.C. § 1400(c)(1).

<sup>112</sup> *Id.*

struction. The IEPs that contribute to helping disabled students become part of society and prepare them for independent living and socializing<sup>113</sup> will suffer because teaching is likely to become focused on test subjects and test-taking strategies. As a result, the NCLB regime will limit instruction devoted to the development of critical thinking skills and other life strategies that help the child on a more foundational level. Thus, the educational services students receive under NCLB will be based on meeting proficiency and not on their individualized needs.<sup>114</sup>

Another purpose of the IDEA, embodied in the least restrictive environment philosophy, addresses Congress's finding that the educational needs of many disabled children were not being fully met because of their complete exclusion from the public school system and the denial of the opportunity to be educated with their peers.<sup>115</sup> Under the NCLB testing regime, however, the problem of exclusion will be exacerbated rather than remedied. Students are likely to be removed from the classroom for remedial, test-based help in subjects tested on assessments. This, in turn, makes instruction in areas not tested on NCLB assessments a secondary goal.<sup>116</sup>

NCLB effectively removes the incentive to teach behavioral, social, functional, and developmental skills, which leaves schools with the choice of potentially failing AYP or having the IEP team ignore the student's nonacademic needs.

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<sup>113</sup> Courts have recognized the importance of developmental education. *See Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 176 (3d Cir. 1988). In *Polk*, the court recognized that for some handicapped children, the related services part of their free appropriate public education "serve as important facilitators of classroom learning." *Id.* The court noted that physical therapy is a prerequisite for other education, in that development of motor abilities is the "first step in overall educational development." *Id.* That is,

[w]here basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social and arithmetic skills, such as counting, making change, and identifying simple words.

*Id.* (citing *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3d Cir. 1980)).

<sup>114</sup> *See* Christin E. Keele, *Is the No Child Left Behind Act the Right Answer for Children with Disabilities?*, 72 UMKC L. REV. 1111, 1119 (2004) ("[M]any teachers have shifted their focus of successful teaching from the individual's improvement, to an overall concern for the schools' success.").

<sup>115</sup> 20 U.S.C. § 1400(c)(2)(B).

<sup>116</sup> *See Metz-Topodas, supra* note 59, at 1399 (observing that schools may place disabled students in separate "intensive test-preparation classes" with the goal of training them to pass NCLB assessments).

#### D. *Misuse of Alternate Assessments*

Congress found that disabled children were not receiving appropriate educational services prior to the enactment of the EAHCA.<sup>117</sup> NCLB's use of proficiency caps, however, encourages inappropriate neglect of disabled students, as well as misuse of alternate assessments. As noted above, only one percent of students using alternate assessments who reach proficiency will be counted in the AYP calculation.<sup>118</sup> To compensate for those who will be deemed nonproficient regardless of achievement because of this cap, teachers may focus on teaching nondisabled students.<sup>119</sup>

Also, because alternate assessments may be easier for certain disabled students than the standard NCLB assessment, an alternate assessment may be chosen for the student even when it is unnecessary or inappropriate.<sup>120</sup> Some argue that the one-percent cap provides a safeguard against overuse of out-of-level (i.e., below grade level) assessments that would be considered alternate assessments under NCLB.<sup>121</sup> Under this argument, the cap provides an incentive to states that were once "unwilling to develop assessments that . . . allow students with disabilities to fully demonstrate their knowledge on grade level content" to develop these assessments.<sup>122</sup>

Although this is an admirable objective, and one that the IDEA would support, the cap does not achieve this goal or provide a safeguard. If schools are concerned about school-wide failure due to disability subgroup failure, they are likely to give an alternate assessment to increase disabled students' chances of success. But if these students are deemed proficient under the alternate assessment, yet are not

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<sup>117</sup> 20 U.S.C. § 1400(c)(2)(A).

<sup>118</sup> 34 C.F.R. § 200.13(c)(2)(i) (2008).

<sup>119</sup> See Shindel, *supra* note 49, at 1074–75 (arguing that the cap "undermines accountability for the education of students with the most significant disabilities by requiring students to take assessments in which their results may not be accurately reported and may disproportionately lead to the [AYP] failure of the students with disabilities subgroup. . . . Given that the cap may cause students to be counted as non-proficient even if they demonstrate proficiency on assessments measured by alternate achievement standards, states understandably will focus their energies and resources on improving the assessment results of students without disabilities who must achieve grade-level standards and whose proficient results will be accurately reported . . .").

<sup>120</sup> See Annino, *supra* note 90, at 832 ("The [Department of Education] emphasizes that students are not to be 'identified for an alternate assessment based on modified academic achievement standards if they have not been receiving appropriate instruction.' [However,] extrinsic pressure [to make AYP] may encourage IEP teams to gloss over the appropriateness of the child's educational instruction and elect an alternate assessment even when it is questionable whether the child is receiving an appropriate educational instruction.").

<sup>121</sup> CORTIELLA, REWARDS & ROADBLOCKS, *supra* note 3, at 12.

<sup>122</sup> *Id.*

counted under the cap, it does not make a difference in the above-stated objective of incentivizing schools to develop appropriate assessments for disabled students. This is because nonproficient scores that exceed the cap are to be included at the school, local education agency,<sup>123</sup> and State level—not the subgroup level.<sup>124</sup> Thus, proficient scores exceeding the cap will still be considered proficient for the subgroup, thereby helping the subgroup to pass. Schools can then make up for the scores that exceed the cap, which are considered nonproficient,<sup>125</sup> with passing scores from the much larger general population. In other words, schools can continue to allow disabled students to take alternate assessments even where inappropriate in order for the subgroup to pass, without being affected by the one percent cap on a schoolwide level.

#### *E. Failing an Otherwise Passing School*

The story of Thomas's school is exemplified in many real situations. For example, the Board of Education for Ottawa Township as well as four special education students and their parents brought suit against the United States Department of Education, the Illinois State Board of Education, and their head officials alleging that certain provisions of NCLB violated the IDEA.<sup>126</sup> Each plaintiff school failed to reach AYP when most of their disabled students were tested at grade level standards, rather than being tested based on their IEP-determined educational needs and ability.<sup>127</sup> Both schools would have achieved AYP if the disabled students' scores were not included in the AYP calculations; yet the schools were still considered failures.<sup>128</sup>

Micro-Pine Level, a school in North Carolina, made "exceptional gains" on state tests, yet it also failed to meet the standards set forth

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<sup>123</sup> See 20 U.S.C. § 1401(19)(A) (2006) (defining local educational agency as "a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools").

<sup>124</sup> 34 C.F.R. § 200.13(c)(7)(iv) (2008).

<sup>125</sup> See *supra* notes 50–51 and accompanying text.

<sup>126</sup> *Bd. of Ottawa Twp. High Sch. Dist. 140 v. U.S. Dep't of Educ.*, No. 05 C 00655, 2007 WL 1017808, at \*1 (N.D. Ill. Mar. 31, 2007). Although on appeal from the district court's ruling that the plaintiffs lacked standing, the Court of Appeals for the Seventh Circuit held that the IDEA must yield to NCLB where irreconcilable, *Bd. of Educ. v. Spellings*, 517 F.3d 922, 926 (7th Cir. 2008), illustrating the plight of disabled students and their schools under NCLB.

<sup>127</sup> *Bd of Ottawa Twp. High Sch. Dist. 140*, 2007 WL 1017808, at \*2.

<sup>128</sup> *Id.*

by NCLB.<sup>129</sup> Although eighty-six percent of the Micro-Pine students reached proficiency in both reading and math, the failure of the special education students rendered the school a failure as a whole.<sup>130</sup> Under NCLB, thirty-four students, or 74.6%, of Micro-Pine's forty-five special education students needed to score proficient in math for the subgroup to be considered as passing AYP.<sup>131</sup> Because a handful of special education students failed, these students rendered the school of five hundred a failure as well.<sup>132</sup> This type of pressure can be crippling to both students and teachers.

The failure of a school to achieve AYP due to subgroup failure entails its own consequences. First, the hard work and adequate progress of the remainder of the school will go unrecognized. In addition, because NCLB mandates that all subgroups must reach proficiency on their own for a school to achieve AYP, a school that as a whole meets proficiency may lose funding due to the failure of one subgroup.<sup>133</sup> As discussed in the next section, such a penalty removes the very funds necessary to help improve that particular subgroup.

#### F. Sanctions for Failure

Congress's IDEA findings indicated that the lack of adequate resources for disabled students in public schools was forcing families to look outside of the public-school system for educational services.<sup>134</sup> When a school fails to meet NCLB requirements, funds can be withheld until the Secretary of Education concludes that the failing state has fulfilled the requirements.<sup>135</sup> The NCLB sanctions take away the very funding that could provide adequate resources for disabled students to remain in public school systems.<sup>136</sup> This elimination of the

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<sup>129</sup> Michael Winerip, *How a Good School Can Fail on Paper*, N.Y. TIMES, Oct. 8, 2003, at B9.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See 20 U.S.C. § 6311(g)(2) (2006) (providing that if a State fails to meet any of the NCLB requirements enacted in 2001, "the Secretary may withhold funds for State administration . . . until the Secretary determines that the State has fulfilled those requirements"). This includes a requirement that all students, including subgroups, achieve AYP. *Id.* § 6311(b)(2)(I)(i).

<sup>134</sup> *Id.* § 1400(c)(2)(D).

<sup>135</sup> *Id.* § 6311(g)(2).

<sup>136</sup> Metz-Topodas, *supra* note 59, at 1396 ("According to one state department of education officer, the reduction in federal funding following failure to reach AYP leaves schools lacking the very funds needed to implement measures to reach AYP." (citing Cory De Vera, *3 Schools in Springfield Miss Goals, Will Face Penalties*, SPRINGFIELD NEWS-LEADER, Aug. 20, 2004, at 1A)).

critical funds needed to improve failing subgroups' performance merely compounds the problem.

This is also the very funding upon which numerous votes for NCLB were predicated. That is, in the 2001 congressional debates concerning enactment of NCLB, many senators expressed their disappointment in the removal of a provision requiring mandatory funding for the IDEA.<sup>137</sup> These senators found NCLB a worthy cause; however, they made a point to address the need for IDEA funding and predicated their votes on addressing that need during the IDEA's reauthorization the following year.<sup>138</sup>

In 2002, special education was underfunded by \$500 million.<sup>139</sup> Budget cuts affecting special education programs made reaching the goals of the IDEA impossible for at least twelve more years, yet NCLB required these goals to be met in seven.<sup>140</sup> NCLB therefore places schools with disabled students in an impossible position: it removes the funds necessary for achieving the goals of the IDEA, yet it threatens to take more away when those goals are not achieved. Although NCLB needs a form of punishment for noncompliance to ensure accountability, the sanctions impose too high a price for disabled students.

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<sup>137</sup> See, e.g., 147 CONG. REC. 26,580 (2001) (statement of Sen. Wellstone) ("We have failed the test of accountability by not making the IDEA program mandatory and providing full funding."); *id.* at 26,594 (statement of Sen. Feingold) ("I regret that the House-Senate conference voted to strip a Senate provision that would have guaranteed full funding of the federal share of the . . . IDEA. This action, coupled with the new Federal testing mandate, could push already stretched local education budgets to the breaking point."); *id.* at 26,602 (statement of Sen. Lincoln) ("Unfortunately, I fell [sic.] compelled to mention one aspect of this legislation that dampens my excitement for its passage. . . . I am very disappointed that we are once again denying the promise we made to our constituents in 1975 to pay 40 percent of the costs of serving students under IDEA. In my opinion, our failure to live up to this promise undermines to some extent the very reforms we seek to advance. While Congress and the Administration continue to ignore the commitment we made 26 years ago, school districts are forced to direct more and more state and local revenues away from classroom instruction to pay the Federal share of the bill.").

<sup>138</sup> *Id.* at 26,582 (statement of Sen. Mikulski) ("I salute Senator Jeffords and Haskin [and] others who led the fight to add more money for IDEA, because at the rate we are funding IDEA it will take us to the year 2017 to fund IDEA at the 40 percent we promised 26 years ago. However, I chose not to hold up this bill over this topic because there is increased funding and next year we are going to address the issue of IDEA . . ."); *id.* at 26,604 (statement of Sen. Murray) ("I believe we must fully fund special education next year. Almost every member of our conference committee expressed a commitment to fulfilling the promise of full funding when IDEA is reauthorized. Keeping that commitment is critical to the success of education reform.").

<sup>139</sup> 148 CONG. REC. 18,944 (2002) (statement of Rep. Baca).

<sup>140</sup> *Id.*

### III. Amending NCLB to Include Individualized Assessments

To align NCLB with the IDEA, this Note proposes including a social, behavioral, development, and functional component in NCLB assessments, as well as altering the proficiency requirements for the traditional NCLB academic assessment to make these requirements more amenable to disabled students' learning pace and abilities.

#### A. Mandatory Inclusion of Disabled Students in NCLB

With the many issues caused by NCLB for disabled students, it is natural to wonder why disabled students should be included in the NCLB testing regime at all. Other proposed legislation suggests that NCLB be amended "to allow parents of special education students to exempt their children from reaching proficiency on state assessments."<sup>141</sup> This proposed exemption is based on NCLB's recognition of "parents' right to choose the 'best' education for their children . . . [as well as their right] to remove their children from . . . less than adequate educational settings."<sup>142</sup> Under this proposal, the school would not have to count the child's participation in AYP calculations.<sup>143</sup>

Leaving disabled students out of NCLB in this way would be the equivalent of renouncing the mainstreaming philosophy. Such a result would be contrary to Congress's intent in enacting the IDEA:

Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by . . . having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to . . . meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and . . . be prepared to lead productive and independent adult lives, to the maximum extent possible.<sup>144</sup>

This philosophy of mainstreaming should not end with inclusion in the classroom. The overarching principle that disabled students should be included in the general education system must start at the highest level—inclusion in nationwide accountability programs like NCLB. This is true for other subgroups who struggle: no one would suggest

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<sup>141</sup> Metz-Topodas, *supra* note 59, at 1434.

<sup>142</sup> *Id.* at 1435.

<sup>143</sup> *Id.*

<sup>144</sup> 20 U.S.C. § 1400(c)(5) (2006).



leaving students from major racial and ethnic groups or economically disadvantaged children out of the system. The key is recognizing that disabled students learn differently, not that they do not learn at all. NCLB's mandate is that no child be left behind; this includes being left out of the system itself.

In addition, NCLB's effect on disabled students is not wholly negative. NCLB does have a positive impact on the IDEA in that it imposes accountability for the IDEA requirements.<sup>145</sup> The IDEA, although imposing requirements concerning the free and appropriate public education owed to disabled students, does not include "provisions setting high expectations and holding schools accountable for their progress."<sup>146</sup> Congress itself stated that "the implementation of [the IDEA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities."<sup>147</sup> Arguably, NCLB has provided the requirement that schools be held accountable and use successful methods to improve disabled students' performance.<sup>148</sup> The accountability provided by NCLB is necessary to carrying out the IDEA's goal of aiding disabled students' educational achievement; however, it must still be aligned with the IDEA's mandate of individualized assessment.

*B. Including a Social, Behavioral, Developmental, and Functional Testing Component in Disabled Students' NCLB Assessments*

As discussed above, social, behavioral, developmental, and functional ("SBDF") skills are integral in many disabled students' educations.<sup>149</sup> This Note focuses on students whose IEPs entail an SBDF component by proposing that these skills be included as part of their NCLB assessment. In mandating this testing component, teachers will not be able to neglect nonacademic learning integral to the student's overall success by focusing exclusively on passing traditional academic subject assessments. Rather, passing AYP will depend on fulfilling all of the student's educational needs—traditional subjects and otherwise.

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<sup>145</sup> James H. Wendorf, *Foreword to CORTIELLA, REWARDS & ROADBLOCKS*, *supra* note 3, at 3.

<sup>146</sup> *Id.*; *see also id.* at 7 (describing how the practice of excluding special education students from state testing undermines school accountability).

<sup>147</sup> 20 U.S.C. §1400(c)(4).

<sup>148</sup> Wendorf, *supra* note 145, at 3.

<sup>149</sup> *See supra* Part I.D.

Assessment of disabled students under NCLB should be driven by the disabled student's IEP, as created by the IEP team.<sup>150</sup> Studies of learning-disabled students reveal that individualized programs that recognize the strengths and weaknesses of a disabled student and how his disability affects his academic and social performance are the most effective in aiding him to advance toward proficiency in a meaningful way.<sup>151</sup> The IEP team is best suited to evaluate the individualized needs of the student, the limitations imposed by his or her disability, and the best methods of testing the child's expertise in a subject because the IEP team is comprised of individuals who are closely acquainted with the student on a personal or educational level. This type of individual evaluation is already in place due to the IEP requirement and will not require burdensome additional funding.

IEP teams have means available to them to assess the nonacademic abilities of their students.<sup>152</sup> A student's IEP must already contain measurable annual functional goals and how progress towards those goals will be measured.<sup>153</sup> These goals will be the basis for SBDF testing. That is, IEP teams will look to the SBDF component already in the student's IEP and select a method by which to evaluate the student's progress. Thus, the mechanisms for SBDF testing are already in place—it is NCLB accountability that is missing.

In terms of the subgroup population, SBDF achievement will be aggregated by the same method as traditional NCLB subjects. Just as states set a statewide *N%* for traditional NCLB assessment subjects, so too will states be required to set a percentage—referred to as "*Y%*" in this Note—for how many students must pass the SBDF component to achieve AYP.<sup>154</sup> If the subgroup meets or exceeds the *Y%*, the subgroup will have passed the first AYP requirement. The following Section details the second requirement.

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<sup>150</sup> See *supra* Part I.A.

<sup>151</sup> See FIEDOROWICZ, *supra* note 56 ("Educators must recognize and accept the scientific evidence, establish policies, develop effective educational programs, and match the instructional goals, content, and pace of teaching specifically to the learning needs of individuals with [learning disabilities] so that these individuals can achieve maximum success.").

<sup>152</sup> See *supra* Part I.D.1.

<sup>153</sup> 20 U.S.C. § 1414(d)(1)(II), (III) (2006).

<sup>154</sup> Although this Note does not purport to set a *Y%*, it is desirable that both the *Y%* and *N%* in each state are similar, emphasizing that the SBDF requirement is equally important as the traditional academic requirement.

### C. Traditional NCLB Academic Subjects: Intrastudent Testing

To compensate for the additional demands of NCLB testing, the proficiency requirements for the academic portion of the NCLB assessment should be revised for disabled students with an SBDF component in their IEP. Evaluation will be based on an individualized progress percentage that uses the student's own past performance as the measure for AYP, rather than a static statewide proficiency standard. The form of assessment—standard, modified, or alternate—used for a disabled student will be the type already determined in his IEP, and students will be provided the accommodations deemed appropriate in their IEP.

Proficiency will not be determined by a student's flat score on his respective test; rather, proficiency will be based on a percentage increase in the student's score from the previous assessment. This percentage—referred to in this Note as  $X\%$ —will be determined for each individual student by his or her IEP team.<sup>155</sup> This allows a student to work toward proficiency at a pace tailored to the limitations of his disability and, in turn, precludes him from having to sacrifice SBDF goals.

A percentage also takes the student's achievements to date into account. By nature, a percentage functions in response to the number already obtained. That is, a child who scores 400 points out of 1000 points will be expected to improve by 40 points if the  $X\%$  is set at 10%.<sup>156</sup> A child who has already scored 700 points will be expected to improve more—by 70 points—because the initial score recognizes that he or she is already achieving at a higher level. Thus, rather than expecting both of these students to reach 1000 points—the flat, inflexible standard that the NCLB-type regime contemplates—the  $X\%$  takes into account the baseline from which the child is working. By using a percentage of students' own academic achievement levels, as students gain proficiency they will be expected to make greater strides each year.

The IEP team is best suited to make the  $X\%$  determination. IEP teams make these types of judgments when setting measurable annual

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<sup>155</sup> An exact determination of the  $X\%$  is outside of the scope of this Note. This percentage should at least, however, be based on sound research concerning the limitations posed by specific types of disabilities, evaluation of the severity of an individual student's disability, and the student's past and present achievement.

<sup>156</sup> This percentage is for demonstrative purposes only. This Note does not advocate what percentage would be appropriate. This is a judgment for IEP teams, using the factors enumerated *supra* in note 155.

goals<sup>157</sup> for a student's IEP. Examples of annual goals include: Thomas will write ten sentences with correct punctuation; Thomas will use a date book for appointments and assignments; Thomas will solve multistep word problems; and Thomas will stand at least two feet away from the other person while conversing.<sup>158</sup> Although these types of annual goals are not appropriate for assessing a standard NCLB test, it is these types of judgments about what a student should be able to accomplish that are the basis for the judgment about what percentage increase a student should be able to make on the assessment. The IEP team is the most closely acquainted with the student's abilities and is in the best position to judge how well a student will be able to perform on an NCLB assessment.

1. *The Problems with Static Standards: Pennsylvania, for Example*

Under the current, inflexible NCLB regime, Pennsylvania uses the Pennsylvania Performance Index to determine whether a student is proficient in a subject.<sup>159</sup> To be considered proficient, a third grade student must score 1180 or greater on the math portion of the test and 1235 or greater on the reading portion.<sup>160</sup> In the 2008 school year, sixty-three percent of students must meet proficiency in reading and fifty-six percent must meet proficiency in math in order for the school to pass AYP.<sup>161</sup> Depending on their scores, students are placed in the

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<sup>157</sup> According to the National Association of Special Education Teachers: Annual goals are statements that identify what knowledge, skills and/or behaviors a student is expected to be able to demonstrate within the period of time beginning with the time the IEP is implemented until the next scheduled review. . . . Measurable annual goals set the general direction for instruction and assist in determining specific courses, experiences, and skills a student will need to reach his or her vision. . . . The goal must include at least three parts: 1. expected change in performance—specifies the anticipated change in performance from a baseline and usually reflects an action or can be directly observed; 2. proposed area of change—identifies skill, knowledge, understanding or behavior; and 3. proposed criteria [that] specify the amount of growth, how much and how frequent, or to what standard or level of proficiency.

Nat'l Ass'n of Special Educ. Teachers: Determining Measurable Annual Goals in an IEP, <http://www.naset.org/760.0.html> (last visited Dec. 1, 2009).

<sup>158</sup> *Id.*

<sup>159</sup> Pa. Dep't of Educ., Pennsylvania Accountability System [hereinafter Pa. Accountability System], [http://www.portal.state.pa.us/portal/server.pt/community/pennsylvania\\_accountability\\_system\\_%28pas%29/8752/fact\\_sheet/510191](http://www.portal.state.pa.us/portal/server.pt/community/pennsylvania_accountability_system_%28pas%29/8752/fact_sheet/510191) (last visited Jan. 9, 2009).

<sup>160</sup> Pa. Dep't of Educ., Pennsylvania Performance Index [hereinafter Pa. Performance Index], [http://www.portal.state.pa.us/portal/server.pt/community/pennsylvania\\_accountability\\_system\\_%28pas%29/8752/pa\\_performance\\_index/510220](http://www.portal.state.pa.us/portal/server.pt/community/pennsylvania_accountability_system_%28pas%29/8752/pa_performance_index/510220) (last visited Jan. 9, 2009).

<sup>161</sup> Pa. Accountability System, *supra* note 159.

“Low Below Basic,” “High Below Basic,” “Low Basic,” “High Basic,” or “Proficient/Advanced” category.<sup>162</sup>

## 2. *Applying the Proposal to Thomas*

Assume that Thomas initially scores 850 in math and 1050 in reading, placing him in the Low Below Basic category in both subjects. According to the NCLB plan, Thomas would have to reach proficiency—that is, raise his score 330 points (39%) in math and 185 points (18%) in reading—to meet AYP. Thomas would have to go from Low Below Basic—the lowest category—to Proficient/Advanced—the highest category—all in one year. Even with accommodations, this is a lofty goal.

This Note’s proposal aims to lighten this burden, allowing Thomas to make a percentage increase in his scores, not necessarily reaching standardized proficiency, but progressing at a pace appropriate to his disability. Thomas’s IEP team determines that based upon his abilities and limitations, Thomas could increase his scores by ten percent.<sup>163</sup> Thus, Thomas would have to score ten percent higher—85 points higher in math, 105 points higher in reading—on the following year’s exam, placing him in the High Below Basic category for both subjects.<sup>164</sup> Although this is below the proficiency level, Thomas has still made progress on par with what the IEP team determined his disability allows. Thus, Thomas should be deemed to have satisfied this component of his *own* Average Yearly Progress—the essence of the IDEA.

## D. *Measuring Subgroup Proficiency*

States already have a minimum percentage,  $N\%$ , of students that must reach proficiency to satisfy AYP. This percentage applies to subgroups as well. If  $N\%$  of students in the disabled student subgroup have improved by  $X\%$  on the traditional NCLB assessment, and  $Y\%$  of students have passed the SBDF assessment, the subgroup will be considered to have met AYP.

In Pennsylvania, the  $N\%$  is 63% for reading and 56% for math.<sup>165</sup> Thus, applying the proposal to Thomas, if 63% of Thomas’s fellow disabled students make the percentage progress determined by their IEP teams (their  $X\%$ ) in reading, 56% of them make the percentage

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<sup>162</sup> Pa. Performance Index, *supra* note 160.

<sup>163</sup> This percentage is for demonstrative purposes only.

<sup>164</sup> Pa. Performance Index, *supra* note 160.

<sup>165</sup> Pa. Accountability System, *supra* note 159.

progress in math, and if the  $Y\%$  set by Pennsylvania for SBFD is achieved, then the subgroup should be considered as satisfying AYP.

*IV. Addressing the Consequences: How Alignment Helps Disabled Students, Their Teachers, and Their Schools*

In brief summary, this Note proposes to amend NCLB to include two requirements for passing AYP: a social, behavioral, developmental, and functional assessment as well as an altered version of the traditional NCLB assessment. The former requires that a student's IEP team choose a method of assessment to evaluate the student's SBDF performance. In addition, the state must require a certain percentage of students to pass the SBDF assessments. The latter requires the IEP team to set a percentage by which a student must improve his scores on traditional NCLB subjects to be considered proficient. The state will have already set the percentage of students who must attain proficiency.

Both of these amendments work to align NCLB with the ideals of the IDEA and to combat the negative consequences of NCLB detailed in Part II. This Part discusses how this proposal reduces the negative impact that the current NCLB regime has on disabled students and addresses potential criticisms.

*A. Neutralizing Up or Down to Avoid Subgroup Consideration*

The practice of neutralizing up or down implicitly recognizes that the current NCLB testing regime does not work. Allowing a student to be evaluated with testing methods tailored to his disability and personal learning pace decreases the risk that he will fail. The significance of the number of students in a subgroup is minimized because these students will likely fare better in the subgroup.

In addition, evaluating students as formally disabled increases the chance that they will pass. Without the proposed amendment, students may be left to sink or swim in the mainstream in the hope that the impact on the larger group will be minimal, as opposed to allowing them to fail in a smaller subgroup, which could cause school-wide failure. Under the proposed amendment, however, formally identifying children as disabled will allow them to be evaluated in a way tailored to their own pace, placing them in the best environment for them and their school to succeed.

### *B. Teachers Cheating Under Pressure*

Faith must be placed in the IEP team's judgment that a student can succeed under the percentage increase the team has designated. IEP teams, as noted above, are in the best position to make these assessments.<sup>166</sup>

Although there will always be pressure on teachers to aid students in achieving their goals, there is more room under the proposal for upfront evaluation in the setting of those goals. If teachers feel they are more in control of the pressure put on their students, they may in turn feel less pressure on themselves.

### *C. Neglecting Nonacademic Goals*

The proposed amendment will not just allow for, but will mandate that teachers do not neglect the social, behavioral, functional, and developmental needs outlined in a student's IEP by including these needs in the NCLB assessment.

In addition, the individualized percentage increases allow for more forgiving standards, leaving time for other forms of instruction. This proposal recognizes that unlike other children who can focus solely on math and reading, disabled students who need instruction on SBFD skills have more on their plates. Allowing the IEP to set reasonable, yet challenging, goals for their students recognizes this incongruity. The relaxed percentage requirement will also allow for the teaching of important foundational skills that show disabled students how to independently analyze problems in general—not just on tests.

### *D. Misuse of Alternate Assessments*

When a school chooses an unnecessary or inappropriate alternate assessment for a student, it increases the possibility that some students who actually pass will be deemed nonproficient because of the one-percent cap. To compensate for this, the focus may turn to teaching nondisabled students.

Under the proposed amendment, however, IEP teams will be responsible for setting the  $X\%$  they believe a student can achieve. Rather than being forced to choose between a much too high standard for the student—passing the NCLB regular assessment—or a much too low standard for the student—an unnecessary alternate assessment—the IEP team will be able to tailor the standard to the individual student. Thus, a student who is unlikely to meet proficiency taking

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<sup>166</sup> See *supra* Part III.B.

the NCLB assessment even with accommodations, but who can still make substantial gains, will be allowed to take the more challenging test without being held to the stringent NCLB passing standard. Because IEP teams will not have to choose between two inappropriate extremes, alternate assessments will be reserved for those students who truly need them.

*E. Addressing Criticisms*

*1. Over-Relaxing Standards*

Because IEP teams, rather than the state, will determine the  $X\%$  increase for each student, one may argue that IEP teams will relax the standards too much so that students will pass, thereby allowing schools to avoid accountability for the progress—or lack thereof—made by these students.

In the context of a federally mandated accountability system there will always be pressure on schools and their administrations to be successful. The role of the IEP team, however, is to act in the best interest of the individual student. The IEP team is comprised of the professionals and family members who know the student best,<sup>167</sup> and presumably the goal of each of these individuals is to challenge the student and create a program that will set him up for success. Because this proposal gives the IEP team the leeway to find the right level of achievement for the student, rather than choosing between extremes, the temptation to choose the lower end of the achievement scale will be significantly decreased.

The presence of parents in the IEP team also reduces the problem of low standard setting. Parents are more personally invested in the student's success and will likely put the interest of their child first, rather than the interest of the school in achieving AYP. In addition, in appropriate circumstances the student may be part of the IEP team. The student is likely to know what he can handle and will want to succeed to the best of his ability.

Another potential means of combating the problem of overly relaxed standards is to provide a check on the IEP team. A neutral party unrelated to the local educational agency could oversee a school's IEP teams to ensure that they are setting appropriate standards.

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<sup>167</sup> See *supra* note 17 and accompanying text.



## 2. *Individualization Is Too Expensive*

Although individualized assessments can be expensive, these measures are already in place through the provisions of the IDEA. An IEP is mandated by the IDEA for every disabled student;<sup>168</sup> thus, the IEP team has already determined—and will revise if necessary—the best methods of assessment for each student. Determining the *X*% is a natural extension of the types of decisionmaking already engaged in by IEP teams.

## 3. *Amendments for Other Subgroups*

In addition to disabled students, NCLB identifies three other subgroups as needing special attention and improvement: economically disadvantaged students, students from major racial and ethnic groups, and students with limited English proficiency.<sup>169</sup> Like disabled students, these groups may struggle to meet proficiency. One can argue that if disabled students are allowed special progression rates, so too should other subgroups. These groups, however, are not already legally entitled to individualized methods of assessment in the way disabled students are.<sup>170</sup>

## *Conclusion*

NCLB has taken a step in the right direction by holding schools accountable for the progress made by all children, including disabled students. The IDEA, however, demands more from the system than accountability. It demands individualized assessment and instruction, and it demands it in more than just math and reading. NCLB should be aligned with the spirit of the IDEA by introducing a social, behavioral, developmental, and functional component to the NCLB assessment for those students whose IEPs require progress in these areas. In addition, the AYP of these students should be based on their own past performance, allowing the IEP team most closely acquainted with the student's disability to set the standards for his or her progress. By applying the ideals of the IDEA to NCLB, these amendments will give disabled students an even greater chance of success.

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<sup>168</sup> 20 U.S.C. § 1414(d)(2)(A) (2006).

<sup>169</sup> *Id.* § 6311(b)(2)(C)(v)(II).

<sup>170</sup> Although there may be merit to the argument that NCLB has an unfair impact on these subgroups as well, they are outside the scope of this Note and therefore have not been addressed.