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**ONE STANDARD FITS ALL? DEFINING
ACHIEVEMENT STANDARDS FOR
STUDENTS WITH COGNITIVE DISABILITIES
WITHIN THE NO CHILD LEFT BEHIND
ACT'S STANDARDIZED FRAMEWORK**

*Cory L. Shindel**

INTRODUCTION

In January 2002, following years of debate about the best means of improving America's failing public schools, Congress passed the No Child Left Behind Act of 2001 ("NCLB").¹ In an effort to unify national education standards, NCLB mandates that each state implement a single, statewide accountability system for its elementary and secondary schools to monitor the state's and each school's adequate yearly progress.² NCLB's accountability

* Brooklyn Law School Class of 2005; B.A. Penn State University, 2001. The author would like to thank her parents, Leonard and Maxine Shindel, for their encouragement and inspiration. She also wishes to thank the staff of the *Journal of Law and Policy* for their careful work. Special thanks to Peter Romer-Friedman for his gentle criticism and unfailing support.

¹ No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2002) (reauthorizing the Elementary and Secondary Education Act).

² See 20 U.S.C. § 6301(4) (2002) (stating as one of the purposes of the NCLB "holding schools, local educational agencies, and States accountable for improving the academic achievement of all students"); 20 U.S.C. § 6301(6) (stating as one of the purposes of the NCLB "improving and strengthening accountability, teaching, and learning by using assessment systems designed to ensure that students are meeting challenging State academic achievement and content standards"); 20 U.S.C. § 6311(b)(2)(A)-(B) (2002) (describing the required contents of state accountability systems that provide for adequate yearly progress for all students).

model is decidedly structured and requires that all students in a state, including general education students, students for whom English is a second language, and students with disabilities, pass assessments with the same content and academic standards.³ If any subgroup (for example, students with disabilities) fails to make progress toward 100 percent success on math and reading exams, the entire school is considered to have failed to make adequate yearly progress.⁴ Failing to make adequate yearly progress in two straight years leads to the identification of a school as in need of improvement.⁵ A school's failure to make adequate yearly progress by the end of the second year after this identification triggers the NCLB's corrective action provisions, which permit parents to

³ 20 U.S.C. § 6311(b)(1)(A)-(B); 34 C.F.R. § 200.6 (2003) (mandating the inclusion of all students). Academic content standards mandate what students learn while achievement standards mandate how well they must learn to be considered "proficient" by their states. *See* NAT'L CTR. FOR EDUCATIONAL OUTCOMES, ACCOUNTABILITY FOR RESULTS IN THE NO CHILD LEFT BEHIND ACT—WHAT IT MEANS FOR CHILDREN WITH DISABILITIES (Aug. 2003), available at http://education.umn.edu/nceo/OnlinePubs/NCLB_disabilities.html. Although 100 percent student participation is the goal, the NCLB requires that at least 95 percent of students in each group participate in assessments in order to account for absenteeism, medical emergencies, and other factors. 20 U.S.C. § 6311(b)(2)(I)(ii).

⁴ 20 U.S.C. § 6311(b)(2)(I) (describing the requirements for a school's annual improvement); 20 U.S.C. § 6316(b)(2)(C)(v)(II) (2002) (outlining the subgroups for which separate measurable objectives are required to determine adequate yearly progress); 20 U.S.C. § 6316(b)(7)(A) (addressing corrective action for schools). *But see* 20 U.S.C. § 6311(b)(2)(I)(i) (stating that a school may make adequate yearly progress even if a subgroup within the school fails to demonstrate proficiency in the assessed subjects "if the percentage of students in that group who did not meet or exceed the proficient level of academic achievement on the State assessments . . . for that year decreased by 10 percent of that percentage from the preceding school year and that group made progress on one or more . . . academic indicators . . ."). This is commonly known as the "safe harbor" provision. CTR. ON EDUC. POL'Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT 1, 24 (Jan. 2004) (discussing the adequate yearly progress provisions of NCLB), available at http://www.ctredpol.org/pubs/nclby2/cep_nclb_y2.pdf.

⁵ 20 U.S.C. § 6316(b)(1)(A) (describing that a school is identified as in need of improvement following two consecutive years of adequate yearly progress failure).

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transfer their children to passing schools.⁶

NCLB, like the Individuals with Disabilities Education Act (“IDEA”), recognizes that special education students may require unique accommodations to take standardized state assessments and requires that states accommodate these students according to their individualized education programs (“IEPs”).⁷ An IEP sets individualized long- and short-term academic goals for students with disabilities, and outlines the educational accommodations or modifications necessary for an individual student’s education and assessment.⁸ Generally, accommodations noted in a student’s IEP do not change the basic material covered by assessments, but rather, allow for adaptations such as time extensions or formatting in Braille.⁹

⁶ 20 U.S.C. § 6316(b)(7)(C)(i)-(iv) (outlining the methods of corrective action available to local educational agencies).

⁷ 20 U.S.C. § 6311(b)(3)(C)(ix)(II) (requiring “reasonable adaptations and accommodations for students with disabilities (as defined under section 1401(3) of this title”); Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87 (2000), at 20 U.S.C. § 1401(3) (2000). The IDEA’s protections extend only to students who fall within one or more of the statutory categories of disability and who require related services and special education. 20 U.S.C. § 1414 (2000) (discussing the procedures by which a student is determined to be eligible for services and educational programming under the IDEA); 20 U.S.C. § 1401(3) (defining the term “child with a disability”). *See generally* MITCHELL YELL, *THE LAW AND SPECIAL EDUCATION* 73 (1998). For IDEA purposes, the term “child with a disability” includes children with “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C. § 1401(3)(a); 34 C.F.R. § 300.7(a)(1)-(b)(13) (1999). Although states must provide IDEA services to students within the above categories, they are free to combine or divide categories as they see fit for identification purposes. YELL, *supra*, at 74.

⁸ 20 U.S.C. § 1414(d)(1)(A)-(B) (explaining that an IEP must include a description of a child’s current educational levels, annual goals and short-term objectives, special education needs, and related services).

⁹ 20 U.S.C. § 1414(d)(3)(B) (describing special considerations for IEPs, including possible instruction through Braille for visually impaired students). Special educators distinguish “accommodations” or adaptations of material to reflect students’ physical and visual needs from “modifications,” which alter test content to align test material with students’ academic plans and abilities. *See*

Despite these accommodations, standardized assessment remains impractical for many students with significant cognitive disabilities.¹⁰ For these students, the IDEA and NCLB mandate the availability of alternate assessments as a means of evaluating

Letter from Bill East, Executive Director of National Association of State Directors of Special Education, to Jacquelyn Jackson, Acting Director of Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education (May 19, 2003) [hereinafter East Letter], at http://www.nasdse.org/government_relations/nclb/regs_051903.htm.

¹⁰ 20 U.S.C. § 6311(b)(2)(I)(ii) (2002); 34 C.F.R. § 200.6(a)(2) (2003) (requiring states to provide one or more alternate assessments for children with disabilities); 20 U.S.C. § 1412(a)(17)(A)(i) (2000) (describing the duty of states or local educational agencies to create “guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs”). The IDEA defines a “child with a disability” as a child who possesses one or more of thirteen types of disabilities and who, by reason thereof, requires special education and related services. 20 U.S.C. § 1401(3)(a); 34 C.F.R. § 300.7(a)(1)-(b)(13) (1999). See also *supra* note 7 (setting forth the categories of disability under the IDEA). Orthopedic impairments, blindness, and deafness are among the categories of disability identified in the IDEA. 20 U.S.C. § 1401(3)(a). Although related services such as special transportation or assistive technology may be necessary to enable students with physical, visual, or auditory impairments to participate in general education programs, these disabilities alone do not affect intellectual functioning. See S. Phillips, *Assessment Accommodations*, 1997 DET. C.L. REV. 917, 918-19 (1997) (noting the distinctions between cognitive and physical disabilities). Consequently, students with disabilities in one or more of the aforementioned categories must require special education in addition to any necessary related services in order to qualify for the protections of the IDEA. LAURA F. ROTHSTEIN, *SPECIAL EDUCATION LAW* 64-65 (1995). In contrast, disabilities such as autism, mental retardation, and traumatic brain injury, involve the impairment of a student’s developmental, learning, or thinking processes. See Nat’l Dissemination Ctr. for Children with Disabilities, *General Information About Disabilities: Disabilities That Qualify Infants, Toddlers, Children and Youth for Services Under the IDEA*, available at <http://www.nichcy.org/pubs/genresc/gr3.pdf> (last visited Mar. 30, 2004). Special educators and disability advocates commonly refer to these impairments as “cognitive disabilities,” although the IDEA does not make use of this term. ATSTAR, *Cognitive Disability* (describing mental retardation and traumatic brain injury as forms of cognitive disability), at http://www.atstar.org/info_disabilities_cognitive.html (last visited Mar. 30, 2004).

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educational progress.¹¹ Department of Education regulations implementing NCLB require that all states provide one or more alternate assessment options to students with disabilities for whom general assessments are inappropriate.¹² The regulations, however, do not elaborate on the format of these exams.¹³ As a result, states and the federal government have scrambled to both interpret and implement these provisions.¹⁴ Performance on grade-level assessments that are measured by state academic standards is unrealistic for many students with significant cognitive disabilities such as autism, mental retardation, or traumatic brain injury.¹⁵ For a small percentage of students with the “most significant”¹⁶

¹¹ 20 U.S.C. § 6311(b)(2)(I)(ii); 34 C.F.R. § 200.6(a)(2); 20 U.S.C. §1412(a)(17)(A)(i) (2000) (describing the duty of states or local educational agencies to create “guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs”).

¹² 34 C.F.R. § 200.6(a)(2).

¹³ 34 C.F.R. § 200.6 (requiring only that states provide alternate assessments for students whose IEPs indicate that such assessments are appropriate, and that alternate assessments yield grade-level results in English language arts and math, and by the 2007-08 academic year, science).

¹⁴ See Jason Wermers, *V.A., U.S. Differ on Tests for Special-Ed Students; Federal Plan Calls for Wider Participation*, RICH. TIMES DISPATCH (Richmond, Virginia), Apr. 30, 2003, at B1.

¹⁵ See Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 13,796, 13,796-97 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13) (suggesting the availability of alternate achievement standards for students with the “most significant” cognitive disabilities); George Merritt, *Special Kids, Standards Tests: Parents, Educators Question Use of Same Yardstick for Every Student*, DENV. POST, Mar. 17, 2004, at A1 (reporting the views of educators and parents that grade-level assessment of some special education students is unrealistic in that it requires students to succeed on assessments based on unfamiliar material).

¹⁶ 68 Fed. Reg. at 13,797. The Department of Education originally defined the target student group for alternate achievement standards as those “students whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean.” *Id.* However, in the final regulation, the Department of Education eliminated this definition and explained that students with the most significant cognitive disabilities are those students who “are within one or more of the thirteen existing categories of disability . . . and whose cognitive impairments may prevent them from attaining grade-level

cognitive disabilities, a recently-enacted NCLB regulation advises that alternate assessments may be evaluated according to alternate achievement standards rather than grade-level academic and content standards.¹⁷

The Department of Education, while favoring the use of alternate achievement standards for students with the most significant cognitive disabilities, fears that such standards may provide an end-run around statewide grade-level standards if left unregulated.¹⁸ Thus, in December 2003, the Department of Education enacted a regulation that limits the degree to which

achievement standards, even with the very best instruction.” Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68,698, 68,704 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13). *See supra* note 7 (setting forth the thirteen categories of disability identified by the IDEA). The Department estimated that no more than 9 percent of students with disabilities would require the use of alternate achievement standards. 68 Fed. Reg. at 68,700.

¹⁷ 68 Fed. Reg. at 68,698.

¹⁸ *See* Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 50,986, 50,987 (Aug. 6, 2002) (to be codified at 34 C.F.R. pt. 200.13) (proposing the use of alternate achievement standards and emphasizing that “[u]nder the Title I accountability system, alternate assessments are an appropriate way to measure the progress of only that very limited portion of students with the most severe cognitive disabilities who will never be able to demonstrate on grade-level academic achievement standards even if provided the very best education”). In proposing the use of alternate achievement standards for students with the most significant cognitive disabilities, the Department of Education sought to add flexibility to NCLB provisions that require the grade-level achievement of all students on statewide assessments. 68 Fed. Reg. at 68,707. The Department noted, however, that alternate achievement standards, that is, standards of lesser complexity that are adjusted to reflect realistic outcomes for students with the most significant cognitive disabilities, are inappropriate for students who have the potential to achieve at grade level if provided quality instruction. *Id.* at 68,700. The Department of Education warned that if schools, districts, and states were permitted to make use of the relaxed standards for all students with disabilities, they could effectively avoid accountability for the students with disabilities subgroup by administering insufficiently challenging educational programs and assessments in order to increase the rate of student proficiency for adequate yearly progress purposes. *Id.* at 68,704-05. The Department of Education explained that the regulated use of alternate achievement standards would ensure that educators maintain high expectations for students with disabilities. *Id.* at 68,698.

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school districts and states may incorporate the proficient results of assessments based on alternate achievement standards within their adequate yearly progress totals.¹⁹ The regulation caps the use of proficient scores on assessments based on alternate achievement standards at 1 percent of students in all grade levels assessed.²⁰

The cap on the use of alternate achievement standards for adequate yearly progress purposes, while commendable in its emphasis on the development of realistic assessment standards for students with the most significant cognitive disabilities, fails to ensure that states and schools are held accountable for the rigorous education of students with disabilities generally.²¹ Specifically, in requiring that IEP teams contend with external pressures to minimize school failure under NCLB, the cap distracts special educators from their rightful focus on the needs of individual students.²² Additionally, the regulation transforms NCLB

¹⁹ 68 Fed. Reg. at 68,698 (setting forth the final regulation on the use of alternate achievement standards for students with the most significant cognitive disabilities).

²⁰ *Id.* at 68,699 (clarifying that alternate achievement standards are appropriate only for a limited group of students). The final regulation is codified at 34 C.F.R. § 200.13(c) (2003). Noting that many students with the most significant cognitive disabilities are unable to attain grade-level achievement, the Department of Education sought through its regulation on alternate achievement standard to offer states, districts, and schools a more practical means of evaluating the progress of these students. *Id.* at 68,703. The Department of Education explained that “[t]oo often in the past, students with disabilities were excluded from assessments and accountability systems, and . . . did not receive the academic attention they deserved.” *Id.* at 68,698. By permitting the use of alternate achievement standards, which reflect realistic outcomes for students with the most significant cognitive disabilities, the Department of Education hoped to “ensure that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as [they] are held accountable for the educational results of all other students with disabilities and students without disabilities.” *Id.* *But see infra* Part III.B.1 (discussing the potentially negative impact of the regulation on accountability for the education of students with disabilities).

²¹ *See* Merritt, *supra* note 15 (reporting the views of parents and administrators who suggest that the cap undermines accountability for students with cognitive disabilities who are made to take assessments based on unfamiliar grade-level material).

²² *See* 20 U.S.C. § 1414(d) (2000) (outlining the required members of an

assessment into a mere formality for many students with disabilities by requiring states and districts to count proficient scores on assessments measured by alternate achievement standards as non-proficient in their adequate yearly progress totals once the 1 percent cap has been reached.²³

Part I of this note sets forth the federal statutory authority for individualized special education and the assessment of students with disabilities. Part II discusses the various alternate assessment models used by states and explores federal efforts to regulate the use of alternate achievement standards. Part III highlights the challenges of implementing the federal cap on the use of alternate achievement standards for adequate yearly progress purposes and emphasizes the need for federal guidance to assist states in the development and administration of alternate achievement

IEP team); Lynn Olson, *All Means All*, EDUC. WK., Jan. 8, 2004, at 49 [hereinafter Olson, *All Means All*] (quoting Lydia Calderon, of the special education office of the Michigan education department, as noting that “[t]he risk is that some students may not be assessed appropriately as the cap influences decision-making”); see also *infra* Part I.A (describing the participants in IEP teams). Under the federal cap, if a state or district exceeds the 1 percent cap on the use of proficient scores on alternate achievement standards for adequate yearly progress purposes, it must count the remaining proficient scores yielded by these standards as non-proficient for adequate yearly progress purposes. 34 C.F.R. § 200.13(c)(4) (2003). Thus, a state or district that surpasses the cap such that it is required to report student scores as non-proficient for adequate yearly progress purposes may fail to make adequate yearly progress and become subject to the corrective action provisions of NCLB. Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68,698, 68,707 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (suggesting that exceeding the 1 percent cap may “create negative consequences for schools that administer the alternate assessment”). Given that NCLB’s corrective action provisions authorize the replacement of key personnel at the school, district, and state levels as well as reductions in funding, IEP teams may be reluctant to approve the use of alternate achievement standards so as to risk exceeding the cap and triggering these provisions. 20 U.S.C. § 6316(c)(10)(C) (authorizing corrective action measures by states); 20 U.S.C. § 6316(b)(7)(C) (authorizing corrective action measures by local educational agencies). See also Olson, *All Means All*, *supra* (discussing the cap’s influences on IEP team decisions).

²³ 34 C.F.R. § 200.13(c)(4) (2003) (requiring that proficient scores on alternate achievement standards above the 1 percent cap must be counted as non-proficient).

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standards. Further, Part III addresses the threat to accountability posed by the limited use of proficient scores on assessments by alternate achievement standards for adequate yearly progress purposes. Part IV proposes greater flexibility in the federal cap on the use of alternate achievement standards for adequate yearly progress purposes and urges that states and the federal government must collaborate to develop meaningful assessment models for students with significant cognitive disabilities. Additionally, Part IV advises that congressional efforts to reconcile the IDEA, which emphasizes individualized achievement, and the NCLB, which prioritizes group progress, must preserve the individualized nature of special education. The note concludes with suggestions for unifying diverse approaches to the assessment of students with significant cognitive disabilities, and in turn, strengthening accountability for the education received by these students.

I. THE STATUTORY FRAMEWORK OF ASSESSMENT

A. *The Individuals with Disabilities Education Act*

Special education is largely the product of the Education of All Handicapped Children Act (“EAHCA”), now referred to as the Individuals with Disabilities Education Act (“IDEA”).²⁴ Beginning at the turn of the twentieth century and continuing through the late 1960s, states statutorily permitted and courts upheld the exclusion of students with disabilities from public schools.²⁵ Grounds for

²⁴ Individuals with Disabilities Education Act, Pub. L. No. 101-46, 104 Stat. 1103 (1997) (amending Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)) (codified at 20 U.S.C. §§ 1400-87 (2000)). Therese Craparo, Note, *Remembering the “Individuals” of the Individuals with Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 467, 472-75 (2003). The EAHCA came to be known as the IDEA through a congressional amendment in 1990. *Id.*

²⁵ 20 U.S.C. § 1400 (2000) (noting that prior to the enactment of EAHCA in 1975 (now the IDEA), more than half of all children with disabilities nationally did not receive “appropriate educational services,” and one million children with disabilities were entirely excluded from the public education system). *See Dep’t of Pub. Welfare v. Haas*, 154 N.E.2d 265 (Ill. 1958) (holding

exclusion included a student's disruption of her peers or a determination by school officials that the student could not benefit from public education.²⁶ Following the Supreme Court's landmark decision in 1954 in *Brown v. Board of Education*, which held that racial segregation of public schools violated the equal protection of the laws guaranteed by the Fourteenth Amendment of the U.S. Constitution, public support for discretionary exclusions waned.²⁷ Modeling their claims after the equal protection arguments asserted in *Brown*, parents of students with disabilities and disability interest groups demanded equal educational opportunities for students with disabilities.²⁸

Despite several court victories upholding the right to a public education for students with disabilities, many students were still denied educational opportunities as states claimed a lack of funding to support appropriate education.²⁹ Further, newly-enacted

that Illinois' compulsory education statute did not mandate the free public education of the "feeble-minded," or of "mentally deficient" children who could not benefit from education); *see also* YELL, *supra* note 7, at 54.

²⁶ *See* Beattie v. Bd. of Educ., 172 N.W. 153 (Wis. 1919) (upholding the expulsion of a student with speech problems and a condition that induced contortions and drooling on the grounds that he nauseated teachers and students, absorbed instruction time, and adversely affected school discipline); *see also* YELL, *supra* note 7, at 54.

²⁷ *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); THOMAS GUERNSEY AND KATHE KLARE, SPECIAL EDUCATION LAW 2 (asserting that "the modern legal history of education for children with disabilities began with *Brown v. Board of Education*"); *see also* YELL, *supra* note 7, at 56-59.

²⁸ *See* *Brown*, 347 U.S. at 493 (holding that if a state provides for compulsory public education, it "must be made available to all on equal terms"); YELL, *supra* note 7, at 56 (outlining the equal protection arguments asserted by parents of students with disabilities, including their claim that treatment of children with disabilities varied from one student to the next, and that some students with disabilities were denied education while their non-disabled counterparts were not).

²⁹ YELL, *supra* note 7, at 60. For example, in *Pennsylvania Ass'n for Retarded Citizens (PARC) v. Commonwealth*, a disability advocacy group and parents of students with disabilities brought a class-action suit challenging Pennsylvania's summary denial of educational opportunities to mentally retarded children. 343 F. Supp. 279 (E.D. Pa. 1972). The plaintiffs argued that the exclusion of mentally retarded students from public schools violated equal protection, due process of law, and state statutes that provided for the free public

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state laws differed greatly in the quality of education they required for students with disabilities.³⁰ In 1975, the federal government provided guidance and support to states in establishing more uniform standards through the enactment of EAHCA, which codified the educational rights of students with disabilities and created a federal funding mechanism to support their education.³¹

Most importantly, EAHCA required all states to provide students with disabilities with a “free appropriate public education” (“FAPE”).³² Free appropriate public education generally means an

education of all children. *Id.* at 283. *PARC* resulted in a consent agreement that mandated the state’s placement of “each mentally retarded child in a free, public program of education and training appropriate to the child’s capacity.” *Id.* at 307. Similarly, in *Mills v. Board of Education*, plaintiffs representing a certified class of nearly 18,000 affected children challenged on due process grounds the District of Columbia’s exclusion of children with disabilities from public schools. 348 F. Supp. 866, 868 (D.D.C. 1972). The district court found for the plaintiffs and ordered the District of Columbia to provide a free public education to all children with disabilities. *Id.* at 878. Additionally, the court required the District to create procedural safeguards for the identification, placement, and exclusion of children with disabilities. *Id.* In subsequent years, similar suits were brought in twenty-six states. NAT’L COUNCIL ON DISABILITY, BACK TO SCHOOL ON CIVIL RIGHTS 1, 26 (2000), available at <http://www.ncd.gov/newsroom/publications/pdf/backtoschool.pdf> (last visited Mar. 1, 2004).

³⁰ YELL, *supra* note 7, at 60-61.

³¹ Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (1975) (amended in 1997 and codified at 20 U.S.C. §§ 1400-1487 (2000)). See also YELL, *supra* note 7, at 62. Prior to the EAHCA, Congress had enacted the Elementary and Secondary Education Act of 1965 (“ESEA”). Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (reauthorized as NCLB and codified at 20 U.S.C. §§ 6301-7941 (2002)). The ESEA allocated funding for the improvement of public education for various groups, including students with disabilities. *Id.* See generally YELL, *supra* note 7, at 61-62.

³² 20 U.S.C. § 1400(d)(1)(A) (2000) (naming among the Act’s purposes the goal of ensuring “that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living”); 34 C.F.R. § 300.121(a) (2002) (stating that every state must have “in effect a policy that ensures that all children with disabilities aged three through twenty-one residing in the State have the right to FAPE, including children with disabilities who have been suspended or expelled from school”).

education that is provided at no extra cost to parents and includes specialized services for students with disabilities.³³ Additionally, EAHCA provided for a student's right to be educated in the "least restrictive environment," that is, the most conducive and least isolating setting for learning—usually, a general education classroom.³⁴ The EAHCA's requirement of a free appropriate public education for all students, regardless of the severity of their disabilities, "has become a hallmark of education policy in the United States."³⁵

See also H. RUTHERFORD TURNBULL III, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* (3d ed. 1990) (providing an extensive discussion of the element components of the FAPE requirement).

³³ 20 U.S.C. § 1401(8) (2000). Free appropriate public education currently is defined in the IDEA as:

special education and related services that: have been provided at public expense, under public direction and supervision, and without charge; meet the standards of the State educational agency; include an appropriate preschool, elementary, or secondary school education in the State involved; and are provided in conformity with the individualized education program required under section 1414(d) of this title.

Id. The Supreme Court first considered the meaning of free appropriate public education in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 192 (1982) (holding in part that the EACHA only requires access to a public education that imparts a "meaningful" benefit on students with disabilities and does not impose on states "any greater substantive educational standard"). *See also* Scott F. Johnson, Note, *Re-examining Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. L.J. 561 (2003) (discussing the current expansion of FAPE beyond *Rowley's* "some educational benefit" standard).

³⁴ *See* NAT'L COUNCIL ON DISABILITY, *supra* note 29, at 29-30 (describing the "least restrictive environment" element as the "integration mandate"); TURNBULL, *supra* note 32, at 149:

LRA was a method for individualizing an exceptional pupil's education because it prevented a child from being placed in special programs without first determining that the child could not profit from regular educational placement It promoted the concept that curriculum adaptations and instructional strategies tailored to the needs of exceptional children could occur in regular as well as in special classrooms.

Id.

³⁵ NAT'L COUNCIL ON DISABILITY, *supra* note 29, at 25.

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The EAHCA, now known as the IDEA, requires states to provide individualized education programs to all students with disabilities.³⁶ An IEP is a written plan developed by a team of individuals that uses broad goals to structure an education program tailored to a student's unique needs and disabilities.³⁷ An IEP team consists of a local board of education or school district representative qualified to evaluate special education programs, a special education teacher, a general education teacher, the student's parents, an individual who can interpret the instructional implications of IEP determinations, other individuals with special expertise regarding the student, and, in some cases, the student.³⁸ The IDEA, as amended in 1997, requires the IEP team to specifically describe the extent to which each special education student can interact with the general curriculum.³⁹ It also mandates the explanation of modifications that are required for a student's

³⁶ Individuals with Disabilities Education Act, Pub. L. No. 101-46, 104 Stat. 1103 (1997) (amending Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975)) (codified at 20 U.S.C. §§ 1400-87 (2000)). The EAHCA came to be known as the IDEA through the 1990 amendments to the IDEA. *Id.*

³⁷ 20 U.S.C. § 1414(d) (outlining the participants of IEP teams); 34 C.F.R. § 300.346 (2002) (describing the development of an IEP to include the consideration of a student's language abilities, previous evaluations, and past performance on district and statewide assessments). The IDEA currently mandates the inclusion of eight elements in each IEP: (1) a student's present levels of educational performance; (2) measurable annual goals, including benchmarks or short-term instructional objectives; (3) specific special education, related or supplementary services or aids to be provided to the student and modifications for personnel; (4) the extent to which the student will not participate with students without disabilities in general education; (5) modifications in the administration of state or district-wide assessments; (6) projected dates of initiation of services and anticipated duration of services; (7) a statement of needed transition services focusing on appropriate courses of study (for students ages fourteen and sixteen); and (8) a statement of how the student's progress toward annual goals will be measured and reported to parents. 20 U.S.C. § 1414(d).

³⁸ 20 U.S.C. § 1414(d)(1)(B).

³⁹ 20 U.S.C. § 1414(d)(1)(A)(i)(I) (explaining that an IEP must set forth "how the child's disability affects the child's involvement and progress in the general curriculum").

participation in district-wide assessments.⁴⁰ IDEA amendments urge that special education students should not be permitted to slip through the cracks of assessments designed to hold schools accountable.⁴¹ As such, the amendments require that states provide students with disabilities opportunities to participate in statewide assessments and to have reports about their group assessment results made available to the public.⁴²

To enable this inclusion, IDEA provisions require that states provide necessary assessment accommodations for all students with disabilities.⁴³ States also must provide one or more alternate assessments for students within this group who, even with

⁴⁰ 20 U.S.C. § 1414(d)(1)(A)(v)(I) (requiring that IEPs include a “statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment”); 34 C.F.R. § 300.347(a)(5) (2002) (requiring the same).

⁴¹ See RACHEL QUENEMOEN, CAMILLA LEHR, MARTHA THURLOW & CAROL MASSANARI, NAT’L CTR. FOR EDUCATIONAL OUTCOMES, STUDENTS WITH DISABILITIES IN STANDARDS-BASED ASSESSMENT AND ACCOUNTABILITY PROGRAMS: EMERGING ISSUES, STRATEGIES AND RECOMMENDATIONS (SYNTHESIS REPORT 37) (2001) [hereinafter QUENEMOEN, STUDENTS WITH DISABILITIES IN STANDARDS-BASED ASSESSMENT] (stating that “IDEA 1997 focused state and district attention on the challenges of full participation of students with disabilities in assessment systems . . . and on the challenge of understanding and developing inclusive accountability systems that will improve outcomes for all students”), available at <http://education.umn.edu/NCEO/OnlinePubs/Synthesis37.html>; 20 U.S.C. § 1400(d)(4) (2000) (stating, in part, that the purpose of the IDEA is “to assess, and ensure the effectiveness of, efforts to education children with disabilities”); 20 U.S.C. § 1414(d)(17)(A) (explaining that “children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary”).

⁴² 20 U.S.C. § 1412(a)(17)(A) (2000) (requiring states to develop guidelines for students with disabilities in alternate assessments and to conduct alternate assessments by July 1, 2000); 34 C.F.R. § 300.139 (1999) (mandating that states report on the number of students with disabilities participating in general and alternate assessments and, where privacy would not be violated, on the general performance of students on these assessments).

⁴³ 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 200.6 (2003) (discussing the inclusion of all students in state academic assessment models). See *supra* note 7 (setting forth the IDEA’s definition of a “child with a disability”).

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accommodations, cannot meaningfully participate in general assessments.⁴⁴ Additionally, states were required by July 1, 2000 to design and implement performance goals and indicators to measure the performance of students with disabilities, and to conduct alternate assessments based on these measures.⁴⁵

While the IDEA requires that states create and make available alternate assessments for students with disabilities, it does not set forth the format of these assessments.⁴⁶ Rather, the development of alternate assessments is left to state educational systems, which must comply with both IDEA and NCLB provisions.⁴⁷ Most often, alternate assessments evaluate students through a process rather than a standardized evaluation.⁴⁸ For example, an alternate assessment may include the observation of a student performing a specified task or a review of the student's work portfolio as opposed to a standardized multiple-choice test.⁴⁹

The current IDEA reauthorization process features debate about the IDEA's alignment with NCLB.⁵⁰ Reauthorization of a statute is required when Congress approves sections of a law for a

⁴⁴ 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 200.6(a)(2)(i).

⁴⁵ 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 200.6(a)(2)(i).

⁴⁶ 20 U.S.C. § 1412(a)(17)(A) (advising only that "as appropriate, the State or local educational agency develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs"); 34 C.F.R. § 300.138 (incorporating the same).

⁴⁷ 34 C.F.R. § 200.6(a)(2)(i). *See infra* Part I.B (discussing the requirements of NCLB).

⁴⁸ Carol B. Massanari, *Special Education Q & A's Written by the Experts* (defining alternate assessments and outlining the statutory underpinnings of alternate assessment models), at <http://www.ideapractices.org/qanda> (last visited Feb. 15, 2004).

⁴⁹ *See* Christopher Morrison, Note, *High Stakes Tests and Students with Disabilities*, 41 B.C. L. REV. 1139, 1161 (2000) (describing alternatives to general assessment through the Massachusetts portfolio model).

⁵⁰ *See* Press Release, U.S. Senate, Sen. Edward M. Kennedy, Statement at the Introduction of the Reauthorization of the Individuals with Disabilities Education Act (June 12, 2003) (stating that the Senate IDEA reauthorization bill includes provisions that allow for the integration of alternate assessment results within NCLB accountability plans), at <http://kennedy.senate.gov/~kennedy/statements/03/06/2003616802.html>.

fixed period of time.⁵¹ At the termination of the fixed period, Congress must affirmatively re-approve the select provisions, or the provisions will expire.⁵² The free appropriate public education requirement, which is codified in Part B of the IDEA, is permanently authorized.⁵³ Part D of the IDEA, which provides for discretionary grants to support state improvement programs (for example, programs that emphasize teacher preparation and credentialing or the improvement of rural special education programs), however, is only authorized in periods of four or five years.⁵⁴ Even with regard to those portions of the IDEA that are permanently authorized, the reauthorization process gives Congress an opportunity to reconsider and revise the IDEA generally.⁵⁵

In April 2003, the U.S. House of Representatives passed an IDEA reauthorization bill, H.R. 1350, which addresses special educators' concerns about the management of IEPs.⁵⁶ Specifically, H.R. 1350 responds to concerns that annual IEP review and revision are accompanied by too much paperwork to enable special educators to simultaneously plan for and deliver the education of

⁵¹ See YELL, *supra* note 7, at 84.

⁵² *Id.*

⁵³ 20 U.S.C. § 1411 et. seq. (2000) (setting forth Part B of IDEA). See YELL, *supra* note 7, at 84.

⁵⁴ 20 U.S.C. § 1451 et. seq. (2000) (setting forth Part D of IDEA). See YELL, *supra* note 7, at 84. Congress last reauthorized the IDEA in 1997. Individuals with Disabilities Education Act, Pub. L. No. 101-46, 104 Stat. 1103 (1997) (codified at 20 U.S.C. §§ 1400-87 (2000)).

⁵⁵ Susan Goodman, Nat'l Info. Ctr. for Children and Youth with Disabilities, *What's Reauthorization All About?* (Mar. 2003) (noting that "even though Part B of the law [IDEA] does not have to be reauthorized, changes are made to it during each reauthorization"), at <http://www.nichcy.org/reauth/goodman.htm>. For example, during the 1997 reauthorization, the law required states to create mediation systems in which parents and schools could meet to resolve conflicts regarding a student's education. *Id.*

⁵⁶ H.R. 1350, 108th Cong. (2003) (entitled Improving Education Results for Children with Disabilities Act of 2003 ("IERCDA") and passed by the House of Representatives on April 29, 2003). See Lisa Goldstein, *Rewrite of Special Education Law Passes the House*, EDUC. WEEK, May 7, 2003, at 26-28 (discussing the House IDEA reauthorization bill that passed 251-171 on April 30, 2003).

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their students.⁵⁷ The House bill allows parents to opt for three-year IEPs for their children rather than annual IEPs in an effort to reduce administrative paperwork.⁵⁸

⁵⁷ Goldstein, *supra* note 56, at 26-28. *See also* Frank Murphy, *Disability Does Not Mean Inability: An Interview with Dr. Robert H. Pasternack*, EXCEPTIONAL PARENT, Apr. 2003, at 47-48 (citing the administrative burdens that face special educators who manage and develop IEPs as one reason for the high turnover rate of special education teachers).

⁵⁸ H.R. 1350 § 614(d)(5)(A). The House debate focused in large part on the funding of the IDEA. *See* Goldstein, *supra* note 56. Specifically, when the IDEA was enacted in 1975, Congress promised to fund 40 percent of the national average per pupil cost of special education. *Id.* At this time, the federal government has committed only eighteen percent of the per pupil cost. *Id.* The House bill contains a discretionary seven-year schedule for achieving full funding of the IDEA. H.R. 1350 § 611.

Additionally, the House bill amends the IDEA's discipline provisions, which outline the conditions under which students with disabilities may be suspended or expelled from schools. *Id.* § 614(j)(1)(B). Opposition to the House bill has centered largely on amendments that would permit schools to suspend or expel students with disabilities for any violations of school codes of conduct, regardless of their severity. *Id.* The IDEA currently permits the expulsion of a student with a disability for up to forty-five days only if the student carries or possesses a weapon at school, knowingly possesses or uses illegal drugs, or is determined by a hearing officer to be likely to injure herself or others. 20 U.S.C. § 1415(k)(1)(A)(ii)(I)-(II) (2000); 20 U.S.C. § 1415(k)(2). The House bill's provisions delete the IDEA's requirement that IEP teams conduct a "manifestation determination" hearing following a school's initiation of disciplinary procedures against a student with a disability, that is, a hearing is designed to evaluate whether a student's misconduct resulted from the student's inappropriate educational placement or the student's disability. H.R. 1350 § 615(k)(4)-(5). *See also* Learning Disabilities OnLine, *What is a Manifest Determination Meeting?* (defining manifestation determination hearing), at http://www.ldonline.org/ld_indepth/iep/manifest_determination_meeting.html (last visited Mar. 9, 2004). The House bill also eliminates the IDEA's requirement that students be permitted to stay in their current educational placements while any appeals challenging their manifestation determination or the quality of their educational program are pending. H.R. 1350 § 615(j)(4). The Senate bill, S.1248, entitled the Individuals with Disabilities Education Improvement Act of 2003, similarly modifies the IDEA's discipline provisions. S. 1248, 108th Cong. (2003) (reported out of the Senate Committee on Health, Education, Labor and Pensions on June 12, 2003). After debate and vote by the U.S. Senate, S. 1248 and H.R. 1350 will be debated in a House-Senate conference. *See* Consortium for Citizens with Disabilities, *S. 1248, Individuals*

The Senate IDEA reauthorization bill, S. 1248, modifies the IDEA by requiring that alternate assessments be “aligned with the State’s challenging content and academic achievement standards . . . or measure the achievement of students against alternate academic achievement standards that are aligned with the States’ academic content standards.”⁵⁹ Notably, the Senate bill permits the use of alternate achievement standards as a means of evaluating student performance.⁶⁰ The Senate bill also authorizes up to three million dollars for a national study on the reliability of alternate assessments and the means by which states can align these assessments with state content standards.⁶¹ In an effort to reduce paperwork, the Senate bill also eliminates the requirement that IEPs include short-term objectives.⁶² Further, the Senate bill creates an option for schools to generate three-year IEPs rather than annual IEPs for students in their final three years of school

with Disabilities Improvement Act of 2003 (June 25, 2003), at <http://www.c-c-d.org/s1248statement.htm>. Unlike H.R. 1350, the Senate bill retains the IDEA’s requirement that a manifestation determination hearing be held within ten days of a student’s placement in an interim alternative setting, unless the placement resulted from a drug or weapons violation. S. 1248 § 615(k)(1)(C). The Senate bill does not permit expulsion for all violations of the school code of conduct; however, it does add the infliction of “serious bodily harm” to original list of infractions for which a student may be expelled without a manifestation determination hearing. *Id.* § 615(k)(1)(D). Like H.R. 1350, S. 1248 eliminates the IDEA’s requirement that students be permitted to stay in their current educational placements during appeals regarding their alternative placement or their manifestation determination. *Id.* § 615(k)(1)(C).

⁵⁹ *Id.* § 612(a)(16)(C)(ii)(II) (discussing the standards against which alternate assessments must be measured). See Nat’l Dissemination Ctr. for Children with Disabilities, *The Latest Scoop on IDEA Reauthorization* (Oct. 20, 2003) (reporting that the U.S. Senate has slowed its current reauthorization efforts, and that the final bill debated on the floor will not be the published S. 1248 version, but a “substitute” bill that will not first be made public), at <http://www.nichcy.org/reauth/scoop.htm>.

⁶⁰ S. 1248 § 612(a)(16)(C)(ii)(II).

⁶¹ *Id.* § 665(c). See Press Release, U.S. Senate, *supra* note 50 (summarizing proposed additions to the IDEA and highlighting the bill’s emphasis on accountability and outcomes for students with disabilities).

⁶² S. 1248 § 614(d), 108th Cong. (2003) (requiring that an IEP include “a statement of measurable annual goals,” without mention of short-term objectives).

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who have reached the age of eighteen.⁶³ The bill is expected to reach the Senate floor for debate in early May 2004.⁶⁴

B. The No Child Left Behind Act

NCLB was enacted in 2002 as a reauthorization of the Elementary and Secondary Education Act of 1965 (“ESEA”) with a much-publicized emphasis on assessment and school accountability.⁶⁵ Under NCLB, each state must develop a plan that defines and evaluates the adequate yearly progress of the state and its schools toward the goal of 100 percent proficiency of all students in math and English language by the 2013-14 academic

⁶³ *Id.* § 614(d)(5)(A) (stating that “[w]ith the consent of the parent, when appropriate, the IEP Team shall develop an IEP . . . that is designed to serve [a child who has reached age eighteen] for the final three-year transition period . . .”). During the reauthorization debate, the Senate also will hear eight proposed amendments to the IDEA. Nat’l Coalition of Parent Ctrs., *Information on IDEA and Discussion Topics for Conversations with Policy Makers* (Jan. 26, 2004) (describing the number and content of Senate floor amendments to the IDEA), *at* <http://pub60.ezboard.com/fourchildrenleftbehindfrm14.showMessage?topicID=107.topic>. The amendments include a provision to limit the award of attorney’s fees to parents who prevail in due process hearings regarding the denial of educational opportunities to their children. *Id.* Another amendment proposes the mandatory full funding of the IDEA, which presently is funded at only 18 percent of the 40 percent authorized by Congress. *See id.*; IDEA FUNDING COALITION, *IDEA FUNDING: TIME FOR A NEW APPROACH* 1, 2-3 (Mar. 2003), *at* http://www.aasa.org/government_relations/idea/Mandatory_2003_Proposal.pdf. The Senate also will hear an amendment that offers IDEA waivers to states to reduce paperwork requirements by delaying the review of student IEPs. Nat’l Coalition of Parent Ctrs., *supra*.

⁶⁴ *Frist Offers Modest Agenda, with Tort Reform, Energy Votes*, CONGRESS DAILY, Apr. 8, 2004, *available at* LEXIS, News Library, Nat’l J. Congress Daily File (reporting that Senate Majority Leader Bill Frist (R-TN) expects to bring the Senate IDEA reauthorization bill to the Senate floor during the first week of May, 2004).

⁶⁵ 20 U.S.C. § 6301 (2002) (stating the purpose of NCLB in part as ensuring “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”).

year.⁶⁶ In addition to the results of academic assessments, adequate yearly progress must be demonstrated through secondary school graduation rates and at least one other indicator for elementary schools.⁶⁷ NCLB also requires states to provide for 100 percent inclusion of students with disabilities in state and district-wide assessments.⁶⁸ One of NCLB's most highly-debated provisions requires that unless students in all subgroups pass grade-level assessments, schools will risk corrective action.⁶⁹ Local educational agencies,⁷⁰ including county or district departments of

⁶⁶ 20 U.S.C. § 6311(b)(2)(C) (2002) (requiring that states define the term "adequate yearly progress" in a manner that applies the same high achievement standards to all students, is statistically valid, and includes measurable annual objectives for all student subgroups, including students with disabilities, economically disadvantaged students, students from major racial and ethnic groups, and students with limited English proficiency). States also are expected to develop assessments to measure the adequate yearly progress of all students toward proficiency in science. *See* 20 U.S.C. § 6311(b)(1)(C). However, states are not required to conduct assessments and meet adequate yearly progress requirements in science until the 2007-08 academic year. *See* 20 U.S.C. § 6311(b)(3)(A).

⁶⁷ 20 U.S.C. § 6311(b)(2)(C)(vi). Additional indicators used to evaluate elementary schools are determined by the states. *Id.* Performance indicators might include dropout rates, graduation rates, or figures regarding participation in and performance on assessments by students with disabilities. *See* Eileen Ahearn, Project FORUM at Nat'l Ass'n of State Directors of Special Educ., *Performance Goals and Indicators for Special Education* 1, 4 (Aug. 6, 2001), at <http://www.epri.org/PDFs/Pro2.pdf>.

⁶⁸ *See* 34 C.F.R. § 200.6 (2003) (requiring the inclusion of all students with disabilities within NCLB assessment plans). Federal regulations, however, now permit states and districts to include within their adequate yearly progress the scores of 1 percent of students with the most significant cognitive disabilities on assessments measured by alternate achievement standards. Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68,698, 68,699 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13).

⁶⁹ 20 U.S.C. § 6311(b)(2)(I) (requiring that to make adequate yearly progress, states must test 95 percent of the students in each subgroup); 20 U.S.C. § 6316(b)(7)(C) (2002) (describing corrective action as appropriate for "any school served by a local educational agency under this part that fails to make adequate yearly progress . . . by the end of the second full school year after the identification" for school improvement).

⁷⁰ 20 U.S.C. § 1401(15)(A)-(C) (2000). The IDEA defines local

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education, must provide for corrective action, which might include replacing school personnel, instituting a new curriculum, extending the school year, or authorizing students to transfer to higher-performing schools.⁷¹ NCLB also requires corrective action by state educational agencies⁷² and permits states to defer or reduce the funding of failing schools.⁷³

NCLB advocates a uniform, standards-based system that does not distinguish potential for achievement based on background or disability.⁷⁴ On the other hand, IDEA emphasizes the individual needs of students and seeks to accommodate the learning styles of students with varied disabilities.⁷⁵ Recognizing a tension between

educational agency as “a public board of education or other public authority legally constituted within a State for either administrative control or direction of . . . public elementary or secondary schools . . . , or . . . combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.” *Id.*

⁷¹ 20 U.S.C. § 6316(b)(7)(C) (detailing the means by which local educational agencies may implement corrective action). The permissible transfer of students from failing to better-performing schools is known as the “public school choice” provision. *Id.* § 6316(b)(1)(E). This option is limited to students in Title I schools, that is, schools that receive extra federal funds to assist the achievement of disadvantaged children. *Id.* The public school choice provision has been highly debated as a form of voucher system that enables parents to receive subsidies to send their children to private schools. *See* Tricia Bishop, *Troubled School Troubles Mother: Howard School System Disagrees Over How to Leave No Child Behind*, *BALT. SUN*, Aug. 21, 2003, at 1B (describing one parent’s efforts to avoid sending her child to a failing elementary school); Stephanie Banchemo & Ana Beatriz Cholo, *Failing Schools Scramble to Obey Law; Right to Transfer Causing Nightmare, Officials Say*, *CHI. TRIBUNE*, Aug. 7, 2003, at 1 (reporting the reactions of schools to the NCLB’s corrective action provision permitting the transfer of students from failing to better-performing schools).

⁷² 20 U.S.C. § 1401(28). The IDEA defines state educational agencies as the “state board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools” *Id.*

⁷³ 20 U.S.C. § 6316(c)(10)(C) (outlining the corrective action measures that states may undertake).

⁷⁴ 20 U.S.C. § 6311(b)(1)(B) (2002) (noting that the academic content and achievement standards created by a state must be the same ones applied “to all schools and children in the State”).

⁷⁵ 20 U.S.C. § 1414(d)(1)(A)-(B) (2000) (requiring IEPs for students with

NCLB and IDEA, Congress included in NCLB provisions that mandate the availability of alternate assessments.⁷⁶ These provisions mirror IDEA assessment mandates, which focus on the manner in which the results of assessments are to be reported to the federal government rather than the style and format of the assessments.⁷⁷ Specifically, NCLB requires that states, districts, and schools “disaggregate” the results of the students with disabilities subgroup from the results of non-disabled students and include these results in state reports so that schools may be held accountable for the progress of special education students.⁷⁸

II. FEDERAL AND STATE GOVERNMENTS ADDRESS ALTERNATE ASSESSMENT

A. *The Federal Government and Alternate Achievement*

Following the enactment of NCLB, the Department of Education responded to the concerns of educators, administrators, and advocates that grade-level achievement on statewide assessments was unrealistic for many students with cognitive

disabilities). See Paul T. O’Neill, *High Stakes Testing Law and Litigation*, 2003 BYU EDUC. & L.J. 623, 631-35 (2003) (describing and comparing various federal education statutes that regulate the student assessment).

⁷⁶ 20 U.S.C. § 6311(3)(C)(ix)(I) (stating that assessments must provide for “reasonable adaptations and accommodations for students with disabilities (as defined under section 1401(3) of this title”). See *infra* Part III.B (discussing the challenges to accountability posed by the interaction between NCLB’s standards-based assessment model and IDEA’s individualized educational framework).

⁷⁷ See 20 U.S.C. § 1412(a)(17)(A) (2000) (outlining the requirement that states provide one or more alternate assessments to students whose IEPs indicate that such assessments would be appropriate).

⁷⁸ 20 U.S.C. § 6311(b)(3)(c)(xiii) (requiring states to disaggregate all subgroups, except when on the school or local educational agency level “the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student”).

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disabilities.⁷⁹ In August 2002, the Department of Education proposed the use of alternate achievement standards to evaluate the performance of students with the “most significant” cognitive disabilities.⁸⁰ The Department of Education worked for more than a year to refine the contours of its final regulation on alternate achievement standards.⁸¹ This section will trace the development of the final regulation from its inception and later revision to its present state.

In August 2002, the U.S. Secretary of Education proposed the limited use of alternate achievement standards by states and school districts to measure the adequate yearly progress of students with the “most significant cognitive disabilities,” that is, those students with cognitive impairments provided for in the IDEA “who will never be able to demonstrate progress on grade level academic achievement standards even if provided the very best possible education.”⁸² The draft regulation set forth a .5 percent cap on the percentage of students whose proficient or advanced scores on assessments measured by alternate achievement standards could be counted as proficient for adequate yearly progress purposes.⁸³

Special educators and school districts, however, reported that .5 percent was an inaccurately low percentage with respect to current school district populations.⁸⁴ In March 2003, the Department of Education proposed raising the cap on the use of proficient scores on assessments based on alternate achievement

⁷⁹ Improving the Academic Achievement of the Disabled, 67 Fed. Reg. 50,986, 50,987 (Aug. 6, 2002) (to be codified at 34 C.F.R. pt. 200.13).

⁸⁰ *Id.* See *supra* note 16 (defining the term “students with the most significant cognitive disabilities”).

⁸¹ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,698-699 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (describing the development of the final regulation on alternate achievement standards).

⁸² 67 Fed. Reg. at 50,987.

⁸³ *Id.* at 50,987-989. The Department of Education did not specify how it arrived at .5 percent as the cap, and stated only that it was “based on current prevalence rates of students with the most significant cognitive disabilities.” *Id.* at 50,987-988.

⁸⁴ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,797 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13).

standards to 1 percent of students in all grades assessed.⁸⁵ Further, the proposed regulation narrowed the population for which assessment by alternate achievement standards would be permitted, defining “students with the most significant cognitive disabilities” as those students “whose intellectual functioning and adaptive behavior are three or more standard deviations below the mean.”⁸⁶ The proposed regulation also provided for a special exception from the 1 percent cap for districts and states that could articulate “circumstances” to explain incidences of significant disabilities that exceed the capped limit.⁸⁷ Permissible explanations for surpassing the cap included hosting “a school, community or health program that has drawn families of students with the most significant cognitive disabilities into the area or a very small overall population in which case a very few students with the most significant cognitive disabilities could cause the State or [local educational agency] to exceed the 1.0 percent limitation.”⁸⁸

In December 2003, following a public comment period, the Department of Education enacted the final NCLB regulation on the use of alternate achievement standards to measure the adequate yearly progress of students with the “most significant” cognitive disabilities.⁸⁹ The final regulation allows school districts and states

⁸⁵ *Id.*

⁸⁶ *Id.* at 13,799. The Department of Education included a background of the studies it relied upon to arrive at the proposed 1 percent cap. *Id.* It cited a study by the Metropolitan Atlanta Developmental Disabilities Surveillance Program (MADDSP) sponsored by the Centers for Disease Control (CDC), which placed the incidence of moderate, severe and profound mental retardation at 33 percent of those with retardation. *Id.* (citing Coleen A. Boyle et al., *Prevalence of Selected Developmental Disabilities in Children 3-10 Years of Age: the Metropolitan Atlanta Developmental Disabilities Surveillance Program, 1991*, MMWR Surveillance Summaries (1996), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/00040928.htm>). Among other studies, the Department of Education cited the findings of a study that placed the incidence of severe to profound mental retardation at “somewhat less than 0.13 percent of the total population.” 68 Fed. Reg. at 13,799 (citing M. BEIRNE-SMITH, ET AL., MENTAL RETARDATION (2001)).

⁸⁷ 68 Fed. Reg. at 13,797.

⁸⁸ *Id.*

⁸⁹ Improving the Academic Achievement of the Disabled, 68 Fed. Reg.

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to include proficient and advanced results on assessments based on alternate achievement standards within their adequate yearly progress totals, so long as their use of these scores does not exceed 1 percent of all students in the grades assessed.⁹⁰ If a district or state exceeds the 1 percent cap, it must count the remaining students as non-proficient for adequate yearly progress purposes.⁹¹ For example, if a school district assesses 10,000 students in a statewide math assessment, 250 of which are evaluated using alternate assessments measured by alternate achievement standards, only 100 of these students, or 1 percent of all students assessed, may have their proficient or advanced scores counted in the district's adequate yearly progress totals.⁹² Thus, the scores of the remaining 150 students with the most significant cognitive disabilities will be reported as non-proficient for adequate yearly progress purposes, regardless of whether the students have demonstrated proficiency based on alternate achievement standards.⁹³

The final regulation clarifies that the 1 percent cap does not limit the number of students who may be evaluated according to alternate achievement standards, but rather, the percentage of students whose proficient results may be factored into the adequate

68,698, 68,699-700 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (outlining the history of the cap on alternate achievement standards for adequate yearly progress and defining the parameters of the final regulation). The Department of Education clarified that the development of alternate achievement standards is permissive rather than mandatory. 68 Fed. Reg. at 68,704. Once a state implements such standards, however, it must abide by the federal regulation. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* The regulation requires that if a student's proficient score on an alternate assessment measured by alternate achievement standards is reported as non-proficient for adequate yearly progress purposes because the 1 percent cap has been reached, the student's parents must be informed of the student's actual level of achievement. *Id.* at 68,701.

⁹² *Id.*

⁹³ *Id.* at 68,701 (noting that states may not exclude student scores that exceed the 1 percent cap from the state or district's adequate yearly progress, but must "count the scores of these students as not proficient, even if some or all of the students achieved proficiency on the alternate achievement standards").

yearly progress totals of their district or state.⁹⁴ Like the proposed version, the final regulation also provides for a special exception from the 1 percent cap for states and districts that can articulate “circumstances” to explain higher incidences of significant disabilities.⁹⁵ Notably, the final regulation, unlike the proposed version, does not define the population for which the use of alternate achievement standards is appropriate.⁹⁶ Where the proposed regulation limited the use of alternate achievement standards to students within a certain IQ range,⁹⁷ the final regulation leaves the development of definitional contours to the states.⁹⁸ The regulation cautions, however, that alternate achievement standards are only appropriate for students who possess one or more of the thirteen categories of disability identified in the IDEA and “whose cognitive impairments may prevent them from attaining grade-level achievement standards, even with the very best instruction.”⁹⁹ Additionally, the final

⁹⁴ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,699 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (clarifying that the cap does not limit the number of students using alternate achievement standards, but only limits “the number of proficient and advanced scores based on alternate achievement standards that may be counted in the calculation of AYP [adequate yearly progress]”). The final regulation was released in December 2003 following the Department of Education’s consideration of commentary by special educators, advocates, and parents. *Id.* at 68,699-700.

⁹⁵ *Id.* at 68,703 (describing the circumstances for which the Secretary of Education may grant an exception to the federal cap).

⁹⁶ Press Release, U.S. Department of Education, New No Child Left Behind Provision Gives Schools Increased Flexibility While Ensuring All Children Count, Including Those with Disabilities (Dec. 9, 2003) (explaining that the final regulation on alternate achievement standards differs from the proposed version in its elimination of a definition of students with “significant cognitive disabilities”), available at <http://www.ed.gov/news/pressreleases/2003/12/12092003.html>.

⁹⁷ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,797 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13) (defining the students for whom alternate achievement standards are appropriate).

⁹⁸ 68 Fed. Reg. at 68,700 (describing the difference between the proposed and final regulations, specifically, the latter’s permission of greater flexibility to states in defining “students with the most significant cognitive disabilities”).

⁹⁹ Improving the Academic Achievement of the Disabled, 68 Fed. Reg.

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regulation clarifies that the term “students with the most significant cognitive disabilities” is not intended to create a new category of disability under the IDEA, but rather, to denote those students whose cognitive disabilities, as defined by the IDEA, are of such severity that they affect the students’ ability to perform at grade-level.¹⁰⁰ The final regulation also permits schools to use out-of-level testing, which is the testing of students at a grade level below that in which they are enrolled.¹⁰¹ The regulation requires, however, that all students assessed by out-of-level testing must be counted within the 1 percent cap for adequate yearly progress purposes.¹⁰²

B. States and Alternate Assessments

To assure compliance with IDEA and NCLB, the federal government requires states to submit accountability plans that detail the format of their traditional and alternate assessment plans.¹⁰³ At this time, the federal government has preliminarily approved the accountability programs of every state.¹⁰⁴ Generally,

68,698, 68,705 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (clarifying that while the use of alternate achievement standards is technically unlimited, the standards are only appropriate for a limited group of students). *See supra* note 7 (setting forth the thirteen categories of disabilities in the IDEA).

¹⁰⁰ 68 Fed. Reg. at 68,704.

¹⁰¹ *Id.* (noting that the federal cap permits states and schools to count the results of students who take out-of-level tests in their adequate yearly progress totals).

¹⁰² *Id.* (advising that out-of-level assessments must be included within the cap “because the achievement standards associated with the content and skills measured by out-of-level assessments are clearly different from the achievement standards in the target grade”).

¹⁰³ 20 U.S.C. § 6311(a)(1) (2002) (outlining the criteria that must be included in a state’s accountability plan). Compliance with NCLB requires the state plan to articulate “challenging academic standards,” a “single statewide accountability system,” and an assessment plan consistent with IDEA and NCLB requirements. *Id.*

¹⁰⁴ Press Release, U.S. Dep’t of Educ., President Bush, Secretary Paige Celebrate Approval of Every State Accountability Plan Under No Child Left Behind (June 10, 2003), *available at* <http://www.ed.gov/news/pressreleases/2003/06/06102003.html>.

the alternate assessment programs within these accountability plans may be loosely categorized into five types: portfolio; IEP-linked body of evidence; performance assessment; checklists; and traditional tests.¹⁰⁵

Portfolio assessments are based on a collection of a student's work that is viewed as representative of a student's performance as to specified skills or knowledge.¹⁰⁶ A student's portfolio may take the form of various mediums, including written work, videotapes, or audiotapes.¹⁰⁷ The student's portfolio then is measured against a scoring rubric to determine the level of performance with regard to predetermined performance goals or standards.¹⁰⁸ The IEP-linked body of evidence assessment approach, like the portfolio approach, relies on a collection of student work to indicate performance of goals and indicators.¹⁰⁹ This approach takes into account documentation in a student's IEP, which informs the scoring process and provides a context for student work samples.¹¹⁰ The performance approach typically requires more direct student-evaluator interaction than other models and requires a teacher or tester to assign specific tasks for the student to perform.¹¹¹ These assessments measure the level of independence with which a student performs the requested task.¹¹² Student responses are usually scored according to a predetermined rubric framework that

¹⁰⁵ RACHEL QUENEMOEN, SANDRA THOMPSON & MARTHA THURLOW, NAT'L CTR. ON EDUCATIONAL OUTCOMES, MEASURING ACADEMIC ACHIEVEMENT OF STUDENTS WITH SIGNIFICANT COGNITIVE DISABILITIES: BUILDING UNDERSTANDING OF ALTERNATE ASSESSMENT SCORING CRITERIA (SYNTHESIS REPORT 50) 1, 6 (June 2003) (citing E. ROEBER, NAT'L CTR. ON EDUCATIONAL OUTCOMES, SETTING STANDARDS ON ALTERNATE ASSESSMENTS (2002)) (defining each of the alternate assessment approaches) [hereinafter QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT].

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 6.

¹¹² *Id.*

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accounts for both accuracy and independence.¹¹³ Checklist assessments, on the other hand, are based on the memory or direct observation of individuals who interact with the student.¹¹⁴ The observers are asked to determine whether the student performed a given skill and at what level.¹¹⁵ Scoring of checklist assessments is based on the number of skills the student performs and the types of settings in which performance of the skill was observed.¹¹⁶ Finally, the traditional test approach requires students to choose from correct or incorrect answers to formulated questions.¹¹⁷ No further scoring is necessary, as the students' correct or incorrect responses immediately provide feedback.¹¹⁸ The National Center on Educational Outcomes explains, however, that "these approaches are not mutually exclusive categories, and as state practices are examined, it is clear that a great deal of overlap in methods occurs."¹¹⁹

Currently, every state has developed an alternate assessment program that uses one or more of the above approaches.¹²⁰ As alternate achievement standards are implemented and IDEA amendments are passed, it is likely that many states will be required to modify their existing alternate assessment systems to

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 6.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 5. The National Center on Educational Outcomes ("NCEO"), founded in 1990, was established to "provide national leadership in designing and building educational assessments and accountability systems that appropriately monitor educational results for all students, including students with disabilities and students with limited English proficiency." *See* Nat'l Ctr. On Educational Outcomes, NCEO Overview, at <http://education.umn.edu/NCEO/overview/overview.html> (last modified Feb. 19, 2003). NCEO has been particularly active in researching the development of alternate assessments for students with significant and severe disabilities. *Id.*

¹²⁰ Press Release, U.S. Dep't of Educ., *supra* note 104 (discussing the approval of every state accountability plan).

comply with new regulations.¹²¹ Thus, despite the efforts of states to implement accountability programs inclusive of students with disabilities, the development of compliant models remains a fluid process.¹²²

III. ANALYSIS OF ALTERNATE ACHIEVEMENT STANDARDS

Nearly thirty years after the IDEA revolutionized the education of students with disabilities, educators and legislators continue to seek a balance between the goal of an individualized education for all students with disabilities and the inclusion of these students in standards-based accountability systems.¹²³ Recent efforts to permit the use of alternate achievement standards highlight the difficulty and importance of blending accountability and individuality.¹²⁴

¹²¹ Letter from Eugene Hickock, Federal Undersecretary of Education to Reed Hastings, President of the California State Board of Education and Jack O'Connell, Superintendent of Public Instruction for the California Department of Education (July 1, 2003) (explaining that the U.S. Secretary of Education would extend uncapped use of alternate achievement standards while the final regulation was pending), *available at* <http://www.ed.gov/admins/lead/account/letters/ca.doc> (last visited Mar. 1, 2004).

¹²² QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 3 (stating that “[i]t is possible that some state alternate assessments . . . may need to be modified as [No Child Left Behind] requirements are implemented and clarified”).

¹²³ QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 4 (explaining that many education experts “raised questions about the appropriateness of a focus on functional domains in an era of standards-based reform for all students, and the requirement in the 1997 reauthorization of IDEA that students should have access to, participate in, and make progress in the general curriculum”).

¹²⁴ *See, e.g.*, Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,700 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (stating that the DOE received comments and critiques of the proposed cap on alternate achievement standards from approximately one hundred parties); Letter from Sue Gamm, Special Counsel to Chicago Public Schools, and Judy Elliott, Assistant Superintendent, Office of Special Education, Long Beach Unified School District, California, to Jacquelyn Jackson, Acting Director of Student Achievement and School Accountability Programs, Office of Elementary and Secondary Education, U.S. Department of Education (May 19, 2003) 1, 1-7 [hereinafter Gamm Letter] (criticizing the federal cap on alternate achievement),

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Many challenges lie ahead in implementing the newly-enacted federal cap on the use of proficient scores on alternate achievement assessments for adequate yearly progress purposes. Specifically, the cap challenges the ability of IEP teams to make individualized determinations about student assessment placements by placing unrealistic limits on the percentage of students whose scores based on alternate achievement standards may be considered proficient for adequate yearly progress purposes.¹²⁵ The cap also threatens accountability for the education of students with significant cognitive disabilities by requiring grade-level achievement of students with significant cognitive disabilities who are not provided for by the cap on alternate achievement standards, but who nonetheless, may be unable to achieve grade-level standards.¹²⁶ By prioritizing uniform, grade-level achievement over the particular needs of students with significant cognitive disabilities, the NCLB undermines the individualized nature of special education under the IDEA.¹²⁷

Additionally, the development of strong special education and statewide accountability programs for students with significant cognitive disabilities is frustrated by recent congressional efforts to align the IDEA and NCLB through the IDEA reauthorization

at http://www.edc.org/collaborative/Resources/District_Letter.pdf; Letter from Lynne Cleveland, Chair of the Arc, Leon Triest, Chair of UCP, and Ruth Luckasson, President of AAMR, to Jacquelyn Jackson, Acting Director of Student Achievement and School Accountability Programs, Office of Elementary and Secondary Educ., U.S. Dep't of Educ. (May 19, 2003) 1, 1-5 [hereinafter Cleveland Letter] (noting the dangers to accountability posed by the cap on alternate achievement standards), at http://www.edc.org/collaborative/Resources/CCD_Letter.pdf.

¹²⁵ 34 C.F.R. § 200.13(c)(4) (2003) (limiting the percentage of students whose proficient scores on alternate assessments based on alternate achievement standards can be counted in state or district adequate yearly progress totals).

¹²⁶ Olson, *All Means All*, *supra* note 22, at 49 (describing the challenges of designing assessment models for special education students who do not have severe cognitive impairments, but who historically have been unable to perform on grade-level).

¹²⁷ See Lynn Olson, *Enveloping Expectations*, EDUC. WK., Jan. 8, 2004, at 8 [hereinafter Olson, *Enveloping Expectations*] (quoting educators who note the impracticality of requiring grade-level achievement of all students with cognitive disabilities).

process.¹²⁸ Specifically, Congress' IDEA reauthorization bills hinder the development of viable accountability systems for students with significant cognitive disabilities by eliminating the requirement that IEPs include short-term objectives for students and by streamlining the disciplinary process by which students with disabilities may be removed from schools.¹²⁹

A. *The Challenges of Implementing Alternate Achievement Standards*

In December 2003, the Department of Education enacted a final NCLB regulation that caps the percentage of students whose proficient or advanced scores on assessments based on alternate achievement standards may be counted as proficient for adequate yearly progress purposes.¹³⁰ The final regulation eliminates the proposed version's restriction on the use of alternate achievement standards to those students whose intellectual and behavioral functioning falls "three standard deviations below the mean."¹³¹ By affording states flexibility in defining the term "most significant cognitive disability," the Department of Education has ensured that students with significant cognitive disabilities will not be excluded from meaningful alternate assessment opportunities by arbitrary

¹²⁸ See generally H.R. 1350, 108th Cong. (2003); S. 1248, 108th Cong. (2003); *infra* Part III.B.2 (outlining the failures of federal efforts to align NCLB and IDEA).

¹²⁹ See H.R. 1350 § 615(k)(1)(A)(ii) (permitting schools to remove students with disabilities for any violations of their school's code of conduct); S. 1248 § 614(d) (eliminating short-term objectives from the list of an IEP's required contents); *infra* Part III.B.2 (discussing the weakness of the House and Senate IDEA reauthorization bills).

¹³⁰ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13).

¹³¹ *Id.* at 68,700 (referencing the proposed regulation's IQ-based definition of disability and noting that the final version adds flexibility by eliminating this definition). See also Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,797 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13) (defining "students with the most significant cognitive disabilities" as students functioning "three or more standard deviations below the mean").

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IQ-based bars.¹³²

The cap, however, poses great challenges to accountability for the education of students with cognitive disabilities.¹³³ Specifically, the federal cap threatens accountability by requiring IEP teams to make determinations about the appropriate use of alternate achievement standards without the necessary informational support and independence to enable responsible performance of this task.¹³⁴ While the final NCLB regulation requires that school districts educate teachers and IEP teams about alternate assessments and alternate achievement standards, it provides scant financial or informational support for this effort.¹³⁵ Absent quality instruction and information on the appropriate use

¹³² PRESIDENT'S COMM'N ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 22 (July 1, 2002) (citing Sharon Vaughn, Ph.D., who notes that "[t]here is no compelling reason to continue to use IQ tests in the identification of learning disabilities. And if we eliminated IQ tests from the identification of individuals with learning disabilities, we could shift our focus on to making sure that individuals are getting services that they need . . ."), available at <http://www.ed.gov/pubs/edpubs.html>.

¹³³ Nat'l Down Syndrome Soc'y, *Advocacy News* (Dec. 12, 2003) (expressing concerns about "the abuses that may take place in implementation [of the cap], in spite of the safeguards in the regulations. It is important that parents of children with Down syndrome understand that this diagnosis should not automatically mean placement in the alternate assessment based on alternate achievement standards."), at http://www.tilrc.org/docs/1203nclb_idea.htm.

¹³⁴ Olson, *All Means All*, supra note 22, at 49 (discussing the impact of the 1 percent cap on the assessment placement determinations made by IEP teams).

¹³⁵ See 68 Fed. Reg. at 68,702 (authorizing no new funding for the regulation and advising that actions authorized by the regulation "will be financed through the appropriations for title I and other Federal programs and . . . will not impose a financial burden that States and LEAs [local educational agencies] will have to meet from non-Federal resources"); 68 Fed. Reg. at 68,700 (stating that the Department of Education will issue a report on the implementation of the cap and alternate achievement standards after two years). *But see Alternate Standards Provide Better Shot at Reaching AYP*, CAL. SPECIAL EDUC. ALERT, Mar. 4, 2004 [hereinafter *Alternate Standards Provide Better Shot at Reaching AYP*] (reporting that the Department of Education is currently writing guidelines for alternate achievement standards and that federal officials will begin to visit states this summer to review alternate standards and provide feedback).

of alternate standards, effective implementation of alternate assessments based on alternate achievement standards will prove elusive.¹³⁶

I. A Call for Guidance: The Development of State Alternate Achievement Standards

In its original pronouncement of alternate achievement standards, the Department of Education defined the term student with a “most significant cognitive disability” as a student “whose intellectual functioning and adaptive behavior are three or more standard deviations below mean.”¹³⁷ Advocacy groups voiced concern that this definition would exclude students with multiple disabilities from assessments based on alternate achievement standards.¹³⁸ Additionally, critics noted the definition’s emphasis on IQ scores—an outdated measurement that disproportionately leads to the misidentification of minorities as cognitively disabled.¹³⁹ The final regulation is a marked improvement in that it

¹³⁶ Press Release, Council for Exceptional Children, New Regulations on No Child Left Behind’s Annual Yearly Progress Requirements Give States and Districts More Flexibility, Says CEC (Dec. 19, 2003) [hereinafter Press Release, Council for Exceptional Children] (suggesting that a plan to assist states in the development of achievement standards is necessary for the implementation of assessment programs), at http://www.cec.sped.org/pp/legislative_update/modules/news/article.php?storyid=46.

¹³⁷ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,797 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13) (setting forth the defined group of students for which the use of alternate achievement is appropriate).

¹³⁸ See Gamm Letter, *supra* note 124, at 2 (noting that the incidence level of students with the most significant cognitive disabilities in the Department of Education’s proposed regulation is inaccurately low, given that most states do not collect data on the number of students with “multiple disabilities” that lead to significant cognitive impairment).

¹³⁹ See PRESIDENT’S COMM’N ON EXCELLENCE IN SPECIAL EDUC., *supra* note 132, at 26 (explaining that “the Commission found several factors responsible for this overrepresentation of minorities [in special education], including the reliance on IQ tests that have known cultural biases”); Debra Viadero, *Disparately Disabled*, EDUC. WK., Jan. 8, 2004, at 25-26 (discussing the disparate representation of minority students in special education programs);

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no longer relies on an IQ-based definition of disability.¹⁴⁰ The regulation may still prove problematic, however, given that the Department of Education has only just begun to develop guidelines for state alternate achievement standards.¹⁴¹ Without sufficient guidance, states may draft alternate achievement standards that are insufficiently ambitious and fail to reflect the highest standards for “students with the most significant cognitive disabilities.”¹⁴²

States play a unique role within the NCLB framework in developing and delivering the education of students beneath a broader umbrella of federal educational standards and regulations.¹⁴³ The education of students with significant cognitive disabilities, for example, autism or mental retardation, often proves the most challenging aspect of education for many states, in part because educational and assessment models for students within this group regularly change with the emergence of new research.¹⁴⁴

Gamm Letter, *supra* note 124, at 3 (commenting on “the degree to which local educational agencies relied on IQ testing and the resulting disproportionate rate of African-American students identified as mentally retarded”).

¹⁴⁰ Press Release, Council for Exceptional Children, *supra* note 136 (applauding the new regulation on alternate achievement for allowing “flexibility in selecting which students can be assessed using alternate achievement standards to meet adequate yearly progress goals”).

¹⁴¹ See *Alternate Standards Provide Better Shot at Reaching AYP*, *supra* note 135 (reporting on recent efforts by the Department of Education to provide guidance to states in the use of alternate achievement standards).

¹⁴² Press Release, Council for Exceptional Children, *supra* note 136 (warning “that implementing the regulations will take a huge investment in training and technical assistance”).

¹⁴³ See Jack Jennings, *Knocking on Your Door: With ‘No Child Left Behind,’ the Federal Government is Taking a Stronger Role in Your Schools*, 189 AM. SCHOOL BOARD J. 25, 27 (Sept. 2002) (advising that “[s]tandards-based reform, as embodied in [NCLB], means that all three levels of school governance—federal, state, and local—must assume responsibilities they have not previously had or have not fully embraced”).

¹⁴⁴ See Olson, *Enveloping Expectations*, *supra* note 127, at 10.

Although enormous strides have been made in special education over the past three decades, enormous gaps remain: in the performance of special education students compared with their peers’, in understanding how best to assess what students with disabilities know and can do, and in the preparation of special and general education teachers to provide

Recent discussions about the best means of including students with significant cognitive disabilities in assessment programs starkly contrast with the historical assumptions of educators and administrators that the inclusion of these students was futile.¹⁴⁵ Believing that students with significant cognitive disabilities could not pass traditional tests or learn to the same degree as general education students, schools enrolled these students in special education programs, but excluded them from school assessment programs.¹⁴⁶

The 1997 amendments to the IDEA improved accountability for the education of students with significant cognitive disabilities by mandating the availability of alternate assessments for students who could not take traditional assessments, even with accommodations.¹⁴⁷ With the implementation of NCLB, the utility of alternate assessments for many of these students diminished.¹⁴⁸ Although these students could more readily access assessment material, many could not achieve the grade-level standards required by NCLB.¹⁴⁹ The newly-enacted NCLB regulation on alternate achievement standards permits the use of alternate achievement standards, a measure designed to ensure that both the assessment process and the results yielded through assessments are responsive to the needs of students with the “most significant

such students with full access to the general education curriculum.

Id.

¹⁴⁵ See *id.* (comparing NCLB’s required assessment inclusion of students with disabilities to the past exclusion of these students and noting that the “new reality is both exhilarating and daunting”).

¹⁴⁶ *Id.*

¹⁴⁷ 20 U.S.C. § 1412(a)(17)(A)(ii) (2000) (requiring that states develop and conduct alternate assessments for students who cannot participate in general assessments by July 1, 2000).

¹⁴⁸ See Olson, *Enveloping Expectations*, *supra* note 127, at 16 (describing that NCLB assessment of students with disabilities resulted in low test scores in many states and caused educators to debate the consequences holding students who function below grade-level to different standards).

¹⁴⁹ *Id.* at 8 (quoting an Oklahoma school superintendent who compared the requirement that all students with cognitive disabilities achieve at grade-level standards to “asking kids to jump a bar one foot off the ground and providing no exceptions for children who are in a wheelchair”).

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cognitive disabilities.”¹⁵⁰

Although alternate achievement standards represent an important step in the assessment inclusion of students with the most significant cognitive disabilities, they are not self-executing, and cannot deliver their promise of accountability without the assistance of quality research and training.¹⁵¹ The NCLB regulation requires that in defining alternate achievement standards, a state must “employ commonly accepted professional practices to define the standards.”¹⁵² The regulation clarifies that if a state chooses to make use of alternate achievement standards, these standards must be “aligned with the State’s academic content standards, promote access to the general curriculum, and reflect professional judgment of the highest achievement standards possible.”¹⁵³

In advising that states act in accordance with “professional judgment” on alternate achievement standards, the regulation relies on a professional consensus that is still developing.¹⁵⁴ While new research constantly informs the creation of alternate assessment programs and alternate achievement standards, the notion of alternate achievement is not without debate.¹⁵⁵ As a result, states

¹⁵⁰ See Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (authorizing the use of alternate achievement standards to evaluate the performance of students with the most significant cognitive disabilities).

¹⁵¹ Press Release, Council for Exceptional Children, *supra* note 136 (warning “that implementing the regulations will take a huge investment in training and technical assistance”).

¹⁵² 68 Fed. Reg. at 68,699 (stating that a state need not develop alternate achievement standards, but if it does, the standards must be developed in accordance with commonly used practices for defining student achievement).

¹⁵³ *Id.* at 68,702.

¹⁵⁴ See QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 4 (suggesting that there is “no clear consensus on the criteria being used to score alternate assessment evidence”); Cleveland Letter, *supra* note 124, at 2 (evaluating the federal cap on alternate achievement and noting that “the field of special education is still grappling with and has by no means solved numerous issues surrounding alternate assessment”).

¹⁵⁵ See, e.g., Cleveland Letter, *supra* note 124, at 3 (expressing the worries of advocates “about those who will view the one percent cap as an invitation to fill that cap with as many students with disabilities as possible so as to shield

are left to compile research and examine the assessment programs of other states to arrive at an understanding of what is professionally sound with regard to achievement standards for students with the most significant cognitive disabilities.¹⁵⁶

The difficulties experienced by states in attempting to align new accountability measures with ever-developing research are best illustrated by the implementation of the IDEA's 1997 alternate assessment mandate.¹⁵⁷ In 1997, Congress required states to provide alternate assessment opportunities to all students who could not take traditional assessments even with accommodations.¹⁵⁸ States were given until July 1, 2000 to create and implement compliant alternate assessment models.¹⁵⁹ Arriving at inclusive and appropriate assessment formats proved challenging for many states that previously had excluded students with disabilities from their assessment programs.¹⁶⁰ States did not develop a consensus on the best alternate assessment models and

school authorities and their schools from any negative impact brought forward by AYP [adequate yearly progress] implementation"); Gamm Letter, *supra* note 124, at 1-6 (noting the limitations of the proposed federal cap on alternate achievement standards).

¹⁵⁶ See Cleveland Letter, *supra* note 124, at 2 (advising that the Department of Education provide training and funding to help schools struggling to interpret and implement the federal cap).

¹⁵⁷ *Id.* (noting the delay by states in implementing the IDEA alternate assessment mandate and the impact of this on the adequacy of data to inform the implementation of alternate achievement standards).

¹⁵⁸ 20 U.S.C. § 1412(a)(17)(A)(ii) (2000) (requiring states to develop and conduct alternate assessments by July 1, 2000); 34 C.F.R. § 200.6(a)(2)(i) (2003) (requiring states to provide one or more alternate assessment opportunities for students who can not participate in general assessments, even with accommodations).

¹⁵⁹ 20 U.S.C. § 1412(a)(17)(A)(ii).

¹⁶⁰ See Olson, *All Means All*, *supra* note 22, at 46-49 (reporting that in 1995-96, only six states offered alternate assessments, and that as late as 2002-03, nearly twenty states had conditions on their IDEA funding due to their failure to implement alternate assessment programs or report alternate scores); Lynn Olson, *Measuring by Other Means*, EDUC. WK., Jan. 8, 2004, at 79 [hereinafter Olson, *Measuring by Other Means*] (explaining the 1997 IDEA amendments mandating the availability of alternate assessments, but stating that the IDEA "provides few details about how such measures should look").

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instead, developed plans based on a variety of formats, from portfolio to traditional test approaches.¹⁶¹ In attempting to incorporate new research into their alternate assessment programs, many states missed the 2000 implementation deadline and failed to implement compliant models until years later.¹⁶²

In order to avoid the delays that characterized the implementation of state alternate assessment programs, the federal government must offer ample guidance to the states on how to create and implement alternate achievement standards.¹⁶³ The Department of Education currently is in the process of drafting guidelines for state alternate achievement standards.¹⁶⁴ Additionally, the Department of Education has announced plans to begin visiting states this summer to provide direction in the development and implementation of alternate achievement standards.¹⁶⁵ The Department of Education's timely response to state concerns about the creation and implementation of alternate achievement standards is commendable. The expedient production of federal guidelines on alternate achievement standards, however,

¹⁶¹ See QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 4 (arguing that a 2001 survey found "a continued range of alternate assessment approaches, and more importantly, no clear consensus on the criteria being used to score alternate assessment evidence") (citations omitted); Diane Browder & Karena Cooper-Duffy, *Evidence-Based Practices for Students with Severe Disabilities and the Requirement for Accountability in "No Child Left Behind"*, 37 J. OF SPECIAL EDUC. 157, 157 (2003) (noting that "[a]lthough research is now emerging on states' alternate assessment practices, many questions remain about how best to measure the progress of students with severe disabilities on state academic standards"); see also *supra* Part II.B (describing various alternate assessment models).

¹⁶² Olson, *All Means All*, *supra* note 22, at 46-49 (reporting that as late as 2002-03, nearly twenty states had conditions on their IDEA funding due to their failure to implement alternate assessment programs or report alternate scores).

¹⁶³ Press Release, Council for Exceptional Children, *supra* note 136 (advising that the federal government should "develop a strategic plan to assist states and districts to develop alternative achievement standards and their corresponding assessments quickly").

¹⁶⁴ *Alternate Standards Provide Better Shot at Reaching AYP*, *supra* note 135 (discussing the Department of Education's current development of guidelines for alternate achievement standards).

¹⁶⁵ *Id.*

must not be rewarded at the expense of their quality. As the federal government crafts guidelines for alternate achievement standards, it must ensure that states are permitted the flexibility to develop standards that are appropriately reflective of student needs. At the same time, it must ensure that new guidelines are not so unduly vague and permissive as to undermine high expectations for students with significant cognitive disabilities. For their part, states must seek and make use of information provided by the Department of Education and must not permit the difficulty of developing compliant standards to become an excuse for implementing unambitious achievement models.¹⁶⁶ Through ongoing collaboration, states and the federal government can guarantee that the new regulation on alternate achievement standards delivers its promise of accountability for the education of students with the most significant cognitive disabilities.

2. *Frustrating the Messenger: The Role of IEP Teams in Alternate Assessment*

IDEA emphasizes the individuality of special education students and mandates the creation of IEPs for all students with disabilities.¹⁶⁷ Rather than promoting either blanket inclusion in general education classrooms or blanket segregation into special education classrooms, IDEA favors individualized education to the extent necessary to provide the most rigorous and least restrictive environment for students with disabilities.¹⁶⁸

¹⁶⁶ See Libby Nealis, Nat'l Ass'n of School Psychologists, *No Child Left Behind?*, 32 NASP Communiqué #4 (Dec. 2003) (advising that "[i]t would be easier for schools to comply with NCLB assessment requirements if they did not have to test certain students. We know these students pose challenges in education, but no child left behind means no child"), at <http://www.nasponline.org/publications/cq324ayp.html>.

¹⁶⁷ See 20 U.S.C. § 1412(a)(4) (2000) (explaining a free appropriate public education to include the development of an IEP).

¹⁶⁸ 20 U.S.C. § 1414(d)(1)(A) (2000) (describing that a student's IEP must include a statement of "how the child's disability affects the child's involvement and progress in the general curriculum" and a statement of the special education services, aids, and modifications required for the child "to be involved in the general curriculum . . . and to be educated and participate with other children

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The new federal cap raises questions about the compatibility of federal education standards with an individualized education model.¹⁶⁹ The final regulation clarifies that, under the NCLB and IDEA, IEP teams must determine how their students will participate in assessment programs that are guided by state achievement and content standards.¹⁷⁰ IEP teams may be reluctant to approve the use of alternate achievement standards, however, given that exceeding the federal cap would require a waiver or the classification of some students as non-proficient for adequate yearly progress purposes.¹⁷¹ Fearing that the adequate yearly progress failure of students with disabilities might trigger identification as a school in need of improvement, or eventually corrective action, IEP teams may hesitate to exceed the cap such that their students' scores will be considered non-proficient for adequate yearly progress purposes.¹⁷²

with disabilities and non-disabled children in the activities [described in the Act]). The full inclusion of students with disabilities in general education programs remains a contentious issue. Craparo, *supra* note 24, at 496-99 (discussing the divergence of interest groups on the degree to which inclusion of students with disabilities in general education classes should be promoted). Some interest groups and educators argue that full inclusion is necessary, despite its costs, because it encourages attitudinal changes toward students with disabilities, and challenges students with disabilities to achieve their potential. *Id.* Other advocacy groups contend that full inclusion is counterproductive and "destructive" to special education. *Id.* at 499 (citing Albert Shanker, *Inclusion and Ideology*, EXCEPTIONAL PARENT, Sept. 1994, at 39).

¹⁶⁹ See 34 C.F.R. § 200.13(c) (2003) (codifying the final regulation capping the use of proficient scores on assessments by alternate achievement standards for adequate yearly progress purposes); Cleveland Letter, *supra* note 124, at 3 (expressing concern about the proposed regulation's classification of the role of IEP teams in alternate assessment decisions).

¹⁷⁰ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,703 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13).

¹⁷¹ See Cleveland Letter, *supra* note 124, at 3 (noting a potential inconsistency between the proposed cap and the IDEA, and urging that the final rule reiterate that the final determination rests with the IEP team); Olson, *All Means All*, *supra* note 22, at 49 (quoting Lydia Calderon, of the special education office of the Michigan education department, as noting that "[t]he risk is that some students may not be assessed appropriately as the cap influences decision-making").

¹⁷² See Olson, *All Means All*, *supra* note 22, at 49.

While the final regulation permits the unlimited use of alternate achievement standards for students with the most significant cognitive disabilities, it requires that states and districts limit the incorporation of proficient scores based on these standards for adequate yearly progress purposes, or else risk NCLB failure and corrective action.¹⁷³ This means that students may be assessed according to alternate achievement standards if IEP teams deem this appropriate, but their proficient results may not be included in their district or state's adequate yearly progress totals once the cap has been reached.¹⁷⁴ Consequently, a state or district that cannot articulate a geographic reason or other circumstance to explain its heightened use of alternate achievement standards will be forced to divide students into two assessment categories, one of students who demonstrated proficiency on assessments measured by alternate achievement standards and may be counted as proficient in adequate yearly progress totals, and one of students who similarly demonstrated proficiency on assessments measured by alternate achievement standards but must be deemed non-proficient for adequate yearly progress purposes.¹⁷⁵ This scheme frustrates the role of IEP teams, which must identify appropriate assessment models for individual students despite the fact that their students' proficient performance may be misreported for adequate yearly progress purposes.¹⁷⁶

The Department of Education asserts that the final regulation does not alter or displace the role of the IEP team in making

¹⁷³ 68 Fed. Reg. at 68,698 (requiring that students measured against alternate achievement standards who exceed the 1 percent cap must be deemed non-proficient for adequate yearly progress purposes).

¹⁷⁴ See Am. Speech-Language-Hearing Ass'n, *Analysis of ED's One Percent Rule for Students with the Most Significant Cognitive Disabilities* 1, 2 (Jan. 12, 2004) (stating that critics of the cap note that "proficient or advanced scores should be counted for all students who are determined to need alternate achievement standards and alternate assessment"), at <http://www.asha.org/about/Legislation-Advocacy>.

¹⁷⁵ *Id.*

¹⁷⁶ East Letter, *supra* note 9 (advising that assessment determinations rest with the IEP team and that accountability requires that students with disabilities "be included and counted in the assessments that are appropriate for them").

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assessment decisions.¹⁷⁷ While decisions indeed remain with IEP teams, external influences may engineer inaccurate student assessment placements.¹⁷⁸ States and districts concerned about recent school failures will be eager to use alternate achievement standards, but might seek to avoid inviting federal oversight by implicating the cap without a substantiated reason.¹⁷⁹ This pressure will inevitably be applied to IEP teams and may frustrate their ability to identify student needs and recommend appropriate assessment placements for these students.¹⁸⁰

To relieve the burden on IEP teams, the Department of Education must collaborate with states to provide instruction on the use and application of alternate achievement standards.¹⁸¹ The Department of Education noted in its final regulation that school districts “must provide information to school personnel and IEP teams about the state assessment, the use of accommodations, and assessments against alternate achievement standards.”¹⁸² The

¹⁷⁷ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,705 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (clarifying the role of the IEP team in determining how a student will participate in district and statewide assessment based on guidelines for assessments set forth by the state).

¹⁷⁸ Olson, *All Means All*, *supra* note 22, at 49 (quoting a state administrator as expressing concern regarding the “influences” of the cap on assessment placement decisions).

¹⁷⁹ *Id.* (warning that the cap may influence assessment placement decisions).

¹⁸⁰ See East Letter, *supra* note 9 (advising that the 1 percent cap “will have a chilling effect on the number of students taking the alternative assessment . . . because of the immense pressure on states, local education agencies (LEAs) and schools to have their students achieve AYP”); Olson, *All Means All*, *supra* note 22, at 49 (warning that the cap may influence assessment placement decisions).

¹⁸¹ Cleveland Letter, *supra* note 124, at 5 (suggesting that the Department of Education “fund ample training and technical assistance to school authorities and parents . . . in order that all parties are prepared, able and willing to profit from whatever gains students and schools systems will reap from this new and untested strategy of performance assessment”).

¹⁸² Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,706 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (describing the responsibilities of local educational agencies in administering the cap on alternate achievement standards).

regulation also highlights that local educational agencies must “ensure appropriate staff receive training to support sound IEP decisions about which students participate in an alternate assessment based on alternate achievement standards.”¹⁸³ Finally, the regulation notes that school districts should monitor the administration of assessments based on alternate achievement standards to ensure that “alternate achievement standards are being used in a manner consistent with the best instructional practices known for students with the most significant cognitive disabilities.”¹⁸⁴

As widespread school corrective action under NCLB triggers school restructuring and the transferring of students from failing to better-performing schools, many states will be eager to take advantage of the cap on alternate achievement standards to improve their adequate yearly progress totals.¹⁸⁵ States and districts must consider the thorough training of educators and IEP teams as a prerequisite to their use of alternate achievement standards and recognize the dangers to accountability posed by indiscriminate use of the cap.¹⁸⁶ Absent sufficient training on alternate achievement standards, such standards may be underused, as IEP teams will be wary of implicating the federal cap and their district’s identification for corrective action.¹⁸⁷ Alternately, a lack of adequate training may cause these standards to be administered too broadly and used to assess students with disabilities who are capable of performing at grade-level.¹⁸⁸ For example, IEP teams

¹⁸³ *Id.* at 68,707 (discussing each school district’s responsibility to train IEP teams on alternate achievement standards).

¹⁸⁴ *Id.*

¹⁸⁵ Ronald A. Skinner & Lisa N. Staresina, *State of the States*, EDUC. WK., Jan. 8, 2004, at 98 (reporting that “[n]ationwide, at least 23,812 schools failed to make adequate yearly progress in 2002-03 and 5,200 were identified as being ‘in need of improvement’”).

¹⁸⁶ 68 Fed. Reg. at 68,707 (noting the importance of training and monitoring in implementing the cap and advising that if it were applied too broadly, “a large number of non-proficient scores would have to be allocated among the schools . . . This would potentially create negative consequences for schools that administer the alternate assessment”).

¹⁸⁷ Olson, *All Means All*, *supra* note 22, at 49.

¹⁸⁸ Improving the Academic Achievement of the Disabled, 68 Fed. Reg.

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may seek to minimize their students' "failures" on grade-level assessments by channeling all students with significant cognitive disabilities into assessments measured by alternate achievement standards without individually evaluating each student's potential to perform on grade-level assessments.¹⁸⁹ Either overuse or underuse of the cap would discount the purpose of the NCLB regulation on alternate achievement standards and deprive students with the most significant cognitive disabilities of meaningful assessment opportunities and accountability.¹⁹⁰

B. Irreconcilable Differences? Aligning the IDEA and NCLB

The debate surrounding the use of alternate achievement standards for students with significant cognitive disabilities stems in large part from the tension between NCLB and IDEA.¹⁹¹ Many disability advocates have argued that NCLB's standards-based model, which requires all but a limited percentage of students to achieve at grade-level, is inherently incompatible with IDEA, which through its IEP provision, mandates the individualized evaluation of student needs and assessment placements.¹⁹² Where NCLB emphasizes the importance of group progress, IDEA highlights individualized achievement.¹⁹³ Although the achievement of individualized goals is not necessarily in conflict

68,698, 68,707 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (advising that if the cap were applied too broadly, a "large number of non-proficient scores would have to be allocated among the schools This would potentially create negative consequences for schools that administer the alternate assessment.").

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (noting the potential consequences of exceeding the cap and suggesting that "[s]tates should ensure that these regulations are implemented appropriately throughout the State to ensure schools benefit from this new flexibility").

¹⁹¹ See Olson, *Enveloping Expectations*, *supra* note 127, at 13 (explaining that "[s]ome observers argue there's an essential conflict between the IDEA, which focuses on individual goals and learning plans for students, and the No Child Left Behind law, which stresses systems accountability and uniformity").

¹⁹² *Id.*

¹⁹³ *Id.*

with overall group achievement, NCLB's blanket requirement that all students achieve at grade level is particularly difficult to reconcile with IDEA's mandate of individualized educational programs and performance goals.¹⁹⁴

1. Identifying Deficiencies in the Assessment Framework for Students with Disabilities

Under NCLB, most students with cognitive disabilities will be required to take grade-level assessments, as they do not possess cognitive impairments severe enough to bring them within the scope of the NCLB provision on alternate achievement standards.¹⁹⁵ Many of these students, however, may be unable to demonstrate proficiency at grade level, given that they traditionally have performed at a level much lower than their chronological grade.¹⁹⁶ By holding schools accountable for the grade-level achievement of all students without providing adequate flexibility for variations in student needs, NCLB sets teachers and schools up to fail, even where their instruction is effective and student achievement is evident.¹⁹⁷ Most dangerously, NCLB falsely

¹⁹⁴ *Id.*

¹⁹⁵ See Improving the Academic Achievement of the Disabled, 68 Fed. Reg. at 68,698, 68,699-700 (to be codified at 34 C.F.R. pt. 200.13) (clarifying that “[f]or most schools, only a small portion of students with disabilities—those with the most significant cognitive disabilities—should appropriately participate in an assessment based on alternate achievement standards, and all other students with disabilities should be assessed against grade-level standards”).

¹⁹⁶ See Olson, *All Means All*, *supra* note 22, at 49 (explaining the confusion of educators over “gap kids,” students “who perform at too high a level to take an alternate assessment designed for youngsters with severe cognitive impairments, but at too low a level to show what they know and can do on state tests for students at their chronological grade”); Cleveland Letter, *supra* note 124, at 4 (“In a perfect world, students with mild mental retardation and other disabilities would be tested at the grade level of their peers. In the real world, however, many of these students are not given the supports, services or access to the general curriculum necessary to achieve at grade level.”).

¹⁹⁷ See CTR. ON EDUC. POL’Y, FROM THE CAPITAL TO THE CLASSROOM: YEAR 2 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 4, at ix (reporting that many educators and administrators note the inefficiency of assessing at grade level students who are placed in special education because they possess

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indicates the “failure” of a school by suggesting that anything less than grade-level achievement by all students is insufficient.¹⁹⁸ A school that strictly complies with IDEA such that its students with disabilities receive quality, individualized instruction still might fail under the NCLB scheme, not for lack of student achievement or quality instruction, but due to the failure of those students to achieve at the same pace as their general education peers.¹⁹⁹ When assessments serve only to highlight intentional modifications to student educational programs rather than quality differences, they effectively fail to measure what they are designed to report.²⁰⁰

Similarly, internal inconsistencies in the final NCLB regulation on alternate achievement standards frustrate accountability for the education of students with the “most significant cognitive disabilities”—the population for which the federal regulation was designed.²⁰¹ Specifically, the regulation permits IEP teams to make

cognitive or learning disabilities that cause them to perform below grade level).

¹⁹⁸ See *id.* (quoting a state education representative as stating that “[h]olding special education . . . students to the same time frame for meeting state standards is unrealistic and can have a damaging effect on the self-esteem of these students”).

¹⁹⁹ *Id.*

²⁰⁰ See Todd Silberman, *Debate Rages on Appropriate Test Goals*, NEWS & OBSERVER, Oct. 22, 2003, at B1 (quoting an elementary school principal who advised that “[w]hen a child is operating at several grade levels below their peers, testing them at grade level doesn’t really give you much information”); Jason Wermers, *High Stakes Testing Studied; Researchers Disagree; U.S. Standard Debated*, RICH. TIMES DISPATCH (Richmond, Virginia), Nov. 4, 2003, at B1 (explaining the reactions of Virginia educators and schools to NCLB regulations requiring grade-level assessment for most students with disabilities). Greg Muzik, the principal of Mary Munford Elementary School, a successful school in Richmond, Virginia, explained the difficulties of having to test all students with disabilities by the same standards as general education students: “We could test all those kids If we did, we have a high enough pass rate that even if they all failed, we would still be fully accredited. But that’s not what is best for those children. We can’t test them just for the sake of testing them.” Wermers, *supra*.

²⁰¹ See Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (explaining that the final regulation is “designed to ensure that schools are held accountable for the educational progress of students with the most significant cognitive disabilities, just as schools are held accountable for the educational results of all

assessments measured by alternate achievement standards available to all students with the most significant cognitive disabilities who require the use of such standards.²⁰² The regulation then undermines the use of alternate achievement standards by advising that only 1 percent of students in all grades assessed may have their proficient and advanced scores on alternate achievement assessments included within the adequate yearly progress totals of their districts and states.²⁰³ As a result, schools, districts, and states may have to contend with the adequate yearly progress failure of the students with disabilities subgroup, which may lead to their identification as “in need of improvement,” or eventually, corrective action.²⁰⁴

The final regulation seeks to minimize the potential disparity between the number of students taking alternate achievement assessments and the percentage of students whose scores will be accurately reported for adequate yearly progress purposes by

other students with disabilities and students without disabilities”); Am. Speech-Language-Hearing Ass’n, *supra* note 174, at 2 (noting criticism that the 1 percent rule is too limiting since it allows students to take assessments by alternate achievement standards, but requires their otherwise proficient scores to be counted as non-proficient once the 1 percent cap has been reached).

²⁰² 68 Fed. Reg. at 68,699-700.

²⁰³ *Id.* at 68,698-700. *But see Be Cognizant of Factors Affecting 1 Percent Cap*, THE SPECIAL EDUCATOR, Mar. 24, 2004 (citing Martha Thurlow, director of the National Center on Educational Outcomes, as stating that, in the majority of states, less than 1 percent of students currently are assessed based on alternate achievement standards).

²⁰⁴ 20 U.S.C. § 6316(b)(1)(A) (2002) (stating that “a local educational agency shall identify for school improvement any elementary or secondary school . . . that fails, for two consecutive years, to make adequate yearly progress as defined in the State’s plan”); 20 U.S.C. § 6316(b)(7) (describing corrective actions measures for schools that fail to make adequate yearly progress by the end of the second full year after identification as a school in need of improvement). The final regulation clarifies that the cap does not apply at the school level in acknowledgement of the fact that small schools would be statistically disadvantaged. *See* 68 Fed. Reg. at 68,699-700. However, the regulation permits states and districts to determine how to distribute non-proficient scores in the excess of the 1 percent cap, which might include adding these scores to the adequate yearly progress totals of the schools responsible for the alternate achievement assessments. *Id.* at 68,701.

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allowing for an exception from the cap for states and districts that can articulate circumstances to describe higher incidence levels of significant cognitive disabilities.²⁰⁵ The regulation's exception, however, is unduly narrow. The final regulation limits the authority of the Secretary of Education to grant states temporary exceptions from the cap, and of states to grant temporary exceptions to districts, to situations in which states and districts can demonstrate a demographic or geographic reason for hosting higher numbers of students with the most significant cognitive disabilities.²⁰⁶ Many states and districts will be unable to secure a temporary waiver from the cap because their reasons for exceeding the 1 percent limit for adequate yearly progress purposes are related to individual student needs rather than the small size of their school or a unique program that attracts large numbers of students with the most significant cognitive disabilities.²⁰⁷ Consequently, these states and districts will be required to count the proficient scores of students with significant cognitive disabilities on assessments based on alternate achievement as non-proficient for adequate yearly progress purposes.²⁰⁸

Under this scheme, the appropriate placement of students with the most significant cognitive disabilities in assessments measured by alternate achievement standards may contribute to the adequate yearly progress failure of schools, states, and districts.²⁰⁹ This

²⁰⁵ See 68 Fed. Reg. at 68,699 (explaining that the U.S. Secretary of Education may approve exceptions from the cap for states and states may approve exceptions from the cap for local educational agencies); Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,796-97 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13).

²⁰⁶ 34 C.F.R. § 200.13(c)(2)-(3) (2003).

²⁰⁷ 34 C.F.R. § 200.13(c)(2)-(3) (permitting waivers from the cap based on proof by the state or district of higher disability incidence levels through "school, community or health programs in the State [or district] that have drawn large numbers of families of students with the most significant cognitive disabilities, or such a small overall student population that it would take only a very few students with such disabilities to exceed the 1 percent cap").

²⁰⁸ 34 C.F.R. § 200.13(c)(4).

²⁰⁹ 20 U.S.C. § 6316(b)(1)(A) (2002) (stating that a school's identification as in need of improvement follows two consecutive years of adequate yearly progress failure). A failure to make adequate yearly progress in the two years

result transforms NCLB assessment into a numbers game rather than a meaningful process that seeks to accurately measure the quality of education provided by schools, districts, and states. By indicating that students lack proficiency in assessed subject areas despite actual student proficiency as demonstrated through alternate achievement assessments, the Department of Education sends a mixed message to states.²¹⁰ In particular, the Department of Education suggests that the assessment process may reflect individualized needs, as prioritized by IDEA, but only to the extent that the results of these assessments do not undermine the uniform, standards-based model of NCLB.

Thus, the final regulation 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 adequate yearly progress failure of the students with disabilities subgroup.²¹¹ Consequently, states and districts may become disinterested in improving the education of students with the most significant cognitive disabilities, as students in this subgroup likely will contribute to adequate yearly progress failure if tested either by grade-level standards or by alternate achievement standards due to the cap's limitations.²¹² Given that the cap may cause students to

following identification as in need of improvement triggers the NCLB's corrective action provisions. *Id.* § 6316(b)(7).

²¹⁰ 34 C.F.R. § 200.13(a)(4)(ii) (mandating that states and districts count proficient scores beyond the 1 percent cap as not proficient in their adequate yearly progress totals).

²¹¹ See East Letter, *supra* note 9 (advising that assessment inclusion and accountability require that students with disabilities be included and counted in whatever assessments are appropriate for them).

²¹² See 34 C.F.R. § 200.13(c)(4) (2003) (requiring that proficient scores on alternate achievement standards above the 1 percent cap must be counted as non-proficient); see also Merritt, *supra* note 15 (noting the potential repercussions of requiring that most students with disabilities be assessed at grade level such that their subgroup regularly contributes to adequate yearly progress failure). Lucinda Hundley, who directs special needs programs in the Littleton Public School district in Denver, Colorado, noted the likelihood that some schools might make special education students unwelcome in order to increase their performance on statewide assessments. Merritt, *supra* note 15.

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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 as such for adequate yearly progress purposes.²¹³ This result would contravene the mandate of NCLB, as students with disabilities would indeed be left behind in the rush of states, districts, and schools to improve the assessment performance of non-disabled students.²¹⁴

2. The Failings of Federal Efforts to Align the IDEA and NCLB

Sadly, the “alignment” of NCLB and IDEA appears distant, given current congressional efforts through the IDEA reauthorization process to dilute the tools that are essential to the development of quality special education programs.²¹⁵ Rather than reconciling the IDEA and NCLB through the IDEA reauthorization as it pledged, Congress has presented drastic reforms during the reauthorization process that hinder current efforts to hold schools accountable for the education of students with disabilities.²¹⁶

²¹³ See 34 C.F.R. § 200.13(c)(4).

²¹⁴ See 20 U.S.C. § 6301(4) (2002) (stating the purpose of NCLB as ensuring “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 assessments”).

²¹⁵ See Ctr. for Law and Educ., Letter to Sens. Judd Gregg and Edward Kennedy from Kathleen B. Boundy, Co-Director, Ctr. for Law and Educ. 1 (Aug. 3, 2003) (stating that “S. 1248 is being hailed by Committee members and staff alike as effectively aligning the IDEA with the NCLB. Nothing is further from the truth.”), available at <http://www.cleweb.org/Alert/CLE-IDEA-NCLB-S1248.pdf>.

²¹⁶ *Id.* (suggesting that “in reauthorizing IDEA, the Senate, as the House before it, has put the basic principles of NCLB at risk and is proposing to strip IDEA of key protections”). *But see* Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*, 15 HASTINGS WOMEN’S L.J. 1, 23-26 (2004) (discussing positive aspects of the IDEA reauthorization bills such as increased focus on monitoring and teacher training). Rosenbaum suggests that “No Child Left Behind is the law of the land, and IDEA as we know it is itself likely to get

Among its bold reforms, the U.S. House of Representatives has streamlined the IDEA's discipline procedures in response to claims by educators and administrators that the disciplinary process for students with disabilities is needlessly complex.²¹⁷ The House reauthorization bill, H.R. 1350, permits schools to unilaterally remove students with disabilities for any violations of their school's code of conduct, regardless of the severity of the violation.²¹⁸ The bill provides school officials with enormous discretion to determine the location and length of alternative educational placements for disciplined students with disabilities.²¹⁹ When juxtaposed with NCLB's requirements that schools demonstrate educational progress for all students or risk corrective action, the House bill's streamlined procedures are especially problematic.²²⁰ In giving schools the authority to unilaterally remove students with disabilities, the bill creates an incentive for schools to avoid NCLB accountability by initiating disciplinary

left behind." *Id.* at 27. Thus, he advises that "[i]n the reauthorization aftermath, [advocates] must engage in new tactics to mitigate what [they] see as damaging changes and yet be open to honest and critical reflection on changes that may actually be harmless or even beneficial." *Id.* at 3-4.

²¹⁷ Robert H. Pasternack, Statement of Robert H. Pasternack, Assistant Secretary for Special Education and Rehabilitative Services, Before the Senate Committee on Health, Education, Labor and Pensions (Mar. 21, 2002) (discussing the IDEA's current discipline provisions and stating that "it is evident that some of the current statutory and regulatory requirements may be too complicated or confusing and need to be reviewed"), at <http://www.ed.gov/news/speeches/2002/03/20020321.html>.

²¹⁸ H.R. 1350 § 615(k)(1)(A)(ii), 108th Cong. (2003).

²¹⁹ See Press Release, Children's Defense Fund, The Changes to IDEA Discipline Procedures In H.R. 1350 Are Not Warranted and Will Lead to Unfair and Inappropriate Treatment of Students with Disabilities 1, 1-2 (Mar. 2003) (criticizing H.R. 1350 for allowing schools to unilaterally remove students with disabilities for any conduct violations and for removing provisions that ensure these expulsions are not based on disability-related behavior), at <http://www.wrightslaw.com/news/2003/idea.discipline.tps.pdf>.

²²⁰ Ctr. for Law and Educ., *supra* note 215, at 3 (noting that "Congress has through S. 1248 and H.R. 1350 succumbed to the backlash to 'Accountability for ALL' from school and school district administrators who fear that students with disabilities will not make 'Adequate Yearly Progress'" at the expense of accountability for the education of students with disabilities).

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procedures against students with significant cognitive disabilities.²²¹ Specifically, NCLB provides that “in determining the adequate yearly progress of a school, the State may not include students who were not enrolled in that school for the full academic year.”²²² Thus, under the House bill, a school could avoid accountability for students with disabilities by invoking disciplinary procedures against them and placing them in interim alternative settings to preclude their full-year enrollment.²²³

With states publicly denouncing NCLB for hinging their funding on unrealistic and unattainable standards for students with disabilities, it is foreseeable that states will abuse the House bill’s disciplinary provisions to avoid NCLB’s corrective action provisions.²²⁴ Rather than working to align IDEA and NCLB, the House bill creates an unmanageable end-run around NCLB accountability.²²⁵

The Senate’s bill similarly fails to resolve the tension between IDEA’s promotion of individualized needs and NCLB’s goal of uniform accountability.²²⁶ In an effort to reduce the paperwork that accompanies special education, the Senate bill eliminates the requirement that IEPs include benchmarks or short-term objectives.²²⁷ Disability advocates have long noted the importance of short-term objectives in enabling IEP teams, educators, and parents to identify and rectify deficiencies in a student’s instruction as they occur rather than waiting until after annual reviews or assessments to address such problems.²²⁸ By eliminating the

²²¹ *Id.* at 2 (suggesting that the changed discipline provisions “create a major loophole and an incentive to shed students—especially those hard to teach students with disabilities who have not made ‘adequate yearly progress’—so they will not be counted for purposes of AYP [adequate yearly progress]”).

²²² 34 C.F.R. § 200.20(e)(2) (2002).

²²³ *Ctr. for Law and Educ., supra* note 215, at 2-3.

²²⁴ *Id.* at 3.

²²⁵ *Id.*

²²⁶ *See generally* S. 1248, 108th Cong. (2003).

²²⁷ S. 1248 § 614(d) (describing the contents of an IEP to include annual measurable goals for students with disabilities, without mention of short-term objectives).

²²⁸ Nat’l Comm. of Parents Organized to Protect IDEA, Letter to Senators (Oct. 30, 2003) (advising that “[p]arents and many teachers and special

requirement that IEPs include short-term objectives in the name of reduced administrative burdens, the Senate bill removes an important form of accountability for the education of students with disabilities.²²⁹ Recent NCLB regulations highlight the central role of the IEP team in the NCLB accountability process for students with disabilities.²³⁰ Indeed, NCLB and IDEA both note that the determination of a student's assessment placement rests with the IEP team.²³¹ By removing short-term objectives from IEPs, the Senate bill deprives IEP teams of valuable information that guides their daily instruction of students with disabilities and their appropriate placement of these students in assessment programs.²³² In prioritizing administrative efficiency over the development of comprehensive educational programs, the Senate bill further challenges the alignment of IDEA and NCLB.²³³

education administrators agree that short-term objectives are essential in determining whether students are making progress on their Individual Education Program (IEP) goals and determining future steps in reaching goals"), at <http://www.nationalparentcenters.org/SenateLetter.pdf>.

²²⁹ *Id.* (noting that "[w]hile report cards are valuable, the major accountability measure for students with disabilities is the IEP. Without short-term objectives parents will have virtually no way of measuring whether their children are making progress in achieving their annual goals.").

²³⁰ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 68,698, 68,705 (Dec. 9, 2003) (to be codified at 34 C.F.R. pt. 200.13) (clarifying that IEP teams make assessment determinations for students with disabilities within the guidelines set by states).

²³¹ 20 U.S.C. §1414(d)(1)(A)(v)(I) (2000) (requiring that IEPs include a "statement of any individual modifications in the administration of State or districtwide assessments of student achievement that are needed in order for the child to participate in such assessment"); 34 C.F.R. § 300.347(a)(5) (2002) (requiring the same).

²³² *See* Ctr. for Law and Educ., *supra* note 215, at 4 (asking "[w]hat is more ironic than Congress couching its legislative agenda as aligning IDEA with NCLB while deleting the very indicators of effectiveness that permit students and presumably teachers to use IEPs as tools for accountability?").

²³³ *Id.* (criticizing Congress' justification of proposed IDEA revisions through the goal of paperwork reduction).

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IV. RECOMMENDATIONS

The development of meaningful accountability systems for students with cognitive disabilities requires a relaxation of NCLB's one-standard-fits-all approach.²³⁴ In order to reconcile IDEA and NCLB, the federal government must add flexibility to its final regulation on the use of alternate achievement standards for adequate yearly progress purposes. Additionally, the federal government must collaborate with states to enable the development of alternate achievement standards that are at once realistic and ambitious.

A. Temporary Means of Reconciling the IDEA and NCLB

Despite the challenges posed by NCLB, the Act's goal of quality education for every student remains worthwhile.²³⁵ In requiring that schools deliver quality educational programs to all students, including students with disabilities, the NCLB offers a promise of accountability for the education of students previously excluded from public schools.²³⁶ Without flexibility in accountability programs to preserve the individualized nature of special education, however, this promise will remain unrealized.²³⁷ In order to reconcile the standards-based NCLB with the individualized IDEA and address the deficiencies previously discussed, the Department of Education must consider adding

²³⁴ See Merritt, *supra* note 15 (noting the potential dangers of assessing students with cognitive disabilities by grade-level standards).

²³⁵ Olson, *Enveloping Expectations*, *supra* note 127, at 10 (quoting Judy Elliott, an assistant superintendent for special education in California, on the mandatory inclusion of students with disabilities in accountability programs). "For the first time, we don't have to fight to be at the table. This is for all kids with disabilities. How long have we been struggling for that? And now, it's like, be careful what you asked for." *Id.*

²³⁶ *Id.* at 9 (quoting a special education professor who applauds NCLB for making inclusion a generalized rather than an exclusively special education concern).

²³⁷ CTR. FOR EDUC. POL'Y, *supra* note 4, at ix (warning that without flexibility in NCLB, the Department of Education may risk "losing the commitment of states and school districts to achieving the Act's goals").

increased flexibility to the new federal cap on alternate achievement standards.²³⁸

A strict cap on the percentage of proficient scores on assessments based on alternate achievement standards that may be counted as proficient for adequate yearly progress purposes is not the best means of ensuring accountability for the educational outcomes of students with cognitive disabilities.²³⁹ Rather, alignment with IDEA's mandate of individualized education suggests that the meaningful assessment of students with cognitive disabilities might include making evaluation by these standards available to a greater number of students.²⁴⁰ While most students with disabilities will be able to participate in statewide, grade-level assessments through alternate assessments, accommodations, or modifications, assessment by grade-level standards is impractical for many students with cognitive disabilities.²⁴¹ In order to reconcile the individualized needs of students with NCLB's standards-based assessment model and ensure that NCLB assessment programs yield meaningful results, the federal government must add flexibility to the special exception provision of the regulation on alternate achievement standards. By broadening the grounds for an exception from the 1 percent cap to include consideration of individualized student needs, the federal government can more effectively guarantee that students with cognitive disabilities receive appropriate assessment placements and that their scores are appropriately reported in adequate yearly progress figures. At the same time, the preservation of a percentage limit on the use of proficient scores on assessments by alternate achievement standards for adequate yearly progress purposes will ensure that these standards are not used indiscriminately by states to circumvent NCLB's goal of grade-level achievement for all

²³⁸ Gamm Letter, *supra* note 124, at 4.

²³⁹ *Id.* (suggesting the implementation of a presumption of 1 percent of students eligible for alternate academic assessments and advising that "when monitoring shows that a number of students above the rate are participating in alternate assessments, the state could be required to intervene.")

²⁴⁰ *Id.*

²⁴¹ Improving the Academic Achievement of the Disabled, 68 Fed. Reg. 13,796, 13,796-97 (Mar. 20, 2003) (to be codified at 34 C.F.R. pt. 200.13).

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students.

Under a more flexible framework, a state or district could be granted an exception from the 1 percent cap on the use of proficient scores for adequate yearly progress purposes by demonstrating that assessment by grade-level standards is inappropriate for individual students, based on their past educational experiences or the existence of cognitive impairments that preclude their grade-level performance of select skills. Upon demonstrating their students' need of alternate achievement standards, schools, districts, and states would be permitted to include the proficient scores of these students within their adequate yearly progress totals. This exception model differs from the final regulation on alternate achievement standards in that it prioritizes the use of appropriate assessments for individual students with disabilities over conformity with group-based, grade-level standards.²⁴²

Notably, flexibility in the exception provision also would eliminate the need to report the proficient scores of students on alternate achievement standards as non-proficient for adequate yearly progress purposes.²⁴³ By eliminating the fiction of failure in the reporting of proficient scores, the federal government can ensure that schools, districts, and states do not erroneously become subject to the corrective action provisions of the NCLB based on their appropriate placement of students in assessments measured by alternate achievement standards.

At this time, familiarity with the final regulation is limited.²⁴⁴ As educators and administrators become increasingly familiar with

²⁴² See Merritt, *supra* note 15 (describing one parent's reaction to the grade-level assessment of her son: "He has an IQ of about 70 . . . [n]o amount of testing is going to change that. But I have a 28-page document that explains exactly what his teachers and his parents expect of him. So why, when testing comes around, do we throw [the plan] out the window?").

²⁴³ 34 C.F.R. § 200.13(c)(4) (2003) (requiring states and local educational agencies to report proficient scores on assessments by alternate achievement standards as non-proficient once the 1 percent cap has been reached).

²⁴⁴ See *Alternate Standards Provide Better Shot at Reaching AYP*, *supra* note 135 (reporting the requests by states for more guidance in the creation and use of alternate achievement standards).

the practical realities of the federal cap on alternate achievement standards for adequate yearly progress purposes, additional changes to the regulation may become necessary.²⁴⁵ Understandably, educators and administrators would have to devote significant time and energy to benefit from an assessment model that requires proof of individual student need in order to include the proficient scores of students with significant cognitive disabilities within adequate yearly progress totals once the 1 percent cap has been reached. Noting the current administrative burdens on special educators, this additional review process may prove unworkable.²⁴⁶ Thus, the use of a flexible exception provision is suggested only as a temporary measure to relieve the tension between the IDEA and NCLB. Through the special exception review process, educators ideally would have an opportunity to engage in candid discussions with school, district, and state authorities regarding the population for which the use of alternate achievement standards is appropriate.²⁴⁷ These discussions would serve to inform future regulation of alternate assessments.²⁴⁸ In the interim, a broadened special exception to the cap would provide students and educators with the necessary flexibility to transform assessment from a mere formality for many students into a meaningful process that is respectful and reflective of individualized student needs.

B. The Importance of Collaboration

The historical exclusion of students with disabilities from

²⁴⁵ 68 Fed. Reg. 68,698, 68,700 (Dec. 9, 2003) (codified at 34 C.F.R. § 200.13) (explaining that “[a]s data and research on assessing students with disabilities improve, the Department may decide to issue regulations or guidance on other related issues in the future”).

²⁴⁶ ELAINE CARLSON ET AL., U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, SPeNSE: STUDY OF PERSONNEL NEEDS IN SPECIAL EDUCATION: FINAL REPORT OF THE PAPERWORK SUBSTUDY NO. 1, 1, 5 (Mar. 24, 2003) (reporting that the typical special education teacher spends an average of five hours per week on administrative tasks and paperwork), available at <http://ferdig.coe.ufl.edu/spense/Finalpaperworkreport3-24-031.pdf>.

²⁴⁷ See Gamm Letter, *supra* note 124, at 4.

²⁴⁸ *Id.*

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public schools serves as a constant reminder of the potential dangers of permitting states to justify the inadequacy of their special education programs by asserting the difficulty of developing alternate assessments and accountability programs for this population.²⁴⁹ Today, the creation of NCLB accountability measures that require uniform outcomes for students with significant cognitive disabilities threatens the same consequences.²⁵⁰ Between these extremes lies a balance that is critical in creating accountability for the education of students with cognitive disabilities.²⁵¹

The debates surrounding special education and NCLB assessment suggest that no agreement exists regarding the best means of assessing students with significant or severe cognitive disabilities.²⁵² In fact, states continue to use divergent alternate assessment approaches to satisfy NCLB and IDEA requirements and achieve school accountability.²⁵³ Instead of viewing this diversity as a liability to the future assessment inclusion of students with significant cognitive disabilities, educators, parents, and legislators would benefit from viewing these differences as a collaborative opportunity.²⁵⁴ In their attempts to comply with

²⁴⁹ See *supra* Part I.A (discussing the history of the exclusion of students with disabilities from public schools).

²⁵⁰ Nat'l Down Syndrome Soc'y, *supra* note 133 (warning of the abuses that may accompany the unsupervised implementation of alternate achievement standards).

²⁵¹ Cleveland Letter, *supra* note 124, at 1 (noting that "[t]here is often a delicate balance of individual effort, appropriate support and accommodations and skilled and committed professionals necessary to meet the goals" of inclusive education and accountability systems).

²⁵² See QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 4 (arguing that a 2001 survey found "a continued range of alternate assessment approaches, and more importantly, no clear consensus on the criteria being used to score alternate assessment evidence") (citations omitted); Browder & Cooper-Duffy, *supra* note 161, at 157 (noting that "[a]lthough research is now emerging on states' alternate assessment practices, many questions remain about how to best measure the progress of students with severe disabilities on state academic standards").

²⁵³ See QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 4.

²⁵⁴ See Rachel Quenemoen, Written Comments to the U.S. Commission on

NCLB and IDEA, states have invested much time, money, and energy into exploring novel alternate assessment options.²⁵⁵ State education departments are becoming experts on the failures and successes of their alternate assessment models, and can be of assistance to other states in meeting national priorities and requirements.²⁵⁶

As states align standards for alternate assessments with state academic and content standards, they also compile important information about the demographics of the students requiring alternate assessments.²⁵⁷ These figures are crucial in identifying the population that should be served by alternate achievement standards.²⁵⁸ The enactment of the cap on alternate achievement standards for adequate yearly progress purposes in the absence of concrete information about the number of students that the regulation will impact suggests that the federal government believes it is sufficient to assess students in accountability programs, despite the fact that their results may not be accurately reflected in adequate yearly progress totals.²⁵⁹ Students with

Civil Rights, *Civil Rights, No Child Left Behind, Assessment, Accountability, and Students with Disabilities* (Feb. 6, 2003) (describing the era of NCLB implementation as a “teachable moment” and “a time of great opportunity for students with disabilities”), at <http://education.umn.edu/NCEO/Presentations/usccr.pdf>.

²⁵⁵ QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at 3 (explaining that states were developing scoring criteria and defining outcomes for students with severe disabilities even amidst the uncertainty of federal regulations on alternate achievement).

²⁵⁶ *Id.* at 2 (stating that in contrast to a history of excluding students with disabilities, “over the past decade, states, districts, and school staff have become familiar with federal requirements that students with disabilities participate in state and district assessment systems and that assessment accommodations and alternate assessments be provided for students who need them”).

²⁵⁷ See 34 C.F.R. § 300.139 (2002) (requiring states to report the number of students with disabilities participating in alternate and general assessments).

²⁵⁸ Cleveland Letter, *supra* note 124, at 3 (suggesting that annual data regarding students taking alternate assessments “should prove instructive to learn of best practices and those who are abusing their discretion in implementing the cap”).

²⁵⁹ See Nealis, *supra* note 166 (explaining that critics of the cap note its failure to indicate proficient and advanced scores beyond the 1 percent cap).

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significant cognitive disabilities deserve better than to be sidelined in the race to implement standards-based reform and achieve universal accountability.²⁶⁰

To ensure that alternate assessments generate useful results and school accountability, the desire for quick-fix solutions to the assessment of students with disabilities should not give way to systems that deprive these students of meaningful assessment opportunities.²⁶¹ Advocates should work to facilitate state collaboration and to develop useful statistics regarding the numbers of students participating in alternate assessments who require evaluation through alternate achievement standards.²⁶² States must recall the consequences of delaying the access of students with disabilities to alternate assessment opportunities and provide for assessments programs as are required by current IDEA and NCLB provisions. This compliance, however, should not be interpreted to signal the end of their responsibility to develop meaningful assessment opportunities and ambitious standards for students with significant cognitive disabilities.²⁶³

CONCLUSION

Recent federal efforts to ensure that schools and states are held accountable for the education of students with the most significant cognitive disabilities are commendable in their attention to the weaknesses of existing special education programs.²⁶⁴ The creation of NCLB standards and regulations alone, however, does not

²⁶⁰ *Id.* (citing the comments of critics as to the 1 percent cap).

²⁶¹ Nat'l Coalition of Parent Ctrs., *supra* note 63.

²⁶² Nealis, *supra* note 166 (explaining that “[i]ncreased collaboration among parents, educators, administrators, researchers and legislators is critical in order to provide schools with appropriate assessments, instructional materials and better guidance to properly implement NCLB”).

²⁶³ QUENEMOEN, MEASURING ACADEMIC ACHIEVEMENT, *supra* note 105, at Executive Summary (stating that “[a]lternative assessments are still very new, and taking time for thoughtful reexamination is critical.”)

²⁶⁴ Press Release, Council for Exceptional Children, *supra* note 136 (applauding the flexibility offered by the new regulation on alternate achievement standards).

ensure that accountability for this subsection of students will be improved.²⁶⁵ To the contrary, the requirement that all but a limited number of students must achieve uniform standards may frustrate the delivery of quality special education by falsely indicating school failure and distracting educator attention from student needs.²⁶⁶

Through the imposition of a uniform, standards-based system, NCLB has privileged process over substance.²⁶⁷ By largely ignoring the individualized needs of students with cognitive disabilities and requiring their achievement at a standardized pace, NCLB has transformed assessment into a mere formality for students with cognitive disabilities who are not provided for by the 1 percent cap, but who are unable to perform at grade-level.²⁶⁸ In order to achieve the accountability envisioned by NCLB, the federal government must add flexibility to NCLB accountability provisions as they relate to students with cognitive disabilities.²⁶⁹ Specifically, the Department of Education must extend the exception provision of the 1 percent cap on the use of alternate achievement standards for adequate yearly progress purposes to include consideration of individualized student needs.²⁷⁰

²⁶⁵ Press Release, Council for Exceptional Children, *supra* note 136 (warning of the need for monitoring and training to successfully implement the cap on alternate achievement standards).

²⁶⁶ CTR. FOR EDUC. POL'Y, *supra* note 4, at ix (warning that without flexibility in NCLB, the Department of Education may risk "losing the commitment of states and school districts to achieving the Act's goals").

²⁶⁷ Silberman, *supra* note 200 (quoting a North Carolina elementary school principal who advised that "[w]hen a child is operating at several grade levels below their peers, testing them at grade level doesn't really give you much information").

²⁶⁸ See CTR. ON EDUC. POL'Y, *supra* note 4, at ix (reporting that many educators and administrators note the inefficiency of assessing at grade level students who are placed in special education primarily because they possess cognitive or learning disabilities that cause them to perform below grade level).

²⁶⁹ Gamm Letter, *supra* note 124, at 4 (suggesting that the Department of Education add flexibility to the proposed cap on alternate achievement).

²⁷⁰ *Id.* (critiquing the proposed cap and suggesting the implementation of a presumption of 1 percent of students eligible for alternate achievement assessments).

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Additionally, Congress must work to provide quality information to states on the creation of alternate achievement standards to ensure that alternate achievement standards are not used to avoid accountability for the education of students with disabilities.²⁷¹

The achievement of students with cognitive disabilities depends on the maintenance of strong special education programs that address individualized needs.²⁷² To this end, Congress must prioritize the development of quality special education programs over financial and administrative efficiency.²⁷³ During the IDEA reauthorization process, Congress must work to close loopholes that provide schools with incentives to avoid accountability by instituting disciplinary procedures against students with disabilities.²⁷⁴ Additionally, Congress must refuse to compromise the integrity and utility of IEPs by removing short-term objectives and delaying vital IEP reviews.²⁷⁵

Students with cognitive disabilities deserve more than to become the subjects of regulations and legislation that railroad their needs and undermine their achievement; they deserve viable and meaningful accountability systems.²⁷⁶ With equal parts

²⁷¹ Press Release, Council for Exceptional Children, *supra* note 136 (noting that training must be provided in order for the cap on alternate achievement standards to be successfully implemented).

²⁷² *See generally* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401-1487 (2000); *see also* Merritt, *supra* note 15 (quoting educators and parents who emphasize the importance of individualized education programs in fostering achievement among students with cognitive disabilities).

²⁷³ *See* Nat'l Coalition of Parent Ctrs., *supra* note 63 (explaining that “[r]educing paperwork” is sometimes used as a code for reducing rights and accountability” and advising Congress to “resist efforts to water down rights for students with disabilities”); *see, e.g., supra* notes 226-33 (discussing the threat to accountability posed by S. 1248, the Senate IDEA reauthorization bill, which removes short-term objectives from student IEPs).

²⁷⁴ *See* Ctr. for Law and Educ., *supra* note 215, at 3; *see, e.g., supra* notes 217-25 (discussing H.R. 1350’s dramatic changes to IDEA’s discipline procedures).

²⁷⁵ Ctr. for Law and Educ., *supra* note 215, at 4 (questioning the validity of recent studies that quantify the paperwork responsibilities of special education teachers as five hours a week, and criticizing Congress’ justification of proposed IDEA provisions through the goal of paperwork reduction).

²⁷⁶ *See* Cleveland Letter, *supra* note 124, at 1 (stating that students with

patience, innovation, and collaboration, accountability for the education of these students can become a reality rather than a distant goal.

disabilities “deserve to be tested and assessed, regardless of their level of disability, so that their unique rate and level of learning can be fairly and accurately measured and so that school systems can be fairly held accountable for their progress”).