

Introduction

The executive, legislative and judicial branches of our government perform an intricate dance as each carry out their respective roles in the provision of education to our nation's students. The legislature will pass a law, an executive agency will issue regulations to that law, and the courts will subsequently decide any issues that arise from the law and its regulations. Sometimes, Congress will amend a law in order to overrule a judicially made decision--in effect saying to the court, "no, that is *not* what we meant." For example, *Commonwealth of Virginia Department of Education v. Riley* held that the Individuals with Disabilities Education Act (IDEA) provision of a Free Appropriate Public Education (FAPE) did not apply to disabled students who were expelled for serious misconduct unrelated to their disabilities.¹ The 1997 Reauthorization of the IDEA codified the exact opposite: that even students whose misbehavior was not a manifestation of their disabilities are still entitled to a FAPE.²

Other times, Congress will expressly codify language from a judicial opinion, saying in effect, "yes, we agree this is good law, or yes, that is exactly what we meant." For example, the *PARC* and *Mills* decisions were arguably the impetus for Congress to create the Education for All Handicapped Children Act (EAHCA), currently known as the IDEA.³ And often, as new statutory laws come into existence, Congress is forced to change and amend existing statutes to reflect and incorporate the new law.

When Congress passed the No Child Left Behind Act (NCLBA) and President Bush signed it into law on January 8, 2002, it quickly became apparent that this law would have a profound impact on the daily lives of education administrators, teachers and students. It also

¹ 106F.3d 559 (4th Cir. 1997).

² 20 U.S.C. §1415(k).

³ *Pa. Ass'n. of Retarded Citizens (PARC) v. Commonwealth* was a consent decree requiring Pennsylvania to provide a free education to retarded children. 334 F. Supp. 1257 (E.D. Pa 1971). *Mills v. Bd. of Educ.*, expanded *PARC* to include not just retarded children, but all children with disabilities. 334 F. Supp. 1257 (E.D. Pa 1971).

became apparent that other already existing education laws, specifically the IDEA, would have to be amended to align with the new goals of the NCLBA. Thus, on November 20, 2004, the Individuals with Disabilities Education Improvement Act of 2004 (known as the IDEIA, or more commonly, 2004 IDEA) was born. The process of the IDEA's reauthorization process began in late 2001 and continued over the next three years, finally culminating in the IDEA 2004.⁴ This process included gathering information from school districts, teachers, parents, and students via public forums and specific commentary periods.⁵ Also during this time, President Bush "established the Commission on Excellence in Special Education to both collect information and study issues related to federal, state, and local special education programs."⁶ The IDEA 2004 was not a *direct* result of the NCLBA, as IDEA reauthorization was scheduled to take place regardless sometime around 2002.⁷ Nonetheless, since Congress passed the NCLBA only two years earlier, it could not help but affect the new IDEA.

This paper describes some specific examples of how the NCBLA influenced the amendments to the IDEA in 2004 and how Congress sought to align the two education statutes. Part I and Part II discusses the IDEA and NCBLA, respectively, in isolation. Part III illustrates some specific examples of how the passage of the NCBLA affected Congress in its attempt to amend the IDEA in 2004. Finally, Part IV questions whether the NCLBA can ever be consistent with the overall goals of the IDEA.

⁴ Susan Goodman, *What's Reauthorization All About?* National Information Center for Children and Youth with Disabilities, available at <http://www.nichcy.org/reauth/goodman.htm>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* The IDEA, Part C and D must be reauthorized about every five years. Part B is considered so important that it has been permanently authorized; although, Congress usually makes significant changes to Part B during the Reauthorizations. The IDEA was last reauthorized in 1997, so it was up for reauthorization again around the year 2002.

Part I: The Individuals with Disabilities Education Act

A. History and Goals

In 1975, as part of a growing movement to recognize the rights of the disabled, Congress passed the Education for All Handicapped Children Act (EAHCA). In 1990, it was amended and renamed the Individuals with Disabilities Education Act. The IDEA's purpose is to distribute federal funds related to special education to states and public agencies within the state provided that they comply with certain requirements. The drafters sought to ensure a "Free Appropriate Public Education" (FAPE) for all students who are labeled as having at least one of thirteen specific disabilities *and* in need of specialized instruction.⁸

The requirements of "free," "public," and "education" are fairly self-explanatory, but the "appropriate" requirement caused much debate in the educational arena and continues to do so today.⁹ The leading case interpreting the "appropriate" provision of the FAPE requirement came just seven years after the passage of the EAHCA. *Board of Education of Hendrick Hudson Central School District v. Rowley* involved an eight-year old hearing impaired student named Amy.¹⁰ Though she was doing fairly well in school by lip reading, her parents requested that the school district provide her with a sign language interpreter so that she could maximize her

⁸ 20 U.S.C. § 1401(A). The listed disabilities include: Autism, Deaf-blindness, Deafness, Emotional Disturbance, Hearing Impairment, Mental Retardation, Multiple Disabilities, Orthopedic Impairments, Other Health Impairments, Specific Learning Disability, Speech or Language Impairment, Traumatic Brain Injury, and Visual Impairment. *See also* The Individuals with Disabilities Education Act Regulations, 34 C.F.R. §300.7(c) (1997).

⁹ For example, in the recent case *Co. Sch. Bd. of Henrico Co., VA v. Z.P.*, the parents argued that their autistic son, Z.P., could only obtain an appropriate education from a private school called the Faison School. Faison utilized the applied behavior analysis (ABA) methodology for instructing students with autism. On the other hand, the school district argued that their proposed IEP, which placed Z.P. in a pre-school autism class at Twin Hickory Elementary School, was appropriate. The Twin Hickory program utilized a different program for instructing autistic children, called the TEACCH method (though the instruction at Twin Hickory did incorporate some aspects of applied behavior analysis in addition to the TEACCH method). The court reversed the District court's finding, and remanded for an opinion that was consistent with the original hearing officer's finding that the proposed IEP was inappropriate for Z.P., given all of the circumstances. 399 F.3d 298 (4th Cir. 2005).

¹⁰ *Rowley*, 458 U.S. 176 (1982).

learning potential.¹¹ The Supreme Court determined that a school district need not “maximize each child’s potential ‘commensurate with the opportunity provided other children.’”¹² Rather, a school district could fulfill the “appropriate” provision of the FAPE requirement simply by providing access to a free public education, so long as that access conferred *some* educational benefit upon the disabled child” (emphasis added).¹³ The Court stated that the EAHCA simply provided “a basic floor of opportunity” for disabled children: no more and no less.¹⁴

The IDEA also has various other provisions that educational agencies must meet in order to comply. First, the IDEA attempts to ensure that disabled children are treated as individuals and that each child is evaluated on a case by case basis rather than grouped together based on their collective disabilities. Toward this end, the IDEA provides that disabled students must each have an “individualized education plan” (IEP) that is developed by a team including the parents of the child, his/her teachers and any other individuals that may have knowledge or expertise concerning the child (including speech therapists, physical therapists, social workers, etc.).¹⁵ The IEP serves as a blueprint for each particular child’s journey through the educational system. If the goals and objectives outlined in the IEP are not met by the educational agency providing services, then the agency has violated the IDEA.

Second, the IDEA provides that disabled students must be educated in the “least restrictive environment” (LRE) that still meets the student’s educational needs.¹⁶ In support of this requirement, the IDEA makes consistent reference to the preference for disabled children to

¹¹ *Id.*

¹² *Id.* at 198.

¹³ *Id.* at 200.

¹⁴ *Id.* at 201.

¹⁵ 34 C.F.R. 300.344(a) (1997).

¹⁶ 34 C.F.R. §§ 300.550, 300.551, 300.552.

be educated in “regular classes” and specifically says that a disabled child must be educated in the local school he or she would normally attend but for his/her disability.¹⁷

Third, the IDEA has a “child find” provision that places an affirmative duty on educational agencies to identify, locate and evaluate all children with disabilities residing in the State who need special education and related services.¹⁸ One final and important provision of the IDEA provides parents with specific due process rights should the local educational agency fail to comply with the IDEA.¹⁹ These due process rights require that parents first exhaust certain administrative remedies before bringing a civil action suit against the educational agency.²⁰

B. The IDEA’s Impact on General Education

1. LRE and Inclusion

The IDEA’s most profound impact upon general education was the introduction of the basic concept that special education should not be a place a disabled child is sent to, but rather, the delivery of specific services so that the disabled child can access the general educational curriculum. Because of the Least Restrictive Environment (LRE) provision, a great number of disabled students have found their place within a general education classroom. The “inclusion” movement of placing disabled students in general education classrooms as opposed to special education classrooms has both supporters and detractors. Supporters cite research that inclusion benefits disabled students socially by allowing them to have interaction with peer models, and

¹⁷ *Id.*

¹⁸ *See* 20 U.S.C. §1412(a)(3)(A) and 34 C.F.R. § 300.125. This means that a school district has the responsibility to seek out disabled students and have them evaluated if their parents agree to an evaluation. This includes students within public schools and private schools, as well as homeless or migratory children. School districts and states can find children through a variety of ways, including mass media, teacher recommendations, doctor referrals, etc.

¹⁹ These due process rights include the opportunity for mediation; the right to file a complaint with the local educational agency; the right to an impartial due process hearing; the right to appeal in a civil action in a state or district court; the right to claim attorney’s fees if declared a prevailing party; the right to a manifestation determination hearing in the event that a school seeks to take disciplinary action against a disabled child; etc. *See* 20 U.S.C. 1415.

²⁰ 20 U.S.C. 1415(l). This means that a parent must first file a complaint with the local educational agency, go through an impartial due process hearing, and possibly appeal to a State Education Agency before they can file a civil action in state or district court.

non-disabled students benefit socially as well by gaining a greater appreciation and understanding of individual differences.²¹ Academically, supporters of inclusion cite research that show positive reading, language and vocabulary gains for disabled students in inclusion classrooms, and positive academic gains (or at the least, no academic detriment) to non-disabled students in the same classroom.²² This is because many methods used to teach disabled students actually benefit non-disabled students as well.²³ Detractors, of course, cite research showing the opposite—studies in which included disabled students made little or no gains academically and non-disabled students (specifically high achieving students) lost ground.²⁴

Regardless of how educational academics feel about inclusion as a policy concept, the courts have been fairly generous to disabled students in their application of the IDEA’s LRE provision. For example, in *L.B. ex rel. K.B. v. Nebo School District*, the 10th Circuit reversed a district court’s finding that a hybrid preschool classroom (about 50% typically developing children, and 50% disabled children) was K.B.’s least restrictive environment.²⁵ Instead, the court found that the *parents’* preferred placement, in a regular education classroom (albeit at a

²¹ See e.g. S. Salend, *The impact of inclusion on students with and without disabilities and their educators*. Remedial and Special Education, Volume 20, 114-126 (1999) (finding that disabled students interacted with their peers more often and developed lasting friendships when in inclusion classrooms (as opposed to special education classrooms), and non-disabled students in inclusion classrooms developed a greater understanding and acceptance of differences).

²² See e.g. Jenkins et al., *Accommodations for individual differences without classroom ability groups: an experiment in school restructuring*. Exceptional Children, Volume 60, 344-358, 355 (1991) (indicating that disabled students in inclusion programs “demonstrated significantly superior gains (in comparison to the control group) on several...scales, including reading, vocabulary, total reading, and language...” and that the positive gains were realized in non-disabled students as well.) See also M.S. Fishbaugh and P. Gum, *Inclusive education in Billings Montana: A prototype for rural schools*, ERIC Reproduction Service No. ED 369363 (1994) (finding that achievement test data showed consistent academic gains by non-disabled students in inclusive classrooms).

²³ For example, the inclusion of one or more disabled students in a classroom may require the addition of another teacher or teacher aide, who can help all students. Also, teachers may have to utilize more hands on or visual learning (as opposed to lecturing) to accommodate a disabled child and this method of instruction will likely benefit all students.

²⁴ See e.g. K. Huber, et al., *The differential impact of inclusion and inclusive practices on high, average, and low achieving general education students*, Psychology in the Schools, Volume 38, 497-504 (2001) (finding that low achieving non-disabled students mildly benefited academically from inclusion, but that high achieving non-disabled students lost ground in math and reading).

²⁵ *L.B. ex rel. K.B. v. Nebo Sch. Dist.* 379 F.3d 966 (10th Cir. 2004).

private preschool), was the LRE for K.B. The court first discussed the three different circuit court tests²⁶ for determining a disabled child's LRE, and then choose to adopt the *Daniel R.R.* test. This test arose out of the 5th Circuit in 1989, and was later adopted by the 3rd and 11th Circuits. The *Daniel R.R.* test considers first whether education can be provided in a regular classroom with the use of supplementary aids and services. If not, the test then considers whether the school district has mainstreamed the child to the maximum extent appropriate. The 5th Circuit utilized four key factors in determining whether the first prong is met: 1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect on the regular classroom of the disabled child's presence in that classroom.²⁷ The 10th Circuit found that the first factor weighed in favor of Nebo School District because it had considered the regular classroom placement and had sent special education administrators to this classroom to observe K.B. Despite this effort, the court determined that the remaining three factors weighed in favor of placing K.B. within a regular education preschool classroom, and thus decided that the private preschool was the LRE for K.B.

²⁶ The three tests are: The *Roncker* Feasibility Test, from *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); the *Daniel R.R.* Test, from *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989); and the *Rachel H.* Balancing Test, from *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994). The tests are substantially similar, but do have slight variations. The *Roncker* Feasibility test asks whether it is feasible to provide educational services for a disabled child in a regular education classroom, taking into consideration the impact on the students and teachers, as well as the cost of including the disabled child. The *Daniel RR* test is described in the text above. Finally, the *Rachel H.* balancing test combines aspects of the *Roncker* and *Daniel R.R.* tests and utilizes four specific factors to determine whether a placement is the LRE for a child. These are: 1) the educational benefits of placement in a full time regular education class; 2) the non-academic benefits for the child; 3) the effect the disabled child has on the teacher and regular education students, and 4) the costs. See Alefia Mithaiwala, *Universal Preschool: A Solution to a Special Education Law Dilemma*, 2004 BYU Educ. & L.J. 373, 379-381 (2004). See also Anne Proffitt Dupre, *Disability and the Public School: The Case Against Inclusion*, 72 Wash. L. Rev. 775, 798-804 (1997).

²⁷ *L.B. ex rel K.B.* at 976.

2. Student Discipline

The IDEA has also had a significant impact on student discipline. Advocates of students with disabilities argue that history has shown that disabled students are likely to be kept out of regular education classrooms because they are different or are regarded as having a disturbing influence.²⁸ Advocates of students with disabilities fear schools will simply expel or suspend disabled students because of their disability-related disruptive behaviors, rather than trying to find meaningful behavior support systems to address those behaviors.²⁹ On the other hand, many parents of non-disabled students and school administrators argue that allowing disruptive disabled students to remain in the classroom halts or slows learning because teachers must constantly address behavior issues.³⁰ The 1997 Amendments to the IDEA attempted to address this debate by enacting provisions designed to appeal to both sides.

The 1997 IDEA is probably the most complex with regard to student discipline. In general, if a disabled student breaks the student code of conduct in a school, he or she may be disciplined the same way as a non-disabled student, so long as the punishment is not for more than 10 school days.³¹ The child need not continue to receive a FAPE during this 10 day period. If the child brings a weapon or drugs to school, the 1997 IDEA allows a school to place the child in an appropriate interim alternative educational setting, but for not more than 45 days.³² During

²⁸ National Council on Disability, *Back to School on Civil Rights*, pt.1, (Jan. 25, 2000), available at http://www.ncd.gov/newsroom/publications/backtoschool_1.html ("Children with disabilities were often considered uneducable, disruptive, and their presence disturbing to children and adults in the school community.").

²⁹ See Lauren Zykorie, *Reauthorizing Discipline for the Disabled Student: Will Congress Create A Better Balance in the Individuals with Disabilities Education Act (IDEA)*, 3 CTPILJ 101, 134 (2003) (giving an example of a mother of a disabled student who testified before Congress that her son was suspended so many times for disability related behaviors that he began to realize that if he acted out, he could escape a difficult classroom activity or situation).

³⁰ For example, a student with autism may engage in repetitive behaviors that the teacher may have to take time out of her lesson to address; a student with an emotional disturbance may interrupt by engaging in a physical assault on another student or throwing a tantrum, or perhaps a student with ADHD may constantly get off task, resulting in the teacher having to spend more time with him than with other students.

³¹ 20 U.S.C. §1415(k)(1)(A)(i) (1997).

³² *Id.* at §1415(k)(1)(A)(ii).

this time, a child must still receive a FAPE and in each case, the school must conduct a functional behavioral assessment (FBA) and implement a behavior intervention plan (BIP) (or review an already existing FBA and BIP) within 10 days of the disciplinary action.³³ Also within the first 10 days, the child's IEP team must conduct a manifestation determination hearing to determine whether the disorderly conduct was related to the child's disability.³⁴ If the conduct *was* a manifestation of the disability, then the child must be returned to the placement from which the child was removed. Only if it was not related may the school undertake the disciplinary action.³⁵ The parent, however, has the right to appeal the decision during the manifestation hearing. During this time, the child is to remain in the interim educational setting until the hearing officer makes a final decision, or until the expiration of the time period for removal, whichever occurs first.³⁶

The most controversial aspect of the discipline provisions is likely the stay-put provision. In the 1997 IDEA, this provision states that when there is a proposed change in placement to which the parents of a disabled child object, then the child will stay-put in the current educational setting. The regulations state that any proposed removal for more than 10 days is a change in placement.³⁷ Also, if the child's interim alternative educational setting is about to expire, and the school wishes to permanently change the child's placement to a placement other than what it was before the interim alternative educational setting, the parent may request a due process hearing on this proposed change of placement. During this appeal, the child will stay-put in his original placement (i.e. the placement he was in when his misbehavior occurred).³⁸ The

³³ *Id.* at §1415(k)(1)(B).

³⁴ *Id.* at §1415(k)(4)

³⁵ Jim Thomeczek, Presentation entitled "Discipline under the IDEA" at the Missouri Council for Administrators of Special Education Spring Law Conference (Mar. 11, 2005).

³⁶ 20 U.S.C. §1415(k)(7)(A) (1997).

³⁷ 34 C.F.R §300.519 (1999).

³⁸ 20 U.S.C. §1415(k)(7).

impact on the general education classroom here is profound: a disruptive student will quickly be returned to his original placement for as long as his parents wish to appeal the case.

Interestingly, the 2004 IDEA Amendments have changed this particular provision—perhaps a response to the growing concerns of parents of non-disabled children and school administrators. The new law states that during an appeal, the child is to remain in the interim alternative educational setting (rather than returned to the original educational setting) “pending the decision of the hearing officer or until the time period for the disciplinary action ends.”³⁹ Another substantive change to the discipline provisions of the IDEA is that in addition to bringing weapons or drugs to school, if the child has inflicted serious bodily injury upon another person while at school or on school premises, then the student may be removed to an interim alternative educational setting for not more than 45 school days.⁴⁰ The addition of the word “school” is also new—under the 1997 IDEA, the provision simply read “45 days,” meaning calendar days.⁴¹

Part II: The No Child Left Behind Act

A. History and Goals

Congress passed the No Child Left Behind Act (NCLBA)⁴² in 2001 with great fanfare, as well as great skepticism. Like the IDEA, it is a funding statute—meaning that states and school districts must comply with the requisite timelines and deadlines, or risk losing valuable federal funding.⁴³ Its goal: “To close the achievement gap with accountability, flexibility, and choice so that no child is left behind.”⁴⁴

³⁹ 20 U.S.C. §1415(k)(4) (2004).

⁴⁰ *Id.* at §615k(2)(G).

⁴¹ *Id.*

⁴² 20 U.S.C. §6301 (Statement of Purpose). Hereinafter cited as NCLBA.

⁴³ Lisa A. Brown, *No Child Left Behind Act*, 66 TXBJ 68 (2003).

⁴⁴ NCLBA §1 (Short title).

Though lauded as the “most sweeping education reform legislation in decades” the NCLBA was not created in a vacuum.⁴⁵ Rather, it built from prior educational reform attempts, namely Title I of the Elementary and Secondary Education Act (ESEA), and President Clinton’s Improving America’s Schools Act (IASA).⁴⁶ First enacted in 1965, Title I of the ESEA was designed primarily to assist disadvantaged students.⁴⁷ Many school districts attempted to comply by hiring teacher’s aides and creating remedial classes, which ultimately “did little to bridge the achievement gap.”⁴⁸ In 1994, Congress reauthorized Title I of the EASA via the passage of the IASA. The IASA used standards-based reform for the first time in federal education legislation.⁴⁹ The 2001 NCLBA is yet another reauthorization of the ESEA and builds on these prior acts by establishing clear goals that each state must reach within a specific timeline. The four key elements of the act are: 1) academic standards set by each state individually, 2) assessment of all students (with some very limited exceptions), 3) accountability to parents and children and 4) having “highly qualified” teachers in all classrooms.

First, each state was instructed to set forth “challenging academic content standards” in math, language arts/reading, and by the beginning of the 2005-2006, science.⁵⁰ Second, each state must develop a method to assess students to ensure they were meeting the academic content standards. The NCLBA “requires annual testing in reading and math in grades three through eight” with at least one more test in grades ten through twelve.⁵¹ Beginning in the 2007-2008 school year, students will be tested in science as well.⁵²

⁴⁵ For example, see *No Child Left Behind: A Collection of Online Resources*, North Central Regional Educational Laboratory, available at <http://www.ncrel.org/policy/curve/resource.htm>.

⁴⁶ James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U.L. Rev. 932, 937 (2004).

⁴⁷ *Id.*

⁴⁸ *Id.*, at 938. These remedial classes were nothing more than a watered down curriculum and therefore failed to address the academic achievement gap between disabled and non-disabled students.

⁴⁹ *Id.*

⁵⁰ NCLBA §1111(b)(1).

⁵¹ Ryan, *supra* n. 46 at 940.

Third, schools are held accountable by measure of “annual yearly progress” or AYP, as measured by the assessment test scores. “The law specifically requires the testing of at-risk students, which the law defines as (1) limited English proficiency students, (2) students with disabilities, (3) economically disadvantaged students, and (4) students from major racial and ethnic groups.”⁵³ Of these subgroups, 95% of the students must be tested and their scores counted toward AYP.⁵⁴ If a school does not make AYP overall or if any one of the subgroups fail to make AYP individually, then the school as a whole fails.⁵⁵ If a school fails for more than two years in a row, it is labeled as “in need of improvement” and parents are given the option of transferring their children to another public school served by the local educational agency, or parents can request supplemental educational services or tutoring for their children from a private agency.⁵⁶ If a school ultimately continues to fail for five years in a row, the entire school staff will be fired and the school will be restructured.⁵⁷

Finally, the fourth key element requires that all teachers hired after the enactment of the NCLBA will be “highly qualified,” and that veteran teachers become “highly qualified” by the beginning of the 2005-2006 school year.⁵⁸ The NCLBA provides a rather complicated definition of “highly qualified,” depending on whether the teacher is new to teaching or a veteran teacher. In general, to be “highly qualified” the teacher must be fully certified and licensed in the state in which they are teaching, as well as have demonstrated competence in the subject they are teaching.⁵⁹ This can be accomplished by passing a State academic subject test in the areas a

⁵² NCLBA §1111(b)(3).

⁵³ Brown, *supra* n. 43. See NCLBA §1111(b)(2)(C)(v).

⁵⁴ Christin E. Keele, *Is the No Child Left Behind Act the Right Answer for Children with Disabilities?*, 72 UMKC L. Rev. 1111, 1115 (2004).

⁵⁵ *Id.*

⁵⁶ *Id.* at 1116. See also NCLBA §1116(b)(5)(B) and §1116e(1).

⁵⁷ *Id.*

⁵⁸ NCLBA §1119(a).

⁵⁹ NCLBA §§9101(23). See also NCLBA Regulations at 34 C.F.R. §200.56

teacher teaches, or in the case of a veteran teacher, by meeting High Objective, Uniform State Standards of Evaluation (HOUSSE), as designed by the individual states.⁶⁰ Each state may develop its own state standard of evaluation for veteran teachers who seek an alternate method for demonstrating competency aside from taking subject matter tests. This standard of evaluation must be an objective way for the local education agency to measure a teacher's competency in the subject area she teaches. For example, in Massachusetts the HOUSSE method requires teachers to develop and implement an Individual Professional Development Plan. The plan designates how that teacher will earn 120 points to complete their plans. Points are awarded by participation in professional development activities including, for example, mentoring or cooperative teaching, graduate level courses, etc.⁶¹ In Florida, teachers must earn 100 points to meet the high objective state standards evaluations. Teachers can earn points in Florida based on their number of years of prior experience, classroom and performance observations, college level courses in the subject, etc.⁶²

B. The NCLBA's Impact on Special Education

Aside from leaving significant fingerprints upon the 2004 IDEA (discussed below in Part III); the NCLBA affected special education from its very inception. First, the NCLBA requirement of the same academic content standards for all students bolsters the inclusion movement stemming from the IDEA's mandate that disabled students be educated in their least restrictive environments. That is, if disabled students will be held to the same academic standards as non-disabled students, it only makes sense to teach them in the regular education classroom⁶³

⁶⁰ *Id.*

⁶¹ See Massachusetts High Objective Uniform Standard of Evaluation, available at http://www.doe.mass.edu/nclb/reportcard/ma_house.html.

⁶² See The Florida HOUSSE Plan available at <http://www.broward.k12.fl.us/certification/HOUSSEeval.pdf>.

⁶³ This is of course, with the caveat that the students also be given the necessary supplemental aids and services required by their individual disabilities and in accordance with their Individual Education Plans.

along with their non-disabled peers. A second NCLBA provision that bolsters the IDEA is the supplemental educational services provision.⁶⁴ Though these supplemental services are only available to students in those schools which have already been designated as failing, it will nonetheless “reach a number of children enrolled in special education.”⁶⁵ This is significant because the IDEA already provides for the use of supplemental aids and services. If a disabled student’s IEP does not provide for specific aids and services (or the school is failing to implement the supplemental aids and services as codified in the student’s IEP), then the NCLBA’s mandate will provide extra insurance that those supplemental educational services are in fact provided.

Finally, the most controversial impact that the NCLBA has had on special education is with regard to its assessment provisions. As noted above, the NCLBA demands that all students be assessed in order to ensure adequate yearly progress.⁶⁶ The statute itself demands that students with disabilities are included in these assessments, and the implementing regulations released by the Department of Education on December 9, 2003 begin by noting the importance of including disabled students in assessments: “We know from research that when students with disabilities are allowed to be excluded from school accountability measures, the rates of referral for students for special education increase dramatically.”⁶⁷

The regulations do carve out some small exceptions for the 1% of students in a school district with the most significant cognitive disabilities. These students are allowed to take alternate assessments based on alternate achievement standards. The 1% cap speaks to the school’s AYP: only 1% of the total number of proficient scores may originate from an alternate

⁶⁴ NCLBA §1116(e).

⁶⁵ Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of It All*. 15 HSTWLJ 1, 29 (2004).

⁶⁶ 34 C.F.R. §200.6.

⁶⁷ 34 C.F.R. app. §200, 68698.

assessment based on alternate achievement standards.⁶⁸ Other disabled students (not the most significantly cognitively impaired) must take alternate assessments (or regular assessments with accommodations) based on the *regular* academic achievement standards.⁶⁹ To loosen this stringent standard, the regulations did not define “significant cognitive disability,” thus allowing each individual state to construct its own definition.⁷⁰ The regulations also enable a state to apply for an exception to the 1% cap if it can demonstrate that the state’s population of students with significant cognitive disabilities exceeds 1% of its total student population.⁷¹ The state must, however, explain *why* its population exceeds the 1% cap as well as demonstrate in its application for an exception that it has “fully and effectively” addressed the procedural safeguards listed in the regulations.⁷²

In April of 2005, the U.S. Department of Education issued new guidelines to the NCLBA, entitled *Raising Achievement: A New Path for No Child Left Behind*. One of the new guidelines builds upon the 1% cap for students with the most severe cognitive disabilities by recognizing that there are some students who may not have severe cognitive disabilities, but are nevertheless unable to perform at grade level. The new guideline allows states to develop modified academic achievement standards and use alternate assessments based on those modified standards for “students with persistent academic disabilities served under the IDEA.”⁷³ “States may include proficient scores from such assessments in making adequate yearly progress (AYP) decisions but those scores will be capped at 2.0% of the total tested population.”⁷⁴ The Department of Education has yet to define “persistent academic disabilities,” but there is some

⁶⁸ 34 C.F.R. §200.213.

⁶⁹ 34 C.F.R. §200.6

⁷⁰ 34 C.F.R. app. §200, 68704.

⁷¹ 34 C.F.R. §200.13

⁷² *Id.*

⁷³ U.S. Department of Education, *Raising Achievement: Alternate Assessments for Students with Disabilities*, at <http://www.ed.gov/policy/elsec/guid/raising/alt-assess-long.html>.

⁷⁴ *Id.*

speculation by special education attorneys that the Department will allow states to develop their own definitions, just as they were allowed to construct their own definitions of “severe cognitive disabilities.”⁷⁵

When the Department announced the new guideline of a 2% cap for students with persistent academic disabilities, in addition to the already existing 1% cap for students with severe cognitive disabilities, it also announced a rationale for the change: “This new policy is the position that best tracks the available research and research findings about students with disabilities.... The totality of this research suggests that there are about 1.8% to 2.5% of children who are not able to reach grade level standards, even with the best instruction.”⁷⁶ The Department realized that, given the research, the 1% cap was too stringent. It thus raised the number of disabled students whose proficient test scores based on modified academic standards could be included in determining the AYP to 3% (1% for those with severe cognitive disabilities plus 2% for those with persistent academic disabilities).

Part III: Specific Examples of How the NCLBA Influenced the 2004 IDEA

A. Language and Definitional Changes

The fingerprints of the NCLBA are all over the 2004 IDEA; although, interestingly, there are no specific references to the “No Child Left Behind Act,” as it is commonly known. Instead, Congress chose to refer to it using its original title: the Elementary and Secondary Education Act of 1965 (ESEA). In the entire reauthorization of the IDEA, there are forty-five references to the ESEA. In the 1997 IDEA, there were only nine references to the ESEA—and most of them were in reference to funding, rather than specific educational provisions.

⁷⁵ Jay Kravetz, *State leaders await IDEA guidance for defining 'persistent' disabilities* (April 20, 2005), at www.specialedconnection.com.

⁷⁶ U.S. Department of Education, *supra* n. 73.

In addition to adding specific references to the ESEA, Congress inserted language into the 2004 IDEA that *indirectly* refers to the NCLBA. For example, in the Findings section, one of the enumerated goals is to have high expectations for disabled children “in order to meet developmental goals and, to the maximum extent possible, *the challenging expectations that have been established for all children.*”⁷⁷ These challenging expectations are no doubt a reference to the NCLBA’s call for “challenging State academic achievement standards and state academic assessments.”⁷⁸ Congress also inserted references to academic achievement into several places of the 2004 IDEA, emphasizing the NCLBA’s mandate for academic achievement—even for those with severe disabilities. For example, the definition of transition services is now: “a coordinated set of activities for a child with a disability that is designed to be within a results oriented process that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities...”⁷⁹ Another example is in the provision regarding IEPs. Under the 2004 IDEA, an IEP must include “a statement of measurable annual goals, including academic and functional goals...”⁸⁰ and an IEP team must consider the “academic, developmental, and functional needs of the child.”⁸¹

⁷⁷ 20 U.S.C. §1401(c)(5)(A)(i) (2004).

⁷⁸ NCLBA §1001.

⁷⁹ 20 U.S.C. §1402(34) (2004). The definition of “transition services” in the former IDEA did not specify that the process should be focused on improving the academic and functional achievement of a child to facilitate the child’s movement into other post school activities. Rather, it simply stated that transition services should be an “outcome-oriented process, which promotes movement from school to post-school activities...” 20 U.S.C. §1402(30) (1997). The clarification that the process should be focused on academic achievement highlights Congress’s intent to incorporate the NCLBA into the 2004 IDEA.

⁸⁰ 20 U.S.C. §1414(d)(1)(A)(i)(II). The provision prior to the 2004 revisions did not specifically state that the goals should include academic goals; rather, it stated that an IEP should include “a statement of measurable annual goals, including benchmarks or short-term objectives...” 20 U.S.C. §1414(d)(1)(A)(ii) (1997).

⁸¹ *Id.* at §1414(d)(3)(A). This section also did not include any references to the academic needs of the child in the former IDEA. Rather, in the former IDEA, the IEP team had to consider only the strengths of the child and the concerns of the parent, as well as the results of the most recent evaluation of the child. §1414(d)(3)(A) (1997).

A final example of Congress's indirect reference to the NCLBA in drafting the 2004 IDEA is in the use of the terms "scientifically based instruction" or "scientifically based research." For example, in determining whether a child has a specific learning disability, the new IDEA asks local educational agencies to first determine if the child responds to "scientific, research-based intervention..."⁸² There is no definition of "scientifically based research" in the IDEA; however, the NCLBA defines it very thoroughly at NCLBA 20 U.S.C. §7707(b)(37). Congress's borrowing of this term is yet another indirect reference to the NCLBA.

By making such direct and indirect references to the NCLBA, Congress made it painstakingly clear that the 2004 IDEA and the NCLBA were meant to act in harmony with each other. In fact, in the Findings section, Congress specifically inserted a reference to the ESEA in the provision regarding the coordination of the IDEA "with other local educational service agency, State, and Federal school improvement efforts..."⁸³ In order to facilitate such coordination, Congress added several definitions to the new IDEA. Most notably were the additions of definitions for "core academic subjects" and "highly qualified teacher." In both instances, rather than defining these terms, Congress refers the reader directly to the definition as given in §1901 of the ESEA.

B. Mandate for Highly Qualified Teachers

Under the 2004 IDEA, special education teachers, like regular education teachers in the NCLBA, are now required to be highly qualified. In addition to meeting the highly qualified standards set forth in the NCLBA, special education teachers will be considered highly qualified

⁸² *Id.* at §1414(b)(6)(B).

⁸³ 20 U.S.C. §1401c(5)(C) now reads "coordinating this title with other local, educational service agency, State, and Federal school improvement efforts *under the Elementary and Secondary Education Act of 1965*, in order to ensure that such children benefit from such efforts..."

only if they are certified, examined, and licensed in special education.⁸⁴ This essentially means that if a high school teacher teaches “pull out”⁸⁵ math to disabled students, she must be certified and licensed in math as well as special education.

There are two exceptions to this general rule. First, if a teacher teaches core academic subjects exclusively to those students who are assessed under alternate achievement standards (i.e. the 1% who are most cognitively disabled, and now to the 2% of those with persistent academic disabilities), then she will be considered highly qualified if she is: a) certified and licensed in those core subject areas as well as in special education (the regular standard for a highly qualified special education teacher) or b) she can show that she has the “subject matter knowledge appropriate to the level of instruction being provided, as determined by the State, needed to effectively teach to those alternate standards.”⁸⁶ This alternative is only available in the case of instruction above the elementary level.⁸⁷

The second exception is for those special education teachers teaching multiple core academic subjects. For example, one special education teacher may teach math and science to a

⁸⁴ 20 U.S.C. §1402(10) (2004).

⁸⁵ Students taught in “pull out” classes are pulled out of the regular education classroom for that specific subject and taught the subject in a one on one or small group setting designed to focus on the child’s particular strengths and weaknesses.

⁸⁶ *Id.* at §1402(10)(C)(ii). As the provision indicates, each state can determine its own method for determining that teachers have subject matter knowledge appropriate to the level of instruction being provided. In Missouri, for example, the State Department of Education has decided that, “[b]ased on Missouri’s use of the C-BASE assessment as an entry requirement for teacher preparation programs, all teachers who graduated from a Missouri educator preparation program and hold Missouri K-12 special education certification in any area will be considered highly qualified for language arts, math, science, and social studies content area instruction when serving special education students in grades 1-12. Special educators graduating from a Missouri teacher preparation program and holding these certifications do not have to meet any additional requirements under IDEA to be considered highly qualified.” See Missouri Department of Elementary and Secondary Education, Memo to Superintendents, Directors of Special Education, Special Educators, from Melodie Friedebach, Assistant Commissioner *available at* <http://www.dese.state.mo.us/divspeced/Administration/ListServPostings/LS03.30.05.html>, March 30, 2005. The C-BASE, or College Basic Academic Subjects Examination, is a criterion-referenced achievement test that consists of “five parts, including a writing component. It assesses knowledge and skills in language arts, mathematics, science, and social studies.” See Missouri Department of Elementary and Secondary Education, Assessments for Teacher Education and Certification in Missouri, *available at* <http://www.dese.state.mo.us/divteachqual/teached/assessment.htm>.

⁸⁷ *Id.*

small group of disabled high school students. Under the general highly qualified provisions, that teacher would have to obtain certification and licensure in special education, math, and science. To aid teachers in this position, §1402(10)(D) of the 2004 IDEA allows a veteran teacher to demonstrate competency in those core subject areas she teaches by meeting her state's High Objective Uniform State Standard of Evaluation.⁸⁸ In the case of new special education teachers who teach multiple subjects, he or she may start teaching with certification and licensure in one core academic subject (i.e. math) and special education, and may demonstrate competence in the other academic subjects she teaches (i.e. science) by meeting the HOUSSSE within two years.⁸⁹ Thus, no teacher in this position will have to obtain three (or more) separate certifications and licensures.

C. Elevating Substance over Form

Inherent in the NCLBA is the idea that a child (or his teacher) simply going through the motions in learning (or teaching) is no longer acceptable. The accountability and assessment provisions are meant to assure that students learn substantive material, and that they can prove that they have learned it. In other words, the NCLBA seeks to elevate the substance of challenging academic content over the form of day-to-day school attendance. Similarly, the 2004 IDEA seeks to elevate substance over form: "A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE." By codifying language long held by the various circuit courts,⁹⁰ the 2004 IDEA now explicitly

⁸⁸ *Id.* at §1402(10)(D).

⁸⁹ *Id.*

⁹⁰ See e.g. *DiBuo v. Bd. of Educ. of Worcester Co.*, 309 F.3d 184, 190 (4th Cir.2002) ("[U]nder our circuit precedent, a violation of a procedural requirement of the IDEA (or one of its implementing regulations) must actually interfere with the provision of a FAPE before the child and/or his parents would be entitled to reimbursement..."); *Erickson v. Albuquerque Public Schools*, 199, F.3d 1116 (10th Cir. 1999) ("[A] school district's failure to comply with statutory IEP content requirements did not amount to a substantive deprivation, so there was no violation of the student's right to a FAPE." (citing *Urban v. Jefferson Co. Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir.1996)); *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765 (6th Cir.2001) ("[A] procedural violation of the IDEA is not a *per se* denial of a

demands that there must be substantive harm, not solely procedural violations, for a hearing officer to find that a FAPE has been denied. A hearing officer can only find a denial of a FAPE if the alleged procedural violations “significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents child”⁹¹ or “caused deprivation of educational benefits.”⁹² Congress’s codification of the case law emphasizes that within special education, as well as regular education, educational results and progress are more important than procedural compliance.

This is not to say that procedural compliance with the IDEA will fall by the wayside. The procedural guidelines were designed so that compliance would likely ensure that a school provides a student with a FAPE.⁹³ Therefore, when a school district fails to comply with the IDEA’s procedural requirements, it may be difficult for it to argue that it nevertheless provided a FAPE. In fact, many cases that have asserted the common law rule that procedural violations alone do not *per se* constitute a denial of a FAPE, have actually held that *in that case* the procedural violations did in fact amount to a denial of FAPE either because the violation significantly impeded the parent’s right to participate, or because the violation denied the student educational benefit.⁹⁴

FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.); *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir.1992) ("Procedural flaws do not automatically require a finding of a denial of a FAPE." "However, procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.").

⁹¹ 20 U.S.C. §1415(f)(2)(E)(ii)(II).

⁹² *Id.* at §1415(f)(2)(E)(ii)(III).

⁹³ “The Supreme Court clearly recognized the importance of the IDEA’s procedural requirements in ensuring that a disabled student receives a FAPE. “[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Deal v. Hamilton Co. Bd. of Educ.* 394 F.3d 840, 860 (6th Cir. 2004) (citing *Rowley*, 458 U.S. at 206).

⁹⁴ For example, in *Deal, supra n. 93*, at 854, the court stated “A finding of procedural violations does not necessarily entitle appellants to relief. Only if a procedural violation has resulted in substantive harm, and thus constitutes a denial of a FAPE, may relief be granted.” Nevertheless, the court went on to find that the school district’s pre-determination of placement precluded the parents from having a meaningful opportunity to participate and its failure

The elevation of substance over form is further emphasized by Congress allowing the award of attorney's fees to the State or local educational agency if the parent brings actions that are found to be frivolous, unreasonable or without foundation. Prior to the 2004 IDEA, only parents could recover attorney's fees (if they were considered the prevailing party). In the 2004 IDEA, school districts are given some relief against parents who file lawsuits simply because of minor procedural violations that do not deny the student a FAPE.

D. Performance Goals and Assessments

In a section of the 2004 IDEA entitled "Performance Goals and Indicators," Congress sought to ensure a true aligning with the NCLBA by mandating that states (in order to be eligible for IDEA funding) "establish goals for the performance of children with disabilities in the State...that are the same as the State's definition of adequate yearly progress."⁹⁵ The states must also establish "performance indicators...including measurable annual objectives for progress by children with disabilities..."⁹⁶ Finally, the 2004 IDEA mandates that states ensure that "all children with disabilities are included in all general State and district-wide assessment programs, including assessments described in the ESEA..., with appropriate accommodations and alternate assessments where necessary and as indicated in their respective IEPs."⁹⁷

E. 2004 IDEA Funding Provisions

Recognizing the hardships that school districts may face in attempting to design appropriate accommodations for regular assessments and/or alternate assessments for disabled

to have regular education teachers at all of the IEP meetings denied the student educational benefit. In *Hall v. Vance Co. Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985), the court stated, "The State Hearing Review Officer concluded that the school 'has consistently failed to inform the parents of their procedural rights and safeguards.' Under *Rowley*, these failures to meet the Act's procedural requirements are adequate grounds by themselves for holding that the school failed to provide James a FAPE." See also, *Amanda J. v. Clark Co. Sch. Dist.*, 267 F.3d 877, 890-891 (9th Cir. 2001) (holding that school district failed to allow disabled student's parents to examine all of the records used in identifying and addressing the student's disability, and that this procedural violation denied the student a FAPE).

⁹⁵ 20 U.S.C. §1412(a)(15)(A)(ii).

⁹⁶ *Id.* §1412(a)(15)(B).

⁹⁷ *Id.* at §1412(a)(16)(A).

students, Congress enacted several provisions in the 2004 IDEA that allow local educational agencies to divert IDEA funding into activities that are now mandated by the NCLBA. For example, Congress has authorized local educational agencies to use certain IDEA funds to “support the development and provision of appropriate accommodations for child with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities in accordance with the ESEA.”⁹⁸ Or, if a school has been identified as “in need of improvement” under the NCLBA solely on the basis of the assessment results of the subgroup of disabled children, IDEA funds can be used to provide technical assistance to schools, supplemental educational services to disabled students, or professional development to special education teachers or regular education teachers who also teach children with disabilities.⁹⁹ Further, the 2004 IDEA allows local educational agencies to reduce local spending on special education by fifty percent of the increase in federal funding from one year to the next year.¹⁰⁰ After this reduction, however, a school district may use the extra funding only to support activities authorized or mandated by the NCLBA.¹⁰¹

IV. In Conjunction or Inherent Conflict?

It is undeniable that Congress envisioned the 2004 IDEA and the NCLBA working in conjunction with each other to ensure accountability and results for all children, including all disabled children. But the two statutes, rather than reinforce one another, may actually present inherent conflicts. The two statutes expound conflicting pedagogical theories: the “NCLBA emphasizes the importance of group progress, while the IDEA highlights individualized

⁹⁸ *Id.* at §1411(e)(2)(C)(x).

⁹⁹ *Id.* at §1411(e)(2)(C)(xi).

¹⁰⁰ *Id.* at §1413(a)(2)(C)(i).

¹⁰¹ *Id.* at §1413(a)(2)(C)(ii).

achievement.”¹⁰² The NCLBA’s mandate for grade level performance of all students conflicts with the IDEA’s mandate that IEPs be designed to meet each individual child’s needs and abilities. The IDEA requires teachers and schools to ensure that a disabled student achieves at levels at which he is individually capable. The NCLBA, on the other hand, asks that the disabled student achieve at the same level as his non-disabled peer. While this is a laudable goal, it ignores the very premise of the IDEA—that differences due to disability cannot be ignored. Instead, the IDEA requires that differences must be recognized and accommodated.

This is not to say that disabled students should necessarily be held to a lower standard simply because of their disability. Rather, the level at which disabled students are asked to perform should be established on a case by case, *individualized* basis instead of a blanket “grade-level” approach. *This* is what the true intent of the IDEA is. A good example of how the new 2004 IDEA, in its effort to align itself with the NCLBA, has undermined itself, is in its requirement that states establish performance goals that are “the same as the State’s definition of AYP, including the State’s objectives for progress by children with disabilities.”¹⁰³ For a state to design and implement uniform state objectives for disabled children undermines the premise that all children with disabilities are not alike—and as such each require *individualized* objectives for progress.

With these arguments as its foundation, a school district in Illinois challenged the NCLBA (as it applies to disabled students) in a federal court. The Boards of Education of Ottawa Township High School and Elementary School filed suit in the United States District Court for

¹⁰² Cory L. Shindel, *One Standard Fits All? Defining Achievement Standards for Students with Cognitive Disabilities within the NCLBA’s Standardized Framework*, 12 JLPOLY 1025, 1069 (2004).

¹⁰³ 20 U.S.C. §1412(a)(15)(A)(ii).

the Northern District of Illinois on February 3, 2005.¹⁰⁴ Another Illinois school district—Streator Elementary School District 44, later joined as co-plaintiffs.¹⁰⁵ The complaint states that the Plaintiff schools did not meet their AYP due to the NCLBA’s mandate for disaggregation of disabled students’ assessment scores, and as such, the school district was forced to “employ or plan for systemic change/remediation activities that focus on the special education student population.”¹⁰⁶ The school districts argue that this mandated systemic change results in various students’ IEPs having to be modified, not because the students were failing to make “meaningful and significant progress on their individualized goals and objectives” but rather because the subgroup as a whole failed to make AYP.¹⁰⁷ The Plaintiffs argue that this is in violation of the IDEA’s mandate for IEPs to be developed according to individual needs.¹⁰⁸

As noted above, the U.S. Department of Education issued a new guideline in April of 2005 that allows school districts to raise the percentage of students who may be tested (and counted towards AYP) based on modified academic achievement standards from 1% to 3%. The Department articulated a research based rationale for the new guideline, but perhaps it was also in response to arguments like those articulated in Ottawa’s complaint. The new guideline will now enable school districts like Ottawa or Streator to meet their AYP and negate the necessity to employ systemic change to their special education programs. This in turn will eliminate the NCLBA’s conflict with individual student’s IEPs, and render the school districts’ complaint moot.¹⁰⁹ While this particular fire may have been put out with the new implementing guideline;

¹⁰⁴ *Bd. of Educ. of Ottawa Township v. U.S. Dept. of Educ.*, Complaint for Declaratory Judgment (Feb. 3, 2005), available at www.specialedconnection.com

¹⁰⁵ *District Has Company on Legal Challenge* (February 18, 2005), at www.specialedconnection.com.

¹⁰⁶ *Ottawa Township Complaint*, *supra*, n. 104.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ On July 20, 2005, Judge David H. Coar of the United States District Court for the Northern District of Illinois dismissed Ottawa Township’s lawsuit, not on the grounds that it was moot, but rather, because he found that Ottawa Township did not have standing—specifically, that it could not establish an injury in fact. Judge Coar wrote,

the inherent pedagogical conflict between the NCLBA and the IDEA remains. The former seeks uniform progress for all, while the latter mandates individualized, case by case progress.¹¹⁰

Conclusion

Despite the inherent pedagogical conflict between the NCLBA and the IDEA, both statutes justly demand progress for our nation's public school children. Congress and the U.S. Department of Education have made clear that there is no turning back—that the NCLBA is here to stay and that they are willing to make changes to the law in order to accommodate any issues that arise in its implementation. In fact, in announcing the new guidelines in April 2005, Secretary of Education, Margaret Spellings stated, “As we continue to watch this law grow and mature, we will address other concerns—again, as long as the children are learning.”¹¹¹ In the

“Plaintiff’s fail to establish that the NCBLA requires them to make systemic changes in violation of the IDEA. The NCLBA does not mandate the specific actions that a school district must take: the statute leaves those pedagogical questions to the actors implementing it.” United States District Court, Northern District of Illinois, Docket Entry, Case 1:05-cv-00655, July 20, 2005.

¹¹⁰ Interestingly, (and perhaps in response to the dismissal of Ottawa Township’s lawsuit) the Illinois General Assembly may have started another fire. It recently passed, and Governor Rod Blagojevich signed into a law, a measure that addresses testing of disabled students under the NCLBA. Signed by the Governor on August 23, 2005, the measure states that “indicators to determine adequate yearly progress for children with disabilities shall be based on their individualized education plans.” See HB 3678, Illinois General Assembly. This essentially means that disabled students in Illinois will be tested at the grade level in which they are being taught under their IEPs, rather than at the grade level of their school-age peers. The legislation is just one example of how states have begun “revolting” to the NCLBA for various reasons. See *States Revolt: Calls for Action to Fix No Child Left Behind*, Communities for Quality Education, at <http://www.qualityednow.org/reports/revolt/index.php>. Though the measure passed in Illinois, it will nevertheless require formal approval from the U.S. Department of Education before it may be implemented. See *News Release*, Office of Governor Rod Blagojevich, available at <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=1&RecNum=4221>, August 23, 2005. The U.S. Department of Education’s response will be interesting—especially given that the Congressional Committee on Education and Workforce has already somewhat responded to Illinois’ argument. In the *IDEA Guide to “Frequently Asked Questions,”* published on February 17, 2005, the Committee on Education and the Workforce posted the following Question and Answer: “Is there a conflict between IDEA and NCLB on assessments for students with disabilities? No. IDEA and NCLB work in concert to ensure that students with disabilities are included in assessments and accountability systems. While IDEA focuses on the needs of the individual child, NCLB focuses on ensuring improved academic achievement for all students.” *IDEA Guide to Frequently Asked Questions*, p. 10, available at <http://edworkforce.house.gov/issues/109th/education/idea/ideafaq.pdf>. In deciding whether to approve Illinois’ new provision, the U.S. Department of Education will be forced to decide which is right: Illinois, which insists there *is* a conflict between the 2004 IDEA and the NCLBA with regard to assessments of students with disabilities, and Congress, which insists that no such conflict exists.

¹¹¹ Secretary of Education Margaret Spellings, Remarks at Mount Vernon, VA announcing the new NCLBA guidelines: *Raising Achievement: A New Path for No Child Left Behind* (April 7, 2005), available at <http://www.ed.gov/news/speeches/2005/04/04072005.html>.

coming years, the legislature, executive and judicial branches will continue their intricate dance to further this mission. No statute is perfect from its inception, and just as the IDEA has been reauthorized, changed, and amended over the years, so too will the No Child Left Behind Act.