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Results Above Rights? The No Child Left Behind Act's Insidious Effect on Students with Disabilities

*"Education, to be sure, is not a 'one size fits all' business."*¹

I. INTRODUCTION

The Federal No Child Left Behind Act (NCLB), passed in January of 2002,² will indisputably blaze a new public school education path adverse to the directives of the Individuals with Disabilities Education Act (IDEA).³ The NCLB accentuates educational quality, school accountability and school choice through mandatory testing at specified points in a student's educational development.⁴ Query whether the NCLB and its mandatory testing initiative will have a positive impact on school children, our nation's most valuable commodity, or if it is another ineffective policy instrumentality effervescing from bureaucracies far removed from the educational trenches. Proponents publicize the NCLB as a landmark measure capable of ensuring that only the highest educational standards are practiced as well as preached in American schools. Opponents argue that the NCLB's testing mandate is nothing more than an onerous administrative procedure void of any educational assistance. Regardless of where one falls on this spectrum, the NCLB directives encroach upon testing participation rights previously afforded students under the IDEA.⁵

1. United States v. Virginia, 518 U.S. 515, 542 (1996).

2. No Child Left Behind Act, 20 U.S.C.A. § 6311(b)(3)(C)(v)(I) (West 2003) [hereinafter NCLB].

3. Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1487 (West 2000) [hereinafter IDEA].

4. 20 U.S.C.A. § 6311(b)(3)(C)(v)(I).

5. 20 U.S.C. § 1414(d)(1)(A)(v).

The IDEA grants numerous rights to students with disabilities, including the right to participate, if at all, in school or district-wide testing.⁶ Students with disabilities may participate in the same manner as their regular education peers.⁷ Concomitantly, depending on individual needs, students may be exempt from participation or may participate alongside their mainstream peers with testing accommodations or substantive modifications.⁸ By compelling school districts to initiate standardized testing for all students, the NCLB infringes on the rights previously bestowed upon students with disabilities. Infringement may deny students with disabilities a meaningful educational benefit, resulting in a substantive violation of the IDEA.⁹ Further, failure to comply with an IDEA measure may result in a procedural violation if noncompliance causes a loss of an educational opportunity.¹⁰

Under the NCLB, absent extreme circumstances, all students, regardless of individual disability, participate in state or district-wide assessments.¹¹ Conversely, pursuant to the IDEA, a student participates in testing depending on the student's disability.¹² Therefore, the NCLB testing mandates interfere with students' needs, as students with disabilities require individualized consideration and attention. This individualized attention is documented in a student's Individualized Education Plan (IEP).¹³ Once a pro-

6. *Id.*

7. *Id.*

8. *Id.* Accommodations refer to changes in testing materials or procedures such as presentation, response, setting, and scheduling. Modifications refer to the manner of participation and include extended time, breaking the test into parts, computer access for essay exams, and the use of calculators. See JUDY W. WOOD, *ADAPTING INSTRUCTION TO ACCOMMODATE STUDENTS IN INCLUSIVE SETTINGS* 144-45 (3d ed. 1998).

9. See Bd. of Educ. Of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 200-01 (1982).

10. See generally 20 U.S.C § 1415.

11. See NCLB, 20 U.S.C.A. § 6311(b)(3)(C).

12. See IDEA, 20 U.S.C. § 1414(d)(1)(A)(v) (West 2000).

13. An IEP is a document describing a child's skills and stated goals for services as well as strategies for achieving those goals. *INCLUDING CHILDREN WITH SPECIAL NEEDS IN EARLY CHILDHOOD PROGRAMS* 45-70 (M. Wolery & J.S. Wilbers eds., National Association for the Education of Young Children) (1994) [hereinafter Wolery & Wilbers]. The IEP includes a student's performance level, annual goals for the particular student, type of education and services to be rendered, extent of mainstreaming, key dates, transitional

vision is codified in the IEP, the student has a vested right in the provision. The NCLB and its mandatory testing scheme may violate the vested rights of a student with disabilities as the testing scheme may run counter to the testing determination previously reflected in the student's IEP.

This Comment examines both IDEA rights and NCLB obligations, illustrating how the NCLB overreaches into the individualized testing considerations the IDEA affords students with disabilities. Additionally, this Comment addresses student rights under the IDEA and the likelihood that the NCLB will eradicate testing rights of students. Section II explains student testing rights under the IDEA, new and conflicting guidelines promulgated in the NCLB, and IDEA violations educators confront in reconfiguring pedagogical procedures to fit the NCLB. Section III analyzes the seminal case, *Bd. of Educ. of the Hudson Cent. Sch. Dist. v. Rowley*, and its progeny to reveal factors courts consider in adjudicating procedural and substantive violation claims associated with planning and implementing student educational opportunities. Section IV explores the relationship between testing and educational placement for students with disabilities to demonstrate that, in addition to potential IDEA violations, it is both impractical and detrimental to educate certain students in a manner consistent with their mainstream contemporaries. Finally, Section V suggests utilizing an elevated standard for students' education to guarantee focus on the students' individual needs above sweeping directives. Under this heightened standard, it may be possible for the IDEA and the NCLB to stand in peaceful coexistence without the threat of litigation, and, more importantly, the infringement on a student's right to an appropriate education.

II. PUBLIC SCHOOL RESPONSIBILITY: IDEA RIGHTS AND NCLB DIRECTIVES

The following section elucidates the design of the above-entitled educational decrees and their ubiquitous impression on the school landscape. Section A summarizes the IDEA, the landmark initiative promulgated to target the individual needs of

services, and procedures for measuring student progress and informing parents. *See also* 20 U.S.C. § 1414(d)(1)(A)(i)-(viii). The IEP is the mechanism for carrying out IDEA provisions. Wolery & Wilbers, *supra*.

unique learners. Section B describes the NCLB, its purported rationale and its unrealistic objectives. Finally, Section C augments the conflicts spawned by the NCLB and the resulting deleterious effect on student rights.

A. *The IDEA and the Rights of Students with Disabilities*

The IDEA demarcates students' rights and corresponding school responsibilities towards students with disabilities.¹⁴ The IDEA's purpose is to guarantee that students with disabilities are provided a "free appropriate public education" (FAPE) through special education and services implemented to address their unique needs.¹⁵ The Act establishes that students with disabilities have the right to a unique education tailored to individual needs.¹⁶ A "free appropriate public education" is a publicly funded and supervised education measured by state standards, executed in accordance with each student's IEP and designed to provide an educational benefit.¹⁷ States are eligible to receive funds under the IDEA provided that the states employ a myriad of policies and procedures including student evaluations and IEP implementation.¹⁸

In addition to these guidelines, the IDEA also requires that students with disabilities participate in state and district-wide assessments.¹⁹ Under the IDEA, students with disabilities may participate with or without accommodations.²⁰ Where appropriate, local education agencies draft and execute alternate assessment guidelines for those who cannot partake in the regular state or district-wide assessment.²¹ A team of educators draft each student's IEP,²² delineating testing modifications and accommoda-

14. See IDEA, 20 U.S.C. § 1400(d)(1)(A)-(C) (West 2000).

15. *Id.* § 1400(d)(1)(A).

16. See *id.* § 1400(d)(1)-(3).

17. *Id.* § 1401(8).

18. See *id.* § 1412(1)-(16). These policies and procedures assist with identification and education of unique learners and include but are not limited to: FAPE, IEPs, least restrictive environment, procedural safeguards, evaluation, confidentiality, general supervision, eligibility, personnel standards, and performance goals and indicators such as individual assessments. *Id.*

19. *Id.* § 1412(a)(17)(A).

20. See *id.*; see also Wolery & Wilbers, *supra* note 13.

21. *Id.* Alternate assessments are any method of evaluating progress differing from the state or district model. *Id.*

22. See IDEA, 20 U.S.C. § 1414(d)(1)(A)(i)-(viii); *id.* § 1414(d)(1)(B). The

tions to be utilized in the assessments.²³ Further, the IEP team determines how, if at all, the student will be assessed.²⁴ Therefore, the IDEA leaves testing procedures to the IEP team to ascertain how to measure individual student progress as the team is most familiar with the student and best equipped to make this determination.

The IDEA's underlying purpose is to meet the "unique needs" of students with disabilities.²⁵ A unique need could require alteration of the manner in which a student participates in an assessment or it could necessitate refraining from academic assessments altogether. In order to comply with individual needs, the IEP determinations must be made on an individual basis. What facilitates progress for one student may not benefit another, even if both students have the same disability. Accordingly, a student's unique needs determine whether the student should participate in state or district-wide testing either with accommodations or through an alternative assessment. Moreover, unique needs may dictate that the student refrain from assessments altogether, without regard to arbitrary numbers or statistics promulgated by any agency.

In addition to testing schema, safeguards exist to ensure, at a minimum, that schools follow certain procedures when executing a student's IEP.²⁶ First, the IDEA gives parents an opportunity to inspect all records that pertain to their student's education.²⁷ Concurrently, the statute requires that parents receive written notice of any change or addition to the student's IEP.²⁸ When, in the course of pedagogical events, parents disagree with either current procedures or the IEP's substance, parents have the opportunity to present their grievances at mediation.²⁹ Depending on the degree and severity of the grievance (or the temperament of the par-

IEP is the mechanism for carrying out IDEA provisions. *See generally id.* § 1414.

23. *Id.* § 1414(d)(1)(A)(v)(I).

24. *Id.* § 1414(d)(1)(A)(v)(I)-(II). The IEP team, consisting of teachers, administrators, and parents is responsible for drafting the student's IEP in accordance with the student's individual needs. *Id.* § 1414(d)(1)(B)(i)-(vi).

25. *Id.* § 1400(d)(1)(A).

26. *Id.* § 1415(b).

27. *Id.* § 1415(b)(1).

28. *Id.* § 1415(b)(3)(A)-(B).

29. *Id.* § 1415(e)(1).

ents and/or school district), mediation may be ineffective. Subsequently, a parent still troubled by perceived educational impropriety may seek redress by filing a complaint with the local school board requesting an impartial due process hearing to determine whether the school district has complied with the Act.³⁰ After exhausting these remedies, a parent may bring a civil action in federal court.³¹

The procedural guidelines promulgated in the IDEA seem straightforward, unproblematic, and easy to employ at first glance.³² To the discerning eye of an experienced educator, however, any procedure purporting simplicity is all too illusory.³³ To add to the labyrinthine procedural exigencies, the United States Supreme Court, in *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*,³⁴ determined that the standard for "free appropriate public education" is tantamount to an educational plan "reasonably calculated to enable the child to receive educational benefits" and educational services falling below this level would not suffice.³⁵ Further, the Court determined the point at which educational services, or the lack thereof, amounted to a substantive violation of a student's rights.³⁶ Thus, given the extent of Congress' devotion to the rights of students with disabilities, the long history of case law, and the Supreme Court's interpretation of federal legislation, public school education of students with disabilities is unequivocally of grave concern. Accordingly, each and every act, ordinance, or policy initiative aimed at public education must be drafted with assiduous precision, taking into consideration how each measure might affect students' preexisting substantive rights and procedural safeguards put in place to protect those

30. *Id.* § 1415(f)(1).

31. *Id.* § 1415(i)(2)(A).

32. It would appear that such detailed legislation, coupled with a societal trend toward litigation, would yield strict adherence to at least the procedural guidelines established in IDEA. See PHILIP CHINN & DONNA GOLLNICK, *MULTICULTURAL EDUCATION IN A PLURALISTIC SOCIETY* 172 (Prentice Hall 1998).

33. At the risk of sounding redundant, this skepticism is evidenced by the long history of case law outlining both procedural and substantive violations of the IDEA. See discussion *infra* Part IV.

34. 458 U.S. 176 (1982).

35. *Id.* at 207 (interpreting the IDEA's predecessor statute, the Education for All Handicapped Children Act).

36. See *id.* at 206.

rights. Therefore, examination of the NCLB, as well as the additional responsibilities Congress imposes on schools, is essential to determine how the two acts coordinate with each other.

*B. The Changing Face of Pedagogic Practice: Implementation of the No Child Left Behind Act*³⁷

On January 8, 2002, Congress passed the NCLB, touted as the most sweeping piece of educational legislation since the Elementary and Secondary Education Act became law during the Johnson Administration.³⁸ The purpose of the NCLB is to offer students the chance to acquire a quality education.³⁹ According to the NCLB, Congress's vision of a "quality education" is equivalent to competence in state academic assessments which purportedly measure a state's "challenging . . . academic standards."⁴⁰ In addition, parents are given school choice options if the school fails to meet state-mandated expectations.⁴¹ Each states' education department drafts guidelines disseminating what the state determines should be taught in the public schools.⁴² After establishing these academic standards, students participate in mandatory district-wide testing to examine whether schools are successfully implementing these criteria.⁴³ To receive federal funds, a public

37. This synopsis is not intended to be comprehensive concerning the plethora of responsibilities and requirements bequeathed upon schools. Instead this account of the NCLB is intended only to identify the NCLB provisions hostile to testing rights of students with disabilities under the IDEA as codified in accompanying IEPs.

38. See U.S. Department of Education, Introduction: *No Child Left Behind*, at <http://www.ed.gov/print/nclb/overview/intro/index.html> (last visited December 1, 2004). In addition to representing a sweeping overhaul of federal efforts to support secondary and elementary education in the United States, No Child Left Behind also reauthorizes the Elementary and Secondary Education Act. See *id.*

39. See NCLB 20 U.S.C.A. §6301 (West 2003).

40. See *id.*

41. *Id.* § 6316(b)(1)(E)(i). More succinctly, if a certain percentage of students are not meeting the standards (a euphemism for "failing") on end-of-year tests at particular schools, parents are free to place their children in another school. See *id.* Whether removing a student and relocating her to a foreign scholastic environment will cause the student to no longer "fail" is beyond the scope of this Comment.

42. 147 CONG. REC. H10083 (daily ed. Dec. 13, 2001) (statement of Rep. Pryce).

43. *Id.*

school system must comply with the NCLB.⁴⁴ Few would oppose the idea of calculating whether students are learning appropriate academic skills; however, the NCLB, in its present form, may have difficulty achieving its intended results because, at least with respect to students with disabilities, such students may not demonstrate comprehension through standardized testing.

Pursuant to the NCLB, states must design demanding academic norms in math and reading that apply to all students.⁴⁵ In addition, states are required to create and implement a system to evaluate whether schools have met state-authorized "adequate yearly progress" measurements.⁴⁶ Included in the definition of "adequate yearly progress" is a proviso obliging "separate measurable annual objectives for continuous and substantial improvement for . . . [t]he achievement of . . . students with disabilities[.]"⁴⁷

Thus, states must decide on a minimum percentage of students with disabilities required to meet proficiency standards.⁴⁸ Though states are free to assign this percentage, at least ninety-five percent of the students in each subgroup must participate in testing for a school district to meet adequate yearly progress standards.⁴⁹ Further, students are to be tested at least once from grades 3 to 5, 6 to 9, and 10 to 12.⁵⁰ The assessments are designed to account for one-hundred percent student participation, regardless of subgroup categorization, or the implementation of accommodations or adaptations.⁵¹ Finally, the local education agency is required to submit a plan to the state education agency demon-

44. *See id.*

45. 20 U.S.C.A. § 6311(b)(1)(C).

46. *Id.* § 6311(b)(2)(B).

47. *Id.* § 6311(b)(2)(C)(v)(II)(cc).

48. *Id.* § 6311(b)(2)(G)(iii).

49. *Id.* § 6311(b)(2)(I). One such subgroup is "students with disabilities," and, for purposes of this Comment, subsequent discussion does not pertain to any other subgroup including "economically disadvantaged students," "students from major racial and ethnic groups," or "students with limited English proficiency." *Id.* § 6311(b)(2)(C). Further, even if the student with disabilities subgroup does not meet the state determined percentage, the school may still meet adequate yearly progress so long as the percentage has not dropped by more than ten percent and the subgroup has made progress on at least one other indicator. *Id.* § 6311(b)(2)(I)(ii).

50. *Id.* § 6311(b)(3)(C)(v)(I).

51. *See id.* § 6311(b)(3)(C)(ix)(I)-(II).

strating how it will implement services under the Act for students with disabilities.⁵²

Students with disabilities are specifically addressed in the NCLB.⁵³ Certainly Congress would not exclude students with disabilities from such an important educational initiative; however, there is evidence that Congress passed the Act with strong reservations concerning this class of students.⁵⁴ Thus, Congress did not pass the NCLB without first studying the likely effects on students with disabilities. Insight notwithstanding, the NCLB as it currently exists presents an inherent conflict with regards to this population. Such conflict can only hinder educational development guided by the IDEA, as the next section illustrates.

C. *The Facial Conflict Between the NCLB and the IDEA*

Notwithstanding any potential standardized testing validity problems, the NCLB testing mandate may violate student rights established by the IDEA. First, under the IDEA, students are required to participate in state or district-wide testing; however, there is no minimum participation percentage.⁵⁵ There are a variety of explanations for such an omission. Primarily, the crux of the IDEA hinges on the individually tailored education plan crafted according to the student's uniqueness, without regard to mandatory, arbitrary floors determined by people who have minimal, or no interaction with the student. Arguably, alternate assessment should make up for this gap as they are included in both the IDEA and the NCLB.⁵⁶ However, the NCLB includes alternative assessments only for determining the percentage of students tested; there is no provision that mentions alternate assessments as a means for achieving a reliable and appropriate measure of proficiency.⁵⁷

Second, under the IDEA, the IEP team, not the local educa-

52. *Id.* § 6312(b)(1)(E).

53. *See id.* § 6311 (b)(2)(C)(v)(II)(cc).

54. 147 CONG. REC. H10103 (daily ed. Dec. 13, 2001) (statement of Rep. Miller). Even though the Act was passed with overwhelming bipartisan support, there still existed serious disagreement over how it would affect special education. *Id.*

55. *See* IDEA, 20 U.S.C. § 1412 (West 2000).

56. *See id.* § 1412(a)(17); 20 U.S.C.A. § 6311(b)(2)(I)(i).

57. *See generally* 20 U.S.C.A. § 6311.

tion agency, determines how the student will be assessed, if at all, depending on the student's disability and need.⁵⁸ The NCLB takes the contrasting position that all students are to participate, regardless of disability or need.⁵⁹ This problematic approach ignores the IEP's primary concern: the student's individual needs. The NCLB requires that students test in particular grades.⁶⁰ However, under the IDEA, students need not reside in a traditional grade, as an education tailored to a particular student does not demand such a distinction. Assignment to a particular grade for the sole purpose of testing again would disregard the IDEA's ultimate goal of particularized treatment of students with disabilities.

Therefore, it is unequivocal that the NCLB and the IDEA posit two different conceptions of education. The IDEA vision focuses on individual needs whereas the NCLB view concentrates on standards employed merely to characterize the pervasive slump that exists in public school education. However, since the IDEA encompasses students' testing participation rights, failure to comply is actionable notwithstanding the NCLB's enactment.

III. THE NCLB PROMPTS GRAVE CONCERN AT THE STATE LEVEL

Data compiled by the Nation's Report Card shows how the NCLB has influenced testing patterns for students with disabilities despite rights established in the IDEA. For example, in Rhode Island in 1998, four years before Congress enacted the NCLB, thirteen percent of all eighth grade students were identified as having some sort of reading disability.⁶¹ Of this thirteen percent, five percent were excluded from testing, and only one percent were tested with accommodations.⁶² Subsequently, in 2002, after the NCLB's passage, sixteen percent of students were identified as disabled, only four percent were excluded from testing and seven percent were tested with accommodations.⁶³ The data evinces a

58. 20 U.S.C. § 1414(d)(1)(A).

59. See 20 U.S.C.A. § 6311(b)(3)(C).

60. *Id.* § 6311(b)(3)(C)(v)(I).

61. National Center for Education Statistics, The Nation's Report Card, at <http://nces.ed.gov/nationsreportcard/reading/results2003/acc-sd-g8.asp> (last visited Sept. 13, 2004).

62. *Id.*

63. *Id.* Similarly, in Massachusetts in 1998, fifteen percent were identified, three were excluded and five were tested without accommodations. In 2002, seventeen percent were identified, four were excluded and eight were

state trend toward identifying more students with disabilities. Yet, despite an increase in identification, fewer students have been excluded from testing; instead, more students are tested with accommodations. It is possible schools may be over-identifying students with disabilities to get low-performing students accommodations, hoping that accommodations will yield more favorable test results. Regardless, the trend, at least in Rhode Island, indicates a move toward assessing a greater number of students.

Although on its face this is not problematic, such a puissant drift becomes suspect given the strict guidelines imposed by the IDEA. The drift poses the question whether administrators strictly adhere to individual IEPs or if administrators disregard IEPs to an extent, and thus violate the IDEA, in order to meet NCLB mandates. As the IDEA grants students with disabilities their only legitimate educational rights, discounting the IDEA to adhere to a quota system does a disservice to the student and exposes the school district to potential liability. Thus, it becomes necessary to diligently diagram testing trends and the resulting impact on students with disabilities.

The NCLB's influence on testing trends in Rhode Island is evident in the recent standardized testing patterns made available by the Rhode Island Department of Education. This assessment trend commenced throughout the country during the 1990s and still remains a powerful force.⁶⁴ Currently in Rhode Island, all students are to participate in state-wide assessments with or without accommodations or using an alternate assessment. Accommodations include changes in test setting, timing, scheduling, presentation, or manner of response.⁶⁵ Students must meet specific thresholds in eight categories to qualify for alternate assessments.⁶⁶ The categories pertain to the existence of an IEP, cognitive and functioning behavior, intensive support, cause of

tested with accommodations. *Id.*

64. Mark Pomplun, *Cooperative Groups: Alternative Assessment for Students with Disabilities?*, 30 J. SPEC. EDUC. 1, 1 (1996).

65. An alternate assessment is any evaluation method utilized to measure progress that differs from the district norm. Rhode Island Department of Elementary and Secondary Education, at <http://www.ridoe.net/standards/stateassessment/Accomodations.htm> (last visited Sept. 13, 2004).

66. Rhode Island Department of Elementary and Secondary Education Web site, at <http://www.ridoe.net/standards/stateassessment/alternateassessment.htm> (last visited Sept. 13, 2004).

educational performance, age-appropriate levels, ability to apply skills, IEP team compliance, and documentation.⁶⁷ If the student does not meet the required thresholds, the student must participate in assessments with or without accommodations.⁶⁸ This standard conflicts with the IDEA, where students may be excluded from state-wide tests under appropriate circumstances.⁶⁹ Moreover, pursuant to the NCLB, schools are required to test ninety-five percent of students in reading and math.⁷⁰ Again, this mandate is inconsistent with the IDEA, which establishes no arbitrary floor for participants, given its commitment to student individuality.⁷¹

In addition to these testing alterations, Rhode Island has implemented twenty-one performance indicators to measure individual school progress.⁷² A school must meet target levels on all twenty-one indicators in order to achieve "adequate yearly progress."⁷³ Indicators include target passing rate percentages on as-

67. *Id.*

68. *Id.*

69. IDEA, 20 U.S.C. § 1414 (West 2000).

70. Linda Borg & Bruce Landis, *How Schools are Evaluated*, PROVIDENCE J. BULL., Aug. 15, 2003, at B3.

71. In Massachusetts, all public education students are required to participate in the Massachusetts Comprehensive Assessment System (MCAS) either in its standard form, with accommodations, or through the use of an alternate assessment. Mass. Department of Education, Mass. Comprehensive Assessment System, at <http://www.doe.mass.edu/mcas/alt/overview.html> (last visited Sept. 14, 2004). Only a small number of students, those with the most significant disabilities, will be permitted to use alternate assessments. *Id.* Furthermore, the IEP team will decide "how, not whether, the student will participate in the MCAS . . ." *Id.* An alternate assessment consists of a portfolio containing academic materials collected throughout the year by both the teacher and the student. *Id.*

Thus, similar to the Rhode Island mandates, Massachusetts places demands on schools and students incompatible with the IDEA. Under the IDEA, the IEP team determines whether the student will participate and, based on the team's discretion, the manner in which an alternate assessment will be conducted. 20 U.S.C. § 1414(d)(1)(A)(v). Therefore, the NCLB has improperly influenced both Massachusetts and Rhode Island into altering testing schemes to potentially result in the IDEA infringement.

72. See R.I. DEP'T OF ELEMENTARY AND SECONDARY EDUC., SCH. AND DIST. PERFORMANCE AND ACCOUNTABILITY SYS., 4 (Sept. 2003), available at <http://131.109.26.242/reportcard/03/AccountabilityBrochure.pdf> (Sept. 18, 2003) [hereinafter PERFORMANCE AND ACCOUNTABILITY SYS.].

73. *Id.*; see also NCLB, 20 U.S.C. § 6311(b)(2)(C) (West 2003) (defining "adequate yearly progress").

assessments for specific student groups, one of which includes students with disabilities.⁷⁴ Failure to meet any indicator can result in potential school reconfiguration, school choice for children or requiring the school to provide a plethora of additional services.⁷⁵ Many Rhode Island schools are not achieving "adequate yearly progress" because the disabled subgroup falls short of the target rate, causing administrative disruption and the loss of essential student services.⁷⁶ Some students with disabilities were previously excluded or offered alternate assessments because state or district tests were not appropriate. Now, participation may not only impinge rights but also facilitate the loss of needed services or cause the reconfiguration of an exemplary school.

Given the heightened sensitivity to procedural and substantive violations of the IDEA, the testing provision changes in Rhode Island will likely lead to litigation.⁷⁷ Rhode Island is currently enacting procedures that would require substantial IEP rearrangement.⁷⁸ In addition to the potential procedural changes, students with disabilities may now be deprived of preexisting pedagogical practices proven to be successful in order to make room for the standardized testing procedures and preparations necessary under the NCLB. It is possible students could bring a cause of action under IDEA section 1415 citing procedural violations due to the IEP changes.⁷⁹ In addition, students could bring claims for substantive violations, claiming that the new testing provisions provide no academic benefits to their education plans. Further case study is required to flesh out the elements of both the procedural and substantive violation of the IDEA.

IV . SUBSTANTIVE AND PROCEDURAL VIOLATIONS OF THE IDEA

In 1982, the United States Supreme Court announced the educational standard schools must provide students with disabilities in *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v.*

74. See PERFORMANCE AND ACCOUNTABILITY SYS., *supra* note 72.

75. See *id.*; see also *id.* at 6; NCLB, 20 U.S.C.A. § 6316(b)(8).

76. See, e.g., David McFadden, *Eight Students Seek Transfer from Failing City Schools*, PROVIDENCE, J., Aug, 29, 2003, at C1.

77. See CHINN & GOLLNICK, *supra* note 32.

78. See McFadden, *supra* note 76.

79. See 20 U.S.C. § 1415 (West 2000).

Rowley.⁸⁰ The Court interpreted the “free appropriate public education” requirement of the IDEA’s predecessor statute, the Education for All Handicapped Children Act, to ascertain the requisite degree of education afforded to students with disabilities.⁸¹ A State complies with the Act’s requirements, the Court held, when it follows the procedures set forth in the Act and if the IEP is “reasonably calculated to enable the child to receive educational benefits” conferring a “minimum floor of opportunity.”⁸²

Noting the distinction between students with disabilities and regular students, the Court proclaimed:

The educational opportunities provided by our public school system undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student’s ability to assimilate information presented in the classroom. The requirement that States provide “equal” educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.⁸³

Thus, the Court determined that states need to provide a minimum floor of opportunity, and highlighted the distinctive and unique characteristics of education plans for students with disabilities.⁸⁴ The IDEA expanded on the individual’s unique learning characteristics highlighting educational benefits for students and offered comprehensive opportunities.⁸⁵

The IDEA focuses on individual uniqueness while the NCLB evaluates educational programs. The IDEA maintains that the IEP shapes the student’s education where the NCLB, with its testing mandate, disregards any individual determination under the auspices of school program evaluation.⁸⁶ Following the *Rowley*

80. 458 U.S. 176, 203-04, 206-07 (1982).

81. *Id.* at 203-04. The Court’s interpretation is still currently applied in evaluating whether a substantive or procedural IDEA violation has occurred. The Court determined that the school did not need to provide a deaf student with a sign language interpreter as the student was advancing from grade to grade with ease. *Id.*

82. *Id.* at 206-07. Here, the Court determined that the school met the standard. *Id.* at 209.

83. *Id.* at 198.

84. *See id.* at 201, 206-207.

85. *See generally* IDEA, 20 U.S.C. § 1415 (2000).

86. *See* James G. Shriner, *Legal Perspectives on School Outcomes As-*

Court's rationale and the IDEA's evolution, standardized testing may be inappropriate and/or invalid for some students.⁸⁷ To furnish any educational benefit, determining whether, and if so, how a student shall be tested, should be done on an individualized basis. A minimum participation percentage requirement may lead to a substantive or procedural IDEA violation. Focus should center back on individual needs, perhaps through wide-scale alternate assessment use, rather than large-scale testing.⁸⁸ If large-scale testing remains the norm, rights may vanish, claims may rise, and students with disabilities might be "left behind." Therefore, careful review of the factors courts consider in determining IDEA violations is necessary to demonstrate how mandatory testing infringes upon educational rights.

A. Substantive IDEA Violations and Potential NCLB Infringements

Mandatory testing invites potential substantive violations of the IDEA because a student may not acquire any meaningful benefit from the standardized test and it may replace preexisting procedures that did offer such a benefit. One type of IDEA violation stems from insufficiencies in the student's IEP. Courts, following the *Rowley* standard, determine whether students can derive meaningful educational benefit from their IEPs. If a student cannot derive a meaningful educational benefit from the IEP, a substantive IDEA violation arises.⁸⁹ Inversely, if a provision necessary for a student to receive an educational benefit is omitted from an IEP, the omission may also lead to a substantive IDEA violation.⁹⁰ To illustrate, the United States Court of Appeals for the Ninth Circuit found that denying a student with a behavioral and emotional disorder placement at a residential treatment facility amounted to a substantive IDEA violation because the student could not derive a meaningful educational benefit without

assessment for Students with Disabilities, 33 J. SPEC. EDUC. 232, 232-33 (2000).

87. See generally *id.*

88. See *infra* notes 97-98 and accompanying text.

89. See, e.g., *Seattle Sch. Dist. v. B.S.*, 82 F.3d 1493, 1498-1500 (9th Cir. 1996).

90. See, e.g., *E.D. v. Enterprise City Bd. of Educ.*, 273 F. Supp. 2d 1252, 1272 (M.D. Ala. 2003).

such placement.⁹¹ The court reasoned that “unique educational needs” are not limited to the academic.⁹² Similarly, in *E.D. v. Enterprise City Bd. of Educ.*,⁹³ a United States District Court for the Middle District of Alabama held that a school district’s IEP amounted to a substantive IDEA violation because it did not provide strategies for the student to return to school on a full-time basis.⁹⁴

In addition to actual IEP content, courts also find substantive IDEA violations based on student performance. For instance, if a deaf and blind student with the capacity to learn self-help skills is not making progress towards academic goals, a substantive violation occurs if the IEP does not provide a program specifically designed for those self-help skills.⁹⁵ Further, courts consider each student’s individual potential because students have different abilities and capabilities.⁹⁶

Given the foregoing review, it is possible the NCLB provisions fall within the substantive violation context. First, a determination must be made whether participation in a state or district-wide test confers an educational benefit to the student. Because testing is addressed in the IDEA, Congress likely recognized the benefit of participation.⁹⁷ However, because a student may potentially be excluded from testing under the IDEA, it is equally likely Congress anticipated situations in which assessments would provide no meaningful educational benefit.⁹⁸ Though NCLB proponents claim that participation enhances accountability and raises expectations for students with disabilities,⁹⁹ deference is due to the original IEP, as it is drafted solely to benefit the individual.

91. *Seattle Sch. Dist.*, 82 F.3d at 1500, 1502.

92. *Id.* at 1500 (quoting H.R. REP. NO. 98-410, at 19 (1983), *reprinted in* 1983 U.S.C.C.A.N. 2088, 2106) (construing “unique educational needs” to include the student’s academic, social, health, emotional, communicative, physical and vocational needs).

93. 273 F. Supp. 2d 1252 (M.D. Ala. 2003).

94. *Id.* at 1272.

95. *See Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993).

96. *See Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 247 (2d Cir. 1999).

97. *See* IDEA, 20 U.S.C. §1414(d)(1)(A) (2000).

98. *See id.*

99. *See* Judy L. Elliot et al., *State-Level Accountability for the Performance of Students with Disabilities: Five Years of Change?*, 39 J. SPEC. EDUC. 39, 39-40 (2000).

Also, because the IDEA enables the IEP team to determine how and if a student should be assessed, denying an alternate assessment deprives a student of a meaningful educational benefit.¹⁰⁰ The NCLB has induced states to adopt categorical, rather than individual, approaches to determine whether a student can participate through alternate assessments.¹⁰¹ The IDEA's language and subsequent case law, however, suggest that alternate assessments likely provide a greater benefit than standardized testing.¹⁰² Therefore, these categorical approaches could deny benefits promised to students by both the IDEA and the Supreme Court.¹⁰³

B. Procedural IDEA Violations and Another Analogy to NCLB Mandates

The NCLB's mandatory testing scheme may also amount to a procedural violation of the IDEA as it could prompt harmful IEP omissions. Procedural violations however are not absolute; that is, if a school does not comply with the procedures set forth in the IDEA, noncompliance does not automatically result in a procedural violation of the student's rights. Courts consider loss of educational opportunity, the nature of noncompliance, and the consequence to a student in determining whether procedural noncompliance amounts to a violation.

In *Cleveland Heights-Univ. City Sch. Dist. v. Boss*,¹⁰⁴ the United States Court of Appeals for the Sixth Circuit found a procedural violation of the IDEA because a student's IEP did not include objective criteria for measuring progress.¹⁰⁵ The court reasoned that such a substantial omission, one more than a mere technical violation, went to the crux of the IEP.¹⁰⁶ Similarly, the United States Court of Appeals for the Fourth Circuit determined that once a school district obtained information concerning a transfer student's IEP, it became obliged to inform parents of

100. See *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192, 200-01 (1982) (defining meaningful education).

101. See generally Pomplun, *supra* note 64.

102. See *Experts: Multiple Methods of Alternate Testing Best*, SPECIAL EDUC. REPORT, Nov. 2003 at 7.

103. See *Rowley*, 458 U.S. at 206-07; IDEA, 20 U.S.C. § 1414(d)(1) (2000).

104. 144 F.3d 391 (6th Cir. 1998).

105. *Id.* at 398-99.

106. *Id.* at 399.

right under the IDEA.¹⁰⁷ The court deduced that once a student is evaluated pursuant to federal IDEA guidelines, the student is entitled to the procedural benefit from school to school.¹⁰⁸ Thus, to an extent, courts hold schools accountable for existing IEPs.

The NCLB's implementation may disrupt existing IEPs or, alternatively, IEPs may fail to address the federally-mandated testing guidelines altogether. A blatant procedural violation would occur if an IEP omits a comprehensive NCLB description and how the new guideline affects the student, if at all. For example, assume that a student was exempt from testing prior to the NCLB. Under new Rhode Island guidelines, the student must participate in testing.¹⁰⁹ The student's IEP must address this change in ample detail, and the school responsible for implementing the change must provide notice to the parents.¹¹⁰ As evidenced by *Salley*, the IEP is of grave importance to the student, and failure to comply with the IDEA procedures for executing it could negatively impact the student.¹¹¹ If a change in testing procedure is not reflected in a student's IEP, the student's teachers may not cater instruction accordingly, leaving the student without the ability to show progress leading to an unequivocal IDEA violation.

C. Distinguishing the Appropriate IEPs: The Imminent Jeopardy the NCLB Poses to the Efficacious IEP

To better understand what may constitute an IDEA violation in light of the NCLB's mandatory testing regime, it is helpful to survey what actions various courts have found acceptable under the IDEA. Courts have confirmed that the following alleged violations of the IDEA did not result in the deprivation or loss of educational opportunity: failure to classify and serve a student with a form of autism when the student did not demonstrate a need for the services;¹¹² IEP offering reverse mainstreaming, or a restric-

107. *Salley v. St. Tammany Parish Sch. Bd.*, 57 F.3d 458, 464-65 (5th Cir. 1995).

108. *Id.* at 465.

109. See R.I. Department of Elementary and Secondary Education at <http://www.ridoe.net/standards/stateassessment/Accommodations.htm> (last visited Sept. 1, 2004).

110. See IDEA, 20 U.S.C. § 1415 (2000).

111. See *Salley*, 57 F.3d at 465.

112. *Eric H. v. Judson Indep. Sch. Dist.*, No. Civ.A. SA01CA0804-NN, 2002 WL 31396140, at *1, *11 (W.D. Tex. 2002).

tive environment, with individual speech, occupational, and physical therapy;¹¹³ a public school implementing its own IEP over an IEP drafted at a private school in another district;¹¹⁴ and lack of a full-time aide for a student with autism in the absence of educational opportunity loss.¹¹⁵ In each circumstance, the respective court found that the student's IEP was appropriate as it did not deprive the student of any benefit nor did it result in the loss of an educational opportunity.¹¹⁶

In contrast, if a student's IEP is changed pursuant to the NCLB, the student could be deprived of a condition previously granting an educational benefit, thus stripping a potential educational opportunity. If a student has an existing IEP, the student already has a demonstrable need for services. Unlike cases where students were seeking to extend their IEPs, an NCLB-induced cause of action under the IDEA will likely be seeking to uphold the current IEP. As discussed earlier, the NCLB has the capacity to deprive the student of assessment procedures, a meaningful educational benefit. Further, altering the testing procedures could amount to the loss of a previously honored educational opportunity. Pre-NCLB, IEP testing guidelines were drafted in a student's best interests, intended to address that particular student's educational needs. The student may have participated in testing through an alternate assessment, or the student may have been excluded from testing because the student did not obtain any benefit from participation. Possibly, the IEP team determined that the student's needs were best addressed by focusing on self-help skills, for example. If the NCLB allowed for increased use of alternate assessments, which it currently curtails, it could be reconciled with the IDEA.

Currently, the NCLB does not allow for such a practice. NCLB alterations are distinguishable from the innocuous situations where courts found the IEPs appropriate. The NCLB has the capacity to alter the IEP to the point where the child is deprived of

113. *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 661 (8th Cir. 1999).

114. *Michael C. v. Radnor Township Sch. Dist.*, 202 F.3d 642, 651 (3d Cir. 2000).

115. *Adam J. v. Keller Indep. Sch. Dist.*, 328 F.3d 804, 807, 810 (5th Cir. 2003).

116. *See supra* notes 112-11 and accompanying text.

a benefit (alternate assessment or exclusion), spawning an IDEA procedural violation.

Notwithstanding this analysis, the NCLB can, if amended, be implemented without violating the IDEA by affording the current IEP deference regarding testing determinations. If an IEP is properly drafted, it will state what assessment methods will best serve the student and why.¹¹⁷ The NCLB manifests crucial shortcomings as decisions are rendered categorically for all students without the input of the IEP team or without taking into consideration a student's individual characteristics.¹¹⁸ When a standardized test is drafted with universal application in mind, it is difficult to argue that the test provides an educational benefit to the individual learner. NCLB proponents would likely argue that the assessments measure the quality of education, not the individual benefit derived. However, it would be difficult to measure the quality of a unique learner's education if the particular assessment method was not a valid or appropriate measure of his or her learning. Therefore, in addition to preserving student rights, an NCLB amendment requiring deference to the IEP team's determinations and allowing assessment alternatives for students with disabilities will likely save testing validity as a unique learner can only demonstrate progress on an appropriate and valid assessment.

D. Adequate Student Progress: Outside the NCLB's Assessment Capabilities

Schools often overlook appropriate measures omitted from a student's IEP if the student demonstrates educational progress.¹¹⁹ Courts rely on the hearing officer's finding of adequate student progress to uphold an IEP.¹²⁰ As such, courts have acknowledged that the following circumstances did not result in the deprivation or loss of educational opportunity because the student adequately progressed: denying one-on-one reading instruction where the student was receiving adequate grades in regular education

117. See IDEA, 20 U.S.C. § 1414(d)(1)(A) (West 2000).

118. Borg & Landis, *supra* note 70, at B3.

119. See, e.g., Eric H. v. Judson Indep. Sch. Dist., No. Civ.A. SA01CA0804-NN, 2002 WL 31396140, at *1, *11 (W.D. Tex. 2002).

120. See, e.g., *Rowley*, 458 U.S. at 210-11 (1982) (Blackmun, J., concurring).

classes;¹²¹ denying increased reading instruction and therapy for a student with written and language deficiencies when the student showed significant progress in reading and oral expression;¹²² denying increased resource time for a student with Tourette's Syndrome, Attention Deficit Disorder, and Obsessive-Compulsive Disorder, despite passing grades, academic progression, and appropriate accommodations and attention when necessary;¹²³ a student with Behavior/Emotional Disorder challenged the school's IEP but experienced overall behavior and academic improvement;¹²⁴ refusal to place a student with Tourette's Syndrome and Attention Deficit-Hyperactivity Disorder in a 24-hour facility instead of an adaptive behavior classroom where the student received passing grades and could walk the halls unaccompanied by an adult;¹²⁵ and a student with processing and attention difficulties challenged the reduction in services despite year-to-year grade progression and consistent increases on standardized tests.¹²⁶

This preceding line of cases shows that positive student progress weighs heavily in favor of IEP appropriateness. A fortiori, a low-achieving student has a better chance of obtaining success in an IDEA claim. It would be difficult for a successful student with disabilities to challenge NCLB testing provisions regardless of whether the test provided a meaningful educational benefit. In other words, a hearing officer would be more likely to examine the IEP of a low-achieving student with disabilities.¹²⁷ Thus, a student bringing a claim after the NCLB's implementation will likely be

121. *Troy Sch. Dist. v. Boutsikaris*, 250 F. Supp. 2d 720, 737 (E.D. Mich. 2003). This is determined by the school district hearing officer and confirmed by the respective court. *Id.* at 727-728.

122. *Coale v. State Dep't of Educ.*, 162 F. Supp. 2d 316, 319, 328, 331 (D. Del. 2001).

123. *Carl D. v. Special Sch. Dist.*, 21 F. Supp. 2d 1042, 1056 (E.D. Mo. 1998).

124. *Bd. of Educ. of Avon Lake City Sch. Dist. v. Patrick M.*, 9 F. Supp. 2d 811, 825 (N.D. Ohio 1998).

125. *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 253-54 (5th Cir. 1997).

126. *Bd. of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 898 F. Supp. 2d 1252, 1262 (N.D. Ill. 1995).

127. This attenuated logic, however, will do a disservice to the student while belittling IDEA for the IEP should govern regardless of past performance.

seeking to uphold, not extend, the current IEP. A rational approach would involve precisely what the IDEA has already set forth: analyzing the unique needs of the individual student. The NCLB's mandatory testing initiatives can survive as long as a student's unique needs remain paramount. Unfortunately, policy frequently overrides IEP procedure and students with disabilities are often left behind.

E. IDEA and Testing: The Graduation Exit Exam Dilemma

Mandatory testing encroaches upon students' rights because, in many cases, the IEP already accounts for testing substance and procedure. Currently, testing participation for students with disabilities is at the forefront of educational debate. Should testing participation be based on the student's individual needs or should a student's needs cede to state policies?¹²⁸ Is it possible to design state policy consistent with the individual needs of a particular student? If the IDEA determines how a student is to be educated it follows that it should also determine how a student is tested.¹²⁹ Increased alternate assessment use may quell the conflict between the IDEA and the NCLB, as alternate assessments are frequently posed as solutions to testing validity problems. School districts frequently avoid alternate assessment use, however.

Some students have already pursued claims against local school boards on the theory that graduation exit exams violate IDEA testing safeguards. In *Chapman v. Cal. Dep't. of Educ.*,¹³⁰ a group of students with disabilities challenged the California High School Exit Exam requirement on grounds that mandatory participation violated the IDEA.¹³¹ The students asserted that the test was invalid because they were denied use of accommodations or alternate assessments, a blatant contradiction of their IEPs.¹³² The students argued that accommodations and alternate assessments were essential to meaningful inclusion in the state-wide

128. See Martha Thurlow, et al., *Students with Disabilities in Large-Scale Assessments: State Participation and Accommodation Policies*, 34 J. SPEC. EDUC. 152, 162 (2000).

129. See *Experts: Multiple Methods of Alternate Testing Best*, SPECIAL EDUC. REPORT, Nov. 2003, at 7.

130. 229 F. Supp. 2d 981 (N.D. Cal. 2002).

131. *Id.* at 983-84.

132. *Id.* at 984.

test.¹³³ The court agreed, deciding that a state cannot deny students with disabilities meaningful participation in the state tests when meaningful participation is available for other students.¹³⁴ The court reasoned that the IEP shall dictate how a student is assessed, which could include accommodations, alternate assessments, or exclusion altogether, as it establishes testing procedures designed to validly assess student capabilities.¹³⁵ Although *Chapman* was reversed by the United States Court of Appeals for the Ninth Circuit on the conjecture that the IDEA does not encompass graduation requirements, its reasoning regarding testing requirements provides helpful insight in evaluating the rationale for standardized testing provisions as they affect students with disabilities.¹³⁶

Other courts have handled the same issue but have applied an analysis that tapers on the edge of a plenary IDEA violation. For example, in *Rene v. Reed*,¹³⁷ the Court of Appeals of Indiana refused to acknowledge the validity of particular students' claims.¹³⁸ The students challenged the state graduation exam requirement that they had previously been exempted from pursuant to their IEPs.¹³⁹ The students were now required to take the exams with accommodations or adaptations.¹⁴⁰ The court determined that the graduation exam did not violate the IDEA because the "IDEA does not require any specific results."¹⁴¹ Further, the court held, the state does not have to honor accommodations contained in individualized plans because this would affect the testing validity.¹⁴² Here, the court disregarded both the IDEA's right-granting

133. *Id.* at 986.

134. *Id.* at 987.

135. *Id.* at 987-88. The court also relied on a memorandum from the U.S. Department of Education, Office of Special Education and Rehabilitative Services to State Directors of Special Education (January 17, 2001), available at <http://www.dssc.org/frc/fed/OSEP01-06.FFAssessment.pdf>.

136. See *Smiley v. Cal. Dep't of Educ.*, Nos. 02-15552, 0215553, 2002 WL 31856343, at *1 (9th Cir. 2002) (reversing *Chapman* in part on grounds that IDEA does not encompass restrictions on a state to set diploma requirements).

137. 751 N.E.2d 736 (Ind. Ct. App. 2001).

138. See *id.* at 745-47.

139. *Id.* at 739.

140. *Id.*

141. *Id.* at 745.

142. See *id.* at 746.

authority and the IEP purposes and qualified its rationale as limited to graduation requirements.

Though the IDEA may not regulate graduation requirements, it does regulate testing procedures for students with disabilities. Testing accommodations are implemented to assist the student in accessing a meaningful proficiency assessment without rendering the assessment invalid.¹⁴³ Contrary to the *Rene* rationale, accommodations likely *save* testing validity. Therefore, in addition to the current legislature, courts also fail to notice the purpose of accommodations, alternate assessments, or exemption from tests.

Notwithstanding the *Rene* court's ambiguous conclusions, these cases show that courts are looking to testing purposes in determining how or whether students with disabilities are to participate. Under the NCLB, students participate to measure the quality of education received.¹⁴⁴ For students with disabilities, however, quality of education is not limited to the academic. Further, a test cannot measure quality of education if it does not comport with teaching pedagogy. In a recent survey, a majority of educators asserted that the NCLB makes no sense for students with disabilities as educational progress is unlikely apparent on a standardized test.¹⁴⁵ Moreover, many educators purport that the law currently inhibits alternate assessment implementation.¹⁴⁶ In the preceding cases, one state could require standardized testing only because it dealt with graduation requirements.¹⁴⁷ The NCLB, however, mandates testing at various points in a student's education. Most of these assessments do not deal with graduation, yet they are still mainstream components, or components of the regular school environment.¹⁴⁸ The mainstream environment, however, is not always the appropriate venue for educating students with disabilities. Presently, without the graduation requirement pretext, schools and courts cannot circumvent rights and subject all students to the mainstream environment without inviting an

143. Memorandum from the U.S. Department of Education, Office of Special Education Programs, to State Directors of Special Education (January 17, 2001), available at <http://www.ed.gov/policy/speced/guid/idea/omip.html>.

144. See NCLB, 20 U.S.C. § 6301(1) (West 2002).

145. *States Seek to Revise Special Education Testing*, SPECIAL EDUC. REPORT, Nov. 2003.

146. *Id.* at 5.

147. 20 U.S.C.A. § 6311(b)(3)(C)(ix).

148. See Wolery & Wilbers, *supra* note 13.

IDEA violation.

V. THE *RONCKER* STANDARD FOR EDUCATIONAL PLACEMENT: AN ANALOGY BETWEEN MAINSTREAM INAPPROPRIATENESS AND THE MAINSTREAM ASSESSMENT

Not all students' particular needs can be addressed in the mainstream environment as the mainstream environment targets regular, not exceptional needs. The mainstream environment undoubtedly includes state or district-wide testing.¹⁴⁹ Thus, if the mainstream environment is not appropriate for particular students then there is reason to believe standardized testing is equally inappropriate,¹⁵⁰ given that the two are not mutually exclusive. The United States Court of Appeals for the Sixth Circuit, in *Roncker v. Walter*, pronounced factors, still applied by federal courts today, for determining the appropriateness of student placement.¹⁵¹ The determination is for placement of students already identified with a disability; thus, this analysis concerns the appropriate educational setting, not the educational standard pronounced in *Rowley*.¹⁵² The Sixth Circuit, in supporting individual, not categorical determinations, applied the following factors determining appropriate placement:

1. Whether services that make placement superior could be feasibly provided in a non-segregated facility.
2. Whether the benefits of mainstreaming outweighed the benefits provided by a segregated environment.
3. The disruptive force of the student in the non-segregated environment.
4. The cost of placing the student in the segregated environment.¹⁵³

Based on this standard, courts frequently conclude that the

149. "Mainstream" refers to the regular education classroom and environment. The segregated environment is the opposite of the mainstream environment. It usually refers to a self-contained classroom. See WOOD, *supra* note 8, at 98-100; THOMAS L. GOOD & JERE E. BROPHY, LOOKING IN CLASSROOMS 262 (7th ed. 1997) (indicating that mainstream students participate as "fully" and "equally" in classroom activities as possible).

150. *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983)

151. *Id.* at 1062-63 (holding that placements should be individually made and not automatically determined based on classification).

152. *Rowley*, 458 U.S. at 202-04, 205-07.

153. *Roncker*, 700 F.2d at 1063.

student should not be educated in the regular classroom. For instance, in *Hudson v. Bloomfield Hills Pub. Sch.*,¹⁵⁴ the court, in relegating a student classified as Trainable Mentally Impaired (TMI) to the segregated classroom, held that a student *should* be educated in the regular environment but here the child's needs required placement elsewhere.¹⁵⁵ Other courts have deemed the mainstream inappropriate, reasoning that technical learning should not be emphasized over life skills and that interaction with non-handicapped peers would be limited to mere observation.¹⁵⁶ In these situations, the factors typically weigh in favor of educating the child in the segregated environment.¹⁵⁷

Although a testing determination is not as extreme as a segregated learning environment, similar factors could be used to circumscribe whether a student with disabilities should participate in state or district-wide testing when the student previously participated in an alternate assessment or was excluded.¹⁵⁸ Regular testing is presumptively inappropriate if a student was previously excluded or the student participated through alternate assessments. Therefore, factors in determining participation must weigh heavily in favor of testing in order to overcome the preexisting IEP standards.

If the IEP is ignored and the student participates in testing regardless of previous IEP team decisions, the focus will shift from the unique needs to standardized testing results. As several courts have already established, focusing purely on the student's aca-

154. *Hudson v. Bloomfield Hills Pub. Sch.*, 910 F. Supp. 1291 (E.D. Mich. 1995).

155. *Id.* at 1304.

156. *See French v. Omaha Pub. Sch.*, 766 F. Supp. 765, 787-88, 792 (D. Neb. 1991); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 161 (8th Cir. 1987) (per curiam). *But cf. Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1401-02, 1404 (9th Cir. 1994) (holding that mainstreaming is preferred and although in some cases segregation may be necessary, in these cases the factors weighed in favor of educating the child in the mainstream environment); *Doe v. Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d 455, 459-60 (6th Cir. 1993).

157. *French*, 766 F. Supp. at 792-94; *A.W.*, 813 F.2d at 161-63.

158. Students segregated from the mainstream are typically categorized by physical and/or learning disability. *See WOOD, supra* note 8, at 96. Although this characteristic weighs heavily in determining placement it is not necessarily dispositive of a testing determination. *See id.* This supports the assertion that testing determinations should be made on an individual basis only; that is, for students with disabilities.

demographic results runs contrary to both the IEP and the IDEA.¹⁵⁹ Although assessing the quality of the student's education is important, this can likely be done without a time consuming and potentially invalid measure. States, therefore, should establish a new standard that focuses on unique needs and student individuality rather than empirical data and test results.

VI. SURPASSING THE ROWLEY STANDARD AND HONORING RONCKER:
CURTAILING THE OVER-REACHING AIMS OF THE NCLB

The political and statutory emphasis on test results, while avowed as beneficial educational renovation by legislators and administrators, abandons certain students with disabilities. In the wake of the NCLB, schools disregard mandatory IEPs and integrate students in an inappropriate environment in order to comply with school accountability guidelines. However, the IDEA continues to require strict IEP adherence in a setting conducive to individual needs. Therefore, new trends employed by school districts attempting to conform to the NCLB are hostile to individual needs, implicating potential IDEA violations pertaining to both the substance and setting of the student's education.¹⁶⁰ Pedagogical predicaments can be avoided if states apply a new standard for educating students with disabilities. A new standard that focuses solely on student needs and is insulated from external policy pressure will ensure maximum student development. School districts have already implemented standards that demonstrate the feasibility of replacing the *Rowley* guidelines.¹⁶¹

The United States Court of Appeals for the First Circuit, in *Town of Burlington v. Dep't of Educ. for the Commonwealth of Mass.*,¹⁶² held that states are free to expand on the Court's interpretation of the Education for All Handicapped Children Act.¹⁶³

159. See *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990); *Roncker*, 700 F.2d at 1064; *Bd. of Educ. of Tullahoma City Sch.*, 9 F.3d at 459; *French*, 766 F. Supp at 799.

160. See generally *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 209-10 (1982) (holding that it was unnecessary for the school district to provide the student with a sign-language interpreter where the student was progressing adequately without an interpreter).

161. See *Roncker*, 700 F.2d at 1064.

162. *Town of Burlington v. Dep't of Educ. for the Commonwealth of Mass.*, 736 F.2d 773 (1st Cir. 1984).

163. *Id.* at 784-85 (interpreting treatment of IDEA's predecessor statute,

Subsequent decisions reiterate this holding, allowing school districts to elevate standards for providing educational benefits to students with disabilities that focus on the individual's unique needs.¹⁶⁴ Under this heightened, student-centered standard, a state's duty to a student with disabilities increases dramatically. The state now has the responsibility of catering to that student's unique needs regardless of any testing mandate. States implementing the heightened standard, though, still must balance this with the NCLB testing mandate.

There is a general inclination, after the NCLB, to test a higher percentage of students and exclude a lower percentage of students from participation.¹⁶⁵ If states employ a student-centered standard, their students would be assured maximum possible development. For a student with disabilities, attaining maximum possible development may require testing with significant accommodations, an alternate form of testing, or refraining from testing altogether. Regardless, maximum possible development can only be obtained by focusing on the individual student's unique needs outlined in the IEP. The NCLB and its mandatory testing guidelines may not necessarily coincide with the student's unique needs and thus, may hinder the student's maximum possible development.

In addition to testing guidelines, some students are educated outside the mainstream environment. The educational benefits of mainstream exclusion may outweigh instructional time alongside non-disabled peers.¹⁶⁶ Therefore, two compelling reasons exist to scrutinize closely testing determinations for students with disabilities: the possibility of violating the IDEA by disregarding IEP testing provisions, and subjecting the student to an inappropriate mainstream environment detrimental to educational development.

If more school districts comport with this heightened individualized standard it is likely more students with disabilities will receive an educational benefit in an appropriate environment conducive to learning without IEP/IDEA infringement. Therefore, the

the Education for All Handicapped Children Act).

164. See *David D. v. Dartmouth Sch. Comm.*, 775 F.2d 411, 423-24 (1st Cir. 1985); *Roland M.*, 910 F.2d at 991-92, 1000; *Norton Sch. Comm. v. Mass. Dep't of Educ.*, 768 F. Supp. 900, 902-04 (D.Mass. 1991).

165. See *supra* note 61.

166. *Roncker*, 700 F.2d at 1063.

NCLB should serve as a guideline without reigning absolute; the student's unique needs, not a statute, must determine how, if at all, a student will be tested. Applying this standard could avoid litigation, and, more importantly, serve students with disabilities adequately and appropriately.

Salvaging student rights requires an NCLB amendment granting unconditional deference to the IDEA and accompanying IEPs. Under the amended Act, students with disabilities would participate in district-wide assessments only if the IEP team deemed participation appropriate. Further, the IEP team could decide that the student cannot meaningfully participate in testing or that meaningful participation requires particular accommodations or modifications. Determinations are made according to the student's IEP, without mandatory participation percentages. This practice would grant school districts the freedom to use alternative assessments that truly measure student progress while comporting with both the IDEA and the NCLB.

VII. CONCLUSION

Students with disabilities require an education specifically tailored to individual needs to obtain any benefit from it. The NCLB, new to the educational arena, may have been drafted with only the best intentions. Nevertheless, its testing mandate reaches too far as it is insensitive to IEPs and specific guidelines implemented for students with disabilities. However, schools lose funding if they do not follow the NCLB, regardless of the Act's effect on a particular population. Thus, there is great incentive to comply with the NCLB, even if this results in ignoring the IDEA. Case law exhibits how the NCLB testing mandate could amount to both an IDEA procedural and substantive violation. In addition to potential violations, NCLB testing may fall within an inappropriate educational environment for students with disabilities as the benefits of regular participation may be outweighed by exclusion or alternative assessments. Reconciliation is possible if states and school districts adhere to a new standard that emphasizes student uniqueness and individuality over assessment results. An amendment to the strict participation requirements of the NCLB is required to allow room for IEP-based, individual participation determinations. Pursuant to this lofty ambition, the NCLB could peacefully coexist with the IDEA to evaluate the quality of student

education without imposing mandatory participation guidelines hostile to the IEP. If otherwise, students will miss educational opportunities while participating in a testing system in inappropriate environments that provide little educational benefit to them.

To make meaningful education a reality, legislators must defer to the IDEA and allow the IEP to dictate how a student with disabilities should be tested, if at all. If this concession is made, the NCLB can remain to evaluate the effectiveness of school programs without subjecting certain students to a scheme and environment detrimental to their individual needs.

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