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NO CHILD LEFT BEHIND AND SPECIAL EDUCATION: THE  
NEED FOR CHANGE IN LEGISLATION THAT IS STILL  
LEAVING SOME STUDENTS BEHIND

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I. INTRODUCTION

When speaking out in favor of education reform, President Bush asserted that “too many of [the nation’s] neediest children [were] being left behind.”<sup>937</sup> President Bush and Congress believed the passage of the No Child Left Behind Act of 2001 (“NCLB”) would improve educational opportunities and impact every student in schools across America.<sup>938</sup> The provisions of NCLB, at the core, seek to “drive broad gains in student achievement and to hold states and schools more accountable for student progress.”<sup>939</sup> Despite the intentions of President Bush and members of Congress, some of the nation’s neediest children are still being left behind.<sup>940</sup>

Since NCLB’s passage, the law has remained at the center of education debates and NCLB has been described as the “symbol of all things good and bad in education.”<sup>941</sup> In particular, the changes brought by NCLB to special education have been dramatic and unrealistic; the changes fail to recognize the wide-range of disabilities affecting over six million children in America.<sup>942</sup> In four parts, this article focuses on NCLB’s negative impact on special education. Part II outlines the provisions of NCLB and examines the differences between NCLB and the Individuals with Disabilities Education Act (“IDEA”).<sup>943</sup> Part III provides a detailed explanation of the existing scholarly opinions in support of, and in disagreement with, NCLB. Part IV discusses the current political landscape and NCLB’s pending reauthorization. Finally, Part V, based on an analysis of the issues plaguing

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<sup>937</sup> U.S. DEPT. OF EDUC., EXECUTIVE SUMMARY: THE NO CHILD LEFT BEHIND ACT OF 2001 1, 1 (Jan. 2002), available at <http://www2.ed.gov/nclb/overview/intro/excsum.pdf>.

<sup>938</sup> *No Child Left Behind*, EDUC. WEEK, August 4, 2004, <http://www.edweek.org/ew/issues/no-child-left-behind/>.

<sup>939</sup> *Id.*

<sup>940</sup> *Id.*

<sup>941</sup> Ann McColl, *Tough Call: Is No Child Left Behind Constitutional?* 86 PHI DELTA KAPPAN 604, 604 (2005).

<sup>942</sup> Nancy D. Reder, *Accountability for Students with Disabilities*, National Association of Special Education, at 1 (May 2007), [http://www.nasdse.org/Portals/0/Documents/1\\_ACCOUNTABILITY%20FOR%20STUDENTS%20WITH%20DISABILITIES.pdf](http://www.nasdse.org/Portals/0/Documents/1_ACCOUNTABILITY%20FOR%20STUDENTS%20WITH%20DISABILITIES.pdf).

<sup>943</sup> Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2006).

the current system, suggests a solution to improve the existing relationship between special education and NCLB. Furthermore, Part V addresses the positive aspects and possible shortcomings of implementing the suggested changes prior to the conclusion of the article in Part VI.

## II. STATEMENT OF THE LAW

Understanding NCLB's framework is key to understanding NCLB's flaws as the Act relates to special education. Part II discusses NCLB's passage and the requirements NCLB sets for schools and districts. This section concludes with the similarities and differences of NCLB in comparison to the IDEA, another significant educational policy that relates to the education of students with disabilities.

### A. NCLB's Passage

In an effort to decrease the achievement gap and hold states and districts accountable for the education of every American student, Congress reauthorized the Elementary and Secondary Education Act ("ESEA") through the passage of NCLB in 2001.<sup>944</sup> When President Bush signed NCLB into law, NCLB authorized some of the most widespread changes to the American school system since the ESEA's passage in 1965.<sup>945</sup> NCLB aims "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments."<sup>946</sup> These requirements focus on improving the quality and effectiveness of the education system and raising achievement levels of all students.<sup>947</sup> Legislators contend successful implementation centers around four main pillars of accountability, flexibility in the use of funding, research-proven effectiveness in instructional methods and

<sup>944</sup> Richard Apling & Nancy Lee Jones, CONG. RESEARCH SERV., RL32913, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA): INTERACTIONS WITH SELECTED PROVISIONS OF THE NO CHILD LEFT BEHIND ACT (NCLBA) 2 (2005), available at <http://www.asha.org/uploadedFiles/advocacy/federal/idea/CRSReportIDEAandNCLBA.pdf>.

<sup>945</sup> Candace Cortiella, *NCLB and IDEA: What Parents and Students with Disabilities Need to Know and Do*, NAT'L CENTER ON EDUC. OUTCOMES, (Aug. 2006), at 6, <http://www.cehd.umn.edu/nceo/onlinepubs/parents.pdf>.

<sup>946</sup> No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2006).

<sup>947</sup> Cortiella, *supra* note 9, at 6.

materials in the classroom, and influence, information, and choice for parents.<sup>948</sup>

## B. NCLB Requirements

NCLB's two primary objectives aim to ensure all students are held to the same academic expectations and that the states and districts use assessments to ensure schools, teachers, and administrators are held accountable for students' failures to meet proficiency goals.<sup>949</sup> NCLB uses testing and accountability requirements to assist with the aim of raising and closing the achievement gaps, "based on a goal of '100 percent proficiency' by 2014."<sup>950</sup> To reach this goal, NCLB requires schools to test students in grades three through eight annually in reading and mathematics, and to test students in science at least one time each in elementary, middle, and high school.<sup>951</sup>

In addition to the testing, NCLB requires states to develop academic proficiency goals for all students.<sup>952</sup> These goals require testing to determine whether all students are meeting the established proficiency goals.<sup>953</sup> The proficiency standards are also used to determine the level of academic achievement, or adequate yearly progress ("AYP"), students must attain, as measured by the state assessments.<sup>954</sup> The definition of AYP must specifically address how districts and schools plan to assess student ability and monitor student progress from year to year.<sup>955</sup> While the provisions of NCLB permit each state to develop a definition for AYP as long as the definition aligns with certain specifications outlined by the federal government.<sup>956</sup>

These tests and the proficiency standards are important because schools must meet the proficiency goals as a whole to make AYP, and specific

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<sup>948</sup> U.S. DEPT. OF EDUC., *supra* note 1, at 1.

<sup>949</sup> 20 U.S.C. § 6301.

<sup>950</sup> Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, THE NATION (May 2, 2007), <http://www.thenation.com/article/evaluating-no-child-left-behind>.

<sup>951</sup> *No Child Left Behind*, EDUC. WEEK, (last updated Sept. 19, 2011), available at <http://www.edweek.org/ew/issues/no-child-left-behind/>.

<sup>952</sup> 20 U.S.C. § 6311(b)(1)(A).

<sup>953</sup> *Id.* § 6311(b)(3)(A).

<sup>954</sup> *Id.* § 6311(b)(2)(B).

<sup>955</sup> *Id.* § 6311(b)(2)(C)(iv)-(v).

<sup>956</sup> *Id.* § 6311(b)(2)(B).

student populations must also meet proficiency goals for a school to make AYP.<sup>957</sup> These student populations, referred to in the statute as subgroups, include students from low-income backgrounds, from major racial and ethnic groups, with disabilities, and with limited English proficiency.<sup>958</sup> Schools must publicly report the passage rates and include a breakdown of success by subgroup, thus holding schools accountable for the learning of every single student.<sup>959</sup>

### C. NCLB'S Relationship to the IDEA

Prior to NCLB, the IDEA contained specifications concerning accountability for the education of students with disabilities; however, these accountability provisions were rarely enforced.<sup>960</sup> This concept of required and enforced accountability for all students is the central difference between the provisions of the IDEA and NCLB.<sup>961</sup> IDEA takes an individualized approach by requiring schools to make specific services available and develop an individualized education program ("IEP") for each child with a disability.<sup>962</sup> NCLB takes a broader view, emphasizing the need to close achievement gaps on test scores and raise the collective scores of all students to meet state-specific proficiency levels.<sup>963</sup>

NCLB advanced the initiatives of the IDEA by establishing the accountability requirement, changes that likely influenced the 2004 IDEA reauthorization signed by President George W. Bush.<sup>964</sup> The reauthorization coordinated the requirements of NCLB with the IDEA's guidelines for special education programs<sup>965</sup> and responded to findings that the education of students with disabilities had been stalled by "low expectations and an insufficient focus on applying replicable research on

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<sup>957</sup> James E. Ryan, *The Perverse Incentives of The No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 940 (2004). For example, if in a certain year, a state determines that eighty percent of students must be proficient on the standardized assessment, then eighty percent of all the students in the school *and* eighty percent of the students within *each* subgroup must meet the proficiency standard for a school to make AYP. *See id.*

<sup>958</sup> *Id.*

<sup>959</sup> Judy A. Schrag, *No Child Left Behind and Its Implications for Students with Disabilities*, 16 SPECIAL EDGE 2, 1 (2003), [http://www.calstat.org/publications/pdfs/edge\\_spring\\_03.pdf](http://www.calstat.org/publications/pdfs/edge_spring_03.pdf).

<sup>960</sup> Stephen D. Luke & Amanda Schwartz, *Assessment & Accommodations*, 2 EVIDENCE FOR EDUC. 1, 2 (2007), <http://nichcy.org/wp-content/uploads/docs/eeaccommodations.pdf>.

<sup>961</sup> Apling & Jones, *supra* note 8, at 1.

<sup>962</sup> *Id.* at 1.

<sup>963</sup> *Id.*

<sup>964</sup> *See id.* at 19.

<sup>965</sup> *Id.* at 1.

proven methods of teaching and learning.”<sup>966</sup> These changes were intended to provide students with disabilities the right to the same education and expectations of their peers in general education classrooms.<sup>967</sup> The 2004 reauthorization elevated the relationship between the IDEA and NCLB to a higher significance, particularly on issues related to the education of children with disabilities,<sup>968</sup> by “providing both individualized instruction and school accountability.”<sup>969</sup>

### III. SCHOLARLY LANDSCAPE

The debate over NCLB finds special education advocates and parents divided; they want high expectations for their students with disabilities but fear that students will ultimately be the party to suffer.<sup>970</sup> The following opinions identify the provisions and aspects of NCLB that scholars believe work for and against special education.

#### A. Positives of NCLB’s Impact on Special Education

##### 1. Holds Districts Accountable for the Education of all Students

Prior to the enactment of NCLB, states and districts largely excluded students with disabilities from state testing programs.<sup>971</sup> Schools cited various reasons for excluding students with disabilities from testing, including a desire to limit stress for those students, a lack of knowledge regarding test modifications and accommodations, and a goal to raise a school’s overall scores.<sup>972</sup> Regardless of the reasons, the exclusion from

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<sup>966</sup> Cortiella, *supra* note 9, at 8; *see also*, Richard J. Wenning et al., *No Child Left Behind: Who is Included in New Federal Accountability Requirements*, in *NO CHILD LEFT BEHIND: WHAT WILL IT TAKE?* 35, 42 (2002), [http://www.edexcellencemedia.net/publications/2002/200202\\_nclbwillittake/NCLB-report.pdf](http://www.edexcellencemedia.net/publications/2002/200202_nclbwillittake/NCLB-report.pdf) (noting that in January 2001, of thirty-four states reviewed, ten percent did not have adequate testing and accountability provisions for students with disabilities).

<sup>967</sup> Cortiella, *supra* note 9, at 8.

<sup>968</sup> Apling & Jones, *supra* note 8, at 1.

<sup>969</sup> Cortiella, *supra* note 9, at 10.

<sup>970</sup> Lynn Olson, *Enveloping Expectations*, *EDUC. WEEK*, Jan. 8, 2004, at 8, 20, available at <http://www.edweek.org/media/ew/qc/archives/QC04full.pdf>.

<sup>971</sup> Nirvi Shah, *Including, Excluding Students with Disabilities Under NCLB*, *EDUC. WEEK* (May 30, 2012, 9:53 AM), [http://blogs.edweek.org/edweek/speced/2012/05/including\\_excluding\\_students\\_with.html?qs=NCLB+\\_special\\_education\\_](http://blogs.edweek.org/edweek/speced/2012/05/including_excluding_students_with.html?qs=NCLB+_special_education_).

<sup>972</sup> Wenning et al., *supra* note 30, at 39.

testing was personally damaging to the students as well as to reform efforts, and the exclusion made it difficult for parents to monitor their child's progress.<sup>973</sup> Now, NCLB requires states and districts to include students with disabilities in local and statewide assessments<sup>974</sup> and for states and school districts to be held accountable for the performance of those students.<sup>975</sup> Parents, advocates, and educators now celebrate that students with disabilities *count* in statewide assessments, fully participate in the assessments, and that their progress is made public.<sup>976</sup>

## 2. Allows Districts, Parents, and Lawmakers to Monitor Progress

In addition to testing and monitoring the progress of students with disabilities, each district must publish a report card every year that outlines total and subgroup AYP performance for each school in the district.<sup>977</sup> Districts must include a wide variety of information in the report cards, including the achievement data aggregated and disaggregated by subgroup, scores in math and reading, percentage of students tested and not tested, and information on indicators used to determine AYP such as graduation rates and teacher qualifications.<sup>978</sup> Since districts publicize these results, the report cards provide a means of comparison for parents to evaluate the quality of their child's education to the education provided at other schools in a district or throughout the state.<sup>979</sup>

## 3. Availability of Accommodation on Testing

Under NCLB, states must assess at least ninety-five percent of all students and students in each of the five subgroups.<sup>980</sup> If students with disabilities need accommodations in order to take the assessments, the

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<sup>973</sup> *Id.*

<sup>974</sup> 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc); *see also* U.S. DEPT. OF EDUC., FACT SHEET: NO CHILD LEFT BEHIND PROVISION GIVES SCHOOLS NEW FLEXIBILITY AND ENSURES ACCOUNTABILITY FOR STUDENTS WITH DISABILITIES, <http://www2.ed.gov/nclb/freedom/local/speccedfactsheet.pdf>.

<sup>975</sup> U.S. DEPT. OF EDUC. FACT SHEET, *supra* note 38, at 1, 2.

<sup>976</sup> Cassandra Cole, *Closing the Achievement Gap: What Is the Impact of NCLB on the Inclusion of Students with Disabilities?*, 4 CENTER FOR EDUC. POL'Y BRIEF: CLOSING THE ACHIEVEMENT GAP SERIES: PART III 1, 2 (Fall 2006), [http://ceep.indiana.edu/projects/PDF/PB\\_V4N11\\_Fall\\_2006\\_NCLB\\_dis.pdf](http://ceep.indiana.edu/projects/PDF/PB_V4N11_Fall_2006_NCLB_dis.pdf).

<sup>977</sup> Cortiella, *supra* note 9, at 18.

<sup>978</sup> George J. Petersen & Michelle D. Young, *The No Child Left Behind Act and Its Influence on Current and Future District Leaders*, 33 J.L. & EDUC. 343, 349 (July 2004).

<sup>979</sup> *Id.*

<sup>980</sup> Margaret J. McLaughlin et al., *Accountability for Students with Disabilities Who Receive Special Education: Characteristics of the Subgroup of Students with Disabilities*, INST. FOR THE STUDY OF EXCEPTIONAL CHILD. & YOUTH, 1, 3 (September 2006), *available at* <http://www.eric.ed.gov/PDFS/ED509859.pdf>.

school must provide those accommodations.<sup>981</sup> These accommodations allow the assessments to measure a student's knowledge and ability without the potential interference of the student's disability.<sup>982</sup> NCLB specifies that the number of proficient scores on alternate achievement standards should not exceed one percent of all students assessed.<sup>983</sup> This alternate achievement standard is different from the grade-level achievement standards used to measure students in general education classrooms.<sup>984</sup> According to NCLB, individual states are allowed to define alternate achievement standards as long as the standards "align with the State's academic content standards; [p]romote access to the general curriculum; and [r]eflect professional judgment of the highest achievement standards possible."<sup>985</sup>

## B. Negatives of NCLB's Impact on Special Education

While proponents of the law believe the accountability and reporting requirements move special education in a positive direction, NCLB's impact on special education has been widely criticized by lawmakers, educators, and parents across the country.<sup>986</sup> This section shifts from the views of NCLB's proponents to examine opponents' views of the law as a cause for major concern.

### 1. Misplaced Objectives and a Narrow Curriculum

Those in opposition to NCLB argue the law wastes already limited resources on assessments that modify curricula, change or eliminate successful programs that work specifically for students with disabilities, and force low-achieving students out of schools.<sup>987</sup> James E. Ryan argues that rather than focusing on yearly achievement, the assessments and AYP goals are actually more about rigid benchmarks.<sup>988</sup> The requirements of

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<sup>981</sup> 34 C.F.R. § 300.320(a)(6).

<sup>982</sup> Cortiella, *supra* note 9, at 14.

<sup>983</sup> 34 C.F.R. § 200.13(c)(2)(i).

<sup>984</sup> U.S. DEPT. OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES: NON-REGULATORY GUIDANCE 1, 20 (August 2005), available at <http://www2.ed.gov/policy/elsec/guid/altguidance.pdf>.

<sup>985</sup> 34 C.F.R. § 200.1(d).

<sup>986</sup> *Adequate Yearly Progress*, EDUC. WEEK, August 3, 2004, available at <http://www.edweek.org/ew/issues/adequate-yearly-progress/>.

<sup>987</sup> Darling-Hammond, *supra* note 14.

<sup>988</sup> Ryan, *supra* note 21, at 941.

NCLB reduce classroom instruction to one goal: teachers teach so their students pass the state assessments so the school can meet AYP for the year.<sup>989</sup> In response to these pressures, teachers spend increased amounts of time on complex assignments that focus on reading and math; in turn, students receive less instruction in other subjects.<sup>990</sup>

## 2. Limited Access to General Education Curriculum

In addition to narrowing the curriculum, NCLB also limits access to the curriculum. “If students with disabilities are to meet the goal of achieving at proficient levels by the year 2014, [these students] will need to have access to the general education curriculum.”<sup>991</sup> The requirement poses a challenge because the success of students with disabilities is dependent upon access to the general education curriculum;<sup>992</sup> however, oftentimes students with disabilities do not possess the same necessary skills as their peers to demonstrate knowledge regarding what they have been taught.<sup>993</sup> In short, the meaning of “proficient” within the special education curriculum differs from the meaning of “proficient” for students learning based on a general education curriculum.<sup>994</sup>

## 3. Special Education Students as Scapegoats for Failure to Meet AYP

Meeting the proficiency requirement can be especially complex and the policies and AYP provisions create concern regarding accountability.<sup>995</sup> In some situations, district administrators blame the performance of students with disabilities on state assessments as being the only factor that keeps a school from reaching AYP.<sup>996</sup> “[E]ducators have been sounding the alarm that . . . special education students . . . are causing their schools” to fall short of the AYP goal.<sup>997</sup> These types of comments could have a negative effect if they were to reach the students’ ears. Furthermore, this blame is

<sup>989</sup> *Id.* at 933.

<sup>990</sup> Interview by Bruce Jacobs with Linda Valli, Associate Professor of Education, University of Maryland, in College Park, Md. (Jan. 8, 2008), available at <http://www.newsdesk.umd.edu/sociss/-release.cfm?ArticleID=1576>.

<sup>991</sup> Schrag, *supra* note 23, at 10.

<sup>992</sup> Katherine Nagle et al., *Students with Disabilities and Accountability Reform: Challenges Identified at the State and Local Levels*, 17 J. DISABILITY POL’Y. STUD. 28, 28 (2006).

<sup>993</sup> See Schrag, *supra* note 23, at 10.

<sup>994</sup> U.S. DEPT. OF EDUC. FACT SHEET, *supra* note 38, at 1.

<sup>995</sup> Willard Daggett & Lawrence Gloeckler, *NCLB - A Crossroads for Special Education*, INT’L. CENTER FOR LEADERSHIP IN EDUC., at 2 (2004), <http://www.leadered.com/pdf/4%20SpecEdwhitepaper.PDF>.

<sup>996</sup> Shah, *supra* note 35.

<sup>997</sup> Daggett & Gloeckler, *supra* note 59, at 2.

misplaced because NCLB contains a safe harbor provision.<sup>998</sup> This provision addresses concerns that a school would fail to meet AYP because one subgroup failed to meet the state AYP goals.<sup>999</sup> This provision states that schools can avoid being marked as failing if, during the next year, the number of subgroup students below proficiency *decreases* by ten percent when compared with the assessment results from the preceding year.<sup>1000</sup>

#### 4. Limited Funding

Lastly, NCLB fails to take into account the nation's financial, educational inequalities.<sup>1001</sup> High-spending schools outspend low-spending schools "at least three to one in most states."<sup>1002</sup> NCLB does provide funding, but it usually allots to less than ten percent of most schools' budgets, and the funding amount fails to meet the extreme financial needs of disadvantaged schools.<sup>1003</sup> In addition, the high cost of providing intervention services to students who fail to meet AYP is a large concern for educators and lawmakers because these services come with extensive costs.<sup>1004</sup>

### IV. CURRENT POLITICAL LANDSCAPE

Congress should have addressed all of the flaws and criticisms surrounding NCLB when the law was scheduled for reauthorization, but the legislation is still overdue for renewal.<sup>1005</sup> Part IV addresses Congress's reauthorization efforts and describes President Obama's proposed solution to fix NCLB's failing provisions. This section concludes by presenting three viewpoints surrounding the relationship between NCLB and the education of students with disabilities.

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<sup>998</sup> Daniel de Vise, 'Safe Harbor' Offers Shelter from Strict 'No Child' Targets, WASH. POST, Apr. 7, 2008, [http://articles.washingtonpost.com/2008-04-07/news/36859627\\_1\\_adequate-progress-safe-harbor-school-scores](http://articles.washingtonpost.com/2008-04-07/news/36859627_1_adequate-progress-safe-harbor-school-scores).

<sup>999</sup> *Id.*

<sup>1000</sup> U.S. DEPT. OF EDUC., NO CHILD LEFT BEHIND: A ROAD MAP FOR STATE IMPLEMENTATION 1, 13, available at <http://www2.ed.gov/admins/lead/account/roadmap/roadmap/pdf>.

<sup>1001</sup> Darling-Hammond, *supra* note 14.

<sup>1002</sup> *Id.*

<sup>1003</sup> *Id.*

<sup>1004</sup> Cole, *supra* note 40, at 4.

<sup>1005</sup> Arne Duncan, Op-Ed., *Escaping the Constraints of 'No Child Left Behind,'* WASH. POST, Jan. 6, 2012, [http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012-01/06/gIQAYmqpfP\\_story.html](http://www.washingtonpost.com/opinions/escaping-the-constraints-of-no-child-left-behind/2012-01/06/gIQAYmqpfP_story.html).

Congress's last serious attempt to rewrite NCLB occurred in 2007, but legislators made no progress because education groups and teachers' unions opposed a provision regarding merit pay.<sup>1006</sup> Efforts for reauthorization increased in 2011 as legislators from both parties began discussing an alternative way to effectively and fairly monitor student progress and hold schools accountable.<sup>1007</sup> Despite these efforts, as of April 2013, Congress has still not reauthorized NCLB or re-written the law.

In response to the growing criticism of the law, the Obama Administration created and released a blueprint for the reauthorization of NCLB in March 2010,<sup>1008</sup> which makes the receipt of funding conditional on districts taking action to improve schools and prepare students for life beyond high school.<sup>1009</sup> The blueprint calls for a "broad overhaul" of the NCLB and proposes to "reshape divisive provisions that encouraged instructors to teach to tests, narrowed the curriculum, and labeled one in three American schools as failing."<sup>1010</sup> President Obama's proposed blueprint includes measures for accountability and consequences for failure but it eliminates the deadline for one hundred percent proficiency in 2014.<sup>1011</sup> Instead, students would leave high school ready for a college or a career.<sup>1012</sup>

The blueprint also specifically addresses meeting the needs of diverse learners, a group in which students with disabilities are included.<sup>1013</sup> In addition to the existing programs, a reauthorization of NCLB would result in increased attention to including students with disabilities and improving their outcomes.<sup>1014</sup> This attention would focus on better teacher preparedness to educate students with disabilities, improved, more accurate assessments, and a diverse curriculum that incorporates learning to meet the needs of every student.<sup>1015</sup>

<sup>1006</sup> Sam Dillon, *Obama to Seek Sweeping Change in 'No Child' Law*, N.Y. TIMES, Jan. 31, 2010, <http://www.nytimes.com/2010/02/01/education/01child.html?pagewanted=all>.

<sup>1007</sup> *Adequate Yearly Progress*, *supra* note 50.

<sup>1008</sup> U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM: THE REAUTHORIZATION OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (2010).

<sup>1009</sup> Dillon, *supra* note 70.

<sup>1010</sup> Sam Dillon, *Obama Calls for Major Change in Education Law*, N.Y. TIMES, Mar. 13, 2010, [http://www.nytimes.com/2010/03/14/education/14child.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2010/03/14/education/14child.html?pagewanted=all&_r=1&).

<sup>1011</sup> *Adequate Yearly Progress*, *supra* note 50.

<sup>1012</sup> Dillon, *supra* note 70 (noting that, as of February 2010, the National Governors Association had started coordinating efforts to write standards defining what it means for a student to leave high school ready for a career or college).

<sup>1013</sup> U.S. DEPT. OF EDUC., A BLUEPRINT FOR REFORM, *supra* note 72, at 19.

<sup>1014</sup> *Id.* at 5.

<sup>1015</sup> *Id.* at 20.

The blueprint's proposal to improve the education of students with disabilities falls within one of the categories in the debate that has emerged over NCLB and its effect on students with disabilities.<sup>1016</sup> The first argues that districts and schools should stay the course and tough it out; the second contends that students with disabilities should stay in the accountability system, but be evaluated against different standards based on different assessments; and the third maintains that districts and schools should completely remove students with disabilities from the NCLB accountability system "because it is unreasonable and unfair."<sup>1017</sup> Based on the description of the blueprint, the changes fall somewhere between the first and the second viewpoints. The blueprint recommends staying on course in the sense that the same programs will stay in place, but aims to provide increased attention to students with disabilities. In addition, the blueprint also falls within the second viewpoint based on the suggestion of continued accountability with the addition of testing modification.

#### V. MENDING THE BROKEN RELATIONSHIP BETWEEN NCLB AND SPECIAL EDUCATION

The opinion expressed in the third viewpoint is a valid assertion; as it stands, NCLB's accountability system *is* unreasonable, unfair, and essentially unrealistic for students with disabilities. The problem with the third option, however, is that it suggests that legislators, educators, and parents give up on students with disabilities; this solution itself is unreasonable, unfair, and unrealistic. Instead, the federal government must recognize the unattainable expectations set by NCLB and reevaluate the current system by setting attainable goals for students with disabilities according to the students' needs.

##### A. Proposal

Congress should address the needs of special education students in NCLB by adapting the four main pillars of the law to fit the needs of students with disabilities. As noted in Part II, NCLB centers on research-proven effectiveness in instructional methods and materials in the classroom; accountability; the availability of parental influence,

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<sup>1016</sup> See Daggett & Gloeckler *supra* note 59, at 1.

<sup>1017</sup> *Id.*

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information, and choice; and flexibility in the use of funding.<sup>1018</sup> After evaluating NCLB and the costs and benefits to special education, the following proposal is based on the ability to revamp the relationship between special education and the four pillars in an ideal legislative environment. The four aforementioned pillars should work in conjunction with the IEP requirements outlined in the IDEA. Collaboration between the two most significant educational policies in the nation's history will provide students with disabilities access to an inclusive education system directly tailored to their needs.

#### 1. Research-Proven Effectiveness in Instructional Methods and Materials in the Classroom

The first way to address the issues plaguing the system is to change the assessments used in special education classrooms. Instead of testing students using the general standardized tests, states should develop specific assessments for students with disabilities. The assessments should test all subject matters, not just reading, math, and science. As a result, the assessments will not constrain students with disabilities to a rigid, narrow curriculum. In addition, the new assessments should focus on the instructional methods and materials used in special education classrooms. By assessing students in the same way they are taught, the assessments will reflect the effectiveness of the instruction. This solution is not meant to suggest that states should create an individualized assessment for each student; rather, it suggests that lawmakers and educators evaluate the methods of instruction used in special education classrooms and develop assessments based on these key methods.

The purpose of an alternate assessment is two-fold: not only will such an assessment test students' knowledge and abilities, but this type of assessment will provide concrete evidence into the effectiveness of chosen instructional methods. If students with disabilities are tested in the same way they are instructed, but still struggle to meet certain goals or objectives, then it is possible that the issues arise out of the instructional methods.

#### 2. Accountability Through IEPs, AYP, and Frequent Assessments

While alternate assessments would remove students with disabilities from school accountability numbers as a whole, this approach still mandates accountability for students with disabilities through the use of

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<sup>1018</sup> U.S. DEPT. OF EDUC., *supra* note 1, at 1.

IEPs, the creation of a separate AYP standard, and an increase in the frequency of assessments. Traditionally, IEPs focus on a student's grasp of basic academics, "access, and/or functional skills and have had little relationship to a specific academic area or grade-level expectations."<sup>1019</sup> In addition to the standard IEP process, this proposal recommends that IEPs also include an additional section pertaining to the state assessment. This section should outline specific goals and objectives a student should grasp based on the content of the assessment.

In turn, this aspect provides the ability to monitor progress based on the creation of separate AYP standards for use in special education classrooms. The definition of AYP should be similar to the definition used for students in the general education curriculum who take the general state assessments; the definition must specifically address how districts and schools plan to assess student ability and monitor student progress as tailored to special education curriculums.<sup>1020</sup> This separate definition of AYP should include the addition of two assessments per year for students with disabilities, one near the beginning of the academic year and one near the end. This will allow teachers, administrators, and parents to see how a child is learning at the beginning of the academic year and then evaluate the child at the end of the year. By testing twice in an academic year, progress may be measured over time. In addition, districts can monitor, address, and correct issues in a more timely manner. These changes allow for different, yet intertwined, ways to hold districts accountable for student progress.

### 3. Influence, Information, and Choice for Parents

This proposal maintains parental input in their child's education while also conforming their child's education to a broader set of standards. Typically, parents are involved in the creation of their child's IEP as part of a larger IEP development team.<sup>1021</sup> The team is also comprised of at least a special education teacher, a regular education teacher, and a representative from the local educational agency.<sup>1022</sup> By heightening the importance and significance of the IEP regarding standardized assessments, parents can still provide input regarding the totality of their child's education. With assessments twice per year, parents will be able to see, through the goals

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<sup>1019</sup> Jason Ballum et al., *IEP Overview*, EDUCATIONAL LAW: STUDENT-RELATED ISSUES IN PUBLIC SCHOOLS, 7, 9 (Va. Law Found., ed., 2012).

<sup>1020</sup> 20 U.S.C. § 6311(b)(2)(B) (2006).

<sup>1021</sup> Ballum, *supra* note 83, at 7.

<sup>1022</sup> *Id.*

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and objectives outlined in their child's IEP, how their child progressed from assessment to assessment.

Districts and schools should provide information to parents detailing the types of special education services and assessments offered. If parents are unsatisfied with the options provided at their child's school, the parents should have the opportunity to voice this opinion and work with the rest of the IEP team to develop a reasonable solution. Districts, schools, and parents should use all means necessary to provide the best education for the student.

#### 4. Flexibility in the Use of Funding

As with the implementation of any type of law or proposal, there must be a source of funding. This proposal proceeds on the assumption that while the states will maintain control over the educational system, the federal government will still provide some funding for special education programs. The state programs must conform to general requirements established by the federal government, such as the inclusion of mandatory accountability procedures in IEPs, testing twice per academic year, and a definition of AYP that conforms with a series of specifications.

This proposal also depends on flexibility in the way federal funding is used to support special education programs. The assessment change alone requires that states have the ability to experiment with different types of assessments. As a result, the federal government should permit the states to use the money in furtherance of continuous improvement of their special education programs. In turn, the states may use federal funding on all aspects of their special education programs.

#### B. Response to These Changes

These changes would likely be praised by some and condemned by others, just as NCLB has been throughout the past 10 years. While the proposal does not provide an absolute cure for every flaw within NCLB, it maintains the positive aspects while avoiding the aforementioned criticisms.

The proposal still includes testing accommodations, accountability provisions, and the ability for parents, lawmakers, and educators to monitor student progress. It also builds accommodations into the assessment by creating assessments that conform to the everyday instruction students

receive. The assessments create accountability for the tests themselves and for the instructional methods used in classrooms. When reviewing the scores, lawmakers, educators, and parents can assess a student's progress in the same classroom with the same instructor over the period of one year.

The proposal also seeks to address the common criticisms of NCLB explained in Part III. This proposal addresses misplaced objectives in districts and schools by creating two separate assessment benchmarks and assessing students modeled on daily instruction. The sole focus shifts away from achieving AYP; instead, the proposal implements a definition of AYP that molds to the special education classroom by creating two assessments to monitor progress and instruction as outlined in students' IEPs. The new assessments also address the criticism that NCLB requirements result in a limited curriculum, as they will focus on all subject matters. Finally, this proposal combats the criticism that students with disabilities serve as scapegoats when districts or schools fail to meet AYP. By implementing an AYP requirement specific to the special education classroom and curriculum, it removes students with disabilities from the overall AYP equation and eliminates the possibility of blame while still keeping a method to track progress.

Despite the ability to keep the positives and address most of the criticisms addressed in Part III, the proposal is not perfect. It is likely that critics will argue that the experimentation and development of assessments will take too long and prove too costly. While these arguments are recognized, the make up of special education classrooms has changed and districts and schools need to adapt; costs and implementation times should not bar these students from "a fair, equal, and significant opportunity to obtain a high-quality education."<sup>1023</sup>

## VI. CONCLUSION

Congress needs to reauthorize NCLB in a way that will stop leaving special education students behind. NCLB placed the spotlight on an increasing achievement gap, prompted new conversations, and introduced Congress to the need for change in the nation's educational system. NCLB's focus on accountability revealed that states must act to avoid a path where students with disabilities only encounter low expectations. By altering NCLB's key provisions, the special education curriculum will be

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<sup>1023</sup> 20 U.S.C. § 6301.

one based on the individual and unique needs of the students.

In contrast, however, lawmakers, educators, and parents must recognize that immediate, dramatic improvement in educational performance is also unrealistic with the state of the current system. Experimentation will serve as a useful tool as districts and schools seek to realign instructional programs. In time, this experimentation will lead to services and opportunities that support and allow special education students to succeed. A new definition of AYP tailored specifically to special education classrooms, combined with a revised set of specific assessments that adapt to the needs of students with disabilities, can bring positive change in special education classrooms across the nation.