Golden Gate University Law Review

Volume 36 | Issue 2 Article 3

January 2006

"No Child Left Behind" In Need of a New "Idea": A Flexible Approach to Alternate Assessment Requirements

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COMMENT

"NO CHILD LEFT BEHIND" IN NEED OF A NEW "IDEA":

A FLEXIBLE APPROACH TO ALTERNATE ASSESSMENT REQUIREMENTS

INTRODUCTION

Jack is a fifth-grade student at Parkview Elementary School.[1] He is a student with mental retardation.[2] Jack is ten years old with a developmental age of four years. He loves his school and his teachers, he is non-verbal (unable to speak), and he receives special education services. He spends half of his school day in a functional life skills class working on individualized educational goals with his special education teacher. One of his current goals reads:

> Upon seeing two objects or pictures, Jack will identify the correct item when asked "point to the _____," or "give me the _____," with one verbal prompt.

Jack's teacher anticipates he will achieve this goal by December. Upon reaching his goal, Jack and his class will make a grocery list of

[1] Hypothetical school and students created by author. This hypothetical is based on the personal experiences of the author as a special education teacher in the Texas public school system from 2000 to 2004.

[2] 34 C.F.R. § 300.8(6) (1999) ("Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.")

items to prepare a meal and Jack will help select those items from the shelves at the store.

Jill is also a fifth-grade student at Parkview Elementary. She is a ten-year-old student with a learning disability in reading.[3] Jill is enrolled in the fifth grade, but she currently reads at a third-grade reading level. Each day, she attends a forty-five-minute intensive reading program where she works on her individualized education goals in reading. Jill's current goal reads:

> Given third-grade level reading materials, Jill will read fluently at a rate of 80 words per minute and answer comprehension questions with 80% accuracy.

Jill struggles with her reading, but she is pleased with her achievements this school year. She has a personal goal of improving her reading skills so she can independently read her favorite set of mystery novels.

Jack's and Jill's stories are not isolated accounts. Approximately 5.5 million students in the United States are identified and receive special education services under the federal Individuals with Disabilities Education Act ("IDEA").[4] Students with significant cognitive disabilities like Jack's constitute approximately eleven percent of all students with disabilities, about 610,000 students.[5] Students with learning disabilities like Jill's make up about fifty-one percent of all students under IDEA, approximately 2.8 million students.[6] During the last thirty years, state and federal agencies have struggled to provide meaningful educational opportunities for students with disabilities.[7]

Despite the protections and services for students with disabilities under IDEA, in 2001 the federal No Child Left Behind Act ("NCLB")[8]

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[3] 34 C.F.R. § 300.8(10) (1999) (defining the term "specific learning disability" as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.")

[4] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-82 (2005) (amending the Individuals with Disabilities Education Act); U.S. Dep't of Educ., Office of Special Educ. and Rehabilitative Services, 22d Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2000).

[5] U.S. Dep't of Educ., Office of Special Educ. and Rehabilitative Services, 22d Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act (2000).

[6] *Id.*

[7] *See infra* notes 45-52 and accompanying text.

[8] No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2005) (amending the Elementary and Secondary Education Act of 1965).

began to require local school districts to hold students with disabilities to the same high standards as non-disabled students, to test students with disabilities using the same assessments, and to face consequences if these students did not perform "proficiently" on these assessments.[9] In its inception, NCLB required students like Jack and Jill to take challenging academic assessments based on fifth-grade level standards in reading and math, and by 2007, in science, simply because they were enrolled in fifth grade.[10] Although Jack and Jill are not performing at the fifth-grade level because of their disabilities in some or all of these subject areas, NCLB requires them to take these tests and have their scores reported to their families and to their school.[11] In addition, their school must include their likely non-proficient scores in data reported to the Department of Education.[12] Thus, if a certain number of students with disabilities do not perform as "proficient" on these assessments, the Department of Education labels their school "in need of improvement."[13] Besides the consequences to the school resulting from this label, this assessment process fails to provide any meaningful information to Jack or Jill, their teachers, their administrators, or their parents regarding their educational progress.[14]

Responding to state criticisms over the inappropriateness of grade-level assessments for students like Jack and Jill, the Department of Education began to allow exceptions to NCLB for certain students identified under IDEA.[15] Both IDEA and NCLB continue to require all students to be tested, including students with disabilities; however, as of 2002, states may create alternate assessments and develop different

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[9] *See infra* notes 38-44 and accompanying text.

[10] 20 U.S.C. § 6311(b)(1)(A)-(C) (2005).

[11] *See* 20 U.S.C. § 6311(b)(2) (2005).

[12] *Id.*

[13] 20 U.S.C. § 6311(b)(1)(C), (J) (2005).

[14] 20 U.S.C. § 6316(b)(1)(A) (2005) (failure to make adequate yearly progress results in a school being identified as in need of improvement). Students in schools identified as in need of improvement for two consecutive years may transfer to a different public school of their choice. 20 U.S.C. § 6316(b)(1)(E) (2005). Low-income students in schools in need of improvement for three of the four preceding years may use federal funds for supplemental educational services, or transfer to the school of their choice. 20 U.S.C. § 6316(b)(5) (2005). Schools in need of improvement for five years must institute a complete restructuring plan; such plan may include closing the school and reopening it as a charter school, replacing all or most of the staff, or turning control over to a private management company or the state. 20 U.S.C. § 6316(b)(8) (2005); *see also* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 285-286, (2003) (discussing the history of educational reform that led to NCLB and describing the statutory penalty scheme under the law).

[15] *See infra* notes 58-75 and accompanying text.

standards for certain students with disabilities.[16] Federal requirements for these assessments are extensive, yet the Department of Education continues to remind states that it will review assessment programs for compliance and employ the full array of penalties provided for under NCLB.[17]

This Comment explores many constitutional issues raised by recent federal assessment policies regarding students with disabilities.[18] Part I summarizes the federal statutory scheme for funding and thereby regulating both public education and the assessment of students with disabilities.[19] Part II discusses federal policy changes to assessment standards and the ambiguity these changes present.[20] Part III examines potential constitutional issues raised by evolving federal assessment requirements under both spending power and federal coercion theories.[21] Part IV proposes that states be relieved from traditional penalties for noncompliance to avoid any constitutional violation and to promote states as laboratories of ideas to meet students' needs.[22] Finally, Part V concludes that relief from federal penalties strikes the appropriate balance between preserving the goal of school accountability and permitting local innovation.[23]

I. FEDERAL PUBLIC EDUCATION LAWS

Public education is the responsibility of state and local agencies in furthering the states' interest in meeting the educational needs of its citizens.[24] The United States Constitution does not give Congress the authority to legislate in the area of education.[25] There remains, however, a compelling national interest in the quality of the nation's public schools.[26]

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[16] *Id.*

[17] *See infra* note 57.

[18] *See infra* notes 80-158 and accompanying text.

[19] *See infra* notes 24-52 and accompanying text.

[20] *See infra* notes 53-79 and accompanying text.

[21] *See infra* notes 80-158 and accompanying text.

[22] *See infra* notes 159-180 and accompanying text.

[23] *See infra* notes 181-182 and accompanying text.

[24] U.S. Dep't of Educ., 10 Facts About K-12 Education Funding (2005), *available at* http://www.ed.gov/about/overview/fed/10facts/index.html (last visited Feb. 14, 2006); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments.")

[25] U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."); U.S. CONST. art. I, § 8 (setting forth the powers of Congress, which do not include public education).

[26] *See* 10 Facts About K-12 Education, *supra* note 24. The United States Supreme Court has

Despite traditional state responsibility and control, Congress enacted statutes in the area of public education pursuant to its authority under the Spending Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[27] By providing grants to states through NCLB[28] and IDEA,[29] the two largest federal education programs to date,[30] Congress has greatly influenced educational programs and assessments for students with disabilities.[31]

In 1965, Congress enacted the Elementary and Secondary Education Act, primarily targeting, and providing grants to states to improve educational opportunities and programs for, low-income families and children.[32] Congress amended and reauthorized the act many times over the past forty years, with its most recent amendment in 2001 re-titling the act "No Child Left Behind" ("NCLB").[33]

In 1975, Congress specifically addressed the educational needs of children with disabilities by enacting the Education for all Handicapped Children Act.[34] Two landmark court decisions formed the basis for this act, establishing that the Equal Protection Clause of the Fourteenth Amendment of the Constitution requires states and local school districts to educate children with disabilities.[35] In 1990, Congress renamed the

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stated that public education is "perhaps the most important function of state and local governments." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973). Under our federal system, "[b]y and large, public education in our Nation is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[27] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . ."); U.S. CONST. amend. XIV § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.")

[28] No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2005) (amending the Elementary and Secondary Education Act of 1965).

[29] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-82 (2005) (amending the Individuals with Disabilities Education Act).

[30] 10 Facts About K-12 Education, *supra* note 24.

[31] Memorandum from the U.S. Secretary of Education Rod Paige to Editorial Writers (Mar. 11, 2004) (describing the "undeniable . . . transformative impact" NCLB has had on our public education system), *available at* http://www.ed.gov/news/opeds/edit/2004/03112004.html (last visited Mar. 7, 2006) .

[32] Elementary and Secondary Education Act, Pub. L. No. 89-10, 79 Stat. 27 (1965) (current version at 20 U.S.C. §§ 6301-7941).

[33] No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2005) (amending the Elementary and Secondary Education Act).

[34] Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975) (current version at 20 U.S.C. §§ 1400-82 (2005)).

[35] *See generally* Pa. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1971) (enjoining the state from enforcing statutes in a manner that excluded children with mental retardation from educational programs, and approving a consent agreement between parents and school board requiring the state to provide appropriate public education to children with mental retardation); *see also* Mills v. Bd. of Educ., 348 F. Supp. 866 (D.C. 1972) (holding that denial of an

act the Individuals with Disabilities Education Act ("IDEA").[36] The most recent reauthorization of IDEA in 2004 reflected Congress's goal of aligning IDEA with NCLB to better meet the educational needs of students with disabilities.[37]

A. THE NO CHILD LEFT BEHIND ACT

Under NCLB, each state educational agency must submit a plan to the Secretary of Education to receive federal grants.[38] In its plan, a state must adopt challenging academic and student achievement standards.[39] A state must apply these standards to all schools and students in the state.[40]

To continue to receive funds under NCLB, the state must demonstrate that its schools make "adequate yearly progress."[41] "Adequate yearly progress" is measured by the proportion of students who have demonstrated proficiency on their state's grade level standards.[42] To demonstrate "adequate yearly progress," the state must have a statewide accountability system that assesses every student, including those with disabilities.[43] Thus, NCLB treats and tests students with disabilities according to the same standards as non-disabled students.[44]

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educational opportunity to children with disabilities when the state undertook to provide a free public education to all children violated the due process and equal protection rights of children with disabilities).

[36] Individuals with Disabilities Education Act, Pub. L. No. 102-119, 105 Stat. 587 (1991) (current version at 20 U.S.C. §§ 1400-82 (2005)).

[37] Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 20 U.S.C. §§ 1400-19 (signed by the President on December 3, 2004; effective July 1, 2005).

[38] 20 U.S.C. § 6311 (2005).

[39] 20 U.S.C. § 6311(b)(1)(A) (2005).

[40] 20 U.S.C. § 6311(b)(1)(B) (2005).

[41] 20 U.S.C. § 6311(b)(2)(A) (2005); U.S. Dep't of Educ., Alternate Achievement Standards for Students with the Most Significant Cognitive Disabilities Non-Regulatory Guidance 1, 19 (Aug. 2005) [hereinafter Non-Regulatory Guidance], *available at* http://www.ed.gov/admins/lead/account/saa.html#guidance (last visited Feb. 14, 2006).

[42] 20 U.S.C. § 6311(b)(2)(C) (2005); *see also* Non-Regulatory Guidance, *supra* note 41, at 19.

[43] 20 U.S.C. § 6311(b)(2)(A) (2005). Assessments for students with disabilities must (1) be aligned with the state's challenging academic content and student achievement standards, (2) be administered to all students, and (3) be provided with "reasonable adaptations and accommodations." 20 U.S.C. § 6311(b)(3)(C) (2005).

[44] *Id.*

B. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

IDEA provides federal grants to state and local education agencies to educate students with disabilities.[45] To qualify for IDEA funds, a state must assure the Secretary of Education that the funds will support educational programs for disabled students.[46]

IDEA reflects dual federal goals of improving educational outcomes while protecting the civil rights of students with disabilities.[47] Educational provisions of IDEA include providing a "free and appropriate public education" through an "individualized education program" ("IEP") specifically tailored to meet the needs of each individual child.[48] Civil-rights provisions of IDEA include providing services in the "least restrictive environment," with non-disabled students, to the maximum extent possible for that child.[49] One hybrid provision furthering IDEA's dual objectives requires all students with disabilities to participate in all state and districtwide assessment programs.[50]

Unlike NCLB, IDEA requires states to develop "alternate assessments" for certain students with disabilities.[51] Unfortunately, IDEA does not provide guidelines for these "alternate assessments."[52] This divergence in funding legislation is problematic because it makes it unclear what conditions a state must accept to receive federal funds.

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[45] 20 U.S.C. § 1411 (2005).

[46] 20 U.S.C. § 1412(a) (2005). Conditions a state must meet to receive funds include the following: free appropriate public education, full educational opportunity goal, child find, individualized education program, least restrictive environment, procedural safeguards, evaluation, confidentiality, transition, children in private schools, state agency supervision, methods of ensuring services, procedural requirements, personnel qualifications, performance goals and indicators, participation in assessments, and various funding and state supervisory duties. *Id.*

[47] 20 U.S.C. § 1400(c)(1) (2005) (explaining that the purpose of the act is to "[i]mprov[e] educational results for children with disabilities" and to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.").

[48] 20 U.S.C. § 1412(a)(1)-(4) (2005).

[49] 20 U.S.C. § 1412(a)(5) (2005). Removal of a child with a disability from the regular educational environment should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.*

[50] 20 U.S.C. § 1412(a)(16)(A) (2005).

[51] 20 U.S.C. § 1412(a)(16)(C)(i)-(ii) (2005) (explaining an alternate assessment (1) is appropriate for children with disabilities who cannot participate in regular assessments with appropriate accommodations, (2) must be aligned with the state's challenging academic content and student achievement standards under NCLB, and (3) may be based on alternate achievement standards as permitted under the regulations promulgated to carry out NCLB).

[52] *Id.*

II. ALTERNATE ASSESSMENT

NCLB and IDEA funding sources inherently conflict because of their disparate goals.[53] On one hand, NCLB demands the same high standards for all children, including children with disabilities.[54] On the other hand, IDEA requires states to meet the individual needs of a student with a disability and to tailor an educational program specifically for that child.[55] The result is an ever-changing landscape of educational policies at the federal level, resulting in state-level confusion over how to meet the needs of students and the requirements of the law.[56] Ultimately, the Department of Education levies penalties against states as they attempt to hit a moving federal target.[57]

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[53] Nat'l Conference of State Legislatures, Task Force on No Child Left Behind Final Report 1, 26 (Feb. 23, 2005) [hereinafter NCSL Task Force] (explaining the "inherent conflicts" between NCLB requiring testing according to grade level, and IDEA requiring students to be taught according to ability), *available at* http://www.ncsl.org/programs/press/2005/pr050223.htm (last visited Feb. 14, 2006).

[54] 20 U.S.C. § 6301 (2005) (stating the purpose of the act is "to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education."); *see also* NCSL Task Force, *supra* note 53, at 26 (explaining how NCLB required testing according to grade level, while IDEA requires that these students be taught according to ability).

[55] 20 U.S.C. § 1400(c)(1) (2005) (explaining the purpose of the act is to "[i]mprov[e] educational results for children with disabilities" and "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities"); *see also* NCSL Task Force, *supra* note 53, at 26 (explaining IDEA requirement of a free appropriate public education in the least restrictive environment through individualized education programs).

[56] *See* Ed Roeber, Nat'l Ctr. on Educational Outcomes, Setting Standards on Alternate Assessments (Synthesis Report 42) (Apr. 2002) (describing the challenge of developing formats and setting standards for alternate assessments), *available at* http://www.education.umn.edu/NCEO/OnlinePubs/Synthesis42.html (last visited Feb. 14, 2006).

[57] *See* S. Rep. No. 108-185, at 13 (2003) (noting the committee's belief that states and local education agencies want to assist students with disabilities in achieving high educational outcomes). State-developed alternate assessment systems are subject to peer review in 2005-06, and remedies and penalties may be employed. Letter from Raymond Simon, Assistant Sec'y, U.S. Dep't of Educ., to Chief State School Officer (Jan. 19, 2005), *available at* http://www.ed.gov/admins/lead/account/saa.html#guidance (last visited Feb. 14, 2006). Results of the peer review process include: (1) *full approval*, granted if a state's system meets all statutory and regulatory requirements; (2) *full approval with recommendations*, granted if a state's system meets all requirements, but some pieces of the system could be improved; (3) *deferred approval*, granted if a state's system meets most, but not all, of the requirements; (4) *final review pending*, the status of a state that seeks an early review, but whose system does not meet a preponderance of the requirements; and (5) *not approved system*, one that does not meet a preponderance of the requirements, or is missing an essential component. *Id.* Remedies and penalties include (1) *withholding state funds*, which is permitted under NCLB until the state meets the law's requirements; (2) *compliance agreement*, a negotiated agreement whereby the state must come into full compliance within three years; and (3) *mandatory oversight status*, a status that places specific conditions on a state's funds and provides for notices before funds would be terminated. *Id.*

A. FEDERAL ADJUSTMENTS RECOGNIZE THAT ONE SIZE DOES NOT FIT ALL

While IDEA required individualized educational planning and mandatory participation in NCLB assessments for students with disabilities, NCLB remained unwavering in its requirement that states test all students according to the same standards.[58] This misalignment sparked criticism because IDEA required schools to individualize a student's educational program according to the student's particular needs, while NCLB required schools to test the student on an entirely different set of statewide standards.[59] The Department of Education responded by carving out an exception to the cornerstone NCLB requirement that all students be held to the same challenging standards.[60]

1. One-Percent Policy

In August 2002, the Department of Education formulated the first NCLB exception by announcing a new policy purportedly based on two "key promises" of NCLB: accountability and flexibility.[61] This new rule allowed states to develop "alternate achievement standards" for "the small number of students with the most significant cognitive disabilities."[62] The Department of Education allowed each state to define

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[58] 20 U.S.C. §§ 1412(a)(16)(A), 6311(b)(3)(C) (2005). Although the agency regulations promulgated to implement NCLB provided for the use of alternate assessments for students with disabilities, the same regulations required that these alternate assessments yield results for the grade in which the student was enrolled. Improving the Academic Achievement of the Disadvantaged, 67 Fed. Reg. 71,710, 71,715 (Dec. 2, 2002) (amending 34 C.F.R. § 200.6(a)(2)(i)-(ii) (2003)).

[59] *See generally* NCSL Task Force, *supra* note 53 (reporting state responses, requests for guidance, and concerns over NCLB requirements). State and local educational agencies challenged the conflicting requirements because calculations of adequate yearly progress were based upon results of NCLB assessments and schools faced being identified as "in need of progress" or as "failing." *See, e.g.*, Nat'l Sch. Boards Ass'n, *Conflict between IDEA and NCLB Requirements Leads Districts to File Suit Against Federal Government*, Legal Clips (Jan. 2005), *available at* http://www.nsba.org/site/doc_cosa.asp?TRACKID=&VID=50&CID=1046&DID=35178 (last visited Feb. 14, 2006).

[60] Press Release, U.S. Department of Education, New No Child Left Behind Provision Gives Schools Increased Flexibility While Ensuring All Children Count, Including Those With Disabilities (Dec. 9, 2003) [hereinafter "Increased Flexibility"] (announcing a new provision of NCLB allowing alternate assessments based on alternate achievement standards), *available at* http://www.ed.gov/news/pressreleases/2003/12/12092003.html.

[61] Increased Flexibility, *supra* note 60 (noting two key promises to states under NCLB: flexibility and accountability).

[62] *See* Improving the Academic Achievement of the Disadvantaged, 68 Fed. Reg. 68,698,

this category of students and develop the alternate standards.[63] However, the number of passing scores from alternate assessments could not exceed one percent of all students in the grades tested.[64] The Department of Education designed the "one-percent cap" to create a disincentive for assessing students with disabilities based on an alternate achievement standard if doing so was not appropriate for that child.[65] The result is that a student who requires an alternate assessment but who exceeds the one-percent cap will have her assessment scored according to her enrolled grade level, not her ability level.[66]

Consequently, most states developed and implemented assessment programs to take advantage of the new exception.[67] However, states soon voiced new criticisms that the flexibility of the one-percent policy was too restrictive to meet all students' educational needs.[68] The Department of Education again responded by announcing a two-percent cap on a different group of students.[69]

2. *Two-Percent Policy*

In April 2005, the Department of Education released the two-percent policy as "a new, common-sense approach to implementing

68,698-99 (Dec. 9, 2003) (explaining significant misunderstanding by commentators responding to the August 6, 2002, notice of proposed rulemaking regarding alternate assessments, alternate achievement standards, and the intent and purpose of the proposals).

[63] Increased Flexibility, *supra* note 60.

[64] *Id.*

[65] *See* Non-Regulatory Guidance, *supra* note 41, at 7; *see also* Increased Flexibility, *supra* note 60 (explaining that this one-percent cap was not a limit on the number of students who could take alternate assessments; it was merely a cap on the number of proficient scores that could be counted).

[66] *See* Non-Regulatory Guidance, *supra* note 41, at 32-33.

[67] *See* Rachel F. Quenemoen & Martha L. Thurlow, Nat'l Ctr. on Educational Outcomes, *I Say Potato, You Say Potahto: An AERA Conference Discussion Paper* 1, 2 (Apr. 15, 2004) (explaining how most states developed alternate assessments by working with their technical advisory committees and other test company partners), *available at* http://education.umn.edu/nceo/Presentations/presentations.htm#conf (last visited Feb. 14, 2006).

[68] *See* Nat'l Conference of State Legislatures, Quick Facts: No Child Left Behind, Legislative Activity in 2004-2005 [hereinafter NCSL Quick Facts] (chronicling the twenty-nine states considering resolutions to request waivers under NCLB, four states considering bills prohibiting the use of state funds to comply with NCLB, and six states considering or having considered "opting-out" of NCLB), *available at* http://www.ncsl.org/programs/educ/NCLB2005LegActivity.htm (last visited Feb. 14, 2006).

[69] Press Release, U.S. Dep't of Educ., Secretary Spellings Announces More Workable, "Common Sense" Approach To Implement No Child Left Behind Law (Apr. 7, 2005) [hereinafter Common Sense], *available at* http://www.ed.gov/news/pressreleases/2005/04/04072005.html (last visited Feb. 14, 2006).

NCLB."[70] The policy permits states to develop "modified achievement standards" and create alternate assessments for students who, because of their disability, "are not likely to achieve grade-level proficiency within the school year."[71] As under the "one-percent cap" limitation, states can include up to two percent of the proficient scores from these assessments in calculations of adequate yearly progress.[72]

Despite its attempt to provide more flexibility under NCLB, which by its very language is inflexible,[73] the Department of Education's two-percent policy carved out yet another ambiguously defined category of students for whom a single achievement standard is inappropriate.[74] This degree of ambiguity leaves states unsure of whether the programs they develop will comply with requirements for federal funds.[75]

B. STATE-DEVELOPED ALTERNATE ASSESSMENT SYSTEMS

States struggle to comply with the myriad of NCLB assessment standards.[76] NCLB policy changes created three different alternate

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[70] Letter from U.S. Dep't of Educ., to Chief State School Officers (May 10, 2005), *available at* http://www.ed.gov/policy/elsec/guid/secletter/050510.html (last visited Feb. 14, 2006).

[71] Improving the Academic Achievement of the Disadvantaged, 70 Fed. Reg. 74,624, 74,624-25 (Dec. 15, 2005); *see also* Common Sense, *supra* note 69. The Department of Education originally termed this group "students who have persistent academic disabilities" but changed its definition in response to advocacy groups' complaints that the term was "inappropriate, demeaning, ill conceived, and must be discarded" by implying that these students will never achieve proficiency on grade level. Letter from the Education Task Force of the Consortium for Citizens with Disabilities, to the Secretary of Education Margaret Spellings (May 4, 2005), *available at* http://www.c-c-d.org/tf-education.htm (last visited Feb. 14, 2006).

[72] *See* Common Sense, *supra* note 69 (clarifying that this two-percent cap is a limit on the number of proficient scores that can be counted, not on the number of students who can take alternate assessments based on modified achievement standards).

[73] 20 U.S.C. § 6311(b)(1)(B) (2005) ("The academic standards required [under this Act] shall be the same academic standards that the State applies to all schools and children in the State.").

[74] *See* Improving the Academic Achievement of the Disadvantaged, *supra* note 71, at 74,624.

[75] *See, e.g.*, Letter from Raymond Simon, Assistant Sec'y, U.S. Dep't of Educ., to Kansas Commissioner of Education Andy Tompkins (May 20, 2004) [hereinafter Kansas Letter] (responding to Kansas' request for assistance in determining whether its alternate assessment met federal requirements, the Secretary stated that such information could only be available after full peer review of Kansas' system), *available at* http://www.ed.gov/policy/elsec/guid/stateletters/aaks.html (last visited Feb. 14, 2006).

[76] States have the responsibility for designing alternate assessments. Non-Regulatory Guidance, *supra* note 41, at 15-16. *See also* Roeber, *supra* note 56 (describing and defining the variability in alternate assessments currently developed by state education agencies); Rachel Quenemoen, Sandra Thompson & Martha Thurlow, Nat'l Ctr. on Educational Outcomes, Measuring Academic Achievement of Students with Significant Cognitive Disabilities: Building Understanding of Alternate Assessment Scoring Criteria (Synthesis Report 50) (Jun. 2003) (citing E. Roeber, Nat'l Ctr. on Educational Outcomes, Setting Standards on Alternate Assessments (2002)) (defining each of the currently developed alternate assessment approaches and explaining the challenges states face

assessment systems: alternate assessments based on (1) "grade level achievement standards," (2) "alternate achievement standards," and (3) "modified achievement standards."[77] Therefore, a state must develop an alternate assessment format and set the appropriate achievement standard to assure the format measures student achievement according to that standard.[78]

Furthermore, the Department of Education's subsequent guidance is unhelpful. This assistance is generally an ever-longer list of requirements punctuated by threats of peer review and penalties.[79] These federal policies understandably create confusion and frustration for states struggling to meet the needs of students while complying with federal funding requirements.

III. THE CONSTITUTIONAL COLLISION

The conflicting federal assessment requirements and seemingly coercive enforcement mechanisms have subjected the legislation to constitutional attack by educators and commentators under both spending power and coercion theories.[80] Alternate assessment requirements are

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in developing the assessments).

[77] 34 C.F.R. § 200.6(a)(2)(ii)(A)-(B) (2003); *see also* Common Sense, *supra* note 69.

[78] *See generally* Roeber, *supra* note 56 (describing various standards-setting techniques a state education agency may employ). Presently, most states offer at least one alternate assessment option for students with disabilities. *See* Sandra Thompson & Martha Turlow, Nat'l Ctr. on Educational Outcomes, 2003 State Special Education Outcomes: Marching On (Dec. 2003) (detailing the thirty-eight states that offer a single type of alternate assessment, eight states that offer two alternate assessments, and three states that offer three or more alternate options).

[79] *See* Non-Regulatory Guidance, *supra* note 41, at 15 (setting forth requirements to comply with NCLB in a 40-page publication three years after the new policy was adopted; for an alternate assessment to meet NCLB requirements, it must (a) be aligned with the state's content standards; (b) yield results separately in both reading/language arts and mathematics; (c) be designed and implemented in a manner that supports use of the results as an indicator of "adequate yearly progress"; (d) have an explicit structure; (e) include guidelines for which students may participate; (f) contain a clearly defined scoring criteria and procedures; (g) have a report format that communicates student performance in terms of the state's academic achievement standards; and (h) meet all NCLB requirements of high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards); *see also* U.S. Dep't of Educ., Standards and Assessments Peer Review Guidance: Information and Examples for Meeting Requirements of the No Child Left Behind Act of 2001 (Apr. 28, 2004) (providing extensive requirements and examples for meeting NCLB requirements three years after NCLB was amended), *available at* http://www.ed.gov/admins/lead/account/saa.html#guidance (last visited Feb. 14, 2006).

[80] Editorial writers questioned NCLB's effectiveness and the impact it is having on state education agencies and students. Memorandum from the Secretary of Education to Editorial Writers, *supra* note 31. The National Conference of State Legislatures, joined by all 50 state legislatures, opposed NCLB as an unconstitutional extension of Congress's spending power and accused the government of coercing states into compliance. NCSL Task Force, *supra* note 53, at 6-

arguably impermissible spending conditions because they are ambiguous, unreasonable, and in violation of students' equal protection rights.[81] Moreover, NCLB penalties may be coercive because states face threats and withholding of federal funds without necessary guidance from the federal government.[82] Therefore, to avoid any constitutional deficiencies, the Department of Education should not impose penalties upon states.

A. ALTERNATE ASSESSMENT AND CONGRESS'S SPENDING POWER

The United States Constitution authorizes Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . .."[83] The United States Supreme Court has held that Congress may attach conditions to the receipt of federal funds incident to its Spending Clause power to further broad policy objectives, [84] but Congress's power is not unlimited.[85] Conditions on the receipt of federal grants are constitutionally permissible if they (1) are in pursuit of the general welfare, (2) are unambiguous, (3) are reasonably related to the purpose of the expenditure, and (4) do not violate any independent constitutional prohibition.[86] Although the Supreme Court has not invalidated a spending scheme under Congress's spending power since its decision in

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7, 9. On April 20, 2005, local school districts, joined by the National Education Association, filed a lawsuit against the Department of Education challenging NCLB as an "unfunded mandate" beyond Congress's spending authority. Nat'l Educ. Ass'n, Complaint for Declaratory and Injunctive Relief, United States District Court for the Eastern District of Michigan, Case No. 2:05-C-71535 (Apr. 20, 2005) [hereinafter NEA Complaint] (setting forth nine plaintiff school districts, including one from Michigan, one from Texas, and seven from Vermont; the case is currently on appeal following the district court's granting of the government's motion to dismiss on Nov. 23, 2005, for failure to state a claim), *available at* http://www.nea.org/lawsuit/summary.html (last visited Feb. 14, 2006). On August 22, 2005, the State of Connecticut sued the federal government over the NCLB as an unfunded mandate and a violation of the Spending Clause and the Tenth Amendment of the United States Constitution. Complaint for Declaratory and Injunctive Relief, United States District Court for the District of Connecticut, Civil Action No. 305-CV-1330 (Aug. 22, 2005) [hereinafter Connecticut Complaint].

[81] *See infra* notes 92-137 and accompanying text.

[82] *See infra* notes 138-158 and accompanying text.

[83] U.S. CONST. art. I, § 8, cl. 1.

[84] South Dakota v. Dole, 483 U.S. 203, 206 (1987); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143-144 (1947).

[85] *Compare,* United States v. Butler, 297 U.S. 1, 72-75 (1936) (holding that the spending power does not authorize Congress to subsidize farmers), *with Dole*, 483 U.S. at 206-07 (holding that the spending power permits Congress to condition highway funds on states' adoption of a minimum drinking age).

[86] New York v. United States, 505 U.S. 144, 171-172 (1992); *see also Dole*, 483 U.S. at 207-08.

Butler v. United States in 1936,[87] states and local school districts are challenging NCLB because the Department of Education is forcing them to implement federal mandates without appropriate support or guidance.[88]

1. In Pursuit of the General Welfare

Quality public education clearly benefits the public.[89] Congress's stated purpose behind NCLB is to "ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education."[90] Few could argue that assessing students' progress and holding schools accountable for providing a high-quality education does not benefit society.[91] Although NCLB's pursuit of a high-quality education for all students benefits the general welfare, the federal government's method of conditioning funds has resulted in ambiguity, unreasonable consequences, and equal protection problems. Therefore, alternate assessment conditions may not meet constitutional requirements.

2. Unambiguous

Legislation enacted pursuant to the spending power operates much in the nature of a contract—in return for federal funds, states agree to comply with federally imposed conditions.[92] The legitimacy of legislation enacted pursuant to the spending power "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[93] A state cannot knowingly accept terms if it is "unaware of the conditions or

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[87] *See generally* United States v. Butler, 297 U.S. 1 (1936) (holding that the spending power does not authorize Congress to subsidize farmers).

[88] *See* NEA Complaint, *supra* note 80; *see also* Connecticut Complaint, *supra* note 80; *see also* Nat'l Sch. Boards Ass'n, *Conflict between IDEA and NCLB Requirements Leads Districts to File Suit Against Federal Government*, *supra* note 59.

[89] The Supreme Court has recognized the importance of education to our democratic society. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[Education] is a principle instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.").

[90] 20 U.S.C. § 6301 (2005).

[91] *See* Gina Austin, Comment, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 356 (2005) (concluding that both proponents and opponents of NCLB agree that providing federal funds for improving education is of benefit to the general welfare); *but see* Coulter M. Bump, Comment, *Reviving the Coercion Test: A Proposal to Prevent Federal Conditional Spending that Leaves Children Behind*, 76 U. COLO. L. REV. 521, 538 (2005) (arguing that NCLB "as prescribed" is not for the general welfare).

[92] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

[93] *Id.* at 17 (citations omitted).

is unable to ascertain what is expected of it."[94]

Several court challenges have addressed this argument. In *Pennhurst State School & Hospital v. Halderman*, a disability-related case, the United States Supreme Court held that the Developmentally Disabled Assistance and Bill of Rights Act did not subject the state to liability for failure to provide certain services, because Congress did not expressly state such a requirement as a condition on the receipt of funds.[95] Likewise, the Fourth Circuit applied these principles in *Virginia Department of Education v. Riley*, a special-education-related case, holding that IDEA did not require states to provide educational services to disabled students whose schools expelled them for reasons unrelated to their disabilities.[96] Because IDEA did not condition funds "*in unmistakably clear terms*," the court refused to imply such a condition.[97] While cases have consistently concluded that the existence of conditions on federal funds must be unambiguously stated, the logical extension of this analysis is that the terms of the condition must be unambiguous.

This novel although implied reasoning illustrates the vagueness of NCLB's terms. NCLB alternate assessment requirements are arguably ambiguous because the law does not define "alternate assessment." Additionally, recent NCLB alternate assessment policies are similarly undefined. Furthermore, NCLB requirements seemingly conflict with those of IDEA, resulting in ambiguity that may not meet constitutional standards.

For example, NCLB neither provides for nor defines "alternate assessment."[98] Although IDEA required alternate assessment options at the time Congress amended NCLB, it also did not define or address achievement standards.[99] Subsequent NCLB regulations and guidance reports purported to clarify alternate assessment requirements.[100] However, the extensive requirements set forth in these reports were not conditions to which the states originally agreed.[101] Admittedly, alternate

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[94] *Id.*

[95] *Id.* at 18, 22. Residents of a state institution alleged the Act required the state to provide "appropriate treatment" in the "least restrictive environment." *Id.* at 10-11. The Court looked to the language of the statute, the legislative history, and the statute as a whole and concluded that it merely required states to take steps to improve the care of disabled persons. *Id.* at 22. It did not require states to fund "new individual rights." *Id.*

[96] Va. Dep't of Educ. v. Riley, 106 F.3d 559, 567 (4th Cir. 1997).

[97] *Id.* at 566 (emphasis in original).

[98] 20 U.S.C. § 6311(b)(3)(C) (2005).

[99] 20 U.S.C. § 6311(b)(3)(C) (2005); *see supra* notes 45-52 and accompanying text.

[100] 68 Fed. Reg. 68,698, 68,699 (Dec. 9, 2003) (amended at 34 C.F.R. § 200.6(a)(2) (2004)); *see also* Non-Regulatory Guidance, *supra* note 41, at 15-19.

[101] *Id.*

assessment is a developing area and difficult to define;[102] however, this merely highlights the problem of requiring conformity.

Moreover, NCLB may also be ambiguous because the Department of Education's "one-percent" and "two-percent" policies regarding achievement standards are similarly undefined and seemingly contrary to the stated purpose of the law.[103] NCLB quite clearly states that all schools must assess their students according to the same high standards.[104] Yet, in 2002, the Department of Education first exempted students with "the most significant cognitive disabilities," and as recently as 2005, exempted students "not likely to achieve grade-level proficiency within the school year."[105] Furthermore, a state may develop and apply an "alternate" or "modified" achievement standard to these groups of students.[106] By developing exceptions to the NCLB, the federal government has attempted to accommodate different groups of students.[107] However, the exceptions do not define the groups of students or the standards to be applied. This level of ambiguity leaves states uncertain how to comply with the new rules.

Finally, NCLB alternate assessment requirements may be subject to challenge as impermissibly conflicting with IDEA. While NCLB requires states to test all students according to the same standard, IDEA requires individual education planning and monitoring of personalized goals.[108] Consequently, schools and educators are unsure of how to follow the mandates of both laws.[109] Therefore, Congress may not have spoken with the constitutionally required "clear voice" to enforce

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[102] *See* Quenemoen, *supra* note 76, at 2 (explaining the particular struggles and difficulties that have occurred since initial IDEA "alternate assessment" provisions were introduced in 1999, and the continuing challenge of defining and developing these assessments and their corresponding standards).

[103] *See supra* notes 58-75 and accompanying text.

[104] 20 U.S.C. § 6311(b)(1)(B) (2005) (setting forth NCLB requirements that state standards "shall be the same academic standards that the State applies to all schools and children within the State.").

[105] *See supra* notes 58-75 and accompanying text.

[106] *Id.*

[107] *Id.*

[108] 20 U.S.C. §§ 1412(a)(4) (2005), 6311(b)(1)(B) (2005).

[109] *See* Nat'l Educ. Ass'n, Education Dept. Proposes Changes to "No Child Left Behind" Regulations (Apr. 2005) (explaining that NCLB has come under intense fire in the last two years, that state legislatures have adopted resolutions critical of NCLB, and that thousands of teachers "have been begging for a more reasonable approach."), *available at* http://www.nea.org/esea/regchanges0504.html (last visited Feb. 14, 2006). These conflicts have led local school districts in Illinois to sue the federal government because they cannot comply with both laws. Nat'l Sch. Boards Ass'n, *Conflict between IDEA and NCLB Requirements Leads Districts to File Suit Against Federal Government*, *supra* note 59.

alternate assessment requirements.[110]

3. *Reasonably Related to the Purpose of the Expenditure*

A condition imposed by Congress on federal funds to states must be reasonably related to the purpose of the expenditure.[111] A logical corollary is that the condition itself must be reasonable: an irrational condition fails to achieve the purpose of a program just as much as one that is unrelated. Enforcing an unreasonable condition because it is "reasonably related" to the program's purpose renders any claimed relationship illusory.

NCLB alternate assessment requirements may be subject to challenge as arbitrary and unreasonable because states must test students with disabilities either (1) using grade-level tests when the students are not receiving grade-level instruction, or (2) using an alternate assessment, but capping the number of those scores that can be counted as passing.[112] The result is that a state must assess students before they have received instruction based on skills they inherently lack because of their disabilities.[113] This unreasonable consequence of NCLB alternate assessment requirements fails to achieve Congress's goal of "ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education."[114]

Moreover, the resulting assessment anomaly falls short of the reliability and validity required by NCLB as a measure of student achievement.[115] Furthermore, measuring alternate assessment scores that exceed the cap according to a higher standard—rather than the level at which a student is currently performing—is unreasonable. The cap on the number of countable scores of students with disabilities is not aligned with the number of students who will be impacted; as a result, students who require alternate assessments will have their scores arbitrarily

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[110] *Pennhurst*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.")

[111] *Dole*, 483 U.S. at 206 (holding that the condition of raising the state's drinking age to twenty-one years was reasonably related to federal highway funding for the purpose of safe interstate travel); *but see Dole*, 483 U.S. at 213 (O'Connor, J., dissenting) (criticizing the majority's "cursory and unconvincing" analysis of the reasonableness of the "supposed purpose" of safe interstate travel and the drinking age condition).

[112] *See supra* notes 58-79 and accompanying text.

[113] *Id.*

[114] 20 U.S.C. § 6301 (2005).

[115] *See* Non-Regulatory Guidance, *supra* note 41, at 15 (explaining that NCLB requires assessments that are of high technical quality, including validity, reliability, accessibility, objectivity, and consistency with nationally recognized professional and technical standards).

reported as failing.[116] Counting those students as failing may harm both students and schools. The ultimate NCLB consequence is withholding funds from programs intended to aid the very students the law aims to protect.[117] Therefore, NCLB requirements are arguably unreasonable because they may harm the students the law intends to help.

4. *Equal Protection Rights of Students with Disabilities*

An invalid conditional grant of federal funds results if it "induce[s] the States to engage in activities that would themselves be unconstitutional."[118] In *South Dakota v. Dole*, the United States Supreme Court distinguished a grant of federal funds conditioned on invidiously discriminatory state action or infliction of cruel and unusual punishment (which would be constitutionally barred) from a state raising its drinking age to twenty-one (which would not).[119] The Court concluded that "the State's action in [raising its drinking age] would not violate the constitutional rights of anyone."[120] Thus, *Dole* establishes that the federal government cannot force a state to violate the rights of its citizens.[121]

NCLB-required assessments arguably violate the equal protection rights of students with disabilities. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall. . .deny to any person within its jurisdiction the equal protection of the laws."[122] The Supreme Court has held that education is not a fundamental right under the United States Constitution,[123] nor is disability a suspect classification for equal protection purposes.[124] As a result, neither factor operates to alter the rational-basis standard of judicial review the Court has applied to a state's social and economic legislation.[125] However, the Court has

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[116] *See* Consortium for Citizens with Disabilities, *supra* note 71 (explaining the research cited by the Department of Education provides an insufficient justification for the one-percent policy because the studies focused only on remediating reading and no other subjects, and were conducted under ideal conditions not found in today's schools and as a result, one percent does not adequately reflect the number of students who require the assessment).

[117] *See supra* note 57.

[118] *Dole*, 483 U.S. at 210.

[119] *Id.* at 210-11.

[120] *Id.* at 211.

[121] *Id.* at 210-11.

[122] U.S. CONST. amend. XIV, § 1.

[123] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

[124] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (concluding mental retardation was not a "quasi-suspect" classification, but nevertheless invalidating a municipal zoning ordinance discriminating against a group home for persons with mental retardation).

[125] *Rodriguez*, 411 U.S. at 35.

also stated "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*"[126]

Two landmark district court cases provided the framework for constitutional equal protection principles that are the basis for IDEA.[127] In one case, *Pennsylvania Association for Retarded Children v. Commonwealth*, the District Court for the Eastern District of Pennsylvania agreed that assuming children with mental retardation were uneducable and untrainable lacked a rational basis in fact and thus violated equal protection.[128] The case resulted in a consent agreement that required the state to provide an appropriate education to disabled children.[129]

NCLB alternate assessment requirements may also lack a rational basis. As applied to students with disabilities, federal mandates require either (1) assessment prior to instruction, or (2)arbitrary caps on scores the Department of Education considers passing.[130] Students and schools "cannot fairly be held accountable for performance unless. . .students are appropriately exposed to the knowledge they are expected to master."[131] As set forth in the cases and in IDEA, equal access to a free and appropriate public education must be made available to children with disabilities.[132]

While in *Pennsylvania Association for Retarded Children*, students were *excluded* from educational programs,[133] in the case of NCLB assessments, students are *required to participate.*[134] Critics may defend

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[126] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (emphasis added).

[127] Pa. Ass'n for Retarded Children v. Commonwealth, 343 F. Supp. 279 (E.D. Pa. 1971); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.C. 1972); *see also* Nat'l Council on Disability, Back to School on Civil Rights (Jan. 25, 2000) (explaining the consent agreements that resulted from the two cases provided the framework for IDEA's protection of the civil rights of children with disabilities), *available at* http://www.ncd.gov/newsroom/publications/2000/backtoschool_1.htm#4 (last visited Feb. 14, 2006).

[128] *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 283.

[129] *Id.* at 307.

[130] *See supra* notes 58-75 and accompanying text.

[131] James W. Guthrie & Richard Rothstein, *Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements, in* Equity and Adequacy in Education Finance: Issues and Perspectives 209, 214 (Helen F. Ladd, Rosemary Chalk, and Janet S. Hansen, eds., 2003) (explaining adequacy litigation suits that are being brought in numerous states and the idea of "delivery standards" which is being asserted in some cases).

[132] *See generally Pa. Ass'n for Retarded Children*, 343 F. Supp. 279; *see also Mills*, 348 F. Supp. 866; 20 U.S.C. § 1412(a)(1) (2005) (requiring a state to provide a "free and appropriate public education" to students with disabilities as a condition of receiving IDEA federal funds).

[133] *Pa. Ass'n for Retarded Children*, 343 F. Supp. at 283.

[134] *See supra* notes 38-44 and accompanying text.

the inclusion of disabled students in NCLB assessments as protecting the equal rights of those students.[135] However, including students with disabilities is not the problematic equal protection issue NCLB presents. Rather, NCLB undercuts IDEA's equal protection principles, thereby undermining students' rights. IDEA mandates that states provide "a free and appropriate public education" to students with disabilities to remedy past equal protection violations.[136] Unfortunately, NCLB's inappropriate treatment of disabled students frustrates this purpose. Therefore, NCLB arguably violates the equal protection rights of students with disabilities.

Ultimately, Congress's spending power and its ability to condition federal funds is not unlimited.[137] Accordingly, NCLB alternate assessment requirements are problematic spending conditions because they are arguably ambiguous, unreasonable, and in violation of students' equal protection rights.

B. CURBING COERCION

Courts have found that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[138] In *Dole*, a foundational "coercion" case, the United States Supreme Court concluded that the "relatively mild encouragement" to the states to enact higher minimum drinking ages did not amount to coercion.[139] The state had the option to participate and, if it refused to participate, would lose only five percent of the available funds.[140] Therefore, the federal condition was permissible and not coercive.[141]

In an education-related case, the Fourth Circuit in *Virginia Department of Education v. Riley* addressed the coercion inherent in the federal government withholding the state's $60 million special-education

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[135] *See, e.g.*, Diane Smith, Nat'l Ass'n of Prot. & Advocacy Sys., *Children with Disabilities Under No Child Left Behind (NCLB): Myths and Realities* (Mar. 29, 2004) (on file with author) (stressing that most students with disabilities are able to perform on the assessments and to keep up with their non-disabled peers).

[136] *See generally Pa. Ass'n for Retarded Children*, 343 F. Supp. 279; *see also Mills*, 348 F. Supp. 866; 20 U.S.C. § 1412(a) (2005) (requiring a state to provide a "free and appropriate public education" to students with disabilities).

[137] *See supra* notes 83-88 and accompanying text.

[138] *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937) (holding conditions on Social Security grants to states were permissible because they were suitable and related; Congress's motive or temptation does not amount to coercion)).

[139] *Dole*, 483 U.S. at 211.

[140] *Id.*

[141] *Id.*

grant.[142] Virginia refused to provide continuing educational services to expelled special-education students (expelled for reasons unrelated to their disabilities) who made up less than one tenth of one percent of all special education students.[143] Distinguishing $60 million from the "'relatively mild encouragement' at issue in *Dole*," the court concluded that the federal action exceeded constitutional limits under the coercion theory.[144] Thus, the Court held the federal government's withholding of funds invalid.[145]

NCLB remedies and penalties are also arguably coercive because of the numerous policy changes and arbitrary enforcement by the federal government. In 2004, Texas was fined $444,282 for not releasing its assessment data by the beginning of the school year.[146] Minnesota had $113,000 withheld for its assessment method—a method the Department of Education had previously given the state a waiver to use but subsequently revoked.[147] Georgia had $700,000 withheld for not conducting a state assessment after administrators raised questions about the test's validity.[148] Thus, federal enforcement of NCLB remedies may be coercive because states and schools are arbitrarily penalized for failure to comply with confusing federal requirements.

Moreover, following the 2004 NCLB regulations on alternate assessment, Kansas requested assistance from the Department of Education regarding whether its assessment plan remained in compliance with the new rule.[149] In response, the Department of Education refused to make a determination of compliance without a peer review of Kansas's program.[150] As a result, Kansas faced its peer review evaluation—the process that determines what penalties the Department of Education will employ—without any assistance from the federal government.[151] Furthermore, of the first eleven states to submit their assessment plans for peer review, the Department of Education gave five states "deferred approval" status, and labeled six others "final review pending," the third and fourth lowest approval ratings given by the

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[142] *Riley*, 106 F.3d at 569.

[143] *Id.* at 569.

[144] *Id.* at 569.

[145] *Id.* at 567.

[146] NCSL Quick Facts, *supra* note 68.

[147] *Id.*

[148] *Id.*

[149] Kansas Letter, *supra* note 75.

[150] *Id.*

[151] *See* Letter from Raymond Simon to Chief State School Officer, *supra* note 57 (explaining possible results of peer review process and potential remedies available).

Department of Education, respectively.[152] Despite its inability to provide substantive feedback, the Department of Education cited critical elements lacking in the states' alternate assessment plans in all but one case.[153] Thus, peer review of a state such as Kansas will likely result in a determination of noncompliance and potential penalties without federal guidance.

In sum, the Department of Education has threatened and imposed the penalty of withholding funds in many cases.[154] A state is left to guess if it will receive funds for its NCLB programs.[155] States will often expend resources to develop alternate assessment testing systems that the Department of Education may ultimately disapprove, in addition to being penalized for noncompliance.[156] This coercive situation should not be imposed on states as they attempt to meet students' educational needs.

Ultimately, states and local education agencies are challenging NCLB as both a violation of the spending power and as unconstitutionally coercive, because they lack the necessary clarity and support to implement federal programs.[157] Such litigation is costly and distracts from the task of educating children.[158] Furthermore, these penalties do not solve the real problem of conflicting and confusing federal assessment requirements. Therefore, to avoid these constitutional challenges, the Department of Education should not penalize states for their alternate assessment plans.

IV. FLEXIBILITY AND FEDERALISM

The public policy of local educational control supports the

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[152] U.S. Dep't of Educ., Decision Letters on Each State's Final Assessment System Under NCLB [hereinafter Decision Letters] (publishing DOE decision letters of "deferred approval" for Alaska, Maryland, North Carolina, South Carolina, and West Virginia, and "final review pending" for Alabama, Idaho, Nebraska, Oregon, South Dakota, and Texas), *available at* http://www.ed.gov/admins/lead/account/nclbfinalassess/index.html (last visited Feb. 14, 2006).

[153] *Id.* The Department of Education noted in its "deferred approval" letter to the Idaho Board of Education that Idaho may be the first state "to have constructed an alternative assessment system acceptable under NCLB." Letter from Henry Johnson, U.S. Dep't of Educ., to Dwight Johnson, Idaho Board of Educ. Interim Executive Director (Dec. 9, 2005), *available at* http://www.ed.gov/admins/lead/account/nclbfinalassess/id.html (last visited Feb. 14, 2006).

[154] *See* NCSL Quick Facts, *supra* note 68.

[155] *See supra* notes 149-153 and accompanying text.

[156] *See supra* notes 57 and 76-79 and accompanying text.

[157] *See supra* note 80 and accompanying text.

[158] *See* Press Release, U.S. Dep't of Educ., Department of Education Issues Statement Regarding Connecticut Lawsuit (Apr. 5, 2005) (criticizing Connecticut officials for "spending their time hiring lawyers while Connecticut's students are suffering from one of the largest achievement gaps in the nation . . ."), *available at* http://www.ed.gov/news/pressreleases/2005/04/04052005.html.

eradication of penalties for alternate assessment programs, because NCLB should not supplant local educational agency efforts in an area traditionally left up to state control. Reactionary federal policies fail to achieve NCLB's stated purpose, are in conflict with IDEA, and are not in the best interest of students.[159] NCLB, instead of acting as a new goal for public education, should reflect efforts already under way in schools and districts across the country.[160] NCLB one-size-fits-all requirements tend to undermine local developments and will curtail future state innovations.[161] In the words of Supreme Court Justice Louis Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[162]

State-developed alternate assessments are a prime illustration of Justice Brandeis's concept of states as laboratories of ideas, as states borrow and adapt assessment approaches to meet the needs of their students.[163] Therefore, eliminating NCLB penalties for state alternate assessment systems and removing the cap on the number of student scores that can be counted, while retaining NCLB's central accountability scheme, would achieve the dual federal goals of accountability and flexibility.[164]

A. RELIEF FROM TRADITIONAL PENALTIES

NCLB is a complex regulatory scheme; however, commentators note that NCLB merely introduced federal codification of state-based

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[159] *See* Consortium for Citizens with Disabilities, *supra* note 71; Nat'l Sch. Boards Ass'n, *Conflict between IDEA and NCLB Requirements Leads Districts to File Suit Against Federal Government*, *supra* note 59.

[160] *See, e.g.*, NCSL Task Force, *supra* note 53, at 4-6 (explaining local education reform efforts that were already underway well before NCLB was amended and the attempt by the federal government to codify certain local efforts into a single federal education statute).

[161] *Id.*

[162] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (Justice Brandeis was the first Supreme Court Justice to articulate the concept of states as laboratories of ideas).

[163] *See* NCSL Task Force, *supra* note 53, at 4 (explaining the dramatic changes brought about by state-developed standards-based curriculum and assessment).

[164] *See* Increased Flexibility, *supra* note 60 (noting the two key promises to states under NCLB: accountability and flexibility).

reform already well under way.[165] The Department of Education proudly professes that flexibility is a central goal of NCLB.[166] Yet, in developing its policies on alternate assessment, the Department of Education proceeds on the cynical assumption that states will exploit this flexibility to avoid labels of "in need of improvement" or "failing."[167] It is illogical for the federal government to recognize that states desire to improve academic achievement for all students,[168] yet to assume that states will exploit the law to get the benefit of federal funds at the cost of educational outcomes for students. Moreover, since standards-based reform predated NCLB,[169] new penalties are unnecessary. Thus, there is no logical purpose for the federal penalty of withholding funds.

Rather than imposing penalties and fund withholdings upon states, the Department of Education should instead provide support and guidance as states develop their alternate assessment programs. Currently, state and federal agencies continue to develop their understanding of alternate assessments.[170] Yet, like the NCLB situation in which states test students with disabilities before those students have had the opportunity to learn, the Department of Education evaluates state

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[165] *See* Memorandum from the Secretary of Education to Editorial Writers, *supra* note 31 (explaining that NCLB is a complex law that was intentionally left vague so that the DOE could smooth out the "rough edges" through the regulatory process); *see also* NCSL Task Force, *supra* note 53, 4 (explaining local education reform efforts that were already underway well before NCLB was amended).

[166] *See* U.S. Dep't of Educ., *Four Pillars of NCLB* (describing "more freedom for states and communities" as one of the four pillars of NCLB; under NCLB, "states and school districts have unprecedented flexibility in how they use federal education funds."), *available at* http://www.ed.gov/nclb/overview/intro/4pillars.html (last visited Feb. 14, 2006).

[167] *See* Non-Regulatory Guidance, *supra* note 41, at 7 (explaining the cap was designed to ensure that there is not an incentive for states to assess a student with a disability, safeguarding against the school assigning lower-performing students to assessments and curricula that are inappropriately restricted).

[168] *See* S. Rep. No. 108-185, at 13 (2003) (noting the committee's belief that states and local education agencies want to assist students with disabilities in achieving high educational outcomes).

[169] *See, e.g.,* NCSL Task Force, *supra* note 53, at 4 (explaining local education reform efforts that were already underway well before NCLB was amended).

[170] *See* Kansas Letter, *supra* note 75 (responding to Kansas' request for assistance in developing its alternate assessment system by explaining the DOE's inability to do so until a full peer review of all the evidence); Letter from Raymond Simon, Assistant Sec'y, U.S. Dep't of Educ., to Virginia Board of Educ. President Hon. Thomas Jackson (Jul. 28, 2004) (explaining the peer review process and the need for Virginia to continue to work in the assessment development process), *available at* http://www.ed.gov/policy/elsec/guid/stateletters/aava.html (last visited Feb. 14, 2006); *see also* Massachusetts Dep't of Educ., Concerns and Questions About Alternate Assessment (January 2005) (responding to numerous comments and questions about Massachusetts' alternate assessment system) (cited by the U.S. Dep't of Educ. at 68 Fed. Reg. 68,698, 68,699 (Dec. 9, 2003) (amended at 34 C.F.R. § 200.6(a)(2) (2004)), *available at* http://www.doe.mass.edu/mcas/alt/QandC.doc (last visited Feb. 14, 2006).

assessment systems before states fully develop those systems.[171] Clearly, the peer review process is important to provide necessary guidance to states.[172] However, during this time of development, the Department of Education should temporarily suspend NCLB penalties so that states have the flexibility and the funds to implement federal directives.

Critics may argue that an NCLB enforcement mechanism is necessary to ensure that states develop compliant systems. However, temporary suspension of penalties would strike a balance between the desire for compliance and the need for flexibility to design appropriate assessments. The severe penalty of withholding funds is unnecessary and overly intrusive. Therefore, any federal threat or imposition of this penalty should not be available during the alternate assessment development process.

B. ENABLING STATES AS LABORATORIES OF IDEAS

Education reform over the last three decades is a classic example of Justice Brandeis's laboratories of ideas.[173] One state would monitor, modify, and adapt another state's reform experiment to fit its specific needs.[174] These developments facilitated the shift to standards-based reform, which NCLB attempted to incorporate into a single federal policy.[175]

However, one policy cannot meet the diverse needs and circumstances of the more than 15,000 local school districts serving more than 45 million school children.[176] The Department of Education continually refuses to address this issue and is quick to point out the exceedingly flexible provisions of NCLB, without explaining how it selectively condensed certain local reform efforts and not others into a single federal statute.[177]

Public policy dictates that all schools provide effective educational

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[171] *See supra* notes 111-117 and 149-156 and accompanying text.

[172] *See* Decision Letters, *supra* note 152 (setting forth the results of an independent peer review of each state's assessment system, including strengths, weaknesses, and necessary yet missing components required for the state to be in full compliance with NCLB).

[173] *See* NCSL Task Force, *supra* note 53, at 4 (explaining the dramatic overhaul of the nation's elementary and secondary education system was initiated and guided by state legislatures "in a classic example of Supreme Court Justice Louis Brandeis' 'laboratories of democracy.'").

[174] *Id.*

[175] *Id.*

[176] *Id.* (explaining how states created a diverse array of programs to account for the differences among 15,000 local districts and 40 million public students).

[177] *Id.* (explaining how Congress selectively incorporated certain state reform efforts into a condensed federal statute).

programs to all students, not just those schools willing to engage in the "experiment." Critics of the "states as laboratories of ideas" theory note that the social and economic reality is that states have the incentive *not* to experiment and incur the cost and potential liability that may follow such endeavors.[178] Understandably, by creating its own accountability system, a state becomes vulnerable to attack from parents, advocacy groups, taxpayers, and state and federal lawmakers.[179] Here, however, this argument fades because such experimental reform was already under way before NCLB was amended.[180] Imposing arbitrary requirements that all students take the same test, or capriciously capping the number of student scores on alternate assessments that the state may count, fails on both legal and educational policy grounds. Therefore, states should be free to test students with assessments that measure what they are learning, and not to have those results limited in calculating funding allocations. Such a solution would further the educational opportunities and civil rights of students with disabilities.

Thus, facilitating local educational control is sound educational policy, which both preserves state sovereignty and meets students' educational needs. During a developmental period (exemplified by current alternate assessment advancements), any practical federal statute must permit flexibility. Thus, temporary suspension of funding penalties and permission to develop innovative educational approaches are necessary components for meeting the needs of each state and each individual student.

V. CONCLUSION

The federal NCLB and IDEA endeavor to improve educational opportunities for students with disabilities and to improve student achievement overall.[181] Local schools should be held accountable for

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[178] *See* Malcolm Feeley & Edward L. Rubin, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923-926 (1994) (discussing the problems related to the experimentation argument because it requires a shared, single goal by all states and requires some states to implement experiments likely to fail in order to test their validity).

[179] *See, e.g.*, Andrew Rudalevige, *Adequacy, Accountability, and the Impact of "No Child Left Behind"* (Oct. 2005) (explaining the impact of NCLB on "adequacy" lawsuits brought by advocates and parents against states; since 1980 forty-five of the fifty states have been sued for failure to provide an "adequate" education), *available at* http://www.ksg.harvard.edu/pepg/PDF/events/Adequacy/PEPG-05-27rudalevige.pdf (last visited Feb. 15, 2006).

[180] *See* NCSL Task Force, *supra* note 53, at 4 (explaining local education reform efforts that were already underway well before NCLB was amended).

[181] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400-82 (2005) (amending the Individuals with Disabilities Education Act); No Child Left Behind Act of

student progress. However, federal education regulations attempt to hold states accountable for student progress by providing federal grants conditioned on strict requirements and penalties.[182] These conflicting requirements have resulted in numerous criticisms, lawsuits, and calls to action by various groups arguing that a one-size-fits-all standard does not fit all students. Furthermore, these challenges raise fundamental constitutional questions regarding Congress's spending power and federal coercion.

Relief from federal penalties and threats of penalties is necessary to reduce these distractions and to provide the flexibility NCLB promises, so that schools can meet the needs of students. Accountability for schools and high expectations for all students are necessary goals for student achievement. Actual, not merely promised, flexibility is necessary to permit states to meet students' needs. While the Department of Education has recognized that it must make exceptions to NCLB to permit "alternate assessments" for students with disabilities, the result is a set of confusing policy changes and inadequate guidance to implement these assessments. Thus, the Department of Education should not threaten or withhold federal funds from states during the development of their alternate assessment programs.

This proposed solution would provide an appropriate balance between the desire for accountability and need for local control. Schools would continue to be accountable, and states would have the necessary flexibility to devise appropriate assessments to measure student achievement. This real type of flexibility is necessary to improve educational opportunities for today's students. Furthermore, this flexibility would facilitate the development of best practices in educational services and research for the students of tomorrow. Permitting states to initiate innovative approaches and to learn and borrow from one another would be in the best interest of all students.

2001, 20 U.S.C. §§ 6301-7941 (2005) (amending the Elementary and Secondary Education Act).

[182] No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2005) (amending the Elementary and Secondary Education Act of 1965).

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* J.D. Candidate 2007, Golden Gate University School of Law, San Francisco, CA; B.S. Applied Learning and Development, University of Texas, Austin, TX. I would like to thank Professor Mark Yates for his guidance and assistance in improving my writing and focusing my legal reasoning. I would also like to thank my editors, Jennifer Lewis and Claire Hulse, for their valuable feedback and support, as well as Meredith Wood and the entire Golden Gate Law Review Editorial Board for their editorial and cite-checking efforts. Finally, I am grateful to my husband, Robert Frazor, for his love and encouragement.