THREE ESSAYS ON EDUCATION LAW AND POLICY: STATE COURT DEFINITIONS OF EDUCATIONAL ADEQUACY; THE NO CHILD LEFT BEHIND ACT UNFUNDED MANDATE DEBATE; AND CONCEPTIONS OF EQUAL EDUCATIONAL OPPORTUNITY FOR STUDENTS WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE NO CHILD LEFT BEHIND ACT.

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ABSTRACT

THREE ESSAYS ON EDUCATION LAW AND POLICY: STATE COURT DEFINITIONS OF EDUCATIONAL ADEQUACY; THE NO CHILD LEFT BEHIND ACT UNFUNDED MANDATE DEBATE; AND CONCEPTIONS OF EQUAL EDUCATIONAL OPPORTUNITY FOR STUDENTS WITH DISABILITIES UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT AND THE NO CHILD LEFT BEHIND ACT.

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My dissertation consists of three essays on education law and policy. The first essay addresses the issue of how state courts define educational adequacy by analyzing court opinions from twenty-six states. The second essay answers the question of whether the No Child Left Behind Act is an unfunded mandate by evaluating the arguments made in the two federal lawsuits that make this claim. The third essay investigates the tensions in federal special education policy under the Individuals with Disabilities Education Act and the No Child Left Behind Act by focusing on their assessment policy and conceptions of equal educational opportunity.

Chapter 1: Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability

This essay compiles information from twenty-six states with educational adequacy court decisions. In these decisions, courts are asked to declare their state's finance system unconstitutional because it is inadequate to provide a basic quality education to all students. Although educational funding is the major component of the adequacy court decisions, this work also identifies educational goals and accountability as important elements of a state's duty to supply an adequate education to all students.

Chapter 2: The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?

This essay analyzes the No Child Left Behind Act (NCLB) unfunded mandate debate using the two federal court cases on the topic, *School District of Pontiac v. Spellings* and *Connecticut v. Spellings*. The plaintiffs in these lawsuits allege that NCLB's unfunded mandate provision should be interpreted to not require states or local educational agencies (LEA) to spend any of their own funds complying with the law, instead the federal government must provide all of the necessary money. The article concludes that NCLB is not an unfunded mandate. Its unfunded mandate provision is only intended to limit federal officials from adding requirements that were not originally contemplated in the law. States and LEAs must perform the obligations they assumed under NCLB, regardless of how much federal funding they actually receive.

Chapter 3: The Individuals with Disabilities Education Act and The No Child Left Behind Act - Convergence and Dissonance in Special Education Policy - The Growing Alignment between these Laws and the Continuing Differences in their Conceptions of Equal Educational Opportunity

This essay examines federal policy for students with disabilities under the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB). It outlines the federal government's response to the differences in these laws' assessment policy, a process that offered more flexibility under NCLB through alternate assessments for students with disabilities and greater alignment in IDEA with NCLB's accountability requirements. It also categorizes the laws' conceptions of equal educational opportunity and explains why advocates for students with disabilities prefer IDEA's vision of equal educational opportunity over NCLB's arguably higher, but potentially unreachable, vision.

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INTRODUCTION

My dissertation is a collection of three essays that address three current issues in education policy. Its unifying theme is the use of law as both the primary source of authority and as the analytical framework to investigate the issues raised in the essays. My research endeavors to add a legal perspective to the ongoing educational policy debates on state responsibility for providing an adequate education to each child, the constitutionality of the No Child Left Behind Act, and the similarities and differences between federal special education policy under the Individuals with Disabilities Education Act and the No Child Left Behind Act. Currently there are numerous voices in the conversation that promote the perspective of educational professionals, parents, and students, however, the discussion usually proceeds without a full understanding of the underlying laws and legal principles that govern the policies. My research includes the relevant background on these education laws in the hope to help bridge the gap between the educational policy at issue and the actual contours of the law itself and the principles that govern it that many times limit the range of possible policy solutions. I do this for three educational policy issues, which I frame by answering the following questions:

1. How are state courts defining an "adequate" education in the lawsuits throughout the country that ask the courts to interpret state constitution education clauses and declare that the states must provide additional funding for a higher quality education for all students?

2. Has Congress exceeded its authority under the Spending Clause of the U.S. Constitution, Article 1, § 8, cl. 1, in enacting the No Child Left Behind Act so that it is an unfunded mandate as many in the educational community contend?

3. How has the federal government responded to concerns regarding the differences between requirements of the two major federal education laws that regulate students with disabilities: IDEA and NCLB? Why did special education advocates have so much consternation over NCLB when it appeared to be promoting something they want, a higher educational benefit for students?

The answers to the questions I raise are found in the following three chapters, each representing one of my articles:

1. Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability

2. The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?

3. The Individuals with Disabilities Education Act and The No Child Left Behind Act - Convergence and Dissonance in Special Education Policy - The Growing Alignment between these Laws and the Continuing Differences in their Conceptions of Equal Educational Opportunity

Each article is summarized below.

Chapter 1: Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability

My first essay outlines the definitions used by the various state courts that have addressed educational adequacy claims. Educational adequacy is a movement to gain additional state funding for education by asking state courts to rely on their state constitutions to require states to provide all children with a certain quality of education

thereby declaring the current level of education and funding for public education inadequate. My work is important to the field because it compiles information on the twenty-six adequacy court decisions in one source and it finds three common components to the court decisions: funding, goals, and accountability. The essay then delineates the important features of each component and explains that each are potential issues courts address, not required features of an adequacy case.

Funding is the most significant aspect of the adequacy decisions since the movement, at its core, is an attempt to secure additional funding for public education in a state. The concept of "adequate" funding is one that calls for a substantial equality of revenues to be provided by the state. It begins with a horizontal equity among districts to provide a sufficient level of financial resources to supply a basic minimum level of a quality education to all students. It then provides for variation in district revenues either through adjustments for the differences in the costs of educating certain groups of students, known as vertical equity, or by permitting local communities to supplement the money raised by the general state funding system, or both.

The adequacy courts have embraced broad goals for their state's educational system. These goals aim to prepare students for their future roles as citizens and individuals, competitors in the market, and participants in our country's political system. As individuals and citizens, students should be trained in a manner that gives them competence in academic subjects, physical and mental health issues, and interpersonal skills. States should also train students as future competitors in the market. In this role, students should be proficient at intelligently choosing occupations, favorably competing for academic or vocational positions, and competently performing the tasks they

undertake. Moreover, students must also be ready to assume their roles as participants in the political system. This responsibility requires a basic knowledge of history, geography, and economic, political and social systems. It also prepares students for civic engagement as voters and members of juries in a manner that will allow them to understand the issues before them and make informed decisions.

The final potential component of an adequacy decision identified in this essay is accountability. This mechanism for holding states responsible for student achievement of the required substantive level of education is the least developed of the elements. Its treatment by a handful of courts has been accomplished through the legislature's adoption of a formal accountability system or through the parties' use of the court system to enforce an initial court decision that declared a state educational finance system unconstitutional.

Chapter 2: The No Child Left Behind Act: Is it an Unfunded Mandate or a Promotion of Federal Educational Ideals?

My second essay examines the No Child Left Behind Act (NCLB) unfunded mandate debate as it has unfolded in the federal courts. It details the arguments made by the parties in the cases of *School District of Pontiac v. Spellings* and *Connecticut v. Spellings* and concludes that NCLB is a permissible exercise of Congress' conditional spending power under article I, sec. 1, cl. 8 of the U.S. Constitution. The work makes a significant contribution to the field by informing the policy debate about the unfunded mandate issue with its relevant legal framework using the actual arguments and legal theories addressed by the courts that are currently deciding the issue.

Plaintiffs, who include the National Education Association, several local education associations, and school districts, and the State of Connecticut, claim the U.S. Secretary of Education cannot require them to spend their own money, i.e. any money beyond what the federal government supplies under the NCLB, to pay for the extensive costs of complying with the law. The argument is based on NCLB's unfunded mandates provision, which says "[n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a).

The initial decision in *School District of Pontiac v. Spellings* was issued in Nov. 2005 and found in favor of the Secretary of Education, saying that the unfunded mandates provision could not reasonably be read to prevent Congress from compelling states to comply with NCLB's requirements, even if they had to spend their own money to do so. Instead, it was only a limit on federal officers or employees from imposing additional duties on states who chose to participate in the law. The Sixth Circuit Court of Appeals reversed this decision in Jan. 2008, agreeing with the Plaintiffs by saying that Congress failed to provide clear notice to states, as evidenced by the unfunded mandate provision, that they would be responsible for all costs associated with implementing NCLB, even those costs that were not paid for by the federal government under the law. In May 2008, the full bench of the Sixth Circuit agreed to rehear this case so the case was still pending at the time of this publication.

The federal district court has issued two decisions in the case of *Connecticut v. Spellings*. The State of Connecticut's lawsuit claimed that the U.S. Secretary of Education's interpretation of NCLB that required the state to spend significant amounts of money to create and implement a new assessment system, money that was not actually provided by the federal government, violated the Spending Clause and the Tenth Amendment of the U.S. Constitution. In its initial Sept. 2006 decision, the court dismissed three of the four claims, finding that it lacked subject matter jurisdiction to hear the issues before it because the Secretary of Education had not taken any formal action to enforce NCLB against Connecticut and the General Education Provisions Act prohibited court review before official administrative action was taken. The remaining claim, under the Administrative Procedures Act, was dismissed in the court's April 2008 decision. After reviewing the administrative record, the court found that the Secretary of Education's actions in denying Connecticut's proposed plan amendments relating to the assessments of students with disabilities and English language learners was not arbitrary and capricious. Moreover, the Secretary's failure to address the unfunded mandate provision in its response to Connecticut was appropriate because the State failed to properly raise the issue.

The article then contains my analysis of the issues presented and finds that NCLB is a valid exercise of Congress' conditional spending power. It argues that the best interpretation of the unfunded mandate provision is one in which it is read in light of the overall statutory scheme to fit into a harmonious whole. This is done by examining the purpose and structure of the act, and these support the view that Congress has the power to impose conditions of assistance on states in exchange for federal funding. First, the

purpose is to improve the educational opportunity and academic performance of all students in the U.S. An offer of additional financial assistance is consistent with this goal. Second, the overall statutory scheme, or context, demonstrates that the law's conditions of assistance are clear to states in that they know they must design and establish their own academic standards and accountability systems and submit plans for federal approval to be able to participate in NCLB. There is no promise of full federal payment for these systems in the law and, in fact, the funding formula used under the law is not linked to state compliance costs. Instead it is based on the number of economically disadvantaged students in a district. Moreover, the statute clearly specifies that states must perform all duties or the Secretary of Education may withhold funding. In this way, states retain the basic funding responsibilities for public education and NCLB only offers some additional financial assistance. Thus, the original reading of the unfunded mandate provision by the district court in the *Pontiac* case, which would require states to comply with the basic conditions of assistance contained in NCLB but not new requirements imposed by officers or employees of the federal government, best comports the text of the unfunded mandate provision with the overall structure and purpose of the law.

Chapter 3: The Individuals with Disabilities Education Act and The No Child Left Behind Act - Convergence and Dissonance in Special Education Policy - The Growing Alignment between these Laws and the Continuing Differences in their Conceptions of Equal Educational Opportunity

This essay discusses federal education policy for students with disabilities by examining the two major laws that govern it: the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB). It analyzes two questions that

have been raised in the policy arena. First, how has the federal government responded to concerns regarding the differences between the requirements of these two laws. It finds that the U.S. Department of Education (USDOE) and Congress have deliberately aligned the purpose, goals, and assessments under IDEA and NCLB. Second, it asks why special education advocates had so much consternation over NCLB when it appeared to be promoting something they wanted, a higher educational benefit for students. On this point, it finds that the laws promote different conceptions of equal educational opportunity and NCLB, even though it has an arguably higher conception of common minimum level of achievement for all students, is a potential threat to the structure and purpose of IDEA because NCLB, with its adequate yearly progress requirements (AYP) and sanctions on school that do not meet its performance targets, potentially limits assessment options for students with disabilities.

This work makes an important contribution to the literature in several ways. First, it answers the question of why advocates for students with disabilities did not wholeheartedly embrace NCLB, even though its goal was a better education for all and special education advocates desire a greater educational benefit for students with disabilities. Second, it illustrates the points of alignment and incongruity between these two major education laws that regulate students with disabilities. Third, it documents the alignment process that was carried out by both the USDOE in its rulemaking on NCLB assessment policy and Congress in its reauthorization of IDEA in 2004. Fourth, it examines the underlying conceptions of equal educational opportunity promoted by the laws.

To answer the first question, the essay uses the policy cycle model of the public policy-making process to examine the actions taken by the USDOE and Congress in response to the differences in IDEA and NCLB, especially in relation to alternate assessments. This model looks at policy making in certain stages and assumes that decisions are made a specific points in time, and so it allows for an investigation into formal policy actions taken by government bodies. By inspecting the relevant government documents, primarily USDOE NCLB regulations and the 2004 IDEA, it finds a deliberate attempt on the part of both the U.S. Department of Education (USDOE) and Congress to align the laws' purpose, goals, and testing requirements through the regulatory and reauthorization process.

Changes to NCLB assessment policy occurred in four stages: (1) the original enactment of the law in early 2002; (2) the introduction of alternate assessments in late 2002; (3) the 1% exemption in 2003 for students with the most significant cognitive disabilities that permits them to take alternate assessments based on alternate achievement standards and have their proficient or advanced scores counted towards a school district's AYP calculation; and (4) the 2% exemption in 2007 for students with disabilities that are unable to reach grade-level proficiency within one academic year that permits them to take alternate assessments based on modified achievement standards and have their proficient or advanced scores counted towards a school district's AYP calculation.

IDEA was specifically aligned with NCLB during the IDEA 2004 reauthorization process. In particular, the laws have a common purpose of providing a high quality education to students with disabilities and have a focus on core academic skills with

IDEA requiring that states set the same academic goals for students with disabilities as they have in NCLB and ensure, through each student's individualized education program (IEP) that the student is included and makes progress in the general education curriculum. In addition, IDEA requires all students with disabilities to participate in their state's assessment system, including testing under NCLB.

In addition to detailing this alignment process, the essay also considers the remaining dissonance in the laws by examining their underlying conceptions of equal educational opportunity. It examines equal educational opportunity from two vantage points. The first applies the equal outcomes conceptions. The second uses conception from the 1982 U.S. Supreme Court case of *Board of Education of the Hendrick Hudson Central School District v. Rowley.*

Equality of opportunity embodies the notion of fundamental fairness, an absence of discrimination or a barrier to a public good like education. It puts into practice the paradox of equality that asserts that all people are equal but recognizes the fact that they really are not. Equal educational opportunity aims to enhance the ability of certain groups of students to benefit from a public education by removing the barriers they face. Its equal outcome conception takes the form of *level the playing field, minimal achievement, same progress, same results*, and *full opportunity.* All of these conceptions desire to minimize the effect of a non-educationally relevant student characteristics, in this case disability, yet they allow for educationally relevant variables of choice and ability to affect a student's ultimate educational outcome, except for same results idea which actually would actually require the same outcome for all.

IDEA promotes a *level the playing field* view of equal educational opportunity because it does not require the same level of academic performance for all students. Instead, it allows students with disabilities to have individual goals and achievements as specified in their IEP, even though all must strive to attain state academic standards and be included in and make progress in the general education curriculum and offers additional support for students to reach these goals in the form of special education and related services. NCLB, on the other hand, promotes a *minimal achievement* view of equal educational opportunity because it requires, through testing, AYP calculations, and consequences for schools, a common level of academic proficiency for all students. Courts examining the level of educational benefit schools are required to provide to students under IDEA have used the *Rowley* case as a guide. This standard is in essence the law's operational definition of equal educational opportunity. Although *Rowley* obligated schools to develop students' IEPs in a manner that consists of goals and services that are reasonably calculated to confer schools to provide *some educational benefit* to students, which is measured by the student receiving passing marks and advancing grade to grade, courts in six federal circuits have adopted a higher *meaningful benefit* standard, which is judged in relation to the child's potential. Many special education advocates have argued that this or some form of a higher benefit standard be adopted nationally.

In light of this conversation, special education advocates' tepid response to NCLB, with its arguably higher *minimal achievement* view of equal educational opportunity, was surprising.

The essay concludes by highlighting the benefits of IDEA, with its *level the playing field* goal of providing students with disabilities an opportunity to receive an educational benefit that is closer to that available to their non-disabled peers than they would receive without its special education and related services. Fundamentally the consideration of the child's unique needs in the IEP development process and the specialized services offered through it are valuable mechanisms to assist students in meeting their educational goals. Thus, special education advocates desire to keep IDEA's structure, promises, and services, and work to enhance the educational opportunity for students with disabilities in the framework of its free appropriate public education promise as interpreted by *Rowley* rather than trade this for NCLB's blanket and perhaps unreachable promise of a minimum level of achievement for all.

Chapter 1 – Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability[1]

1.1 – Introduction

Headlines during the past two decades have read that courts have struck down their state's school finance systems as unconstitutionally inadequate. In fact, twenty-one out of the twenty-six states in which courts have considered adequacy claims have had rulings that were favorable to adequacy plaintiffs.[2] In these rulings, states have been directed by the courts to redesign their school finance systems, fix outdated facilities, and introduce new programs and curriculum. As a consequence of the significant actions being taken in various states, adequacy has a ubiquitous presence in the educational policy arena. In spite of all of the discussion and action, it is not always clear what courts envision as "adequate" when they strike down a state's educational system for not meeting that constitutional standard.

The meaning of the term educational "adequacy" is ambiguous because, like many other legal theories, it has been built in a piecemeal fashion from the numerous state court decisions around the country that have found their state's educational system to be insufficient to meet its constitutional duty in some respect. This ambiguity is situated in various aspects of the decisions. First, since the adequacy decisions are made at the state level, every one is unique to the state in which it is made. Each individual state's education clause, education funding system, legal and political history, and the

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1 This article has been published. *See* 2007 BYU EDUC. & L.J. 281.

2 The definition of adequacy cases used in this article include only those where the court relied upon its state constitution's education clause to find some aspect of its educational system unconstitutional. There are a few cases that meet this definition that have not been included in this article because they were either decided at the trial level or are currently pending and were therefore too difficult to obtain. See Appendix 1.1 for a list of included cases. *See also* National Access Network, http://www.schoolfunding.info/index.php3 (listing funding litigation history for all states in the nation).

role the various branches of state government play in the decision making process impact the definition of adequacy. Second, plaintiffs in adequacy lawsuits bring different combinations of causes of actions, arguments, supporting evidence, and requests for relief in their individual cases. Third, the deciding courts utilize different underlying approaches, understandings, and language to define what type of education their state constitution requires.

Despite these differences, commonalities in approaches to defining "adequacy" can be identified. For instance, the underlying concepts, elements, and goals of "adequacy" can be delineated. In this sense, adequacy is commonly defined as a level of resources or inputs that is sufficient to meet defined or absolute, rather than relative, output standards, such as a minimum passing score on a state achievement test.[3] It is an outcome-oriented strategy. The adequacy approach emphasizes the quality of education itself and asks what inputs are needed to attain a desired level of achievement.[4] In addition, the features that distinguish it from other finance concepts, particularly equity, can be explained. In this sense, school finance experts recognize adequacy's focus on educational outputs in absolute levels of achievement rather than the relative distribution of educational inputs[5] and lawyers classify arguments as either "adequacy" if they are based on state education clauses or "equity" if they are based on equal protection clauses.

At their core, adequacy lawsuits are designed to garner increased educational funding to enhance the education offered within a state, typically with a focus on the poorer school districts. Yet in their broadest sense, adequacy cases go beyond this basic

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3 EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 23 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999) [hereinafter EQUITY AND ADEQUACY].
4 Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 583 (2004).
5 EQUITY AND ADEQUACY, *supra* note 3.

finance purpose and reformulate a state's responsibility for and treatment of its public educational establishment, encompassing the finances, goals, and accountability for the outcomes of education.

This article addresses the complexity of educational adequacy by examining the various definitions of "adequacy" used by the courts. Since definitions are important in law, other law and education finance commentators have examined the issue of the definition of adequacy from different perspectives.[6] This article extends the work done in these previous articles by outlining the full reach of adequacy as including a state's educational finance system, educational goals, and accountability mechanism. It also provides a deeper look into the detail from the various state court decisions about the

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6 Josh Kagan identified five types of adequacy definitions or approaches the courts have employed to determine whether a state's educational system is constitutionally adequate. They include the following: (1) relying on "existing standards and established output measurements"; (2) "future legislative definition"; (3) "a laundry list of outputs" the state must produce; (4) a series of educational inputs to ensure an adequate opportunity to learn; and (5) a list of educational inputs and outputs. Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2249-57 (2003).

James Liebman and Charles Sabel examined the definitions of adequacy through the lens of the remedies imposed by the courts and found that courts take one of three possible approaches to creating workable definitions of adequacy and measures of progress in achieving it. They either (1) "extract standards specifying very general goals for the states' schools from expert accounts of well-functioning schools" (it may then fall to the legislature to translate these goals into a workable plan for educational reform); (2) "select one or more detailed models of successfully reformed schools" (school districts found to be violating their constitutional obligations then are required to choose a model or an unlisted alternative that delivers superior results); or (3) issue "a sibylline rejection of solutions that do not meet its adequacy standard, while remaining silent as to the specifics of that standard or how to comply with it." 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, 205-06 (2003).

Deborah Verstegen examined the school finance court decisions to determine what factors contributed to the success of the lawsuits. She identified a bifurcated theory of adequacy based on the definition of the state educational goals articulated by the courts. When the lawsuits were unsuccessful, the courts "invoke[d] an age-old minimalist standard of adequacy set down in the 1920s" that says because all students have access to a minimum, basic education, the system of funding is not unconstitutional despite disparities in quality of education and financing.. When the adequacy lawsuits were successful, the educational responsibilities of the state were defined more broadly "in the context of the information age and a global economy" that equips children to function in this environment. Deborah A. Verstegen, *The Law of Financing Education: Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499, 507-09 (2004).

underlying definitional components in the areas of the relevant constitutional provisions, school finance language, educational opportunity guarantees, and educational goals.

The analysis begins in Section 1.2 with a brief history of the school finance movement. Section 1.3 explores the adequacy lawsuits by examining their constitutional underpinnings, the resulting state duties towards public education, and the evidence of inadequacy observed. Section 1.4 surveys the three components of adequacy articulated by the courts with respect to funding, educational attainment goals, and accountability features. Section 1.4.1 identifies the common characteristics of adequacy as they relate to sufficiency of funding to provide a high minimum quality education and the required educational opportunity offered to all students. Section 1.4.2 discusses the educational goals of training the future citizens, workers, and participants in our country's political system. Section 1.4.3 investigates the required accountability for meeting the educational goals.

The article concludes in section 1.5 with finding that although the adequacy lawsuits can be broadly conceived as encompassing the three components of educational funding, goals, and accountability, it is the requirement that a state government provide sufficient funding for a basic quality education that dominates the court decisions. This funding requirement can be classified, in most states, as promoting a baseline level of funding that can be supplemented, either to provide additional financial assistance to schools that have higher educational costs or as a supplement that local residents are permitted to supply to their district. The educational goals portions of the decisions reflect the breadth of the goals Americans desire for our educational system to pursue, and can be broadly conceived as encompassing intellectual, career, and political pursuits.

Although courts have outlined broad educational goals, holding the state accountable for achieving them through a formal accountability system is not a common component of the adequacy decisions. Despite this fact, the importance of more carefully defining and achieving the goals of our educational system is likely to grow with the national push towards more standards and accountability in education.

1.2 – Summary of the History of School Finance Litigation

Educational adequacy is a legal theory that calls for the provision of a high-minimum quality education to all of the students in a state. Most scholars mark its beginning with the 1989 state court decisions in Kentucky, Texas, and Montana that declared their educational finance systems inadequate and unconstitutional based on their state education clauses.[7]

The decisions in Kentucky, Texas, and Montana served as a break from previous school finance litigation that had already undergone two different waves wherein the challenges to the state educational systems were based on legal theories of equity. Wave one, which spanned the years of the late 1960s until the 1973 Supreme Court decision in *San Antonio Independent School District v. Rodriguez*,[8] was characterized by federal equal protection challenges to the state education systems.[9] These equality or equity suits were concerned about the vast financial resource differences between high-property-wealth and low-property-wealth districts and argued that all children were entitled to have the same amount of money spent on their education ("horizontal equity").[10] The

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7 EQUITY AND ADEQUACY, *supra* note 3, at 56.
8 411 U.S. 1 (1973).
9 *See* William E. Thro, *Issues in Education and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 600-01 (1994); Joseph S. Patt, *School Finance Battles: Survey Says? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 557-59 (Summer, 1999); EQUITY AND ADEQUACY, *supra* note 3, at 35-41.
10 EQUITY AND ADEQUACY, *supra* note 3, at 18-20.

U.S. Supreme Court in *Rodriguez*, effectively ended this line of argument when it upheld the Texas educational finance system against a federal equal protection clause challenge, saying that students living in poor property-wealth school districts were not an identifiable class of suspect persons and that education is not a fundamental right under the U.S. Constitution.[11]

After *Rodriguez* foreclosed the federal avenue, the challenges to the constitutionality of state education finance systems shifted to the state courts and the individual states' constitutional provisions.[12] Prominent from 1973 to 1989, the plaintiffs in wave two cases reasoned that education was a fundamental right under the state education clause, so any governmental interference must be examined under the strict scrutiny analysis of the state equal protection clause. They highlighted the inequitable method for funding public schools that made the amount of resources available to local school districts dependent upon the property wealth located in that district. Plaintiffs sought to eliminate this spending gap between high-wealth and low-wealth districts, relying on the horizontal equity concept of equal revenues for every district or on a vertical equity notion that all districts should have equality of educational opportunity in the sense that students in districts with higher needs should have more money spent on their education than those with lesser educational needs ("vertical equity").[13] A few plaintiffs also contended that the state's education clause required access to educational

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11 *Rodriguez*, 411 U.S. at 28, 35.
12Thro, *supra* note 9, at 601-03; Patt, *supra* note 9, at 559-61; EQUITY AND ADEQUACY, *supra* note 3, at 41-55.
13 EQUITY AND ADEQUACY, *supra* note 3, at 20-21.

opportunities.[14] These cases were the precursors to the adequacy movement as we see it today.[15]

In the adequacy lawsuits of wave three, plaintiffs have argued that: (1) their state education clause requires that a specific substantive level of education, which is defined by state standards or goals, be provided to all students within the state; (2) this quality of education is not currently being supplied; and that therefore, (3) the state has violated its constitutional duty with respect to education as embodied in its education clause and (4) the court should impose a remedy.[16] This focus on funding to meet specific educational outcomes or standards is a significant shift from the horizontal and vertical equity arguments from the previous two waves of litigation which focused on the relative amounts of funding among groups of students or districts within the state.

Under adequacy arguments, when state finance systems have been found unconstitutionally inadequate for not providing the required substantive level of education to the students in the state, the courts have ordered states to reconstitute them and to provide to the school districts the amount of money needed to offer a constitutionally adequate education for all of their students. In certain states, this may require the retooling of the whole educational system including its finance, goals, and accountability measures. This process has proven to be difficult to implement as demonstrated by protracted litigation in states such as New Hampshire, New Jersey, New York, Ohio, and Texas.[17]

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14 Robinson v. Cahill, 303 A.2d 273 (N.J. 1973); Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979).
15 Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 ARK. L. REV. 107, 111 (2004).
16Thro, *supra* note 9, at 602-04; Patt, *supra* note 9, at 561; EQUITY AND ADEQUACY, *supra* note 3, at 56-62.
17 See Appendix 1.1 for list of cases.

Most commentary has acknowledged 1989 as the beginning of the adequacy movement, and identified an adequacy lawsuit, at least initially, by the plaintiffs' exclusive focus on a state's education clause violation without an accompanying equal protection argument. However, plaintiffs, both before and after this date, have brought equal protection claims in addition to their education clause claims in their educational finance lawsuits. Therefore, this article considers a court decision an adequacy case if (1) the plaintiffs argued a state duty to provide an adequate education under the education clause of the state constitution, (2) the court agreed that there was a duty, and (3) the court found a possible or actual violation of that duty. Thus, the adequacy cases discussed here include a few decisions before 1989 and some after that date that might not traditionally be considered adequacy cases but that do include the basic educational theory promoted by the adequacy movement. [18]

1.3 – The Courts' Conceptions of Adequacy

Adequacy lawsuits are a response in general to the wide differences in the quality of education that is provided to students throughout a given state and in particular to the poor quality education that certain students receive. Because education is at least partly funded through local sources in most states,[19] children who reside in districts with a lower ability to raise education revenues receive a lower quality of education than children living in other districts that are able to raise more funds to devote to education.[20]

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18 These cases include decisions from Alabama, Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Texas, Washington, West Virginia, and Wyoming. See Appendix 1.1 for a list of cases.

19 MAKING MONEY MATTER: FINANCING AMERICA'S SCHOOLS 53 (Helen F. Ladd & Janet S. Hansen eds., 1999).

20 *See e.g.*, McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); *see also* Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 690 (Mont. 1989) (discussing the conclusion that spending disparities between school districts means unequal educational opportunities).

These districts, adequacy proponents contend, are not financially able to provide students with an adequate education. Adequacy proponents desire to enforce the state's responsibility to offer a basic quality education to all students regardless of where they reside within the state.

The foundation of the educational adequacy argument is the idea that the individual state constitutions require the state government to establish, maintain, and sufficiently fund a quality public education system so that students can meet specific educational outcomes or standards. This duty is a constitutional priority that must be fulfilled by the state and cannot be subject to local differences that undermine the quality of the education provided. After a court identifies that a duty to educate exists, it must define the state's responsibilities under this duty. This is often done in reference to educational standards or goals that are created either by the court, the state legislature, or the state education agency. Once these obligations are articulated, the court must determine whether they are being fulfilled. At this stage, evidence of the condition of the state's school buildings, the quality of its staff, and the state of its educational programs is considered. If the education provided is insufficient to attain the state's standards and goals, the court finds a constitutional violation and orders the state to improve its educational programs in order to perform its responsibility to educate its youth.

1.3.1 – The State Constitutional Duty to Provide a Public Education

In an adequacy lawsuit, the court is asked to interpret its state constitution's education clause to identify and enforce the state's duty to establish and maintain its public education system at the constitutionally required level of financial and academic sufficiency. Almost every state constitution requires its government to institute and

sustain a system of public schools.[21] Yet each state constitution is unique, so the specific language used to create and describe the government's obligation for public education must be examined in light of the state's legal and political history to determine whether a duty exists for the state to provide an education to its populace and, if so, what this duty entails.

The adequacy courts begin their analysis by examining the basic pronouncements on public schooling in their respective state constitutions to determine the components of the state's duty. At their most basic level, the state constitutions require that the government "establish and maintain" a public education system. Beyond the provision of and support for public education, adequacy courts must identify the level of quality that this system must exhibit.

To identify a level of quality, most courts rely on the constitutional language that describes the schools the state must furnish. Initial legal scholars on this topic suggested that this descriptive or "quality" component of the state's education clause could be used as a predictor to determine whether an adequacy lawsuit was likely to succeed because

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21Required: ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 6(b); KY. CONST. § 183; LA. CONST. art. VIII, § 13(B); ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, §§ 1-2; MINN. CONST. art. Art. XIII, § 1; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1-2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § IV, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, §§ 1-4; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. ANN. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, §12; TEX. CONST. art. VII § 1; UTAH CONST. art. X, § 1; VT. CONST. § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1-2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. I, §23 and art. VII, § 1.
Legislature may support: ALA. CONST. art. XIV, § 256; MISS. CONST. art. VIII, § 201; W. VA. CONST. art. XII, § 1.
Education responsibility not included in the constitution: Iowa.

the language could be organized into categories according to its strength.[22] Yet, not all states have quality language in addition to the "establish and maintain" clause, and no correlation has been shown between the purported quality language in the constitution and the likelihood of success in an adequacy lawsuit. In practice, adequacy lawsuits have been successful across the quality spectrum. The constitutional language in the successful adequacy cases range from a state whose education clause mandates only that a public school system be "established and maintained"[23] to two states in which the interests of education must be "cherished".[24]

The wide range of language used in state constitutions to describe the state's duty with respect to education is represented below. The constitutional language in the successful adequacy lawsuits describes either the quality of the educational system to be provided or the system's purpose as follows:

- free – *New York, South Carolina,*[25]
- liberal – *Alabama,*[26]
- uniform – *New Mexico, North Dakota,*[27]
- general and uniform – *Arizona, Minnesota, North Carolina, Oregon, South Dakota Washington,*[28]

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22 William Thro has categorized the state education clauses language into three different groups that reflect the quality requirement contained within. At the low end of the spectrum are the "establishment provisions" that require the state to maintain a system of public schools. In the middle are the "quality provisions" that include a quality qualifier for the educational system. At the high end of the spectrum are the "high duty provisions" that make education a priority among other government services. Thro, *supra* note 9, at 539-40 (referring generally to classifications used by Erica B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R. –C.L. L. REV. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16, n.143-46 (1985)).

23 ALASKA CONST. art. VII, § 1.

24 MASS. CONST. pt. 2, ch. V, § 2. art. III; N.H. CONST. pt. 2, art. 83.

25 N.Y. CONST. art. XI, § 1; S.C. CONST. ANN. art. XI, § 3.

26 ALA. CONST. art. XIV, § 256. (The current version of this constitutional section no longer includes this language.)

27 N.M. CONST. art. XII, § 1; N.D. CONST. art. VIII, § 2..

- complete and uniform – *Wyoming*,[29]
- general, uniform, and thorough – *Idaho*,[30]
- as nearly uniform as practicable – *Wisconsin*,[31]
- efficient – *Texas, Kentucky*,[32]
- general, suitable and efficient – *Arkansas*,[33] and
- thorough and efficient – *Maryland, New Jersey, Ohio, West Virginia, Wyoming*.[34]
- guarantee equality of educational opportunity to all – *Montana*,[35]
- make suitable provision for the finance of the educational interests – *Kansas*,[36] and
- cherish the interests of literature and the sciences – *Massachusetts, New Hampshire*.[37]

No clear pattern emerges from examining these provisions. The adequacy courts have found a basic quality requirement that was not being met even when the state is only required to provide a free or no cost education,[38] an efficient education,[39] and when it must cherish the interests of literature and the sciences.[40] In essence these courts have

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28 ARIZ. CONST. art. XI, § 1; MINN. CONST. art. XIII, § 1; N.C. CONST. art. IX, § 2(1); OR. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2.
29 WYO. CONST. art. VII, § 1.
30 IDAHO CONST. art. IX, § 1.
31 WIS. CONST. art. X, § 3.
32 KY. CONST. § 183; TEX. CONST. art. VII § 1.
33 ARK. CONST. art. XIV, § 1.
34 MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § IV, ¶ 1; OHIO CONST. art. VI, § 2; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 9.
35 MONT. CONST. art. X, § 1(1).
36 KAN. CONST. art. VI, § 6(b).
37 MASS. CONST. pt. 2, ch. V, § 2; N.H. CONST. pt. 2, art. 83.
38 *See e.g.* Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999).
39 *See e.g.* Rose v. Council for Better Educ., 790 S.W.2d 186, 215 (Ky. 1989).
40 *See e.g.* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 553-54 (Mass. 1993).

held that whenever a state is required to establish and maintain a public education system, regardless of the particular language used to describe it, it must meet basic quality standards.

In the unsuccessful adequacy lawsuits, the specific language of the state education clauses has not been determinative of their outcome. Instead, the courts have focused on separation of powers issues and rejected the adequacy proponents' request for the court to define what constitutes an adequate education or adequate funding because, in the courts' view, this determination is a responsibility of the state legislature.[41] The courts that have declined to pass judgment on their state educational system on adequacy grounds have had constitutional language that is very similar to that of the adequacy courts. These states have education clauses that require the government to do the following:

- make adequate provision for a uniform system of public schools – *Florida*,[42]
- provide an efficient system of high quality public educational institutions and services - *Illinois*,[43]
- provide a minimum foundation of education in all public elementary and secondary schools - *Louisiana*,[44]
- provide for a thorough and efficient system of public education - *Pennsylvania*,[45] and

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41 Coal. for Adequacy and Fairness v. Chiles, 680 So. 2d 400, 407-8 (Fla. 1996); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996); Charlet v. Louisiana, 713 So. 2d 1199, 1206 (La. 1998); Marerro v. Pennsylvania, 709 A.2d 956, 965-66 (Pa. 1997); City of Pawtucket v. Sundlun, 662 A.2d 40, 57-59 (R.I. 1995).

42FLA. CONST. art. IX, § 1. *See Coalition for Adequacy*, 680 So. 2d at 405. Since this decision the Florida Constitution has been revised to include even stronger language regarding the State's responsibility for education.

43 ILL. CONST. art. X, § 1. *Edgar*, 672 N.E.2d at 1183.

44 LA. CONST. art. VIII, § 13B. *Charlet*, 713 So. 2d at 1203.

45 PA. CONST. art. III, § 14. *Marerro*, 709 A.2d 956, 958.

- secure to the people the advantages and opportunities of education - *Rhode Island.*[46]

There is no appreciable difference in these underlying constitutional provisions from those interpreted by the courts in which adequacy lawsuits were successful. In fact, the constitutional language to support the argument for providing a quality education seems stronger in these states than in many of those where adequacy lawsuits have been unsuccessful. But these courts have avoided a determination of quality by focusing on the separation of powers issue.

In sum, numerous courts have found a duty to provide an adequate education to the children of their state based on the education provisions in their state constitutions. This duty has been established across the spectrum of the strength of the quality language that describes the state's responsibility toward public schooling. Yet a few state courts have declined to step into the educational adequacy arena, perceiving it as an interference with the state legislature's role to provide for public education in the state.

1.3.2. – Evidence of an Inadequate Education

Plaintiffs have brought lawsuits that highlight the inadequacies in the current systems by detailing problems with the objects of education: the resources/inputs available in the schools and/or the results/outputs of education. The financial inputs of education are the items that figured prominently in the previous equity lawsuits of the first and second waves. Adequacy cases are sometimes characterized by their reliance on an output rather than input analysis as a basis for finding inadequacy of educational effort. The concept of adequacy, as one that strives to provide a high minimum quality of education to all students, would seem to naturally focus the inquiry into the sufficiency of

46 R.I. CONST. art. XII, § 1. *Sundlun*, 662 A.2d at 49-50.

the state's educational effort by examining the accomplishments of its students — the most frequently used output measure. Yet the adequacy courts have continued to place a heavy emphasis on educational input measures.

The quality of education supplied though these inputs and outputs is contrasted with a statement of what students should learn through their education, the education provided by other, usually wealthier, districts in the state, and/or with surrounding states that supply their students with quality facilities, staff, equipment, supplies, and course offerings. If the quality of the inputs and outputs within the districts in question are significantly lower than that in the comparison set, an inadequate education is being provided.

On the input side, courts have found insufficient numbers of trained teachers,[47] large class size and high student-teacher ratios,[48] shortages of school staff,[49] inadequate educational supplies,[50] scarce equipment,[51] limited course offerings,[52] inadequate curricula or teaching of basic subjects,[53] school buildings that are overcrowded, in

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47*See, e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 489 (Ark. 2002); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 553 (Mass. 1993); Campaign for Fiscal Equity v. New York (*Campaign III*), 801 N.E.2d 326, 333 (N.Y. 2003); DeRolph v. Ohio (*DeRolph I*), 677 N.E.2d 733, 745 (Ohio 1997).

48 Opinion of the Justices No. 338, 624 So. 2d 107, 133 (Ala. 1993) (quoting from lower court decision, which is included as an appendix to this opinion); Rose v. Council for Better Educ., 790 S.W.2d 186, 197 (Ky. 1989); *McDuffy*, 615 N.E.2d at 553; *Campaign III*, 801 N.E.2d at 335; *DeRolph I*, 677 N.E.2d at 744; Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1253 (Wyo. 1995).

49 *Opinion*, 624 So. 2d at 133; *DeRolph I* , 677 N.E.2d at 761(Douglas, J. concurring).

50*See, e.g., Opinion* 624 So. 2d at 131-32; *Lake View* 91 S.W.3d at 489-490; Campaign for Fiscal Equity v. New York (*Campaign II*), 719 N.Y.S.2d 475, 513 (App. Div. 2001); *DeRolph I*, 677 N.E.2d at 744.

51*Opinion*, 624 So. 2d at 134; *Lake View* 91 S.W.3d at 489-490; *Campaign II*, 719 N.Y.S.2d at 514; *DeRolph I*, 677 N.E.2d at 742.

52 *See, e.g.*, *Opinion*, 624 So. 2d at 131-132; *Lake View*, 91 S.W.3d at 490; *Rose*, 790 S.W.2d at 197; *McDuffy*, 615 N.E.2d at 553; *Campaign II*, 719 N.Y.S.2d at 500-501 (discussing the defunding of art and physical education and the important role these courses play in "supporting a sound basic education").

53 *Opinion*, 624 So. 2d at 121-22; *see also* Kasayulie v. Alaska, NO. 3AN-97-3782 CIV (Alaska Super. Ct. 1999); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 808 (Ariz. 1994); *McDuffy*, 615 N.E.2d at 553.

disrepair, or lack basic necessary components,[54] schools that do not meet accreditation standards,[55] disparities in amounts of money spent per students among different districts within the state,[56] disproportionate tax burdens among districts within the state,[57] and significantly lower amounts spent on education than in other states[58] to be relevant in their inquiry.

In fact, the Ohio Supreme Court based its 1997 adequacy decision on overwhelming evidence of insufficient educational inputs, saying that "many districts are 'starved for funds,' and lack teachers, buildings, or equipment. These school districts, plagued with deteriorating buildings, insufficient supplies, inadequate curricula and technology, and large student-teacher ratios, desperately lack the resources necessary to provide students with a minimally adequate education."[59]

Output measures that have been used by the courts as a basis for finding the quality of the education provided inadequate include low standardized test scores,[60] high

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54 *See* Columbia Falls Sch. Dist. No. 6 v. Montana, 109 P.3d 257, 263 (Mont. 2005); *Campaign II*, 719 N.Y.S.2d at 500-508; *DeRolph I*, 677 N.E.2d at 742; Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1255 (Wyo. 1995).

55 *Opinion*, 624 So. 2d at 127-128.

56 *Id.* at 116; *Rose*, 790 S.W.2d at 199; *McDuffy*, 615 N.E.2d at 552; Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 686 (Mont. 1989); Abbott v. Burke, 575 A.2d 359, 374 (N.J. 1990); Hoke County Bd. of Educ. v. North Carolina, 599 S.E.2d 365, 373 (N.C. 2004); *DeRolph I*, 677 N.E.2d at 758-59; Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 392 (Tex. 1989).

57 Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1356 (N.H. 1997); *DeRolph I, 677 N.E.2d at 745-746; Edgewood I*, 777 S.W.2d at 393.

58 *Opinion*, 624 So. 2d at 138; Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 488 (Ark. 2002).

59 *DeRolph I*, 677 N.E.2d at 745.

60 *See, e.g.*, *Lake View*, 91 S.W.3d at 488-89; *Rose*, 790 S.W.2d at 197; Bradford v. Md. State Bd. of Educ., Case No. 95258055/CL20251¶¶ 101-105 (Baltimore City Cir. Ct., Aug. 20, 2004) (stating that Baltimore City student performance is not up to par with state requirements, or state averages, "at every grade level and on every test"); *Hoke*, 599 S.E.2d at 383; Campaign for Fiscal Equity v. New York (*Campaign III*), 801 N.E.2d 326, 339-340 (N.Y. 2003); *But see* Columbia Falls v. Montana, 109 P.3d 257, 263 (Mont. 2005) (holding that good student performance on standardized achievement tests are not the only measurement of a quality education system).

drop out rates among high school students,[61] low graduation rates,[62] high college remediation rates,[63] and insufficient preparation for the workforce.[64]

For example, North Carolina's Supreme Court in a 2004 decision found that "an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their [academic] performance..., their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks,"[65] constituted a "clear showing that they have failed to obtain a Leandro-comporting education."[66]

Thus, courts have considered the quality of both the outcomes of education such as student test scores and graduation rates along with the more traditional concern for the inputs of education that include money, supplies, equipment, curricula, buildings, and staff when making their determinations about the suitability of the state's educational efforts.

1.4 – The Components of an Adequate Educational System

The three components of educational adequacy that have been addressed by the courts are funding, goals, and accountability. The intent of the proponents of the adequacy lawsuits is to find the current level of state funding for education and the quality of education provided constitutionally insufficient. To do this, many courts have

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61 *Opinion* 624 So. 2d at 136-37; *Bradford*, Case No. 95258055/CL20251 at ¶¶ 113-114; *Hoke*, 599 S.E.2d at 384.
62 *Lake View*, 91 S.W.3d at 488; *Bradford*, Case No. 95258055/CL20251 at ¶ 115; *Hoke*, 599 S.E.2d at 384 *Campaign III*, 801 N.E.2d at 336-37.
63 *Opinion*, 624 So. 2d at 137; *Lake View* , 91 S.W.3d at 488; *Hoke*, 599 S.E.2d at 385.
64 *Hoke*, 599 S.E.2d at 384.
65 *Id.* at 386.
66 *Id. Leandro* is the previous North Carolina court decision that found the educational system to be inadequate. *See* Leandro v. North Carolina, 488 S.E.2d 249 (N.C. 1997).

defined the goals of a constitutionally adequate education, (i.e. the qualities, skills, and characteristics a child would need to effectively function in society today), as a way of measuring the sufficiency of the funding and the educational program. In addition, a few courts have acknowledged that just having funding and standards are not enough to guarantee the desired results; a system to hold schools accountable for accomplishing the learning is also needed.[67]

1.4.1 – Funding

At the core of the adequacy lawsuits is their challenge to the existing state school finance systems. A foundational principle in adequacy cases is that there is a causal link between the amount of money spent on education and the educational opportunity offered to the students. One court noted, "[I]ncreased educational resources, if properly deployed, can have a significant and lasting effect on student performance."[68]

The adequacy decisions clarify the states' responsibility for funding their public school systems. They declare that it is a state, not a local, duty to adequately fund the schools in light of the state constitution's requirement that its government establish and maintain the public education system.[69] Because of the constitutional stature of the duty to educate, a few courts have declared it to be the state's first funding priority over the

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67 Claremont Sch. Dist. v. Governor (*Claremont IV*), 794 A.2d 744, 751 (N.H. 2002).

68 Campaign for Fiscal Equity v. New York (*Campaign II*), 719 N.Y.S.2d 475, 525 (App. Div. 2001); *see also Opinion*, 624 So. 2d at 140-41; *Lake View*, 91 S.W.3d at 498; Rose v. Council for Better Educ., 790 S.W.2d 186, 198 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993); Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990); ("Money can make a difference if effectively used, it can provide students with an equal educational opportunity, a chance to succeed."); *cf.* Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 393 (Tex. 1989) ("The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity offered that student.").

69 *See Opinion*, 624 So. 2d at 146; Lake View v. Huckabee, No. 1992-5318, #49 (Ark. Ch. Ct., May 25, 2001); Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 813 (Ariz. 1994); *Rose*, 790 S.W.2d at 205; *McDuffy*, 615 N.E.2d at 548; Claremont School District v. Governor (*Claremont II*), 703 A.2d 1353, 1356 (N.H. 1997); DeRolph v. Ohio (*DeRolph I*), 677 N.E.2d 733, 745 (Ohio 1997).

provision of all other government services.[70] In addition, some courts have held education funding cannot be reliant on local capacity to fund.[71] The revenue sources must be dependable, not derived from discretionary levies or taxes that voters can choose not to enact. [72] A number of states do allow for local revenues to be part of the basic funding for an adequate education,[73] but their reliance on local funding sources cannot be the cause of the disparities among districts in the state[74] or be based on unreasonable and inequitable tax burdens.[75]

At its essence, educational adequacy requires that each district within the state have enough money to offer its students a basic quality education. This is an absolute level of sufficiency rather than a relative standard like that traditionally associated with the educational finance equity cases of the past, which centered on comparing spending across districts. The level of funding provided by the state must be enough in every district to afford the substantive level of education that is mandated by the state constitution.[76] To establish this standard, the courts have called for sufficient educational financial support to do the following:

- to provide an adequate education,[77]
- to meet the constitutional mandate,[78]

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70 *Rose*, 790 S.W.2d at 211; Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 91 (Wash. 1978); Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1279 (Wyo. 1995).
71 *See, e.g. Rose*, 790 S.W.2d at 211; *McDuffy*, 615 N.E.2d at 555 (Mass. 1993); *Campbell*, 907 P.2d at 1274; *DeRolph I*, 677 N.E.2d at 745, 747.
72 *Seattle*, 585 P.2d at 97.
73 *Claremont II*, 703 A.2d at 1360; Robinson v. Cahill, 303 A.2d 273, 292 (N.J. 1973); Leandro v. North Carolina, 488 S.E.2d 249, 256 (N.C. 1997); *Edgewood IV*, 917 S.W.2d at 730.
74 *Lake View* No. 1992-5318; *Roosevelt*, 877 P.2d at 815; DeRolph v. Ohio (*DeRolph II*), 728 N.E.2d 993, 1013 (Ohio 2000).
75 *Claremont II*, 703 A.2d at 1360.
76 *See* Opinion of the Justices No. 338, 624 So. 2d 107, 165-66 (Ala. 1993); *see generally* Pinto v. Ala. Coal. for Equity, 662 So. 2d 894 (Ala. 1995); Montoy v. Kansas, 102 P.3d 1160, 1164 (Kan. 2005); *Rose*, 790 S.W.2d at 213; Abbott v Burke, 575 A.2d 359, 368 (N.J. 1990); Campaign for Fiscal Equity v. New York (*Campaign I*), 655 N.E.2d 661, 667 (N.Y. 1995); *Edgewood IV*, 917 S.W.2d 717, 730-731.
77 *Rose*, 790 S.W.2d at 213.

- to provide basic education,[79]
- to provide equal access to a sound basic education,[80]
- to offer "the opportunity for a sound basic education" in every school,[81] and
- to ensure enough money so that students have a chance to succeed because of the educational opportunity provided, not in spite of it.[82]

In this manner, adequacy requires the state governments to furnish the money for a basic quality education in all of the districts throughout the state.

The sufficiency of a state's school funding can be defined (1) by its provision of educational inputs as one in which "each and every school district in the state has an ample number of teachers, sound buildings ..., and equipment sufficient for all students to be afforded an educational opportunity,"[83] or (2) by the system's outputs as one in which the "amount of revenue per pupil enable[s] a student to acquire knowledge and skills necessary to participate productively in society ...."[84]

Adequacy requires the state to provide equality of educational opportunity to each student to achieve the constitutionally mandated level of education. It does not require strict horizontal equity so that each child within the state will have the same amount of money spent on his or her education.[85] Vertical equity funding disparities are allowed by several adequacy courts to compensate for differences in regional costs and student needs that translate into higher costs to supply the same quality of education throughout the

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78 McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 556 (Mass. 1993).
79 Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 95 (Wash. 1978).
80 Leandro v. North Carolina, 488 S.E.2d 249, 256 (N.C. 1997).
81 Campaign for Fiscal Equity v. New York (*Campaign III*), 801 N.E.2d 326, 348 (N.Y. 2003).
82 DeRolph v. Ohio (*DeRolph I*), 677 N.E.2d 733, 746 (Ohio 1997).
83 DeRolph v. Ohio (*DeRolph II*), 728 N.E.2d 993, 1001 (Ohio 2000).
84 Lake View Sch. Dist., No. 25 v. Huckabee, No. 1992-5318 # 47(Ark. Ch. Ct. May 25, 2001).
85 Roosevelt v. Bishop, 877 P.2d 806, 814 (Ariz. 1994); Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990); *DeRolph I*, 677 N.E.2d at 746; Edgewood Indep. Sch. Dist. v. Kirby (*Edgewood I*), 777 S.W.2d 391, 397 (Tex. 1989).

state. [86] Numerous courts also allow for local communities to supplement the basic quality education required by the state constitution to provide for a better-than-adequate education.[87] Even though these adjustments and supplements will result in unequal revenues across districts, the courts that allow them have found that they are consistent with the state's constitutional duties to provide its citizens with an adequate education.

Looking at the twenty-one adequacy court decisions represented in the table below,[88] a total of thirteen states[89] specifically allow for variance in funding among districts. Three of these provide for regional and student population cost differences,[90] five states permit localities to supplement state established minimum district funding levels,[91] and the remaining five states sanction both types of funding variations.[92]

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86 Opinion of the Justices No. 338, 624 So. 2d 107, ¶ 115 (Ala. 1993); Montoy v. Kansas (*Montoy I*), 102 P.3d 1160, 1164-1165 (Kan. 2005); Bradford v. Md. State Bd. of Educ., Case No. 95258055/CL20251 ¶ 38-39 (Baltimore City Cir. Ct. Aug. 20, 2004); Robinson v. Cahill, 303 A.2d 273, 297-98 (N.J. 1973); *Abbott*, 575 A.2d at 375; *see also* Campaign for Fiscal Equity v. New York *(Campaign II)*, 719 N.Y.S.2d 475, 517 (App. Div. 2001) (stating that while the State is required only to "provide the opportunity for a sound basic education," that opportunity "must be placed within reach of all students," and the State is not relieved of its constitutional obligations "when public school students present with socio-economic deficits"); *Campaign III*, 801 N.E.2d at 348; *Edgewood I*, 777 S.W.2d at 398; Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1278-79 (Wyo. 1995).

87 *Lake View*, No. 1992-5318 # 125; *Roosevelt*, 877 P.2d at 815; Montoy v. Kansas (*Montoy II*), 112 P.3d 923, 937 (Kan. 2005); Rose v. Council for Better Educ., 790 S.W.2d 186, 211-12 (Ky. 1989); Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1274 (Wyo. 1995); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1360 (N.H. 1997); *Robinson*, 303 A.2d at 298; Leandro v. North Carolina, 488 S.E.2d 249, 256 (N.C. 1997); *DeRolph I*, 677 N.E.2d at 746; *Edgewood I*, 777 S.W.2d at 398.

88 This table categorizes states based on a specific reference to the relevant issue within a court's decision. Other states may permit supplemental educational revenues or adjustments within the context of adequacy, but it is not specifically mentioned within a court decision.

89 Alabama, Arizona, Arkansas, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, North Carolina, Ohio, Texas, and Wyoming.

90 Alabama, Maryland, and New York.

91 Arkansas, Kentucky, New Hampshire, North Carolina, and Ohio.

92 Arizona, Kansas, New Jersey, Texas and Wyoming.

Table 1.1 – Funding Comparison

	Vertical Equity	Localities Can Supplement $
*Alabama	Yes	
*Alaska		
Arizona	Yes	Yes
*Arkansas		Yes
Idaho		
Kansas	Yes	Yes
Kentucky		Yes
Maryland	Yes	
Massachusetts		
Montana	No	
New Hampshire		Yes
New Jersey	Yes	Yes
New Mexico		
New York	Yes	
North Carolina		Yes
Ohio		Yes
South Carolina		
Texas	Yes	Yes
Washington		
*West Virginia		
*Wyoming	Yes	Yes

* Denotes Court decisions that are based in part on state equal protection clauses.[93]

To accomplish the funding of an adequate education, most states begin with an equalization of revenues concept, similar to that promoted by horizontal equity. Adequate educational funding promotes this revenue equalizing principle by:

- eliminating large disparities in funding – *Kentucky*,[94] *Montana*,[95] *New Jersey*,[96] & *Texas*,[97] or in educational offerings – *Kentucky*-[98] between richer and poorer school districts,

93 See Appendix 1.1 for case names.
94 Rose v. Council for Better Educ., 790 S.W.2d 186, 216 (Ky. 1989).
95 Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 690 (Mont. 1989).
96 Abbott v. Burke (*Abbott I*), 495 A.2d 376, 388 (N.J. 1985).
97 Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 397-398 (Tex. 1989).
98 *Rose*, 790 S.W.2d at 198; 213.

- providing substantially equal educational revenues to rich and poor districts – *New Jersey*[99] & *Texas*,[100]
- assuring comparable funding to every school district – *New Hampshire*,[101]
- funding in an equitable manner – *Montana*,[102] and
- distributing funds equitably and evenly – *Texas*,[103] and
- supplying "sufficient funds to educate children on substantially equal terms" – *Arizona*.[104]

Once a base level of funding is determined, courts in eight states provide for the adjustment of educational revenues to account for differences in the cost of educating students in specific regions or groupings.[105] The Kansas Supreme Court calls for a financing formula with equitable distribution relative to the actual costs of education.[106] Similarly, the Arkansas County Chancery Court explained that the dollar amount that is "adequate" is a function of many variables, including the purchasing power of a dollar in a given locality, characteristics of students and other factors such as population sparsity and school size.[107]

Finally, a total of ten adequacy courts allow for the supplementation of educational revenues by localities.[108] The Kansas Supreme Court explained that once the legislature has provided suitable funding for the state school system, there may be

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99 Abbott v. Burke (*Abbott II*), 575 A.2d 359, 408 (N.J. 1990).
100 *Edgewood*, 777 S.W.2d at 397.
101 Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1360 (N.H. 1997).
102 Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 690 (Mont. 1989).
103 *Edgewood*, 777 S.W.2d at 398.
104 Roosevelt v. Bishop, 877 P.2d 806, 814 (Ariz. 1994).
105 Alabama, Arizona, Kansas, Maryland, New Jersey, New York, Texas, and Wyoming.
106 Montoy v. Kansas (*Montoy III*), 112 P.3d 923, 937-39 (Kan. 2005).
107 Lake View Sch. Dist. No. 25 v. Huckabee, No. 1992-5318, 47 (Ark. Ch. Ct. May 25, 2001).
108 Arizona, Arkansas, Kansas, Kentucky, New Hampshire, New Jersey, North Carolina, Ohio, Texas and Wyoming.

nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education already provided.[109]

Adequacy can be characterized as requiring substantial equality of educational funding throughout the state at a level that permits a basic quality education to be supplied.[110] It generally does not obligate a state to supply equal amounts of financial resources to each district. Instead, it calls for a basic level of funding necessary to provide the required level of educational quality. This amount can be supplemented based on regional and student group cost differences and local revenue enhancement.

1.4.2 – The States' Teaching Responsibilities — Education Goals[111]

Courts that have been asked to consider adequacy challenges interpret their state constitutions' education clause to determine whether a duty to educate exists and what it entails. Of the states whose courts have addressed the issue, ultimately all of the courts have found a governmental obligation to educate the children within the state. The courts stipulate that children be given the following types of education:

- adequate education – *Arkansas*,[112] *Kansas*,[113] *Kentucky*,[114] *Maryland*,[115] *Massachusetts*,[116] *New Hampshire*,[117] *Ohio*,[118]

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109 *Montoy III*, 112 P.3d at 937.
110 But see Leandro v. North Carolina, 488 S.E.2d 249, 256-57 (N.C. 1997), in which the court rejects this particular wording when it calls for equal access to a sound basic education but not substantially equal funding or educational advantages in every district. This court allows for local supplementation and discusses the impracticality of attempting to equalize funding or educational advantages across the state.
111 This discussion is limited to the education goals created and adopted by the courts. Other educational goals that were developed by the state legislature or department of education are not included here.
112 Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002).
113 *See Montoy III*, 112 P.3d at 937.
114 Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989).
115 Bradford v. Md. State Bd. of Educ., Case No. 95258055/CL20251 ¶ 57 (Baltimore City Cir. Ct. Aug. 20, 2004).
116 McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 519 n.8 (Mass. 1993). In this case the court uses the term "adequate" but thinks it is redundant with the term "education."

- a minimally adequate education – *Alabama*,[119] *New York*,[120] *South Carolina*,[121]
- a basic education – *Washington*,[122]
- a sound basic education – *New York*,[123] *North Carolina*,[124]
- a quality education – *Alabama*,[125] *Montana*,[126] *Wyoming*,[127]
- a proper education – *Wyoming*,[128]
- a suitable education – *Kansas*,[129]
- a high quality education – *West Virginia*,[130] or
- a thorough and efficient education – *New Jersey*.[131]

Although the manner in which the required education is described differs, ultimately, all of the courts call for schools that meet educational standards and accomplish their educational goals. As one court explained, the state has a "duty to ensure that the public schools achieve their object and educate the people."[132]

The courts use similar language to describe the level of access to education required by the states' constitutions. The basic requirement is that the state must educate

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117 Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375, 1376 (N.H. 1993).
118 DeRolph v. State, (*DeRolph I*) 677 N.E.2d 733, 745 (Ohio 1997).
119 Opinion of the Justices No. 338, 624 So. 2d 107, 154 (Ala. 1993).
120 Campaign for Fiscal Equity v. New York (*Campaign II*), 719 N.Y.S.2d 475, 520 (App. Div. 2001).
121 Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999).
122 Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 95 (Wash. 1978).
123 Campaign for Fiscal Equity v. New York (*Campaign I*), 655 N.E.2d 661, 665 (N.Y. 1995).
124 Leandro v. North Carolina, 488 S.E.2d 249, 254 (NC 1997).
125 Opinion of the Justices No. 338, 624 So. 2d 107, 154 (Ala. 1993).
126 Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 689 (Mont. 1989).
127 Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1258 (Wyo. 1995).
128 *Id.* at 1259.
129 Montoy v. Kansas, 102 P.3d 1160, 1164 (Kan. 2005).
130 *See* Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).
131 New Jersey – all *Robinson* and *Abbott* decisions. See Appendix 1.1.
132 McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 526 (Mass. 1993).

all children[133] and that each child must have a chance to succeed because of the educational opportunity provided by the state, not in spite of it.[134] To describe the level of educational opportunity that the states need to offer, the courts stipulate that child be given:

- an opportunity – *New York*,[135] *North Carolina*,[136] *South Carolina*,[137]
- the same opportunity and access – *Kentucky*,[138]
- a substantially equal or equitable opportunity – *Alabama*,[139] or
- an equal opportunity – *Arkansas*,[140] *Kentucky*,[141] *Montana*,[142] *New Jersey*,[143] *Wyoming*.[144]

However the courts describe it, this opportunity is the right of all children to have access to an adequate education. It encompasses the basic components of education — including teachers,[145] curricula,[146] facilities,[147] and instruments of learning[148]— so that

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133 *Id.* at 553.
134 DeRolph v. Ohio (*DeRolph I*), 677 N.E.2d 733, 746 (Ohio 1997).
135 Campaign for Fiscal Equity v. New York, 655 N.E.2d 661, 666 (N.Y. 1995).
136 Leandro v. North Carolina, 488 S.E.2d 249, 255 (N.C. 1997).
137 *See* Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 541 (S.C. 1999).
138 Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989).
139 Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995).
140 Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 492 (Ark. 2002).
141 *Rose*, 790 S.W.2d at 212.
142 Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684, 689-90 (Mont. 1989).
143 *See* Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (holding that the state has an "obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education ...").
144 Campbell County Sch. Dist. v. Wyoming, 907 P.2d 1238, 1266 (Wyo. 1995).
This language is typically thought of in reference to the equal protection clause of the state constitutions. Alabama, Arkansas, West Virginia, and Wyoming are states in which the courts specifically found state equal protection clause violations in addition to an education article or adequacy violation. Therefore, it is not surprising that all of these states use a variation of the equal opportunity language to specify the type of access to education required. Montana's education clause specifically requires equal educational opportunity. The New Jersey plaintiffs brought an equal protection clause challenge, but the courts decided only on education clause grounds.
145 *Helena*, 769 P.2d at 691. Although the court chose not to address specific elements that constitute an "equal educational opportunity," it did name teachers as one of the "additional factors" that are a "significant part of the education of each person in Montana." *Id.* Campaign for Fiscal Equity v. New York (*Campaign I*), 655 N.E.2d 661, 666 (NY 1995).

children living in all areas of the state, regardless of the wealth of the communities within which they live or their own personal economic circumstances, are presented with the opportunity to acquire the essential competencies that equate to an adequate education[149] thereby allowing them to achieve basic educational equality with their more advantaged peers.[150]

Access to education does not mean, however, that each district will have equality in educational resources or financing. The North Carolina Supreme Court explained that although access to an adequate education must be provided equally in every school district, the constitution does not require substantially equal educational programs in all school districts. In some instances, the playing field must be leveled by providing poorer districts with more money. In others, the educational opportunities in a community will be supplemented beyond the level of an adequate education through voluntary local funding. Thus, the term "substantial equality" most accurately describes the level of educational opportunities required by the adequacy courts.[151] The substantial equality of opportunity is found in the state's provision of an adequate education within the reach of all students[152] within the state while inequality in the amount actually spent on the education and the supplemental programs offered may vary from district to district.

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146 Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 500 (Ark. 2002); *Campaign I*, 655 N.E.2d at 666.
147 *Lake View*, 91 S.W.3d at 500; *Campaign I*, 655 N.E.2d at 666.
148 *Lake View*, 91 S.W.3d at 500; *Campaign I*, 655 N.E.2d at 666.
149 Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995); Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989).
150 Abbott v. Burke, 575 A.2d 359, 403 (N.J. 1990).
151 But see Leandro v. North Carolina, 488 S.E.2d 249, 256-57 (N.C. 1997), that says you cannot call so much variation "substantial equality."
152 Campaign for Fiscal Equity v. New York (*Campaign II*), 719 N.Y.S.2d 475, 517 (App. Div. 2001).

1.4.2.1 – What this Duty Entails — Expectations for Student Performance

While it is clear that states have a duty to provide an education to their children, the parameters of what this education encompasses are not immediately obvious. The training of students through education may be understood in its totality as comprising:

> all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in the future. In its most extended signification it may be defined, in reference to man, to be the act of developing and cultivating the various physical, intellectual, aesthetic and moral faculties.[153]

Translating this broad definition into practice, the courts have identified three general roles that public education is intended to prepare students to perform in society. Schools should develop the intellectual, emotional, and moral capabilities of students as individuals, workers, and participants in our political system. As one court noted, "The State's constitutional duty ... embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas."[154]

1.4.2.1.1 – Role as citizens/individuals — Intellectual pursuits – Alabama, Kentucky, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Texas, Washington, and West Virginia

As one of its primary goals, education should prepare children to function as individual adults who possess a basic understanding of the world, who are capable and self-aware, and who interact with others in a complex and rapidly changing society.

153 Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 94 (Wash. 1978).
154 *Id.*

Many courts have indicated that a basic understanding of our complex society should be promoted in the public schools by teaching what has traditionally been seen as the academic subjects.[155] This includes a foundational knowledge of the fields of mathematics,[156] physical science,[157] and language arts.[158] It also encompasses an awareness of and ability to appreciate music,[159] visual art,[160] performance art,[161] and literature.[162]

In addition to this basic academic knowledge, some courts have directed the schools to educate the whole person, focusing not only their minds, but also their bodies and their emotions. Promoting knowledge of oneself[163] and understanding of one's physical and mental health[164] are important components to a child's education. In addition, every student should receive support and guidance so he or she feels a sense of self-worth, an ability to achieve, and is encouraged to live up to his or her full human potential.[165] Moreover, courts call for students to interact with others in society. To

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155 Of course these subjects are also important to train students who are participants in our government and economy.
156 Campaign for Fiscal Equity v. New York (*Campaign I*), 655 N.E.2d 661, 666 (N.Y. 1995); *Leandro*, 488 S.E.2d at 255; Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999).
157 *Leandro*, 488 S.E.2d at 255; *Abbeville*, 515 S.E.2d at 540.
158 *See Campaign I*, 655 N.E.2d at 666 (N.Y. 1995) ("Children are also entitled to ... reasonably up-to-date basic curricula such as reading, writing ... "); *Leandro*, 488 S.E.2d at 255; *see also Abbeville*, 515 S.E.2d at 540 (stating that the abilities of reading, writing, and speaking English should also be taught).
159 *See* Abbott v. Burke, 575 A.2d 359, 397 (N.J. 1990); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).
160Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); *Abbott*, 575 A.2d at 364; Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997); Campaign for Fiscal Equity v. NY (*Campaign II*), 719 N.Y.S.2d 475, 500 (App. Div. 2001); *Pauley*, 255 S.E.2d at 877 (W. Va. 1979).
161 *Campaign II*, 719 N.Y.S.2d at 500-01; *Pauley*, 255 S.E.2d at 877.
162 *Abbott*, 575 A.2d at 397; *Pauley*, 255 S.E.2d at 877.
163 Pinto v. Ala. Coal. for Equity, 662 So. 2d 894, 896 (Ala. 1995); *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; *Pauley*, 255 S.E.2d at 877.
164 *Pinto*, 662 So. 2d at 896; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 94 (Wash. 1978); *see also Pauley*, 255 S.E.2d at 877 (defining education as "the development of mind, body and social morality ... ").
165 *Pinto*, 662 So. 2d at 896.

facilitate compatibility with others, students should learn oral and written communications skills[166] and social ethics or morality.[167]

To this end, courts envision future adult citizens who are equipped to fully participate in the life of their community and society.[168] With their academic foundation, self-knowledge, and interactive skills, these adults will be able to inquire, study, evaluate, and gain maturity and understanding,[169] to function at the state, national and international levels,[170] to appreciate their cultural and historical heritage,[171] and the cultural heritage of others,[172] to share their ideas with others,[173] and to exercise their First Amendment freedoms.[174] They will also be capable of monitoring and contributing to their own physical and mental well-being.[175] If successful, the state will have cultivated the intellectual, aesthetic, and moral faculties of each individual child.[176]

1.4.2.1.2 – Competitors in market — Career pursuits – Alabama, New York, South Carolina, and West Virginia.

The adequacy courts have identified preparation of students to compete for and perform their future career pursuits as one of the main goals of education.[177] These pursuits fall into two categories: academic and vocational. In the academic realm, students compete for enrollment into post-secondary education programs. In the job

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166 *Id.*; *Rose.*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; Leandro v. North Carolina, 488 S.E.2d 249, 255 (NC 1997).
167 *Seattle*, 585 P.2d at 94; Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).
168Abbott v. Burke, 575 A.2d 359, 397 (N.J. 1990).
169 *Seattle*, 585 P.2d at 72.
170 *Pinto*, 662 So. 2d at 896.
171 *Id.*; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359.
172 *Pinto*, 662 So. 2d at 896.
173 *Abbott*, 575 A.2d at 397.
174 *Seattle*, 585 P.2d at 94.
175 *Pinto*, 662 So. 2d at 896.
176 *Seattle*, 585 P.2d at 94.
177 *See e.g.*Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va.1979) (describing an efficient education system as one that prepares its charges to pursue "useful and happy occupations...").

market, students vie for gainful employment. The preparation of students for their future career pursuits is accomplished by the education system through the development of scholastic and employment skills.[178] Students should receive "sufficient training or preparation for advanced training in academic or vocational skills"[179] so that they may be engaged in and make a contribution to the economy.[180]

The courts have described their desire to produce adults who are competitive in these fields in different ways. First, some are concerned with students' career decision-making process, saying that students should be equipped "to choose and pursue life work intelligently"[181] and that they should be prepared "for useful and happy occupations."[182] Second, others want students who are successful in securing their desired positions, saying that they should be prepared to compete on an equal basis with others[183] or to compete favorably with their counterparts in surrounding states,[184] across the nation, and throughout the world[185] in academics or in the job market. Third, courts want students who can competently perform the tasks they undertake. Schools should develop students

178 The vocational skills have not been defined by the courts. Academic skills include the foundational knowledge of mathematics, physical science, and language arts.
179 *Pinto*, 662 So. 2d at 896; *see also* Abbeville County Sch. Dist. v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999) (stating that the South Carolina Constitution requires that students "have the opportunity to acquire ... academic and vocational skills"); *Pauley*, 255 S.E.2d 859, 877 (calling for the "development in every child to his or her capacity of ... work-training and advanced academic training as the child may intelligently choose").
180 Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475, 485 (App. Div. 2001).
181 *Pinto*, 662 So. 2d at 896; Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997).
182 *Pauley*, 255 S.E.2d at 877.
183 Leandro v. North Carolina, 488 S.E.2d 249, 255 (N.C. 1997).
184 *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359.
185 *Pinto*, 662 So. 2d at 896.

who can successfully engage in post-secondary education or vocational training[186] and sustain competitive employment.[187]

1.4.2.1.3 – Marketplace of ideas—Political System – Political Pursuits – Alabama, Kentucky, Massachusetts, New Hampshire, New York, North Carolina, Washington, and West Virginia

The third key goal of the education system, as defined by the adequacy courts, is to train students to be future participants in the American political system. To do this, public schools should teach students basic history and geography,[188] and provide them with a fundamental knowledge of economic and political systems[189] and social systems.[190] Schools should also familiarize students with the government[191] and governmental processes[192] of their state and of the nation.

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186 *See id.* ("Students [should be given] the opportunity to attain ... sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently [and] sufficient training, or preparation for advanced training ... to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market."); *Rose*, 790 S.W.2d at 212 (stating the same standard as the *Pinto* court); *McDuffy*., 615 So. 2d at 554 (stating the same standard as the *Pinto* court) ; *Claremont II*, 703 A.2d at 1359; *Leandro*, 488 S.E.2d at 255; Abbeville County Sch. Dist v. South Carolina, 515 S.E.2d 535, 540 (S.C. 1999) (stating that every student must have the "opportunity to acquire ... academic and vocational skills").

187 Campaign for Fiscal Equity v. New York, 719 N.Y.S.2d 475, 487 (App. Div. 2001).

188 *Leandro*, 488 S.E.2d at 255; *See also Pinto*, 662 So. 2d at 896 (including history, but not geography); *Abbeville*, 515 S.E.2d at 540 (requiring that students be given the opportunity to acquire, inter alia, a fundamental knowledge "of history and governmental processes").

189 *Pinto*, 662 So. 2d at 896; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; *Leandro*, 488 S.E.2d at 255; *Abbeville*, 515 S.E.2d at 540.

190 *Pinto*, 662 So. 2d at 896; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; *Abbeville*, 515 S.E.2d at 540.

191 *See* Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

192 *See id*

The aim is to develop productive citizens who are capable of civic engagement[193] through intelligent and effective involvement in our political system.[194] This takes two forms, first, as members of a jury[195] and second, as voters.[196]

To serve on juries, individuals need to be capable of being impartial, learning unfamiliar facts and concepts, deciding complex matter that require verbal, reasoning, math, and science skills, and communicating and reaching decisions with their fellow jurors.[197]

As engaged voters who participate in our political system, these young adults will be able to understand the issues that affect their community, state and nation,[198] to contribute to[199] and make informed choices[200] regarding these issues as they relate to them personally[201] or affect their community, state, and nation.[202] They will also be able to choose "among persons and issues that affect [their] own governance."[203] Ultimately, the goal here is to produce citizens on whom the government may rely to meet its needs and to further its interests[204] thereby ensuring the survival of our open political system[205] by producing intelligent and capable members of our political community.

193Campaign for Fiscal Equity v. New York *(Campaign II*, 719 N.Y.S.2d 475, 487 (App. Div. 2001).
194 Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 94 (Wash. 1978).
195 Campaign for Fiscal Equity v. New York (*Campaign I*), 655 N.E.2d 661, 666 (N.Y. 1995).
196 *Campaign II*, 719 N.Y.S.2d at 485.
197 *Id.*
198 Pinto v. Ala.Coal. for Equity, 662 So. 2d 894, 896 (Ala.1995); Rose v. Council for Better Educ., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Sec'y of the Exec. Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353, 1359 (N.H. 1997).
199 *Pinto*, 662 So. 2d at 896.
200 *Id.*; *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359; Leandro v. North Carolina, 488 S.E.2d 249, 255 (N.C. 1996); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).
201 *Leandro*, 488 S.E.2d at 255.
202*Pinto*, 662 So. 2d at 896; *Leandro*, 488 S.E.2d at 255.
203 *Pauley*, 255 S.E.2d at 877.
204 *McDuffy*, 615 N.E.2d at 555.
205 Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71, 94 (Wash. 1978).

1.4.3 – Accountability

The third component of adequacy discussed by the courts is accountability. This concept demands that states not only provide high standards and sufficient funding for education, but that they also are held responsible for achieving the substantive level of education required by their constitution. One court defined it in this manner:

> Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty.[206] Accountability is the least developed element of the adequacy lawsuits,[207]

yet it serves the important function of putting into place a system for monitoring the state's progress towards and compliance with its constitutional responsibility to provide an adequate education to all of its children.[208] As one court noted, "[i]f the State cannot be held accountable for fulfilling its duty, the duty creates no obligation and is no longer a duty."[209]

The mechanisms for holding states responsible for fulfilling their constitutional responsibilities for public education can be implemented through the adoption of a formal accountability system or through a series of rulings by the courts on whether the government has fulfilled its obligations with respect to the state educational system. Two states with adequacy lawsuits have adopted formal accountability systems and in two others, courts have called for the creation of one.[210] In at least six states, plaintiffs have

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206 Claremont Sch. Dist. v. Governor (*Claremont IV*), 794 A.2d 744, 751 (N.H. 2002).
207 *See* Abbott v. Burke, 693 A.2d 417, 428-29 (N.J. 1997).
208 *See* Lake View Sch. Dist., No. 25 v. Huckabee, No. 1992-5318, # 48 (Ark. Ch. Ct. May 25, 2001) ("[T]here must be an effective accountability system that holds the schools accountable for results."; *Claremont IV*, 794 A.2d at 751; DeRolph v. Ohio (*DeRolph II*), 728 N.E.2d 993, 1018-20 (Ohio 2000).
209 *Claremont IV*, 794 A.2d at 751.
210 The Massachusetts and Ohio Legislatures adopted formal accountability systems.Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137-38 (Mass. 2005); *DeRolph II*, 728 N.E.2d at 1017-18. The New York

utilized the court system to hold states accountable for providing adequate educational opportunities to their children.[211]

1.5 – Conclusion

Adequacy can be seen as another advance in the school reformers' quest to utilize the legal system to secure an education system that better serves the needs of all children within a state. With courts in twenty-one of the twenty-six states that have considered adequacy claims finding support for the legal theory of adequacy, these reformers have largely succeeded in the goal of enlisting state courts to advance their desire for sufficient funding for a quality education for all students within a state. The decisions, however, form a patchwork of legal precedence on adequacy that was created by the often ambiguous state constitutional education provisions, in light of the underlying state school finance systems and the evidence of inadequacy within the existing public school systems.

To develop a better understanding of the theory of adequacy, this paper examined these decisions to identify their similarities and differences, providing a comparative analysis on several key aspects of adequacy theory, cross-referenced to the outcomes in individual states. The result is a set of similarities that is intended to provide the reader with a deeper understanding of adequacy and the requirements governing state provision of a high minimum quality education.

Although this paper is organized around the three components of adequacy—funding, educational goals, and accountability—these categories are not required to be

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courts call for the development of one. Campaign for Fiscal Equity. v. New York (*Campaign III*), 801 N.E.2d 326, 345-47 (N.Y. 2003). The New Hampshire Court calls for a meaningful accountability in its decision. *Claremont IV*, 794 A.2d at 758.

211 Arizona, New Hampshire, New Jersey, New York, Ohio, and Texas are states that have a series of adequacy court decisions. See Appendix 1.1 for a list of cases.

addressed in a successful adequacy case. Adequacy as a theory is most often associated with its financial component because these lawsuits, at their essence, have a primary goal of obligating the states to spend more money on their public school systems. This goal can be met without defining the specific educational goals the state should pursue in the education of its children and without providing for an accountability mechanism to guarantee that its standards are attained. In fact, many would argue that these two functions fall within the authority of the legislatures, not the courts.[212]

And so the educational funding question continues to serve as the focus on the adequacy lawsuits as courts attempt to determine whether their state is providing sufficient financial resources to fund a high minimum quality education. This adequate funding level could be represented by either horizontal equity, substantial equality in access to financial resources, or vertical equity, obligating the state to offer a comparable base level of educational opportunity to its students throughout the state. Interestingly, the adequacy rulings typically do not mandate the same level of funding in every district. Instead, they recognize the state's ability to provide extra funding for districts whose student population or physical location translate into higher costs to provide the same level of educational programs as in other districts. In some instances, they also permit local communities to supplement the educational offerings in their school districts beyond the base-level adequate education supplied by the state.

Several adequacy courts did address the relevant educational goals that should be pursued by the state. They envision an educational system that prepares students to

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212 *See e.g.* Coal. For Adequacy and Firness v. Chiles, 680 So. 2d 400, 407-8 (Fla. 1996); Comm. For Educ. Rights v. Edgar, 672 N.E.2d 1178, 1193 (Ill. 1996); Charlet v. Louisiana, 713 So. 2d 1199, 1205 (La. 1998); Marerro v. Pennsylvania, 709 A.2d 956, 965-66 (Pa. 1997); City of Pawtucket v. Sundlun, 662 A.2d 40, 57-59 (R.I. 1995).

assume their three primary roles in society as: citizens, workers, and participants in the political system. These courts want schools to develop students as individuals who are prepared to engage in intellectual pursuits. They should have a general knowledge about academic subjects, our culture, and our society. Students should also be prepared to compete for jobs and entrance into higher educational institutions. They must be trained to assume their roles as productive members of our society. In addition, these courts see the survival of our democratic form of government as dependent upon our future members' ability to intelligently analyze and choose among the issues and alternatives presented to them in their roles as voters and members of juries.

The issue of holding states accountable for actually achieving the educational objectives delineated in a few of these cases is something that is not satisfactorily addressed by most of these decisions. While many courts are motivated by their desire to not overstep their bounds into an area that is controlled by the legislature, it seems as if more could be done with this issue. Even in the current climate of standards-based accountability in this country, which has been heightened by the No Child Left Behind Act, the accountability measures undertaken by the states through testing and reporting of results do not begin to address the breadth of the educational goals that the adequacy courts describe.[213] It is possible that these broad intellectual, political, and career goals are meant to be merely hortatory, ideals that we ascribe to in our democratic society. It is also likely that these goals would be very difficult to measure. However, if these are the actual goals of the American educational system, more attention should be paid to

213 The No Child Left Behind Act requires only "yearly student academic assessments that include ... mathematics, reading or language arts, and science" 20 U.S.C. § 6311(b)(3)(A).

determining how and whether they are being accomplished in the educational program offered to our children in our public schools.

In this way, the adequacy wave of the school finance reform movement progresses beyond the previous two waves of reform with an exclusive focus on the finance of education through measurements of educational inputs, tackling a broader array of the significant challenges faced by public schools. It encompasses not only the financial issues, but also the relevant educational goals and achievement results of the students. With so many state courts siding with adequacy reformers, one should expect to see further pushes in other states to use adequacy rulings to drive substantive education reform in years to come.

CHAPTER 1 APPENDIX

APPENDIX 1.1

Alabama

Ala. Coal. for Equity v. Hunt, CV-90-883-R & CV-91-0117-R (Ala. Cir. Ct. March 31, 1993), in appendix of Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993) (finding public education system unconstitutional under education and equal protection clause).

Pinto v. Ala. Coal. for Equity, 662 So. 2d 894 (Ala. 1995) (affirming circuit court decision regarding the unconstitutionality of public education system).

Ex parte James, 836 So. 2d 813 (Ala. 2002) (*sua sponte* dismissal of equity funding case).

Alaska

Kasayulie v. Alaska, NO. 3AN-97-3782 CIV (Alaska Super. Ct. Sept. 1, 1999) (holding that the method of financing capital funding project for education unconstitutional under both the education and equal protection clauses).

Arizona

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994) (finding unconstitutional the financing scheme for public school facilities under the education clause).

Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 74 P.3d 258 (Ariz. 2003) (reversing the lower court's judgment due to insufficient evidence of inadequate funding for public school facilities).

Hull v. Albrecht, 950 P.2d 1141 (Ariz. 1997) (new capital funding system not sufficient to meet education clause requirements).

Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998) (new capital funding system still not sufficient to meet education clause requirements).

Arkansas

Lake View Sch. Dist. No. 25 v. Huckabee, No. 1992-5318 (Ark. Ch. Ct. May 25, 2001) (declaring the public school system inequitable and inadequate under the equality and education provisions).

Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002) (affirming the lower court decision).

Idaho
Idaho Sch. for Equal Educ. Opportunity v. Idaho, 976 P.2d 913 (Idaho 1998) (remanding case for trial on potential violation of education clause for facilities funding).

Kansas[214]
Montoy v. Kansas (*Montoy II)*, 102 P.3d 1160 (Kan. 2005)(lack of suitable funding for middle and large districts with high minority, at-risk, and special education population violates education clause), *supplemental opinion at* 112 P.3d 923 (Kan. 2005) (new financing system still unconstitutionally inadequate because of over-reliance on local revenues).

Montoy v. Kansas (*Montoy III)*, 138 P.3d 755 (Kan. 2006) (case dismissed because legislature in substantial compliance with court order on school finance formula).

Kentucky
Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989) (declaring school system unconstitutional under education clause).

Maryland
Bradford v. Md. State Bd. of Educ., Case No. 95258055/CL20251 (Baltimore City Cir. Ct. Aug. 20, 2004) (finding the Baltimore school system unconstitutionally inadequate).

Massachusetts
McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993) (declaring the educational system unconstitutional under the education clause because it fails to provide education without regard to the fiscal capacity of the community or district in which the children live).

Hancock v. Comm'r of Educ., 822 N.E.2d 1134 (Mass. 2005) (rejecting the conclusion that the State is not meeting its educational obligations, terminating jurisdiction in the case).

Montana
Helena Elementary Sch. Dist. No. 1 v. Montana, 769 P.2d 684 (Mont. 1989) (finding that Montana's public school funding system violates its education clause).

Helena Elementary Sch. Dist. No. 1 v. Montana, 784 P.2d 412 (Mont. 1990) (delaying the effect of 1989 decision until 1991 to give legislature time to adopt new educational funding scheme).

Columbia Falls Sch. Dist. No. 6 v. Montana, 109 P.3d 257 (Mont. 2005) (finding the educational product of the public school system constitutionally deficient and the funding insufficient).

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214 Montoy v. State (*Montoy I)*, 62 P.3d 228 (Kan. 2003) (overturning summary disposition and remanding case to trial).

New Hampshire

Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375 (N.H. 1993) (finding the public school finance system violated the education clause).

Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353 (N.H. 1997) (finding the educational funding system unconstitutional because of the differing tax burdens between districts).

Claremont Sch. Dist. v. Governor (*Claremont III*), 744 A.2d 1107 (N.H. 1999) (declaring the phase-in feature of property tax system unconstitutional).

Claremont Sch. Dist. v. Governor (*Claremont IV*), 794 A.2d 744 (N.H. 2002) (holding that accountability is an essential component of the State's educational duty, and the current accountability system constitutionally deficient).

New Jersey

Abbott v. Burke (*Abbott I*), 495 A.2d 376 (N.J. 1985) (remanding case to administrative agency).

Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990) (finding a violation of the education clause in the poor urban districts).

Abbott v. Burke (*Abbott III*), 643 A.2d 575 (N.J. 1994) (holding the Quality Education Act unconstitutional for failing to achieve financial parity for regular education expenditures between special needs districts and richer districts).

Abbott v. Burke (*Abbott IV*), 693 A.2d 417 (N.J. 1997) (finding the Comprehensive Educational Improvement and Finance Act insufficiently addresses the needs of special needs districts, is not calculated in a manner that relates to student needs, does not address facilities deficiencies, and does not address the extra educational needs of poor students).

Abbott v. Burke (*Abbott V*), 710 A.2d 450 (N.J. 1998) (ordering the implementation of improvement plan that includes preschool).

Abbott v. Burke (*Abbott VI*), 748 A.2d 82 (N.J. 2000) (finding that the preschool program is not properly implemented in the poor, urban districts).

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Abbott v. Burke (*Abbott VIII*), 857 A.2d 173 (N.J. 2004) (relaxing the requirements for certification of preschool teachers subject to specified conditions).

Abbott v. Burke (*Abbott IX*), 862 A.2d 538 (N.J. 2004) (ordering the parties to participate in mediation).

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North Carolina
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Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Seattle Sch. Dist. No. 1 v. Washington, 585 P.2d 71 (Wash. 1978).

Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 ARK. L. REV. 107 (2004).

S.C. CONST. ANN. art. XI, § 3.

S.D. CONST. art. VIII, § 1.

William E. Thro, *Issues in Education and Policy: Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994).

TENN. CONST. art. XI, §12.

TEX. CONST. art. VII § 1.

UTAH CONST. art. X, § 1.

VT. CONST. § 68.

Deborah A. Verstegen, *The Law of Financing Education: Towards a Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 ST. LOUIS U. PUB. L. REV. 499 (2004).

VA. CONST. art. VIII, § 1.

WASH. CONST. art. IX, §§ 1-2.

West Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558 (Tex. 2003).

W. VA. CONST. art. XII, § 1.

WIS. CONST. art. X, § 3.

Wyoming v. Campbell County Sch. Dist. (*Campbell II*), 19 P.3d 518 (Wyo. 2001).

Wyoming v. Campbell County Sch. Dist. (*Campbell III*), 32 P.3d 325 (Wyo. 2003).

WYO. CONST. art. I, §23 and art. VII, § 1.

Zuni Sch. Dist. v. State, CV-98-14-II (N.M. Dist. Ct, Oct. 14, 1999).

CHAPTER 2 – THE NO CHILD LEFT BEHIND ACT: IS IT AN UNFUNDED MANDATE OR A PROMOTION OF FEDERAL EDUCATIONAL IDEALS?[215]

2.1 – Introduction: Federalism and American Educational Policy

Since its inception, the No Child Left Behind Act of 2001 (NCLB)[216] has generated substantial controversy over the expanding role of the federal government in public K-12 education. The NCLB, a revision of the 1965 Elementary and Secondary Education Act, calls for states and localities to hire highly qualified teachers, develop and implement challenging academic standards, set achievement targets for students, administer assessments to measure student progress, report data on all students, and face consequences if these requirements are not satisfied. Schools across the country are diligently working to meet these goals. NCLB, with its pervasive reach, has become a lightening rod in education policy forums regarding the federal government's ability to require local and state education reforms, particularly in light of the small share of overall national education funding that originates from federal sources.

The National Education Association, along with several local associations and school districts, brought this debate to the federal court system in 2005 in their *School District of Pontiac v. Spellings* lawsuit.[217] A few months later, the State of Connecticut entered the fray by filing *Connecticut v. Spellings*.[218] These lawsuits argue that the federal government, represented by the Secretary of Education, is overstepping its authority in its regulation of state and local education practices under NCLB by requiring

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215 This article has been published. *See* 37 J. L. & EDUC. 193 (2008).
216 The No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* (2002).
217 No. CIV.A.05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005).
218 453 F.Supp.2d 459 (D. Conn. 2006).

compliance with the law's provisions even if federal funding is not sufficient to cover all of these expenses. Plaintiffs characterize NCLB as an unfunded or underfunded mandate.[219]

The Sixth Circuit Court of Appeals' 2008 decision in the *Pontiac* case[220] affirmed the plaintiffs' position that the language of the NCLB, in light of § 7907(a) of the law, did not clearly alert states to their responsibility to pay for the additional costs of compliance not covered by federal dollars provided under the act, and that therefore, NCLB violated the Spending Clause's clear statement requirement. The court's majority found that a state official could plausibly interpret NCLB as not requiring states and localities to pay for those costs not covered by federal funding. This decision overturned the federal district court's 2005 decision that states and local districts were bound by NCLB's requirements under current funding because the funding language in § 7907(a) was only intended to prevent federal officers and employees from imposing additional unfunded obligations on the states and localities, beyond those provided for in the statute. It would make no sense for Congress to enact an elaborate statutory scheme and then allow states to not comply with some of it because they had to spend their own money on its implementation.

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219 The use of the word "mandate" is not an accurate description of the whole statute even if plaintiffs' allegations are correct, though. NCLB was passed under Congress' conditional spending power. A valid use of this authority is an inducement, not a mandate, since Congress may only invite states to participate in the regulatory scheme, and once they do require their compliance with its terms. It may not command a state to comply with the statute if they do not accept the federal monies offered under it. Plaintiffs use the term "mandate" to describe the Secretary of Education's actions in requiring the performance of funding obligations they do not believe are clearly set forth in the legislation, not to describe the authority under which the statute was enacted. *See* Lorraine McDonnell & Richard Elmore. *Getting the Job Done: Alternative Policy Instruments*. 9 EDUC. EVALUATION AND POLICY ANALYSIS, 133, 138-39 (1987).

220 On May 14, 2008, the Sixth Circuit agreed to have the entire fourteen member court re-hear this case. Mark Walsh, *Full Appeals Court to Reconsider Ruling that Revived NCLB Suit,* 27 EDUC. WEEK 8 (May 7, 2008).

This article addresses the arguments in the NCLB unfunded mandate debate as it has unfolded in the courts. Section 2.2 explores the expansion of the federal government's policy-making role in and financial support for education over the past sixty years. Section 2.3 examines Congress' use of its Spending Clause power to enact legislation that affects education. It discusses several court decisions that define the scope and limit of Congress' Spending Clause power, a mechanism that permits Congress to legislate in fields over which it holds no direct authority. It then examines Congress' Spending Clause power within the context of the NCLB by detailing the two lawsuits that allege NCLB constitutes an unfunded mandate that exceeds Congress' conditional spending power. Ultimately, Section 2.5 concludes that NCLB is a valid exercise of Congress' Spending Clause power rather than an unfunded mandate. Therefore, states are required to fulfill the obligations they assumed under the law at the current funding levels provided by the federal government.

Several legal commentators have weighed in on this debate and have landed on both sides of the issue of the NCLB's constitutionality. While commentators agree that NCLB can be construed to be in support of the general welfare of the nation under the legal test set forth in *South Dakota v Dole*,[221] they disagree about the law's status under the other requirements necessary for NCLB to qualify as a valid conditional spending program.[222] Gina Austin, Nicole Lugori, and Professor L. Darnell Weeden have

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221 483 U.S. 203 (1987).

222 *Compare* Gina Austin, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States' Rights*, 27 T. JEFFERSON L. REV. 337, 356 (2005); Nicole Liguori, *Leaving No Child Behind (Except in States that don't do as we say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy through the Spending Clause*, 47 B.C. L. REV. 1033, 1070 (2006); *and* L. Darnell Weeden, *Does the No Child Left Behind Law (NCLBA) Burden the States as an Unfunded Mandate Under Federal Law?*, 31 T. MARSHALL L. REV. 239, 242 (2006); *with* Philip T.K. Daniel, *No Child Left Behind: The Balm of Gilead has Arrived in American Education*, 206 EDUC. L. REP. 791, 800-01 (2006); *and* Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. 125 (2006).

concluded that NCLB is unconstitutional.[223] In her analysis, Ms. Austin argues that NCLB exceeds congressional authority under the Spending Clause under four of the five prongs of the *Dole* test,[224] and Professor L. Darnell Weeden agrees with her analysis.[225] Ms. Lugori believes a court should declare NCLB unconstitutional under the prong that considers other constitutional conditions, in particular the Equal Protection Clause. Although she concedes that a court is not likely to do so because of prior jurisprudence.[226]

On the other side of the analysis are Professor T.K. Daniels[227]and Professor Michael Heise.[228] Professor Daniels focuses on the overall *Dole* test, concluding that courts are likely to find that NCLB is a valid use of Congress' conditional spending power because NCLB provides for the general welfare of the nation by promoting education.[229] In concluding that NCLB does not amount to legal coercion, Professor Heise notes the courts' reluctance to embrace *Dole's* coercion prong except in extreme circumstances. Although, he does argue that NCLB is politically rather than legally coercive.[230]

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223 Austin, *supra* note 222; Liguori, *supra* note 222; Weeden, *supra* note 222. *See also* Amanda K. Wingfield, *The No Child Left Behind Act: Legal Challenges as an Underfunded Mandate*, 6 LOY. J. PUB. INT. L. 185 (2005) (describing the potential legal avenues for and barriers to challenging NCLB).
224 Austin, *supra* note 222 (alleging that NCLB is not a valid exercise of Congress' conditional spending power because it is ambiguous, not closely tied to the federal interest, coercive, and is barred by the Tenth Amendment).
225 Weeden, *supra* note 222, at 243-44.
226 Liguori, *supra* note 222, at 1076-80 (arguing that the Secretary of Education's administration of NCLB, which threatens to remove all federal education Title 1 funding from Connecticut leaves the State vulnerable to a Fourteenth Amendment's Equal Protection Clause challenge by its public school students who are likely to receive an inferior education to students in other states because of this lack of funding).
227 Daniel, *supra* note 222, at 791.
228 Heise, *supra* note 222, at 125.
229 Daniel, *supra* note 222, at 800-01 (contending that the federal government may attach conditions to funds given to the states to protect the general welfare of the nation, in this case by promoting education).
230 Heise, *supra* note 222, at 156.

While these discussions have added valuable insight to the debate, one cannot over look the particular arguments advanced by the parties of the two NCLB lawsuits or the findings of the respective courts. The legal analysis in this article focuses specifically on these arguments, rather than on a broader spectrum of potential arguments that plaintiffs could bring. Therefore, this article helps illuminate the legal framework for the policy debate about NCLB in this country as members of the public, the government, and the education community continue to negotiate its implementation and reauthorization.

2.2 – The History of Federal Involvement in Education

State and local governments have traditionally been responsible for providing education in the United States. Education is not mentioned in the U.S. Constitution, so it is reserved to the states through the Tenth Amendment.[231] The U.S. Supreme Court has declared that education is not a fundamental right even though it plays a vital role in our society.[232] Most state constitutions require state governments to provide free public education, and state governments normally delegate this duty to local school districts. Thus, the states and their subordinate localities have the responsibility for and control over education under both tradition and law. For most of our nation's history, local control has been the hallmark of educational governance, and the federal government has played a limited role. However, federal influence has grown substantially during the past sixty years, and most of this expansion has been accomplished through federal legislation passed under Congress' Article 1, § 8 spending power.

231 See U.S. CONST. amend. X (providing the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people).
232 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

2.2.1 – Laws Regulating Education: 1950s to Present

The 1950s mark the time when the federal government became increasingly involved in K-12 education. The 1954 landmark U.S. Supreme Court decision in *Brown v. Board of Education*[233] and the 1957 launch of the Soviet Union's first earth-orbiting satellite, Sputnik, set the stage for Congress' enactment of the National Defense Education Act (NDEA) in 1958.[234] The NDEA was the first in a series of acts passed by Congress using its Spending Clause power to influence the field of education.[235]

In the 1960s, as part of the Great Society reforms, Congress passed several laws using its spending power in an attempt to eliminate poverty and racial inequality. These included Title VI of the Civil Rights Act of 1964,[236] the Elementary and Secondary Education Act of 1965 (ESEA),[237] and the Bilingual Education Act of 1968.[238] It was during this era that the federal government became the biggest sponsor of educational reform, and the ESEA was the most significant of the educational legislation passed. [239] Title I of this act, which provided financial assistance to improve the educational opportunities for poor children, embodied the federal hopes for a better future. This

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233 347 U.S. 483 (1954).

234 Law of Sept. 2, 1958, Title I § 101, 1958, 72 Stat. 1581 (repealed 1970). This law was designed to stimulate education in science, engineering, foreign languages, and mathematics by offering schools financial assistance and scholarships for students attending post-secondary institutions in these fields of study.

235 Prior to this date this power had only been used infrequently. One example of its prior use was in the passage of the Smith-Hughes Vocational Education Act, Pub. L. No. 64-347, 39 Stat. 929 (1917),, an act that provided federal funds for vocational education, particularly in the field of agriculture.

236 42 U.S.C. § 2000d *et seq.* (2003). This law links federal funds to non-discrimination and supports desegregation activities.

237 20 U.S.C. § 6301 *et seq.* (2002) (original version at ch. 70, 79 Stat. 27 (1965)). This law provides federal funding for remedial educational and support services for elementary and secondary school students residing in low-income areas.

238Act of Jan. 2, 1968, ch. 20, 20 U.S.C. § 6811, *replaced by* the English Language Acquisition, Language Enhancement, and Academic Achievement Act, 20 U.S.C. § 6811 *et seq* .(2002).

239 Bruce Dollar, *Federal Attempts to Change the Schools*, 33 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE, 109, No. 2 (1978).

legislation continues today in its reauthorized form, the No Child Left Behind Act of 2001.[240]

This legislative trend continued into the 1970s with the passage of Title IX of the Education Amendments Act of 1972,[241] Section 504 of the Rehabilitation Act of 1973,[242] the Equal Educational Opportunities Act of 1974,[243] and the Education for all Handicapped Children Act of 1975.[244] During the past thirty years, Congress enacted fewer new education-related legislative initiatives, [245] instead focusing on the reauthorization of prior acts. The two most prominent of these successively reauthorized acts have been the Elementary and Secondary Education Act of 1965[246] and the Education for all Handicapped Children Act of 1975, which was renamed the Individuals with Disabilities Education Act in 1990.[247]

Through all of these initiatives, the federal government has assumed the role as a promoter of educational opportunity to students with enumerated "disadvantages," such as those living in poverty, in need of special education, subject to discrimination based on race or sex, or learning English as a second language.[248] To accomplish this goal, it has provided supplemental financial resources through categorical grants to states and

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240*Id.*; 20 U.S.C. § 6301 *et seq.* (2002).
241 20 U.S.C. § 1681 *et seq.* (2000 & Supp. 2006). This act bans sex discrimination in all education programs and activities receiving federal funds.
242 29 U.S.C. § 794 (1999 & Supp. 2006). This law prohibits discrimination against otherwise qualified individuals with certain physical impairments that limit major life activities.
243 20 U.S.C. § 1701 *et seq.* (2000). This act provides that no state shall deny equal educational opportunity because of race, color, sex, or national origin.
244 Pub. L. No. 94-142 (S 6), November 29, 1975. This act amended Pub. L. No. 93-380, the Education of the Handicapped Act of 1970 (84 Stat. 175), a non-funded amendment to Title IV-B of the Elementary and Secondary Education Act.
245 Congress did enact a few new laws during this period. The Federal Equal Access Act in 1984, 20 U.S.C. § 4071 *et seq.* (2003) and the Goals 2000: Educate America Act in 1994, 20 U.S.C. § 5801 *et seq.* (2003 & Supp. 2006) are two examples.
246 20 U.S.C. § 6301 *et seq.* (2002) (original version at ch. 70, 79 Stat. 27 (1965)).
247 20 U.S.C. § 1400 *et seq.*(2000 & Supp. 2006).
248 20 U.S.C. §§ 6301, 1701, 6811; PL 94-142 (S 6); 42 U.S.C. § 2000d.

localities to allow them to better service students' special needs in the schools.[249] In this manner, the federal government has been able to support its agenda of improving the educational quality for certain groups of students by offering funding only for specific programs and limiting its use to narrowly defined activities.

Over time, however, the federal government's role has changed so that it now has a greater focus on aligning federal support with the overall national goals for the education of all students.[250] These universal student goals are reflected in the No Child Left Behind Act. The NCLB is controversial because it expands coverage to all students without providing sufficient funding to pay for all costs associated with implementing its requirements .

2.2.2 – The No Child Left Behind Act Controversy: Does it expand the federal role in education?

The No Child Left Behind Act (NCLB) is designed to change the culture of America's schools by closing the achievement gap between disadvantaged children and other student groups in U.S. public schools.[251] Specifically, the introduction to the Act states as follows:

> [t]he purpose of this subchapter is 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.[252]

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249 Donald W. Burnes, *A Case Study of Federal Involvement in Education*, 33 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 87, No. 2 (1978).
250 Michael W. Kirst, *Recent Research on Intergovernmental Relations in Education Policy*, 24 EDUCATIONAL RESEARCHER 18, No. 9 (1995).
251 U.S. DEP'T OF EDUC. OVERVIEW OF NCLB (2003), http://www.ed.gov/nclb/accountability/index.html.
252 20 U.S.C. § 6301 (2002).

To guide this effort, the law requires states to develop and implement academic standards,[253] employ "highly qualified" teachers,[254] test students annually,[255] report student scores,[256] define and determine whether "adequate yearly progress" (AYP) towards academic goals is being made,[257] and impose consequences on schools that do not make AYP, ranging from a requirement to provide extra services to students[258] to total reorganization of the school.[259] To receive funds under the act, states must submit a plan to the U.S. Department of Education that outlines their commitment to comply with the key features of NCLB.[260]

Many in education today argue that this latest version of the Elementary and Secondary Education Act (ESEA) goes beyond the traditional federal role and infringes into the field of education too deeply – in a manner that usurps States' rights.[261] They see NCLB as reaching beyond the federal government's customary role of providing money

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253 20 U.S.C. § 6311(b)(1) (2006).
254 20 U.S.C. § 6319 (2002).
255 20 U.S.C. § 6311(b)(3).
256 20 U.S.C. § 6311(b)(h).
257 20 U.S.C. § 6311(b)(2)
258 Stages 1 & 2 – School Improvement: After two years of not making adequate yearly progress (AYP), the school is identified for school improvement. The school must undertake professional development for its teachers, and all students enrolled in these schools are offered the opportunity to transfer to a different public school that has not been labeled for school improvement. 20 U.S.C. § 6316(b) (2002). If the identified school does not meet AYP for the third consecutive year, the students who remain in the school must be offered the option to utilize supplemental services, most commonly manifested as individual tutoring. 20 U.S.C. § 6316(b)(5). The school must allocate twenty percent of its federal funds to cover the costs of transporting students who chose to attend different schools and providing supplemental services to those who remain in the failing school. 20 U.S.C. § 6316(b)(9-10).
259 Stages 3 & 4 – Corrective Action and Restructuring: If the identified school does not meet AYP for the fourth consecutive year, corrective action must be taken by the district to respond to the consistent academic failure of the school. This action involves significant changes at the school level including new curriculum, staff changes, a longer school day or year, the hiring of outside consultants, and the continuation of the options offered to parents for school choice or supplemental services. 20 U.S.C.. § 6316(b)(7). After one year on a corrective action plan, if the school still does not meet its AYP targets, it must be restructured. 20 U.S.C. § 6316(b)(8). Restructuring involves implementation of an alternative governance system that replaces some or all of the school's staff in addition to a continuation of the provision of parental choice and supplemental services. *20 U.S.C. § 6316(b)(8).*
260 20 U.S.C. § 6311(a-b) (2002).
261 *See* Austin, *supra* note 222; Lance Fusarelli, *Gubernatorial Reactions to No Child Left Behind: Politics, Pressure, and Educational Reform*, 80 THE PEABODY J. OF EDUC. 120, No. 2 (2005).

for states and localities to use in schools as they see fit within the context of fairly loose guidelines. Four of the features of NCLB are especially troublesome: (1) the "highly qualified" teacher requirement; (2) its call for curriculum and teaching practices to be based on scientific research; (3) its requirement that schools produce certain levels of educational progress for all students, reported as adequate yearly progress (AYP) measures on state academic tests; and (4) the consequences for schools whose students do not meet their academic targets.[262] In this manner, NCLB extends federal authority into areas of education such as teacher qualifications, curriculum selection, and educational assessment that have previously been state or local prerogatives. This is seen as a reordering of intergovernmental relationships that has given the federal government unprecedented control over education.[263]

Others argue that NCLB represents an evolution of the federal role in education rather than a radical departure from past practice because NCLB's features of standards, assessments, and accountability are extensions of the framework contained in the most recent prior versions of the law and the surrounding federal and state policy context.[264] To see this progression, the federal government's relationship through ESEA's Title 1 with states and local districts has been categorized into three distinct periods.[265] First, during the period of 1965 to 1980, the law established a categorical program that operated at a distance from the regular education programs of local schools, primarily through classroom pull-outs where economically disadvantaged children received

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262 Kathryn A. McDermott & Laura S. Jensen, *Dubious Sovereignty: Federal Conditions of Aid and the No Child Left Behind Act*, 80 THE PEABODY J. OF EDUC. 39,45 NO. 2 (2005).
263 *Id.* at 48.
264 Lorraine M. McDonnell, *No Child Left Behind and the Federal Role in Education: Evolution or Revolution?*, 80 THE PEABODY J. OF EDUC. 19, 33-34 No .2 (2005). This article does not comment on the validity or appropriateness of the evolution of the law; it merely documents its development.
265 *Id.* at 22.

additional instruction outside of their regular classrooms.[266] Second, during the Reagan and George H. W. Bush administrations, ESEA's scope and funding were downsized but the national rhetoric surrounding it focused on ensuring excellence in education for all students.[267] Third, since 1988, ESEA's goals have become more tightly linked to the states' educational priorities while simultaneously shaping those policies to concentrate on academic standards, achievement, and assessments for all students.[268] Thus, NCLB's basic policy framework can be seen as an outgrowth of the original ESEA because it builds on its goal of improving the educational opportunity for certain disadvantaged students as it has been adapted to the changing political and educational environment over its forty year history to include a concern for the overall quality of education in the U.S. and attention to the achievement of additional "disadvantaged" student groups.[269]

2.2.3 - Educational Funding in the U.S.

To frame the NCLB unfunded mandate debate, it is also important to understand the magnitude of the financial commitment being made to public education in this country at the federal, state and local levels. Public spending on K-12 education in the United States was $536 billion in 2004-05.[270] State sources account for about 83 percent of the revenue spent on K-12 education—generally through a mix of property, sales and income taxes. Federal sources account for approximately 8.3 percent of the revenue spent on education, and private funding, mostly for private schools, account for the other

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266 *Id.*
267 *Id.* at 27.
268 *Id.* at 31.
269 *Id.* at 36.
270 U.S. DEP'T OF EDUCATION, 10 FACTS ABOUT K-12 EDUCATION FUNDING (2005), http://www.ed.gov/about/overview/fed/10facts/10facts.pdf.

8.9 percent.[271] Overall federal education spending in 2006 was $36 billion.[272] In the fiscal year 2002, the year following NCLB's enactment, federal education funding increased $4.7 billion—or 26 percent—over the previous year.[273] After three years of growth, federal appropriations for education programs began to taper off in fiscal year 2004 and slowed in fiscal year 2005.[274] Federal NCLB funding has held steady in 2005, 2006, and 2007, at $12.7 billion annually.[275] Yet, because of the relatively small share of funding provided by the federal government, the increase in federal funding due to NCLB amounts to only about 2 percent of total K-12 appropriations.[276] It is against this historical and financial backdrop that the NCLB unfunded mandate debate has evolved.

2.3 – Legal Analysis: Federalism and the Spending Clause

2.3.1 – Federalism: The Division of Power between the Federal & State Governments

The U.S. system of government is one of dual sovereignty between the federal and state governments. The presence of an apportionment of power between these two entities is manifested in the Tenth Amendment of the U.S. Constitution, which declares that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Since education is not explicitly mentioned in the U.S. Constitution, it is not specifically

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271 *Id.* 83% and 8% are the averages across states and that the actual state and federal contributions vary. *See e.g.* Goodwin Lui, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2045, 2072 (2006).

272 *Id.*

273 NAT'L CONFERENCE OF STATE LEGISLATURES, TASK FORCE ON NO CHILD LEFT BEHIND FINAL REPORT (2005), http://www.hartfordinfo.org/issues/documents/education/nclb.pdf.

274 CENTER ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 3 OF THE NO CHILD LEFT BEHIND ACT (2005), http://www.cepdc.org/index.cfm?fuseaction=document.showDocumentByID&DocumentID=48&C:\CFusionMX7\verity\Data\dummy.txt.

275 U.S. DEP'T OF EDUCATION, ESEA TITLE 1 GRANTS TO LOCAL EDUC. AGENCIES (2007), http://www.ed.gov/about/overview/budget/statetables/08stbyprogram.pdf.

276 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 42.

delegated to the federal government, and therefore lies with the states. Thus, Congress does not have a Constitutional grant of authority to regulate directly education in the United States.

This balance of power between the federal and state governments offers three primary benefits for the governance of our nation. First, it guards against the blurring of political accountability.[277] Because federalism assigns different powers to each level of government, citizens are able to determine which entity to hold accountable. Also, if either the federal or a state government attempts to encroach on the powers of the other, it can be checked by the other for overstepping its boundaries. Second, federalism protects individual freedoms.[278] Having strong state and local governments provides many opportunities for citizens to participate in government, to employ diverse solutions to social, economic, and cultural issues, and to influence national policy by building support on the local level. Third, federalism fulfills the balanced vision of the political structure for our country that is embodied in the Tenth Amendment of the U.S. Constitution.[279]

To maintain this balance, Congress must only act within its delineated powers, thereby not encroaching on the areas under the control of the states. To determine whether Congress has invaded the authority reserved to the states by the Tenth Amendment, an inquiry must be made into whether Congress exceeded the limits of its authority conferred to it by Article I, Sec. 8 of the U.S. Constitution.

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277 Ryan C. Squire, *Effectuating Principles of Federalism: Reevaluating the Federal Spending Power as the Great Tenth Amendment Loophole*, 25 PEPP. L. REV. 869, 877-881 (1998).
278 *Id.* at 881-882.
279 *Id.* at 882-883.

2.3.2 – The Federal Conditional Spending Power[280]

2.3.2.1 – The Grant of Authority: U.S. Constitution, Art. 1, § 8

Congress' powers to regulate are found in Article 1, § 8 of the Constitution. Congress may regulate an activity or enterprise directly, and states are required to comply, if it falls within certain powers, such as those contained in the Commerce Clause.[281] If it does not, Congress may utilize its spending power under Article I, § 8, clause 1 of the U.S. Constitution to induce the states to cooperate with its policies.[282] This clause says "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[283] Unlike direct regulatory power where the federal government can mandate state and local action, through its Spending Clause power Congress can offer states money in exchange for their agreement to abide by certain laws and their regulations. In this manner, Congress may legislate in fields, such as education, over which it holds no direct authority.

2.3.2.2 – Limits on the Grant of Authority

The boundaries on Congress' ability to spend have been enumerated by the United States Supreme Court, and these boundaries form the criteria that must be met in

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280 This article examines the constitutionality of the No Child Left Behind Act. An analysis could also be performed under the Unfunded Mandate Reform Act of 1995 (UFMRA). A 2004 GAO report conducted such an analysis and determined that NCLB did not violate this act because, under the definitions of the UMRA, state participation was a voluntary, and so it was not a "mandate." U.S. GEN. ACCOUNTING OFFICE, GAO-04-637, UNFUNDED MANDATES: ANALYSIS OF REFORM ACT COVERAGE 4 (2004), http://www.gao.gov/new.items/d04637.pdf.

281 U.S. CONST. art. I, § 8, cl.3.

282 *See e.g.* the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (current version at 20 U.S.C. § 6301 (2002)); the Individuals with Disabilities Education Act, Pub. L. No. 91-230, 84 Stat. 175 (current version at 20 U.S.C. § 1400 (2000 & Supp. 2006)).

283 U.S. CONST. art. I, § 8, cl. 1.

order for the federal legislature to utilize its conditional power under the Spending Clause in a manner consistent with the federal structure of government established in the U.S. Constitution.

Five criteria for determining the constitutionality of Congress' use of its spending power were specified by the U.S. Supreme Court in *South Dakota v. Dole*.[284] First, the federal legislation must be in pursuit of the general welfare.[285] Second, any conditions on the receipt of federal funds must be unambiguous, so that states may know the consequences of their participation.[286] Third, the conditions must be related to the federal interest in national projects or programs.[287] Fourth, the conditions must not be prohibited by other constitutional provisions.[288] And fifth, the conditions or circumstances of the financial inducement offered by the federal government cannot be coercive so as to violate the Tenth Amendment.[289]

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284 483 U.S. 203 (1987) (finding the withholding of highway funds from states with legal drinking ages under 21 to be consistent with the national goal of safe interstate travel).

285 South Dakota v. Dole, 483 U.S. at 207. The discretion to determine what promotes the general welfare of the nation lies with Congress unless its choice is clearly wrong, a display of arbitrary power, instead of an exercise of judgment. Helvering v. Davis, 301 U.S. 619, 640 (1937). Numerous federal conditional spending programs have been found to be in pursuit of the general welfare. *See e.g.* Helvering v. Davis, 301 U.S. 619 (1937) (upholding the creation of the Social Security system as a valid exercise of Congress' judgment about the need for financial support for older Americans in light of the changing economy and population composition of the nation).

286 South Dakota v. Dole, 483 U.S. at 207. This criterion requires the federal government to clearly and unambiguously state the conditions a state will be bound by if it accepts federal aid, so a state may knowingly accept its terms.

287 *Id.* at 207-208. This criterion recognizes that the federal government may impose reasonable conditions on the use of federal funds, federal property, and federal privileges, but it requires that the conditions under which federal monies or other benefits are given to participating states be reasonably related to the federal interest in the particular national program or project. Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958). *See e.g.* Massachusetts v. United States, 435 U.S. 444, 461-62 (1978) (finding a valid federal interest in requiring states pay an annual registration fee for their aircraft as part of a national effort to recoup the costs of federal aviation programs).

288 South Dakota v. Dole, 483 U.S. at 207-208. Congress' conditional spending "power may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Id.* at 210.

289 *Id.* at 211. The courts have not yet defined the point at which a condition passes from encouragement to coercion.

Although all of these criteria are relevant to the question of Congress' permissible use of its spending power, the limitations that are most pertinent to an analysis of the constitutional status of The No Child Left Behind Act are numbers two and five -- whether the conditions are stated unambiguously and not coercively.[290] Therefore, this article will focus on these two criteria.

2.3.2.3 – Limit on Grant Authority – Clarity of Conditions

3.3.2.3.1 – Overview of the Law

The NCLB unfunded mandate debate currently unfolding in the courts centers on the second requirement that federal program conditions cannot be ambiguous to be binding on the states. When Congress enacts legislation under its spending power and invites states to participate in the resulting program, it has the power to set the terms under which federal funds will be distributed to the states.[291] The relationship that is established between the federal government and the states is in the nature of a contract

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290 The other limitations are easily satisfied by the Act.

A court is likely to defer to Congress' judgment that NCLB's purpose of improving education promotes the general welfare. 20 U.S.C. § 6301 (2002); South Dakota v. Dole, 483 U.S. at 207 ("In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.")

NCLB's conditions dealing with the provision of education, such as requiring highly qualified teachers and annual assessments, are reasonably related to the federal interest in promoting education because they are intended to improve the quality of education provided. 20 U.S.C. § 6301 (2002). *But see* Austin, *supra* note 222 (arguing that NCLB is not closely tied to the federal interest because its conditions are over- and under- inclusive).

Moreover, there is no potential inducement for states to engage in conduct prohibited by the U.S. Constitution because NCLB only asks states to engage in legal activities, such as testing students and reporting student scores, that do not potentially infringe on rights guaranteed by the Constitution. The potential removal of federal Title 1 funding would not create an Equal Protection violation because education is not a fundamental right. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973). And NCLB does not impose substantial financial burdens on state citizens or require a specified form of political or institutional structure, since states set and implement their own educational standards. 20 U.S.C. § 6301 (2002). *But see* Liguori, *supra* note 222, at 1076-80.(arguing that the Secretary of Education's administration of NCLB, which threatens to remove all federal education Title 1 funding from Connecticut leaves the State vulnerable to a Fourteenth Amendment's Equal Protection Clause challenge by its public school students who are likely to receive an inferior education to students in other states because of this lack of funding); *See* Austin, *supra* note 222 (alleging that the Tenth Amendment is an independent constitutional bar to NCLB).

291 Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

where the states agree to comply with the requirements of the legislation in exchange for federal monies.[292] Thus, the legitimacy of Congress' use of its conditional spending power is dependent upon states voluntarily and knowingly accepting the terms of the "contract."[293]

To determine the responsibilities states and local school districts must fulfill under conditional spending statutes, the courts routinely examine the text of the statute,[294] its purpose,[295] its legislative history,[296] and/or the cases interpreting it.[297] These sources are considered from the perspective of the state official who is making the determination of whether to accept the federal funds offered in exchange for the statutory obligations.[298] In order for the obligations to be binding on the states, Congress must speak "with a clear voice" in identifying them, so that states are cognizant of the consequences of their participation.[299] If the requirements are clear, then a state is bound by the statute's terms under the "contract theory" because the state knowingly assumed the responsibilities under the law.[300] States cannot be bound by conditions that they are unable to ascertain.[301]

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292 *Id.*; Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999).
293 Pennhurst State Sch. and Hosp., 451 U.S. at 17.
294 Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 547 U.S. 1038 (2006); Jackson v. Birmingham County Bd. of Educ., 544 U.S. 167, 173 (2005); Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 666 (1985); Bell v. New Jersey, 461 U.S. 773, 783 (1983); Pennhurst State Sch. and Hosp., 451 U.S. at 18; Com. of. Va., Dept. of Educ. v. Riley, 106 F.3d 559, 568 (4th Cir. 1997).
295 Arlington Cent. Sch. Dist. Bd. of Educ., 547 U.S. 1038; Jackson, 544 U.S. at 180; Pennhurst State Sch. and Hosp., 451 U.S. at 18; Com. of Va., Dept. of Educ., 106 F.3d at 568; County Sch. Bd. of Henrico County, Va. v. RT, 433 F.Supp.2d 692, 708 (E.D. Va. 2006).
296 Arlington Cent. Sch. Dist. Bd. of Educ., 547 U.S.1038; Bell, 461 U.S. at 783; Pennhurst State Sch. and Hosp., 451 U.S. at 18; Com. of. Va., Dept. of Educ., 106 F.3d at 568.
297 Arlington Cent. Sch. Dist. Bd. of Educ., 547 U.S. 1038; Jackson, 544 U.S. at 182; County Sch. Bd. of Henrico County, Va., 433 F.Supp.2d at 712.
298 Arlington Cent. Sch. Dist. Bd. of Educ., 548 U.S. at 2459.
299 *Id.*
300 Bell, 461 U.S. at 790-791.
301 Davis, 526 U.S. at 640.

If a court finds that a state was able to determine the conditions and agreed to them by accepting federal monies in exchange for their performance, then several potential remedies are available to the federal government. When the conditions have been found to be clear and therefore agreed to by the parties, courts have required states and local school boards to fulfill them,[302] permitted the federal government to enforce financial withholding provisions against states,[303] and even barred a local board from challenging the validity of the law under the Spending Clause.[304] In contrast, if the federal conditions are unclear, then states and school boards are not bound by those terms.[305] In this situation, the federal government may not properly impose conditions because to do so would violate the Spending Clause.[306] Moreover, the federal government may not withhold funds promised under a statute in an attempt to enforce conditions that are not clearly assumed by the state.[307]

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302 *See e.g.* Jackson, 544 U.S. at 173-82 (2005) (allowing a private action for retaliation against the school board because Title IX provided sufficient notice that the board would be liable for retaliation against an individual who reports sexual harassment since the law's terms broadly prohibit any discrimination based on sex, even though the text of the statute did not specifically mention "retaliation"); County Sch. Bd. of Henrico County, Va., 433 F.Supp.2d at 713-14 (requiring a school district to pay for the costs of a private school placement for a student with a disability while the district appealed a hearing officer's decision that the placement was appropriate because the district was aware of its responsibility to pay for this type of service both through its application for federal funding under the Individuals with Disabilities Education Act (IDEA) and several court decisions interpreting the law).

303 *See e.g.* Bell, 461 U.S. at 782-87 (finding that the ESEA gives the Secretary of Education explicit authority to recover funds misspent by a recipient); Bennett, 470 U.S. at 662-66 (allowing the U.S. Department of Education to demand repayment from Kentucky for funds misused under Title 1).

304 County Sch. Bd. of Henrico County, Va., 433 F.Supp.2d at 705-706 (finding that states and local school boards may actually be estopped from challenging the validity of the law when they have consented to its terms in cases where the state or local board receives an advantage over the federal government due to the inconsistency from its original agreement).

305 Com. of. Va., Dept. of Educ., 106 F.3d at 567.

306 Davis, 526 U.S. at 640 (states cannot be bound where Congress does not speak with a "clear voice" because there can be no knowingly acceptance of terms if states are unable to ascertain them). *See e.g.* Arlington Cent. Sch. Dist. Bd. of Educ., 547 U.S. at 2459-61 (finding that a school district lacked sufficient notice and was therefore not required to reimburse parents of children with disabilities for the cost of experts hired for IDEA proceedings where the statute's plain language stated only that they must be reimbursed for attorney fees as part of the "costs" associated with the hearings, and expert fees were not traditionally associated with these costs).

307 *See e.g.* Com. of. Va., Dept. of Educ., 106 F.3d at 567 (holding that the federal Department of Education was without authority to withhold IDEA funds from the Commonwealth of Virginia for not

3.3.2.3.2 – The NCLB Unfunded Mandate Lawsuits

The plaintiffs[308] in both lawsuits contend that in fact NCLB's provisions are *not ambiguous*. Instead, the law's unfunded mandate section specifies that the states are not required to expend their own funds to meet NCLB's goals.[309] Despite this promise and the fact that federal Title 1 education funding does not cover all of the states' and local districts' costs in implementing NCLB,[310] the United States Secretary of Education has mandated that the states fulfill all of the law's requirements.[311] Therefore the federal government is violating its agreement with the states under the terms of the law itself,[312] exceeding the scope of its powers under the Spending Clause by changing one of the conditions under which the states agreed to participate,[313] and also infringing on the

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providing special educational services to students with disabilities who were suspended or expelled from school for reasons unrelated to their disability because the language of the statute did not explicitly mention or even imply such a duty on the part of the state).

308 Plaintiffs in the Pontiac School District suit include nine school districts (Pontiac School District in Michigan, Laredo Independent School District in Texas, Vermont school districts Rutland Northeast Supervisory Union, Leicester Town School District, Neshobe Elementary School District, Otter Valley Union High School District, Pittsford Town School District, Sudbury Town School District and Whiting Town School District) and the following ten education associations: the National Education Association (NEA), eight NEA state affiliates (the Connecticut Education Association, Illinois Education Association, Indiana State Teachers Association, Michigan Education Association, NEA-New Hampshire, Ohio Education Association and Vermont-NEA) and one NEA local affiliate (the Reading Education Association). Proof Opening Brief of Plaintiffs-Appellants Pontiac School District et. al., No. 05-2708 (6th Cir. March 22, 2006) FN 4. The Plaintiffs in the Connecticut. v. Spellings lawsuit include the State of Connecticut and its General Assembly. Complaint for Declaratory and Injunctive Relief at 1-3, Connecticut v. Spellings, No. 3:05-cv-1330 (MRK) (D. Conn. Aug. 22, 2005).

309 Second Amended Complaint at 17, Connecticut. v. Spellings, No. 3:05-cv-1330 (MRK) (D. Conn. June 6, 2006).

310 Complaint for Declaratory and Injunctive Relief, Sch. Dist. of Pontiac v. Spellings at 14, No. 05-CV-715 35-DT (E.D. Mich. April 20, 2005); Second Amended Complaint, Connecticut., *supra* note 309, at 18. Connecticut also argues that the Secretary of Education's arbitrary and capricious failure to waive its mandates through plan waivers and/or amendments exacerbates the problem. Second Amended Complaint, Connecticut., *supra* note 309, at 41.

311 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 12; Second Amended Complaint, *supra* note 309, at 17.

312 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 57-58; Second Amended Complaint, Connecticut., *supra* note 309, at 40-41.

313 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 56-57; Second Amended Complaint, Connecticut., *supra* note 309, at 42-43.

state's sovereignty under the Tenth Amendment.[314] As a remedy, these plaintiffs are asking the courts to enforce their agreement with the federal government and declare first, that they do not have to spend their own money to implement the law, and second, that the Secretary of Education cannot penalize them for not meeting their NCLB achievement goals if they fail because they did not spend their own funds attempting to meet them.[315]

In response, the Secretary of Education also contends that the provisions of NCLB are *not ambiguous*, saying that it is a legitimate exercise of Congress' conditional spending clause authority. NCLB is valid and enforceable against the states because it creates a federal-state partnership wherein federal funds are provided to support the states' efforts in ensuring that their students make adequate academic progress using educational standards, assessments, and accountability systems developed and implemented by the states. [316] Educating kids to be proficient in reading and mathematics has traditionally been and continues to be primarily a state and local responsibility.[317] The generous funding the federal government provides to the states under NCLB is only intended to supplement the state educational effort. NCLB does not require the federal government to pay for any and all costs a state chooses to designate as being related to NCLB. Instead, NCLB grants local school districts unprecedented new flexibility while

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314 U.S. CONST. amend X. This allegation is included only in the Connecticut. v. Spellings lawsuit. Second Amended Complaint, Connecticut., *supra* note 309, at 42-43.
315 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 3-4; Second Amended Complaint, Connecticut., *supra* note 309, at 46-48. Much of Connecticut's argument in its lawsuit also focuses on the U.S. Department of Education's failure to grant it waivers under the law, so in crafting its request for relief, Connecticut asks that either the federal government be required to pass the extra costs associated with compliance or grant the waivers it seeks that it claims force Connecticut to spend money in addition to that given to it by the federal government. The State's Opposition to the Secretary's Motion to Dismiss, Connecticut. v. Spellings, No. 3:05-cv-1330 (MRK) (D. Conn. Dec. 23, 2005) at 45.
316 Final Brief for the Appellee at 11, Sch. Dist. of Pontiac . v. Spellings, No. 05-2708 (6th Cir. July 13, 2006).
317 Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut. v. Spellings at 37, 3:05-cv-01330 (MRK) (D. Conn. Dec. 2, 2005).

at the same time demanding results in public education through strict accountability measures.[318] The states voluntarily assumed their responsibilities under NCLB.[319] Now they must fulfill them, even if it means spending their own funds.[320]

The dispute between the parties focuses primarily on the language of NCLB's unfunded mandate provision. It reads, in pertinent part as follows:

> [n]othing in this Act shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this chapter.[321]

The plaintiffs in both of the NCLB unfunded mandates lawsuits have argued that this language clearly says the federal government cannot require the states to "incur any costs" or spend any "funds" not paid for by the federal government pursuant to the act or to "mandate, allocate or control" state and local funding.[322] The plaintiffs argue that on its face, §7907(a) applies to all actions a state or locality might have to undertake to comply with NCLB. Therefore, the federal government must pay the entire additional costs imposed on states by NCLB. Because overall federal NCLB funding is insufficient to meet all of its requirements,[323] states are forced to pay part of the costs of compliance out

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318 Final Brief for Appellee, Sch. Dist. Of Pontiac, *supra* note 316, at 5-6.
319 Reply in Support of Defendant's Motion to Dismiss at 10, Connecticut. v. Spellings, No. 3:05-cv-01330 (MRK), (D. Conn., Jan. 13, 2006).
320 Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 37-38.
321 20 U.S.C.A. § 7907(a) (2002).
322 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 56-58. The "mandate, allocate or control" portion of the argument is only present in the Connecticut lawsuit. Second Amended Complaint, Connecticut., *supra* note 309, at 41.
323 The Plaintiffs in the Sch. Dist. of Pontiac v. Spellings lawsuit claim that not only is NCLB funded at a level less than that called for by the legislation, the costs for complying with all of its mandates, such as revised curriculum standards, developing and administering standardized tests, reporting the assessment results, and ensuring that staff are qualified, are enormous. Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 14-52. Connecticut alleges that federal funding is insufficient in two respects. First, the total amount of funding received under NCLB does not cover all of the State's NCLB-related expenses. Second, the $5.8 million provided for assessments under NCLB will not pay for the State's annual assessment costs of $14.4

of their own money. As a consequence, the federal government is violating the plain language of the statute,[324] the Spending Clause,[325] and the Tenth Amendment.[326]

In addition to the plain language of the unfunded mandates provision, the section's legislative history and the overall structure of the NCLB act reveal that Congress was strongly committed to avoiding the imposition of unfunded federal mandates on states. Although legislators did not specifically comment on the inclusion of § 7907(a) in NCLB, this provision was present in three prior acts: Goals 2000: Educate America Act,[327] the School-to-Work Opportunities Act,[328] and the prior version of ESEA the Improving America's Schools Act.[329] The legislative commentary about the unfunded mandate section in these acts makes it clear that legislators did not intend to require states to do things that were not paid for under these laws. Similarly, the overall structure of the law supports this reading. The purpose of NCLB was to increase resources for education, not decrease them. Thus, § 7907(a) covers additional expenditures imposed by the law, and provisions such as § 6321(b)(1) that require states and localities to maintain their financial effort for education[330] and § 6311(b)(3)(D) that require a minimum threshold for federal funding for states to be responsible to implement the assessment portion of

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million plus its modified special education assessments. State's Memorandum Regarding its First Amended Complaint, Connecticut. v. Spellings, No. 3:05cv1330 (D. Conn., Feb. 28, 2006) at 8.

324 Complaint, Sch. Dist. of Pontiac, *supra* note 310, at 57-58; Second Amended Complaint, Connecticut v. Spellings, *supra* note 309, at 40-41.

325 Complaint, Sch. Dist. of Pontiac, v. Spellings, *supra* note 310, at 56-57; Second Amended Complaint, Connecticut v. Spelling, *supra* note 309, at 42-43.

326 Second Amended Complaint, Connecticut v. Spellings, *supra* note 309, at 42-43.

327 20 U.S.C. § 5801 *et seq.* (1996 & Supp. 2006).

328 20 U.S.C. § 6111 *et seq.* (2003).

329 Law of Oct. 20, 1994, Title I, § 101, 108 Stat. 3906 (repealed 2002).

330 "A State educational agency or local educational agency shall use Federal funds received under this part [20 USCS §§ 6311 et seq.] only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part [20 USCS §§ 6311 et seq.], and not to supplant such funds." 20 U.S.C. §6321(b)(1) (2003).

NCLB[331] do not alter the unfunded mandate aspect of the law. Connecticut's decision to accept NCLB funds was informed by a view of the statute as a whole. While annual testing in all grades was a general expectation, under no circumstances would a state be required to spend any additional state resources to comply with the law and states would have the right to seek waivers from any of NCLB's requirements.

The U.S. Secretary of Education, on the other hand, has alleged that § 7907(a) does not alter the conditions of aid included in the statute itself since the federal government has offered federal financial assistance in exchange for a state's compliance with NCLB's provisions, and the various states have affirmatively agreed to abide by them. The conditions of assistance the states agreed to when accepting federal funds--like annual assessments at specific grade levels--were clear from the language of the act. Section §7907(a) does not introduce ambiguity into the statute. Instead, this section prohibits federal officers or employees from imposing extra unfunded requirements in the form of actions or expenditures (such as curriculum or staffing directives or per pupil spending, teacher salaries, or the purchase of new equipment) on states or localities that are in addition to the statutory conditions in the law for the receipt of federal NCLB funds.[332] In this manner, §7907(a) clarifies the scope of the U.S. Department of Education's power to administer and enforce NCLB.

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331 "A State may defer the commencement, or suspend the administration, but not cease the development, of the assessments described in this paragraph, that were not required prior to the date of enactment of the No Child Left Behind Act of 2001 [enacted Jan. 8, 2002], for 1 year for each year for which the amount appropriated for grants under section 6113(a)(2) [20 USCS § 7301b(a)(2)] is less than--

(i) $ 370,000,000 for fiscal year 2002;

(ii) $ 380,000,000 for fiscal year 2003;

(iii) $ 390,000,000 for fiscal year 2004; and

(iv) $ 400,000,000 for fiscal years 2005 through 2007." 20 U.S.C. §6311(b)(3)(D).

332 Final Brief for the Appellee, Pontiac Sch. Dist., *supra* note 316, at 10, 20.

In addition to its plain language, the Secretary of Education argues that § 7907(a) must be read in harmony with the rest of NCLB. At its core, NCLB is a law that assists states in their effort to educate students. Any programmatic or financial obligations the states assume pursuant to this law are voluntarily entered into, not mandated by the federal government.[333] Two provisions highlight this fact. First, the maintenance of effort provision clarifies that states continue to be primarily responsible for education funding.[334] Second, §6311(b)(3)(D) defines the only instance in which a state can be excused from performance under the act. This section temporarily excuses a state's administration of assessments if federal funding falls below the levels set in the act, a situation that has not occurred.[335] Furthermore, plaintiffs' interpretation of § 7907(a) undermines Congressional intent because it pits two of NCLB's main features against each other–accountability versus state and local autonomy and flexibility–in a manner that allows one to defeat the other.[336] As defined by the plaintiffs, a state's autonomy and flexibility under NCLB to develop its own standards, assessments and accountability system could effectively remove the state from any responsibility to actually achieve the goals of the law in any circumstance where a state claims the system it developed itself for meeting NCLB's requirements costs more than the federal government is providing funding. This result is contrary to the purposes of the act that promote the ability of all children to achieve "proficiency on challenging state academic achievement standards

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333 Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 31.

334 20 U.S.C. § 6321(b)(1). *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 37-38.

335 20 U.S.C. §6311(b)(3)(D). *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 35; Final Brief for the Appellee, Pontiac Sch. Dist., *supra* note 316, at 15-16.

336 *See* Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 38-41.

and state academic assessments."[337] Therefore, § 7907(a) must be read as it was intended, to limit the ability of an officer or employee of the federal government to impose additional unfunded requirements on states while maintaining a state's responsibility to abide by the obligations it voluntarily assumed under NCLB in exchange for federal funds.

2.3.2.3.3 – The Decision in School District of the City of Pontiac v. Secretary of the United States Department of Education[338]

The 6th Circuit Court of Appeals, in its January 2008 decision, held that NCLB failed to provide clear notice regarding who bears the additional cost of compliance not paid for by the federal funding provided under the act and therefore violates the Spending Clause of the U.S. Constitution.[339] The court found that a state official could "plausibly contend," based on § 7907(a), she understood that "her State need not comply with NCLB requirements for which federal funding falls short."[340] This decision overturned the lower court's interpretation of the law, which read § 7907(a) as only prohibiting officers and employees of the federal government from imposing additional, unfunded obligations on the states that were not in the original statute,[341] not as prohibiting "Congress itself from offering federal funds on the condition that States and school districts comply with the many statutory requirements" of the act.[342]

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337 "The purpose of this title [20 USCS §§ 6301 et seq.] is 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." 20 U.S.C. § 6301 (2003).
338 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 (6th Cir. Jan. 7, 2008).
339 *Id.* at *15.
340 *Id.* at *11.
341 Sch. Dist. of Pontiac v. Spellings, Civ.A. 05-CV-71535-D, 2005 WL 3149545, *4 (E.D. Mich. Nov. 23, 2005).
342 *Id.* at *5.

In reaching this conclusion, the Court of Appeals stated that although NCLB plainly lays out the obligations of states and school districts that participate in the act to fulfill its educational and accountability requirements, such as the submission of state plans, and tracking student achievement, it is not obvious from the language of the statute or its legislative history that states must pay for the cost of implementing these measures if federal monies do not cover their full cost.[343] Without clarity on this assumption of liability, states cannot have knowingly assumed these obligations.

The Court of Appeals rejected the Secretary of Education's interpretation of NCLB wherein states are required to fully fund in compliance with NCLB regardless of federal funding based on two possible readings of § 7907(a): (1) stopping rogue federal officials or employees from imposing additional requirements on participating states; and (2) ensuring that states would not be subject to mandates under NCLB that did not form a part of this voluntary program, saying that these interpretations are not evident enough from the text,[344] syntax,[345] and legislative history[346] of the provision to bind the states.

In reaching this conclusion, though, the court made the following acknowledgement: "[t]hat is not to say, however, that the Secretary's interpretation of the Act ... is frivolous. Indeed, perhaps the Secretary's view of the text is ultimately correct."[347] Nevertheless the court said the only real question was whether the act provides clear notice to states of their obligation, and NCLB does not.[348]

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343 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 at * 14-16.
344 *Id.* at 12;13.
345 *Id.* at 12.
346 *Id.* at 13-14.
347 *Id.* at 11.
348 *Id.*

2.3.2.3.4 – The Decision in Connecticut v. Spellings[349]

The court in *Connecticut v. Spellings* declined to reach the merits of the case on the unfunded mandate issue, finding instead that it lacked subject-matter jurisdiction to entertain this pre-enforcement declaratory judgment action brought by the State of Connecticut to determine if the U.S. Secretary of Education's interpretation of NCLB's unfunded mandate provision was proper.[350] The Court reached this decision because Connecticut remained in compliance with NCLB's provisions. Therefore, the U.S. Secretary of Education had not declared Connecticut in violation of any provision of NCLB and had not undertaken any enforcement actions against the state.[351] Review of a final agency action in this situation is governed by the General Education Provisions Act (GEPA).[352] This act provides for a hearing of disputes by an administrative law judge with discretionary review of this decision by the Secretary of Education. The Secretary's decision is considered a final agency action. A court may review the Secretary's decision. Therefore, GEPA effectively precludes a pre-enforcement court action by an aggrieved party because allowing it would undermine the "comprehensive system for enforcement" created by Congress, and the courts must defer to its preference that disputes be heard at the administrative level before they are brought before the courts.[353]

2.3.2.3.5 – Analysis

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349 453 F.Supp.2d 459 (D. Conn. 2006).
350 *Id.* at 489 and 494. This case was dismissed in April 2008. Connecticut v. Spellings, 549 F.Supp.2d 161 (D. Conn. 2007). The court found that the U.S. Secretary of Education's decision to deny Connecticut's plan amendments regarding the testing of students with disabilities and English language learners was not arbitrary or capricious because it was consistent with NCLB requirements that all students be tested every year using the same academic standards. *Id.* at 174-76. In addition, the court declined to decide the Unfunded Mandate Provision claim because Connecticut had not properly raised it in its correspondence regarding the contested state plan amendments. *Id.* at 181.
351 *Id.* at 482.
352 20 U.S.C. § 1221 *et seq.* (2003 & Supp. 2006).
353 Connecticut v. Spellings, 453 F.Supp.2d at 484.

The question raised by these cases is ultimately whether states had clear notice that they would be required to comply with all of the provisions of NCLB as conditions of assistance under Congress' conditional spending power even if federal funding was insufficient to cover all of the costs associated with its implementation. The analysis focuses on the text of the statute, most particularly the unfunded mandate provision,[354] whose words must be read in light of the overall statutory scheme to "fit, if possible, all parts into a harmonious whole."[355]

The original reading of the unfunded mandate provision by the district court in the *Pontiac* case,[356] which would require states to comply with the basic conditions of assistance contained in the law but not new requirements imposed by officers or employees of the federal government, best comports the text of § 7097(a), the unfunded mandate provision, with the overall structure and purpose of the NCLB. The text of the key provision in dispute, § 7097(a) of the act,[357] does not provide conclusive guidance on the ultimate question raised by these cases.

Nothing in this Act [20 USCS §§ 6301 et seq.] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act.

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354 "Nothing in this Act [20 USCS §§ 6301 et seq.] shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's curriculum, program of instruction, or allocation of State or local resources, or mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a) (2003).

355 Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

356 Sch. Dist. of Pontiac v. Spellings, Civ.A. 05-CV-71535-D, 2005 WL 3149545 (E.D. Mich. Nov. 23, 2005), reversed, Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 (6th Cir. Jan. 7, 2008). -

357 20 U.S.C. § 7907(a) (2003).

What is clear from this provision is that it has two parts that somehow limit the federal government's ability to: (1) affect curriculum, instruction and allocation of state resources and (2) require states, or their subdivisions, to spend money not provided by the law.[358] What is not clear is whether the latter prohibition contained in this provision, against states being required to "spend any funds" or "incur any costs" not paid under the act, applies to the basic conditions of assistance contained in the statute itself, as alleged by Plaintiffs, [359] or only to additional directives by federal government officers or employees made after the law was passed, as argued by the Secretary of Education. [360] The line between these alternative understandings of this provision is drawn around the "officer or employee of the Federal Government" language in § 7907(a) by asking whether it modifies the clause regarding the spending of state and local government funds. Both interpretations offered by the parties are feasible under the rules of punctuation and grammar.[361] And because of this, the Sixth Circuit Court of Appeals said that a state official could plausibly contend that her state would not have to implement portions of NCLB where no federal funds were provided.[362] But the traditional tools of

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358 *Id.*

359 Plaintiffs propose that the clause be read as follows: "Nothing in this Act [20 USCS §§ 6301 et seq.] shall be construed ...mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a).

360 The Secretary of Education says that the provision is properly read as follows: "Nothing in this Act [20 USCS §§ 6301 et seq.] shall be construed to authorize an officer or employee of the Federal Government to ... mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act." 20 U.S.C. § 7907(a).

361 Plaintiffs justify their position that the clause "officer or employee of the Federal Government" does not modify the subject act by focusing on the final series comma after "local resources," saying that it marks the separation between the first and second clauses or parts of this provision. The Secretary of Education, on the other hand, focuses on the infinitive "to mandate" to say that "officer or employee of the Federal Government" must be read as part of the last dependent clause to give the provision a parallel structure.

362 The majority opinion rejects the Secretary of Education's interpretation of the text on three grounds: (1) the reading is not "so evident" that a state would clearly understand Congress to have meant it; (2) it is reasonable to read the "officer or employee" language to modify only the middle clause regarding state and local control over curriculum, not the funding portion of the provision; and (3) if the "officer or employee" language is read to modify the final clause regarding funding then the following words would have to be

statutory construction, used to determine an act's meaning, include an examination of the law's overall structure and purpose.[363]

The overall structure of NCLB is consistent with a reading of § 7907(a) that retains the basic conditions of assistance of the statute but limits the Secretary of Education's ability to require states to fund things that were not contemplated by the act. NCLB is a statute that aspires to improve the educational opportunity and academic performance of all students in the U.S.[364] by requiring states to devise and implement their own challenging academic standards[365] and accountability systems that measure adequate yearly progress of their schools in preparing all students to meet these educational standards,[366] with content being taught by highly qualified teachers,[367] all students taking academic assessments, [368] and having their scores publicly reported.[369] It offers states, schools and teachers the flexibility to devise and implement their own version of the law's key requirements in exchange for greater accountability for student performance.[370] States and local educational agencies that desire to obtain funding under the act must submit plans that guarantee they will meet the law's requirements.[371] If a state does not fulfill any of its obligations under the law, the Secretary of Education has the authority to withhold funding.[372]

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substituted into the provision in order to effect the desired result ("... or incur any costs *not paid for under this Act* rather than "...not *authorized under this Act*"). Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 *11-12 (6th Cir. Jan. 7, 2008).

363 Bell Atlantic v. FCC, 131 F.3d 1044, 1047 (D.C. 1997).

364 20 U.S.C. § 6301 (2003).

365 20 U.S.C. § 6311(b)(1) (2003).

366 20 U.S.C. § 6311(b)(2) (2003).

367 20 U.S.C. § 6319(a) (2003).

368 20 U.S.C. §6311(b)(3) (2003).

369 20 U.S.C. § 6311(h) (20003).

370 20 U.S.C. § 6301(7) (2003).

371 20 U.S.C. § 6311(a)(1) (2003); 20 U.S.C. § 6312 (2003).

372 "If a State fails to meet any of the requirements of this section, other than the requirements described

Although federal funding for education has increased substantially under NCLB, there is no implication in the law that all costs will be covered. In fact, there is no mention of the cost of compliance in the statute, and the formula for distributing federal Title 1 education funding is based on the number of children from families with incomes below the poverty level,[373] not on any estimates of the actual costs that might be incurred by states or districts in creating, implementing, and administering the requirements of the law. In addition, most schools that do receive funding must spend funds only on the specific students for whom the money is given, not on the entire student body.[374] Moreover, NCLB requires all school districts in states that participate to test students under their challenging academic standards, even if the districts do not receive NCLB funding.[375]

These are all indications that Congress "did not intend to tie the cost of complying with NCLB's requirements to the amount of federal funding, which is inherently subject to change based on the spending priorities of each particular Congress and its competing demands for increasingly scarce federal dollars.[376] Instead, NCLB contains a section that excuses state performance only from administering assessments and only if federal funding falls below certain levels, [377] which have been met. In addition, there is a

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in paragraph (1), then the Secretary may withhold funds for State administration under this part [20 USCS §§ 6311 et seq.] until the Secretary determines that the State has fulfilled those requirements." 20 U.S.C. § 6311(g)(2) (2003).
373 20 U.S.C. § 6333(a)-(c) (2003).
374 20 U.S.C. § 6333(a)(1)(B) (2003).
375 20 U.S.C. § 6311(b)(3)(C)(ix)(I) (2003).
376 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 *20 (6th Cir. Jan. 7, 2008) (McKeague, J., dissenting).
377 20 U.S.C. § 6311(b)(3)(D) (2003).

maintenance of state effort provision that obligates states to continue their substantial financial support for education when federal funding is provided.[378]

The unfunded mandate provision does not alter the fundamental obligations the states assumed when they agreed to accept federal funding under NCLB. Instead, this section's reference to an "officer or employee of the Federal Government" can be most reasonably interpreted to limit the U.S. Department of Education's power to add extra requirements that were not originally included in the act and would require states or local educational agencies to spend their own funds to accomplish. Thus, the unfunded mandate provision is best read as follows: "Nothing in this Act [20 USCS §§ 6301 *et seq.*] shall be construed to authorize an officer or employee of the Federal Government to ... mandate a State or any subdivision thereof to spend any funds or incur any costs not paid for under this Act."[379]

This reading is proper for several reasons. First, the reading is most consistent with the act's purpose to improve the educational opportunities of all children in the nation. Second, this reading is most consistent with the extensive obligations for educational standards, assessments, and accountability systems that it allows states to first define and then commit to implementing. Third, it is consistent with the provisions that do not link funding with the costs of compliance but still hold states to the financial obligations they assume[380] and provide excuses for non-compliance only in limited circumstances.[381] Fourth, this reading is consistent with the text of § 7907(a) that specifically refers to federal officers or employees: "In expounding a statute, the ... Court

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378 20 U.S.C. § 6321(b)(1) (2003).
379 20 U.S.C. § 7907(a) (2003).
380 20 U.S.C. § 6321(b)(1).
381 20 U.S.C. § 6311(b)(3)(D).

must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[382] It is the only reading that maintains the integrity of the act. Finally, it avoids the "absurd effect of eviscerating with a single provision the entire comprehensive scheme of accountability requirements and financial disbursements set forth in hundreds of pages of statutory text."[383] Therefore, the unfunded mandate provision should be read in the context of the whole statute as only limiting officers' and employees' of the federal government ability to impose additional requirements on states not included in the original statute and NCLB should be found to be within Congress' permissible use of its Spending Clause power to encourage states to implement its conditions in exchange for federal funding for education. With this issue addressed, we turn to the other relevant limitation on Congress' conditional spending power, the fifth listed by the Court in South Dakota v. Dole,[384] to determine if NCLB amounts to impermissible coercion that infringes on states' sovereignty.

2.3.2.4 – Limit to Grant of Authority – Coercion

2.3.2.4.1 – Overview of the Law

In order for the federal use of the spending power to be valid, the conditions imposed on the states and localities in exchange for federal benefits received cannot be so coercive as "to pass the point at which pressure turns into compulsion."[385] To make this determination, courts examine whether states have a real choice on whether to participate or are instead forced into submitting to Congress' desires set forth in the legislation in

382 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981).
383 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 *20 (6th Cir. Jan. 7, 2008) (McKeague, J., dissenting).
384 South Dakota v. Dole, 483 U.S. 203, 211 (1987).
385 South Dakota v. Dole, 483 U.S. 203, 211 (1987).

question.[386] If the federal action goes beyond encouraging state participation in a federal program to coercing it, it violates the Tenth Amendment as an encroachment on state sovereignty because it interferes with a power reserved to the states.[387] To decide whether federal spending conditions constitute coercion rather than encouragement, courts have consistently looked to the scope of the forfeiture of federal funding.[388] Other factors that have also been considered are the nature and severity of the alleged breach of duties by the state,[389] the period of time the federal government has maintained that the provision in question is an essential component of the federal-state relationship,[390] and the extent to which the condition treads on a state's essential policy-making functions.[391]

Although several courts have considered coercion arguments by examining the amount of money states would have to sacrifice if they would reject federal funding, none have found that the federal requirements rose to the level of undue coercion.[392] In *South Dakota v. Dole,* a potential loss of 5% of federal highway funds for states that chose not to enact a drinking age of twenty-one was not found to be a coercive condition.[393] This financial inducement was characterized by the Court as a mild encouragement to adopt the drinking age minimum, one that did not remove a state's real choice to decide whether to participate in the federal program.[394] Similarly, in *Hodges v. Shalala*, a requirement that states establish and operate a specific child support enforcement system

386 Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000).
387 New York v. United States, 505 U.S. 144, 156 (1992).
388 *See* South Dakota, 483 U.S. at 211; Hodges v. Shala, 121 F.Supp.2d 854, 875 (D.S.C. 2000); Jim C., 235 F.3d at 1082; Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 569 (4th Cir. 1997); Pace v. Bagalusa City Sch. Bd., 403 F.3d 272, 287 (5th Cir. 2005).
389 Hodges, 121 F.Supp.2d at 876; Virginia Dep't of Educ., 121 F.Supp.2d at 570.
390 Hodges, 121 F.Supp.2d at 876.
391 *Id.*; Virginia Dep't of Educ., 121 F.Supp.2d at 571.
392 West Virginia v. U.S. Dep't of Health and Human Serv., 289 F.3d 281, 289 (4th Cir. 2002).
393 South Dakota v. Dole, 483 U.S. 203, 211-12 (1987).
394 *Id.*

as a condition of receiving federal monies under the Temporary Assistance to Needy Families (TANF) program was not found to be coercive even though the states could potentially lose all funding under it for non-compliance because the federal program offered alternative penalty options that would only result in the loss of a maximum of six percent of federal TANF funds.[395]

Courts have not found the federal conditional spending power coercive even when they may cost states their entire federal funding for a program or a particular state agency. In *Jim C v. United States*, the Court held that the federal government's insistence that Arkansas either give up all of its federal education funding, in the amount of $250 million, or accept it and be subject to lawsuits under §504 of the Rehabilitation Act, although politically painful, was not unduly coercive so as to invalidate Congress' use of its conditional spending power.[396] Instead, it was a normal *quid pro quo* type of arrangement where the federal government offers states funds in exchange for performing certain activities.[397]

However, one court did suggest that a total loss of funding for one education program based on a minor infraction under the act for which funding was received would amount to coercion in violation of the Tenth Amendment. In *Virginia Department of Education v. Riley*, the court, after finding that the U.S. Department of Education's interpretation of the Individuals with Disabilities Act, which required states to provide special education services to students with disabilities who were expelled from school for reasons unrelated to their disabilities, violated the Spending Clause because it was not

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395 Hodges v. Shalala, 121 F.Supp.2d 854, 874-77 (D.S.C. 2000).
396 Jim C v. United States, 235 F.3d 1079, 1081-82 (8th Cir. 2000).
397 *Id.*; Pace v. Bogalusa City School Board, 403 F.3d 272, 287 (5th Cir. 2005) (finding no coercion under either the Individuals with Disabilities Act or §504 of the Rehabilitation Act).

clearly and unambiguously stated in the act. The court said that the state had a strong claim that this condition was coercive because the U.S. Department of Education had withheld 100% of Virginia's funds under the act for its failure to provide services to less than one tenth of one percent of eligible students in the state.[398]

2.3.2.4.2 – The Connecticut v. Spellings Lawsuit

In the Connecticut NCLB unfunded mandate lawsuit, Connecticut argues that the Secretary of Education's penalties are so harsh and unrelated to the conditions upon which Connecticut accepted the funds that they violate the Tenth Amendment.[399] Connecticut contends that it stands to lose hundreds of millions of dollars in federal education funding if it attempts to opt out of NCLB.[400] To support this claim, Connecticut cites the U.S. Department of Education's response to Utah's inquiry about the financial effect of opting out of NCLB. The U.S. Department of Education told Utah that it would lose all of its funding that relied upon the Title 1 formula for distribution, not just the federal funds provided under NCLB.[401] From 2002-2005, Connecticut received approximately $175 to $184 million per year under Title 1 and $287 to $325 million per year in total education funding.[402] This money is in jeopardy if Connecticut fails to comply with NCLB. Because states are becoming increasingly dependent upon federal funding for education, the U.S. Department of Education's threat to remove most of the

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398 Va. Dep't of Educ. v. Riley, 106 F.3d 559, 569-572 (4th Cir. 1997).
399 Second Amended Complaint, Connecticut v. Spellings, *supra* note 309, at 43.
400 *Id.* at 16.
401 *Id.*. These monies would include funds for safe and drug free schools, after-school programs, and literacy programs for parents. The State's Opposition to the Secretary's Motion to Dismiss, Connecticut v. Spellings, *supra* note 315, at 7.
402 Second Amended Complaint, Connecticut v. Spelling, *supra* note 309, at 15. Federal education funding represents approximately 5% of overall educational spending in Connecticut and between 10% and 15% of the budgets in certain districts. *Id.*

federal education funding is coercive.[403] Therefore, the federal government has intruded into the state's sovereignty through its imposition of NCLB.

The U. S. Department of Education responds to these claims by saying that requiring states to honor the obligations they assumed under the conditional spending clause does not intrude on their sovereignty. It is clearly within a states' power to refuse federal funding under NCLB and not be subject to its requirements.[404] Moreover, the boundary between inducement and coercion has never been well defined by the courts, and courts have found no coercion where large amounts of money were at stake.[405] So, NCLB is a valid exercise of Congress' conditional spending power. It does not violate the Tenth Amendment.

2.3.2.4.3 – Analysis

Although the courts have articulated that limiting the federal government's ability to unduly infringe on a state's sovereignty by compelling its participation through coercive conditions is an important limitation on Congress' spending power, no court has actually found Congressional conditions to be coercive, and the point at which the incentive Congress offers within a conditional spending statute passes from encouragement to coercion is unclear.[406]

The coercion claim is difficult to analyze for two reasons: (1) few lawsuits have been successfully prosecuted using it, so the legal standard is not well-established; and (2) Connecticut remains in compliance with NCLB's requirements, so the U.S. Department of Education has not taken any enforcement action against it. Therefore,

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403 *Id.*
404 Memorandum of Law in Support of Defendant's Motion to Dismiss, Connecticut, *supra* note 317, at 49.
405 *Id.* at 50.
406 West Virginia v. U.S. Dep't of Health and Human Services, 289 F.3d 281, 288-289 (4th Cir. 2002).

there is no actual scope of the breach or magnitude of withholding to apply to the legal principles set forth in the relevant Tenth Amendment cases. Connecticut desires the court to rule before it actually does not comply with NCLB because it potentially stands to lose much of its education funding.

Assuming that the U.S. Department of Education removes 100% of the state's Title 1 funding, plus some additional funding that uses the Title 1 distribution formula, Connecticut would lose at least $184 million in annual funding, which amounts to over 50% of their total federal education funding. Moreover, this funding affects education, a primary state responsibility. While this is a substantial amount of money for an essential state function, this figure must be weighed against the nature and severity of the breach. Here Connecticut's primary desire is not to implement the required summative testing in grades 3, 5, and 7 and instead use formative tests in those years. Essentially, Connecticut is asking to continue its student assessment system in the grades it covered before NCLB was adopted without adding the new assessments required by the law.[407] The U.S. Department of Education considers annual assessments to be one of the act's cornerstones, so failure to conduct these would be a material and substantial breach of NCLB.

Ultimately, any action the U.S. Department of Education takes against Connecticut in withholding funds for its future non-compliance with NCLB because of a

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407 Connecticut's student assessment system consists of three categories of tests: the Connecticut Mastery Test (CMT), the Connecticut Academic Performance Test (CAPT), and the CMT/CAPT Skills checklist, an alternate assessment. The CMT was first administered in 1985 to measure the achievement and progress of Connecticut students in Grades 4, 6 and 8. Its most recent version, begun in 2005-2006, is a criterion referenced test that assesses three major content areas on each grade-level version of the CMT: reading, writing and mathematics. CONNECTICUT STATE DEP'T OF EDUC. BUREAU OF STUDENT ASSESSMENT BUREAU OF SPECIAL EDUC. ASSESSMENT GUIDELINES FOR ADMINISTERING THE CONNECTICUT MASTERY TEST, CONNECTICUT ACADEMIC PERFORMANCE TEST AND THE CMT/CAPT SKILLS CHECKLIST TO STUDENTS ENROLLED IN SPECIAL EDUCATION STUDENTS IDENTIFIED UNDER SECTION 504 OF THE REHABILITATION ACT & STUDENTS WITH LIMITED ENGLISH PROFICIENCY (2005).

refusal to implement annual testing is likely to be upheld as not infringing on Connecticut's sovereignty. Even a total withholding of federal education funding to the state would amount to only 5% of Connecticut's total educational expenditures.[408] It is unlikely that a court would find that this amount would result in a compulsion for Connecticut to participate in NCLB. Even if all federal education dollars were withheld, Connecticut would retain the real choice and the right to decline federal funding and not participate in NCLB.

2.4 – Is NCLB an Unfunded Mandate – The Research on the Finances

There is little agreement in the education community about how much NCLB actually costs to implement. Disagreement is due to a number of factors including a lack of consensus over what counts as legitimate costs attributable to the Act, the difficulty in estimating uncertain future costs, and differences in the methodologies used to calculate the costs. Several cost studies have been conducted on this topic, and several methodologies have been used to estimate NCLB costs in them.[409]

The 2005 National Conference of State Legislatures (NCSL) report on The No Child Left Behind Act outlines six distinct approaches to estimating NCLB costs.[410] The methods to calculate NCLB costs include the relative federal expenditure increases,[411] unspent balances in federal education accounts,[412] the difference between the statutory

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408 Second Amended Complaint, Connecticut v. Spellings, *supra* note 309, at 15.
409 *See* William J. Mathis, *The Cost of Implementing the Federal No Child Left Behind Act: Different Assumptions, Different Answers*, PEABODY J. OF EDUC., 80(2), 90-119 (2005) (summarizing the results from the studies performed).
410 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 43. *See also* Mathis, *supra* note 409, at 93-97 (listing a similar set of approaches).
411 In this method, federal spending increases are compared to previous levels of federal financial support. *See e.g.* CENTER ON EDUCATION POLICY, *Title I Funds: Who's Gaining and Who's Losing: School Year 2006-07 Update*, (2007), (reporting stagnant funding levels for 2006-07 year) , http://www.cep-dc.org/index.cfm?fuseaction=page.viewpage&pageid=509.
412 This method measures the amount of money present in federal education accounts.

authorization and actual appropriation amounts,[413] the statutory definition of full funding,[414] compliance costs,[415] and proficiency costs.[416] The NCSL report concludes that a compliance versus proficiency cost estimate approach is the one that best captures the actual costs of the law.[417] This approach contrasts the conservative cost estimates generated by those who believe that only the technical *compliance* costs like the administrative and processing costs should be counted as NCLB costs with the much more generous estimates that consider all of the costs necessary to bring the nation's children up to *proficiency* in the high academic standards called for by NCLB.[418]

2.4.1 – Compliance Costs

Compliance costs are generally comprised of the direct costs the state will incur in administrating NCLB, including the annual testing, data collection, analysis and reporting, implementing adequate yearly progress (AYP), providing sanctions such as school choice, supplemental services, and technical assistance, and getting teachers to meet the "highly qualified" definition. [419] This is the approach that many state NCLB cost studies adopt. The National Conference of State Legislatures Task force on NCLB estimates that these costs will range from 1 percent of aggregate K-12 budgets to 5.3 percent of state aggregate resources, with 2 percent emerging as a national average.[420] Consequently, the NCSL concludes under the lowest cost estimates, i.e. those that

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413 The authorization amounts are taken from the statutory provisions and then compared with actual legislative appropriations.
414 Full funding is defined in the statute as 40 percent of the average state per pupil expenditure for Title 1 students. *See e.g.* NAT'L EDUC. ASS'N, NO CHILD LEFT BEHIND? THE FUNDING GAP IN ESEA AND OTHER FEDERAL EDUC. PROGRAMS 7 (2004), (identifying a $16.5 billion funding gap in Title I-A in 2003 alone) http://www.nea.org/esea/images/funding-gap.pdf.
415 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 43.
416 *Id.*
417 *Id.*
418 Mathis' work also focuses on these approaches, which he calls "administrative, implementation, and 'hard costs'" and "costs of teaching children to the standards." Mathis, *supra* note 409, at 96-97.
419 *Id.* at 41.
420 *Id.* at 46.

consider just compliance costs, the increased federal funding should cover the average state compliance costs of the law since federal NCLB funding increases are estimated to contribute an additional two percent to overall education funding.[421] Virginia's NCLB's cost estimate supports this finding. In a 2005 report, the state calculates the actual new costs of implementing NCLB at approximately $20 million/year from 2004-2008. Virginia officials expect the additional federal revenues provided under the law to cover these costs.[422]

One aspect of compliance costs, the development and administration of state assessments, is considered particularly expensive by the states. The General Accounting Office estimated that states will have to expend between $1.9 and $5.3 billion for the first six years of NCLB (fiscal year 2002 – 2008).[423] The $1.9 billion figure represents all states using multiple choice question tests. If states employ tests using a mixture of multiple-choice questions and a limited number of open-ended questions where students write a short response, the cost would be $5.3 billion. The method by which tests are scored largely explains the differences in cost estimates. State spending will be at about $3.9 billion if the states keep the mix of question they reported when this study was conducted.[424]

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421 *Id.* at 45. Because this is an average estimate, several states have estimated their costs substantially higher than this. For example, Connecticut, Hawaii, and Minnesota's estimates are described as marginal costs of compliance, not proficiency, but they still find a substantial cost differential from the funds provided under NCLB. *But see* Mathis, *supra* note 409, at 103 (concluding that even with a 2% to 2.5% cost estimate increase, new federal NCLB revenues will not cover implementation costs).

422 VIRGINIA DEP'T OF EDUC., REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY ON THE COSTS OF THE FEDERAL NO CHILD LEFT BEHIND ACT TO THE VIRGINIA DEP'T OF EDUC. 24 (2005), http://www.doe.virginia.gov/VDOE/nclb/coststudyreport-state.pdf.

423 U.S. GEN. ACCOUNTING OFFICE, GAO-03-389, TITLE 1: CHARACTERISTICS OF TESTS WILL INFLUENCE EXPENSES; INFORMATION SHARING MAY HELP STATES REALIZE EFFICIENCIES 3 (2003), http://www.gao.gov/new.items/d03389.pdf.

424 *Id.*

In its lawsuit, Connecticut estimates that it will spend $14.4 million on assessments in 2006, but federal funding will only be $5.8 million, thus producing a $8.6 million shortfall.[425] In addition, Connecticut estimates that it will need to spend $1.5 million for special education student assessments.[426] These additional expenses would bring the NCLB funding shortfall to $10.1 million for 2006. The total of all Connecticut's federal Title 1 funding for 2006 was $100 million.[427]

2.4.2 – Proficiency Costs

The proficiency costs are the additional resources needed to actually increase student achievement to the levels specified by NCLB. This can include a wide array of activities, some of which states were doing prior to NCLB. But fulfilling the expectation of having all children proficient by 2013-2014 will require states to drastically increase funding for these programs and others.[428] It is these costs that detractors of NCLB most frequently cite.

William J. Mathis examined the cost studies for ten states – Maryland, Indiana, Montana, Nebraska, New Hampshire, New York, South Carolina, Texas, Vermont, and Wisconsin – and summarized their conclusions regarding the cost of bringing the state's children up to a high academic standard.[429] Each of the ten states found that providing a "standards-based" NCLB education for all children will require massive new investments

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425 Second Amended Complaint, Connecticut v. Spellings, *supra* note 309, at 19.
426 *Id.* Sixty-five thousand students with disabilities receive special education services in Connecticut. These students represent 11.4% of the total school population of children ages 6-21 in the state. CT State Dep't of Educ., *Assessment guidelines*, *supra* note 407. From 1990 to 2004, many students with disabilities in Connecticut were given the CMT test that corresponded to their instructional level, a practice known as out of level testing (OOL). For example, a 9th grade student may take the 7th grade CMT. This is the practice the state requested to continue under in its plan amendments to NCLB. Connecticut v. Spellings, 453 F.Supp.2d 459 (D. Conn. 2006).
427 U.S. DEP'T OF EDUCATION, ESEA TITLE 1 GRANTS TO LOCAL EDUC. AGENCIES (2007), *supra* note 275.
428 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 41.
429 William J. Mathis, *No Child Left Behind: What are the Costs? Will We Realize any Benefits?* (2003).

in education spending. Seven of the 10 studies show increases in base cost that are greater than 24%, and of these, six were between 30% and 46%; two were in the 15% range; one did not directly address the base cost. Mathis uses these studies to approximate the total new investment needed in our educational system. Starting from a figure of $422.7 billion in 2001-2002, Mathis estimates a need for an additional $84.5 billion a year by adding 20% to the total annual national education expenditures and $148 billion with a 35% increase.[430]

The cost study done for the State of Ohio illustrates the projected massive amounts of expenditures needed when an expansive approach, one that considers both compliance and proficiency costs, to estimating NCLB costs is adopted. In Ohio's study, the overwhelming majority of the costs are allocated to the proficiency interventions in the schools. These include additional teacher and instructional assistant salaries, summer school costs, extended school day costs, intensive in-school academic intervention, academic coordination services, and early assessment and intervention monitoring. The report estimates that Ohio districts will need an additional $1.5 billion annually to implement fully NCLB. The programs and services purchased with this money are designed to empower 100% of Ohio's children to achieve proficiency on its state achievement standards. Federal funding for Ohio is only estimated to be $44 million.[431]

2.4.3 – Analysis

The technical issue of whether NCLB is an unfunded mandate depends on whether the costs of compliance or the costs of compliance plus proficiency are

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430 *Id.*

431 William Driscoll & Dr. Harold Fleeter, OHIO DEP'T OF EDUC., PROJECTED COSTS OF IMPLEMENTING THE FEDERAL "NO CHILD LEFT BEHIND" ACT IN OHIO (2003),http://www.ode.state.oh.us/GD/DocumentManagement/DocumentDownload.aspx?DocumentID=2947.

measured. If states only consider their administrative costs when implementing the law, these will, for the most part, be covered by the increased federal funding under NCLB because federal funding has increased approximately 2% under the act and this coincides with the average estimated expenses for states in implementing the law.[432] If, on the other hand, states include the cost of interventions to raise all student performance to the proficiency level, the additional federal funds supplied under NCLB will be vastly insufficient. Connecticut strongly argues that its Title 1 funding will not be adequate to cover its costs, particularly for its assessments. This claim is probably true because Connecticut uses assessments that are much more expensive to develop and to score than the multiple choice formats utilized by many other states. With this in mind, the U.S. Department of Education suggested that Connecticut implement multiple choice tests for the grades whose assessments are newly required by NCLB. Connecticut has rejected this suggestion and has developed its high quality assessments for all grades that are tested. Therefore, it is likely that Connecticut has incurred substantial costs to comply with NCLB.

2.5 – CONCLUSION

Over the past sixty years, policy analysts, educators and administrators have watched the influence of the federal government grow in the field of education. The NCLB represents the most far-reaching manifestation of this powerful federal presence in an area that has, by both law and tradition, been reserved to the states. In the educational policy arena it is frequently alleged that NCLB is an unfunded mandate because it asks states and local school districts to implement educational standards, assessments, and accountability systems for all students in the nation while only providing federal funding

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432 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 42.

in certain limited amounts; amounts that many contend are insufficient to perform all of the necessary tasks.

NCLB represents the latest iteration of the federal government's use of its conditional spending power, granted in Article 1, Sec. 8, clause 1 of the U.S. Constitution, in a manner that has gradually expanded its role in setting education policy by offering states federal dollars in exchange for compliance with the conditions specified in the relevant laws, such as the Individuals with Disabilities Education Act[433] and the Elementary and Secondary Education Act.[434] To be valid, these statutory conditions must be in pursuit of the general welfare, unambiguous, related to the federal interest, not prohibited by other constitutional provisions, and not coercive.[435]

The Sixth Circuit Court of Appeals weighed in on this debate in early 2008, essentially agreeing with the unfunded mandate claims,[436] ruling in *Pontiac v. Secretary of the U.S. Department of Education*, that NCLB exceeds Congress' Spending Clause authority because it does not provide clear notice regarding who bears the additional costs of compliance for implementing the law's requirements.[437] This article has examined the legal context and the arguments in both this lawsuit and *Connecticut v. Spellings*,[438] and reached the opposite conclusion, arguing instead that NCLB is a valid exercise of Congress' Spending Clause power. NCLB is a permissible use of Congress' conditional spending power because it is consistent with the principles that govern its use. It promotes the general welfare of the nation and is related to the federal interest of

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433 20 U.S.C. § 1400 *et seq.* (2000 & Supp. 2006).
434 20 U.S.C. § 6301 et seq. (2003) (original version at ch. 70, 79 Stat. 27 (1965)).
435 South Dakota v. Dole, 483 U.S. 203, 207 (1987).
436 Although a Spending Clause analysis is one that examines whether an inducement is proper. Congress may not mandate state or local action under this clause of the Constitution. *See* U.S. CONST. art. I, § 8, cl. 1; McDonnell & Elmore, *supra* note 219, at 138-39.
437 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 (6th Cir. Jan. 7, 2008).
438 Connecticut v. Spellings, 453 F.Supp.2d 459 (D. Conn. 2006).

improving the educational opportunity for all students. It unambiguously conditions federal financial assistance on the fulfillment of its terms that require states to define and implement standards, assessments, and accountability systems, and states have clear notice of their responsibility to pay for the costs of these reforms if federal funds are not sufficient. It does not induce states to violate other constitutional provisions. And states retain a real choice either to accept federal funds or decline them if they do not wish to participate in this program. Thus, from a legal perspective, NCLB is not an unfunded mandate.

Moreover, NCLB is not an unfunded mandate from a financial perspective. Although NCLB implementation cost estimates differ depending on the approach used, calculations that include only the basic compliance costs of implementation and administration of the technical requirements predict that the new federal funding provided under the law will be sufficient to cover the average estimated expenses for states implementing the law.[439] Funding under NCLB will not, however, cover the proficiency costs of raising student performance to higher levels of academic achievement. Under the conditions of the statute, states and local school districts must fund any additional monies that are necessary to achieve their student achievement goals.

Even though NCLB has generated a lot of controversy in the education community, its passage is within the scope of Congress' Spending Clause power. Judge McKeague made the following observation in his dissent in the *Pontiac* decision, "[t]he notion that Congress intended to pay in full for a testing and reporting regime of indeterminate cost, designed and implemented by States and school districts, not federal agencies, is not only nonsensical and fiscally irresponsible, but also contravenes the

439 NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 273, at 42.

traditional recognition of State and local governments' primary responsibility for public education."[440]Therefore, after examining the law's language and structure, and in light of this clear division of responsibility for public education among government agencies, NCLB is best characterized as a permissible promotion of the federal education ideal of improving the educational quality of all students in this country, rather than an unfunded mandate.

440 Sch. Dist. of Pontiac v. Sec'y of the U.S. Dep't of Educ., 2008 WL 60187 *22 (6th Cir. Jan. 7, 2008) (McKeague, J., dissenting).

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Chapter 3 – IDEA and NCLB - Convergence and Dissonance in Special Education Policy - The Growing Alignment between these Laws and the Continuing Differences in their Conceptions of Equal Educational Opportunity

3.1 – Introduction

As an outside observer studying the No Child Left Behind Act (NCLB) from a legal perspective, I was intrigued to find so much consternation in the special education community over its 2002 authorization.[441] On its surface the landmark legislation providing sweeping guarantees that students with disabilities would be expected to achieve improved academic goals in step with the general education peers, a laudable goal sought by a generation of special education advocates. Yet concerns were raised about the means through which NCLB would achieve this goal. While most educators agreed that its principle purpose of improving educational results for all students, including those with disabilities was a laudable goal– the most notable of which was inclusion of all students in the standardized test regimen, which has proven to be the accountability bulwark of the new law.[442]

Proponents described NCLB as an opportunity to enhance the educational rights and opportunities for students with disabilities.[443] Several articles describe the potential benefit to students with disabilities because of NCLB's expectations for improved educational performance and closing the achievement gap among students found in the

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441 No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (2003 & Supp. 2008).
442 Christian E. Keele, *Is the No Child Left Behind Act the Right Answer for Children with Disabilities?*, 72 UNIV. OF MISSOURI AT KANSAS CITY L. REV. 1111, 1117-118 (Summer, 2004); Michael J. Wasta, *No Child Left Behind: The Death of Special Education?*, 88(4) PHI DELTA KAPPAN 298, 299 (Dec. 2006).
443 Beth Handler, *Meeting the Shared Vision of No Child Left Behind and Individuals with Disabilities Education Improvement Act of 2004*, 80(1) THE CLEARING HOUSE 5, 5-6 (Sept./Oct. 2006); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 BYU. EDUC. & L.J. 574-75 (2003); Stephen A. Rosenbaum, *Aligning or Maligning? Getting Inside a New IDEA, Getting Behind No Child Left Behind and Getting Outside of it all*, 15 HASTINGS L.J. 1, 27-28 (Winter, 2004).

law's requirements that students be included in and make progress in the general education curriculum and participate in and achieve a proficient level on state academic assessments.[444]

Detractors saw NCLB as a threat to the substantial rights that were afforded to students with disabilities under the Individuals with Disabilities Education Act (IDEA) because, as enacted, NCLB required that students with disabilities be fully included in its standardized testing mandates.[445] Two main categories of concern emerged. First, a shift from IDEA's focus on the unique needs of each child with a disability to a school's required level of attainment on the tests under NCLB was seen as a potential threat to students with disabilities' rights under IDEA to a free appropriate education.[446] Second, the potential negative effects on the students themselves that could result from NCLB such as increased anxiety, a shift in curriculum from life skills and personal success to test taking techniques, and the likelihood of a higher drop-out rate for students with disabilities because of the increased academic pressure.[447]

At the same time as this seminal conversation unfolded, both IDEA and NCLB were being amended through legislative and administrative processes to address many of the concerns raised by commentators regarding the full inclusion of students with disabilities in NCLB's accountability systems. The 2004 reauthorization of IDEA specifically incorporated many of the key NCLB accountability requirements. In

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444 Handler, *supra* note 443, at 5; Johnson, *supra* note 443 at 574-75; Rosenbaum, *supra* note 443, at 27-28.

445 Matthew R. Plain, Comment, *Results Above Rights? The No Child Left Behind Act's Insidious Effect on Students with Disabilities,* 10 ROGER WILLIAMS U. L. REV. 249 (Fall 2004); Michael Metz-Topez, Comment, *Testing – The Tension Between the No Child Left Behind Act and the Individuals with Disabilities Education Act,* 79 TEMP. L. REV. 1387 (Winter, 2006); ERIN G. Frazor, Comment, *"No Child Left Behind" in Need of a New "IDEA": A Flexible Approach to Alternate Assessment Requirements*, 36 GOLDEN GATE U. L. REV. 157 (Spring, 2006); Keele, *supra* note 442.

446 Keele, *supra* note 442, at 1119; Plain, *supra* note 445 at 258; Metz-Topodas, *supra* note 445, at 1409.

447 Keele, *supra* note 442, at 1119-22; Metz-Topodas, *supra* note 445, at 1397-99.

addition, the U.S. Department of Education issued regulations that permitted certain students with disabilities to take alternate assessments rather than the standardized general assessments required under the original version of the law.

What few commentators acknowledge is that the subsequent modifications provided greater alignment between the two laws. First, there is an agreement in the overall purpose of the laws to improve the educational outcomes for students with disabilities.[448] Second, there is better coherence in their accountability provisions since both require the same performance goals and indicators for students with disabilities, that all students must participate in assessments, and that their scores must be reported and count towards a school's AYP calculation.[449] Third, there is better consistency among their assessment requirements, which now permit alternate assessments.[450]

During the same time period, a parallel conversation was taking place regarding the possibility of greater opportunity for students with disabilities under the new accountability provisions in IDEA 1997 and 2004. Several articles were written to advocate for an elevated educational benefit standard for the free and appropriate public education students with disabilities must be provided by states under IDEA. Although most focused exclusively on the provisions of IDEA in their argument,[451] one author references NCLB's high expectations for student achievement as support for this

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448 Handler, *supra* note 3, at 5.
449 U.S. DEP'T OF EDUC. OFFICE OF SPECIAL ED. PROGRAMS, ALIGNMENT WITH THE *NO CHILD LEFT BEHIND (NCLB) ACT* (FEB. 2, 2007) at 4-5.
450 *Id.* at 5.
451 Tara L. Eyer, *Greater Expectations: How the 1997 IDEA Amendments Raise the Basic Floor of Opportunity for Children with Disabilities*, 103 DICK. L. REV. 613 (Spring, 1999) (arguing that the "some educational benefit standard" is no longer viable because of substantive changes that have been made to IDEA over the years that emphasize greater expectations for the educational achievement of students with disabilities); Johnson, *supra* note 443; AndreaValentino, *The Individuals with Disabilities Education Improvement Act: Changing What Constitutes an "Appropriate" Education*, 20 J.L. & Health 139 (2007).

claim.[452] All allege that the "some educational benefit" requirement for the appropriateness of the individualized education program provided to a child with a disability that was articulated by the U.S. Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*,[453] should be raised to require states to offer students with disabilities a higher substantive level of educational benefit.[454]

These conversations – the one regarding special education inclusion in NCLB's accountability system and the one arguing for greater educational rights for students with disabilities under IDEA -- provide an excellent framework for examining the underlying conceptions of equal educational opportunity that emerge from these policies. Both IDEA and NCLB are compensatory education statutes that seek to promote a high quality education for students with certain disadvantages, specifically including students with disabilities. The compensatory education model embodied in the Education for All Handicapped Children Act of 1975 established a *level the playing field* goal for students with disabilities that offered them additional assistance to have an educational program that was reasonably calculated to offer each child some educational benefit. Twenty-five years later, NCLB was enacted with a conception of equal educational opportunity that called for a higher standard, one of *minimal achievement* that required all students, including those with disabilities, to reach a certain level of proficiency as demonstrated by their proficiency on academic assessments.[455] And so, at first glance, especially in

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452 Johnson, *supra* note 443, at 561-62 (alleging that the "some educational benefit" standard no longer accurately reflects the requirements of IDEA because of significant changes in the educational landscape, specifically NCLB and the state standards movement, the educational adequacy state court decisions, and the 1997 amendments to IDEA).

453 458 U.S. 176 (1982).

454 Johnson, *supra* note 443; Eyer, *supra* note 451; Valentino, *supra* note 451.

455 *But see* Harvey Kantor and Robert Low, *From New Deal to No Deal: No Child Left Behind and the Devolution of Responsibility for Equal Opportunity*, 76(4) HARVARD EDUC. REVIEW 474, 482-88 (Winter, 2006) (arguing that although NCLB appears to promote equality of educational opportunity, in practice it is

light of the numerous advocates arguing under the new IDEA for a higher standard of educational benefit for students with disabilities, the special education community's tepid response to NCLB seemed out of place.

This article explores this tension in the similarities and differences between the rights and requirements IDEA and NCLB place on students with disabilities and the underlying conceptions of equal educational opportunity embodied in these laws. It utilizes two bodies of literature to do this: policy-making and equal educational opportunity. The article begins in section 3.2 by outlining the foundational principles for both theoretical frameworks. Regarding the policy-making process, it includes the necessary background for the idea that laws are viewed as fixed or static and are often discussed in this manner to allow for analysis of their specific components but that in reality they are always changing through revisions made by Congress itself and the administrative agencies charged with administering them. Regarding equal educational opportunity, sketches out the central concepts conveyed by the terms "equality", "equal opportunity", and "equality of educational opportunity" as they have manifested themselves in the U.S. public education system, particularly related to students with disabilities and identifies a equal outcomes conceptual model for describing it.

Section 3.3 traces the development of the guarantee of equal educational opportunity to students with disabilities, starting in the 1960s with both the cases and legislation that pre-date the Education for all Handicapped Children of 1975 and including a discussion of this law and the U.S. Supreme Court decision in *Rowley* that interpreted it.

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likely to reduce it through a narrowing of the curriculum, a stigmatization of schools that educate large numbers of low-income students, and, most importantly, its inattention to the broader social issues that prevent student success in schools).

Section 3.4 contains the discussion of federal education policy for students with disabilities under both IDEA and NCLB. It examines the relevant portions of both laws and then analyzes their conceptions of equal educational opportunity using the equal outcomes framework set forth in the second section of the article and a description of how federal courts currently analyze questions of educational opportunity under the IDEA's free appropriate public education (FAPE) provision. Using this information, it then explains the tension in the requirements of both laws and the debate that has ensured about including students with disabilities in general local and state standardized tests.

Section 3.5 looks specifically at the federal government's assessment policy for students with disabilities, as articulated in both NCLB and IDEA. Its particular focus is on NCLB assessment policy, and it traces the development of the requirements for participation of students with disabilities issued by the U.S. Department of Education under NCLB and the resulting modifications to the full inclusion requirement in NCLB's original text to accommodate the concerns of special education advocates.

Section 3.6 contains the analysis. It describes the usefulness and limitations of the policy cycle model for examining the changing nature of laws. It also applies both models for describing the conceptions of equal educational opportunity: the equal outcomes model and the *Rowley* FAPE test.

I conclude with my findings in Section 3.7 by identifying the critical distinction between IDEA and NCLB, which both apply to students with disabilities. Special education advocates value the responsibility of considering each child's unique situation in crafting an individualized education program under IDEA, one that arguably equates to a lower level of equal educational opportunity known as *level the playing field* more

highly than a blanket and perhaps unreachable promise that all students must *minimally achieve* the same level of proficiency on a standardized test. It is this right that drove the conversation leading the USDOE to modify NCLB's assessment requirements from all students taking the same standardized tests to the establishment of five different testing options and a 3% exemption in AYP calculations for students with disabilities within five years of NCLB's passage.

3.2 – Theoretical Framework

This article examines special education policy under the lenses of two different bodies of literature: policy-making and equal opportunity. It studies the main provisions of the Individuals with Disabilities Education Act (IDEA) and the No Child Left Behind Act (NCLB) to identify their similarities and differences with respect to their terms that require the type of educational benefit or services that each school is required to provide to a student with disabilities and the consequences that occur if they are not supplied under each of the laws. It then compares both laws' visions of the type and quality of education students with disabilities must receive, paying particular attention to the laws' view of accountability policy, using both bodies of literature. This section lays out the relevant theoretical frameworks that are utilized in the analysis. The first focuses on the process of policy-making that generates laws in this country using the policy cycle model to observe the role the U.S. Department of Education (USDOE) played in altering and aligning the assessment requirements of NCLB and IDEA. The second considers the notion of equal opportunity that has been promoted in the U.S. educational system in order to examine the current conceptions that reside in IDEA and NCLB.

3.2.1 – The Policy-Making Process

Public policymaking is the process by which society chooses to do or not do certain activities through government.[456] "The goal of a political theory of the policy process is to explain how interested political actors interact within political institutions to produce, implement, evaluate and revise public policies."[457]

Research about policy takes many forms. Two major categories of policy research are analysis *for* policy and analysis *of* policy.[458] Analysis *for* policy is concerned with influencing policy decisions through either policy advocacy, information for policy, or policy monitoring and implementation research. Analysis *of* policy is concerned with how policy develops and analyzes either policy determination or policy content. This article is an analysis *of* policy determination and content because it focuses both on the process through which NCLB and IDEA were revised by NCLB's regulations and IDEA's reauthorization and on conceptions of equality of educational opportunity in these laws.

3.2.1.1 – Policy Development in General

Although there are several different ways to characterize the policy-making process, the most enduring is the rational decision-making model that outlines the policy cycle approach.[459] The common formulation of this model contains the stages in which a problem is identified and placed on the policy agenda, alternative solutions are proposed,

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456 DAVID J. GOULD, LAW AND THE ADMINISTRATIVE PROCESS: ANALYTIC FRAMEWORKS FOR UNDERSTANDING PUBLIC POLICYMAKING (University Press of America 1979) (1977).
457 Edella Schlager & William Bloomquist, *A Comparison of Three Emerging Theories of the Policy Process*, 49(3) POLITICAL RESEARCH QUARTERLY 651 (Sept. 1996).
458 LES BELL & HOWARD STEVENSON, EDUCATION POLICY: PROCESS, THEMES AND IMPACT 10-11 (Routledge 2006).
459 WAYNE PARSONS, AN INTRODUCTION TO THE THEORY AND PRACTICE OF POLICY ANALYSIS (Edward Elgar Publishing Co. 1995); *See also* DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 10 (Rev. ed., Norton & Co, Inc. 2002) (1988).

analyzed, and then selected. After this process is complete, the policy is implemented and its implementation is evaluated.[460]

Many scholars have identified shortcomings the policy cycle model in describing the policy-making process, a process that is much more fluid than the model suggests.[461] In practice, policy development is not linear, and does not progress in a methodical manner through a well-defined process, almost as if on an assembly line.[462] Instead, it goes through a variety of stages and takes place at a number of different levels. Education policy, in particular, is formed and re-formed as it is being implemented by those working at the ground level of implementation in the schools.[463] And so any attempt to break up the policy making process into steps is artificial. The steps cannot be reliably distinguished from one another because policy making is a complex interactive process without beginning or end, in part because implementation of one policy raises unanticipated concerns that must be addressed.[464]

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460 *See generally* Parsons, *supra* note 459, at 77-80; B. GUY PETERS, AMERICAN PUBLIC POLICY PROMISE AND PERFORMANCE (5th ed., University Press, 1999); Stone, *supra* note 459, at 10-11.

461 Criticism of the model have been stated as follows:

- "it does not provide any causal explanation of how policy moves from one stage to another;
- it cannot be tested on an empirical basis;
- it characterizes policy-making as essentially 'top-down', and fails to take account of 'street-level' and other actors;
- the notion of a policy cycle ignores the real world of policy-making, which involves multiple levels of government and interacting cycles;
- it does not provide for an integrated view of the analysis of the policy process and analysis (knowledge, information, research) which is used in the policy process." Parsons, *supra* note 459, at 79-80.

462 Stone, *supra* note 459, at xi-xii.

463 Bell & Stevenson, *supra* note 458, at 8-9. Bell & Stevenson argue that the policy process passes through a variety of stages and takes place at a number of different levels almost simultaneously. Policy development is a continuous and and contested process in which those with competing values and differential access to power seek to form and shape policy in their own interests. Even individuals who the policy affects are able to shape it. *Id.* at 2. They criticize analysis of a formal policy document, such as the text of a law, as being only a statement of intent, a plan of action, or a set of guidelines. *Id.* at 23.

464 CHARLES E. LINDBLOM & EDWARD J. WOODHOUSE, THE POLICY-MAKING PROCESS 10 (3rd ed., Prentice Hall 1993) (1968).

However, this model has proven to be a good heuristic tool through which to explore the policy process[465] because it identifies some important markers in it.[466] In addition, the actions taken by Congress and federal administrative agencies, such as the U.S. Department of Education, can be easily identified by examining the documents they publish. These actions fit into the identification, evaluation, and selection section of policy options phase of the model. This phase occurs throughout the policy process, including immediately after the initial identification of the problem, subsequent to any action taken by Congress, and following implementation efforts by both the federal administrative agency charged with administering the law and local implementation efforts. Moreover, it is a method of examining policy that is frequently employed in the field of administrative law.[467]

3.2.1.1.1 – The Development of Laws

The Role of Congress. An act of Congress represents a political decision made at one point in time. It is generally seen as being something permanent and final. However, the act is not designed to be the ultimate resolution of a problem. Most often the problem continues, inside and outside of Congress, and new laws are proposed which reshape the issues and ground rules of previously fought battles.[468] Therefore, over time, laws rarely

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465 Parsons, *supra* note 459, at 81.

466 Lindblom & Woodhouse, *supra* note 464, at 11. Lindblom and Woodhouse discuss the importance of some of these conventional steps in the policy-making process, such as voting, elected functionaries, bureaucratic policy making, and interest groups in their book, however, they recognize the limitations of this type of analysis by arguing that understanding the relevant power relationships is really key to producing better policy. *Id.*

467 *See generally,* KENNETH F. WARREN, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM (4th ed., Westview Press 2004).

468 EUGENE EIDENBERG & ROY D. MOREY, AN ACT OF CONGRESS: THE LEGISLATIVE PROCESS AND THE MAKING OF EDUCATION POLICY 175 (W.W. Norton & Co., Inc. 1969).

remain static. Instead, after their enactment, they are frequently modified. This has been the case with both NCLB[469] and IDEA.[470]

The Role of Administrative Agencies. While policy development is a recursive process, administrative agencies play a specific and fairly well-defined on-going role in it. Gary Bryner describes the importance of the role the agencies fulfill.

Administrative processes have become a central element in policy making. They are a major source of legislative initiatives, a dominant force in the shaping of basic policy decisions, and the primary mechanism for the implementation of public policies. Delegation of broad, policy-making powers to administrative agencies has become one of the most important characteristics of the modern U.S. administrative state.[471]

Agencies fill this role because laws are "neither self-explanatory nor self-executing in any detailed sense."[472] The two key types of administrative discretion are the authority to make legislative-like policy decisions and the authority to decide how general policies apply to specific cases.[473] This discretion can be exercised in the rule-making process, in policy statements issued by an agency, in the approval process for state plans to participate in federal programs, or in quasi-judicial proceedings.[474] This analysis will examine the legislative rather than the judicial types of policy making,

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469 NCLB is a reauthorization of the Elementary and Secondary Education Act, which was first passed in 1965.
470 IDEA is a reauthorization of the Education for All Handicapped Children Act, which was originally enacted as a separate statute in 1975.
471 GARY C. BRYNER, BUREAUCRATIC DISCRETION: LAW AND POLICY IN FEDERAL REGULATORY AGENCIES (Pergamon Press 1987).
472 STEPHEN K. BAILEY & EDITH K. MOSHER, ESEA: THE OFFICE OF EDUCATION ADMINISTERS A LAW 98 (Syracuse Univ. Press 1968).
473 *Id.*
474 *See generally* FLORENCE HEFFRON & NEIL MCFEELEY, THE ADMINISTRATIVE REGULATORY PROCESS (Longman Inc. 1983).

specifically the rules promulgated and the informal policy documents that were issued under NCLB relating to alternate assessments by the USDOE.

Rule-Making and Informal Policy Documents. Administrative agencies write administrative rules using the authority delegated to them from Congress in the statutes that authorize the agency's existence and set their mission, goals and objectives.[475] The issuance of rules is governed by the Administrative Procedure Act.[476] These rules are law and carry same weight as congressional legislation, presidential executive orders, and judicial decisions.[477] In contrast, agency policy statements are informal pronouncements of policy and therefore do not have the force of law.[478]

The use of administrative agencies such as the USDOE to promulgate rules that interpret federal statutes arise for a number of reasons. Congress may deliberately write a statute with vague language to facilitate compromise among competing interpretations so that each side believes its interpretation will be adopted in the implementation process or they may write an ambitious program into law that is beyond enactor's competence, leaving the details to be worked out by the administrative.[479] Congress may also delegate the task of developing the details of a law because it involves issues that are best resolved

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475 CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY (3rd ed., CQ Press 2003). The U.S. Department of Education was established in 1980 as an executive office by the Department of Education Organization Act of 1979, Pub. L. No. 96-88, § 101, 93 Stat. 669. The U.S. Secretary of Education, who directs the agency, is appointed by the President. 20 U.S.C. § 3411. The U.S. Secretary of Education is authorized to proscribe the rules and regulations necessary to administer and manage the U.S. Department of Education. 20 U.S.C. § 3474.

476 The Administrative Procedures Act defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure or practice requirements of an agency." 5 U.S.C. §551(4).

477 Kerwin, *supra* note 475.

478 Heffron & McFeeley, *supra* note 474.

479 Lindblom & Woodhouse, *supra* note 464. Statutes that rely on federal spending clause authority may be unconstitutional if they contain ambiguous provisions because states cannot be bound to conditions they did not clearly understand that the time they agreed to participate in the law's regulatory scheme.

utilizing the professional expertise of the agency.[480] The development of agency rules may also occur because of ambiguous or imprecise language in the statute or contradictory statutory provisions that arise unintentionally through either legislative haste or a lack of agreement among legislators.[481] Moreover, as is the case with NLCB, rules may be created to address problems with implementation of the law in the field.

Federal agencies may use rules to accomplish one of three essential functions: (1) legislative/substantive rules where what the agencies write is essentially new law; (2) interpretative rules where agencies explain how they interpret existing law and policy; and (3) procedural rules that define the organization and processes of the agency.[482]

The rules issued by USDOE regarding alternate assessments are interpretive rules. They are the vehicle for specifying how a statute will be put into effect.

3.2.2 – Equal Educational Opportunity

3.2.2.1 – Underlying Theoretical Constructs

3.2.2.1.1 – Equality

"Equality" connotes a sameness or essential equivalence.[483] In its strictest sense, equality in education would call for parity of educational resources, access, and results.[484] In practice, however, equality is combined with notions of justice, and it does not require uniformity but it instead ensures that decisions about the allocation of resources like

480 Bryner, *supra* note 471.
481 Lindblom & Woodhouse, *supra* note 464.
482 Kerwin, *supra* note 475.
483 ANN BASTIAN, NORM FRUCHTER, MARILYN GITTELL, COLIN GREER, & KENNETH HASKINS, CHOOSING EQUALITY: THE CASE FOR DEMOCRATIC SCHOOLING 28 (Temple Univ. Press 1986); Lawrence B. Joseph, *Some Ways of Thinking about Equality of Opportunity,* 33(3) THE WESTERN POLITICAL QUARTERLY 393 (Sept. 1980).
484 THOMAS GREEN, EXCELLENCE, EQUITY, AND EQUALITY (Lee Shulman & Gary Sykes eds., Excellence, equity, Longman 1983).

education are made consistent with the fundamental societal rules on the subject.[485] Equality recognizes that human beings are different and calls for individuals to be considered and treated as equals in the sense that particular kinds of inequalities are eliminated, not that each person is treated identically in all circumstances.[486]

3.2.2.1.2 – Equal Opportunity

Equal opportunity embodies a concept of fundamental fairness, an absence of discrimination or a barrier to access to a public good or benefit like education.[487] It puts into practice the paradox of equality that asserts all people are equal but recognizes the fact that they really are not.[488] In its most general sense, equality of opportunity usually means that people should be enabled to acquire a public good or benefit, such as education, on the basis of their natural abilities or actual achievement and not on the basis of arbitrary factors such as race, religion, sex, social class origins, etc.[489] Equal opportunity is not typically conceived of in a strict egalitarian sense that would require everyone to receive the same amount of any particular good or benefit in society.[490]

When thinking about equal opportunity, the characteristics of individuals can usually grouped into two bundles: those over which individuals have control, such as effort and choice, and those over which they do not, such as ability, race, gender, and disability. It is the interaction of these two bundles that ultimately produce valuable life outcomes such as income, vocation, social outcomes.

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485 Mary Warnock, *The Concept of Equality in Education,* 1(1) OXFORD REVIEW OF EDUC. 3, 3 (1975).
486 Joseph, *supra* note 483, at 393.
487 *Id.*
488 William J. Smith & Charles Lusthaus, *The Nexus of Equality and Quality in Education: A Framework for Debate*, 20(3) CANADIAN J. OF EDUC. 378, 379 (Summer, 1995).
489 *Id. at* 379.
490 KENNETH E. HOWE, UNDERSTANDING EQUAL EDUCATIONAL OPPORTUNITY: SOCIAL JUSTICE, DEMOCRACY, AND SCHOOLING (Teachers College Press 1997).

A continuum of views exists on what equal opportunity requires.[491] The views are based on beliefs about how society should allocate its scarce resources among individuals with competing needs, i.e. their theory of distributive justice.[492] At one end of the continuum are forms of formal or procedural equality such as nondiscrimination and "fair play" and at the other end are forms of substantive or compensatory equality such as the elimination of disadvantages among individuals, ultimately concluding with the concept of "fair shares" and equal results.[493] Formal or procedural equality involves removing external barriers to permit individuals who are qualified for a position in society to be included in the pool of applicants for it, in other words, to compete in "life's race" based on their own individual merit as evidenced by their performance or achievement.[494] Substantive or compensatory equality promotes the collective welfare of all members of the community as its goal and supplies extra support for certain individuals during their periods of formation, individuals with certain inherent disadvantages such as race, sex, social class, and disability status, so that they may be able to compete for positions in

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491 JOHN E. ROEMER, EQUALITY OF OPPORTUNITY 2 (Harvard University Press 1998)[hereinafter Roemer, *Equality of Opportunity*]; Howe, *supra* note 490, at 15; Joseph, *supra* note 483, at 393.

492 Joseph, *supra* note 483; Howe, *supra* note 490; Roemer, *Equality of Opportunity, supra* note 491; JOHN E. ROEMER, THEORIES OF DISTRIBUTIVE JUSTICE 1(Harvard Univ. Press 1996) [hereinafter Roemer, *Theories of Distributive Justice*]. Howe identifies three main theories of distributive justice: libertarianism, utilitarianism, and liberal egalitarianism. Libertarianism focuses on individual liberty as its core value and calls for only minimal state interference through policy. It views the purpose of equal educational opportunity to promote individuals' ability to pursue the type of education they select. Actual results are virtually irrelevant. Howe, *supra* note 490, at 23-24. Meritocratic utilitarianism's vision of equal educational opportunity as one that promotes economically valuable skills. Results are relevant but they do not need to be equal because educational opportunity takes a back seat to maximizing economic productivity. *Id.* at 25-26. Liberal egalitarianism calls for compensatory measures to be provided by the government to make the competition of goods fairer to certain disadvantaged groups. Howe advocates for a version of liberal-egalitarianism he calls participatory interpretation of equality of educational opportunity. *Id.* at 31-32.

493 Nicholas C. Burbules, Brian T. Lord, & Ann L. Sherman, *Equity, Equal Opportunity, and Education,* 4(2) EDUC. EVALUATION AND POLICY ANALYSIS 169, 182-83 (Summer, 1982); Howe, *supra* note 490, at 15; Joseph, *supra* note 483, at 394; Roemer, *Equality of Educational Opportunity, supra* note 491, at 2; Smith & Lusthaus, *supra* note 488, at 380.

494 Joseph, *supra* note 483, at 394; Roemer, *Equality of Educational Opportunity, supra* note 491, at 1; Smith & Lusthaus, *supra* note 488 at 380.

society with others in the future based on their own ability and effort alone, not hampered by the disadvantages with which they were born.[495]

3.2.2.1.3 – Equal Educational Opportunity

Our society regards education as a sufficiently important building block to be able to live a good life that it sees it as a necessary component of equalizing opportunities in this country.[496] The U.S. Supreme Court in *Brown v. Board of Education*, explained it this way:

> Today, education is perhaps the most important function of state and local governments. ... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal 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. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[497]

Although it is apparent that education is valuable, it is not obvious what an equal educational opportunity for all students looks like.

Since equality of opportunity exists on a continuum, equality of educational opportunity does too. The position on the continuum depends on the level of government intervention utilized to influence individuals' educational outcomes.[498] Through the years, discussions of equal educational opportunity have focused on a basic dichotomy between the equivalence of educational inputs, which are the raw materials of the educational process, such as the right to attend public schools, per pupil expenditures, physical facilities, library holdings, hours of operation, and quality of teachers, and of

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495 Joseph, *supra* note 483, at 394; Roemer, *Equality of Educational Opportunity, supra* note 491, at 1; Smith & Lusthaus, *supra* note 488, at 380.
496 Roemer, *Equality of Educational Opportunity, supra* note 491, at 5.
497 Brown v. Bd. of Educ. v. Topeka, 347 U.S. 483, 493 (1954).
498 Howe, *supra* note 490, at 20.

educational outputs, such as the level of academic achievement attained by students or later life outcomes.[499] More recent discussions have also included the concept of throughputs, i.e. the educational practices of the schools themselves.[500] This can involve factors such as the content of curriculum and textbooks, how teachers treat students, and perceptions the gender, race, ethnic background and disability status of students within the schools.[501]

3.2.2.2 – Equal Educational Opportunity in the U.S. Schools.

The conception of equal educational opportunity in the United States has evolved over time changing from one that strove for equal access to a common educational experience to one that promoted the opportunity for equal attainment of educational outcomes.[502]

3.2.2.2.1 – Common School Movement

In the initial stages of the common school movement, educational opportunity consisted of a free education for children until their entry into the labor force, a common curriculum for all children and children from diverse backgrounds in the same school.[503] This focus on these equal inputs was intended to create a populace who had a common experience and an equal opportunity to succeed academically in the schools. It

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499 James S. Coleman, *What is Meant by "an Equal Educational Opportunity"?,* 1(1) OXFORD REIVEW OF EDUC. 27, 27-28 (1975) [hereinafter Coleman, *What is Meant by "an Equal Educational Opportunity"?*]; James S. Coleman & Kevin Marjoribanks, *Equal Educational Opportunity: A Definition,* 1(1) Oxford Review of Educ. 25, 25 (1975); Howe, *supra* note 490, at 15;20-21; Smith & Lusthaus, *supra* note 488, at 380.

500 Smith & Lusthaus, *supra* note 488, at 380; JOEL SPRING, AMERICAN EDUCATION 106 (7th ed., McGraw-Hill, Inc. 1996).

501 Spring, *supra* note 500, at 106.

502 Shirley M. Clark, *Changing Meanings of Equal Educational* Opportunity, 25(1) THEORY INTO PRACTICE 77 (Feb. 1976); JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 17 (Westview Press 1990).

503 Clark, *supra* note 502, at 79.

understood that educational outcomes would be different based on the meritocratic ideal that smarter students would be more successful in the classroom.[504]

3.2.2.2.2 – 1950s and Beyond

The second stage of equal educational opportunity as a goal in American education introduced the assumption that equality of opportunity depends upon equality in the effects, results, or output of schooling.[505] Equality of outcomes charges schools with the responsibility of educating all students to a level of proficiency that will allow them to enter the competitive, meritocratic selection process of adult life equally well prepared.[506] Thus, the discussion shifted from one looking solely at the inputs of education resources to the outputs or results of schooling.[507] This shift was marked by the landmark decision of *Brown v. Board of Education* and the Coleman Report on the status of equal educational opportunity in the U.S.[508] *Brown* declared that separate schools for black and white students, even though they had equivalent inputs, were inherently unequal and unconstitutional.[509] The Coleman Report utilized a definition of "equality of educational opportunity" that focused on equality of results given the same individual input rather than one that measured educational inputs alone.[510]

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504 ROBERT CHURCH & MICHAEL SEDLAK, EDUCATION IN THE UNITED STATES: AN INTERPRETIVE HISTORY 438 (Free Press 1976).
505 Clark, *supra* note 502, at 79; Church & Sedlak, *supra* note 504, at 453.
506 Church & Sedlak, *supra* note 504, at 453.
507 Coleman, *What is Meant by "An Equal Educational Opportunity"?, supra* note 499, at 27.
508 Clark, *supra* note 502, at 79; Church & Sedlak, *supra* note 504, at 444-45; 451; JAMES E. COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (Nat'l Center for Educ. Statistics 1966); Brown v. Bd. of Educ of Topeka, 247 U.S. 483 (1954).
509 *Brown*, 347 U.S. at 495.
510 Coleman, *Equality of Educational Opportunity*, *supra* note 508; Coleman & Marjoribanks, *supra* note 509.

3.2.2.2.3 – Equal Outcomes Conception of Equal Educational Opportunity

The equal outcomes conception of equal education opportunity that took hold in the 1950s and 1960s, continues today. Through the years it has been expressed in compensatory education programs, like Head Start, ESEA, and IDEA. However, although compensatory education programs fall under the broad umbrella of equal results, there are variations in their underlying conception of equal educational opportunity. There are numerous definitions of equal results: *level the playing field*,[511] *minimal achievement*,[512] *same progress*,[513] *same results*,[514] and *full opportunity*.[515] The *level the playing field* view calls for extra assistance for individuals with certain disadvantages during their periods of formation to enable them to compete for positions in society in the future.[516] Thus, equality of educational opportunity means that everyone has an equal chance to receive an education but it does not necessarily guarantee life outcomes or even an equal opportunity to compete in the labor market.[517] Essentially it allows for a random distribution of "resources, attainment, and educational achievement" with respect to the educationally relevant variables of choice, ability or virtue, not educationally irrelevant characteristics such as sex, race or geography.[518] The *minimal achievement* view requires the provision of sufficient resources to allow the attainment of

511 Roemer, *Equality of Educational Opportunity, supra* note 491.
512 Burbules, Lord & Sherman, *supra* note 493, at 183 (authors argue that different versions of equal results propose valuable social goals but they cannot be justified in terms of equal or equitable opportunity because the assumption cannot be made that equitable opportunities will have egalitarian results); RICHARD E. WISE, RICH SCHOOLS POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY 151 (Univ. of Chicago Press 1968). Wise labels this "minimum-attainment." *Id.*
513 Burbules, Lord & Sherman, *supra* note 493, at 182.
514 *Id.*
515 Wise, *supra* note 512, at 148.
516 Roemer, *Equality of Educational Opportunity, supra* note 491, at 1. Compensatory education, such as that provided through IDEA and ESEA, embodies a "level the playing field" philosophy.
517 Spring, *supra* note 500, at 107.
518 Green, *supra* note 484, at 325.

some minimum common level of achievement or standard of competence for all.[519] The *same progress* view calls for each person to make equal progress relative to their own starting point.[520] The *same results* view aims towards a strict equalization of outcomes for some specified measure.[521]The *full opportunity* view would allow each person to be given a full opportunity to develop his or her individual abilities,[522] so ultimate results would vary under this model.

3.3 – Equal Educational Opportunity for Students with Disabilities

3.3.1 – The Development of the Law 1960s to 1975

3.3.1.1 – History of the Development of Special Education – beginning in the 1960s

A number of forces converged in the 1960s and 1970s to enhance the rights and opportunities for students with disabilities. The stage was set by the 1954 *Brown v. Board of Education* decision finding an equal protection clause violation in segregated schools for black children. This propelled the civil rights movement and it was the civil rights movement along with the War on Poverty that provided the framework for the change in the status of disabled kids.[523] Developments in the Cold War in the late 1950s also

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519 Burbules, Lord & Sherman, *supra* note 493, at 183; Wise, *supra* note 512, at 151. This view is consistent with the theory of educational adequacy that has taken hold in numerous state courts around the country that requires a substantial equality of opportunity to achieve a high minimum quality education. Regina R. Umpstead, *Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007(2) BYU EDUC. & L.J. 281, 305, 313 (2007).
520 Burbules, Lord & Sherman, *supra* note 493, at 183.
521 Burbules, Lord & Sherman, *supra* note 493, at 182. This view has been criticized as unachievable. Coleman, *What is meant by "an Equal Educational Opportunity"?*, *supra* note 499, at 28.
522 Wise, *supra* note 512, at 148.
523 DAVID CARLETON, STUDENT'S GUIDE TO LANDMARK CONGRESSIONAL LAWS ON EDUCATION 183 (Greenwood Press 2002); SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION 346 (David L. Kirp & Donald N. Jensen eds., The Falmer Press 1986).

provided motivation for an expanded federal role in education, and legislation passed during this time addressed some issues of disability.[524]

During the progression of the Eisenhower, Kennedy, and Johnson administrations, disability joined race and gender as conditions that needed – and demanded – equal protection under the law.[525] Robert Osgood identifies four key arenas which contributed to enhanced rights and opportunities for students with disabilities: (1) a dramatic increase in federal attention and resources devoted to disabilities; (2) state and federal court decisions and legislation that fundamentally altered the expectations for public and private entities to address the needs of individuals with disabilities; (3) the definition of "disability" itself was redefined by medical, psychological, and educational professionals; and (4) the rise of the Disability Rights Movement which consisted of heightened activism by advocacy groups for disabled persons.[526]

Education of students with disabilities was transformed in the process, moving from outright exclusion from the educational system[527] and segregated placements for those students who were included to greater integration into the general education environment.[528] Margret Winzer identifies three reasons for this transformation: (1) the accumulation of empirical data on the effectiveness of special classes and concerns for the identification of minority-group children; (2) a growth of empirical knowledge about the learning of children in school and behavior problems that supported individualized

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524 Carleton, *supra* note 523, at 109.
525 ROBERT L. OSGOOD, THE HISTORY OF SPECIAL EDUCATION: A STRUGGLE FOR EQUALITY IN AMERICAN PUBLIC SCHOOLS 101-102 (Praeger Publishers 2008).
526 *Id.* at 99-100.
527 Barbara Gaddy, Brian McNulty, and Tim Waters, *The Reauthorization of the Individuals with Disabilities Act: Moving Toward a More Unified System*, MID-CONTINENT RESEARCH FOR EDUCATION AND LEARNING 4 (April 2002), http://www.mcrel.org/PDF/PolicyBriefs/5022PI_PBReauthorizationIDEA.pdf.
528 MARGARET A. WINZER, THE HISTORY OF SPECIAL EDUCATION: FROM ISOLATION TO INTEGRATION (Galaudet Univ. Press 1993).

educational planning for each child rather than homogeneous diagnostic categories; and (3) legislation and litigation.[529] This article will focus on the legal aspects of this change.

3.3.1.2 – Early Legislation

Federal involvement in elementary and secondary education significantly expanded in the late 1950s. Driven by fears in the context of the Cold War and the Soviet Union's launch of *Sputnik I*, the first man-made satellite, Congress passed the National Defense Education Act in 1958.[530] This law sought to fully develop the "mental resources and technical skills" of the nation's youth by providing "additional and more adequate educational opportunities" through loans to college students, financial assistance to states to improve science, mathematics, and foreign language instruction, and graduate student fellowships.[531] The first amendment to this act included the Education of the Mentally Retarded Child Act, which provided grants to institutions of higher learning and state educational agencies to encourage the expansion of teaching and training of leadership personnel in the education of mentally retarded children.[532] Five years later, in 1963, Congress expanded this act to offer grants to train college teachers and researchers in a broader array of disabilities.[533]

By the early 1960s, domestic poverty became a national concern and education was seen as a way to remedy it.[534] The Economic Opportunity Act of 1964[535] was designed to "eliminate the paradox of poverty in the midst of plenty in this Nation by

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529 *Id.* at 381.
530 Carleton, *supra* note 523, at 109.
531 National Defense Education Act, Law of Sept. 2, 1958, Title I § 101, 1958, 72 Stat. 1581 (repealed 1970).
532 Law of Sept. 6, 1958, Pub. L. No. 85-926, 72 Stat. 1777 (repealed 1970).
533 Pub. L. No. 88-104.
534 LEE W. ANDERSON, CONGRESS AND THE CLASSROOM: FROM THE COLD WAR TO "NO CHILD LEFT BEHIND 62 (Pennsylvania State Univ. Press, 2007).
535 Pub.L. 88-452, 78 Stat. 508 (codified as amended at 42 U.S.C. § 2701).

opening to everyone the opportunity for education and training, the opportunity to work, and the opportunity to live in decency and dignity."[536] In addition to a youth job corps, work training program, and work-study programs, the community action provisions of this law were used to develop the Head Start program.[537] That same year, Congress also passed the 1964 Civil Rights Act,[538] which outlawed discrimination in all programs that accepted federal aid.

The Elementary and Secondary Education Act,[539] enacted in 1965, was promoted as an educational contribution to both the federal civil rights movement and the War on Poverty.[540] It was designed to expand and improve the educational programs of the nation's elementary and secondary schools that met the special educational needs of children from low-income families.[541] ESEA created significant level of federal involvement in K-12 education by providing almost $1 billion under Title I to support the schooling of educationally disadvantaged children.[542] ESEA was a categorical rather than a general aid program, having a funding formula under Title 1 of the act that tied federal financial support to the number of children from impoverished families in each school district, directing more aid to districts with higher concentrations of low-income families.[543] States were directed to use federal funds to support programs of "sufficient size, scope, and quality to give reasonable promise of substantial progress" towards

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536 *Id.* at § 2.
537 Carleton, *supra* note 523, at 128-29.
538 Law of July 2, 1964, Pub. L. 88-352, 78 Stat. 241.
539 Law of April 11, 1965, Pub.L. 89-10, 79 Stat. 27.
540 Anderson, *supra* note 534, at 502; CANDACE CORTIELLA, NCLB AND IDEA: WHAT PARENTS OF STUDENTS WITH DISABILITIES NEED TO KNOW & DO, (National Center on Educational Outcomes 2006), http://cedhumn.edu/NCEO/OnlinePubs/Parents.pdf.
541 Pub. L. 89-10, 79 Stat. 27 § 201.
542 Anderson, *supra* note 534, at 63.
543 Pub. L. 89-10, 79 Stat. 27 § 203(a)(2)); Anderson, *supra* note 534, at 63; Eidenberg & Morey, *supra* note 468, at 79.

meeting the needs of these educationally deprived children.[544] Even in its original form, ESEA called for measuring the educational achievement of the beneficiaries of Title 1 projects.[545]

Congress used ESEA to address the issue of educating handicapped children. In its first amendment to the act in 1966, ESEA's Title VI offered grants for the education of handicapped children through preschool, elementary, and secondary school programs.[546] This program was revised in both 1970 and 1974. The 1970 amendments to ESEA gave the provisions the title of the Education of the Handicapped Act.[547] The 1974 ESEA amendments used the same name and included most of the same components as were in earlier versions of the law. One significant change, however, was that the law's purpose was amended to promote "full educational opportunities to all handicapped children[548] rather than just assisting with funding for school programs for these students.[549]

In 1975, The Education for all Handicapped Children Act of 1975 was passed as a separate act. Although it modified the earlier versions of the Education of the Handicapped Act, it greatly expanded the scope of the rights to students and parents offered and the responsibilities of the states who received funding under the law.[550] Its

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544 Pub. L. 89-10, 79 Stat. 27 § 205(a)(1).
545 Bailey & Mosher, *supra* note 472, at 51; "[T]hat effective procedures, including provision for appropriate objective measurements of educational achievement, will be adopted for evaluating at least annually the effectiveness of the programs in meeting the special educational needs of educationally deprived children." §205(a)(5).
546 Elementary and Secondary Education Act, Pub. L. 89-750, 80 Stat 1191, 1204-1208 (1966).
547 Elementary and Secondary Education Act, Pub. L. 91-230, 84 Stat.175-188 (1970).
548 Elementary and Secondary Education Act, Pub. L. 93-380, 88 Stat. 579-585 (1974).
549 Elementary and Secondary Education Act, Pub. L. 91-230 § 611(a), 84 Stat.175-188. (1970).
550 Education for all Handicapped Children Act, Pub. L. 94-142, 89 Stat. 773 (1975). "It is the purpose of this Act to assure that all handicapped children have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States

key provisions included a child find and zero reject policy, which required that all handicapped children be identified, evaluated, and offered educational services.[551] These special education and related services[552] were to be based on the unique needs of each child as embodied in their individualized education program that had a statement of the child's current level of educational performance, specific annual goals, and the services that would be provided to the child.[553] A least restrictive environment mandate required that the education should take place, to the maximum extent appropriate, in classes with non-handicapped peers.[554] In addition, due process and procedural safeguards were included for the parents of handicapped children.[555]

3.3.1.3 – Equal Educational Opportunity and the U.S. Supreme Court

The parameters of equal educational opportunity for students with disabilities in this country were also established through several federal court decisions responding to challenges to the opportunities provided to students in the public education system brought under the equal protection clause and the due process clause of the U.S. Constitution.

The Equal Protection Clause of the Fourteenth Amendment provides that "[no] State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This guarantee has been examined in the context of specific groups of children's rights to equal educational opportunity: African Americans, children of illegal aliens, and poor

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and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children." PL 94-142 §3(c).
551 §612(2)(C).
552 § 4(a).
553 § 4(a)(19).
554 *Id.*
555 § 615.

children. What has emerged from these court decisions is the idea that although education is perhaps one of the most important state functions, its provision is not a fundamental right under the U.S. Constitution. Therefore, a State must only have a sufficient rational basis for a law that furthers a substantial state goal that affects a group of children's access to a benefit.

In *Brown v. Board of Education*,[556] the segregation of African American children in separate schools, even though the physical facilities and other tangible factors were equal, was found to violate the equal protection clause because education is an important state and local function, [557]and its provision by the state in public schools is a right which must be made available to all on equal terms to all.[558] Separate educational facilities are inherently unequal[559] because of intangible factors such as the psychological impact on African American kids who may feel inferior because of the separation.[560] An equal protection violation was found in the case of the denial of all educational services to the children of illegal aliens in *Plyler v. Doe*.[561] The Court reasoned that the state lacked a sufficient rational basis for discrimination against the children of illegal aliens because they had no control over their legal status and denying them the benefit of public education would impose a lifetime of hardship on these children. In contrast, no equal protection violation was found in *San Antonio Independent School District v. Rodriguez*,[562] where school funding was based on district wealth because the state's

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556 347 U.S. 483 (1954).
557 *Id.* at 493.
558 *Id.*
559 *Id.* at 495.
560 *Id.* at 494.
561 457 U.S. 202 (1982).
562 411 U.S. 1 (1973).

action had a rational relationship to the legitimate state purpose of encouraging local participation and control of schools through local district taxation.

3.3.1.4 – Early Federal Court Decisions related to Special Education

The denial of equal protection to children with disabilities has not been addressed by the U.S. Supreme Court. Instead, the components of the 1975 Education for all Handicapped Children Act were taken, in large part, from two federal cases from the early 1970s that challenged the exclusion of handicapped students from the public schools on equal protection grounds.[563]

Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania,[564] was a class action lawsuit that sought to end the denial of educational services to mentally retarded children within the Commonwealth. Pennsylvania had several sections of its school code that were being used by school officials to deny retarded children access to the public education system. Schools were able to refuse to accept or retain students: who had not attained a mental age of five years old;[565] who were not within the eight to seventeen year old age range of the compulsory attendance laws;[566] and who were deemed unable to benefit from schooling.[567]

The Court entered a consent decree that recognized a legal right to education for retarded children in Pennsylvania and prevented the Commonwealth from applying its school code provisions in a manner that postponed, terminated or denied any mentally retarded child access to a public education. Access to a free public program of education

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563 Andrea Blau, *The IDEIA and the Right to an "Appropriate" Education*, 2007 BYU Educ. & L.J. 1, 8 (2007); Judith Welch Wegner, *Variations on a Theme. The Concept of Equal Educational Opportunity and Programming Decisions under the Education for All Handicapped Children Act of 1975*, 48(1) Law and Contemporary Problems 169, 171-72 (Winter, 1985).
564 334 F. Supp. 1257 (E.D. Penn. 1971).
565 *Id.* at 1260.
566 *Id.* at 1261.
567 *Id.* at 1262.

and training appropriate to his learning capacities was guaranteed to every retarded person between the ages of six and twenty.[568] The decree also provided for "due process" notice and an opportunity for a hearing before a child's admission to school could be postponed.

In the case of *Mills v. Board of Education of the District of Columbia*,[569] plaintiffs brought a class action challenging the exclusion of "exceptional" children[570] from the District of Columbia's public schools. Plaintiffs in this case estimated that 18,000 out of 22,000 "exceptional" children were not being served.[571] In its defense, the Board of Education argued that it was much too costly for them to educate all children.[572] The court held that the District of Columbia was required by the U.S. Constitution, the District of Columbia Code, and the Board of Education regulations to provide a publicly-supported education to these "exceptional" children.[573]

The court found that the District of Columbia must provide each school aged child a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment.[574] This education must be suited to the child's individual needs.[575] In addition, a child cannot be excluded from a regular public school assignment unless the child was provided with adequate alternative educational services suited to the child's needs, and a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any

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568 *Id.* at 1258.
569 348 F. Supp. 866 (D.C. Cir. 1972).
570 Exceptional children includes those who are mentally retarded, emotionally disturbed, blind, deaf, and speech or learning disabled. *Mills*, 348 F. Supp. at 868.
571 *Id.* at 868.
572 *Id.* at 876.
573 *Id.*
574 *Id.* at 878.
575 *Id.*

educational alternative.[576] Moreover, "exceptional" children must be afforded due process protections that include notifying their parents of any proposed placement, transfer or denial and the right to a hearing before a hearing officer.[577]

3.3.2 – Educational Opportunity for Students with Disabilities: The Adopted Standard

3.3.2.1 – The Education for All Handicapped Children Act of 1975

Within a few years of the *PARC*[578] and *Mills*[579] decisions, Congress passed the Education for all Handicapped Children Act of 1975 (EHA), which set a goal of providing "full educational opportunity" to all handicapped children[580] This goal was to be met by providing a "free appropriate public education (FAPE) to all handicapped children within a state between the ages of three and twenty-one[581] which emphasizes special education[582] and related services[583] designed to meet their unique needs"[584] in the least restrictive environment.[585]

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576 *Id.*
577 *Id.* at 880.
578 *PARC*, 334 F. Supp. 1257 (E.D. Penn. 1971).
579 *Mills*, 348 F. Supp. 866 (D.C. Cir. 1972).
580 Education for all Handicapped Children Act, Pub. L. 94-142, § 612(2)(A), 89 Stat. 773 (1975.) Handicapped children includes those who are "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children or children with specific learning disabilities who by reason thereof require special education and related services." §4(a)(1).
581 § 612(2)(B).
582 Special education means "specially designed instruction, at no cost to the parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." § 4(a)(16).
583 Related services means "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children." § 4(a)(17).
584 Education for all Handicapped Children Act, Pub. L. 94-142, § 3(c), 89 Stat. 773 (1975).
585 The State has established ... procedures to assure that, to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment

To assure that handicapped students receive FAPE, EHA required school districts to provide an individualized education program (IEP) for each handicapped child. This written statement includes the child's present levels of educational performance, annual goals and short-term instructional objectives, a description of the educational services the child will receive, the extent to which the child will be able to participate in regular education programs, and the criteria and evaluation procedures for determining whether the student's instructional objectives are being achieved.[586] The IEP is to be formulated in a meeting with a representative of the local educational agency, the child's teacher, the child's parents or guardian, and if appropriate, the child should also be included.[587]

In addition, EHA established a series of procedural safeguards designed to ensure that the parents or guardian are both notified of decisions affecting their child and given an opportunity to object to those decisions in the form of the ability to review relevant records, prior written notice of a proposed change or a refusal to change a child's status or placement, and to file complaints on any issues related to these matters.[588]

The vision of educational opportunity that handicapped students were required to be afforded under the law was articulated primarily in EHA's FAPE definition.

The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State

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occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily .... § 612(5)(B).
586 § 4(a)(19).
587 *Id.*
588 § 615.

involved, and (D) are provided in conformity with the individualized education program required under section 614(a)(5).[589]

Although this definition had an outline of the services required to be supplied, it did not clearly identify the law's vision of equal educational opportunity beyond the basic free, public and appropriate characteristics. Therefore, the responsibility fell to the courts to delineate its contours.

3.3.2.2 – Initial Interpretations of Equal Educational Opportunity by the Law's Sponsors and the Courts after the Passage of EHA

At the time of EHA's passage, hopes ran high for an expansive interpretation of the educational opportunity provided to handicapped students under the law. The sponsors and early commentators anticipated that the law would have radical social consequences.[590] Initial interpretations by the courts were consistent with this idea, with many applying a "commensurate opportunity" definition of the "appropriate" education required by the act that required districts to give students the opportunity to achieve their full potential commensurate with the opportunity offered to their non-handicapped peers.[591]

3.3.2.3 – The US Supreme Court interprets EHA and its Equal Educational Opportunity requirements: A Focus on FAPE

The U.S. Supreme Court addressed the issue in its 1982 decision in the case of *Board of Education of the Hendrick Hudson Central School District v. Rowley*.[592] Amy Rowley was a deaf kindergarten student whose parents wanted the school to provide a

589 Education for all Handicapped Children Act, Pub. L. 94-142, § 4(a)(18), 89 Stat. 773 (1975).
590 Mark C. Weber, *Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 25 U.C. DAVIS L. REV. 349, 366 (1990).
591 *Id.* at 366.
592 458 U.S. 176 (1982).

sign language interpreter in all of her academic classes. The majority opinion, written by Justice Rehnquist, proceeded under a two-step inquiry: first, whether the state has complied with the law's procedural requirements and second, whether the IEP is "reasonably calculated to enable the child to receive educational benefits."[593] The court found that the services provided to Amy by the school district, which included an FM hearing aid to be used to assist her in the regular classroom, in addition to services from a tutor and a speech therapist, rather than an in-class sign language interpreter, were personalized instruction and related services calculated to meet her educational needs. In reaching this conclusion, the court relied on two key academic indicators: passing marks in school and advancement from grade to grade.[594] Since Amy performed better than the average child in her class and was advancing easily from grade to grade, she was receiving an adequate education, one that conformed to the FAPE requirements.[595]

The "some educational benefit" standard of FAPE emerged from the majority opinion in this decision.[596] The court explained that the EHA required a "basic floor of opportunity"[597] that consists of educational instruction specially designed to meet the unique needs of the handicapped child and are supported by services that are necessary to permit the child to benefit educationally.[598] This education must be provided at the public

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593 *Id.* at 211-12.
594 *Id.* at 204.
595 *Id.* at 210-11.
596 *Id.* at 200. Writing in 1985, Judith Welch Wegner identified the three possible visions of equal educational opportunity advocated for by justices in each portion of the decision: the majority, the concurrence, and the dissent. She labeled them "some benefit," "equivalent opportunity," and "equalized opportunity." Wegner, *supra* note 563, at 175, 183. She describes the *some benefit* standard as "assur[ing] students of receiving resources needed to make some incremental progress toward their educational goals, without guaranteeing the means necessary to the actual achievement of those goals." *Id.*
597 *Id.* at 201.
598 *Rowley*, 458 U.S. at 188-89.

expense, meet the state's educational standards, approximate the grade levels used in the state's regular education, and comport with the child's IEP.[599]

In reaching this decision, the majority's opinion emphasized EHA's legislative history and its numerous references to the millions of handicapped children who were being excluded from the public education system.[600] It clarified that the EHA does not require the same educational outcome for all students.[601] Rather, the child's progress must be viewed in light of the limitations imposed by the disability. Since a wide spectrum of handicapped children exists, the benefits they receive from their education should also be expected to fall along a spectrum where the educational results will differ dramatically among children.[602] Moreover, the educational services do not need to "maximize each child's potential" or "achieve strict equality of educational services."[603]

Justice Blackmun's concurrence, while reaching the same conclusion that the child's individualized education program was sufficient under the EHA, advocated for a different standard against which to measure whether a free appropriate public education was being provided.[604] He called for the court to consider whether the educational program, when viewed as a whole, offered the child an educational opportunity through which she could understand and participate in the classroom in a manner that was

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599 *Id.* at 203.
600 *Id.* at 189.
601 *Id.* at 192.
602 *Id.* at 202.
603 *Id.* at 198.
604 Wegner calls Justice Blackman's opinion the "equivalent opportunity" standard. It requires a comparison of both the tangible and the intangible educational inputs such as services, programs and facilities provided to handicapped and non-handicapped children to determine if the educational program offers the child an opportunity to understand and participate in the classroom substantially equivalent to her nonhandicapped peers. This inquiry would involve a balancing of the opportunity afforded the handicapped child against the resources available. Wegner, *supra* note 563, at 175, 184, 192.

"substantially equal" to that of her nonhandicapped peers.[605] This measure considers equal access to the educational process, not to any particular educational outcome.[606]

Justice White's dissent argued that since the purpose to provide a "full educational opportunity to all handicapped children,"[607] the FAPE standard the court should apply should be to "eliminate the effects of the handicap" so that the child will be given "an equal opportunity to learn if that is reasonably possible."[608] He concluded that because without a sign-language interpreter Amy was able to comprehend less than half of what is said in the classroom, she did not receive FAPE as required under the law.[609]

3.4 – Federal Education Policy Under IDEA and NCLB

This section outlines education policy as articulated in both IDEA and NCLB. It lays out the relevant laws' provisions and examines their views of equal educational opportunity using the equal outcomes conceptual framework of *level the playing field, minimal achievement, same progress, same results,* and *full opportunity*. For IDEA, it also includes an educational opportunity discussion utilizing *Rowley*'s educational benefit standard. It then explains the ongoing NCLB special education debate, a controversy that focuses on the laws' accountability provisions and their advisability for students with disabilities.

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605 *Rowley*, 458 U.S. at 211 (Blackman, J., concurring).
606 *Id.*
607 *Rowley,* 458 U.S. at 213 (White, J. dissenting).
608 *Id.* at 215. Wegner labeled this vision, "equalized" educational opportunity because it would offer a handicapped student "whatever services are needed to minimize the effects of his handicapping condition to allow him to benefit as nearly as possible from the same educational opportunities as his nonhandicapped peers." This determination would involve a comparison of the possible educational techniques or programs available to assist the child. Wegner, *supra* note 563, at 176, 185, 193.
609 *Id.*

3.4.1 – IDEA as Special Education Law and Policy: Its Provisions, Accountability Requirements, and Conceptions of Equal Educational Opportunity

3.4.1.1 – The Pre-1997 IDEA era

The Education for All Handicapped Students Act (EHA) has been reauthorized through the years and today it is known as the Individuals with Disabilities Education Act (IDEA).[610] Special education policy under the IDEA has traditionally differed from general education in two significant ways: (1) the focus in special education has been on compliance with the procedures and requirements set forth in IDEA and (2) accountability for individual student performance has been "individualized, private, and based on the individualized education program (IEP) review process," not benchmarked against educational standards and assessed through standardized testing and publicly reported.[611]

Students with disabilities have not generally participated in standardized testing. Their exclusion was motivated by several factors: (1) schools were not legally required to include them; (2) schools wanted to achieve the highest test scores possible; (3) teachers and parents desired to protect students from the stress of testing; (4) schools did not offer many accommodations to allow students with disabilities to take the tests.[612] A combination of the personalized rights offered under IDEA to students with disabilities and their general exclusion from standardized testing essentially established a dual

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610 The name of the statute was changed in the 1990 revision. PUB. L. NO. 101-476, 104 Stat. 1103 (codified as amended at 20 U.S.C. §§ 1400-1482 (2000 & Supp. 2008).
611 Margaret J. McLaughlin and Martha Thurlow, *Educational Accountability and Students with Disabilities: Issues and Challenges,* 17 EDUCATIONAL POLICY 431,435-36 (2003).
612 NATIONAL TRANSITION NETWORK, *Education Reform: What does it Mean for Students with Disabilities?* (Sept. 1999), http://ici2.umn.edu/ntn/pub/briefs/edre.html.

system of education in the U.S.: one group system for regular, general education students, and another individualized system for special education students.[613]

3.4.1.2 – IDEA 1997

Today IDEA continues to provide students with disabilities[614] between the ages of three and twenty-one[615] with the basic guarantees introduced by EHA of a free appropriate public education[616] emphasizing special education[617] and related services[618] designed to meet their unique needs,[619] delivered in the least restrictive environment[620] as articulated in each student's individualized education program (IEP).[621]

Providing full educational opportunity to all children with disabilities remains one of the law's primary goals,[622] and its basic statement of purpose has been expanded to clarify that the law is designed to prepare students with disabilities for further education, employment, and independent living.[623] This shift from access to education to higher

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613 *See generally* Barbara Gaddy, Brian McNulty, and Tim Waters, *supra* note 527, at 4 (April 2002).
614 The definition of a "child with a disability" has expanded over the years. The current decision is as follows: "a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities and who, by reason thereof, needs special education and related services. 20 U.S.C. § 1401(3).
615 20 U.S.C. § 1412(a)((1).
616 20 U.S.C. § 1414(a)(4).
617 "Special education" means "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29) (2000).
618 "The term 'related services' means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26).
619 20 U.S.C. § 1400(d).
620 20 U.S.C. § 1414(a)(5).
621 20 U.S.C. § 1414(d).
622 20 U.S.C. § 1412(a)(2) (2000).
623 20 U.S.C. § 1400(d).

expectations for student performance began with the 1997 revisions to the law[624] and continues in its latest version,[625] which was reauthorized in 2004.[626] One significant finding in the 1997 version of the act was the fact that achievement of the law's objectives had been impeded by "low expectations" and that research demonstrates having higher expectations for children with disabilities and ensuring "access in the general curriculum to the maximum extent possible" was likely to make it more effective.[627] In light of this, IDEA has retained its status as a civil rights law, one which works to ensure equal educational opportunity to students with disabilities.[628]

IDEA 1997 accomplished a considerable shift in special education accountability policy by requiring both a higher level of educational achievement and the measurement of this attainment through general state and district assessment programs.[629] IDEA 1997 called for enhanced expectations for students with disabilities to be reflected in the academic and functional goals[630] and special education and related services[631] provided to students in their IEPs with an overall goal of allowing them to "make progress" in the general curriculum.[632] Schools and states were to be held accountable for students with

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624 PUB. L. NO. 105-17, § 687(c)(3)-(5), 111 Stat. 37 (codified as amended at 20 U.S.C. § 1400(c)(3)-(5) (2000 & Supp. 2008)).
625 20 U.S.C. § 1400(c)(3)-(5).
626 PUB. L. NO. 108-446, 118 Stat. 2738 (codified at 20 U.S.C. §§ 1400-1482 (2000 & Supp. 2008)).
627 PUB. L. NO. 105-17, § 687(c)(3)-(5), 111 Stat. 37 (codified as amended at 20 U.S.C. § 1400(c)(4)-(5) (2000 & 2008)).
628 H. Rutherford TurnBull III, *Individuals with Disabilities Education Act Reauthorization: Accountability and Personal Responsibility*, 26 REMEDIAL AND SPECIAL EDUCATION 320, 322 (2005). Turnbull identifies six key principles that identify IDEA as civil rights legislation: zero rejection, nondiscriminatory evaluation, appropriate education, least restrictive environment, procedural due process, and parent participation because they reflect the core constitutional principles of life, liberty, and equality and the ethical principles of dignity, family as a foundation, and community. *Id.* at 322-23.
629 Gaddy, McNulty, & Waters, *supra* note 527, at 4.
630 20 U.S.C. § 1414(d)(1)(A)(ii) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(A)(i)(II) (2004).
631 20 U.S.C. § 1414(d)(1)(A)(iii) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (2004).
632 20 U.S.C. § 1414(d)(1)(A)(i)-(iii) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(I-IV) (2004).

disabilities' learning by setting high performance goals and indicators for them,[633] including them in the regular local and state assessments[634] or in alternate assessments if they were not able to take the general assessments,[635] and reporting their performance in the same manner as nondisabled students.[636] These changes created greater alignment between the accountability systems for students with disabilities and general education students.[637] In addition, with these changes, IDEA 1997 implicitly defined participation in local and state assessments as conferring an educational benefit on students with disabilities.[638] Moreover, it shifted IDEA's accountability scheme from one best characterized as legal compliance with the procedures contained in the law and the student's IEP to one of educational accountability that publicly reports aggregate student performance in relation to a common educational standard.[639]

This change in the accountability system for students with disabilities under IDEA was reflective of broader changes in the overall general education accountability climate nationwide. Two dominate features of state accountability in place at the time were (1) a focus on student academic performance demonstrated by assessments and (2) consequences, through public reporting or rewards and/or sanctions, for failing to attain specific levels of performance.[640]

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633 20 U.S.C. § 1412(a)(16)(A)(i)-(ii) (1997), *amended by* 20 U.S.C. § 1412(a)(15)(A)(i)-(iv) (2004).
634 "Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary." 20 U.S.C. § 1412(a)(17)(A) (1997), *amended by* 20 U.S.C. § 1412(a)(16)(A) (2004).
635 20 U.S.C. § 1412(a)(17)(A)(ii) (1997), *amended by* 20 U.S.C. § 1412(a)(16)(B) (2004); McLaughlin & Thurlow, *supra* note 611, at 438.
636 "The State educational agency ... reports to the public ... the number of children with disabilities participating in regular assessments ... [and] alternate assessments ...[and] [t]the performance of those children on regular assessments and on alternate assessments .... 20 U.S.C. § 1412(a)(17)(B)(i)-(iii) (1997) *amended by* 20 U.S.C. § 1412(a)(16)(D) (2004).
637 McLaughlin & Thurlow, *supra* note 611, at 438.
638 *Id.*
639 *Id.* at 435-36.
640 *Id.* at 433-34.

3.4.1.3 – Equal Educational Opportunity Standards

This article views equal educational opportunity from two vantage points. The first applies the equal outcomes conceptions of *level the playing field, minimal achievement, same progress, same results,* and *full opportunity.* The second uses the *Rowley* standard to interpret the type of educational opportunity or benefit students must be provided. This section examines the similarities and differences in the law in its recent revisions from the initial language used by the *Rowley* court to set the *some benefit* standard. It then lays out how courts have construed the test into three views: *some benefit*, *meaningful benefit*, and *mixed.*

3.4.1.3.1 – Equal Outcome Conception of Educational Opportunity: Level-the-Playing Field

The version of equal educational opportunity envisioned by pre-1997 IDEA was one best characterized as *level the playing field.* It was intended to provide extra assistance for students with disabilities during their youth, through special education and related services, to help them achieve their personal educational goals that were outlined in their IEP. IEP goals were generally set at a level that was less rigorous than those for the non-disabled student population and so although IDEA did not attempt guarantee a particular life or educational outcome, it did better equip students with disabilities to function in society.[641]

IDEA 1997 attempted to remedy the problem of low academic expectations for students with disabilities by replacing them with higher performance expectations by

641 *See* Green, *supra* note 484, at 325; *Roemer, Equality of Opportunity*, *supra* note 491 at 1; Spring, *supra* note 500, at 107.

requiring IEP goals that permitted the child to make progress in the general curriculum,[642] advance toward meeting these goals[643] and participate in standardized assessments.[644] IDEA 1997 also introduced a new form of accountability for student performance through the required reporting of student test scores.[645] Using this instrument the public is able to know the test scores of students with disabilities who participate in the regular and alternate assessments, but the reporting provides only information, not a mechanism to address any discrepancies in their performance. Parents of students with disabilities are the ones who have the right under IDEA to bring a due process complaint if for any reason the district is not providing FAPE to their child.[646]

These changes moved IDEA 1997 further down the equal educational opportunity continuum towards the *minimal achievement* view, one that would require schools to educate all students to a common level of academic performance.[647] However, IDEA 1997 still promotes a *level the playing field* approach to equal educational opportunity because it does not require the same level of academic performance for all students, even though students with disabilities must be included and make progress in the school's general curriculum and the state's assessment system. It allows for variable goals and achievement by setting state performance goals for students with disabilities that are consistent with the goals and standards for all children, to the maximum extent

642 20 U.S.C. § 1414(d)(1)(A)(ii) (1997), *amended by* § 1414(d)(1)(A)(i)(II) (2004) (2000 & Supp. 2008).
643 20 U.S.C. § 1414(d)(1)(A)(iii)(I) (1997), *amended by* § 1414(d)(1)(A)(i)(IV) (2004) (2000 & Supp. 2008).
644 This section assumes the student will participate in the general assessments but provides the IEP team the option to not including the child by explaining why the assessment is not appropriate. 20 U.S.C. § 1414(d)(1)(A)(v) (1997), *amended by* § 1414(d)(1)(A)(i)(VI)(aa)&(bb) (2004) (2000 & Supp. 2008).
645 20 U.S.C. § 1412(a)(17)(A) (1997), *amended by* 20 U.S.C. § 1412(a)(16)(A) (2004) (Supp. 2008).
646 20 U.S.C. § 1415(b)(6) (1997).
647 *See* Burbules, Lord & Sherman, *supra* note 493, at 183; Wise, *supra* note 512, at 151.

appropriate,[648] and by permitting IEP teams to exempt an unlimited number of children from the general assessments as long as an explanation is provided.[649]

3.4.1.3.2 – Applying Rowley's Conceptions of Educational Opportunity

In the more than thirty years that have elapsed since the Education for All Handicapped Children Act of 1975 was enacted and the twenty-five years since the *Rowley* decision, federal courts continue to interpret and apply IDEA's FAPE requirement. The text of this provision remains the same since the original 1975 version of the law. A "free appropriate public education" still refers to "special education and related services that – (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program.[650]

It is this provision that the courts rely on to determine the type of "appropriate" educational opportunity students with disabilities receive. Courts examine the services provided to the child in relation to the IEP, has been generally examined by the courts for three factors: (1) whether it is related to the child's learning capacity,[651] (2) whether it is specially designed for the child's unique needs and not merely what is offered to

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648 20 U.S.C. § 1412(a)(16)(A)(ii) (1997), *amended by* 20 U.S.C. § 1412(a)(15)(A) (2004).
649 20 U.S.C. § 1414(d)(1)(A)(i)-(iii) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(I-IV) (2004).
650 20 U.S.C. § 1401(9) (2000). The general requirement was recently amended to clarify that services must still be provided to students with disabilities who have been suspended or expelled from school. 20 U.S.C. § 1412(a)(1)(A) (Supp. 2008).
651 Edwin W. Martin, Reed Martin, & Donna L. Terman, *The Legislative and Litigation History of Special Education*, THE FUTURE OF CHILDREN 34 (Spring, 1996). *See also* Bd. of Ed. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 209-10 (1982).

others,[652] and (3) whether it is reasonably calculated to confer educational benefit.[653] Using these criteria, courts apply three basic standards to judge the "appropriateness" of a child's education in FAPE challenges: "adequate benefit" or "some benefit," "meaningful benefit," and mixed.[654]

The *some benefit* standard adopts the *Rowley* pronouncements on FAPE that require an IEP that is reasonably calculated to "confer the basic floor of educational opportunity"[655] and "enable the child to receive educational benefits."[656] The IEP does not need to maximize the child's potential[657] or offer the best possible education[658] that would lead to superior educational results.[659] Although IDEA encourages parents'

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652 Martin, Martin, & Terman, *supra* note 651, at 34; *See also Rowley*, 458 U.S. at 188-89.
653 Martin, Martin, & Terman, *supra* note 651, at 34; *See also Rowley*, 458 U.S. at 204.
654 Lester Aron, *Too Much or Not Enough: How Have the Circuit Courts Defined a Free Appropriate Public Education After Rowley?*, 39 SUFFOLK U. L. REV. 1, 7 (2005). One reason that these standards have emerged is because although *Rowley* set the basic framework for interpreting IDEA's FAPE requirement, states may establish a higher substantive standard regarding the level of services that must be provided to students with disabilities in their own laws. Gill v. Columbia 93 Sch. Dist., 217 F.3d 1027, 1035 (8th Cir. 2000).
655 *Rowley*, 458 U.S. at 201.
656 *Rowley*, 458 U.S. at 207; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1292 (11th Cir. 2001). Child with autism's IEP was found to be reasonably calculated to confer a basic floor of educational benefits where he was making progress on his goals for school, even though these skills were not transferable to the home environment. The court found that IDEA does not require the educational benefit to be generalizable. Meaningful gains in the classroom are sufficient. *Id.* at 1293.
657 Leonard v. McKenzie, 869 F.2d 1558,1561 (D.C. Cir. 1989). No IDEA violation was found when a district's proposed IEP placed a child with learning disabilities and emotional problems in a full-time public elementary school program designed for learning disabled students. Even though the parents reasonably believed that a private lab school was the optimal educational environment for their child, the IEP was reasonably calculated to enable him to receive educational benefits, and therefore it met the statutory requirements. *Id.* at 1562.
658 L.T. v. Warwick Sch. Comm., 361 F.3d 80, 83 (1st Cir. 2004). An autistic child's placement in a self-contained public school classroom was found to be reasonably calculated to provide an appropriate education despite parents' claims that child would be better served in a private program that offered one-on-one attention where the IEP was based on a review of the child's prior educational history, observations of the child, and there was insufficient evidence that the district's proposed placement was similar to a program that had not served the child's needs in the past. Since the court found the IEP to be adequate, it would not consider whether other programs might better serve the child's needs. *Id.* at 86. *See also* Fort Zumwalt School District v. Clynes ex rel. Clynes, 119 F.3d 607,613 (8th Cir. 1997).
659 *Fort Zumwalt*, 119 F.3d at 613. Parents sought reimbursement for private placement for son with a learning disability in reading and math. The court found the IEP was "reasonably calculated to enable the child to receive educational benefits" because he was receiving passing marks, his overall reading skills had improved, and he had been promoted to the next grade even though he was not reading as well as his non-disabled peers and he may have benefitted more from the private school environment. *Id.* at 613

participation in the IEP development process, the district is not required to adopt the parents' preferred educational placement for their child.[660] Moreover, once a decision is made that the challenged IEP is reasonably calculated to provide FAPE, other educational programs need not be considered.[661] This view is based on the idea that courts "lack the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy"[662] and they must "avoid imposing their view of the preferable educational methods."[663] This standard is utilized in the First, Eighth, Tenth, Eleventh, and D.C. Circuits.[664]

The "meaningful benefit" standard builds on the *Rowley* requirements. It starts with the premise that IDEA requires more than a trivial or *de minimis* educational benefit[665] and directs courts to consider the individual child's potential and confer a meaningful educational benefit gauged in relation to this potential.[666] *Meaningful benefit*

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660 Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658 (8th Cir. 1999). This case involved a placement dispute over a child with autistic behaviors. The IEP, which called for a "reverse mainstream" classroom with additional related services, was found to provide "some educational benefit" and thus the parents' proposed placement would not be considered by the court. *Id.*

661 *Id.* at 661.

662 *Rowley*, 458 U.S. at 208

663 *Id.* at 207.

664 Aron, *supra* note 654, at 7.

665 Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 180, 182 (3rd Cir. 1988). The circuit court found that the lower court had applied the wrong substantive legal standard in this case where a teenager was given occupational therapy rather than direct physical therapy. It reviewed the text and legislative history of the EHA to determine that Congress did not intend for any educational benefit to be sufficient even if it was *de minimis*, rather the law requires a meaningful benefit gauged in relation to the child's potential. *Id.* at 181-85.

666 *Polk*, 853 F.2d at 184-85; Deal ex rel. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 861-62 (6th Cir. 2004). *Deal* involved a placement dispute regarding a child with autism. The child's parents' desired a private program while the district's proposed IEP called for his primary placement in a regular education kindergarten class *Deal ex rel. Deal*, 392 F.3d at 847. The court found that the district's refusal to consider evidence regarding the child's individual needs and the effectiveness of the private program amounted to predetermination, a procedural violation of IDEA, which denied him FAPE *Id.* at 857-58. Regarding the substantive standard for FAPE, the court stated that although the district is not required to "maximize each child's potential commensurate with the opportunity provided other children," it must confer a "meaningful educational benefit gauged in relation to the potential of the child," and that at some point the difference in outcomes between two educational programs, such as the public verses private placement at issue, could be so great that providing the lesser program could constitute a denial of FAPE. *Id.* at 861-62.

is based on IDEA's requirement that special education must be tailored to the unique needs of the disabled child.[667] It is designed to produce progress, not regression. This standard is currently applied in the Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits.[668]

A mixed substantive standard[669] was applied in the Seventh Circuit by the court in Alex R. ex rel. Beth R. v. Forrestville Valley Community Unit School District #221.[670] In this case, although the court used the "meaningful benefit" label,[671] the functional test it applied in its analysis was consistent with the "some benefit" standard, which looks to such things as receiving passing grades and advancing from grade to grade to show sufficient progress in the educational program.[672]

3.4.1.3.3 – Characterization of IDEA Using Only its FAPE Provision as Interpreted by the Courts

All three views of the type of educational opportunity that have emerged under *Rowley*, *some benefit*, *meaningful benefit*, and *mixed*, are consistent with the basic underlying conception of compensatory education that has been categorized as *level the playing field*, since they provide extra assistance for students with disabilities but do not guarantee a particular educational outcome.[673] Thus, under IDEA, states give students with disabilities an opportunity to receive an educational benefit that is closer to that

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667 Ridgewood Bd. of Educ. v. Stokley, 172 F.3d 238, 247 (1999).
668 Aron, *supra* note 654, at 7.
669 *Id.*
670 375 F.3d 603 (7th Cir. 2004).
671 *Alex R. ex rel. Beth R*, 375 F.3d at 612.
672 In this case, the court found that the IEP for an elementary-aged child with Landau-Kleffner Syndrome, met both the procedural and substantive requirements of IDEA because it was "reasonably calculated to enable him to receive educational benefits" based on his history of advancing from grade-to-grade, his avoidance of disciplinary infractions, and his progress in learning *Id.* at 615-16.
673 *See* Green, *supra* note 484, at 325; Roemer, *Equality of Opportunity*, *supra* note 491, at 1; Spring, *supra* note 500, at 107.

available to their non-disabled peers than they would receive without the special education and related services. *Some benefit* and *meaningful benefit* fall along the same continuum with each designating a different level of assistance required to have the ability to participate and learn in educational settings. Both require more than a trivial or *de minimis* benefit, and at least the basic attainment of receiving passing grades, and advancing from grade to grade, if the child is capable of doing so, but they do not require states to maximize a child's potential.

Courts applying a *meaningful benefit* view have focused on the individual nature of the required inquiry and said that it is important to consider the child's potential compared with actual learning and that at some point the educational benefit offered is insufficient if progress under one proposed program is significantly less than what possible under a different proposed program.

It is against this backdrop that the No Child Left Behind Act of 2001 was enacted.

3.4.2 – NCLB and the Special Education Controversy

3.4.2.1 -- The Requirements of No Child Left Behind, as enacted: PL 107-110

The No Child Left Behind Act ("NCLB") is intended 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."[674] It is based on four pillars: stronger accountability for

674 20 U.S.C. § 6301 (emphasis added).

results, more freedom for states and communities, proven education methods, and more choices for parents.[675] The accountability principle is the most relevant to this discussion.

The school accountability system has three critical components: academic content standards, academic achievement standards, and a measurement of progress towards achieving these standards through assessments, adequate yearly progress, and public report cards.[676] Under NCLB, states specify their own rigorous content and achievement standards that include the same knowledge, skills, and levels of achievement expected of all elementary and secondary school students in math, reading or language arts, and science[677] and evaluate whether schools are being successful in teaching students the knowledge and skills defined by the content standards using academic assessments.[678] As enacted, NCLB permits students with disabilities to participate in the assessments using reasonable adaptations consistent with IDEA.[679] Assessments are to be administered every year in grades three through eight and at least once in high school.[680] NCLB sets a goal of having 100 percent of the students in this country achieve a "proficient" score, as

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675 U.S. DEP'T OF EDUC., FOUR PILLARS OF NCLB 1 (July 1, 2004), http://www.ed.gov/nclb/overview/intro/4pillars.html. It has also been characterized as being guided by the following six principles: accountability, highly qualified teachers, scientifically based instruction, local flexibility, safe schools, and parent participation and choice. TurnBull, *supra* note 628, at 321-22.

676 *See* Candace Cortiella, *supra* note 540, at 17-18; Rules and Regulations, 68 FED. REG. 68698 (Dec. 9, 2003).

677 "Each State plan shall ... adopt[ed] challenging academic content standards and challenging student academic achievement .... The academic standards ... shall be the same academic standards that the State applies to all schools and children .... [i]ncluding at least mathematics, reading or language arts, and ... science...." 20 U.S.C. § 6311(b)(1)(A)-(C).

678 "Each State ...shall implement[ed] a set of high-quality, yearly student academic assessments ... that will be used as the primary means of determining the yearly performance of the State and of each local educational agency and school ... in enabling all children to meet the State's challenging student academic achievement standards .... Such assessments shall be the same academic assessments used to measure the achievement of all children." 20 U.S.C. § 6311(b)(3)(A)&(C)(i). *See also* Rules and Regulations, 68 FED. REG. 68698 (Dec. 9, 2003).

679 20 U.S.C. § 6311(b)(3)(C)(ix)(II).

680 20 U.S.C. § 6311(b)(3)(C)(v)&(vii).

defined by the state, on its assessments by the 2013-2014 academic year.[681] In the meantime, the law has states adopt an "adequate yearly progress" ("AYP") standard that marks the way towards meeting student academic achievement goals and reducing the gaps in achievement among different student groups.[682] The law requires reporting of student achievement scores of all students and certain student groups, including economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.[683] Ninety five percent of all students enrolled must participate in the assessments for the results to count as valid.[684] To calculate AYP, all students and each group of students within a school must meet or exceed the state's annual measurable objectives.[685] Schools face sanctions if they do not meet these student achievement targets. If even one student group does not, the school does not meet its AYP target and it is subject to sanctions.[686]

There are four stages of consequences for failure to make AYP. The initial two stages are called "*school improvement*" and stage one begins when a school fails to make AYP for two consecutive years.[687] The school must notify parents about its school improvement status, offer all students enrolled in the school the opportunity to transfer to

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681 "Each State must establish a timeline for making AYP that ensures that, not later than the 2013-2014 school year, all students in each group ... will meet or exceed the State's proficient level of academic achievement. 34 C.F.R. § 200.15.

682 20 U.S.C. § 6311(b)(2)(B). States are able to define their own student percentage achievement targets each year (e.g. step, continuous improvement, or growth model) until the one hundred percent proficiency goal requirement in 2014.

683 20 U.S.C. § 6311 (b)(2)(C)(v).

684 20 U.S.C. § 6311(b)(2)(I)(ii) (2003 & Supp. 2008).

685 34 C.F.R. § 200.20(a)(2). States have flexibility in setting the minimum group size, so if there are not enough students within a school to meet the group size requirement, the school does not have to report the scores of students in a particular subgroup. 5-04 ED policy letter

686 34 C.F.R. 200.20(a)(1). There is a "safe harbor" provision that allows a school to count a subgroup as meeting AYP even if it does not meet the state's annual measurable objections if the rest of the school makes AYP and the subgroup has percentage of students in the group that are below proficient has decreased by at least 10 percent from the previous year. 34 C.F.R. § 200.20(b).

687 20 U.S.C. § 6316(b)(1)(A) (2003 & Supp. 2008).

a different public school that has not been labeled for school improvement, undertake professional development for its teachers, and develop a school plan to address the academic issues in the school.[688] If the identified school does not meet AYP for the third consecutive year, the students who remain in the school must be offered supplemental services that consist of extra academic help such as individual tutoring.[689] If the school does not meet AYP for the fourth consecutive year, it moves to the level three intervention called "*corrective action.*"[690] This stage involves significant changes including new curriculum, staff changes, a longer school day or year, the hiring of outside consultants, and the continuation of the earlier options offered to parents for school choice and supplemental services.[691] After one year on a corrective action plan, if the school still does not meet its AYP targets, it must be restructured under the step called "*restructuring.*"[692] This level four intervention requires either the replacement of most of the school's staff or the implementation of an alternative governance system.[693]

3.4.2.2 – Version of Equal Educational Opportunity embodied in NCLB: Minimal Achievement

NLCB is considered to be a compensatory education program because it is designed to provide extra assistance to certain groups of students, including low achieving children in high-poverty schools and children with disabilities.[694] Its accountability system that relies on state academic assessments to hold schools accountable for "improving the academic achievement of all students" in a manner that

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688 20 U.S.C. § 6316(b)(1)-(3).
689 20 U.S.C. § 6316(b)(5). *See also* U.S. DEP'T OF EDUC., DESCRIPTION OF SUPPLEMENTAL EDUCATIONAL SERVICES 1 (Feb. 26, 2007), http://www.ed.gov/nclb/choice/help/ses/description.html.
690 20 U.S.C. § 6311(b)(7) (2003).
691 *Id.*
692 20 U.S.C. § 6316(b)(8) (2003 & Supp. 2008).
693 *Id.*
694 *See* 20 U.S.C. § 6301 (2003 & Supp. 2008).

enables them to receive a "high-quality education"[695] is one of the key mechanisms it uses to accomplish this goal. This combination of the achievement of a universal educational standard in the form of a proficient score on state academic assessments, and accountability through escalating consequences for schools if it is not met, is consistent with the *minimal achievement* version of equality of educational opportunity because it requires the provision of sufficient resources to allow for the attainment of some minimum common level of achievement for all.[696] Thus, NCLB's vision of equal educational opportunity promotes each student's right to attain at least a proficient score state standardized tests in mathematics, reading or language arts, and science, or the student's school must undertake specific steps to correct the deficiency – the school's overall low score on the test.[697]

What NCLB does not guarantee, however, is an individual student's right to attain a score that is proficient or above on the state assessments. In practice, NCLB views students as a group, requiring ninety-five percent participation in the assessments and the reporting of aggregate student scores at each proficient level and also disaggregated scores by group.[698] There is no private right to action provision in NCLB, therefore, an individual student may not sue to enforce any of its provisions.[699] Thus, even though NCLB strives to provide each student with the opportunity to obtain a high-quality education as evidenced by their scores on state academic assessments, it does not guarantee it. Yet inherent in the concept of equal educational opportunity is the idea of

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695 20 U.S.C. § 6301(4) (2003).
696 Burbules, Lord & Sherman, *supra* note 493, at 183.
697 NCLB would not fit the same results model of equal educational opportunity because it does not require the "strict equalization of outcomes," or test scores. Any score that is proficient or above is counted in a school's adequate yearly progress calculation. *See* Burbules, Lord & Sherman, *supra* note 493, at 182.
698 20 U.S.C. § 6311(h)((1)(C) (2003).
699 However, each student in an underperforming school is entitled to transfer to a non-failing school or utilize supplemental services like individual tutoring.

offering students a chance to achieve a certain educational result and not requiring that they actually attain it. Equal educational opportunity commonly makes allowances for the student's own educationally relevant variables, such as effort and choice, to play a part in the outcome. Therefore, even though the promise of achieving a proficient score on the state tests is not made directly to the students themselves in a way that they are able to claim and enforce, the consequences on schools if sufficient numbers of students do not meet the proscribed academic targets, is probably enough to characterize NCLB's equal educational opportunity standard as the *minimal achievement* view.

3.4.2.3 -- NCLB and IDEA: Tension between the requirements

Congress's vision of a "high-quality education" in NCLB is that all students have a "fair, equal, and significant opportunity" to obtain proficiency on state academic assessments that reflect challenging academic expectations.[700] Its vision of an "appropriate" education in IDEA is one that is individualized to the child with a disability, affords them with the opportunity to receive an "educational benefit"[701] and prepares them for "further education, employment and independent living."[702] Since both laws apply to students with disabilities, the education community began to discuss the potential opportunities and problems for these students after NCLB's passage. Some commentators saw NCLB as a positive development in the field, one which could raise the academic expectations and opportunities for students with disabilities,[703] while others viewed it as a threat, one which could have a negative effect on their education.[704]

These divergent views emerged because of the differing requirements in each of the laws relating to students with disabilities and the vision of educational opportunity for these students that they each promote. Even though IDEA and NCLB are both considered compensatory education programs since they offer additional resources to certain groups of students, IDEA's primary goal is on *leveling the playing field* by focusing on the unique needs of each child with a disability[705] while NCLB views children in groups, such as disadvantaged kids and students with disabilities, requiring a *minimum level of achievement* through a specified level of proficiency for all students in each group on

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700 20 U.S.C. §6301 (2003 & Supp. 2008).
701 Bd. of Ed. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982).
702 20 U.S.C. § 1400(d)(1)(A).
703 Handler, *supra* note 443; Johnson, *supra* note 443; Rosenbaum, *supra* note 443.
704 Keele, *supra* note 442; Metz-Topodas, *supra* note 445; Plain *supra* note 445.
705 20 U.S.C. § 1400(d)(1)(A).

academic assessments. With this difference at the forefront, the ideological battle was fought around the laws' requirements regarding the participation of students with disabilities in state standardized testing. NCLB requires the inclusion of students with disabilities in state and district standardized tests[706] the separate reporting of their scores,[707] and that a sufficient number of them obtain a proficient score on these tests in order to count towards a schools' AYP calculation.[708] Although IDEA 1997 also called for the participation of students with disabilities in state assessments, it provided more testing options, specifically alternate assessments in addition to the regular assessment system. [709] In its original form, NCLB contemplated that all students would take the regular state assessments using state grade-level content and achievement standards.[710]

The commentators that viewed NCLB's assessment and reporting requirements as benefitting students with disabilities made four main points. First, NCLB sheds light on the students receiving special education services, many of whom do not really belong there and can, with the proper support, achieve at the same level as their regular education counterparts.[711] Since most students with disabilities spend the majority of their

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706 20 U.S.C. § 6311(b)(3)((C)(ix)(I)&(II) (2003 & Supp. 2008).
707 20 U.S.C. § 6311(h)(1)(C)(i) (2003).
708 20 U.S.C. § 6311(b)(3)(C) (2003 & Supp. 2008).
709 "Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations where necessary. As appropriate, the State or local educational agency – (i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and (ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments. 20 U.S.C. § 1412(a)(17)(A)(1997) *amended by* 20 U.S.C. § 1412(a)(16)(A) (2004).
710 "Such assessments shall – (i) be the same academic assessments used to measure the achievement of all children; (ii) be aligned with the State's challenging academic content and student academic achievement standards, and provide coherent information about student attainment of such standards .... (ix) provide for (I) the participation in such assessments of all students; (II) the reasonable adaptations and accommodations for students with disabilities (as defined under section 602(3) of the Individuals with Disabilities Education Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards. 20 U.S.C. § 6311(b)(3)(C).
711 *Leaving some children behind: special education should not be exempted from No Child Left Behind Act*, THE NEW YORK TIMES, Jan. 27, 2004, at A22.

time in general education classrooms, including them in the accountability system is likely to raise educators' academic expectations for them.[712] Second, students with disabilities, even those with the most significant cognitive disabilities, benefit instructionally from participation in standardized tests.[713] Third, assessments help schools evaluate the academic progress of all students.[714] Fourth, all kids, including those in special education, need to learn certain academic skills.[715] In the past, many students with disabilities were not even taught basic academic concepts.[716]

Those commentators that were concerned about NCLB's potential negative effect on students with disabilities also had four main concerns. First, teachers would shift their focus from an individual student's improvement to the overall school's academic success[717] thereby potentially creating a substantive violation of IDEA by denying students with disabilities an educational benefit.[718] Second, teachers would teach to the tests rather than impart the broader range of knowledge and skills that students need to learn.[719] Third, including students with disabilities in standardized testing could create a high level of anxiety in them.[720] Fourth, the pressure to perform well on these tests could produce a backlash against students with disabilities and induce higher drop-out rates for them.[721]

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712 Rules and Regulations, 68 FED. REG. 68698 (Dec. 9, 2003).
713 U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE 11 (July 20, 2007), http://www.ed.gov/policy/speced/guid/nclb/twopercent.doc.
714 *Id.*
715 U.S. DEP'T OF EDUC., WORKING TOGETHER FOR STUDENTS WITH DISABILITIES: INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA) AND NO CHILD LEFT BEHIND ACT (NCLB) FREQUENTLY ASKED QUESTIONS [hereinafter USDOE *Working Together for Students*], Dec. 2005, http://www.ed.gov/admins/lead/speced/toolkit/faqs.doc.
716 Rules and Regulations, 68 FED. REG. 68698 (Dec. 9, 2003).
717 Keele, *supra* note 442, at 1119.
718 Plain, *supra* note 445, at 250.
719 Keele, *supra* note 442, at 1119-20.
720 *Id.* at 1120.
721 *Id.* at 1119.

It is the first concern that best describe the underlying legal tension between IDEA and NCLB. Without individual consideration of the student's educational status and needs, NCLB was seen as undermining a cornerstone of IDEA, the individually crafted education plans with realistic goals that are specifically designed to confer an educational benefit on a particular student.[722] In essence, it was argued, NCLB transforms the philosophy of special education from individual-based assessment to a group-based standardized accountability based on an arbitrary number of students participating and the scores received.[723] NCLB was also seen as a threat to a special education student's right not to participate in an assessment at all if the student's IEP team, a team that has both educational expertise and familiarity with the child, determines that the child would receive a greater educational benefit from not participating,[724] even though IDEA directed them to be included either through regular or alternate assessments. Under IDEA 1997, students with disabilities were not required to engage in the curriculum in the same manner, practice the same skills, or even make the same academic progress as general education students,[725] although states were required to offer them access to and the ability to make progress in the general curriculum.[726] In light of these concerns advocates argued that a broader range of testing methods than was offered under NCLB should be available to utilize with the identified learning styles of students with disabilities.[727]

Both the U.S. Department of Education (USDOE) and Congress responded to these concerns about the alignment of the laws and the advisability of including all

722 Keele, *supra* note 442, at 1133; Plain, *supra* note 445, at 257.
723 Keele, *supra* note 442, at 1116.
724 Plain, *supra* note 445, at 252-53.
725 Keele, *supra* note 442, at 1126.
726 20 U.S.C. § 1414(d).
727 *Id.* at 1133.

students with disabilities in a state's general standardized assessment system. The USDOE promulgated regulations under NCLB and Congress revised IDEA in its reauthorization process.

3.5 – Alternate Assessments: The Federal Government's Response to Concerns about Including all Students with Disabilities in NCLB's Accountability Requirements

This section outlines both the U.S. Department of Education's (USDOE) and Congress' response to the concerns expressed over students with disabilities' participation in NCLB's standardized testing requirements. The USDOE acted quickly to modify No Child Left Behinds' (NCLB) assessment provision that did not allow for students with disabilities to take alternate assessment. Congress, in its 2004 reauthorization of the Individuals with Disabilities Education Act (IDEA), specifically aligned the law with NCLB's revised assessment requirements that did permit alternate assessments.

3.5.1 – NCLB: USDOE's Response to Concerns about Including all Students with Disabilities in NCLB's Accountability Requirements

3.5.1.1 –The Current Status of NCLB Assessment Policy for Students with Disabilities

Under NCLB, students with disabilities, except for a small percentage who may take alternate assessments, must take and successfully perform on the regular academic standardized tests.[728] There are five different ways in which students with disabilities may participate in the state assessment systems: (1) a general grade-level assessment; (2)

728 20 U.S.C. § 6311(b)(2)(C) (2003); 34 C.F.R. § 200.13.

a general grade-level assessment with accommodations;[729] (3) an alternate assessment based on grade-level academic achievement standards; (4) an alternative assessment based on modified academic achievement standards; or (5) an alternate assessment based on alternate academic achievement standards.[730] USDOE regulations permit students with the most significant cognitive disabilities, up to 1 percent of the total population of students in the grades assessed, to take alternate tests based on alternate academic achievement standards and have their proficient or advanced scores count towards AYP.[731] Similarly, the regulations allow students with disabilities, who have been unable to achieve grade-level proficiency within the one year period covered by an IEP, to take alternate tests based on modified academic achievement standards. [732] Up to 2 percent of the total population of students may utilize this option and have their proficient or advanced scores counted in the school's AYP calculation.[733] The combined total of scores that may count towards proficient in a state's AYP calculation may not exceed 3 percent of all students in the grade assessed.[734]

Over the course of five years, NCLB assessment requirements for students with disabilities progressed from all students taking the same test, some with accommodations, to three alternate assessment options, in addition to the general state assessment. An

729 Reasonable adaptations and accommodations for students with disabilities are permitted when necessary to measure the academic achievement of students. 20 U.S.C. § 6311(b)(3)(C)(ix)(II). These accommodation guidelines are set by states. 20 U.S.C. § 1412(a)(16)(B). Accommodations may include: changes in presentation, changes in response mode, changes in timing, or changes in setting. Keele, *supra* note 442, at 1124.
730U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 713, at 11.
731 34 C.F.R. § 200.13(c)(2)(i); 34 C.F.R. § 200.1(d).
732 34 C.F.R. § 200.13(c)(2)(ii); 34 C.F.R. § 200.1(e)(2).
733 *Id.*
734 34 C.F.R. § 200.13(c)(3).

"alternate" assessment is an assessment that is an "alternate" to a general assessment.[735] It is intended to evaluate what students know and can do in situations where students cannot demonstrate these skills on the general assessments.[736] To qualify as an alternate assessment, it must be aligned with the state's content standards, must yield results separately in both reading/language arts and mathematics, and must be designed and implemented in a manner that supports use of the results as an indicator of AYP.[737] All of the alternate assessments permitted by NCLB are based on state academic content standards.[738] It is the academic achievement standards[739] that may be altered for two of these assessments.

3.5.1.2 – NCLB: Changes to the Assessment Requirements for Students with Disabilities in the Regulatory Process

The evolution of NCLB's testing requirements for students with disabilities has occurred in four phases: (1) the original enactment of NCLB that included all students with disabilities in the general state assessment systems with accommodations but without alternate assessments; (2) the first rule-making round that directed states to incorporate alternate assessments based on the regular academic achievement standards into their general state assessment system; (3) the second rulemaking round that introduced the 1 percent rule for alternate assessments using alternate academic achievement standards for students with the most significant cognitive disabilities; and

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735 U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 713, at 22.
736 *Id.* at 12.
737 U.S. DEP'T OF EDUC., *Working Together for Students*, *supra* note 715.
738 "Academic content standards are statements of the knowledge and skills that schools are expected to teach and students are expected to learn." U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 713, at 13.
739 "Academic achievement standards are explicit definitions of how students are expected to demonstrate attainment of the knowledge and skills reflected in the content standards." *Id.*

(4) the third rule-making round that established the 2 percent rule for alternate assessments using modified academic achievement standards for students with disabilities that affect their ability to reach grade-level proficiency within one academic year. In its description of the changes, the U.S. Department of Education documents say that they are motivated by clarifying the statute and providing flexibility[740] and in response to the experience of the states and recent research.[741]

Within one month after the passage of NCLB, the U.S. Secretary of Education issued a notice of meetings to conduct a negotiated rulemaking process.[742]

3.5.1.2.1 – First Rule-Making: Alternate Assessments using Grade-Level Content and Achievement Standards

The first draft regulations, published in February 2002, proposed "one or more alternate assessments for students with disabilities who cannot participate in all or part of the regular State assessments, even with reasonable adaptations and accommodations."[743] The final regulations, which were published later that year, adopted this change, thereby allowing students to take alternate assessments as part of NCLB's accountability scheme.[744] The regulations were then reissued to clarify that alternate assessments must yield results for the grade in which the student with disabilities is enrolled, i.e. the

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740 Notice of Proposed Rulemaking, Adequate Yearly Progress, 67 FED. REG. 50987 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).
741 Proposed Rules, 70 FED. REG. 74624 (Dec. 15, 2005).
742 Notice of Meetings to Conduct Negotiated Rulemaking Process, 67 FED. REG. 9223 (Feb. 28, 2002).
743 Draft Regulations for Negotiated Rulemaking, Inclusion of All Students, (February 28, 2002) (to be codified at 34 C.F.R. § 200.6), http://www.ed.gov/news/events/rulemaking/html.
744"Alternate assessment. (i) The State's academic assessment system must provide for one or more alternate assessments for a student with disabilities as defined under section 602(3) of the IDEA who the student's IEP team determines cannot participate in all or part of the State's assessments ..., even with appropriate accommodations. (ii) Alternate assessments must yield results for the grade in which the student is enrolled in at least reading/language arts, mathematics, and, beginning in the 2007-2008 school year, science." Inclusion of All Students, 67 FED. REG. 71715 (Dec. 2, 2002)(to be codified at 34 C.F.R. § 200.6).

alternate assessments must be based on grade-level content and achievement standards just like the regular assessments.[745]

3.5.1.2.2 – Second Rulemaking: 1 Percent Rule

The rule regarding the students with the most significant cognitive disabilities was initially proposed by the Secretary of Education on August 6, 2002.[746] It was designed to allow states and local educational agencies to evaluate students with the most significant cognitive disabilities', such as those with autism, multiple disabilities, and traumatic brain injury,[747] learning using alternate achievement standards that reflected the "highest learning standards possible for those students"[748] rather than the general state standards and have their proficient and advanced scores on these alternate assessments counted in their AYP calculation.[749] Alternate achievement standards set a less complex expectation of performance for students than the regular grade-level achievement standards, usually based on a very limited sample of content, yet are still aligned with the state's academic

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745 Inclusion of All Students, 67 FED. REG.45041 (July, 5, 2002); *See also* 67 FED. REG. 71715 & 71741 (Dec. 2, 2002).

746 Notice of Proposed Rulemaking, Adequate Yearly Progress, 67 FED. REG. 51005 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).

747 U.S. DEP'T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES NON-REGULATORY GUIDANCE 20 (Aug. 2005), http://www.ed.gov/policy/elsec/guid/altguidance.pdf.

748"Alternate academic achievement standards. For students under section 602(3) of the Individuals with Disabilities Education Act with the most significant cognitive disabilities who take an alternate assessment, a State may, through a documented an validated standards-setting process, define alternate academic achievement standards, provided those standards –

(1) Are aligned with the State's academic content standards;

(2) Promote access to the general curriculum; and

(3) Reflect professional judgment of the highest achievement standards possible.

34 C.F.R. § 200.1(d)

749§ 200.13(c)(1) In calculating adequate yearly progress for schools, LEA's, and the State, a State –

(ii) Must, consistent with § 200.7(a), include the scores of al students with disabilities, even those with the most significant cognitive disabilities; but

(iii) May include the proficient and advanced scores of students with the most significant cognitive disabilities based on the alternate academic achievement standards in § 200.1(d), provided that the number of those students who score at the proficient or advanced level on those alternate achievement standards at the LEA and at the State levels, separately, does not exceed 1.0 percent of all students in the grades assessed in reading/language arts and in mathematics." *Id.* at 50987 & 51005.

content standards.[750] They may include prerequisite or enabling skills that are part of a continuum of skills that culminates in grade-level proficiency.[751] States define who is eligible to take the alternate assessments and individual IEP teams determine how, not whether, a student will participate in the state assessment system.[752]

In its original form, the proposed regulation contained a .5 percent limit.[753] This limit was increased to 1 percent in the rule that was proposed on March 20, 2003.[754] It was adopted on December 9, 2003.[755] The 1 percent limit is calculated using the total number of students enrolled in the grade tested at the state and local educational agency level, not within individual schools.[756] This limit is consistent with the national incidence rates of students with the most significant cognitive disabilities, which are between 5 percent and 10 percent of students with disabilities and roughly translates to .5 percent to 1 percent of all students.[757] The rule is set forth in the three regulations.[758] These regulations do not limit the number of students who may take alternate assessments using alternate achievement standards, instead they only limit the number of student proficient and advanced scores on these tests that may be included in a school's adequate yearly progress calculation.[759]

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750 U.S. DEP'T OF EDUC., ALTERNATE ACHIEVEMENT STANDARDS FOR STUDENTS WITH THE MOST SIGNIFICANT COGNITIVE DISABILITIES NON-REGULATORY GUIDANCE, *supra* note 747, at 20; U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 713, at 15.
751 *Id.* at 27. See the Appendix 3.1 for an example.
752 *Id.* at 23-24.
753 Notice of Proposed Rulemaking, Adequate Yearly Progress, 67 FED. REG. 50987 (Aug. 6, 2002) (to be codified at 34 C.F.R. § 200.13(c)).
754 Proposed Rules, 68 FED. REG. 13797-98 (March 20, 2003) (to be codified at 34 C.F.R. § 200.1(d) and § 200.13(c)(1)).
755 Rules and Regulations, 68 FED. REG. 68703 (Dec. 9, 2003) (to be codified at 34 C.F.R. § 200.1, § 200.6 and § 200.13).
756 Rules and Regulations, 68 FED. REG. 68706 (Dec. 9, 2003).
757 Proposed Rules, 68 FED. REG. 13799 (March 20, 2003).
758 34 C.F.R. §§ 200.1(d); 200.6(a)(2)(ii)(B); 200.13(c)(1).
759 Rules and Regulations, 68 FED. REG. 68706 (Dec. 9, 2003).

3.5.1.2.3 – Third Rulemaking: 2 Percent Rule

The formal process for adopting 2 percent rule was initiated in December 2005.[760] The U.S. Secretary of Education proposed allowing for 2 percent of all students in a grade assessed, approximately 20 percent of students with disabilities, to have their proficient and advanced scores on assessments included in a district and state AYP calculation.[761] This regulation was designed to cover "students, who because of their disability, have significant difficulty achieving grade-level proficiency, even with the best instruction."[762] The modified academic achievement standards must be aligned with the state's content standards for the grade in which the student is enrolled and set at a level that is challenging for the students taking the assessment but less difficult than the regular grade-level achievement standards.[763] States may use a variety of strategies to make the assessment less rigorous than the general assessment, including, but not limited to, modifying the general test by replacing the most difficult items, simplifying the language, or eliminating a "distractor" answer if it is a multiple choice test.[764] States may also develop a completely separate test based on the modified achievement standards.[765] The goal of these assessments is to provide students with access to the curriculum so that they can move closer to grade-level achievement, thereby maintaining high expectations for their academic performance.[766] As with the 1 percent rule, this 2 percent cap is only a

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760 Notice of Proposed Rulemaking, 70 FED. REG. 74624 (Dec. 15, 2005).
761 *Id.* at 74625.
762 *Id.* at 74624. "The student's progress to date in response to appropriate instruction, including special education and related services designed to address the student's individual needs, is such that, even if significant grown occurs, the IEP team is reasonably certain that the student will not achieve grade-level proficiency within the year covered by the student's IEP." 34 C.F.R. § 200.1(e)(2)((ii)(A).
763 34 C.F.R. § 200.1(e)(i)&(ii).
764 U.S. DEP'T OF EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS NON-REGULATORY GUIDANCE, *supra* note 713, at 25.
765 *Id.*
766 Rules and Regulations, 72 FED. REG. 17755 (April 9, 2007).

limitation on the number of students whose proficient and advanced test scores may count in an AYP calculation, not on the number of students who may actually participate in this type of assessment. The decision on how an individual student should participate in an assessment is made by that student's IEP team.[767] To make this change, five NCLB regulations were amended,[768] along with one under IDEA addressing student participation in assessments.[769]

The following tables provide an overview of the current alternate assessment options available to states under NCLB. Table 1 links the type of assessment with the relevant student population, state achievement standards, and NCLB AYP calculations. Table 3.2 lists the alternate achievement standards options.

Table 3.1 – Assessment System for Students with Disabilities under NCLB & IDEA[770]

Student Group	Achievement Standards	Assessment	NCLB AYP Calculation
Students working on grade level who complete it with or without accommodations	Grade-level achievement standards	Based on grade-level achievement standards	No exemption[771]
Students working on grade level who are not able to complete all grade-level material in the course of a year	Modified achievement standards that are aligned with grade-level content standards, but are modified so that they reflect reduced breadth or depth of grade-level content	Based on modified grade-level achievement standards	2% exception

767 "For each student with a disability, as defined under section 602(3) of the IDEA, appropriate accommodations that the student's IEP team determines are necessary to measure the academic achievement of the student relative to the State's academic content and academic achievement standards for the grade in which the student is enrolled ...." 34 C.F.R. § 200.6(a)(1)(i)(A).
768 34 C.F.R. §§ 200.1(a)(e)&(f); 200.6(a)&(c); 200.7(a); 200.13(c); 200.20(c)(f)&(g). Rules and Regulations, 72 FED. REG. 17778-81 (April 9, 2007).
769 34 C.F.R. § 300.160; Rules and Regulations, 72 FED. REG. at 177781.
770 Letter from Edward Roeber & Jacquelyn Thompson, Michigan Department of Education (Feb. 28, 2006) (on file with author); USDOE, *Working Together for Students*, *supra* note 715.
771 All students with disabilities who do not qualify for an exemption should be in this category.

Table 3.1 (cont'd).

Students with most significant cognitive disabilities	(1) Grade-level achievement standards OR (2) Alternative achievement standards -Aligned with the State's academic content standards & promote access to the general curriculum but cover a narrower range of content (e.g., fewer objectives under each content standard) & reflect a different set of expectations in the content areas (reduced complexity or modified to reflect pre-requisite skills) than do regular assessments or alternate assessments based on grade-level achievement standards.	Alternative assessments based on either: (1) grade-level achievement standards -Assessment procedures may differ from the regular assessment (e.g., include body-of-work or performance tasks instead of multiple choice) OR (2) Alternative achievement standards -Assessment procedures may differ here too.	1% exemption applies

Table 3.2 – Characteristics of Alternate Achievement Standards772

Alternate Assessment based on Alternate Academic Achievement Standards (1%)	**Alternate Assessment based on Modified Academic Achievement Standards (2%)**	**Alternate Assessment based on Grade-Level Academic Achievement Standards**
An alternate academic achievement standard is an expectation of performance that differs in complexity from a grade-level achievement standard, usually based on a very limited sample of content that is linked to but does not fully represent grade-level content.	A modified academic achievement standard is aligned to grade-level content standards for the grade in which a student is enrolled and challenging for eligible students, but may be less difficult than grade-level achievement standards.	A grade-level academic achievement standard defines a level of "proficient" performance equivalent to grade-level achievement on the State's regular assessment.

772 U.S. Dep't of Educ., Modified Academic Achievement Standards Non-Regulatory Guidance, *supra* note 713, at 52.

3.5.2 – IDEA 2004 Accountability Provisions: Growing Alignment with NCLB

The 2004 reauthorization of IDEA aligned the law with NCLB in its high expectations for the educational success of students with disabilities and accountability for this success.[773] The common vision shared by both laws is for improved educational outcomes for students with disabilities.[774] The articulation of this vision is found in the laws' stated purposes [775] and its inclusion of students with disabilities in NCLB's accountability scheme, as reflected in its requirement that students with disabilities be taught core academic content[776] and in the assessment system.[777] The two primary means Congress used to accomplish this alignment was through the use of direct references to NCLB and parallel language in the text of the laws.[778]

3.5.2.1 – Purpose

IDEA aims to prepare students with disabilities for further education, employment, and independent living.[779] This goal is consistent with NCLB's goal is to provide a high quality education for low achieving kids, including those with disabilities, so that they may achieve academic proficiency as demonstrated on local and state assessments.[780]

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773 *See generally* Handler, *supra* note 443; U.S. DEP'T OF EDUC., IDEA REGULATIONS: ALIGNMENT WITH THE *NO CHILD LEFT BEHIND (NCLB) ACT* (Feb. 2, 2007), http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C3%2C [hereinafter "USDOE, *IDEA Regulations*"].
774 *Id.*
775 *Id.*
776 USDOE, *IDEA Regulations, supra* note 743 at 1.
777 *Id.* at 5.
778 NCLB specifically mentions IDEA at least thirty-eight times in its text. Handler, *supra* note 443, at 5.
779 20 U.S.C. § 1400(d).
780 20 U.S.C. § 6301.

3.5.2.2 – Core Academic Content

NCLB requires states to establish academic content and achievement standards in mathematics, reading or language arts, and science.[781] IDEA 2004 accomplishes alignment with NCLB's focus on core academic subjects through two provisions: performance goals and indicators and IEP goals and services that promote access to the general education curriculum.[782] The law was revised to specifically require states to apply their NCLB adequate yearly progress performance goals to students with disabilities.[783] IDEA 1997 only called for states to have goals for the performance of children with disabilities that: (1) promoted the "purposes of the act" and (2) were "consistent, to the maximum extent appropriate, with other goals and standards for children established by the State."[784] While IDEA 2004, kept these two stipulations, it added the requirements that the goals for students with disabilities match those defined by NCLB and that they assess students with disabilities' progress towards annual adequate yearly progress objectives.[785] This change emphasized not only that the state's academic standards apply to everyone, but also that students with disabilities, according to IDEA's own terms, would be included in NCLB's formal accountability system. IDEA's expanded focus on core academic skills was also manifested in its IEP components section that require a description of the child's measurable annual goals and special education and related services that permit the child to be "involved and make

781 20 U.S.C. § 6311(b)(1)(A)-(C).
782 Handler, *supra* note 443, at 6.
783 20 U.S.C. § 1412(a)(15)(A)(ii); 34 C.F.R. 300.157(a) and (b); *See* 20 U.S.C. § 6311(b)(2)(C).
784 § 1412(a)(16) (1997), *as amended* 20 U.S.C. § 1412(a)(15) (2004).
785 "The State has established goals for the performance of children with disabilities in the State that -- ... are the same as the State's adequate yearly progress, including the State's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the Elementary and Secondary Act of 1965 [20 U.S.C. § 6311(b)(2)(C)]." § 1412(a)(15). The highlighted section of NCLB requires the same high standards of academic achievement for all students and separate measurable annual objectives for continuous and substantial improvement for students with disabilities. 20 U.S.C. § 6311(b)(2)(C)(i)&(v).

progress in the general education curriculum."[786] IDEA 2004 specifies that the IEP goals should be academic and functional and that there must be a description of how the child's progress toward meeting these goals will be measured.[787]

3.5.2.3 – Assessments

IDEA 1997 initiated the requirements that children with disabilities participate in state and district-wide assessments and permitted them to use accommodations where necessary."[788] IDEA 2004 stresses that all children with disabilities participate in state and district assessments, allowing for the option of using accommodations or taking alternate assessments, and it specifically references the assessments required by NCLB.[789] The change between the two IDEA versions, therefore, is not that children with disabilities take some form of assessment but that it specifically aligns itself with NCLB.[790] In addition, IDEA 2004 adds a section on alternate assessments, which specifies that the content and achievement standards upon which these assessments are based must be aligned with NCLB.[791]

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786 20 U.S.C. § 1414(d)(1)(A)(i)(II)&(IV).
787 20 U.S.C. § 1414(d)(1)(A)(i)(III).
788 20 U.S.C. § 1414(d)(1)(A)(v) (1997), *amended by* 20 U.S.C. § 1414(d)(1)(A)(i)(vi) (2004); Turnbull, *supra* note 628, at 321. IDEA 1997 directs states to develop alternate assessment guidelines for children who cannot participate in the regular assessments. 20 U.S.C. § 1412(a)(17)(A) (1997) *amended by* 20 U.S.C. § 1412(a)(16)(A) (2004).
789 "All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 1111 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 6311], with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs." 20 U.S.C. § 1412(a)(16). The IEP team is directed to indicate the appropriate accommodations necessary to measure the child's academic achievement and functional performance on the standardized tests or the appropriate alternate assessment if the child cannot participate in the regular test. 20 U.S.C. § 1414(d)(A)(VI).
790 Turnbull, *supra* note 628, at 321.
791 20 U.S.C. § 1412(a)(16)(B)(ii); 34 C.F.R. § 300.160.

3.6 – Analysis

This section applies the theoretical frameworks to special education assessment policy as it is articulated in the No Child Left Behind Act (NCLB) and the Individuals with Disabilities Education Act (IDEA). First, it discusses the usefulness and limitations of the policy cycle model as a method to analyze the modifications to the laws by the U.S. Department of Education (USDOE) and Congress. Second, it uses both the original conceptual model and the *Rowley* free appropriate public education (FAPE) test to examine the conceptions of equal educational opportunity in IDEA 2004.

3.6.1 – a Alignment of NCLB and IDEA through the Policy-Making Process

The manner in which the concerns about the participation of students with disabilities in local and state assessment systems has been addressed is good illustration of the ever-evolving nature of laws in the United States is. It is also indicative of the roles Congress federal administrative agencies play in this policy development process.

Even though a law appears static in its original enactment, as many in the field portray by continuing to refer to it by its public act number throughout its life, it is not. Instead, laws are living documents. Following the enactment of a federal education statute, the USDOE plays an important role as its interpreter,[792] creating a fluid process of "give-and-take" between the original statute, the federal agency, its state and local counterparts who, in large measure, are charged with the law's implementation, and the educators, parents, and students who the law effects.

The USDOE's rule-making authority was the primary mechanism used by the federal government to address the considerable concerns expressed by experts, parents,

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792 Kerwin, *supra* note 475.

and educators of students with disabilities regarding their inclusion in NCLB's accountability regime, a program that relies heavily on standardized tests.[793]

Congress also took note of the challenges in implementing NCLB posed by students with disabilities and chose to amend IDEA in 2004 reauthorization to address some of the more significant concerns by deliberately aligning IDEA with NCLB.

As it currently stands, up to 30% of students with disabilities may participate in NCLB's accountability program and have their proficient and advanced scores included in the AYP calculation. This means that USDOE officials expect 70% of students with disabilities to be able to take and earn at least a proficient score on the regular local and state standardized tests. This is considerably less than the 100% requirement originally contained in NCLB. IDEA 2004 does not have a limit on participation in alternate assessments.

The USDOE cited flexibility, experience, and developments in research as motivating forces behind its regulatory changes to NCLB. Thus, the regulatory policy mechanism can be considered successful in its goal of giving flexibility to Congress in passing laws by allowing administrative agencies to tweak the details that do not work in the field.

In one sense, this analysis of the changes to NCLB and IDEA, by examining the formal changes in the laws through regulations and reauthorization, has demonstrated the usefulness of the policy cycle model for highlighting a certain stage or formal action that can be documented. USDOE rule-making under NCLB and Congressional reauthorization of IDEA occurred and its results are evident in the text of the laws and

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793 The USDOE has also included additional guidelines on the assessment requirements in its non-regulatory guidance documents. *See* USDOE, *Modified Achievement Standards, supra* note 713; USDOE, *Alternate Achievement Standards, supra* note 747.

regulations they issued. In another sense, it also reinforces the criticisms of that model that explain policy development is not easily captured by a snapshot in time or a conception of a clear progression from one stage to the next. There was overlap in the stages because these laws were being implemented by state and local officials as the federal officials were considering and adopting changes to them. There is also a limited opportunity to identify actual practices in the field because the USDOE documents can only be used to make inferences about how assessments for students with disabilities were being implemented, since they consist primarily of a one-sided discussion about what states and districts are allowed to do.[794] Thus these documents represent an idealized form of the policy that should be implemented, not what actually is.

3.6.2 – Conception of Equal Educational Opportunity in IDEA 2004

One of the basic questions I raised in this article is whether the change in the requirements that more closely align IDEA with standards-based accountability principles in NCLB, alters its vision of equal educational opportunity in a manner that enhances or detracts from the educational rights of students with disabilities.

NCLB's primary accountability mechanism that includes all students in local and state assessment systems has been controversial, particularly in relation to the special education population. The significant changes in its requirements over the course of five years demonstrate that there was a great deal of attention paid to this issue. At first glance, IDEA 1997 and 2004 also required the students with disabilities to participate in assessments, so the enormous concern over the issue expressed by special education advocates was surprising. This was especially true in light of the fact that NCLB's

794 The content of the rules, the comments on the proposed rules, and the nature of the questions answered in the non-regulatory guidance provide some insight into these issues if the assumption is made that the USDOE acted in response to parent and educator concerns.

primary promise was one of a higher level of educational attainment for all students and numerous special education advocates had argued through the years that under IDEA students with disabilities deserved a higher level of educational services and results.

Thus, the conversation about educational opportunity for students with disabilities has proceeded down two paths. The first, centered on the purpose, structure, and text of IDEA and promotes a view that is consistent with NCLB's requirement of higher attainment for all students. The second, focused on the type of educational opportunity schools are required to provide under IDEA's FAPE provision and the U.S. Supreme Court decision that interprets its meaning. Both arguments provide two parts to the frame I use to analyze IDEA's vision of equal educational opportunity. Part 1 asks: Has IDEA's basic *level the playing field* view changed into a *minimal achievement* view? Part 2 asks: How should IDEA's new accountability principles be reflected in the FAPE substantive educational opportunity standard courts apply?

The key provisions that align IDEA 2004 with NCLB are its purpose that reflects a desire to provide a high quality education to students with disabilities, the core academic content requirements found in the IEP academic performance goals and indicators that require progress in the general education curriculum, and in the inclusion of all students with disabilities in the general local and state assessment systems, using accommodations and alternate assessments, and the reporting of student test scores.

Although much has changed in the accountability requirements with the latest two revisions to IDEA, the basic components upon which the educational rights of students with disabilities were built have not. IDEA 2004 has the same mechanisms for providing services to students with disabilities that were present in the original version of the law

when it was enacted in 1975. IDEA's fundamental guarantee continues to be that a student with a disability receive a "free appropriate public education"[795] in the form of "special education and related services"[796] devised to meet the child's unique needs[797] in the least restrictive environment,[798] consistent with the child's written IEP.[799] IDEA's requirement that students with disabilities be included in the general assessment systems, even though it references NCLB's assessments, does not limit either the number of students who may participate in an alternate assessment or the number whose scores may be considered for the AYP calculation.

3.6.2.1 – Does IDEA 2004 have a new vision of equal educational opportunity?

As indicated earlier in this article, the basic IDEA framework that guarantees educational rights to students with disabilities embodies a *level the playing field* approach to equal educational opportunity because it provides additional support for students with disabilities but does not guarantee a certain level of educational outcomes.[800] IDEA 2004 retains this *level the playing field* view of equal educational opportunity.[801] Even though IDEA requires access for students with disabilities to the general education curriculum through IEP goals and indicators that are tied to common academic achievement

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795 20 U.S.C. § 1414(a)(4).
796 20 U.S.C. § 1401(26)&(29).
797 20 U.S.C. § 1400(d).
798 20 U.S.C. § 1414(a)(5).
799 20 U.S.C. § 1414(d).
800 *See* Green, *supra* note 484, at 325; Roemer, *Equality of Opportunity, supra* note 491, at 1; Spring, *supra* note 500, at 107.
801 The two key differences between the 1997 and 2004 versions of the law are the requirements that states establish the same performance goals and indicators for all students with disabilities that comply with NCLB's AYP provisions, 20 U.S.C. § 1412(a)(15)(A)(ii), and that all students with disabilities are included in all general state and districtwide assessments, taking either the regular assessments with or without accommodations or alternate assessments that are aligned with NCLB's content and achievement standards. 20 U.S.C. § 1414(a)(16)(A)-(C).

standards for all students, particularly those specified by NCLB,[802] and participation in the general local and state standardized tests,[803] its educational guarantees are fundamentally personal and will vary according to the needs of the individual student because they are set out in each student's IEP.[804] Therefore, although IDEA 2004 strongly encourages higher standards and expectations for the academic performance of students with disabilities, the same standards promoted by NCLB, they do not actually compel that they be obtained. The IEP provisions call for students to advance toward attaining their goals[805] and make progress in the general education curriculum.[806] While this is a much higher standard than just access to educational programs and services as was required in the pre-1997 versions of IDEA, it does not guarantee achievement of these things. Moreover, unlike NCLB, IDEA does not have minimal proficiency targets, set limits on the number of students who may participate in alternate assessments and have their scores counted towards the AYP calculation,[807] or impose consequences on schools who do not meet the educational goals set forth in a student's IEP. IDEA's enforcement mechanism is through due process complaints made on behalf of individual students.[808] Without a common required level of proficiency for all or at least most students, IDEA 2004 does not have a *minimal achievement* view of equal educational opportunity similar to that contained in NCLB.

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802 20 U.S.C. § 1412(a)(15)(A)(ii) specifically incorporates NCLB's AYP definition found in 20 U.S.C. § 6311(b)(2)(C).
803 "All children with disabilities are included in all general State and districtwide assessments ... with appropriate accommodations and alternate assessments where necessary as indicated in their respective individualized education programs." 20 U.S.C. § 1412(a)(16).
804 20 U.S.C. § 1414(d).
805 § 1414(d)(A)(IV)(aa).
806 § 1414(d)(A)(IV)(bb).
807 20 U.S.C. § 1412(a)(16)(C).
808 20 U.S.C. § 1415(b)(6).

3.6.2.2 – How should IDEA's new accountability principles be reflected in the FAPE substantive educational opportunity standard courts apply?

Several commentators have argued that the new accountability requirements in IDEA 1997 and 2004 that require heightened academic goals, progress in the general curriculum, testing, school district accountability, and AYP calculations that include all students, have raised the level of educational benefit states are required to provide students under the law, making the *some benefit* standard articulated under *Rowley* no longer viable.[809]

Several proposals have emerged as the proper method for resolving this dilemma by setting a new, more rigorous standard that requires schools to offer more than a basic floor of educational opportunity.[810] One suggested solution is for all courts to adopt the *meaningful benefit* standard already utilized in several federal circuits.[811] This standard directs schools to plan the special education and related services provided to the child by considering each child's potential in order to make the educational benefit conferred

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809 Blau, *supra* note 563, at 2-19; Eyer, *supra* note 451 at 630-37; Johnson, *supra* note 443, at 561; Valentino, *supra* note 451, at 164-66. Courts applying the *some benefit* standard frequently rely on the indicators of whether a child is advancing from grade to grade and receiving passing marks in classes rather than directly measuring achievement of proficiency in the subject matter contained in state standards. *See Rowley*, 458 U.S. at 204. The limitations of the *some benefit* test as a means to promote a high level of educational opportunity for students with disabilities is found in the *Rowley* decision itself. The majority focuses on access to education rather than the quality of the education received. *Id.* at 189. It also specifies that special educational services do not need to maximize a child's potential. *Id.* at 198.

810 *Rowley*, 458 U.S. at 201.

811 Tara Eyer advocates for courts to increase the educational benefit required to be provided so that it is "reasonably calculated to confer measurable educational progress based on the general education curriculum." Eyer, *supra* note 451, at 634. This change would reflect the IEP requirements, initially included in IDEA 1997, that articulate higher academic expectations for students with disabilities, *Id.* at 631, and shift from basic access to education to progress in the regular curriculum. *Id.* at 635.

meaningful.[812] A second idea is for the courts to apply the *educational benefit* standard articulated by the concurrence and dissent in the *Rowley* decision so that schools would be required to eliminate the effects of the child's handicapping condition, if possible, so they can learn in the classroom.[813] A third proposal is for courts to utilize state education standards, including those created for NCLB and principles from the adequacy court decisions to define the new substantive educational benefit.[814] A fourth proposed resolution is for USDOE to formally define the level of "appropriate" education required under the law.[815]

It seems reasonable for courts or the USDOE, the entities that interpret and apply IDEA, to take note of the significant changes to IDEA in its application of the "appropriate" portion of its FAPE provision and the test that emerged from the *Rowley* decision because these provisions form an important part of the law that informs the whole body of it and articulates the mechanisms for promoting its purpose of providing a full educational opportunity to students with disabilities.[816]

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812 *See* Deal ex rel. Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3rd Cir. 1988); Ridgewood Bd. of Educ. v. Stokley, 172 F.3d 238 (1999).

813 Andrea Valentino argues a new definition of "appropriate" should be used by courts in order to realize IDEA's goal of preparing students with disabilities for further education, employment, and independent living. She advocates for an "educational opportunity," one that she derived by combining the concurrence and dissent of the *Rowley* decision. Both justices advocated for offering students with disabilities opportunities to learn that are similar to their non-disabled peers, rather than one that only offers them "some educational benefit." The basic floor of opportunity stipulated by IDEA requires schools to eliminate the effects of the child's handicapping condition, if possible, so they can learn in the classroom. Valentino, *supra* note 451, at 150-51. This change would be consistent with the language of IDEA, the heightened procedures, and its congressional intent. *Id.* at 165.

814 Johnson, *supra* note 443, at 584-85.

815 Blau, *supra* note 563, at 17-19.

816 Many courts have declined to do so because Congress has not specifically amended the FAPE requirement in its reauthorizations of the law. Since IDEA was passed using Congress' spending clause authority, changes in its requirements must be clear and unambiguous in order for states to be bound by them. IDEAs FAPE provision has been used since the 1980s to determine the "appropriate" level of education a student receives, so Congress must specifically change it in order for the U.S. Supreme Court's interpretation in *Rowley* to be modified. Since Congress has not done this, it must intend for Rowley's *some benefit* test to stand.

Although all of the proposed solutions offered by commentators, *meaningful benefit, educational opportunity,* or using state academic or adequacy standards, offer different versions of equal educational opportunity, in practice they would be consistent with IDEA's underlying *level the playing field* definition of equal educational opportunity in large part because they would be implemented using IDEA's IEP framework that demands consideration of the individual needs of the child. What they would offer students with disabilities, however, is a version of this conception of equal educational opportunity is that closer to the *minimal achievement* view that is promoted by both NCLB and the adequacy state court decisions[817] or even the *full opportunity* view that was advanced by Amy Rowley's parents[818] because the educational benefit would either have to permit the child to make meaningful progress towards IEP goals under *meaningful benefit*, eliminate the effects of the disabling condition so the child has the same opportunity to learn as non-disabled peers under *educational opportunity*,[819] or offer a real opportunity to attain a basic level of mastery of state academic standards under *adequacy*.[820] Courts applying the *some benefit* standard consider a more basic measure of sufficiency for special education and related services rather than directly measuring achievement of proficiency in the subject matter contained in state standards.[821] Thus, using one of the proposed tests would result in a higher substantive level of educational opportunity, one that better reflects the type of progress towards high academic content and achievement standards that special education advocates desire and still retain IDEA's fundamental consideration of and concern for the unique needs of

817 *See* Umpstead, *supra* note 519.
818 Bd. of Ed. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982).
819 Valentino, *supra* note 451, at 150-51.
820 Umpstead, *supra* note 519, at 305, 313.
821 *See Rowley*, 458 U.S. at 204.

each child with a disability. This is true even if the standard remains as the *level the playing field* conception of equal educational opportunity.

The vision of equal educational opportunity that advocates ultimately desire is likely to be the one proposed by Justice White's dissent in *Rowley* of equalized educational opportunity if it was defined in a way that allowed for students with disabilities to be provided the same opportunity as their non-disabled peers to achieve a high level of academic proficiency in a manner that considers their unique needs, abilities, and learning styles and thereby guarantees not a common level of *minimal achievement* but rather a *full opportunity* to optimize each individual's educational results.

3.6.2.3 – Do Assessments Matter?

What is most interesting about the above analysis is that it barely mentions alternate assessments. This issue, the one over which the special education battle regarding NCLB has been fought, does not directly affect the conception of equal educational opportunity promoted by the law. Yet clearly the issue must matter if so much attention has been paid to it.

The concern over assessments may be representative of a deeper concern about the continuing viability of IDEA in the shadow of growing federal influence over education through NCLB. The federal government has been intricately involved in guaranteeing educational opportunity for students with disabilities for over thirty years and for students with other educational disadvantages, particularly economic challenges, for over forty years. Under their governing laws, however, the types of educational opportunities provided to these two groups and the rights specified have substantially

differed. Students with disabilities have had the guarantee that each child's unique needs would be considered in an educational program that was reasonably calculated to confer an educational benefit on them as represented in an individualized education program. Schools with large percentages of children living in poverty have been given extra money to enhance their educational programs to close the achievement gap between them and the rest of the educational population. NCLB extends this guarantee with greater force and possible impact on students with disabilities by listing them as a subgroup whose scores must be reported on the standardized assessments it requires.

In this way, NCLB possibly threatens the existence of IDEA. That is not to say that IDEA is in any immediate danger of being formally eliminated. Its process, procedures, and educational guarantees are well engrained in the educational landscape. The threat from NCLB is more of an operational threat. If both IDEA and NCLB require states to develop and schools to administer assessments that are linked to common content and achievement standards for all students, the range of assessment and possibly even learning alternatives for students with disabilities may be eliminated. When IEP teams meet to craft an educational plan that considers the unique needs of each child, the state academic content and achievement standards and assessment requirements are required to be a prominent component of the discussion under both IDEA and NCLB. And under NCLB, only 3 percent of all students, equating to roughly 30 percent of students with disabilities, may take alternate assessments and have their proficient or advanced score counted towards the AYP calculation. This requirement, which is intended to put pressure on the schools in general and the IEP teams in particular to include students with disabilities in the highest level of assessment they are able to take,

is the one that special education advocates fear will result in the loss of true individual consideration of needs and abilities of each student with disabilities.

And so the battle for more flexibility under NCLB to develop and administer alternate assessments to students with disabilities is one advocates view as worth fighting. Ultimately, special education advocates are willing to accept a *level the playing field* vision of educational opportunity under IDEA and work to enhance state responsibilities under it to make it more responsive to the individual needs of students with disabilities than assume the potential negative consequences on students with disabilities in the comprehensive and somewhat prescriptive requirements contained in NCLB, even though it promotes a *minimal achievement* vision of educational opportunity. Instead, special education advocates prefer to characterize the new accountability requirements in IDEA and NCLB as offering students with disabilities greater access to the general education environment, though inclusion in the core curriculum and testing, and requiring schools to promote an individual's students' success. This success, in the minds of many, would best be accomplished by enhancing students' rights under the *Rowley* FAPE test, which should be modified, in light of the changes in IDEA and NCLB, to require schools to provide a *meaningful benefit, educational opportunity* or an education that meets state *adequacy* standards. NCLB should defer to IDEA and allow it to define the assessment requirements for students with disabilities.

3.7 – Conclusion

3.7.1 – Policy Development: The Evolution of Assessment Options for Students with Disabilities

In this article I employed the policy cycle model of public policy development to highlight the iterative relationship between the No Child Left Behind Act (NCLB) and the Individuals with Disabilities Education Act (IDEA) that has resulted in greater alignment between the two laws and examine the resulting evolution of the assessment requirements for students with disabilities. I have also outlined the significant formal steps taken by the U.S. Department of Education (USDOE) and Congress to move from a requirement that all students participate in a uniform assessment system to permitting three forms of alternate assessments for students with disabilities.

Although including students with disabilities in a state's formal accountability program was first required by IDEA 1997, it was NCLB that stipulated that they take the same standardized tests given to the general education population, allowing only for accommodations. IDEA 1997 permitted alternate assessments. The original version of NCLB did not mention this alternate assessment and would not allow the score on such tests to be included in an adequate yearly progress (AYP) measure – the primary means for determining progress and holding schools accountable under this law. This discrepancy in the requirements of the two laws was the source of considerable controversy in the field and the federal government acted quickly to resolve the tension between them.

Within one month of NCLB's enactment, the USDOE, through its rule-making process, proposed creating alternate assessments for students with disabilities to be

permitted in the law's accountability regime. They were allowed later that year. In 2003, the USDOE passed new regulations creating a 1% exemption for students with the most significant cognitive disabilities to take alternate assessments based on alternate achievement standards. And in 2007, the USDOE promulgated another set of regulations permitting up to 2% of students to take alternate assessments tied to modified academic achievement standards. Thus, NCLB evolved from requiring all students to participate in the general assessments based on challenging academic content and performance standards to a total of five options, three of which involve alternate assessments, within the course of five years. These assessment options were then also written into IDEA's most recent reauthorization and its regulations[822]

Congress' 2004 reauthorization of IDEA incorporated some key concepts from NCLB regarding high academic expectations for students with disabilities as evidenced by improved educational outcomes on academic assessments. Using some language from NCLB and references to the law itself, Congress accomplished greater alignment between the two education laws in their similar purposes that promote high quality education for students with disabilities, the requirement that students with disabilities be taught core academic content, and in its assessment requirements, that also allowed alternate assessments using alternate or modified academic achievement standards.

By examining the development of the alternate assessment rules through the USDOE promulgation process, it is clear that statutes are not fixed or permanent but rather fluid laws that are responsive to the policy environment in which the administrative agency operates. In the cases of NCLB and IDEA, the USDOE plays a valuable role in formal rule-making and informal policy documents. It also revealed the

822 34 C.F.R. § 300.160(c).

strength of the policy cycle model as an appropriate tool for studying the actions taken by the USDOE regarding the assessment options for students with disabilities under NCLB. It also identified one weakness of the model, its inability to directly report on how the resulting alternate assessments were actually implemented in the field either before or after the changes to IDEA requirements.

3.7.2 – Conceptions of Equal Educational Opportunity

While examining the adaptations of these laws to the surrounding policy environment was instructive as to how laws interrelate and how government entities respond to constituency concerns, my investigation of the underlying conceptions of equal educational opportunity proved to be the more engaging issue to emerge from studying these two federal policies.

The quest for equal educational opportunity has been a driving force in the educational policy of this nation since the beginning of the common school movement in the mid-nineteenth century and it has taken different forms throughout our history. Initially it began with a concept of equal inputs by exposing students to a common curriculum in common schools. It shifted the goal to one that at least considered the possibility of equality outcomes in the mid-twentieth century beginning with the U.S. Supreme Court decision in *Brown v. Board of Education* and the Coleman report. The federal government promoted educational opportunity for certain groups of disadvantaged students through two major compensatory education programs: The Elementary and Secondary Education Act of 1965, now known as NCLB, and the Education for all Handicapped Children Act of 1975, now known as IDEA.

The main vehicle for the promotion of educational opportunity for students with disabilities is IDEA. Its primary guarantees include the provision of a free appropriate public education consisting of special education and related services to all students with disabilities between the ages of three and twenty-one. This requirement was interpreted by the U.S. Supreme Court in the 1982 case of *Board of Education of the Hendrick Hudson Central School District v. Rowley.*[823] The court found that IDEA guaranteed a basic floor of opportunity for students with disabilities through special education and related services that were designed to offer the child *some educational benefit.* Since this decision, six federal circuits recognize a higher substantive standard, one described as a *meaningful benefit*, while five retain the lower *some benefit* standard articulated in *Rowley.*[824]

This debate was ongoing when NCLB entered the educational scene. NCLB's provisions promised all students a higher level of educational performance through rigorous academic content and achievement standards, standardized assessments, the reporting of test results for all students and student subgroups, and consequences on schools whose students did not perform adequately. Despite this promise, NCLB did not receive a warm reception by the special education community. Instead, many expressed concern that NCLB actually threatened the educational guarantees included in IDEA and the quality of the education special education students would receive. This response was especially interesting when the underlying conceptions of equal educational opportunity in the two laws are considered, since NCLB arguably required a high level of opportunity, one that called for a common level of *minimum achievement* from each

823 458 U.S. 176 (1984).
824 Aron, *supra* note 654, at 7.

child, while IDEA promoted a *level the playing field* view of educational opportunity whose purpose is to reduce the effect of the disability but not guarantee a certain educational outcome.

What the analysis in this article reveals is that special education advocates value the individualized nature of the educational guarantee provided in IDEA through its IEP process that demands each IEP team consider the unique needs of each child and develop educational goals and objectives accordingly. This is true even in the face of growing alignment between the laws. NCLB with its focus on the overall academic performance of the school and its relevant student subgroups potentially threatens the individual guarantees offered in IDEA by limiting student assessment options through its requirement that only 3 percent of students, or about 30 percent of the special education population, may participate in an alternate assessment and have their proficient or advanced scores included in the AYP calculation. This cap, along with the language in both IDEA and NCLB that IEP teams include students with disabilities in the general standardized testing, and NCLB's consequences for schools who do not meet AYP targets, puts pressure on IEP teams to include students with disabilities in the highest level of assessments that they are potentially able to complete.

That is why the criticism of NCLB's alternate assessments has been so intense. Ultimately what special education advocates desire is to retain the IDEA structure and system but to raise the level of educational benefit required under the law, ideally to one that would obligate schools to provide a *full opportunity* to students with disabilities in a manner that would maximize their educational potential. Since this standard was specifically rejected by the *Rowley* court, the current proposals suggest that the schools

be required to provide students with a higher substantive level of educational benefit described as a *meaningful benefit, an educational opportunity,* or one that is tied to state academic or adequacy standards.

These standards are arguably less rigorous than the *minimal achievement* view promoted by NCLB where every child, except those in the 3 percent who take alternate assessments, attains proficiency on the same state assessments based on challenging academic content, yet they do promote a high level of achievement and are based on the actual needs of students with disabilities because IDEA now requires the same academic goals as NCLB and the inclusion of students with disabilities in local and state assessment system. However, IDEA still provides each student's IEP team flexibility in decision-making about which assessment the student will take and sets no limits on the number who may participate in each type. Even though this promise fits within the *level the playing field* vision of equal educational opportunity, IDEA maintains of the important pledge of an educational experience that is tailored in a way that benefits the individual child.

CHAPTER 3 APPENDIX

APPENDIX 3.1

Different Performance Levels for Elementary Level Word Recognition[825]

Table 3.3 MI-ACCESS Example

Grade Level English Language Arts (ELA) 2nd Grade Content Expectations 2nd Grade[826]	MI-ACCESS ELA Functional Independence 3rd Grade Performance Level Descriptors[827]	MI-ACCESS ELA Supported Independence Elementary Performance Level Descriptors[828]	MI-ACCESS ELA Participation Elementary Performance Level Descriptors[829]
Automatically recognize frequently encountered words in print whether encountered in connected text or in isolation.	Use picture-printed word associations to identify many common vocabulary words, including -personally meaningful words, -frequently encountered words, and -functional words.	Recognize some: -frequently encountered/personally meaningful words (e.g., name, address, family members) -functional words (e.g., exit, danger)	Recognize *some* frequently encountered objects and/or pictures paired with words (e.g., name, survival words/symbols).
Make progress in automatically recognizing the 220 Dolch basic sight words and 95 common nouns for mastery in third grade.			

825 This example is taken from Michigan, which has three alternate assessments.

826 MICHIGAN DEP'T OF EDUC., MICHIGAN SECOND GRADE ELA GRADE LEVEL CONTENT EXPECTATIONS, (Dec. 2005), http://www.michigan.gov/documents/mde/Final_ELA_Assessable_Content_Document_Gr._2-7_178042_7.pdf.

827 MICHIGAN DEP'T OF EDUC., MI-ACCESS FUNCTIONAL INDEPENDENCE ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS, (June 9, 2006), http://www.michigan.gov/mde/0,1607,7-140-22709_28463-136385--,00.html.

828 MICHIGAN DEP'T OF EDUC., MI-ACCESS SUPPORTED INDEPENDENCE ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS, (June 1, 2007), http://www.michigan.gov/mde/0,1607,7-140-22709_28463-136385--,00.html.

829 MICHIGAN DEP'T OF EDUC., MI-ACCESS PARTICIATION ENGLISH LANGUAGE ARTS ASSESSMENT PERFORMANCE LEVEL DESCRIPTORS, (June 1, 2007), http://www.michigan.gov/mde/0,1607,7-140-22709_28463-136385--,00.html.

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