Being Neighborly in Title 20: Using the IDEA to Lend a Helping Hand to NCLB

MARK BURGREN

Congress passed the No Child Left Behind Act of 2001 to improve educational opportunities for poor and minority students. Reliable testing data show, however, that academic achievement gaps persist. This Note argues that the Individuals with Disabilities Education Act's individualized education program and due process provisions provide a valuable framework to amend NCLB to help it fulfill its two promises. First, an IEP for all non-proficient students would make the Act's second goal more realistic—that all students become proficient according to challenging state standards. Second, due process provisions giving parents a private right of action to challenge the sufficiency of their children's IEPs would help ensure NCLB's first goal is met—that all children have the opportunity to obtain a high quality education.

I. INTRODUCTION

Three days after being sworn into office, George W. Bush called the No Child Left Behind Act of 2001 (“NCLB”) his administration's “cornerstone.” Despite challenging economic times and leading the United States in its war against terror after the September 11, 2001 attacks, President Bush secured NCLB’s

---

* The author would like to thank Michael A. Rebell, the Campaign for Educational Equity’s executive director and professor of law and education practice at Columbia University for his guidance, as well as the editorial staff of the Journal of Law and Social Problems for their invaluable input and assistance through the revision process.


passage. The Act is the most recent legislative attempt to provide poor and minority students with the tools they need to succeed, making two promises in its statement of purpose: that all children (1) “have a fair, equal, and significant opportunity to obtain a high-quality education” and (2) “reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”

Despite NCLB’s laudable goals, National Assessment of Educational Progress (“NAEP”) data overwhelmingly show that educational achievement gaps persist. The gaps appear before kindergarten, and by the end of elementary school many poor and minority students have already fallen almost hopelessly behind. These students will complete high school achieving much less, on average, than their middle-class peers.

---

3. Id.
4. § 6301 (footnote omitted).
6. See Michael A. Rebell & Jessica R. Wolff, Moving Every Child Ahead: From NCLB Hype to Meaningful Educational Opportunity 3 (2008) (“Overall, progress on standardized reading and math tests has been minimal, and wide achievement gaps persist between low-income and minority students and their more affluent White peers.”). This Note speaks in terms of “achievement gaps,” rather than a single gap because it is addressing the many types of gaps that exist, including race, class, gender, and maternal education. See Paul Tough, Whatever it Takes: Geoffrey Canada’s Quest to Change Harlem and America 98 (2008) (explaining how race and poverty are inextricably intertwined); see also, Peg Tyre, The Trouble with Boys; They’re Kinetic, Maddening and Failing at School. Now Educators are Trying New Ways to Help Them Succeed, Newsweek, Jan. 30, 2006 (contending that “boys across the nation and in every demographic group are falling behind”).
7. The Black-White Test Score Gap 1 (Christopher Jencks & Meredith Phillips eds., 1998); Thernstrom & Thernstrom, supra note 5, at 22–23.
8. Richard Rothstein, Class and Schools: Using Social, Economic, and Educational Reform to Close the Black-White Achievement Gap 14 (2004). Some scholars point out that there is more test-score variation within populations. See, e.g., Holding NCLB Accountable: Achieving Accountability, Equity, & School Reform 21 (Gail L. Sunderman ed., 2008) (arguing that achieving a more equitable education system between groups would still leave a large gap within groups); Rothstein, Jacobson & Wilder, supra note 5, at 2 (speculating that even if the black-white test score gap was eliminated, variability in student performance within racial and ethnic groups would remain).
A confluence of factors produce achievement gaps. Poor children face obstacles such as “worse schools, worse living conditions, worse nutrition, fewer books, fewer educational toys, ... [and] parents who ... [are] less well-educated, younger, less healthy, and more overwhelmed.” To eliminate gaps completely, “every American child ... [would need] access to the same kind of nurturing, stimulating, language-rich early home life ...” Since such a scenario is probably unrealistic, it becomes the public school system’s role to do its best to provide substitutes for what many children are not receiving at home. But why place such a hefty burden on schools?

In President Barack Obama’s first major speech on education, he highlighted the importance of educating every American child, proclaiming that

The source of America’s prosperity has never been merely how ably we accumulate wealth, but how well we educate our people. This has never been more true than it is today. In a 21st century world where jobs can be shipped wherever there’s an Internet connection, where a child born in Dallas is now competing with a child in New Delhi, where your best job qualification is not what you do, but what you know, education is no longer just a pathway to opportunity and success, it’s a prerequisite for success.

Gaps should be narrowed to preserve our democracy, as the next generation of voters and jury members must possess the critical thinking skills required to thrive in an increasingly complex and global economy. Moreover, it would pave the way for

---

9. TOUGH, supra note 6, at 40.
10. Id. at 194.
11. Id.
13. RESELL & WOLFF, supra note 6, at 1–2. Scholars generally agree that in our system achievement gaps can and should be narrowed, but will never be closed. See JAMES S. COLEMAN, EQUALITY AND ACHIEVEMENT IN EDUCATION 29 (1990) (dismissing the idea of “complete equality of opportunity” as something that could only be achieved if “all the divergent out-of-school influences vanish, a condition that would arise only in the advent of boarding schools”); Richard Rothstein, Leaving “No Child Left Behind” Behind, THE AMERICAN PROSPECT, Jan. 1, 2008, at 53 (contending that there will always be “children who come to school hungry, scared, abused, or ill”).
accomplishing many salient public goals, such as equalizing job earnings, reducing crime, and lowering welfare and healthcare costs.14

Although NCLB has thus far failed to achieve its goals, the Act should not be completely abandoned. By focusing on the achievement of all students, including poor, minority, disabled, and those with limited English proficiency ("LEP"), NCLB could be “one of the most important pieces of education civil rights legislation in a generation.”15 NCLB provisions that hold states accountable for the performance of all groups provide the urgency and attention needed to promote racial and ethnic justice.16 This Note argues that incorporating provisions from the Individuals with Disabilities Education Act ("IDEA")17 into NCLB would make NCLB’s equality-of-opportunity and proficiency goals more attainable.

Following the introduction in Part I, Part II of this Note provides a general overview of (A) NCLB and (B) the IDEA. Part III.A. argues that implementing the IDEA’s individualized education program ("IEP") provisions in the NCLB context for non-proficient students would make NCLB’s second proficiency goal more viable.18 Non-proficient students could benefit from the individualized attention and academic support that an IEP currently provides disabled children.19 Other scholars have previously advocated for expanding the IEP concept to all students, but did not attempt to fit it within NCLB’s framework.20

16. Id.; see Rebell & Wolff, supra note 6, at 4 (listing various educational policy experts that support NCLB from LEP, race, class, and disability perspectives).
18. § 6301.
20. See Stephen A. Rosenbaum, Full Sp[Ed] Ahead: Expanding the IDEA Idea to Let All Students Ride the Same Bus, 4 STAN. J. C.R. & C.L. 373, 384–85 (2008) (advancing that labeling “regular ed” and “special ed” is inconsequential and that every child should receive IEP services and be provided a free appropriate public education); Seligmann, supra note 19, at 760–61 (arguing that “the resources already available through the IDEA can, if used inclusively, help provide a better education to every school child”).
Part III.B. proposes using the IDEA’s due process provisions to make NCLB’s first equality-of-opportunity goal more viable. Law-based educational reform has benefited children with disabilities more than any other group that has been previously excluded or discriminated against in our public school system. In this part, the pros and cons of incorporating due process provisions into NCLB will be addressed. The balance will ultimately resolve in favor of amending NCLB to grant parents of non-proficient students a private right to challenge school districts’ educational failures in developing or implementing their child’s IEP.

II. BACKGROUND

A. NCLB

During the 1980s, the federal government began to take a strong interest in educational policy. A Nation at Risk, a government report published in 1983, served as a catalyst for increased federal regulation of the educational domain, which was previously under the states’ nearly exclusive control. In A Nation at Risk, Ronald Reagan’s National Commission on Excellence reported that America’s schools were falling woefully behind the rest of the world in academic achievement due to a “rising tide of mediocrity.”

Almost a decade earlier, Congress enacted the Elementary and Secondary Education Act of 1965 (“ESEA”), which was designed to help improve educational opportunities for low-income students.
In response to *A Nation at Risk*, Congress passed a series of bills that reauthorized the ESEA. President George H.W. Bush’s “America 2000” strategy in 1989, Bill Clinton’s “Goals 2000: Educate America Act” in 1993, and the “Improving America’s Schools Act of 1994” proposed solutions that emphasized high standards and increased student assessment — collectively becoming known as the “standards-based reform movement.” The movement culminated in 2001 when Congress, in a bi-partisan effort, passed NCLB as the ESEA’s latest reauthorization. The major difference between NCLB and past standards-based legislation is that NCLB serves as an unprecedented federal expansion into educational policy, boasting rigorous accountability provisions; the Act contains strict consequences for failing to meet the standards it imposes. Relying on its spending power, Congress also mandates that each state educational agency submit a plan to the Secretary of Education to receive federal grants.

NCLB’s core provision requires that all children attain academic proficiency by 2014. Individual states must devise challenging standards that define proficiency and apply them to all their schools and students. By 2014, the standards must “contain coherent and rigorous content” and “encourage the teaching

31. REBBELL & WOLFF, supra note 6, at 51. The movement for “accountability” stemmed from a bargain struck at President George H.W. Bush’s “historic 1989 education summit with the Nation’s Governors at Charlottesville, Virginia.” U.S. DEPT. OF EDUC., supra note 2, at 2. The bargain was that states would get flexibility in their use of funds under Title I of the ESEA, but would be held strictly accountable for their results. Id.
33. SUnderman, supra note 25, at 11.
34. Id. at 12.
36. § 6311(b)(2)(F). In past ESEA legislation, the full proficiency goal was voluntary for states and mainly served as motivational rhetoric, but NCLB made it a legal mandate. REBBELL & WOLFF, supra note 6, at 5, 67.
37. § 6311(b)(1)(A), (B).
of advanced skills . . ." State accountability systems are based on student performance in reading and math. Specifically, NCLB requires validated annual tests in grades three through eight and once more in high school. Using these tests, states must demonstrate that their schools make adequate yearly progress ("AYP"), that is, an increase in the percentage of students who demonstrate proficiency on state-set, grade-level standards. Each state must have an accountability system that assesses all of their students — including poor, minority, disabled, and those with LEP — and report their disaggregated results. Failure of any group to meet AYP results in an escalating series of sanctions.

38. § 6311(b)(1)(D)(i)(II), (III).
39. § 6311(b)(1)(C). NCLB also contains a testing requirement for science, but NCLB’s sanctions only apply to math and reading. Rebell & Wolff, supra note 6, at 69.
40. Despite the validation requirement, “[m]any of the state tests used to measure adequate yearly progress are not valid in accordance with established psychometric standards, and most state tests are not fully aligned with the state’s academic standards.” Id. at 3.
41. § 6311(b)(3)(C)(v)(I).
42. § 6311(b)(2)(A)–(C).
43. § 6311(h)(1)(C)(i).
44. § 6316(b). To determine which states should be sanctioned, NCLB requires that they issue an annual report card containing their AYP and teachers’ professional qualifications. § 6311(h)(1)(C)(viii); see § 6314(b)(1)(C) (providing that “highly qualified teachers” must instruct all children in core academic subjects). The report card may also optionally contain the average class size of each grade, violence and drug incidences, degree of parental involvement, percentage of students who successfully complete advanced placement courses, and a “clear and concise description of the State’s accountability system, including a description of the criteria by which the State evaluates school performance . . . .” § 6311(h)(1)(D). School districts that fail to demonstrate AYP on their report cards may be subject to “improvement, corrective action, and restructuring measures aimed at getting them back on course to meet State standards.” U.S. Dep’t of Educ., supra note 2, at 1; see § 6316(b) (outlining sanction provisions). Initially, students in such schools must be given the opportunity to transfer to a “better” public school within the same district. U.S. Dep’t of Educ., supra note 2, at 2. The district must set aside five percent of its Title I funds for transportation to the new school. Id. If the school fails to make AYP for three of the last four years, then Title I funds must be made available for students to obtain supplemental educational services from public or private tutors. Id. The final step is school reconstitution and restructuring measures when the school fails to make AYP for five years. Id. On the other hand, “[s]chools that meet or exceed AYP objectives or close achievement gaps [are] . . . eligible for State Academic Achievement Awards.” Id. at 1; see also Sam Dillon, For Education Chief, Stimulus Means Power; Money and Risk, N.Y. Times, Feb. 17, 2009, at A1 (noting that the recently passed stimulus bill “sets aside $5 billion . . . to reward states, districts and schools for setting high standards and narrowing achievement gaps”).
Dissatisfied with the progress made under programs designed to ensure disabled children were receiving the same educational opportunities as their non-disabled peers, Congress enacted the Education of the Handicapped Act (“EHA”) in 1970.\textsuperscript{45} Prior to the EHA, parents had little involvement in school placement decisions for their children and had no legal recourse available when they disagreed.\textsuperscript{46} In the late 1980s, the EHA was amended and renamed the Individuals with Disabilities Education Act: Congress’s “ambitious effort to promote the education of handicapped children.”\textsuperscript{47} More recently, Congress reauthorized, amended, and renamed the Act the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA04”).\textsuperscript{48} Today, the IDEA04 covers about thirteen percent of public school students at a cost of around $11 billion per year.\textsuperscript{49}

States must guarantee the Secretary of Education that they will support educational programs for disabled students by providing such students a free appropriate public education (“FAPE”) to receive federal funds under the IDEA04.\textsuperscript{50} To provide

\begin{itemize}
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 179 (1982).
\item \textsuperscript{49} Rebell & Wolff, supra note 6, at 73; Department of Education ESEA Title I Grants to Local Educational Agencies, http://www.ed.gov/about/overview/budget/statetables/09stbyprogram.pdf (last visited Sept. 19, 2009).
\item \textsuperscript{50} 20 U.S.C. § 1412(a) (2006). The IDEA defines a FAPE as: 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 . . . . § 1401(9).
\end{itemize}
a FAPE, schools must create an individualized education program ("IEP") tailored to the unique needs of each disabled child.\footnote{§ 1412(a)(1), (4).} In general, an IEP must contain a statement of the child’s present levels of educational performance, annual goals, specific education services to be provided, and objective criteria and evaluation procedures for determining at least annually whether objectives are being achieved.\footnote{§ 1414(d)(1)(A)(i).} The first step for children who want to receive services under the IDEA is evaluation.\footnote{§ 1414(a)(1).} The evaluation determines whether children are disabled and what services they need in their IEP for them to make academic progress.\footnote{Id.} Next, an "IEP team," which normally includes the child’s parents and teachers, meets to develop the IEP.\footnote{§ 1414(d)(1)(B).} Although developing the IEP is a collaborative effort, the school board retains discretion to choose between competing methodologies that accomplish the same educational goals.\footnote{Seligmann, supra note 19, at 763 (citing Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist, Westchester County v. Rowley, 458 U.S. 176, 208 (1982)).}

School officials, teachers, and the child’s parents must reconvene at least annually to prepare the child’s IEP.\footnote{§ 1414(d)(4)(A)(i).} If the child’s parents find the IEP unacceptable, then they may challenge it through state administrative procedures,\footnote{§ 1415(f), (g).} which they may further appeal to federal court.\footnote{§ 1415(i)(3)(B)(i)(I).} The IDEA\textsuperscript{14} allows for an award of attorney’s fees when parents are successful.\footnote{§ 1415(i)(2)(a); see § 1415(l) (detailing the IDEA’s administrative exhaustion requirement).} However, Congress designed the legal challenge process to maximize parental involvement in their child’s education, not to be adversarial.\footnote{Rowley, 458 U.S. at 183 n.6.}
III. USING THE IDEA TO LEND A HELPING HAND TO NCLB

The IDEA’s individualized education program and due process provisions provide a valuable framework to amend NCLB to help it fulfill its twin promises. First, in section A, this Note contends that an individualized education program for all non-proficient students would make the Act’s second goal more realistic — that all students become proficient according to challenging state standards. Second, in section B, this Note argues that due process provisions giving parents a private right of action to challenge the sufficiency of their children’s IEPs would help ensure NCLB’s first goal is met — that all children have the opportunity to obtain a high quality education.

A. THE IDEA’S IEP MAKES NCLB’S SECOND PROFICIENCY GOAL MORE VIABLE

The IDEA’s IEP provisions can make NCLB’s second proficiency goal more realistic. This section will also (1) speculate about the services NCLB’s IEP might contain and (2) offer a new AYP standard for IEPs.

NCLB’s second goal is that all children “reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments.”62 Educators, policymakers, advocates, and academics have all criticized this goal, as well as NCLB generally.63 One-hundred percent academic proficiency by

---

62. § 6301 (footnote omitted).

2014, if it is defined at a level that has any meaning, is an impossible objective that will eventually undermine NCLB’s credibility and should be eliminated.\textsuperscript{64}

Even if a country boasted the best educational system in the world, the simple truth of human variation dictates that 100% proficiency is unobtainable.\textsuperscript{65} Whether it is endurance, height, weight, driving ability, or athleticism, “[t]here is no aspect of human performance or behavior that is not achieved in differed degrees by individuals in a large population.”\textsuperscript{66} The Department of Education’s attempt to apply NCLB’s “one-size-fits-all” approach to states with diverse educational challenges and students with wide-ranging academic abilities has forced it to grant a series of waivers — amending the Act’s requirements in an ad-hoc, accountable manner.\textsuperscript{67}

States create their own standard for adequate yearly progress, or AYP, toward the 100% proficiency goal under NCLB. To account for inherent student variation, while avoiding the sanctions tied to AYP, the majority of states define it as essentially “any progress whatsoever” from the previous year.\textsuperscript{68} The states’ sanction-dodging behavior is not their fault, however, because any standard they set would ultimately be arbitrary and subjective.\textsuperscript{69}

NCLB shortcomings have highlighted that all children “require different levels and types of resources, programs, and services in order to make their educational opportunity meaningful.”\textsuperscript{70} With the IDEA04, Congress accepted this proposition for

\textsuperscript{64} Rebello & Wolff, supra note 6, at 156; see Charles Murray, Editorial, Acid Tests: No Child Left Behind is Beyond Uninformative. It is Deceptive., WALL ST. J., July 25, 2006 (pointing out NCLB’s “devastating effects on teacher morale”); Joetta L. Sack, Progress Report on ‘No Child’ Law Shows Hits and Misses, EDUCATION WEEK, Mar. 23, 2005 (describing a pending report by the Center on Education Policy that shows concerns about lack of school choice options, inadequate staffing, insufficient data and funding, and unrealistic time frames for student achievement and AYP “that could undermine the law”).

\textsuperscript{65} Rothstein, Jacobson & Wilder, supra note 5, at 17.

\textsuperscript{66} Id.

\textsuperscript{67} Sunderman, supra note 25, at 52.

\textsuperscript{68} Press Release, The Educ. Trust, Summary of Education Trust Recommendations for No Child Left Behind Reauthorization 8 (Apr. 11, 2007), http://www2.edtrust.org/NR/rdonlyres/BE18FFC3-20A7-4689-8C30-1ACC1E64EDF2/0/EdTrustNCLBRecommendationsSummary41607.pdf.; see Murray, supra note 64 (highlighting the “powerful incentives” states have to set their proficiency standards as low as possible).

\textsuperscript{69} Rothstein, Jacobson & Wilder, supra note 5, at 2.

\textsuperscript{70} See Rebello & Wolff, supra note 6, at 72 (observing that poor, LEP, and disabled children have distinct in- and out-of-school educational requirements).
disabled children, acknowledging that for them to benefit from education they would require support and services tailored to their individual needs. The IEPs that disabled children receive avoid the one-size-fits-all mentality that plagues NCLB and the standards-based movement. “It is hard to quarrel with a vision of education that focuses on reaching and meeting every child’s needs.”

The IDEA04 also stresses parental involvement by including them in the IEP formation process and, if necessary, allows them to challenge their child’s IEP in federal court. Research has shown “a strong positive relationship between parental involvement in children’s education both in school and at home, and children’s educational outcomes, their positive attitudes, and their avoidance of truancy and dropping out.” Parents are their child’s best teachers and advocates, and parental involvement is one of the major advantages that middle-class children have over their less fortunate peers.

While it appears that IEPs would help NCLB achieve its proficiency goal, it is less clear how it would be practically implemented. The next section addresses this issue. First, this Note will explore the types of services an IEP might contain in the NCLB context. Second, it suggests defining AYP in a manner that truly leads to educational progress, instead of using arbitrary state-set standards.

71. Id. at 73.
72. Seligmann, supra note 19, at 761.
73. Id. at 778. But see EDMUND W. GORDON, TOWARD DEFINING EQUALITY OF EDUCATIONAL OPPORTUNITY 26 (1971) (advancing that “[a]t some points in the development of a society it may be necessary to favor universality to the disadvantage of uniqueness. At other times universality may need to be sacrificed in the interest of unique achievement. If preferential position is continually given to one, equality of opportunity is precluded.”).
74. 20 U.S.C. § 1414(d)(1)(B)(i). NCLB also contains a provision encouraging parental involvement, but it is vague and provides little guidance to states. See § 6311(d)(1) (noting that parental involvement should “be based on the most current research that meets the highest professional and technical standards”).
75. § 1415(i)(2)(a).
1. The Services NCLB's IEP Would Contain

NCLB's IEP would be like a "doctor's medicine chest." It could use "practice tests to diagnose which students suffer... from which ailments, and then cure them, one by one, with the appropriate prescriptions: A dose of small-group reading instructions here, a shot of... math classes there." In more concrete terms, NCLB's IEP will first provide a statement of the child's present levels of educational performance, for example, "Josie is presently reading on the third-grade level." An initial evaluation will determine present levels of performance. Second, the IEP will supply annual goals, for example, "Josie is going to read at the fourth-grade level by the end of the year." Progress objectives in this section will be based on statistically reasonable projections. Third, the IEP delineates the necessary steps to reach yearly goals, for example, Josie will require one hour of after-school math tutoring per week to advance from the 60th percentile to the 63rd percentile. Other types of services might include one-on-one tutoring, small-group sessions during the school day, after...
school or summer instruction, or catch-up sessions on the weekends.\textsuperscript{85}

Promisingly, President Obama has advocated for extending the school day and year in his new approach to education. In a speech to the United States Hispanic Chamber of Commerce, he declared that “[w]e can no longer afford an academic calendar designed for when America was a nation of farmers who needed their children at home plowing the land . . . .”\textsuperscript{86} An IEP should serve as the vehicle we use to implement President Obama’s vision.

2. A New AYP Standard

As mentioned previously, the mandate of 100% proficiency, and the AYP required for states to get there, is inherently flawed.\textsuperscript{87} This section suggests redefining AYP to make NCLB’s proficiency-for-all goal more realistic.\textsuperscript{88} More specifically, AYP should be redefined so that there are demanding but reasonable projections on each non-proficient student’s IEP.

Reasonable projections should be based on the individual student’s percentile on a bell curve. Standardized tests, including those approved for NCLB purposes, should create a statistically normal distribution of scores.\textsuperscript{89} Normal distribution means that the test results are in a symmetric bell-shape when depicted graphically.\textsuperscript{90} The total area under the bell curve represents every student that took the test.\textsuperscript{91} Not every bell curve is perfectly normal, meaning the median, or typical, student may be differ-
ent than the mean, or average, student.\textsuperscript{92} However, in general, “roughly two-thirds of all humans perform reasonably similar on any characteristic . . . \textsuperscript{93} About two-thirds perform slightly below or above average, that is, within one standard deviation of the mean to the left or right.\textsuperscript{94} The remaining one-third performs considerably below or above average.\textsuperscript{95}

Analogizing to behavioral science research,\textsuperscript{96} Richard Rothstein of the Economic Policy Institute and Campaign for Educational Equity calculates that a workable standard for educational progress is one that shifts typical student performance approximately a quarter to a third of a standard deviation to the right on a bell curve; put another way, the typical student would increase his performance to between the 60th and 63rd percentile.\textsuperscript{97} Shifting Rothstein’s analysis to the individual level, after obtaining a student’s percentile, it would then be possible to create an IEP for that student with a reasonable projection for future performance on NCLB testing.

Thus, AYP under NCLB should be redefined to involve challenging but reasonable growth targets for each non-proficient student’s IEP. This would make NCLB’s second proficiency-for-all goal a much more realistic target.\textsuperscript{98}

\textsuperscript{92} ROTHSTEIN, JACOBSON & WILDER, supra note 5, at 6 (in footnote).
\textsuperscript{93} Id. at 17.
\textsuperscript{94} Id. at 17–18.
\textsuperscript{95} Id. at 18.
\textsuperscript{96} According to behavioral science research, “an intervention designed to improve human performance is generally considered effective but small if it improves average performance by 0.2 standard deviations; medium if it improves average performance by 0.5 standard deviations; and large if it improves average performance by 0.8 standard deviations.” Id. at 22. Rothstein distinguishes such research because it lacks the same degree of experimental controls, creating smaller effect sizes. Id.
\textsuperscript{97} ROTHSTEIN, JACOBSON & WILDER, supra note 5, at 23. Aside from Rothstein, other standards for AYP have been proposed, but they lack the same specificity and complexity. See, e.g., Letter from FairTest: The National Center for Fair and Open Testing et al., to Congress (Oct. 21, 2004), http://www.fairtest.org/node/30 (lobbying Congress to “[e]replace the law’s arbitrary proficiency targets with ambitious achievement targets based on rates of success . . . achieved by the most effective public schools”).
B. THE IDEA’S DUE PROCESS PROVISIONS MAKE NCLB’S FIRST GOAL MORE Viable

Currently, NCLB contains no private right of action. However, for the Act to reach its second goal that all children have a significant opportunity to obtain a high quality education, such a right modeled on the IDEA04’s due process provisions must exist.100

Historically, courts have played an integral role bringing about positive educational changes. Desegregation efforts were most effective with Green v. County School Board’s definitive directive for change, and LEP students enjoyed their most substantial advances in rights when the Supreme Court held that their educational services must be “meaningful.”102 More recently, the courts have been struggling with salient public issues such as affirmative action, education services for immigrant children, and school finance.103

99. Id.

100. Private causes of action can arise from three primary sources: (1) an express private cause of action (2) an implied private cause of action, and (3) a 42 U.S.C. § 1983 (2000) action. Benjamin Michael Superfine, Using the Courts to Influence the Implementation of No Child Left Behind, 28 CARDOZO L. REV. 779, 806 (2006). This Note advocates for an express private cause of action to sue school districts based on IEP inadequacies like under the IDEA04. Lawsuits challenging NCLB’s provisions directly have been unsuccessful for a variety of reasons, such as ambiguous statutory directives. Id. at 782. But see Sch. Dist. of Pontiac v. Sec’y of the U.S. Dep’t of Educ., 512 F.3d 252, 254 (6th Cir. 2008) (school district brought suit under NCLB’s “unfunded mandates” provision, 20 U.S.C. § 7907(a) (2006), arguing that it does not have to comply with the Act because federal funds do not cover the cost of compliance), reh’g en banc granted, No. 05-2708, 2008 U.S. App. LEXIS 12121 (6th Cir. May 1, 2008). Section 1983 litigation has been unsuccessful due to the demanding three-part test the Supreme Court established in Blessing v. Freestone, 520 U.S. 329, 339 (1997). See Superfine, supra, at 807 (detailing the Blessing test, which states that plaintiffs can sue under § 1983 when “(1) plaintiffs are the intended beneficiaries of the legislation, (2) the right [is] . . . not . . . so vague and amorphous that its enforcement would strain judicial competence, and (3) the statutory language clearly binds the states with an obligation to comply” (internal quotation marks omitted)).

101. Id. at 782.


103. Heubert, supra note 22, at 4; see, e.g., Campaign for Fiscal Equity v. New York, 801 N.E.2d 326, 348 (N.Y. 2003) (directing that, under the New York State Constitution,
The role of litigation has been particularly pervasive in special education. In 1974, Congress approved an EHA amendment that provided a procedure for parents to challenge their child’s IEP. Today, the IDEA “guarantees an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a . . . [FAPE] to such child.” This private right of action has allowed courts to define and refine the legal entitlement to a FAPE over time, such that “[t]he abstract statutory right became concrete and meaningful only through these mechanisms.” In other words, the IDEA’s extensive, abstract educational entitlements became significant once parents challenged their meaning in the adversarial system. Today, disabled children’s educational rights are more secure than other children’s precisely because favorable court decisions have supplemented and enforced the IDEA’s statutory protections. The IDEA’s due process provisions remained in place through the 2004 amendments because they were successful in the state must provide every New York City school with the funding necessary to provide each student a “sound basic education”).


106. Kevin J. Lanigan et al., Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process, in RETHINKING SPECIAL EDUCATION FOR A NEW CENTURY 213, 218 (Chester E. Finn, Jr. et al. eds., 2001), available at http://www.pponline.org/documents/SpecialEd_complete_volume.pdf (internal quotation marks omitted); see 20 U.S.C. § 1415(d) (2006) (detailing the procedural safeguards notice requirements). Generally, administrative hearings follow the same procedure as a civil trial, including evidence, witnesses, direct examination, and cross examination. Lanigan et al., supra, at 219 (citing 34 C.F.R. § 300.512(a) (2007)). Most litigation concerns whether the child’s IEP substantively provides a FAPE or procedural issues from IEP meetings. Id. at 216.


108. Id.

109. Heubert, supra note 22, at 4; see Lanigan et al., supra note 106, at 225 (highlighting how the IDEA’s due process provisions help ensure a FAPE is provided through IEPs).

110. THE CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, supra note 15, at 12.
improving the education of disabled children." Research shows that students perform better when parents are “actively involved, volunteer in the classroom, and hold school officials accountable.” Schools also critically examine their IEP services and procedures to minimize challenges from parents, which, in turn, improves their disabled students’ education. Further, schools use IDEA04 suits to secure billions in state funding. Moreover, courts respond in different ways to legal issues and, in doing so, provide a potential model for other jurisdictions to follow.

The IDEA04 also incorporates provisions designed to make parents aware of their due process rights. Parents receive notice whenever the school proposes to change their child’s IEP, not just for IEP meetings. “[W]ritten prior notice” must explain the reason for altering a child’s IEP and outline the procedural rights available under the IDEA in “an easily understandable manner.” Additionally, the school district may only move forward with an IEP meeting without the child’s parents present if it attempts “other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.”

Thus, the IDEA04’s due process provisions present numerous potential benefits for NCLB. If incorporated, lawyers, school administrators, and parents would be more able to ensure that “all children have a fair, equal, and significant opportunity to obtain a high-quality education . . .” However, two major arguments against incorporating the IDEA04’s due process provisions into NCLB must be addressed: (1) over-bureaucratization through copious amounts of paperwork and (2) over-legalization through costly, time-consuming, and adversarial procedures.

111. Heubert, supra note 22, at 32.
113. Heubert, supra note 104, at 541; see Lanigan et al., supra note 106, at 225 (arguing that due process “enhances the overall quality of the districts’ special education program and their ability to meet the needs of the children they serve.”).
115. REBELL & WOLFF, supra note 6, at 79.
117. Lanigan et al., supra note 106, at 217 (quoting § 1415(d)(2)).
118. 34 C.F.R. § 300.501(c)(3) (2007).
1. Over-Bureaucratization

Congress was aware of the bureaucratization issue when it initially passed the IDEA. The purposes section notes that “[a]lmost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by — focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results . . . .” Nevertheless, President George W. Bush’s Commission on Excellence in Special Education found that although the Act offered “basic legal safeguards” and court access to children with disabilities, it placed procedural compliance above substantive IEP outcomes connected with student achievement. Furthermore, “a recent national study . . . [found] 53 percent of special education teachers reported that routine duties and paperwork greatly interfered with their teaching.”

While the IEPs’ bureaucratic burdens may be daunting, a compromise can be struck that retains the benefits of IEP procedure without burying teachers in paperwork. In 2004, Congress, aware of the bureaucratic issues, attempted to reduce the paperwork burden with the IDEA04. Specifically the IDEA04 sought to reduce the frequency of meetings and assessments, minimize the required notice to parents for IEP changes, decrease some of the documentation and procedural safeguards, and eliminate IEP short-term objectives (except for students with the most significant disabilities). It also called for a “ten-state pilot program” that granted waivers for the Act’s paperwork requirements.

120. § 1400(c)(5)(G) (emphasis added).
122. Id. at 4.
123. Annino, supra note 80, at 11.
124. The IDEA04 eliminated the requirement that “schools inform parents whether a child’s progress is sufficient to enable the child to achieve the goals by the end of the year.” Id. (internal quotation marks omitted). Instead, the IDEA04 requires “periodic reports on the progress the child is making toward meeting annual goals.” 20 U.S.C. § 1414(d)(1)(A)(i)(III) (2006).
125. Annino, supra note 80, at 11. For example, the IDEA04 allows parents and school districts to agree to waive reevaluation procedures for a child at least once every three years. See id. (doubting the effectiveness of the provision because “[i]t is hard to imagine any case where a waiver would be appropriate for the student. . . . [A] waiver presumes that a child with a disability is unchanging”). Short-term objectives — which the 1997
The IDEA04 is an attempt to achieve a delicate balance between form and function that similarly needs to take place in the NCLB context. For example, pushing too hard in the antibureaucratization direction has resulted in parental complaints that they no longer know their child’s progress toward IEP goals, which is an essential component of the Act’s substantive benefits. A compromise would be for non-proficient students’ IEPs to contain “brief and comprehensible” school-year goals rather than “a thicker packet replete with painstakingly crafted” short-term goals. Such compromises are necessary to reap the benefits of IEP procedural compliance, while avoiding overbureaucratization. Realistic administrative expectations, like those strived for in the IDEA04, would create confidence in the benefits of NCLB’s IEP process.

2. Over-Legalization

Another major hurdle for NCLB due process is that educators are “conditioned to see the law as an unwelcome intrusion...” Educators are not alone; in our society there is widespread hostility toward lawyers. This attitude is unsurprising in the educational arena because school districts spend substantial resources complying with “multiple court orders or consent decrees on such issues as special education, bilingual education, and desegregation.” Prior to the IDEA04, the Act was notorious for its extensive and burdensome procedures.

IDEA litigation has, in some cases, accounted for “one-fourth of all funding for education and nearly a third of all federal court

---

IDEA called “benchmarks” — were defined as “measurable, intermediate steps between the child’s current level of educational performance and the annual goals." Id. (internal quotation marks omitted). The benchmarks were eliminated under 34 C.F.R. § 200.13 (2007).

126. Rosenbaum, supra note 121, at 4.
127. Id.
128. Annino, supra note 80, at 11.
129. Rosenbaum, supra note 121, at 6.
131. Heubert, supra note 104, at 570.
133. Id. at 29.
litigation in education involves special education..." These expenses come from a district’s operating budget because state funds are normally unavailable for lawsuits. As a result, schools often settle suits even when they have legitimate defenses. Other non-monetary costs include lost teacher and staff time, a hostile relationship between the school district and parents, psychological strain on school employees, and diminished school leader legitimacy when lawsuits are lost. Students ultimately bear these costs through a lower quality learning environment because the school’s attention is on defending lawsuits rather than on teaching. Moreover, the resources expended on litigation are unavailable for other educational purposes.

Even before due process hearings begin, attorneys are often present at IEP meetings to make a record or obtain early discovery for expected litigation. Once the hearing commences, it is

134. Heubert, supra note 104, at 532 (citation omitted); see Seligmann, supra note 19, at 781 (emphasizing the enormous costs that numerous trial preparations and hearings can generate for school districts).
135. Heubert, supra note 104, at 541.
136. See id. (pointing out that “a school district that has been sued successfully may have to provide remedies that cost millions of dollars... Even a... school district that prevails in the end may spend large sums on attorney’s fees and other litigation costs, which is why defendants sometimes settle cases that they would probably win in court”); see also Lanigan et al., supra note 106, at 226 (noting that schools have conceded IEP issues to parents only because the costs of cases would be greater than the costs of modifying IEPs); Sarah E. Redfield, The Convergence of Education and Law: A New Class of Educators and Lawyers, 36 IND. L. REV. 609, 622 (2003) (arguing that the “expedient settlement is attractive” for schools when taxpayer money is involved, even when “pedagogical wisdom or student welfare” suffer).
137. This is due to litigation-related activities like “[collecting documents, responding to detailed requests for information, preparing for interviews or trial testimony, and] meeting with attorneys and outside experts to discuss the issues and plan strategy... .” Heubert, supra note 104, at 541–42 (adding that “employees rarely receive extra compensation for the time they spend on lawsuits”); Lanigan et al., supra note 106, at 225 (noting that special education staff can spend significant time away from the classroom while embroiled in rescheduled IEP meetings, attorney depositions, and testifying at trials).
138. Like most people, educators that are “overworked, underpaid, and under-appreciated” do not enjoy being dragged into a lawsuit. Heubert, supra note 104, at 542. Lawsuits question the employees “competence and character,” and many teachers have quit their jobs as a result. Id.; see Redfield, supra note 137, at 622 (citing educator surveys that reveal teachers’ sentiment that they “spend too much time litigating or worrying about litigating”).
139. Heubert, supra note 104, at 542; see Redfield, supra note 137, at 640 (observing that legalization causes educators to lose professional autonomy).
140. Heubert, supra note 104, at 542; Redfield, supra note 137, at 623.
141. Lanigan et al., supra note 106, at 225.
142. Id. at 216.
accompanied by an adversarial atmosphere ripe with “mutual perceptions of dishonesty . . . and hostility . . . .”\textsuperscript{143} Also, despite Congress’s intent to maximize parental involvement, the Act’s due process procedures can be “complex and technical” and nearly impossible for some parents to utilize without the aid of an attorney or some other experienced advocate.\textsuperscript{144} As a result, affluent and educated parents who can navigate the system more easily take advantage of due process, while less wealthy and less sophisticated parents are subject to school district intimidation and are more likely to be ignorant as to their legal rights generally.\textsuperscript{145} If the IDEA due process provisions are incorporated into the NCLB framework, then the over-legalization issues that the IEP process creates must be addressed.

The IDEA\textsuperscript{04}’s provisions can serve as a model for Congress when adding NCLB’s due process procedures. Even before an IEP meeting, the IDEA\textsuperscript{04} contains a provision for waiving IEP procedures when parents and school districts agree to do so.\textsuperscript{146} Waivers can include excusing a teacher from attending an IEP meeting, rather than requiring the entire IEP team’s attendance whenever changes are made.\textsuperscript{147} Moreover, under this provision, “the school district is to encourage consolidation of IEP meetings.”\textsuperscript{148} Revising NCLB to include due process provisions provides an opportunity to continue the IDEA\textsuperscript{04}’s emphasis on “quality over quantity” for attendance at IEP meetings.\textsuperscript{149} Teachers and staff are busy, and everyone “cannot possibly align their calendars” all at once.\textsuperscript{150}

\textsuperscript{143} Id. at 227.
\textsuperscript{144} Id. at 226; Seligmann, supra note 19, at 781–82. But see Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) (holding that parents may proceed pro se in IDEA federal court litigation).
\textsuperscript{145} Seligmann, supra note 19, at 781–82; see also Kahlenberg, supra note 112, at 1550 (contending that parents with low incomes and multiple jobs may not have time to be active participants in their children’s education).
\textsuperscript{146} Rosenbaum, supra note 121, at 4.
\textsuperscript{147} Id.; see 20 U.S.C. § 1414(d)(1)(C)(ii) (2006) (“A member of the IEP Team may be excused from attending an IEP meeting . . . if — (I) the parent and the local educational agency consent to the excusal . . . .”).
\textsuperscript{148} Rosenbaum, supra note 121, at 4; see § 1414(d)(3)(E) (“To the extent possible, the local educational agency shall encourage the consolidation of . . . IEP Team meetings for the child.”).
\textsuperscript{149} Rosenbaum, supra note 121, at 6.
\textsuperscript{150} Id.
The IDEA also created and revised several pre-due process provisions to encourage settlement and expediency, while minimizing costly, adversarial litigation. When a parent files a complaint for an impartial due process hearing, the IDEA has provisions that mandate a thirty-day “cooling-off” period, limit complaints to adequately pled issues, and provide for a two-year statute of limitations. Furthermore, in a provision that originated from the 1997 IDEA, a district court must encourage free mediation “conduct by a qualified and impartial mediator who is trained in effective mediation techniques.” Congress’s intent was to facilitate discussions and collaboration between parents and the school districts in lieu of protracted litigation. If parents do not want to participate in mediation, then the school district can require them “to meet with a disinterested parent group or alternative dispute resolution group ‘to encourage the use, and explain the benefits, of the mediation process.’” Still, the school district cannot take advantage of mediation “to deny or delay a parent’s right to a due process hearing” or other rights under the IDEA.

Mediation is not the only way the IDEA seeks to deter litigation. After a parent files a complaint, the IDEA calls for a mandatory resolution session where parents and the school district have a last chance, without attorneys present, to resolve their dispute before the litigation process commences. Also, formal and informal settlement conferences can take place to end the dispute at any point between the complaint’s filing and the administrative law judge’s final ruling.

152. § 1415(b)(7)(A); 34 C.F.R. § 300.508(b) (2007).
153. Rosenbaum, supra note 121, at 4; see § 1415(b)(6)(B) (describing two-year statute of limitations).
156. Lanigan et al., supra note 106, at 218 (quoting § 1415(e)(2)(B)(ii)).
158. Blau, supra note 45, 71–72 (citing § 1415(f)(1)(B)(ii)). But see Mark C. Weber, Reflections on the New Individuals with Disabilities Education Improvement Act, 58 Fla. L. Rev. 7, 31 (2006) (pointing out that although attorneys are barred from attending resolution sessions, “neither the statute’s terms nor the proposed regulations specify how far away the school district lawyer must stay”).
159. Blau, supra note 45, at 84.
A further measure implemented to deter litigation is that, in addition to victorious parents, under the IDEA04 school districts may also recover attorney’s fees if the complaint is “frivolous, unreasonable or without foundation,” or is “presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.” Attorney’s fees may also be avoided or reduced for the school district if “parents reject a settlement offer without substantial justification.”

When Congress drafts due process provisions for NCLB, it should incorporate the lessons learned in the disability context. Congress should strive for the proper balance between due process rights and the goals of expediency and economy. Due process hearings under NCLB should only be used as a last resort to ensure school districts are abiding by NCLB’s mandates, while mediation, alternative dispute resolution, and settlement should be encouraged at all times. In general, greater efforts must be made to help parents understand all the non-litigation options available. The more fundamental problem of distrust between parents and school districts must also be confronted, as the IDEA04 is struggling to balance the power disparity between parents and repeat-player school districts.

It is difficult to predict the number and type of due process complaints challenging IEPs for non-proficient students that would arise in the NCLB context. District-sponsored private placement is the most expensive and contentious issue in IDEA04

160. § 1415(i)(3)(B)(i)(II), (III). This provision has the potential to cut both ways. On the one hand, the change could cause parents to give up otherwise valid claims for fear that they may be deemed frivolous; on the other hand, attorney’s fees may make mediation a more attractive option for litigious parents. Weber, supra note 158, at 29–30.

161. Lanigan et al., supra note 106, at 217 (citing § 1415(i)(3)(D), (E)).

162. Id.
at 229.

163. Id. at 226. Even during these resolution procedures, the playing field can be complex and require legal assistance, especially for those parents who are uneducated or have limited English proficiency. Rosenbaum, supra note 121, at 6. Perhaps a greater number of low-cost, lay advocates need to be trained to accommodate the increased demand for low-cost legal assistance — for example, through law school clinical programs. See id. (citing the suggestions of educational activist Lilliam Rangel-Diaz).

164. See Blau, supra note 45, 73–74 (cautioning that, despite the IDEA04’s efforts, mediation remains underutilized and speculates that “the lack of understanding about the mediation process by school personnel, parents, and organizations might explain their resistance”).

165. See id. at 74 (noting that even parties who used the mediation process did not feel that a long-term, trusting relationship was established with the school district).
litigation. Such litigation would be minimal, or perhaps nonexistent, in the NCLB context. Further, from the parents’ perspective, the root of most conflicts with schools is their desire to maximize their child’s potential. If Congress adopts Rothstein’s progress standard for NCLB, then parents would likely have far fewer complaints about the services provided in their child’s IEP because the projections are designed to be statistically reasonable.

It is tempting to conclude that due process is too cumbersome and cannot be implemented effectively, but mediation’s success alone provides much reason for optimism that an effective, collaborative approach can be achieved. Most cases settle before they reach the administrative process, as is true for the legal system as a whole. Moreover, the rate of administrative complaints filed under the IDEA is miniscule when compared to the millions of children that receive the benefits of IEP services without incident. In sum, the IDEA serves as an impeccable starting point for statutory structure, but it is now up to Congress to make NCLB’s first goal, that “all children have a fair, equal, and significant opportunity to obtain a high-quality education,” a viable reality by incorporating due process provisions into the Act.

IV. CONCLUSION

The IDEA’s IEP, if incorporated into NCLB, can make NCLB’s second, proficiency-for-all goal more viable. Non-proficient students — identified by state-set standards under NCLB — should receive individualized assessments with services tailored to their needs.

166. Lanigan et al., supra note 106, at 228.
167. Correspondingly, unforeseen issues may arise in the NCLB context that were not part of IDEA litigation, and Congress must consider the various claims when creating due process provisions.
168. See id. at 229 (postulating that “what these parents really want — indeed what all parents want — is an education that will allow their children to maximize their potential. The IDEA does not require this. This is the fundamental source of parents’ conflict with school officials”).
169. See discussion supra Part III.A.2.
170. Blau, supra note 45, at 75.
171. Seligmann, supra note 19, at 782.
172. Id.
unique needs. Their IEPs should contain statistically reasonable projections for progress rather than the arbitrary and subjective benchmarks currently in place.

Further, incorporating the IDEA’s due process provisions into NCLB would make its first goal, equal opportunity, more feasible. The impressive strides the IDEA04 framework has already taken can enable parents, lawyers, and school districts to advance educational objectives while keeping litigation and paperwork at a minimum. Due process is important because the “history of social movements and legislation teaches us that without a legal mandate, change is slow and spotty; with it, change occurs.” As the disability context shows, judicial pressure creates positive legislative and administrative change.

While the perfect balance between form and function for due process has not yet been realized, Congress has an opportunity to promote negotiation, mediation, alternative dispute resolution, and settlement over adversarial and costly litigation with NCLB’s due process provisions. With the proper incentives in place, a proper balance is achievable.

In March 2009, Congress handed the Department of Education $97 billion as part a stimulus bill to distribute to 14,000 school districts across the country, $25 billion of which is earmarked for spending on poor and disabled students. If America’s education system is to once again be the envy of the world, we cannot afford to waste these precious funds. President Obama, Congress, and all school districts need to reflect deeply on the twin aims of NCLB when allocating and spending these and future funds — and should consider the benefits of looking to NCLB’s neighbor in Title 20.

175. Seligmann, supra note 19, at 789.
176. See Rebell, supra note 107, at 29 (arguing that, in New York City and Boston, "specific court judgments" is what made the rights of students with disabilities "concrete and meaningful."); see also Heubert, supra note 22, at 5 ("For the past half century, courts have [been] . . . a major source of educational policy . . .") (citation omitted)).