Maximizing Expectations: The IDEA, Louisiana, and the Assessment of Students with Disabilities

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I. INTRODUCTION

Damon is 16 years old and on his second try at passing the eighth grade. He has received special education services since the first grade when he was diagnosed with a learning disability that causes him to write letters and numbers in the wrong order. He also has Attention Deficit Disorder (ADD) and struggles to pay attention and keep up with the lesson in class.1 Damon currently reads and writes on a fourth-grade level, and his math skills are on a fifth-grade level. He has never scored proficient on any state standardized test, and he repeated the eighth grade because he failed the high-stakes test the previous year.2 Damon has been frustrated with school since he was young, and his test scores reflect his discouragement.

Damon represents one of the approximately 32,000 students with disabilities in Louisiana who took the regular education state standardized test in the 2007-2008 school year.3 At the middle school level, 15% of students with disabilities who took the high-stakes regular state assessment scored proficient in English Language Arts (ELA), and 25% scored proficient in math.4

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1. ADD is:
[A] syndrome of disordered learning and disruptive behavior that is not caused by any serious underlying physical or mental disorder and that has several subtypes characterized primarily by symptoms of inattentiveness or primarily by symptoms of hyperactivity and impulsive behavior (as in speaking out of turn) or by the significant expression of all three.


contrast, students without disabilities scored proficient at more than twice the rate of their disabled peers. In 1997, Congress enacted additional provisions to the Individuals with Disabilities Education Act (IDEA) with the purpose of closing this gap "to the maximum extent possible." In addition, the No Child Left Behind Act of 2001 (NCLB) set the goal that all children will score proficient on assessments by the 2013–2014 school year and created an accountability structure to measure states' progress.

The goal of this Comment is to determine the source of and suggest solutions for the low performance of special education students on regular assessments nationwide and in Louisiana. At the national level, this Comment proposes to change the policy statements of the IDEA to reflect the ambitious goal that all children will achieve proficiency on the assessment particular to their abilities. Additionally, this Comment asserts that the IDEA needs an improved structure of accountability for states and schools with specific goals for special education students. Louisiana's special education students achieve proficiency at a significantly lower rate than their non-disabled peers, yet the Louisiana Legislature recently passed a bill that could cause students with special needs to fall further behind. This Comment proposes to repeal this bill and create an ambitious standard for proficiency in Louisiana legislation.

Part II introduces the IDEA, defines pertinent key terms, and explains the assessment structure under the Act. Additionally, Part II identifies important features of Louisiana special education law and describes the State's assessment structure. Part III highlights

5. Id. Middle school students without disabilities scored proficient or above at the following rates: 61% in ELA and 60% in math. Id.
7. 20 U.S.C. § 1400(c)(5) ("[T]he education of children with disabilities can be made more effective by . . . having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to . . . meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children . . . .")
10. Id. § 1401(29) ("The term 'special education' means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability . . . ."). Reasoning a contrario, the plain language of the term "regular education" indicates that students in "regular education" are those that are not in "special education." Id.
11. See infra Part III.B.
the gap between special and regular education student performance on regular assessment and details the consequences of the gap. Part IV suggests that federal and Louisiana legislation should require a clear and targeted policy that every student with a disability can and will achieve proficiency on national and state tests deemed appropriate to the child’s ability. In addition, states, districts, schools, and teachers should be held accountable for this ambitious goal. Part V concludes the Comment with an example of how legislative and administrative changes can produce a positive outcome for students with disabilities.

II. SPECIAL EDUCATION LAW: PAST AND PRESENT

Congress did not always guarantee disabled students like Damon the right to a public education. Congress and the Louisiana Legislature have enacted laws and procedures to better meet the needs of students with disabilities, but an analysis of the history of these laws reveals the need for further improvement. Federal legislation requires states to create special education regulations, but Louisiana laws are not entirely consistent with the goals of the IDEA.

A. Federal Special Education Law

The history of federal special education law demonstrates a move toward the inclusion of students with special needs in public schools and classrooms. Current legislation requires schools to educate students with disabilities with their non-disabled peers “to the maximum extent appropriate.” In addition, states must measure the progress of students with disabilities on statewide assessments.

1. History of the IDEA

Before Congress enacted federal special education legislation in 1975, students who did not meet educational standards “were considered ‘mentally deficient’” and were not educated with their non-disabled peers. Approximately one million of the eight

15. Rebekah Gleason Hope, Foster Children and the IDEA: The Fox No Longer Guarding the Henhouse?, 69 LA. L. REV. 349, 353 (2009). The most influential changes in special education legislation occurred in 1975, but the federal government enacted laws to support the education of children with disabilities as early as the 1950s. These early laws focused on creating separate
million handicapped children\textsuperscript{16} in the United States in the 1970s “were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers.”\textsuperscript{17} Many children with disabilities lived in state institutions where their basic needs of food, clothing, and shelter were met, but they participated in no intellectual or educational pursuits.\textsuperscript{18}

In 1972, federal courts signaled change in the special education system with two landmark cases: \textit{Pennsylvania Association for Retarded Children v. Pennsylvania (PARC)}\textsuperscript{19} and \textit{Mills v. Board of Education of the District of Columbia.}\textsuperscript{20} School systems denied access to public education to certain handicapped children, and parents and disability advocacy groups filed suit to force the schools to accommodate these children.\textsuperscript{21} The federal district courts in \textit{PARC} and \textit{Mills} ruled that such a denial was unconstitutional.\textsuperscript{22} The courts found the right to a public education for handicapped children was “grounded in the equal protection clause of the 14th Amendment to the United States Constitution.”\textsuperscript{23}

In response, Congress mandated public education for all students with disabilities in 1975 when it passed the Education for All Handicapped Children Act (EAHCA).\textsuperscript{24} The focus of the EAHCA was to provide an education for students with disabilities, either in a classroom with non-disabled students or in a separate schools for students with disabilities and training special education teachers. A 25 Year History of the IDEA, ED.gov, http://ed.gov/policy/speced/leg/idea/history.html (last modified July 19, 2007).


17. \textit{Id.} at 191.

18. A 25 Year History of the IDEA, supra note 15 (“Too often, persons with disabilities . . . were merely accommodated rather than assessed, educated, and rehabilitated.”).


24. \textit{Id.}
States received funds under the EAHCA provided that they complied with the requirements of the Act. In the 1980s, every state, except New Mexico, received funds under the EAHCA; thus, almost every state provided disabled students with a "free appropriate public education" as defined by federal law. Therefore, federal legislation directly resulted in students with disabilities receiving an education in public schools.

Congress amended the EAHCA in 1990 and changed the name to the current title—IDEA—to illustrate the shift from labeling students as "handicapped" to the more acceptable and less stigmatizing description of "students with disabilities." Congress created the current IDEA in 1997 and reauthorized the Act in 2004. The IDEA requires states to ensure that "to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled." In sum, the EAHCA mandated the education of students with disabilities, and the IDEA required states to educate children with disabilities alongside their non-disabled peers.

2. Special Education Under the IDEA

Special education is a highly regulated field. The IDEA affords important rights and responsibilities to students, parents, schools, school districts, and states in providing a free appropriate public education for children with disabilities. The Act includes specific and detailed definitions of important terms to provide a common ground for communication between all parties involved in special education. Special education law often uses a language all of its own, and these words and phrases lay the foundation to analyze the current special education structure.

A student who qualifies under the IDEA receives an individualized education program (IEP) that details his or her disability, current levels of achievement, appropriate goals, and all

26. Id. at 183–84.
27. Id.
28. A 25 Year History of the IDEA, supra note 15; see also Hope, supra note 15, at 355.
31. Id.
of the services to which the student is entitled.\textsuperscript{32} The child’s parent or guardian, regular and special education teachers, school administrators, and others form the “IEP Team” that creates a student’s IEP.\textsuperscript{33} A key component of the IEP is the student’s placement, i.e., where the child spends his day.\textsuperscript{34} Schools must educate children with disabilities in the Least Restrictive Environment (LRE), which means that whenever possible, a student should be in a regular education classroom and have access to the regular education curriculum.\textsuperscript{35} The IDEA ensures that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in

\begin{itemize}
\item \textsuperscript{32} 20 U.S.C. § 1414(d). To receive IDEA protection, students must have at least one of ten listed disabilities \textit{and} “need special education and related services” as a result of that disability. \textit{Id.} § 1401(3). The ten categories of disabilities are “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to . . . as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” \textit{Id.}
\item \textsuperscript{33} \textit{Id.} § 1414(d). The IEP team means a group of individuals composed of—(i) the parents of a child with a disability; (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment); (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child; (iv) a representative of the local educational agency . . . ; (v) an individual who can interpret the instructional implications of evaluation results . . . ; (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability.
\item \textsuperscript{34} \textit{Id.} § 1414(d). To receive IDEA protection, students must have at list one of ten listed disabilities \textit{and} “need special education and related services” as a result of that disability. \textit{Id.} § 1401(3). The ten categories of disabilities are “mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to . . . as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” \textit{Id.}
\item \textsuperscript{35} See 34 C.F.R. §§ 300.115–117 (2009) (describing the continuum of placements for students in special education).
\end{itemize}
regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.\(^{36}\)

To meet the requirements of the IDEA, school districts offer special education students a continuum of placements that depend on the individual needs of the child.\(^{37}\) The least restrictive placement for a special education student, often called a "full inclusion placement," is one in which the child spends the entirety of the day—including lunch, recess, and other activities—in integrated settings with regular education students and receives all needed support and services within that setting.\(^{38}\) The most restrictive settings involve placement in a segregated classroom within a neighborhood school, a child’s home, a special school, or even a residential placement such as a hospital or treatment facility.\(^{39}\) However, students placed outside of the regular school setting comprise less than 5% of all students with disabilities, a figure reflective of the federal mandate to educate children with disabilities in regular schools whenever possible.\(^{40}\)

As a result of the IDEA mandate, the majority of students with disabilities spend most of their days in regular classes learning the same material as their non-disabled peers.\(^{41}\) Education in the regular classroom is consistent with Congress's finding that schools should hold students with disabilities to the same high expectations as students without disabilities.\(^{42}\)

### 3. Federal Structure of Student Assessment

Even if states and school districts educate every child with a disability, they do not automatically receive IDEA funds.\(^{43}\) Rather, the IDEA mandates the participation and tracking of special education students in measures designed "to assess, and ensure the effectiveness of, efforts to educate children with disabilities."\(^{44}\) In other words, it is not sufficient for Damon to just have a place in a

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37. 34 C.F.R. §§ 300.115–117.
38. Id.
39. Id.
41. Fast Facts, supra note 40 ("In 2006, 95 percent of students 6 to 21 years old served under IDEA were enrolled in regular school . . . .").
42. 20 U.S.C. § 1400(c)(5).
43. Id. § 1400(d).
44. Id.
regular school and be educated with his peers; rather, the State must also assess his progress. Assessment refers to the statewide standardized tests that students take each school year to determine their mastery of academic standards. Each state sets its own academic standards that “specify what children are expected to know and be able to do . . . [and] contain coherent and rigorous content.” Furthermore, the IDEA mandates that states comply with NCLB. Section 6311 of NCLB requires that states:

[D]emonstrate that the State educational agency . . . has implemented 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 the State in enabling all children to meet the State’s challenging student academic achievement standards . . . .

In order to receive funds under the IDEA, states must ensure that “[a]ll children with disabilities are included in all general State and districtwide assessment programs.” Student participation in assessments and reports of results are mandatory under the IDEA, while NCLB provides a structure of accountability for the progress of states.

To address the participation requirement of the IDEA, students with disabilities participate in either regular statewide assessment or “alternate assessment.” Alternate assessment is for students with “the most significant cognitive disabilities” or “persistent academic disabilities” who are cognitively unable to master grade-level standards within the school year. However, students like Damon who have mild disabilities and can master grade-level standards take the regular assessment.

A student who takes an alternate assessment often has different post-secondary opportunities than a student who takes the regular

45. Id. § 6311(b)(3).
46. Id. § 6311(b)(1).
47. Id. §§ 1412(a)(15)–(16); see also supra Part I.
49. Id. § 1412(a)(16)(A).
50. Id.; id. § 6311; see also discussion infra Part IV.A.3.
Because the assessment decision can impact a child's future, the IEP team considers the educational needs and abilities of the child and potential outcomes of the assessment decision. If students with disabilities do not participate in alternate assessment, they will participate in the regular assessment with or without accommodations. Accommodations are certain procedures, settings, or devices "necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments." Students with mild and moderate disabilities can master regular academic standards, but they require a change in the format, presentation, or response option to the test in order to demonstrate their knowledge. Students with disabilities who receive accommodations achieve proficiency more often than students with disabilities who do not receive accommodations.

55. See 34 C.F.R. § 300.160(d) ("A State ... must provide IEP Teams with a clear explanation of ... any effects of State or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards (such as whether only satisfactory performance on a regular assessment would qualify a student for a regular high school diploma."); see also discussion infra Part IV.B.

56. See 34 C.F.R. § 300.160(d); see also supra note 33 and accompanying text.


58. Id. For example, Damon takes his standardized assessment in a small group of eight students in order to reduce distractions. Students with visual impairments may use a large-print version of the test booklet and answer sheet. Students who have poor writing skills might use a computer word processing program to type their answers during the essay portion of the English assessment. LA. DEPT' OF EDUC., LEAP/GEE SPECIAL POPULATIONS AND ACCOMMODATIONS 4 (2009), available at http://www.doe.state.la.us/lde/uploads/12522.pdf. Students who take alternate assessment may also have accommodations. 20 U.S.C. § 1412(a)(16). The purpose of accommodations is "to eliminate barriers to performance related to a student's disability." Lynn Olson, All Means All, EDUC. WK., Jan. 8, 2004, at 44, 44. This goal mirrors that of the Americans with Disabilities Act to provide accommodations to individuals with disabilities in the workplace. See SAMUEL R. BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 64 (2009) ("[T]he Court has recognized that accommodation serves the goal of equal access to societal opportunities by helping to dismantle a structure of subordination.").


The IDEA requires states to report their student achievement to the federal government in order to receive funds under the Act. In addition, states must establish "goals for the performance of children with disabilities in the State that . . . are consistent, to the extent appropriate, with any other goals and standards for children established by the State." However, the IDEA does not require the states to actually meet these goals in order to receive funds under the Act. In comparison, NCLB requires states to make "adequate yearly progress" (AYP) by demonstrating "substantial improvement" for certain subgroups of students. A state's AYP is composed of the performance of certain subgroups of students, including students with disabilities. In each state, "[a]ll student subgroups must meet AYP goals or the schools may face state or federal government intervention, particularly with regard to their administration and funding." Under NCLB, funds are tied to demonstrated improvement, whereas the IDEA focuses on the measure of compliance with enumerated regulations.

B. Applying Federal Requirements to Louisiana

States must comply with the rules of the IDEA in order to receive funds under the Act, and legislators have changed Louisiana law in an attempt to meet the requirements. Furthermore, states are not "immune under the 11th Amendment to the Constitution of the United States from suit in Federal court for a violation of [the IDEA]," thus, Louisiana has economic and

62. Id. § 1412(a)(15).
63. Id. § 6311(b)(2)(C).
64. Id.
66. 20 U.S.C. § 6316; see also OFFICE OF GEN. COUNSEL, supra note 65, at 2.
68. 20 U.S.C. § 1407(a).
69. See infra Part II.B.1.
70. 20 U.S.C. § 1403(a); see U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
legal incentives to establish rules and procedures in accordance with the IDEA.

1. History of Louisiana Special Education Law

Louisiana law has responded to federal legislation concerning the inclusion of students with disabilities in public schools. In 1950, Louisiana enacted the “Exceptional Children’s Fund,” which “allowed parish school boards to establish special classes for all exceptional or handicapped children between birth and 21 years of age except the mentally gifted or mentally retarded.” However, the Fund was permissive and reimbursed parishes if they chose to create special classes for such children. In 1964, Louisiana introduced the first law that required schools to create special classes for exceptional and handicapped children.

Following the decisions in *PARC* and *Mills* and the subsequent passage of the EAHCA, Louisiana responded with the “Education of Exceptional Children Act” (EECA), which was the precursor to the State’s current special education law. The EECA made it the “duty of state, city and parish public school systems of the State of Louisiana to provide an appropriate, free, publicly supported education to every exceptional child who is a resident therein.” Legislators renamed the EECA the “Children with Exceptionalities Act” (CEA) in 1998 and amended the Act to comply with the IDEA.

The Louisiana Administrative Code establishes the “Regulations for Implementation of the Children with Exceptionalities Act” and contains provisions for a child’s IEP.
Louisiana law uses the same definition for LRE as found in the IDEA; thus, schools must educate students with disabilities in Louisiana with their non-disabled peers "to the maximum extent appropriate." Students who remain inside the regular class 80% of the school day or more comprise a significant majority of students with disabilities in Louisiana. This figure illustrates that IEP teams in Louisiana have adopted the mindset that students with disabilities should be educated with their non-disabled peers "to the maximum extent appropriate" as prescribed by the IDEA. Educating regular and special education students in the same classroom ensures accountability to the high expectations set for all children as measured by statewide assessments.

2. Student Assessment in Louisiana

All students with disabilities in Louisiana take the regular assessment or one of two alternate assessments, and the IEP team is responsible for the assessment decision. The Louisiana Code, "[t]he sources of law are legislation and custom." LA. CIV. CODE art. 1 (2009). The Administrative Code is not legislation defined as a "solemn expression of legislative will" because the Louisiana Legislature has not created the specific rules and procedures for implementing special education services. Id. art. 2. Rather, the Louisiana Legislature has vested the Louisiana Department of Education and the State Board of Elementary and Secondary Education with establishing such rules as set forth in the Administrative Code. LA. REV. STAT. ANN. § 17:1943(A) (Supp. 2009). Accordingly, Louisiana Revised Statutes have authority over the Louisiana Administrative Code. Also, Louisiana refers to disabilities as "exceptionalities." For purposes of this Comment, "disability" will be used instead of "exceptionality" in order to remain consistent with federal terms. Louisiana recognizes that a student may be classified with multiple disabilities or deaf-blindness and considers these two exceptionalities in addition to the ten disabilities listed under the IDEA. Id. § 17:1942(B).

82. The percentage of students who are "Inside [the] Regular Class Less than 40% of the Day" are as follows: 2005–2006: 16.7%; 2006–2007: 16.1%; 2007–2008: 15.3%. Id.
83. Louisiana law requires the Louisiana Department of Education to "ensure that all students with disabilities are included in all general state and district-wide assessment programs . . . with appropriate accommodations and
Educational Assessment Program (LEAP) is the state’s regular assessment. Most students with disabilities who take the LEAP do so with accommodations. Students in the fourth and eighth grades must score at least “Basic” in the section of either ELA or math and at least “Approaching Basic” in the other section (either ELA or math) in order to advance to the next grade. A score of “Basic” or above is considered “proficient” for the state’s AYP score; therefore, students in Louisiana pass the LEAP test even if they are not actually proficient in both the math and ELA skills necessary to perform well in the next grade.

In fact, requiring “Basic” in either math or ELA is a recent increase in expectations for students in Louisiana: “From 1999 through 2003, students in grade 4 were required to score Approaching Basic or above on both the [ELA] and the [math] tests to progress to grade 5,” and eighth grade students were held alternate assessments, if necessary, as indicated in their respective IEPs.” LA. ADMIN. CODE tit. 28, pt. 43, § 160.


85. In 2005, 95.1% of fourth-grade students with IEPs took the regular LEAP assessment with 73.1% using accommodations, and 91.3% of eighth-grade students with IEPs took the LEAP with 79% using accommodations. LA. PERFORMANCE PLAN 2009, supra note 60, at 20.

86. LEAP ANNUAL REPORT 2007, supra note 2, at 1. Students in grades three, five, six, seven, and nine take the integrated LEAP (“iLEAP”), but the test is not “high stakes.” LA. DEP’T OF EDUC., /LEAP 2007 ANNUAL REPORT 1 (2007), available at http://www.doe.state.la.us/1de/uploads/11494.pdf; see also supra note 2.

87. LA. DEP’T OF EDUC., STATE SPECIAL EDUCATION DATA PROFILE 2007, at 129 (2007) [hereinafter SPECIAL EDUC. DATA PROFILE 2007], available at http://www.doe.state.la.us/1de/uploads/12257.pdf. (“Proficient is a score of Basic and above.”). The Louisiana achievement levels are:

1. Advanced—a student at this level has demonstrated superior performance beyond the mastery level. 2. Mastery (formerly Proficient)—a student at this level has demonstrated competency over challenging subject matter and is well prepared for the next level of schooling. 3. Basic—a student at this level has demonstrated only the fundamental knowledge and skills needed for the next level of schooling. 4. Approaching Basic—a student at this level has only partially demonstrated the fundamental knowledge and skills needed for the next level of schooling. 5. Unsatisfactory—a student at this level has not demonstrated the fundamental knowledge and skills needed for the next level of schooling.

LA. ADMIN. CODE tit. 28, pt. 111, § 1113 (2009). Indeed, the achievement level of “Mastery” is the minimum level at which a student is actually “well prepared for the next level of schooling.” Id. (emphasis added).

88. LEAP ANNUAL REPORT 2007, supra note 2, at 1.
to similar expectations from 1999 through 2005.\textsuperscript{89} There are exceptions to the LEAP requirements for special education students to advance to the fifth or ninth grade.\textsuperscript{90} Most notably, students have a lowered minimum achievement score if they attend summer remediation courses and retake the test in the summer.\textsuperscript{91}

In accordance with the IDEA, Louisiana has alternate assessments for students who are unable to take the regular assessment:\textsuperscript{92} Louisiana Alternate Assessment Level 1 (LAA 1) and Louisiana Alternate Assessment Level 2 (LAA 2).\textsuperscript{93} LAA 1 is for "students with the most significant cognitive disabilities" and measures student mastery of Louisiana "extended standards" (alternate standards) as opposed to the regular standards.\textsuperscript{94} An important characteristic of LAA 1 is that students who take this assessment are not eligible for high school diplomas but rather "Certificates of Achievement," which are primarily for attendance purposes and have little value for post-secondary opportunities.\textsuperscript{95} In 2005, only 4.5\% and 7.5\% of fourth- and eighth-grade students respectively took the LAA 1.\textsuperscript{96} This indicates that the assessment is reserved for students with the "most significant cognitive disabilities" as required by law.\textsuperscript{97}

In contrast, LAA 2 is the alternate assessment for students who have performed at an unsatisfactory level on the regular assessments.\textsuperscript{98} Students who take LAA 2 have "persistent academic disabilities," and the IEP team has determined that they are unable to master grade-level standards during the school year.\textsuperscript{99}

\textsuperscript{89.} Id.
\textsuperscript{90.} Id.
\textsuperscript{91.} Id. In addition to the exceptions for students who take summer remediation, "[t]he high-stakes testing policy for grade 4 and 8 students was suspended for the 2005–2006 school year due to hurricanes"; thus, an entire class of students was not required to demonstrate proficiency before advancing to the next grade. Id.
\textsuperscript{92.} \textit{See supra} Part II.A.3.
\textsuperscript{94.} Id. §§ 1901–03. This is the Louisiana version of the federal policy on alternate achievement for students with "persistent academic disabilities." \textit{Raising Achievement, supra} note 54.
\textsuperscript{95.} LA. DEP’T OF EDUC., LEAP ALTERNATE ASSESSMENT LEVEL 1, (LAA 1) PARTICIPATION CRITERIA (2008), \textit{available at} http://special.edbetschools.org/eduWEB2/1000013/docs/xess_laa1participationcriteriarev12.2008.pdf; \textit{see also} discussion \textit{infra} Part IV.B.
\textsuperscript{96.} LA. PERFORMANCE PLAN 2009, \textit{supra} note 60, at 20.
\textsuperscript{97.} LA. ADMIN. CODE tit. 28, pt. 111, §§ 1901–03.
\textsuperscript{98.} LA. DEP’T OF EDUC., LEAP ALTERNATE ASSESSMENT LEVEL 2, (LAA 2) PARTICIPATION CRITERIA, \textit{available at} http://www.doe.state.la.us/lde/uploads/7992.pdf.
In 2007, 8.8% of all students with disabilities participated in LAA 2—an increase from 2.57% in 2006. The performance of students with disabilities who take the regular assessment provides insight as to why an increasing number of students take the alternate assessment.

III. THE GAP IN STUDENT ACHIEVEMENT

States and school districts hold every regular and special education student who takes the regular assessment to the same challenging academic standards, and holding students with disabilities to high expectations is consistent with the purpose of the IDEA. However, students with disabilities have not risen to these high expectations on a level equivalent with their non-disabled peers as illustrated by student achievement data. Low performance on assessments can have serious consequences for students and the state as a whole.

A. The Nationwide Gap in Student Achievement

According to the National Assessment of Educational Progress (NAEP), students without disabilities consistently score proficient at a higher rate than students with disabilities. The NAEP is a useful measure of comparison because all students take the same test—alternate assessment is not a factor: “Inclusion in NAEP of an SD [student with a disability] or ELL [English Language Learner] student is encouraged if that student (a) participated in the regular state academic assessment in the subject being tested, and (b) if that student can participate in NAEP with the accommodations NAEP allows.” In 2007, fourth-grade students with disabilities scored proficient at less than half the rate of their

100. SPECIAL EDUC. DATA PROFILE 2007, supra note 87, at 128.
102. See infra notes 115–16 and accompanying text.
non-disabled peers in both math and reading. This gap widened in the eighth grade where students with disabilities scored proficient at one-fourth the rate of students without disabilities.

Each state uses its own assessment system in calculating its AYP to the federal government, and the results from statewide assessments mirror the NAEP results. In 2008, the Council of the Great City Schools released a survey of the assessment results from every major urban area in the United States and presented the data according to demographic subgroups. States reported proficiency rates based on their own assessment system (as opposed to the NAEP). Thirty-five states participated in the study, and students with disabilities scored proficient at a lower rate than their non-disabled peers in every state. Results of both national and state assessments demonstrate that students with disabilities have not met the bold goal for all students to achieve proficiency.

B. The Louisiana Gap in Student Achievement

Although the percentage of both special education and regular education students scoring “Basic” or above in each subject area has slowly increased over the past decade, the gap between special education and regular education students remains pronounced. In

105. Fourth-grade students with disabilities scored at the following proficiency levels: 13% in reading and 19% in math. NAEP Math Report Card 2007, supra note 103; NAEP Reading Report Card 2007, supra note 103. Compare to proficiency levels of students without disabilities: 35% in reading and 42% in math. NAEP Math Report Card 2007, supra note 103; NAEP Reading Report Card 2007, supra note 103.

106. Eighth-grade students with disabilities scored at the following proficiency levels: 7% in reading and 8% in math. NAEP Math Report Card 2007, supra note 103; NAEP Reading Report Card 2007, supra note 103. Compare to proficiency levels of students without disabilities: 33% in reading and 34% in math. NAEP Math Report Card 2007, supra note 103; NAEP Reading Report Card 2007, supra note 103.


109. Id.

110. Id.

the subjects of ELA and math at both the fourth- and eighth-grade levels, students with disabilities have consistently achieved proficiency at less than half the rate of students without disabilities.\(^{112}\) This gap exists despite the fact that the proficiency goal for all groups of students is the same: 57.9% in ELA and 53.5% in math.\(^ {113}\) At the elementary, middle, and high school levels, students without disabilities exceeded the target proficiency rates in both ELA and math.\(^ {114}\) In comparison, students with disabilities fell at least ten points below the target scores in ELA and math at all grade levels.\(^ {115}\) A persistent gap exists between the performance of students in special education and those in regular education.\(^ {116}\) Overall, students in special education both nationwide and in Louisiana do not meet the same high expectations set for students in regular education as encouraged by the IDEA.\(^ {117}\)

C. Consequences of Low Performance on Assessments

In addition to the fact that national and state assessment results indicate that students with disabilities do not meet the goals of the IDEA, poor performance on assessments is linked to potentially greater problems for students. Performance on statewide assessments can be indicative of future success or failure, and students who perform poorly on statewide assessments frequently face challenges later in life:

While poor academic performance is not a direct cause of delinquency, studies consistently demonstrate a strong link between marginal literacy skills and the likelihood of involvement in the juvenile justice system. Most

\(^{112}\) LEAP ANNUAL REPORT 2008, supra note 4, at 12–16.

\(^{113}\) This means that it is the State’s AYP goal for every subgroup to achieve a proficiency rate of 57.9% in ELA and 53.5% in math. LA. DEP’T OF EDUC., 2007–2008 STATE OF LOUISIANA SUBGROUP COMPONENT REPORT 10–12 (2009), available at http://www.doe.state.la.us/1de/uploads/14334.pdf.

\(^{114}\) Students without disabilities scored proficient or above at the following rates: elementary school—71.4% in ELA and 69.2% in math; middle school—66.1% in ELA and 63.3% in math; high school—62.5% in ELA and 67.9% in math. Id.

\(^{115}\) Students with disabilities scored proficient or above at the following rates: elementary school—37.0% in ELA and 41.8% in math; middle school—25.3% in ELA and 28.1% in math; high school—20.0% in ELA and 25.6% in math. Alternate assessment proficiency scores are included in the proficiency percentage. Even with alternate assessment scores, students with disabilities did not achieve proficiency at the rate of their non-disabled peers. Id.

\(^{116}\) LEAP ANNUAL REPORT 2008, supra note 4, at 12–16.

incarcerated youth lag two or more years behind their age peers in basic academic skills and have higher rates of grade retention, truancy, and suspension and expulsion. A national study found that more than one-third of youth incarcerated in the juvenile justice system read below the fourth grade level.\footnote{118} This clearly indicates a significant correlation between poor academic performance and delinquency.\footnote{119} Also, "[a]n estimated 70 percent of the juvenile justice population suffer[s] from learning disabilities," which is an alarmingly significant majority.\footnote{120} Failure to pass a high-stakes standardized test increases the risk that a student will drop out of school: "The proliferating use of high-stakes tests is increasing the numbers of students . . . held back [a] grade and denied high school diplomas for failure to pass one or a set of state-mandated exams."\footnote{121} Furthermore, failure to succeed on statewide assessments impacts not only individual students but the state as well. Students with disabilities who drop out of school are "less likely to be competitively employed or [attend] post-secondary schools and [are] more likely to . . . [be] arrested than youths with disabilities who [do] not drop out."\footnote{122} Individuals who are not employed require state funds for assistance, and incarcerating an individual costs more than educating the individual.\footnote{123} The IDEA makes it

119. \textit{Id.} at 136 n.62; \textit{see also} Johanna Wald & Daniel J. Losen, \textit{Defining and Redirecting a School-to-Prison Pipeline}, \textit{New Directions for Youth Dev.}, Fall 2003, at 9, 11 (citing \textsc{Coal. for Juvenile Justice, Abandoned in the Back Row: New Lessons in Education and Delinquency Prevention} (2001), \textit{available at} \url{http://www.juvjustice.org/media/resources/resource_122.pdf}). In 2001, the Coalition for Juvenile Justice compiled studies linking school achievement with risk of incarceration and made recommendations to the President and Congress. \textsc{Coal. for Juvenile Justice, supra}.  
120. Wald & Losen, \textit{supra} note 119, at 11.  
121. \textit{Id.} at 9.  
122. \textsc{Kristin Geenen et al., Nat'l Ctr. on Educ. Outcomes, A Disability Perspective on Five Years of Education Reform} 17 (1995) (citation omitted).  
123. \textsc{Children's Def. Fund, supra} note 118, at 20 ("States spend on average almost three times as much per prisoner as per public school pupil."). In the words of the U.S. Secretary of Education, Arne Duncan, "Either we're going to invest in education early or we're going to keep building jail cells on the back end. . . . We're [going to] pay now or pay later in a much worse situation." Interview by Stephen Colbert with Arne Duncan, U.S. Sec'y of Educ., in \textsc{N.Y.C., N.Y.} (Oct. 5, 2009), \textit{available at} \url{http://www.colbertnation.com/the-colbert-report-videos/251047/october-05-2009/arme-duncan/}.}
incumbent on states to increase the achievement levels of its students with disabilities to ensure that they are successful and productive members of society.¹²⁴ Closing the gap between special and regular education students is essential for the future of both students and the state.

IV. CLOSING THE GAP

This Comment proposes two specific changes to the IDEA in order to prepare thousands of students with special needs to succeed in school. First, the language of the IDEA should reflect that special education students placed in regular assessment by their IEP teams are capable of achieving proficiency and are expected to do so. Second, the IDEA should hold teachers, administrators, and education officials accountable for this ambitious goal. In Louisiana, the legislature should repeal a recent act that decreases standards for a high school diploma because the act lowers expectations for all students and will have a negative impact on the proficiency levels of students with disabilities.¹²⁵

A. Changes to the IDEA

The IDEA governs the national structure of special education, and problems within the legislation have impacted student achievement. Improvements to the language of the Act and the accountability structure are imperative for reform.

1. The Problem with the Language of the IDEA

A goal of the IDEA is to ensure that Damon has the same access to educational opportunities as his non-disabled peers.¹²⁶ However, despite the increase in proficiency scores for students in special education, the gap remains in Louisiana and nationwide.¹²⁷ The regulations of the IDEA require states to include special education students in schools, classrooms, curricula, and assessments with regular education students. However, the policy statements of the IDEA imply an exception to these regulations. The IDEA states that:

[T]he education of children with disabilities can be made more effective by—(A) having high expectations for such

¹²⁴ 20 U.S.C. § 1400(c)(5) (2006); id. § 1407(a).
¹²⁷ See supra Part III.
children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible. 128

The language of the IDEA provides for those situations in which meeting the high expectations required of all children will not be possible for a child with a disability. There is a built-in expectation for students with disabilities that their “maximum extent possible” in terms of achievement will consistently be at a lower level than their non-disabled peers.

This statutory language has created a culture of low expectations for students with disabilities at the state, district, school, and classroom level: “Researchers have found that students with disabilities face systematic and institutionalized low expectations that have been internalized by most educators.”129 Special education state directors have conveyed a policy of low expectations to teachers and administrators, and this policy has been detrimental at the classroom level.130 Education Week conducted a survey of 800 teachers in both special and regular

129. Office of Gen. Counsel, supra note 65, at 20. More generally, legal scholars also have described the link between law and individual beliefs:

As an implement of social change, law entails two interrelated processes: the institutionalization of a pattern of behavior refers to the establishment of a norm with provisions for its enforcement (such as desegregation of public schools), and internalization of a pattern of behavior means the incorporation of the value or values implicit in a law (for example, integrated public schools are “good”). Evan notes: “Law . . . can affect behavior directly only through the process of institutionalization; if, however, the institutionalization process is successful, it, in turn, facilitates the internalization of attitudes or beliefs.”

Steven Vago, Law and Society 326 (6th ed. 2000) (citation omitted) (quoting William M. Evan, Law as an Implement of Social Change, in Applied Sociology: Opportunities and Problems 285, 287 (Alvin W. Gouldner & S.M. Miller eds., 1965)). In the case of special education legislation, setting the goal that students with disabilities will achieve proficiency would be the “establishment of a norm,” and the implicit “value” in the law is that students with disabilities should succeed on assessments. Id.; see also discussion infra Part IV.B.2.

education to determine their perception of appropriate expectations for students with special needs.\footnote{131} The study found that:

A striking 84 percent of teachers reject the concept that special education students should be expected to meet the same set of content standards as general education students their age. . . . Almost eight in 10 teachers say that special education students should be excused from taking the same state tests as other students their age, even if allowed appropriate accommodations.\footnote{132}

This is detrimental to student achievement because studies show that teacher expectations have a profound effect on student performance.\footnote{133} Educators are influenced by “centuries of fear and bias, or . . . pity and caretaking toward people with disabilities.”\footnote{134} Sympathetic teachers do not want failure on regular assessments to consistently frustrate students.\footnote{135}

Student failure is a legitimate concern, especially in Louisiana where at least one-third of special education students who took the LEAP scored “Unsatisfactory” on the fourth- and eighth-grade test in both ELA and math every year from 1999 to 2008.\footnote{136} This means that for ten years in a row, students with disabilities who

\begin{footnotesize}
\footnote{131. Although the survey was not conducted exclusively in Louisiana, it is a representative sample of teachers with various levels of experience and areas of expertise. Melissa McCabe, Teachers: Spec. Ed. Students Should Meet Own Standards, EDUC. WK., Jan. 8, 2004, at 20.}
\footnote{132. Id.}
\footnote{133. KEVIN S. McGREW & JEFFREY EVANS, NAT’L CTR. ON EDUC. OUTCOMES, EXPECTATIONS FOR STUDENTS WITH COGNITIVE DISABILITIES: IS THE CUP HALF EMPTY OR HALF FULL? CAN THE CUP FLOW OVER? 13 (2004) (quoting KATHLEEN COTTON, NW. REG’L EDUC. LAB., EXPECTATIONS AND STUDENT OUTCOMES (2003), available at http://sparkaction.org/node/25862), available at http://www.cehd.umn.edu/NCEO/OnlinePubs/synthesis55.html (“Based on a comprehensive review of the literature . . . ‘teacher expectations are, of course, a component of school wide expectations . . . the most important finding from this research is that teacher expectations can and do affect students’ achievement and attitudes.’” (citation omitted)). However, much of the research on teacher expectations involved false information given to teachers concerning the intelligence of a particular group of students. Id. In the case of special education students, teachers have accurate information concerning the child’s disability but may stereotype students with particular disabilities as having a fixed level of intelligence that prevents them from learning difficult material, regardless of the amount or style of instruction. Id.}
\footnote{135. McCabe, supra note 131, at 20.}
\footnote{136. LEAP ANNUAL REPORT 2008, supra note 4, at 12–16.}
\end{footnotesize}
took the LEAP were labeled as “not demonstrat[ing] the fundamental knowledge and skills needed for the next level of schooling.” If Damon opens his test results year after year and consistently falls below proficient, he might begin to assume that he will be unsuccessful regardless of his effort.

However, making excuses for Damon and setting low expectations for his performance on the regular assessment does not improve the outcome, and teachers are influenced by the lowered expectations in the language of the IDEA. The IEP team has determined that Damon is capable of learning the same material and demonstrating his progress on the same assessment as students in regular education; thus, the law should reflect that teachers, administrators, parents, and legislators have the high expectation for Damon to achieve proficiency.

2. Recommended Language Change to the IDEA

As written, the current policy of the IDEA fails to reflect the goal that all students will achieve proficient or above on the assessments that IEP teams have deemed appropriate to the students’ abilities. The language of the IDEA should reflect that special education students placed in regular assessment by their IEP teams are capable of achieving proficiency and are expected to do so. The IDEA should qualify that IEP teams determine “the maximum extent” that a student is able to participate in the regular standards and curricula. Setting a policy of high expectations has yielded concrete results under NCLB, and the policy of the IDEA should be changed accordingly. NCLB boldly states: “The 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 [S]tate academic assessments.”

Since NCLB was enacted in 2001, student achievement on the NAEP has increased. Compared to results in 1971, the gap

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137. LEAP ANNUAL REPORT 2007, supra note 2, at 1; see supra note 91.
138. McGrew & Evans, supra note 133.
139. This is in contrast to students who take the alternate assessment. In the case of these students, the IEP team has decided that they will be measured using a different assessment. They are still expected to achieve proficiency on the alternate assessment, but their performance is not compared to students who take the regular assessment. Raising Achievement, supra note 54.
between minority and non-minority students has decreased significantly in both reading and math.\textsuperscript{142} For the past ten years, the gap between minority and non-minority students has decreased in some grade levels and remains unchanged in others.\textsuperscript{143} However, the gap between minority and non-minority students is significantly smaller than the gap between students with disabilities and those without disabilities.\textsuperscript{144} The statement of policy for NCLB clearly states the ambitious and measurable goal that all children can achieve proficiency on assessments, and there is no limit imposed on certain groups of students.\textsuperscript{145} There is no “maximum extent appropriate” for the achievement of the different subgroups of students.\textsuperscript{146}

Currently, the IDEA suggests that schools and states are justified in limiting their expectations for students with disabilities. In Board of Education of Hendrick Hudson Central School District\textsuperscript{147} v. Rowley, an “appropriate” education was one that was “adequate” and resulted in some “educational benefit” to the student with a disability.\textsuperscript{147} The disabled student in Rowley made satisfactory academic progress with appropriate services in place, but current assessment results show that the majority of students in special education are not making satisfactory progress.\textsuperscript{148} The IDEA states that “Congress finds the following:”\textsuperscript{149}

An effective educational system serving students with disabilities should—(A) maintain high academic achievement standards and clear performance goals for children with disabilities, consistent with the standards and expectations for all students in the educational system, and provide for appropriate and effective strategies and methods to ensure that all children with disabilities have the opportunity to achieve those standards and goals . . . .\textsuperscript{150}

\textsuperscript{143} Id.
\textsuperscript{144} Mapping America’s Educational Progress 2008, supra note 141; NAEP Math Report Card 2007, supra note 103; NAEP Reading Report Card 2007, supra note 103.
\textsuperscript{145} 20 U.S.C. § 6301.
\textsuperscript{146} Id.
\textsuperscript{147} 458 U.S. 176 (1982).
\textsuperscript{148} Id.; see also supra Part III.A–B.
\textsuperscript{149} 20 U.S.C. § 1450.
\textsuperscript{150} Id. § 1450(4) (emphasis added).
The phrase “to the maximum extent possible” contradicts Congress’ findings. Congress set the rule that students with disabilities should be held to the same high expectations as “all students in the educational system,” but “to the maximum extent possible” creates an exception to the rule. This exception contributes to the gap in achievement on regular assessment between special and regular education students. In order to close the gap, “to the maximum extent possible” should not apply to expectations for student achievement levels on assessments.

The source of the phrase “to the maximum extent possible” is the 1975 EAHCA, which required schools to educate "handicapped children" “to the maximum extent appropriate” with “children who are not handicapped.” The EAHCA required special education services for children "regardless of the severity of their handicap," but the priority of the EAHCA was “first ‘to handicapped children who [were] not receiving an education’ and second ‘to handicapped children . . . with the most severe handicaps who are receiving an inadequate education.’” Accordingly, “to the maximum extent appropriate” originally referred to situations in which students with severe handicaps were not educated with non-handicapped children. In Daniel R.R. v. State Board of Education, the “maximum extent” of including handicapped students in the regular classroom was applied to those students with severe physical and cognitive handicaps. Conversely, schools were more likely to educate students with mild or moderate handicaps in regular education classes because their disabilities were not severe.

151. Id.
152. Id. § 1400(c)(5).
154. Id.
155. Id.
156. 874 F.2d 1036 (5th Cir. 1989).
158. Including handicapped students in regular classes was called "mainstreaming." Rowley, 458 U.S. at 181 n.4 (citing Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 84 Stat. 175) ("Despite this preference for ‘mainstreaming’ handicapped children—educating them with nonhandicapped children—Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that ‘the nature or severity of the handicap
Given the source of the language, the phrase “to the maximum extent possible” should apply only to those students with the most severe and profound disabilities who typically spend their entire school day in a special education classroom and who annually participate in alternative assessment.\textsuperscript{159} For these students, modified standards and alternate assessments exist to measure their progress on important academic skills designed to fit their unique needs, such as basic communication in reading and writing and simple math calculations required for daily living. Simply put, students who are non-verbal or physically unable to dress, feed, or bathe themselves should be expected to make progress toward a different set of standards, and alternate assessment measures their mastery of such standards.

However, the majority of students in special education have disabilities that impact only their academic progress.\textsuperscript{160} These students typically have mild or moderate disabilities, and IEP teams have determined that these students can master challenging academic standards and demonstrate their mastery on regular assessments.\textsuperscript{161} Damon requires accommodations in the classroom and on the assessment in order to achieve proficiency on the regular assessment, but his learning disability and ADD do not impair his cognitive function to the point where he is unable to learn the challenging grade-level standards that are tested on the regular assessment.\textsuperscript{162} Damon needs a change in the presentation or format of the material and not a change in the material itself.\textsuperscript{163}

The IDEA has safeguards in place, such as alternate and modified standards and alternate assessment, for students who need a change in the material itself.\textsuperscript{164} Modified and alternate standards set high expectations for those students as are

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\textsuperscript{161.} Students must have “severe” or “persistent” cognitive disabilities in order to qualify for alternate assessment. 34 C.F.R. § 200.6 (2009). Reasoning \textit{a contrario}, students without “severe” or “persistent” disabilities (i.e., students with mild disabilities) would not qualify for the alternate assessment and must take the regular assessment. \textit{Id.}

\textsuperscript{162.} See supra notes 62–64 and accompanying text.

\textsuperscript{163.} See supra notes 62–64 and accompanying text.

appropriate for their needs.\textsuperscript{165} A simple change in the presentation or format of the material is insufficient for certain students to achieve proficiency on the regular assessment.\textsuperscript{166} Based on the child’s disability and individual needs, the IEP team determines if the individual child is cognitively able to master the regular standards and take the regular assessment.\textsuperscript{167} If the child’s disability prevents him from taking the regular assessment, then the IEP team places the child in alternate assessment.\textsuperscript{168} The locus of control should remain with the IEP team to set expectations for children based on their particular cognitive abilities. The IEP team is in the best position to determine the expectations for the child, and federal legislation should remove the ceiling of expectations it sets for students with disabilities.

A potential concern is that IEP teams will place every child with a disability in alternate assessment. Since alternate assessments are based on less advanced standards, student proficiency would likely increase if every student with a disability took the alternate assessment.\textsuperscript{169} However, there are incentives for IEP teams and state officials not to place large percentages of students with disabilities in alternate assessment. The alternate assessment takes students off track for a standard high school diploma, and not having a high school diploma can significantly limit a child’s future opportunities.\textsuperscript{170}

AYP requirements also prevent the overuse of alternate assessments. Under NCLB, states must set a target for “graduation rates for public secondary school students (defined as the percentage of students who graduate from secondary school with a regular diploma in the standard number of years).”\textsuperscript{171} If a high percentage of students with disabilities takes the alternate assessment and are subsequently precluded from earning a regular high school diploma, then the state’s graduation rate would drop and the state would move further from its AYP target. Furthermore, NCLB limits states’ ability to use proficiency scores

\begin{itemize}
  \item \textsuperscript{165} 34 C.F.R. § 200.1(d).
  \item \textsuperscript{166} See supra notes 62–64 and accompanying text.
  \item \textsuperscript{167} 20 U.S.C. § 1414(d)(1)(B); see also 34 C.F.R. § 200.6(a) (“The State’s academic assessment system must provide for one or more alternate assessments for a child with a disability as defined under section 602(3) of the Individuals with Disabilities Education Act (IDEA) whom the child’s IEP team determines cannot participate in all or part of the State [regular] assessments . . . even with appropriate accommodations.” (emphasis added)).
  \item \textsuperscript{168} 20 U.S.C. § 1414(d)(1)(B).
  \item \textsuperscript{169} 34 C.F.R. § 200.1(d).
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} 20 U.S.C. § 6311(b)(2) (2009).
\end{itemize}
from alternate assessments in calculating their AYP. Only 3% of a state’s AYP proficiency rate can come from alternate assessment results; thus, placing every student with a disability in alternate assessment would not significantly increase a state’s AYP proficiency rate. Therefore, neither IEP teams nor states have an incentive to place students who are cognitively able to take the regular assessment in alternate assessments.

Section 1400 of the IDEA should qualify that the phrase “to the maximum extent possible” does not apply to expected proficiency levels for students with disabilities. Rather, IEP teams determine the “maximum extent” to which a student participates in the regular education standards and curricula that comprise the regular assessment. In addition, the IDEA should specify that students who take the alternate assessment are necessarily held to a different set of standards as a result of their cognitive ability as decided by their IEP team. The alternate assessment establishes an alternate set of high expectations, and students who are truly unable to learn regular standards with accommodations strive to meet these alternate expectations. The expectations are not lowered for these students; rather, they are measured using a different assessment as appropriate for the child’s individual needs. This language change is imperative in order to mitigate the mindset of expecting low performance from students with mild and moderate disabilities who take the regular assessment. There should be no “maximum extent” to achievement expectations for students with disabilities. The change in language to the IDEA is important to establish a fundamental culture of achievement, and the IDEA requires an improved accountability structure to enforce its policy and ensure that students with disabilities are achieving proficiency.

3. Problems with Accountability Under the IDEA

The IDEA regulates state accountability, but state funding is only tied to the enactment of state regulations. The Act lacks a strong requirement that states actually show improvement in order to qualify for funds. One purpose of the IDEA is “to assess, and ensure the effectiveness of, efforts to educate children with disabilities,” but there is no mandated performance assurance.
The focus of the IDEA is on "efforts," while NCLB is considerably more outcome-oriented:

[T]he only requirement under IDEA to improve the performance of students with disabilities on state assessments is the need for the state to revise its improvement plan if it not making progress toward its specified goals. NCLB imposes significantly more responsibility on school systems to ensure the progress of students with disabilities toward challenging educational standards. NCLB focuses on the school and requires annual yearly progress for each student group toward 100% proficiency on state assessments within 12 years and indicates that if less than 45% of a student subgroup participates in state assessments it has not met its annual progress goal.

The IDEA does not enforce a strict mandate that states demonstrate progress toward closing the gap between special and regular education students in order to receive funds and retain their autonomy. Furthermore, the IDEA fails to state "student performance on assessments" as a key priority for monitoring state compliance with the IDEA. Currently, the IDEA fails to hold schools and districts accountable for the assessment performance of students with disabilities.

Under the IDEA, states are required to set performance goals for the achievement of students with disabilities on assessments. Every year, states submit a performance plan "that evaluates that State's efforts to implement the requirements and purposes of [the IDEA]." If states do not meet the goals of their performance, the U.S. Department of Education labels them as needing "assistance"; states that continue to fall short of their goals earn a classification of needing "intervention" or "substantial intervention." The U.S. Secretary of Education can withhold

177. Id.
178. Id. § 6311(b)(2) ("Each State plan shall demonstrate, based on academic assessments . . . what constitutes adequate yearly progress of the State . . . toward enabling all public elementary and secondary school students to meet the State's student academic achievement standards, while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools.").
179. THOMPSON ET AL., supra note 67, at 15.
181. Id. § 1412(a)(15).
182. Id. § 1416(b).
183. Id. § 1416(d).
184. 34 C.F.R. § 300.604 (2009).
funds from a state that needs “substantial intervention” until the state provides a plan to address and corrects the problems that are causing the state’s failure to comply with the IDEA. However, a state that is in need of “substantial intervention” does not actually have to show increased student achievement in order to regain funds—the state needs only to show a future plan. In short, the strongest accountability measure under the IDEA is the threat of withholding federal funds from states based on a plan for future action as opposed to accountability for actual demonstrated results.

In contrast, NCLB requires schools to show increased achievement scores and meet AYP goals in order to retain their autonomy. The IDEA is confined to the state and district level, whereas NCLB addresses accountability at the school level. A strong point of NCLB is that individual schools that fail to meet AYP goals are threatened with being completely “restructured” by the state: “Restructuring’ means a major reorganization of a school’s governance arrangement . . . that . . . makes fundamental reforms to improve student academic achievement in the school . . . .” The state can take over failing schools and hire an entirely new administration and faculty. As a result, the school loses its individual autonomy, and the state runs the school.

The IDEA does not have a similar strict requirement in its accountability structure. Presently under the IDEA, only an entire state is identified as needing “assistance” or a level of “intervention,” but the problems in the special education system in one school or district in the state could be completely different from the problems at another school or district. The current IDEA structure of accountability fails to impose strict measures on individual schools that fail to demonstrate progress in the achievement of students with disabilities.

4. Recommendations for Improving the Accountability Structure of the IDEA

To increase results in test scores for students with disabilities, the accountability structure of the IDEA should mandate improved achievement and hold individual districts, schools, and teachers accountable for assessment results. The IDEA should use an accountability structure similar to that of NCLB, but it should be targeted directly toward special education departments at the district and school level. Special education departments need the

185. Id.
186. Id.
187. Id. § 200.43.
threat of “restructuring” and state takeover if they fail to properly implement the provisions of the IDEA and if they fail to make marked improvement in student assessment scores. Holding individual schools accountable has increased student achievement under NCLB, and Congress should establish a similar standard for special education administrations and teachers.

The trend in federal regulations is toward high expectations for all students (including students with disabilities) and, even more specifically, in holding teachers “accountable for the success or failure of their students.” IEP teams should place students who are cognitively unable to master regular standards in alternate assessment, and school districts can hold teachers accountable for student progress as measured by the alternate assessment. Given that the achievement gap widens in middle and high school, the teacher accountability system should begin in the lower grades and gradually progress to upper-grade teachers. Gradual introduction of an accountability structure will ensure that younger students are actually prepared for the upper grades.

If the IDEA truly holds students with disabilities to the same high expectations as non-disabled students, it should also hold teachers accountable for the assessment results of students with disabilities who take the regular assessment. Accountability measures should not include firing, lowering the pay of, or somehow demeaning the work of teachers whose students do not perform well on assessments. Rather, teachers whose students do perform well should train and support teachers whose students do not meet assessment goals.

When a state is classified as needing “assistance” or requiring a level of “intervention,” the U.S. Secretary of Education requires the state to take certain measures to improve performance. The Secretary assigns particular measures at his discretion, but there is no requirement that the state implement strategies and regulations that have produced results in other states. Congress found that

188. Id.
192. Id. § 1416(e) ("Such technical assistance may include . . . (ii) assistance in identifying and implementing professional development, instructional
the use of evidence-based strategies was a characteristic of an "effective educational system serving students with disabilities," and the IDEA should mandate such strategies. In further support, NCLB emphatically states that assistance provided to schools "must be based on scientifically based research," and the IDEA should be consistent with NCLB in this requirement. The goal is to support and facilitate an overall collaborative culture of achievement through shared evidence-based practices mandated by the IDEA. The accountability measures of the IDEA should align with its stated goals.

There is an argument that the IDEA does not need to develop an improved accountability structure; rather, the structure under NCLB should include specific actions for improving the special education structure at individual schools. However, Congress intended for the IDEA to govern all aspects of special education as evidenced by the fact that it did not repeal the IDEA in 2001 when NCLB was passed. If Congress intended for NCLB to govern all aspects of accountability for students with disabilities, then the IDEA would not serve a purpose and Congress would not have reauthorized it in 2004. In addition, the IDEA affords students with disabilities particular rights and legal and administrative remedies. Claims brought against a school, district, or state concerning students with disabilities are decided under the IDEA, and decisions on such claims are necessarily tied to the accountability requirements of the Act. Congress has determined since 1975 that students with disabilities require a special set of protections, and accountability for the achievement of these students should occur in the Act created especially for them.

B. Changes in Louisiana

Louisiana’s special education laws should follow federal legislation by adopting a clear policy that students with disabilities

strategies, and method of instruction that are based on scientifically based research . . . .” (emphasis added)).
193. Id. § 1450(4).
195. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647. Reasoning ab inutilitate, Congress would not have reauthorized the IDEA if the 2001 NCLB structure encompassed the rights and needs of students with disabilities. Id.
197. Id. For example, due process claims for students with disabilities are brought under the IDEA. Id.
who take the regular assessment can achieve proficiency at the same rate as their non-disabled peers. Regulations for high expectations have resulted in increased achievement scores in Louisiana,198 but the legislature recently reduced expectations for all students.199 Act 298 of the 2009 legislative session lowered the requirements for a high school diploma, and this imprudent change contradicts the goals of the IDEA.200

1. The Value of High Expectations in Louisiana

There is a substantial achievement gap between special and regular education students in Louisiana, and the State must set clear goals and align legislation with these goals in order to close the gap. When Louisiana raised the achievement levels required to pass the LEAP, the performance of students with disabilities increased.201 Most notably, the percentage of students with disabilities scoring “Unsatisfactory” on the LEAP in both fourth and eighth grade has decreased significantly.202

In 2001, 55% of both fourth- and eighth-grade students with disabilities scored “Unsatisfactory” on the ELA section of the LEAP.203 Subsequently, in 2008, 36% of fourth and 44% of eighth-grade students with disabilities scored “Unsatisfactory” on the same section.204 On both the ELA and math sections of the LEAP, the percentage of fourth- and eighth-grade students with disabilities scoring “Unsatisfactory” has steadily declined since the legislature raised expectations.205 However, the percent of students in regular education who scored “Unsatisfactory” has also decreased; thus, the gap between regular and special education students persists.206 The rising tide of increased expectations has lifted all boats, including students in special education, but the gap has yet to close.207

198. See infra Part IV.B.1.
200. Id.
201. LEAP ANNUAL REPORT 2008, supra note 4, at 12–16.
202. Id.
203. Id.
204. Id.
205. Id.
206. Id.
207. See discussion supra Part III.B. The author is indebted to Hector Linares for the metaphor.
2. Act 298: A Step in the Wrong Direction

Recent changes to Louisiana legislation indicate that the State is moving toward lower—rather than higher—expectations for all students. In 2009, the Louisiana Legislature addressed the State dropout rate based on recent figures: "Roughly one in three [high school students] fail[s] to graduate on time compared with one in four nationally." Poor academic performance and low assessment scores contribute to a student’s choice to drop out of school, and students with disabilities face a high risk of dropping out.

In response, the Louisiana Legislature passed Act No. 298, which created a “career major” high school diploma that focuses on basic academic courses such as English and math and includes vocational activities. The career major diploma is an alternative to the traditional “academic major” diploma, and both diplomas are acceptable for those students who seek to enter a post-secondary institution. The career major diploma allows students to score “Approaching Basic” in both ELA and math on the eighth-grade LEAP, whereas a traditional diploma requires the student to score “Basic” in at least one of the subjects.

The goal of the new career major diploma is “to prepare students for a career or entry into a technical school or community college” and reduce the dropout rate in Louisiana. The career major diploma is not limited to students in special education, but this subgroup has significantly contributed to the dropout rate in Louisiana. Students with disabilities may be a targeted group to benefit from the new diploma option, but the Act fails to address the source of the problem—students lack the academic skills needed to pass the regular education assessments.

Indeed, the career major diploma does not meet the requirement for state administration under the IDEA because it fails to “enable children with disabilities to meet the challenging State student academic achievement standards.” Rather, the new diploma provides a way around the requirement that all students achieve proficiency. The lowering of expectations for students who

208. Will Sentell, House Backs Alternate School Option, ADVOCATE (Baton Rouge, La.), May 21, 2009, at 8A.
209. See discussion supra Part III.C.
211. Id.
212. Id
213. Sentell, supra note 208.
participate in the regular assessment is a step backward for education reform in Louisiana.\textsuperscript{216}

3. Recommendations for Change in Louisiana

The requirements for a high school diploma in Louisiana should not be lowered. Allowing students to graduate without achieving proficiency on assessments does not improve their future prospects but simply sends them into the world unprepared. Rather, educators should examine assessments to determine if they effectively measure students’ mastery of academic content. An important purpose of alternate assessments is for students with disabilities to have an alternate method of proving what they know. The career major diploma is valuable in that it recognizes the need for a middle ground between a standard academic major diploma and a “certificate of achievement,” but lowering the requirements for a high school diploma sets a lower goal for all students.

A potential argument in favor of the career diploma is that it enables students who cannot achieve proficiency to still get a high school diploma and increases their chances for employment.\textsuperscript{217} However, if a child is cognitively unable to learn the standards required to be proficient, then that student can take the alternate assessment.\textsuperscript{218} Those students who take the regular assessment should be expected to score “Basic” or above and be truly proficient in the challenging regular academic standards.

Similar to the need for change at the federal level, Louisiana must update its legislative language to reflect a culture of high expectations for all children. Currently, the statement of policy for special education law in Louisiana reads: “It . . . shall be the duty of state and local educational agencies of the state of Louisiana to provide a free appropriate public education in the least restrictive environment to every student with an exceptionality, ages three through twenty-one, who is a resident therein.”\textsuperscript{219} The achievement gap in Louisiana is not for lack of an excellent system to track

\textsuperscript{216} See also PAR Says Keep Eighth-Grade LEAP Standards Intact, PUB. AFF. RES. COUNCIL OF LA., http://www.la-par.org/article.cfm?id=266&cateid=2 (last updated May 19, 2009) (“PAR historically has championed rigorous accountability standards, believing that Louisiana should demand more of its students, not less. The slow but steady increase in test scores over the past decade shows the higher standards are working.”).
\textsuperscript{217} See discussion supra Part III.C.
\textsuperscript{218} See discussion supra Part II.B.
\textsuperscript{219} LA. REV. STAT. ANN. § 17:1941 (Supp. 2009).
standards and accountability. Rather, Louisiana’s “Statement of Policy” lacks the vision and purpose necessary to improve the outcomes of students with disabilities.

The Louisiana Legislature should boldly state that it is the duty of every stakeholder in special education to hold students with disabilities to high expectations and achieve proficiency on assessments. The State’s priority should be to provide these students with the necessary accommodations in the classroom and on the assessment in order to meet the policy’s high expectation. The Louisiana Legislature should set a goal in the Revised Statutes that all students will attain proficiency as measured by the assessment appropriate to their needs.

A study prepared for the U.S. Department of Education supports this policy. The study examined district progress in implementing the IDEA and classified districts as Category I, II, or III, with Category III being the highest classification. The study reported a key finding in Category III districts:

[C]onsistent practices across schools revealed a clear set of expectations for students with disabilities. Across districts, stakeholders defined curricular access in terms of teaching the same content with the same materials with instructional modifications as determined by the IEP team, and expecting students with disabilities to achieve at the level of students without disabilities.


221. The Louisiana Administrative Code contains the requirements that students in special education participate in assessments with necessary accommodations as included on their IEPs. LA. ADMIN. CODE. tit. 28, pt. 111, § 3303 (2009). However, the Louisiana Administrative Code is not as authoritative a source as the Louisiana Revised Statutes, nor is the requirement a broad statement of policy that permeates more micro levels of legislation at district and school levels. See supra note 78.


223. Id. at v (“Category III: These districts showed evidence of a comprehensive range of implementation tools; consistent relationship between stated policies and activities; consistency across stakeholders on the necessary knowledge base and skills required for implementation; stakeholder satisfaction.”).

224. Id. at 57.
Louisiana needs to make a bold statement of policy and enact legislative reform to reflect that lawmakers and educators believe that students with disabilities who take the regular assessment can perform at the level of their non-disabled peers. The State's declaration of policy and repealing of Act 298 are the first steps needed to convince districts, schools, administrators, and teachers to adopt this ambitious goal and to manifest their high expectations for students.

V. CONCLUSION

Every year that Damon fails to master the regular standards and receives a letter that he has scored “Unsatisfactory” brings him one year closer to dropping out of school. He is cognitively able to understand the material on the regular assessment, but he learns the material in a different style and format than his non-disabled peers. Each day, Damon observes his classmates quickly grasp the steps of the lesson, and he does not understand why he takes more time to understand the same material. Damon is confused when the teacher becomes annoyed when he repeatedly asks for help, and he wants to escape his constant frustration at school.

However, Damon has a 7-year-old brother, Joshua, who is in the second grade. Like Damon, Joshua has ADD and a learning disability, but his experience in the public education system could be vastly different from Damon’s. Joshua could progress under legislation that declares that students with disabilities who take the regular assessment are expected to perform as well as their non-disabled peers. Joshua’s teachers could use the IDEA-mandated “successful practices” for meeting the needs of students with disabilities in a regular education classroom and regularly employ these practices. Consequently, by the end of his second-grade year, Joshua could be functioning academically on a third-grade level.

The principal at Joshua’s school could hold teachers accountable for the assessment scores of their students and direct them to resources to improve their instruction when a gap appears. Every teacher at Joshua’s school could focus on particular skills that enable students with disabilities to achieve at the same levels as the regular education students. The district and state could support the principal’s efforts and create a statewide system for collaboration to improve the assessment scores of students with disabilities.

226. See Raising Achievement, supra note 54.
Federal special education reform has a profound impact on states, schools, and classrooms. Every year is critical for students with disabilities, and one year of failure is detrimental to a child’s future. Over time, these years result in the incredible achievement gap between special and regular education students. A disability should not increase the risk that a child will drop out of school and be unemployed or incarcerated. Legislation should clearly articulate policy and an accountability structure to meet the goal that all students with disabilities who take the regular assessment can and will achieve proficiency.

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