

PAVING THE WAY FOR INCLUSION BY WAY OF EXCLUSION FROM
STANDARDIZED TESTING

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Abstract

Legislation protecting the rights of disabled students has continuously evolved over time, with each revision containing a similar goal of promoting the inclusion of disabled students within the public education system. However, despite numerous revisions and evolutions, the finish line of inclusivity has yet to effectively be reached.

This Article discusses legislation aimed at protecting the educational rights of disabled students, and how standardized testing provisions within said legislation may be counterintuitively hindering progress towards inclusivity. More specifically, this Article dives into Every Student Succeeds Act and its consequentially exclusory standardized testing provisions, focusing on the Act's ninety-five percent participation quota and one percent cap on cognitively disabled students who are eligible for alternate assessments. Florida-specific data is used to display less than adequate test scores on Florida's Alternate Assessment and provide feedback from teachers and administrators who have voiced their grievances with both the assessment itself and its administration procedures. Through caselaw research, alternative solutions to Every Student Succeeds Act's inappropriate testing provisions are provided in a way that both promotes inclusivity for disabled students while still adhering to the education legislation currently in effect.

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INTRODUCTION

Legislative protection of disabled students' educational rights dates back to the year 1975, when the Education for All Handicapped Children Act (EHA)¹ set out to provide free education for disabled students, becoming the first act of legislation to promote disability inclusivity in public education.² Legislation protecting the rights of disabled students has continued to evolve over time, with each revision containing a similar goal of promoting the inclusion of disabled students in the public education system. However, despite the numerous revisions and

1. Pub. L. No. 94-142, 84 Stat. 175 (1970) (codified as amended in 20 U.S.C. §§ 1400–1482).

2. See 20 U.S.C. § 1400(c)(2).

evolutions, the finish line of inclusivity has yet to be reached effectively. With inappropriate standards in place tracking the educational progress of disabled students and school systems, current legislation has a consequentially exclusory effect on the very students it aims to protect. Certain standardized testing assessments used to measure student and school progress are far beyond the appropriate level of rigor for the disabled students the assessments are designed for. Likewise, with federal legislation limiting students' ability to opt out of standardized testing, a cycle of exclusion and inappropriate testing and progress-measuring conditions for disabled students will remain. While the goal of protecting the educational rights of disabled students is well intended, the desired results are unattainable given current methods, and serious revisions are necessary if progress is to be achieved.

Grant statutes such as the EHA³ exist to provide funds to state agencies seeking to implement free education to handicapped children.⁴ EHA was eventually revised in 1990, becoming the Individuals with Disabilities Education Act (IDEA),⁵ which similarly provided that all children with disabilities shall be afforded a free appropriate public education (FAPE) and provided grants to state agencies to help cover the cost of implementing FAPE.⁶ With no statutory guidance on what exactly was meant by a "Free Appropriate Public Education," judicial interpretations provided guidance for determining compliance in cases such as *Rochester*,⁷ *Rowley*,⁸ and *Endrew*.⁹ Subsequent judicial interpretations determined that FAPE for a child integrated into a regular classroom includes appropriate educational progress demonstrated through an IEP, which outlines a level of instruction calculated to reasonably facilitate the child advancing through grade levels.¹⁰ For a child who is not in a regular classroom setting, FAPE will be met by an IEP reasonably enabling a child to progress in light of their conditions.¹¹ Likewise, all students, regardless of the severity of their disability, are to be included in and covered by special education laws and legislation.¹²

In addition to legislation governing education at the federal level, statutes began providing the states with more freedom to decide how to provide public school students with a FAPE, by way of statutes such as

3. *See id.* § 1400(c)–(d).

4. *Id.* § 1400(d)(1)(A)–(C).

5. *See id.* § 1400(a) ("This chapter may be cited as the 'Individuals with Disabilities Education Act.'").

6. 20 U.S.C. § 1401(9).

7. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954 (1st Cir. 1989).

8. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

9. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 580 U.S. 386 (2017).

10. *Rowley*, 458 U.S. at 209–10.

11. *Endrew*, 580 U.S. at 399–400.

12. *Rochester*, 875 F.2d at 960.

the No Child Left Behind Act (NCLB).¹³ NCLB emphasized the use of state-mandated standardized testing to monitor both school and student progress.¹⁴ This statute was eventually revised and replaced by Every Student Succeeds Act (ESSA),¹⁵ which aimed to revise the elements of NCLB that produced negative effects on students with disabilities.¹⁶ However, ESSA seemingly fell short of its intent.¹⁷ This shortcoming is due to ESSA retaining provisions of NCLB, such as the requirement that schools risk losing Title I funding where less than ninety-five percent of students participate in state-mandated standardized testing.¹⁸ Similarly adopted from NCLB, ESSA provides that only the one percent most significantly cognitively impaired students may take an alternate assessment instead of the general assessment taken by all other students within the state.¹⁹ A state must submit a waiver whenever more than one percent of cognitively impaired students participate in an alternate assessment.²⁰ A waiver is denied if the state shows no progress towards reaching one percent, and exceeding one percent with no waiver puts the state at risk of losing Title I funding.²¹

As legislation surrounding the education of disabled students continues to evolve, parents, teachers, and administrators are left to wonder whether lawmakers will finally get it right. While inclusion of disabled students in public education has been the intended goal, legislation continues to include provisions that are consequentially inappropriate for and exclude the very students they aim to protect. This Article will discuss and present the problems stemming from ESSA's ninety-five percent standardized testing participation standard and the low quota of only allowing one percent of cognitively impaired students to participate in an alternate assessment. Part I of this Article will provide an overview of federal legislation pertaining to and protecting the education of disabled students such as EHA, IDEA, and Section 504, and the judicial opinions interpreting the concept of FAPE. Part II will discuss

13. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425, 1439–1620 (2002).

14. *Id.*

15. 20 U.S.C. § 6311(a).

16. LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 2:20 (5th ed. 2025). NCLB's strict testing provisions used as the standard of assessment for the progress of public schools consequentially lead schools to exclude students with disabilities, fearing that their low test scores would bring down the overall rating of the school and potentially cause the school to lose federal funding. *Id.*

17. Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CAL. L. REV. 1309, 1313 (2017).

18. 20 U.S.C. § 6311(c)(4)(E); 20 U.S.C. § 6311(a)(1); *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 960 (1st Cir. 1989).

19. 20 U.S.C. § 6311(b)(2)(D)(i)(I).

20. 34 C.F.R. § 200.6(c)(4)(v) (2026).

21. *Id.*

federal legislation providing the states with the freedom to make decisions pertaining to how they will provide students with a FAPE, including the progression from NCLB to ESSA and a comparison between the two statutes. Part III will focus primarily on the state of Florida, specifically Florida's ESSA plan, statistics pertaining to Florida's continuous need for a one percent waiver, Florida's alternate assessment for the qualified one percent, the students' alternate assessment results, and teacher/administrator feedback on said alternate assessment. Part IV of this Article will cover the problems caused by ESSA's ninety-five percent participation standard and one percent exemption cap and propose an opt-out provision as a solution to these issues. Finally, Part V will then discuss the implementation of the proposed opt-out provision using comparison through case law to determine that this solution will comply with the concept of inclusion for all handicapped students and FAPE under IDEA.

I. FEDERAL LEGISLATIVE HISTORY OF EDUCATION FOR DISABLED STUDENTS

Federal legislation such as EHA (Education for All Handicapped Children Act), IDEA (Individuals with Disabilities Education Act), and Section 504 of the Rehabilitation Act aim to protect the rights of disabled students, ensuring that all students regardless of their disability receive a free, appropriate, public education (FAPE). Whether granting funding in response to compliance (or stripping funding in response to non-compliance) through EHA and IDEA, or by providing a civil remedy for disability discrimination through Section 504, these laws protect against discrimination towards disabled students at the federal level.

A. *Education for All Handicapped Children Act*

The inclusion of all handicapped²² children within the public education system began in 1975 with the "Education for All Handicapped Children Act" (EHA).²³ EHA provided that the federal government would make payments to state educational agencies to assist states in providing a free and full educational opportunity for all handicapped children.²⁴ In order to be eligible for this funding, states were required to show that they had a policy in effect ensuring all handicapped children the right to a free appropriate public education.²⁵

The case of *Timothy v. Rochester* brought forth the first legal discussion pertaining to the term "all" within the EHA. When Timothy's

22. "Handicapped" was the preferred term at the time the Act was passed; however, the preferred term is now "disabled." See 20 U.S.C. § 1401(3)(a) (defining "child with a disability").

23. Pub. L. No. 94-142, 89 Stat. 773 (1975).

24. Pub. L. No. 94-142, § 611, 89 Stat. 773, 785 (1975).

25. *Id.*

school district deemed that his cognitive dysfunction was so severe that he was ineligible for special education, Timothy's parents filed suit, alleging that his rights had been violated under the EHA, as the statute ensured rights for "all" children.²⁶ In formulating its ruling, the court cited to the language of the EHA, emphasizing that wherever Congress referred to "all" children, it did so without exception for the severely disabled, nor did it establish a prerequisite that the children must demonstrate that they will benefit from said education in order to receive it.²⁷ The court went on to quote a Senate Report which stated that, "the Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome."²⁸

1. Free Appropriate Public Education (FAPE) Under EHA

The concept of a free appropriate public education (FAPE) under EHA, specifically what is deemed "appropriate," was first discussed in the Supreme Court case *Board of Education of Hendrick Hudson Central School District v. Rowley*.²⁹ Amy Rowley, a deaf student, requested a sign language interpreter be placed in her first-grade classroom in addition to her hearing aids.³⁰ The school district denied the request on the basis that she was already performing on a higher academic level than the average child in her class without the use of an interpreter.³¹ The Supreme Court looked to the congressional purpose of EHA when interpreting what was meant by an "appropriate" education, and determined that a free appropriate public education consists of an education designed to meet the needs of the specific handicapped student (as expressed through the construction of an Individualized Education Plan, hereinafter referenced as an IEP³²), and supported by services necessary to allow the child to benefit from the education in question.³³ A non-handicapped child in a public education system is deemed educated to the grade level in which they have completed, and thus a handicapped child in a "regular" classroom should be similarly deemed appropriately educated upon the

26. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 960 (1st Cir. 1989).

27. *Id.*

28. *Id.* at 965; S. REP. NO. 94-168, at 8 (1975), as reprinted in 1975 U.S.C.C.A.N. 1431, 1433.

29. 458 U.S. 175, 186 (1982).

30. *Id.* at 3039-40.

31. *Id.* at 3040.

32. 34 C.F.R. § 300.320(a) (2007) (defining an individualized education plan (IEP) as a written statement for each child with a disability that is developed, reviewed, and revised, and must include a statement of the child's current level of academic performance including how the child's disability affects this performance. It must also include a description of measurable goals and a plan for how the child will meet said goals (among other requirements).).

33. *Rowley*, 458 U.S. at 3049.

achievement of the child's progression through the grade levels.³⁴ Therefore, despite Rowley's argument that her academic performance would improve with the utilization of a sign language interpreter, the school district was only required to ensure that she was performing to the ability necessary to progress onto the next grade level, instead of to the best of her own ability.

B. *Individuals with Disabilities Education Act*

In 1990, EHA was amended and renamed, becoming the "Individuals with Disabilities Education Act" (IDEA). IDEA, much like EHA, ensures a FAPE for all children with disabilities³⁵ by constructing an IEP tailored to outline the unique needs of each disabled child.³⁶ States complying with the provisions of IDEA receive federal grants to assist with implementing these provisions.³⁷

1. FAPE Under IDEA

IDEA defines FAPE as "special education and related services that . . . a) have been provided at public expense, b) meet the standards of the State educational agency, c) include an appropriate . . . education in the State involved, and d) are provided in conformity with the IEP."³⁸ IDEA, similar to EHA, fails to statutorily define what makes an education appropriate, thus leaving the determination to the courts.

The question of what is deemed an "appropriate" education within the meaning of FAPE, this time in regard to a child not integrated into a regular classroom, was addressed by the Supreme Court in the 2017 case *Endrew v. Douglas County School District*.³⁹ In *Endrew*, a child with autism had received IEPs up through the fourth grade in his public school

34. *Id.* at 3036 ("Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.").

35. The list of IDEA specified disabilities include Autism, Deaf-Blind, Deafness, Emotional Disturbance, Hearing Impairment, Intellectual Disability, Multiple Disabilities, Orthopedic Impairments, Other Health Impaired, Specific Learning Disability, Speech or Language Impairment, Traumatic Brain Injury, and Visual Impairment including Blindness. Sharon Schultz, *Differences Between a 504 Plan and an Individualized Education Plan (IEP)*, NAT'L EDUC. ASS'N: ADVICE (Dec. 2022), <https://www.nea.org/professional-excellence/student-engagement/tools-tips/differences-between-504-plan-and-individualized-education-program-iep> [https://perma.cc/GB3R-JX37].

36. 20 U.S.C. § 1400.

37. *Id.*

38. *Id.* § 1401(9).

39. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 580 U.S. 386, 387 (2017).

district, as required by IDEA.⁴⁰ After years of IEPs with no progress, Endrew's parents pulled him from the public school system and placed him in a specialized private school where he was able to academically progress.⁴¹ The parents sought tuition reimbursement from the public school district and filed suit under IDEA when the request was denied.⁴² The Supreme Court, in reference to the appropriate education that must be outlined in a child's IEP, determined that the IDEA requires more than the *de minimis* standard set out in *Rowley*, and stated that an IEP must reasonably enable a child to make progress in light of the child's condition in order to comply with IDEA.⁴³ The Court did, however, emphasize that they cannot and will not attempt to define what "appropriate" progress will look like from case-to-case, as an IEP relies on the unique circumstances of each child.⁴⁴

The Supreme Court, through statutory interpretation of EHA and IDEA in both *Rowley* and *Endrew*, clarified that "appropriate" educational progress for a child integrated into a regular classroom will be met by an IEP outlining a level of instruction calculated to reasonably facilitate the child advancing through grade levels.⁴⁵ For a child not in a regular classroom setting, this requirement is met where an IEP reasonably enables a child to progress in light of their conditions.⁴⁶ A question that the courts have failed to address, however, is not only what it means to appropriately "progress," but what occurs if there is no progression to be made.

2. Uneducability and The Zero-Reject Principle Under IDEA

The Merriam-Webster dictionary defines "uneducable" as the inability to be educated or to learn.⁴⁷ While the definition and concept of "uneducable" exists in the real world, so to speak, no such label exists

40. *Id.*

41. *Id.* at 386.

42. *Id.*

43. *Id.* at 402–03 ("When all is said and done, a student offered an educational program providing 'merely more than *de minimis*' progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly . . . awaiting the time when they were old enough to 'drop out.'" The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." (citing *Bd. of Educ. v. Rowley*, 458 U.S. 175, 179 (1982))).

44. *Id.* at 403–04 ("We will not attempt to elaborate on what 'appropriate' progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created.").

45. *Rowley*, 458 U.S. at 179.

46. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017).

47. *Uneducable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/uneducable> [<https://perma.cc/8T9Y-NRGX>] (last visited Feb. 13, 2026).

within the legal realm of education. The courts have made it clear that all disabled children are entitled to an education, with no child being deemed “uneducable.” In *Rochester*, the First Circuit quoted the decision in *Abrahamson v. Hershman*:⁴⁸

It appears that courts intend to enforce the school districts’ legal duty to educate children, even when presented with a child who has a very limited capacity to be educated. “With persons as severely retarded as plaintiff, the scope for education is extremely limited, but we do not understand the state to be arguing that plaintiff or the other members of the class are uneducable. Nor would such an argument be likely to succeed.”⁴⁹

The above quotation was stated in response to the question of potential uneducability for severely handicapped and cognitively disabled children.⁵⁰

Professor Laura Rothstein discusses the concept of uneducability under the IDEA in her book *Disabilities and the Law*. Rothstein notes the potential policy issues stemming from the *Rochester* decision and contemplates a hypothetical posed in the *Rochester* opinion about educating a comatose child.⁵¹ She states that when it comes to the rare case of a child being truly unable to benefit from special education (such as a child in a comatose state), it seems appropriate that the parents should not have to bear the expense of support and programming for their child, and questions whether Congress considered these situations in forming special education laws.⁵² Similarly, though it would make sense for an educational agency to coordinate the programming and funding for a child in this condition, she questions whether the federal funding provided under IDEA compensates for a situation as expensive as the posed hypothetical would be.⁵³

Thus, not only does IDEA itself fail to address possible questions pertaining to the funding and financial responsibility of a child who is truly unable to benefit from special education, but as Rothstein stated, it is questionable whether Congress even contemplated such a situation when forming the laws governing special education. However, due to the zero-reject principle, questions such as the ones posed by Rothstein

48. 701 F.2d 223 (1st Cir. 1983). The court held that the *Rowley* decision does not authorize residential care to enhance an “otherwise sufficient” education program simply to allow a child to reach their full potential, but rather this court found residential care was essential to Plaintiff if he were to make any educational progress at all and thus allowed the placement. *Id.* at 227.

49. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 970 (1st Cir. 1989) (quoting *Abraham v. Hershman*, 701 F.2d at 228).

50. *Id.*

51. ROTHSTEIN & IRZYK, *supra* note 16, § 2:15.

52. ROTHSTEIN & IRZYK, *supra* note 16, § 2:15.

53. ROTHSTEIN & IRZYK, *supra* note 16, § 2:15.

pertaining to an uneducable child seem to go unanswered, as the legal need for such an answer may never arise.

The concept of a child being “uneducable” falls under one of the six main principles of IDEA: the zero-reject principle.⁵⁴ Rudd Turnbull and Ann P. Turnbull⁵⁵ define the zero-reject principle as the concept that no disabled student may be denied a FAPE.⁵⁶ This concept mirrors the EHA’s interpretation of “all” and leaves no room for the determination that a child may truly not benefit from a special education. A FAPE must be available to all children with disabilities from ages three to twenty-one, with no level of disability rendering a child uneducable.⁵⁷

C. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 protects the rights of individuals with disabilities in federally funded programs, such as schools receiving federal financial assistance from the United States Department of Education.⁵⁸ Section 504 states, “No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.”⁵⁹ For a student to be considered disabled under Section 504, they must have a physical or mental impairment that substantially limits one or more major life activity, have a record of such impairment, or be regarded as having such impairment.⁶⁰ What qualifies as a physical or mental impairment is defined in the statute.⁶¹ Section 504

54. ROTHSTEIN & IRZYK, *supra* note 16, § 2:15.

55. Ann Turnbull *Biography*, UNIV. OF KAN. DEP’T OF SPECIAL EDUC., <https://specialedu.ku.edu/people/ann-turnbull> [<https://perma.cc/CMT3-69QH>] (last visited Jan. 21, 2026). Ann P. Turnbull and Rudd Turnbull are the co-founders and co-directors of the Beach Center on Disability. *Id.* Both Ann and Rudd Turnbull were recognized by the National Historic Preservation Trust in Developmental Disabilities as one of thirty-six individuals across the world who have changed the course of history for individuals with disabilities in the 20th century. *Id.*

56. Rud Turnbull & Ann P. Turnbull, *Reaching the Ideal*, EDUC. NEXT: WINTER 2003 VOL. 3, No. 1, <https://www.educationnext.org/reachingtheideal/> [<https://perma.cc/W6K9-RTUT>] (2006) (“Zero reject is the principle that no student with a disability can be denied a free, appropriate public education. This is both a civil right under the equal protection doctrine and good social policy, grounded in the individual and social utilitarianism of educating all students.”).

57. 20 U.S.C. § 1412(a)(1)(A).

58. *Frequently Asked Questions: Section 504 Free Appropriate Public Education (FAPE)*, U.S. DEP’T OF EDUC.: DISABILITY DISCRIMINATION (2025), <https://www.ed.gov/laws-and-policy/civil-rights-laws/disability-discrimination/frequently-asked-questions-section-504-free-appropriate-public-education-fape> [<https://perma.cc/5L9P-BDKT>].

59. 29 U.S.C. § 794(a).

60. 34 C.F.R. § 104.3(j) (2025).

61. *Id.* § 104.3(j)(2)(i) (“(A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs;

similarly outlines the concept of a FAPE and states that a recipient of federal funding operating a public education program must provide all qualified disabled students a FAPE, regardless of the severity of the disability.⁶² An appropriate education consists of a regular or special education and related services designed to meet the individual educational needs of a disabled person as adequately as the needs of a person who is not disabled are met, and are based on the procedures that satisfy this requirement.⁶³ The use of an IEP is one way of meeting this standard.⁶⁴

While Section 504 and IDEA are seemingly identical in their message of non-discrimination against disabled students in public education, they are fundamentally different in how they affect their targeted beneficiaries. IDEA is a grant statute, and each educational agency is responsible for administering IDEA and distributing funds for special education programs, with conditions attached to the receipt of the IDEA funds.⁶⁵ Section 504 is a civil rights antidiscrimination law that must be abided by and provides no funding in exchange for compliance.⁶⁶

Students covered by Section 504 are eligible for a “504 Plan.” A 504 Plan is a written plan that provides for accommodations and supports the students’ access to academic and extra-curricular activities in instances where a student is excluded from said activities due to their disabilities.⁶⁷ The 504 Plan must address the services needed to access and participate in the learning process afforded to their grade-equal peers.⁶⁸ A 504 Plan is tailored towards students who do not require specialized instruction, but need assurance that they will be provided equal access to public education.⁶⁹ While this sounds similar to an IEP, an IEP under IDEA is tailored towards students who require specialized instruction to have access to and progress in the public education curriculum.⁷⁰ This will include measurable learning goals, accommodations/modifications, and standards of how a student’s progress will be measured.⁷¹

cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”).

62. 34 C.F.R. § 104.33(a) (2025).

63. *Id.* § 104.33(b)(1).

64. *Id.* § 104.33(b)(2).

65. UNIV. OF KAN. DEP’T OF SPECIAL EDUC., *supra* note 55.

66. UNIV. OF KAN. DEP’T OF SPECIAL EDUC., *supra* note 55.

67. Schultz, *supra* note 35.

68. Schultz, *supra* note 35.

69. Schultz, *supra* note 35.

70. Schultz, *supra* note 35.

71. Schultz, *supra* note 35.

II. STATE REQUIREMENTS UNDER FEDERAL LEGISLATION

While EHA, IDEA, and Section 504 federally regulate the education of disabled students by providing broad requirements that states must adhere to, legislation such as the No Child Left Behind Act (NCLB) and Every Student Succeeds Act (ESSA) put authority in the hands of the states, allowing states to create their own action plans demonstrating how they intend to improve education for all public-school students within their state.⁷² These acts focus on state-mandated standardized testing scores to measure academic improvement and achievement, and use funding, or a lack thereof, to incentivize schools to meet improvement goals.⁷³

A. *No Child Left Behind Act*

The No Child Left Behind Act (NCLB)⁷⁴ was signed into effect by President George W. Bush in 2001 to substantially revise the Elementary and Secondary Education Act of 1965.⁷⁵ NCLB was based on four principles: stronger accountability for results, greater flexibility for states and school districts in the usage of federal funds, more choices for parents of children from disadvantaged backgrounds, and an emphasis on teaching methods that have been demonstrated to work.⁷⁶ NCLB required each state to develop and implement an accountability system ensuring that all public schools were held to a proficient student-achievement standard regarding mathematics, reading/language arts, and science.⁷⁷ This standard included implementing academic assessments in these subject areas, adopting annual measurable objectives for student achievement, demonstrating that the state and its schools were making adequate yearly progress (AYP)⁷⁸ measured by student performance, and

72. 20 U.S.C. § 6311(a)(1).

73. 20 U.S.C. § 6311(a)(1), (g)(1).

74. No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425 (2002).

75. Fla. House of Representatives, *No Child Left Behind (NCLB) Act*, in EDUC. FACT SHEET 2010-11 at 327 (2010), https://flhouse.gov/FileStores/Web/HouseContent/Approved/Web%20Site/education_fact_sheets/2011/documents/2010-11%20No%20Child%20Left%20Behind%20%28NCLB%29%20Act.3.pdf [<https://perma.cc/S5KN-3CGJ>] (“For more than 40 years, through the Elementary and Secondary Education Act (ESEA) of 1965, the U.S. Congress has authorized federal grants to states and school districts to improve the educational opportunities for economically disadvantaged students. The No Child Left Behind Act of 2001 reauthorized and substantially revised the ESEA.”).

76. *Id.*

77. *Id.*

78. ROTHSTEIN & IRZYK, *supra* note 16 (“The key principles of NCLB include having highly qualified teachers, scientifically based instruction, and a demonstration of adequate yearly progress. These assessments often use testing instruments that have not been validated for students with disabilities. The testing measures have been criticized because the system of testing marginalizes special education students by emphasizing testing instead of implementing an individualized education plan.”).

identifying which schools failed to make AYP for two consecutive years.⁷⁹ If a school consecutively failed to make AYP, it could be required to fire its staff and face other federal penalties.⁸⁰

NCLB most notably placed strong emphasis on standardized testing and the results of these assessments.⁸¹ Through standardized testing results, NCLB aimed to narrow educational achievement gaps for students with disabilities, among other sub-groups.⁸² These assessment standards required that the same academic assessments be used to measure the achievement of all elementary and secondary schools in the state and be administered to all public elementary and secondary students within those schools.⁸³ The results of these assessments were used to demonstrate AYP by showing an annual increase in student achievement through test scores.⁸⁴

1. The Consequences of NCLB

While a statute titled “*No Child Left Behind Act*” facially sounds to be a step in the right direction, the unfortunate consequences of NCLB instead dragged the movement for inclusivity in education backwards. Linda Darling-Hammond (Hammond), in her book titled *Many Children Left Behind*, states that NCLB was often mockingly referred to as “No Child Left Untested,” “No School Board Left Standing,” and “No Child’s Behind Left.”⁸⁵ Hammond states that while NCLB was imposed with good intentions, the act was more harmful than beneficial towards the students it was implemented to help.⁸⁶ The reason for this being that the Act set unachievable test score targets that penalized schools that served needier groups of children, therefore incentivizing schools to push out underachieving students in order to raise test score averages.⁸⁷

79. ROTHSTEIN & IRZYK, *supra* note 16.

80. The Difference Between the Every Student Succeeds Act and No Child Left Behind, UNDERSTOOD, <https://www.understood.org/en/articles/the-difference-between-the-every-student-succeeds-act-and-no-child-left-behind> [https://perma.cc/Z3AA-PLUC] (last visited Feb. 5, 2026) (“States had to bring *all* students up to the ‘proficient’ level on state tests. This included students in special education. States also had to set targets for improvement, called adequate yearly progress (AYP). If a school didn’t meet AYP, it could be labeled as ‘needing improvement.’ It could be required to fire its staff and face other federal penalties.”) (emphasis in original).

81. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1425, 1439 (2002).

82. See *id.*

83. *Id.* § 101, §1111, 115 Stat. 1425, 1444 (2002).

84. *Id.*

85. Linda Darling-Hammond, *From “Separate but Equal” to “No Child Left Behind”: The Collision of New Standards and Old Inequalities*, in *MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN AND OUR SCHOOLS* 3, 4 (Deborah Meier & George Woods eds., 2004).

86. *Id.*

87. *Id.*

Laura Rothstein similarly notes that due to the penalties imposed on schools for not meeting their testing goals (being considered a “failing school” for not reaching its AYP) under NCLB provisions, there was a disincentive for schools to include children with disabilities, especially magnet or charter schools.⁸⁸ With only one percent of students with the most severe cognitive disabilities being able to utilize an alternate assessment route, schools feared that the assessment results of children with severe cognitive disabilities who are not included in the one percent would prohibit them from meeting their NCLB goals.⁸⁹ This resulted in negative consequences for the IDEA movement, thus leading to NCLB being replaced by ESSA.⁹⁰

B. *Every Student Succeeds Act*

The Every Student Succeeds Act (ESSA)⁹¹ was signed into law by President Barack Obama in 2015 to replace NCLB and is still good law. The purpose of ESSA is to “provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps.”⁹² ESSA, much like NCLB, emphasizes standardized testing and the utilization of test results to assess the academic achievements of students within the public schools, however, with a slightly more relaxed approach.⁹³

In order to incentivize and assist schools in implementing ESSA requirements, the statute details ways in which local education agencies may receive and appropriate grants and funding received through ESSA compliance.⁹⁴ The statute similarly provides grants to state educational agencies to assist them in the development of assessment standards and to administer and carry out said assessments (including ensuring the appropriate accommodations for children with disabilities), with the requirement that the state receiving these grants submit an annual report to the Secretary describing the assessment results.⁹⁵

88. ROTHSTEIN & IRZYK, *supra* note 16.

89. ROTHSTEIN & IRZYK, *supra* note 16 (“Generally, students with disabilities (except for a very small percentage) are not exempted from proficiency tests and measurements. Because of the penalties (being designated a failing school) for not meeting the goals of NCLB (proficiency of 100% of students in math and reading by 2014) there is a disincentive to include students with disabilities in schools, especially magnet and charter schools.”).

90. ROTHSTEIN & IRZYK, *supra* note 16.

91. 20 U.S.C. § 6301(a).

92. *Id.*

93. *Id.* § 6361.

94. *Id.* § 6302-4.

95. *Id.* § 6361.

1. Comparison of ESSA and NCLB Assessment Standards

ESSA adopted the language of NCLB in regard to standardized testing and assessment standards. ESSA, like NCLB, requires that the same academic assessments be used to measure the achievement of all elementary and secondary schools in the state, the assessments be administered to all public elementary and secondary students within those schools, and that the results of these assessments be used to demonstrate progress.⁹⁶

ESSA also adopted NCLB's provision on assessment standards for students with disabilities. ESSA, identically to NCLB, allows for "alternate academic achievement standards" for students with the most significant cognitive disabilities.⁹⁷ Though the standards are "alternate," they must still be aligned with the state academic content standards, promote access to the general education curriculum, reflect professional judgment as to the highest possible standards achievable by these students, be designated in the student's IEP, and be aligned to ensure the student is on track to pursue post-secondary education or employment.⁹⁸ While the alternate assessment route does exist for students with significant cognitive disabilities, the quantity of students in the state allowed to utilize such an exception still may not exceed one percent.⁹⁹

ESSA adopting similar, if not identical, testing provisions to NCLB creates an element of confusion, as the vast opposition to NCLB was the testing provisions. If ESSA and NCLB have such similar testing provisions, then how did ESSA pass? Why amend NCLB? Frederick M. Hess discusses this concept in his book, *The Every Student Succeeds Act: What It Means for Schools, Systems, and States*.¹⁰⁰ Senator Lamar Alexander was considered to be an "architect" of ESSA; it was initially rumored that Alexander was in favor of peeling back on testing provisions, aligning with the values of many educators and teachers' unions.¹⁰¹ However, after it became apparent that ESSA had no intention to minimize testing provisions, people began to question whether Alexander ever truly considered a different approach to testing, or if it was all a façade to win over educational organizations and persuade the Democrats to accept a lesser federal role in education.¹⁰² Alexander

96. *Id.* § 6311(b)(2)(A)–(C).

97. *Id.* § (b)(1)(E).

98. *Id.* § (b)(1)(E)(i)(I)–(V).

99. *Id.* § (b)(2)(D)(i)(I).

100. FREDRICK M. HESS & MAX EDEN, *THE EVERY STUDENT SUCCEEDS ACT: WHAT IT MEANS FOR SCHOOLS, SYSTEMS, AND STATES* (2017).

101. *Id.* at 149.

102. *Id.* at 40 ("Teachers, teachers' unions, and parents strongly disliked that teacher evaluations were tied to testing scores and began to detest standardized testing requirements in their entirety. Parents began opting their children out of Common-Core testing, and The National Education Association and American Federation of Teachers backed bills that would allow

revealed to Hess that while he did truly consider altering testing provisions, winning Democrat votes by way of scare tactics was a large motivating factor.¹⁰³ Ultimately, ESSA was enacted simply to impose a bottom-up approach, theorizing that schools could be better governed at a lower level rather than by the federal government.¹⁰⁴

Derek Black, in his *California Law Review* article, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, states that while facially the ESSA is aimed at correcting NCLB's flaws, in reality the flaws are only reproduced through different means.¹⁰⁵ By giving states more freedom to govern their own education policies, the states have a newfound opportunity to manipulate the system.¹⁰⁶ This potential for manipulation stems from the fact that ESSA, instead of immediately addressing schools not meeting AYP, requires that states wait three years before identifying schools in need of assistance and does not specify what the assistance plan will be.¹⁰⁷

2. Differences Between ESSA and NCLB

While ESSA and NCLB run parallel in their testing requirements, this new "bottom-up" approach imposed key differences that provided the states with more power to set their own standards. Under ESSA, states have much more flexibility to set their own student achievement goals, are not limited to using their own standardized tests (they could use the SAT or the ACT), and most notably can use more than just test scores when evaluating schools.¹⁰⁸ Instead of solely using test scores, states are required to use reading and math test scores, English/language proficiency test scores, high school graduation rates, and a state-chosen

students to be tested in different grade spans instead of every year. Democrats opposed this movement and emphasized the importance of yearly testing. Alexander, by openly considering the lessening or removal of state testing, was able to both win over educational organizations who opposed standardized tests and scare the Democrats into accepting a smaller federal role in education. While he won everyone over by 'considering' lessening testing provisions, he ultimately failed to alter NCLB's testing provisions at all.").

103. *Id.*

104. *Id.*

105. Black, *supra* note 17, at 1335.

106. Black, *supra* note 17, at 1335 ("In sum, on its face, the ESSA maintains continuity with the NCLB's testing regime and seeks to correct some of the NCLB's most glaring flaws. Yet, through its mechanics, the ESSA repeats the NCLB's flaws, just through different means. The NCLB permitted states to manipulate academic standards and test scores but mandated absolute sanctions--a tradeoff that ultimately proved insufficient to save the Act. In response, the ESSA slightly tightens academic standards but vastly reduces federal oversight of those standards and federal expectations for the accountability system. The net result is an opening for states to manipulate the system--from the standards they adopt to the schools they target.").

107. Laura Adler-Greene, *Every Student Succeeds Act: Are Schools Making Sure Every Student Succeeds?*, 35 *TOURO L. REV.* 11, 21 (2019).

108. 20 U.S.C. § 6311(c)(4)(B)(v)(II)–(VIII).

academic measure for elementary and middle school.¹⁰⁹ States can additionally choose from a handful of additional factors to be evaluated on, such as kindergarten or postsecondary readiness.¹¹⁰

Additionally, schools that do not meet their annual goals are no longer labeled as “failing” or “needing improvement,” nor are they federally penalized.¹¹¹ Instead, states must only identify and intervene with the bottom five percent of schools where the high school graduation rate is sixty-seven percent or below.¹¹² States are only required to identify these schools once every three years, and schools have up to four years to improve their graduation rates before state-chosen intervention methods are implemented.¹¹³ Likewise, while states no longer need to ensure all students are scoring proficiently on state tests (including special education students), the state must still set “ambitious” goals for special education students.¹¹⁴

Another difference is that ESSA does not preempt state laws if they wish to have a testing opt-out provision.¹¹⁵ However, ESSA retained NCLB’s ninety-five percent rule, requiring states to ensure that at least ninety-five percent of students participate in standardized testing for purposes of Title I accountability.¹¹⁶ Students whose parents opt out of testing are still counted toward the ninety-five percent participation requirement, disincentivizing parent opt-outs in fear of their child’s school losing funding.¹¹⁷ ESSA did, however, eliminate the federal requirement that standardized test scores be included in teacher evaluations.¹¹⁸

109. *Id.* § 6311(b)(1)(C).

110. *Id.* § 6311(c)(4)(B)(v)(II).

111. Adler-Greene, *supra* note 107, at 17.

112. Adler-Greene, *supra* note 107, at 15.

113. Adler-Greene, *supra* note 107, at 15.

114. 20 U.S.C. § 6311(c)(4)(A).

115. *See id.* § 6311(b)(2)(K) (“Nothing in this paragraph shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent’s child participate in the academic assessments under this paragraph.”).

116. *See id.* § 6311(c)(4)(E); Adler-Greene, *supra* note 107, at 21.

117. *See* Adler-Greene, *supra* note 107, at 21 (“Opponents of ESSA . . . argue that keeping the 95 percent rule . . . keeps the high-stakes testing system in place and poses a new threat to parents and communities that want to opt out of the testing. Students, whose parents opt them out of the test, must be included in the 95 percent participation formula. Under the ESSA accountability system, states must annually measure 95 percent of their students and every subgroup of students while also penalizing schools that do not meet 95 percent through the state accountability system.”).

118. Adler-Greene, *supra* note 107, at 17; *see also supra* note 106 (describing the linkage between teacher evaluations and test scores as a large source of frustration amongst teachers and parents, causing many parents to opt their children out of the Common-Core standardized assessments).

III. FLORIDA'S ESSA PLAN

Florida's initial ESSA plan was approved in 2018, and an amended plan was submitted and received approval in 2023.¹¹⁹ In Florida's amended plan, the Florida Department of Education (FLDOE) emphasizes the goal of reducing the achievement gap among subgroups (children with disabilities being a subgroup) in order to ensure that all students are reaching their full potential.¹²⁰

Florida uses the "Federal Percent of Points Index" to assign a quantity of points to ESSA indicators, functioning as a rubric for how much each indicator is worth when evaluating a school's progress.¹²¹ Schools will receive a "report card" indicating how many points they received in each indicator category, and these report cards will be used to determine which schools will be placed in improvement programs.¹²² At the elementary school level, indicator categories include academic achievement (standardized testing), academic gains/progress, school quality/student success, and English language proficiency (ELP).¹²³ Middle schools are evaluated on the same indicator categories as elementary schools.¹²⁴ For high schools, graduation rate is added as an indicator category, and academic progress is removed.¹²⁵ Though academic gains are a separately scored category from academic achievements (assessment scores) on the points index, student gains are similarly measured by using student performance on statewide standardized assessments.¹²⁶ Students are able to demonstrate a learning gain by either (1) maintaining a score within the achievement level five; (2) improving one or more achievement levels; (3) maintaining a passing achievement level and increasing their score by at least one point in levels three or four; or (4) for students in level one or two, by increasing their score to a higher subcategory within the level.¹²⁷ The student gains scale is applicable to all students, including

119. FLA. DEP'T OF EDUC., EVERY STUDENT SUCCEEDS ACT (ESSA) STATE PLAN 1 (2023), <https://www.fldoe.org/core/fileparse.php/14196/urlt/fl-essa-stateplan080223.pdf> [<https://perma.cc/8BDS-HJA4>].

120. *Id.* at 14 ("Florida is focused on closing the achievement gap among subgroups to ensure that all students are able to reach their full potential. FDOE staff will use data to identify districts that need more support in closing the achievement gap through its Multi-tiered System of Support and provide support based on the needs identified in the data. Florida has a goal to reduce the achievement gap by one-third between each subgroup in each subject area by 2020 from baseline performance in 2014-2015. This increase is ambitious and requires significant progress in closing the gap in order to reduce the gap by one-third in five years from the baseline in 2014-2015.").

121. *Id.* at 23-24.

122. *Id.* at 18.

123. *Id.* at 23.

124. *Id.*

125. *Id.* at 23-24.

126. *Id.* at 19.

127. *Id.*

students performing within the bottom twenty-five percent, regardless of the subgroup they belong to.¹²⁸

A. Standardized Testing and Alternate Assessments

Under ESSA requirements, Florida must have ninety-five percent student participation in statewide mathematics and reading/language arts assessments.¹²⁹ In its amended plan, the state outlined that if a school tested less than ninety-five percent of students in a subgroup, it must review the school's testing practices and submit a plan to demonstrate how the school will achieve ninety-five percent participation in the future.¹³⁰ If the school does not reach ninety-five percent of students tested in the subsequent year, the FLDOE will implement additional actions and interventions in order to ensure the school reaches the threshold.¹³¹

Florida's 2023 ESSA plan included baseline performance data on students of all subgroups.¹³² In order for Florida to analyze their performance in closing achievement gaps between subgroups, all subgroups must progress beyond their baseline, with the lowest performing subgroups progressing at a faster rate in order to close the gap.¹³³ The baseline gap between disabled students and non-disabled students for academic achievements in the 2018–19 school year was thirty-eight percent for ELA and thirty-three percent for math.¹³⁴ The actual gap measured in the 2022–23 school year was thirty-three percent for ELA and twenty-eight percent for math.¹³⁵ As this is the largest gap of any subgroup, children with disabilities would be expected to progress at a faster rate in order to close the achievement gap between them and non-disabled students.

128. *Id.*

129. *Id.* at 29.

130. *Id.*

131. Schools with a participation rate of less than 95% on statewide ELA and Mathematics assessments including EOCs, must review their testing practices and submit a plan for change to achieve 95% tested in the future. If the percent tested does not improve above 95% in the subsequent year, FDOE will implement additional actions and interventions to ensure that the 95% testing threshold is met. FLA. DEP'T OF EDUC., ESSA STATE PLAN, *supra* note 119, at 29 (noting that the plan does not specify what the "additional actions and interventions" will entail).

132. FLA. DEP'T OF EDUC., ESSA STATE PLAN, *supra* note 119, at 72.

133. FLA. DEP'T OF EDUC., ESSA STATE PLAN, *supra* note 119, at 72 ("When Florida analyzes its performance in closing the achievement gaps, it will not consider a gap to be closing if the top group stays the same or regresses. All subgroups must progress beyond the baseline and the lower-performing subgroups must progress at a faster rate to close the gap.").

134. FLA. DEP'T OF EDUC., ESSA STATE PLAN, *supra* note 119, at 78.

135. FLA. DEP'T OF EDUC., CLOSING THE GAP (2023), <https://edudata.fldoe.org/StrategicPlan/reports/ClosingTheGap.html> [<https://perma.cc/562Y-7JHK>].

1. One Percent Alternate Assessment Cap

As stated in ESSA regulations, only one percent of students with the most severe cognitive disabilities may be allowed to take the FAA (Florida Alternate Assessment).¹³⁶ Florida defines “most severe cognitive disabilities” as “a global cognitive impairment that adversely impacts multiple areas of functioning across many settings, is a result of a congenital, acquired, or traumatic brain injury or syndrome”¹³⁷ In order for a child with a severe cognitive disability to qualify for the FAA, the child’s IEP team must refer to a Florida-specific checklist when determining the appropriate course of testing.¹³⁸ Additionally, in order to proceed with FAA testing, the child’s parent must sign a consent form acknowledging the implications alternate testing may have on their child’s education.¹³⁹ Once it is determined that a child would benefit from FAA and the parent provides consent, the IEP team must complete a brief questionnaire to determine how to best administer the assessment.¹⁴⁰ The child’s Exceptional Students Education (ESE) teacher, a certified teacher, or other licensed professional who has worked extensively with the

136. 34 C.F.R. § 200.6(c)(2) (2026).

137. FLA. DEP’T OF EDUC., 1% CAP ON ALTERNATE ASSESSMENT PARTICIPATION WAIVER REQUEST 12 (drft. 2023), <https://www.fldoe.org/core/fileparse.php/7567/urlt/Draft-23onepercentwaiver.pdf> [https://perma.cc/2U47-T9FG].

138. *Id.* at 16–17.

139. *Id.*

140. *Id.* at 17–18. Questionnaire as follows:

1. Does the student primarily communicate through cries, facial expression, eye gaze and change in muscle tone that requires interpretation by listeners/observers?

2. Does the student respond/react to sensory (e.g., auditory, visual, touch, movement) input from another person BUT requires actual physical assistance to follow simple directions?

3. Does the student react primarily to stimuli (e.g., student only communicates being hungry, tired, uncomfortable, and sleepy)?

Previous FAA—Performance Task Performance (If Applicable)

4. Has the student’s previous performance on the FAA – Performance Task provided limited information and reflected limited growth within Level 1? . . .

If “NO” is selected for each of the first three questions, the IEP team should conclude that the FAA – Performance Task is the more appropriate statewide, standardized assessment. If “YES” is selected for any of the first three questions and “YES” is also selected for the fourth question (when applicable), then the IEP team should conclude that the FAA – Datafolio is the appropriate method to provide meaningful evaluation of the student’s current academic achievement.

Id.

student, must administer the exam.¹⁴¹ All individuals administering the exam must be trained in administering said exam and receive annual training updates.¹⁴²

In November of 2023, Florida's Chancellor of Public Schools, Dr. Paul O. Burns, submitted a waiver requesting Florida be exempt from the one percent alternate assessment cap for students with disabilities.¹⁴³ Dr. Burns highlights that IDEA required students with disabilities to be included in each state's accountability system, and similarly ESSA includes all children in a state's accountability system by requiring states to report student achievement for all students and specific student subgroups.¹⁴⁴ Under ESSA, only one percent of students may take an alternate assessment, and states that exceed the one percent threshold may have Title I funds withheld.¹⁴⁵

The FLDOE's "[One Percent] Cap on Alternate Assessment Participation Waiver Request Draft" reported that as of the 2022–23 school year, there were 428,213 disabled students in the state of Florida.¹⁴⁶ As of the 2022–23 school year, the Florida Alternate Assessment rates were 1.4% in ELA, 1.8% in math, and 1.5% in science.¹⁴⁷ Florida applied for a one percent cap waiver in 2019–20, 2020–21, and 2021–22.¹⁴⁸ Florida's waiver for the 2022–23 school year was denied due to lack of progress, and Florida submitted a new waiver for 2023–24 in anticipation of continuing to exceed the one percent cap.¹⁴⁹ States requesting a one percent cap waiver must demonstrate progress towards reducing the quantity of children who are participating in the alternate assessment.¹⁵⁰

The September 2018 edition of the Special Education Law Bulletin addresses the one percent assessment cap, stating that in 2018 Betsy DeVos granted waivers to nineteen out of the twenty-three states who exceeded the one percent assessment cap.¹⁵¹ However, the article highlighted that people feared that granting waivers without addressing the underlying issue of why so many waivers are necessary is only

141. *Id.* at 18.

142. *Id.*

143. Memorandum from Paul O. Burns, Ed.D., Chancellor of Pub. Schs., Fla. Dep't of Educ., to Sch. Dist. Superintendents, regarding Request for Waiver Regarding 1% Participation Cap for Alternate Assessment – Opportunity for Comment (Nov. 2, 2023), <https://info.fl DOE.org/docushare/dsweb/Get/Document-10050/DPS-2023-196.pdf> [<https://perma.cc/S857-W5LX>].

144. *Id.*

145. *Id.*

146. FLA. DEP'T OF EDUC., *supra* note 137, at 4.

147. FLA. DEP'T OF EDUC., *supra* note 137, at 5.

148. FLA. DEP'T OF EDUC., *supra* note 137, at 5.

149. FLA. DEP'T OF EDUC., *supra* note 137, at 5.

150. 34 C.F.R. § 200.6(c)(4)(v) (2026).

151. *In the News*, QUINLAN SPECIAL EDUC. L. BULL., Sept. 2018, at 2.

slapping a band-aid on the issue.¹⁵² Problems with the way the one percent cap is implemented are outlined, including that the cap is by state rather than district and some districts may require a much higher cap, which takes away the number of spots from other districts.¹⁵³

2. Florida Alternate Assessment

The Florida Alternate Assessment (FAA) is designed for the one percent of students with the most severe cognitive disabilities who are exempt from participating in the statewide standardized assessment.¹⁵⁴

Once an IEP team determines that a child would benefit from an alternate assessment, they must decide between the FSAA-Performance Task or the FSAA-Datafolio.¹⁵⁵ The Performance Task assessment is designed to assess students at three different complexity levels with results measured by levels of achievement, and the Datafolio assessment is best suited for students with significant cognitive disabilities who do not have a formal mode of communication and work at the pre-academic levels.¹⁵⁶

On the FAA website, the different levels of achievement for the Performance Task assessment are outlined regarding ELA, math, and science/social studies.¹⁵⁷ At the midpoint level of achievement (level three of four) for grade three ELA, students are expected to, amongst other things, make inferences, reason, plan, explain a character's perspective, identify a literary plot, and identify Greek and Latin roots and base words.¹⁵⁸ For grade three mathematics (at level three), students are expected to, amongst other things, add and subtract two-digit

152. *Id.*

153. *Id.* ("Although the idea of the 1% cap is sound, there are some serious problems with the way it is implemented. First, the cap is by state, rather than by district or school. This is problematic because some districts may legitimately need a higher cap, and they may take some of the extremely limited number of spots of alternate testing from other districts. A second problem is that monitoring may fall to a district's education departments, which will circumvent the special education departments, and avoid getting to the root of the problem so that it can be fixed.").

154. *Welcome to the Florida Statewide Assessments Portal*, FLA. DEP'T OF EDUC., <https://fsassessments.org/fsa.html> [<https://perma.cc/NHJ6-VVF9>] (last visited Jan. 30, 2026) (The FAA is aligned with the Florida Alternate Achievements Standards curriculum, "Access Points.").

155. *Id.*

156. *Id.*

157. *Florida Alternate Assessment—Performance Task (FAA—PT) English Language Arts Achievement Level Policy Definitions and Achievement Level Descriptions*, FLA. ALTERNATE ASSESSMENT (2021), <https://faa.fsassessments.org/content/contentresources/en/FAA-PT-ELA-ALDs.pdf> [<https://perma.cc/HP4H-VH2D>].

158. *Id.*

numbers, compare fractions, solve two-step addition and subtraction problems, and identify quadrilaterals.¹⁵⁹

For the FSAA-Datafolio exam, there are only three levels of achievement.¹⁶⁰ For ELA, students functioning at level two in grade three are working to identify character development, identify Greek and Latin roots and base words, and identify the central idea of a text.¹⁶¹ For level two students in grade three, the mathematic assessment is based on reading and generating numbers from one to one-thousand, recognizing fractions less than a whole, and solving time problems by finding an end time when given a start time and elapsed time in whole hours or minutes.¹⁶²

a. FSAA – Performance Task and Datafolio ELA and Math Results

In the school year of 2022, 27,426 students qualifying for FAA-Performance Task were enrolled in ELA, and 92.3% were administered an FSAA- Performance Task exam.¹⁶³ For mathematics, 19,270 students were enrolled and 94.4% were tested.¹⁶⁴ For the grade three ELA exam, 31.8% of students scored at level three proficiency, 31.4% scored at level two, 20.36% at level one, and 16.37% at level four.¹⁶⁵ For grade three mathematics, 28.8% of students scored at level three, 26.9% at level two, 25.1% at level one, and 19.1% at level four.¹⁶⁶

In the 2023 school year, 1,024 students qualifying for FSAA-Datafolio were enrolled in ELA, and 88.41% were tested.¹⁶⁷ For

159. *Id.*

160. *FAA—Datafolio Achievement Level Descriptions (ALDs)*, FLA. ALTERNATE ASSESSMENT: RESOURCE LIST, <https://faa.fsassessments.org/resource-list/en/faa-datafolio-achievement-level-descriptions-alds> [<https://perma.cc/HH52-D97W>] (last visited Jan. 30, 2026).

161. FLA. ALTERNATE ASSESSMENT, FLORIDA ALTERNATE ASSESSMENT—DATAFOLIO: ENGLISH LANGUAGE ARTS ACHIEVEMENT LEVEL POLICY DEFINITIONS AND ACHIEVEMENT LEVEL DESCRIPTIONS 2 (2021), <https://faa.fsassessments.org/content/contentresources/en/FAA-Datafolio-ELA-ALDs.pdf> [<https://perma.cc/LFB5-SGH8>].

162. FLA. ALTERNATE ASSESSMENT, FLORIDA ALTERNATE ASSESSMENT—DATAFOLIO: MATHEMATICS ACHIEVEMENT LEVEL POLICY DEFINITIONS AND ACHIEVEMENT LEVEL DESCRIPTIONS 2 (2021), <https://faa.fsassessments.org/content/contentresources/en/FAA-Datafolio-Math-ALDs.pdf> [<https://perma.cc/MTK7-V4MJ>].

163. FLA. ALTERNATE ASSESSMENT, FLORIDA STANDARDS ALTERNATE ASSESSMENT PERFORMANCE TASK (FSAA—PT) TECHNICAL REPORT 2022–23 app. B (2023), <https://faa.fsassessments.org/content/contentresources/en/2022-23-FSAA-Performance-Task-Tech-Report.pdf> [<https://perma.cc/3BRG-ZVXS>].

164. *Id.*

165. *Id.* at app. O.

166. *Id.*

167. FLA. ALTERNATE ASSESSMENT, FLORIDA STANDARDS ALTERNATE ASSESSMENT DATAFOLIO (FSAA—DATAFOLIO) TECHNICAL REPORT 2022–23 app. B at 1 (2023), <https://faa.fsassessments.org/content/contentresources/en/2022-23-FSAA-Datafolio-Tech-Report.pdf> [<https://perma.cc/4AKS-NXDP>].

mathematics, 754 students were enrolled and 87.93% were tested.¹⁶⁸ The Datafolio exam is scored using score combinations.¹⁶⁹ There are three qualifications for each subject on each level (levels ranged from one to three), and for each qualification the students receive a score ranging from zero to five.¹⁷⁰ The score combinations are what determines the students' level of achievement.¹⁷¹ For ELA, out of the 898 students tested, 24.39% of students (219 students) received a score combination of three zeros, amounting to the greatest quantity of students in any score combination.¹⁷² Out of the 658 students tested in mathematics, 25.53% of students (168 students) received a score combination of three zeros, also amounting to the greatest quantity of students in any score combination.¹⁷³ The data from the FSAA-Datafolio score combinations demonstrates that the combination in which the largest quantity of students received in both ELA and mathematics was all zeros—meaning the achievement level that the largest quantity of students obtained was no achievement at all.

b. Teacher/Administrator Feedback

The FAA website's 2022–23 Performance Task Technical Report included an Administrator and Teacher Survey Report.¹⁷⁴ Notable feedback provided by teachers and administrators after the administration of the 2023 FSAA-Performance Task exam included:

“Test is not appropriate for a [nonverbal], autistic student that gets easily frustrated.”

“This test does not test what students in a classroom with significant disabilities are taught. We need to focus on functional skills. The rainfall in Tallahassee is not part of a functional skill at the elementary level. If my students were able to do multiplication, they would be in the general education classroom. There is no [] reliability to this test. [The] student guessed most answers. Students chose answers to please the teacher. There is little to measure what knowledge or progress students have made. Students' progress is INDIVIDUAL! What a waste! Of my time and yours!”

168. *Id.* at 2.

169. *Id.* at app. G.

170. *Id.*

171. *Id.*

172. *Id.* at app. I.

173. *Id.*

174. FLA. ALTERNATE ASSESSMENT, *supra* note 163, at app F.

“I think this alternative assessment does not measure what a student with multiple disabilities knows and what they are able to learn.”

“Yes! This was ridiculous. I spent well over 30 hours administering this garbage. Most of my students did not understand the questions, so the assessment is meaningless! What a waste of time. Why do we have standardized tests for students with significant disabilities? This is nonsensical. It is such a waste of time. What did you assess? Florida geography? Really? Explain what the purpose of this garbage is. Thank you!”

“The material got here late and was inappropriate. The students do not have a grasp of grammar, decimals, fractions, etc.”

“Some of the questions are too difficult for this population of students. Having to answer two step math problems is too difficult. Also[,] the test is too wordy, by the time I am finished reading the questions, the students are not engaged and have forgotten the question.”

“I continue to be surprised with the difficulty of the test questions for students with a significant cognitive disability. Who creates the questions? Have they been in an InD classroom or spoken to teachers about their concerns.”

“Reading passages are ridiculous and [too] long for students with cognitive disabilities. The reading test should be the same format as the civics test. Math concepts should be based on functional math. Is it really necessary for a student with cognitive disabilities to know about a scatter plot, solving equations with two variables, or the structure of a sentence? This test should be focusing on functional reading and math. This test is a joke and doesn’t show what our students are able to do. Plus, it has had the same questions and reading passages for over the past 5 years.”

“I have administered this test for several years and for over 2 decades administered similar tests of multiple states. I work with students with high magnitude behaviors. I have gone to great lengths in testing to do it with fidelity. To keep documents safe. Probably 99% of the time the students will [chose] either the last choice or a picture that is appealing to them. I put my own health at risk when I administer this [test]. I take great precautions to ensure safety of myself,

students, and staff. This year I went [to the] ER cause of a behavior triggered by test.”¹⁷⁵

These are just a select few of the numerous negative responses to the level of difficulty and rigor that children with the “most severe cognitive disabilities” were being expected to perform at. The FSAA-Datafolio Technical Report for the 2022–23 school year similarly provided for teacher and administrator responses.¹⁷⁶ Notable responses after the administration of the 2022–23 FSAA-Datafolio exam are as follows:

“The test needs to be removed. Most students do not even actually “take” the test. They just point or guess. This is not a true picture of a [student’s] ability. There were countless times my students just got lucky over and over and point at the correct answer. This is just unnecessary additional stress on a population of teachers who are already weary to the bone. This is one of the reasons I am not returning to this classroom.”

“Student had severe seizures all of collection 3 period. He went from a P to a N & I couldn’t document that....That is wrong!”

“My student was most of the time sleeping or absent, it was very hard to find the right moment to administer the test.”

“The tasks for the very low non verbal students is not applicable or appropriate. More consideration for exemptions should be in place.”

“I think the activities are too hard for a student with a 18 month old understanding, but I realize it is not your choice.”

“The process for exempting our most impaired students should be far simpler. The rumor is that districts don’t want to opt eligible students out because districts will lose funding/\$\$. If true, how tragic that our students are being reduced to.”¹⁷⁷

Again, these are just a few of the many negative reactions to the level of achievement expected in the FSAA-Datafolio exam; an exam intended to be administered not only to children with the most severe cognitive disabilities, but children within that group who struggle with communication and work at a pre-academic level.

The “rumor” addressed in the final quoted piece of feedback is unfortunately no rumor at all but the sad truth. Schools, districts, and

175. FLA. ALTERNATE ASSESSMENT, *supra* note 163, at app F.

176. FLA. ALTERNATE ASSESSMENT, *supra* note 167, at app. D.

177. FLA. ALTERNATE ASSESSMENT, *supra* note 167, at app. D.

states fear losing funding if they have under ninety-five percent participation in standardized testing or exempt over one percent of children with the most severe cognitive disabilities. As a result, students within the one percent are subjected to inappropriate testing conditions, and students falling just outside the one percent must participate in the general education standardized testing.

Similarly, Florida schools, including schools catered to the subgroup of students with severe cognitive disabilities, must test at least ninety-five percent of all students within the school. With this implication, students who are physically and/or cognitively unable to perform on the FAA or have proven to not benefit from learning complex math, ELA, and science/social studies topics, must still be subjected to an alternate assessment testing their performance in various academic fields far beyond their level of understanding.

IV. THE PROBLEM AND PROPOSED SOLUTION

It is evident not only from the FAA-Datafolio results¹⁷⁸ but from the detailed feedback from teachers and administrators that the method of evaluating the academic achievements of disabled students must be revised.

A. *The Problem with ESSA*

The concept of “progress” seems to be an overarching theme for ESSA: progress towards having only one percent of students taking an alternate assessment is required for a one percent waiver,¹⁷⁹ disabled students are required to progress beyond their baseline in order to “close the gap,”¹⁸⁰ and standardized test results are used to demonstrate both school and student progress.¹⁸¹ These “progress” requirements beg the aforementioned question: What if there is no progression to be made? The inability to progress with the current system in place is demonstrated by Florida’s attempt to circumvent the one percent cap by applying for a waiver for three years in a row, only for their 2023 waiver to be denied due to their failure to show the required progress towards achieving one percent.¹⁸² As Florida has stated their intent to apply for yet another one percent cap waiver for the 2024 school year,¹⁸³ it is evident that progress is unlikely.

178. FLA. ALTERNATE ASSESSMENT, *supra* note 167, at app. I (illustrating that the score combination that the greatest quantity of students received was all zeros in both ELA and mathematics).

179. 34 C.F.R. § 200.6(c)(4)(v) (2026).

180. FLA. DEP’T OF EDUC., *supra* note 119, at 14.

181. 20 U.S.C. § 6311(b)(2)(A)-(C).

182. FLA. DEP’T OF EDUC., *supra* note 137, at 4.

183. FLA. DEP’T OF EDUC., *supra* note 137, at 4.

The one percent most cognitively impaired students with no formal mode of communication who function at pre-academic levels¹⁸⁴ are being required to take an annual standardized test assessing topics such as Latin base words and fractions.¹⁸⁵ Consequentially, it should come as no surprise that the score received by most test takers was zeros across the board.¹⁸⁶ As for cognitively impaired students who do not fall within the top one percent, they will take the same exam administered to every student in their grade level within the state.¹⁸⁷ While states now choose whether or not they wish to allow parents to opt their children out of this testing, ESSA states that if less than ninety-five percent of students participate in the state's standardized exam, the school is at risk for losing their Title I funding.¹⁸⁸

The intended "silver lining," however, is that, as states are now free to choose which standardized test these students will be taking, a child falling just outside of the one percent most cognitively disabled can take the SAT or ACT instead of the formerly federally mandated Common-Core exam.¹⁸⁹ These requirements were all set with the end goal being for disabled students to academically progress closer to the achievement levels of non-disabled students, promoting inclusion in public education.¹⁹⁰ While the goal in mind is well intended, the desired results are unattainable with the methods currently being implemented, and serious revisions must be made if progress is to ever be achieved.

B. Proposed Solutions

Revisions on both the state and federal level may serve as a solution to the problem of education legislation failing to meet the intended goal of inclusion of disabled students in public education. By amending the state alternate assessments to more appropriately suit the targeted test takers, or most importantly allowing for an opt-out provision in ESSA, improvement in education policies can more effectively be reached.

1. State Level

ESSA requires that ninety-five percent of all disabled students be tested and only allows one percent of the most cognitively impaired students to take an alternate assessment,¹⁹¹ creating a large barrier to change at the state level. Likewise, states wishing to exempt more than

184. FLA. DEP'T OF EDUC., *supra* note 137, at 17.

185. FLA. ALTERNATE ASSESSMENT, *supra* note 161.

186. FLA. ALTERNATE ASSESSMENT, *supra* note 167, at app. I.

187. 20 U.S.C. § 6311(b)(2)(A)-(C).

188. Adler-Greene, *supra* note 107, at 21.

189. 20 U.S.C. § 6311(a).

190. FLA. DEP'T OF EDUC., *supra* note 119, at 14.

191. FLA. DEP'T OF EDUC., *supra* note 119, at 29.

one percent of students must apply for a waiver that is approved at the federal level,¹⁹² and states that wish to test less than ninety-five percent of their students risk losing federal funding.¹⁹³ Ironical, considering the mission of ESSA was to limit federal interference with education.

While these barriers limit states' ability to make change at the root of the issue, there is still much to be done at the surface level. For Florida, this change starts with the FAA. Through the teachers' and administrators' feedback on both the content and administration of the FAA, it is evident that the testing method in place is unfit for the students who take the exam. Teachers' remarks indicate that the exam is extremely inappropriate for the academic level the students function at, and many comments state that the exam does not accurately measure the academic achievements of students, as they simply guess or point to the last option given to them. One comment posed a particularly interesting question: "Who creates the questions? Have they been in an InD¹⁹⁴ classroom or spoken to teachers about their concerns?"¹⁹⁵

The answer to who creates the alternate assessments questions is the FLDOE.¹⁹⁶ The FLDOE Bureau of K-12 assessment, according to its website, is responsible for Florida's K-12 statewide student assessment programs, including the developing, administering, scoring, and reporting.¹⁹⁷ These assessment services are provided both by the FLDOE and outside contracts with assessment vendors.¹⁹⁸ Also on the FLDOE website is a list of staff responsible for the scoring, administration, and development of the standardized assessments.¹⁹⁹ The staff of the Test Development Center contains personnel responsible for ELA testing from Pre-K through grade ten, mathematics from Pre-K through Algebra 1, and Geometry, science, and social studies.²⁰⁰ Nowhere on this list is

192. FLA. DEP'T OF EDUC., *supra* note 119, at 29.

193. Adler-Greene, *supra* note 107, at 21.

194. An InD classroom is a classroom for students with an intellectual disability. *Intellectual Disability (InD)*, FLA. DEP'T OF EDUC.: ESE ELIGIBILITY, <https://www.fldoe.org/academics/exceptional-student-edu/ese-eligibility/intellectual-disabilities-ind.shtml> [https://perma.cc/KJ47-FVM6] (last visited Jan. 30, 2026).

195. FLA. ALTERNATE ASSESSMENT, *supra* note 163, at app. F.

196. Fla. House of Representatives, *Teacher Certification*, in EDUC. FACT SHEET 2010-11 at 327 (2010), https://www.flhouse.gov/FileStores/Web/HouseContent/Approved/Web%20Site/education_fact_sheets/2011/documents/2010-11%20Teacher%20Certification.3.pdf [https://perma.cc/SE7P-6LDQ].

197. *K-12 Student Assessment*, FLA. DEP'T OF EDUC.: ASSESSMENTS, <https://www.fldoe.org/accountability/assessments/k-12-student-assessment/> [https://perma.cc/CRW3-FA52] (last visited Feb. 8, 2026).

198. *Id.*

199. *Staff Members*, FLA. DEP'T OF EDUC.: ASSESSMENTS, <https://www.fldoe.org/accountability/assessments/staff-members.shtml#k12> [https://perma.cc/27GF-ANNB] (last visited Feb. 8, 2026).

200. *Id.*

staff for the development of the FAA, or personnel specializing in alternative assessment standards for disabled students. Upon further research through the FAA website, there is a company name and email supplied to offer technical support when administering the FAA program.²⁰¹ The testing company responsible for the creation of the FAA appears to be Cambium Assessments. Cambium Assessments' website states their commitment "to accurate and reliable assessment of what students know and can do."²⁰² However, the teachers in Florida administering the FAA disagree. According to Cambium Assessments, the company works with its state partners to customize exams that provide a full picture of the students' proficiency and test items aligned with state standards.²⁰³ It is unknown from the information on their websites if Cambium Assessments or the FLDOE Test Development Center employs any staff specializing in the creation of alternate assessments or with a background in special education.

While the method of creating the FAA is unknown, the most impactful way to change this broken system on a state level would be for the exam creators to listen to the teachers and administrators. The teachers who are administering the FAA spend months, if not years, alongside these children.²⁰⁴ Their feedback comes not only from years of experience in their profession, but from years of experience with their students. These teachers have voiced that the information on the exams is inappropriate, the tests are not aligned with the students' learning capabilities, they do not accurately measure a students' knowledge or academic achievements, and that the FAA is a waste of everyone's time. As such, if change is to be made on a state level, it must start with the FLDOE taking the feedback that they asked for into consideration and altering the FAA to appropriately align with the academic levels of its test takers.

2. Federal Level

While Florida altering the FAA to better meet the academic levels of the test takers is a step in the right direction, the most impactful change in this system must be made on a federal level. This strong need for

201. *Contact Us*, FLA. ALT. ASSESSMENT, <https://faa.fsassessments.org/contact.html> [<https://perma.cc/DH8U-5KZL>] (last visited Feb. 8, 2026).

202. *Our Commitments*, CAMBIUM ASSESSMENT, <https://www.cambiumassessment.com/commitments.html> [<https://perma.cc/SJ6P-PXCK>] (last visited Feb. 8, 2026).

203. *K-12 State Services*, CAMBIUM ASSESSMENT, <https://www.cambiumassessment.com/state-services.html> [<https://perma.cc/K723-HCZM>] (last visited Feb. 8, 2026).

204. FLA STAT. § 1003.5716 (2025) ("All students with disabilities who are 3 years of age to 21 years of age have a right to a free, appropriate public education."). With this, students with disabilities will be in the public education system for up to 18 years. Students who are in a public specialized school for children with disabilities are often times able to remain in that same school for their entire 18 years of eligibility. As such, teachers, therapists, and administrators performing the FAA on these students may have been alongside them for up to 18 years of their life.

change stems from the one percent alternate assessment participation cap, as well as the ninety-five percent total participation standard.

The one percent alternate assessment participation cap was put in place due to research showing that some students participating in alternate assessments would have been more appropriately assessed with the general assessment.²⁰⁵ While states may request a waiver to exceed the one percent cap, they do so at the risk of losing Title I funding,²⁰⁶ and their waivers may be denied if they fail to show continuous annual progress towards reaching one percent.²⁰⁷ The National Center on Educational Outcomes (NECO) published a brief discussing strategies to assist states in meeting their one percent participation cap.²⁰⁸ The NCEO outlines how to determine if a student has a significant cognitive disability, and provides that intellectual disabilities, autism, and multiply disabled students are examples of children who may fall into this category, while students with learning disabilities, health impairments, or speech-language impairments are children who do not.²⁰⁹ However, the brief does not discuss the possibility of students with significant cognitive disabilities amounting to over one percent of a state's total student body. Not only is this possibility not discussed in literature pertaining to the one percent cap, but there is no evidence that this possibility was accounted for when the cap was implemented.

It is in the students' best interest that there are limitations on who can and cannot participate in an alternate assessment. Participating in these alternate assessments may delay a student's progress towards receiving their high-school diploma, thus delaying, or possibly restricting, post-high school endeavors.²¹⁰ The initial purpose for the implementation of the one percent cap was well-intended, and aimed to protect students from being improperly administered the alternate assessment when they would be more appropriately assessed with the general assessment.²¹¹ However, a numerical quota, especially one as low as one percent, does not seem to be the most efficient and inclusive way to achieve this goal. Due to the quota being as low as one percent, states need to request waivers to exceed this amount and are at risk for losing federal funding. A cap at one percent does not protect students who are fit for the general exam from being improperly administered the alternate exam. Rather, this quota forces schools to choose only the top one percent most cognitively

205. *Strategies for Meeting the 1% State-Level Cap on Participation in the Alternate Assessment*, NCEO BRIEF No. 12 (Nat'l Ctr. on Educ. Outcomes, Minneapolis, Minn.), Apr. 2017, at 2.

206. Burns, *supra* note 143.

207. 34 C.F.R. § 200.6(c)(4)(v).

208. Nat'l Ctr. on Educ. Outcomes, *supra* note 205.

209. See Nat'l Ctr. on Educ. Outcomes, *supra* note 205, at 3.

210. Nat'l Ctr. on Educ. Outcomes, *supra* note 205, at 2.

211. See Nat'l Ctr. on Educ. Outcomes, *supra* note 205, at 2.

disabled students to receive the alternate assessment, while students falling just outside the one percent are limited to taking exams such as the SAT. Though ESSA aimed to promote inclusivity of disabled students in public education with this one percent cap, it has created inappropriate testing conditions that do not accurately measure disabled students' academic achievements and capabilities.

The same can be said for the ninety-five percent assessment participation standard. Under ESSA, ninety-five percent of all students, and ninety-five percent of every subgroup (including children with disabilities) must participate in state standardized testing, or states risk losing Title I funding.²¹² The goal of a ninety-five percent participation rate similarly aims to promote inclusivity and to ensure that all students, including disabled students, are participating in assessments to accurately measure the students' and schools' academic progress. However, with the ninety-five percent participation rate and one percent cap combined, disabled students are at a disadvantage. Cognitively disabled students who do not meet the standard to be included in the one percent cap are being forced to participate in general assessments that are not appropriate for their academic level, and due to the ninety-five percent participation standard, they are restricted from opting out. Likewise, students who do meet the one percent cap but are cognitively disabled to a degree in which the alternate assessment is not appropriate for their academic level are also restricted from opting out of testing due to the ninety-five percent participation standard. This ninety-five percent participation standard, which aims to ensure all students are being tested to accurately measure academic progress, is operationally functioning in a way where disabled students must take an exam that is inappropriate for their academic level and in turn, will not accurately measure their academic ability. If this seems counterintuitive, that is because it is.

Calling for the elimination of the one percent alternate assessment cap or ninety-five percent participation cap under ESSA would be a major change, especially considering ESSA had retained these provisions from NCLB.²¹³ However, beneficial change can be made without the elimination of established provisions by amending ESSA to include a new provision. In order to make standardized testing more inclusive for disabled students, the most effective method would be to impose an opt-out provision. The opt-out provision would pertain to cognitively disabled students who have proven that an alternate assessment route is

212. Adler-Greene, *supra* note 107, at 21.

213. With the 95% participation standard and 1% alternate assessment cap surviving multiple rounds of revisions from NCLB through ESSA, it is proven that the government has a strong stance in retaining these provisions. As such, revising ESSA to eliminate these provisions is likely an unattainable goal. *See* 20 U.S.C. § 1412 (a)(1)(A).

not appropriate to measure their academic ability, either through prior testing scores or through an evaluation by their IEP team.

An example of students who would fall into this category would be the students who had scored across-the-board zeros on the FAA-Datafolio exam, possibly for many years in a row. The students covered under this opt-out provision would not be included in assessing the ninety-five percent participation standard, and as such would not put their state at risk for losing federal funding by opting out. Likewise, as students who are not fit for the alternate assessment would be opting out, there would be more room in the top one percent cognitively disabled cap for students who an alternate assessment would be appropriate for. Due to the top one percent having room to include students who would benefit from taking an alternate assessment, states are less likely to have to apply for a one percent cap waiver or lose funding by exceeding one percent. By implementing this opt-out provision, state alternate assessments such as the FAA would not need to entirely re-structure to better meet the academic abilities of its test takers, as the test takers would now be appropriate for the exam that is in place. By disabled students taking an appropriate exam for their academic levels, the state will be able to better assess the students' level of achievement and analyze the progress in closing the gap between disabled and non-disabled students.

As mentioned, progress is a recurring theme in the education of disabled students: progress towards having only one percent of students taking an alternate assessment is required for a one percent waiver, disabled students are required to progress beyond their baseline in order to "close the gap," and standardized test results are used to demonstrate both school and student progress. With students unfit for alternate assessments being able to opt out of standardized testing, there will be strong progress in having only one percent of students taking alternate assessments, and a one percent waiver will not be necessary. Likewise, disabled students will be able to progress beyond their baseline to close the gap, and the test results meant to demonstrate school and student progress will accurately measure the amount of progress that is being made.

V. IMPLEMENTING THE SOLUTION: THE INTERCEPTION OF AN OPT-OUT PROVISION AND THE ZERO-REJECT PRINCIPLE

While a provision allowing for students deemed unfit for an alternate assessment to opt out of state mandated testing sounds like a simple solution, there is a large legal setback to this concept. This setback is the aforementioned zero-reject principle under the IDEA. Under the zero-reject principle, all children must be afforded a FAPE, including all

children with disabilities.²¹⁴ This FAPE must be available to all children ages three through twenty-one, with no child being deemed uneducable.²¹⁵ This principle reflects the concept of “all” children being included in education laws, as portrayed in the *Rochester* case, with the Court holding that “all” children are included in EHA, with no exception being made for those who are severely disabled.²¹⁶ Likewise, the Court stated that for a child to be included under the Act, they need not demonstrate that they will “benefit” from the educational program in question.²¹⁷ This concept, when looked at alongside the proposed solution of alternate testing conditions for disabled children, raises many issues and questions. Primarily, would the proposed opt-out provision violate the concept of students with disabilities being afforded a FAPE? Additionally, though the Court had stated that a child need not demonstrate that they will “benefit” in order to be included in a program, what happens if their lack of benefit imposes a detriment on another student?

A. Indicators That a FAPE Has Been Provided

As with other educational accommodations for students with disabilities, the ability for a child to opt out of standardized testing would be indicated in their IEP. As previously noted, an IEP is a written statement for each child with a disability that is developed, reviewed, and revised, and must include a statement of the child’s current level of academic performance, including how the child’s disability affects this performance.²¹⁸ It must also include a description of measurable goals and a plan for how the child will meet those goals (amongst other requirements).²¹⁹ The Supreme Court’s determination in *Rowley* indicated that a FAPE for a disabled student would consist of an education designed to meet the needs of the student in question and to allow the child to confer a benefit from the education, and the child’s IEP would express those needs in order for the child to receive an appropriate education under FAPE.²²⁰ Likewise, the Supreme Court in *Endrew* held

214. Turnbull & Turnbull, *supra* note 56.

215. 20 U.S.C. § 1412(a)(1)(A).

216. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 960 (1st Cir. 1989) (“The language of the Act could not be more unequivocal. The statute is permeated with the words “all handicapped children” whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed, as indicated *supra* the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will “benefit” from the educational program.”).

217. *Id.*

218. 34 C.F.R. § 300.320(a) (2026).

219. *Id.*

220. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 176 (1982).

that in order for an IEP to comply with FAPE under IDEA it must reasonably enable a child to make progress in light of their condition.²²¹ Allan Osborne²²² and Ralph Mawdsley,²²³ in their West's Education Law Reporter article *Determining Whether the IDEA's Substantive FAPE Standard Has Been Met*, discuss how standardized test scores can be used to determine if a school has fulfilled its duty of providing a FAPE to a child with a disability, and if the child's IEP is reasonably calculated to provide a FAPE.²²⁴ In this article, it is stated that though standardized test results may be most appropriate for mainstream students, they can be useful for measuring growth for some students in special education settings as well.²²⁵ The article goes on to cite numerous cases where courts had ruled that, due to students showing growth on standardized test scores, it was determined that the school had met its requirement of providing that student with a FAPE.²²⁶

However, standardized test scores are not the only accepted indicators of an IEP's goals being met, and thus a FAPE being provided. The case of *Jaccari J. v. Board of Education of City of Chicago* is cited in Osborne and Mawdsley's article, as the court had ruled that a child's test scores alone do not indicate progress.²²⁷ Other indicators to determine academic and behavioral growth may be used, such as report cards indicating the child's improvement in putting forth effort, and improvement in their willingness to cooperate with staff.²²⁸ Likewise, in the case of *James D. v. Board of Education of Aptakisic-Tripp Community Consolidated*,²²⁹ the court held that testimony by the student's teacher that the student was making progress, in addition to the student's improvement on standardized test scores, sufficed to conclude that the student's IEP was

221. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

222. Allan G. Osborne, Jr., SAGE PUBL'NS: AUTHOR, <https://us.sagepub.com/en-us/nam/author/allan-g-osborne-jr> [<https://perma.cc/3SCT-GANG>] (last visited Jan. 24, 2026).

223. Ralph D. Mawdsley, CLEV. ST. UNIV. PURE RSCH. GALLERY: PROFILES, <https://csuohio.elsevierpure.com/en/persons/ralph-d-mawdsley/> [<https://perma.cc/44C6-7VRP>] (last visited Jan. 24, 2026).

224. Allan G. Osborne, Jr. & Ralph D. Mawdsley, *Determining Whether the IDEA's Substantive FAPE Standard Has Been Met*, 310 W.'S EDUC. L. REPORTER 595, 612–13 (2015).

225. *Id.* at 600–01.

226. *Id.* at 601–02.

227. *Id.* at 603; *Jaccari J. v. Bd. of Educ.*, 690 F. Supp. 2d 687, 697 (N.D. Ill. 2010) (“While Jaccari's results on standardized tests are certainly less than desirable, they must be considered in the context of his intellectual and emotional impairments. Ideally, Jaccari would be performing near his grade level on standardized tests. In this case, however, the Court is faced with less-than-ideal circumstances. As evident in the record, Jaccari has been diagnosed with a case of ‘Mild Mental Retardation’; his level of cognitive ability has also been categorized in the ‘mentally deficient range.’ Given these cognitive impairments, the Court finds that standardized test scores are not the sole or dispositive indicia of progress.”).

228. *See Jaccari*, 690 F. Supp. 2d at 698.

229. *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804 (N.D. Ill. 2009).

reasonably calculated to confer an educational benefit. In the case of *K.S. ex rel. P.S. v. Fremont Unified School District*,²³⁰ the court ruled that, “nothing in the IDEA or related case law equates appropriate progress with achievement of each and every goal set forth in the IEP.” The court similarly stated that a student making slow progress does not indicate that they have not received a FAPE, especially in light of a child’s cognitive impairments.²³¹

In the case of *G.D. v. Swampscott Public Schools*,²³² a Massachusetts student’s parents argued that IDEA required a school district to meet the standards of the State’s educational agency when providing a FAPE. In Massachusetts, the State Educational Agency’s standard was to use standardized testing to measure progress.²³³ As such, the parents asserted that since standardized testing is relied on in Massachusetts, evidence that a child has made no progress on state standardized tests will suffice to prove that the child is not showing the progress necessary to have received a FAPE, despite other evidence of progress towards IEP goals.²³⁴ The court held that a child will receive a FAPE if their IEP is reasonably calculated to enable them to make appropriate progress in light of their circumstances, and standardized tests are designed to measure progress without regard to individual circumstances.²³⁵ As such, it was appropriate for the district court to use informal assessment evidence of the student’s “slow gains” under the IEP to show that the student had been afforded a FAPE, instead of using the evidence that the student had failed to progress on state-wide standardized testing.²³⁶

Analyzing the holdings of the discussed cases, it is evident through precedent that indicators such as report cards, willingness to cooperate, teacher testimony, and informal assessment evidence will be acceptable to prove that a child has made progress towards meeting IEP goals and thus has been afforded a FAPE. Likewise, as seen in the holdings of *K.S. v. Fremont* and *G.D. v. Swampscott*, not every IEP goal must be met in order to indicate progress, and “slow gains” or slow progress are acceptable to show the student has received a FAPE.²³⁷ Factors other than standardized testing have been proven to indicate that a child with disabilities has been afforded a FAPE, and that their IEP has been tailored to provide said FAPE. With these precedents, it is demonstrated that

230. *K.S. ex rel. P.S. v. Fremont Unified Sch. Dist.*, 679 F. Supp. 2d 1046, 1057 (N.D. Cal. 2009), *aff’d sub nom. K.S. v. Fremont Unified Sch. Dist.*, 426 F. App’x 536 (9th Cir. 2011).

231. *Id.* at 1057.

232. *G.D. v. Swampscott Pub. Sch.*, 27 F.4th 1, 5 (1st Cir. 2022).

233. *Id.* at 11.

234. *Id.* at 12.

235. *Id.*

236. *Id.*

237. *K. S. v. Fremont Unified Sch. Dist.*, 426 F. App’x 536, 528 (9th Cir. 2011); *G.D.*, 27 F.4th at 5. *See also* Osborne & Mawdsley, *supra* note 227, at 600.

standardized testing and the analysis of standardized testing results are not necessary to determine that a student with disabilities has received a FAPE, as standardized tests are designed to measure progress without any regard to individualized circumstances. As such, an opt-out provision for students who are deemed unfit for an alternate assessment will not violate IDEA, as it can be proven that those students will still have been afforded a FAPE despite not participating in state standardized testing.

B. *Balancing Benefits and Detriments*

As previously noted, the court in *Rochester* stated that a disabled child does not need to demonstrate that they will benefit from the educational program in question as a prerequisite for inclusion.²³⁸ However, there is very little literature on what would occur if a disabled student's lack of benefit comes as a detriment to another student. This question is especially prevalent when discussing a potential opt-out provision. The opt-out provision's necessity stems from significantly cognitively impaired students who have proven to not benefit from an alternate assessment being required to take said assessment, thus being included in the one percent cap and ninety-five percent participation standard. These students inappropriately taking the alternate assessment, yet being included in the state quotas, may come as a detriment to students who would benefit from an alternate assessment, but are required to take the general assessment as they fall just outside the one percent cap.

Though this specific issue has yet to be uncovered, the closest parallel that can be made is through the concept of a least restrictive environment. Under the IDEA, the state must have policies and procedures in place to ensure that children with disabilities, to an appropriate extent, are educated alongside their nondisabled peers.²³⁹ The removal of children with disabilities from a regular educational environment should only occur if the nature or severity of the disability is to an extent in which a satisfactory education cannot be provided in the regular classroom.²⁴⁰ This concept is known as the "least restrictive environment" (LRE).²⁴¹ While these requirements were implemented to promote the inclusion of special education students in a general education classroom setting, concerns have been raised about the effects of LRE requirements on nondisabled students.²⁴²

238. *Timothy W. v. Rochester Sch. Dist.*, 875 F.2d 954, 965–66 (1st Cir. 1989).

239. 34 C.F.R. § 300.114(a)(2) (2026).

240. *Id.*

241. *Id.*

242. Mark T. Keaney, *Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools*, 56 ST. LOUIS U. L.J. 827, 830 (2012) ("The increasing presence of special education students in general education classrooms has raised concerns not only about the overall efficacy of the integration model for special education students, but also about its potentially adverse impact on the general education population. Critics

In the case of *Daniel R.R. v. State Board of Education*,²⁴³ the Fifth Circuit Court analyzed the appropriateness of a child with disabilities being placed in a regular education classroom under LRE requirements. The court implemented a balancing test, weighing the benefits of a disabled student's presence in a regular classroom against any detriments their presence may impose on their peers.²⁴⁴ With this, the court analyzed whether the disabled student would benefit from being in a regular education classroom by evaluating the student's ability to grasp the curriculum alongside any potential social benefits of mainstreaming, such as language models.²⁴⁵ As for detriments, however, the court stated that mainstreaming may be less beneficial to disabled students themselves if an instructor had to modify the curriculum to better suit a disabled child who is not required to learn the material taught in the regular education classroom.²⁴⁶ The court further stated that if an instructor in a regular classroom must devote all of their time to a child with a disability, it may be to the detriment of the entire class—possibly even to other equally deserving disabled students who require their attention.²⁴⁷ As such, if a disabled child in a mainstream classroom is disruptive to the extent that the education of other students is significantly impaired or the child requires so much of the instructor's attention that the other students suffer, the balancing scale will tip in favor of the child being placed in a special education environment.²⁴⁸ By analyzing all of these factors, the Court concluded that, in a regular classroom, the child gained little-to-no educational or social benefit, took most of the instructor's attention away from other students, and was disruptive to the rest of the class.²⁴⁹ As such, it was found that the district's decision to remove the child from regular education did not violate LRE requirements because the balancing test showed that the child was a better fit for a special education setting.²⁵⁰

The balancing test outlined in *Daniel* can be applied analogously to the proposed opt-out provision when weighing the benefits of students

of integration argue that the education of non-disabled students is being compromised by the time-consuming, highly individualized demands of their special education counterparts.”).

243. 874 F.2d 1036, 1045 (1989).

244. *Id.* at 1048.

245. *Id.* at 1049.

246. *Id.*

247. *Id.* at 1048–49.

248. *Id.* at 1049–50. “[W]here a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs.” 34 C.F.R. § 300.552 Comment (quoting 34 CFR Part 104—Appendix, Paragraph 24).” *Id.* at 1049. “If, however, the handicapped child requires so much of the teacher or the aide's time that the rest of the class suffers, then the balance will tip in favor of placing the child in special education.” *Id.* at 1049–50.

249. *Id.* at 1050–51.

250. *Id.* at 1050.

unfit for alternate assessments participating in standardized testing against the detriments this may cause other students who are better fit for an alternate assessment. When weighing benefits and detriments, the court in *Daniel* stated that mainstreaming disabled students may be ineffective if instructors have to modify the regular curriculum to better suit disabled students who are not required to learn the same material as non-disabled students.²⁵¹ When applying this logic to the proposed opt-out provision, it can be argued that standardized testing, especially alternate assessments, may be ineffective if the assessment has to be modified to better suit significantly cognitively impaired students who are not capable of learning the tested material (in particular, if the FAA had to be further modified to suit students who the current content is inappropriate and far too advanced for).

The court also analyzes the benefit, if any, that a disabled student receives from being included in a regular classroom setting by evaluating their ability to grasp the curriculum and potential social benefits.²⁵² Likewise, when applying this to the opt-out provision, the benefit of significantly cognitively disabled students participating in standardized testing should be analyzed by their ability to grasp the content of the assessment and the potential social benefits conferred from the students sitting for and participating in said assessments. The court then weighs the possible benefits of including disabled students in a regular classroom against the possible detriments their presence may have on the other students. If the disabled child is imposing a detriment on the education of the other students, the balance will tip towards a special education setting.²⁵³ As such, the benefits of significantly cognitively impaired students participating in standardized testing should be weighed against the detriments their participation may have on the students who fall just outside the one percent cap. If their inclusion in standardized testing (and as such, within the one percent cap) provides them with no educational or social benefit but is coming as a detriment to other students (students who fall just outside the one percent cap who would be a better fit for an alternate assessment), the balance should tip towards opting out. By opting out, there would be room within the one percent cap for students who are better suited for an alternate assessment than the general assessment, and under the proposed provision, this opt out would not affect the ninety-five percent participation standard.

Though the *Daniel* case discusses LRE requirements and not standardized testing provisions, the analogous application of the court's balancing test can be used to demonstrate that significantly cognitively impaired students who are unfit for standardized testing should be eligible

251. *Id.* at 1049.

252. *Id.*

253. *Id.*

to opt out if it is found that the testing provides the students in question with no benefit, yet their participation comes as a detriment to other students who fall just outside the one percent cap.

CONCLUSION

ESSA's one percent alternate assessment cap and ninety-five percent participation standard have consequently negatively impacted disabled students—the very students the statute aims to protect. ESSA, alongside other education legislation such as IDEA, aims to promote inclusivity for disabled students in the public education system, yet continues to fall just short of truly and effectively meeting this goal.

Alternate assessments currently in place, such as the FAA, are far beyond the appropriate level of rigor suitable for its test takers, as seen through poor assessment results and complaints from teachers and administrators. Likewise, due to the one percent alternate assessment cap, states must only allow the top one percent most cognitively impaired students to take this alternate assessment, leaving students falling just outside the top one percent with no option other than to take the general assessment. With ESSA's ninety-five percent participation standard, even if a state allows for an opt-out provision, parents are disincentivized from opting their child out of standardized testing as it puts the school at risk for losing Title I funding. As such, students within the top one percent most cognitively disabled must take alternate assessments far beyond their academic capacity without the ability to opt out of testing, while students more properly suited for this alternate assessment must take the same general assessment as their non-disabled peers.

This cycle of improper and inappropriate standardized testing conditions leading to a lack of inclusivity and progress in special education can be solved with the addition of an opt-out provision to ESSA. This provision would allow eligible severely cognitively disabled students (either through analysis of their prior testing scores or evaluation by their IEP team) to opt out of ESSA's standardized testing provisions without being included in the ninety-five percent participation standard or the one percent alternate assessment cap. This solution would release these children from inappropriate mandatory standardized testing requirements, while simultaneously creating room for students within the top one percent whom the alternate assessments are better suited for. As such, states will have less concern over exceeding one percent, applying for one percent waivers, or dropping below ninety-five percent participation at risk of losing funding.

By way of an opt-out provision, education legislation can effectively progress towards the goal of inclusivity for disabled students in the public education system. Teachers, parents, and administrators alike have expressed the need for change in legislation, and it is time for lawmakers

to listen to these concerns and execute the necessary solutions to implement appropriate standardized testing policies for disabled students.