
POLICING STATE TESTING UNDER NO CHILD LEFT BEHIND: ENCOURAGING STUDENTS WITH DISABILITIES TO BLOW THE WHISTLE ON UNSCRUPULOUS EDUCATORS

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*"In God We Trust, all others bring data."*¹

I. INTRODUCTION

With these words, U.S. Secretary of Education Margaret Spellings expressed her belief that the progress of state public educational systems can only be trusted when supported by objective data.² While the age-old adage, "numbers do not lie," may hold true in other contexts, the results of recent investigations along with teacher and student allegations suggest that in the educational context, sometimes they do.³ In an effort to feign educational progress on state assessment tests in reading and mathematics, educators at state and local levels are targeting low performing students by excluding these students from state testing, providing them with the correct answers to test questions during their exams, and doctoring their answer sheets before submitting them for scoring.⁴

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1. Margaret Spellings, Sec'y of Educ., U.S. Dep't of Educ., Remarks at the Microsoft Women's Conference (Jan. 12, 2006) (transcript available at <http://www.ed.gov/news/speeches/2006/01/01122006.html>).

2. *See id.*

3. *See infra* Part III.

4. *See infra* notes 67–74 and accompanying text.

What is driving educators to cheat? The answer: federal legislation known by four words that are striking fear into educators throughout the nation—"No Child Left Behind."⁵ Few can argue with the Act's admirable goals: (1) ensuring that all children, including those historically left behind, are held to the same academic achievement standards; (2) narrowing the achievement gap between our nation's highest and lowest performing students; and (3) ensuring that all students reach grade-level proficiency by 2014.⁶ However, under No Child Left Behind ("NCLB"), states, school districts, and public schools are exposed to an escalating series of harsh sanctions when student test scores on state assessment tests in reading and mathematics do not reflect "adequate yearly progress."⁷ Since NCLB's inception, many of our nation's school districts and public elementary and secondary schools have failed to make adequate yearly progress.⁸ These failures have coincided with reports indicating that teachers and administrators, whose jobs and professional reputations are at risk, are doing whatever it takes to portray progress.⁹

Students with disabilities are particularly vulnerable to educator misconduct.¹⁰ Many claim that these students, by definition, cannot reach grade-level proficiency.¹¹ Yet, except for the small percentage that qualify for alternate assessment,¹² students with disabilities are held to the same

5. No Child Left Behind Act of 2001, 20 U.S.C.A. §§ 6301–7941 (Westlaw through May 2007 legislation) [hereinafter NCLB]. See also CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 4 OF THE NO CHILD LEFT BEHIND ACT 10 (2006), available at <http://www.cep-dc.org/index.cfm?fuseaction=Page.viewPage&pageId=495&parented=481> [hereinafter YEAR 4 OF THE NO CHILD LEFT BEHIND ACT] (noting one educator's opinion that NCLB attempts to make good workers out of teachers by using fear, threats, and scare tactics).

6. See 20 U.S.C.A. §§ 6301, 6311(b)(2)(F).

7. See *id.* § 6316.

8. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 56–57 (finding that about 16% (14,121) of schools and 20% (2,347) of school districts failed to make adequate yearly progress based on 2004–05 test results). See also Press Release, Ctr. on Educ. Policy, New Report on No Child Left Behind Offers First-Ever Analysis of Implementation Efforts at Federal, State & Local Levels, (Jan. 26, 2004), available at http://www.cep-dc.org/pubs/nclby2/nclb_press_26jan2004/css/nclb_press_26jan2004.htm.

9. See *infra* notes 67–74 and accompanying text.

10. See *infra* Part V.

11. CTR. ON EDUC. POLICY, FROM THE CAPITAL TO THE CLASSROOM: YEAR 3 OF THE NO CHILD LEFT BEHIND ACT 91 (2005) [hereinafter YEAR 3 OF THE NO CHILD LEFT BEHIND ACT] ("Some asserted that many special education students are generally unable to reach proficiency 'by definition,' because if they were able to reach grade or proficient level they would no longer require special education services.").

12. See *infra* Part II.B.1 (noting that the U.S. Department of Education allows states to assess students with disabilities using alternate assessments, but places limits on the number of proficient scores on such assessments that can be counted toward adequate yearly progress).

high standards as their grade level peers under NCLB.¹³ Educators are growing increasingly disgruntled as they see otherwise high performing schools sanctioned under NCLB because students with disabilities, as a group, fail to demonstrate adequate yearly progress.¹⁴ While the U.S. Department of Education has provided some flexibility for the assessment of these students,¹⁵ many educators argue that more needs to be done.¹⁶ Additionally, research suggests that while other students are scoring at higher levels on state assessment tests, students with disabilities have not demonstrated the same degree of progress.¹⁷ Research indicating that adequate yearly progress will grow increasingly difficult to attain, as schools approach the 2014 deadline,¹⁸ suggests that students with disabilities will be more likely to fall victim to educator misconduct in the years to come.

This Note argues that students with disabilities and their parents must police the system to prevent future misconduct. Part II of this Note introduces the No Child Left Behind Act and its requirements for states receiving federal education funding. Part III describes recent occurrences of cheating and illustrates the numerous ways in which educators are attempting to manipulate the system. Part III also argues that what has been reported so far most likely only represents the tip of the iceberg and that

13. 20 U.S.C.A. § 6311(b)(1)(B) (Westlaw through May 2007 legislation).

14. See YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67; YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 91. In its report the Center on Education Policy (“CEP”) describes a middle school in suburban Michigan that is in restructuring because its students with disabilities have failed to make adequate yearly progress. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67. “Last year, district officials estimated that if only two more special education students had passed state tests, the school would have made [adequate yearly progress]. Teachers [in the district] complain that Michigan’s state achievement test is intimidating and discouraging to special education students” and “has no value to them.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67–68.

15. See *infra* Part II.B.1.

16. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67; Patti Ralabate, Senior Professional Associate for Special Needs, National Education Association (NEA), Statement to the Aspen Institute’s Commission on No Child Left Behind (Aug. 2, 2006) [hereinafter Statement of Patti Ralabate], available at <http://www.nea.org/lac/esea/080206testi.html>.

17. See sources cited *infra* notes 137–47; YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 91.

18. See *infra* note 92; YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 65 (noting factors that may make it more difficult for schools and districts to demonstrate adequate yearly progress in the future). In addition to rising adequate yearly progress targets, the CEP reported that in NCLB’s fourth year, some states had just started to test children in all grades three through eight and once in high school. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 65. According to the CEP, “more tested grades will mean that student subgroups will be large enough to count for [adequate yearly progress] at individual schools, and some subgroups may not meet state targets.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 65.

more instances of cheating can be expected in the years to come. Part IV attempts to pinpoint why teachers and administrators are cheating under NCLB, ultimately identifying four reasons why NCLB's high-stakes accountability encourages educators to manipulate the system.

Part V of this Note contends that students with disabilities are likely to fall victim to educator misconduct under NCLB. Educators feel that NCLB's goal of 100% proficiency by 2014 is especially unrealistic for these students. In addition, many schools and districts are being punished because students with disabilities are not demonstrating academic progress. Part VI describes proposed methods of preventing future cheating and argues that these methods will not adequately address the problem because they are difficult to implement and may do more harm than good. Part VI also argues that due to a lack of federal and state funding, school districts already finding it difficult to afford NCLB's requirements cannot be trusted to do what is necessary to prevent future cheating.

Finally, Part VII argues that because students with disabilities and their parents cannot rely on school districts to prevent future misconduct, students with disabilities need a means of defending themselves against unscrupulous educators. Part VII argues that when educators exclude students with disabilities from state testing or help them cheat on state assessment tests, they violate their rights under title II of the Americans with Disabilities Act ("ADA") and section 504 of the Rehabilitation Act. Furthermore, Part VII argues that when educators cheat, students with disabilities are harmed because cheating denies students their right to equal educational opportunities and may prevent them from obtaining the option to transfer to a better school or to receive supplemental educational services paid for by the district. Additionally, when students with disabilities are denied meaningful participation in state testing, they are further stigmatized; a result which research has shown is likely to adversely affect their future academic achievement. Part VII also describes how students with disabilities go about establishing a violation and the various forms of relief available to them. It concludes by describing the various reasons why private causes of action will prove to be the missing link to preventing future cheating and suggests that effective prevention will now require instructing students with disabilities and their parents how to spot misconduct.

II. THE NO CHILD LEFT BEHIND ACT

In January 2002, Congress passed the No Child Left Behind Act of

2001.¹⁹ “[NCLB] builds off the 1994 reauthorization of the Elementary and Secondary Education Act of 1965 (ESEA) . . . and its focus on lessening the disparities in academic performance between poor and wealthy schools.”²⁰ Supporters hope that NCLB will succeed where its predecessors have failed and finally achieve educational equality at the elementary and secondary school level.²¹ NCLB is premised on the theory that by holding states accountable for the performance of their local educational agencies and public elementary and secondary schools, NCLB will ensure that all students, including those historically “left behind,” receive a high-quality education.²² Thus, under NCLB, each state that receives federal funds pursuant to title I of the ESEA must demonstrate to the U.S. Department of Education that it has developed a “single, statewide accountability system for its local educational agencies and elementary and secondary schools.”²³ Accountability systems must include challenging academic achievement and content standards²⁴ and valid and reliable state assessments in reading and mathematics that are aligned with these

19. No Child Left Behind Act, Pub. L. No. 107-110 (codified as 20 U.S.C.A. §§ 6301–7941 (Westlaw through May 2007 legislation)).

20. Note, *No Child Left Behind and the Political Safeguards of Federalism*, 119 HARV. L. REV. 885, 887 (2006).

21. “Title I established an annual block grant to state educational agencies (SEAs) in return for a commitment to provide programs benefiting educationally disadvantaged students.” Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-Minded Section 1983 Jurisprudence*, 153 U. PA. L. REV. 1011, 1016 (2005). Numerous reasons have been offered for the failure of title I to achieve educational equality, however, scholars and advocates generally agree that the lack of evaluation and enforcement made it difficult for title I to succeed. See Peter Zamora, Note, *In Recognition of the Special Educational Needs of Low-Income Families?: Ideological Discord and Its Effects Upon Title I of the Elementary and Secondary Education Acts of 1965 and 2001*, 10 GEO. J. ON POVERTY L. & POL’Y 413, 424 (2003).

22. See 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, 3 (Deborah Meier & George Woods eds., 2004) (“Many civil rights advocates initially hailed the . . . No Child Left Behind [Act] as a step forward in the long battle to improve education for those children traditionally left behind in American schools—in particular, students of color and students living in poverty, new English learners, and students with disabilities.”).

23. 20 U.S.C.A. § 6311. “NCLB requires [the U.S. Department of Education] to conduct a peer review of each state’s standards and assessments to determine whether they meet the requirements of the law.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 81.

24. 20 U.S.C.A. § 6311(b)(1)(A). Content standards must “[s]pecify what all students are expected to know and be able to do in reading and mathematics,” “encourage the teaching of advanced skills,” and “[b]e grade specific.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 82. Achievement standards must “[b]e aligned with the content standards, and include at least two levels of achievement (proficient and advanced) that reflect mastery of the content standards and a third level of achievement (basic) that provides information about the students who are working toward mastering the standards.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 82.

standards.²⁵ NCLB requires each state to make “adequate yearly progress” toward the goal of having 100% of its students meet or exceed its standards by 2014.²⁶ Adequate yearly progress is based primarily on student performance on state assessment tests.²⁷ States are required to sanction local educational agencies and schools that fail to make adequate yearly progress and reward local educational agencies and schools that are consistently successful.²⁸

A. ADEQUATE YEARLY PROGRESS

Each state must determine what constitutes adequate yearly progress for its local educational agencies and public elementary and secondary schools with an eye toward achieving 100% student proficiency on state academic assessments by 2014.²⁹ This requires setting a starting point based on the higher of the percentage of students at the proficient level who are in (1) the state’s lowest achieving group of students or (2) the school at the 20th percentile in the state.³⁰ In addition, adequate yearly progress must include separate measurable annual objectives for “the achievement of all public elementary school and secondary school students,” and the following four subgroups: economically disadvantaged students, students from major racial and ethnic groups, students with disabilities, and students with limited English proficiency.³¹ These objectives must include the minimum percentage of students in each applicable group that must score

25. 20 U.S.C.A. § 6311(b)(3)(C)(ii). *See also* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 82 (listing requirements that assessments must satisfy in order to pass peer review).

26. 20 U.S.C.A. § 6311(b)(2)(F).

27. *Id.* § 6311(b)(2)(I)(i).

Determining [adequate yearly progress] under NCLB is largely based on a *status model*, which takes a snapshot of student proficiency at one point in time and compares that with a fixed target. Progress is defined by the percentage of students achieving at the proficient level [on state assessment tests] for [a] particular year, and the school is evaluated based on whether the student group met or did not meet that goal.

YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 79 (emphasis in original).

28. 20 U.S.C.A. § 6311(b)(2)(A)(iii). *See also infra* Part II.C.

29. *See* U.S. DEP’T OF EDUC., A GUIDE TO EDUCATION AND NO CHILD LEFT BEHIND 22 (2004), available at <http://www.ed.gov/nclb/overview/intro/guide/guide.pdf>. *See also* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 44 (noting that each state sets its own definition of proficient and uses its own test which makes comparison of student achievement between states difficult).

30. 20 U.S.C.A. § 6311(b)(2)(E). “In most cases the latter value will be the higher one and will define the starting point.” Robert L. Linn, *Scientific Evidence and Inference in Educational Policy and Practice: Implications for Evaluating Adequate Yearly Progress*, in MEASUREMENT AND RESEARCH IN THE ACCOUNTABILITY ERA 21, 23 (Carol Anne Dwyer ed., 2005).

31. 20 U.S.C.A. § 6311(b)(2)(C)(v). States, their local educational agencies, and schools are not required to disaggregate data where the number of students in a category is insufficient to yield statistically reliable information or the results would reveal personally identifiable information about an individual student. *Id.* § 6311(b)(2)(C)(v).

at or above the proficient level on state assessment tests in a given year so that the state and its local educational agencies and schools can achieve 100% proficiency by 2014.³² With the exception of a “safe harbor” provision,³³ if one of the groups at either the local educational agency or school level fails to meet the state’s annual objectives, or a local educational agency or school fails to test at least 95% of the students in a given group, the entire school district and/or school fails to make adequate yearly progress.³⁴

B. STATE ASSESSMENT TESTS

NCLB holds states accountable by measuring the performance of their students on state-adopted and administered assessment tests in reading, language arts, and mathematics.³⁵ Because so much emphasis is placed on student test scores,³⁶ NCLB requires that states adopt assessment tests that are aligned with the challenging content and achievement standards that each state has developed and are valid and reliable measures of what students should know.³⁷ States are required to administer these tests to all of their students at least once during grades three through five, grades six through nine, and grades ten through twelve.³⁸

32. *Id.* § 6311(b)(2)(G)(iii).

33. *Id.* § 6311(b)(2)(I)(i). Schools that otherwise would have failed to make adequate yearly progress because of a single subgroup, shall nevertheless be considered to have made adequate yearly progress if the percentage of students in that group “who did not meet or exceed the proficient level of academic achievement on the State assessments . . . for that year decreased by 10% of that percentage from the preceding school year and that group made progress on one or more of the [State’s other] academic indicators.” *Id.* Some states use confidence intervals in conjunction with NCLB’s Safe Harbor. *See* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 70 (noting that “[t]he introduction of a confidence interval in these cases can relax the 10% reduction rule substantially,” making it “possible for schools or subgroups to make [adequate yearly progress] without meeting state targets and without making much improvement over the previous year”). For more on confidence intervals see *infra* note 110 and YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 68–73.

34. 20 U.S.C.A. § 6311(b)(2)(I). In 2004, the U.S. Department of Education began “allowing states to average their participation rates over two or three years, so that a 94% participation rate one year could be balanced by a 96% participation rate the following or previous year.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 75.

35. *See* U.S. Dep’t of Educ., The Facts About . . . Measuring Progress (Archived Information), <http://www.ed.gov/nclb/accountability/ayp/testing.html> (last visited Sept. 16, 2007) (“Under [NCLB], every state must set clear and high standards for what students in each grade should know and be able to do in the core academic subjects of reading, math and science. States will measure each student’s progress toward those standards with tests aligned with those higher standards.”).

36. *See id.*

37. 20 U.S.C.A § 6311(b)(3)(C)(ii)–(iii).

38. *Id.* § 6311(b)(3)(C)(v)(I).

1. Assessing the Achievement of Students with Disabilities

While the U.S. Department of Education continues to assume that the majority of students will take the same assessment tests, with or without accommodations,³⁹ it has provided states with some flexibility in terms of how students with disabilities are assessed and how their scores figure into adequate yearly progress calculations. According to the Department of Education, research shows that “a very small number of students with disabilities are not able to be assessed meaningfully against the same standards as their classmates.”⁴⁰ For those few students who cannot be assessed by the general standards, states can develop alternate assessments based on different achievement standards and can use these methods to assess students with the “most significant cognitive disabilities.”⁴¹ In addition, states, school districts, and schools can count the “proficient” scores of students taking these assessments when measuring adequate yearly progress, except that for the purpose of calculating adequate yearly progress at the state and local educational agency levels the number of proficient scores may not exceed 2% of all students in the grades tested.⁴² According to the Department of Education, “this regulation ensures that schools, districts and states are rewarded for the progress that students with the most significant cognitive disabilities make during the school year.”⁴³

In addition, the U.S. Department of Education recently announced new regulations under NCLB that provide states and schools with greater flexibility in terms of how they can assess students with disabilities.⁴⁴ The

39. NCLB requires states to provide students with disabilities with appropriate accommodations on state assessment tests. *See* 34 C.F.R. § 200.6 (a)(1) (2007). In determining what accommodations are necessary, states must consider the unique needs of the students. *See id.* Examples of appropriate accommodations include increased time or the use of assistive technology. U.S. Dep’t of Educ., Fact Sheet: No Child Left Behind Provision Gives Schools New Flexibility and Ensures Accountability For Students With Disabilities, <http://www.ed.gov/nclb/freedom/local/spcedfactsheet.pdf> [hereinafter NCLB Fact Sheet] (last visited Sept. 16, 2007).

40. NCLB Fact Sheet, *supra* note 39.

41. 34 C.F.R. §§ 200.1(d), 200.6(a)(2)(ii)(B) (2007). *See also* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 86 (noting that the regulation “allow[s] states to give students with significant cognitive disabilities an alternate assessment geared to their learning level (alternate standards) rather than their grade-level (grade-level standards)”).

42. 34 C.F.R. § 200.13(c)(2)(i) (2007). In other words, “their scores [cannot] account for more than 1% of a state or district’s proficient scores when determining [adequate yearly progress].” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 66. According to the Center on Education Policy, “almost all states have now adopted this policy.” *Id.* at 66. “The district or state is still free to test as many students with disabilities under alternate standards as it wants, but any proficient scores above the 1% cap cannot be counted for [adequate yearly progress] purposes.” *Id.*

43. NCLB Fact Sheet, *supra* note 39.

44. Press Release, U.S. Dep’t of Educ., Secretary Spellings Announces New Regulations to

new regulations allow states to develop “[m]odified academic achievement standards”⁴⁵ for students with disabilities “who are capable of achieving high standards but may not reach grade level in the same time frame as their peers.”⁴⁶ Compared with grade level achievement standards, modified achievement standards may reflect reduced breadth or depth of grade level content.⁴⁷ The regulations do not limit the number of students that states and school districts can assess using alternate assessments aligned with modified achievement standards; however, the number of proficient scores on these tests that states and local educational agencies can count toward their adequate yearly progress may not exceed 2% of all students in the grades tested.⁴⁸

C. REWARDS AND SANCTIONS

A school’s failure to make adequate yearly progress for two consecutive years triggers an escalating series of sanctions. After two consecutive failing years, a school must be identified as in need of improvement.⁴⁹ Once identified, the school must provide its enrollees with the option of transferring to a different public school within the same district that has not been identified as in need of improvement, and devise a plan that addresses the academic achievement problem that caused the original school to be identified.⁵⁰ If the school fails the following year, it must continue to provide its students with the option to transfer and must make supplemental educational services available to all of its students.⁵¹ The failure to make adequate yearly progress for four consecutive years can result in the firing and replacement of school staff relevant to the failure.⁵²

More Accurately Assess Students With Disabilities (Apr. 4, 2007), *available at* <http://www.ed.gov/print/news/pressreleases/2007/04/04042007.html> [hereinafter Press Release: New Regulations].

45. 34 C.F.R. § 200.1(e)(1) (2007).

46. Press Release: New Regulations, *supra* note 44. Students who can make significant progress but may not reach grade-level achievement within the same time frame are sometimes referred to as “gap kids.” YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 92.

47. U.S. Dep’t of Educ., Assessing Students With Disabilities: IDEA and NCLB Working Together, <http://www.ed.gov/admins/lead/speced/toolkit/idea-nclb.doc> (last visited Sept. 17, 2007).

48. 34 C.F.R. § 200.13(c)(2)(ii) (2007). “Now, an additional 2% of the proficient scores of all students in the testing pool can come from students with disabilities assessed against ‘modified standards,’ on top of the 1% assessed against ‘alternate standards’ allowed by the 2003 policy change [referred to in Section II.B.1. of this Note].” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 66.

49. 20 U.S.C § 6316(b)(1)(A) (Westlaw through May 2007 legislation).

50. *Id.* § 6316(b)(1)(E)(i) & (b)(3)(A).

51. *Id.* § 6316(b)(5).

52. *Id.* § 6316(b)(7)(C)(iv)(I).

After five consecutive failing years, a school is targeted for restructuring, a process that can include reopening the school as a charter school or transferring its operation to the state or a private entity.⁵³

In addition to instilling fear into the hearts of administrators and teachers, NCLB allows states to reward schools and individual teachers who have demonstrated sustained excellence. After exceeding adequate yearly progress goals for two consecutive years or significantly closing the achievement gap between its general educational student population and applicable subgroups, schools and their teachers become eligible for recognition which may include professional and/or financial rewards.⁵⁴ Although NCLB puts limits on the amount of federal funds schools can set aside for this purpose, states are free to use non-federal funds as they deem appropriate.⁵⁵ Thus, in some states, financial incentives can be substantial.⁵⁶

III. TEACHERS AND ADMINISTRATORS CHEATING ON STATE ASSESSMENT TESTS: RECENT ALLEGATIONS

Before NCLB was enacted a number of states were painting a false picture of their educational progress by exempting low performing students from testing or failing to include their test scores in official calculations.⁵⁷ NCLB was enacted, in part, as a response to this type of misconduct. Unfortunately, the law has teachers and administrators devising new and creative ways to artificially inflate student test scores. The following recent headlines shed some light on this phenomenon: “Celebrated School Accused of Cheating Exclusive: TAKS Results Too Good to be True at

53. *Id.* § 6316(b)(8).

54. *Id.* § 6317(b).

55. *Id.* § 6317(c)(2).

56. To illustrate this point, a Houston, Texas school district spent more than \$7 million a year on performance bonuses that were primarily based on test scores under Texas’s system of accountability. Lisa Snell, *How Schools Cheat: From Underreporting Violence to Inflating Graduation Rates to Fudging Testscores* [sic], *Educators Are Lying to the American People*, REASON FOUNDATION, (June 2005), <http://www.reason.com/news/show/36161.html>. The bonuses included up to \$800 for teachers, \$5,000 for principals, and \$20,000 for higher-level administrators. *Id.*

57. The Austin, Texas, school district was indicted for criminal tampering after it was uncovered that school officials excluded low performing students from standardized testing in order to raise the overall test scores. Nat’l Ctr. for Policy Analysis: Idea House, *Tests Drive Cheaters to Cheat*, <http://www.ncpa.org/pi/edu/pd071300f.html> (last visited Sept. 17, 2007). In 1999, prior to NCLB, it was uncovered that the Florida State Department of Education had been “quietly excluding the test scores of thousands of children . . . in special education programs.” Diane Rado, *Testing Policy Raises Questions: Florida Excludes Special Education Students and Others When Evaluating Schools, Thus Inflating Test Scores*, ST. PETERSBURG TIMES, May 23, 1999, at 1B. The students were taking the tests but officials were not counting or making public the results of their work. *Id.*

Houston Elementaries”⁵⁸ and “A Little help on TAKS Exclusive: At W-H, Students Say Teachers Gave Answers.”⁵⁹ A recent article in the *Indianapolis Star* helps to contextualize the problem. The article begins, “Yesterday’s cheaters hid in the back row and spied for answers over their classmates’ shoulders. Today’s top cheaters include teachers who lead entire classes into dishonesty in a desperate bid to prop up test scores.”⁶⁰

In 2004, the *Dallas Morning News* (“DMN”) uncovered what is perhaps the largest cheating scandal since the enactment of NCLB. In response to troubling test score gaps in various Texas schools, including instances where test scores made dramatic “leaps from mediocre to stellar in a year’s time,” DMN conducted a statewide analysis of test scores at 7,700 Texas public schools.⁶¹ The results were disturbing. DMN uncovered “unusual gaps in nearly 400 schools: schools where students scored extraordinarily well in one grade but very poorly in the next, or where students were near the state’s bottom in reading but had the best math scores in Texas.”⁶² Following the publication of these findings, several students and teachers came forward with allegations supporting the suspicions raised by DMN’s data analysis.⁶³ Students reported that during the testing period teachers would walk around the classroom providing them with the correct responses to test questions they had answered incorrectly or would enlist higher performing students to “help” underachievers with their exams.⁶⁴

Cheating by teachers and administrators has been uncovered or alleged in various other states, including Indiana, North Carolina, Massachusetts, Ohio, and Nevada,⁶⁵ and comes in many forms “ranging from the subtle coaching of students to the overt manipulation of test results.”⁶⁶ Some examples include: asking weak students to stay home on

58. Joshua Benton & Holly K. Hacker, *Celebrated School Accused of Cheating Exclusive: TAKS Results Too Good to Be True at Houston Elementaries*, DALLAS MORNING NEWS, Dec. 31, 2004, at 1A.

59. Joshua Benton, *A Little Help on TAKS Exclusive: At W-H, Students Say Teachers Gave Answers*, DALLAS MORNING NEWS, November 14, 2004, at 1A.

60. Staci Hupp, *Amid Testing Stress, Some Teachers Cheat; Experts Chalk Up Cases of Score-fixing to Growing Stakes of the State Exams*, INDIANAPOLIS STAR, Jan. 2, 2005, at 1A.

61. Benton & Hacker, *supra* note 58.

62. *Id.*

63. Benton, *supra* note 59.

64. *Id.*

65. See Marie Gryphon, *Education Law Encourages Fuzzy Math*, NEWARK STAR-LEDGER, Feb. 18, 2005, available at http://www.cato.org/pub_display.php?pub_id=3694&print=Y (“Recently the state of North Carolina hired a consultant to learn whether its teachers and administrators are cheating on high-stakes tests”); Hupp, *supra* note 60.

66. Gregory J. Cizek, *Cheating to the Test*, EDUCATION NEXT (Spring 2001), available at <http://www.hoover.org/publications/ednext/3390971.html>.

test day,⁶⁷ driving weak students out of school,⁶⁸ moving students likely to attain low test scores to a different classroom so that they can receive special assistance,⁶⁹ extending testing time limits,⁷⁰ providing students with correct answers during the testing period,⁷¹ giving students answers to test questions in advance,⁷² doctoring students' answer sheets,⁷³ and failing to submit a student's answer sheet for scoring.⁷⁴

What is particularly troubling about these recent incidences of cheating is that they appear to be widespread and organized. In other words, it appears that educators at all levels—teachers, principals, and school district officials—are all in on it.⁷⁵ In response to DMN's investigation, one Texas teacher stated that when she raised the issue of cheating with her school's principal, she received no response, but was moved in the middle of the year from a fourth-grade classroom to a second-grade classroom.⁷⁶ According to her, she was moved to a grade in which no state assessment test was given because “[school administrators] didn't want someone asking questions.”⁷⁷ Furthermore, it seems highly unlikely that state and local officials were unaware of the misconduct uncovered in Texas, given the large number of schools reporting highly suspicious student test scores.⁷⁸

Supporters of NCLB and its high-stakes testing regime contend that

67. Gryphon, *supra* note 65.

68. Ajuah Helton, *Allegations of Test Improprieties Cropping Up Across the Country: With High-stakes Tests, Are Teachers and Administrators Under Pressure to Cheat?*, PHILADELPHIA PUBLIC SCHOOL NOTEBOOK (Spring 2003), available at <http://www.thenotebook.org/editions/2003/spring/cheating.htm>.

69. Jim Brown, *Cheating Scandal Involved Teachers and Administrators, Says Houston District*, AGAPE PRESS NEWS, May 12, 2005, available at <http://headlines.agapepress.org/archive/5/afa/122005d.asp>.

70. Hupp, *supra* note 60.

71. *Id.*

72. *Id.*

73. *Id.*

74. Helton, *supra* note 68.

75. Hupp, *supra* note 60 (quoting an Arizona State University education psychology professor who studies the manipulation of test score data: “Some people are bending the rules . . . I think it's mainly teachers, principals, and superintendents, because of accountability and the need to show the public you're doing a good job”). See also Patti Ghezzi, *Who's Winking and Nodding?*, ATLANTA JOURNAL-CONSTITUTION, Apr. 18, 2006, available at http://www.ajc.com/blogs/content/shared-blogs/ajc/education/entries/2006/04/18/whos_winking_an.html.

76. Benton, *supra* note 59.

77. *Id.*

78. See *supra* notes 61–64 and accompanying text (discussing results of the Dallas Morning News' analysis of test scores from 7,700 Texas public schools).

cheating is the exception, not the norm.⁷⁹ However, the results of a research study conducted by Brian Jacob and Steven Levitt suggest that what has been uncovered so far represents only the tip of the iceberg.⁸⁰ In an effort to develop a mathematical formula for detecting cheating, Jacob and Levitt analyzed answer booklets for every Chicago public school student in grades three through eight that took the state's assessment test from 1993 to 2000.⁸¹ The researchers found that cheating occurred in approximately 4 to 5% of the classes in their sample and noted that this estimate most likely understated the true prevalence of cheating.⁸² Furthermore, the researchers found that the prevalence of cheating responded to relatively minor changes in teacher incentives⁸³ and was systematically lower when the costs of cheating were higher (under conditions in which cheating was more difficult)⁸⁴ or the benefits of cheating were lower (for example, in classrooms with more special education students who take the assessment, but whose scores are excluded from official calculations).⁸⁵

If cheating does in fact correspond to changes in teacher and

79. See Megan Tench, *Allegations of Cheating Hint At Stress Teachers Feel*, BOSTON GLOBE, Dec. 27, 2003, at B1 (noting that educators claim that "cheating is an extreme and isolated response" and that "[w]hen it comes to the pressure of statewide exams, 'the vast majority of teachers respond in ways that are ethical and responsible'").

80. Brian A. Jacob & Steven D. Levitt, *Rotten Apples: An Investigation of the Prevalence and Predictors of Teacher Cheating*, 118 Q.J. OF ECON. 843, 846 (2003) (detecting cheating in approximately 4 to 5 % of the classes in the research sample).

81. *Id.* at 845. It is important to note that prior to 1996, Chicago's public schools did not operate under an accountability system. *Id.* at 867. However, beginning in 1996, a system of accountability was implemented. *Id.* This system involved putting schools "'on probation' if less than 15% of students scored at or above national norms" on the state's assessment test in reading. *Id.* Scores on the state's assessment test in math were not used for the purpose of determining probation status. *Id.* Schools on probation that failed to make sufficient improvement were subject to reconstitution. *Id.* These serve as additional reasons why we should expect the prevalence of cheating to be even higher under the accountability systems mandated by NCLB.

82. *Id.* at 846. According to the researchers, their estimate most likely understated the true prevalence of cheating because their study focused "only on the most egregious type of cheating, where teachers systematically alter student test forms." *Id.* Thus, their mathematical formula for detecting cheating is unlikely to detect more subtle forms of cheating, such as providing extra time to students. *Id.* Furthermore, even when student test forms are systematically altered, the results of the study suggest that the formula will only detect extreme instances of such misconduct, meaning that instances where teachers target a small number of students in a given classroom by changing their answers to a small number of test questions are likely to go undetected. *See id.* at 860-61.

83. *Id.* at 846.

84. *Id.* at 847.

85. *Id.* If this is true we should expect the prevalence of cheating to be higher under an accountability system that requires the scores of all students to be included in the official calculations. If the scores of all students, including those with disabilities, were included in the official calculations the benefits of cheating would presumably be higher.

administrator incentives, NCLB should result in a greater prevalence of cheating since the law's lofty goals, harsh sanctions, and strict requirements have increased the benefits of cheating without increasing its costs. Although NCLB's requirement that schools and local educational agencies test, at a minimum, 95% of students in each applicable subgroup was intended to prevent misconduct,⁸⁶ based on the results of Jacob and Levitt's study, such provisions may have the opposite effect. According to Jacob and Levitt, "classes with a higher proportion of students who are included in the official test reporting are more likely to cheat—a 10 percentage point increase in the proportion of students in a class whose test scores 'count' will increase the likelihood of cheating by roughly 20 percent."⁸⁷ Given that before NCLB, several states and school districts were either exempting low performing students, like students with disabilities, from testing or reporting their test scores,⁸⁸ if Jacob and Levitt are correct, NCLB's 95% rule should increase the benefits of cheating,⁸⁹ thereby, resulting in a greater likelihood of educator misconduct. Unfortunately, under NCLB, the costs of cheating have remained relatively low. It is fairly easy for educators to cheat because in the majority of America's public schools, teachers administer state assessment tests to their own students in their own classrooms behind closed doors.⁹⁰ In addition, testing materials and answer sheets pass through the hands of several school employees before they are submitted to district or state offices for tabulation.⁹¹ Finally, research indicates that the incentives for cheating will only increase as schools and local educational agencies find it increasingly difficult to make adequate yearly progress as they approach the 2014 deadline.⁹² Thus, if not adequately addressed, we should expect the

86. See *supra* note 57 and accompanying text (noting that prior to NCLB, states were excluding low-performing students, like students with disabilities, from testing).

87. Jacob & Levitt, *supra* note 80, at 870.

88. See *supra* note 57.

89. If the benefits of cheating decrease as the number of low performers that can be excluded from official calculations increases, then the benefits of cheating should increase as the number of low performers that can be excluded from official calculations decreases.

90. Helton, *supra* note 68.

91. *Id.*

92. See Jacob & Levitt, *supra* note 80, at 847. Under NCLB, states' annual measurable objectives (intermediate goals) must "increase in equal increments over the period covered by the State's timeline[,] . . . provide for the first increase to occur in not more than 2 years[,] . . . and provide for each following increase to occur in not more than 3 years." 20 U.S.C.A. § 6311(b)(2)(H) (Westlaw through May 2007 legislation). The Department of Education "has interpreted this provision in a way that allows states to vary the number of years between constant increments in the percentage of students at the proficient level or above." Linn, *supra* note 30, at 24. Thus, it is more common for states to adopt a pattern of adequate yearly progress goals in which increases in the percentage of students at the proficient level or above occur every three years until 2010, after which increases are required every

prevalence of cheating to increase in the years to come.

IV. WHY ARE TEACHERS AND ADMINISTRATORS CHEATING?

Research has shown:

[E]mployees are motivated to exert effort when they face a task with challenging goals and obtainable rewards that they feel competent to attain. If teachers see a connection between individual effort and expected rewards and have the requisite capacity to reach their goals, if they deem the attainment of the reward likely and the goal as realistic, and if they value the expected reward itself [for example, consider high test scores or exit from probation as important], . . . [they] will improve their performance.⁹³

Using this as a model, this Part of the Note proposes some possible reasons why teachers and administrators are attempting to manipulate the system under NCLB. An understanding of the reasons why teachers and administrators cheat is the first step toward arriving at a cost-effective method of preventing future misconduct. NCLB's high-stakes accountability systems encourage teachers and administrators to cheat for the following reasons: (1) teachers and administrators believe that cheating is necessary in order to succeed; (2) even if annual goals can be achieved without engaging in misconduct, given the uncertainty of success and possibility of failure, teachers and administrators may find not cheating to be too risky; (3) teachers and administrators believe that cheating is justifiable; and (4) given challenging state academic standards, teachers and administrators may cheat because doing so is easier than spending the time, effort, and resources necessary to consistently make adequate yearly progress.

A. BELIEF THAT SCHOOLS CANNOT SUCCEED WITHOUT CHEATING

Since its enactment, critics have argued that while NCLB's goals are

year. *Id.* This allows states to postpone until later years gains that have to be realized every year. *Id.* This practice may turn out to be costly. Research has shown that gains in student performance on state assessment tests tend to be greatest in the first few years after they have been introduced as part of an accountability system and then taper off in later years. *Id.* If students are likely to make less progress at a time when states and school districts need gains in student achievement to increase at a rather rapid rate, making adequate yearly progress will become increasingly difficult. *Id.* See also *supra* text accompanying note 18. Thus, it appears that cheating will become an even more appealing option for educators in the years to come.

93. HEINRICH MINTROP, SCHOOLS ON PROBATION: HOW ACCOUNTABILITY WORKS (AND DOESN'T WORK) 15 (2004) (citations omitted).

admirable, they are unrealistic.⁹⁴ Survey data suggests that an alarming number of educators are buying into this argument.⁹⁵ While some critics have gone so far as to claim that raising 100% of public elementary and secondary school students to proficient levels (or above) on state academic standards by 2014 is an impossible task,⁹⁶ the more common argument is that the Act's short and long-term goals are unrealistic due to a lack of funding⁹⁷ and insufficient flexibility in terms of measuring the progress of special education students and English language learners.⁹⁸ The following statements made by South Dakota superintendents are particularly illustrative of these arguments. In regards to the lack of funding, one superintendent states, "Our federal funds keep decreasing each year [and] the feds want more from the schools. That is becoming *impossible*."⁹⁹ With regard to the lack of flexibility school districts have in terms of assessing the progress of their special education population, one superintendent commented, "I do not think NCLB 'proficiency' standards are realistic for our special education students. By definition students in [special] education are 'not proficient in one or more areas because of a disability.'"¹⁰⁰ On top of these difficulties, many educators have criticized NCLB for stacking the deck against educators by ignoring factors that contribute to the ability or inability to learn at grade level, like socioeconomic status, parental education, stable housing, and adequate health care—all factors that

94. See Statement of Patti Ralabate, *supra* note 16.

95. See YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 11; CHAPTER 4 - A SURVEY OF SOUTH DAKOTA SCHOOL SUPERINTENDENTS (2004), available at <http://www.state.sd.us/legislativeaudit/NCLB/Chapter%204.pdf> [hereinafter SOUTH DAKOTA SURVEY]; SEN. COMM. ON EDUC. AND MILITARY AFFAIRS, NO CHILD LEFT BEHIND (NCLB) SURVEY TO HAWAII SCHOOL PRINCIPALS, available at http://www.capitol.hawaii.gov/site1/senate/members/newsletters/2_NCLB_SurveyAnalysis.pdf; OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINN., NO CHILD LEFT BEHIND: MAJOR FINDINGS, (2004), available at <http://www.auditor.leg.state.mn.us/ped/pedrep/0404a.pdf> [hereinafter MINNESOTA REPORT SUMMARY].

96. See *infra* text accompanying note 102. See also YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 11 (reporting survey results, which indicate that "[s]everal states and districts questioned their ability to bring 100% of their students to the proficient level of achievement by 2014").

97. See NAT'L CONFERENCE OF STATE LEGISLATURES TASK FORCE ON NO CHILD LEFT BEHIND, REPORT: EXECUTIVE SUMMARY, SUMMARY OF CH. 6: THE COST OF CLOSING THE ACHIEVEMENT GAP: COMPLIANCE VS. PROFICIENCY (Feb. 23, 2005), available at http://www.ncsl.org/programs/press/2005/NCLB_exec_Summary.htm [hereinafter NCSL Report]. See also YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 12 (reporting that in 2004–05, 37% of the states surveyed reported that the adequacy of state funds to carry out duties under NCLB presented a serious or moderate challenge).

98. See NCSL Report, *supra* note 97, at SUMMARY OF CH. 3: AYP: STUDENTS WITH DISABILITIES AND LIMITED ENGLISH PROFICIENCY; YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 11 ("[C]ase study interviewees . . . felt the 100% goal was unrealistic, especially for students with disabilities.").

99. SOUTH DAKOTA SURVEY, *supra* note 95 (emphasis added).

100. *Id.*

educators claim are largely beyond their control.¹⁰¹

While supporters of NCLB argue that such criticisms can be attributed to disgruntled school officials who do not want to do what is necessary to meet the Act's lofty goals, there is some indication that critics may be right. Using a definition of proficiency benchmarked to the National Assessment of Educational Progress (NAEP), one analyst calculated that it would take schools more than one hundred years to reach 100% proficiency in all content areas.¹⁰² Research has also shown that under NCLB, schools making large gains in student proficiency from year to year may, nevertheless, face sanctions while schools that demonstrate little or no gains in student achievement at all succeed.¹⁰³ Finally, while it is unclear whether NCLB is in fact underfunded, criticisms of the law are likely to persist given the fact that Congress continues to cut funding for the law below its originally established levels.¹⁰⁴ In addition, the Individuals With

101. See Pedro A. Noguera, *Standards for What? Accountability for Whom? Rethinking Standards-Based Reform in Public Education*, in HOLDING ACCOUNTABILITY ACCOUNTABLE: WHAT OUGHT TO MATTER IN PUBLIC EDUCATION 66, 73 (Kenneth A. Sirotnik ed., 2004) (noting that "[t]he students who are least likely to achieve in school are the students from the poorest families—the kids who are least likely to have educated parents, stable housing, or adequate health care" and arguing that "[i]f we want to ensure that all students have the opportunity to learn we must ensure that their basic needs are met"); Alain Jehlen, *NCLB: The Sequel*, NEA TODAY, Feb. 2007, at 31; YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 61–63 (noting that "[t]he effects of NCLB are concentrated in urban districts" and suggesting that one possible explanation for this is that urban districts generally have more low-income students); Hupp, *supra* note 60; MINTROP, *supra* note 93 at 24 ("In the view of a majority of the [teachers interviewed], the challenging living circumstances of the students—poverty, unstable families, drugs, high mobility, and the like—were dominant explanations for the school's decline and made it difficult for them to raise student performance.")

102. Darling-Hammond, *supra* note 22, at 10 (citing Robert L. Linn, *Accountability: Responsibility and Reasonable Expectations*, EDUC. RESEARCHER, Oct. 2003, at 3, 3–13).

103. This is because schools with a lower proficiency starting point need to make much larger gains than schools with a higher proficiency starting point. Thus, a school with a lower proficiency starting point could make much more progress than a school with a higher proficiency starting point, yet still be penalized for not making adequate yearly progress while the school with a higher proficiency starting point avoids sanctions even though its gains are modest at best. In addition, a school that began with a large majority of its students at or above the proficient level could theoretically remain comfortably above the state adequate yearly progress goal line for several years despite a "steady erosion of the percentage of students at the proficient level or above." Linn, *supra* note 30, at 28–29.

104. See Nat'l Educ. Assoc., *Washington Shortchanges Children and Public Schools Across the Nation*, available at <http://www.nea.org/lawsuit/statefact.html?mode=print> [hereinafter NEA]; Wendy Lecker, *The Promises and Challenges of the No Child Left Behind Act*, ACCESS (online database) (Sept. 2005), available at http://www.schoolfunding.info/federal/NCLB/nclb_brief.php3; *Congress Cuts NCLB By More Than \$1 Billion: Historic Reduction Damages Education Funding*, ACCESS (online database) (Jan. 2006), available at <http://www.schoolfunding.info/news/federal/1-4-06nclbbudgetcuts.php3> [hereinafter *Congress Cuts NCLB*]; Diana Jean Schemo, *The President's Budget: Education; A Leaner Year Is Proposed for Schools*, N.Y. TIMES, Feb. 7, 2006, at A16 (noting that "[a]lthough President Bush called in the State of the Union address for a major new commitment to improving math and science instruction, his budget for the [2006 fiscal year] would cut the Education

Disabilities Education Act (“IDEA”) has never been fully funded, making it especially difficult to reach achievement levels in special education.¹⁰⁵

B. BELIEF THAT NOT CHEATING IS TOO RISKY

Assuming for the sake of argument that the Act’s goals are not impossible to achieve, teachers and administrators may cheat because they perceive the likelihood of failure to be too great and largely beyond their control. Success under NCLB is by no means guaranteed. “There are 16 different ways to become a low-performing school under [the Act].”¹⁰⁶ With the exception of the Act’s safe-harbor provision, if one subgroup fails to make adequate yearly progress in a given year, the entire school is penalized.¹⁰⁷ In addition, research has shown that one student’s poor performance could potentially spell failure for the entire subgroup, thereby exposing an otherwise high-achieving school to sanctions.¹⁰⁸ Furthermore, not cheating may pose an even greater risk of failure in districts and schools that serve a diverse student population. Research has found that because of the number of subgroups that must meet adequate yearly progress goals, schools serving many demographic groups are more likely to be identified as “needing improvement.”¹⁰⁹ Finally, studies have found that a decrease or increase in test scores from one year to the next may to a large extent be due to “random fluctuation—things like variations in transient student population or statistical error in the tests themselves.”¹¹⁰

Department’s discretionary budget to \$54.41 billion from \$55.92 billion in the current fiscal year” resulting in a reduction in the title I allotments for 29 states); *infra* note 195 and accompanying text.

105. “IDEA was envisioned as a federal-state partnership in which Congress would provide 40 percent of the cost and the state would pay 60 percent . . . [yet, Congress] has never increased funding to the 40 percent level.” Ronald D. Wenkart, *An Essay: Unfunded Federal Mandates: The No Child Left Behind Act and The Individuals With Disabilities Education Act*, 202 ED. LAW REP. 461, 462 (2005). This makes it especially difficult for schools to adequately address the educational needs of its special education population since “[t]he average cost of educating a disabled student is twice that of educating a student who is not disabled, and the number of disabled students continues to increase, due to improvements in medical treatment, new technology for the disabled, and increased parental awareness of programs for the disabled.” *Id.*

106. Tench, *supra* note 79.

107. See 20 U.S.C.A. § 6311(b)(2)(I)(i) (Westlaw through May 2007 legislation).

108. See Darling-Hammond, *supra* note 22, at 19 (noting that as lower scoring students disappear, test scores go up and describing the impact that the lowest performing student can have on a school’s average score).

109. Sam Dillon, *Diverse Schools More Likely to Be Labeled as Failing, Study Says*, N.Y. TIMES, Dec. 25, 2003, at A19. See also Darling-Hammond, *supra* note 22, at 5; YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 61–63 (reporting that urban school districts and schools have experienced greater difficulty in meeting adequate yearly progress goals than their suburban and rural counterparts).

110. Stan Karp, *NCLB’s Selective Vision of Equality: Some Gaps Count More Than Others*, in MANY CHILDREN LEFT BEHIND: HOW THE NO CHILD LEFT BEHIND ACT IS DAMAGING OUR CHILDREN

Thus, many educators may cheat because they feel that no matter how hard they try, success or failure may be determined by factors beyond their control.

C. CHEATING AS A FORM OF CIVIL DISOBEDIENCE

Cheating may also occur because administrators and teachers believe that they are justified in doing so, either because they feel that NCLB is inherently unfair or that it will end up doing more harm than good. Thus, as Gregory Cizek argues, teachers and administrators may view cheating as a form of “civil disobedience.”¹¹¹ If the effectiveness of an accountability system depends on whether or not teachers value the expected reward,¹¹² this means that, to a large extent, the effectiveness of NCLB depends on teachers and administrators buying into the importance of high test scores. Studies suggest that many educators have not done so. While generally agreeing that 100% proficiency is a noble goal, many educators believe that it is wrong to measure a school’s success or failure with test scores.¹¹³ Critics argue that doing so has led to a phenomenon known as “teaching to the test,” a practice in which teachers devote a large amount of time and

AND OUR SCHOOLS 53, 56 (Deborah Meier & George Wood eds., 2004). Recognizing this, the U.S. Department of Education has allowed most states to use confidence intervals. See YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 68. A confidence interval is a statistical technique, “somewhat like a margin of error in an opinion poll,” which, when applied, “creates a window of plus or minus a few points around the percentage of students in a school or district who score at the proficient level on state tests.” *Id.* If the state’s adequate yearly progress target falls within that window, the school or subgroup is counted as making adequate yearly progress. *Id.*

111. Cizek, *supra* note 66.

112. MINTROP, *supra* note 93, at 15.

113. See Jehlen, *supra* note 101, at 32 (stating that according to a 27-member committee charged with planning the National Education Association’s (NEA’s) efforts to change and improve the No Child Left Behind law, NEA members across the country stated that “[m]easuring school success exclusively by test scores narrows the curriculum by making schools teach to the test”); YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 5 (reporting that a “bipartisan task force of the National Conference of State Legislatures made 43 recommendations for revising NCLB,” one of which included “removing the one-size-fits-all method of measuring student performance”); MINTROP, *supra* note 93, at 37 (noting that many teachers surveyed felt that “[p]reparing students for a productive life was [a] teacher[’s] primary mission [and] a goal that . . . could not be captured adequately by test scores”). Mintrop surveyed a large sample of public school teachers in Kentucky and Maryland. While the study was conducted prior to NCLB’s enactment, the assessment tests that the teachers were asked to comment on are similar to those currently employed by both states under NCLB. See *id.* at 6 (“At the time the study was conducted between 1997 and 2000, both states had features of elaborate accountability systems in common: complex student assessments, performance categories for schools, rewards and sanctions, school improvement planning and monitoring.”). For a more detailed description of the school accountability systems in place in Maryland and Kentucky at the time of Mintrop’s study, see MINTROP, *supra* note 93, at 6–11.

energy preparing students specifically for state assessment tests.¹¹⁴ Many educators believe that this has resulted in the elimination of subjects such as art and music that are not covered by state assessment tests.¹¹⁵ Furthermore, teachers and administrators are constantly confronted with the results of studies finding that high-stakes testing and accountability are ineffective educational strategies.¹¹⁶ If, as Secretary Spellings implied, numbers do not lie,¹¹⁷ it is no wonder why teachers and administrators feel that cheating is a justifiable response. As one critic put it, “The real cheating going on in education reform is by those who are cheating students out of an education by turning schools into giant test-prep centers.”¹¹⁸

D. CHEATING BECAUSE IT IS EASY

Finally, educators may cheat because it is easier than doing what is necessary to make adequate yearly progress.¹¹⁹ In a perfect world, all educators would be equally dedicated and willing to do whatever was necessary to ensure that all public elementary and secondary school students received a high quality education. NCLB acknowledges that we do not live in a perfect world and recognizes that we cannot rely on educators to hold themselves accountable to our nation’s public school students and

114. Kenneth A. Sirotnik, *Introduction: Critical Concerns About Accountability Concepts and Practices*, in HOLDING ACCOUNTABILITY ACCOUNTABLE: WHAT OUGHT TO MATTER IN PUBLIC EDUCATION 1, 5 (Kenneth A. Sirotnik ed., 2004). See also YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 10 (reporting that several survey and case study participants stated that among NCLB’s negative effects are “excessive time required for testing” and a “narrowing of curriculum content and skills”).

115. Noguera, *supra* note 101, at 72. See also YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 10 (reporting that several survey and case study participants stated that some of the minuses of NCLB’s testing provisions include “a loss of time for subjects like music and social studies and creative classroom activities”).

116. See *Much Pain, But No Gain*, NEATODAY, Jan. 2006, at 10 (reporting that the latest and most systematic study on whether high-stakes testing actually works found that there was “no consistent link between [increased] pressure and scores on the National Assessment of Educational Progress” and that “high-stakes testing may be increasing the dropout rate”); *NCLB: A Hindrance?*, NEATODAY, Jan. 2006, at 11 (noting that since NCLB’s enactment, “scores from the 2005 National Assessment of Educational Progress show that American fourth-graders are reading at about the same level as they did in 1992” and “while math scores had been steadily improving,” recently, progress has slowed). According to Jack Jennings, president of the Washington-based Center on Education Policy, “[t]here’s a question as to whether No Child [Left Behind] is slowing down our progress.” *Id.*

117. In a speech given by U.S. Secretary of Education Margaret Spellings, the Secretary opened with the following line: “In God we trust, all others bring data.” See Spellings, *supra* note 1.

118. Cizek, *supra* note 66 (quoting Alfie Kohn, a prominent critic of testing).

119. This could explain why Jacob and Levitt found that “[c]lassrooms that tested poorly last year are much more likely to cheat.” Jacob & Levitt, *supra* note 80, at 870. Instead of fixing the problem, districts may find it easier to manipulate the system.

their parents. Even if this perfect world existed, educators at all levels have acknowledged that insufficient funding has made it increasingly difficult for districts to provide schools with the resources they need to make adequate yearly progress and to assist those schools identified for improvement.¹²⁰ In particular, where a school fails to make adequate yearly progress because a sufficient percentage of its students with disabilities have not achieved at the proficient level, educators will face tremendous difficulties in terms of providing that school with the resources it needs to raise the achievement levels of its disabled student population because both NCLB and IDEA are underfunded.¹²¹

The problem is that while NCLB has made it difficult to succeed, its mandated accountability systems are easily manipulated. Indeed, under NCLB, the federal government has merely created the illusion of strict accountability. While the Act mandates that states develop accountability systems that will enable them to achieve 100% proficiency by 2014, test scores provide the only assurance that states, local educational agencies, and schools are sticking to their respective plans.¹²² Despite the emphasis placed on test scores, states, local educational agencies, and schools—entities that share the same interests in terms of avoiding sanctions under the Act—are responsible for administering the exams and ensuring that misconduct does not occur.¹²³ Thus, it should come as no surprise that educators are choosing to manipulate the system rather than taking the difficult steps that are necessary to close the achievement gap.

V. STUDENTS WITH DISABILITIES: A VULNERABLE SUBGROUP

NCLB was passed, in part, to ensure that historically low-performing students, like students with disabilities, would no longer be held to lower

120. YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at vi (reporting that educators at the state and local levels have stated that states and local school districts do not have the financial capacity to help low performing schools and students). *See also* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 17 (“In both 2004 and 2005, nearly two-thirds of states [surveyed] reported that funds have not been sufficient to provide technical assistance to schools in need of improvement.”).

121. *See generally* Wenkart, *supra* note 105.

122. *See* Brian Stecher, Laura Hamilton & Scott Naftel, *Introduction to First-Year Findings from the Implementing Standards-Based Accountability (ISBA) Project 22* (RAND Education, Working Paper No. WR-255-EDU, Apr. 2005), available at https://www.rand.org/pubs/working_papers/2005/RAND_WR255.pdf (reporting that the State of Georgia had to completely revise the curriculum standards it had developed pursuant to its NCLB state accountability plan in response to an external audit conducted by Phi Delta Kappa that found that the state’s Quality Core Curriculum “lacked depth, covered too many topics, and was not aligned with national standards”). *See generally* 20 U.S.C.A. § 6311 (Westlaw through May 2007 legislation).

123. Ghezzi, *supra* note 75. *See also* 20 U.S.C.A. § 6311; Helton, *supra* note 68.

academic standards than their grade level peers.¹²⁴ In an effort to hold schools accountable for the academic achievement of their special education population, NCLB mandates that all students with disabilities participate in state testing and that their scores be included in states' adequate yearly progress calculations.¹²⁵ Although students with disabilities are less likely to be excluded from testing under NCLB since adequate yearly progress requires schools to test at least 95% of these students,¹²⁶ what researchers have learned about cheating incentives suggests that this requirement is likely to give rise to a different kind of exclusion—denying students with disabilities full and equal participation in state testing.¹²⁷ Indeed, there are numerous incentives for teachers to engage in this type of misconduct. Students with disabilities have historically been unable to perform at grade-level,¹²⁸ a fact that lends support to the argument that 100% proficiency by 2014 is particularly unrealistic for these students.¹²⁹ Studies suggest that high-stakes testing is not narrowing (or at least, not significantly narrowing) the achievement gap between disabled and non-disabled students.¹³⁰ Local educational agencies and schools are still failing to make adequate yearly progress because of the special education population.¹³¹ Finally, many educators believe that the U.S. Department of Education has not provided sufficient flexibility to states for the assessment of these students.¹³²

Survey data shows that, while educators generally agree that it is important to hold students with disabilities to high academic standards, many feel that NCLB's assumption that the majority of students in special

124. See Darling-Hammond, *supra* note 22, at 3.

125. 20 U.S.C.A. § 6311(b)(3)(C)(ix)(I) (mandating that state assessment tests provide for the participation of all students). See also *id.* § 6311(b)(2)(I)(ii) (stating that schools and districts must test at least 95% of the special education student population in order to make adequate yearly progress).

126. See *id.* § 6311(b)(2)(I)(ii).

127. See Jacob & Levitt, *supra* note 80, at 870. Forcing states to include the scores of students with disabilities increases the benefits of cheating. See *id.* at 870. Thus, educators engage in various types of conduct—both legal and illegal—designed to artificially inflate the scores of students with disabilities. See YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 66 (noting that because NCLB legally allows states to determine the minimum subgroup size, “[m]any states have raised the minimum subgroup size, so that more schools can exclude the subgroup of students with disabilities from school-level [adequate yearly progress] calculations”); Tench, *supra* note 79 (reporting that school sources at a Massachusetts elementary school said that one of the school's special education teachers illegally helped her students choose correct answers to test questions on the Massachusetts Comprehensive Assessment System exam).

128. See *infra* notes 134–38 and accompanying text.

129. See *infra* text accompanying note 133.

130. See *infra* notes 137–47.

131. See *infra* notes 139, 144–47.

132. See, e.g., YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67.

education programs can achieve the same level of proficiency as their grade level peers is unrealistic.¹³³ The findings of a nationally representative longitudinal investigation of elementary students with disabilities, known as the Special Education Elementary Longitudinal Study (“SEELS”),¹³⁴ support this argument. After collecting and analyzing the test scores of students with disabilities for the 2001–02 school year, researchers found that while “individuals with disabilities [could] be found across the full range of academic performance,” the majority scored in the lower half of the distribution of achievement in both reading and mathematics.¹³⁵ In addition, the study found that students with learning disabilities tended to score between .7 and 1.3 years behind grade-level.¹³⁶

Studies analyzing more recent test scores for students with disabilities suggest that under NCLB, students with disabilities are not making significant increases in achievement.¹³⁷ Although the results of these studies suggest that, as a whole, student performance on state tests is improving under NCLB, the results have not been as promising for students with disabilities.¹³⁸ According to the Center on Education Policy (“CEP”), during the 2003–04 school year, “many schools fail[ed] to make [adequate yearly progress] and enter[ed] improvement status when the students with disabilities subgroup [did] not meet state targets”¹³⁹ And although CEP reported the following year that a majority of state and district officials claimed that overall student achievement in reading and

133. *Id.* at 36. “In district case studies and in response to open-ended survey questions, state and district officials applauded NCLB’s goal of closing achievement gaps because it brought attention to traditionally underserved groups. Many state and district officials, however, called the goal of closing the gap entirely unrealistic for students with disabilities.” *Id.*

134. KEVIN S. MCGREW & JEFFREY EVANS, UNIV. OF MINN., NAT’L CTR. ON EDUC. OUTCOMES, EXPECTATIONS FOR STUDENTS WITH COGNITIVE DISABILITIES: IS THE CUP HALF EMPTY OR HALF FULL? CAN THE CUP FLOW OVER? (NCEO SYNTHESIS REPORT 55), 1, 5, available at <http://www.osepideasthatwork.org/toolkit/pdf/ExpectationsStudentsCogDisabilities.pdf>.

135. *Id.* at 5 (citing Olson, L., *Enveloping Expectations*, EDUCATION WEEK (QUALITY COUNTS), 2004, at 8, 8–21).

136. Jose Blackorby, Michael Chrorst, Nicolle Garza, & Anne-Marie Guzman, *The Academic Performance of Elementary and Middle School Students With Disabilities*, in SEELS: ENGAGEMENT, ACADEMIC, SOCIAL ADJUSTMENT, AND INDEPENDENCE: THE ACHIEVEMENTS OF ELEMENTARY AND MIDDLE SCHOOL STUDENTS WITH DISABILITIES 4-12, available at http://www.seels.net/designdocs/engagement/04_SEELS_outcomes_C4_8-19-04.pdf.

137. See YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 91; *infra* note 142 and accompanying text. Since NCLB’s passage, the CEP has conducted surveys of state and district officials and performed case studies on school districts in an effort to assess NCLB’s impact. See generally YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5.

138. See *infra* notes 139, 142–145 and accompanying text; YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 91.

139. YEAR 3 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 11, at 91.

mathematics was improving¹⁴⁰ and that all subgroups were narrowing the achievement gap,¹⁴¹ a significant percentage of state and district officials indicated that the achievement gap between students with disabilities and non-disabled students was widening.¹⁴² Furthermore, according to the CEP, while some case studies conducted for the 2004–05 school year indicated a rise in student achievement on state tests, it was more often the case that districts in the study demonstrated some indications of rising student achievement, as well as some indications of achievement holding steady or declining slightly.¹⁴³ As an example of a more “typical” case study district, the CEP described a Michigan school district where a middle school failed to make adequate yearly progress because its students with disabilities subgroup underperformed on the state’s math assessment test.¹⁴⁴ District officials estimated that if only two more special education students had scored at or above proficient, the school would have made adequate yearly progress.¹⁴⁵

Based on the difficulties that states, local educational agencies, and schools are experiencing in terms of raising students with disabilities to the state-determined level of proficiency, it should come as no surprise that states are continuing to push for increased flexibility in assessing students with disabilities and counting their scores toward adequate yearly progress.¹⁴⁶ Educators contend that the Department of Education’s 1% and 2% regulations, while necessary, are insufficient,¹⁴⁷ and place them in a compromising situation.¹⁴⁸ Special education students have Individualized Education Programs (“IEP”) pursuant to the IDEA.¹⁴⁹ The IDEA requires that students with disabilities receive accommodations and specialized educational services responsive to their disabilities.¹⁵⁰ IEPs often require that these students take out of level assessments (that is, alternate assessments based on alternate standards and alternate assessments based

140. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 36–37.

141. *See id.* at 48 fig.2-B, 49 fig.2-C.

142. *See id.* According to the CEP’s latest report, while many officials believe that the gap between disabled and non-disabled students is narrowing, many admit that the gap remains wide and are concerned about whether 100% proficiency by 2014 is a realistic goal for students with disabilities. *See id.* at 47, 50–51.

143. *See id.* at 40.

144. *See id.* at 40, 41 tbl.2-B.

145. *See id.* at 41 tbl.2-B.

146. *See id.* at 67; Statement of Patti Ralabate, *supra* note 16.

147. *See* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67; Statement of Patti Ralabate, *supra* note 16.

148. *See infra* notes 150–55.

149. *See* 20 U.S.C.A. § 1414 (d)(1)(A) (Westlaw through May 2007 legislation).

150. *See id.* § 1400(d).

on modified standards).¹⁵¹ Because the number of scores reported at the proficient level or above based on these out of level assessments cannot exceed 3%¹⁵² of the students in the grades tested in the school district, districts with a high percentage of students with disabilities may be forced to choose between violating students' IEPs or failing to make adequate yearly progress.¹⁵³

Without more flexibility, or eliminating cap limits and allowing all of the proficient scores of students with disabilities—including scores on assessments chosen by each student's IEP team—to count toward adequate yearly progress, educators who feel that they are being unfairly restricted in terms of how they can assess students with disabilities will become increasingly disgruntled as schools fail to make adequate yearly progress because of the special education subgroup. Because the incentives for cheating are likely to increase as adequate yearly progress goals become increasingly difficult to realize,¹⁵⁴ reports of teachers and administrators providing special education students with “special assistance” on state assessment tests should come as no surprise.

VI. PREVENTING FUTURE CHEATING: AN ANALYSIS OF PROPOSED MEASURES & WHY THEY WILL PROVE TO BE INEFFECTIVE

Under NCLB, states bear responsibility for devising and implementing test security measures to ensure the reliability and validity of their assessment tests.¹⁵⁵ However, for practical reasons, it is primarily up to

151. See *id.* § 1412(a)(16).

152. See discussion *supra* Part II.B.I.

153. See Cory L. Shindel, Notes and Comments, *One Standard Fits All? Defining Achievement Standards For Students With Cognitive Disabilities Within the No Child Left Behind Act's Standardized Framework*, 12 J.L. & POL'Y 1025, 1031–32 (2004) (arguing that “in requiring that IEP teams contend with external pressures to minimize school failure under NCLB, the [1%] cap distracts . . . educators from their rightful focus on the needs of individual students [with disabilities]”); Statement of Patti Ralabate, *supra* note 16. According to Ms. Ralabate:

[The NEA has] created several guides for our members about how to write effective IEPs aligned with content standards. Unfortunately, these tools are not nearly as useful as they should be given the lack of direction to states and local districts about how to design modified and alternate standards that are appropriate to the wide range of students with disabilities and compliant with NCLB. . . .

As a result, students with disabilities are tested in formats that do not allow them to demonstrate their capabilities. Teachers and parents are expressing frustrations with the NCLB assessment system. And, students who are not participating in appropriate assessments are feeling defeated or shortchanged.

Id.

154. See *supra* text accompanying notes 18, 92.

155. See 20 U.S.C.A. § 6311 (Westlaw through May 2007 legislation).

local educational agencies to police the system—detecting misconduct when it occurs and punishing those responsible for it.¹⁵⁶ In response to recent allegations of cheating, officials at the state and local levels have launched large-scale investigations and imposed harsh punishments on those found guilty of misconduct.¹⁵⁷ The problem is that these responses have followed allegations by teachers or students or private reports highlighting suspicious test results, leaving many to wonder why the misconduct occurred in the first place and why those in charge failed to detect it.¹⁵⁸ Recognizing this, state and local officials have proposed various measures that they believe will either stop cheating before it occurs by making it more difficult for educators to manipulate the system or ensure that those who do cheat do not get away with it. Unfortunately, these measures suffer from two major drawbacks: first, there are numerous reasons to believe that they will be ineffective and, second, they come with a price tag that most states and local educational agencies cannot afford.

In an effort to increase what Jacob and Levitt describe as the costs of cheating,¹⁵⁹ state and local officials have contemplated using test monitors or external exam proctors.¹⁶⁰ Others have proposed allowing teachers to continue proctoring the exams, but not to their own students.¹⁶¹ In terms of the tests themselves, officials have contemplated using bar codes or other methods of identifying testing materials plus a system for tracking them.¹⁶²

156. See Hupp, *supra* note 60 (“Punishing cheaters . . . is up to school districts . . . [Indiana] offers no guidance when it comes to disciplining teachers.”); Ghezzi, *supra* note 75 (noting that all test monitors come from within the school system).

157. See Joshua Benton, *States to Dissolve W-H School Board: TEA Report Says More Than 20 Educators gave Students TAKS Answers*, DALLAS MORNING NEWS, March 22, 2005, at 1A [hereinafter Benton 2]; Benton & Hacker, *supra* note 58; Benton, *supra* note 59. These sources report the results of full-scale investigations conducted by the Texas Educational Agency and various Texas school districts in response to a series of reports by the Dallas Morning News highlighting suspicious test scores. Punishments for cheating have ranged from professional sanctions to criminal penalties. See Benton 2, *supra* (reporting on the Texas State Education Commissioner’s dissolution of a local school district’s board in response to findings of widespread misconduct and on the firing of a Texas superintendent following his indictment on felony document tampering charges); Hupp, *supra* note 60 (noting that in some states teachers caught cheating can have their licenses revoked).

158. The largest documented occurrence of cheating since NCLB was passed was initially detected by a Texas newspaper’s investigation. See discussion *supra* notes 51–53 and accompanying text.

159. Jacob & Levitt, *supra* note 80, at 847. The “costs of cheating” signify how difficult it is for educators to cheat. The greater the costs, the less likely educators will cheat.

160. Test monitors have been used before but only following accusations of cheating. See Benton, *supra* note 59; Helton, *supra* note 68 (discussing the drawbacks of hiring outside test proctors including the lack of funds).

161. See Helton, *supra* note 68 (quoting a Texas teacher commenting that, “[i]n no other arena are those who stand to benefit or suffer according to test results in charge of testing”).

162. See Cizek, *supra* note 66.

States have also hired private consultants to analyze the safeguards they have in place and determine if additional safeguards are necessary.¹⁶³

From a practical standpoint, there are several reasons why these measures will be ineffective. Test score validity may be compromised if an individual unfamiliar to students proctors the exam. Educators argue that external proctors and test monitors are a distraction that will negatively impact student performance.¹⁶⁴ In addition, school and district officials argue that shuffling teachers around to different locations will be extremely difficult to coordinate.¹⁶⁵ Finally, these measures do not come cheaply. Indiana education officials paid a private test security company \$25,000 to tell them whether they needed to tighten up their test security.¹⁶⁶ Bar coding test booklets could cost districts over \$20,000 per test version, and it has been estimated that hiring outside test proctors or rotating school staffs to different school sites could cost over one dollar per pupil, per test, per year.¹⁶⁷

Random auditing of test scores and occasional retesting has been proposed as a means of increasing the likelihood that cheating will be detected.¹⁶⁸ The problem, however, is that retesting, whether random or based on reasonable suspicion, would detract from valuable class time.¹⁶⁹ Where retesting is not random, it will most likely be based on the result of a random audit, the reliability of which is questionable. As the results of Jacob and Levitt's study suggest, auditing student test scores, whether random or not, will most likely be ineffective at detecting anything other than the most extreme forms of cheating, meaning that many instances of misconduct will go undetected.¹⁷⁰ Furthermore, the personnel costs alone are enough to make both random audits and retesting an unattractive option for state and local educational agencies.¹⁷¹

163. Gryphon, *supra* note 65 (reporting that in 2005, North Carolina hired a consultant to learn whether its teachers and administrators were cheating); Hupp *supra* note 60 (noting that in 2005, the State of Indiana hired private consultants to determine whether they had adequate testing safeguards in place and that several other states were scheduled to do the same).

164. See Aimee Edmondson, *Exams Test Educator Integrity: Emphasis on Scores Can Lead to Cheating, Survey Finds*, COMMERCIAL-APPEAL (Memphis, Tenn.), Sept. 21, 2003, available at <http://www.freerepublic.com/focus/f-news/986561/posts>.

165. See Helton, *supra* note 68.

166. Hupp, *supra* note 60.

167. Helton, *supra* note 68.

168. Cizek, *supra* note 66.

169. See Jehlen, *supra* note 101, at 32 (suggesting that initial testing already consumes too much valuable class time). As one teacher put it, "I have been forced to squander 17 days of class time because of standardized tests." *Id.*

170. Jacob & Levitt, *supra* note 80, at 846.

171. See discussion *infra* Part VI.A.

Another option, although unattractive, is for students and parents to rely on the Secretary of Education to effectively police the system. Under NCLB, the Secretary of Education “may enforce state compliance with its obligations under the Act through [her] power to terminate state funds.”¹⁷² Unfortunately, this remedy is likely to have little if any deterrent effect given the Department of Education’s unwillingness to use it despite occasions to do so.¹⁷³ For example, in 2005, the Department of Education and education officials in Texas “clashed over the fact that Texas had been testing 9% of its students using alternate assessments and counting those scores towards [adequate yearly progress], far above the percentages allowed by [the] recent policy changes.”¹⁷⁴ Texas’s funding was not terminated. Instead, “[t]he matter was resolved when the state agreed to pay a fine . . . and [the Department of Education] and Texas settled on a 5% cap, a level not extended to other states.” Although it is arguable that the fine was a sufficient punishment, it is equally arguable that the fine was not a punishment at all, but rather, the price Texas was willing to pay for additional flexibility with respect to the assessment of students with disabilities. Furthermore, the denial of funding might be out of proportion to many or even most instances of cheating¹⁷⁵ and is likely to be an unattractive option for parents since it would “financially cripple the program they are trying to improve.”¹⁷⁶

Given the drawbacks of these proposed measures, the U.S. Department of Education’s recently enacted regulations may be the most promising means of preventing future cheating to date. Whether intended to decrease the incentives for cheating or not, the additional flexibility that the Department’s 2% regulation will provide, with respect to the testing of students with disabilities and the inclusion of their scores in adequate yearly progress calculations, should reduce the benefits of cheating by making it easier for schools and districts to make adequate yearly

172. Greenberger, *supra* note 21, at 1013. *See also* 20 U.S.C.A. § 6311(g) (Westlaw through May 2007 legislation).

173. Greenberger, *supra* note 21, at 1013 n.15, 1039 (noting that “[f]und termination is a dramatic step that is rarely taken under any Spending Clause program” and stating that fund termination, as a remedy, is rarely used).

174. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67.

175. *See* Greenberger, *supra* note 21, at 1038. Unless cheating was occurring at all public elementary and secondary schools in a given state, terminating funding would arguably be out of proportion to the nature of the violation.

176. *See id.* at 1014. In essence, terminating funding would punish students for educator misconduct. *See* Jesse H. Choper & John C. Yoo, *Who’s Afraid of the Eleventh Amendment? The Limited Impact of the Court’s Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 248 (2006) (stating that “such drastic action that could result in denying benefits to the disabled . . . will not help the situation of [that] group[], which [has] already suffered harm at the hand of the state”).

progress.¹⁷⁷ However, besides appearing to reward educator misconduct—defying the age old adage “cheaters never prosper” by conveying that sometimes cheaters do prosper—it is unclear whether these changes will provide enough flexibility¹⁷⁸ and whether states will be able to meet the requirements necessary to take advantage of the added flexibility.¹⁷⁹

Although state and district officials welcome the additional flexibility, many believe that it will only provide minimal assistance¹⁸⁰ and that even more flexibility is needed.¹⁸¹ A number of states have already asked the Department for its permission to use a higher cap rate.¹⁸² In addition, the National Education Association has proposed “eliminat[ing] . . . the one and two percent limits” and “[i]nstead, . . . allowing each student’s IEP team . . . to determine the most appropriate assessment for the student, and then allowing use of the scores on these tests for [adequate yearly progress] purposes *without limits*.”¹⁸³

In addition, time and money may prevent states from taking advantage of the added flexibility, at least in the near future. Taking advantage of the 2% regulation will require states to develop modified achievement standards that are valid and reliable, and new assessment tests aligned with

177. 34 C.F.R. § 200.13(c)(2)(ii) (2007). In recent years the U.S. Department of Education has allowed certain states to use larger confidence intervals and performance indexes. YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 68, 73. See also *supra* text accompanying note 110 (discussing confidence intervals). Performance indexes “give credit for gains made by schools and districts at achievement levels below proficient, such as having more students score at the ‘basic’ instead of ‘below basic’ level compared with the previous year.” YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 73. Also, in 2005, “Secretary Spellings announced a pilot program whereby interested and qualified states could submit proposals for developing ‘growth models’ . . . as an alternate means of determining [adequate yearly progress].” *Id.* at 78. “These models could enable states to credit schools for the academic growth of individual students even if the percentage at the proficient level falls short of state [adequate yearly progress] goals.” *Id.* at 79. Like the Department’s 2% regulation, these measures should make it easier for local educational agencies and schools to make adequate yearly progress. However, in light of evidence suggesting that the benefits of cheating will increase as local educational agencies and schools find it increasingly difficult to make adequate yearly progress as they approach the 2014 deadline, it is unclear whether these measures will reduce the benefits of cheating enough to solve the problem. What is clear is that students with disabilities and their parents cannot afford to wait and see.

178. See *infra* notes 180–87.

179. See *infra* notes 184–91 and accompanying text (noting that time and money may prevent states from taking advantage of the additional flexibility).

180. See YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 67 (noting that in response to survey questions regarding the perceived helpfulness of the 2% regulation, a “majority of state officials . . . described the students with disabilities policy change as not helpful or only minimally helpful”).

181. *Id.* at 67, 76–77.

182. *Id.* at 67.

183. Statement of Patti Ralabate, *supra* note 16 (emphasis added).

these standards.¹⁸⁴ Given that “four and a half years into the law, only ten states [had] received full approval from the Department of Education for their [initial] content standards and assessment systems,” and “many states [had] not received final approval due to their lack of valid and reliable accommodations and alternate assessments for students with disabilities,”¹⁸⁵ it is unlikely that states will be able to develop and have the Department of Education approve modified standards and assessments in the near future. Timely development of acceptable standards and assessment tests is likely to be made even more difficult by the fact that, according to educators, there has been a “lack of guidance to states, and therefore, to educators, about how to create these modified . . . standards.”¹⁸⁶ Furthermore, given that state and district officials have long complained about inadequate funding under NCLB, in particular with respect to the development of standards and assessment tests, many states may be unable to afford the additional flexibility.¹⁸⁷

A. MONEY OR THE LACK THEREOF: THE BIGGEST OBSTACLE TO
PREVENTING FUTURE CHEATING

While the effectiveness of these measures is questionable at best, one thing is certain: each will place a financial burden on states and local school districts that they cannot afford. The following Part describes the financial difficulties that states and local school districts have experienced in complying with the Act’s requirements and argues that these difficulties will only increase as the 2014 deadline approaches. It will conclude by arguing that (1) the U.S. Department of Education and state educational agencies will be disinclined to divert scarce financial resources to local school districts for the purpose of combating teacher and administrator misconduct and (2) that without financial assistance local school districts will be forced to choose between doing nothing and diverting scarce resources away from what should be the district’s primary objective—providing the remediation services and enhanced learning opportunities

184. *Id.*

185. *Id.*

186. *Id.*

187. *See id.* (recommending additional funding “for development of high quality tests—resources that have been dwindling over the last two years”); YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 18 (“The development and implementation of assessments . . . far exceeds the funds provided by the state and U.S. Department of Education. In addition, the development of alternate assessments will be another burden to the already stretched assessment budget.”). *But see* Press Release: New Regulations, *supra* note 44 (according to Secretary Spellings, “the U.S. Department of Education will provide \$21.1 million in grant funds for technical assistance as states develop new assessments”).

necessary to meet the proficiency goals of NCLB.

Since its passage in 2002, states have proclaimed that NCLB is an “unfunded mandate.”¹⁸⁸ According to critics, the Act’s administrative costs alone saddle states with a financial burden that they arguably cannot bear.¹⁸⁹ Without additional federal assistance, states and local school districts argue that they will be unable to meet the Act’s administrative costs, let alone the costs associated with raising student achievement.¹⁹⁰ Meanwhile, the U.S. Department of Education continues to argue that it has provided and will continue to provide states with the financial resources necessary to meet the Act’s requirements.¹⁹¹ Federal officials contend that the problem is not a lack of resources, but states’ failure to allocate the resources they have in an efficient manner.¹⁹²

While the U.S. Department of Education and state educational agencies continue to point the finger at one another, it is clear that regardless of whether either side can afford to spend more, neither is willing to do so. In recent years, Congress has failed to provide states with the level of funding it initially promised.¹⁹³ To make matters worse,

188. Wendy Lecker, *The Promise and Challenges of the “No Child Left Behind Act,”* ACCESS (online database) (Sept. 2005), available at http://www.schoolfunding.info/federal/NCLB/nclb_brief.php3 (noting that many chief state school officers, legislators and school district superintendents assert that NCLB is an unfunded mandate, and that “[i]ronically, NCLB is one of the few federal laws that explicitly prohibits imposition of unfunded mandates”). States have gone so far as to file suits against the U.S. Department of Education challenging NCLB as an unfunded mandate. See *Sch. Dist. of Pontiac v. Spellings*, No.05-CV-71535-D, WL 3149545 (E.D. Mich. 2005); *Connecticut v. Spellings*, 453 F. Supp. 2d 459 (D. Conn. 2006); Wenkart, *supra* note 105, at 461.

189. Joy Farmer, *The No Child Left Behind Act: Will It Produce a New Breed of School Financing Litigation?*, 38 COLUM. J.L. & SOC. PROBS. 443, 450 (2005) (“Finally, it costs money to implement NCLB’s mandates—money that some argue states simply do not have.”). See also YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 17; NCSL Report, *supra* note 97, at Chapter 6 (“In the best case scenario, federal funding marginally covers the costs of complying with the administrative processes of the law.”).

190. Katherine Lu, *Cost Study Finds NCLB Underfunded in Virginia*, ACCESS (online database) (Sept. 2005), available at <http://www.schoolfunding.info/news/federal/9-23-05VAnclbcoststudies.php3> (noting that the act’s administrative costs at the state and school district levels will require the diversion of scarce resources from other activities). See also MINNESOTA REPORT SUMMARY, *supra* note 95 (predicting that the costs of implementing NCLB may exceed the increase in NCLB revenue).

191. Brandi M. Powell, *Take the Money or Run?: The Dilemma of the No Child Left Behind Act for State and Local Governments*, 6 LOY. J. PUB. INT. L. 153, 162 (2005).

192. *Id.* at 170 (noting that supporters of NCLB suggest that the results of cost studies are erroneous because states are considering expenditures not actually required by the law and choosing options that are more costly than needed to comply with the law). Powell, however, argues that the government’s claim that states are spending more money than necessary demonstrates that the government favors compliance over implementing the best educational practices possible). *Id.* at 171.

193. NEA, *supra* note 104.

Congress cut NCLB's funding for the 2006¹⁹⁴ and 2007 fiscal years.¹⁹⁵ Although the President's proposed budget for fiscal year 2008 would end this downward trend, according to the Committee on Education and Labor, "his budget still does not provide schools with nearly as much funding as they need to carry out their responsibilities under the law" and "would cut \$291 million from special education programs."¹⁹⁶ Given both sides' reluctance to allocate money toward meeting the Act's primary objective, it is unlikely that local school districts will receive the resources necessary to mount an effective and lasting defense against teacher and administrator misconduct.

Finally, while cheating poses a significant threat to the integrity of state accountability systems, it is not clear whether the costs of cheating justify allocating scarce financial resources toward the financing of costly test security measures. What is certain is that money spent on preventing teacher and administrator misconduct is money that cannot be spent on improving education.

VII. SUITS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT: THE MISSING LINK TO THE EFFECTIVE PREVENTION OF EDUCATOR MISCONDUCT

While educator cheating is likely to increase, it is clear that students with disabilities cannot rely on the U.S. Department of Education or state and local educational agencies to take action to prevent misconduct. Proposed methods of prevention are impractical and expensive, and more importantly, state and local educational officials have little incentive to take

194. *Congress Cuts NCLB*, *supra* note 104. *See also* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 14 (reporting that "[i]n fiscal year (FY) 2006, federal funding for Title I and other key NCLB programs was cut for the first time since NCLB was enacted" and more specifically, that in 2006, "Title I [(which accounts for more than half of the federal funding for NCLB)] received \$12.74 billion, a cut of more than 26 million from the FY 2005 level"); Schemo, *supra* note 104.

195. HONORABLE GEORGE MILLER, SENIOR DEMOCRATIC MEMBER COMM. ON EDUC. AND THE WORKFORCE, BUSH FISCAL YEAR 2007 EDUCATION BUDGET: BREAKS PROMISES, UNDERFUNDS PRESCHOOL AND K-12 EDUCATION, AND PUTS COLLEGE FARTHER OUT OF REACH FOR MILLIONS OF AMERICANS 3 (2006), available at <http://edworkforce.house.gov/committee/publications/fy07edbudgetsummary.pdf>. *But see* YEAR 4 OF THE NO CHILD LEFT BEHIND ACT, *supra* note 5, at 14 (reporting that although President Bush's budget for FY 2007 proposes to further shrink federal education funding by about 3%, "[o]n the plus side, the budget for the first time recommends badly needed funding for NCLB school improvement grants").

196. Press Release, Reps. Miller & Kilder, Comm. on Educ. and Labor, On NCLB, President's Budget Undoes Damage From '06, But Still Leaves Schools Short: Budget Also Includes Unacceptable Funding Cuts for Children with Disabilities, Early Childhood Education, (Feb. 5, 2007), available at http://www.house.gov/apps/list/speech/edlabor_dem/rel020507.html.

action since they stand to benefit from educator misconduct. Students with disabilities and their parents need a vehicle through which they can defend themselves against unscrupulous educators. NCLB does not provide “an administrative process or an explicit private cause of action for individuals to bring claims and enforce compliance with state or local obligations.”¹⁹⁷ However, through private causes of action under title II of the Americans With Disabilities Act (“ADA”)¹⁹⁸ and section 504 of the Rehabilitation Act (“RA”)¹⁹⁹—legislation designed to prevent the exclusion of individuals with disabilities from participation in or denial of the benefits of public programs and services²⁰⁰—students with disabilities and parents can force districts and schools to take action to prevent future misconduct and the harm that it causes, and obtain compensation when unscrupulous educators violate their rights.

A. TITLE II OF THE ADA AND SECTION 504 OF THE RA

Title II of the ADA and section 504 of the RA represent Congress’s response to a serious and pervasive social problem: the discrimination against individuals with disabilities “in such critical areas as employment, housing, public accommodations, *education*, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”²⁰¹ Although the Acts were passed pursuant to different Congressional powers—the ADA was passed pursuant to Congress’s Fourteenth Amendment section 5 power and authority under the Commerce Clause, while the RA was passed pursuant to Congress’s spending power—the Acts share the same fundamental objective, to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals’ rights to enjoy the same privileges and duties afforded to all U.S. citizens.²⁰² While the RA applies only to programs, projects, and services that receive federal funding,²⁰³ title II of the ADA signifies an expansion of Congress’s effort to prevent discrimination against individuals with disabilities by targeting all public

197. Greenberger, *supra* note 21, at 1013–14.

198. 42 U.S.C. § 12132 (2000) [hereinafter title II of the ADA].

199. 29 U.S.C. § 794 (2000) [hereinafter section 504 of the RA].

200. See 42 U.S.C. § 12131; 29 U.S.C. § 794.

201. 42 U.S.C. § 12101(a)(3) (2000) (emphasis added). See also 29 U.S.C. § 701(a)(3) (2000) (“Congress finds that disability is a natural part of the human experience and in no way diminishes the right of individuals to . . . (F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.”).

202. See *Galloway v. Superior Court of D.C.*, 816 F. Supp. 12, 20 (D.D.C. 1993).

203. 29 U.S.C. § 701(c) (2000).

entities, regardless of whether or not they received federal assistance.²⁰⁴ Both Acts give individuals with disabilities the means to enforce their right to equal opportunity and full inclusion and integration into society by providing them with a private cause of action²⁰⁵ when they are denied full and equal participation in the services, programs, or activities of a public entity because of their disability.²⁰⁶

B. ESTABLISHING A VIOLATION BASED ON TEACHER AND ADMINISTRATOR MISCONDUCT

To establish a violation of title II of the ADA, a plaintiff must demonstrate (1) that it is a qualified individual with a disability; (2) it was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities; and (3) such exclusion or discrimination was by reason of its disability.²⁰⁷ The requirements for establishing a violation under section 504 of the RA are almost identical²⁰⁸—the plaintiff must demonstrate that it (1) is handicapped (within the meaning of the RA), (2) is otherwise qualified for the benefit or services sought, (3) was denied the benefit or services solely by reason of its handicap, and (4) the program providing the benefit or services receives federal financial assistance.²⁰⁹ To show that one is a “qualified individual with a disability” within the meaning of the Statutes, a litigant must demonstrate that he or she has an impairment that substantially limits a major life activity and is capable of meeting all of the requirements of a particular publicly funded program despite the impairment.²¹⁰

204. See 42 U.S.C. 12131(1) (2000) (“The term ‘public entity’ means (A) any state or local government; (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government.”).

205. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

206. 42 U.S.C. § 12132 (2000).

207. See, e.g., *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002).

208. Rachel E. Brodin, Comment, *Remedying a Particularized Form of Discrimination: Why Disabled Plaintiffs Can and Should Bring Claims For Police Misconduct Under the Americans With Disabilities Act*, 154 U. PA. L. REV. 157, 191 (2005) (“Indeed, some courts examining actions in which plaintiffs have pleaded claims under both section 504 and title II have not distinguished between the two claims in their opinions.”).

209. *Lovell*, 303 F.3d at 1052.

210. Paul T. O’Neill, *High Stakes Testing Law and Litigation*, 2003 B.Y.U. EDUC. & L.J. 623, 645 (2003). See also 42 U.S.C. § 12131(2) (2000) (providing that a “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements” for the public program or service).

It should be clear that students with cognitive disabilities who are the victims of the type of misconduct described within this Note have been unlawfully discriminated against under both title II of the ADA and section 504 of the RA. School districts and public schools are subject to liability under both Acts. Both are “public entities” within the meaning of the ADA and are encompassed within the RA’s meaning of “programs and activit[ies]” that receive federal funding.²¹¹ Special education students, by definition, have a disability within the meaning of both Acts.²¹² Additionally, they are “otherwise qualified” to participate in state testing within the meaning of both Acts.²¹³ State testing is a “publicly funded program” that is part of the federally mandated accountability systems under NCLB.²¹⁴ The only requirement for participation in state testing is that the individual be an enrolled student at a public elementary or secondary school. This is evident in the fact that under NCLB, states, school districts, and public elementary and secondary schools are required to include all students with disabilities in the testing process, with or without accommodations.²¹⁵ Furthermore, regulations enacted by the U.S. Department of Education allow qualifying students with disabilities to be alternatively assessed.²¹⁶ Thus, it would be difficult, to say the least, for a

211. See 42 U.S.C. § 12131(1) (2000); 29 U.S.C. § 794 (2000). A school district is a “public entity” under title II of the ADA. *Swenson v. Lincoln County Sch. Dist.*, 260 F. Supp. 2d 1136 (D. Wyo. 2003). Each year, the federal government provides states with federal funding for their public education systems. See U.S. DEP’T OF EDUC. FUNDING, FUNDS FOR STATE FORMULA-ALLOCATED AND SELECTED STUDENT AID PROGRAMS, <http://www.ed.gov/about/overview/budget/statetables/07stbystate.pdf>

212. See 28 C.F.R. § 35.104 (2006); 34 C.F.R. § 104.3(j) (2006). Special education students have a physical or mental impairment that limits their ability to learn. Learning is a “major life activity” within the meaning of both Acts. See 28 C.F.R. § 35.104; 34 C.F.R. § 104.3(j).

213. See 20 U.S.C.A. § 6311(b)(3)(C)(ix) (Westlaw through May 2007 legislation) (requiring that state assessments “provide for the participation . . . of all students” and “the reasonable adaptations and accommodations for students with disabilities . . . necessary to measure the academic achievement of such students”); U.S. Dep’t of Educ., *Working Together for Students with Disabilities: Individuals with Disabilities Education Act (IDEA) and No Child Left Behind Act (NCLB): Frequently Asked Questions* (Dec. 2005), <http://www.ed.gov/admins/lead/spced/toolkit/faqs.doc> (“NCLB is the first law to hold schools accountable for ensuring that all students participate in the state assessment system.”). The IDEA also requires that students with disabilities participate in state testing. *Id.* The IDEA requires that “[a]ll children with disabilities are included in all general State and districtwide assessment programs . . . with appropriate accommodations and alternate assessments, where necessary and as indicated in their respective individualized education programs.” 20 U.S.C.A. § 1412(c)(16)(A) (Westlaw through May 2007 legislation).

214. See 20 U.S.C.A. § 6311 (Westlaw through May 2007 legislation). Furthermore, state testing is part of the overall public educational system which is clearly a publicly funded program. Cheating not only denies students with disabilities full and equal participation in state testing, but also denies them full and equal participation in the public educational system.

215. See *supra* text accompanying note 213.

216. See *supra* Part II.B.1.

state to successfully argue that a student with a cognitive disability was not qualified to participate in state testing.²¹⁷ Finally, where educators cheat by artificially inflating the test scores of students with cognitive disabilities, they exclude these students from participation in or deny them the benefits of state testing because of their disability.²¹⁸

C. REMEDIES

The remedies for violations of title II of the ADA and section 504 of the RA are “coextensive with the remedies available in a private cause of action brought under title VI of the Civil Rights Act of 1964,²¹⁹ which prohibits racial discrimination in federally funded programs and activities.”²²⁰ Such remedies include declaratory²²¹ and injunctive relief,

217. A school district may have an interesting argument where a student’s individual needs dictate that the student be allowed to take an alternate assessment, but the school district is effectively coerced into giving the same assessment test that grade-level peers are required to take because of the 1% and 2% caps. The argument would be that the student is not qualified to take the test that the school is forced to administer. In other words, because of the student’s disability, the student’s test score will not provide an accurate measure of achievement and therefore, the student is not qualified to participate in state testing unless the school is allowed to accommodate by giving the alternate assessment. This argument would most likely fail. The 1% and 2% caps do not prevent schools from allowing students to take alternate assessments, but only limit the proficient scores on such assessments that can be counted toward adequate yearly progress. Furthermore, the inability to reasonably accommodate does not give an entity the right to exclude. NCLB provides that students with disabilities are to participate in state testing with or *without* accommodations.

218. The purpose of state testing is to provide students, parents, and educators with an accurate measure of student achievement so that schools are held accountable and so that administrators and educators can target areas that are in need of improvement. When an educator does not allow students with a cognitive disability to take the assessment test, provides them with the correct answers during the exam, or alters their answers before submitting them for scoring, that educator excludes these students from participation (with participation not just being sitting for the test, but participation in the essence of state testing, which as just stated, means more than just receiving a score, it means receiving a score that is an accurate and valid measure of one’s academic achievement) and denies them the benefit of state testing (the benefit of an accurate and valid score by which the student and his parents can hold the school accountable). This exclusion or denial occurs because of the student’s disability. The educator cheats because he or she believes that the student will attain a low score; however, it is because of the student’s cognitive disability that the educator believes this. The belief may be the product of unconscious stereotypes, prejudice, or based on the fact that because of the disability, the student has performed poorly in the past.

219. 42 U.S.C. §§ 2000d to 2000d-7 (2000).

220. *See Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (citations omitted). The remedies available under the ADA are the same as those available under the RA. The remedies available under the RA are the same as those available under title VI of the Civil Rights Act of 1964. Therefore, the remedies available under the ADA are the same as those available under title VI of the Civil Rights Act of 1964. *See id.*

221. This Note will not discuss declaratory relief because in this context, it has no value to potential plaintiffs. Declaratory relief is designed “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” *See DOUGLAS LAYCOCK, MODERN*

compensatory damages, and attorneys' fees.²²² Punitive damages may not be awarded under either title II of the ADA or section 504 of the RA.²²³

1. Injunctive Relief

Plaintiffs can pursue injunctive relief under title II of the ADA and section 504 of the RA.²²⁴ Where cheating has already occurred, injunctive relief will enable students with disabilities and their parents to coerce local educational agencies and schools to take action to ensure that cheating does not occur in the future.²²⁵ Injunctive relief is necessary to prevent future misconduct because without the threat of a court's contempt power, local educational agencies and schools have less incentive to pay for the implementation of adequate testing safeguards²²⁶ and greater incentive to engage in more moderate or sophisticated (i.e., less easily detectible) forms of cheating the second time around.²²⁷

AMERICAN REMEDIES 515 (3d ed. 2002). Here there is no uncertainty with respect to the rights of students with disabilities with respect to NCLB mandated testing. *See* 20 U.S.C.A. 6311(b)(3)(C)(ix) (Westlaw through May 2007 legislation) (providing that state assessments must provide for the participation of all students and reasonable adaptations and accommodations for students with disabilities necessary to measure their academic achievement).

222. Mary L. Topliff, *Remedies Available Under Americans with Disabilities Act* (42 U.S.C. §§ 12101 *et seq.*), 136 A.L.R. FED. 63, 63 (1997) ("In actions brought under Title II for disability discrimination in public services, injunctive relief and attorneys' fees are available."); *Tennessee v. Lane*, 541 U.S. 509, 517 (2004) ("Title II's enforcement provision incorporates by reference § 505 of the Rehabilitation Act of 1973, . . . as added, 29 U.S.C. § 794a, which authorizes private citizens to bring suits for money damages." (citation omitted)).

223. *Barnes*, 536 U.S. at 189. In *Barnes v. Gorman*, the Supreme Court held that punitive damages may not be awarded in private suits brought under section 202 of the ADA and section 504 of the Rehabilitation Act. Applying the same contract-law analogy it used in finding a damages remedy available in private suits under Spending Clause legislation, the Court concluded that because punitive damages are generally not available for breach of contract, they are not available under title VI, and therefore, may not be awarded in private suits under title II of the ADA and section 504 of the Rehabilitation Act. *Id.* at 186. The Court noted that punitive damages were not necessary "to make good the wrong done" because of the availability of compensatory damages and that because "compensatory damages alone 'might well exceed a recipient's level of federal funding,' punitive damages on top of that could . . . be disastrous." *Id.* at 188 (citations omitted). Indeterminate liability in the form of punitive damages would do more harm than good by detracting from an already scarce pool of financial resources money that could be allocated directly to efforts designed to improve education.

224. *See supra* note 222 and accompanying text. "An injunction is a court order, enforceable by sanctions for contempt of court, directing defendant to do or refrain from doing some particular thing." LAYCOCK, *supra* note 221, at 235. If done willfully, violating an injunction could subject educators to criminal penalties. *See id.* at 237.

225. Parents need some way to ensure that cheating will not occur in the future since, as argued previously in this Note, parents cannot rely on local educational agencies and schools to fix the problem. *See supra* Part VI.A.

226. *See supra* Part V.

227. *See supra* text accompanying notes 170–73 (noting that random auditing will probably only detect the most extreme forms of cheating).

To establish standing for injunctive relief, a plaintiff must demonstrate that it will suffer an injury in fact. The injury in fact must be concrete and particularized and actual or imminent, not conjectural or hypothetical.²²⁸ In other words, plaintiffs must demonstrate that the conduct at issue caused them to be harmed and that without an injunction, they are likely to be harmed in the future by the same conduct.

a. Educator Cheating Harms Students with Disabilities

Unlike high-stakes testing for students, the most common example being high school exit examinations,²²⁹ state assessment tests are generally viewed as having consequences for schools, not students. While it is true that students who do poorly on a state assessment test will not be denied a high school diploma, state testing has important implications for students and their parents.²³⁰ Furthermore, exclusion from state testing, or the denial of its benefits, stigmatizes those excluded and causes them to suffer mental distress, both of which are likely to have an adverse impact on the student's future academic achievement.²³¹

Although a public education is not a constitutional right,²³² in *Brown v. Board of Education*,²³³ the Supreme Court concluded that where a public education is provided, it must be provided in a non-discriminatory manner.²³⁴ Under NCLB, state assessment tests have become a major part of the public education system.²³⁵ Test scores provide students, parents, and educators with information that is used to determine areas in which public schools are in need of improvement.²³⁶ Policymakers and educational administrators rely on test scores to inform their "decisions on staffing, curricula, professional development, and teacher-credentialing

228. *Gillespie v. Dimensions Health Corp.*, 369 F. Supp. 2d 636, 640 (D. Md. 2005).

229. Many states are requiring students to pass a uniform, large-scale assessment in order to receive a high school diploma. See O'Neill, *supra* note 210, at 623. See also Betsy A. Gerber, *High Stakes Testing: A Potentially Discriminatory Practice With Diminishing Legal Relief For Students at Risk*, 75 TEMP. L. REV. 863 (2002) (addressing the discriminatory effects that high stakes testing has on minority students).

230. 20 U.S.C.A. § 6311(b)(3)(C)(xii) (Westlaw through May 2007 legislation) (State assessment tests shall "produce individual student interpretive, descriptive, and diagnostic reports . . . that allow parents, teachers, and principals to understand and address the specific academic needs of students").

231. See *infra* notes 240–56 and accompanying text.

232. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 38 (1973) (asserting that even an interest of such importance in our society as public education does not qualify as a "fundamental right" for equal protection purposes because it has no textually independent constitutional status).

233. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

234. *Id.* at 493 ("[The opportunity of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.").

235. See *supra* Part II.B.

236. 20 U.S.C.A. § 6311(b)(10) (Westlaw through May 2007 legislation).

requirements and to measure the effectiveness of educational reforms.”²³⁷ When educators exclude students with disabilities from participation in or deny them the benefits of state testing, they effectively set these students aside. The result is that these students are disenfranchised from the instructional decision-making process.²³⁸ When this occurs, students with disabilities are denied the provision of a public education in a discriminatory manner.

Additionally, under NCLB all students attending schools that have failed to make adequate yearly progress for two or more years have the right to transfer to another school and the right to free supplemental educational services.²³⁹ Because cheating masks inadequacies and may result in schools that would have otherwise failed to make adequate yearly progress avoiding sanctions, students with disabilities that should have the options of transferring and/or obtaining supplemental educational services paid for by the school district may be denied these opportunities.

Lastly, when educators artificially inflate the test scores of students with disabilities by helping them cheat on state assessment tests, their conduct has a stigmatizing affect,²⁴⁰ which research suggests, has a lasting and negative impact on these students’ academic achievement.²⁴¹ Cheating tells those targeted that their teachers have no faith in their academic abilities. Through their misconduct, teachers express their negative educational expectations for the students they provide with “special assistance.” In effect, teachers are saying to these students, “We believe that you will fail if we allow you to take the test on your own.”

237. Cizek, *supra* note 66.

238. JANE MINNEMA, MARTHA THURLOW, & JOHN BIELINSKI, UNIV. OF MINN., NAT’L CTR. ON EDUC. OUTCOMES, TEST AND MEASUREMENT EXPERT OPINIONS: A DIALOGUE ABOUT TESTING STUDENTS WITH DISABILITIES OUT OF LEVEL IN LARGE-SCALE ASSESSMENTS (OUT-OF-LEVEL TESTING PROJECT REPORT 6) 2002, *available at* <http://education.umn.edu/NCEO/OnlinePubs/OOLT6.html>. On a more individual level, “[w]hen cheating occurs, testing yields inaccurate information about individual students [with disabilities]. The error is compounded when this information is then used for any educational purpose, and specific students wind up paying the price. One student may not receive the remedial instruction in reading that she needs.” Cizek, *supra* note 66.

239. *See supra* text accompanying notes 50–51.

240. The U.S. Department of Education recognizes that the exclusion of students with disabilities from testing has a stigmatizing effect. NCLB Fact Sheet, *supra* note 39 (“[S]uch exclusion . . . wrongly stigmatizes children with disabilities among their classmates as unable to achieve to high standards.”). Giving students “special assistance” (giving them the answers to test questions or extra time to complete their exams) will presumably have the same effect.

241. *See* MCGREW & EVANS, *supra* note 134; Frank Pajares & Dale H. Schunk, *Self-Beliefs and School Success: Self-Efficacy, Self-Concept, and School Achievement*, in SELF PERCEPTION 239, 239–66 (R. Riding & S. Rayne eds., 2001), *available at* <http://www.des.emory.edu/mfp/PajaresSchunk2001.html>.

According to researchers, academic self-efficacy, the confidence that we have in our academic abilities, is shaped by our vicarious experiences and the social messages that we receive from others.²⁴² In the educational context, vicarious experiences refer to the effects produced by students' interactions with their classmates, interactions that include how students compare themselves to their peers.²⁴³ Negative interactions generally reduce students' confidence in their academic abilities.²⁴⁴ This has major implications in the context of cheating since cheating effectively labels its victims as inferior and, therefore, is likely to have an adverse effect on how students' peers perceive and interact with them.²⁴⁵ Furthermore, where students with disabilities are the focus of the misconduct, these students are likely to compare themselves negatively to classmates who were allowed to take the test on their own. The social messages that students receive from teachers and their peers are the most important determinant of their self-efficacy.²⁴⁶ Research suggests that negative social messages are particularly destructive where students do not possess the resilience to withstand and counteract such judgments.²⁴⁷ Because students with cognitive disabilities generally perform at lower levels than their peers,²⁴⁸ they presumably will lack the academic accomplishments needed to counteract negative messages. Studies have also shown that it is generally easier to weaken confidence through negative messages than it is to strengthen it through positive encouragement.²⁴⁹ This suggests that the negative messages that cheating conveys will most likely have a lasting adverse impact on students' self-efficacy that subsequent positive encouragement will not be able to reverse.

The negative impact that cheating will predictably have on self-efficacy is particularly troubling in light of studies which have found that self-efficacy directly influences student achievement. Researchers have found that "[c]ompared with students who doubt their learning capabilities [(students with low self-efficacy)], those who feel efficacious for learning . . . work harder, [and] persist longer when they encounter

242. Frank Pajares, Lecture at the Emory University Great Teachers Lecture Series: Schooling in America: Myths, Mixed Messages, and Good Intentions (Jan. 27, 2000).

243. *Id.*

244. *Id.*

245. MCGREW & EVANS, *supra* note 134, at 15 (asserting that labels that carry pejorative connotations tend to adversely affect students' interactions with their peers).

246. Pajares, *supra* note 242.

247. *Id.*

248. *See supra* Part V.

249. Pajares, *supra* note 242.

difficulties”²⁵⁰ Some studies even suggest that self-efficacy has just as profound an impact on student performance as mental ability.²⁵¹ Furthermore, where social messages convey negative educational expectations, these expectations may lead to self-fulfilling prophecies, which according to researchers, students with low achievement self-concepts (like students with cognitive disabilities) are more susceptible to.²⁵² Thus, even if negative educational expectations have an initial reality base, these expectations tend to result in students performing more poorly than their past performances would predict.

b. Without an Injunction, Future Harm Is Likely

As previously argued, where cheating has occurred, it is likely to occur in the future. This argument is based on the findings of Jacob and Levitt’s study, which suggests that cheating is widespread and organized and tends to occur over time across classrooms (in a given school) and schools (in a given district).²⁵³ Support for this argument can also be found in the fact that, given that artificially inflating the scores of students with disabilities stands to benefit states, districts, and schools and that given the practical and monetary difficulties associated with preventing future cheating, educators at all levels cannot be trusted to take action.²⁵⁴ Because students with disabilities will most likely be the subject of future testing under NCLB²⁵⁵ and may remain in the same school or a school in the same district, the likelihood of future cheating makes the likelihood of future harm to the plaintiff substantial. While defendants may argue that educators will not be foolish enough to cheat once caught, the fact that there are numerous ways to cheat, some more difficult to detect than others,²⁵⁶ combined with research suggesting that it will become increasingly difficult for schools and districts to avoid sanctions²⁵⁷ suggests that cheating is likely to occur in the future and will presumably be more sophisticated.

250. Dale H. Schunk & Frank Pajares, *The Development of Academic Self-Efficacy*, in DEVELOPMENT OF ACHIEVEMENT MOTIVATION 15, 16 (A. Wigfield & J. Eccles eds., 2002).

251. *Id.*

252. MCGREW & EVANS, *supra* note 134, at 15.

253. Jacob & Levitt, *supra* note 80, at 862–64.

254. *See supra* note 123 and Part VI.

255. Under NCLB, states are required to administer these tests to all of its students at least once during grades three through five, grades six through nine, and grades ten through twelve. 20 U.S.C.A. § 6311(b)(3)(C) (Westlaw through May 2007 legislation).

256. *See supra* text accompanying note 82.

257. *See supra* text accompanying notes 18, 92.

2. Compensatory Damages

While declaratory and injunctive relief will ensure that students with disabilities will not be harmed by future cheating, compensatory damages distinguish suits under title II of the ADA and section 504 of the RA from the remedial measures described in Part VI of this Note because none of those measures would compensate students with disabilities for the harm inflicted upon them.²⁵⁸ Compensatory damages are a core feature of a private cause of action as an effective remedial measure.²⁵⁹ Monetary damages provide an additional incentive to parents of students with disabilities who, research has shown, are reluctant to use the legal system to defend their rights.²⁶⁰ Monetary damages also reduce the incentives for educators to cheat until they are caught²⁶¹ without financially crippling the public educational system.²⁶²

a. The Availability of Compensatory Damages Under Title II of the ADA

In the educational context, Eleventh Amendment sovereign immunity may bar students with disabilities from suing states (or state entities)²⁶³ for

258. See *supra* Part VI. The proposed measures to prevent future cheating focus primarily on detection and punishment but fail to provide compensation for the victims.

259. See Christopher Cowan, Note, *An Unworkable Rule of Law: The ADA, Education, and Sovereign Immunity: An Argument for Overruling Seminole Tribe of Florida v. Florida Consistent with Stare Decisis*, 80 S. CAL. L. REV. 347, 368 (2007) (noting that “[s]ome scholars . . . insist that injunctive relief is not enough, claiming that money damages are ‘essential to ensuring accountability’ and sometimes the only way to incentivize compliance with federal law”) (citing Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1214 (2001)).

260. While preventing future cheating is important, if injunctive relief is the sole remedy available, parents and students may find that the costs of litigation (e.g., time, effort, and financial resources) outweigh its benefits. Furthermore, there is evidence that parents of students with disabilities often lack the wherewithal to know their rights or are reluctant to assert them as the legal system creates feelings of vulnerability and disempowerment within them. See David M. Engel, Essay, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 188 (1991).

261. See Cowan, *supra* note 259, at 368 (citing Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1016–17 (2000)).

[I]n a world with no threat of monetary damage awards, there is ‘little to lose, and much to gain’ for a state not to comply with federal law and simply wait for a suit compelling compliance, especially in circumstances where the ‘scope of federal duties is uncertain or the cost of compliance is very high.

Id.

262. Unlike punitive damages and withholding federal funding, compensatory damages would reduce the incentives for cheating and compensate victims without *unnecessarily* depriving districts of financial resources that could otherwise have been used on educational improvements.

263. This discussion assumes that school districts and schools qualify as state entities. They may not. See Roger C. Hartley, *Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL’Y 323, 370–71 (2000) (“State sovereign immunity does not extend to a state’s political subdivisions—local governing

money damages under title II of the ADA. Unless abrogated by a valid exercise of Congress's section 5 power under the Fourteenth Amendment, sovereign immunity blocks the citizen of a state from suing that state in federal court for retrospective money damages.²⁶⁴ The standard for abrogation of state sovereign immunity has two prongs: "Congress must (1) explicitly intend to abrogate sovereign immunity and (2) be legislating within the bounds of [its] section 5 [Fourteenth Amendment power]."²⁶⁵ title II of the ADA satisfies the first prong.²⁶⁶ In order to satisfy the second prong, section 5 legislation must pass a "congruence and proportionality" test. Under this test, "section 5 legislation is valid if it exhibits 'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"²⁶⁷ In the context of public

bodies such as municipal corporations, counties, cities, and school districts." *But see* McNulty v. Bd. of Educ. of Calvert County, No. DKC 2003-2520, 2004 WL 1554401, at *4 (D. Md. July 8, 2004) (acknowledging the Board of Education as a state agency under certain conditions).

Confusion arises because the arm-of-the-state doctrine lacks coherent standards, produces contradictory results, and is unsupportable based on functional differences between a state and its political subdivisions. . . . [In addition,] the Court has recognized an . . . exception to [this doctrine]. Even when it is undisputed that a governing entity is not entitled to state sovereign immunity on its own, the Court will accord immunity when the relief granted would harm the state directly. The crucial factors are the level of state cooperation between state and local officials anticipated by state law and whether the source of funding comes exclusively or primarily from the state.

Hartley, *supra*, at 371–72.

264. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65–66 (1996). The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Although not supported by a literal reading of the Eleventh Amendment, in *Hans v. Louisiana*, the Court held "that principles of state sovereign immunity prevented a citizen of a state from calling that state before a federal court." See Cowan, *supra* note 259, at 351 (citing *Hans v. Louisiana*, 134 U.S. 1, 10–11 (1890)). The court's ruling has never been overturned. *Id.* at 351–52 (citing James Leonard, *A Damaged Remedy: Disability Discrimination Claims Against State Entities Under the Americans with Disabilities Act After Seminole Tribe and Flores*, 41 ARIZ. L. REV. 651, 664 (1999)).

265. Camille L. Zentner, *Between the Hockey Rink and the Voting Booth: The ADA and Abrogation of Sovereign Immunity in the Educational Context*, 71 BROOK. L. REV. 589, 595 (2005) (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72 (2000)).

266. 42 U.S.C. § 12202 (2000). Title II provides: "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." *Id.* See also *Tennessee v. Lane*, 541 U.S. 509, 518 (2004) (stating that the question of whether title II satisfies the first part of the abrogation standard is "easily answered" in the affirmative).

267. *Lane*, 541 U.S. at 520 (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). In *City of Boerne v. Flores*:

[The Court] created a three-part test to determine whether a congressional action is a valid exercise of section 5 power. First, the violated right must be identified, the violation of which is judged by the appropriate level of judicial scrutiny. Second, the Court must determine whether there is a continuous history of the violation through an examination of the congressional record. Finally, the Court must determine if the remedy created by the statute is 'congruent and proportional' to the history and importance of the violated right.

education, courts disagree on whether title II satisfies this test.²⁶⁸ This subsection will discuss how the Court has handled the issue of whether the Americans with Disabilities Act can abrogate sovereign immunity in an attempt to determine whether students with disabilities will be able to obtain compensatory damages from states under title II of the ADA when educators deprive them of full and equal participation in NCLB mandated testing.

In *Board of Trustees of the University of Alabama v. Garrett*, the court addressed the following question: Is title I of the ADA—which prohibits discrimination based on disability in the employment context²⁶⁹—a valid abrogation of state sovereign immunity pursuant to Congress’s section 5 power?²⁷⁰ Recognizing that the ADA’s language explicitly stated Congress’s intent to abrogate state sovereign immunity,²⁷¹ the Court focused on the second prong of the abrogation standard and held that because title I failed the congruence and proportionality test, it was not valid section 5 legislation, and therefore, could not abrogate state sovereign immunity.²⁷² Specifically, the Court found that (1) the right to be free from discrimination based on disability warranted only rational basis review²⁷³; (2) Congress failed to identify a “history and pattern of unconstitutional employment discrimination by the States against the disabled”²⁷⁴; and (3) even if such a history and pattern of discrimination existed, title I required more of states than was constitutionally required under rational basis review and, therefore, was not congruent and proportional to its object of preventing disability discrimination in employment.²⁷⁵ Thus, according to the Court, the Eleventh Amendment barred the plaintiffs from suing the State of Alabama for money damages under title I.²⁷⁶

Garrett left unanswered the question of whether title II of the ADA

Cowan, *supra* note 259, at 357 (citing *Flores*, 521 U.S. at 529–36 and Bd. of Trs. of the Univ. of Ala. v. *Garrett*, 531 U.S. 356, 365–74 (2001)).

268. See *infra* notes 285–94.

269. Under title I of the ADA, state employers are prohibited from “discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) (2000).

270. *Garrett*, 531 U.S. at 360.

271. *Id.* at 363–64.

272. *Id.* at 374.

273. *Id.* at 365–68.

274. *Id.* at 368.

275. *Id.* at 372.

276. See *id.* at 360, 368.

could abrogate state sovereign immunity.²⁷⁷ However, in its wake, a number of circuits held that like title I, title II was not a valid abrogation of sovereign immunity pursuant to Congress's section 5 power.²⁷⁸ It was not until *Tennessee v. Lane*, that the Supreme Court addressed this question.²⁷⁹ In *Lane*, the Court held that, as it applied to the right of access to the courts, title II of the ADA was a valid exercise of Congress's section 5 power and, therefore, could abrogate sovereign immunity.²⁸⁰ The court asserted that the right of access to the courts was a fundamental right protected by the Due Process Clause, and therefore, unlike the right implicated in *Garrett*, warranted "more searching judicial review."²⁸¹ Deviating from *Garrett*, the Court widened its search for a history and pattern of discrimination and determined that Congress had identified a history and pattern of disability discrimination in the provision of public services, programs, and activities such that disability discrimination in this context was an appropriate subject for prophylactic legislation.²⁸² Re-narrowing its focus, the Court concluded that title II was congruent and proportional to its object of enforcing the fundamental right of access to the courts.²⁸³

Lane's narrow "as applied" holding left to the lower courts the task of determining whether title II can abrogate sovereign immunity in other contexts.²⁸⁴ In the educational context, courts are divided on this issue. So

277. *Tennessee v. Lane*, 541 U.S. 509, 514 (2004) (citing *Garrett*, 531 U.S. at 360).

278. The Second, Fifth, and Tenth Circuits held that title II was not a valid exercise of section 5 power and therefore could not abrogate sovereign immunity. See *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 108–10 (2d Cir. 2001); *Reickenbacker v. Foster*, 274 F.3d 974, 984 (5th Cir. 2001); *Thompson v. Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001). *But see Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1174 (9th Cir. 2002) (holding that title II is a valid exercise of Congress's section 5 power).

279. *Lane*, 541 U.S. at 513.

280. *See id.* at 533.

281. *Id.* at 522–23.

282. *Id.* at 524–29. According to the Court, it was "clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation." *Id.* at 529. *See also Cowan*, *supra* note 259, at 379 (stating that the Court's examination "was much broader than that allowed under *Garrett*. The Court cited not only instances of deprivation of disabled persons' right of access to the courts, but also a whole host of other rights—some fundamental and some not—in order to prove this history and pattern of harm to the disabled").

283. *Lane*, 541 U.S. at 533. *See Cowan*, *supra* note 259, at 380 (criticizing the majority's analysis in *Lane* as "logistical acrobatics").

The majority first identifies a very specific right—the fundamental right of access to the courts. Then it finds evidentiary support for a history and pattern of deprivation of that right by considering instances of deprivation of that right and other rights protected by the statute as a whole. Finally, the court returns to an examination of the original right and whether the remedy provided by Congress is permissibly remedial to protect that specific right.

Id.

284. *Lane*, 541 U.S. at 533 n.20 ("Because this case implicates the right of access to the courts, we need not consider whether title II's duty to accommodate exceeds what the Constitution requires in the class of cases that implicate only *Cleburne*'s prohibition on irrational discrimination.").

far, the Eleventh, Fourth, First, and Third Circuits have held that title II can abrogate state sovereign immunity in the educational context emphasizing that although not fundamental, the right to an education is extremely important.²⁸⁵ Until recently, it appeared that district courts in the Second Circuit agreed that “*Lane* cannot extend to suits outside of the ‘fundamental right’ context and that title II does not amount to a congruent and proportional response to the history of deprivation of the right to public education.”²⁸⁶ However, a district court in the Second Circuit recently sided with the Eleventh, Fourth, First, and Third Circuits, holding that in the educational context, title II is a valid abrogation of state sovereign immunity pursuant to Congress’s section 5 power.²⁸⁷ On the other side of the fence, a district court in the Seventh Circuit has held that title II is not a valid abrogation of sovereign immunity in the educational context.²⁸⁸ The Eighth Circuit, although not addressing this specific question, has refused to extend *Lane* to any non-fundamental right.²⁸⁹ Finally, before *Lane*, the Sixth Circuit held that in the educational context, title II cannot abrogate sovereign immunity.²⁹⁰

In light of this division among lower courts, it is unclear whether students with disabilities will be able to obtain compensatory damages from states under title II of the ADA when educators deprive them of full and equal participation in NCLB mandated testing. Their ability to do so will depend on where they file suit. In the Eleventh, Fourth, First, and Third Circuits, and possibly the Second Circuit, students with disabilities should be able to sue states for money damages under title II,²⁹¹ but probably will be unable to do so in the Sixth, Seventh, and Eighth Circuits.²⁹² For those students bringing title II claims in courts that have yet to address this issue since *Lane*, their ability to obtain monetary damages from states will depend on whether these courts extend *Lane* beyond the courthouse to the classroom.

285. *Bowers v. N.C.A.A.*, 475 F.3d 524, 555 (3d Cir. 2007); *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006); *Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ.*, 405 F.3d 954, 958–59 (11th Cir. 2005); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 490 (4th Cir. 2005).

286. *Cowan*, *supra* note 259, at 384–85 (citing *Press v. S.U.N.Y. at Stony Brook*, 388 F. Supp. 2d 127, 134–35 (E.D.N.Y. 2005); *Johnson v. S. Conn. State Univ.*, No. CIVA3:02-CV-2065(CFD), 2004 WL 2377225, at *1, *4 (D. Conn. Sept. 30, 2004)).

287. *Goonewardena v. New York*, 475 F. Supp. 2d 310 (S.D.N.Y. 2007).

288. *Doe v. Bd. of Trs. of the Univ. of Ill.*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006).

289. *Bill M. v. Neb. Dep’t of Health & Human Servs. Fin. & Support*, 408 F.3d 1096, 1100 (8th Cir. 2005).

290. *Carten v. Kent State Univ.*, 282 F.3d 391, 395 (6th Cir. 2002).

291. *See supra* cases cited in notes 285, 287.

292. *See supra* cases cited notes 288–94.

b. The Availability of Compensatory Damages Under section 504 of the RA

Even if monetary damages are unavailable under title II of the ADA, in most instances of educator misconduct, students with disabilities should be able to recover damages pursuant to section 504 of the RA. Passed pursuant to Congress's spending power, section 504 of the RA conditions the receipt of federal funds on state waiver of immunity.²⁹³ Under section 504 of the RA "compensatory damages are not available absent a showing of discriminatory intent."²⁹⁴ Courts have found that discriminatory intent exists where the defendant was "deliberate[ly] indifferen[t]" to the plaintiff's rights.²⁹⁵ Deliberate indifference requires knowledge that harm to a federally protected right is substantially likely and a failure to act upon that likelihood.²⁹⁶ The first element is satisfied when a public entity has notice that an accommodation is required,²⁹⁷ while the second element is satisfied if the entity's "failure to act [is] a result of conduct that is more than negligent, and involves an element of deliberateness."²⁹⁸

293. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280 (5th Cir. 2005). *But see* *South Dakota v. Dole*, 483 U.S. 203, 207–09 (1987) (stating that although Congress can condition the receipt of federal funds on waiver of state immunity, the conditions cannot be so extreme as to be unduly coercive); *Cowan*, *supra* note 259, at 390 (suggesting that although the Court has not found section 504 of the RA to be unduly coercive, given the amount of money states receive from the federal government for education, conditioning the receipt of such funds on waiver of state immunity "could be seen by today's Court as impermissibly coercive . . .").

294. *Lovell v. Chandler*, 303 F.3d 1039, 1056 (9th Cir. 2002) (quoting *Ferguson v. Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998)). Courts have used a contract-law analogy to find that monetary damages may be awarded in suits under the Rehabilitation Act. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74–75 (1992). The theory is that spending legislation, like the Rehabilitation Act, is analogous to a contract and therefore, since compensatory damages are available as a remedy for breach of contract, they should be available as a remedy for a violation of the conditions attached to the receipt of federal funding. *See Barnes v. Gorman*, 536 U.S. 181, 186–88 (2002). "The Supreme Court has said that the purpose of requiring proof of intent as a prerequisite for the recovery of monetary damages from a public entity is to ensure that the entity had knowledge and notice." *Lovell*, 303 F.3d at 1057 (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287–89 (1998) (finding "notice to the school district indispensable before it can be held financially liable under title IX for a teacher's sexual harassment of a student, but not requiring active approval of such harassment")). In other words, a public entity should not have to pay for violations that it did not know were occurring.

295. *Duvall v. County of Kitsap*, 260 F.3d 1124, 1138 (9th Cir. 2001). Other courts have found that in cases involving facial discrimination, discriminatory intent can be presumed. *See Pandazides v. Va. Bd. of Ed.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (reasoning that because "intentional discrimination" was "synonymous with discrimination resulting in 'disparate treatment,' which contrasts with 'disparate impact,'" no greater proof of mental state was necessary) (citing *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983)).

296. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

297. In the context of educator cheating, the accommodation is the inclusion of students with disabilities in testing and testing them appropriately.

298. *Duvall*, 260 F.3d at 1139.

While the results of Jacob and Levitt's study on the prevalence of cheating and internal investigations conducted in response to suspicious test scores and allegations of cheating suggest that officials at the district level are often at least aware of cheating, there may be instances where cheating is the product of teachers operating independently. In such cases, it is unclear whether plaintiffs will be able to recover compensatory damages since the Supreme Court has not ruled on the following issues: (1) whether the doctrine of respondeat superior applies to disability discrimination claims under the Rehabilitation Act, (2) whether actual knowledge is needed to satisfy the "deliberate indifference standard" or whether constructive knowledge will suffice, and (3) whether private suits against individuals can be brought under the Rehabilitation Act.

i. Respondeat Superior

The Ninth Circuit has held that school districts can be held liable in monetary damages for the discriminatory acts of teachers.²⁹⁹ Under the doctrine of respondeat superior, the requisite "intent to discriminate" may be imputed to the school district where one of its teachers intentionally discriminates against an individual because of his or her disability.³⁰⁰ In order for a school district to be found vicariously liable, the violation must have occurred within the course and scope of the teacher's employment.³⁰¹ When a teacher cheats, a school district will argue that the violation was outside the course and scope of the teacher's employment because while teachers are required to administer state assessment tests, rules and test security procedures promulgated by the district and designed to keep teachers honest provide a clear indication that the school district does not assume liability for cheating.³⁰² While, on its face, this argument seems compelling, a number of courts have found that "the mere fact that an

299. See *Bonner v. Lewis*, 857 F.2d 559, 566-67 (9th Cir. 1988).

300. Under the doctrine of respondeat superior, liability is premised on the employment relationship. The employer is liable for the acts of its employees. The application of this doctrine to claims under the Rehabilitation Act would mean that the employee's intentionally discriminatory conduct becomes the employer's conduct for purposes of imposing liability. 17 CAUSES OF ACTION 647 (2006). Thus, where the employee acted with the intent to discriminate, the law assumes that the employer had the same intent.

301. 17 CAUSES OF ACTION 647, § 7 (Supp. 2005).

302. See *Edmondson*, *supra* note 166 (In response to allegations of cheating, "[s]chool officials [in Tennessee] point to the lengthy state requirements and test security procedures designed to keep teachers and students honest. In city schools, all teachers and administrators must sign a statement saying they understand testing rules and the consequences for breaking those rules"); Cizek, *supra* note 66 (noting that "commercial test publishers produce carefully scripted directions and clear guidelines for administering their tests," many of which are used by states as part of their accountability systems, and that many states have professional codes of ethics that "define the responsibilities and boundaries associated with mandated testing").

employer has specifically forbidden the type of behavior involved . . . does not automatically remove it from the . . . ‘scope of employment.’”³⁰³ The factors relevant to the determination of whether the violation occurred within the course and scope of employment are:

- (1) [T]he extent to which the employee-tortfeasor was motivated by desire to serve the employer in engaging in the tortious conduct, (2) whether the tortious conduct was committed during the time the employee was on duty, (3) whether the tortious conduct was committed while the employee was on the employer’s premises or on premises where the employee’s duties would naturally cause the employee to go, and (4) the extent to which the impetus for the tortious conduct was causally related to the tortfeasor’s employment.³⁰⁴

These factors suggest that in cases where courts apply the doctrine of respondeat superior to claims under the Rehabilitation Act, school districts are likely to be found vicariously liable for teacher cheating and, thereby, subject to compensatory damages.³⁰⁵ When a teacher excludes students with disabilities from testing or helps them cheat, that teacher intentionally discriminates against these students. Under the doctrine of respondeat superior, the teacher’s “intent to discriminate” should be imputed to the school district for purposes of recouping compensatory damages.

Despite Ninth Circuit precedent,³⁰⁶ the Supreme Court’s decision in *Gebser v. Lago Vista Independent School District* suggests that the Court may find that the doctrine does not apply to claims under the Rehabilitation Act.³⁰⁷ In *Gebser*, the issue was whether a school district could be held liable in damages based on an implied right of action under title IX of the Education Amendments of 1972 for a teacher’s sexual harassment of a female student.³⁰⁸ The Court concluded that “damages may not be

303. See 17 CAUSES OF ACTION 647 § 7: Practice Guide. See also RESTATEMENT (SECOND) OF AGENCY § 230.

304. 17 CAUSES OF ACTION 647 § 7: Practice Guide. While this standard applies to intentional torts committed by an employee, courts have compared violations of the Rehabilitation Act to intentional torts.

305. While a teacher’s motivation to cheat may be self-serving, cheating, in most instances, occurs while the teacher is on duty, on the employer’s premises, and is arguably causally related to the teacher’s employment since teachers presumably cheat to avoid sanctions under NCLB.

306. See *supra* note 299.

307. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285, 290 (1998) (noting that under title IX, knowledge will be imputed to the school district where an appropriate person—an official of the recipient entity with authority to take corrective action to end the discrimination—is aware of the discriminatory conduct and fails to take corrective action). The language of the opinion suggests that a school’s principal would qualify as an “appropriate person.” See *id.* at 290.

308. *Id.* at 277.

recovered . . . unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to the teacher's misconduct."³⁰⁹ According to the Court, its central concern with regard to the imposition of monetary liability for violations of Spending Clause legislation is with "ensuring that 'the receiving entity of federal funds [has] notice that it will be liable for a monetary award.'"³¹⁰ Therefore, the Court found that liability could not be imposed pursuant to the doctrine of respondeat superior since "it [was] unlikely that [in accepting federal funds, the school board] . . . agreed to suffer liability whenever its employees discriminate[d] on the basis of sex."³¹¹ Moreover, the Court noted that "a central purpose of requiring notice of the violation 'to the appropriate person' and an opportunity for voluntary compliance . . . is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs."³¹² Should a case presenting the question of whether the doctrine of respondeat superior applies to claims under the Rehabilitation Act come before the Court, the Court is likely to rely on its decision in *Gebser* because, like the Rehabilitation Act, title IX is Spending Clause Legislation, and the Court has interpreted title IX consistently with title VI—legislation which Congress expressly referred to in the Rehabilitation Act and which the Court has used to decide questions pertaining to the availability and scope of damages under the Act.³¹³

As previously stated, it is unclear in cases where a school district was unaware that one or more of its teachers were cheating whether plaintiffs will be able to recover compensatory damages. What is clear is that the application of the doctrine of respondeat superior to claims under the Rehabilitation Act would serve important policy goals. Vicarious liability would promote the Rehabilitation Act's policy of eliminating discrimination against the disabled and would also create an incentive for school districts to exercise care in the selection, instruction, and supervision of its teachers. However, the decision will presumably be complicated by the Court's acknowledgement in *Gebser* that vicarious liability may result in school districts being deprived of scarce financial resources in cases where it was not aware of the misconduct and was not

309. *Id.*

310. *Id.* at 287 (citing *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74 (1992)).

311. *Id.* at 288 (quoting *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 654 (5th Cir. 1997)).

312. *Id.* at 289.

313. *See* 29 U.S.C. § 794(a) (2000); *Barnes v. Gorman*, 536 U.S. 181, 184–89 (2002).

given the opportunity to remedy it.³¹⁴ Finally, while the Court's reasoning in *Gebser* may be applicable to the determination of whether the doctrine of respondeat superior applies to claims under the Rehabilitation Act, the facts in *Gebser* are distinguishable from suits alleging that a teacher discriminated against disabled students by excluding them from testing or helping them cheat. In *Gebser*, the alleged misconduct was a teacher's sexual harassment of a female student³¹⁵—behavior that does not promote the interests of the district. On the other hand, when teachers manipulate the system, the school district stands to benefit since local educational agencies are subject to sanctions under NCLB.³¹⁶ It would be unfair to plaintiffs and against public policy to allow a school district to benefit from its teachers' misconduct while at the same time using these same teachers to shield itself from monetary liability.

ii. Constructive Knowledge

So far, the Supreme Court has yet to rule on whether actual knowledge is required to satisfy the "deliberate indifference" standard in the context of claims brought under the Rehabilitation Act. Language in a U.S. district court opinion suggests that defendants can be liable in monetary damages where, despite not having actual knowledge of the alleged misconduct, they had constructive knowledge of its occurrence.³¹⁷ However, in *Gebser*, the Court found that actual knowledge was necessary to impose monetary liability for violations of title IX.³¹⁸ The same arguments for and against the application of the doctrine of respondeat superior to claims under the Rehabilitation Act can also be made in this context. As the Court in *Gebser* argued, constructive knowledge could result in the diversion of education funding from beneficial uses where a recipient was unaware of discrimination in its programs and willing to take corrective measures.³¹⁹ While this is true, constructive knowledge would also encourage school districts to take additional steps to prevent teachers from manipulating the system, and would reduce a district's ability to reap the benefits of cheating

314. *Gebser*, 524 U.S. at 289.

315. *Id.* at 277–79.

316. 20 U.S.C.A. § 6316(c) (Westlaw through May 2007 legislation).

317. *Doe v. Haw. Dep't of Educ.*, 351 F. Supp. 2d 998, 1013–15 (D. Haw. 2004) (finding that plaintiffs failed to satisfy the deliberate indifference standard because they could not show that defendants had actual or constructive knowledge of the alleged discrimination).

318. *Gebser*, 524 U.S. at 285 (“[W]e conclude that it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice to a school district official.” (emphasis omitted)).

319. *Id.* at 289.

while at the same time escaping responsibility for its occurrence in cases where district officials suspected misconduct but chose not to act on those suspicions.

iii. Individual Liability

While the Supreme Court has not ruled on whether private suits against individuals are allowed under the Rehabilitation Act,³²⁰ a number of circuit courts have determined that section 504 does not provide for such suits.³²¹ Furthermore, while the Court has yet to announce a ruling that directly addresses this issue, its decision in *United States Department of Transportation v. Paralyzed Veterans of America* suggests that in the context of educator cheating, teachers cannot be held individually liable under the Rehabilitation Act.³²² According to the Court, section 504's prohibitions only apply to those who actually receive federal funding, and not to those who are merely beneficiaries of the assistance.³²³ By limiting coverage to recipients, Congress imposes the obligation of section 504 upon those who are in a position to accept or reject those obligations as part of the decision whether or not to receive federal funds.³²⁴ Because public school teachers do not receive title I funding and are not in a position to decide whether or not to accept it, plaintiffs will most likely not be able to recover compensatory damages from them.

3. Attorneys' Fees

The costs associated with the litigation of these types of claims will most likely be significant since proving that misconduct occurred may require a large scale investigation and necessitate the hiring of expert

320. See *Doe*, 351 F. Supp. 2d at 1011.

321. See *id.* at 1011 (citing *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 107 (2d Cir. 2001); *Hiler v. Brown*, 177 F.3d 542, 545-46 (6th Cir. 1999)); *Butler v. Prairie Vill.*, 172 F.3d 736, 744 (10th Cir. 1999). This conclusion seems appropriate since section 504 of the RA applies to "any program or activity receiving federal financial assistance" and an individual is clearly not a "program or activity receiving federal financial assistance." 29 U.S.C. § 794(a) (2000). *But see* *Chaplin v. Consol. Edison Co.*, 587 F. Supp. 519, 521 (S.D.N.Y. 1984) (holding individual actors liable and noting that section 504 of the RA does not speak of discrimination "by" a recipient of federal funds but discrimination "under" any program or activity receiving federal funds). In any event, in the few cases holding individuals liable under section 504 of the RA, the individual found liable was not only responsible for the discrimination, but also in a position to accept or reject federal funds on behalf of the program or activity. See, e.g., *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 323 (D. Mass. 1997) (finding former university president and current university chancellor potentially subject to liability under section 504 of the RA).

322. *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 613 (1986).

323. *Id.* at 605.

324. *Glanz v. Vernick*, 756 F. Supp. 632, 637 (D. Mass. 1991).

witnesses, especially where the plaintiff must prove “deliberate indifference” for the purpose of obtaining compensatory damages.³²⁵ Because many students with disabilities come from low-income families and therefore, in most cases, cannot afford to pay the costs associated with litigation, if unable to recover such costs, students with disabilities and attorneys would have less incentive to bring claims of this nature.³²⁶ Fortunately, the ADA authorizes a court to award attorneys’ fees, litigation expenses, and costs to a prevailing party.³²⁷ Similarly, under the Rehabilitation Act, the court, in its discretion, may allow the prevailing party reasonable attorneys’ fees “in any action or proceeding to enforce or charge a violation” of the Act.³²⁸ Plaintiffs are a “prevailing party” when the actual relief they obtain materially alters the legal relationship between the defendant and themselves by modifying the defendant’s behavior in a way that directly benefits them.³²⁹ This includes instances in which the plaintiffs enter into a legally enforceable settlement agreement with the defendant.³³⁰ The amount awarded may include all reasonable expenses

325. Plaintiffs can file a complaint with the Office of Civil Rights (OCR). Should the OCR decide to conduct an investigation, there is nothing that prohibits plaintiffs from using the evidence uncovered by the investigation in a private suit. Obviously, plaintiffs cannot recover for the costs associated with the production of this evidence. *See* E.E.O.C. v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1288 (7th Cir. 1995) (finding that plaintiffs could not recover for duplicative work performed by the Equal Employment Opportunity Commission). This would help defray the costs of litigation and thereby serve as an incentive to plaintiffs and attorneys to bring these types of claims. It is important to note that while the OCR takes complaints, conducts investigations when deemed appropriate, and seeks voluntary compliance, plaintiffs should not rely on the OCR to ensure that future cheating does not occur. For starters, the OCR lacks the capacity and funding necessary to adequately handle all complaints. Furthermore, because the OCR seeks voluntary compliance, this method does not provide the same incentive for schools and districts to ensure that their educators are not cheating given that there is no threat of bad publicity, litigation costs, or monetary liability.

326. *See* Cowan, *supra* note 259, at 387 (noting that “[t]he importance of the availability of [attorneys’] fees in Title II suits is clear” given that many students with disabilities come from low-income families) (citing QI WANG, U.S. CENSUS BUREAU, DISABILITY AND AMERICAN FAMILIES: 2000; CENSUS 2000 SPECIAL REPORT 10 (2005), available at <http://www.census.gov/prod/2005pubs/censr-23.pdf>).

327. 42 U.S.C. § 12205 (2000); 28 C.F.R. § 35.175 (2006).

328. 29 U.S.C. § 794a(b) (2000). *See also* Mantoletto v. Bolger, 791 F.2d 784, 786 (9th Cir. 1986).

329. *Richard S. v. Cal. Dep’t. of Developmental Servs.*, 317 F.3d 1080, 1086 (9th Cir. 2003). *But see* *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t. of Health & Human Res.*, 532 U.S. 598, 600 (2001) (holding that “prevailing party” status requires a “judgment on the merits or a court-ordered consent decree”). The Court’s holding in *Buckhannon* might allow “a state [to] avoid the payment of [attorneys’ fees] by simply changing its illegal policy and making the injunctive suit moot any time prior to judgment or settlement, even though it was likely the merits of the cause of action that led the state to make the change.” Cowan, *supra* note 259, at 387 (citing *Buckhannon*, 532 U.S. at 622 (Ginsburg, J., dissenting)). Critics argue that this creates a disincentive for attorneys to file suits since attorneys’ fees might become “unavailable well into the costly litigation process.” Cowan, *supra* note 259, at 387.

330. *Richard S.*, 317 F.3d at 1086.

incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case.³³¹ Prevailing parties may also recover expert witness fees.³³² Finally, attorneys' fees may also be assessed in favor of a defendant when it is found that the plaintiff's claim was frivolous, unreasonable, or groundless.³³³

D. THE MISSING LINK TO EFFECTIVE PREVENTION

Up until now, "whistle-blowing [has been] largely up . . . to teachers, school administrators and independent test scorers . . . who have few incentives to report [cheating]."³³⁴ While some of the best evidence of cheating has come from students themselves,³³⁵ the value of students as reliable detectors of cheating has been largely ignored. Private causes of action under title II of the ADA and section 504 of the RA encourage students with disabilities and parents to blow the whistle on cheaters. Other proposed methods of preventing cheating fail to compensate the victims for the harm inflicted upon them,³³⁶ and because they are implemented by the entities that stand to benefit from cheating,³³⁷ they are inherently suspect. Thus, until now, parents could reasonably expect that blowing the whistle on cheaters would not necessarily result in corrective action. Now, parents have the means not only to be made whole after their rights have been violated, but also to prevent future cheating and the harm that it causes by forcing schools to take action. Furthermore, the negative consequences that lawsuits entail for districts and schools—litigation costs (both their own and the prevailing party's), monetary liability in the form of compensatory damages, and the bad publicity that lawsuits generate—will encourage them to take action to prevent future misconduct before it occurs. Finally, these private causes of action increase the likelihood that cheaters will be caught and punished appropriately for all types of cheating—including

331. 42 U.S.C. § 1988 (2000). 42 U.S.C. § 1988 applies to title VI of the Civil Rights Act of 1964 and therefore, applies to both section 504 of the RA and title II of the ADA. *See supra* note 220 and accompanying text. The amount that the plaintiff is awarded as compensatory damages may impact the size of the eventual attorney fee award. *See Fischer v. SJB P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000). However, it is only one of many factors that the court will consider in determining the size of the award. *See Webb v. James*, 967 F. Supp. 320, 325 (N.D. Ill. 1997).

332. *See Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002) (noting that "litigation expenses" encompass expert witness fees, travel expenses, and the preparation of exhibits).

333. *See Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978).

334. Hupp, *supra* note 60.

335. *See Benton*, *supra* note 59; *Benton & Hacker*, *supra* note 58; Hupp, *supra* note 60.

336. *See supra* Part VI.

337. *See supra* accompanying text note 123.

cheating that is more moderate in scope and quality.³³⁸

The effectiveness of private causes of action under title II of the ADA and section 504 of the RA is largely dependent on educating students with disabilities and their parents of their rights. While private causes of action provide the vehicle through which these students and their parents can defend themselves against unscrupulous educators, students with disabilities and their parents need to be educated on how to effectively use this valuable tool. This will require not only making sure that students with disabilities and their parents are well-versed on their rights and how they can use the legal system to defend those rights,³³⁹ but will also require educating students with disabilities and their parents on appropriate testing procedures,³⁴⁰ and instructing parents on how to spot “suspicious test scores”—large discrepancies from one year to the next in their child’s test scores, the scores of the students within a disability subgroup, and the adequate yearly progress of their child’s school and district.³⁴¹

VIII. CONCLUSION

When educators attempt to artificially inflate the scores of students with disabilities through various acts of manipulation, students with disabilities suffer. Because it is unlikely that NCLB will be repealed or undergo a major overhaul in the near future,³⁴² the incentives to cheat will

338. According to Jacob and Levitt, moderate or “subtle” cheating is more likely to go undetected. Jacob & Levitt, *supra* note 80, at 846. This type of cheating includes, but is not limited to, providing extra time to students, or changing fewer answers on a smaller percentage of students’ answer sheets. *Id.*

339. If this is not done, the parents of students with disabilities will be less likely to stand up for their child’s rights, as well as their own rights. See Engel, *supra* note 260, at 188.

340. “Commercial test publishers produce carefully scripted directions and clear guidelines for administering their tests.” Cizek, *supra* note 66. In addition, states and school districts have rules that define the “responsibilities and boundaries associated with mandated testing.” *Id.* Nevertheless, there is still some uncertainty amongst educators as to what types of conduct constitute cheating. For example, if a student does not understand what a particular test question is asking and asks the teacher for assistance, can the teacher provide an explanation?

341. See James Walsh, *Test Scores Not Always What They Seem: EWA Seminar Looks at Ways to Accurately Assess Achievement Rates*, 39 EDUC. REP., Nov.–Dec. 2005, at 1 (stating that “schools that have wildly fluctuating results should raise red flags” and that detecting cheating will require “go[ing] beyond ‘passing rates’ to look at the actual student scores and compare the scores on tests used under No Child Left Behind to other measures of academic success to see if improvement appears consistent”).

342. Although up for reauthorization as of January 8, 2007, “Washington insiders” believe that reauthorization is not likely until 2009 and that a major overhaul of the Act is unlikely. See COBY LOUP & MICHAEL J. PETRILLI, THOMAS B. FORDHAM INST., RESEARCH BRIEF: CRYSTAL APPLE: EDUCATION INSIDERS’ PREDICTIONS FOR NO CHILD LEFT BEHIND’S REAUTHORIZATION, at <http://www.edexcellence.net/doc/CrystalAppleNCLBBrief.pdf> (last visited Sept. 1, 2007).

undoubtedly persist and as some suggest, may increase. Students with disabilities and their parents cannot rely on the educational system or the federal government to hold schools accountable. Suits under title II of the Americans with Disabilities Act and section 504 of the Rehabilitation Act provide students with the means to do so. The question of how to effectively educate and assess students with disabilities continues to be debated. Research suggests that it is unclear whether NCLB's high stakes accountability increases the educational achievement of students with disabilities, thus narrowing the achievement gap that exists between these students and their non-disabled peers. What is clear is that if educators continue to cheat, we will never know the answer to this question. If NCLB is truly unrealistic and ill-advised, when educators cheat, they perpetuate the problem, making the Act appear to be successful when it truly is not. Thus, cheating is bad for everyone—students with disabilities, their parents, and educators themselves—and needs to stop. It is up to students with disabilities and their parents to ensure that it does.