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Bridging the Gap between Policy and Practice: Using Negotiated Rulemaking to Build Consensus on Assessments in Special Education

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BRIDGING THE GAP BETWEEN POLICY AND PRACTICE: USING NEGOTIATED RULEMAKING TO BUILD CONSENSUS ON ASSESSMENTS IN SPECIAL EDUCATION

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I. INTRODUCTION

Over 6.6 million special education students are served in U.S. schools and covered by the No Child Left Behind Act (NCLB) and the Individuals with Disabilities Education Act (IDEA).¹ This number reflects roughly 13.4% of the total enrollment of all public school students.²

Before the passage of the NCLB law, few states had implemented

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1. THOMAS D. SNYDER ET AL., NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS Table 50 (45th ed. 2010).

2. *See id.*

alternate assessments for students with disabilities, and the scores of students with disabilities were frequently excluded (or only sporadically included) in state standardized assessment results.³ As a result, decisions about the material that special education students were taught, the methods by which they were assessed, and the way that those assessments were valued and used, rested almost exclusively with special education teachers and individualized education program (“IEP”) teams. This trend began to change in 1997, when IDEA was amended to require students with disabilities to participate in state assessments and to require IEP teams to specifically consider how special needs children would access and progress in the standard curriculum. However, the 1997 amendments imposed no external standards and still left much of the power to determine the content of special education and the value to place on assessment results with special education practitioners.

In 2004, the dynamic changed dramatically as lawmakers aligned IDEA with NCLB, explicitly linking the Adequate Yearly Progress (AYP) of a school to the ability of its special education students to achieve proficiency on the same standards as general education students. This alignment shifted the power to determine the content of special education from the IEP team to state curriculum experts. In addition, by making AYP on standardized tests the evaluative standard for special education as well as general education, the type, use, and value of assessments in special education were also shifted toward more centralized determinations.

The results of this attempt to increase accountability in special education, by making content and assessment decisions more standardized and centralized, are mixed and varied. Though reports show measured achievement in several states and narrowing of the achievement gap,⁴ special education students are still the lowest achieving subgroup in many states.⁵ For example, in Indiana, over seventy-five percent of failing schools missed AYP in whole or in part because special education students did not meet benchmarks.⁶ In Pennsylvania, forty-three percent of failing

3. Margaret J. McLaughlin et al., *Standards, Assessments, and Accountability for Students with Disabilities: An Evolving Meaning of “Free and Appropriate Public Education,”* in *NCLB AT THE CROSSROADS: REEXAMINING THE FEDERAL EFFORT TO CLOSE THE ACHIEVEMENT GAP 107-08* (Michael A. Rebell et al. eds., 2009).

4. CHRISTINE E. SLEETER, *UN-STANDARDIZING CURRICULUM: MULTI-CULTURAL TEACHING IN THE STANDARDS-BASED CURRICULUM* 6, 66 (2005).

5. See KAREN E. JOHNSON ET AL., NAT’L CTR. FOR EDUC. AND INST. OF REG’L ASSISTANCE, U.S. DEP’T OF EDUC., *THE STUDENTS WITH DISABILITIES SUBGROUP AND ADEQUATE YEARLY PROGRESS IN MID-ATLANTIC REGION SCHOOLS* (2007), available at http://ies.ed.gov/ncee/edlabs/regions/midatlantic/pdf/REL_2007018_sum.pdf.

6. Gail R. Chaddock, *Americans Grow Skeptical as School Reform Takes Toll: New Surveys Show Public Support for the Goals—But Not Effect of No Child Left*

schools missed AYP because their special education students did not meet proficiency benchmarks,⁷ while twenty-nine percent of schools in New Jersey missed AYP solely because of the students with disabilities subgroup.⁸

These results suggest that not only is there room for improvement in the achievement of special education students, but also that current methods of promoting this improvement are flawed. There are, of course, no shortages of substantive critiques of the IDEA/NCLB alignment,⁹ but this Article suggests that these substantive flaws are rooted in procedural flaws.¹⁰ The NCLB law specifically incorporates a requirement that implementing regulations be adopted through a process of negotiated rulemaking;¹¹ however, the voices of special education teachers were notably missing from discussions of both the NCLB regulations and the regulations on special education assessments.¹² Moreover, with respect to rulemaking, the Department of Education declined to engage in negotiated rulemaking at all, finding that the NCLB negotiated rulemaking alone satisfied the congressional directive.¹³ As a result, the buy-in and consensus that often attend negotiated rulemaking have been markedly absent in special

Behind, CHRISTIAN SCI. MONITOR (Aug. 24, 2005), <http://www.csmonitor.com/2005/0824/p02s01-uspo.html>.

7. Connie Langland, *Groups Seeks Changes to 'No Child' Law*, THE PHILA. INQUIRER (July 19, 2005), http://articles.philly.com/2005-07-19/news/25434107_1_special-education-special-education-and-limited-english-speaking-students-lisa-andrejko.

8. JOHNSON, *supra* note 5.

9. See John Heintz, *Political Currency and Hard Currency: The No Child Left Behind Act Turns Three*, 40 J. MARSHALL L. REV. 345, 359 (2006) (“By conceding that special education students require special attention and special criteria to succeed on a standard test, the Department of Education implicitly admits that holding all students to the same level of performance does not work. As more than a practical matter then, special education is the irresistible force meeting the immovable object of the NCLBA’s standardized exams.”).

10. Accord Danielle Holly-Walker, *The Importance of Negotiated Rulemaking in the No Child Left Behind Act*, 85 NEB. L. REV. 1015, 1018 (2011).

11. 20 U.S.C. § 6571(b) (2003).

12. 67 FED. REG., 9224 (Feb. 28, 2002) The list of negotiating committee members for NCLB assessment regulations includes only two teachers, neither of whom is identified as a special education teacher. *See id.*

13. 72 FED. REG., 17,754 (Apr. 9, 2007) (noting in the discussion of alternative assessments for special education that “the statutory requirements for negotiated rulemaking in section 1901 of the ESEA to . . . apply to Title I standards and assessment regulations required to be implemented within one year of enactment of NCLB, not to subsequent regulatory amendments such as those included in these regulations”).

education classrooms, and special education teachers themselves have been marginalized in the process. This marginalization is particularly troubling given that special education teachers are overwhelmingly female.¹⁴ Though only fifty-eight percent of secondary school teachers are female, seventy-two percent of secondary special education teachers are female.¹⁵ In elementary school, the percentages are eighty-seven percent and ninety percent respectively.¹⁶

This Article uses Critical Discourse Analysis (CDA) as a framework through which to critique federal regulation of special education assessment under NCLB. It uses the results of CDA on the special education assessment regulations and interviews with special education teachers to underscore the wide gap between the assessment practices of special education teachers and the requirements of federal assessment regulations. This Article argues that the procedural failure to use negotiated rulemaking in the context of special education was a primary contributor to the flawed special education regulations that have been a primary source of controversy, and these flaws have remained uncorrected due to the devaluing of the knowledge of special education teachers, who are overwhelmingly female. It suggests that remedying this procedural flaw is a prerequisite to substantive improvement in the NCLB/IDEA assessment regime and the key to greater compliance and improved student outcomes.

This Article is divided into three parts. Part I provides a brief overview of the IDEA law and discusses its incorporation into the NCLB regime. Part II contrasts the discourse models of assessment underlying the Code of Federal Regulations (CFR) provisions with the models of assessment held by representative special education teachers, and pays particular attention to the disconnect between the two sets of models. Part III discusses the devaluation of practitioner knowledge inherent in this disconnect and proposes authentic negotiated rulemaking as the first step in remedying the flaws of the NCLB/IDEA regime.

II. INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Concern for the education of children with disabilities began around 1966 with a series of amendments to the Elementary and Secondary

14. See NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATIONAL STATISTICS Table 82 (2012), available at http://nces.ed.gov/programs/digest/d12/tables/dt12_082.asp.

15. See *id.*

16. WHO'S TEACHING OUR CHILDREN WITH DISABILITIES, NATIONAL INFORMATION CENTER FOR CHILDREN AND YOUTH WITH DISABILITIES, http://www.kidsource.com/kidsource/content4/Spec_Ed/Spec_Ed.html (last visited Apr. 6, 2014).

Education Act (ESEA) that provided funding to supplement state efforts to educate handicapped children. However, these initial efforts by states were not far-reaching. It was not until the early 1970s that a series of court decisions recognizing the right of children with special needs to a free and public education placed real pressure on states to educate their special needs population.¹⁷ While some states made genuine efforts to comply with the court decisions, many states indicated that a shortage of financial resources prevented them from providing adequate educational opportunities to their special needs students.¹⁸ The result was the passage of the Education for All Handicapped Children Act of 1975 (EAHCA), which provided significant levels of federal funding for the education of students with disabilities, while also clearly establishing the right of special needs students to “a free and appropriate education.”¹⁹

EAHCA contained three foundational principles that remain the cornerstones of today’s special education regime:

All students, regardless of the nature or severity of their disability, are entitled to a publicly funded education in the least restrictive environment.²⁰

Students with disabilities are entitled to an individualized educational program that takes into account their disability, their present educational performance, and the nature and duration of any special educational services that they need to succeed as a student.²¹

Students with disabilities and their parents are entitled to due process protections and open access to information regarding the provision of services, placement, and evaluation of their special needs.²²

Although EAHCA, renamed the Individuals with Disabilities Education Act in 1990, has always contained accountability provisions regarding how the program is run and the procedures to be followed in providing services to special needs children, the rise of the accountability movement—that culminated in the passage of the NCLB law—resulted in a new emphasis on assessment related accountability in special education classrooms. For example, the 2004 amendments were passed after the NCLB and reflect several of the accountability themes that were incorporated into that Act,

17. *See generally* Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 878 (D.D.C. 1972).

18. *See* Individuals with Disabilities Education Act, 20 U.S.C. § 1400(c)(2)(D) (2004) (citing the lack of sufficient resources within public school systems in 1975 as a reason why the needs of students with disabilities were often unmet).

19. Education for All Handicapped Children Act, 20 U.S.C. § 1400(c) (1976).

20. 34 C.F.R. § 300.128 (2014); 34 C.F.R. §§ 300.550-300.556 (2014).

21. § 300.132.

22. §§ 300.561-62.

such as standards based assessments and highly qualified teachers.²³ Moreover, the 2004 IDEA specifically provides that all students, even those with disabilities, have the same performance goals.²⁴ This means that students with disabilities must participate in the NCLB assessments, though some accommodation of their disability is permitted. These amendments permit a limited number of students to take alternate assessments, or assessments based on modified standards,²⁵ but the percentages of such students are pre-determined and may be unreflective of the actual numbers of students needing alternative assessments or modified standards. These provisions add detail to the NCLB mandate that at least ninety-five percent of students with disabilities participate in a state's standardized assessments.²⁶

These provisions are particularly troubling within the context of special education because they contradict insights from research and practice within the field of special education. For example, much of the rhetoric within the current testing and accountability movement promotes the idea that if states articulate clear and challenging learning objectives in the curriculum, require teachers to teach them, assess student mastery of them, and attach high stakes to the test results (graduation, continuation of jobs), then instruction and student achievement will improve.²⁷ While some researchers have noted improvement in student test scores as a result of such testing,²⁸ it is almost impossible in many school districts for special education students to avoid failure as a subgroup. Special education students who demonstrate their ability to achieve at the same level as regular education students are transitioned out of special education and into the general education program. This creates the risk that the testing paradigm will merely re-inscribe traditional inequalities by confirming existing negative perceptions of special education students without addressing the structures and processes that result in unequal outcomes.

In addition, researchers such as Stafford Hood have expressed concern that a single standards-based test is limited in its ability to cover the range of skills a student learns in a given year²⁹ and may often contradict more

23. Compare No Child Left Behind Act, 20 U.S.C. § 6311(b)(2)(H) (2002), with Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (2004).

24. Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (2004).

25. *Id.*

26. No Child Left Behind Act, 20 U.S.C. § 6311(b)(2)(H) (2002).

27. SLEETER, *supra* note 4, at 65.

28. Melissa Roderick et al., *The Impact of High-Stakes Testing in Chicago on Student Achievement in Promotional Gate Grades*, 24 EVALUATION & POL'Y ANALYSIS 333, 333 (2002) (discussing the rise of accountability policies in school reform).

29. Stafford Hood, *Culturally Responsive Performance-Based Assessment*:

authentic assessments and observations made by teachers in the classroom.³⁰ This is particularly problematic in the special education context where traditional tests are often unable to accurately capture the achievement of special education students and where high stakes testing exacerbates the problem of the employability of special education students by denying many of them a diploma. Moreover, these standardized assessments often conflict with the mandate of an individualized education program—including individualized goals—that has long been the hallmark of special education,³¹ for they presuppose not only that all students should learn the same content, but also that all students should learn that content at the same *rate*. Given the array of skill levels among special education students, much less than between special education and general education students, it seems unrealistic to expect to standardize the rate at which *all* students learn.³² Inherent in the distinction between special education and general education is an acknowledgement of differences in learning styles and rates.

Several alternatives to the high stakes proficiency approach to student assessment in special education have been proposed. For example, in recent years, researchers and departments of education have begun to shift focus from arbitrary grade level benchmarks that ignore the achievement gains of the lowest performing students to growth models that attempt to capture student progress at all achievement levels.³³ These models do not attempt to broaden the range of skills tested, but rather they attempt to capture all student progress—particularly progress that takes place below the proficiency level. Other suggested reforms consist of performance-based/culturally relevant assessments that address the actual make-up and theory of assessment, advocating for multimodal evaluation shaped by the

Conceptual and Psychometric Considerations, 67 J. NEGRO EDUC. 187, 188 (1998).

30. *Id.* at 189.

31. Heintz, *supra* note 9, at 360-61 (“The vaunted even-handedness of standardized testing . . . exists in tension with the personalized accommodations required in a special education student’s individualized education plan.”).

32. Accord Deborah L. Voltz et al., *Urban Special Education in the Context of Standards-Based Reform*, 27 REMEDIAL & SPECIAL EDUC. 329, 332-33 (2006) (arguing that attempts to standardize expectations across urban students who differ so dramatically “invites trouble”).

33. See generally Damian W. Betebenner, *Norm- and Criterion-Referenced Student Growth*, 28 EDUC. MEASUREMENT: ISSUES & PRAC. 42, 42 (2009); Kilchan Choi, et al., *Children Left Behind in AYP and Non-AYP Schools: Using Student Progress and the Distribution of Student Gains to Validate AYP*, 26 EDUC. MEASUREMENT: ISSUES & PRAC. 21, 21 (2007) (discussing status-benchmark models and growth-progress models as the two key approaches to defining student achievement).

actual lives of students.³⁴ Unfortunately, these alternatives are not reflected in the current NCLB/IDEA regime.

III. CRITICAL DISCOURSE ANALYSIS ON ASSESSMENT IN SPECIAL EDUCATION

A. Method and Terminology

The results of my discourse analysis³⁵ of the assessment models embraced by policymakers and practitioners suggest that there is a significant disconnect between the assessment models that underlie the NCLB/IDEA regime and those of special education teachers. This discourse analysis used situated meanings and cultural models to investigate how speakers and writers gave speech acts and texts specific meanings within certain contexts. According to James P. Gee, situated meanings are experiential patterns and images associated with a word, while cultural models are the underlying explanations for these patterns.³⁶ In the context of educational achievement, cultural models explain the different meanings assigned to student achievement by practitioners and bureaucrats. The questions Gee suggests that one ask about cultural models—what must people feel, value, and believe in order to interact in this way, what models are being used to make value judgments, what sorts of interactions/institutions could have given rise to these models, how the relevant cultural models are helping to reproduce or transform relationships³⁷—are the questions that create the context for understanding

34. SLEETER, *supra* note 4, at 71.

35. This study drew upon a convenience sample to identify potential interviewees within certain parameters, seeking interviewees who varied in years of experience, type of school (high school, middle school, elementary, urban, suburban), and classroom setting (inclusion, self-contained, and resource). The sampling ultimately resulted in a pool of seven teachers: three European-American women, two African-American women, an African woman, and a Hispanic woman, identified throughout by pseudonyms. The European-American teachers (Ms. Daughy, Ms. Elliot, and Ms. Laughlin) all worked in public schools in well-funded suburban areas. One of the two African-American teachers (Ms. Franklin) and the African teacher (Ms. Silverand), worked in urban schools in major cities, and the other African-American teacher (Ms. Alcott) worked in a small charter school in an urban area. The Hispanic teacher (Ms. Lewis) worked in a magnet public school in an urban area. The teachers ranged in years of experience from one year for an African-American teacher to twenty-two years in special education for the Hispanic teacher. They taught in high school, middle school, and elementary school settings. The teachers in this sample also represented all three types of special education settings—self-contained, inclusion, and resource.

36. JAMES P. GEE, AN INTRODUCTION TO DISCOURSE ANALYSIS: THEORY AND METHOD 59-61 (2d ed. 2007).

37. *Id.* at 77.

the situated meanings (patterns and images) practitioners assign to student achievement. These questions also help explore practitioners' understanding of the cultural models and situated meanings of student achievement embedded in the NCLB law.

Cultural models and their corresponding situated meanings are generally expressed through building tasks, three of which—activity building, identity building, and connection building—were explored in this critical discourse analysis. Activity building uses language clues and cues to “assemble” situated meanings about what activity is taking place.³⁸ The socio-culturally situated identity and relationship task mirrors this function in assembling situated meanings about the identities and relationships that are relevant to the interaction.³⁹ This is key in understanding how teachers position themselves and envision their roles in relation to their principals, the state, and the government in the process of improving student achievement, as well as how they believe they have been positioned by others. Lastly, the connection building task addresses what is being referred to and assumed in the interaction that connects it to previous and future interactions.⁴⁰ Connection building is a very important element of analysis because all identities and activities (re)created in the moment of discourse contain elements of past and future identities created in similar discourses; exploring this coherence is crucial to understanding the activity and identities being created and reflected in the learning event under study.

B. Policy Assessment Models

The NCLB testing regulations use the concept of AYP to measure the achievement of special education students. Despite the views of special educators and researchers that assessments of special education students should measure growth rather than proficiency, the negotiated regulations define adequate yearly progress almost exclusively as standardized test performance⁴¹ and appear to do little more than merely repeat the text of the NCLB law.⁴²

The situated meaning of AYP in the regulations is inconsistent with growth-based models of assessment. For example, adequate progress in this passage suggests that it requires more than “progress” and much more than average progress. The regulation explains AYP by using such words as “high standards” and “substantial improvement” and defines progress as

38. *See id.* at 98.

39. *See id.* at 98-100.

40. *See id.* at 100-01.

41. No Child Left Behind Act, 20 U.S.C. § 6311(b)(2)(C) (2002).

42. *Compare* § 6311(b)(2)(C), *with* 34 C.F.R. § 200.13 (2014).

a student status (proficient) rather than as student improvement.⁴³ In addition, the law presents adequate progress as the equivalent of “continuous” progress, making the goal of adequate yearly progress substantial annual improvement in group test scores until one hundred percent of students are proficient.⁴⁴

“Progress” in this text also has a specific situated meaning and it does not refer to individual growth. Instead, progress, as used in this passage, refers to the yearly increases in the percentages of students from disadvantaged groups who are proficient in reading and math.⁴⁵ This creates an educational paradigm within which the progress of the group subsumes individual growth, and reading and math are the only subjects that count toward a high quality education.⁴⁶

In addition, the situated meaning of the “achievement gap” plays a significant role in this text. By singling out poor students, students of color, students with disabilities, and immigrant students, the text defines the achievement gap in terms of their failures and their need for remediation.⁴⁷ It suggests that the test scores of certain groups of nonmainstream students—but not access to resources—will require extra focus if such students are to make “adequate” progress. In so doing, the text reproduces the social construction of students with disabilities as “other” and “at risk” as compared to their non-disabled peers. While the singling out of these students for attention was designed to increase their significance in the learning process, it has instead resulted in an increase in their marginalization.⁴⁸ By highlighting the inability of special education students to master grade level standards without individualized consideration of the appropriateness of those standards and the availability of resources, NCLB strengthens the stigma of being in special education classes.⁴⁹

The construction of “valid and reliable” academic assessments and indicators is also key wording in this passage. These terms seem to require that assessments be quantitative rather than qualitative. The text’s emphasis on *statistical* validity and the defining of adequate yearly progress as incremental numerical increases in proficiency for groups of

43. See 34 C.F.R. § 200.13 (2014).

44. *Id.*

45. *Id.*

46. Though other subjects are tested, AYP progress toward 100% proficiency has generally been calculated based on reading and math scores.

47. See 34 C.F.R. § 200.13 (2014).

48. Thomas Rentschler, *No Child Left Behind: Admirable Goals, Disastrous Outcomes*, 12 WIDENER L. REV. 637, 662 (2006).

49. *Id.*

students supports this idea that assessments are required to be quantitative. Similarly supportive of this emphasis is the text's limitation of "other academic indicators" of effectiveness to factors that can be reduced to a percentage. In addition, the text creates a connection between funding for local education agencies and their ability to demonstrate proof of the academic effectiveness of their reform programs quantitatively.⁵⁰ These all indicate a high level of attention to quantitative measures of education to the exclusion of other indicators rooted in qualitative analyses.

The connection building analysis underscores NCLB's emphasis on narrowly defined measures of achievement for nonmainstream groups. For example, the goal of adequate yearly progress, defined in terms of group proficiency, is connected not only to increases in proficiency, but specifically to increases in proficiency "while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools."⁵¹ As social conversations around the achievement gap are fixated on the persistent and pervasive differences in the test scores of mainstream and nonmainstream students, assessment under NCLB refers exclusively to group progress on standardized tests. Unlike increased student proficiency, which can be defined in innumerable ways, the achievement gap has historically been defined in terms of standardized test performance. As NCLB's goal is not merely to increase student proficiency, but also (more so) to reduce the achievement gap, its narrow, group-focused assessment framework may be the inevitable result of measuring states' progress in narrowing the achievement gap.⁵² This raises the question of whether the benefits of focusing on and tracking the achievement gap are worth the cost. Professor Geneva Gay has suggested that such an orientation focuses attention on remediating the perceived academic deficiencies of nonmainstream students as a group, rather than on the more important issue of the congruence, or lack thereof, between the testing paradigm and the actual needs of students.⁵³

Another connection evident in this passage is that between AYP and the banking model of education. Adequate yearly progress is defined once a year, beginning in third grade, by a single multiple-choice test. The idea that the quality and efficacy of a year's education can be accurately evaluated by a single multiple-choice test assumes to some extent that education is the transfer of a discrete body of knowledge and skills from teacher to student—for more complex interactional models cannot be

50. No Child Left Behind Act, 20 U.S.C. § 6311(b)(2)(C) (2002).

51. § 6311(b)(2)(B).

52. *See id.*

53. *See generally* GENEVA GAY, CULTURALLY RESPONSIVE TEACHING: THEORY RESEARCH AND PRACTICE 141 (2000).

measured exclusively in this way. Under the banking model, teachers deposit knowledge and skills into students, and the state assesses the “account balances” of each child once a year before permitting them to pass on to the next grade.⁵⁴ An assumption of the banking model is that if teachers correctly deposit the information, the account balances of each child will reflect that information. The failure of students to show the correct balances is located in problems in the deposit process, not problems with the information deposited or the way in which the “knowledge and social subjectivities offered the pupils are appropriated.”⁵⁵ However, practitioners often view teaching and learning as a more complex process whereby students actively engage in receiving and transforming instructional content. As a result, accountability measures that rely on the banking model of education are often viewed as lacking legitimacy, and the belief that a policy is illegitimate tends to increase resistance and non-compliance.

Another element of analysis in this text is identity and the presuppositions and assumptions the text makes about the roles of the state, teachers, and students in the assessment process. For example, the whole of this passage addresses the state.⁵⁶ This not only assumes that the state alone has primary responsibility for the assessment of the children within its borders, but it also presents assessment as a form of surveillance by the state through documentation.⁵⁷ This removes assessment that counts from the purview of local schoolteachers and places it with the state—again elevating group results over individual achievement. This further decreases the power of local schoolteachers and confines their contribution to technocratic implementations of standardized curricula and shifts decision-making and evaluation to the state level.⁵⁸ This approach reinforces the view of practitioner insights as “female” knowledge—experiential, subjective, and less reliable than objective scientific (and masculine) knowledge. In addition, by implicitly stereotyping practitioner knowledge as subjective and thus less valuable than scientific knowledge, this approach runs counter to the purposes of special education to provide a

54. See PAULO FRIERE, *PEDAGOGY OF THE OPPRESSED* 72-73 (2000).

55. David O’Shea, *Review of Sentimental Education: Schooling, Popular Culture, and the Regulation of Liberty*, 15 *MEDIA, CULTURE, & SOC’Y* 503, 504 (1993).

56. § 6311 (requiring states seeking federal funding to develop plans that incorporate “challenging academic standards” and an accountability system that measures adequate yearly progress).

57. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF PRISON* 186-90 (1977).

58. See § 6311 (requiring decisions about curriculum, assessment, and adequate student progress to be determined at the state rather than local level).

more personal and individualized education for exceptional students. One effect of this orientation is that it gives the state the ability to make comparisons across groups of students, which supports the idea that the relevance of the achievement gap plays a driving role in NCLB assessment models.⁵⁹ However, as the achievement gap is generally defined in reference to race, not to disability, it seems inevitable that special education students would be marginalized within this paradigm.

Though the NCLB testing regime is embedded in the noncontroversial idea that assessment should inform instruction, the achievement gap model suggests that in practice, NCLB assessment is retrospective rather than prospective, and it primarily serves to categorize schools according to the proficiency levels of their minority students and their progress in narrowing the achievement gap.⁶⁰ This approach creates an achievement standard in schools based on proficiency expectations rooted in the practices and performance of mainstream general education students. This inherently disadvantages special education students, many of whom are in special education due to a demonstrated inability to perform like mainstream general education students.⁶¹ Simply redefining student achievement as “adequate yearly progress” does not address the causes of underperformance in special education classrooms or remedy the failure to measure the strengths of these students. Moreover, the test-based definition of adequate educational progress under NCLB raises equity concerns, given that testing paradigms have historically been used as a vehicle to “track students of color into lower tracks, classify them as retarded or in need of special education, and block entry into higher education.”⁶² While narrowing the achievement gap has important equitable dimensions, it must be balanced by good pedagogy, which in special education is often experiential and personal.

C. Practitioner Assessment Models

In contrast to the discourse models embedded in the assessment regulations, the discourse models of the special education teachers in this study emphasized higher standards for assessing and defining student achievement rather than specific uniform benchmarks. Teachers generally

59. See § 6311(b)(2)(B) (noting that states should promote adequate yearly progress “while working toward the goal of narrowing the achievement gaps in the State, local educational agencies, and schools”).

60. § 6301.

61. Nancy W. Larson, *The Time Has Come, the Walrus Said, To Speak of Many Things!*, 28 LEARNING DISABILITY Q. 247, 247 (2005).

62. SLEETER, *supra* note 4, at 67 (citing C.D. Lee, *Culturally Responsive Pedagogy and Performance-Based Assessment*, 67 J. NEGRO EDUC. 268, 279 (1998)).

agreed that a generic “more” should be expected from special needs students, but rejected the setting of a minimum benchmark for progress. As a result, the assessment discourse models embraced by the teachers seemed to be independent of the assessment discourse models reflected in the NCLB special education assessment regulations, relying on individualized student-centered assessments of progress rather than objective, pre-defined standards of proficiency.

1. I Don't Believe the Tests Actually Measure a Student's Academic Abilities and Skills.

For me, no I don't [think the test accurately measures what my students have learned] because for the most part, you know, these particular topics are [going to] be addressed on the test, but there may be like one or two questions. [L]et's say, I know my students know tone[, a]nd tone is going to be something that's on the test. They know tone like the back of their hand[, a]nd then, there are only two questions on the entire test that [are about] tone. So and it's like, you know, if they get one [question] right and the other [question] incorrect, it's like, all right, do they really know it or do they not really know it—when I know that, if given more questions, you could accurately see that they know or really have a clear understanding of tone. I would say that for the most part, it doesn't measure all of the students' understanding of or knowledge of all the different things that are addressed throughout the year. I would say that I don't believe that it actually measures a student's abilities and skills as it relates to academics. And so with that being the case, I'm kind of like indifferent.⁶³ -Ms. Franklin

In this text, the connections Ms. Franklin builds between test performance and student knowledge provide interesting insights. Ms. Franklin describes her hypothetical students as “knowing tone like the back of their hand” but having only fifty percent mastery on the standardized test. This suggests that the assessment that counts is Ms. Franklin's personal assessment of her students' knowledge of tone. She disregards the contrary evidence of the standardized test. Ms. Franklin's acknowledgement of the validity of standardized assessments that do not mirror classroom results seems limited and is distinct from her acceptance of the standards as the source of classroom instructional content. One way to view this result is as a subordination of the legal definitions of test validity, mandated and defined by the laws, to more practitioner views of validity at the classroom level. Where the law defines validity in terms of the scientific reliability of the test across populations, Ms. Franklin constructs a different validity related to the ability of the test to produce

63. Interview with “Ms. Franklin,” Middle and High School Special Education Teacher (2009).

outcomes similar to in class assessments for individual students. This implies that where her assessment of student knowledge differs from that revealed by test performance, her assessment is privileged over the test results.

Ms. Franklin's remarks contain overtones of a wider social conversation regarding whether teacher evaluations or standardized tests should be privileged in assessing student achievement. On the one hand lies the idea that standardized tests are a limited snap shot that do not capture multiple measures of learning and higher order thinking skills and cannot cover all that is taught in a classroom in the course of a year. On the other lies a concern that student outcomes can only be improved if education moves beyond teachers' subjective views of what their individual students can and are learning to objective measures of student achievement that can be quantified and compared across diverse groups. In her personal narrative of the actual assessment of her students on tone, Ms. Franklin clearly presents a discourse model of standardized assessment as partial and limited and not a true gauge of a student's actual mastery or lack of mastery. Whatever benefit standardized assessments may have for documenting and reducing the achievement gap on national and state levels, Ms. Franklin judges them solely by their accuracy in assessing the individual growth of her students.

2. *That Test Is—It Is Just Way Above Them No Matter What.*

Ms. Daughy also assigned limited validity to standardized assessments, but in a broader capacity that implicates the underlying standards as well as the assessment itself.

I think my teachers try their best to have the kid have the appropriate accommodation [in hopes that] maybe they could do well on the test; however, I mean that test is—it is just way above them no matter what. I mean no matter what my teachers do, if the student isn't going to grasp that kind of information, it is not going to help them. Anything with four multiple choice or five multiple choice [options], that really just already is a deficit for most of our special ed[ucation] kids.⁶⁴ (Ms. Daughy)

Here again, the connection building task is helpful in understanding the underlying discourse models. The legal texts assign primacy to where the child ends on an assessment—where the child starts is rendered less relevant. However, in her discourse, Ms. Daughy assigns primary emphasis to where the child starts, implying that this has a far greater, almost determinative impact on where the child ends. Ms. Daughy suggests that “no matter what” teachers do—no matter the methods, the

64. Telephone Interview with “Ms. Daughy,” Elementary School Special Education Teacher (2009).

resources, the high quality of the teacher—proficiency is just outside the reach of some students given where they have started and what their capabilities are, as assessed by their teachers. One way to view Ms. Daughy's comments is through the model of low expectations that has prevented countless generations of special education students from achieving their full potential. Another way to view it, however, and the way in which Ms. Daughy herself seems to view it, is that assessment needs to be based on the individualized needs of the students, not the standardized goals of the state.

In addition, Ms. Daughy expresses reservations regarding the valuation of standardized tests over the evaluation of teachers from an accuracy perspective as well as from a perspective of the effect on the child's social and emotional development, a consideration often ignored in the accountability debates.

I think it's honestly bad in my opinion because I look at these students who, you know, are working as hard as they can already and then you are testing them and [for] a lot of these kids that is too much for them. They become anxious, they just—they can't, it is just not for them. They've been working so hard to get them to this point and then you [indiscernibly] work with them for like an hour or two hours at a time on a test and then the student doesn't always understand it, so that just makes them feel bad. Do you know what I'm saying?⁶⁵

Ms. Daughy's concern is a non-academic one, which raises the question of whether it is possible to focus solely on the academic achievement of students or whether a student's academic achievement is always mediated by socio-cultural factors that affect her response to and performance on a test. As Bell Hooks noted, "[t]o teach in a manner that respects and cares for the souls of our students is essential if we are to provide the necessary conditions where learning can most deeply and intimately begin."⁶⁶

In this text, Ms. Daughy's efforts at connection building make the socio-emotional development of her students and their own perceptions of their abilities a relevant factor in assessment. This may suggest a view that if students are already working as hard as they can, assessment should reflect that by placing a premium on effort as well as proficiency. However, the connections built into the NCLB special education assessment laws appear to render effort irrelevant by defining the end goal of education and assessment as proficiency—not trying, but actually succeeding. Ms. Daughy, on the other hand, introduces a child-centered aspect to assessment, suggesting that assessment, which devalues student effort, is

65. *Id.*

66. BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 1, 13 (1994).

“honestly bad.” This construction positions assessment as only one aspect of a quality education and one that must support the overall goals of education. It does not reflect the NCLB model of assessment as the focus and ultimate goal of education itself. Here again, neither the model of assessment tailored to the individual skill levels of the students, nor the model of assessment as a single strand of a quality education, reflect the discourse models in the NCLB special education assessment laws. Instead, these models seem to have been locally generated from classroom experiences, though they do draw upon several non-assessment related themes in IDEA.

3. I Pretended Like We Weren't Taking the Test.

[As a classroom teacher], I did what was best for the students and pretended like we weren't taking the test. It meant nothing to me. I felt like I gave the students what they needed at the level they were actually at . . . I think that, um, its [NCLB] had a core effect as far as the testing goes for our school for sure, that's absolutely . . . ludicrous. Students who are . . . five grade levels below the grade they're supposed to be on and they would test them on the grade that they're supposed to be on . . . kinda defeats the purpose of individualizing, which is what special ed[ucation] is all about.⁶⁷ (Ms. Alcott)

In these excerpts, Ms. Alcott is engaged in activity building; she is defining what activities are and are not central to what takes place in a special education classroom. In her view, standardized testing is not a relevant component of teaching special education. It is not included in what is “best” for students, but rather, it is something on the periphery of learning. As a result, a term of key significance in this text is “individualizing,” which seems to index strategies and content tailored to students’ actual, rather than ideal, level of mastery. However, what is insignificant in this text, and what means “nothing” to Ms. Alcott, is grade level testing. It is constructed as being in irresolvable tension with the core of special education—individualized instruction—and disconnected from the current achievement realities of children. This view is not unique to Ms. Alcott, but reflects a recurring critique that NCLB’s unbending focus on grade level achievement masks below grade level achievement and does not adequately measure student progress.⁶⁸ As adequately measuring student progress lies at the core of assessment, these critiques, like Ms. Alcott’s, suggest that NCLB testing is distinct from the educational activity

67. Interview with “Ms. Alcott,” High School Special Education Teacher (2009).

68. See Rentschler, *supra* note 48, at 661-62 (advocating out of grade level testing for some special education students due to their disabilities and the size of the achievement gap).

of the classroom. The discourse model suggested by Ms. Alcott is that standardized assessment is a harmful and an unhelpful intrusion into the special education classroom that has no relevance to student performance. This orientation seems to reflect the fact that the achievement gap, which drives much of the NCLB assessment paradigm, is often irrelevant in special education classrooms.

One result of special education teachers' construction of local discourse models to explain standardized assessment is the corresponding construction of emic definitions of failure and success. Despite high failure rates among the special education students when tested on NCLB standards, most special education teachers in this study refused to see their students as "failing."⁶⁹ They took the failure on the standardized exam as a sign that the test was not testing what the students had learned, rather than as a sign that the students were not learning.⁷⁰ Most of the teachers interviewed continued to view classroom observation and performance as the key to student success, subordinating test scores to the other data collected over the course of the school year.⁷¹ For these teachers, success was defined by the day-to-day work in the classroom and covered a broad range of skills.⁷² In at least three cases, whenever the test failed to confirm classroom mastery, the testing method, rather than the student, was considered to have failed.⁷³

For example, an excerpt from Ms. Franklin's interview provides interesting insights into a teacher's espousal of NCLB standards while rejecting NCLB as an evaluative template.

I definitely think the accountability is really good However, I don't necessarily agree with the fact that sometimes the accountability goes too far. So[,] for example, if the teachers thought the students don't perform, I'm like, well, how can you blame me if this kid just really doesn't get it? Or let's just say, and I literally like watch students do this. 'I don't feel like taking the test today.' And what I see in the end, there's not a bubble [filled] in [T]hat's not a true reflection on the teacher. It's like it takes responsibility off of the students, and that aspect of it, I don't necessarily think it's fair and I don't necessarily like But for the

69. See, e.g., Interview of "Ms. Franklin," *supra* note 63; Interview of "Ms. Daughy," *supra* note 64; Interview of "Ms. Alcott," *supra* note 67.

70. See, e.g., Interview of "Ms. Franklin," *supra* note 63; Interview of "Ms. Daughy," *supra* note 64; Interview of "Ms. Alcott," *supra* note 67.

71. See, e.g., Interview of "Ms. Franklin," *supra* note 63; Interview of "Ms. Daughy," *supra* note 64; Interview of "Ms. Alcott," *supra* note 67.

72. See, e.g., Interview of "Ms. Franklin," *supra* note 63; Interview of "Ms. Daughy," *supra* note 64; Interview of "Ms. Alcott," *supra* note 67.

73. See, e.g., Interview of "Ms. Franklin," *supra* note 63; Interview of "Ms. Daughy," *supra* note 64; Interview of "Ms. Alcott," *supra* note 67.

most part, like I said, I do like the fact that the accountability charges you to step up. I like that part of it, but I don't like the fact that it kind of takes the responsibility off of the students. The students have a responsibility. The teachers have a responsibility. Administration, county officials, the creators of the test, all of them, everyone has a responsibility. But if we don't work it and own up to it, then that is what really truly creates the problem.⁷⁴

Ms. Franklin repeatedly underscores her embrace of the key discourse models in the NCLB paradigm: accountability and personal responsibility. She embraces her positioning as responsible for the academic achievement of her students. However, where NCLB locates education and proficiency generation within the four walls of the classroom, Ms. Franklin invokes a wider set of participants in the education process. She indicates that the successful education of students is effectively everyone's responsibility, not just the teachers', and she underscores the need for a guiding coalition that includes leaders from all levels of the government and education system in successful school reform.⁷⁵

Moreover, as a high school teacher rather than elementary school teacher, Ms. Franklin recognizes that her students are not passive containers that she can fill with knowledge if she only finds the "right" instructional strategy. In Ms. Franklin's view, her students are autonomous individuals who can and do resist knowledge acquisition. Ms. Franklin describes some of her students as just "not wanting to take the test today," and refusing evaluation by turning in blank bubble sheets. Professor Thompson theorizes that such unconcern and defiance are often students' ways of masking academic insecurities and avoiding the humiliation of academic failure.⁷⁶ Ms. Franklin's remarks suggest that student failure triggered by the testing climate must be taken into account when using test scores as evaluative measures.

Ms. Franklin's view of failure rests in part on her rejection of a central premise of NCLB—that all children can learn all skills at roughly the same rate if teachers are doing their jobs.⁷⁷ Instead, Ms. Franklin demands to know how she can be blamed "if this kid just really doesn't get it."⁷⁸ Ms. Franklin's role as the special education expert for her co-teaching team is to modify assignments and instruction so that they are accessible to special

74. Interview with "Ms. Franklin," *supra* note 63.

75. MICHAEL FULLAN, *WHOLE SCHOOL REFORM: PROBLEMS AND PROMISES*, 1, 11-12 (2001), available at <http://www.michaelfullan.ca/media/13396099810.pdf>.

76. GAIL L. THOMPSON, *THROUGH EBONY EYES: WHAT TEACHERS NEED TO KNOW BUT ARE AFRAID TO ASK ABOUT AFRICAN-AMERICAN STUDENTS* 91 (2004).

77. See Interview with "Ms. Franklin," *supra* note 63.

78. *Id.*

education students “included” in the regular education setting. Implicit in Ms. Franklin’s question, however, is an assumption that some special education students are just not going to master certain skills—a fundamental rejection of NCLB’s central premise that all children can achieve grade level proficiency if instructed properly. In Ms. Franklin’s view, even with proper instruction, some children are not going to master all grade level skills. They are simply not going to “get it.”

Among NCLB proponents, the suggestion that special education children cannot learn at the same rate and level as general education students is often derided as “low teacher expectations.” While the rhetorical resonance of all children learning at the same rate and none of them being “left behind” led to the bipartisan passage of the Act, this view has had less traction in special education classrooms. The teachers in this study routinely and unapologetically acknowledged that there were some things that their special needs students were simply not going to grasp.⁷⁹

Ms. Franklin’s choice of phrase steps outside the discourse of NCLB into a very local practitioner’s discourse. She does not say, “not every child is going to be ‘proficient’ on every skill.” Instead, Ms. Franklin expresses the view that not every child is going to “get it.” Whereas proficiency is a measure of mastery that implicates and indicts both teacher and student, “getting it” indexes a lack of mastery that is not the fault of either the teacher or the student. Implicit in the concept that the “student didn’t get it” is the assumption that there was something to get—there was quality instruction directed toward the student, but somehow, through no fault of the teacher, the student “just didn’t get it.” The teacher is not to blame.

At the same time, however, the student is not to blame for not “getting it” either. Ms. Franklin’s invocation of responsibility comes later, with the student who is actively resisting instruction and evaluation. The student who is merely “not getting it” is not acting at all. Instead, she is the object—the intended recipient—and is not responsible for “not getting it.” Though Ms. Franklin invokes narratives of accountability and personal responsibility frequently in her response, she also embraces a discourse model fundamentally at odds with accountability and personal responsibility. Students cannot be held personally accountable for “not getting it” because there was no blameworthy action on their parts. Teachers have fulfilled their responsibility because they did all they could to help the student get it. Unfortunately, the student did not get it, but there is no “accounting” for it within the NCLB paradigm. Ms. Franklin’s

79. See, e.g., Interview with “Ms. Franklin,” *supra* note 63; Interview with “Ms. Alcott,” *supra* note 68.

response is similar to the critique of David O’Shea, which suggests that mainstream reform discourses, like NCLB,

[i]gnore the fact that however carefully goals are set out, curricula designed and implemented, there is no guarantee that the knowledge and social subjectivities offered the pupils are appropriated as intended. For not only are subjectivities always only ever *problematically* occupied, but they also have to pass through ‘the messy dynamics of desire, fantasy, and transgression.’⁸⁰

NCLB’s 100% proficiency narrative presupposes a banking model of education and assumes that there are always pedagogical reasons for why a student “just doesn’t get it.” Thus, in order for teachers to put the NCLB discourse models to use beyond espousal—to evaluative and interactional uses—they must accept full responsibility for fixing problems that originate and escalate beyond their realm of influence.⁸¹ They must also reject models of learning that take into account the ways that students’ background and experiences influence their knowledge and understanding of educational messages. However, the lived experiences of these teachers often contradict the NCLB model, and this makes it difficult for these teachers to accept the positions into which they are invited by the NCLB law. For example, Ms. Alcott, who teaches in a struggling urban charter school, noted:

When our students are tested by the state, it’s the same test as the regular ed[ucation] students. They do it by age, what grade you’re supposed to be in, and they give them that test, and it’s very aggravating for our students because, you know, they get encouraged about improvement and then we put a test in front of them, which we have no choice but to do, but way above what they’ve been [taught] . . . so it definitely discourages them.⁸²

Like Ms. Elliot’s students,⁸³ Ms. Alcott’s students are tested on grade level standards. However, Ms. Alcott’s response is devoid of any sense of personal responsibility or accountability for the lack of proficiency for her students. In Ms. Alcott’s view, the test does not take into account the students’ background, their experiences, or their response to the testing climate, and thus does more harm than good to the process of education.

In addition, Ms. Alcott’s views reflect a theme of several teachers in this study: that “getting it” requires that the information be within the students’ zones of proximal development and that it builds on students’ strengths and

80. David O’Shea, *Review of Sentimental Education: Schooling, Popular Culture, and the Regulation of Liberty*, 15 MEDIA, CULTURE, & SOC’Y 503, 504 (1993).

81. DAVID TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA* 9 (1995).

82. Interview with “Ms. Alcott,” *supra* note 67.

83. See Interview with “Ms. Elliot,” General Education Teacher (2008).

resources. Under this view, when the information taught is not within the student's grasp neither the teacher nor the student is responsible for the failure. NCLB's narrative assumes that all students have roughly the same zone of proximal development, and it attempts to hold teachers accountable for ensuring that every student "get it." However, the ways in which this prescription contradicts the practical experiences of teachers, and the foundational principle of "appropriateness" under IDEA, resulted in significant resistance to this formulation of achievement from the special education teachers in the study. It may also account for the relative lack of overlap between legal and practitioner discourse models of assessment.

Moreover, if teachers' beliefs determine teachers' practices, as is often thought, the success of the alignment of IDEA and NCLB in effecting change in the special education classroom is correlated with the degree to which teachers adopt the discourse models embedded in the revised laws, not as espousal models only, but as models in interactions that guide their practice and inform their subjective pedagogical theories.

Despite the 2004 alignment of NCLB with IDEA, and the efforts of at least thirty-three states over the past several years to implement standards-based IEPs,⁸⁴ this study suggests that competing discourse models of the role of assessment in special education remain intact. Many of these discourse models are hybridized versions of the discourse models from the pre-2004 era of IDEA, with an emphasis on the social and behavioral aspects of special education and the personal growth of the students. This trend suggests a filtering out of the messages of NCLB in the name of fidelity to the "true" purposes of special education as articulated in the pre-NCLB era and codified as the subjective pedagogical theories of the teachers. While the special education teachers in this study showed a willingness to embrace high standards, they continually questioned the legitimacy of the academic proficiency approach of NCLB for their special needs children—resisting, rejecting, and refining it in favor of growth models that addressed both academic and socio-behavioral goals. Rudolph van den Berg suggests that this response is only to be expected, noting that the result of the intensification of the teaching profession and the "deskilling" of teachers under NCLB reform is an increasing tendency on the part of teachers to question the legitimacy of the externally imposed definitions of their responsibilities.⁸⁵

84. EILEEN AHEARN, STANDARDS-BASED IEP: IMPLEMENTATION UPDATE, PROJECT FORUM 4 (2010), available at <http://www.laamerica.org/stateline/documents-2010/10sept/Standards-BasedIEP.pdf>.

85. Rudolf van den Berg, *Teachers' Meaning Regarding Educational Practice*, 72 REV. EDUC. RES. 577, 598 (2002) (noting that increased pressure on teachers has led them to question the legitimacy of the policy changes they are often asked to

Though almost all the teachers interviewed in this study indicated that they were trying to teach to the NCLB standards, only the general education teacher appeared to embrace NCLB's definition of achievement.⁸⁶ All special education teachers, in all settings and across all grade levels, seemed to conceptualize the achievement of their students much more broadly to include dimensions of their students' ability to function independently in wider society, reflecting historical approaches to education as incorporating academic, vocational, social, and personal objectives.⁸⁷

These conceptualizations by special education teachers seem to reflect the reality that students with disabilities are twice as likely to drop out of school as their regular education peers⁸⁸ and much less likely to obtain employment, with as few as fifteen percent obtaining post-school employment.⁸⁹ Thus, regardless of their level of acquiescence to the normative standards of NCLB, special education teachers continue to view achievement for their students as not limited to the acquisition of academic knowledge, but as also incorporating their students' social and interpersonal growth, with an overemphasis on encouraging the students not to give up and fostering independence. These teachers recognize that the "special needs" they were meeting for their students were only partially academic. This broadens the view of achievement adding an almost parental dimension to the teachers' interactions with their students and the teachers' view of their relationship with their students.

This analysis suggests that special education teachers' fitful implementation of NCLB is not merely a matter of resistance to excessive testing and overly high standards, but a resistance to the redefinition of their roles from professionals in child development to technicians.⁹⁰ The special education teachers in this study did not use the terminology of

implement).

86. Interview with "Ms. Elliot," *supra* note 83 ("Our [special education] children do need to work at grade level, and it's not okay just to make sure that their disability is accommodated, cause if they're not learning then you're just taking up space.").

87. See generally JOHN I. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* (2d ed. 2004).

88. Martha Thurlow et al., *Students with Disabilities Who Drop Out of School—Implications for Policy and Practice*, NAT'L CTR. ON SECONDARY EDUC. & TRANSITION ISSUE BRIEF (June 2002), <http://www.ncset.org/publications/viewdesc.asp?id=425>.

89. Office of Disability Emp't Pol'y (ODEP), *News Brief* (Feb. 3, 2012) <http://semihy.blogspot.com/2012/02/odep-news-brief-february-3-2012.html> ("[For] youth age[s] 20-24, the employment rate was 26.7[%] for those with disabilities, compared to 61.0 for those with no disabilities.").

90. Maureen Duffy et al., *No Child Left Behind: Values and Research Issues in High-Stakes Assessments*, 53 COUNSELING & VALUES 53, 61 (2008).

opposition to “narrowing the curriculum.” Instead, they constructed the classroom activity as an exercise in child development and reframed and repositioned NCLB mandates in service of that goal.

These results suggest that special education teachers recognize that the previous paradigm of special education paid too little attention to academics and student progress. All of the teachers in this study favored accountability and higher expectations. However, their view of their role in the classroom and their construction of their own identities and the identities of their students limited their support of these principles. These teachers viewed their students as having distinctly social and developmental learning needs and viewed their role as that of surrogate parents—to provide the character development and life skills support the students would need to be responsible adults. This orientation clashed with the identities NCLB assigned to the teachers and the students, causing teachers to assign meanings to accountability and high expectations that went beyond standards and testing and indexed genuine engagement with the development and life success of special needs children. This resulted in the belief that NCLB went too far and did not go far enough in ensuring successful educational outcomes for students with disabilities—with too much emphasis on grade level achievement and not enough on the actual educational needs of special populations. The desire of teachers for greater engagement with and responsibility for the development of special needs children, and NCLB’s mandate of grade level proficiency for special needs children, are two very different responses to a common recognition of a single problem related to the achievement of special education students. The gap between them is thus not unbridgeable if the dichotomy between experiential and scientific knowledge is broken down and transformed into a fruitful space for dialogue and compromise. Authentic negotiated rulemaking could achieve precisely that.

IV. NEGOTIATED RULEMAKING AS A BRIDGE

Negotiated rulemaking is an approach to rulemaking that seeks to reduce the adversarial posturing that often attends notice and comment rulemaking through broad based participation and consensus.⁹¹ For example, in traditional rulemaking, an agency generates and publishes a proposed rule, and interested parties submit separate, independent comments on the rule—many of which are critiques and requests for modification. In negotiated rulemaking, however, the agency does not present a fully formed proposed rule to interested parties. Instead, it assembles a negotiating committee

91. See PETER L. STRAUSS ET AL., *ADMINISTRATIVE LAW: CASES AND COMMENTS* 627 (2003).

representative of the affected interests, and the committee generates a proposed rule through collaboration and consensus.⁹² While this participatory process is not a universal cure for regulatory ossification, it is considered superior to notice and comment rulemaking for building trust, generating information, and increasing a rule's legitimacy.⁹³

These characteristics are particularly necessary in the context of education regulation given the surveillance and enforcement difficulties that are unique to the education setting. For example, despite advances in educational technologies, teaching is still primarily an unmonitored activity that takes place behind closed doors, out of the sight of regulators and supervisors. Once the classroom door closes, teachers can choose to comply with regulations only "symbolically, . . . fitfully[,] or not at all,"⁹⁴ with few the wiser.

Moreover, efforts by school reformers to compensate for the opaqueness of the education process through documentation of outcomes cannot succeed. Educational outcomes are not the product of teaching alone, but are always conflated with socio-economic status and home environment. This means that documentation of education outcomes cannot reliably index compliance, for compliance and non-compliance are equally masked by variables that are outside of the control of regulators and teachers. In such a circumstance, the link between non-compliance and enforcement is attenuated, and poor outcomes that are the result of individual failures of compliance are indistinguishable from poor outcomes that are the result of more systemic social problems. As a result, documentation-based enforcement necessarily sanctions compliant teachers along with the non-compliant, making sanctioning teachers for low-performing students a somewhat arbitrary and politically costly process.

When the dynamics of a regulated activity are such that one cannot fully monitor acts of compliance and non-compliance, nor identify instances of non-compliance with any certainty due to confounding variables, voluntary compliance becomes an integral part of the regulatory scheme. This makes the trust building and information generating attributes of negotiated rulemaking highly desirable—if not absolutely necessary—in this context. In addition, when, as suggested above, non-compliance rests heavily on practitioner disagreement with the accuracy of regulatory mandates, the increased legitimacy generated by the use of the negotiated rulemaking process may be more effective than sanctions in securing practitioner

92. *See id.* at 628.

93. Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 62-63 (2000).

94. TYACK & CUBAN, *supra* note 81, at 9.

compliance.

Negotiated rulemaking is no stranger to the Department of Education, given existing congressional mandates.⁹⁵ However, the continued stigmatization of practitioner knowledge as personal and subjective, and thus ill-suited to policy development, consistently ensures that such negotiated regulations are pure formalities, with no genuine engagement with competing or conflicting viewpoints taking place. Indeed, the text and purpose of NCLB reflect the congressional belief that the problem with educational failure is overreliance on the personal and subjective, and the vast majority of its provisions seeks a wholesale replacement of these perspectives with more “reliable” knowledge rooted in objective, scientific epistemology. In order for negotiated rulemaking to work effectively, however, politicians must realize that special education, like medicine, cannot be divorced from the personal and experiential. No matter how brilliant the physician or how scientific his methods, his diagnoses depends on the patient’s personal, bodily, subjective experiences of pain. In a similar fashion, successful and effective special education depends on the personal and subjective ways in which students receive, change, and internalize instruction—information that is uniquely within the knowledge of the local practitioners. Effective pedagogical science can no more ignore the teachers’ knowledge of and experience with their students than medical science can ignore the patient’s knowledge of and experience with their pain.

In both instances, the devaluation of “feminine” knowledge, rooted in hierarchical systems of knowledge, can only serve to retard progress toward effective and meaningful solutions. Education is a field that requires parity between gendered systems of knowledge, and this cannot be achieved in a vacuum. Instead, experts in the personal and the subjective, and experts in the scientific and objective, must engage with each other on equal terms in order to reap the benefits of knowledge and information sharing. Unlike adversarial approaches to rulemaking, effective “negotiated solution[s] [must] . . . stimulate[] the parties to develop relevant information about facts and values, provide[] a counter-weight to concentrations of power, and advance[] participation by those the decisions affect [the most].”⁹⁶ Thus, the beauty of true negotiated rulemaking lies in

95. See, e.g., No Child Left Behind Act, 20 U.S.C. § 6571 (2002) (requiring the Secretary of Education to “establish a negotiated rulemaking process, at a minimum, [on] standards and assessments”); Higher Education Resources and Student Assistance, 20 U.S.C. § 1098(a) (2009) (requiring negotiated rulemaking for provisions related to student assistance).

96. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32, 52 (2000) (quoting Peter H. Schuck,

its ability to achieve this by stepping outside “either-or” dichotomies that pit the personal against the scientific and generate “both-and” solutions that partake of the best of both types of knowledge.

It is undeniable that negotiated rulemaking is a very expensive process. However, in the special education context, the failure to have a formal negotiated rulemaking has embroiled the Department of Education in numerous informal “negotiated rulemakings” on its special education assessment regulations. These informal rulemakings also entail costs, but lack the consensus building benefits of participatory methods and are not designed to generate broadly applicable solutions.⁹⁷ Moreover, as the 2013-2014 school year comes to a close, with its deadline for 100% proficiency, the overwhelming lack of proficiency among special education students, and the increasing need for ad hoc exceptions to special education assessment regulations in almost every state, highlight the difficulties of regulating effectively in this area without practitioner input and consensus. A new negotiated rulemaking on special education assessment is the logical step in creating special education assessment regulations that can be consistently and effectively enforced in practice.

V. CONCLUSION

Every day in classrooms across the nation, teachers stand on the front lines of educational change, attempting to realize the vision of education as the key social welfare policy of our nation and the foundation of equality for students from a wide variety of social, cultural, and economic backgrounds. In the course of their practice, these teachers develop frameworks and ideologies about the nature of education, the abilities of students, and the process of school reform based on years, even decades, of day to day experience with real children in actual learning situations. All too often, however, the accumulated wisdom of classroom practitioners is ignored and marginalized in national conversations about the state of our schools and the progress, or lack thereof, of generations of school children. This results in school reforms that miss their audience and fail to engage the attention of their most crucial stakeholders—the classroom teachers.

This Article invites law and policymakers to go beyond including token

Litigation, Bargaining, and Regulation, REG. 31 (July/Aug. 1979)).

97. As noted above, the persistent failures of special education students as a subgroup are a leading cause (if not the leading cause) of failure of states to make the adequate yearly progress required under the No Child Left Behind Act. To date, forty-two states, the District of Columbia, and Puerto Rico have individually negotiated waivers of the No Child Left Behind progress provisions with the Department of Education. See DEP’T OF EDUC., *NCLB Flexibility* (Apr. 18, 2014), <http://www.ed.gov/category/keyword/nclb-flexibility>.

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teacher “perspectives” at the policy table and instead to seek a genuine engagement with special education teachers themselves through authentic negotiated rulemaking on special education assessments. This approach would not only reduce instances of civil disobedience to education regulations, but it also holds the promise of generating effective reform policies. Central to such progress, however, is recognition that personal and experiential knowledge have value beyond the four walls of the classroom, and if heard, can significantly improve educational outcomes in special education.