

SID WOLINSKY (California Bar No. 33716)  
ALISON AUBREJUAN (California Bar. No. 194107)  
MONICA GORACKE (California Bar. No. 218758)  
STEPHEN TOLLAFIELD (California Bar No. 221170)  
DISABILITY RIGHTS ADVOCATES  
449 Fifteenth Street, Suite 303  
Oakland, California 94612  
Telephone: (510) 451-8644  
Facsimile: (510) 451-8511

DAVID W. OESTING (Alaska Bar No. 8106041)  
JOAN M. WILSON (Alaska Bar No. 9611069)  
DAVIS WRIGHT TREMAINE LLP  
701 West Eighth Avenue, Suite 800  
Anchorage, Alaska 99501-3468  
Telephone: (907) 257-5300  
Facsimile: (907) 257-5399

DAVID FLEURANT (Alaska Bar No. 8611109)  
DISABILITY LAW CENTER OF ALASKA  
3330 Arctic Boulevard, Suite 103  
Anchorage, Alaska 99503  
Telephone: (800) 478-1234

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
DISTRICT OF ALASKA

ALEXANDER NOON, a minor, by his guardian ad litem Tracy Barbee; KENDALL LEIBACH, a minor, by her guardian ad litem Jacqueline Leibach; DOUGLAS MATE; TIANA LUPIE, a minor, by her guardian ad litem, Evelyn Lupie; IRENE TAKAK, on behalf of themselves and all individuals similarly situated; and LEARNING DISABILITIES ASSOCIATION OF ALASKA,

CASE NO.

**COMPLAINT**

**CLASS ACTION**

Plaintiffs,  
v.

ALASKA STATE BOARD OF EDUCATION  
AND EARLY DEVELOPMENT; ROGER  
SAMPSON, Commissioner of Education & Early  
Development, sued in his official capacity;  
ANCHORAGE SCHOOL DISTRICT; RICHARD  
SMILEY, Administrator, Standards and  
Assessment, Alaska Department of Education &  
Early Development, sued in his official capacity,

Defendants.



## **JURISDICTION**

1. The Court has subject matter jurisdiction over Plaintiffs' federal law claims under 28 U.S.C. §§ 1331 and 1343. The Court has supplemental subject matter jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367.

2. The Court has jurisdiction to issue declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Plaintiffs are not required to exhaust the administrative procedures set forth in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.*, because they are challenging policies and practices of general applicability that are contrary to numerous federal laws (including IDEA) and because Plaintiffs cannot obtain adequate relief through administrative remedies.

4. Venue is proper in this Court under 28 U.S.C. § 1391(b). All Defendants reside in the District of Alaska, and all of the events giving rise to this action occurred in the District of Alaska.

## **INTRODUCTION**

5. This action arises out of the discrimination by Defendants ALASKA STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT, ROGER SAMPSON, the ANCHORAGE SCHOOL DISTRICT, and RICHARD SMILEY ("Defendants") against students with disabilities in the Alaska public school system. Defendants are forcing vulnerable students with disabilities to pass the Alaska High School Graduation Qualifying Examination (sometimes hereafter referred to as the "Exit Exam" or "HSGQE") in order to receive a diploma in Spring 2004 without the preparation or safeguards required by law. In doing so, they are ignoring the educational attainments of these students, flagrantly violating their rights, destroying their self esteem, and damaging their academic, professional and employment opportunities forever.

6. In formulating and administering the Alaska HSGQE, Defendants failed and refused to take into account the needs of students with disabilities. According to recent Alaska special education data, Defendants' conduct affects 18,000 students in the Alaska public school system with special education needs. Of these, nearly half have specific learning disabilities.

Another quarter have speech and language disabilities. The rest of these students experience a variety of other mental and physical disabilities, including low vision/blindness, deafness, autism, or orthopedic disabilities.

7. As of December 15, 2003, 69.7% of special education students in the Anchorage School District alone were ineligible for diplomas in 2004 because they had failed the HSGQE, with only one opportunity left to pass before their scheduled graduation date. Throughout Alaska, students with disabilities have the lowest passage rate of any discrete group of Alaska students. *Without immediate intervention by this Court, more than 500 students with disabilities statewide who are on a diploma track will be denied diplomas this spring.* This number comprises over two-thirds of all Alaska special education students in the class of 2004.

8. The “high stakes” consequences of the HSGQE (that is, the complete denial of a diploma solely because the student fails the exam regardless of the student’s other achievements) may lead to increased drop-out rates for special education students and other students with disabilities. Many students, perhaps hundreds in the Anchorage School District alone, have accelerated their course of study – sacrificing extracurricular activities and health considerations – to graduate in January before the graduation requirement became effective in February 2004. Many other students with disabilities are fleeing the Alaska public school system to attend private schools, which can cost thousands of dollars a semester per family, so that the student can avoid exposure to the discriminatory HSGQE and can obtain a high school diploma.

9. In spite of the multiple and significant defects of the High School Graduation Qualifying Examination as it affects students with disabilities, Defendants administered the exam in February 2004, and will prevent the students in the class of 2004 who have otherwise satisfied all of the necessary graduation requirements but who have not passed the HSGQE from receiving the diploma they have struggled for years to obtain.

10. The High School Exit Exam has three parts: reading, writing and mathematics. The reading portion of the test, which includes multiple-choice and constructed-response questions, uses excerpts from published literature as the basis for evaluating students’ reading skills. The writing test includes both multiple-choice questions and short essays and evaluates

writing composition and knowledge of “conventions” of Standard English. The mathematics test covers procedures such as estimation and mental computation; computation problems; reading, interpreting and constructing graphs; and principles of geometry and measurement.

11. Students take the Exit Exam for the first time in tenth grade, and can retake any portion that they do not pass in eleventh and twelfth grades and for an additional three years after they graduate High School. The test is given twice a year and students must pass all three sections of the test or they will not receive a diploma.

12. Defendants require all public school students in the Class of 2004 to pass the Exit Exam in order to graduate from high school.

13. The consequences to students of failing to pass the Exit Exam are potentially devastating and lifelong. Regardless of how bright and talented students are, how hard they work, or how high achieving they may be, students who do not pass the exam will not graduate from high school, will not receive a regular diploma, and will be severely disadvantaged in applying for employment, college admission or vocational training programs. These students will be relegated to a life of substantially less earning power, lowered expectations, fewer opportunities, and increased vulnerability to poverty and homelessness.

14. The Exit Exam discriminates against children with disabilities in numerous ways. Defendants illegally burden and restrict Plaintiffs’ access to many of the most common learning accommodations available under Individualized Education Programs (“IEPs”) or education plans established pursuant to Section 504 of the Rehabilitation Act of 1973 (“section 504 plans”).

15. Federal law requires that students with disabilities be permitted to use reasonable accommodations on all statewide tests. However, Defendants permit students to use some accommodations on an “optional assessment” only after the student first (1) makes the futile gesture of taking the HSGQE without the necessary accommodation, *and* (2) fails the test. Defendants thus force disabled students to endure the humiliation of needlessly proving the extent of their disability before allowing them to use the tools they are entitled to under the law to accurately demonstrate their skills. The accommodations available only on these “optional assessments” include spell checkers and four-function calculators for students who are unable to

perform particular discrete tasks due to specific learning disabilities, such as dyslexia. These are some of the most common special education accommodations and are used by students every day in Alaska public schools to acquire and demonstrate math or language skills. Students should have access to them on *all* HSGQE tests, not just an “optional assessment.”

16. In addition, defendants have designated some accommodations as completely unavailable for use on the Exit Exam, and have arbitrarily determined that the very use of these accommodations will invalidate a student’s entire score, regardless of the use of that accommodation in the student’s everyday educational experience. Defendants classify these prohibited accommodations as “modifications,” under the erroneous reasoning that they alter or obscure the entire measurement of a student’s skills. Defendants have made these designations in an arbitrary manner and without acceptable psychometric or legal justification (including any demonstration that the specific skill supposedly “altered” by a “modification” is actually one that comprises a significant or meaningful test construct).

17. One example of an illegally and arbitrarily prohibited accommodation is the oral presentation of test material on the reading portion of the HSGQE. While oral presentation assists a student who cannot read printed words, it does not compromise the assessment of a student’s abilities of reading comprehension, vocabulary, or any of the number of other things a “reading” test measures. Nevertheless, a blind student who cannot read Braille – but who is otherwise fully capable of language comprehension and analysis – will automatically fail the test if they use a reader and will be denied a diploma. Contrary to the discriminatory assumptions that drives this result, a blind student is not stupid, illiterate, or unemployable by virtue of their inability to perform the physical act of reading printed words off of a page.

18. In addition to the impermissible denial of accommodations by re-labeling them as “modifications,” Defendants arbitrarily prohibit the use of any accommodation unless the student has used it at least three months prior to a HSGQE administration.

19. This illegal policy strips IEP teams of their statutory discretion under federal law to determine the individualized needs of a particular student with respect to any educational experience. If, for example, an IEP team determined ten weeks before a student took her first

administration of the HSGQE that she needed an accommodation for that test that she had not needed before, Defendants would deny the student that accommodation. This denial violates the 1997 Amendments to IDEA, as well as state law, both of which guarantee every student's right to all accommodations recommended by the IEP team. Additionally, the HSGQE operates on a compressed timeline, leaving teachers, students, and IEP teams with no time to determine and implement HSGQE accommodations in enough time between test administrations to meet the discriminatory three-month limitation.

20. Defendants also have failed to provide adequate, coherent or consistent oversight and guidance to local school districts and families regarding the use of accommodations on the Exit Exam. As a result, students, parents, and school administrators do not know what process should be followed to request accommodations, or which accommodations are even allowed.

21. For example, the 2002/2003 "Participation Guidelines For Alaska Students In State Assessments" specifically states that use of a graphing calculator on the math test and grammar checking software are not permissible, purportedly because they are "modifications" that will entirely invalidate a student's score. Then, less than two weeks before requests for "optional assessment" accommodations were due to the State in December 2003 for the February 2004 exam administration, this policy was suddenly changed in a memo from Defendant Roger Sampson declaring that grammar checkers and graphing calculators *would* be acceptable accommodations on an "optional assessment," assuming the accommodations were used in the classroom. This memo was never distributed to families and students with disabilities or the IEP teams that serve them, and was distributed only to superintendents, special education directors, test coordinators, and principals. First, this amounts to an admission that (1) those accommodations never really "modified" the test at all (that is to say, Defendants cannot reasonably argue that one day a graphing calculator compromises test integrity and that the next day it does not), and (2) Defendants had been arbitrarily depriving students of those reasonable accommodations for years. Additionally, this type of last-minute and unpublicized reversal leaves IEP teams, students, and parents completely in the dark about acceptable accommodations

and illegally burdens each student's right to reasonable accommodations on statewide assessments.

22. Because many very capable students cannot be fairly assessed by a standardized written test, Defendants also are required, under both federal and state law, to provide an alternate means of assessment to the Alaska HSGQE for *all students* who are unable to access statewide standardized assessments because of physical or mental disabilities. An alternate assessment is (1) a mechanism or means, offered as an alternative to the Exit Exam standardized test, of evaluating and measuring a student's mastery of high school content standards, such as a review of a portfolio of work or review of a collection of teacher evaluations over a period of time, which (2) leads to the same high school diploma that is granted following the inaccessible standardized assessment. Defendants have failed to comply with this legal requirement.

23. Defendants' current "alternate assessment" is only available to students (1) with the most severe cognitive and functional disabilities and (2) whose disabilities prevent them from mastering high school content standards. However, many students, with numerous other types of disabilities, are entitled to and should participate in an alternate method of assessment rather than the HSGQE because an alternate assessment is the only method by which these students' abilities and skills can be accurately measured. Defendants do not provide an alternative method of evaluation for those disabled students who, while capable of mastering State high school standards, are not able to demonstrate their proficiency on a statewide standardized assessment.

24. The Exit Exam further discriminates against students with disabilities because these students have not been prepared by the Alaska public school system to take the HSGQE. Throughout their educations, these students, pursuant to federal law, have studied an individualized curriculum set forth in their IEPs or section 504 plans. However, IEP teams in Alaska have not had time to fully align the content taught under individual IEPs with the standard graduation requirements tested by the HSGQE. Furthermore, due to mass confusion over which students served by IEPs and 504 plans would be entitled to diplomas, many special education teams did not know that they were supposed to design IEPs to include Exit Exam-aligned content, such as geometry. In short, in direct contravention of federal and state law, the

Exit Exam unlawfully and unfairly tests these children on material that they have never been taught.

25. Without meaningful access to accommodations (or alternative assessments of their achievement), and without modification of their specialized curriculum to include the subject matter being tested, it is a certainty that the great majority of Alaskan students with disabilities will not be able ever to pass the Exit Exam, no matter how many times the test is given to them, and therefore will not be able to graduate from high school.

26. In fact, the defects of the Exit Exam are such that retesting for students with disabilities does not result in any materially improved pass rate.

27. By requiring children with disabilities to take discriminatory and unfair tests with high stakes consequences and no meaningful access to alternate means of assessments, Defendants have created a dual track system of public education in which otherwise qualified students with disabilities will be relegated to the lower tier and prevented from pursuing academic, professional and employment opportunities simply because of their disabilities.

28. In sum, the High School Exit Exam discriminates against students with disabilities because, among other problems, (1) there is no meaningful access to an alternate assessment, (2) the accommodations policies illegally burden students' rights to use the tools necessary to demonstrate their skills, and (3) the Exam unfairly tests disabled students on material they have never been taught.

29. In recognition of these dangers posed by standardized assessment for students with disabilities, other states have taken and are taking extensive and practical steps to ensure that their statewide assessment systems do not discriminate against students with disabilities. For example, Oregon agreed to adopt the recommendations of an expert panel commissioned under the terms of a settlement agreement to study Oregon's testing system. The panel examined whether Oregon's high stakes assessment scheme discriminated against students with disabilities and recommended that Oregon: (a) develop alternate assessments for disabled students, (b) allow extensive accommodations for disabled students, (c) provide comprehensive information and training to parents, teachers, administrators, and IEP and 504 Plan team members regarding the

assessment system and participation options for students with disabilities, (d) ensure that the IEP and 504 teams individually assess every disabled student to determine how that student should participate in the assessment system, (e) institute a problem resolution and appeals process by which students can appeal decisions regarding accommodation requests and participation in an alternate assessment, and (f) conduct ongoing research regarding accommodations and the validity and reliability of the assessment system for students with disabilities. Alaska has initiated none of such measures.

30. Without immediate relief from the Court, Plaintiff students will be irreparably harmed in that they will be denied numerous academic, professional and employment opportunities, may not graduate from high school, and will experience severe damage to their future earning capabilities, self-esteem and emotional well-being.

### **THE PARTIES**

31. Named Plaintiff ALEXANDER NOON is a public high school student in the class of 2004 with certification for special education services due to bi-polar disorder, attention deficit/hyperactivity disorder (“ADHD”), and dyslexia. Alexander attends Service High School in the Anchorage School District and must pass the HSGQE in order to receive a diploma this spring. He has taken the HSGQE four times, but because has never passed the math section, he is ineligible for a high school diploma. Alexander’s mother, Tracy Barbee, has filed a petition with the Court to act as his guardian ad litem.

32. Named Plaintiff KENDALL LEIBACH is a public high school student in the class of 2005 with certification for special education services due to dyslexia. Kendall attends Bartlett High School in the Anchorage School District and must pass the HSGQE in order to receive a diploma. She has already taken the HSGQE twice but has not passed the reading or the math sections. Kendall’s mother, Jacqueline Leibach, has filed a petition with the Court to act as her guardian ad litem.

33. Named Plaintiff DOUGLAS MATE is a public high school student in the class of 2004 with a certification for special education services due to an emotional disturbance. Doug attends Chugiak High School in the Anchorage School District and must pass the HSGQE in

order to receive a diploma this spring. Doug has taken the test four times and has not yet passed the math section.

34. Named Plaintiff TIANA KATHERINE LUPIE is a public high school student in the class of 2005 who is blind. She is an Honor Roll student at Lewis Angapak Memorial School in the Lower Kuskokwim School District. She is required to pass the HSGQE in order to receive a high school diploma. Tiana has taken the HSGQE three times, but has not passed the reading or math sections of the test. Tiana's mother, Evelyn Lupie, has filed a petition with the Court to act as her guardian ad litem.

35. Named Plaintiff IRENE TAKAK is a public high school student in the class of 2004 with certification for special education services due to speech and language delay. Irene attends Shaktoolik High School in the Bering Strait School District and must pass the HSGQE in order to receive a diploma this spring. She has taken all three sections of the test four times, but has not passed any of them.

36. Organizational Plaintiff LEARNING DISABILITIES ASSOCIATION OF ALASKA ("LDAalaska") is a non-profit nationally affiliated organization dedicated to helping individuals with learning disabilities, their families and professionals through individual empowerment, public education, service and collaborative efforts. Barriers to students with learning disabilities are major areas of interest and involvement for LDA. The membership of LDAalaska includes individuals with learning disabilities, parents and other family members, educators, other professionals and concerned citizens. LDAalaska is dedicated to identifying causes and promoting prevention of learning disabilities, and enhancing the quality of life for all individuals with learning disabilities and their families by encouraging effective identification and intervention, fostering research, and protecting their rights under the law.

37. Defendant ALASKA STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT ("Board") sets education policy, state academic content and performance standards, and puts into action regulations governing programs, including public schools, that operate under Title 14 of the Alaska Statutes. The Board is a public entity within the meaning of Title II of the Americans with Disabilities Act and other applicable laws. The Board receives

federal financial assistance from the United States Department of Education and is therefore covered by the requirements of Section 504 of the Rehabilitation Act of 1973. The Board is a state educational agency and is therefore covered by the requirements of IDEA.

38. Defendant ROGER SAMPSON is the Alaska Commissioner of Education & Early Development and is Defendants' principal executive officer. He is being sued in his official capacity.

39. Defendant ANCHORAGE SCHOOL DISTRICT is a local government entity within the meaning of Title II of the ADA, a recipient of federal financial assistance within the meaning of Section 504 of the Rehabilitation Act, and a local educational agency covered by IDEA. The Anchorage School District has at least fifty employees.

40. Defendant RICHARD SMILEY is the Administrator of Standards and Assessment for the Alaska Department of Education & Early Development. He is being sued in his official capacity.

41. References in this Complaint to Defendants, unless otherwise stated, shall be deemed to refer to all defendants, and to each of them.

### **CLASS ALLEGATIONS**

42. Pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2), Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated. The class, which these Plaintiffs represent, is composed of all Alaska public school students with IEPs or Section 504 plans who have taken or will be required to take the Alaska High School Graduation Qualifying Examination. The class is sometimes hereafter referred to as "Plaintiff students" or "Plaintiff children."

43. The persons in the class are so numerous that joinder of all such persons is impracticable. There are over forty other students in the Alaska public school system like named Plaintiff Tiana Lupie who receive special education services for visual impairments, while another fourteen are both deaf and blind. Named Plaintiff Doug Mate is just one of 767 students in Alaska public schools that are entitled to special education services for emotional disturbance disabilities. Named Plaintiffs Alexander Noon, Kendall Leibach, and Irene Takak are just three

of over 8,000 students statewide that receive special education services for specific learning disabilities. In all, there are nearly 18,000 students with a variety of disabilities who receive special education services in the Alaska public school system and who must ultimately pass the HSGQE in order to obtain a diploma.

44. There are numerous issues of fact and questions of law common to the class. These common factual issues include, but are not limited to, the following:

- a. Defendants' failure to provide access to a meaningful alternate assessment to the HSGQE, leading to a diploma, for all students who need an alternative format to demonstrate their mastery of basic skills.
- b. Defendants' denial of reasonable accommodations to disabled students by utilizing an arbitrary process which re-labels accommodations as impermissible "modifications."
- c. Defendants' denial of reasonable accommodations that have not been used at least three months prior to an HSGQE administration.
- d. Defendants' failure to provide sufficient guidance to parents and administrators so that students with disabilities have meaningful access to the accommodations they need to succeed on the Exit Exam.
- e. Defendants' denial of certain accommodations to students with disabilities until they have taken and failed one administration of the test.
- f. Defendants' development and administration of the Exit Exam, which all public high school students are required to pass to graduate from high school.
- g. Defendants' unfair invalidation of the entire test scores of students with disabilities solely because the students used an accommodation that tests only one of many skills measured by the Exit Exam.
- h. Defendants' failure to provide adequate oversight of accommodations policies to ensure uniform and predictable outcomes for all Alaska students with disabilities.

- i. Defendants' failure to establish an appeals process by which students can appeal denials of accommodations requests.
  - j. Defendants' creation of confusion and uncertainty by their failure to provide training and guidance to teachers, administrators, and IEP and 504 Plan team members regarding the HSGQE and participation options for students with disabilities.
  - k. Defendants' failure to assure that the IEPs or 504 Plans of disabled students were modified to align with the curriculum tested on the Exit Exam.
45. The common questions of law include, but are not limited to, the following:
- a. Does Defendants' failure to provide a meaningful alternate assessment to the HSGQE discriminate against Plaintiffs in violation of federal and state law?
  - b. Does Defendants' failure to modify disabled students' IEPs and Section 504 plans to align with the curriculum tested on the Exit Exam violate federal and state law?
  - c. Does Defendants' failure to provide meaningful accommodations policies constitute illegal discrimination under federal and state law?
  - d. Does Defendants' failure to establish any procedure for appealing denials of requests for reasonable accommodations violate federal law?
  - e. Is the Exit Exam an invalid test for assessing the knowledge, skills and abilities of students with disabilities, in violation of the due process protections of the United States or Alaska Constitution?
  - f. Have students with disabilities been provided with an adequate opportunity to learn the material tested on the Exit Exam, as required by the due process protections of the United States Constitution?

46. The claims of the named Plaintiffs are typical of those of the class, and Plaintiffs will fairly and adequately represent the interests of the class. Plaintiffs have engaged competent counsel to assist them in prosecuting their claims.

47. Defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class as a whole.

48. References herein to "Plaintiffs" shall be deemed to include the named Plaintiffs and each member of the class.

### **FACTUAL ALLEGATIONS**

49. Plaintiffs, who attend public schools throughout Alaska, are students with disabilities protected by federal law. There are nearly 18,000 special education students that attend Alaska's public schools and who will be required to pass the High School Graduation Qualifying Examination in order to graduate from high school beginning this Spring, 2004.

50. By virtue of their disabilities, most students with disabilities have either a legally mandated IEP or a section 504 plan. These plans are required by law to be created through an interactive process between educators, parents and their children, and are required to specify a child's individual needs, including how a student will participate on statewide assessments such as the HSGQE. Some students with disabilities do not have either an IEP or a section 504 plan.

51. Students with disabilities span the intelligence spectrum and many children with disabilities are of very high intelligence. Learning disabilities are the result of permanent neurological dysfunction or information processing disruptions that result in limited, unexpected, and usually intractable impediments in the ability to learn one or more basic skills taught through traditional formal education. Many people with learning disabilities work far harder than others in order to compensate for their disabilities.

52. There are several types of learning disabilities. Dyslexia, a particular learning disability, results from a neurological difference in processing phonemes, the basic unit of language, and can be seen in brain scans as early as infancy. Dyslexia impairs the ability to process language. A dyslexic individual may have difficulty reading, developing age/grade

appropriate vocabulary, handwriting, spelling, taking notes, and memorizing rote and sequential facts, steps and information. Dysgraphia, another specific learning disability, is a neurocognitive, neuromotor language-based processing disorder often, but not always, associated with dyslexia. Dysgraphia impairs an individual's ability to write legibly in a defined space over a normal timeframe. Dyscalculia is a mathematical learning disability in which a person has significant difficulty grasping math concepts and acquiring and retaining math computation and problem solving skills.

53. In addition to specific learning disabilities, students with a variety of other physical and mental disabilities are served by IEPs and section 504 plans. Students with physical and neurological disabilities that do not necessarily affect cognitive functioning, such as deafness, low vision/blindness, or cerebral palsy, often require the support of assistive technology or human aides/interpreters to acquire and demonstrate language or math skills. Similarly, students with emotional and mental disabilities, such as autism or bipolar disorder, have special needs in the classroom to ensure that they have the same opportunity as their non-disabled peers to benefit from a public education. Named Plaintiffs are representative of students throughout Alaska with a variety of disabilities.

54. Named Plaintiff Alexander Noon is a disabled student with ADHD, bi-polar disorder, and dyslexia. Alexander is in the class of 2004 and attends Service High School in the Anchorage School District. He is required to pass the HSGQE in order to graduate and will have completed all other diploma requirements by graduation.

55. Alexander's IEP allows him to use the following accommodations: extended time on writing assignments, assistance with developing/maintaining book and assignment calendar, use of a graphing calculator when appropriate, use of a word processor/AlphaSmart keyboard to write, access to teacher or student notes, and taking tests in a small group in a separate location with frequent breaks. Alexander's IEP also provides that he may use special test administrator, including his teacher. When Alexander has access to all of these tools, he is fully capable of demonstrating mastery of Alaska high school content standards.

56. Alexander has never been allowed to use many of his accommodations on the HSGQE, even though these accommodations are listed in his IEP and are accommodations he uses in the classroom on a regular basis, such as extra time on exams and taking tests in a small group in a separate location with frequent breaks. He was not allowed to use a calculator the first three times he took the HSGQE. He was allowed to use a calculator on the most recent test, but he was not allowed to use a graphing calculator as specifically permitted by his IEP (and in violation of Roger Sampson's directive issued December 8, 2003). Alexander and his parents were never given any information on the HSGQE accommodations policies, such as how to request specific accommodations or how to appeal accommodations decisions.

57. Alexander was forced to seek private tutoring for math in an effort to pass the math portion of the HSGQE. Alexander's IEP team did not make a commitment to tailor his IEP to emphasize math skills in preparation for the HSGQE until November 2003, after he had already taken and failed the math portion three times. Despite recent efforts to learn the math skills necessary to pass the HSGQE, Alexander has not had a fair, adequate, or equal opportunity to learn the material.

58. Named Plaintiff Kendall Leibach is a disabled student with dyslexia, which affects her in the areas of reading, written expression, and math. She is in the class of 2005 and is required to pass the HSGQE in order to obtain a diploma. Kendall attends Bartlett High School in the Anchorage School District. She currently has an overall Grade Point Average of 3.516 and is in the top 15% of the students in her class, with a class rank of 45 out of 360 students. She is hoping to graduate summa cum laude next year.

59. Kendall's IEP include the following accommodations: extended time for test taking, asking for test direction and question clarification, test taking in a small group setting in a separate location, reading directions out loud, a test administrator who is her teacher, using a four function calculator, dictionary, thesaurus, and computer with spell checking software. Kendall requires these tools for test taking and is able to accurately demonstrate her capabilities when she uses them. Kendall was not allowed to use her calculator on her first HSGQE administration in 2003. Kendall's parents were not given any information or guidelines about the "optional

assessment” for students with disabilities until *after* she took an optional assessment (with a calculator, dictionary, and clarified test questions) in October 2003. They were never given any information on how to challenge the denial of accommodations.

60. Kendall was not prepared for the HSGQE before she was required to take it for the first time in May 2003. Specifically, the HSGQE tested her on concepts of geometry that she had never been taught. Since then, Kendall has been enrolled (at her family’s expense) in private tutoring classes for reading and geometry to attempt to make up for Defendants’ failure to adequately prepare her for the HSGQE. Although an alternate means of assessing Kendall’s skills may be appropriate, no one has ever provided any information to Kendall about another way of measuring her mastery of state standards.

61. Named Plaintiff Douglas Mate is a public school student with an emotional disturbance disability. He is in the class of 2004 and must pass the HSGQE in order to obtain a diploma. He attends Chugiak High School in the Anchorage School District, and will have fulfilled all other diploma requirements by graduation. Doug’s pre-enlistment in the Army has qualified him for a \$40,000 scholarship, which he will forfeit if he does not obtain a diploma this spring as planned. His last opportunity to pass the HSGQE was in February 2004; he will not receive the results until two weeks before graduation.

62. Doug’s IEP allows him to use a calculator for all purposes in his everyday classroom setting. Additionally, his IEP team added a note in November 2003 to his IEP that he should be allowed to use a calculator on the HSGQE. However, Doug was not allowed to use a calculator at all on the HSGQE until the February 2004 administration, after he had already taken and failed the math section three times. When asked, Anchorage School District officials did not know anything about using a calculator on an “optional assessment,” and Doug’s mother only discovered this possibility after contacting the State Department of Education and Early Development directly.

63. Although geometry is one of the areas tested, Doug had never taken a geometry class before being forced to take the HSGQE. Defendants have not provided any remedial opportunities beyond a Saturday HSGQE preparation class that consisted only of taking a

practice test on a computer. Although an alternate means of assessing Doug's skills may be appropriate, no one has ever provided any information to Doug about another way of measuring his mastery of state standards.

64. Named Plaintiff Tiana Katherine Lupie is a student in the class of 2005 and is blind. She maintains a 3.33 grade point average and is an Honor Roll student at Lewis Angapak Memorial School in the Lower Kuskokwim School District. Tiana reads Braille and speaks Yupik as her native language. She has not passed the reading and math sections of the HSGQE, but must pass them in order to obtain a high school diploma.

65. Tiana's IEP qualifies her for the following accommodations: extended time in both classroom work and taking tests; taking tests over several short time periods, over several days if necessary to prevent unwarranted fatigue associated with reading Braille; and all materials and supplies adapted to Braille. Tiana has an assistant with her in the classroom to help with materials and supplies, to answer questions and to do some tutoring. Tiana has never been allowed to break up the reading portion of the test into smaller segments over two days – as she regularly does in her classroom – and has therefore never been able to complete more than half of the HSGQE reading test. Defendants summarily denied her request for this particular accommodation with no opportunity for appeal or formal documentation of the denial. If Tiana were allowed the testing accommodations she requires to accurately demonstrate her skills, she would be able to pass the HSGQE and graduate with a diploma.

66. Named Plaintiff Irene Takak is a public school student in the class of 2004 with speech and language delays due to a learning disability, which qualify her for special education services by Shaktoolik High School in the Bering Sea School District. Irene has taken the HSGQE four times, but has not yet passed it. She took it most recently in February 2004, but will not get her scores until two weeks before graduation. She must pass all three sections of the February 2004 HSGQE in order to obtain a diploma.

67. In testing situations other than the HSGQE, Irene is allowed to use a calculator where appropriate and to take smaller portions of a test over several days to minimize fatigue caused by her disability. Irene has never been permitted to use these accommodations that she

needs everyday in her classroom to demonstrate her proficiency in her schoolwork. She has never received any information about taking an optional assessment. Additionally, her IEP has never been reviewed or updated to ensure that the individualized curriculum she studies is fully aligned with the material tested by the HSGQE. For example, she has never been taught the graphing skills necessary to pass the math portion. Although an alternative to the HSGQE may be more appropriate to measure Irene's mastery of state content standards, no one has ever told her of another way to obtain a diploma other than by taking the same pen-and-paper test that non-disabled students take.

### **Development of the HSGQE**

68. In 1997, the Alaska Legislature enacted a law that requires all Alaska high school students to pass an examination in reading, writing, and mathematics before they can receive a high school diploma. Pursuant to this legislation, the Department of Education and Early Development ("DEED") contracted CTB/McGraw-Hill in 1998 to create the HSGQE for Alaska, which was to assess students' mastery of the State educational standards adopted as part of the Alaska Quality School Initiative. The HSGQE was originally intended to be a graduation requirement for students in the class of 2002.

69. With such a short timeline to create and fully implement the HSGQE, CTB/McGraw-Hill combined the recently adopted State education standards for high school students with test questions CTB/McGraw-Hill had previously developed for another project to create the first draft of the Alaska HSGQE.

70. In March 2000, the state administered the HSGQE for the first time. Most students did not receive their score reports from that first administration until over six months later. (By that time, there was less than a month before the first opportunity to retake the test during the beginning of the next school year (2000-2001), forcing students and administrators to scramble to prepare students for the next retest opportunity without adequate opportunity to design and request appropriate accommodations.)

71. The results of the first administration were devastating – over 60% of all students who took the test failed. The legislature responded to the immediate public controversy by

retreating from its original plans and postponing the implementation of the HSGQE graduation requirement from the class of 2002 until the class of 2004 to allow the exam to be re-worked.

72. Defendants proceeded with implementation of the HSGQE and have administered the exam in Spring and Winter 2003 and February 2004 to all high school students beginning in tenth grade. These students, which include members of the class of 2004, are required to pass the HSGQE in order to graduate from high school. Recently, Defendants announced that the statewide assessment contract has just been awarded to a different corporation, Data Recognition Corporation. While Defendants will still use the test developed by CTB/McGraw-Hill for the fall 2004 and spring 2005 administrations, a totally new test will be implemented after that time, injecting yet another layer of confusion regarding the alignment of school coursework and availability of accommodations and alternate assessments.

73. Based on prior experience in Alaska and early test scores, unless the Court intervenes, it is likely that over two-thirds of otherwise qualified students with disabilities in the class of 2004 will not receive a diploma, with devastating lasting effects on their lives.

74. Defendants are fully aware that the failure to take steps to maximize the participation of special education students has resulted in an Exit Exam that discriminates against students with disabilities. The Exit Exam discriminates against students with disabilities in at least the following multiple ways.

#### **Alternate Assessment**

75. Defendants failed to develop an “alternate assessment” to the Alaska HSGQE, which leads to a standard diploma, as is required by IDEA.

76. IDEA was amended in 1997 to require all states to develop and implement “alternate assessments” that have the same outcomes (such as grade advancement, district ranking, or high school graduation) as any regular statewide assessment administered by the State. Alternate assessments are required for any student with a disability who is unable to participate in the standard assessment by virtue of his or her disability, including students who can master high school language and math skills but cannot demonstrate them in a timed standardized test format. The requirement to provide an alternative means of measuring a

student's mastery of high school content is essential to allowing students with disabilities an equal opportunity with respect to statewide assessments such as the Alaska HSGQE.

77. Under these 1997 amendments, alternate assessments were to be in place by July of 2000. *See* 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 300.138. Defendants have been and remain fully aware of their legal obligation to develop alternate assessments to the HSGQE.

78. However, Defendants ignored this legal obligation and refused to develop an alternate assessment to the HSGQE for students who are capable of mastering high school graduation standards but who cannot access a standardized test. Instead, Defendants require all students to take the same pen-and-paper test in order to obtain a diploma.

79. The so-called "optional assessment," offered by defendants, is not an alternative format or alternative assessment method that leads to the same outcomes for the student. Rather, it is the exact same pen-and-paper test that all students take, administered with a few of the most standard accommodations in special education that Defendants arbitrarily prohibit on the regular HSGQE.

80. The Alaska "alternate assessment" also is not an alternative means of measuring a student's mastery of high school content as contemplated by the 1997 amendments to IDEA. The HSGQE "alternate assessment" does not lead to a diploma and is designed only for severely disabled students who cannot be expected to meet high school graduation standards in the first place.

81. At the December 2003 meeting of the State Board of Education and Early Development, Roger Sampson recommended that the Board adopt an alternate assessment program that is truly an alternate format to the standardized HSGQE. This program would require that a student (1) have an IEP or 504 plan that requires an alternative assessment program and (2) take and fail the standard HSGQE first. However, the Board rejected this recommendation and instead adopted an alternative recommendation that students have access only to an "optional assessment" – that is, the same pen-and-paper HSGQE but with other accommodations listed in the student's IEP. Again, this contributed to the mass confusion surrounding the HSGQE, as people were unclear if this was really any different from the

previous policy. Additionally, it is unclear what the policy even means or if it has ever been communicated to students. Finally, this demonstrates that the Board of Education and Early Development *did not even adopt final regulations to govern the “optional assessments” until December 2003*, leaving students and administrators without adequate regulatory guidance for years of high stakes test administrations, and effectively giving students with disabilities just one chance to take and pass the Exit Exam with a finalized regulatory framework in February 2004.

82. To add to the confusion, Defendants have adopted regulations under which a student with a disability can get a diploma without taking the HSGQE if the student (1) was in the 9th grade or higher in the Alaska public schools during the 2002-03 school year and (2) successfully completed an alternate assessment program required by his/her IEP. This exception to the HSGQE graduation requirement and the standard alternate assessment policy was adopted because previously, the DEED had said that students could demonstrate their mastery of high school standards *and receive diplomas* through completing alternate assessments identified in the a student’s IEP. However, the Attorney General stated last fall (2003) that the DEED was misinterpreting the regulations and reversed the rule, stating that alternate assessments could not lead to standard diplomas. Defendants implemented the new regulations as a compromise with all of the students and parents who had reasonably relied on the old regulations and had worked to implement alternate assessments that would lead to a diploma. However, this compromise indicates that Defendants (1) continue to fuel the mass confusion over the implementation of the HSGQE by constantly and arbitrarily revising the procedures that students rely upon to graduate from high school and (2) overtly recognize the necessity of individualized alternate assessments that qualify students for regular high school diplomas.

83. By failing and refusing to develop and provide a meaningful alternative means of measuring a student’s mastery of high school materials for students with disabilities who require one (regardless of the type or nature of the disability), Defendants are discriminating against all Alaska students with disabilities for whom an alternate assessment, rather than the standardized Exit Exam, is appropriate. These students will not be properly assessed by the HSGQE, and will not be able to accurately demonstrate their knowledge, skills and abilities.

### **Reasonable Accommodations**

84. In order to minimize the unfair effects of their disabilities on standardized tests, Plaintiff students require and are guaranteed under federal and state law reasonable accommodations on the HSGQE.

85. Without such accommodations, Plaintiff students will be tested on their disabilities instead of their abilities and are subjected to discrimination on the basis of their disabilities. Without the use of reasonable accommodations on the Exam, Plaintiffs will be unable to pass the Exam and therefore will be unable to graduate from high school.

86. Defendants have created chaos and confusion by failing to formulate clear policies and procedures regarding the provision of reasonable accommodations on the Alaska High School Graduation Qualifying Examination. This failure has led to ad hoc policymaking by Defendants, resulting in conflicting and sometimes mutually exclusive “policies” and “procedures.”

87. Defendants’ current policies and regulations regarding access to accommodations on the HSGQE are deficient and discriminatory in numerous ways.

88. The regulations promulgated by Defendants are illegal and discriminatory because they do not allow students with disabilities to use an accommodation on the Exit Exam that they may need, but that is not listed in their IEP or 504 Plan, or that they have not used for the past three months during instruction and classroom assessments. Because of the different nature of the Exit Exam, as compared to classroom education, many students with disabilities may require accommodations on the Exit Exam that they may not have previously required for classroom assessments.

89. The regulations are also discriminatory because they do not allow for a disabled student who does not have an IEP or 504 plan to use accommodations on the Exit Exam. While the majority of students eligible for accommodations are those with an IEP or a section 504 plan, there are students with disabilities who do not have either an IEP or a section 504 plan who will need accommodations on the Exit Exam. Other states, such as Massachusetts, have recognized

this and explicitly provide in their regulations that disabled students who do not have IEPs or section 504 plans may request accommodations on statewide assessments.

90. In addition, Defendants' policies do not provide for any clear procedure for students to request accommodations on the Exit Exam, and therefore students, parents, and administrators do not know what process is available for requesting accommodations, or what standards are used in reviewing and granting these accommodation requests.

91. The method by which the Exit Exam would be administered with accommodations was defined – in a secret and unaccountable process – by a single individual, Defendant Richard Smiley. No opportunity was made available to provide public input or to appeal Defendants' "allowable accommodations" designations.

92. The only means of applying for accommodations or an optional assessment is through Richard Smiley, and his method of granting or denying accommodations or an optional assessment is standardless and discretionary. His determination of which common classroom special education tools would be appropriate accommodations or impermissible "modifications" was similarly arbitrary and unfounded. His ad hoc formulation and administration of the accommodations policies and optional assessment has left students with disabilities, parents, and special educators vulnerable to arbitrary and unpredictable results.

93. Under Defendants' arbitrary and defective accommodations/modifications policies, the invalidation of an entire test score because the student uses an accommodation that assists with just one of the many skills measured by a test is discriminatory based solely on the student's disability. For example, the HSGQE reading test measures many different skills, or "domains," associated with reading, including the ability to understand printed language (referred to as "decoding"), reading comprehension, vocabulary, etc. Oral presentation of material, which is a prohibited "modification" for the HSGQE, only compensates for one such domain – a student's ability to decode printed language. It does not compromise the measurement of the student's ability to draw inferences, understand vocabulary and composition of sentences, or any of the other skills tested by reading tests. However, students with disabilities are denied any credit for their abilities to demonstrate these other skills because their

performance is completely invalidated due to the use of an accommodation for a totally different test domain.

94. The regulations do not provide for any appeals of denials of accommodation requests. Thus, regardless of how arbitrary or incorrect a denial of an accommodation request is, a student has no standards-driven process to appeal that denial.

95. Defendants have failed to provide mechanisms, procedures, policies or personnel to engage in the legally required process with parents and students for the fashioning of reasonable accommodations. Defendants have not provided adequate training or information to schools and school districts regarding the individualized assessment necessary to determine what accommodations a disabled student will require on the Exit Exam.

96. Confusion regarding the means of requesting accommodations or optional assessments is pervasive and undermines students' abilities to access the learning tools guaranteed to them by federal law. Due to the lack of clear policies and procedures regarding obtaining accommodations on the Exit Exam, parents of Plaintiff students have been (1) unable to make informed decisions about how their child should prepare for or take the tests, (2) misled about the procedures and consequences, (3) forced to make decisions which may be unnecessarily damaging to their children's future, (4) unable to participate meaningfully in designing Plaintiffs' IEPs or section 504 plans, and/or (5) discouraged from requesting the reasonable accommodations and alternate assessments to which they are entitled by state and federal law.

97. Although Defendants have stated that students will be provided reasonable accommodations in accordance with their IEPs or section 504 plans, this has not occurred. In many instances, the issue of reasonable accommodations on the Alaska HSGQE was not even addressed at the student's IEP or section 504 meeting. In other instances, although the issue of reasonable accommodations on the Exit Exam may have been discussed at a student's IEP or section 504 plan meeting, parents of Plaintiff children were nevertheless unable to make informed choices regarding their child's education because school officials did not know what the policies and procedures were regarding reasonable accommodations on the Exit Exam.

98. At various times, various school officials have made the following representations to parents of Plaintiff children regarding requested accommodations:

- a. The head of special education at Doug Mate's school in the Anchorage School District had no idea that students with disabilities could take the HSGQE with a calculator on an "optional assessment."
- b. Staff at Kendall Leibach's school in the Anchorage School District told her that she could not use *any* accommodations the first time she took the HSGQE in 2003. The special education department chair told her mother that a student had to fail before accommodations could be provided.
- c. When Tiana Lupie's IEP team requested that she be allowed to take the test over several days, the request had to be made verbally to the District Test Coordinator, because there were no procedures available for requesting them in writing. When the IEP team's request was rejected (again, verbally), they were told that there was no opportunity for appeal in light of Tiana's special circumstances.

99. Finally, even if parents and IEP teams managed to properly reserve specific accommodations for a student's test, Defendants have failed to provide adequate oversight of accommodations to ensure the accommodations are implemented fairly or consistently. For example, Defendants have failed to ensure the presence of an adequate number of proctors for individualized settings. In Ketchikan, several students with disabilities typed their HSGQE response on computers and then taped the printed answers into the exam booklets. Inexplicably, half of those exams were graded, while the other half was not graded. This is emblematic of systemically inadequate oversight and administration that violates students' right to reasonable accommodations on all statewide assessments.

#### **Lack of Validity**

100. The HSGQE also discriminates against students with disabilities because they have not had an opportunity to learn the material tested by the HSGQE. Throughout their educations, Plaintiff students have been provided with specific courses of study in accordance

with their IEPs or section 504 plans that in many cases deviate from the general curriculum. These IEPs and 504 plans have not been modified to align with the subject matter tested on the HSGQE, and as a consequence the test lacks *curricular* validity for students with disabilities. Further, because students have not actually been exposed to the material tested by the HSGQE, it also lacks *instructional* validity. The process of modifying IEPs and section 504 plans to align with the material tested on the Exit Exam can be lengthy and may require a lead time of many years.

101. Despite the fact that Defendants have already implemented the HSGQE, Defendants have not taken adequate steps to ensure that Plaintiffs' IEPs and section 504 plans are modified to align with the Exam. In addition, widespread confusion regarding which students with disabilities would be able to take the HSGQE and receive a diploma left many IEP teams unaware that they were supposed to align a student's education plan with the content tested by the HSGQE. Because these IEP teams learned so late – if ever – that the student needed to be offered specific materials in preparation for the HSGQE, these students are unfairly and illegally disadvantaged in their efforts to master and demonstrate high school competency.

102. A paper prepared by researchers at the Anchorage School District for presentation at the 2001 American Educational Research Association Convention admitted that the low passing rates on the math portion of the HSGQE indicated the test's lack of validity as a minimum competency test. The paper also admitted that the HSGQE implementation process did not make any close examination of external validity through the examination of instruction and actual learning. Defendants made no effort to establish the extent to which students are getting the direct instruction needed in the standards areas to prepare them to answer the specific items included in the tests.

103. The results of the paper indicated that, particularly in the area of math, teachers did not report substantial levels of opportunity to learn the materials tested by the HSGQE. In fact, while the math portion tests a total of 27 different standards, 20 percent or more of the teachers surveyed for the paper admitted that they had given little or no emphasis to each of those areas. Thirteen of the 27 math standards had more than 40 percent of the teachers saying

that no emphasis was given to the standard. Four of the 27 standards had more than 50 percent of the teachers saying no emphasis was given to the standard.

104. The authors of that study concluded:

[T]he high failure rates, the lack of evidence that standards align with instruction, the questionable results from Opportunity to Learn Studies, the high initial failure rate on the test, and the poor performance of Anchorage students who have known success in course work, and evidence of better-than-average performance on a national norm referenced test all raise questions about the fairness and validity of the test scores. Similarly, the gross differences in performance of non-English speaking students and special education students raise questions about Opportunity to Learn and the Alaska assertion that all students should meet the standards embodied in the HSGQE.

105. In a recent state-by-state survey by a leading national education newspaper, *Education Week*, Alaska received the lowest grade of any state this year for efforts to improve teacher quality. Alaska ranked 43rd out of the 50 states in the survey's adequacy of school resources index. Alaska was last in the nation for having the widest variation in per pupil spending across districts, indicating an imbalanced distribution of educational resources. Standardized statewide high stakes assessment is fundamentally unfair where the opportunities to receive instruction on the test material are so uneven, particularly for students with disabilities who receive individualized instruction.

106. Defendants have not taken adequate steps to ensure appropriate remediation for disabled students who do not pass the Exit Exam on their first attempt.

107. Without immediate relief from the Court, Plaintiffs will be irreparably harmed in that they will be denied numerous academic, employment and professional opportunities, may not graduate from high school, and will experience severe damage to their self-esteem and emotional well-being.

### **FIRST CLAIM**

(Violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*)  
(Against All Defendants)

108. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 107 inclusive.

109. Defendants' acts and omissions alleged herein are in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., ("ADA") and the regulations promulgated hereunder, 28 C.F.R. Part 35, et seq.

110. Plaintiffs are qualified individuals with disabilities within the meaning of the ADA. 42 U.S.C. § 12131(2).

111. Defendants ALASKA STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT and ANCHORAGE SCHOOL DISTRICT are public entities within the meaning of Title II of the ADA and the regulations promulgated thereunder. 42 U.S.C. § 12131(1)(B).

112. In violation of the ADA, Defendants have failed to evaluate their policies and practices to ensure that these policies and procedures do not exclude or limit the participation of individuals with disabilities in their programs and activities. 28 C.F.R. § 35.105.

113. In violation of the ADA, Defendants have refused to develop and provide alternate assessments to those Plaintiffs who require an alternate assessment by virtue of their disability. 28 C.F.R. § 35.130.

114. In violation of the ADA, Defendants have excluded Plaintiff children from participation in and denied them the benefits of the services, programs or activities of a public entity solely on the basis of disability. Defendants have further violated the ADA by otherwise subjecting Plaintiff children to discrimination based upon disability. 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a).

115. Defendants have violated the ADA by denying Plaintiff children the opportunity to participate in or benefit from aids, benefits and services provided by the public entities, and by providing Plaintiff children with the opportunity to participate in or benefit from aids, benefits or services that are not equal to those afforded non-disabled children who attend Alaska's public schools. 28 C.F.R. § 35.130(b)(1)(i)-(ii).

116. Defendants have violated the ADA by providing Plaintiff children with benefits that are different and/or not as effective in affording equal opportunity to obtain the same results,

to gain the same benefits, or to reach the same levels of achievement as that provided to others. 28 C.F.R. § 35.130(b)(1)(iii)(iv).

117. Defendants have violated the ADA by utilizing criteria or methods of administration that have the effect of subjecting Plaintiff children to discrimination on the basis of disability or that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities. 28 C.F.R. § 35.130(b)(3).

118. Defendants have violated the ADA by administering a certification program in a manner that subjects Plaintiff children to discrimination on the basis of disability. 28 C.F.R. § 35.130(b)(6).

119. Defendants have violated the ADA by failing to make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability. 28 C.F.R. § 35.130(7).

120. Defendants have violated the ADA by imposing eligibility requirements that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity offered by Defendants. 28 C.F.R. § 130.(b)(8).

121. WHEREFORE, Plaintiffs request relief as set forth below.

**SECOND CLAIM**

(Violation of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*)  
(Against All Defendants)

122. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 121 inclusive.

123. Plaintiffs are qualified individuals with disabilities within the meaning the Rehabilitation Act of 1973.

124. Defendants ALASKA STATE BOARD OF EDUCATION AND EARLY DEVELOPMENT and ANCHORAGE SCHOOL DISTRICT are the recipients of federal funds sufficient to invoke the coverage of the Rehabilitation Act of 1973.

125. Defendants have intentionally discriminated against Plaintiffs on the basis of their disabilities in violation of the Rehabilitation Act. 29 U.S.C. § 794.

126. Solely by reason of their disabilities, Plaintiffs have been, and continue to be, excluded from participation in, denied the benefits of, and subjected to discrimination in their attempts to receive, full and equal access to the programs, services and activities offered by Defendants in violation of the Rehabilitation Act. 29 U.S.C. § 794.

127. WHEREFORE, Plaintiffs request relief as set forth below.

**THIRD CLAIM**

(Violation of Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*)  
(Against All Defendants)

128. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 127 inclusive.

129. Defendants have violated IDEA by failing to develop adequate regulations for the provision of appropriate accommodations to students with disabilities on the Alaska High School Graduation Qualifying Exam. 20 U.S.C. § 1412(a)(17)(A).

130. Defendants have violated IDEA by failing to develop guidelines for the participation of children with disabilities in alternate assessments for those disabled students who cannot participate in the High School Exit Exam but who can still master Alaska state high school content standards. 20 U.S.C. § 1412(a)(17)(A)(I).

131. Defendants have violated IDEA by not ensuring that the Alaska High School Graduation Qualifying Exam has been validated for the specific purpose for which it is used. 20 U.S.C. § 1414(b)(3)(B)(I).

132. Defendants have adopted a policy of discrimination based solely upon the disabilities of school children, resulting in severe interference with and deprivation of Plaintiffs' fundamental right to a free and appropriate public education, which is secured to them by the laws of the United States and specifically pursuant to IDEA. 20 U.S.C. § 1401(8).

133. No administrative remedy exists under IDEA to address these wholesale and statewide violations by Defendants. Accordingly, Plaintiffs are not required to exhaust the administrative procedures set forth in IDEA.

134. WHEREFORE, Plaintiffs request relief as set forth below.

**FOURTH CLAIM**

(Violation of Due Process Clause of United States Constitution)

(Against Defendants Roger Sampson, Richard Smiley, and the Anchorage School District)

135. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 134 inclusive.

136. The actions of Defendants have violated and continue to violate the Fourteenth Amendment to the United States Constitution in that Defendants have failed to provide Plaintiffs and their parents with adequate notice of the testing requirements for the Exit Exam. Due to widespread confusion and a systemic lack of adequate notice, parents and educators have not had sufficient time to consider and determine whether and how the skills tested on the statewide tests should be addressed in a child's IEP or Section 504 Plan. Alaska schools have never taught or trained children with disabilities many of the skills and content currently being tested on the Alaska High School Graduation Qualifying Examination. Defendants have taken no steps to ensure that disabled students' IEPs or Section 504 Plans are modified to align with the curriculum and skills tested on the Exit Exam. Instead, Defendants have embarked upon a one-test-fits-all, test-first-provide-education-later procedure without conducting adequate research into the far-reaching consequences for students with disabilities, which effectively makes it impossible for these students to pass the required exams.

137. The actions of Defendants have violated and continue to violate the Fourteenth Amendment to the United States Constitution because the Exit Exam, as currently formulated and administered, lacks both instructional and curricular validity, and has not been shown to be valid for students with disabilities.

138. Defendants have violated and continue to violate the Fourteenth Amendment to the United States Constitution by failing to create and implement clear, consistent and understandable policies and procedures regarding provision of reasonable accommodations on the Exit Exam. Defendants have violated the Fourteenth Amendment to the United States Constitution by formulating arbitrary accommodations guidelines in a secret and unaccountable process without any psychometric justification whatsoever.

139. Defendants have violated and continue to violate the Fourteenth Amendment to the United States Constitution by failing to establish a formal procedure for parents and students to challenge even the most arbitrary conduct with regard to the denials of reasonable accommodations on the Alaska High School Graduation Qualifying Examination.

140. The actions of Defendants have violated and continue to violate the Fourteenth Amendment to the United States Constitution in that the HSGQE is fundamentally unfair because many students with disabilities will not be accurately assessed by the Exit Exam because they require an alternate assessment. Defendants have refused, in violation of federal law, to develop a meaningful alternate assessment to the Alaska High School Graduation Qualifying Examination.

141. Moreover, because the HSGQE lacks curricular validity in that it tests materials that students with disabilities have not had the opportunity to learn, it is not even rationally related to any legitimate state interest. *See Debra P. v. Turlington*, 644 F.2d 397, 406 (5th Cir. 1981).

142. WHEREFORE, Plaintiffs request relief as set forth below.

#### **FIFTH CLAIM**

(Declaratory Relief, 28 U.S.C. §§ 2201, 2202)  
(Against All Defendants)

143. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 142 inclusive.

144. Plaintiffs contend, and are informed and believe that Defendants deny that the ALASKA STATE BOARD OF EDUCATION has failed to comply with applicable law prohibiting discrimination against persons with disabilities and is in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.*; the Individuals with Disabilities Education Act, and the United States Constitution.

145. A judicial declaration is necessary and appropriate at this time in order that each of the parties may know his or her respective rights and duties and act accordingly.

146. WHEREFORE, Plaintiffs request relief as set forth below.

**SIXTH CLAIM**  
(Alaska Statutes § 14.03.075)  
(Against All Defendants)

147. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 146 inclusive.

148. The Alaska statute that creates the High School Graduation Qualifying Exam requires the administration of an “alternative assessment program.” Alaska Stat. § 14.03.075(c)(1). Students that successfully complete the alternative assessment program are eligible to receive a standard high school diploma upon graduation.

149. Defendants violate this provision by administering an “optional assessment,” which (1) is not a “program” as required by the statute and amounts to the exact same pen-and-paper test everyone else takes with five additional standard accommodations, and (2) does not comply with the statutory intent to comply with the alternative assessment provisions of the 1997 Amendments to IDEA.

150. Furthermore, in violation of this statute, the “alternate assessments” that Defendants provide to students with disabilities (1) are available only to students with the most severe cognitive disabilities who are not expected to master the State’s high school content standards, and (2) do not lead to a standard high school diploma.

151. WHEREFORE, Plaintiffs request relief as set forth below.

**SEVENTH CLAIM**  
(Alaska Administrative Code, Title 4, § 06.775)  
(Against All Defendants)

152. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 151 inclusive.

153. The regulations promulgated by Defendants to implement the HSGQE require that a student be allowed to use all “accommodations required in a student’s IEP or section 504 plan for every required standards based or norm referenced test.” 4 AAC § 06.775(a)(1).

154. In violation of this regulatory provision, Defendants prohibit students from accessing the full range of accommodations that may be recommended by an IEP team or section 504 plan including, but not limited to, a blanket prohibition against extended time to take a test

beyond one day, oral presentation of the reading test, and any accommodation that was added to an IEP within the three months preceding an HSGQE administration. These illegal and arbitrary restrictions and burdens on students' right to their reasonable accommodations were devised in secret without any articulated justification beyond the subjective beliefs of state bureaucrats.

155. Additionally, Defendants force students to take the HSGQE once *without* certain accommodations – such as spell checkers and four function calculators, which are among the most commonly recommended accommodations in special education – before allowing them to use the accommodations on an “optional assessment,” thereby burdening and violating each student’s state right to every accommodation recommended by an IEP or section 504 plan.

156. WHEREFORE, Plaintiffs request relief as set forth below.

**EIGHTH CLAIM**

(Alaska Human Rights Act, Alaska Stat. §§ 18.80.200 *et seq.*)  
(Against All Defendants)

157. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 156 inclusive.

158. The Alaska public schools, as places offering educational services to the general public, are public accommodations that must offer their services and privileges without regard to physical or mental disability. Alaska Stat. § 18.80.230.

159. Defendants violate state law by burdening and violating Plaintiffs’ rights to reasonable accommodations and a meaningful alternate assessment for statewide assessments because of students’ physical or mental disabilities. Defendants’ denial of appropriate educational opportunities to prepare for the HSGQE because Plaintiffs are served by individualized curriculums is also an illegal and discriminatory denial of Defendants’ public services based solely upon disability.

160. WHEREFORE, Plaintiffs request relief as set forth below.

**NINTH CLAIM**

(Violation of Equal Protection Clause of Alaska Constitution)  
(Against All Defendants)

161. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 160 inclusive.

162. The Alaska Constitution guarantees all children of Alaska a right to a public education. Alaska Const., Art. 7, § 1; *Hootch v. Alaska State-Operated Sch. System*, 536 P.2d 793, 799 (Alaska 1975).

163. Defendants are agencies of the State of Alaska and the conduct attributable to Defendants amounts to state action. Defendants are obligated to extend equal rights, protection, and opportunities to all residents of Alaska. Alaska Const., Art. 1, § 1. The Alaska equal protection and due process provisions provide broader protections than the federal constitutional counterparts. *Burnor v. State*, 829 P.2d 837 (Alaska Ct. App. 1992).

164. Defendants have violated and continue to violate the Equal Protection provisions of the Alaska Constitution by failing to ensure that plaintiff students with disabilities have an equal opportunity as nondisabled students to demonstrate mastery of the content standards addressed in the HSGQE through use of reasonable accommodations and/or an alternate assessment.

165. Disabled students in this year's senior class who were retested in the spring of 2003 – without an appropriate policy for reasonable accommodations or a meaningful alternate assessment in place – failed the writing section at a rate of 77% and the math section at a rate of 82%. These rates are compared to a failure rate on the writing section of 50% and on the math section of 63% for all Alaska public school students who retook the HSGQE in the spring of 2003, including students with disabilities.

166. Unless student Plaintiffs are provided with appropriate reasonable accommodations and/or an alternate assessment, students with disabilities will continue to fail the HSGQE in disproportionate numbers, and thus will be deprived of the opportunity to obtain a high school diploma.

167. These inequalities in opportunity and preparation do not further the State's interest in ensuring a standards-based secondary education for all students where (1) disabled students are capable of mastering high school standards but (2) are limited in their ability to demonstrate this mastery on a standardized test with or without accommodations. As means of pursuing the legislative objective of statewide assessment, Defendants' legally deficient and

educationally unsound accommodations, alternate assessment, and curriculum alignment policies do not afford Plaintiffs an equal opportunity meet state education standards.

168. WHEREFORE, Plaintiffs request relief as set forth below.

**TENTH CLAIM**

(Violation of Due Process Clause of Alaska Constitution)  
(Against All Defendants)

169. Plaintiffs incorporate by reference herein the allegations in paragraphs 1 through 168 inclusive.

170. Both the Alaska Constitution, Article I section 7, and the 14th amendment of the United States Constitution prohibit the State from depriving any person of “life, liberty, or property, without due process of law.” *Bush v. Reid*, 516 P.2d 1215, 1217 n.9 (Alaska 1973). While the protections of the Alaska Due Process Clause are broader than the 14th Amendment, Defendants violate the Alaska Constitution for the same reasons they violate the federal Constitution. See ¶¶ 135-42, *supra*.

171. WHEREFORE, Plaintiffs request relief as set forth below.

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs pray for relief as follows:

1. A determination by this Court that this action may be maintained as a class action.
2. The issuance of a declaratory judgment that Defendants have violated the Individuals with Disabilities Education Act; the Americans with Disabilities Act; the Rehabilitation Act of 1973; the United States Constitution; Alaska Statutes and Alaska Code of Regulations; and the Alaska Constitution.
3. The issuance of an injunction restraining Defendants from making the HSGQE a condition of graduation unless and until Defendants have developed and provided alternate assessments to all disabled students who require such an assessment (not just those with severe cognitive disabilities who cannot master state standards); issued and publicized clear regulations and establish a procedure by which students and their parents can request reasonable accommodations on the Exit Exam, as well as a standard for consideration and granting of such requests; establish an appeals process by which students can appeal denials of accommodations

requests; and taken all steps necessary to ensure that the High School Graduation Qualifying Exam is valid and reliable for students with disabilities.

4. Retention of jurisdiction by this Court until such time as the Court is satisfied that Defendants' unlawful policies, practices, acts, and omissions complained of herein have been remedied and will not recur.

5. An award of reasonable attorneys' fees and costs.

6. Such other and further relief as the Court deems just and proper.

DATED: \_\_\_\_\_

Respectfully submitted,

By: \_\_\_\_\_

SID WOLINSKY  
DISABILITY RIGHTS ADVOCATES  
449 15th Street, Suite 303  
Oakland, California 94612  
(510) 451-8644 (t)  
(510) 451-8511 (f)  
(510) 451-8716 (TTY)

---

DAVID W. OESTING  
DAVIS WRIGHT TREMAINE LLP  
701 West Eighth Avenue, Suite 800  
Anchorage, Alaska 99501-3468  
(907) 257-5300 (t)  
(907) 257-5399 (f)

---

DAVID FLEURANT

DISABILITY LAW CENTER OF  
ALASKA  
3330 Arctic Boulevard, Suite 103  
Anchorage, Alaska 99503  
(800) 478-1234 (t)

Attorneys for Plaintiffs

\Server\Cases\Disabled.AlaskaExam\Pleadings\Complaint.doc