

Endnotes: High-Stakes Testing: Educational Barometer for Success, or False Prognosticator for Failure

[Print this page](#)

These are endnotes for the article, [High-Stakes Testing: Educational Barometer for Success, or False Prognosticator for Failure](#) by Torin Togut, Esq.

Endnotes

[1] Tyack, David B., *The One Best System: A History of American Urban Education* (1974); Eisner, Elliott W., (1995). Standards for American Schools: Help or Hindrance? *Phi Delta Kappan*, 759-60.

[2] Ravitch, Diane, (1995). *National Standards in American Education: A Citizen's Guide*.

[3] *Id.* at 39-41, 46-47.

[4] Marion, Scott F. & Sheinker, Alan (January 1999). Issues and Consequences for State-Level Minimum Competency Testing Programs. (Wyoming Report 1), Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes. Throughout the 1970s and 1980s, more than 40 states instituted minimum competency testing for more accountability. Frederiksenm, N. (1994). The influence of minimum competency tests on teaching and learning. Princeton, NJ: Educational Testing Service, Policy Information Center; Winfield, L.F. (1990). School competency testing reforms and student achievement. Exploring a national perspective. *Educational Evaluation and Policy Analysis*, 12, 157-73.

[5] McCall, James M., Note And Comment: Now Pinch Hitting For Educational Reform: Delaware's Minimum Competency Testing And The Diploma Sanction, *18 J.L. & Com.* 373, 375 (1999). On July 10, 1998, the Delaware General Assembly passed the Delaware Student Testing Program (DSTP), which tests students in grades 3, 5, 8, and 10 in English language arts and mathematics. If students fail the DSTP, they are not promoted to the next grade. For high school students, the failure to pass the DSTP results in denial of their diploma. *Id.* at 374.

[6] *Id.*

[7] National Committee on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (1983). See Moran, Rachel F., Symposium: Education And The Constitution: Shaping Each Other And The Next Century, *34 Akron L.Rev.* 107, 111-12 (2000).

[8] *Id.* See also National Governors' Association, *High School Exit Examinations: Setting High Expectations* (1998)

[9] Coleman, Arthur L., Excellence and Equity in Education: High Standards for High Stakes Tests, *6 Va.J.Soc.Policy* 81 & n.6 (Fall 1998).

[10] Heubert, J.P. and Hauser, R.M., (1998). High Stakes: Testing for Tracking,

Promotion, and Graduation (NCR Report), Washington, D.C.: National Research Council, at pp. 163-64.

[11] NRC Report at p. 163.

[12] Heubert, Jay P., J.D., Ed.D. (2000). High-Stakes Testing: Opportunities and Risks for Students of Color, English-Language Learners, and Students with Disabilities, published as a chapter in Pines, M., ed., *The Continuing Challenge: Moving the Youth Agenda Forward* (Policy Issues Monograph 00-02, Sar Levitan Center for Social Policy Studies). Baltimore, MD: John Hopkins University Press.

[13] Based upon a survey conducted in July 2002, the following states have mandatory exit exams: Alabama, Florida, Georgia, Indiana, Louisiana, Maryland, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, and Virginia. The following states are phasing in exit exams but are not yet withholding diplomas: Alaska, Arizona, California, Massachusetts, Utah, and Washington. See Chudowsky, N., Kober, N., Gayler, K.S., & Hamilton, M. (August 2002). *State High School Exit Exams - A Baseline Report, Center on Education Policy*, at pp. 6-7. In 1998, 11 of 15 states below the Mason-Dixon line required students to pass a high school exit examination. In 2002, 10 states had minimum-competency exams, 7 had standards-based exams, and 2 had end-of-course exams. *State High School Exit Exams - A Baseline Report, Action Summary for State and National Leaders*, Center on Education Policy (August 2002) at p 5. Louisiana, New Mexico, and North Carolina link test scores to promotion or retention and more states plan to do the same in the future. See Amrein, Audrey, L., & Berliner, David C., (March 28, 2002). High-stakes testing, uncertainty, and student learning. *Education Policy Analysis Archives*, 10(8) at 8. Arizona State University.

High-stakes testing has been concentrated in states and school districts with substantial numbers of low-income residents and minorities. See Reardon, Sean F., *Eighth-Grade Minority Competency Testing and Early High School Dropout Patterns 4-5* (April 1996), a paper presented at the annual meeting of the American Educational Research Association. Students of color are substantially more likely to fail an exit exam on the first try than white students. The percentage of students who do not pass exit exams on their first try ranges from 9% to 69% in mathematics, depending upon the state, and from 5% to 42% in English and language arts. In Minnesota, only 59% of poor students, 40% of special education, and 30% of English language learners passed the exam on the first attempt. See Chudowsky, *et. al.*, (August 2002) at p 4. The majority of students pass the exit exam for graduation. In Indiana and Ohio, approximately 98% of the students who completed their course requirements for graduation passed the exit exam and received a diploma. But these statistics are deceiving in that they do not count students who drop out of school, repeat their senior year, move out of the state or district, or are excluded from testing because of their disability or language status. *Id.*

[14] Coleman, Arthur L., Excellence and Equity in Education: High Standards for High Stakes Tests, *Va.J.Soc.Policy* 81 & n.29-30 (Fall 1998). For example, the North Carolina Board of Education instituted a policy that third-through-eighth grade students who do not achieve a designated score on a state administered standardized test will be retained.

[15] Elul, Hagit, Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas. *Colum. Human Rights L. Rev.* (Summer 1999), at p. 495 n.1

[16] *New York Times* (Jan. 20, 1999) at A22; *New York Times* (Feb. 5, 1997), at A20; see also Jay P. Heubert & Robert M. Hauser eds. (1999). *Commission on Behav. & Soc. Sci & Educ.*, Nat'l Res. Council, High Stakes: Testing for Tracking, Promotion, and Graduation.

[17] *Id.*

[18] Coleman, Arthur L., Excellence and Equity in Education: High Standards for High Stakes Tests, *Va.J.Soc.Policy* 81 (Fall 1998). See also Goals 2000: Educate America Act, 20 U.S.C. § 5801 (1994); Elementary and Secondary Education Act, 20 U.S.C. § 6301 (1994); National Council on Education Standards and Testing, *Raising Standards for American Education: A Report to Congress, the Secretary of Education, the National Goals Panel, and the American People* (1992); National Governors' Association, *From Rhetoric to Action: State Progress in Restructuring the Education System* (1991).

[19] See Hagit Elul, Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas. *30 Colum Human Rights L. Rev.* 495, 498 & n. 22 (Summer, 1999).

[20] The late Senator Paul Wellstone of Minnesota voiced concerns about high-stakes testing, saying that, "Today in education there is a threat afoot . . . the threat of high-stakes testing being grossly abused in the name of greater accountability, and almost always to the serious detriment of our children." High-stakes tests: A harsh agenda for America's children. (March 13, 2000). Remarks prepared for U.S. Senator Paul D. Wellstone. Teachers College, Columbia University.

[21] Elul, Hagit, Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas, *30 Colum. Human Rights L. Rev.* 495, 500 (Summer 1999).

[22] See e.g., More Schools Rely on Tests, but Study Raises Doubts, *New York Times* (Dec. 28, 2002); Frase-Blunt, Martha, High Stakes Testing a Mixed Blessing for Special Students, *CEC Today*, Vol. 7, No. September 2000; McDonnell, Lorraine, The Politics of High Stakes Testing, *CRESST/UCLA* (1999); WestEd *Policy Brief, the High Stakes of High-Stakes Testing*, (February 2000); Johnson, Joseph F., Treisman, Uri, and Fuller, Ed., American Association of Administrators: *Testing in Texas*, December 2000; Porter, Andrew, American Association of School Administrators, *Doing High-Stakes Assessment Right* (December 2000); National Council of Teachers of Mathematics (NCTM), *High-Stakes Testing* (November 2000); Cizek, Gregory, University of North Carolina, In Defense of Testing Series, *Unintended Consequences of High-Stakes Testing*, EducationNews.org; International Reading Association, Summary of a Position Statement of the International Reading Association: *High-Stakes Assessments in Reading* (August 1999); American Psychological Association, *Appropriate Use of High-Stakes Testing in Our Nation's Schools* (May 2001); American Educational Research Association (AERA), *AERA Position Statement Concerning High-Stakes Testing in PreK-12 Education* (July 2000); The National Forum To Accelerate Middle-Grades Reform, Research & Policy, *National Forum Policy Statement on High-Stakes Testing*; National Association of School Psychologists,

National Mental Health and Education Center, *Large Scale Assessments and High Stakes Decisions: Facts, Cautions and Guidelines* (2002); Nathan, Linda, The Human Face of the High-Stakes Testing Story. *Phi Delta Kappan* (April 2002); Bracey, Gerald, Ph.D., (December 2000). *High Stakes Testing*, Center for Education Research, Analysis, and Information. An Education Policy Project Briefing Paper: University of Wisconsin-Milwaukee, Milwaukee, WI. **Note:** This list of articles on the subject of high-stakes testing is far from being exhaustive.

[23] *Id.* at 501.

[24] *Id.* at 16.

[25] See e.g. *Erik V. v Causby*, 977 F. Supp. 384 (E.D.N.C. 1997); *GI Forum v. Texas Educational Agency*, 87 F. Supp.2d 667 (W.D. Tex. 2000). It is difficult to prove that student accountability policies are not a valid means of improving student achievement. This may be proved, however, by showing that (1) standardized tests are not appropriate for determining grade detention or diploma denial; and (2) grade retention and diploma denial policies do not lead to academic achievement. Elul, Hagit, Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas, *Colum. Human Rights L. Rev.* 495, 523-25 (Summer 1999). For example, a Texas student accountability policy uses the TAAS exam to assess whether students acquired the knowledge, skills, or abilities deemed to be essential for graduation. If these tests do not accurately assess the skills, knowledge, and abilities essential for grade promotion or high school graduation, then they may be invalid under Title VI. If these high-stakes tests embody a standard that results in cultural, ethnic, racial, or gender bias, this may violate Title VI and Title IX. *Id.* See Joint Committee on Testing Practices, *Code of Fair Testing Practices in Education*, <http://www.apa.org/science/FinalCode.pdf>

[26] Heubert, J.P., & Hauser, R.M. (1999). *High stakes: Testing for tracking, promotion and graduation*. Washington, DC: National Academy Press; Almond, P., Quenemoen, R.F., Olsen, K., & Thurlow, M. (2000). Gray areas of assessment systems. *Synthesis Report 32*. Minneapolis, MN: University of Minnesota, Center on Educational Outcomes.

[27] Amrein, Audrey, L., & Berliner, David C., (March 28, 2002). High-stakes testing, uncertainty, and student learning. *Education Policy Analysis Archives*, 10(8). Research suggests that these arguments are likely to be false most of the time; some research shows the opposite result. See McNeil, L.M. (2000). *Contradictions of school reform*. New York, NY: Routledge; Orfield, G., & Kornhaber, M.L. (Eds.) (2001). *Raising standards or raising barriers? Inequity and high stakes testing in public education*. New York: The Century Foundation Press; Paris, S.G. (2000). Trojan horse in the schoolyard: The hidden threats in high-stakes testing. *Issues in Education*, 6(1,2), 1-16; Sacks, P. (1999). *Standardized minds: The high price of America's testing culture and what we can do to change it*. Cambridge, MA: Perseus Books; Sheldon, K.M. & Biddle, B.J., (1998). Standards accountability and school reform: Perils and pitfalls. *Teacher College Record*, 100(1), 164-180.

[28] Jaeger, R.M. (1982). The final hurdle: Minimum competency achievement testing. In G.R. Austin & H. Garber (Eds.) *The rise and fall of national test scores* (pp. 223-246), New York: Academic Press.

[29] Marion, Scott F., & Sheinker (January 1999). Issues and Consequences of

State-Level Minimum Competency Testing Programs. *Wyoming Report 1* at pp. 4-5. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[30] *Id.*

[31] *Id.* at 6.

[32] Popham, W.J. (1987). The merits of measurement-driven instruction. *Phi Delta Kappan*, 68, 679-682. There is evidence that an increase in test scores is related to what is taught. Resnick, L.B., & Resnick, D.P. (1992). *Assessing the thinking curriculum: New tools for educational reform*. B.R. Gifford & M.C. O'Conner (eds.), *Changing assessments: Alternative views of aptitude, achievement and instruction*. Boston: Kluwer Academic. But high-stakes testing is, in itself, insufficient to drive instruction; it must be linked to standards and content. Airasian, P.W. (1988). Measurement driven instruction: A closer look. *Educational Measurement: Issues and Practice*, 7(4), 6-11.

[33] Shepard, L.A. (1991). Psychometricians' beliefs about learning. *Educational Researcher*, 4, 2-16; Mislevy, R.J. (1996). Some recent developments in assessing student learning. Princeton, NJ: Educational Testing Service, Center for Performance Assessment; Glasser, R. & Silver, E. (1994). Assessment, testing, and instruction: Retrospect and prospect. *Review of Research in Education*, 20, 393-419.

[34] Marion, Scott F., & Sheinker, Alan (January 1999). Issues and Consequences of State-Level Minimum Competency Testing Programs. *Wyoming Report 1*, at pp. 9-10. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes,

[35] *Id.* at 11. A validity study of minimum competency testing should examine both the positive and negative effects on curriculum and learning. An evaluator should determine whether the effects are intended or unintended. There should be an expectation that minimum competency testing will increase student learning. A good evaluation should try to account, either statistically or by establishing a comparison group, to measure competing variables.

[36] One study found positive effects of minimum competency testing in reading for students in grades eight and eleven, but no difference in fourth grade students. Winfield, L.F. (1990). School competency testing reforms and student achievement: Exploring a national perspective. *Educational Evaluation and Policy Analysis*, 12, 157-73.

[37] Frederiksen, N. (1994). *The influence of minimum competency tests on teaching and learning*. Princeton, NJ: Educational Testing Service, Policy Information Center. Students from 10 high-stakes states improved their math scores on routine problems compared with students from 11 low-stakes states.

[38] Quenemoen, Rachel F., Lhr, Camilla, A., Thurlow, Martha L., & Massanai, Carol B. (February 2001). Students with Disabilities in Standards-based Assessment and Accountability Systems: Emerging Issues, Strategies, and Recommendations. *NCEO Synthesis Report 37* at pp. 10-11. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[39] *Id.* at 14. Except for fourth graders, students' performance on routine problems

did not generalize to nonroutine (high-order thinking) problems.

[40] There is no consensus about the impact of minimum competency testing on the dropout rate. See Reardon, S.F. (April 1996). Eighth grade minimum competency testing and early high school drop out patterns. Paper presented at the Annual Meeting of the American Educational Research Association, New York; Griffin, B.W. & Heidorn, M.H. (1996). An examination of the relationship between minimum competency performance and dropping out of high school. *Educational Evaluation and Policy Analysis*, 18, 243-52; Catterall, J.S. (1989) Standards and school dropouts: A national study of tests required for high school graduation. *American Journal of Education*, 98, 1-34.

[41] Restriction on curriculum and instruction appears to have a greater impact on minority students. Lomax, R.G., West, M.M., Harmon, M.C., Viator, K.A. & Madaus, G.F. (1995). The impact of mandated standardized testing on minority students. *Journal of Negro Education*, 64, 171-85; Darling-Hammond, L. (1994). Performance-based assessment and educational equity. *Harvard Educational Review*, 64, 5-30.

[42] Students and teachers may engage in unethical practices such as cheating, and developing curricula based on the content of the test to practice actual exams. Haladyna, T.M., Nolan, S.B., & Haas, N.S. (1991). Raising standardized achievement test scores and the origins of test score pollution. *Educational Researcher*, 20 (5), 2-7.

[43] Time devoted to testing and test preparation may actually reduce time and opportunities for learning. Haladyna, T.M., Nolan, S.B., & Haas, N.S. (1991). Raising standardized achievement test scores and the origins of test score pollution. *Educational Researcher*, 20 (5), 2-7; Lomax, R.G., West, M.M., Harmon, M.C., Viator, K.A. & Madaus, G.F. (1995). The impact of mandated standardized testing on minority students. *Journal of Negro Education*, 64, 171-85

[44] When high-stakes testing is used inappropriately, it undermines the quality of education, reduces opportunities for some students, and relegates some students to low-quality educational experiences or worse. Heubert, J.P. and Hauser, R.M., (1998). *High Stakes: Testing for Tracking, Promotion, and Graduation* (NCR Report), Washington, DC: National Research Council; A Position Paper Presented to the Program Committee of the Governors' Education Reform Commission by the (Georgia) Governor's Council on Development Disabilities Outcomes, *Outcomes and Accountability for All: Unifying Reform in General and Special Education* (September 2000), at pp. 17-18.

[45] The cost of remediation can be substantial, depending upon the number of students retained, and the cost of hiring of additional staff for remediation. In Wyoming, the cost of minimum competency testing, without remediation or grade retention, is approximately \$265,625 per year. If Wyoming hired paraprofessionals at an additional cost of \$530,000 per year, the total cost would be \$795,625 per year. Marion, Scott F., & Sheinker (January 1999). Issues and Consequences of State-Level Minimum Competency Testing Programs. *Wyoming Report 1*, at pp. 15-16. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[46] Quenemoen, Rachel F., Lhr, Camilla, A., Thurlow, Martha L., & Massanai, Carol B. (2001). Students with Disabilities in Standards-based Assessment and

Accountability Systems: Emerging Issues, Strategies, and Recommendations. *NCEO Synthesis Report 37* at pp. 11-12. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[47] Thompson, S. Thurlow, M., Spicuzza, R., & Parson, L. (1999). Participation and performance of students receiving special education services on Minnesota's Basic Standards Tests: Reading & Math, 1996 through 1998, *Minnesota Report 18*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[48] Amrein, Audrey, L., & Berliner, David C., (March 28, 2002). High-stakes testing, uncertainty, and student learning. *Education Policy Analysis Archives*, 10(8).

[49] *Id.* at 6.

[50] National Center for Education Statistics Finance Data. <http://www.nces.ed.gov>

[51] Elazar, D.J. (1984). *American federalism: A view from the states (3rd ed.)*. New York: Harper & Row, Publishers.

[52] 2000 Census Bureau. <http://www.census.gov>

[53] Amrein, Audrey, L., & Berliner, David C., (March 28, 2002).

[54] 1999 Census Bureau Data. <http://www.census.gov/> High school exams have a disproportionate negative effect on minority students and low social economic backgrounds. Firestone, W.A., Camilli, G., Yurecko, M., Monfils, L., & Mayrowetz, D. (2000). State standards, social-fiscal context and opportunity to learn in New Jersey. *Education Policy Analysis Archives*, 8(35).

[55] 2001 Kids Count Data. <http://www.aecf.org/kidscount/kc2001/>

[56] Education Commission of the States. (1998). Designing and implementing standards-based accountability systems.

[57] Salvia, J., & Ysseldyke, J.E. (2001). *Assessment (8th ed.)*. Boston: Houghton Mifflin.

[58] *Id.*

[59] Almond, P., Quenemoen, R., Olsen, K., & Thurlow, M. (2000). Gray areas of assessment systems. *Synthesis Report 32*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[60] Heubert, Jay P., J.D., Ed.D., *supra*, at 7.

[61] Thurlow, M., House, A. Boys, C., Scott, D., Ysseldyke, J. (2000). State participation and accommodations policies for students with disabilities: 1999 update. *Synthesis Report 33*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes; Tindal, G., & Fuchs, L. (1999). *A summary of research on test changes: An empirical basis for defining accommodations*. Lexington, KY: Mid-South Regional Resource Center.

[62] Quenemoen, Rachel F., Lhr, Camilla, A., Thurlow, Martha L., & Massanai, Carol

B. (February 2001). Students with Disabilities in Standards-based Assessment and Accountability Systems: Emerging Issues, Strategies, and Recommendations. *NCEO Synthesis Report 37*, pp. 9-10. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[63] *Id.*

[64] Thurlow, M.L., Ysseldyke, J.E., & Anderson, C.L. (1996). High school graduation requirements: What's happening for students with disabilities? *Synthesis Report 20*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[65] All states have written policies that guide the provision of assessment accommodations for students with disabilities. Thurlow, M.L., House, A., Boys, C., Scott, D. & Ysseldyke, J. (2000). State participating and accommodations policies for students with disabilities: 1999 update. *Synthesis Report 33*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[66] Thurlow, Martha, Erickson, Spicuzza, Richard, Vieburg, Kayleen, & Ruhland, Aaron (August 1996). Accommodations for Students with Disabilities: Guidelines from States with Graduation Rates, *Minnesota Report*. Minneapolis, MN: National Center on Educational Outcomes; Thurlow, M. (August 2001). Use of Accommodations in State Assessments: What Databases Tell Us About Differential Levels of Use and How to Document the Use of Accommodations. *Technical Report 30* at p. 8. Minneapolis, MN: University of Minnesota, Center on Educational Outcomes.

[67] For a comprehensive exploration of State Policies on Testing Accommodations for Students with Disabilities, see Reed Martin Special Education Law & Advocacy Strategies. <http://www.reedmartin.com/stateaccommodationspolicies.htm>

[68] O'Neill, Paul T., Willkie Farr & Gallagher, Pass The Test or No Diploma: High Stakes Testing Graduation Testing and Children with Learning Disabilities. http://www.idonline.org/ld_indepth/assessment/oneill.html

[69] *NCR Report* at p. 195. It is important to note that accommodations should be used only to level the playing field for students with disabilities. Accommodations are intended to correct for distortions of the child's abilities that are caused by the disability, and are unrelated to the area being measured. For example, if a child with fine motor impairments were permitted to dictate his answers to a writing test designed to measure handwriting, the objective of the test would be compromised and the test results would be invalid.

[70] Booth, Rebecca Chapman (1998). *Disability Rights Advocates: List of Appropriate School-Based Accommodations and Interventions*, at pp. 3-4.

[71] Thurlow, M. (August 2001) at p. 19.

[72] Elliott, J., Bielinski, J. Thurlow, M., DeVito, P., Hedlund, E. (1999). Accommodations and the performance of all students on Rhode Island's performance assessment, *Rhode Island Report 1*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[73] Bielinski, J., Ysseldyke, J. Bolt, S., Friedebach, M., & Friedebach, J. Prevalence

of accommodations for students with disabilities participating in a statewide testing program. *Diagnostique*.

[74] Delaware Department of Education. (1997). *State summary report: 1997 Delaware writing assessment program*.

[75] Minnema, Jane, Thompson, Sandy, Thurlow, Martha, Barrow, Sarah (January 2000). Unintended Consequences of the Minnesota Basic Standards Tests: Do the Data Answer the Questions Yet? *Minnesota Report 23*, Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[76] *Id.* at 14-15.

[77] Bond, L.A., Roeber, E., & Braskamp, D. (1996). Trends in statewide student assessment. Washington, DC: Council of Chief State School Officers and NCREL; Shepard, L.A. (1992). Will national tests improve student learning? *CSE Technical Report 342*. Los Angeles: University of California, Center for Research on Evaluation, Standards, and Student Learning; Koretz, D., McCaffrey, D., Klein, S., Bell, R., & Stecher, B. (1993). The reliability of scores from the 1992 Vermont portfolio assessment program. *CSE Technical Report 355*. Los Angeles, CA: National Center for Research on Evaluation, Standards, and Student Testing (CRESST), University of California. In Vermont, for example, the portfolio assessment faced substantial hurdles because of the unreliability of scoring. There was low rater reliability. Nonetheless, teachers liked portfolio assessments and believed that portfolios were a valuable tool in gauging student progress.

[78] Quenemoen, Rachel F., Lehr, Camilla, A, Thurlow, Martha L., Thompson, Sandra J., Bolt, Sara. (June 2000). Social Promotion and Students with Disabilities: Issues and Challenges in Developing State Policies. *NCEO Synthesis Report 34*, p.5. Minneapolis, MN: University of Minnesota, National Center for Center on Educational Outcomes. For a comprehensive review of all social promotion policies, see Appendix A - State Social Promotion Policies <http://education.umn.edu/nceo/OnlinePubs/Synthesis34.html>.

[79] Shepard, L.A., (1991). Negative policies for dealing with diversity: when does assessment and diagnosis turn into sorting and desegregation? In E. Hiebert (ed.) *Literacy for a diverse society: Perspective, practices and policies*. New York: Teachers College Press.

[80] Shepard, L.A., & Smith, M.L. (1989). *Flunking grades: Research and policies on retention*. London: Falmer Press.

[81] Alexander, K.L., Entwisle, D.R., & Dauber, S.L. (1995). *On the success of failure*. Cambridge: Cambridge University Press.

[82] Policy Information Center. (1995). *Dreams deferred: high school dropouts in the United States*. Princeton, NJ: Educational Testing Service.

[83] Moore, D.R. (1999). A comment on ending social promotion: Results from the first two years. In *Designs for Change*. <http://www.designsforchange.org/>

[84] Roderick, M., Bryk, A.S., Jacob, B.A., Easton, J.Q., & Allensworth, E.. (1999). Ending social promotion: Results from the first two years by Consortium on Chicago

School Research. <http://www.consortium-chicago.org>

[85] Moore, D.R., (1999), at 3.

[86] Quenemoen, Rachel F., *et al.* (June 2000), at p. 7.

[87] *Id.* at 99.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 100.

[91] Langenfeld, Karen, Thurlow, Martha, and Scott, Dorene (January 1997). High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities. *Synthesis Report No. 26*, at p. 3. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[92] *Id.*

[93] Amrein, Audrey, L., & Berliner, David C., at 13.

[94] *Id.* at 15. In this study, researchers examined test scores on the American College Testing (ACT) program, Scholastic Achievement Test (SAT), National Assessment of Educational Progress (NAEP), and Advanced Placement (AP) exams in high-stakes testing states. The researchers assumed that ACT, SAT, NAEP, and AP tests are reasonable measures of the domains that a high-stakes testing program is intended to affect. They found little evidence, except for a few exceptions, that high-stakes testing policies promoted learning as measured by increased test scores on the ACT, SAT, NAEP, and AP tests. *Id.* at 18-54. See also Amrein, Audrey L., Berliner, David C. (December 2002). The Impact of High-Stakes Tests on Student Academic Performance: An Analysis of NAEP Results in States with High-Stakes Tests and ACT, SAT, and AP Test Results in States with High School Graduation Exams. *Education Policy Research*. The purpose of the study was to assess whether academic achievement increased after high-stakes testing was introduced. First, the study assessed whether academic achievement improved since the introduction of high-stakes testing in 27 states with high-stakes policies for grades 1-8. Second, the study assessed whether academic achievement increased after high-stakes were attached to tests in grades 1-8. There was inadequate evidence to support the proposition that high-stakes tests and high school graduation exams increase student achievement. After high school exit exams were introduced, it appeared that academic achievement decreased. In other words, the learning for high-stakes tests did not generalize to NAEP, ACT, SAT, and AP tests.

[95] *Id.* at 4-5.

[96] *Id.* at 5.

[97] Coleman, Arthur L., Excellence and Equity in Education: High Standards for High Stakes Tests, *Va.J.Soc.Policy* 81 & n. 69-71 (Fall 1998).

[98] *Id.* Despite this caveat, an increasing number of states and school districts

automatically deny promotion or high-school diplomas to students who fail high-stakes tests, regardless of how well these students perform on other measures of achievement. Heubert, Jay P., J.D., Ed.D. (2000), at p. 7. Recent studies conducted by the NCR (1999:279) and American Education Research Association (2000) emphasize that educators should always use test scores in conjunction with other relevant information about student knowledge and skills, including grades, teacher recommendations, and other data, when making high-stakes decisions about individual students. Heubert, J.P. and Hauser, R.M., (1998). High Stakes: Testing for Tracking, Promotion, and Graduation, *NCR Report*, Washington, D.C.: National Research Council; American Education Research Association (2000). AERA Position Statement Concerning High-Stakes Testing in PreK-12 Education. <http://www.aera.net/about/policy/stakes.htm>

Although there is little dispute that there has been significant grade inflation during the last three decades, grades are a better measure of student motivation than standardized tests. Thus, it is important to use grades in addition to test scores to measure academic performance. Heubert, Jay P., J.D., Ed.D., (2000) at p. 8.

[99] *Id.* For an extensive discussion of the validity and reliability of tests and test administration, see Tests and Measurements for the Parent, Teachers, Attorney and Advocate at http://www.wrightslaw.com/advoc/articles/tests_measurements.htm and <http://www.wrightslaw.com/info/test.index.htm>

[100] *Id.* at 10. See *Anderson v. Banks*, 520 F. Supp. 472, 489 (S.D. Ga. 1981) "Validity in the testing field indicates whether a test measures what it is supposed to measure."

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Langenfeld, Karen, Thurlow, Martha, and Scott, Dorene (January 1997). High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities. *Synthesis Report No. 26* at p. 6. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[107] Langenfeld, Karen, Thurlow, Martha, Scott, Dorene (January 1997). High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities. *Synthesis Report No. 26*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[108] *Id.* at 7.

[109] *Id.*

[110] *Id.* at 8. Does the teaching of subject matter skills and knowledge for a test generalize across other tests of achievement? One study found that mathematics scores did not generalize from one test to another, and that reading scores improved

marginally. Thus, overall student achievement did not improve in this situation. There are also questions about whether retaining students to improve their test scores, sometimes referred to as "academic red shirting," works.

[111] *Id.* at 10.

[112] See Guy, Barbara, Shin, Hyeonsook, Lee, Sun-Young, Thurlow, Martha L. (April 1999). *State Graduation Requirements for Students With and Without Disabilities. Technical Report 24.* Minneapolis, MN: University of Minnesota, Center on Educational Outcomes. To demonstrate the differences in state diploma requirements, in Colorado, Michigan, and Pennsylvania, local educational agencies set the graduation requirements. In Iowa, minimum course requirements are set by the state but local boards may require additional credits. Massachusetts has statewide credit requirements for certain areas while local educational agencies decide credit for other content areas. Nebraska requires a total of 200 credits, but how those credits are distributed is decided at the local level, as long as 80% of the credits are in core curriculum subjects. The actual numbers of credits required for graduation varies from state to state. Vermont requires 14.5 credits while Alabama, Florida, Hawaii, Utah, and West Virginia require 24 credits. California, Idaho, Indiana, Massachusetts, Nebraska and New Jersey leave decisions about the number of credits required for graduation to local educational agencies. There are other significant differences among states in graduation requirements for students with disabilities. Graduation requirements are established by the State Education Agency in Wisconsin, yet diploma requirements are established by the local educational agency. Colorado, Iowa, Montana, New Hampshire, Rhode Island, and Wyoming do not have state requirements for students with disabilities. Oklahoma, Idaho, and Washington do not specify whether their graduation requirements are established at the state or local level. Alaska, District of Columbia, Nebraska, and Oregon offer a certificate option for students with disabilities; and Alaska and the District of Columbia also have an IEP diploma option for students with disabilities. About 10% of states with course requirements allow students with disabilities to earn a high school diploma by completing their IEPs. Yet, few states permit the IEP team to change graduation requirements. In these states, students with disabilities may be held to different academic standards than nondisabled students.

See also Mehrens, W.A., Brown, C.L., Henke, R.R., Ross, L., & McArthur, E. (1992). *Overview and inventory of state requirements for school coursework and attendance.* Washington, DC: US Department of Education Office of Educational Research and Improvement, National Center for Education Statistics. (ERIC Document Reproduction Service No. ED 346 619). This study analyzed each state's required courses for graduation, the name and description of the exit exam, if any, and provisions for graduation for students with disabilities. In addition, this study described how states implemented minimum competency testing programs: (a) state-developed test with state-defined minimum score to receive a high school diploma; (b) state-developed test with the local education agency setting passing standards; (c) state-developed test used only to award special advanced or honor high school diplomas; and (d) state-defined competencies required for graduation with local educational agency determining the method of assessment.

[113] Thurlow, M., & Thompson, S. (1999). *Diploma Options and Graduation Policies for Students with Disabilities.* Minneapolis, MN: University of Minnesota, Center on Educational Outcomes.

[114] For a fairly recent report of each state's exit options, see Guy, Barbara, *et. al.* National Center on Educational Outcomes *Technical Report No. 24: State Graduation Requirements for Students With Disabilities and Without Disabilities* (NCEO Report), p. 8. As of the spring 1999, 23 states were considering revising their policies regarding exit options available for children with disabilities. NCEO Report at p. 12.

[115] NCEO Report, Table 12.

[116] O'Neill, Paul T., Willkie Farr & Gallagher, *Pass The Test or No Diploma: High Stakes Testing Graduation Testing and Children with Learning Disabilities.*

http://www.ldonline.org/ld_indepth/assessment/oneill.html

Nine states (Alabama, Georgia, Hawaii, Mississippi, Nevada, New Mexico, New York, and North Carolina) with exit exams offer special diplomas or certificates only for children with disabilities. These special diplomas may be called an IEP Diploma, Adjusted Diploma, Occupational Diploma, or Graduation Certificate. Thurlow, M. & Thompson, S. (1999). *Diploma Options and Graduation Policies for Students with Disabilities.* (Number 10). Minneapolis, MN: University of Minnesota, Center for Educational Outcomes.

[117] *Id.*

[118] *Id.*

[119] Hoff, David, *Testing Ups and Downs Predictable, Education Week* (January 26, 2000), pp. 1, 12.

[120] Hotaklainen, Rob, *High Stakes Tests Under Fire in Texas: Scores Rising But Some Students are Left Behind, Minneapolis Star-Tribune*, at 1A.

[121] Nussbaum, Debra, *Does School Testing Make the Grade? The New York Times* (December 12, 1999) Section 14, NJ, p.1.

See also Schrag, P. (2000). *Too Good to Be True. The American Prospect* 4(11); Clarke, M., W. Haney, and G. Madaus (2000). *High Stakes Testing and High-School Completion.* Boston: National Board of Educational Testing and Public Policy 1 (3), 1-11. The strongest predictor about whether students drop out is whether they were retained. Students who are retained once are significantly more likely to drop out than students who are not retained. A single retention increases the dropout rate by 40 percent; multiple retentions increase the dropout rate to 90 percent. Hauser, R. (1999). *Should We End Social Promotion? Truth or Consequences.* In Orfield, G., and M. Kornhaber, eds., *Raising Standards or Raising Barriers? Inequality and High Stakes Testing in Education.* New York: The Century Fund. National Research Council, Heubert J., and R. Hauser, Eds. (1999). *High Stakes: Testing for Tracking, Promotion, and Graduation.* Committee on Appropriate Test Use. Washington, D.C.: National Academy Press. One study found that schools retain 30% of all students, 50% of all African American males, 50% of all Latino students, and 20% of all white students. In Texas, the K-12 retention rate is 44% (55% for African Americans); the Louisiana rate is 66%; the Wisconsin rate is 30%. The drop out rate for these states is proportionate to retention rate. Heubert, J. (2000) *Critical Issues in Special Education: High Stakes Assessment & Students with Disabilities.* Harvard University, Cambridge, MA. Shepard, L.A. and M.L. Smith, Eds. (1989). *Flunking Grades: Research and Policies on Retention.* London: Falmer Press. See Linda Darling-Hammond and Beverly Falk, *Using Standards and Assessments to Support Student*

Learning, *Phi Delta Kappan*, Nov. 1997, at 191, 193 (annual retention rates in the U.S. are roughly 15-19%, which is comparable to Haiti and Sierra Leon).

The evidence that grade retention does not produce academic success is overwhelming. Requiring a student to repeat a school year is inconsistent with learning patterns and cognitive development. A retained student may not receive additional help, but is usually placed in the same learning environment in which they failed. Retained students are placed in remedial courses known as tracking. Tracking, however, tends to widen the achievement gap by placing students with the greatest academic needs with the lowest qualified teachers. Elul, Hagit, Making the Grade, Public Education Reform: The Use of Standardized Testing to Retain Students and Deny Diplomas, 30 Colum. Human Rights L. Rev. 495, 530-31. (Summer 1999).

Denial of diplomas has high social costs, including lower earnings, decreased job opportunities, reduced community involvement, poorer health, and family instability. Heubert, Jay P., (1999). *High Stakes: Testing for Tracking, Promotion, and Graduation*. It is arguable that less drastic, more effective alternative non-discriminatory means are available to ensure that students meet high standards. Schools should focus on early identification of students who experience academic difficulties in early grades. For example, at-risk students may participate in summer school programs, after school tutoring, smaller classes, and quality instructional programs. Elul, Hagit, (Summer 1999) at 536.

One study that examined the causal connection between high stakes testing and drop out rates found indirect evidence that high-stakes testing increases drop out rates. When students were retained because of high-stakes testing, more students dropped out of school. High stakes testing and higher standards for graduation increased rates of retention. There is anecdotal evidence that students who fail high-stakes tests have doubts that they will complete high school. In one study, drop out rates increased for students who were doing well academically, but not for minority students and students who exhibited poor academic performance. There is evidence that minimum competency testing in urban areas with high concentrations of low-income and minority students increased drop out rates. Langenfeld, Karen, Thurlow, Martha, Scott, Dorene (January 1997). High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities. *Synthesis Report No. 26* at. 9-10. Minneapolis, MN: University of Minnesota, National Center on Education Outcomes.

[122] *Id.*

[123] Corbett, H.D. & Wilson, B.L. (1991). *Testing, reform, and rebellion*. Norwood, NJ: Ablex; Rottenberg, C. & Smith, M.L. (April 1990). Unintended effects of external testing in elementary schools. Paper presented at the annual meeting of the American Educational Research Association, Boston.

[124] McKinney, J.D. (1983). Performance of handicapped children on the North Carolina minimum competency test. *Exceptional Children*, 49, 547-550; Thurlow, M.L., Ysseldyke, J.E., & Andeson, C.L. (May 1995). High school graduation requirements: What's happening for students with disabilities? *Synthesis Report 20*. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes.

[125] *Id.*

[126] *Id.* A criterion-referenced test measures student proficiency in a single or multiple subject area.

[127] *Id.*

[128] Chin-Chance, S.A., Gronna, S.S., & Jenkins, A.A. (March 1996). Assessing special education students in a norm referenced statewide testing program: Hawaii State Department of Education. Paper presented at the meeting of the State Collaborative on Assessment and Student Standards (SCASS) Assessing Special Education Students. Washington, D.C. sponsored by the Council of Chief State School Officers (CCSSO).

[129] McKinney, J.D. (1983). Performance of handicapped children on the North Carolina minimum competency test. *Exceptional Child*, 49, 547-550; Vitello, Camilli & Molenaar. (1987). Performance of special education students on a minimum competency test. *Diagnostique*, 13(1), 28-35.

[130] Griffin, B.W. & Heidorn (1996). An examination of the relationship between minimum competency test performance and dropping out of school. *Educational Evaluation and Policy Analysis*, 18(3), 233-266; Reardon, S. (April 1996). Eighth grade minimum competency testing and early high school dropout patterns. Paper presented at the annual meeting of the American Educational Research Association, New York.

[131] *Id.*

[132] Langenfeld, Karen, Thurlow, Martha, Scott, Dorene (January 1997). High Stakes Testing for Students: Unanswered Questions and Implications for Students with Disabilities. *Synthesis Report No. 26* at 18. Minneapolis, MN: University of Minnesota, National Center on Educational Outcomes; Anderson, B.D. (1977). The costs of legislated minimal competency requirements. A background paper prepared for the Minimal Competency Workshops sponsored by the Education Commission of the States and the National Institute of Education. (ERIC Document Reproduction Services No. ED 157 947); Potter, D.C., & Wall, M.E. (April 1992). Higher standards for grade promotion and graduation: Unintended benefits of reform. Paper presented at the annual meeting of the American Educational Research Association, San Francisco; Foshee, D.P., Davis, M.A., & Stone, M.A. (1991). Evaluating the impact of criterion-referenced measurement on remediation decisions. *Remedial and Special Education*, 12(2) 48-52; Singer, H., & Balow, I.H.. (1987). *Proficiency assessment and its consequences*. Riverside, CA: University of California. (ERIC Document Reproduction Service No. ED 290 127).

[133] Heubert, Jay P. , J.D., Ed.D., (2000). High-Stakes Testing: Opportunities and Risks for Students of Color, English-Language Learners, and Students with Disabilities, published as a chapter in Pines, M., ed., *The Continuing Challenge: Moving the Youth Agenda Forward* (Policy Issues Monograph 00-02, Sar Levitan Center for Social Policy Studies). Baltimore, MD: John Hopkins University Press, at p.2.

[134] Executive Summary: Conference on Minority Issues in Special Education, The Civil Rights Project, Harvard University, (2001) at p.2. For further information on this study, see <http://www.civilrightsproject.harvard.edu/>

See also Coleman, Arthur L., Excellence and Equity in Education: High Standards for High Stakes Tests, *Va.J.Soc.Policy* 81 & n.35 (Fall 1998).

[135] *Id.*

[136] Linn, R. (2000), Assessments and accountability, *Educational Researcher* 29(2), 4-16.

[137] Schrag, P. (2000). Too Good to Be True, *The American Prospect* 4(11); Viadero, D. (2000). Testing System in Texas Yet to Get Final Grade, *Education Week*. Data shows continuing disparities in the cumulative failure rate: 17.6 percent for black students, 17.4 percent for Hispanic students, and 6.7 percent for white students; Natriello, G., and A. Pallas (1999). *The Development of High Stakes Testing*. Paper presented at the Conference on Civil Rights Implications of High-Stakes Testing, sponsored by the Harvard Civil Rights Project, Teachers College, and Columbia Law School.

[138] Grissmer, D. *et. al.* (2000). *Improving Student Achievement: What State NAEP Scores Tell Us*. Santa Monica, CA: Rand.

[139] Schrag, P. (2000). Too Good to Be True, *The American Prospect* 4(11).

[140] Allington, R. (2000). Letters: On Special Education Accommodations. *Education Week* 19(35); Sack, J. (2000). Researchers Warn of Possible Pitfalls in Spec. Ed. Testing. *Education Week* 19(32); Yssedyke, J.E., M.L. Thurlow, K.L. Langenfeld, J.R. Nelson, E. Teelucksingh, and A. Seyfarth. (1998). *Educational Results for Students with Disabilities: What Do the Data Tell Us?* Minneapolis, MN: National Center on Educational Outcomes.

[141] American Federation of Teachers (1999). *Making Standards Matter*. Washington, D.C.: American Federation of Teachers.

[142] National Research Council, Heubert J., and R. Hauser, Eds. (1999). *High Stakes: Testing for Tracking, Promotion, and Graduation*. Committee on Appropriate Test Use. Washington, D.C.; National Academy Press citing Stake, R. (1998, July). Some Comments on Assessments in U.S. Education. Educational Policy Analysis Archives, 6(14). See <http://epaa.asu.edu/> and <http://www.nap.edu/catalog/6336.html>

[143] In August 1997, the American Bar Association (ABA) Individual Rights and Responsibilities Section submitted comments to the U.S. Department of Education, recommending changes to *The Use of Tests When Making High-Stakes Decisions for Students*. The ABA's comments, developed by the Section's Task Force on Diversity, noted several concerns. The ABA suggested that the Guide: (1) should contain more neutral language that reflects both the legal obligations to be met when using high-stakes tests and a caution about psychometric effects of such testing; (2) should include a strongly worded caution against the reliance on a standardized test as the sole criterion for high-stakes decision; (3) should explain how the "disparate impact" legal standard is applied in conjunction with principles of fair test use; (4) should acknowledge the limits of most standardized tests from content bias and norming bias for students with limited English proficiency; (5) Guide should articulate more accurately the applicable Title IX legal standard to address the requirement of intentional discrimination; and (6) should clarify the discussion of use of tests of

students with disabilities, and promotion decisions. ABA Section on Individual Rights & Responsibilities, Fall 2000.

In 1999, the Department of Education, Office for Civil Rights (OCR) launched an investigation into the effects of high-stakes testing on Hispanic students. OCR investigated complaints about high school exit exams in Ohio, Nevada, North Carolina, Texas, and Illinois. In Ohio and Texas, federal and state officials agreed that high-stakes tests could be used, but that all students must have access to remedial assistance, multiple chances to pass the exam, and appropriate instruction to prepare for exam. President's Advisory Commission on Educational Excellence for Hispanic Americans, *A Report to the Nation: Policies and Issues on Testing Hispanic Students in the U.S.* (1999); Zehr, Mary Ann, Hispanic Students Left Out By High-Stakes Tests, Panel Concludes, *Education Week on the Web* (Sep. 22, 1999); Blair, Julie, OCR Issues Revised Guidelines on High-Stakes Testing, *Education Week on the Web* (Jan. 12, 2000); Wildavsky, Ben, Achievement Testing Gets Its Day in Court, *U.S. News and World Report* (Sept. 27, 1999) at 30, 32; Chaddock, Gail Russell, Adverse Impact, *Christian Science Monitor* (Nov. 30, 1999); Rossi, Rosalind, Complaints Hit School Promotion Rule, *Chicago Sun-Times* (Oct. 22, 1999).

[144] Heubert, Jay P., J.D., Ed.D., (1999) at p. 10.

[145] National Mental Health and Education Center, *Large Scale Assessments and High Stakes Decisions: Facts, Cautions and Guidelines* (2002), at p. 4.

[146] *Id.*

[147] Heubert, Jay P., J.D., Ed.D., (1999), at p. 10.

[148] Katzman, John & Hodas, Steve, (1995). *Class Action: How to Create Accountability, Innovation, and Excellence in American Schools*. Villard Books, at 69-70.

[149] *Id.* at 70.

[150] *Id.* at 73-77.

[151] Tucker, Marc S. & Coddling, Judy B. (1998). *Standards for Our Schools: How to Set Them, Measure Them, and Reach Them*. Jossey-Bass Publishers: 190, 192-93

[152] *Id.* at 198-99.

[153] 20 U.S.C. § 6311. This section is not intended to provide a comprehensive analysis of the No Child Left Behind Act, but is merely a brief overview of the Act's primary directives that will impact State and district-wide assessments in charter and public schools.

[154] 20 U.S.C. § 6311(g); O'Neill, Paul T., Willkie Farr & Gallagher, Pass The Test or No Diploma: High Stakes Testing Graduation Testing and Children with Learning Disabilities. http://www.ldonline.org/ld_indepth/assessment/oneill.html

[155] 20 U.S.C. § 6311(b)(2)(A)-(C).

[156] 20 U.S.C. § 6311(b)(1)(C),(D).

[157] 20 U.S.C. § 6311(b)(3)(c)(ix); O'Neill, Paul T., Willkie Farr & Gallagher, Pass The Test or No Diploma: High Stakes Testing Graduation Testing and Children with Learning Disabilities: http://www.ldonline.org/ld_indepth/assessment/oneill.html

[158] 20 U.S.C. § 6316(b)(5)-(8), (14); 6316(c), 6316(f).

[159] 20 U.S.C. § 6311.

[160] 20 U.S.C. § 6311(g); Chudowsky, N., Kober, Nancy, Gayler, K.S., & Hamilton, Madlene. (August 2002). *State High School Exit Exams - A Baseline Report*. Washington, DC: Center on Education Policy.

[161] See *Castaneda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

[162] 20 U.S.C. § 1706, 1708.

[163] Although there is a requirement that the IEP team document recommendations about whether the child will participate in testing and accommodations or modifications in testing, this requirement alone does not ensure that IEP teams make such decisions. The National Center for Educational Outcomes (NCEO) examined instructional and assessment accommodations in two states, Maryland and Kentucky. In Kentucky, 89% of students with IEPs received accommodations on state tests, with approximately 83% receiving classroom accommodations. In Maryland, 82% of students with IEPs received classroom accommodations. Twenty percent of the IEPs included no explanation as to why accommodations were made; another 19% did not provide adequate explanations. The NCEO study did not examine whether assessment accommodations and participation recommendations were carried out in practice.

There are ways to increase the IEP team's compliance with requirements about participation recommendations and assessment accommodations. First, training can influence teachers' participation and accommodations decisions. Second, school-level planning is needed to anticipate, carry out, and monitor testing procedures. Third, the IEP should be developed during the same academic year as state testing, consider the curriculum and instructional accommodations that the student received during the year, and involve teachers who will implement assessment recommendations. Shriner, James G., Destefano, L (2002). Participation and Accommodations in State Assessment: The Role of Individualized Education Programs. *Council for Exceptional Children*, Vol. 68, No. 2, pp. 147-161.

In one 1999 survey, 80% of states with exit exams recorded participation of students with disabilities in those exams. Less than 75% of states with exit exams had records of performance of students with disabilities, and approximately 70% of these states disaggregated performance by category of disability. Preliminary data suggests that states had difficulty meeting the requirements for assessment of students with disabilities under the IDEA Amendments of 1997. See Guy, Barbara, Shin, Hyeonsook, Lee, Sun-Young, Thurlow, Martha L. (April 1999). *State Graduation Requirements for Students With and Without Disabilities. Technical Report 24*. Minneapolis, MN: University of Minnesota, Center on Educational Outcomes. In the 1999 National Survey of State Directors of Special Education, only 23 states provided data about participation of students with disabilities in statewide testing. There was considerable variation between states in alternative assessment participation rates. See Thompson, Sandra, Thurlow, Martha. (December 1999). *1999 State Special Education Outcomes: A Report on State Activities at the End of the Century*. Minneapolis, MN: University of Minnesota, Center on Educational Outcomes.

<http://education.umn.edu/nceo/OnlinePubs/99/StateReport.htm>

In a later survey, state directors of special education reported increased participation rates for students with disabilities in state assessments and improved performance. This may be a result of an increase in alternate assessment participation by students who were excluded in the past. In Alaska, Arkansas, Connecticut, Delaware, Florida, Illinois, Montana, Nebraska, New Jersey, New Mexico, Rhode Island, and Vermont, all students are included in state assessments. The remaining states permit students to be excluded for many reasons including parental refusal, medical fragility, emotional distress, homebound or hospitalized, limited English proficiency, and absent on test day. In regard to accommodations for testing, nearly 60% of the states maintain data on the use of accommodations; 50% of states reported increased use of accommodations. Most states use a portfolio as their alternative assessment, but nearly 50% of states do not report the scores of students who use non-approved accommodations. Thompson, Sandra, Thurlow, Martha L. (June 2001). *2001 State Special Education Outcomes: A Report on State Activities at the Beginning of a New Decade*. Minneapolis, MN: University of Minnesota, Center on Educational Outcomes. <http://education.umn.edu/nceo/OnlinePubs/2001/StateReport.html>

[164] Goals 2000 Educate America Act, 20 U.S.C. § 5801.

[165] 20 U.S.C. § 5885, 5886; Shin, Barbara, *et al.*, *supra*.

[166] *Id.*; see 20 U.S.C. § 5886(c)(2).

[167] 20 U.S.C. § 5886(c)(1)(B)(III).

[168] See 27 IDELR 138 (1997)

[169] See <http://www.law.ou.edu/hist/state97.html>

[170] See <http://www.wrightslaw.com/law/osep/memor.assess.2000.pdf>

[171] The more widely accepted view is that denial of promotion opportunity or the opportunity to graduate at a particular time is not a constitutionally protected property interest. *Bester v. Tucaloosa City Bd. of Educ.*, 722 F.2d 1514, 1516 (11th Cir. 1984); *Williams v. Austin Indep. Sch. Dist.*, 796 F. Supp. 251, 253-54 (W.D. Tex. 1992); *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552, 554 (E.D. Tex. 1992). But see *Brookhart v. Illinois State Bd. of Educ.*, 697 F.2d 179, 185 (7th Cir. 1983) in which the Seventh Circuit concluded that the right to receive a diploma conferred by state law based on extant academic requirements constitutes a cognizable liberty interest under the Fourteenth Amendment to the Constitution.

[172] For an extensive analysis of *GI Forum v. Texas Education Agency*, see Moran, Rachel F., Symposium: Education And The Constitution: Shaping Each Other And The Next Century: Sorting and Reforming: High-Stakes Testing in Public Schools, 34 *Akron L. Rev.* 107, 122-128 (2000). The author opines that the *GI Forum* decision and other recent cases demonstrate that, in a conservative era, federal courts are increasingly unwilling to probe the workings of state educational systems. *Id.* at 130. The question remains whether state courts may be more sympathetic to challenges to high-stakes testing. State court challenges to the system of financing public schools in Kentucky and Texas may encourage similar lawsuits against high-stakes testing. *Id.* at 131. See e.g. *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) holding that education is a fundamental right in Kentucky and

government must afford equal educational opportunities to every child within the state; *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) which held that the system of state funding of education violates Texas Constitution; *Brigham v. State*, 166 Vt. 246 (1997) which held that children were denied equal educational opportunity under Vermont Constitution.

[173] See an article about this lawsuit, "High Stakes Testing - Indiana Judge Asked for Injunction so Seniors can Graduate," at http://www.wrightslaw.com/advoc/articles/highstakes_tests-2000.htm and Education Week (May 31, 2000), Indiana Case Focuses on Special Ed at <http://www.edweek.org/ew/ewstory.cfm?slug=38staskes.h19>

[174] Courts can review academic decisions of public educational institutions under the substantive due process standard. *Regents v. University of Michigan v. Ewing*, 474 U.S. 214, 222 (1985).

[175] *Ewing*, 474 U.S. at 225. A plaintiff may challenge high-takes testing on the ground of substantive due process due to lack of curricular validity.

[176] One author predicts that the Equal Protection Clause will offer little realistic opportunity to challenge high-stakes testing unless it involves disadvantaged minority students. In support of this prediction, the author argues that discriminatory intent is difficult to prove. Because the interest in obtaining a diploma is not recognized as a fundamental right, a facially non-discriminatory competency test can survive a minimal amount of judicial scrutiny. McCall, James M., Note And Comment: Now Pinch Hitting For Educational Reform: Delaware's Minimum Competency Testing And The Diploma Sanction, *J.L. & Com.* 373, 385 (1999).

[177] *Washington v. Davis*, 426 U.S. 229 (1976). A plaintiff must prove intentional discrimination, grounded upon a discriminatory purpose in the establishment of a practice at issue, for which there is no legitimate educational justification, to sustain a constitutional claim under the Fourteenth Amendment.

[178] For an in-depth analysis of *Rankins v. Louisiana State Bd. of Elementary & Secondary Educ.* and related cases, see Johnson, Lloyd, E., The Louisiana Graduation Exit Exam: Permissible Discrimination, *22 S.U.L. Rev.* 184 (1995).

[179] *Georgia State Conf. of Branches of NAACP*, 775 F.2d at 1417. The test under Title VI is whether the challenged practice has sufficiently adverse racial impact, and if so, whether the practice is adequately justified. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57(1989).

[180] The court found that material on the test did not appear on the students' IEPs and programs were not developed with the purpose of passing the test. Therefore, the students were awarded an extended period to prepare before taking the test. *Brookhart*, 679 F.2d at 187.

[181] *Id.* The student was offered other accommodations and alternative testing assessment.

[182] Hearing officer found that student was able to demonstrate his language abilities without any accommodations or a reader. The student earned all high school credits without a reader and passed the reading portion of the Alabama High School

Graduation Examination. Thus, the student was not severely deficient in reading skills. Instead, the hearing officer opined that the student did not master skills necessary to pass the language portion of the exam. If the student exhibited a severe reading deficiency in reading and language arts, and his IEP required a reader for tests and assessments, would the hearing officer ruled differently? What effect, if any, would the IDEA Amendments of 1997 have on the hearing officer's reasoning and outcome of this decision?

[183] Hearing officer found that the IEP team recommended that the student be given a reading accommodation on the math portion as well as language portion of the high school exit exam. The hearing officer ruled invalid the Alabama's Department of Education's policy that required in order to receive a reading accommodation in a subject, a provision for oral testing in that subject must have been made for the student during the period of the student's last two IEPs. This policy conflicts with the IDEA and was inconsistent with classroom exams as opposed to exit exams. The student was disadvantaged on the exit exam because 30% of the exam required reading skills and 70% involved computational skills.

[184] For a comprehensive examination of learning disabilities, see "*How School Systems Are Failing to Properly Identify, Evaluate, and Provide A Free Appropriate Public Education to Children With Learning Disabilities and What We Can Do About It*" by Torin Togut, Esq. Presented at 4th Annual COPAA Conference (March 8-11, 2001), Pages BR3-3 - BR3-30).

[185] Sills, Caryl, K., (1995). Success for Learning Disabled Writers Across the Curriculum, *College Teaching* 43 (2), 66.

[186] Disability Rights Advocate, *Do No Harm - High Stakes Testing and Students with Learning Disabilities* (2001), at pp. 2-4.

[187] *Id.* at 6.

[188] *Id.* at 8-10. It is important to distinguish between testing accommodations and testing modifications. Testing accommodations change how test material is presented or how a student responds to a test. Testing accommodations may change the setting, scheduling, or response time. These changes do not substantially change the test's level, content, or performance criteria but provide the student with a level playing field and an opportunity to demonstrate his or her knowledge. On the other hand, testing modifications may substantially change to what a test measures or the difficulty of the test. Testing modifications change what the test actually measures.

[189] *Id.* at 11-12. See also *Thirteen Core Principles to Ensure Fair Treatment of All Students, Including Those with Learning Disabilities, with Regard to High Stakes Assessments*, at 15.

[190] See *Students with Learning Disabilities and State of Oregon Settle Class Action Suit Over High Stakes Assessments in Public Schools*, *Wrightslaw*, http://www.wrightslaw.com/law/news/OR_settlement_dyslexia.htm

[191] For an article regarding the district court's opinion in *Chapman v. California Dept. Ed.* see <http://www.wrightslaw.com/news/2002/ca.injunction.accoms.htm>

[192] See "Class Action Suit Filed Against Alaska's High-Stakes Exit Exam" on

Wrightslaw, <http://www.wrightslaw.com/news/04/high.stakes.ak.htm>; also, "Alaska Students with Disabilities Can Graduate with Diploma in 2004 Without Passing Exit Exam" on Wrightslaw at <http://www.wrightslaw.com/news/04/high.stakes.ak.0410.htm>

[To top](#)

Copyright © 1999-2009, Peter W. D. Wright and Pamela Darr Wright. All rights reserved. [Contact Us](#)