

The Next Wave of Special Education Litigation

by
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Special education law and litigation is on the verge of a major shift in direction. Within the next five years, I believe the educational landscape will begin to change for all children.

Many attorneys and advocates remember when tuition reimbursement cases surged after the U. S. Supreme Court issued the decision in Burlington. Another surge of reimbursement cases came after the U. S. Supreme Court's decision in [Florence County v. Shannon Carter](#) in 1993.

By 1995, [Carter](#) helped to open the doors to reimbursement for the ABA /Lovaas / DTT therapy that is used to educate young children with autism.

After Congress reauthorized the Individuals with Disabilities Act in 1997, we saw an increase in discipline cases. This was due in part to the incredibly confusing language of the [IDEA discipline statute of 1415\(k\)](#), coupled with an overzealous application of "zero tolerance" policies by school administrators and school boards who abdicated their responsibility to use logic and discretion.

As more states require students to pass high-stakes tests before they can receive high school diplomas, we are seeing a new kind of case. We are being asked to represent children who cannot pass high-stakes tests because their schools did not teach them the information and skills they needed to pass these tests, or because their district or state refused to provide them with accommodations or adaptations.

The most recent high-stakes testing case was *Noon v. Alaska State Board of Education and Anchorage School District*, a class action lawsuit challenging Alaska's High School Graduation Qualifying Examination. The [Complaint](#) filed in the U. S. District Court is available at <http://www.harborouselaw.com/law/plead/ak.highstakes.complaint.pdf>

In *Noon*, plaintiffs asserted that "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."

Failure to Teach Knowledge and Skills

The plaintiffs in *Noon* charged that the exit exam discriminated against students with disabilities because "these students have not been prepared by the Alaska public school system to take the [high-stakes test] and that the "exit exam unlawfully and unfairly tests these children on material that they have never been taught."

"Fail First" Policy Discriminated Against Students with Disabilities

The lawsuit also charged that students were required to fail the high-stakes test before they were allowed reasonable accommodations. Plaintiffs asserted that the

defendants arbitrarily made some accommodations unavailable, claimed that accommodations would invalidate a student's score, and made these determinations "without acceptable psychometric or legal justification."

On August 2, 2004, the parties in the *Noon v. Alaska* lawsuit announced that they had reached a settlement.

IDEA & NCLB Requirements about Accommodations on High-Stakes Tests

Schools that retain or refuse to graduate children often claim that the No Child Left Behind Act requires them to take these actions. This is simply not true.

The Individuals with Disabilities Education Act of 1997, the federal special education regulations, Appendix A to the special education regulations, and the No Child Left Behind Act of 2001 are consistent about the requirements to provide reasonable accommodations and adaptations on high-stakes tests.

IDEA Statute

(17) Participation in Assessments -

(A) In General - children with disabilities are included in general State and district-wide assessment programs, **with appropriate accommodations, where necessary**. 20 U.S.C. 1412(a)(17) ([Wrightslaw: Special Education Law](#), page 48-9)

IDEA Regulations

Sec. 300.138. Participation in Assessments.

The State must have on file with the Secretary information to demonstrate that -

(a) Children with disabilities are included in general State and district-wide assessment programs, **with appropriate accommodations and modifications in administration, if necessary** ([Wrightslaw: Special Education Law](#), page 151)

Appendix A to the IDEA Regulations

Appendix A to the IDEA Regulations is a Q & A document about IEPs, parental role, transition, and other issues. An Appendix to the Regulations has the same power as the regulation. The following text is copied directly from Appendix A.

Involvement and Progress of Each Child With a Disability in the General Curriculum

"In many cases, children with disabilities will need appropriate supports in order to successfully progress in the general curriculum, participate in State and district-wide assessment programs, achieve the measurable goals in their IEPs, and be educated together with their nondisabled peers. Accordingly, the Act **requires the IEP team to determine, and the public agency to provide, the**

accommodations, modifications, supports, and supplementary aids and services, needed by each child with a disability to successfully be involved in and progress in the general curriculum achieve the goals of the IEP, **and successfully demonstrate his or her competencies in State and district-wide assessments.**"
([Wrightslaw: Special Education Law](#), page 209)

Participation in State or District-Wide Assessments of Student Achievement

"Consistent with Sec. 300.138(a), which sets forth a presumption that children with disabilities will be included in general State and district-wide assessment programs, and **provided with appropriate accommodations if necessary**, Sec. 300.347(a)(5) **requires** that the IEP for each student with a disability include: (i) a statement of **any individual modifications** in the administration of State or district-wide assessments of student achievement **that are needed** in order **for the child to participate in the assessment . . .**"
([Wrightslaw: Special Education Law](#), page 211)

OSEP Policy Memorandum: Questions and Answers about State and District-wide Assessment Requirements under the IDEA

In 2000, the U. S. Department of Education Office of Special Education Programs published a [Policy Memorandum: Questions and Answers about State and Districtwide Assessment Requirements Under the IDEA](#).

Note: This Memorandum is available at <http://www.harborhouselaw.com/law/osep.memo.assess.2000.pdf>

The first paragraph of the Memorandum states that policies that limit disabled children from participating in assessments or deny benefits from participating in assessments (i.e., promotion, graduation) are discriminatory and violate the law. "Because of the benefits that accrue as the result of assessment, exclusion from assessments on the basis on disability generally would violate Section 504 and ADA."

No Child Left Behind Act of 2001

The No Child Left Behind Act of 2001 is consistent with the Individuals with Disabilities Act on requirements that schools shall provide "reasonable accommodations and adaptations."

- (3) Academic Assessments
- (C) Requirements - Such assessments **shall** -
 - (ix) provide for --
 - (I) the participation in such assessments of all students;
 - (II) the **reasonable adaptations and accommodations for students with disabilities** (as defined under section 602(3) of the Individuals with Disabilities Act) necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards . . . ([Wrightslaw: No Child Left Behind](#), page 150)

Grade Retention & Graduation

No Child Left Behind does not require schools to retain students nor to withhold diplomas. In fact, subsection 6311(l) states, "Nothing in this part shall be construed to prescribe the use of the academic assessments . . . for student promotion or graduation purposes." ([Wrightslaw: No Child Left Behind](#), page 160)

Over the next five years, I believe we will see more lawsuits by special education and general education students who sue their states and school districts because they were not taught the necessary skills to pass high-stakes tests or because they could not pass high-stakes tests because their state or school district refused to provide them with "reasonable adaptations and accommodations" to measure their academic achievement.

Fortunately, the Individuals with Disabilities Act of 1997 and the No Child Left Behind Act of 2001 provides tools we need to prevail.

About Peter Wright, Esq.

Peter Wright is an attorney who represents children with disabilities. He speaks at national conferences about "How To Secure an Appropriate Special Education for Your Child and Avoid Due Process" and presents at continuing legal education seminars about representing special education children. Pete and his wife Pam do legal and advocacy training programs around the country.

On October 6, 1993, Pete gave oral argument before the United States Supreme Court in [Florence County School District Four v. Shannon Carter](#), 510 U.S. 7 (1993) . Thirty-four days later, the Court found for his client, Shannon Carter, in a unanimous decision.

Mr. Wright and his wife are the authors of several best-selling books, including [Wrightslaw: Special Education Law](#) and [Wrightslaw: From Emotions to Advocacy](#). The Wright's new book, [Wrightslaw: No Child Left Behind](#), was co-authored by Suzanne Heath.

The Wrights provide information and advice about educational law and advocacy at [Wrightslaw](#), the #1 ranked special education website in the world.