

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

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I. Introduction

Legal challenges to high-stakes tests are the leading edge of litigation in education of children with and without disabilities. This article describes the historical background of Minimum Competency Testing, the relationships between competency testing, grade retention and social promotion, accommodations and modifications in testing, risks of high-stakes testing for children who have often been excluded from accountability systems, and past and present legal challenges to high-stakes testing. The article includes extensive endnotes.

To understand this analysis of high-stakes testing, it is essential to understand the legal system and the inter-relationships between statutes, regulations, policy letters, and caselaw. Many principles contained in various Acts of Congress, the United States Code (U.S.C.), the Code of Federal Regulations (C.F.R.), Memoranda and

Policy letters issued by the U. S. Department of Education, and state statutes, state regulations, and state interpretations are poorly understood.

Constitutional Law

The United States Constitution outlines the structure of the federal government. All laws passed must agree with the principles and rights set forth in the Constitution. The first ten amendments to the Constitution are called the Bill of Rights. The Bill of Rights is the source of the most fundamental rights - freedom of speech and religion, the right to a jury trial, and protection against unreasonable searches and seizures. These Amendments were added to the Constitution to protect citizens against interference from the federal government.

Federal and State Statutes

Statutes are laws passed by federal, state, and local legislatures. Federal statutes are passed by the United States Congress and signed into law by the President. At that point, a law is called an "Act." For example, the current special education law is the ***Individuals with Disabilities Education Act*** (IDEA) which was originally called the ***Education for All Handicapped Children Act***. The last amendment of IDEA was an "Act" that amended an earlier version of the special education law.

No Child Left Behind (NCLB) is a wholesale amendment of the ***Elementary and Secondary Education Act (ESEA) of 1965***. ***No Child Left Behind*** is a federal statute. Federal statutes are organized by subject, indexed, and published in the United States Code (U.S.C.) by Title number. Both IDEA and NCLB are published in the United States Code in the education title, known as Title 20 (20 U.S.C.) (**Note:** The full text of IDEA and the NCLB regulations are located in the publications, [Wrightslaw: Special Education Law, 2nd Edition](#) and [Wrightslaw: No Child Left Behind](#)) References to law are called citations. Legal citations are written in a standardized form describing exactly where the statute, regulation, or case is located. Citations to federal statutes include the title for the U. S. Code and the section number.

Other key education acts and statutes are ***Section 504 of the Rehabilitation Act of 1973*** which is codified in Title 29 of the United States Code at Section 794 and is cited as 29 U. S. C. §794 and the ***Family Educational and Privacy Rights Act*** in Title 20 and codified as 20 U. S. C. § 1232, *et. seq.*

Federal Regulations

The purpose of regulations is to clarify and explain the statute. Although regulations give force and effect to a statute, they must also be consistent with the statute. Regulations have the same power as the statute. Regulations are published in the ***Code of Federal Regulations***, also known as "C. F. R." Before Regulations are published in the ***Code of Federal Regulations***, they are published in the ***Federal Register*** (F. R.), which is issued daily.

Both IDEA and NCLB require the U. S. Department of Education to develop and publish regulations. The IDEA regulations are in Volume 34, Part 300 of the Code of

Federal Regulations. (34 C.F.R. Part 300) The legal citation for the NCLB regulations is 34 C.F.R. Part 200.

State Law and Regulations

State constitutions establish the structure of state government. State education statutes and regulations must be consistent with the United States Code (U. S. C.) and the Code of Federal Regulations (C. F. R.). State statutes and regulations may provide more education rights than the corresponding federal law, but states may not take away rights provided by federal law.

Legislative Intent

Statutory and regulatory laws are based on legislative intent. In many cases, the legal interpretation of a law, the meaning of a specific section, or the meaning of a particular word will be influenced by the use of "may " instead of "shall, " or even the location of a semicolon.

Sometimes, one word in a statute leads to extensive litigation. In the area of special education law, the word "appropriate" has been litigated extensively. After more than twenty-five years of case law, "appropriate "has many interpretations that vary considerably from one set of facts to another.

Sometimes, members of Congress are unable to agree on the wording of a proposed statute. To keep a bill from dying in committee, legislators agree to vague compromise wording. Because Courts must interpret the meaning of a word or phrase in the context of the statute, it is not surprising that different courts often arrive at different conclusions.

When you read decisions by the U. S. Supreme Court, you will see that the Justices often include a discussion of legislative intent and legislative history in their decisions. Through this process, vague, ambiguous words and terms receive more precise legal definitions.

Judicial Interpretations

It is not unusual for one court to interpret a word, phrase, or code section differently from another court, even when facts are similar. This process leads to more interpretations and more litigation. Over time, a "majority rule "usually develops as courts agree on the same interpretation. A "minority rule "also develops. If a clear majority rule does not develop, the legal issue will become more confusing and diverse. A U. S. Court of Appeals may issue a ruling in a case that controls the lower courts.

Sometimes, two or more U. S. Courts of Appeal issue rulings that are in conflict with each other. This is called a "split among circuits. " When a split occurs, Congress may amend the law or the U. S. Supreme Court may issue a decision that clarifies the issue. Legal issues that result in a "split among circuits" have the highest probability of being accepted for review by the U. S. Supreme Court.

Caselaw

Caselaw is the body of law that evolves in state and federal courts. Decisions issued by state court judges can be appealed to higher state courts. In most states, the highest state court is known as the state's Supreme Court.

A New York trial judge 's interpretation of a statute will be governed by earlier rulings from the highest State Court in New York. However, a New York state court judge is not bound by an opinion issued by a State Supreme Court in another state.

Decisions by U. S. District Court judges can be appealed to the U. S. Court of Appeals for that geographical area. District Court judges are bound by interpretations and rulings from their Courts of Appeals. New York is in the Second Circuit. U. S. District Court judges in New York must follow rulings from the Second Circuit Court of Appeals. California is in the Ninth Circuit. U. S. District judges in California must follow rulings from the Ninth Circuit. Neither District Court judge has to follow a legal ruling from the other circuit.

Interpretations of the federal statute by U. S. District Courts are binding on state court trial judges in that state. However, decisions from a U. S. District Court in New York are not binding on state court or Federal court judges in California. Decisions from a U. S. District Court in California are not binding on state or Federal judges in New York or other states.

When the U. S. Supreme Court issues a ruling, all state and federal courts must follow the ruling.

Memoranda and Policy Guidance Letters

Local and state school boards and federal agencies such as the U. S. Department of Education may issue Memoranda, "Superintendent's Memos" or other documents to clarify the meaning, intent, and or interpretation of a statute or regulation. Although these documents do not have the force of law, if subsequent litigation arises about the issue, the documents may have some persuasive authority.

In the evolution of the "High Stakes Testing" controversy, many such documents, guidelines, and policy letters from different school boards and states appear to be in conflict with each other. You should ensure that your opinions and conclusions are based on your own reading of the statute, regulation, case, independent of such guidelines and policy letters. If you do not read the original primary source material, you are at the mercy of interpretations, opinions and mistakes of others.

This article is the first step to increase your knowledge of the legal issues in this, the fastest growing and most controversial area of education litigation.

(**Note:** Later in this article, you will see legal citations to EHLR and IDELR. EHLR, the *Education for the Handicapped Law Reporter* was later renamed the *Individuals with Disabilities Education Law Reporter*. Many special education statutes, regulations, cases, and policy letters are published in EHLR or IDELR. IDELR is published by LRP Publications. For more information about IDELR and related publications, go to www.lrp.com.)

(**Note:** Large portions of the preceding explanation and discussion about law were taken verbatim, with permission, from [Wrightslaw: Special Education Law, 2nd Edition](#) and [Wrightslaw: No Child Left Behind](#). For more information about these and other Wrightslaw special education law publications, go to www.wrightslaw.com.)

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II. Historical Background of Minimum Competency Testing

A. Educational Reform, Educational Standards and Social Promotion

The roots of high-stakes testing originate in the late nineteenth century. Business and professional leaders who were concerned about accountability and standardization, particularly in urban schools, pressed for centralized administrative control of school districts.[1] In 1892, the National Education Association created a Committee of Ten to draft recommendations for strengthening the curriculum in high schools. In addition to secondary school course innovations, the Committee also recommended standards for college admissions. The recommendations also focused on the need to ensure that "all students received the same preparation for the duties of life" through a liberal education, regardless of whether the students were preparing for college.[2]

After the Committee of Ten's recommendations, another committee reviewed college admission criteria. This led to the creation of the College Entrance Examination Board and the Scholastic Aptitude Test. The successful use of standardized testing for college admissions paved the way for the use of standardized tests in elementary and secondary education.[3]

The 1965 Elementary and Secondary Act (ESEA) included provisions for standardized tests to measure student achievement.[4] In the 1970's, a movement emerged to prevent the implementation of testing for promotion and graduation.[5] This movement stirred a debate about how high-stakes tests punished minorities who were victims of discrimination and attended inferior schools. These objections slowed the high-stakes testing movement, but interest in accountability and standards was rekindled during the early 1980's.[6]

In 1983, the National Commission on Excellence in Education published *A Nation at Risk*, a hard-hitting report about educational quality.

Our nation is at risk . . . the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and people . . . If an unfriendly foreign power had attempted to impose on America that mediocre educational performance that exists today, we might well have viewed it as an act of war.[7]

According to *A Nation at Risk*, thirteen percent of seventeen-year-olds were functionally illiterate, with minority student illiteracy at forty percent. Many seventeen-year-olds did not have sufficient skills to draw inferences from written material, solve complex mathematical problems, or write persuasive essays. High

school and college achievement test scores had declined since the 1960s. Colleges, military, and business leaders complained that high school graduates lacked the basic skills in reading, writing, spelling, and mathematics that were necessary to succeed in postsecondary institutions and workplaces.[8]

Although high-stakes testing had been part of the American educational system for more a century, the purpose has changed significantly in the last decade. High-stakes tests were formerly used as indicia of basic competency. Now they are benchmarks for high standards of learning.[9]

Since the 1970's, many states required students to pass high school exit exams before graduating from high school.[10] These exams were to measure if students mastered basic courses for high school graduates.[11] "Social promotion" was viewed as failure. States developed new policies that required students to pass standardized tests for grade-to-grade promotion.[12] A growing number of states required students to pass exit exams to receive high school diplomas, or planned to implement exit exams.[13] A growing number of states implemented testing requirements for grade promotion as a supplement to course requirements.[14]

States that required students to pass an exam for grade promotion were concerned about failed social promotion policies. Social promotion is the process by which students are promoted, regardless of their ability to succeed at the next grade level.[15] In his 1999 State of the Union address, former President Clinton called for an end to social promotion in primary and secondary schools.[16] In this address, President Clinton promoted the Education Accountability Act. This Act would require schools receiving federal funds to end social promotion, adopt higher education standards, and hold schools and teachers accountable for poor student performance.[17]

The concepts and principles set forth in President Clinton's proposed Education Accountability Act are the basis for educational reform as contained in the No Child Left Behind Act of 2001.

In the late 1990s, there was a clarion call for increasing educational standards nationwide.[18] A 1998 Gallup poll revealed that 73 percent of those surveyed favored requiring students to pass a standardized test in order to obtain a high school diploma, and 70 percent favored the use of standardized tests to determine grade promotion.[19] A strong vocal minority, however, cautioned against the use of testing to make placement, promotion, and diploma decisions.[20] They feared that students who are educated in poorly financed school systems would be unduly penalized, and that minorities would be disproportionately affected by high-stakes testing and suffer unfair consequences for their poor performance on such tests.[21] Consequently, the high-stakes movement has created considerable controversy. Educators, school administrators, professional and advocacy organizations, associations, parents, and other stakeholders weighed in with comments, criticisms, and suggestions of how high-stakes tests should be used.[22]

B. Student Accountability Policies

In response to increasing public and political pressure, states have adopted or are considering adopting Student Accountability Programs or Policies to measure student achievement, and hold schools and administrators accountable for poor student

performance.[23] Some educators and commentators contend that there is an irreconcilable conflict between efforts to promote high standards and accountability in education with high-stakes testing, and the efforts that such tests are fairly used.[24] For this reason, parents, students, and advocacy groups have challenged these programs and policies because they violate their rights under the federal and state constitutions, and under other federal statutes.[25]

The high stakes testing movement has gained considerable recognition in light of the demand for accountability. Several state tests have been developed as part of the state's accountability system, and are designed to measure progress of districts and schools toward state or local defined standards for all students. These states have developed high-stakes tests in response to the Improving America's School (IASA) Act Title I requirements. The IASA requires that standards be established and assessments be designed in the areas of mathematics and language arts. There is an overlap between school improvement and measurement of a student's performance. However, it is highly questionable to use a single test score from an assessment that is designed to measure system performance.[26]

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III. Common Assumptions of Minimum Competency Programs

Several assumptions underlie Minimum Competency Programs:

- Students and teachers will use high-stakes tests to know what they should teach and learn
- Teachers who are accountable by high-stakes tests will be motivated to be good teachers
- Students who are required to take high-stakes tests will work harder and learn more
- High-scoring students will enjoy success and low scoring students will increase their efforts to learn
- High-stakes tests will measure the curriculum taught in schools
- High-stakes tests will provide an equal opportunity for all students to demonstrate their knowledge and skills
- Teachers will use results of high-stakes tests to improve instruction for individual students
- Administrators will use results of high-stakes tests to develop better teacher training and professional development
- Parents will understand the purposes of high-stake tests and know how to interpret the results.[27]

A. Workplace Readiness

One common assumption about minimum competency testing is that it prepares students for workforce readiness. What is "workforce readiness?" [28] The Secretary of the U.S. Department of Labor, Commission on Achieving Necessary Skills (SCANS) defines workforce readiness as the skills and knowledge that workers need to succeed. Workers are expected to have basic literacy and computational skills, in addition to thinking skills.[29] High-performance workplaces require other competencies, such as the ability to manage resources, to work amicably with

others, to acquire and use information, to master complex systems, and to work with various technologies.

The Commission made several recommendations about education for high-performance workplaces: (1) students should learn content while solving real life problems; (2) changes in how instruction is delivered and how students learn; (3) creation of new school administration and assessment systems; and (4) involving the community in the process.[30]

B. Incentives for Low-Performing Schools and Students to Improve Performance

Another common assumption is that minimum competency testing will create incentives for low-performing schools to improve their performance. This assumption is based on the premise that if students and teachers are aware of the specific content and performance standards and are held accountable for these standards through high-stakes testing, they will be motivated to meet these standards. Measurement-Driven Instruction (MDI) is based on the belief that high-stakes testing will influence or drive instruction.[31] The elements of effective MDI programs are:

- Criterion-referenced tests specify the skills and knowledge students must learn;
- Objectives and tests represent meaningful content;
- Limited number of skills and objectives are assessed;
- Teachers use test objectives to plan instruction; and
- Teachers receive support to properly teach specified knowledge and skills.[32]

C. Improved Opportunities for Student Learning

Most stakeholders who support high-stakes testing believe that this testing will lead to improved student learning. However, there are differences in learning theories and their relationship to testing of learning.[33]

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IV. Characteristics of Minimum Competency Programs

In minimum competency testing programs, language arts and mathematics are the most commonly tested content areas. Most states with minimum competency tests use criterion-referenced tests, although some states assess writing skills. A few states use norm-referenced tests.

On norm-referenced tests, students are expected to score above a certain national percentile to achieve competency. On criterion-referenced tests, students are expected to reach a certain level of performance. Most tests have multiple-choice or "fill-in-the blank" answers. In general, multiple-choice tests measure lower-level cognitive processes. In most states, calculators are not used on mathematics assessments. Passing the competency test is usually a requirement for promotion or graduation.[34]

A. Evaluation of Minimum Competency Testing Programs

The intended effects of Minimum Competency Testing [35] are to: increase reading achievement [36]; increase basic mathematical skills [37]; provide access to the general curriculum; provide an opportunity to learn; encourage mastery of grade level material; and make diplomas meaningful.[38]

The unintended effects of Minimum Competency Testing are: lack of transfer to higher-order skills; [39] increase in school drop out rates; [40] narrowing of the curriculum; [41] corruptibility of high stakes tests; [42] less time for teaching and learning; [43]; wider achievement gaps between educational "haves" and "have-nots"; [44] financial costs; [45] lower expectations on IEP objectives to ensure mastery; misinterpretation of achievement results; higher rates of exemption of students; [46] and higher rates of failure on tests [47].

B. High-Stakes Testing Practices

States use a carrot-and-stick approach to reward and punish schools for their performance on high-stakes tests. Currently, twenty-two states offer incentives to schools that improve their test scores.[48] Twenty states offer financial incentives to schools; nineteen distribute financial incentives to schools that show improved scores. Eleven states disperse money directly to administrators or teachers in schools that demonstrate the greatest improvement in test scores. All states hold schools accountable by publishing district and/or school report cards. Fourteen states have the authority to close, reconstitute, or take over low performing schools; sixteen states have the authority to replace teachers or administrators; eleven have the authority to revoke accreditation.[49]

C. Who Uses High-Stakes Tests?

High school graduation examinations are used most commonly in: (a) states that allocate less money than the national per pupil average for schooling; [50] (b) states that have more centralized governments, rather than local, county, or city governments; [51] (c) states with the most population or largest population growth; [52] (d) states in the Southwest and South; [53] (e) states with higher percentages of African-Americans and Hispanics, and lower percentages of Caucasians; [54] (f) states with the highest degree poverty; and (g) states with lower levels of achievement on high-stakes tests.[55]

D. Accountability Systems, High-Stakes Tests and School Reform

The components of accountability systems that drive high-stakes testing and school reform are: (1) content and performance; (2) curriculum and instruction; (3) alternative assessment systems; (4) reporting and improvement plans; and (5) accommodations policies.

Three key terms are used to describe accountability systems.

Accountability system: a systemic collection, analysis, and use of information to hold schools, educators, and others responsible for the performance of students and the education system.[56]

Assessment system: the process of collecting data for the purpose of making decisions.[57]

Testing: the process of administering a test to an individual or group to obtain a score.[58]

Content and performance standards provide clear directives on what all students must know. For some students with disabilities, adjusting performance standards in alternate assessments is a challenge.[59]

Curriculum and instruction standards are essential to the validity of accountability systems. One objection to high-stakes tests is that these tests do not measure what students have been taught. A recent ten-state study suggests that there is little overlap between state standards and what teachers say they are teaching in the classroom. The overlap is surprisingly small, from 5 percent to 46 percent, depending upon the subject, grade level, and state.[60]

One key element of an accountability system is how the alternative assessment system is designed. The challenges of designing alternate assessment systems are that they must ensure that all students are included, incorporate accommodations, modifications, and alternate assessments, and technical adequacy of these options.[61]

Accountability systems must include reporting and improvement plans. There are psychometric difficulties in putting all students on the same level versus accountability for all students, i.e., achieving a balance between what makes sense for improvement planning and psychometric planning. The challenge of designing an assessment system that benefits all students includes training on the purposes and uses of data, and ensuring that all students, including students with disabilities and students with limited English proficiency, are included.[62] Is the system designed to test all students? Does the system use data from all students for improvement? Should the system be held accountable before students are held accountable?[63]

There is a need to identify students who can participate in assessments without accommodations, students who can participate in assessments with accommodations, and students who will need an alternative assessment.[64] In all states with high-stakes testing, accommodation policies are an important part of accountability standards.[65]

In general, four types of accommodations are used for students with disabilities:

- (a) format and equipment accommodations:** Braille, large print, word processor or typewriter, sign language, magnifying equipment and template, audio/video tape and amplification equipment;
- (b) scheduling accommodations:** extended time, multiple sessions with breaks, testing over multiple days, and breaks away from test area;
- (c) setting/administration accommodations:** administration individually, in small groups, at home, in separate rooms, administration by others, proximity to test administrator; and
- (d) response accommodations:** use of a proctor or scribe, machine, test booklet, dictation, Braille writer, sign language and lined paper.

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V. Assessment Accommodations and Alternative Assessments for Students Disabilities

A. Assessment Accommodations

Virtually all states modify their exit exams to accommodate children with disabilities.[67] In at least four states (Minnesota, New Jersey, Ohio, and Texas), modifications are available for students with disabilities. Modifications may mean that some students with disabilities are exempt from exit exams but still receive standard diplomas, or that these students are required to take alternative assessments. All states allow retesting for students who fail the exit exam. In many states, all students are required to pass the same exam. Some states allow students with severe disabilities to pass the exam with a different score than children who are not disabled. About half of all states maintain records of the performance of children with disabilities on their tests.[68]

The National Research Council describes four types of accommodations:

- (a) change in presentation:** i.e. Braille forms for visually-impaired students, books on tape for children with hearing-impairments;
- (b) change in response mode:** computer assistance provided on tests, and use of a scribe to write answers;
- (c) change in timing:** a student is given extra time or reallocation of time blocks within a testing session; and
- (d) change in setting:** a student is administered a test in a small room or small groups, or in a separate room.[69]

These broad categories do not shed light on other accommodations that are commonly used to test students with disabilities. These accommodations fall into two categories: accommodations for the student and redesign of the test. For instance, before a test, the student may be given specific information, in an appropriate medium (e.g. writing or orally), about the content of the test and an opportunity to take a practice exam. The student may have other opportunities, methods, or different formats to test their knowledge and skills. The student may receive test taking skills training and tutoring. The test may be designed for easy reading - in large and bold print - and less distracting page. Instructions may be placed near questions to which they relate. Questions should stand out visually, when compared to test answers in multiple choice or matching situations. Test questions should be sequentially ordered in a logical manner.[70]

In general, there has been an increase in the use of accommodations during State and district-wide assessments. For example, Kentucky has a relatively broad accommodations policy. Assessment accommodations are aligned with instructional accommodations, except for reading the test aloud when the test measures the student's reading decoding skills. Kentucky has one of the highest percentages of students receive accommodations on state testing (50%-82%).[71] Rhode Island provides accommodations for all students. In Rhode Island, a moderately high percentage of students receive accommodations on state testing (30%-61%).[72] In

Missouri, a larger percentage of students use accommodations in elementary and middle school than in high school.[73] In Delaware, about 30 percent of students with disabilities use accommodations on assessments.[74]

In 1998, nearly 90% of students with disabilities participated in Minnesota's Basic Standards Tests which are criterion-referenced tests designed to measure student competency in reading and mathematics. Students must obtain a specific level of competency in order to graduate from high school.[75] One large school district had seven Section 504 accommodation plans for the 1998-99 school year, while a smaller school district had twenty-one Section 504 accommodation plans for the same period. Minnesota implemented 696 accommodation plans for the 1998-99 school year. Did referrals for special education or requests for section 504 plans increase because the state implemented the Basic Standards Test? We do not yet have data to answer this question.[76]

B. Alternative Assessments

Portfolio and authentic assessments are growing in popularity as alternatives to high-stakes testing. Portfolio assessments examine students' learning histories in depth. Authentic assessments are designed to examine students' performance level with tasks that are instructionally relevant to the child and based on tasks that are expected to be part of the curriculum. These assessments provide more information about students, are more helpful for teachers, and measure higher-level skills that are more difficult to assess with standardized testing.

However, these assessments have significant disadvantages, including time to design and implement them. Teachers must spend more time on marking, record keeping, gathering resources, and planning daily work activities. The time spent to develop and implement alternative assessments takes away time from other classroom and teaching duties. Teachers view and treat the assessment process as a special activity, apart from their usual teaching responsibilities. Alternative assessments include subjective teacher assessments. These assessments are not reliable indicators of student academic performance.[77]

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VI. Grade Retention and Social Promotion

Studies of grade retention show that retention is not an effective way to improve student achievement. Studies of social promotion fail to document the number or percentage of socially promoted students and how these students were identified.[78]

Retention is a common consequence for students who fail to master grade level material.[79] It is estimated that 2.4 million students are retained each year, at a cost of 14 billion annually.[80] Students who are likely to be retained are male, African-American, or Hispanic, of low-economic status, and with parents who dropped out.[81] When students are retained, they are likely to drop out of school. Retained students are more likely to be low wage earners, experience high unemployment, and prone to end up in the criminal justice system.[82]

In the early 1990s, many large urban school districts implemented policies to end social promotion. These policies showed mixed results in improving student performance. Different interpretations of early data generated heated debate.[83] There was evidence that policies designed to end social promotion led to gains in the number of students who achieved standards, but that this progress was not maintained over time.[84] Social promotion policies had a disproportionate effect on minority students.[85]

States and school districts that implemented policies to end social promotion used other strategies including retention, retention with interventions and supports, and promotion with intervention and supports.[86] Arkansas, California, Delaware, Florida, Louisiana, North Carolina, Ohio, and Texas have policies to end social promotion and specific guidelines about interventions for students with disabilities.[87]

Most state policies do not specify clear intervention options for students with disabilities who fail promotion tests, nor do these policies specify whether interventions are to be used for students with disabilities. Arkansas, Delaware, Florida, Illinois, Louisiana, Ohio, and Virginia have policies requiring the use of school improvement plans to address goals for students to meet grade level standards.[88] Most states require the development of comprehensive long-range school improvement plans that focus on school achievement.[89] Arkansas, California, Delaware, Florida, Illinois, Louisiana, North Carolina, Ohio, South Carolina, Texas, and Virginia tie funding to policies designed to end social promotion.[90]

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VII. Questions about High-Stakes Testing

A. What is a High-Stakes Test?

A test is a high-stakes test if the results have perceived or real consequence for staff, students, or schools. These consequences can be intentional or unintentional.[91] Consequences of high-stakes tests may include grade promotion, high school graduation, academic probation, allocation of resources, and financial incentives for schools and teachers. Other consequences may include public opinion of the quality of schools and districts, which may lead to public school choice.[92] Public opinion may cause pressure on the school board and school officials to improve test scores, especially if there is a perception that the system, parents, and students are suffering because of poor scores.

B. What is the Impact of High-Stakes Testing on the Curriculum?

Some individuals believe that high-stakes testing will improve curricula as schools, teachers, and students attempt to meet the standards imposed by such testing. Others believe that high-stakes testing will narrow the curriculum, cause teachers to focus on lower-order skills, or remove control from local school authorities. In some cases, training (rather than learning or education) is taking place in states and districts.[93] In other words, in high-stakes testing states, there is limited evidence that students are learning more, beyond the training that prepares them to take the tests.[94]

One study shows that in some high-stakes test situations, there was a narrowing of the curriculum. Not all teachers thought this was negative. Implementation of high-stakes testing affected both content and sequence of instruction. Classes were more focused as the testing date approached. However, another study demonstrated that high-stakes testing (Iowa Test of Basic Skills - ITBS) reduced the time available for instruction. There was evidence that schools failed to teach material that was not on the high-stakes tests, and encouraged teachers to use instructional methods that resembled high-stakes tests, including multiple-choice exams.[95]

Other studies had mixed outcomes. In a study of two states that used high-stakes testing, teachers gave greater emphasis to basic skill instruction, and there was less focus on non-test items because of the emphasis on standardized tests. Teachers also spent a great deal of time preparing students for the test, rather than on focusing on the general curriculum. The teachers reported that the tests helped them set clear instructional goals for their students. Socio-economic status was negatively correlated to the attention that schools and teachers gave to test scores, curriculum planning, and time devoted to test-related activities. In other words, testing had a strong impact on teaching in schools that served more disadvantaged students.[96]

Overall, the evidence is inconclusive about impact of high-stakes tests on curricula. However, research does show that high-stakes testing affects what and how teachers teach. The question of whether high-stakes testing narrows curricula or causes curricula to be more focused has not been answered conclusively.

C. How Are High-Stakes Tests Used?

1. Educational Objectives

In general, test results provide guidance in making educational decisions about instruction, placement, and promotional opportunities for students. Tests can provide information about a student's progress, and help evaluate educational programs.[97] However, there are several caveats about test results.

First, educators and professionals agree that one test score should not be used the sole criterion for high-stakes educational decisions.[98] Second, the use and purpose of any high-stakes test must be established before test design, administration, and use. A test may be valid for one purpose and invalid for another. The context in which the test is administered will determine the appropriateness and conclusions derived from its use.[99] Third, a high-stakes test must be validated for these situations.[100] A test must be reliable and must conform to accepted professional standards. There should be evidence that students who take the test several times receive similar scores.[101] Fourth, there should be scrutiny of statistically significant disparities in test scores among subgroup populations. However, subgroup differences may be due to casual factors unrelated to test construction or may reflect problems with the test itself.[102]

2. Methodology of Test Administration and Interpretation

To ensure that test administration and interpretation do not deny educational opportunities, specific protections should be in place. First, there should be compensatory or tutorial support to ensure that all students have the same opportunity to master test material. Second, students should have multiple

opportunities to take the test. Third, school authorities should consider academic factors, in addition to test scores, before drawing conclusions about a student. Adequate protections must be in place so students are not denied meaningful educational opportunities because of their performance on a single test.[103]

3. Establishment and Alignment of Test Content Results

High-stakes tests should be developed and administered as a part of an overall plan to improve student performance and integrated into the learning environment. If the tests are aligned with the curriculum and instruction, they are more likely to serve as accurate measures of the learning environment. Educators should ensure that high-stakes tests are used only when students can master the material or skills on which they will be tested. Yet, the question of when high-stakes tests can be imposed must be considered in conjunction with the purpose, use, and administration of these tests. When these tests are administered, they should be part of a larger inquiry that includes educational supports, opportunities for re-taking the test, and consideration of academic factors in addition to high-stakes tests.[104]

4. Test Results

School authorities should carefully monitor test inputs and outcomes over time. This monitoring will reveal if there are significant disparities between student groups, based upon race, national origin, gender, or disability. If disparities exist, investigation will be necessary to prevent bias or discrimination in test administration and results.[105]

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VIII. Implications of High Stakes Testing for Students with Disabilities

A. Educational Opportunities for Students with Disabilities Affected by High Stakes Tests

No studies directly assess the impact of high-stakes tests on curricula for students with disabilities. However, one 1986-1987 study assessed the impact of Florida's graduation and competency test standards on students with disabilities. According to this study, students with disabilities had difficulty obtaining sufficient credits for a regular high school diploma, and had difficulty obtaining credits toward a special diploma on courses that paralleled the standard diploma. These students had little opportunity for vocational training in their programs. The study concluded that while these students were likely to graduate with a standard or special diploma, they had no marketable job skills.[106]

What is the effect of high-stakes testing on educational programs of students with disabilities? Do students with disabilities study more for a test when the stakes are high? If so, how does this affect how teachers perceive the utility of the general curriculum or how much time they should devote to preparing students to take the test? Should students with disabilities focus on vocational skills or on academic skills measured by high-stakes tests?

How should parents, advocates, and parent's attorneys think about the child's IEP when there are State or district-wide assessments and testing? What potential pitfalls do parents, advocates, and parents' attorneys face when the child is must pass a high-stakes test for grade promotion or high school graduation? What impact does high-stakes testing have on transition programs and services for children with disabilities? These questions must be answered before the IEP team makes decisions about the child's IEP and educational placement.

B. How High-Stakes Testing Affects Student Learning

Little research exists about how high-stakes testing affects learning for students with disabilities.[107] One study of high stakes testing in Maryland showed that teachers spent more time on test preparation, used more practice tests, and conducted more reviews. Nevertheless, this study drew no conclusions about whether teacher preparation for testing actually improved learning.[108] Consequently, more attention must be paid to how high-stakes testing affects learning.

Teachers can employ skills to increase student test scores, regardless of student knowledge. In the teacher trade, these skills are called "testwiseness." Testwiseness includes getting a good night's sleep before a test, learning how to make educated guesses, and using relaxation skills during a test. Other testwiseness skills cross ethical and professional lines (i.e., giving students copies of the test, hinting at answers on a practice exam, and changing answers on test papers). Providing students with worksheets so they are familiar with the exam format falls in the middle ground.[109]

Do increases in test scores reflect increases in student learning? Does "teaching to the test" work? One study focused on factors such as pretesting students, curriculum changes based on the state's education standards, and workshops to increase teacher skills in implementing state standards. According to this student, pre-testing contributed to an increase in test scores. This suggests that increases in test scores may be due to familiarity with the test, not actual learning.[110]

States and school districts that are under pressure to improve test scores may be tempted to label, exclude, or remove poor-performing students, including students with disabilities. This practice may trickle down to teachers, who may view their professional worth as dependent on how well their students perform on high-stakes testing.[111]

C. Impact of High-Stakes Testing on High School Graduation

Requirements to earn a high school diploma include: (1) earn a specific number of credits, usually referred to as Carnegie course units; (2) pass an exit exam; and (3) earn sufficient course credits and pass an exit exam. States have different requirements about how students can earn a high school diploma.[112]

If the state or district offers several diploma options, it must consider the requirements for each option. The state or district should widely disseminate the requirements for each type of diploma. The state or district should have fair, inclusive options for all students. Policies should be developed that recognize: (a) the same diploma options for all students; (b) all students do not demonstrate high-level knowledge and skills in the same manner; (c) options that correspond to the

student's knowledge and skills; (d) implications of difference diploma options for special education services; (e) teachers, union representatives, administrators, parents, individuals with disabilities and their families, representatives from higher education and business and legislators should provide input about impact of diploma options and policies; and (f) the use of the media to inform the public about the diploma options.[113]

There is considerable variation in how states provide exit options for students. Many states have multiple exit options.[114] According to a 1999 National Center on Educational Outcomes (NCEO) Report, a standard diploma is the only option in nine states. Under this option, a **standard diploma** is awarded to students who meet the requirements for graduation, which is usually based on an established number of Carnegie Units or credits.[115] Some states may impose additional attendance requirements, and a passing score on the exit exam.

Approximately half of the states offer an **IEP diploma** or **certificate of attainment** or **certificate of attendance** or **special certificate of completion** or **special education diploma** to children with disabilities who successfully complete the program outlined in the IEP. In some states, completion of the IEP program is sufficient to earn a standard diploma. [116] Indiana offers a certificate of achievement to students with disabilities for whom a diploma track was not deemed appropriate.[117] Finally, several states offer work-study diplomas.[118]

D. Dropout Rates, Retention, Absenteeism, Lower Graduation Rates

In states with exit exams, roughly 30 to 40 percent of first time takers fail the test.[119] In Texas, nearly 40,000 children have been denied diplomas for failure to pass the exit exam since 1994.[120] It is not surprising that large numbers children drop out of school because they anticipate failing the exit exam.[121] In a backlash, Arkansas cancelled exit exams. Wisconsin backed away from plans to impose high stakes testing.[122]

E. Stress, Burnout, Cheating, and Other Problems

Cheating has been reported in school districts that face fiscal and other consequences for poor performance. Teachers feel they are forced to "teach to the test" to prepare their students for the exit exam.

Studies show a greater emotional effect on educators in states where there is high-stakes testing, including higher stress, more paperwork, and decreased reliance on professional judgment. Some teachers complain of a loss of autonomy. However, high-stakes testing increases teacher satisfaction when student scores are high.

Many teachers believe that high-stakes testing is "cruel" for some students. Teachers believe that students suffer from anxiety, stress, frustration, mental failure, fatigue, physical and psychological illness, and misbehavior because of the length and difficulty of tests, the number of tests, the time limits imposed by the tests, fine print, and difficulty transferring answers to answer sheets.[123] In regard to students with disabilities, the impact of high-stakes testing is more troubling than for students without disabilities. Teachers worry about increased frustration and report that students are concerned about their ability to pass high-stakes tests. The child's

IEP team should take into account the possible negative and positive effects of participation and non-participation of the child in high-stakes testing.[124]

If student performance and scores on high-stakes tests is linked to promotions, bonuses, or sanctions, will teachers and administrators exclude more students with disabilities from testing? Will high-stakes testing affect the IEP team's decisions to include students with disabilities in regular classrooms? Are special educators more vulnerable than regular teachers to high-stakes testing and its implications for autonomy and professional judgment? These questions should be answered to determine the emotional and attitudinal impact of high-stakes testing on students, teachers, and administrators.

F. Inclusion of Students with Disabilities in State and Local Testing

There is substantial evidence that students with disabilities are often left out of statewide standardized assessments and denied appropriate accommodations because the test was not standardized on this population. The failure to include students with disabilities in statewide assessments, or make appropriate accommodations, raises a red flag about the validity and reliability of test scores.

Researchers are trying to determine if accommodations (i.e., large print, extra time on tests, Braille versions of tests) are valid means of including students with disabilities in state standardized assessments.[125] It is easier to adapt criterion-referenced tests for students with disabilities.[126] Several states use criterion-referenced tests to determine if a student will receive a high school diploma, or use alternative assessments for graduation decisions. It is generally easier to include students with disabilities in criterion-referenced testing than on norm-referenced testing.[127]

G. How Students with Disabilities Perform on High-Stakes Tests

A few studies show that students with disabilities perform poorly on high-stakes tests, when compared to their nondisabled peers. In Hawaii, for example, students with all categories of disabilities did more poorly on all standardized tests than students without disabilities. However, when the test scores were compared from one year to the next, Hawaiian students showed more improvement than the national norm, and students with disabilities performed as well, or better than students without disabilities. However, this study did not examine how students with disabilities performed on high school graduation exit exams.[128]

One study examined how test accommodations affected performance on high-stakes tests. The students were given extended time to complete the test, placed in small groups, provided audio cassettes, large print editions of tests, and sign language. Students with mild mental retardation who received accommodations were more likely to pass the test than those who did not receive accommodations. However, students with mild mental retardation were less likely to pass the test and more likely to become frustrated during the testing process. In addition, students with mild mental retardation were not helped by remediation efforts. Fifty percent of other disability groups who retook the test passed on the second try.[129]

Should educators exclude students with disabilities from State or district-wide assessments? Would this lead to less time spent teaching areas that these tests

cover? If educators decide to include a student with a disability in state or district assessments, will the IEP team neglect other components of the student's education, such as vocational or self-help skills? If educators exclude students with disabilities from the high-stakes tests required for graduation, students with learning disabilities and emotional disabilities will be even more likely to drop out of school.[130]

Special educators should support new testing programs that include students with disabilities in norming samples, and include appropriate accommodations when developing tests. This would allow educators an opportunity to measure the performance of students with disabilities and to increase participation in State or district-wide assessments.[131]

H. Costs v. Benefits of High-Stakes Testing

Some researchers claim that high-stakes testing can improve student performance at little cost, and only meager efforts by legislators, government, or the public. Others claim that high-stakes testing has hidden costs. These hidden costs include test development, administration, development and maintenance of bureaucracies to support testing, and competency programs to bring students who do not pass the test up to standards. Remediation may be the greatest hidden cost. Evidence suggests that remediation is expensive and may not improve the scores of students who performed poorly on the test previously.[132]

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IX. Opportunities and Risks of High-Stakes Testing for Students of Color, English Language Learners and Students with Disabilities

Proponents of high-stakes testing argue that minority students are more likely to be poorly educated and have more to gain from a movement whose main objective is to hold schools, teachers, and students accountable for teaching and learning. Yet, critics of high-stakes testing believe minority students will be harmed by such tests because they are more likely to be retained or denied high school diplomas.[133] There is research to support both views, so it is difficult to reach a clear conclusion.

In general, students with disabilities fail diploma tests, or tests used for grade promotion, at a higher rate than non-disabled students. This failure is particularly evident for minority students with disabilities who are often not provided with opportunities to learn the material on high-stakes tests.[134] In addition, a large percentage of students who are enrolled in limited English proficiency (LEP) programs are not tested on state and district high-stakes tests and are not provided with appropriate accommodations for these tests. Students with limited English proficiency who also have disabilities are less likely to be identified, assessed, provided with remediation, or given appropriate accommodations on tests.[135]

Typically, failure rates decline among all groups a few years after the introduction of a new test.[136] Texas, for example, has high-stakes tests in the seventh and eighth grades. In Texas, the pass rates for blacks and Latinos doubled between 1994 and 1998 and the achievement gap between whites, blacks, and Latinos narrowed

considerably.[137] Some of these gains may be attributed to smaller class sizes, preschool programs, and better resources for children.[138]

New York and Texas attempted to lower failure rates by making their exit exams easier to pass.[139] Moreover, states that do not report results of low-achieving students may show higher pass rates. Reported exit exam passing rates should be viewed with caution in light of: (1) dropout rates; (2) whether states count students who leave school to pursue general equivalency diplomas (GED) as dropouts; (3) exemptions of students with disabilities and limited English proficiency learners; and (4) improper testing accommodations that inflate the scores of some students.[140]

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X. Strategies to Address Consequences of High Stakes Testing

States are continuing to adopt standards for what students should know and be able to do.[141] Policymakers and educators must work to bring their curricula into alignment with state standards. Administrators and educators should bring instruction in line with state standards and curricula. In the meantime, states can use large-scale assessments to help drive instruction. Nevertheless, tests should be used to determine if students will receive high school diplomas or be promoted only after students have been taught the knowledge and skills that these tests measure. Unfortunately, "[t] here is little evidence to suggest that exit exams in current use have been validated properly against defined curriculum and actual instruction; rather, it appears many states may not have taken adequate steps to validate their assessment instruments, and that proper studies would reveal important weaknesses." [142]

Schools should not use tests for high-stakes purposes until students are actually learning the knowledge and skills that form the basis of state standards.[143] Test administrators should ensure that high-stakes tests are validated for their intended use. Test developers should take students with disabilities, limited English proficiency students, minority students, and other groups into account, in test development to ensure that the test is valid for all student population groups.[144] Schools must implement appropriate accommodations, modifications, or alternative assessments, when necessary.

Universally designed assessments will increase the comparability of scores.[145] Test users should not rely solely on test scores in making graduation and promotion decisions. Test use is inappropriate if it leads to inappropriate educational decisions for students. Information from a variety of sources should be considered in making changes to teaching and learning.

Staff development and training is necessary before a state or district implements high-stakes assessments. These assessment programs must be sufficiently funded to ensure that a high quality test is developed, implemented, and evaluated.[146] Finally, additional research may be needed to determine how high-stakes testing affects student learning and dropout rates, especially for at-risk groups, including students with disabilities, limited English proficiency students, and minority students.[147]

There are alternatives to high-stakes testing. Some educators advocate for a Multiple National Curricula. Schools could choose from several curricula developed by public and private agencies, teachers, and businesses. These curricula are similar to what is already taught in public schools, but differ in their approach to assessment or choice of source materials.[148] Each curriculum would have a prospectus with specific information: background on the authors and its goals; information about the construction and scoring of its final test; and statistics about the performance of different ethnic and socio-economic groups. Each school would be involved in setting goals that reflect the values of the community.[149] Other approaches are to use portfolios of student work throughout the school year, or a final project that would replace a final examination.[150]

Some educational advocates want high-stakes tests abolished. They propose that schools adopt a core curriculum that has high academic standards and is relevant to real world problems. Students would work to obtain a Certificate of Initial Mastery (CIM).[151] In this scenario, when students entered high school, they would be assessed to determine their educational level. A program would be developed to meet their individual needs. When students meet the CIM requirements, they may enroll in a post-CIM program that would prepare them for college.[152]

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XI. Statutory Authority for High Stakes Testing

A. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et. seq., P.L. 107-110

The No Child Left Behind Act of 2001 (NCLB) affects accountability because states and school districts must ensure that schools are making Adequate Yearly Progress (AYP) toward having all students proficient in math, reading, and science by 2014.

Beginning in the 2005-2006 school year, states must test all students annually in grades three through eight in reading or language arts, and math, and must test students at least once between grades 10-12. By the 2007-2008 school year, states must test all students in science at these grades levels. Until the 2005-2006 school year, states may continue annual reading/language arts and mathematic assessments in at least one grade in each of the following spans: 3-5, 6-9, and 10-12. Each state shall demonstrate that the state is making adequate yearly progress. Each state must describe how the state department of education (State educational agency) will ensure that the results of state assessments are provided to school districts, schools, teachers and parents in ways that are easily understood. These results are to be used by school districts to improve the educational achievement of students.[153]

Each state must submit a state plan that includes information about their challenging content and performance standards and must conduct assessments to assess student mastery of their new curriculum.[154] Each state must submit annual progress reports with information about the success of their efforts.[155] Students with disabilities must be included in the assessment of state standards.[156] Title I also requires schools to provide all students with diverse learning needs with reasonable adaptations and accommodations.[157]

As states and districts begin to comply with the Act, we are likely to see an increase in the testing of students. The purpose of this testing is to determine if States and school districts are making adequate yearly progress. Schools and school districts that fail to make adequate yearly progress for all major racial, ethnic, and income groups are subject to district and state interventions.[158] Schools and school districts may face sanctions. There are no federally mandated consequences for students who do not perform well on these tests. States will have flexibility in determining whether individual students must pass an exam for promotion or to obtain a high school diploma.[159]

Graduation rates are one indicator that states must use in determining if schools and school districts are making adequate yearly progress. Since many states have already implemented high-stakes tests, they may be reluctant to develop and implement more challenging exit exams. Since more rigorous exit exams are very likely to lower graduation rates, this will lead to more schools being targeted for intervention. States that do not have exit exam requirements may exercise caution in implementing new assessment requirements.

The No Child Left Behind Act may also impact state budgets. Since states will use more resources to expand testing programs, train teachers and administrators, and upgrade the qualifications of their staff, they may have fewer resources to develop and implement new exit exams.[160]

B. Equal Educational Opportunities Act (EEOA), 20 U.S.C. § 1703

The Equal Educational Opportunities Act (EEOA) prohibits states from denying equal educational opportunities by failing to take "appropriate action to overcome language barriers that impedes equal participation by its students in its instructional programs." [161] States and school districts that receive federal financial assistance are prohibited from discriminating against students on the basis of national origin. An individual who is denied equal educational opportunity may institute a civil action in an appropriate federal district court for such relief as may be appropriate.[162]

C. Individuals with Disabilities Education Act (IDEA) Amendments of 1997, 20 U.S.C. § 1401, et. seq.

In general, schools must include children with disabilities in state and district assessment programs and must provide appropriate accommodations and modifications in test administration, if necessary. For children who cannot participate in state and district assessments, state departments of education (SEAs) and local school districts (LEAs) are required to develop guidelines about how these children will participate in alternative assessments. The state or school district is responsible for developing these alternative assessments. 20 U.S.C. § 1412(a)(17)(A); 34 C.F.R. § 300.138.

State departments of education shall make available to the public, and report to the public "with the same frequency and in the same detail as it reports on the assessment of nondisabled children," the number of children with disabilities participating in regular and alternative assessments. These reports must include aggregated data that include the performance of children with disabilities together with all other children, and disaggregated data on the performance of children with disabilities. 20 U.S.C. § 1412(a)(17)(B); 34 C.F.R. § 300.139(a),(b).

The child's IEP must contain a statement of any individual modifications in the administration of state or district assessments that the child needs to participate in the assessment. If the child's IEP team determines that the child will not participate in a state or district assessment, the IEP team must include a statement about why the assessment is not appropriate for the child and how the child will be assessed. 20 U.S.C. § 1414(d)(1)(A)(v) 34 C.F.R. § 300.347(a)(5)(i)-(ii).[163]

D. Goals 2000, Educate America Act, 20 U.S.C. § 5801, et. seq.

Goals 2000, Educate America Act [164] provides federal funds for states to improve education, devise strategies to improve learning, and ensure that students master basic and advanced skills in core content areas.[165] Strategies must include a process to set student performance standards and assess achievement of these standards.[166] States must "provide for the participation in such assessments necessary to permit such accommodations." [167]

E. Joint Policy Memorandum on Assessments (1997)

On September 29, 1997, the Office of Special Education and Rehabilitative Services and the Office for Civil Rights of the U. S. Department of Education issued a Joint Policy Memorandum on Assessments.[168] The Memorandum began with this statement: "As you know, President Clinton has announced a bold, national education initiative which includes the goal of learning to challenging and clear standards of achievement for all students, including students with disabilities." The Memorandum referenced former President Clinton's 1997 State of the Union address about national tests in reading and math that would "embodying national standards, teaching every student to read independently by the end of the third grade, and increased accountability in public education." [169] According to the Memorandum, "Assessment is an integral aspect of accountability. . . Too often, in the past, students with disabilities have not fully participated in State and district assessments only to be short-changed by the low expectations and less challenging curriculum that may result from exclusion."

Key points from the 1997 Joint Memorandum on Assessment include:

- Excluding students with disabilities from assessments because of their disabilities violates Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and the IDEA Amendments of 1997.
- The IDEA Amendments of 1997 expressly requires inclusion of students with disabilities in State and district-wide assessments. If accommodations are necessary for students to participate in assessments, they must be provided. If a student cannot participate in the assessments, the IEP team must include a statement in the IEP about why the student cannot participate. The IEP team must also indicate alternative methods by which the student will be assessed if he or she is not participating in State or district-wide assessments.
- The IEP team must list appropriate accommodations on state or district-wide assessments in the child's IEP Examples of accommodations in test presentation, response mode and setting include oral administration, large print, Braille version, individual or separate room administration, extended time and multiple test sessions.

- The State educational agency and/or local school district must develop guidelines for students with disabilities who cannot participate in State or district-wide assessments. There is a requirement that States have policies and procedures to ensure that certain data and information about assessments is available to the public.

F. OSEP Policy Memorandum: Questions and Answers about State and District-wide Assessments under the IDEA (2000)

On August 24, 2000, the Office of Special Education and Rehabilitative Services of the U. S. Department of Education issued a Memorandum identified as OSEP 00-24. The subject was "Questions and Answers about Provisions in the Individuals with Disabilities Education Act Amendments of 1997 Related to Students with Disabilities and State and District-wide Assessments." [170]

Key points include:

- All students with disabilities who attend schools that receive funds under Title I of the Elementary and Secondary School Act must be included in the State assessment system, and the scores of these students must be included for the purpose of public reporting and school and district accountability.
- Under the IDEA, States must use information about the performance of students with disabilities on state and district-wide assessments to revise their State Improvement Plans to improve their performance.
- The IEP team determines how a child with a disability will participate in State and district-wide assessments and if the child requires accommodations or modifications on the assessments. 34 C.F.R. § 300.347(a)(5)(I). The child's IEP must include a statement of any accommodations or modifications on State or district-wide assessments. The IEP team will determine if the child will or will not participate in State and district-wide assessments. If the IEP team determines that the child will not participate, the team must state the reasons for their determination and provide appropriate alternative assessments.
- Children with disabilities are not exempt from participating in state or district-wide assessments, except for students with disabilities convicted as adults under State law and incarcerated in adult prisons. 34 C.F.R. § 300.311(b)(1). Improperly excluding a child with a disability from a state or district-wide assessment may violate Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act.
- Parental consent is not required for children with disabilities to participate in State and district-wide assessments. Parents may "opt out" of State and district-wide assessments for their children, but they must be provided with information about the consequences of opting out of these assessments.

Accommodations are changes in format, response, setting, timing, or scheduling of assessments that do not alter what the test measures or the comparability of scores. **Modifications** denote an alteration in what the test is supposed to measure or the comparability of scores. The term "modification in the administration" as used in 34

C.F.R. § 300.347 should be viewed as a general term about accommodations and modifications as these terms are used in assessment practice. Under 34 C.F.R. § 300.138, children with disabilities should be provided with "accommodations and modifications in administration, if necessary" that include the full range of accommodations and modifications used in assessment practice.

The IDEA requires states to ensure that the requirements for providing accommodations and modifications for students with disabilities in State or district-wide assessments are met. 34 C.F.R. § 300.600. State educational agencies must report to the public on the participation and performance of children on assessments. Every two years states must report to the Secretary of Education and to the public the progress of the State and of children with disabilities in the State toward meeting performance goals including performance on assessments, dropout rates, and graduation rates. 34 C.F.R. § 300.137.

State educational agencies are also required to report to the public, with the same frequency and detail as for non-disabled children, the performance results of children with disabilities who participate in regular and alternative assessments and aggregated data that include the participation of children with disabilities together with all children and disaggregated data on the performance of children with disabilities. 34 C.F.R. § 300.139. There is no requirement for disaggregation by category of disability. The requirement is only that the performance of children with disabilities be reported separately from the performance of non-disabled children. States must report performance data from alternative assessments in a manner that ensures that all children with disabilities are included in the accountability benefits of State and district-wide assessments.

Alternative assessment means an assessment designed for students with disabilities who are unable to participate in State or district-wide assessments, even when provided with accommodations or modifications. The need for an alternative assessment depends on the child's individual needs, not the nature or severity of the child's disability. Alternative assessments should be flexible enough to meet the needs of difficult-to-assess students with disabilities who need to demonstrate competency for graduation, promotion or a diploma. State and local educational agencies must develop alternative assessment guidelines for those children who cannot participate in State and district-wide assessments. 34 C.F.R. § 300.138. Guidelines established by states and school districts should be consistent.

An alternative assessment should assess, at a minimum, communication, mathematics, social studies, science, and other areas, as well as functional skills that the state or school district determines necessary. Whether the state alternative assessment is also an appropriate assessment for a local school district assessment depends on the type of alternative assessment selected, the content measured, and the purposes for which the test results will be used.

In states that have statewide assessment programs, local school districts must administer the state alternate assessment. Local school districts must develop and conduct alternative assessments if they use district-wide assessments, or they may use the State alternative, if appropriate.

The IDEA does not prohibit out-of-level testing (assessing students who are in one grade with tests designed for students in lower grades). But out-of-level testing may

not properly assess the content standards assessed with the "grade-level" assessments, and may run afoul of the requirement that performance goals for students with disabilities should be consistent, to the maximum extent appropriate, with the other goals and standards for all children established by the State. 34 C.F.R. § 300.137. Out-of-level tests are considered modified administrations of State or district-wide assessments and are not recognized alternative assessments.

G. OSEP Memorandum to Chief State School Officers (2001)

Key points of the 2001 Memorandum to Chief State School Officers include:

- The IEP team has the authority to determine accommodations and modifications for a student with a disability to participate in State or district-wide assessments of student achievement.
- The State educational agency and local school district must ensure that their assessments are valid, reliable, and consistent with professional and technical standards.
- The State educational agency and local school district can provide guidelines and training to help IEP teams make informed decisions about a student's accommodations or modifications. They can also monitor the use of accommodations, modifications, and alternative assessments for students with disabilities.
- If assessments are associated with high stakes for students with disabilities . . . then certain legal principles regarding the possible denial of benefits on the basis of disability apply. The IEP team should consider availability of less restrictive alternatives, fairness of process for involving and informing parents and students, and the possibility of using other evidence in lieu of a single score, and other factors.
- Incorporates and restates the requirements, recommendations, and provisions cited in the September 29, 1997 Joint Policy Memorandum on Assessments about accommodations, modifications, and reporting requirements for State and district-wide assessments of students with disabilities.
- Accommodations for assessments should be chosen because of the student's individual needs and should be consistent with accommodations provided during instruction.

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XII. Legal Challenges to High-Stakes Testing

A. First Amendment - Establishment Clause

Establishment Clause: *Triplett v. Livingston County Board of Education*, 967 S.W.2d 25, 31 (KY 1997). Court held that requirement for taking Kentucky's mandatory exit exam did not violate Establishment Clause because its purpose was secular; the exam did not advance or inhibit religion, and the exam did not foster government entanglement with religion.

Free Exercise Clause: *Triplett v. Livingston County Board of Education*, 967 S.W.2d 25, 32-33 (KY 1997) Court held that despite Triplett's religious practice, the State's interest in the improvement of the educational system was sufficiently compelling to require that all students take the exam.

B. Fourteenth Amendment - Procedural Due Process

1. *Mahavongsanan v. Hall*, 529 F.2d 448, 450 (5th Cir. 1976). Student received timely notice that she was required to take an exit exam and was given the option to complete additional courses in lieu of the exam, which provided her adequate due process protections.

2. *Debra P. v. Turlington*, 644 F.2d 397, 404 (5th Cir. Unit B 1981). Court declared Florida law unconstitutional under the Due Process Clause because it did not provide adequate notice for students to pass a statewide minimum competency test in order to receive a diploma, and test was fundamental unfair because covered material was not taught in Florida's schools.

3. *Brookhart v. Illinois State Bd. Educ.*, 697 F.2d 179, 186-87 (7th Cir. 1983). Court held that Due Process Clause of Fourteenth Amendment requires that students with disabilities be provided substantial notice and opportunity, which is more than eighteen months, to prepare for a minimum competency exit exam.

4. *Bester v. Tuscaloosa City Bd. of Educ.*, 722 F.2d 1514, 1516 (11th Cir. 1984). Students have no property right in an expectation that they will be promoted, despite objectively substandard class work, and they have no procedural due process claim.

5. *Anderson v. Banks*, 520 F. Supp. 472, 505 (S.D. Ga. 1981). Where a school ensured that an exam could be retaken, remedial courses would be provided, and students given more than two years notice of an exit exam, there was no procedural due process violation of students' rights.

6. *Crump v. Gilmer Indep. Sch. Dist.*, 797 F. Supp. 552, 555-57 (E.D. Tex. 1992). Court granted a temporary restraining order to students on grounds that the implementation period for Texas Assessment of Academic Skills (TAAS) was insufficient, and that matters tested under TAAS were not actually taught in schools, which violated the Due Process Clause. *Cf. Williams v. Austin Indep. Sch. Dist.*, 796 F.Supp. 251, 254-56 (W.D. Tex. 1992). Court denied a temporary restraining order to the student on grounds that student provided was adequate notice that he must pass the TAAS to graduate, and school courses adequately prepared him to take the TAAS, which satisfied the Due Process Clause.

7. *Erik V. v. Causby*, 977 F. Supp. 384 (E.D. NC 1997). Students failed to establish that there is any property right in promotion that triggers procedural protections under Due Process Clause.[171]

8. *GI Forum v. Texas Educational Agency*, 87 F. Supp.2d 667, 682-83 (W.D. Tex. 2000). Court ruled there was no due process violation on the ground that the Texas Educational Agency provided adequate notice of the consequences of TAAS and ensured that the exam was correlated to material actually taught in the classroom.[172]

9. *Bd. of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 107 Misc.2d 830,843, 436 N.Y.S.2d 564, 573-575 (1981), *aff'd in part, rev'd in part*, 458 N.Y.S.2d 680, 680, 684-85 (A.D. 1982), *aff'd*, 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, 776 (Ct. App. 1983), *cert. denied*, 465 U.S. 1101 (1984). There was no violation of the Due Process Clause because students had no reasonable expectation of receiving a high school diploma without completing a competency exam, and were given three years advance notice of the requirements of the exit exam prior to graduation.

10. *Rene Ex Rel Rene v. Reed*, 751 N.E.2d 736, 742-42 (Ind. App. 2001). There was no due process violation when students were provided adequate notice of competency exam requirements.[173]

C. Fourteenth Amendment - Substantive Due Process [174]

GI Forum v. Texas Educational Agency, 87 F. Supp.2d 667, 682-83 (W.D. Tex. 2000). A state educational determination may be invalid under substantive due process analysis when they reflect a "substantial departure from accepted academic norms to demonstrate that the person or committee responsible did not actually exercise professional judgment." [175]

D. Fourteenth Amendment - Equal Protection [176]

1. *Sandlin v. Johnson*, 643 F.2d 1027, 1029 (4th Cir. 1981). Classifying students for promotion on the basis of a reading level determined by the Ginn Reading Series was rationally related to permissible governmental interests in education and passed muster under equal protection.

2. *Debra P. v. Turlington*, 730 F.2d 1405, 1409-1417 (11th Cir. 1984). There is no equal protection claim when the apparent unfairness in causing failure of black students on the exit exam is outweighed by the demonstrated effect of diploma sanctions on remedying the greater unfairness of functional illiteracy, which helps remedy vestiges of past discrimination.

3. *Larry P. v. Riles*, 793 F.2d 969, 984 (9th Cir. 1984). Plaintiffs' equal protection claim fails because pervasiveness of discriminatory effect without more cannot be equated with discriminatory intent required by *Washington v. Davis*. [177]

4. *Georgia State Conf. of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1414-16 (11th Cir. 1985). Ability grouping is not unconstitutional under the Equal Protection Clause, even when it results in racial disparity in classrooms and when ability group schemes will remedy consequences of past racial segregation.

5. *Anderson v. Banks*, 520 F. Supp. 472, 498-503 (S.D. Ga. 1981). The school district's exit exam policy violated the Equal Protection Clause of Fourteenth Amendment.

6. *Rankins v. Louisiana State Bd. of Elementary and Secondary Educ.*, 637 So.2d 548, 555 (La. Ct. App. 1994). Court held there was no violation of the Equal Protection Clause because students in non-public schools and home-based study programs were not treated differently from all similarly treated students, and the

test bore a rational relationship to the State of Louisiana's interest in ensuring the minimum competency of students obtaining a high school diploma.[178]

7. *Bd. of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 107 Misc.2d 830, 436 N.Y.S.2d 564, 571 (1981), *aff'd in part, rev'd in part*, 458 N.Y.S.2d 680, 689 (A.D. 1982), *aff'd*, 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, 776 (Ct. App. 1983), *cert. denied*, 465 U.S. 1101 (1984). Court held there was no violation of the Equal Protection Clause because students with disabilities do not constitute suspect classification and equal protection test and there is a rational basis for governmental interest in implementing exit exams as it improves educational services to students, provides remediation, and improves value of high school diploma.

E. Title VI of the Civil Rights Act

1. *Erik V. v. Causby*, 977 F. Supp. 384, 390 (E.D.N.C. 1997). Minority students failed to show that a Board policy that provides students in grades 3 through 8 who not receive passing scores on state-developed standardized test will be retained treats minorities more harshly than white students.

2. *Anderson v. Banks*, 520 F. Supp. 472 (S.D. Ga. 1981). Court held that Georgia's high school exit exam violated Title VI of the Civil Rights Act because it imposed diploma requirements on black students who attended substandard segregated schools and were subject to tracking systems in a school district. See also *Debra P. v. Turlington*, 644 F.2d 397, 407 (5th Cir. Unit B 1981). African-American students received inferior education compared to white students so that immediate use of diploma sanction would be unfair and would punish black students for deficiencies created by dual school systems.

3. *Graves v. Alabama State Bd. of Educ.*, 776 F. Supp. 1518, 1523 (M.D. Ala. 1991). Redress is available under Title VI for facially neutral "actions having an unjustifiable disparate impact on minorities." [179]

4. *GI Forum v. Texas Educational Agency*, 87 F. Supp.2d 667, 677-682 (W.D. Tex. 2000). The TAAS test adversely affects minority students, but the Texas Educational Agency demonstrated educational necessity for the test and there are no equally effective alternatives, therefore TAAS exit exam does not violate regulations promulgated under Title VI of the Civil Rights Act of 1964.

F. Title IX of the Civil Rights Act

Sharif v. New York State Educ. Dept, 709 F. Supp. 345, 361 (S.D. N.Y. 1989). Plaintiffs used the disparate impact test to show that exclusive use of the SAT to award merit scholarships to disadvantaged female applicants violated Title IX of the Civil Rights Act.

G. Section 504 of the Rehabilitation Act of 1973

1. *Brookhart v. Illinois State Bd. Educ.*, 697 F.2d 179, 184(7th Cir. 1983). Court held that students with learning disabilities do not meet the requirement of "otherwise

qualified" under Section 504 so denial of a diploma because they could not pass the exit exam is not discriminatory.

2. *Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1984). Plaintiffs establish prima facie case under Title VI by showing that tests have a discriminatory impact on black students so the burden shifts to the defendants to demonstrate requirements that caused disproportionate discrimination educationally necessary. Here, defendants failed to show educational necessity for using I.Q. tests to place black students in classes for the educable mentally retarded). But see *Georgia State Conf. of Branches of NAACP v. State of Georgia*, 775 F.2d 1403, 1416-1420 (11th Cir. 1985). Defendants rebutted plaintiffs' prima facie case of disparate impact by establishing educational necessity for achievement grouping.

3. *Georgia State Conf. of Branches of NAACP*, 775 F.2d 1403, 1428 (11th Cir.1985). Plaintiffs must prove intentional discrimination or bad faith to obtain monetary damages under Section 504.

4. *Anderson v. Banks*, 520 F. Supp. 472, 510-12 (S.D. Ga. 1981). Court held that Section 504 regulations provide a claim for relief for those who were misclassified as disabled. But court held that school authorities have not engaged in unlawful discrimination under Section 504 against those students with disabilities who cannot meet a certain standard of academic achievement because of their disability.

5. *Ellis v. Morehouse School of Medicine*, 925 F. Supp. 1529, 1549 (N.D.Ga. 1996). Court held that a medical student who suffered from dyslexia did not prove he could not perform the essential requirements necessary for a medical student despite his disability or with reasonable accommodation, and thus he did not meet the requirement of "otherwise qualified" under Section 504.

6. *Bd. of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 107 Misc.2d 830, 836, 436 N.Y.S.2d 564, 569-70 (1981), *aff'd in part, rev'd in part*, 458 N.Y.S.2d 680, 688 (A.D. 1982), *aff'd*, 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, 776 (Ct. App. 1983), *cert. denied*, 465 U.S. 1101 (1984). Court held that denial of a diploma based upon inability to pass an exit exam is not denial of a benefit "solely by reason of" a handicap; Section 504 requires that a handicapped student be provided with an appropriate education but does not guarantee that the student will successfully meet the requirements for a diploma.

7. *Hawaii State Dept. of Educ.*, 17 EHLR 360 (OCR 1990). The Office of Civil Rights determined that the State educational agency (SEA) failed to consider, on an individual basis, whether students with disabilities required reading assistance during an exam. The SEA denied those students, and those similarly situated, an equal opportunity to pass exam in violation of Section 504 regulation, 34 C.F.R. 104(b)(1)(vii) and (b)(2)).

H. Individuals with Disabilities Education Act

1. *Larry P. v. Riles*, 793 F.2d 969, 981 (9th Cir. 1984). A school district improperly used I.Q. tests that have not been validated to place black students in "educable mentally retarded" (E.M.R.) special educational classes, which violated the Education for All Handicapped Children Act.

2. *Bd. of Educ. of Northport-East Northport Union Free Sch. Dist. v. Ambach*, 107 Misc.2d 830, 836, 436 N.Y.S.2d 564, 570 (1981), *aff'd in part, rev'd in part*, 458 N.Y.S.2d 680, 688 (A.D. 1982), *aff'd*, 469 N.Y.S.2d 669, 60 N.Y.2d 758, 457 N.E.2d 775, 776 (Ct. App. 1983), *cert. denied*, 465 U.S. 1101 (1984)(1981). The award of diploma is not a necessary component of a "free appropriate public education," and the denial of a diploma for failure to pass an exit exam is not a violation of the EHA.

3. *Brookhart v. Illinois State Board of Education*, 697 F.2d 179, 182-83 (7th Cir. 1983). The denial of diplomas to children with disabilities who qualified to receive special education and related services under the IDEA, but who were unable to pass the Minimal Competency Test, is not a denial of a "free appropriate public education." [180]

4. *Rene Ex Rel Rene v. Reed*, 751 N.E.2d 736, 742-42 (Ind. App. 2001). The state is not required to honor certain accommodations in students' IEPs under the IDEA where they would affect the validity of test results, such as reading of test questions that are meant to test reading skills and comprehension.

I. Burden of Proof in Establishing the Adverse Impact of High-Stakes Testing

Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000(d) *et seq.*, 34 C.F.R. 100.3, the plaintiff bears the burden of proof to establish the adverse impact of the high-stakes test. If that burden is met, then the burden of proof shifts to the school to establish an educational justification for the test use. If the school establishes educational justification, then the burden shifts back to the plaintiff to show that there are less discriminatory alternatives that are practicable and that would effectively meet the educational objectives of the school. *GI Forum v. Texas Educational Agency*, 87 F. Supp.2d 667, 677-682 (W.D. Tex. 2000).

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XIII. Reasonable Accommodations and Modifications for Testing

(**Note:** Section XI, Subsection F "OSEP Policy Memorandum: Questions and Answers about State and District-wide Assessments under the IDEA" includes an explanation and description of the differences between Accommodations, Modifications, and Alternate Assessments.)

OCR and SEA Decisions

1. *Alabama Dept. of Educ.*, 29 IDELR 249 (OCR 1998). The student was provided with approved testing modifications on the high school exit exam, such as testing in a small group setting, large test print, math and language sections read aloud, marked answers in a test booklet. The student was not permitted to use an Arkenstone scanner as a modification during the reading subtest because it would not measure his ability to read and comprehend, but only his listening skills. The reading subtest assessed whether the student could read well enough to comprehend everyday material. A scanner could be used for math and language subtests on the exam. OCR determined there was no violation of Section 504 and Title II of the ADA.

2. *Florida State Dept. of Educ.*, 28 IDELR 1002 (OCR 1998). The Department of Education's rules and guidelines did not allow reading items on the communication skills section of the high school competency exam to be read as an accommodation, because it may invalidate the validity of the exam. OCR found no violation of Section 504 and Title II of the ADA.

3. *Virginia Dept. of Educ.*, 27 IDELR 1148 (OCR 1997). OCR found no violation of Section 504 and Title II of the ADA because the state's norm-referenced test was used to measure the student's academic achievement, and was not for educational or placement purposes; the student had test questions read to him, but this invalidated his scores on the reading portion of the test.[181]

4. *Georgia Dept. of Educ.*, 27 IDELR 1072 (OCR 1997). OCR determined that modifications requested by the student to take the exam were not called for in the student's IEP and were consistent with the student's primary method of communication. There was no violation of Section 504 and Title II of the ADA.

5. *Mobile County (AL) Bd. of Educ.*, 26 IDELR 695 (SEA 1997). A hearing officer found that Alabama's High School Exit Exam is a criterion-referenced test. Students with disabilities were afforded accommodations such as an unlimited opportunity to pass the exam. The state's policies and procedures in denying students to have certain portions of exam regarding language and math read to them did not violate Section 504 and Title II of the ADA.

6. *Santa Paula (CA) Unified High Sch. Dist.*, 26 IDELR 1021 (OCR 1997). OCR found insufficient facts to support a claim that the district discriminated against the student by failing to provide that he take all tests orally, or take tests in Resource Specialist's class.

7. *Nevada State Dept. of Educ.*, 25 IDELR 752 (OCR 1996). OCR determined that there was no violation of Section 504 and Title II of ADA because the state's required 11th grade exit exam tested basic skills that were an essential part of its educational program. Students with disabilities were provided accommodations, including extra time, pass scores were set relatively low, and no student failed the test due to the state's failure to provide a calculator.

8. *Northeast (TX) Indep. School Dist.*, 23 IDELR 52 (OCR 1995). OCR found that a district was not at fault for failing to identify child as a student with a disability, so district was not obligated to provide accommodations for a reading test.

9. *Huntsville (AL) City Bd. of Educ.*, 21 IDELR 767 (SEA 1994). A hearing officer ruled that a child was not denied a free appropriate public education because the district denied reading accommodations for retaking of the language portion of the Alabama High School Graduation Examination.[182]

10. *Birmingham (AL) Bd. of Educ.*, 20 IDELR 1281 (SEA1994). A hearing officer ruled that a student with a disability should have been provided a reading accommodation on the math portion of the Alabama High School Graduation Examination.[183]

11. *Hawaii State Dept. of Educ.*, 17 EHLR 360 (OCR 1990). OCR determined that requiring students to complete sections of test that measure reading competency

without a reader is not discriminatory under Section 504 and Title II of the ADA but failure to provide a reader for students with learning disabilities on other sections of the test not intended to measure reading competency is discriminatory.

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XIV. Challenges to High-Stakes Testing for Students with Learning Disabilities

Administering high-stakes tests to students with learning disabilities is challenging for several reasons. Several lawsuits have been filed in recent years. [184]

A. Problems in Administering Tests

Students with learning disabilities encounter an array of problems in taking standardized tests. These problems include errors in "omission of low information load words, such as auxiliaries, modals, prepositions, pronouns, or conjunctions; distorted word orders; lack of punctuation; limited word choice; and problems using multiple meanings of words." [185]

Students with learning disabilities also may have problems with spelling and word formation. Students with written language deficits (known as dysgraphia) find this is a serious impediment to test taking. In addition, multiple-choice tests do not provide sufficient context for students with learning disabilities. Thus, standardized tests often test the student's disability rather than the student's ability. [186] For these reasons, students with learning disabilities have the right to reasonable accommodations on standardized tests so these tests demonstrate knowledge and skills, not limitations caused by the disability. [187]

B. Reasonable Accommodations

Reasonable testing accommodations for students with learning disabilities may include, but are not limited to, extended time, the use of computers or word processors, dictation machines, the use of a scribe or reader, and audio test materials. "The IEP or Section 504 team and the parent or guardian of the student should jointly decide what accommodations and assessments the student will take." [188]

C. Alternative Assessments

There are a number of alternative methods by which students with disabilities can be assessed. These methods include, but are not limited to, portfolio-based assessments; interviews and oral presentations; constructed responses (student produces own answers instead of selecting answers from a set format); experiments to test student's understanding of scientific concepts; and interdisciplinary projects that can demonstrate a broad range of competencies, skills, and knowledge. [189]

D. Cases

1. *Advocates for Special Kids v. Oregon Board of Education*, Case No. CV-99-263 filed February 24, 1999 (D. Or. 1999). In this class action lawsuit against the Oregon

State Board of Education for imposing discriminatory high-stakes testing requirements for children with learning disabilities, the parties settled the lawsuit in February 2001. The settlement provides, in part, that the Oregon Board of Education will modify its current high-stakes testing system for students with disabilities so they can demonstrate their abilities instead of being tested on their disabilities.[190]

2. *Chapman et al v. California Department of Education*, 36 IDELR 91 (N.D. Calif. 2001). The California Board of Education was ordered to provide accommodations on the California High School Exit Exam (CAHEE) for more than 45 students with learning disabilities. The Board of Education was required to develop alternative methods to assess the knowledge and skills of students who do not pass the exam, *rev'd in part, and remanded*.

Smiley v. California Department of Education, 37 IDELR 219 (9th Cir. 2002). Court upheld part of the district court's decision permitting accommodations that are necessary for students to take the CAHEE, but held that students did not meet burden of showing probable success on the merits, and that students' challenge to the state's waiver provision was not ripe for adjudication.[191]

3. *Alexander Noon, et al. v. Alaska Department of Education and Anchorage School District*, Case number A04-0057 CV filed on March 16, 2004. This class action lawsuit charged that Alaska's exit exam discriminates against students with disabilities in multiple ways and ensured that students with disabilities will fail. Three areas of concern related to IDEA were cited: children with disabilities need to have reasonable accommodations; children with disabilities need to have an alternative way to be assessed; children should not be tested on things they have not been taught or required to learn.[192] [Complaint in Noon v. Alaska Dept of Ed.](#)

Note: On August 2, 2004, Noon v. Alaska Dept of Ed. was settled. [Settlement agreement](#).

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XV. Conclusion

Since the 1980's, state educational agencies and school districts have relied increasingly on high-stakes tests. The shift back to using high stakes testing on at levels of the educational continuum is due, in part, to pressure on the administration and Congress from the public and other stakeholders who expect government to be accountable to its citizens. Whether high stakes testing is a panacea for our nation's educational woes is yet to be determined.

While the verdict is still out on high-stakes tests, a growing number of states jumped on the testing bandwagon to comply with the No Child Left Behind Act. What does this mean for students with disabilities and minorities who lag far behind their nondisabled peers in test scores and graduation rates?

No one knows the fate of minorities and students with disabilities who must pass a high-stakes test to graduate from high school, or to be promoted to the next grade. If present trends continue, the unacceptably high drop-out rate for students with disabilities may worsen. More minority students may leave school before graduation, resulting in countless youth who are unable to obtain gainful employment, self-sufficiency, and independence in their communities. If a primary purpose of high-

stakes tests is to improve student educational performance, such tests must benefit **all** students.

Politicians like to use the popular phrase, "a rising tide will lift all boats" to describe how cuts in federal income tax rates will benefit all citizens, not just the wealthy. In reality, the gap between the wealthy and poor continues to grow, despite decreases in federal income tax levels. Similarly, high-stakes tests have not substantially improved the educational performance of all students, including students with disabilities and minorities. We expect educators and administrators to publicize high-stakes test successes, while ignoring or hiding the results of students who are becoming invisible in the educational system.

A solution may be to use standardized tests as one of several measures or indicators of student learning. States that adopted this plan have shown promising gains in student performance. As evidence and research shows that high-stakes tests should not be used as the sole measure of student learning, states may heed this warning and judiciously consider the breadth and scope of such tests. Until the states wage a political battle to prevent high-stakes tests from overshadowing the academic accomplishments of **all** students, we will achieve only partial success in curing our nation's educational woes.

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Appendix and Resources

I would like to thank Peter Wright, Pamela Wright and Suzanne Heath for their review and comments on this article, and for their excellent feedback and editing.

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Amrein, A.L. & Berliner, D.C. (2002) High-stakes testing, uncertainty, and student learning Education Policy Analysis Archives, 10(18). <http://epaa.asu.edu/epaa/v10n18/>

Disability Rights Advocates. <http://www.add.org/content/school/list.htm>

Educational Policy Reform Research Institute, U.S. Department of Education, Office of Special Education and Rehabilitative Services. Study explores the impact of educational accountability reform on students with disabilities at the system and individual levels. <http://www.eprri.org/about.html>

HumRRO (2000-2004). Evaluation of the California High School Exit Exam sponsored by the California State Department of Education. This study provides an independent evaluation of California's high school exit exam (CAHSEE) in terms of quality, fairness, and consequences. <http://www.cde.ca.gov/ta/tg/hs/evaluations.asp>

National Center on Educational Outcomes. <http://education.umn.edu/NCEO/OnlinePubs/Synthesis26.htm>

National Center on Educational Outcomes (NCEO)(2002-2003). Intended and Unintended Consequences Project by the U.S. Department of Education, Office of Special Education Programs. Thi study is designed to evaluate the intended and unintended consequences of large-scale assessments and accountability system for students with disabilities.

<http://education.umn.edu/NCEO/projects/projdefault.html>

Sussan & Greenwald, Esqs. High Stakes Testing: http://www.special-ed-law.com/high_stakes_testing.htm

The American Diploma Project (2001-2003). Study conducted by ACHIEVE, the Education Trust, the Fordham Foundation, the Hewelett Foundation, and the National Alliance of Business to align high school exit exams with expectations of higher education and employers, and to develop and solidify demand for standards-based high school assessment data in the admissions and hiring processes.

<http://www.achieve.org/achieve.nsf/AmericanDiplomaProject?openform>

U.S. Department of Education, Office for Civil Rights:

<http://www.ed.gov/about/offices/list/OCR/index.html/?src=mr>

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Mr. Togut is a frequent speaker in the areas of special education and disability rights at local, regional and national conferences. He is a graduate of Cornell University (B.S. 1973) and University of LaVerne College of Law (J.D. 1976). He is a member of the Vermont and Georgia Bars. He is admitted to practice before the federal district court in Vermont, the federal district courts in the Northern District, Middle District, and Southern District of Georgia, the Second Circuit and Eleventh Circuit Court of Appeals, and the United States Supreme Court.

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Endnotes

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