DOCUMENT RESUME

ED 450 460 EA 030 878

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TITLE Student Testing and Assessment: Answering the Legal Questions.

INSTITUTION National School Boards Association, Alexandria, VA. Council of School Attorneys.

ISBN ISBN-0-88364-239-5

PUB DATE 2000-09-00

NOTE 84p.

AVAILABLE FROM NSBA Distribution Center, P.O. Box 161, Annapolis Junction, MD 20701. (Item Number 06-178-W, $25). Tel: 800-706-6722 (Toll-Free); Fax: 301-604-0158; Web Site: http://www.nsba.org; e-mail: info@nsba.org.

PUB TYPE Guides - Non-Classroom (055)

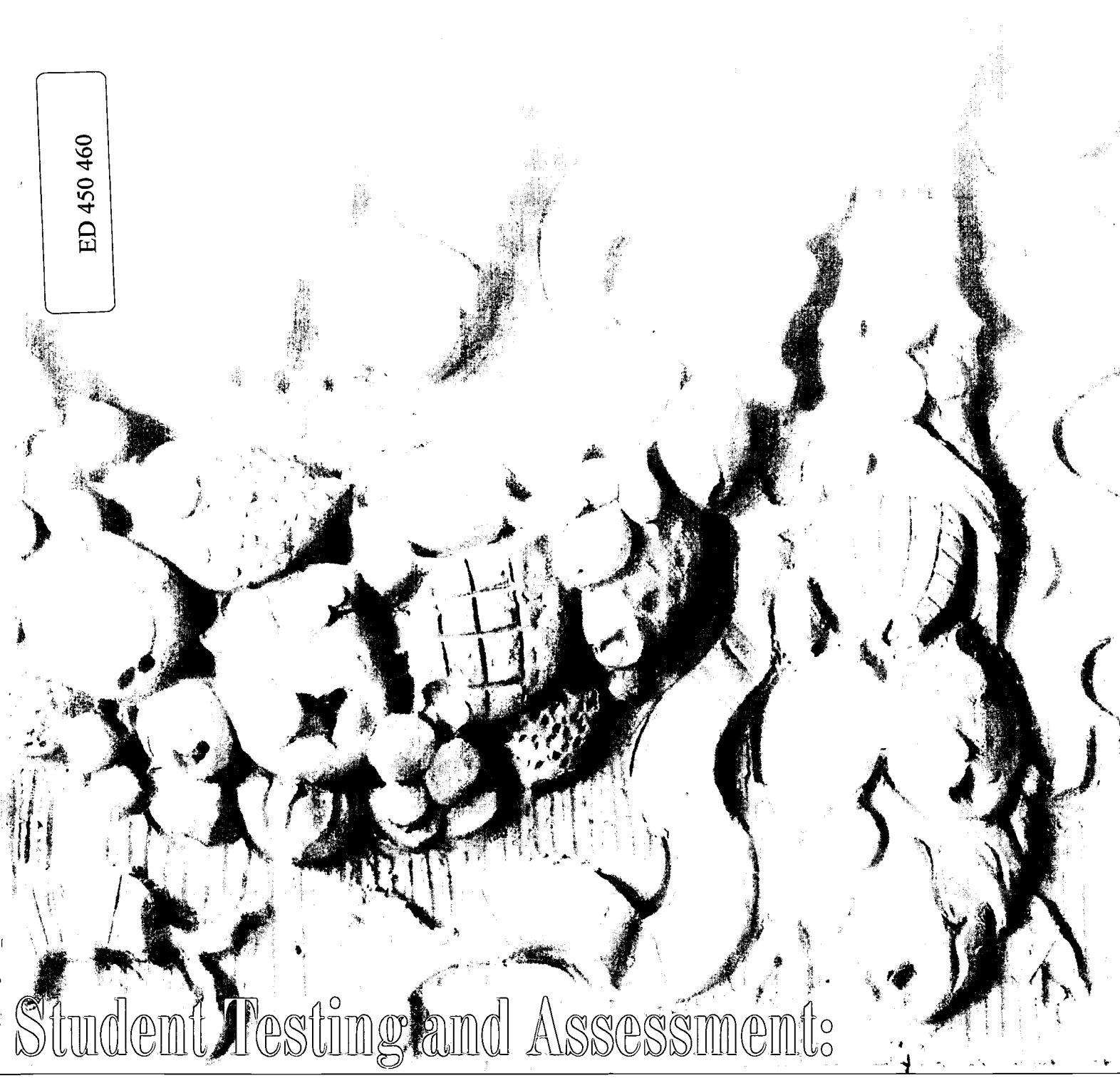
EDRS PRICE MF01/PC04 Plus Postage.

DESCRIPTORS Academic Achievement; Compliance (Legal); Court Litigation; Disability Discrimination; *Educational Assessment; *Educational Discrimination; Elementary Secondary Education; High Stakes Tests; *Institutional Evaluation; Laws; *Legal Responsibility; *Student Evaluation; Test Interpretation; Test Validity; Testing; *Testing Problems; Testing Programs

IDENTIFIERS Department of Education; Improving Americas Schools Act 1994; National School Boards Association

ABSTRACT

This guide examines the legal issues to consider in setting policy on the appropriate uses, and consequences, of student testing, and explores the controversies that have arisen in places where new polices were implemented. Chapter 1, "An Overview of Student Testing and Assessment," provides a brief overview of some of the state and federal legal implications of high-stakes testing. Several state programs are examined in greater detail, including Virginia's Standards of Learning program, the Massachusetts Comprehensive Assessment System initiative, and California's Standardized Testing and Reporting program. Chapter 2, "A Framework for Addressing Student Test Use Issues," explores lessons attorneys should draw from federal jurisprudence, research, practice, and psychometric principles, including the need to understand testing objectives, the need to align curriculum, instruction, and testing content, and limits in use of testing. Chapter 3, "Due Process and Discrimination Issues in High-Stakes Testing," reveals several important legal issues that must be considered during the controversial process of designing and using high-stakes testing. Chapter 4, "Special Considerations in High-Stakes Testing," investigates the testing of students with disabilities under the Individuals with Disabilities Education Act, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Chapter 5, "Using Student Test Results to Evaluate Educational Professionals and Institutions," evaluates case law germane to high-stakes testing. (TEJ)



Student Testing and Assessment:

Answering the Legal Questions

A Publication of the NSBA Council of School Attorneys

Student Testing and Assessment: Answering the Legal Questions

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September 2000

About the NSBA Council of School Attorneys . . . .

Leadership in legal advocacy for public schools has been the overriding mission of the NSBA Council of School Attorneys throughout its celebrated history. Almost 3,000 members strong today, the Council was formed in 1967 to provide information and practical assistance to attorneys who represent public school districts. It is the only national advocacy organization composed exclusively of attorneys representing school boards. It offers continuing legal education, specialized publications, a forum for exchange of information, and it supports the legal advocacy efforts of the National School Boards Association. For information on membership, contact your state school boards association or the NSBA Council of School Attorneys.

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ISBN 0-88364-239-5

Single copies of this publication can be obtained from NSBA for $25.00 ($20.00 NSBA National Affiliate school district or Council of School Attorneys member) plus $7.00 for shipping and handling. See end of this publication for order information.

STUDENT TESTING AND ASSESSMENT: ANSWERING THE LEGAL QUESTIONS is a publication of the NSBA Council of School Attorneys. NSBA's Office of General Counsel and Office of Constituent Services provide professional and executive staff support to the Council and its varied programming for school attorneys across the United States. For more information about Council membership, publications and programs, call NSBA at 703/838-6722; write NSBA Council of School Attorneys, 1680 Duke Street, Alexandria, Virginia 22314; or visit the Council Web site at: http://www.nsba.org/cosa/

FOREWORD

Helping school board members to lead efforts to raise student achievement in their school districts is a priority of the National School Boards Association. In keeping with this effort to promote excellence in education, the Council of School Attorneys presents *Student Testing and Assessment: Answering the Legal Questions.* Intended to help school attorneys understand the legal issues that have emerged over student testing as a component of the current reforms, this book first provides some context to that discussion by briefly looking at the some of the testing programs being used across the nation and examining some pertinent federal developments. An overall framework for evaluating the legal integrity of testing policies is also set forth. The following chapters analyze the key legal issues surrounding testing used for high-stakes purposes including discrimination, due process, testing of students with disabilities and English language learners, and the use of student test scores to evaluate educational professionals and institutions. The appendices include excerpts from several federal documents concerning student testing, some recommendations from a national study of high-stakes testing, state statutory references on standards and assessments and a list of other useful resources on this subject.

While these articles strive to provide accurate legal information, they are not intended to be legal advice. When questions arise concerning policies or practices with respect to student testing, a qualified professional should be consulted.

I wish to thank the school attorneys who contributed their time and expertise to this publication. I also recognize the efforts of all the NSBA staff members who prepared these articles for publication.

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Naomi E. Gittins
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INTRODUCTION

Ensuring that students achieve to high standards is the mission of public education. How can we determine whether our schools are successfully meeting this goal and that student academic achievement is improving? Using a time honored tradition, many states have decided that testing students, using standardized examinations, to see how well they do is one of the assessment tools that makes the most sense. But what sounds like a simple educational proposition has turned out to be anything but that. The problems and controversies about student testing occur at many levels besides the educational, which by themselves are difficult enough. Overlaying the educational complexities that surround testing are other issues staggering in magnitude—political, social, economic, and legal. This book examines only the legal issues that should be considered in setting policy on the appropriate uses and consequences of student testing. It also explores the legal controversies that have already arisen or that could emerge when those policies are actually implemented. To help give context to the extended discussion in the following chapters, here is a short overview of some of the state and federal legislative and agency activities with legal implications for high-stakes student testing. A few brief state profiles are included as examples.

STATE ACTIVITY

Legislative and Regulatory Trends

- **Standards and Assessments**[1]

Virtually all states have adopted minimum "standards" that outline what students need to know in certain academic areas. As of 1999 more than 40 states were using student assessments (including norm-referenced tests, criterion-referenced tests, performance assessments and portfolios) to measure student achievement against these standards and to hold students, teachers, schools and districts accountable. (See Appendix F for state-by-state statutory references on standards and assessments.) To measure gains in achievement, scores from tests are used separately or in combination with other factors. Some of these accountability systems compare the current year's scores with previous year(s) in reference to a state or national standard. Comparisons may be made between classes at a certain grade level, among schools within a district or among different school districts. Group comparison is used more often than individual tracking because of the difficulties in measuring individual progress where student populations are mobile.[2]

1. This discussion of standards and assessment is based on information contained in Judith K. Mather, PERFORMANCE-BASED ACCOUNTABILITY SYSTEMS (Education Commission of the States, 1999).

2. Only four states mandate collection of data on student mobility: Alaska, Colorado, Illinois and Nevada. *Id.*

STATES WITH LEGISLATIVE AUTHORITY TO REMOVE PRINCIPAL OF SCHOOL

Alabama	Michigan
Delaware	Nevada
Illinois	New York
Kansas	North Carolina
Louisiana	South Carolina

STATES WITH LEGISLATIVE AUTHORITY TO RECONSTITUTE, TAKE OVER OR CLOSE SCHOOLS

Alabama	Michigan	Oklahoma
Illinois	Nevada	Rhode Island
Indiana	New Mexico	South Carolina
Kansas	New York	Texas
Louisiana	North Carolina	Vermont
Maryland		

Source: Education Commission of the States, *State Education Leader*, Vol. 18, No. 1 (Winter 2000). Reprinted with permission from ECS, 707 17th St., Denver, CO 80202-3427. © 2000 ECS.

- **District or School Rewards for Student Performance** [3]

By 1999, 17 states were providing rewards to districts and schools based on gains in student performance. Most of the rewards are monetary, but some states also provide waivers from assessment rules and regulations.[4] Experts disagree as to whether rewards are effective, noting that they can motivate changes, but the improvements may be not be enduring. Rewards for student performance have also raised fairness issues, with many claiming that assessment measures such as scores on standardized tests are not valid and reliable indicators of student achievement or the school's or district's efforts to provide students with a high quality education. Some claim that one time monetary rewards are also limited in value because the appropriation of funds must be sustained over time if it is to enhance educational quality in a real sense.

- **District or School Sanctions for Student Performance** [5]

A far larger number of states (35) impose sanctions when students fail to achieve minimum standards.[6] Some of the more commonly used state sanctions are: letter of warning or notification; require development of improvement plan; placement on public list of low performing districts/ schools;[7] impose implementation of improvement plan; provide additional funds; state assistance team or probation manager assigned; enrollment options, *e.g.*, permitting students in low performing schools to transfer;[8] loss of accreditation; reconstitution;[9] reorganization (see box), takeover[10] and school closure.

3. *Id.*

4. More commonly, waivers are granted not as a reward for improving student achievement but rather as a form of assistance to allow a school or district flexibility in attempting to raise student achievement through a plan or program that would be otherwise impermissible under current regulations.

5. This discussion of possible sanctions relies on information contained in *How States are Responding to Low-Performing Schools,* STATE EDUCATION LEADER, Vol. 18, No. 1, at 13 (Education Commission of the States, Winter 2000).

6. Sometimes the sanctions or interventions are part of a school accreditation system that considers other indicators in addition to student achievement. These factors may include: attendance, drop-out rates, student discipline statistics and faculty credentials.

7. Twenty-one states either currently or plan in the near future to issue overall ratings of their schools based largely on student performance as measured by student test scores on standardized tests and other academic indicators. Lynn Olson, *Worries of a Standards "Backlash" Grow,* EDUCATION WEEK, April 5, 2000.

8. As of January 1999 seven states (Kentucky, Louisiana, Oklahoma, New York, North Carolina, Texas and West Virginia) allowed such transfers.

9. The first reconstitution occurred in San Francisco in 1983. Districts in at least six other states (Colorado, Illinois, Maryland, New York, Ohio, and Texas) have undergone reconstitution since then.

10. Takeovers may be implemented in several different ways, *e.g.*, changing a public school to a state-run charter school or shifting control to other local or state officials.

- **High-Stakes Consequences for Students**[11]

At least 27 states and Puerto Rico have enacted statutes requiring students to take high school exit examinations as a condition of graduation (see box). In some of these states the requirement does not become effective for several years. Administered at varying points during the high school years, these tests are sometimes used to determine which students need remediation to meet the standards. Students may be provided several opportunities to pass the exams. A few states[12] use tests to award endorsed or honors diplomas. At least 17 states base promotion and retention decisions on state and/or district assessment (see box).

STATES WITH HIGH SCHOOL GRADUATION EXIT EXAMINATIONS*

Alabama	Maryland	Ohio
Alaska	Massachusetts	Puerto Rico
Arizona	Minnesota	South Carolina
California	Mississipi	Tennessee
Delaware	Nevada	Texas
Florida	New Jersey	Utah
Georgia	New Mexico	Virginia
Hawaii	New York	Washington
Indiana	North Carolina	Wisconsin
Louisiana		

*As of July 31, 1999

Source: National Governor's Association, as reprinted in Education Commission of the States, *State Education Leader,* Vol. 18, No. 1, at 11 (Winter 2000). Reprinted with permission from ECS, 707 17th St., Denver, CO 80202-3427. © 2000 ECS.

- **Teacher Evaluation**

At least five states (Delaware, Kansas, Kentucky, Tennessee, Texas) link teacher evaluation to student examination scores.[13] Under Delaware's new law student scores on state and local assessments count for at least 20% of teacher and administrator performance reviews.[14] Other states are considering how to do this, but are finding it to be a difficult political issue. Some local schools do it to avoid losing state aid. For example, Baltimore, Maryland began using test scores to evaluate teachers in 1996. Under Baltimore's system teachers are given training if their students do not improve after one year and are dismissed if student performance does not

STATES THAT BASE PROMOTION AND RETENTION ON STATE AND/OR DISTRICT ASSESSMENT

Arizona	Connecticut	Louisiana	North Carolina
Arkansas	Delaware	Michigan	Oklahoma
California	Florida	Mississsippi	South Carolina
Colorado	Illinois	New Mexico	Texas
			Wisconsin

Source: "State Student Promotion/Retention Policies," ECS Web site, www.ecs.org, as reprinted in Education Commission of the States, *State Education Leader,* Vol. 18, No. 1, at 11 (Winter 2000). Reprinted with permission from ECS, 707 17th St., Denver, CO 80202-3427. © 2000 ECS.

11. This discussion of high-stakes consequences for students is based on information contained in tables found in Education Commission of the States, STATE EDUCATION LEADER, Vol. 18, No. 1, at 11 (Winter 2000).

12. Massachusetts, Michigan, Ohio, New York and Tennessee. STATES CONDUCTING STUDENT COMPETENCY TESTING FOR HIGH SCHOOL GRADUATION (Education Commission of the States, August 1999).

13. TEACHER EVALUATION (Education Commission of the States Information Clearinghouse Sept. 1997); Joetta Sack, *Del. Ties School Job Reviews to Student Tests,* EDUCATION WEEK, May 3, 2000.

14. J. Sack, *Del. Ties School Job Reviews, supra,* n. 13.

improve by the third year.[15] Of course, many districts discuss student performance with teachers during evaluations, but don't directly link the two.

- **Alignment Problem**

State efforts to measure student achievement through standardized tests and to hold the various stakeholders (students, teachers, schools and districts) accountable based on test scores have encountered many problems. In some states, one of the most troublesome from a legal and educational point of view, is the problem of non-alignment between standards, assessments, rewards and sanctions. This happens when states use national standardized tests or administer state examinations that are not linked to their standards or when standards and curriculum don't match. This has resulted in part from the failure to coordinate the various pieces of legislation (which may have been enacted separately over time, rather than simultaneously) that mandate the content standards, require assessment, grant rewards and impose sanctions.[16] Others believe that the problem is largely caused by districts refusing to relinquish control over curriculum. Yet still others say it's a matter of resources—with teachers being required to teach new curriculum without the necessary support such as appropriate textbooks, instructional materials and training.[17] This situation has caused many to cry foul. Their complaint, which in some cases has been made through legal channels, is that it is basically unfair to make decisions about student, teacher, school and district performance based on tests that cover content that students are not being adequately taught. To address these concerns monumental efforts must be made to readjust a school's or district's curriculum and to provide adequate resources so that teachers can properly prepare students for the materials on which they will be tested.

Profiles of Selected State Testing Programs

- **Virginia**[18]

In Spring 1998 Virginia began its Standards of Learning (SOL) testing program, requiring students in the third, fifth, eighth grades as well as high school students to take state standardized tests in several subject areas. Schools are currently issued "report cards" showing their pass rates. Beginning in 2006-2007 schools must achieve 70% or better pass rates in each of the subject areas in order to be "accredited." And starting with the class of 2004, high school students must pass at least six of the eleven tests in the high school SOL battery to graduate.

The school pass rates emerging from the Spring 1999 administration of the tests showed that only 6.5% of the state's schools met the standard for accreditation. Students likewise have passed the exams at surprisingly low rates. In 1998 only 54% of Fairfax County students—who have an average SAT score well above the national average and where 91% pursue post-secondary education—passed the battery of tests that will be a graduation requirement not too far in the future.

Schools in Virginia, like in many other states who have embraced high-stakes testing, must also figure out what to do about disparities between the test scores of minorities and those of white students. At least 66% of African American students compared to 30% of white students would not have received their diplomas in 1999 had the tests been used as a graduation requirement that year.

Because of public concerns about the SOL's fairness, the state asked a team of experts to evaluate them. The experts' report released in 1999 found that the tests were valid and reliable, but the state has nonethe-

15. TEACHER EVALUATION, *supra*, n. 13.

16. J. Mather, PERFORMANCE-BASED ACCOUNTABILITY SYSTEMS, *supra*, n. 1.

17. Ann Bradley, *Union Head Issues Standards Warning*, EDUCATION WEEK, July 12, 2000.

18. This state profile draws heavily from material found in J. Dounay, *High-stakes Testing Systems*, ECS POLICY BRIEF (March 2000).

less formed a technical advisory committee to review the tests annually and to propose recommendations for future change. The state board of education has also heard from state education organizations that voiced their concerns about using the test scores alone to determine student promotion and graduation. One change the state board of education approved in October 1999 with respect to school accountability is to allow schools to avoid reconstitution while making progress in raising student test scores.

In July 2000 the Virginia Board of Education yielded to some of the demands for flexibility in the testing requirements for graduation but held fast to the standard that students pass tests in at least six content areas. Virginia now allows students to satisfy the testing criteria through performance on a wide range of tests in addition to the SOL tests. Among the approved alternative tests are examinations used in conjunction with the Advanced Placement program, International Baccalaureate program, College-Level Examination Program, SAT-II, and Test of English as a Foreign Language. The board also gave additional flexibility to students currently in the seventh, eighth and ninth grades by allowing them to choose four of the six tests they must pass to graduate. It rejected proposals to delay the effective date of the testing requirement.

- **Massachusetts**[19]

Massachusetts's testing program, known as the Massachusetts Comprehensive Assessment System (MCAS), assesses student performance in fourth, eighth and tenth grade in language arts, math, science and technology. As in Virginia, these state standardized achievement tests have created controversy among various members of the education community and within the public mind as well. So much so that there have been student boycotts of the tests, establishment of parent protest groups and refusals by some teachers to administer parts of the tests that they felt were unfair. In June 2000 several school boards registered their discontent, signing resolutions calling on the state to eliminate the MCAS as a graduation requirement. These dissenting boards say that they support high standards but do not believe that the test should be the sole criterion.

Student test scores are used as a measure for both school and individual student performance. The state board of education rates schools on a two-year cycle, looking at overall performance against the state standards and progress on improvement goals set according to the school's baseline performance. If the school has not made satisfactory improvement on those goals, it must submit to a review panel a report explaining its performance and a plan for improvement. The state has authority to take over schools that fail to meet their plan goals within two years of plan approval. Beginning in 2003, high school students will also be held accountable for their performance on the MCAS. Those who do not achieve a rating of proficient or above will not be eligible to graduate. Results from the 1999 tests show that only one third of the tenth grade students scored above the graduation cut scores in language arts and barely a quarter did so on the mathematics, science and technology portions of the test. These scores on the state standardized tests are, like those in Virginia, inconsistent with the national performance ratings of students in Massachusetts who do very well in comparisons based on the National Assessment of Education Progress (NAEP) tests. In response the state board has now set passing scores on the MCAS exit examinations at levels some consider to be too low, with promises to raise them in future.

Troublesome disparities between the scores of white students and those of minority students have also emerged in Massachusetts. An analysis done by a University of Massachusetts group showed that on the 1998 MCAS math test for tenth graders, the overall failure rate for students of all races was 52%, but that percentage shot up to 83% for Hispanic students and to 80% for African American students.

19. *Id.*

- **Texas**

The high failure rates of minority students on a state standardized examination used to measure mastery of the state-mandated curriculum was at the center of a lawsuit claiming that use of the test as a requirement for graduation unfairly discriminates against Texas minority students and violates their due process rights. The case, *GI Forum v. Texas Education Agency*[20] involved a challenge to the Texas Assessment of Academic Skills (TAAS) under the due process clause of the Fourteenth Amendment and under an implementing regulation to Title VI of the Civil Rights Act of 1964. Ultimately, the district court upheld the fairness of the test, first instituted in 1990 to replace an earlier state high school exit examination. While there was evidence that minority students have been, and to some extent continue to be, the victims of educational inequality, there was not enough evidence to support a finding that the TAAS test was developed, implemented and used to impermissibly disadvantage minorities.

Texas public school students begin taking the TAAS tests in the third grade and take the exit level examination in the tenth grade. Students who do not pass the three parts of the test in reading, mathematics and writing, have at least seven additional opportunities to take and pass the TAAS exam before their scheduled graduation date. The Texas Education Agency has set the cut score for the exit exam at 70% even though by its own projections, setting the passing score at this level means much greater percentages of Hispanic and African American students will fail the test than their white counterparts. In spite of these projected disparities, the TEA determined that objective measures of mastery should be imposed in order to eliminate what it perceived as inconsistent and subjective teacher evaluations of students. Schools are required to provided remediation to those students who fail to master any portion of the test although there is no state mandated approach to remediation and so such efforts vary from district to district.

Texas uses student performance scores on the TAAS exams to hold administrators, schools and teachers accountable. Texas is one of the few states in which teacher evaluations are directly linked to student test scores. The state disaggregates passing and failing scores into racial subgroups so that schools and districts are aware of the degree of success or failure of each subgroup. If one subgroup fails to meet minimum performance standards, a school or district will receive a low accountability rating. Under these circumstances, it is no surprise that many Texas teachers and administrators feel a tremendous pressure to take drastic measures to raise their students' scores. Cases of cheating on state assessments in Houston, Austin and eight other Texas districts led to the creation of the Public Education Integrity Task Force.[21]

- **California**

In 1998 the state initiated a new assessment and accountability system known as the Standardized Testing and Reporting (STAR) program that uses the Stanford Achievement Test Series for grades 2-11. However, the state board of education did not pass state standards until 1999, thus requiring some efforts to retrofit the testing system to the newly established standards. The state has devised some augmented items to be used in conjunction with the Stanford tests and is currently designing the California Assessment of Applied Academic Skills. The state will also require beginning in 2004 that high school students pass an exit exam in language arts and mathematics in order to graduate.

All students in grades 2-11 take the STAR tests. This includes students with disabilities unless they are specifically exempted by their Individual Education Plan (IEP)[22] and English language learners (ELL).[23] ELL students who

20. 87 F. Supp.2d 667 (W.D. Tex. 2000).

21. As the use of high-stakes testing has increased, charges of cheating by teachers and administrators have arisen in other places such as New York City and Montgomery County, Maryland.

have been in school less than 12 months are also tested in their primary language. Students who have been in school more than 12 months but are still classified as ELL may also be given a primary language test. As in other states assessment of ELL students is highly controversial.[24] The concern is that testing students in a language they do not understand prevents them from showing what they know and can do in content areas such as math and science. Some question whether primary language testing is the answer since some research shows that such testing helps only those who have been instructed in their native language. California law prohibits teaching ELL students in their primary language if they have resided in this country for more than a year. The quality of education provided to minority students in California has also come under attack on other grounds. The American Civil Liberties Union filed a suit in August 1999 alleging that the state has failed to provide equal access to advanced placement courses in schools where the enrollment is predominantly lower-income African American and Hispanic students.

22. According to a report by the National Center for Educational Outcomes many states are struggling to create alternative assessment systems and guidelines to determine which students should be considered for alternatives.

23. English language learners is another name for students sometimes described as Limited English Proficient (LEP).

24. For example, in Arizona minority at risk and ELL students brought suit in federal district court, alleging that the state violated the Equal Education Act of 1974, 20 USC 1703(f), by not providing adequate funding to carry out its *Lau* responsibilities and violated implementing regulations under Title VI of the Civil Rights Act of 1964 based on the disparate impact that the AIMS (Arizona Instrument to Measure Standards) test has on ELL students. In *Flores v. State of Arizona,* No. CIV 92-596-T-ACM, (D. Ariz. Jan. 24, 2000). The district court ruled in favor of the students on the *Lau* claim but rejected the Title VI claim, saying that the plaintiffs had failed to establish the necessary causal link between their disproportionate failure on the AIMS test and their race.

SOME FEDERAL DEVELOPMENTS

The student testing and assessment phenomenon that has swept the nation has both sparked and been spurred by federal activity on testing.

Title I

Under Title I of the Improving America's Schools Act of 1994[25] receipt of federal funds is conditioned upon the state's development of standards and assessments that meet certain criteria, including the use of multiple measures, assessments for children with different language backgrounds and measures of progress. Intended as a means to ensure state and district accountability for providing high quality education to all students (not to assess individual student performance), the statewide assessment system must be in place by the 2000-01 school year.

All students, including those who have limited English proficiency or disabilities, must be included in the assessments. The only students who may be exempted are those who have not attended schools in the local education agency for a full academic year.[26] To the extent practicable, ELL students must be assessed in the language and form most likely to yield valid results. For example, this might mean giving the student a bilingual (English and native language) version of the test. This determination must be made on an individualized basis but in no case may an ELL student be assessed against content or performance standards less rigorous or demanding than the standards applicable to all other students.

The assessment systems must also include "reasonable adaptations and accommodations for students with diverse learning needs, necessary to measure the achievement of students relative to state content standards." States must develop policies on testing accommodations that include the range of accommodations local officials may use, the types of

25. 20 U.S.C. § 6301 *et seq.*

26. 20 U.S.C. § 6311(b)(3)(F), (G).

students and the conditions under which each accommodation may be used, instructions on the proper use of each accommodation and reporting requirements that enable the state to track and evaluate the use of accommodations.

With respect to students with disabilities whose IEP or Section 504 teams determine that the standard state assessment is not appropriate, states must have a statewide alternate assessment system or a comprehensive state policy governing locally developed alternate assessments. (See Appendix B for reprint of memorandum from Michael Cohen, Assistant Secretary for the Office of Elementary and Secondary Education, U.S. Department of Education, providing summary guidance on the inclusive requirement of Title I assessments.)

Individuals with Disabilities Education Act

Likewise the 1997 Amendments to the Individuals with Disabilities Education Act[27] (IDEA) require states and districts to include students with disabilities in their assessment programs to the extent appropriate and also to report scores. Ultimately, it is a decision for the IEP team as to whether a student with a disability should be included in broad scale testing. If the decision is to exempt the student, the IEP must state the reasons supporting such a decision.

States had until July 2000 to develop guidelines for alternative assessment systems for students who are deemed unable to take the regular tests even with accommodations. The federal government has provided only vague guidance to the states on how to set up such systems and has left decisions about eligibility, types of assessment, scoring of tests, reporting of scores and alignment of alternatives with state academic standards to state officials. In addition, states must cope with development of procedures to implement the alternative assessments, training of staff, many of whom may be uncertified, and how to handle students who cannot take the standard assessments, even with accommodations, but who do not fit the criteria for alternative assessments.[28]

For those who do receive accommodations, there is concern that too many accommodations to take the exams will make the test scores hard to interpret as a measure of the students' actual achievement both on an individual and aggregate level. In addition, over-accommodation may be detrimental to efforts to help such children become independent. (See K. Mehfoud, *Special Considerations in Testing, infra,* at 4 -1 for more information about testing students with disabilities and English language learners.)

National Research Council Study

In 1997 in response to the proposals for voluntary national testing and the increasing use of large scale testing by states for high-stakes purposes, Congress asked the National Academy of Sciences through its National Research Council for guidance on the appropriate and nondiscriminatory use of such tests.[29] The Council's Board on Testing and Assessment issued its report to Congress in 1999. *High-stakes Testing for Tracking, Promotion and Graduation* (J. Heubert and R. Hauser, eds., National Academy Press). Among the recommendations contained in the report are the following:

- Accountability for educational outcomes should be a shared responsibility of states, school districts, public officials, educators, parents and students.
- Those who share this responsibility should have access to information about the nature and interpretation of tests and test scores.
- Tests may be appropriately used to lead to curricular reform but should not be

27. 20 U.S.C. § 1400 *et seq.*

28. Joetta Sack, *Alternate-Test Plans Prove Challenging,* EDUCATION WEEK, June 21, 2000.

29. Pub. L. 105-78, Sec. 309.

used to make high-stakes decision about individual students until test users can show that the test measures what the students have been taught.

- Test users should avoid simple either-or options for students doing poorly in school in favor of strategies combining early intervention and effective remediation.
- High-stakes decisions, such as tracking, promotion and graduation should not be made on the basis of a single test score.
- Students should be provided with sufficient test preparation. Adequate test preparation for a particular test format should be balanced against the possibility that excessively narrow preparation will invalidate test outcomes.
- High-stakes testing programs should be routinely evaluated. Policymakers should monitor the consequences of high-stakes assessments on all students and on significant subgroups such as minorities, English language learners and students with disabilities.

(See Appendix C for more of the Council's recommendations and potential strategies for appropriate test use.)

Proposed Legislation

Some of these recommendations appear in a bill introduced in Congress called the Fairness and Accuracy in Student Testing Act.[30] The bill requires that a state or local education agency receiving funds under the Elementary and Secondary Education Act of 1965 meet certain conditions to use standardized test performance as part of its decision making about retention, graduation, tracking or within-class ability grouping of an individual student. Among the conditions are:

- test scores cannot be the sole determinant or be assigned determinative weight in making the decision;
- test must be valid and reliable for the purpose for which the results are being used; validity and reliability of cut scores must be established;
- test must be based on state or local content and performance standards; test must be aligned with curriculum and classroom instruction;
- students must be provided multiple opportunities to demonstrate proficiency in the subject matter tested;
- test must be administered in accordance with written guidance from test developer or publisher;
- accommodations and alternative assessments must be available for students with disabilities;
- appropriate accommodations must be provided to ELL students; and
- state or local education agency must conduct comprehensive evaluation of the test's use on students' education and educational outcomes; agency must pay particular attention to impact on students disaggregated by socio-economic status, race, ethnicity, limited English proficiency, disability and gender.

These bills have been referred to the education committees in both houses.

OCR Guidance

In response to numerous requests for technical assistance and a rising number of discrimination complaints in the area of testing and assessment, the Office for Civil Rights (OCR) of the U.S. Department of Education is developing a resource guide for

30. H.R. 4333 and S. 2348, 106th Cong., 2d Sess. (2000).

educators and policymakers on the use of tests when making high-stakes decisions for students such as graduation, promotion, and placement in special programs. Intended as a practical document to help in the planning and implementation of testing policies, the guide in its current draft form contains discussion of test measurement principles in the context of sound educational policy and practice and their relationship to compliance with the federal nondiscrimination statutes enforced by OCR. The guide's discussion of test measurement principles draws heavily from the *Standards for Educational and Psychological Testing (Joint Standards)* which were recently revised by a joint committee of the American Educational Research Association, the American Psychological Association and the National Council on Measurement. The chapter on legal issues emphasizes the nondiscrimination requirements under Title VI of the Civil Rights Act of 1964 (race and national origin), Section 504 of the Rehabilitation Act of 1974 (disability), Title II of the Americans with Disabilities Act (disability) and Title IX of the Education Amendments of 1972 (gender). The analysis is divided between different treatment and disparate impact. There is a separate discussion of special issues related to students with disabilities and a brief examination of some of the constitutional principles that apply. The guide also includes a glossary of legal terms, a compendium of legal concepts that are relevant to student testing programs and a list of other resources and references. Currently in draft form,[31] the final document is expected to be published in September 2000.

CONCLUSION

As states have raised the stakes associated with student performance on standardized tests, controversies have emerged that have no easy solutions. Many believe that the current testing phenomenon reflects our misguided obsession with measuring the outcomes of our education system (student performance) without first dedicating the resources, in terms of time, effort and money, for students to have any real chance of achieving the standards we set for them. Others say that setting standards and attaching high-stakes consequences to meeting those standards will drive reforms within public education that will ensure that students do achieve academic proficiency.

Despite these controversies, one thing is clear—the current emphasis on standards and high-stakes testing is unlikely to disappear any time soon. This makes it imperative that school leaders make sound educational decisions about test use consistent with the requirements of the law.

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31. The draft is currently available at http://www.ed.gov/offices/OCR/testing

A Framework for Addressing Student Test Use Issues*

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INTRODUCTION

In the last decade, accountability became the driving force behind public education reforms. Echoes of "are my child's teachers qualified?," "does my child's school measure up to others?" and "does my child know enough?" continue to reverberate in conversations about the performance of our schools nationwide. Few educators dispute the importance of accountability in education, but many vigorously disagree about how to ensure accountability for students, teachers, and schools—especially when the subject of test use arises.

Education reforms that rely on high-stakes tests to measure student achievement have increased the focus on the legal parameters and educational principles that should guide decisions about student promotion and high school graduation. This article will describe the central legal and educational principles that should guide the development and implementation of tests used in these critical, high-stakes decisions. Ultimately, the lessons to be derived from federal jurisprudence, educational research and practice, and psychometric principles are as simple as they are important. They are:

- The determination of whether a test is valid cannot be made without knowing the educational objective and purpose of the test. A test may be valid for one situation or use and invalid for others; likewise it may be valid when measuring the performance of some test-takers and not others.
- Any test with high-stakes consequences for students must be valid for its particular use. This means tests designed to measure learning and used to determine high school graduation or advancement from grade to grade must fairly measure what the student has been taught. As a general proposition, there must be alignment among the curriculum, instruction and material covered on such a high-stakes assessment. Issues related to accommodations or alternative testing for students who are not fully proficient in English and students with disabilities must also be examined with care to ensure that the testing of these students corresponds to their particular educational programs.
- Test results can provide very valuable guidance in deciding whether to promote a student. However, a test is only

* An earlier version of this article appeared in *Inquiry & Analysis* (NSBA Council of School Attorneys, Mar. 1999). Segments of this article are taken from: Coleman, *Excellence and Equity in Education: High Standards for High-Stakes Tests,* 6 VA. J. SOCIAL POL. & L. 81 (Fall 1998), which provides more extensive and detailed coverage of the issue. Citations to the legal, educational and psychometric principles set forth herein can be found in that article. Segments used with permission. Readers interested in this issue also should review: National Research Council, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION. (J. Heubert & R. Hauser, eds., 1999). *See* Appendix D for other related resources.

one tool among many. Many factors—some relating to what a test measures, and some not—may affect a student's performance on a particular test. Not surprisingly, therefore, psychometric standards confirm that a single test score should not be used as the sole criterion to make high-stakes educational decisions, such as high school graduation or promotion from grade to grade.

- The existence of statistically significant disparities in test scores among discrete student populations (*e.g.,* minority-non-minority; urban-rural) should cause further inquiry and examination regarding the relevant educational program and associated testing practices. Group differences in test scores may reflect a range of causal factors unrelated to the test, such as lack of preparation for the test, or they may reflect a problem with the test itself. Strategic and systematic monitoring of results over time can help prevent (and cure) problems of test bias, other discriminatory practices, or programmatic deficiencies affecting student learning.

EDUCATIONAL RIGHTS AND RESPONSIBILITIES: SOME FOUNDATIONS

Several fundamental principles underlie the framework of questions policy makers and educators should consider to ensure testing practices appropriately influence educational decisions about student advancement. These guiding principles have: (1) influenced an array of federal court decisions since the 1954 decision in *Brown v. Board of Education*;[1] (2) shaped federal educational policy since at least 1993; and (3) informed the policy choices in numerous states and locales that have grappled with standards-based reform issues.

1. 347 U.S. 483 (1954).

Principle One: The basic obligation of public educators is to teach students, with their different backgrounds and abilities, the knowledge and skills they need to progress academically and mature with meaningful expectations of a productive life.

Simply put, the job of the public educator is to prepare students to be successful members of society. This educational mandate is no less present during classroom instruction than it is when educators administer, evaluate and act on student test results. Tests, in short, should be instruments used by educators to accomplish this goal. Thus, policy makers and the education community must work to guarantee that the establishment of high standards for all students does not unfairly deny educational opportunity to any one student.

Principle Two: The goals of guaranteeing excellence by promoting high academic standards and ensuring that all students have fair opportunities to achieve success in public education are inseparable, mutually dependent goals.

The goals of excellence through high academic standards and the opportunity for students to achieve success in public education are corresponding, coextensive goals—not, as some maintain, irreconcilable objectives. Policy makers and the education community should approach the issues regarding the use of high-stakes tests with a commitment to ensure that all students can learn in an environment in which standards are high and in which "all" means "all." They must appropriately address the right questions when designing and implementing test-related reforms so that all students receive the opportunity to learn to standards that reflect the curriculum and instruction, and that are measured fairly.

Principle Three: If it doesn't make educational sense, it can't make legal sense under federal civil rights laws.

The legal standards that guide the enforcement and adjudication of federal civil rights laws related to student access to education are

ultimately premised on educational judgments—not some abstract legal theory. For instance, in claims of race, national origin or sex discrimination in education, the dispositive questions posed by the courts center upon the adversity to a student's (or group of students') educational opportunity. The courts focus on the foundations for the educational decision-making leading to the challenged practice.

FEDERAL LEGAL STANDARDS AND INQUIRIES

The parameters that should guide educators in the design and use of high-stakes tests can be found in an array of federal cases raising race discrimination and due process challenges in the elementary and secondary context. The legal inquiry under a typical (non-intentional) race discrimination challenge is:

- Does the use of the test cause an adverse racial impact: does the use of the test cause a denial of educational opportunities to students of one race in numbers significantly disproportionate to the numbers eligible for the educational opportunity being denied—when compared to students of other races? and
- Is the use of the test educationally necessary: is the test valid for the particular purpose used and, if so, are there feasible, less discriminatory alternatives that would as effectively serve the educational objectives identified by the school?

The federal due process inquiry typically centers on the sufficiency of the notice of the testing requirement and the opportunity that students have had to learn the material tested. The legal inquiry is:

- Are students denied educational benefits or opportunities to which they have a legitimate claim, based on their test scores? In legal terms, is there a denial of a property right or liberty interest? and
- Have the students been provided with a fair opportunity to pass the test? More particularly, is the test valid for the purpose used?

Whether it is a claim of discrimination or a broader claim of unfairness in the test design or in test-related practices, the ultimate question upon which the typical federal legal analysis hinges is one of educational sufficiency: is the test valid for the purposes used for all students taking the test? The questions in each instance are, in simple terms: Does the test do what it is intended to do? Are the inferences derived from test scores and the educational judgments based on those inferences appropriate?

The federal courts have also affirmed some psychometric principles that demonstrate the highly complex, contextual and fact-intensive nature of the inquiry regarding the validity of the use of test results. Accordingly, no one-size-fits-all formula can guide decision making regarding test use—particularly with regard to high-stakes decision making, about how to link test results to student promotion from grade to grade. However, principles derived from the federal cases dealing with the issue of standards, equity and high-stakes test use can be distilled into questions that should be thoroughly examined and addressed when schools consider high-stakes testing.

FRAMEWORK TO GUIDE THE USE OF HIGH-STAKES TESTS

What are the educational objectives or justifications that support the use of a particular test?

Before any state or district administers any test, the objectives of the testing exercise should be clear: what are the goals for and uses of the test? The answer to this question

will guide all other relevant inquiries about whether the test is educationally appropriate. Judgments about a test's validity are impossible, and the conclusions one may draw from the results are meaningless, absent clear test use objectives. For example, one cannot conclude that a particular test of ninth grade science proficiency is, as a general proposition, a valid test. A test of student achievement and learning fully aligned with District A's ninth grade science curriculum and instruction and validated according to professional standards for such use may be an appropriate consideration when making promotion decisions about students taking the test. Conversely, that same test, if used as a tool to make special education decisions or used to determine college admissions, would neither pass legal nor psychometric scrutiny. In fact, the test would not necessarily be appropriate to use with District B to measure ninth grade science proficiency absent a determination that material tested was fairly representative of the material taught in District B's ninth grade science courses.

Not surprisingly, compliance with federal legal standards related to due process and discrimination protections rests, in the first instance, upon the educational judgment about the purpose and use of the test. Central to this inquiry is the issue of whether high-stakes consequences attach to the test results at all. Is the test designed to monitor a student's or school's performance and to inform educators over time about the need for additional resources? Or, is the test designed as a gatekeeper, so that failure has particular and real consequences for the student taking the test? Absent a denial of educational opportunity to particular students, federal constitutional or statutory protections designed to ensure fair and equitable opportunities for students are less likely to be triggered. Even if a test is not high-stakes, civil rights protections may apply where the opportunity to take the test is itself an educational benefit, and that opportunity is denied on the basis of race, national origin, gender or disability. If the test use in question has high-stakes consequences, then the ultimate legal inquiry parallels the ultimate educational question: Do the test results at issue allow for informed and consequential decisions to be made about students taking the test? In other words, are the conclusions derived from the test results valid?

Is there alignment between the material tested and the curriculum and instruction? Have the students who must achieve to a school's academic standards been provided the necessary instruction to give them a fair opportunity to do so?

As instruments designed to inform students, parents and educators about success in meeting educational goals, high-stakes tests should be developed and administered as part of the educational effort to improve student performance; they should be integrated into the overall educational program. When tests (as measures of outcomes) are aligned with the curriculum and instruction (the educational inputs), they will more likely be measures of classroom learning. When the content of a high-stakes test reflects actual classroom instruction and the curriculum of an educational system, appropriate test use can help achieve educational excellence for all students. In addition, when tests provide a fair basis for making decisions regarding student graduation or promotion from an educational standpoint, the more likely they will pass legal scrutiny.

In the leading case on the subject, *Debra P. v. Turlington*,[2] the Fifth Circuit Court of Appeals ruled that a state proposing testing requirements as a condition of high school graduation was obligated to determine if the material being tested was actually being taught. The court found the test "was fundamentally unfair in that it may have covered matters that were not taught in the schools of the state."[3] Recently, the federal

2. 644 F.2d 397 (5th Cir. 1981).

3. *Id.* at 403.

district court in *G.I. Forum v. Texas Education Agency*[4] reaffirmed the notion that there must be more than theoretical coverage of the curriculum on such tests. In that case, the court partially based its ruling in favor of the State of Texas on the evidence showing that "the [challenged] test measures what it purports to measure . . . [and] all students in Texas have had a reasonable opportunity to learn the subject matters covered by the exam."[5]

This alignment issue (which is, ultimately, an opportunity to learn issue) is decidedly more complex for students who are not fully proficient in English or who have disabilities. A related yet distinct set of accommodations and alternative testing issues surface as high-stakes testing includes these students.

For students who are not fully proficient in English (often referred to as English language learners or limited English proficient students), educators must ensure that assessment practices mesh with the instructional programs designed to (1) address the students' language abilities *and* (2) allow for content mastery. In short, the way in which these students are assessed for high-stakes purposes cannot be divorced from the overall theory of the educational program provided: symmetry between the educational program (whether it is some form of bilingual instruction or immersion, for instance) and the corresponding testing practices must exist.

Similarly, disabled students who, under federal law, should be educated pursuant to an individualized educational program, must be assessed in a way that is consistent with that program. This means, at a minimum, that the high-stakes testing practices (and the drive toward inclusion of all students in statewide and district-wide programs) cannot be imposed without regard to the terms of these individualized programs and the particular needs of the students individually. See K. Mehfoud, *Special Considerations in High-Stakes Testing, infra,* at 4-1 for more discussion of testing disabled students.)

When establishing high-stakes consequences for students, the issue of notice about the policy changes that will have significant consequences for students is paramount. One federal court has observed: "No one could seriously contend that academic requirements could never be changed during the twelve years a child typically spends in school. It is also obvious that [high-stakes test] requirement[s] could not . . . be[] constitutionally imposed a day prior to graduation. Such late notice could serve no academic purpose."[6] The timing between the establishment of educational objectives related to student advancement and the actual imposition of high-stakes consequences attached to student performance (frequently based on test scores) is important. Clearly, there's a relationship between the notice provided and the kind of opportunity that students have had to master the material or skills tested. Once again, the central legal (and educational) inquiry regarding the students' opportunity to learn drives the analysis. (See R.C. Wood, *Due Process and Discrimination Issues, infra,* at 3-1 for more discussion of due process issues.)

How are new test requirements implemented and interpreted to ensure appropriate educational decision making?

A series of protections may be integrated into the administration of a test and the interpretation of test scores to help eliminate the risk of inappropriately denying (or conferring) educational opportunities to students based on test scores. Those steps include: (1) establishing compensatory or tutorial supports to ensure that all students have the same basic and fair opportunity to master the material tested; (2) providing multiple opportunities to take the test; (3) considering academic factors in addition to the test scores

4. 87 F. Supp.2d 667 (W.D. Tex 2000).

5. *Id.* at 681-82.

6. Anderson v. Banks, 520 F. Supp. 472, 506 (S.D. Ga. 1981).

that may affirm or challenge the high-stakes conclusions derived from the test score alone; and (4) using appropriate accommodations to meet the needs of disabled or limited English proficient students.

These are all highly contextual practices that inform in very real terms the ultimate fairness of any test instrument. These kinds of protections are premised in part on a recognition that tests are not perfect barometers of learning, and similarly, that conclusions based on those results are not error-free. Given the inevitable presence of the human element in teaching and in learning, there is no guarantee that each student will have received all of the instruction necessary to provide a fair chance for success on high-stakes tests, even where there is alignment among standards, curriculum, instruction and high-stakes tests. Nor is there any foundation upon which one could reasonably conclude that all students can demonstrate what they have learned and what they know equally well on standarized tests. The principles of psychometrics in education recognize these points. Simply, there is no magic to any particular test score. Therefore, there should be ample protections in place to ensure that students are not inappropriately denied meaningful educational opportunities as a result of performance during a single test administration.

What evidence exists regarding the adverse impact of the high-stakes decision making upon discrete groups of students? What history and continuing effects of racial segregation or discrimination exist in the state or school district in question?

The perfect test is not, and cannot be, the enemy of the good test when evaluating and implementing testing practices. Nonetheless, psychometrically sound testing practices and conclusions must guide the development, administration and use of tests designed to further high-standards learning. The evaluation of test results is necessarily a dynamic one: test results can change over time based on a range of factors that may affect those results, such as teaching practices, methods of test administration, and student limitations and needs. As a result, careful monitoring of test inputs and outcomes over time is critical. Importantly, educators should regularly monitor test results to determine if there are significant disparities among student groups, based on race, national origin, gender or disability. Psychometrically and legally, the presence of such disparities should lead to further investigation so that any potential bias or discrimination in the test use can be eliminated.

Similarly, a state's or district's history of *de jure* segregation is central in any determination regarding the imposition of new high-stakes criteria. Such test instruments have the potential to perpetuate (rather than eliminate) continuing effects of past discrimination. One court, in this context, has noted that the otherwise legitimate aim of improving educational standards cannot be viewed in isolation when a school district has a *de jure* history and a subsequent policy of student tracking that perpetuated the segregation. The point is this: If a school system denied full and equal opportunity to a particular group of children by not providing them a level of instruction that ensures a meaningful opportunity to succeed, then the efforts to implement high-stakes measures with impact on individual students must not perpetuate the vestiges of that prior discrimination.

CONCLUSION

As the cases involving discrimination and "unfairness" claims reveal, the educational interest is at the heart of the examination of whether tests are being used in legally appropriate ways. This legal and educational alignment suggests, therefore, a basic foundation for concluding that the promotion of excellence in education can be and should be fully consistent with the promotion of equity and fairness in education. In short, it may be useful to think about the fundamental point

of this discussion in very simple (albeit deceptively simple) terms. One court has noted: "An invalid test cannot measure merit."

The relative simplicity of the framework proposed in this article does not suggest that the issues to be addressed are simple or easy. The challenges facing educators struggling to improve the quality of their schools and student performance are many and complex. How can we improve the quality of teaching to better prepare our students for a new century? How can we ensure that schools facing some of the most significant challenges have the necessary resources to help all students achieve to high standards? One step in the right direction is to move beyond the frequently polarizing rhetoric to address the real issues educators face and to identify frameworks and strategies that can be pursued to accomplish the twin educational aims of high standards and fairness.

High standards for academic achievement, when coupled with instruction and support that help students reach those standards—as determined by valid and reliable assessments—can unite students, parents, teachers, administrators and community residents around the shared goal of improving student performance for all. By defining what students should know and be able to do, standards keep schools focused on the desired results for students—and can stimulate local development of appropriate curricula and application of effective teaching strategies to make these results possible and challenge students to learn. Standards also indicate what assessments must measure in order to show achievement.

Although the questions that arise about standards and equity will be as different as the students served by our public schools, a fundamental point should not be lost: all students need an educational system that expects high performance and that offers real and meaningful educational opportunities. As U.S. Education Secretary Riley has often said, "All students have the right to a high quality, high standards education. Nothing less will do."

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Due Process and Discrimination Issues in High-Stakes Testing

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INTRODUCTION

The trend that began more than 25 years ago with the experimental use of performance-based testing in education recently has become a tidal wave of reform that is sweeping the country. The ubiquitous movement toward standards and assessment is a product of many forces, most powerfully the demand for accountability. Many parents, community leaders, employers and school boards dissatisfied with student literacy see performance-based testing as the most effective way to increase both the quality of education and the level of student achievement. In response to these concerns, state legislatures are under increasing pressure from various factions to mandate higher standards and to hold educators accountable when these standards are not met. Legislators are responding by passing sweeping educational reform statutes that in many cases have significant consequences for schools. (See N. Gittins, *An Overview of Student Testing and Assessment, supra,* at 1-1 for a summary of state and federal activity on student testing.)

High-stakes tests have aroused emotional debate in recent years, but more importantly they implicate a multitude of legal issues. While case law on the issue is limited, there is a core body of law that is useful in predicting legal outcomes. Because some states (particularly Florida and Texas) were ahead of the pack in tying accountability and consequences to assessment, their experiences offer insight into how courts likely will approach the issues.

In the realm of educational accountability, the higher the stakes, the greater the risk of legal action. In districts where core knowledge is measured, but not tied to any specific consequences, there is little legal impact. When students who complete required courses are nevertheless denied high school diplomas because of low test scores, and teachers are given unsatisfactory evaluations based on those scores, the landscape becomes ripe for litigation.

The most prevalent issues arising out of the use of high-stakes testing include racial and sex discrimination, due process concerns, fundamental fairness and test validity, testing of disabled students, adverse employment action for teachers and issues of collective bargaining. While some of these issues have yet to be addressed by the courts, sufficient legal precedent exists upon which to draw some general conclusions.

LEGAL BACKGROUND

States' Rights and Responsibilities

States have undisputed power to educate their citizens. The Tenth Amendment to the Constitution reserves powers not expressly delegated to the federal government to the states and their citizens, and all states have exercised this authority by creating and maintaining systems of free public education. State constitutions typically provide plenary power over education.

The Supreme Court has been reluctant to interfere with the states' rights to oversee education and usually will do so only when "necessary to protect freedoms and privileges guaranteed by the United States Constitution."[1] In applying rational basis scrutiny to decisions about education, the Court has stated that "the education of the people in schools. . .is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of clear and unmistakable disregard of the rights secured by the supreme law of the land."[2]

Because states have a crucial interest in maintaining the quality of education for their citizens, they may impose the standards they deem necessary, as long as the standards are not arbitrary or capricious. So long as an action does not violate the U.S. Constitution, a state "may determine the length, matter and content of any education it provides," including the use of high-stakes testing.[3]

LEGAL IMPLICATIONS OF HIGH-STAKES TESTING

Equal Protection

Testing linked to adverse consequences inevitably increases the potential for discrimination claims by affected student groups. Statistics show female and minority students routinely score lower on standardized tests than do white males. Adversely affected students sometimes argue that disparities in test scores result from illegal discrimination. Legal claims may be brought both under the Equal Protection Clause and under Title VI of the Civil Rights Act of 1964. Title VI in particular requires that educational institutions "take steps to insure that test materials. . .are selected and administered in a manner which is nondiscriminatory in its impact."[4]

It is difficult to show discriminatory intent in legislation requiring minimum competency standards in education. However, experience has demonstrated that discriminatory impact is often an unfortunate result of such tests. One recent study, commissioned by the Harvard Civil Rights Project, charged that high-stakes tests in some states actually detracted from learning, especially for minority and low income students.[5]

In Texas, a lawsuit challenging that state's testing program filed by the Mexican American Legal Defense and Education Fund in 1997 alleged that "Hispanic and African American students concentrated in underfunded school districts have not been afforded an equal opportunity to learn the material covered on the graduation exam."[6] The lawsuit alleged that "minority students have failed the test and been denied diplomas in disproportionate numbers."[7] However, in early 2000 the federal judge hearing the case rejected the charges that the Texas test is unfair to black and Hispanic students, including those in poor communities, and dismissed the case.[8] Similar cases are pending in North Carolina and Nevada where plaintiffs allege discrimination based on race and national origin.[9] As in other circumstances, courts will look to motive, justification, and the impact of past discrimination to assess whether or not present practices are discriminatory.

The seminal case in this area of law is the Fifth Circuit decision in *Debra P. v. Turlington*.[10] The case arose after passage of Florida's Educational Accountability Act of 1976, in which the legislature established new requirements for graduation from Florida's public

1. Debra P. v. Turlington, 644 F.2d 397, 402 (5th Cir. 1981).
2. *Id.* (citing Cumming v. Board of Educ., 175 U.S. 528 (1899)).
3. *Id.*
4. 42 U.S.C. § 2000d *et seq.* (1996).
5. Harvard Civil Rights Project, THE DEVELOPMENT AND IMPACT OF HIGH-STAKES TESTING (1999).
6. Kenneth J. Cooper, *Standardized Exam Faces Test in Texas*, THE WASHINGTON POST, Sept. 22, 1999, at A19, (referencing G.I. Forum v. Texas Education Agency prior to the January 7, 2000 decision).
7. *Id.*
8. G.I. Forum v. Texas Education Agency, 87 F. Supp.2d 667 (W.D. Tex. 2000).
9. Cooper, *supra*, n. 6.
10. *Debra P.*, 644 F.2d 397.

schools. Among other things, the Act (as amended in 1978) required students to pass a functional literacy test in order to receive a high school diploma. Functional literacy was defined as "the ability to apply basic skills in reading, writing and arithmetic."[11]

On the first administration of the test, 78% of black students failed one or more sections, while only 25% of white students failed some portion.[12] Minority plaintiffs filed a class action suit challenging Florida's exam on several constitutional and statutory theories including the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and the Equal Educational Opportunities Act.[13]

In ruling on the discrimination claim, the Fifth Circuit agreed with the trial court that the evidence was insufficient to support a holding of present intent to discriminate.[14] The Fifth Circuit upheld the trial court's finding that past purposeful discrimination had affected the plaintiffs, and that the diploma sanction perpetuated that discrimination.[15] The trial court found that until 1967, Florida operated a dual school system, segregating intentionally by race. The segregation persisted until 1971, and predominantly black schools were substantially inferior in terms of facilities, course offerings, materials and equipment.[16] The court required that the government, in attempting to justify the discriminatory impact of the test, show "either that the disproportionate failure of blacks was not due to the present effects of past discrimination or, that. . .the diploma sanction was necessary to remedy those effects."[17]

The Fifth Circuit held that the trial court was correct in finding the government did not meet its burden and that the test could not be used as a requirement for graduation until all graduating seniors had completed all of their public education in a unitary system.[18] The court upheld the trial court's ruling that the test not be used for four years, except for assessment and remedial purposes, and remanded the case to the trial court to consider the impact of past discrimination on the ability of the students to pass the test.[19]

Four years after the former Fifth Circuit ruled in *Debra P.*, the Eleventh Circuit held that the district court on remand correctly found that the vestiges of past intentional segregation did not cause the test's disparate impact on blacks.[20] Despite evidence that such vestiges still existed in Florida schools,[21] the court accepted the trial court's reliance on expert testimony that there was no causal link between the effects of past discrimination and the disproportionate impact of the test on black students. The expert testified that other factors such as the "educational background of a student's parents, class size, attendance, and amount of homework more directly relate to student performance."[22] The court also found that the remedial efforts of the school to help failing students pass the test further severed the causal link between past discrimination and present disparate impact.[23] Additionally, the court noted that while 57% of students who failed the exam in 1983 were black, though blacks constituted only 20% of the class, more than 90% of blacks ultimately passed the test. They found this fact

11. *Id.* at 401.
12. *Id.*
13. *Id.*
14. *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979).
15. *Id.* at 407.
16. *Id.*
17. *Id.* (applying the rule used in McNeal v. Tate County Sch. Dist., 508 F.2d 1017 (5th Cir. 1975)).
18. *Id.*
19. *Id.*
20. Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).
21. Evidence existed that teachers had racial biases which impaired their teaching ability, black students were still suspended more often than white students, racial stereotypes still persisted and blacks were more readily assigned to educable mentally retarded classes than whites. Additionally, though failure rates for blacks had improved since earlier administration, of the test, 57% of students who failed the test in 1983 were black, even though blacks constituted only 20% of the class. *Id.* at 1405.
22. *Id.* at 1415.
23. *Id.*

to be "strong evidence that vestiges of segregation do not cause blacks to fail the test."[24]

Finally, the Eleventh Circuit held that use of the test as a diploma sanction would help remedy the vestiges of past discrimination.[25] The court relied on an expert who presented studies and testified that "the best way to encourage student performance is by setting objective standards and creating a 'climate of order' to motivate students."[26] The court expressed a "heavy sense of discomfort over the unfairness if discriminatory vestiges. . .have in fact caused a student to fail [the test]," but decided that the unfairness "would be outweighed by the demonstrated effect of the diploma sanction in remedying the greater unfairness of functional illiteracy."[27]

This case and others indicate that courts will look to past practices of school districts to determine whether they bear a causal relationship to current disparate effects of testing.[28] Districts which have long been integrated and which have continuously provided equal educational opportunity may fare better in the event of a legal challenge than those which still have a tainted history of discrimination. If testing results in a disparate impact on minorities, schools that have such histories will be required to show that the disproportionate test results are not the present effects of past discrimination, or that use of the test and its accompanying sanctions is necessary to remedy those effects.

Title VI Disparate Impact

Even schools with no recent history of discrimination face challenges on the basis of disparate impact. Title VI prohibits federally funded programs from implementing policies that have a disparate impact on minorities.[29] While the United States Supreme Court has limited Title VI itself to constitutional parameters requiring a showing of intent to discriminate in order to prove a violation,[30] some courts allow individuals to sue on a disparate impact theory under the regulations implementing Title VI.[31] In this context, differences in student performance based on race or national origin do not necessarily constitute an impermissible disparate impact. Rather, the disparities must be statistically significant, and must be present after control for other relevant variables such as family income.

As previously mentioned, a United States district court in Texas recently considered whether the Texas Assessment of Academic Skills (TAAS) examination had an impermissible adverse impact on that state's minority students.[32] The court ruled that although the TAAS test did adversely affect minority students, the Texas Education Agency (TEA) demonstrated an educational necessity for the test, and the plaintiffs did not identify an equally effective alternative as required.[33] Thus, the court refused the plaintiffs' request for an injunction preventing the TEA from using failure on the exit-level TAAS test as a basis for denying high school diplomas.[34] The analysis employed by the court should prove useful for other states as they consider whether their own high-stakes tests have an unlawful discriminatory impact.

Texas's efforts to impose accountability on its public school system began in 1984 when the legislature passed the Equal Educational Opportunity Act. In 1987, Texas implemented its first high school graduation exit test. This exam was superseded in 1990 by the TAAS. Texas students in public schools must pass the TAAS exit-level exam before they can graduate high school and receive their diplomas. Texas public school students begin taking the TAAS test in third grade. The "exit-level" TAAS exam, the one which students must pass in order to graduate,

24. *Id.*
25. *Id.* at 1416
26. *Id.*
27. *Id.*
28. *See also* Anderson v. Banks, 520 F. Supp. 472 (S.D. Ga. 1981); Bester v. Tuscaloosa City Bd. of Educ., 722 F.2d 1514 (11th Cir. 1984).
29. 34 C.F.R. § 100.3(b)(2).
30. *See* United States v. Fordice, 505 U.S. 717, 722 n. 7 (1992).
31. *See, e.g.*, G.I. Forum v. Texas Educ. Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000).
32. *G.I. Forum*, 87 F. Supp. 2d 667.
33. *Id.*
34. *Id.*

is first administered in tenth grade. Students who do not pass on the first attempt are given at least seven additional opportunities to take and pass the TAAS exam before their scheduled graduation date.

Nine minority Texas students who did not pass the TAAS exit-level exam prior to their graduation dates filed suit individually, demanding that their respective school districts issue their diplomas.[35] In assessing the plaintiffs' Title VI claim, the court applied the burden-shifting analysis established by cases brought under Title VII of the Civil Rights Act of 1964.[36] Under Title VII, the plaintiff makes a *prima facie* case of disparate impact by demonstrating that a facially neutral practice has caused a disproportionate adverse effect on a protected class.[37] According to the court, if the plaintiff makes this showing, then the burden of production shifts to the defendant.[38] The defendant must then produce evidence that the practice is justified by educational necessity.[39] If the defendant meets its burden, then the plaintiff may still prevail by showing that an equally effective alternative practice could result in less racial disproportionality while still serving the articulated need.[40]

In this case, the court found that plaintiffs made a *prima facie* showing of significant adverse impact.[41] In reaching this determination, the court considered both the disparate impact on first-time administration of the exam and the cumulative pass rates of students after educational remediation.[42] The court noted that after educational remediation, the scores of minority students showed dramatic improvement.[43] Nevertheless, the court determined that in all cases, whether after single or cumulative administrations of the exam, there were still significant statistical differences.[44]

After deciding that plaintiffs made a *prima facie* case of significant adverse impact, the court determined that the TEA met its burden of production on the question of whether the TAAS test was an educational necessity.[45] "[A]n educational necessity exists where the challenged practice serves the legitimate educational goals of the institution."[46] According to the court, the TEA merely needed to produce evidence that there was a manifest relationship between the TAAS test and a legitimate educational goal.[47] The articulated goals of the TAAS tests were "to hold schools, students, and teachers accountable for education and to ensure that all Texas students receive the same, adequate learning opportunities."[48]

Three arguments persuaded the court that the TAAS test bore a manifest relationship to a legitimate educational goal. First, the court believed that the TAAS test effectively and objectively measured whether students had mastered a discrete set of skills and knowledge.[49] Second, the court concluded that a passing standard served the state's legitimate interest in requiring students to master 70 percent of the tested minimal essentials prior to graduation.[50] Third, the court found that use of high-stakes tests as a "graduation requirement guarantees that students will be motivated to learn the curriculum tested."[51]

Finally, the court considered whether the plaintiffs showed that equally effective alternatives existed. The plaintiffs offered evidence of alternative approaches including a sliding-scale system that would allow a student's low test performance to be compensated by high

35. *Id.* at 668, n. 1.
36. *Id.* at 667.
37. *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656-57 (1989)).
38. *Id.*
39. *Id.*
40. *Id.* (citing Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986-87 (1988)).
41. *Id.* at 678-79.
42. *Id.*
43. *Id.*
44. *Id.* at 679.
45. *Id.* at 679-81.
46. *Id.* at 679.
47. *Id.*
48. *Id.*
49. *Id.* at 680.
50. *Id.*
51. *Id.* at 681.

academic grades and vice versa. However, the plaintiffs did not persuade the court that these alternatives could sufficiently motivate students to perform to their highest ability. As a result, the court ruled that plaintiffs "produced no alternative that adequately addressed the goal of systemic accountability."[52] After going on to consider due process concerns, the court ultimately rejected all of plaintiffs' claims and decided that the TAAS exit-level exam did not violate Title VI implementing regulations.[53]

The court's analysis in this case highlights several important considerations for other school districts who employ high-stakes testing. First, effective remedial programs to support students who initially fail are essential. However, even if remedial programs wholly eliminate the disparate effects of high-stakes testing prior to graduation, a court may still consider the disparate impact of the initial test. Second, the goals of any high-stakes testing regime should be well articulated in the legislation or in the implementing regulations. In the face of challenge, the manifest relationship between the high-stakes testing and the articulated educational goals will be critical. Third, schools would do well to ensure that their tests are designed not only to effectively and objectively measure student skills and knowledge, but also to compel progress in schools. Fourth, while this court sanctioned the use of Texas's cut-score, schools should be prepared to defend the rationale for choosing a particular cut-score.

The court's analysis in this case also leaves unanswered questions. The court modeled its disparate impact analysis after the test articulated in *Wards Cove*.[54] The second step of the *Wards Cove* test shifts only the burden of *production* to the defendant to produce evidence that the practice is justified by educational necessity.[55] In contrast, the Civil Rights Act of 1991 purports to overrule this portion of *Wards Cove*.[56] Section 703(k)(1)(A)(i) requires that during the second step, the defendant bear not only the burden of production, but also the burden of *persuasion*.[57] If other courts follow the text of Title VII and case law subsequent to the Civil Rights Act of 1991, then school districts will bear a heavier burden. Once a plaintiff establishes a *prima facie* case of disparate impact, the school district would then need to produce evidence that high-stakes testing is justified by educational necessity, and persuade the court as to the weight of the evidence. Only if the school district successfully met that burden would the court require the plaintiff to prove equally effective alternatives. Because other courts can justifiably employ this requirement, schools should be prepared to meet the heavier burden.

Due Process

Strongly linked to the issue of discrimination is the notion of procedural due process. The Fourteenth Amendment prohibits states from depriving citizens of life, liberty and property without due process of law. Property rights are legitimate expectations of entitlement created through state law, regulations or

52. *Id.* at 682. The need for specific articulated goals is critical during this final step of the analysis. At least one state uses a system assessment which allows accountability for teachers, school systems and individual schools, but not for individual students. "Value-added assessment," as the method is termed, requires testing each student at each grade level. Individual student information is then aggregated and run through a complex statistical model which adjusts for complexities such as students who miss tests, students who move in and out of a school system, and students who skip grades. The data is then analyzed for a wide variety of purposes. For example, estimates of teacher effectiveness, the effect of race and socioeconomic factors on academic gains, and the effectiveness of particular school systems are a few of the findings the model can generate. <http://www.aasa.org/SA/dec9801.htm>

Thus, if a school system's goal was expressed simply as a desire for "general accountability," potential plaintiffs could argue that an alternative method such as the value-added assessment could provide the desired accountability without imposing high-stakes on individual students.

53. 87 F. Supp. 2d at 683-84.

54. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

55. *Id.* at 656-57.

56. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

57. *Id.*

contracts, and play a direct role in determining whether a student has a right to due process under the law.

The Supreme Court has held that students have acquired a legitimate entitlement to education as a property interest.[58] Extending that rule, the court in *Debra P.* held that "in establishing a system of free public education and in making school attendance mandatory, the state has created an expectation in the students. . .that if a student attends school. . .and takes and passes the required courses, he will receive a diploma."[59] It found that the right to a diploma is an implied property right "as the term is used constitutionally."[60] By allowing students a property right in a high school diploma (and arguably in the accompanying graduation ceremony), the court secured a benefit to students that may not be infringed without due process of law.

It is the right to due process that has received the most attention by courts dealing with high-stakes testing. In *Debra P.* the court held that the implementation schedule for the exit exam, which was a new statutory requirement for graduation, violated due process of law by depriving students of their property right to a diploma without adequate notice.[61] The Florida Act at issue was amended in 1978 to require passage of an exit exam for receipt of a diploma. The first students required to take the test were members of the graduating class of 1979. The court noted that such an "eleventh hour change," with virtually no warning or time to prepare for the test, was too severe a requirement.[62] The court upheld the injunction against using the test for four years, and allowed its immediate use for purposes of assessment and remediation only.

Texas has required students to pass a statewide competency exam in order to receive a high school diploma since 1985. However, in 1991 it began to require the exam as a prerequisite to attending graduation ceremonies. The test is called the Texas Assessment of Academic Skills (TAAS), and it measures student performance in math and writing. In *Crump v. Gilmer Independent School District,* a 1992 Eastern District of Texas opinion, the court held that two students who had completed all requirements for graduation, but who had failed the TAAS exam by two points, were entitled to a preliminary injunction requiring the school to allow them to participate in graduation exercises.[63] The court addressed the issue of notice and applied the rule from *Debra P.* that due process requires students be given adequate notice that passing the test is a prerequisite to graduation.[64] The court reasoned that notice is necessary to give students adequate opportunity to prepare for the test, to give the school district adequate time to prepare a remedial program, and to have sufficient time to correct deficiencies in the test and set an appropriate passing score.[65]

Despite the fact that Texas had previously required passage of the TAAS exam for receipt of a diploma, the court relied on the fact that it was only made a requirement for graduation in the fall of 1991. The students were required to take the test in the spring of 1992, some 18 months later. The court noted other cases in which implementation periods of 13 and 18 months were held to be unconstitutional, and determined that it was likely the implementation period would be found to be constitutionally deficient.[66] In granting the injunction ordering the school to allow the students to participate in the graduation ceremony, the court required the plaintiffs to sign affidavits swearing they would continue to take the TAAS exam until they passed.[67]

Interestingly, in the same year in the Western District of Texas, a student who failed

58. Goss v. Lopez, 419 U.S. 565, 574 (1975).
59. *Debra P.*, 644 F.2d at 404.
60. *Id.*
61. *Id.*
62. *Id.*
63. Crump v. Gilmer Indep. Sch. Dist., 797 F. Supp. 552, 554 (E.D. Tex. 1992).
64. *Id.*
65. *Id.*
66. *Id.* at 555.
67. *Id.*

the TAAS exam by one point was denied a temporary restraining order that would have allowed him to participate in his graduation ceremony.[68] Contrary to the holding in *Crump*, the court in *Williams v. Austin Independent School District* found that the student actually had seven years notice between the implementation of the test and the time he actually took the test.[69] In *Crump*, the court measured the implementation period from the date in 1991 when the rule was announced that the TAAS exam would now be required for *graduation*, to the 1992-examination date. In contrast, the *Williams* court measured the implementation period from the original enactment of the Act requiring the TAAS for receipt of a *diploma*, which was in 1985. It reasoned that the student had known for seven years that he had to pass the TAAS exam for receipt of a diploma, and impliedly correlated receipt of the diploma with graduation.[70]

In another interesting note the court in *Williams* stressed that the student who was denied the right to attend graduation ceremonies suffered no irreparable injury. It reasoned that "walking across the stage certainly does not rise to the level of a constitutionally protected property interest any more than attending one's high school prom. . ."[71] Furthermore, it reasoned that upon completion of the TAAS exam, the student could attend a graduation at a later date. In comparison, the *Crump* court specifically found that plaintiffs would "suffer irreparable harm if they [were] denied the opportunity to participate in their graduation ceremony."[72] That court reasoned that though the school has a strong interest in "instilling pride in accomplishment by giving students a strong incentive to complete high school successfully," these "marginal benefits. . .are outweighed by the tremendous potential for irreparable harm to [the students]."[73]

The judge in *Williams* acknowledged the disparity in the decisions of the two courts and stated his disagreement with the *Crump* holding. "Any state interference in the [educational] process is simply destructive to the attempts by the state to salvage its educational system, and this includes interference by the federal judiciary."[74]

The tensions in the case law illuminate that this area of law is not well settled. It is clear, however, that the analysis will be intensely fact-based. Schools should err on the side of caution, and those school systems implementing high-stakes testing should allow adequate time for students to prepare for the exam. They also must allow sufficient time to prepare and implement a remedial program, and to correct any deficiencies in the test.[75] Attorneys representing school districts should be familiar with the testing program, and should be prepared to make a thorough and competent defense of the program on short notice in an injunction hearing.

Systems in which segregation has only recently been remedied must pay special attention to this requirement. They must allow sufficient time for the present effects of segregation to dissipate, and should engage in aggressive remedial efforts where possible. The court in *Debra P.* relied on expert testimony that in order to meet constitutional standards, at least "four to six years should intervene between the announcement of the objectives and the implementation of the diploma sanction."[76] While this may not be a magic number in a court of law, it is a good starting point.

Fundamental Fairness — Test Validity

Another issue that inevitably implicates due process is termed "fundamental fairness."

68. Williams v. Austin Indep. Sch. Dist., 796 F. Supp. 251 (W.D. Tex. 1992).
69. *Id.* at 253.
70. *Id.*
71. *Id.* at 254.
72. *Crump*, 797 F. Supp. at 554.
73. *Id.*
74. *Williams*, 796 F. Supp. at 255.
75. *Id.*
76. 474 F. Supp. 244, 267 (M.D. Fla. 1979).

This issue hinges on the validity of the minimum competency test, and is often at the heart of litigation surrounding high-stakes testing. Can schools adequately prepare students for competency tests that carry high-stakes? How do they ensure each student has an opportunity to learn the material that is tested? These are difficult questions, and the answers are unclear.

The issue of fundamental fairness was explored in *Debra P.*, where receipt of a high school diploma was dependent on obtaining a passing score on an exit exam. The court held that if the exam covered materials not taught in the schools, it was fundamentally unfair and a violation of both equal protection and due process.[77] In addition, the court held that the test must be a "fair test of that which was taught."[78] In remanding the issue for further findings of fact, the court applied rational basis scrutiny to determine that a functional literacy exam bears a rational relation to a valid state interest.[79] Hence the use of an exam-for-diploma is likely to be upheld as long as it is fundamentally fair. The appeals court, however, vacated the district court's finding of validity, because it found insufficient evidence that the Florida schools actually taught the materials that were tested.[80] The court noted that an important component of a valid test is curricular validity (also known as curriculum-to-test match).[81] Curricular validity has two components. First, the test items must adequately correspond to the required curriculum in which the students should have been instructed before they take the test. Second, the test must correspond to the material actually taught in the school regardless of what should have been taught.[82] The State Board of Education stipulated that it had made no effort to ascertain whether or not the performance standards were actually being taught in Florida public schools.[83] Additionally, no formal studies were conducted to verify curricular validity, and a teacher testified that he did not cover all materials in class.[84] The court noted the trial court's statement that "the test was probably a good test of what the students should know, but not necessarily of what they had the opportunity to learn."[85]

The rule announced in *Debra P.* has become the barometer of the fundamental fairness of high-stakes tests. All other courts addressing the constitutionality of such tests have relied on the "curricular validity" or "instructional validity" test. In the two Texas cases mentioned above, the courts arrived at inconsistent findings on the issue of instructional validity, even though the facts in each case should have been nearly identical. In *Crump* the court granted the students a preliminary injunction barring the school from prohibiting them from participating in graduation ceremonies because they failed the TAAS exam.[86] The court expressed considerable doubt that the defendant would be able to show instructional validity. It noted that teachers and administrators were not allowed to view the tests, and therefore they had no way to determine whether the exam was based on material taught in the classroom.[87]

Under the same facts, the *Williams* court *denied* a temporary restraining order on behalf of a student who wished to attend graduation ceremonies, by finding "substantial evidence" that the school taught, and the student took, courses which adequately prepared him for the TAAS exam.[88] While not focusing on specific course content, it credited the testimony of a

77. 644 F.2d at 397.

78. *Id.* at 406.

79. *Id.*

80. *Id.*

81. *Id.*

82. *See Crump,* 797 F. Supp. at 555.

83. However the Department of Education noted the absence only of formal studies and indicated it would be able to prove the test actually covered materials taught in the classroom. This was the case, because on remand the district court (and the Eleventh Circuit on appeal) held the test to be instructionally valid. *See* Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).

84. *Debra P.;* 644 F.2d at 405.

85. *Id.*

86. *Crump,* 797 F. Supp. at 556.

87. *Id.*

88. *Williams,* 796 F. Supp. at 254

math teacher stating that the math portion of the test covers geometry and algebra, and that the student had taken both classes in school. The court also noted the student had received remedial instruction in math to help him pass the test after he had previously failed it. Finally, the court acknowledged but gave no weight to the fact that teachers and administrators are not permitted to view the contents of the test.

The underlying issue in these cases is whether students have the *opportunity to learn* the materials that are tested on the exam. As *Debra P.* states, to be fundamentally fair, the test must cover only subjects taught in school and must be a fair test of that which is taught in each subject. Ensuring instructional validity is no small challenge. Not only must schools ensure test validity for the students who grow up in a particular school system and attend school everyday, they must address how to ensure a curriculum-to-test match for students transferring into the system at various times. For instance, many states require testing only in certain school years. In Virginia, students are tested in grades three, five, eight and high school. Those schools must find ways to ensure students transferring into the system at grade seven are equipped to take the test in grade eight. This can pose a real challenge for any school when test performance is tied to consequences, especially when those consequences include revocation of the school's accreditation.

The cases demonstrate that whether a test is fundamentally fair is a fact-intensive analysis, and outcomes can vary widely, even on the same set of facts. Schools would do well to assess their own tests for curricular validity prior to a legal action arising. Schools may employ outside agencies to assess whether what is tested is actually taught, and should document such findings, including changes made to the curriculum and the test. While this may be an arduous task, a school district interested in implementing accountability mechanisms such as high-stakes tests must be prepared for legal challenges that likely will arise.

CONCLUSION

While the paucity of case law in the area of high-stakes testing inhibits the ability to make general conclusions, the issue appears to implicate few surprising or novel legal theories. In general, deference to the states and to local school boards will continue, and the traditional legal regimes covering due process and equal protection will remain intact. However, it is important to note that the consequences of high-stakes testing for students and teachers extend beyond the mere issues of grade promotion and graduation. The impact on students of being denied a diploma can be enduring, affecting access to employment opportunities and higher education, while the effect on teachers may be equally dramatic. (See D. Farmelo, *Using Student Test Results to Evaluate Educational Professionals and Institutions, infra,* for discussion of the impact of high-stakes testing programs when used to evaluate teachers.) The implementation of such high-stakes mechanisms means school systems must be prepared to defeat potential litigation by preemptively ensuring their school reform not only is educationally valid, but also legally sound. Appendix A provides a practical checklist of the issues discussed in this chapter to assist the practitioner in constructing, implementing, and assessing a legally sound high-stakes testing program.

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Special Considerations in High-Stakes Testing

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The legal issues surrounding high-stakes testing are very complicated even if one does not factor in the special considerations required by students with special needs. It is apparent, however, that a large number of students within a school district may require special considerations in the administration of high-stakes testing. These special needs may arise as a result of a disability, limited English proficiency, or other special status. This chapter will discuss the issues arising in the testing of students who have these special needs.[1]

TESTING OF STUDENTS WITH DISABILITIES

The increased use of high-stakes tests has created additional problems in the testing of students with disabilities. Tests are routinely used to determine whether a student qualifies as a student with disabilities. But other testing issues must be addressed when determining whether students with disabilities should participate in high-stakes tests including: what accommodations are required for effective participation, whether the high-stakes test would be invalidated as a result of these test accommodations and whether the particular test is an appropriate instrument for use with the special needs student. These various issues are addressed in the following discussion.

Individuals with Disabilities Education Act

The Individuals with Disabilities Education Act,[2] ("IDEA" or "1997 IDEA") places special emphasis in its 1997 reauthorization on increased expectations for performance by children with disabilities. The 1997 IDEA also requires an assessment of the effectiveness of the methods used to educate these special children.[3] Obviously, testing serves as an important tool for judging whether the methods used to educate students with disabilities are successful.

The emphasis on increased expectations and outcomes has also focused more attention on educating students with disabilities in the regular classroom and on insuring their participation in the general curriculum. In furtherance of this goal, the 1997 IDEA requires that students with disabilities be educated with their non-disabled peers and in general education classes "[t]o the maximum extent appropriate."[4] Students with disabilities are to be placed in settings other than the regular classroom only when the nature or severity of the disability is such that the student cannot be educated successfully in the regular classroom with the use of supple-

1. The reader should also follow the status of legislation pending in Congress, H.R. 4333-Fairness and Accuracy in Student Testing, 106th Cong., 2d Sess. (2000). That legislation, if passed, could affect the opinions in this article.

2. 20 U.S.C. § 1400 *et seq.*

3. 20 U.S.C. § 1400(c).

4. 20 U.S.C. § 1412(a)(5)(A).

mentary aids and services.[5] Each student with a disability must have access to the general curriculum available to all students, whether in special education or regular education classes, unless it is shown that the student cannot benefit from the general curriculum.[6]

This emphasis in the 1997 IDEA on participation in regular classes and in the regular curriculum appears to derive from a recognition that students who do not have access to the general curriculum may be ill-prepared for success in school, attainment of a regular diploma, future employment opportunities and independent living. Testing will be an important means by which attainment of these goals will be judged.

The IDEA emphasizes the importance of testing for purposes of determining whether a student qualifies as disabled and whether accommodations in the classroom or in testing are necessary. The reauthorization of IDEA in 1997 also recognizes problems with the over-identification of minorities and of students with limited English proficiency as disabled.[7] This over-identification may result in part from use of inappropriate test instruments. To clarify these issues, the following discussion will also address the special considerations in the testing of disabled students for purposes of identification and for participation in state and district-wide assessments.

- **Testing to Identify a Disability**

It is the obligation of the local school district to seek out students with disabilities residing within the district and to evaluate them to determine whether they require special education and related services.[8] This requirement extends even to children residing within the school district who are enrolled in private and parochial elementary and secondary schools.[9] The evaluations that are administered to these children must be sufficient to determine whether the child has a disability as defined by the IDEA and to determine the child's educational needs.[10]

The IDEA requires that the tests used for this purpose meet rigidly prescribed criteria. These criteria mandate that the school district use a variety of assessments in the determination of eligibility for special education services. The statute provides as follows:

> (2) *Conduct of evaluation*
>
> In conducting the evaluation, the local educational agency shall —
>
> (A) use a variety of assessment tools and strategies to gather relevant functional and developmental information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general curriculum or, for preschool children, to participate in appropriate activities;
>
> (B) not use any single procedure as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and
>
> (C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.[11]

5. *Id.*
6. 20 U.S.C. § 1414(d)(1)(A)(i)(I).
7. 20 U.S.C. § 1400(c)(7)(F) & (8).
8. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.125.
9. 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. § 300.125(a)(1)(i).
10. 20 U.S.C. § 1414(a)(1)(B); 34 C.F.R. § 300.532(b).
11. 20 U.S.C. § 1414(a)(2).

Significantly, one purpose of the testing is to determine the extent to which the student can participate in the general curriculum. Participation in the general curriculum is linked to participation in high-stakes tests and to the opportunity to earn a regular diploma.

The chosen test instruments must be technically sound, unbiased, administered in the child's native language, validated for the specific purpose for which they are administered and administered by trained and knowledgeable persons. To make sure that the assessment instruments are appropriate, the 1997 IDEA dictates that a number of additional test criteria be satisfied.

> (3) *Additional requirements.*
>
> Each local educational agency shall ensure that —
>
> (A) tests and other evaluation materials used to assess a child under this section —
>
> (i) are selected and administered so as not to be discriminatory on a racial or cultural basis; and
>
> (ii) are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so; and
>
> (B) any standardized tests that are given to the child —
>
> (i) have been validated for the specific purpose for which they are used;
>
> (ii) are administered by trained and knowledgeable personnel; and
>
> (iii) are administered in accordance with any instructions provided by the provider of such tests.[12]

12. 20 U.S.C. § 1414(a)(3); 34 C.F.R. § 300.532.

It is believed that adherence to these rigorous testing requirements will promote more reliable eligibility determinations and lessen the chances that the child will be incorrectly identified as disabled. To comply with the IDEA in testing to identify the existence of a disability, it is recommended that the school district: (1)use a variety of assessment tools; (2)use widely accepted tests proven to be reliable; (3)consider whether the tests are discriminatory; and (4)ensure that standardized tests have been validated for the purpose for which they are used, are administered in accordance with test protocols and are administered by trained and knowledgeable professionals.

- **Participation in District-wide and State Assessments**

Once students are identified as having a disability, they may also be entitled to other testing considerations. The IDEA recognizes the use of high-stakes tests by school districts for children with disabilities and requires appropriate accommodations when necessary.[13] Participation in the general curriculum by students with disabilities is important if these students are to have an opportunity to pass high-stakes tests. Specifically, the IDEA provides that students with disabilities must participate, as appropriate, in state and district-wide assessments. They must also be provided needed accommodations. Additionally, if those students cannot participate in the regular assessment program, then they must participate in alternate assessment programs beginning July 1, 2000. The statute provides:

13. The reader should watch for rulings in high-stakes testing cases pending in many states. These cases will provide further insight into this complicated topic. For example, an Indiana Superior Court judge recently rebuffed a challenge by disabled students to the new state testing requirements for graduation and the limitations placed on permissible accommodations. The court ruled that requiring special education students to pass the test to graduate did not violate the IDEA nor the due process clause of the Fourteeth Amendment. *See Indiana Special Ed. Students Don't Get Test Exemption,* SCHOOL LAW NEWS, June 23, 2000, at 8 (discussing Rene v. Reed).

Participation in assessments.

(A) In General—Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. As appropriate, the State or local educational agency —

(i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district wide assessment programs; and

(ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments.[14]

The federal regulations corresponding to the IDEA also reflect that students with disabilities must participate, when appropriate, in the state and district-wide assessments or in alternative assessments:

Participation in assessments.

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

(a) Children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations and modifications in administration, if necessary;

(b) As appropriate, the State or LEA —

(1) Develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs;

(2) Develops alternate assessments in accordance with paragraph (b)(1) of this section; and

(3) Beginning not later than, July 1, 2000 conducts the alternate assessments described in paragraph (b)(2).[15]

It is the further statutory obligation of school districts to file a public report concerning the participation of children with disabilities in high-stakes test.

(B) *Reports*

The State educational agency makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments.

(ii) The number of those children participating in alternate assessments.

(iii)(I) The performance of those children on regular assessments (beginning not later than July 1, 1998) and on alternate assessments (not later than July 1, 2000), if doing so would be statistically sound and would not result in the disclosure of performance results identifiable to individual children.

(II) Data relating to the performance of children described under subclause (I) shall be disaggregated—

(aa) for assessments conducted after July 1, 1998; and

(bb) for assessments conducted before July 1, 1998, if the State is

14. 20 U.S.C. § 1412(a)(17)(A).

15. 34 C.F.R. § 300.138.

> required to disaggregate such data prior to July 1, 1998.[16]

This information will be used to show how successful school districts are in including students with disabilities in their testing programs. The data will also provide information about the positive or negative outcomes of the educational services provided to students with disabilities.

Clearly, the IDEA anticipates that students with disabilities will participate in high-stakes tests. These requirements under the IDEA should not be construed as requiring the participation of every student with a disability in general education classes or in district-wide and state assessments. The determination of whether a student will participate in high-stakes testing is made by the student's individualized education program ("IEP") team. The IEP team also decides which accommodations are required for each student who participates in high-stakes testing.

The IDEA directs that the issue of participation in high-stakes tests must be addressed in the student's IEP. Specifically, the IEP is to include:

> (I) a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in such assessments; and
>
> (II) if the IEP Team determines that the child will not participate in a particular State or district-wide assessment of student achievement (or part of such an assessment), a statement of — (aa) why that assessment is not appropriate for the child; and (bb) how the child will be assessed.[17]

This statutory provision makes clear that students with disabilities will participate in high-stakes testing *unless* the IEP committee grants an exemption. To make sure this decision is made fairly, the decision-making team includes the parents as members of the IEP team. This decision about participation is not made by an individual administrator, who may seek to exclude students with disabilities from testing in order to elevate scores in the school. The modifications needed for assessments are also determined by the IEP team. If the child will not participate in the regular assessment, the determination is made by the IEP team of how the child will be assessed through alternate assessments.[18]

The U.S. Department of Education has issued a *Joint Policy Memorandum on Assessments*[19] which provides guidance on these testing requirements for students with disabilities. The *Joint Policy Memorandum* states:

> Assessment is an integral aspect of accountability. Assessment systems have varied purposes. Whatever the focus of the particular assessment system — program evaluation, school and staff accountability or measuring student progress — assessments provide valuable information which benefits individual students, either directly, such as in the measurement of individual progress against standards, or indirectly, such as in evaluating programs. Given the emphasis on assessment in recent educational reform efforts, including state and federal legislation linking assessment and school accountability, it is of utmost importance that students with disabilities be included in the development and implementation of assessment activities. Too often, in the past, students with disabilities have not fully participated in

16. 20 U.S.C. § 1412(a)(17)(B); 34 C.F.R. § 300.139.

17. 20 U.S.C. § 1414(d)(1)(A)(v); 34 C.F.R. § 300.347(a)(4) & (5).

18. 20 U.S.C. § 1414(d)(1)(A)(v); 34 C.F.R. § 300.347(a)(5)(ii).

19. 27 IDELR 138 (Sept. 29, 1997)(reproduced in Appendix E).

> state and district assessments only to be short changed by the low expectations in less challenging curriculum that may result from exclusion.[20]

The U.S. Department of Education concluded that it would violate IDEA if students with disabilities were systematically excluded from participation in high-stakes testing programs.

Case law also supports the administration of high-stakes testing to students with disabilities, and rejects arguments that students with disabilities should be exempt from testing requirements. At issue in *Brookhart v. Illinois State Board of Educ.*[21] was the "Minimal Competency Test" (MCT) required for receipt of a diploma. This graduation requirement was challenged by disabled elementary and secondary students. The court determined that the school district had the authority to establish minimum standards for the receipt of a diploma and that such a requirement did not violate the IDEA.[22] The *Brookhart* court found that denying diplomas to students with disabilities who are unable to achieve the educational level necessary to pass the MCT is not a denial of a free appropriate public education.[23]

The *Brookhart* court further determined that the graduation test requirement did not violate the Rehabilitation Act:

> Altering the content of the MCT to accommodate an individual's inability to learn the tested material because of his handicap would be a "substantial modification" as well as a "perversion" of the diploma requirement. . . . A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap. Thus, the denial of a diploma because of inability to pass the MCT is not discrimination under the [Rehabilitation Act].[24]

It has also been found that where the state has established a requirement for passage of a high-stakes test for graduation, a local school district cannot override that rule for its disabled students. In *Board of Education of Northport-East Northport Union Free School District v. Ambach,*[25] the New York State Department of Education decided to require a graduation test for students in reading and mathematics. The test was adopted because of concerns over lowered college board scores and a lack of basic skills. To pass the test, a student had to be able to answer 80% of the questions correctly at a level expected of the average ninth grade student. The test was field tested and found to be valid.

Two special education students did not take the test but were awarded regular diplomas by the local school district. The diplomas were awarded on the basis that the students had successfully met their IEP requirements. The State sought to revoke the diplomas, and the school districts initiated suit to prevent the revocation.

The *Ambach* court first concluded that it was permissible for the State to impose this testing requirement: "[W]e first reject the contention that respondents do not have the power to determine educational policy in this State and to establish criteria for high school graduation. Indisputably, control and management of educational affairs is vested in the Board of Regents and Commissioner of Education"[26]

20. *Id.*

21. 697 F.2d 179 (7th Cir. 1983).

22. *Id.*

23. *Id.* at 183.

24. *Id.* at 184. *See also,* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

25. 90 A.D.2d 227, 458 N.Y.S.2d 680 (N.Y. Sup. Ct. App. Div. 1982); *aff'd,* 457 N.E.2d 775, 469 N.Y.S.2d 669 (N.Y. Ct. App. 1983).

26. 90 A.D.2d at 230.

The court then addressed the appropriateness of imposing the test on the disabled population. The court found that discrimination in violation of Section 504 of the Rehabilitation Act of 1973 arises only when benefits are denied to an individual who is able to meet all of a program's requirements in spite of a disability.[27] The two special education students were found not "otherwise qualified" because they had not taken and passed the high-stakes test and were not capable of doing so. The court also concluded that the failure to earn the diploma by a student who was provided a free appropriate public education did not violate the Education of the Handicapped Act (now IDEA).[28] Case law clearly supports the imposition of a high-stakes test requirement for graduation, even for disabled students.

The use of a high-stakes test as a graduation requirement is more easily defended if it can be shown that the test is but one criteria for graduation. As noted previously, no single test can be used as the basis for decision-making under the IDEA. Thus, to defend the use of a high-stakes test as a prerequisite for graduation, it must be shown that it is one of several criteria. For example, the student would also be required to complete and pass a prescribed course of study and IEP requirements.[29]

Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against an "otherwise qualified individual with a disability . . . solely by reason of her or his disability. . . ."[30] The federal regulations implementing Section 504 provide that "[a] recipient, in providing any aid, benefit or service, may not directly or through contractual, licensing, or other arrangements on the basis of handicap: (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit or service. . . ."[31]

The U.S. Department of Education has opined that the exclusion of students with disabilities from assessment programs because of a disability would violate this requirement of the Rehabilitation Act of 1973.

> Given the benefits that accrue as a result of assessment, exclusion from assessments based on disability generally would not only undermine the value of the assessment but also violate Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits exclusion from participation of, denial of benefits to, or discrimination against, individuals with disabilities on the basis of their disability in Federally-assisted programs or activities.[32]

It appears evident that students with disabilities cannot be excluded from high-stakes testing solely because they possess a disability without raising concerns about violations of Section 504.

On the other hand, the existence of a disability cannot be put forward as an excuse to exempt the student from test requirements. A student with disabilities must still pass any test required for graduation or used for other program requirements. There is no requirement that there be substantial modification of standards to accommodate a student with disabilities.[33] Students with disabilities can be expected to take and pass high-stakes tests without violating Section 504, provided reasonable accommodations are granted.[34]

In summary, the Rehabilitation Act requires that acceptable accommodations in

27. *Id.* at 232.
28. *Id.* at 233-34.
29. *See, e.g., Brookhart,* 697 F.2d at 183.
30. 29 U.S.C. § 794(a).
31. 34 C.F.R. § 104.4(b)(1).
32. *Joint Policy Memorandum on Assessments, supra,* n. 19.
33. *See Southeastern Community College,* 442 U.S. at 413.
34. *Brookhart,* 697 F.2d at 184. See discussion of this case on 4-6, *supra.*

testing be allowed but does not grant exemptions for students with disabilities from meeting test requirements.

Americans With Disabilities Act of 1990

Title II of the Americans With Disabilities Act of 1990 (ADA) provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[35] Similar to the IDEA and Section 504, the ADA requires reasonable accommodations to avoid discrimination on the basis of disability. The ADA does not require modifications which would alter the fundamental nature of the service, program or activity.

The U.S. Department of Education has stated that high-stakes test requirements do not violate the ADA.[36] It is only the systemic exclusion of students with disabilities from taking the test which would violate ADA. Typically, if IDEA and Section 504 standards regarding testing are met, then the ADA requirements are also satisfied.

Accommodations in Testing for Students with Disabilities

Students with disabilities are entitled to receive accommodations in testing to make allowances for the effects of their disabilities. As noted previously, the extent of the accommodations will be determined by the IEP team or the Section 504 team. Extensive accommodations may invalidate the test results so that the student's score will not be viewed as a passing score even if high enough to be judged as "passing." There must be a balancing act between the need to provide reasonable accommodations to allow the disabled student to pass and the need to preserve test integrity.

There is no requirement that every disabled student be able to pass a high-stakes test. Federal regulations implementing. Section 504 state: "[A]ids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped persons and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs."[37]

Accommodations are to provide access to tests not to guarantee results. Accordingly, altering the content of a test as a means of accommodating a disability is not required.[38]

Accommodations must be reasonable. A number of accommodations requested by students have been held to be unreasonable. For example, a ban on the use of calculators in the math portion of a proficiency exam was upheld by the Office for Civil Rights (OCR) of the U.S. Department of Education.[39] OCR upheld the State's determination that computational skills were an essential part of the state's educational program. The accommodation of a calculator would be a significant alteration of the program and would not be reasonable.

OCR also upheld a state's policy of denying the use of reading devices for the Alabama High School Exit Exam because it would invalidate the test.[40] It is easy to conclude that having a reading test read to a student will not provide a valid assessment of the student's ability to read.

Generally, test accommodations will mirror those used by the student in school. In administering the Alabama High School Exit Exam, a student was allowed to use accommo-

35. 42 U.S.C. § 12132

36. *See Joint Policy Memorandum on Assessments, supra,* n. 19.

37. 34 C.F.R. § 104.4(2). *See also,* 20 U.S.C. § 1412 (a)(17); 34 C.F.R. § 300.138.

38. *See Brookhart,* 697 F.2d at 184.

39. *See Nevada State Dep't of Education,* 25 IDELR 752 (OCR 1996).

40. *See Alabama Dep't of Educ.,* 29 IDELR 249 (OCR 1998).

dations that did not invalidate the assessment, and that were a part of his or her instructional program.[41] The administrative hearing officer upheld the district's policy and the denial of an accommodation to the student which was not part of his customary instructional program.

It is not necessarily required, however, that accommodations on high-stakes tests equate with those used in the classroom. State guidelines limiting permissible accommodations for a high school competency test were upheld even though the school district permitted additional accommodations to the student in his classes.[42] The State's guidelines prohibited reading or explaining the communications portion of an exam to a student. The State believed such an accommodation would invalidate the test. No violation of either Section 504 or the ADA was found when the student, who was allowed such accommodations in other test situations in school, was not allowed the accommodation for the competency exam.

Some examples of potential permissible accommodations are the use of braille, additional time on the test, breaking the test up into sections administered over multiple days and providing a distraction free environment. The determination of needed accommodations must be made on individualized basis. A State's blanket policy of only providing "readers" to visually impaired students was found to be a violation of Section 504.[43] Section 504 requires individual determinations of a student's educational needs. Denial of a reader for an examination required for the receipt of a diploma to other disabled students who may have needed such an accommodation denied them an equal opportunity to receive a diploma.

In summary, accommodations on high-stakes tests should be provided on an individual basis as determined by the student's IEP or Section 504 plan. Accommodations regularly used in the classroom may be denied for use on a high-stakes test if the accommodation would invalidate the test. States and local school districts which require high-stakes tests would be well-served to maintain a list of impermissible accommodations that would invalidate a test and of permissible accommodations which would not. Obviously, there would need to be a valid justification for distinguishing between the types of accommodations.

BIAS IN TESTING

As noted in the discussion above, the 1997 IDEA cited concern about the over-identification of minorities as disabled.[44] In order to address this concern, the 1997 IDEA provides that tests and evaluation materials used to assess a child must be "selected and administered so as not to be discriminatory on a racial or cultural basis." 20 U.S.C. § 1414(b)(3)(A). The issue of over-identification of minorities as disabled has become a focus of some investigations by the Office for Civil Rights.[45]

One method of proving discrimination resulting in over-identification of minorities is to prove the bias inherent in the underlying tests. The tests used for evaluation have been challenged in the courts particularly as they relate to the identification of minority students as mentally retarded. Two courts have reached opposite conclusions as to whether intelligence tests are biased against minorities and prevent an accurate assessment of the existence of a disability.

In the 1980s, African-American children were about 9% of California's population, but constituted about 27% of the state's Educable Mentally Retarded (EMR) population.[46] Many

41. *Mobile County Bd. of Educ.*, 26 IDELR 695 (Ala. 1997)

42. *See Florida State Dep't of Educ.*, 28 IDELR 1002 (OCR 1998).

43. *Hawaii State Dep't of Educ.*, 17 EHLR 360 (OCR 1990).

44. 20 U.S.C. § 1400(c)(8).

45. *See Letter to Anonymous*, 30 IDELR 706 (OCR 1998).

46. *See Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1986).

African-American students were placed in EMR programs designed to teach social adjustment and economic usefulness rather than being placed in the regular curriculum. The state had established a list of required intelligence quotient (IQ) tests to be administered in order to identify a student as EMR. The tests were not selected by an expert in IQ testing, and the list of tests was compiled quickly. Concerns were raised that the tests were classifying students based on social differences, language difficulties and cultural differences rather than on the basis of true IQ deficiencies. School districts were found by the *Larry P.* court to be making the EMR placements almost exclusively on the basis of IQ test results without considering other factors.

The *Larry P.* court observed that tests used for identification are required to be non-discriminatory under the Rehabilitation Act and under the Education for All Handicapped Children Act (now the IDEA).[47] It was also found that no one test should be used to justify identification of students as disabled. The court ruled that, for the test to be valid, the state would need to show "that the tests are a proven tool to determine which students have characteristics consistent with EMR status and placement in EMR classes, i.e., 'whose mental capabilities make it impossible for them to profit from the regular educational programs' even with remedial instruction."[48] Basically, the court required the State to show validity of the IQ tests for minority students. The court noted that this validity had been assumed but not established.[49] The court found that use of the IQ test was also improper because of the failure of the school districts to rely on a variety of criteria for identification of students as disabled. Thus, the use of the IQ test by itself violated testing provisions of the EAHCA (now IDEA). The use of intelligence tests for identification of minorities as disabled was enjoined.

It is of interest that the Ninth Circuit limited the *Larry P.* prohibition against IQ testing of minorities for identification as disabled to only those African-American students who were being considered for identification as EMR.[50] This limitation was imposed at the request of African-American students who sought identification as learning disabled but were hampered in their efforts by the earlier *Larry P.* injunction. The Ninth Circuit permitted the use of IQ tests for identification of disabilities under categories other than the category of EMR. As a basis for this decision, the Ninth Circuit noted that the *Larry P.* ruling arose from an inquiry into "the disproportionate enrollment of African-American children in dead-end EMR classes, not the use of IQ tests generally."

Another court concluded that IQ tests were not discriminatory. *In Parents in Action on Special Education v. Hannon,*[51] African-American students were allegedly placed in special classes for the educable mentally handicapped based on IQ tests which were culturally biased. While 62% of the Chicago Public Schools student population was African-American, 82% of the Educable Mentally Handicapped (EMH) classes were African-American. The Stanford-Binet, and the WISC-R and WISC tests were reviewed by the court for discriminatory attributes.

The evidence at trial revealed that these tests were administered by trained psychologists, many of whom were minorities. Also, there were other criteria used for identification as disabled besides the IQ test. Poverty was found to produce another explanation for poor test performance rather than bias in the test itself. Use of the Weschler and Stanford-Binet tests was not discriminatory because the test results by themselves were not used to initiate a referral for special education services. The initial referral was based upon poor classroom performance.

47. *Id.* at 979-80.

48. *Id.* at 980.

49. *Id.*

50. *See* Crawford v. Honig, 37 F.3d 485 (9th Cir. 1994).

51. 506 F. Supp. 831 (N.D. Ill. 1980).

The several test items on the IQ tests, which the court found to be biased, would not significantly affect the score of an individual taking the test. The court commented on the *Larry P.* case and noted that the court in *Larry P.* had not undertaken an analysis of the test items. It had simply concluded that the issue of test discrimination was "hardly disputed." This later decision distinguished the *Larry P.* case on that basis.

Clearly, school districts must be prepared to defend against allegations of bias in the test instruments that are selected.

TESTING OF ENGLISH LANGUAGE LEARNERS

English Lanuage learners (ELL) students also require special considerations regarding their participation in high-stakes tests. (See N. Gittins, *An Overview of Student Testing and Assessment, supra,* at 1-1 for discussion of requirements under Elementary and Secondary Education Act for Assessment of ELL students.) It is permissible to hold these students accountable for an acceptable level of language competency. For a language competency requirement to be equitable and legal, the ELL students must be taught the necessary skills so that they may pass the tests. At least one court has recognized that ELL students can be required to meet proficiency standards in language.

> At stake here are the educational policies of an entire state, matters traditionally, in our federal system, viewed as primarily state concerns. The issue is essentially a pedagogic one: how best to teach comprehension of a language. Neither we nor the trial court possess special competence in such matters. It follows that on such thin ice both tribunals should tread warily, doing no more than correcting clear inequities and leaving positive programming to those more expert in educational matters than are we.[52]

Title VI

Where testing of language skills is a requirement, ELL students must be taught the necessary skills. In *Lau v. Nichols*,[53] there were 2,856 students of Chinese ancestry in the school district who did not speak English. Only 1000 were given supplemental instruction in English. The education code required that no diploma be awarded until the student met proficiency standards in English as well as other subjects. The Supreme Court held that the failure to teach English sufficiently to all students denied the students a meaningful opportunity to participate in the educational program in violation of Title VI of the Civil Rights Act of 1964.[54] Under these state imposed standards equality of treatment did not occur merely by providing students with the same facilities, text books, teachers, and curriculum. The students who did not understand English were effectively foreclosed from any meaningful education.[55]

Thus, ELL students must receive supplementary English language instruction if they are to be held accountable for proficiency in English. The simple provision of routine educational classes and instruction will not be sufficient.[56]

A federal district court recently issued a ruling in a class action suit alleging that the state of Arizona had violated the Equal Educational Opportunity Act of 1974[57] (EEOA) and Title VI by failing to provide English language learners in the Nogales Unified School District

52. United States v. State of Texas, 680 F.2d 356, 370 (5th Cir. 1982)

53. 414 U.S. 563, 567 (1974).

54. 42 U.S.C. § 2000d.

55. *Id.* at 566.

56. For additional guidance on this subject, see U.S. DEP'T OF EDUCATION, POLICY UPDATE ON SCHOOLS OBLIGATION TOWARD NATIONAL ORIGIN MINORITY STUDENTS WITH LIMITED ENGLISH PROFICIENCY (Sept. 27, 1991).

57. 20 U.S.C. § 1703.

(NUSD) with a program of instruction calculated to make them proficient in speaking understanding, reading and writing English while enabling them to master the standard academic curriculum as required of all students.[58] The court specifically addressed two issues: 1)whether the defendants adequately fund and oversee the *Lau* program in NUSD; and 2)whether the Arizona Instrument to Measure Standards (AIMS) test disparately impacts minority students at NUSD. The court found that the state had violated the EEOA by providing funding at a base level that is "arbitrary and capricious" and "bears no relation to the actual funding needed to ensure that LEP students in NUSD are achieving mastery of its specified 'essential skills'." The court cited such deficiencies in the *Lau* program as overcrowded class rooms, insufficient number of class rooms, lack of qualified teachers to teach ESL and bilingual teachers to teach content area studies, not enough teacher aides, inadequate tutoring programs and insufficient teaching materials for ESL classes and content area courses. The court, however, rejected the plaintiffs' Title VI claim that the AIMS test had a disparate impact on NUSD minority students. The court said, "the correlation that exists in NUSD between 'at risk' students and LEP students destroys any race-based inferences that might otherwise be drawn. . . [T]he students at NUSD might very well fail the test because they are low-income 'at risk' students. Members in this group are not protected from discriminatory treatment."

IDEA - Indentification of ELL Students as Disabled

Special provisions are made for ELL students in the IDEA. The IDEA recognizes that ELL students are a fast growing population in the schools and may be over-represented in the population of disabled students.

> (F) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation. In the Nation's two largest school districts, limited English students make up almost half of all students initially entering school at the kindergarten level. Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education. The Department of Education has found that services provided to limited English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds.[59]

To counter this concern, IDEA 1997 has a special eligibility rule for the identification of an LEP student as disabled. LEP students may not be identified as disabled if it is shown that "the dominant factor for such determination is . . . limited English proficiency."[60] Having limited English proficiency is not a disability. It is accordingly recommended that consideration be given in the referral process to the student's primary language.

Testing under the IDEA must be administered in the "child's native language."[61] The evaluation procedures utilized must assess whether the child has a disability and the nature of the disability rather than the child's English language deficiencies.[62] Furthermore, "[m]aterials and procedures used to assess a child with limited English proficiency [must be] selected and administered to ensure that

58. *Flores v. State of Arizona,* No. CIV-92-596-T-ACM (D. Ariz. Jan. 24, 2000).

59. 20 U.S.C. § 1400(c)(7)(F).

60. 20 U.S.C. § 1414(a)(5).

61. 34 C.F.R. § 300.532(a)(1)(ii).

62. *See San Luis Valley (CO) Board of Cooperative Services,* 21 IDELR 304 (OCR 1994).

they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills."[63]

One way to rule out any difficulties arising from limited English proficiency is to administer a language proficiency test. If the child is found to be proficient in English, then the child may be tested with English language instruments. If not, then assessments must be administered in the child's primary language.[64] Also, if a language other than English is spoken in the home, this fact will not automatically require that the student be tested in the home language. The language to be used for assessment will depend on the student's proficiency level.[65]

The IEP committee is also directed to, "in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP."[66] The IEP committee must specify if language services are needed due to LEP. There is no right to limit services to a choice of special education services or LEP services. A student may be entitled to both types of services.[67]

Thus, for the LEP student population, requiring proficiency in English language skills is permissible if the needed skills have been taught. Before an LEP student is identified as disabled, it must be shown that any poor performance is not predominantly due to an English language deficiency. Educational programs must address a student's needs in LEP and in special education if a student has these dual needs.

63. 34 C.F.R. § 300.532(a)(2).

64. *See San Diego (CA) Unified School District,* 31 IDELR 40 (OCR 1999).

65. *Id.*

66. 20 U.S.C. § 1414d(3)(B)(ii); 34 C.F.R. § 300.346(a)(2)(i).

67. *See San Luis Valley, supra,* n. 62.

TESTING OF CHILDREN WHO ARE NOT ATTENDING THE PUBLIC SCHOOLS

A number of students with special needs do not attend regular public schools. They may be enrolled in private schools, charter schools or be home schooled. The question arises as to the obligation of the public schools to test these students. The 1997 IDEA provides some clarification on this issue.

Charter Schools

A charter school appears to be included in the definition of a local education agency.[68] The federal regulations make clear that charter schools are public agencies.[69] More importantly, the federal regulations provide that "[c]hildren with disabilities who attend public charter schools and their parents retain all rights under this part."[70] As a result, it appears that children with disabilities who attend public charter schools have the same testing rights as those students enrolled in regular public schools.

Private Schools

The testing rights of children in private schools is somewhat different. These rights will vary depending on whether the children were privately placed by their parents or by the school district. If placed by the school district in a private school in order to receive a free appropriate public education, the private school child "[h]as all of the rights of a child with a disability who is served by a public agency."[71]

"Private school children with disabilities," as defined by federal regulations, are those children placed privately by their parents in private schools or facilities.[72] These private school children are nonetheless entitled to be

68. *See* 20 U.S.C. § 1401(15).

69. 34 C.F.R. § 300.22.

70. 34 C.F.R. § 300.312(a).

71. 34 C.F.R. § 300.400(c).

72. 34 C.F.R. § 300.450.

a part of child find.[73] The identification of disabled children who attend private schools is a mandate of the IDEA. This mandate includes the right to be evaluated in order to identify the existence of a disability. "Under Part B, States and local school districts are responsible for locating, identifying and evaluating all children suspected of having disabilities who may be in need of special education and related services. Therefore, if private school personnel suspect a child of having disabilities, they should request that the local school district where the child resides evaluate the student."[74]

Home Schools

It is not clear whether these same testing provisions apply to home school students. If home school children are considered as placed in a private school or facility, then they have the same rights as private school children There is no definition in the IDEA statutes or regulations of a "private school or facility." The Office of Special Education Program advises that "the determination of whether a particular home education arrangement constitutes the enrollment of a child with a disability in a private school or facility must be based on State law."[75] If the home schooled student is considered a private school student under State law, then the student will be permitted to participate in child find and testing requirements. Obviously, local school districts will need to look to State law in addition to the federal requirements to determine their responsibilities to test children enrolled in schools other than private schools.

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73. *See* 20 U.S.C. § 1412(a)(10)(A)(ii); 34 C.F.R. § 300.451.

74. *Letter to Burr,* 30 IDELR 146 (OSEP 1998).

75. *Letter to Sarzynski,* 29 IDELR 904 (OSEP 1997).

Using Student Test Results to Evaluate Educational Professionals and Institutions: What the Law Instructs

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This article will focus on systems which tie employee evaluation to student performance on high-stakes tests. In addition to reviewing the potential legal challenges to these systems, this article will address collective bargaining issues, touch on issues related to administrators, and discuss some possible unintended consequences of these systems.

REPORTED CASE LAW

Only two reported cases address legal challenges to the use of student test scores to evaluate professional educators. Both concern actions taken by local school districts rather than state-established systems.

Scheelhaase v. Woodbury Central Community School District

In 1972, the District Court for the Northern District of Iowa ruled in favor of an Iowa teacher whose contract had not been renewed based on the poor performance of her students on the Iowa Test of Basic Skills (ITBS) and the Iowa Test of Educational Development (ITED). The following year, the Eighth Circuit reversed that decision. The teacher in *Scheelhaase v. Woodbury Central Community School District*[1] was not tenured, as all Iowa teachers are employed pursuant to renewable one-year contracts. She was a language arts teacher who had been employed for a period of ten years prior to her non-renewal. All procedural requirements of Iowa law, which included a statement of the reason for non-renewal as well as both a private and a public hearing on the stated reason, had been afforded to the plaintiff. The statement of the reason for the non-renewal cited only the student test scores. At trial the school district attempted to rely upon additional reasons, such as "a rote following of text materials, lack of congenial relationship between teacher and pupil, and indications of poor preparation."[2] The trial court rejected those reasons because they had not been asserted in the administrative proceedings conducted by the school district.

The plaintiff alleged that she had a constitutionally protected property interest in her contract of employment and a right to renewal that could not be denied without procedural due process. She also asserted a violation of substantive due process because the determination not to renew her contract was arbitrary and capricious. She asserted that her professional competence should not be determined solely on the basis of her students' achievement on the two state tests, particularly in light of her student's "normal educational growth rates."[3] The district court upheld all of the teacher's claims. It awarded her reinstatement to her position and damages for lost wages.

1. 349 F. Supp. 988 (N.D. Iowa 1972), *rev'd*, 488 F.2d 237 (8th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

2. 448 F.2d at 239, n. 6.

3. 349 F. Supp. at 990.

In reversing the lower court, the Eighth Circuit considered the case to be "one of Federal jurisdiction with respect to the continued employment of a non-tenured teacher under Iowa law."[4] The court founded its reversal on its conclusion that the teacher had no property right in her position. The court noted that she did not have tenure protections, and that she had been afforded all procedures to which she was entitled under her year-by-year appointment. In the absence of a provision of state law establishing a property right, the court declined to undertake a substantive due process review, stating:

> [T]he administration of the internal affairs of the school district before us has not passed . . .to the Federal court. Such matters as the competence of teachers, and the standards of its measurement are not, without more, matters of constitutional dimensions. They are peculiarly appropriate to state and local administration.[5]

In a concurring opinion, one judge expressed a significantly different reason for reversing the lower court. He stated, "I think it is fair to say that the concept of substantive due process is not wholly alien to the administration of public schools."[6] The concurring judge also expressed his own strong disagreement with the notion of using student test results to judge the competence of a teacher. He concluded, however, that the school district was entitled to rely upon the recommendations and conclusions of its superintendent of schools that the poor results on the standardized tests were an appropriate basis for teacher evaluation. Even though the judge disagreed with the superintendent's view, he could not find that the district's reliance on it was arbitrary or capricious. On that basis, he agreed that the non-renewal should be upheld.

4. 488 F.2d at 238.
5. *Id.* at 243-244.
6. *Id.* at 244.

St. Louis Teachers Union v. Board of Education of the City of St. Louis

In 1987 the District Court for the Eastern District of Missouri considered a challenge to a new method of evaluating certain teachers in the St. Louis public school system.[7] This new methodology was based on the performance of a teacher's students on the California Achievement Test (CAT). A teacher whose students did poorly on that test received a preliminary unsatisfactory rating, which led to a review of the teacher's evaluations. If the principal documented other deficiencies in the teacher's performance, the teacher could then receive a final "unsatisfactory" rating. The possible consequences of that rating were loss of salary advancement, placement on probation, and eventually the risk of termination.

The claims in this lawsuit focused on the validity of assessing the performance of teachers on the basis of their students' CAT scores. The teachers and their union claimed that the CAT had not been designed or validated for use as a teacher evaluation tool, and, therefore, the school district's use of the test results for this purpose constituted arbitrary, capricious and irrational action.

In ruling on the school district's motion to dismiss, the court addressed each of the legal theories put forth by the plaintiffs. The teachers first claimed a Fourteenth Amendment violation by virtue of a denial of equal protection of the laws. They based this claim on the fact that the CAT was used to assess only English language, communications and mathematics teachers, and not any other teachers in the district. The court dismissed this claim because the school district used the test results to assess only those teachers who taught the subject matter covered by the test. The fact that the test could not be used to assess other teachers did not undermine the rationality of using the results for these teach-

7. St. Louis Teachers Union v. Board of Education of the City of St. Louis, 652 F. Supp. 425 (E.D. Mo. 1987).

ers. The court found that the classification of individuals for whom the test was used was rational and, therefore, withstood equal protection analysis.[8]

The court also dismissed an equal protection claim based on the assertion that the only teachers who received unsatisfactory ratings were those who had their evaluations reviewed on the basis of their students' CAT scores. The court accepted the school district's assertion that the CAT results established a rational basis for reviewing those evaluations to determine whether the teachers in question should receive final unsatisfactory ratings.[9]

The plaintiffs also claimed violation of their procedural due process rights on the ground that the CAT scores did not serve as sufficient basis for an unsatisfactory rating of a teacher's performance. Addressing this claim, the court found there was no protected liberty interest on the part of the teachers based upon statements about their competency; statements on that subject were found not to be stigmatizing in a manner which gives rise to a constitutionally protected liberty interest in their salary advancement. With respect to the teachers' claimed property interest, the court found that the teachers did not have either a contractual or statutory expectation of salary advancement. However, it found that they might be able to support a claim of entitlement based upon a common understanding between the teachers and the school district, that would be sufficient to establish a property right that could not be denied without procedural due process. That claim, therefore, was allowed to go forward to determine whether the implementation of the CAT-based evaluations denied the teachers procedural due process.[10]

In assessing the teachers' substantive due process claim, the court stated that, "Teachers have a substantive due process right to be free from arbitrary, capricious, and irrational action on the part of their government employers in relation to their teaching positions."[11] In reaching this conclusion, the court cited a 1986 Eighth Circuit case which had found substantive due process rights to be implicated in a superintendent's removal during the term of a one-year contract, as opposed to non-renewal of such a contract at its expiration.[12] Here, the issue was not non-renewal of a teacher whose contract had expired but action taken against teachers during the term of their employment. The court, therefore, refused to dismiss the claim that the use of CAT scores as the sole or primary basis for an unsatisfactory rating constituted a violation of the teachers' substantive due process rights.[13]

The plaintiffs also alleged that a disproportionate number of teachers rated unsatisfactory taught in schools that had been found to be non-integrated in previous litigation. In this decision, the court stated that it could not discern how this disproportionate impact violated the rights of the teachers as opposed to the rights of the students. The court allowed plaintiffs additional time to explain this claim, stating that if it were not explained, it would be stricken.[14]

Finally, the union claimed that elements of this new evaluation methodology violated portions of its contract with the school district. The court found that these state law claims were within the pendent jurisdiction of the court.[15]

Guidance That Can Be Drawn from the Cases

Some guidance on the legality of these systems can be drawn from these cases. First, claims of tenured teachers, or claims related to a teacher's continued employment such as

8. *Id.* at 431.
9. *Id.* at 432.
10. *Id.* at 433-434.
11. *Id.* at 435.
12. Moore v. Warwick Public School District No. 29, 794 F.2d 322, 329 (8th Cir. 1986).
13. 652 F. Supp. at 435-436.
14. *Id.* at 436.
15. *Id.*

salary advancement, have a stronger legal foundation than do claims related to the termination of probationary teachers. As a rule, a probationer, or a teacher employed in a state which does not confer tenure, does not have a sufficient expectation of continued employment to establish a property right. Likewise, the infringement of a liberty interest as a result of an employment action based on competence rather than issues of character may be difficult to establish.[16] However, if the teacher in question is tenured, or if the action in question affects a benefit related to the status of being employed, such as salary level, then property rights sufficient to invoke procedural and substantive due process claims may exist. In that event, the deference afforded to the schools with respect to educational matters, including the assessment of teacher performance, will give the school system or the state a strong legal foundation from which to argue the validity of its judgment. The analysis of that issue will largely be driven by a fact-based analysis of the way the school or state uses student test scores. Therefore, careful consideration in developing the system by which student test scores are used to assess personnel will put the school authorities in the best possible light should their program be subjected to judicial review.

THE CENTRAL ISSUE: WHETHER STUDENT TEST RESULTS ARE A VALID INDICATOR OF TEACHER PERFORMANCE

This issue is, of course, at the heart of the claims of teachers and administrators concerning the use of student performance criteria, and particularly standardized test scores, as an indicator of employee performance. The literature evidences a number of factors that affect the use of test scores to evaluate teachers. Those factors can help guide the development of a program of employee assessment which makes use of student test scores in a legally defensible manner.

16. *But see,* Donato v. Plainview-Old Bethpage Central School District, 96 F.3d 623 (2d Cir. 1996), *cert. denied,* 519 U.S. 1150 (1997).

Factors Outside Teacher's Control

Teacher performance is not the only factor which affects the academic performance of students. Many factors which a teacher cannot control affect student performance. These can include the student's sleep habits, adequacy of diet and nutrition, general health, exercise levels, parental prioritizing of and involvement in school work, self-esteem, other psychological issues and socio-economic conditions.[17] For example, some teachers who teach in low income areas have complained that teachers working in more affluent areas have an unfair advantage in evaluation systems based on student test scores. They claim that the scores of students from affluent homes are often boosted by private tutoring or test preparation courses that parents with more disposable income can afford, while children from economically disadvantaged homes do not have this option and insteaad must contend with many other factors that tend to push their scores down.

Another factor outside the control of a teacher is the variation in the ability levels of the students in the class(es) or school(s). Certain classes of a particular grade, or grade levels within a particular school, have their own characteristics stemming from behavioral issues, socialization, language barriers and variances in the general levels of academic capability and performance. Hence, one teacher may end up with a less capable class than another, or from year to year, whole grade levels of students may show demonstrable differences in test performance which have no bearing whatsoever on the competence or performance of the teacher. Schools in one geographic area may have student populations which over time evidence different ability levels from those in other areas.[18]

17. M. Jane Turner, LINKING TEACHER EVALUATION TO STUDENT ACHIEVEMENT (National School Boards Association 1999).

18. Gene V. Glass, *Using Student Test Scores to Evaluate Teachers,* <http://glass.ed.asu.edu/gene/papers/tcheval.html>; *High stakes testing: a wake-up call, supra,* n. 2.; Ben Keller, *In Age of Accountability, Principals Feel the Heat,* EDUCATION WEEK, May 20, 1998.

Student mobility can also have a significant impact on student test scores. For example, a teacher may have a large number of students who are new arrivals and have not been exposed to the curriculum with which a particular test is aligned. Shifts in student populations also make year-to-year comparisons more difficult.

These factors can all influence a student's performance, yet there is little a teacher can do to affect them. The question is whether a court will consider these factors to be significant enough to invalidate a teacher evaluation based on test scores.

Test Validation

These general points about student performance as a reflection of teacher performance become more focused when student achievement is measured solely by the result of a particular test (or group of tests). In that case, it becomes extremely important that the test be validated as an indicator of teacher performance, as well as student achievement.

No reported cases deal with the issue of test validation in the context of teacher evaluation. In other contexts, however, legal challenges have been raised when a test has been used for a purpose other than that for which it was designed. One case concerned the use of minimum Graduate Record Exam scores as a requirement for both incumbent and prospective teachers. That test had never been validated as an indicator of teacher performance.[19] Similarly, a challenge was raised to Georgia's use of a minimum score on the National Teacher Examination (NTE) as a requirement to obtain a higher level teaching certificate. The teachers charged that the NTE was designed to measure academic preparation for prospective teachers and had not been validated as an evaluative measure for inservice teachers.[20] In both cases, the court found that the test in question had not been validated for the particular purpose for which it was being used. In each case, therefore, use of the test was struck down on equal protection grounds.[21]

To avoid this situation, school districts should ensure that the results of tests have been validated for the purpose of assessing teacher performance. The difficulty, of course, is that a test students take as a measure of their own performance may not be a valid measure of teacher or school system performance. In that event, the district will be faced with the choice of giving more tests to students in order to obtain valid results which can be used for different purposes, or using the student-validated test results and running the risk of a possible challenge by the teachers who may claim that the tests have not been validated for employee evaluation.

Curriculum Alignment

The type of test to be used gives rise to another issue which must be considered: the alignment of the testing mechanism with the curriculum. In cases where students have been denied certain academic benefits or opportunities on the basis of negative test results, one of the substantive due process challenges raised has been that the students have not been given an adequate opportunity to learn the information assessed by the test.[22] This same argument could also be raised by teachers asserting that the test results used to assess their performance are not sufficiently related to the curriculum they are mandated to teach.

This point implicates a costs/benefits issue that arises in the use of standardized tests. The use of nationally developed tests of student performance are the most readily available and least costly alternative. However, they may not be well aligned with the curriculum of the district. Where the state or school

19. Armstead v. Starkville Municipal Separate School District, 461 F.2d 276 (5th Cir. 1972).

20. Georgia Association of Educators v. Nix, 407 F. Supp. 1102 (N.D. Ga. 1976).

21. *See,* Turner, *supra,* n. 17.

22. *E.g.,* Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

system is starting with a clean slate, the best practice from both an educational and a legal perspective is to match the curriculum and classroom teaching to the testing instruments so that the tests are related to the instruction in the classroom.[23] Of course, this requires a considerable investment of resources to see that tests are properly designed to measure student learning on the materials presented to them. However, failing to take this step may lead to greater questions about the validity of the test as an indicator of how well the teacher has taught the required curriculum.

Test Results as the Sole Factor or One of Several Factors

Where the validity of test scores is in question, the weight attributed to the scores in the teacher evaluation process can also be significant in defending the action. If student test scores are the sole basis for the action, the propriety of the action will be wholly dependent on the validity of the test use. If the test is not a valid indicator of teacher performance, then arguably the action taken against the teacher has no rational basis.

The propriety of the action will be easier to establish if test scores are considered in conjunction with more traditional factors of teacher evaluation, such as observation of classroom instruction, assessment of planning, and other activities of the teacher. If student test results are but one factor in the assessment of a teacher's performance, the action taken will not be solely dependent on the validity of the test. This was certainly a significant point in *St. Louis Teachers Union, supra,* where the test scores alone did not cause a negative evaluation but only led to a review of other measures of teacher performance. It may also be noted that the school district in the *Scheelhaase* case, *supra,* attempted to raise in court grounds besides test results for the teacher's non-renewal. One could infer that the district realized its case would have been much stronger if it had relied on multiple factors rather than on test scores alone.[24]

Individual or Group Assessment

To avoid the potential problems cited above in evaluating the performance of a single teacher based on student testing scores, some districts apply student performance factors on a group basis. For example, in Kentucky the state-mandated student performance element of teacher evaluation is assessed on a school-wide basis. In this manner, characteristics of individual classes of students and even whole grades are taken out of the equation. In addition, making school-wide assessments of performance may help to retain the collegiality of the teaching staff rather than engendering competitiveness among them.[25]

The benefits of group assessment are not, however, universally perceived. One Texas teacher was reported to have reacted to the notion of group assessment by saying, "I think it's quite unfair. In education, there are teachers, and then there are teachers. I should not be affected by what someone else does not do."[26] This was so even though the statute and proposed regulation at issue made test scores only one of many factors used in evaluating a teacher.

Areas Not Subject to Standardized Testing

Another area of difficulty in using standardized test scores for the assessment of teacher performance lies in the fact that those test scores generally are available only for certain academic areas. For example, the

23. HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION (Jay P. Heubert and Robert P. Hauser, eds., National Academy Press 1999) (See Appendix C for excerpt of recommendations from this report); Anne L. Bryant, *Standards and testing: the real goal is to improve student learning,* SCHOOL BOARD NEWS, May 30, 2000; Carolyn Kelley and Jean Protsik, *Risk and Reward: Perspectives on the Implementation of Kentucky's School-Based Performance Award Program,* 33 EDUC. ADMIN. Q. 474 (Oct. 1997).

24. *See,* Turner, LINKING TEACHER EVALUATION, *supra,* n. 17.

25. Kelley and Protsik, *Risk and Reward, supra,* n. 23; Turner, LINKING TEACHER EVALUATION, *supra,* n. 17.

26. Beth Reinhard, *Texas Proposal Ties Teacher Performance to School Scores,* EDUCATION WEEK, Feb. 12, 1997.

California Achievement Test used in the *St. Louis Teachers Union* case could assess only English, communications and mathematics teachers. In that case, the use of those scores to evaluate only those teachers was found to be rationally related to the district's objective of assuring that it had competent teachers in the classroom. However, it is difficult to predict whether all courts would look at this issue in the same way, particularly when some areas such as physical education, music and art (at least at the elementary levels) are generally not subject to standardized tests. In the *St. Louis Teachers Union* case, the scores were used only as a starting point to identify teachers who were then reviewed on other criteria to see if they should be rated "unsatisfactory". Another court may be more likely to question the rationality of the test use where whole groups of teachers are not subject to the test-based assessment (an issue apparently not raised in the St. Louis case, where this point was argued only on equal protection grounds).

Selection of Criterion-Referenced, Norm-Referenced or Improvement-Based Test Interpretation

Another factor to consider in determining the validity of the use of student test scores to assess professional staff or school systems is the standard by which student performance is measured. The three basic categories for measurement are: (1) criterion-referenced interpretation, which measures the scores achieved by students against a fixed standard, and without regard to how other students do on the test; (2) norm-referenced interpretation, in which student scores are assessed on the basis of comparisons to the performance of others in a defined population; and (3) improvement-based analysis, in which the assessment is whether gains have been made in the performance of the student as measured against an initial starting point.

There is, of course, no "right" answer as to which type of assessment should be used. If the goal of the measurement system is to see whether teachers are preparing students to meet a minimum threshold of competence, a criterion-referenced standard would be appropriate. If the goal is to assess whether teachers or schools are performing better or worse than their cohorts, a norm-based reference would be indicated. If the goal is to determine whether teachers are actually having a positive effect on the capacity of the students to master the materials set forth on the test, then an improvement-based standard would appear to provide the desired data.

None of these measures would be immune from legal challenge. A criterion-referenced standard could be subject to attack by teachers or school systems able to show that the student population tested were affected by outside factors which caused their scores to be lower, despite the efforts of the teacher. The same arguments can be made in regard to a norm-referenced standard, where the comparison is among student populations.[27] Perhaps the most defensible system is one that measures improvement. Arguments have been made that improvement-based standards which look to performance gains from year-to-year help to filter out student differences and yield results more indicative of the efforts of the teacher.

Once again, there is no formula for establishing a perfectly defensible program. Certainly, issues other than legal considerations will dictate how test scores are measured for employee evaluation purposes, particularly in the absence of clear legal guidelines as to an acceptable means of measurement.

REMEDIATION BEFORE IMPOSITION OF NEGATIVE CONSEQUENCES

Systems which impose funding cuts or reconstitution upon schools which do not meet the established standards raise another potential area where claims may be made as to the rationality of the evaluation system. If the goal of imposing standards is to increase

27. It may be noted that California prohibits the use of a norm-referenced standard on national tests. CAL. EDUC. CODE § 44662.

student achievement, then where the desired level of achievement is not being realized, it is reasonable to argue that more resources should be devoted to help the students meet the desired standards. It would seem advisable, from both an educational and a legal standpoint, to implement remedial help for students, teachers or schools failing to meet the desired standards before more severe and punitive steps, such as loss of funding, reconstitution or termination of employees are implemented.

No reported cases address this issue. However, the logic of providing assistance to meet the goals, rather than simply punishing non-performance, would appear to be another possible point for plaintiffs to cite if they are seeking to establish the lack of rationality in the use of high-stakes test scores. Indeed, the delays in some states' implementation of sanctions for low scores have been to allow time for remediation efforts to help achieve the standards.[28]

COLLECTIVE BARGAINING ISSUES

Local school districts desiring to use student test scores to evaluate employees will need to consider the impact of their collective bargaining obligations in that process. The first such issue is whether a local district's program of using student test scores to evaluate employees violates the current collective bargaining agreement. Many districts have negotiated provisions concerning teacher evaluation which may conflict with a plan to use student test scores in the evaluation process.

If no such provision exists, the district must determine whether it is obligated by the governing bargaining statute to negotiate such a plan before it is implemented. The scope of bargaining, of course, varies from state to state. In a number of states, the establishment of criteria for assessment of employee performance is not an issue which must be negotiated with the employees' union, but is left to the employer as a management prerogative.[29] Where that is the rule, a district wishing to consider student test results in assessing employees may do so without first negotiating that issue. The challenge to that action may then come when the district attempts to take some form of adverse action against the teacher for substandard performance, part of which will presumably be established through the student test results. The validity of using test scores for this purpose will then be determined in the forum for the resolution of teacher disciplinary issues.

A bargaining obligation is much more likely to be present if a district wishes to grant tangible rewards for teachers whose students score well on the test. The granting of the cash awards (usually seen in the form of bonuses) is clearly a form of compensation which will be negotiable under almost all collective bargaining laws.[30]

ISSUES RELATED TO ADMINISTRATORS

A number of states and local school districts have instituted student performance-based assessments of administrators as well as teachers. For example, under recent legislation, superintendents of schools in Illinois can receive multi-year contracts only if such contracts "include the goals and indicators of student performance and academic improvement determined and used by the local school board to measure the performance and effectiveness of the superintendent and such other information as the local school board may determine."[31]

Of course, the link between the administrator's performance and student scores is not as direct as it is between a teacher's performance and student scores. Nonetheless, some strongly believe that admin-

28. *High-stakes testing: a wake-up call, in Virginia,* SCHOOL BOARD NEWS, Feb. 9, 1999.

29. *E.g., Somers Faculty Ass'n,* 9 N.Y. PERB ¶3014 (1976).

30. *See, e.g., Academic Prof'l of Cal. v. Cal. State Univ.,* 18 PERC ¶25001 (1993); *Matter of County of Camden,* 20 N.J. PER ¶25177 (1994).

31. *Illinois Compiled Statutes,* 105 I.L.C.S. 5/10-23.8 (1998).

istrators should be accountable for the performance of their students,[32] because they do in fact have control over elements in the school program that can have a significant impact on the achievement of student performance goals. For example, principals can institute programs for tutoring, teacher-student mentoring, practice tests, and other factors to assist students in reaching higher performance levels.[33] In addition, some think that administrators ought to be held responsible simply because they are the educational leaders of the building and should accept responsibility for the performance of their teachers and their students. Accordingly, most of the analysis set forth above can be applied to building administrators and even higher level school officials. The primary difference is that they must be assessed on a school-wide or district-wide basis.

CHALLENGES TO STATE SYSTEMS

The basis for a legal challenge to a state-established system that sanctions low-performing schools or school systems is more difficult to discern. Most challenges to high-stakes testing, by both students and employees, are founded on claimed violations of constitutional or statutory civil rights. Therefore, challenges to sanctions imposed on schools or school systems would have to be brought by an individual or group of individuals affected by that action. Conceivably, students in a school system which suffered a funding penalty could make such a claim. In all likelihood, however, a lawsuit would not be filed over that issue alone. More likely, the monetary penalty on the school or school system would be raised as an element of a claim attacking the validity of the high-stakes testing program as it applies to students. The impact on the funds available for the school would likely be cited as one more element of the negative impact on the students in the school, rather than as an independent claim.

Of course, in some cases the consequences affect the teachers or administrators directly. For example, a bonus may not be earned, or there may be direct action to terminate them. In those situations, the teachers may raise the types of claims addressed above that are available when attacking a district implemented program.

State assessments which lead to significant consequences such as additional grants of funding for high performing schools or remedial/reconstitution-type actions for low performing schools frequently are not linked solely to student test scores. For example, the Texas Successful Schools Award System uses several factors to rate schools for a possible receipt of awards. These factors include student performance on the TAAS (Texas Assessment of Academic Skills), drop-out rate and attendance rate. In addition, the ratings on the testing factors include the school's performance compared not only to state standards but also to the school's previous performance. Kentucky's system also considers a number of factors in addition to test scores. As addressed above, legal challenges to such a system will be more difficult to make, because the test results are merely one factor among many leading to either rewards or sanctions.

UNDESIRED CONSEQUENCES

While perhaps not strictly legal issues, other phenomena must be considered in linking student tests and employee assessment. First, it must be recognized that where a teacher will be evaluated on test results, the teacher will, to one degree or another, teach to the test. Many view this as a highly negative factor, arguing that efforts to achieve higher test scores detract from other elements of the teaching process.[34] Particularly where

32. Keller, *In Age of Accountability, supra,* n. 20; Ann Bradley, *Cincinnati Links Administrators' Pay, Performance,* EDUCATION WEEK, Jan. 25, 1995.

33. Rose Hanson Scripps, *If scores improve, should principal get a raise?* DESERET NEWS, Nov. 30, 1998.

34. *See, e.g.,* Donna Harrington-Lueker, *The Uneasy Coexistence of High Stakes and Developmental Practice,* AASA ON LINE, Jan. 2000, <http://www.aasa.org/sa/jan0001.htm>.

tests are not aligned with the curriculum, steps to achieve good test scores may be at odds with good educational practices.

Also, by attaching employment-related consequences to high-stakes testing results, the pressure increases for some teachers and administrators to resort to unethical measures to inflate scores. Recently, a representative of the New York City School System stated that 47 principals, teachers and staff members from 32 school buildings had engaged in "systematic cheating" during the past five years in order to help students achieve higher scores on city reading and mathematics tests.[35] In Austin, Texas, it is reported that an administrator gave poorly performing students identification numbers that would lead to inconsistencies in their records and thereby caused deletion of their scores.[36] The pressure to achieve good test results has, in other cases, caused educators to take steps to exclude the scores of certain students from the assessments. There are reports of administrators placing students in certain special education categories which exclude their scores from the test results used to assess the schools and educational professionals.[37] This can, of course, occur even where there are no employment consequences attached to the test scores. The likelihood of this happening increases, however, when professional educators are evaluated on the basis of those scores.

CONCLUSION

In using high-stakes test results to measure the performance of educational professionals and institutions, it is important to keep in mind the ultimate goal of this effort: to improve student learning. Test-based standards are one measure of student achievement, and they may help to push students, teachers, administrators and school boards toward higher levels of student learning. They will have the most beneficial effect if the process begins with a well-conceived notion of how the test results fit in with other steps to improve student learning. With that starting point, another important factor will be to ensusre that tests are in alignment with the curriculum being taught to the students. The standards should be clearly stated to the teachers, and they should be provided with the resources needed to achieve improvement in student scores. Good educational practice would generally dictate that the test scores also be used as one factor in the assessment of the performance of employees and school systems, and not the sole basis of evaluation.

If the system for using high-stakes test scores is well conceived from an educational standpoint, then it is more likely to be defensible should the system be subject to a legal challenge. Generally, courts will assess the validity of such systems on the reasonableness and rationality of the system from an educational standpoint. The best legal defense will be available if careful attention has been given to the factors discussed above and sound educational explanations can be provided to support the use of the tests for the desired evaluative purpose.

35. *Id.*

36. *Teachers accused of cheating on students' tests,* SCHOOL BOARD NEWS, Jan. 11, 2000; *see* Glass, *Using Student Test Scores, supra,* n. 18.

37. *E.g.,* Andrea Tortora and Richard Whitmire, *Schools Can Raise Scores by Exclusion,* CINCINNATI ENQUIRER, Aug. 31, 1999, <http://enquirer.com/editions/1999/08/31/loc_schools_can_raise.html>; Keller, *In Age of Accountability, supra,* n. 18.

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APPENDIX A

GUIDANCE FOR DEVELOPING AND IMPLEMENTING A HIGH-STAKES TESTING PROGRAM

DEVELOPING A HIGH-STAKES TESTING PROGRAM

1. Determine the purpose of the program — to assess performance generally, to eliminate social promotion and functional illiteracy, or to create an exit/graduation standard. Clearly articulate the goals in the implementing regulations.
2. Determine at which grades testing should be required to periodically assess advancement. It is recommended that testing occur at least every three years to ensure that individual students do not deviate too far from district or state expectations without targeted remediation.
3. Determine what core knowledge every student should possess to advance or graduate. Obtain broad-based input and consensus on the standards. Allocate the core skills and facts to the appropriate subject area, and determine where in the curriculum each fact or skill will be taught. Determine the pass rate necessary to demonstrate "mastery" or knowledge of the standard.
4. Communicate to teachers, parents and, as age appropriate, students the material that will be tested, the level of mastery required to pass the test, and the consequences of failure to pass.
5. Develop test instruments that correspond exactly to the core competencies, and validate the tests.

IMPLEMENTING THE TESTING PROGRAM

1. Academic departments should meet to review the core competencies, to assure they are integrated into the curriculum, and to develop instructional strategies to ensure student mastery of the competencies.
2. Teachers should be held accountable for actually teaching, evaluating, and remediating each of the core competencies.
3. In-house testing programs should be developed to accustom students to the test format and to identify students who are not making adequate progress.
4. Remedial programs should be developed to assist struggling students, and to provide an intensive teaching and review program for students who move into the school and who have not been exposed to the entire curriculum.
5. Schools should consider incentive programs for teachers and for students to enhance motivation and performance.
6. Students should be given multiple opportunities to take the test, with time for remedial instruction between re-takes.

EVALUATING THE PROGRAM

1. Student test scores should be carefully reviewed. Questions with an unusually high "miss" rate should be examined to determine: (a) whether the question was too hard, (b) whether the question did not adequately reflect the competency it purported to test, or (c) whether the curriculum or the instructors failed to cover the competency adequately.
2. Statistical analyses of student performance, controlled for factors such as aptitude and socio-economic status, should be performed to identify teachers whose students perform more poorly than otherwise expected. A plan for improvement with appropriate support, reasonable time frames and follow-up evaluation should be provided to these teachers. Where a teacher is subject to possible termination for incompetence if his or her students continue to underperform, the improvement plan should clearly advise the teacher of this consequence.
3. The core competencies and curriculum should be periodically reviewed for continued appropriateness.

Source: R. Craig Wood, McGuire, Woods, Battle & Boothe, LLP, Charlottesville, Virginia

APPENDIX B

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION
THE ASSISTANT SECRETARY

MEMORANDUM

TO: Chief State School Officers

FROM: Michael Cohen, Assistant Secretary

SUBJECT: Review of State Assessment Systems for Title I

[Body of letter omitted.]

SUMMARY GUIDANCE ON THE INCLUSION REQUIREMENT FOR TITLE I FINAL ASSESSMENTS

In the 2000-01 school year, each State must have in place a Statewide assessment system that serves as the primary means for determining whether schools and districts receiving Title I funds are making adequate yearly progress toward educating all students to high standards. Statewide assessment systems must satisfy statutory requirements for technical quality, alignment, and disaggregated reporting of results (among other requirements). Assessment systems must also meet a set of "inclusion" requirements. Section 1111(b)(3)(F) of Title I says that State assessments shall provide for:

(i) the participation in such assessments of all students;
(ii) the reasonable adaptations and accommodations for students with diverse learning needs, necessary to measure the achievement of such students relative to State content standards; and
(iii) the inclusion of limited English proficient students who shall be assessed, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what such students know and can do, to determine such students' mastery of skills in subjects other than English.

Section 1111(b)(3)(G) makes clear that the only category of students who are exempt from State assessments are students who have not attended schools in the local educational agency for a full academic year.

Inclusion of LEP students. The fundamental requirement is that each State must include in its assessment system all LEP students in the grades being assessed. Section 1111(b)(5) requires, as an initial step toward meeting this requirement, that "[e]ach State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student assessments are not available and are needed." Under section 1111(b)(5), States must "make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible assessment measures are needed." Similarly, section 1111(b)(3)(F) requires States to assess LEP students, to the extent practicable, in the language and

form most likely to yield valid results. That section also requires States to provide reasonable accommodations and adaptations necessary to measure the achievement of LEP students relative to State content standards. Given these requirements, States must choose the most valid option for assessing each LEP student, keeping in mind that the purpose of assessment under Title I is to measure school and district performance, not to hold individual students accountable for their performance.

* In some instances, the State may assess an LEP student in English without accommodations or adaptations — i.e., administer the standard assessment. This may occur when a student is classified as "LEP" (by State or Federal definition) but is found to have adequate oral and written English proficiency such that the standard assessment would yield valid results. Moreover, this approach may be the most appropriate option for LEP students who receive instruction in English without accommodations.

* In other instances, the State may assess an LEP student in English with reasonable accommodations, if this would provide the most valid and reliable assessment of these students' achievement relative to State content standards. Accommodations might include extra time, small group administration, oral reading of questions in English, use of bilingual word lists or dictionaries.

* If native-language assessment is practicable, and if it is the form of assessment most likely to yield valid results, then a State must utilize such assessments.

In those rare instances where testing in a native language other than English is necessary to yield accurate and reliable results, but doing so is not practicable, States may use other measures to assess LEP students' progress, including classroom performance measures such as portfolios, teacher observation checklists, and student performance evaluations. A State may only use classroom performance measures if the State presents evidence that those measures are valid and reliable and hold LEP students to the same high standards as other students and that scores from those measures, like scores from any other assessment approach, will be included in the assessment system for purposes of public reporting and school and district accountability.

Inclusion of students with disabilities. Like LEP students, all students with disabilities must be included in the State assessment system. Individualized education program (IEP) teams or section 504 placement teams are responsible for determining whether a student is able to participate in the standard assessment, and if so, what (if any) accommodations are appropriate. The State's obligation is to provide reasonable accommodations necessary to validly measure the achievement of students with disabilities relative to State standards. In those infrequent cases when an IEP team or section 504 team determines that standard assessments, even with reasonable accommodations, do not provide a student with an opportunity to demonstrate her or his knowledge and skills, then the State or school district must provide an alternate assessment. Whatever assessment approach is taken, the scores of students with disabilities must be included in the assessment system for purposes of public reporting and school and district accountability.

State submissions of evidence. The inclusion requirement under Title I has significant implications for State assessment policies and practices. The following four points clarify the policies and practices that States are expected to demonstrate in their submissions of evidence in order to achieve compliance with the inclusion requirement:

* State policies must guarantee that each LEP student is included in the State assessment system. LEP students are to be provided an individualized determination of the most appropriate language and form of assessment for that student, based on English language proficiency, native-language proficiency, language and format of their current instructional program, or other relevant factors. Whether an LEP student should be tested with the State assessment, the State assessment with accommodations, or (to the extent practicable) a native-language assessment will depend on which assessment most validly and reliably measures her or his knowledge and skills. In no instance may a State assess an LEP student against content or performance standards less rigorous or less demanding than the standards applicable to all other students.

  Accordingly, a blanket State exemption policy for LEP students for Title I purposes, whether permissive or mandatory based on time in U.S. schools or time in English instruction, would not meet the Title I requirements.

* Each State must have a comprehensive policy governing the use of testing accommodations. While it is important that school and district officials have some flexibility in choosing accommodations, States must develop policies to ensure that local officials use accommodations appropriately and consistently, based on the needs of individual students. Moreover, States must ensure consistency and appropriateness in the use of accommodations through technical assistance, monitoring, and data collection. A comprehensive State policy is one that makes clear (a) the range of accommodations local officials may use, (b) for what type of student and under what conditions each accommodation may be used, (c) instructions for the proper use of each accommodation, and (d) reporting requirements to enable the State to track and evaluate the use of accommodations.

* For students with disabilities whose IEP or section 504 placement teams have determined that the standard state assessment would not appropriately show what those students know and are able to do, each State must have a Statewide alternate assessment system or a comprehensive State policy governing locally developed alternate assessments. Alternate assessments must be valid, reliable, and, to the maximum extent appropriate, aligned to State content and performance standards. In addition, States must monitor and collect data from school districts to ensure the proper use of alternate assessments; they must publicly report the results of alternate assessments; and they must integrate the results of alternate assessments into their accountability systems.

* Each State must include in its accountability system all students in the grades being assessed. State assessment systems must assign a score, for accountability purposes, to every student who has attended school within a single school district for a full academic year. If a student has attended multiple schools within a district during a single academic year, the student's score shall be used only for purposes of district (not school) accountability. In their submissions of evidence, States must explain how scores from alternate assessments are integrated into their accountability systems. Furthermore, assessment results for LEP students and students with disabilities must be disaggregated and reported publicly.

These four points focus on areas that merit particular attention in light of current State policies and practices. Compliance with these four requirements will be deemed compliance with the Title I inclusion requirement. Of course, compliance with the inclusion requirement is only a necessary, not sufficient, condition for meeting the Title I final assessment requirements overall.

APPENDIX C

RECOMMENDATIONS OF NATIONAL RESEARCH COUNCIL

FROM *HIGH STAKES: TESTING FOR TRACKING, PROMOTION AND GRADUATION*

CROSS-CUTTING THEMES

- Accountability for educational outcomes should be a shared responsibility of states, school districts, public officials, educators, parents, and students. High standards cannot be established and maintained merely by imposing them on students.
- If parents, educators, public officials, and others who share responsibility for educational outcomes are to discharge their responsibility effectively, they should have access to information about the nature and interpretation of tests and test scores. Such information should be made available to the public and should be incorporated into teacher education and into educational programs for principals, administrators, public officials, and others.
- A test may appropriately be used to lead curricular reform, but it should not also be used to make high-stakes decisions about individual students until test users can show that the test measures what they have been taught.
- Test users should avoid simple either or options when high-stakes and other indicators show that students are doing poorly in school, in favor of strategies combining early intervention and effective remediation of learning problems.
- High-stakes decisions such as tracking, promotion, and graduation should not automatically be made on the basis of a single test score but should be buttressed by other relevant information about the student's knowledge and skills, such as grades, teacher recommendations, and extenuating circumstances.
- In general, large-scale assessments should not be used to make high-stakes decisions about students who are less than 8 years old or enrolled below grade 3.
- All students are entitled to sufficient test preparation so their performance will not be adversely affected by unfamiliarity with item format or by ignorance of appropriate test-taking strategies. Test users should balance efforts to prepare students for a particular test format against the possibility that excessively narrow preparation will invalidate test outcomes.
- High-stakes testing programs should routinely include a well-designed evaluation component. Policy makers should monitor both the intended and unintended consequences of high-stakes assessments on all students and on significant subgroups of students, including minorities, English-language learners, and students with disabilities.

TRACKING

- As tracking is currently practiced, low-track classes are typically characterized by an exclusive focus on basic skills, low expectations, and the least-qualified teachers. Students assigned to low-track classes are worse off than they would be in other placements. This form of tracking should be eliminated. Neither test scores nor other information should be used to place students in such classes.

- Since tracking decisions are basically placement decisions, tests and other information used for this purpose should meet professional test standards regarding placement.
- Because a key assumption underlying placement decisions is that students will benefit more from certain educational experiences than from others, the standard for using a test or other information to make tracking decisions should be accuracy in predicting the likely educational effects of each of several alternative educational experiences.
- If a cutscore is to be employed on a test used in making a tracking or placement decision, the quality of the standard-setting process should be documented and evaluated.

PROMOTION AND RETENTION

- Scores from large-scale assessments should never be the only sources of information used to make a promotion or retention decision. No single source of information—whether test scores, course grades, or teacher judgements—should stand alone in making promotion decisions. Test scores should always be used in combination with other sources of information about student achievement.
- Tests and other information used in promotion decisions should adhere, as appropriate, to psychometric standards for placement and psychometric standards for certifying knowledge and skill.
- Tests and other information used in promotion decisions may be interpreted either as evidence of mastery of material already taught or as evidence of student readiness for material at the next grade level. In the former case, test content should be representative of the curriculum at the current grade level. In the latter case, test scores should predict the likely educational effects of future placements—whether promotion, retention in grade, or some other intervention options.
- If a cutscore is to be employed on a test used in making a promotion decision, the quality of the standard-setting process should be documented and evaluated—including the qualification of the judges employed, the method or methods employed, and the degree of consensus reached.
- Students who fail should have the opportunity to retake any test used in making promotion decisions; this implies that tests used in making promotion decisions should have alternate forms.
- Test users should avoid the simple either-or option to promote or retain in grade when high-stakes tests and other indicators show that students are doing poorly in school, in favor of strategies combining early identification and effective remediation of learning problems.

AWARDING OR WITHHOLDING HIGH SCHOOL DIPLOMAS

- High school graduation decisions are inherently certification decisions; the diploma should certify that the student has achieved acceptable levels of learning. Tests and other information used for this purpose should afford each student a fair opportunity to demonstrate the required levels of knowledge and skill in accordance with psychometric standards for certification tests.
- Graduation tests should provide evidence of mastery of material taught. Thus, there is a need for evidence that the test content is representative of what students have been taught.

- The quality of the process of setting a cutscore on a graduation test should be documented and evaluated—including the qualification of the judges employed, the method or methods employed, and the degree of consensus reached.
- Students who are at risk of failing a graduation test should be advised of their situation well in advance and provided with appropriate instruction that would improve their chances of passing.
- Research is needed on the effects of high-stakes graduation tests on teaching, learning, and high school completion. Research is also needed on alternatives to test-based denial of the high school diploma, such as endorsed diplomas, end-of-course tests, and combining graduation test scores with other indicators of knowledge and skill in making the graduation decision.

USING THE VOLUNTARY NATIONAL TESTS FOR TRACKING PROMOTION, OR GRADUATION DECISONS

- The voluntary national tests should not be used for decisions about the tracking, promotion, or graduation of individual students.
- If the voluntary national tests are implemented, the federal government should issue regulations or guidance to ensure that VNT scores are not used for decisions about the tracking, promotion, or graduation of individual students.

STUDENTS WITH DISABILITIES

- More research is needed to enable students with disabilities to participate in large-scale assessments in ways that provide valid information. This goal significantly challenges current knowledge and technology about measurement and test design and the infrastructure needed to achieve broad-based participation.
- The needs of students with disabilities should be considered throughout the test development process.
- Decisions about how students with disabilities will participate in large-scale assessments should be guided by criteria that are as systematic and objective as possible. They should also be applied on a case-by-case basis as part of the child's individual education program and consistent with the instructional accommodations that the child receives.
- If a student with disabilities is subject to an assessment used for promotion or graduation decisions, the IEP team should ensure that the curriculum and instruction received by the student through the individual education program is aligned with test content and that the student has had adequate opportunity to learn the material covered by the test.
- Students who cannot participate in a large-scale assessment should have alternate ways of demonstrating proficiency.
- Because a test score may not be a valid representation of the skills and achievement of students with disabilities, high-stakes decisions about these students should consider other sources of evidence such as grades, teacher recommendations, and other examples of student work.

ENGLISH-LANGUAGE LEARNERS

- Systematic research that investigates the impact of specific accommodations on the test performance of both English-language learners and other students is needed. Accommodations should be investigated to see whether they reduce construct-irrelevant sources of variance for English-language learners without disadvantaging other students who do not receive accommodations. The relationship of test accommodations to instruc-

tional accommodations should also be studied.

- Development and implementation of alternative measures, such as primary language assessments, should be accompanied by information regarding the validity, reliability, and comparability of scores on primary language and English assessments.
- The learning and language needs of English-language learners should be considered during test development.
- Policy decisions about how individual English-language learners will participate in large-scale assessments—such as the language and accommodations to be used—should balance the demands of political accountability with professional standards of good testing practice. These standards require evidence that such accommodations or alternate forms of assessment lead to valid inferences regarding performance.
- States, school districts, and schools should report and interpret disaggregated assessment scores of English-language learners when psychometrically sound for the purpose of analyzing their educational outcomes.
- Placement decisions based on tests should incorporate information about educational accomplishments, particularly literacy skills, in the primary language. Certification tests (e.g., for high school graduation) should be designed to reflect state or local deliberations and decisions about the role of English-learners proficiency in the construct to be assessed. This allows for subject matter assessment in English only, in the primary language, or using a test that accommodates English-language learners by providing assistance, primary language support, or both.
- As for all learners, interpretation of the test scores of English-language learners for promotion or graduation should be accompanied by information about opportunity to master the material tested. For English-language learners, this includes information about educational history, exposure to instruction in the primary language and in English, language resources in the home, and exposure to the mainstream curriculum.

APPENDIX D

RESOURCES ON STUDENT TESTING AND ASSESSMENT

Publications

GERALD W. BRACEY AND MICHAEL A. RESNICK, RAISING THE BAR: A SCHOOL BOARD PRIMER ON STUDENT ACHIEVEMENT (National School Boards Association 1997)

HANDBOOK FOR DEVELOPMENT OF PERFORMANCE STANDARDS: MEETING REQUIREMENTS OF TITLE I (Council of Chief State School Officers 1998)

JOINT COMMITTEE ON TESTING PRACTICES, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING (American Educational Research Association, American Psychological Association and National Council on Measurement in Education 1999)

JOINT COMMITTEE ON TESTING PRACTICES, CODE OF FAIR TESTING PRACTICES IN EDUCATION (American Psychological Assocation 1988)

REBECCA J. KOPRIVA, ENSURING ACCURACY IN TESTING FOR LEP STUDENTS (Council of Chief State School Officers 2000)

NATIONAL RESEARCH COUNCIL, HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION (Jay P. Heubert and Robert M. Hauser, eds., National Academy Press 1999)

OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., POLICY UPDATE ON SCHOOLS' OBLIGATIONS TOWARD NATIONAL ORIGIN-MINORITY STUDENTS WITH LIMITED ENGLISH PROFICIENCY (1991)

OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., THE USE OF TESTS WHEN MAKING HIGH-STAKES DECISIONS FOR STUDENTS: A RESOURCE GUIDE FOR EDUCATORS AND POLICYMAKERS (Draft, July 2000, final expected Sept. 2000)

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, U.S. DEP'T OF EDUC., PEER REVIEW GUIDANCE FOR EVALUATING EVIDENCE OF FINAL ASSESSMENTS UNDER TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT (1999)

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, U.S. DEP'T OF EDUC., STANDARDS, ASSESSMENTS AND ACCOUNTABILITY (1997)

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION, U.S. DEP'T OF EDUC., TAKING RESPONSIBILITY FOR ENDING SOCIAL PROMOTION: A GUIDE FOR EDUCATORS AND STATE AND LOCAL LEADERS (1999)

TIBBET L. SPEER, REACHING FOR EXCELLENCE: WHAT SCHOOLS ARE DOING TO RAISE STUDENT ACHIEVEMENT (National School Boards Association 1998)

Web Sites

American Counseling Association, http://www.counseling.org/

American Educational Research Association, http://www.aera.org/

American Psychological Association, http://www.apa.org/science/testing.html

American Speech-Language Hearing Association, http://www.asha.org/

Association of Test Publishers, http://www.testpublishers.org

Council of Chief State School Officers, http://www.CCSSO.org

Education Commission of the States, http://www.ecs.org

Educational Testing Service, http://www.ets.org/

ERIC Clearinghouse on Testing and Assessment, http://www.ericae.net/

Fair Test, http://www.fairtest.org

National Assessment of Educational Progress, http://nces.ed.gov/nationsreportcard

National Association of School Psychologists, http://www.naspweb.org

National Board on Educational Testing and Public Policy, http://www.nbetpp.bc.edu

National Center for Educational Outcomes, http://www.coled.umn.edu/NCEO

National Center for Research on Evaluation, Standards and Student Testing (CRESST), http://www.cse.ucla.edu/

National Clearinghouse for Bilingual Education, http://www.ncbe.gwu.edu

National Council on Measurement in Education, http://ncme.ed.uiuc.edu/

National Institute on Student Achievement, Curriculum and Assessment, http://www.ed.gov/offices/OERI/SAI

National Research Council, http://nas.edu/nrc

Office for Civil Rights, U.S. Department of Education, http://www.ed.gov/offices/OCR

Office for Elementary and Secondary Education, U.S. Department of Education, http://www.ed.gov/offices/OESE

APPENDIX E

JOINT POLICY MEMORANDUM ON ASSESSMENTS

(U.S. Department of Education Document, Sept. 29, 1997)

We are writing to you today to highlight the importance of including students with disabilities in all educational reform activities and, in particular, in statewide assessment systems. 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. In his 1997 State of the Union address, the President announced a ten-point call to action including rigorous, voluntary national tests in reading and math embodying national standards, teaching every student to read independently by the end of the third grade, and increased accountability in public education.

Assessment is an integral aspect of accountability. Assessment systems have varied purposes. Whatever the focus of the particular assessment system—program evaluation, school and staff accountability or measuring student progress—assessments provide valuable information which benefits individual students, either directly, such as in the measurement of individual progress against standards, or indirectly, such as in evaluating programs. Given the emphasis on assessment in recent educational reform efforts, including State and Federal legislation linking assessment and school accountability, it is of utmost importance that students with disabilities be included in the development and implementation of assessment activities. 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.

Given the benefits that accrue as a result of assessment, exclusion from assessments based on disability generally would not only undermine the value of the assessment but also violate Section 504 of the Rehabilitation Act of 1973 (Section 504), which prohibits exclusion from participation of, denial of benefits to, or discrimination against, individuals with disabilities on the basis of their disability in Federally-assisted programs or activities. 29 U.S.C. 794. Similarly Title II of the Americans with Disabilities Act (ADA) of 1990 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity. 42 U.S.C. 12132.

The newly enacted Individuals with Disabilities Education Act Amendments of 1997 (IDEA) emphasizes improving results for children with disabilities. Consistent with an emphasis on results, IDEA contains requirements related to assessments. As a condition of eligibility, Part B of IDEA requires States to have policies and procedures to ensure that children with disabilities are included in general State and district-wide assessment programs, with appropriate accommodations, where necessary. Sec. 612 (a)(17); 111 Stat. 67. Effective July 1, 1998, IDEA requires that individual education programs (IEPs) include a statement of any individual modifications in the administration of State or district-wide assessments of student achievement that are needed in order for the child to participate in such assessments; and if the IEP team determines that the child will not participate in a particular state or district-wide assessment of student achievement (or part of such assessment), the IEP must include a statement of why that assessment is not appropriate for the child; and how the child will be assessed. Section 614(d)(1)(A)(v); 111 Stat. 84.

In addition to inclusion in assessments, Section 504, Title II of the ADA, and the IDEA require that students with disabilities must be

provided with appropriate test accommodations, where necessary. Many students with disabilities who have, until now, been excluded can participate appropriately in assessments without any test adaptations or accommodations. However, for those students who need accommodations to participate in the assessment, appropriate accommodations must be provided. Among the possible accommodations in test presentation, response mode and setting are the following: oral administration, large print, Braille version, individual or separate room administration, extended time and multiple test sessions. The individualized determinations of whether a student will participate in a particular assessment, and what accommodations, if any, are appropriate should be addressed through the individualized education program process or other evaluation and placement process and included in either the student's IEP or Section 504 plan.

For the small number of students whose IEPs specify that they should be excluded from regular assessments, including some students with significant cognitive impairments, participation in regular assessments is not appropriate. For these students, Part B of IDEA requires that the State ensure that, as appropriate, the State or local agency (i) develops guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in State and district-wide assessment programs; and (ii) develops and, beginning not later than July 1, 2000, conducts those alternate assessments. Section 612(a)(17)(A); 111 Stat. 67. Some States are already implementing assessment models that include all students and use test adaptations, accommodations and alternate assessments, as appropriate.

Part B of IDEA also contains reporting requirements related to assessments. It requires that States have policies and procedures to ensure that the State educational agency makes available to the public (i) the number of children with disabilities participating in regular assessments; (ii) the number of those children participating in alternate assessments; and (iii) beginning not later than July 1, 1998, the performance of children with disabilities on regular assessments and not later than July 1, 2000, the performance of children with disabilities on alternate assessments, if it can be reported in a statistically sound manner and would not result in disclosure of performance results identifiable to individual children. The reports must be provided with the same frequency and in the same level of detail as the State's reports on the assessment of nondisabled children. For assessments conducted after July 1, 1998, data relating to the performance of children with disabilities in regular assessments is required to be disaggregated. For those assessments conducted prior to July 1, 1998, the data for children with disabilities participating in regular assessments, is only required by IDEA to be disaggregated if the State requires disaggregation. Section 612(a)(17)(B); 111 Stat. 67-68.

The Office of Special Education Programs within OSERS has a cooperative agreement with the National Center on Education Outcomes (NCEO) at the University of Minnesota to study and provide information on including students with disabilities in statewide and other assessments. We have enclosed a brochure on the NCEO, which may be contacted for more information

As we work together to reform our educational system, we must ensure that all children, including students with disabilities, are part of that reform. Including students with disabilities in the development and implementation of assessments is a vital step towards providing access to the general curriculum and learning to challenging standards.

Judith E. Heumann
Assistant Secretary for Special Education and Rehabilitative Services

Norma V. Cantu
Assistant Secretary for Civil Rights

APPENDIX F

REFERENCES FOR STATE ACCOUNTABILITY COMPONENTS

Key: * s = standards; a = assessments

State	*	Standards and Assessments	Multiple Indicators	Rewards	Sanctions
AK	s a	§ 14.07.020(b)(1) § 14.07.020(b)(2)	§ 14.03.120	none	§ 14.03.123
AL	s a	§ 16-6B-1 § 16-6B-1	§ 16-6B-7	none	§ 16-6B-3
AR	s a	§§ 6-15-401 to 407 §§ 6-15-404, -405	§ 6-15-806	none	§ 6-15-418
AZ	s a	regulation § 15-741	§ 15-746	§ 15-757	none
CA	s a	§ 60602 § 60604	§ 33126	none	none
CO	s a	§ 22-53-407 § 22-53-409	§ 22-11-104	none	§ 22-11-202
CT	a	§ 10-14n	regulation	§ 10-262 I	§ 10-4b(b)
DE	s a	regulation 14 § 151-152	14 § 124A(d)	14 § 154(3)(c)	14 § 154(D)(1-4)
FL	s a	§ 229.565 § 229.57	§ 236.1228(4)	§ 236.1228	§ 229.0535
GA	s a	§ 20-2-281 § 20-2-281	§ 20-2-282(d)	§ 20-2-253	§ 20-2-282 § 20-2-283
HI	s	§ 302A-201	§ 302A-1004	none	none
IA		none	§ 256.7(21)	none	§ 256.11(10), (12)
ID	s	regulation	§ 33-4501	none	none
IL	s a	§ 105 ILCS 5/2-3.64 § 105 ILCS 5/2-3.64	§ 105 ILCS 5/10-17A	§ 105 ILCS 5/2-3.25C	§ 105 ILCS 5/2-3.25F; 5/34-8.3
IN	s a	§ 20-10.1-16-6 § 20-10.1-16-4	§ 20-1-1.2-6	§ 20-1-1.3-3	§ 20-1-1.2-9

State	*	Standards and Assessments	Multiple Indicators	Rewards	Sanctions
KS	s a	§ 72-6439(b), (c) § 72-6439(b), (c)	regulation	none	regulation
KY	s a	§ 158.6453 § 158.6453	§ 158.6451	§ 158.6455	§ 158.6455
LA	s a	§ 17:391.3 § 17:391.3	§ 17:3911(B)	none	§ 17:391.10
MA	s a	ch. 69 § 1I	ch. 69 § 1I	none	ch. 69 § 1J
MD	a	§ 7-204	regulation	§ 5-208	regulation
ME	s a	§ 6209 § 6202	regulation	none	none
MI	s a	§ 15.41278 § 15.41278	§ 15-41204(1)	none	§ 15.41280
MN	a	§ 121.1113	none	none	none
MO	s a	§ 160.514 § 160.518	§ 160.522	none	§ 160.538
MS	a	§ 37-16-1	regulation	none	§ 37-17-6 § 37-17-13
MT		none	none	none	none
NC	s a	§ 115C-105.3 §§ 115C-174.10-11	regulation	§ 115C-105.36	§ 115C-105.37-39
ND		none	none	none	none
NE	s a	regulation § 79-760	none	§ 79-758	none
NH	s a	§ 193-C § 193-C	§ 193-E(3)	none	none
NJ	s a	regulation regulation	§ 18A:7E-3	§ 18A:7F-29	§ 18A-7A-14
NM	s a	regulation § 22-2-8.5	§ 22-1-6	§ 22-13A	§ 22-2-14 § 22-2-15
NV	s a	§ 389.010 § 389.015	§ 385.347	none	§ 385.363-389

State	*	Standards and Assessments	Multiple Indicators	Rewards	Sanctions
NY	s a	regulation regulation	NY CLS Educ. § 215-a	none	regulation
OH	s a	regulation § 3301.07.10	§ 3301.07.14	none	§ 3302.03-.04
OK	s a	regulation § 1210.505-512	§ 1210.531	none	§ 1210.541 § 1210.542
OR	s a	§ 329.045 § 329.485	§ 329.115	none	§ 334.217
PA	s a	regulation regulation	24 P.S. § 25-2595	24 P.S. § 25-2595	none
RI	s a	§ 16-7.1-2 § 16-7.1-13	§ 16-604-4(22)	none	§ 16-7.1-5
SC	s a	§ 59-30-10 § 59-30-10	§ 59-18-30	§ 59-18-10	§ 59-18-30
SD	s a	§ 13-3-48 § 13-3-55	none	none	none
TN	s a	§ 49-1-601 §§ 49-1-603 - 610	§ 49-1-601	none	§ 49-1-601 § 49-1-602
TX	s a	§ 39.021 § 39.022	§ 39.051 § 39.052	§ 39.091-.112	§ 39-131
UT	s a	§ 53A-1a-107 § 53A-1-601-610	§ 53A-3-602	none	none
VA	s a	§ 22.1-253.13:1 § 22.1-253.13:3	regulation	none	regulation
VT	s a	tit. 16 § 164(9) tit. 16 § 164(9)	none	none	tit. 16 § 165(7)
WA	s a	§ 28A.630.885(3)(a) § 28A.630.885(3)(b)	§ 28A.320.205	§28A.630.885(3)(h)	§ 28A.630.885(3)(h)
WI	s a	exec. order § 118.30	§ 115.38	none	none
WV	s a	regulation § 18-2E-1a	§ 18-2E-5(d)	none	§ 18-2E-5
WY		none	none	none	none

THE NATIONAL SCHOOL BOARDS ASSOCIATION COUNCIL OF SCHOOL ATTORNEYS

Membership Information

The NSBA Council of School Attorneys is the only national network of school law practitioners which provides its members with information and practical assistance on the latest developments in school law. Nearly 3,000 attorneys, representing school districts of all sizes, benefit from Council activities and programs. The Council's unique program:

- helps you design school policies and practices well grounded in the law so your clients avoid costly law suits
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NSBA Council of School Attorneys
Publications List
September 2000

Americans with Disabilities Act: Its Impact on Public Schools (March 1993) by Nancy Fredman Krent, Scott S. Cairns, and Jean Arnold Dodge. This publication analyzes the key titles applicable to public schools of the American with Disabilities Act. Included are discussions of the law's anti-discrimination requirements in the areas of employment and state and local government services. The appendices reproduce relevant portions of the statute, implementing regulations and agency interpretive guidance. 120 pp. ISBN 0-88364-146-1 (List $25, National Affiliates and Council members $20).

Child Abuse: Legal Issues for Schools (March 1994). This monograph addresses the legal issues schools face in responding to child abuse, including employee background checks, reporting requirements, appropriate training, interagency cooperation, investigation of school-based abuse, due process, insurance coverage, victim assistance and liability. The appendices contain applicable state and federal laws and numerous sample policies and forms. 198 pp. ISBN 0-88364-184-4 (List $25, National Affiliates and Council members $20).

Desk Reference on Significant U.S. Supreme Court Decisions Affecting Public Schools (*Revised Edition* 2000) This desk reference provides attorneys and laymen alike with quick access to the name, citation and/or rule of virtually every U.S. Supreme Court case in which a public school district was a party and a substantive decision was rendered (however, it does not analysis the decision). It includes an extensive word index, table of cases with full parallel citations and table of constitutional and statutory provisions. 118 pages. ISBN 0-88364-227-1 (List $25, National Affiliates and Council members $20).

Environmental Law: Fundamentals for Schools (March 1995) by David Day. This monograph provides school attorneys and administrators with information on the basic requirements and potential issues under some of the federal environmental laws that affect schools. Such topics as Superfund, RCRA, asbestos, radon, lead, USTs and toxic torts are discussed with practical pointers provided to prevent and respond to environmental crises in school. Intended as a primer, this publication serves as an overview of the key environmental issues of which schools must be aware. 36 pp. ISBN 0-88364-194-1 (List $15, National Affiliates and Council members $12).

Legal Handbook on School Athletics (March 1997) This monograph provides school attorneys, board members, administrators and athletic directors with an understanding of the various legal issues that affect school athletic programs. Discussion of the law is supplemented with practical advice. Topics include: discipline of athletes: due process considerations, eligibility rules protecting high school athletes, participation of private school and disabled students, drug testing, Title IX, public school sports and religion, injuries during physical education classes and extracurricular activities, spectator issues, student athletics and insurance issues, athletic personnel and volunteer issues. 120 pages. ISBN 0-88364-206-9 (List $35, National Affiliates and Council Members $28).

Legal Guidelines for Curbing School Violence (March 1995). Addressing one of the most urgent problems in schools today, this publication covers such issues as search and seizure, metal detectors, students' due process rights, discipline of students with disabilities, tort and constitutional liability, hate speech, dress codes and gangs, keeping weapons out of schools and working with the criminal justice system. This comprehensive legal guide includes numerous sample policies. 162 pages. ISBN 0-88364-195-X (List $30, National Affiliates and Council Members $25).

Legal Issues & Education Technology: A School Leader's Guide (April 1999) School districts that use new technologies without establishing strong usage policies can incur legal liability and jeopardize the safety and privacy of students, faculty and staff. This publication, written in plain language by NSBA Council of School Attorneys members expert in the field of school law, helps you tackle the challenge of striking a healthy balance between protection and open communications. Topics include Internet filtering; acceptable use policies for Internet access; copyright and fair use; privacy rights, and freedom of expression; as well as peripheral questions on topics such as open meeting "sunshine" laws for school boards; attorney/client privilege; sexual harassment; and Americans with Disabilities Act compliance. Appendices lead to Web sites for updated guidance and policy samples. 96 pages. ISBN 0-88364-222-0 (*List $35, Technology Leadership Network members and National Affiliate members $28). Order #03-145-10

Reasonable Accommodation of Disabled Employees: A Comprehensive Case Law Reference (February 1996) written by Brian Shaw. This reference book provides brief summaries of over 200 cases deciding reasonable accommodation issues under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. The summaries are arranged topically addressing: 1) general issues such as standards, knowledge of disability, suggesting an accommodation, burden of proof, and good faith defense; 2) over 20 different types of accommodations; and 3) undue hardship issues. A detailed table of contents and table of cases provide easy access to school attorneys looking for case law to help answer their clients' accommodation questions. 95 pages. ISBN 0-88364-200-X (List $15, National Affiliates/Council of School Attorneys price $12).

Religion, Education and the U.S. Constitution (March 1994) edited by Naomi Gittins. This edition includes the latest developments in the law, including the Supreme Court's decisions in Zobrest, Lamb's Chapel and Lukumi. This monograph is a compilation of articles written by Council members and focuses on the effect of the establishment and free exercise clauses of the first amendment and the constitutional issues surrounding accommodating employee religious beliefs, wearing of religious garb, curriculum content, school prayer/moment of silence, holiday observances, equal access, home school and much more. 198 pp. ISBN 0-88364-183-6 (List $25, National Affiliates and Council members $20).

Safe Schools, Safe Communities (Available in the Fall 2000). Emphasizing the need for cooperation to prevent and respond to violence at school, this book examines how schools and communities can work together to make our schools safe. Among the topics discussed are the need to balance school safety needs and the rights of individual students, how to deal with threats of violence, the role of the school attorney in response to violence, and how to work with the media in times of crisis. Also included are other helpful materials such as sample interagency agreements, a list of other resources on school safety, warning signs that should trigger school response and sample policies. ISBN 0-88364-238-7 (List $25, National Affiliates and Council Members $20).

School Board Member Liability Under Section 1983 (April 1992) by David B. Rubin, Piscataway, NJ (editor, Naomi E. Gittins, NSBA staff attorney). Like earlier editions published in 1981 and 1985, this monograph serves as a primer for both school board members and school attorneys on board member liability issues. The current version seeks to explain clearly and accurately in layman's terms the basics of civil rights law under Section 1983. It focuses on the types of claims most commonly brought under Section 1983 against school boards and presents factual circumstances and how the courts have applied the law in immunity defenses. 44 pp. ISBN 0-88364-134-8 (List $15, National Affiliates and Council members $12).

A School Law Primer: Part I (April 1999) Created to meet the needs of the attorneys who serve public school districts and those of the school community at large, *A School Law Primer: Part I* is intended as a training manual to help you keep your clients out of court. Specifically, the *Primer* was designed to save you hundreds of hours in research time, help when you have been called upon to do a presentation, and be a valuable resource for training new associates and clients. Each chapter consists of three main components - a presentation outline and case summaries; participant "notes pages;" and a diskette containing Microsoft PowerPoint® slides that correspond to the outline. The *Primer* features these subjects: Student Discipline; Students' Constitutional Rights; Special Education; and Teacher Discipline. ISBN 0-88364-224-7 (List $400.00, National Affiliates and Council Members $320.00 or purchase A School law Primer Part I and Part II for $512. Non-member price $640.)

A School Law Primer: Part II (March 2000) Update your law library with the second part of this training tool. Created to meet the needs of the attorneys who serve public school districts and those of the school community at large. Intended as a resource to help you keep your clients out of court, this school law training manual covers such topics as: employee rights, negligence, school safety and sexual harassment. Each chapter consists of three main components — a presentation outline and case summaries; participant "notes pages;" and a diskette containing Microsoft Powerpoint® slides that correspond to the outline. This publication will save you hundreds of hours in research time, help when you have been called upon to do a presentation -- and need to have the material right at your fingertips, and be a valuable resource for training new associates and clients. ISBN 0-88364-234-4 (List $400, NSBA Council of School Attorneys' members and NSBA National Affiliate School Districts $320 or purchase A School law Primer Part I and Part II for $512. Non-member price $640.)

A School Law Retreat (October 1999) This loose-leaf trial notebook is a compilation of the presentations given at the Council's October 1999 advocacy seminar in Charleston, SC. Topics include school tuition vouchers, student drug testing, employee benefits, superintendent contracts and settlement agreements, peer sexual harassment, the Internet and use of e-mail, board member issues, linking teacher evaluation to student achievement, sexual orientation: student and employee issues, religion and the schools, voluntary desegregation, student-to-student sexual harassment claims under Title IX, student control and discipline, responding to threats of violence, the ethical use of technology in the practice of school law, and Individuals with Disabilities Education Act (IDEA). 402 pages. ISBN 0-88364-288-X (List $200, National Affiliates and Council members $160).

School Law in Review 2000 (March 2000) This digest of papers presented at the 2000 Annual School Law Seminar includes the following topics: balancing student safety and students' civil rights; update on sexual harassment in schools; doing business with business – product endorsements/vendor contracts: the role of the school board attorney; selecting and hiring a superintendent: the school attorney's role; Internet use by students, employees and school boards: critical legal issues; voluntary desegregation under fire; hate speech and the public schools; ethical considerations in attorney-led investigations; Supreme Court update; anticipate pitfalls: understanding the interaction between the IDEA, Section 504 and the ADA; containing the costs of providing special education services to parentally placed private school students; discrimination claims and arbitration and recent developments in public sector labor law. 190 pages. ISBN 0-88364-233-6 (List $35, Council members - first copy free. National Affiliates and additional Council copies $28).

School Reform: The Legal Challenges of Change (April 1996). This monograph is intended to assist school attorneys in their efforts to advise school boards on the legal issues that accompany various reform measures. Covering such topics as school finance, choice, site-based management, privatization, alternative schools, charter schools and tenure reform, the discussion ranges from constitutional dilemmas to statutory issues to labor relations implications. Review of the law is supplemented with practical advice. 150 pp. ISBN 0-88364-202-6 (List $30, National Affiliates and Council members $25).

Selecting and Working With a School Attorney: A Guide for School Boards (April 1997) In today's world, getting good legal advice when problems arise and on how to avoid problems in the first place is a must for school boards. This book shows school board members how to select and to work effectively with a school attorney. Topics include: historical development of the role of the school attorney, hiring in-house counsel v. an outside attorney, selection, recruitment and retention of legal counsel, ethical issues in school board representation, evaluation and termination of school district counsel, the school attorney as a preventive law practitioner, how to work effectively with the school attorney. Also included in the appendices are sample policies, forms, agreements and checklists. 142 pages. ISBN 0-88364-209-3 (List $35, National Affiliates and Council Members $28).

Sexual Harassment by School Employees (Available Fall 2000). School leaders and school lawyers faced with the task of preventing and responding to sexual harassment by employees will find the information they need in this monograph. Covering harassment that occurs between employees and employee harassment of students, it discusses current federal case law, effective policy development, how to conduct internal investigations, training advice and resources and agency (OCR and EEOC) investigations. The appendices contain many useful documents including regulations, agency guidance, sample policies and checklists. ISBN 0-88364-237-9 (List $30, National Affiliates and Council Members $24).

Student-to-Student Sexual Harassment: A Legal Guide for Schools (Revised Edition March 2000) Addressing a complex legal and social issue, this monograph provides the school law practitioner and school leaders with information on how to prevent, respond to, analyze and defend student to student harassment claims. In addition to discussing federal case law, it includes a section on policy development, advice on conducting investigation; tips for training, and analysis of the Office of Civil Rights Guidelines and appendices containing OCR documents, sample policies and forms and helpful check lists. 192 pages? ISBN 0-88364-235-2 (List $35, National Affiliates and Council Members $28).

Student Testing and Assessment: Answering the Legal Questions (Available Fall 2000). Addresses one of the most controversial developments in education reform today. This book takes a look at the legal issues with which education leaders and decision makers are faced in setting policy on and implementing high-stakes testing programs. Among the materials included are, an overview of state testing laws and federal activity; a framework for making policy decisions about test use; discrimination and due process issues that may arise; considerations for testing special student groups, such as children with disabilities and limited english proficiency; and accountability of educators, schools and districts based on student test scores. ISBN 0-88364-239-5 (List $25, National Affiliates and Council Members $20).

Termination of School Employees: Legal Issues and Techniques (April 1997) Disputes over employee termination are the most common legal problem faced by schools. In order to assist school attorneys and officials in handling these disputes, this monograph addresses the legal issues and suggests effective techniques associated with proper termination of school employees. Topics include: employee performance documentation, evaluation, remediation, settlement agreements, public employee speech and off duty conduct, termination of drug/alcohol abusers, legal issues in trying a misconduct case, due process, and employment at will. 316 pages. ISBN 0-88364-210-7 (List $35, National Affiliates and Council Members $28).

The 1999 IDEA Regulations: A Practical Analysis (July 1999) School districts had to comply with the new rules by October 1, 1999. . . It is imperative that schools understand the special rules and requirements that they must follow in addressing the needs of students served under the Individuals with Disabilities Education Act (IDEA). The NSBA Council of School Attorneys presents *The 1999 IDEA Regulations: A Practical Analysis* as a guide for all school professionals involved in special education to grasp the basic requirements and implications of the regulations issued by the U.S. Department of Education. Using an easy to follow format that tracks the regulations rule-by-rule, special education experts explain to you what you need to know and what you must do to comply with the provisions on a broad range of issues including: public charter schools, graduation of special needs students, assessments, use of Medicaid and insurance, IEP requirements, services to children in private schools, procedural safeguards, and discipline of children with disabilities. 96 pages. ISBN 0-88364-225-5 (List $25, National Affiliates and Council Members $20).

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about NSBA...

The National School Boards Association is the nationwide organization representing public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education through school board leadership. NSBA achieves its mission by representing the school board perspective before federal government agencies and with national organizations that affect education, and by providing vital information and services to state associations of school boards and local school boards throughout the nation.

NSBA advocates local school boards as the ultimate expression of grassroots democracy. NSBA supports the capacity of each school board—acting on behalf of and in close concert with the people of its community—to envision the future of education in its community, to establish a structure and environment that allow all students to reach their maximum potential, to provide accountability for the people of its community on performance in the schools, and to serve as the key community advocate for children and youth and their public schools.

Founded in 1940, NSBA is a not-for-profit federation of associations of school boards across the United States and its territories. NSBA represents the nation's 95,000 school board members that govern 14,800 local school districts serving the nation's more than 47 million public school students. Virtually all school board members are elected; the rest are appointed by elected officials.

NSBA policy is determined by a 150-member Delegate Assembly of local school board members. The 25-member Board of Directors translates this policy into action. Programs and services are administered by the NSBA executive director, assisted by a 150 person staff. NSBA is located in metropolitan Washington, D.C.

NSBA's Programs and Services

- **National Affiliate Program** — enables school boards to work with their state association and NSBA to identify and influence federal and national trends and issues affecting public school governance.
- Council of Urban Boards of Education — serves the governance needs of urban school boards.
- Large District Forum — serves the governance needs of large but non-urban boards.
- Rural and Small District Forum — serves the governance needs of rural and small enrollment districts.
- Federal Relations Network — school board members from each congressional district actively participate in NSBA's federal and national advocacy efforts.
- Federal Policy Coordinators Network — focuses on the administration of federally funded programs.
- Award Winning Publications — *American School Board Journal, School Board News,* and special substantive reports on public school governance throughout the year.
- ITTE: Education Technology Programs and Technology Leadership Network — advance public education through best uses of technology in the classroom and school district operations.
- Council of School Attorneys — focuses on school law issues and services to school board attorneys.
- Annual Conference and Exposition — the nation's largest policy and training conference for local education officials on national and federal issues affecting the public schools in the United States.
- National Education Policy Network — provides the latest policy information nationwide and a framework for public governance through written policies.
- Training/Development and Resource Exchange — for the policy leadership of state school boards associations and local school boards.

·NSBA·

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